Mugambi & 4 others v Thuginku (Suing as the Legal Rep of the Estate of Thiginki Jacob Mugitra alias Wilfred Thiginki - Deceased) (Environment and Land Appeal E041 of 2024) [2025] KEELC 5038 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELC 5038 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E041 OF 2024

JO MBOYA, J

JUNE 26, 2025

BETWEEN

MOSES MUGAMBI .... 1ST APPELLANT

GEOFFREY MURIUKI MANENE .... 2ND APPELLANT

JANE KIRIGO MURIUKI .... 3RD APPELLANT

THE LAND REGISTRAR IMENTI NORTH DISTRICT .... 4TH APPELLANT

THE ATTORNEY GENERAL .... 5TH APPELLANT

AND

SABERINA ALFRED THUGINKU [SUING AS THE LEGAL REP OF THE ESTATE OF THIGINKI JACOB MUGITRA ALIAS WILFRED THIGINKI - DECEASED) .... RESPONDENT

JUDGMENT

1. The 1st, 2nd and 3rd Appellants were the 1st, 2nd and 3rd Defendants in the original suit. The said Defendants duly entered appearance, filed a statement of defence and counterclaim and thereafter participated in the fixing of the hearing date for the 9th March 2023. Nevertheless, the 1st, 2nd, and 3rd Appellants [who were the 1st, 2nd, and 3rd Defendants] failed to attend court on the scheduled hearing date. Thereafter, the learned trial magistrate proceeded with the scheduled hearing.

2. Subsequently, the 1st, 2nd and 3rd Appellants instructed their learned counsel to file an application seeking to set aside the proceedings held on the 9th March 2023; and to re-open the defence case. Suffice it to state that their counsel indeed obliged and filed the application dated 28th March 2023.

3. Neverthelss, the said application, namely; the Applicated dated 28th March 2023; was never heard. For good measure, the said application was left hanging in the court file or better still, same was abandoned.

4. Be that as it may, the 1st, 2nd, and 3rd Appellants herein filed yet another application dated 29th Jan 2024 and wherein same sought near similar reliefs like the ones at the foot of the previous application. The application dated 29th Jan 2024 was thereafter heard and disposed of vide ruling rendered on the 4th April 2024 and wherein the learned trial magistrate found and held that the application was devoid of merit[s]. To this end, the learned trial magistrate dismissed the application with costs to the Respondent.

5. Aggrieved by and dissatisfied with the ruling rendered on 4th April 2024; the 1st, 2nd, and 3rd Appellants have approached this court vide Memorandum of Appeal dated 6th June 2024 and wherein the named Appellants have highlighted the following grounds:

    I. That the Learned magistrate erred in law and in fact in dismissing an application seeking to cured an injustice meted out upon the appellants by their counsel.

    II. That the Learned Magistrate erred in law and in fact by failing to consider the provisions of article 50, 159(2) (d) of *the constitution* of Kenya 2010, order 9B rule 8 of the civil procedure rules 2010, laid down the threshold for setting aside Judgement and review.

    III. That the Learned magistrate erred in law and in fact in condemning the Appellants without affording it an opportunity to bed heard.

    IV. That the Learned Magistrate erred in law and in fact by concluding that a counsel should have filed an affidavit to substantiate claims by the 2nd Appellant.

    V. That the Learned Magistrate erred in law and in fact by finding that the Appellants squandered the opportunity to ventilate the defence without considering the mistake occasioned by his counsel.

    VI. That the Learned Magistrate erred in law and fact in finding by punishing an innocent litigant through the mistake of his counsel which caused a grave miscarriage of justice.

    VII. That the Learned Magistrate erred in law and in fact in finding that the only avenue was an appeal and not review.

    VIII. That the Learned Magistrate erred in law and in fact in failing to weight the miscarriage of justice meted upon the appellants by failing to afford them an opportunity to defend the suit as opposed to the rights of the Respondent who does not stand to be prejudiced.

