



REPUBLIC OF KENYA



**Gitau & another v Mwangi (Environment and Land Appeal
E002 of 2024) [2024] KEELC 5678 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5678 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E002 OF 2024**

LN GACHERU, J

JULY 31, 2024

BETWEEN

SAMUEL MBURU GITAU 1ST INTENDED APPLICANT

JOSEPH NG'ANG'A GITAU 2ND INTENDED APPLICANT

AND

ROBERT BENSON MWANGI RESPONDENT

RULING

1. Vide this Notice of Motion Application dated 9th May, 2024, which is premised on Rules 4, 12, 41(3), 42 and 43 of the *Court of Appeal Rules*, Section 3A of the *Appellate Jurisdiction Act* and Article 159 of the *Constitution* of Kenya, the Appellants/Applicants have sought for these orders:
 - 1). That the Court be pleased to grant the Applicants/Intended Appellants leave to Appeal out of time against the Judgment of the Hon. J. Irura in ELC Case No. 11 of 2019 dated 24th August, 2023.
 - 2). That pending the hearing and determination of this Application, this Honourable Court be pleased to issue an Order of stay of Execution of [the Orders] contained in the Decree issued by the Kigumo Court on 25th September 2023.
 - 3). That upon grant of leave to Appeal out of time, the Memorandum and record of Appeal enclosed hereafter be deemed as fully lodged subject to payment of court fees.
 - 4). That the costs of this appeal be provided for.
2. The Application is supported by the Eight grounds stated thereon and by the Supporting Affidavit sworn jointly by the Intended Appellants/Applicants on 9th May, 2024. The Applicants averred that they are senior citizens aged between 69 and 81 years. They contended that they relied upon their Advocate namely Mr. Mwangi Kamau, in the proceedings before the trial Court in Elc Case No. 11 OF



- 2019 (Kigumo) and were unaware of the hearing of 8th December, 2022, in the same suit and also of the Judgment delivered on 23rd August, 2023, wherein, the Court found in favour of the Respondent herein and declared the suit property the subject of a customary trust.
3. The Applicants further averred that they became aware the trial Court's decision dated 23rd August, 2023, upon being served with a Court Notice purporting to subdivide the suit land. Further, that they were dissatisfied with the said Judgment as it disinherited them of their property without being afforded a hearing.
 4. The Applicants attributed the delay in lodging an Appeal against the trial Court's Judgment delivered on 23rd August, 2023, to their Advocates on record in the proceedings before the trial Court. They stated that it has come to their knowledge that their Advocate received hearing Notice in respect of the hearing scheduled for 8th December, 2022, under protest and thereafter failed to conduct the said hearing on their behalf. That the same Advocate failed to inform them of the said Hearing date, hence they did not turn up in Court in person for the hearing. They urged the court not to dismiss the instant Application on account of the mistake of their Counsel.
 5. The Applicants further contended that the suit property is the subject of the proceedings in Murang'a High Court Succession Cause No. 344 of 2014 (In The Matter Of The Estate Of Gitau Kinuthia (Deceased) wherein, all three (3) parties herein are Joint Administrators of the estate of the deceased, which matter is ongoing and was scheduled to be mentioned before Justice Wakiaga on 15th May, 2024.
 6. They contended that their Intended Appeal has high chances of success and that in their said intended Appeal vide the Memorandum of Appeal dated 9th May, 2024, they have sought for:
 - (1) The Appeal be allowed with costs.
 - (2) The Judgment/Orders of the trial Court be set aside.
 - (3) The Respondent's suit before the trial Court be dismissed.
 - (4) General damages be assessed and awarded to the Applicants/Intended Appellants.
 - (5) That the matter be reverted to the Court in Murang'a High Court Succession Cause No. 344 of 2014 (In The Matter Of The Estate Of Gitau Kinuthia (Deceased) for further hearing and determination.
 7. The Applicants/Intended Appellants Memorandum of Appeal is supported by the averments set out in the Affidavit of Robert Mugo Mutitu, an Advocate working in the Law Firm of Mutitu Thiong'o & Company Advocates, sworn on 9th May, 2020, on behalf of the Applicants/Intended Appellants.
 8. The deponent stated that the Respondent originated the suit before the trial Court wherein, the Applicants/Intended Appellants were represented by Mr. Kamau Mwangi Advocate. He reiterated the Applicants/Intended Appellants claim that the said Advocate failed to attend Court during the hearing scheduled for 8th December, 2022, and also failed to inform the Applicants/Intended Appellants of the hearing date, so that they could attend in person or appoint another Advocate to act on their behalf.
 9. He averred that the failure to lodge an Appeal out of time was due to circumstances which were outside the control of the Applicants/Intended Appellants and is attributable to the mistake of their Counsel on record in the suit before the trial Court.
 10. The Application is opposed by the Respondent through the Replying Affidavit of Robert Benson Mwangi, sworn on 2nd June, 2024 (the date is partly blotted out by the Stamp of the Commissioning Advocate). The Respondent contended that the instant Application is incompetent and bad in law.



