Mwachala v Msafari & 3 others (Civil Appeal E024 of 2022) [2025] KECA 1142 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1142 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E024 OF 2022

SG KAIRU, KI LAIBUTA & GWN MACHARIA, JJA

JUNE 20, 2025

BETWEEN

MILLICENT ZIGHE MWACHALA .... APPELLANT

AND

JEREMIAH MGHANGA MSAFARI .... 1ST RESPONDENT

CHRISPUS MWACHALA PAKA .... 2ND RESPONDENT

TRUSTEES OF THE ASSOCIATION OF JEHOVA'S WITNESSES (EA) .... 3RD RESPONDENT

LAND REGISTRAR – WUNDANYI .... 4TH RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (J. N. Onyiego, J.) delivered on 23rd December 2021 in Family Appeal No. E011 of 2021)

JUDGMENT

1. By a plaint dated 3rd September 2019 and amended on 10th August 2020, the appellant, Millicent Zighe Mwachala, sued Chrispus Mwachala Paka, the Trustees of the Association of Jehovah's Witnesses in East Africa (the Association) and the Lands Registrar, Wundanyi (the 2nd, 3rd and 4th respondents respectively) in the Senior Resident Magistrate's Court at Taveta in ELC Case No. 10 of 2019 praying for:

   > " 1. A declaration that the suit property known as Plot Number Taita Taveta/Kimala Mata/4X9 measuring approximately five (5) acres forms part of matrimonial property.
   >
   > 1A. A declaration that the suit property known as Plot Numbers Taita Taveta/Kimala Mata/1XX7, Taita Taveta/Kimala Mata/4X9, Kimorogo/

Mboghoni/1X7 & Starehe Kamili/Mwanza Ngombe Allotment No. 75 forms part of matrimonial property.

2. An order of a permanent injunction restraining all [the] Defendants either by themselves or through their agents/servants and or employees from transferring, constructing, selling, charging or otherwise dealing in any manner with the said property known as Plot Number Taita Taveta/Kimala Mata/4X9.

2A. An order of a permanent injunction restraining all [the] Defendants either by themselves or through their agents/servants and or employees from transferring, constructing, selling, charging or otherwise dealing in any manner with the said property known as Plot Numbers Taita Taveta/Kimala Mata/1XX7, Taita Taveta/Kimala Mata/4X9, Kimorogo/Mboghoni/1X7 & Starehe Kamili/Mwanza Ngombe Allotment No. 75.

3. Costs and interest at court rates.

4. Any other further relief that the court deems just and fit."

2. The appellant's case was that she was married to the 2nd respondent; that the 2nd respondent entered into an agreement to sell and did sell part of the suit property known as parcel No. Taita Taveta/Kimala Mata/4X9, to the 3rd respondent without her knowledge and consent; that upon discovery of the sale, she lodged a caution on 12th June 2019 to prevent transfer of the suit property to the 3rd respondent; that the 2nd respondent procured removal of the caution; that the 4th respondent failed to notify her of the removal thereof or call for a hearing before its removal; and that the 2nd respondent was in the process of disposing off the family properties specified in prayer 1A of the plaint.

3. In his Statement of Defence dated 20th September 2019, the 2nd respondent denied the appellant's claim and stated that he had been separated from the appellant for a period of thirty (30) years; that he had acquired the properties aforesaid in her absence while they were so separated; that the appellant had no right to deny him the right to dispose of the suit property; and that she had not made any contribution towards acquisition of any of the said properties. He prayed that her suit be dismissed with costs.

4. By a Statement of Defence dated 25th August 2020, which is not on the record as put to us, but which is alluded to in the impugned judgment, the 4th respondent stated that the caution lodged by the appellant was removed after the 2nd respondent wrote a letter dated 24th June 2019 requesting for its removal; and that, the appellant having failed to respond to the notice issued by the Registrar to the cautioner to file any objection to the removal, the same was procedurally removed upon expiry of 30 days' notice.

5. The trial court's record does not contain the Statement of Defence (if any) filed by the 3rd respondent.

6. In its judgment dated 12th November 2020, the trial court (Khapoya S. Benson, PM) allowed the appellant's suit and declared the properties in issue as forming part of matrimonial property. In addition, the learned Magistrate issued a permanent injunction restraining the respondents from dealing with the suit properties otherwise than with spousal and family consent. The court ordered that each party bears their own costs of the suit.

