



REPUBLIC OF KENYA



**Ongwae & another v Gitenya & 7 others (Environment & Land Case E009 of 2021) [2022] KEELC 14746 (KLR) (15 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14746 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND CASE E009 OF 2021**

**JM KAMAU, J**

**NOVEMBER 15, 2022**

**BETWEEN**

**STEPHEN MAMBOLEO ONGWAE ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN MAMBOLEO ONGWAE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SUSAN MANOTI GITENYA ..... 1<sup>ST</sup> RESPONDENT**

**SUSAN MANOTI GITENYA ..... 2<sup>ND</sup> RESPONDENT**

**JOHNSON MACHORA ONGWAE ..... 3<sup>RD</sup> RESPONDENT**

**JOHNSON MACHORA ONGWAE ..... 4<sup>TH</sup> RESPONDENT**

**GEORGE MOGAMBI ONGWAE ..... 5<sup>TH</sup> RESPONDENT**

**GEORGE MOGAMBI ONGWAE ..... 6<sup>TH</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR NYAMIRA COUNTY .. 7<sup>TH</sup> RESPONDENT**

**COUNTY LAND REGISTRAR NYAMIRA COUNTY ..... 8<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. After this Appeal was filed an undated Application was filed in court on 4/10/2022. The same sought for the following orders:

1. That this honourable court be pleased to admit the Report and Valuation of Damon Appraisers dated 3<sup>rd</sup> August, with respect to land holding West Migirango/Siamani/3427; being one of the two 'suit properties' in the application of the respondent (plaintiff in the former MCELC 057 OF 2021 at Nyamira Law Courts) and as well, being one of the three properties comprising the intermeddled estate of Ongwae Moenga (Deceased). This report will



support and add value to the assertions by the appellant that the chief magistrate's court lacked jurisdiction to hear and determine case no MCELC 057 of 2021 in the following filings at the Chief Magistrate's Registry, Nyamira. These filings (canvassed here below) were duly assessed and acknowledged by the chief magistrate's Court Registry and were duly served on parties:

2. That this honourable court be pleased to exclude the affidavit titled: 1<sup>st</sup> And 2<sup>nd</sup> respondents replying affidavit; dated September 19, 2022 for reasons canvassed here- below.
3. That this honourable court be pleased to exclude the photographic annexures to the respondent's application in MCELC 057 of 2021 at Nyamira Law Courts.
2. The said application was abandoned and withdrawn by the appellant on 11/10/2022 and the parties decided to confine their efforts on the main Appeal.
- 3 This Appeal emanates from a suit in the Chief Magistrates court, Nyamira being CMCC ELC No. W057 of 2021. In the said suit the appellant herein Stephen Mamboleo Ongwae is the 1<sup>st</sup> defendant. Susan Manoti Gitenya, is the Plaintiff and is now the 1<sup>st</sup> respondent while Johnson Machora Ongwae, George Mogambi Ongwae and the County Land Registrar Nyamira County are the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively being the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant in the lower court in the same order.
4. In the lower court, the appellant herein requested the trial magistrate in what is referred to as "Request for change Presiding Judge/Magistrate" dated 23/1/2021 and filed in court on 26/1/2022. From the Memorandum of Appeal, the Appellant raises the following as his grounds of Appeal;
  1. The Honourable William Chepseba misdirected himself in fact and in law by basing his ruling entirely only on issuance interim orders and ignoring the submissions of the appellant and misreading the submissions of counsel for the plaintiff.
  2. The learned magistrate failed to take into account relevant factors such as:
    - (a) Issuance of interim orders when: -
      - i) A *prima facie* case with a probability of success was not shown in the plaintiff's application by way of supporting documents or witnesses and witness statements in the matters of eviction, destruction of crops and trees and allocation of land parcels by Ongwae Moenga.
      - ii) An impartial arbiter would not have granted the interlocutory injunctions since the applicant did not show that she might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages.
      - iii) The court could not be in doubt of the two principles above, to resort to a decision of the application on the balance of convenience. Even if that was the case, an impartial court would have easily come to the conclusion that on the balance of convenience, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents would be greatly inconvenienced by the interlocutory injunctions while the plaintiff had nothing to lose.
    - (b) Jurisdiction of the honourable court.
5. The jurisdiction of the Honourable William Chepseba to handle the matter of intermeddling in the land estate of Richard Ongwae Moenga deceased was called to question by the appellant; by the filling of a guide to the valuation of the estate of Ongwae Moenga deceased. The learned Magistrate failed to exercise his judicial discretion and require the production of a valuation report of the estate of Ongwae



Moenga from a qualified valuer before the learned Magistrate could rule on the issue of his own recusal as he did on the July 14, 2022.

6. The appellant then concludes that the learned trial magistrate should recuse himself because an impartial Arbiter would not have granted the interlocutory injunctions since the applicant did not show that she might otherwise suffer irrevocable injury, which would not be adequately compensated by an award of Damages.
7. The applicant further proceeds to conclude that the honourable court ruled against all these in contravention and disregard of clear provisions of the law.
8. Finally, the appellant prays that this court be pleased to enter Judgement as follows:
  1. The Ruling and orders of the Honourable William Chepseba, Chief Magistrate, Nyamira Law Courts, delivered on July 14, 2022 in MCELC 057 of 2021 be vacated in their entirety.
  2. The Interim Orders issued by the Honourable William Chepseba, Chief Magistrate, Nyamira Law Courts, on July 26, 2022 in MCELC 057 of 2021 be vacated in their entirety.
  3. The Application dated 23<sup>rd</sup> of January, 2021 and titled Request for Change of Presiding Judge/ Magistrate be allowed in its entirety.
  4. Proceedings in the subordinate court in MCELC 057 of 2021 be stayed and finally be vacated in their entirety.
  5. Costs of MCELC 057 2021 and this Appeal be awarded to the Appellant.
9. I have considered both submissions as well as the oral submissions made in court and I must admit that this is not a proper Application for recusal. An application for recusal is based on bias or partiality on the part of the Arbiter but not on a Judgement that a party considers not to be correct or not based on proper principles of law. The latter gives the aggrieved party a right to appeal but not to ask the court to recuse itself. An Application for recusal cannot be used to correct legal errors, i.e. where a court makes a Decision it is allowed to make, but decides incorrectly. The latter type of error can only be challenged through an Appeal. In the absence of grounds of misconduct on the part of the trial court, I would hesitate to grant the orders sought by the Appellant. As to the issue of the monetary jurisdiction of the lower court, I invite the applicant to raise the issue with the court or file a Miscellaneous Application in this court to have the case transferred to the appropriate court. In the premises I disallow the Appeal herein with costs.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 15TH DAY OF NOVEMBER 2022.**

**MUGO KAMAU**

**JUDGE**

In the Presence of: -

Court Assistant: Sibota

Appellant: In person

Respondent: Mr. Mituga

