



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyakundi v Kwena & 2 others (Environment and Land Appeal  
13 of 2019) [2025] KEELC 5319 (KLR) (14 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5319 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND APPEAL 13 OF 2019**

**MN KULLOW, J  
JULY 14, 2025**

**BETWEEN**

**BENEDICT NYAKUNDI ..... APPELLANT**

**AND**

**WYCLIFFE ANGWENYI KWENA ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN OMBATI KWENA (SUING AS THE LEGAL REPRESENTATIVES OF  
KWENA NYANDWARO NYAMEIYO) ..... 2<sup>ND</sup> RESPONDENT**

**NYABUTI KEBASI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Being dissatisfied with the Judgement and decree of T. Gesora [SPM] issued in Narok CM ELC NO.115 of 2018 delivered on 23<sup>rd</sup> July 2019, the Appellant filed the memorandum of appeal dated 30<sup>th</sup> July 2019 seeking to set aside the said judgement on grounds;
  - a. That the Hon. Magistrate erred in law and procedure in allowing the suit to proceed without giving the Appellant a chance to be heard.
  - b. That the Hon. Magistrate erred in law and procedure in proceeding with the suit ex -parte despite the fact that the Appellant was represented.
  - c. That the Hon. Magistrate erred in law in taking evidence of a litigant who was not the owner of the suit property i.e Narok Cis/Mara-Oleleshwa/2501, and allowed the suit on that basis.
  - d. The learned Magistrate erred in law in allowing the Plaintiffs to tender evidence concerning a property that never belonged to the estates that the Respondents purported to represent.
2. To bring the appeal into perspective, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein had sued the Appellant herein in Narok CM ELC NO.115 of 2018 vide a plaint dated 16<sup>th</sup> October 2017 seeking an eviction



order against him from the parcel of land known as CIS-Mara /Oleleshwa/2501. Their claim was that the Appellant had been allowed to temporarily occupy the suit land by Kwena Nyandwaro Nyameiyo[deceased] who later sold the parcel to the 3<sup>rd</sup> Respondent who was issued with title. They claimed that the 3<sup>rd</sup> Respondent could not take up possession because the Appellant refused to vacate the suit parcel claiming to be owner.

3. In the Court below, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents claimed that in the year 2009, the Appellant filed Land Dispute Tribunal Central Division No.34 of 2009 claiming ownership of the suit parcel and that the said suit was dismissed. Subsequently, he appealed the said decision to the Rift Valley Land Dispute Appeal Committee in 2009, and his appeal 67 of 2009 was dismissed. He sought to challenge the said decision in the High Court vide Kericho Civil Appeal No.35 of 2010 and that the said appeal was dismissed on 21<sup>st</sup> April 2015 by Hon. Justice H.I Ongundi.
4. The appeal was canvassed vide written submissions. The Appellant did not file submissions. In their written submissions dated 15<sup>th</sup> July 2020, the Respondents submitted that the appeal is res -judicata and as such offends Section 7 of the *Civil Procedure Act* as issues raised have already been adjudicated upon. To buttress their case, they relied on the case of Bernard Mugi Ndegwa v James Nderitu Githae & 2 others [2010] eKLR.
5. The Respondents further submitted that the Appellant never produced any legal ownership documents proving ownership of the suit property and that there was no agreement between him and the original owner [Kwena Nyandwaro Nyameiyo] showing that he gifted him the suit parcel adding that the deceased did not execute a transfer /Land Control Board consent in the Appellant's favour either.
6. They contended that a transfer was executed in favour of Kwena Nyameiyo and a title deed was issued to him and his title is protected under Section 26 of the *Land Registration Act*.
7. On the allegation that the Appellant was not heard, the Respondents submitted that he was given numerous opportunities to defend the suit but he squandered the same and that judgement was entered by the court after taking into account relevant law and evidence produced. The court was urged to dismiss the appeal.
8. The record indicates that vide its ruling of 10<sup>th</sup> February 2020, this court granted stay of execution in Narok CMCC No.115 of 2018 pending hearing and determination of the appeal.

