



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A)**

**CIVIL APPEAL NO. 131 OF 2016**

**BETWEEN**

**KEREN BUARON.....APPELLANT**

**VERSUS**

**SONY HOLDINGS LIMITED.....1<sup>ST</sup> RESPONDENT**

**NAKUMATT HOLDINGS LIMITED.....2<sup>ND</sup> RESPONDENT**

**KNIGHT FRANK LIMITED.....3<sup>RD</sup> RESPONDENT**

***(Appeal from the entire judgement/decision of the Nairobi High Court (J.K. Sergon, J) dated 1<sup>st</sup> April 2016***

***in***

***HCCA No.s 165, 166, & 167 of 2015 (consolidated)***

**JUDGMENT OF THE COURT**

1. This Appeal by Keren Buaron arises from a High Court decision made in Nairobi High Court Civil Case No. 16 of 2009 where she alleged that she was forcefully evicted from a shop, Unit G 8 at the Westgate Shopping Mall in Nairobi as a result of which she filed the case against Sony Holdings, the 1<sup>st</sup> Respondent, Nakumatt Holdings the 2<sup>nd</sup> Respondent and Knight Frank the 3<sup>rd</sup> Respondent.

2. The Appeal is taken from a judgment delivered on 3<sup>rd</sup> April, 2016 by Hon Justice Sergon setting aside the Deputy Registrar's ruling and order delivered on 14<sup>th</sup> April, 2015, upholding the preliminary objection dated 17<sup>th</sup> April, 2014 and dismissing the Plaintiff's application dated 26<sup>th</sup> March, 2013 with costs. In support of her appeal, the appellant assigns six alleged errors as having been committed by the trial court in its decision in that the judge erred in:

*i. Allowing the Respondent's Appeal on the ground that the Appellant's Notice of Motion dated 26<sup>th</sup> March, 2014 brought under Order 26 Rule 5(2) of the Civil Procedure Rules was res judicata.*

*ii. Fettering and interfering with the discretion and/or jurisdiction of the learned Deputy Registrar (Hon. F.R. Wangila) to hear and determine the appellant's Notice of Motion dated 26<sup>th</sup> March,*

2014 brought under Order 26 Rule 5(2) of the Civil Procedure Rules.

iii. Holding that the learned Deputy Registrar (Hon F.R. Wangila) did not have jurisdiction to hear and determine the appellant's Notice of Motion dated 26<sup>th</sup> March, 2014.

iv. Denying the appellant a hearing before the subordinate court (Deputy Registrar) through the appellant's Notice of Motion dated 26<sup>th</sup> March, 2014, and by denying the appellant an opportunity to be heard in showing sufficient cause why security for costs could not be furnished within the time ordered, in upholding the respondent's appeals.

v. Taking into consideration irrelevant issues, in misguiding himself and misinterpreting facts and the law.

vi. That the decision of the High Court (Hon. J.K. Serگون) is contrary to the overriding objectives of Civil Procedure Act and Article 159 (2) of the Constitution of Kenya, further, the impugned decision is injudicious and inconsistent, it is contrary to the pleadings, submissions, evidence and precedent: and it is inexplicable on the law/practice.

## **BACKGROUND**

3. After the appellant instituted this suit at the High Court, the respondents filed an application seeking orders for security for costs. It was heard by the Deputy Registrar Hon. A.K. Ndungu who on 26<sup>th</sup> June, 2013 delivered a ruling allowing the application and ordered the appellant to deposit the sum of KShs 2,400,000/= within 45 days. The appellant did not appeal this ruling within the stipulated period, but thereafter filed a motion at the High Court on 31<sup>st</sup> July 2013 seeking leave to appeal the decision of the Deputy Registrar out of time. The application was heard by Onyancha, J who in his ruling delivered on 29<sup>th</sup> October, 2013 granted the following orders:

i. *The applicant shall file his appeal within 7 days.*

ii. *The applicant shall together with the Memorandum of Appeal deposit in this court the sum of KShs 2.4 million being security for costs for the lower court suit as ordered by that court.*

iii. *In default of such deposit the leave to appeal within 7 days aforesaid shall automatically lapse and the defendants/ respondents shall be at liberty to move the lower court under Order 26 Rule 5 (1) as earlier ordered by the lower court.*

iv. *Costs of this application shall be borne by the applicant the same as agreed upon or be taxed.*

