



**Gathua v Nyatogo & 2 others (Environment and Land Appeal
E020 of 2023) [2025] KEELC 2856 (KLR) (19 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2856 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E020 OF 2023
EK MAKORI, J
MARCH 19, 2025**

BETWEEN

CYRUS NGARI GATHUA APPELLANT

AND

SAKAYO ONGATI NYATOGO 1ST RESPONDENT

LAND REGISTRAR, LAMU COUNTY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. In the current appeal, the Appellant is seeking the following reliefs:
 - a. This appeal be allowed;
 - b. The judgment and decree, and consequential orders therefrom, of the Honorable Trial Court be set aside.
 - c. The Respondent bears the costs of the Appeal.
2. The Appellant, being dissatisfied with the judgment of the Hon. P.E. Nabwana (SRM) delivered on 19th April 2023, filed an appeal citing ten grounds.
3. The plaint dated 24th February 2021, the Appellant sought the following prayers:
 - a. An order of cancellation of title No. Lamu/Lake Kenyatta 1/1536 from the 1st Defendant's name to the Plaintiff's name and order of permanent injunction restraining the Defendants from trespassing, encroaching upon, sub-dividing, selling off, building, constructing, alienating, damaging, wasting, disposing of, and or in any other manner howsoever carrying out any activities or at all over the suit property herein referenced as title No. Lamu/Lake Kenyatta 1/1536, situated in Mpeketoni, Lamu County, for damages resulting from trespass.



- b.
 - c.
4. In dismissing the Plaintiff's (now Appellant's) suit, the learned trial magistrate pronounced himself as follows on page 161, para. 10 Record of Appeal:

“By filing this suit, as opposed to moving the Public Trustee or the High Court on a petition seeking to challenge the Summary Certificate issued by the Public Trustee, the Plaintiff is inviting this Court to sit on appeal of the decision of the Public Trustee which is untenable and outside the powers of this Court.”

5. Citing, among other things, lack of proof of fraud on the part of the 1st and 2nd Defendants, the learned trial magistrate declined jurisdiction and proceeded to adjudicate on the 1st Defendant's (Respondent's) counter-claim by making the following determination:
- a. “A declaration is hereby made that the 1st Defendant is the lawfully registered owner of all that parcel of land known as Lamu/Lake Kenyatta 1/1536.
 - b. Order to vacate within three (3) months and, in default, eviction to ensue.
 - c. OCS Mpeketoni Police Station to provide Security during eviction. In the event the Plaintiff shall not have handed over vacant possession within the stipulated timelines.”
6. The appeal was canvassed through written submissions.
7. The Appellant, through its record of Appeal and submissions, appears to have abandoned all grounds that it believed the trial court may have erred and has submitted only on the trial court's decision regarding jurisdiction.
8. Based on the materials presented to me, the questions I pose for this court's consideration are whether the trial magistrate made a legal and factual error by refusing jurisdiction over the main suit while proceeding to hear and resolve the counterclaim of the 1st respondent. Additionally, I will examine whether the trial magistrate erred in law and fact by dismissing the Appellant's suit due to a lack of jurisdiction. Furthermore, I will assess whether the learned trial magistrate incorrectly determined that the respondent is the legally registered owner of the property in question.
9. The role of the appellate court at this stage is crucial, as it involves re-evaluating the evidence and drawing its independent conclusion. In the often-cited case of *Okeno v Republic* [1972] EA 32 at 36, the East Africa Court of Appeal stated the duty of the Court on a first appeal as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] E. A. 424.”



