



**Nyatiemo v Akello (Environment and Land Appeal E033 of 2022)  
[2023] KEELC 17068 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17068 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E033 OF 2022  
GMA ONGONDO, J  
APRIL 26, 2023**

**BETWEEN**

**MARGARET OKUMU NYATIENO ..... APPELLANT**

**AND**

**DR OMOLLO OTIENO AKELLO ..... RESPONDENT**

*(An appeal from the judgment of Honourable E.M Onzere (PM) rendered on 3rd August 2022 in Ndhiwa Principal Magistrate’s Court Environment and Land Case number 37 of 2019)*

**JUDGMENT**

1. This appeal was provoked by the Judgment of Honourable E M Onzere, Principal Magistrate in Ndhiwa Principal Magistrate’s Court Environment and Land Case number 37 of 2019 rendered on 3<sup>rd</sup> August 2022 where the learned trial magistrate opined in part thus;

“.....This court cannot sit on review or on appeal of a decision of a court of concurrent jurisdiction.....the plaintiff has not proved his case to the required standard and the suit is dismissed with costs to the defendant.”

2. The appeal is anchored on a memorandum of appeal dated 19<sup>th</sup> August 2022 based on grounds 1 to 5 set out on the face of the same namely;

- a. The learned trial magistrate misdirected herself on several matters of law and fact.
- b. The learned trial magistrate erred in law by delivering judgment herein in favour of the respondent on behalf of Charles Ondiri’s estate whereas he had no letters of grant to represent that estate.



- c. The learned trial magistrate erred in law by delivering judgment in favour of the respondent without realizing that the execution period in respect to the decree in Homa Bay Misc 14 of 2010 had since elapsed hence unenforceable in law.
  - d. The learned trial magistrate erred in law by failing to appreciate the fact that at the time of judgment the entire suit land had reverted back to the estate of George Muok (Deceased) hence the respondent had no claim whatsoever.
  - e. The learned trial magistrate erred in law by delivering judgment that was entirely misplaced.
3. So, the appellant's prayer before this court is to quash the trial court's decision and order thus;
    - a. Declaration that parcel number /Kanyidoto/Kabura/545 (The suit land) belongs solely to the appellant's family and that the respondent has no claim whatsoever.
    - b. Cost of the appeal be provided for.
  4. On 1<sup>st</sup> February 2023, the court directed that the appeal be heard by written submissions.
  5. Consequently, the appellant through H.O Mimba and Company Advocates filed submissions dated 20<sup>th</sup> February 2023 on 21<sup>st</sup> February 2023 relying entirely on the grounds of appeal. The appellant submitted in part, that the alleged contract between the respondent and the late Charles Ondiri in respect of the suit land, was not proved at the hearing of the suit hence making the respondent's claim to the land baseless and unwarranted. So, she prayed that the appeal be allowed accordingly.
  6. The respondent through Robert Ochieng and Company Advocates filed submissions dated 22<sup>nd</sup> February 2023 and implored the court to dismiss the appeal with costs. It was submitted that the plaintiff failed in law and that the entire suit is res judicata. The respondent's counsel relied on section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya, Henderson-vs-Henderson (1843) 67 ER 313 and Section 3 (1) of the *Trespass Act* Chapter 294 Laws of Kenya, among others, to buttress the submissions.
  7. It must be remembered that the appellant who was the plaintiff in the trial court sued the defendant, the respondent herein by way of a plaint dated 11<sup>th</sup> October 2019 and filed in court on 21<sup>st</sup> October 2019 for;
    - a. A declaration that the suit land herein solely belongs to George D.Muok Orego (Deceased) and his family and not the defendant.
    - b. A permanent order of injunction restraining the defendant, servant, agent and or employer from interfering in any way with the suit land.
    - c. Cost of the suit.
  8. By a statement of defence dated 30<sup>th</sup> December 2019 and lodged in court on 6<sup>th</sup> January 2020, the respondent denied the appellant's claim. He prayed for dismissal of the suit with costs.
  9. It is established law that the appellate court has to reconsider the evidence of the trial court, assess it and arrive at its own appropriate conclusions and inferences. However, the court should not interfere with the trial court's decision unless the same is founded on no evidence at all or on wrong principles of fact and or law or a misapprehension it; see *Ephantus Mwangi and another-vs-Duncan Wambugu* (1984) eKLR.
  10. In this regard, the issues for determination in this appeal are as set out in the grounds of appeal which are condensed to whether the entire appeal is tenable.



11. The appellant asserted that the trial court entered judgment based entirely on Homa Bay SRMC Misc. Application 14 of 2010 in favour of the respondent who was not a party to the suit. The decree in the said case and attached to the defendant's list of documents, reveals that the claimant was Charles Odero Ondiri against the objector, the appellant herein. The dispute revolved on the suit land.
12. The appellant laments that the respondent has no grant of letters of administration in respect of the estate of Charles Odero Ondiri (Deceased). This court is aware that the estate of the deceased is vested in his legal representative; see *Trouistik Union International and another-vs-Jane Mbeyu and another* (1993) KLR.
13. Additionally, in *Omari Kaburu-vs-Industrial & Commercial Development Corporation* (2007) KLR Wanjiru Karanja J (now, JA) held-

“.....The law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased.....”
14. In the case of *Alfred Njau and others-vs-City Council of Nairobi* (1982-88) 1 KAR 229, the Court of Appeal stated that-

“..... Locus standi is the right to appear or be heard in court or other proceedings.....”
15. Besides, the learned trial magistrate called for and perused original record as regards Homa Bay SRMC Misc. Application No. 14 of 2010 and Kisiii HCCA No. 112 of 2003 upon evaluating the evidence on record further to her orders of 24<sup>th</sup> May 2022 to meet the ends of justice. She had the mandate to do so pursuant to sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya.
16. In that regard, it was the finding of the trial court that the issue of ownership of the suit land had been adjudicated upon and decision reached by a court of concurrent jurisdiction. Clearly, this is the true position in light of the decree dated 18<sup>th</sup> March 2010 issued in Homa Bay SRMC Misc. Application No. 14 of 2010 and an order dated 7<sup>th</sup> March 2005 (appeal dismissed summarily) in Kisii HCCA No. 112 of 2003.
17. Furthermore, it must be noted that the suit before the trial court was originated after the same matter had been finally determined by courts of competent jurisdiction as discerned in the decree and order referred to in paragraphs 15 and 16 hereinabove. So, the suit was barred by dint of sections 7 and 34 (1) of the *Civil Procedure Act* Chapter 21 Laws of Kenya.
18. The cardinal principle is that litigation has to come to an end; see Halsbury's Laws of England 4<sup>th</sup> Edition Volume 22 at page 273.
19. In conclusion, I find that the impugned judgment was arrived at after careful consideration of the record availed before the trial court and application of the relevant legal principles. Therefore, the judgment is faultless at law and I uphold it accordingly.
20. The upshot is that this appeal is devoid of merit and the same is hereby dismissed.
21. Costs of this appeal and the court below to be borne by the appellant.
22. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 26<sup>TH</sup> DAY OF APRIL 2023.**

**G.M.A ONGONDO**



## **JUDGE**

### **Present**

- a. L K Obwanda instructed by Robert Ochieng, learned counsel for the respondent
- b. Respondent
- c. Terrence and Edith, court assistants

