



**Kogo & 3 others v Toroitich (Environment and Land Appeal
E004 of 2024) [2025] KEELC 5474 (KLR) (16 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5474 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E004 OF 2024**

**L WAITHAKA, J
JULY 16, 2025**

BETWEEN

**WILSON CHERUTICH KOGO 1ST APPELLANT
BARNABA LOCHUMBA 2ND APPELLANT
CATHERINE KOIMA 3RD APPELLANT
EMILY KIMUTAI 4TH APPELLANT**

AND

SIMION KIBET TOROITICH RESPONDENT

*(Being an appeal from the judgment of Hon. Charles Kutwa SPM,
delivered on 17th April, 2024 in Iten SPMC ELC Case No. E013 of 2022)*

JUDGMENT

Background

1. This appeal is in respect of the judgment of Hon. Charles Kutwa SPM, delivered on 17th April, 2024 in Iten SPMC ELC Case No. E013 of 2022. Through the impugned judgment, the learned trial magistrate allowed the plaintiff's suit/claim against the defendants (appellants) by allowing prayers (a), (b) and (e) in the plaint, which are in the following terms: -
 - a. A permanent injunction restraining the defendants, their agents and/or servants from entering, trespassing, encroaching, ploughing, planting, cutting down trees, putting up illegal structure or dealing in any manner with the parcel of land known as Elgeyo Marakwet/ Kocholwo "A"/1758;
 - b. An eviction order;
 - c. Costs of the suit.



2. In allowing the plaintiff's claim, the learned trial magistrate stated/held: -

“...The defendants were served with a hearing notice for 14th February, 2024. They failed to attend court and as a result the plaintiff proceeded ex parte. The plaintiff testified that he is the absolute owner of parcel number Elgeyo Marakwet/Kocholwa “A”/1758. That the parcel was originally Kocholwa “A” Adjudication plot No.1440. The same went through the adjudication process and he was issued with title No. Elgeyo Marakwet/Kocholwa ‘A’/1758. The defendants did not call any evidence in support of their case. The defendants were served with the pleadings and a hearing notice but they failed and/or neglected to appear in court on various occasions....

The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation, the plaintiff is taken to have proved his case on a balance of probability in the absence of the defendant's evidence.

In the instant case, the plaintiff gave evidence which was not challenged and availed documents in support of his claim. The evidence on record shows that the plaintiff had no dealings with the defendants. The 2nd to 4th defendant engaged parties who had no capacity to deal with the land and the sale is illegal and invalid. I find the plaintiff's evidence to be credible and I am satisfied the plaintiff pleaded and proved his claim.

I therefore do allow the plaintiff's claim in terms of prayers No. (a), (b) and (e). The other prayers were not proved and the same are dismissed.”

3. The court record shows that the defendants were served with a hearing notice. That fact is borne out by the affidavit of service filed on 9th February, 2024. The affidavit of service indicates that the defendants acknowledged service of the hearing notice but declined to sign the process server's copy saying that they would look for another advocate. It is noteworthy that previously, the defendants were represented by an advocate who had successfully applied to cease acting for the defendants for want of instructions.
4. The court proceedings for 14th February, 2024 indicate that after the plaintiff testified and closed his case, the court directed parties to file submissions and slated the case for mention on 28th February, 2024.
5. On 28th February 2024, the plaintiff informed the court that they had filed submissions. The court slated the case for judgment on 10th April, 2024.
6. It is noteworthy that the proceedings of 28th February 2024 have no indication as to whether the defendants were served with the mention notice and/or the submissions filed by the plaintiff.
7. The court record shows that the defendants filed a notice of motion dated 8th April, 2024 inter alia seeking to set aside the orders closing the defence case. Directions were issued by Hon Karanja Virginia PM in respect of that application on 9th April, 2024 to the effect that the application be mentioned on 10th April, 2024 before the trial magistrate for directions.
8. The court record does not have any record of proceedings for 10th April 2024. The court record, in particular, the court proceedings, show that judgment was not delivered on 10th April, 2024 but on a later date, 17th April, 2024. In its judgment, the trial court does not allude to the application, so it not possible to tell whether it ever got seized of the application and gave directions as was expected to happen on 10th April, 2024.



