



REPUBLIC OF KENYA



**Ochenge v Momanyi (Environment and Land Appeal E010 of 2022)
[2023] KEELC 21329 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E010 OF 2022**

JM KAMAU, J

OCTOBER 24, 2023

BETWEEN

CHRISTINE OCHENGE APPELLANT

AND

MARK OKEO MOMANYI RESPONDENT

*(Being an Appeal against the Judgment of Hon. B. M. Kimtai Matata
– PM Keroka dated and signed on the 2nd August, 2022 in the original
Keroka Principal Magistrate’s Court ELC Case No. E013 of 2021)*

JUDGMENT

1. This Appeal has its roots in the Judgment of the Honourable Kimutai Matata, P.M. dated 02/08/2022 in Keroka CMCC ELC. No. E013 of 2021. The Appellant had sued the Respondent and prayed for the following orders: -
 1. A permanent injunction restraining the Defendant, his agents and/or servants from trespassing onto land parcel number Nyaribari Masaba/Bomobea/862.
 2. Costs and Interests of the suit.
2. She grounded her suit on the averments that she is the legal wife of Ochenge Nkiewa who is now deceased, having died on 05/05/1997 and who is the registered proprietor of the parcel of land known as Nyaribari Masaba/Bomobea/862 measuring approximately 2.4 Hectares. She did obtain letters of administration *Ad litem* to enable her file the suit and averred that in the month of December 2020 the Defendant, an Assistant Chief of Amabuko Sub-Location called a Baraza (public meeting) to declare the sub-divisions of the suit land where he put up a permanent structure. This according to the Appellant was illegal and an abuse of power and which amounted to trespass. The same caused loss and damage to the Estate and should be restrained. In his defence, the Respondent admitted that the suit land belongs to the estate represented by the Appellant, that of the late Ochenge Nkiewa but that the



Appellant was the second wife of the Deceased, Ochenge while the first wife, Mokeira Ochenge is also Deceased. He said that in his capacity as the area Assistant Chief, he did settle one Linet Ragogi, the wife of the Appellant's son Anthony Ragogi Ochenge (the latter is also deceased) on the suit land on instructions from the Chief, Irianyi Location, ACC Ibacho Sub-County and DCC Masaba South. He further avers that he has never trespassed onto the suit land but that the Appellant has no powers to sell the suit land. He proceeds to say that it is the Appellant and one Gladys who sold Linet's portion of land to one Alloys Anyenga, thus intermeddling with the Deceased's Estate. He stated that the Appellant should first take out a full grant before moving the court. The Respondent prayed for the dismissal of the case. The Learned Trial Magistrate then set down the case for Hearing. The chief repeated what is contained in his Defence with some elaboration.

3. The Learned Trial Magistrate then went ahead to dismiss the suit on the grounds that while acknowledging that the Appellant is 2nd wife to the Deceased, the suit land is registered in the name of the said Ochenge Nkinya (Deceased) and that the Estate has not been subjected to Succession and therefore it would be hard at this point to determine who exactly is the legal heir of the said Estate until Probate is procured in order to find out whether the parties are legitimate beneficiaries of the Estate.
4. The Trial Magistrate having acknowledged that the Appellant is the wife of the Deceased, the registered owner of the suit property, he would therefore not have gone ahead to dismiss her quest to have the suit property protected. The Appellant ranks first under Section, 66 of the *Law of Succession Act* (CAP 160 Laws of Kenya) in priority among those people who can take out letters of Administration as administrators. Under Sections 82 & 83 of the Act, one of the duties of the Administrator is to protect the Estate and ensure that it transmits to its rightful beneficiaries whether she (the Administrator) is a beneficiary or not.
5. I don't agree with the Respondent that the Appellant is not properly before the court. Having taken out letters of Administration Ad litem that enable her to file suit and protect the Estate of her late husband. She is properly before the court. I wonder whose interests the Respondent has been trying to protect. It doesn't matter that he was given instructions by his superiors to act as he did. He has to follow the law and the law does not allow him to take sides in a succession matter or direct parties as to how to sub-divide the Estate of a Deceased person. This is not part of his mandate as an Assistant Chief and for this, I wish to advise the Respondent to stick to his lane under the Chief's Act. Bwana Assistant Chief, it doesn't matter how good advice you gave to the beneficiaries of the Estate of the late Ochenge. My advise to you is that you keep off the affairs of Ochenge's estate and other Estates within your jurisdiction or elsewhere.
6. On whether the Trial Magistrate altered the Judgment after reading it in court, there is no evidence on record to that effect and I would want to leave it at that point. In any case the Appellants prayer to overturn his Judgment, if granted, would cure this. I would also say the same over Grounds Numbers (5 to 10 inclusive) of the Memorandum of Appeal.
 5. The Learned Magistrate erred in law and fact by intentionally/deliberately failing to record the proceedings and more especially on the 2nd day of August, 2022 whereby he failed to record that the Appellant's Advocate was present online/virtually through Microsoft Teams virtual court session and that the magistrate after dismissing the suit with no order as to costs orally in court bowed to the Respondent's Advocate's pressure/demands for costs whereupon he proceeded to record in the court file that costs had been awarded upon perusing the court file which was unprocedural and illegal.
 6. The Learned Magistrate erred in law and fact by allowing the Respondent's demands for costs after delivering Judgment without giving the Appellant or his advocate the opportunity to



