



**Mariga v Ketere & another (Environment and Land Appeal E017 of 2024)
[2025] KEELC 6443 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6443 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E017 OF 2024
MN MWANYALE, J
SEPTEMBER 30, 2025**

BETWEEN

IBRAHIM THOMAS MARIGA APPELLANT

AND

WILLIAM SANKONA KETERE 1ST RESPONDENT

KISEKU ENOLE PESI 2ND RESPONDENT

JUDGMENT

1. Vide the Amended Memorandum of Appeal Amended on 5th November 2024 the Appellant Ibrahim Thomas Mariga penned 21 grounds of Appeal and sought for the following relief; -
 - a. That this Appeal be allowed with costs in this court.
 - b. That the Learned Magistrate judgment be quashed and/or set aside, in the alternative, the order awarding costs of the suit and the counter-claim in favour of the Respondent be set aside and replaced with an order that each party bears own costs.
 - c. That the Appellant's suit against the Respondents in the subordinate court be allowedIT.
 - d. That the 1st Respondents counter-claim against the appellant in the subordinate court be dismissed.
2. In the subordinate court be dismissed. The Appellant filed about 3 applications alleging that the Respondent was constructing on the suit property and sort for an injunction pending appeal.
3. The applications were compromised by an order initially issued on 27.02.2025 which order was extended on 06.03.2025 and further confirmed on 02.04.2025 pending determination of the Appeal and his judgment was not made in error.



In answer to issue 2, the court finds that the Appeal herein lacks merit, as the plaintiff was breach of the clause 1(p) of the lease Agreement dated 01.01.2016 when he sublet the demised premises to a third party without consent of the landlord, and the landlord had a right of re-entry upon which the term of the lease would be terminated

4. Upon admission of the Appeal directions were issued for the Appeal to be canvassed by way of written submissions.
5. Mr. Matoke appeared for the Appellant, while Mr. Ochwangi for the 1st Respondent and Ms. Wekesa for the 2nd Respondent.
6. The Appellant was granted leave to file Rejoinder submissions in respect of the sole issue of whether or not, he ought to have obtained leave before filing an Amended Memorandum of Appeal.
7. The court shall now summarise the parties' respective submissions; in view of the grounds of Appeal being 21, the court shall not set them out in this Appeal but shall consider them alongside the submissions.

Appellant's Submissions

8. The Appellant condensed the grounds of Appeal into issues for determination and submitted on them.
9. On issue 1, the Appellant submits that the trial court was biased and was not interested in visiting the suit land which was a few metres from the court and failed to issue interim orders to preserve the suit land and refused to recused himself once an application for recusal was made; hence grounds 5, 6 and 7 of the appeal are merited so submits the Appellant.
10. On issue number 2, the Appellant submits that the learned trial Magistrate erred in law and in fact in failing to find that the 1st Respondent had failed to prove his case on a balance of probabilities that the 1st Respondent received proceeds of the sublease meant that the 1st Respondent acquired to the sublease. That no notice of re-entry was issued to the Appellant which notice ought to have been a 12 months' Notice; that this was in breach of Section 65(2) of the *Land Act*. In support of this the Appellant cites the case of Zaburi Enterprises Co. Ltd Vs. Chepkemoi (Civil Appeal NO. 57/2020).
11. The Appellant submits that the Learned Magistrate erred in awarding costs of the suit without considering the relationship of the parties, and submits that the costs should not have been awarded since the lease had not expired not terminated; and submits that costs ought to have been awarded to the Respondents since the Appellant developed the property.
12. On the strength of the above submissions the Appellant urges the court to allow the Appeal.

1st Respondent's Submission

13. The Appellant submits that the Amended Memorandum of Appeal was filed out of time without leave of the court.
14. The 1st Respondent submits this that in so far as the Amended Memorandum of Appeal was filed without leave, the same is an abuse of the court process.
15. The 1st Respondent submits that the onus to prove was on the Appellant to prove his case; and he failed to do so, hence the issue of the biasness on the learned Magistrate are all red herrings.

The 1st Respondent submits that costs follow the event pursuant to Section 27 of the *Civil Procedure Act* hence the court was correct to award costs to the Respondents and o fault can be attributed.



