



Mbugua & 4 others v Mwangi & another (Environment and Land Appeal E010 of 2024) [2025] KEELC 3180 (KLR) (8 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3180 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E010 OF 2024**

MN GICHERU, J

APRIL 8, 2025

BETWEEN

**MARGARET NYOKABI MBUGUA 1ST APPELLANT
CATHERINE FELISTAS WAMBUI 2ND APPELLANT
GEOFFREY KIBATHI MBUGUA 3RD APPELLANT
EILEEN WANJIKU MBUGUA 4TH APPELLANT
GEORGE SIMON KAMAU 5TH APPELLANT**

AND

**PETER NJOGU MWANGI 1ST RESPONDENT
THE LAND REGISTRAR OF MURANG'A 2ND RESPONDENT**

JUDGMENT

1. This judgment relates to a decision by the Honourable Senior Resident Magistrate, Murang'a, in case No. MCELC E015 of 2022 whereby the learned magistrate entered judgment in favour of the 1st Respondent. In the Judgment dated 14-2-2024, the Court made the following orders
 - a. A permanent injunction be and is hereby issued restraining the defendant's, their servants, agents, relatives employees or otherwise howsoever from trespassing on the said land or in any other way interfering with the suit land pending the hearing and determination of this suit.
 - b. A declaration be and is hereby made that the title deed for L.R NO. Makuyu/Kariaini Block 11/1541 measuring approximately 0.0828 Ha issued in the names of the Plaintiff, Peter Njogu Mwangi on 3rd April 1989 by the 1st Defendant is the valid, regular and legal title document over the said subject suit premises.



- c. A declaration be and is hereby made that any subsequent title deeds issued in respect to parcel L.R. No. Makuyu/Kariaini Block 11/1541 bearing the name of the late Samuel Mbugua Kibathi or any other name(s) whatsoever are irregular and are hereby and are hereby revoked forthwith.
 - d. The Land Registrar , Muranga is hereby ordered to immediately cancel all entries in the green card and/or parcel file and also revoke all the title deeds for L.R. No. Makuyu/Kariaini Block 11/1541 in the names of Samuel Mbugua Kibathi or any other name(s) and the resultant title deeds after the said land was subdivided and individual title deeds issued to the 2nd – 6th Defendants being: Margaret Nyokabi Mbugua, Catherine Felistas Wambui Mbugua, Geoffrey Kibathi, Eileen Wanjiku Mbugua and George Simon Kamau and the same to revert and/or remain in the names of the Plaintiff herein – Peter Njogu Mwangi.
 - e. The Land Registrar Murang’a is further ordered to issue another title deed for L.R. No. Makuyu/Kariaini Block II/1541 in the names of the Plaintiff – Peter Njogu Mwangi containing the correct details relating thereto in favour of the Plaintiff herein.
 - f. The Plaintiff is also awarded Kshs. 400,000/= as general damages for trespass.
 - g. The Plaintiff is also awarded costs of this suit.
2. Dissatisfied with this judgment, the appellants, through their Counsel on record filed a memorandum of appeal dated 1-3-2024 seeking three orders.
- a. The Appeal be allowed with costs.
 - b. The judgment delivered on 14th February 2024 by the Senior Resident Magistrate, Honourable Susan N. Mwangi be set aside and substituted with an order allowing the Appellants’ statement of defence in the lower Court dated 8th June 2022 and the suit therein be reopened for pretrial and full hearing.
 - c. The costs of this Appeal, be borne by the 1st Respondent.
3. The memorandum of appeal has listed thirteen(13) grounds for seeking the setting aside of the judgment dated 14-2-2024. They are as follows.
- The learned trial magistrate erred in law and fact,
1. in finding that the Plaintiff is the legal owner of L.R. No. Makuyu/Kariaini Block II/1541, suit land,
 2. in finding that the Plaintiff is the legal owner of 0.0828 Hectares from L.R. No. Makuyu/ Kariaini Block II/1541 which measures 18.50 Hectares and proceeded to issue orders of cancellation of the entire title,
 3. by failing to find that the Appellants are the legal owners of the entire suit land L.R. No. Makuyu/Kariaini Block 2/1541 as determined in Murang’a ELC No. 84 of 2017,
 4. in failing to consider the Appellants’ statement of defence already filed, which raised triable issues,
 5. in disregarding the Appellants’ statement of defence and assuming that the Appellants had no interest in cross examining the Plaintiff during the hearing just from not filing their documents on time,



