



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT
THIKA

ELCL APPEAL NO. E125 OF 2024

WILSON MUNGAI.....1ST

APPELLANT

GITHUNGURI CONSTITUENCY RANCHING CO. LTD...2ND

APPELLANT

VERSUS

JOHN KARARA KIMWAKI.....1ST

RESPONDENT

THE THIKA LAND OFFICER.....2ND

RESPONDENT

***(Being an appeal against the Ruling of the Chief
Magistrate Court at Thika***

***Hon Atiang Mitullah CM) delivered on 22nd October 2024
in Chief***

Magistrate MCL&E No. 208 of 2018)

BETWEEN

JOHN KARARA KIMWAKI.....

.....PLAINTIFF

VERSUS

WILSON MUNGAI.....1ST

DEFENDANT

GITHUNGURI CONSTITUENCY RANCHING CO. LTD...2ND

DEFENDANT

THE THIKA LAND OFFICER.....3RD

DEFENDANT

JUDGMENT

1. This Appeal arises from the decision of the Chief Magistrate in **MCL & E Suit No. 208 of 2018** (hereinafter referred to as the **“Trial Court”**) by Honourable Atiang Mitulla (CM), delivered on 22/10/2024.
2. The Appellant herein was the 1st Defendant in the Trial Court, sued alongside the 2nd Appellant and the 2nd Respondent by the 1st Respondent, who sought among other a declaration that he is the bona fide owner of RUIRU/KIU BLOCK 2/184. The 1st Respondent also requested a permanent injunction restraining the 1st Defendant who is the Appellant from entering, disposing off or in any other way interfering with the 1st Respondent’s parcel **RUIRU/KIU BLOCK 2/184** including himself, agents servants or anybody claiming to act with his authority from trespassing on, altering, developing the suit property situate in Ruiru Kiambu. Additionally, the 1st Respondent sought an order that the 3rd Defendant does cancel title deed for RUIRU/KIU BLOCK 2/184 issued to the 1st Defendant (Appellant), an order of demolition and eviction,

the OCS Muthaiga Police to ensure compliance, general damages and mesne profits among other orders.

3. In the Complaint dated 1/10/2018, the 1st Respondent averred that he is the legal and registered owner of the land parcel number **RUIRU/KIU BLOCK 2/184** having obtained title deed on 24/11/2003. That by a search dated 20/03/2015 which was issued to him on 23/03/2015 by the Land Registrar, his name was the one on the Green Card reading Joseph Karara Kimwaki.
4. He stated that he was registered member of Githunguri Ranching Company Ltd on 14/06/1985 and he paid a fee of Ksh 2005 for shares and entrance fee. Later he paid a survey fee of Ksh 1,200 and a further Ksh 100 for water project. He was also required to pay which he did Ksh 2,700 for registration and survey fees of Certificate No. 5766.
5. The land he paid for measuring 1¼ acres bore the certificate number 5766 he had 200 shares his ballot number was 2833. He was later given a clearance certificate which he used to collect the said title deed. He however noted that on 8/11/2016 when he went to search his title he found that it was bearing the names of Wilson Mungai from Wangige.
6. He avers to have discovered that without his knowledge and consent someone had started constructing a permanent building on his suit property. Upon investigation he states that he discovered that the 1st Defendant was now the registered owner of the suit property and his name was unlawfully,

illegally and or irregularly entered into the register and a title issued.

7. That despite the Land Registrar summoning both the 1st and 2nd Defendants to appear and shade light on the title issued to the 1st Defendant, the 2nd Defendant never appeared. This led to the 1st Respondent lodging a report to the Police on 28/11/2016 and 9/08/2018.
8. She claims that she noted when she obtained the green card that 1st Defendant had fraudulently, illegally, irregularly and unprocedurally caused the suit property to be transferred in his favour and a title was issued on 03/11/2016 yet the land was already registered and a title issued to the Plaintiff/ 1st Respondent on 23/11/2003.
9. He has listed the particulars of trespass by the 1st Defendant at paragraphs 6, 7-11 of the Plaint. He further avers that in 2015 and 2016, the 1st, 2nd and 3rd Defendants. The 1st Respondent also itemized the particulars of fraud against the 1st Defendant/Appellant at paragraphs 11, (a) to (e). He averred that the 1st Defendant received and retained a title to the suit property having presented fraudulent documentation in collusion with the 2nd Defendants' directors John Maina and Peter Mwangi Muturi.
10. At paragraph 11 subparagraphs (i) to (v) he listed the particulars of fraud by 2nd Defendant and accused them of issuing a title deed for parcel, RUIRU/KIU BLOCK 2/1848 to the Appellant herein dated 3/09/2016 knowing that there was

