



Ogoncho (Suing on Behalf of the Estate of the Late Samuel Ogoncho Mogaka (Deceased)) v Solian & 3 others (Environment and Land Appeal E031 of 2024) [2025] KEELC 6447 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6447 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E031 OF 2024
MN MWANYALE, J
SEPTEMBER 30, 2025**

BETWEEN

**DANIEL OGONCHO APPELLANT
SUING ON BEHALF OF THE ESTATE OF THE LATE SAMUEL OGONCHO
MOGAKA (DECEASED)**

AND

**DAVIS DIKIRR SOLIAN 1ST RESPONDENT
STEPHEN MPALA 2ND RESPONDENT
THE DISTRICT LAND REGISTRAR 3RD RESPONDENT
TRANSMARA WEST/EAST DISTRICTS 4TH RESPONDENT**

JUDGMENT

1. Being dissatisfied by the judgment of Hon. W.C Waswa, Senior Resident Magistrate delivered on 20.09.2024 in Kilgoris Chief Magistrates court E&LC Case No. E001 of 2024, between The Appellant David Ogoncho (suing on behalf of the Estate of the late Samuel Ogoncho Mogaka) as plaintiff therein and Davis Dikkir Solian, Stephen Mpala and the District Land Registrar Transmara West/East Districts, the Respondents herein as defendants in the suit before the trial court, the Appellant vide the Memorandum of Appeal dated 14th October 2024 penned 41 grounds of Appeal.
2. The Memorandum of Appeal seeks the following reliefs; -
 - a. That the Appeal be allowed.
 - b. That the judgment of the Senior Resident Magistrate Hon. Waswa delivered on 20th September 2024 in Kilgoris MELC No. E001 of 2024 be set aside in its entirety.



- c. This court do issue a declaration that the Registration of land parcel No. Transmara/Nkararo/217 in the name of the 1st Respondent is null and void and that the said parcel of land should revert to the Estate of the late Samuel Ogoncho Mogaka.
 - d. An order be issued cancelling the 1st Respondent's title deed and directing the District Land Registrar to register the suit property in the name of the Applicant.
 - e. The order for permanent injunction and eviction against the Appellant be vacated.
 - f. Costs of the Appeal and costs for the lower court be awarded to the Appellant.
 - g. Any other relief this Honourable court deems just and fit to grant.
3. As stated at paragraph 1 of this judgment, the Appellant penned 41 grounds of Appeal, the court shall not set out the said grounds but shall consider them in disposing off the Appeal.
 4. On 27.01.2025, the Appellant was granted leave to file a supplementary record of Appeal; but did not file the same. The said leave was extended again on 24.02.2025.
 5. An Amended Memorandum of Appeal was filed alongside the supplementary record of Appeal.
 6. In the Amended Memorandum of Appeal dated 4th March 2024, the Appellant penned 29 grounds of Appeal and introduced a new relief which sought for damages of Kshs.2,758,300/= being damages for trespass but the other reliefs remained the same thought differently worded.
 7. The Appeal was admitted on 03.05.2025 whereat directions were issued for the same to be canvased by way of written submissions; and timelines issued for filing and exchange of the submissions.
 8. The court upon consideration of an application dated 10.04.2025 which sought for supply of electronic transcripts to the Appellant issued directions to the effect that the said issue could be handled administratively a request for the same to the trial court having not been made. The Appellant through his counsel addressed the court on 02.07.2025 and requested directions on their letter dated 16.05.2025, whereat the court directed a mention before the D/R who was also the trial court for 29.07.2025; but reserved judgment for 30.09.2025.
 9. The record further reveals that on 29.07.2025, the Appellant counsels did not appear before the DR as he had requested hence the issue of the request for supply of electronic transcript, was not addressed by the Appellants counsel.
 10. The 3rd and 4th Respondents represented by the A.G's office Kisii opted not to participate in the Appeal but the Appellant, as well as the 1st and 2nd Respondents filed their Respective submissions on the Appeal; which the court summarises as herefollows; -

Appellant's Submissions

11. The Appellant condensed the grounds of Appeal and submitted on them in terms of 3 thematic areas to wit,
 - i. whether the 1st Respondent proved in his assertions in the counter-claim and if not, then the trial court was in error of law and fact,
 - ii. secondly whether the evidence adduced by the Appellant at the trial court prove his case and



- iii. thirdly, if the trial court disregard the law of evidence in allowing the 1st Respondent's counter-claim in spite of the inconsistencies and illegality of the evidence adduced by the 1st Respondent.
12. On a preliminary point the Appellant submits that under the provisions of Order 42 Rule 3 of the Civil Procedure Rules, he could Amend his Memorandum of Appeal, as the Appeal had not been admitted for hearing, directions having not been issued thereof.
13. On issued No. 1, the Appellant submits that the learned trial Magistrate erred in law in not taking judicial notice of an investigation report on alleged irregular registration of parcel of land number 341, Nkararo adjudication section Transmara West sub-county by the Commission of Administrative of Justice dated 14th February, 2022.
14. The Appellant submit that the court ought to have taken judicial notice of the said report since the same is matter of public notoriety in Kilgoris Law Courts as it involves several cases in Nkararo adjudication section. The Appellant submits that the Adjudication record referred at Paragraph 77 of the impugned judgment serial number A2/2918 formed part of the adjudication records adversely mentioned in the ombudsman report.
15. On issue number 2, it is the Appellants submissions that parties are bound by their pleadings. That the 1st Respondent while pleading that the Appellant trespassed on the suit property yet testified that he had lived on the suit property since he was 18 years old and therefore did not prove trespass on part of the Appellant and the counter-claim was thus not proven.
16. On issue number 3, the Appellant submits that 1st Respondent did not produce a certified copy of the land Adjudication record but proved a photocopy thereof, hence did not prove his claim.

On the strength of the above, he submitted for the Appeal to be allowed.

1st and 2nd Respondent's Submissions

17. The 1st and 2nd Respondents submit that the Appellant initially erroneously filed a Notice of Appeal dated 20.09.2024 and thereafter filed a Memorandum of Appeal dated 4th March 2024; That there is no provision for filing of a Notice of Appeal against a decision of a subordinate court. That in so far as the Memorandum of Appeal dated 4th March 2024 predated the delivery of the judgment which was delivered on 20th September 2024, the same is not only irregular but also unlawful, but assuming that the same was a typographical error and ought to have been dated 4th March 2025 the same was filed out of time without leave; hence the Amended Memorandum of Appeal is an abuse of due process of the court.
18. The 1st and 2nd Respondent submit that an Amendment to a Memorandum of Appeal ought to be done by leave, hence having not sought for leave, the appeal before court is an abuse of the court process.
19. The 1st and 2nd Respondents further submit that the Appeal herein is fatally defective as no record of Appeal was filed, but a supplementary record of Appeal was filed pursuant to the Amended Memorandum of Appeal.
20. With respect to some of the grounds of Appeal, the 1st and 2nd Respondent submit that the alleged investigation report was not produced by the Appellant in evidence hence the court could not rely on it, and that the court placed reliance on the evidence as produced by the Appellants included the Adjudication record dated 12.09.1990 and that the Appellant did not produce evidence in support of the fraud.



21. On the adjudication record the 1st Respondent submits that the 1st Appellant produced the copy of the adjudication record in the name of the 1st Respondent. The report from the Ombudsman was not produced in court.
22. On the strength of their submissions the Respondent sought for dismissal of the Appeal.

Issues for Determination

23. Having analysed the Record of Appeal, the rival submissions and considered the law, the issues for determination arising out of this Appeal are as follows;
 - i. Whether or not there is a competent appeal before court?
 - ii. Whether or not the Appeal is merited; in deciding this issue, the court shall consider
 - a. Whether the Appellant herein as the plaintiff before the trial court proved his case.
 - b. Whether the 1st Respondent herein as the 1st Defendant in the trial court proved his counter-claim.
 - iii. What reliefs ought to issue?
 - iv. Who bears the costs of the Appeal?

Analysis and Determination

24. The court is cognisant of its duties as a first Appellate court, as was stated in the decision in the case of *Selle Vs. Associated Motor Boat Co. (1968) EA 123* where the court held inter alia, “An appeal to this court from a trial by the High Court is by way of retrial by and the principles upon which this court is such an appeal are well settle. 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 allowances in this respect.....”
25. On issue number 1, the 1st Respondent submits that there is no competent Appeal before court as the Appellant filed a ‘Notice of Appeal’ whereas no provision for a Notice of Appeal exists against decisions of subordinate court to the ELC; hence by the time the Amended Memorandum of Appeal was filed, the same was filed out of time without leave thus making the Appeal herein incompetent.
26. The Appellant submits that since the Appeal had not been admitted for hearing, as directions had not been issued, he had the right to Amend the Memorandum of Appeal without leave in accordance with Order 42 Rule 3 of the Civil Procedure Rules. Hence his Appeal is competent.
27. Indeed, once the impugned judgment was delivered on 20th September 2024 a Notice of Appeal dated the said date was filed. The Notice of Appeal appears on pages 1 of the Record of Appeal. At pages 2 to 9 of the Record of Appeal, a Memorandum of Appeal filed under Oder 42 Rule 1 against the judgment dated 20.09.2024 was equally filed and the same was dated 14th October 2024. The said Memo of Appeal had 41 grounds of Appeal as alluded at paragraph 1 of this judgment.
28. The said Memorandum of Appeal was filed on 14.10.2024 well within the 30 days period for filing of an appeal and thus it was filed timeously, under section 79 G of the *Civil Procedure Act*.
29. With regard to the Amendment made on the Memorandum of Appeal, the Amended Memo of Appeal was filed on 4th March 2025, while directions under Rule 13 of Order 42 were issued on 03.04.2025; consequently the Amendment was done prior to the issuance of directions and in accordance with



Order 42 Rule 3(1) this was permissible and in order, hence the 1st Respondent contention that there is no competent Appeal before court as the Memorandum of Appeal was filed without leave and out of time is not only misplaced but also not factual.

