

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCLA E025 OF 2024

JARED KIARIGA 1ST APPELLANT

EDWARD JOMO 2ND APPELLANT

OKETCH KITITASI 3RD APPELLANT

JOMO RATEMO 4TH APPELLANT

VERSUS

SAMMY MOGENI MOMANYI RESPONDENT

JUDGMENT

(Being an appeal against the ruling of Hon. C.A Ocharo, Chief Magistrate, delivered on 3 July 2024, in the suit Kisii MCELC No. 61 of 2020)

(Appeal against refusal of the trial Magistrate to give the appellants more time to avail their defence; record indicating that the appellants were served with summons but filed no defence; record showing that the appellants sought numerous adjournments to present their defence which they failed; court of opinion that trial court sufficiently accommodated the appellants; in any event no draft defence exhibited to demonstrate any good defence; appeal dismissed)

1. The appeal herein assails the ruling of the Magistrates' Court delivered on 3 July 2024, which ruling dismissed an application dated 18 April 2024, in which the appellants had sought orders to arrest the judgment and for the case to be re-opened so that they could tender their evidence in defence of the suit. Upon dismissal of their application, the judgment was duly delivered on 12 July 2024 in favour of the respondent.
2. To put matters into context, the suit itself was commenced vide a plaint filed by the respondent on 5 August 2020. In that plaint, the respondent pleaded to be the registered proprietor of the land parcel Wanjare/Bokeire/1484. He pleaded that on 14 June 2020, the appellants trespassed into his land and cut down 2,000 eucalyptus trees and napier grass valued at Kshs. 5,487,648/=. In the plaint, the respondent asked for the following orders :

- (i) A declaration that he is entitled to exclusive and unimpeded possession and occupation of the suit land.
 - (ii) General damages for trespass.
 - (iii) Special damages of Kshs. 5,487,648/=.
 - (iv) Costs and interest.
 - (v) Any other relief the court may deem appropriate.
3. There was no appearance that was filed soon after service of summons and the respondent's counsel took a date for formal proof for 21 October 2020 but the court ordered fresh service to be effected. As that was pending, the respondent filed an application seeking orders of injunction against the appellants. Nothing was filed to oppose the application and it was allowed on 4 November 2020. On 17 March 2021 the matter was in court for directions and the court gave a hearing date of 7 July 2021. On 7 July 2021 the matter did not proceed. It was mentioned that the appellants were served but they were facing a criminal matter which was due for 19 July 2021.
4. On 14 July 2021, a notice of appointment of advocates was filed on behalf of the appellants by M/s Ochwangi & Company Advocates but no defence was filed. There were a couple of mentions including one on 2 November 2011 when Mr. Okemwa, holding brief for Mr. Ochwangi, asked for to time to file a defence and he was given 14 days. The court listed the matter for hearing on 9 March 2022. On that day, there was no appearance for the appellants; the court observed that the hearing date was taken by consent and directed the matter to proceed. The plaintiff gave evidence, presented one witness and closed his case. It will be recalled that counsel for the appellants was not present. The court did not order the hearing closed but gave 26 July 2022 for defence hearing.
5. Before that date, an application dated 8 March 2022 was filed, in person, by Jared Kiariga and Edward Jomo, the 1st and 2nd appellants. They said that they were imprisoned and wished to have a production order. The court ordered their production in court on 26 July 2022. On 26 July 2022 there was no appearance on the part of the appellants or their counsel and only counsel for the respondent was present. The court gave 22 November 2022 for defence hearing. On that day the 1st and 3rd appellants were present in court but their counsel was absent. The 1st appellant stated that Mr. Ochwangi, who had filed the notice of appointment on their behalf, was no longer representing them and that their advocate is Mr. Nyagwencha. The 3rd appellant stated that he does not have an advocate.

The court pointed out to the 1st and 3rd appellants that no notice of change of advocate has been filed and they were advised to put their house in order. The court directed defence hearing on 31 January 2023. The Magistrate did not sit on that day and a new hearing date of 11 April 2023 was given. On that day, only the 1st appellant was present without an advocate. He still mentioned that he had appointed Mr. Nyagwencha. Ms. Nduhukire, learned counsel for the respondent, stated that she was aware that the other defendants were in custody. The court informed the 1st appellant that there is no defence and they need to be serious with the matter. They were given 14 days to file defence failure to which the court would order the defence case closed.

