



**Ma-Ni-Utheri v Pram Company Limited (Environment and Land Appeal  
E033 of 2021) [2025] KEELC 483 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 483 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E033 OF 2021  
BM EBOSO, J  
FEBRUARY 11, 2025**

**BETWEEN**

**MA-NI-UTHERI ..... APPELLANT**

**AND**

**PRAM COMPANY LIMITED ..... RESPONDENT**

*(Being an appeal against the Ruling of Hon Nangea, Chief Magistrate delivered on  
6/4/2021 in Thika Chief Magistrate Court Environment and Land Case No. 220 of 2018)*

**JUDGMENT**

**Introduction**

1. This appeal challenges the ruling of the Thika Chief Magistrate Court, Hon J M Nang’ea, Chief Magistrate [as he was then] rendered on 6/4/2021 in Thika Chief Magistrate Court MCL&E Case No. 220 of 2018. Through the impugned ruling, the Lower Court dismissed the appellant’s application dated 11/11/2020 in which the appellant sought a reinstatement of the suit. The suit had been dismissed for “non-prosecution” on 10/11/2020. The key issue to be determined in this Judgment is whether the Lower Court exercised its discretionary jurisdiction properly in declining to reinstate the suit. I will outline a brief background to the appeal and summarize the parties’ respective cases in the appeal before I dispose the issue.

**Background**

2. Through a plaint dated 9/11/1993, the appellant sued the respondent in the High Court at Nairobi, seeking: (i) a declaration that the sale agreement dated 6/10/1987 between the appellant and the respondent was null and void, (ii) a declaration that the oral sale agreement of 31/7/1987 between the appellant and the respondent was null and void in its entirety; (iii) an order decreeing the respondent



to refund to the appellant a sum of Kshs 5,448,100 together with interest at 35% p.a reckoned from 13/10/1993 till payment in full; and (iv) an order awarding the appellant costs of the suit.

3. The case of the appellant was that through a sale agreement dated 6/10/1987, the respondent agreed to sell to the appellant 1,000 acres of land that was to be surveyed out of LR Nos 5938, 18594, and 2883. The agreed purchase price was Kshs 9,000,000 out of which they paid to the respondent Kshs 900,000. Subsequent to entering into the sale agreement, they learnt that LR No 5938, which measured 284 acres, was charged to Agricultural Finance Corporation and had five (5) encumbrances (charges) registered against it to secure a loan of Kshs 14,355,000. They further contended that the respondent failed to obtain the requisite consent of the Land Control Board within 6 months, thereby rendering the transaction null and void.
4. As a further and an alternative plea, the appellant contended that they entered into an oral agreement with the respondent on 31/7/1990 to the effect that the respondent would sell to them 570 acres of land at Kshs. 12,000 per acre.
5. The appellant contended that the claimed sum of Kshs 5,448,100 comprised of the principal sum of Kshs. 900,000 which they had paid to the respondent and interest on the said sum at 35% p.a from 6/10/1987.
6. The respondent filed a statement of defence and counterclaim dated 15/1/21994 The defence and counterclaim were amended on 20/6/2019. They averred that the appellant was unable to raise the purchase price required under the sale agreement, thereby rendering completion of the sale impossible. The respondent denied liability to refund the principal sum and or interest.
7. By way of counterclaim, the respondent averred that upon entering into the sale agreement, without their consent, the appellant caused their members to enter onto the respondent's parcels of land, LR No. 5938 and LR No. 18594, and the said members occupied 500 acres of the land located in Muri Farm in 1987. They added that the said members cut down virgin bush and carried out charcoal burning on the land. The respondent contended that the appellant was in breach of the sale agreement, in that they failed to pay balance of the purchase price. The respondent sought an order decreeing the appellant to pay them damages for breach of contract. They further sought an order decreeing the appellant to give them vacant possession of the land. In addition, they sought mense profits and costs of the primary suit and the counterclaim.
8. After many years, the suit was transferred from Milimani High Court to Thika Chief Magistrate Court. The primary suit and the counterclaim came up for hearing before the Thika Chief Magistrate Court on 10/11/2020. On that day, the appellant's advocate was absent but the respondent's advocate was present. Counsel for the respondent informed the Lower Court that the appellant's advocate had informed him that he could not get in touch with the appellant. Counsel for the respondent added that he had no objection to an adjournment. The trial court dismissed the suit in the following terms:

