



**Kamau v County Government of Murang'a (Environment and Land Appeal
E014 of 2021) [2022] KEELC 3135 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3135 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E014 OF 2021**

LN GACHERU, J

JUNE 9, 2022

BETWEEN

PETER CHEGE KAMAU APPELLANT

AND

COUNTY GOVERNMENT OF MURANG'A RESPONDENT

*(Being an appeal from the Ruling delivered on 8th July, 2021, by Hon. E.
Muriuki Nyaga (S.P.M) in Murang'a Chief Magistrates Court OS No. 64 of 2019)*

JUDGMENT

1. The appellant Peter Chege Kamau, is the Plaintiff in Muranga OS No.64 of 2019, while the respondent herein is the defendant. in respect to the notice of motion application dated April 14, 2021, the appellant is the respondent, while the respondent herein is the applicant
2. By a notice of motion application dated April 14, 2021, the applicant (respondent) therein, sought for orders that; -
 - a) That the proceedings and order by Hon. E. M. Nyaga issued on March 5, 2019, granting the applicant herein leave to institute a suit out of time be reviewed, varied and/or set aside.
 - b) That the ex-parte application dated March 21, 2019, seeking leave to appeal out of time be and is hereby dismissed, with costs to the respondent herein.
 - c) That the cost of the application be provided for.
3. The Application was premised on twelve (12) grounds set out on the face of the said application and on the supporting affidavit of Mbiyu Kamau, the County Attorney Murang'a County, sworn on April 14, 2021. In the said Supporting Affidavit, Mbiyu Kamau, deponed that the Plaintiff instituted a suit on 4th December 2018, against the Defendant thereon being CMCC 415 of 2018, seeking general



- damages and special damages for Kshs. 10,000,000/= for trespass and alleged destruction of houses and other developments. That the Defendant proceeded to file Defence dated 4th February 2019, that was accompanied by a Notice of Preliminary Objection, dated the same day. That the Defendant also filed an application dated February 15, 2019, seeking dismissal of CMELC 415 of 2018, on grounds that it was barred by the Public Authorities Limitation Act. That before the aforementioned application was heard and determined, the Plaintiff thereon filed the Application dated February 21, 2019 that sought leave to file a suit out of time. That the orders sought in the Application dated February 21, 2019, could not be granted as they had already been overtaken by events and the said suit had already been filed.
4. Further, that the application dated February 21, 2019, was neither served nor brought to the attention of the respondent thereon contrary to article 50 of the Constitution. That it is a requirement under section 28(1) of the Limitation of Actions Act, that an application seeking extension of time after the commencement of the suit must be served upon the respondent. That there was material non-disclosure as the applicant thereon did not disclose to the court the existing suit and the pending notice of preliminary objection. That it was based on this material non-disclosure that the court issued orders on March 5, 2019, granting the applicant thereon leave to file suit out of time. That it is only fair and just that the orders sought in the said application be granted.
 5. In addition, it was the applicant's disposition that for avoidance of doubt, the notice of preliminary objection dated February 4, 2019, was dismissed through a ruling delivered on July 18, 2019, on the basis that leave had already been sought and granted on March 5, 2020. That this position was erroneous as the said order was only served on their Advocates on August 28, 2020. That by the time the order of March 5, 2019, was served upon the defendant, he had already filed an appeal dated August 15, 2019, challenging the ruling delivered on July 18, 2019. That the ELC directed that this order be challenged in the trial court.
 6. The application was opposed through the replying affidavit sworn by peter chege kamau, the plaintiff/respondent thereon but the (appellant) herein, on 1May 1, 2021. He averred that the application as filed before the court was frivolous, vexatious and an abuse of the court process and the prayers sought are untenable and should be dismissed. That he was granted a valid leave to institute proceedings and there is no valid reason to have it reviewed, varied or set aside. That the defendant/applicant filed his defence on February 4, 2019, together with the notice of preliminary objection, which was heard and dismissed. That the defendant/applicant was aggrieved by the said ruling and he appealed against it in Murang'a ELCA Case No. 19 of 2019, which was heard on merits and dismissed on May 27, 2020. That the application and order granting leave to file suit out of time was brought to the attention of the defendant via a replying affidavit filed on March 14, 2019, and served upon the defendant on 11th of March 2019.
 7. Further that no provision of law was infringed and no prejudice was occasioned to the defendant/applicant. That he was informed by his advocate which information he verily believes to be true that sections 27 and 28 of the Limitation of Actions Act Cap 22, applies to all cases on negligence, nuisance, breach of duty which exist by virtue of contract or a written law among others and not necessarily personal injuries as alleged by the Applicant.
 8. That the instant suit is seeking Kshs. 10,000,000/= as general damages and not personal injuries. That the Defendant did not Appeal against the decision in the ELC Appeal delivered on February 27, 2020, and the instant application is therefore Res-Judicata. In conclusion he urged the Court to dismiss the application with costs.



