Apaga v Noor (Environment and Land Appeal 20 of 2024)
[2025] KEELC 5801 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5801 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL 20 OF 2024

JO MBOYA, J

JULY 31, 2025

BETWEEN

ANNA ACHWA APAGA ..... APPELLANT

AND

MOHAMMED NOOR ..... RESPONDENT

(Being an Appeal from the Ruling of Hon. Lucy Mutai Kathure Chief Magistrate, Isiolo Magistrates' Court in ELC CASE NO. 96 OF 2015 dated 23rd September 2024)

JUDGMENT

1. The Respondent herein [who was the Plaintiff in the subordinate court] filed an amended Plaint dated 28th January 2022; and wherein the Respondent sought various reliefs. The reliefs that were sought at the foot of the amended Plaint were as hereunder;

    a. A declaration that the Plaintiff is the lawful owner of all that Plot known as Isiolo Township/ Block II/244 measuring approximately 0.82 ha.

    b. An order of permanent injunction restraining the Defendants, their agents, servants, employees or anybody acting at their behest from interfering with the plaintiff peaceful use, ownership and occupation of the suit land.

    c. An order of Eviction of the Defendant from the suit property and demolition of structures constructed thereon.

    d. Costs of the suit plus interest.

    e. Any other relief, interest and Mesne Profits.

2. The Appellant herein duly entered appearance and filed a statement of defence and wherein the Appellant denied the claims by the Respondent. Furthermore, the appellant contended that the

respondent's claim to the suit property was premised on fraudulent document[s]. Moreover, the Appellant contended that same had been in lawful possession of the suit property. To this end, the Appellant sought that the respondent's suit be dismissed.

3. The suit in the subordinate court was fixed for hearing on the 6th February 2024 and the appellant's counsel was duly served with a hearing notice. However, the appellant and counsel failed to attend court and thereafter the matter proceeded for hearing. Subsequently, the learned trial magistrate crafted and delivered the Judgment on 5th March 2024.

4. Following the delivery of the Judgment, the appellant herein filed an application dated 5th April 2024; and wherein the appellant sought to set aside the proceedings that were taken on the 6th February 2024 and the consequential Judgment delivered on 5th March 2024. Moreover, the appellant filed yet another application dated 10th June 2024, the latter seeking leave to amend the application dated 5th April 2024.

5. The two applications [details in terms of the preceding paragraphs] were set down for hearing and were subsequently heard and disposed of vide ruling delivered on 23rd September 2024. For good measure, the learned trial magistrate found and held that the appellant had not demonstrated sufficient cause to warrant the setting aside of the proceedings of 6th February 2024 and the subsequent Judgment rendered on 5th March 2024.

6. It is the ruling dated 23rd September 2024 which has aggrieved the appellant culminating into the filing of the current appeal. The appellant has raised various grounds as hereunder;

    i. That the Learned magistrate erred in law and in fact in dismissing the appellant's application dated 10th June 2024 seeking to amend the application dated 5th April 2024 on the grounds that a notice of motion is not a pleading is unfounded in law, misconceived, simplistic and lacks in-depth of law.

    ii. That the Learned magistrate erred in law and in fact in giving section 2 of the Civil Procedure rules a limited interpretation, thus dismissing the appellant's application dated 10th June 2024, which sought to amend the notice of motion.

    iii. That the Learned magistrate erred in law and in fact in failing to consider the appellant's submissions and authorities cited, especially the Supreme Court decision that allowed an amendment to an application.

    iv. That the Learned magistrate erred in law and in fact in dismissing the appellant's application dated 5th April 2024 yet the same raised reasonable grounds for setting aside of the judgment of the court dated 5th March 2024.

    v. That the Learned magistrate erred in law and in fact in failing to consider that the appellant had a good defence that raised triable issues before dismissing her application to set aside the Ex- parte Judgment.

    vi. That the Learned magistrate erred in law and in fact in failing to find that the advocate for the appellant gave a reasonable ground for failing to appear in court on the 6th of February 2024.

    vii. That the Learned magistrate erred in law and in fact in failing to consider the hearing notice that was received under protest and also in failing to appreciate that court of appeal matters and high court matters take precedent over lower court matters when considering the reasons for failure by the advocate to appear in court.

