

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: KANTAI, ALI-ARONI & MUCHELULE, JJ.A.)

CIVIL APPEAL NO. 126 OF 2020

BETWEEN

JOB MURIITHI WAWERU.....APPELLANT

AND

MARY WARUGURU MUNENE.....RESPONDENT

*(Being an appeal against the ruling and order of the Environment and
Land Court at Nairobi (E.C. Cheronu, J.) dated 3rd July
2020*

in

Misc. Civil Appl. No. 4 of 2020)

JUDGMENT OF THE COURT

1. Before the Chief Magistrate's Court at Kerugoya, Mary Waruguru Munene (the respondent) sought judgment against Job Muriithi Waweru (the appellant) for the transfer of a half share of the property known as Inoi/Thaita/2878 (the suit property). She asserted that the suit property resulted from the subdivision of land parcel Inoi/Thaita/108, which had been jointly purchased and owned by the appellant and the late Aurelius Ngari Karathi. In 2018, the appellant subdivided parcel number 108 into three portions, retaining the suit property. The respondent, as the legal administrator of the deceased's estate, claimed entitlement to a half share of the suit property, having been in occupation of the land prior to the subdivision. In support of her claim, she produced a green card showing that

parcel number 108 was jointly registered in

the names of the appellant and the deceased on 27th March 2008.

2. Following a request for judgment by the respondent, judgment was entered for the respondent on 9th May 2019, wherein the trial court found that the late Aurelius Ngare Karuthi jointly purchased land parcel Inoi/Thaita/108 with the appellant, as conclusively established by the decree in **Land Disputes Tribunal Case No. 55 of 2001**. That decree expressly confirmed joint and equal ownership of the land by the appellant and the deceased. The trial court held that, in light of this determination and the green card evidence showing joint registration of parcel number 108, it was unlawful for the appellant to unilaterally register the resultant subdivision, Inoi/Thaita/2878, in his sole name.
3. The trial court further found that the respondent, as the legal representative of the deceased's estate, had proved her claim on a balance of probabilities. Accordingly, judgment was entered in her favour for the transfer of the deceased's half share of the suit property. For clarity, the court defined the half share as 2 $\frac{1}{8}$ acres, being the portion, the respondent had occupied and utilized prior to the subdivision. Although the trial court noted that the pleadings did not specifically seek vacant possession or a permanent injunction, it held that this omission did not defeat the claim and that the respondent remained at liberty to pursue those remedies separately.

4. Aggrieved by the above decision, the appellant vide motion dated 4th July 2019 sought for orders *inter alia*: that the interlocutory judgment entered in the matter on 9th May 2019 be set aside and the defendant be granted leave to file a defence out of time; that the annexed defence be deemed to be filed within time; and the costs of the application be provided for. It was asserted that the appellant's erstwhile advocate inadvertently failed to file a defence. It was further asserted that there had been ongoing negotiations at the CID's offices between the parties herein; the appellant anticipated that the respondent would withdraw the suit. The respondent opposed the application.
5. In the ruling delivered on 24th October 2019, the trial court held that the appellant's draft defence disclosed no triable issue. The alleged denial of joint ownership was untenable because ownership of the land parcel Inoi/Thaita/108 had been conclusively determined in **Land Disputes Tribunal Case No. 55 of 2001**, which found that the land was jointly owned by the appellant and the late Aurelius Ngari Karuthi. The trial court further found that the respondent, as administrator of the deceased's estate, was merely seeking enforcement of that determination through the transfer of the deceased's half share in Inoi/Thaita/2878, a subdivision of the original parcel. Since the issue of ownership had already been settled and was never lawfully challenged, the suit raised no issue requiring trial. Accordingly, the trial court rejected the defence as a

mere denial, declined to reopen a settled

decree, and granted the relief sought, holding that the right to be heard must be grounded in a genuine triable issue.

6. Vide orders issued on 14th November 2019, the trial court directed the Land Registrar Kirinyaga County to dispense with the production of the original title deed for the suit property and the appellant's identification documents. It was further directed that the Executive Officer of the trial court execute all relevant documents to facilitate subdivision accordingly.
7. Aggrieved by the judgment and subsequent orders, the appellant filed a motion before the superior court vide **Misc. Civil Appl. No. 4 of 2020**, seeking *inter alia*: there be a stay of further execution of the decree dated 9th May 2019 and issued on 17th June 2019 emanating from the judgment; pending the hearing and determination of this application and the intended appeal, there be a stay of proceedings in Kerugoya Chief Magistrate's Court; there be leave to appeal against the whole judgment; that the notice of appeal and memorandum of appeal annexed thereto be deemed as duly filed and served.
8. The appellant contended that the respondent's claim to half of land parcel INOI/THAITA/2878 was legally untenable because the land was derived from parcel INOI/THAITA/108, which he became solely entitled to by survivorship following the death of the respondent's husband. He maintained that upon the deceased's demise, his name was lawfully removed from the register under the doctrine of

jus accrescendi, after which he

subdivided the land and retained parcel INOI/THAITA/2878 measuring 4½ acres. He explained that judgment in the lower court was entered against him by default due to his advocates' failure to file a defence in time, and that his subsequent application to set aside the default judgment was dismissed. He further stated that the respondent thereafter moved to enforce the decree, leading to registration of the respondent as proprietor of 2⅛ acres of the suit land and imminent subdivision and transfer. The appellant argued that his intended appeal was arguable and a had high chance of success, and that unless conservatory orders were granted, the appeal would be rendered nugatory.

