



REPUBLIC OF KENYA



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**Kipkoech & 4 others v Cheruiyot (Environment and Land Appeal
13 of 2023) [2025] KEELC 154 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 154 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 13 OF 2023**

**JM ONYANGO, J
JANUARY 22, 2025**

BETWEEN

**KENNEDY K KIPKOECH 1ST APPELLANT
SAMMY CHESOO CHESUSHO 2ND APPELLANT
JOHANA KIPTOO ROTICH 3RD APPELLANT
GEORFFREY KIPROTICH RUTO 4TH APPELLANT
DAVID KIPKOECH KIPLAGAT 5TH APPELLANT**

AND

CATHERINE JEPKORIR CHERUIYOT RESPONDENT

*(Being an Appeal against the order/ruling dated 18th May, 2023 by the
Hon. Peter Nyagaka Areri (SPM) in Eldoret CM ELC No. 86 of 2018)*

JUDGMENT

1. This Appeal arises out of the decision of Hon. Peter N. Areri (SPM) of 18th May, 2023 in which he dismissed the Appellants' Application dated 13th March, 2023 for want of prosecution. Vide a Memorandum of Appeal dated 8th June, 2023, the Appellants challenged the said decision, asking that the order of the lower court be set aside and substituted with an order granting leave to file a supplementary affidavit. The Appellants also seek an order that the application dated 13th March, 2023 be given directions as to disposal thereof before any other court, as well as costs of the Appeal.
2. The Appeal is based on the following grounds:-
 - a. That the Learned Magistrate erred in law and fact by making a decision ultimately determining the Appellants' application which had raised substantive matters on a mention date.



- b. That the Learned Magistrate erred in law and fact in dismissing the Appellants' application for want of prosecution while the Advocate for the Appellants was in court.
 - c. That the Learned Magistrate erred in law and in fact in not only dismissing the application for want of prosecution but also failing to accord the Appellants' advocate an opportunity to be heard.
 - d. That the Learned Magistrate erred in law and fact in declining to grant leave to file a supplementary affidavit to the appellants without having due regard to the law, the exercise of judicial powers and the fact that the same was not opposed by the respondent.
 - e. That the Learned Magistrate erred in law and fact in failing to consider that the provisions on dismissal for want of prosecution apply to suits and not interlocutory applications.
3. The Appeal herein came up for directions on the 6th November, 2024 on which date the court directed that it would be canvassed and disposed of by way of written submissions. The parties complied, with the Appellants filing their submissions dated 20th November, 2024 while the Respondent's submissions are dated 4th December, 2024.

Appellants' Submissions

4. On the part of the Appellants, the trial magistrate was faulted for dismissing the application for want of prosecution on a date fixed for mention, yet the Appellants' Advocate was present in court. It was contended that the trial magistrate had no jurisdiction to dismiss the matter on a mention date. Counsel for the Appellants submitted that no consent could be reached for disposal of the application since the Respondent's advocate was absent. Further, that the Appellants were not accorded an opportunity to be heard before the decision dismissing their Motion was made, and this amounted to a travesty of justice. Counsel relied on *Nzioki vs Kitusa (1982) eKLR* and *Republic vs Anti-Counterfeit Agency & 2 Others ex-parte Sugippharm Limited (2014) eKLR*.
5. Counsel for the Appellant also submitted that Order 51 of the Civil Procedure Rules which governs the prosecution of applications does not provide for dismissal for want of prosecution. The trial magistrate's decision was equated to driving the Appellants away from the seat of justice. It was argued that in the alternative, since the Appellants' Advocate was present, if the Application was to proceed, the Court ought to have received representations from him before making any decision. Counsel cited *Martha Wangari Karua vs Independent Electoral and Boundaries Commission & Others (2018) eKLR* and *Trust Bank Limited vs Amalo Company Limited (2002) eKLR*.
6. On the refusal of leave to file a Supplementary Affidavit, counsel explained that the court made no comment on the same and proceeded to dismiss the Application. Counsel argued that when a relief sought is not granted expressly, it is deemed to have been denied, hence its inclusion as a ground of appeal. Counsel submitted that Order 51 Rule 14(3) allows an Applicant to file a Supplementary Affidavit with leave of court. Counsel contended that the failure to give any reason for denying the application for leave as well as the failure to comment on it, is an improper exercise of judicial discretion. To bolster these arguments, Counsel relied on *Peter Gichuki King'ara vs Independent Electoral and Boundaries Commission & 2 Others (2014) eKLR* and *Party of Independent Candidates of Kenya vs Mutula Kilonzo & 2 Others, HC EP No. 6 of 2013*. Counsel prayed that the appeal be allowed as prayed and for costs of the appeal.



