



**Masai v Kwoba alias Ratenyi (Environment and Land Appeal
E030 of 2023) [2025] KEELC 544 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E030 OF 2023
DO OHUNGO, J
FEBRUARY 13, 2025**

BETWEEN

JOHN JUMA MASAI APPELLANT

AND

JACKSON MOHAMMED KWOPA ALIAS RATENYI RESPONDENT

*(Being an appeal from the judgment of the Senior Principal Magistrate's
Court at Mumias (Hon. W K Cheruiyot, Principal Magistrate)
delivered on 31st May 2023 in Mumias MCELC No. 110 of 2018)*

JUDGMENT

1. Litigation leading to this appeal commenced in the High Court at Kakamega on 6th February 1996 when the Appellant filed Plaintiff dated 13th November 1995. The suit was brought against Ramadhan Nyongesa as First Defendant and the Respondent herein as Second Defendant. The matter remained in the High Court until 23rd July 2014 when it was transferred to this Court. Later, on 5th March 2018, it was transferred to the Senior Principal Magistrate's Court at Mumias for hearing and determination.
2. The Appellant averred in the Plaintiff that he was the proprietor of land parcel number North Wanga/Kholera/102 measuring 14½ acres while Ramadhan Nyongesa was the proprietor of land parcel number North Wanga/Kholera/103. That in July 1995, Ramadhan Nyongesa and the Respondent stopped him from growing sugarcane on his North Wanga/Kholera/102 and thereafter started ploughing 5 acres of the said parcel. That earlier, in October 1991, he was summoned by the District Officer, Mumias Division and forced to sign strange documents after which the Respondent became registered proprietor of 5 acres of his North Wanga/Kholera/102 and that Ramadhan Nyongesa and the Respondent continued ploughing the said 5 acres.



3. The Appellant therefore sought judgment against Ramadhan Nyongesa and the Respondent for their eviction from the 5 acres, mesne profits for the period he was kept out of possession of the 5 acres until they deliver vacant possession, costs of the suit and interest.
4. The Respondent filed Statement of Defence and Counterclaim dated 18th April 2011 in which he averred that Ramadhan Nyongesa had passed away and that North Wanga/Kholera/102 was ancestral land which was registered in the name of the Appellant to hold in trust. He further averred that the Appellant fraudulently obtained registration of the said parcel in his name.
5. The Respondent therefore sought judgment against the Appellant for a declaration that having stayed on North Wanga/Kholera/102 for over 4 decades, he could not be evicted or restrained from living on it or using it, a declaration that the Appellant got registered as the proprietor fraudulently and that the said registration if lawful was to be held in trust for the sons of Mzee Ratenyi (deceased) and especially the Respondent 's father. He further prayed for “reversion of land parcel number North Wanga/Kholera/1204 measuring approximately 5 acres from land parcel number North Wanga/Kholera/102” into the Respondent’s names and an order restraining the Appellant from interfering, ploughing, tilling, dealing with, construction on, fencing off, building on and or in any way interfering with land parcel number North Wanga/Kholera/1204. He also prayed for costs of the counterclaim.
6. Upon hearing the matter, the Subordinate Court (Hon. W K Cheruiyot, Principal Magistrate) delivered judgment on 31st May 2023 and dismissed the Appellant’s case for want of proof. The Learned Trial Magistrate further held that the Respondent’s counterclaim was proved and allowed it as prayed. He ordered land parcel numbers “N/Wanga/Kholera/1203 and 1204 be reinstated as per the status obtaining before filing of this suit.” He also awarded costs of the suit to the Respondent.
7. Dissatisfied with the outcome, the Appellant filed this appeal on 12th June 2023, through Memorandum of Appeal dated 10th June 2023. He prayed that the judgment be set aside and that his case be allowed while the Respondent’s counterclaim be dismissed. He also sought costs.
8. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
 1. That the learned trial Magistrate erred in law and in fact in finding Appellant liable to transfer 5 acres to be carved from land parcel No. N. Wanga/Kholera/102 to the Respondent against the evidence.
 2. That the Trial Magistrate erred in law and in fact for failure to acknowledge that land parcel No. N. Wanga/Kholera/102 still exist is backed by the green card.
 3. That the learned Trial Magistrate erred in law and in fact by holding that the Defendant/ Respondent had proved his counter-claim on a balance of probability.
 4. That the learned Trial Magistrate erred in law and in fact by holding that the plaintiff/ Appellant initiated and subdivided the parent land, obtained the Land Control Board Consent to transfer parcel No. N. Wanga/Kholera/1024 to the Defendant/Respondent when there was no evidence to prove the same thus lead to miscarriage of justice.
 5. That the learned Trial Magistrate erred in law and in fact by failing to consider the plaintiff/ Appellant’s written submissions.
 6. That the learned Trial Magistrate erred in law and in fact to consider that the Defendant/ Respondent’s evidence and his witnesses was so contradictory that the Counter-claim was not proved to the required standard.



