



Simbiri Nan Bell Community Health Centre (ACBO suing through its chairman) Erick Odede) v Mbori & 6 others (Environment and Land Appeal 11 of 2022) [2022] KEELC 14767 (KLR) (15 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14767 (KLR)

FORMERLY MIGORI ELC APPEAL NO. E005 OF 2020

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND APPEAL 11 OF 2022

GMA ONGONDO, J

NOVEMBER 15, 2022

BETWEEN

**SIMBIRI NAN BELL COMMUNITY HEALTH CENTRE APPELLANT
ACBO SUING THROUGH ITS CHAIRMAN) ERICK ODEDE**

AND

**ALFRED N. MBORI 1ST RESPONDENT
SAMWEL S. RAPEMO 2ND RESPONDENT
LINET O.O. OSOO 3RD RESPONDENT
WALTER A. OSOO 4TH RESPONDENT
JOSEPH MIRERI RAPEMO 5TH RESPONDENT
LAND REGISTRAR, KARACHUONYO SUB-COUNTY 6TH RESPONDENT
ATTORNEY GENERAL 7TH RESPONDENT**

(Being an appeal from the ruling of Hon. Celesa Okore (Principal Magistrate) delivered on 22nd October, 2020 in Oyugis Principal Magistrate's Court Environment and Land Case No. 35 of 2019)



JUDGMENT

1. The present appeal arose from the trial court's ruling delivered on the 22nd October, 2020 by the Honourable Celesa Okore (Principal Magistrate) in Oyugis Principal Magistrate's Court Environment and Land Case no 35 of 2019 where she held, inter alia;

“...I have considered the issues raised herein in the application and the entire suit. And it is my considered opinion that the issues have already been dealt with in the Kisumu CMCC 656/2002 and Oyugis PMCC 3/18, and/or are being taken care of in Oyugis PMCC 23/19... This suit is therefore *sub judice* and must go...For avoidance of doubt, the plaintiff's suit in its entirety is hereby dismissed with costs to the defendants...”

2. The appellant was aggrieved thereby. As a result, he lodged the appeal herein through the firm of Obach and Partners Advocates.

3. By a memorandum of appeal dated 28th October 2020, the appellant anchored the appeal on grounds 1 to 5 as set out on the face of the same and these include:

- a. The learned trial magistrate erred in law and fact in entertaining and/or delving into issues or facts while making a determination on the Preliminary Objection raised by the defendants/applicants.
- b. The learned trial magistrate erred in law and fact in holding that the appellant's suit is an abuse of court process and that the issues in controversy/dispute in Kisumu CMCC 656/2002 and Oyugis PMCC. 3/18, and/or are being taken care of in Oyugis PMCC 23/19.
- c. The ruling of the learned trial magistrate does not capture the issue(s) for determination, the determination thereof and the reasons for such determination.

4. In that regard, the appellant is seeking the orders as *infra*:

- a. That the ruling of the learned trial magistrate dated 22nd October 2019 (sic) be quashed and/or set aside.
- b. That the costs of this appeal and in the trial court be awarded to the appellant.

5. Initially, the appeal was lodged at Migori Environment and Land Court. On 27th January 2022, the same was transferred to this court for hearing and determination. Further, the appeal was heard by written submissions following this court's orders dated 13th June 2022.

6. Accordingly, learned counsel for the appellant filed submissions dated 29th June 2022 on 25th July, 2022 and identified one issue for determination thus: whether the appellant's suit in Oyugis ELC Case no 35 of 2019 is sub judice Oyugis PMCC no3 of 2018 and PMCC no 23 of 2019. Counsel submitted that in Oyugis PMCC no3 of 2018, the main issue for determination was management and company registration whilst in Oyugis ELC Case no 35 of 2019 from which this appeal emanates, the issue in contention was the respondents' fraudulent and illegal registration of themselves on suit parcels of land, to wit, Kasipul/Kawere Kamagak/2041 and 2043, in the place of the appellant herein. Counsel urged the honourable court to be guided by the principles of Article 48 of the [Constitution of Kenya, 2010](#) as well as Article 40 (1) and (6) of the same Constitution.



