



**Odhiambo v Opande & another (Environment and Land Appeal 41 of 2021) [2023] KEELC 18630 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18630 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 41 OF 2021  
SO OKONG'O, J  
JULY 6, 2023**

**BETWEEN**

**BENSON ODHIAMBO ODHIAMBO ..... APPELLANT**

**AND**

**ERASTUS WADE OPANDE ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL (SUED ON BEHALF OF DISTRICT LAND REGISTRAR NYANDO) ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the judgment and decree of Hon. S.O.TEMU PM in Nyando PMCELC No. 85 of 2018 delivered on 6th May 2021)*

**JUDGMENT**

**Background**

1. From what I can gather from the material before me, this dispute has a long history. The 1<sup>st</sup> Respondent and one, Isaack Opande lodged a claim against the Appellant and one, Siplina Ondigo at Nyando District Land Disputes Tribunal (hereinafter referred to as “the tribunal”) in 2010 in Tribunal Case No 2 of 2010. The 1<sup>st</sup> Respondent and the said Isaack Opande claimed a portion measuring 1 acre of all that parcel of land known as Kisumu/Wawidhi A11/507(hereinafter referred to as “the original parcel”). The original parcel was initially registered in the name of Siplina Ondigo. At the time of the tribunal case, the property was registered in the name of the Appellant. The tribunal determined the claim in favour of the 1<sup>st</sup> Respondent. The Appellant was aggrieved by the decision of the tribunal and appealed against the same to Nyanza Land Dispute Appeals Committee (hereinafter referred to as “the appeals committee”). The appeal was registered as Case No 98 of 2011. The appeals committee considered the appeal and dismissed the same on November 10, 2011. The committee advised that the dispute be taken to the High Court for further arbitration. Following the dismissal of the Appellant’s appeal, the 1<sup>st</sup> Respondent filed the tribunal’s award at the Senior Resident Magistrate’s Court at Nyando in



Nyando Srm Misc civil Case No 2 OF 2011 (hereinafter referred to as “the adoption case”) for adoption of a judgment of the court. The said award was adopted as a judgment of the court on July 3, 2013 by Hon D Chepkwony SPM (as she then was). In the adoption case, the court ordered the Executive Officer of the court to sign the mutation forms and any other document necessary for the subdivision of the original parcel and transfer of a portion thereof to the 1<sup>st</sup> Respondent in accordance with the award of the tribunal. Following that order, the original parcel was subdivided into two portions, Kisumu/Wawidhi A11/1511 measuring 1.80 hectares which was registered in the name of the Appellant on September 13, 2013 and Kisumu/Wawidhi A11/1512 measuring 0.40 hectares which was registered in the name of the 1<sup>st</sup> Respondent on July 17, 2014.

2. The Appellant who was all along aware of the adoption of the tribunal’s award as a judgment of the court took no immediate action to challenge the same. After a four-year lull, the Appellant filed a suit before this court against the Respondents herein namely, Kisumu ELC Case No 257 of 2017(hereinafter referred to as “the ELC Case”). In the ELC Case, the Appellant narrated the genesis of the dispute between him and the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent’s claim against him before the tribunal, the tribunal’s decision against him, his appeal to the appeals committee which was dismissed and the adoption of the tribunal’s award as a judgment of the court. The Appellant also mentioned the subsequent subdivision of the original parcel and the transfer of a portion thereof which was registered as Kisumu/Wawidhi A11/1512 (hereinafter referred to as “Plot No 1512”) to the 1<sup>st</sup> Respondent.
3. The Appellant contended that the subdivision of the original parcel and registration of Plot No 1512 in the name of the 1<sup>st</sup> Respondent were illegal and fraudulent. The Appellant averred that following the registration of Plot No 1512 in the name of the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent had been trespassing on the said parcel of land and interfering with his occupation thereof. The Appellant sought a declaration that the 2<sup>nd</sup> Respondent should cancel the title deeds for Kisumu/Wawidhi A11/1511 and Kisumu/Wawidhi A11/1512 and restore the original parcel, Kisumu/Wawidhi A11/507 in the name of the Appellant. The Appellant also sought the costs of the suit.
4. The 1<sup>st</sup> Respondent filed his statement of defence to the ELC Case on August 24, 2017. The 1<sup>st</sup> Respondent admitted the proceedings before the tribunal, the appeals committee and the adoption case. The 1<sup>st</sup> Respondent denied that the subdivision of the original parcel and the transfer of a portion thereof to him was unlawful and fraudulent.
5. The ELC Case was transferred to the Resident Magistrate’s Court at Nyando on May 25, 2018 and assigned Nyando SPMC ELC No 85 of 2018 (hereinafter referred to only as “the lower court case”). The lower court heard the Appellant’s claim and rendered a judgment on May 6, 2021. In the judgment, the lower court found that what the Appellant sought before the court was the setting aside of the award of the tribunal and the adoption of the same in the adoption case as a judgment of the court. The lower court held that since the award by the tribunal was adopted as a judgment of the court by a Magistrate Court, the lower court which was also a Magistrate Court did not have jurisdiction to set aside the orders of another Magistrate Court. The lower court stated that what the Appellant was required to do was to file an appeal at the High Court against the decision of the appeals committee instead of filing a fresh suit. The lower court struck out the Appellant’s suit with costs to the Respondents for want of jurisdiction.

### **The appeal**

6. The Appellant was aggrieved by the said judgment and preferred the present appeal. In his Memorandum of Appeal dated June 3, 2021, the Appellant challenged the lower court’s judgment on the following grounds;



1. The Learned Magistrate grossly misdirected himself in both law and fact by holding that he had no jurisdiction to entertain the Appellant's suit.
  2. The Learned Magistrate erred in law and fact in holding that he could not set aside orders that were made by a court of concurrent jurisdiction.
  3. The Learned Magistrate erred in law and fact in claiming that the dispute was heard by the tribunal.
  4. The Learned Magistrate erred in law and fact in failing to appreciate that the appeals committee referred the dispute to the Environment and Land Court.
  5. The Learned Magistrate misdirected himself by stating that the Appellant was supposed to file an appeal to the High Court instead of filing a fresh suit.
7. The Appellant prayed that the appeal to be allowed, the judgment of the lower court dated May 6, 2021 set aside and substituted with an order that the lower court proceeds to render judgment based on the evidence on record. The Appeal was heard by way of written submissions. The Appellant filed his submissions on March 7, 2023 while the Respondents did not file submissions. The Appellant submitted that the lower court suit was properly before that court and that the court should have proceeded to determine the same on merit. The appellant prayed for an order that the lower court suit be heard a fresh by another magistrate. The Appellant urged the court to allow the appeal with costs.

### **Analysis and determination**

8. I have considered the pleadings and proceedings of the lower court, the judgment of the court and the grounds of appeal put forward by the Appellant. I have also considered the submissions by the Appellant. From the Appellant's grounds of appeal, the issues arising for determination in this appeal are; whether the lower court had jurisdiction to hear and determine the lower court suit, whether the lower court erred in striking out the suit, and whether the appeal should be allowed. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions on the issues that were raised for determination before the lower court. Since the suit was not determined on merit, it is not necessary to re-evaluate the evidence on record. The appeal would be determined purely on the pleadings and the law.
9. I have at the beginning of this judgment set out the history of the dispute between the main adversaries herein. From that history and the pleadings that were filed in the suit before the lower court, I am unable to fault the finding of the lower court that it had no jurisdiction to entertain the Appellant's suit. The only relief that was sought by the Appellant in the lower court was the cancellation of the subdivision of Kisumu/Wawidhi A11/507 and the resultant titles for Kisumu/Wawidhi A11/1511 and Kisumu/Wawidhi A11/1512 so that the whole land reverts to the name of the Appellant. It is common ground that Kisumu/Wawidhi A11/507 was subdivided into two portions, Kisumu/Wawidhi A11/1511 and Kisumu/Wawidhi A11/1512 following a court order that was issued by the Magistrate's Court on July 3, 2013 after the adoption of the award of the tribunal as a judgment of the court. Kisumu/Wawidhi A11/1512 was also registered in the name of the 1<sup>st</sup> Respondent following the same order by the Magistrate's Court. As rightly observed by the lower court, the orders that were sought by the Appellant before that court were intended to set aside the orders that were issued by the same Magistrate's Court on July 3, 2013. Orders made by a magistrate in a suit cannot be set aside in another suit between the same parties over the same subject matter by another magistrate. A Magistrate's Court having ordered that Kisumu/Wawidhi A11/507 be subdivided and a portion thereof registered in the name of the 1<sup>st</sup> Respondent, another Magistrate's Court could not order the



said subdivision to be cancelled together with the titles that were issued for the two sub-plots following the subdivision.

10. I am in agreement with the lower court that the Appellant should have filed an Appeal to the High Court (the Environment and Land Court was not in existence) instead of filing a fresh suit. The Land Disputes Tribunals Act, 1990 (now repealed) had elaborate provisions for appeals in Section 8 thereof. Any party aggrieved by the decision of the tribunal had a right to appeal to the Provincial Appeals Committee. A decision of the Provincial Appeals Committee was appealable to the High Court on points of law. Apart from the appeal process, a party who felt that the tribunal dealt with a matter outside its jurisdiction had a right to challenge the decision by way of a judicial review in the High Court. The Appellant did not take any of these steps. He waited for six years after the dismissal of his appeal by the appeals committee to file a fresh suit to challenge decisions that had been implemented.

### **Conclusion**

11. In the final analysis, I find no merit in the appeal before the court. The appeal is dismissed. On the issue of costs, I am of the view that the tribunal dealt with a dispute that was beyond its jurisdiction and that if the Appellant had moved the court in an appropriate manner, the decision of the tribunal could have been set aside. For that reason, each party shall bear its own costs of the appeal.

**DELIVERED AND DATED AT KISUMU ON THIS 6<sup>TH</sup> DAY OF JULY 2023**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

N/A for the Appellant

Ms. Nyalunji for the 1<sup>st</sup> Respondent

N/A for the 2<sup>nd</sup> Respondent

Ms. J. Omondi-Court Assistant

