



**Kimutai v Kiyeng & 27 others (Environment and Land Appeal  
E009 of 2022) [2024] KEELC 1522 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1522 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL E009 OF 2022  
L WAITHAKA, J  
MARCH 20, 2024**

**BETWEEN**

**WILLIAM KIPKOECH KIMUTAI ..... APPELLANT**

**AND**

**PAUL KIYENG & 27 OTHERS ..... RESPONDENT**

*((Being an Appeal from the Ruling of Hon. C. A. Kutwa SPM  
in Iten MC ELC No. E024 of 2022 delivered on 3rd April, 2022))*

**JUDGMENT**

1. This appeal is in respect the ruling, order and/or decision of Hon. C.A Kutwa SPM made on 3<sup>rd</sup> August 2022 in Iten SPMC MELC No. E024 of 2022. Through the impugned decision/order the learned trial magistrate issued an order of temporary injunction restraining the defendants /respondents from trespassing onto or in any other way interfering with the plaintiffs/applicants' ownership, possession, occupation and use of land titles No. Elgeyo Marakwet/Sangurur/2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518 and 2519 pending the hearing and determination of the suit. The learned magistrate also ordered the O.C.S Kapsowar Police Station to oversee compliance with the court order.
2. Aggrieved by the order/decision of the learned trial magistrate, William Kipkoech Kimutai, who is sued as the 1<sup>st</sup> defendant in the suit before the lower court, appealed to this court on 16 grounds that can be reduced to one broad ground namely, that the learned magistrate did not properly exercise the discretionary power vested in him of deciding whether or not to allow the defendants /respondents application for extension of time within which they ought to have filed a response to the plaintiff/ applicant's application.
3. The learned trial magistrate is also faulted for failing to give reasons for his decision.
4. From the grounds of appeal and the submissions by the parties, the sole issue for the court's determination is whether the learned trial magistrate properly exercised the discretionary power



vested in him when he denied the appellant's application for leave to file a response to the plaintiff/respondent's application for injunction.

5. As I pointed out in the ruling, delivered by this court on 26<sup>th</sup> March 2023 in respect of the appellant's application for stay of execution of the order appealed from, the question as to whether or not the trial magistrate exercised the discretionary power vested in him to allow or deny the application for adjournment and make orders incidental to that exercise of the discretionary power are matters of law to be determined upon review of the totality of evidence and circumstances surrounding the issuance of the impugned orders and the reasons, if any given by the trial magistrate for the decision taken.
6. The circumstances leading to issuance of the impugned decision or order are captured in the lower court's proceedings of 3<sup>rd</sup> August 2022 thus:-

“Kenei-It is for inter partes hearing. The application is not opposed. The same was served.

Isiji-I did file an application dated 1.8.2022. It is for mention. The same was served. I seek for 14 days to respond to my colleague's application.

Kenei- my colleague has confirmed that he has not filed a response to the application. The application of the defendant cannot be deemed to be a response. No reason has been given why a response was not filed. The 2<sup>nd</sup> to 17<sup>th</sup> respondents have not responded to the application. My application can be allowed.

Court: I note that the 1<sup>st</sup> defendant was served with pleadings. In his own wisdom he decided to file an application to discharge the orders instead of filing a response to the application dated 15.7.2022. The same applies to the 2<sup>nd</sup> to 17<sup>th</sup> defendants. In the premises, I do allow the application dated 15.7.2022. The application dated 1.8.2022 to be heard by way of written submissions.”

7. The proceedings also indicate that the 2<sup>nd</sup> to 17<sup>th</sup> defendants were present in court on that day but there's no indication as to whether they were given opportunity to address the court and if they were, what they told the court.
8. A review of the court's record shows that the 17<sup>th</sup> defendant was not a party to the suit and the application. He was to be introduced to the suit through the defendant's application dated 1<sup>st</sup> August, 2023. That being the case, there is no way the 17<sup>th</sup> defendant (proposed defendant) would have been served with the application dated 15<sup>th</sup> July 2022 yet he was not a party to the suit and the application.
9. In the circumstances, I agree with the appellant's submission/contention that the learned trial magistrate misdirected himself when he determined that the 17<sup>th</sup> defendant had been served with the application but failed to file a response.
10. The submissions by the 14<sup>th</sup> to 25<sup>th</sup> and 27<sup>th</sup> respondents raise an issue concerning the correctness or completeness of the proceedings of 3<sup>rd</sup> August, 2022.
11. The submissions are to the effect that the 14<sup>th</sup> to 25<sup>th</sup> respondents and the 27<sup>th</sup> respondent were present in court on 3<sup>rd</sup> August 2022 and that they sought to be given time to file their response which fact is not captured in the court's proceedings.
12. If indeed the 14<sup>th</sup> to 25<sup>th</sup> and 27<sup>th</sup> defendant/respondents made that application, it was the duty of the trial court to not only record that prayer but also to consider it and make a decision thereon.
13. I note that the learned trial magistrate did not properly account for the exercise of the discretion vested in him in determining whether or not the plaintiff/applicant had made a case for being granted



the orders sought. He allowed the application merely on the ground that it was undefended yet the appellant had filed an application to set aside the ex parte orders of the court, a fact which the trial court was not only aware of but also seized of.

14. As was stated in the case of *Kridha Limited V. Peter Salai Kituri* (2020) e KLR, in exercise of the judicial discretion vested in him, the learned trial magistrate had a duty to account for his decision by explaining the basis of his decision, which duty he failed to properly discharge in this case.

“A judge or magistrate exercising judicial discretion bears the burden of accounting for their decision and in order to discharge this burden the judge or magistrate ought to explain the basis of their decision.”

15. The proceedings of 3<sup>rd</sup> August 2022 do not indicate whether the 14<sup>th</sup> to 25<sup>th</sup> respondents and the 27<sup>th</sup> respondent were present in court and whether or not they made the application they claim to have made.

16. In *United India Insurance Co. Ltd v. East African Underwriters (Kenya) Limited* (1985) E.A Madan J.A (as he then was) held:-

“The court of appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given a decision different to that given by the judge to the various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrongly.

17. Based on the foregoing observations and the decisions in the above cited authorities, I am satisfied that the appellant has made up a case for interference with the decision/order appealed from. Consequently, I allow the appeal with costs to the appellant.

18. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 20<sup>TH</sup> DAY OF MARCH, 2024.**

**L. N. WAITHAKA**

**JUDGE**

**Judgment delivered virtually in the presence of:-**

Mr. Isiji for the appellants

Ms. Chelugoi holding brief for Mr. Kenei for the 1<sup>st</sup> to 13<sup>th</sup> respondents

Alfred Kiptoo (22<sup>nd</sup> respondent) holding brief for 14<sup>th</sup> – 21<sup>st</sup> respondents, 23<sup>rd</sup> to 25<sup>th</sup> and 27<sup>th</sup> respondent

N/A for 26<sup>th</sup> & 28<sup>th</sup> respondents

Court Asst.: Christine

