



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mudavadi v Oriaro (Environment and Land Appeal E006 of 2021)  
[2024] KEELC 6287 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6287 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND APPEAL E006 OF 2021  
GMA ONGONDO, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**CLARIS K. MUDAVADI ..... APPELLANT**

**AND**

**BENSON OLIANGA ORIARO ..... RESPONDENT**

*(An appeal from the judgment of Honourable D.O Onyango (CM) delivered on 16th December 2020 in Migori Chief Magistrate's Court Environment and Land Case No. 50 of 2019)*

**JUDGMENT**

1. This appeal stems from the trial court's judgment where the Honourable magistrate held in part thus;
  - a. An eviction order do issue against the defendant if she fails to vacate the suit land within 45 days from the date of this judgment.
  - b. Upon vacating the suit land or upon eviction of the defendant from the suit land, a permanent injunction to issue restraining the defendant either by herself, servants, agents and/or any person claiming through her from invading and/or trespassing onto the plaintiff's L.R. Suna West/Wasweta II/6317.
  - c. Lastly, the plaintiff shall have costs of the suit.
2. The appellant, Claris K Mudavadi, being dissatisfied at the said judgment, through M/s Abisai and Company Advocates, instituted the present appeal vide a memorandum of appeal dated 1<sup>st</sup> February 2021. The same is founded upon ten grounds of appeal as follows;
  - a. The Learned Trial Magistrate erred in law and fact by upholding the prayers sought in the Respondent's plaint dated 21<sup>st</sup> August 2017 despite the presence of overwhelming evidence



that the Appellant was first in time in the purchase of part of LR. NO SUNA WEST/WASWETA 11/6317 measuring approximately 3 acres.

- b. The Learned Trial Magistrate misdirected himself and misapplied the law by failing to appreciate that PW4 acknowledged that the Appellant indeed purchased part of the suit property from his brother Raphael Oloo Ochola in the year 1992 and 1993.
  - c. The Learned Trial Magistrate misdirected himself and misapplied the law by failing to appreciate that the Respondent actually bought the suit parcel with the full knowledge of the fact that the appellant was already in occupation of the same.
  - d. The Learned Trial magistrate misdirected himself and misapplied the law by failing to appreciate that there was apparent collusion between the Respondent and PW4 to defeat the Appellant's interest in the suit parcel.
  - e. The Learned Trial Magistrate erred in law and fact by failing to take into account that the Respondent was unable to prove the extent of the trespass, if any, that the Appellant had allegedly encroached upon. Furthermore, no surveyors report was produced to substantiate this allegation.
  - f. The Learned Trial magistrate erred in law and fact by failing to appreciate that the Respondent admitted knowledge of the Appellant possession and use of the suit property before he purchased the same from PW4.
  - g. The Learned Trial Magistrate erred in Law and fact by failing to appreciate that PW4 duly acknowledged the fact that he had not transferred title to the Appellant albeit the fact that she had purchased the suit property before the Respondent herein.
  - h. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the Respondent's title to the suit property was obtained clandestinely in an effort to defeat the interest of the Appellant.
  - i. The Learned Trial Magistrate erred in Law and fact by placing over-reliance on verbal testimony of the Respondent without placing such reliance of the Appellant's testimony.
  - j. That as a result of the foregoing, the Learned Trial Magistrate erred in Law in finding that the Respondent's claim was worthy of the prayers sought in the plaint dated 21<sup>st</sup> August 2017.
3. So, the appellant has sought the following orders;
- a. The appeal herein be allowed.
  - b. The order allowing the Appellant's case be set aside.
  - c. Judgment be entered for the Appellant.
  - d. Costs both in the lower court and the High Court.
  - e. Interest of (d) at court rates.
  - f. The court to issue any orders it deems just and equitable in the circumstances.
4. The appeal was heard by written submissions pursuant to the court's directions of 16<sup>th</sup> November 2023.
5. The appellant's counsel filed submissions dated 17<sup>th</sup> January 2023 (sic) on 17<sup>th</sup> January 2024 and identified two issues for determination thus:



