



**Obare v Obare & another (Environment and Land Appeal E006 of 2023)
[2023] KEELC 21325 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21325 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E006 OF 2023
JM KAMAU, J
OCTOBER 26, 2023**

BETWEEN

ALFRED ANASI OBARE APPELLANT

AND

NEHEMIAH NYAUMA OBARE 1ST RESPONDENT

JOSEPHINE BOSIBORI ATUYA 2ND RESPONDENT

*(Being an Appeal from the Judgment of the Magistrate's Court at Nyamira
by Hon. M.C. Nyigei – Principal Magistrate dated and delivered on the
1st day of March, 2023 in Nyamira MCELC Case No. E028 of 2021)*

JUDGMENT

1. The Respondents filed a suit on 06/05/2021 for orders against the Respondent for:-
 1. A Declaration that the Defendant holds a section/portion of land measuring 1.5 Acres comprised in land parcel Title Number North Mugirango/Boisanga/992 in trust of the minors listed in paragraph 7 above.
 2. Consequently, to prayer (1) above, an order dissolving the aforesaid trust and a portion of the land measuring 1.5 Acres comprised land parcel Title Number North Mugirango/Boisanga/992 be registered in the name of the Plaintiff to hold it for themselves and in trust of the minors listed in paragraph 7 above.
 3. An order to issue to the Executive Officer, Nyamira Law Courts to be directed and/or ordered to execute the transfer instrument, Land Control Board Application Forms for consent and all attendant document, to facilitate the sub-division, transfer and registration of a portion of the land measuring North Mugirango/Boisanga/992 to be registered in the name of the Plaintiff



to hold it for themselves and event of default by the Defendant to execute the said instruments/ documents.

4. An order of permanent injunction to restrain the Defendant from setting foot on the parcel of land occupied by the Plaintiff comprised in setting foot on the parcel of land occupied by the Plaintiff in the land parcel Title Number North Mugirango/Boisanga/992 measuring 1.5 Acres and the resultant after sub-division.
5. The Defendant to pay the costs of this suit.
2. Their case was based on claims that in 1996, the Appellant had parcel number North Mugirango/ Boisanga/992 registered in his name by which time the 1st Respondent was young. The Respondent had 2 brothers viz Samuel Ateya Obare (who is now Deceased) and the Appellant himself. The Appellant caused the suit land to be divided into 2, him taking 1.5 Hectares and 1.7 Hectares to be shared by his 2 brothers which was registered in the name of their mother, Kwamboka Obare. The Respondent denied the contents of the Plaint and in particular that North Mugirango/Boisanga/992 was registered in his name illegally and unlawfully and that the suit land was never ancestral.
3. During the Hearing the 1st Respondent repeated the averments contained in the Plaint. He also said that the 2nd Respondent is his sister in law whose husband died in 2005. He said that LR No North Mugirango/ 992 measuring 3.2 Hectares belonged to his father – Obare Osore. His mother Jerusha Kwamboka Obare died in 2016. This was her share since their father had 3 wives. After the Appellant divided the land into 2 giving him and his brother 1.7 Hectares to share among themselves, and the Appellant took 1.5 Hectares he placed a caution over the land as a beneficiary. He also testified that in 1973 the Appellant wanted to evict them from the land but under the leadership of the area chief, the land was divided into 3 equal portions among the 3 brothers until 2016 when their mother died when the Appellant re-divided the land giving himself 1.5 Hectares and leaving the other 1.7 Hectares to be shared among his brothers. His prayer was that the 2 parcels LR No North Mugirango/992 and 1167. be redistributed equally among the 3 brothers. He also told the court that no grant in respect to their father’s Estate had been issued or applied even for. The 2nd Respondent Josephine Bosibori Atuya testified that the other 2 parties were her brothers in-law.
4. On the other hand it is the Appellant’s case that he is the eldest son of the late Obare and the Respondents are his brother and sister in law respectively. He said that he obtained the land that was later registered as North Mugirango/Boisanga/992 in 1973 during the land adjudication exercise. The Title Deed thereof was issued to him in 1996. He also said that the land was never ancestral nor a subject of Trust. He also testified that the land parcels North Mugirango/992 and 1167 were never one and never emanated from one parcel of land and that he also deserved a portion out of North Mugirango/Boisanga/1167 which is registered in the name of his late mother Kwamboka Obare. He did produce a copy of the Title Deed, a copy of official search, Green Card in respect of LR No North Mugirango/992 all showing that the land has always been registered in his name and a copy of letter dated 27/08/1973 from the Senior Land Adjudication Officer.
5. According to the Green Card issued on 01/04/2021, Anasi Obare was the first registered owner of North Mugirango/Boisanga/992 on 14/03/1973. There is no evidence of the land having been curved out of any other parcel of land.
6. In her Judgment the Learned Trial Magistrate held as follows: -