2nd Respondent's Submission

16. The 2nd Respondent did not frame issues for determination but submitted on the grounds of Appeal generally.
17. On grounds 1, 3, 4 and 8, the 2nd Respondent submits that the impugned judgment was sound in law and it was arrived at after consideration of all facts and evidence.
18. On grounds 2, the 2nd Respondent submits that the Appellant failed to prove his case as required and the court was not biased; as the Appellant failed to prove his case.
19. On ground 5, the 2nd Respondent submits that the matter proceeded for trial where the Appellant testified and granted.
20. The 2nd Respondent submits that the Amended Memorandum of Appeal was filed out of time hence there is no appeal, she submits that the Appeal be disallowed.
21. The Appellant pursuant to leave granted filed rejoinder submissions on the sole issue of whether he required leave to file an Amended Memorandum of Appeal; on this issue he submits that under Order 42 Rule 3, of the Civil Procedure Rules he could file an Amended without leave before the court issued directions on the Appeal under Rule 13 and that he filed the Amended Memorandum of Appeal before issuance of directions and he required no leave of the court; hence his appeal was filed timeously.
22. Before framing the issues for determination, the court notes the following undisputed facts arising in this Appeal; -
 1. That there exists a lease Agreement between the Appellant and 1st Respondent dated 1st January 2016, and the tenancy created therein was for a term of 15 years, with respect of a portion of the plot known as Plot No.24 Kilgoris town.
 2. It is also common ground that the Appellant entered into a sublease dated 20.09.2022 between himself and Josemo Distributors for a period of 2 years and renewable.
23. In view of the fact that the suit before the trial court involved a Tenancy Agreement, and in view of the jurisdiction conferred upon the Business Premises Rent Tribunal under CAP 302 it is important for the court to establish whether the Tenancy agreement herein was a controlled tenancy, so as to oust the jurisdiction of the Learned trial magistrate or whether, the trial court had the requisite jurisdiction.
24. In Khalif Jele Mohammed and Another Vs. Republic and Another (2019) eKLR, the court of Appeal dealt extensively with the issue of what constitutes a controlled tenancy under CAP 302.
25. The court held interalia;
 - “ 16. We have considered the Appeal and the submissions by the learned counsel; as we have already stated, the critical issue on which the appeal turns and which we need to determine is whether the judge correctly interpreted Section 2(1) (b)(11) of the Act.
 - 17there is no dispute.....
 - 18
 - 19
 - 20



21. “As produced above Section 2(1)(b)(11) of the Act stipulates that if a tenancy agreement has provision for termination otherwise than for breach of covenant, within 5 years from the commencement of the term, it is controlled tenancy, in other words, if such a tenancy has provision for termination which can be invoked at any time during the term, it is our view a controlled tenancy..”

26. I have examined the tenancy Agreement and the same for a term of 15 years and termination provided therein was upon any breach of the terms therein as provided by clause 6 and there were no other provisions for termination, it follows therefrom that the tenancy agreement between the parties herein was not a controlled tenancy and the learned magistrate had jurisdiction to hear and determine the suit.

Issues for Determination

27. Having analysed the Record of Appeal, the rival submissions and considered the law, the issues for determination in this Appeal are framed as follows; -
- i. Whether or not there is a competent Appeal before court.
 - ii. Whether the Appeal is merited and in answering this issue, the court shall determine also whether the Appellant as plaintiff proved his case before the trial court.
 - iii. What reliefs ought to issue.
 - iv. Who bears costs of this Appeal.

Analysis and Determination

28. On issue number 1 on the competence or otherwise of the Appeal, both the 1st and 2nd Respondents submit that the Amended Memorandum of Appeal was filed out of time without leave hence there is no competent Appeal.
29. In response vide the Rejoinder submissions, the Appellant submits that he filed the Amended Memo of Appeal before directions on the Appeal had been issued, hence required n leave of the court under the provisions of Order 42 Rule 3 of the Civil Procedure Rules.
30. The impugned judgment was delivered on 27.06.2024.
31. The Original Memorandum of Appeal was filed on 9th July 2024 that was well within the 30 days period provided for under Section 79(G) of the *Civil Procedure Act*.
32. The Memo of Appeal was Amended on 05.11.2024 and directions under Order 42 Rule 13 on admission of the Appeal were issued on 02.04.2025. The Amendment of the Memorandum of Appeal was thus made before directions were issued, and in accordance with Order 42 Rule 3. No leave was required before the Amendment could be effected.
33. The position taken by the Respondents is thus not the proper position in law and the court finds that there is a competent Appeal before it and answers issue number 1 in the affirmative.
34. On issue number 2, as to whether the Appeal is merited and whether the Appellant as plaintiff had proven his case before the trial court, the court shall proceed to examine the same.
35. It was the Appellant’s case before the trial court that the 1st Respondent had breached the terms of the lease Agreement dated 1st January 2016 paragraph 5 of the Plaint appearing on page 45 of the Record of Appeal, pleads the breach to be by way of Trespass occasioned on 14th October 2023, by an entry



by the 1st Respondent as Defendant onto the suit property and starting to subdivide the building into half to create land for himself.

