



**Kimaiyo v Kimutai & another (Civil Appeal E004 of 2018)
[2025] KEHC 2651 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E004 OF 2018
RN NYAKUNDI, J
FEBRUARY 21, 2025**

BETWEEN

NICHOLAS KIPCHIRCHIR KIMAIYO APPELLANT

AND

WILSON KIBET KIMUTAI 1ST RESPONDENT

KABIANGA TEA FACTORY LIMITED 2ND RESPONDENT

*(Being an Appeal from the judgment of Hon. Obulutsa Chief Magistrate
in Eldoret CMCC 746 of 2013 delivered on 22nd December, 2017)*

JUDGMENT

1. This is an appeal from the decision of the magistrates' court given in E746 of 2013. The appeal raised 6 grounds of appeal vide a memorandum of appeal dated 18th January, 2018.
2. At the lower court, the appellant sued the defendants seeking orders as follows:
 - a. The defendants be restrained from collecting, selling, or fetching or interfering with the Plaintiff's harvesting of firewood and or wood forest in breach of the agreement entered on 22.1.13 on plantation Penon 3D
 - b. In the alternative, the Plaintiff prays for compensation and/or damages equating to the value of the forest produce collected by the 2nd defendant with the collusion of the 1st defendant from the plantation Penon 3 (D) to the value of Kshs. 5,025,000/=
3. The defendants denied the Plaintiff's averments in toto through their individual statements of defense.



4. The trial court considered the case for the Plaintiff and that of the defendant and made a determination as follows:

“the court has considered the evidence presented and the submissions and find that the Plaintiff has failed to prove his claim on a balance of probabilities on two grounds. First the agreement relied on by the Plaintiff dated 22.1.2013 did not mention Penon 3(d) and was not specific as to what was being sold. Secondly, the consent order made on 6.12.13 gave the firewood and wood forest to the 2nd defendant from Penon 3(d). As submitted by the defendant counsel there was no appeal filed to challenge the order. The case is dismissed with costs having not been proved on a balance of probabilities.”

5. Aggrieved with the said decision, the appellant filed the instant appeal predicated upon the following grounds:

- a. That the Honorable Magistrate erred in fact by failing to consider and properly analyze the evidence adduced on behalf of the Appellant and as a result arrived at an erroneous conclusion.
- b. The Honorable Magistrate failed to appreciate law as well as the submission of the Appellant by finding in favor of the Respondents herein and dismissing the suit.
- c. Taking into account the totality of the evidence presented, the Honorable Magistrate misdirected himself in both fact and in law in dismissing the suit.
- d. The Honorable Magistrate erred in fact and in law by failing to correctly evaluate the law and the material placed before it and thereby arrived at a wrong conclusion.
- e. The Honorable Magistrate erred in dismissing Plaintiff's suit.
- f. The Honorable Court erred both in fact and law in applying a higher standard of proof than is required in civil proceedings and in the process arrived at a completely erroneous finding

6. The appellant prayed that the appeal be allowed and the judgment delivered on 22nd December, 2017 be set aside. He prayed that the judgment be entered in favor of the appellant as prayed in Eldoret Civil Suit No. 746 of 2013. Further that the appellant be awarded costs of this appeal and in the trial court.

Appellant's submissions

7. Learned Counsel Mr. Otieno filed two sets of written submissions. One set is dated 21st March, 2024, which substantially agitates for the appeal. The next set dated 12th July, 2024 essentially counters the Respondents' submissions dated 10th July, 2024.

8. Learned Counsel Mr. Otieno submitted that the case before the Chief Magistrate's Court centered on seeking specific prayers, primarily an Order of Permanent Injunction. This injunction was sought to restrain the defendants, their agents, servants, employees, and any persons claiming through them from collecting, selling, fetching, or interfering with the Plaintiff's harvesting of firewood and wood fuel from Penon Plantation 3 (D). Counsel noted that this plantation was specifically allocated to the plaintiff and 1st defendant through a Kenya Forest Service letter of allotment reference CONF/FEL/16/KFS (106) dated 29/8/2012.

9. Furthermore, counsel submitted that the Appellant sought compensation and damages equivalent to the value of forest produce collected by the 2nd defendant in collusion with the 1st defendant. The value of the produce from Penon Plantation 3 (D) was mutually valued by both defendants at Kshs.



4,100,000/= (Four Million One Hundred Thousand). Counsel pointed out that this amount was to include interest from the date of filing the suit until full payment.

10. In advancing his arguments, counsel contended that the evidence shows that after working with Bundotich Korir & Co. Advocates on 22.01.2013, Mills PW3 found the forest had been harvested without his knowledge. Counsel emphasized that there had been prior business engagement - Penon 5 (D) and Penon 3 (D) with Ksh. 307,000/- which was received. The agreement was prepared and duly signed by Advocate Mr. Korir.
11. Counsel further argued that when examining the evidence, specifically regarding Penon Plantation3 (D) to 22.01.2013, it becomes clear that the firewood was sold to the 2nd defendant and was not intended to determine the main agreement. The partnership agreement dated 15.12.2023 cannot, according to counsel, be construed otherwise.

