



**Njege & another v Njathiaka (Environment and Land Appeal  
E008 of 2022) [2025] KEELC 3818 (KLR) (6 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3818 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E008 OF 2022**

**AK BOR, J**

**MAY 6, 2025**

**BETWEEN**

**RANDIA IGOKI NJEJE ..... 1<sup>ST</sup> APPELLANT**

**ANDREW MUTIINI NJEJE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MAKENA IRERI NJATHIACA ..... RESPONDENT**

**JUDGMENT**

1. The Appellants lodged this appeal to challenge the orders given in Siakago CM ELC Case E017 of 2022 on 7/6/2022 by Honourable E. Wasike, Principal Magistrate. The Appellants are the defendants in that suit. They contended that the trial court granted substantive orders on 7/6/2022 when the case came up for mention without hearing them.
2. In the Memorandum of Appeal dated 5/7/2022, the Appellants faulted the trial court for hearing the application dated 16/2/2022 on a date when the matter was fixed for mention and not hearing of the application. Further, they faulted the Learned Magistrate for expunging their replying affidavit opposing the application dated 16/2/2022 on the basis that it was filed late even when no prejudice was suffered by the Respondent thereby denying the Appellants an opportunity to be heard on that application.
3. The Appellants maintained that even without a replying affidavit, they were still entitled to argue their application dated 16/2/2022 on points of law. Further, that an application cannot be allowed simply because it was not opposed. That by not fixing the application dated 16/2/2022 for hearing and allowing it instead, the trial court denied them the right to be heard and to justice.
4. The other grounds of appeal were that the Learned Magistrate failed to find that the Respondent had not established that she had the legal capacity to institute a suit on behalf of the estate of her late husband and that based on this, she did not satisfy the requirements for the grant of an order of



- injunction. The trial court was also faulted for failing to find that granting the orders sought had the effect of evicting the Appellants from the land known as Mbeere/ Riachina/2982 (suit land) which they had occupied for more than 30 years, before the case was heard and determined.
5. The Appellants sought to have the ruling and orders granted by the trial court on 7/6/2022 set aside and for the application dated 6/2/2022 to be heard afresh. They also sought to have their replying affidavit sworn on 7/6/2022 reinstated and considered in the determination of the application dated 6/2/2022.
  6. The court directed parties to file and exchange written submissions which it has considered. The Appellants invited the court to look at the record of the trial court which confirms that the matter was scheduled for mention on 7/6/2022 and that both parties were represented and the court noted that the replying affidavit was on the record. That the defendants' advocate sought time to serve the replying affidavit upon the plaintiff's advocate. That the court struck out the replying affidavit and allowed the application on a date set for mention.
  7. The Appellants contended that the action by the trial court was unlawful and unprocedural because no substantive orders should be made in a case during a mention unless it is by consent of parties. They contended that they were not given an opportunity to be heard on the application. Further, they urged that the application did not satisfy the requirements for the grant of an injunction and that the effect of the orders granted by the court was that the Appellants could be evicted from the suit land before the case was heard and determined.
  8. The Appellants relied on Articles 37 and 159(2)(d) of *the Constitution* in urging that they were entitled to be heard as one of rules of natural justice and that justice should be administered without undue regard to procedural technicalities.
  9. The Appellant cited the decision in Barclays Bank of Kenya Limited and Another v Gladys Muthoni and 20 Others (2016) eKLR where the court observed that on a day when a matter was fixed for mention, the case should not be heard unless the parties consented to the hearing. They reiterated that the trial court should have fixed the application for hearing or given directions for the filing of submissions since they still had a right to be heard even if the replying affidavit was expunged from the record.
  10. The Respondent relied on Article 23 of *the Constitution* on the power of the court to grant various orders including injunctions. She cited Sections 1A, 1B and 3A of the *Civil Procedure Act* which call for the determination of cases on merit and grants the court the discretion to make orders which are necessary for the ends of justice and to prevent abuse of court process. The Respondent maintained that the injunctive orders being challenged was causing the Respondent more suffering compared to what the Appellant would suffer because the Appellants were destroying the suit land. The Respondent contended that injunctive orders are issued by the court to preserve the subject matter until the suit is determined.
  11. The Respondent maintained that the trial court did not err by issuing the injunctive orders because it is clothed with inherent powers to issue such orders in the interest of justice and to preserve the subject matter of the suit. She maintained that she had satisfied the requirements for the grant of the orders of injunction.
  12. The issue for determination is whether the court should allow the appeal and set aside the orders issued by the trial court on 7/6/2022. The orders were issued pursuant to application dated 16/2/2022 which the trial court certified as urgent on 3/3/2022 and directed parties to file and exchange their responses.



The court directed that the final mention would be on the 7/6/2022 and added that the status quo would be maintained.

13. The record shows that when the matter came up for mention on 7/6/2022, the defendant's advocate informed the court that they had not filed their response due to challenges in obtaining documents from the lands registry. After hearing both advocates, the Learned Magistrate stated that on 31/3/2022 he had given the defendants 10 days to file their response but that they had failed to comply with orders of 31/3/2022. The Learned Magistrate stated that he had just been given a replying affidavit which was filed in contravention of the orders of 31/3/2022 and had not been served on the plaintiffs. The court went ahead to strike out the replying affidavit sworn on 7/6/2022 and allowed the application dated 16/2/2022.
14. The court agrees with the Appellant that the trial court erred when it granted substantive orders on a date when the matter was fixed for mention. Striking out a pleading or response to an application is draconian and should only be done in exceptional circumstances. It was not proper for the trial court to strike out the response filed by the defendants in opposition to the application for injunction. The defendants explained why their response to the application for injunction was not filed within the timelines given by the court.
15. The court allows the appeal. The orders made by Hon E. Wasike in Siakago PM ELC Case No. E017 of 2022 on 7/6/2022 are set aside.
16. The application dated 6/2/2022 will be heard afresh and the Replying Affidavit sworn on 7/6/2022 is reinstated for consideration by the trial court in its determination of the application dated 6/2/2022.
17. Each party will bear its costs.

**DELIVERED VIRTUALLY AT EMBU THIS 6<sup>TH</sup> DAY OF MAY 2025.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Cynthia Wanjiku for the Respondent

Diana Kemboi-Court Assistant

No appearance for the Appellants

