



REPUBLIC OF KENYA



KENYA LAW
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**Deya v Mwanzu (Environment and Land Appeal E039 of 2023)
[2025] KEELC 6661 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E039 OF 2023**

E ASATI, J

OCTOBER 2, 2025

BETWEEN

CEPHAS OLIECH DEYA APPELLANT

AND

JORAM OURU MWANZU RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. K. Cheruiyot given at Kisumu on the 23rd day of September, 2023 in Kisumu ELC Case No.35 of 2018 and vide leave to appeal out of time granted on 7th December, 2023 by Justice E. Asati)

JUDGMENT

1. A brief background of the appeal herein as can be gathered from the record of appeal filed herein dated 4th November, 2024 is that Cephas Oliech Deya, the Appellant herein was the Plaintiff in Kisumu CMC EL Case No.35 of 2019 (the suit). The record shows that vide the plaint dated 12th March, 2019, the Appellant who claims to be the registered owner of a parcel of land known as Kisumu/Nyahera/2796 (the suit land) sued the Respondent herein claiming that the Respondent had sometime in the year 2016 trespassed onto the Appellant's land. He therefore sought for orders of;
 - a. An eviction order do issue against the Defendant, his servants or agents and/or by whatsoever name called from land parcel No. Kisumu/Nyahera/2796 forthwith.
 - b. Costs of this suit.
 - c. Interest on (a) and (b) at court rates from the date of filing suit to the time of payment in full.
 - d. Any other further relief the honourable court may deem just and expedient to grant.
2. The Respondent filed a Statement of Defence dated 5th April, 2019. He denied the appellant's claim and averred that he is the legal occupant of the land parcel No. Kisumu/Nyahera/753 which



the Appellant unlawfully, un-procedurally and illegally sub-divided into Kisumu/Nyahera/2795 and 2796. He urged the court to dismiss the suit with costs.

3. The record shows that the suit was heard before the trial court which found, vide its judgement dated 25th September, 2023, that the Appellant's case was lacking in merit and dismissed it with costs to the Respondent.

The Appeal

4. Aggrieved by the judgement, the Appellant preferred the present appeal vide the Memorandum of Appeal dated 13th December, 2023 on the grounds that:
 1. The learned Magistrate completely misunderstood the evidence before him, wrongly analysed the evidence and therefore came to wrong conclusion of fact and law.
 2. The learned Magistrate erred in law in finding that the Plaintiff obtained the title to parcel of land number Kisumu/Nyahera/2796 through fraud yet the Plaintiff followed the due procedure to obtain the said title deed.
 3. That the learned Magistrate erred in law and in fact by holding that the Plaintiff transferred the whole of land originally number Kisumu/Nyahera/753 in his name and did not provide any evidence to show that he left the other portion to the Defendant yet the same was provided for.
 4. The learned Magistrate erred in law and in fact by failing to take into consideration that the land parcel number Kisumu/Nyahera/753 was originally owned jointly by the Plaintiff's father and the Defendant's father with each having definite portion and the Defendant has since occupied the portion that belonged to the Plaintiff's father with the Defendant's brother being in occupation of the other portion belonging to their father.
 5. The learned Magistrate erred in fact and law by relying on the inconsistent evidence of the Defendant.
 6. The learned Magistrate totally misunderstood and wrongly evaluated the evidence before her and therefore arrived at a wrong conclusion.
5. The Appellant seeks for orders that;
 - a. the Appeal be allowed
 - b. the court be pleased to re-assess and re-appreciate the evidence afresh and to arrive at independent conclusion
 - c. the Appellant be awarded the cost of the appeal.

Submissions

6. Vide directions given on 4th March, 2025, the appeal was heard by way of written submissions. Written submissions dated 16th May, 2025 were filed on behalf of the Appellant by the firm of Otieno & Achieng Advocates.
7. Written submissions dated 10th April, 2025 were filed by the firm of Mwamu & Company Advocates on behalf of the Respondent.



Issues for Determination

8. Although the Appellant raised a total of 6 grounds of appeal, he framed only 3 issues for Determination in the appeal namely;
 - a. whether the Appellant obtained the suit land fraudulently;
 - b. whether the Respondent is a trespasser on the suit parcel of land
 - c. whether the Appellant is entitled to the prayers that were sought in that plaint.

Analysis and Determination

9. This being a first appeal the court has a duty to re-examine the whole evidence placed before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which this court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of *Gitobu Imanyara & 2 others –vs- Attorney General* [2016] eKLR the court held that the principles upon which a first appellate court proceeds are well settled and stated that:-

" 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."

