



**Ongoche v Otieno & another (Environment and Land Appeal  
E017 of 2021) [2023] KEELC 21150 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21150 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E017 OF 2021  
GMA ONGONDO, J  
OCTOBER 31, 2023**

**BETWEEN**

**OBADIA AUKO ONGOCHE ..... APPELLANT**

**AND**

**JARED OGINGO OTIENO ..... 1<sup>ST</sup> DEFENDANT**

**GEORGE OPIYO DIANGA OPIYO ..... 2<sup>ND</sup> DEFENDANT**

*(Being an appeal from the judgment of Hon. J.S Wesonga (SRM) in Homa Bay Chief Magistrate's Court Environment and Land Case No. 43 of 2020 delivered on the 15th day of September 2020)*

**JUDGMENT**

1. This appeal emanates from the judgment of the trial court (Hon. J.S Wesonga, SRM) delivered on 17<sup>th</sup> September 2020 where the learned magistrate reasoned, inter alia;
  - a. That the plaint dated 18<sup>th</sup> day of August, 2020 is hereby struck out.
  - b. That the plaintiff's suit is dismissed with costs to the defendant.
2. Being aggrieved at the said decision, the appellant who appears in person, filed the appeal by way of a memorandum of appeal dated 2<sup>nd</sup> December 2021 based on the grounds infra;
  - a. The learned Magistrate failed and/or erred in law and facts by not considering that his case against the respondents who were the defendants in the original suit was purely land suit and not boundary dispute as alleged by the trial Senior Resident Magistrate and due to this, it is self-evident truth that judgment was arrived at based on wrong information.
  - b. The learned Magistrate erred in law by not ensuring that the HomaBay county Land Surveyor and Land Registrar appeared in court for cross examination but merely relied on their reports which she knows were not in good faith but were doctored to fit the interests of the defendants/



respondents. The trial Senior Magistrate could not order for their appearance for the same and the appellant is confident that all this happened due to compromise.

- c. The learned Magistrate erred in law and fact in failing to know that the appellant is the registered owner of the suit land parcel herein number Kanyada/Kalanya/Kanyango/329.
  - d. The learned Magistrate erred in law by not considering the facts and by allowing the defendants to bury their late father (Jeremiah Dianga Aweyo-Deceased) on the suit land parcel registered in the name of appellant herein without considering the Luo customary law on burial rights of their deceased (especially males) which ought to be done on the ancestral land of the deceased without any doubt and or disputes on such burial sites.
3. Wherefore, the appellant has sought thus;
- a. This appeal be allowed with costs and the judgment and decree of the learned trial magistrate delivered dated 15<sup>th</sup> September 2020 be set aside and replaced with an entire dismissal of the ruling (I think the appellant meant, judgment).
  - b. The respondents be condemned to pay the costs of the appeal and the costs arising out of the subordinate court.
4. In the original suit mounted by way of a plaint dated 18<sup>th</sup> August 2020 and filed in court on 19<sup>th</sup> August 2020, the appellant who was the plaintiff before the trial court sought, the orders that;
- a. An order of permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from burying the remains of the deceased on suit land parcel.
  - b. Costs of this suit.
  - c. Any other relief the Honourable court deems just and expedient to grant.
5. By a joint statement of defence dated 24<sup>th</sup> August 2020 and filed in court on 25<sup>th</sup> August 2020, the respondents denied the appellant's claim and stated in part that there has existed ever since a public road between the suit land parcel and the other land parcel number Kanyada/Kanyango-Kalanya/330. That a permanent injunction sought in the suit is an equitable remedy and cannot be issued by court on the basis of an apprehension or a hypothetical situation.
6. The appellant did not call oral evidence as disclosed in the trial court's proceedings of 14<sup>th</sup> September 2020 and the second page of the impugned judgment. Ms Obwanda instructed by Mr Obach learned counsel for the appellant implored the trial magistrate to rely on the Land Registrar's report filed in court on 10<sup>th</sup> September 2020 and the Surveyor's report filed on 11<sup>th</sup> September 2020 to reach her decision. This request was endorsed by the 1<sup>st</sup> respondent.
7. In that regard, the trial magistrate based the impugned judgment on the parties' respective pleadings, the said reports, rival submissions and the applicable law, inter alia, section 18 of the [Land Registration Act](#), 2016 (2012), section 107 of the [Evidence Act](#) Chapter 80 Laws of Kenya and the decision in the case of [Francis Onosa Orango v Joseph Mato Ngoko and another](#) (2008) eKLR. In arriving at the judgment, she stated;

“The land registrar's and surveyor's reports settled the question of common boundaries between Kanyada/kalanya/kanyango/329 and 330. There is no evidence of encroachment noted or established amongst the two parcels and in view of the provisions of sections 18



f the *Land Registration Act* 2012, that position is not likely to be changed by parties; oral evidence”.

