Kimitei v Tuitok (Civil Appeal E013 of 2023)
[2025] KEHC 16915 (KLR) (21 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16915 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CIVIL APPEAL E013 OF 2023

JRA WANANDA, J

NOVEMBER 21, 2025

BETWEEN

JOSEPH KILIT KIMITEI ..... APPELLANT

AND

PIUS TUITOK ..... RESPONDENT

RULING

1. I delivered a Judgment on 7/02/2025 dismissing this Appeal. In recounting the background to the Appeal, I captured the following chronology in respect to the suit or suits that gave rise to the Appeal:

> " 2. The background of the matter is that by the Plaint filed on 22/12/2021 through Messrs T. Cheruiyot & Co. Advocates, the Respondent pleaded that at all material times, he and the Appellant were neighbours within the same locality, that on diverse dates including 27/09/2021, 28/09/2021 and 29/09/2021, the Appellant so negligently failed to control his livestock and which then damaged and destroyed the Respondent's crops in his farm. As particulars of negligence, he blamed the Appellant for failing to exercise proper control of his livestock, and failing or ignoring to put the livestock in an enclosure. He averred that as a result of the destruction, he suffered damage to his crops (tomatoes and beans) which damage he particularized at the sum of Kshs 78,000/- and sought compensation thereof as special damages. He also sought interest and costs of the suit".

2. I continued as follows:

> " 4. The suit was in a series comprising 2 others arising, apparently, from the same incident but involving different Plaintiffs, and in respect to which Judgment

was entered in each in favour of the respective Plaintiffs. All 3 suits have now elicited Appeals as follows:

Iten SPMCC No.	Plaintiff	Iten High Court Civil Appeal No.
E055 of 2021	Edwin Kurgat	E015 of 2023
E056 of 2021	Pius Tuitoek	E013 of 2023
E057 of 2021	Philip Kandie	E014 of 2023

> " 5. For this reason, it was agreed by the parties that this Ruling will also apply, as far as is practical, to the other two said Appeals.

3. I further stated the following, at paragraphs 6 and 23 of the Judgment, respectively:

> " 6. Be that as it may, the suit proceeded to trial wherein the Respondent called 3 witnesses, while the Appellant did not call any. After the hearing, the trial Court delivered its Judgment on 30/10/2023, as aforesaid, in favour of the Respondent, at the sum of Kshs 78,000/- as prayed, plus costs and interest." [Emphasis mine]

> "23. In respect to the above arguments, my observation is that the Appellant did not present anything to contradict the Respondent's averment that he (Respondent) was in occupation of the parcel of land in issue, that he had cultivated thereon and that the crops cultivated were destroyed by the Appellant's cows. The Respondent called 3 witnesses who testified on his behalf, and who advanced his case as pleaded, and whom the trial Magistrate saw and believed. On his part, the Appellant did not testify nor call any witness at all. In the circumstances, the Respondent's testimony and that of his witnesses, both oral, and as contained in the respective Witness Statements, remained uncontroverted." [Emphasis mine]

4. The Appellant has now returned with an Application seeking review and setting aside of the said Judgment, and the writing of a fresh one. The Application is the Notice of Motion dated 14/03/2025. The same is filed through Messrs Nyekwei & Co. Advocates, and is supported by the Affidavit sworn by the Appellant, Joseph Kitilit.

5. In the Affidavit, the Appellant contended that the Court, in the Judgment, held in paragraph 23 that the Appellant did not testify neither did he call a witness, and that based on the above finding, the Court held in subsequent findings that the Respondent's evidence was not controverted by the Appellant. He deponed that this finding was erroneous since the correct position is that the trial Court file Iten SPMCC No. E056/2021 was consolidated with Iten SPMCC No. E055 and E057/2021, and that pursuant to the foregoing, the parties agreed that Iten SPMCC No. E055 would be the lead file, in which the parties' viva voce evidence would then be recorded. The Appellant deponed further that he had filed a Defence, Witness Statement and List of Documents prior to hearing of all 3 suits, that he adopted the Statements as his evidence, and also produced the documents as Defence exhibits in the 3 files.

