Mbugua & another v Mwai (Environment and Land Appeal E105 of 2023) [2025] KEELC 4208 (KLR) (3 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4208 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E105 OF 2023

JA MOGENI, J

JUNE 3, 2025

BETWEEN

PATRICK NGIGI MBUGUA .... 1ST APPELLANT

ARDHI LINK LIMITED .... 2ND APPELLANT

AND

DAVID NGUYO MWAI .... RESPONDENT

(Being an Appeal from the Judgment and decree of Hon. C.K Kisiangani Senior Principal Magistrate in the Chief Magistrate Court at Ruiru in RUIRU MCELC CASE NO. E169 OF 2023)

JUDGMENT

1. This Appeal arises from the Judgment and Decree of Hon. C.K Kisiangani Senior Principal Magistrate in RUIRU MCLELC CASE NO. 169 of 2023 where the Learned Magistrate found in favour of the Plaintiff.
2. Dissatisfied with the Court's decision, the Appellant lodged this Appeal citing three (3) grounds summarized as follows:-
    1. That the Honorable Magistrate erred both in fact and in law in allowing the Plaintiff suit without hearing the Defendant's/Appellant's Application dated 6th June 2024.
    2. That the Honorable Magistrate erred both in fact and in law in failing to consider the counterclaim of the Defendant/Appellant which was contained in the Notice of Motion dated 6th June 2024.
    3. That the Learned Trial Magistrate erred in law and fact when she failed to consider the testimony of the Appellant that the Respondent had at various points during the subsistence

of the matter in lower Court admitted that he had been fully paid the amount he was claiming under that suit.

3. The Appellants prays for Judgment against the Respondent for;

   i. The Decree and Judgment of the Hon. C. K. Kisiangani Senior Principal Magistrate delivered on the 13th June 2024 be set aside.

   ii. That the Honorable Court do direct that the Appellant Motion dated 6th June 2024 be considered and proposed directions be given Mutatis Mutandis.

4. Parties put in written submissions to dispose of the Appeal.

5. At the same time the Appellant had filed a Notice of Motion Application dated 3/02/2025 in which the Applicant seeks lifting of the Warrants of Arrest issued on 22/01/2025 against the Appellant and issuance of Orders of stay pending the hearing and determination of the Appeal.

6. The Application is premised on the ground that a Warrant of Arrest has been issued in by Ruiru Law Courts in MELC E169 of 2023 despite the 1st Appellant paying Kesh 100,000 to the Respondent since 1/10/2024 to date.

7. Further that the 1st Appellant has advertised to sell Land Parcels No. East/Juja East Block 2/41208 and Ruiru East Block 2/38591 in a bid to offset the decretal amount and the sale will be prejudiced if the warrant remains in force. Thus the Appeal will be rendered nugatory if the stay orders are not granted.

8. That the Court in Stanley Kang'ethe Kinyanjui vs Tony Ketter & Others (2013)eKLR, stated that even a single arguable point is sufficient to warrant stay of execution. At the same time the 1st Appellant stated that he is willing to deposit with the Court Title Deeds for Land Parcels Nos. Ruiru East/Juja East Block 2/41211, Ruiru East/Juja East Block 2/41212, Ruiru East/Juja East Block 2/41197 whose value are Kesh 4,500,000/- which is more than half of the decretal sum.

9. The Respondent had filed an earlier Replying Affidavit in response to the Notice of Motion Application dated 18/09/2024 however when the parties came to Court on 26/02/2025 the 1st Appellant moved the Court to have the Notice of Motion dated 3/02/2025 canvassed. To which the Respondent stated that they would rely on their Replying Affidavits earlier filed and that they sought a Judgment date for the Appeal which was canvased by way of written submissions.

10. In the Application the Respondent averred that through the proceedings of 29/10/2024 in the trial Court, the Applicants/Appellants committed themselves to settling the entire decretal sum and the same was allowed vide a Ruling on the same day albeit with certain conditions as seen in annexure DM-1. They contended that the Notice of Motion Application dated 8/09/2024, is thus frivolous, vexatious, bad in law, meritless and abuse of the Court process. Further that the Appellants should deposit the entire decretal sum with the Court as security of Kesh 9,925,525 as was decreed by the Court since they are insistent on prosecuting their Appeal. Annexure DM-2 is the copy of the Decree and Certificate of Ccosts.

