

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT KERICHO

ELRC APPEAL NO. E004 OF 2025
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

**AFRICAN BREEDERS SERVICES TOTAL
CATTLE MANAGEMENT.....**
.....APPELLANT

VERSUS

NOAH KIPKORIR MUTAI.....
.....RESPONDENT

***(Being an Appeal from the Ruling and Order of the
Honourable Japheth Cheruiyot Bii, Senior Resident
Magistrate, delivered on 22nd May 2025 in Kericho
MCELRC No. E016 OF 2022)***

JUDGMENT

1. The Appellant, being dissatisfied with the ruling and order of Senior Resident Magistrate Honourable Japheth Cheruiyot Bii, filed this appeal vide a Memorandum of Appeal dated 30th May 2025, on the following grounds that:

***1. The learned trial Magistrate erred in law
and in fact as to the principles for the
grant of orders of setting aside judgment,
and thus improperly exercised his
discretion by dismissing the application for***

setting aside judgment dated 28th March 2024.

- 2. The learned trial Magistrate erred in law and fact by failing to consider the reasons adduced for the delay, the defence which raised triable issues and the degree of prejudice the Appellant stands to suffer if the case is not heard on merit.**
- 3. The learned trial Magistrate erred in law and fact, exercising discretion in favour of the Respondent against the reasons adduced by the Appellant, and the great injustice of shutting out the Appellant from the hearing of their case.**
- 4. The learned trial Magistrate erred in law and fact by failing to consider the grave injustice to be occasioned to the Appellant if the matter is not determined on merit.**
- 5. The learned trial Magistrate erred in law and fact by failing to appreciate that the Appellant had led a defence which raises triable issues and which should have been considered before dismissing their**

application dated 16th August 2024, and to re-open the defence case for hearing on merit.

6. The learned trial Magistrate erred and misdirected himself when he failed to consider the Appellant's submissions on both points of law and fact.

7. The learned trial Magistrate improperly exercised his discretion in dismissing the Appellant's application to set aside the Judgment dated 28th March 2024.

2. The Appellant prays that:

1. The ruling and ensuing orders dated 22nd May 2025 by Honourable Japheth Cheruiyot Bii be and is hereby set aside.

2. Its application dated 16th August 2024, filed in Kericho Magistrates Court, MCELRC No. E016 of 2022 be allowed with costs.

3. The matter be remitted back for hearing in the lower court by other Magistrate other than the one that handled it.

4. Such further orders that this court may deem fit and to grant.

3. Parties canvassed the appeal by way of written submissions.

Appellant's written submissions

4. Being the first appeal, the Appellant submitted that the court should not interfere with the exercise of discretion unless the court is satisfied that its decision is clearly wrong due to misdirection or because it has failed to take into consideration with the result that it arrived at a wrong conclusion set out in the case of ***Mombasa Cement Limited v Kitsao & 34 others [2022] KECA 562.***
5. The Appellant argued that courts have unfettered discretion under ***Order 10 Rule 11 of the Civil Procedure Rules*** to set aside default judgments, and that this discretion must be exercised judiciously by considering the reasons for delay, the time elapsed, whether the defence raises triable issues, and the prejudice to each party. The Appellant stressed that the right to be heard is fundamental, citing ***Article 159(2)(d) of the Constitution, section 3 of the Employment and Labour Relations Court Act,*** and

Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, which prioritize substantive justice over technicalities. The Appellant relied on the case law of **Joswa Kenyatta v Civicon Ltd [2020] KEELRC 420**, which emphasizes on substantive justice, fairness, and flexibility over undue technicality. In **Shah v Mbogo & Another [1967] EA 116**, the court held that discretion prevents injustice from accident or mistake. In **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75**, where the court held that triable issues warrant setting aside and in **Belinda Murai & 9 Others v Amos Wainaina [1978] KECA 23**, where the Court of Appeal held that mistakes of counsel are excusable, **CMC Holdings Ltd v Nzioki [2004] 1 KLR 173** where the court held that discretion avoids injustice, not punishment, and **Tree Shade Motors Ltd v D.T. Dobie & Co. (K) Ltd [1995-1998] 1 EA 324** where the court stated that draft defences must be considered if they raise reasonable grounds.

6. The Appellant concluded that the learned magistrate misapplied the law by elevating procedural technicalities over substantive justice, thereby violating the constitutional right to a fair hearing under

Article 50(1) of the Constitution, and urges the appellate court to set aside the ruling and allow the matter to be heard on merit.

