



**Otieno v Nyangoi & 4 others (Environment and Land Appeal
E009 of 2023) [2024] KEELC 14205 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 14205 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E009 OF 2023
GMA ONGONDO, J
OCTOBER 23, 2024**

BETWEEN

DALMAS ODHIAMBO OTIENO APPELLANT

AND

SYLVANUS OMOLLO NYANGOI 1ST RESPONDENT

ELIAS AWALA OMOLLO 2ND RESPONDENT

PHILIP OWINO 3RD RESPONDENT

THE REGISTRAR OF LANDS HOMA BAY 4TH RESPONDENT

THE DISTRICT LAND SURVEYOR HOMA BAY 5TH RESPONDENT

*(Being an appeal from the Judgement and Decree of the Honourable Principal
Magistrate, Ndhiwa dated 26th July 2023, Hon. Onxere E.M in MCELC No. 22 of 2018)*

JUDGMENT

1. The subject matter of the present appeal is land reference number Kanyamwa/Kayambo Kwamo/569 originally measuring approximately Thirty-one (31) acres in area registered in the name of the 1st respondent, the original suit land herein. Later, it got sub divided into land reference numbers Kanyamwa/Kayambo/Kwamo/2698 measuring 1.54 Hectares in area and registered in the name of the appellant and Kanyamwa/Kayambo/Kwamo/2728 measuring approximately 0.50 Hectares in area (The 1st and 2nd subdivisions respectively) leaving 6.30 hectares (13 acres) thereof.
2. The origin of the appeal is the trial court's judgment delivered on 26th July 2023 where the learned trial magistrate reasoned that;
 - a. The 1st defendant and Philip Owino are entitled to only 3 acres of the original suit land.



- b. The 1st defendant's land, the 1st sub division is in excess of the size sold to him and as such he is ordered to transfer 2.1 acres of the 1st sub division to the 1st plaintiff's land namely the original suit land within the next thirty (30) days.
 - c. Should the 1st defendant fail to comply with Order 2 above, the Court Administrator Ndhwa to execute the transfer documents and forward them to the Land Registrar Homa-Bay County for enforcement.
 - d. Costs of the suit are awarded to the plaintiffs and since the 2nd defendant did not participate in the proceedings, the costs will be borne by the 1st defendant.
3. The 1st defendant/appellant was aggrieved at the said judgment thus, lodged the appeal by way of memorandum of appeal dated 24th August 2023 through Oduk and Company Advocates premised upon eleven grounds which include;
 - a. The trial magistrate assumed a jurisdiction which she did not have and acted in excess of her powers.
 - b. The learned trial magistrate erred in law and in fact in failing to find that the title to the 1st sub division was a first registration following an adjudication process and the registration was final, absolute and indefeasible.
 - c. The trial magistrate erred in law and in fact in dealing with and reopening issues of determining interest in land and ownership when the said issues had been determined by the Land Adjudication Officer and were properly and legally within the province and jurisdiction of the Land Adjudication Officer and erred fundamentally in law by substituting her own views and findings over those of the adjudication officer.
 - d. The trial magistrate erred in law and in fact in the face of glaring evidence that the ownership and acquisition of the 1st sub division had been a subject of the process and that as at 22nd November 1989, objection proceedings held under the Land Adjudication Act had determined that the appellant, Dalmas Odhiambo Otieno was "to get no. 2698" as per the Land Adjudication Records, and the subsequent purchase done in 1993 was but a consolidation of the appellant interest in the said land.
 - e. The trial magistrate erred in law and in fact in denying the appellant the interest held in the land without proof of any fraud or wrong doing by the appellant, and wrongly purported to have jurisdiction to do so under section 26 of the Land Registration Act, when the same was not applicable.
 - f. The trial magistrate's award and order on costs was punitive, erroneous and not merited.
4. Wherefore, the appellant has sought the following orders;
 - a. The trial magistrate's decision in MCELC No. 22 of 2018 dated 26th July 2023, be set aside.
 - b. The 1st respondents' suit in MCELC No. 22 of 2018, be dismissed with costs.
 - c. The 2nd respondents' suit in MCELC No. 22 of 2018, be dismissed with costs.
 - d. The trial court's decision in MCELC No. 22 of 2018 dated 26th July 2023 dismissing the appellant's counterclaim, be set aside.
 - e. The appellant's counter claim in MCELC No. 22 of 2018 be allowed as prayed in the 1st defendant's defence and counterclaim.



