



**Olunja v Ogola (Environment and Land Appeal E012 of 2021)  
[2023] KEELC 22369 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22369 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E012 OF 2021  
GMA ONGONDO, J  
DECEMBER 14, 2023**

**BETWEEN**

**JOSEPH SAMWEL OLUNJA ..... APPELLANT**

**AND**

**SAMWEL OTIENO OGOLA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Tom Olando,  
Principal Magistrate, delivered on 3rd November 2021 in Homa Bay  
Chief Magistrate's Court Environment and Land Case No. 72 of 2018)*

**JUDGMENT**

1. This is an appeal that arises from the trial court's judgment delivered on the 3<sup>rd</sup> November 2021 by the Honourable Tom Olando, Principal Magistrate, in Homabay Chief Magistrate's Court Environment and Land Case No. 72 of 2018 where he entered judgment as against the defendant as prayed in the plaint dated 6<sup>th</sup> August 2018 for a permanent injunction, among other orders.
2. The appellant through the firm of Moriasi Osoro and Company Advocates mounted the appeal by way of a memorandum of appeal dated 5<sup>th</sup> November 2021 and filed herein on even date. The Appeal is anchored on grounds 1 to 6 as set out on the face thereof and the same include:
  - a. The learned trial magistrate erred in law and fact by making a finding and holding that L. R. No. East Kanyada/Kanyadier/6660 is not the same as L. R. No. East Kanyada/Kanyadier/4923 and that the title of L. R. No. East Kanyada/Kanyadier/6660 is valid against the evidence on record.
  - b. The learned trial magistrate erred in law and fact by failing to appreciate and apply the law more specifically on issues of the validity of title deed no. L. R. No. East Kanyada/Kanyadier/6660 yet upon scrutiny of the said title the land registrar had rectified upon discovery of mistakes.



- c. The learned trial magistrate erred in law and fact by accepting that indeed there is a problem that was created by the land registrar and goes ahead to aggravate the problem by validating a title that is nonexistent on the ground.
3. Wherefore, the appellant prays that the instant appeal be allowed, judgment of the trial court be set aside and that costs at the trial court and in this appeal be awarded to the appellant.
4. The appeal was heard by way of written submissions pursuant to this court's directions of 31<sup>st</sup> May 2023.
5. Accordingly, the appellant's counsel filed submissions dated 17<sup>th</sup> July 2023 and submitted on the following three issues:
  - a. Whether the learned magistrate erred in law and fact by ignoring the evidence of the technical officers.
  - b. Whether the learned trial magistrate followed the law in validating title deed number 6660 and the true record on the suit land.
  - c. Whether the County Land Registrar followed the right procedure in cancelling title number 6660 to replace it with parcel number 4923.
6. In discussing the issues, learned counsel submitted that Section 79 of the [Land Registration Act, 2016](#) (2012) empowers the Land Registrar to rectify the register. That due process was followed in this case. Thus, counsel urged the court to allow the instant appeal and set aside the judgment of the trial court.
7. The respondent's counsel did not file any submissions herein.
8. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to whether the appellant:
  - a. Has demonstrated that this appeal is tenable and
  - b. Is entitled to the orders sought in the memorandum of appeal.
9. It is noteworthy that the instant appeal being the first one from the trial court in the matter, I am obliged to review the record of the trial court, evaluate it and arrive at own conclusions in this appeal; see *Mwanasokoni-vs Kenya Bus Services Ltd (1982-88) 1KAR 278* applied in other cases, inter alia, *Titus Ong'ang'a Nyachio v Martin Okioma Nyauma and 3 others [2017] eKLR*.
10. At the trial court, the suit was commenced by way of a plaint dated 6<sup>th</sup> August 2018 mounted by the plaintiff/respondent against the 1<sup>st</sup> defendant/appellant and the Land Registrar and Land Surveyor, both of Homa Bay County seeking the following orders;
  - a. A permanent injunction order to issue restraining the 1<sup>st</sup> defendant/appellant either by himself or through his servants or agents from attacking and threatening the plaintiff and/or any other member of his family or doing anything on L. R. No. East Kanyada/Kanyadier/6660 (the suit land herein).
  - b. An injunction to issue against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants restraining them either through themselves or their agents or servants from further subdividing or interfering in any way with the suit land.
  - c. Costs of this suit and interest thereof at court rate.
  - d. Any other relief that this honourable court deems fit to grant.