9. The application before the trial court was canvassed by way of written submissions, and on July 8, 2021, the said trial court delivered a ruling in favour of the applicant and stated as follows;

“Having considered the circumstances herein and the submissions made, I am convinced that the Application has merit and the same is hereby allowed with no order as to costs”

10. The appellant was aggrieved by the above determination of the court in favour of the respondent herein and has sought to challenge the said ruling through the memorandum of appeal dated August 11, 2021, and sought for orders that;

1. The Ruling and Order delivered by the Honourable E Muriuki (SPM) on the 8th July 2021, be reversed and set aside.
2. That the suit being ELC No 415 of 2018, as filed in the Chief Magistrates Court in Murang'a on the 14th of December 2018, do proceed for hearing.
3. That the costs of this Appeal and those of the Application dated 14th April 2021, be borne by the Respondent herein.

The grounds of Appeal are:-

1. The Learned trial Magistrate erred in Law and fact by failure to appreciate the fact and the law that the application dated 14/4/2021, was ‘Res judicata’
 2. The Learned trial Magistrate erred in Law and fact for failure to appreciate and find that an application for leave of the Court for the purposes of Section 27 and 28 of the *Limitation of Actions Act*, Cap 22 shall be made exparte.
 3. The Learned trial Magistrate erred in Law and fact for failure to appreciate and find that there was no ex parte Application dated 21st March 2019, seeking leave to appeal out of time which was capable of being dismissed.
 4. The Learned trial Magistrate erred in Law and fact for failure to find that the Respondent ought to have challenged the leave to file suit out of time in ELC 415 of 2018, and not Originating Summons No. 64 of 2019.
 5. The Learned trial Magistrate erred in Law and fact for delivering the afore-mentioned ruling and making an order based on a complete misapprehension of the law
 6. The Learned trial Magistrate erred in Law and fact for failure to comply with the High Court Ruling in ELC Appeal No. 19 of 2019.
 7. The Learned trial Magistrate erred in Law and fact in disregarding the Appellant’s submissions and Authorities filed in opposition of the said Application.
 8. The Learned trial Magistrate erred in Law and fact for failure to find that in the interest of Justice CMELC Suit 415 of 2018 ought to proceed as filed and not deny the Appellant access to Justice.
10. On 15 th December, 2021, the Court directed that the Appeal be canvassed by way of written submissions.
11. The Appellant through the Law Firm of Bwonwonga & Co Advocates, filed his written submissions dated 18th January 2022. He submitted that Courts of Justice should strive to sustain suits rather than dismiss them especially where Justice would still be done through a fair trial, despite delay. In



conclusion the Appellant urged the Court to allow the Appeal with costs both in this Appeal and in the lower Court.

12. The Respondent in this Appeal failed to file submissions despite being served by the Appellant with his submissions on 10th February 2022, as per the Affidavit of Service even dated. Further, the Respondent's time within which to file submissions was extended and he was given several opportunities by this Court to file the same, but he did not and on 28th April 2022, the Court reserved a judgment date.
13. The Court has considered the evidence as well as the submissions thereafter by parties. The Court has also carefully considered the findings of the trial Court, and the Submissions of Counsels and finds as follows; -
14. Being a first Appeal, this has a duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by section 78 of the *Civil Procedure Act*.

See the case of *bok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where the Court held; -

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

15. The court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial court, analyse the same, evaluate it and arrive at an independent conclusion.
16. Before this court can interfere with the trial courts discretion, it must be satisfied that the learned trial Magistrate misdirected himself and as a result arrived at a wrong decision or that he misapprehended the law or failed to take into account some relevant matter. Madan, JA (as he then was) captured the principle more succinctly in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA 898 as follows:

“The Court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The Court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

17. Having now carefully read and considered the Record of Appeal, the grounds of Appeal, the written submissions, and the Ruling by the trial Court. This Court and finds that the issue for determination is whether the Appeal is merited.

i. Whether the instant Appeal is merited

18. What flows from the evidence, pleadings and the submissions herein, and the record before this Court is that the Appellant instituted a suit in the Chief Magistrates Court at Murang'a ELC No. 415 of 2018, via a Complaint dated 14th December 2018. The Respondent herein filed a Defence to the said suit dated 4th February 2019, and it was accompanied by a Notice of Preliminary Objection, dated the same