6. in failing to consider the appellants' reasons for delay in filing their list of documents,
 7. in failing to consider that the notice to show cause issued by the Court was not served upon the Appellants and that the return of service by the process server was false,
 8. in failing to consider that the Plaintiffs' application to strike out the Appellants' defence was not served upon the Appellants and that there was no return of service filed in that effect,
 9. in striking out the Appellant's statement of defence by allowing the Plaintiffs' application which was not served upon the Appellants,
 10. by denying the Appellants a chance to defend their case despite having duly filed and served their statement of defence,
 11. by striking out the Appellants defence prematurely when the matter did not undergo pretrial conference and get certified ready for hearing,
 12. by failing to adhere to the Civil Procedure Rules by fixing the matter for hearing without undergoing pretrial conference and instead relying on the Plaintiff's information from internal letters between the parties while the matter is pending in Court,
 13. in finding that the Defendants' defence was unmerited.
4. The facts which precipitated this appeal are as follows. On 5.12.2023 the case came up for hearing before the trial Court. The 1st Plaintiff's Counsel was present and there was a counsel holding brief for counsel for the 2nd – 6th Defendants. The latter Counsel sought an adjournment on the ground that they were not ready for trial because they were yet to secure a document from the Ministry of Lands. Secondly, even though the Defendant's counsel had been served with a hearing notice, they were not aware of the proceedings relating to the Application dated 22-9-23 and the ruling of 8-11-2023 which directed that the case proceeds by way of formal proof. The application for adjournment was opposed by the 1st Plaintiff's counsel on various grounds. The first one was that the Defendants never filed witness statements and documents within the time stipulated by the law. Secondly, even though service of the hearing notice on the Defendant's counsel had been three weeks prior to the hearing date, they did not indicate, in good time that they would be seeking to adjourn the case on the hearing date to mitigate the costs incurred by the Plaintiffs.
5. In its ruling, the Court dismissed the application for adjournment on the ground that the ruling of 8-11-2023 directed the case to proceed by way of formal proof and there was no order reviewing the said directions or issued by a higher Court staying the directions of 8-11-2023. After the dismissal of the application for adjournment, the case proceeded *ex parte* on the same 5-12-2023 and a judgment date was set for 14-2-2024. Judgment was delivered as scheduled.
6. Counsel for the parties filed written submissions dated 12-8-2024 and 6-11-2024 respectively. The Appellants' counsel identified the following issues as coming up for the determination.
- a. Whether the trial Court erred in law and in fact in denying the Appellants' advocate an opportunity to be heard.
 - b. Whether the trial Court erred in law and in fact by declaring that the 1st Respondent as the legal proprietor of L.R. No. Makuyu/Kariaini Block 2/1541 measuring 0.0828 Ha yet the acreage on the same was disputed and evidence from the green card was contrary to the 1st Respondent's ownership.



The 1st Respondent's counsel on the other hand identified three (3) issues for determination out of the 14 grounds in the memorandum of appeal. They are as follows.

- a. Whether the trial magistrate erred in upholding the validity of the title issued in the 1st Respondent's name on 3rd April, 1989 over the suit land and ordering a revocation of any other subsequent title over the land.
 - b. Whether the trial magistrate properly directed herself in regard to the parties' pleadings and the required proof.
 - c. Whether the Appellants' failure to file accompanying documents was fatal to their defence to the suit.
 - d. Who should bear the costs of this appeal?
7. I have carefully considered the appeal in its entirety including the thirteen grounds in the memorandum of appeal, the record of appeal especially the proceedings of 5-12-2023 and the Judgment dated 14-2-2024, the written submissions and the issues raised therein including the law cited. I find that the best approach to this appeal is to make a determination on each of the thirteen grounds in the memorandum of appeal dated 1-3-2024. I agree with the submission by the Appellants' Counsel that this being a first appeal, "this Court is not bound to necessarily accept the findings of fact by the Court below. An appeal to this Court from a trial by the magistrates' Court is by way of retrial... 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 allowance in this report..." "See *Selle Vs. Associated Motor Boat Company Ltd* 1968 EA 123."
8. On the first ground, I find that the trial magistrate did not err in finding that the Plaintiff is the legal owner of the land known as Makuyu/kariaini Block 2/1541. There was sufficient evidence from the Plaintiff to prove his case on a balance of probabilities. This evidence included the Plaintiff's witness statement dated 22-2-2022, six documents and testimony at the trial. All this evidence was uncontroverted by any evidence from the defence.
9. As for the second grounds, I find that the trial magistrate should have confined herself to the Plaintiff's size of 0.0828 and left the rest of the land to the Defendants as the Plaintiff had no claim to it.
10. Regarding the third ground, the trial magistrate did not err. The Defendants did not file the judgment in Murang'a ELC No. 84 of 2017 so that it could be considered by the trial Court. It was not enough for the Defendants in the lower Court to file a defence on 9/6/2022 and fail to file the material that must accompany a defence and leave it to the Court to assume that there was ever a case known as Murang'a ELC No. 84 of 2017.
11. On the fourth ground, I find that the defence by the 2nd-6th Defendants was a general denial not supported by any evidence. The trial magistrate could not consider mere pleadings without any evidence in form of witness statements and documents.
12. Considering the 5th ground and looking at the record, there is nothing to show that the counsel for the Defendant sought leave to cross examine the Plaintiff on 5-12-2023. Had he requested to cross-examine the Plaintiff, then ground 5 would probably have been valid. I find no merit in this ground.
13. On the sixth ground, I find that the trial magistrate did not err in dismissing the application for adjournment on 5-12-2023. The reasons given for failing to file the witness statements, documents and the requisite lists were very lame. The law makes it mandatory for a Defendant to file a defence within 14 days of filing an appearance unless the Court orders otherwise. The defence must be accompanied