“From the evidence above, it would seem that the Plaintiffs are in possession and occupation of the suit parcel and this is further proved by the Defendant herein filing Kisii ELC Case



No 112/2017 where in paragraphs 6 and 7 he pleaded that the Plaintiffs herein trespassed into his land in 2013 and 2016 and have planted bananas and elected a building respectively.

It is therefore my finding that the Plaintiffs have shown that they are in possession and occupation of a portion of the suit parcel and have therefore proved the key elements of customary trust.

As per the decision in the case of *Justus Maina Muruku v Jane Waitihira Mwangi* (2018) eKLR, I find that the registration of the Defendant as the owner of North Mugirango/Boisanga/992 was encumbered by customary trust and the said trust was not dissolved by the registration of the mother in parcel 1167. The provisions of Section 26 of the Act do not apply to the issue between the parties herein since this is not a claim based on fraud, misrepresentation or corruption.

The provision of Section 25 of the Act applies in the case herein despite the fact that it is a first registration and as per (2), nothing in the said Section shall be taken to relieve the Defendant from any duty or obligation to which he is subject to as a trustee.

It was the prayer of the Plaintiffs that parcels 992 and 1167 be consolidated and shared equally amongst the 3 brothers. This is by all means a fair prayer.

It is therefore the finding of the court that the Plaintiffs have proved their case on a balance of probabilities against the Defendant. I shall therefore grant orders as follows: -

1. A declaration is hereby issued that the Defendant holds a Section/portion of land measuring 2/3 of 1.5 Ha comprised in land parcel North Mugirango/Boisanga/992 in trust for the Plaintiffs.
2. An order is hereby issued dissolving the aforesaid trust and a portion of the land measuring 2/3 of 1.5 Ha comprised in land parcel North Mugirango/Boisanga/992 be registered in the name of the Plaintiffs with each Plaintiff getting 1/3 of the 2/3 portion of 1.5 Ha.
3. The Defendant to transfer 2/3 of the of the 1.5 Ha in the suit parcel to the Plaintiffs within 30 Days failure to which the Court administrator, Nyamira Law Courts is hereby directed to execute the transfer forms, Land Control Board Application Forms for consent and all attendant documents, to facilitate the sub-division, transfer and registration of a portion of the land registered in the name of the Plaintiffs.
4. The parties are advised to commence succession proceedings in regard to the Estate of Kwmboka Obare to which they are all entitled.”

7. Having had his case dismissed the Appellant preferred this Appeal on the following grounds:-

1. The Learned Trial Magistrate erred in law and fact in arriving at finding that the Appellant’s LR North Mugirango/Boisanga/992 was encumbered by customary trust and the same was not dissolved by first registration.
2. The Learned Trial Magistrate erred in law and fact in making orders in the Judgment which orders were not prayed for nor supported by the evidence on record.
3. The Learned Trial Magistrate erred in law and fact in failing to make a finding that the Plaintiffs now the Respondents were in occupation of LR 1167 measuring 1.7 Hectares which land was exclusively registered in their mother’s name in trust for the Plaintiffs, now the Respondents



