

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ELCA NO. E005 OF 2025

JOHN OLANGO ODEK.....
APPELLANT

VERSUS

KINGI GEORGE OONGO.....1ST
RESPONDENT
JOHN OHURU OMWENGA.....2ND
RESPONDENT

JUDGMENT

**(Being an appeal from the judgment of the Principal
Magistrate Hon. Ongeru (PM) delivered on the 3rd
December, 2024 in Oyugis ELC Suit No. E057 of 2023).**

INTRODUCTION

- 1.** Often judges come across very difficult cases to resolve but they must, in the interest of justice, do so by interpreting the law to the facts as to give the law life where it would otherwise be a dry stick to be used to whip the errant. In the instant Appeal, I have before me a contention that a suit filed subsequent to another one over the same subject, but by a difference party was struck out, on the basis that it should not have been filed in the first place.
- 2.** This is an appeal arising from the ruling of Honourable Ongeru Principal Magistrate, delivered on 3rd December, 2024 in Oyugis ELC No. E057 of 2023. The Appellant filed an Amended

Memorandum of Appeal dated 29th January, 2025 appealing against the said judgment on the following grounds: -

- 1. THAT the Learned Magistrate erred in Law and in facts and thereby committed Serious Jurisdictional Errors by dismissing the Appellants Suit without delving into its merits in contravention of Articles 10, 25, 27, 48, 50 and 159 of the Constitution of Kenya 2010 and Rules of Natural Justice.**
- 2. THAT the Learned Magistrate erred in Law and in Facts in finding that the Appellants Suit had contravened Section 6 of the Civil Procedure Act or at all against the materials on record and the Law.**
- 3. THAT the Learned Magistrate erred in Law and in facts in failing to find that the Suit filed by the Respondents herein against Samuel Odoyo Odek being Oyugis ELC NO. 41 of 2022 is defective, incompetent, null and void considering that the said Samuel Odoyo Odek is not the Administrator of the Estate of ENOS ODEK OJIERO (deceased) who was the Registered owner of the disputed parcels of Land.**
- 4. THAT in the premises, the Appellants contends that the impugned Judgment delivered by the Hon. Principal**

Magistrate Mr. Ongeru on the 3rd December 2024 is incompetent and biased and intended to buy time for the Respondents herein meriting the urgent Intervention of this Honourable Court as is being sought herein-below.

5. THAT Further or in the alternative, the Appellant herein contends that the Learned Magistrate erred in Law and in Facts by deliberately failing to consider the Appellants/Plaintiffs Written Submissions on record in the body of his otherwise biased Judgment and thereby failing to accord the Appellants/Plaintiff Fair hearing contrary to the Rules of Natural Justice and in contravention of Articles 10, 25, 27, 48 and 50 of the Constitution of Kenya 2010.

3. The Appellant seeks orders allowing the appeal and setting aside the trial magistrate's judgment dated 3rd December, 2024. He also prays that the case in Oyugis ELC No. 41 of 2022 be dismissed with costs for lack of jurisdiction and be awarded costs of the proceedings in the subordinate court.

BRIEF FACTS

4. The Appellant had filed a suit against the Respondents vide a plaint dated 4th July, 2023 seeking a declaration that the Respondents had fraudulently acquired suit parcels West-Kasipul/Kodera-Karabach/1280 and West Kasipul/Kodera Karabach/1281. He also prayed that the same be restored back to the deceased estate together with general damages for trespass.
5. The matter was consolidated with Oyugis ELC No. 41 of 2022 where the Respondents were the Plaintiff.
6. The trial magistrate in his judgment dated 3rd December, 2024 struck out the case for being in contravention of Section 6 of the Civil Procedure Act. The court did not issue costs for the suit.
7. The Appellant being dissatisfied with the judgment filed the present appeal which was canvassed by way of written submissions.

Submissions

8. Counsel for the Appellant file his submissions dated 1st September, 2025 where he identified two issues for determination. The first issue was whether the Plaintiff's suit was res-judicata and therefore offended Section 6 of the Civil Procedure Act. It was his submission that the Appellant was not a party in the Oyugis ELC No. 41 of 2022

which was pending hearing and determination. He urged the court to allow grounds 1, 2, 4 and 5 of the Memorandum of Appeal.

9. The second issue was whether the Respondent had locus standi to sue Samuel Odoyo Odek (the Appellant's brother) in Oyugis ELC No. 41 of 2022. Counsel submits that since Samuel Odoyo Odek was not the administrator of the Estate of Enos Odek Ojiero (deceased) the registered owner of the suit parcels, the Respondents had no capacity to institute the suit. He urged the court to allow ground 3 of the Memorandum of Appeal.

Analysis and Determination

10. Upon consideration of the grounds of appeal, pleadings, submissions and the authorities cited, the following issues are for determination:

1. Whether the appeal is merited.

2. Who should bear the cost of the appeal.

11. Being a first appeal, the court relies on a number of principles as set out in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123:**

“...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. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

12. Further as was found in the case of **Mwangi V Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

13. Section 6 of the **Civil Procedure Act** provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is

pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

14. It is not in dispute that there were two cases being Oyugis PM ELC No. 41 of 2022 involving the Respondents and the suit properties West-Kasipul/Kodera-Karabach/1280 and West Kasipul/Kodera Karabach/1281. It is a fact that there was also Oyugis ELC No. 57 of 2023 involving the Appellant and the Respondents and the suit properties West-Kasipul/Kodera-Karabach/1280 and West Kasipul/Kodera Karabach/1281.

15. The learned trial magistrate observed that the Plaintiff raised the issue of capacity to sue. He did not comment much on the same or make a finding on it. However, looking at the Plaintiff’s own evidence, particularly, PExh 1 which is a copy of the letters of administration, it is a fact that the Grant of Letters of Administration was issued on 6th September 2016 to two people, namely, John Olango Odek and Monicah Aluoch Odek. But the instant suit was brought by only one John Olango Odek. As the administration of the estate of the deceased was joint, as ordered by the court, both should have brought the suit. Administration of an estate cannot be severed. Where a Grant is issued jointly it should be administered as such. In this case it is not explained why there is only one purported administrator, contrary to the law. The

trial magistrate out to have found that the plaintiff lacked capacity and the suit was incompetent hence strike it out even on that account along. I find that the suit was actually incompetent and maintain the order of striking it out.

16. Besides the above, it is not in dispute that the trial court found that PM ELC E057 of 2023 offended the provisions of *sub judice* by virtue of the ELC Case No. 41 of 2022 and had the suit struck out. It is also a fact that the two matters are substantially similar as it revolved around the same subject matter and same parties in the sense that the Defendants in E057 of 2023 were the Plaintiffs in E041 of 2022. But the Plaintiff in E057 of 2023 was not the same as the Defendant in E041 of 2022. However, it is curious that in the statement dated 4th July 2023 which he adopted as evidence in chief on 31st January 2024 he stated in paragraph 2 that the Defendants (who were Plaintiffs in E041 of 2022) were not entitled to the prayers sought in that suit number E041 of 2022.

17. Notably, the trial magistrate found that the Applicant had requested that the two matters be consolidated. I have however, taken the liberty to peruse the court record and it is not in dispute that there was no evidence that the two matters had been consolidated.

18. The trial court found that the suit offended the doctrine of sub judice. While the finding of the trial Magistrate was wrong in that regard, it is this court's view that the trial Magistrate having established that the latter suit offended the doctrine of *sub judice*, he ought to have stayed the suit in ELC E057 of 2023 and allowed the former suit be heard and determined. It is this court's view that with that finding of the trial Court, the magistrate was not obligated to hear the suit on merit having already found that it went against the provisions of Section 6 of the Civil Procedure Act. Thus, regarding the striking out of the suit, looking at the wider interest of justice I find that the trial magistrate did not misdirect himself on this principle as enumerated under Section 6 of the Civil Procedure Act because as I have stated above, the Plaintiff in E057 of 2023 knew of the existence of the previous suit but never sought to be enjoined in it as a party. Instead, through his evidence in the statement form he sought to have the court determine the other matter by praying and asking the court to disentitle the Plaintiffs therein who were the defendants in his suit the reliefs they sought therein. This brought the latter suit within the purview of the determination of the issues in the former or previous suit and therefore entitled the trial magistrate, on that account, to strike out suit No. E057 of 2023. In my humble view, the trial magistrate was

by that process giving the Plaintiff now appellant to apply to be joined as a party in E041 of 2022, and the party should have done so rather than filing this appeal.

19. It is also this court's view that having found that the trial magistrate could not hear and determine the suit in Oyugis ELC E057 of 2023, grounds 3 to 5 of the Memorandum of Appeal also fails in their entirety since they delve into the merits of the case which the trial court could not interrogate.

20. Besides, from the evidence adduced by the plaintiff, none was led to prove the allegations of fraud levelled against the Defendants. This is because the documentary evidence, by way of **PExhibits 1 to 5**, relied on by the Plaintiff did not satisfy the provisions of Sections 80 and 81 of the Evidence Act in terms of production of secondary documents. They were photocopies which were not certified by their makers, in terms of the two provisions of the Act and the cases of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR (by the Court of Appeal)** and **Sofie Feis Caroline Lwangu v Benson Wafula Ndote [2022] KEELC 986 (KLR)**, by this court, they were inadmissible. Thus, basically the Appellant only gave oral evidence which was basically inadmissible hearsay. His suit could not have succeeded after all but the Court was lenient to strike it out rather than dismiss it.

21. Be that as it may, it is this court's view that the Appellant has not satisfied this court's interference with the trial court's judgment. The upshot of the foregoing is that the appeal lacks merit and the same is hereby dismissed with costs to the Respondents.

22. It is so ordered.

Judgment **dated, signed** and **delivered virtually** via the **Teams Platform this 28th day of January 2026.**

HON. DR. IUR NYAGAKA
JUDGE

From 10:17 AM in the presence of,

Mr. P. Ngoge Advocate for the Appellant

G. Masese Advocate for the Respondent absent (served by the D/R and also notified by Mr. Ngoge Advocate)