

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC APPEAL NO. E040 OF 2023

EDNA BISIERI ONG'UTI APPELLANT

VERSUS

SUSAN AWINO OWILI.....1ST RESPONDENT

JAMES F. M. NJUGUNA 2ND RESPONDENT

(An appeal from the judgement of the Chief Magistrate delivered by Hon. E.A. Obina (SPM) on 14th November 2023 in KSM CMC E & L CASE NO. E110 OF 2021)

BETWEEN

EDNA BISIERI ONG'UTI PLAINTIFF

VERSUS

SUSAN AWINO OWILI.....1ST DEFENDANT

JAMES F. M. NJUGUNA 2ND DEFENDANT

JUDGEMENT

Introduction

Vide the Memorandum of Appeal dated 14th December 2023, the Appellant appealed against the Judgement dated 14th November 2023 in Kisumu CMC ELC Case No. E110 of 2021 and sought that the appeal be allowed with costs and the decision of the trial court be substituted with the following orders:

- (i) The Appellant do retain the ownership of land parcel No. Kisumu/Manyatta "B"/1318 for all intents and purposes.
- (ii) A permanent injunction restraining the Defendant either by herself or persons claiming through her directly or indirectly from continuing to remain in possession, trespassing, engaging in renting out the premises or in

any other activities affecting proprietary rights of the Appellant regarding land parcel No. KISUMU/MANYATTA "B"/1318 in any manner howsoever.

- (iii) An order of eviction of the Respondent from land parcel No. KISUMU/MANYATTA "B"/1318.
- (iv) Costs of the appeal and of the court below.

A brief background of the Appeal as can be gathered from the Record of Appeal is that the Appellant was the Plaintiff in Kisumu CMC ELC Case NO. E110 of 2021 wherein she had sued the respondent vide the plaint dated 11th August 2021 seeking for orders of permanent injunction restraining the respondent from interfering with land parcel No. KISUMU/MANYATTA "B"/1318 (the suit land), an eviction order of the respondent from the suit land, general damages for unlawfully and deliberately remaining in possession of the suit land, costs of the suit, interest on the general damages and costs.

In response to the Appellant's claim, the record shows that the respondent filed amended statement of defence dated 9th June 2022 denying the Appellant's claim.

The record shows further that the suit was heard before the trial court which vide the Judgement delivered on 14th November 2023 found that the Appellant had not proved her case and made the following orders.

- (i) "The Plaintiff's suit be and is hereby dismissed.
- (ii) For avoidance of doubt the property subject matter shall revert into the names of JAMES F. M. NJUGUNA as ordered by the Honourable Justice S. M. Kibunja on the

9th May 2018. I do not have the Jurisdiction to contradict those orders.

- (iii) The Plaintiff's title to the said property recalled and cancelled and the Land Registrar to rectify the register to that effect.
- (iv) The caution that had been placed on the suit property to be reinstated and only to be removed after following due process which may include moving the court where suits were filed and orders given for review of those orders.
- (v) The plaintiff is at liberty to follow the 2nd Defendant for refund of her money.
- (vi) The costs of this suit shall be to the 1st defendant."

Aggrieved by the judgement, the Appellant filed the present appeal on the grounds that the Honourable Magistrate erred by:

- (1) holding that the plaintiff did not acquire an indefeasible title of land parcel No. KISUMU/MANYATTA "B"/1318 whereas there was direct evidence to that effect hence arriving at a wrong decision.
- (2) allowing himself to enter into the arena of litigation by putting himself in the position of the respondent hence alluding to the fact that the respondent never received Notice of Intention to remove a caution which notice was duly issued and the respondent never called the County Land Registrar to prove the contrary hence arriving at a wrong decision.

- (3) misinterpreting the judgement in KSM ELC No. 237 of 2015 hence arriving at a wrong decision and which decision has occasioned miscarriage of Justice.
- (4) By seriously misinterpreting the obligations of the 2nd Defendant *vis a vis* his child whom it was admitted by the Respondent had finished his college studies and is now a mature person and independent and hence should have appreciated orders of the court given on 8th August 2018 and extracted on 29th April 2021 and thereby arriving at a wrong decision.
- (5) ordering the cancellation of the Appellant's title and reverting the ownership of land title No. KISUMU/MANYATTA "B"/1318 in the name of James Njuguna whereas there were no pleadings in support of or against such a prayer hence entering judgement in favour of the respondent without jurisdiction and thereby occasioning a miscarriage of justice.
- (6) failing to appreciate that the Appellant purchased the subject suit land bonafides as the owner to the suit land was not limited in any way from disposing the subject parcel of land and the court was therefore influenced by extrinsic and extraneous matters and thereby arriving at a wrong decision.

Submissions

Pursuant to directions given on 3/2/2025, the appeal was dispensed heard by way of written submissions.

Submissions fo the Appellant

Written submissions dated 27th May 2025 were filed by D. O. E. Anyul & Company Advocates on behalf of the Appellant.

Counsel presented two grounds for determination namely: -

- (i) Indefeasibility of the Appellant's title No. KISUMU/MANYATTA "B"/1318.
- (ii) Conflict of interest and the grave error of the honourable court of jumping into the arena of litigation thus arriving at a wrong decision.

Relying on the provisions of section 26 of the Land Registration Act, Counsel submitted that the Appellant led evidence that she was the absolute owner of the suit land. That the Appellant ventured too much into the arena of conflict of litigation.

That the trial Magistrate made mistakes and convoluted disruption leading to miscarriage of justice.

Counsel relied on the case of Mwambole Ichappu Mbwana vs IEBC and others where it was held that parties are bound by their own pleadings and that a court could not frame issues not stated in the pleadings.

That the trial court's observation that it believed the 1st respondent when she said that she never received notice of intention to remove the caution was not raised by the 1st respondent whatsoever and not pleaded. That if the 1st Respondent felt that the caution placed by her was removed unprocedurally, she ought to have filed a Counter-claim against the 2nd Respondent and the Land Registrar.

That there was no evidence that the Appellant was indebted to the 1st Respondent.

Counsel urged the court to allow the appeal as prayed in the Memorandum of Appeal.

Submissions by the 1st Respondent

The 1st Respondent filed written submissions dated 14th April 2025. The 1st Respondent submitted that the suit parcel of land was originally in the name of the 2nd Respondent and that the same was attached vide a Court Order in Children Case No. 6 of 2006, that further Justice Kibunja vide the order made in ELC No. 237 of 2015 reinstated the 1st Respondent back to the land and gave an order of injunction against the 2nd Respondent from dealing in the suit land and extended parental responsibility of the minor who was the subject matter of the children's case beyond 18 years. That the order was not appealed against.

That this clearly shows that the 2nd Respondent did not have good title to transfer to the Appellant herein hence the Appellant's title was not indefeasible.

Relying on Sections 73 and 78 (1) of the Land Registration Act, the 1st Respondent submitted that no evidence was produced before court to show how the caution was removed.

That the trial Magistrate correctly directed his mind in arriving at his decision.

The 1st Respondent urged the court to dismiss the appeal.

Analysis and determination

This being a first appeal, the court is bound to analyse and re-examine the evidence placed before the trial court.

The record shows that the suit land had been a subject of previous litigation in which court orders had been made affecting the land.

These orders culminated in the Judgement in Kisumu ELC Case No. 237 of 2015 in which the trial Judge Hon. Justice Kibunja entered Judgement in favour of the 1st Respondent herein as follows: -

“

- (a) That the 3rd Defendant is hereby directed to rectify the register of Land Parcel No. KISUMU/MANYATTA “B”/1318 by revoking the entries numbers 9, 10, and 11 made on the 18th March 2015 and revert the registration of the said land in the name of James F. M. Njuguna as in entry number 4. That accordingly the 2nd Defendant’s title to the said land be recalled and cancelled.
- (b) That the caution filed by the Plaintiff against the title to the suit property on the 1st September 2010 under entry number 8 be reinstated forthwith and not to be withdrawn without compliance to section 73 (2) of the Land Registration Act.
- (c) That the Defendants do meet the Plaintiff’s costs of the suit.
- (d) The 2nd Defendant’s counterclaim against the Plaintiff is hereby dismissed with costs.”

A reading of the judgement will show that one of the reasons why the suit property was reverted to the name of the 2nd Respondent herein who was the 1st respondent in the ELC case No. 237 of 2015 was so that a court order made in Children's Case No. 6 of 2006 for attachment of the rent from the premises on the suit property towards the school fees of the child of the 1st Respondent herein could not be defeated.

The 2nd Defendant in the ELC case No. 237 of 2015 whose title was cancelled was a purchaser who was trying to buy the land in spite of the existence of a caution on the land and the court orders in the Children Case and High Court Misc. Application No. 165 of 2009.

It appears when the land was reverted to the 2nd respondent herein, he repeated the same process as the one cancelled by the court in ELC No. 237 of 2015. He purported to sell the land to the appellant herein without adhering to the process of removing the caution as ordered in KISUMU ELC CASE NO. 237 OF 2025. I have read the record. There is no evidence that the 2nd respondent or the appellant followed the provisions of section 73(2) of the Land Registration Act in removing the caution that was reinstated by the court.

The trial court found as much and dismissed the appellant's suit. I find no grounds to interfere with the judgement of the trial court. If the minor has now attained the age of majority the recourse available to the 2nd respondent is to seek review of the orders in the Children's Case and the Miscellaneous Application and to comply with the court order in ELC NO. 237 OF 2015 for

removal of the Caution so as to release himself from the obligations placed by the orders emanating therefrom.

The appellant has recourse to the 2nd respondent for refund. Her title to the land was marred with irregularity for having been processed without compliance with existing court orders.

For the foregoing reasons court finds that the appeal lacks merit and hereby dismisses it. Costs of the appeal to the 1st Respondent.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 20th day of January, 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen: Court Assistant.

No appearance for the Appellant.

1st Respondent present in person.

No appearance for the 2nd Respondent.