

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT VIHIGA**  
**ELCLA NO. E018 OF 2024**

KENNETH LUMUAMU MUSILA ( Suing as the  
legal representative of the estate Of SAMSON  
MUSILA JALENGA-Deceased) .....APPELLANT

VERSUS

PASELINE SIBIRA.....RESPONDENT

*(Being an appeal from the ruling of the Hon. J. A Agonda (PM) delivered in  
Vihiga on the 27<sup>th</sup> day of August 2024 in VIHIGA PMC ELC MISC 7 OF 2019)*

BETWEEN

KENNETH LUMUAMU MUSILA ( Suing as the  
legal representative of the estate Of SAMSON  
MUSILA JALENGA-Deceased) .....APPLICANT

VERSUS

PASELINE SIBIRA.....RESPONDENT

**JUDGEMENT**

**Introduction**

Vide the Memorandum of Appeal dated 26<sup>th</sup> September 2025, the appellant challenges the ruling of Hon. J. Agonda PM delivered on 27<sup>th</sup> August 2024 in VIHIGA PMC ELC MISC 7 of 2019. The appellant seeks that the appeal be allowed with costs and the ruling be set aside.

The record of appeal dated 10<sup>th</sup> March 2025 shows that the impugned ruling was in respect of an application dated 11<sup>th</sup> December 2023 filed by the appellant herein seeking for orders that;

- a) The honourable court be pleased to grant the applicant extension of time to seek leave to substitute the Defendant with the Administrator Kenneth Lumuamu Musila in this matter.
- b) That the applicant be made a party to the suit on behalf of himself and the estate of the deceased Defendant and the defence be amended.
- c) The honourable court be pleased to grant a temporary order of stay of execution as against the Defendant herein pending the hearing and determination of the application interpartes and thereafter the main suit.
- d) The honourable court be pleased to set aside the ex parte judgement and all consequential proceedings.
- e) The defendant be granted leave to defend the suit
- f) Costs of this application be provided for.

The application was supported by the contents of the Supporting Affidavit sworn by the appellant on 11<sup>th</sup> December 2023.

The appellant's case in the application was that he is the son of Samson Musila Jalenga, the Defendant who was the registered owner of land known as L.R. NO. North MARAGOLI/VIYALO/1775 (the suit land). That the defendant died on 27<sup>th</sup> August 2020 during the pendency of the suit. That the applicant, as the administrator of the estate of the deceased wished to take up the suit on behalf of the deceased. That the plaintiff misled the court, obtained orders and sub-divided the suit land into NORTH MARAGOLI/VIYALO/2151, 2152 which she is

currently occupying and 2153. That the suit land is the subject of a Succession Cause at Vihiga Law Courts.

That the plaintiff will not be prejudiced at all and that it is in the interest of justice that the orders sought be granted.

The record of appeal shows that the application was opposed vide the respondent's Replying Affidavit sworn on 2<sup>nd</sup> August 2024. The respondent's case was that it was not in dispute that she had purchased part of the suit land from the deceased defendant.

That the defendant had instructed Mr. Amendi J. Advocates who represented him in the suit. That because the court delivered its judgement on 23<sup>rd</sup> July 2021 it became *functus officio*. That the applicant's advocates are improperly before court. That the Respondent had obtained title and use of her portion of the suit land namely; LR NO. NORTH MARAGOLI/VIYALO/2152.

That the Defendant remained with the other portions of the suit land. That she followed due process in obtaining title to her portion. That she will be prejudiced by the application and that the application is frivolous vexatious and a clear abuse of the court process. The respondent prayed that the application be dismissed.

The record shows that the application was heard before the trial court which vide its ruling delivered on 17<sup>th</sup> August 2024 found that the application was not merited and dismissed it in entirety with no order as to costs.

### The Appeal

The grounds of appeal as set out in the Memorandum of Appeal are that; -

- 1) The learned trial Magistrate erred in law and in fact in reaching her decision that the suit had abated without analyzing the entire evidence on record.

- 2) The Learned trial Magistrate erred in law and in fact in her analysis of the evidence in finding that the appellant's family had slept on their rights even though the matter proceeded ex parte.
- 3) The learned trial Magistrate erred in law and in fact in holding that one member of the family one Thomas Onzere appeared as a party without being joined officially in court.
- 4) The learned trial Magistrate erred in law and in fact in her analysis of the evidence in holding that the case at Hamisi Law Courts was concluded when the available evidence clearly contradicts the same.
- 5) The learned trial Magistrate erred in law and in fact in her analysis of the evidence in holding that the Respondent who had gone ahead to obtain a title deed in her name by going through court system will be prejudiced by the application when the available evidence clearly contradicts the same.
- 6) The learned trial Magistrate misdirected herself into arriving at a decision and ruling that was obviously wrong and against the law and also against the wright of the evidence offered.
- 7) The learned trial Magistrate erred in law and in fact in failing to consider or sufficiently the evidence the written submissions tendered by the appellant's Counsel and n failing to consider the relevant authorities tendered therewith as a whole.
- 8) The learned trial Magistrate erred in law and in fact in otherwise failing to exercise her discretion in a proper manner resulting in injustice to the appellant.

### Submissions

Vide directions given on 11<sup>th</sup> June 2025, the appeal was heard by way of written submissions. Written submissions dated 18<sup>th</sup> July 2025 were field on behalf of the

appellant by the firm of Ben Aduol Nyanga & Company advocates and written submissions dated 24<sup>th</sup> July 2025 were filed by the Respondent in person.

### **Issues for Determination**

Although the appellant presented 8 grounds of appeal, vide his submissions he compressed them into 4 issues for determination in the appeal namely; -

- a) Whether the trial court erred in fact and in law in failing to grant temporary order of stay of execution against the Defendant.
- b) Whether the trial court erred in fact and in law by failing to set aside the ex parte judgment and all the consequential proceedings.
- c) Whether the trial court erred in fact and in law by failing to grant the appellant leave to defend the case
- d) Who should bear the costs of the case.

The court adopts these as the issues for determination in this appeal.

### **Analysis and Determination**

This is a first appeal and the court has an obligation to re-examine and analyze the evidence presented before the trial court.

The first issue for determination is whether or not the trial court erred in failing to grant temporary order of stay of execution against the Defendant.

Perusal of the application that resulted in the ruling the subject of this appeal shows that prayer 3 thereof was for a temporary order of stay of execution as against the Defendant pending hearing of the application inter parties and thereafter the main suit.

The record shows that as at the time the application was filed judgment had already been entered in the matter. The proceedings show that the Respondent testified on 24/10/2019 and the matter was adjourned to another date.

On 22/10/2020 the court was informed that Counsel for the Defendant was unable to proceed as the Defendant had died on 20/8/2020 and therefore Counsel had no further instructions on substitution.

The record shows further that on 24/6/2021 the court closed the defence case and gave a date for judgement namely; 23/7/2021. That is the judgment whose execution the applicant sought to be stayed pending the hearing of the application.

It has been submitted on behalf of the appellant herein that in the case of Butt -vs- Rent Restriction Tribunal (1982) KLR 417 the Court of Appeal provided directions on how a court should proceed to exercise its discretion in instances where a party seeks stay of execution. On behalf of the Respondent it was submitted that it was after execution of the judgement that the application was filed.

I have perused the record of Appeal. On page 34 thereof, there is a copy of title deed in respect of land parcel number NORTH MARAGOLI/VIYALO/2152 in the names of the Respondent. The title deed is dated 25/5/2023. It is common ground that the title deed was a result of execution of the judgement. The application the subject matter hereof was dated 11/12/2023 which was more than 6 months after the judgement had been executed and title deed issued.

Although the trial court made no specific finding on the prayer for an order of stay of execution, I find that the prayer was not available as the judgment had already been executed. The trial court did not therefore err in failing to grant an order of stay of execution. The prayer did not satisfy the grounds for grant of an order of stay of execution in Order 42 Rule 6(2) of the Civil Procedure Rules.

The second issue for determination is whether or not the trial court erred in law and in fact in failing to set aside the ex parte judgment and all consequential proceedings.

It was submitted on behalf of the appellant herein that the trial court did not exercise its discretion properly. That the defendant died in the pendency of the suit and did not have a chance to be heard. That several liabilities within the land parcel number NORTH MARAGOLI/VIYALO/1775 are being deprived of their right to transmission, registration and issuance of title deeds as bona fide purchasers and that the trial court failed to take this into account.

Counsel relied on the case of CMC Holdings Ltd -vs Nzoia (2004) KLR 173 where it was held inter alia that in law the discretion that a court of law has in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among others, an excusable mistake or error.

On behalf of the respondent it was submitted that the court's discretion was properly exercised. The respondent relied on the case of Shah -vs Mbogo & Another (1967) EA 116 where it was held that discretion may only be interfered with where it is shown to have been exercised arbitrarily, capriciously or based on misapprehension of the facts. The respondent further submitted that the principle of finality in litigation must be upheld. That a party who has slept on their rights cannot be allowed to revive a suit that has abated by operation of the law. That the applicant had ample time to act but did not do so.

A reading of the ruling the subject of the appeal shows that in respect of the prayer for setting aside of the judgment, the trial court observed; -

“The applicant has not explained to this court why he took too long to move the court knowing too well that there was a suit pending in court. I find the reasons given are not sufficient to enable this court exercise its discretionary powers to set aside the proceedings concluded in 2021 and the instant application filed in December 2023.”