7. That the learned Trial Magistrate erred in law and in fact for failure to appreciate that the Plaintiff/Appellant had distinct land parcel No. N. Wanga/Kholera/102 and the Defendant/Respondent's land is N. Wanga/Kholera/103 which boarder one another hence infringed the Appellant's proprietorship.
 8. That the learned Trial erred in law and in fact to hold that Appellant obtained parcel No. N. Wanga/Kholera/102 fraudulently when the Respondent failed to prove the same.
 9. That the learned Trial Magistrate erred in law and in fact by applying wrong principles by awarding the Defendant/Respondent 5 acres and finding that the Defendant/Respondent has proved Counter-claim on balance of probability.
 10. That the learned Trial Magistrate erred in law and in fact when he failed to establish whether the Defendant/Respondent's claim under Counter-claim was time barred and prayers sought should not have been granted.
9. The appeal was canvassed through written submissions. The Appellant filed submissions dated 20th February 2024. Relying on the cases of Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR and Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, the Appellant argued that Mzee Ratenyi (deceased) owned a big parcel of land and had several sons who were entitled to the said land. That from the evidence adduced by the Respondent, it was clear that the person entitled to the share was his father, the Appellant's father and other brothers of his father, who were six in number. He also argued that the Respondent is his cousin and that trust was not established since they are not siblings and the Respondent's family had their own land parcel number North Wanga/Kholera/103 which was neighbouring land parcel number North Wanga/Kholera/102. He referred to Sections 24 and 26 of the [Land Registration Act](#) and argued that the Respondent did not establish grounds for nullification of a title.
 10. In reply, the Respondent filed submissions dated 4th March 2024. He argued that at the time the Appellant filed the suit, the Respondent was the registered owner of land parcel North Wanga/Kholera/1204 while the Appellant was the registered owner of North Wanga/Kholera/1203. That although the two titles were cancelled pursuant to the initial ex parte judgment delivered by the High Court, the said judgment was later set aside by the High Court. That as a result, the status of the suit land reverted to what it was at the institution of the suit. In other words, the Respondent remained the registered owner of land parcel North Wanga/Kholera/1204 while the Appellant remained the registered owner of North Wanga/Kholera/1203. He added that the change was not reflected in the register and that the counterclaim was sustained to align with that situation.
 11. The Respondent went on to argue that the Appellant's claims as to existence of parcel number North Wanga/Kholera/102 are not backed by any law in view of the setting aside the ex-parte judgment. He also contended that the Appellant himself had initially sub-divided parcel number North Wanga/Kholera/102 and obtained consent of the Land Control Board to transfer parcel number North Wanga/Kholera/1204 measuring 5 acres to the Respondent, as can be seen in the minutes of the Land Control Board which were produced. The Respondent further argued that the Appellant was thus not truthful in his claims that the Respondent unlawfully entered into North Wanga/Kholera/102. He added that he was in the circumstances entitled to land parcel number North Wanga/Kholera/1204 measuring 5 acres.
 12. The Respondent also argued that the Appellant did not challenge the creation of title numbers North Wanga/Kholera/1204 and North Wanga/Kholera/1203 and did not plead and prove any fraud. That although the Appellant accused the Divisional Officer Mumias of forcing him to sign strange



