



**Cheruiyot v Cheruiyot & 3 others (Environment and Land Appeal
E010 of 2024) [2025] KEELC 3344 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3344 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E010 OF 2024
LA OMOLLO, J
APRIL 24, 2025**

BETWEEN

JOHNSTONE KIPTANUI CHERUIYOT APPELLANT

AND

RICHARD KIMUTAI CHERUIYOT 1ST RESPONDENT

KIPRUTO CHERUIYOT 2ND RESPONDENT

EDWIN MUTAI 3RD RESPONDENT

RONALD KIPSANG MUTAI 4TH RESPONDENT

(By a Memorandum of Appeal dated 7th August, 2024 the Appellant appeals against the Ruling and Order of Hon. Johnstone Munguti (SPM) Kericho which was delivered on 25th July, 2024 in Kericho CM ELC Case No. E053 OF 2023.)

JUDGMENT

Introduction.

1. By a Memorandum of Appeal dated 7th August, 2024 the Appellant appeals against the Ruling and Order of Hon. Johnstone Munguti (SPM) Kericho which was delivered on 25th July, 2024 in Kericho CM ELC Case No. E053 OF 2023.
2. The grounds of appeal are as follows;
 - a. That the Learned Trial Magistrate erred in law and in fact in failing to make a finding that the Judgment delivered on the 2nd November, 2023 was obtained regularly and upon the Respondents, their agents and their Advocates having been duly served with all the pleadings.



- b. That the learned Trial Magistrate erred in fact and law in failing to analyze at all, the principles precedent for an application for Stay of execution of judgment and setting aside a regular judgment to succeed.
 - c. That the Learned Trial Magistrate erred in fact and law in failing to find that the Court was functus Officio upon issuing a judgment and Decree, which decree had been fully implemented before the Respondents approached the Court for a Stay of execution of the same.
 - d. That the Learned Trial Magistrate erred in fact and law in ordering a Stay of Execution of Eviction Orders even after finding that the Eviction Orders had been fully implemented and the Respondents evicted. There was nothing to stay since the Eviction Orders which had fully been implemented were negative Orders incapable of being stayed.
 - e. That the Learned Trial Magistrate erred in general principles of law in granting Orders which are incapable of being implemented hence issuing Orders in vain.
 - f. That the Learned Trial Magistrate erred in fact and law in basing his Ruling on extraneous issues which were not placed before him, hence departing from the legal principles of basing his Ruling on the material placed before him for determination.
 - g. That the Learned Trial Magistrate erred in fact and law in drawing an inference in his ruling that there existed a trust (customary or otherwise) when the same had neither been pleaded or presented before him for determination.
 - h. That the Learned Trial Magistrate erred in law and in fact in failing to fully analyze the evidence tendered by the Appellant herein and giving undue weight to the Respondent's case and least weight on the Appellant's case hence totally departing from his earlier judgement delivered on the 2nd November, 2023.
3. The Appellant prays that the Court sets aside the said ruling and orders and dismiss the Respondents application dated 12th April, 2024.

Factual Background.

- 4. The suit before the Magistrate's Court was commenced by the Appellant vide the Complaint dated 13th June, 2023. He averred that he was the registered proprietor of land parcel No. Kericho/Chesinende/SS/45.
- 5. He also averred that the Respondents who are his brothers sought license to occupy a portion of the suit parcel measuring 2 acres.
- 6. He further averred that in the year 2021, the Respondents began to claim that the suit parcel was ancestral land and in the year 2022 he revoked their license.
- 7. It was his averment that despite revoking the said license, the Respondents declined to move from the suit parcel. He therefore sought the following prayers:
 - a. A declaration that the Defendants, whether by themselves or their servants or agents and/or otherwise howsoever, are trespassers on that property known by reference LR No. Kericho/Chesinende S.S /45.
 - b. A permanent injunction to issue restraining the Defendants whether by themselves their agents and/or servants from entering and/or remaining on LR No. Kericho/Chesinende S.S/45



Or in the alternative

An order of eviction to issue to remove the Defendants, their agents and/or servants from the portion of land comprised in LR No. Kericho/Chesinende S.S/45 which they have trespassed onto.

