



**Kimulu v Kiilu (Environment and Land Appeal E012 of 2022)
[2025] KEELC 3395 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3395 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E012 OF 2022**

AY KOROSS, J

APRIL 29, 2025

BETWEEN

JOSEPH MUTINDA KIMULU APPELLANT

AND

JOHN KYAMBI KIILU RESPONDENT

*(Being an appeal from the ruling and order of the PM Hon. C.N.
Ondieki delivered on 24/03/2022 in Machakos ELC Case No. 827 of 2014)*

JUDGMENT

Background

1. Having considered the record that is before this court, it is of great significance to set out the history of the matter, as it has an impact on the final determination of the appeal.
2. In the trial court, the appellant's mother, Monica Mbithe Mutua (Monica) had been sued by the respondent over plot no. 137 Mua Hills (mother parcel) which the respondent had purchased from Monica.
3. After the hearing, judgment was entered in the respondent's favour on 1/9/2015 where an order of specific performance was made and Monica was ordered to transfer 2 acres of the mother parcel to the respondent within 3 months and she was restrained from interfering with the respondent's portion. Costs were awarded to the respondent.
4. Monica defied the judgment and decree of the trial court, and the respondent took steps towards enforcing the judgment. In an unfortunate turn of events, Monica died on 10/09/2016.
5. Thereafter, the appellant was granted limited grant of letters of administration on 10/03/2020 over Monica's estate.



6. It emerged that all along, Monica and/or the appellant had disobeyed the judgment of the court and subdivided the mother parcel into several portions of land. It suffices these actions were intended to defeat the judgment of the court.
7. Thus, to identify where his portion stood in the larger mother parcel, the respondent sought the services of a government surveyor who detected and recognised that the decreed parcel of land sat in land parcel no. Machakos/Mua Hills/1557 (disputed parcel).
8. Armed with this information and without haste he moved the trial court through his motion dated 23/09/2021 where he sought for the appellant to be joined to the proceedings as Monica's legal representative, orders inhibiting transactions over the disputed parcel pending determination of the substantive motion and an order directing the executive officer of the court to execute instruments of transfer in enforcement of the trial court's judgment.
9. The motion was opposed by the appellant's replying affidavit which he deposed on 21/10/2021 and he maintained Monica never owned the disputed parcel, the disputed parcel did not form part of her estate, he did not have the capacity to represent her estate and that at the time of the judgment, title over the mother parcel had ceased to exist.
10. These assertions were countered by the respondent's supplementary affidavit sworn on 3/12/2021. The motion was eventually set down for hearing by way of written submissions.
11. In considering the history of the matter, probate proceedings and respondent's documents, the impugned ruling allowed the respondent's motion of 24/03/2022 in the following terms: -
 - a. Monica be substituted by the appellant.
 - b. The executive officer of Machakos Law Courts be directed to execute all documents and instruments necessary to effect a transfer of 2 acres from the disputed land.
 - c. Each party to bear their own costs.
12. The impugned ruling demonstrates the learned trial magistrate may have overlooked the appellant's replying affidavit and submissions.
13. Aggrieved by this decision, the appellant lodged a memorandum of appeal before this court on 25/03/2022 and at the same time, filed a motion dated 26/04/2022 that sought to stay execution of the impugned decision.
14. Upon consideration of this motion on merits, this court, in a ruling rendered on 3/05/2023, dismissed it.
15. With this decision in hand, a notice to show cause (NTSC) proceedings were instituted by the respondent against the appellant before the trial court, whereby he sought to enforce the impugned ruling.
16. In the trial court proceedings of 18/1/2023, Mr. Kisengese, counsel for the respondent, informed the court that for the executive officer to enforce orders of the impugned ruling, the appellant needed to release the original title deed of the disputed parcel.
17. The appellant, who was in court too and was represented by counsel Mr. Langalanga, emphatically informed the court that the appellant did not have custody of the title document and they sought 21 days for them to avail it.



18. Indeed, when counsels for both parties were present before the trial court on the mention date of 2/2/2023, it was confirmed that the title document had been released to the respondent's counsel and the appellant had complied with the orders of the court.
19. One would have expected the matter would end there, yet in total abuse of the court process, the appellant filed a motion dated 12/6/2023 before the trial court seeking a stay of execution.
20. Nonetheless and while considering the ruling of this court of 3/05/2023, the trial magistrate rightfully so, downed his tools on 9/11/2023 and closed the trial court file.
21. Additionally, and as evidenced by the proceedings of that day, the only outstanding issue between the parties was that of costs.