documents, he neither joined the said Divisional Officer to the suit nor pleaded any fraud against him. The Appellant therefore urged this Court to dismiss this appeal with costs for want of merit.

13. This being a first appeal, this Court has an obligation to re-consider and re-evaluate the pleadings and the material on record and to determine whether the conclusions reached by the Learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
14. I have considered the record, the pleadings, the evidence and submissions of the parties. The issue that arises for determination is whether the parties were entitled to the reliefs that they had sought.
15. As of 6th February 1996 when the Appellant filed his Complaint, parcel North Wanga/Kholera/102 did not exist since it was closed on 3rd May 1995 upon its subdivision into North Wanga/Kholera/1204 whose registered proprietor was the Respondent and North Wanga/Kholera/1203 whose registered proprietor was the Appellant. That notwithstanding, the Appellant pleaded his case exclusively around North Wanga/Kholera/102. From the record, it is apparent that through ex parte judgment delivered on 13th October 1999 by Tanui, J., the High Court ordered that “the registration of the [Respondent] as the owner of 5 acres of portion of [North Wanga/Kholera/102] is cancelled ...” Whereas the judgment did not specifically mention either North Wanga/Kholera/1204 or North Wanga/Kholera/1203, the arising decree was implemented at the land registry on 2nd June 2006 by cancelling both North Wanga/Kholera/1204 and North Wanga/Kholera/1203 and reverting to North Wanga/Kholera/102.
16. The record further shows that the ex parte judgment of 13th October 1999 was later set aside through a ruling delivered on 2nd March 2011 by I. Lenaola, J. (as he then was). The effect of the setting aside meant that the Respondent remained the registered owner of land parcel North Wanga/Kholera/1204 while the Appellant remained the registered owner of North Wanga/Kholera/1203. That development was however not reflected in the registers of North Wanga/Kholera/102, North Wanga/Kholera/1204 and North Wanga/Kholera/1203. The Appellant’s contention that the register shows that North Wanga/Kholera/102 remained in existence is plainly wrong since the register was to accord with the court orders.
17. Thus, as the litigation progressed in court, it was for all intents and purposes an academic exercise since the Appellant’s case concerned North Wanga/Kholera/102, a parcel that was not in existence. The Respondent could not be evicted from North Wanga/Kholera/1204 which he owned, nor could he be condemned to pay mesne profits in respect of his own land. Since the Appellant did not seek nullification of the resultant North Wanga/Kholera/1204 and North Wanga/Kholera/1203, the Subordinate Court could not make any orders that would infringe on the Respondent’s rights as a registered proprietor of land.
18. Similarly, the Respondent’s counterclaim for “reversion of land parcel number North Wanga/Kholera/1204 measuring approximately 5 acres from land parcel number North Wanga/Kholera/102” to his name was not necessary since the registers just needed to be updated to accord with orders of the Court following the ruling of 2nd March 2011.
19. I have considered the record in detail, and I find no fault with the manner in which the Learned Magistrate handled the matter as well as the conclusions that he reached. The Appellant was not entitled to the reliefs that he sought. On the other hand, the orders granted on the counterclaim simply aligned or updated the register in view of the ruling of 2nd March 2011.



20. I find no merit in the appeal, and I therefore dismiss it. Considering the close family relationship between the parties, I make no order as to costs of the appeal.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 13TH DAY OF FEBRUARY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance for the Appellant

Mrs Chungu for the Respondent

Court Assistant: B Kerubo

