

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC APPEAL NO. E003 OF 2023

MARGARET NAFULA MATUMBAI-----
1ST APPELLANT
SIMEON KIPROTICH MERENG-----
2ND APPELLANT

VERSUS

TOROITICH MISOI MERENG-----
RESPONDENT

[Being an appeal against the judgment of Hon. S.K. Mutai (SPM) delivered on 30/01/2023 in Kitale CMC ELC No. 19 of 2020]

BETWEEN

TOROITICH MISOI
MERENG-----PLAINTIFF

VERSUS

MARGARET NAFULA MATUMBAI-----1ST
DEFENDANT
SIMEON KIPROTICH MERENG-----2ND
DEFENDANT

JUDGMENT

1. The appellants, who were the defendants at the lower court, had been sued by the respondent through an amended plaint dated **8/7/2020**, seeking an eviction order from parcel No. **Trans Nzoia/Chepchoina/Twiga/354** and a declaration that the sale agreement dated **31/12/2019**, between

him and the 2nd appellant, be cancelled or terminated, and he be awarded *mesne profits*. The respondent had contended that he was the bona fide, legal, and beneficial owner of the suit land measuring **22.5 Ha**, which the 2nd appellant, in **2019**, encroached onto without his consent.

- 2.** It was alleged that the 2nd appellant's claim was based on a purchaser's interest out of a sale agreement dated **31/12/2019**, whereby he deposited **Kshs. 1,500,000/=**, out of a total of **Kshs. 3,760,000/=**. Regarding the balance due by **31/12/2019**, it was averred that the 2nd appellant only paid **Kshs. 100,000/=**, hence breaching the sale agreement for non-clearance of **Kshs. 2,160,000/=**.
- 3.** The respondent had averred that upon receipt of the deposit, vacant possession was handed over to the 2nd appellant in good faith, but once he breached the sale agreement, he repossessed the land. However, it was averred that the 2nd appellant continued to frustrate, intimidate, harass, or refused to grant the respondent quiet possession of the land either by inhibiting access or ploughing, without his consent or approval.

4. The appellants filed a statement of defence dated **27/7/2020**, admitting the existence of the land sale agreement between the respondent and the 2nd appellant, but denied that the respondent was the owner of the land as alleged. They denied owing the 2nd appellant **Kshs. 2,160,000/=** as alleged, or having failed to clear it, or having breached any land sale agreement, or there having been any alleged repossession, frustration, or breach of the alleged sale agreement.
5. The appellants denied that the respondent had any rights, interests, or entitlement to possession of the land or consideration thereof, or requiring any permissions, consent, or authority to deal with or occupy the land.
6. The appellants averred that the subject matter was also before the court in **Eldoret ELC No. 309 of 2014**, whose primary claim had been dismissed, but the counterclaim was yet to be heard and determined, hence the suit was incompetent or untenable, and was an abuse of the court process.
7. The appellants averred that the respondent was guilty of perjury, was holding the land as a trustee of the 2nd appellant, and had maliciously declined to

receive the balance of the purchase price, nor had he issued any valid notice of revocation or cancellation of the sale agreement.

- 8.** By an application dated **16/11/2020**, the appellants sought for stay of the proceedings herein on account of **Eldoret ELC No. 309 of 2014**, based on a supporting affidavit of Simeon Kiprotich Katam, sworn on **16/11/2020**, attaching the pleadings in **Eldoret ELC No. 309 of 2014** as annexures marked **SKK-(1), (2), and (3)**.
- 9.** The respondent opposed the application by a replying affidavit sworn on **17/2/2021**, attaching the order dated **17/4/2019** and a bill of costs as annexures **TMM-(1) and (2)**, that the suit had been dismissed for non-attendance.
- 10.** The said application was withdrawn by a notice of withdrawal dated **30/2/2021**, which was followed by an application dated **9/6/2021**, seeking to amend the defence to incorporate a counterclaim. It is not clear if the application was allowed; otherwise, there is an amended defence and counterclaim dated **22/6/2021** in the court file. It appears that parties were ordered to comply with **Order 11** of the Civil Procedure Rules. A hearing date was issued several

times, culminating in the last adjournment to the appellants on **7/3/2022**. When the matter came up on **26/9/2022**, the appellant's counsel was not ready to proceed, for he had filed an application dated **23/9/2022** to cease representing the appellants.

