

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT

NAIROBI

ELCLA NO. E002 OF 2023

SAMUEL ARUWA

APPELLANT

VERSUS

ESTEEM ENERGY LIMITED

RESPONDENT

(Being an appeal from the Ruling and Order of the Hon. EDGAR KAGONI (PM) delivered on the 16th day of December, 2022 in the Chief Magistrate's Court at Nairobi Civil Suit No. E3625 of 2022)

JUDGMENT

Introduction

1. This is an appeal by **Samuel Aruwa** the Appellant herein against the Ruling of the **Honourable Edgar Kagoni (PM)** delivered on **16th December 2022** in **Chief Magistrate's Court Civil Suit No. E3625 of 2022**. By that Ruling, the learned Magistrate dismissed

the Appellant's Notice of Motion dated **20th September 2022** seeking, inter alia, to discharge, vary or set aside the ex-parte orders of injunction granted on **27th July 2022** restraining the Appellant from trespassing, occupying or interfering with the Respondent's alleged quiet possession of Land Reference No. 209/22664 (the suit property).

2. The appeal was admitted for hearing on **24th March 2026**. Directions were issued for the parties to file and exchange written submissions within stipulated timelines. A perusal of the Court Tracking System (CTS) confirms that neither party filed submissions in compliance with the Court's directions. Nevertheless, this Court is obliged to determine the appeal on the basis of the Memorandum of Appeal, the Ruling appealed from, the proceedings before the trial court, and the entire Record of Appeal.
3. Be that as it may it is noteworthy that failure to file written submissions is not fatal to the appeal. Written submissions are merely meant to assist the Court in crystallizing the issues and appreciating the parties

arguments. However, submissions are not evidence. They are merely arguments based on record.

4. in the case of **Daniel Toroitich Arap Moi =Versus= Mwangi Stephen Muthui & Another (2014) KLR**, the Court of Appeal held that submissions cannot take the place of evidence and that a Court may determine a matter on the basis of the record even in the absence of submissions.
5. This Court is also guided by **Article 159(2)(d) of the Constitution** of Kenya which enjoins this Court to administer justice without undue regard to procedural technicalities. Accordingly, the failure by the parties to file written submissions does not automatically render the appeal abandoned. This Court shall proceed to determine the appeal on the basis of the Record of Appeal and the applicable provisions of the law.
6. The Court has also carefully considered the entire Record, Memorandum of Appeal including the Appellant's application and Supporting Affidavit, submissions filed by both parties before the Magistrate, and the certified proceedings.

The appellant's grounds of appeal

7. The Memorandum of Appeal dated **13th January 2023** raises the following eleven (11) grounds of appeal:

1. THAT the Learned Magistrate erred in both law and fact by failing to find that the court had no requisite pecuniary jurisdiction to entertain the Respondent's suit and application.

2. THAT the Learned Magistrate erred in law and in fact in failing to find that the Appellant had sufficiently made out a case to warrant the setting aside of the orders of injunction made in the matter on 27th July, 2022.

3. THAT the Learned Magistrate erred in fact and in law in misdirecting himself on the Law and facts and as a result arrived at a wrong decision. The Learned Magistrate particularly misdirected himself by failing to apply the applicable law on discharge, setting aside

and variation of orders of injunction thereby arriving at a wrong decision.

4. THAT the Learned Magistrate erred in law in failing to consider the Appellant's submissions.

5. THAT the Learned Magistrate erred in fact and in law by finding that the Appellant was served with court process when the evidence on record proved otherwise.

6. THAT the Learned Magistrate misdirected himself on the facts and the law and based his findings on wrong and irrelevant considerations.

7. THAT the Learned Magistrate erred in both law and in fact by failing to find that the Respondent's application was tainted with fraud, non disclosure of material facts and misrepresentation of material facts.

8. THAT in all the circumstances of the case, the findings of the learned Magistrate are totally insupportable in law.

9. THAT the Learned Magistrate erred in law and in fact in placing reliance on extraneous evidence and matters in arriving at his decision.

10. THAT the Learned Magistrate was openly biased in favour of the Respondent.

11. THAT in all the circumstances of the case, the Learned Magistrate failed to do justice before the Appellant.

Brief facts

8. The Respondent filed suit claiming to be the registered proprietor of **Land Reference No. 209/22664** (disputed by the Appellant as originally **LR No. 209/5923**, now known as **Nairobi/Block 69/6**). It alleged that the Appellant, together with unknown persons, had unlawfully trespassed onto the property on or about 4th July 2022, causing damage and interfering with its quiet possession.

9. **On 27th July 2022**, the learned Magistrate granted a temporary injunction restraining the Appellant from entering, remaining upon, trespassing, or interfering

with the suit property, and directed the Appellant to vacate the same pending inter-partes hearing.

10. The Appellant filed his application dated **20th September 2022** asserting, inter alia, that he had never been served, that the suit property had been his family's home for decades, that the injunction was obtained through concealment and misrepresentation, and that the trial court lacked pecuniary jurisdiction. The Appellant produced a valuation report by Messrs Pinnacle Valuers Ltd dated 9th September 2022 showing the current open market value of the property as **KShs. 73,000,000/**. The application was heard inter-partes and dismissed by the impugned Ruling.

