



**Thuraine v Laikuru & 3 others (Environment and Land Appeal
E006 of 2023) [2025] KEELC 4795 (KLR) (23 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4795 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

BM EBOSO, J

JUNE 23, 2025

BETWEEN

M'MBOROKI THURAINÉ APPELLANT

AND

M'IKIAO LAIKURU 1ST RESPONDENT

STANLEY KIRIA MITAMBO 2ND RESPONDENT

**DISTRICT LAND ADJUDICATION OFFICER, THARAKA
DISTRICT 3RD RESPONDENT**

THE HON ATTORNEY GENERAL 4TH RESPONDENT

*(Being an Appeal arising from the Order of Hon Mbayaki Wafula, Principal
Magistrate, made on 17/10/2023 in Marimanti SPMC E&L Case No 37 of 2017)*

JUDGMENT

Introduction

1. This appeal challenges the dismissal order made by the Principal Magistrate Court at Marimanti SPMC (Hon Mbayaki Wafula PM) on 17/10/2023 in Marimanti SPMC E & L Case No 37 of 2017. The appellant was the plaintiff in the said suit. The respondents were defendants in the suit. The suit came up for substantive hearing on 17/10/2023 at 14:53 pm. Although the appellant's advocate was present in court, the appellant was absent. Consequently, the trial court dismissed the suit for "non-attendance and want of prosecution" and awarded the 2nd respondent costs of the suit. The two key issues to be determined in this appeal are: (i) Whether the trial court exercised its jurisdiction properly in declining to grant an adjournment to the appellant and in dismissing the suit; and (ii) Whether a proper basis has been laid to warrant the setting aside of the impugned dismissal order. Before I analyse and dispose the two issues, I will briefly outline the background to the appeal.



Background

2. Vide a plaint dated 22/12/2009, the appellant sued the respondents in the High Court at Meru seeking the following reliefs: (i) a declaration that the findings and the subsequent decision of the District Land Adjudication Officer –Tharaka District, relating to land parcel number 1851 Nkondi “A” Adjudication Section (hereinafter referred to as “the suit land”), were biased against the appellant; (ii) an order setting aside the said findings and decision and vesting the said parcel of land in the appellant; and (iii) an order awarding the appellant costs of the suit.
3. The case of the appellant was that, he personally gathered and cleared the suit land in 1966 and the suit land was subsequently “demarcated for him.” In 1992, the 1st respondent tried to assert a proprietary claim over the suit land during land adjudication in the section but he (the 1st respondent) lost to him (to the appellant) at the committee stage. The 1st respondent lodged an appeal to the arbitration board and to the surprise of the appellant, the 1st respondent was “given the portion in dispute.” Subsequently, the appellant filed Objection Number 239 against the adjudication register. The plaint was not clear on the outcome of the objection. What was clear is that the appellant subsequently filed a suit in the lower court seeking a declaration decreeing the findings and the decision of the District Land Adjudication Officer, Tharaka as biased.
4. The 1st and 2nd respondents filed a joint statement of defence dated 9/3/2010 in which they contested the appellant’s claim, terming it baseless and lacking legal foundation. They averred that the appellant’s claim over the suit land was adjudicated upon under the Land Adjudication Act and was found unmerited in a just and fair adjudication process. They faulted the appellant for failing to challenge the decision of the arbitration board within the prescribed period. The 2nd respondent contended that he was an innocent purchaser of the suit land for value, adding that he was not aware of the appellant’s interest in the suit land. The two respondents faulted the appellant for trying to circumvent the law by filing a plaint in the High Court without consent of the Adjudication Officer and without exhausting the mechanism spelt out in the law. They reserved their right to object to the suit. They urged the court to dismiss the suit. The original record of the trial court does not bear any pleadings by the 3rd and 4th respondents.
5. Upon establishment of the Environment and Land (hereinafter referred to as “the ELC”), the suit was listed before the ELC (P. M. Njoroge J) on 18/7/2013 and the ELC was seized of the suit from 18/7/2013 to 12/11/2014 when it transferred the suit from Meru ELC to Marimanti SPMC for hearing and determination.
6. Subsequent to that, the 1st and 2nd respondents filed a notice of preliminary objection inviting the court to strike out the appellant’s suit on the grounds that: (i) the court could not grant the reliefs sought in the plaint; (ii) the suit was fraudulent and was intended to circumvent the law; and (iii) the suit was incompetent as it sought to quash the decision of the Minister in charge of lands. The preliminary objection was upheld and the suit was dismissed by the lower court vide a ruling dated 22/11/2018.
7. The ruling attracted Chuka ELC Appeal No 8 of 2018 in which the ELC (P M Njoroge J) reinstated the suit on the ground that the points raised in the notice of preliminary objection could not be ventilated through a notice of preliminary objection.
8. It subsequently emerged that the 1st respondent had died. The appellant was given time to pursue substitution of the deceased defendant by seeking joinder of his personal representative. The appellant eventually brought an application dated 4/8/2022 seeking substitution of the late M’Ikiao Laikuru and revival of the suit against him. The application was allowed on 1/12/2022.



