



**Ware v Halake (Environment and Land Appeal 017 of 2021)  
[2022] KEELC 15153 (KLR) (5 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15153 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT AND LAND APPEAL 017 OF 2021  
PM NJOROGE, J  
DECEMBER 5, 2022**

**BETWEEN**

**DUBA WARE ..... APPELLANT**

**AND**

**HELLEN HAKULE HALAKE ..... RESPONDENT**

*(Being an appeal from the Judgment/Decree of the Marsabit Senior Resident Magistrate Hon. Mbayaki Wafula, in E&L Case Number 2 of 2019, delivered on 24th June 2020, by virtue of enlargement of time granted on 20th May 2021 by Hon. Lady Justice L.N. Mbugua in Meru High Court Miscellaneous Civil Application Number 11 of 2020)*

**JUDGMENT**

1. The memorandum of appeal in this suit is in the following format:

Memorandum of appeal

1. That the learned senior resident magistrate erred in law and misdirected himself on the law and the facts in coming to the conclusion that a claim for overriding interests cannot be made over registered land.
2. It was a misdirection of the law and the facts when the learned senior resident magistrate held that time for overriding interests was terminated or interrupted when PW3 vacated the disputed land.
3. That the learned senior resident magistrate erred in law and misdirected himself in holding that the appellant had no claim of entitlement in the absence of grant of letters of administration to the estate of Henry Halake deceased husband of the respondent
4. That the learned senior resident magistrate misdirected himself on the law and the facts in transforming the case into a boundary dispute when this was never the case.



5. That the learned senior resident magistrate had no jurisdiction to call for and rely on a report by the land registrar in the absence of prior consent by the parties and without him being cross-examined.
6. That the learned senior resident magistrate erred in law and misdirected himself on the facts in holding that the appellant's claim was based on adverse possession and ought to have been lodged in the High Court.
7. By bringing into the judgement matters which were never in issue and never canvassed during the hearing, the learned senior resident magistrate engendered great injustice to the appellant in dismissing the case.
8. That the entire judgement was not supported by evidence or the law.

Dated at Isiolo this 17<sup>th</sup> day of June 2021.

2. The appeal was canvassed by way of written submissions.
3. This being a first appeal, this court is entitled to consider the evidence given in the lower court and to arrive at its own decision. I have carefully gone through the pleadings, the proceedings in the lower court, the judgement of the lower court and the submissions proffered by the parties to buttress their veritably incongruent assertions.
4. On ground 1, the appellant says that the lower court was wrong to assume that overriding interests cannot exist over registered land. His advocate says that he submitted in detail on this point but his submissions were overlooked by the lower court which misdirected itself by concluding that the issue in dispute was ownership of land. It is not true that the learned senior resident magistrate assumed that overriding interests cannot exist over registered land. To the contrary he recognized that section 26 (1) as read with section 30 (g) of the *Land Registration Act* provide for and protect overriding interests. The respondent opposes the appellants submissions. He says that the appellant did not adduce any evidence that he had any overriding or customary rights over the land.
5. Having carefully studied the proceedings in the lower court, I find that the appellant did not prove, on a balance of probability, existence of overriding interests in his favour over the suit land. I dismiss ground No 1.
6. In ground 2, the appellant says that he had occupied the land he claims against the respondent for close to 37 years. For this reason of longevity of stay, he submits that the lower court should have upheld his overriding interests over the suit land. The respondent categorically says that the lower court rightly found that the appellant had not proved his claim. I agree. As I found for ground 1, I find that the claim had not been proved, ground 2 is, therefore, dismissed.
7. In ground 3, the appellant says that the learned magistrate was wrong in holding that the appellant had no valid claim as the respondent had no grant of letters of administration concerning her husband's estate. He says that the claim was not against the estate but against Hellen Hakule Halakhe, the respondent. Indeed, the appellant's advocate says that the suit was against the respondent in her individual capacity.