- c. General Damages for trespass.
 - d. Costs of this suit.
 - e. Any other relief that this Honourable Court may deem fit and just to grant.”
8. The matter proceeded ex parte and the Court delivered its judgement on 2nd November, 2023 where it issued the following orders;
- a. A declaration that the Defendants, by themselves or their servants or agents and/or otherwise howsoever, are trespassers on that property known by Ref. No. LR Kericho/Chesinende S.S 45.
 - b. Permanent injunction is hereby issued restraining the Defendants whether by themselves, their agents and or servants from any further entrance or remaining on LR Kericho/Chesinende S.S 45.
 - c. An order of eviction of the Defendants herein namely Richard Mutai, Kipruto Cheruiyot, Edwin Mutai and Ronald Kipsang Mutai including their agents, servants or children from LR Kericho/Chesinende S.S/45.
 - d. The prayer for general damages for trespass was not proven hence the same is declined.
 - e. The Defendants are ordered to pay the costs of this suit.
 - f. The Defendants or their agents are granted 30 days to remove any structure on Kericho/Chesinende S.S/45 or to harvest any crops failing which the Plaintiff has to evict the Defendants or their agents.

In the event of the eviction option is to be applied, I direct the OCS in charge of the area where the suit and (sic) is situated to provide security at the Plaintiff's cost which the Plaintiff has a right to claim from the Defendants.”

9. After judgement was delivered, the Respondents filed the Notice of Motion application dated 12th April, 2024 where they sought the following orders;
- a. That this Notice of Motion be certified as extremely urgent and the same be dispensed with in the first instance.
 - b. That M/s Bii V.K & Co. Advocates be granted leave to come on record on behalf of M/S Kemboi Chambers Advocates being the requirements of the law.
 - c. That pending the inter partes hearing of this application the Honourable Court be pleased to temporary set aside the order dated 2nd November, 2023 and further stay of any proceedings herein.
 - d. That the order issued against the Defendants/Applicants and all the ex parte proceedings and judgement entered on 1st February, 2024 be set aside and the Defendants be granted leave to defend their case on merit.



- e. That costs of the application be in the cause.
10. In response to the Respondents application, the Appellant filed grounds of opposition dated 23rd April, 2024 and a Replying Affidavit sworn on the same date.
 11. The grounds of opposition are as follows;
 - a. That the Applicants' application dated 12th April, 2024 has not established a prima facie case with any chances of success to warrant a grant of the reliefs sought.
 - b. That the orders sought cannot issue in their form as presented since they have been overtaken by events by dint of the Applicants' guilty of leaches. (sic)
 - c. That the Applicants have not established that have (sic) a triable issue to be placed for defence and as such the application is misconceived and premised on a misrepresentation of the provisions under which it is brought.
 - d. That the application is frivolous, vexatious and a total abuse of the Court process as it is brought in the best interest of justice but with the aim of circumventing and thwarting this Court's orders which were issued legally and procedurally.
 - e. That the application will gravely prejudice the Plaintiff/Respondent if the orders sought are granted since the application herein, having been overtaken by events, then the orders (if issued) shall be issued in vain. (sic) This Court does not issue orders in vain."
 12. The Respondents later filed a Supplementary Affidavit and the Appellant also filed a 'Further Replying Affidavit'.
 13. The Learned Trial Magistrate delivered his ruling on the said application on 24th July, 2024 where he set aside the judgement and all the consequential orders flowing from it.
 14. It is from this ruling that the Appellant has filed this Appeal.
 15. On 13th November, 2024 the Court admitted the appeal for hearing and directed that it be disposed by way of written submissions.
 16. It was mentioned a few times to confirm filing of submissions. On 19th February, 2025, the Appeal was reserved for ruling.

Issues For Determination.

17. The Appellant filed his submissions on 22nd January, 2025 while the Respondents filed their submissions on 18th February, 2025.
18. The Appellant in his submissions sets out the history of the matter and submits on the following issues;
 - a. Whether the Learned Trial Court erred in law and fact in failing to find that the judgement delivered on the 2nd November, 2023 was a regular and proper judgement, hence could not be set aside unless as per law provided.
 - b. Whether the Learned Trial Court erred in law and fact in failing to analyze the principles precedent for an application for stay of execution and setting aside a regular judgement.
 - c. Whether the Learned Trial Court erred in fact and law in failing to find that failure to annex a draft defence in an application seeking to set aside a judgement was fatal.



