REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC APPEAL CASE NO. E003 OF 2020

ROBERT MUKEMBU MEENI.....APPELLANT

VERSUS

MUTUGI CIMBA.....1ST RESPONDENT

NYAGA KIIRA.....2ND RESPONDENT

MUGIIRA KIRIA.....3RD RESPONDENT

(Being an appeal from the Ruling of the honourable Senior Principal Magistrate P.N. Maina) (Mr) delivered at Marimanti Court on 1st day of October, 2020)

JUDGMENT

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

MEMORANDUM OF APPEAL

The appellant ROBERT MUKEMBU MEENI being aggrieved/dissatisfied by the ruling of the Learned Senior Principal Magistrate Hon P.N Maina (Mr.) delivered on 1st October ,2020 in Marimanti-SPMC Environment & Land Case No13 Of 2017 appeals to the Environment and land court at Chuka against part of the said ruling dismissing prayers NO. 4 & 5 of the appellant's application dated 4th February, 2020, and sets out herein below his grounds of appeal.

1. The Learned Senior Principal Magistrate erred in law and in fact in dismissing prayers NO. 4 &5 of the appellant's application 4th February, 2020 whereas the appellant had offered sufficient cause to warrant the court to set aside judgment which was entered on 15th November, 2018 and any consequential decree or order.

2. The Learned Senior Principal Magistrate erred in law and in fact for failing to exercise his discretion judiciously, thereby dismissing the prayers 4 and 5 of the appellant's application dated 4th February, 2020.

3. The learned Senior Principal Magistrate erred in law and in fact for failing to find and for reasons that he failed to find that the 1st respondent would not suffer injustice and/or prejudice if the judgment entered on 15th November, 2018 and any consequential decree or order are set aside.

4. The Learned Senior Principal Magistrate erred in law and infact for failing to find and for reasons that he failed (sic) to that the appellant would suffer injustice and hardship if the judgment entered on 15th November, 2018 and any consequential decree or order are not set aside.

5. The Learned Senior Principal Magistrate erred in law and in fact for failing to find and for reasons that he failed to find that the mistake of appellant's former advocate should not be visited upon the appellant.

6. The Learned Senior Principal Magistrate Principal Magistrate erred in law and in fact for denying the appellant right to heard (sic) by dismissing prayers 4 & 5 of the appellant's application dated 4th February, 2020.

7. The Learned Senior Principal Magistrate erred in law and infact for dismissing prayers 4 and 5 of the appellant's application dated 4th February, 2020 whereas the respondents had not opposed the said application.

8. The Learned Senior Principal Magistrate erred in law and in fact for failing to find and for reasons that he failed to find that the mistakes of the appellant were excusable and inadvertent, as a result of which he dismissed prayers No. 4 and 5 of the appellant's said application.

REASONS WHEREFORE, the appellant prays that:

a. The Learned Senior Principal Magistrate's ruling dated 1st October, 2020 dismissing prayers 4 & 5 of the appellant's application dated 4th February, 2020 be set aside.

b. The appeal be allowed with costs to the appellant.

Dated at Meru this……28TH …….day of……October…..…...……..2020

J.G GITONGA & COMPANY

ADVOCATES FOR THE APPELLANT

2. The parties canvassed this appeal by way of written submissions.

3. The Appellant's written submissions are pasted herebelow without any alterations whatsoever.

APPELLANT'S WRITTEN SUBMISSIONS

Your lordship, we submit as hereunder on behalf of the appellant .

Your lordship, the appeal herein relates to a ruling dated 1st October,2020 wherein Hon P.N Maina S.P.M dismissed prayers number, 4 & 5 of the appellant's application dated 4th February,2020. The ruling is at pages 102 to 110 of the record of the appeal while the application dated 4th February,2020 is at pages 36 to 44 of the record of appeal.

Your lordship, the appellant was seeking the following orders in prayers 4 & 5 of his application dated 4th February,2020

- That judgment entered herein on 15th November,2018 and any consequential decree or order be reviewed by having the same set aside
- That case be re-heard

Your lordship, we shall submit on all grounds together as they are inter-related.