10. The first issue raised by the Appellant for determination is whether or not the Appellant obtained the title to the suit land fraudulently.
11. The appellant's explanation as to how he became registered owner of the suit land was that he was at all material times to the suit, the registered owner of the suit land, and the Defendant the occupant of parcel No. Kisumu/Nyahera/2795. That the two parcels of land were resultant parcels of the sub-division of land parcel No. Kisumu/Nyahera/753 previously registered in the name of Gideon Deya Akelo and Mwandhu Owili, both deceased, owning ½ share thereof each.
12. That upon completion of succession in respect of the estate of Gideon Deya Akelo, he (the appellant) caused sub-division of land parcel No. Kisumu/Nyahera/753 to create parcel number Kisumu/Nyahera/2796 registered in his name and Kisumu/Nyahera/2795 left to be registered in the name of Mwandhu Owili as no succession had been commenced in respect of the estate of Mwandhu Owili as at the material time.
13. Proceedings before the trial court show that the Appellant produced a copy of register (green card) in respect of the suit land to demonstrate that he was the registered owner of the land. He however pointed out that there was a cancellation of his name and replacement of the same with the name of one Mwandhu Owili – deceased.
14. The Respondent's case on the other hand as pleaded in the Statement of Defence was that the Appellant unlawfully, unprocedurally and illegally sub-divided land parcel No. Kisumu/Nyahera/753 to create the suit land and land parcel number Kisumu/Nyahera/2795.
15. That the Respondent's grandfather by the name of Timothy Owili was originally the sole owner of parcel No. Kisumu/Nyahera/753 and that the Appellant illegally, fraudulently and irregularly registered his father's name alongside the Respondent's grandfather and proceeded to sub-divide the parcel without the Respondent's consent or authority.



16. The Respondent stated vide his witness statement dated 5th April, 2019 adopted as his evidence in chief that land parcel No. Kisumu/Nyahera/753 was their ancestral land originally owned by his grandfather by the name of Timothy Owili. That when he was born in 1963, he found his father one Wilson Mwanzu living on the land which is the Respondent's residence to date. That the Respondent had enjoyed quiet possession of the land until the year 2010 when the Appellant emerged claiming ownership of the land.
17. That he later found out that the Appellant had sub-divided land parcel No. Kisumu/Nyahera/753 and allocated himself one half thereof. That the Respondent's house is built on parcel No. Kisumu/Nyahera/2796. That on the plot claimed by the Appellant, the Respondent had buried the bodies of his father, mother, grandparents, two brothers, sister in law and nieces and nephews.
18. That the Appellant irregularly and illegally sub-divided the land without the consent of the Respondent.
19. After hearing this evidence, the record shows that the trial court found that "the sub-division of land parcel number Kisumu/Nyahera/753 into two parcels namely; Kisumu/Nyahera/2795 and 2796 was unprocedural, unlawful and illegal. Reason being that the Plaintiff cannot benefit from file of the mother parcel number 753 even if he may have a claim to a portion of the land."
20. The Appellant faults this finding and argues that the trial court completely misunderstood the evidence before it, wrongly analysed the evidence and therefore came to the wrong conclusion of fact and law. That the trial court erred in law in finding that the Appellant obtained the title to the land parcel number Kisumu/Nyahera/2796 through fraud yet the Appellant followed the due procedure to obtain the title deed.
21. It was submitted on behalf of the Appellant in this appeal that the Appellant after undertaking succession and obtaining Letters of Administration to the estate of his deceased father one Gideon Deya Akello caused transmission of the half share of the land that belonged to his father upon partition done whereby parcel number Kisumu/Nyahera/2796 was registered in the name of the Appellant and No. Kisumu/Nyahera/2795 remained in the name of Mwanzu Owili deceased.
22. That the original parcel No. Kisumu/Nyahera/753 was owned in common between the Appellant's father and the Respondent's father. That in a tenancy in common each tenant has a distinct share in the common property which has not yet been divided among the co-owners, that the size of a tenant's share is not affected by the death of a co-owner, that when a tenant dies, the property passes to his or her beneficiaries under a will or intestacy.
23. Relying on Section 61 of the *Land Registration Act*, Counsel submitted that the personal representative is entitled to be registered by transmission as the proprietor in place of the deceased and that such registration takes effect from the date of the death of the proprietor.
24. Counsel submitted that the Appellant acquired a good title after following the right procedure. That the Respondent did not prove that the title was obtained by fraud and that fraud was not pleaded in the defence filed in court by the Respondent.
25. On behalf of the Respondent, it was submitted herein that the sub-divisions of land parcel number Kisumu/Nyahera/753 was illegal, was done without the consent of the family of Mwandhu Owili and in total disregard of the fact that the Respondent who is the beneficiary in the estate of Mwandhu Owili was in occupation of land parcel No. Kisumu/Nyahera/753 and had lived on the property for many years before the property was sub-divided.