viii. That the Learned magistrate wrongfully exercised her discretion in dismissing the appellant's applications dated 10th June 2024 and 5th April 2024.

ix. That the Learned magistrate applied wrong principles in arriving at the finding that a notice of motion is not a pleading and in dismissing the appellant's application dated 5th April 2024 seeking to set aside the exparte judgment.

x. That the Learned magistrate acted and applied wrong principles in arriving at her finding[s] in the two applications.

xi. That the Learned magistrate acted and applied wrong principles in arriving at her finding in the two applications.

xii. That the Learned magistrate erred in law and in fact in failing to consider the appellant's submissions and authorities relied on in both applications before arriving at a ruling.

xiii. That the Learned magistrate erred in law and in fact in considering only the respondents' submissions in arriving at her finding.

xiv. That the Learned magistrate erred in law and in fact in failing to consider that the hearing notice was received under protest and that that fact was not challenged by counsel for the respondent and arrive at a different finding.

xv. That the Learned magistrate erred in law and in fact in finding that the appellant in her application did not raise sufficient cause for setting aside the Ex-parte Judgment entered on 5th March 2024.

7. The Appeal beforehand came up for directions on various dates resting with the 22nd May 2025, whereupon the appellant confirmed having filed the record of appeal. Furthermore, the parties herein agreed that the appeal was ready for hearing. To this end, the court proceeded to and directed that the appeal be canvassed by way of written submissions to be filed and exchanged by the Parties. Moreover, the court also circumscribed the timeline[s] for the filing of the written submissions.

8. The appellant filed her written submissions dated 8th July 2025 and where in the appellant has raised and canvassed three [3] key issues. Firstly, learned counsel for the appellant has submitted that the learned trial magistrate erred in law in finding and holding that the application dated 5th April 2024, is not a pleading and thus same could not be amended. In any event, it has been contended that the interpretation that was given and taken by the learned trial magistrate is restrictive and misconceived. Furthermore, it has been submitted that the decision of the learned trial magistrate finding that an application cannot be amended is contrary to the provisions of Order 8 rules 2 & 3 of the Civil Procedure Rules, 2010; as read together with section 100 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

9. To buttress the foregoing submissions, learned counsel for the appellant has cited and referenced the case of Taibu Ali Taibu vs Firoz Nural Hirji & another (2020) eKLR and Gazebo Industries Ltd vs Rift Valley Kenya Ltd (2022) eKLR, respectively.

10. Secondly, Learned counsel for the appellant has submitted that the dismissal of the application dated 5th April 2024 and the application dated 10th June 2024 have deprived the appellant of the right to be heard. Furthermore, it has been submitted that the appellant has been condemned without being afforded the opportunity to be heard.

11. Thirdly, learned counsel for the appellant has submitted that the learned trial magistrate failed to consider and take into account the reason[s] that was advanced by learned counsel for the appellant and which formed the basis for the non-attendance by counsel before the court on the date when the suit was scheduled for hearing. In particular, it has been submitted that the appellant's counsel was engaged before the Court of Appeal with various matters and thus same could not attend the scheduled hearing.

12. Additionally, it has been submitted that the appellant's counsel duly communicated the fact that same was going to be engaged before the court of appeal to the advocates for the respondent. However, it has been contended that despite the respondents' advocate being knowledgeable of the engagements by the appellant's advocate, same [respondents' advocate] failed to inform the court of the position. To this end, it was contended that the respondent's advocate concealed and withheld the vital information from the court.

13. Furthermore, it has been submitted that the respondent's advocate also failed to bring to attention of the trial court that the hearing notice which had been served was received under protest. According to counsel for the appellant, the fact that the hearing notice had been received under protest was sufficient to forewarn the respondent that the appellant would not be ready to proceed.

14. Finally, learned counsel for the appellant has also submitted that the learned trial magistrate was also informed about the appellant's counsel's engagements via WhatsApp. In this regard, it has been posited that on the basis of [sic] the WhatsApp message, the court [the Learned Magistrate] was therefore made aware that counsel for the appellant was not going to be available.

