



**Omukhulu (Suing as Legal Representative of the Late Masinde Wanzetse )  
v Lipuku & another (Environment and Land Appeal E017 of 2023)  
[2024] KEELC 13878 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13878 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E017 OF 2023  
DO OHUNGO, J  
DECEMBER 16, 2024**

**BETWEEN**

**ARNOLD OUMKHULU (SUING AS LEGAL REPRESENTATIVE OF THE LATE  
MASINDE WANZETSE ) ..... APPELLANT**

**AND**

**HANNINGTON HAGGAI MINABO LIPUKU ..... 1<sup>ST</sup> RESPONDENT**

**EVERLYN ATIENO KANGU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Principal  
Magistrate's Court at Butere (Hon. E. Wasike, Principal Magistrate)  
delivered on 22nd August 2023 in Butere MCELC No. 49 of 2021)*

**JUDGMENT**

1. The background of this appeal is that the Appellant moved the Subordinate Court through Plaintiff dated 16<sup>th</sup> November 2021. He joined the First and Second Respondents herein as First and Second Defendants, respectively. He also joined the Land Registrar Kakamega as the Third Defendant.
2. The Appellant averred in the Plaintiff that following a court order, the Second Respondent's husband who is since deceased was entitled to only 2.2 acres of the parcel of land known as Marama/ Shiatsala/1334 (the suit property) but instead acquired 5 acres. That the Second Respondent later acquired the suit property through succession then sold it to the First Respondent who was the registered proprietor as of the time of filing the suit. The Appellant claim was for surrender of 2.8 acres which he averred that the First Respondent was not entitled to.
3. The Appellant therefore sought judgment against the Respondents as follows:



- a. Corrections of land register in relation to land parcel N. MARAMA/SHIATSALA/1334 which currently reads 2.2 Acres to 5 acres.
  - b. A declaration that the 1<sup>st</sup> defendant is only entitled to a portion measuring 2.2 Acres as per the title he holds and the excess be registered to the plaintiff.
  - c. Costs of the suit and interests.
  - d. Any other relief that the court deed (sic) fit to grant.
4. The First and Second Respondents filed Statement of Defence and Counterclaim in which they denied that they were only entitled to 2.2 acres. They averred that the certificate of title and other documents held by the Ministry of Lands erroneously indicated the size of the suit property as 2.2 acres instead of 5.5 acres. The First Respondent averred that the Appellant wrongly entered the suit property in the year 2016, took possession of a portion of it and refused to vacate.
5. The First Respondent therefore prayed for dismissal of the Appellant's case and for judgment against the Appellant for:
- a. A permanent injunction restraining the Plaintiff whether by himself or his servants and or agents or otherwise howsoever from entering into the suit property remaining on or continuing in occupation, or interfering with the Plaintiff's enjoyment and quiet possession of the suit property.
  - b. Eviction of the Plaintiff from the suit property.
  - c. General damages and exemplary damages for trespass.
  - d. Costs and interest.
6. Upon hearing the matter, the Subordinate Court (Hon. E. Wasike, Principal Magistrate) delivered judgment on 22<sup>nd</sup> August 2023 through which it dismissed the Appellant's case and entered judgment in favour of the First Respondent by granting him orders of permanent injunction and eviction as sought in the counterclaim. He also awarded the First Respondent costs of the suit.
7. Dissatisfied with the judgment, the Appellant filed this appeal on 30<sup>th</sup> August 2023, through Memorandum of Appeal dated 29<sup>th</sup> August 2023. He did not join the Land Registrar Kakamega to the appeal. He prayed that the judgment of the Subordinate Court be set aside and be replaced with an order granting him judgment as he had sought in his Plaint.
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 fact by disregarding the evidence adduced by the appellant to prove his case.
  2. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate the fact that the Appellant had proved his case to the required legal standard, on a balance of probabilities.
  3. That the Learned Trial Magistrate erred in law and fact in failing to appreciate the fact that the Appellant was suing on behalf of the original proprietor of the suit land MARAMA/SHIATSALA/1334 by virtue of the letters of administration ad litem duly issued to him by the court.
  4. That the learned judge erred in law and fact in his determination that the 2<sup>nd</sup> respondent was entitled to 5 acres when the title deed reads 2.2 acres.



