



**Leitich v Mwangi (Civil Appeal (Application) E147 of 2023)
[2025] KECA 1279 (KLR) (11 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1279 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E147 OF 2023
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA
JULY 11, 2025**

BETWEEN

FLORENCE LEITICH APPLICANT

AND

ANN WAMBUI MWANGI RESPONDENT

(Being an application for a conservatory order/injunction to stay the judgment in the Environment and Land Court of Kenya at Nakuru (J. M. Mutungi, J.) dated 17th June, 2021 in ELC Appeal No. E001 of 2020)

RULING

1. In the intricate tapestry of our legal system, the role of advocates stand as pillars of justice, ensuring effective representation of their clients and a fair judicial process. It is here that the trajectory of a case is determined, making the role of the trial advocate critical to the outcome. Therefore, the trial advocate is the central figure in this process. The advocate is responsible for presenting his/her client's case in a manner that is both legally sound and persuasive. From drafting the pleadings, filing the case in court, preparing for the trial to arguing their cases in courts, the trial advocate's actions directly influence the direction of the case and its eventual resolution. An inefficient trial advocate can jeopardize his client's case in ways that could be avoided.
2. A trial is not merely a sequence of events but a carefully planned process. Advocates must anticipate opposing arguments, prepare rebuttals, and ensure that their case remains coherent and compelling throughout the proceedings. An advocate's role extends beyond legal expertise to effective drafting, communication and courtesy to the opposing advocate and the court. An advocate must present his/her pleadings and arguments clearly to the court, explain complex legal points to his/her clients and where the case is a non- starter, advice the client accordingly instead of giving them false hope, which comes with a heavy cost to the client not to mention loss of valuable time.



3. Regrettably, Appellate Courts often encounter cases marred by fatal avoidable errors occasioned either during the trial stage or by poorly and carelessly crafted pleadings. These errors could be avoided if the advocates pay meticulous attention to detail and have a clear understanding of the law and the rules of procedure. By ensuring that all legal, procedural and evidentiary aspects are adequately addressed, trial advocates can prevent unnecessary dismissal of their cases.
4. Undeniably, the advocate's role is significant. His/her work lays the groundwork for the entire judicial process, influencing not just the immediate outcome of a case but also its journey through the legal system. An advocate must approach each case with diligence, caution, and an unwavering commitment to justice. The need to adhere and uphold the highest standards of their profession cannot be gainsaid. The efficiency of trial advocates not only benefits individual clients but also contributes to the broader judicial process.
5. An effective trial advocate must understand the rules of procedure and the consequences of not adhering to the rules governing the proceedings. In essence, procedural rules are a vital mechanism for upholding the rule of law, ensuring fairness, and promoting efficient and just outcomes in civil litigation. These rules are not merely technicalities but serve as the foundation for a just and predictable legal system.
6. Proceedings in this Court are governed by the *Court of Appeal Rules, 2022*. Relevant to the application before us is rule 58 which primarily governs the reinstatement of applications that have been dismissed for non-attendance. Specifically, this rule has very clear terms, outlines the conditions under which a party can apply to have a dismissed application restored for hearing. The key requirements are demonstrating a sufficient cause for the absence and making the application within a specified timeframe. The said rule reads:

“ 58. Procedure on non- appearance

1. If, on any day fixed for the hearing of an application, the applicant does not appear or comply with directions, the application may be dismissed, unless the Court sees fit to adjourn the hearing:
Provided that the Court may order that an application may be heard by way of written submissions and where parties have filed written submissions, the court shall consider the submissions.
2. If the applicant appears or complies and the respondent fails to appear or comply, the application shall proceed in the absence of the respondent, unless the Court sees fit to adjourn the hearing.
3. Where an application has been dismissed or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re- hear it, as the case may be, if that party can show that he or she was prevented by any sufficient cause from appearing when the application was called on for hearing.
4. An application made under sub rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing } but was not so served, within thirty days after that party's first hearing of that decision.



