



**Nyambura & another v Muturi (Environment and Land Appeal
E027 of 2021) [2025] KEELC 1366 (KLR) (19 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1366 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E027 OF 2021
LN MBUGUA, J
MARCH 19, 2025**

BETWEEN

PETER NDIRANGU NYAMBURA 1ST APPELLANT

JOEL NDIRANGU NJOKI 2ND APPELLANT

AND

PETER NDIRANGU MUTURI RESPONDENT

*(Being an appeal from the judgement of Hon S.N.Mwangi (SRM)
delivered in Nyahururu CMELC No. 277 of 2018 on 26.11.2022)*

JUDGMENT

1. From the onset this court declares the proceedings before the Senior Resident Magistrates Court a mistrial for reasons which the court shall give in the body of this judgment. Thus the court has not determined the issues in controversy relating to claims of ownership of the suit property, parcel MUTARA/MUTARA/BLOCK 11/73 (URUKU).
2. The appellants herein instituted proceedings in the trial court vide a plaint dated 22.7.2015 seeking orders of:
 - a) A permanent injunction restraining the Defendant whether by himself, his servants agents or otherwise howsoever from entering, demolishing structures, tilling the parcel of land or in any other way from trespassing and/or interfering with the plaintiff quiet possession over land parcel No. Mutara/Mutara Block 11/73 (Uruku).
 - b) Costs of suit
 - c) Any other relief this Honourable court may deem fit to grant



3. The Respondent opposed the suit vide his statement of defence 10.8.2015 claiming that he is the absolute registered owner of the suit property, averring that the subsequent registration of the suit property in the name of the appellants was fraudulent irregular and illegal.
4. The matter proceeded for hearing on different dates with the first witness (PW1) taking to the stand on 4.3.2020 while the last one, (DW2), probably testified on 30.8.2021. I say probably because, I simply can't tell with certainty as to when and how the aforementioned proceedings were conducted.
5. In a judgment delivered on 26.11.2021, the trial court made the following findings;
 - i. A declaration be and is hereby made that the defendant herein – Peter Ndirangu Muturi is the bonafide registered and absolute proprietor of title No. MUTARA/MUTARA BLOCK II/73 (URUKU) and the intermeddling or tampering of the land register in respect of the suit land such as cancellation of entries therein touching on the registration of and issuance of a title deed in the names of the plaintiffs was illegal, irregular, mistaken, unprocedural, fraudulent, improper and therefore null and void ab initio and such cancellations to be expunged and/or be removed from the land register forthwith.
 - ii. The Land Registrar – Laikipia be and is hereby directed to immediately cancel the title deed for No. MUTARA/MUTARA BLOCK II/73 (URUKU) in the names of he plaintiffs as the same was fraudulently acquired.
 - iii. The defendant is awarded costs of the main suit and also for the counterclaim.
6. Aggrieved by the aforesaid decision, the appellants filed his Memorandum of Appeal on 10.12.2021 raising eight (8) grounds of appeal seeking to have the judgment of the trial court set aside.
7. On 12.6.2023 the court gave directions for the appeal to be heard by way of written submissions, of which the submissions of the appellant are dated 31.8.2023 while those of the respondent are dated 7.7.2023 and 18.9.2023. I handled the file for the very first time on 6.2.2025, where by the court gave a date for judgment with the consent of the advocates for the rival parties. It is when I retired to write the judgment that I found this to be a classic case of Murphy's law where "anything that can go wrong will go wrong anyway". For there seems to be nothing right in so far as the record is concerned to aid the court in resolving the issues in controversy.
8. The duty of the 1st appellate court was explained in the case of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] Ea 123, where the appellate court is required to reconsider the evidence, evaluate it itself and draw its own conclusion. Here lies the problem, for where is the evidence which the court is supposed to evaluate and make its own conclusion.
9. The provisions of Order 42 rule 13 (4) of the Civil Procedure Rules stipulate that;

“ Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

 - (a) The memorandum of appeal;
 - (b) The pleadings; 102 Civil Procedure Rules ([Legal Notice 151 of 2010](#)) Kenya
 - (c) The notes of the trial magistrate made at the hearing;
 - (d) The transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;



- (e) All affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) The judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal”