- d. Whether the Learned Trial Court erred in law in failing to find that it had become functus official upon issuance of the eviction orders and the same having been fully implemented.
 - e. Whether the Learned Trial Court erred in fact and law in issuing orders in vain.
 - f. Whether the Learned Trial Court erred in fact and law in departing from pleadings presented before him and considering extraneous issues and matters which were never placed before him.
 - g. Whether this appeal is merited.
19. With regard to the first issue, the Appellant submits that the Respondents were properly served with summons to enter appearance and Plaint together with all the accompanying documents.
 20. The Appellant also submits that an affidavit of service was filed and he adhered to the provisions of Order 5 Rule 8 of the Civil Procedure Rules.
 21. The Appellant relies on Order 5 Rule 13 of the Civil Procedure Rules and submits that the Respondents were duly served and the Court satisfied with the service and that is why it delivered a detailed judgement.
 22. The Appellant relies on the judicial decision of James Kanyिता Nderitu & another vs Marios Philotas Ghikas & another eKLR (Msa) as was cited in William Macharia Maina & another v Francis Barchuro & 3 others Kibiwott Yator Kuryases & 8 others (Interested Parties) eKLR and submits that the Respondents admitted to being served with the pleadings in this matter and stated that they instructed the firm of Kemboi Chambers Advocates who did not ‘serve them with any hearing notices’.
 23. The Appellant urges the Court to find that the Respondents were properly served and that the judgement entered by the Court was regular. He adds that the Trial Court made an error in setting aside a regular judgement.
 24. With regard to the second issue, the Appellant submits that when the Respondents initially filed the application for setting aside the trial Court’s judgement, they failed to annex a draft Defence.
 25. The Appellant also submits that he raised the said issue in his Replying Affidavit and the Respondents subsequently filed a ‘sham’ defence which they annexed to their Supplementary Affidavit.
 26. The Appellant further submits that a draft defence ought to have been annexed to the affidavit in support of the application and not the supplementary affidavit.
 27. The Appellant relies on the judicial decision of David Kiptanui Yego & 134 others vs Benjamin Rono & 3 others [2021] eKLR and submits that the Learned Trial Magistrate erred in failing to consider the issue of the Respondents failure to annex a draft defence.
 28. On the third issue, the Appellant submits that the Trial Court issued eviction orders which were implemented and therefore the Trial Court was functus officio as there was nothing to set aside.
 29. The Appellant relies on the judicial decisions of Nakuru Packers Ltd v Monica Nyambura Waititu [2004]Eklr and Erick Njenga Watitu v Nakuru Packers Limited [2020]eKLR in support of his submissions.
 30. The Appellant also submits that the Respondents raised the issue of ownership of the suit parcel which could not be raised at that stage of the proceedings as the issue had already been dealt with during the hearing of the suit.



