

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
EMBU
ELC APPEAL NO. E030 OF 2024

ALOISIO NDUMA.....1ST

APPELLANT

MUNENE MUNYI MWANGO.....2ND

APPELLANT

VERSUS

MURIUKI NDWIGA MWITA.....1ST

RESPONDENT

JUSTER NKIROTE NKOROI.....2ND

RESPONDENT

JUDGMENT

1. This appeal was lodged against the judgment of Hon Stephen K. Ngii, Principal Magistrate, delivered on 27/6/2024 in Siakago MCELC Case No. E067 of 2022, which the Respondents instituted seeking the eviction of the Appellants, their agents, servants, children, relatives, clan members or anyone claiming through them from the parcel of land known as Mbeere/Kirima/3875 (the suit land). A prayer was also made to have the Officer Commanding Kiritiri Police Station provide security during the eviction as well as costs of the suit.

2. The Respondent's case before the trial court was that they are the registered proprietors the suit land measuring approximately 12.14 hectares (ha). They averred that the Appellants had trespassed on a portion of the suit land and were working on it despite demands to vacate. They averred that the Appellants' actions violated their proprietary rights over the suit land and that those acts amounted to trespass.
3. The Appellants filed a defence and averred that the Respondents bought the suit land illegally and that they had been living peacefully on the suit land with their families and had never been served with any notice of eviction since 1988. They averred that there was another matter before the court over the same subject matter being Embu High Court Civil Case No. 16 of 2009, which the Respondents did not disclose.
4. During the hearing, the 1st Respondent testified and told the trial court that the 2nd Respondent is his wife and co-owner of the suit land which they purchased around April 2011 from Njeru Mubothi and were issued a title deed. That when they bought the land, there was no one residing on it and that he noticed some shanties within the land when they were putting beacons. When he approached the Appellants to leave the land, they claimed that they were herding livestock. He stated that he farmed on the lower side of the land and that the Appellants built a shanty a kilometer from where he has been farming. He averred that the Appellants are squatters on the land and that they kept promising to move out but failed to do so. He was not aware of

the other case referred to by the Appellants. The 1st Respondent produced a copy of a title deed for the suit land and authority to plead on behalf of the 2nd Respondent.

5. The Appellants neither participated at the hearing nor did they file their witness statements even after being given time by the court.
6. In its judgment, the trial court held that the 1st Respondent had proved on a balance of probabilities that he is the registered owner of the suit land. The court found that the Respondent's evidence that the Appellants entered into the suit land after the Respondents had purchased it and had remained thereon unlawfully was uncontroverted. The court was satisfied that the reliefs sought were justified and entered judgment in favour of the Respondents. The court directed the Appellants to vacate the suit land within 90 days from the date of service of the notice of judgment and decree, and in default, they would be evicted from the suit land.
7. Aggrieved by that decision, the Appellants raised six grounds in their memorandum of appeal. Their main complaint is that the trial court erred in denying them the right to be heard or to cross-examine the Respondents, despite the fact that they had filed a defence and were present in court when the suit was heard. They urged the court to set aside the judgment of the trial court, order that the matter starts *de novo* and allow them to cross-examine the Respondents. They also prayed that the costs of the appeal be borne by the Respondents.

8. The court directed parties to file and exchange written submissions, which it has considered. The Appellants submitted that they filed their defence, list of witnesses, and list of documents on the 15/2/2023. The matter was mentioned on the 20/7/2023 when their advocate, Mr. Gachuba informed the court that he had been instructed to represent the Appellants and sought more time to file a notice of appointment, which the trial court granted. The matter was mentioned again on 19/10/2023 and Mr. Gachuba informed the court that he had not filed the notice of appointment. The court gave a further mention date of 28/12/2023 for pre-trial directions. Both parties were absent on that day and the court fixed the hearing for 11/4/2024.
9. On the hearing date, the Appellants sought an adjournment on the ground that their advocate, Mr. Gachuba, was not willing to proceed with the matter. The application for adjournment was declined since the advocate had not filed his notice of appointment. The Appellants argued that their right to a fair hearing was compromised by the denial of an adjournment, and that that occasioned a miscarriage of justice as they were denied the opportunity to adduce evidence and cross-examine the Respondents.
10. They submitted that their defence, particularly paragraph 7, indicated that they live on the suit land and that the defence raised triable issues which warranted them to get an adjournment so that they could participate in the hearing of the suit.

