



**Zacharia & another v Mutua (Environment and Land Appeal  
E009 of 2024) [2025] KEELC 4801 (KLR) (23 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4801 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND APPEAL E009 OF 2024**

**BM EBOSO, J**

**JUNE 23, 2025**

**BETWEEN**

**FRANCIS KATHIO ZACHARIA ..... 1<sup>ST</sup> APPELLANT**

**ALEX KABURIA NKABUNE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KELVIN MAWIRA MUTUA ..... RESPONDENT**

*(Being an Appeal arising from the Ruling of the Senior Principal Magistrate Court at Chuka  
(Hon D. A Ocharo), delivered on 9/5/2024 in Chuka CMC E & L Case No. E051 of 2023)*

**JUDGMENT**

**Introduction**

1. This appeal challenges the ruling of the Senior Principal Magistrate Court at Chuka (Hon D.A. Ocharo, SPM) rendered on 9/5/2024 in Chuka CMC Environment & Land Case No E051 of 2023. The key issue to be determined in this judgment is whether the lower court erred in declining to suspend/stay the orders which had been issued in the said suit on 12/10/2023. Before I analyze and dispose the issue, I will briefly outline the contextual background to the appeal.

**Background**

2. Through a plaint dated 26/9/2023, the respondent sued the appellants vide Chuka CMC E & L Case No E051 of 2023. He alleged that he was the registered proprietor of land parcel number Meru/Lower East Magutuni/4469 (hereinafter referred to as “the suit land”) and contended that since July 2018, the appellants had been “causing all manner of nuisance” to the suit land and had severally removed the fence and beacons relating to the suit land. He prayed for a permanent injunction restraining the appellants and their agents/servants/assigns against entering, remaining on or in any way interfering with his peaceful occupation of the suit land.



3. Together with the plaint, the respondent filed a notice of motion dated 26/9/2023, seeking the following verbatim interlocutory reliefs: (i) an interlocutory injunction restraining the 1st and 2nd appellants and their servants, workers, agents and/or employees from interfering with, trespassing on, auctioning, wasting, damaging, alienating, offering for sale, charging or interfering with any portion of the property known as Meru/Lower East Magutuni/4469 measuring 2.44ha or any part thereof pending the hearing and determination of the suit; (ii) an order awarding the plaintiff costs of the application; and (iii) an order directing the Officer Commanding Magutuni Police Station to provide security should need arise.
4. When the application came up for interpartes hearing on 11/10/2023, the appellants were absent. Counsel for the respondent informed the lower court (Hon. J.M. Gandani, CM) that the appellants had been duly served. The lower court granted the application as prayed. Subsequent to that, the appellants filed a notice of motion dated 14/11/023 seeking the following verbatim orders:
  - “(i) That this application be certified as urgent, the same be heard ex-parte and service be dispensed with in the first instance.
  - (ii) That pending hearing and determination interpartes of this application this Honourable Court be pleased to suspend and/or stay execution of the Order dated 12/10/2023.
  - (iii) That this Honourable Court be pleased to issue any orders as it may deem fit to grant in the circumstances.
  - (iv) That costs for this application be provided for.”
5. The above application was canvassed through written submissions and came up for determination on 9/5/2024. The lower court (Hon. D.A. Ocharo SPM) disposed the application through a brief ruling dated 9/5/2024. The lower court rejected the application and awarded the respondent costs of the application.

## **Appeal**

6. Aggrieved by the ruling, the appellants brought this appeal, advancing the following verbatim grounds:
  - “1. That the learned magistrate of the lower court erred in law and fact by declining to grant the reliefs sought by the appellants in the application dated 14th November, 2023 in the Chief Magistrate Court at Chuka ELC Case No. E051 of 2023, and issue an order suspending and/or staying the execution of the order of the court issued therein on 12th October, 2023.
  2. The learned magistrate of the lower court erred in law and in fact by filing to appreciate and observe that the issues before the court in the matter are more of a boundary issue between the parcels of land LR No. Meru/Lower East Magutuni/4469 and LR Nos. Mwimbi/L.E. Magutuni/5988, 5089, 5090 and 5091 hence the need to stay the orders issued on 12th October, 2023 pending hearing and determination of the suit on merit.
  3. That the learned magistrate of the lower court erred in law and in fact by finding that the appellants did not show reason as to why the said order dated 12th October 2023 should not be executed.



4. That the learned magistrate of the lower court erred in law and in fact by failing to appreciate that court orders must be executed in a lawful, reasonable and orderly manner and that where a party seeks stay of such orders on reasonable grounds it is expedient to grant such a stay to avoid inadvertent noncompliance of such orders.
  5. The learned magistrate of the trial court erred in law and fact by failing to appreciate that by the way the prayers for the orders were framed it is clearly apparent that the appellants have some manner of control over or interaction with the suit land.
  6. the learned magistrate erred in law and fact by failing to consider the issues raised by the appellants in their application for stay of the orders issued on 12th October 2023.”
7. The appellants prayed for an order allowing the appeal. They further prayed for an order staying the orders issued on 12/10/2023. Lastly, they prayed for costs of the appeal.

