



Njuguna (Suing as the legal representative of the Estate of Benard Ayieyo Okoth (Deceased)) v Munyao & another (Suing as the legal representative of the Estate of Jacob Odeny Owange (Deceased)) (Environment and Land Appeal E001 of 2022) [2023] KEELC 604 (KLR) (1 February 2023) (Judgment)

Neutral citation: [2023] KEELC 604 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E001 OF 2022**

**GMA ONGONDO, J
FEBRUARY 1, 2023**

BETWEEN

**MARY ADHIAMBO NJUGUNA APPELLANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BENARD
AYIEYO OKOTH (DECEASED)**

AND

**MARY ANYANGO ODENY 1ST RESPONDENT
MAGDALENE MUNYAO 2ND RESPONDENT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JACOB
ODENY OWANGE (DECEASED)**

(Being an appeal from the judgment and subsequent decree of Hon. N. Moseti-Senior Resident Magistrate, delivered on 8th December 2021, in Mbita Principal Magistrate's Court Environment and Land Case No. 15 of 2020)

JUDGMENT

1. On 20th January 2022, the appellant namely Mary Adhiambo Njuguna through M/S G. S. Okoth & Company Advocates, filed a Memorandum of Appeal dated 12th January, 2022, being an appeal from the judgment delivered by the Honourable N. Moseti (Senior Resident Magistrate) in Mbita Principal Magistrate's Court Environment and Land Case No. 15 of 2020 on the 8th day of December 2021.
2. The Appeal is anchored on grounds 1 to 6 as set out on the face of the memorandum of appeal and the same include:
 - a. The learned trial magistrate misdirected himself on several matters of law and fact in that:



- i. He acted beyond his jurisdiction in ordering the rectification of the register by directing that the title for Land Parcel No. Kasgunga/Kamreri/2841 be deleted from the register and that the same be removed from the survey map without proof that the same was obtained by fraud or mistake and without hearing any evidence from the Land Registrar, the Surveyor or the Land Adjudication Officer.
 - ii. He relied on copies of proceedings of Land Adjudication Committee Case No. 130 of 1985 which being a public document was produced as evidence without proof of payment of legal fees for certification of the same as required by Section 80 of the [Evidence Act](#) and when the certificate thereon was made by an Advocate who is not a public officer.
 - b. The learned trial magistrate erred in law of Civil Procedure and Practice in misconstruing, misinterpreting and misunderstanding the provisions of Order 1 Rule 9 of the Civil Procedure Rules and thereby making an unfair and unjust decision.
3. In that regard, the appellant prays to this honourable court to quash the decision of the trial magistrate, set aside the judgment and orders made thereby or alternatively vary the said orders and thereafter to enter judgment as prayed in the counterclaim after dismissing the plaintiff's suit with costs and allow the appellant's appeal accordingly.
 4. On 22nd June 2022, the court directed that the appeal be heard by written submissions.
 5. Accordingly, Learned Counsel for the appellant filed submissions dated 26th September 2022 on 27th September 2022. Briefly, counsel submitted on five main grounds of appeal and in particular, that the land parcel No. Kasgunga-Kamreri/2841 was registered in the name of Benard Ayieyo Okoth on 21st September 2008 yet the suit at the trial court was filed on 2nd July 2020. That the suit at the trial court was statute barred pursuant to Section 7 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya. That in the alternative, the defendant being the sole surviving daughter of the deceased has overriding interest pursuant to Section 28(h) of the [Land Registration Act](#), 2016 (2012). Counsel relied on the case of [Mary Wangui Muthoga –vs- Samwel Ndungu Chege & Another](#) (2016) eKLR, to buttress the submissions.
 6. The respondent through Robert Ochieng Advocates, filed submissions dated 12th October 2022 on 7th November 2022 to the effect that the suit land was initially one undivided parcel of land known as Kasgunga/Kamreri/915 in the name of Jacob Odeny Owange, the deceased husband of the 1st respondent herein. That a dispute arose between the said Jacob Odeny Owange (deceased) and Benard Ayiyo Okoth (deceased), the father of appellant herein. That the said dispute was the subject of Mbita Land Adjudication Committee Case No. 130 of 1985 in which the Committee made a determination in the following terms:
 - a. Land Parcel No. Kasgunga/Kamreri/915 was given entirely to Odeny Owange
 - b. Odeny Owange would get two portions of land, an upper and lower portion and a new parcel number for the lower land reaching the lake
 - c. Bernard Ayieyo would get a new number in the middle of land parcel No. Kasgunga/Kamreri/915
 7. Counsel further submitted that in 2008, Land Parcel No. Kasgunga/Kamreri/2841 in the name of the appellant's deceased father was registered. The appellant's father had passed on in 2004. It was thus, unclear who moved the registrar to create the new number since the appellant only obtained letters of