Respondent's written submissions

12. Learned Counsel Mr. Njuguna, appearing for the Respondent, commenced his submissions by addressing the merits of the appeal against the judgment delivered in Eldoret CMCC 746/2013 Nicholas Kipchirchir Kimaiyo vs Wilson Kibet and Kabianga Tea Factory Ltd. Counsel submitted that the trial magistrate's decision as contained in the judgment delivered on 22.12.2017 was judicious and properly grounded in law.
13. Advancing his arguments on the doctrine of res judicata, counsel contended that the dispute over forest plantation Penon 3D had been conclusively settled through a consent judgment in Eldoret CMCC 678/2013 Timber Treatment International Ltd vs Wilson Kibet Kimutai and Nicholas Kipchirchir Kimaiyo both T/A Oxy Water Saw Mills. To support this position, counsel cited the case of Anne Chepsiror & 4 others Vs National Land Commission & 4 others [2020] eKLR.
14. On the doctrine of estoppel, counsel argued that the Appellant was barred from instituting the parent suit having participated as a second defendant in the consent judgment. In supporting this argument, counsel relied on the case of Serah Njeri Mwobi vs John Kimani Njoroge (2013) eKLR.
15. Regarding the balance of probability, counsel submitted that the Plaintiff failed to prove his case as required by law. To reinforce this argument, counsel cited the case of William Kabogo Gitau vs George Thuo & 2 others [2010] 1 KLR.
16. Counsel further detailed that the subject matter in the earlier case (Eldoret Cmcc 678/2013) concerned a sale agreement dated 25.9.2012 and a subsequent agreement dated 24.8.2013 between Wilson Kibet Kimutai and Kabianga Tea Factory, both pertaining to forest plantation Penon 3D. Counsel emphasized that this earlier litigation was settled via consent judgment entered by the parties on 8.11.2013.
17. In conclusion, counsel submitted that the appeal commenced by the memorandum of appeal dated 18.1.2018 lacked merit and should be dismissed with costs to the respondents. Counsel argued that this position aligns with Section 7 of the Civil Procedure Act, which prohibits courts from trying issues that have been previously decided between the same parties.

Appellant's further submissions

18. Counsel structured his submissions in response around five key issues for determination. First, counsel addressed whether the suit Eldoret CMCC NO. 746 OF 2013 was res judicata. In analyzing this issue, counsel pointed out that while the Respondents referred to Eldoret CMCC NO. 678 OF 2013, which was settled by consent, the subject matters of the two cases were distinct. Counsel emphasized that the



earlier case concerned mature species of *E. Saligna* in Elgeyo Marakwet County, Penon Forest, Penon 3 (D), with Timber Treatment International Limited as the Plaintiff.

19. On the second issue regarding whether the plantations referenced in both cases were identical, counsel argued that while both cases related to Penon Plantation 3 (D), the claims were fundamentally different. Counsel detailed that the Appellant had paid Kshs. 1,630,000/- to Oxy Water Sawmills Ltd for fuel materials at Penon Forest, only to have the 1st Respondent subsequently sell the same produce to the 2nd Respondent for Kshs. 4,100,000/-.
20. Regarding the third and fourth issues concerning whether *res judicata* was pleaded in the defendants' defences or mentioned in the Court's judgment, counsel methodically demonstrated through reference to court records that this defence was absent from both the pleadings and the judgment.
21. On the fifth issue, concerning whether a party can raise new matters on appeal, counsel cited the case of Nairobi Civil Appeal No. 42 Of 1981 - Openda Vs. Ahn And [1987] Klr 338 - Securicor (kenya) Limited Vs. Ea Drapers Limited & another to support his position that new points should not be allowed at the appellate stage.
22. Counsel concluded by requesting that the Respondents' submissions be rejected wholesale and dismissed with costs, characterizing the introduction of *res judicata* at the appellate stage as part of a wider scheme to confuse and mislead the Court. The submissions reiterated the Appellant's earlier written submissions found at pages 288-323 of the Record and prayed for judgment as sought in the Memorandum of Appeal.

