



REPUBLIC OF KENYA



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**Khamisi & 4 others v Khamisi & another (Civil Appeal E012 of 2022)
[2025] KECA 1703 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1703 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E012 OF 2022
P NYAMWEYA, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
OCTOBER 24, 2025**

BETWEEN

**AUSTIN SADALA KHAMISI 1ST APPELLANT
CATHERINE WAITHIRA NDAMBIRI 2ND APPELLANT
NYALE MWANGEMI 3RD APPELLANT
JOSEPHINE MURINGO NDAMBIRI 4TH APPELLANT
MERCY ROSELINE NDAMBIRI 5TH APPELLANT**

AND

**THOMAS JERRY KHAMISI 1ST RESPONDENT
EDWARD MWAMUYE MWADZOYA 2ND RESPONDENT**

(Being an appeal against the Ruling and Order of the Environment and Land Court of Kenya at Malindi (Olola, J.) dated 16th July 2021 in Malindi ELC No. 33 of 2018)

JUDGMENT

1. The appeal before us faults the exercise of discretionary power of the learned Judge of the Environment and Land Court at Malindi (Olola, J.), who declined, by the impugned ruling dated 16th July 2021, to set aside a judgement he had delivered on 29th April 2020 in Malindi ELC No. 33 of 2018.
2. Thomas Jerry Khamisi and Edward Mwamuye Mwadzoya (the respondents) filed the said suit by way of a plaint dated 8th February 2018. They prayed for judgement against Austin Sadala Khamisi, Catherine Waithira Ndambiri, Agnes Nyale Mwangemi, Josephine Muringo Ndambiri and Mercy Roseline Ndambiri (the appellants) jointly and severally for following reliefs:



- a. the court declares as illegal and fraudulent the sub- divisions of land sub-division number MN/III/9105 (Original No. 7748/2) CR 65402, MN/III/9106 (Original No. 7748/2) CR 65403 and MN/III/9107 (Original No. 7748/2) CR 65404 and cancels the said sub-divisions and their subsequent sale and transfer and the register be restored to reflect land sub-division No. MN/III/7748 (Original No. 13331/12) CR. No. 56340 as it was before the infringed sub-divisions;
 - b. cancellation and restoration of the register as indicated in (a) above;
 - c. there be a permanent injunction stopping the appellants either by themselves, their agents or any other persons acting under their names from selling, cultivating, leasing, transferring or in any way dealing with L.R. No. MN/III/7748 (Original No. 1331/12) CR No. 56340;
 - d. a refund of Kshs.365,000 to the 2nd respondent being the purchase price and further compensation at prevailing market rates for the house he had constructed on the suit property;
 - e. a declaration that the purported sale and transfer of the suit property by the 1st appellant to the 2nd, 3rd, 4th and 5th appellants was marred with fraud, irregularity, and hence null and void and the appellants be evicted from the suit land;
 - f. costs of the suit; and
 - g. general damages for trespass.
3. The facts that gave rise to the dispute are as follows. The 1st respondent sued as the legal representative of the estate of Charles Juma Khamis (the deceased). The familial relationship between the 1st respondent and the deceased was that of siblings. The 1st respondent pleaded that their late father bequeathed all his sons land subdivision No. MN/III/7748 (Original No. 1331/12) CR No. 56340 measuring 0.1403 Ha. (the suit property) situate in Mtwapa as the registered owners. In the year 2016, the 1st respondent, together with his other deceased brother, Fredrick Haraka Khamis came across a purported sale agreement dated 1st January 2013 between the 1st appellant and an unnamed seller in which the 1st appellant was buying the suit property for a consideration of Kshs.500,000.
 4. The 1st respondent wrote a letter dated 19th January 2016 to the Registrar of Titles in Mombasa alerting that office that the land was not for sale. Subsequently, the 1st respondent discovered that the 1st appellant had subdivided the suit property into three other subdivisions, namely MN/III/9105, MN/III/9106, and MN/III/9107. The subdivisions were registered in the names of the 2nd, 4th and 5th appellants respectively, and the 3rd appellant had purchased the allegedly fraudulent subdivision from the 2nd appellant.
 5. The 2nd respondent stated that, as a result of the appellants' fraudulent actions, he carried out construction on the suit property for which he incurred expenses. The respondents further pleaded that the sale could not have been possible without grant of letters of administration and a confirmation of grant thereof in respect of the deceased's estate since the joint owners of the suit property were deceased.
 6. The appellants entered appearance and filed a joint Statement of Defence dated 9th April 2018. They denied the allegations that they acquired the sub-divided portions of the suit property through fraud. In particular, the 1st appellant denied receiving a sum of Kshs.365,000 from the 2nd respondent. The 2nd and 3rd appellants contended that they were innocent purchasers for value; that they acquired their respective portions properly and lawfully; and that their title was indefeasible.



