



**Nyakech v Ayoo & 2 others (Environment and Land Appeal  
E025 of 2023) [2024] KEELC 7186 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7186 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E025 OF 2023  
AY KOROSS, J  
OCTOBER 31, 2024**

**BETWEEN**

**GEORGE OMONDI NYAKECH ..... APPELLANT**

**AND**

**FRANCIS OGOLA AYOO ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, SIAYA ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*((Being an appeal from the judgment of PM Hon. B.Limo given  
on 5/12/2023 in Siaya PM ELC Civil Case No. 55 of 2022))*

**JUDGMENT**

**Background of the appeal**

1. In the lower court, the appellant was the defendant and the 1<sup>st</sup> respondent the plaintiff. In the appellant's counterclaim, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were respectively joined as 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The parcel of land in dispute was land parcel no. East Gem/ Kagilo/1461 (suit property) that was registered in the 1<sup>st</sup> respondent's name.
2. In a plaint dated 23/09/2022, the 1<sup>st</sup> respondent contended the appellant not only trespassed on a portion of the suit property in 2022 by cultivating it but also in 2018, blocked and cultivated the public access road that gave access to the suit property.
3. Accordingly, he sought a declaration that the appellant's actions were illegal, general damages, mesne profits, removal of a restriction placed on the suit property by the appellant, permanent injunction, removal of the appellant's structures, and costs of the suit.



4. In response, the appellant filed a statement of defence and counterclaim dated 28/10/2022. He asserted the suit property was a creation of an illegal subdivision of land parcel no. East Gem/Kagilo/186 (mother parcel) that not only created the suit property but East Gem/Kagilo/1460 (1460) that was registered in the name of David Oguta Ojee (David).
5. The appellant pleaded and particularised malice and fraud in his counterclaim but did not disclose against whom amongst the respondents the claims were made.
6. The appellant pleaded he was not a trespasser as the mother parcel was at 1<sup>st</sup> registration, registered in the name of Samuel Nyakech Ojee (Samuel) who was his father.
7. He asserted he had been in occupation of the suit property and 1460 since the date of 1<sup>st</sup> registration of the mother parcel and continued to so do during the subdivision and the registrations. Worth noting was that David and Samuel were brothers.
8. The appellant sought several reliefs, a declaration that the suit property was an illegal subdivision; an order for nullification of the suit property's title and that of 1460 and title be issued to him; permanent injunction; general and exemplary damages for trespass; conversion of property; nuisance and lastly costs of the suit together with interests.
9. After hearing the parties, the matter was reserved for judgment. In the impugned judgment that was rendered by the learned trial magistrate, he identified 2 issues as arising for resolution; whether the 1<sup>st</sup> respondent had proved his claim on a balance of probabilities and, who meets the costs of the suit and of the counterclaim.
10. In his conclusions on these issues, the learned trial magistrate found the 1<sup>st</sup> respondent had proved his case to the required standards and granted him the reliefs sought in his claim.
11. The learned trial magistrate also addressed another issue- whether the appellant had proved his claim of fraud. On this issue, he found that the particulars of fraud had not been proved by the appellant and dismissed the counterclaim. On the issue of costs, the 1<sup>st</sup> respondent was awarded costs.

### **Appeal to this court**

12. Dissatisfied by the impugned judgment, the appellant preferred an appeal to this court and his memorandum of appeal dated 19/12/2023 raised 12 grounds for appeal.
13. Because of several inadequacies that have been noted by this court in the entire grounds of appeal, the contents therein shall be outlined verbatim et literatim:-
  1. That the learned trial magistrate erred in law and in fact by referring to the document filed by the respondent as plaint in his judgment when in reality the document was "memorandum of claim".
  2. That the learned trial magistrate erred in law and in fact by failing to deem the respondent's "memorandum of claim" as a plaint during pre-trial conference.
  3. That the learned trial magistrate erred in law and in fact by failing to consider the effect of the various notices to produce filed by both the appellant and respondent in his judgment.
  4. That the learned trial magistrate erred in law and in fact in considering extraneous matter not pleaded by the parties after dealinating the issues for determination (See paragraphs 12 and 15 of the judgment).



5. That the learned trial magistrate erred in law and in fact by looking into issues of customary trust, which were not pleaded by any of the parties and did not come out during trial. (See paragraphs 12 & 15 of the judgment).
  6. That the learned trial magistrate erred in law and in fact by reaching a finding that the plaintiff's evidence was uncontroverted when the appellant clearly challenged the respondent's ownership in paragraph 8 of his defence and by questions in cross examination put to the respondent by the appellant's counsel. (See paragraph 17 of the judgment and paragraph 8 of the defence).
  7. That the learned trial magistrate erred in law and in fact by giving an open ended finding in his judgment.(See paragraph 18 of the judgment).
  8. That the learned trial magistrate erred in law and in fact by making a finding that was not specifically pleaded by the parties to the suit i.e issue of customary trust. (See paragraph 19 of the judgment).
  9. That the learned trial magistrate erred in law and in fact by arriving at a finding that an affidavit sworn by a vendor amounts to a written sale agreement.
  10. That the learned trial magistrate erred in fact and in law by failing to consider the current position of the law in respect to an innocent purchaser for value without notice as enunciated in *Dina Management Limited v. County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) 2023 KESC 30 (KLR) 21 April 2023 Judgment.
  11. That the learned trial magistrate erred in fact and in law by failing to consider the finding of a superior court as enunciated in *Elijah Makeri Nyangwae v Stephen Mungai Njunguna & Another* (2013) eKLR in line with Section 26 of the *Land Act*.
  12. That the learned trial magistrate erred in fact and in law in failing to consider this honourable's court own jurisprudence enunciated in *Agabitus Okoth Owuor v. Redemta Akinyi & 2 Others* ELCA No. 11 of 2021.
14. In the memorandum of appeal, the appellant urged this court to set aside the impugned judgment and grant such orders as it deems fit.

### **Appellant's submissions**

15. This court on 7/05/2024 directed all parties to dispose of the appeal by filing written submissions. In compliance, the appellant's counsel on record Mr. Ochanyo B.Ochanyo filed written submissions dated 7/05/2024. The 1<sup>st</sup> respondent who acts in person filed his written submissions that were dated 17/05/2024. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not participate in the proceedings.
16. The appellant's submissions addressed 3 issues of law which were respectively; fraudulently dealing with land that had not undergone probate proceedings, bonafide purchaser for value, and intermeddling with an estate of a deceased person. The 4<sup>th</sup> issue was on costs.
17. The 1<sup>st</sup> respondent's submissions identified 3 issues for determination which challenged the appellant's submissions; they failed to highlight sections of the impugned judgment that he was aggrieved against and introduced new issues that were neither canvassed before the learned trial magistrate nor contained in the memorandum of appeal.



18. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the respective parties' arguments on the particular issue and also consider provisions of law and authorities they relied upon to advance their arguments. But before I do that, this court has to consider the shortcomings in the memorandum of appeal as a preliminary issue as it may dispose of the entire appeal.

### **Preliminary issues**

19. The nature and form of a memorandum of appeal are set out in Order 42 Rule 1 (2) of the Civil Procedure Rules in the following manner: -

“The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

20. The Court of Appeal in the decision of *Attorney General v Bala (Civil Appeal 223 of 2017)* [2023] KECA 117 (KLR) (3 February 2023) (Judgment) weighed in on this issue albeit inaccurately referenced Order 43 instead of 42 and stated:-

“5. Under the *Civil Procedure Act* and the Civil Procedure Rules made thereunder, an appeal lay only as against a decree or as against an order passed under rules from which an appeal was expressly allowed by order 43, rule 1 of the Civil Procedure Rules. The first sentence in the two paragraphs the appellant cited were mere findings by the High Court. The last sentences were his views. No appeal could lie against a mere finding for the simple reason that the *Civil Procedure Act* and the Civil Procedure Rules did not provide for any such appeal.”

21. The essence of Order 42 Rule 1 (2) of the Civil Procedure Rules is to assist the court and parties in framing the issues and to identify the core grounds the appellant is aggrieved against as derived from the decree.
22. With due respect to the appellant, the grounds of appeal as charted out in the memorandum of appeal fell short of this law as they were not concise, argumentative, narratively stated the evidence, attacked the learned trial magistrate's obiter dictum and reasoning, repetitive and delved into matters of jurisprudence. It also introduced a new issue in ground 3.
23. Grounds (1) and (2) are questions of semantics. Black's Law Dictionary, 11<sup>th</sup> edition, pg 1391, and the *Employment and Labour Relations Court Act* respectively define a plaint and memorandum of claim as a complaint. Humbly, the interchangeable use of synonyms by the learned trial magistrate cannot form the basis of an appeal.
24. Ground (3) introduced a new issue that was never pleaded, canvassed, raised, or succinctly made an issue before the trial court to enable it to exercise its mind upon it. See *Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited)* [2019] eKLR. If at all the appellant wanted to raise a new issue on appeal, then, he should have first moved the court within the provisions of Section 78 (1) (d) of the *Civil Procedure Act* and Order 42 Rules 27, 28, and 29 of the Civil Procedure Rules.
25. Grounds (4), (5), (6), (7) (8), and (9) attacked the learned trial magistrate's obiter dictum and reasoning. I have scrutinized the judgment including the particular paragraphs that have been highlighted by the



- appellant in the memorandum of appeal and the learned trial magistrate did not make any findings on them.
26. In my view, these grounds were predominantly drawn from the learned trial magistrate’s reasoning as contained in the impugned judgment’s body and not from the final disposal orders from which a decree is derived from. In other words, it did not comply with the provisions of Order 42 Rule 1 (2) of the Civil Procedure Rules.
27. In similar circumstances as this case, the Attorney General (Supra) had this to say:-
- “The appeal presented a unique scenario where the appellant seemed to be unhappy with the High Court’s reasoning and opted to overturn the reasoning as opposed to the final orders. An appeal only lay against the final decree/orders.”
28. Grounds (10), (11), and (12) cannot form grounds for appeal. In my humble view, these grounds that touched on jurisprudence should have been preserved for submissions which usually argue parties’ grounds of appeal either on matters of evidence or law.
29. It appears the appellant did not appreciate what an appeal entails because had he comprehended Section 78 (1) (d) of the *Civil Procedure Act* and Order 42 Rules 1 (2), 27, 28, and 29 of the Civil Procedure Rules and carefully understood the body of the impugned judgment, its final disposal orders and decree, he would have raised appropriate grounds on appeal.
30. The appellant’s submissions are a reflection of his miscomprehension as he has departed from some of the grounds of his appeal. This explains why in his submissions, the 1<sup>st</sup> respondent is perplexed and unable to respond to the grounds of appeal.
31. Ultimately, for reasons stated hereinabove, it is my finding there were no grounds for appeal capable of being considered by this court. I find the appeal lacks merit. I hereby dismiss it and uphold the judgment of the learned trial magistrate delivered on 5/12/2023. It is trite law costs follow the event, and I award costs to the 1<sup>st</sup> respondent. Since the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not participate in the proceedings, costs are not awarded to them.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**31/10/2024**

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

In the Presence of

Mr. Ochanyo for the appellant

N/A for 1<sup>st</sup> respondent

N/A for 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Court assistant: Maureen Achieng