already another title issued on 24/11/2003 for the same piece of land.

11. At the same paragraph 11 subparagraphs (a) and (c) the 1st Respondent listed particulars of fraud attributed to the 3rd Defendant and stated that they registered a transfer of land and issued a title deed to the 1st Defendant/Appellant on 3/11/2026 knowing too well that the land had already been registered in the name of 1st Respondent/Plaintiff on 23/11/2003. Further, failing to produce a copy of the green card when requested to do so.
12. At paragraphs 12 to 13 the 1st Respondent itemized particulars of loss and damage that he has suffered due to the 1st Defendant's trespass, encroachment, wrongful occupation of the land. Misuse and degradation.
13. In response the 1st Defendant filed a Statement of Defence dated 24/09/2019 and denied in toto all the averments in the plaint and put the Plaintiff to strict proof. He also denied the particulars of fraud itemized at paragraph 11 (a-e). He avers that the Plaintiff/1st Respondent's registration as owner of the parcel known as RUIRU/KIU BLOCK 2/1848 is tainted with illegality, fraud, falsehood and material non-disclosure of true facts. He denies that there is any demand and notice of intention to sue that has ever been served.
14. Equally the 3rd Defendant filed their Statement of Defence dated 6/11/2021 and denied the content of the Plaint and put the Plaintiff to strict proof. They also deny that the

Plaintiff/1st Respondent are entitled to the prayers sought in the Plaint. They asked the Court to dismiss the Plaintiff's suit. They even denied that any demand was served on the 3rd Defendant.

15. In support of the Plaintiff's/1st Respondent's case the documents listed herebelow were produced:

- a) Bundle of receipts
- b) Certificate No. 5766 issued by Githunguri Constituency Ranching Company
- c) Ballot Paper
- d) Copy of title No. RUIRU/KIU Block 2/1848
- e) OB No. 38 dated 28/11/2016
- f) Application for caution dated 13/06/2018
- g) Transfer form
- h) Certificate of search dated 28/09/2018
- i) Certificate of search dated 23/03/2015

16. As stated in the Judgment, the matter proceeded ex parte on 14/02/2023 the date having been given in Court on 11/10/2022 in the presence of Counsel for 1st and 2nd Defendants and notice having been sent to Counsel for the 3rd Defendant. Further that the 1st and 3rd Defendants filed Statements of Defence but failed to tender evidence to rebut the evidence called in support of the Plaintiff's claim.

17. Upon considering the matter, the trial Court, Hon. Atiang Mitulla- SPM, in a Judgment delivered on 30/05/2023, entered Judgment in favour of the 1st Respondent, granting prayers (a),

(b), (c), (d), and (e) of the Plaint and awarded costs to the 1st Respondent.

18. The Appellant was aggrieved by that Judgment and filed this appeal vide the Memorandum of Appeal dated 04/11/2024 raising the following grounds:-

- 1) That the Learned trial Magistrate erred in law and in fact in dismissing the Appellants application dated 7th June 2023 seeking to re-open the case and be heard thereby shutting him unheard as against the natural rules of justice as to fair hearing.
- 2) That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Appellant was the bonafide registered owner of land parcel RUIRU KIU BLOCK 2(GITHUNGURI) 1848 and failing to accord him a chance to defend in title deed and consequently annulling it in favour of the Respondent was a grave abuse of his wide discretion to hear all parties.
- 3) That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the cause of action relates to land matter very emotive in nature and by shutting a registered owner was not rendering justice to such a party but creating injustice in all for circumstances and instances.
- 4) That the Learned Trial Magistrate erred in law in looking at procedural technicalities rather than

rendering substantive justice to all parties especially the Appellant by shutting him unheard which was unconstitutional solely meant to deny him access to the seat of justice.

