



**Odira v Mwai & another (Environment and Land Appeal E007 of 2021)  
[2023] KEELC 17159 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17159 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E007 OF 2021  
GMA ONGONDO, J  
APRIL 27, 2023**

**BETWEEN**

**BONFACE ODHIAMBO ODIRA ..... APPELLANT**

**AND**

**SIPRIANO ODIRA MWAI ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY LAND REGISTRAR, HOMA BAY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Honourable T. Obutu (SPM) delivered on 16th September 2021 in Homa Bay Chief Magistrate's Court Environment and Land Case number 008 of 2020)*

**JUDGMENT**

1. The present appeal emanated from the trial court's judgment delivered on 16<sup>th</sup> September 2021 where the learned magistrate held that the plaintiff who is the 1<sup>st</sup> respondent herein, had proved his case against the 1<sup>st</sup> and 2<sup>nd</sup> defendants who are the appellant and the 2<sup>nd</sup> respondents respectively herein as required by law.
2. In the result, the court entered judgment for the 1<sup>st</sup> respondent against the appellant and the 2<sup>nd</sup> respondent as follows;
  - a. A declaration that the transfer of the entire land parcel No Kanyada/Kalanya/6360 and the subsequent registration of the same to the 1<sup>st</sup> defendant's name was fraudulent and hence illegal and therefore null and void.
  - b. That this honourable court therefore revokes the title deed of land parcel No Kanyada/Kalanya/6360 which is in the name of the 1<sup>st</sup> defendant.
  - c. An order for rectification of the register directing the County Land Registrar Homa Bay County to rectify the register in respect of land parcel No Kanyada/Kalanya/6360 by



cancelling the name of the 1<sup>st</sup> defendant from there and replacing it with that of the plaintiff Sipriano Odira Mwai and title deed issued in his name is hereby granted.

- d. Costs of the suit to the plaintiff.
3. The appellant commenced the appeal by way of a memorandum of appeal dated 13<sup>th</sup> August 2021 and filed herein on 14<sup>th</sup> October 2021 through the firm of Oscar Otieno and Company Advocates based on the grounds *infra*;
    - a. That the learned magistrate erred in law and granted himself jurisdiction to decide the suit on an issue that had not been pleaded by the parties.
    - b. The learned magistrate completely misapprehended the law and the circumstances of the case thereby coming to the wrong conclusion.
    - c. That the learned magistrate erred in law and misdirected himself as relates and/or in the interpretation of the provisions of Section 26 of the *Land Registration Act*, 2012.
    - d. That the learned magistrate misdirected himself and erred in law in failing to appreciate the issues for determination before the court as filed and as submitted by the parties.
    - e. That the learned magistrate erred in law by making findings and holdings that were not raised as issues in the pleadings.
    - f. The learned magistrate erred in fact and in law in failing to enter judgment in favour of the 1<sup>st</sup> respondent, based on the merits of the 1<sup>st</sup> respondent's case.
    - g. The learned magistrate erred in fact and in law in failing to consider the evidence placed by the plaintiff.
    - h. The learned magistrate erred in fact in holding that there was misrepresentation in the transfer of title in respect of land parcel No Kanyada/K/Kalanya/ 6360 (The property in dispute herein)
  4. On that account, the appellant has sought the following orders;
    - a. That the appeal be allowed.
    - b. That the judgment of the learned magistrate be set aside.
    - c. That the costs of the appeal and of the lower court be granted to the appellant.
  5. The appeal was heard the appeal by way of written submissions further to this court's directions given on 13<sup>th</sup> June 2022.
  6. By the submissions dated 18<sup>th</sup> October 2022 and filed in court on 24<sup>th</sup> October 2022, learned counsel for the appellant stated the factual background of the case inclusive of the origin of the property in dispute being a sub division of land reference number Kanyada/K/Kalanya/3379, one of the properties registered in the name of the 1<sup>st</sup> respondent. Counsel framed four issues for determination including whether the learned trial magistrate completely misapprehended the law and the circumstances of the case and specifically Section 26 of the *Land Registration Act*, 2012 thereby coming to a wrong conclusion. Counsel discussed the issues and concluded that the evidence of the 1<sup>st</sup> respondent did not meet the threshold for impeachment of the title in question.
  7. To fortify the submissions, counsel relied upon Sections 26 (1) and 80 of the *Land Registration Act* (*supra*) alongside *Bullen and Leake & Jacobs, Precedence of Pleadings* 13<sup>th</sup> Edition at page 427, Sections