4. The appellant did not comply with the above orders but on 5<sup>th</sup> November, 2013 filed another notice of motion asking the court to review/vary the order made on 29<sup>th</sup> October, 2013 and further also seeking the court to enlarge time for deposit of security by ten more days from the expiry date, and a stay of the ruling and orders made on 29<sup>th</sup> October, 2013. After hearing the application, Onyancha J. found it lacking in merit and dismissed it with costs. The appellant having not complied with the orders of Onyancha, J., the respondents applied for dismissal of the appellant's suit and the Deputy Registrar Hon. F.R. Wangila delivered a ruling on 13<sup>th</sup> March, 2014 dismissing the suit pursuant to Order 26 Rule 5 (1) of the Civil Procedure rules.

5. On 26<sup>th</sup> March, 2014 the appellant made an application before the same Deputy Registrar under Order 26 Rule 5 (2) seeking the setting aside of her previous orders dismissing the suit as per the ruling dated 13<sup>th</sup> March, 2014 and also once again sought to be allowed to deposit security out of time. In response to this application, the respondents filed a preliminary objection dated 17<sup>th</sup> April, 2014 on the ground that the Deputy Registrar lacked jurisdiction to hear and issue the orders sought, as the issues were *res judicata*, the same having been exhaustively dealt with by Onyancha J. The Deputy Registrar heard the

application and in her ruling delivered on 14<sup>th</sup> April, 2105 dismissed the respondents' Preliminary Objection dated 17<sup>th</sup> April, 2014 and ordered that the application dated 26<sup>th</sup> March,2014, be heard on a priority basis on a date to be fixed at the registry.

6. The respondents being dissatisfied with the ruling of the Deputy Registrar filed an appeal to the High Court which was allowed by Serگون J, by his judgment delivered on 1<sup>st</sup> April, 2016, which ruling is the subject of this appeal.

7. The facts of this case have been comprehensively stated in both the ruling and judgments of Hon Justice Onyancha, Justice Serگون and the rulings of the Deputy Registrars.

While appreciating the fact that this appeal is against the judgment of Serگون J upholding the respondents' preliminary objection, in order to place this matter in proper perspective,we find it necessary to revisit the circumstances leading to the impugned judgment in greater detail. As stated earlier, the decision and orders made by the deputy registrar Hon A. K. Ndungu related to the issue for security of costs which was to be deposited within 45 days. After the delivery of the ruling, the appellant did not deposit the amount as ordered within the timelines given and did not appeal the decision within the stipulated time.

8. However, on 31<sup>st</sup> July, 2013, the appellant filed an application before the High Court seeking leave to appeal out of time arguing that although the appellant was aware of the date fixed for the ruling, she failed to attend court because the matter did not appear in the cause list of that day. While allowing the application, the learned Judge made the following pertinent observations in respect of the appellant's conduct in the matter;

***“that it is also clear from the record that the applicant concedes the same, that although he allegedly knew that the ruling was delivered on 26<sup>th</sup> June 2013, and that he intended to appeal against it within 7 days he did not do so. He did not either file this application for extension of time until 31<sup>st</sup> July, 2013 which was about 38 days out of time to appeal and 14 days after allegedly knowing the result of the ruling.***

***The Applicant's counsel concede that it was his mistake or negligence that led to the failure to file the intended appeal in time. He conceded as well that he failed to file this application more timeously after he learnt of the rest of the ruling. He finally undertook to obey any conditions that the court may attach to any favourable discretion that the court may grant.”***

At page 413 he further stated:

***“...that the result of all this lethargic conduct on the part of the Appellant is that the delay episodes were unjustified and unnecessary in an application of this nature where the favourable exercise of discretion would be dependent on diligent and equitable conduct on the part of the Applicant. The Applicant herein should accordingly expect little sympathy.”***

