



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ELCA NO. E001 OF 2025

CHRISTOPHER KIMAIYO EGO

(Suing on his behalf and as the personal legal representative and the administrator of the Estate of the late Leonida Jeruto Kiprop alias Ziphora Kimaiyo alias Zippora Jeruto.....APPELLANT

VS

JACOB KIBET BIWOTT.....1ST

RESPONDENT

MARK KIPKOSGEI KIPROP.....2ND

RESPONDENT

JUDGMENT

(Being an Appeal from the Judgement of Hon. V Karanja PM delivered on 16th December 2024 in Iten SPMCC NO.17 of 2018)

Introduction

1. By a plaint dated 6th June, 2018 and amended on 8th August, 2019 the plaintiff now appellant, instituted a suit in the lower court to wit Iten SPMCC

No. 17 of 2022 seeking judgment against the defendants now respondents for:-

- a) A declaration that he (the plaintiff) is entitled to the business premises that were fenced off by the defendants);
- b) A declaration that the defendants action of fencing off the plaintiff's business premises and consequently evicting the plaintiff from the said business premises situated on land parcel number Irong/Iten/40 is illegal and unlawful and the plaintiff is entitled to damages thereof;
- c) An injunction restraining the defendants, jointly and severally, their agents and/or servants from interfering with the plaintiff's business premises situated on one acre of land comprised in land parcel Irong/Iten/40;
- d) Damages
- e) Costs of and incidental to the suit;
- f) Any other relief that the honourable court may deem fit and just to grant.

2. The plaintiff's suit was premised on the grounds that on 20th May, 2016 the defendants, jointly and severally, unlawfully, illegally and without any justifiable reasons, fenced off a fueling station (fuel pump) which he jointly owned with his wife, Leonida (deceased).

3. It was the plaintiff's pleaded case that as a result of the illegal/unlawful activities of the defendants complained of, he had suffered loss of business, special and general damages. The particulars of loss of business are listed in paragraph 6 of the plaint thus:-

**“i. Unexpected closure of business, fueling station;
ii. Loss of daily income of Kshs. 2,000.00 (Kenya shillings two thousand) from the said business.”**

4. Vide paragraph 7 of the plaint, the plaintiff pleaded that he was claiming on his own behalf and on behalf of the estate of his deceased wife, damages from the defendants for the loss suffered.

5. The 1st defendant filed a statement of defence, dated 15th October 2018, in which he denied the allegations leveled against the defendants and contended that the plaintiff is not entitled to the prayers sought in paragraph 8 and 9 of the plaint.

6. The 2nd defendant did not file a defence to the suit.

7. When the suit came up for hearing, the plaintiff and the defendants led evidence in support of their pleaded cases and at close of hearing, filed submissions in support of their cases.

8. Upon considering the parties cases urged before her, the learned trial magistrate rendered herself thus:-

“(a) the issue for determination is whether the plaintiff is entitled to the orders sought;

(b). Who is to bear the costs.”

9. Regarding those issues, the learned trial magistrate stated/held:-

“A certificate of title is conclusive evidence of ownership and is *prima facie* evidence that the registered owner is the owner...from the evidence, the suit land, Irong/Iten/40 is registered in the name of Kibaliat Chirchir (deceased) a grandfather of DW2 and DW3. The plaintiff was the husband of the late Leonida Jeruto a daughter of the registered owner. It was stated that the late Leonida Jeruto operated a fuel pump on the suit land and she had been given by her late father and upon her demise the business was closed by the 2nd defendant. The plaintiff did not produce any documents to show there was any contracted business agreement/lease agreement between him and the registered owner. It was indicated that the late

Leonida had been given the suit land by her father to run the fuel pump business following the frustrations she endured from the plaintiff.

From the foregoing it is clear that the suit land Irong/Iten/40 has not been transmitted to the beneficiaries of the Estate of Kibaliat Chirchir since succession proceedings have not been concluded and therefore there is no distinct share for each beneficiary. Therefore, the plaintiff cannot therefore lay claim on the suit land where the business was. The court cannot grant him the prayers sought in this plaint. The upshot of the foregoing is that the plaintiff failed to prove his case on a balance of probabilities against the defendants and I proceed to dismiss his suit with costs to the defendants.”

10. Dissatisfied with the decision of the trial court, the plaintiff appealed to this court on the grounds that the learned trial magistrate erred by:-
 - i) Dismissing his suit with costs without justifiable reasons;
 - ii) Ignoring his submissions;
 - iii) Dismissing his claim against the 2nd defendant/respondent yet the 2nd defendant/respondent did not defend his case;

- iv) Failing to enter interlocutory judgment against the 2nd defendant, Mark Kipkosgei Kiprop;
- v) Making a determination in respect of ownership of land yet what was in issue is the illegal and unlawful eviction of the plaintiff/appellant by the defendants/respondents and the malicious closure of the plaintiff's/appellant's petrol station business by the defendants/respondents;
- vi) Failing to appreciate the fact that the claim before her was in respect of petrol station business premises erected on the suit land and not ownership of land;
- vii) Failing to appreciate that the land in issue was not registered in the defendants/respondents and as such, the defendants/respondents lacked power and authority to illegally and unlawfully evict him from his business premises and consequently denying him access to his petrol station business premises;
- viii) By demonstrating biasness and lack of impartiality in dealing with the suit by allowing the defendants/respondents to file witness statements after he had testified thereby making him suffer prejudice;
- ix) Delivering a judgment that is unjust and oppressive;
- x) Delving into extraneous matter and/or immaterial matters and ignoring the

evidence placed before her in reaching her findings and conclusions and failing to appreciate the fact that given the circumstances of the case, the defendants/respondents were held liable and responsible for the illegal eviction of the plaintiff/appellant from his business premises and the closure of the same.

11. Pursuant to directions given on 3rd October, 2025 the appeal was disposed of by way of written submissions.

SUMBISSIONS

Appellant's submissions

12. In his submissions filed on 4th August, 2025 the appellant faults the learned trial magistrate for having admitted the evidence of DW3 after he had closed his case. In his grounds of appeal, he also faulted the learned trial magistrate for having delved into extraneous matters and/or immaterial matters and ignoring the evidence placed before her in reaching her findings and conclusions.
13. Based on the trial court's determination that the appellant did not produce any documents to show there was contractual business/lease agreement between him and the registered owner and that the appellant cannot lay a claim on the suit land where

the fuel business was operating as the estate of the owner of the land is yet to be administered; the appellant submits that the learned trial magistrate misapprehended the evidence on record by making a finding to the effect that he was laying a claim on the suit land on behalf of his late wife. The appellant further submits that the learned trial magistrate failed to appreciate that his claim was based on material damage of the petrol-business he co-owned with his late wife.

14. Pointing out that the respondents, particularly the 2nd respondent admitted having evicted him (the appellant) from the suit property, the appellant submits that the eviction was illegal/unlawful because firstly, it was conducted by a person who was not the owner of the land or administrator of the Estate of the owner. Secondly, the respondents in carrying out the eviction, did not comply with the applicable law and procedures, particularly **Section 152E** of the Land Act, 2012.

15. The appellant further submits that the notice of 14 days, allegedly issued to him cannot be enforced by court for want of compliance with **Section 152E** of the Land Act, 2012.

16. On whether the learned trial magistrate demonstrated bias in handling the case, the appellant submits that she did because she allowed

DW3 to testify after he had closed his case. The appellant also faults the learned trial magistrate for ignoring his submissions which he states were in the judiciary CTS.

17. On whether he, the appellant, is entitled to damages, the appellant points out that he had pleaded that he had suffered damages and given particulars thereof. He urges the court to award him damages amounting to Kshs. 6,480,000/- calculated as follows:-

- i. Every day a loss of Kshs. 2000;
- ii. Every month Kshs. 60,000/- (720,000/-);
- iii. Every year Kshs. 720,000 (60,000 x 12)
- iv. Loss incurred for the last nine years;
 $720,000 \times 9 = 6,480,000/=$.