7. By a Notice of Motion dated 10th December 2020 filed pursuant to Order 45 rule 1 of the Civil Procedure Rules, 2010 the 1st

respondent, Jeremiah Mghanga Msafari, sought: orders to stay execution of the trial court's judgment and decree; leave to be joined as an interested party to the suit; review of the trial court's judgment and orders to set it aside; leave to file pleadings in the suit; orders that the case be heard de novo; and costs of the application.

8. The 1st respondent's Motion was supported by his affidavit sworn on 10th December 2020 essentially deposing to the grounds on which his application was anchored, namely: that, vide a sale agreement dated 23rd September 2019, he purchased one of the suit properties, to wit, parcel No. Kimorigo/Mboghoni/1X7 from the 2nd respondent for a consideration of Kshs. 650,000/-; that he was granted vacant possession thereof the very next day; that he conducted due diligence prior to purchase of the subject property; that he obtained the original title document to the suit property as registered in his name on 15th September 2020; that he was not privy to any judicial proceedings relating to its ownership; that he only became aware of the appellant's suit when he was served with a copy of the decree on 1st December 2020; and that the decree was obtained without material disclosure of the ownership status of the suit property.

9. In opposition to the 1st respondent's Motion, the appellant filed a replying affidavit sworn on 17th December 2020 stating, inter alia: that, as at the time of purchasing the suit property, there was in existence a court order restraining all dealings therewith; that the 1st respondent was aware of the suit at the time of purchase of the suit property; that her daughter, one Elizabeth Mwachala, informed the 1st respondent of the existence of the suit and requested for a copy of the sale agreement; that the 1st respondent denied purchasing the property and declined to supply her with a copy of the sale agreement; that the 1st respondent cannot be joined as an interested party; and that the application was fatally defective and incurable, and that the orders sought cannot issue.

10. In response to the appellant's replying affidavit, the 1st respondent filed a supplementary affidavit sworn on 17th December 2020 reiterating the contents of his supporting affidavit in addition to which he stated that he was not aware of any suit over the property; and that it was only fair that he be accorded an opportunity to ventilate his claim over the suit property in line with *the Constitution*. In conclusion, he contended that natural justice commanded that he had the right to be heard.

11. We find nothing on record to suggest that any other respondent filed any reply to the 1st respondent's Motion, or to the appellant's replying affidavit.

12. In its ruling dated 8th April 2021, the trial court (Khapoya S. Benson, PM) dismissed the 1st respondent's Motion in its entirety with costs to the appellant. According to the learned Magistrate:

> "The applicant herein is staking claim to the suit property. He claims he bought the suit property from the defendant [2nd Respondent] and therefore he is asserting his ownership rights. It is indeed [a]settled legal position that an interested party is not the principal party to the proceedings and can only participate by assisting either of the parties or making submissions to help [the] court."

13. Dissatisfied with the trial court's decision, the 1st respondent moved on appeal to the High Court of Kenya at Mombasa in Family Appeal No. E011 of 2021 on 12 grounds. In summary, he faulted the learned Magistrate for, inter alia: failing to recognize that the 1st respondent had the right to be heard, but that he condemned him unheard; proceeding to make a judgment altering a title deed No. Kimorigo/Mboghoni/1X7 without requiring its production; allowing introduction of an amended plaint after close of the pleadings without leave of the court being sought and obtained; not recognizing that the subject title was inherited land and not matrimonial property; allowing amendment of the

plaint without joinder of the 1st respondent; not recognizing and considering the 1st respondent's supplementary affidavit sworn on 17th December 2020 in response to the appellant's replying affidavit; concluding that the 1st respondent was fully aware of the subject proceedings; holding that the court was functus officio, and that the ruling was not supported by law or evidence.

14. The learned Judge narrowed the issues in contention to two (2), namely whether the 1st respondent was aware of the subject proceedings before the lower court; and whether he was entitled to be joined as an interested party. Allowing the appeal, the learned Judge (J. N. Onyiego, J.) had this to say in determination of the two issues:

> "24. … there is no evidence whether by way of return of service or otherwise that the appellant was aware of the proceedings. Although one might argue that the 2nd respondent ought to have revealed to the appellant of the pending proceedings, it is also possible that the 2nd respondent may have kept it as a secret with the intention of getting money.
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> … ….
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> 33. It is trite that joinder of an interested party is meant to safeguard parties who may otherwise be ignored or side lined by a malicious party/s with the sole purpose of disenfranchising a party's inalienable right of being heard before being condemned. Further, it is cost saving as it avoids multiple suits when one suit can solve the claim once and for all. It is my finding that the appellant is entitled to a hearing as an interested party being the registered owner of the property in question. His claim should not be dismissed prematurely by being denied the right of hearing. There is no greater prejudice in starting the case de novo than denying the appellant the right to be heard."

15. Aggrieved by the learned Judge's decision, the appellant moved to this Court on appeal on 6 grounds set out in her memorandum of appeal dated 7th March 2022 contending that the learned Judge erred in law and fact by: failing to find that the 1st respondent could not be joined in the suit as an interested party while claiming ownership of the suit property; failing to find that joinder of a party is not legally permissible after judgment has been entered and decree extracted; finding that the 1st respondent was not aware of the proceedings before the trial court; finding that the doctrine of les pendence was not binding on the 1st respondent; interfering with the trial court's discretionary powers; and by failing to consider the evidence adduced by the appellant when arriving at his decision.

16. In support of the appeal, learned counsel for the appellant, Mr. Nyange Sharia, filed written submissions dated 8th January 2025 citing 7 judicial authorities, including the cases of Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others [2013] eKLR, arguing that a suit is a solemn process owned solely by the parties; James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR; and Methodist Church in Kenya v Mohamed Fugicha & 3 Others [2013] eKLR, submitting that a Motion to set aside a judgment cannot be brought by an interested party or any other party other than a defendant; JMK v MWM & Another [2015] eKLR, submitting that a stranger cannot be allowed to participate in a case once judgment is delivered, and that joinder of parties cannot be made post judgment; Bellamy v Sabine [1857] 1 De J 566; and Mawji v US International University & Another [1976] KLR 185, submitting on the purpose of the doctrine of lis pendens; and United India Insurance Company Limited v East African Underwriters (Kenya) Limited (1985) EA 898, submitting on the power of the Court on appeal to interfere with the discretionary decision of the Judge appealed from. They urged us to allow the appeal with costs.

17. In rebuttal, learned counsel for the 1st respondent, M/s. Muriithi & Masore Law, relied on their written submissions filed at the High Court and a list of authorities and case digest dated 31st January 2025 filed in this Court. Counsel cited 3 judicial authorities, namely: Mwita v Woodventure (K) Ltd & Another [2022] KECA 628 (KLR), submitting that the jurisdiction of the 2nd appellate court is limited to consideration of matters of law; Alton Homes Limited & Another v Davis Nathan Chelogoi & Others [2019] KEELC 1122 (KLR), submitting that a registered land owner has the right to be heard by way of joinder as an interested party even after judgment has been delivered; and Alton Homes Limited & Another v Davis Nathan Chelogoi & Others [2020] KECA 326 (KLR) where this Court upheld joinder of the registered owner as an interested party.

18. When the appeal came for hearing on the Court's virtual platform on 4th February 2025, the appellant withdrew her appeal as against the 2nd and 3rd respondents, whereupon counsel for the appellant and for the 1st respondent proceeded to make oral highlights of their respective submissions on the issues raised.

19. Unless otherwise provided, this Court's mandate on 2nd appeal is limited to points of law. Section 72 (1) of the *Civil Procedure Act* provides that:

> 72. Second appeal from the High Court
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> 1. Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—
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>   a. the decision being contrary to law or to some usage having the force of law;
>
>   b. the decision having failed to determine some material issue of law or usage having the force of law;
>
>   c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

20. In Stanley N. Muriithi & another v Bernard Munene Ithiga

[2016] eKLR, this Court held that:

> "We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law."

21. In the same vein, this Court held thus in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR:

> "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have

considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:

> 'We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 198 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.'"

22. In our considered view, four main issues of law arise for our determination, namely: (i) whether the 1st respondent was entitled to be joined as an interested party in the suit before the trial court post judgment of the learned Magistrate; (ii) whether the learned Judge was at fault in holding that the doctrine of lis pendens did not apply to the 1st respondent; (iii) whether the learned Judge was at fault in interfering with the discretionary decision of the trial Magistrate; and (iv) whether the learned Judge was in error in allowing the 1st respondent's appeal in its entirety, and in directing that the suit before the trial court be heard de novo by a Magistrate other than Khaboya S. Benson.

23. On the 1st issue as to whether the 1st respondent was entitled to be joined as an interested party post judgment of the trial court, the first appellate court found that the 1st respondent, being the registered proprietor of the suit property, was entitled to a hearing as an interested party; that his claim should not have been dismissed prematurely by being denied the right to be heard; and that there was no greater prejudice in starting the case de novo than denying the appellant the right to be heard.

24. Taking issue with the learned Judge's decision, counsel for the appellant submitted on the authority of Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others (supra) that a suit is a solemn process owned solely by the parties and that, by implication, the 1st respondent had no part in, and could not be joined as an interested party therein; and that only a defendant could move the court to set aside the trial court's judgment.

25. Citing the cases of Alton Homes Limited & Another v Davis N athan Chelogoi & Others (supra), counsel for the 1st respondent submitted that a registered land owner has the right to be heard by way of joinder as an interested party even after judgment has been delivered. On the authority of Alton Homes Limited & Another v Davis Nathan Chelogoi & Others (supra), counsel drew our attention to the fact that this Court had upheld joinder of the registered owner of the suit property as an interested party post judgment of the trial court.

26. In the legal context, an "interested party" refers to someone who has a recognizable stake in a matter, meaning that they are directly affected by the outcome, or have a legal interest that could be impacted. Essentially, they are not a direct party to the lawsuit but have a vested interest in the proceedings. With the exception of the *Supreme Court Act*, 2011 and the Supreme Court Rules, 2012 none of the parent Acts defines an interested party. However, *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules) were promulgated to minimize the injustice that had, for long before the promulgation of the 2010 Constitution, permeated the justice system in Kenya by denying persons who had an interest in judicial or tribunal proceedings the right to be joined thereto on the ground that they lacked the requisite locus standi, precisely the ground on which the appellant moved to exclude the 1st respondent from the proceedings in the trial court and on 1st appeal to the superior court.

27. It is not lost on us that, in principle, for one to be joined in certain proceedings with intent to procure a merit decision, those proceedings have to be pending before the trial court. In Leonard Kimeu Mwanthi v Rukaria M'twerandu M'iringu; Nathaniel Kithinji Ikiugu & 4 others (Intended Interested Parties) [2021] eKLR, Justice L. Mbugua aptly stated that "a party claiming to be enjoined in proceedings must have an interest in the pending litigation ...." In other words, the proceedings should still be alive in the trial court: they could be at the nascent or other stages, but must be alive (See also the Supreme Court's decision in Everton Coal Enterprises Limited v Karanja & 5 others [2023] KESC 98 (KLR) where the Court held that "... a party will only be added to on-going proceedings in order to enable the court adjudicate fully upon and settle all the questions involved in the particular proceedings before it").

28. Discussing the issue of joinder of parties, this Court in Central Kenya Ltd v Trust Bank Limited & 4 others [1996] KECA 197 (KLR) held that:

> "We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code (supra), quoting as authority decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings ...; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.". [Emphasis added] (see also this Court's decision in JMK v MWM & Another [2015] eKLR where the Court stressed the principle that "... an application for joinder of parties can be filed only in pending proceedings."

29. The meaning of (a court becoming) functus officio was rendered in Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) (2014) eKLR as follows:

> " The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued ...." [Emphasis ours]

30. In view of the foregoing, it is safe to conclude that where a party seeks to alter the merits of the judgment of the court with issues that are sought to be introduced by the proposed interested party, the court will be extremely hesitant to venture into that 'mine' field. Thus, it will not grant the proposed party opportunity to be part of the long- gone proceedings because its purpose shall have been served. Be that as it may, the principle as enunciated in the afore-cited authorities does not of itself bar subsequent proceedings on appeal by the interested party in determination of which the appellate court may breath new life to the competing claims by setting aside the trial court's decision and remitting the matter for hearing de novo as did the superior court. To our mind, that is the scenario contemplated in the *Supreme Court Act* and the Rules made thereunder, and in the Mutunga Rules.

31. Rule 2 of the Mutunga Rules defines an interested party as "a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation." The determining basis for joinder would be the establishment of a link between the substratum or subject matter of the proceedings at hand and a direct interest by, and prejudice to, a person seeking leave of the court to be joined as an interested party.

32. It is not in dispute that the proceedings in which the 1st respondent sought to be joined had come to an end, and hence his Motion for joinder, review and setting aside of the judgment to pave way for hearing de novo to ventilate his claim over the suit property. Notwithstanding the fact that he was the registered proprietor of the suit property with an identifiable stake and legal interest in the suit, the appellant and the 2nd respondent intentionally concealed the existence of, and excluded him from, the proceedings in the trial court. Consequently, far-reaching orders were made thereby putting him at the risk of dispossession of his property without being heard. Indeed, unless he was accorded the opportunity to state his case, he stood to be condemned unheard and unduly prejudiced by the trial court's decision (see: Judicial Service Commission v Speaker of the National Assembly & another [2013] eKLR).

33. By reason of the matters aforesaid, the 1st respondent stood condemned unheard in breach of his constitutional right to property under Article 40 as well as his right to be heard under Article 50 of *the Constitution*. It is for these profound reasons that he moved to the superior court on appeal against the trial court's decision to deny him the orders sought to set aside or review its decision and allow his joinder as a party in fresh proceedings to facilitate ventilation of the parties' competing claims on merit. Otherwise, he stood to suffer grave injustice.

34. The pertinent question is whether the 1st respondent was an interested party properly so called with the right to be joined in the proceedings before the trial court; and, if so, when could such joinder be allowed. It is indubitable that the 1st respondent was and still is an interested party with regard to the proceedings relating to the suit property of which he was the registered proprietor, and in respect of which he was unfairly excluded to his prejudice. It is the exclusion of the 1st respondent from the proceedings instituted by the appellant against, inter alia, the 2nd respondent, who was her former husband, that prompted him (the 1st respondent) to move the trial court for joinder, review and setting aside of the judgment and, thereafter, hearing de novo on the merits of their competing claims.

35. To avoid disenfranchising the 1st respondent's inalienable right to be heard before being condemned, the learned Judge set aside the trial Magistrate's decision and allowed joinder as prayed by reason of the fact that the 1st respondent was an interested and necessary party to the proceedings in the trial court. In his judgment, the learned Judge correctly held that "… the appellant [was] entitled to a hearing as an interested party being the registered owner of the property in question." According to the learned Judge, "… His claim should not [have been] dismissed prematurely by being denied the right of hearing. There is no greater prejudice in starting the case denovo than denying the appellant the right to be heard".

36. This Court in Alton Homes Limited & another v Davis Nathan Chelogoi & 5 others [2020] KECA 326 (KLR)affirmed the trial court's decision in Alton Homes Limited & another v Davis Nathan Chelogoi & 2 others; Joshua Omondi Hallonda & 2 others (Interested Parties) [2019] KEELC 1122 (KLR) where the learned Judge had this to say:

> "It is not in doubt that the right to be heard is a valued right and which is enshrined in our Constitution. This right was not observed herein because for reasons not made clear to this court, the 2nd defendant failed to bring on board the 1st interested party whom he sold his suit property to thus orders were issued by this court which Orders have adversely affected the 1st interested party. *The Constitution* of Kenya is very clear on the right to protection of one's property and the said property cannot be arbitrarily taken away from such an owner without being heard or without being accorded an opportunity to ventilate his case."

37. As the Court rightly concluded in dismissing the appeal in the afore-cited case of Alton Homes Limited & another v Davis Nathan Chelogoi & 5 others (supra):

> " decisions reached in breach of the rules of natural justice are liable to be set aside as of right." See: Onyango v Attorney General (1986-1989) EA 456; Mbaki others v Macharia & another [2005] 2 EA 206 ; and Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR.

38. Turning to the 2nd issue as to whether the learned Judge was at fault in concluding that the doctrine of lis pendens did not bind the 1st respondent, we hasten to observe that this is an issue that might well arise in the fresh trial of the parties' claims consequent upon our determination of the instant appeal to that end. Accordingly, we consider it inappropriate for us to express any substantive views or pronounce ourselves thereon lest we pre-empt or embarrass the trial court.

39. Turning to the 3rd issue as to whether the learned Judge was at fault in interfering with the discretionary decision of the trial Magistrate, we take to mind the hallowed principle that "to whom much is given, much is required." One of the latitudes given to judges and judicial officers in the course of their work is judicial discretion.

40. Black's Law Dictionary (10th Edition) defines judicial discretion as:

> " The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

41. While the learned Judge appreciated the principles governing joinder of interested parties in judicial proceedings, he was not at fault in setting aside the trial Magistrate's decision by reason of the fact, inter alia: that the 1st respondent had a right of appeal against the trial Magistrate's ruling and orders; that he was an interested and necessary party in determination of the dispute relating to the suit property of which he was the registered proprietor; that, to his prejudice, he had been intentionally excluded from the proceedings in the trial court in which adverse orders were made with the possible effect of dispossessing him of the property without being heard; that, in effect, he was condemned unheard; that the learned Judge properly exercised his powers under section 78 of the *Civil Procedure Act*; and that the only relief available to the 1st respondent to remedy the apparent breach of his property rights under Article 40 as well as the right to be heard pursuant to Article 50 of *the Constitution* was by setting aside the trial court's decision and remitting the case for hearing de novo upon joinder of the 1st respondent as an interested party.

42. To our mind, the learned Judge's decision was in accord with the celebrated maxim that equity will not suffer a wrong to be without a remedy (see: Khushi Motor Limited v Obuya [2024] KEHC 3757 (KLR); and Mbogo & Another v Shah [1968] EA 93 where the court set out the grounds on which it may interfere with the judicial decision of the lower court). Put differently, where there is a right there is a remedy as expressed in the Latin Maxim "ubi jus ibi remedium", meaning that no wrong should go unredressed if it is capable of being remedied by courts as was the 1st respondent's case.

43. Closely linked to the 2nd is the 3rd issue with regard to which we hasten to observe that, in exercise of its appellate jurisdiction under the *Civil Procedure Act* (Cap. 21), the High Court has power to review and rectify errors in lower court decisions, ensuring fair administration of justice. This includes the power to call for records, provide directions, make orders, including orders to remand a case for retrial by the subordinate court.

44. Section 78 of the Act provides:

> 78. Powers of appellate court
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> (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
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> a. to determine a case finally;
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> b. to remand a case;
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> c. to frame issues and refer them for trial;
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> d. to take additional evidence or to require the evidence to be taken;
>
> e. to order a new trial.

45. Section 78 of Cap. 21 is in accord with Article 165(3) of *the Constitution*, which provides:

> 3. Subject to clause (5), the High Court shall have—
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> a. unlimited original jurisdiction in criminal and civil matters;
>
> … …;
>
> (e) any other jurisdiction, original or appellate, conferred on it by legislation.

46. Section 78 of Cap. 21 is couched in no uncertain terms. It confers on the High Court (as well as courts of equal status) appellate jurisdiction and power to confirm, reverse, or vary decisions from lower courts, as well as remit proceedings back to the lower court with specific directions. It also has the power to order a new trial and make any orders necessary for the proper administration of justice. In short, the High Court (and, by extension, the ELC) can review the decision of a lower court on appeal and confirm it if it finds no error or injustice (see: Slock Construction Limited v Eric Odhiambo Odongo [2022] eKLR). That answers the question as to whether the learned Judge's decision to set aside the trial court's decision and order the 1st respondent's joinder and determination of the competing claims at a fresh hearing was of itself in contravention of statute law or procedure. Accordingly, we reach the conclusion that the learned Judge was not at fault in making the impugned decision. Accordingly, it goes without saying that the learned Judge was not in error in allowing the 1st respondent's appeal in its entirety, and in directing that the suit before the trial court be heard de novo before any Magistrate other than Khaboya S. Benson, and for good cause.

47. The Supreme Court of India in Mohd. Hussain @ Julfikar Ali vs. State (Govt. of NCT of Delhi) (2012) 9 SCC 408, held that:

> "A de novo trial or retrial … … should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice.… The guiding factor for retrial must always be demand of justice." [Emphasis ours]

48. Likewise, the Environment and Land Court on Appeal in Ohando v Akama & 4 others [2023] KEELC 21537 (KLR) persuade us that:

> "the hearing of a suit de novo affords a party a right to fair hearing as set out in Article 50 of *the Constitution* but this has to be balanced with the right of a litigant to have his suit expeditiously disposed of as envisaged in Article 159(2)(b) of *the Constitution* of Kenya and Sections 1A and 1B of the *Civil Procedure Act*."

49. Having carefully considered the record as put to us, the grounds of appeal, the rival submissions of learned counsel, the cited authorities and the law. We find that the appeal fails and is hereby dismissed in its entirety with costs to the 1st respondent. Consequently, the Judgment and Decree of the High Court of Kenya at Mombasa (J. N. Onyiego, J.) delivered on 23rd December 2021 is hereby upheld.

50. Orders accordingly.

DATED AND DELIVERED AT MALINDI THIS 20TH DAY OF JUNE, 2025

S. GATEMBU KAIRU, FCIARB.

....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

...

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR