



REPUBLIC OF KENYA



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**Omukaya v Ochanda & another (Environment and Land Appeal
E001 of 2023) [2023] KEELC 17781 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17781 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

E ASATI, J

JUNE 8, 2023

BETWEEN

MARGARET OTIENO OMUKAYA APPELLANT

AND

DOREEN OCHANDA 1ST RESPONDENT

DAMARIS ODHIAMBO 2ND RESPONDENT

*(Being an Appeal against the Judgement of the Senior Resident
Magistrate Hon. Rose M. Ndombi delivered on 12/1/2023)*

JUDGMENT

Introduction

1. This appeal arises from the judgement in Vihiga SPMC ELC No266 of 2022 (the suit) delivered on January 12, 2023. The subject matter of the suit was a parcel of land known as East Bunyore/iboona/758 measuring 0.36 hectare (the suit land). The Appellant herein was the Defendant in the suit and the Respondents the Plaintiffs. The court record reveals that the Plaintiffs had sued the Appellant seeking for orders that the Appellant be restrained from interring the remains of one Nelson Otieno Omukaya, deceased, on the suit land. The deceased was the Appellant’s husband and a step brother to the Respondents.
2. The Respondents’ case in the lower court was that the suit land belonged to their mother one Flonicah Achungo Omukaya, also deceased, and the registration of the same in the name of the deceased was by fraudulent means and that the deceased had his own land namely East Bunyore/iboona/783 where his remains should be interred.



The case of the Appellant was that the suit land belonged to her late husband, the deceased, as it was registered in his name and that the deceased's home was on the suit land and she therefore had the right to inter his remains thereon.

The suit was heard before the trial court who found in favour of the Respondents (Plaintiffs in the suit) and made orders that:

- a. the deceased's body be and is hereby released to the Defendant for burial.
 - b. the deceased's body shall be interred on his land parcel No East Bunyore/iboona/783 where he was given by his father.
 - c. an order of permanent injunction do issue restraining the Defendant from burying her deceased husband one Nelson Otieno on land parcel No East/bunyore/iboona/758.
 - d. an order is directed to the local administration and the area chief to ensure peace and compliance with order.
 - e. Each party to bear its own costs of the suit.
3. Dissatisfied with the judgement, the Appellant filed the appeal herein vide the Memorandum of Appeal dated January 27, 2023 seeking for:
- a. an order setting aside the judgment delivered on January 12, 2023 by the Senior Resident Magistrate's court.
 - b. a declaration and a finding that the deceased, the late Nelson Otieno be buried in No East Bunyore/iboona/758
 - c. cost of the case.
4. Before directions could be taken on the appeal under Order 42 rule 13 Civil Procedure Rules the Respondents filed an application vide the Notice of Motion dated February 28, 2023.
5. Directions were taken by consent of the parties on March 6, 2023 that the application and the appeal be canvassed together by way of written submissions within given timelines. In compliance with the directions, the Appellant filed her written submissions dated March 27, 2023 through the firm of Mukabi & Co Advocates. The Respondents filed their written submissions dated March 16, 2023 in person.
6. The ruling in respect of the application has been delivered separately.

Issues for determination in the Appeal

7. The issues for determination herein are the grounds of appeal raised in the Memorandum of Appeal namely whether or not the learned trial Magistrate erred in law and facts: -
- a. by finding that the Plaintiff had locus standi to claim the ownership of land belonging to the estate of their deceased mother without Grant of Letter of Administration.
 - b. by finding that the Plaintiff had several disputes with the deceased over the ownership of the land parcel number East Bunyore/iboona/758 without proper documentation.
 - c. by finding that the Plaintiff proved that flonicah their mother was the legal owner of land parcel number East Bunyore/iboona/758 when indeed the deceased is the registered owner of the same and such registration was done legally and the same has not been challenged.



- d. by finding that the Respondents are entitled to injunction sought against the Appellant, her servants and/or agents from burying the deceased in land parcel number NoEast Bunyore/iboona/758 when indeed all parties admitted during the hearing that the deceased one Nelson Otieno Omukaya has stayed and established his home on the suit land.
- e. by finding that the deceased Nelson Otieno was fraudulently registered as the owner of the suit land NoEast Bunyore/iboona/758 when the particulars of the fraud had not been pleaded in the plaint by the Respondent.
- f. by considering the facts and issues which the Respondent had not pleaded in the plaint or even adduced during the hearing.
- g. when she misapprehended the facts of the case in finding that the Respondents had proved the existence of their custom that the deceased should be buried in his mother's land parcel No East Bunyore/iboona/783 when such custom had not been pleaded in the plaint or adduced by the Respondent during the hearing. Further the learned Magistrate failed to appreciate that the issue in dispute was the ownership of land in dispute but not who should bury the deceased.
- h. by finding that the deceased had built a permanent house on land parcel No East Bunyore/iboona/783 when such evidence were not adduced by the Respondents.
- i. by finding that the deceased forcefully built a house at Flonicah's land parcel No East Bunyore/iboona/758 when the same was not proved during the hearing.
- j. by considering irrelevant facts and matters not related and/or relevant to the case and failing to appreciate that the deceased Nelson Otieno Omukaya was legally registered as the absolute owner of the land in dispute way back before the death of the Plaintiffs' mother one Flonicah.
- k. in failing to appreciate that the land parcel No East Bunyore/iboona/783 was being co-owned by Nelson Otieno Omukaya and Flonicah, all deceased.

