



**Odul v Yuaya (Environment & Land Case 51 of 2021)  
[2024] KEELC 5910 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5910 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 51 OF 2021  
AY KOROSS, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**ALFRED OGOLA ODUL ..... APPELLANT**

**AND**

**JOSEPH ONYANGO YUAYA ..... RESPONDENT**

*(Being an appeal against the judgment of the Siaya district land disputes tribunal delivered on 8/3/2006 in land case no. Siaya/44/2005)*

**JUDGMENT**

**Background of the appeal**

1. This is an appeal that emanated from the defunct Siaya Land Disputes Tribunal (Siaya tribunal) that was established under the repealed Land Disputes Tribunals Act (Chapter 303A). In this case, the appellant was the complainant, and the respondent was the objector.
2. Aggrieved by the decision of the Siaya tribunal, the appellant appealed to the defunct Nyanza Land Disputes Appeals Committee (Nyanza appeal's committee) however, while the appeal was pending, the Land Disputes Tribunals Act was repealed thus the bodies which were created therein were abolished.
3. The not-so-new Environment & Land Court which was created under the Environment & Land Court Act was seized with jurisdiction to take over land matters including those which were dealt with by the Land Disputes Tribunals Act.
4. As was held in the case of Francis Kimani Karimira v Chege Macharia [2022] eKLR which I hereby adopt, the ELC has both original and appellate jurisdiction and proceedings that were pending determination before the defunct District Land Disputes Tribunal (defunct tribunals) were moved to the Magistrates Court and as any appeal from the defunct District Land Disputes Tribunal lay in the



Provincial Appeals Committee (defunct appeals committees), it was only proper that all undecided appeals before it be dealt with by this court. It therefore follows that this matter was properly transferred from the Nyanza appeals committee to this court.

5. The Siaya tribunal rendered its decision on 8/03/2006 in which it dismissed the appellant's claim of illegal acquisition by the respondent of land parcel no. Kathieno B/694 and 695 (suit properties).
6. As provided for in Section 7 of the repealed Land Disputes Tribunals Act, the Siaya tribunal's decision was remitted to the Magistrate's court and it appears on an application dated 15/09/2011, the Siaya tribunal's decision was adopted as a decision of the court on 4/10/2011 and parties were given a 30 day right of appeal. This decision was made in the presence of both parties.

### **Appeal to this court**

7. Despite the existence of the court order, the appellant appealed to the Nyanza appeals committee against the Siaya tribunal's decision dated 5/10/2011 in which he raised the following grounds for determination: -
  - a. Notwithstanding the lack of probate proceedings on Athunga Nundu's estate, the suit properties were registered in the respondent's name.
  - b. He was not accorded a fair hearing.
  - c. The Siaya tribunal erred in failing to consider the previous proprietor Oyiera Othieno took advantage of the appellant's absence from home and thus transferred the suit properties to his name.
  - d. The Siaya tribunal erred in finding that the claim was time-barred.
  - e. The Siaya tribunal erred in not conducting a site visit and collecting views from the locals.
  - f. Village elders could prove the land was his.
8. Consequently, he urged this court to allow the appeal and set aside the Siaya tribunal's decision.

### **Parties' submissions**

9. As directed by the court, the appeal was canvassed by written submissions and the appellant's law firm on record M/s. Juliet Kokeyo & Co. Advocates filed written submissions dated 14/11/2023. Despite service, the respondent's law firm on record M/s. Ombito & Co. Advocates did not file any.
10. The appellant's counsel identified 4 issues as arising for determination which were inter alia whether the tribunal erred in not finding the suit properties which were subdivisions of land parcel no. Kathieno B 184 (mother parcel) was acquired fraudulently by Oyiera Othieno(Oyiera); whether the tribunal erred in concluding that the appellant was not the immediate next of kin of Athunga Nundu (Athunga); whether the respondent acquired title to the suit properties legally and lastly, whether the tribunal erred in dismissing the appellant's case without according him a fair hearing.
11. To buttress the arguments, the appellant's counsel relied on legal provisions and several legal authorities. However, because these authorities that were relied upon were not remitted to this court, this court will not consider them.
12. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the counsel's arguments on the particular issue and also consider provisions of law relied upon to advance the arguments.



