



**Kaipoi v Kuuu (Environment and Land Appeal 13 of 2021)  
[2022] KEELC 2478 (KLR) (13 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2478 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT AND LAND APPEAL 13 OF 2021**

**MN KULLOW, J  
JULY 13, 2022**

**BETWEEN**

**JAMES KAIPOI ..... APPELLANT**

**AND**

**LESHAN OLE KUKUU ..... RESPONDENT**

**JUDGMENT**

1. This Appeal emanates from the Judgment and Decree of Hon. D.K. Matutu (Principal Magistrate) delivered on 12<sup>th</sup> June, 2019 at Kilgoris PMCC ELC No. 96 of 2018, in favour of the Plaintiff and whose effect was to issue an order of permanent injunction restraining the Defendant from trespassing and interfering with the Plaintiff's parcel or land together with costs of the suit. The grounds in the Memorandum of Appeal are that: -
  - i. The Learned Trial Magistrate erred in fact and law, in finding and holding that the Respondent herein is the lawful and legitimate owner and/or proprietor of Plot Number Olomismis Adjudication Section 186, which parcel of land was however non-existent, unheard of and imaginative.
  - ii. In finding and holding the Respondent was the registered owner and/or proprietor of Plot Number Olomismis Adjudication Section 186, the Learned Trial Magistrate failed to appreciate that Olomismis Land, was never subjected to Adjudication process, but to the contrary same was registered in the name of Olomismis Group Ranch, to hold on behalf of the members thereof. Consequently, the claim by the Respondent in respect of Plot Number Olomismis Adjudication Section 186 was/is pre-mature.
  - iii. In finding and holding the Respondent herein had proved and/or established his claim speaking to Plot Number Olomismis Adjudication Section 186, the Learned Trial Magistrate ignored and/or disregarded documentary evidence that was laid before him, by inter-alia the



Land Registrar, Trans-Mara East/West Sub- Counties, who is the custodian of land related records.

- iv. The Learned Trial Magistrate erred in fact and in law in holding that L.r. No. Trans-mara/olomismis/ 1072, belonging to and registered in the name pf the Appellant, was synonymous with Plot Number Olomismis Adjudication Section 186, which finding and/or holding was/ is speculative, hypothetical and anchored on misapprehension of the totality of the evidence on record.
- v. The Learned Trial Magistrate erred in fact and in law in finding and holding that the transfer and registration of L.r. No. Trans-mara/ Olomismis/ 1072, in the name of the Appellant, was procured and/or obtained by fraud, whereas the Pleadings before the Honourable Court, by and/or on behalf of the Respondent, did not relate to and/or touch on fraud whatsoever and/ or howsoever.
- vi. In advertng to and/or holding that the transfer and registration of L.r. Trans-mara/ Olomismis/ 1072, in the name of the Appellant, was procured by fraud, the learned Trial Magistrate violated the doctrine of Departure and proceeded on a frolic of his own. In this regard, the Judgment and/or Decision of the Learned Trial Magistrate is inimical to basic and established law.
- vii. The Learned Trial Magistrate erred in law in finding and holding that the transfer and registration of L.r. No. Trans-mara/ Olomismis/ 1072 in favour of the Appellant was fraudulent, notwithstanding the fact that the originator of the Title, (the Appellant's predecessor), had not been impleaded and/or joined in the proceedings before the Subordinate Court.
- viii. The Learned Trial Magistrate erred in law in finding and holding that the Appellant had not laid before the honourable court evidence and/or any sufficient evidence underlining the acquisition, transfer and registration of L.r. No. Trans-mara/ Olomismis/1072, in his (Appellant's) name, notwithstanding a plethora of evidence tendered before and obtaining in the court file. Consequently, the judgment of the learned trial magistrate is based on misapprehension of the facts, the evidence and the applicable law.
- ix. The Judgement and/or Decision of the learned trial magistrate, is contrary and/or antithetical to the provisions of the Land (Group Representatives) Act, Chapter 297, Laws of Kenya (now repealed) under which the sub-division, alienation, transfer and ultimate registration of L.r. No. Trans-mara/ Olomismis/ 1072, transpired and/or was carried out.
- x. The learned trial magistrate erred in fact and in law, in ordering and/or granting an Order of Eviction against the Appellant, over and in respect of L.r. No. Trans-mara/olomismis/ 1072, which in any event, is separate and distinct from the (sic)plot claimed by the Respondent.
- xi. The learned trial magistrate erred in law in granting an Order of Eviction, anchored and/or founded on a non-existent parcel of land. Consequently, the Judgment and/or Decision of the learned trial magistrate was/is an exercise in futility.
- xii. The learned trial magistrate failed and/or neglected to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before him and thus arrived at an erroneous conclusion, contrary to and in contradiction of the Evidence on record.