- i. Whether Migori CMC ELC No 50 of 2019, Benson Olianga Oriaro vs Claris K. Mudavadi (the lower court suit), leading to this appeal was sub judice ab initio and now res judicata in light of proceedings and judgment in Migori ELC O.S No. 736 of 2017 (the ELC suit), Claris K. Mudavadi vs Raphael Oloo Ochola, Ezekiel Otieno Ochola and Benson Olianga Oriaro.
  - ii. Whether judgment in this appeal should abide judgment in the ELC suit.
6. Counsel submitted that the lower court suit leading to this appeal was filed during the pendency of the ELC suit, with the intention to defeat the appellant's claim. That the same amounted to sub judice. That the lower court and Environment and Land Court delivered judgments on 16<sup>th</sup> December 2020 and 27<sup>th</sup> April 2023 respectively. That whilst the lower court judgment was in favour of the respondent, the Environment and Land Court found in favour of the appellant herein thus, creating confusion. That therefore, this appeal is determined by the findings in the ELC suit and is res judicata. That the lower court ought to have awaited the decision of the Environment and Land Court. Reliance was placed on various authoritative pronouncements, including the case of Law Society of Kenya vs Attorney General & another [2019] eKLR, to buttress the submissions.
  7. By the submissions dated 14<sup>th</sup> March 2024 and filed herein on 20<sup>th</sup> June 2024, the respondent's counsel, Tom Mboya and Company Advocates, identified twin issues for determination thus: Whether the appellant's appeal should be allowed and who is entitled to pay the cost of this suit?
  8. Learned counsel submitted that the appellant's acts of destroying the existing boundary, making bricks, cutting down trees, cultivating and constructing structures on L. R. No. Suna West/Wasweta II/6317 (the suit land herein) were wrongful and unlawful and the same amounted to trespass. That parties are bound by their pleadings yet the appellant's submissions introduced new issues of sub judice and res judicata. That the appellant failed to prove adverse possession in the ELC suit. Reliance was placed on the cases of *Galaxy Paints Co. Ltd. -vs- Falcon Guards Ltd. Court of Appeal Civil Appeal No. 219 of 1998* and *Wambugu-vs-Wainaina (1983) KLR 173*, among others, to reinforce the submissions.
  9. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to:
    - a. Whether the instant appeal is tenable.
    - b. What just orders can be granted in this appeal to meet the ends of justice?
  10. It is borne in mind that the instant appeal being the first one from the trial court, I have the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters-vs-Sunday Post (1958) EA 424 at 429*.
  11. The original suit was generated by way of a plaint dated 21<sup>st</sup> August 2017 by the plaintiff/respondent, seeking the following orders;
    - a. A permanent injunction order restraining the defendant herein either by herself, servants, agents and/or any person claiming authority under him from invading and/or trespassing into the plaintiff suit land situated within Migori county and further stop all illegal acts of putting up building/construction; cultivation; cutting down of trees and/or indiscriminate destruction of boundary marks.
    - b. An eviction order against the said defendant herein from the suit land situated at SUNA-WEST sub County within Migori County.
    - c. Costs of the suit.