- 11.** The respondent opposed the request for an adjournment as the record of **7/3/2022** showed that the appellants' lawyers on record had raised a similar intent to withdraw from the matter for lack of instructions, but did not file such an application then. The trial court declined to allow the adjournment. Though the record shows that the trial court proceeded with the hearing of the respondent's case, who relied on a witness statement dated **28/12/2022** as his evidence-in-chief and produced a title deed, a sale agreement dated **28/12/2009**, a demand letter, and a ruling in **Eldoret ELC No. 309 of 2014** as **P. Exhibits. No. (1) - (4)**, it is not clear why the appellants' lawyer did not participate in the hearing.
- 12.** By a judgment dated **24/10/2022**, the respondent's claim in terms of an amended plaint dated **8/7/2020** was allowed.

- 13.** The record shows that the appellants filed an application dated **11/10/2022** to arrest the judgment delivery, review, and setting aside of the proceedings of **26/9/2022**, claiming that they were not aware of the hearing date, the right to be heard is sacrosanct, and mistake or error of advocates should not be visited upon them. By the time the application came up for hearing on **31/10/2022**, the judgment had already been delivered, hence it was marked as overtaken by the event.
- 14.** The appellants filed another application dated **1/11/2022**, seeking to stay of the execution of the judgment, review, and setting aside of the order of **26/7/2022** and the judgment dated **24/10/2022**. The application was based on the affidavit of Simeon Kiprotich Katam, sworn on **1/11/2022**, in which blame was laid on his erstwhile lawyers for not notifying him of the impending hearing, or consulting with him on a date to take, and for being denied an opportunity to be heard.
- 15.** The application as opposed by a replying affidavit of the respondent sworn on **17/11/2022**, that the applicants, as per annexures **TM(a), (b), (c), (d)** and **(e)**, had sought for adjournments many time,

the application was dishonest, and full of misrepresentation of facts and that the applicants did not have the land, hence no threat of eviction could arise, that the application had been made in bad faith, the applicants was guilty of approbation and reprobation, he has been using all maneuvers to delay the matter, that the application was an afterthought, an abuse of the court process and lacking merits.

- 16.** Through a ruling dated **30/1/2023**, the application dated **1/11/2023** was dismissed.
- 17.** By a memorandum of appeal dated **2/2/2023**, the appellants blames the trial court for; not setting aside the default judgment, denying them a right to be heard; basing the ruling on a false promise that a party whose advocate takes a convenient date cannot thereafter seek setting aside; delivering an unjust and an inequitable decision; for not finding that courts are there to do justice; for not finding that the respondents could be compensated by way of costs and for misuse of discretion.
- 18. Order 43** of the Civil Procedure Rules relates to appeals against orders. The application dated **1/11/2023** was brought under **Order 45** of the Civil

Procedure Rules and **Section 80** of the Civil Procedure Act; it lies as of right to this court.

- 19.** This appeal was canvassed by way of written submissions. The appellants rely on written submissions dated **24/5/2024**, while the respondent relies on written submissions dated **20/11/2025**. Reliance is placed on **Shanzu Investments Ltd -vs- Commissioner of Lands [1993] KECA 36 (KLR)**, that there were no sufficient grounds to exercise discretion in favour of the appellants or to disturb the discretion on appeal.
- 20.** The role of an appellate court is to rehearse, rehear, and re-appraise itself on the record of the court below, and come up with its own findings on both facts and the law. See **Imanyara & 2 others -vs- Attorney General [2016] KECA 557 (KLR)**.
- 21.** Having perused the entire lower court record, the grounds of appeal, and written submissions, the issues calling for my determination are:
- (a) *If the trial court exercised its discretion lawfully, in rejecting the application dated 1/11/2022 seeking to stay the enforcement of the judgment, and its consequential orders, review and setting aside of the proceedings of 26/9/2021 and the judgment dated 24/10/2022.***

(b) If the appeal is competent and has merit.

(c) What is the order as to costs?

- 22.** The appellants are attacking the trial court's exercise of discretion in rejecting the notice of motion dated **1/11/2022**. Discretion is to be exercised judiciously and on sound legal principles. In **Mbogo & Another -vs- Shah [1968] EA 93**, the court observed that an appellate court will only interfere if, in the exercise of discretion, it is satisfied that the trial court misdirected itself in such matter and as a result arrived at a wrong conclusion, or where it is manifested from the case that as a whole, the trial court was clearly wrong in the exercise of its discretion.
- 23.** In **Ferdinand Ndungu Waititu -vs- Republic Petition 2 of 2020**, the Supreme Court observed that the appellant had not demonstrated how the exercise of discretion was not judicious or how the learned judges of both the High Court and the Court of Appeal erred in failing to interfere with the exercise of the trial court's discretion.
- 24.** In the instant case, the trial court record shows that before the application for stay and review of the judgment was filed on **1/11/2022**, another

application dated **11/10/2022** had been filed to arrest the judgment and set aside the proceedings of **26/9/2022**. It is not clear why the appellants did not prosecute their application before the delivery of the judgment, and only came to court on **31/10/2022**.

- 25.** The general considerations on an application for an adjournment were discussed in **Japhet Muroko & another v Independent Electoral & Boundaries Commission & 2 others [2018] KECA 457 (KLR)**. The court cited **Peter M. Kariuki -vs- Attorney General [2014] eKLR**, that an adjournment is not granted as of right, but is a discretion of the court, taking into account the circumstances of the case and the conduct of the parties. The court cited **Nanyuki Equator Sacco Co-operative Society Ltd -vs- Nyeri Sacco Society & Another, CA No. Nai 86 of 2005,** that the discretion necessarily involves a latitude of individual choice according to the particular circumstances of each case, and that to adjourn or not to adjourn is a discretion to be exercised judiciously and upon reasons, rather than arbitrarily, capriciously, or on whim or sentiments, and that no two cases are alike.

26. The court held that the consideration to bear in mind is determining an adjournment is whether the applicant was aware of the hearing, date, the time he had to prepare and get up for hearing, whether his conduct has been diligent or dilatory, the reasons for seeking adjournment, the sufficiency and truth of such reasons, the nature of the dispute before the court, the need to afford parties as much as possible, an opportunity to fully agitate their cases, the overriding constitutional principles that justice shall not be delayed, whether a miscarriage of justice is likely to be occasioned by the refusal of an adjournment, the prejudice that is likely to occur if the adjournment is granted or denied, and whether the award of costs will ameliorate any prejudice to the respondent, and lastly, the constitutional prescribed timelines to determine the dispute. The court cited **Castanho -vs- Brown & Root (UK) Ltd & Another [1981] 1 ALL ER 143**, that a court has inherent power to prevent a party from obtaining by use of its process, a collateral advantage which it would be unjust to him to retain.

27. In **Waweru -vs- Maina Civil Appeal 59 of 2019 [2025] KECA 50 [KLR] (17th January 2025)**

(Judgment), a stay of execution and setting aside of the judgment and all subsequent orders had been sought at the High Court, which was declined. Unlike in the present appeal, the issue of service of summons was contested.

- 28.** The court held that the legal standard in reviewing a decision of this nature is an abuse of discretion standard, which includes whether the decision was made capriciously, arbitrarily, in plain error, or otherwise not in accordance with the law or logic. The court held that on appeal about the exercise of that legal standard, the appellate court must be convinced or persuaded that the decision lies beyond the pale of reasonable justification or range of permissible outcomes under the circumstances.
- 29.** From the record, it appears that on **26/9/2022**, the trial court refused to allow an adjournment of the suit on the part of the appellant's counsel, who had just applied to cease acting for his clients, the appellants. The record shows that the appellants had previously sought for adjournment on **22/3/2021, 21/6/2021, 5/7/2021, 6/12/2021**, and were granted the last adjournment on **7/3/2022**. When the matter came for hearing on **6/6/2022**, another adjournment was

granted, and the matter was listed for **8/8/2022**. Miss Mufutu advocate appeared for Mr. Momanyi for the appellants on **8/8/2022**, and the date for the hearing on **26/9/2022** was fixed by consent.