Respondent's Submissions

7. On his part, Counsel for the Respondent commenced his submissions with the argument that the Record of Appeal herein was filed in contravention of the mandatory provisions of Order 42 Rule 13(4) of the Civil Procedure Rules. It is counsel's submissions that the Record of Appeal herein does not contain the trial magistrate's certified notes made at the hearing thus the record herein is defective for being incomplete despite the Applicants being given sufficient time within which to comply. Counsel urged that this defect goes to the root of the Appeal as it is impossible to verify the correctness of the allegations in the absence of the certified notes from the trial, occasioning unfairness and great injustice. For this reason, Counsel submitted that the Court ought to strike out the entire record of Appeal as it lacks jurisdiction to entertain the Appeal. Counsel relied on *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 Others* (2015) eKLR and *Kilonzo David t/a Silver Bullet Bus Company vs Kyalo Kiliku & Another* (2018) eKLR.
8. Counsel for the Respondent submitted that owing to the Appellant's conduct in the matter regarding the Application dated 13th March, 2023 the trial magistrate's decision was within the law. Counsel faulted the Appellants for not complying with the directions issued on 4th April, 2023 when the application first came up for directions. He therefore argued that ground 1 of the Memorandum of Appeal should fail. Counsel argued that the Appellants had misrepresented the facts since there is no indication that their Advocate had actually sought leave to file the supplementary affidavit, and they had thus come to court with unclean hands. Counsel also accused the Appellants of laxity in prosecuting their application as well as delaying the matter which had been pending since 2018. It was also submitted that grounds 2, 3 and 4 of the Memorandum of Appeal contained contradictions and should not be allowed.
9. With regards to ground 5, the Respondent's Advocate submitted that order 12 of the Civil Procedure Rules applies to both suits and applications, thus the trial magistrate was right and acted within the law in dismissing the application for want of prosecution. In support of his argument, Counsel cited *Obusuru vs Mwai & 3 Others (Trading as Karima Housing Company) & Another* (2024) KEELC 1606 (KLR) and *Emarti Ole Narau Group Ranch vs Sewani Ole Nkushu Naroki, Nchosiya Ole Leboi, Ntiyani Ole Leponyo, Ainkanae Ole Sapuru & Rancho Ole Mardadi* (2014) KEHC 4859 (KLR). Counsel concluded that an application may be dismissed for want of prosecution if the initiator shows laxity in prosecuting it, and submitted that ground 5 of the appeal therefore lacks merit and should be dismissed. Counsel asked the court to dismiss the Appeal with costs to the Respondent.

Analysis and Determination

10. This court has gone through the Record of Appeal and given due consideration to the submissions by the parties' respective Counsel. The issues for determination in this appeal are:-
 - a. Whether the Appeal is defective for failure to incorporate the trial notes in the record of Appeal;
 - b. Whether the Appeal has merit;

(a) Whether the Record of Appeal herein is defective for failure to incorporate the trial notes;

11. The Respondent's Counsel opposed the appeal on the ground that it is defective since the notes of the trial magistrate made at the hearing were not included in the Record of Appeal. Counsel contended that the present appeal was defective and contravened the provisions of Order 42 Rule 13(4) of the Civil Procedure Rules, 2010 and urged this court to strike out the appeal on the said ground.



12. Order 42 Rule 13(4) of the Civil Procedure Rules, 2010 provides as follows:-

- “(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:
- (a) the memorandum of appeal;
 - (b) the pleadings;
 - (c) the notes of the trial magistrate made at the hearing;
 - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.”

13. Order 42 Rule 13(4)(c) lists the notes of the trial magistrate made at the hearing as one of the documents to be included in the record of Appeal. However, Proviso (ii) to the above Rule provides that “the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)”. Accordingly, since the notes are not one of the mandatory documents under Proviso (ii), this Court thus has power to dispense with that requirement.

