Muchiri & 2 others v Muchiri (Environment and Land Appeal E012 of 2020) [2026] KEELC 649 (KLR) (11 February 2026) (Judgment)

Neutral citation: [2026] KEELC 649 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND APPEAL E012 OF 2020

SM KIBUNJA, J

FEBRUARY 11, 2026

BETWEEN

STANLEY MUGWERU MUCHIRI ..... 1ST APPELLANT

JOSEPH MUGO MUCHIRI ..... 2ND APPELLANT

PAUL MUREITHI MUCHIRI ..... 3RD APPELLANT

AND

JOHN MUTHIKE MUCHIRI ..... RESPONDENT

(Being an appeal against the ruling and order of Hon. G.M. Mutiso, PM, in Wang'uru PMCC Case No. 101 of 2011 delivered on 29th May 2020)

JUDGMENT

1. The Appellants, aggrieved and dissatisfied with the findings of the trial court, have lodged this appeal through the memorandum of appeal dated 23rd June 2020, raising the following seven (7) grounds:
    1. That the learned trial magistrate erred in law and in fact by holding that, by virtue of a judgment dated 16th April 2013, the Applicant/Respondent was the legal licensee of the alleged suit property.
    2. That the learned trial magistrate misdirected himself by holding that the Grounds of Opposition filed on 11th September 2019 were filed by the Defendants.
    3. That the learned trial magistrate erred in law and in fact by failing to properly interrogate the events of 24th April 2013, where the Applicant/Respondent purportedly surrendered the suit property.

4. That the learned trial magistrate erred in law and in fact by failing to recognize that the Appellants were never parties to Wang'uru Civil Suit No. 101 of 2011, and therefore, should not have been affected by the judgment in that matter.

5. That the learned trial magistrate erred in law and in fact by failing to acknowledge that the Defendants, Gikaria Phineas and Wairimu Mwangi, are no longer interested in the suit and have no stake in the outcome of the matter.

6. That the learned trial magistrate erred in law and in fact by issuing orders that are incapable of being executed, as the circumstances surrounding the case have changed and the orders are no longer feasible.

7. That the learned trial magistrate erred in law and in fact by failing to appreciate and note that the judgment dated 16th April 2013 was illegal, ab initio, and of no legal consequence whatsoever, as the trial court lacked the requisite jurisdiction under the National *Irrigation Act* (Cap. 347, Laws of Kenya).

The Appellants pray for their appeal to be allowed, setting aside of the ruling delivered on 29th May 2020 in Wang'uru PMC Suit No. 101 of 2011, dismissal of the application in the lower court and they be awarded the costs.

2. The appellants also filed the record of appeal dated 3rd May 2024. The court thereafter issued directions on filing and exchanging submissions. The learned counsel for the Appellants filed written submissions dated 8th August 2024, raising three principal issues.

They submitted inter alia that the learned trial magistrate erred in law and in fact in holding that the Respondent was the legal licensee of Rice Holding No. 1632 by virtue of the judgment delivered on 16th April 2013. Counsel traced the history of the suit property to Mucira Mbui-Imwi, who died in 1975, following which his widow Micere Mucira was registered as proprietor, with the Respondent, then a minor, recorded as a beneficiary.

It was submitted that the Respondent held the rice holding in trust for his siblings and that no succession proceedings were ever undertaken. Counsel further submitted that on 22nd October 2010, the family agreed to subdivide the rice holding into Units Nos. 1632A–D, each measuring one acre, which portions were thereafter leased by the Appellants despite the absence of tenant cards or licences.

According to counsel, the trial court in its judgment of 16th April 2013 acknowledged that the Respondent had agreed to part with the leased portions but held the leases to be non-existent solely because the subdivision had not been operationalised through the National Irrigation Board.

Secondly, counsel submitted that the learned trial magistrate failed to interrogate the events of 24th April 2013, when the Respondent allegedly surrendered the suit property. It was argued that following the 2013 judgment, the parties and their siblings appeared before the Mwea Irrigation Scheme and executed a consent subdividing the rice holding into six units of three-quarters of an acre each, upon which new licences and tenant cards were issued. The Respondent was allocated Unit No. 1632F, which he later sold after executing an affidavit of surrender dated 23rd June 2014. Counsel maintained that these steps cured the deficiencies identified in the 2013 judgment and rendered the Appellants lawful licensees.

