



**Macharai & another v Muruithia (Environment & Land Case
56 of 2023) [2025] KEELC 4227 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 56 OF 2023**

JM KAMAU, J

MAY 28, 2025

BETWEEN

FRANCIS GIKONYO MACHARAI 1ST APPELLANT

HUMPHREY NGATIA MACHARIA 2ND APPELLANT

AND

MARY GACHAMBI MURUITHIA RESPONDENT

RULING

1. In the Appeal dated 24/11/2022 the Appellants have sought this courts' intervention to overturn the Ruling of the Honourable Susan Mwangi Senior Resident Magistrate delivered on 10/1/2022 in *Nyabururu C.M ELC No. E 016 of 2021* on the following grounds.
 1. The learner trial Magistrate erred in law and fact in finding that the Appellants Statement of Defence filed in the trial Court did not disclose any triable issues which should be heard in Court in the usual manner.
 2. The learned trial Magistrate erred in law and fact in entering judgement for the Respondent when no evidence had been adduced in support of the claim and no trial whatsoever was conducted as if the Plaintiffs claim was a liquidated claim.
 3. The learned trial Magistrate erred in law and fact in depriving the Appellants their right of being heard in a fair and impartial way in a case that had an interest in as dictated by the [Constitution](#) of Kenya without any sufficient lawful reasons.
 4. The learned Honourable Magistrate erred in law and fact in holding that the Appellants grievances or interest in the subject land could only be redressed in a Succession Court when it was very clear from the pleadings that the Appellants claim was that of trust and/or beneficial ownership.



5. The learned trial Magistrates erred in law in summarily dismissing the Appellants claim, entitlement and Defence with regard to the suit land without having even heard /listened to them.
 6. The learned trial Magistrate erred in law in adopting and using a procedure unknown in law to circumvent the mandatory requirements for hearing of the land case but eventually rendering what amounted to a final judgement.
 7. The learned trial Magistrate erred in law and fact in allowing the Respondents Notice of Motion Application dated 15th February, 2021 even when the same was not prosecuted.
 8. The learned trial Magistrate erred in law and fact in hearing and allowing the Notice of Motion Application dated 15th February, 2021 which was res judicata and ostensibly overturning and overruling a previous Magisttaes Order that had directed the said case should be heard and determined the normal way.
 9. The Ruling by the learned trial Magistrate was against the substance and weight of the depositions placed before her and the law and hence she completely failed to render a fair and just ruling in accordance with the law.
2. The Appellants pray that:-
- a. That the Ruling of 10/11/2022 striking or dismissing the Appellants Statement of Defence in *Nyabururu CM ELC No. E016 of 2021* and entering judgement for the Plaintiff be reversed and/or set aside and an order be issued the suit be heard on merit before another magistrate.
 - b. That the costs of the Appeal be borne by the Respondent.
3. The Appeal was filed on 24/11/2022. On 13/11/2024 the Respondent filed an Application urging this court to dismiss the Appeal for want of precaution mainly on the ground that the Appeal is a deliberate inaction to frustrate the Judicial process as well as the Respondent. The same is brought under [Order 42 Rule 35 \(2\)](#) which provides that: -
- If within one year after the service of the memorandum of Appeal, the Appeal has not been set down for hearing, the petition shall, on Notice to the parties , list the Appeal before a Judge in chambers for dismissal”.
4. The same is supported by the Affidavit of Mary Gachambi Muruithia and the grounds on the face of the said Notice of Motion. The Respondent depones that the Appeal has been pending for 719 days, almost one year more than the one-year threshold set out under Order 42 Rule 35 (2) of the [Civil Procedure Rules](#). He further states that the Appellants here failed to secure Directions, list the appeal, compile the Record of Appeal and that this inaction is not a matter of mere oversight but a deliberate strategy to stall the proceedings, which constitute an abuse of the judicial process. The Respondent would wish that the Court does not believe the Administrative excuses given by the Appellants for failure to prosecute the Appeal. He prays that this Appeal should not clog the judicial system.
 5. The Appellants are rightly of the view that the Courts’ duty is to ensure that justice is administered promptly and that the Appeal process is not used as a delaying tactic. He opines that this Appeal is being advanced as a tool for delay. Finally, the Respondent states that the courts’ inherent discretion and the overriding interest in substantive justice should compel the dismissal of the appeal for want of prosecution. In the supplementary Affidavit sworn on the 28/2/2025, the Respondent depones that in the Appellant’s Replying Affidavit they have tendered no evidence of any remedial or follow-up



- action to mitigate the inexcusable delay. They only shift accountability for their neglect at fictitious administrative delays which argument is both legally unsustainable and transparently disingenuous.
6. The Appellants responded to this Application through a Replying Affidavit sworn by their joint Advocate David K. Kaburu Advocate who depones that he has the conduct of this matter on behalf of the Appellants. He contends that it is not true that the Appellants have deliberately refused to prosecute the Appeal without any reasons. He claims that an attempt to prosecute the Appeal has been made with the Appellants applying for certified copies of proceedings and Judgement on 23/3/2023 and he appended the said letter to the Replying Affidavit. But that the Court has to date not supplied the Appellants with the said documents which they paid for and that it could be impossible to prepare a Record of Appeal without the documents sought to which the Respondent in Paragraph 7 of her Supplementary Affidavit sworn on the 28/2/2025 responded this “nominal action” took 4 months after filing the Appeal which is inexcusable and that there is no evidence of proactive follow up. And on this, the court agrees with the Respondent. The Court further agrees with the Respondent who in response to the Appellants’ assertion that this Appeal was first filed in *Nyahururu as ELC No. 26 of 2022* on 25/11/2022. The same was later transferred to Nyandarua ELC on unknown dates without any notice to the Appellants. She says and rightly so that the E-Judiciary portal provides litigants with real-time unambiguous access to case progress and that when the Court moved from Nyahururu the Registry dutifully published all transferred matters based on the clear criteria that parcels registered in the Nyandarua Lands Registry including the suit land fell within its jurisdiction.
 7. I wish to say from the outset that the Appellants’ inaction cannot be excused at all and that equity aids the vigilant and not the indolent. I do agree with the Respondent that Mr. Kaburu Advocate should not take the administration of the Court as an excuse to hide behind. I am sure that he must have known that the ELC left Nyahururu for Ol-kalou where all land situate within Nyandarua County such as this one will have to be heard.
 8. The judiciary made this known to all and sundry and the opening of the Court at Ol-kalou was done by no inferior mortal than her Ladyship the Honourable Chief Justice of Kenya. I believe the Appellants’ Advocate must have received this news whether he attended the opening ceremony to which he must have been invited or not. Secondly, as the Respondent puts it, the E-judiciary Portal provides litigants and their counsel a very useful real-time access progress of the case including the instant one and failure to have followed the progress of this case is inexcusable.
 9. Having said so, the dismissal of a case for want of prosecution is such a draconian occurrence and one that would be very punitive to the Appellants since it is a final Order. The granting of this prayer is discretionary. I will reluctantly spare the Appellants the axe and order that the Record of Appeal be filed and served within the next 15 days from the date hereof and that the same be prosecuted within 60 days thereafter. This is to avoid anxiety on the part of the Respondent who, from the fact that she is signing her documents by way of a thumb print she must be fairly old. These are the Orders of the Court.
 10. The Respondent will have the costs of this Application in any event.

RULING DATED AND SIGNED AT NYANDARUA THIS 28TH DAY OF MAY, 2025.

HON MUGO KAMAU

JUDGE

In the presence of:

Court Assistant - Samson.



Mr. Kaburu for the Appellants

Mr. Muchangi for the Respondent

