



**Makabuni v Makabuni & another (Environment and Land Appeal  
E022 of 2022) [2023] KEELC 18973 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18973 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E022 OF 2022**

**M SILA, J**

**JULY 26, 2023**

**BETWEEN**

**BENARD DOEL MAKABUNI ..... PLAINTIFF**

**AND**

**JOHN ONDIEKI MAKABUNI ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, KISII COUNTY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the judgment of Hon. P.K Mutai, Senior Resident Magistrate, Kisii, delivered on 12 September 2022 in the suit Kisii CMCC/ELC No. 428 of 2020 (OS))*

**JUDGMENT**

(Appellant being step-brother of the respondent; appellant claiming that the respondent illegally obtained title to the land of their deceased father and thereafter proceeded to subdivide it into other parcels of land and selling some of the subdivisions; there having been an ongoing succession dispute in the High Court; suit dismissed on basis that the issues will be decided in the succession cause; appellant aggrieved and filing this appeal inter alia on basis that the Magistrate misappreciated the dispute; correct that the trial court did not properly appreciate the dispute as the suit was for reinstating title of a deceased person; however, appeal cannot succeed as the appellant did not file suit on behalf of the estate of the deceased, thus lacked *locus standi* and also did not file suit against the owners of the subdivisions of the original land; appeal dismissed)

1. The appellant commenced suit as the applicant through an Originating Summons filed on September 2, 2020. The Originating Summons was said to be brought pursuant to Order 37 Rule 14 of the [Civil Procedure Rules, 2010](#), and the appellant asked for the following orders, that:-

1. The act of making titles without a succession cause be deemed irregular and illegal.



2. The honourable court be pleased to revoke and cancel all resultant numbers which were created from land parcel West Kitutu/Bomatara/656.
3. That costs for the application be borne jointly by the defendants.
2. The Originating Summons was supported by an affidavit vide which the appellant deposed that the subject land is subject to Kisii High Court Succession Cause No 351 of 1998 which was active. He deposed that the 1<sup>st</sup> respondent lied to court that he had never sold or transferred the subject land when the family appeared before the judge in the High Court despite glaring evidence of physical demarcation by fencing and that ‘the last one’ was sold two weeks to the filing of the suit. To the affidavit, he annexed a copy of an affidavit filed in support of summons for confirmation of grant of letters of administration intestate for the estate of Francis Makabuni Ogetuka (deceased), filed in Kisii High Court, Succession Cause No. 351 of 1998. That affidavit avers that the deceased left the properties West Kitutu/Bomatara/656 and another identified as Manga Settlement Scheme/291. There is also a replying affidavit attached, which was filed by the 1<sup>st</sup> respondent herein in the same succession cause, where he denied selling any portion of the land.
3. The 1<sup>st</sup> respondent opposed the Originating Summons by filing a replying affidavit. In it, he *inter alia* deposed that the appellant is his step-brother and that their late father, Francis Makabuni Ogetuka (Ogetuka), had three wives, with the appellant’s mother being the first wife and his mother being the second wife. He deposed that his father distributed his properties to his three wives but the mother of the 1<sup>st</sup> respondent was not satisfied and she filed suit against Ogetuka, being Kisii HCCC No. 59 of 1996. The case was heard and determined, with the court holding that the land parcel Manga Settlement Scheme/291 be divided between the 1<sup>st</sup> and 3<sup>rd</sup> wife while the 2<sup>nd</sup> wife was to have the land parcel West Kitutu/Bomatara/656. He annexed a copy of the decree. He deposed that since the appellant was son of the first wife, he was to get his share from his mother’s share in the land parcel Manga Settlement Scheme/291. He deposed that the land at Manga was subdivided and the appellant got his portion. He annexed copies of official searches of the subdivisions. He deposed that despite the appellant getting his share of inheritance in the land parcel Manga/Settlement Scheme/291, he still wants a share of the property West Kitutu/Bomatara/656 which he is not entitled to. He admitted that the case Kisii High Court Succession Cause No. 351 of 1998 was active, and that it was filed by the appellant, and he alleged that it was to subdivide the land parcel Manga Settlement Scheme/291 between himself and his brother. He claimed that the succession proceedings were with regard to this parcel No. 291 at Manga Settlement Scheme and that he and his siblings did not object to it as they had no interest. He deposed that since his late father had shared his land during his lifetime, he and his siblings are entitled to the land parcel West Kitutu/Bomatara/656 which is the disputed land. He added that the appellant was misleading the court claiming that other properties were excluded in the succession cause so that he can benefit twice from the estate of their deceased father. He contended that the applicant has no locus to bring the suit as he is not beneficiary of the suit land. He nevertheless denied selling or transferring portions of the suit land as alleged by the appellant and asserted that he has not intermeddled in the estate of their deceased father.
4. The appellant filed a supplementary affidavit where he *inter alia* deposed that the 1<sup>st</sup> respondent has not disclosed that he filed Succession Cause No. 399 of 2014 which he abandoned midstream and that he bought title deeds over the counter at the Kisii Lands Registry. He claimed that the 1<sup>st</sup> respondent had sold six portions of the suit land that their late father had allocated to his mother. He averred that in Succession Cause No. 351 of 1998, they had been advised to seek a settlement.
5. At the hearing of the case, the appellant relied on his statement which was more or less what is deposed in his affidavit. The 1<sup>st</sup> respondent on the other hand testified that his father had three wives and two



parcels of land, being the suit land which is located in Nyamataro Kisii, and the other land at Manga Settlement Scheme. He testified that his father shared the land while he was still alive and that his mother was given the suit land while the rest were given the land at Manga Settlement Scheme. He pointed out that the appellant was eldest son of the first wife who lives at Manga. Cross-examined he stated that the parcel No. 656 was given to his mother through court proceedings. He denied having title to the parcel No. 656.

