



REPUBLIC OF KENYA



KENYA LAW

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**Macheso & 2 others v Mabonga & another (Civil Appeal
41 of 2022) [2023] KEHC 51 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 51 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 41 OF 2022
AC MRIMA, J
JANUARY 17, 2023**

BETWEEN

EDWARD MAKOKHA MACHESO 1ST APPELLANT

MARGARET NALIKA 2ND APPELLANT

ISAAC SIMIYU WAFULA 3RD APPELLANT

AND

ISAAC MACHESO MABONGA 1ST RESPONDENT

JOSHUA MABONGA MACHESO 2ND RESPONDENT

*(Being an Appeal arising out of the Judgment and decree of Hon.
C. M. Kesse, (Principal Magistrate) in Kitale Chief Magistrate's
Court Civil Case No. 438 of 2019 delivered on 23rd March, 2021)*

JUDGMENT

1. The appeal subject of this judgment arose from the judgment rendered on 23rd March, 2021 in Kitale Chief Magistrate's Court Civil Case No. 438 of 2019 *Isaac Macheso Mabonga (suing as the recognized agent of Joshua Mabonga Macheso) vs. Edward Makokha Macheso & 2 Others* (hereinafter referred to as 'the suit').
2. The Memorandum of Appeal was filed is dated 9th December, 2022 although it was filed on 8th December, 2022. The filing followed the extension of time to file an appeal out of time granted on 5th December, 2022 in Kitale High Court Misc. Civil Application No. 38 of 2022.
3. The suit mainly sought to restrain the then Defendants from burying the remains of one Esther Nasimiyu Simiyu (hereinafter referred to as 'the deceased') on the parcel of land known as Saboti/ Sikhendu Block 8(Weonia)/41 (hereinafter referred to as 'the land').



4. In the main, the Plaintiff dated 18th November, 2019 (in the suit) prayed for the following orders: -
 - a. A Permanent injunction restraining the defendants their agents and/or servants or anybody acting for them or through them from burying and/or disposing the remains of the late Esther Nasimiyu Simiyu Parcel No.Saboti/Sikhendu Block 8(Weonia)/41.
 - b. Costs of this suit.
 - c. Any other further relief that this Honourable Court may deem fit and just to grant.
5. The suit was defended. The Appellants herein (then Defendants) filed a Joint Statement of Defence dated 29th November, 2019.
6. On the trial Court's directions, the suit was fully heard and judgment delivered. In allowing the suit, the Court granted prayers (a) and (b) as sought in the Plaintiff.
7. Aggrieved by the decision, the Appellants herein preferred an appeal in Kitale Environment and Land Court Appeal No. 7 of 2021. The appeal was struck out on 28th June, 2022, hence the commencement of the proceedings culminating with the subject appeal.
8. In their Memorandum of Appeal, the Appellants preferred a raft of 11 grounds. The grounds are as follows: -
 1. The learned trial Magistrate erred in law and in fact in closing her eyes to the beneficial interest of the deceased and her children in the suit land where she has raised resided from time immemorial.
 2. The learned trial Magistrate erred in law and in fact in determining ownership of land through a burial dispute without jurisdiction to do so.
 3. The learned trial Magistrate erred in conferring rights of ownership of the land issue to the Respondent.
 4. The learned trial Magistrate erred in deliberately delaying the hearing and determination of the dispute so as to give undue advantage to the Respondents.
 5. The learned trial Magistrate erred in fact and in law in failing to take into account the Appellants right to a fair trial.
 6. The learned trial Magistrate erred in law and in fact in failing to find that the Deceased had no other place of abode other than the suit land where she resided from time immemorial and which she had purchased after the 2nd Respondent had disposed of family (ancestral) land at Kimilili.
 7. The learned trial Magistrate erred in law and in fact when she failed to make an appropriate finding about while the Appellants had strongly challenged the case filed by the Respondents.
 8. The learned trial Magistrate erred in law and in fact when she took into account extraneous matters in arriving at her decision.
 9. The learned trial magistrate erred in law and precedents when she failed to take into account the existing statutes and case law applicable to the circumstances of the case before her.
 10. The learned trial Magistrate erred in failing to act in a fair, objective and rational manner as a Judicial Officer which resulted in a biased decision.



11. The findings of the learned trial Magistrate was against the weight of available evidence.
9. The Appellants then prayed for the following reliefs: -
 - i. The findings, Judgment and Decree of the learned trial Magistrate be set aside.
 - ii. This suit filed by the Respondents be dismissed accordingly.
 - iii. Costs of the suit and interest be awarded to the Appellants.
10. The appeal was heard by way of written submissions. Both parties filed their respective submissions. In their submissions, the Appellant expounded on two main grounds. They were whether the trial Court failed to consider the deceased's beneficial interest in the land and whether the Court did not act in a fair, objective and rational manner. They also submitted on the issue of costs.
11. The Appellants urged this Court to allow the appeal as prayed.
12. Opposing the appeal, the Respondents made contended that the appeal was in respect of a land matter and as such this Court lacked jurisdiction. They urged the Court to down its tools and to dismiss the appeal.
13. This Court has carefully considered this appeal. It has perused the record.
14. The Court recalls its role as the first appellate Court as discussed in *Abdul Hammed Saif vs. Ali Mobamed Sholan* (1955) 22 EACA. 270. Even though the case was an appeal from the High Court to the Court of Appeal still the applicable legal principles are similar to appeals from the lower Courts to the High Court, hence, its relevance.
15. The Court of Appeal stated as follows: -

... An appeal to this court from a trial by the High Court is by way of 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally....
16. See also *Selle & Another vs. Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
17. In discharging the above duty, this Court will not loose sight of the fact that it is dealing with an appeal whose substratum is a suit on whether an injunction be granted restraining the burial of the deceased on the land.
18. This appeal, as well as the suit, did not, therefore, deal with the ownership of the land. The issue of the ownership of the land only arose as the basis upon which the Respondents herein sought to restrain the burial of the deceased on the land.
19. Having perused the pleadings and the exhibits produced, I am satisfied that there was prima-facie evidence that the land was registered in favour of Joshua Mabonga Macheso on 24th May, 2017.
20. The evidence also had it that there was a pending Kitale Chief Magistrate's Court Land Case No. 52 of 2019 *Isaac Macheso Mabonga (suing as the recognized agent of Joshua Mabonga Macheso) vs. Esther*



Nasimiyu Simiyu and Isaac Wafula Simiyu where the Plaintiff therein (now the Respondent herein) sought inter alia the eviction of the Defendants (including the deceased) from the land, a permanent injunction and damages.

21. The Appellants herein also contended that they filed a counter-claim in the said Kitale Chief Magistrate's Court Land Case No. 52 of 2019 seeking ownership rights therein.
22. There is, therefore, no doubt that the issue of ownership of the land is not yet settled. It is pending determination in Kitale Chief Magistrate's Court Land Case No. 52 of 2019. Faced with such facts, the best a Court can do is not to assert any of the parties' alleged rights in the land pending the outcome of the Kitale Chief Magistrate's Court Land Case No. 52 of 2019. That position would be readily achieved by not allowing the burial of the deceased on the land.
23. It is on that basis that this Court agrees with the trial Court in its finding that '... the suit land is duly registered in the name of Joshua Mabonga Macheso as the sole proprietor...', hence allowed the suit. However, the injunction ought to have been pegged on the determination of Kitale Chief Magistrate's Court Land Case No. 52 of 2019.
24. Having said so, this Court must, however, and without the benefit of the pleadings in Kitale Chief Magistrate's Court Land Case No. 52 of 2019, reiterate that the findings in the suit and in this appeal are not in any way an attempt to settle the ownership of the land. They are special proceedings a way of preserving the locus quo pending further orders on ownership.
25. The Court will also deal with the jurisdictional point raised by the Respondents herein.
26. The Respondents alleged that the matter dealt with land and ought to be dealt with by the Environment and Land Court.
27. The response to the issue is not far-fetched. When the judgment in the suit was delivered, the Appellants herein preferred an appeal in Kitale Environment and Land Court Appeal No. 7 of 2021. The appeal was eventually struck out on for the reason that the cause of action did not relate to any interests in land for it was a simple burial dispute. The Respondents herein neither preferred any appeal against the decision nor sought to review the same.
28. The result is that the jurisdictional issue is res judicata and cannot be re-opened before a Court with concurrent jurisdiction. The ground fails.
29. There was also the issue as to whether the trial Court acted in an unfair, subjective and irrational manner in handling the suit. Having perused the record, I am unable to find any ground sustaining such allegations. There were reasons for all the adjournments granted and this Court cannot point out any injudicious exercise of discretion in allowing the adjournment.
30. Having said so, perhaps it is time for this Court to urge trial Courts dealing with burial disputes to undertake all possible ways and determine the disputes within very short periods. In this matter, the Plaintiff was filed on 18th November, 2019 and judgment was rendered on 23rd March, 2021. That was a period of around 16 months. During that period, the body of deceased lay in the mortuary and obviously many expenses accrued including prolonged emotional and psychological torture. A Court has a duty to mitigate such by promptly disposing of burial disputes.
31. With the foregoing, this Court is now capable of disposing of this appeal and with the following orders:
 - a. The appeal is unsuccessful and is hereby dismissed.



- b. The injunction order issued by the trial Court in Kitale Chief Magistrate's Court Civil Case No. 438 of 2019 is hereby reviewed and shall forthwith issue as follows: -

" 1. An injunction is hereby issued, restraining all and any of the Defendants, their agents, servants and or assignees from burying and/or disposing of the remains of the Late Esther Nasimiyu Sirengo on the parcel of land known as Saboti/Sikhendu Block 8 (Weonia)/41 pending the determination of Kitale Chief Magistrate's Court Land Case No. 52 of 2019 *Isaac Macheso Mabonga (suing as the recognized agent of Joshua Mabonga Macheso) vs. Esther Nasimiyu Simiyu and Isaac Wafula Simiyu* or upon such appropriate orders of a Court of Law."

- c. The Hon. Deputy Registrar of this Court shall serve a copy of this judgment upon the trial Court in Kitale Chief Magistrate's Court Land Case No. 52 of 2019 *Isaac Macheso Mabonga (suing as the recognized agent of Joshua Mabonga Macheso) vs. Esther Nasimiyu Simiyu and Isaac Wafula Simiyu*.
- d. Since the dispute over the land is still on-going and the parties are closely related, each party shall bear its own costs of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 17TH DAY OF JANUARY, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:-

Mr. Walter Wanyonyi, Counsel for the Appellants.

Mr. Bororio, Counsel for the Respondents.

Regina/Chemutai – Court Assistants.

