



REPUBLIC OF KENYA



**Njenga v Equity Bank Limited & 2 others; Vassey Engineering Contractors Ltd & 2 others  
(Third party) (Civil Appeal 349 of 2023) [2025] KEHC 537 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 537 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 349 OF 2023  
FN MUCHEMI, J  
JANUARY 23, 2025**

**BETWEEN**

**GRACE MWIHAKI NJENGA ..... APPELLANT**

**AND**

**EQUITY BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**IMMEDIATE AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**SAMUEL MAINA NGUGI ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**VASSEY ENGINEERING CONTRACTORS LTD ..... THIRD PARTY**

**ERNEST MWAURA NJENGA ..... THIRD PARTY**

**STEPHEN NJENGA MWAURA ..... THIRD PARTY**

*(Being an Appeal from the Ruling of Hon. M. W. Wanjala (SRM)  
delivered on 19th December 2019 in Thika CMCC No. 763 of 2014)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the ruling of Thika Senior Resident Magistrate in CMCC No. 763 of 2014 in which the Magistrate dismissed the appellant's application seeking that the orders dismissing her suit to be set aside and that the suit be reinstated for hearing.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 8 grounds summarized as follows:-



- a. The learned trial magistrate erred in law and in fact by rendering a ruling that was against the weight of the evidence;
  - b. The decision of the subordinate court is contrary to the overriding objectives of the Civil Procedure Act and Article 159(2) of the Constitution and further the decision is injudicious and inconsistent, contrary to the pleadings, submissions, evidence and precedent; and it is inexplicable on the law or practice.
3. Parties put in written submissions.

### **Appellant's Submissions**

4. The appellant relies on the

### **The 1<sup>st</sup> Respondent's Submissions.**

5. The 1<sup>st</sup> respondent submits that the appellant's suit was instituted vide a plaint dated 22<sup>nd</sup> September 2014 accompanied by an application filed under certificate of urgency. Furthermore, the appellant repeatedly submitted numerous overlapping applications including three dated 31<sup>st</sup> October 2016, 5<sup>th</sup> February 2018 and 16<sup>th</sup> April 2018 all seeking similar reliefs. The 1<sup>st</sup> respondent argues that the said applications were not pursued by the appellant or her advocates resulting in prolonged periods of inaction and delays which eventually led to the withdrawal and dismissal of the applications. In the ruling of the application dated 5<sup>th</sup> February 2018 delivered on 27<sup>th</sup> September 2018, the appellant was directed to ensure his case was concluded within 6 months from that date. The period was to expire on 27<sup>th</sup> March 2019. However, the appellant failed to meet this deadline.
6. The 1<sup>st</sup> respondent submits that on 20<sup>th</sup> March 2019, during a Notice to Show Cause hearing the appellant requested for extension of time to conclude his case. He was granted an additional three (3) months to end on 27<sup>th</sup> June 2019. The 1<sup>st</sup> respondent further states that the appellant did not meet the deadline Furthermore, the 1<sup>st</sup> and 2<sup>nd</sup> respondents complied with Order 11 of the Civil Procedure Rules, 2010 by 2<sup>nd</sup> May 2019 and were ready for hearing. The respondents state that they were not responsible for the delay in resolving the suit. It was on 6<sup>th</sup> August 2019, nearly two months past the court set deadline that the honourable magistrate's court deemed it appropriate to dismiss the suit suo moto, and went ahead to do so.
7. The 1<sup>st</sup> respondent argues that the application dated 22<sup>nd</sup> September 2014 was heard ex parte and final orders issued on 6<sup>th</sup> October 2014 which were served upon the respondents. The 1<sup>st</sup> & 2<sup>nd</sup> respondents being aggrieved by the said orders, expeditiously filed an application dated 9<sup>th</sup> October 2014 seeking to set aside the said orders and the initial final orders issued on 6<sup>th</sup> October 2014 were set aside. The appellant was then granted interim orders on 9<sup>th</sup> March 2015 where the 1<sup>st</sup> and 2<sup>nd</sup> respondents were allowed to file a Replying Affidavit to the application dated 22<sup>nd</sup> September. When the application came up for inter parties hearing on 21<sup>st</sup> August 2015, the same did not proceed as the appellant sought leave to file a supplementary affidavit which she eventually never did despite the matter being mentioned on several occasions.
8. The 1<sup>st</sup> respondent argues that the appellant abandoned prosecuting her application and never moved the court to reinstate the injunctive orders issued on 9<sup>th</sup> March 2015 which lapsed on expiry of twelve (12) months pursuant to Order 40 Rule 6 of the Civil Procedure Rules.
9. The 1<sup>st</sup> respondent submits that after the lapse of the temporary injunctive orders, it instructed the 2<sup>nd</sup> respondent to issue the forty five (45) days statutory redemption notice dated 5<sup>th</sup> September 2016 to