18. The appellant also urges the court to award him Kshs. 5,000,000/- as general damages for illegal eviction. In support of that claim, the appellant puts reliance on the cases of **AS t/a Business 2000 v Lakhamshi Virpal Shah & 5 others (2016) e KLR** where Kshs. 5,000,000/- was awarded; and **Rev. Simon Ndungu Mungai & Another vs. Municipal Council of Kiambu (2011)e KLR** where the plaintiff was awarded Kshs. 2,000,000/-.

Respondents submissions

19. In their submissions dated 4th September 2025, the respondents submit as follows:-

- a) The appellant has not demonstrated that he filed his submissions within the timelines given by the court to file submissions or demonstrated that he sought extension of time to file submissions; that it beats logic for the appellant to fault the court for failing to consider submissions which were never filed for consideration by the court.
- b) On whether the 2nd respondent defended his case, the respondents submit that the court record bears out that the 2nd respondent was represented by counsel.
- c) On nexus of the issue of ownership and the petrol station business, the respondents point out that the appellant sued them for illegal eviction from the land known as irong/iten/40 and submits that for the court to determine whether or not the claim for eviction is valid, it is imperative to address the issue as to whether the appellant was the owner, otherwise he loses basis to sue for eviction.
- d) On whether the appellant proved the alleged eviction, the respondents have submitted that there is no evidence adduced to demonstrate that indeed the respondents fenced off the petrol station business and evicted the appellant. It is

further submitted that there is no evidence at all that there was a lease agreement between the appellant's wife and the registered owner of the land for the petrol station to be taken in the land.

- e) Concerning alleged failure to comply with the provisions of **Section 152E** of the Land Laws (Amendment) Act 2016, the respondents acknowledge that it only the owner of the land or his legal representative who can evict a person who is occupying his land without his permission but interestingly submits that it was incumbent upon the appellant to demonstrate through evidence that he had permission by the owner to set up the business on the land. The respondents acknowledge albeit impliedly, that they are not the administrators of the estate of the owner by stating that the land owner's estate is yet to be administered.
- f) The respondents further submit that it was the duty of appellant to demonstrate that the petrol business on the subject land was legal, especially that his deceased wife was bequeathed the portion by the deceased as no action founded on illegality can stand.

- g) In conclusion, the respondents submit that the appellant has failed to prove any of the grounds taken in support of his appeal.
- h) Terming the appeal lacking in merit, the respondents urge the court to dismiss it with costs to them.

Analysis and determination

20. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see **Selle & Another vs. Associated Motor Boat Co. Ltd (1968)E.A 123** and **Mwanasokoni vs. Kenya Bus Service Ltd (1982-88)1 KAR** and **Kiruga vs. Kiruga & Another (1988)KLR 348**.

21. From the grounds taken up in support of the appeal and the submissions by the parties, I have identified the following as the issues for determination:-

- i) Departure from pleadings and adduction of evidence not arising from the pleadings.
- ii) Whether the appellant proved his case on a balance of probability against the respondents;
- iii) Whether the appellant is entitled to damages;
- iv) Whether the trial magistrate was biased against the appellant;
- v) What orders should the court make.

22. On the issue of departure from pleadings and adduction of evidence not arising from the parties pleadings, it is noteworthy that in his statement of defence, dated 15th October, 2018 the 1st respondent, merely denied the appellant's contention that the appellant's wife, Leonida (deceased) and the appellant, operated a fuel business on the parcel of land known as Irong/Iten/ 40; that the respondents, jointly and severally, unlawfully and illegally fenced off the said fueling station making it difficult for the appellant to operate it thereby causing the Estate of the appellant's deceased wife and the appellant to suffer loss of business, special damages and general damages.

23. As pointed out herein above, the 2nd respondent did not file a defence to the plaint or the amended plaint filed by the appellant.

24. From the record of appeal, it also appears that the 1st respondent did not amend his statement of defence, dated 15th October, 2018.

25. When the came up for hearing, the 2nd respondent, who had not filed a statement of defence, led evidence as follows:-

“I am the 2nd defendant in this case, the plaintiff married my young sister Zipporah Cheruto.I know the plaintiff, he married my sister. He is my brother-in-law....the land had a business petrol station my father gave her that business because the plaintiff used to frustrate her. My father gave her land to construct the petrol station. She used to pay my father. They had not divorced..... The plaintiff did not proceed with the business after her death. I prevented him from continuing with the business.I prevented him because he failed to pay. I chased him away from the plot. I fenced off the petrol station....”