- d. Any other relief this Honourable Court may deem fit to grant in the circumstances.
12. PW1, Benson Olianga Oriaro, testified that he purchased the suit land in 2017 from one Ezekiel Otieno (hereinafter referred to as the seller) after conducting a search. That the suit land was vacant and unused. That a transfer was executed and a title deed issued in his name. He produced a copy of the title deed to the suit land, a certificate of search dated 24<sup>th</sup> September 2019 and a copy of the green card (PE Exhibits 1 to 3 respectively). In cross-examination, PW1 stated that he purchased the suit land for Kshs. 1.2 Million.
  13. PW2, Mose Khemen Olala, relied on his statement dated 7<sup>th</sup> November 2018, which was adopted as his evidence in chief. During cross-examination, he conceded that he was not a witness to the sale agreement between the respondent and the seller but that he introduced the parties to each other.
  14. PW3, Francis Ouma Okumu, relied on his statement dated 7<sup>th</sup> November 2018, which was adopted as part of his evidence in chief. He testified that it is indeed the respondent who purchased the suit land from the seller. That he is a clan elder and was aware of the transaction. Under cross-examination, PW3 stated that the appellant had purchased a different parcel of land from the seller and constructed a house thereon. That the appellant later moved to a different parcel of land.
  15. PW4, Ezekiel Otieno Ocholla relied on his statement filed herein as part of his testimony and stated that he sold the suit land to the respondent. That the same is now occupied by the appellant. That the appellant put up a structure thereon in 2018, after the same had been sold to the respondent. In cross-examination, he stated that it is his brother, Raphael Oloo Achola, who sold the appellant a portion of the original land. That the land was initially in the name of their deceased father but following succession, the same was subdivided between his brother and himself. That the alleged sale to the appellant occurred before the said subdivision.
  16. The suit was opposed by the appellant vide a statement of defence dated 23<sup>rd</sup> August 2019. She prayed for dismissal of the suit with costs.
  17. DW1, Claris Kenaize Mudavadi, relied on her statement dated 23<sup>rd</sup> August 2019, which was adopted as part of her evidence. She testified that she purchased 3 acres of L.R. No. Suna West/Wasweta II/490 (the mother parcel) from Raphael Oloo Ochola, a brother to PW4. That the suit land is a subdivision of the mother parcel. During cross-examination, she admitted that the said Raphael Oloo Ochola was not the registered proprietor of the mother parcel at the time of purchase.
  18. It is noteworthy that the learned trial magistrate set out the parties' respective cases, framed three issues for determination, analysed them and arrived at his decision based on reasons. Therefore, the impugned judgment was in line with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
  19. In his judgment, the learned trial magistrate observed, inter alia;

“...The defendant’s assertion that she has been in occupation of the suit land for 27 years is not convincing at all. In fact, in cross-examination, the defendant admitted that she has an alternative home established in a parcel to which she has a title deed.....Further, the defendant’s purchase of the suit land is shrouded in mystery. During cross-examination, she admitted that the person who allegedly sold her the land to which she lays a claim only became a proprietor in 1999. The person had no clean title to pass to her between 1990 to 1993, when she allegedly did the purchases...”
  20. The appellant contends that the lower court suit leading to this appeal was filed during the pendency of the ELC suit, hence contravened the doctrine of sub judice. That the lower court and Environment



and Land Court delivered judgments on 16<sup>th</sup> December 2020 and 27<sup>th</sup> April 2023 respectively. That thus, this appeal is determined by the findings in the ELC suit and is res judicata. That the lower court ought to have awaited the decision of the Environment and Land Court.

21. I have examined the record and proceedings of the trial court in entirety. It is noted that the appellant did not bring it to the attention of the court that there was another matter between the same parties and over the same subject matter proceeding before the Environment and Land Court in Migori.
22. Moreover, the proceedings and judgment in Migori Environment and Land Court OS No. 736 of 2017, have not been introduced herein as new evidence. Clearly, the appellant did not obtain leave of this court to introduce the said evidence in the spirit of Section 78 of the Civil Procedure Act, Chapter 21 Laws of Kenya and the decision in the case of Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR.
23. Wherefore, it is my considered view that the instant appeal generated by way of a memorandum of appeal dated 1<sup>st</sup> February 2021 is inept. The same is hereby struck out with costs to the respondent.
24. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**G.M.A ONG'ONDO**

**JUDGE**

**In Presence of:-**

Ms A. Abisai instructed by R Abisai learned counsel for the appellant

Ms A. Ogutu instructed by Tom Mboya learned counsel for the respondent

Tom, court assistant