    IX. That the Learned Magistrate erred in law and in fact by determining issues outside the scope of the suit.

    X. That the Learned trial magistrate's ruling is bad in law and against the weight of the evidence.

    XI. The Learned trial Magistrate erred in law by failing to take into account matters he ought to have taken into account while arriving at his decision.

6. The subject appeal came up for direction[s] on the 25th April 2025; whereupon the advocates for the respective parties confirmed that the record of appeal had been duly filed and served. Furthermore, the learned counsel also posited that the record of appeal was complete. To this end, it was agreed that the appeal was ready for hearing. Moreover, learned counsel covenanted to canvass and dispose of appeal by way of written submissions.

7. Flowing from the foregoing, the court proceeded to and issued directions pertaining to the hearing and disposal of the appeal. Furthermore, the court circumscribed the timelines for the filing of the written submissions.

8. The learned counsel for the Appellants proceeded to and filed written submissions wherein same [learned counsel] has highlighted three [3] salient issues, namely; that the learned trial magistrate erred in law in finding and holding that the 1st, 2nd, and 3rd Appellants ought to have filed an appeal against the orders closing the defence case and not to file an application for review; the learned trial magistrate condemned the 1st, 2nd, and 3rd Appellants without affording same an opportunity to be heard; and the learned magistrate erred in law in visiting the mistake of counsel upon the innocent litigants, namely; the 1st, 2nd, and 3rd Appellants herein.

9. Learned counsel for the Respondent filed written submissions and canvassed three [3] key issues, namely; that the appellants herein were guilty of delaying tactics in an endeavour to defeat the expeditious hearing and disposal of the suit in the subordinate court; the orders of the learned trial magistrate closing the defence case were not amenable to setting aside and or reviewing; and the ruling of the trial court is well grounded and thus the appeal before hand is devoid [bereft] of merits.

10. Having reviewed the record of appeal; having taken into account the proceedings that were undertaken before the subordinate court and upon consideration of the written submissions filed by and on behalf of the respective parties, I come to the conclusion that the determination of the subject appeal turns on three [3] key issues, namely; whether the appeal before hand is competent or otherwise; whether the application dated the 29th of January 2024 constituted an abuse of the due process of the court; and whether the learned trial magistrate reached and or arrived at the correct conclusion in finding that the application under reference was devoid of merit[s].

11. Before venturing to analyse the thematic issues highlighted in the preceding paragraph, it is imperative to observe that what is before me is a first appeal from the subordinate court. Furthermore, it is also evident that the ruling being appealed against, arose out of exercise of judicial discretion by the learned trial magistrate. Suffice it to underscore that what was before the learned trial magistrate was an application which sought exercise of judicial discretion.

12. Being a first appeal, this court is vested with the jurisdiction to undertake exhaustive review, appraisal, re-evaluation and scrutiny of the entirety of the evidence tendered before the court and thereafter to form an independent conclusion arising out of the evidence on record.

13. Nevertheless, it is imperative to observe that even though this court has the jurisdiction to depart from the factual conclusions and finding of the trial court, such departure must only be undertaken when it is evident that the trial court either acted on a misapprehension of evidence on record; acted on no evidence; where the finding is perverse to the evidence on record, or where it is shown that there exist[s] a demonstrable error of principle, which vitiates the finding of the trial court.

14. The jurisdictional remit of the first appellate court while entertaining and adjudicating upon 1st appeal has been addressed in various judicial decisions. Recently, in the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) the Court of Appeal reviewed a number of decision[s] on the point and thereafter stated as hereunder;

> " We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember

that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same.

We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows: "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution.

If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...

It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate

the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

15. Moreover, it is not lost on me that the matter before hand touches on and concerns exercise of judicial discretion. In this regard, other than the principles highlighted in the decision [supra], it is also imperative to underscore that this court must only interfere with the findings of the learned trial magistrate on circumscribed grounds. [See Mbogo & Another v Shah, [1968] EA 93].