11. The plaintiff contended that he inherited L. R. No. East Kanyada/Kanyadier/4927 from his late parents. However, that during adjudication process in 1993, the said parcel was registered under the name of one Joseph Onditi Nyauke and a title deed issued thereto. That on 22<sup>nd</sup> March 2018, the 2<sup>nd</sup> defendant then issued the plaintiff with a new number for his parcel, the suit land herein. The plaintiff laments that sometime in June 2018, the 1<sup>st</sup> and 2<sup>nd</sup> defendant turned around and made a report to the effect that the suit land is the same as L. R. No. East Kanyada/Kanyadier/4923, belonging to the 1<sup>st</sup> defendant. That the 1<sup>st</sup> defendant is working in cahoots with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to deprive the plaintiff of the suit land.
12. PW1, Samuel Otieno Ogola, relied on his statements dated 6<sup>th</sup> August 2018 and 14<sup>th</sup> February 2020 as part of his evidence in chief. He produced in evidence a search certificate for L. R. No. East Kanyada/Kanyadier/4923, a search certificate for L. R. No. East Kanyada/Kanyadier/6660, a search certificate for L. R. No. East Kanyada/Kanyadier/4927, map sheet number 4927 (PExhibits 1 to 5). He denied selling the suit land to one Gerson Ongudi. That the suit land and L. R. No. East Kanyada/Kanyadier/4923 are not the same.
13. In cross-examination, he admitted that he was charged for trespassing on land belonging to the appellant herein. That the matter is pending before court.
14. PW2, Evelyne Othim of DCIO Nairobi Forensic Department, testified that the signature on the adjudication records did not belong to the plaintiff. She produced a report and a memo (as PExhibit 6 and PExhibit 7 respectively). During cross-examination, PW2 stated that it is possible for a person to change their signature.
15. PW3, Grace Anna Otieno, 2<sup>nd</sup> wife to the plaintiff/respondent, relied on her statement dated 14<sup>th</sup> February 2020 as part of her evidence. In cross-examination, she stated that they cultivate the suit land.
16. Alfred Otieno Osodo, PW4, Assistant Chief Kobwola Kogwang Sub-location, produced a letter dated 22<sup>nd</sup> November 2017 as PExhibit 3. He stated that the purpose of the letter was to introduce the plaintiff/respondent to the Land Registrar.
17. On cross-examination, PW4 stated that following PExhibit 3, both the Land Registrar and Surveyor visited the suit land. That both parties were present as well as other witnesses during the visit.
18. In his statement of defence and counterclaim, the 1<sup>st</sup> defendant /appellant herein denied the claim and sought that the respondent be evicted from L. R. No. East Kanyada/Kanyadier/4923, which is registered in his name.
19. DW1, the appellant herein, testified that he purchased L. R. No. East Kanyada/Kanyadier/4923 on 13<sup>th</sup> December 1997 from one Gerison Ogudo Oraro who purchased the same from the respondent. That at the time, the property was in the name of the respondent who later filed an objection, allowing the said property to be registered in the name of the appellant and a title deed issued thereto. That he was in possession of the land from 1997 to 2018 when the respondent trespassed onto the land. Further, that there is an ongoing criminal case between the parties regarding the said land. In cross-examination, he admitted that he did not have a land sale agreement between the respondent and the said Gerson Oraro regarding that land parcel.
20. DW2, Antony Odete, Surveyor Homa Bay testified that together with the Registrar, they visited the area. That the suit land is not in the map. That it is L. R. No. East Kanyada/ Kanyadier/4923 that is on the map and is registered in the name of the appellant herein. He produced in evidence a map for the area, DExhibit 7.