9. It is discernible from the record that between 4/3/2021 and 26/7/2023, the suit came up for hearing severally but hearing did not take off. On 15/7/2021, the appellant's counsel applied for an adjournment on, inter alia, the ground that he (the advocate) needed certain documents from the appellant. On 5/8/2021, hearing was adjourned because the appellant was pursuing documents to facilitate substitution of the 1st respondent.
10. When the suit eventually came up for hearing on 17/10/2023 at 9:00 am, counsel for the appellant sought an adjournment on the ground that whereas she was appearing virtually from her chamber, her client (the appellant) was present in the open court. Counsel for the 1st and 2nd defendants vehemently opposed the application for adjournment. Ultimately the court adjourned the hearing to 2:00 pm.
11. On convening to hear the case in the afternoon, counsel for the appellant (Mr. Mwanzia) was present in the open court but the appellant was absent. (The typed proceedings bear the words "not present" instead of "now present" in relation to counsel for the appellant. The handwritten proceedings bear the words "Now present"). Counsel for the appellant informed the trial court that the appellant had informed him that he was in court. He added that they had agreed with the appellant that the appellant would go to his chambers. Counsel for the appellant further told the trial court that he was not ready for the hearing because his client was not in court. On his part, counsel for the 1st and 2nd respondents informed the trial court that he was ready for the hearing.
12. The trial court considered the plea for adjournment and rejected it. The trial court proceeded to dismiss the suit in the following verbatim terms:

"Matter is dismissed with costs to the defendant 2 for N/A and want of prosecution.

17/10/2023"

Appeal

13. The above order triggered the present appeal in which the appellant raised the following three grounds:
 1. That the learned trial magistrate erred in law and fact in dismissing the appellant's suit without hearing the same on merits.
 2. That the learned trial magistrate erred in law and fact in failing to give/allow an adjournment in the circumstances presented before it.
 3. That the learned trial magistrate's decision was against the law."
14. The appellant urged this court to allow the appeal and remit the case for hearing in the subordinate court. He urged the court to award him costs of the appeal and costs of "the subordinate court."

Appellant's Submissions

15. The appeal was canvassed through written submissions dated 7/4/2025, filed by M/s Muia Mwanzia & Co Advocates. Counsel for the appellant submitted that it was clear from the proceedings of 17/10/2023 that there was a misunderstanding between the appellant and his counsel, adding that when the matter came up for hearing in the morning, whereas the appellant was in open court, the appellant's counsel appeared virtually from his chamber. Counsel added that there was a similar misunderstanding in the afternoon in that whereas the appellant's counsel was in the open court, the appellant had not reached counsel's chambers and was not in the open court.



16. Counsel for the appellant argued that the trial court erred in dismissing the suit in the above circumstances. Counsel submitted that a honest mistake arose, adding that the trial court should have considered the above circumstances and should have rescheduled the hearing to another date instead of dismissing the case. Placing reliance on the decision in *MSA Vs. KMKA Civil Application No E123 of 2014 eKLR*, counsel submitted that the trial court should have considered the wider interest of justice to have the case determined on merits. It was the view of counsel that an award of costs would have sufficed. In conclusion counsel argued that dismissal of the case in the above circumstances was bad in law and constituted a miscarriage of justice. Counsel urged the court to allow the appeal.