- xiii. The Learned Trial Magistrate arrived at a slanted and erroneous judgment, based on failure to appreciate and/or discern the claim by and/or at the instance of the Respondent and the applicable law, particularly the provisions of the *Land Registration Act*, 2012.
  - xiv. The learned trial magistrate erred in law in disregarding and/or ignoring the submissions mounted and/or filed by the Appellant herein, without assigning any plausible explanation and/or reason whatsoever. Consequently, the Appellant herein, has been subjected to unfair treatment and hence suffered a miscarriage of justice.
  - xv. The judgment of the learned trial magistrate is convoluted and the issues raised by the learned trial magistrate, are slanted and thereby camouflage the judicial mind of the trial court from appreciating, discerning and/or understanding the true nature of the dispute. Consequently, the judgment of the learned trial magistrate is a nullity.
2. Consequently, the Appellant sought the following orders: -
- a. The Judgment and Decree of the Learned Trial Magistrate dated 12<sup>th</sup> June, 2019, be set aside and/or quashed and the same be substituted with an order dismissing the Respondent's suit vide *Kilgoris Pmcc No. 96 Of 2018*.
  - b. The Honourable Court be pleased to vary and/or set aside the limb of the judgment, dismissing the Appellant's Counter- Claim and in lieu thereof, grant an Order allowing the Counter-Claim, dated 8<sup>th</sup> February, 2018.
  - c. The Respondent herein be condemned to bear costs incurred in the subordinate court.
  - d. Costs of the Appeal be borne by the Respondent.
  - e. Such further and/or other orders be granted as this Honourable Court may deem fit and expedient.
3. The backdrop to this appeal is that the Plaintiff/ Respondent instituted a suit vide a Plaint dated 30.05.2017 seeking against the Defendant/Appellant, an order of Eviction from the Plaintiff's suit parcel Plot No. Olomismis Adjudication No. 186 in the Olomismis Group Ranch, an Order of Permanent injunction restraining the Defendant from trespassing on, interfering and/or in any manner dealing with the plaintiff's suit parcel, General damages together with costs of the suit. The Defendant/Appellant in response to the Plaint filed a Statement of Defence and Counter- Claim dated 08.02.2018. He denied all the allegations of trespass and malicious destruction of property raised by the Plaintiff and further stated that the said suit parcel Plot No. Olomismis Adjudication No. 186 is non-existent, the land belonging to the Olomismis Group Ranch had already been subdivided to the individual members of the Group Ranch and who have their distinct title documents relating to specific titles.
4. In the Counter- Claim, the Defendant averred that he was a lawful and bonafide member of the Olomismis Group Ranch which was the registered proprietor of all that parcel of land known as L.r. No. Trans-mara/ Olomismis/ 1 and which has since been subdivided and thus is non-existent. That upon the said subdivision of the original parcel to the various members of the group ranch; several titles were created the Defendant was awarded L.R. NO. Trans-mara/ Olomismis/ 1072 which was registered in his name with clear boundaries and beacons to his land parcel.
5. The Defendant/ Appellant further did contend that upon being registered as the legal proprietor, he was bestowed with the rights and interests over the suit property to the exclusion of everyone including the Plaintiff/ Respondent. His claim against the Plaintiff was for a Declaration that the Defendant is



the lawful, bonafide and registered proprietor of L.r. No. Trans-mara/ Olomismis/ 1072, an Eviction Order and a Permanent Injunction restraining the Plaintiff from entering, re-entering, trespassing onto, laying a claim to, cultivating, interfering with and in any manner dealing with the suit property; L.r. No. Trans-mara/ Olomismis/ 1072 together with general damages plus interest and costs of the counter-claim.

6. The matter did proceed to trial, after the close of each party's case, submissions were filed and the trial court delivered its judgment on the 12.06.2019, whose effect was to allow the Plaintiff's claim against the Defendant. Aggrieved by the said decision, the Defendant lodged the present Appeal.
7. On 17.11.2020, this court directed that the Appeal be canvassed by way of written submissions, to be filed and exchanged within 60 days. The Appellant filed his submissions dated 11.01.2020 whilst the Respondent filed his submission dated 01.12.2020, which I have taken into consideration in arriving at my decision.