6. DW-2 was Patrick Onchoge Nyabiasi, elder brother of the 1<sup>st</sup> respondent. His evidence was that their mother was given the suit land before their father died and that there was judgment to that effect.
7. With the above evidence, the parties closed their respective cases and were invited to file submissions. The trial court delivered judgment on September 12, 2022. In his judgment, the trial Magistrate assessed the pleadings and the evidence and held as follows :-

“Both parties agree that land parcel number West Kitutu/Bomatara/656 is subject of ongoing succession in cause number 351 of 1998. Both in union confirmed that the matter is still active in High Court. In my view the High Court matter relating to the property in question will determine issues being raised by the plaintiff. This is basically about succession. The high Court is better placed to decide as to whether the resultant title created out of West Kitutu/Bomatara/656 was obtained by fraud or not. I therefore decline to assume jurisdiction of this case considering the fact that higher court is seized of it. The plaintiff (sic) case is dismissed with no orders as to costs.”

8. Aggrieved, the appellant has preferred this appeal on the following grounds :-
  - a. That the learned trial magistrate erred in law and ignored the law and refused to deal with the issue of intermeddling of the estate of the deceased despite proof and admission by the 1<sup>st</sup> respondent that he had a title without succession cause.
  - b. That the learned trial magistrate erred and allowed extraneous issues of a land parcel Manga Scheme/291 that was not part of the pleadings.
  - c. That the learned trial Magistrate erred in holding that he did not have jurisdiction when it's known by law and practice that the trial magistrate is gazetted to handle environment and land matters.
  - d. That the learned trial magistrate erred and failed to discern that the high court is sitting as a family court.
  - e. That the learned trial magistrate in law and fact by dismissing a case instead of referring to a court with jurisdiction.
9. The appellant seeks orders for this court to allow the appeal and cancel the titles created from the suit land i.e West Kitutu/Bomatara/656.
10. The appeal was argued through written submissions which I have taken note of before arriving at my decision.
11. . In a nutshell, what the appellant wished in the suit before the subordinate court was for cancellation of titles created from subdivision of the land parcel West Kitutu/Bomatara/656. He claimed that the 1<sup>st</sup> respondent had obtained title without first going through a succession process and proceeded to subdivide the land. He believed that this was irregular. The defence of the 1<sup>st</sup> respondent was that this



land was allocated to his mother and the appellant has no share in it since their house was assigned the land in Manga Settlement Scheme.

12. With respect, I think the trial Magistrate did not properly appreciate the issues.  
What was before court was actually not a succession dispute. It was a dispute vide which the appellant was seeking cancellation of titles created from subdivision of the land parcel West Kitutu/Bomatara/656 so that the land can revert back to the deceased and be included in the succession cause. The suit land and the subdivisions could not be subject to the succession cause as they were no longer properties in name of the deceased. They could only be brought into the succession matter after being recovered for the estate of the deceased. The issues before court were therefore not issues before the succession court and in fact could not be issues therein as I have explained above.
13. Having said that, I have serious problems with the case of the appellant, and as drawn, the case could not have succeeded. First, it is apparent that what the appellant seeks is to reclaim the land parcel West Kitutu/Bomatara/656 so that it reverts to the name of the deceased. The appellant could only file such suit as administrator of the estate of the deceased. But he filed this suit in his own capacity, and not in the capacity of administrator of the estate of the deceased, and as an individual, he could not have had locus to sue on behalf of the estate of the deceased. Secondly, and most importantly, he never sued the owners of the subdivisions of the land parcel West Kitutu/Bomatara/656. Even if he had locus, and had filed the suit on behalf of the estate of the deceased, he would still have failed on this ground.
14. From the record, I have seen a green card for the parcel West Kitutu/Bomatara/656. It shows that the 1<sup>st</sup> respondent obtained registration of the said land on 8 August 2008. I see that this title was closed on subdivision and there is reference to the parcels No. 5298 to 5304. No green cards for these seven subdivisions were ever presented and their owners are unknown. It is these titles that the appellant was seeking cancellation of, but there was no way he could get the orders he wished for without first identifying who the registered proprietors of these parcels are, and joining them to the suit. It would be unusual for a court to proceed to cancel titles of persons without them being sued and without them being given a hearing. In our instance, as I have mentioned, the owners of the said parcels of land were not even identified.
15. Although I have held that the trial Magistrate was wrong in construing the issues before him, the appellant would still have failed even if the trial Magistrate had fully appreciated the issues. He could not have succeeded before the trial court without suing as administrator of the estate of the deceased and without suing the owners of the subdivisions of the suit land. I will substitute the judgment of the trial court and order that the suit before the trial court is dismissed for the above two reasons.
16. The end result is that this appeal must fail and is dismissed.
17. The last issue is costs. The appellant may have had a cause of action but he went about it the wrong way. I also observe that he has a close relationship with the 1<sup>st</sup> respondent. For these reasons, each party to bear his/her own costs.
18. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 26 DAY OF JULY 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