The Appeal

9. After judgment was delivered, the defendants appealed to this court on grounds that the learned trial magistrate erred by:-
 - i. Denying them an opportunity to ventilate their grievance;
 - ii. Disregarding their application dated 8th April, 2024;
Failing to recognize that they have an inherent right to be heard and defend their case;
 - iii. Failing to take into account their statement of defence and documents when writing his judgment;
 - iv. Denying them a defense hearing date;
 - v. Unfairly and injudiciously denying them an adjournment to call witnesses;
 - vi. Condemning them unheard leading to miscarriage of justice
 - vii. Making an ex parte judgment which in effect amounts to facilitating stealing of a match from them;
 - viii. Failing to recognize that they were not served with the plaintiff's submissions in order for them to revert;
 - ix. Refusing to give them an opportunity to file their submissions;
 - x. Denying them audience thereby arriving at a judgment devoid of substantive justice;
 - xi. Failing to evaluate the totality of the evidence by shutting the defence case.
10. Contending that the judgment is against the weight of evidence hence erroneous and untenable in law, the appellants pray that the entire judgment be set aside; the lower court be ordered to re-open the defence case and that they be allowed to testify together with all their witnesses; that the lower court be ordered to recall the plaintiff for purposes of cross examination by the defense counsel and the defence case be re-opened and the defendants be allowed to defend their case; costs of the appeal and any other order that the court may deem fit for interest of justice.
11. Pursuant to directions given on 27th March 2025, the appeal was disposed off by way of written submissions.

Submissions

Appellant's submissions

12. In their submissions filed on 16th May 2025, the appellants have given an overview of the circumstances giving rise to the appeal and framed the main issue for determination to be whether the entire judgment of the lower court appealed from can be set aside, the lower court ordered to re-open the defence case and the plaintiff be recalled for purposes of cross examination.
13. Regarding that issue, the appellants have made reference to Article 50(1) and Article 159(2) (d) of *the Constitution* and the decisions in the cases of *Mbaki & others v. Macharia & Another* (2005) 2 EA; *Patriotic Guards Limited v. James Kipchirchir Sambu* (2018) eKLR and *Richard Nchapai Leiyangu vs IEBC & 2 Others* to underscore the importance of cases being decided on their merit and lamented



that in the instant appeal, their case was closed before they testified. They also lament that their attempt to secure their right to be heard was unsuccessful.

14. On who should bear the costs of the appeal, based on the principle that costs follow the event, the appellant urges the court to award them costs of the appeal.

Respondent's submissions

15. According to the respondent, the grounds of appeal raise issues that ought to have been litigated in the trial court. The respondent contends that the appellants did not prosecute their application dated 8th April 2024 and or file an application seeking to set aside the ex parte judgment delivered by the honourable court. As such, they are appealing against a nonexistent ruling. They are not disputing the merits of the judgment of the honourable court but rather a nonexistent order to their purported application.
16. As to whether the appeal is merited and/or rightly before court, it is contended that the appellant is not appealing against the merits of the judgment delivered on 17th April, 2024 but seeking orders that the judgment be set aside and the suit be reopened in order for the defendant to cross examine the plaintiff and tender their evidence.
17. Terming the reliefs sought in the appeal the same or similar to those sought in the appellants' application dated 8th April, 2024 which the appellants never prosecuted to its logical conclusion to warrant appeal on adverse orders, if issued against them; the respondent contends that the appellants did not file an application to set aside the judgment of the trial court as required by law. In that regard, reference is made to the provisions of Order 10 rule 11 and Order 12 rule 7 of the Civil Procedure Rules.
18. The respondent further submits that this court lacks jurisdiction to entertain the instant appeal as the appellant ought to have moved the trial court to set aside the court's judgment rather than file the instant appeal.
19. It is the respondent's case that the appeal is incurably incompetent for violating the mandatory provisions of Section 34 of the *Civil Procedure Act*.
20. The respondent maintains that the appellant ought to have moved the trial court, if they so wished, to set aside the impugned judgment and not jumped gun and filed the instant appeal.
21. Terming the prayers sought in the appeal untenable, the respondent submits that the judgment appealed from can only be set aside and/or varied in the same matter and not in an appeal.
22. The respondent maintains that there is nothing to show that the appellants challenged the judgment appealed from, by setting it aside or at the very least prosecuting their application dated 8th April, 2024 to warrant filing of an appeal to the orders of the trial court.
23. The respondent retaliates his contention that this court lacks jurisdiction to entertain the appeal and asserts that the appeal is incompetent.
24. The respondent has cited the cases of *Mbuthia & 6 Others vs. Mbuthia & 3 others* (2023) eKLR and *Kepue Ole Ngweta & Another vs. Sarah Njoki Munge* (2015) eKLR in support of his argument that the appeal offends the provisions of Section 34 of the *Civil Procedure Act* hence incompetent.