### **Appellant's Submissions**

8. The Appellant submitted on each of the grounds in the Memorandum of Appeal separately; on ground 1 and 3, it was his submission that the Land Registrar confirmed on record that Plot Adjudication No. 186 Olomismis was non-existent because Olomismis Group Ranch had been subdivided and members were issued with individual titles. He further confirmed that L.R. NO. trans-mara/ olomismis/ 1072 existed and was registered in the name of the Appellant. The Registrar maintained that the suit parcel claimed by the Plaintiff/ Respondent was non-existent. It was therefore his submission that the Land Registrar having confirmed that the suit parcel is registered in the name of the Appellant; sections 24 and 26 of the [Land Registration Act](#), conferred upon the Appellant all rights and privileges thereto. The Land Registrar produced copies of the Green Card as DExh1, the area limit as DExh2 and the Mutation Form as DExh 3 exhibits in further support of the Appellant's case.
9. On ground 2, he maintained that the suit parcel was never subjected to adjudication process but was registered in the name of Olomismis Group Ranch to hold on behalf of its members including the Appellant. That according to the area list for subdivision of the Olomismis Group Ranch, parcel no. 186 is registered in the name of ole morijoi kesoi ole ketere thus the averment by the Respondent that he was allocated Plot Adjudication Record No. 186 is false. Further, he submitted that the Land Registrar gave evidence to the effect that 186 is a town plot as distinguished from l.r. no. trans-mara/ olomismis/ 1072 which is a farming land. That upon the said subdivision, the Appellant entered and took possession of the suit property and began developing the same.
10. His submission on ground 4 was that the Land Registrar tendered evidence that Plot Adjudication No. 186 is a town plot as contrasted with l.r. no. trans-mara/ olomismis/ 1072; the 2 parcel are distinguishable in that L.r. No. Trans-mara/ Olomismis/ 1072 was allocated to the Appellant as the registered proprietor. All documents confirming ownership were duly produced to that effect
11. Grounds 5 and 6 on the transfer and registration of parcel No. L.r. No. Trans-mara/ Olomismis/ 1072 in the name of the Appellant as having been procured by fraud; he submitted that from the record of appeal and the proceedings in the trial court; impeachment of the title L.r. No. Trans-mara/ Olomismis/ 1072 was never an issue neither was it pleaded, thus the court erred in making a substantial departure from the pleadings yet it is trite law that a party is bound by their pleadings. Section 26 of the [Land Registration Act](#) states the grounds upon which a title can be challenged. He submitted that courts are mandated to consider the title document as prima facie evidence of ownership and conclusive evidence of proprietorship that can only be challenged on the grounds stipulated under



section 26 of the Act. He relied in the case of Margaret Njeri Wachira vs Eliud Waweru Njenga [2018] eKLR to that effect.

12. On ground 7, he relied on the provisions of section 107(1) of the *Evidence Act* and submitted that the onus was on the Respondent to prove that the Appellant's title was acquired fraudulently. He relied on the court of appeal case in Kinyanjui Kamau vs George Kamau Njoroge [2015] eKLR. And Mary Ruguru Njoroge vs John Samuel Gachuma Mbugua & 4 Others [2014] eKLR.
13. He further submitted that the original owner of the title was never impleaded or joined in the proceedings in the trial court and thus the finding that the transfer and registration was fraudulent occasioned a glaring miscarriage of justice on the part of the Appellant. It was his claim that he lawfully purchased the suit parcel from an original owner before the subdivision of the whole parcel as registered in the name of the Olomismis Group Ranch. That he was thereafter listed as a member of the group by acquisition to enable him get his legitimate share as per the Sale Agreement.
14. On ground 8 and 9 that the Appellant had not laid sufficient evidence underlining the acquisition, transfer and registration of L.r. No. Trans-mara/ Olomismis/ 1072, the Appellant submitted that the evidence laid before the trial court was concrete in proving the manner of acquisition and registration of the suit parcel, he produced a copy of the green card, the area limit and the mutation form
15. On ground 10 and 11, it was his submission that the trial magistrate erred in granting an order of eviction against the Appellant founded on a non-existent parcel of land. He stated that the Land Registrar – Kilgoris unequivocally stated that Plot No. 186 is a town plot as opposed to L.R. No. Trans-mara/ Olomismis/ 1072 which is a farming land. It is therefore his contention that from the official records in the custody of the legitimate government offices, the land parcel being claimed by the Respondent is non-existent and further that the Olomismis Group Ranch had already been subdivided and members hold individual titles.
16. His submission on ground 12 and 13 was that nothing was presented by the Respondent to prove that the Appellant's title was fraudulently acquired and thus the holding by the court that the Appellant's title was not a good title was erroneous.

