

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF AT MIGORI**  
**ENVIRONMENT AND LAND COURT APPEAL NO. E0021 OF**  
**2024**

**JAYNE ACHIENG AOKO**  
**(Suing as the Administrator**  
**of the Estate of Timothy Ben Odhiambo)**  
.....**APPELLANT**  
**VERSUS**  
**COUNTY GOVERNMENT OF**  
**MIGORI.....RESPONDENT**

*(Being an appeal arising from the judgement and decree of Hon M. Okuche  
(SPM) in Migori MELC No. E015 of 2021 delivered on 31<sup>st</sup> July 2024)*

**JUDGEMENT**

- 1.** Vide a Plaint dated 2<sup>nd</sup> February 2021, plaintiff sought the following orders against the defendant:-
  - 1) An order for compensation by the Defendant for construction of public road on LR. NO. KANYAMKAGO/KAWERE I/303 which is a private land.**
  - 2) Costs of the suit.**
  - 3) Any other relief this Honourable court may deem fit to grant in the circumstances.**
- 2.** The Appellant pleaded that her husband, the late Timothy Ben Odhiambo, was the registered owner of LR. NO. KANYAMKAGO/KAWERE I/303 which parcel is situated within East Kanyamkago Location in Awendo Sub-County Migori County. Further, that in 2019 or thereabout, the Plaintiff was dismayed to learn that the defendant herein without her

consent and/or authority, trespassed into her husband's land parcel LR. NO. KANYAMKAGO/KAWERE I/303 and illegally created a public road.

3. The Respondent filed a defendant statement of defence dated 22<sup>nd</sup> June 2021 by which they denied the contents of paragraph 4 but nevertheless averred that if there was a public road created as alleged or otherwise, the same was and still is in the interest of the public including the plaintiff. The Respondent also averred that the plaintiff has never suffered any loss and/or damage by reason of the defendant's commission and/or omission be it as alleged or at all.

### **Hearing at the trial court**

4. The matter then proceeded for hearing, with only two witnesses testifying.
5. The Plaintiff, **Jayne Achieng Aoko Odhiambo** testified as **PW1**. She stated that she was an administrator of her husbands' estate producing a grant as Pexh-1. She testified that the defendant encroached on her husbands' land and she sought refuge at the Lands Survey office. That the surveyor came and made his report which she produced as PMFI2. That the area that was affected was  $\frac{1}{2}$  an acre which she sought compensation of Kshs. 500,000/- for. During cross examination, she stated that she had not produced any document to prove ownership and further, that she did not have a valuation report to prove the alleged value of the

land. She urged that she issued a demand letter to the Respondent but she had not produced the same in court.

- 6. PW2 was Peter Wanjala**, the Land Surveyor. He produced the surveyors' report and submitted that he found that an 11 meter road had been built on Land Parcel No. Kanyamkago/Kawere I/303 belonging to Timothy Ben Odhiambo. Further, that the portion where the road is situated is not supported by map sheet 39 of Kawere.
- 7.** The plaintiff's case was then closed and the defence also closed its case right after. Upon considering the evidence, pleadings and testimonies, the trial court dismissed the suit with no order as to costs.
- 8.** Dissatisfied with the judgement and decree, the Appellant instituted the present appeal vide a memorandum of appeal dated 21<sup>st</sup> March 2025 premised on the following grounds;
  - 1) The learned trial magistrate erred in law and fact by misdirecting himself on the wrong principle and thus arriving at the wrong conclusion.**
  - 2) The learned trial magistrate erred in law and in fact in disregarding the evidence of the expert Surveyor which was never controverted by evidence of any other surveyor thereby deliberately ignoring his evidence.**
  - 3) The Learned trial Magistrate erred in law and in fact in creating evidence and alluding to imaginary issues to inform his judgment.**
  - 4) The learned trial magistrate was biased against the Appellant herein.**

- 9.** The Appeal was canvassed by way of written submissions. The Appellant filed submissions dated 11<sup>th</sup> June 2025 through the firm of Messrs. Tom Mboya & Co. Advocates whereas the Respondent filed submissions dated 9<sup>th</sup> July 2025 through the firm of Messrs. Odhiambo Oronga & Company Advocates.