- day. That in addition to the Preliminary Objection, they also filed another application dated February 15, 2019, seeking to strike out Murang'a ELC No. 415 of 2018, on the ground that it offended the *Public Authorities Limitation Act*.
19. That while the Preliminary Objection dated February 4, 2019, and the Notice of Motion Application dated 15th February 2019, were pending hearing before the trial Court, the Appellant herein instituted the suit from which this Appeal is founded being Originating Summons No. 64 of 2019, in the Chief Magistrates Court by way of an ex-parte Notice of Motion dated February 21, 2019, seeking inter alia; leave to file a suit out of time. That the application dated February 21, 2021, was heard ex-parte and the trial Court delivered its ruling on the March 5, 2021, and granted the orders sought.
20. Armed with the said ex parte orders, the Appellant herein proceeded to serve the pleadings together with the ex parte order delivered on March 5, 2021. It is this action that jolted the respondent herein into action and he filed notice of motion application dated April 14, 2021, seeking inter alia that the orders granted on March 5, 2021, be reviewed, set aside or varied and the application dated March 21, 2021, be dismissed.
21. This court has not been seized with the benefit of perusing the court file in Murang'a ELC No. 415 of 2018, but from the evidence produced by both parties, the preliminary objection dated February 4, 2019, was heard and a ruling dismissing it was delivered on July 18, 2019. It also flows from the evidence that the respondent herein, being aggrieved by the orders of the Court issued on 18th July 2019, appealed to this court via a memorandum of appeal dated August 15, 2019. That the said memorandum of appeal upon filing was allocated ELC Appeal 19 of 2019. Further that ELC Appeal 19 of 2019, was heard and a determination delivered on February 27, 2020, dismissing it. In the said appeal this court held as follows
- “29. It is the view of the Court that the orders of extension of time are still alive having not been Appealed, set aside or vacated and the best for way to challenge it is before the trial Court by way of setting aside or discharge through such other action open to the Appellant, if the orders were granted ex-parte. The pertinent question is whether or not the respondent was entitled to the extension of time pursuant to section 27(1) of the *Limitation of Actions Act* and can only be challenged in the trial proceedings.
30. It is noted that the Appellant did not challenge the orders when the same were brought to its knowledge in the month of March 2019. ...
32. In the end the Appeal fails and it is dismissed with costs payable to the respondent by the appellant”
22. This court notes that the parties have been embroiled in countless preliminary applications including Muranga Chief Magistrates Court O.S No. 64 of 2019, on which this Appeal is founded. The Court notes further that the said applications all revolve around the validity of Murang'a Chief Magistrates ELC 415 of 2018. In fact, Murang'a Chief Magistrates Court O.S No. 64 of 2019 appears to have been filed by the appellant herein in a huff in an attempt to arrest the respondent's preliminary objection dated February 4, 2019, and their application dated February 15, 2019 seeking to strike out Murang'a ELC No 415 of 2018, on the ground that it offended the *Public Authorities Limitation Act*.
23. While it is evident that the preliminary objection dated 4th february 2019, was heard and determined, this court however is not well guided as to whether the application dated 15th February 2019 has been heard and determined by the court in Murang'a ELC No. 415 of 2018.



24. Having outlined the above for good order, this court will now proceed to determine if the instant appeal is merited. The appellant in the instant Appeal seeks inter alia to set aside the ruling and order delivered by the trial court on July 8, 2021.
25. This court points out that the Ruling delivered on July 8, 2021, had the effect of allowing the application dated April 14, 2021. The said Application sought that the orders of the court issued on March 5, 2019, be varied or set aside. It also sought that the application dated 21st March 2019, seeking leave to appeal out of time be dismissed with costs. This court has perused the lower court file and notes that there is no application therein dated March 21, 2021. Therefore, the trial court erred in pronouncing itself on a non-existent application and on this ground the appeal partially succeeds
26. On the second limb, the power to set aside orders or Judgement are discretionary and the court must use its discretion to come to a conclusion while also ensuring that Justice has been done.

Order 12 rule 7 of the [Civil Procedure Rules](#) provides that;

“where under this order judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment or order upon such terms as may be just.”

27. Further, section 3A of the [Civil Procedure Act](#) provides for the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. It provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

28. The court, as stated above, has discretion to set aside a judgment or order. The exercise of this discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. In *Shah v Mbogo & another* (1967) EA 116, it was held that:

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

29. In his decision in *Haji Ahmed Sheikh t/a Hasa Hauliers v Highway Carriers Ltd* [1982 – 88] 1 KAR 1184, Gachuhi JA stated as follows:

“The powers of the court in dealing with application under order IX rule 10 is to do justice to the parties. In *Pithon Waweru Maina vs Thuku Mugiria*, Civil Appeal No. 27 of 1982 (unreported) (ibid) (Porter, Kneller, JJ.A. and Chesoni, Ag. J.A.) Potter, J.A. in quoting Duffus, P., in *Patel v E.A. Cargo Handling Services Ltd.*, [1974] E.A. 75 stated at page 1 of his judgment this:

There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just’ The main concern of the court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules’.



