



Kiru Tea Factory Company Ltd v Gilbert & 5 others (Civil Appeal E017, E018 & E019 of 2021 (Consolidated)) [2026] KECA 654 (KLR) (25 March 2026) (Judgment)

Neutral citation: [2026] KECA 654 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E017, E018 & E019 OF 2021 (CONSOLIDATED)
S OLE KANTAI, A ALI-ARONI & GV ODUNGA, JJA
MARCH 25, 2026**

BETWEEN

KIRU TEA FACTORY COMPANY LTD APPELLANT

AND

ISAIAH MUNYI GILBERT RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL E018 OF 2021**

BETWEEN

KIRU TEA FACTORY COMPANY LTD APPELLANT

AND

NTHIGA NJIRU 1ST RESPONDENT

SIMON NJERU NTHIGA 2ND RESPONDENT

SAMUEL GITHINJI NYAGA 3RD RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL E019 OF 2021**

BETWEEN

KIRU TEA FACTORY COMPANY LTD APPELLANT

AND

EVANS NJIRU MUCHIRI 1ST RESPONDENT



(Being an Appeal from the Ruling and Order of the Environment and Land Court at Embu (Y. M. Angima, J.) delivered on 29th October 2020 in ELC Case Nos. 46, 47 and 48 of 2014)

JUDGMENT

1. This appeal arises from three consolidated appeals, being Nyeri Civil Appeal Nos. E017 of 2021, E018 of 2021 and E019 of 2021. The appeals arose from decisions made in Embu Environment and Land Court Cases Nos. 47 of 2014, 48 of 2014 and 46 of 2014, respectively. The appellant, Kiru Tea Factory Ltd, by plaints dated 10th June 2014, sought judgment against the respondents for an order of eviction from LR No. Nthawa/Riandu/1516 (the suit property), based on the ground that the appellant was the registered proprietor of the suit property and that the respondents were unlawfully occupying the same despite numerous demands for vacant possession.
2. In their statements of defence, the respondents averred that they together with their families had been in open, peaceful, continuous and uninterrupted occupation of the suit property for more than 30 years and that the suit property was the subject matter of Embu ELC Case No. 346 of 2015 (formerly Nairobi HCCC No. 991 of 2001) (OS) and Nairobi ELC Case 369 of 2007, which were still pending although the suits were not consolidated, it appears, from the ruling appealed from and the recordings in each record, that the proceedings were contemporaneously conducted in all the three files, with the ruling being made in Civil Suit No. 46 of 2014.
3. The hearing of the suit commenced on 20th April 2015 when the appellant called its first witness, Josiah Mwangi Ndegwa, who was stood down in the course of the hearing in order to enable him to obtain the originals of the documents he was relying upon. However, the matter did not proceed on the adjourned date and on 9th March 2016, the court directed that the matter commence de novo, a new Judge having taken over the matter. Similar orders were made on 3rd April 2017. After several mentions, the final directions were given on 30th October 2019 for the exchange of trial bundles, duly bound and paginated within 30 days. When the matter was mentioned on 18th December 2019, only the respondents were represented, and their counsel informed the court that they had complied with the said directions. Further directions were issued to the appellant to comply with the directions within 14 days, in default of which, the suit would stand struck out. The matter was fixed for further mention on 2nd March 2020 to confirm compliance, and the respondents were directed to serve the appellant with the mention notice. On 2nd March 2020, only the respondents were represented, and the matter was fixed for mention on 30th March 2020 for directions before the trial Judge on the hearing of the suit.
4. By an application dated 25th June 2020, the appellant sought, inter alia, orders for the review and setting aside of the orders made on 18th December 2019 and for the reinstatement of the suit which stood struck out pursuant to the said orders. The application was substantially based on the grounds that the appellant was not advised by its former advocates on what transpired in court on 30th October 2019 and 18th December 2019, and that it was not clear from the court record whether the orders given on 18th December 2019 were served on its former advocates.
5. The application was opposed by grounds of opposition filed by the respondents, contending: that the application was defective, bad in law and an abuse of the court process; that the appellant had not complied with the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules on change of advocates after judgement; that the appellant had not explained the inordinate delay in filing the



