



**Mwangi v Consolidated Bank of Kenya Limited & 3 others (Civil Appeal  
E104 of 2021) [2024] KECA 250 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KECA 250 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E104 OF 2021  
F TUIYOTT, K M'INOTI & GWN MACHARIA, JJA  
MARCH 8, 2024**

**BETWEEN**

**JOHN MATHARA MWANGI ..... APPELLANT**

**AND**

**CONSOLIDATED BANK OF KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**COMMERCIAL MART LTD ..... 2<sup>ND</sup> RESPONDENT**

**JOSEPH KARIUKI T/A JOSRIC MERCHANTS AUCTIONEERS .... 3<sup>RD</sup>  
RESPONDENT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

*(Appeal from the ruling and order of the High Court of Kenya at Nairobi  
(Majanja, J.) dated 10th February 2021 in HC (C&TD) C No. 162 of 2019)*

**JUDGMENT**

1. The memorandum of appeal before sets forth 12 grounds of appeal against the ruling of the High Court of Kenya at Nairobi (Majanja, J.) dated 10<sup>th</sup> February 2021. By that ruling, the learned judge dismissed a suit by the appellant, John Mathara Mwangi, for want of prosecution. It is plainly clear, therefore, that the central question in the appeal, the multiplicity of grounds of appeal notwithstanding, is whether the learned judge judiciously exercised his discretion in dismissing the appellant's suit. At the hearing of the appeal, the appellant urged four grounds of appeal which we shall consider shortly.
2. The short background to the appeal is that on 20<sup>th</sup> July 2009, the appellant took a loan of Kshs 15 million from the 1<sup>st</sup> respondent, Consolidated Bank of Kenya Ltd. The loan was secured by a charge over the appellant's property known as LR. No. 4894/148 Garden Estate (the suit property). On 23<sup>rd</sup> July 2013 the parties restructured the loan and the appellant took a further loan of Kshs



- 10,940,435.00 payable in 120 months. The appellant defaulted in servicing the loan, which he blamed on “the vicissitudes of business”, and on 28<sup>th</sup> August 2015, the 1<sup>st</sup> respondent sold the suit property by public auction to the 2<sup>nd</sup> respondent, Commercial Mart Ltd.
3. On 20<sup>th</sup> December 2017, the appellant filed suit in the Environment & Land Court at Nairobi, challenging the sale of the suit property on the grounds, among others that the 1<sup>st</sup> respondent had undervalued the suit property and that the sale was fraudulent and in violation of section 44A of the *Banking Act* (the in Duplum Rule). The particulars of the fraud, collusion, malice and conspiracy alleged on the part of the respondents were duly pleaded. The appellant prayed for declarations that the sale of the suit property was null and void; refund of moneys found to have been paid in violation of section 44A of the *Banking Act*; an injunction to stop any dealings with the suit property, cancellation of the 2<sup>nd</sup> respondent’s registration as the owner of the suit property, general damages and costs.
  4. The 1<sup>st</sup> respondent filed its defence on 9<sup>th</sup> March 2018 whilst the 2<sup>nd</sup> respondent and the 4<sup>th</sup> respondent filed theirs on 7<sup>th</sup> March 2018 and 9<sup>th</sup> April 2018, respectively. They all traversed the appellant’s averments, and prayed for dismissal of the suit. By an order dated 8<sup>th</sup> July 2019, the suit was transferred to the High Court for hearing and determination.
  5. The suit was then set down for virtual hearing on 10<sup>th</sup> February 2021 before Majanja, J. due to the Covid-19 pandemic that was then raging in the country and globally. When the suit was called out of hearing, an advocate, Mr. Ndege, placed himself on record as holding brief for Mr. Kinyanjui for the appellant (then the plaintiff). Mr. Ndege applied for an adjournment which the learned judge declined to grant. The record is not entirely clear, as counsel is recorded stating that the appellant was “exposed” (indisposed?) and that he had not yet given any recommendations (instructions?), presumably to his counsel. After denying the application for adjournment, the learned judge informed counsel to be ready to proceed with the hearing once the court had finished with the other matters on the cause list.
  6. When the matter was called out later that morning for hearing, Mr. Kinyanjui appeared for the appellant and informed the court that his client was not in court. Mr. Kinyanjui made a further application for adjournment on the grounds that the hearing date was not convenient to him because he was engaged the same morning in several petitions before a court of concurrent jurisdiction. In addition, counsel told the court that it was the appellant’s wish that the hearing of the suit should take place physically rather than virtually. The learned judge again declined to adjourn the hearing and ultimately dismissed the same after the appellant failed to prosecute his suit when called upon to do so.
  7. The appellant was aggrieved, and after filing a notice of appeal, lodged the current appeal, in which he impugns the decision of the High Court on the grounds of wrongful exercise of discretion, lacuna and lack of legal framework for conducting virtual hearings, failure to follow stare decisis and bias on the part of the learned judge.
  8. In support of the first ground of appeal, Mr. Kinyanjui submitted that the learned judge erred by dismissing the suit without hearing the appellant. In counsel’s view, a court ought to dismiss a suit sparingly, and in support of that view he relied on *D.T. Dobie & Company (K) Ltd v Joseph Mbaria Muchina* [1980] eKLR.
  9. The appellant further cited the judgment in *Philip Chemwolo & Another v. Augustine Kubende* [1986] eKLR and submitted that mistakes and blunders by parties are excusable in an effort to vindicate their rights and justice. *Essanji & Another v. Solanki* [1968] EA 218 was cited to support the argument that the court should strive to hear all disputes on their merits.