6. On 30 May 2023, the court gave the hearing date of 12 September 2023 with direction that all defendants be served and a production order to issue to those in custody. On 12 September 2023, the 2nd and 3rd appellants were present. The 2nd appellant stated that he was not ready to proceed because he only learnt of the case the previous day when he was served. The 3rd appellant also stated that he was not ready because there was pending another case in another court which was due for judgment on 21 September 2023. The file was placed aside briefly for Ms. Nduhukire to be present. She appeared and strongly opposed the application. The record shows that the 1st appellant then spoke and said that they have never left prison as they had been arrested on 16 December 2021. This time the court was not moved to adjourn. The court mentioned that the record spoke for itself. The application for adjournment was denied and the defence case ordered closed. Parties were directed to file submissions and the matter be mentioned on 7 November 2023.
7. On 7 November 2023, the 1st, 2nd and 3rd appellants were present in court. They said that they have never been served with submissions. They were served in court and the court directed that they file their submissions in 14 days and gave 17 January 2024 for mention. On the same day they said that they were still in custody and I see that on 8 November 2024, the court directed that they be released from custody.
8. On 16 January 2024, a notice of appointment of advocates was filed on behalf of the appellants by M/s Bosire Gichana & Company Advocates. On 17 January 2024, Ms. Bosire from the aforesaid law firm, appeared in court on behalf of the appellants and stated that she had received instructions the previous day. She asked for 14 days to put her house in order. The court gave counsel 14 days to file submissions and directed mention on 13 February 2024. On 13 February 2024, Ms. Nyaenya again from M/s Bosire Gichana & Company Advocates, was present in court for the appellants. She stated that

they just came on record. She asked for more time to familiarize herself with the matter. The application was opposed by Ms. Nduhukire. The court stated that the appellants had been given sufficient time but nonetheless gave 3 days for filing submissions and gave 2 April 2024 for judgment.

9. On 28 March 2024 a motion dated 27 March 2024 was placed before court seeking orders to arrest the judgment and allow the appellants present their defence. Interim orders arresting the judgment were given but the application faced a technical challenge on the supporting affidavit and it was struck out on 17 April 2024. The court directed that the matter be mentioned on 22 May 2024. Before that date the application¹⁸ April 2024 was made. That application asked for the following orders :

- (1) That the application be certified urgent and be heard on priority basis.
- (2) That the judgment scheduled for 2nd April 2024 (sic) be arrested pending the hearing and determination of the instant application.
- (3) That the honourable court be pleased to set aside and/or vary the order given on 12th September 2023 closing the defence case.
- (4) That upon granting prayer (3) above the Honourable Court be pleased to reopen the defence case for hearing on merit.
- (5) Any other suitable orders be made for the interest of justice.
- (6) Costs of the application.

10. The application was based on grounds that the applicants could not defend their case since they were serving a prison term of 3 years starting 2021 to November 2023 over criminal charges relating to the same land in which the respondent was complainant; that upon serving their term and being released from prison they appointed M/s Bosire Gichana & Company Advocates on 16 January 2024; that counsel obtained court proceedings on 12 February 2024; that on perusal of the proceedings counsel realized that the defence case was closed on 12 September 2023 and was due for mention on 13 February 2024; that the applicants then instructed counsel to file the instant application; that the applicants desire to prosecute the matter. The application was supported by the affidavit of Nyachiro Edward Jomo, the 2nd appellant who mentioned that he had the authority of the 1st and 3rd appellants who reiterated what I have already outlined above as the grounds of the application. There were no exhibits annexed to this affidavit.

11. In her ruling, the trial Magistrate found that the appellants had appointed M/s Ochwangi & Company Advocates who participated in the case until they opted to appear in person. She found that the appellants had been indolent and that equity only aids the vigilant. She was of opinion that the record speaks for itself and that despite several chances given to them they failed to present their case. She did not find any explanation whatsoever why the appellants had failed to put in a statement of defence. She proceeded to dismiss the application and directed that judgment would be delivered on 12 July 2024.