26. In re-examination the 2nd respondent (DW2) stated as follows:-

“The petrol station belonged to Zipporah and she used to pay us. The plaintiff closed the business, he

finished the fuel and closed it, he failed to pay....Zipporah constructed the petrol station and used to pay my father Kshs.1000/- I did not chase the plaintiff away.....”

27. Upon re-evaluation of the pleaded case and the evidence adduced before the lower court, I find and hold that the learned trial magistrate erred by allowing the 2nd respondent to testify in the case yet he had not filed a statement of defence on which his case could hinge. By allowing the 2nd respondent to lead evidence in the case and relying on his evidence in determination of the case when the 2nd respondent had not filed a statement of defence on which his defence could hinge, the learned trial magistrate committed an error which clearly prejudiced the appellant.
28. By interfering with the running of the business, in the manner he did, the 2nd respondent clearly interfered with the rights of the Estate of Leonida in that business.
29. The suit presented before the lower court did not relate to the appellant alone but also to the Estate of Leonida which the appellant represented.
30. The case presented before the lower court sufficed to prove that the 2nd respondent illegally and

without any justifiable cause, interfered with the operations of the business that belonged to the Estate of the deceased by unlawfully fencing it off and causing it to stop operating.

31. The mere fact that the business was being operated by Leonida who passed on does not mean that the business ought to come to an end on account of her demise.

32. Whilst the 2nd respondent claimed that the appellant's deceased wife was given opportunity to run the business in the premises because the appellant was frustrating her, he admitted and acknowledged that the deceased and the appellant were not separated.

33. As pointed out herein above, the 2nd respondent did not file a statement of defence on which he could hinge his evidence on. His evidence did not therefore hinge on any pleading and ought not to have been considered. In that regard, see the case of **Joshua Mungai Mulango & another vs. Jeremiah Kiarie Mukoma (2015) e KLR** where the Court of Appeal stated/held:-

“....The court is bound to determine a dispute on the basis of the pleadings filed by the parties and the evidence adduced on the basis of such pleadings. In an

adversarial system such as ours, it is the parties who set the agenda for the trial by their pleadings. The need for this cannot be gainsaid. For the purpose of ensuring certainty and finality, a party cannot be allowed to resile from its pleadings without amendment. Each party knows the case he has to meet and cannot be taken by surprise. The purpose and importance of the rules in this regard is to ensure litigation is conducted in a framework that will guarantee fair play without prolixity and needless escalation of litigation costs”.

34. Having determined that the 2nd respondent was not justified in interfering with the appellant's business in the manner he did, I find and hold that the appellant made up a case for being granted general damages for unlawful eviction from the suit property.

35. As to whether the appellant made up a case for being awarded the pleaded special damages, I find that other than pleading the damages, the appellant did not strictly prove that the estate of the deceased suffered the pleaded special damages. Moreover, upon closure of business, the appellant had a duty of mitigating his losses by for instance moving the court for appropriate orders or reliefs.

36. Having determined that the appellant has made out a case for award of damages, I award the estate of Leonida, which he represents Kshs. 300,000/- for unlawful interference with its business by the 2nd respondent.

37. The upshot of the foregoing is that I find the appeal to be merited and allow it by setting aside the judgment of the lower court delivered on 16th December 2024 and substituting it with an order allowing the appellant's claim for general damages, which damages I assess at Kshs. 300,000/- as against the 2nd respondent. I also award the appellant the costs of the suit in the lower court and of the appeal, to be paid by the 2nd respondent who admitted to have carried out the illegal or unlawful activities complained of by the appellant.

38. Orders accordingly.

Dated, signed and delivered virtually at Iten this 9th day of October, 2025.

**L. N. WAITHAKA
JUDGE**

Judgment read virtually in the presence of;-

Mr Nabasenge for the appellant.

Mr Kiplagat for the respondent.

Court Assistant; Ian.

ORIGINAL