Analysis and determination

11. Having carefully considered the Memorandum of Appeal, the Record of Appeal, the Ruling appealed from, and the pleadings and proceedings before the trial court, this Court has identified the following six issues as falling for determination in this appeal:

i) Whether the trial court had the requisite pecuniary and subject-matter jurisdiction to

entertain the suit and the interlocutory application;

ii) Whether the Appellant was properly served with court process, and whether the learned Magistrate erred in finding service proper;

iii) Whether the learned Magistrate misdirected himself on the law and facts by failing to apply the principles governing the discharge, variation or setting aside of ex-parte injunction orders under Order 40 Rule 7 of the Civil Procedure Rules, 2010;

iv) Whether the Respondent's application for injunction was tainted by fraud, non-disclosure or misrepresentation of material facts;

v) Whether the learned Magistrate failed to consider the Appellant's submissions, relied on extraneous matters, exhibited bias, or otherwise failed to do justice; and

vi) Whether the Ruling is supportable in law and fact, and what orders should issue.

Issue 1: Jurisdiction

12. Jurisdiction is a threshold issue that goes to the root of the proceedings. A court without jurisdiction acts in vain; its decisions are nullities as was stated in the cases of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1; Madhvani v Madhvani [1989] KLR 238**.
13. The Appellant contended that the value of the suit property far exceeded the pecuniary jurisdiction of the Chief Magistrate's Court. The Record discloses a valuation report by Messrs Pinnacle Valuers Ltd placing the current open market value of the property **LR No. 209/5923 / Nairobi/Block 69/6 at KShs. 73,000,000/-**. This figure was annexed to the Appellant's Supporting Affidavit and was not effectively controverted by the Respondent. The value clearly exceeded the statutory pecuniary limit applicable to a Principal Magistrate at the material time. Reliance is made to the **Magistrates' Courts Act, 2012**, as amended, and the pecuniary limits prescribed

thereunder also **Kengen v. Mujirambo (1966) EA 43.**

The learned Magistrate did not address this fundamental issue despite it being canvassed in the Appellant's submissions.

Issue 2: Service of Court Process

14. The Appellant deposed that he was never served and only became aware of the suit on 5th September 2022 when forcibly evicted. The Magistrate relied on the presumption arising from the Affidavit of Service and the Appellant's failure to cross-examine the process server.

15. While the presumption is rebuttable, the Appellant placed sufficient material before the court including his own affidavit and surrounding circumstances to raise a triable issue. The Magistrate's focus on cross-examination, without considering the totality of evidence and the Appellant's explanation, amounted to a misdirection. In applications to set aside ex-parte orders, the court must be astute to ensure that no party

is condemned unheard where service is genuinely disputed.

Issue 3: Discharge/Set Aside of Injunction -
Applicable Principles

16. **Order 40 Rule 7 of the Civil Procedure Rules**

empowers the court to discharge, vary or set aside an injunction on application made thereto by any party dissatisfied with such order. The principles for granting or setting aside interlocutory injunctions are well settled in line with the decision of **Giella v Cassman Brown & Co. Ltd [1973] EA 358**:

- (a) a prima facie case with a probability of success;
- (b) irreparable injury not compensable by damages;
- and
- (c) balance of convenience.

Where an ex-parte injunction is obtained by non-disclosure or misrepresentation of material facts, it is liable to be discharged as of right, irrespective of the merits.

The Respondent's Supporting Affidavit claimed "quiet and uninterrupted occupation" and recent trespass, yet the Appellant produced evidence suggesting long-standing family occupation and possible title discrepancies (LR 209/22664 vs 209/5923). These were material facts that ought to have been disclosed at the ex-parte stage. The Magistrate failed to apply these principles and instead dismissed the application on technicalities.

Issue 4: Fraud, Non-Disclosure and Misrepresentation

17. The Record discloses serious allegations of concealment. The Appellant's evidence raised triable issues regarding the Respondent's title, the true nature of occupation, and the circumstances of entry onto the property. The Magistrate did not interrogate these allegations or weigh the evidence. This was a misdirection. Courts of equity will not allow a party to retain an advantage gained through suppression of material facts (see also the authorities cited by the Appellant at pages 141-145 of the Record)..

Issues 5 & 6: Consideration of Submissions, Bias and Overall Justice

18. A perusal of the Ruling does not demonstrate that the learned Magistrate considered the Appellant's detailed submissions on jurisdiction, non-disclosure or the applicable law on setting aside injunctions. A judicial officer must give reasons that show the parties were heard as was stated in the case **Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 Others [2014] eKLR**. The failure to do so, coupled with reliance on extraneous considerations and the overall circumstances, rendered the decision insupportable. While actual bias is not lightly inferred, the cumulative errors amounted to a failure to do justice.

Disposition and final orders

19. For the foregoing reasons, the appeal succeeds and this Court makes the following final orders;

i) The Appeal be and is hereby allowed.

ii) The Ruling and Order of the Hon. Edgar Kagoni (PM) delivered on 16th December

2022 in CMCC No. E3625 of 2022 be and is hereby set aside in its entirety.

iii) The ex-parte and inter-partes orders of injunction granted on 27th July 2022 be and are hereby discharged and set aside.

iv) The Appellant's application dated 20th September 2022 be and is hereby allowed in terms of the prayers for discharge of the injunction.

v) The Respondent's suit be and is hereby struck out for want of jurisdiction.

vi) Each party shall bear its own costs of the application before the trial court, the suit and this Appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH
DAY OF MAY 2026.**

**E.K. WABWOTO
JUDGE**

In the presence of:

Mr. Githinji for the Appellant.

Mr. Shikanda for the Respondent.

Court Assistants; Mary Ngoira and David Ngoosa.