10. The appellant's view on the issue of declining jurisdiction in the main suit and assuming jurisdiction in the counterclaim is significant and should be considered. The appellant submits that this disadvantaged him and amounted to a failure on the part of the trial court to hear his case. The moment the court formed the view that it had no jurisdiction to hear the matter, it should have withdrawn from hearing both the appellant's case and the 1st respondent's counterclaim. The appellant is of the view that the Public Trustee has dealt with the question of Succession; the main contention should have been ownership and that the magistrate had jurisdiction to entertain the same by virtue of the Gazettement by the Chief Justice to handle land matters. The Appellant has cited the decisions in *Njagi v Njagi & 7 others* (Environment and Land Appeal E001 of 2023) [2023] KEELC 21928(KLR) (30 November 2023) (Judgment) Neutral citation: [2023] KEELC21928(KLR, where Yano J. held:

“The jurisdiction of the Environment and Land Court to hear and determine disputes relating to the environment, use and occupation of and title to land is provided for under Article 162 (2) (b) of *the constitution* of Kenya. Furthermore, Section 13 of the *Environment and Land Court Act* grants the court the power to hear and determine disputes relating to, among others, title to land. The said provisions are replicated under Section 90 of the *Magistrates' Courts Act*, 2015. Indeed, some magistrates have been gazetted to hear environment and land matters. Therefore, it is my view that since the issue was in regard to the titles held by the Appellant, and specifically the question of how the same were acquired, the trial court had the requisite jurisdiction to hear and determine the matter. I am not persuaded that the probate court still had the jurisdiction to adjudicate over the matter since it had already concluded the dispute that was before it by distributing the estate of the deceased.”

11. The appellant proceeds to state that failure to be heard on the merits means that the matter should be remitted back to be heard at Mpeketoni by a magistrate other than Hon. Nabwana SRM. In this regard, the decision in *Gitau v Maina* (the Appointed Attorney of Teresia Nduta Muhia); Njeri (Interested Party) (Environment and Land Appeal E091 of 2021) [2023] KEELC 17535 (KLR) (22 May 2023) (Judgment) Neutral citation: [2023] KEELC 17535(KLR), is cited where Eboso J. on a similar situation held as follows:

“With the above two findings, it is clear that the Judgment of the trial court cannot stand. It cannot stand because the appellant's defence and counterclaim were neither considered nor determined. It is also clear that, in the circumstances, the proper course of action is to remit the dispute to the Chief Magistrate Court for a fresh trial and determination of all the issues that need to be resolved. In the circumstances, this court will restrain itself against making definitive pronouncements on the other issues that were identified in this appeal because such pronouncements may prejudice the parties when they go for fresh trial.”

12. The 1st respondent is of a different view, asserting that, dating back to antiquity, a counterclaim is substantially a cross-action, not merely a defense to the plaintiff's claim. It is a cross-claim, which the defendant may raise in the very action brought against them by the plaintiff rather than initiating a separate, independent action against the plaintiff.
13. 1st respondent avers that numerous legislations succinctly support the above position. Key among them is the Civil Procedure Rules and the *Limitation of Actions Act*.
14. The 1st respondent contends that the Court of Appeal, in the case of *County Government of Kilifi v Mombasa Cement Limited* [2017] eKLR while interpreting Order 7, Rule 3 of the Civil Procedure



Rules, held that the counterclaim need not be related to the subject matter of the original suit. It can be on an entirely different subject matter as long as it relates to the same parties. The Superior Court held:

“In our view, a plain reading of the above provision allows or gives a defendant in a suit permission, or a carte blanche, to raise a counterclaim based on any right or claim against a plaintiff. That provision says nothing to the effect that such counterclaim must be related to the original subject matter of the suit, and neither does it attract such an implication.”

15. The 1st respondent further cites the Court of Appeal in the case of *County Government of Kilifi v Mombasa Cement Limited* [2017] eKLR, which cited with approval the Indian Supreme Court decision in *Sh. Jag Mohan Chawla & Another v Dera Radha Swami Satsang & Others* [1996], where the Indian Supreme Court decided that:

“.....The counter-claim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit.....”

16. The 1st respondent believes that when the defendant sets up a counterclaim and the plaintiff's suit is discontinued, the counterclaim is dismissed; however, it may nevertheless proceed. The principle is that the counterclaims of a cross-action are not affected by anything that relates solely to the Plaintiff's claim. To support this proposition, the 1st defendant invokes Order 7 Rule 13 of the Civil Procedure Rules, which provides:

“If, in case in which the defendant sets up a counterclaim, the suit of the Plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.”