6. He thus deponed that it was erroneous for the Court, in the Judgment delivered herein, to have held that the Appellant did not contest the suit at the trial stage. He urged further that the Court's presupposition that the claim was not controverted influenced the rest of the Court's findings culminating in the final verdict, and thus there is a clear error on the face of the record. He therefore asked the Court to set aside the Judgment and determine the Appeal afresh on the basis that there was is a Defence, Witness Statement, produced exhibits and viva voce evidence in opposition to the claim.

7. The Application is opposed by the Respondent by way of his Replying Affidavit sworn on 18/03/2025, and filed through Messrs T. Cheruiyot & Co. Advocates. He averred that the instant application is an afterthought and is meant to deny him the right to enjoy the fruits of the Judgment. He then deponed that the Appellant did testify in the lower Court and the Court considered the evidence and testimony, and found in the Respondent's favour, that reading the Judgment, it is clear that the Court appreciated the evidence of both parties in the lower Court as seen in paragraph 3 thereof, that the entire Judgment captured what transpired and that the Appellant did not call any other witnesses apart from himself at the lower Court, and thus, the Judgment is correct and the Appellant has not established grounds to warrant grant a review.

8. I then granted the parties liberty to file Written Submissions within specified timelines. Pursuant thereto, the Appellant filed the Submissions dated 5/06/2025. On the part of the Respondent however, although his Counsel indicated to me that he had filed Submissions, there is none either in the Judiciary Case Tracking System (CTS) online portal, or in the physical Court file.

9. Counsel for the Appellant basically repeated the matters already urged in the Application, save that he recited the provisions of Order 45 Rule 1(1) of the Civil Procedure Rules in respect to application and availability of the relief of review. He also cited the case of Josiah v Nyaga [2022] KEHC 3393 (KLR).

Determination

10. The issue for determination in this matter is "whether the Appellant has made out a case warranting review of the Judgment delivered herein on 7/02/2025."

11. The relief of Review is governed by Order 45 of the Civil Procedure Rules. In respect thereto, Order 45(1) provides as follows:

    1.

        (1) Any person considering himself aggrieved—

            (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

            (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

12. Section 80 of the *Civil Procedure Act* is premised on similar terms:

13. It is therefore clear that Order 45 provides for three circumstances under which an order for review can be made. The first one is where there has been discovery of new and important matter or evidence. The second is where there has been a mistake or error apparent on the face of the record. The third ground is "for any other sufficient reason". The Appellant has evidently come under the ground of "mistake or error apparent on the face of the record".

14. In respect to the meaning of an "error apparent on the face of the record", the Court of Appeal, in the leading case of Nyamogo and Nyamogo Advocates v Kogo [2001]1 EA 173, explained the phrase as follows:

> "An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

15. There is also the case of National Bank of Kenya Limited v Ndungu Njau [1997] eKLR, in which the Court of Appeal had the following to say:

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

16. The Appellant's bone of contention is that this Court made an error on the face of the record when it held that he never testified or produced any evidence at the trial Court, and thus proceeded on presupposition that the Respondent's case was uncontroverted.

17. As aforesaid, the lower Court suit was in a series comprising of 3 suits arising from the same incident but involving different Plaintiffs. I have perused the respective files afresh and indeed, the Appellant is right when he says that he testified at the trial Court in Iten Senior Magistrate's Court Civil Case No. E055 of 2021, which testimony was then adopted as the lead file by the lower Court, and that therefore, his testimony therein was to be applicable in the 2 other suits. To this extent, the Appellant is vindicated and this Court thus clearly committed an "error apparent on the face of the record".

18. With that observation however, the more important question is whether this Court's commission of the apparent error cited, and thus its consequent erroneous assumption that the Appellant did testify at the trial Court is capable of changing the substance of the judgment rendered, and the final verdict arrived at by this Court. In other words, was the error a material mistake?

19. Strangely, Counsel for the Appellant made no effort to demonstrate that the error cited was material. I say strange because in Applications of this nature, it is not enough to merely point out the error and not go further to demonstrate how and whether that error actually affected the final verdict in any material manner. This, Counsel never bothered to do. It is thus left to me to discern that position.

20. To answer the above question, and to put the Appellant's defence before the trial in full context, I take the liberty to reproduce the entire contents of the Witness Statement dated 2/02/2022 filed by the Appellant in Iten SPMCC No. E055 of 2021, which he then adopted at the trial as his evidence-in - chief, as follows:

> " I, Joseph Kitilit, do hereby state as follows:
>
> i) I am Joseph Kitilit and not Joseph Kitilit Kimitei.
>
> ii) The plaintiff is well known to me because we campaigned for competing M.C.A aspirant in 2017 General Elections and our relationship has not been well since then.
>
> iii) In August 2020, I was summoned to appear before the area assistant chief – Chepsigot Sub-location following the plaintiff's complaint that my livestock had damaged his crop. However upon inquiry, it was noted that the livestock complained of were not mine.
>
> iv) I live 4 kilometers away from the plaintiff.
>
> v) My cattle are confined to my 50 acre land parcel Kibargoy/Lower Cheptebo/161, which is well fenced along the boundary.
>
> vi) It is not therefore possible for my cattle to destroy anyone's crop but the plaintiff has always held grudges against me since August 2020.
>
> vii) I deny that my livestock damaged his crop and further deny that I should pay damages.
>
> viii) At no point has the plaintiff complained to me that my livestock damaged his crop in the manner or extent stated in the pleadings.
>
> ix) I therefore pray that his claim be dismissed"

21. The Appellant then testified in the said Iten SPMCC No. E055 of 2021 on 17/07/2023. I also reproduce his oral testimony in full, as follows:

> " DW 1 Joseph Kitilit Id 4639489 Adult Male Christian Sworn And States In Kiswahili
>
> I am not Kimitei. I know the plaintiff. He is not my neighbour. He resides at Soi within Flourspar. It is over 20 km from my area. I know the plaintiff during the 2017 elections. We fought over campaigning money. That is where our differences arose. I filed my defence and statement dated 2.2.2022 which I pray that it be adopted as evidence in chief. (Adopted)
>
> The incident occurred at Chepsigot area. I reside within Cheptebo Sub-location. We have different chief. It is about 4km from my area. I have the title deed copy of Kibargoy/Lower Chebtobo/16, which is Dexh 1. I do not know the worker mentioned in the plaintiff statements. I have not been charged for permitting stock.

On CC 57/2021, I know Pius Tuitoek. I pray my statement be adopted as my evidence. Adopted. I have produced my copy of title deed used here. Mpesa statement produced as Dexh 2.

I had given the plaintiff Kshs. 19,500/- and send him a balance of Kshs. 500 which I sent him via Mpesa. He had borrowed 20,000/-.

On CC 56/2021 I pray my statement be adopted as evidence in chief. It is dated 2.2.2023. I have never been charged with permitting stock. I do not know the mentioned worker. I pray that the plaintiff's suit be dismissed with costs.

Mr Cheruiyot In Cross Examination

I am Joseph Kitilit. I know the 3 defendants in the matter. We are from one location. The plaintiffs know me. They know my names. I have my land number 161. My cows normally graze on my land. I do not know Jonathan, Anna. I differed with the plaintiff over campaign money. The grudge started from there. The campaign money has no issue with the damaged crops. The Agricultural officer can lie in court. I was never called for the crop damage. I was not served with the demand notice. I have never had earlier disputes over the grazing issues. We never took the issue to mheshimiwa.

Cheptobo is in Soi North. Edwin lives in Soi South Pius and Philip lives in Soi North. I have never settled any issue with Pius over cows. I have a grudge with 3 defendants. Pius supplied me with a damaged tank. I refused to pick it.

I never took photos of the tank. I have never reported to the police. My wife never complained or reported the matter. Philip Kandie borrowed me ksh 20,000/-. It was an oral agreement. He has never returned my money. I never reported the matter or filed suit against him. He told me he will give me a cow. It was our own agreement. I do not know Jonathan Kibet. He testified in court. I do not know if he implicated me.

Mr. Kipnyekwei In Re-examination

The Agricultural Report never mentioned me"

22. In respect to the Appellant's List of Documents dated 2/02/2022, it contained only one document, a copy of the title deed for the subject parcel of land.

