



**Munene & 4 others v Mathenge (Suing as the Next Friend of Gerald Muthigani Ngari) (Environment and Land Appeal 47 of 2023) [2025] KEELC 7888 (KLR) (12 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7888 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL 47 OF 2023**

**JM MUTUNGI, J  
NOVEMBER 12, 2025**

**BETWEEN**

**JOSEPH MUNENE ..... 1<sup>ST</sup> APPELLANT  
JENNIFER NJERI MATHENGE ..... 2<sup>ND</sup> APPELLANT  
EDWARD MURIMI ..... 3<sup>RD</sup> APPELLANT  
GOSPEL REVIVAL CENTRE-KIBURU ..... 4<sup>TH</sup> APPELLANT  
ERICK BUNDI KIRAGU ..... 5<sup>TH</sup> APPELLANT**

**AND**

**TERESIAH WANGECI MATHENGE (SUING AS THE NEXT FRIEND OF GERALD MUTHIGANI NGARI) ..... RESPONDENT**

*(Being an Appeal against the Ruling of Hon. D. M. Ileri, PM in Baricho PM ELC No. 25 of 2019 on 24th November 2023)*

**JUDGMENT**

1. This Appeal is against the Ruling delivered by Hon. D.M. Ileri PM in Baricho PM ELC No. 25 of 2019 on 24<sup>th</sup> November, 2023 dismissing the Appellants application dated 30<sup>th</sup> August, 2023.
2. By the application dated 30<sup>th</sup> August, 2023 the Appellants who were the Defendants in the suit had inter alia sought orders:-
  - i. That the Court be pleased to set aside the exparte Judgment delivered on 11<sup>th</sup> August, 2023.
  - ii. That the Court be pleased to grant leave to the Defendants to defend themselves against the suit.



- iii. In the alternative, the Court be pleased to stay the execution of the Judgment entered on 11<sup>th</sup> August 2023 until the determination of the application pending before Kerugoya High Court Succession Cause No. 123 of 2023.
3. The application was supported on the grounds on the face of it and a Supporting Affidavit sworn by the 2<sup>nd</sup> Appellant. The 2<sup>nd</sup> Appellant's explanation for non attendance when the suit was scheduled for hearing was that there was miscommunication owing to strained relationship with their previous Advocate on record. The Respondent opposed the Appellants application vide a Replying Affidavit sworn by the Respondent dated 28<sup>th</sup> September 2023. The Respondent asserted the Appellants had properly been served and that the Appellants previous Advocates Magee LLP had filed their application to cease to act for the Appellants way back in November 2022 and contended the Appellants had no good or valid reason for failure to attend Court for the hearing of the suit.
4. The Learned Trial Magistrate heard the application by way of written submissions. The Learned Magistrate in the impugned Ruling found that the Appellants had been served and had proper notice of the hearing but they ignored to turn up for the hearing of the case. He stated the Appellants were afforded the opportunity to attend Court to present their defence but they apparently waived that right and the matter procedurally proceeded for hearing in the Appellants absence and was consequently determined. The Learned Magistrate further observed that the succession cause No. 123 of 2023 that was pending before the High Court had not been shown to have any relationship with the suit before the Court to warrant a stay of proceedings of the suit. The Learned Magistrate thus held there was no basis demonstrated to warrant the exercise of discretion by the Court in favour of the Applicants and dismissed the Applicants application.
5. The Appellants being dissatisfied and aggrieved by the Learned Magistrate's Ruling have appealed to this Court against the Ruling and has by the Memorandum of Appeal dated 22<sup>nd</sup> December, 2023 set out 5 grounds of Appeal as follows:-
  1. That the Learned Magistrate erred in law and fact in dismissing the Defendant's application with costs yet the Appellants were never given a chance to be heard when the Judgment dated 11<sup>th</sup> August 2023 was made therefore the Judgment was exparte.
  2. That the Learned Magistrate failed to take into consideration that the Judgment made on 11<sup>th</sup> August 2023 was an exparte Judgment and land being emotive it would be better to give each party a chance to express themselves having lived on the land for more than 50 years and an eviction order being issued without the Appellant's input was against substantive justice.
  3. That the Learned Magistrate erred in law and in fact in failing to appreciate that the Appellants were never served with a hearing notice and if the Respondent served the Advocate then on record then he did not communicate to the client and therefore his mistake to inform the client should not be visited upon them and have them evicted from the suit property Mwerua/Kagioini/881 without being given a chance to be heard.
  4. That the Learned Magistrate erred in law and fact in failing to fairly evaluate the evidence tendered before him.
6. The Appellants thus prayed the Appeal be allowed, the Ruling dated 24<sup>th</sup> November 2023 be set aside and the Appellants be permitted to defend the suit before the Magistrate's Court.
7. The Court directed that the Appeal be argued by way of written submissions. Though the parties were to have filed their submissions by 17<sup>th</sup> February 2025, the Appellants had not filed their submissions. The Respondent had filed her submissions dated 28<sup>th</sup> January 2025. The Appellants were allowed a



