



**Ngunyi & another v Keru (Suing as the Legal Representative of Josephat K Karanja - Deceased)
(Civil Appeal E303 of 2023) [2025] KEHC 13108 (KLR) (23 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E303 OF 2023
SM MOHOCHI, J
SEPTEMBER 23, 2025**

BETWEEN

JAMES NGUNYI 1ST APPELLANT

DANSON NJUGUNA 2ND APPELLANT

AND

**SARAH WANGOI KERU (SUING AS THE LEGAL REPRESENTATIVE OF
JOSEPHAT K KARANJA - DECEASED) RESPONDENT**

(An Appeal from the Orders of the Honourable Senior Resident Magistrate Hon P. Nyotah, In Nakuru CMCC Number 419 of 2019 delivered on the 16th October, 2023)

JUDGMENT

1. This is an Interlocutory Appeal flowing from, Nakuru Chief Magistrate's Civil Suit Number 419 of 2019, filed on 25th April 2019 which came up for hearing on the 16th October, 2023, before Honourable Senior Resident Magistrate, P. Nyotah, when the Plaintiff's case was heard and closed and upon direction to present defence case Counsel for the Appellants sought for adjournment and the application was dismissed the Court closed the defence case and directed the parties to file written submission and set the judgment date.
2. Being aggrieved by the ruling of the learned magistrate the Appellants preferred the Appeal on a whopping twelve (12) grounds of Appeal including That;
 - i. The Learned Magistrate erred in law and in fact, by refusing to grant the Appellants an Adjournment notwithstanding the fact that it was their first request of that nature and thus would not have prejudiced the Respondent.
 - ii. The Learned Magistrate erred in law and in fact, in totally ignoring the explanation put forth by the Appellants' counsel, to be considered, for the granting of the Adjournment.



- iii. The Learned Magistrate erred in law and in fact, in denying the Appellants the opportunity to be heard and peremptory closing their case and ordering them to submit submissions in fifteen (15) days, simultaneously with the Respondent.
 - iv. The Learned Magistrate erred in law and in fact, in failing to appreciate that the Respondent has before that day, not been keen to prosecute her case and that consequently, the Appellants were not to blame for the four-year pendency of the suit.
 - v. The Learned Magistrate erred in law and in fact, in failing to appreciate that the Appellants having complied with all pre-trial requirements, their Application for Adjournment was not frivolous.
 - vi. The Learned Magistrate erred in law and in fact, in failing to recognize that, while it is the discretion of the Court to grant or refuse an Application for Adjournment, the same should be exercised fairly and judiciously.
 - vii. The Learned Magistrate erred in law and in fact, by misinterpreting the provisions of the law with respect to denying the Appellants the opportunity to present their case.
 - viii. The Learned Magistrate erred in law and in fact, by disregarding the Appellants' right to fair trial as enshrined in Article 25(C) of *the Constitution* of Kenya, 2010.
 - ix. The Learned Magistrate erred in law and in fact, by failing to recognize the delicate balance between the need for efficiency and expediency on the one hand and the need to accord all parties before it equal opportunity to be heard.
 - x. The Learned Magistrate erred in law and in fact, by condemning the Appellants unheard.
 - xi. The decision of the trial Court was arrived at on consideration, to the extent that it was done, on the wrong principles of law.
 - xii. The decision demonstrated partiality and bias.
3. The Appeal was duly admitted to be heard and determined by way of filed written submissions and parties were directed to file the same.

