



**Muriithi v Njoroge & another (Environment and Land Appeal  
E013 of 2021) [2025] KEELC 3626 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3626 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL E013 OF 2021**

**JO OLOLA, J**

**MAY 8, 2025**

**BETWEEN**

**JOHN MUYA MURIITHI ..... APPELLANT**

**AND**

**LUCY MUTHONI NJOROGE ..... 1<sup>ST</sup> RESPONDENT**

**GABRIEL WACHIRA MURIITHI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. This is an Appeal arising from two (2) Rulings delivered by the Honourable D.M. Ireri (SRM) on 6<sup>th</sup> July, 2020 and 16<sup>th</sup> April, 2021 respectively in Othaya MELC Case No. 4 of 2020
2. By a Notice of Motion dated 26<sup>th</sup> June, 2020, Lucy Muthoni Njoroge (the 1<sup>st</sup> Respondent) had sought for inter alia orders to preserve the subject property pending the hearing and determination of the suit. On 6<sup>th</sup> July, 2020, the trial court proceeded to allow the order of preservation noting that the application was unopposed.
3. Subsequently and by another Notice of Motion dated 17<sup>th</sup> December, 2020, John Muya Muriithi (the Appellant) sought for an order that the orders issued ex-parte on 6<sup>th</sup> July, 2020 be discharged or set aside on account that he was dissatisfied therewith and prejudiced by the same.
4. Having heard the parties and in the second Ruling delivered on 16<sup>th</sup> April, 2021, the trial court dismissed the said application for lack of merit and ordered the parties to bear their own costs.



5. Aggrieved by the said determination, the Appellant moved to this court vide a Memorandum of Appeal dated 28<sup>th</sup> April, 2021 urging this court to set aside the two (2) Rulings on some ten (10) grounds listed therein as follows:

1. That the Learned Senior Resident Magistrate erred and misdirected himself in failing to discharge, vary or set aside (the) ex-parte order he had issued against the appellant on 6<sup>th</sup> July, 2020 under Order 40 Rule 7 which had dissatisfied and prejudiced the Appellant as it was obtained by fraud committed between the Respondents;
2. That the Learned Senior Resident Magistrate erred in law and misdirected himself in issuing an injunction restraining eviction of the 1<sup>st</sup> Respondent who has never been in occupation of LR. (No.) Mahiga/Ugachiku/847;
3. The Learned Senior Resident Magistrate erred in law and misdirected himself in issuing an injunction against the Appellant from occupying, cultivating and/or interfering with his own land LR (No.) Mahiga/ Ugachiku/847 which he has lived in since time immemorial over seventy years;
4. The Learned Senior Resident Magistrate erred in Law and misdirected himself in issuing an injunction which would operate to evict the registered owner of the land from his own property;
5. The Senior Resident Magistrate erred in Law and misdirected himself in failing to exercise his discretion judiciously to set aside an injunction order he had granted on false allegations that there was a valid contract of sale of land between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent which was a nullity;
6. That the Respondents had concealed from (the) Court that the land subject of the sale agreement between the 2<sup>nd</sup> and 1<sup>st</sup> Respondents was registered in the name of a third party and the seller had no capacity to sell the same;
7. The Respondents deliberately misrepresented to the Court that the 1<sup>st</sup> Respondent was in occupation of LR (No.) Mahiga/Ugachiku/847 at the time of obtaining the injunction on 6<sup>th</sup> July, 2020 which is untrue;
8. The Learned Senior Resident Magistrate erred in Law in failing to appreciate the Appellant's submissions that the order made on 6-7-2020 failed to meet the standard of prima facie case as set in *Giella V Cassman Brown & Co Ltd* (1973) EA 358 to be a basis of the temporary injunction;
9. The Learned Senior Resident Magistrate erred in Law and misdirected himself in accepting that (the) Order dated 6-7-2020 was merely to preserve the status quo and not prejudice the appellant;
10. The Learned Magistrate erred in law in failing to put into account the Pleadings in the Plaint and in the Defence and all annexures thereon to assist him to arrive to a just decision before making the injunction order ex-parte.