further 21 days to file their submissions but yet again on 19<sup>th</sup> March 2025 when the matter was fixed for mention to confirm the filing of the submissions and to take a Judgment date, the Appellants had not filed their submissions. The Court yet again granted the Appellants a further 30 days to file their submissions but on 20<sup>th</sup> May, 2025 when the matter was further mentioned the Appellants had not filed any submissions and the Court reserved Judgment on the Appeal. At the time of preparation of this Judgment no submissions had been filed by the Appellants.

7. This being a first Appeal the Court is under a duty to re-evaluate the evidence and material before the Lower Court to satisfy itself whether the decision reached by the Trial Court was justified. The Court is not bound by the findings of the trial Court and can make its own findings and concludes upon re-evaluation and consideration of the evidence. See the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Another* (1968) EA 123.

9. In the instant appeal the singular issue for determination is whether the Learned Magistrate in declining to set aside the *ex parte* Judgment exercised his discretion fairly and judiciously. The facts giving rise to the impugned Ruling are that the Appellants and/or their Advocate failed to attend Court for hearing of the suit on 17<sup>th</sup> July 2023. The hearing date was fixed on 17<sup>th</sup> March 2023 in the presence of Counsel for the Respondent (Plaintiff) and the counsel for the second Appellant (2<sup>nd</sup> Defendant). The trial Court directed the other Appellant (Defendant) to be served with a hearing notice. On the hearing date only the Respondent and her Counsel attended Court. The Counsel notified the Court the Appellants had been served. The trial Court before allowing the hearing to proceed noted:-

“I have perused the Affidavit of Service dated 10<sup>th</sup> July 2023 and I am satisfied the defendants are duly served. Matter to proceed as scheduled.”

10. The Respondent in her submissions in opposition to the Appeal submitted that the Appellants had not given any cogent reason as to why they failed to attend court and were therefore not entitled to exercise of judicial discretion in their favor. The explanation given by the Appellants for non attendance on the hearing date was alleged breakdown in relationship with their previous Advocate. It is not clear how the breakdown in the relationship with the previous Advocate impacted on the Court attendance since as per the record the hearing notice was served directly on the Appellants. The least the appellants could do was to attend Court and if need be explain to the Court that they needed to instruct new Counsel at any rate the previous Advocate Magee Law LLP as per the record were on 3<sup>rd</sup> February 2023 allowed to cease to represent the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent. The trial Court was justified to proceed with the hearing as there was proof of service.

11. As concerns the Appellants application to set aside the Judgment delivered following the hearing, the learned trial Magistrate was equally justified to decline it, as the Appellants had failed to give any viable explanation for their non attendance during the hearing. In the instant case the respondent obtained a valid and regular Judgment. The Appellants as illustrated were duly served with a hearing notice and unless there is a justifiable reason why it should be set aside, the Respondent is entitled to enjoy the fruits of his Judgment. In the case of *SHAH – vs – MBOGO* [1967] EA166 the then East African Court of Appeal. Considered factors to be considered in applications to set aside an *ex parte* Judgment. The Court stated:-

“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. Secondly the discretion to set aside is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence, or excusable mistake, or error but not designed to assist the



person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the cause of justice.”

12. In the present matter the Appellants did not sufficiently and reasonably explain the cause of their failure to attend the Court for hearing. The appellants clearly were not diligent in the conduct of their case and they solely have themselves to blame. Justice cuts both ways, the Plaintiff / Respondent deserved justice as the Defendants/ Appellants did. The Respondent diligently pursued her right while the Appellants conduct without doubt shows they were casual in the manner they dealt with the Court. They did not deserve the Court’s exercise of discretion.
13. For the foregoing reasons, I find no merits in the Appellants Appeal and I dismiss the same with costs to the Respondent.

**JUDEGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 12<sup>TH</sup> DAY OF NOVEMBER 2025**

**J. M. MUTUNGI**

**ELC-JUDGE**