2nd Respondent's Submissions

17. The 2nd respondent filed written submissions dated 11/4/2025 through M/s Murango Mwenda & Company Advocates. Counsel enumerated the various dates when the case came up for hearing and was adjourned at the behest of the appellant, identifying 1/4/2015, 3/9/2015, 21/4/2016, 7/12/2017, 8/3/2018, 22/3/2018, 15/7/2021 and 20/7/2023 as the dates when the hearing was adjourned at the behest of the appellant. Counsel argued that on 17/10/2023, at 2:00 pm, the appellant disappeared from court without any explanation hence the trial court properly dismissed the case.
18. Counsel argued that the appellant was not interested in the disposal of the case, adding that the appellant had been taking court in circles. It was the position of counsel for the 2nd respondent that the appellant had acted contrary to the overriding objective of the *Civil Procedure Act* and Rules by dragging the case since 2009. Counsel for the 2nd respondent argued that the appellant did not provide a sufficient cause to justify an adjournment, adding that counsel for the appellant did not offer any explanation as to the absence of the appellant.
19. Lastly, counsel submitted that even after the case was dismissed and this appeal was filed, the appellant did not serve the memorandum of appeal until 29/2/2024, adding that the appellant had not explained the delay of almost five (5) months. Counsel for the 2nd respondent urged the court to reject the appeal.

3rd and 4th Respondents' Submissions.

20. The 3rd and 4th respondents filed written submissions dated 21/4/2025 through Ms E. Kendi, Senior Litigation Counsel. Counsel argued that the single issue for determination in the appeal was whether the appeal was merited. Counsel observed that on 20/7/2023, hearing of the case was adjourned at the behest of the appellant because the appellant was physically in court while his advocate had attended the court virtually. Counsel added that the same thing happened in the morning on 17/10/2023 culminating in the rescheduling of the hearing to 2:00 pm.
21. Citing the framework in Order 12 rules 3(1) and (7) and various past decisions, counsel argued that it was the primary duty of the appellant to take steps to prosecute his case. Counsel added that no satisfactory reasons were given to the trial court to warrant an adjournment. Counsel argued that pendency of a case costs money and exposes a defendant to mental anguish. Counsel urged the court to reject the appeal.

Analysis and Determination.

22. The court has read and considered the original record of the lower court; the record filed in this appeal; the three grounds of appeal; and the parties' respective submissions. The court has also considered the relevant legal frameworks and jurisprudence. As observed in the opening paragraph of this judgment, the two key issues that fall for determination are: (i) Whether the trial court exercised its jurisdiction properly in declining to grant an adjournment and in dismissing the appellant's suit; and (ii) Whether



a proper basis has been laid to warrant the setting aside of the impugned dismissal order. The two issues are intertwined. Consequently, I will analyse and dispose them simultaneously. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

23. This is a first appeal. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

24. The principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associated v John Patrick Machira t/a Machira & Co Advocated* (2013) eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

25. The suit that was the subject of the impugned dismissal order was filed in the High Court on 22/12/2009. At the time the dismissal order was made, the suit was 13 years and 10 months old. Secondly, in its entirety, the suit challenged the award of the Land Adjudication Officer made under the framework of the *Land Adjudication Act* in relation to a parcel of land that fell within a gazetted adjudication section. From the original record of the trial court, it emerges that through a decision made on 17/7/1992, the committee awarded the suit land to the appellant. On appeal to the arbitration board, the board, in a decision rendered on 23/9/1994, set aside the award of the adjudication committee and awarded part of the land in dispute to the 1st respondent. An adjudication register was consequently prepared. The appellant’s objection under Section 26 of the *Land Adjudication Act* was heard and determined through a decision rendered on 10/9/2002 in which the appellant’s objection was found unmerited and dismissed. It is not clear whether the appellant challenged the decision of 10/9/2002 through an appeal to the Minister. What is clear is that through the suit filed in 2009, the appellant sought to annul the decision of 10/9/2002.