21. Having found that the trial court was properly vested with the mandate and discretionary power to set aside the orders of March 5, 2019, this court will now proceed to determine if the said discretion was exercised judiciously in relation to an order for leave to institute a suit of time.

Order 37, rule 6 of the Civil Procedure Act (Cap 210) provides:-

- (1) An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made ex-parte by originating summons supported by affidavit.
- (2) Any such application made after the filing of a suit shall be made ex-parte in that suit.”

22. The Limitation of Actions Act, (Cap 22) provides for extension of limitation period in the following terms:-

Section 27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.

- (1) Section 4(2) does not afford a defence to an action founded on tort where—
 - (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
 - (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
 - (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
 - (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.
- (2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—
 - (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
 - (b) in either case, was a date not earlier than one year before the date on which the action was brought.

Further Section 28, cap 22(supra) stipulates that as follows;

- “(1) (1) Application for leave of court under section 27 (1) an application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.

.....

- (3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court



that, if the like evidence would in the absence of any evidence to the contrary, be sufficient— (a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and (b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action, and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 27 of this Act) to afford a defence under section 4(2) of this Act.”

23. The principles governing an *ex-parte* application in respect of leave to file a suit out of time were enunciated in the Supreme Court case of *County Executive of Kisumu v County Government of Kisumu and 8 others* [2017] eKLR [Civil Application No. 3 of 2016] as follows: -
- a) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c) Whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis;
 - d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e) Whether there will be any prejudice suffered by the Respondents if the extension is granted;
 - f) Whether the application has been brought without undue delay; and
 - g) Whether in certain cases, like the election petitions, public interest should be a consideration for extending time.
24. In the instant Appeal, an *ex parte* order allowing the appellant to file a suit out of time was delivered on 5th of March 2019. The court notes that the said orders emanated from an *ex parte* notice of motion application dated February 21, 2019. Further the court notes that the suit, that the Appellant sought leave to file out of time was filed on December 14, 2018. The procedure for seeking leave to file a suit out of time in an already filed suit is categorically provided for in Order 37 rule 6(2) cited above as read together section 28 (3) of the *Limitation of Actions Act* which provides for the substantive law.
25. As provided by order 37 rule 6(2), an Application seeking leave to file a suit out of time in an already filed suit shall be filed via an *ex parte* application in that suit. It is therefore accurate to conclude that the appellant did not adhere strictly to the rules of procedure when he filed the OS 64 of 2019, via an application dated February 21, 2019, which in turn gave rise to the ruling of March 5, 2019.
26. The upshot of the foregoing is that the application dated February 21, 2019, is bad in law for want of procedure and therefore any action that emanated from it is null and void ab-intio.
27. The Court of Appeal in *Oruta & another v Nyamato* [1988] eKLR stated as follows;
- “The procedure for obtaining the extension of time for the purpose of section 27 of the Act is set out in section 28. It is also provided for in order XXXVI rule 3C of the *Civil Procedure Rules*. The application is to be made *ex-parte* and the defendant is not in a position to oppose the application. In fact he only becomes aware of the order, if obtained, when the order is



served together with the plaint. However, there is no provision for the application to set aside the order in the Act but the defendant can raise the matter as an issue at the trial. Now that the preliminary point has been raised before the trial, it now calls for interpretation of the section as to the reason of the enactment providing for the application to be made ex-parte. Why shouldn't the defendant be afforded a chance to oppose the application before the order is granted and before the suit is filed so as to minimise costs”

28. Having found as above, it is this courts findings that the instant appeal is not merited and it is accordingly dismissed on the ground that the suit on which it is founded is bad in law as the court has stated above, and thus the same is voided.
29. Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the memorandum of appeal, together with the written submissions, the court finds and holds that the trial Magistrate misapprehended the law by allowing the application dated February 12, 2019, and entertaining any pleadings and/or action that emanated from it. Any other proceedings that flowed from the said application are thus null and void.
30. The upshot of the foregoing is that the appellant's appeal is found not merited and consequently the said appeal is dismissed entirely. Since both parties equally contributed in propagating a nullity, no orders as to costs shall be issued.

It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9TH DAY OF JUNE 2022.

L.GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

Mr Bwonwonga for the Appellant

N/A for the Respondent

L.GACHERU

JUDGE

9/6/2022

