



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoroge v Baruh & 2 others (Civil Appeal 163 of 2019)  
[2023] KEHC 2978 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2978 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 163 OF 2019  
LN MUGAMBI, J  
MARCH 31, 2023**

**BETWEEN**

**SARAH WANJUHI NJOROGE ..... APPELLANT**

**AND**

**PETER BARUH ..... 1<sup>ST</sup> RESPONDENT**

**JANE NJERI KIMANI ..... 2<sup>ND</sup> RESPONDENT**

**GEORGE KAMAU KAGIMBI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The appellant filed Kiambu CMCC No. 477 'A' of 2016 through a plaint dated 8<sup>th</sup> December 2016 in which she sued the Respondent for the injuries sustained due to an accident on 13<sup>th</sup> June, 2009 which allegedly occurred as she travelled in a motor vehicle registration number KAY 195E along Limuru Road near Runda junction.
2. The Respondents entered appearance on 20/4/2017 and filed their defence on 8/5/2017.
3. On 14<sup>th</sup> May 2018 the suit was dismissed under Order 17 Rule 2(1) of the Civil Procedure Rules for want of prosecution.
4. This appeal arises from the ruling dated 2<sup>nd</sup> October 2019 delivered by the Hon. S. Atambo, SPM, in Kiambu CMCC No. 477 'A' of 2016.
5. The application subject of the said ruling is dated 10<sup>th</sup> July 2018.
6. The appellant sought to have the orders issued on 14<sup>th</sup> May 2018 which dismissed the suit to be set aside and the suit be reinstated and fixed for hearing.
7. The Respondents filed Grounds of Opposition dated 22<sup>nd</sup> September 2018 attacking the application for being fatally defective, unnecessary, vexatious and misconceived and an abuse of the court process.



They averred that it posed substantial risk to fair trial and would cause them serious prejudice hence it ought to be dismissed.

8. In its ruling, the trial court stated that there was inexcusable delay that had not been explained and that there was no guarantee that there will be no further delay. The trial court rejected the application and maintained that the suit stood dismissed.
9. The appellant was aggrieved by the ruling and preferred this appeal. In the Memorandum of Appeal, she listed five grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and in fact in disallowing the application dated 10<sup>th</sup> July 2018.
  - b. That the learned trial magistrate erred in law and in fact in failing to appreciate and consider that the Appellant was not served with a Notice of Dismissal and that the same was only served upon the Respondents.
  - c. That the learned trial magistrate erred in law and in fact in failing to consider that the appellant was never served with a Notice to Show Cause why suit should not be dismissed.
  - d. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's submissions and authorities attached thereto in order to avoid injustice.
  - e. That the learned trial magistrate's ruling was an erroneous decision as the learned magistrate did not consider that the appellant's mistake or error was excusable.
10. The appellant prayed that this appeal be allowed and the lower court's ruling on the Notice of Motion dated 10<sup>th</sup> July 2018 be set aside and that this Honourable Court do reinstate CMCC NO. 477 'A' of 2016 – Kiambu and the same be heard by a magistrate with competent jurisdiction. She prayed that the costs of this appeal and those in the lower court be awarded to the appellant with interest.
11. Directions were issued that the hearing of the suit be by way of written submissions.

### **Appellant's submissions**

12. The appellant filed their submissions on 12<sup>th</sup> August 2022 and submitted on four issues. On whether the trial court erred in disallowing the application, they submitted that they demonstrated that her advocates made several attempts to fix the matter for pre-trial directions and the case was constantly quoted as 477. The 'A' was inadvertently left out hence every time the clerk visited the registry the file was always missing. It was later discovered that the file was 477 'A' but by then the same had been dismissed for want of prosecution.
13. On the second issue, appellant submitted that upon perusal of the court file, it was realized that the Notice to Show Cause was served upon the Respondents only on 11<sup>th</sup> April 2018.
14. The appellant was not served with the notice to show cause. The appellant submitted that she was willing to prosecute the matter.
15. On whether their submissions were considered, they submitted that they were condemned unheard and deserved a fair trial before the court. They argued that their submissions on record were never considered.