7. The suit proceeded for hearing by way of viva voce evidence. The 2nd respondent testified as PW1 and the 1st respondent as PW2. There was no participation by the appellants. We shall later in this judgement examine the circumstances under which the appellants did not participate in the hearing.
8. In a judgment delivered on 29th April 2020, the learned Judge found merit in the respondents' claim and accordingly entered judgement in their favour against the appellants as prayed in the plaint. As regards the 2nd respondent's prayer for compensation, the trial court directed that the 1st appellant refunds the sum of Kshs.365,000 to him; and that the 1st, 2nd and 3rd appellants compensate the 2nd respondent in the sum of Kshs.450,000, being the value of the development carried out on the suit property together with interest at court rates. The respondents were also awarded costs of the suit.
9. Aggrieved by the judgement and decree, the appellants filed a Notice of Motion dated 28th July 2020 before the trial court seeking stay of execution and setting aside of the judgment delivered on 29th April 2020, and that the court allows them to defend the suit on merit.
10. The grounds upon which the application was based were contained in a supporting and supplementary affidavits of the 2nd appellant sworn on 9th April 2019 and 28th October 2020 respectively. It was deposed that the appellants instructed the firm of Mburu Kariuki advocates, who entered appearance on their behalf on 3rd April 2018 and filed a defence on 13th April 2018; on 3rd September 2018, they were informed by their counsel that the court was not sitting, and they would be informed of the next hearing date once it was notified; the 4th and 5th appellants could not travel from the United States of America to the country in order to record their statements; and their counsel was taken ill and had been in India for 4 months seeking treatment, hence he was unable to give his associates instructions to proceed to defend the suit.
11. In response, the 2nd respondent filed a replying affidavit dated 24th September 2020 in which he stated that pre-trial directions were issued on 16th July 2021 in the presence of the appellants' counsel; the directions gave them 21 days within which to file their list of documents and witness statements, but that they failed to do so; the suit was fixed for a further pre-trial conference on 3rd September 2018, but the appellants' counsel did not appear and the matter was fixed for hearing; the respondents' counsel invited the appellants' counsel to fix a hearing date vide a letter dated 6th September 2019 but there was no response; and as a result, the respondent's counsel proceeded to fix a hearing date and served the appellants' counsel with a hearing notice.
12. It was further deposed that the suit came up for hearing on 18th December 2018 when the appellants, being represented by learned counsel Mr. Shujaa, asked for an adjournment so as to comply with Order 11 with respect to pre-trial preparations, which prayer was granted; that an adjournment was granted and the appellants given 30 days within which to comply with Order 11; the suit was then fixed for hearing on 5th March 2019 in the presence of the parties' advocates; on 5th March 2019, the appellants' counsel, Mr. Shujaa, applied for an adjournment on the basis that they had not filed witness statements and a list of documents; as at that juncture, there was no mention of the appellants' counsel indisposition due to illness; the court declined to allow the adjournment sought, and, instead, ordered that the matter proceeds at 10.30 a.m.; the matter was called out for hearing at 11.15 a.m. at which time Mr. Shujaa did not appear in court, yet he had been accorded an opportunity to cross examine and challenge the evidence adduced by the respondents; and that, in the circumstances, it could not be said that Mr. Shujaa did not have instructions to represent the appellants while he had appeared in court twice on their behalf.
13. In their supplementary affidavit, the appellants stated that their former counsel was invited to fix the matter for hearing three days to the hearing date; for this reason, it was impossible to avail a clerk to



