



REPUBLIC OF KENYA



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Okwach (Legal representative of Solomon Okwach Masudi - Deceased) v Olilo (Environment and Land Appeal E023 of 2023) [2025] KEELC 758 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 758 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E023 OF 2023**

E ASATI, J

FEBRUARY 20, 2025

BETWEEN

**PETER OTIENO OKWACH (LEGAL REPRESENTATIVE OF SOLOMON
OKWACH MASUDI - DECEASED) APPELLANT**

AND

HANNINGTON OMEDO OLILO RESPONDENT

*(Being an appeal from the decision of Hon. K Cheruiyot SPM in
KISUMU CMC MELC NO 408 OF 2018, dated 26th May 2023)*

JUDGMENT

Background

1. A brief background of the appeal herein, as can be gathered from the record of appeal, is that the Appellant was the Defendant in Kisumu CMC ELC No.408 of 2018 (herein referred to as the suit). The Appellant had been sued by the Respondent herein over a parcel of land known as Kisumu/Wathorego/1902, (herein referred to as the suit land).
2. The Respondent's claim in the suit was that the suit land belonged to him as it had been awarded to him during Land Adjudication and for which he was registered as owner and issued with a title deed. That Solomon Okwach Masudi, using an unlawful award/decision of the Land Disputes Tribunal caused the suit land to be unlawfully transferred in his favour.
3. The Respondent therefore sought for orders against the appellant that;
 - a. The District Land Tribunal erred in awarding Kisumu/Wathorego/1902 to Solomon Okwach Masudi.
 - b. An order directing the Deputy Land Registrar to revoke the title deed registered in the name of Solomon Okwach Masudi against Kisumu/Wathorego/1902.



- c. A declaration that the Plaintiff (Hannington Omedo Olilo) is the bona fide owner/sole proprietor of Kisumu/Wathorego/1902.
 - d. Costs of the suit.
4. The appellant denied the Respondent's claim vide the amended defence dated 23rd April, 2021.
 5. The suit was subsequently heard before the trial court which vide the judgement dated 26th May 2023 found that the bona fide proprietor of the suit property was the Respondent, having been awarded the same by the Land Adjudication Committee and issued with a title deed. The trial court found that the Respondent was entitled to the relief sought and costs of the suit and proceeded to enter judgement in favour of the Respondent against the Appellant as prayed in the plaint.

The Appeal

6. Aggrieved by the judgement, the Appellant preferred the present appeal on the grounds that;
 1. The Learned Honourable Magistrate erred in law and fact in failing to appreciate that he had no jurisdiction to hear and determine the matter having been subject to objection under the [Land Adjudication Act](#) the order of the Land Disputes Tribunal having been adopted by the Magistrate's Court they could not have overturn and set aside an order of the court or convert jurisdiction in a separate suit.
 2. The learned Honourable Magistrate erred in law and fact when he failed to consider that the suit was brought before him without the written consent from the adjudication officer in accordance with the provisions of Section 30 of the [Land Adjudication Act](#).
 3. The Learned Honourable Magistrate erred in law and fact by failing to appreciate that the matter having been subject to objection proceedings under the [Land Adjudication Act](#) as it was mandatory to obtain consent of the Minister before moving Court with a consent which the Respondent never obtained therefore the Court lacked jurisdiction to entertain the matter
 4. The Learned Honourable Trial Magistrate misdirected himself by declaring that the Land parcel no. KISUMU/WATHOREGO/1902 to be awarded to the respondent herein relying on the claim that the Adjudication Committee awarded the land to him when the adjudication committee had awarded the land to the Appellant
 5. The learned Honourable Magistrate erred in law and fact by failing to consider the decree issued by the court in Kisumu land case no.6 of 2002 where the Land parcel KISUMU/WATHOREGO/1902 was awarded to the appellant
 6. The Learned Honourable Magistrate erred in law and fact by failing to appreciate the totality of the evidence and exhibits availed thus arriving at a conclusion not supported by facts, evidence and exhibits.
7. In this appeal the Appellant seeks for orders that;
 - a. the appeal be allowed and judgement of the trial court be set aside.
 - b. the costs of this appeal and costs in the subordinate court be awarded to the Appellant.