16. On the fourth issue, the appellant stated that the mistake was excusable. They tried to fix the matter for pre-trial directions severally without success and just after they had discovered the problem, the matter was dismissed as they sought to fix it for pre-trial directions. The Appellant relied on *CMC Holdings Limited V Nzioki* (2004) 1 KLR 173 which stated as follows:-

“That discretion must be exercised upon reasons and must be exercised judiciously... In law, the discretion that a court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle... The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so, she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate.”

### **Respondents' Submissions**

17. The Respondents filed their submissions on 6<sup>th</sup> December 2022 and submitted that this Honourable Court lacks the jurisdiction to hear this appeal because the appellant did not obtain leave of court before filing this appeal as pursuant to Order 43 Rule 2. They stated that Order 43 Rule 1 of the Civil Procedure Rules provides for appeals which lie to this court as of right and does not include Order 17 Rule 2(1,3) where a court dismisses a suit for want of prosecution in such cases, one has to seek leave. They relied on the decision of *Isaac Mbugua Ngirachu v Stephen Gichobi Kaara* (2021) eKLR;

“...The consequence of failure to seek leave of the court to file an appeal was explained in the Court of Appeal decision of *Nyutu Agrovat vs Airtel Networks Ltd* [2015] eKLR; wherein a five (5) judge bench held that where there was no automatic right to appeal as stipulated under Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules then the appellate court had no jurisdiction to hear or determine an appeal unless such leave was first sought and obtained; From the above decision, the omission in this instance touches on jurisdiction of the court; and this court is guided by the aforesaid decision which also held that ...‘the right to appeal is conferred by statute and cannot be inferred’ Jurisdictional issues are not matters that fall in the category of procedural technicalities and it is this courts considered view that the invoking of the provisions of Article 159(2)(d) cannot salvage the instant appeal as jurisdiction goes to the root of the matter; case law referred to *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [2013]eKLR; and without jurisdiction this court or any other court can do nothing more than down its tools; as was held in *Owners of Motor Vessel ‘Lilian S’ vs Caltex Oil (K) Ltd* (1989) KLR. This court is satisfied that the appeal is not competently before this court.”

18. The Respondents submitted further that the failure to prosecute the case for two years has not been sufficiently explained and therefore the appellant does not deserve the orders of reinstatement of the suit. They cited the decision in *Josephat Muthui Muli v Ezeetec Ltd* (2014) EKLR, where Hon. Nzioki J cited the case of *Shah vs. Mbogo* and held as follows;

“...In my considered view, I consider whether the Counsel for the Applicant has adduced sufficient evidence as to why he as well as the Claimant did not appear on the hearing date. I have a free hand in the exercise of my discretion in favour of the Applicant should I be so



mind. However, in doing so I must ensure that I do not aid a party who is undeserving of the exercise of that discretion.

... Justice cuts both ways. There are rights that have accrued to the Respondent and on the basis of *Shah v. Mbogo* I would be misplaced to exercise my discretion as there was no excusable mistake or error. Counsel was well aware of the matter and failed to attend or obtain representation.

The upshot of the foregoing is that the Claimant's Notice of Motion Application lacks merit and is not fit for grant. It is dismissed with costs to the Respondent"

19. The Respondents urged the court to uphold the decision of the trial court and dismiss this appeal with costs.
20. Having reviewed the application, the response thereto and the submissions thereof, I deduce that the issues that fall for determination in this appeal are as follows:
  - a. Whether this court has jurisdiction to determine the application before it;
  - b. Whether the application is merited;
  - c. Who should pay the costs of this suit?
21. It is now well settled that jurisdiction is everything as it is what gives a court or tribunal the power deal with a matter before it. The Court of Appeal in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989)* when faced with the question of jurisdiction explained it as follows:

“...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...”
22. The Supreme Court in *In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011* held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.
23. A court's jurisdiction thus stems from *the Constitution* and the statutes. Having so ascertained, where does this court have the power to entertain this appeal? The Appellate jurisdiction is anchored on section 75 of the *Civil Procedure Act*. Order 43 Rule 1 of the Civil Procedure Rules provides for appeals which lie as of right. A suit that is dismissed under Order 17 Rule 2(1) is not fall under those appeals that lie as a right as order 17 is not specifically listed. Order 43 Rule 2(2) provides that an appeal shall lie with the leave of the court from any other order made under these Rules.
24. The Respondents contended that the appellant failed to seek leave of court before filing this instant appeal hence this court has no jurisdiction to entertain it.