### **Issues**

- a. Whether the suit is res judicata.
- b. Whether the Appellant was denied a hearing in Narok CMCC No.115 of 2018 and whether the appeal should be allowed.

### **Analysis**

9. The court has considered the memorandum of Appeal, submissions filed as well as the record of appeal. The court has also re-appraised the evidence presented at the trial court afresh.
10. The parcel of land known as CIS-Mara /Oleleshwa/2501 is in contention between the Appellant and the Respondents. In Narok CMCC No.115 of 2018, the Appellant was ordered to vacate the suit land on the basis that it was purchased by Kwena Nyandwaro Nyameiyo [deceased] who sold it to the 3<sup>rd</sup> Respondent. The Appellant seeks to set aside the said decision on the basis that he was not given



an opportunity to be heard and that the learned magistrate misapprehended facts and arrived at the wrong conclusion.

11. The Respondents contend that the Appellant was given an opportunity to be heard but he squandered it. They also contend that the suit is res-judicata.

12. Section 7 of the *Civil Procedure Act* provides for res judicata as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

13. The court has carefully analyzed the record which indicates several decisions arrived at by different courts and which touch on the suit parcel. The Appellant first filed Land Dispute Tribunal Central Division No.34 of 2009 claiming ownership of the suit parcel. The said suit was dismissed. Subsequently, he appealed the said decision to the Rift Valley Land Dispute Appeal Committee in 2009, and his appeal 67 of 2009 was dismissed. He sought to challenge the said decision in the High Court vide Kericho Civil Appeal No.35 of 2010 and that the said appeal was dismissed on 21<sup>st</sup> April 2015 by Hon. Justice H.I Ongundi. There is also a judgement in Civil Case 169 of 2007 between Kwena Nyandwaro Nyameyio and the Appellant herein reached on 14<sup>th</sup> May 2009 by A.G Kiiru, Snr Resident Magistrate.

14. In order to determine whether a matter is res judicata, the court is called upon to look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case. I find that there are no pleadings pertaining to Civil Case 169 of 2007 and Kericho Civil Appeal No.35 of 2010 that would assist this court to determine whether the issues herein are res-judicata.

15. On the 2<sup>nd</sup> issue, the record indicates that when the matter came up for hearing on 14<sup>th</sup> May 2019, it was adjourned at the instant of the Defendant [Appellant]. A hearing date was then set for 16<sup>th</sup> July 2019 when Mr. Nyakiri appeared for Maritim for the Appellant herein at 10.00 a.m. Later at 12.20 p.m, the Defendant [Appellant] did not appear and the matter proceeded.

16. In my view, while a party has a right to be heard, a party is entitled to a reasonable opportunity to be heard and inaction is not to be excused. The Appellant drove himself from the seat of justice by failing to attend court for hearing. In *Moschion v Mwangi* [Environment & Land Case 350 of 2018] [2023] KEELC 17144 [KLR] [27 April 2023] [Ruling], it was stated;

“The right to be heard is sacrosanct and is embodied in the latin maxim “audi alteram partem”. However, a party is only entitled to reasonable opportunity to be heard, See *Nginyanga Kavole v Mailu Gideon* [2019] eKLR.

17. Further, a copy of certificate of search dated 26th September 2007 placed on record indicates that Kwena Nyandwaro Nyameiyo was issued with a title deed on 3rd July 2003. He entered into a sale agreement with the 3rd Respondent on 28th September 2007. He sold him the entire suit parcel. On 14.1.2011, a title deed was issued to the 3rd Respondent. There is no merit in the appeal.

18. The court therefore issues orders;

A. That the Appeal is dismissed with costs.



B. Stay orders granted on 10<sup>th</sup> February 2020 are hereby lifted.

C. The Appellant to vacate the suit land within 90 days.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF JULY, 2025.**

**MOHAMMED A KULLOW**

**JUDGE.**

In the presence of:

..... for the Appellant.

..... for the Respondents.

Philomena W.\_\ \_ Court Assistant.