The court proceeded to add that the applicant wants the court to sit on its own appeal and in particular on court orders granted by court of competent and similar jurisdiction.

The grounds for setting aside ex parte judgment are generally that the applicant must give sufficient explanation for non-participation in the case, demonstrate that he/she has a good defense that raises triable issues to the claim and that prejudice will not be occasioned to the claimant.

The record shows that in his lifetime, the Defendant actively participated in the suit. The explanation for failure to adduce evidence and prosecute the defence was that the defendant died. The proceedings show that the fact of the defendant's death was brought to the attention of the court before the judgement sought to be set aside was made. There is no evidence that any effort was made by the plaintiff/respondent to rein in the family/dependents of the defendant as by law provided either by way of citation or other lawful mechanism. I find that the explanation for non-participation in the proceedings was sufficient.

The second ground is that the applicant must demonstrate that he has a good defence that raises triable issues.

The court record shows that the Defendant through the firm of Amena Amendi J & Company Advocates filed an amended statement of defence and counterclaim dated 19<sup>th</sup> August 2019 which raised various triable issues including a claim that

the purchase price paid by the respondent had been fully refunded to her (See paragraph 6) and that she was required to hand back vacant possession of the suit land to the defendant. Vide the counter-claim, the defendant had sought for damages for trespass, an eviction order, costs of the suit and interest. The appellant demonstrated that he had a good defence that raised triable issues.

And on whether or not the plaintiff would suffer prejudice if the judgement were to be set aside, taking into account the circumstances under which the judgment was made, it is in the interest of justice to have both parties present their respective cases. The law gives trial courts power to set aside own judgements decrees and/or orders where the applicant meets the threshold and exercise of this power does not amount to the court sitting on appeal of its own orders.

I respectfully find that the trial court erred in failing to appreciate that the applicant had met the threshold for setting aside the judgement and in failing to set aside the judgement.

The judgement relates to property of a deceased person which can only be administered and distributed in accordance with the provisions of the Law of Succession Act.

The next issue for determination is whether the trial court erred in fact and in law by failing to grant the appellant leave to defend the case.

The prayers sought in the application which if granted would enable the appellant to defend the suit were prayer 1 which was a prayer for substitution of the deceased defendant with the appellant, prayer 2 that the appellant be made a party in the suit and prayer 5 that the appellant be granted leave to defend the suit.

The application had been brought pursuant to the provisions of order 1 Rule 10(31) Order 50 Rule (6) and Order 51 Order 10 Rule 11, Order 22 Rule 22 Civil procedure Rules.

Among the exhibits annexed to the application was a certificate of death dated 7<sup>th</sup> October 2020 showing that the defendant died on 27/8/2020, Grant of Letters of Administration intestate dated 6<sup>th</sup> July 2023 in favour of the appellant in respect of the estate of the defendant and a green card (copy of register) in respect of the suit land showing that the register in respect of the suit land was closed on 10/3/2023 upon sub-division. With these documents, the appellant demonstrated that he was competent person as an administrator of the estate of the deceased to be substituted for the deceased.

Order 24 Rule 7(2) allows the personal representative of the deceased to apply for revival of the suit and/or setting aside of dismissed orders.

It was submitted on behalf of the respondent that while the court may extend time under its discretionary powers under order 24 Rule 7(2) such extension is not automatic and must be based on sufficient cause being shown. That the right to be heard is not absolute and that it must be balanced with the need for finality in litigation. That the appellant is the author of his own predicament since he consciously slept on his right to defend the suit.

I have considered this submission and find that even if the suit had abated, the court had powers to revive the same or set aside the adverse orders that had been given against the estate of the deceased.

In the end, the court finds that the appeal has merit and hereby allows it with the result that:

1. the ruling of the trial court made on 27<sup>th</sup> August 2024 together with all consequential orders and actions based thereon are set aside.
2. the application dated 11<sup>th</sup> December 2023 is allowed in the following terms;
  - a. the Defendant, deceased, be and is hereby substituted with Kenneth Lumuamu Musila, the administrator of his estate.
  - b. That the applicant is hereby made a party to the suit on behalf of himself and the estate of the deceased Defendant.
  - c. the ex parte judgement dated 23<sup>rd</sup> July 2021 and all consequential orders is set aside.
  - d. The applicant is granted leave to defend the suit.
  - e. Costs of the application be in the cause.
3. Each party to bear own costs of the appeal.

Orders accordingly.

**Ruling dated and signed at Vihiga and read virtually this 16<sup>th</sup> day of October, 2025**

**E. ASATI,  
JUDGE.**

In the presence of:

Ajevi- Court Assistant.

Willie for the appellant.

Respondent present in person.