



**Midumbi (Suing as Personal Representative of the Estate of the Late Polycap
Otieno Arodi - Deceased) v Sule & 6 others (Environment and Land Appeal
E009 of 2023) [2025] KEELC 4080 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4080 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E009 OF 2023**

**E ASATI, J
MAY 29, 2025**

BETWEEN

**GODFREY ONYANGO MIDUMBI (SUING AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF THE LATE POLYCAP OTIENO ARODI -
DECEASED) APPELLANT**

AND

**MUSA NYAGOL SULE 1ST RESPONDENT
MARY ACHIENG ARODI 2ND RESPONDENT
MICHAEL OTIENO OKITE 3RD RESPONDENT
VALARIE JEROTICH KIMETO 4TH RESPONDENT
CLARA ODHIAMBO OGUTU 5TH RESPONDENT
BENARD ODHIAMBO OGUTU 6TH RESPONDENT
THE LAND REGISTRY, KISUMU 7TH RESPONDENT**

*(Being an appeal against the Judgement of Hon. J.N. Wambilianga (SPM) delivered
on 27th of July 2023 in the Magistrate's Court in Suit No.ELC NO.414 OF 2018)*

JUDGMENT

Introduction

1. The Appellant herein was the Plaintiff in Kisumu CMC EL Case No.414 OF 2018 (the suit) and the Respondent, the Defendant.



1. The claim in the suit as can be seen from the plaint dated 11th September, 2018 was for an order of permanent injunction restraining the Respondent from burying the remains of one Thomas Nyamori Sule on a parcel of land known as Kisumu/kasule/545, (the suit land herein).
2. The Appellant who had filed the suit in his capacity as legal representative of Polycarp Otieno Arodi, deceased, claimed that the suit land was the property of the deceased and that the Defendant (Respondent herein) was planning to bury the remains of the said Thomas Nyamori Sule, who had died, on the suit land.
3. The record shows that the suit was compromised vide a consent order entered into between the Appellant herein and the 1st Respondent on 24th September, 2018 as follows:

“By consent;

 1. The suit herein be marked as withdrawn with no order as to costs.
 2. The land parcel in Kisumu/Kasule/545 be sub-divided between the 2 families being the family of Polycarp Otieno Arodi and the late Richard Sule Odonje at the ratio of 50% to both families.
 3. Parties herein to handle the issue of sub-division of the said parcel of land.
 4. The said orders herein to apply to Kisumu ELC NO.77/17.
4. The record further shows that thereafter an application dated 15th June, 2022 was filed by the Appellant. In addition to the Appellant and Respondent, other parties were included in the heading of the application who were listed as the 1st to 6th Interested Parties and who in this appeal have been listed as the 2nd to 7th Respondents.
5. The application sought for orders that;
 - a. The sub-division of land parcel number Kisumu/Kasule/9395, 9396, 9397, 9398, 9399, 9400 and 9401 and the subsequent transfers be declared null and void.
 - b. The 6th Interested Party does cancel and revoke title deed numbers Kisumu/Kasule/9396, 9397, 9398, 9399, 9400 and 9401.
 - c. The sub-division of land parcel Kisumu/Kasule/545 into two halves as per mutation form number 04377448 be upheld.
 - d. The 6th Interested Party does comply with the consent order dated 2nd October, 2018.
 - e. The costs of the application be provided for.
5. The record shows that in response to the application, the 1st Interested Party filed her Replying Affidavit sworn on 28th July, 2022 wherein she deposed that the suit land was sub-divided as per the consent order of which the 1st Respondent received parcel number Kisumu/Kasule/9395 and the remainder was sub-divided as per the 1st Interested Party’s wish on behalf of the family of Polycarp Otieno Arodi, deceased.
6. On behalf of the 6th Interested Party, the Land Registrar, the Attorney General opposed the application vide the Grounds of Opposition dated 25th July, 2022.
7. The record shows that the application was argued by way of written submissions upon which the court delivered its ruling on 27th July, 2023. The court found that the consent was complied with as the suit



parcel was sub-divided into two halves and that what had arisen was a dispute within the family of the Plaintiff and not with the Defendant.

8. The court also found that the Interested Parties were not part of the consent as the suit and the consent were between Godfrey Onyango Midumba on behalf of Polycarp Otieno Arodi, deceased and Musa Nyagol Sule. The court further found that the Applicant had not complied with the provisions of Order 1 of the Civil Procedure Rules as no leave of the court had been sought for joinder of the Interested Parties in the suit. The court ultimately found that the application was not merited and dismissed it with costs.

The Appeal

9. Aggrieved by the ruling, the Appellant preferred the present appeal vide the grounds of appeal contained in the Memorandum of Appeal dated 14th August, 2023.
10. The Appellant seeks for orders that the judgement of the lower court be set aside, and in its place be replaced with an order dismissing the suit with costs.

Submissions.