21. DW3, Joan Eredi, Land Adjudication Officer Homa Bay, testified that L. R. No. East Kanyada/Kanyadier/4923 initially belonged to the respondent herein. However, in 1999 the appellant lodged an objection against the said land parcel, which objection was allowed and the land registered in the name of the appellant. The objection proceedings were produced as DExhibit 2 and a copy of the adjudication records produced as DExhibit 4(a) respectively. In cross-examination, DW3 stated that she was not present at the time of objection.
22. The Land Registrar Homa Bay, Ndege Tiberious, testified as DW4 and produced the Report done by his predecessor, Ms. Lamu (DExhibit 6).
23. DW5, Peter Ogony, testified that the respondent sold the suit land to Gerson Ongudi. He, however, admitted that he did not witness the sale.
24. In the impugned judgment, the learned trial magistrate observed, inter alia;

“...the Land Registrar went to the land and confirmed the same and created a title deed number 6660 for the plaintiff. The Registrar cannot purport to cancel the title without following the right procedure...”
25. The appellant contends that the learned trial magistrate erred in law and fact by making a finding and holding that the suit land is not the same as L. R. No. East Kanyada/Kanyadier/4923 and that the title of the suit land is valid against the evidence on record.
26. In her Report dated 21<sup>st</sup> February 2019, the Land Registrar observed that both the respondent and appellant pointed at the same position representing L. R. No. East Kanyada/ Kanyadier/4923 and the suit land herein. The Registrar noted that although the entire disputed parcel was initially registered in the name of the respondent, he later transferred the same during objection case no. 247 of 1999 to the appellant, who then occupied the middle section thereof.
27. The Registrar ruled in part:

“...the plaintiff on his part did not disclose that he once shared the land with his brothers and his position (middle) had been in occupation by the 1<sup>st</sup> defendant since 1997. Instead, he made it look like misposition of Nyauke’s land had displaced him. Thus, the created surveyor’s number now floats on original number 4923...”
28. Further, she held that:

“...since map is not authority to boundaries... the actual ground position remains the authority...In summary, No. 6660 is a coined number on top of No. 4923 thus, to correct the error, it was knocked out on the basing of double numbering. The actual ground position belongs to No. 4923...”
29. The law on opinion of an expert witness is well established; See Sections 48 to 54 of the *Evidence Act*, Chapter 80 Laws of Kenya. Expert evidence is a piece of evidence to be considered alongside other evidence on record; see *Shah and Another v Shah and Others* [2003] 1 EA 290.



30. In the instant case, the trial magistrate dispelled the expert evidence of the Land Registrar and the Report produced noting thus:

“...the actions of the Registrar of cancelling the title (of the suit land) was illegal, having found that the plaintiff had a lawful claim over the land...”

31. Section 79 of the *Land Registration Act* (supra) empowers the Registrar to rectify the register or any instrument presented for registration. Therefore, she acted within the law as captured in the Report.

32. This court subscribes to the decision in *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others* [2017] eKLR, where the Court of Appeal stated thus:

“...A property cannot have two valid title deeds. Even assuming that the second title had been issued by mistake, the first in time prevails; see *Gitwany Investment Limited v Tajmal Limited & 3 Others* [2006] eKLR...”

33. Further, under Article 10 (2)(b) of *the Constitution* of Kenya, 2010, equity is a national value and principle of governance; see also Section 3(1)(c) of the *Judicature Act*, Chapter 8 Laws of Kenya. It is trite law that where equities are equal, the first in time shall prevail.

34. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:

- i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

35. In that regard, I find that the respondent who was the plaintiff at the trial court did not prove his claim on a balance of probabilities.

36. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 5<sup>th</sup> November 2021 and filed herein on even date is merited. The same is allowed as stated in paragraph 3 hereinabove.

37. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 14<sup>TH</sup> DAY OF DECEMBER 2023.**

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

**JUDGE**

**Present**

1. Appellant- present
2. Mr. Osoro, Learned Counsel for the appellant
3. Ms. E. Apondi, Learned Counsel for the respondent
4. Moses, Court Assistant

