



**Masembo v Yambo & 3 others (Environment and Land Appeal
19 of 2021) [2022] KEELC 3731 (KLR) (20 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3731 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 19 OF 2021
GMA ONGONDO, J
JUNE 20, 2022
(FORMERLY MIGORI ELC APPEAL NO. 18 OF 2020)**

BETWEEN

NARKISO OCHOLA MASEMBO APPELLANT

AND

JOSEPH OGOLA YAMBO 1ST RESPONDENT

CHARLES ODIRA YAMBO 2ND RESPONDENT

LUCAS YAMBO YAMBO 3RD RESPONDENT

WILFRIDA NDONGA YAMBO 4TH RESPONDENT

(Being an appeal from the judgment of Hon. Mary A. Ochieng- PM delivered on the 17th June, 2020, in Ndhiwa Principal Magistrate's Court Environment and Land Case No. 27 of 2018)

JUDGMENT

1. The appellant, Narkiso Ochola Masembo, through M/S Odingo & Company Advocates, generated the present appeal by way of a Memorandum of Appeal dated June 29, 2020, filed on July 1, 2020. It is an appeal from the judgment delivered on the 17th June, 2020 by the Honourable Mary A. Ochieng, Principal Magistrate in Ndhiwa Principal Magistrate's Court Environment and Land Case No. 27 of 2018.
2. The appeal is anchored on five (5) grounds as set out on the face of the memorandum of appeal, inter alia, that the trial magistrate erred in law and in fact by failing to find that the appellant's suit land reference number Kanyamwa/Kabonyo/Kwandiku/1314 was lawfully and procedurally registered in the names of the appellant thereby occasioning him to be absolute and indefeasible owner of the same. In that regard, the appellant urged the honourable court to allow the instant appeal and set aside or vary the decision of the trial court, and/or in the alternative judgment be entered as prayed in the primary



- suit. The appellant further prayed that the costs of this appeal and that incurred in the lower court by the appellant be borne by the respondents.
3. On August 11, 2020, the appellant filed an application by way of Notice of Motion dated August 10, 2020. He sought among other orders; that the honourable court be pleased to issue temporary injunction orders restraining the respondents, their servants, agents and anybody interested in them and/or having any rights over them from trespassing into, interfering with the boundaries, cultivating and cutting trees or destroying any developments in the suit land till the determination of this appeal.
 4. This honourable court granted orders of temporary injunction as sought in the application dated August 10, 2020 through a ruling delivered on November 9, 2020.
 5. On October 28, 2020, the respondents through M/S H. Obach & Partners, filed a notice of cross appeal dated September 24, 2020. The same is anchored on four (4) grounds as stated on the face of the notice of cross appeal which include; that the trial magistrate erred in law and in fact by failing to hold that the respondents are entitled to the ownership of the whole of the suit land.
 6. So, the respondents urged the honourable court to allow the cross appeal with costs to the appellant and vary part of the judgment of the trial court.
 7. On December 28, 2021, the appellant's counsel filed a record of appeal dated December 17, 2021.
 8. On January 25, 2022, this court ordered and directed that the appeal be argued by way of written submissions.
 9. Accordingly, Learned Counsel for the respondents filed submissions dated February 14, 2022 on February 15, 2022. Counsel identified twin issues for determination namely, whether the judgment for the trial court should be partly varied and the respondents given the title to the suit parcel of land and whether the appellant's appeal should be entertained.
 10. In discussing the issues, learned counsel submitted, inter alia, that the learned trial magistrate found that the respondents have a claim to the suit land, which claim dates back to the year 1994. That the learned trial magistrate also found that the appellant acquired title to the suit land illegally and without following proper procedure. However, that the court issued a decree that does not solve the matter in totality. Counsel thus, urged this court to cancel the appellant's title to the suit land pursuant to section 80 of the [Land Registration Act](#), 2016 (2012).
 11. Counsel relied on various cases including [Kipkoros Arap Soi vs Abuya Maragia Mwembe & 2 others](#) (2014) eKLR, [Kuria Greens Ltd -vs- Registrar of Titles & another](#) (2011) eKLR, among others. Counsel urged the court to dismiss the appeal with costs to the respondents and allow the cross-appeal.
 12. Learned counsel for the appellant filed submissions dated April 28, 2022 on May 4, 2022. Counsel submitted that the issue in question was ownership of the suit land measuring about 3.1 Hectares registered in the names of the appellant. That the trial court's decision was based on how the suit land was registered and the age of the appellant at the time. Counsel cited section 26 of the [Land Registration Act](#) (supra), adding that the respondents failed to adduce any evidence to prove that the registration of the suit land was by fraud, illegal or through a corrupt scheme. Counsel relied on the case of In re [HEA \(minor\)](#) (2019) eKLR, to fortify his submissions.
 13. Originally, this appeal was lodged at Migori Environment and Land Court. On October 7, 2021, Kullow J sitting at Migori Environment and Land Court directed that the appeal be transferred to this court as the suit land is located in Homa Bay.



14. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed thus:
 - a. Whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal;
 - b. If the answer to (a) is in the negative, whether the respondents have demonstrated that the cross-appeal is tenable to warrant grant of the orders sought therein; and
 - c. Who should bear the costs of this appeal?
15. I have duly perused the pleadings, court proceedings as well as the judgment of the learned trial magistrate. It must be noted that it is the duty of this court to reconsider the evidence on record afresh and come to its conclusions and inferences; see *Williamson Diamonds Ltd. –vs- Brown* (1970) EA 1.
16. The plaint filed on August 13, 2018 raises the issue of trespass by the respondents on the suit land. Clearly, the land is registered in the names of the appellant. Indeed, the appellant sought an order of eviction compelling the respondents to vacate the suit land and an order of permanent injunction restraining the respondents, their agents, employees, proxies and/or anyone acting under their authority from trespassing on the suit land.
17. PW1 to PW4 relied on their respective statements filed in court on 13th August 2018. They produced in evidence, Copy of identity card of PW1, a copy of title deed, a copy of official search, a copy of green card, plot card for the suit land, a copy of chief's letter, a copy of a letter dated September 2, 2002 from the D.O Ndhiwa, copy of a letter dated January 29, 2018 from Deputy County Commissioner and a copy of demand letter dated April 27, 2018 (PExhibits 1, 2(a), 2(b), 2(c), 2(d), 3(a), 3(b), 3(c), 3(d) and 4 respectively).
18. The respondents filed a statement of defence and counterclaim dated 15th October 2018 on 5th November, 2018. They sought an order of permanent injunction restraining the plaintiff, his agents and/ or anyone acting under his instructions from interfering with, disposing, alienating, transferring and leasing the suit land; an order compelling the appellant to execute transfer of the suit land in favour of the first respondent and in the alternative, an order directing the executive officer to sign the documents for subdivision of the suit land and transfer of resultant number thereof in favour of the 1st defendant.
19. DW1 to DW4 also relied on their respective witness statements filed on diverse dates. Joseph Ogallo Yambo, DW3 produced the adjudication record, chief's letter and minutes of the land meeting before the area assistant chief as DExhibits 1, 2 and 3 respectively.
20. Notably, the learned trial magistrate did not issue the orders sought by the appellant. At page 10 of the judgment, the learned trial magistrate remarked thus: “.....the fact that the plaintiff who was aged 1 year old was allocated land in the year 1976 when he had no legal capacity to own the suit parcel of land makes the court to find that he acquired title to the said land illegally and without following correct procedure....”
21. The learned trial magistrate noted at page 11 of the judgment that although the defendants persuaded the court that they have a claim over the suit land, none of the parties produced evidence of a land adjudication officer, Land Registrar or Land Surveyor. The court found that without such evidence, it could not ascertain the exact acreage of the suit land that is used and occupied by the plaintiff and that occupied and used by the defendants. The plaintiff's case and defendants' counterclaim were thus, dismissed.



22. I note from the cross- appeal that the respondents did not specifically include a prayer for rectification of title but only mentioned it in their submissions. The respondents cited Section 80 of the Land Registration Act (supra) which provides that:

'(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'

23. This court subscribes to the decision in *Odd Jobs –vs- Mubia* [1970] EA 476 where the Court of Appeal for East Africa held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision. That decision was followed by the Court of Appeal in the case of *Vyas Industries –vs- Diocese of Meru* [1982] KLR 114.

24. In the instant case, the learned trial magistrate noted that the appellant acquired title to the suit land illegally and without following correct procedure. Having acquired title to the suit land illegally and without following correct procedure, can the title of the appellant be protected?

25. Section 26 of the Land Registration Act (supra) provides as follows :-

26.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.(Emphasis added)

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

26. Quite clearly, title to land is protected. However, title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. It is my considered view, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.

27. I endorse the reasoning of my learned brother, Munyao J. in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & another*, Eldoret Environment and Land Court Case No. 609 B of 2012 where the court stated as follows :-

“...it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title



holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions."

28. Considering the totality of the evidence availed in this case, and applying the relevant legal principles, it is my considered view that the title of the appellant is clearly impeachable by dint of the provisions of section 26 (1) (b) (supra). It cannot be allowed to stand and must be cancelled.
29. It is therefore, the finding of this court that the learned trial magistrate's judgment is sound at law. I hereby uphold the same. Accordingly, I find the appeal devoid of merits and hereby proceed to dismiss the same.
30. Besides, the cross-appeal succeeds partially since as held by the learned trial magistrate, the defendants do have a claim over the suit land.
31. Wherefore, it is the finding of this court that the title of the appellant, Narkiso Ochola Masemba, to the suit land Kanyamwa Kabonyo/Kwandiku/ 1314, was improperly procured and the same is hereby cancelled.
32. This court hereby further directs that the suit land be surveyed and sub-divided according to proper procedure and the minutes of the meeting held at Uradi on February 11, 1994(DEXhibit3) and February 17, 1994 where it was decided thus "Yambo's to be given property alongside those sides of Gunda where Yambo was buried and Masemba to remain with the portion he already lives on".
33. The costs of the survey, subdivision and subsequent registration of the new parcels of land to be borne by all the parties equally.
34. Each party to bear their own costs.
35. Orders accordingly.

G.M.A ONG'ONDO

JUDGE

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 20TH DAY OF JUNE 2022.

G.M.A ONG'ONDO

JUDGE

Present

1. Ms Oriche holding brief for Kisukwa for the respondents and for Mr. Odingo for the appellant
2. Okello, Court Assistant