11. Vide directions given on 19th November, 2024, the appeal was disposed of by way of written submissions.
132. It was submitted on behalf of the Appellant that property of a deceased person can only be lawfully transmitted to the beneficiaries after succession has been undertaken. That no evidence was produced as to when succession to the estate of the deceased registered owner Polycarp Otieno Arodi was undertaken. That no grant of Letters of Administration for the deceased registered owner was produced to show that indeed succession to estate had been undertaken after the adoption of the consent order dated 2nd October, 2018.
13. Counsel submitted further that the consent dated 2nd October, 2018 was never strictly followed. That the Respondent and the Interested Parties through fraudulent means proceeded to have the suit land directly registered in to their respective names. That succession to the estate of Polycarp Otieno Arodi was never done and the suit land was never sub-divided into two portions but several portions contrary to the terms of the consent. Counsel prayed that the appeal be allowed.
14. On behalf of the 2nd Interested Party who was named as the 2nd Respondent in the appeal, it was submitted that the land was sub-divided into two portions and the 2nd Respondent sub-divided the portions of land meant for her late husband into smaller portions.
15. That the ruling delivered by the Hon. Magistrate on 27th July, 2023 was proper. That the Appellant and the 1st Respondent were the only litigating parties in the suit. That the Interested Parties were never parties to the suit hence if the orders sought herein are granted, the Interested Parties shall be condemned unheard.

Analysis

16. This being a first appeal the court has a duty to reconsider the whole evidence produced before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which this court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of *Gitobu Imanyara & 2 others –vs-*



Attorney General [2016] e KLR the court held that the principles upon which a first appellate court proceeds are well settled and stated that:-

“Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.

(Also see *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123 and *Peter M. Kariuki vs attorney General* [2014]eKLR)

The first issue for determination is whether or not the appeal is against the judgement in the suit or ruling.

17. The heading of the Memorandum of Appeal and the record of appeal indicate that the appeal is against the judgement of Hon. J.N. Wambilianga (Senior Principal Magistrate) delivered on 27th July, 2023.
18. The prayers sought include a prayer for the judgement of the lower court to be set aside and be replaced with an order dismissing the suit with costs.
19. A reading through the record of appeal shows that there was no judgement in the suit delivered by Hon. Wambilianga on 27th July, 2023. That the suit had been compromised vide the consent order and that the only decision delivered on 27th July, 2023 by Hon. Wambilianga was the ruling in respect of the application dated 15th June, 2022.
20. The appeal therefore is against the said ruling and the not judgement and to that extent the appeal is misconceived.

The second issue for determination as contained in ground 1 of appeal is whether the court failed to properly analyze the evidence and exhibits presented before court and therefore coming to a wrong determination which is not backed by evidence.

21. The evidence presented before the trial court was the Supporting Affidavit to the application and the Replying Affidavit thereto and the annexures. It has not been pointed out in the submissions what aspects of the evidence the court failed to take into account. My reading of the Affidavits and the annexures reveal that there is no complainant by MUSA NYAGOL SULE, the Defendant that his family has not received the 50% as per the consent order.
22. The Appellant’s displeasure appears to be emanating from the fact that the share for Polycarp Otieno Arodi’s family was shared out to his dependents.
23. The burden of proof in this appeal that the court failed to properly analyze the evidence was with the Appellant. He has not discharged the burden.

The next issue as contained in ground 2 of appeal is whether or not the court failed to take into account evidence of the Appellant regarding the contents of the consent order.

24. The record shows that the court upon analyzing the contents of the application, the Supporting Affidavit, Replying Affidavit and submissions, framed the following as the issues for determination;
 - a. whether the consent has not been complied with;
 - b. whether the Interested Parties were part of the consent
 - c. whether the application has been proved.



25. From these issues, it is clear that the central issue for determination by the trial court was whether or not the consent had been complied with.
26. In this appeal, I have re-examined and analysed the documents placed before the trial court. The record shows that land parcel No.9395 which measured approximately half of the suit land was given to the Defendant (1st Respondent herein). There is no complaint from the 1st Respondent.
27. The consent order merely required that each of the two families receives half or 50% of the land.
28. It is not in dispute that the recipients of all the other parcels save for No.9395 are members of the family of Polycarp Otieno Arodi – or got their portions through the members of the family of Polycarp Otieno Arodi.
29. I find that the trial court did not fail to take any evidence placed before it into account.

The next issue is whether the Interested Parties were properly before court.

30. The starting point is that the suit had been withdrawn vide the consent order. A suit that has been withdrawn is an ended suit. The law only provides for filing of fresh suit should the parties wish to pursue the claim in the withdrawn suit.
31. Even if the suit was still active, in order to add parties thereto, the Appellant had to comply with the rules in relating to joinder of parties. There is no evidence that this happened. The Interested Parties who are in this appeal listed as Respondents are improperly before court. They are strangers in these proceedings.
32. I find that the grounds of appeal have not been proved.
33. Although the Appellant prayed in the Memorandum of Appeal that this court may make an order dismissing the suit, there is no suit to be dismissed as the same was withdrawn vide the consent.
34. The appeal lacks merit and is hereby dismissed.
35. Costs to the Respondents.
Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 29TH DAY OF MAY, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Anyango for the Appellant.

Onsongo for the 1st Respondent.

Odoyo for the 2nd Respondent.