- travel to Malindi for this purpose; they wished to participate in the proceedings but there was lack of communication due to sickness on the part of their former advocate; and that the mistake of their advocate should not be visited upon them.
14. Vide the impugned ruling, the learned Judge held that at all times when the matter was in court, there was appearance by counsel holding brief for the appellants' previous advocate; when the matter came up for hearing on 13th September 2018, learned counsel Mr. Shujaa held brief for the appellant's counsel on which date he asked for an adjournment; and that the matter was then fixed for hearing on 5th March 2019 when Mr. Shujaa was in court, but he failed to appear in court after it was scheduled for hearing at 10.30 a.m.
 15. The trial court further held that, apart from writing a letter dated 13th October 2020 stating that he was unwell, the appellants' previous counsel did not deny that he instructed the advocates who came to court to hold his brief; the fact that the appellants filed a defence was an indication that they were aware of the existence of the suit; their failure to testify was out of lack of diligence; and that their conduct was meant to delay the cause of justice. Ultimately, the appellants' Motion was dismissed with costs.
 16. It is this ruling that gave rise to the instant appeal. We respectively think that the appeal hangs on a very thin legal thread, the issue for determination being narrow as to not attract a copious 15 grounds of appeal as outlined in the Memorandum of Appeal dated 25th February 2022. It is for this reason that we have condensed the grounds of appeal into only one ground, being that the learned Judge erred in both law and in fact in failing to exercise his discretion judiciously as enshrined under Article 159 (2) (d) of *the Constitution* to set aside the trial court's judgment delivered on 29th April 2020 as prayed in the appellants' application dated 28th July 2020, which he dismissed.
 17. We heard this appeal on 8th April 2025. Learned counsel Ms. Oloo holding brief for Mr. Kilonzo appeared for the appellants while learned counsel Mr. Nyongesa appeared for the respondents. Both counsel relied on their respective parties' written submissions, which they briefly highlighted. Those of the appellants are dated 24th January 2024 while those of the respondents are dated 17th January 2025.
 18. The appellants submitted that their failure to participate in the hearing of the suit was occasioned by circumstances beyond their control, being the indisposition of their advocate who was in India for treatment the whole year in 2010; the COVID-19 pandemic; and failure to be served with the notice of delivery of judgement. They relied on this Court's decision of *Savings & Loan Kenya Limited vs. Onyancha Bwomote* (2014) eKLR for the proposition that a party should not be condemned for the mistake of his counsel; and the High Court case of *Wachira Karani vs. Bildad Wachira* (2016) eKLR, submitting that, in exercising its discretion to set aside a judgment, a court should be guided by the principle of doing justice and whether the party approaching the court has demonstrated sufficient cause to warrant the exercise of the court's discretion.
 19. The appellants further contended that the failure of the trial court to set aside its judgment denied them the right to a fair hearing and access to justice as envisaged under Articles 25 (c), 47 and 50 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*. To buttress this submission, reference was made to a ruling by the High Court in *Multiscope Consulting Engineers vs. University of Nairobi & Another* (2014) eKLR for the proposition that the right to a fair hearing is the cornerstone to the rule of law; and this Court's case of *Shah vs. Mbogo & Another* (1967) EA 116 (HCK), for the submission that 'the discretion of setting aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused.'