17. The 1st respondent concludes that the dismissal of the plaintiff's suit should not affect the counterclaim. A counterclaim is considered a stand-alone suit against the plaintiff. The Environment and Land Court sitting at Mombasa in the decision of *Ocean Engineering Works Ltd & another v SBM Bank of Kenya Ltd (Civil Appeal 112 of 2021)* [2024] KEELC 4724 (KLR) (5 June 2024) (Ruling) had this to say:

“.... a counterclaim can be treated as a cross suit. If it is a cross suit, as long as it was instituted within time, its existence should not necessarily depend on that of the suit. It breathes its own life and can bring forth the life of a judgment or decision of a court independent of the suit. Thus, I find the case of: - *Beatrice Mumbi Wamahiu v Mobil Oil Kenya Limited* [2011] eKLR” to fully summarise and makes the final conclusion on this issue. It was held that:- “.....the withdrawal of the main suit did not affect the Counter- Claim. A Counterclaim is treated as a separate suit under Section 35 of the *Limitation of Actions Act*; hence, its survival cannot be pegged to the pendency of the primary suit.



18. The 1st respondent supports the trial court's dismissal of the appellant's action for want of jurisdiction, as mandated by the Statute. From the evidence on record, it is clear that the appellant was challenging the validity of the Summary Certificate issued by the Public Trustee. This is because the 1st defendant obtained succession documents from the Public Trustee that allowed him to commence succession proceedings. The only recourse available to the appellant herein was to file an objection before the Public Trustee; if not satisfied, it should have filed an appeal before the High Court, challenging the decision of the Public Trustee. Section 8(4)(c) of the Public Trustees Act, Cap 168, Laws of Kenya, provides as follows regarding the revocation of the Summary Certificate issued.

“(c) the Public Trustee may revoke the certificate on either of the following grounds

—

- i. that the certificate was obtained by fraud or misrepresentation made to him; or
- ii. that the certificate was obtained by means of an untrue allegation of a fact essential in law to justify the grant though the allegation was made in ignorance or inadvertently.”

19. Furthermore, Section 11 of the Public Trustees Act, Cap 168, Laws of Kenya, provides that any dispute shall be resolved by petition to the High Court.

20. I will resolve all the issues at once because they are interconnected.

21. The appellant did not submit concerning the counterclaim as allowed by the trial court; however, the 1st respondent submits that he transferred the property to himself after acquiring the Summary Certificate from the Public Trustee, which permitted him to administer the deceased's estate. It follows, therefore, that the 1st defendant, having obtained the Summary Certificate, was the only authorized person to dispose of or deal with the deceased's property without being guilty of intermeddling.

22. The appellant alleges that he entered into a Sale Agreement with the family of the deceased. Pursuant to that Sale Agreement, the deceased's family sold the deceased's property to the appellant. The appellant admitted that all this happened before the family commenced the succession process to obtain a Summary Certificate from the Public Trustee, to deter any interference. This is based on the record as narrated by the trial court.

23. The 1st respondent averred that the Sale Agreement on which the appellant seeks to rely could not withstand the test of the law of succession. It amounted to intermeddling with the deceased's estate; hence, it is void ab initio. Such a contract is unenforceable, lacks any legal force, and is only suitable for cosmetic purposes. The High Court, in the case of *In re Estate of Mukhobi Namonya (Deceased)* [2020] eKLR, held that:

“...no survivor, whether as spouse or child of the deceased, has a right to transact over estate assets until representation has been granted to them. Under section 45 of the [Law of Succession Act](#), it is an offence for such a person to handle estate property without first obtaining representation. As I have stated above, the fact of appointment as personal representative of the deceased vests the assets of the estate in the person so appointed by virtue of section 79 of the [Law of Succession Act](#). It is only then that the person so appointed, and upon whom the estate has vested under section 79, can exercise the powers that are set out in section 82 of the [Law of Succession Act](#) and incur the duties imposed by section 83 of the same Act.