Determination

8. The court reminds itself of its duty as a court handling a first appeal. The duty is to reconsider, re-evaluate and analyze the evidence tendered before the trial court afresh, make its own independent conclusions and thereby determine whether the trial court's decision was in accordance with the evidence and applicable law.

In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

9. The first issue is whether or not the trial Magistrate erred in law and in fact in finding that the Plaintiff had locus standi to bring the suit. The Respondents' claim as seen in paragraphs 8 and 9 of the plaint, was that the suit land was given by their father to their late mother one Flonicah. But however, the deceased transferred the suit land to his names by way of gift. That the deceased “used forgery means” to transfer the suit land to his name and hence they sought orders of injunction to restrain the Appellant who is the deceased's widow from burying the remains of the deceased on the suit land.



In their testimony in court, the Respondents admitted that they had not obtained Letters of Administration in respect of the estate of Flonicah. It was submitted on behalf of the Appellant that in the absence of Letters of Administration, the Plaintiff lacked capacity to file a suit claiming land belonging to their deceased mother.

10. The trial court, found that none of the parties had Letters of Administration to their respective estates of their deceased family members. The court further found that Article 159(2)(d) of the [Constitution of Kenya](#) and the Oxygen Principles as drafted were meant to cure technicalities in the process of administration of justice. That the purpose of seeking for Letters of Administration has always been administrative; to curb the many beneficiaries from filing many suits all over with respect to the property of the deceased. That the court took cognizance of Section 45 of the [Law of Succession Act](#) which prohibits dealing with property of deceased persons and that the Plaintiffs are the only surviving children of the deceased Flonicah Achungo who seek to preserve the state of the deceased. With these findings the court decided that “This court shall exercise its discretion and move to determine the suit on its substance”.
11. In this appeal, it was submitted on behalf of the Appellant that the Respondents lacked capacity to file the suit on behalf of the state of Flonicah Achungo, deceased. Counsel relied, inter alia, on the provisions of Section 82 of the [Law of Succession Act](#) and decided cases to support the submissions. He relied on the case of [Alfred Njau v City Council of Nairobi](#) [1983]eKLR 625 where the Court of Appeal held that

“Locus standi literally means a place of standing and refer to the right to appear or be heard in court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard.”

Counsel also relied on the case of Julian Adoyo Ongunga v Francis Kiberenge Abano [2016] eKLR wher it was held partly that;

“simply put a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even wehr a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party.”

And Kaikai Asituha & 3 Others –vs- Olekia Mahindu Makeya & Another [2021] eKLR where this court observed that lack of capacity to sue is not a procedural technicality for which a party can find refuge in article 159 of the Constitution of Kenya 2010.

12. The Respondents submitted on their part that the matter before court was a burial dispute. That they are claiming ownership through their biological mother who is now deceased as beneficiaries and that they were the only surviving beneficiaries of their deceased mother Flonicah Achungo and that they seek to preserve the estate of the deceased.
13. Section 2(1) of the [Law of Succession Act](#) provides that;

“Except otherwise expressly provided in this Act or any other written law, the provision of the Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estate of the deceased person dying after the commencement of this Act and to the Administration of Estates of those persons.”

The meaning of this provision of the law is that an estate of a deceased person in Kenya can only be handled in accordance with the provisions of the [Law of Succession Act](#) (the Act). On filing of suits in respect of such estate, the Act, in Section 82, vests the power in the



personal representative of the deceased duly appointed through the process of succession as provided for in the Act. There is no evidence placed before the court that the Respondents have been duly appointed as personal representatives of the deceased through the process provided for in the Act.

14. Capacity to sue in civil cases is a substantive issue lack of which renders the suit incompetent as at the time of inception. I find that the Respondents had no capacity to sue hence the suit was incompetent from inception. The finding of the learned trial Magistrate and the decision to proceed to entertain the suit and enter judgement in favour of the Respondents was therefore erroneous.
15. Moreover, on the face of it, the suit land was not part of the estate of the Respondent's mother as it is registered in the name of the deceased and it was not disputed that the deceased had his home on the suit land as at the time of his death.
16. Having found that the suit was incompetent for lack of locus standi on the part of the plaintiffs right from its inception and that the proceedings in respect thereof a nullity, I find that the appeal has merit. I also find that this disposes of the appeal without going into the rest of the grounds of appeal. and make the following orders: -
 - i. The appeal is allowed.
 - ii. The judgement in Vihiga SPMC ELC No 266 of 2022 dated January 12, 2023 is hereby set aside in its entirety and substituted with a judgement dismissing the suit.
 - iii. Each party to bear own costs of the suit.
 - iv. Costs of the appeal to the appellant.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED IN OPEN COURT THIS 8TH DAY OF JUNE, 2023.

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E. ASATI,

JUDGE.

In the presence of:

Neville-Court Assistant.

Malanda holding brief for Musiega for the Appellant.

Both Respondents present in person