20. We were thus urged to allow the appeal.
21. In response, the respondents submitted that, before the appellants' counsel fell ill in November 2018, the matter had already been adjourned and the appellants had been given sufficient time to comply with Order 11 of the Civil Procedure Rules; there was no action taken on the suit from 9th April 2019 to 29th April 2020 when judgment was delivered; in a suit, justice cuts both ways, for the plaintiff and the defendant, and that the court cannot entertain a party who is not interested in prosecuting its case at the expense of another who is keen to do so. For this submission, reliance was placed on this Court's cases of *Tabuche vs. Tinga & 2 Others* (2024) KECA 551 (KLR); and *Group Company Limited vs. Malewa Bush Ventures Limited & Another* (2024) KECA 1645 (KLR).
22. The respondents also contended that the trial court had severally indulged the appellants; a further delay on hearing the matter would negate the court's mandate to ensure expeditious disposal of cases; for this reason, it is not true that the appellants were denied a right to a fair hearing under Articles 47 and 50 of *the Constitution*; courts are not to interpret Article 159(2) (d) of *the Constitution* in a blanket manner; and that Article 159(2) (d) was never intended to oust the obligations on litigants to comply with procedural imperatives. We were referred to this Court's decisions in *Mrao Limited vs. First American Bank of Kenya & 2 Others* (2003) eKLR; and *James Kanyiita Nderitu & Another vs. Marlos Philota Ghikas & Another* (2016) eKLR where the principles to be considered in setting aside a regular judgement were discussed; and *Ferruz Omar Mahendan & 4 Others vs. Ahmed Mohammed Honey* (2016) eKLR where it was held that '... a party whose conduct discloses an intention to obstruct or delay court proceedings and who takes court discretions as to disposal of an appeal in a casual manner cannot expect the court to exercise its discretion in his favour.'
23. The respondents urged us to find that the appellants floundered on the chances given to them to prosecute the suit and, as such, the appeal should be dismissed with costs.
24. We have considered the record of appeal, the respective rival submissions and the law. This being a first appeal on an interlocutory ruling where no evidence was tendered, our mandate is to re-assess, re-evaluate and re-analyze the record of appeal so as to reach an independent finding as we are mandated to under rule 31(1) (a) of the Court of Appeal Rules, 2022.
25. In certain instances, such as this one where the discretion of the trial court is being challenged, Madan, JA. (as he then was) held as follows in *United India Insurance Co. Ltd. vs. held*:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
26. It is common ground that the appellants, in their application subject of the impugned ruling, sought to set aside the judgement delivered by the trial Court on 29th April 2020. According to the appellants, the dismissal of the application violated their right to be heard in accordance with Articles 25(c), 47 and 50 of *the Constitution*. In view thereof, the only issue that falls for our determination is whether the appellants gave a satisfactory explanation as to their failure to defend the suit.



27. The decision of a court on whether or not to set aside a judgement is discretionary. Order 12 rule 7 of the Civil Procedure Rules, 2010 provides that:

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

28. The Supreme Court in *Kibira vs. Independent Electoral & Boundaries Commission & 2 others* (2019) KESC 62 (KLR) gives good guidance on what an appellate court should consider when determining an appeal which is based on the exercise of discretion. It held thus:

“We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v. Bashir* (2010) NZSC 112; (2011) 2 IVZLR 1 (*Kacem*) where it was held: -

‘In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter:

1. error of law or principle;
2. taking account of irrelevant considerations;
3. failing to take account of a relevant consideration; or
4. the decision is plainly wrong.’”

29. In *Yooshin Engineering Corporation vs. Aia Architects Limited* (2023) KECA 872 (KLR), this Court rendered itself as follows:

“However, even where the judgement is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgement, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant.”

30. The trial court record speaks for itself. On 16th July 2018, Ms. Emukule appearing for the appellants for pre-trial directions asked for 21 days within which to comply with Order 11 of the Civil Procedure Rules and, by consent, the next mention date for the same purpose was fixed for 3rd September 2018. When there was no appearance on the next mention date, the matter was certified ready for hearing and the parties were advised to fix a hearing date in the registry.

31. The appellants do not contend that they were not invited to fix a hearing date. Their grievance is that the invitation letter was sent 3 days to the due date, yet there was no clerk available to travel to Malindi to attend to the fixing of the hearing date. That notwithstanding, the matter was fixed for hearing on 18th December 2018, and we can authoritatively deduce that the appellants were certainly served with a hearing notice since Mr. Shujaa appeared in court on their behalf on that day.

