REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELCLA NO. E031 OF 2025

HARRISON NJOKA

NDONG'IORA.....APPELLANT

VERSUS

JEREMIAH IRERI

MUNYI.....RESPONDENT

(Being an Appeal from the Judgment of Hon. E.N. WASIKE (P.M) in SIAKAGO PM-ELC Case No. 16 of 2020 delivered on 17th November, 2022)

JUDGMENT

INTRODUCTION

This is an appeal against the judgment of Hon. E.N. Wasike (P.M) in Siakago PM-ELC Case No. 16 of 2020 delivered on 17th November 2022, in which the trial magistrate found in favour of the Respondent and ordered the eviction of the Appellant from land parcel No. MBEERE/RIACHINA/2068. The Appellant, being aggrieved, filed a Memorandum of Appeal dated 8th May 2025 raising seven grounds of appeal. The parties agreed to canvass the appeal by way of written submissions.

In the lower court, the Respondent filed a plaint dated 14th May 2020 seeking an eviction order against the Appellant from land parcel No. MBEERE/RIACHINA/2068, together with an order directing the OCS Kiritiri Police Station to provide security during the eviction exercise. The Appellant filed a statement of defence dated 15th September 2020. During the hearing, the Respondent testified as PW-1 and produced a certificate of official search and a Title Deed for land parcel No. MBEERE/RIACHINA/2068 in support of his claim. The Appellant did not call any witness. The trial court subsequently entered judgment in favour of the Respondent.

The Appellant, through M/S Muchangi Gichugu & Co. Advocates, submits on the single issue of whether he was denied his right to a fair hearing, contending that the trial court closed the defence case and entered judgment without affording him an opportunity to testify or challenge the Respondent’s evidence. The Appellant attributes his non-participation to the failure of his then-advocate from Muraguri Advocates to keep him informed of hearing dates, arguing that he should not be penalised for his counsel’s dereliction. He relies on the constitutional guarantee under Article 50(1) of the Constitution of Kenya and the principle of audi alteram partem, as well as the case of Philip Chemwolo & Another v Augustine Kubende.

The Respondent, through his advocates, submits that the Respondent discharged his burden of proof on a balance

of probabilities by producing a certificate of official search and a Title Deed establishing his ownership of the suit land, and that the Appellant's claims of long occupation since the 1960s were mere assertions unsupported by evidence. The Respondent relies on Section 24(a) of the Land Registration Act, Section 3 of the Trespass Act, Section 107(1) of the Evidence Act, and Clerk & Lindsel on Torts, 18th Edition.

ANALYSIS AND DETERMINATION

I have carefully considered the record of appeal, the grounds of appeal and the parties' respective submissions. The central and determinative issue raised by the Appellant is whether the conduct of the proceedings in the lower court violated his constitutional right to a fair hearing.

Before addressing the substance of this ground, however, a preliminary but fundamental jurisdictional question arises: what is the proper procedural vehicle for the relief the Appellant seeks?

The record discloses that the judgment appealed against was entered ex parte, in the absence of the Appellant and without his participation in the defence proceedings. The Appellant was represented by an advocate, Muraguri Advocates, who is said to have failed to attend court or inform the Appellant of hearing dates. The trial court, upon the Appellant's non-appearance and failure to adduce evidence, entered judgment for the Respondent.

It is trite law that where a judgment is entered ex parte or in the absence of one of the parties, the primary and appropriate remedy is an application to set aside that judgment before the same court. This is well established by Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules, 2010, which grant the trial court jurisdiction to set aside any ex parte judgment or order upon such terms as are just. The rationale for this rule is sound: the trial court that entered the judgment is best placed to evaluate the circumstances, assess the explanation for non-appearance, impose appropriate terms, and restore the matter to the hearing list without the expense and delay of an appeal.

This position was affirmed by the Court of Appeal in Philip Chemwolo & Another v Augustine Kubende [1982-88] 1 KAR 1030, the very case relied upon by the Appellant. In that case, the Court held that a party against whom an ex parte judgment has been entered ought first to apply to set aside that judgment before the trial court, rather than proceeding directly on appeal. The court went further to state that an appellate court is not the proper forum to entertain what is in substance a grievance about non-participation at trial, since such a grievance requires findings of fact — as to the reason for absence, whether the explanation is credible, and whether it is just to restore the matter to hearing — which are the province of the trial court.

It is therefore noteworthy, and indeed decisive, that the Appellant did not apply to set aside the ex parte judgment before the trial magistrate. No such application appears on the record. The Appellant proceeded directly to file this appeal more than two years after the judgment was delivered. This court is therefore being asked, in the guise of an appeal, to grant relief that ought to have been sought from the trial court in the first instance.