- 107, 109 and 112 of the *Evidence Act* Chapter Laws of Kenya and the *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 17 at paragraphs 13 and 14. Also, *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi and another* (2005) 1 EA 334, *Vijay Morjaria v Nasingh Darbar and another* (2000) eKLR and *Jephter O. Opande v Mary Atemo Gathiriga* (2019) eKLR, among other authoritative pronouncements, were cited in the submissions.
8. In the submissions dated 19<sup>th</sup> October 2022 through the firm of Everlyne Kuke and Company Advocates, the 1<sup>st</sup> respondent referred to the parties' respective pleadings, the judgment rendered by the trial court, the grounds of appeal and identified a single issue for determination namely whether the certificate of title in respect of the land in dispute, was fraudulently obtained and or a forgery. Counsel discussed the issue in the affirmative in view of the 1<sup>st</sup> respondent's evidence on record to the effect that there was misrepresentation thereof on the part of the defendants.
  9. In support of the submissions, counsel relied on the *Black's Law Dictionary* regarding the definition of "Fraud" and the decision in *Gichinga Kibutha v Caroline Nduku* (2018) eKLR. Further, counsel cited Sections 24 and 26 of the *Land Registration Act*, 2016 (2012) and the case of *Josephine Mwikali Kikenye v Omar Abdalla Kombo and another* (2018) eKLR therein.
  10. The 2<sup>nd</sup> respondent did not file submissions in the instant appeal.
  11. In the foregone, the issues for determination in this appeal are as captured in the grounds of appeal which boil down to whether;
    - a. The trial court erred in law in entertaining issues not raised in the parties' respective pleadings,
    - b. The learned trial magistrate misdirected himself as relates to and or interpretation of Section 26 of the *Land Registration Act*, 2016 (2012)
    - c. The appellant is entitled to the orders sought herein.
  12. It must be borne in mind that the appellate court has the mandate to review the evidence of the trial court with caution to determine whether the conclusion originally arrived at upon that evidence, should stand; see *Watt v Thomas* (1947) 1 ALL ER 482 and *Ephantus Mwangi and another v Duncan Wambugu* (1984) eKLR.
  13. As regards the first issue, in the plaint dated 11<sup>th</sup> November 2020 at paragraph 11, the 1<sup>st</sup> respondent set out particulars of fraud on the part of the appellant and 2<sup>nd</sup> respondent. At paragraph 8 of his statement of defence dated 18<sup>th</sup> November 2020, the 1<sup>st</sup> defendant/appellant denied the particulars as alleged in the plaint.
  14. Indeed, parties are bound by their pleadings ; see *Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule* (2014) eKLR.
  15. Furthermore, in *Odd Jobs v Mubia* (1970) EA 476, Duffus, P held, inter alia;

“ ....a court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties.”
  16. The 1<sup>st</sup> respondent sought any other or further relief in the plaint. The same is shown as prayer (e) at the foot thereof and the court had the discretion to address the same.
  17. Clearly, the learned trial magistrate set out the orders sought in the plaint on the face of the judgment, analyzed the issues for determination and granted the orders accordingly.



18. On the second issue, Section 26 of the *Land Registration Act*, 2016 (2012) provides for certificate of title of a proprietor and the same may be challenged on grounds of fraud and misrepresentation. It is trite that allegations of fraud must be distinctly pleaded and proved; see *Kinyanjui Kamau v George Kamau* (2015) eKLR.
19. PW1, the 1<sup>st</sup> respondent stated that he didn't sell the suit land to his son, the appellant who secretly transferred the whole suit land to himself. PW2, Felix Odhiambo, the county surveyor Homa Bay and PW3, Simon Barak Odira stated that the appellant transferred the land on 14<sup>th</sup> May 2019. According to PW4 (I think court meant DW1), the appellant confirmed the fact of registration in his name. Rose Were Odira (DW2) stated that when land was given to the appellant by PW1, no person was present.
20. I subscribe to *Black's Law Dictionary* (*supra*) pertaining to the meaning of the term "Fraud" as cited in the case of *Abiero v Thabiti Finance Company Ltd and another* (2001) KLR 496; See also *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742.
21. In the case of *Marigi v Muriuki* (2008) 1 KLR (G & F) 1073 at 1077/78, it was held the registered owner of the suit property is still alive, his property is not yet available for distribution among his wives and children except if he personally on his own free will decide to subdivide and distribute it among them. Evidently, PW1 did not transfer the whole suit land to the appellant on his own volition.
22. The trial court noted that PW1 was not aware that he was transferring the whole land to the appellant who subsequently refused to attend meeting after report was made to the area chief. The transfer by the 1<sup>st</sup> respondent was made by mistake as DW1 misled him. PW1 had other sons and purchasers who were already in occupation of the suit land. Therefore, PW1 proved his claim against DW1 to the requisite standards.
23. As regards the third issue, it is my considered view that the trial court's findings were in accordance with the evidence and the relevant legal principles. I proceed to endorse the impugned judgment accordingly.
24. To that end, the appellant does not deserve the orders sought in the memorandum of appeal. The instant appeal is devoid of merit.
25. *A fortiori*, this appeal is hereby dismissed with costs of the appeal and the court below to be borne by the appellant.
26. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 27<sup>TH</sup> DAY OF APRIL 2023**

**G. M. A. ONGONDO**

**JUDGE**

Present

1. Mr. M. Migele holding brief for Otieno, learned counsel for the appellant
2. Ms. Okong'o holding brief for Kuke, learned counsel for the 1<sup>st</sup> respondent
3. Terrence and Edith, Court Assistants