11. They cited **Job Ohanda v Stage Coach International Services Ltd & Another (2002) eKLR, Central Organization of Trade Unions v Benjamin K. Nzioka & Others, Civil Appeal No. 166 of 1993** and **Susan Munyi v Keshar Shiani (2013) eKLR** in support of their appeal.
12. On their part, the Respondents submitted that the trial court accorded both parties a fair hearing and that no rules of natural justice were violated during the proceedings in the trial court. It was their contention that the Appellants were granted an opportunity to be heard but failed to file their witness statements despite the court's indulgence for over a year.
13. That when the matter came up for hearing on 11/4/2024, the Appellants were not ready to proceed on the ground that their advocate was unwilling to continue with the matter. The trial court declined their application for adjournment and directed that the Respondent proceed with the suit undefended, because the Appellants' defence could not stand without evidence. The Respondents argued that failure to file witness statements was not a procedural technicality capable of being cured by Article 159(2)(d) of the Constitution, as it resulted from their deliberate actions of failing to comply with rules.
14. Further, the Respondents submitted that the trial court correctly directed the Appellants to vacate the suit land as their occupation amounted to trespass. They urged that they proved ownership of the suit land through a title deed, while the Appellants failed to produce any ownership documents. They

maintained that the trial magistrate did not err in delivering the judgment dated 27/6/2024 and that justice was duly administered. They relied on the decisions in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others (2013) eKLR** and **Dr. Joseph Arap Ngok v Justice Moiwo Ole Keiwa & 5 others, Civil Appeal No. 60 of 1997** to support their arguments in the appeal.

15. The issue for determination is whether the appeal has merit. The main complaint raised by the Appellants is that they were denied a fair hearing when the trial court declined to grant them an adjournment and proceeded to hear the matter without their participation. The right to be heard is a fundamental right protected under Article 50(1) of the Constitution. That right must be balanced with the equally important principles that litigation must come to an end and that cases must be heard and disposed of expeditiously for justice delayed is justice denied.
16. The court record shows that the Appellants filed a defence and a list of documents on 15/2/2023. However, they did not file any witness statements as required under Order 7 rule 5 of the Civil Procedure Rules despite being granted several opportunities by the trial court to comply. They filed a mention notice in this case, letter from the area Chief confirming that Gachoni Munyi resides on a Block 2244, and a letter summoning the 2nd Appellant over his occupation of Mbeere/Kirima/2981 belonging to James Njeru Mubothi. This does not bear any relation to Mbeere/Kirima/3875,

which is in dispute in this case. They therefore had no probative value in the matter before the trial court.

17. When the matter came up for hearing on 11/4/2024, the Appellants sought an adjournment on the ground that their advocate was unwilling to proceed. The trial court found that reason unsatisfactory and declined the request, noting the Appellants' persistent failure to comply with pre-trial directions and to take steps to have the dispute heard and determined. Consideration of an application for adjournment is a matter of judicial discretion, and an appellate court will only interfere where that discretion was wrongly exercised.
18. The Appellants submitted that they filed their defence, list of witnesses, and list of documents on the 15/2/2023. From 20/7/2023 when the Appellants' advocate, Mr. Gachuba sought more time to file a notice of appointment until 11/4/2024 when the matter was scheduled for hearing, the Appellants had ample time to comply with the pretrial directions and to file their documents. When the matter was mentioned on 19/10/2023, Mr. Gachuba informed the court that he had not filed the notice of appointment. The Appellants' ground for seeking an adjournment when the case came up for hearing on 11/4/2024 was that their advocate was unwilling to continue with the matter. That is the same advocate who failed to file a notice of appointment for over six months.
19. Based on the circumstances of this case, this court is of the view that, the Learned Magistrate's decision to proceed with the

hearing was both reasonable and justified. The Appellants were intent on delaying the determination of the dispute over the suit land, perhaps because they were enjoying possession.

20. The appeal lacks merit and is dismissed with costs to the Respondents.

Delivered virtually at Bungoma this 2nd day of February 2026

**K. BOR
JUDGE**

In the presence of: -

Mr. Aloisio Nduma- the 1st Appellant

Mr. Munene Munyi- 2nd Respondent

No appearance for the Respondents