10. On the second ground, the appellant submitted that there was confusion because physical access to the court was restricted but there was no legal framework on virtual court hearings. It was contended that the appellant ought not to have been penalised because of the said lacuna.
11. Next, the appellant submitted that the learned judge erred by failing to follow stare decisis as enunciated in *Geoffrey M. Asanyo & 3 Others v Attorney General* [2020] eKLR and *Dodhia v. National & Grindlays Bank Ltd. & Another* [1970] EA 195. It was contended that the decision of this Court in *D.T. Dobie & Company (K) Ltd v Joseph Mbaria Muchina* (supra) was binding on the learned judge and that he fell into error by failing to follow the same.
12. Lastly, the appellant submitted that the learned judge was biased against him because he recorded the presence of the 1<sup>st</sup> respondent's advocate but failed to record that of the appellant's advocate and also failed to accurately record the proceedings. In the appellant's view, that was in breach of regulation 9(1) of the Judiciary Code of Conduct. It was also contended that the learned judge was biased as he awarded costs to the 1<sup>st</sup> respondent after the proceedings. The appellant relied on the decisions of this Court in *Protus Evans Masinde v. Cheng Katana Kioi & 3 others* [2021] eKLR and *Kasmir Wesonga Ongoma & Another v Wangi* [1987] eKLR on the court's duty to keep an accurate record.
13. The appellant concluded by relying on the overriding principle, which, on the authority of *Lucy Bosire v. Kehancha Division Land Dispute Tribunal & 2 Others* [2013] eKLR he contended demands that disputes should be heard and determined on merit.
14. Mr. Mbatia, learned counsel, holding brief for Mr. Issa for the 1<sup>st</sup> respondent, opposed the appeal. It was his submission that the learned judge properly exercised his discretion, both in declining to grant an adjournment and in dismissing the appellant's suit after he failed to prosecute the same when invited to do so.
15. Relying on Order 17 rule 1 of the Civil Procedure Rules, counsel submitted that once a suit is set down for hearing, it is not to be adjourned unless a party satisfies the court that it is just to grant an adjournment. He added, citing *Shah v Mbogo* [1968] EA 93 that since what the appellant was challenging was exercise of discretion by the trial court, this Court should not interfere unless it is satisfied that the trial court had misdirected itself on some matter and arrived at a wrong decision or unless it is manifest that the court was clearly wrong in the exercise of its discretion and had thereby occasioned misjustice.
16. Counsel submitted that the appellant presented to the trial court four different and inconsistent grounds to justify an adjournment and that in the circumstances, the learned judge was justified in holding that there was no good reason to adjourn the hearing of the suit.
17. On the contention that there was lacuna in legal framework on virtual hearing, the 1<sup>st</sup> respondent submitted that the appellant's contention was an afterthought, and that the appellant made the request to be heard in open court only after failing to secure an adjournment. Relying on Order 12 rule 3(1) of the Civil Procedure Rules, counsel submitted that the trial court was entitled to dismiss the suit because when the same was called out, the 1<sup>st</sup> respondent was present whilst the appellant was not. Counsel relied on *Kaisugu v Stephen George & 103 Others* [2007] eKLR and *Pandya Memorial Hospital v Geeta Joshi* [2020] eKLR, where this Court refused to interfere with exercise of discretion by the trial court which had refused to grant an adjournment in the absence of good reasons for doing so.
18. Counsel further submitted that although the appellant emphasised the importance of access to justice under *the Constitution* and the overriding principle, both *the Constitution* and the overriding principle equally demand efficient disposal of the business of the court, timely and expeditious disposal of