Respondent's written submission

7. The Respondent submitted that, being the first appeal, the appellate court's primary role is to re-evaluate, re-assess, and re-analyze the record to determine whether the trial court's conclusions should stand. Reliance is placed on ***Kenya Ports Authority v Kuston (Kenya) Ltd (2009) 2 EA 212***, where the Court of Appeal held that on a first appeal, the court must reconsider the evidence, evaluate it independently, and draw its own conclusions, while bearing in mind it has not seen or heard the witnesses.
8. The Respondent argued that the certified typed proceedings were not furnished in time, and the later supplementary record was not properly certified, hence should be expunged. The Respondent maintains that both parties presented their case through affidavits and submissions, that service was not contested, and that despite entering appearance, the Appellant failed to file a defence. Consequently, the Respondent contended that the judgment entered was

regular, supported by proper service and affidavits of service, and therefore the trial court correctly exercised its discretion in dismissing the application to set aside.

9. The Respondent submitted that the Appellant was indolent and deliberately failed to defend the suit despite ample opportunity. The Respondent noted that although the Appellant acknowledged service and filed a memorandum of appearance in January 2023, they failed to file a defence within the statutory period and only sought to set aside judgment more than two years later, long after judgment had been delivered. The Respondent emphasized that the Appellant's conduct, including absence during key proceedings, shows neglect intended to frustrate the Respondent. To support this, reliance is placed on ***Ecobank Kenya Limited v Minolta Limited & 2 others [2018] KEHC 10053 (KLR)***, where the court held that discretion under ***Order 10 Rule 11 of the Civil Procedure Rules*** is not meant to assist parties who deliberately obstruct justice, citing ***Mbogo v Shah [1968] EA 93*** in support of that proposition. The Respondent also invoked the case of ***Nicholas***

Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others

[2013] KECA 113 (KLR), where Kiage JA cautioned that Article 159 of the Constitution and the “Oxygen Principles” were never intended to overthrow procedural rules, but rather to ensure justice is administered with clarity, certainty, and fairness.

10. The Respondent argued that the Appellant has failed to demonstrate a credible defence or any prejudice that would arise if the judgment is not set aside, noting that the draft defence consists only of bare denials. To support this, reliance is placed on ***Richard Murigu Wamai v Attorney General & another [2018] KEHC 10018 (KLR)***, citing the case of ***Patel v E.A. Cargo Handling Services Ltd (1974) EA 75***, where the court held that a regular judgment will not usually be set aside unless a defence raises a triable issue. Further, in ***Ogutu v St. Kevin Hills School [2023] KEELRC 930***, while citing ***Shah v Mbogo [1969] EA 116***, the court emphasized that discretion to set aside ex-parte judgments is meant to prevent injustice from accident or excusable mistake, but not to aid parties who deliberately obstruct justice.

11. On this basis, the Respondent urged dismissal of the appeal, contending that the appellant's conduct reflects indolence rather than genuine grounds for relief.

Analysis and determination

12. Being the first appeal, the court must re-evaluate the evidence and come to a conclusion since it was not present when the evidence was adduced or see the witnesses as set out in ***Kenya Ports Authority v Kuston (Kenya) Ltd (Supra)*** and ***Selle Associates V Associated Motor Boat Company Ltd (1968) E.A. 123.***

13. Having considered the record of appeal, memorandum of appeal and the rival submissions by both parties, the issue for determination is whether the appeal against the trial magistrate's ruling is merited.

14. ***Order 10 Rule 11 of the Civil Procedure Rules*** provides as follows:

“Where judgment has been entered under this Order, the court may set aside or vary such judgment and any

consequential decree or order upon such terms as are just.”

15. In ***Berlin Equipment Ltd & and other v Tata Africa Holdings (K) Limited [2026] KECA 100 (KLR)***, the Court of Appeal held as follows:

“It is common ground that the jurisdiction under Order 10 rule 11 is discretionary. The rule empowers the court to set aside or vary a default judgment “upon such terms as are just.” The principles guiding the exercise of that discretion are well settled. The discretion exists to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, and is not intended to assist a party who has deliberately sought to obstruct or delay the course of justice, as articulated in the celebrated case, Shah v Mbogo (1967) EA 166. Where a default judgment is regular, the court ordinarily considers whether the defendant has

shown a defence on the merits. A defence on the merits does not mean one that must succeed; it suffices that it raises a triable issue deserving of adjudication at a trial, as stated by this Court in Patel v E.A. Cargo Handling Services Ltd (1974) EA 75 and reiterated in Tree Shade Motors Ltd v D.T. Dobie & Another (1995- 1998) 1 EA 324.17.”