- application; and that no evidence was tendered to demonstrate that the appellant's previous advocates did not notify them of the pre-trial directions.
6. In its ruling the subject matter of this appeal dismissing the said application, the learned Judge found: that the failure to apply for leave of court to change advocates or to obtain the consent from its former advocates to facilitate such change was not fatal; that where an advocate fails to keep a client informed of the progress of a suit for a long time, the client has an obligation to make inquiries from his advocate; that the material on record indicated that the suit was over five (5) years old by the time pre-trial directions were given hence the appellant was obligated to follow up on the prosecution of the suit; that although the court was inclined to accept the appellant's explanation for the default that resulted in the striking out of the suit, the appellant had not been diligent in seeking remedial action; that the application for review was filed on 25th June 2020 more than 6 months after the default clause had taken effect; that assuming that the appellant only learnt of the pre-trial directions in March 2020, there was no plausible explanation for the delay of another 3 months in filing the application; that the reasons advanced for the delay in filing the application, being government restrictions on physical movements due to Covid-19, were unsatisfactory since litigants had been filing applications through on line platforms and the court had been hearing them since April 2020; that although the judiciary scaled down operations on 18th March 2020, they were upscaled with effect from 21st April 2020; that the appellant did not move the court expeditiously for the discretionary orders it was seeking; and that the court was not satisfied that the appellant had made out a case for the grant of the orders sought.
 7. The application was dismissed with costs with direction that the decision would apply to Embu ELC No. 47 of 2014 and ELC No. 48 of 2014.
 8. Dissatisfied with the said ruling, the appellant moved to this Court challenging the decision on the grounds that the learned Judge erred: in holding that the appellant had not been diligent in seeking remedial action; in failing to consider that although the suit was five (5) years old, pre-trial directions were given on 30th October 2014 and the order that resulted in the suit being struck out on 18th October 2014, less than two months later, hence the appellant could not be said to have failed to follow up the prosecution of the suit; in failing to consider the merits of the appellant's motion and case but deciding the case solely on the ground of alleged delay; and in failing to consider the loss occasioned to the appellant by the striking out the suit in favour of trespassers with no stake in the suit property.
 9. The appellant seeks that the appeal be allowed, the order dismissing the application be set aside, and the motion dated 25th June 2020 be allowed. It is also sought that the costs of this appeal be borne by the respondents.
 10. We heard the appeal on this Court's virtual platform on 3rd November 2015 in the presence of learned counsel, Mr Kiura, for the appellant and learned counsel, Mr Ngatia, who held brief for Mr Kinyua Murithi for the respondent.
 11. It was submitted on behalf of the appellant: that in view of the drastic nature of the order of 18th December 2019, it was incumbent upon the respondents to extract and effect its service upon the appellant herein; that the appellant's contention that neither the appellant nor its advocates were served with the said order was not controverted by the respondents; that the Court should take note of the fact that limited access to court did not start until the end of April 2020 and that many government parastatals and private offices that had not shut down had limited staff due to the covid-19 restrictions; and that in those circumstances, the appellant's explanation that it could not have prepared and filed the application dated 25th June 2020 before that date cannot be said to be without merit and that the delay in the circumstance was not inordinate.



