Muriithi v Njogu & 6 others (Civil Appeal E069 of 2021) [2025] KECA 1426 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1426 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E069 OF 2021

JW LESSIT, J MOHAMMED & A ALI-ARONI, JJA

JULY 31, 2025

BETWEEN

PERIS WANJIRA MURIITHI .... APPELLANT

AND

THOMAS NDWIGA NJOGU .... 1ST RESPONDENT

SOSPETER GACHOKI NJOGU .... 2ND RESPONDENT

SAMUEL KARUGA NJOGU .... 3RD RESPONDENT

GEOFREY MURIUKI NJOGU .... 4TH RESPONDENT

MARY WANJIKU NJOGU .... 5TH RESPONDENT

HELLEN MUTHONI NJOGU .... 6TH RESPONDENT

LOISE WAMBURA NJOGU .... 7TH RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court at Kerugoya, (E. Cherono, J.) dated and delivered on 4th June 2021)

JUDGMENT

Background

1. This is an appeal against the ruling and order of the Environment and Land Court [ELC] [E.Chereno, J.] delivered on 4th June 2021, which dismissed the application by Peris Wanjira Muriithi [the appellant] to set aside ex- parte proceedings and the resultant judgment.

2. Thomas Ndwiga Njogu, Sospeter Gachoki Njogu, Samuel Karuga Njogu, Mary Wanjiku Njogu, Hellen Muthoni Njogu, and Loise Wambura Njogu [the 1st to 7th respondents] had instituted a suit via a plaint dated 31st July 2018, seeking declaratory relief to the effect that Patrick Muriithi Njogu [the

deceased], whose estate is represented by the appellant, held Land Parcel No. Ngariama/Thirikwa/481 [the suit property] in trust for them and Land Parcel No. Ngariama/Thirikwa/1524 in trust for the 4th respondent. They sought the transfer of 7/8 of the suit property to themselves in equal shares, and that Land Parcel No. Ngariama/Thirikwa/1524 be transferred and registered in the name of the 4th respondent.

3. The appellant, through the firm of Ndegwa & Ndegwa Advocates, entered an appearance and filed a statement of defence dated 31st October 2018. However, she failed to attend the hearing on 9th July 2019, prompting the court to proceed exparte. The court, in a judgment dated 20th September 2019, entered judgment in favour of the respondents, holding that the deceased held the suit properties in trust.

4. The appellant did not appeal the said judgment. Instead, by a Notice of Motion dated 15th October 2020, she sought leave for a new firm of advocates to come on record, a stay of execution, and an order setting aside the judgment and all consequential orders. The application was premised on the allegation that her former advocates failed to inform her of the hearing date.

5. In response, the 1st respondent opposed the application, citing the procedural history and the fact that the hearing date had been fixed by consent. The respondents also contended that the application had been filed nearly a year later, thereby occasioning undue prejudice.

6. The trial court dismissed the application, finding that the appellant had failed to demonstrate diligence. The ELC noted that the appellant had never attended court and had passively relied on her advocate without making any follow-up. The court declined to exercise its discretion in her favour.

7. In rejecting the argument that the mistakes of counsel should not be visited upon an innocent litigant, the ELC held in part as follows: -

> " From the evidence on record it appears that the applicant never attended court at any point when the matter came up. She merely sat back and waited for her advocate to inform her of the outcome. When the updates were not forthcoming and when her calls were ostensibly unanswered, the applicant did nothing else, between when the defence was filed in October 2018 until one year after judgement was rendered. The indolence of the applicant cannot warrant an exercise of the court's discretion in her favour."

