

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE APPEAL NO. 001 OF
2023

KENNEDY ONYANGO ODERA
APPELLANT

VERSUS

PETER OTIANG OGAWO.1ST
RESPONDENT

PASKALIA ODINGA ODERA.....2ND
RESPONDENT

(Appeal from the Judgment of the Environment and Land Court at Siaya by Hon. Limo B. Benjamin (P.M.) dated 21. 11. 2023)

JUDGEMENT

- 1 The Appellant herein being dissatisfied with the judgment of the Learned Trial Magistrate Hon. Limo B. Benjamin (Principal Magistrate), Siaya Magistrate’s Court in MCELC No. E041 of 2021 delivered on 21st November, 2023 together with its subsequent Orders appeals against the whole of the said judgment, ensuing Orders and decree.
- 2 The Appellant in its Memorandum of Appeal dated 19th December 2023 sets out 9 grounds of appeal as follows; -

- 1) The Learned Trial Magistrate erred in law and fact in holding that the Appellant's suit lacks merit.
- 2) The Learned Trial Magistrate erred in law and fact in holding that the Interested party's counterclaim succeeds.
- 3) The Learned Trial Magistrate erred in law and fact in failing to find that the Appellant acquired the suit land legally.
- 4) The Learned Trial Magistrate erred in law and fact in failing to find that the Appellant is the registered owner of the suit land parcel number South Gem/Gombe/2091 and deserves quiet enjoyment of the same.
- 5) The Learned Trial Magistrate erred in law and fact in failing to find that Respondents' arguments were based on inheritance which was long sorted by the succession court under succession Act, and that the decision/orders of the succession court still stands.
- 6) The Learned Trial Magistrate erred in law and fact in failing to find that the Respondents have not been staying on the suit land peacefully and lately the Appellant resorted in court intervention after all conflict resolution avenues failed.
- 7) The Learned Trial Magistrate erred in law and fact in failing to find that it is only the succession court who can review its orders unless appealed.
- 8) The Learned Trial Magistrate erred in law and fact in failing to find that the Honourable Succession court orders granting the Appellant the suit land still stands

9) The Learned Trial Magistrate erred in law and fact in rejecting the Appellant's evidence and accepting the evidence of the Respondent's not proved to have either been verified.

3 On the strength of the above grounds the Appellant sought that; -

- a) This appeal be allowed.
- b) The Judgment dated 21/11/2023, be set aside and a Judgment be entered against the Respondents in favour of the Appellant and permanent injunction against the Respondents, PETER OTIANG OGAWO and PASKALIA ODINGA ODERA by themselves, servants, agents or anyone from dealing with the suit property namely: South Gem/Gombe/2091 herein referred to as suit property for purposes of this suit.
- c) An order of eviction be issued directing the Respondents to vacate the suit land under supervision of the OCS;
- d) Costs of this appeal and costs in the subordinate Court be awarded to the Appellant with interest at Court rates

SUBMISSIONS

4 Upon admission of the Appeal the court directed that the Appeal proceeds by way of written submissions. The parties filed the said submissions and which are summarized as follows; -

APPELLANTS SUBMISSIONS

- 5 The appellants submissions are dated 16th June 2025. Counsel submitted on each ground of appeal as follows;
- 6 It is submitted the Appellant Petitioned the estate of JOSEPH MENJE ODERA where he was issued with a grant which grant was confirmed and finally the suit land was transmitted into his names. That to-date, the said grant still stands and no one had bothered to challenge the same.
- 7 It is submitted that title-deed the Appellant was in possession of was as a result of the succession cause which cause has not been challenged by any of the parties herein.
- 8 That said orders conflict each other and that the Respondents approached the wrong court. No, application for revocation and or review has been filed against the Appellant in the succession cause.
- 9 It is contended that each court has got its territorial jurisdiction to avoid conflicting orders, be it a Succession or Land matter. That the Trial court had no jurisdiction to revoke and or issue grant, a duty “only” the succession court is allocated in lieu of the Succession Act and Probate Rules”.
- 10 That Section 47 of the Laws of Succession Act and the Probate and Administration Rules, grants a succession court inherent powers to make such orders as may be

necessary for the ends of justice and or to prevent abuse of the court process. Such Powers includes cancellation of title deeds obtained through fraud or where there has been an abuse of the court process. Reliance is placed on

- 11 It is submitted that a title deed issued by a Succession court can only be revoked by a Succession court.