by a list of witnesses to be called at the trial, written statements signed by the witnesses to be called at the trial and copies of documents to be relied on at the trial. These requirements are mandatory and the only exception is that the Court may, upon request, allow the Defendant to file such statements, 15 days to the pretrial conference.

In this case, the 2nd-6th Defendants filed their memorandum of appearance on 5-5-2022. The defence was filed on 9-6-2022 without the accompanying material contrary to Order 7 rule 5 Civil Procedure rules. If there was a single document which could not be secured from the lands office, there was no good reason for failure to file the other material within the time allowed by the law. Further to the above, the above Defendants' counsel had no Courtesy of informing the Plaintiff's counsel that he would be seeking an adjournment. Had he done so, he would have created a positive impression of counsel who was acting diligently and who wanted to prosecute the defence in a fair manner. The trial magistrate was entitled to exercise her discretion and dismiss the application for adjournment the way she did in all the circumstances of this case.

14. The issue of the notice to show cause dated 22-8-2023 is not relevant to this appeal because it was not an issue for consideration in the determination of the merit or otherwise of the Plaintiffs' suit.
15. As for the 8th and 9th grounds, it was up to the Defendants to seek to set aside the ruling that struck out the Defendants defence so that the issue of service could have been considered by the trial Court.
16. The tenth ground is closely related to the fifth ground and the reasoning in paragraph (12) above will apply here. There is nothing on record to show that the Defendants' counsel made any further application after his application for adjournment was dismissed on 5-12-2023. Had he done so and his application dismissed without good reason, this ground would have been valid. Like I have already said, the Defendants failed to file their evidence in form of witness statements and documents in good time and they cannot therefore be heard to say that the written statement of defence was evidence. It was not. It was bare pleadings without any evidence.
17. Grounds numbers 11 and 12 are the same in that they relate to failure to hold a pretrial directions and conferences as required by Order 11 of the Civil Procedure Rules. On these two grounds, I find that Order 11 rule 1 of the Civil Procedure Rules makes pre-trial directions and conferences mandatory in all cases governed by the *Civil Procedure Act*. The only exception to this is in relation to small claims or such other suits as the Court may exempt from the pretrial conference.
18. Even though the Defendants were casual in the way in which they conducted their case, I find that are good reasons why they should not be condemned unheard in all the circumstances of this case.

Firstly, they have shown through this appeal that they wish to be given a second chance. Under Article 50(1) of *the Constitution* a party to a dispute should be given a fair hearing. Locking out a party from a case before a hearing should only happen if such a party does not crave to be heard. Here, the Defendants crave to be heard. Secondly, failure to hold a pretrial conference in this case undermined the Defendants chance to pray for time to extend the time within which to file their evidence. Had such a conference taken place, the Defendants would have been awoken from their slumber of lateness in filing their evidence. Finally, the revocation of the Defendants' title to their land which is alleged to be 18.50 hectares while the Plaintiffs' land is said to be only 0.0828 hectares leaves unresolved what is to happen to the balance of the land measuring 18.4172 hectares.
19. For the above stated reasons, I allow the appeal on the following conditions.
 - a. The Defendants to pay the costs of this appeal.
 - b. The judgment delivered on 14-2-2024 is set aside.



- c. The Defendant to comply with Order 7 rules 1 and 5 Civil Procedure Rules within 14 days.
- d. Thereafter, the case to proceed as stipulated in the Civil Procedure Rules.
- e. Costs in (a) above to be paid to the Plaintiff before the suit is set down for hearing.
- f. For avoidance of doubt, case to proceed before the same learned magistrate who delivered the judgment dated 14-2-2024.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF APRIL, 2025.

M.N. GICHERU

JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Appellants' Counsel – Miss Musyoka

Respondents Counsel – Miss Cynthia