### **Preliminary issue**

13. However, before I proceed, I must address certain preliminary issues that emerged from the appellant's grounds of appeal and his submissions.
14. Grounds (a), (d) (e), and (f) of the appeal that were earlier highlighted in the judgment were never the subject of determination before Siaya tribunal. His submissions too raised issues that were never the subject of determination or grounds for appeal. In particular, the issues of fraud and the relationship between Athunga and the appellant.
15. All these issues new issues raised on appeal were never subjected to determination by the Siaya tribunal and since they were never pleaded, canvassed, raised, or succinctly made issues before the Siaya tribunal to enable it to exercise its mind upon them, they will be discarded. Further, the appellant was bound by the grounds postulated in his memorandum of appeal and was not allowed to travel beyond them by sneaking new grounds in his submissions.
16. Therefore, this court will disregard grounds (a), (d), (e), and (f) of the memorandum of appeal and the limb of the submissions on fraud and the relationship between the appellant and Athunga. In arriving at this, I rely on the Court of Appeal decision of Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited) [2019] eKLR.

### **Issues for determination**

17. Being an appellate court, this court will not interfere with the impugned judgment save this court satisfies itself the Siaya tribunal misdirected itself and thus arrived at an erroneous decision, undoubtedly exercised its discretion wrongly and occasioned injustice by such erroneous exercise.
18. The role of an appellate court was aptly stated in the decision of Watt v Thomas [1947] AC, 484 at p 485 which was cited with approval in the Court of Appeal decision of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR thus: -

“Lord Simon’s speech in Watt v Thomas [1947] AC, 484 at p 485 as follows:

“...an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight...”

19. Reminding myself of the role of an appellate court, I have carefully considered the records and appellant’s submissions, provisions of law relied upon and the following 4 issues which shall be dealt with sequentially commend themselves for determination: -
  - a. Whether the appeal is competent.
  - b. Whether the appellant was accorded a fair hearing by the tribunal.



- c. Whether the respondent acquired the suit properties illegally.
- d. What orders should this court issue including an order as to costs?

## **Analysis and Determination**

### **a. Whether the appeal is competent.**

20. This issue was never addressed by the appellant's counsel in the submissions. The repealed Land Disputes Tribunals Act provided an elaborate dispute resolution mechanism and upon a decision being rendered by the tribunal which was the first port of call, a party could by Section 8 (1) thereof appeal to the defunct appeals committees or seek its adoption as a court order as envisaged by Section 7 of the said Act. These provisions of law provided thus: -

“7.

- (1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.
- (2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*.

8.

- (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.”

21. This court in the decision of *Benedict Obat & 3 others v Pius Onyango Obat* [2021] eKLR elaborated on these provisions of law and their effect in the following words: -

“My understanding of these provisions of law is that once the 30-day window period of appeal to the Land Disputes Appeal Committee had lapsed, the tribunal would remit its decision to court which would then adopt the decision as its judgement. It henceforth became a valid court judgement capable of execution.”

22. The tribunal's decision was rendered on 8/3/2006 and the last date the appellant could appeal was 7/03/2006 which was a Friday. Instead and without seeking such leave for an extension of time, he lodged it around the year 2011 which was close to 5 years after the decision was rendered.

23. Since the date of filing is not disclosed in the memorandum of appeal. It is evidently dated 5/10/2011 and case no. 112 of the year 2011 was assigned to it by the Nyanza appeals committee. Thus, it can only be concluded the appeal was lodged after 5/10/2011 which was obviously out of time.

24. However, instead of lodging his appeal on time as is required by law and then thereafter seek the adoption of the appeal outcome as an order of the court, he filed an application dated 15/09/2011 in



which he sought for the Siaya tribunal's decision to be adopted as an order of the court – which the Magistrate's court did on 4/10/2011.

25. The appellant has turned a blind eye to this decision and has acted like it never existed. The memorandum of appeal has not raised any grounds whatsoever that could impugn this valid decision which has not been reviewed or set aside.
26. By the adoption of the Siaya tribunal's decision as an order of the court, the Siaya tribunal's decision ceased to exist as it was subsequently replaced by the court order. Therefore, even if the appeal was not time-barred which for the record it is, the grounds of appeal would be in vain with no effect as the order issued on 4/10/2011 would remain intact as an unchallenged order.
27. Put another way, the Siaya tribunal's decision ceased to exist as an independent decision challengeable separately in an appeal. This position was upheld in the Court of Appeal decision of Alfred Sagero Omweri v Kennedy Omweri Ondieki [2020] eKLR and the decision of Republic v Chairman, Lands Disputes Tribunal Kirinyaga District & another Ex-parte Peter Maru Kariuki [2005] eKLR. Therefore, I find the appeal is incompetent.
28. The finding on the appeal's incompetency renders the resolution of issues (b) and (c) unnecessary and for the reasons stated above, the appeal is hereby struck out and since it is trite law that costs follow the event, I award costs to the respondent.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

19/9/2024

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

In the Presence of:

Miss. Kokeyo for the plaintiff

N/A for the respondent

Court assistant: Ishmael Orwa