12. It was further submitted: that there is nothing to show that up to 30th October 2019, when directions were given, the appellant was not following up on the matter; that it should be noted that the appellant's advocate attended court on 30th October 2019 although the said advocate did not advise the appellant on what transpired on that date; that it was on 18th December 2019, less than two (2) months later that the default orders were given resulting in the striking out of the appellant's suit due to the absence of its advocate; that soon thereafter in March 2020, the Appellant appointed other advocates to represent it hence it cannot be said that the appellant was, in the circumstances, not following up on the suit; that the trial Judge, while finding merit in the appellant's explanation for failure to comply with the directions and noting that the delay in filing the application was explained by the travel restrictions occasioned by Covid-19, nevertheless, disregarded the said explanation on the ground that the delay was excessive; and that in so deciding, the trial Judge failed to consider the appellant's application on merit that the delay in preparation and filing of the application subject matter of this appeal was reasonable.
13. The Court was urged to take note of the fact that the appellant, a public body, is the proprietor of the suit land while the respondents are trespassers thereon; that in the premises, the suit should be determined on merits in order not to uphold an illegality. In support of the submissions, the appellant cited the case of *Maina v Mugiria* [1983] KLR 78 to highlight the the principles governing the exercise of judicial discretion and *CMC Holdings Limited v Nzioki* [2004] KLR 173 for the position that setting aside is meant to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error.
14. In response to the appellant's submissions, the respondents contended: that although in the memorandum of appeal it is indicated that the ruling and decision appealed against is dated 29th November 2020, no ruling was delivered on that date; that the only ruling delivered by the learned Judge is that dated 29th October 2020; that on the authority of the case of *Abok Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR, this Court, on a first appeal, has the duty to reappraise (re-evaluate, re-assess and re-analyse) the record and the evidence tendered at the trial Court and determine for itself whether the conclusions reached by the learned trial Judge are to stand or not, and give reasons either may; that the learned Judge was right in dismissing the appellant's application dated 25th June 2020 on the basis of the orders made on 18th December 2019; that the appellant had an obligation to expeditiously prosecute the suit and that the orders of 30th October 2019 and 18th December 2019 were meant to ensure that the suit was expeditiously disposal of; that it was wrong to submit that the onus lay on the respondents to inform the appellant of the orders made therein; and that if the appellant's advocate did not keep the appellant informed of the proceedings, this cannot be shifted and attributed to the respondents.
15. It was further submitted: that there was no evidence tendered during the hearing of the application by the appellant to show and confirm that its previous advocate did not keep the appellant informed of the proceedings and orders made; that in the absence of that evidence, that reason was an afterthought and the court was right in dismissing the application; that there was no evidence of the attempts by the appellant to establish the status of the suit, an indication that the appellant had lost interest in its matter; that in the absence of an explanation as to what prompted the appellant to change its advocate, it must be taken that the appellant was privy to what transpired in court hence the change of advocates was designed to mislead the court to re- instate the suit; that there was no evidence presented before the trial court by the appellant to show that it ever sought information from *M/S Mugambi Njeru & Co. Advocates*, by requesting the said firm of advocates to swear an affidavit to support the appellant's allegations that it was not kept updated on the progress of the matter.



16. The respondents submitted, in addition: that the trial court was satisfied that there was inordinate, unexplained and inexcusable delay in bringing the application; that the fact that the firm of Riunga Raiji & Co. Advocates filed a Notice of Change of Advocates on 12th March 2020 was evidence that by that date the appellants were aware of the orders striking out the suit, yet the application was filed on 25th June 2020 without an explanation for the delay of 105 days; that on the authority of the case of Nilesh Premchand Mulji Shah & Another T/A Ketan Emporium V M.D Popat And Others & Another (2016) eKLR, the suit may properly be dismissed where the continued delay infringes on the defendant's rights and legitimate expectations that disputes ought to be resolved expeditiously.
17. It was pointed out: that from the record of the proceedings, the appellant did not assist the court in realizing the overriding objectives as provided for under sections 1A and IB of the *Civil Procedure Act*, whose achievement the orders were geared towards; and that notwithstanding the contention that the appellant is a public entity, it was a party in a suit like any other party and bound by all rules and procedures of expeditious disposal of matters.
18. We have considered the submissions made before us in this appeal. Although the respondents have taken issue with the date of the ruling as indicated in the memorandum of appeal, they did not take steps to have the appeal struck out on that ground. In any case, since no prejudice has been alleged to have been occasioned by that error, we find that it is the kind of procedural lapse that is curable by arising to the higher calling of doing justice without undue regard to procedural technicalities.
19. In determining the appeal, we are alive to the fact that we are sitting in this matter as a first appellate Court. Although the appeal arises from an application, our jurisdiction on a first appeal remains the same as in cases where oral evidence is taken, since affidavits contain the evidence on which the decision is arrived at. Accordingly, we are enjoined to reconsider and re-evaluate the affidavit evidence on record and draw our own conclusions thereon, with the rider that the usual caution, that we ought to take into account that we neither saw nor heard the witnesses testify and to give allowance for that fact, does not arise. While we must accord due deference to the findings of fact by the trial court, should we be satisfied that the findings were based on no evidence, on a misapprehension of the evidence, or on wrong principles, we are entitled to interfere. (See *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 and *Jabane v Olenja* [1986] KLR 661).
20. In addition, since the decision appealed against arises from an exercise of judicial discretion, as held in the case of *United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