8. Displeased by the turn of events, the appellant lodged the instant appeal citing the following grounds that: -

   i. The Learned Judge erred in both law and fact in failing to appreciate that the application to set aside judgment entered on 20th September 2019 and set the suit for hearing and determination on merits;

   ii. The decision of the trial court is against the provisions of Articles 5 [1] and 159 [2] of *the Constitution* as the appellant was never heard to give her evidence;

   iii. The ruling and orders of the trial court is based on the conclusion that the appellant's husband has never held any land in trust for the respondent neither was there any trust to be determined;

   iv. The trial court misapprehended by directing that the Land Parcel Number Ngariama/ Thirikwa/1524 be transferred and registered in the name of Geoffrey Muriuki Njogu;

   v. The ruling, decision and orders of the trial court are against the weight of the evidence and material on record.

9. The appellant urged that the appeal be allowed with costs, the decision of the trial court and the appellant's application be set aside and substituted with judgment against the respondents in favour of the appellant, the appellant be declared absolute proprietor of Land Parcel Nos. Ngariama/Thirikwa/481 and Ngariama/Thirikwa/1524 and the respondents be condemned to pay costs of this appeal and the Kerugoya ELC Case.

Submissions by Counsel

10. At the hearing of the appeal, learned counsel Mr. Danstan Omari appeared for the appellant and relied entirely on the written submissions and cited authorities.

11. Counsel for the appellant submitted that the appellant had since recovered, changed counsel, and was ready and willing to prosecute the matter on merit. Counsel submitted that the appellant's failure to attend the hearing was attributed to two reasons: [i] that her previous counsel failed to inform her of the hearing date, and [ii] that she was undergoing chemotherapy for cancer at the material time.

12. Counsel referred to the cases of Bi-Mach Engineers Ltd v James Kahoro Mwangi [2011] KECA 242 [KLR], and Shanzu Investments Ltd v Commissioner of Lands [1993] KECA 36 [KLR], reiterating that courts have wide discretion to set aside ex parte judgments where there is an excusable mistake or inadvertence. It was further submitted that the appellant was an elderly, illiterate widow of approximately 70 years, and she depended entirely on her former advocate.

13. The respondents, through learned counsel, Mr. Maina Kagio, opposed the appeal and relied on their written submissions and authorities. Counsel emphasized that the appellant was at all material times aware of the proceedings and that the hearing date had been taken by consent. Counsel asserted that the appellant failed to comply with directions to file witness statements and documents.

14. Counsel contended that the delay in filing the application—over one year— was inordinate and unexplained. Counsel further submitted that there was no medical evidence to support the illness claim, nor was there an affidavit from the former counsel to explain the non-attendance.

15. Citing Mbogo & Another v Shah [1968] EA 93, Kibira v IEBC & 2 Others [2019] KESC 62 [KLR], and Habo Agencies Ltd v Wilfred Odhiambo Musingo [2015] eKLR, the respondents argued that the ELC exercised its discretion judiciously and that there was no basis for this Court to interfere with the decision of the ELC.

Determination

16. We have considered the grounds of appeal, the written submissions filed, the authorities cited and the law. This appeal is against the exercise of discretion of the ELC for failure to set aside an ex parte judgment.

17. The key issue for determination is whether the learned Judge erred in declining to set aside the ex parte proceedings and judgment rendered on 20th September 2019.

18. The principles governing the setting aside of ex parte judgments are well settled. As held in Mbogo & Another v Shah [1968] EA 93, appellate interference with the exercise of discretion is limited to instances of misdirection, consideration of irrelevant matters, or failure to consider relevant ones.

19. We have perused the application dated 15th October 2020. The appellant explained that she had no knowledge that the suit proceeded to its logical conclusion until 5th October 2020. The appellant's explanation for the delay in filing the application to set aside the ex parte proceedings was blamed on her erstwhile counsel.

20. Having appreciated the trial court proceedings, on 11th February 2018 and 22nd January 2019, the appellant's counsel did not appear in court for pretrial directions despite service. On 5th March 2019, learned counsel Mr.Ndegwa for the appellant appeared in court and requested for 14 days to comply. When the matter was mentioned on 13th March 2019, Mr. Ndegwa stated that he had not complied with the court directions and asked for two more weeks.

