Itiri v M'Naituli & 3 others (Civil Appeal E170 of 2023) [2025] KEHC 10629 (KLR) (14 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10629 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E170 OF 2023

SM GITHINJI, J

JULY 14, 2025

BETWEEN

GEOFFREY KIUNYE ITIRI .... APPELLANT

AND

JAPHET MURIUKI M'NAITULI .... 1ST RESPONDENT

GERALD BAIKWANGA NCEBERE .... 2ND RESPONDENT

JOHN NCEBERE .... 3RD RESPONDENT

JAMES KAITAKULI NKUBITU .... 4TH RESPONDENT

(Being an Appeal from the Judgment of Hon. P. Wechuli (PM) in Tigania CMCC No. E007 of 2022 delivered on 11th of September, 2023)

JUDGMENT

1. This Appeal arises from the judgment of the learned Principal Magistrate Hon. P. Wechuli delivered on 11.09.2023 in Tigania Civil Suit No. E007 of 2022 wherein the Appellant's case was dismissed, with no orders as to costs.

2. Aggrieved by the said dismissal of his case, the Appellant set forth the following grounds in the Memorandum of appeal dated 11th October, 2023;

    1. The Learned Trial Magistrate erred in law and fact in finding that the prayer to lift curses against the Appellant by the Njuri Ncheke house was not justifiable whereas the court has authority to give any orders that will ensure justice is served to all.

    2. The Learned Trial Magistrate erred in law and fact in failing to consider that the Appellant was not a member of Njuri Ncheke and does not know its procedures and hence he should

not be compelled to follow its procedures which he believes are contrary to his personal belief and religion.

3. The Learned Trial Magistrate erred in law and fact in failing to consider that the Appellant was not afforded a fair hearing by Njuri Ncheke and that he was condemned and cursed unheard and in his absence.

4. The Learned Trial Magistrate erred in law and fact in failing to consider the evidence adduced by the Appellant its entirety and hence arrived at an erroneous decision that the Appellant has not adduced enough evidence to have the prayers prayed granted.

5. The Learned Trial Magistrate erred in law and fact in concluding that the Appellant was the one not keen on following the procedures of Njuri Ncheke whereas he is not a member of Njuri Ncheke, was never informed of the said procedures and the Respondents do not deny he was cursed in his absence.

6. The Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and judicial authorities on the issues before the court thereby making an erroneous decision.

7. The Learned Trial Magistrate erred in law and fact by failing to award general damages to the Appellant whereas the acts of the Respondents to curse him in his absence have caused damages to his reputation.

8. The Learned Trial Magistrate erred in law and fact by failing to award special damages to the Appellant whereas receipts had been produced in court to support the costs incurred and PW2 had also confirmed that money is involved in order to bring Njuri Ncheke elders for any sitting.

3. The Respondents set forth the following grounds in the Memorandum of cross appeal dated 30th October, 2023;

   a. The trial Magistrate erred in denying the Respondents costs without giving reasons for doing so.

   b. The trial magistrate erred in failing to exercise his discretion judicially.

Evidence at trial

4. PW1 Geoffrey Kiunya Iteeri, the Appellant herein adopted his statement dated 1/1/2022 as his evidence in chief and produced the list of documents as exhibits. He told the court that the 1st Respondent and 2nd Respondent's wife filed a matter at Njuri Ncheke. He went to Njuri Ncheke but the 1st Respondent did not come. The 1st Respondent said that he was a witch and he took him there saying he wanted to finish everything in his home. He was taken to Kithiri when he failed to appear on 9/3/2019. He appeared at Njuri who have refused to remove the Kithiri and that is why they are here. Kithiri can only be lifted by the person who took him there, and that is why he sued the Respondents and not Njuri. He is not supposed to send an emissary to request for its lifting and he wanted the court to compel the Respondents to lift it. For the hearing, he paid the elders Ksh. 2,500, but no receipts were issued. Gerald Baikiunga's wife complained since his son had married the son of Baikiunga. He has sued the 3rd and 4th Respondents since they allowed him to be taken to Kithiri without a reason. He went to Njuri Ncheke on the first occasion but they did not come and he was awarded Ksh. 15,000 and the curse had not been removed. Although Njuri has already said that the curse be removed, they have not done so, and he wants the court to compel the curse to be removed.

5. PW2 Stephen Kailemia, the secretary of Kanukiri Shrine adopted his statement dated 15/1/2022 as his evidence in chief and produced exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9. He told the court that he has never been an official at Kilemi and he was not in their meetings. He became aware of the complainants when the Appellant appealed at their shrine. They said the Kithiri be lifted, and the procedure of lifting has to be done by those involved and the shrine. A curse by Kilemi cannot be lifted by Kanukiri, and the procedure is that wazees can also order the other shrine to lift the curse. Part of the process is to request the person who placed the Kithiri to remove it. He was not aware if the Appellant approached the Respondents to lift it. John Ncebere was an official in Kilemi while James Kaithulia was the chairman at the time, and the curse cannot be removed without the two officials.

