

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ELCLA E057 OF 2024

CONSOLATA ACHIENG OYUGI.....
APPELLANT

VERSUS

RICHARD OUMA KOYWER.....
RESPONDENT

JUDGMENT

**(Being an appeal from the ruling of the Chief Magistrate
Hon. C.A.S Mutai (CM) delivered on the 31st October,
2024 in Homabay ELC No. 2 of 2020)**

INTRODUCTION

- 1.** This is an Appeal arising from the judgment of Honourable C. A. S. Mutai, Chief Magistrate, delivered on 31st October, 2024 in Homabay ELC No. 2 of 2020.
- 2.** The Appellant filed a Memorandum of Appeal dated 27th November, 2024 appealing against the said ruling on the following grounds: -
 - 1. The cause of action in the main suit as between the parties abated immediately the Respondent ceased to hold title to the suit parcel of land.**

2. The continued trial of the suit at the subordinate court is thus unlawful as the orders sought in the main suit at the subordinate court are not sustainable and if issued, would occasioned a travesty of justice.

3. The Appellant seeks orders allowing the appeal and an order declaring that the proceedings in the subordinate court over the suit land is not sustainable. He also sought for orders terminating the proceedings in the subordinate court.

BRIEF FACTS

4. The Appellant had filed an application dated 17th July, 2024 seeking for orders that the suit be dismissed on account that the Respondent was no longer the registered owner of the suit parcel. The Respondent filed a response wherein he averred that the cause of action was clear as per the Amended Plaint.

5. The trial court heard the application and found that the Respondent was the registered owner at the time the suit had been instituted. He added that there was a cause of action that needed to be determined. He dismissed that application with costs.

6. The Appellant being dissatisfied with the ruling filed the present appeal which was canvassed by way of written submissions.

Submissions

7. Counsel for the Appellant filed his submissions dated 1st October, 2025 where he identified two issues for determination, whether the appeal is merited and who should bear the costs of the appeal.
8. On the first issue, he relied on the case of **Drummond Jackson V Britain Medical Association [1970] 2WLR 688**. He submits that the Respondent filed an amended plaint dated 22nd January, 2020 seeking orders inter alia for permanent injunction restraining the Appellant and her agents from interfering with land parcel number GEM/KOTIENO/KAWUOR/1129 owned by the Respondent.
9. Counsel submitted that the suit parcel has since been transferred to a third party known as Taifa Gas by the Respondent with full knowledge of the Respondent. He added that the Respondent has since ceased to have any interest in the said parcel.
10. He further submits that disposal of the subject matter by the Respondent results in the cause of action having been extinguished and cannot be maintained in the form originally presented.

- 11.** It was his submission that there was no suit to which further proceedings in the lower court could be conducted or sufficient cause preferred by the Respondent to warrant further proceedings in the subordinate court. He cited the case in **Honourable Attorney General V Law Society of Kenya & Another Civil Application No. 133 of 2011.**
- 12.** Counsel submits that the suit in the lower court is anchored on a complaint that has since been overtaken by events and therefore ought to be terminated. He relied on the case of **Agricultural Finance Corporation V Lengetia Ltd [1985] KLR 765.**
- 13.** In conclusion, he urged the court to allow the appeal as prayed.
- 14.** As for the Respondent, counsel, on the other hand, filed his submissions dated 28th November, 2025. In them he identified one issue for determination, whether the cause of action between parties has abated.
- 15.** He relied on **Article 40** of the constitution and **Section 24 and 25 of the Land Registration Act.** He submits that at the time the suit was instituted, the Respondent was the registered owner of the suit land.
- 16.** It was counsel's submission that the suit had not been heard on account of the delay in the interlocutory application filed by the

Appellant. He adds that the case before the trial court was proper and ought to be heard.

17. He cited the case in **Charles Ogejo Ochieng V Geoffrey Okumu (1995) eKLR** and submits that dismissing the suit should not be warranted as the third party who is alleged to have the current title deed may be enjoined in the suit. He adds that at the time of registration of the suit, the Respondent was the registered owner.

18. He further submitted that the Appellant's claim that the land belonged to his father, he demonstrated he was not asserting as an independent, hostile title in denial of the true owner.

19. He cited **Article 159 (2)(d)** of the constitution and submit that the third party could be added to the case through amendment of pleadings and thus the sui does not warrant any form of dismissal.

20. It was counsel's submission that the appeal lacked merit and ought to be dismissed with costs.

Analysis and Determination

21. 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.

22. 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 ...”

23. Further, in the case of **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)** the court held that:

“This being a first appeal, this court’s mandate is to re-evaluate, re-assess and re-analyze the record and

then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect.”

24. But for the instant appeal, the decision appealed from was one where the court made a determination by way of exercise of discretion. In relation to that, many decisions have been made guiding on how the appellate court should handle an appeal arising from it. In such circumstances, the court has to consider whether exercised injudiciously and or proceeded on the wrong principles or included matters he ought not to have included or failed to take into account some he ought to have considered. Thus, issues **Supermarine Handling Services Ltd V Kenya Revenue Authority [2010] KECA 373 (KLR)** the court held as follows:

“...Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It

will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.

25. Also, in **Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006)** the

Court stated :-

“... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.

26. Similarly, in **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR** the Court of Appeal held that:

“...the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that

discretion either way was improper and therefore warrants interference.”

27. Moreover, in **Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16 EACA 63**, it was held that there is no bar to an appeal lying to an Appellate Court against an order made in the exercise of judicial discretion, but for the Appeal Court to interfere only if it be shown that the discretion was exercised injudiciously.

28. Furthermore, in **Mbogo and Another v Shah [1968] EA 93** at **96** the court held:

“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”

29. Also, in **Agola v Ngodhe (An administrator to the Estate of Zakayo Ngodhe) (Environment and Land Appeal E025 of**

2024) [2025] KEELC 1367 (KLR) (6 March 2025) (Judgment),

this court stated;

“As for the instant appeal, it is clear that it arose from the low court’s exercise of discretion. Regarding appeals of such nature, the appellate court will not normally interfere with the discretion of the trial court unless the trial magistrate or judge exercised the discretion wrongly, injudiciously or misdirected himself in some matter thereby arriving at a wrong decision, the decision clearly wrong.”

30. Also, in **Nyaoke & 7 others v Ayaga (Environment and Land Appeal E024 of 2024) [2025] KEELC 7345 (KLR) (28 October 2025) (Judgment)** this court held,

“Again, it is worth of note that this is an appeal that challenges the exercise of discretion by the trial court. The principles that govern the instances that an appellant court may interfere with a decision arrived at by exercise of discretion by a court appealed from are now settled. This court must be cautious in deciding to interfere with the discretion of the trial court. If I must do so, I should not substitute my decision with the that of the trial court. I must consider and find, if I have to overturn that

decision, that the trial court failed to act judiciously or was plainly wrong on principles that he proceeded on or considered or failed to consider factors which he ought not or ought to have considered, respectively.”

- 31.** The decisions are clear that the exercise of judicial discretion has to be judicious. It was the Appellant’s case that the suit in the trial court ought to be dismissed since the cause of action was not sustainable as the suit property did not belong to the Respondent. He added that the suit property had been transferred to a third party.
- 32.** The Respondent on the other hand contends that there was a cause of action which ought to be determined since at the time the case was filed, the Respondent was the registered owner of the suit parcel.
- 33.** It was the Respondent’s case that the matter was yet to be heard and that parties had the liberty to amend the pleadings.
- 34. Order 8 Rule 5** of the Civil Procedure Rules provides as follows: -

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of

any party order any documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

- 35.** The Appellant in filing the application dated 17th July, 2024 sought for orders to dismiss the suit on the basis that the suit property was no longer registered in the Respondent’s name but another party.
- 36.** Notably, the matter had partially commenced for hearing when the court directed that survey be conducted. The trial court found that dismissing the suit where there was a valid cause of action which was yet to be ventilated would not resolve the issue of encroachment.
- 37.** I have perused the court record. It is not in dispute that the pleadings as they stood have not been amended by any of the parties to show the different position claimed by the Appellant. it is only a claim that is made from the applicant’s side, without the backing of pleadings. Parties are bound by their pleadings. Evidence can only be adduced along the pleadings filed. Thus, any that deviates is to be ignored by the court. It is therefore this court’s view that the trial magistrate did not err in dismissing the

application since the Amended Complaint dated 22nd January, 2020 still featured the Plaintiff/Respondent as Richard Ouma Koywer.

- 38.** The upshot of the foregoing is that the appeal is not merited and is hereby dismissed with costs to the Respondent.
- 39.** The original court file be transmitted back to the lower court registry for purposes of giving a hearing date of the matter.
- 40.** Orders accordingly.

Judgment **dated, signed and delivered virtually** via the **Teams Platform this 26th day of February 2026.**

HON. DR. IUR NYAGAKA
JUDGE

From 11:29 AM, in the presence of,

1. Shikuku Advocate for the Appellant
2. Ms. Kimberly Advocate for the Respondent