



**Chalo v Masyula & 3 others (Environment and Land Appeal E006 of 2024)
[2025] KEELC 3814 (KLR) (Environment and Land) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3814 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E006 OF 2024**

EK WABWOTO, J

MAY 15, 2025

BETWEEN

MARY KAIYO CHALO APPELLANT

AND

LUCY MUMBUA MASYULA 1ST RESPONDENT

JOHN MBOLU 2ND RESPONDENT

COUNTY LAND ADJUDICATION OFFICER, TAVETA 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

(Being an appeal from the Ruling of the Senior Principal Magistrate's Court at Taveta delivered on 6th June 2024 by Hon. D. M. Ndungi (PM) in PMC ELC No. 12 of 2019)

JUDGMENT

1. This is an appeal against the ruling of the subordinate court dated 6th June 2024 wherein the subordinate court dismissed the Appellant's Preliminary Objection and allowed the 1st Respondent's application dated 5th October 2023.
2. In its ruling, the subordinate court held that the principle of *functus officio* does not apply in cases where on *ex parte* judgment was issued. It was also held that the 1st Respondent was not properly served with the hearing notice for the hearing date of 9th June 2022 and as such the *ex parte* judgment dated 15th September 2022 was irregular and cannot stand and ought to be set aside. It was also held that the amendment of the description of the sought property that was sought to be done in the decree was not typographical error that could be cured by slip rate within the meaning of Section 99 and 100 of the *Civil Procedure Act*.



3. The Appellant being aggrieved by the said Ruling filed the instant Appeal vide a Memorandum of Appeal dated 7th June 2024 which was premised on the following grounds:-
 - i. That the Learned trial Magistrate erred in law and in fact in dismissing the Appellant's Preliminary Objection dated 31st October 2023.
 - ii. That the Learned trial Magistrate erred in law and in fact in holding that the hearing notice for 9th June 2024 was not properly effected upon the 1st Respondent.
 - iii. That the Learned trial Magistrate erred in law and in fact in failing to acknowledge that the suit property as described in the pleadings is the same property as stated in the decree.
 - iv. That the Learned trial Magistrate erred in law and in fact in failing to acknowledge that the Plaintiff in her plaint and the 1st Respondent in her defence were both referring to the same suit property.
 - v. That the Learned trial Magistrate erred in law and in fact in failing to acknowledge that the 1st Respondent had been properly served with the summons and pleadings and she had filed her statement of defence.
 - vi. That the Learned trial Magistrate erred in law and in fact in setting aside the judgment, decree and all consequential orders.
 - vii. That the Learned trial Magistrate erred in law and in fact in holding that the amendment of the decree was fundamental and not for a typographical error.
 - viii. That the trial Magistrate erred in law and in fact in directing that the title deed issued to the Appellant be cancelled and another title be issued to the 1st Respondent.
 - ix. That the trial Magistrate erred in law and in fact in giving orders that inhibit the Appellant from right to access to justice.
4. The Appellant thus prayed for:-
 - i. This Appeal be allowed with costs to the Appellant.
 - ii. An Order do issue setting aside in entirety the Ruling of 6th June 2024.
 - iii. An Order do issue upholding the judgment delivered on 15th September 2022.
 - iv. An Order do issue allowing the Preliminary Objection raised by the Appellant dated 31st October 2023 to the effect that the trial Magistrate court is functus officio.
 - v. Judgment be entered in favour of the Appellant against the Respondents as prayed.
5. The Appeal was contested by the 1st Respondent and pursuant to the directions issued by the court, the parties filed written submissions in support of their respective cases. The Appellant filed written submissions dated 23rd April 2025 while the 1st Respondent filed written submissions dated 1st May 2025 which submissions the court has duly considered.
6. This being a first appeal, this court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the evidence and then determine whether the conclusions reached by the learned magistrate are to stand and give reasons either way. That was the pronouncement of the court in the case of Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira



- & Co. Advocates (2013) eKLR. The court held that a first appellate court has a duty to re-evaluate, re-assess and re-analyse the record and make its own conclusions.
7. The main issue for determination in this appeal is whether the trial Magistrate erred in dismissing the 1st Appellant's Preliminary Objection and granting the prayers sought in the 1st Respondent's application dated 5th October 2023.
 8. From the Ruling of the Learned Magistrate, it is clear that he was exercising discretionary jurisdiction thus before this court can interfere with the trial Magistrate's discretion, it must be satisfied that he either misdirected himself in some matter and a result arrived at a wrong decision or that he misapprehended the law or failed to consider some relevant matter (see Mbogo =Versus= Shah (1968) EA 93).
 9. In the Supreme Court case of Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others (2019) eKLR in which it was held that:

“We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v. Bashir (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held:“In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter:(1)error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.”
 10. It was therefore held by this Court in Price & Another v Hilder [1986] KLR 95 that it would be wrong for the court to interfere with the exercise of the trial court's discretion merely because the Court's decision would have been different.
 11. In this case, the Learned Magistrate found that the 1st Respondent had not been properly served with the hearing notice because the process server one had deponed that he did not find the 1st Respondent at home and he left the hearing notice with the 1st Respondent's mother.
 12. It is thus evident that the hearing before the subordinate court proceeded without the 1st Respondent and the said judgment was found to be irregular. What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.
 13. However, even where the judgement is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgement, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the parties.
 14. Article 50 of *the Constitution* of Kenya guarantees everyone a right to be heard and in view of the foregoing, the Learned Magistrate did not err when he set aside the exparte judgment and allowed the 1st Respondent to defend the suit.



15. As to whether or not the trial Magistrate erred in setting aside the decree and all its consequential orders on the basis that the replacement and or change of the particulars of the description of the suit land, it is evident that the doctrine of slip rule only applies where courts are expected to correct errors in judgments, rulings, or orders that are apparent on their face. These errors must be obvious and their correction shouldn't change the substance of the judgment or alter the court's clear intention. In the instant case the trial Magistrate made the proper and sound decision in setting aside the decree on the basis that the change in the description of the suit property could not have been made vide the slip note. The same was fundamental as it amounted to the change of the subject matter before the said court.
16. Having considered the entire record of appeal, I find no fault on the ruling made by the Learned Magistrate and the consequential orders thereto. This court would have still arrived at the same decision.
17. On the issue of costs, by dint of the provisions of Section 27 of the *Civil Procedure Act*, Costs are at the discretion of the court. Nevertheless, costs do follow the event unless there is good clause to deprive the successful party of such costs. I do not see any reason to depart from the same. In respect to the subject matter, the order that commands itself to me to grant is that the Appellant shall bear the costs of this Appeal. Considering that the lower court file has to be returned to the said court for hearing and determination of the pending suit Taveta PMC ELC Case No. 12 of 2019, the costs payable for this appeal are assessed at Ksh 20,000 payable to the 1st Respondent.
18. In conclusion, this court is satisfied that the Learned Magistrate addressed himself properly on the law and considered all relevant factors in arriving at his decision. Having addressed all the issues that were synchronized herein above, I now conclude as hereunder: -
 - i. The Appeal is devoid of merit and is dismissed.
 - ii. Costs of this Appeal assessed at Ksh 20,000.00 are awarded to the 1st Respondent.
 - iii. The lower court file Taveta PMC ELC Case No. 12 of 2019 to be returned forthwith for hearing and determination of the said pending suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 15TH DAY OF MAY 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Mwanzia for the Appellant.

Mr. Shem Karani for the 1st Respondent.

N/A for the other parties.

Court Assistants: Mary Ngoira and Norah Chao.