respond to the same noting that in his oral reading of the Judgment in open court on the 2nd day of August, 2022 he had dismissed the suit with no orders as to costs.

7. The Learned Trial Magistrate erred in law and fact by abusing his discretion of awarding costs by awarding costs upon oral demands by the Respondent's Advocate for costs even though Judgment had been delivered by the Learned Magistrate pronouncing that the same had been dismissed with no order as to costs and proceeded to record the same in the court file without pronouncing the same orally in court and without recording the reasons for granting costs to the Respondent.
 8. The Learned Trial Magistrate erred in law and fact by engaging in judicial misconduct and exhibiting open bias against the Appellant by deliberately recording and admitting irrelevant and disputed documentary evidence which had not been filed in court and served upon the Appellant.
 9. The Learned Trial Magistrate erred in law and fact by un-procedurally/illegally allowing the Respondent's oral Application for costs after he had orally dismissed with no order as to cost when the civil procedure rules dictate that one must file an Application for review or Appeal against the decision aggrieved against.
 10. The Learned Trial Magistrate erred in law and fact by abusing his judicial powers and illegally making a decision and acting beyond the court's jurisdiction by hearing an oral Application veiled as an Appeal against the Judgment which he had delivered in court orally and proceeded to record the same in the court file without the knowledge and consent of the Appellant's Advocate who was attending the court virtually but was not given an opportunity to respond to the Respondent's Advocate demands for costs having confirmed from the court in its oral pronouncement in open court that the suit had been dismissed with no order as to costs only to find out later he had recorded that the Respondent had been granted costs.
6. I would not wish to venture into prayer No;
- (a) That the Honourable Court be pleased to issue an order seeking to retrieve, recall and examine the Microsoft teams virtual court recording and/or proceedings of the Honourable Kimutai Mutata (P.M.) Court Number 1, Keroka Law Court on the 2nd August, 2022 for purposes of interrogating the legality of court's proceedings/Judgment) of the Memorandum of Appeal as recourse on that lies elsewhere.
7. My main focus is to assess the evidence on record and decide whether the Judgment of the lower court should stand or not and my response is in the negative. I therefore set aside and overturn the Judgment of the Honourable Kimutai Matata - P.M. in Keroka Chief Magistrate's Court ELC. NO. E013 of 2021 dated and delivered on 02/08/2022 and substitute the same with the following: -
- A permanent injunction be and is hereby issued restraining the Respondent herein (the Defendant in the KEroka CMCC ELC. NO. E013 of 2021), his Seniors, Agents, and/or Servants from trespassing onto and/or giving any advice relating to the Estate of the late Ochenge Nkiewa in general and/or in particular land parcel Number Nyaribari Masaba/ Bomobe/ 862.”
8. I also grant the costs of this Appeal as well as those of the subordinate court that this Appeal emanates from to the Appellant.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 24TH DAY OF OCTOBER, 2023



MUGO KAMAU

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the Presence of: -

Appellant – present

Mr. Magara for the Appellant