On the applicant's second application to the High Court dated 5<sup>th</sup> November, 2013 in his ruling, Justice Onyancha further remarked at page 311 that;

***“The said security was to be deposited in a joint interest earning bank account in the joint names of the advocates representing the parties, within a period of 45 days of the 26<sup>th</sup> June, 2013. The record shows that the Applicant/Plaintiff did not raise and/or deposit the security for costs as ordered by the Deputy Registrar until the relevant period expired. She did not either appeal to the Judge in Chambers seeking reversal or setting aside of the Deputy Registrar's order within seven days prescribed by law. Things would have ended there but they did not. This is because over a month later, the applicant filed a Notice of Motion seeking leave of the court to file an appeal out of time to Judge in Chambers. ...this court found that the applicant had filed the application to appeal out of time, 38 days after the Deputy Registrar's orders were made, a delay***

**which it found was wrong and inordinate in the circumstances of the case. This court hinted that the applicant's conduct which culminated in the delay could have been deliberate and unreasonable. The Court also noted that the applicant's conduct towards the filing of the application which went before the Deputy Registrar, was unnecessary, unjustified, inequitable and not diligent.**

**Notwithstanding the applicant's undeserving conduct above, the court bent backwards in the name of justice and gave the applicant leave to appeal out of time on condition only, that she complied with the Deputy Registrar's meritorious orders to the effect that she deposits the sum of Kshs 2.4 million within a period of seven (7) days within which the intended appeal was to be filed.**

On page 314, the Judge added;

**"I have carefully considered the application before me after perusing the supporting documents and the submissions from both sides. In my view and finding the orders of this court were made deliberately to assist the applicant/Plaintiff who from the circumstances of the case, did not deserve them. Maybe that is why the court constructed them in a manner which would not give the applicant a further chance to abuse the court's favourable discretion after failing to deposit the security of costs ordered by the Deputy Registrar and thus delaying unduly from filing her appeal in time. The court saw an applicant who was playing with the court's process which it felt she was abusing. The court orders granting further time to file an appeal were clearly and strictly conditional upon her complying with the court's discretion in her favour. She would by those orders obey them and secure herself a further chance to conduct her suit to the ultimate end. If she failed to comply (and she knew so), she would lose the said rights. The orders were clear, that the leave to appeal would lapse if the Memorandum of Appeal was not filed within 7 days. The memorandum of appeal on the other hand would not be filed without a demonstration that the security for costs of Kshs 2.4 million had already been deposited in court. There was clearly no room for any other maneuver.**

**In the court's view and finding accordingly, the moment the applicant failed to deposit the said security for costs, she automatically lost the chance to file the appeal and on the other hand, to get any further opportunity to expand the time to deposit the same."**

9. We have found it necessary to reproduce *in extenso* the Honourable Judge's findings in order to give a clear picture as to why Serгон J gave the impugned orders. From the above cited judgment it becomes evident that the learned Judge (Onyancha, J.) did not send the appellant away in haste, but gave her wide latitude to comply with the orders of the court in order to safeguard her right to be heard. That notwithstanding, the appellant failed to comply thus causing the law to take its course, leading to the dismissal of the suit by the Deputy Registrar on 13<sup>th</sup> March, 2014.

Unrelenting the appellant decided to engage reverse gear and move back to the Deputy Registrar to reargue for the orders Onyancha J had in his considered judgment declined to give. To this end she filed an application on 26<sup>th</sup> March, 2014 seeking extension of time, which was variably opposed by the respondents by way of preliminary objection on the ground of *res judicata* and want of jurisdiction. However, the objection by the respondents was dismissed by the Deputy Registrar and the respondents being aggrieved by that decision appealed to the High Court.