15. Based on the foregoing, learned counsel for the appellant has submitted that the appeal beforehand is meritorious and thus ought to be allowed. To this end, the court has been invited to proceed and allow the appeal, set aside the impugned ruling and restore the original suit for hearing and determination on merits [de novo].

16. The respondent filed written submissions dated 21st July 2025 and wherein same has highlighted four[4] key issues for consideration and determination by the court. Firstly, learned counsel for the respondent has submitted that the ruling by the learned trial magistrate and particularly, the limb that found that the application could not be amended, was correct and well-grounded. Moreover, learned counsel for the respondent has submitted that a notice of motion [like the one that was filed by the appellant] is not a pleading and thus same does not lend itself to amendments in terms of the provisions of Order 8 of the Civil Procedure Rules, 2010.

17. Furthermore, it was submitted that the application dated 10th June 2024, which sought leave to amend the application dated 5th April 2024, was not crafted in accordance with the law guiding/regulating amendments. In this regard, it was posited that the said application was fatally defective and thus could not have been allowed.

18. To vindicate the submissions that a Notice of Motion Application cannot be amended, learned counsel for the respondent has cited inter alia the holding in Fredrick Mwangi Nyaga vs Garam Investments and another (2013) eKLR and Jacinta Muiruri vs Jane Mwangi & another (2006) eKLR, wherein it is reported that the courts held that a Notice of Motion Application is not a pleading and thus same cannot lend itself to amendments in line with the provisions of Order 8 of the Civil Procedure Rules, 2010.

19. Secondly, it has been submitted that the learned counsel for the appellant was duly and properly served with the hearing notice relating to the scheduled hearing. To this end, learned counsel for the respondent has posited that the appellant's counsel was served with the hearing notice on the 6th

October 2023. Furthermore, learned counsel has thereafter referenced the affidavit of service filed in court on 11th October 2023.

20. Additionally, learned counsel for the respondent has submitted that the appellant's counsel was re-served with a hearing notice on 30th January 2024. However, it was contended and clarified that the hearing notice which was served on the 30th January 2024 was merely a reminder, taking into account that the appellant had been previously served.

21. Flowing from the foregoing, it has been submitted that the appellant's counsel was therefore aware and knowledgeable of the scheduled hearing. To this end, it has been contended that it behooved the appellant and counsel to make suitable arrangements to attend court. In this regard, learned counsel for the respondent has therefore posited that the failure by counsel for the appellant and the appellant to attend court was a deliberate ploy to defeat the scheduled hearing; and hence same is not excusable.

22. Thirdly, learned counsel for the Respondent has submitted that the appellant failed to tender and place before the trial court sufficient cause to demonstrate her failure to attend court on the scheduled hearing date. In any event, it has been posited that the conduct of the appellant and that of her counsel was one intended to delay, obstruct and or defeat the hearing and determination of the suit. Moreover, it has been submitted that the conduct of the appellant and counsel was informed by negligence and utter disregard of the due process of the law.

23. To buttress the submissions pertaining to proof of sufficient cause, Learned counsel for the respondent has cited and referenced the decision in Wachira Karani vs Bildad Wachira (2016) eKLR where the court highlighted the legal position that negligence and lack of bona-fides negate sufficient cause.

24. Fourthly, Learned counsel for the Respondent has submitted that the setting aside of Ex-parte proceedings and Judgment [if any] is premised on the exercise of discretion. To this end, it has been submitted that it was incumbent upon the appellant to place before the trial court plausible, cogent and believable reasons [explanation] to account for the failure and thus to lay a basis for the exercise of discretion.

25. Moreover, it was submitted that the discretion of the court in setting aside Ex-parte proceedings and Judgment [if any] is not to be exercised to assist a party who by conduct has endeavored to delay, obstruct and or defeat the hearing and determination of a matter. Further and in any event, it was submitted that the exercise of discretion must take into account the antecedent conduct of a party.

26. To support the submissions pertaining to the factors to be considered by a court before exercising discretion to set aside proceedings and Ex-parte Judgment, learned counsel for the respondent has cited and referenced inter-alia Mbogo vs Shah (1968) E.A, Mobil Kitale Service Ltd vs Mobil Oil (K) Ltd and Philip Keipto Chemwolo & another vs Kubende [1986] eKLR.

