



**Hammo v Muriethi (Environment & Land Miscellaneous Case  
010 of 2022) [2023] KEELC 21622 (KLR) (20 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21622 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT & LAND MISCELLANEOUS CASE 010 OF 2022  
PM NJOROGE, J  
NOVEMBER 20, 2023**

**BETWEEN**

**ALI SHEIK HAMMO ..... APPELLANT**

**AND**

**REGINA KAGWIRIA MURIETHI ..... RESPONDENT**

**RULING**

1. This application is dated 15/10/2022 and seeks orders:
  1. That this Honourable Court be pleased to grant the Applicant leave to appeal out of time against the ruling delivered by Hon. E Ngigi (Chief Magistrate) on August 23, 2022 in Isiolo ELC No. 42 of 2020.
  2. That this Honourable Court be pleased to set aside the judgment of Isiolo Chief Magistrate Court delivered by Hon. E Ngigi on the 30<sup>th</sup> November, 2021 pending the hearing and determination of this application.
  3. That this Honourable Court be pleased to set aside the judgment of Isiolo Chief Magistrate Court delivered by Hon. E Ngigi on the 30<sup>th</sup> November, 2021 pending hearing and determination of intended appeal.
  4. That costs of this application be provided for.
2. The application is supported by the affidavit of Ali Sheikh Hammosworn on 13/10/2022 and has the following grounds:
  - a. On the August 23, 2022 Honourable E. Ngigi, Chief Magistrate delivered his ruling in Isiolo ELC No. 42 of 2022, No notification of the ruling date was issued to my counsel.



- b. Soon thereafter, my advocate sought to peruse the file to find out whether there is a ruling. She was informed that the file has been in the Hon. Magistrate’s Chambers and that the court clerk’s cannot access the same.
  - c. Then my advocate made numerous visits to the court’s registry in a bid to retrieve and peruse the file but she was informed that the file had been locked in the magistrate’s chambers. This is in the month of September 2022.
  - d. Further, the Honourable Chief Magistrate who heard and determined the matter was transferred from Isiolo Law Courts to another court station causing more delays in retrieving the file.
  - e. That given these unfortunate but short delays, my advocate was precluded from reading the ruling delivered in time as she was finally able to receive and read the ruling sometime last week.
  - f. Subsequently the time allowed to file an appeal in this matter run out.
  - g. The respondent herein is unlikely to suffer any prejudice if this application is allowed.
  - h. The delay to file an appeal in this matter is not so inordinate or so great as to be inexcusable hence it is in the interest of justice and fairness that this honourable court allows this instant application.
3. In his submissions the applicant says that he was unable to file an appeal within the stipulated time because;
    - a. He had not been issued with a notice regarding when the lower courts judgment would be delivered.
    - b. The court’s file had been locked in the Magistrate’s Chambers in the months of September and could not be retrieved.
    - c. The trial magistrate had been transferred to another station and for this reason the suit file could not be retrieved before expiry of the statutorily stipulate time.
    - d. That the impugned judgment being an ex parte judgment ought to be set aside.
  4. The applicant has transferred the case of Nicholas Kiptoo Arap Salat Versus IEBC and 7 others which is unequivocal that extension of time is not a right of a party but it is an equitable remedy that is only available to a deserving party at the discretion of the court. He argues that he is a deserving party and moves the court to exercise its discretion to extend the time for filing an appeal.
  5. The applicant submits that the trial court’s judgment ought an irregular judgment as envisaged in the Case of *James Kanyita Nderitu versus Maries Philotas Ghika & another* [2016] eKLR which has proffered as an authority.
  6. Regarding extension time to appeal the respondent says that the applicant has not explained satisfactorily the reason for having not filed his intended appeal within the statutorily stipulated time. He says that the excuse that the trial magistrate had locked the file in his Chambers has not satisfactorily explained. He has also submitted that the fact that the trial magistrate had been transferred to another station was not a tenable explanation because judicial officers who have been transferred do not take



records with them to their new stations. The respondent proffered the case of *Mombasa County Government Versus Kenya Ferry Services & another* [2019] eKLR where the court opined as follows;

“.....It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are only estimating circumstances that can enable the court to exercise its discretion in favour of the applicant.”

7. Regarding setting aside of the impugned judgment, the respondent demonstrated that although the applicant had at all times been served with suit papers, he had refused to participate in the proceedings. He submits that the impugned judgment was not an irregular judgment as evidence has been tendered and despite service the applicant had refused to enter appearance and to participate in the trial proceedings.

The respondent proffered the case of *Shah versus Mbogo* [1967] EA 166 where the court held as follows;

“ This discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from an accidents, inadvertence or excusable mistake or error but it is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”

8. The respondent submits that the grant of the reliefs sought by the applicant is not merited.
9. I have carefully gone through the proceedings in the lower court. I do find that at every stage, the application was served with suit documents. I also find that the trial magistrate clearly and pellucidly addressed this matter and went out of his way to allow the applicant to participate in the trial proceedings. I do opine that the applicant merely wanted to delay determination of the case in the lower court.
10. Evidence was properly tendered. The only fly in the ointment was that, willingly the applicant refused to participate in the trial proceedings. When a judgment is given in these circumstances, the apposite judgment is not an irregular judgment. It ought not to be set aside as if there was an unintended accident, inadvertence or excusable mistake. Choices have consequences and as a result, the applicant is the author of his predicament.
11. The excuse given by the applicant that the trial magistrate had locked the trial file in his chambers is veritably risible. It is common judicial practice that when a judgment had been delivered, the file is taken back to the registry.
12. The claim that the trial magistrate had been transferred to another station and, therefore, the trial file could not be retrieved is unbelievable. Judicial officers do not take files and court documents to their new stations. This claim amounts to veritable hot air. In any case, the applicant did not adduce even an iota of evidence to buttress his ludicrous claim.
13. In the circumstances, I find that I have not been persuaded to exercise my unfettered but judicious and not capricious discretion in favour of allowing the applicant to file his intended appeal out of time. I also deny the applicant the prayer to have the impugned judgment set aside.
14. Consequently I issue the following orders;
  - a. This application is dismissed.
  - b. Costs shall follow the event and are awarded to the respondent.



**DELIVERED IN OPEN COURT AT ISIOLO THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2023 IN THE PRESENCE OF:**

Court assistant: Balozi/Rahma

Miss Nyasani holding brief for Zainabu Jirma

Caleb Mwiti present for the Respondent.

**HON. JUSTICE P.M NJOROGE**

**JUDGE**

