



**Kuka v Seriani (Environment and Land Appeal E032 of 2024)
[2025] KEELC 5622 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5622 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E032 OF 2024**

MN MWANYALE, J

JULY 30, 2025

BETWEEN

FREDRICK OLE KUKA APPELLANT

AND

MICHAEL LETEIPA SERIANI RESPONDENT

JUDGMENT

1. Being dissatisfied by the judgment delivered on 3rd of October 2024 in Kilgoris C.M Case No. E026/2023, by Hon. C.W Waswa (SRM) the Appellant Fredrick Ole Kuka penned 9 grounds of Appeal vide the Memorandum of Appeal filed through Messrs. Odongo, Okal & Co. Advocates.
2. In his Appeal, the Appellant sought the following prayers: -
 - i. To set aside the judgment of the trial court and dismiss the Respondents case.
 - ii. To allow this Appeal with costs and that the trial court and allow the Appellants (sic).
 - iii. To grant such other orders as shall be necessary so as to meet the ends of justice.
3. The grounds of Appeal are interalia: -
 - i. The Learned Trial Magistrate erred in law by purporting to render judgment twice over the same matter when he purported to deliver “judgment” dated 03.10.2024.
 - ii. The Learned Trial Magistrate became functus officio on the 31.05.2024 when he delivered his “judgment”.
 - iii. The Learned Trial Magistrate erred in law and in fact by purporting to rely on a Land Registrar and Surveyor’s report filed in court on 5th August 2024 in delivering its judgment without according the Appellant the right to see, inspect, examine the said document and cross-examine



its contents thus denying the Appellant a right to be heard and challenge evidence adduced in violation of the Appellant's right to a fair trial and right to challenge evidence, adduced.

- iv. The Learned Trial Magistrate erred in law and in fact by purporting to call for new evidence and relying on such new evidence without (sic) thus entering into the arena of litigants whilst it's expected to be an impartial arbiter.
 - v. The Learned Trial Magistrate erred in law and in fact in directing that the Appellant be evicted without due accord and process as stipulated in the Lands Act 2012 and [Land Registration Act](#).
 - vi. The Learned Trial Magistrate erred in law and in fact in purporting to impeach the Appellant's title to the suit land with undue regard to the relevant provisions of the law.
 - vii. The Learned Trial Magistrate erred in law and in dismissing the Appellants defence and submission without due regard to its weight.
 - viii. The decision of the Learned Trial Magistrate was made against the weight of evidence adduced by his (sic) Appellant
4. On the strength of the above grounds the Appellant sought for the prayers set out at paragraph 2 of this judgment.
 5. A record of Appeal dated 21st January 2025 was filed but the same inadvertently left out some crucial documents including the surveyor's report dated 05.08.2024, judgment dated 03.10.2024 and a ruling dated 05.12.2024 hence leave was granted to the Appellant to file and serve a supplementary record of Appeal which he did by filing the one dated 12th February 2024.
 6. Similarly, the supplementary record of Appeal dated 12th February 2024 was incomplete having left out the judgment dated 31.05.2024, and the Appellant filed a further supplementary record of Appeal.
 7. Upon confirmation of the correctness of the record of Appeal, the Appeal was admitted and directions given that the same to be disposed off by way of written submissions.

Appellant's Submissions

8. It is the Appellant's submission that the new evidence in the form of the surveyor's report was called in by the court suo moto after delivering of judgment of the court's judgment; which an alien concept; as it made the court enter the Arena of litigation. That the introduction of the new evidence was not in consonance with the principles set out in the decision in the case of Patrick Thoithi Kanywira Vs. Kenya Airports Authority (Petition (Application) No. 7/2017).
9. The Appellant further submits that none of the parties cross-examined and/or submitted on the expert report thus denying them a right to a fair hearing.
10. The Appellant further submits that once the court made its judgment it becomes functus officio and cannot deliver a second judgment.
11. To buttress the point, the Appellant placed reliance on the decisions in the cases of Telkom Kenya Limited Vs. John Ochanda (2014) eKLR as well as Raila Odinga Vs. IEBC and 3 Others.
12. The Appellant further submits that the 1st judgment was not a partial judgment in terms of Order 21 Rule 4 of the Civil Procedure Rules.