31. The Appellant relies on the judicial decisions of James Kabathi Mwangi T/A Tangerine Auto Hardware vs Kenya Commercial Bank Limited; Joseph Gathonjia Gatuni (Proposed Interested party) [2021] eKLR, Akithii Ranching (Directed Agricultural) Company Limited v District Land Adjudication and Settlements Officer Tigania Districts & 2 Others [2014] eKLR, Mungai v Wairimu & 2 others; Karomba & 6 others (Applicant) (Environment & Land Case 385 of 2017) [2023] KEELC 18065 (KLR) (8 June 2023) (Ruling) in support of his submissions.
32. With regard to the fourth issue, the Appellant relies on the judicial decisions of Kenyaga v Onganyo & 5 Others (Sued as trustees of Barina Squatters Self Help Group) (Environment & Land Court Case 313 of 2013) [2022] KEELC 2329 (KLR) (12 May 2022) (Ruling), Caleb Ouma & 5 Others v Seventh Day Adventist Church (East Africa Ltd) [2020] eKLR, Silvanus Kamaamia v Peterson Waruinge Kiguru [2020]eKLR, Peter Maosa Nyang'au v National Bank of Kenya Ltd & another [2021]eKLR and submits that since the Respondents had already been evicted from the suit parcel, the orders issued by the trial Court were issued in vain.
33. On the fifth issue, the Appellant relies on Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd [2019] eKLR and submits that the trial Court in its ruling delivered on 25th July, 2024 delved into issues that were not presented to Court. It is the Appellant's submissions that the Learned Trial Magistrate held that the Respondents family seemed large and as such they may not have had funds to defend the suit. He adds that it is not clear where the Learned Trial Magistrate found the assertion that the family was large.
34. The Appellant concludes his submissions by urging the Court to set aside the ruling delivered on 25th July, 2024 and dismiss the Applicant's application dated 12th April, 2024.
35. The Respondents in their submissions set out the facts of the case and submit that they were not served with the pleadings filed before the Trial Court.
36. It is also the Respondents submissions that they were shocked when their houses were destroyed and that is when they approached the Trial Court seeking for justice.
37. The Respondents submit that the trial Court in its ruling delivered on 25th July, 2024 which set aside the judgement, took into consideration the evidence placed before it which showed that they were not properly served with summons to enter appearance.
38. It is further the Respondents submissions that the allegations that they were represented by one Kemboi Gilbert are not true as the said Advocate did not file any documents before the Trial Court.
39. The Respondents submit that their application dated 12th April, 2024 was properly filed before Court and the ruling delivered on 25th July, 2024 was regular.
40. The Respondents also submit that the allegation that there was no draft defence is not true as the Court granted them leave to file a Supplementary Affidavit which was filed on 6th May, 2024 and a draft defence attached.
41. The Respondents further submit that the doctrine of functus officio does not apply in the present proceedings as no eviction took place.
42. It is the Respondents submissions that the Auctioneers who were to conduct the eviction cut down trees and demolished houses and the Appellant never took possession of the suit parcel as it is family land and all the siblings live on it.
43. The Respondents then submit on the following issues;



- a. Whether the Appellant have (sic) satisfied the conditions for appeal set out under Order 42 Rule 2 of the Civil Procedure Rules.
 - b. Whether the Appellant has made out a good case to justify the grant of orders set out in the s (sic) appeal.
 - c. Who should bear costs of the appeal.
44. With regard to the first issue, the Respondents submit that the Appellant has not satisfied the condition for appeal (sic) as no order of the ruling delivered on 25th July, 2024 was extracted and placed on the record of appeal.
45. It is the Respondents submissions that the appeal is therefore fatally defective and cannot stand as is.
46. With regard to the second issue, the Respondents submit that the Appellant has urged the Court to set aside the ruling of the trial Court delivered on 25th July, 2024 and dismiss the application dated 12th April, 2024 which orders are not capable of being granted.
47. On who should bear costs, the Respondents rely on the judicial decision of Joseph Oduor Anode vs Kenya Red Cross Society Nairobi High Court Civil Suit No. 66 of 2009 [2012] eKLR and submit that Appellant's appeal is defective as the suit parcel is family property which fact the Appellant has always been aware of.
48. The Respondents conclude their submissions by urging the Court to dismiss the appeal with costs.

Analysis And Determination.

49. The issues that arise for determination are as follows;
- a. Whether the Learned Trial Magistrate erred in not finding that the judgement delivered on 2nd November, 2023 was obtained regularly considering that the Respondents were served with the pleadings.
 - b. Whether the Learned Trial Magistrate erred in failing to take into consideration the principles of setting aside a regular judgement and instead based his ruling on extraneous issues that had not been pleaded.
 - c. Whether the Learned Trial Magistrate erred in failing to find that the Court was functus officio as the decree had already been implemented.
 - d. Whether the Learned Trial Magistrate erred in granting orders of stay of execution of eviction after making a finding that the Respondents had already been evicted from the suit parcel.
 - e. Whether the Learned Trial Magistrate erred in inferring that a trust existed and yet the said issue was not pleaded.
 - f. Who should bear costs of the appeal.



A. Whether the Learned Trial Magistrate erred in not finding that the judgement delivered on 2nd November, 2023 was obtained regularly as the Respondents were served with the pleadings.

50. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others Vs Attorney General* [2016] eKLR. It was held as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal is well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

51. In *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the Learned Trial Judge are to stand or not and give reasons either way.”

52. The Appellant contends that the Learned Trial Magistrate erred in failing to find that the judgement delivered on 2nd November, 2023 was obtained regularly as the Respondents were served with the pleadings.

53. It is the Appellant’s submissions that the Respondents acknowledged before the trial Court that they were served with pleadings and even appointed Counsel.

54. The Appellant therefore urges the Court to find that the Respondents were served with the pleadings in the matter and that the judgement that was obtained was regular.