36. The particulars of trespass were pleaded at paragraph 9 of the plaint which included loss of plaintiff's quiet possession of the property.

As a first appellate court, the court is aware of its duties as stated in *Selle and Another vs. Associated Motor Boat and 3 Others* where it was held "An appeal to this court from a trial by the High Court is by way of retrial by and the principles upon which this court is such an appeal are well settle. 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 allowances in this respect....." and shall thus proceed to analyse, and examine the evidence so as to draw its conclusion.

37. At paragraphs 59 to 60 of the impugned judgment the learned Magistrate set out the crux of the plaintiff's case being paragraph 9 of the plaint. The plaintiff was under a legal obligation and burden imposed by Section 107 of the *Evidence Act* to prove the allegations of Trespass especially the ones particularised under paragraph 9.

38. Turning to the lease Agreement the same provided for a lease of a portion of Plot number 24 Kilgoris Town, which it termed as the Demised premises.

39. It follows that the lease was not for the whole parcel of land. in fact, clause 1(f) of the lease, recognised that one half of the parcel was occupied by a building called KFA; while clause 1(p) thereof prohibited the subleasing and/or parting of possession of the demised properties.

the said clause permitted the landlord to re-enter the premises without Notice if there was a breach of this particular clause; with the consequent of the term ending, upon such a breach.

40. Was the entry pleaded at paragraph 9 of the plaint thus trespass?

Contrary to submissions that the entry by the landlord constituted trespass and a breach of the lease Agreement, the entry was permitted under clause 1 (p) of the lease Agreement upon breach of the said clause by subletting the demised premises and/or parting possession of the same.

41. Clause 1 (p) appears at page 20 of the Record of Appeal.

Consequently, the Appellant as plaintiff did not prove the trespass against the 1st Respondent and the Learned Magistrate in making that finding reached the correct conclusion.

42. The Appellant faults the learned Magistrate as having been biased and that the 1st Respondent did not prove his case.

43. The 1st Respondent as Defendant before the trial court filed a defence and counter-claim dated 15th January 2024, and pleaded at paragraph 17, 18 and 19 of thereof the various breaches occasioned by the Appellant as plaintiff. He particularised the breaches at paragraph 20 of the counter-claim which breaches included the issue of leaving the suit property and subletting the same.

44. The 1st Respondent produced a copy of a lease Agreement between the Appellant as lessor and Josemo Distributors, proving that the Appellant had sublet the demised premises without his written consent. The Appellant in cross-examination appearing at page 270 of the Record of Appeal concede having sublet the premises to Josemo distributors vide an agreement dated 20.09.2022.



45. That admission was prove of breach of clause 1(p) that entitled a re-entry and termination of the tenancy and the learned Magistrate was right in reaching the same conclusion at paragraph 71 of the impugned judgment. The 1st Respondent thus proved the counter-claim.
46. The court thus finds that the Appellant as plaintiff did not before the trial court did not prove his case while the 1st Respondent as a Defendant before the trial court proved his counter-claim. and that the Learned Magistrate reached the correct findings and conclusions.
47. Section 27 of the *Civil Procedure Act*, allows the court to make an Order on costs; costs ordinarily follow the event and the learned Magistrate did not err in awarding the Defendants costs before the trial court.
48. On what reliefs ought to issue having found no merits on the Appeal, the inevitable conclusion is that the Appeal herein must fail as it hereby does by way of a dismissal.
49. The Interim Orders issued on 27.02.2025 and confirmed on 02.04.2025 are hereby discharged.

Disposition

50. The Appeal herein be and is hereby dismissed and the judgment delivered by Hon. W.C Waswa on 27.06.2024 is upheld.
51. Costs of the Appeal, the suit and the counter-claim are awarded to the Respondents herein.

DATED AT KILGORIS THIS 30TH DAY OF SEPTEMBER, 2025.

HON. M.N MWANYALE

JUDGE

In the presence of

C/A Emmanuel/ Sylvia/ Sandra

Mr. Ochwangi for the 1st Respondent

Ms. Wekesa for 2nd Respondent

Mr. Matoke h/b Mr. Nyagaka for the Appellant

