



**Odumba v Mingo (Environment and Land Appeal E016 of 2022)
[2023] KEELC 17715 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17715 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E016 OF 2022
GMA ONGONDO, J
MAY 30, 2023**

BETWEEN

SAMWEL OGENO ODUMBA APPELLANT

AND

CARINA AUMA MINGO RESPONDENT

*(An appeal from the judgment of the Chief Magistrate's Court at Homa-Bay Law Courts
(Hon. J. Nange'ea), delivered on the 27th day of April 2022 in ELC case No. 24 of 2020)*

JUDGMENT

1. The instant appeal radiates from the judgment of the learned trial magistrate, Hon J M Mukut (CM) where he held in part;
 - a) The plaintiff/appellant unlawfully obtained registration of the suit land, Kochia/Kamenya/4261 and that he had not proved his claim on a balance of probability, hence dismissed the suit with costs.
 - b) The respondent/defendant had proved her counter claim on a balance of probability.
2. In the result, the trial court entered judgment for the respondent against the appellant on the counter claim as follows;
 - a. Declaration that the Counter Claimer is the lawful and legitimate proprietor plot No. Kochia/Kamenya /No. 4261 by way of prescription and adverse possession since 1977 and/or a declaration that the Plaintiff obtained the title thereto by way of fraud and misrepresentation of facts to the land adjudication Committee.
 - b. The plaintiff's title to the suit land is hereby cancelled and the plaintiff is ordered to execute necessary documents for transfer of the suit land in favour of the plaintiff within 14 days of the



date hereof. In default, the Court Administrator is directed to execute the transfer documents to enable registration of the defendant as owner of the suit land.

- c. A permanent injunction issues restraining the plaintiff either by himself, agents, servants and/or anyone claiming under him from alienating, trespassing onto, cultivating, building on, interfering with the defendant's /counter claimer's occupation and/or peaceful development of the suit land or any portion thereof.
 - d. The costs of the counterclaim shall be borne by the plaintiff.
3. The appellant, Samwel Ogeno Odumba is represented by the firm of Aluoch Odera, Nyauke and Company Advocates.
 4. The respondent, Carina Auma Mingo appears in person herein.
 5. This appeal was commenced by way of a memorandum of appeal dated 27th April 2022 and lodged in court on even date premised upon the grounds thus;
 - a) The Honourable Magistrate misdirected himself on the application of the law of adverse possession as there was no evidence to support the said issue of adverse possession neither was adverse possession pleaded at all by the respondent.
 - b) The Learned Trial Court misdirected himself in holding that the Appellant acquired the suit parcel of land fraudulently when fraud was not proved as by law required.
 - c) The Learned Trial Magistrate failed to appreciate that the Appellant's title was emanating from first registration and without attacking the adjudication process, then there was no basis for using the Appellant to transfer the said parcel of land to the Respondent.
 - d) The judgment of the trial Court was based on no known legal provisions of the law, is null and void to the extent that the said judgment offends the law.
 - e) The Trial Court harshly went overboard by requiring the Appellant to produce witnesses who were long dead.
 - f) The Learned Trial Magistrate thus misdirected himself on several matters of facts all law.
 6. Therefore, the appellant prays that;
 - a) That entire subordinate court's judgment to be quashed and set aside.
 - b) Costs of this Appeal and the costs in the subordinate court be provided in favour of the Appellant.
 7. The appeal was heard by written submissions pursuant to this court's orders and directions of 31st October 2022.
 8. In the appellant's submissions dated 2nd February 2023, there is a brief highlight of the case including pleadings, hearing of the original suit and framed an issue for determination namely whether the appeal has merit. He referred to the evidence on record and stated that he is the registered owner of the suit land as shown in the certificate of official search. That the respondent failed to give the particulars of the alleged fraud or give evidence in support of the allegations.
 9. Learned counsel for the appellant cited section 26 (1) of the [Land Registration Act](#), 2016 (2011) and [Everline Karibu-vs-M'Chabari Kinoro \(2022\) eKLR](#), among others, to reinforce the submissions. So,



