



REPUBLIC OF KENYA



**Miruka & another v Oketch (Environment and Land Appeal  
16 of 2022) [2023] KEELC 18379 (KLR) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18379 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 16 OF 2022  
GMA ONGONDO, J  
JUNE 19, 2023**

**BETWEEN**

**DEBORAH ADOYO MIRUKA ..... 1<sup>ST</sup> APPELLANT**

**BOB OMOLO MIRUKA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOB OCHIENG OKETCH ..... RESPONDENT**

*(Formerly Migori Elc Civil Appeal No. 2 Of 2021) Being an appeal from the judgment  
of Hon. B.O.Omwansa, PM in Oyugis Chief Magistrate's Court Environment  
and Land Case number 32 of 2019 rendered on 23<sup>rd</sup> December 2020)*

**JUDGMENT**

1. Article 159 (2) of the [Constitution](#) of Kenya, 2010 provides;  
  
' Justice shall not be delayed.'
2. On that score, this determination is in respect of the following matters;
  - a. A notice of motion dated January 30, 2023 by the applicant/respondent through the firm of Slla & Mudany Advocates (The application herein) and
  - b. The present appeal lodged by way of a memorandum of appeal dated January 12, 2021 by the respondents/appellants through SO Odingo and Company Advocates and formerly by HO Mimba and Company Advocates (The appeal herein).
3. The orders sought in the application are thus;
  - a. The memorandum of appeal lodged in court by the respondent be deemed to be withdrawn or be struck out.



- b. The costs of this application be awarded to the applicant against the respondent.
4. The application is founded upon grounds 1 to 9 set out on the face of it alongside the applicant/respondent's supporting affidavit of twelve paragraphs sworn on even date. In a nutshell, the applicant grumbles, inter alia, that the appellants lodged the memorandum of appeal over two years ago and has failed to file and serve any memorandum of appeal despite the orders of April 21, 2021 issued by this court. That this appeal is incompetent hence the same is deemed withdrawn or struck out with costs in the interest of justice.
5. The application is unopposed.
6. By the trial court's judgment delivered on December 23, 2020, the Hon learned magistrate held that the appellant's counter claim could not stand and entered judgment for the respondent who was the plaintiff before that court in terms of an amended plaint. Thus, it provoked the appeal.
7. The appeal is founded upon grounds, inter alia;
  - a. The learned trial magistrate erred in law by entering judgment in favour of the respondent merely on the ground that the respondent's mother Katherine Aoko Okech (Deceased1 herein) had no authority to sell the suit land.
  - b. The trial magistrate erred in law and fact by failing to realize that at the time of judgment the respondent was in possession of two Ad Litem grants one in respect to the estate of Deceased1 and another in respect of the estate of Deceased 2, Aloice Oketch Oyath (respondents' parents).
  - c. The trial magistrate erred in law by delivering that declared Deceased 2 as the owner of the suit land based on the green card amended on July 4, 2019 without any title document produced in court to warrant the same hence an error.
8. So, the appellant has sought thus;
  - a. A declaration that the appellants and /or family are the lawful owners of that portion of land known as parcel no. East Kasipul/Kakelo/Dudi/973 (The disputed land herein) sold to them one acre which they have been cultivating over the years and that the same be transferred to them by the respondent.
  - b. A permanent order of injunction restraining the respondent, agent, employee and or servant from interfering with the appellants' portion of land.
  - c. Costs of the appeal be provided.
9. The court heard the application alongside the appeal by way of written submissions further to this court's directions of March 7, 2023 in the spirit of Article 159 (2) (b) (supra) and section 3 of the [Environment and Land Court Act](#), 2015 (2011).
10. In the submissions dated February 1, 2023, learned counsel for the appellants stated that the respondent failed to cite the appellants before filing the suit at the trial court as required under Rule 22 of the Probate and Administration Rules. That the respondent did not establish his claim to the required standard and relied upon section 107 of the Law of [Evidence Act](#) Chapter 80 Laws of Kenya as well as section 39 of the [Law of Succession Act](#) Chapter 160 of the Laws of Kenya. That the appellants were bona fide buyers of the disputed land and the appeal be allowed in terms of the prayers therein.
11. By the submissions filed herein, learned counsel for the respondent stated, inter alia, that Deceased 1 never undertook succession in respect of the estate of the deceased 2. That the trial court was therefore,