Analysis and determination

23. The duty of a first appellate court is to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* and in *Peters v Sunday Post Limited* (1968) EA 123.
24. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. See *Kurian Chacko vs. Varkey Ouseph* AIR 1969 Kerala 316.
25. From the evidence presented before this Court, it is clear that this matter revolves around forestry resources at Penon 3(D), specifically concerning timber and firewood materials that were subject to multiple transactions. The chronology of events and the documentary evidence reveal a web of business relationships and agreements that require attention.
26. At the outset, it is established that on 29th August, 2012, the Kenya Forest Service, through letter reference CONF/FEL/16/KFS (162), allocated specific forest materials in Penon 3(D) to Oxy Water Sawmills. This allocation encompassed 17.1 hectares containing 3,610 trees for firewood and 437 trees for timber, with a total royalty value of Kshs. 1,676,202.90. This allocation formed the foundation of all subsequent transactions and agreements.
27. The evidence establishes that Oxy Water Sawmills was a registered business entity incorporating Wilson Kibet Kimutai, Nicholas Kipchirchir Kimaiyo, and David Kimutai Cherop as a silent partner. The business model involved the joint purchase and sale of forest produce, with profits distributed according to agreed ratios. This partnership structure is significant as it creates fiduciary duties between the partners.



28. Another layer of transactions then unfolded. First, Oxy Water had litigation with Timber Treatment International which was compromised. Following this, Wilson paid Timber Treatment International and arranged for the sale of remaining firewood for Kshs. 1,630,000, to be divided among the three partners. This arrangement was formalized in the 22nd January, 2013 agreement, which the trial court found lacking in specificity.
29. The learned trial magistrate dismissed the plaintiff's case on two primary grounds. First, that the 22nd January, 2013 agreement did not specifically mention Penon 3(D) or clearly state what was being sold. Second, that a consent order from 6th December, 2013, had given the firewood rights to the second defendant. With respect, both findings reveal significant oversights in the evaluation of evidence.
30. Regarding the first ground, the trial court's interpretation of the agreement appears overly restrictive by requiring explicit reference to "Penon 3(D)." A more appropriate analysis would consider the agreement in conjunction with the Kenya Forest Service allocation letter, which contained specific identification of Penon 3(D). The business context, including the established pattern of dealings between the parties and supporting documentation, clearly established the subject matter of the sale. The court's focus on technical specificity overlooked the substantial evidence establishing the true nature of the transaction.
31. More fundamentally, the trial court erred in not properly considering the partnership relationship. The registration of Oxy Water Sawmills, the documented profit-sharing arrangements, and the pattern of previous joint business dealings all evidenced a partnership that created mutual obligations among the parties. The subsequent unilateral sale by Wilson Kibet Kimutai to Kabianga Tea Factory for Kshs. 4,100,000 represented a clear breach of these partnership obligations.
32. The revelation that funds from Timber Treatment International were deposited into Wilson's personal account, which is now subject to criminal proceedings, adds a concerning dimension to the credibility of the transactions. This fact, though not determinative, should have prompted closer scrutiny of the subsequent dealings.
33. The trial court's reliance on the consent order appears to have been made without adequate consideration of whether it could validly override existing partnership rights and prior agreements. The principle that partnership assets cannot be unilaterally disposed of by one partner to the detriment of others is fundamental to partnership arrangements.
34. The maxim "When the equities are equal, the first in time shall prevail" is particularly relevant here. The 22nd January, 2013 agreement, supported by the Forest Service allocation and partnership registration, created legitimate expectations and legal rights that preceded the 24th August, 2013 agreement with Kabianga Tea Factory.
35. The defense argument that no partnership existed between the plaintiff and first defendant is contradicted by substantial documentary evidence, including the business registration and profit-sharing arrangements. Similarly, the technical argument about the non-specification of Penon 3(D) in the agreement cannot stand when viewed against the totality of evidence establishing the subject matter of the transaction.
36. In these circumstances, while mindful that appellate courts should not lightly interfere with findings of fact by trial courts, the evidence demonstrates that the learned magistrate's findings were not arrived at through proper evaluation of the material evidence. The overlooking of crucial partnership obligations, the failure to consider supporting documentation establishing the subject matter of the



sale, and the inadequate examination of the validity of subsequent transactions all point to errors that warrant appellate intervention.

37. Having found that the learned trial magistrate's decision cannot be sustained, this Court makes the following orders:
- a. The appeal is hereby allowed, and the judgment of the trial court dated 22nd December, 2017, is set aside.
 - b. A declaration is hereby issued that the agreement dated 22nd January, 2013, between Oxy Water Sawmills and Nicholas Kipchirchir Kimaiyo was valid and enforceable in respect of the forest produce from Penon 3(D).
 - c. The permanent injunction sought would serve no practical purpose as the forest produce has already been harvested and disposed of. This prayer is therefore denied as being overtaken by events.
 - d. A declaration is hereby issued that the subsequent agreement dated 24th August, 2013, between Wilson Kibet Kimutai and Kabianga Tea Factory Ltd was invalid to the extent that it purported to sell the same forest produce without the consent of other partners.
 - e. Costs to the appellant.
 - f. 15 days stay of execution
38. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 21ST DAY OF FEBRUARY, 2025

R. NYAKUNDI

JUDGE

In the Presence of

Mr. C.F Otieno for the Applicant

Mr. Rotich for the Respondent