proceedings, and that justice shall not be delayed. He cited the decision of the High Court in *Mbithika Titus v. Jackline Mutindi* [2020] eKLR regarding the factors to be taken into account in granting or refusing an application for adjournment.

19. The 1<sup>st</sup> respondent further referred to the antecedents of the matter and submitted that the appellant had previously failed to appear in court for scheduled hearings, five times, forcing the court to adjourn the suit on all those occasions. In the circumstances, he submitted, the appellant could not be heard to complain that he had been denied an opportunity to be heard. The decisions in *Samuel Thalami M'Maitai v. Susan Kairuthi Mbirithi* [2021] eKLR and *Savannah Development Co. Ltd. v. Mercantile Finance Co. Ltd.* [1992] eKLR were cited in support of the submission.
20. Lastly, turning to the bias alleged by the appellant on the part of the learned judge, the 1<sup>st</sup> respondent submitted that the record of the trial court was clear on what transpired in court and that it compressively and accurately covered the proceedings of the day. Counsel also submitted that having dismissed the suit for want of prosecution, the judge did not err in awarding costs to the 1<sup>st</sup> respondent because costs follow the event. He denied that the costs were awarded after the proceedings. Accordingly, the 1<sup>st</sup> respondent urged the Court to dismiss the appeal with costs.
21. The appeal was also opposed by Mr. Musili, learned counsel for the 2<sup>nd</sup> respondent, who submitted that it was in the discretion of the trial court to grant or refuse an adjournment and that the appellant did not advance any good reasons to justify adjournment of the hearing of the suit. In the circumstances, it was contended, that the appellant cannot be heard to claim that his right to access justice was denied. Like the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent relied on the provisions of Order 17 rule 1 and Order 12 rule 3(1) of the Civil Procedure Rules and submitted that the learned judge had properly exercised his discretion. Counsel relied on the decision of the Supreme Court of India (which he erroneously attributed to the Supreme Court of Canada) in *M/s Shiv Cotex v. Tirgun Auto Plant P. Ltd & Others*, CA No. 7532 of 2011 and the decision of the High Court in *Mukabi Ways Co. Ltd v Family Bank Ltd* [2015] eKLR, on what constitutes justifiable grounds for an adjournment.
22. This respondent contended that the appellant's alleged wish to prosecute his suit physically in court was an afterthought as the appellant himself was not in court and that granted the raging covid-19 pandemic, the request was neither practical nor in good faith. As regards the lacuna alleged in the legal framework on virtual proceedings, the 2<sup>nd</sup> respondent cited the Practice Directions on Electronic Case Management published on 21<sup>st</sup> March 2020 and submitted that the appellant's complaint was baseless. It was this respondent's further submission that it stood to suffer greater prejudice if the appellant was allowed to continue delaying determination of the suit and that public policy demanded that litigation must come to an end.
23. Lastly, the 2<sup>nd</sup> respondent submitted that the court had kept a correct and truthful record and that, contrary to the appellant's submissions, the court had not denied costs, to later award the same as an afterthought. The 2<sup>nd</sup> respondent urged the Court to dismiss the appeal with costs.
23. We have carefully considered the grounds of appeal, the record of appeal, the submissions, both written and oral by the parties, and the authorities they relied upon. It is common ground that the dismissal of the appellant's suit was closely intertwined with the failure of the appellant's application for adjournment. After the learned judge denied the appellant's application for adjournment and called upon him to prosecute his suit, he did not do so forcing the learned judge to dismiss the suit.
24. At the heart of both the denial of the application for adjournment and the dismissal of the suit for want of prosecution is exercise of discretion by the learned judge on both occasions. This Court does not determine whether to interfere with exercise of discretion by the trial court by divination, casting