32. The hearing did not proceed as anticipated since Mr. Shujaa prayed for more time to comply with directions to file witness statements and list of documents. The request was granted and the



appellants given 30 days within which to comply, and the hearing was set down for 5th March 2019. A computation of the time between 18th December 2019 to 5th March 2019 is more than 30 days. Once again, on 5th March 2019, Mr. Shujaa appeared for the appellants and asked for a further adjournment on the basis that the appellants, who were to file the witness statements, were out of the country. It is at this juncture that the adjournment was declined and the matter fixed for hearing at 10.30 am. It was called out at 11.15 a.m. when Mr. Shujaa failed to show up. Ultimately, the hearing proceeded.

33. From the above chronology of events, it is clear that none of the reasons advanced by the appellants as to their failure to comply with Order 11 of the Civil Procedure Rules and participate in the hearing holds water, or is plausible for that matter. Firstly, we appreciate the contents of the letter dated 13th October 2020 in which Mr. Mburu explained his ailment and the medical attention sought in India. However, even in his absence, there was a properly instructed counsel who always attended Court. There is no denial on Mr. Mburu's part that he did not instruct the advocates who appeared on behalf of the appellants. Clearly, all through, Mr. Mburu instructed a counsel to appear on his behalf, hence there is no iota of an oversight on his part for failure to do what was professionally required of him to do. Our view then is that this is not a fit and proper case in which counsel may argue that mistake of counsel should not be visited upon an innocent litigant.
34. Secondly, the contention that the appellants were not available to record witness statements because they were not in the country is not plausible either, and illogical to say the least. In today's world of advanced technology, there are several means and platforms through which persons living abroad communicate with other persons back home. This also extends to any business communication such as in the instant scenario of counsel instructed by clients who live outside the country.
35. Flowing from the above, nothing stopped the 4th and 5th appellants from having their witness statements recorded, for instance, through 'video calls' or in a telephone conversation, or even other platforms like 'google meet', which are not, in any way, recent discoveries.
36. We take to mind, though, that as at the time when the matter was being heard, the then Chief Justice had not published the Practice Directions on Electronic Case Management, 2020 under Gazette No. 2357, which made elaborate provisions on, among others, electronic signatures. This notwithstanding, there was the option of sending the signed witness statements via international courier services which, by all means, was, and still is, an affordable way of delivery of parcels than flying to the country.
37. That aside, the 2nd appellant deposed that it is the 4th and 5th appellants who could not secure their travel to Kenya. The question which then begs an answer is why the 1st, 2nd and 3rd appellants did not find it necessary to file their own statements and acquire the necessary authority to represent the 4th and 5th appellants in the proceedings, in the same manner that the 2nd appellant filed the application on behalf of the rest of the appellants. There is no remote suggestion that the 1st, 2nd and 3rd appellants were not in the country. Thus, the explanation that there was impediment in filing the witness statements by the 4th and 5th appellants on account of being unavailable in the country is a red herring and most unconvincing.
38. A litigant who ignores court processes and orders cannot later cry wolf whereas he/she knew the consequences of not complying with the orders. Much less when the court has previously indulged him/her severally for non-compliance. In this instance, the appellants were disingenuous, and their actions pointed to persons who were not willing to defend the suit. Their indolence was undoubtedly intended to delay the course of justice. It is also a truism that justice must not only be done, but that it must also be seen to be done. The appellants wilfully defaulted in compliance with court orders and failed to show good cause why the regular judgement of 29th April 2020 should be set aside. They can only blame themselves for their indolence.



39. As we come to the end of our discourse, we can only but agree with the holding by this Court in Shah vs. Mbogo & Another (supra) that:

“...the discretion of setting aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused”.

40. In the end, we find that the appeal lacks merit. We hereby uphold the ruling of the learned Olola, J. in Malindi ELC No. 33 of 2018 delivered on 16th July 2021. Ultimately, the appeal is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF OCTOBER, 2025.

P. NYAMWEYA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