11. The Respondent's response to the Application was that the Application was seeking a stay too late in the day when the Appeal is being determined further that the Appeal itself does not raise any serious issues for consideration as the trial Court was well reasoned in making its Judgement and that the Application is only meant to deny the Respondent the fruits of the Judgement while at the same time misleading the Court and thus it ought to be dismissed with costs.

12. I did peruse the Court file and noted that there were no interim stay orders issued by the Court thus the request by the Counsel of the 1st Appellant to have stay orders extended was misleading the Court. That

means that there are no interim stay orders in existence and none are extended as prayed on 26/02/2025 by Counsel Okeyo for the 1st Appellant. The Application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the Application is merited.

13. Order 42 rule 6 of the Civil Procedure Rules stipulates as follows: -

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the Court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.
>
> (2) No order for stay of execution shall be made under subrule (1) unless—
>
> (a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and
>
> (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
>
> (3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal Application made, to order upon such terms as it may deem fit, a stay of execution pending the hearing of a formal Application.
>
> (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given
>
> (5) An Application for stay of execution may be made informally immediately following the delivery of Judgment or ruling.
>
> (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with."

14. The principles governing stay of execution pending Appeal were restated in the case of Elena Doudoladova Korir v Kenyatta University [2012] eKLR at paragraph *para_7 7* as follows: -

> "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the Application must be made without unreasonable delay. In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo v Straman EA Ltd (2013) eKLR and Hassan Guyo Wakalo v Straman FA Ltd [2013] eKLR in which

it was held thus; 'In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.'"(See also the Court of Appeal decision in Court of Appeal case of Halai & Another v Thorton & Turpin [1963] Ltd [1990] KLR 365)."

15. An Applicant seeking orders for stay of execution pending Appeal must therefore satisfy the following conditions: -

    i. That substantial loss may result to them unless the orders sought are granted by the Court;

    ii. That the Application must be brought without unreasonable delay; and

    iii. That the Applicant has given such security as the Court orders for the due performance of such a decree or order which may be binding on them.

16. Courts have also taken the position that they must balance the Appellant's right to appeal with the right of a Decree-Holder to the fruits of his Decree. In striking this balance, the Court must consider that a Decree Holder should not be unduly prejudiced or precluded from enjoying the fruits of their Judgment. This was the determination in RWW v EKW [2019] eKLR, where the Court stated thus:-

> " The purpose of an Application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an Application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent."

17. It was the Applicant's case that the decretal sum of Kshs. 9,952,552/= is a colossal amount that he may not be able to raise. When the parties appeared in Court on 2/11/2024 the Applicant/Appellant had proposed to pay Kesh 1 million as a reasonable security when the Respondent had insisted that the Applicant deposits security before a grant of stay.

18. I note that the Applicant/1st Appellant has averred in his Supporting Affidavit that he has continued to pay Kesh 100,000 from 1/10/2024 but has not provided any proof of this payment.

19. The impugned Judgment was delivered on 13/06/2024 wherein the Applicant sought for stay of execution vide the current Application dated 03/02/2025. It is important to note that the Warrant of Arrest was issued on 22/01/2025 whereupon this Application was filed on 23/02/2025 a delay of three weeks. For me this is undue delay and no plausible explanation was given for this delay. I am not inclined to grant any stay and especially given the circumstances of the case.

20. I now turn my attention to the Appeal which was canvassed by way of written submissions.

Appellant's Submissions

21. The Appellant submitted that the Trial Magistrate refused to give the Appellant a chance to introduce a Counter-claim which would have gone to show that the Respondent in this Appeal was not owed the sum of Kesh 8,000,000. That there were some sums of money which the Appellant had paid on behalf

of the Respondent but which he could not prove since he was not able to introduce a Counterclaim and canvass it.