8. The appeal was heard by written submissions pursuant to this court’s directions given on 31<sup>st</sup> October 2022.
9. On 28<sup>th</sup> April 2022, the appellant filed submissions of even date and stated that the matter relates to the suit land parcel registered in the name of the appellant hence, it belongs to him and not the respondents. That the body of the Deceased who was the respondents’ father, was buried in the suit land parcel in lieu of the other land parcel thus, constituted trespass thereon. That the appellant is the lawful owner of the suit land parcel and that the court should allow the prayers in the appeal.
10. The respondents’ submissions dated 25<sup>th</sup> April 2023 and filed on even date referred to the memorandum of appeal dated 31<sup>st</sup> October 2021 and two other unstamped memoranda of appeal captured at pages 36-37 and 41-42 of the record of appeal which were not stamped contrary to Order 42 Rule 10 of the *Civil Procedure Rules*, 2010. Also, that the memorandum of appeal did not follow the format directed therein hence contrary to Order 42 Rule 13 (4). Further, they relied on sections 16 and 79G *Civil Procedure Act* and that the report by surveyor was that the burial site was on the other land parcel. That the appellant is a vexatious litigant, the appeal has no merit and that it be dismissed with costs.
11. In the foregone, the issues for determination are as captured in the four grounds of the appeal. Therefore, is the appeal tenable based on the said grounds?.
12. It is well settled that the appellate court has the jurisdiction to review the evidence on record in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters v Sunday Post* (1958) EA 424 at 429.
13. It was the contention of the appellant that the suit was purely land and not boundary dispute as alleged in the impugned judgment. He submitted that the instant dispute relates to the suit land parcel registered in his name and the respondents buried the remains of the deceased therein without his consent.
14. Besides, boundary issue featured in paragraphs 6, 7, 8 and 9 of the plaint. Also, paragraph 10 of the plaint reads;

“ the plaintiff states that it would be unjust that the 1<sup>st</sup> and 2<sup>nd</sup> defendants to bury the remains of the deceased pending the survey and fixing of the boundary between land parcel numbers Kanyada/Kalanya/Kanyango/329 and 330.
15. Furthermore, the respondents stated at paragraph 5 of their joint statement of defence thus;

“...the said land which was cleared along the boundary was to reopen the public road which the plaintiff had ploughed and blocked.....”
16. Clearly, the dispute between the appellant and the respondents pertains to land boundary. So, the learned trial magistrate did not entertain the claim until the Land Registrar and Surveyor visited the suit land parcel as well as the other land parcel and generated the two reports as provided for under sections 18 and 19 of the *Land Registration Act*, 2016 (2012).
17. There is no dispute from the trial court’s proceedings that the parties agreed not to call oral evidence in this suit. They urged the learned trial magistrate to base her decision on the two reports and she arrived at her informed decision as stated in paragraph 7 hereinabove.



18. The learned trial court considered the two reports and opined that the same settled the common boundaries between the suit land parcel and the other land parcel. Further, the learned trial magistrate remarked;

“.....There is therefore no basis of this court getting oral evidence as no triable issues remain between the parties.....”

19. It is common baseline that the appellant is the proprietor of the suit land parcel as discerned in paragraphs 4 and 5 of the plaint alongside paragraph 3 of the joint statement of defence. The court is not unaware of the protection to right to property under Article 40 of the Constitution of Kenya, 2010 and sections 24, 25 and 26 of the Land Registration Act, 2016 (2012).

20. It is established law that he who seeks to rely on any African customary law as the basis of his claim must prove by evidence the existence of such custom; see *Ernest Kinyanjui Kimani v Muiru Gikanga and another* (1965) EA 735. Further, I take into account section 3 of the Judicature Act Chapter 8 Laws of Kenya, Article 11 of the Constitution (supra) and that the trial court’s decision was that the remains of the deceased be interred in the other land parcel and not the suit land parcel.

21. In conclusion, it is the considered view of this court that the trial court correctly applied all the material before her and applied the principles of law in reaching her decision. Thus, this appeal fails in entirety as I find no reason to fault the trial court’s judgment.

22. *A fortiori*, the present appeal originated by way of a memorandum of appeal dated 2<sup>nd</sup> December 2021 is hereby dismissed with costs of the appeal and the original suit to be borne by the appellant.

**DATED AND DELIVERED AT HOMA BAY THIS 31<sup>ST</sup> DAY OF OCTOBER 2023**

**G.M. A ONG’ONDO**

**JUDGE**

Present

1. Appellant in person.
2. 1<sup>st</sup> and 2<sup>nd</sup> respondents in person.
3. Terrence, court assistant.