- administration to her father's estate in the year 2019. That consequently, the trial court issued orders cancelling the said title and directing the Land Registrar to implement the decision in Mbita Land Adjudication Committee Case No. 130 of 1985.
8. Also, learned counsel submitted that even if the title to Land Parcel Kasungu/ Kamreri/2841 was not acquired by fraud, it was acquired unprocedurally as at the time of its acquisition, the appellant's father was already deceased and no letters of administration of his estate had been taken out. Reliance was placed on Section 26(1) (b) of the [Land Registration Act](#), 2016 (2012).
 9. Further, counsel submitted that no appeal was preferred against the Committee's decision in Mbita Land Adjudication Committee Case No. 130 of 1985. That the document was relied upon by both parties in their pleadings and evidence at the trial court did not file any submissions in respect to the appeal herein. That the appellant has raised the issue of jurisdiction at appeal stage, though the same does not apply as the issue at the trial court was not one of boundary but one of implementation of the Committee's decision in Mbita Land Adjudication Committee Case No. 130 of 1985. Counsel relied on various authoritative pronouncements including Homa Bay ELC Appeal Case No. 32 of 2021 in which this honourable court cited the case of *Odd Jobs -vs- Mubia* (1970) EA 476 and [Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 others](#) (2013) eKLR. Counsel also relied on the case of [Munyu Maina -vs- Hiram Gathiba Maina](#) (2013) eKLR, to fortify the submissions.
 10. From the foregoing, the issues for determination herein are as contained in the grounds of appeal and condensed to:
 - a. Whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal?
 - b. Who should bear the costs of this appeal and the court below?
 11. The instant appeal is the first one from the trial court in the matter. Therefore, it is the duty of this court to reconsider the evidence on record and come to its conclusions and inferences; see *Selle and another -vs- Associated Motor Boat Co. Ltd. and others* (1968) EA 123 and *Williamson Diamonds Ltd. -vs- Brown* (1970) EA 1.
 12. It is noteworthy that the suit was commenced by way of a plaint dated 2nd June 2020 and filed in court on 2nd July 2020 by the 1st respondent herein seeking the following orders;
 - a. An order of declaration that the existing cactus fence and/or any other fence set up by Jacob Odeny Owange (deceased) in the year 1976 does remain as the true boundary delineating Land Parcel No. Kasungu/Kamreri/2841 registered and occupied by the estate of Benard Ayieyo from Land Parcel No. Kasungu/Kamreri/915 registered and occupied by the estate of Jacob Odeny Owange (deceased).
 - b. An order directed at the Homa Bay County Lands Registrar directing him to excise a portion of Land Parcel No. Kasungu/Kamreri/915 from the road to the lake, delineate the same by affixing beacons thereon and that the same be given a new number and thereafter be registered in the name of Jacob Odeny Owange.
 - c. An order directed at the Homa Bay County Lands Registrar and Homa Bay County Lands Surveyor to visit the area covering Land Parcel No. Kasungu/Kamreri/915 and Land Parcel No. Kasungu/Kamreri/ 2841, survey the same and thereafter amend the map and land registers of Land Parcel No. Kasungu/Kamreri/915 and Land Parcel No. Kasungu/Kamreri/2841 to reflect the existing cactus fence set up by Jacob Odeny Owange (deceased) in the year 1976 delienating and/or separating the two parcels of land.