It was further submitted that the impugned ruling was erroneous as the suit property had ceased to exist in its original form and the licences issued on 24th April 2013 had never been challenged or cancelled. Thirdly, counsel submitted that the learned trial magistrate erred in law and in fact by issuing orders against persons who were not parties to Wang'uru PMCC No. 101 of 2011. Counsel argued that

the Appellants were neither defendants nor interested parties in the suit or in the application dated 13th August 2019, and were never afforded an opportunity to be heard. It was contended that any enforcement of the decree against them was therefore fatally defective, rendering the impugned ruling incapable of enforcement.

3. The learned counsel for the Respondent submitted inter alia that the Court should uphold the ruling delivered on 29th May 2020. That the learned trial magistrate properly exercised his discretion in granting the orders sought and that the Appellants had not demonstrated any basis for appellate interference. Counsel submitted that the dispute over Rice Holding No. 1632 had been conclusively determined by the judgment delivered on 16th April 2013, in which the trial court declared the Respondent the lawful licensee of the suit property and issued a permanent injunction restraining interference by the Defendants. It was argued that the said judgment had never been set aside, reviewed, or appealed against on the merits and therefore remained valid and binding. The counsel for the Respondent maintained that the application dated 13th August 2019 was a lawful post-judgment application seeking enforcement of existing court orders, and that the trial court was entitled to give effect to its earlier judgment.

   Counsel submitted that the Appellants' actions amounted to continued disobedience of court orders, necessitating the intervention of the court. On the issue of alleged subdivision, surrender, and issuance of new licences, counsel submitted that there was no lawful basis upon which the Respondent could be divested of rights already affirmed by a court of competent jurisdiction. It was argued that any purported surrender, subdivision, or reallocation undertaken outside the court process could not override or defeat the subsisting judgment and injunction.

   Counsel further submitted that the Appellants were fully aware of the proceedings in Wang'uru PMCC No. 101 of 2011 and could not evade compliance with the court's orders by alleging non-joinder. It was contended that the trial court correctly found that the Respondent remained entitled to protection of the suit property and that the orders issued were neither unlawful nor incapable of enforcement.

   In conclusion, the Respondent urged the Court to dismiss the appeal with costs, maintaining that it was devoid of merit and intended to frustrate the enjoyment of rights already determined by the court.

4. From the record of appeal and submissions, the following issues arise for the court's determinations:

   a. Whether this Court has been placed in a position to meaningfully interrogate the ruling delivered on 29th May 2020.

   b. If so, whether the learned trial magistrate erred in law or in fact in granting the orders arising from the application dated 13th August 2019.

   c. Who pays the costs?

5. I have carefully considered the memorandum of appeal, record of appeal, submissions by the learned counsel, superior court decisions cited thereon and come to the following findings:

   a. The dispute between the parties concerns Rice Holding No. 1632, Unit I, Mwea Section (the suit property), situated within the Mwea Irrigation Scheme. The suit in which the judgment that sought to be enforced by the plaintiff/respondent in the lower court case was commenced vide a plaint dated 2nd September 2011, in which the he sought for inter alia, a permanent injunction restraining the named Defendants, Gikaria Phineas and Wairimu Mwangi, from interfering with his occupation and use of the suit property.

The Respondent's case was premised on the assertion that he was the lawful licensee of the rice holding, having acquired the same through family arrangements following the death of his parents. The Defendants filed a statement of defence disputing the Respondent's claim to exclusive rights over the suit property and asserting that the rice holding had been subdivided among the beneficiaries of the family and lawfully leased out. The appellants herein testified as the defendants' witnesses in that suit.

The suit culminated in a judgment delivered on 16th April 2013 by Hon. B. M. Ochoi, in which the trial court entered judgment in favour of the Respondent and issued a permanent injunction restraining the defendants, their agents and/or servants from entering, remaining on, cultivating, draining water from, or otherwise interfering with the Respondent's occupation and use of Rice Holding No. 1632, Unit I, Mwea Section. Several years after the delivery of the judgment of 16th April 2013, the Respondent moved the trial court by way of an application dated 13th August 2019, seeking further orders in relation to the enforcement of the said judgment. That application was heard by the trial court and culminated in the impugned ruling delivered on 29th May 2020, which ruling is the subject of the present appeal.

b. As this is a first appeal, the duty of this Court is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses. This principle was stated in Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123, where the Court of Appeal held:

> "This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial... 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 allowance in this respect."