4. The Learned Trial Magistrate erred in law in holding that there existed minors in whose favor a trust existed over land parcel North Mugirango/Boisanga/992 contrary to the evidence on record.
 5. The Learned Trial Magistrate erred in law and fact by holding that the Appellant held the whole of LR North Mugirango/Boisanga/992 in trust for the Plaintiffs, now the Respondents contrary to the evidence on record and particularly that the Plaintiffs, now the Respondents, were in occupation and possession of LR North Mugirango/Boisanga/992.
 6. The Learned Trial Magistrate erred in law in relying on documents purported to challenge the Appellant's first registration to LR North Mugirango/Boisanga/992 in total disregard of the fact that the process of Adjudication and first registration had exhaustive legal mechanisms to determine any complaints therefrom conclusively in law.
 7. The Learned Trial Magistrate by the Judgment and consequent order therefrom breached the Appellant's Constitutional Right to own and enjoy property.
 8. The Learned Trial Magistrate erred in law and fact in making a finding that Section 26 of the [Land Registration Act](#), 2012 was not applicable to the issued at the Trial despite over whelming evidence on record.
 9. The Learned Trial Magistrate erred in law and fact by making orders which were discriminatory to the Appellant as the parties had other siblings who were first registered owners of their respective properties but were not party to this suit.
 10. The Learned Trial Magistrate erred in law and fact by wading into matters not before court and making orders thereto and hence arrived at Judgment whose of orders amounted to displacing the Appellant and opening avenue for future litigations and the Judgment set a bad precedent to the peaceful co-existence of the parties.
8. The first registration of the parcel of land known as LR No West Mugirango/Boisanga/992 stems from the Land Adjudication process. This is not in dispute. What is in dispute is whether the parcel of land was meant to be registered in the name of the Appellant for himself and his siblings. The Appellant insists that the land was and is solely his and was rightfully registered so. But the Respondents on the other hand claim that it was registered in his name in trust for the family of their late father, Obare Misuko. Having been ancestral land, how should this have been resolved and did the lower court have jurisdiction to hear the dispute?
 9. I do agree with the Appellant's Counsel that, where a dispute resolution mechanism exists outside courts, the same has to be exhausted before the jurisdiction of the courts is invoked. See in this regard the decisions in [Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others](#) [2015] eKLR and [Mutanga Tea & Coffee Company Ltd v Shikara Limited & another](#) [2015] eKLR.
 10. There is an elaborate process that is laid down by the [Land Adjudication Act](#). On how to determine which persons are, and the extent to which, they are entitled to interests in the land under adjudication, and it is therefore necessary that it is first employed before resort is made to the Courts, and also shielded from unnecessary and unjustified abuses.
 11. Section 4 of the [Land Adjudication Act](#) (CAP. 284 Laws of Kenya) which is

“ An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto”



in this respect provides that:

1. Where an order is made under section 3(1) of this Act, the Minister shall, by notice in the Gazette, appoint a public officer to be the adjudication officer for the adjudication area, and the adjudication officer may in writing appoint such demarcation officers, survey officers and recording officers, being public officers, as may be necessary for demarcating, surveying and recording interests within the adjudication area,
2. Where the Minister has appointed an adjudication officer for an adjudication area, he may, if he considers that the situation so requires, appoint for that adjudication area additional adjudication officers having limited powers and confer on them all or any of the powers conferred by sections 9(2), 10, 11(b), 12, 20(b), 21(2), 26 and 34 of this Act, and an adjudication officer so appointed shall have the powers so conferred on him and no more.

12. The Act further proceeds to list the duties of adjudication officer as follows:

1. The adjudication officer shall be in charge of and shall exercise general supervision and control over the adjudication.
2. The adjudication officer shall hear and determine:
 - a. any petition respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer; and
 - b. any objection to the adjudication register
 - c. which is submitted in accordance with section 26 of this Act.

13. Further under Sections 10 and 11 of the Act,

10. The adjudication officer shall have jurisdiction in all claims made under this Act relating to interests in land in the adjudication area, with power to determine any question that needs to be determined in connexion with such claims,
11. In the course of the adjudication, the adjudication officer shall have the following powers—
 - a. he may issue to the officers subordinate to him and to committees and boards such general or particular directions as he thinks necessary for carrying out the provisions of the Act which relate to the procedure for demarcation, recording of title and survey within the adjudication area;
 - b. at any time before the adjudication register is completed, he may correct any error or supply any omission occurring in the adjudication register;
 - c. he may make a claim or otherwise act on behalf of a person who is absent or under a disability if he considers it necessary to avoid injustice.