25. Order 43 Rule 2(3) of the Civil Procedure Rules states that an application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within 14 days from the date of such order. The trial court in its ruling dated 2<sup>nd</sup> October 2019 granted the appellant (applicant therein) 28 days right of appeal.
26. It is my opinion therefore that the appellant was granted leave to appeal the decision of the trial court within 28 days. The Memorandum of Appeal dated 17<sup>th</sup> October 2019 was filed on 28<sup>th</sup> October 2019. This was within the timelines that the trial court had granted.
27. It is my finding therefore that this Honourable Court is equipped with the jurisdiction to handle this appeal before it.
28. On the second issue of whether this appeal is merited, the appellant explained that the mistake emanated from erroneously citing the suit that was before the trial court as Kiambu CMCC No. 477 OF 2016 instead of Kiambu CMCC No. 477 'A' OF 2016.
29. The appellant has demonstrated through her Advocate that she tried to set the matter down for pre-trial directions through invitation letters dated 17<sup>th</sup> July 2017, 7<sup>th</sup> November 2017 and 15<sup>th</sup> March 2018 addressed to the Respondents' counsels on record. However, the court file could not be traced at the registry due to the wrong citation.
30. I do note that on the face of the letters it was written that the court file was not available and in the last letter, it was further noted that the parties were wrong. I have also perused the trial court file and made reference to the receipt issued when the suit was filed being receipt serial no. 7871457 which is a \*counterfoil. On the face of it, the letter 'A' appears to have been added after the receipt had already been issued.
31. The case number in the plaint does not include the said letter 'A' as part of the case citation.
32. This shows that the letter 'A' was added subsequently as the same was a later addition even on the court documents. It was what misled the Appellant and was in the circumstances excusable. It was not her making. To her credit, the appellant tried on numerous occasions to set the matter down for pre-trial direction using the wrong case number and when she finally found the correct case number and traced the file, she realized the suit had already been dismissed under Order 17 Rule 2 of the Civil Procedure Rules.
33. Further, the appellant contended that they were not served with a Notice to Show Cause as is provided by law as the said notice was only served upon the Respondents. The affidavit of service dated 16<sup>th</sup> April 2018 sworn by Miriam Ndiritu shows that the Respondents were served with the Notice to Show Cause. There is no affidavit of service on record which shows that the Notice was served upon the Appellant in spite of the trial court making a finding that they were served.
34. While I do agree with the trial court that the suit belongs to the plaintiff (appellant) and should not have to wait to be served with a Notice to Show Cause to swing into action, It is my finding that the appellant was not served with the said notice to show cause. The appellant was thus denied opportunity to be heard which the law prescribes before her suit was dismissed for want of prosecution.
35. In light of the forgoing, I find that the trial court did not consider all the salient factors in denying the reinstatement of the suit and thus order that in the interest of justice this suit should be reinstated for trial on merits.



36. I allow the application dated 10<sup>th</sup> July 2018 together with costs of this appeal. The trial court hereby directed to set the suit down for pre-trial directions within 45 days of the date of this ruling.

**DATED, SIGNED and DELIVERED at BUSIA this 31<sup>st</sup> day of March 2023.**

**L.N MUGAMBI**

**JUDGE**

**In the presence of: -**

**Coram:**

Court Assistant- Etyang

Appellant: - absent

**Advocate for Respondent- absent**

Advocate for the Appellant- absent

**COURT**

To be transmitted digitally by the Deputy Registrar to the Parties Advocates on record through their respective email addresses.

**L.N. MUGAMBI**

**JUDGE**