Analysis and determination

25. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see *Selle & another vs. Associated Motor Boat Co. Ltd* (1968) E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988) KLR 348.
26. From the pleadings filed in this case, the evidence and the submissions filed by the parties, I have noted several procedural flaws in the manner in which the proceedings were conducted thereby denying the appellant the right to a fair hearing. These include failure for the defendants to be served with a mention notice for submissions thereby denying them an opportunity to file submissions on the plaintiff's case despite having not presented their defence.
27. The defendants needed to be given an opportunity to address issues of law arising from the plaintiff's pleaded case. The trial court misdirected itself by suggesting that lack of offering evidence in support of the defendants' case meant that the plaintiff's suit was to be taken as proven. Failure by the defendants to offer evidence in support of their pleaded case neither took away the duty imposed on the plaintiff by Section 107 of the *Evidence Act* to prove his pleaded case to the required standard of proof nor took away the defendants' right to file submissions raising issues of law arising from the plaintiff's case like whether or not the evidence adduced by the plaintiff sufficed to prove his case to the required standard. Had the court properly directed itself on the issue of need to accord the defendants an opportunity to at least participate in the case by filing submissions, the trial court would not have set the case for delivery of judgment without confirming whether the defendants were served with a mention notice for purpose of confirming filing of submission and/or without satisfying itself that the defendants had been served with the plaintiff's submissions.
28. The case before the court being a land dispute hence not subject of an interlocutory judgment, the trial court ought to have at least afforded the defendants an opportunity to file submissions. Denial of the opportunity to file submissions, in the circumstances of this case, amounted to violation of the defendants' right to a fair hearing under Article 50 of *the Constitution*, entitling the defendants to challenge the decision on appeal as they did. In view of the foregoing, I do not agree with the respondent's submission that the appeal is incompetent and/or bad in law.
29. There is also an issue touching on the application dated 8th April, 2024 which the defendants filed seeking to set aside the order closing their case. There is no explanation as to why the trial court did not address it in its judgment or other proceedings. It is the considered view of this court that unless the application was not brought to the attention of the court, which fact is not apparent or even inferable from the court record, the trial court ought to have made a decision concerning that application one way or the other before pronouncing its judgment. Pronouncement of a judgment during the pendency of the defendants' application seeking to set aside the order closing their case is clearly a violation of the defendant's right to be heard on that application hence a violation of their right to a fair hearing enshrined in Article 50 of *the Constitution*.
30. In view of the foregoing, I find the defendants' appeal to be merited and allow it as prayed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ITEN THIS 16TH DAY OF JULY, 2025.

L. N. WAITHAKA



JUDGE

In the presence of:

Ms. Mutai for the appellants.

Ms. Kibet h/b for Mr. Kibii for the Respondent.

Court Assistant; Ian.

