



**Obwate v Okunda (Environment and Land Appeal E061 of 2022)  
[2024] KEELC 3737 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3737 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E061 OF 2022**

**DO OHUNGO, J**

**MAY 8, 2024**

**BETWEEN**

**PETER AMUSALA OBWATE ..... APPELLANT**

**AND**

**PHILOMENA MUSABI OKUNDA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's  
Court at Kakamega (Hon. H Wandere, Senior Principal Magistrate)  
delivered on 30th November 2022 in Kakamega MCELC No. E172 of 2022)*

**JUDGMENT**

1. Litigation leading to this appeal started in the Subordinate Court on 27<sup>th</sup> October 2022 when the respondent filed a plaint dated 27<sup>th</sup> October 2022, against the appellant. She averred in the plaint that she was the registered proprietor of land parcel number Kisa/Emasatsi/1582 (the suit property) and that the appellant had encroached on the suit property and was illegally staying thereon and cultivating. She therefore prayed for judgment against the appellant for an eviction order, demolition of his structures, and a permanent injunction, restraining the appellant, his agents, servants, and assignees from entering, cultivating, or dealing with the suit property in any manner. She also prayed for an order that the OCS Khwisero Police Station ensures compliance with the Subordinate Court's orders.
2. The appellant filed a statement of defence and counterclaim dated 20<sup>th</sup> November 2022 through which he denied the respondent's allegations of ownership and further averred that he had acquired ownership of a portion of the suit property by adverse possession. He prayed that the respondent's case be dismissed and that an order of transfer to him of 1.6 hectares of the suit property be made. He also prayed for costs.



3. Upon hearing the matter, the Subordinate Court (H Wandere, Senior Principal Magistrate) delivered judgment on 30<sup>th</sup> November 2022 wherein she found that the respondent had proved her case and ordered the appellant to vacate failure to which an eviction order would issue.
4. Dissatisfied with that outcome, the appellant filed this appeal on 21<sup>st</sup> December 2022 through Memorandum of Appeal dated 20<sup>th</sup> December 2022. He prayed that the judgment be set aside. The grounds of appeal are that the handling of the case by the Subordinate Court was unprocedural and illegal, that the pleadings had not closed when the learned magistrate heard the case and that the learned magistrate erred in not upholding the appellant's right to legal representation.
5. The appeal was canvassed through written submissions. The appellant argued that the learned magistrate heard interlocutory applications without satisfying herself that he had been served and thereby depriving him an opportunity to be heard. The appellant further argued that he was arrested and taken to court on 25<sup>th</sup> November 2022 when hearing of the suit proceeded with him having been served with a hearing notice. That he sought time to prepare his defence, but the court ignored him thereby depriving him of the right to be represented by an advocate. The appellant therefore urged this court to allow the appeal.
6. On the other hand, the respondent argued that there was no evidence that the appellant served any defence and counterclaim to warrant the complaint that he was denied legal representation. The respondent further argued that the appellant did not state that he had an advocate and that the record is clear at page 44 of the record of appeal that the appellant told the Subordinate Court that he was ready to prosecute the claim. The respondent therefore urged this court to dismiss the appeal with costs.
7. This being a first appeal, this court's mandate is as stated by the Court of Appeal in [\*Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates\*](#) [2013] eKLR:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.
8. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions.
9. A perusal of the Memorandum of Appeal herein reveals that the appeal is against the judgment delivered by the Subordinate Court on 30<sup>th</sup> November 2022 and not against any interlocutory order. Unfortunately, the grounds of appeal and the appellant's submissions all address preliminary issues and not the merits or otherwise of the judgment. If the appellant was of the view that hearing ought not to have proceeded on the dates it did, he ought to have applied for setting aside as opposed to appealing against the judgment. As the respondent has correctly pointed out, the appellant told the Subordinate Court on 25<sup>th</sup> November 2022 that he was ready to proceed with defence case. He said so knowing fully well that he had advocates on record. In so doing, he opted to prosecute his own case, an option that was fully within his right. Again, if the appellant later took the view that he ought not to have proceeded that way, the proper recourse would have been to approach the Subordinate Court with an application for setting aside of the proceedings. As matters stand at this stage, the issues of failure to serve hearing notices, whether pleadings had closed and being deprived of the right of legal representation are being raised from the bar through submissions and without supporting evidence.
10. I find no merit in this appeal, and I therefore dismiss it. I make no order as to costs.



**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF MAY 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Mango holding brief for Mr Manyoni for the Appellant

Ms Wanyonyi for the Respondent

Court Assistant: M Nguyayi

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