Respondent's Submission

13. It is the Respondent's submission that courts can write a preliminary judgment and follow it up with a final judgment.
14. In this regard the Respondent placed reliance on the High Court decision in the case of Michael Maki Vs. Paul K. Makut Masisai and Another (2010) KEHC 1038 KLR as well as the decision in Kilgoris ELC No. 24 of 2021 between Kipaipai Ole Kantai Vs. Leornard Terere Keriako where a judgment was first delivered on 14th November 2022, and an addendum thereto delivered on 18th October 2023.
15. With regard to the powers of the court in issuing a preliminary judgment and a final judgment, the Respondent further places reliance on the decision in the case of Attorney General Vs. Bala (Civil Appeal 223 of 2017) 2023 KECA 117.
16. On the strength of the above the Respondent submits that the Appeal should be dismissed.
17. From the pleadings, and the evidence in the record of Appeal, it is uncontested that the plaintiff is the registered owner of L.R No. Transmara/Olomismis/566 as pleaded at paragraph 5 of the Plaint; measuring 3.264 Hectares which paragraph was admitted at paragraph 4 of the defence, but the acreage is denied.
18. Thus, from the pleadings, the Plaintiff/Respondent is the registered owner of Transmara/Olomismis/566, while the Defendant/Appellant is the registered owner of Transmara/Olomismis/568. The issues in dispute before the trial court was thus whether or not the Defendant/Appellant had trespassed into the Plaintiff's portion, as issue could be determined by a Land Registrar/Surveyor report.
19. Having now analysed the record of Appeal, the rival submissions the court frames the following as issues for determination?
 - i. Whether or not the Appeal is merited, determining this issue the court shall determine the following sub issues
 - a. Whether or not there were two judgments rendered by the trial court or whether the judgment dated 31.05.2024 was a preliminary judgment, or directions and/or a structural interdict pending delivery of the final judgment.
 - b. Whether or not the court could call for a Land Registrar's report.
 - ii. What reliefs ought to issue.
 - iii. Who bears the costs of the Appeal.

Analysis and Determination

20. The further supplementary record of Appeal dated 18th February 2025 shows a judgment delivered on 31st May 2024, under the hand of the Learned Trial Magistrate Hon. C.W Waswa SRM. In the said judgment especially at paragraph 68 – 70 the court was of the view that “it was important to establish whether the Defendant resided on the Plaintiff's property and thus directed the Land Registrar and Surveyor to establish boundaries of Transmara/Olomismis/566, and to file a report within 45 days; and upon receipt of the report the court will render its final decision on the matter”



21. The supplementary record of Appeal dated 12th February 2025, shows a judgment dated 3rd October 2024 and in its opening paragraph 1, the judgment dated 3rd October 2024 makes reference to paragraph 70 of the judgment dated 31.05.2024.
22. On sub issue number 1, was the judgment delivered on 31.05.2024, merely directions, a preliminary judgment or structural interdict?
23. Having being titled as a judgment and the same having been reserved after hearing and submissions filed the court pronouncements made on 31.05.2024 were thus not directions.
24. For it to qualify as structural interdict pending final outcome, the same ought to have specific, appropriate, clear, effective and directed at the parties when issuing interim orders the court could indicate that the orders interim in nature and that the final judgment had to await the crystallisation of certain actions as was held in the decision in the case of Mitu-Bell Welfare Society Vs. Kenya Airports Authority and 2 Others (Petition 3/2018 (2021)) KESC 34 KLR.
25. In the judgment dated 31.05.2024, the court did not indicate the same to be an interim order, though it is indicated that a final decision would be rendered upon receipt of the report.
26. It is the court's view that the decision made on 31.05.2024 was a decision on the merits of the case and thus having not been framed as an interim order was not a structural interdict, either, but a Judgment.
27. On whether the decision made on 31.05.2024 was a preliminary judgment and that the decision rendered on 03.10.2024 a final decision, a position taken by the Respondent, which position I find difficult to accept in that the Civil Procedure Act does not make provisions for preliminary judgment in this manner save for summary judgment in liquidated claims which was not the case herein. The definition of a preliminary decree at Section 2 of the Civil Procedure Act to include a preliminary judgment in an appeal must be deemed to relate to summary judgments in liquidated claims.
28. I thus find that there were two judgments rendered in this matter, hence the Appellant's first ground of Appeal in this regard is merited.
29. On the issue as to whether the court entered the arena of litigation by calling for the survey report the provisions of Order 18 Rule 10 of the Civil Procedure Rules as read together with Section 146(4) of the Evidence Act allow courts to recall witnesses; of course, subject to cross-examination by the parties which was not in this case accorded to the parties.
30. The court finds that the Appellant has demonstrated merits on the Appeal in so far as there are two judgments in the matter and that parties did not cross-examine the contents of the survey report and based on the two grounds of Appeal, the Appeal succeeds.
31. On issue No. 2, on what reliefs ought to issue, the court enters judgment for the Appellant and issues the following reliefs: -
 - i. That the Appeal herein is allowed.
 - ii. That the judgments dated 31.05.2024 and 03.10.2024 are hereby set aside.
 - iii. The matter is remitted for a new trial under Section 78(i) (e) of the Civil Procedure Act before the Chief Magistrate Court Kilgoris, and to be heard by any Honourable Judicial Officer other than Hon. C.W Waswa who heard the matter in the first instance.
 - iv. Costs are awarded to the Appellants.

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



HON. M.N MWANYALE

JUDGE

In the presence of

CA – Emmanuel/Sylvia/Sandra

Mr. Odongo for Appellant

Ms. Opondo for Respondent