### **Respondent's Submission**

17. The Respondents' on the other hand submitted on 4 issues; whether the judgment and decree dated 12.06.2019 should be set aside, whether the counter-claim dated 08/02/2018 should be allowed, whether the trial magistrate exhaustively captured and evaluated all the evidence on record and whether the trial magistrate erred in fact and law in finding and holding that the Respondent is the lawful and legitimate owner of plot number Olomismis Adjudication Section 186.
18. On the first issue; it was his submission that the judgment and decree dated 12.06.2019 was fair and just. That the learned trial magistrate came up with relevant key questions for determination and which informed his fair and just judgment. He relied on the case of Murtaza Hassan & Another vs Ahmed Slad Kulmiye [2020] eKLR.
19. On the second issue of the counter-claim, he submitted that the Appellant had not proved on a balance of probabilities that he was a bonafide member of the Olomismis Group Ranch. On the third issue; he maintained that the learned trial magistrate exhaustively captured and evaluated all the evidence before rendering its judgment. He relied on the case of Sunrays Rent- A-Car Safaris vs Contra Tours Ltd [2018] eKLR and Nemwel Momanyi vs James Finlay (K) Ltd [2017] eKLR respectively.
20. Lastly, on whether the learned magistrate erred in finding and holding that the Respondent is the lawful and legitimate owner of plot number Olomismis Adjudication Section 186; he submitted that the



Appellant failed to prove on a balance of probabilities that he is the rightful owner of plot number Olomismis Adjudication section 186. He subsequently urged the court to dismiss the Memorandum of Appeal with costs.

21. I have looked at the Memorandum of Appeal, the Record of Appeal and the rival submissions in totality; I find that the main issue for determination is whether in the circumstances, this Court should interfere with the exercise of discretion by the trial court and set aside and/or quash its Judgment and Decree issued on 12<sup>th</sup> June, 2019.
22. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. This mandate certainly does not entail taking on board matters which were never brought to the trial court's attention or were not subject of the said court's consideration. See the Court of Appeal decision in *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR.
23. I am further guided by the Court of Appeal's decision in *Selle v Associated Motor Boat Co.* [1968] EA 123) where it was held as follows: -

“ this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
24. The main issue before the trial court was on the ownership of the suit property and whether or not there was trespass. Both parties laid ownership claims on the suit land; the Plaintiff claimed that he was the owner of parcel number Olomismis Adjudication 186 in Olomismis Group Ranch while the Defendant also claimed that he was the legal, bonafide and registered proprietor of the suit parcel L.R. No. Trans-Mara/ Olomismis/ 1072. Both the Plaintiff and the Defendant claimed that the other encroached onto their respective parcels.
25. I will now proceed to re-evaluate and re-assess each of the party's claim from the trial court record and the judgment; in order to determine whether the trial magistrate rightly exercised his discretion in holding in favour of the Plaintiff/ Respondent.
26. The Appellant in his Memorandum of Appeal outlined 15 grounds upon which he sought to challenge the judgment and decree of the learned trial magistrate. The said grounds can be summarized into issues of ownership of the suit land, the evidence presented in support of the respective claims by both parties in the trial court and evaluation of the said evidences, issues of fraud in the acquisition and registration of Appellant as the legal owner of L.R. No. Trans- Mara/ Olomismis/ 1072, orders granted touching in the suit land and the various provisions of the law. The Respondent on the other hand has maintained that he is the rightful owner of the suit parcel which according to him is parcel No. 186 and is the same as L.R. No. Trans- Mara/ Olomismis/ 1072.
27. At the centre of the dispute between the parties herein is the ownership of suit property measuring approx. 10acres. According to the Appellant, the suit property L.R. No. Transmara/ Olomismis/ 1072 is separate and distinct from the parcel claimed by the Respondent, parcel number Olomismis Adjudication 186. He thus contends that the parcel claimed by the Respondent is non-existent and the orders sought in the plaint were untenable.