21. From his ruling, the learned Judge was, in his own words:

“inclined to accept the Plaintiff's explanation for the default which resulted in the striking out of the suit.”



22. The explanation, according to the appellant, which was accepted by the learned Judge, was that its former advocate did not inform him of the directions given on 18th December 2019. Secondly, although the said orders were made in the absence of its advocate with a direction that the same be served, there was no indication that they were served.
23. The reason why the learned Judge declined to grant the application was the fact that the appellant had not been diligent in seeking remedial action, since the application was filed more than 6 months after the default clause had taken effect. According to the appellant, it was only after they appointed their new advocates on 12th March 2020 that they learnt of the directions issued on 18th December 2019. There was no evidence, and the trial court did not find, that this contention was untrue. The application was dated 25th June 2020, which was about three months from the date of appointment of the new advocates. The learned Judge, however, held that, assuming that the Plaintiff only learnt of the pre-trial directions in March 2020, there was no plausible explanation for the delay of another 3 months in filing the instant application. The court did not accept, as genuine, the appellant's explanation that government restrictions on physical movements due to Covid-19 prevented it from filing the application timeously. There was no basis for this conclusion since the respondents did not file replying affidavits to challenge the averments by the appellant. The learned Judge therefore, made a decision based on a premise not supported by the facts presented before him.
24. As regards the reasons for the delay, the learned Judge found that litigants had been filing applications through online platforms and the court had been hearing them since April 2020. While that might have been the position, the appellant's reasons for the delay in making the application were not the restrictions on the part of the court. Rather, it was due to the restrictions placed by the government which restricted government operations. It is not disputed that the appellant is a government entity.
25. We are also mindful of the position taken in *Re Jokai Tea Holdings Ltd.* (1993) 1 All ER 630, to the effect that where a court has to decide what consequences should follow from non-compliance with an order that a pleading be struck out unless further and better particulars are served within a specified time, the relevant question is whether such failure to comply with the "unless" order is intentional and contumacious. The court while appreciating that it should not be astute to find excuses for such failure since obedience to such peremptory orders is the foundation of its authority, nevertheless explained that if the non-complying party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, the failure ought not be treated as contumacious and ought not to disentitle him to the rights which he would otherwise have enjoyed. In this case, the learned Judge was, rightly in our view, inclined to accept the appellant's explanation for the default which resulted in the striking out of the suit. The next consideration, which he failed to take into account, was whether the failure was contumacious.
26. In the premises, we find that the learned Judge misapprehended the facts and also failed to consider material relevant to the exercise of discretion and, as a result, arrived at a wrong decision, thus justifying our interference with the exercise of discretion.
27. We allow the appeal, set aside the ruling and orders made on 29th October, 2022, dismissing the application dated 25th June 2020 and substitute therefor an order allowing the said application.
28. Considering the appellant's conduct prior to the giving of the directions of 18th December 2019, we direct each party to bear its own costs of the appeals.

Orders Accordingly.

DATED AND DELIVERED AT NYERI THIS 25TH DAY OF MARCH, 2026.



S. OLE KANTAI

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

*****I certify that this is the true copy of the original

DEPUTY REGISTRAR_**