- f. The costs of this appeal and of the suit in the subordinate court be awarded to the appellant.
 - g. An order to issue for the fixing damages for the appellant.
5. The appeal was heard by way of written submissions further to this court's directions given herein.
 6. In the submissions dated 2nd June 2024, learned counsel for the appellant referred to the impugned judgment, the eleven grounds of appeal and the background of the case including that the registration of three acres consolidated into the 1st sub division in the name of the appellant and title issued for 1.54 hectares as revealed in PExhibit 10 (a) and (c). Counsel wholly adopted the appellant's submissions before the trial court as part of his submissions in this appeal. It was submitted that the dispute is a product of adjudication process which was concluded with the issuance of title to the appellant and it was with finality as noted in *Mbui v Mbui* 2005 1 EA 256. That the registration of the appellant extinguished customary law rights as held in *Gathiba v Gathiba* 2001 EALR 342 and that the process of adjudication cannot be challenged through an ordinary suit as held in *Melika v Mbuvi* 2001 (1) EA 124
 7. Further, counsel submitted that this matter is res judicata and the trial court had no jurisdiction over the same under sections 29 and 30 of the [Land Adjudication Act](#) Chapter 284 Laws of Kenya as the dispute had been attended to with finality by quasi-judicial institution. That there was no proof of fraud and trespass on the 1st sub division by the plaintiffs and that no due process was followed by them in taking over the same and that the counter claim was dismissed in error thus, the appeal be allowed.
 8. In the 1st and 2nd respondents' submissions dated 11th September 2024 by Everlyne Kuke and Company Advocates, reference was made to the amended plaint of 20th May 2022 by the 1st and 2nd respondents against the appellant for the principal order of registration of the appellant and 2nd respondent on the excess of three acres comprising of the 1st and 2nd sub divisions of the original suit land. That the suit was opposed by the statement of defence dated 16th September 2009. Counsel summarised the grounds of appeal and submitted that the acquisition of title in respect of 2.1 acres being the excess portion of the original suit land in the name of the appellant and the 3rd respondent, was fraudulent. That therefore, the trial court had jurisdiction over the matter.
 9. Also, counsel submitted, *inter alia*, that under section 26 of the [Land Adjudication Act](#) Chapter 284 of the Laws of Kenya, an appeal to the Minister is optional hence, other remedies are open to any aggrieved party. That section 29 of the said Act uses 'may' which is non mandatory. That the trial court had jurisdiction in respect of the matter and relied on [Joseph Madegwa v Gaylord Avedi](#) (2018) eKLR, among other authorities and implored the court to dismiss this appeal with costs.
 10. By the submissions dated 26th September 2024 in reply to the 1st and 2nd respondents' submissions, learned counsel for the appellant stated in part that the 1st and 2nd respondents expressly admit that the respondents did not exhaust sections 29 and 30 of the [Land Adjudication Act](#) (Cap 284) which are the only known legal proceedings of appeal provided for. That fraud was not proved against the appellant and in any event, lack of proof was inconsequential for want of jurisdiction on the part of the trial court hence, the appeal be allowed as prayed.
 11. This is a first appeal and the role of this court is to re-appraise the evidence on record and draw inferences before reaching it's own conclusions always bearing in mind that unlike the trial court, I did not see and hear the witnesses testify and due allowance must be made for that respect; see *Selle v Associated Motor Boat Company Limited* (1968) EA 123.



