



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthui & 10 others v Wainaina (Environment and Land Appeal  
E022 of 2023) [2024] KEELC 4760 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4760 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E022 OF 2023**

**DO OHUNGO, J**

**JUNE 19, 2024**

**BETWEEN**

**GEORGE KIMNUGY MUTHUI ..... 1<sup>ST</sup> APPELLANT**  
**JOHN OBOTE KABUNDIEKA ..... 2<sup>ND</sup> APPELLANT**  
**MARGARET MUGASIA KABUNO ..... 3<sup>RD</sup> APPELLANT**  
**ALFAYO WANYONYI ..... 4<sup>TH</sup> APPELLANT**  
**ALBERT ONTITA ..... 5<sup>TH</sup> APPELLANT**  
**STANLEY MUGO ..... 6<sup>TH</sup> APPELLANT**  
**JOHN KAMAU KIARIE ..... 7<sup>TH</sup> APPELLANT**  
**EMILY WAFULA ..... 8<sup>TH</sup> APPELLANT**  
**BOAZ MILIMU ..... 9<sup>TH</sup> APPELLANT**  
**RUTH NAFULA ..... 10<sup>TH</sup> APPELLANT**  
**RUTH WANJIRO ..... 11<sup>TH</sup> APPELLANT**

**AND**

**SHADRACK WAINAINA ..... RESPONDENT**

*(Being an appeal from the ruling of the Principal Magistrate's Court  
at Butali (Hon. R S Kipngeno, Principal Magistrate) delivered  
on 17th November 2022 in Butali MCELC No. E061 of 2021)*



## JUDGMENT

1. This appeal traces its roots to plaint dated November 17, 2021, which the respondent filed in the Subordinate Court, against the appellants herein. The respondent averred therein that he was the registered proprietor of the parcel of land known as Kakamega/Sango/2792 (the suit property) which the appellants had occupied illegally. He therefore prayed for judgment against the appellants for their eviction and mesne profits.
2. The appellants reacted to the plaint by filing Notice of Motion dated September 8, 2022, through which they sought striking out of the plaint and in the alternative, stay of proceedings pending hearing and determination of Eldoret Court of Appeal Civil Appeal No. 47 of 2019.
3. Upon hearing the application, Hon. R S Kipngeno (Principal Magistrate) delivered ruling on November 17, 2022 and dismissed it with costs. Dissatisfied with the outcome, the appellants filed this appeal through Memorandum of Appeal dated May 5, 2023. Pursuant to an order made by this court on May 22, 2023, extension of time for filing the appeal was granted and the appeal was admitted out of time.
4. The following are the grounds of appeal as listed on the face of the memorandum of appeal:
  1. That the learned Magistrate erred in law and in fact in failing to find that the existence of the suit in Butali SPM ELC No. E061 of 2021 was an abuse of court process, embarrassing and a vexatious cause to the appellants while there existed a pending appeal touching over the subject matter and between the same parties in Eldoret Court of Appeal Civil Appeal No. 47 of 2019 - *George Kimnugy Muthui v Shadrack Wainaina*.
  2. That the learned Magistrate erred in law and in fact by failing to consider that the Environment and Land Court in Kakamega ELC No. of 18 of 2018 did strike out a suit by the respondent on account of the appeal pending in the Court of Appeal.
  3. That the learned Magistrate erred in law and in fact by failing to appreciate that the decision of the Environment and Land Court in Kakamega ELC No. 18 of 2018 which was of a superior court was never appealed by the respondent or set aside and was thus binding in accordance with the doctrine of *stare decisis* and in line with the authority in [Geoffrey M. Asanyo & 3 Others v Attorney General](#) (2020) eKLR.
  4. That the learned Magistrate erred in law and in fact by finding that the appellants were forum shopping and were keen to frustrate the realization of the fruits of the judgement in Kitale High Court Succession Cause No. 246 of 2004 - *Re Estate of the Late Esther Kagoiri Muthui* - deceased despite the pendency of the appeal before the Court of Appeal.
  5. That the learned Magistrate erred in law and in fact in dismissing the application by the appellants.
5. Based on those grounds, the appellants urged the court to set aside the ruling and, in its place, make an order allowing the appellants' Notice of Motion dated September 8, 2022.
6. The appeal was canvassed through written submissions. The appellants submitted that the respondent acquired title to the suit property through succession proceedings that are the subject of Eldoret Court of Appeal Civil Appeal No. 47 of 2019 and that it would be prejudicial and a waste of judicial time if Butali MCELC No. E061 of 2021 proceeded to conclusion only for the Court of Appeal to reverse



the decision that led to the respondent's title. The appellants conceded that the orders sought in the application were purely discretionary and further argued that the learned magistrate erred in the exercise of discretion. They relied on *Global Tours & Travels Limited* Nairobi HC Winding up Cause No. 43 of 2000 (Unreported) and argued that the respondent's suit was an abuse of process since the root of his title was being challenged in the Court of Appeal.

