



Ochieng & another v Olima (Suing as the legal representative of Caleb Olima Okothe (Deceased) (Environment and Land Appeal E042 of 2021) [2023] KEELC 18020 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 18020 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E042 OF 2021**

**MN KULLOW, J
MAY 31, 2023**

BETWEEN

ROSE TAU OCHIENG 1ST APPELLANT

LEONARD ENZOVELI LEVI 2ND APPELLANT

AND

MAURINE AWUOR OLIMA (SUING AS THE LEGAL REPRESENTATIVE OF CALEB OLIMA OKOTHE (DECEASED)) RESPONDENT

JUDGMENT

1. This Appeal emanates from the Judgment and Decree of Hon. M. Obiero delivered on October 7, 2021 in Migori CMELC Case No. E030 of 2020, in which the plaintiff's claim against the Defendants was allowed as prayed. The grounds in the Memorandum of Appeal dated October 18, 2021 are as follows: -
 - i. The Honourable Trial Magistrate erred in law and fact in directing that the 1st appellant does transfer of Plot No. 24B to the respondent yet the said Plot is registered in the name of the deceased and Succession has not been done.
 - ii. The Learned Magistrate erred in law and fact by holding that the Respondent is entitled to the contested subject property Plot No. 24B as a whole.
 - iii. The Learned Magistrate erred in law and facts by misdirecting himself in holding that the Respondent is entitled to Plot No. 24B as a whole.
 - iv. That the Trial Magistrate erred in law and facts by holding that the Respondent is entitled to the whole Plot No. 24B yet the respondent in her pleadings had sought for a portion in Plot No. 24B.



- v. The Learned Magistrate erred in law and facts by ignoring the evidence of the Appellants and their witnesses.
 - vi. That the Learned Magistrate erred in law and fact by failing to establish the case on a balance of probability.
 - vii. The Learned Magistrate erred in law and fact by not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellants.
 - viii. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered, thereby arrived at a decision which is erroneous.
2. Consequently, the Appellants prays for judgment against the Respondent and for the grant of the following Orders;
- a. The judgment and Decree of the subordinate court be set aside and be substituted with a proper finding for Orders sought by the Respondent as against the appellants.
 - b. The Honourable Court be pleased to make any other or further order as may be just and expedient in the circumstances.
 - c. Costs of the Appeal be awarded to the Appellants.
3. A brief background to bring the Appeal into perspective is that; the plaintiff/ respondent instituted the suit vide a Plaint dated 14.12.2020 against the Defendants /Appellants; seeking an order of Specific Performance, Permanent Injunction restraining the defendants from interfering with her quiet possession and ownership and that of her tenant upon ¼ portion of Plot No. 24 within Oyani Maasai Center, also known as Plot No. 24B.
4. It was her claim that the 1st Defendant entered into an agreement with her late husband Caleb Olima, for the sale of a ¼ portion of Plot No. 24 sometimes in the year 2007. Her husband paid the purchase price in full and thereafter took immediate possession thereof and started carrying out business and letting other parts out.
5. It was her contention that sometimes in October 2020, the 1st defendant in utter breach of their Agreements illegally sold the suit plot to the 2nd defendant and who has since threatened them with eviction.
6. The defendants/appellants in response to the Plaint filed a Joint Statement of Defence dated 05.01.2021. The 1st defendant admitted having sold a portion of the suit plot but denied that the plaintiff's husband Caleb Olima developed the said portion. The 1st defendant further maintained that he lawfully sold the remaining portion of Plot No. 24B to the 2nd defendant. They further denied the allegations of eviction made by the Plaintiff and urged the court to dismiss the suit with costs.
7. The suit was heard and judgment was delivered on the October 7, 2021, whose effect was to allow the Plaintiff's claim as prayed against the Defendants hence the instant Appeal.
8. On February 22, 2023, directions were taken and by consent Parties agreed to have the Appeal canvassed by way of written submissions, to be filed and exchanged within 14 days. Both parties filed their rival submissions and authorities which I have read and taken into account.



Appellant's Submission

9. The Appellants' counsel framed 3 issues for determination; on the first issue, Counsel submitted in the affirmative pursuant to the provisions of section 7 of the *Limitation of Actions Act*, but maintained that the Respondent did not pursue her claim under adverse possession. He further submitted that the fact that the Respondent was in occupation of the disputed portion did not mean that the 1st appellant had abandoned possession of her plot.
10. On the second issue, counsel submitted that the 1st Appellant divided the suit plot into 2 portions; she sold a ¼ portion to the Respondent's husband and later sold the remaining portion measuring 25 *55 Ft to the 2nd appellant. Pursuant to the said sale, the 2nd appellant was issued with title to the said portion by the County Government of Migori and he is therefore the registered proprietor. It was their contention that since the court did not cancel the Plot Card issued in favor of the 2nd Appellant, an order of permanent injunction could not issue in the circumstances.
11. On the final issue; it was counsel's submission that the evidence of DW4 confirmed that the subject plot was registered in the name of one Joseph Ochieng Owuor, the 1st Appellant's husband and who was since deceased and no letters of administration had been issued before the sale of the plots. Therefore, the trial court erred in bestowing ownership to the Respondent whereas the suit plot had not been subjected to succession.
12. They relied on the case of *Joseph Macharia Kairu v Kenneth Kimani Muiruri* Murang'a ELC No E003 of 2021 (OS) and *Alfred Welimo vs Mulaa Sumba* CA No. 186 of 2011 in further support of their case.

Respondent's Submissions

13. The respondent's counsel submitted on one issue; whether the Appeal was merited. It was counsel's submission that the Appellants admitted before the trial court that the respondent's husband, Caleb Olima Okothe validly purchased a portion of the suit plot in the year 2007 and a sale agreement was prepared to that effect. Pursuant to the said sale, the said Caleb Olima took possession of the said plot and developed the same.
14. He therefore maintained that Caleb Olima Okoth having been a first buyer, he was put into possession and he proceeded to develop his portion and the second sale to the 2nd appellant made on the 09/09/2020, claiming the same portion purchased and developed by the Respondent's deceased husband, was fraudulent.
15. Regarding the claims made by the appellants that the suit plot is subject to Succession Proceedings; counsel submitted that the plot in question is owned by the County government of Migori, which is in charge of regulations and allotment and the 1st appellant's husband was merely an Allottee thereof. Thus, there was no requirement for a Grant of Representation in respect of such plot since ownership does not pass to any Allottee but is reserved by the county government.
16. I have looked at the grounds of Appeal and it is my considered opinion that the main issue arising for determination is whether this Court should interfere with the exercise of discretion by the trial court by setting aside and substituting its judgment delivered on November 25, 2020 and I will proceed to discuss the same on account of;
 - i. Whether the Record of Appeal as filed is incomplete and hence incompetent.
 - ii. Whether the Appeal is merited and the Appellants are entitled to the reliefs sought in the Memorandum of Appeal.



17. This court’s jurisdiction and duties as a first appellate court have been outlined in section 78 of the [Civil Procedure Act](#) and the same includes to reevaluate, reassess and reanalyze the evidence or issues which were before the trial court and make its own conclusion. This position was reiterated by the Court of Appeal in *Selle v Associated Motor Boat Co.* [1968] EA 123) the Court of Appeal held as follows: -

“this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

Whether the Record of Appeal as filed is incomplete and hence incompetent.

18. Even though the Respondent did not challenge the competency of the Record of Appeal, this court is under a duty to ensure that the Record of Appeal as filed is complete before it can proceed to determine the Appeal on merit. Where a required document lacks in the Record of Appeal and no sufficient explanation has been given by the Appellants for the omission, the same amounts to a ground for striking out the Record of Appeal.
19. Order 42, Rule 13(4)(f) of the *Civil Procedure Rules*, 2010 provides the contents of the Record of Appeal as follows;

- “(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
- (a) the memorandum of appeal;
 - (b) the pleadings;
 - (c) the notes of the trial magistrate made at the hearing;
 - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other



than those specified in paragraphs (a), (b) and (f).”

20. The Supreme Court in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR in addressing the contents of a Record of Appeal held as follows at paragraph 41:

“Without a record of appeal, a court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

21. The Supreme Court in the *Bwana case (supra)* referred to its earlier decision in *Law Society of Kenya v Centre for Human Rights and Democracy & others*, Supreme Court Petition No. 14 of 2013 at paragraph 38 thereof and stated that;

“.... [38] The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

22. Guided by the Supreme Court decisions above; I have carefully reviewed the Appellants Record of Appeal dated 20/12/2021 and the Supplementary Record of Appeal dated 17/8/2022. I have noted that at page 28 of the record of appeal dated 20/12/2021, the same only indicates the close of the Plaintiff’s case and starts with the testimony of DW1 Rose Tali Ochieng. The Plaintiff’s testimony and that of her witnesses has not been included either by omission or by sheer negligence whereas there is a certified copy of the complete proceedings in the trial court file. In view of the foregoing, I find that the Record of Appeal as filed is incomplete and the same is therefore incompetent.
23. In conclusion, I accordingly find that the Appeal and the Record of Appeal is incompetent and the Memorandum of Appeal dated October 18, 2021 is hereby Struck Out with costs to the respondent. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI 31ST MAY, 2023.

MOHAMED N. KULLOW

JUDGE

In presence of; -

Nonappearance for the Appellants

Mr. Kisera for the Respondent

Court Assistants- Tom Maurice/ Victor

