



**Makau v Malika (Environment and Land Appeal E020 of 2023)  
[2025] KEELC 4535 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4535 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E020 OF 2023  
LC KOMINGOI, J  
JUNE 12, 2025**

**BETWEEN**

**MARGARET NDUKU MAKAU ..... APPELLANT**

**AND**

**NDUKU MALIKA ..... RESPONDENT**

*(Being an Appeal against the Ruling and Order of Hon. E. Kagoni  
in Kajiado PMCC 281 of 2013 delivered on 26th September 2023)*

**JUDGMENT**

1. In the Ruling delivered on 26<sup>th</sup> September 2023 in PMCC Kajiado 281 of 2013 by the learned Hon. E. Kagoni held:

“... Since there is no evidence proving the delay was justified and hence excusable, I find the delay was inexcusable. I have also taken note that, on the last date the Applicant’s previous counsel was in court i.e., 29.04.2014, he told the court that Applicant could not be traced and asked the Application to be stood over generally. Thereafter, no action was taken by the Applicant, till the present application. This kind of indolence/lethargy is inexcusable and cannot be condoned.

In light of all the above findings, I do not think it is in the interest of justice to reinstate this suit. The prayer for reinstatement lacks merit and is hereby dismissed...”

2. Aggrieved by the said Ruling, the Appellant filed this Memorandum of Appeal on the grounds that:
  1. The learned Magistrate erred in law and fact in failing to appreciate the cardinal principle that a Court cannot sit on its own decision.



2. The learned Magistrate erred in law and fact in adjudicating on the prayer seeking reinstatement of the suit PMCC 281 of 2013 yet the same had been granted by the same court.
  3. The learned Magistrate erred in law and fact in failing to reinstate the suit.
  4. The learned Magistrate erred in law and fact in reaching a decision that the Applications dated 4<sup>th</sup> October 2013 and 12<sup>th</sup> July 2022 are similar.
  5. The learned Magistrate erred in law and fact in failing to give life to Section 3A and 3B of the [Civil Procedure Act](#) in determining the issue of reinstatement of the suit.
  6. That the learned Magistrate erred in law and fact in failing to determine all the issues as raised in the submissions.
3. This Appeal was canvassed by way of written submissions.

### **The Appellant's submissions**

4. On whether the trial court erred in dismissing the Application to reinstate the suit, Counsel submitted that the trial Court reinstated the suit on 30<sup>th</sup> August 2022 and what was left for determination were the other prayers. Therefore, the Court in dismissing the suit in its ruling dated 26<sup>th</sup> September 2023 was an error which was akin to it sitting on its own appeal with reference to *Masibo & another (Suing as the Administrators of the Estate of Charles Naule Diffu (Deceased) v Were & 5 others* [2024] KEELC 4791 (KLR).
5. Counsel went on to submit that the trial court also erred in not determining all the other issues and only determined the issue of reinstatement which prejudiced the Appellant.
6. Counsel also submitted on the issue of interlocutory injunction stating the Appellant had a prima facie case with evidence of success and stood to suffer irreparable loss and injury which could not be adequately compensated by way of damages referencing *Giella v Cassman Brown & Company Limited* (1973) E A 358 and *American Cyanamid Co. v Ethicom Limited* (1975) A AER 504. As such, the appeal should be allowed with costs.

### **The Respondent's submissions**

7. Counsel for the Respondent submitted that she was not aware that the suit had been reinstated *ex parte* on 30<sup>th</sup> August 2022 and when the application came for interparte hearing, this was not disclosed. Therefore, the trial court proceeded to determine the issue of reinstatement in error. Therefore, since this was an error apparent on the face of record, the Appellant should have sought a review and not an Appeal citing *National Bank of Kenya Ltd vs Ndungu Njau* Civil Appeal No. 211 of 1996 (UR). On the other issues, counsel submitted that once the trial court determined that the reinstatement prayer was negative, then it was moot to determine the other prayers. As such, the Appeal should be dismissed with costs to the Respondent.