30. On **26/9/2022**, the appellant's counsel sought to adjourn the matter since he had just filed an application dated **23/9/2022** to cease acting for the appellant. The trial court declined to grant the adjournment. The reason for seeking to cease acting was that the appellants had failed to instruct counsel to represent them.

31. The appellants changed advocates on record on **9/10/2022**, to the present one, who now filed the application dated **7/10/2022**. In the supporting affidavit, the appellants blamed their former lawyer for not consulting them when fixing a hearing date or informing them of the hearing date of **26/9/2022**; otherwise, between **July 2022** and **6/10/2022**, the appellants had not received communication from him on the hearing dates. The appellants alleged that they had been denied a chance to be heard. The application was marked as overtaken by events on **31/10/2022**.

- 32.** Whereas the right to be heard before an adverse decision is made permeates our entire justice system, it is not the law that the applicant must be heard, especially if he is allowed to do so but opts not to take it up. From the court record, it is not explained by the appellants when, before **July 2022**, they last communicated with their former advocates on record. The first time the former advocate on record expressed the intention to cease acting for the appellants was on **7/3/2022**. Before then, the matter had been listed for hearing severally including **20/9/2021** and **6/12/2021**. The last adjournment had been given to the appellants, with costs to the respondent to be paid by **6/6/2022**.
- 33.** A case belongs to a party and not an advocate. If the appellants had not heard from the former advocate between July and **6/10/2022**, the inference to be drawn is that they had communicated with them before **July 2022**, when already there was a last adjournment order made by the trial court on **7/3/2022**, when the matter was listed for **6/6/2022** and again adjourned for **8/8/2022**.
- 34.** A party has an obligation to follow up on the progress of its case. Sufficient cause or reasons warranting

setting aside an order for refusing an adjournment must have been given, as the appellants had refused to give sufficient instructions to their former lawyers or attend the hearing on various occasions, as shown by the record herein.

- 35.** In **Wachira Karani -vs- Bildad Wachira [2016] KEHC 6334 (KLR)**, the court cited **Parimal -vs- Veena**, where the Supreme Court of India held that the word sufficient means adequate enough, and where a party cannot be alleged to have not acted diligently or remained inactive. The court said that in deciding whether there is sufficient cause, or not, the court must bear in mind the object of doing substantial justice to all parties concerned.
- 36.** The test in this appeal is whether the circumstances surrounding the events of **26/9/2022** show that the appellants had acted honestly and sincerely, such that they could not be blamed for not attending court on **26/9/2022**.
- 37.** The record shows that up to **26/9/2022**, the relationship between the appellants and their former lawyers had deteriorated, and had caused inordinate delay to the matter. It is as a result of this that the former lawyers applied to cease representing them

only three days before the hearing on **26/9/2022**, which the respondent, in my view, rightly opposed based on the previous conduct of the appellants in delaying the matter. The appellants in the affidavit in support of the application dated **1/11/2022**, were actually confirming the grounds and the affidavit in support of their former lawyers that they had actually neglected, abandoned, and or become disinterested in their own defence and counterclaim.

38. In **Utalii Transport Co. Ltd & Others -vs- NIC Bank & Another [2014] eKLR**, the court said that it is the primary duty of parties, and especially a plaintiff, to take steps to progress their cases. In **Gideon Sitelu Konchella -vs- Daima Bank Ltd [2013]**, the court cited, **Mobile Kitale Service Station -vs- Mobil Oil Kenya Ltd & Another [2004] eKLR**, that it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past and that justice would better be served if matters are disposed of expeditiously. Parties have a duty to assist the court in attaining the overriding objective.