### **Appellants' Submissions**

- 10.** Learned counsel for the Appellant submitted that the trial court made an error in finding that the matter proceeded as undefended when there was in fact a statement of defence filed on record. Counsel urged that the Trial Court in its judgment concluded that the matter proceeded as undefended claim since the defendant did not enter appearance nor file a defence despite being served. Further, that from the record it is evident that Respondent entered appearance and filed a statement of defence dated 22<sup>nd</sup> June 2021 denying the allegations in the plaint. He stated that a suit is typically considered undefended if a defendant fails to respond to the claim at all, either by not filing a defence or not appearing in court. Further, that a defence, if filed, means the suit is being contested, and the court will proceed to hear evidence and arguments from both sides to determine the facts and applicable law. Counsel urged that when a defendant files a defence but then fails to testify or call witnesses, the court generally treats the defendant's defence as mere allegations without proof. The plaintiff's testimony and evidence then stand uncontroverted, potentially leading

to a judgment in favour of the plaintiff. This was the holding in the case of *Rono v Lomsons Enterprises* (Civil Case 5 of 2019) [2024] KEHC 6249 (KLR) (31 May 2024) (Judgment).

- 11.** Counsel submitted that the trial court made an error in disregarding the surveyor's report and concluding in its finding that the plaintiff had not proven her case. That the Appellant produced in his evidence at the trial court a copy of surveyor's report dated 10<sup>th</sup> July 2019. From the report the surveyor confirms the allegations lodged into the office of the County Secretary by the Appellant vide her letter dated 21<sup>st</sup> June 2019. From the report the surveyor indeed found that an access road, with a paved width of 11 meters indeed existed in the vicinity connecting the pedestrians and motorists to Ulanda centre from Piny Nyadundo where the Appellants land is located. Further that the said access road indeed traverses the Appellant's parcel as per the attached map with an affected area of 0.02 hectares. The report further adds that the road was recently paved, occasioning minimal damages to the Appellant's maize crop and a line of eucalyptus tree which he (the surveyor) was unable to quantify due to passage of time between the paving date and his visit.
- 12.** Counsel submitted that the evidence adduced by the plaintiff at the trial court remain uncontroverted and therefore unchallenged. In such a situation the Appellant is taken to have proved her case on balance of probability in absence of the defendant's evidence to the contrary.
- 13.** On compensation, counsel submitted that the Appellant in her plaint stated that in 2019 or thereabout, she was

dismayed to learn that the defendant herein without her consent and/or authority, trespassed into her husband's land parcel LR. NO. KANYAMKAGO/KAWERE I/303 and illegally created a public road. She therefore prayed for Judgment against the Defendant for:-

*a) An order for compensation by the Defendant for construction of public road on LR. NO. KANYAMKAGO/KAWERE I/303 which is a private land.*

*b) Cost of the suit,*

*c) Any other relief this Honourable court may deem fit to grant in the circumstances.*

**14.** That having pleaded trespass in the plaint, the logical conclusion was that compensation was for the alleged trespass whether coined by the defendant as compulsory acquisition in the public interest. Further, that what was sought as compensation for was clear from the pleadings and that it was erroneous for the court to find that she neither told the court what kind of compensation she sought from the court. Counsel urged that the compensation is in the nature of general damages which are damages which cannot be mathematically assessed as at the date of the trial. These damages are not amenable to precise monetary quantification and are assessed by the Court, ordinarily guided by precedents of a similar nature.

**15.** Counsel submitted that the surveyor indicated that he was unable to quantify the extent of the damage that had been caused by the defendant as a result of the trespass onto the

suit property. The court should have exercised its discretion and proceeded to assess the damages. Counsel submitted that should the court find that the Appellant indeed proved her case, proceed to assess damages payable for the said trespass and damage to property.

- 16.** Counsel urged that even if the court was to agree that the Respondent's acts amounted to compulsory acquisition for public interest as alluded to in the statement of defence, the same was subject to the provisions of the law which require among other things that the registered owner of the land compulsorily acquired must be compensated. That the process of compulsory acquisition is provided for under Section 107 of the Land Act. This Section provides an elaborate and detailed process that commences with submission of a request from the National or County governments to the Commission for acquisition of land on its behalf.
- 17.** Counsel submitted that the Respondent, County Government of Migori, did not follow the due process as provided by the law, in that no notice of was served on the Plaintiff, and no gazettelement was done by the County government failure to follow these processes rendered the process illegal and unlawful. He placed reliance on the case of Christopher Ndarathi Murungaru vs Kenya Anti-Corruption Commission & Hon. Attorney General (2006) eKLR in this regard.
- 18.** Counsel urged that Section 112 of the Land Act which provides for issuance of notice of at least thirty days (30)

days after publishing the notice of intention to acquire land was not complied with and in the end, the compulsory acquisition of LR No. KANYAMKAGO/KAWERE 1/303 was without the following of due process. Additionally, Counsel cited Article 27(1) & (2) of the Constitution and urged that even if the public interest always supersede the private interest, at least due process ought to have been followed and the Respondent had no right whatsoever to trample on the Appellant's rights and/or breach her right to property as provided by Article 40 of the Constitution. The action of the County or Ministry of Roads officials and specifically the Ministry for Roads who supervised the said demolition contravened Article 47 of the Constitution.

