



**Opondo & 3 others v Ogina (Environment and Land Appeal
4 of 2022) [2023] KEELC 16563 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16563 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 4 OF 2022
GMA ONGONDO, J
MARCH 23, 2023
(FORMERLY MIGORI ELC APPEAL NO. 7 OF 2019)**

BETWEEN

**JOSEPH OYIEYO OPONDO 1ST APPELLANT
PHILIP OUMA OPONDI 2ND APPELLANT
JOHN NDEGE OYOLO 3RD APPELLANT
RICHARD AMOLLO ABUTO 4TH APPELLANT**

AND

DOLROSE AWINO OGINA RESPONDENT

*(Being an Appeal from Judgment of Hon. Obutu (SPM) delivered on 28th
February, 2019 in Homa Bay Chief Magistrate's Court Land Case No. 52 of 2018)*

JUDGMENT

- 1) This appeal revolves around land reference number Gem/Kowuor/Kotieno/277 measuring approximately Two (2) acres in area (The suit land herein) and it is located within Homa Bay County. The same was first registered in the name of Rodi Opondi (Deceased-1) and later, in the name of Samwel Onyuka Opondi (Deceased-2).
- 2) The appeal was precipitated by the trial court's judgment delivered on 28th February 2018 where the learned trial magistrate entered judgment in favour of the plaintiff who is the respondent against the defendants, the appellants herein jointly and severally for;
 - i. A permanent injunction is hereby issued restraining the respondents jointly and severally from trespassing, selling and or interfering with the suit land belonging to the plaintiff.



- ii. An order is hereby issued compelling the respondents jointly and severally to exhume the remains of the deceased from the suit land.
 - iii. Costs of the suit to the plaintiff.
- 3) The duly lodged appeal by a memorandum of appeal dated 28th February 2019 through the firm of Aluoch Odera and Nyauke Company Advocates, lodged is founded on two grounds thus;
- a) That the court below erred in law in his judgment by failing to properly frame the issues placed before him for determination and therefore ended up addressing issues which otherwise were not in contest in the matter placed before him thus:-
 - i. The Court below failed to appreciate that the respondent did not appear before it to testify and instead allowed a non-party to testify in the proceeding in a representation capacity much against the law and the rules.
 - ii. The Court below failed to appreciate the law governing agreement and went ahead to misapprehend facts by indicating that a witness to an agreement of sale of land was also a party to the sale agreement which is contested.
 - iii. The court below did not adequately address itself to the issue regarding the fact that the person who entered into the agreement with the respondent, if any did not have the capacity to do so as the land that was being purportedly sold belonged to a deceased person whose estate had not been succeeded and which land had visibly been acquired irregularly.
 - iv. The honourable learned magistrate erred in law and in fact by failing to appreciate the fact that the parties sued were non-parties in that the deceased Samwel Onyuka Opondi's wife was present and was not sued.
 - v. The honourable Court below put itself as a sympathizer of the respondent and ignored all facts and the law governing claims against deceased persons.
 - b) The honourable magistrate was biased its judgment and in his desire to assist an undeserving party to unlawfully act outside the legal requirements and still proceed to earn from the same illegal actions.
4. Therefore, the appellants have proposed that;
- a) This appeal be allowed and the plaintiffs suit in the subordinate Court be dismissed.
 - b) That the costs of this appeal be granted to the appellant.
5. The appeal was admitted on 31st May 2021. It was transferred from Migori Environment and Land Court to this court on 1st February 2022 for hearing and determination. The same was heard by way of written submissions further to this court's directions of 7th November 2022.
6. By the appellants' submissions dated 11th January 2023, reference is made to the memorandum of appeal, section 65 (1) of the *Civil Procedure Act* Chapter 21 Laws of Kenya and brief facts including the genesis of the matter being a burial dispute ignited by the respondent who sought injunctive orders against the appellant from burying the remains of Deceased-2 in the suit land. It was submitted that the alleged sale of land agreement in respect of the suit land was invalid and that the appellants had no locus standi to be sued on behalf of deceased-2.



7. Their Counsel summarized the evidence of PW1 to PW4, relied on sections 45, 79 and 82 (iii) of the Law of Succession Act Chapter 160 of the Laws of Kenya, sections 107 and 108 of the Evidence Act Chapter 80 Laws of Kenya as well as the decision in re Estate of Charles Gungu Gwiyanga (Deceased) [2022] eKLR, among others. Counsel termed the appeal merited and urged the court to allow the same with costs to the appellants.
8. The respondent through the firm of H.Obach and Partners Advocates filed submissions dated 14th February 2023 giving facts of the matter including sale of the suit land by way of contract through deceased-2. Counsel framed two issues for determination, inter alia, validity of the contract of sale of the suit land. In analyzing the issues, counsel relied on authorities including, Garvey-vs-Richard (2011) JMCA 16 and submitted that the contract was not faulty as equitable principles were applicable in the matter. Counsel termed the appeal devoid of merit and urged the court to dismiss it with costs to the respondent.
9. At the trial court, the respondent sued the appellants by way of a plaint (Fast Track) dated 24th May 2018 and lodged in court on 25th May 2018 for a permanent injunctive relief, among other orders, against the appellants in respect of the suit land. She claimed in part, that on 13th April 2016, she bought the suit land from the 1st defendant/appellant and deceased-2. That the suit land was registered in the name of the former to hold the same in trust for his brothers including deceased-1 who was staying in the middle of the land. That deceased-2 subdivided the suit land, settled on one acre thereof and allowed the respondent to take possession of two acres but failed to transfer the same to the respondent.
10. In their statement of defence dated 7th June 2018, the appellants denied the respondent's claim and termed the purported agreement a nullity since the suit land is registered in the name of deceased-2. They prayed that the suit be dismissed with costs.
11. The respondent did not testify in the suit. Nonetheless, she called witnesses in support of her claim.
12. PW1, Veronica Atieno Ogino, the mother to the respondent stated both in examination in chief and cross examination that the trial court's proceedings were in name of the respondent who is in the United States of America (US). Further, PW1 stated that she witnessed a sale agreement between deceased-2 and the respondent but did not sign it. That deceased-2 had not taken succession proceedings in respect of the estate of his father, deceased-1.
13. PW2, John Odhiambo Guya, chief of Kotieno Location witnessed agreement dated 13th April 2016 (PEXhibit 1). He testified that the suit land was in the name of deceased-1. During cross examination, he stated, inter alia, that the owner of land was deceased and the seller was a beneficiary. That seller, the 1st appellant did not have letters of administration of the estate of the deceased and that the parties to the sale agreement agreed that the 1st appellant could file a succession cause.
14. PW3, Octavian Uhuru Konunda stated that he witnessed PEXhibit-1. Also, he told the trial court that the process of transfer of the suit land was never completed.
15. PW4, Elizabeth Akinyi Ogolla, an aunt to the respondent stated that deceased-2 sold the suit land to the respondent who fenced it, started ploughing the same and planted trees and maize thereon. That the 1st appellant was to file a succession cause as the suit land was in the name of a deceased person.
16. PW5, Spencer Ochieng Ondiegi testified that the respondent who sent her statement via email (PEXhibit 2). In cross examination, he stated that he had no authority to represent the respondent and had no proof of her telephone number.



17. PW6, Violet Lamu, Land Registrar, Homa Bay told the court that the suit land was first registered in the name of deceased-1 as it's sole proprietor and title issued on 28th November 2014. That deceased-2 presented to her, documents including chief's letter for correction of name of the proprietor. In cross examination, she stated-

“... I have discovered that Samwel is the son of Rodi Opondi. The chief gave a wrong name ...succession ought to have been done title to Samwel questionable and illegal and should be revoked...”
18. DW1, Rose Achieng Onyuka stated that she got married as the 2nd wife to deceased-2 in the year 2009, among other things. During cross examination, she stated that by the time of death of deceased-2;

“ title deed had not been issued. The land was still in the name of my grandfather in law.....”
19. DW2, John Denge Oyolo, the 3rd appellant and a cousin to Samuel deceased-1 testified that he was not aware of any sale of the suit land. In examination in chief, DW2 stated that;

“ succession had not been done. Samuel had no powers to transact on the parcel of land.....”
20. In the foregone, the issues for determination are contained in the grounds of appeal which crystallize to whether the appeal is tenable.
21. It is important to note that the trial court's findings were reached upon consideration of the parties' respective cases in brief including pleadings, testimonies, exhibits and submissions. The learned trial magistrate framed four issues for determination; as envisioned in Order 15 of the Civil Procedure Rules, 2010
22. The trial court proceeded to analyze the issues and arrived at the impugned judgment grounded on reasons; see Order 21 Rule 4 of the Civil Procedure Rules, 2010
23. Further, it is key to note that the respondent did not testify before the trial court. This is discerned in the trial court's proceedings including the testimonies of PW1, PW4 and PW5 who are her relatives and witnesses.