Further, that suit before the trial Court commenced in 2018 by way of a Plaint filed in ELC No.164 OF 2018 Murang'a ELC (magistrate's) Court wherein the Applicants/Intended Appellants were served with both the Summons and Plaint. That the Applicants entered appearance in the suit on 29th November, 2018, through their Advocates on record.

11. The Respondent averred that the said suit was subsequently transferred to Kigumo Law Courts and allocated a new number namely, ELC. No.11 of 2019. It was the Respondent's further averment that Applicants/Intended Appellants and/or their Advocates failed to file a Statement of Defence in respect of the suit before the trial Court, whereupon the Respondent instructed his Advocate to request for interlocutory Judgment and the same was entered in his favour on 23rd August 2019. Thereafter, the matter proceeded as a formal proof on 9th August 2019, and a final Judgment was entered on 23rd August 2019.
12. The Respondent's further contended that the Applicants/Intended Appellants thereafter moved the Court through an Application to set aside the said ex parte Judgment which Application was allowed and the matter scheduled for mention for the Court's directions. That despite obtaining orders from the trial Court of setting aside its Judgment dated 23rd August, 2019, the Applicants/Intended Appellants failed to attend Court to ventilate their case. That the Respondent testified before the trial Court and a Judgment was rendered in respect of the same on 24th August, 2023.
13. The Respondent refuted the Applicants/Intended Appellants claim that they were unaware that the suit before the trial Court was scheduled for Judgment on 24th August, 2023, because they were served by the Respondent's Advocate with the Respondent's written submissions, and they failed to respond to the same as attested to by the Respondent's annexure "RMB2 (a) and (b)" enclosed to his Replying Affidavit.
14. Further, the Respondent averred that the Applicants/Intended Appellants were served with the Orders of the trial Court which indicated that the suit property would be subdivided, but they failed to raise objection to the same.
15. He alleged that the Applicants/Intended Appellants affirmed their knowledge of the Decree of the trial Court as attested to by the contents of their Replying Affidavit filed in response to the Contempt of Court Order dated 6th March, 2024 which appears as the Respondent's annexure "RMB3".
16. That in November 2023, the 1st Applicant/Intended Appellant filed an Affidavit opposing issuance of further Orders emanating from the Judgment of the trial Court dated 24th August, 2023, as attested to by the Respondent's annexure "RMB4".
17. He contended that he stands to be prejudiced if the instant Application is allowed because the Judgment of the trial Court has already been executed and he has fenced and cultivated his portion of the suit property. Further, that he has procured a title deed in respect of the portion of the suit land granted to him by the trial Court as demonstrated by his annexure "RMB7".
18. The Respondent also contended that he received an Invitation to attend a meeting hosted by the Deputy County Commissioner (DCC) Murang'a South concerning the suit land which is land parcel No.Loc.7/Kaharo/7, which the Respondent attended and served the DCC with a letter dated 25th March 2024 which letter was acknowledged by the DCC as verified from the Respondent's annexure "RMB6".
19. He also contended that the Applicants have not explained the delay of Seven (7) months in bringing the instant Application and the same amounts inordinate and unreasonable delay. That the Orders



sought by the Applicants/Intended Appellants have been overtaken by events; furthermore, that they have been cited for contempt of Court in the proceedings before the trial Court.