of lots or voodoo. It does so on the basis of firmly established principles, well-articulated by Madan, JA (as he then was) in *United India Insurance Co. Ltd. v East African Underwriters (Kenya) Ltd.* [1985] E.A 898 as follows:

“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.”

25. The critical facts on the basis of which the decision of the learned judge to deny the application for injunction and later on to dismiss the appellant’s suit for want of prosecution are that the hearing of the suit had been previously adjourned more than three times primarily because of the appellant. The date for the hearing had been set down and both parties were aware of it. The appellant was not in court twice when the suit was called out for hearing. Counsel for the 1<sup>st</sup> respondent was present with her witness. On the two occasions the suit was called out for hearing, about four different reasons were presented on behalf of the appellant why the hearing had to be adjourned. First was that the appellant was indisposed and that he had not given counsel instructions. After those reasons failed to impress the learned judge, he was requested to adjourn the hearing because counsel was involved in petitions before another court of coordinate jurisdiction and that in any event, it was the wish of the appellant to have the proceedings conducted in open court rather than virtually.
26. An adjournment is not a birthright of a party. The default position under Order 17 rule 1 of the Civil Procedure Rules is that once a suit is set down for hearing, adjourning the same is the exception, not the rule. In the terms of that rule, the suit is not to be adjourned “unless a party applying for adjournment satisfies the Court that it is just to grant the adjournment.” To be earned, therefore, an adjournment has to be justified with genuine and bona fide reasons. A party who displays obvious lack of candour cannot expect a court to reward his lack of sincerity. It is symptomatic of utter lack of frankness to present four different and inconsistent reasons for an adjournment, on two separate occasions, the same morning.
27. The reasons presented for adjournment in this case simply did not make sense to us. On one hand, the appellant was indisposed; on the other he was ready to proceed in open court rather than virtually. In one breadth, the reason why counsel could no proceed was that he had no instructions; in the other, the reason was because he had other matters simultaneously before a different judge.
28. If the appellant’s wish to proceed in open court was genuine, he could have notified the court the moment the hearing date was firmly set. That he did not do, but waited until the very last moment. In addition, how the appellant was going to proceed in open court when he was not even present in court is not clear to us. This persuades us to agree with the respondents that the belated wish to proceed with the hearing in open court was nothing but an afterthought, a rouse to push the court to the wall, so as to make the desired adjournment a fiat accompli.
29. After denying the applications for adjournment, the learned judge duly called upon counsel for the appellant to proceed and call his witnesses. As we have noted, neither the appellant nor his witnesses, if any, were in court. On the other hand, counsel for the 1st respondent was in court with her witness. In



those circumstances the learned judge had no option but to dismiss the suit. By dint of Order 12 rule (3) (i) of the Civil Procedure Rules, if on the day scheduled for hearing the plaintiff does not appear and the defendant is present, the suit is to be dismissed “unless for good cause to be recorded by the court.” In this case, the appellant did not show any good cause why his suit should not be dismissed because he was relying on the very same reasons which had failed to satisfy the learned judge to grant an adjournment.

