



**Inyama v Ligabo (Environment and Land Appeal E017 of 2021)
[2024] KEELC 530 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 530 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E017 OF 2021
DO OHUNGO, J
FEBRUARY 6, 2024**

BETWEEN

LIGABO INYAMA APPELLANT

AND

DOUGLAS MILIMU LIGABO RESPONDENT

*(Being an appeal from the ruling and order of the Chief Magistrate's
Court at Kakamega (Hon. D Alego, Senior Principal Magistrate)
delivered on 26th April 2021 in Kakamega MCELC Misc. No. 1 of 2020)*

JUDGMENT

1. The parties to this appeal are brothers. Litigation between them leading to this appeal traces its roots to Notice of Motion dated 22nd April 2020 which the respondent filed before the Subordinate Court seeking orders that the said court grants him leave to cut down blue gum trees planted by the appellant on his land parcel number Isukha/Ileho/1461 and that the appellant be made to reimburse him the cost of felling the trees. The application was supported by an affidavit sworn by the respondent. The appellant opposed it through a replying affidavit.
2. Upon hearing the application, the Subordinate Court (Hon. D Alego, Senior Principal Magistrate) delivered its ruling on 26th April 2021 and allowed it as prayed. Aggrieved, the appellant filed this appeal through Memorandum of Appeal dated 19th May 2021. The following are the grounds of appeal as listed on the face of the memorandum:
 1. That the learned trial magistrate erred in law and fact in failing to appreciate the proper effect and purposes of the evidence and in arriving at a decision which is not supported by or is against the weight of evidence on record.



2. That the learned trial magistrate erred in law and in fact in failing to appreciate that the appellant is the registered owner of suit parcel land number Isukha/Ileho/1460 and hence has indefeasible rights over the same and interference of the same amounted to a miscarriage of justice.
3. That the learned trial magistrate erred in law and in fact by making a finding that he appellant by not filing submissions had not proved his case yet there was a detailed replying. affidavit on record.
4. That the learned trial magistrate erred in law and in fact in failing to recognize and properly direct her mind to the gaps and lacunas in the evidence tendered in support of the Respondent's case.
5. That the learned trial magistrate erred in law and in fact in failing to find that the Appellant was entitled to parcel of land number Isukha/Ileho/1460 being his inheritance from his deceased father and the actions of the respondent was unconstitutional as it also amounts to affecting the rights of registered owner as to ownership of property.
6. That the learned trial honorable magistrate erred both in law and fact in failing to judicially exercise the discretion bestowed upon her by the constitution and the *land Act* 2012.
7. That the learned trial magistrate erred in law and in fact in all circumstances of the matters failed to achieve the objective, function and purpose of the court and to do justice as regards the suit that is before her and accordingly erred in law by making orders that she did.
8. That the learned trial magistrate misdirected herself in relying heavily on submissions only yet there was a replying affidavit duly filed hence arriving at a wrong decision.
9. That the learned trial magistrate erred in law and in fact in failing to appreciate that the suit title deeds had been contested through a court of competent jurisdiction being deliberated on in a succession court and therefore the respondent had no right at all to lay any claim over a disputed title deed.
10. That the learned trial magistrate erred in law and in fact in failing to appreciate that the land registrar and surveyors report had disputed and the appellant had appealed over the same and had sought to have independent surveyors report yet she relied on a disputed report to make a wrong and biased decision.
11. That the learned trial magistrate erred in law and in fact for failing to appreciate that the orders sought could not be granted in a miscellaneous application as it required parties to tender evidence in support of their case in a proper suit.
12. That the learned trial magistrate erred in law and in fact in failing to appreciate that there was no report from the agricultural officer/forest officer to support the respondents claim of the effect of the tress of the appellant that have been in existence for more than 13 years to the respondents farm.
13. That the learned trial magistrate failed to appreciate that there has been bad blood between the appellant and the respondent by virtue of numerous court cases mentioned in the replying affidavit which she closed her eye not to look at and the application was brought in bad faith hence her decision was not only biased but was not backed by any tangible facts and law.