The respondent ripostes that the land in dispute is registered in the name of Henry Halake, deceased, who was the husband of the deceased hence the necessity for grant of letters of administration. The respondent also says since the appellant had invoked section 30 (a) of the *Registered Land Act* and section 28 (b) of the *Land Registration Act*, he ought to have had prior knowledge that the suit land was registered land registered in the name of a deceased person. I find the claim that the respondent was



being sued in her individual capacity quite interesting. I wonder how a litigant can claim land from a person who does not own land. I dismiss ground No 3.

8. Ground 4 is that the senior resident magistrate misdirected himself by transforming the case into a boundary dispute when this was not the case. He says that the learned magistrate appears to have been influenced by the report of the land registrar and by so doing had introduced extraneous matters.

The respondent says that the parties had consented to the site visit and had willingly participated. He says that the appellant ought to have objected to the visit at the trial, which he did not.

I do note that the appellant in his oral evidence was claiming 2 acres of land given to him before land adjudication had taken place. In his plaint, the appellant claimed unregistered land. The respondent in his evidence asserted that his land was surveyed and registered. I find that the visit by the land registrar was meant to assist the court in identifying the disputed land or lands.

Regarding the claim that the learned senior resident magistrate had introduced an extraneous matter, to wit, a boundary dispute, I opine that parties should be bound by their pleadings. In paragraph 8 of his plaint in the lower court, the appellant says that he had at one time sought the assistance of the surveyor to determine his and the respondent's land. This is admission by him, that he felt that there was a boundary dispute.

I dismiss ground No 4.

9. In ground No 5, the appellant says that the learned senior resident magistrate had no jurisdiction to call for and rely on a report by the land registrar in the absence of prior consent by the parties and without him being cross-examined.

I have examined the proceedings in the lower court. Clearly, the appellant is being economical with the truth. Both parties agreed that the site visit be undertaken. All parties were represented during the site visit. The appellant's advocate was represented by one advocate called John Behaile. The parties therefore knew that the report was being filed in court. There is no indication anywhere that the appellant's advocate had sought to cross-examine the land registrar.

In the circumstances, I dismiss ground No 5.

10. Ground No 6 is that the learned resident magistrate misdirected himself in holding that the appellant's claim was based on adverse possession and ought to have been lodged in the High Court. He says that the learned senior resident magistrate conflated a claim for overriding interests with a claim for adverse possession.

This is disputed by the respondent who says that the magistrate merely pointed out that he lacked jurisdiction to hear adverse possession matters.

It would seem that the appellant was buttressing his overriding interests claim upon longevity of stay. The honourable senior resident magistrate, having found that the appellant had not proved overriding interests over the suit land, only mentioned in passing that had the suit been one of adverse possession, he would not have had jurisdiction as it was vested in a superior court. Indeed, the suit was dismissed on the basis that the plaintiff had not proved his case on a balance of probabilities.

In the circumstances, ground 6 is dismissed.

11. In grounds number 7 and 8, the appellant says that by bringing into the judgement matters which were never in issue and never canvassed during the hearing, the learned senior resident magistrate engendered great injustice to the appellant in dismissing the case. He also says that the judgement was not supported by the evidence or law.



The respondent ripostes that the subordinate court was mandated to render judgement based on a balance of probabilities when the evidence adduced by the parties is considered in totality. He also categorically submits that the lower court did not consider extraneous matters.

Having perused the proceedings in the lower court and the judgement which spawned this appeal, I find that the learned senior resident magistrate in the lower court did not consider uncanvassed and extraneous matters in his judgement.

In the circumstances, ground numbers 7 and 8 are dismissed.

12. I issue the following orders; -

- a. This appeal is dismissed.
- b. Costs in this appeal and in the lower court shall follow the event and are awarded to the respondent.

**DELIVERED IN OPEN COURT AT ISIOLO THIS 5<sup>TH</sup> DAY OF DECEMBER, 2022 IN THE PRESENCE OF;**

Court assistant: Balozi

Abdullahi holding brief for Halake for the Respondent.

Miss Nyasani holding brief for Mukira for the Appellant.

**HON. JUSTICE P.M NJOROGE**

**JUDGE**

