Mwiwawi & 2 others v Commissioner of Lands & another; Isangawishi Group Ranch (Interested Party) (Civil Appeal E139 of 2022) [2025] KECA 1296 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1296 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E139 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JULY 18, 2025

BETWEEN

MILTON MASALE MWIWAWI ..... 1ST APPELLANT

BERNARD NDOLE MBAYA ..... 2ND APPELLANT

NORBERT LENJO MSHAMBA ..... 3RD APPELLANT

AND

COMMISSIONER OF LANDS ..... 1ST RESPONDENT

CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

AND

ISANGAWISHI GROUP RANCH ..... INTERESTED PARTY

(Being an appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (A. Amollo, J.) dated 24th June 2016 in Misc. App. No. 225 of 2000)

JUDGMENT

1. By a Notice of Motion dated 9th October 2000, the appellants (Milton Masale Mwiwawi, Bernard Ndole Mbaya and Norbert Lenjo Mshamba) and 3 others not party to the instant appeal applied for judicial review in Mombasa HC Miscellaneous. Civil Application No.225 of 2000 in the High Court of Kenya at Mombasa seeking orders of certiorari, prohibition and mandamus against the 1st and 2nd respondents' decision to issue a title deed to the Interested Party (Isangawishi Group Ranch) in respect of Plot No. Bura/Isangawishi/18.

2. Upon hearing the appellants' Motion, the learned Judge (J. K. Sergon, J.) delivered his ruling dated 28th March 2008 dismissing the appellants' application with costs to the respondents (the Commissioner of Lands and the Chief Land Registrar) and the Interested Party.

3. Subsequently, the Interested Party's Bill of Costs dated 30th September 2009 was taxed at Kshs. 6,733,295/- vide the Certificate of Taxation issued on 29th March 2012. The record as put to us does not disclose whether any Bill of Costs was taxed in favour of the respondents or either of them.

4. Dissatisfied by the costs as taxed, the appellants moved the trial court vide their Notice of Motion dated 22nd October 2012 seeking, inter alia,: orders that the warrants of attachment issued to the respondent (the Interested Party herein) be set aside; that stay of execution do issue; that they be granted leave to file a Reference on the taxation within a period of fourteen (14) days; that the auctioneers costs be borne by the respondent (to the Motion); and that the costs of the application be provided for.

5. The appellants' Motion was supported by the 3rd appellant's affidavit sworn on 23rd October 2012 deposing to the grounds on which the Motion was anchored, namely: that taxation of costs took place on 14th May 2010; that the ruling on taxation was scheduled for delivery on 25th June 2010, but was not delivered as scheduled; that they were not notified of the delivery; and that they only learnt that the ruling had been long delivered when, on 12th October 2011, and that auctioneers were moved to execute warrants of attachment and proclaimed the attachment of property belonging to one Edward Lenjo (not party to the instant appeal).

6. In response to the Motion, the Interested Party filed Grounds of Objection dated 26th October 2012 contending that the court had issued notice of delivery of the ruling on taxation; that the ruling was delivered in the absence of all the parties; and that the appellants were negligent in failing to pursue the matter and ascertain the progress.

7. Though named in the Motion, the respondents did not reply thereto.

8. In her ruling dated 11th February 2015, the learned Judge (A. Omollo, J.) allowed the appellants' Motion in part and granted the appellants leave to file the intended Reference within 7 days next following. She declined to grant the rest of the orders sought and directed that the parties bear their own costs of the Motion.

9. Having failed to comply with the orders given on 11th February 2015, the appellants filed an application dated 22nd July 2015 seeking "enlargement of time" to file their Reference against the taxation in issue. Their Motion was supported by the affidavit of Gikandi Ngibuini, learned counsel for the appellants, sworn on 22nd July 2015 deposing to the reasons for the 5-months delay in compliance with previous court orders. Counsel deponed that the ruling of 11th February 2015 was delivered in their absence despite notice of delivery; that counsel had written to the court on 9th December 2014 indicating that he wished to highlight his written submissions before delivery of the ruling; that he was not given the opportunity to highlight his written submissions; that it was only on 20th April 2015 that he became aware that the ruling had been delivered; that he regretted the oversight, that the appellants should not be made to suffer due to no fault of their own; that the intended Reference raises fundamental questions of law; and that the Interested Party will suffer no prejudice if the application is allowed.

10. The Interested Party opposed the appellants' Motion vide their Grounds of Opposition dated 31st July 2015, contending that the application is res judicata; that the application is contrary to rule 11 of the Advocates (Remuneration) Order; that the appellants were guilty of laches; and that the application was an abuse of the court process.

11. By a ruling dated 24th June 2016, A. Omollo, J. dismissed the appellants' Motion with costs to the Interested Party. According to the learned Judge, the application was res judicata, and had no merit.