30. The conclusion in respect of issue number 1, is that the court finds that there is a competent Appeal before it.
31. On issue number 2, the court shall examine whether the plaintiff proved his claim before the trial court. The plaint appears at pages 41 – 50 of the Record of Appeal and the plaintiff's claim before the trial court was that the Late Samuel Mogaka lawfully purchased parcel No. 46 Nkararo Adjudication Section which was hived off from No. Transmara/Nkararo/217 from Samson Koisala Sankale, but the said parcel was fraudulently registered in the name of the 1st Defendant/Respondent who authorised the destruction of the plants thereon.
32. In his judgment at pages 10 – 30 of the Record of Appeal the Learned Magistrate at paragraphs 86-90 found that the plaintiff failed to prove his claim.
33. At paragraphs 74-76 the judgment the Learned Magistrate observed interalia that an Adjudication record is a statutory form in terms of Section 23 of the adjudication Act and that the Plaintiff produced a handwritten document purporting it to be the adjudication record.
34. Similarly, at paragraph 81 of the judgment the learned Magistrate found that the green card the suit property was not a subdivision of Nkararo 46.
35. Based on the above, the court found the plaintiff had not proved his case.
36. I have reviewed the above findings of the trial court, vis-a vis the evidence produced and the testimony of the witnesses.
37. adopted his witness statement and on cross-examination he indicated that Transmara/Nkararo/217 belonged to his Late father who had died in 2013, that his Late father had been registered as the owner thereof, though he did not have a title deed nor a search, to prove the same. He did not have evidence that parcel No. Transmara/Nkararo/217 was subdivided from Transmara/Nkararo/46, though his father had lived and cultivated on the suit land.
38. equally did not have evidence of the subdivision of Transmara/Nkararo/46 so as to give rise to the suit property.
The witness in re-examination indicated that the adjudication record read that Sankale 46, 217 and 29 hence 217 was hived off from 46.
39. From the testimony of P.W.1, P.W.2 and P.W.3, none of the witnesses was able to connect Transmara/Nkararo/217 as a subdivision of Transmara/Nkararo/46.
40. The Plaintiff did not further prove that the title deed held by the 1st Defendant/Respondent was obtained fraudulently.
41. The Appellant as plaintiff did not also file as part of the list of documents the Ombudsman report that he formed part of the grounds of Appeal, that the trial court did not take judicial Notice of.
42. In a Nutshell, the burden to prove the facts placed under Section 107 of the *Evidence Act* was not proven and the trial court did not err in making the findings it did in respect of the plaintiff case, at paragraph of the impugned judgment.



43. On sub-issue number 1, the court finds that the Appellant as plaintiff before the trial court did not on a balance of probabilities prove his case.
44. The court shall now examine whether the 1st Respondent as Defendant and counter-claimer proved his case before the trial court.
45. The 1st Respondent's case as pleaded in the statement of Defence and counter-claim appearing at pages 90 to 95 of the Record of Appeal is that he is the registered proprietor of Transmara/Nkararo/217, in support of records (green card) of Transmara/Nkararo/217, a copy of official search of Transmara/Nkararo/217 as well as a copy of title deed of Transmara/Nkararo/217, copy of mapsheet 10, a copy of Adjudication record in respect of plot number 217, were produced.
46. The counter-claimer thus laid basis for the suit property through the Adjudication process and eventually being registered thereof and issued a title deed, in accordance with section 28 of the [Land Adjudication Act](#).
47. The trial court found at paragraphs 77-78 of the impugned judgment, that the adjudication record exhibited by the counter-claimer was in compliance with the law.
48. The court thus finds that the counter-claim was proven on a balance of probability and that the learned magistrate did not err in law and in fact.
49. On the totality of the evidence adduced before the trial court, the Appellant as plaintiff did not prove his case, while the counter-claimer prove his counter-claim.
50. It follows therefore and in answer to issue number 1 that the Appeal here is not merited
51. On issue number 2, on what reliefs ought to issue, the court having found the Appeal not to be merited has no otherwise but to dismiss the same, with costs to the 1st Respondent, together with the costs of the suit and counter-claim in the lower court.
52. Judgment accordingly.

DATED AT KILGORIS THIS 30TH DAY OF SEPTEMBER, 2025.

HON. M.N MWANYALE

JUDGE

In the presence of

CA – Emmanuel/Sylvia/Sandra

Mr. Ochwangi for 1st and 2nd Respondent

Mr. Ongiti for the Appellant