9. The motion was opposed by the respondent. The respondent contended that interim orders were granted in the present application without affording her a hearing, contrary to the rules of natural justice. She maintained that in the lower court proceedings, the appellant entered an appearance but failed to file a defence, leading to the matter proceeding to formal proof and judgment being lawfully entered. She stated that upon the appellant's refusal to comply with the judgment by transferring the land, she moved the court to enforce the decree. The appellant opposed the enforcement and also filed an application to set aside the judgment, which was heard and dismissed on 24th October 2019. The respondent asserted that the appellant was accorded opportunities to be heard but failed to diligently pursue them. She further argued that

the present application was filed after an inordinate and

unexplained delay following the delivery of judgment on 9th May 2019, and that the matter ought to come to an end.

10. In the ruling delivered on 3rd July 2020, the learned judge found that the applicant failed to satisfy the statutory requirements for the grant of a stay of execution and leave to appeal out of time under **Order 42 Rule 6** of the **Civil Procedure Rules**. In particular, the applicant did not demonstrate that he would suffer substantial loss if a stay was not granted, nor did he offer any security for the due performance of the decree. The court further found that the application had been brought after an inordinate and unexplained delay. The applicant's attempt to blame his former advocates for failure to file a defence, prosecute applications, or lodge an appeal in time was rejected, the court holding that the acts and omissions of a duly instructed advocate are attributable to the client and that mere inaction or negligence by counsel is not excusable. In the absence of a satisfactory explanation for the delay, material to justify the exercise of discretion, proof of substantial loss, or provision of security, the court declined to grant the orders sought. Consequently, the application dated 3rd February 2020 was dismissed with costs to the respondent.
11. In the memorandum of appeal, the appellant has raised 9 grounds which he has summarized *inter alia*: the learned judge erred in law and fact by denying the appellant leave to appeal against the judgment, decree and subsequent

orders of Hon.

E.O. Wambo, SRM in Kerugoya Chief Magistrate's Court ELC

No. 101 of 2018; the learned judge erred in law and fact by failing to appreciate that the proposed appeal in respect of which his leave was being sought intended to address serious issues which had caused serious miscarriage of justice as the entry of interlocutory judgment in favour of the respondent for

½ of the share of the suit property; the learned judge erred in law and fact by failing to look at the entire case before leading to his failure to exercise his discretion judiciously and refusal to grant the leave sought; and that the learned judge erred in law by rejecting the request for stay of execution meant to give effect to the main request to appeal out of time in the emotive issue of land by misinterpreting the provisions of **Order 42, Rule 6** of the **Civil Procedure Rules**, failing to consider and apply binding decisions of this court pertinent to the issues raised before the learned judge.

12. When the appeal came up for hearing on 10th June 2025, learned counsel Mr. Muchiri was present for the appellant, while learned counsel Mr. Makworo was present for the respondent. The appeal was canvassed by way of written submissions with limited oral highlights.
13. Counsel for the Respondent, Mr. Makworo, argued that the appellant's application to file a defence out of time had been properly dismissed by the lower court on 24th October 2019. Instead of appealing that ruling, the appellant improperly filed a miscellaneous application four months later seeking substantive orders that could only be granted

on appeal. He submitted that this procedure was irregular and incompetent.

14. Mr. Makworo further contended that the failure to file a defence was due to inaction by the appellant's advocate, not an excusable mistake. Relying on **Berber Alibhai Mawji -vs- Sultan Hasham Lalji & 2 Others [1990-1991] E.A. 337**), he argued that inaction or refusal to act by counsel cannot be treated as a mistake deserving the court's discretion and should not be excused or visited upon the court to grant relief. He maintained that negotiations were denied and that the lower court correctly dismissed the application on that basis.
15. In response to questions from the bench, Mr. Makworo emphasized that the explanation advanced, ongoing negotiations, did not justify the failure to file a defence and amounted to inaction rather than an error. He also acknowledged that he came on record at the appellate stage.
16. On the other hand, Mr. Muchiri, appearing for the appellant, maintained that the appellant had instructed counsel, who entered an appearance, and that negotiations were indeed ongoing, as asserted by the appellant and supported by an affidavit. He indicated that these matters had been adequately addressed in his written submissions and did not add further oral argument.
17. Counsel for the appellant submitted that after an *ex parte* judgment was entered in favour of the respondent awarding a half share of the suit property, the appellant

applied to set aside that judgment and sought leave to file a defence. This

was on the basis that there were ongoing out-of-court negotiations, evidence of which was not rebutted. In a ruling delivered on 24th October 2019, the trial court erred in holding that the appellant had not raised any triable issues, despite acknowledging that the suit property had initially been jointly owned by the appellant and the deceased. Aggrieved by that decision, the appellant moved to the Environment and Land Court (ELC) seeking, among other orders, leave to appeal against the trial court's judgment.