3. The appeal was canvassed through written submissions. The appellant argued that he adduced sufficient evidence to rebut the respondent's case through his replying affidavit, that from the sketch drawn by the surveyor the appellant's land was reduced from 2.0 hectares to 1.48 hectares and that no evidence was adduced of damage to the respondent's crops. Further, that since the dispute was a contested one where other cases were mentioned, the learned magistrate ought to have gone an extra mile to establish the position and to strike out the respondent's application which was brought as a miscellaneous application and not a substantive suit.
4. In response, the respondent argued that the appellant maintained in his replying affidavit that the blue gum trees were planted on the appellant's land. That the survey report had not been challenged by the time of the filing of the application hence the subordinate court determined the matter on a balance of probabilities. He added that the order of the subordinate court has since been enforced through felling of the trees and that the argument that the proceedings were brought as a miscellaneous application and not a substantive suit was never advanced before the subordinate court.
5. As the first appellate court in this matter, this court has an obligation to re-consider and re-evaluate the pleadings and evidence and to determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and [Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR.
6. I have considered, the application, the affidavits on record, the grounds of appeal and parties' submissions. The issue for determination is whether the reliefs sought in the application ought to have issued.
7. One of the issues raised by the appellant is that the learned magistrate did not consider his replying affidavit. A perusal of the ruling shows that the learned magistrate stated that she had perused the replying affidavit filed by the appellant. I have also perused the said replying affidavit which was sworn on 30th April 2020. The appellant deposed therein that his parcel Isukha/Ileho/1460 which was a subdivision of Isukha/Ileho/491 was properly demarcated and that Isukha/Ileho/491 had been the subject of litigation in Kakamega HC Succession Cause Number 21 of 1988, Kakamega ELC Number 312 of 2016 and Kisumu Court of Appeal Civil Appeal Number 183 of 2019 which were still pending. He further stated that no proper survey had been conducted to confirm the claims of trespass. That he objected to the survey being conducted and that the sketch map attached to the survey report since it indicated that the size of the appellant's Isukha/Ileho/1460 was 1.48 hectares as opposed to 2.0 hectares. He further deposed that he planted the trees that the respondent was complaining of on his own Isukha/Ileho/1460 and not on the respondent's Isukha/Ileho/1461. He added that since he had disputed the survey, an independent survey ought to be carried in the presence of each party's surveyor.
8. In view of the foregoing, it is clear that the appellant opposed the application, a reality that is not changed by his failure to file written submissions.
9. From the material on record, there is no dispute on ownership of the respective parcels. The appellant is the registered proprietor of Isukha/Ileho/1460 while the respondent is the registered proprietor of Isukha/Ileho/1461. In view of the provisions of Sections 24 and 26 of the [Land Registration Act](#), the respective proprietors are entitled to the rights, privileges and benefits associated with such proprietorship. Further, the courts are obligated to accept their certificates of title as conclusive evidence of proprietorship, unless fraud or misrepresentation to which the registered proprietor is proved to be a party is established or where it is shown that the certificate of title was acquired illegally, un-procedurally or through a corrupt scheme. There was no case before the subordinate court for nullification of any title.



10. The material on record further shows that the land registrar and the district surveyor went to the site and prepared reports. Although the appellant claims that he was not present, he had advance notice of the scheduled visit and even wrote to the land registrar through his advocates on 30th October 2017 which was the eve of the visit. As correctly observed by the land registrar in his report dated 14th December 2017, the appellant deliberately chose to stay away when the officers were on site. Both the land registrar and the district surveyor were categorical in their reports regarding the location of the boundary between the two plots. Additionally, the land registrar stated in his report that the appellant had erected an unlawful boundary and planted blue gum trees in the respondent's land.
11. The appellant also contended that the dispute was pending in court in other cases being Kakamega HC Succession Cause Number 21 of 1988, Kakamega ELC Number 312 of 2016 and Kisumu Court of Appeal Civil Appeal Number 183 of 2019. I have perused the pleadings and material that the appellant annexed in respect of the cases. I note that the respondent is not named as a party in the said cases. Further, neither the respondent's parcel number Isukha/Ileho/1461 nor the question of removal of blue gum trees planted on the said parcel was demonstrated to be a subject matter in those suits.
12. In his submissions in this appeal, the respondent stated that the order appealed against was executed and that the trees have since been felled. The appellant did not dispute that position. There was thus sufficient evidence before the subordinate court to support the respondent's contention that the appellant had encroached on his land and planted the offending trees therein. The learned magistrate cannot be faulted for arriving at the conclusion that the reliefs sought in the application should issue.
13. I find no merit in the appeal, and I therefore dismiss it. Considering the family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF FEBRUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:-

No appearance for the Appellant

Ms Ikhumba holding brief for Ms Mukhwana for the Respondent

Court Assistant: E. Juma