- right in holding that deceased 1 is the absolute proprietor of the portion of the disputed land. That the appellants failed to prove fraud on the part of the respondent. That the appeal be disallowed. Counsel cited sections 24, 25 and 26 of the Land Registration Act, 2016 (2012), Gichinga Kibutha-vs-Caroline Nduku (2018) eKLR and Koinange and 13 others-vs-Koinange (1986) KLR 23, among other authorities.
12. Originally, the respondent sued the appellants by a plaint (Fast Track) amended on October 3, 2019 claiming that on March 8, 2019, the latter had trespassed into the disputed land and demolished his house erected thereon. Thus, the respondent sought, inter alia;
    - a. A declaration that Deceased 2 is the registered proprietor of the disputed land and that the appellants have no right and or authority enter claim, alienate and cultivate, demolish and or rent out the disputed land to 3<sup>rd</sup> parties.
    - b. A permanent injunction restraining the appellants herein either through themselves, their agents, employees and or any other person deriving authority from them from entering, wasting, damaging, alienating, demolishing, claiming, allocating, cultivating, renting out to 3<sup>rd</sup> parties.
  13. By their statement of defence and counter claim dated April 23, 2019, the appellants stated that by an agreement dated August 25, 2004, deceased 1 sold the disputed land registered in her name, to Jeremiah Miruka (Deceased 3 herein) who was the husband to the 1<sup>st</sup> appellant and father to the 2<sup>nd</sup> appellant. That the family of Deceased 3 took possession of the disputed land and started cultivating the same. That Deceased 1 and Deceased 3 died without transfer of the disputed land.
  14. In the counter claim, the appellants asserted that the respondent trespassed into the disputed land. Therefore, the appellants prayed for;
    - a. A declaration that the disputed land measuring 1 acre belongs to the appellants' family as the bona fide purchaser.
    - b. An order compelling the respondent to transfer the disputed land to the 1<sup>st</sup> appellant without further delay.
    - c. Any order of permanent injunction restraining the respondent, agent and or servant from interfering with the appellants' land.
    - d. General damages
  15. In that regard, the issues for determination crystallize to whether there is merit in the application and the appeal?
  16. It must be noted that the appellants were given time lines namely fourteen (14) days within which to file and serve the record of appeal as per this court's directions of April 21, 2022. So, did they comply with the said orders and directions?
  17. It is pretty clear that the appellants filed the record of appeal dated July 26, 2022 outside the timelines set by the court. It is trite that even if the appellant were to apply for extension of time, the whole period of delay should be declared and explained satisfactory to the court; see County Executive of Kisumu-vs-County Government of Kisumu and 8 others (2020) eKLR.
  18. This court is guided by Article 159 (2) (d) of the Constitution of Kenya, 2010 and section 19 (1) of the ELC Act, 2015 (2011) that justice shall be administered without undue regard to procedural



technicalities. Besides, in [\*Kakuta Maimai Hamisi-vs-Peris Pesi Tobiko and 2 others \(2013\) eKLR\*](#), the Court of Appeal held;

' We do not consider Article 159 (2) (d) of the [\*Constitution\*](#) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation.'

19. Moreover, the court is conscious of the consequences of an appeal which has been struck out by court; see [\*Ngoni Matengo Cooperative Union Ltd-vs-Alimohamed Osman \(1959\) EA 577\*](#)

20. Be that as it may, this appeal as contained in the record of appeal, has been heard and ought to be determined on merits. In the case of [\*Philip Chemwolo and another-vs-Augustine Kubende \(1982-88\) KAR 103\*](#) where the Court of Appeal remarked;

' Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.'

21. It is well established that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system; see [\*James Kanyiita Nderitu and another-vs-Marios Philotas Gbikas and another \(2016\) eKLR\*](#).

22. It is common baseline from the plaint, the statement of the respondent and a copy of death certificate in the respondent's list of documents dated October 3, 2019 that Deceased 2 died December 20, 1998 (PEXhibit 1). Deceased 1 got registered as the proprietor of the disputed land on June 19, 2002 as revealed in a copy of green card in respect of the disputed land in the said list of documents (PEXhibit 4). The respondent obtained a limited grant of letters of administration ad litem regarding the estate of Deceased 2 on October 4, 2019 (PEXhibit 5).

23. Under cross examination, PW1 stated that he sued on behalf of the registered owner of the disputed land, deceased 2 who died in 1998. That Deceased 1 and deceased 3 entered into sale of the disputed land on August 25, 2004 and that he obtained grants of letters of administration Ad Litem in respect of the estates of deceased 1 and deceased 2 in 2019.

24. During re-examination, PW1 stated as follows;

' Deceased 2 died in 1998 a dead person cannot transfer any interest in land.'

25. The 1<sup>st</sup> appellant (DW1) testified that the respondent's family sold the disputed land registered in the name of deceased 2 to deceased 3 on August 25, 2004. During cross examination, DW1 stated that;

' Jeremiah (Deceased 3) purchased the land in 2004. I did not obtain the letters ad litem to defend the estate of the deceased.'

26. The learned trial magistrate opined that the sale of agreement was entered into in 2004 while the owner of the disputed land died on December 22, 1998. That therefore;

' Whatever transaction which was carried out by the purported vendor is null and void for she had no capacity to so, what she was doing can be clearly described as intermeddling with the estate of the deceased.'

27. Plainly, section 45 of the [\*Law of Succession Act\*](#) (Cap 160) prohibits the inter meddling with the estate of a deceased person. In the instant appeal, the estate in question is that of deceased 1.



28. To this end, deceased 1 had no capacity to transact with deceased 3 in 2004 in respect of the disputed land which forms part of the estate of deceased 2 who died in 1998 as she did not have the requisite grant thereof. The authority to handle the assets of a deceased person emanates from grants of representation to the estate of such deceased; see *Kothari-vs-Quaresh (1967) EA 364* and my decision in *Mary Adhiambo Njuguna Mary Anyango Odeny (2023) eKLR*, among other authoritative pronouncements.
29. It is therefore, the finding of this court that this appeal originated from a misconceived and incompetent suit. In the circumstances, the original suit must collapse. Furthermore, the counter claim must fail as I approve the trial court's findings to that extent.
30. Wherefore, the appeal in entirety, is hereby struck out with costs to the respondent.
31. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 19<sup>TH</sup> DAY OF JUNE 2023.**

**G. M. A ONG'ONDO**

**JUDGE**

**PRESENT**

- a. J. Sala learned counsel for the applicant/respondent.
- b. P.Odhiambo instructed by Odingo learned counsel for the respondent/appellant.
- c. **Terrence, court assistant.**