21. While fixing the hearing date for 9th July 2019 in the presence of counsel for both parties, the appellant was granted 14 days to file and serve a list of documents and witness statement, and in default, they would not be admitted. When the matter was called out for hearing on 9th July 2019, Counsel for the appellant was not in attendance.

22. From the record, there is a one-year period of delay between the time when judgment was delivered and when the application dated 5th October 2020 to set aside the ex-parte proceedings and judgment was filed in court. In the instant appeal, through written submissions, the appellant stated that apart from knowing of the outcome of the suit late, she had been ailing from cancer and going through chemotherapy sessions and therefore, she could not follow up on the progress of her case.

23. Before the trial court, the appellant had the opportunity to establish with precision and adduce evidence in her affidavit to demonstrate her ailment so that the court would give her the benefit of doubt. It is trite law that submissions are not evidence. To put matters into their proper perspective, we find that the explanation of the appellant's sickness was not an issue that was put to the test before the trial court.

24. With the foregoing in mind, we are aware of the jurisprudence that mistakes of Counsel should not be visited upon an innocent litigant, as it has been held in In Phillip Chemowolo & Another v Augustine KAR 103 at 104, where Apalloo, JA. observed that:

> " It does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merit; that courts exist for the purpose of deciding rights of the parties and not the purpose of imposing discipline."

25. In Belinda Murai & 9 others v Amos Wainaina [1978] KECA 23 [KLR] Madan, JA stated that: -

> " the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better."

26. However, we reiterate that there is no satisfactory explanation of the period of delay between 12th September 2019 and 5th October 2020. This Court in Habo Agencies Limited -v- Wilfred Odhiambo Musingo [2015] eKLR stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.

27. Shah JA in Mwangi v Kariuki [199] LLR 2632 [CAK] ruled that: -

> " Mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless show what action the appellant took between 24th October attitude. In the instant case, there is nothing on record to at the High Court was prosecuted. There is no credible explanation for the delay by the appellant's former advocate."

28. Koome JA [as she then was] in Rhoda Ndululu Sengete & another v Tabitha Kavenge Matolo [2019] KECA 640 [KLR] held:-

> “ I think it is time litigants started to bear the mistakes made by lawyers whom they have chosen. I say so because sometimes it has become almost obvious for every delay an advocate is blamed and yet no action is demonstrated to show there was due diligence on the part of the litigant.”

29. Lastly, P.N. Waki JA in Bi-Mach Engineers Limited [supra] held as follows: -

> “ I have examined the affidavit in support of the application and it is my view that it falls short of candidness and betrays lack of expedition. There is no explanation at all about what the applicant was doing between 2nd December and 30th December, 2010 when an undisclosed informer gave out the information about the decision of the court. The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”

30. From the foregoing, we find that in the instant appeal, the learned Judge correctly considered the relevant factors, including the inordinate delay of over one year, the absence of supporting evidence such as medical records or an affidavit from the previous counsel, and the appellant’s general lack of diligence.

31. We are not persuaded that there was any misdirection or abuse of discretion. The hearing date was taken by consent, and the appellant had previously failed to comply with pre-trial directions. The learned Judge was therefore entitled to conclude that the appellant had not demonstrated sufficient cause to warrant the setting aside of the judgment.

32. While the Court appreciates that litigation should, where possible, be determined on merit, such indulgence is unavailable to litigants who are indolent or fail to follow up on the conduct of their cases.

33. As reiterated in Habo Agencies Ltd v Wilfred Odhiambo Musingo [2015] eKLR, a litigant must demonstrate interest and diligence in prosecuting their case, even when represented by counsel.

34. In view of the foregoing, we find no justification to disturb the findings of the trial court. The appeal is devoid of merit and is hereby dismissed.

35. Given the familial nature of the dispute, we direct that each party shall bear their own costs of the appeal.

36. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI – ARONI

……………………………

JUDGE OF APPEAL

I certify that this is a true Copy of the original

Signed

DEPUTY REGISTRAR