6. It is now settled that the duty of this court as the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on the facts and the law and to arrive at its own



conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand [see *Selle and Another –vs- Associated Motor Boat Co. Ltd and Others* (1968) EA 123].

7. The Appellant herein was the sole Defendant in a suit brought before the Senior Resident Magistrates Court at Othaya by the two Respondents. Together with their suit as filed before the Lower Court, the Respondents instituted a Notice of Motion application dated 26<sup>th</sup> June, 2020. While the Appellants did not include the said Motion in the Record of Appeal filed herein, it was apparent that the same was placed before the Honourable D.M. Ireri, SRM who upon consideration of the same did on 6<sup>th</sup> July, 2020 issue orders as follows:
  1. That the Defendant/Respondent by himself, his agents and/or servants be and is hereby restrained from selling, transferring, leasing, Charging, trespassing, sub-dividing, developing or erecting structures or otherwise interfering with the land parcel No. Mahiga/Ugachiku/847 and occupation of the Applicant pending the hearing and determination of this suit;
  2. That the OCS Mahiga Munyange Police Station be and is hereby ordered to ensure compliance with the orders of this Court; and
  3. That the costs of this application shall abide the outcome of this suit
8. It was not clear from the Record when those orders were served upon the Appellant. What was clear was that at some point in time, the Respondents felt that the Appellant was in disobedience of the said orders. Accordingly, and by a Notice of Motion application dated 25<sup>th</sup> November, 2020, the Respondents instituted a contempt of court application against the Appellant.
9. Subsequently, and by a Notice of Motion application dated 17<sup>th</sup> December, 2020, the Appellant urged the same court to grant the following orders:
  1. That (the) application be heard ex-parte in the first instance;
  2. That the determination of the Notice of Motion dated 25<sup>th</sup> November, 2020 be stayed until the hearing and determination of this application;
  3. That the temporary order issued ex-parte on 6<sup>th</sup> July, 2020 be discharged, varied or set aside by the Court under Order 40 Rule 7 as the Applicant/defendant is dissatisfied and prejudiced by it;
  4. That in the alternative the determination of the application dated 25<sup>th</sup> November, 2020 be struck out in view of the alleged typing error in prayer (2) therefore for date 30<sup>th</sup> July, 2020 which is incurable orally by submissions;
  5. That in further alternative the Ruling in the application dated 25<sup>th</sup> November, 2020 be stayed and leave be granted to the Defendant/Applicant to file (an) appeal against the Ruling dated 6<sup>th</sup> July, 2020;
  6. That unless this application is heard and orders granted the Applicant's/Defendants constitutional rights for fair hearing and lawful detention shall be infringed by an order of arrest and detention in prison or attachment of his properties; and
  7. That the Respondent/Plaintiff be condemned to pay costs of this application.
10. It was apparent from a perusal of the Ruling delivered on 16<sup>th</sup> April, 2021 that the court had delivered another Ruling on 22<sup>nd</sup> January, 2021 in which the issues touching on the contempt application were



dismissed and that all that thereafter remained for consideration was Prayer No. 3 which sought to have the court to discharge, vary and/or set aside the orders earlier on issued on 6<sup>th</sup> July, 2020.

11. Having considered the said issue and analysed several authorities thereon the Learned Trial Magistrate proceeded to render himself as follows at pages 11 and 12 of the Ruling:

“The subject order was issued on 6.7.2020 and was brought to the attention of the applicant on 10.7.2020 as per the Affidavit of Service on record by Julius Kariuki Mundia dated 10.3.2020 which has not been challenged considering that the applicant has never sought the summoning of the said process server for cross examination in court on the issue of service. In any case the Applicant’s Learned Counsel filed his notice of appointment and defence on 23.7.2020. The applicant did not seek to challenge the order at the earliest opportunity despite having filed his defence on 23.7.2020 but was only prompted by the application for contempt of the said order filed in November 2020 about five months later. The applicant has not even explained why he failed to seek to set aside the order earlier if at all he was offended by it as he claims now. Having failed to challenge the order at the earliest opportunity, it is my view that the applicant cannot now seek to benefit from the provisions of Section 1A and 3A of the Act since the same will be in contravention of the overriding objectives of the Act one which is aimed at a just and expeditious disposal and or resolution of civil disputes. It will be against the overriding objective principle to set aside the said order about 9 months later when the applicant has not explained the delay in seeking to set it aside or shown any justification as to why the order should be set aside.”

12. According to the Appellant, in arriving at that conclusion the trial court had erred in law and greatly misdirected itself. On that basis, the Appellant has raised, as we have seen, ten (10) grounds of Appeal on the basis of which he wants the decision overturned. In my considered view, grounds 6 and 7 as raised in the Memorandum of Appeal are mere complaints against the Respondent and do not amount to valid grounds of Appeal against the decision of the court. It was further clear to me that the remaining grounds turn only on one point, that is, whether or not the Learned Trial Magistrate erred in law and or misdirected himself when he declined to discharge, vary and or set aside the orders granted by the court on 6<sup>th</sup> July, 2020.

13. As it were, Order 40 Rule 7 of the Civil Procedure Rules upon which the Appellant’s application was premised provides as follows:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

14. In furtherance of his application before the court, the Appellant deponed as follows at Paragraph 5 of the Supporting Affidavit sworn on 17<sup>th</sup> December, 2020:

“5. That the ex-parte order dated 6<sup>th</sup> July 2020 and issued on 7<sup>th</sup> July, 2020 is ex-parte and has never been heard inter-parties and pray that same be discharged, varied or set aside under Order 40 Rule 7 of the Civil Procedure (sic) as it has dissatisfied and prejudiced my case.”

15. It was not clear to me why the Appellant insisted that the orders issued on 6<sup>th</sup> July, 2020 were issued ex-parte and that the same had not been heard inter-partes. In the entire affidavit in support of his application, he does not deny that he had been served with the Notice of Motion dated 26<sup>th</sup> June, 2020.



16. From a perusal of the Record of Appeal the Appellant has filed herein, it was apparent from pages 53 to 55 that the said application had initially been placed before the Learned Trial Magistrate on 30<sup>th</sup> June, 2020 under Certificate of Urgency. The Court declined to certify the matter as urgent and directed the application be served for inter-partes hearing on 6<sup>th</sup> July, 2020.
17. It was further evident that on the said 6<sup>th</sup> July, 2020 when the matter came up for hearing, the Respondents had filed before the court an Affidavit of Service sworn by one Julius Kariuki Mundia, a Court Process Server, indicating that the Appellant had been served with the application on 1<sup>st</sup> July, 2020. Having considered the Affidavit, the Learned Trial Magistrate allowed the hearing of the application to proceed and thereafter proceeded to grant the orders contested by the Appellant.
18. That being the case, it was first and foremost incumbent upon the Appellant to satisfactorily explain to the court the reason for his failure to attend court on and or file a response to the application by, the date, fixed for inter-parties hearing. No such explanation has been proffered and it was evident that there was no plausible reason why the Appellant did not attend court on the date fixed for inter-partes hearing.
19. Again, that being the case, it was apparent that the application had been heard inter-partes and the only reason upon which the same could be set aside if at all were where the orders had been obtained by means of misrepresentation and/or concealment of material facts.
20. From a perusal of the impugned Ruling, it was evident that the Learned Trial Magistrate was fully conscious of this position and had taken the same into account before arriving at his decision. The Affidavit in support of the Appellant's application before the court is to be found at pages 51 and 52 of the Record of Appeal. I have gone through the 9 – paragraphs thereof and there is no single paragraph that accuses the Respondent of having concealed any facts material or otherwise from the court.
21. In the premises herein, I was not persuaded that the Learned Trial Magistrate had erred and/or misdirected himself in the manner purported in the Memorandum of Appeal dated 28<sup>th</sup> April, 2021 or at all. This Appeal therefore lacks basis. The same is dismissed with costs.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 8<sup>TH</sup> DAY OF MAY, 2025**

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**J.O. OLOLA**

**JUDGE**

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Mrs. Maina holding brief for Kebuk Advocate for the Appellant
- c. Mr. Muchiri wa Gathoni Advocate for the Respondent