55. In response, the Respondents contend that they were not served with the pleadings in this matter and neither did they appoint any counsel to represent them.

56. The entirety of the Learned Trial Magistrate’s ruling delivered on 25th July, 2024 is set out hereunder;

“In the Notice of Motion dated 12/4/2024 the Defendants prayed that the firm of V.K Bii is allowed to come on record in place of Kemboi Chambers Advocates.

That the orders issued in the judgement dated 1st February, 2024 (sic) be set aside and the Defendants be granted leave to defend the suit.

The application was vehemently opposed by the Plaintiff and Kemboi Advocate who all insist the Defendants were all along aware of the case and that they were in touch with Kemboi Chambers on phone and his staff. In a nutshell, Kemboi ganged up with the Plaintiff to insist that the Defendants were aware of the case and in any events, (sic) what they seek to forestall has already been achieved namely eviction and the matter should be treated as a closed chapter.

However, when I went through material placed before me by Richard Kimutai Cheruiyot on behalf of his family there is massive bone of evidence showing how the Arap Tesot Family left Nyanza during colonial times and early days of independence when they were resettled in Rift Valley in 1972. There are documents showing how the land was acquired and how



senior Chief Kiplangat Arap Chumo chose the Plaintiff as trustee for the family, how the land was paid for and disputes touching on the land.

In view of this revelation by the Defendants through Richard Kimutai Kirui and the able Counsel V.K Bii Advocate and notwithstanding failure to act despite being aware of the case. I will concede to their application confident they may have failed to instruct Counsel due to lack of funds and getting the family together which appears large may (sic) have been a challenge for whoever led them.

In the premises I allowed (sic) the application to set aside the judgement dated 1st February, 2024 (sic) and all consequential orders flowing from the same judgement.

For avoidance of doubt the status quo obtaining before judgement is the one to be maintained pending further directions in the matter.” [Emphasis mine]

57. It is evident that the Learned Trial Magistrate made a finding that the Respondents were aware of the suit.

58. In the judicial decision of Moses Kimaiyo Kipsang v Geoffrey Kiprotich Kirui & 2 others [2022] eKLR the Court held as follows;

“ 30. Having come to the conclusion that service was proper and the Applicants did not attend Court at their fault when the matter proceeded I find that the (sic) judgment delivered on 25th May, 2021 was regular.”

59. The Learned Trial Magistrate made the determination that the Respondents were aware of the proceedings. That meant that the judgement was regular. The word “regular” may not have been used expressly but it is logical to draw inference that a finding was made that the judgment was regular.

60. This ground of appeal therefore fails.

B. Whether the Learned Trial Magistrate erred in failing to take into consideration the principles of setting aside a regular judgement and instead based his ruling on extraneous issues that had not been pleaded.

61. It is the Appellant’s submissions that the Learned Trial Magistrate in his ruling delivered on 25th July, 2024 failed to take into consideration the principles of setting aside a regular judgement and instead set aside the judgement by considering issues that had not been placed before him.

62. The Appellants submit that the Learned Trial Magistrate departed from the pleadings and stated that the Respondents family seemed large and may not have had funds to defend the suit.

63. The Respondents submit that the Learned Trial Magistrate in setting aside the judgement considered the evidence placed before him which showed that they were not properly served with the summons to enter appearance. It has been established that the Respondents were aware of the suit and were actually represented by counsel.

64. The Learned Trial Magistrate in his ruling held as follows;

“In view of this revelation by the Defendants through Richard Kimutai Kirui and the able Counsel V.K Bii Advocate and notwithstanding failure to act despite being aware of the case.



I will concede to their application confident they may have failed to instruct Counsel due to lack of funds and getting the family together which appears large may (sic) have been a challenge for whoever led them.

In the premises I allowed (sic) the application to set aside the judgement dated 1st February, 2024 (sic) and all consequential orders flowing from the same judgement.

For avoidance of doubt the status quo obtaining before judgement is the one to be maintained pending further directions in the matter.”