Appellants Case

- 4. The Appellants in its filed written submissions dated 7th April 2025, opted to submit only on grounds 4,5,6,8 and 9.
- 5. That it is settled law, that the decision whether or not to allow an application for Adjournment is discretionary, which discretion is intended to be exercised judicially in order to avoid injustice and hardship.
- 6. Reliance is placed upon the case of Savannah Development Company Ltd v Merchantile Company Ltd, CA NO. 120 of 1992, where the Court held that,

‘where there are valid reasons for seeking adjournment of a case set down for hearing on a particular day and that where there are valid reasons to justify granting of an adjournment, the Court always has unfettered discretion to grant the adjournment’.
- 7. That the Court further set out the elements to be taken into consideration in an application for adjournment including:-
 - a. The adequacy of the reasons given for the application for adjournment:



- b. How far, if at all, the other party is likely to be prejudiced by the adjournment;
 - c. Whether the other party can be suitably compensated by award of costs.
8. The Appellants submit that, the Trial Court ought to have taken the above factors into consideration when looking into the Appellant's application for adjournment.
 9. That the typed proceedings are wanting in material respect with what exactly transpired(1) Save for the statement by the Appellants' Counsel that, "justice has to be done on both sides", the reasons proffered by Counsel for the adjournment were not captured in the proceedings and the peremptory closure of the Appellants' case by the Court was not recorded, the directions on filing of submissions, and on the date of judgment were omitted and the Appellants' application for stay of execution pending appeal is not captured.
 10. That despite the foregoing omissions the Appellants submit that in the circumstances they had shown good and sufficient cause to have warranted the granting of the adjournment.
 11. That fact that, the Appellants had not only consistently attended Court, but also complied with all pre-trial requirements, is proof that they were ready to defend the claim and had thus evinced their commitment to have the case heard expeditiously.
 12. That the reasons given for seeking adjournment, though not recorded, were plausible and reasonable, the main reason being the Appellants' inability to attend Court on the said date for bearing.
 13. That this was the first day of bearing and the first Application for adjournment by the Appellants since the institution of the suit. It is worth noting that, in addition to several absences in Court on the Respondent's part before the subject date, the Respondent's Advocates on 22nd May, 2023 sought an adjournment on the basis that Counsel was unavailable to conduct hearing. The said Application for adjournment was allowed.
 14. That the Appellants were not to blame for the 4-year delay in disposal of the case and the refusal by the Trial Court to grant the adjournment, if upheld, will occasion a miscarriage of justice and prejudice the Appellants constitutional right to a fair hearing, as they will have been denied an opportunity to be heard.
 15. That the denial of an adjournment to the Appellants, in the circumstances of this case, was inconsistent with the Court's stated overriding objectives of an efficient and timely disposal of proceedings, especially considering the time now lost appealing.
 16. That the Trial Court's decision to deny the Appellants an adjournment lacked the balance required, between efficiency and expediency, and was not a fair and judicious exercise of the Court's discretion.
 17. This Court's attention is drawn to the words of Mr Justice Lokeshwar Singh Panta, of the Supreme Court of India in Mrs. Kalyani Baskar V Mrs. M Sampooram, Criminal Appeal 1293 of 2006, where he stated: "The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. 'Fair trial includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and Courts should be jealous in seeing that there is no breach of them.



18. The above is the global position, has been adopted locally in *Mhaki & others v Macharia & Another* (2005) 2E4 206 this Court stated as follows:

“The right to be heard is a valued right, it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being affected afforded an opportunity to be heard.”

19. That the Appellants were unjustly and prejudicially denied an adjournment as a result of which they were denied the fundamental right to a fair hearing as guaranteed in Article 25(C) of *the Constitution*. It is trite law that the right to be heard is no longer just a rule of natural Justice but a constitutional imperative in Kenya under both Articles 50 (11) and Article 25 (2) which provide that the right to a fair hearing cannot be limited.

20. In conclusion the Appellants urge that it is the interest of justice that the Appellants appeal be allowed.

Respondents Case

21. The Appeal is opposed by the Respondent who largely contends that the Appeal fails for not satisfying the minimum conditions to disturb the expertise of discretion.

22. In her filed written submissions dated 11th April 2025 she contends the need to scrutinize the circumstances leading up to the order declining adjournment.

23. Firstly, the Appellants failed to give the reason for adjournment as the record dictates at page 57 of the Record of Appeal only saying "I request for another date for defence hearing. Justice has to be done on both sides"

24. That notably, the Appellants had not informed the Respondent of the intended adjournment earlier as it was also a surprise oral Application

25. That the Honorable Court took to account the age of the matter having been filed in 2019 more than half a decade earlier and the lack of a reason and exercised its discretion and declined the request.