- the appellant to redeem her property followed by the statutory action in advertisement as required by law leading up to the auction that occurred on 10<sup>th</sup> October 2017, whereby the 3<sup>rd</sup> respondent emerged the highest bidder.
10. The 1<sup>st</sup> respondent submits that it has not received any monies from the appellant or the 1<sup>st</sup> third party in a bid to rescue their financial exposure or settle outstanding monies due and owing from them. The 1<sup>st</sup> respondent further submits that it has been courteous enough to give the appellant more a lot of time after the expiry of the period set in the statutory notices to comply but all that has been in vain as the appellant has not complied.
  11. The 1<sup>st</sup> respondent argues that the appellant rushed to court to stop the auction vide her application dated 31<sup>st</sup> October 2016 after she received the Notice of Redemption of her property. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a Replying Affidavit and Notice of preliminary Objections dated 3<sup>rd</sup> November 2016 on 4<sup>th</sup> November 2016 when the matter was coming up for inter parties hearing. On the said date, the appellant sought for more time to file her response to the Notice of preliminary Objections which was granted and a further hearing date set for 9<sup>th</sup> December 2016. On the further hearing date, the appellant failed to attend court yet again and the 1<sup>st</sup> respondent states that the respondents proceeded to request the court to dismiss the appellant's application dated 31<sup>st</sup> October 2016 since the orders granted in the original application dated 22<sup>nd</sup> September 2014 had lapsed and the appellant showed no interest of extending them. The court however reserved its discretion on the respondents' request to dismiss the said application with the matter being a land suit as the magistrate's courts' jurisdiction had been stayed pending the ruling in *Law Society of Kenya Nairobi Branch vs Malindi Law Society & 6 Others* [2017] eKLR hence the matter was stood over generally.
  12. On 5<sup>th</sup> February 2018, the appellant filed an application seeking similar injunctive prayers as the two previous applications and further sought to amend the application dated 31<sup>st</sup> October 2016. The appellant never amended the application dated 31<sup>st</sup> October 2016 pursuant to leave granted but instead filed another application dated 12<sup>th</sup> October 2018 withdrawing the earlier application. The 1<sup>st</sup> respondent argues that the appellant outrightly wasted the honourable trial court's time with the endless applications only to withdraw them at the tail end.
  13. The 1<sup>st</sup> respondent submits that as a result of the further inaction by the appellant to prosecute the said application dated 5<sup>th</sup> February 2018, the appellant filed another application dated 16<sup>th</sup> April 2018 whose ruling was delivered on 22<sup>nd</sup> June 2018. The court declined to grant an injunction and to set the hearing date of the application on 5<sup>th</sup> July 2018. The trial court issued its ruling on the application dated 5<sup>th</sup> February 2018 on 27<sup>th</sup> September 2018 to the effect that the suit was to be heard and determined within the 6 month period during which status quo would be maintained. The 1<sup>st</sup> respondent argues that it is the appellant who delayed the matter from the onset leading to the expiry of the 6 months period within which the suit was to be heard and determined, which time was to lapse on 27<sup>th</sup> March 2019. On 20<sup>th</sup> March 2019, the court extended the duration of concluding the appellant's case with three (3) months which were to lapse on 27<sup>th</sup> June 2019. During that time, the appellant failed to set the matter for hearing within the period of three (3) months.
  14. The 1<sup>st</sup> respondent submits that on 24<sup>th</sup> June 2019 when the matter came up for mention and when the appellant could have orally sought an extension of time to prosecute the matter, she did not attend court. The court scheduled further mentions for 25<sup>th</sup> July 2019 and 6<sup>th</sup> August 2019 both of which the appellant or her counsel did not attend court. From the foregoing, the 1<sup>st</sup> respondent argues that it is clear that the appellant continuously filed multiple and overlapping applications seeking similar prayers. Despite filing of the said applications, the appellant did not prosecute the applications and



thereby delayed the conclusion of the matter. The appellant also withdrew most of his applications before they were determined. Indeed, indolence of the appellant led to the dismissal of his suit. Thus, the 1<sup>st</sup> respondent argues that the trial court did not err in fact and in law in disallowing the appellant's application to set aside the order dismissing the suit for want of prosecution as she was given ample opportunity to prosecute is case. The case was in court for almost five (5) years. The 1<sup>st</sup> respondent urges the court to consider the principle of equity that equity aids the vigilant and not the indolent.

### **Issue for determination**

15. The main issue for determination is whether the appeal has merit.

### **The Law**

16. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

17. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

18. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

### **Whether the appeal has merit.**

19. The appellant instituted her suit in Thika CMCC No. 763 of 2014 on 22<sup>nd</sup> September 2014 seeking a permanent injunction restraining the respondents from selling her property LR. No. Thika Municipality Block 21/13335 Mountain View Estate. At the same time, the appellant filed an application seeking similar injunctive orders temporarily pending the hearing and determination of the suit. On 6<sup>th</sup> October 2014, the trial court granted the injunctive orders as the respondents never put in any response despite being served. Being aggrieved by the said orders, the respondents filed an application dated 9<sup>th</sup> October 2014 whereby they sought to set aside the ex parte orders issued and be



- granted an opportunity to file a replying affidavit to the said application. The trial court allowed the application and granted the respondents time within which to file their response. The application was then set for hearing inter parties for 21<sup>st</sup> August 2015 and the same did not proceed as the appellant sought leave to file a Further Affidavit. The trial court granted the appellant leave to file her Further Affidavit and set the matter for mention on 23<sup>rd</sup> October 2015 to confirm filing of submissions.
20. On 23<sup>rd</sup> October 2015, the appellant's counsel requested for more time to file her submissions which was granted and the matter was scheduled for mention on 20<sup>th</sup> November 2015. The matter came to a standstill on 25<sup>th</sup> April 2016 when the same could not proceed pursuant to the petition in *Law Society of Kenya Nairobi Branch vs Malindi Law Society & 6 Others* [2017] eKLR which would determine whether magistrates' courts had the jurisdiction to deal with land matters.
  21. The appellant thereafter filed an application dated 31<sup>st</sup> October 2016 which came up for hearing on 9<sup>th</sup> December 2016. The appellant failed to attend court to prosecute her application. The appellant sought for orders of the 2<sup>nd</sup> respondent to be committed to civil jail for a period of 6 months and their property be attached for disobedience of court orders issued on 6<sup>th</sup> October 2014. The respondents applied for the application to be dismissed for want of prosecution but the trial court stood over the matter generally. The respondents then sought for a hearing date for their preliminary objection dated 3<sup>rd</sup> November 2016 which they filed against hearing of the applicant's application. Before the preliminary objection could be heard, the appellant filed another application dated 5<sup>th</sup> February 2018 which was scheduled for hearing on 12<sup>th</sup> February 2018. In the said application, the appellant sought for the orders of a temporary injunction against the respondents from interfering or dealing with LR. No. Thika Municipality Block 2/1335 Mountain View Estate, to enjoin Samuel Maina Ngugi as the 3<sup>rd</sup> defendant and the appellant be granted leave to amend the application dated 31<sup>st</sup> October 2016.
  22. On the fateful day, the court granted the respondents time to put in a response to the application and directed that the application be disposed of by way of written submissions. The matter came up for mention on 26<sup>th</sup> February 2018 but none of the parties attended court and before the said application could be determined, the appellant filed yet another application dated 16<sup>th</sup> April 2018. This latter application was fixed for hearing on 23<sup>rd</sup> April 2018. In the said application, the appellant sought for orders of a temporary injunction restraining the respondents and the intended interested party one Samuel Maina Ngugi from dealing or interfering with LR. No. Thika Municipality Block 21/1335 Mountain View Estate and sought for an early date to be given for the hearing of the application dated 5<sup>th</sup> February 2018. The court directed that parties file submissions on the application and on 28<sup>th</sup> May 2018 when the matter came up for compliance, the appellant did not attend court nor had she put in her written submissions. The trial court thus set the matter down for ruling on 22<sup>nd</sup> June 2018 which was delivered in open court in the presence of the intended 3<sup>rd</sup> party, to the effect that the trial court declined to grant the injunction sought but set the application dated 5<sup>th</sup> February 2018 for hearing on 5<sup>th</sup> July 2018.
  23. The matter then came up for mention on 5<sup>th</sup> July 2018 whereby the appellant was not in attendance and the respondents told the trial court that the application dated 5<sup>th</sup> February 2018 was still pending. The court directed that the parties dispose of the application by way of written submissions and the matter came up subsequently for mention on 25<sup>th</sup> July 2018 and 17<sup>th</sup> August 2018 during which the appellant never attended court on both occasions. The court delivered its ruling on 27<sup>th</sup> September 2018 to the effect that leave was granted for the appellant to amend the application dated 31<sup>st</sup> October 2016, Samuel Maina Ngugi was granted leave to be enjoined as the 3<sup>rd</sup> defendant and the status quo subsisting as at the date of the ruling which was the intended 3<sup>rd</sup> defendant had not effected the transfer



of the suit property to his name to subsist for 6 months from then within which period the suit was to be heard and determined.

24. The matter came up for hearing on 11<sup>th</sup> March 2019 but did not proceed and the trial court set the matter for further hearing on 20<sup>th</sup> March 2019 keeping in mind that pursuant to its ruling on 27<sup>th</sup> September 2018, the 6 months would expire on 27<sup>th</sup> March 2019. On 27<sup>th</sup> September 2018, the matter did not proceed as counsel for the defendants preferred to argue its application first before the hearing of the main suit and objected to the production of the valuation report by the appellant unless it would be produced by its maker. Notably, the appellant and the respondents were both ready to proceed with their witnesses in court. The court however granted the respondents' application for adjournment and directed that the application dated 14<sup>th</sup> March 2019 be heard, granting the appellant and 3<sup>rd</sup> defendant time to put in their respective responses within 7 days. The court further extended the period within which the case to be heard for a further three (3) months from 27<sup>th</sup> March 2019 and directed that the appellant calls the maker of the valuation report.
25. On 3<sup>rd</sup> April 2019, the court allowed the application and directed that the third-party notices be served upon the third parties within 21 days. The 1<sup>st</sup> and 2<sup>nd</sup> third parties entered appearance and the trial court set the matter for further mention on 16<sup>th</sup> May 2019 and directed that parties comply with Order 11 of the Civil Procedure Rules. The matter came up for pre trial directions on 23<sup>rd</sup> May 2019, 6<sup>th</sup> June 2019 and 24<sup>th</sup> June 2019 whereby the court directed that since the 3<sup>rd</sup> third party was deceased, the appellant had to sought out the issue of the 3<sup>rd</sup> third party. The 3<sup>rd</sup> defendant and the 1<sup>st</sup> & 2<sup>nd</sup> defendants confirmed to the court that they had complied with Order 11. The appellant did not attend the mention scheduled for 24<sup>th</sup> June 2019 and the court then directed that the 1<sup>st</sup> & end respondents serve her with the mention date as well as the 1<sup>st</sup> & 2<sup>nd</sup> third parties.
26. The matter came up on 6<sup>th</sup> August 2019 and the respondents' counsel sought directions from the court as the time had lapsed within which the appellant was to set down the matter for hearing. The court noted that on 27<sup>th</sup> March 2019 the court extended time to hear the case for a further 3 months which period lapsed on 27<sup>th</sup> June 2019 thus rendering the suit dismissed.
27. From the chronology of events, it is evident that the appellant was indolent in prosecuting her case that was instituted in the year 2014 and upon being granted interim injunctive orders, she was never keen on prosecuting the said case. The court upon considering the history of the case rendered its ruling on 27<sup>th</sup> September 2018 to the effect that the suit was to be heard and concluded within 6 months. The reason for limiting the time for prosecuting of the case was due to the delay that the appellant had already caused. The six-month period was to lapse on 28<sup>th</sup> March 2019. The appellant did not set the matter down for mention or hearing until 11<sup>th</sup> March 2019 which was about two weeks the lapse of the 6-month period. The trial court extended the 6-month period for a further 3 months which was to lapse on 27<sup>th</sup> June 2019. Thus, when the matter came up on 6<sup>th</sup> August 2019, the trial court merely confirmed that the period given had expired as the suit stood dismissed on 27<sup>th</sup> June 2019 based on the earlier orders of the court. At the time the appellant filed the application dated 7<sup>th</sup> August 2019 seeking to set aside the orders of the trial court issued on 6<sup>th</sup> August 2019, reinstate the suit for hearing and extending the time within which the appellant's suit should be heard and determined, the suit already stood dismissed as the period had lapsed. In my view, the court was correct in saying that it could not extend time that did not exist. These facts are clearly explained in the ruling of the Magistrate. The appellant ought to have sought for extension before the lapse of the period given by the court. Accordingly, the appellant's suit was dismissed occasioned by operation of timelines set by the court.



28. It is evident that the period given to the appellant to ensure he took the necessary steps to conclude the case were given for good reasons that are in the court record. The court did so in good faith and in pursuance of the principle of “justice delayed is justice denied.” The action was also in compliance with expeditious disposal of cases. The timelines were aimed at ensuring that the respondents were not kept in court for an unnecessary long period by the appellant who seemed to be deliberately delaying the case.
29. In conclusion, I find that the appellant has failed to demonstrate that ruling of the Magistrate denied her justice or fair hearing. The ruling was in strict observance of the Overriding Objective in regard to expeditious disposal of cases. Given the facts of the case, the Magistrate was duty bound to give justice to the respondents as well for they had waited for 5 years for the appellant to prosecute his case.
30. I find no merit in this appeal and I hereby dismiss it with costs.
31. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SGIEND AT THIKA THIS 23<sup>RD</sup> DAY OF JANUARY 2025.**

**F. MUCHEMI**

**JUDGE**