- 5) That the learned trial magistrate erred; in law and in fact by failing to consider the application of 26/05/2023 and casually stated that he would deliver the slated Judgment any way and treated the matter not with the seriousness it deserved
- 6) That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Appellant had equally filed an application dated **26/05/2023** seeking to arrest the Judgment of the Court that was slated for delivery on **30/05/2023** hence proving that the Appellant was fully keen in prosecuting his case.
- 7) That the learned Trial Magistrate erred in law and in fact in appearing biased towards the Appellant for his refusal to exercise his wide discretion in favour of the Appellant despite cogent grounds or reasons having been advised by the Appellant and having shown keen interest in hearing of his case.
- 8) That the Learned Trial Magistrate erred in law and in

fact by putting more weight on the Respondents case and failing to devolve into the weighty issues raised by the Appellants.

REASONS WHEREFORE the Appellant prays for:

- a) That the Ruling of the trial Court dated **22nd October 2024** be set aside.
- b) That the matter be retried before a Resident Magistrate other than Hon M. Atiang Mitullah, CM.
- c) That the cost of the suit plus cost of the Appeal be granted to the Appellant.

19. The Appeal was canvassed by way of written submissions. The Appellant filed submissions dated 3/10/2025 and the 1st Respondent filed their dated 1/10/2025.

Appellant's Submissions

20. The Appellant submits that the dispute concerns the ownership of land parcel **RUIRU KIU BLOCK 2 (GITHUNGURI) 1848**, for which both the 1st Appellant and the 1st Respondent hold title deeds derived from the 2nd Appellant. Despite the Appellants' Counsel being present when the hearing date was fixed, the matter proceeded ex-parte on 14/02/2023, because Counsel lacked instructions and had lost touch with the clients.

21. Upon discovering the ex-parte proceedings, the Appellants filed an application on 26/05/2023, to arrest the Judgment scheduled for 30/05/2023. The trial Court, however, remained silent on this application and proceeded to deliver a Judgment

that cancelled the 1st Appellant's title and ordered their eviction. Consequently, the Appellants filed a second application on 7/06/2023, to set aside the Judgment, which was subsequently dismissed, leading to this appeal.

22. The Appellants contend that the trial Court failed to exercise its judicial discretion properly. The primary legal pillars of their submission include the claim to the right to be heard and natural justice. The Appellants rely on the fundamental maxim *audi alteram partem* (hear the other side). They cite **Misc. Civil Application 266 of 2017** where **Odunga J (as he then was)**, quoting **Chief Constable Pietermaritzburg v Shim (1908)**, argue that no person should be condemned unheard. This is further reinforced by Section 4(3) of the Fair Administrative Action Act, 2015, and Articles 49 and 50 of the Constitution of Kenya, which guarantee the right to a fair hearing and dictate that justice be administered without undue regard to procedural technicalities.

23. At the same time, he also submitted on the scope of judicial discretion and citing the Court of Appeal in **Richard Ncharpi Leiyagu v IEBC & 2 Others [2013] eKLR**, the Appellants argue that the Court's inherent jurisdiction to dismiss suits should be exercised sparingly. Furthermore, they reference **Patel v EA Cargo Handling Services Ltd [1974] EA 75**, where **Duffus P** emphasized that the Court's main concern is to do justice and should not fetter its wide discretion with self-imposed conditions.

24. Additionally, the Appellant contends that under the principles in **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR**, the Court must consider the reason for non-appearance, whether a meritorious defense exists, and if justice can be done without prejudice. The Appellants maintain they were not indolent, as evidenced by their swift attempts to arrest the Judgment and the subsequent filing of the application to set it aside.

25. Finally, the Appellants cite **Shah v Mbogo & Another (1967) EA 116** asserting that discretion is intended to avoid hardship resulting from inadvertence or excusable mistake, rather than to assist those obstructing justice. Given the emotive nature of land ownership, they urge this Court to re-evaluate the proceedings to ensure both titles are considered.