27. Arising from the foregoing, learned counsel for the Respondent has therefore implored the court to find and hold that the appeal beforehand is devoid of merits. To this end, the court has been invited to dismiss the Appeal with costs.

28. Having reviewed the record of appeal, the affidavit evidence and upon taking into account the written submissions filed by and on behalf of the parties [both the Appellant and the Respondent], I come to the conclusion that the determination of the subject appeal turns on two [2] key issues namely; whether the appellant placed before the trial court plausible, cogent and credible explanation underpinning failure to attend court on the scheduled hearing Date or otherwise; and whether the learned trial magistrate improperly or injudiciously exercised her discretion in declining to set aside the impugned Judgment.

29. Before venturing forward to analyse the issue[s] that have been highlighted, it is imperative to observe that the Appeal beforehand is a first appeal from the decision of the court of first instance, namely, the Subordinate Court. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at independent conclusions, taking into account the pleadings filed, evidence on record and the applicable laws. [See the provisions of Section 78 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya].

30. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is, however, called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless the findings of the trial court are informed by extraneous factors or, better still, are perverse to the evidence on record.

31. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, the Court of Appeal for Eastern Africa [EACA] elaborated on the applicable principle[s] and stated thus;

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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..."

32. Likewise, the extent and scope of the Jurisdictional remit of the first appellate court was also elaborated upon in the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the Court of Appeal held thus;

> We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:-
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> " Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in Sottos Shipping versus Sauviet Sohold, the Times, March 16,1983.
>
> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said"

Again, in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:

> " It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses"

33. Without endeavouring to exhaust the case law that elaborates on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the Court of Appeal in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, where the court held as hereunder;

> As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters –vs- Sunday Post Ltd [1958] EA 424. In its own words: -
>
> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...".

34. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the 1st appellate court, I am now disposed to revert to the subject matter and to discern whether the learned trial magistrate correctly appraised, analyzed and evaluated the evidence tendered before her and arrived at the correct findings, taking into account the fact that setting aside of proceedings and Judgment [where appropriate] is predicated on exercise of judicial discretion. [see Mbogo vs Shah (1968) E.A 53 and Philip Keiptoo Chemwolo & another vs Kubende (1986) eKLR.

35. Back to the issues. It is common ground that the appellant and her counsel were duly served with the hearing notice pertaining to the scheduled hearing on 6th February 2024. Furthermore, it is imperative to observe that the respondent's counsel thereafter proceeded to and filed two [2] sets of affidavits denoting service.

36. Other than the foregoing, evidence abound that the appellant's counsel was indeed aware and knowledgeable of the scheduled hearing on the 6th February 2024. To this end, it suffices to reference the submissions made by learned counsel for the appellant and wherein same [learned counsel for the appellant] has contended that same communicated her engagements to the respondent's advocate. Furthermore, it has been contended that learned counsel for the appellant also [sic] sent a WhatsApp message to the magistrate intimating that same shall not be available to attend court and proceed with the hearing on the 6th of February 2024.

37. The totality of the evidence on record and the submissions by the Learned counsel for the appellant demonstrate that the appellant and counsel were knowledgeable of the scheduled date. Same, however, failed to attend court or procure a representative to attend court and apply for an adjournment.

38. Having failed to attend court and or procure a representative to attend court and apply for an adjournment, the appellant herein filed an application seeking to set aside the Ex-parte proceedings and the consequential Judgment. The reasons underpinning the application were stated to include; the appellant's counsel was engaged before the Court of Appeal; the Court of A ppeal is a higher court and thus same takes precedence over the lower court; the hearing notice served had been received [sic]

under protest; that the respondent's advocates had been informed but withheld the information from the court; and the learned trial magistrate had been duly notified vide WhatsApp message.

39. The foregoing averments constitute the reasons and or explanations, which were placed before the learned trial magistrate in pursuit of setting aside of the Ex-parte proceedings and the consequential Judgment. The question that does arise is whether the averments under reference constituted sufficient cause to underpin the exercise of discretion in favour of the appellant.