Submissions

8. On 27th May, 2024, directions were taken that the appeal be canvassed by way of written submission.



9. It was submitted on behalf of the Appellant vide the written submissions dated 2nd October, 2024 filed by the firm of Omondi Abande & Company Advocates that the issues that are for determination in this appeal are;
 - a. whether the trial Magistrate had jurisdiction to hear and determined the matter.
 - b. whether the land parcel No. Kisumu/Wathorego/1902 was allocated to Solomon Okwach Masudi (deceased).
 - c. who pays the cost of the appeal?
10. On jurisdiction of the trial court, Counsel relied on the case of Constantine Joseph Advocate LLP -vs- Attorney General [2022]eKLR and the case of Owners of Motor Vessel “Lilian S” -vs- Caltex Oil (Kenya) Limited [1989]KLR 1 and submitted that jurisdiction is so central in judicial proceedings and that a court acting without jurisdiction is acting in vain.
11. That in the present case, the court lacked jurisdiction because firstly, the Respondent had failed to obtain the written consent of the adjudication officer prior to filing of the case in court as required by section 30(1) of the Land Adjudication Act and secondly, because a similar case had already been heard and determined by a court of equal status via Chief Magistrate’s Land Case No.6 of 2002 in which the court adopted the judgement of the District Land Tribunal and awarded the land parcel No. Kisumu/Wathorego/1902 to Solomon Okwach Masudi, deceased. Counsel relied on the provisions of Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya.
12. On whether or not land parcel No. Kisumu/Wathorego/1902 was allocated to Solomon Okwach Masudi, (deceased), Counsel submitted that the Appellant was given ownership of the suit property. That the land was given by the Appellant’s father by the name Masudi Amena.
13. That the evidence on record indicates that the Appellant rightfully owns land parcel No. Kisumu/Wathorego/1902 while the Respondent is attempting to unfairly enrich himself by claiming ownership not only of the parcel allocated to him by his uncle, but also of the Appellant’s rightful share.
14. Counsel prayed that the appeal be allowed with costs.
15. On behalf of the Respondent written submissions dated 30th September, 2024 were filed by the firm of Mwamu & Company Advocates. It was submitted that under Section 4 and 13(1) of the Environment and Land Court Act the court had jurisdiction to hear the matter.
16. Counsel relied on the cases of Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Ltd & 2 Other (2012)eKLR and Owners of Motor Vessel “Lilian S”-vs- Caltex Oil (Kenya) Ltd (1989) 1 KLR to support the submission.
17. On whether the Land Disputes Tribunal had jurisdiction to award land parcel No. Kisumu/Wathorego/1902 to Solomon Okwach Masudi, Counsel submitted that bearing in mind the provision of Section 3(1) of the Land Disputes Tribunals Act (now repealed) that Tribunal exceeded its jurisdiction.
18. On whether consent was required from the adjudication officer, Counsel relied on the case of Nakuru ELC Judicial Review Republic -vs- Musank Lempaso Ole Kuyieni Lesalo Lekition & Others (ex parte) submitted that owing to the fact that the case had been dismissed by the Land Dispute Tribunal, it gave a leeway for the matter to be determined by the court.



19. Counsel submitted further that the award of the land to the Appellant was unlawful as the Tribunal had no jurisdiction. Counsel urged the court to find that the appeal lack merit and dismiss the same with costs.

Issues for Determination

20. From the grounds of appeal filed and the submissions made the issues that arise for determination are;
- a. whether the trial court had jurisdiction to hear and determine the suit.
 - b. whether the Respondent had proved his case before the trial court.
 - c. whether the appeal herein has merit.
 - d. who pays costs of the appeal.

Analysis and Determination

21. This is a first appeal hence the court has a duty to reconsider the whole evidence produced before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which this court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of *Gitobu Imanyara & 2 others –vs- Attorney General* [2016] e KLR the court held that the principles upon which a first appellate court proceeds are well settled and stated that:-

"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 allowances in this respect".

(Also see *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123 and *Peter M. Kariuki vs attorney General* [2014]eKLR)

22. The evidence placed before the trial court by the Respondent who was the Plaintiff therein comprised of the testimony of the Respondent and the exhibits he produced. He adopted the contents of his witness statement as his evidence in chief. He had stated in the witness statement that the suit land was his ancestral land and that he inherited it from his father. That the Land Adjudication Committee awarded him the land. That an appeal lodged by Solomon Okwach Masudi and Joseph Masudi against the decision of the Land Adjudication Committee was dismissed on 2nd April, 1982 and the land was subsequently registered in his name and on 4th April, 1995 he was issued with a title deed.
23. That thereafter, Solomon Okwach Masudi alias Okwach Masudi Okwach filed a matter before the District Land Tribunal Case No.15 of 1998. That the Tribunal erred as it handled the case that was beyond its powers and awarded the land to Solomon Okwach Masudi.
24. That the Respondent's appeal to the Provincial Appeals Committee in Appeal No.6 of 2022 held that the Tribunal acted beyond its mandate and that the decision of the Tribunal should be quashed and set aside.
25. The Provincial Appeal No.6 of 2002 also led to No.110 of 2002 where it was ordered that the case be referred to the High Court as it was beyond the mandate of the Provincial Appeals Committee to handle.
26. That Solomon Okwach Masudi alias Okwach Masudi Okwach fraudulently used the decision of the District Land Tribunal to obtain a title deed in respect of the suit land on 10th March, 2003.



27. That in Appeal No.112 of 2010, the High Court ordered for a fresh hearing before a competent court.
28. He produced a copy of findings of 16th March, 1982 Appeal at the Land Adjudication Committee, copy of judgement in Provincial Land Appeal Committee No.110 of 2002, copy of Judgement in High Court Appeal No.112 of 2012, copy of green card, Letters of Administration for the estate of Okwach Masudi Okwach, search dated 26th July, 1999 and copy of title deed.
29. The Appellant's evidence before the trial court comprised of his testimony and the documents he produced as exhibits D. 1 to D. 10. He stated through his witness statement dated 23rd April, 2021 that the land belonged to Masudi Amenya. That after marrying a second wife Masudi Amenya moved to south Nyanza, Awendo and left Okwach Masudi Okwach and his brother Joseph Omuga Masudi to take care of his parcels of land. That as at that time, the Respondent was staying at his home at Got Nyabondo about 25km from the suit land.
30. That the Respondent was only accommodated on the land by Okwach Masudi Okwach at the request of his own (Respondent's) brother-in-law by the name of Ogolo Nyandek.
31. That the land was sub-divided by the village elders on 27th December, 1971 with the Respondent getting the upper side and Okwach and his brother getting the southern part where Masudi Amenya's homestead was built.
32. That later the Appellant and his brother sub-divided their side of the land to produce the suit land belonging to the Appellant and Kisumu/Wathorego/1941 belonging to the Appellant's brother by the name of Joseph Omuga.
33. That later, the Appellant realized that his name had been cancelled and replaced with that of the Respondent in the land record. That Okwach Masudi Okwach filed a case before the Land Disputes Tribunal which awarded the land to Okwach Masudi Okwach. That the High Court ordered that the case starts afresh but did not cancel the titles. That one Caroline Akinyi Okwach who is a relative of the Appellant stays on the suit land. That the Respondent lives on land parcel No. Kisumu/Wathorego/1982 but he cultivates land parcel No. Kisumu/Wathorego/1983 which is the upper side, land that he was given by Masudi Amenya. He called 2 witnesses. He produced exhibits namely; proceedings of Kisumu Land Disputes Tribunal, decree in Kisumu CMC dated 23/4/2022, copy of green card, proceedings of Land Adjudication, certificate of official search, title deed, letter dated 25/1/1984, Elders proceedings dated 27/12/1971 copy of grant of Letters of Administration and judgement dated 8th September 2016.
34. The first issue for determination is whether the court had the jurisdiction to hear and determine the case before it.
35. It was submitted on behalf the Appellant that the trial court did not have jurisdiction, firstly for lack of consent of Adjudication Officer under Section 30 of the *Land Adjudication Act*.
36. Section 30(1) of the *Land Adjudication Act* stipulates as follows:

Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act."
37. The evidence placed before court shows that the suit land as at the time of filing suit was not land under adjudication. It is land in respect of which the adjudication process was completed by the year 1994.