12. On 12 July 2024 the judgment was duly delivered. In the judgment, the trial Magistrate found that there was no defence to the respondent's case. She was of the view that the respondent had proved his case and entered judgment as prayed in the plaint with costs.

13. I have already mentioned that what this appeal contests is the ruling dismissing the application dated 18 April 2024. The appeal is based on the following grounds :

(1) The learned Magistrate erred in law and misdirected herself fundamentally in holding that the appellants had been indolent notwithstanding that they were remanded at Kisii Prison much of the time.

(2) The learned trial Magistrate erred in law and in fact in lightly taking away the appellants' right to be heard on merit.

(3) The learned Magistrate disregarded the appellants' effort to defend the matter by appointing an advocate immediately they were released from prison.

(4) The learned Magistrate disregarded the fact that the appellants were held in prison from acts arising from the same subject matter.

(5) The learned magistrate failed to apply her discretion judicially and/or taking into account the relevant principles in exercise of judicial discretion to set aside the ex parte proceedings.

The appellants ask that the ruling be set aside and be substituted with an order allowing the application dated 18 April 2024 with costs.

14. The appeal was canvassed through written submissions and I have taken cognisance of the submissions filed by Ms. Bosire, learned counsel for the appellants, and Ms. Nduhukire, learned counsel for the respondent. I have considered the appeal.

15. I have already set down what the appellants wanted in the application dated 18 April 2024. The substantive prayers were prayers (3) and (4); prayer (3) asking for the court to set aside the orders of 12 September 2023 closing the defence case, and prayer (4) asking that the defence case be reopened for hearing on merits. I have already copied earlier in this judgment what happened on 12 September 2023. The 1st, 2nd and 3rd appellants were in court and they wished to have more time which was declined by the court. They of course said that they had been in prison and that there was a related matter coming up for judgment on 21 September 2023 (not sure what case this was). It will be recalled that before that date, on 22 November 2022, the 1st and 3rd appellants were in court and they were allowed time. They were also allowed time on 11 April 2023. It will further be recalled that even earlier than that, on 2 November 2021 to be precise, when Mr. Ochwangi was on record for them, the appellants through their counsel were given 14 days to file their defence. No defence was ever filed.
16. The excuse being given is that they were in prison. That to me is a flimsy excuse. The appellants had counsel on record and nothing stopped them from instructing him to file a defence. Being in prison does not stop anyone from filing pleadings and if they were serious on the case, they would have filed their pleadings. In any event, what they asked for in their application was for the defence case to be opened ; but there was nothing to open since no defence was filed, and clearly more than sufficient time had been granted to them. For avoidance of doubt that application did not ask to file defence out of time but even if it was to be assumed to have been seeking such an order, it is clear that the appellants had been accommodated on numerous occasions. The case had been filed in 2020 and close to 4 years had lapsed to 2024 when they were asking for the orders to have their defence opened.
17. I actually think that the trial Magistrate was overly gracious and granted them adjournments and more time even when they did not deserve. I cannot fault her for eventually running out of patience with the appellants and refusing to exercise her discretion in their favour. She was right that the appellants had been accommodated to the breaking point level and any further adjournment was now going to occasion the respondent extreme prejudice. In fact, my own view of the matter is that the appellants were hell bent on stretching and prolonging the litigation. And I even wonder what sort of defence they wished to present as there was no draft defence anywhere exhibited.

18. There is really no point of saying more. I am not moved to set aside the orders dismissing the appellants' application dated 18 April 2024. That dismissal was fully merited. There is no substance in this appeal and it is hereby dismissed with costs.

19. Judgment accordingly.

DATED AND DELIVERED THIS 12 DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Nyaenya instructed by M/s Bosire Gichana & Company Advocates for the appellants

Ms. Nduhukire instructed by M/s A.N. Moruri & Company Advocates for the respondent

Court Assistant – Michael Oyuko.