5. The provisions of sub-rule (1) shall not apply to a criminal application if the applicant is in prison and is not represented by an advocate and in any such case, the application shall be heard notwithstanding the absence of the applicant, unless the Court shall otherwise order.
 6. Subject to the provisions of sub-rules (1), (2), (3), (4), and (5), the Court shall have discretion to dismiss an application or an appeal where one or both parties fail to appear or comply after being duly served, or cannot be traced at the parties' last known address.
 7. A party's advocate may effect service under this rule.
7. The above rule appears to be completely alien to the applicant's counsel Mr. Mutai. We say so because by an application dated 7th July 2021 being Civil Appeal (Application) No. E038 of 2021, the applicant moved this Court seeking stay of execution of the judgement and decree issued on 17th June 2021 in Nakuru ELC Appeal No. E001 of 2020. The said application was scheduled for hearing on 5th September 2024. However, on the said date, the applicant's counsel did not attend Court. Consequently, the said application was dismissed for non-attendance as provided by rule 58 (1).
 8. Rule 58 (3) provides that where an application has been dismissed, the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if that party can show that he or she was prevented by any sufficient cause from appearing when the application was called for hearing. Instead of invoking the said provision, the applicant filed yet another application, that is, Civil Application No. 056 of 2024 which came up for hearing on 30th October 2024. However, the respondent's counsel Mr. Karanja raised an objection citing the applicant's previous application which was dismissed for non-attendance. This Court, in a restrained manner, advised the applicant's counsel Mr. Mutai to withdraw the said application and approach the Court properly by filing an appropriate application for reinstatement of his earlier application which had been dismissed for non-attendance. Accordingly, the said application was by consent marked as withdrawn.
 9. Even before the ink recording the above order could dry, the applicant once again, and for the third time moved this Court by an application dated 6th February 2025, the subject of this ruling brought under rules 5 (2) (b) and 47 of the *Court of Appeal Rules*, 2022, and Article 164 (3) of the *Constitution* seeking a conservatory order, or in the alternative, an injunction restraining the respondent, whether by herself, her employees, agents, servants, or otherwise, from demolishing, interfering with, or evicting her or her employees, servants, and/ or tenants from the property known as Plot 36A, situated at Rongai Junction Trading Centre and Plot 5 Petrol Service Station - Rongai Junction. Alternatively, the applicant prays for a conservatory order suspending the demolition of all buildings and structures on the suit premises to preserve the status quo and prevent irreparable harm to the applicant and her tenants. Lastly, the applicant prays for the costs of the application to abide the outcome of the appeal.
 10. Either by accident or design, in the prayers, the applicant does mention the case number and the judgment against which the orders are directed. However, in the title to the application, which is strikingly similar to the previous two applications, the applicant wrote "being an Appeal against the judgment of Hon. T. M Mutungi dated and delivered on the 17th June 2021 in Nakuru ELC Appeal No. E001 of 2020" clearly showing that the orders sought seek to stay the same judgment, which was the subject of the application which was dismissed for non- attendance and the subsequent similar application which was withdrawn.



11. The germane ground in support of the application is that the application is not res judicata since the previous application was not heard and conclusively determined on merits. Similarly, the main ground of objection raised by the respondent's counsel and in her replying affidavit and in their submissions is that the application is not res judicata.
12. During the hearing of this application, this Court spent quality time exhorting Mr. Mutai to reconsider his application and apply for reinstatement in accordance with the rules. However, Mr. Mutai was adamant that he wanted a ruling and exhibited confidence. Unfortunately, behind that unwavering confidence lay a worrying ignorance of rule 58. In fact, both parties spent a lot of ink in their submissions on the question of res judicata, which was totally inapplicable in this case. This is because the key question in this application which both parties did not seem to understand was whether it was open for the applicant whose application was dismissed for non-attendance to file a fresh application or applications seeking the same or substantially the similar orders. It is basic law that when an application is dismissed for non-attendance, the affected party can apply for its reinstatement rather than filing a fresh one. This procedure is clearly provided under rule 58 reproduced earlier. Courts generally allow for reinstatement if a sufficient cause for the non-attendance is shown and the application is made promptly. We are unable to understand why the applicant's counsel could not grasp this elementary fact and move the court as clearly provided under the rules, even after this Court leaned backwards and told him to approach the court as provided by the rules.
13. Filing similar applications after the first application was dismissed constitutes abuse of Court process. The *Black's Law Dictionary*, 10th Edition defines abuse as "a departure from legal or reasonable use; misuse." An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use. Situations that may give rise to an abuse of Court process are indeed in exhaustive, but basically, it involves situations where the Court process has not been or resorted to fairly, properly, honestly to the detriment of the other party. In *Patrick Macharia Nderitu vs. Director of Public Prosecutions & 2 Others; Dovey Pharma Limited (Interested Party)* [2020] eKLR, the High Court citing authorities provided the following examples which constitute abuse of court process:
 - a. Instituting multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
 - b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
 - c. Where two similar processes are used in respect of the exercise of the same right.
 - d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
 - e. Where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
 - f. Where a party has adopted the system of forum- shopping in the enforcement of a conceived right.
 - g. Where an appellant files an application in respect of a matter which is already subject of an earlier application.



- h. }Where two actions are commenced, the second asking for a relief which may have been obtained in the first.
14. Abuse of the Court process creates a factual scenario where a party is pursuing the same matter by two or more court processes. In other words, a party is involved in some gamble; a game of chance to get the best in the judicial process. Had the applicant obtained the orders sought in the first application, the second, and the third applications would not have been filed. The applicant is simply seeking to obtain from the Court the same orders she could not obtain in the first application. Adding the prayer for a conservatory order cannot change the colour or character of the earlier application which was dismissed.
15. As was observed by the High Court in the above case, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse of Court process. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of the person exercising the right, to harass, irritate, and annoy the adversary or interface with the administration of justice. The instant application is an abuse of court process.
16. In conclusion, only one order is merited in this application, which is dismissal. Accordingly, the application dated 6th February 2025 is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF JULY, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.

