



Wamburu & another v Gichandi (Being sued in her capacity as the legal representative of the Estate of Matthew Muriithi Kimani - Deceased) ((Being sued in her capacity as the legal representative of the Estate of Matthew Muriithi Kimani - Deceased)) (Environment and Land Appeal E016 of 2023) [2024] KEELC 13663 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13663 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E016 OF 2023**

**LN GACHERU, J
DECEMBER 5, 2024**

BETWEEN

WAMBUI KIHARA WAMBURU 1ST APPELLANT

J. WAMBURU KIHARA 2ND APPELLANT

AND

AGNES WANJIKU GICHANDI RESPONDENT

**(BEING SUED IN HER CAPACITY AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF MATTHEW MURIITHI KIMANI - DECEASED)**

*(Being an appeal of a Ruling delivered by the Senior Principal Magistrate Hon. J.
IRURA on 19th September 2023 in KIGUMO ELC Case No. 9 of 2020 (E001 of 2020))*

JUDGMENT

1. Vide an Amended Memorandum of Appeal dated 6th November 2023, premised under Order 42 Rule 3(1) of the Civil Procedure Rules, the Appellants have sought for Judgement and orders against the Respondent as follows;
 1. That the Ruling of the trial Court in ELC Case No. 9 of 2020 (E001 of 2020)], be set aside and Kigumo ELC Case No. 9 of 2020 (E001 of 2020)], be reopened and the matter be heard denovo on merit.
 2. That the Appeal be allowed.
 3. Costs of the appeal.
 4. Any other relief that the court may consider just and expedient.”



2. The Appellants were the Defendants in ELC Case No. 9 of 2020 (SPM Court at Kigumo) wherein, the suit was set down for hearing and it proceeded *ex parte*, in the absence of the Defendants/Appellants herein, and thereafter the trial Court entered Judgment in favour of the Respondent on 31st October 2022.
3. Thereafter, the Appellants(Defendants) filed a Notice of Motion Application dated 18th January 2023, seeking to have the said *ex parte* Judgement set aside and for the matter to start *denovo*, and the Defendants(Appellants) be granted an opportunity to tender their evidence.
4. However, on 19th September 2023, the trial court delivered its Ruling and dismissed the Appellant's application, on the ground that the same was not merited.
5. Dissatisfied with the said Ruling, the Appellants instituted the instant Appeal, which is anchored on the following eight (8) grounds:
 1. That the trial Court erred in law and in fact in dismissing the Appellants' Application dated 18th January, 2023.
 2. That the trial Court erred in law and in fact in dismissing the Appellants' Application dated 18th January 2023, without according the Appellants a hearing on merit.
 3. That the trial Court erred in law and in fact in dismissing the Appellants' Application dated 18th January 2023, without considering the repercussions upon the Appellants and without giving due consideration to the legal question thereby arriving at a wrong decision.
 4. That the trial Court erred in law and in fact by failing to consider the Appellants as an innocent litigants who stand to suffer irreparable loss and damage because of the mistake of their previous counsel.
 5. That the trial Court erred in law and in fact in failing to give due consideration to the Applicants' written submissions and list of Authorities.
 6. That the trial Court erred in law and in fact by failing to observe Sections 1A and 1B of the *Civil Procedure Act*; and Article 59 of the *Constitution* of Kenya thereby, arriving at a wrong decision.
 7. That the trial Court erred by applying the wrong principles of law thereby, arriving at a wrong decision.
 8. That the trial Court erred in law and in fact by wholly misapplying its judicial discretion in the case before it.
6. In the said Application before the trial Court dated 18th January 2023, the Appellants (then Defendants) sought a stay of execution of the trial Court's Judgment delivered on 31st October 2022, and/or setting aside of the said Judgement. They also prayed that the suit be heard *de novo*. The trial Court, *vide* a Ruling dated 19th September 2023, dismissed the said Application dated 18th January 2023.
7. The trial Court found and held that the Application before it had been brought after inordinate and unreasonable delay. Further, that the Defendants (now Appellants) failed to provide sufficient cause for their failure to institute their Application timeously. The trial Court cited the provisions of Order 12 Rule 7 of the Civil Procedure Rules, and reasoned that the same were not applicable to the suit before it, as it was not disputed that the Appellants were served with summons to enter appearance,



in response to which they filed a Memorandum of Appearance dated 22nd September 2020, as well as a defence through their Advocate, Mbiyu Kamau.

8. Further, that it was evident that the Appellants were also served with a notice of the pre-trial conference and hearing notices, but they failed to appear in Court, with the result that the suit proceeded in their absence and Judgment was entered for the Respondent (then Plaintiff).
9. It was the trial Court's further reasoning that the Appellants were not entitled to the exercise of its discretion in their favour on account of their "inertia" or inactivity in terms of prosecuting the suit before it, for a prolonged length of time.
10. This Court admitted the instant Appeal under the provisions of Section 79B of the Civil Procedure Act, with directions that the said Appeal be canvassed by way of written submissions.
11. The Appellants filed their written submissions dated 26th April 2024, through the Law Firm of Wokabi Mathenge & Co. Advocates. After setting out the history of the instant appeal, they argued that this Court is empowered to set aside the trial Court's exercise of its discretionary power to dismiss their Application dated 18th January 2023. Reliance was placed in the holding of the Court in the case of *Mrao Ltd V First American Bank of Kenya ltd & 2 others* (2003) KLR 125.
12. The Appellants set out the following five (5) issues for resolution by this Court;
 - a. Whether the trial Court [misdirected] itself on the law.
 - b. Whether the trial Court misapprehended the facts.
 - c. Whether the trial Court took to account matters which it ought not have taken to account.
 - d. Whether the trial Court failed to take to account matters which it ought to have taken to account.
 - e. Whether decision of the trial Court, although a discretionary one, was plainly wrong.
13. It was the Appellants' submission that in consideration of an Application to set aside an ex-parte Judgment, the primary consideration for the Court is to render justice to the parties before it. Reliance was sought in the Judgment of the Court in the cases of *Esther Wamaitha Njihia & 2 Others Vs Safaricom Limited* [2014] eKLR; *Patel Vs East Africa Cargo Handling Services Ltd* (1974) E.A. 1975; and, *Shah V Mbogo* (1969) E.A. 116.
14. It was further submitted that the trial Court's Judgment was delivered on 31st October 2022, while the Appellants brought an Application for stay of execution of the same some 86 days later on 18th January 2023; it was argued that the stated delay was not inordinate or unreasonable.
15. The Appellants argued that the trial Court considered matters which it ought not have considered as reflected in the statement below:

“In my humble view, the applicants are hell bent to connive and collude to obstruct the course of justice for the Plaintiff who has remained in the Court corridors for over 3 years”.
16. It was further submitted that in the suit before the trial Court, no allegation of conniving or collusion was directed against themselves by the Plaintiff (Respondent). Further, that the trial Court's reasoning as set out above diminished the impact of the mistakes committed by Appellants' counsel, who they submitted, failed to render proper information regarding the suit before the trial Court.



17. For this submission, reliance was sought in the decision of the Court in the case of Wachira Karani Vs Bildad Wachira [2016] eKLR, on the issue of sufficient cause, and the holding in Belinda Murai & Others Vs Amoi Wainaina [1978] LLR 2782 (CALL), with respect to mistakes by counsel.
18. The Appellants further argued that although the trial Court appeared to understand that their counsel failed to provide them with information in respect of the suit, and which explains their non-attendance before it, the Court nevertheless expected the Appellants to discover on their own the dates whereby the suit was set down for hearing. It was their further submission that the trial Court on one hand acknowledged the mistake of Appellants' counsel; and on the other hand, the Court failed to appreciate the impact of an Advocate upon a litigant; particularly, the Advocate's contribution to the cause in question.
19. The Appellants relied on the reasoning of the Court in the cases of Republic Vs Kenya School of Law Ex Parte Thomas Otieno Oriwo [2015] eKLR; and, Markson Karani Muchunku V Joseph Ngari Gituku [2021] eKLR.
20. It was further submitted that the trial Court arrived at a plainly wrong outcome by dismissing the Appellant's Application dated 18th January, 2023, as it did not adhere to the principles established in the case of Wachira Karani Vs Bildad Wachira [2016] eKLR, wherein, the Court pronounced itself on the subject of substantial justice in relation to procedural technicalities.
21. Further reliance was placed in the Judgment of the Court in the case of Richard Ncharpi Leiyagu Vs Independent Electoral Boundaries Commissions & 2 Others [2013] eKLR, to buttress the submission that the trial Court by dismissing the Application dated 18th January 2023, denied the Appellants the opportunity to be heard. Further reliance was sought in the decision of the Court in the case of Philip Chemwolo & Another vs Augustine Kubede [1982-1988] KAR 103 at 1040.