28. The Appellant has maintained that he is the bonafide, lawful and the registered owner of the suit property and has urged the court to re-evaluate the evidence he produced in the trial court in support of his ownership claims, particularly the evidence tendered by the Land Registrar who testified as DW1 in support of his case.
29. From the record and a look at the testimony and evidence of DW1, I do note that the Land Registrar produced various documents as exhibits to wit; certified copy of the green card marked as DExhibit 1, a copy of the Area list produced as DExhibit 2, a copy of the Mutation Form produced as DExhibit 3, a copy of the Title Deed issued to James Kaipoi as DExhibit 4, a copy of the Certificate for official search as DExhibit 5 and the R/M for 1072 as DExhibit 6.
30. It was also his testimony that James Kaipoi, the Appellant herein is the registered owner of L.R. NO. Trans- Mara/ Olomismis/ 1072 measuring 4.067Ha approx. 10 acres. He further stated that No. 186 as claimed by the Respondent/ Plaintiff is a town plot belonging to Kelo Ole Ketere while No. 1072 is a farming land. According to him, the two parcels of land claimed are separate and distinct.
31. The Respondent on the other hand produced the documents in his list of documents as his exhibits in support of his claim. Among the said documents was a certified copy of an Adjudication register/ record, which bears his name as at No. 186. From the said record/register; the acreage/ size of the said parcel is not indicated and there is therefore no way of ascertaining is indeed the same is 10acres as alleged or more/less. Further, it is impossible to ascertain from a cursory look at the register who was the initial owner of the alleged parcel No. 186; the Respondent averred that he purchased an additional 10acres of land from one Ole Ketere.
32. Further, from the Area list for subdivision of Olomismis Group ranch produced by the Appellant/ Defendant; No. 186 measures 0.047Ha (approx. 0.116aces) belongs to Ole Morijoi Kesoi Ole Ketere. No. 1072 measuring 4.067 (10.033 acres) belongs to James K. Kaipoi, the Appellant herein. To this end, I find that the trial court erred in finding that the plaintiff had indeed proved on a balance of probabilities that he is the bonafide, lawful owner of suit parcel based on the Adjudication register/ records produced.
33. I also wish to point out that the copy of the judgment in Civil Appeal No. 29 of 2014 dated 14/10/2015 by the court of appeal sitting in Kisumu, which was produced and relied on by the Plaintiff/ Respondent; the said decision was delivered after the title deed had already been issued to the Appellant on 6/11/2014 and thus the Respondent could not use the same as a basis to challenge the title held by the Appellant. In addition, from the map produced by the Appellant, the same shows the exact parcel numbers where the said suit parcel No. 1072 and which is separate and distinct from parcel 186 as claimed by the plaintiff.
34. It is trite law that he who alleges must prove. Section 107(i) of the [Evidence Act](#) provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
35. From a re-evaluation of the evidence adduced, I have noted that the Appellant indeed produced ownership documents to the suit title. Section 25 and 26 of the [Land Registration Act](#) is clear as to what amounts to conclusive evidence of ownership and the rights and privileges accruing to the registered proprietor thereto. In the absence of any proof to the contrary, I find that the documents produced by the Appellant are sufficient proof of ownership. Section 24 of the [Land Registration Act](#) states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.



36. The trial court further misdirected itself in dismissing the evidence produced by the Appellant in support of his ownership claims and finding that the Respondent had proved to the required threshold that the acquisition, transfer and registration of the Appellant as the legal proprietor of L.R No. Trans-Mara/ Olomismis/ 1072 was fraudulent. I have carefully looked at the pleadings filed in the trial court and I find that the Respondent did not at any point seek to challenge the title held by the Appellant on grounds of fraud or misrepresentation. Further, from the testimony and the evidence produced by the Respondent, there is no such proof of fraud and/or misrepresentation to warrant the revocation of the title issued in favour of the Appellant as anticipated under section 26 of the Land Registration Act. A party is bound by their pleadings.
37. In view of the foregoing, I find that the learned trial magistrate did not exercise his discretion properly in allowing the Plaintiff's claim and dismissing the counter-claim by the Appellant. The analysis and subsequent decision did not consider the examination of the full facts of the case and the evidence produced in support of the rival claims in totality.

### **Conclusion**

38. In conclusion, I accordingly find that the Appeal is merited and I proceed to allow the same on the following terms;
- i. The Judgment and Decree of the Learned Trial Magistrate dated 12th June, 2019, be and is hereby set aside. and/or quashed and the same be substituted with an order dismissing the Respondent's suit vide *Kilgoris Pmcc No. 96 Of 2018*.
  - ii. The Appellant's Counter- Claim dated 8th February, 2018 be and is hereby allowed and a declaration do issue that the appellant is the lawful owner of suit parcel L.r. No. Trans-mara/ Olomismis/ 1072.
  - iii. An Order of Permanent Injunction is hereby issued restraining the Respondent, his servants, employees and/or agents from trespassing onto, dealing and interfering in any manner whatsoever with the Appellant's use, occupation and possession.
  - iv. The Respondent is hereby directed to vacate the suit land L.r. No. Trans-mara/ Olomismis/ 1072 within 120 days from the date of this judgment.
  - v. The costs in the subordinate court and the Appeal to be borne by the Respondent.

**DATED,SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 13TH DAY OF JULY, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of; -**

Nonappearance for Appellant

Mr. Mukoya for Respondent

Tom Maurice – Court Assistant