40. To start with, it is important to underscore that both the appellant and the appellant's counsel had a duty to attend court on the scheduled date and or procure a representative to attend court and apply for an adjournment. It was not enough for learned counsel for the appellant to purport that same received the hearing notice under protest and that such protest would suffice. For good measure, it is common ground that courts of law are not moved to make orders on the basis of letters and or protests. Instructively, an applicant desirous to procure adjournment must appear before a court of law and supply plausible evidence to warrant exercise of discretion in granting an adjournment. Notably, the grant or refusal to grant an adjournment entails exercise of discretion.

41. Secondly, it is important to highlight that the respondent's advocate who is said to have been communicated to was not holding fort for the appellant. In this regard, learned counsel for the appellant cannot be heard to now lay a blame on learned counsel for the respondent. Quite clearly, learned counsel for the respondent owed no professional or moral duty to propagate the appellant's case before the trial court. The converse is true. It is the Appellant's Counsel who owed duty to the Appellant.

42. Thirdly, it is common knowledge that parties and their legal representatives are not obliged to send WhatsApp messages to Judges and J udicial officers intimating to same the desire to obtain adjournments. To my mind, the contention that learned counsel for the appellant sent a WhatsApp message to the trial magistrate signifying that same [learned counsel] would not be available to attend court was not only unorthodox but quite curious.

43. Nevertheless, I hold the humble view that the manner in which the appellant and her counsel handled the proceedings in the subordinate court was devoid of the requisite diligence required of a litigant. To this end, it suffices to reference the provisions of sections 1A, 1B and 1C of the *Civil Procedure Act* Cap 21 Laws of Kenya, which underpins the need for due diligence by the Parties and their respective Counsel.

44. Moreover, it is not lost on me that the appellant herein was called upon to demonstrate good faith and sufficient cause before the trial court. Did the appellant demonstrate such good faith[bona-fides]? Certainly, the evidence obtaining demonstrates that the appellant and counsel were engaged in a game intended to delay, obstruct and or otherwise defeat the expeditious hearing and disposal of the suit.

45. In my humble, albeit considered view, the appellant did not place before the court any plausible, cogent and or credible basis to warrant the exercise of judicial discretion in her favour. Furthermore, there is no gainsaying that the appellant did not establish sufficient cause to warrant the invocation of equitable discretion by the trial court.

46. The obligation on an applicant seeking exercise of judicial discretion in his or her favour to place before the court plausible reasons was expounded by the Court of Appeal in the case of Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) where the Court at paragraphs *12* and *13* stated thus;

> 12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation

must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

47. Before concluding on this issue, it is also instructive to underscore that the appellant did not demonstrate sufficient cause. What constitutes sufficient cause was highlighted in the case of Wachira Karani vs Bildad Wachira (2016) eKLR where the court stated as hereunder;

> The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others[9] discussing what constitutes sufficient cause had this to say:-
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> "It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted, however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" [Emphasis added].
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> In Daphene Parry vs Murray Alexander Carson[10] the court had the following to say:-
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> 'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, ..."[Emphasis added].
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> Examining the provisions relating to setting aside Ex-Parte Judgements, Justice Adoyo of the High Court of Uganda in Transafrica Assurance Co Ltd vs Lincoln Mujuni[11]stated that:-
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> "The rationale for this rule lies largely on the premise that an ex parte judgement is not a judgement on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing"

48. Bearing the foregoing in mind, I come to the conclusion that the appellant did not lay before the trial magistrate any basis to warrant exercise of discretion in her favour. In any event, there is no gainsaying that discretion of the court ought not to be exercised in favour of a person whose antecedent conduct has been less than equitable. In addition, discretion must not be exercised to assist a party who has exhibited conduct intended to obstruct, delay and or defeat the due cause of justice.

49. In the ever-green case of Mbogo vs Shah (1968) E.A page 93 the Court of Appeal for Eastern Africa [EACA] stated as hereunder;

> " I think it is well settled that this Court will not interfere with the exercise of its discretion by 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

because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

It would be wrong for this Court to interfere with the exercise of the trial Judge's discretion merely because this Court's decision have been different.