“ This is a very old case and neither the plaintiff nor its advocate has appeared. It is now 11.00 a.m. The suit is hereby dismissed for non-prosecution with no order as to costs.”
9. On the following day, the appellant filed a notice of motion dated 11/11/2020 seeking a reinstatement of the suit. The application culminated in the impugned ruling dated 6/4/2021. The Lower Court found that the appellant had shown reasonable cause for their advocate's failure to attend the hearing of the suit on 10/11/2020. The Lower Court nonetheless declined to reinstate the suit, observing that the suit had previously been dismissed by the High Court and subsequently reinstated by the same Court. The Lower Court further observed that the appellant had previously given a similar reason of engagement in the High Court while seeking an adjournment in the past.



10. The Lower Court rendered itself thus:

“The stated antecedents clearly show that the plaintiff has not demonstrated necessary bonafides to merit reinstatement of the suit also considering that the superior court had dismissed it before for the same reason. Reinstating the suit would violate Sections 1A and 3A of the CPA which require expeditious proportionate and affordable resolution of civil disputes governed by the Act”.

### **Appeal**

11. Aggrieved by the Lower Court’s refusal to reinstate the suit, the appellant brought this appeal, advancing the following ten (10) verbatim grounds:

1. The Learned Magistrate erred in law in exercising discretion in determining the application dated 11/11/2020 to wit dismissing it on account that the court could not reinstate the suit.
2. The Learned Magistrate erred in law and fact in making a determination that the appellant had exhibited conduct that would lead to the court failing to exercise discretion in its favour.
3. The Learned Magistrate erred in law and fact in relying on extraneous reasons leading to the dismissal of the appellants application.
4. The Learned Magistrate disregarded the parties’ pleadings and the effect of a dismissal order of the appellant’s application.
5. The Learned Magistrate misdirected himself on the longevity in time by the parties to take action and the totality of their conduct.
6. The Learned Magistrate misapprehended the law on reinstatement of a suit thereby making an erroneous finding.
7. The Learned Magistrate erred in law and fact in failing to consider any other remedies available in law aside from dismissal of the appellant’s application dated 11/11/2020.
8. The Learned Magistrate failed to evaluate the reasons for failure to have prosecuted the suit on the instances it came up for hearing.
9. The Learned Magistrate misapplied the law on the expedients disposal of suits thereby dismissing the appellant’s application dated 11/11/2020.
10. The Learned Magistrate misdirected himself in rendering a wrong determination on the application dated 11/11/2020.

### **Appellant’s Submissions**

12. The appeal was canvassed through written submissions dated 12/3/2024, filed by Wokabi Mathenge & Co Advocates. Counsel for the appellant identified the following as the two issues that fell for determination in the appeal: (i) Whether the Lower Court exercised judicial discretion judiciously in dismissal of the appellant’s suit; and (ii) Who should bear costs of this suit.
13. On whether the Lower Court exercised judicial discretion judiciously in dismissing the appellant’s suit, counsel submitted that when the suit came up for hearing, the respondent informed the Lower Court that they did not object to the adjournment of the hearing. Counsel contended that the respondent was estopped from changing positions on the issue. Counsel added that the respondent’s subsequent



contention that the appellant had caused various past adjournments was misleading, adding that the respondent amended their pleadings 25 years after they had filed their defence to the primary suit.

14. Counsel added that past issues on failure to file and/or take action in the suit were not a relevant consideration when the Lower Court dismissed the suit on 10/11/2020. Counsel invited the court to re-evaluate the circumstances leading to the dismissal on 10/11/2020. Counsel pleaded with the court to grant the appellant the opportunity to be heard on the merits of their claim. Counsel did not submit on the issue of costs of the appeal.