The jurisdiction of this court on first appeal from the magistrate's court is as set out in Section 78 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules. An appellate court considers the evidence on record and determines whether the trial court's conclusions were correct. Crucially, the appellate court is bound by the record as compiled. It cannot receive fresh evidence that was never placed before the trial court, and it cannot make findings of fact on matters — such as why a party failed to attend trial, whether counsel was negligent, or whether the party had a meritorious defence — that were never ventilated below.

In the present case, all the substantive grounds of appeal raised by the Appellant — including the claim of long occupation since the 1960s, the alleged fraud on the title documents, and the contention that the evidence was insufficient — presuppose the existence of evidence that the Appellant would have adduced had he participated in the trial. There is no such evidence on the record. The Appellant

cannot use this appeal to introduce, for the first time, a case that was never presented to the trial court. As the Court of Appeal observed in Shah v Mbogo & Another [1967] EA 116, an appellate court should be slow to interfere with the findings of the trial court, and where no evidence was adduced by the appellant below, there is nothing upon which the appellate court can base a different finding.

Equally, the Appellant's complaint about the absence of timelines for appeal and execution (Ground 7) and the direction to the OCS to provide security (Ground 6) are matters that could and should have been raised before the trial court, either by way of an application to stay execution pending appeal or by applying to set aside the judgment and varying its terms.

The Appellant's invocation of Article 50(1) of the Constitution and the principle of audi alteram partem is not without merit in principle. The right to a fair hearing is foundational and non-derogable. It is correct, as submitted, that a court ought not finally determine rights after hearing only one side where the other party has had no real opportunity to be heard. This court does not discount that principle.

However, the principle does not operate in a vacuum. It must be balanced against equally important principles of procedural law: the finality of judgments, the proper allocation of remedies between courts of first instance and appellate courts, and the responsibility of litigants — and

their counsel — to comply with court processes. Where a party's absence from trial is attributable to the negligence of their own advocate, the remedy lies in an action against that advocate, or in an application to set aside the judgment on those grounds before the trial court, and not in an unfettered right to re-litigate on appeal.

It bears emphasis that the doctrine of audi alteram partem entitles a party to an opportunity to be heard; it does not guarantee that the party will avail themselves of that opportunity. The record does not disclose that the Appellant was denied notice of the proceedings or that the trial court acted in bad faith. Rather, the Appellant, through his counsel, chose not to engage with the proceedings. The consequences of that choice, regrettable as they may be, cannot be visited upon the appellate process without first exhausting the remedy specifically designed for this situation — an application to set aside the ex parte judgment.

For completeness, and to the extent the court is required to consider the evidence on record, the Respondent produced a certificate of official search and a Title Deed, both of which identify him as the registered proprietor of land parcel No. MBEERE/RIACHINA/2068. Under Section 24(a) of the Land Registration Act, No. 3 of 2012, registration of a person as the proprietor of land vests in that person absolute ownership of that land, together with all rights and privileges belonging or appurtenant thereto. The title deed is prima facie evidence of ownership.

Against this, the Appellant offered no documentary evidence and no oral testimony. His claim of adverse possession since the 1960s, even if credible, was required to be pleaded as a counterclaim and supported by evidence. The Appellant filed no counterclaim for adverse possession. In the absence of any evidence to rebut the Respondent's documentary proof of title, the trial magistrate's finding that the Respondent had discharged the burden of proof on a balance of probabilities was unimpeachable on the record as it stood.

CONCLUSION AND ORDERS

In the result, and for the foregoing reasons, this court makes the following findings:

1. The appropriate remedy for the Appellant's grievance that he was denied a hearing in the lower court was an application to set aside the ex parte judgment before the trial magistrate, which remedy the Appellant did not pursue.
2. This court, sitting as a first appellate court, cannot make findings of fact on matters never ventilated before the trial court, nor can it allow the Appellant to introduce through this appeal evidence that was never adduced below.
3. The Appellant has not demonstrated any basis upon which this court can interfere with the findings and orders of the trial magistrate.

4. The appeal is hereby dismissed.

5. The costs of this appeal are awarded to the Respondent.

It is so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 14TH DAY OF MAY, 2026.

HON. E.C CHERONO

ELC JUDGE, EMBU

In the presence of:

1. Mr Kiplimo holding brief Mugambi Njeru for the Appellant
2. Njeru Ithiga for Respondent
3. Ruth C/A