



REPUBLIC OF KENYA



KENYA LAW
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Owino v Ochere (Civil Appeal 5 of 2020) [2023] KEHC 367 (KLR) (23 January 2023) (Judgment)

Neutral citation: [2023] KEHC 367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY**

CIVIL APPEAL 5 OF 2020

KW KIARIE, J

JANUARY 23, 2023

BETWEEN

JOSEPH AKONGO OWINO APPELLANT

AND

JOSEPH OTIENO OCHERE RESPONDENT

(Being an Appeal from the ruling and order in Homa Bay Chief Magistrate's Succession Cause No.28 of 1990 by Hon. Tom Mark Olando –Senior Resident Magistrate)

JUDGMENT

1. On January 24, 2019 Hon Tom Mark Olando dismissed an application for revocation of grant dated March 18, 2019. The appellant was aggrieved by the said ruling and filed this appeal. He was represented by the firm of H Obach & Partners. He raised the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and/or in fact by ignoring the appellant's evidence and treating it superficially.
 - b. That the learned trial magistrate's judgment [sic] does not capture the issue(s) for determination, the determination thereof and the reasons for such determination. Consequently, the judgment [sic] of the learned trial judge is partially unfair, unjust and sanctions illegalities and abuse of the process of the honorable court.
 - c. That the leaned trial magistrate erred in fact and in law in finding and holding that the respondent herein had proved and or established his case against the appellant herein and thus warranting judgment [sic] in his favour, notwithstanding the evident and apparent contradictions between the pleadings and the evidence on record.
 - d. That in finding and holding that the respondent had proved his case, the learned trial magistrate, failed to appreciate and or discern the veracity of the evidence tendered by the appellant, which in any event, was incredible.



- e. That the learned trial magistrate erred in law and fact in that he disregarded the appellant's submissions and judicial authorities with the resultant miscarriage of justice to the appellant.
 - f. That the learned trial magistrate erred in law and fact by failing to evaluate the entire evidence on record and make a finding that the respondent had proved his case against the appellant on a balance of probability and thereby arrived on wrong findings on the issues before the court.
2. The appeal and submissions were served upon the firm of Kerario Marwa & Company Advocates. They did not file any response or submissions.
 3. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs Associated Motor Boat Co Ltd [1965] EA 123*, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
 4. Though the trial magistrate and the appellant termed the decision as a judgment, it was a ruling for it emanated from an application for revocation. This is merely a misdescription that will not affect the outcome of this appeal.
 5. At the time of hearing of the application before the trial court, it emerged that there were rival claims over parcel of land number Gem/Kajulu/ 37. The same parties had a pending dispute over the same parcel of land at Migori Environment and Land Court No 801 of 2017.
 6. I therefore find that the trial magistrate was right in declining to grant the orders sought. The court which is mandated to establish ownership or otherwise of land is the Environment and Land Court. This appeal therefore lacks merit and the same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF JANUARY, 2023.

KIARIE WAWERU KIARIE

JUDGE