10. That was the appeal that was heard and allowed by Sergon J, and which is the subject of this appeal. The court at page 38 made the following remarks:

**"The first ground is whether or not the learned Deputy Registrar had jurisdiction to entertain the motion dated 26<sup>th</sup> March 2014. The second ground is that the motion was *res judicata*." ... It is pointed out that the aforesaid provides that the Deputy Registrar may set aside the order dismissing the suit and extend the time for giving the required security ..."**

At page 40 the Judge added;

***“ There is no dispute that the question regarding the deposit of security out of time was brought up in the Respondents’ application dated 26<sup>th</sup> March 2014 was directly and substantially in issue in the application that was determined by Justice Onyancha on 13.11.2013 This fact was acknowledged by Hon. F.R. Wangila in her ruling delivered on 13.3.2015 while dismissing the Respondents’ suit. It is trite law that a party is precluded from raising an issue in a subsequent proceedings that was directly and substantially in issue in previous proceedings.*”**

The Judge continues on page 41 to state that

***“Where it is shown that new proceedings are filed with the intention to upstage any findings made in earlier proceedings the court has the right to prevent an abuse of the process. The doctrine of res judicata applies to take away the jurisdiction of the Deputy Registrar to entertain the Respondent’s application. The ruling of Justice Onyancha was clear on point that the suit shall stand dismissed unless the Respondent deposits the security for costs. The Respondent lost that opportunity when she failed to meet the terms of the order. Since there is no evidence to show that the Respondent has challenged Justice Onyancha’s order on appeal, then the learned Deputy Registrar had no jurisdiction to entertain the application dated 26.3.2013. The matter was simply res judicata and the learned Deputy Registrar should have ruled so...”*”**

We shall advert to these findings later.

11. The appeal was canvassed by way of written submissions with brief highlighting at the plenary hearing. Mr. Miyare, learned counsel for the appellant, while reiterating his submissions filed on 30th May, 2017 did not challenge the factual sequence of events as we have analysed. The thrust of the appellant’s submissions is twofold. First, that the Deputy Registrar had the requisite jurisdiction to entertain the application and reinstate the suit and re-issue the orders on security under Order 26 Rule 5; and second that the issue of depositing security was not res judicata.

12. On the issue of *res judicata* learned counsel called in aid a High Court decision in Samuel **Kiiru Gitau vs John Kamau Gitau (1998) LLR1769**, and the decision of the predecessor of this Court in **G.R Mandavia vs Rattan Singh (1965) EA118**.

Learned counsel also extensively submitted on the application of the overriding principle and the extent to which the learned Judge could interfere with the Deputy Registrar’s discretion to reinstate the suit. On this issue he placed reliance on the locus classicus case of **Mbogo vs Shah (1968) EA 93**; and **Shah and another vs Osman Allu (1974) 14EACA 45**.

The *ratio decidendi* of these two cases is that an appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the trial Judge or magistrate has misdirected himself/herself by considering matters that he/she ought not to have considered, or failed to consider matters that were supposed to be considered as a result of which he/she arrived at the impugned decision. It was learned counsel’s submission that there was no reason for the Judge to interfere with the decision of the Deputy Registrar to reinstate the suit that had been dismissed. He urged the Court to allow the appeal and allow the appellant to deposit security and to proceed with her suit before the High Court.

13. In opposition to the appeal, the respondents filed separate sets of submissions which were nonetheless basically the same. They reminded this Court of its jurisdiction while acting on second appeal, which is the duty to only deal with points of law and not fact. They entreated us to decline the invitation to consider points of fact as invited to do in the appellant’s memorandum of appeal. They cited *inter alia* this Court’s decisions in **Agnes Kwamboka Ombuna vs Birisila Kerubo Ombuna, Civil Appeal No.106 of 2011 (Kisumu)**, and **Kenya Breweries Limited vs Godfrey Odoyo. Civil Appeal No.127 of 2007**. These decisions just reinforce the provisions of Section 62 of the Civil Procedure Act.

14. Mr. Mbugua, learned counsel for the 1st Respondent relied on the written submissions and made brief

remarks in highlighting. He emphasised that the matter was *res judicata* having been dealt with by the Onyancha J conclusively and the Deputy Registrar could not therefore reopen it. Learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, Mr. Musyoki and Mr. Mege respectively urged the Court to consider their written submissions and did not make any oral highlights.

The law in this area is settled and we shall not therefore belabor the point. What however must come out clearly is that we cannot venture into the arena of fact in this appeal.

15. Having considered the entire record before us, along with the grounds of appeal and the written and oral submissions of counsel, we have summarized the points of law that fall for our determination as follows.

*i. Whether or not the Deputy Registrar had jurisdiction to hear and determine the Notice of Motion application dated 26<sup>th</sup> March 2014?*

*ii. Whether or not the Notice of Motion application dated 26<sup>th</sup> March, 2014 is res judicata?*

*iii. Whether or not the High Court (Hon. J.K. Sergon) was right in fettering and interfering with the discretion of the subordinate court (Hon. F.R. Wangila) to hear and determine the Notice of Motion dated 26<sup>th</sup> March, 2014.*

16. At the outset it is worthy of note that the Court's power under Order 26 Rule 5 (1) and (2) is clearly spelt out in that first, it is to give or not to give orders for security for costs. Second, to order within what period of time the ordered security would be given, third to permit the withdrawal of the suit, fourth to order the dismissal of the suit if there is failure to give the security for costs. Lastly, where the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs, the court may set aside the order dismissing the suit and extend time for giving the required security. There is no dispute that the Deputy Registrar of the High Court pursuant to the then order 48 (present 49) of the Civil Procedure Act had jurisdiction to perform all the functions provided for under Order 25 Rule 5 on behalf of the Learned Judge of the High Court. Both Mr Ndungu and Ms Wangila therefore had jurisdiction to make the order for security for costs.

They also had the power to dismiss the suit for noncompliance with the said orders upon application. They could also be moved to extend time within which the plaintiff could comply with the said order. The elephant in the room in this matter however is whether the Deputy Registrar retains the same power if the matter escalates to the Judge, who deals with the matter and then sends it back to the registrar for purposes of compliance.

17. In our considered view, once the Judge is seized of the matter and gives orders, the Deputy Registrar can only comply with those orders. S/he cannot vary or vacate such orders under any circumstances. Nor can S/he 'reinstate' a matter after having been moved to dismiss it following the orders of the Judge. In this case after Onyancha J, heard the two applications to extend time which were filed before him, and having sent the file back to the Deputy Registrar to hear the application for dismissal, the Deputy Registrar was divested of any residual jurisdiction other than that to hear and dismiss the application. Having heard and disposed of the application, she was also bereft of jurisdiction to reopen the matter and entertain the same issue. We find that the Deputy Registrar had no jurisdiction to entertain the application dated 26<sup>th</sup> March, 2014, and the learned Judge did not err in so finding.

18. On the issue of *res judicata*, **Section 7 of the Civil Procedure Act** provides as follows:

***“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 parties, or between parties under whom they or any of them, 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.”***

This doctrine of *res judicata* applies where the same parties have litigated over the same issues in respect of the same subject matter, and the matter having been determined on merit. The doctrine and the principle behind it was succinctly explained in the case of **North West Water Ltd V Binnie & Partners [1990] 3 all E.R.547**, where the court held:

***“Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between different parties arising out of identical facts and dependent on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, for the issue to be re-litigated.”***

We agree that is a proper rendition of the law as appertains to the doctrine of *res judicata*. (see also **Karia & Another v the Attorney General and Others [2005] 1 EA 83** and **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**).

The question this Court is called upon to determine is whether the issue of deposit of security, and that of extension of time had been litigated on and determined conclusively before being reintroduced through the application dated 26<sup>th</sup> March 2014, which precipitated the preliminary objection.