12. Dissatisfied by the learned Judge's decision, the appellants moved to this Court on appeal on 12 grounds faulting the learned Judge for: declining enlargement of time; misconstruing the nature of the Motion; misinterpreting the proceedings of 9th December 2014; denying the appellants the right to a fair hearing; misinterpreting the weight and import of counsel's letter dated 9th December 2014 requesting for an opportunity to highlight their submissions; failing to exercise her discretion judiciously; finding that the appellants' application was res judicata; allowing the Interested Party to enjoy manifestly exaggerated and unjustified costs; and for arriving at a decision against the weight of evidence and the law. Counsel urged us to set aside the impugned ruling and extend time to file a Reference.

13. In support of the appeal, learned counsel for the appellant, M/s. Gikandi & Company, filed submissions, a list and bundle of authorities dated 28th May 2024 citing 6 judicial decisions, which we have duly considered.

14. In rebuttal, learned counsel for the Interested Party, M/s. Munyithia, Mutugi, Umara & Muzna, filed written submissions and a summary analysis of authorities dated 19th June 2024, which we have taken into consideration.

15. To our mind, the appeal stands or falls on our determination of two main issues: whether the appellants' Motion dated 22nd July 2015 was res judicata the earlier application dated 22nd October 2012; and whether sufficient cause has been shown to warrant interference with the discretionary decision of the learned Judge.

16. On the 1st issue, we hasten to draw a clear distinction between a discretionary order given in exercise of a judicial discretion and an order given on the merits of the case. Black's Law Dictionary (Tenth Edition) points to the fact that a discretionary order is not deserved as of right.

17. On the other hand, an order or decision made on the merits refers to a situation where a court has reached a final determination on the substantive issues of a case, not just procedural or jurisdictional matters. This signifies that the court has fully considered the facts, the law, and the arguments presented, and has reached a conclusion that resolves the dispute with finality. The phrase "on the merits" refers to a case whose decision rests upon the law as it applied to the particular evidence and facts presented in the case.

18. Black's Law Dictionary (Second Edition) defines merit as:

> " Matter of substance in law, as distinguished from matter of mere form."

19. It is with regard to such decisions (on merit) that the res judicata doctrine applies as stipulated in section 7 of the *Civil Procedure Act* (Cap. 21), which reads:

> 7. Res judicata
>
> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

20. The Supreme Court in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR held that:

> " 86. We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
>
> a. There is a former Judgment or order which was final;
>
> b. The Judgment or order was on merit;
>
> c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d. There must be between the first and the second action identical parties, subject matter and cause of action."

21. It is not lost on us that the doctrine of res judicata not only applies to suits, but also to applications determined on merit as opposed to those subject to courts' discretionary powers on matters of form and procedure. This legal position was stated in Mburu Kinyua v Gachini Tuti [1978] KLR 69 at 81 and reiterated by the Court of Appeal in Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others [1996] eKLR as follows:

> "…. That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation."

22. In view of the foregoing, we are of the considered view that the impugned ruling and orders were made in exercise of the learned Judge's discretionary powers. Accordingly, the appellants' Motion dated 22nd July 2015 was not by any means res judicata the earlier Motion dated 22nd October 2012.

23. Turning to the 2nd and final issue as to whether the learned Judge was at fault in declining to grant the appellants' Motion dated 22nd July 2015 for extension of time to file their Reference, and whether sufficient cause has been shown to warrant interference with the impugned ruling, we hasten to observe that the grounds on which this Court may interfere with the discretionary decision of a single Judge are limited. The reasons given for the delay must be plausible and satisfactory.

24. This Court in Wakaba Ndegwa & another vs. Lucy Nyaguthii [2017] eKLR had this to say on the matter:

> " 13. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercised. Aganyanya, JA in Monica Malel & Anor V. R, Eldoret Civil AppLN NO. NAI 246 OF 2008 stated:
>
> 'When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show … the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.'"

25. The explanation given by learned counsel for the appellants that time passed and the orders granting 7 days to file the intended Reference lapsed as they waited for an opportunity to highlight their written submissions is by no means plausible. Having failed to comply with the orders given on 11th February 2015, it took the appellants over five (5) months to file yet another application on 22nd July 2015 on the flimsy ground that they were waiting in anticipation of the court's response to their request to be given an opportunity to make oral highlights of their written submissions. It is noteworthy that counsel did not deny having notice of the date for delivery of the ruling dated 11th February 2015. Neither did they allude to any prejudice suffered by the appellants on account of the learned Judge's consideration of their written submissions without the need for oral highlights.

26. We take to mind the hallowed principle that "to whom much is given, much is required." One of the latitudes given to judges and judicial officers in the course of their work is judicial discretion. Black's Law Dictionary, 10th Edition defines judicial discretion as:

> " The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

27. Madan JA (as he then was) in United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A had this to say on the matter:

> "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."

28. To our mind, none of the five grounds advanced in United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd (supra) warrant interference of a Judge's discretionary decision have been alluded to in the instant case. In effect, the appellants have failed to substantiate any ground on which the learned Judge could be faulted for declining their 2nd Motion for extension of time.

29. Having found no reason to interfere with the learned Judge's decision, we find that the appeal fails and is hereby dismissed. Consequently, the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (A. Amollo, J.) dated 24th June 2016 are hereby upheld, save for the holding that the Motion was res judicata.

30. The appellants shall bear the costs of the appeal. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR