



**REPUBLIC OF KENYA**

**IN THE ENIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC APPEAL NO. 7 OF 2018**

**JOHNSTONE OGADA VIKIRU ..... APPELLANT**

**VERSUS**

**JONATHAN MAHUGI**

**FREDRICK EWOYELE**

**FRANCIS AMBANI**

**AGNES MMBONE**

**BENJAMIN MUGIZA**

**JOHN MUTANGE**

**FRANCIS ONDEGAO ..... RESPONDENTS**

**JUDGEMENT**

Johnstone Ogada Vikiru, the appellant above named appeals against judgment and decision of the Learned Principal Magistrate Mrs Jacinta A. Owiti, at Vihiga RMC Land Case no. 139 of 2018 delivered on the 13<sup>th</sup> day of July, 2018 upon the following grounds:-

1. The learned trial magistrate erred in entertaining the respondents' counter claim when the same was not only misconceived but also subjudice.
2. The learned trial magistrate materially contradicted herself by purporting not to deal with the question of ownership of Land Title number Kakamega/Bugonda/2069 but proceedings to cancel the appellant's proprietorship of the same.
3. The said decision of the learned trial magistrate has grossly violated the appellant's sacrosanct rights over the said land title number Kakamega/Bugonda/2069.
4. The decision to permit burial of the deceased and to annul the appellant's title was wrong in the face of the express finding by the learned trial magistrate that the respondents had no proprietary interest in the land title number Kakamega/Bugonda/2069.
5. The learned trial magistrate misdirected herself in framing issues that were largely inappropriate and in making heavy weather of family land, a concept alien to registered land.
6. The learned trial magistrate erred in failing to consider the effect of limitation upon the alleged tort of fraud.
7. The judgment of the learned trial magistrate is casual, rash, perfunctory, was arrived at without due circumspection and has occasioned a serious miscarriage of justice.

The appellant prays that:

1. This appeal be allowed with costs;
2. The judgment of the trial magistrate be set aside and the registration of the appellant as owner of land title

Kakamega/Bugonda/2069 be restored.

The appellant submitted that he was at all material times the registered owner of Kakamega/Bugonda/2069 having been registered on 30<sup>th</sup> March 2009. In the same year the appellant filed Kakamega HCCC No. 180 of 2009 against one Nathan Kaduka for eviction and injunction from the suit land. The case became Kakamega ELC No. 163 of 2016 after the creation of the ELC Court. The said Nathan Kaduka died on the 26<sup>th</sup> August 2016 and the appellant obtained an injunction against his burial on the suit land. On the 28<sup>th</sup> November 2016, Jonathan Mahingi Odera the son of Nathan Kaduka instituted Kakamega ELC No. 244 of 2016 against the appellant seeking the cancellation of his title to the suit land Kakamega/Bugonda/2069 and an injunction against eviction. On the 7<sup>th</sup> February 2018 both Kakamega ELC No. 163 of 2016 and Kakamega ELC No. 244 of 2016 were consolidated and are coming up for hearing on the 4<sup>th</sup> December 2019. In the meantime another relative of Nathan Kaduka died and his kin sought to bury him on the suit land. The appellant then filed MELC No. 139 of 2018. The issue was a burial dispute but the sons and relatives of Nathan Kaduka put in a counterclaim seeking cancellation of the appellant's title on account of fraud. The trial Magistrate dismissed the appellant's claim and allowed the counterclaim cancelling the appellant's title hence this appeal. The appellant submitted that this was contrary to section 6 of the Civil Procedure Act.

This court has considered the appeal and the submissions herein. The issue as to whether or not the counterclaim is sub judice is a preliminary one and the court will consider the same even before going into the merit and demerits of the case. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

*“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”*

Section 7.

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

In the instant appeal, the appellant submitted that he was at all material times the registered owner of Kakamega/Bugonda/2069 having been registered on 30<sup>th</sup> March 2009. In the same year the appellant filed Kakamega HCCC No. 180 of 2009 against one Nathan Kaduka for eviction and injunction from the suit land. The case became Kakamega ELC No. 163 of 2016 after the creation of the ELC Court. The said Nathan Kaduka died on the 26<sup>th</sup> August 2016 and the appellant obtained an injunction against his burial on the suit land. On the 28<sup>th</sup> November 2016, Jonathan Mahingi Odera the son of Nathan Kaduka instituted Kakamega ELC No. 244 of 2016 against the appellant seeking the cancellation of his title to the suit land Kakamega/Bugonda/2069 and an injunction against eviction. On the 7<sup>th</sup> February 2018 both Kakamega ELC No. 163 of 2016 and Kakamega ELC No. 244 of 2016 were consolidated and are coming up for hearing on the 4<sup>th</sup> December 2019. Subsequently, another relative of Nathan Kaduka, on Simon Ungadi died and his kin sought to bury him on the suit land. The appellant then filed MELC No. 139 of 2018. The issue was a burial dispute but the sons and relatives of Nathan Kaduka put in a counterclaim seeking cancellation of the appellant's title on account of fraud. The trial Magistrate dismissed the appellant's claim and allowed the counterclaim cancelling the appellant's title hence this appeal. This court has perused the pleadings of all the cases mentioned above. It is clear that the parties and the subject matter in Kakamega ELC No. 163 of 2016 and Kakamega ELC No. 244 of 2016 which are still pending are similar and or the same as in MELC No. 139 of 2018. In the plaint in MELC No. 139 of 2018 paragraph 11, it is clearly pleaded that two suits exist regarding the said subject matter namely, Kakamega ELC No. 163 of 2016 and Kakamega ELC No. 244 of 2016. This would imply that the trial Magistrate was aware of a similar suit pending and filed before the one filed in her court yet went ahead and determined the matter. I find that, learned trial magistrate erred in fact and in law in failing to consider the principle of subjudice as provided in section 6 of the Civil Procedure Act which states that, no court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

In *Mwanasokoni v Kenya Bus Service* (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was not judiciously arrived at. I find this appeal is merited and I allow it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17<sup>TH</sup> DECEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**