19. From our earlier analysis, it is evident that the issue of security and also extension of time to deposit the same was litigated fully before Onyancha J and he rendered himself quite clearly on the same twice. In the first instance, after the order for deposit of security was made by the Deputy Registrar, the appellant did not comply with the order and nor did he appeal within 7 days as ordered. After the lapse of this time the appellant filed a Notice of Motion at the High Court, seeking an extension of time to file the appeal out of time. When the matter came up for hearing before Justice Onyancha, the issues considered by the learned Judge were those of extension of time to file the appeal out of time and the extension of time to provide the security for costs. The application was determined in favour of the appellant where she was allowed to file the appeal within 7 days, and to deposit Kshs 2.4 million as security for costs. After the appellant failed to meet these conditions, she went back to the same Judge with the same issues of deposit of security and extension of time.

The subsequent appeal also before Onyancha J, was on similar issues of deposit of security for costs and extension of time. The learned Judge addressed those issues fully and made conclusive determinations on them. He ordered that in the event of noncompliance with the orders, then the Deputy Registrar, upon application would dismiss the suit. That is exactly what happened. Having gone the full circle, as it were, that matter was closed and could not be reopened afresh. The only recourse open to the appellant was to move to this Court on appeal against Onyancha J’s orders but she did not do so. The application before the Deputy Registrar dated 26<sup>th</sup> March, 2014, seeking to re-litigate matters that had already been determined by the Judge was *res judicata* and the preliminary objection was therefore properly taken. The learned Judge (Sergon J cannot be faulted for upholding the Preliminary objection.

20. On whether the learned Judge could interfere with the discretion of the Deputy Registrar, our view is that the issue of discretion was inapplicable in this case. The Deputy Registrar was not exercising any discretion in reinstating a suit that had already been dismissed following orders of the Judge. What she did was *ultra vires* as it was done without jurisdiction, and the discourse as to when an appellate court can interfere with the discretion of a trial court is therefore irrelevant for purposes of this judgment.

21. The last issue for determination is on the overriding principle espoused in Article 159(2) of the constitution and under Section 3A and 3B of the Appellate Jurisdiction Act. We must say that these are provisions that must be invoked only in deserving cases and should not be applied with unfettered abandon. The same cannot also be invoked to assist a party who has clearly demonstrated willful or negligent noncompliance with lawful court orders.

This position was clearly captured in this Court’s decision in the case of **Hunker Trading Company Limited vs Elf Oil Kenya Limited (Civil Application No. Nai 6 of 2010)**, which in our view is very relevant to the present circumstances:-

***“The applicant cannot be allowed to invoke the ‘02 principle’ and at the same time abuse it at will... All provisions and rules in the relevant Acts must be ‘02 principle’ compliant because they exist for no other purpose. The ‘02 principle’ poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promoted good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the ‘02 principle’ could easily become an unruly horse and therefore while the enactment of the ‘double O’ principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained.”***

This Court also stated in **City Chemist (Nrb) & Another vs. Oriental Commercial Bank Ltd, Civil Application No. Nai. 302 of 2008 (UR. 199/2008)** as follows:-

***“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”***

22. As is clear from these decisions, the overriding principle does not debunk the cherished and well settled principles which the courts have applied persistently and consistently over the years in the administration of justice. Nor does it aid a party who fails knowingly to abide by orders of the court. Earlier in this judgment we set out at length the observations and findings of Onyancha J. in his ruling and judgment. In these observations, it comes out very clearly what kind of litigant the appellant was. Her conduct is important in determining whether she is deserving of protection under the overriding principle. From the record we observed that the High Court did all it could to accommodate the appellant. In one of his Rulings Onyancha J, admitted that the court had to even bend backwards to accommodate the appellant, all in a bid to ensure that she was not dislodged from the seat of justice. Even then the appellant seemed adamant of playing a game of musical chairs with the court and the respondents.

The court must always remember that there are always two sides of a coin. When the appellant was filing the already mentioned applications, the respondents were also dragged to court in a bid to defend them. This translates to incurring unnecessary expenses and wastage of time on their part and creates unnecessary anxiety. Contrary to learned counsel for the appellant’s submission, it cannot be said that the respondents will not suffer any prejudice if this appeal is dismissed.

The applicant is the author of her own predicament. She is in our considered view undeserving of protection under the overriding principle. The upshot of the above analysis and findings is that this appeal lacks merit and is dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of September, 2017.**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**