Your lordship, the Learned Senior Principal Magistrate erred in law and infact in dismissing prayers 4 & 5 of the appellant's application dated 4th February,2020 whereas the appellant had offered sufficient cause to warrant the court to set aside judgment which was entered on 15th November,2018 and any consequential decree or order. Order 45 Rule1 of the Civil Procedure Rules gives the court discretionary power to allow review on the three limbs stated therein. The appellant's application dated 4th February, 2020 was based on the last ground, that there existed sufficient reason or cause to warrant the court to review the judgment entered on 15th November, 2018 by having the same set aside and ordering that the case be heard afresh.

Your lordship, **In D CHANDULAL K VORA & CO LTD=VS= KENYA REVENUE AUTHORITY (2017) eKLR** the court quoted with approval the case of **Wangechi Kimata & Another=vs= Charan Singh (CA NO 80 OF 1988) (unreported**) wherein the court held as follows:

> **"Any other sufficient reason need not be analogous with the other grounds set out in the Rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act, and that the other grounds set out in the Rule did not in themselves form a genus or class of things which the third general head could be said to be analogous"**

Your lordship, in **WILSON CHEBOI YEGO=VS= SAMUEL KIPSANG CHEBOI (2019) eKLR,** the court of appeal relied on the case of **Hon Attorney General=Vs= The Law Society of Kenya & Another, Civil Appeal (Application) No 133 of 2021** to define sufficient cause as follows:

> "Sufficient cause or "good cause " in law means:
>
> > **"……the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused" .See BLACK'S LAW DICTIONARY, 9th Edition, page 251.Sufficient cause must therefore be rational, plausible , logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the**

sequence of events."

Your lordship, the hearing in the lower court proceeded on 15th April, 2016 in the absence of the appellant's advocate. The appellant did not give evidence in chief when the matter was heard in the lower court. The appellant was not aware that he was supposed to give evidence in chief on 15th April,2016 as his advocate did not attend court on the said date and advise him on the necessity to give evidence in chief in the court below.

Your lordship, had the appellant's former advocate attended court when the lower court matter was heard on 15th April,2016 and further had the appellant's given evidence in chief the trial magistrate would probably have arrived at a different verdict.

Your lordship, the appellant had offered sufficient cause to warrant the lower court to set aside judgment which was entered on 15th November,2018 and any consequential decree or order.

Your lordship, the Learned Senior Principal Magistrate erred in law and in fact for failing to find and for reasons that he failed to find that the 1st respondent would not suffer injustice and/or prejudice if the judgment entered on 15th November,2018 and any consequential decree or order are set aside. The 1st respondent would not have suffered injustice and/or prejudice if the judgment entered on 15th November,2018 and any consequential decree or order were set aside. The 1st respondent did not appose the appellant's application dated 4th February,2020 and therefore he did not demonstrate that he would suffer injustice and/or prejudice if prayer 4 & 5 of the appellant's application dated 4th February,2020 were allowed.

Your lordship, in **EDNEY ADAKA ISMAIL =VS= EQUITY BANK LIMITED (2014) EKLR,** Justice Mabeya held as follows:

> **"in my view, the court has to take cognizance of the effect of allowing the plaintiff's application. If the plaintiff's dismissed application is reinstated fro hearing and thereafter the same is found to be unmerited, there would be no prejudice caused on the part of the defendant. This must however be weighed against the consequences of shutting out the plaintiff from the hearing of his application and hence losing his vehicles held as collateral for the loan facility by the Bank. The court must take into account the principle of proportionality and see where the scales of justice lie. The law is now clear that the business of the court, so far as possible, is to do justice between the parties and not to render nugatory that ultimate end of justice"**

Your lordship, no prejudice and/or injustice would be caused to the plaintiff if prayers 4 & 5 of the appellant's application dated 4th February,2020 are allowed as the plaintiff can reasonably be compensated by an award of costs for any delay occasioned by setting aside of the judgment .To deny the appellant a hearing should be last result of the court In **PHILIP KEIPTO CHEMWOLO & ANOR=VS= AUGUSTINE KUBENDE (1986) eKLR** it was held as follows;

> **"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 for the purpose of imposing discipline"**

Your lordship, the learned senior principal magistrate erred in law and in fact for failing to find and for reasons that he failed to find that the appellant would suffer injustice and hardship if the judgment entered on 15th November,2018 and any consequential decree or order are not set aside .