22. Further, that the Trial Magistrate did not even address herself to the issue of Notice of Motion dated 6/06/2024 which however is included as part of the Record of Appeal filed by the Appellant seeking to introduce a Counterclaim to the suit that was before her. Thus failure by the Trial Magistrate to acknowledge the Application shows that she erred and had formed an opinion against the Appellant without hearing what he had to say in the Counter-claim. This is tantamount to a Magistrate refusing to hear a claim filed before her without giving reasons for such refusal.

23. The Appellant urged the Court to find that there is merit in the Appeal and order for retrial of Ruiru ELC E169 of 2023 and give the parties a rider to amend their pleadings if need be. The Appellant also submitted that the Learned Magistrate erred by refusing to find that the Respondent has admitted having been paid in RUIRU MCEL No. 35 of 2020 for the suit property. It is the Appellant's contention that he has been shut out of the seat of justice and prays that the Appeal be allowed and send back to the lower Court for Retrial preferably before a different Magistrate other than C.K Kasiangani (PM).

24. On the part of the Respondents, they identified two issues for determination namely:

    a. Whether the Amended Memorandum of Appeal dated 14th October, 2024 is meritorious.

    b. Who bears the cost?

25. It is the Respondent's submission that the only controversy the Appellants seem to have is that the trial Court did not consider their Application dated 6th June, 2024 which sought to introduce a Counter-claim. The 1st Respondent submits that the said Application was filed after both the Plaintiff and Defendants (as then were) had closed their cases and directions on submissions and date for Judgement given. He referred the Court to a perusal of the record and he stated that the perusal will indicate that the Defendants closed their case on 23rd April, 2024 upon which directions for submissions and Judgement were issued.

26. That the trial Court upon considering the said Application noted that there was a pending Judgement and declined to allow the Application. Therefore, it is disingenuous for the Appellants to purport that the said Application was part of the Court record and ought to have been considered.

27. The Respondent further submitted that the said Application does not feature anywhere in the Appellants' Record of Appeal which is an indication that Application was not entertained. Further that it is not clear why the Appellants were filing an Application seeking to introduce a Counter-claim almost two months after both parties had closed their cases and were awaiting Judgment. It is a bizarre and unknown practice both in our substantive and procedural laws and the trial Court should not be blamed for failing to countenance upon such malpractice.

28. In his submissions the Respondent has stated that the only remedy that was available to the Appellants was to file an Application for Review of Judgement under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010, a right the Appellants chose not to exercise.

29. It was the submission of the Respondent that the Appellants' Amended Memorandum of Appeal dated 14th October, 2024 lacks merit and is a gross abuse of the Court process; a desperate attempt to delay the course of justice. It ought to be dismissed with costs to the Respondent.

Analysis and Determination

30. I have considered the grounds raised in the Memorandum of Appeal, the Record of Appeal and submissions filed by Counsel for the parties. As the first Appellate Court, this Court's mandate is to re-evaluate the trial Court Judgment in order to come to its own conclusion as was succinctly stated by the Court of Appeal in Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR, where the Court of Appeal stated that;

> " 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 are 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."

31. I have thoroughly considered the record, rival submissions and the law. This being a first Appeal, both issues of fact and law shall be considered. My task is to reconsider and re-evaluate the evidence that was adduced by both parties and arrive at my own independent conclusions. In doing so, I will bear in mind that I neither saw nor heard the witnesses and shall give allowance in that respect.

32. I must accordingly defer to the conclusions of the trial Court unless its findings were based on no evidence, on a misapprehension of the evidence or that the trial Court was shown demonstrably to have acted on wrong principles in reaching its findings. See Susan Munyi v Keshar Shiani CA. No. 38 of 2002 and Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278].

33. Before I proceed further, I must address certain disconcerting issues that have emerged from the Appellant's Appeal and submissions. The Appellant has introduced new issues that were not pleaded and uncanvassed before the trial Court. He has not sought leave to adduce new evidence.

34. The Appellant avers that he had an Application which the trial Court did not attend to which carried a Counter-claim. Yet my scrutiny of the proceedings does not reveal anywhere where the Appellant made an Application to introduce a Counter-claim. As a matter of fact on 26/03/2024 when the matter was scheduled for hearing and the Counsel for the Defendant was unavailable and his client was indisposed the Court adjourned the matter until 23/04/2024 when the defence hearing resumed and there was no Application on record or even leave sought to file a Counter-claim.

