

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. E056 OF 2023

FIDELIS WANJA MATHENGE 1ST APPELLANT
RODGERS NDUNGU KIMANI (Suing as Legal Representative of the
Estate of MARY WANJIKU MATHENGE..... 2ND
APPELLANT

=VERSUS=

FRANCIS KANYORI MUNIO 1ST
RESPONDENT
NYAKINYUA INVESTMENT LIMITED 2ND
RESPONDENT
THE LAND REGISTRAR RUIRU 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH
RESPONDENT

(Being an appeal from the ruling of Honourable C. K Kisiangani, Principal Magistrate, delivered on 12th October 2023 in Ruiru CMELC Case No. E065 of 2022).

JUDGMENT

1. This appeal arises from the ruling of Honourable C.K Kisiangani, Principal Magistrate, delivered on 12th October 2023 in Ruiru CMELC Case No. E065 of 2022. The said ruling was in respect of an application erroneously dated 13th April 2022 filed by the 1st Appellant (the 1st Plaintiff in the trial court) seeking *inter alia* to set aside and

vacate the ex parte orders given on 30th March 2023. The 1st Appellant also sought reinstatement of the suit.

2. The application was brought pursuant to Rule 63 and 73 of the Probate and Administration Rules, Section 1A, 1B and 3A of the Civil Procedure Act and

Order 45 Rule 1 and Order 51 of the Civil Procedure Rules, 2010.

3. I shall give a brief background of the case. The Appellants instituted a suit in the lower court against the Respondents claiming that they were the *bonafide* owners of Land Parcel Number Ruiru/Ruiru East Block 2/1407 having purchased it from the 2nd Respondent sometime in 1991. They contended that in 2006, they visited the 2nd Respondent's office to collect the title to the suit property; however, they were issued with an unsigned copy of the title, and upon inquiry, they were informed that the 3rd Respondent declined to sign the title, given that there already existed a title issued in the name of the 1st Respondent. Their claim was that the 1st Respondent had acquired the title fraudulently.

4. The 1st Respondent entered appearance and filed a Statement of Defence dated 29th August 2022 in which he denied the Appellants' claim. He contended that he was the legitimate owner of the suit property having purchased it from one Josephine Wangui Kanyori for valuable consideration without any notice of defect in title. He further contended that he had been in quiet possession of the suit property

since he acquired it in 2006 and that he subdivided it and even sold some portions to third parties.

5. The 2nd Respondent neither entered an appearance nor filed a Defence. The 3rd and 4th Respondents filed a Statement of Defence dated 15th August 2022. They denied the allegations of fraud levelled against the 3rd Respondent by the Appellants. They added that any transfers registered by the 3rd Respondent were based on the documentation presented to them, which was believed to be authentic.
6. By consent of the parties, the suit was scheduled for hearing on 30th March 2023 at 9.00 a.m. On the said date, neither of the parties nor their advocates attended court, and as a result, the suit was dismissed for want of prosecution. The 1st Appellant subsequently filed an application dated 13th April 2023 seeking to set aside the orders of the court given on 30th March 2023. She also sought reinstatement of the suit. She contended that her advocate one Mr. Njuguna, was unable to attend court on the hearing date because of the insecurity in Nairobi caused by demonstrations that took place on 30th March 2023. She added that Mr. Njuguna had never requested an adjournment of the matter before and that the failure by him to attend the hearing of the suit was due to circumstances beyond his control.

7. The 1st Respondent opposed the application through Grounds of Opposition dated 29th May 2023. Counsel for the 1st Respondent submitted that the Appellant's application was frivolous, vexatious, and intended merely to harass the 1st Respondent. He argued that the Appellants had failed to show where they were on 30th March 2023 when the matter came up for hearing and had not provided credible evidence of the alleged widespread fear or insecurity.
8. Counsel noted that, even if insecurity existed in Nairobi, the Appellants had previously stated that they resided in Thika and thus had no valid reason for failing to attend court. He maintained that since the suit had been dismissed for want of prosecution, the court could only reinstate it upon the presentation of reasonable and cogent evidence explaining the non-attendance, which had not been adduced. He therefore urged the court to find the application devoid of merit and to dismiss it with costs to the 1st Respondent in the interest of justice and equity.
9. The Appellants being aggrieved by the said ruling, filed the instant appeal citing ten Grounds of Appeal. They prayed that the appeal be allowed and the Ruling of the Principal Magistrate made on 12th October 2023 be set aside. They also sought costs of the Appeal.
10. The appeal was canvassed by way of written submissions. The Appellants filed Written Submissions and Further Submissions dated

16th January 2025 and 1st April 2025, respectively. The 1st Respondent filed Submissions dated 4th March 2025.