RESPONDENTS SUBMISSIONS

- 12 The Respondents submissions are dated 5th November 2025. The issues are identified for determination as follows; -
- 13 Whether the Appellant was entitled to the Orders sought in the Plaintiff and whether the appeal should be allowed. The respondent outlined five undisputed facts arising from the proceedings being the Appellant and the interested party both had certificates of confirmation of grant to the estate of Joseph Menje Odera. The Appellant obtained title to the said succession proceedings and that while he claimed to be the sole beneficiary and next of kin of the deceased it was actually the interested party who was the sole surviving immediate family member and biological sister of Joseph Menje Odera. That the 1st Respondent was residing on the suit land prior to the Appellants acquisition of his title and the 1st Respondent was settled on the suit land by the deceased owner.
- 14 It is submitted that arising from the above fact the trial court made the correct finding that the Appellant's

acquisition of his title was fraudulent because he had categorically stated that prior to instituting the succession proceedings he had not made an attempt to trace the deceased's next of kin. The Appellant himself acknowledged that indeed it is the 2nd Respondent who was the sister to the deceased original owner.

- 15 It is urged that there is no basis in law or in fact why the Appeal ought to be allowed. In the succession proceedings he described himself as a next of kin of the deceased while in the Plea he refers to himself as a buyer. The Appellant approached the court with unclean hands.
- 16 On jurisdiction and the ground that only the succession court had jurisdiction to cancel a title it has issued, it is submitted that the Appellant has claimed in his submissions that for the reason that his title was obtained by way of succession proceedings it is only the succession court that can cancel his title. It is urged that all courts are called upon to ensure that substantive justice is done to all parties without undue regard to technicalities of procedure. That regardless of whether the title was obtained by way of succession proceedings or not, the Environment and Land Court is empowered to consider the propriety of each and every title. It is contended that where evidence of fraud has been presented before the land court it has a duty to act.

ANALYSIS AND DETERMINATION

17 Having analysed the record of appeal and the submissions of the parties this appeal will be best handled from the point of the jurisdiction of the trial court being whether the said court had jurisdiction to determine the matter. This approach will become clearer later in this judgement.

18 This being a first appeal I will be guided by the case of **Selle vs. Associated Motor Boat Co. [1968] EA 123** where 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 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 or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

19 Moreover the court is also guided by the following rendition in the case of **Ephantus Mwangi & Another - vs- Duncan Mwangi Wambugu [1982-88] IKAR 278.**” where Hancox, J.A. stated at page 292: -

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding he did.”

- 20 Having considered the submissions of the Appellant a lot of emphasis has been placed on the issue of jurisdiction of the trial court. The contest on jurisdiction herein is based on the fact that the Respondents approached the wrong court as this was a succession matter which had been dealt with by a succession Court. That the trial court had no jurisdiction to revoke and issue grant since such powers lay with the Succession Court by dint of the provisions of section 47 of the law of Succession Act and the Probate & Administration Rules. It is urged that even the succession Court can cancel title obtained fraudulently.
- 21 It is trite that jurisdiction is everything where a court finds that it has no jurisdiction it must down its tool see **Owners of Motor Vessel Lilian S Vs. Caltex Oil (Kenya) Ltd (1989)**.
- 22 The discourse of the jurisdiction of the High Court and the ELC as it relates to succession of land belonging to a deceased person was settled by the Court of Appeal in the case of **Diasproperty Limited & Others Vs Githae &**

