



**Lore v Ojwaka & 2 others (Environment and Land Appeal  
E026 of 2022) [2023] KEELC 17656 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17656 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E026 OF 2022**

**AY KOROSS, J**

**MAY 25, 2023**

**BETWEEN**

**OMONDI LORE ..... APPELLANT**

**AND**

**JAMES ZADOCK NYADA OJWAKA ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR-BONDO ..... 2<sup>ND</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the judgment of the Principal Magistrate Hon.  
J.P. Nandi delivered on 28/07/2022 in Bondo ELC Case No. E52 of 2021)*

**JUDGMENT**

**Background**

1. By a plaint dated 27/10/2022, the 1<sup>st</sup> respondent instituted suit against the appellant. He claimed the registered proprietor George Odhiambo Akal (“the deceased”) who was the legal owner of Siaya/Ramba/1538 (hereinafter referred to as ‘the suit property’) sold the suit property to him in 1989.
2. According to the 1<sup>st</sup> respondent, the appellant frustrated his efforts of being registered as the proprietor by lodging a caution over the suit property thus necessitating institution of proceedings.
3. In his claim, the 1<sup>st</sup> respondent sought several reliefs inter alia, an order compelling the appellant, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, their agents, employees, assigns and relatives to remove any restrictions, cautions or inhibitions placed on the suit property; a permanent injunction barring them from lodging further cautions, an order compelling the 2<sup>nd</sup> respondent to transfer and register the suit property in his name; general damages; costs and interest.



4. The appellant who was acting in person filed a defence dated 02/12/2021. He denied the assertions made in the plaint and put the 1<sup>st</sup> respondent to strict proof.
5. He asserted it was not tenable for the deceased to sell the suit property since there were occupants on it. He was a beneficiary of the suit property. He objected to the registration of the suit property and the 2<sup>nd</sup> respondent was satisfied with the grounds of objection. The 1<sup>st</sup> respondent had not objected to the removal of the caution. He admitted the court's jurisdiction and his description.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not participate in the proceedings that were before the trial court.
7. The appellant and 1<sup>st</sup> respondent adduced their respective evidence and after hearing the parties and closed their respective cases, the trial court identified a single issue for determination; whether the 1<sup>st</sup> respondent bought the suit property from the deceased.
8. After analysing the facts of the case, evidence and precedents, the trial court found the deceased was bound by his contract for sale. The existence of the land control board ('LCB') consent and executed transfer form which were paid for affirmed this position. Except for general damages, the 1<sup>st</sup> respondent was granted the reliefs sought in his claim.

### **Appeal to this court**

9. Aggrieved by this decision, the appellant preferred an appeal to this court on several grounds. From the appellant's submissions, it is apparent that he collapsed some of them, abandoned others and introduced new grounds. The grounds were: -
  - a) The trial court erred in law and fact in failing to find the suit was incompetent against the appellant since he was sued in the wrong capacity.
  - b) The trial court erred in law and fact in making findings the 1<sup>st</sup> respondent had proved his case.
  - c) The trial court erred in law and fact in failing to appreciate the 1<sup>st</sup> respondent's suit was statute barred.
  - d) The trial court erred in law and fact in failing to consider the 1<sup>st</sup> respondent allegedly purchased the suit property without physically inspecting it.
  - e) The trial court erred in law and fact in failing to consider the appellant lived on the suit property and did not have alternative land.
  - f) The trial magistrate erred in failing to find the 1<sup>st</sup> respondent did not have capacity to sue.
  - g) The trial court erred in law and fact by finding the signatures of the deceased were authentic.
  - h) The trial court erred in law and fact by failing to apprehend the law and appreciate the appellant's evidence thus arrived at an erroneous finding.
10. The appellant prayed for the trial court's judgment to be set aside and for the appeal to be allowed with costs.



### **The appellant's submissions**

11. Mr Mulinge, counsel for the appellant, filed written submissions dated 01/02/2023. Counsel submitted on the 8 condensed grounds of appeal earlier highlighted in this judgment.
12. Relying on Section 82 (a) of the [Law of Succession Act](#), counsel submitted on the 1<sup>st</sup> and 6<sup>th</sup> grounds. Counsel submitted the appellant was the administrator of the estate of the deceased and he had obtained a certificate of confirmation of grant and title was issued to him.
13. In the absence of producing evidence that limited grant was issued to him (1<sup>st</sup> respondent), it followed the trial suit was incompetent since the 1<sup>st</sup> respondent lacked locus standi. This position applied mutatis mutandis to the capacity of the appellant not to be sued in his personal capacity; he was the administrator of the deceased's estate. Counsel relied on *Hawo Shanko vs. Mohamed Uta Shanko* [2018] eKLR which held: -  
  
‘The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose...’
14. On the 2<sup>nd</sup> and 7<sup>th</sup> grounds, counsel submitted the 1<sup>st</sup> respondent's case was not supported or corroborated. Further, by the provisions of Section 6(1) of the [Land Control Act](#), the 1<sup>st</sup> respondent did not proffer cogent reasons why the transfer did not take place within 6 months from the date of the agreement. In addition, the 1<sup>st</sup> respondent's documents did not comply with Section 19 of the [Stamp Duty Act](#) as they were unstamped.
15. On the 3<sup>rd</sup> ground, counsel asserted that by virtue of Section 7 of the [Limitation of Actions Act](#), the 1<sup>st</sup> respondent's suit was statutory barred since the cause of action arose 35 years ago. Further, by Section 26 of the [Land Registration Act](#), a proprietor's title could be revoked on grounds of fraud, misrepresentation or where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme. In that regard, counsel cited the case of *Esther Ndegi Njiru & another vs. Leonard Gatei* [2014] eKLR.
16. On the 4<sup>th</sup> ground, counsel submitted it was mandatory for the 1<sup>st</sup> respondent to physically examine the suit property before he purchased it; which he did not.
17. On the 5<sup>th</sup> and 8<sup>th</sup> grounds, counsel submitted the appellant had constructed his house on the suit property, had lived on it since 1989 and had buried his parents on it. He had acquired overriding interests over it and that was his only abode. The appellant had acquired the suit property by probate proceedings and his title had not been challenged.

### **Respondent's submissions**

18. The 1<sup>st</sup> respondent filed his written submissions on 09/03/2023. It was his submission the trial court did not err in finding that he had proved his case. According to the 1<sup>st</sup> respondent, from his evidence, it was clear the deceased intended to sell the suit property to him. He prayed for the appeal to be dismissed with costs.

### **Analysis and determination**

19. I have thoroughly considered the record, rival submissions and the law. This being a first appeal, both issues of fact and law shall be considered. My task is to reconsider and re-evaluate the evidence that was adduced by both parties and arrive at my own independent conclusions. In doing so, I will bear in mind that I neither saw nor heard the witnesses and shall give allowance in that respect.



20. I must accordingly defer to the conclusions of the trial court unless its findings were based on no evidence, on a misapprehension of the evidence or that the trial court was shown demonstrably to have acted on wrong principles in reaching its findings. See *Susan Munyi v Keshar Shiani CA. No. 38 of 2002* and *Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278*.
21. Before I proceed further, I must address certain disconcerting issues that have emerged from the appellant's appeal and submissions. Apart from the issues of jurisdiction of the trial court, the appellant has introduced several issues that were unpleaded and uncanvassed before the trial court. He has not sought leave to adduce new evidence. Further, the appellant travelled beyond the grounds set out in his memorandum of appeal and advanced new grounds of appeal without seeking leave of court.
22. Additionally, it is not lost to this court the appellant raised grounds which no evidence was led on them before the trial court, the parties did not address the trial court on them and, the trial court did not pronounce itself on those new issues the appellant has raised on appeal. This court will summarize these new issues.
23. No evidence whatsoever was adduced before the trial in relation to the provisions of Section 6(1) of the *Land Control Act* and Section 19 of the *Stamp Duty Act*. He did not specifically plead he had been on the suit property since 1989 or 1984 but rather he lived with his aunty Mary Otuoma on the suit property. It only emerged in his evidence that he was born in 1984 and he found his family residing on the suit property.
24. He never raised any evidence that gravesites were subsisting on the suit property, the 1<sup>st</sup> respondent was required to physically examine the suit property, his only abode stood on the suit property, he had subsisting overriding rights or his title document could only be revoked pursuant to Section 26 of the *Land Registration Act*. I see no reason to entertain these new issues and this court will disregard them.
25. In arriving at my decision of rejecting new evidence and new grounds of appeal, I will adopt the Court of Appeal's decision of *Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR* which cited with approval *Thomas Openda v Peter Martin Ahn [1982] eKLR* and *Nyangau v Nyakwara [1986] KLR 712* as follows: -