16. With the foregoing in mind, I am now well disposed to revert to the subject appeal and to discern whether the decision sought to be impeached is well grounded or otherwise. To this end, I shall deal with the issue[s] sequentially.

17. Regarding the first issue, namely; whether the appeal before hand is competent or otherwise, it is imperative to state and observe that the ruling being appealed against was rendered on the 4th April 2024. In this regard, there is no gainsaying that if the appellants were minded to mount or prefer an appeal, then same were obligated to file the intended appeal within 30 days from the date of delivery of the impugned ruling.

18. Neverthelss, it is evident that the appeal before hand was not filed until the 6th June 2024. To this end, what becomes apparent is that the appeal appears to have been filed outside the statutory 30 days prescribed by the provisions of Section 79G of the *Civil Procedure Act*, chapter 21 Laws of Kenya. To the extent that the appeal was filed outside the 30 days timeline, there is no gainsaying that the appeal before hand is not only bad in law, but same is misconceived and legally untenable.

19. The provisions of Section 79G of the *Civil Procedure Act* [supra] which speaks to the timelines for filing of an appeal stipulates thus;

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."[Emphasis supplied].

20. To my mind, where an appeal is filed outside the prescribed timelines, such an appeal is rendered incompetent. In any event, it is imperative to underscore that the timelines for filing an appeal goes to the root of the matter. Simply put, such an issue is not a procedural technicality capable of being cured vide Article 159[2][d] of *the Constitution* 2010.

21. Before concluding on this issue, it suffices to reference the decision of Court of Appeal in the case of Patrick Kiruja Kithinji v Victor Mugira Marete [2015] KECA 872 (KLR) where the Court stated as hereunder

> " 12. In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159."

22. The foregoing legal position was also amplified by the Court of Appeal in the case of Attorney General v Bala (Civil Appeal 223 of 2017) [2023] KECA 117 (KLR) (3 February 2023) (Judgment); and in the

case of Esquire Investments Limited versus Southfork Investments Limited & 5 others Civil Appeal [Application] Number E621 of 2024 [Ruling delivered on 5th June 2025- unreported].

23. Turning to the second issue, namely; whether the application dated 29 Jan 2024 constituted an abuse of the due process of the court, it is imperative to highlight that the 1st, 2nd, and 3rd Appellants had previously filed the application dated 28th March 2023 and wherein same sought orders seeking to set aside [sic] the Ex- parte proceedings taken on 9th March 2023 and to reopen the defence case. The said application was never canvassed and/or prosecuted. For good measure, the application was left hanging in the court file.

24. Despite the filing of the previous application, the 1st, 2nd, and 3rd Appellants thereafter proceeded to and filed the subsequent application dated 29th Jan 2024. Instructively, the latter application seeks near similar orders/reliefs like ones which coloured the foot of the previous application.

25. What comes to the fore is to the effect that the 1st, 2nd, and 3rd Appellants are guilty of filing applications and leaving same in the court file and thereafter filing similar applications. To my mind, such kind of conduct does not portend well for the cause of justice.

26. On the contrary, such kind of conduct constitutes and amounts to gross abuse of the due process of the court. The parties must not be allowed to play lottery with the due process of the Court.

27. The Concept of abuse of the due process of the court is incapable of exhaustive definition. Nevertheless, the said concept envisages various perspectives and nuances whose net effect is to deploy the court process for collateral purposes.

28. In the case of Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016) [2018] KESC 27 (KLR) (19 September 2018) (Ruling) the Supreme Court [the apex Court] expounded on the concept in the following terms;

> " The concept of "abuse of the process of the Court" bears no fixed meaning, but has to do with the motives behind the guilty party's actions; and with a perceived attempt to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of Court process is that, it "appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption..." .... Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process."