26. The record of the trial court also shows that the trial court granted a last adjournment in the case in the following terms:

“By consent hearing 11/5/2023. Application for joinder has lapsed and is vacated. No adjournment as matter is gravely backlog.”

27. The court has considered the grounds of appeal in the context of the above background and in the context of Order 12 rule 3 (1) of the Civil Procedure Rules which provides as follows:

“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”

28. It is clear from the above framework that to grant an adjournment, the trial court had to have a good cause which had to be recorded by the court. The appellant was absent at the hearing of his case. The court was not informed on what made him to be absent. Put differently, whereas the appellant’s advocate was in court, he had no evidence to present to the court and no good cause was presented to



the court for recording so as to form the basis for an adjournment. All that the appellant's advocate stated was as follows:

“My client informed me that he is in court. We had agreed that he comes to chambers. I am not ready for hearing as my client is not in court.”

29. The appellant was physically in court in the morning when the hearing was rescheduled to the afternoon. Hearing was adjourned in order to accommodate the appellant's advocate who was not physically in court. As a plaintiff, the appellant was obliged to be in court and to tender his evidence. If he had a good reason that made it impossible for him to be in court at the appointed time, it was his duty to communicate the reason to his advocate who would in turn communicate the reason to the trial court for recording. From the record, the appellant did not attend court in the afternoon. He did not present to his advocate the reason for his inability to attend court. His advocate did not present explanation for his absence.
30. In the absence of a good reason, the trial court had no proper basis for reviewing its earlier order to the effect that there would be no further adjournment in the matter. Put differently, in the absence of good cause, the trial court had no basis for adjourning the hearing.
31. What remedy did the law avail to the appellant against the dismissal order? The remedy is found in Order 12 rule 7 of the Civil Procedure Rules which provides as follows:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
32. Even after the appellant failed to give his advocate an explanation for his inability to attend court, Order 12 rule 7 of the Civil Procedure Rules provided him a platform on which to approach the trial court through an application for an order setting aside the dismissal order and tender an explanation by way of affidavit evidence as to why he failed to attend court at 2.00 pm on 17/10/2023. If dissatisfied with the trial court's decision on an application under Order 12 rule 7 of the Civil Procedure Rules, the appellant would have the opportunity to approach this court through an appeal and invite this court to evaluate the trial court's exercise of its discretionary jurisdiction under Order 12 rule 7 of the Civil Procedure Rules.
33. The appellant did not pursue the above remedy. As things stand, the appellant prematurely approached this court through an appeal against the dismissal order of 17/10/2023 without any explanation as to what it is that made it impossible for him to attend court in the afternoon of 17/10/2023. He wants the court to find that the trial court failed to exercise its discretionally jurisdiction judiciously yet he has not moved the trial court through a formal application placing before the trial court an explanation (good cause) and inviting it to exercise discretionally jurisdiction to set aside the dismissal order under Order 12 rule 7 of the Civil Procedure Rules. Regrettably, this court cannot interfere with the dismissal order without an explanation by the appellant. The explanation comes in form of evidence.
34. For the above reasons, my finding on the first issue is that, given the history of the case and given the fact that no good cause was shown to warrant an adjournment, the trial court properly declined to grant an adjournment and properly dismissed the suit under Order 12 rule 3 (1) of the Civil Procedure Rules. My finding on the second issue is that the appellant has prematurely invoked the appellate jurisdiction of this court. The appellant is required to first exhaust the remedy availed to him under Order 12 rule 7 of the Civil Procedure Rules. Consequently, this appeal stands to be struck out for having been brought prematurely without the appellant first exhausting the remedy available under Order 12 rule 7 of the Civil Procedure Rules.



35. On costs, there is no proper basis to warrant a departure from the general principle in Section 27 of the *Civil Procedure Act*. Consequently, the appellant shall bear costs of this appeal.
36. In the end, this appeal is struck out for having been lodged prematurely. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 23RD DAY OF JUNE, 2025.

B M EBOSO [MR]

JUDGE

In the Presence of:

Appellant - Absent

1st, 3rd and 4th Respondents – Absent

2nd Respondent – Ms. Gumato

Court Assistant – Mr. Mwangi