7. The appellants further argued that the Environment and Land Court at Kakamega having struck out Kakamega ELC No. 18 of 2018, the said decision was binding on the learned magistrate in accordance with the doctrine of *stare decisis*. They relied on the cases of *Geoffrey M. Asanyo & 3 Others v Attorney General* [2020] eKLR and *Kenya Wildlife Service v James Mutembei* [2019] eKLR and argued that the learned magistrate misdirected himself in dismissing the application. They therefore urged the court to allow the appeal with costs.
8. In response, the respondent argued that his suit was not an abuse of process, and the appellants did not provide any evidence of the existence of Eldoret Court of Appeal Civil Appeal No. 47 of 2019. That Kakamega ELC No. 18 of 2018 was struck out on account of existence of Eldoret Court of Appeal Civil Appeal No. 18 of 2018 yet the appellants referred in their application to Eldoret Court of Appeal Civil Appeal No. 47 of 2019, thereby leaving the Subordinate Court in a dilemma. The respondent further argued that he was neither served with the notice of appeal nor the record of appeal in Eldoret Court of Appeal Civil Appeal No. 47 of 2019 and could not therefore be faulted for filing the suit. Relying on Section 6 of the *Civil Procedure Act* and the cases of *Anthony Milimu Lubulela v County Government of Kakamega*, Kisumu Civil Appeal No. 171 of 2020 and *Millicent Wamaitha Njogu v Mauline Nyambura Waweru*, Naivasha High Court Civil Appeal No. E049 of 2021, the respondent argued that the power to stay proceedings is a discretionary one and urged the court to dismiss the appeal.
9. This being a first appeal, the mandate of this court is to re-consider and re-evaluate the record and to determine whether the conclusions reached by the learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR. I further bear in mind that an appellate court should not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion. See *Mombasa Cement Limited v Kitsao & 34 others* (Civil Appeal E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment).
10. I have carefully considered the grounds of appeal and the parties' respective submissions. The issue that arises for determination is whether the reliefs sought in Notice of Motion dated September 8, 2022 ought to have issued.
11. The appellants sought striking out of the respondent's suit and in the alternative, stay of proceedings pending hearing and determination of Eldoret Court of Appeal Civil Appeal No. 47 of 2019. The basis of the application was that the said appeal had the potential of reversing the confirmation of grant pursuant to which the respondent obtained title.
12. Striking out of pleadings is a *draconian* remedy that should only be resorted to in the clearest of cases and where life cannot be injected into the matter in some other way. See *Uchumi Supermarkets Limited & another v Sidhi Investments Limited* [2019] eKLR.
13. A perusal of the appellants' application and their submissions in this appeal reveal that their concern is that Eldoret Court of Appeal Civil Appeal No. 47 of 2019 has the potential of reversing the



confirmation of grant pursuant to which the respondent obtained title to the suit property. The appeal is against judgment and decree in Kitale HC Succession Cause No. 246 of 2004. The decree was passed on October 30, 2017 pursuant to proceedings under the Law of Succession Act. On the other hand, the proceedings that have led to the present appeal relate to title, use and occupation of land and are being conducted pursuant to Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015. The two jurisdictions are worlds apart. In the event that the judgment and decree in Kitale HC Succession Cause No. 246 of 2004 is reversed, there will be another process for nullification of the titles. As matters stand now, the respondent's title is pegged on a decree that has not been reversed. I do not see how the respondent's suit can be said to be abuse of court process.

14. Jurisdiction to stay proceedings in one suit owing to existence of another suit is guided by Section 6 of the Civil Procedure Act which provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

15. The decision on whether to grant stay of proceedings is discretionary but must be exercised judiciously and on sound principles. The main consideration is whether it is in the interest of justice to grant such an order. See *Global Tours & Travels Limited (supra)*.
16. As noted above, Kitale HC Succession Cause No. 246 of 2004 and Butali MCELC No. E061 of 2021 are under different jurisdictions. The pending appeal was filed by the first appellant herein way back in the year 2019. Both the Record of Appeal and Memorandum of Appeal are dated July 31, 2019. The first appellant herein should proactively prosecute his said appeal if he really thinks that its outcome will have a bearing on Butali MCELC No. E061 of 2021, a suit that was filed over four years after the decree in Kitale HC Succession Cause No. 246 of 2004. The respondent is a successful litigant and in the absence of stay of execution of the decree that yielded his title, the interest of justice will not be served by blanketly staying proceedings in Butali MCELC No. E061 of 2021.
17. The appellants have not demonstrated any misdirection on the part of the Subordinate Court or that the decision of the Subordinate Court is clearly wrong. In those circumstances, there is no basis upon which to interfere with the exercise of discretion. The respondent was entitled to dismissal of Notice of Motion dated September 8, 2022.
18. I find no merit in this appeal. Consequently, I dismiss it with costs to the respondent.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF JUNE 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Mogambi for the appellants

Ms Munihu for the respondent

Court Assistant: M Nguyayi