23. As also observed in the Judgment, the Statement of Defence dated 2/02/2022 filed by the Appellant was basically a general denial of the allegations made in the Plaint.

24. With the above state of the defence case, could its consideration by this Court have materially changed the substance of this Court's findings?

25. In the impugned Judgment, I summarized the Appellant's case at the Appeal and found that his case was that, in order for the trial Court to find that the Respondent's crop was damaged, the Court had to establish, first, that the Appellant was in possession of the parcel of land on which the crop stood, that the Respondent conceded that he had no particulars of the parcel of land in which the crops were planted, and this was despite the Respondent's admission that parcels of land in the area in issue were registered and titles issued in individual names, and that there is no evidence that the Respondent had any farm as alleged in the Plaint. According to him therefore, the Respondent could not have had food crops if he had no evidence of possession of land on which the crops stood. The Appellant also contended that the trial Court ought to have been satisfied that the Respondent had invested in cultivation of the crops, and the extent of the damage. According to him, the Respondent did not

produce any records on expenditure or purchase of farm input, such as seeds, fertilizer, pesticides, herbicides and labour cost and as such, it was not possible to ascertain if the crops complained of were really his.

26. The Appellant also contended that the claim was based on negligence for which the Respondent gave particulars, but the trial Court did not make a finding on whether the livestock complained of belonged to the Appellant and as such, no basis was laid to hold the Appellant liable for the crop damage. Another challenge raised by the Appellant was that the Respondent stated that the livestock in issue were under the management of the Respondent's hersdsman by the name "Kimoi", that the inference therefore is that "Kimoi" was negligent while the Appellant was vicariously liable for the acts of his agent, that however, the Appellant denied having employed the said "Kimoi", and that it was therefore necessary to join the alleged agent as a crucial party to the suit. He submitted that the Appellant could not be held vicariously liable if his alleged employee had not been found liable for negligence. It was also the Appellant's submission that although the Respondent, in the Plaint, averred that his "tomatoes and beans" were damaged, no evidence was led to demonstrate this allegation and that instead, the Respondent produced a demand notice and an Assessment Report showing that the crops destroyed were in fact "pawpaws and bananas". He contended that parties are bound by their pleadings and that it was therefore incumbent upon the Respondent to adduce evidence in relation to "tomatoes and beans".

27. In determining this Appeal, this Court rejected all the above challenges and held that the Appellant did not present any substantial evidence to contradict the Respondent's averment that he (Respondent) was in occupation of the parcel of land in issue, that the Respondent had cultivated thereon, and that the crops cultivated were destroyed by the Appellant's cows. This Court also observed that the Respondent called 3 witnesses who testified on his behalf, and who advanced his case as pleaded, and whom the trial Magistrate saw and believed. In the end, this Court held that although the Judgment of the trial Court failed to analyze and/or determine the issues raised before it, this Appellate Court's finding, after re-evaluating, re-assessing and reviewing the record, is that the Respondent, to an acceptable extent, proved his case on a "balance of probabilities", within the meaning known in law.

28. With the above state of the record, could this Court, now taking into consideration the contents of his Statement of Defence, Witness Statement, and oral testimony, have come to a different finding? Clearly not. As already demonstrated, the Appellant's testimony and/or evidence not considered by this Court never in any way addressed the matters raised by the Appellant in this Appeal. Even if they were to be now considered, they would clearly in no way change the Court's finding that that the Appellant did not present anything substantial to contradict the Respondent's case, that the Respondent called 3 witnesses who testified on his behalf, and who advanced his case as pleaded, and whom the trial Magistrate saw and believed, and finally, that the Respondent, to an acceptable extent, proved his case on a "balance of probabilities". The substance of the Judgment rendered by this Court was determined by way of the actual evidence presented, the facts considered by the trial Court, and the legal reasoning applied. Accordingly, it is my finding that the Appellant's contentions are devoid of merit.

Final Order

29. In the premises, the Application dated 14/03/2025 is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF NOVEMBER 2025

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Ms Mutai for Appellant

Mr. Kipnyekwei for Respondent

Court Assistant: Brian Kimathi