What the above means is that any transaction that is entered into with regard to the assets before representation is obtained, be it selling or, leasing or contracting in connection with the assets, would be unlawful, and the contracts entered into would be unenforceable for that reason. A grant-holder can bind the estate since the assets vest in them by virtue of section 79, and any contracts entered into with regard to estate assets would be enforceable. However, there is a restriction with respect to immovable assets. The proviso in section 82(b) (ii) of the *Law of Succession Act* is to the effect that immovable property is not to be sold before the grant has been confirmed. That would mean that where it becomes necessary to dispose of estate assets for whatever reason, the administrators have to have regard to that provision. It bars them from selling such property before confirmation. If the estate requires funds so urgently that it cannot wait for confirmation, then the prudent thing would be to move the court for leave to dispose of such property before confirmation for reasons that they should place before the court. Otherwise, any contracts that they would get into contrary to that proviso would leave them with contracts that they cannot enforce on account of their unlawfulness.”

24. The 1st respondent submits that he is the lawful owner of the suit property, having obtained it in strict compliance with the law. He first received a Summary Certificate from the Public Trustee, which granted him the authority to conduct any transactions regarding the deceased's estate. The High Court, in the case of *In re Estate of Mukhobi Namonya (Deceased)* [2020] eKLR, held that:

“A grant-holder can bind the estate since the assets vest in them by virtue of section 79, and any contracts entered into with regard to estate assets would be enforceable.”
25. The 1st respondent believes that the appellant should challenge the process by which the Summary Certificate was obtained, if at all; in his view, it was obtained fraudulently.
26. Having considered the evidence and the material placed before the trial court, it will be reckoned from the word go that, severally, the appellant was called upon to comply with pretrial directions and have the matter heard on its merit. The record shows that the appellant testified, was stood down, and never returned or took to the witness stand for cross-examination and the hearing of the defence case and the counter-claim. The trial court records that the appellant, in failure to proceed, had indicated he would prefer an appeal.
27. From the record, based on the materials before the trial court, a primary suit was filed by the appellant, which was partially heard. The appellant was heard, stood down for a later date for cross-examination, and never returned for a further hearing, as the counterclaim and defence were being heard.
28. On the main suit by the appellant, the trial court, after considering the evidence tendered, including the appellant's witness statement, after a merit review, formed its mind – rightfully so that the appellant was challenging the Summary Certificate issued to the 1st respondent by the Public Trustee under Section 8(4)(c) of the *Public Trustee Act*, that under that section, the appellant ought to have objected the issuance of the same to the Public Trustee for consideration as the first port of call and that if his grievances were unaddressed pursuant to Section 11 of the Act, the appellant had a right to petition the High Court for redress. The appellant did not follow the prescribed journey as outlined in the Statute but chose to petition the Magistrates' Court. At that stage, the trial court had a right to consider whether it had jurisdiction or not. The magistrate held that he had no jurisdiction and proceeded to dismiss the appellant's claim.



29. Considering the authorities cited by the appellant (particularly the Njagi case (supra), the trial court could still proceed and hear the claim as proposed by the appellant, as it revolved around ownership.
30. The Magistrate proceeded to hear the counterclaim, which, as ably submitted by the 1st respondent citing authorities recorded in the body of this judgment as a separate cross-action, the magistrate discussed the very issue of ownership in the counter-claim and as correctly submitted by the 1st respondent, the magistrate found that the appellant, by purporting to purchase the suit property from the deceased's relatives he, ran afoul of Section 45 of the Law of Succession Act in what is referred to as intermeddling with the Estate of the deceased before distribution. See the decision cited by the 1st respondent, In re Estate of Mukhobi Namonya (supra), with which I concur.
31. The Appellant's failure to fully participate in the trial in the Lower Court was his Achilles heel in this appeal. The evidence he tendered before the trial court was fully considered, albeit he did not participate fully due to his own making, as recorded by the trial magistrate.
32. I will not fault the trial court's findings; even if I were to remit the matter for a rematch, in my view, it would yield the same result: the purchase of the suit property by the appellant amounted to intermeddling with the deceased's Estate.
33. The net effect arising from the foregoing is that the appeal lacks merit and is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 19TH DAY OF MARCH 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Mwangi, for the Appellant

Mr. Maina, for the 1st respondent

Happy: Court Assistant