During cross examination, PW1 stated that she was a mere witness and her testimony was what the respondent could have told the court.
24. I bear in mind the definition of the term “Authority” in Black's Law Dictionary 10th Edition at page 158. In that regard, PW5 was emphatic in cross examination that;

“I have no authority to represent her (the respondent)....”
25. The appellant's lamentation that parties sued at the trial court were non-parties, was addressed under issue number 3 in the impugned judgment. This court is aware of Parties who may be joined as plaintiffs in a suit as provided for under Order 1 Rule 1 of the *Civil Procedure Rules*.
26. Notably, PExhibit 1 was attended to under issues (a) and (b) in the impugned judgment. The parties to the agreement reduced it into writing as the seller's thumb print and Identity Card number xxxx as well as the buyer's signature and Identity card number xxxx appear thereon.
27. Also, PExhibit 1 reveals the consideration paid to the seller by the respondent and four witnesses including PW3 signed it. So, the agreement complied with section 3 (3) of the *Law of Contract Act* Chapter 23 Laws of Kenya



28. Besides, the respondent failed to testify in the suit to verify PExhibit 1. Furthermore, I bear in mind sections 62, 107 to 110 and 143 of the Civil Procedure Act Chapter 21 Laws of Kenya.
29. In arriving at the impugned decision, the trial court noted;
- “.....I do find that the plaintiff has proved her case as per the required standards and the defendants by their conduct are estopped from denying the existing of a sale agreement between the plaintiff and the deceased.”
30. The respondent alleged in the plaint that the 1st appellant and deceased-2 sold to her two acres of the suit land registered in the name of the 1st appellant who held it in trust for his other brothers including deceased-2. Being guided by section 28 (a) of the *Land Registration Act*, 2016 [2012] and the decision in *Isack M’Inanga Kiebia v Isaaya Theun M’Lintan and another* [2018] eKLR, I find no elements of any trust discerned in the matter.
31. The estate of the deceased person is vested in the legal representative; see *Trouistik Union International and another v Jane Mbeyu and another* [1993] eKLR.
32. In the case of *Chudasama v Chudasama* [2014] KLR, the Court of Appeal held-
- “.... A litigant is clothed with locus standi upon obtaining a limited or a full grant of letter of administration in case of intestate succession”
33. So, did the 1st and deceased-2 have capacity to enter into PEXh 1 in respect of the suit land which formed part of estate of deceased? The answer is not in the affirmative as I am guided by section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya on the definition of “Legal representative” and the provisions of section 82(a) of the Law of succession Act (Cap 160).
34. The appellants asserted that the trial court’s decision was a biased decision targeted at assisting undeserving party to engage in illegal actions. This prompts the court to look at the relief sought and granted in the matter.
35. The nature of relief sought in the originating summons attracted prohibition of unlawful occupation of private land under section 152 of the Land Act, 2016 [2012]. The relief include the injunction granted by the trial court. I bear in mind the essence of injunctive relief as held in the case of *Nguruman Ltd v Jan Bonde Nielsen* [2014] eKLR
36. To that end, it is the finding of this court that grounds 1 (b) and (d) of the appeal fail while grounds 1a, 1c, 1e and 2 partly succeed.
37. Thus, this appeal succeeds in part.
38. In the obtaining circumstances, each party to bear own costs of this appeal and the court below.
39. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 23RD DAY OF MARCH 2023

G.M.A ONG’ONDO

JUDGE

PRESENT

a. Mimba holding brief for Aluoch Odera learned counsel for the appellant,



b. Mr. Ngagi holding brief for Obach learned counsel for the respondent.

c. Okello, Court Assistant.

