



REPUBLIC OF KENYA



KENYA LAW
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**Ayieko v Ogendo & another (Environment and Land Appeal
E012 of 2021) [2023] KEELC 16143 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E012 OF 2021**

E ASATI, J

MARCH 16, 2023

BETWEEN

CATHERINE ATIENO AYIEKO APPELLANT

AND

SHADRACK ANYANGE OGENDO 1ST RESPONDENT

BENJAMIN ATIENO OLIECH 2ND RESPONDENT

(Being an Appeal from the Judgement and Decree of the Hon. W.K. Onkunya given at Kisumu on the 24th Day of February, 2021 in Kisumu CM E&L Case No.190 of 2018)

JUDGMENT

Introduction

1. The appeal herein arose from the judgement and decree in Kisumu CMC E&L Case No 190 of 2018 (the suit) delivered on February 24, 2021. The Appellant Cathrine Atieno Ayieko was the Defendant in the suit. She had been sued by the Respondents herein; Shadrack Anyange Ogendo and Benjamin Atieno Oliech vide the plaint dated March 27, 2018 seeking orders of injunction restraining the Appellant from trespassing in any manner on the land parcel known as Kisumu/Bar/1893 (the suit land).
2. The Respondents' case in the suit was that they were at all material times the joint registered owners of the suit land in equal shares. That the Appellant who owns an adjacent property had trespassed onto the suit land and started cultivating it. That by reason of the Appellant's unlawful activities, they had been denied quiet and peaceful use and occupation of the suit property and that they had suffered loss and damage.
3. The Appellant filed a defence dated May 17, 2018 vide which she denied the Respondents' claim and averred that she was the legal and rightful owner of the suit land having bought the land from Joseph



- Opondo Ochieng at Kshs 16,500/- and being issued with a title deed in her name. That her activities on the suit land were not acts of trespass but that she was simply carrying out cultivation of her farm. That the Respondents had subjected her to psychological torture as they constantly threatened to evict her. She prayed that the suit be dismissed and that she be declared as the legal owner of the suit land and that the Respondents bear the costs of the suit.
4. The suit was heard before the trial court which delivered judgement in favour of the Respondents for the prayers sought in the plaint.
 5. The Appellant was aggrieved by the judgement and vide her Memorandum of Appeal dated February 12, 2021 preferred this appeal on the following grounds: -
 - a. The Learned Magistrate completely misunderstood the evidence before her, wrongly analysed the evidence and therefore came to wrong conclusion of facts and law.
 - b. The Learned Magistrate erred in law and in fact by failing to take in to consideration the irregular procedure which was followed to transfer the parcel of land Kisumu/bar/1893 from the name of Appellant to the name of Jane Adoyo Opondo (Deceased) who was not even the original owner of the said land.
 - c. The Learned Magistrate erred in fact and law by failing to take into consideration the evidence that was produced by the Appellant to show that she indeed purchased the land parcel number Kisumu/Bar/1893 and she was issued with a title deed which was only cancelled under duress and without following the due procedure.
 - d. The Learned Magistrate erred in fact and law by relying on the fact that the title which was obtained was obtained through fraud and that is the reason as to why it was cancelled yet no action was taken against the Appellant to prove the said fraud.
 - e. That the Learned Magistrate erred in fact and law by holding that the Appellant has not addressed any evidence to show which action she took to reclaim the suit property yet the Appellant provided several proofs of the actions she took such as the criminal case that she filed and citation case Number 190 of 1995 that was filed against the estate of Jane Adoyo Opondo Deceased.
 - f. The Learned Judge totally misunderstood and wrongly evaluated the evidence before the and therefore arrived at a wrong conclusion.
 6. She prayed for orders in this appeal that the appeal be allowed, the court be pleased to reassess and re-appreciate the evidence afresh and to arrive at independent conclusion and that the Appellant be awarded the costs of the appeal.

Submissions

7. The appeal was urged by way of written submissions. The Appellant's written submissions were filed by the firm of Otieno & Achieng Advocates on her behalf. No submissions were filed by the Respondents. Counsel for the Appellant in his written submissions formulated 3 issues as the issues for determination in the appeal namely;
 - a. Whether the Respondent was entitled to the land parcel No Kisumu/Bar/1893.
 - b. Whether the Respondents were entitled to the suit parcel of land.
 - c. Whether the Appellant provided any proof to show that she took steps in time to regain back her parcel of land Kisumu/Bar/1893.



8. On the first issue of whether the appellant was entitled to the suit land, Counsel submitted that the Appellant demonstrated that she was once the registered owner of land parcel No Kisumu/Bar/1893 and had purchased the same from Joseph Opondo deceased. That she obtained consent from the Land Control Board which she produced as exhibit. That she produced the copy of the agreement to confirm sale. That she obtained title deed which was later cancelled by the Land Registrar under the watch of the DCI after which the land was transferred to the name of one Jane Adoyo Opondo without following the due process.

That she proved that after cancellation of the title, she (the Appellant) made steps to get the land back by filing citation proceedings against the estate of Jane Adoyo Opondo and also lodged a criminal case. Counsel concluded on this issue that the Appellant having obtained her title lawfully is entitled to the suit parcel of land.