20. The Applicants/Intended Appellants filed a Further Affidavit dated 9th July, 2024, and averred that this Court has Jurisdiction to determine the instant matter and that the trial Court erred in holding and finding that 1.657 Acres, out of the suit land was held in Trust for the Respondent.
21. They contended that if the said trust truly existed, the same ought to have been recorded in the Land register. Further that the Respondent's father was registered as the proprietor of land parcel no. LOC.7/Kaharo/8, while the father to the Applicants/Intended Appellants was registered as the owner of land parcel no. Loc.7/Kaharo/7 (the suit land).
22. That the trial Court exceeded its Jurisdiction by allowing the execution of the Judgment in respect of the trust, rather than forwarding her findings to the Court adjudicating Murang'a High Court Succession Cause No. 344 of 2014 (In The Matter Of The Estate Of Gitau Kinuthia (Deceased)), which matter is live in Court.
23. They also contended that the impugned decision of the trial Court should be transmitted to the Court which is in charge of Murang'a High Court Succession Cause No. 344 of 2014 (In The Matter Of The Estate Of Gitau Kinuthia (Deceased)).
24. Further, the Applicants averred that they should not suffer for the mistakes of their counsel who failed to attend Court on their behalf, and to advise them that he would not be attending Court for the scheduled hearing. They stated that seven (7) months delay is not inordinate and relied on the decision of the Court in the case of *Mwangi Kinyua V Waweru Kinyanjui and 4 others* (Civil Appeal No. Nairobi 251 of 2004.) to anchor the proposition that 300 days was found not to amount to unreasonable delay on the circumstances of that case.
25. They also averred that the suit land was sub-divided prematurely because it was the subject of the proceedings in Murang'a High Court Succession Cause No. 344 of 2014 (In The Matter Of The Estate Of Gitau Kinuthia (Deceased)) which are yet to be concluded.
26. The instant Application was canvassed by way of written submissions.
27. The Applicants/Intended Appellants filed their written submissions dated 19th July, 2024, through the Law Firm of Mutitu Thiong'o & CO Advocates, and reiterated the averment that the suit land is the subject of proceedings in Murang'a High Court Succession Cause No. 344 of 2014 (In The Matter Of The Estate Of Gitau Kinuthia (Deceased)).
28. It was their submissions that the High Court directed the Respondent to file his claim before the trial court, to determine the question of trust and also the issue of the 1.657 Acres. That the trial court heard the matter in the absence of the Applicant/ Intended Appellants and found in favour of the Respondent.
29. It was also submitted that the trial Court exceeded its jurisdiction in ordering the distribution of the suit land to the Respondent. Further, that the trial Court's finding that a trust existed in favour of the Respondent in respect of the suit property ought to have been referred to the Court handling Murang'a High Court Succession Cause No. 344 of 2014 (In The Matter Of The Estate Of Gitau Kinuthia (Deceased)) rather than sub-diving the suit land prematurely.
30. That the Applicants/Intended Appellants have provided a reasonable explanation for the failure to appeal against the decision of the trial Court within the stipulated time. They also reiterated the averment that they are senior citizens. The Applicants relied on the holding of the Court in the case



of *Mwangi Kinyua V Waweru Kinyanjui and 4 others* (Civil Appeal No. Nairobi 251 of 2004; and, *Itute ingu & Another V Isumael Mwakavi Mwendwa* (1994) e KLR.

