



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELCLA E109 OF 2024

PETER NJOROGE GITHINJI.....

.....APPELLANT

VERSUS

MARY NJOKI GITHENGERE

HANNAH WAMBUI MUCHINA

MARY MUTHONI MUGO

NYAKINYUA INVESTMENTS CO. LTD

LAND REGISTRAR, RUIRU

THE HON. ATTORNEY GENERAL

RESPONDENTS

***[Being an Appeal of Ruling delivered by Hon. CK
KISIANGANI on the 4th September 2024 at Ruiru in
MCELC/E113/2021]***

BETWEEN

MARY NJOKI GITHENGERE.....1ST

PLAINTIFF

HANNAH WAMBUI MUCHINA.....2ND

PLAINTIFF

VERSUS

PETER NJOROGE GITHINJI.....1ST

DEFENDANT

MARY MUTHONI MUGO.....2ND

DEFENDANT

NYAKINYUA INVESTMENTS CO. LTD.....3RD

DEFENDANT

LAND REGISTRAR RUIRU.....4TH

DEFENDANT

THE HON. ATTORNEY GENERAL.....5TH

DEFENDANT

JUDGMENT

1. In her Judgement dated 1/12/2022 in **Ruiru MCELC E113 of 2018**, Hon. C.K Kisiangani entered Judgment in favour of the 1st and 2nd Respondents where a permanent injunction was issued against the 1st Defendant/Appellant barring them from trespassing on the suit property Ruiru/Ruiru East Block 2/4203, the Ruiru Land Registrar was ordered to remove the caution and cancel any title deed for the suit property and register the 1st and 2nd Respondents on the title.
2. Aggrieved by this decision, the 1st Defendant in the lower Court filed a Notice of Motion Application dated 28/05/2024 seeking the following orders:
 1. Spent.
 2. THAT the Honorable Court be pleased to set aside the ex parte Judgment herein and grant the 1st

Defendant/Applicant unconditional leave to file his Statement of Defence.

3. THAT the Honorable Court be pleased to order the Process Server John Omuganda to appear in Court to be cross examined on the contents of his Affidavit of Service deponed to on 17/02/2022.
 4. That cost of this application be provided for.
3. The Learned Trial Magistrate dismissed the Application and stated as follows:

“The 1st Defendant has not stated why he failed to enter appearance and file his Defence. In his Affidavit, he claims that he learnt of these proceedings after he was summoned by police officers and he was informed that the suit parcel does not belong to him. The prayers sought herein are discretionary and therefore the Applicant ought to have convinced the Court that his failure to take part in these proceedings was not deliberate for the Court to invoke its discretion. However, I am not convinced with the reasons advanced. I therefore decline to exercise my discretion as prayed by the Applicant. I hereby dismiss the application dated 28th May, 2024 with no orders as to costs.”

4. It is this Ruling that is the subject of this Appeal. The Appellant filed a Memorandum of Appeal dated 19/09/2024

seeking that the said Ruling be set aside, this Appeal be allowed, and costs on grounds that:

1. THAT the Learned Magistrate erred in fact by failing to set aside the ex parte Judgment entered against the Appellant.
2. THAT the Learned Magistrate erred in law and fact in dismissing the Applicant's application dated 28th May 2024.
3. THAT the Learned Magistrate erred in law and fact in dismissing the Application without according the Appellant a hearing on merit.
4. THAT the Learned Magistrate erred in law and fact in dismissing the Appellant's Application dated 28th May, 2024 without considering the repercussions it would do to the Appellant and without giving due consideration to the legal question thereby arriving at a wrong decision.
5. THAT the Learned Magistrate erred in law and fact by failing to observe section 3A of the Civil Procedure Act and Articles 50 and 159 of the Constitution of Kenya 2010 thereby arriving at a wrong decision.
6. THAT the Learned Magistrate erred in law and fact in failing to give due consideration to the Appellant's Written submissions and list of Authorities.

7. THAT the Learned Magistrate erred by applying the wrong principles of law thereby arriving at a wrong decision.
8. THAT the Learned Magistrate erred in law and fact by wholly misapplying his judicial discretion in the circumstances of this case.
5. The Appellant prays for the following:
- a. That the Ruling of the trial Court in MCELC Case No. E113 of 2021 delivered on the 4th September 2024 be set aside and the Appellants be allowed to prosecute their application dated 28th May, 2024.**
 - b. That the appeal be allowed.**
 - c. Cost of the Appeal.**
 - d. Any other relief that the Court may consider just and expedient.**
6. In response, the Respondents filed a Replying Affidavit sworn by the 2nd Respondent on 15/09/2025. They stated that the grounds in the Memorandum of Appeal are frivolous and have no merit. That the Learned Magistrate exercised her discretion in disallowing the application as there were no reasonable grounds given to allow the setting aside of the ex parte Judgment nor upholding the Application dated 28/05/2024.
7. The Respondents opposed the Memorandum of Appeal since there was proof of service via substituted service yet the

Appellant failed to enter appearance and that he has given no plausible explanation why he failed to enter appearance or why they delayed in raising their claim.

8. It is the averment of the Respondents that the suit property is no longer in existence as the mother title was already subdivided. Thus, the Appeal should be dismissed since no sufficient reasons have been adduced for the Appeal.
9. When the parties appeared in Court on 09/12/2025 the 4th Respondent made an application to be struck off the Appeal and the Appellant was in agreement and so the 4th Respondent was struck off the Appeal on 09/12/2025.
10. The appeal was canvassed by way of written submissions. At the time of writing this Judgment only the 1st and 2nd Respondents had filed their written submissions despite the Court having issued directions on filing of submissions on 09/12/2025.

1st and 2nd Respondents' Submissions

11. The 1st and 2nd Respondents submit that the Appeal is unmerited, represents an abuse of the Court process, and should be dismissed with costs. Their arguments center on the validity of the original proceedings, the disappearance of the subject matter, and the Appellant's own negligence in pursuing his rights.
12. The Respondents argue that the Appellant was afforded a fair opportunity to be heard. They contend that service of the suit was properly executed via a newspaper

advertisement in a widely circulated publication, a method specifically authorized by the Court. Consequently, they maintain that the Appellant's failure to enter an appearance was a deliberate choice rather than a procedural oversight. They assert that the Appellant cannot now claim a violation of the right to be heard when he effectively waived that right by failing to participate after being legally served.

13. A central pillar of the Respondents' submission is that the suit property, identified as **RUIRU/RUIRU EAST BLOCK 2/4203**, no longer exists in its original form. They point to evidence, allegedly admitted by the Appellant in Annexure **'PNG1'**, confirming that the land has been subdivided and transferred to third parties who are not joined in this suit. The Respondents argue that it would be extremely unfair to disturb the titles of innocent third parties who acquired the land following a valid Court decision. They maintain that because the property is no longer in their hands, the reliefs sought by the Appellant are incapable of being granted.
14. Citing the landmark case of **Machira T/A Machira & Co. Advocates vs. East African Standard (No. 2) [2002] KLR 63**, the Respondents emphasize that a successful litigant is entitled to the fruits of their Judgment. They argue that the Court's discretion to set aside a Judgment must be exercised with a firm eye on the overriding objective of civil procedure: to do justice and prevent the abuse of Court processes. Furthermore, they

raise the doctrine of *functus officio*, suggesting that the trial Court has already exhausted its jurisdiction over the matter and should not sit on its own Appeal, as doing so would contribute to unnecessary case backlogs.

15. Finally, the Respondents invoke the equitable maxims that equity aids the vigilant and not the indolent and that delay defeats equity. They characterize the Appellant's long-standing inaction as sleeping on his rights, noting that he failed to monitor the status of the land or timeously prosecute a Defense. Referring to **Article 159 of the Constitution**, they argue that the Appellant's unexplained delay and subsequent rush to Court after Judgment constitutes a miscarriage of justice against the Respondents. They conclude that the Appeal is a mere afterthought designed to frustrate the finality of litigation.

16. The Appellant did not file any written submissions at the time of writing this Judgment despite being given 14 days by this Court on 9/12/2025 and the Judgment date being set for 17/03/2026 in the presence of the parties.

Analysis and Determination.

17. In considering this Appeal, this Court must first observe that the Appellant has maintained a consistent pattern of procedural non-compliance. Despite being present on 9/12/2025, when the Court issued clear directions for the filing of written submissions, and being fully aware of the Judgment date of 17/03/2026, the Appellant has failed to file

any submissions in support of his case. This habit of failing to prosecute his cause, mirrors the very conduct that led to the original *ex parte* Judgment in the lower Court and strongly suggests a lack of seriousness in pursuing the legal remedies sought.

18. Following my consideration of the Appeal, the Replying Affidavit filed and the written submissions filed by the 1st and 2nd Respondents, the primary issues for determination in this Appeal are:

- i. Whether the learned trial Magistrate properly exercised her judicial discretion in refusing to set aside the ex parte Judgment;*
- ii. Whether the service of summons via substituted service was valid and effective;*
- iii. Whether the disappearance of the suit property through subdivision and transfer to third parties renders the appeal moot; and*
- iv. Whether the Appellant's delay in seeking relief constitutes laches that bars the intervention of this Court.*

19. Regarding the exercise of judicial discretion, it is trite law that a Court will only interfere with a trial Court's discretionary Ruling if it is demonstrated that the Court misdirected itself on the law, ignored relevant facts, or arrived at a decision that is clearly perverse. The trial Magistrate noted that the Appellant provided no plausible

explanation for his failure to enter an appearance. The record indicates that service was effected through a newspaper advertisement as authorized by the Court. Substituted service is a recognized legal mechanism, and once the advertisement is placed, the burden shifts to the Defendant to show why they remained unaware of the proceedings. The Appellant's claim that he only learned of the suit through police intervention is insufficient to overcome the presumption of valid service, especially when no evidence was led to challenge the Process Server beyond a mere request for cross-examination.

20. Furthermore, the Court finds merit in the Respondents' argument regarding the status of the suit property. It is an uncontroverted fact that **RUIRU/RUIRU EAST BLOCK 2/4203** has been subdivided and the resulting titles transferred to third parties who are not joined in these proceedings. To set aside the Judgment at this stage would be a futile exercise, as the original mother title no longer exists in a form that can be reverted to the Appellant without significantly prejudicing innocent third-party purchasers. Equity does not act in vain, nor does it seek to cause irreparable hardship to parties who relied on a valid Court order to acquire property interests.

21. The Appellant's conduct further invokes the equitable doctrine of laches. By failing to monitor his alleged interest in the land and waiting nearly two years after the Judgment

to move the Court, the Appellant has slept on his rights. As established in the case of **Machira T/A Machira & Co. Advocates vs. East African Standard (No. 2) [2002] KLR 63**, the successful party is entitled to the fruits of their Judgment. The Respondents have already acted upon the Decree of the lower Court. To allow the Appellant to reopen the matter now, without a compelling reason for his prior indolence, would violate the principle of finality in litigation and the overriding objectives enshrined in Article 159 of the Constitution.

22. Consequently, this Court finds that the Learned Trial Magistrate was correct in her determination. There were no triable issues raised that would justify setting aside a Judgment where service was properly effected and where the subject matter has since been legally alienated. The Appellant's continued failure to prosecute this Appeal only reinforces the conclusion that the application was an afterthought intended to frustrate the Respondents.

Final Determination:

23. The Appeal is hereby dismissed in its entirety. The Ruling and Orders of the trial Court in **Ruiru MCELC E113 of 2018** are upheld. The 1st and 2nd Respondents shall have the costs of this Appeal.

24. It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA VIRTUALLY THROUGH MICROSOFT TEAMS ON THIS 17TH DAY OF MARCH 2026.

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MOGENI J
JUDGE

In the presence of:-

..... for the Appellant
..... for the 1st Respondent
..... for the 2nd Respondent
..... for the 3rd Respondent
..... for the 5th Respondent
..... for the 6th Respondent
Melita..... Court Assistant

.....
MOGENI J
JUDGE