



**Masitsa & another v Amusala (Environment and Land Appeal  
5 of 2023) [2024] KEELC 4944 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4944 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL 5 OF 2023**

**E ASATI, J  
JUNE 13, 2024**

**BETWEEN**

**RODAH MASITSA ..... 1<sup>ST</sup> APPELLANT**

**BIRISIRA LUNGAZO AMUSALA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HAROUN SHIAVA AMUSALA ALIAS HAROUN SHIABA ALIAS CLEMENT  
SHAVA AMUSALA ..... RESPONDENT**

*(Being an appeal from the judgement and decision of the Senior Principal Magistrate's court at Hamisi delivered on the 3rd April, 2023 by Hon. Ochieng (SPM) in the Land suit No. 7 of 2021)*

**JUDGMENT**

**Introduction**

1. The appellants were the plaintiffs in Hamisi Pmc Land Case No 7 of 2021(the suit) wherein they had sued the Respondent over parcels of land known as Kakamega/Bumbo/512measuring 0.7 Ha and Kakamega/Bulukhoba/543 (the suit lands) and sought for; -
  - a. Declaratory orders that the land parcels known as Kakamega/Bumbo/512 and Kakamega/Bulukhoba/543 which are known in the land registry of Vihiga as registered in the name of the defendant are hereby declared to be so registered and held by the defendant in trust for the four beneficiaries; Rodah Masitsa, Birisila Lungazo, Esther Shitolwa and the defendant himself.
  - b. That the said land parcel Kakamega/Bumbo/512 and Kakamega/Bulukhoba/543 be formally subdivided and distributed among the four beneficiaries (namely Rodah Masitsa, Birisila Lungazo, Esther Shitolwa and the Defendant) in equal shares
  - c. The defendant to execute the relevant application forms to the Land Control Board as well as the necessary mutation forms, transfer forms and all the conveyance documents necessary



for subdivision of land parcel Kakamega/Bumbo/512 and Kakamega/Bulukhoba/543 and subsequent transfer of the respective portion to the said four beneficiaries and in default of the defendant so executing then the Court Administrator or Executive Officer of the honorable court to execute the forms and documents on behalf of the defendant.

- d. The defendant to bear the costs of the suit.
2. The record of appeal shows that in response to the suit, the Respondent filed defence and counterclaim dated 4<sup>th</sup> May 2021 and denied the appellants' claims and vide the counterclaim claimed for an order of permanent injunction restraining the appellants from claiming, entering, cultivating or in any other manner interfering with the land.
3. The suit was heard by the trial court which vide its judgment dated 3/4/ 2023 declared the suit land to be held by the Respondent in trust for the beneficiaries namely; the appellants herein, Esther Shitolwa and the Defendant. The court however declined to make an order of subdivision and distribution amongst the four beneficiaries as prayed in the plaint and ordered each party to bear own cost.
4. Aggrieved by the judgment, the appellants filed the present appeal and sought that the appeal be allowed and the part of the judgment that disallowed prayers (b) and (c) of the plaint be set aside and be substituted by an order allowing prayers (b) and(c) of the plaint. The appellant also prayed for the costs of the appeal.
5. The grounds of appeal as contained in the Memorandum of Appeal are that: -
  - i. the learned Magistrate erred in law by failing to take into account or have due regard to the Plaintiffs' evidence as presented to the lower court in support of the remedies sought under the aforesaid.
  - ii. The learned Magistrate erred in law and in fact by arriving at conclusions that were perverse, based on a misapprehension of the pleadings and evidence on record and/or unsupported by the established facts.
  - iii. The learned Magistrate erred in fact by holding that she did not, at the stage of delivery of her judgement, find any reason to allow the land parcels KAKAMEGA/BUMBO/512 and KAKAMEGA/BULUKHOPA/543 to be formally sub-divided and distributed amongst the said 4 beneficiaries (namely; Rodah Masitsa, Birisira Lungazo, Ester Shitolwa and the Defendant) and by further holding that prayer (c) of the plaint should also fail.
  - iv. The learned Magistrate erred in law and in fact by rendering a judgement that served to leave the parties to the suit in limbo and in a state of uncertainty and to thereby creates the undesirable urge and room for further or future litigation thereby negating on the principle that judgement should serve to bring litigation to an end by settling the dispute with a sense of finality.

## **Submissions**

6. The appeal was argued by way of written submission.
7. Written submission dated 4<sup>th</sup> March 2024 were filed by the firm of Balusi & Smart Advocates on behalf of the Appellants. Counsel submitted that by the court disallowing prayers (b) and (c) of the plaint, the land shall continue to remain in the name of the Respondent. That the land should be subdivided so that each beneficiary gets their share. That the evidence placed before the trial court supports the subdivision of the land. That the appellant are not minors and do not suffer from any mental incapacity. Counsel prayed that the appeal be allowed.



8. No submissions were filed by or on behalf of the Respondent.

### **Issues for determination**

9. From the grounds of Appeal and the submissions filed only one substantive issue arises for determination namely; whether or not the trial court erred in disallowing prayers (b) and (c) of the plaint.

### **Analysis of determination**

10. This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. See section 78 of the *Civil Procedure Act* and *Selle & another v Associated Motor Boat Company Ltd & Another* (1968) IEA 123) where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.
11. Prayers (b) and (c) of the plaint were the prayers for the subdivision of the suit land and transfer to the four 4 beneficiaries their respective shares. In respect of these prayers a reading of the judgment shows that the trial court held: -

“as for whether the court will allow the two parcels of land to be formally subdivided and distributed amongst the said 4 beneficiaries the court does not at this stage find any reason to do so, in order to preserve the said two parcels of land from possible waste and/or transfer to other third parties, noting that the 2 parcels of land are ancestral land. It follows therefore that the prayer c of the plaint should also fail.”
12. The appellant’s complaint as contained in the grounds of Appeal is that the said decision did not take into account the appellants evidence in support of the remedies sought, that the decision was based on misapprehension of the pleading and evidence and was unsupported by established facts that the decision left the parties to the suit in limbo and uncertainty and creates room for future litigation, and failed to settle the dispute unto a sense of finality.
13. The evidence produced by the appellant before the trial court was that the suit land was registered in the name of the Respondent in trust for the appellants, Esther Shitolwa and the defendant. The appellants vide their witness statements narrated the struggle and challenges of trying to access the suit lands while it is registered in the name of the defendant. That the defendant and Esther Shitolwa have threatened and prevented the other beneficiaries from accessing the suit land.
14. The reasons given by the trial court for disallowing prayer (b) and (c) of the plaint were that the land was ancestral land and that the same should be present. However, no basis was given for the holding. The appellant submitted that they are of age and of sound mind and there is no reason why the land should not be distributed. That distributing the land will bring finality to the claim.
15. I have considered the grounds of appeal, the findings of the trial court and the submissions made. The court did find that the land was held by the Respondent in trust for the beneficiaries. The court ought to have proceeded further and granted prayers (b) and (c) of the plaint so as to bring the matter to finality.
16. I therefore find that the trial court erred in disallowing prayers (b) and (c) of the plaint. I find that the appeal has merit and allow it as follows:



- i. The judgement of the trial court dated 3<sup>rd</sup> April 2023 is hereby set aside and replaced with a judgement in favour of the appellants in terms of prayers (a), (b) and (c) of the plaint.
- ii. As the parties are siblings each party to bear own cost of the appeal.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF JUNE, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Ajevi: Court Assistant.

No appearance for the appellant.

No appearance for the Respondent.