30. In light of the foregoing, we do not perceive any wrongful exercise of discretion on the part of the learned judge, either in denying the application for adjournment or in dismissing the appellant’s suit for want of prosecution. Nor do we perceive any honest mitigating mistake or blunder of the nature that Philip Chemwolo & Another v. Augustine Kubende (supra) speaks to, on the part of the appellant or his counsel. We would only like to add, as regards this aspect of the appeal, that it cannot, in the circumstances of this appeal, fall from the mouth of the appellant to assert that he was denied the right to be heard. Whilst the court will strive to hear suits on merit in deference to *the Constitution* and the overriding principle, it will only do so in deserving cases. Those constitutional and statutory provisions were never intended as bazookas for holding the court to ransom or for blasting into extinction other equally important principles of justice, like expeditious resolution of disputes.
31. We are also persuaded that the argument founded on lacuna in the legal framework for conduct of virtual hearings is nothing but a red herring. As pointed out by the 2<sup>nd</sup> respondent, on 20<sup>th</sup> March (not 21<sup>st</sup> March) 2020, barely one week after the first case of Covid-19 was reported in Kenya, the Hon. the Chief Justice published in Gazette No. 2357 the Practice Directions on Electronic Case Management, 2020, which were applicable to all the courts and made elaborate provisions on e-filing, e-service of documents, electronic exchange of documents, electronic discovery, electronic signatures, video and audio conferencing, and computers in the court room. It was on the basis of those Directions that the Judiciary conducted online proceedings during the Covid-19 pandemic and beyond. It is therefore disingenuous for the appellant to allege, one year after the publication and adoption of the Practice Directions, that there was no legal framework for the conduct of virtual hearings. There is absolutely no merit in this ground of appeal.
32. The bias alleged on the part of the learned judge is based on the contention that he did not keep a correct record, that he did not record the submissions of the appellant’s counsel and that he awarded costs as an afterthought. The test for judicial bias is whether the circumstances of the case would give rise in the mind of a reasonable, fair-minded and informed member of the public, who is aware of all the circumstances, a reasonable apprehension that a judge will not act impartially. (See Kalpana H. Rawal v Judicial Service Commission of Kenya & 2 Others [2016] eKLR).
33. We are satisfied that an informed, fair-minded person fully aware of all the circumstances including the antecedents of the suit, the previous adjournments at the instance of the appellant, the relevant provisions of the Civil Procedure Rules, the rather nebulous grounds advanced in support of the application for adjournment, and the record of the court would not apprehend bias on the part of the judge. Specifically, as regards the record of the court, it is obvious to us that the appellant has relied on a rather truncated record of the proceedings rather than the complete record which the 1st respondent provided in a supplementary record of appeal. The complete record covers both instances when the appellant applied for adjournment right up to the time when the judge dismissed the suit for want of prosecution. From that record, the submissions by both parties are captured and we do not perceive any of the selective or slanted recording alleged by the appellant.
34. As regards award of costs, contrary to the appellant’s assertion that the learned judge denied them, then, awarded them subsequently as an afterthought, the same has no merit. There is nothing on record to show that the learned judge had denied the respondents costs. After dismissing the suit for want



of prosecution, the learned judge, upon inquiry from counsel for the 1<sup>st</sup> respondent, indicated that the suit had been dismissed with costs. To us, that does not constitute irregular award of costs or an afterthought indicative of bias on the part of the judge.

35. Lastly, on the appellant's contention that the learned judge erred by failing to follow binding precedent from this Court, it is equally plainly obvious to us that in the circumstances of the case before him, the decisions in *D.T. Dobie & Company (K) Ltd v. Joseph Mbaria Muchina (supra)* (summary dismissal of a suit) and *Philip Chemwolo & another v. Augustine Kubende (supra)* (setting aside of a default judgment) were not applicable. Those decisions were easily distinguishable from the issues that the learned judge was dealing with. Ultimately, we have come to the conclusion that this appeal is utterly bereft of merit and the same is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**F. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