- 39. Sections 1A and 1B** of the Civil Procedure Act and **Article 159** of the Constitution seek to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes. As held in **Savings & Loans Ltd -vs- Susan Wanjiru Muritu, Nairobi HCCC No. 39 of 2002**, a case belongs to a litigant and not the advocate, to be blamed for non-attendance at the hearing.
- 40.** It is evident from the trial court record that the appellants had abdicated their responsibilities as litigants and were not constantly checking with their former advocates the progress of their case; otherwise, they would have known about the order for the last adjournment and for the payment of both adjournment costs of **Kshs. 1,500/=** and costs to the respondent, before **8/8/2022**, when the suit was again adjourned for **26/9/2022**. Courts cannot shy away from dismissing suits or refusing unnecessary or unjustified adjournments.
- 41.** In this appeal, the appellants blame their erstwhile lawyers, yet it is evident that the lawyers were also blaming them for the lack of instructions. It is not enough to lay blame and seek to use non-instruction of lawyers as a basis for setting aside the orders

without first explaining what had stopped the appellants from executing their duties. Sufficient cause or reason must have been shown by the appellants before the trial court for them to lay blame, if any, on the trial court that it exercised its discretion, capriciously, or on wrong principles, or arbitrarily and or unjustly.

- 42.** In **Sirma -vs- Independent Electoral and Boundaries Commission & 2 others [2019] KESC 64 (KLR)**, the Supreme Court held that it could only interfere with the exercise of discretion, if it could conclude that in the exercise of such discretion the appellate court acted arbitrarily, capriciously, or ignored relevant facts or completely disregarded the principles of the governing law, leading to an unjust order.
- 43.** In the replying affidavit sworn on **17/11/2022**, opposing the application, Toroitich Miso Mereng had attached annexing **TMM-1(a), (b), (c), and (d)**, to demonstrate how the former lawyers had frustrated the hearing of the suit, that the 1st appellant was the one on the suit land, the application had been made in bad faith and was a delaying tactic, the order of **26/9/2022** had not been appealed against, he would

be prejudiced by the issuance of the orders and that the application was against the overriding objective of the court.

- 44.** In this appeal, the appellants did not demonstrate how the trial court acted on whims; its decision was unreasonable, misapprehended the facts, looked into account, irrelevant matters or issues, or reached a plainly wrong decision as held in **Shanzu Investments Ltd** (*supra*).
- 45.** Strangely, the 2nd appellant had not sworn any affidavit. In this appeal, the trial court gave the last adjournment on the part of the appellants. Justice to the respondents was equally important.
- 46.** The court has emphasized that courts must be in the driving seat to ensure that the backlog of cases caused by endless adjournments on the part of the parties is a thing of the past. This is why no adjournment policy is being enforced except in exceptional circumstances. A party who comes to court and parks his or her matter without prosecuting it, even when given several chances, cannot, after the inevitable happens, turn around and invoke the right to be heard at the lower court yet he failed to explain why he had also not attended the hearing on

26/9/2022 or any other time leading to inordinate delay of the suit.

47. In **Chatur -vs- Habib & 6 others (Civil Appeal 543 of 2019) [2025] KECA 1463 (KLR) (31 July 2025) (Judgment)**, adjournment had been refused for two reasons. The appellant had applied for adjournments in the past, and the trial court had marked a last adjournment and a further one, as the very last adjournment. The appellate court confirmed the refusal of the adjournment as it was a discretion exercised fairly, given that the medical reports relied upon to seek an adjournment did not reveal that the appellant had been treated recently or that he was unable to attend court, for a hearing on that day.

48. The upshot is that the appeal herein lacks merit. It is dismissed with costs.

49. Orders accordingly.

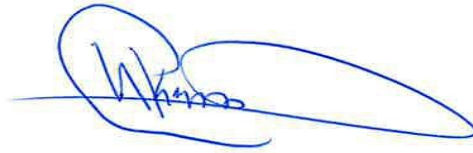
Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 26th day of November 2025.

In the presence of:

Court Assistant - Dennis

Wainaina for Nyambegera for appellants present

Mukabane for respondent present



**HON. C.K. NZILI
JUDGE, ELC KITALE.**

ORIGINAL