6. DW1 Japhet Muriuki M'Naituli adopted his statement as his evidence in chief. He testified that he was not related to the Appellant. Mutungori came to tell him about a case contrary to Njuri rules and he was unaware of Kanukiri centre issues and of Ksh. 119,000. He took the Appellant to Njuri since he said he would finish everyone in his home including insects. Penina Kaimuri was a witness to that and Njuri never told him that the Appellant had gone to them.

7. DW2 Gerald Ncebere adopted his witness statement as his evidence in chief. He told the court that he took the Appellant herein, his neighbour and inlaw to Njuri but he was with Mutunguri. He was not aware that the Appellant had appealed and he was told to remove Kithiri. He also did not know whether the Appellant had used Ksh. 119,000 since he did not have Mutunguri. Without Mutunguri, you cannot pay anything, and he was not a party to Tigania CC 73/2018. The Appellant called his wife a witch and she took him to Njuri.

8. DW3 John Ncebere, a member of Njuri Nceke adopted his witness statement as his witness statement. Njuri Ncheke elders are not liars, and the Appellant is a liar, and that is why he was taken to Njuri. The procedure of Njuri was followed as the procedure is a Mutunguri who takes someone to Kithiri. The Kanukiri house is not the supervisor to other Njuri Ncheke's houses and he had no powers to remove the Kithiri. The Kithiri is of Japheth and Gerald, and only those can remove it through Mutunguri. He ought to go to Mutunguri with a she goat. Mutunguri goes to the person who did the oath, and that person asks for costs. Once costs are paid, the person who did the oath will present a ram and the Kithiri is removed. Kithiri can be done in absence of a condemned person, and Mutunguri can go to him even 4 times. He was not present when Kithiri was done but was only present during the decision since he was just a member.

Submissions

9. The Appellant through the firm of Thuranira Atheru & Co. Advocates filed submissions dated 12th November, 2024. Counsel submitted that the prayer to lift the curses against the Appellant was justiciable because he was not given an opportunity to be heard before being cursed by the Njuri Ncheke, and cited Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others (2012) eKLR. Counsel argued that the actions of the Respondents had ruined the Appellant's reputation, and amounted to defamation. Counsel contended that the Appellant was therefore entitled to general and punitive damages of Ksh. 2,000,000 for the wrongful curse, and cited Nation Media Group Limited & 2 Others v Joseph Kamotho & 3 others (2010) eKLR and Joseph Njogu Kamunge v Charles Muriuki Gachari (2016) eKLR. Counsel submitted that the trial court properly exercised its discretion by not awarding costs to the Respondents.

10. The Respondents through the firm of Nkunja & Co. Advocates filed submissions dated 6th December 2024 citing Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of Ben Siguda Okach (Deceased) [2021] eKLR, Abok James Odera T/A A.J Odera

& Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR and Mkube v Nyamuro (1983) LLR at 403 on the first appellate court's duty. On whether the prayer for lifting of the curses was justiciable, counsel cited Arthur Gatungu Gathuna v African Orthodox Church of Kenya (1982) eKLR, where it was held that courts should refrain from adjudicating purely spiritual or metaphysical matters unless these matters intersect with temporal or legal rights. Counsel submitted that the alleged slanderous statement was made in 2019 and 2020, and the suit regarding defamation was time barred as it was filed on 15/1/2022. Counsel contended that the special damages sought by the Appellant were not specifically pleaded and proved. Counsel urged the court to allow the cross appeal with costs, and cited Wycliffe A Swanya v Toyota East Africa Limited & Another (2009) eKLR, Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited (2016) eKLR, Aberdare Maize Milling Ltd v Julius Kiambati M'mbura (2020) eKLR, Joseph Oduor Anode v Kenya Red Cross Society (2012) eKLR and Supermarine Handling Services Ltd v Kenya Revenue Authority (2010) eKLR.

Analysis and Determination

11. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.

12. In Selle & another v Associated Motor Boat Co. Ltd [1968] EA, the court held as follows: "This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect."

13. I have considered the appeal herein, the trial court's judgment which is the subject of this appeal as well as the submissions by counsel.

14. From the grounds of appeal, the issues for determination are whether the Appellant proved his case on a balance of probabilities, whether the prayer to lift the curses against the Appellant was justiciable and whether the Appellant's submissions and authorities were considered.