31. The Applicants identified Four (4) issues for determination being:
 - (1) Whether Applicants/Intended Appellants for the wrongdoing of their advocate should be made to suffer.
 - (2) Whether the trial Court should be allowed to get away with a wrong finding about the existence of a trust when none existed to the detriment of the Applicants just because they were late to file an Appeal.
 - (3) Whether this Court should not exercise its jurisdiction to stop the apparent injustice in the abuse of the Court's discretion in such a case as this one.
 - (4) Whether Applicants/Intended Appellants for the wrongdoing of their advocates should be made to suffer, yet apparent errors were made by the trial Court just because they were late to file an Appeal.
32. The Applicants/Intended Appellants further submitted that they were arrested and held to be in contempt of the Orders of Court, and warrants of arrest issued by the trial Court dated 11th July, 2024, committing them to civil jail for interfering with the suit land. They affirmed that the Respondent has obtained a title deed in his name in respect of 1.657 Acres, out of the suit land and he has also demolished their houses and property located on the suit property.
33. On his part, the Respondent filed his written submissions dated 29th July, 2024, through the Law Firm of T. M. Njoroge & Co. Advocates, and submitted that the Applicants/Intended Appellants' Counsel on record in the proceedings before the trial Court fully participated in those proceedings, and obtained at one instance an order of setting aside a Judgment delivered in favour of the Respondent.
34. He also submitted that the Applicants/Intended Appellants went to slumber after the setting aside of the said delivered judgement in favour of the Respondent. Further, that the Applicants/Intended Appellants are guilty of laches and inordinate delay in lodging an Appeal against the decision of the trial Court dated 24th August, 2023.
35. It was the Respondent's further submissions that his counsel on record in the suit before the trial Court as well the counsel for the Applicants/Intended Appellants appeared before the trial Court at Kigumo Law Courts, in respect of the proceedings for Contempt of Court against the Applicants/Intended Appellants. Therefore, it is mischievous for the Applicants/Intended Appellants to claim that they were unaware of the Judgment of the Court dated 24th August, 2023.
36. Further, the Respondent submitted that the Applicants/Intended Appellants being dissatisfied with the decision of the trial Court in respect of the said proceedings for contempt of Court, approached the Succession Court vide an Application filed in Murang'a High Court Succession Cause No. 344 of 2014 (In The Matter Of The Estate Of Gitau Kinuthia (Deceased) which was dismissed by the Court on 16th February, 2024. That the said Application in the Succession Cause was dismissed by the Court on 16th February, 2024 and no longer exists.
37. The Respondent also submitted that a stay of execution cannot be granted in circumstances where the Judgment sought to be stayed has been executed, and that the Respondent has already been issued with a title deed.
38. Reliance was placed in the holding of the court in the case of *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* – Nairobi Civil Appl. No. 251 of 1997; and in the provisions of Section 79 (G) of the [Civil](#)



- Procedure Act. Further, it was submitted that it was not plausible that the same counsel whom the Applicants/Intended Appellants are blaming for failure to conduct the suit before the trial Court on their behalf is the same counsel who filed the Application which was in the Succession Court on 16th February, 2024.
39. It was also submitted that in the present-day age characterized by electronic communication, it is not possible for a party to claim that he was unable to communicate with his counsel for over a period of ten (10) months.
40. The Respondent urged the Court to dismiss the instant Application for having been filed after an inordinate delay. Further, he submitted that the Applicants/Intended Appellants Memorandum of Appeal is entirely without merit and the impugned Judgment of the trial Court is beyond reproach.
41. This court has now carefully considered the instant Application, the annexures thereto, the response to the same, the rival written submissions and relevant provisions of law, and finds the single issue for determination is:- Whether the Applicants/Intended Appellants are entitled to the Orders sought?
42. For the court to arrive on its determination, it will consider the findings of different courts, faced with similar issue and the principles or factors to be considered in such an Application for leave to file Appeal out of time and/ or stay of execution pending Appeal.
43. In the case of *M/S Portreitz Maternity V James Karanga Kabia* Civil Appeal No. 63 of 1997 the Court held that:
- “That right of Appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right...”
44. In the heading of this Application, the same is premised to be brought under section 3A of the Appellate Jurisdiction Act, Rules 4,12, 5 41(3) 42 and 43 of the Court of Appeals Rules. However, this court finds that the instant Application is premised on the wrong provisions of law, as the Applicants are seeking for leave to file an Appeal out of time. This court is not governed by the Court of Appeals rules, but by the Civil Procedure Act and Rules.
45. Therefore, the Applicants ought to have invoked the Provisions of section 79G of the Civil Procedure Act and order on the Leave to file an Appeal out of time.
46. Be that as it may, Order 51 Rule 10(1) & (2) of the Civil Procedure Rules is very clear that no suit should be defeated for want of form, but court should consider the substance of the matter. It provides as follows:
- (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.
 - (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application
47. Further, Article 159(2) (d), of the Constitution binds the Court to consider substantive justice, and not to rely on technicalities to defeat justice. See Article 159(2)(d) of the Constitution.
- (d) justice shall be administered without undue regard to procedural technicalities;