50. Turning to the second issue, namely; whether the learned trial magistrate improperly or injudiciously exercised her discretion. It is imperative to state that the jurisdiction of the 1st appellate court, while dealing with a matter touching on exercise of discretion is circumscribed. For good measure, the 1st appellate court can only interfere with the exercise of judicial discretion by the lower court where it is shown that the lower court either failed to take into account relevant matters, took into account irrelevant matters, or where the decision arrived at is outrightly unreasonable and contrary to established legal principles.

51. To this end, it is instructive to cite and reference the decision of the Court of Appeal in the case of Patel vs E. A Cargo Handling Services Limited (1974) E.A 75 or 76 letter C and E.

52. For coherence, the court stated thus;

> " There are no limits or restriction on the Judge's discretion
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> except that if he does not vary the judgment he does as on such
>
> terms as may be just.
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> The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the order discretion give to it by the rules"

Secondly, as was stated by Harris J in Shah vs Mbogo (1967) EA 116 at page 123 letter B:

> "This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, in..... , or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the course of justice"

53. Having taken into account the dictum in the foregoing decision, it is now apposite to revert to the ruling of the learned trial magistrate and to discern whether there was any improper, or injudicious exercise of discretion. In this regard, it suffices to reproduce the substratum of the ruling by the learned magistrate.

54. Same stated as hereunder;

> " In this case, the reason advanced by the applicant for non-attendance is unreasonable and inexcusable since the counsel had an option of either appearing virtually or sending a representative. However, the counsel chose not to.
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> The counsel in her averments has also confirmed that she was served with the hearing notice. To this end, I find that the prayer by the applicant to have the proceedings of 6th February 2024, seeking to set aside court proceedings unmeritorious.

55. From the excerpt which has been referenced above, it is evident that the learned trial magistrate appraised the reasons and or explanations that were proferred by the appellant. Thereafter, the court came to the conclusion that the appellant had not tendered any plausible and or credible evidence.

Moreover, the court found and held that the explanations that were being relied upon were devoid of bona-fides.

56. Additionally, it is apparent that the learned trial magistrate considered the conduct of both the appellant and the learned counsel for the appellant vis a vis the established practice, namely; that where a party desires to procure an adjournment, such a party is obligated to attend court and mount the application. In this case, the appellant's counsel adopted and deployed the unorthodox tactic, which is not known to law.

57. It is not lost on me that the appellant and her counsel had a duty to assist the court to discharge its core mandate. The core mandate of the court is to entertain and adjudicate upon legal disputes/proceedings expeditiously, proportionately, justly and in an affordable manner. At any rate, it suffices to reference the provisions of Article 159 (2) (b) of *the Constitution*, 2010; that underpins the constitutional imperative that justice shall not be delayed.

58. Before concluding on this issue, it is instructive to take cognizance of the decision of the Court of Appeal in the case of Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] KECA 284 (KLR), where the court stated as hereunder;

> "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation.

59. The court ventured forward and stated thus;

We also reiterate Lord Griffith's words is in Ketterman v Hansel Properties Ltd (1988) 4 All ER 769, that;

> "Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their heads..."

60. Flowing from the foregoing, I come to the conclusion that the appellant herein has neither established nor demonstrated any improper or injudicious exercise of judicial discretion. For good measure, this court is not imbued with the jurisdiction to interfere with the discretion of the subordinate court at will. Simply put, certain parameters must be established and met. However, in respect of the instant matter, the appellant has failed to meet same.

FINAL DISPOSITION

61. Having reviewed the two [2] thematic issues, which were highlighted in the body of the Judgment, it must have become apparent, nay, evident that the appeal beforehand is devoid of merits. To this end, the appeal courts dismissal.

62. Consequently, and in the premises the final orders that commend 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 23rd September 2024 be and is hereby affirmed.

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

    IV. The Costs in terms of clause (III) shall be agreed upon and in default same to be taxed in the usual manner.

63. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 31ST DAY OF JULY 2025.

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

JUDGE

In the presence of:

Hussein – Court Assistant

Mr. Kahiga Mungai for the Appellant

Ms. Lucy Kaaria for the Respondent