### **Appellants’ Submissions**

8. The appeal was canvassed through written submissions dated 10/2/2025, filed through M/S Waklaw Advocates. Counsel for the appellants submitted that the respondent’s application dated 26/9/2023 was served on the appellants late, adding that the appellants arrived in court late on 11/10/2023 because they first went to a wrong courtroom. Counsel observed that owing to the above circumstances, the orders of 12/10/2023 were issued ex-parte without the court getting full facts. Counsel submitted that had the court received full facts, it would have become clear that the dispute before court related to land boundaries.
9. Arguing that the respondent did not live on the suit land, counsel submitted that the appellants owned parcel numbers Mwimbi/Lower East Magutuni/5088, 5089, 5090 and 5091, adding that the four parcels had “nothing to do with” the suit land. Counsel argued that by allowing the application dated 26/9/2023, the lower court effectively granted the respondent a carte blanche, adding that the respondent had “weaponized” the order of 11/10/2023 against them and was using the orders to evict them from their land.
10. Counsel argued that it was clear from their application dated 14/11/2023 and from the annexures to the said application that they were the legitimate owners of land parcel numbers Mwimbi/Lower East Magutuni/5088, 5089, 5090 And 5091, which they occupied and which the respondent purported to be the one registered as parcel number Meru/ Lower East Magutuni/4469. Counsel submitted that, had the lower court considered the pleadings and the evidence before it, it would have “vacated” the order of 11/10/2023. Counsel faulted the lower court for allowing the application dated 26/9/2023 as prayed, contending that the respondent had not discharged the burden of proof. Lastly, counsel submitted that allowing the application dated 26/9/2023 without giving the appellants an opportunity to be heard and subsequently dismissing the appellants’ application dated 14/10/2023 was arbitrary and unjustifiable. Counsel urged the court to allow the appeal and grant the orders sought in the appeal.

### **Respondent’s Submissions**

11. The respondent opposed the appeal through written submissions dated 4/3/2025, filed by M/s T. M. David & Company Advocates. Counsel submitted that the orders sought in the application dated



26/9/2023 were granted in their entirety because the application was unopposed and the court was satisfied it had been served. Counsel argued that it was clear from the titles dated 11/2/2023 which the appellants were waving that there was no overlap between the four titles and the respondent's title which was issued on 5/12/2017, hence the issue of boundary dispute did not arise.

12. Counsel submitted that a stay order would ordinarily be issued after the court is satisfied that a prima facie case worth consideration has been demonstrated, adding that the appellants did not meet the above criteria. Counsel urged the court to protect the respondent's title by declining to stay the order issued on 11/10/2023. Counsel urged the court to reject the appeal.

### **Analysis and Determination**

13. I have read and considered the entire original record of the lower court, the record filed in this appeal, the grounds of appeal and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. As observed in the opening paragraph of this judgment, the key issue to be determined in this appeal is whether the lower court erred in declining to suspend or stay the orders which had been granted in the suit before it on 11/10/2023. Before I dispose the issue, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

14. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The principle was summarized by the Court of Appeal in the case of Susan Munyi Vs. Senshar 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 the evidence and arrive at our own independent conclusions.”

15. The above principle was similarly outlined in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR as follows:

“This bring 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.”

16. This appeal challenges the ruling of the lower court rendered on the appellants' application dated 14/11/2023. The reliefs which the appellants specified and sought in the said application have been reproduced in this judgment verbatim. It is clear from the notice of motion dated 14/11/2023 that the reliefs sought in the said application were as follows:

- “1. That the application be certified as urgent, the same be heard ex-parte and service be dispensed with in the first instance.
2. That pending hearing and determination interpartes of this application this Honourable court be pleased to suspend and/or stay execution of the order dated 12th October, 2023.
3. That this Honourable court be pleased to issue any other orders as it may deem fit to grant in the circumstances.
4. That costs of the application be provided for.”



17. It does emerge from a reading of the above reliefs that, as at the time of rendering a ruling on the application dated 14/11/2023, the said application was spent in its entirety. I say so because the only substantive prayer in the application was to abide the interpartes hearing and determination of the application dated 14/11/2023. No other substantive relief was sought in the application. Even if the lower court was inclined to grant an order suspending or staying the orders issued on 11/10/2023, no such relief was sought. Granting a relief of that nature suo motto in a contested application would have been irregular.
18. Clearly, the appellants failed to pray for an order reviewing or setting aside the order of 11/10/2023. They failed to pray for an order suspending/staying the order of 11/10/2023 pending the hearing and determination of the suit. Consequently, as a first appellate court, on evaluating the application and the materials that were before the lower court, I do not find a proper basis upon which to suspend or stay the orders issued on 11/10/2023.
19. For the above reasons, I find that there was no error in the lower court's refusal to suspend/stay the orders of 11/10/2023. The result is that I do not find merit in this appeal. The appeal is rejected and dismissed for lack of merit.
20. In line with the general principle in Section 27 of the *Civil Procedure Act*, the appellants 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:

Mr. Wakoko for the Appellants

Ms. David for the Respondent

Court Assistant – Mr. Mwangi