Your lordship, in **REMICO LIMITED=VS= MISTRY JADVA PARBAT & CO LTD & 2 OTHERS**, the court quoted with approval the case of **LPATEL=VS= EA CARGO HANDLING SERVICE LIMITED (1975) EA75** where it was held as follows " The discretion is intended to avoid justice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice"'

Your lordship, it is the contention of the appellant that 16 ½ acres of the suit land belongs to him and that his two children reside thereon with their families . Further it is the contention of the appellant that he has been farming on 161/2 acres of the suit land and that he has developed the same. The learned senior principal magistrate did not consider the above facts in disallowing prayer 4 & 5 of the appellant's application dated 4th February,2020.

Your lordship, the Learned Senior Principal Magistrate erred in law and in fact for failing to find and for reasons that he failed to find that the mistake of appellant's former advocate should not be visited upon the appellant. The appellant's former advocate did not attend court during hearing of the case in the lower court.

Your lordship, in **PHILIP KEIPTO CHEMWOLO & ANOTHER =VS= AUGUSTINE KUBENDE (1986) eKLR** It was held as follows; **I think a distinguished equity judge has said :**

> **"blunders 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 determined on its merits"**

Further in **MUWANGA ESTATES AND ANOTHER=VS= N PART CA 49/2001** it was held as follows:

> **"it is not now an established principal of law that original litigant who is not guilty of dilatory conduct should not be debarred from pursuing his rights in court because of the negligence of his counsel"**

Your lordship, the appellant's former advocate's mistake of not attending court during hearing of the case in lower court ought not to have been visited upon the appellant by the Learned Senior Principal Magistrate.

Your lordship, the Learned Principal Magistrate erred in law and in fact for denying the appellant right to be heard by dismissing prayers 4 & 5 of the appellant's application dated 4th Febrruary,2020.The appellant did not give his evidence in chief of in the lower court. The Learned Senior Principal Magistrate ought to allowed have prayers 4 & 5 of the said appellant's said application so as to allow the appellant to give his evidence in chief. In **RICHARD NCHARPI LEIYAGU=VS= INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 2 OTHERS (2013) eKLR** the court held as follows:

> **The right to a hearing has always been a well protected right in our constitution and is also the cornerstone of the Rule of Law. This is why even if the courts have inherent jurisdiction to dismissed suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"**

Your lordship, the learned senior principal magistrate erred in law and in fact for dismissing prayers 4 & 5 of the appellant's application dated 4th February,2020 whereas the respondents had not opposed the said applicant. The respondents did not file a replying affidavit , notice of preliminary objection and/or grounds of opposition to the appellant's said applicants. The appellant's said application was therefore not opposed. The senior principal magistrate ought not to have dismissed the appellant's said application as the same was not opposed by the respondents.

Your lordship, the learned Senior Principal Magistrate erred in law and in fact for failing to find that mistakes of the appellant were excusable and/or inadvertent, as a result of which he dismissed prayers 4 &5 of the appellant's application dated 4th February ,2020.The appellant was in court when the matter proceeded in the lower court on 15th Apil,2016 but did not give evidence in chief on that day. The appellant was not aware that he was supposed to give evidence in chief on 15th April,2016 when the matter was heard. The appellant's mistake of not giving evidence in chief on 15th April,2016 was excusable and/or inadvertent as his advocate was not present so as to advise him on the necessity of giving evidence in chief in the case

Your lordship, the Learned Senior Principal Magistrate erred in law and in fact for failing to exercise his discretion judiciously, thereby dismissing prayers 4 & 5 of the appellant's application dated 4th February,2020.In **D CHANDULAL K VORA & CO LTD=VS= KENYA REVENUE AUTHORITY (2017) eKLR** the court quoted with approval the case of **MBOGO & ANOTHER=VS= SHAH (1968) EA 93**. where it was held **"……a court of appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice……."**

Your lordship, as hereinbefore demonstrated, the learned senior principal magistrate misdirected himself in some matter and as a result arrived at a wrong decision .The learned senior principal magistrate was clearly wrong in excise of his discretion and as a result there was injustice on the part of the appellant.

Your lordship, in **D CHANDULAL K VORA & CO LTD =VS= KENYA REVENUE AUTHORITY (2017) eKLR** the court quoted with approval the case of **NICHOLAS KIPTOO ARAP KORIR SALAT =VS= INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS (2013)** eKLR where it was held "**The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice……..**

> **In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects likely the delay like to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."**

Your lordship, in view of our above submissions, we urge the Honourable court to find that the appeal has merit and consequently allow the same with costs to the appellant.

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2 (d) of the constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects likely the delay like to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article

159(2)(d) of the constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and with it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.

Your lordship, in view of our above submissions, we urge the Honourable Court to find that the appeal has merit and consequently allow the same with costs to the appellant.

Dated at Meru this 17th day of February, 2021.

J. G. GITONGA & COMPANY,

ADVOCATES FOR APPELLANT.

4. The Respondent's written submissions are pasted herebelow without any alterations whatsoever.

1ST RESPONDENT'S SUBMISSIONS

Your Lordship, the following comprises of submissions on behalf of the 1st Respondent with regard to the Appeal filed on 29/10/2020.

Introduction:

Your Lordship, the Appellant's Appeal challenges the ruling of the trial Magistrate in which he declined to reopen the suit to allow the Appellant offer his evidence.

The Memorandum of Appeal raises 8 grounds which we shall address by interrogating the following issues, which we deem arise for determination.

a. Whether the Appellant's application for review of the judgment of the trial court satisfied the ingredients provided under Order 45(1) of the Civil Procedure Rules, 2010 under the prevailing circumstances.

b. Whether failure to oppose an application as provided under Order 51 Rule 14(1) of the Civil Procedure Rules, 2010 enjoins the trial court to automatically allow the same.

c. Whether the Appellant's conduct before the trial court could be remedied by recourse to Article 159 (2) (d) of the Constitution.

Order 45(1) of the Civil Procedure Rules, 2010

Your Lordship, the Appellant's application was primarily premised on the cited provision of the law.

A reading of the said provision will reveal that a party seeking refuge therein must satisfy any or all of the following ingredients

i. Discovery of new and important matter or evidence which, even after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced at the time the decree or order was made.

ii. For any other sufficient reason.

iii. The application must be filed without an unreasonable delay.

In our considered view, the first two ingredients are not relevant since firstly, there was no allegation before the trial court that the Appellant had discovered new and important matter, and secondly, the mistake contemplated in the second ingredient is that of the court record and not that of counsel.

Your Lordship, the Appellant's application was firmly predicated on the third limb:- *"for any other sufficient reason"*.

The alleged sufficient reasons that can be deduced from the application before the Lower Court can be summarized as;

i. Mistake of counsel

ii. Substantial and irreparable loss likely to be suffered by the Appellant.

iii. The fact that the 1st Respondent would not suffer prejudice or injustice

Your Lordship, it is our submission that the issues of substantial and irreparable loss and prejudice are not among the considerations contemplated under Order 45 Rule 1 since as was held in **JOSIAH MWANGI MUTERO & ANOTHER vs RACHAEL WAGITHI MUTERO [2016] eKLR** *"the expression any other sufficient reason means a reason sufficiently analogous to those specified in the rules. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the order would amount to an abuse of the liberty given to the tribunal under the act to review its judgment. Those words (i.e. sufficient reason) mean that the reason must be one sufficient to the court to which the application for review is made".*

Your Lordship, the Appellant heavily relied on the failure of his former Advocate to attend court on 15/04/2016 when the plaintiff testified and closed his case.

The following facts are apparent from the proceedings of the lower court comprising the record of Appeal.

i. On 04/02/2016, 11/03/2016 and 15/04/2016 the Appellant's counsel did not attend court for undisclosed reasons but the appellant was always present.

ii. On15/04/2016, the Appellant cross-examined the 1st Respondent and his witness upon testifying albeit in the absence of his counsel.

iii. On 05/05/2016 counsel for the Appellant appeared in court and while acknowledging that the matter was partly heard nevertheless challenged the jurisdiction of the Lower Court.

iv. On numerous other subsequent dates the appellant's counsel failed to attend court for varied or undisclosed reasons.

v. On 17/05/2018, the trial court expressly warned the Appellant that the defence case would be closed and judgment delivered if he would not be ready to proceed with the case on the subsequent hearing date.

vi. On 31/05/2018 the Appellants Advocate did not attend court and the trial Magistrate deemed the defence closed after the Appellant informed court that his Advocate was unavailable.

Your Lordship, we have endeavored to lay out the chronology of events where relevant, to demonstrate that the Appellant was all through acutely aware of the lethargic conduct of his advocate but chose to take no action to remedy the situation.

In fact on 17/05/2018, the trial court informed the parties of the need to change Advocates instead of opting to proceed in person.

Your Lordship in **JOSIAH MWANGI MUTERO (supra)** where a party sought to be exonerated on account of his Advocates mistake, the court pronounced itself as follows:-

"I am not persuaded that the reason offered amounts to a sufficient reason within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reason stipulated in Order 45 Rule 1".

The court proceeded to state

"To order that this case be re-opened where sufficient grounds have not been given would in my view amount to injustice".

Your Lordship, the trial court comprehensively analyzed the conduct of the Appellant and came to the correct conclusion:- that no sufficient reasons were adduced to necessitate the re-opening of the case.

Your Lordship, Order 45 Rule 1 further requires a party seeking a relief thereunder to approach court without an unreasonable delay.

In the present case the judgment sought to be reviewed was delivered on 15/11/2018 while the application for review was filed on 04/02/2020. This is a period of more than Fourteen (14) months.

In his said application, the Appellant made no attempt at explaining the cause of the delay.

A similar scenario obtained in **JOSIAH MWANGI MUTERO (supra)** where the court held

"The application before me was filed after about 9 months after the order complained about was rendered. One thing is clear in this application. The delay has not been explained. Other than blaming the lawyer, no convincing explanation has been offered to show why it took about 9 months to bring the present application to court or engage another advocate ".

Your Lordship what is even more striking about the appellant's conduct is that the Appellant was present when the defence case was closed and a date for judgment given on the 31/05/2018.

Further, it is clear that the Appellant appeared in court, post judgment on 19/12/2019 and 06/01/2020 to defend an application by the 1st respondent herein.

In sum, the Appellant's own conduct depicts a party who is indolent and apathetic and which is aptly captured in the words of this court in the case of **MICHENI KENYATTA & ANOTHER vs M'KEA M'MURITHI [2019] eKLR** to the effect that:-

> *"The advocate representing the applicants has submitted that the delay of one year and 3 months in filing this application after this court delivered its judgment on 20/06/2018 can only be blamed on the advocates who previously represented the applicants. I do not agree with this veritably hackneyed excuse. The period of one year and 3 months before this application was filed is inordinate.*
>
> *Indeed, in all circumstances, a suit belongs to the litigant. It is his responsibility to ensure that his suit is diligently and timeously prosecuted".*

Order 51 Rule 14(1)

Your Lordship, the Appellant has contended that since the application before the Lower Court was unopposed, then the court should have robotically allowed the application. Nothing could be further from the truth.

In **GIDEON SITELA KONCHELLAH vs JULIUS KEKAKENY OLE SUNKULI & OTHERS [2018] eKLR** the court observed as follows:-

> *"It is not automatic that for any unopposed application the court will as a matter of course grant the orders sought. It behoves the court to be satisfied that prima facie, with no objection the application is meritorious and the prayers may be granted. The court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as jurisdictional impediment which might render the application a non-starter…".*

The trial Magistrate duly appreciated this legal position and rightly proceeded to fully analyze the merits of the application based on the prevailing circumstances and he can thus not be faulted.

Article 159 (2) (d) of the Constitution

Your Lordship, the Appellant has in his submission invoked the provisions of Article 159 (2) (d) of the Constitution and Sections 3A and 3B of the Appellate Jurisdiction Act.