18. It was further submitted that the ELC erred in declining to grant leave to appeal, as both the trial court and the ELC failed to appreciate that the respondent had no cause of action against the appellant under the doctrine of *jus accrescendi* (right of survivorship). Counsel argued that the green cards showed that upon the deceased's death, his name was removed from the register, leaving the appellant as the sole proprietor. This led to the subdivision of the original parcel No. 108, with the appellant ultimately retaining the suit property. It was contended that both courts denied the appellant the right to be heard by determining the matter on a technicality. Reliance was placed on ***Keres & Others -vs Tasur & Others [2003] 2 EA 531 (CAK)***.

19. Additionally, it was submitted that the ELC failed to appreciate that the intended appeal sought to remedy a serious miscarriage of justice arising from the interlocutory

judgment and that the court failed to exercise its discretion judiciously.

20. In opposing the appeal, it was submitted that the ruling of the superior court, which is the subject of this appeal, contained negative orders that are incapable of being stayed and, therefore, could not be appealed against. It was argued that the appellant ought to have first sought leave to appeal before this Court and, further, should have sought leave from the subordinate court to file a defence out of time. It was also submitted that the appellant's motion for leave to appeal, filed on 3rd February 2020 against a judgment delivered on 9th May 2019, was filed after an inordinate delay of 11 months, which could not be excused as a mistake.
21. This appeal arises from the decision of the Environment and Land Court declining to grant the appellant leave to appeal against the judgment of the subordinate court delivered on 9th May 2019. In its *ex parte* judgment delivered on 9th May 2019, the trial court awarded the respondent a half share of the suit property herein.
22. The issue for our determination is narrow: whether the ELC properly exercised its discretion in refusing to grant leave to appeal.
23. It is not in dispute that the grant of leave to appeal is discretionary. That discretion, however, must be exercised judiciously and on sound principles. At this stage, an applicant needs only to demonstrate that the intended appeal is arguable and not frivolous. The merits of the appeal are not to be conclusively determined at the leave

stage. This position

is well settled (**Kenya Commercial Bank Ltd -vs- Muiri Coffee Estate Ltd** [2016] eKLR and **Dennis Mogambi Mong'are -vs- Attorney General & 3 Others** [2012] eKLR).

24. In the memorandum of appeal attached to the motion before the ELC, the appellant sought to challenge the judgment that had been, according to him, irregularly entered, and the failure to set aside the judgment based on the doctrine of survivorship. The governing principles in such matters are long established. In **Shah -vs- Mbogo & Another** [1967] EA 116, it was held that the discretion to set aside an *ex parte* judgment is intended to avoid injustice or hardship occasioned by accident, inadvertence, or excusable mistake, but not to assist a party who has deliberately sought to obstruct or delay the course of justice.
25. Before the ELC, the appellant contended that the failure to file a defence was occasioned by ongoing negotiations between the parties and further raised substantive issues touching on ownership of the suit property, particularly the applicability of the doctrine of survivorship (*jus accrescendi*). It was asserted that upon the death of the joint proprietor, the appellant became the sole registered owner, thereby calling into question the respondent's cause of action.
26. In our view, whether the respondent had a sustainable

claim in light of the doctrine of survivorship, and whether the appellant should have been shut out without a hearing, were not idle or frivolous matters. Sir William Duffins P. held in

Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA 75, that where a defence raises even a single triable issue, a defendant ought to be afforded an opportunity to be heard.

27. The ELC declined to grant leave largely on procedural considerations, including delay. While delay is a relevant factor, it is not, of itself, determinative. Courts are enjoined to balance procedural discipline with the overriding objective of facilitating substantive justice. As this Court observed in **Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, procedural rules are handmaidens of justice and should not be applied mechanistically to defeat substantive rights.
28. Moreover, the refusal to grant leave in the circumstances of this case effectively insulated the trial court's exercise of discretion from appellate scrutiny, notwithstanding the presence of arguable grounds. That was a misdirection. In interlocutory matters that implicate the right to be heard, leave to appeal should not be withheld where an applicant demonstrates a bona fide grievance deserving consideration by an appellate court.
29. We are therefore satisfied that the ELC failed to exercise its discretion judiciously and fell into error.
30. In the end, the appeal is allowed with costs to the appellant. The ruling of the Environment and Land Court

declining to

grant leave to appeal is set aside. The appellant shall, within 14 days, file and serve his appeal.

Dated and delivered at Nyeri this 25th day of March 2026

S. ole KANTAI

.....
JUDGE OF

**APPEAL ALI-
ARONI**

.....
JUDGE OF APPEAL

A.O. MUCHELULE

.....
JUDGE OF APPEAL

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

SIGNED

DEPUTY

REGISTRAR