10. A perusal of the index of the Record of Appeal filed on 9.3.2023 reveals that on the face of it, all the above mentioned documents have been availed particularly the pleadings, the evidence adduced by the parties including the documentary evidence as well as the judgment, complete with pagination. The actual content of the aforementioned documents reveals a complete different and very grim picture of the record.
11. To start with, the notes of the trial magistrate referred to at Order 42 rule 13 (4) (c) above are in disarray in the Record of Appeal. Item 30 in the index of the Record of appeal indicates that the proceedings run from page 141-246. True, page 141 indicates that the proceedings commenced on 23.7.2015, but the pagination of the proceedings is so much in disorder that one cannot tell as to who testified when! And what was produced as exhibits.
12. Nothing seems to have happened between years 2015 and 27.2.19 in terms of actual hearing as seen from page 141 to 150 of the Record of Appeal. However, the following page (after page 150) is page 230 where proceedings on actual oral hearing commence as follows “ destroyed my own fence. I was charged with forgery on 23.9.2013.....”. The said proceedings appear to relate to the defence case running all the way to page 243 of the Record of Appeal.
13. After page 243 is page 151 where someone (most probable a defence counsel) is making an application to file a counter claim. Then plaintiffs’ case appears at page 160 on 4.3.2020 with 4 witnesses testifying on different dates until 28.10.2020 at page 216 when plaintiff’s case was closed.
14. Then there is the case of the defence resurfacing at page 223 on 19.7.2021 all the way to page 229, followed by page 244.
15. There is not the slightest justification for the appellant to present the Record of Appeal in such a shambolic manner. It is deplorable to say the least. The provisions of Section 1A (3) of the Civil Procedure Act provides that;

“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”
16. Thus counsel for the appellants did not adhere to the above provisions of law as he failed to present a proper record of appeal, or at least to explain the circumstances under which the proceedings are in disarray. Further, the Record of Appeal does not contain the last page, hence some orders are missing. Luckily, the signed copy of the judgment can be found in the original file. It is worthy to not that the typed proceedings (not the handwritten notes) in the lower court file are in order, at least from the dates of 4.3.2020 to 10.11.2021
17. In his submissions dated 7.7.2023 before this court, the respondent commences his arguments as follows;

“ My Lord, the instant appeal is vehemently opposed by the Respondent and he prays that the same be dismissed with costs. The record of appeal failed to follow chronological order or the consecutive order in which documents were filed in court (say item 1-52 for all plaintiffs



documents then item 53 to 114 for the lumped-up defendant's documents) but worst of all it failed to include the appellants or plaintiffs exhibits or the Respondent or defendant's exhibits as admitted or produced in the trial court"

18. Thus the respondent too knew of the short comings in the Record of Appeal, but opted to raise the same in the platform of submissions instead of raising the issue before the hearing in tandem with the provisions of Order 42 rule 13 (4) of the Civil Procedure Rules.
19. What then does it take to make a determination in an appeal. I would say that as long as the pleadings, the evidence including the documentary evidence and the judgment can be discerned, then the appellate court can go ahead to make a determination. Not so in this case. As stated earlier, the plaintiffs' case appears to have commenced on 4.3.2020 with the last witness for defence testifying on 30.8.2021 going by the Record of Appeal, the one in disarray. Since the original file was availed to this court, I did embark on perusing the same so as to establish the status of the proceedings and find out how they are aligned with the typed proceedings. However, the hand written notes are missing, the ones where parties gave evidence, yet the typed proceedings in the lower court file capture the said evidence!!
20. A perusal of the original file before the magistrate's court reveals that the coram at page 31 to 33 of the hand written notes contains proceedings of 23.10.2019 where by the matter did not proceed for hearing, it was adjourned and given a hearing date on 4.3.2020 but there are no proceedings for the said date of 4.3.2020.
21. The next page of the hand written notes is page 34 which bears several corams of different dates as follows;
 - i. 23.3.2021, at the registry
 - ii. 28.4.2021 before S.N Mwangi SRM, when nothing happened
 - iii. 8.10.2021, at the registry
 - iv. 10.11.2021 Before S.N Mwangi, when nothing happened
 - v. 6.12.2023 before Hon Larabi Dr...
22. The pages and the corams in the hand written records are very important. Firstly, the plaintiff's case started on 4.3.2020 (going by the Record of Appeal at page 161) and the case was closed on 28.10.2020 (see page 216 of the said record). The hand written notes and the corams relating to the aforementioned proceedings are completely missing in the original record.
23. As for defence case, it commenced on 19.7.2021 (page 223 of the Record of Appeal) and the same was closed on 30.8.2021 (page 237 of the record of Appeal). The logical trend is that the corams for the two dates would be captured as the 3rd and 4th entries in the hand written record at page 34. However, there is no coram for the two dates in July and August 2021, yet those of 28.4.2021 and 8.10.2021 follow each other on the same page! There is not the slightest indication as to how evidence was taken before the trial court, since this is not a case of missing or misplaced records!
24. There is no rocket science needed to discern that there was human intervention to distort the record a move which is to say the least despicable, vile and rotten to the core and flies against the principles of justice and fairness.
25. Thus as it were, the original record is devoid of anything that can guide the court in the resolution of the dispute between the protagonists.