26. The Appellants submit that the trial Court's silence on the initial application and the subsequent dismissal of the motion to set aside the Judgment effectively locked them out of the seat of justice. They pray that the ex-parte Judgment of **30/05/2023**, be set aside and that the parties be allowed to litigate the matter on its merits, with costs following the event.

1st Respondent's Submissions

27. The 1st Respondent submits and maintains that the Ruling delivered on **22/10/2024**, by **Hon. M. Atiang Mitullah (CM)**, is factually and legally sound. The Respondent contends that the Appellants were afforded a fair opportunity

to be heard and that the trial Court's decision was based on a substantive evaluation of the evidence rather than mere procedural technicalities.

28. The Respondent asserts that the Appellants were fully aware of the suit and the proceedings leading up to the Judgment of dated 30/05/2023. Specifically, the hearing date for the formal proof was fixed in the presence of all parties except the 3rd Defendant, who was served by notice. The Respondent highlights that this fact remains uncontroverted by the Appellants, yet they chose not to attend, necessitating the formal proof process.

29. According to the 1st Respondent, formal proof hearing is not a procedural technicality but a substantive hearing on the merits. Citing **Kamau vs. Matunda (Fruits) Bus Services (2024) KEHC 4829 (KLR)**, the Respondent relies on the findings of Justice D.S. Majanja and Justice Emukule, who observed that in formal proof, all rules of evidence and procedure are observed.

30. The Respondent argues that the burden of proof remains on the Plaintiff to adduce sufficient evidence to sustain their claim. In this case, the Respondent successfully substantiated their ownership of **Ruiru/Kiu Block 2/1848** through documentary evidence dated **1/10/ 2018**. The trial Court, as noted in paragraphs 8 and 9 of its Judgment, actively considered these submissions and the lack of rebuttal evidence from the Defendants. This aligns with Section 107 of

the Evidence Act, which mandates that a party asserting facts to establish a legal right must prove those facts exist.

31. Regarding the Court's discretion to set aside ex-parte Judgments, the Respondent cites the landmark cases of **Mbogo & Another vs. Shah (1968) 1 EA 93** and **Neeta Gohil vs. Fidelity Commercial Bank Limited (2019) eKLR**. These authorities establish that judicial discretion is intended to avoid injustice and hardship, not to assist a party in obstructing or delaying the course of justice.

32. The Respondent submits that the Appellants' application to set aside the Judgment was an attempt to further violate the Respondent's proprietary rights over the suit land. Therefore, the Respondent contends that the trial Court correctly exercised its discretion to protect the integrity of the judicial process and the Respondent's interests.

33. The 1st Respondent concludes that the appeal lacks merit, as the trial Court's decision was a result of the Appellants' own failure to participate in a properly scheduled hearing. The Respondent humbly requests that the appeal be dismissed with costs.

Analysis and Determination

34. This Appeal stems from a standard conflict in Kenyan land law where there is the existence of double titles and the tension between the right to a fair hearing and the Court's duty to ensure the efficient disposition of cases. The Appellants 1st and 2nd Defendants seek to set aside an ex

parte Judgment delivered on 30/05/2023, and a subsequent Ruling on 22/10/2024, which denied their application to re-open the case.

35. The 1st Respondent (Plaintiff) asserts ownership of **RUIRU/KIU BLOCK 2/1848** based on a title issued in 2003, whereas the 1st Appellant holds a title for the same parcel issued in 2016. The Trial Court proceeded to hear the matter *ex parte* after the Appellants' Counsel despite being present when the date was fixed failed to secure instructions.

36. The Court must weigh two competing legal interests. On one hand is the Appellants' right to a fair hearing under Article 50(1) of the Constitution of Kenya, which dictates that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing. On the other hand, is the Respondent's right to finality in litigation and the Court's mandate under the **Oxygen Principle** enunciated in Sections 1A and 1B of the Civil Procedure Act to facilitate the just, expeditious, and cost-effective resolution of disputes.

37. **Black's Law Dictionary** defines *audi alteram partem* as the ***"principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them."***

However, this right is not absolute and does not protect the indolent litigant.

