Kirui & 3 others v Korir (Civil Appeal E053 of 2024) [2025] KEHC 17432 (KLR) (27 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17432 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CIVIL APPEAL E053 OF 2024

JR KARANJA, J

NOVEMBER 27, 2025

BETWEEN

HILDA KIRUI .... 1ST APPELLANT

CHARLES KIRUI .... 2ND APPELLANT

BEATRICE CHELANGAT .... 3RD APPELLANT

BENARD KIRUI .... 4TH APPELLANT

AND

BERSUS PETER KORIR .... RESPONDENT

JUDGMENT

1. The memorandum of Appeal dated 20th December, 2023 refers to a judgement of the Senior Resident Magistrate at Kericho in Kericho Civil Suit No. E82 of 2021, delivered on 29th November, 2023, while the record of appeal dated 24th June, 2024 refers to a judgement delivered on 21st December, 2022.
2. However, the original file of the primary suit shows that what was delivered on 21st December, 2022 was an interlocutory judgement made in favour of the Respondent herein against the Applicants herein for the sum of Ksh 500,000/= being general damages suffered from the Applicants own conduct. The original record also shows that the Applicants filed an application dated 29th June, 2023 for setting aside of the interlocutory judgement, but it was dismissed by the court in a ruling made on 29th November, 2023.
3. This appeal as may be gleaned from the memorandum of appeal is actually in respect of the ruling dated 29th November, 2023 and not the interlocutory judgement delivered on 21st December, 2022. Be that as it may, the grounds set out in the memorandum of appeal indicate that the appeal mainly hinges on ground two (2) in which the Appellant/Applicants complain that the trial court erred in

both law and fact in reaching a wrong conclusion that they were indolent and demonstrated lack of interest in prosecuting their case.

4. The rest of the grounds are merely pedestrian and irrelevant considering that they more or less relate to matters relevant to the interlocutory judgement rather than the impugned ruling, save perhaps ground three (3) which alludes to the trial court having ignored the explanation offered by the Applicants.

5. The duty of this court, having considered the appeal on the basis of the supporting grounds and the rival arguments (submissions) by the parties, was to re-look at the matter afresh and arrive at its own conclusion.

   In that regard, it was without doubt that the main prayer in the application was prayer four (4) in which the Applicants prayed for setting aside of the interlocutory judgement and all consequential orders.

6. Prayer five (5) was for leave to file defence out of time and was more or less dependant on ground four (4).

   In their submissions at the lower court the Applicants indicated that their failure to file defence within the prescribed period of time was as a result of their advocate's mistake whom they had instructed to defend the suit on their behalf.

7. The Applicants argued that the mistake of their then advocate ought not be visited against them. They therefore urged the court to allow their application in its entirety. In response, the Respondent argued that the Applicants invited the interlocutory judgment by their intentional conduct of failing to file their defence within the prescribed time. That, the Applicants came to court with unclean hands such that their application was on abuse of the court process.

8. The Respondent further argued that the Applicants had several reconciliatory meetings with him and negotiated quantum of damages arising from their unlawful conduct against him, but when they failed to reach a consensus the Applicants opted not to defendant the suit. The Respondent therefore urged the court to dismiss the Applicants application

9. After considering the arguments by both sides, the trial court concluded that the Applicants had failed to show sufficient reasons for exercise of discretion in their favour. As a result, the application was dismissed and in doing so, the trial court rendered itself as herein under to wit;-

> " I have perused the record in this case when the case came up on 2nd March, 2022, there was counsel who appeared for the Defendants. That counsel, a Mr. Kipkoech sought for time to file an application for stay of interlocutory judgment. The matter proceeded for formal proof as it had been slated. Nothing was thereafter filed on behalf of the defendants until judgment was entered on 21st December, 2022. The situation above in my view, does not amount to inadvertence or excusable mistake. It appears there was a deliberate move not to take action. The Defendants failed to follow-up on their case. They sat back in indolence until judgement was entered in favour of the Plaintiff".

10. In arriving at its conclusion, the trial court relied on the decisions in Murethi Charles and Another Vs JACOBS Arina Nyageuka (2022)Eklr, Multiple Hauliers Vs Enok elindi Murundi and 2 others (2021) Eklr and Savings & Loans Ltd Vs Susan Wanjiru Muritu Nairobi HCCS NO. 391 of 2002.

11. In the Mureithi case, the court observed that;-

> " That the decision whether or not to set aside ex-parte judgement is discretionary and is not in about and that the discretion is intended so to be exercised to avoid injustice and hardship

resulting from accidents, 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 cause of justice, see Shah Vs Mbogo & Another (1961)EA116".

In the Multiple Hauliers case, the failure by the Applicant to attend court was attributed to the mistake of an advocate. This was also the position in the Savings & Loans Ltd case, where it was stated that;-

" whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by the former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has duty to pursue the prosecution of his or her case. The cn the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court.".

12. With that finding the court in that case declined to exercise discretion in favour of the Defendant/ Applicant noting that she had been indolent.

    The exercise of discretion by any court is at most intended to avoid injustice or hardship resulting from accident, in advertence or excusable mistake or error, it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice (see Shah Vs Mbogo (1967)EA 116].

13. With regard to mistakes by advocates, the general rule as based on the principles of agency would be that a client is bound by the actions and omissions of their advocate including mistakes made by the advocates since the advocate acts as the agent of the client. However, courts can grant relief to the client if satisfied that the mistake was not due to the client's fault. Thus a party ought not suffer for the mistake of his advocate if he is not privy to the mistake.

14. In this case, the factual material placed before the trial court by both sides as maybe borne by the court record provided sufficient reasons for the trial court's refusal to exercise discretion in favour of the Applicants and set aside the interlocutory judgment. This court agrees that the applicants were indolent in pursuing this matter to its logical conclusion and from their conduct of engaging in discussions on the matter with the respondent and thereafter sitting back without ensuring that their defence was filed after the failure of the discussion, it may safely be stated they were privy to the lack of diligence by their that advocate on the matter, hence privy to the advocate's mistake.

15. What could be deduced from the forgoing was that the applicant's intention was to delay the expeditious disposal of this matter otherwise why would they engage in discussions on the matter without serious commitment and then renegade on the same without any attempt to file their statement of defence for determination of the matter by the court.

16. This court doesn't see any good reason to fault and alter the conclusion reached by the trial court on the impugned application. This appeal is therefore wanting on merit and is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED THIS 27TH DAY OF NOVEMBER, 2025.

J.R. KARANJAH

JUDGE.