Appellants' Submissions

11. Counsel for the Appellants identified the following two issues for determination: (i) Whether the trial court erred in fact and in law in declining to set aside the dismissal order dated 30th March 2023; and (ii) Who should bear cost of the appeal.
12. Counsel for the Appellants submitted that the trial court erred in declining to set aside the dismissal order of 30th March 2023, arguing that there existed sound and sufficient legal grounds to warrant reinstatement of the suit. She cited **Tabro Transporters Limited vs Absolom Dova Lumbasi [2012] eKLR** and **Mukuma vs Abuoga [1988] KLR 645**, contending that the Appellant had demonstrated "sufficient cause" as defined in those authorities, namely, that substantial loss would result unless the orders were made and that the application was filed without unreasonable delay. Counsel maintained that the Appellant met this threshold, as she stood to suffer grave prejudice if denied a chance to prosecute the suit on its merits.
13. She explained that the Appellant's non-attendance on the hearing date was not deliberate but arose from circumstances beyond counsel's control namely, the violent civil unrest that occurred in Nairobi on the material day, which prevented timely appearance in

court. Relying on the principle that mistakes of counsel should not be visited upon a litigant, she submitted that the omission was an excusable human error that ought not to close the doors of justice. She emphasized that the Appellant had at all times remained a vigilant litigant, and that reinstating the suit would not prejudice the Respondents, invoking the equitable maxim that “equity aids the vigilant, not the indolent.”

14. Counsel further argued that the court possessed wide discretionary powers under Section 3A of the Civil Procedure Act to make orders necessary for the ends of justice and to prevent abuse of process. She cited authorities including **Esther Wamaitha Njihia & 2 Others v Safaricom Limited (2014) eKLR**, **Patel vs E.A. Cargo Handling Services Ltd [1974] E.A. 75**, and **Wachira Karani vs Bildad Wachira [2016] eKLR** to underscore that judicial discretion should be exercised to remedy injustice or hardship caused by accident, inadvertence, or excusable mistake. According to her, the lower court misdirected itself by adopting a rigid approach rather than exercising its discretion to serve substantive justice.
15. Finally, counsel relied on **Intercessory Deliverance & Counselling Ministry vs Tack Holdings Limited & Nairobi City Council [2021] eKLR**, submitting that the trial court’s dismissal ignored the Appellant’s prior diligence in prosecuting the matter. She maintained that the failure to attend court was neither negligent nor contemptuous but purely accidental. In conclusion, she urged the

appellate court to allow the appeal, set aside the ruling of the subordinate court, allow the application dated 13th April 2024, and award costs to the Appellant both in the appeal and the application.

16. In the Further Written Submissions, counsel for the Appellants submitted that the 1st Respondent's opposition to the appeal was purely grounded on technicalities, which ought not to override the duty of the court to administer substantive justice. She argued that the omission to attach a certified order or decree in the record of appeal was a procedural defect curable under Order 42 Rule 2 of the Civil Procedure Rules. Counsel emphasized that Article 159(2)(d) of the Constitution requires courts to dispense justice without undue regard to procedural technicalities, adding that adherence to rigid formalities should not defeat a party's right to a fair hearing as guaranteed under Article 50 of the Constitution.
18. She maintained that the Record of Appeal contained duly certified typed proceedings, a ruling, and an extracted, sealed, and signed order from the Ruiru Law Courts. Counsel noted that the 1st Respondent had neither disputed the authenticity of the order nor produced any contrary evidence. In her view, the omission alleged by the Respondent did not render the record incompetent. She cited **South Nyanza Sugar Co. Ltd vs Daniel Obara Nyandoro [2010] eKLR**, where the court held that striking out an appeal for failure to attach a decree after admission and directions would amount to a miscarriage of justice. Similarly, she relied on **Abdirahaman Abdi**

vs Safi Petroleum Products Ltd & 6 Others [2011] eKLR, where the Court of Appeal discouraged procedural rigidity that undermines the overriding objective of the Civil Procedure Act.