12. Initially, the 1st and 2nd respondents who were the 1st and 2nd plaintiffs sued the Appellant, the 3rd, 4th and 5th respondents who were the 1st, 2nd, 3rd and 4th defendants respectively in the trial by way of an amended plaint dated 20th May 2022 for the orders infra;
 - a. The registration of the appellant and 3rd respondent on the excess three (3) acres was null and void, and the 3rd and 4th Defendants do register the same in the names of the 1st Plaintiff.
 - b. The costs of this suit.
 - c. Any other relief deemed fit in the circumstances to be granted by this Honourable Court.
13. By his statement of defence and counter claim dated 16th September 2009, the 1st defendant/appellant herein denied the plaintiffs' claim and termed it wild and misplaced. The appellant claimed that the 1st sub division was bought from the plaintiffs and the portion bequeathed to him by his late father Thomas Otieno (Deceased) during his life time and recorded in the Adjudication Register during the demarcation exercise and without any objection by the plaintiffs. That the appellant's title was a first registration thus, indefeasible and not open to challenge.
14. In the counterclaim, the appellant stated that in the year 2006 and in August 2009, the plaintiffs unlawfully entered the 1st subdivision measuring approximately half share of three acres which he had bought on about 1st January 1993 and started to erect structures thereon hence, deprived the appellant of the use and enjoyment of the same. That the plaintiffs' actions have caused the appellant to suffer loss and damage.
15. Thus, the appellant prayed that the plaintiffs' suit be dismissed and judgment be entered against the defendants jointly and severally for;
 - a. Injunction to restrain the plaintiffs either by themselves their servants or agents or otherwise whomsoever from remaining or continuing in occupation of the said land and/or an order of eviction directed against the plaintiffs evicting them from the 1st sub division.
 - b. Possession of the said land and/or an order of eviction directed against the plaintiffs evicting them from the 1st sub division.
 - c. Damages or mesne profits from 2006, until possession is delivered up.
 - d. Aggravated damages and other relief.
16. By his statement of defence dated 16th September 2009, the 2nd defendant denied the plaintiffs' claim and prayed that the suit be dismissed with costs. He stated in part that he is the registered proprietor of half of the portion of the parcel sold as "approximately three acres" which portion upon demarcation, recording and survey was found to be 0.5 hectares, and was awarded to him as specifically found and fenced on the ground.
17. In their statement of defence dated 29th June 2022, the 3rd and 4th defendants denied the plaintiffs' allegations in the amended plaint. They stated that they were strangers to the allegations and prayed that the plaintiffs' suit be dismissed with costs.
18. PW1, Peter Otieno Omol, a son of the 1st Respondent relied on his statement dated 22nd May 2022 and a list of documents filed on 22nd August 2022 (PExhibits 1 to 8) which include; power of attorney (PExhibit 1) and sale agreement dated 18th January 1993 (PExhibit 7) as part of his testimony. During cross examination, he stated that the title deed for the original suit land is in the name of the 1st respondent and first registered on 29th July 2008 and there was no sub division of the same.



19. PW2, Elias Owano Omollo (2nd Respondent) stated that he is son of the 1st respondent. He relied on his statement and PExhibits 1 to 8 as part of his testimony to the effect that DW1 did not sub divide the original suit land for sale.
20. PW3, Samuel Odhiambo Omolo testified that he is a son to the 1st respondent and based part of his evidence in chief on his statement dated 31st August 2022. During cross examination, he stated that he was aware that the appellant who is known to him, bought land.
21. PW4, John Ogola relied on his statement dated 2nd September 2022 as part of his evidence in chief. In cross examination, he stated that he is brother to the 1st respondent and that the appellant built on the land of the 1st respondent temporarily.
22. The appellant (DW1) anchored his testimony on, inter alia, his statement filed on 10th October 2019 and documents inclusive of a certificate of official search, title deed, land sale agreement of 18th January 1993 and adjudication records (DExhibits 1 to 10 (a) (b) and (c).
23. In the foregone, the issues for determination herein are as contained in the grounds of appeal which are condensed to whether:
 - a. The trial court was seized of the jurisdiction in regard to the instant dispute in the first instance.
 - b. Subject to the first issue, the registration of the appellant and 3rd respondents on the excess three (3) acres of the original suit land, was null and void to entitle the 1st and 2nd respondents to the orders sought in the amended plaint.
 - c. The 1st and 2nd respondents are trespassers on the 1st sub division to attract the orders sought in the counter claim.
 - d. The instant appeal is tenable and the appropriate orders to issue to meet the ends of justice herein.
24. Concerning the first issue, in Halsbury’s Laws of England 4th Edition Volume 9 at page 350, the term “Jurisdiction” means;