- d. A permanent injunction be issued restraining the defendant, her next of kins, workers, servants, agents or any person deriving authority through her from entering into, cultivating, alienating, selling, transferring and or in any other way dealing with Land Parcel No. Kasgunga/Kamreri/915 or the fence delineating the same.
 - e. Costs of this suit together with interest thereon at the rate of 14% p.a. from the date of judgment until payment in full.
 - f. Such further of other alternative relief as this honourable court deems fit to grant.
13. The testimony of Mary Anyango Odeny (PW1), who was the plaintiff before the trial court was that she is a widow of Jacob Odeny (deceased), who is the registered owner of Land Parcel No. Kasgunga/Kamreri/915. That a dispute arose between the said Jacob Odeny (deceased) and Benard Ayiyo Okoth (deceased), the father of appellant herein relating to the said parcel of land. That the said dispute was the subject of Mbita Land Adjudication Committee Case No. 130 of 1985 in which the Committee made a determination on various terms including that Jacob Odeny (deceased) would get two portions of land, an upper and lower portion and a new parcel number for the lower land reaching the lake, while Bernard Ayeyo (deceased) would get a new number in the middle of land parcel No. Kasgunga/Kamreri/915. That this culminated in Bernard Ayeyo (deceased) being registered as proprietor of Land Parcel No. Kasgunga/Kamreri/2841.
 14. PW1 averred that there was an error in allocating acreage of Land Parcel No. Kasgunga/Kamreri/2841. She produced as part of her testimony, a copy of her national Identity Card, a copy of certificate of official search dated 4th October 2019 for Land Parcel No. Kasgunga/Kamreri/915, a copy of certificate of official search dated 4th October 2019 for Land Parcel No. Kasgunga/Kamreri/2841, a copy of map for Land Parcel No. Kasgunga/Kamreri/915, Grant of letters of administration intestate, Land Adjudication Committee Record of Mbita Land Adjudication Committee Case No. 130 of 1985, Demand Letter from G. S. Okoth and Company Advocates, response to demand Letter from G. S. Okoth and Company Advocates and reply to response to demand Letter from G. S. Okoth and Company Advocates (PExhibits 1 to 9 respectively).
 15. The defendant opposed the claim by way of a statement of defence and counterclaim dated 10th August 2020 and duly filed on 12th August 2020. The defendant averred that the plaint offends order 2 rule 3(1) of the Civil Procedure Rules, 2010, Section 62 of the Evidence Act Chapter 80 Laws of Kenya and that the claim is time barred pursuant to Section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.
 16. In the counterclaim, the defendant pleaded fraud and prayed that the plaintiff's suit be dismissed with costs and judgment be entered in favour of the defendant for:
 - a. General damages for trespass to land and fraud
 - b. An order that the 2nd defendant to counterclaim to vacate land parcel No. Kasgunga/Kamreri/2841 or any part thereof within 30 days.
 - c. Alternatively, the 2nd defendant to counterclaim do negotiate for the purchase of the occupied portion of land with the administrator on a willing-buyer-willing-seller basis.
 - d. Costs of this suit together with interest at 14% p.a as provided in Section 27(2) of the Civil Procedure Act.
 - e. Such further or alternative relief as this honourable court deems fit to grant.



17. Notably, although the defendant had given notice in her pleadings that she would raise a preliminary objection, she did not do so.
18. DW1, Mary Adhiambo Njuguna, the daughter and legal administrator of the estate of Benard Ayieyo Okoth (deceased) relied on her witness statement. She produced in evidence a copy of title deed for Land Parcel No. Kasgunga/Kamreri/2841, Map extract for Kasgunga/Kamreri Adjudication Section, a letter dated 24/11/2006, a letter dated 10/01/2007, Death certificate for Benard Ayueyo Okoth, Grant of letters of administration intestate dated 28/03/2019, a letter dated 28/03/2019, a letter dated 19/05/2020, a letter dated 24/06/2020 and ground photographs of the suit land (DExhibits 1 to 10 respectively).
19. During cross-examination, DW1 admitted that she was aware of the decision in Mbita Land Adjudication Committee Case No. 130 of 1985. That the committee did not give the acreage of land but only indicated the positions of land allocated. Further, DW1 stated that her father, Benard Ayueyo Okoth, died in 2004 but Land Parcel No. Kasgunga/Kamreri/2841 was registered in his name in the year 2008. She also stated that she obtained grant of letters of administration to her father's estate in 2019.
20. DW2, Michael Ojuoyi Ojuoyi adopted his statement dated 16th March 2021 as his evidence-in-chief. On cross-examination, the witness stated that he was informed that Adenyo Ogwange sold land to one Munyao. He admitted that he was not aware of Mbita Land Adjudication Committee Case No. 130 of 1985.
21. DW3, Monica Apiyo Nyabwanyi, relied on her statement recorded on 16th March 2021 as part of her evidence. During cross-examination, the witness stated that she is elderly and is unable to recall the number of the land parcel in question.
22. The 2nd defendant to the counterclaim, Magdalene Azisa Munyao, relied on her statement dated 8th September 2020 and testified that her parcel of land is L. R. No. Kasgunga/Kamreri/4959. She produced in evidence a copy of title deed for L. R. No. Kasgunga/Kamreri/4959, bundles of aerial photographs (CExh 1 and 2).
23. Indeed, the learned trial magistrate stated the parties' respective cases, framed four issues for determination, discussed them and arrived at his decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
24. The appellant contends that learned trial magistrate failed to appreciate the fact that since the proceedings were conflicting with the title deed and the survey map, an explanation could only be obtained from the Land Adjudication Officer, the Land Registrar and/or Surveyor.
25. The respondent's counsel pointed out that the appellant herself did not join the parties stated at paragraph 24 hereinabove in her counterclaim at the trial court. Therefore, this court endorses the trial magistrate's reasoning, particularly his reliance on Order 1 Rule 9 of the Civil Procedure Rules, 2010 in holding that:

“...I find that non-joinder of the Land Registrar, Attorney General and the Land Adjudication Officer is not a basis that would make the court to make adverse orders as prayed by the defendant without any convincing evidence...”
26. The appellant further contends that the learned trial magistrate erred in law by failing to appreciate the weight of the provisions of Sections 24, 25 and 26 of the [Land Registration Act](#), 2016 (2012).



27. Section 26 (1) of the [Land Registration Act](#) (supra) provides as follows:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (Emphasis added)

28. From the record including the trial court’s finding, it emerged that Land Parcel No. Kasgunga/Kamreri/2841 in the name of the appellant’s deceased father was registered in 2008. The appellant’s father had passed on in 2004. Further, the appellant only obtained letters of administration to her father’s estate in the year 2019. This begs the question as to how the said registration happened. Section 45 of the [Law of Succession Act](#), Chapter 160 of the Laws of Kenya provides that the authority to handle the assets of a deceased person emanates from grants of representation to the estate of such deceased; see also *Kothari –vs- Quaresb* (1967) EA 364.

29. Moreover, I subscribe to the Court of Appeal decision in [Munyu Maina](#) case (supra) where it was noted that:

“...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register...”

30. This court therefore, endorses the trial magistrate’s decision to cancel the title of the suit land. The court held:

“...having found that the title to Land Parcel No. Kasgunga/Kamreri/2841 was unprocedurally acquired, I hereby order that the same be and is hereby cancelled...”

31. On the appellant’s contention that the suit at the trial court was statute barred pursuant to Section 7 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya, this court notes that the appellant herein had given notice in her pleadings that she would raise a preliminary objection at the trial court but did not do so. As rightly noted by the respondent’s counsel, the preliminary objection ought to be pointed out at the earliest instance; see also *Kakuta Maimai Hamisi-vs-Peris Pesi Tobiko & 2 others* (supra).

32. This court is not unaware that a preliminary objection must be on pure points of law including a plea of limitation; see *Mukisa Biscuits Manufacturing Co. Ltd –V- West End Distributors Limited* (1969) EA. 696

33. Furthermore, I am guided by Sections 107 to 110 of the [Evidence Act](#) Chapter 80 Laws of Kenya on the burden of proof. On that account, has the appellant met the threshold?

34. It is my considered view that in the instant appeal, the appellant has not placed before the court sufficient evidence to demonstrate that the trial magistrate’s decision rendered on 8th December, 2021



is faulty at law. Therefore, the grounds of appeal are quite untenable. I hereby uphold the trial court's judgment.

35. In the result, the instant appeal lodged by way of a Memorandum of Appeal dated 12th January, 2022, be and is hereby dismissed with costs of the appeal and the original suit to be borne by the appellant.

36. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 1ST DAY OF FEBRUARY 2023.

G.M.A ONG'ONDO

JUDGE

Present

1. Mr. Nyauke holding brief for G. S. Okoth, Learned Counsel for the appellant
2. Mr. R. Ochieng, Learned Counsel for the respondents
3. Respondent
4. Okello, Court Assistant