19. Counsel further submitted that the issue of dates raised by the 1st Respondent was a mere typographical error, as the ruling appealed from was delivered on 12th April 2023, while the extracted order bore the date 12th October 2023. She argued that this discrepancy was inconsequential and could not invalidate the appeal. She reiterated that under the Civil Procedure Rules 2010, this Honourable Court enjoys wide discretion to make such orders as may be necessary to achieve substantive justice, rather than to stifle it through technical objections.
20. In conclusion, counsel noted that when the subordinate court at Ruiru dismissed the suit, none of the parties was present. She therefore urged the appellate court to disregard the 1st Respondent's submissions, exercise its discretion in favour of the Appellant, reinstate the dismissed suit, and direct that it be heard and determined on its merits.

1st Respondent's Submissions

21. Counsel for the 1st Respondent submitted that the appeal was unmerited, fatally defective, and should be dismissed with costs. He identified three issues for determination: (i) whether the appeal was defective for want of a certified copy of the order appealed from; (ii)

whether it had merit, and (iii) who should bear the costs. On the first issue, he referred to Order 42 Rules 2 and 13(4)(f) of the Civil Procedure Rules, 2010, which require an extracted and certified order to form part of the Record of Appeal. He relied on **Mary Rono vs Ben Gathogo & Another [2019] eKLR** and **Jackton Wiyema Imbwaka vs Jamii Bora Bank Ltd & Another [2020] eKLR**, where the courts struck out appeals lacking certified orders, arguing that such omissions rendered appeals incurably defective. He therefore urged the court to find that the present appeal was bad in law and a proper candidate for dismissal.

22. On whether the appeal was merited, counsel argued that the trial court had not erred in dismissing the Appellant's application for review and reinstatement of the suit. He contended that the application was fatally defective, as the Notice of Motion was dated a year apart from the supporting affidavit and predated the order it sought to challenge. Further, the Appellant failed to attach the formal order sought to be reviewed, contrary to the principles outlined in **Suleiman Murunga vs Nilestar Holdings Ltd & Another [2015] eKLR**. He added that the Appellant had not shown sufficient cause to justify reinstatement, citing **Julius Kibiwott Tuwei vs Reuben Argut & 7 Others [2022] eKLR**, where the court emphasized that sufficient cause must be free of negligence, inaction, or lack of bona fides.

23. Counsel maintained that the Appellants and their advocate had been negligent and inactive, having offered only hearsay explanations for their absence and failing to provide an affidavit from counsel explaining the alleged difficulties in attending court. He further noted that the Appellant's review application was misconceived, as it invoked the wrong legal provisions seeking to set aside orders under Order 17 Rule 2 instead of the appropriate Order 12 Rule 7, which governs dismissal for non-attendance. Citing **Savings and Loan Ltd vs Susan Wanjiru Muritu [HCCC No. 397 of 2002]**, he submitted that a case belongs to a litigant, not the advocate, and that litigants must follow up their matters diligently.
24. On costs, counsel urged the court to dismiss the appeal with costs to the 1st Respondent, relying on **Mary Rono vs Ben Gathogo & Another [2019] eKLR** and **Julius Kibiwott Tuwei vs Reuben Argut & 7 Others (2022) eKLR**, both of which awarded costs to successful respondents in similar circumstances. In conclusion, he maintained that the appeal was incompetent, lacked merit, and ought to be dismissed in its entirety with costs to the 1st Respondent.

ANALYSIS AND DETERMINATION

25. I have considered the Memorandum of Appeal, Record of Appeal and the rival submissions. The singular issue for determination is whether the ruling of the trial magistrate ought to be set aside.

26. This is an appeal against a discretionary order. The principles upon which an appellate court may interfere with the exercise of discretion by a trial court have been stated in many decisions. In the case of ***Mbogo & Another vs Shah [1968] EA***, Sir Clement de Lestang, V.P. at page 94 stated thus,

“I think it is well settled that a court will not interfere with the exercise of its discretion of 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 it failed to take into consideration which it should have taken into consideration and in so doing arrived at the wrong conclusion.”

27. Even though the court has the discretion to set aside an ex parte judgment or order, the discretion is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
28. In **Patel vs. East Africa Cargo Services Ltd (1974) EA 75** this principle was reiterated thus:

“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 wide discretion given to it by the rules ... where it is a regular judgment as is the case here the court will not usually set aside the judgment

unless it is satisfied that there is a defence on the merits."