7. Despite service being effected as noted in *Ogada v Mollin* (2009) KLR 620, the respondents herein did not enter appearance nor file submissions in respect to the instant appeal.
8. In light of the above, the issues for determination herein are as contained in the grounds of appeal and condensed as follows:
 - a. Whether the appeal is tenable?
 - b. The orders to be made in this appeal to meet the best ends of justice.
9. It must be remembered that the instant appeal is the first one from the trial court in the matter. Therefore, this court is obliged to review the record of the trial court, evaluate it afresh and arrive at its own findings herein; see *Mwanasokoni v Kenya Bus Services Ltd* 1982-88 1KAR 278 applied in the case of *Titus Ong'ang'a Nyachio v Martin Okioma Nyauma and 3 others* 2017 eKLR.
10. The 1st respondent who was the 1st defendant before the trial court lodged an application by way of Notice of Motion dated 26th February, 2020 seeking the following orders;
 - a. That the court be pleased to strike out the plaintiff's suit herein.
 - b. Costs of the suit and the application be awarded to the defendant.
11. In the said application, the 1st respondent herein contended that the appellant herein lacked the legal competence and/or capacity to mount any case as held in the decision in Oyugis PMCC no 3 of 2018 dated 22nd January, 2018. That further, the suit at the trial court was *sub judice* Oyugis PMCC 23 of 2019 as the matters in contention involved the same suit parcels of land and the same parties.
12. The applicant/1st respondent herein attached proceedings and a ruling dated 22nd January, 2018 in Oyugis PMCC 3 of 2018 in which the appellant herein, Erick Odede, was found to have no *locus standi* in the suit he had brought against these same parties about the same subject matter in the trial court. Notably, the appellant did not prefer an appeal against that decision.
13. The applicant also attached the proceedings in Kisumu Case no CMCC 656 of 2002. This suit dealt with how the land was acquired, how the Simbiri Nan Bell Community Health Centre came into being as well as how the defendants became its directors, its accounts and/or finances and the sponsors/financiers thereto.
14. The appellant's counsel has submitted that in Oyugis PMCC no3 of 2018, the main issue for determination was management and company registration whilst in Oyugis ELC Case no 35 of 2019 from which this appeal emanates, the issue in contention was the respondents' fraudulent and illegal registration of themselves on suit parcels of land in the place of the appellant herein.
15. In Oyugis ELC Case no 35 of 2019, the appellant herein instituted suit as against the respondents herein by way of a plaint dated 10th April 2019 seeking the orders *infra*:
 - a. A declaration that the change of registration particulars in favour of the defendants by the 6th defendant was fraudulent, illegal, null and void.
 - b. An order of rectification compelling the 6th defendant to rectify its register so as to remove the entries in favour of the 1st to the 5th defendants to revert it back to its rightful owner, the plaintiff.
 - c. Costs of the suit together with interest thereon.



16. The suit in Oyugis CMCC no 23 of 2019 was instituted by way of an amended plaint dated 6th May 2019 by Simbiri Nan-Bell Community Health Centre Ltd against Erick Odede (the appellant herein), Elijah Miruka, Spenser Otieno, Equity Bank Ltd. Oyugis Branch and Thomas Oluoch Nyakado. The plaintiff sought, amongst other orders:
 - a. An order directing the defendants to render accounts and refund, reimburse and/or pay to the plaintiff all the money they (defendants) have received through the bank account number 1500XXXXXX109, on behalf of and account of the plaintiff failure to which the plaintiff be at liberty to levy execution against the defendants personally, jointly and severally for the deposits received on account of the plaintiff.
 - b. Permanent injunction orders be issued against the 1st, 2nd and 3rd defendants.
 - c. Eviction orders as against the defendants, their representatives, relatives and/or any persons they have purported to employ and posted to the plaintiff's health facility.
17. In her ruling, the Learned Trial Magistrate noted that in the court's ruling dated 22nd January, 2018 in Oyugis PMCC 3 of 2018, the appellant herein, Erick Odede, was found to have no locus standi in the suit he had brought against these same parties about the same subject matter in the trial court. That further, the suit in Kisumu Case no CMCC 656 of 2002 dealt with how the land was acquired, how the Simbiri Nan Bell Community Health Centre came into being as well as how the defendants became its directors, its accounts and/or finances and the sponsors/financiers thereto. That therefore, the issues for determination in the trial court's suit have been sufficiently addressed in the two suits and/or are being taken care of in Oyugis PMCC no 23 of 2019.
18. In the said ruling in Oyugis PMCC 3 of 2018, the appellant's suit was dismissed with costs. Notably, the appellant did not prefer an appeal against that decision. How then did he institute the suit at the trial court?
19. The appellant also contends that the impugned ruling did not capture the issue(s) for determination, the decision thereon, and the reasons for such decision; see Order 21 rule 4 of the [*Civil Procedure Rules, 2010*](#).
20. Besides, I note that the learned trial magistrate addressed herself to only one issue, to wit, whether the suit is sub judice. This court is conscious of the term "*sub judice*" as defined in *Black's Law Dictionary* 10th Edition at page 1369.
21. In reaching the determination, the learned trial magistrate relied on among others, copy of the amended plaint in Oyugis PMCC 23/ 2019, court proceedings in Kisumu Case no CMCC. 656 of 2002 and proceedings and ruling in Oyugis PMCC 3/2018.
22. I bear in mind the entire evidence on record in this case, and the facts of the case as well as legal principles applicable and as stated above. It is my considered view that the learned trial magistrate correctly applied herself to the record before her and the principles of law. Therefore, the grounds of appeal are untenable.
23. To that end, it is the finding of this court that there are no reasons or at all, to fault the learned trial magistrate's ruling. I proceed to uphold the same.
24. *A fortiori*, the instant appeal originated by way of a memorandum of appeal dated 28th October, 2020 is hereby dismissed.



25. By dint of the proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of this appeal and the original suit in the court below, together with interest on costs at court rates, to be borne by the appellant.

26. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 15TH DAY OF NOVEMBER 2022.

G.M.A ONG'ONDO

JUDGE

Present

1. Ms. Ochieng holding brief for H. Obach, learned counsel for the appellant

2. Okello, Court Assistant