14. In any event, although the Appellants are at fault, they cannot be allowed to bear the burden of that fault alone. For starters, the Respondent could have raised the issue at the preliminary stage of this Appeal, but conspicuously failed to do so.

15. I am thus of the view that while the omitted document renders the record of appeal defective, it does not however render it incurably defective. And although the Appellants erred in omitting them from the Record of Appeal without leave of court, I have taken time to peruse the trial file. I note that indeed the Application was dismissed on 18th May, 2023 for want of prosecution. I have also confirmed that the Advocate holding brief for the Appellants’ Advocate was present in court, whereas the Respondent’s Advocate was marked as absent on the material date. Having assured myself of the proceedings of the trial court on 18th May, 2023 which are in contention herein, I am further convinced of my finding that the said error is not fatally defective to this Appeal. I therefore decline to strike out the appeal and must consider it on its merits, as opposed to condemning it on account of a want of procedure.

16. In making this decision, I am persuasively guided by the decision of the High Court in *Microsoft Corporation vs Mitusimi Computer Garage Ltd* (2001) 2 EA 460, where it held as follows:-

“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated



as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...”

17. I have also considered Article 159 2(d) of the *Constitution*, which provides that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. Applying Article 159(2)(d) of the *Constitution*, especially considering that the omission arose due to an oversight by the court, I will dispense with the requirement for the trial notes.
18. Additionally, I disagree with the Respondent’s contention that the failure to include the trial notes in the Record of Appeal strips this court of its jurisdiction to hear the instant Appeal. I am of the view that the defect in the Record of Appeal neither goes to the jurisdiction of the Court nor prejudices the Respondent in any respect. I therefore decline to strike out the instant appeal on that ground.

a. Whether the Appeal has merit;

19. The record of the trial file shows that on 18th May, 2023 the Application dated 14th March, 2023 came up for mention to confirm filing of written submissions. The Appellants’ Counsel was not in court, but the Advocate holding his brief informed the court that parties had not filed their written submissions. The trial magistrate then proceeded to dismiss the application for want of prosecution. Being a mention date, parties have submitted differently on whether the trial magistrate could dismiss an application as he did.
20. However, it is trite law that a court ought not proceed and determine substantive issues on a mention date. There are numerous cases discussing the issue of dismissal of an application on a date fixed for mention. See Peter Nzioki & Another vs Aron Kuvuva Kitusa Civil Appeal No. 54 of 1882; [1984] KLR 487, where the Court of Appeal explained that:-

“On the mention date, March 16, 1982, Mr J B Patel was unable to attend, being engaged elsewhere, and his brief was held by Mr Makecha. Mr Mervyn Morgan appeared for the respondents. Mr. Makecha informed Muli J that he had no knowledge of the matter. Instead of fixing a date for the hearing of the application and again without hearing any argument on the merits, the learned judge proceeded to dismiss the application for review, with costs. From this order, the applicants have lodged the present appeal as of right, see order XLII rule 1(1) (aa). The principal ground of appeal, argued before us by Mr Patel, was that the learned judge erred in dismissing the application for review without hearing the parties. Mr Mervyn Morgan, for the respondent, conceded that there had never been a hearing.”

21. The Court of Appeal then held that:-

“We have no doubt that this appeal must succeed. March 16, 1982, was fixed as a date for mention of the application, and not as a hearing date. The application for review has never been heard, and it could not therefore lawfully have been dismissed.”

22. The court set aside the order of Muli, J dismissing the application and ordered that the application be remitted to the High Court for hearing. It follows therefore that, where a matter is fixed for mention on a particular date, the court has no business determining the substantive issues on that date. As explained by Makau J. in Tetra Pak Limited vs Macheo Limited (2018) eKLR, this is because:-

“When a matter is scheduled for mention, it is procedurally and legally wrong to turn a mention date to a hearing date and issue final orders as the party who had expected the matter to be mentioned and appropriate orders issued is not only prejudiced by issuance



of final orders in the matter but is denied fair hearing. The party who attends the mention should not get final orders in his favour, even where he is prejudiced by non-attendance of the other party but cost, which in my view, would be adequate compensation for cost incurred in the day in attending the mention date.”

23. The learned Judge also explained that:-

“9. My understanding of the procedure as regards mention of matters, is where a matter for mention is turned to hearing by consent of all parties it may be necessary for reasons for proceedings to hearing to be recorded. It is usually in exceptional circumstances where mention date can be turned into a hearing.”