29. The record shows that the Appellants' suit was dismissed for non-attendance on 30th March 2023 when neither the parties nor their advocates appeared for hearing. The Appellants later filed an application dated 13th April 2023 seeking to set aside the dismissal and to have the matter reinstated, explaining that their counsel was unable to attend court due to insecurity and transport disruptions occasioned by demonstrations in Nairobi on that date.
30. The learned magistrate, having evaluated the application and the response, declined to reinstate the suit, finding that the Appellants had not demonstrated sufficient cause to warrant the exercise of the court's discretion in their favour. The Appellants now contend that the trial court erred in failing to appreciate that the failure to attend court was excusable and beyond their control, and that the omission of their advocate ought not to have been visited upon them.
31. The law governing reinstatement of suits dismissed for non-attendance is found under Order 12 Rule 7 of the Civil Procedure Rules, which grants the court discretion to set aside or vary such dismissal "upon such terms as may be just." The test is whether the applicant has shown sufficient cause for non-attendance. As held in **Philip Chemwolo & Another vs Augustine Kubende [1982-88] KAR 103** and **Shah vs Mbogo [1967] EA 116**, the discretion to set aside is meant to avoid injustice or hardship arising from

inadvertence, accident, or excusable mistake, and not to aid deliberate indolence.

32. In the instant case, the explanation advanced was that counsel for the Appellants could not access the court owing to violent demonstrations that made movement in and around Nairobi unsafe. This court takes judicial notice that on 30th March 2023, there were indeed widespread demonstrations in various parts of Nairobi and Kiambu Counties, which disrupted transport and court attendance in several stations. It would therefore not be far-fetched that an advocate scheduled to attend court in Ruiru could have been reasonably impeded by those events.
33. The learned magistrate, however, appears to have discounted that explanation, observing that the Appellants resided in Thika and had not provided evidence of insecurity. With respect, the trial court seems to have adopted a rigid approach rather than considering the broader context of the day's unrest, which was a matter of public notoriety. Courts are enjoined by Article 159(2)(d) of the Constitution to administer justice without undue regard to procedural technicalities and to uphold substantive justice over form.
34. The Respondent argued that the Appellants had been indolent and that the application was defective. While there were indeed procedural imperfections such as the misdating of the Notice of Motion and possible mis-citation of legal provisions these were not

fatal to the substance of the application. As stated by the Court of Appeal in **Abdirahman Abdi vs Safi Petroleum Products Ltd & 6 Others [2011] eKLR**, procedural lapses should not bar a litigant from accessing substantive justice where no prejudice is occasioned to the opposite party.

35. On the question of counsel's mistake, the law is also clear that a litigant should not suffer irreparable loss for the inadvertence or honest mistake of counsel, unless it is shown that the litigant was personally indolent or acted in bad faith. In **Belinda Murai & 9 Others vs Amos Wainaina [1979] eKLR**, Madan JA stated that a mistake is a mistake, and the court should not turn away a litigant because of it if justice can still be done without injustice to the other side.
36. There is no indication that the Appellants deliberately absented themselves or intended to delay the matter. They moved the court within two weeks to seek reinstatement. This demonstrates promptness and good faith. The Respondents have not shown what prejudice they would suffer if the matter were heard on the merits.
37. The duty of the court is to balance competing interests on the one hand, the right of the Appellants to be heard, and on the other, the right of the Respondents to expeditious disposal of litigation. In **Patel vs E.A. Cargo Handling Services Ltd [1974] EA 75**, the court emphasized that the main concern is to do justice to the

parties, and any limitation on the court's discretion should not be used to fetter that objective.

38. Upon careful evaluation, this court is satisfied that the Appellants established sufficient cause to justify reinstatement of the suit. The explanation offered was reasonable and supported by circumstances that were beyond their control. The trial magistrate, in failing to take judicial notice of those circumstances and in focusing on procedural lapses, misdirected herself and consequently arrived at an erroneous conclusion.
39. In the result, this court finds that the appeal has merit. The ruling and order of the Principal Magistrate delivered on 12th October 2023 in Ruiru CMELC Case No. E065 of 2022 are hereby set aside. The Appellants' application dated 13th April 2023 is allowed, and the suit in the subordinate court is reinstated for hearing on the merits before any magistrate other than Honourable C.K. Kisiangani, Principal Magistrate.
40. Given that the lapse leading to dismissal was partly attributable to both counsel and circumstances, I direct that each party shall bear their own costs of this appeal and of the application in the lower court.

Dated, signed and delivered virtually at Thika this 28th day of October 2025.

.....
J. M. ONYANGO
JUDGE

In the presence of:

1. Mr Lumwachi for the Appellant
2. Mr Kimani for the 2nd Respondent

Court Assistant: Hinga

ORIGINAL