29. Additionally, the concept of abuse of due process of the court was also elaborated upon by Hon. Justice Mativo, Judge [as he then was] in the case of Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR) where the court elaborated on the concept thus;

> " 28. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. [18] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice. [19] I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above."

30. Quite clear, the filing of the previous application namely, the application dated 28th March 2023 and thereafter abandoning same on record, constitutes an abuse of the due process of the court.

31. Next is the issue of whether the ruling of the learned trial magistrate was well grounded or otherwise. Suffice it to state that the 1st, 2nd, and 3rd Appellants were present in court on 16th Feb 2023 when the hearing date of the 9th March 2023 was taken.

32. First forward, on 9th March 2023, the 1st, 2nd, and 3rd Appellants [who were defendants in the subordinate court] were represented by learned counsel Mr. Omari, who was holding brief for Mr. Igweta. The said counsel proceeded to and applied for adjournment on behalf of the named appellant[s]. Instructively, the application for adjournment was declined and the trial court directed the hearing to proceed.

33. Subsequently, the hearing of the matter proceeded and thereafter the learned trial magistrate closed the Plaintiff's case as well as the Defendant's case. It is the said decision that was sought to be reviewed and or set aside vide the Application dated 29th Jan 2024.

34. Following the hearing of the said application, the learned trial magistrate concluded that the recourse for the appellants herein after an application for adjournment was refused lay in an appeal and not otherwise. To this end, the learned magistrate proceeded to and held that the application was devoid of merit[s].

35. It is the said ruling and decision that is now sought to be impeached. It suffices to underscore that the ruling declining an adjournment could only be challenged and or impeached vide an appeal and not otherwise. For good measure, the learned trial magistrate could not be invited to have a second bite on the issue either by setting aside the proceedings or reviewing the orders. Such an endeavour would have amounted to the learned magistrate sitting on appeal on own decision. There is no gainsaying that such an endeavour would amount to an absurdity.

36. Furthermore, it is also important to posit that the proceedings that were undertaken on 9th March 2023, shortly after the application for adjournment was refused were not Ex parte proceedings. Instructively, the said proceedings were taken in the presence of learned counsel. It is immaterial whether learned counsel for the appellants chose to walk out of the court or to decline to participate in the proceedings. The bottom line is that the learned counsel was present in court; applied for adjournment; but which was declined.

37. In my considered view, the proceedings in question were not ex parte. In this regard, the named appellants could not purport to revert to the trial court and seek to invite the trial court to have a second bite on the issue. Such an invitation would have culminated into the trial court sitting on appeal on own decision. Quite clearly, the learned magistrate appreciated the law and arrived at the correct decision.

38. Premised on the foregoing, I am unable to discern any injudicious [improper] exercise of discretion by the learned trial magistrate. On the contrary, I find and hold that the learned trial magistrate properly apprehended the principles and thereafter correctly applied the same. Simply put, I would have arrived at the same conclusion.

Final Disposition:

39. Flowing from the analysis captured in the body of the Judgement, it must have become apparent that the appeal beforehand was not only filed out of time albeit without leave, but same is also devoid of merits.

40. Consequently, and in the premises, there is no gainsaying that the appeal courts dismissal.

41. In a nutshell, the final orders that commends themselves to the Court are as hereunder:

I. The Appeal be and is hereby Dismissed.

II. The Ruling of the Learned trial Magistrate rendered on 4th April 2024 be and is hereby affirmed.

III. The Costs of the Appeal be and are hereby awarded to the Respondents.

IV. The Costs in terms of clause [II] above shall be agreed upon and in default be taxed by the Deputy Registrar in the conventional manner.

42. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF JUNE 2025.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE.

In the presence of:

Mutuma – Court Assistant

Ms. Kiyuki for the 1st, 2nd and 3rd Appellants

Ms. Miranda [Senior Litigation Counsel] for the 4th and 5th Appellants

Mr. Omari for the Respondent