10 Others (2024) KECA 318 KLR where the court stated thus; -

36. *Under Article 165(5)(b) of the Constitution, the High Court shall not have any jurisdiction in respect of matters within the jurisdiction of the Environment and Land Court. Under Article 162(2) of the Constitution and section 13 of the Environment and Land Court Act, 2012, all matters relating to land, its ownership, use, tenure, boundaries, and so on, are reserved for the Environment and Land Court.*

37. *It is notable that under Rule 43(1) of the Probate and Administration Rules, made under the Law of Succession Act, where, in succession proceedings, a party claiming that he was beneficially entitled to a parcel of land that the deceased left in his name, or there is a general dispute relating to the ownership of a parcel of land registered in the name of the deceased, such dispute has to be adjourned and be determined in originating summons in a separate court. It is when such a determination is made that the succession court can confirm the grant, bearing in mind the determination. Of course, with the Constitution and the Environment and Land Court Act, such a dispute has to be referred to the Environment and Land Court for resolution.*

39. *We have considered these arguments. In the first place, when the*

3rd appellant approached the succession court he did not notify

the respondent. On the evidence, it is clear to us that he knew of

the respondent's claim to the land, based on the sale agreement

with the deceased. Even assuming that he did not know, he went

to the succession court on the basis that the suit property was

the free property of the deceased. It turns out that that was not

the case. Even if the respondent had become aware that the 3rd

appellant had filed the succession cause, what would have been

open to him would have been to lodge a claim in the cause as a

creditor to the estate of the deceased. And since his claim was

disputed by the 3rd appellant and his siblings, the succession court

would have had no jurisdiction to hear and determine the claim. It would have asked the respondent to file a suit in

Environment and Land Court to have the claim determined there. In the meantime, it would have adjourned the

confirmation of the grant to allow for such determination.

The result of such determination would then have formed the basis of the distribution of the estate of the deceased

to the beneficiaries. As matters stand, we find, that

procedure was not followed owing to the fact that the 3rd appellant concealed the fact of the succession proceedings from the respondent. But now, the Environment and Land Court has determined that the deceased held the 200 acres in trust for the respondent.'

- 23 In the case of **Joel Arusei Kipsaina & Ano. Vs. Zipporah Jepketer Kipsaina & Another (2014) eKLR** - the court emphasised that the Environment and Land Court has no jurisdiction to re - distribute an estate. It has no jurisdiction to declare null and void succession proceedings that led to the distribution of a suit land to any of the parties.
- 24 The jurisdiction of magistrates' courts to handle land matters is founded under section 26 of the Environment and Land Court Act. The Magistrates' Court Act which is an Act of Parliament to give effect to provisions of the Constitution to confer jurisdiction, functions and powers on the magistrates' courts, provides that a Magistrate's Court shall, in the exercise of the jurisdiction conferred upon it by Section 26 of the Environment and Land Court Act and subject to its pecuniary limits, hear and determine claims relating to Moreover the Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.

25 **Article 162 (2) (b)** of the Constitution provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and shall determine the jurisdiction and functions of these courts. The jurisdiction of the said courts is found in **section 13 of the Environment and Land Court Act of 2012** which provides that the court shall hear disputes relating to:

- (a)** environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b)** compulsory acquisition of land;
- (c)** land administration and management;
- (d)** public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e)** any other dispute relating to environment and land.

26 The court will therefore be so guided.

27 In the plaint the Appellant claims land Parcel South Gem/Gombe/2091-2.35 Ha which is a subdivision of the LR South Gem/Gombe/587 (herein mother title) as evidenced in Part B proprietorship section of the title produced by the Appellant. PW1 confirmed in cross examination that the title he claims is from parcel 597 which was in the name of

Joseph Menje Odera and who is his grandfather. It is not in dispute that the mother parcel was registered in the names of Joseph Menje Odera (deceased)