15. The Appellant was taken to the Kiremi Njuri Ncheke shrine by the 1st and 2nd Respondents on allegations that he was a witch. The officials of the Kiremi Njuri Ncheke shrine heard the matter and eventually cursed the Appellant on 7/3/2020 and 2/9/2020 in his absence. The Appellant appealed to the Kanunkiri Njuri shrine which ordered that all the curses against him be lifted forthwith, which has not been done to date, thus necessitating the commencement of these proceedings in the trial court, to compel the 1st and 2nd Respondents to remove the curse.

16. The Appellant told the court that; "I went to Njuri cheke but he did not come. It must have been 21st September. On 9/10/19 I was not called. The date was changed since it was supposed to be 9/11/19. I was not informed of the date of 9th March. I know I was taken to Kithiri where I failed. I want court to compel the curse to be removed. "

17. PW2 stated that; "The procedure of lifting the said Kithiri has to be done by those involved and the shrine. The procedure is wazees can also order the other shrine to lift the curse. Yes part of the process is to request the person who placed the Kithiri to remove it."

18. The 1st Respondent told the court that; "Yes Mutunguu was sent to Geoffrey. I took him Njuri since he came and said he shall finish everyone in my home including insects."

19. The 2nd Respondent stated that; "I took Geoffrey to Njuri but I was with Mutunguri. I am not aware he appealed and I was told to remove Kithiri. I don't know whether he used Ksh 119,000/- since I had no Mutunguri. Without Mutinguri you cant pay anything."

20. The contention by the Appellant that he was condemned unheard is far from the truth. According to the judgment from Kiremi Njuri Nceke dated 9/11/2019, it is expressed that; "Mr. Kiunye failed to attend the case on the above date and the above case was due on 9/10/2019 and both parties to come. Intermediaries were set again to Mr. Kiunye, and to appear before the council of elders on 7/3/2020, without fail. Muriuki complainant appeared before the council. Kiunye defendant did not appear in front of the council and must incur an expenditure of 34,370."

21. How then can the Appellant lament that he was not afforded an opportunity to be heard when he deliberately and severally failed to appear before the Njuri Ncheke council despite having full knowledge of the dates?

22. I find that from the totality of the evidence on record, the Appellant failed to prove his case on a balance of probabilities, and the trial court cannot be faulted for dismissing it.

23. On whether the prayer for lifting of the curse was justiciable, the Appellant did not adhere to the laid down procedure in having the Kithiri removed by the 1st and 2nd Respondents. The procedure was explained at length by the 3rd Respondent and a member of Njuri Ncheke as follows; "The procedure of Njuri was followed as the procedure from njuri is a Mutunguri who takes someone to Kithiri. The Kithiri is of Japhet and Gerald. Only those can remove it through Mutunguri with us as witness. He ought to go to Mutunguri with a she goat. Mutunguri goes to the person who did the oath. That person asks for costs. Once costs are paid, the person who did the oath will present a ram and the Kithiri is removed."

24. In Kiriro Wa Ngugi & 19 others v Attorney General & 2 others [2020] eKLR, a 3 judge bench expounded that; "97. A Court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine. The doctrines are crosscutting and closely intertwined."

25. I find that the prayer to remove the curse was not only non-justiciable but also unripe for determination by the court, as the Appellant had a recourse before the Njuri Ncheke council of elders, which he ought to have first exhaustively pursued before prematurely rushing to the court.

26. Without evidence in the form of receipts to support his claim for special damages, the sum of Ksh. 150,520 sought in the plaint appeared to have been plucked from the thin air, devoid of any basis upon which it had been arrived at. It therefore follows that it was properly dismissed by the trial court.

27. On whether the trial court erred by not awarding costs to the Respondents, the general rule is that costs follow the event, and are awardable to a successful litigant. Nonetheless, the award of costs is at the discretion of the trial court.

28. I find that the Respondents have not established that in denying costs, the trial court exercised its discretion unjudicially and capriciously, to warrant interference by this court.

29. On whether the Appellant's submissions and authorities were considered, it has been countlessly held that submissions are neither pleadings nor evidence and their consideration or lack thereof cannot in itself be a ground to interfere with the discretion of a trial court.

30. I draw guidance from Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR where the Court of Appeal elucidated that; “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

31. The inevitable conclusion from the foregoing is that the appeal and the cross appeal are in want of merit and they are hereby dismissed with no order as to costs.

DATED AND DELIVERED AT MERU THIS 14TH JULY, 2025

S.M. GITHINJI

JUDGE

Appearances:-

Mr. Atheru for the Appellant.

Miss Gacheri holding brief for Mr. Nkunja for the Respondent.