The Appellate Jurisdiction Act governs conduct of proceedings in the Court of Appeal and we shall assume the correct provisions to be cited by the Appellant should have been Sections 1A and 1B of the Civil Procedure Act.

So can the Appellant successfully seek refuge under Article 159 (2) (d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act bearing in mind the facts of this case?

While Article 159 (2) (d) enjoins the court to administer justice without undue regard to technicalities, Sections 1A and 1B provide for the overriding objectives to guide courts that include expeditious and efficient disposal and resolution of disputes.

As demonstrated elsewhere in these submissions, there was an inordinate delay by the Appellant in seeking the orders of review.

Further, the suit had been instituted in the year 2014 and the Appellant's attempt to re-open the same came six (6) years later.

Clearly this does not reflect the aspirations of Sections 1A and 1B of the Act.

Further, the issue before the trial court was not a procedural or technical issue but one that is to be adjudicated on a substantive provision of the law as set out under Order 45(1) of the Civil Procedure Rules.

It is our submission therefore that the Appellant's predicament cannot be remedied by

invoking the said provisions of law.

Conclusion

In conclusion, we submit that the decision arrived at by the learned trial Magistrate was sound and well-reasoned.

We thus urge the court to find that the instant Appeal lacks merit and proceed to dismiss the same.

We so humbly pray.

DATED AT CHUKA THIS ……6TH ….. DAY OF ……MAY,…….2021.

……

FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES

ADVOCATES FOR THE 1ST RESPONDENT

5. I have carefully considered the assertions proffered by the parties to buttress their diametrically incongruent assertions. I have also considered the authorities they have adduced in support of their submissions. I, however, hasten to opine that although all the authorities provided by the parties are good authorities in their facts and circumstances NO two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. All the authorities proffered by the parties are good all authorities in their facts and circumstances. I opine that it would constitute a nebulous and repetitive exercise if I were to regurgitate the principles espoused by those authorities as they have been reproduced in the parties' written submissions which are fully reproduced in an earlier part of this judgment.

6. This appeal concerns a ruling delivered by the Hon. P. M. Maina, SPM Marimanti Law Courts. The ruling concerned an application dated **4th February, 2020**. I reproduce herebelow prayers 4 and 5 which principally concern this appeal. They read as follows:

> Prayer 4 – That the Judgment entered herein on **15th November, 2018** and any consequential decree or order be reviewed by having the same set aside.
>
> Prayer 5 – That this case be reheard.

7. This being a first appeal, this court is entitled to examine all the evidence and decisions made in the lower court. The Genesis of this appeal can be traced to the Judgment of the Lower Court delivered on **15th November, 2018.**

8. I find that the Hon. Senior Principal Magistrate eruditely set out the evidence before him analysed it properly and based on that evidence arrived at his judgment. In my view, the appellant should have appealed against that judgment within the time stipulated by the law.

9. I now come to the impugned ruling. At page 4 of the ruling, the Learned Magistrate states that on **13th February, 2020**, the 1st defendant (now the appellant) was informed that the application dated **4th February, 2020** was still pending for hearing. He was in court. eventually, the application was set down for hearing on **10th September, 2020.**

10. On **10th September, 2020**, the plaintiff had not filed any response. The opposite advocate told the court that he would rely on the grounds on the face of the application and asked the court to the allow the application on account of it not being opposed.

11. The trial magistrate applied his mind to all apposite issues and found that setting aside a Judgment was the discretion of the court that delivered it. He, however, rightly noted that such discretion must be exercised by the court Judicially. He narrated the chronology that culminated in the impugned Judgment. He noted that the appellant was given ample opportunity to canvass his case. He felt that it would be a miscarriage of justice to revive a case that was filed on **4th July, 2014** and deny the opposite party the fruits of his judgment which was entered on **15th November, 2018** nearly **two years** before the date of the ruling delivered on **17th September, 2020.**

12. In his submissions, the appellant says that the suit proceeded to be heard on **15th April, 2016** in the absence of the appellant's advocate. He does not, however, deny that he was in court on the said day. In a nutshell he blames his former advocate for not giving his evidence. I find this claim tendentious because he was present in court and had the liberty to tender his evidence. Blaming former advocates is a hackneyed excuse which should not be used to hold courts to ransom with the effect that expeditious hearing and disposal of cases would be delayed. The appellant asserts that by failing to allow his application, the Learned Senior Principal Magistrate exposed him to suffer injustice and hardship. He also says that the learned Senior Principal Magistrate did not consider that he had developments on the suit land. Outrightly, I find that the learned Senior Principal Magistrate had in his ruling eruditely addressed these issues. The court notes that the learned Senior Principal Magistrate had to juxtapose his ruling with the judgment delivered on 17th September, 2020. He could not give his decision in the ruling in a vacuum. It had to be cross-referenced to the Judgment.

13. In his submissions, the respondent discounts all the assertions proffered and gives a chronology of the happenings during the proceedings in the lower court as follows:

> i. On **4.2.2016, 11.3.2016 and 15.4.2016** the Appellant's counsel did not attend court for undisclosed reasons but the appellant was always present.
>
> ii. On **15.4.2016,** the Appellant cross-examined the 1st Respondent and his witness upon testifying albeit in the absence of his counsel.
>
> iii. On **5.5.2016,** counsel for Appellant appeared in court and while acknowledging that the matter was partly heard nevertheless challenged the jurisdiction of the lower court.
>
> iv. On numerous other subsequent dates the appellant's counsel failed to attend court for varied or undisclosed reasons.
>
> v. On **17.5.2018**, the trial court expressly warned the Appellant that the defence case would be closed and judgment delivered if he would not be ready to proceed with the case on the subsequent hearing date.
>
> vi. On **31.5.2018** the Appellant's advocate did not attend court and the trial magistrate deemed the defence closed after the Appellant informed court that his advocate was unavailable.

14. The Respondent asserts that the appellant robustly participated in the lower court's proceedings. He points that he was in court when he should have tendered his evidence but did not do so. He also says that he was there when the date of delivery of Judgment was fixed. He says that the appellant should not blame his former advocate for not filing his appeal in time and for filing his application dated **4th February, 2020** very late when the judgment had been delivered on **15th November, 2018**, over one year since delivery of the Judgment. The respondents argue that **Article 159(2)** of the Constitution cannot be used as a panacea for all acts of indolence and for all infractions especially when parties do not file appeals in good time. He also says that Section 1A and 1B of the Civil Procedure Act cannot be used to cure such shortcomings. The 1st Respondent unequivocally asserts that there was inordinate delay by the appellant in seeking the orders he had sought in his application.

15. The 1st Respondent also proffered an authority to the effect that it was not automatic for any unopposed application to be allowed by the court. He quotes the case of **Gideon Sitelu Konchellah versus Julius Lekakeny Ole Sunkuli & Others [2018] eKLR** which observed as follows:

> ***"It is not automatic that for any unopposed application the court will as a matter of course grant the orders sought."***

16. I have carefully examined all the issues raised by the parties. I find that all the issues raised by the appellant in his 8 grounds of appeal had been eruditely addressed by the lower court in its Ruling and in its Judgment.

17. Whereas in some instances, the courts can give a litigant the benefit of doubt due to infractions committed by his former advocate, in this case the appellant was in court even during the day he should have given his evidence which he chose not to give. The date for delivery of Judgment was given in his presence. He, therefore, had no excuse not to appeal within the stipulated time. He has also not given a satisfactory explanation as to why he filed his application dated **14th February, 2020** fourteen months after the impugned Judgment was delivered.

18. I find that dismissal of the appellant's application dated **4th February, 2020** was not done perfunctorily. It was not done in a cursory or mechanical manner or even carelessly.

19. In the circumstances, the following orders are issued:

a. This appeal is hereby dismissed.

b. Costs shall follow the event and are awarded to the 1st respondent.

DELIVERED IN OPEN COURT AT CHUKA THIS 26TH DAY OF JULY, 2021 IN THE PRESENCE OF:

CA: Ndegwa

Muthomi Gitari h/b Muriithi for 1st Respondent

Appellant and his advocate Absent

Other parties and or their advocates absent

P. M. NJOROGE,

JUDGE.