24. The court of Appeal in *Rahab W. Evans vs Esso Kenya LTD (1995) KECA 135 (KLR)* made a similar finding, holding that:-

“We have no doubt that where a matter is fixed for mention, as it was in this case, the learned judge had no business determining on that date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reason for adopting such a procedure which is repugnant to the administration of justice.”

25. From the above authorities, a date on which a matter is fixed for mention can be turned to a hearing by consent of all parties, but this happens only in exceptional circumstances. Further, that when this is done, it may be necessary for reasons for converting a mention to a hearing to be recorded. In this instance, the Respondent’s Advocate was not in court on the mention date thus, as rightly submitted by the Appellants, no consent could be reached for disposal of the Application. In other words, there was no consent by the parties to convert the mention into a hearing. The dismissal of the Appellants’ Application on 18th May, 2023 being a date fixed for mention of the matter, was therefore not within the law.

26. Having said that, I do not however agree with the Appellant’s argument that under Order 51 of the Civil Procedure Rules, an application cannot be dismissed for want of prosecution. It cannot have been the intention of law makers that once an application is filed it should be allowed to stand unprosecuted indefinitely for no justifiable reason. Order 12 on “Hearing and the Consequence of Non-Attendance” applies to both suits and applications alike, and courts are rife with decisions where applications have been dismissed for want of prosecution. An example is the case of *Obusuru vs Mwai & 3 others (Trading as Karima Housing Company) & another (Environment & Land Case 207 of 2016) [2024] KEELC 1606 (KLR)*, which was cited by the Respondent, where the court explained that:-

“The Court’s power to dismiss a suit or an application for want of prosecution/non-attendance is provided for under Order 12 of the Civil Procedure Rules. Order 12 Rule 7 of the Civil Procedure Rules, gives relief to a party whose application/suit has been dismissed by providing thus;

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”



27. However, the circumstances herein were not such as to warrant the dismissal of the Application for want of prosecution. The reason being that, as extensively explained above, the matter was fixed for mention and not a hearing.
28. In any event, I have perused the copies of the impugned Application dated 14th March, 2023 and note that the same raised pertinent issues relating to abatement of the suit against the 4th Defendant. It also points to the fact that the 5th Defendant herein is deceased and that he was sued after his demise. If this is true, I fail to understand how the trial magistrate intended to proceed with the suit as it is. What the trial magistrate should have done in my opinion, is to fix the matter for hearing on a subsequent date, and if the Appellants still refused to prosecute the application, then he would be at liberty to dismiss it for want of prosecution. The law is clear on issues of abatement of suits and the death of a defendant, and collectively, one cannot proceed in a suit against a dead Defendant. It is therefore in the interest of justice that the issues raised in the Application dated 14th March, 2023 be heard and resolved before the suit can be allowed to proceed for hearing and determination.
29. As to the order allowing the filing of a Supplementary Affidavit, having perused the trial court file, I noted that there was no record made of any prayer by the Appellants' Advocate for leave to file the same as alleged. Consequently, the same not having been a matter raised before the trial court and a determination made thereon, it cannot form a ground of Appeal in this instance. It is trite that the purpose of an Appeal is to reconsider and correct errors in the trial court's decision, not to determine new issues.
30. For the foregoing reasons, I find that the Appeal herein is merited. The same is allowed as follows:
- a. The order of the trial court made on 18th May, 2023 in Eldoret CM ELC No. 86 of 2018 dismissing the Appellant's Application dated 14th March, 2023 for want of prosecution be and is hereby set aside.
 - b. The said Application is hereby remitted back to the Chief Magistrate's Court for directions and to be heard and determined on its merits.
 - c. The Application shall be heard and determined by any other Magistrate other than Hon. Peter Nyagaka Areri (SPM) whose order has been set aside herein. The Appellants are at liberty to approach that court for leave to file their Supplementary Affidavit.
 - d. The Appellants are awarded the costs of this Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 22ND DAY OF JANUARY 2025.

J. M ONYANGO

JUDGE

In the virtual presence of :

1. Mr Mua Wambua for the Appellants
2. Mr Osewe Atieno for the Respondents

Court Assistant: Brian