48. For the above reasons, this court will disregard the above omission and proceed to consider the merit of this Application, but will not dwell on the application the fact that was premised on the wrong provisions of law, which is a technicality.
49. The first prayer is for stay of execution of the Decree of the trial court, issued on 25th September 2023, pending the hearing of this Application. By looking at that prayer, the court would be tempted to find that it has been overtaken by events, as it was sought pending the hearing of the Application. But given that this court has held that it will not rely on technicalities, the court will assume the Applicants meant pending the hearing and determination of the intended Appeal.
50. The issue of Stay of Execution is not a novel one. It has been decided by courts in various cases and the principles to be considered are well laid out.
51. This court will consider the case of Antoine Ndiaye v African Virtual University [2015] eKLR, which was referred to by the Court in the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR , and declared as follows:

“... an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given”.

52. The law on stay of execution pending Appeal is found in Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* which provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is referred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—(a)the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and(b)such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

53. In the case of *James Wangalwa & Anor Vs Agnes Naliaka* [2012], the Court stated that

“No doubt, in law, the fact that the process of execution has been put in motion or is likely to be put in motion by itself does not amount to substantial loss...the Applicant must establish



other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party in the Appeal.”

54. Further, in the case of *Butt vs Rent Restriction Tribunal* [1982] KLR 417, the Court declared *inter alia* that:

“ a.) The power of the court to grant or refuse an Application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal

b.) The general principle in granting or refusing a stay is: if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory...”

55. In the instant Application, all the parties are in agreement that the Respondent has executed the decision of the trial Court dated 24th August, 2023, by procuring and obtaining a title deed in his favour in respect of 1.567 Acres, out of the suit land allocated to him following the trial Court’s decision that he demonstrated the existence of a trust in his favour with respect to the suit property.

56. This court has considered the decision in the case of *Evans Kidero v Speaker of Nairobi City County Assembly & Another* (2018) eKLR, where the Court stated *inter alia* that:

“ A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact...”

No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. ...A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity...

A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness...”

57. Further, the Court of Appeal in the case of *Okiya Omtatah Okiiti & 2 others vs Attorney General & 4 others* [2020] at paragraph 65, while citing the case of *Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) vs County Government of Nairobi* [2019] e KLR, stated that:

“ A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact.”



58. The doctrine of “mootness” was further outlined in the case *National Assembly of Kenya & another vs Institute of Social Accountability & 6 others* [2017] e KLR when the court rendered that:

“...it is clear that the mootness doctrine is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on principles of Judicial economy and functional competence of the courts and the integrity of the Judicial System... the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly the *Constitution* law and public interest.”

59. On the prayer for leave to file Appeal out of time, it is clear that section 79G of the *Civil Procedure Act*, provides that an Appeal should be filed within a period of 30 days from the date of Judgement. However, the proviso to the said Section provide that the court may grant leave or extension of time to file Appeal out of time, but the delay must be explained. The above section states as follows:

79G “Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

60. It is therefore not in doubt that the court has discretion to grant leave to file Appeal out of time, but the delay must be reasonably explained. Courts in this country have had occasion to decide on this issue of Leave to file Appeals out of time, and have set the principles to be considered and established. The main factor is that the delay must be explained.