35. The Defendant/Appellant closed his case on 23/04/2024 and only stated that he will file submissions to which the Court granted him time to file submissions and a Judgment date was reserved.

36. In its Judgment the Court found both Defendants culpable and decreed that the Plaintiff is entitled to the balance of the purchase price of Kesh 8,235,000 and costs of the suit.

37. Thus, it is not lost to this Court that the Appellant raised grounds which no evidence was led on them before the trial Court, the parties did not address the trial Court on them and, the trial Court did not pronounce itself on those new issues the Appellant has raised on Appeal. This Court will summarize these new issues.

38. No evidence whatsoever was adduced before the trial in relation to the Defendant's/Appellant's Application dated 6/06/2024 nor the Counter Claim contained in the said Application.

39. Since this matter was heard between the two parties the Appellant never raised any issue about the trial Court not having given a chance to the parties to be heard and that is why when the Court directed for filing of submissions the Appellant who had closed his case did file their submissions.

40. In arriving at my decision of rejecting new evidence and new grounds of Appeal, I will adopt the Court of Appeal's decision of Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR which cited with approval Thomas Openda v Peter Martin Ahn [1982] eKLR and Nyangau v Nyakwara [1986] KLR 712 as follows: -

> "Openda v Ahn, (supra) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the Applicant's case as conducted in the trial Court, not changing it into a totally different case; the matter must have be properly pleaded and the facts in support of the new point must have come out in the trial Court; a new point which has not been pleaded or canvassed in the trial Court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial Court, if fully investigated, would support the point; where the question is one of law turning on the construction of a document, the new point may be allowed but only if the facts when fully investigated support the new plea…In Nyangau v. Nyakwara (supra) this Court allowed a new point to be taken on appeal because the new point raised an issue of jurisdiction."

41. However, since grounds of proving a case on a balance of probability goes to the root of the trial Court's jurisdiction, this Court will address this.

42. So in my considered view, the residual Ground of Appeal that fall for determination can succinctly be summarised into 1 issue; the trial Court erred in finding the Respondent proved his case.

The trial Court erred in finding the 1st Respondent proved his case

43. It is trite law that he who alleges must prove. See Sections 107 to 109 of the *Evidence Act*. In the impugned Judgment, the trial Court stated:-

> "… the Plaintiff has proven his case on a balanc3e of probabilities against both Defendants in regards to pray a) I find that he is entitled to the balance of the purchase price of Kesh 8,235,000/- plus costs of the suit and interest. I therefore award the Plaintiff Kesh 8,235,000 which is the balance of the purchase price."

44. I disagree with the Appellant's Counsel that the trial Court failed to consider the testimony of the Appellant that the Respondent had raised at various points during the subsistence of the matter in lower Court by admitting that he had been fully paid the amount he was claiming under the suit.

45. The 1st Defendant in cross-examination told the Court that he cannot confirm how much he paid by cash, mpesa and bank deposit and neither could he give a breakdown of how he paid Kesh 8,235,000 which was the balance after paying Kesh 1,145,000. He only stated that he paid it in several instalments and produced no documents to support the claim.

46. The Appellant's evidence was unsupported or it was wanting for not being corroborated. The onus was on him to discharge the burden of proof to the required standards.

47. The 1st Respondent produced documents before the trial Court which were credible and consistent. The 1st Respondent's evidence was not refuted by the Appellant. I do not see any errs in the conclusion arrived at by the trial Court. The 1st Respondent proved his case on a balance of probabilities. It is my finding this Ground of Appeal fails.

48. It is my ultimate finding the trial Court exercised its discretion properly and arrived at a proper determination and this Court finds no reason to upset it.

49. For the reasons stated above, the upshot is that the Appellant's Appeal is not merited and accordingly, the Appeal herein is disallowed and dismissed entirely and the Judgment of the trial Court is upheld. I award costs to the 1st Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 3RD DAY OF JUNE 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:

Mr. Okeyo for the 1st and 2nd Appellants

Mr. Nduati for the Respondent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE