



**Okelo (Sued as the Legal Representative of the Estate of Okello Ogil - Deceased) v Oloo & 3 others (Environment and Land Appeal 12 of 2021) [2023] KEELC 17069 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17069 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 12 OF 2021  
GMA ONGONDO, J  
APRIL 27, 2023**

**BETWEEN**

**JENIFFER ANYANGO OKELO (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF OKELLO OGIL - DECEASED) ..... APPELLANT**

**AND**

**PAUL ODOYO OLOO ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR- HOMA BAY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**LAND SURVEYOR- HOMA BAY COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling of Honourable T.M Olando (PM) delivered on 25th August 2021 in Homa Bay Chief Magistrate's Court Environment and Land Case number 10 of 2020)*

**JUDGMENT**

1. The instant appeal radiates from the learned trial magistrate's ruling rendered on 25<sup>th</sup> August 2021 where he held that the application dated 18<sup>th</sup> June 2021 was devoid of merit. Thus, he proceeded to dismiss the same.
2. In arriving at the decision, the trial court observed in part thus;

“I note that this court has the jurisdiction to defend any land dispute subject to pecuniary jurisdiction and the fact that the plaintiff did not appeal to the Environment and Land Court against the decision of the Registrar does not take away the jurisdiction of this court to hear the matter”



3. The appeal was commenced by way of a memorandum of appeal dated 24<sup>th</sup> September 2021 and lodged on even date through the firm of Migele and Company Advocates, founded upon the following seven grounds;
  - a. The learned magistrate erred in fact by finding that the dispute between the appellant and the 1<sup>st</sup> respondent is a land dispute.
  - b. The learned magistrate erred in law and fact by finding that he has jurisdiction over the matter before him.
  - c. The learned magistrate erred in law and fact by finding that the dispute between the appellant and the 1<sup>st</sup> respondent is a land dispute whereas the 1<sup>st</sup> respondent is challenging and/or impeaching and/or appealing and/or reviewing an administrative decision and /or finding of the 2<sup>nd</sup> respondent with the aim of reversing the same decision.
  - d. The learned magistrate erred in fact by finding that the dispute between the appellant and the 1<sup>st</sup> respondent is a land dispute and not a grievance by the 1<sup>st</sup> respondent as a result of the ruling and/or decision by the Homa Bay County Land Registrar.
  - e. The learned magistrate erred in law and fact by finding that he has jurisdiction over the issue before him where the 1<sup>st</sup> respondent is seeking to reverse the decision and/or finding of the 2<sup>nd</sup> respondent.
  - f. The learned trial magistrate erred in law and fact by finding that he has jurisdiction over the issue before him whereas the 1<sup>st</sup> respondent is challenging and/or impeaching and/or appealing and/or reviewing the decision of the 2<sup>nd</sup> respondent.
  - g. The learned magistrate erred in law and fact by dismissing the merited application by the appellant.
4. Therefore, the appellant prays that;
  - a. This appeal be allowed and the orders and/or ruling of Hon. T. M. Olando delivered on 25<sup>th</sup> August 2021, be set aside and/or quashed.
  - b. The cost of this appeal and the cost of the application in the trial court be awarded to the appellant against the 1<sup>st</sup> respondent.
5. On 15<sup>th</sup> June 2022, the court directed that the appeal be heard by way of written submissions.
6. So, by the submissions dated 31<sup>st</sup> October 2022 and filed on 1<sup>st</sup> November 2022, the appellant's counsel made reference to the grounds of appeal and delineated two issues for determination namely challenge to the 2<sup>nd</sup> respondent's decision dated 14<sup>th</sup> August 2018. Counsel did challenge the jurisdiction of the trial court and implored the court to grant the orders sought in this appeal. That by the Land Registrar's ruling dated 14<sup>th</sup> August 2018, the existing boundary remains the boundaries of the suit parcels of land (infra).
7. To buttress the submissions, counsel relied on Section 13 of the *Environment and Land Court Act*, 2015 (2011), Regulation 40 (1), (5) and (6) of the *Land Registration (General) Regulations, 2017*. Also, counsel submitted that the suit is neither an appeal nor Judicial Review pursuant to Sections 2, 7 and 9 of the *Fair Administrative Action Act*, 2015. Further, counsel relied on the case of *Owners of Motor Vessel Lillian "S"-vs-Caltex Oil (Kenya) Ltd* (1989) eKLR and *Samuel Kamau Macharia-vs-KCB and*



- 2 others (2012) eKLR. That the trial court's ruling is misdirected and that the appeal is merited hence, it be allowed accordingly.
8. The 1<sup>st</sup> respondent who appears in person filed submissions dated 17<sup>th</sup> June 2022. He argued, inter alia, that that the origin of this case is a boundary dispute between the appellant and himself. That he engaged Homa Bay Land Registrar who visited the site in August 2018 but no survey was carried out hence, he filed the suit for fair and transparent determination of the dispute.
  9. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed submissions dated 6<sup>th</sup> March 2022 on 10<sup>th</sup> March 2022 through Lorna Orege, Senior State Counsel and urged the court to allow the appeal on merit. That the learned trial magistrate did arrogate himself supervisory jurisdiction over the Land Registrar which ought not to be the case in line with Article 165 (5) and (6) of the Constitution of Kenya, 2010. Counsel cited, *inter alia*, Section 86 of the Land Registration Act, 2016 (2012), Owners of Motor Vessel Lilian 'S' and Samuel Kamau Macharia case (both supra), to reinforce the submissions.
  10. In this regard, the issues for determination herein are as contained in the grounds of appeal which are condensed to whether;
    - a. The trial court was seized of jurisdiction over this matter.
    - b. Subject to issue number (a) hereinabove, does the appellant deserve the orders sought in the memorandum of appeal?
  11. It is trite that an appellate court has the mandate to reconsider the evidence on record with caution and reach its own independent conclusions and inferences; see Kiruga-vs-Kiruga and another (1988) eKLR.
  12. At the trial court, the plaintiff/1<sup>st</sup> respondent herein sued the 1<sup>st</sup> defendant/appellant and other three defendants by way of a plaint dated 13<sup>th</sup> May 2020 for;
    - a. Orders directing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to establish the correct sizes and boundaries between Gem/Koyolo/278 and 279 (The suit parcels of land) so that their respective sizes on the map and the certificates of title;
    - b. Costs
  13. In his statement of defence dated 2<sup>nd</sup> July 2020, the 1<sup>st</sup> defendant denied the plaintiff's claim and prayed that the suit be dismissed with costs. That the boundaries of the suit parcels of land having been created even before adjudication process, have remained unchanged.
  14. By an application dated 18<sup>th</sup> June 2021 and lodged in court on 21<sup>st</sup> June 2021, the 1<sup>st</sup> defendant/appellant through Migele and Company Advocates prayed that the suit be struck out with cost for want of jurisdiction. The application was premised upon grounds (i) to (m) stated thereon and the appellant's supporting affidavit of even date to the effect that the 2<sup>nd</sup> defendant's decision dated 14<sup>th</sup> August 2018, was reached without completing the required duty. That thus, the exercise that gave rise to the decision, be re-conducted.
  15. In the replying affidavit of 14 paragraphs sworn on 30<sup>th</sup> June 2021, the plaintiff/ 1<sup>st</sup> respondent through Quinter Adoyo and Company Advocates, opposed the application, termed the same, inter alia, improper, lacks merit and sought dismissal of the same with costs. He deposed in part, that he was aware of the Land Registrar's jurisdiction over the dispute and that he had exhausted that avenue alongside an out of court settlement which avenues were thwarted by the defendants including the appellant. That therefore, he was entitled to institute the suit pursuant to Article 50 of the Constitution of Kenya, 2010.



16. The parties' respective pleadings and the proceedings before the trial court show that the dispute relates to boundaries of the suit parcels of land. Section 18 (2) of the [Land Registration Act](#), 2016 [2012] provides;
- “The court shall not entertain any action or proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”
17. Clearly, the appellant's application referred to in paragraph 1 hereinabove, was a form of preliminary objection to the jurisdiction of the trial court over the matter. In the case of *Mukisa Biscuits Manufacturing Company Ltd-vs-West End Distributors Ltd.* (1969) EA 696, it was held that a preliminary objection consists of a point of law which has been pleaded or raised by clear implication of the pleadings. The same include; objection to jurisdiction of the court.
18. In the case of *Owners of Motor Vessel Lillian "S"-vs-Caltex Oil (Kenya) Ltd* (1989) KLR 1, it was noted that jurisdiction is everything. That without it, a court has no power to take one more step; see also [Republic-vs-Karisa Chengo and 2 others](#) (2017) eKLR.
19. So, did the trial court have jurisdiction in respect of the dispute in the first instance? Evidently, the answer is in the negative in light of Section 18 (2) of the [Land Registration Act](#) (supra) and the Land Registrar's ruling dated 14<sup>th</sup> August 2018 on the dispute.
20. Furthermore, I subscribe to the decision in the case of [Geoffrey Muthiga Kabiru and 2 others-vs-Samwel Munga Henry and 1756 others](#) (2015) eKLR on the exhaustion doctrine. Indeed, the doctrine was met as revealed in the Land Registrar's ruling dated 14<sup>th</sup> August 2018.
21. In view of the said ruling, the trial court was devoid of jurisdiction over the suit which is a non-starter. Thus, the suit is hereby struck out.
22. By the way, the respondent has the right to ventilate his lamentations, if any and appropriately, as urged in the Land Registrar's ruling in line with Articles 48, 50 (1) and 25 (c) of the [Constitution](#) of Kenya, 2010; see also [Halsbury's Laws of England](#) 5<sup>th</sup> Edition 2010 Volume 61 paragraph 639 that an opportunity to be heard is a fundamental principle of justice.
23. Accordingly, this appeal is merited. The same is hereby allowed in terms of the orders set out at paragraph 4(a) and (b) hereinabove.
24. Orders accordingly.

**DATED AND DELIVERED AT HOMA BAY THIS 27TH DAY OF APRIL, 2023.**

**G. M. A. ONGONDO**

**JUDGE**

**Present**

1. Mr. M. Migele, learned counsel for the appellant
2. The respondent in person
3. Terrence and Edith, Court Assistants

