

1. The appellants herein have challenged the ruling of Hon. J.J. Masiga (Principal Magistrate) delivered on 24th April 2024 in Kakamega Chief Magistrates Court L&E Case No. 71 of 2020. In the impugned ruling, the learned trial Magistrate dismissed the appellants' application dated 6th June 2023, wherein the appellants had sought review of the trial court's orders of 12th July 2022 and reinstatement of the suit to be heard and determined on merit.

Background

2. The plaintiffs (the appellants herein) instituted suit in the lower court by way of plaint dated 9th June 2020 seeking refund of purchase price of Kshs. 1, 100, 000/= being purchase price paid to the defendant, together with legal fees and costs for obtaining search respectively of Kshs. 24 900/= and 520/=. They also sought damages for breach of contract and costs on account of a land sale agreement which was allegedly breached by the defendant who failed to complete the transaction.

3. In a defence dated 5th March 2021, the defendant denied the plaintiffs' claim and put him to strict proof alleging that he was ready and willing to complete the agreement but that the plaintiffs had not paid the entire purchase price.

4. On 22/02/ 2022 in the presence of counsel for both parties, the matter was slated for hearing on 12/7/2022. On 12/7/2022, when the matter was called out, none of the parties was present and the court dismissed the same under the provisions of Order 12 Rule 1 and 2 of the Civil Procedure Rules. On 31/01/2023, the plaintiff's counsel's representative attended the court registry and fixed the matter for mention for directions of 19/4/2023, when on the said date, the court indicated that the matter was dismissed. Subsequently, the appellants filed application dated 6th June 2023 seeking review of the orders of 12/7/2022 and prayed further that the suit be reinstated for hearing on merit. The application was anchored on the affidavit sworn by Victor Kariuki, the applicants' Advocate dated 6th June 2023.

5. The applicants' case was that their counsel only learnt that the suit was dismissed for non-attendance on 19/4/2023. That when the matter was scheduled for hearing, he was travelling to Kakamega via Kisumu by air and that the flight had a prolonged layover at Eldoret.
6. He added that upon contacting Mr. Fwaya Advocate's office to seek indulgence for an adjournment in view of his unforeseen circumstances, he was informed by the receptionist that they were not aware that the matter was coming up for hearing on that date. That they had however served them via email on 1st March 2022. That he was therefore under an honest mistaken belief that the matter was stood over. That he was told the matter had been allocated to another court as the previous Magistrate had gone on transfer and granted a date for allocation on 19th April 2023.
7. That his nonattendance was not intentional and that he apologized for the inconvenience. That the plaintiff had genuine and weighty issues that ought to be determined on merit.

8. The application was opposed by a replying affidavit sworn by the defendant dated 9th October 2023. He stated that the suit was filed in June 2020 and that he was served in March 2021, a period of about 9 months. That between June 2020 and July 2022, a period of two years, the plaintiffs never took any steps to have their matter heard. That the case was dismissed on 19/04/2023 and the file closed on 12/7/2023 and hence even if orders sought are granted, the case will still stand dismissed and the application of 6/6/2023 is an exercise in futility.

9. He further stated that due notice was given to the parties and the plaintiff failed to attend court. That the reasons given by the applicant are false and meant to mislead the court. That the file was closed and an application that does not seek to reopen it, is misconceived. That the application was an abuse of the court process.

10. On considering the application, response thereto and submissions, the trial court found that the applicants failed to explain the inordinate delay between the time of dismissal and when the application was filed, a period of 11 months. The trial court further found that although

counsel for the applicants had blamed unforeseen layover in Eldoret, no plane ticket was attached to the application to demonstrate that he used a flight on that day. The trial court held the view that the reasons given were not convincing and proceeded to dismiss the application.

11. Aggrieved with the decision of 24th April 2024, the appellant filed appeal against that decision vide a Memorandum of appeal dated 24th June 2024 citing the following seven grounds, namely;

a) That the learned Magistrate erred in law and in fact in finding that the explanation given for non-attendance was not sufficiently explained.

b) That the learned Magistrate erred in law and in fact by unjustifiably failing to exercise his discretion to set aside, recall and or reinstate a suit or application dismissed for non-prosecution or non-attendance under Order 12 Rule 7 of the Civil Procedure Rules, 2010.

c) That the learned Magistrate erred in Law and in fact in unreasonably and unjustifiably dismissing the appellants' subject application by failing to exercise his discretion judiciously and failing to take into account that the

appellants' right to be heard and right to a fair hearing as enshrined in Article 47 and 50 of the Constitution of Kenya are so fundamental that they cannot be fettered by an exercise of discretion and cannot be limited as in accordance to Article 25 of the Constitution of Kenya 2010.

- d) That the learned Magistrate erred in law and in fact by dismissing the plaintiff's application dated 6th June, 2023 without considering in totality the grounds in the application and the supporting affidavit thereof.**
- e) That the learned trial Magistrate erred both in fact and law for failing to evaluate and to take into account that the appellants risk to be highly prejudiced by the subject ruling as they will be condemned to lose both the property which was the subject property of the dispute or the monies paid thereof leading to unjust enrichment of the respondent for a mistake that was not of their making.**
- f) That the learned Magistrate erred in law and in fact in taking into accounts facts in issue that were not subject of the application dated 6th June, 2023.**

g) That the learned Magistrate erred in law and fact in failing to attach weight to the appellant's evidence and submissions.

12. Consequently, the appellant sought the following orders;

a) This appeal be allowed.

b) That the ruling of the learned Magistrate delivered on 24th April 2024 be set aside.

c) Costs of this appeal be provided for

13. The appeal was canvassed by way of written submissions. On record are submissions filed by the appellants dated 5th October 2025 and those filed by the respondent dated 11th August 2025

Appellants' submissions

14. Counsel for the appellants submitted that the appeal herein was admitted by this court and parties directed to file submissions. Counsel rehashed the facts as stated before the trial court. Counsel argued that the respondent's argument that the suit was served after 9 months had no bearing to the application before the trial

court and that the appellants had difficulties tracing the respondent.

15. It was further submitted for the appellants that it was not true that the appellants had failed to take steps to prosecute their case. Counsel contended that when the appellants tried to obtain a pre-trial date, they were informed that the matter had been allocated to court No. 3 but that the court's diary was full and the new diary for 2022 was unavailable.

16. Relying on provisions of Order 12 Rule 7 of the Civil Procedure Rules, counsel argued that the trial court had discretion to set aside, recall and or reinstate the suit which had been dismissed for non-attendance. Counsel maintained that the main mandate of the court is to do justice to the parties and exercise discretion judiciously not to assist a person obstruct the course of justice. Counsel further submitted that the appellants' advocate did not get opportunity to file further affidavit to respond to the replying affidavit. It was emphasized for the appellants that counsel's non-attendance was not deliberate.

Respondent's submissions

17. Counsel for the respondent submitted that the suit was incompetent for having been filed after 30 days from the date of the decision appealed against. On the merits of the case, counsel submitted that the trial court cannot be faulted for its orders as it could not have granted what was never sought. Counsel argued that the appellant sought for review of the orders of 12th July 2023 and that even if those orders were to be reviewed, the order of 19th April 2023 dismissing the suit would still remain.

18. It was also submitted for the respondent that the threshold in section 80 of the Civil Procedure Act and Order 45 of the civil procedure rules on review was not met. Counsel argued that as the trial court's decision was an exercise of discretion, the trial court cannot be faulted for its decision. Counsel urged the court to find that the appeal lacked merit.

Analysis and determination

19. The court has considered the appeal, submissions and the entire record. This appeal challenges the exercise

of discretion by the trial court in refusing to review its orders of 12/07/2022 and declining to reinstate the suit before the trial court for hearing on merit.

20. I have considered the grounds of appeal raised in the Memorandum of Appeal, the parties' rival submissions and the entire record. Although in their submissions, the respondent's counsel argued that the appeal was incompetent for having been filed out of time, the record shows that when this appeal came up for directions on 25th May 2025, the respondent's counsel neither objected to the admission of the appeal nor raised the question of the appeal having been filed out of time. Consequently, the appeal was admitted to hearing on 26th May 2025. On that basis therefore, I will proceed to hear and determine the appeal on its merit. This being a challenge against the exercise of discretion by the trial court, the only issue for determination is whether there is sufficient material placed before court to justify this court's interference with the exercise of discretion by the trial court in dismissing the appellants' application dated 6th June 2023.

21. This court will not ordinarily interfere with the exercise of discretion by the trial court, merely on the basis that it would have arrived at a different decision if it had heard the matter. This court will only interfere with the exercise of discretion by the trial court where it is shown that the trial court acted whimsically and failed to act judiciously and or made an error of law or principle; took into account irrelevant considerations; failed to take into account relevant considerations; or the decision is plainly wrong.

22. The Supreme Court of Kenya in the case of **Apungu Arthur Kibira v Independent Electoral and Commission Boundaries & 3 Others [2019] e KLR** stated that:

“We reiterate that in an appeal from a decision based on an exercise of discretionary power, 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 NLRI (Kacem) where it was held para 32:“In this context a general appeal is to be distinguished

from an appeal against the decision made in exercise of discretion. In that kind of case, the criteria for a successful appeal are stricter: (i) 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.”

23. Also, in the case of **Mbogo & Another vs. Shah [1968] EA. 93 at page 96**, the Court of Appeal

maintained that: -

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice....”

24. In the instant case, the record shows that on 22nd February 2022, in the presence of both counsel the hearing date of 12th July 2022 was fixed by consent. On 12th July 2022, none of the parties was in attendance, which resulted in the dismissal of the suit for non-

attendance. The appellants have argued that the reason for non-attendance of their counsel was that he encountered unforeseen circumstances because his flight from Nairobi to Kisumu had a long layover at Eldoret, hence the non-attendance was not deliberate.

25. The appellants did not provide a flight ticket for their advocate to show that indeed on that date their advocate was on a flight to court. The trial court on that basis found the appellants' explanation unconvincing. The trial court also found that the delay between the dismissal of the suit and the filing of the application for review being 11 months was inordinate.

26. I have re-analyzed the trial court's decision, and I take the view that the trial court having considered the period of delay and the reason and or explanation given for non-attendance, the court took in to account relevant matters before reaching its conclusion, and no other relevant matter that the trial court failed to take into account has been brought to the attention of this court by the appellants.

27. I agree with the conclusions arrived at by the trial court that the delay of 11 months is inordinate and was not explained. I also agree with the findings of the trial court that the explanation that there was a flight delay was not plausible at all, as the appellants did not provide any thing to show that the appellants' counsel travelled on the hearing date or that he travelled by flight.

28. In any event, the appellants never informed the trial court why they were not in court on the hearing date, as the presence of their counsel alone, was not sufficient for the hearing to proceed. Discretion of the court is not to be exercised whimsically or arbitrarily and therefore, the trial court in this matter acted judiciously in rejecting the prayers sought in the appellants' application dated 6th June 2023 as the delay was inordinate and the explanation for the delay was implausible.

29. In the premises, I find no merit in this appeal, which I dismiss with costs to the respondent.

30. It is so ordered

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 11TH DAY OF FEBUARY, 2026**

A. NYUKURI

JUDGE

In the presence of;

Mr. Kariuki for the appellants

Ms Masakhwe for the respondent

Court Assistant: Delphine