“The authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for decision.”
25. So, what is the source of jurisdiction? In the celebrated case of *Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others* (2012) eKLR, the Supreme Court of the Republic of Kenya held-

“....a court’s jurisdiction flows from either the Constitution or legislation or both.....It cannot arrogate to itself jurisdiction.....”
26. In the *locus classicus* case of *Owners of Motor Vessel “Lillian S” v Caltex Oil (K) Ltd* (1989) KLR 1, the Court of Appeal observed-

“...Jurisdiction is everything. Without it a court has no power to take one more step.....”



27. Equally, in *Republic v Karisa Chengo & 2 others* (2017) eKLR, the Supreme Court of the Republic of Kenya remarked;
- “...lack of jurisdiction renders a court’s decision void as opposed to it being merely voidable...”
28. Definitely, assumed jurisdiction is a nullity as held in the case of *Desai v Warsama* (1967) EA 351, amongst other pronouncements. Thus, it is incumbent on this court to establish whether the trial court had jurisdiction over the matter in the first instance.
29. It is abundantly clear that the principal order sought in the amended plaint is the registration of the appellant and 3rd respondent on the excess three acres as stated in paragraph 12 (a) hereinabove. Additionally, the orders sought in the counter claim include; injunction and eviction for alleged trespass by the 1st and 2nd respondents as disclosed in paragraph 15 hereinabove. So, the parties’ respective claims relate to title to, the use and occupation of land which fall within the jurisdiction of this court under Article 162 (2) (b) of the *Constitution of Kenya, 2010* and section 13 of the *Environment and Land Court Act* 2015 (2011).
30. Indeed, the jurisdiction of this court is cascaded down to the magistrates’ courts including the trial court by Section 26 (4) of the *Environment and Land Court Act*, 2015 (2011) and section 9 (a) of the *Magistrates’ Courts Act* No. 26 of 2015; see also *Joseph Madegwa case* (*supra*). As such, the trial court had jurisdiction in respect of the instant matter.
31. As regards the second issue, PW1 maintained during cross examination that he did not sub-divide the original suit land registered in his name. That the appellant took a larger share of the land than what was sold to him and proceeded to build his home thereon in the year 2004 and cultivates it.
32. The evidence of PW1 was affirmed by PW2 who stated in cross examination that the original suit land is in the name of the 1st respondent as the first owner who did not sub divide it. Also, PW4 did affirm that the 1st respondent never gave the appellant the land.
33. The testimony of DW1 was that he was taken in as a child of the Deceased through dowry payment thus, he was raised by the Deceased and his wife, Petronala and given the 1st sub division. That the 1st respondent gave the Deceased land since the former married Margaret Aoko, a daughter of the latter and built his home on part of land he purchased from the 1st respondent.
34. A party who seeks to rely on any African Customary law as the basis of his or her claim, must prove by evidence the existence of such custom; see *Ernest Kinyanjui Kimani v Muiru Gikanga and another* (19650 EA 73 and sections 107 to 109 of the *Evidence Act* Chapter 80 Laws of Kenya.
35. In the instant case, the appellant raised the issue of African custom in terms of alleged payment of dowry to treat DW1 as his child. Be that as it may, he appellant failed to present evidence to prove his allegation on that aspect.
36. Moreover, the learned trial magistrate observed in the impugned judgment that the Deceased was not the owner of the original suit land. That as such, he had no title to pass to the appellant as there was no evidence that such registration was obtained following the adjudication of rights and interests under sections 26 to 29 of the *Land Adjudication Act* Cap 284 Laws of Kenya and that parties participated in the adjudication process to finality. So, the appellant is not validly registered as absolute and indefeasible owner of the excess portion of the original suit land.
37. The 1st and 2nd respondents distinctively pleaded fraud at paragraph 13 (a) to (g) against the 1st and 2nd defendants and paragraphs 15 (a) and (b) against the 3rd and 4th defendants. Further, fraud was