9. On the second issue of whether or not the Respondents were entitled to the suit parcel of land, Counsel submitted that it was after the Respondents did succession to the Estate of Jane Adoyo Opondo that they obtained title. That since Jane obtained title by fraud, the title obtained by the Respondents could be challenged under Section 26 of the *Land Registration Act*.

That the right to property under Article 40 of *Constitution of Kenya, 2010* does not extend to any property that has been found to have been unlawfully acquired and that to uphold such title, the court would be encouraging an illegality.

10. On the 3rd issue of whether the Appellant provided proof that she took steps in time to regain back her parcel of land number No Kisumu/Bar/1893, Counsel submitted that soon after cancellation of the title, the Appellant lodged a complaint with her lawyers who wrote a letter to Jane's husband demanding for the title deed for purposes of transfer back to the Appellant. That she filed a citation No 190 of 1995 in order to site the estate of Jane Adoyo for fraud and placed a caution on the title. That the Respondents are hence entitled to the land.

Issues For Determination

11. The court adopts the issues framed by the appellant's counsel as the issues for determination herein namely:
- d. Whether the Respondent was entitled to the land parcel No Kisumu/Bar/1893.
 - e. Whether the Respondents were entitled to the suit parcel of land.
 - f. Whether the Appellant provided any proof to show that she took steps in time to regain back her parcel of land Kisumu/Bar1893.

Analysis and Determination

12. This being a first appeal, the court reminds itself of the duty to re-assess and examine the evidence placed before the trial court so as to come to independent conclusion.
13. The court has been invited to reassess and re-appreciate the evidence produced. This I will do as I discuss each of the issues for determination.
14. On whether or not the Appellant was entitled to the suit land, the trial court held that by the Defendants' (Appellant's) own admission, she transferred the suit land to Jane Adoyo Opondo and hence is currently not in possession of title to the land. The Appellant alleged that she had done the transfer under duress by the CID and the Land Registrar. It is however important to note that the Appellant has never taken any step against the CID or the Land Registrar. The steps that she claims to



have taken were all targeted at Jane Adoyo Opondo, deceased and her estate. There is no evidence of any suit against the Attorney General on behalf of the CID or the Land Registrar.

15. Secondly, the Appellant has never taken any steps for recovery of the suit land from the Respondents since she realized that the same is in their names. Even in the suit in the lower court, she only denied the Respondent's claim. Looking at the documents she produced in the Lower Court as exhibits, the relevant documents to prove her claim could be the ones that explain how she acquired the land including land sale agreement, Consent of the Land Control Board and transfer forms duly executed by the registered owner in her favour. These documents were not produced.
16. The agreement referred to in Counsel for the Appellant's submissions is not one of the documents listed in the Appellant's list of documents dated May 17, 2018 which contained 20 items in the bundle of documents filed in court.

However, the proceedings show that DW2 produced on behalf of the Appellant as defence exhibit D21 copy of agreement for sale of land dated 16/6/1989. When DW2 was referred to the same exhibit D21 during cross examination, he responded;

“It was in regard to land parcel 1855. It states that Mr. Joseph Opondo Ochieng sold part of piece of land No 1855 at Kshs16,500 to Ms. Catherine Atieno According to the agreement, Joseph Opondo sold part of the land”.

From the record, land parcel No 1855 was the original parcel from which the Appellant bought a piece of land. After the agreement, it was subdivided to produce the suit land and the portion bought by the appellant registered in her name as parcel No KISUMU/BAR/1894. The Respondents acknowledged that parcel No 1894 belonged to the appellant because she bought it.

DW.2 also stated in cross-examination that;

“I don't have an agreement for purchase of part of 1893 by my mother.”

DW.2 was the son of the Appellant.

17. Consent of Land Control Board was not produced. Exhibit D14 was an application form for consent of the Land Control Board. Perusal of the said exhibit shows that the same was not complete as there was no evidence on it to show that the same had been received or registered at the relevant Land Control Board. No transfer form was produced to demonstrate lawful transfer of the suit land to the Appellant.
18. On the 2nd issue of whether or not the Respondents were entitled to the suit land, as at the time of her death, Jane Adoyo Opondo was the registered owner of the suit land. There is no dispute that the Respondents were her remaining immediate relatives and hence undertook succession to her estate. There is no evidence that the Appellant has ever challenged the succession proceedings. The Respondents obtained registration of the suit land in their names through the successions process. The title they hold is, under the provisions of Section 26 of the *Land Registration Act*, prima facie, a good title.
19. On the last issue of the steps taken by the Appellant to recover the land, the same has been adequately addressed in determining issues number 2 and 3 here.
20. Having determined that the evidence placed before the court proved that the Respondents were entitled to the suit land and did not support the appellant's claim, I find no reason to interfere with the decision of the trial court as the same was in accordance with the evidence. I find that the trial court did not err in its evaluation of the evidence or in its final decision. I find that the appeal lacks merit.



21. As provided in section 27 of the *Civil Procedure Act*, costs follow the event and I find no reason to exercise my discretion to order otherwise.
22. In conclusion, on the basis of the findings herein, I dismiss the appeal and award costs of the appeal to the respondents.
23. Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 16TH DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

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E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Miss Otieno for the Appellant.

No appearance for the Respondents.