26. That what is in issue is, if that discretion can be set-aside considering the circumstances highlighted above.

27. That the position on the exercise of a judge's discretion was stated in the Court of Appeal case of *Mbogo & Another v Shah* [1968] EA where, Sir Clement, de Lestang. V.P. at page 94 stated thus,

“I think it is well settled that a Court will not interfere with the exercise of its discretion of an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or it failed to take into consideration which it should have taken into consideration and in so doing arrived at the wrong conclusion.”

28. That for the Court to arrive at a determination of if the discretion was judicious, an assessment of the circumstances that transpired has to be undertaken.

29. Further, the Court has a duty under the overriding objectives of the *Civil Procedure Act* to facilitate the just, expeditious disposal of matters and when a party seeks to be accommodated on baseless adjournments the same is counterproductive to the said mandate.



30. That Lord Denning, MR in the often-cited case of *Fitzpatrick v Batger & Co. Ltd* (1967) 2 All ER 657 warned that; "Public policy demands that the business of the Courts should be conducted with expedition."
31. Additionally, Order 17 Rule 1 of the Civil Procedure Rules requires, as a general rule, that hearing of suits once commenced continue from day to day. It stipulates: "(1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the Court that it is just to grant the adjournment.
32. In the instant case the Appellant did not move the Court with any reasons why they should be granted an adjournment but are quick to make a conclusion they for the simple reason that they asked for an adjournment therefore they are entitled to it.
33. That this Appeal is gratuitous, mortifying and an attempt by the Appellant to frustrate the proceedings in the Trial Court and is a prime candidate for dismissal with costs to the Respondent.
34. No reason was given for seeking an adjournment and thus the discretion of the Trial Court ought not to be disturbed on imaginable grounds.

Analysis and Determination

35. Being a first appeal this Court lays emphasis on the principles as set out in *Selle and Another v 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.”

36. The Sole issue emerging for the determination of this interlocutory Appeal is;

Whether the trial magistrate exercised her discretion judiciously in disallowing the belated application for adjournment?

37. In the case of *Hajar Services Limited v Peter Nyangi Mwita* [2020] eKLR, the Court reiterated that discretion must be exercised judicially, not whimsically.

“This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court’s discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in *Feroz Begum Qureshi and Another v. Maganbhai Patel and Others* [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in *Daphne Parry v. Murray Alexander Carson* [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance



substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles."

38. The Appellants, in this instance on the 16th October 2023 ambushed the Court with an Application for an Adjournment without any reason or basis, it should be recalled that both parties had confirmed their readiness to proceed in fact Ms. Njoki did inform the Court she was ready to proceed and the Court scheduled the hearing to commence at 10.15am her awakening only became apparent immediately the prosecution's case was closed, which when logically considered would imply that Ms. Njoki had the knowledge that she was not ready with her defence but failed to notify the Court in the morning when she was ready to proceed.
39. I equally find the Application for adjournment was without reason. The statement that "justice must be done to both sides" is no reason for an adjournment. Counsel never offered the Court any reason that the trial magistrate is alleged to have ignored as argued on appeal. The law does not aid the indolent. Discretion, when exercised in their favor, must serve the ends of justice, not serve as a refuge for indolence.
40. That the Appellants have failed to demonstrate to this Court that the trial magistrate never exercised her jurisdiction judicially and thus this Court finds no fault on the trial magistrate in proceeding with the trial while dismissing the Application for adjournment.
41. The Memorandum of Appeal dated 26th October 2023 is found to be without merit. The Trial in the subordinate Court shall proceed from where it stalled upon Appeal.
42. Costs of this Appeal are awarded to the Respondent.

It is So Ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM.

ON THIS 23RD SEPTEMBER 2025

MOHOCHI S.M

JUDGE

