



**Otieno & 2 others v Obuya (Environment and Land Appeal  
13 of 2022) [2023] KEELC 19037 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19037 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 13 OF 2022  
GMA ONGONDO, J  
JULY 24, 2023**

**BETWEEN**

**HELLEN AOKO OTIENO ..... 1<sup>ST</sup> APPELLANT**

**FLANTINUS OLOO OGOLA ..... 2<sup>ND</sup> APPELLANT**

**DAVID OUMA OTIENO ..... 3<sup>RD</sup> APPELLANT**

**AND**

**PAUL OUMA OBUYA ..... RESPONDENT**

*(Being an appeal against the ruling and orders of Hon.B.O. Omwansa, SPM in Oyugis  
SPM Environment and Land case number 74 of 2021 delivered on 23rd March 2022)*

**JUDGMENT**

1. The instant appeal radiates from the trial court's ruling rendered on 23<sup>rd</sup> March 2023 where the learned trial magistrate dismissed the 2<sup>nd</sup> defendant/appellant's preliminary objection dated 21<sup>st</sup> December 2021 with costs to the plaintiff who is the respondent in this appeal.
2. The appellants through Abwuor and Company Advocates, generated the appeal by way of a memorandum of appeal dated 14<sup>th</sup> April 2022 and filed on 14<sup>th</sup> April 2022 based on the grounds infra;
  - a. The Trial Magistrate erred in Law and fact by dismissing the Defendant's Preliminary Objection dated 21<sup>st</sup> December 2021, which raised clear point of law that the Honorable Court lacks Jurisdiction to hear and determine the matter as the same offends the Provisions of section 18 of the [Land Registration Act](#) 2012.
  - b. That because the matter touches on boundaries of Land Parcel No. Central Kasipul/kachien/2121 (The suit land herein), which matter is under the Jurisdiction of the Land Registrar in first instance and not the Land Court.



- c. The matter being filed contrary to a clear provision of the statute, particularly section 18(1) and (2) of the [Land Registration Act](#), 2012, and for that reason, the same is an abuse of the process of the Honourable Court.
  - d. That the Trial Magistrate erred in law and fact to have dismissed the Plaintiff's Preliminary objection and ignored the issues raised and the Submissions of the Appellants herein.
3. So, the appellant is seeking thus;
  - a. That the orders dated 23<sup>rd</sup> March 2022, dismissing the Defendants preliminary objection dated 8<sup>th</sup> December 2022, be set aside for being per in curium for want of the requisite jurisdiction and a further order, do issue dismissing the Plaintiff/Respondent, suit before the Senior Principal Magistrate's Court vide a Plaint dated 8<sup>th</sup> December 2021.
  - b. Costs of this appeal and costs of the suit before the trial court.
4. The appeal was heard by written submissions pursuant to this court's orders of 8<sup>th</sup> November 2022.
5. By the submissions dated 20<sup>th</sup> February 2023, learned counsel for the appellant implored the court to find and hold that the learned trial magistrate erred in dismissing the appellant's notice of preliminary objection since the main cause of action was based on encroachment into the suit land. Counsel relied upon sections 18 (2) and 19 of the [Land Registration Act](#), 2016 (2012) and the case of [Kiarie Wamutu-vs-Mungai Kiarie and another](#) (1982) eKLR, among other authoritative pronouncements.
6. The respondents did not file and serve any submissions in this appeal.
7. On 15<sup>th</sup> May 2023, the appellant's counsel filed a supplementary record of appeal dated 5<sup>th</sup> May 2023 which contains certified copies of the proceedings, ruling and order of the trial court in this matter.
8. In that regard, the issues for determination in this appeal crystallize to whether the trial court is devoid of jurisdiction in respect of the matter bearing in mind the mandate of this court as held in the case of [Kiruga-vs-Kiruga and another](#) (1988) eKLR and the provisions of section 13 of the [Environment and Land Court Act](#) 2015(2011).
9. This court is aware of the import of sections 18 (1) and 19 of the [Land Registration Act](#), 2016 (2012). Moreover, I take into account the meaning of the term "Jurisdiction" in Halsbury's Laws of England (4<sup>th</sup> Edition) Volume 9 at page 350.
10. By a plaint dated 8<sup>th</sup> December 2021, the respondent laments, inter alia, that he is the registered proprietor of the suit land. That the appellants who are related inter se and the beneficiaries of land parcel number Central Kasipul/Kachieng/433 which they occupy, have gradually encroached into the suit land and erected their homesteads thereon.
11. As a result, the respondent sought the following orders;
  - a. An eviction order against the appellants/defendants evicting them from the respondent/ Plaintiff's land namely the suit land.
  - b. A permanent injunction against the Appellants/Defendants barring them and their families, agents, servants and/or employees from living onto, constructing houses, and /or any structures on the suit land.
  - c. Damages for trespass on parcel number Eviction order against the Appellants/Defendants from the suit land.



- d. Costs and interest of the suit.
12. The appellants denied the respondent's claim in their statement of defence dated 21<sup>st</sup> December 2021 and prayed that the respondent's suit be dismissed with costs. That the trial court lacks jurisdiction to entertain the suit.
13. This court is conscious of the exhaustion principle; see *Geoffrey Muthiga Kabiru and 2 others-vs-Samwel Munga Henry and 1756 others* (2015) KLR
14. It is trite law that where there is clear procedure of redress of any particular grievance, the same to be adhered to since there are good reasons for such special procedures; *Speaker of National Assembly-vs-Karume* (1992) KLR 21.
15. Besides, Paragraph 9 of the plaint and letters dated 5<sup>th</sup> December 2021 and 8<sup>th</sup> August 2021 on the Plaintiff /Respondent's list accompanying it, tend to show that the matter had been drawn to the attention of the area chief and sub county surveyor. Apart from the boundary, issues including ownership and occupation of the suit land are raised in the parties' respective pleadings.
16. On that score, I endorse the decision of the learned trial magistrate that the suit calls for merit determination of all those issues and he correctly observed;
- “ .... There is more than that of the boundary and whatever is being canvased by the 2<sup>nd</sup> defendant in the said preliminary objection appears more of evidence than preliminary objection on a point of law.....”
17. In the premises, this appeal is unmerited. The same be and is hereby dismissed with no orders as to costs
18. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 24<sup>TH</sup> DAY OF JULY 2023**

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

**JUDGE**

**PRESENT.**

Okello, Court Assistant.