- distinctly proved by PW1 who stated that he did not subdivide the original suit land and that DW1 took excess three acres of land as confirmed by the testimonies of PW2 and PW4 as I subscribe to the Court of Appeal decision in the case of *Kinyanjui Kamau v George Kamau* (2015) eKLR.
38. Furthermore, proof of fraud was buttressed by DW1 who under cross examination by Kuke for the plaintiffs stated that the original suit land was in the name of the 1st respondent as per the adjudication record dated 16th May 1984. That page 2 of adjudication record of the 1st sub division is missing and that there was no document to show that the Deceased gave him (DW1) land which was merged with the one he bought and registered in his name.
39. In that regard, the learned trial magistrate at paragraph VI of the judgment correctly observed that;
- “The 1st defendant is holding the title to land parcel Kanyamwa/Kayambo/2698 which I have found is in excess of what was sold to him. I have also found that the process through which he used to be the registered owner of the land was flawed and he did not get the extra 2. 1 acres lawfully. This is a valid ground for challenging the title in line with Section 26 of the *Land Registration Act*. In view of the above, the Counter Claim by the 1st defendant has merit and it is dismissed.’
40. In the obtaining circumstances and bearing in mind Article 40 of the Constitution of Kenya 2010, the appellant’s acquisition of title to the excess three acres of land in question, was not legal and formal hence, the title thereof is challenged under Section 26 (1) of the *Land Registration Act*, 2016 (2012). Therefore, I subscribe to the Court of Appeal’s decision in *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR, where it was stated thus:
- “We have stated that when a registered proprietor of title is challenged, it is not sufficient to dangle the instrument of instrument as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (Emphasis supplied).
41. In paragraphs 10 to 16 of the counter claim, the appellant asserted that the plaintiffs unlawfully entered the 1st sub division. Nonetheless, the entire counter claim fails as noted by the trial court on the basis that the appellant’s title to the excess three acres is under challenge as stated hereinabove.
42. It must be observed that the learned trial magistrate summarized the parties’ respective cases, flagged out twinned issue for determination, analysed the same and arrived at her informed decision based on reasons. Therefore, the impugned judgment was in line with Order 21 Rule 4 of the *Civil Procedure Rules, 2010*.
43. To that end, the learned trial magistrate relied on the evidence on record and applied correct principles of law in arriving at the impugned judgment where she granted orders inclusive of costs in light of the proviso to section 27 (1) of the *Civil Procedure Act* Chapter 21 Laws of Kenya. The trial court’s judgment is faultless at law. Therefore, I find no reason to disturb the judgment which I endorse accordingly as the appeal is untenable
44. A fortiori, this appeal originated by way of memorandum of appeal dated 24th August 2023, be and is hereby dismissed with costs to the 1st and 2nd respondents.
45. It is so ordered.



DATED AND DELIVERED AT HOMA BAY THIS 23RD DAY OF OCTOBER 2024.

G.M.A ONG'ONDO

JUDGE

Present;

1. Ms. Theuri instructed by Oduk learned counsel for the Appellant
2. Mr. Ongoro instructed by Kuke learned counsel for the 1st and 2nd Respondents
3. Mr. Luanga, court assistant