### **Respondent's Submissions**

15. The respondent filed written submissions dated 1/10/2024 through M/s Mahinda & Maina Company Advocates. Counsel submitted that the sole issue that fell for determination in the appeal was whether the Lower Court erred in the exercise of its discretionary power to reinstate a suit that had been dismissed for want of prosecution.
16. Citing the pronouncements in *Shah v Mbogo & Another* [1976] EA 1116; *Bilha Ngonyo Isaac v Kembu Farm Ltd & Another* [2018] eKLR; and *Ivita v Kyumbu* [1975] eKLR, counsel submitted that the explanation tendered by the appellant in support of the plea for reinstatement was at variance with the earlier representation that the appellant's counsel made to the respondent. Highlighting the history of the dismissed suit, counsel submitted that the reasons put forth by the appellant were not excusable to warrant exercise of the court's discretion in their favour. Counsel urged the court to reject the appeal.

### **Analysis and Determination**

17. The Court has read and considered the original record of the Lower Court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions in the appeal. The Court has also considered the relevant legal frameworks and jurisprudence. As observed in the opening paragraph of this Judgment, the single issue that falls for determination in this appeal is whether the Lower Court exercised its discretionary jurisdiction properly in declining to reinstate the dismissed suit. Before I dispose the issue, I will outline the principle that guides this Court when exercising jurisdiction as a first appellate court.
18. This is a first appeal. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
19. The principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse 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.”
20. Did the Lower Court exercise its discretionary jurisdiction properly? First, there appears to have been a misdirection in terms of the dismissal order that triggered the application which culminated in the



impugned ruling. Although the Lower Court did not cite the specific legal framework under which the dismissal order was issued, it is clear from the record that the reason for the dismissal was the absence of both the appellant and their advocate during a scheduled hearing session. Put differently, the reason for dismissal was the non-attendance by the appellant and their advocate at a scheduled hearing session. The respondent's advocate attended the hearing session. In the circumstances, the order which was available to the trial court was an order of dismissal of the primary suit for non-attendance under Order 12 rule 3 of the Civil Procedure Rules. The order of dismissal for non-prosecution or for want of prosecution was only available under Order 17 upon the court issuing and causing to be served a notice to show cause. To this extent, the order of 10/11/2020 was irregular.

21. That is not the only irregular aspect of the order. The Lower Court was seized of both the appellant's primary claim and the respondent's counterclaim. The Lower Court record does not bear any remarks from the respondent on their readiness to prosecute their counterclaim. Indeed, it appears nothing was said about the respondent's counterclaim. The Lower Court was obligated to make an inquiry about the respondent's readiness to tender evidence in support of their counterclaim. If the respondent confirmed availability of a witness or witnesses, the Lower Court was required to conduct a hearing relating to the counterclaim. As things stand now, nothing was said about the counterclaim. Indeed, nothing has been said about the respondent's counterclaim in this appeal. The counterclaim was neither withdrawn nor heard. The above two anomalies are sufficient grounds to warrant a reinstatement of the suit so that both the primary claim and the counterclaim are disposed. I now turn to the key issue in the appeal.
22. A perusal of the original record of the Lower Court reveals that in 1994, the respondent filed a defence and counterclaim in the suit. In 2017, the respondent filed an application dated 4/4/2017, seeking leave to amend its defence and counterclaim. On 13/12/2017, parties recorded a consent granting the respondent leave to file an amended defence and counterclaim within 14 days. The appellant was granted corresponding leave to file a reply to the amended pleadings within 14 days of service. The parties subsequently caused the matter to be listed before the Judge at Milimani High Court Civil Division and recorded a consent transferring the suit to Thika CM Court on 9/10/2018. On 9/7/2019, the respondent was directed to comply with pre-trial requirements within 30 days. On 19/11/2019, by consent, the suit was fixed for hearing on 4/2/2019. On 4/2/2019, by consent the hearing was put off to 14/4/2020. Owing to Covid disruptions, the matter was taken out of the hearing list of 14/4/2020. Subsequently, the suit was, by consent, fixed for hearing on 10/11/2020. On 10/11/2020, Mr. Macharia, counsel for the respondent, attended Court and made the following verbatim presentation:

“The plaintiff's Advocate says he couldn't get in touch with his client. We have no objection to adjournment.”
23. It does appear from the Court record that Mr. Macharia said nothing about the defendant's counterclaim. He did not invite the court to dismiss the appellant's suit. The Lower Court nonetheless made the following verbatim order dismissing the suit:

“This is a very old case and neither the plaintiff nor its Advocate has appeared. It is now 11.00 a.m. The suit is hereby dismissed for non-prosecution with no orders as to costs”
24. It is clear from the above chronology of activities that, other than the appellant's non-attendance on 10/11/2020, there is nothing on record to suggest that upon transfer of the suit to the Lower Court, the appellant deliberately obstructed hearing of the suit. What is evident is that as late as 2017, the



- respondent sought leave to amend pleadings and as late as 2018, the respondent had not complied with the pre-trial requirements despite having a counterclaim against the appellant.
25. The Court has looked at the evidence that was tendered by the parties in relation to the application that sought reinstatement of the suit. The appellant's counsel, Mr Daniel Wokabi Mathenge, swore an affidavit in which he deponed that he instructed an advocate, Philip Gacheru, to hold his brief on 10/11/2020. He also deponed that his failure to personally attend the hearing was due to Machakos HC Criminal Case NO. E006/2020 R V Nancy Njeri Waithira in which he was required.
  26. It is also clear from the record that counsel for the appellant reached out to counsel for the respondent. Secondly, it is clear that the respondent's advocate expressly informed the Court that he was not opposed to an adjournment in order to accommodate the appellant's advocate. Thirdly, it does emerge from the evidence tendered by the appellant's advocate that there was a clash of cases in his diary. That is something that the advocate should ordinarily not have allowed to happen but it was excusable.
  27. The approach which our courts have taken in applications of this nature is that, where circumstances justify, the applicant is given the opportunity to have his case heard on merits and the respondent is indemnified through an award of costs. Indeed, the guiding principle in the court's exercise of the discretionary jurisdiction to set aside a dismissal order of this nature was spelt out in *Mbogo & Another Vs Shah* (1968) EA 96. The applicable principle is that the court's discretion is intended to prevent injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. The discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the cause of justice.
  28. In *Belinda Murai & others Vs Amoi Wainaina* (1978) Madan JA set out the following approach which has guided our courts over the years on the question of reinstatement of a suit or on a plea to set aside an *ex parte* judgment.

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”
  29. Apollo JA outlined the following approach to a similar question in *Philip Chemwolo & another Vs Augustine Kabede* (1982 – 88) KAR:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purposes of deciding the rights of the parties and not the purpose of imposing discipline.”
  30. In the impugned ruling, the Lower Court found that the appellant's advocate had shown reasonable cause for their failure to attend the hearing on 10/11/2020. The Lower Court nonetheless proceeded to dismiss the plea for reinstatement of the suit. This was clearly a misdirection. Having come to the above finding, the Lower Court should have allowed the plea for reinstatement.
  31. Taking into account the above principles and the above unique circumstances, this Court comes to the finding that the Lower Court did not exercise its discretionary jurisdiction properly in declining to reinstate the dismissed suit. The proper approach would be to allow the appellant their day in court but have them indemnify the respondent by paying costs of attendance and costs of the application, together assessed at Kshs. 25,000.



32. On costs of this appeal, the error giving rise to the appeal was committed by the Lower Court. Consequently, parties will bear their respective costs of the appeal.
33. For the above reasons, this appeal is allowed in the following terms:
- a. The ruling rendered on 6/4/2021 by Hon. Nang'ea Chief Magistrate [as he then was] in Thika CMC M E & L Case No 220 of 2018 is hereby set aside and is substituted with an order reinstating the said suit for immediate hearing and determination on merit on priority basis.
  - b. The appellant [the plaintiff in the Lower Court] shall within 30 days pay the respondent [the defendant in the Lower Court] throwaway costs of Kshs. 25,000 in respect of the said application and attendance costs for 10/11/2020. In default, the order reinstating the suit shall stand vacated and the said suit shall stand dismissed.
  - c. Parties shall bear their respective costs of this appeal

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2025**

**B M EBOSO [MR]**

**JUDGE**

In the Presence of

Ms Nyambura Ngugi holding brief for Mr. Mathenge for the Appellant

Ms Kamande for the Respondent

Mr. Tupet – Court Assistant