The Respondent's Submissions

22. The Respondent filed his written submissions on 7th June 2024, through the Law Firm of T.M. Njoroge Advocate, and submitted that the Appellants failed to present a cogent explanation to warrant interference with the trial Court's exercise of its discretion to disallow the Applicants' Application for stay of execution of its decision dated 31st October, 2021.
23. That it is worth noting at this point that, while the Appellant's submitted that the trial Court's Judgment was rendered on 31st October 2022, therefore, their Application dated 18th January 2023, was brought 86 days later, the Respondent submitted that the trial Court's decision was delivered exactly a year earlier on 31st October, 2021.
24. The Respondent further submitted that the Appellants are guilty of laches, are indolent and, thus, not entitled to equitable relief having allowed 2 years to lapse before instituting their application for stay of execution of the trial Court's decision dated 31st October 2021. That as at 18th January 2023, when the Appellant's sought for stay of execution before the trial Court, the Court Administrator at KIGUMO Law Courts had embarked on the process of transfer of the parcels of land in question.
25. Further, that the Appellants were well aware of the suit before the trial Court, and were represented by an Advocate; in the circumstances, a stay of execution could not issue to assist a person who deliberately sought either by evasion or otherwise to obstruct or delay the course of justice. The Respondent submitted that the Appellants' only wish is to frustrate the execution process to her own loss as the successful party at the trial Court.



26. Relying on the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, the Respondent submitted that an application for stay of execution must be made without unreasonable delay. Further, that the Appellants failed to explain the reasons for the delay in seeking a stay of execution, which delay was unreasonable.
27. Reliance was placed in the decision of the Court in the cases of Pauline Yebei & Another Vs Estate of Kiprotich Leting represented by Andrew Kipkoech Kiprono (2017) eKLR; and, [*Ismael Kagunyi Thand Vs Housing Finance Kenya Ltd Civil Appeal No. Nai. 157 of 2006.*](#)
28. This court has now considered the instant Memo of Appeal, the Record of Appeal, the rival written submissions, and the relevant provisions of law, and finds the issues for determination are; -
 - i. Whether the Appellants are entitled to the Orders sought.
 - ii. Who shall bear the costs of the Application.

i). Whether the Appellants are entitled to the Orders sought?

29. The Appellants placed before the Court a consent dated 17th January 2023, executed between their outgoing Advocates, that is the Law Firm of Mbiyu Kamua & Co. Advocates, and the incoming Advocates for purposes of the present Appeal, that is the Law Firm of Wokabi Mathenge & Co. Advocates.
30. The suit before the trial Court was originated by way of a Plaint dated 9th August 2020, wherein the Plaintiff (Respondent) sought these reliefs as against the Defendants (Appellants) jointly and severally:
 - a) An order directing the defendants to transfer a portion measuring 0.85 Acres out of land parcel No. LOC.3/Gituru/223 to the Plaintiff.
 - b) Costs of the suit.
 - c) Interest on (b) above.
 - d) Further relief as may be just.
31. Before the trial Court, the Respondent laid claim to a portion of land measuring 0.85 Acres, out of land parcel No. LOC.3/Gituru/223 (the suit property), on the strength of a Sale Agreement dated 23rd September 1983, executed between her husband Matthew Mureithi Kimani (Deceased), in the role of purchaser, and the 2nd Appellant in her capacity as the Seller, which agreement is written in the Kikuyu language.
32. Further, in the said proceedings before the trial Court, the said sale Agreement was accompanied by a Certificate of Translation to English. In the said Agreement, the 2nd Appellant confirms receipt of Kshs.10,000/=, from the purchaser on 23rd September 1983, being the remaining half of the entire consideration of Kshs.20,000/=, for 0.85 Acres portion of the suit land.
33. The Appellants, as the Defendants opposed the said suit before the trial Court through a Notice of Preliminary Objection dated 2nd October 2020, and joint Statement of Defence. They contended that the Respondent's husband (Deceased) and purchaser of 0.85 Acres portion of the suit land rescinded the contract for sale of the suit land on 13th July 1985.
34. In her Witness Statement filed before the trial Court on 5th October 2020, the 2nd Appellant admitted that she entered into an agreement to dispose the suit land to the Respondent's husband for the full purchase price of Kshs.20,000/- which she affirmed having received in full. She further stated that the



Respondent's husband subsequently approached her stating that the acreage was too small, and he wished for a refund of the entire purchase price, which proposal she found agreeable.

35. The 2nd Appellant also averred that she refunded the full purchase price to the Respondent's husband plus another Kshs.10,000/=, through a formal agreement executed on 13th July 1985, which she annexed in her bundle of documents in the suit before the trial Court. Further, that neither the Respondent nor her husband (deceased) has ever been in occupation of the suit land.
36. The court has seen and considered the copy of trial Court's Judgment annexed by the Appellants to the said Application dated 31st October, 2022. Further, according to the record of the trial Court's proceedings filed before this Court, the trial Court certified the matter before it as ready for trial on 11th November, 2021. The said record of proceedings also indicates that on 28th March 2022, counsel for the Plaintiff (now Respondent) prayed for a new hearing date on account of non-appearance by counsel for the Defendants (now Appellants). The Court thereupon set down the matter for hearing on 8th September, 2022.
37. The Respondent, in her written submissions confirmed that the Judgement of trial Court was issued on 31st October, 2021.
38. In light of the foregoing, this Court must assess whether the Appellant's Application for stay dated 18th January 2023, was brought after inordinate and/or unreasonable delay. The principles upon which a Court may grant stay of execution pending appeal are set out under Order 42 Rule 6(2)(a) and (b) of the Civil Procedure Rules, which states as follows:

“No order for stay of execution shall be made under sub-rule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

39. In the case of *Absalom Dova Vs Tarbo Transporters* [2013] eKLR, the Court reasoned as follows:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

40. Further, in the case of *RWW v EKW* [2019] KEHC 6523 (KLR), the Court declared as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”



41. Again in the case of Antoine Ndiaye vs African Virtual University [2015] eKLR, the Court in the case of Nicholas Stephen Okaka & another v Alfred Waga Wesonga [2022] eKLR declared as follows:

“... an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given”.

42. It is noteworthy that the Respondent’s Advocate for purposes of the instant appeal; Tim Njoroge Advocate, was also on record for the Respondent (the Plaintiff), at the trial Court; Therefore, it follows that Respondent’s counsel was well-aware of the date when the trial Court’s Judgment was delivered. For the avoidance of doubt, the record of the trial Court’s proceedings reflects that the hearing scheduled for 8th September 2022, proceeded upon the Court being satisfied that counsel for the Defendants (now Appellants) was served by Respondent’s counsel with the necessary hearing notice through email and failed to turn up for the same.

43. On the 8th September 2022, the Respondent’s counsel led the evidence of PW1, who is the Respondent herein and thereafter closed the Plaintiff’s case. Having been a participant in the proceedings before the trial Court, it amounts to misleading the Court for counsel for the Respondent to submit that the trial Court’s decision was rendered on 31st October 2021; and to further submit that there was a two (2) year delay in commencing the Appellant’s Application dated 18th January, 2023.

44. In the case of Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR, the court understood the meaning and import of the term abuse of the process of the Court as follows:

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of ‘abuse of process.’ It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

45. From the record of the proceedings before the trial Court, it is not in doubt that the trial Court’s Judgment which the Appellants sought to stay through their Application dated 18th January 2023, was rendered on 31st October 2022, as distinguished from 31st October 2021, which date the trial Court in its Ruling dated 19th September 2023, wrongly assumed to be when Judgment was issued.

46. It is telling that the Magistrate who delivered the Judgment dated 31st October 2022, is the self-same person who issued the Ruling dated 19th September 2023. The Court is persuaded that the trial Court’s decision dated 19th September 2023, was based on incorrect timelines with respect to the length of the delay in commencing the application before it; Therefore, it cannot stand.

47. The Appellants submitted that their Advocates on record in the suit before the trial Court failed to provide them with regular information concerning the said matter. In the case of Tana & Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR, the Court addressed the issue of mistakes by counsel as follows:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter.



However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."

48. From the record of proceedings at the trial Court, it is clear that Defendants' (now Appellants) counsel failed to appear in Court despite being served with hearing notices through his Law Firm's recognized email address. This Court would be remiss to attribute the said failures to the Appellants herein.
49. In the case of Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR, the Court ruled as follows:

"The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."
50. It is the finding and holding of this Court that the period of 86 days between delivery of the trial Court's Judgment dated 31st October 2022, and the filing of an Application for stay on 18th January 2023, by the Applicants was neither inordinate nor unreasonable. The delay in question has been satisfactorily explained to the Court as arising from the non-communication by the Appellants' previous counsel on record.
51. Having carefully considered the Record of Appeal, and having re-analyzed, re-evaluated and re-considered the available evidence before the trial court as contained in the Record of Appeal, this court finds and holds that this Appeal is merited, and therefore, this court in its Appellate jurisdiction will have no option but proceeds to upset and/ or set aside the trial court's findings in its Ruling dated 19th September 2023.
52. Consequently, this Court allows the instant Appeal as prayed in Appellants' Amended Memorandum of Appeal Amended on 6th November 2023. Consequently, this matter is remitted back to the trial court, to be heard denovo, but the same shall be heard by another trial Magistrate different from J. IRURA (SPM,) who rendered the decisions of 31st October 2022, and 19th September 2023, respectively.
53. Accordingly, prayers Nos. 1 and 2 of the Amended Memorandum of Appeal dated 6th November, 2023 are hereby allowed.

(ii) Who should bear costs of the Appeal?

54. On the issue of costs, the Appellants herein being the successful parties in this Appeal are entitled to costs of this Appeal. The Court herein is guided by the provisions of section 27 of the [Civil Procedure Act](#).

Appeal allowed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER 2024.

L. GACHERU

JUDGE

5/12/2024

Delivered online in the presence of:



Joel Njonjo – Court Assistant.

N/A for the Appellants

though Judgment date taken in the presence of the counsels for the parties.

N/A for the Respondent

L. GACHERU

JUDGE

05/12/2024