26. That the Appellant interfered in the estate of Mwandhu Owili by causing registration of parcel Kisumu/Nyahera/2795 into his name vide entry made on 18th April, 2017 without a proper succession filed by the estate of Mwandhu Owili which amounts to intermeddling.
27. Counsel relied on the case of *Re Estate of John Gakunga Njoroge* [2015] eKLR and *Morris Mwiti Mburugu -vs- Dennis Kimathi M. Mburugu* (2016) eKLR to support the submission.
28. Counsel submitted further that the proper thing to do would have been for the Appellant to involve the family of the Respondent who are the beneficiaries of the estate of Mwandhu Owili in the sub-division process by allowing them to be involved in the process of demarcation and putting boundaries. That what this would achieve is to ensure that the Respondent is allocated the portion where his home stands. That the Respondent resides and buried his relatives on parcel No. Kisumu/Nyahera/2796 which the Appellant allocated himself.
29. Counsel relied on the case of *Margaret Wambui Kamau & 2 Others -vs- Eutycus Mwangi Karanja & 3 Others* [2022] eKLR to urge the court to cancel the sub-division, have the estate of Mwandhu Owili succeeded and sub-division be done thereafter.
30. I have considered all the material placed before the trial court on this issue and the submissions made herein.
31. It is not in dispute that the suit land was a resultant parcel of sub-division of land parcel No. Kisumu/Nyahera/753. From the evidence presented particularly the green card in respect of land parcel number Kisumu/Nyahera/753, the land belonged to the fathers of the parties herein, who held it as proprietors in common. The green card shows that the land parcel number Kisumu/Nyahera/753 was registered in the name of Mwandhu Owili and Gideon Deya Akelo on 1st August, 1980 as a first registration. The green card further shows that the two were to hold the land as common proprietors each owning ½ share thereof.
32. Although the Respondent initially claimed that the entire land parcel number Kisumu/Nyahera/753 belonged to his grandfather solely and that the Appellant fraudulently inserted the name of Gideon Deya Akelo, no evidence was produced to support the allegations. Further, the respondent appears to have abandoned this contention because in his submissions in this appeal, he faulted the appellant only for failure to involve the respondent's family and all the beneficiaries of Mwandhu Owili in the sub-division of the mother title number Kisumu/Nyahera/753 and subsequent transfer of the suit land in favour of the appellant.
33. While Section 61 of the *Land Registration Act*, which was relied upon by the appellant, provides for replacement of the name of a deceased proprietor in common with the name of the personal representative, section 94 provides for partition of land held in common between or amongst the proprietors in common. Section 94(1) provides;

" Any the tenants in common may with the consent of all the tenants in common, make an application in the prescribed form to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a subdivision of land and of any covenants or conditions in a certificate of title or certificate of lease, the Registrar shall effect the partition to the land in accordance with the agreement of the tenants in common."
34. It is paramount firstly, that the consent of all proprietors in common be sought by the proprietor who seeks the partition and secondly the other proprietors participate in the process of partition of the land



35. It is clear in the present case that no such consent was sought or obtained. It is also clear that the family of the Respondent who are the beneficiaries of the other proprietor in common was not involved in the partition process. There is no evidence that the procedure provides for in section 94 of the Land Registration Act was followed in the process that led to the creation of the suit land as a product of land that was held in common tenancy. There is no evidence of application by the appellant to the Land Registrar for partition, there is no evidence of consent or agreement by the other proprietor in common and no evidence of hearing before the Land Registrar or involvement of the Land Registrar at all.
36. The respondent complained that as a result of their non-involvement, the portion of the mother land which was taken and registered by the appellant as the suit land, is actually the portion where the respondent has his home, where Mwadhu Owili, the proprietor in common had his home and where the respondent has interred the remains of the respondent's relatives hence the portion that the respondent should retain.
37. I find that the trial court did not err in its finding that the suit land was created in an unlawful, un-procedural and illegal way.
38. The second issue is whether the respondent trespassed onto the suit land.
39. The title in respect the suit land having been illegally obtained cannot form the basis for a claim of trespass. Further no evidence of trespass was placed before the trial court.
- And lastly on whether the appellant was entitled to the relief sought,
40. The substantive relief sought was for an order of eviction of the respondent from the suit land. Article 40 of the Constitution does not extend protection of the right to property to property acquired unlawfully.
41. In conclusion, following the determinations herein, the court finds that the appeal lacks merit. The appeal is dismissed. Costs to the Respondent.
42. Let the parties follow the law in order to partition the mother title No. Kisumu/Nyahera/753 that was held by the proprietors in common who are now deceased persons.
- Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 2ND DAY OF OCTOBER, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE

In the presence of:

Maureen - Court Assistant.

Otieno for the Appellant.

Awuonda for the respondent.