### **Analysis and Determination**

8. I have considered the grounds of Appeal, the record of Appeal, the written submissions and the authorities cited. I find that the issues for determination are;
  - i. Whether the Learned Magistrate erred in dismissing the Appellant's application dated 12<sup>th</sup> July 2022 with costs;
  - ii. Whether this Appeal is merited;



- iii. Who should bear costs of the Appeal?
9. Being a first appeal, the Court has a duty to re-evaluate the case and make its own findings with consideration that it neither saw nor heard the witnesses. This was the Court of Appeal's holding in *Kagina v Kagina & 2 others* ([2021] KECA 242 (KLR)):
- “This being a first appeal to this court, is to 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 that respect....”
10. This suit began in 2013 with the appellant seeking to be declared owner of plot No. 2301/Business/Emali T.Centre and that the Respondent be restrained from trespassing or continuing with the construction. The Appellant claimed that she allocated plot 2301 through the allotment letter dated 15<sup>th</sup> May 2013.
11. The Respondent contested this claim on grounds that the plot belonged to her and it was plot No. 102 Business/Emali Trading Centre and it was allocated to her on 17<sup>th</sup> May 1994. She confirmed that she was indeed developing the property.
12. On 29<sup>th</sup> April 2014, counsel for the Appellant asked for the matter to be stood over generally on grounds that he could not trace his client. From the record, on 14<sup>th</sup> July 2021 the Appellant was issued with a Notice to Show Cause and on 19<sup>th</sup> August 2021, this matter was dismissed for want of prosecution.
13. The Appellant then filed an application for reinstatement of the suit dated 12<sup>th</sup> July 2022. The Respondent contested this application. On 26<sup>th</sup> September 2023 the trial court's ruling upheld the dismissal of the suit. And that is the reason for this appeal.
14. Did the lower court err in dismissing the Appellant's suit at the Lower Court?
15. It is on record that on 30<sup>th</sup> August 2022 the trial Court ordered: “The Court has reviewed the application dated 12/07/2022 and hereby grants orders 1 and 2 pending interparty hearing on 13/09/2022...”
16. The said prayer 1 and 2 of the Notice of Motion application dated 12<sup>th</sup> July 2022 sought:
- i. That the Honourable Court be pleased to certify this matter as urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
  - ii. That the Honourable Court issues an Order reinstating Civil Suit PMCC N0.281 of 2013.
17. Therefore, the reliefs for determination were 3, 4 and 5. However, the Ruling dated 26<sup>th</sup> September 2023 made a determination of prayer 2, 4 and 5. Which was an error because prayer 2 had already been determined. As such, the Court was functus officio and the only way that prayer was open for consideration was through an Appeal.
18. The Respondent submitted that the trial Court's determination on the question of reinstatement was an error on the face of record a review should have sufficed. The Respondent also submitted that she was not aware that the reinstatement orders had been issued exparte and only learnt of this at the Appeal. While man is to error, this Court does not find that justification sufficient to warrant the dismissal of this Appeal. The Court file and court record is always available for perusal. Therefore, nothing stopped the Respondent from perusing the file to get acquainted with what had transpired in their absence.



19. I therefore find that the trial court erred in dismissing the suit on the ground of reinstatement which had already been determined and orders issued.
20. On whether the trial court erred in not determining the other issues and only determining the issue of reinstatement, this court does not find that there was any error in that. Once the Court found that the suit should not be reinstated, then determining any other issue was an academic exercise which would not have been judicious use of its time and resources. Because once the suit was determined it was up for dismissal, any other prayer after that was moot.
21. The Appeal hereby succeeds and PMCC Kajiado 281 of 2013 is remitted back to the Lower Court for hearing and determination before another Magistrate other than Hon. E. Kagoni.
22. Costs of this Appeal shall abide the outcome of the Lower Court's suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12<sup>TH</sup> JUNE 2025.**

**L.KOMINGOI**

**JUDGE.**

In the presence of:

Mr. Mungai for the Appellant.

Mr. Muthuva for the Respondent.

Court Assistant – Mutisya.