61. In the case of *Abdul Aziz vs Mungai Mathayo* (1976) Kenya LR 61,62. The Court of Appeal held that: -

“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after sufficient reason for extending time has been established and it is only that the other consideration such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered”

62. Further the Court of Appeal at Malindi – Civil Appeal (Application) No.130 of 2018 – *The County Government of Mombasa VS Kooba Kenya Limited*. The Court of Appeal observed: -

that the delays were not explained and no sufficient reason for extending time was established. The length of the delay involved were some of the considerations to be borne in mind while dealing with an application for extension of time.

63. Again in the case of *Karny Zabarya & Another vs Shalom Lev* Civil Appeal No.80 of 2018, Koome, JA stated:-

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties.....”



64. Therefore, this court finds that while considering this Application, it will not consider the length of time for the delay, but whether the said delay has been explained to the satisfaction of the court. Have the Applicants herein explained the delay?
65. The Court has considered the pleadings, evidence availed by the parties and rival written submissions, and it is satisfied that the Applicants/Intended Appellants were well aware of the decision of the trial Court dated 24th August, 2023, as early as 15th November, 2023, as attested by the Replying Affidavit of Samuel Mburu Gitau, the 1st Applicant/Intended Applicant, of even date.
66. Further, this court finds and holds that the Applicants/Intended Appellants did not provide a plausible explanation for the failure to lodge an Appeal against the Judgment of the trial Court at that point in time. The Court has found and held that the Applicants were notified of the impugned Judgement of the trial court or, in early 2024, when the Applicants/Intended Appellants were engaged in contesting the proceedings to commit them to civil jail in respect of the Judgment of the trial Court. Why did they not file the Appeal on time? The delay in filing the Appeal and instant Application has not been explained.
67. Therefore, it is the holding of this Court that the instant Application is brought after unexplained, unreasonably and inordinate delay, as the said delay to lodge the appeal was not explained to the satisfaction of this Court. Further, the Court finds and holds that the Orders sought in the instant Application having been overtaken by events, it would not be in the interests of justice to allow same.
68. The Applicants/Intended Appellants had argued and submitted that the trial Court ought to have transmitted its finding that a trust exists in the favour of Respondent in respect of the suit property to the Succession Court handling Murang'a High Court Succession Cause No. 344 of 2014 (In The Matter Of The Estate Of Gitau Kinuthia (Deceased)). They reiterated that the said suit is active in Court, and involves the ownership of the suit land.
69. By the same token, the Court holds and finds that the Court handling Murang'a High Court Succession Cause No. 344 of 2014 (In The Matter Of The Estate Of Gitau Kinuthia (Deceased)), provides the Applicants/Intended Appellants herein with a better forum to raise the issues raised in the instant Application. This Court is cognizant of its responsibility as set out under Article 159 of the *Constitution* and Sections 1, 1A, 1B, 3 and 3A of the *Civil Procedure Act*. Therefore, it would be remiss to interfere in a matter which is before another Court competent of jurisdiction for determination.
70. Having observed as above, it is the finding and holding of this court that the instant Notice of Motion Application dated 9th May, 2024, is not merited and therefore cannot be allowed. Consequently, the said Application is dismissed entirely with costs to the Respondent.
71. Having dismissed the entire Application means no Leave to file Appeal out of time, therefore there is no Appeal in existence. This file is thus marked as settled and closed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 31ST DAY OF JULY 2024.

L. GACHERU

JUDGE

31st July 2024.

Delivered online in the presence of:



Joel Njonjo – Court Assistant.

Mr. Robert Mutitu for the Applicants/Intended Appellants

Mr T. M. Njoroge for the Respondents.

L. GACHERU

JUDGE

31st July 2024.