And in the case of Neepu Auto Limited versus Narendra Chananlal Solanki & 3 Others [2014] KECA 383 (KLR), the Court of Appeal held that:

> "Being a first appeal we must re-evaluate the evidence and come to our own conclusions, but always bearing in mind we did not hear the witnesses nor observe their demeanour. We may only interfere with the findings of the trial judge if the judge failed to take into account particular circumstances or based his impression on demeanour of witnesses which was inconsistent with the evidence – see the judgement of this court in Maimuna s/o Patrick Mutoo versus Wilson Njau Nyaki Civil Appeal No. 131 of 1994. In Peters versus Sunday Post Limited, [1958] EA 424 it was held that:
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> > "while an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide"

c. The first issue of whether this Court has been placed in a position to meaningfully interrogate the ruling delivered on 29th May 2020, goes to the competence of the appeal itself, and must

be addressed first at the outset. This is an appeal against a ruling delivered on 29th May 2020, arising from an application dated 13th August 2019. The impugned ruling was therefore an exercise of judicial discretion by the trial court based on the material placed before it in that application.

A careful examination of the Record of Appeal reveals that while the ruling appealed from is on record, the application dated 13th August 2019, together with the supporting affidavit(s) and the grounds of opposition dated 11th September 2019, are not included in the record. Under Order 42 Rule 13 of the Civil Procedure Rules, the duty placed upon an appellate court before allowing an appeal to proceed is set out as follows:

> "Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
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> (a) the memorandum of appeal;
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> (b) the pleadings;
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> (c) the notes of the trial magistrate made at the hearing;
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> (d) the transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing;
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> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
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> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal."

While it is correct that interlocutory applications and grounds of opposition do not, strictly speaking, fall within the definition of "pleadings", it is beyond dispute that applications are invariably supported by affidavits, and that such affidavits, together with any documents annexed thereto, constitute the evidentiary foundation upon which the trial court is invited to exercise discretion.

In view of the appellants failing to comply with the provision in Order 42 Rule 13(4)(e) in particular, resulting to the application dated 13th August 2019 and the affidavits filed in support of and the grounds of objection raised in opposition thereto, not having been included in the record of appeal, this Court is unable to ascertain:

i. The precise reliefs that were sought before the trial court;

ii. The factual basis upon which those reliefs were anchored;

iii. The matters contested by the opposing parties; and

iv. The evidentiary context within which the learned trial magistrate exercised discretion.

d. This Court is acutely aware that an appellate court does not sit as a court of first instance. Its mandate is not to substitute its own discretion, but to interrogate whether the discretion exercised by the trial court was judicious, principled, and based on the material placed before it. That exercise is impossible where the evidentiary material forming the basis of the impugned ruling is absent from the record.

Although both parties filed written submissions in this appeal, submissions are not substitutes for evidence. They are merely a party's arguments on the law and facts, and cannot supply or replace the affidavits and documents that were before the trial court, and which were required to be filed in the appellate court as part of the record of appeal. To determine the appeal on the basis of submissions alone would be to invite this Court to speculate as to the contents of the missing affidavits and the factual controversies that were presented to the trial court. This omission is therefore not a procedural lapse capable of being cured by the filing of submissions. It goes to the very heart of the appellate function and renders this Court incapable of conducting a meaningful review of the impugned ruling. In the circumstances, this Court finds that it has not been placed in a position to properly interrogate the ruling delivered on 29th May 2020. The appeal is therefore incompetent for want of a complete record as contemplated under Order 42 Rule 13(1)(e) of the Civil Procedure Rules.

e. On costs, the court in the case of re Estate of Monica Wanjiru Macharia (Deceased) (Family Appeal15 of 2023) [2024] KEHC 14780 (KLR) held that:

> " Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously."

In the case of Morgan Air Cargo versus Everest Enterprises Limited [2014] eKLR, the court set out the factors that ought to be considered when determining the costs to include the conduct of the parties; the subject of litigation; the circumstances which led to the institution of the proceedings; the events which eventually led to their determination; the stage in which they are terminated; the relationship between the parties; and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2) of *the Constitution*. Having given due considerations to the foregoing factors as discerned from the facts in the appeal, the court find it fair and just to award the respondent the costs in this appeal.

6. In light of the above determination on this appeal, the court finds and orders as follows:

   a. That the appeal as filed is incompetent and is hereby dismissed in its entirety.

   b. That the appellants will meet the respondent's costs in the appeal.

   Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 11TH DAY OF FEBRUARY 2026.

S. M. Kibunja

ELC JUDGE

In the presence of:

Appellants – Mr. Maina Kagio

Respondent – No appearance

Kinyua - court assistant.

S. M. Kibunja, J.

ELC JUDGE