14. Section 25 provides what the Adjudication Officer does after the completion of the process:

“When the adjudication register has been completed, the adjudication officer shall so certify on the adjudication record and demarcation map, and shall then:

- a. deliver the duplicate adjudication record (bearing a copy of the certificate) to the Director of Land Adjudication;
- b. display the original adjudication register for inspection at a convenient place within the adjudication section; and
- c. give notice that the adjudication register has been completed and may be inspected at that place during a period of sixty days from the date of the notice.”

15. Under Sections 26,26A and 28 of the Act:

1. Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
2. The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

26A.

- (1) When the time for objection under section 26(1) has expired, the adjudication officer shall prepare a “No Objection” Register in respect of any land not subject to an objection, and deliver the same to the Director of Land Adjudication who shall—
 - a. certify thereon and on the duplicate adjudication register that the adjudication of the land set out therein has become final; and
 - b. forward the No Objection Register together with a copy of the duplicate adjudication register to the Chief Land Registrar for the purpose of registration under section 28.

28. Action by Chief Land Registrar

Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register:

16. Section 29 (a) provides a mechanism for Appeal and (b) provides a finality clause.

- (1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by:-
 - a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and



- b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

17. The *Land Consolidation Act* (Cap 283 Laws of Kenya) which goes hand in hand with the *Land Adjudication Act* (CAP. 284 Laws of Kenya) has as its preamble the following words:

“An Act of Parliament to provide for the ascertainment of rights and interests in, and for the consolidation of, land in the special areas; for the registration of title to, and of transactions and devolutions affecting, such land and other land in the special areas; and for purposes connected therewith and incidental thereto”.

also provides under Section 18 the Procedure with regard to objections

- (1) The executive officer, with whom an objection is lodged in accordance with the provisions of section 17 of this Act, shall either—
 - (a) refer the objection to the Committee, if it appears to him that the inaccuracy or incompleteness alleged is a consequence of any decision of the Committee; or
 - (b) submit the objection to the Adjudication Officer, if it appears to the executive officer that the inaccuracy or incompleteness alleged is a consequence of any decision of an Arbitration Board.
 - (2) Any objection referred to a Committee under subsection (1) of this section shall be considered by the Committee and the Committee shall make a finding thereon; every such finding shall be submitted to the Adjudication Officer.
 - (3) The Adjudication Officer, to whom an objection or the finding of a Committee is submitted under subsection (1) or subsection (2) of this section (as the case may be) shall, in the case of an objection so submitted to him, consider the matter with the Arbitration Board and, after making such further inquiries as he may think fit, determine the matter; and shall, in the case of a finding so submitted to him, either—
 - (a) confirm the finding of the Committee; or
 - (b) consider the matter with the Arbitration Board and, after making such further inquiries as he may think fit, determine the matter.
18. It also provides the Decision of Adjudication Officer to be final and the procedure to be followed by any aggrieved party.
19. Any confirmation or determination of an Adjudication Officer made under section 18 of this Act shall be final and shall be notified in writing, signed by the Adjudication Officer, to the executive officer of the Committee concerned, who shall make such alteration, if any, as may be required in the Record of Existing Rights to give effect to such confirmation or determination.
20. After the expiry of sixty days from the date mentioned in section 17, or on the date upon which all alterations to the Record of Existing Rights have been made in accordance with section 19, of this Act, whichever is the later, the Record shall be deemed to be a true and complete record of all existing rights and interests in the adjudication section to which the Record relates:
21. When the Adjudication Register in respect of any adjudication section has been completed the executive officer of the Committee shall sign and date a certificate to that effect and



shall forthwith give notice of the completion thereof and of the place or places within the adjudication section at which the same can be inspected.

22.

- (1) Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act.
- (2) If the Adjudication Officer considers that such rectification would incur unreasonable expense, delay or inconvenience, he may award such compensation in lieu of rectification as he may deem appropriate.
- (3) No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be, but the Minister or any person to whom compensation has been awarded and who is dissatisfied with the amount awarded by the Adjudication Officer may apply to a subordinate court held by a Resident Magistrate for its revision in such manner as may be prescribed.

23. After the expiration of sixty days from the date of the certificate mentioned in section 25, or on the determination of all objections in accordance with section 26, of this Act, whichever shall be the latter, the Adjudication Register shall be final.

19. Pursuant to the provisions of section 29(3) of the [Land Adjudication Act](#), the Director is mandated to sign certificates of finality upon the completion of the adjudication process and forward the adjudication register to the Chief Land Registrar for registration.
20. Under Section 26(3) of the [Land Consolidation Act](#) the Decision of the Land Adjudication Officer is final and not subject to appeal except on very limited grounds. An appeal against the impugned Decision of the Land Adjudication Officer is barred under Section 29 of the [Land Adjudication Act](#). The only recourse the Respondents may have had was to apply for judicial review before the superior court.
21. The centrality of the Committee to the adjudication process under the Act, is that they would be the primary Decision-making organ. The Court is not even mandated to substitute its own Decision for that of the Adjudication Officer. The Court can only come in in the judicial Review jurisdiction which does not consider the merits of the Decision but the process of the Decision-making:
22. The Supreme Court in the case of [Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others](#) (2012) eKLR on the issue of jurisdiction held as follows:

A court's jurisdiction flows from either the [Constitution](#) or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the [Constitution](#) or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law... the



issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

23. In the case of *Abdalla Mangi Mobamed v Lazarus and 5 others* [2012] eKLR it was held, inter alia, that:

...where there is a dispute as to the Applicant’s entitlement to property and where there exists a mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the Applicant’s claim to the property rather than clog the constitutional court with applications for enforcement of property rights which require prior determination...”

24. The Respondents are bound by the provisions of the *Land Consolidation Act* and that upon the Decision of the Land Adjudication Officer being rendered it would become final subject only to the supervisory jurisdiction of the superior courts through judicial review proceedings.

25. In the case of *Speaker of National Assembly v Karume* [1992] KLR 425 the Court held that;

where there was a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed”.

26. In *Lawi Mwanika v Joel Mworira Mwirabua & 2 others* [2021] eKLR, Environment and Land Court at Meru ELCA No 98 of 2019 Justice Y. M. Angima had this to say:

The court is of the opinion that there is a good reason why parliament in its wisdom created the various institutions under the *Land Consolidation Act* and vested them with specific functions and responsibilities for execution of the statute. It was not the intention of parliament that once the statutory process of dispute resolution came to its logical conclusion under the *Land Consolidation Act*, then the adjudication process for determination of property rights would start afresh before the Magistrates’ courts. That is why the legislature provided that the decision of the Land Adjudication Officer would be final and not Appellable.”

27. The role of the court vis-a-vis that of the adjudicating bodies under the land adjudication statutes was considered by Okongo J, in the case of *Tobias Achola Osindi & 13 others v Cyprian Otieno Ogalo & 6 others* [2013] eKLR as follows:

The whole process leading up to the registration of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interests in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act...

The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the



process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot, however, usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land. Due to the foregoing, a consent issued by the Land Adjudication Officer under Section 30 of the Act does not entitle any party who has an interest in land within an adjudication area to bring up to court for determination issues which should be determined by the adjudication officer or through the dispute resolution machinery laid out in the Act.”

28. Section 26(3) of the *land Consolidation Act* has provided a concise procedure on how the register herein is supposed to be rectified. The duty to rectify is wholly placed in the hands of the Adjudication Officer. At no point is the court granted jurisdiction to rectify the register. In fact, Section 26(3) is clear that no appeal shall lie against the Decision by the Adjudication Officer to order rectification. Entertaining the suit for a declaration and rectification of the adjudication register would amount to judicial usurpation of the mandate and functions of the Land Adjudication Officer under the law. The trial court erred in Law in holding that it had jurisdiction to entertain the claim which falls under the *Land Consolidation Act* and the *Land Adjudication Act*.
29. By asking the Court to declare the suit land to be held by the Appellant in trust for the Respondents the Court was being asked to order rectification of the adjudication register which is unlawful and not supported by any law.
30. I believe the rationale of giving the process of adjudication to the Adjudication Officer with officers on the ground under him and the process made final is that with the help of the people on the ground, it is more expedient and convenient to establish the true ownership of the parcels of land with certainty and without regard to the technicalities normally associated with the strict rules of evidence. It is also easier to get readily available witnesses without exorbitant expenses. It should be noted that most of such witnesses are advanced in age and mainly live in the neighbourhood.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 26TH DAY OF OCTOBER, 2023.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant Brenda

In the presence of all the parties and their Advocates.