65. The Court of Appeal in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR held as follows;

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the Defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a Defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the Court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the Court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the Defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah (supra)*, *Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another v. Kubende [1986] KLR 492* and *CMC Holdings v. Nzioki [2004] 1 KLR 173*.” [Emphasis Mine]

66. In the above cited judicial decision, it was held that while the Court has the discretion whether or not to set aside a regular judgment, the Court shall take into consideration several factors such as; Reasons why the Defendant and/or Respondent did not enter appearance and/or file defence on time, the length of time that has elapsed since the default judgment was entered, Whether the intended defence raises triable issues and the prejudice each party is likely to suffer.
67. In the present matter, it is evident that the sole reason, as read from the ruling, why the Learned Trial Magistrate allowed the application to set aside the judgement was because the Respondents ‘may have failed to instruct Counsel due to lack of funds and it may have been a challenge to get the family together since it was large.’
68. It is evident that the facts of a large family or lack of funds to instruct counsel are not ejusdem generis with factors to be considered in setting aside a regular judgment as set out in the judicial decision cited in the foregoing paragraphs.
69. It is important to note that the Respondents contention before the trial Court was that they were not served with the pleadings.
70. It is equally important to note that the issue of whether or not the family was large and whether or not the Respondents had funds to instruct Counsel were not raised by the Respondents.
71. Therefore, I find that the Learned Trial Magistrate’s finding that the Respondents failure to instruct Counsel was due to lack of funds and that it was a challenge to get the family together to be erroneous



as the said issues were not pleaded and are not part of the factors for consideration in determining whether or not to set aside a regular default judgment.

72. This ground of appeal succeeds.

C. Whether the Learned Trial Magistrate erred in failing to find that the Court was functus officio as the decree had already been implemented.

73. The Appellant contends that the trial Court issued eviction orders in its judgement which were implemented and therefore the Court was functus officio.

74. In response the Respondents contend that the trial Court was not functus officio as no such eviction took place.

75. The ruling delivered by the Learned Trial Magistrate has been set out in the preceding paragraphs and it is evident that he did not address the issue of whether or not the Court was functus officio.

76. This Court has taken the liberty of perusing the Trial Court record and has looked at the Respondents application dated 12th April, 2024, the Appellant's Replying Affidavit sworn on 23rd April, 2024 together with the Grounds of Opposition, the Supplementary Affidavit sworn by the 1st Respondent on 6th May, 2024 and the Appellant's "Further Replying Affidavit" sworn on 8th May, 2024.

77. Upon perusal it is evident that the issue of whether or not the Trial Court was functus officio was not raised by either of the parties.

78. The Court of Appeal in the judicial decision of Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto [2018] eKLR held as follows;

"It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy v. Ruth Watiri Kibe, [CA No. 39 of 2015](#) and Openda v. Ahn [1983] KLR 165). In this case we have stated that the Appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the Appellant did not raise the issue in his memorandum of appeal in this Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our Appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the Appellate Court to consideration of the issues that were canvassed before and decided by the trial Court. If that were not the case, the appellate Court would become a trial Court in disguise and make decisions without the benefit of the input of the Court of first instance. (See North Staffordshire Railway Co. v. Edge [1920] AC 254)." [Emphasis Mine]

79. I find that the Appellant is precluded from raising the issue of whether or not the Trial Court was functus officio as the said issue was not raised before the trial Court.

80. Therefore, this ground of appeal fails.

D. Whether the Learned Trial Magistrate erred in granting orders of stay of execution of eviction after making a finding that the Respondents had already been evicted from the suit parcel.

81. The Appellant contends that the Learned Trial Magistrate erred in granting orders of stay of execution of eviction after the Respondents were evicted from the suit parcel.



82. As afore stated, the Respondents deny that any such eviction took place.
83. The Learned Trial Magistrate in his ruling delivered on 24th July, 2024 did not grant orders of stay of execution.
84. The prayers sought by the Respondents in their Notice of Motion application dated 12th April, 2024 have been set out in the preceding paragraphs but I will replicate them as hereunder;
- a. That this Notice of Motion be certified as extremely urgent and the same be dispensed with in the first instance.
 - b. That M/s Bii V.K & Co. Advocates be granted leave to come on record on behalf of M/S Kemboi Chambers Advocates being the requirements of the law.
 - c. That pending the inter partes hearing of this application the Honourable Court be pleased to temporary set aside the order dated 2nd November, 2023 and further stay of any proceedings herein.
 - d. That the order issued against the Defendants/Applicants and all the ex parte proceedings and judgement entered on 1st February, 2024 be set aside and the Defendants be granted leave to defend their case on merit.
 - e. That costs of the application be in the cause.”
85. It is important to note that the Respondents did not seek orders of stay of execution in their application and a reading of the ruling reveals that none was granted.
86. This ground of appeal therefore lacks merit and it fails.