38. The Appellants rely on **Shah v Mbogo [supra]**, where the Court held:

"The discretion is intended so to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, but is not also intended to assist a person who has deliberately sought to obstruct or delay the course of justice."

39. Conversely, the Respondent points to the Appellants' presence during the fixing of the hearing date as evidence of deliberate inaction. The Respondent argues that a formal proof hearing is a substantive determination. As held in **Kamau vs. Matunda (Fruits) Bus Services (2024) KEHC 4829 (KLR)**, a judgment resulting from formal proof is a judgment on the merits because the Plaintiff must still discharge the burden of proof under Section 107 of the Evidence Act.

40. Based on the submissions and the history of the case, I am persuaded that the following issues arise for determination:

- i. Whether the Trial Magistrate exercised judicial discretion judiciously in refusing to set aside the ex parte Judgment.***
- ii. Whether the non-appearance of the Appellants' Counsel was excusable mistake or gross negligence.***

iii. Whether the nature of land disputes touching on proprietary rights necessitates a higher threshold for shutting out a party.

iv. What orders should be issued regarding the conflicting titles?

v. Who pays the costs of both the Appeal?

41. In **Patel v EA Cargo Handling Services Ltd [1974] EA 75**, the Court of Appeal for East Africa emphasized that the main concern of the Court is to do justice. The Trial Court in this matter chose to ignore an application to arrest Judgment filed on 26/05/2023 before the Judgment was delivered. Silence on an active application that challenges the Court's jurisdiction to proceed *ex parte* is a procedural frailty

42. The Appellants claim their Counsel lost touch with them. Generally, the mistakes of a legal and professional advisor should not be visited upon a client, unless the client is also shown to be complicit in the delay. In **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR**, the Court noted that if a meritorious defense exists, the Court should lean toward a hearing on the merits. Here, the 1st Appellant holds a title deed; while it may be challenged for fraud, the legality of its issuance is a triable issue.

43. The Supreme Court has often noted that land is an emotive and fundamental resource. In the Indian case of **Collector, Land Acquisition, Anantnag v. Mst. Katiji (1987) 2 SCC 107**, the Court observed:

"When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have a vested right in injustice being done because of a non-deliberate delay."

44. By cancelling a title deed without hearing the holder, the Trial Court effectively determined a claim of fraud which requires a high standard of proof on a one-sided account.

45. In conclusion, having considered the history of this case, this Court finds that while the Appellants were indeed negligent in their initial follow-up, the Trial Court's refusal to consider the application to arrest the judgment and the subsequent refusal to set it aside resulted in a total shutting out of a party in a matter involving the permanent deprivation of property.

46. The 1st Respondent's 2003 title carries great weight, but the 1st Appellant's 2016 title, issued by the 3rd Defendant the Land Registrar, deserves a day in Court to determine which registration process was flawed. Justice is not a one-way street; it must be seen to be done to both the diligent and the reformed-indolent.

47. Accordingly, this Court orders as follows:

i) The Appeal is hereby allowed.

ii) The Ruling of the Trial Court dated 22/10/2024, and the Ex Parte Judgment delivered on 30/05/2023, are hereby set aside.

- iii) The Suit MCL & E No. 208 of 2018 is reinstated for hearing on its merits before any Magistrate of competent jurisdiction other than Hon. Atiang Mitulla (CM).**
- iv) The Appellants shall pay the 1st Respondent thrown-away costs of the Trial Court and the costs of this Appeal as a condition precedent to the re-opening of the case of Kesh 100,000.**
- v) The Status Quo regarding the suit property RUIRU/KIU BLOCK 2/1848 shall be maintained (no development or transfer) until the final determination of the reinstated suit.**
- vi) Parties shall bear their respective costs of this Appeal.**

Orders accordingly.

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 27TH DAY OF APRIL 2026.

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**MOGENI J
JUDGE**

In the presence of:-

Kanyi Kiruchi for the 1st Appellant
Kiratu Kamunya for the 1st Respondent
Mr. Melita - Court Assistant

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MOGENI J
JUDGE

ORIGINAL