



**Wesonga v Omukuya & another (Civil Appeal E183 of 2023)
[2024] KEHC 15393 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E183 OF 2023
S MBUNGI, J
DECEMBER 4, 2024**

BETWEEN

MUSA MUNG'ONI WESONGA APPELLANT

AND

MARGARET OMARI OMUKUYA 1ST RESPONDENT

CICILIA MUNGONI CHEBI 2ND RESPONDENT

(Being an appeal arising from the judgment of the Honorable T.A Obutu SPM delivered on 23rd November 2023 in Mumias Senior Principal Magistrate's Court in Civil Suit No. E146 of 2023)

JUDGMENT

1. Vide a plaint dated the November 2, 2023, the plaintiff's (respondents herein) brought this suit against the defendants (appellant) and sought for orders for:
 - a. The nullification of the title in the 2nd defendant's name.
 - b. The prohibition of the defendants all their agents and servants from interfering with the property No. South Wanga/Buchifi/ 3435.
 - c. Rights to bury the deceased Michael Wesonga on property No. South Wanga/Buchifi/ 3435.
 - d. Interests on (a) above at the Commercial rates prevailing from the time to time from the respective due dates until payment in full.
 - e. General damages.
 - f. Costs of the suit together with interests thereon at such rate and for such period as this Honourable court may deem fit to grant.
 - g. Any other just and equitable relief this Honourable court may deem fit to grant.



2. After service of the suit papers, the defendants filed their defence dated the 23rd day of October 2023. The matter proceeded to full hearing and judgment was entered against the defendants.
3. Having being dissatisfied with the judgment the appellant lodged this appeal on the following grounds:
 - i. That the learned magistrate grossly erred in law by addressing issues of land in a burial dispute case.
 - ii. That the trial magistrate grossly erred in law by making a determination on land issues sitting as a civil court thereby usurping the power and jurisdiction of the environment and land court.
 - iii. That the trial magistrate grossly erred in law and fact by revoking the appellant's title to land parcel number S/Wanga/Buchifi/3435 without sound grounds.
 - iv. That the trial magistrate grossly erred in law and fact by ordering cancellation of title based on emotions.
4. The appellant sought that this court set aside the order for revocation of his title to land parcel number S/Wanga/Musanda/3435.
5. The appeal was admitted and the court directed that it be canvassed by way of written submissions.

Appellant's Case.

6. In his submissions dated 18.07.2024, the appellant isolated the sole issue of determination as whether the trial court had jurisdiction to address issues of land in a burial dispute.
7. He argued that part of the orders sought in the plaint by the respondents in the trial court was the nullification of the title in the 2nd defendant's name, prohibition of the defendants from interfering with the property no S/Wanga/Buchifi/3435 and rights to bury the deceased Michael Wesonga on the said property.
8. He averred that the court, sitting as a civil court, had no jurisdiction to make a determination on land issues, or order for the cancellation of the title deed registered in the appellant's name so that proper succession cause can be undertaken. It was his submission that Article 162(2)(b) of *the constitution* expressly established the Environment and Land Court to hear and determine disputes relating to the environment, use and occupation of land and title to land.
9. Further, the appellant contended that the trial court impugned order relied on section 80(1) of the registration *land act* as it did not explain any fraud or mistake on the part of the appellant in obtaining registration to the land parcel No. S/Wanga/Buchifi/3435; but acted purely on emotions and speculations so as to protect the interest of the respondents lest the land be sold and they be evicted.

Respondent's Case.

10. The respondents filed submissions and isolated two main issues for determination. On whether the court had jurisdiction to address the land issue of S/Wanga/Buchifu/3435, they submitted positively. They stated that section 9(a) of the Magistrate's Court *Act No. 26 of 2015* gives the Magistrates Courts jurisdiction to handle claims in employment, labor relation claims and environment and land cases.
11. They further submitted that section 7(3) of the same Act stated that jurisdiction shall be subject to the value of the subject matter. It was their submission that since the property in question had a value lower than Kshs. 15,000,000/- prescribed for determination by any Senior Principal Magistrate like the trial magistrate.



12. It was the respondents' submission that practice directions issued by the Chief Justice under Gazette Notice No. 16268 of November 2012 allowed all pending proceedings before the Magistrates Courts having been transferred thereto from the now defunct District Land Disputes Tribunals to be heard and determined by the same courts. Moreover, it was directed that the Magistrates Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction.
13. On whether the court provided sound grounds for its judgment, they also submitted affirmatively. The respondents submitted that the learned trial magistrate stated that he did not find the claim by the appellant that he was holding the property in trust for the dependents plausible, since the title document only bore his name and no other names.
14. To add on this, the respondents submitted that the court pronounced itself so as to protect the interests of the represented families which included minors in the full guidance of the Magistrates Court Act section 3 which dictates, that the conduct of the court shall be in accordance to Articles 10, 159 and 169 of *the Constitution* of Kenya 2010.

Analysis.

15. This being a first appeal, this court is under a duty to re-evaluate and re assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows:

“...This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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...”
16. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”
17. I have looked at the memorandum of appeal, the submissions by both parties, the proceedings from the lower court and the trial court's judgment.
18. The issue of determination is whether the lower court had jurisdiction to delve into the issue of land ownership of parcel No. S/Wanga/ Buchifi / 3435 and issue the cancellation order it issued pursuant to section 80(1) of the registration of *land Act*.



Determination.

19. As it was held in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR :

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. Under both Article 162(2)(b) of *the Constitution*, the Magistrates Court *Act No. 26 of 2015* section 9(a) and section 24 of the Environment and *Land Act* a Magistrates Court has powers to hear and determine matters to do with Environment and Land subject to the value of the subject matter. (See section 7 of the Magistrates Court *Act No. 26 of 2015*).
21. When a Magistrates Court is exercising its jurisdiction, under the above provisions of the law, it sits as an Environment and Land Court but not as a civil court as it happened in the lower court case.
22. The heading clearly states as follows:

Republic of Kenya

In The Senior Principal Magistrate's Court At Mumias

Civil Suit No. 146 of 2023

Margaret Omari Omukuya 1st Plaintiff

Cecilia Mung'oni Chebi 2nd Plaintiff

Versus

Agnesa Naliaka 1st Defendant

Musa Mung'oni Wesonga 2nd Defendant

23. The Trial Magistrate Should Have Restricted himself to the issue of burial. Whoever wants to question the authenticity of the title deed in the name of the appellant can move to the Environment and Land Court for redress.
24. I agree with the appellant and find that the appeal has merit and set aside the order (2) of the lower court judgment dated November 23, 2023.
25. This being a matter involving family members, each party shall bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Appellant – absent

Respondents – absent

Ms. Irungu for the respondents present online



Ms. Omar for the appellant present online.

Court Assistant – Albright.