5. That the learned trial magistrate erred in law and fact by not taking into account the variation in the title deed of the suit land and the actual measurement 5 acres on the ground as verified by the land registrar.
  6. That the learned trial magistrate erred in law and fact by failing to appreciate the fact that the purported sale of land between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was a nullity in that the acreage on the ground is not the same acreage on the title deed.
  7. That the learned trial magistrate erred in law and in fact by branding the Appellant a trespasser over the suit land yet that is where he was born and brought up.
  8. That the Learned Trial Magistrate erred in law and in fact in failing to note that the Appellant is not seeking to evict the Appellants (sic) from the parcel of land which they legally own.
  9. That the Learned Trial Magistrate correctly stated that the 2<sup>nd</sup> defendants title was sacrosanct and that it was protected under section 24 and 25 of the registered land Act but failed to appreciate the fact that the excess land thereof is not protected as such.
  10. That the learned trial magistrate erred in law and in fact in not ordering for rectification of the register after ascertaining that there was a disparity in acreage of the suit land, between what is on the title deed and what is on the ground.
  11. That the learned trial magistrate erred in law and fact in relying on extraneous factors in arriving at his judgement hence occasioning a grave miscarriage of justice.
9. The appeal was argued through written submissions. The Appellant filed submissions dated 14<sup>th</sup> May 2024 through which he argued that the Learned Magistrate disregarded evidence which he adduced to the effect that a survey showed that the suit property measures 5 produced in regard particularly 2 the size of the suit acres as opposed to the 2.2 acres stated in the title documents. He added that by demonstrating the disparity in size of the suit property, he had proven his case on a balance of probabilities. That the Learned Magistrate having agreed that there was inconsistency in size, ought to have ordered rectification of the register as he had sought.
  10. The Appellant went on to argue that in the Learned Magistrate failed to appreciate that he had brought suit on behalf of the original proprietor of the suit property pursuant to letters of administration ad litem. He further argued that the sale agreement between the Respondents was null and void since it purported that the parcel sold measured 5 acres, yet the title documents stated the size as 2.2 acres. The Appellant also argued that he was a beneficiary of the estate of the original proprietor of the suit property and could not therefore be a trespasser. He therefore urged this Court to allow his appeal as prayed.
  11. On their part, the Respondents filed submissions dated 19<sup>th</sup> September 2024, through which they argued that the Appellant lacked both legal capacity to sue on behalf of the estate of his maternal grandfather and legal capacity to challenge the auction sale of 1975 pursuant to which the Second Respondent's spouse acquired title to the suit property. They argued that other heirs ranking in priority to the Appellant neither challenged the sale nor testified in support of the Appellant's case.
  12. Regarding the question of whether the Appellant is entitled to 2.8 acres from the suit property, the Respondents argued that no evidence was adduced to prove the quantum of the debt which his grandfather Masinde Wanzetse owed or to support the Appellant's contention 2.2 acres was enough to settle the debt. They argued that the Appellant offered no evidence to show that the Second Respondent's husband purchased only 2.2 acres and not the whole of the suit property.



13. Lastly, the Respondents argued that the Appellant trespassed on the suit property from the year 2016 and that the First Respondent was therefore entitled to KShs 200,000 as general and exemplary damages for trespass. Relying on several authorities which they diligently listed in a Case Digest dated 19<sup>th</sup> September 2024, they urged the Court to dismiss the appeal with costs
14. This being a first appeal, this Court's duty is to re- evaluate the evidence in the trial court both on points of law and facts and to come up with its own findings and conclusions. As the Court of Appeal held in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
15. I have carefully considered the record, the submissions by the parties and the authorities cited. The issues that arise for determination are whether the Appellant had legal capacity to sue on behalf of the estate of his maternal grandfather, whether the Appellant was entitled to the 2.8 acres and whether the First Respondent is entitled to damages for trespass.
16. There is no dispute that the First Respondent is the registered proprietor of the suit property. According to the certified copy of the register which was produced in evidence, the First Respondent became registered proprietor on 19<sup>th</sup> March 2018. The register further shows that they first registered for proprietor was Masinde Wanzetse, the Appellant's maternal grandfather.
17. It is not disputed that the Appellant holds letters of administration ad litem in respect of the estate of Masinde Wanzetse, who passed away on 6<sup>th</sup> November 2005. The Respondents argued that the Appellant lacked legal capacity to sue on behalf of the estate, basing that contention on the argument that there were other heirs of Masinde Wanzetse (deceased) ranking in priority to the Appellant and who could have obtained grant.
18. It must be remembered that the proceedings before the Subordinate Court why not for purposes of obtaining grant under the *Law of Succession Act*. All that the Appellant was required to demonstrate was that he was a legal representative of the deceased. The term "legal representative" is defined in section 2 of the *Civil Procedure Act* as meaning:

a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.
19. As the Court of Appeal held in *Trouistik Union International and Anor. vs. Mrs. Jane Mbeyu and Anor* [1993] KLR 230, legal representative means executor or administrator of a deceased person duly appointed under the *Law of Succession Act*, Cap 160. To the extent that the Appellant held letters of administration ad litem in respect of the estate of the deceased, I find that he had legal capacity to sue on behalf of the said estate.
20. It is not disputed that the deceased lost ownership of the suit property to the Second Respondent's husband through an auction sale that was conducted in 1975. A perusal of the material on record shows that the sale was conducted on 30<sup>th</sup> August 1975 by an auctioneer by the name Moses Wabuko, in execution of a decree issued against the deceased in Kakamega RMCC No. 141 of 1972. The auctioneer issued an auction certificate stating that the parcel, not a portion of it, was sold to the Second



- Respondent's husband. There are on record documents showing that a vesting order was sought for transfer of the whole of the suit property to the Second Respondent's husband.
21. The register of the suit property shows that it was transferred to the Second Respondent's husband on 9<sup>th</sup> June 1986 and that the Second Respondent became proprietor on 19<sup>th</sup> March 2018 through succession proceedings. She transferred the suit property the same day to the First Respondent.
  22. The parties agree that the register states that the size of the suit property is 2.2 acres while its size on the ground is 5 acres. A perusal of the register shows that "acres" is inserted by hand. I have also noted on record a certificate of official search dated 29<sup>th</sup> October 2021 where the size is stated as 2.2 acres. Equally, there is a report dated 20<sup>th</sup> September 2021, by the County Surveyor Kakamega, which states that the size is 2.2 hectares or 5 acres. In view of the handwritten "acres" in the register, it is not clear to me if the initial intention was to render the size in hectares.
  23. The Appellant's contention is that the auction sale entitled the Respondents to only to 2.2 acres and that the extra 2.8 acres should go to the deceased's estate. A perusal of paragraph 7 of the Appellant's plaint lays bare the Appellant's reasoning. He states therein that "... it has come to the Plaintiff's knowledge that land ... measuring approximately 2.2 Acres was enough to pay for the said debt ..." Put differently, the Appellant's case was that 2.2 acres was enough to settle decree issued against the deceased in Kakamega RMCC No. 141 of 1972. Such a contention, besides being unsupported, goes to the validity of execution proceedings in Kakamega RMCC No. 141 of 1972 and would have to be raised in the said case. Suffice it to state that the court in Kakamega RMCC No. 141 of 1972 was satisfied with the auction sale of the entire of the suit property and vested it in favour of the Second Respondent's husband. Any issues as to the size of the suit property are matters to be resolved as between the registered proprietor and the Land Registrar. On the other hand, if Masinde Wanzetse (deceased) had an issue with the auction sale conducted on 30<sup>th</sup> August 1975 and the vesting order, he ought to have raised it in RMCC No. 141 of 1972 since he remained alive until 6<sup>th</sup> November 2005. The Appellant testified that he was born in the year 1990, long after the auction sale. His challenge of the foundations of the auction and vesting order would need a firmer grounding.
  24. The First respondent is a registered proprietor of land. He is thus entitled to the rights, privileges, and benefits spelt out by the law, ranging from Article 40 of *the Constitution* to Section 24 of the *Land Registration Act*. Section 26 of the Act obligates the court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The Appellant did not present any case to warrant interference with the First respondent's proprietorship of any portion of the suit property.
  25. In view of the foregoing, I find that the Appellant was not entitled to the 2.8 acres which he claimed.
  26. In his submissions in this appeal, the First Respondent argued that he is entitled to damages for trespass. I note however that the First Respondent did not challenge the judgment of the Subordinate Court through any cross appeal. In those circumstances, he cannot seek at this stage that which he did not obtain before the Subordinate Court.
  27. In view of the foregoing discourse, I find no merit in this appeal. I dismiss it with costs to the Respondents.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 16<sup>TH</sup> DAY OF DECEMBER 2024.**



**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Anyona for Appellant

Ms Nyagol for the Respondents

Court Assistant: M Nguyayi