16. In this case, an interlocutory judgment was delivered on 28th March 2023 in favour of the Claimant/Respondent. The application dated 15th August 2024 was for prayer for judgment to be set aside.

The trial Magistrate delivered a Ruling on 22nd May 2024 dismissing the said Application to set the judgment aside.

The Appellant filed the appeal dated 30th May 2025 appealing the said Ruling.

17. The contention of the Appellant to why he did not participate in the lower court suit was that he was not served with the hearing notice.

18. The other issue raised by the Respondent is that he was not mapped in the court portal until 12th August 2024. He says that is now when he was upraised on the activities of the matter and that by then judgment had been delivered on 23rd May 2024. He has not however explained why he took three months to apply for judgment to be set aside by his application. The said application is dated 15th August 2024.
19. The case was initially filed in the Small Claims Court by claim dated 26th September 2022 but later seems to have been filed in the Employment and Labour Relations Court - vide Case MIC ELRC 016/2022.
20. The court has considered the record of Appeal and the respective submissions and case laws cited by the rival parties. **Order 10 rule 11 of the Civil Procedure Rules** in relation to setting aside a judgment provides as hereinunder: -
- “Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”***

21. Clearly, the Appellant's counsel was indolent and was not proactive in defending the suit and the court admonished him for that laxity. The said laxity has caused immense delay to finalising the suit and obviously justice should not be delayed. The said counsel contends he was unable to log in on 5th April 2023 and from then he does not demonstrate efforts taken to follow up the case until judgment was entered. He filed application to set the same aside on 18th August 2024. A year was lost with no apparent justification. This behaviour is not only an inconvenience to the litigants but also to the court.

22. Having said so, the court will not visit the failure of a Counsel on the litigant. The court is persuaded by the averment in **SHAH VERSUS MBOGO & ANOTHER 1967 E.A 116** where the court held that discretion in setting judgment aside is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake.

In **CMC Holdings Ltd -Vs- NZIOKI (2004) I KLR 173** case the court emphasised that discretion should be exercised to avoid injustice and not to punish a litigant for Counsel's error.

23. Looking at the record of appeal, in particular the Appellant's Response to the Memorandum of Claim and counterclaim, the court is of the view that the said response to the memorandum of claim and counterclaim raises triable issues and the court is inclined to give the Appellant opportunity to be heard. Under Article 159(d) of the Constitution fortifies that justice shall be administered without undue regard to technicalities. In ***Jomo Kenyatta University of Agriculture & Technology v Mussa Ezekiel Oebah [2014] KECA 143 (KLR)***, the Court of Appeal held as follows:

“In our view, those issues are triable and call for trial. The court should have been reluctant to deny the appellant a hearing. In the circumstances, it is clear that immediately the appellants became aware of the judgment on being served with notice of entry of judgment, it took steps to rectify the position. We consider that the learned judge misdirected herself by attempting to weigh the merits of the defence with insufficient material in a matter befitting trial, with the result that she arrived at a

wrong decision disallowing the appellant's application."

24. At least once the trial court denied the Appellant their application to set the interlocutory judgment aside on 22nd May 2025 they filed this appeal dated 22nd May 2025 without any delay at all on 30th May 2025

25. Flowing from the foregoing analysis, the Court will in exercise its discretion as by law provided allow this appeal. Accordingly, the appeal is hereby allowed as prayed. The ruling delivered on 22nd May 2025, together with the judgment rendered on 28th March 2024, are hereby set aside. The matter is ordered for re-trial, and the case shall be placed before a different magistrate for hearing and determination in accordance with the law. The Appellant is at liberty and is granted 14 days to file its response and counterclaim and hearing should commence without any delay.

26. The Respondents will have throw-away costs of Kshs.10,000/= to mitigate the inconvenience caused and will be paid by the Appellant's Counsel who has contributed a lot to the delay in finalising this case.

Order accordingly.

**Dated, Signed and Delivered virtually at Nakuru
this 15th Day of
May, 2026.**

**ANNA NGIBUINI MWAURE
JUDGE**

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate

just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE

ORIGINAL