



REPUBLIC OF KENYA



**Abdille & another v Mugambi & 2 others (Environment and Land Appeal  
007 of 2021) [2022] KEELC 2577 (KLR) (18 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2577 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT AND LAND APPEAL 007 OF 2021**

**PM NJOROGE, J**

**JULY 18, 2022**

**BETWEEN**

**AHMED GULLEID ABDILLE ..... 1<sup>ST</sup> APPELLANT**

**HUSSEIN MOHAMED BOYA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BENSON MUGAMBI ..... 1<sup>ST</sup> RESPONDENT**

**JAMES KAMAU KAMINA ..... 2<sup>ND</sup> RESPONDENT**

**PAULINE NTINYARI KAMAU ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the Ruling of Hon. S M Mungai  
– CM in Isiolo ELC No. 3 of 2017 delivered on 17/05/2021)*

**JUDGMENT**

1. The Memorandum of Appeal in this case states as follows:

**Memorandum Of Appeal**

2. The Appellant named above being dissatisfied with ruling of Samuel M. Mungai Chief Magistrate made on 17/05/2021 in IsioloELC no. 3 of 2017 appeals against the whole ruling and act (sic) here below the grounds of appeal namely.
  1. The learned trial magistrate erred in law and in fact in dismissing the appellant’s application seeking reinstatement of the suit.
  2. The learned trial magistrate erred in law falling (sic) to give effect to the overriding objective in Section 1a, 1b Of The *Civil Procedure Act* And Article 159 Of *The Constitution* Of Kenya



2010 in denying the appellant the opportunity of a just determination and in dismissing the motion on the account of mistake of appellant, and his counsel.

3. The learned trial magistrate erred in law in failing to appreciate that the date for hearing the main suit was fixed *ex parte* by the respondent without invitation letter service up the appellant counsel to prepare in advance.
4. The learned trial magistrate erred in law and in fact in failing to acknowledge that the counsel for the appellant was indisposed and the matter was waiting for surveyor's report.
5. The learned trial magistrate erred in law in holding the appellant advocate (sic) failure to inform the appellant of the hearing date and the appellant's failure to attend court on the hearing date had been adequately explained.
6. The learned trial magistrate erred in law and in fact in failing to appreciate that there was no proper service effected upon the appellant by the time the matter was called out for hearing.
7. The learned trial magistrate erred in law and in fact in failing to appreciate that the respondent had not filed an affidavit of service by the time the matter was called out for hearing.
8. The learned trial magistrate erred in law in holding that the appellant has been an obstacle to the expeditious disposal of the suit.

Reasons Where of the appellant prays the Honourable Court to allow this appeal with costs set-aside the orders of subordinate court dated 17/05/2021 and proceed to allow the appellant (sic) application in IsioloELC no. 3 of 2017 with costs.

Date At Metu This 17<sup>th</sup> Day Of June 2021

Kiogora Mugambi & Co. Advocates For The Appellant

2. The appeal was canvassed by way of written submissions.
3. The Appellants have submitted as follow:
  - a. When the suit was dismissed, the respondents' advocate had not served the apposite hearing notice and that the advocate had only learnt about it from the cause list necessitating him to ask another advocate to hold his brief.
  - b. That the Hon. Magistrate in the Lower Court had ignored the information that the appellants' advocate was indisposed. The appellants' advocate relied on the Case of Christopher Orina Kenyariri T/a Kenyariri & Associates Advocates Versus Salama Beach Hotel for his assertion that lapses in form and procedure should not unduly penalize a litigant. The advocate also proffered the case of *Edney Adaka Ismail versus Equity Bank Ltd* [2014] eKLR and *Burban Decorators And Contractors Versus Morining Ford Ltd & Another* [2014] eKLR for his assertion that a mistake of a counsel should not be visited on an innocent client.
  - c. The appellants advocate also proffered that dismissal of the apposite suit was done when the Country was undergoing the Covid 19 pandemic and "MAY BE" the appellants were experiencing financial constraints. I do observe that the use of the word "MAY BE" may connote uncertainty on the part of the appellants' advocate concerning this assertion.
  - d. The appellants' advocate felt that the suit was dismissed on a procedural technicality contrary to the provisions of Article 159 of *the Constitution* and Sections 1A and 1B of the *Civil Procedure Act*.



4. The respondents have submitted as follows:
  - a. The appellants' advocate had given conflicting reasons regarding his non-attendance in Court on the material day. According to the respondents, the appellants' second reason was an afterthought and, therefore, not genuine. He further claims that the plaintiffs' counsel's assertion that he was unwell seems to have been abandoned in the application and no documentary evidence was adduced to support the claim that he was indisposed. He further says that if the appellants' counsel was indisposed, he ought to have informed the respondents' counsel who would have not to come to court and to avoid unnecessary expenses.
  - b. The respondents' advocate submits that though the appellants' sought leave to amend their plaint on 8/10/2019, which leave was granted, the appellants were yet to file an amended plaint when the suit was dismissed.
  - c. The respondents submit that the appellants had continued to drag them in Court over unnecessary litigation and proffer that the Hon. Magistrate in the Lower Court had agreed with the respondents that the apposite suit was ripe for dismissal and dismissed the suit with costs.
5. The respondents proffered the case of *John Kabira versus George Namasaka t/a Sichangi & CO. Advocates* (2019) eKLR, where the Court dismissed a suit for delay caused by a litigant. The respondents also cited the case of *Shah Hirji Marek Ltd Versus Ramesh Premchad Shah & 3 others* (2013) eKLR where the Court opined as follows:

“...the Sword of Justice must cut both ways. No party should suffer as a result of a right being given to the other party. Bearing in mind the aforesaid principles, I do not find this to be a case which merits the exercise of my discretion in favour of the Plaintiff herein. I concur with the 3<sup>rd</sup> and 4<sup>th</sup> defendants that the defendants have suffered as a result of the delays by the plaintiff prosecuting the application dated 9<sup>th</sup> May, 2007....”
6. The respondents do point out that the learned magistrate in the Lower Court had at paragraph 20 of his ruling observed that the impugned hearing date had been fixed by the defendants and not by the plaintiffs, and therefore, the defendants could not be allowed to successfully claim that a Hearing Notice had not been issued.
7. The respondents asked the Court to rely on the case of *Bilba Ngonyo Isaac versus Kembu Farm & Another* [2018] eKLR for their assertions that the trial court had not misdirected itself in disallowing the application for reinstatement of the suit and that reasons for the decision were well thought out and explained by the trial court.
8. The respondents concluded that though the appellants had an opportunity to prosecute their case they had squandered that opportunity by delaying the hearing of the suit and thereby occasioning them huge losses. They urged the court to find that the decision of the Honourable Magistrate in the Lower Court was merited and to dismiss the appeal with costs.
9. This being a first appeal, this Court is entitled to carefully peruse the proceedings in the Lower Court to come to its own findings whether in support of the appeal or against it.
10. At the outset, I do not agree with the claim in paragraph 30 of the Memorandum of Appeal that the hearing date was fixed by the respondents. A perusal of the proceedings shows that it is the appellants who had fixed the hearing date.



11. The Memorandum of Appeal is attacking the ruling of the Honourable Magistrate in the Lower Court. I have considered all the authorities proffered by the parties to buttress their veritably incongruent assertions. All the authorities are good authorities in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances.
12. Having carefully gone through the impugned ruling, I find that the learned Honourable Magistrate had addressed all the 8 Grounds of Appeal. I refuse to exercise my judicial discretion and authority to set aside the orders of the Lower Court.
13. I issue the following orders:
  - a. This Appeal is dismissed.
  - b. Costs shall follow the event and are awarded to the respondents.

**DELIVERED IN OPEN COURT AT ISIOLO THIS 18TH DAY OF JULY, 2022 IN THE PRESENCE OF:**

Court Assistant: Balozi/Rahma

Tyson Mwenda h/b Kariuki for the Respondent

Kiogora Mugambi for the Applicant - Absent

**HON. JUSTICE P. M. NJOROGE**

**JUDGE**