26. The judgment delivered by the trial court only made a bad situation worse as it doesn't adhere to the law as provided under Order 21, rule 4 of the Civil Procedure Rules where it is stipulated that

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision”.

27. A perusal of the said judgment reveals that the same lacks coherence on how the evidence was taken including the production of documents as outlined under Section 146 of the *Evidence Act*.

28. The determination in the judgment appears to commence at page 265 of the Record of Appeal where the trial court states that “ I have carefully and thoroughly considered the evidence on record.....”,. However, it is quite apparent that the trial court delved into the determination right from the word “go” when capturing the evidence as seen at page 252 of the Record of Appeal where he states as follows in relation to the evidence of pw1; “she could not explain when the deceased was issued with the first ballot”.

29. Still on the judgment, the analysis as captured from page 265 of the Record of Appeal only delves into the evidence of the plaintiffs, leaving out that of the defendant, yet there were two competing claims anchored in two titles. What more, the judgment awards the defendants costs in the main suit “and also for the counter claim!”, but the pleading of the defendant relied on in that judgment is the defence dated 11.8.2015 (page 249 B) of the Record of Appeal. The amended statement of defence and counterclaim of the defendant dated 8.8.2019 (page 105 of the record of appeal) has not been mentioned in the judgment!

30. This far, it is clear beyond peradventure that the court would be perpetuating an injustice if it was to make a determination on the substantive issues in controversy. The right to be heard is sacrosanct as stipulated under Article 50 (1) of *the Constitution* where it is stated that;

“every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”

31. In view of the fact that the foundational proceedings are non-existent in the original file, while the Record of Appeal is in shambles then I conclude that the proceedings of the trial court do not contain a true reflection of what is fair and just.

32. The notion of what is fair and just was well elucidated in the case of Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another [2018] Eklr as follows;

“The contours of Civil due process are the bedrock principle that a trial of the claim must precede judgement cannot be over emphasized. At the heart of Article 50 of *the constitution* is the notice - hearing approach and due process before an independent tribunal which simply underpins the foundation of our adversarial system of justice. Under *the Constitution* and *Civil Procedure Act* and rules a model of procedural fair administration of justice highlights the following components:

- (1) Participatory procedures in the proceedings
- (2) An independent and competent umpire or adjudicator
- (3) Prior due process before judgement



(4) Continuity fair trial rights to attach at all stages of the hearing”

Also see; *The Khamis & 9 others v Aula & 3 others* (Family Appeal 35 of 2018) [2022] KEHC 17157 (KLR) (23 December 2022) (Judgment) Neutral citation: [2022] KEHC 17157 (KLR).

33. In the case of *SM v HGE* [2019] KEHC 4160 (KLR), the court held thus;

“Where a trial process is wholly deficient or unsatisfactory, the appellate court should declare a mistrial, and order a retrial. An appellate court can order a retrial where the hearing by and the judgment of the trial court were so unsatisfactory as to amount to a complete mistrial. One other factor would be the unsatisfactory state of the trial court record...”

34. Similarly, in the case at hand, the trial process including the judgment has fundamental flaws with no semblance of fairness and justice. I therefore proceed to declare the proceedings before the trial court a mistrial and proceed to give the following orders;

- i) The judgment delivered on 26.11.2021 before Hon S.N. Mwangi and any consequential orders are hereby set aside.
- ii) Noting that the integrity and sanctity of the lower court record has been put to question, I direct the Deputy Registrar of this court to reproduce (by way of photocopying) the lower court file (hand written notes and documents produced by the parties) and retain the same as an appendage to this appeal file.
- iii) Thereafter, the lower court file is to be transmitted to Nyahururu Magistrates court with a copy of this judgment for the matter to be heard afresh before any magistrate with jurisdiction to hear land matters other than Hon S.N. Mwangi (SRM).
- iv). The matter is to be heard expeditiously on priority basis.
- v) Each party is to bear their own costs before this court as well as before the trial court.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 19TH DAY OF MARCH 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

M/S Ndegwa holding brief for M/S Muigai for Appellant

Joel Sigilai for Respondent

Nancy Mwangi – Court Assistant