The title deed produced by the Plaintiff shows that the register in respect of the suit land was opened on 19th November, 1994 and the land registered in the name of the Respondent.

38. As was held in *Lolugumen & 5 others (Suing on their behalf and on behalf of 383 Household of Lakira Village) v Lparttuk Group Ranch & 3 others* [2023]eKLR (16th March 2023) Ruling that

"It is evident from a plain reading of the provisions of Section 30(1) of the said Act that the consent of the land adjudication officer becomes necessary only if the adjudication register has not become final in all respects. The affidavit evidence filed by the Defendants indicates that the adjudication process was concluded in 1995 and a certificate to that effect was issued. The replying affidavit of Edward Okoth exhibited a copy of certificate of finality dated 02.11.1995 certifying that the adjudication register had become final. Moreover, there is evidence on record to demonstrate that the 1st Defendant was issued with a title deed to the suit property in 2021 something which could only happen after conclusion of the adjudication process."

39. In the present suit the consent under Section 30(1) of the *Land Adjudication Act* was not applicable.

40. Secondly, it was the appellant's case that the matter had been decided earlier by a court of competent jurisdiction when the court adopted the decision of the Land Dispute Tribunal as a judgement of the court. Relying on the provisions of Section 7 of the *Civil Procedure Act*, it was submitted that the court did not therefore have jurisdiction to relitigate the matter.

41. I have read the exhibits produced by the parties. They show that indeed the decision of the Land Disputes Tribunal in Case No.15 of 1998 was filed in the CM's Court at Kisumu vide Land Case No.4 of 2002 and that judgement was entered by the court in terms of the decision and decree dated 23rd April, 2002 issued.

42. The Respondent's exhibits show that he preferred an appeal against the decision of the Tribunal to the Provincial Appeals Committee which referred the case to the High Court. The record shows that the High Court vide the judgement dated 8th September, 2016 in case No. KIsumu High Court Civil Appeal No. 112 of 2010 made an order that the fate of each of the titles to the land be decided after a fresh hearing. And ordered that the costs of the appeal abide the outcome of the fresh hearing. It was the Respondent's case that the suit the subject matter of the appeal herein was the fresh suit that was filed pursuant to the orders of the High Court.

43. The procedure provided for handling disputes under the Land Disputes Tribunals Act (now repealed) included an appeal from the decision of the Provincial Appeals Committee to the High Court.

44. Section 8(9) of the Act provided that;

"Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within 60 days from the date of the decision complained of. Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved."

45. Further, as the Tribunal had no jurisdiction, its decision was a nullity. The consequent decree adopting the decision of the Tribunal was also a nullity. In *Macfoy vs United Africa Co. Ltd* 1961 3 All ER, 1169 it was held that

"if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding



which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

46. In *Jamin Kiombe Lidodo v Emily Jerono Kiomber & another* [2013] eKLR it was held that;

“My own opinion of the matter is that there is no bar to filing a suit to declare the decision of a Land Disputes Tribunal null and void. True, the avenues of appeal and judicial review are available, but I am not of the view that these are the sole avenues for relief. I am more inclined to associate myself with the decision of Nambuye J in the *David Ngetich Kimibei* case and that of the court of appeal in the *Robert Entwistle* case. With respect, I decline to follow the decision in *Emilly Jepkemei Ngeyoni*. I am of the stand that the plaintiff is perfectly entitled to file this suit seeking inter alia a declaration that the decision of the Tribunal was made without jurisdiction. I do not at this stage wish to go into the issue of whether or not the Tribunal had jurisdiction to determine the matter. That of course is the subject matter of the dispute and it will not be wise for me to delve into it. But I see nothing to bar me from making a declaration as to whether or not that decision was one that the Tribunal had jurisdiction to make. If it had no jurisdiction to make the decision, I see no reason why such decision ought to be let to stand. Just because the avenue of judicial review and appeal were closed by effluxion of time does not mean that the plaintiff no longer has any remedy. He can, as he has sought to do, seek to have the decision of the tribunal declared null and void. If such declaration is granted, then the decision will no longer stand.”

47. The Court of Appeal in *David Kipleting Chemei vs Kanamoi Cheptoo Kimoituk & Another* (2021)eKLR held that

“when a body acts without jurisdiction its decision is a nullity and is not enforceable. It matters not that the appellant did not expressly raise the issue of jurisdiction when he appeared before the Tribunal.....

Since neither the Tribunal nor the Chief Magistrate’s court had jurisdiction to determine the dispute over ownership of the suit land it cannot therefore be said that the matter was re judicata.”

48. In the case of *Johana Nyokwoyo Buti vs Walter Rasugu Omariba*(suing through his attorney *Beauttah Onsomu Rasugu*) & 2 others [2011]eKLR, the appeal challenged the decision of the High Court that a trial court had jurisdiction to entertain a fresh suit which sought to impeach the decision of the Land Disputes Tribunal which decision had already been adopted as a judgement of the court. The Court of Appeal held that;

“Moreover, although the Resident Magistrate’s court entered judgement in accordance with the decision of the Tribunal, such judgement could be challenged in fresh proceedings if obtained by fraud or mistake etc. see paragraph 1210 of the *Halsbury’s Laws of England* 4th Edition Re-Issue page 353) In *Janesco vs Beard* [1930] AC 293 the House of Lords held that the proper method of impeaching a complete judgement on the ground of fraud is by action which decision was followed in *Kuwait Airways Corporation vs Iraq Airways Co. & another*(No. 2)[2001]1WLR 29. The decision of the Tribunal has of course been merged in the judgement of the Magistrate’s court.”

49. Guided by these decisions and in the circumstances of the case, I find that the trial court had jurisdiction to entertain the suit.

50. The second issue for determination is whether or not the Respondent proved his case before the trial.



51. The Respondent produced a copy of title deed and green card in respect of the suit property among other documents as exhibits. These showed that he was the registered owner of the land on a first registration before the Land was transferred to the appellant.
 52. It was not denied by the appellant that the basis for transfer of the land to him was the decision of the Land Disputes Tribunal.
 53. The decision of the Land Adjudication Committee and the proceedings from the Land Adjudication Board show that the suit land was the subject of litigation before the Land Adjudication Committee and the Land Adjudication Board. The issues of the origin and ownership of the suit land were canvassed in details before Land Adjudication Committee and Land Adjudication Board. The exhibits show that the adjudication process interrogated the claims by the deceased Solomon Okwach Masudi, and the parties herein in respect of the suit land and found that the suit land belonged to the Respondent. The litigation culminated in the decision of the Land Adjudication Board in Case No.A/ Board Case No.77/82 which was as follows:

"claim dismissed with costs. Committee decision confirmed. Land awarded to Defendant called Hannington Omedo Olilo".
 54. The Respondent testified that the land was subsequently registered in his name as a first registered owner and title deed issued.
 55. The Respondent demonstrated that the High Court ordered for a fresh suit to determine the fate of the titles held by the parties in the suit by producing a copy of the judgement in KSM HCC Appeal No, 112 of 2010 where the court held and ordered that;

(15) Then, which way forward? This matter should be heard afresh before a competent court. The existing title or titles should not be cancelled at this stage. But they should also not be used for any legitimate transaction concerning the land. The determination of the court should come first. And for the avoidance of doubt, the decisions of the two Tribunals are stayed. The court before which matter will be taken should decide the ultimate fate of the decisions. I am cautious not to order decision quashed just in case a title may have been issued on their basis. And I do so because I understand there may be two titles. The fate of each title should be decided after a fresh hearing. The cost of this appeal should abide the outcome of any fresh suit that will be filed."
 56. The Respondent demonstrated before the trial court that the Tribunal which awarded the land to the appellant's father had no jurisdiction and that hence the process of removing his name from the register and issuing title to the Appellant was unlawful and the title deed issued to the appellant a nullity.
 57. I find that the Plaintiff proved his case before the trial court.
 58. The third issue for determination is whether the appeal has merit.
 59. Having made a finding that the Respondent proved his claim before the trial court, it follows that the appeal lacks merit.
 60. For the fore going reasons, I find no reason to interfere with the findings and decision of the trial court. The appeal is hereby dismissed. Costs to the Respondent.
- Orders accordingly.



JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 20TH DAY OF FEBRUARY, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Raburu for the Appellant.

Mwamu h/b for Omondi T for the Respondent.