- counsel beseeched this court to find that the appeal is meritorious and that the same be allowed with costs of the appeal and the original suit to the appellant.
10. In her submissions dated 12th April 2023, the respondent stated brief facts of the case and in particular, the grounds of appeal which she opposed and delineated five issues for determination including whether the trial court was only bound to determine only those issues specifically pleaded and prayers sought therein as well as whether the respondent sufficiently proved the allegations of fraud in the case. She discussed the issues in favour of her counter claim concluded before the trial court.
 11. Furthermore, the respondent submitted that the appellant failed to prove that he acquired the suit land from his father. That the appellant's certificate of title to the suit land was acquired fraudulently and she relied on *Gitobu Imanyara and 2 others-vs-Attorney General (2016) KLR*, *Selle and another-vs-Associated Motor Boat Co. Ltd and others (1968) EA 123*, *Odd Jobs v Mubia (1974) EA 476*, Sections 26 (1) and 29(3) of the *Land Adjudication Act* and section 109 of the *Evidence Act* Cap 80 Laws of Kenya, to buttress the submissions. She termed the impugned judgment merited and urged this court to dismiss the appeal with costs to the respondent.
 12. Notably, the appellant mounted the original suit by way of a plaint (Fast Track) dated 29th June 2020 for;
 - a. An order of eviction and injunction to issue against the defendant over land parcel Number Kochia/Kamenya 4261.
 - b. Costs of suit from the date of ruling this suit until payment in full.
 13. The summary of the appellant's case before the trial court is that in the year 2017, the respondent commenced cultivation of the appellant's suit land which was still under adjudication but now registered. That the respondent's actions thereon were annoying, unlawful and delaying the appellant's peaceful use, occupation and enjoyment of the suit land. The appellant (PW1) testified, called no witnesses and relied on a copy of certificate of official search in respect of the suit land and a copy of Judgment rendered in Homa Bay CMCC EL Case No. 25 of 2018 on 29th July 2019 being PExhibits 1 and 2 respectively.
 14. By her statement of defence and counter claim dated 27th July 2020, the respondent denied the appellant's claim and asserted that the suit land belongs to her husband, Samwel Mingo Migun (Deceased) and that the appellant obtained its registration by fraud and misrepresentation during adjudication process. That she has utilized it since 1977 to-date, a period in excess of 42 years.
 15. So, the respondent implored the court to dismiss the suit and enter judgment for her as follows;
 - a. Declaration that the Counter Claimer is the lawful and legitimate proprietor plot No. Kochia/Kamenya/No. 4261 by way of prescription and adverse possession since 1977 and/or a declaration that the Plaintiff obtained the title thereto by way of fraud and misrepresentation of facts to the land adjudication Committee.
 - b. The plaintiff's title to the suit land is hereby cancelled and the plaintiff is ordered to execute necessary documents for transfer of the suit land in favour of the plaintiff within 14 days of the date hereof. In default, the Court Administrator is directed to execute the transfer documents to enable registration of the defendant as owner of the suit land.
 - c. A permanent injunction issues restraining the plaintiff either by himself, agents, servants and/or anyone claiming under him from alienating, trespassing onto, cultivating, building on,



interfering with the defendant's /counter claimer's occupation and/or peaceful development of the suit land or any portion thereof.

- d. The costs of the counterclaim shall be borne by the plaintiff.
 - e. Such further and/or other relief as the Honourable Court may deem fit and expedient.
16. The defendant (DW1) testified at the suit land and relied on her statement dated 27th July 2019 as part of her evidence and called no witness. She stated, inter alia, that the appellant wrongly acquired the suit land and pointed at its physical location. Also, she stated that she cultivates the suit land and identified maize seedlings growing on part of the same.
 17. In his reply to defence and defence to counter claim dated 28th August 2020, the appellant denied the respondent's statement of defence and reiterated the averments in the plaint. He denied the counter claim and stated, inter alia, that the respondent's counter claim is unfounded, illegal, false, annoying, a hindrance and intended to dispossess the appellant of the suit land. He prayed that the defence and counter claim be dismissed and judgment be entered in his favour as per the plaint.
 18. In reaching the finding, the learned trial magistrate opined that the respondent's evidence had not been sufficiently rebutted and that she had been utilizing the suit land for a very long time. That the appellant falsely and fraudulently obtained registration of the suit land in his name.
 19. In the foregone, the issues for determination herein are as captured in the grounds of appeal which boil down to whether;
 - a. This appeal is tenable. and,
 - b. Based on issue (a) hereinabove, the orders to grant to meet the ends of justice.
 20. It is important to note that the suit land is registered in the name of the appellant as revealed at paragraph 3 of the plaint and his statement in paragraph 2. In examination in chief, PW1 was emphatic that;

“the land is still mine and is now registered in my name.....”
 21. At paragraphs 4, 14 and 16 of the statement of defence and counter claim, DW1 stated that the suit land is registered in the name of PW1. Indeed, the registration thereof is disclosed on the face of the statement of DW1 which forms part of his evidence.
 22. Furthermore, the suit land is registered in the name PW1 with effect from 29th June 2018 and title deed was issued on the same date as discerned in PExhibit 1. The learned trial magistrate noted that PW1 tendered PExhibit 1, showing that he is the registered owner of the suit land.
 23. This court is conscious of sections 24, 25 and 26 of the *Land Registration Act*, 2016 (2012) in respect of interest conferred by registration, rights of a proprietor and the certificate of title such as conclusive evidence of proprietorship respectively. Besides, the latter section provides that such certificate including the one issued to PW1 as shown in PExhibit 1, may be challenged on grounds of fraud or misrepresentation; see also *Kuria Kiarie and 2 others-vs-Sammy Magera* (2018) eKLR.
 24. The respondent alleged that PW1 obtained registration of the suit land by fraud and misrepresentation. She pleaded the same at paragraph 15 of the counter claim. In any event, I bear in mind Article 159 (2) (d) of *the Constitution* of Kenya, 2010 and section 19 (1) of the *Environment and Land Court Act*, 2015 (2011) that justice shall be administered without undue regard to procedural technicalities.



25. In examination in chief, DW1 stated that PW1 wrongly acquired the suit land. This assertion was not challenged by DW1 during cross examination hence it is cogent and steadfast herein.
26. Article 40 (1) of *the Constitution* of Kenya, 2010 stipulates that every person has the right to acquire and own property of any description and in any part of Kenya subject to Article 65 thereof. Nonetheless, the same Article, 40 (6) reads;

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”
27. As correctly pointed out by the learned trial magistrate, PW1 didn’t call his father or any other witness in support of his acquisition of the suit land. It is crystal clear that sections 107 to 110 of the *Evidence Act* Chapter 80 Laws of Kenya set out the burden of proof in such cases but the appellant failed to discharge the said burden.
28. At paragraph 16 of the counter claim, DW1 claimed that she has been using the suit land since 1977 and in particular, her son has been in occupation of part of the same for over 14 years. This is reinforced by her statement which forms part of his evidence.
29. PW1 testified that DW1 still cultivates the suit land. During hearing, DW1 affirmed that position and pointed at the physical location of the suit land. Further, she told the court that PW1 does not use it.
30. It is established law that adverse possession can take different forms such as fencing and cultivation; see Titus Ong’ang’a Nyachio v Martin Okioma Nyauma & 3 others [2017] eKLR.
31. Also, the ingredients of adverse possession are well settled; see Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein [2015] eKLR.
32. Cultivation of the suit land by DW1 is not challenged by PW1, Therefore, the letter has been dispossessed thereby as he has ceased to possess it; see Halsbury’s Laws of England 4th Edition Volume 28.
33. Clearly, adverse possession in favour of the respondent come into play in this suit. Clearly, the learned trial magistrate remarked thus;

“Moreover, the fact that the defendant has been utilizing the suit land for a very long time further corroborates her claim.....”
34. Section 28 *Land Registration Act*, 2016 (2012) provides for overriding interests over registered land and adverse possession is included thereunder.
35. An order of adverse possession is envisioned in prayer (e) in the counter claim further to paragraph 16 therein. The respondent established the essentials attained thereof as held in Kazungu Katana case (supra).
36. Further, this court is guided by the case of Odd Jobs case (supra) where Duffus, P held;

“.....a court may base it’s decision on un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.....”
37. In sum, it is the finding of this court that the appellant failed to prove the legality of how he acquired title of the suit land as held in Munyu Maina-vs-Hiram Githiha Maina (2013) eKLR. That the



respondent firmly proved that the acquisition of the title was fraudulent. Thus, the appellant's claim failed while the respondent established the counter claim to the requisite standard.

38. To that end, the respondent was entitled to specific performance as sought in the counter claim. Since section 152A of the *Land Act*, 2016 (2012) provides for prohibition of unlawful occupation of private land, the respondent deserves a permanent injunction against the appellant bearing in mind the essence of the relief as held in *Giella v Cassman Brown & Co.Ltd* [1973] E A 358. To great extent, the trial court's decision is sound at law and I proceed to affirm it accordingly.
39. Wherefore, the instant appeal is devoid of merit and the same is hereby dismissed with costs to the respondent.
40. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 30TH DAY OF MAY 2023.

G.M.A ONG'ONDO

JUDGE

PRESENT

1. Ms Aluoch Odera learned counsel for the appellant.
2. Court Assistant, Mutiva.