Appeal to this court

22. While proceedings were still ongoing in the trial court towards enforcement of the ruling which from the record has been fully complied with by the appellant, the appeal was pending before this court.
23. The appeal raised the following grounds which challenged the decision of the learned trial magistrate: -
 - a. The learned trial magistrate erred in law in not allowing the appellant to be heard, thus violating the audi alteram partem principle;
 - b. The learned trial magistrate erred in law for not complying with the provisions of order 1 rule 10 (4) of the *Civil Procedure Rules*;
 - c. The learned trial magistrate erred in not considering the appellant's replying affidavit and submissions filed in opposition to the motion; and
 - d. The learned trial magistrate erred by failing to appreciate the disputed land was not one of the free properties of Monica against which the decree had been issued or which the appellant, as a legal administrator, was liable for.
24. Accordingly, the appellant implored this court to allow the appeal with costs, set aside the impugned ruling and substitute it with an order dismissing the motion which gave rise to the ruling.

Submissions.

25. As directed by the court, the appeal was canvassed by written submissions. The appellant's submissions dated 17/02/2024, which appear to have an erroneous date, were filed by the law firm of R.K. Mutua & Co. Advocates and counsel framed the following issues for determination;
26. Whether the trial court erred in law and fact by failing to attach considerable weight to the appellant's replying affidavit and submissions; whether this court has jurisdiction to entertain the appeal, and lastly, who should bear the costs of the appeal.
27. Despite Mr. Musyoki counsel for the respondent being granted leave to file written submissions within 21 days from 24/02/2024, none have been filed and if at all he will file them, this court will consider them as having been filed out of time.
28. Upon identifying and considering the issues for determination, this court will, in its analysis and determination, consider the appellant's counsel's arguments as posited on the particular issue and also consider provisions of the law and judicial precedents that were relied upon to advance the arguments.



Issues for determination.

29. As was stated in the case of *Abok James Odera t/a A. J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, this court is alive that its role as a first appellate court is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate stand or not and give reasons either way.
30. Turning to the matter at hand and compliance with the impugned ruling by the appellant, the issues that arise for determination are as follows: -
 - a. Whether the appeal is moot.
 - b. Whether the appeal is merited.
 - c. What orders should this court grant, including an order as to costs?

Analysis and determination

31. These issues that have been highlighted earlier as arising for determination shall all be dealt with sequentially.
 - a. Whether the appeal is moot.
32. The *Black's Law Dictionary*, 9th Edition defines mootness as:-

“having no practical significance; hypothetical or academic (the question on appeal became moot once the parties settled their case).”
33. The doctrine of mootness is not new and has been dealt with in a series of decisions of the Supreme Court, and this court will seek guidance from them in assessing whether the appeal is moot.
34. After considering jurisprudence on mootness, the apex court in *Institute for Social Accountability & another v National Assembly & 5 others* [2022] KESC 39 (KLR) stated as follows on the doctrine: -

“66... The doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. An appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.”
35. In this decision, the apex cited with approval Canada's Supreme Court's decision of *Borowski v Canada (Attorney General)* [1989] 1 SCR 342 which stated the process of determining if a decision is moot is a two-tier procedure whereby in the first instance, the court is first required to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case.
36. This issue of mootness was never addressed by the appellant in his submissions. Irrespective, the court proceedings of the trial court speak for themselves and this court has elaborately summarized the process that was undertaken by the appellant towards complying with the impugned ruling.



37. Noting the above expressions of caselaw, at the time of lodging of the appeal, the appellant had not observed the trial court's impugned ruling but upon denial of a stay of execution by this court and the outcome of the NTSC, the appellant fulfilled the conditions precedent towards enforcement of the impugned ruling.
38. This action occurred when the appellant relented and released the disputed land's title deed to the respondent's counsel, paving the way for enforcement of the judgment. Thus, at last, the respondent was able to enjoy the fruits of his judgment despite frustrations from Monica and the appellant.
39. Having released the title deed for purposes of enforcement, the appeal became moot as the grounds of appeal are no longer a live controversy. In this court's humble view, this explains why the respondent did not file any submissions in opposition to the appeal.
40. Thus, it is the finding of this court that there exists no live controversy between the parties as the modalities of transfer of the disputed land to the respondent have already taken place and the appeal is moot.
41. Consequently, it is unnecessary for this court to determine issue (b) while on issue (c), the appeal is deemed moot, and since it is trite law costs follow the event, this court awards costs to the respondent. In the end, the court hereby issues the following final disposal orders: -
 - a. The appeal is moot.
 - b. Costs are awarded to the respondent.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 29TH DAY OF APRIL, 2025.

HON. A. Y. KOROSS

JUDGE

29.04.2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

N/A for parties

Ms Kanja- Court Assistant