E. Whether the Learned Trial Magistrate erred in inferring that a trust existed and yet the said issue was not pleaded.

87. The Appellant at ground number 7 of his Memorandum of Appeal states that the Learned Trial Magistrate erred in drawing an inference that a trust existed and yet the said issue was not pleaded.
88. Neither of the parties addressed this issue in their submissions.
89. In *Khetshi Dharamshi & Company Ltd v Obuyumbi* (Appeal 10 of 2023) [2023] KEELRC 2664 (KLR) (30 October 2023) (Judgment) the Court held as follows;
- “4. To answer the 1st issue, the Court returns (sic) that the Appellant has made no submissions on the issue of want of jurisdiction by the Trial Court per Grounds 1 and 2 of Appeal and as submitted for the Respondent, the Appellant is deemed to have abandoned the two grounds. The Court returns that the two grounds stand abandoned accordingly.”
90. In the judicial decision of *Kamonde v Mulonzya & another* (As Administrators of the Estate of Paul Vinzi - Deceased) (Civil Case E213 of 2022) [2024] KEHC 5648 (KLR) (9 May 2024) (Judgment) the Court held as follows;

“There was no submission on other grounds of Appeal hence they are deemed abandoned.”



91. In the present matter, the Appellant did not address ground number 7 of his Memorandum of Appeal in his submissions. He is deemed to have abandoned the said ground and I shall, therefore, not make a determination on it.
92. Similarly, I note that Appellant extensively submitted on whether the failure to annex a draft defence to the application to set aside judgement was fatal. This issue was not raised in the Memorandum of Appeal.
93. The Court of Appeal in *Coastal Bottlers Limited v George Karanja* [2015] eKLR held as follows;
- “It is trite law that pleadings are not only binding on the Court but on the parties as well (see. *Galaxy Paints Company Ltd v Falcon Guards Ltd*, Civil Appeal No. 219 of 1998, where this Court held that: -
- “The issues for determination in a suit generally flowed from the pleadings and the Trial Court could only pronounce judgment on the issues arising from such issues as the parties framed for the Court’s determination.”
- This decision was also adopted with approval by this Court in *William Muthee Muthami v Bank of Baroda* [2014] eKLR), when it restated the principle thus:-
- “It is a firmly established rule of evidence that the evidence produced in Court to prove a claim must flow from the pleadings.”
- This applies not only to pleadings and proceedings before the Trial Court, but to appeals as well. An Appellate Court is bound by the issues pleaded in the Memorandum of Appeal and ought not address any issues extraneous to the grounds pleaded (see. *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR).” (Emphasis mine)
94. In the judicial decision of Amoth [*¶ 2 others v Duncan ¶ 10 others \(Environment and Land Appeal E002 of 2023\)*](#) [2024] KEELC 1340 (KLR) (14 March 2024) (Judgment) the Court held as follows;
- “...The issue of the trial Court’s jurisdiction has been raised in the Appellants’ submissions and not in their Grounds of Appeal.
17. It must be noted the Appellants were bound by grounds postulated in their Memorandum of Appeal and are not allowed to travel beyond them by sneaking new grounds in their submissions. This Court will disregard this limb of their submissions. See *Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited)* [2019] eKLR.” (Emphasis mine)
95. As was held in the above cited judicial decisions, Appellants are bound by the Grounds of Appeal in their Memorandum of Appeal and any new issues raised in submissions are best disregarded.
96. I shall disregard the Appellants submissions on whether the Learned Trial Magistrate erred in failing to find that failure to annex a draft defence was fatal.



F. Who should bear costs of the appeal?

97. It is now settled that costs shall follow the event. This is in accordance with the Provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

98. In the result, the appeal succeeds and I order as follows:

- a. The ruling and order in Kericho – CM ELC Case No. E053 of 2023 delivered on 25th July, 2024 is hereby set aside.
- b. The Appellant shall have costs of this appeal.

99. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 24TH DAY OF APRIL, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Mwita for the Appellant.

Mr. Bii for the Respondents.

Court Assistant; Mr. Joseph Makori.