- 28 Arising from the proceedings of the trial court this court gathers that the Respondent title was obtained after he obtained letters of administration for the estate of the deceased Joseph Menje Odera from the High Court Kisumu. Though the plaintiff was silent about this in his plaint and witness statement he produced in support of his case Grant of Probate issued on 6th February 2017 in respect of the estate of Joseph Menje Odera and Certificate of Confirmation of a Grant dated 13th February 2017. The suit property LR South Gem/Gombe/587 is the only property listed and distributed wholly to the plaintiff appellant.
- 29 The defendant and interested party (Respondents in this appeal) responded to the suit by way of Defence and Counterclaim where it is alleged that the Interested Party (herein Paskalia) was the only person entitled by law to petition administer and distribute the estate of Joseph Menje Odera as the only surviving beneficiary being the sister of the deceased. According to Paskalia she indeed filled succession proceedings culminating in the issuance of a certificate of confirmation of grant.
- 30 The Plaintiff claim was premised on the allegation that he was the registered owner of the parcel 2091 and wanted the defendant evicted as trespasser. The Defendant case

is that the same was acquired by the Plaintiff respondent through fraud and illegality. The particulars of fraud and illegality are listed in paragraph 4 of the Interested Party Statement of Defence as

- a) Acquiring title without the knowledge and or consent of the Interested Party the sole surviving immediate next of kin of the deceased
- b) Unlawfully subdividing the mother parcel without the knowledge and or consent of the Interested Party being the immediate next of kin of the deceased the original owner of the mother parcel.
- c) Purporting to acquire title to the suit property knowing well that the Interested party had a bonafide beneficial interest and as well secretly obtaining title to the property.

31 The counterclaim sought for a declaration that the plaintiff was a stranger to the estate of the deceased and therefore not the proper person to petition for letters of administration to the said estate and that Paskalia be declared as the sole surviving immediate next kin of the deceased and the proper person to petition for the grant of letters of administration to the said estate. A declaration that the transfer to the plaintiff was fraudulent and an order cancelling the subdivisions and reversion of the title to the name of the deceased and to then accept the certificate of confirmation of grant dated 4/04/2017 issued to Paskalia Odinga Odera.

- 32 It is not in dispute that two grants were issued to the plaintiff/Appellant and the Interested Party Paskalia in respect of the deceased estate. Before the trial court was produced Certificate of Confirmation of Grant issued to Kennedy Onyango Odera the Plaintiff in respect of the deceased estate dated 13/02/2017 in High Court Kisumu Succession Cause No. 505 of 2015. The other Certificate of Confirmation of Grant is issued in Principal Magistrates Court Siaya Succession Cause No. 29 of 2016 to Paskalia Odinga Odera dated 4/4/2017.
- 33 In the judgement the trial court dismissed the Plaintiffs case and allowed the Defendants and Interested Party counterclaim as prayed. The trial court then issued an order cancelling the sub divisions of parcel 587 and reverted it to Joseph Menje Odera to allow distribution of the estate to its rightful beneficiaries.
- 34 The trial court stated thus ***'it is the finding of this court the plaintiff title has been challenged and impeached on grounds of misrepresentation on the part of the plaintiff who misrepresented himself to be the next of kin to the estate of Joseph Menje Odera and acquired title in South Gem/Gombe/587 unlawfully and thereafter subdivided into 3 portions among them one which gave rise to south Gem/Gombe/2091. He intends now to evict parties who are lawfully entitled to the estate of the deceased thus dispossessing the beneficiaries of***

the deceased of their rightful share to the original suit land.'

- 35 Essentially by allowing the counterclaims as prayed the trial court declared the plaintiff/Appellant was not the proper person to petition for the grant in respect of the estate of the deceased. It was the trial court finding that the Appellant had misrepresented that he was the only next of kin yet he was not. Further by allowing the counterclaim the trial court declared Paskalia Odinga Odera was the sole surviving immediate next of kin and therefore the proper person to petition for grant of letters of administration and even sustained the grant issued in her favor.
- 36 The trial court was sitting as an extension of the Environment and Land Court. Clearly the issue of who is the proper and right beneficiary and indeed who are the beneficiaries was not within his mandate. This is the territory of the Succession Court by dint of Section 47 of the Law of Succession Act and Rule 73 of the Probate & Administration Rules.
- 37 The correct procedure would have been for Paskalia to move the succession Court for the cancellation of the grant issued to the Plaintiff/Applicant and also vice versa for the plaintiff as soon as he realised there was another grant issued to approach the succession court for nullification of the same. None of the parties did this.

38 It is the finding of this court that the trial court did not have jurisdiction to issue such orders or even entertain Paskalia's counterclaim to that extent.

39 The trial court further proceeded to make an order of cancellation of title and reversion of the title to the deceased. This order was premised on the provisions of Section 26 (1) (a) (b) and of the Land Registration Act which provides as follows; -

“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.”

40 The trial court orders were on the basis of the grant obtained by the Plaintiff through misrepresentation that he was the only surviving next of kin and not disclosing to the succession court that there was a sister to the deceased

whom he could not trace. It is my considered view that as long as the Plaintiff derived his title by transmission pursuant to the alleged impugned grant the trial court was divested of jurisdiction. It cannot be heard to be said that the ELC has a jurisdiction and duty to take action and cancel a fraudulent title. The competent court is the Succession court and this is where the issue of who the beneficiaries are would lie and the cancellation of the title.

41 Moreover the Succession court is mandated to cancel title. In this regard the court finds guidance in the case of **Santuzza Bilioti alias Mei Santuzza (deceased) versus Giancarlo Falasconi (2014) Eklr** cited by the counsel for the Appellant where it was held that; -

“....the succession court has powers to order a title-deed to revert to the names of the deceased person. This in effect amounts to cancellation of the title-deed. Further a Succession court can order a cancellation of a title deed if a deceased property is being fraudulently taken away by nonbeneficiaries such as where the property is being sold before a grant is confirmed.’

42 I will now look at the 1st Respondent case and the orders issued in his favor. The defendant testified that Joseph Menje Odera was brought up by the defendant’s family after the death of his father. The father of Joseph Menje Odera had invited the defendant’s family in the suit property where the defendant was born and brought up and lived for the last 31 years. That the only surviving keen of Joseph Menje Odera was the Interested Party. All

this evidence was not controverted by the plaintiff who in fact admitted the presence of the defendant on the land before he himself got his title in the year 2020.

43 The 1st respondent case is that he was not a trespasser. That the plaintiff failed to prove that the defendant was a trespasser in the suit property.

44 The trial court in my view had the jurisdiction to entertain the 1st Respondents counterclaim based on the provisions I have already mentioned herein before. Having analysed the evidence, I agree with the finding of the trial court in respect of the 1st defendant. The plaintiff had no idea how the defendant came to be in the suit property. Paskalia had no issue with this occupation. I would grant the prayers on the basis of his long occupation on the portion of the land he had occupied for the over 30 years. These are the only orders that stand to be validated by this court.

45 The upshot of the foregoing therefore is that this appeal succeeds on the basis of the fact that the trial court had no jurisdiction to hear and determine issues touching on succession and specifically the rightful beneficiaries of the estate of the deceased and proceed to make declarations in that regard. This also applies to the order cancelling the subdivisions and reverting them to the name of the deceased as already discussed hereinbefore.

46 The appeal therefore is disposed in the following terms;-

- 1) The appeal be allowed and the final orders in the judgment of the trial court dated 21/11/2023, be set aside.
- 2) The trial court finding that the plaintiff failed to prove the Defendant Peter O. Otawo is a trespasser on the suit property is upheld to that extent.
- 3) There shall be no orders as to costs to enable an environment of reconciliation.

Orders accordingly.

Dated at Siaya this 22 Day of April, 2026

**HON. JUSTICE A. E. DENA
JUDGE
22/04/2026**

**Judgement delivered virtually through Microsoft Teams
Video Conferencing Platform in the Presence of:**

Mr. Matete for Appellant

Mr. Ooro E for Respondents

Court Assistant: Dorothy Awuor