- 19.** Counsel submitted that the Respondent denied the Appellant these rights, the Appellant had legitimate expectation that the Defendant would allow her a quiet possession of the suit land and she also had legitimate expectation that in case the land was to be compulsorily acquired, due process would be followed, which was not the case herein. Counsel placed reliance on the case of Attorney General v Ryath (1980) and prayed that the appeal be allowed as prayed with costs.

### **Analysis and Determination**

- 20.** This being a first appeal, this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion, while bearing in mind that it did not see nor hear the witnesses and therefore give an allowance for the same. In the case of **Selle & Another vs. Associated**

**Motor Boat Co. Ltd & Others 1968 E.A. 123**, the court enunciated this principle as follows;

- a. **“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 re consider 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.”**

**21.** The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**. It was held 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 allowances in this respect.”**

- 22.** The sole issue that arises for determination is; ***Whether the trial court erred in dismissing the Appellants' Suit.*** Attendant to it shall be the one of ***who to bear the costs of this appeal.***
- 23.** The main issue is that the Respondent constructed a road on the appellant's late husband's parcel of land without lawful authority hence trespassed and should pay damages to that effect.
- 24.** The Appellants' claim was premised on the grounds that a road was constructed on her husband's parcel to wit; No. 303 and she therefore sought compensation for the same. She produced a Grant *Ad Litem* for the estate of the late Timothy Ben Odhiambo. I note that there is also a land Registrar's Report on record where it states that the land belonged to the deceased husband. However, there is no title produced as evidence that it was indeed registered in his name.
- 25.** Generally, in matters touching on private land, it is the owner of the land who can sue, which is the tenor of **Sections 24**, and **26** of the Land Registration Act, which provide as follows :

#### **24) Interest conferred by registration**

##### **Subject to this Act—**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

**(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.**

**26. Certificate of title to be held as conclusive evidence of proprietorship**

**(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.**

26. Without demonstrating *locus standi*, one cannot have capacity to sue. In the case of **Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [2019] eKLR** the court observed as follows:

**“It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no locus standi, then the Applicant cannot be heard and that point alone may dispose of the suit.”**

27. Having failed to avail any evidence that the suit land was registered in her husbands’ name and was therefore part of his estate, I find that she had no *locus standi* to seek any reliefs pertaining to the said parcel of land not in the sense that she does not have letters of ad litem but that she has not demonstrated her nexus to the existence of such a parcel of land, if at all it is.

28. From the record of the trial court, the matter proceeded for formal proof. Be that as it may **Section 107** of the **Evidence Act** is clear that whosoever desires to prove or disprove the existence or otherwise of a fact, the burden lies on him to do so, and for civil cases on a balance of probabilities, unless the law places the burden expressly on another person. Therefore, it was upon the Appellant to

prove at the trial court, to the required standard, that the land in issue was registered in the name of her husband or his estate. It was not enough to state in evidence that she had a grant ad litem to the Estate of her deceased husband. She needed to show that the Estate owned a parcel of land of that description, as Section 26 of the Land Registration Act provides regarding the registration of a person as proprietor of a title or certificate of lease, and that required production of a title or lease to that effect. The appellant failed to satisfy the court on this burden of proof. What if the title deed or Certificate of leave reason someone else's name and the court awarded her compensation, and then the rightful owner also sues? It would be a grave error and injustice.

- 29.** I also note that the Appellant contends that the compensation sought in the Plaint was of the nature of damages for trespass. A cursory look at the pleadings and the prayers sought reveals that the Appellant sought the same merely as compensation for trespass. If the Appellant intended to seek general damages, the correct way to approach the court was to plead general damages for trespass. Further, there was no evidence adduced to prove that any loss was incurred and further, the fact that she could not provide any evidence that the suit land was registered in the name of the deceased, renders any claim for compensation moot.
- 30.** The upshot of the foregoing is that the appeal is dismissed in its entirety. There is no order as to costs.

**JUDGMENT Dated, Signed and DELIVERED** virtually via the **Teams Platform** this **20<sup>TH</sup>** Day of **November 2025**.

**HON. DR. IUR NYAGAKA**

**JUDGE**

**In the presence of,**

Court Assistant: Md. Lola

Ms. Ogutu Advocate for the Appellant

Odhiambo Oronga for the Respondents (absent)