'Openda v Ahn, (supra) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court; a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point; where the question is one of law turning on the construction of a document, the new point may be allowed but only if the facts when fully investigated support the new plea...In *Nyangau v. Nyakwara* (supra) this Court allowed a new point to be taken on appeal because the new point raised an issue of jurisdiction.'
26. However, since grounds of locus standi of the appellant and the suit being statute barred albeit not pleaded or canvassed went to the root of the trial court's jurisdiction, this court will address them.
27. In my considered view, the residual grounds of appeal that fall for determination can succinctly be summarised into 3; (a) the trial court erred in law and fact in failing to find the appellant lacked locus standi to be sued (b) the trial court erred in not finding the suit was statute barred and, (c) the trial court erred in finding the 1<sup>st</sup> respondent proved his case. I will now proceed to serially address these grounds.



**a) The trial court erred in law and fact in failing to find the appellant lacked locus standi to be sued**

28. Section 73(1) of the [Land Registration Act](#) provides that: -  
'A caution may be withdrawn by the cautioner or removed by order of the court or subject to subsection 2 by order of the Registrar.'
29. Order 4 Rule 4 of the Civil Procedure Rules states as follows on locus standi of parties to sue or be sued as representatives of the estates of deceased's persons as follows: -  
'Where the plaintiff sues in a representative capacity the plaint shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaint shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises.'
30. Order 4 Rule 5 of the said Rules further states: -  
'The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.'
31. From evidence adduced before the trial court, the appellant was the administrator of the estate of the deceased. The 1<sup>st</sup> respondent's pleadings shows he was not suing the appellant in his capacity as the administrator of the deceased's estate but as a cautioner who had stalled his (1<sup>st</sup> respondent's) registration as proprietor of the suit property.
32. The 1<sup>st</sup> respondent's pleadings reveals the deceased had executed and remitted all the completion documents and instruments of transfer to him. He did not have any qualms with the deceased or his estate but against the cautioner. The appellant in paragraph 13 of his defense admitted he was the cautioner when he stated as follows: - '...the caution was lodged by the 1<sup>st</sup> defendant and the registrar must have seen sense in the 1<sup>st</sup> defendant's explanation for him to retain the caution lodged by the 1<sup>st</sup> defendant.'
33. The claim was properly instituted against the appellant who was the cautioner and had capacity to be sued. The trial court had jurisdiction to entertain the suit. This ground of appeal fails.

**b) The trial court erred in not finding the suit was statute barred**

35. . Section 7 of the [Limitation of Actions Act](#) reads as follows: -  
'An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'
36. . The Black's Law Dictionary, 11<sup>th</sup> Edition has defined the term 'recover' to mean: -  
'...to get back or regain in full or in equivalence.'
37. On application of this definition, my understanding of the 1<sup>st</sup> respondent's claim was not to recover the suit property from any party but rather, the caution that was lodged by the appellant be lifted in order for the lawful process of his registration as the proprietor of the suit property to be effected in accordance by the provisions of Sections 37 and 40 of the [Land Registration Act](#). The appellant's application of the provisions of the [Limitation of Actions Act](#) was misplaced. It is my finding this ground of appeal fails.



**c) The trial court erred in finding the 1<sup>st</sup> respondent proved his case**

38. It is trite law that he who alleges must prove. See Sections 107 to 109 of the Evidence Act. In the impugned judgment, the trial court stated: -

‘...the Plaintiff produced a Sale Agreement dated 23/05/1989 evidencing the purchase. He also produced application for consent to the Land Control Board dated 25/05/1989 and were issued with a consent dated 03/07/1989. The Plaintiff and George signed transfer of land form dated 16/08/1989 and paid for the same on 17/08/1989. This evidence clearly shows that indeed the Plaintiff bought the suit land and obtained consent to transfer the land to himself. The 1<sup>st</sup> Defendant has not challenged the above evidence and documents produced by the Plaintiff.’

40. I disagree with the appellant’s counsel that the 1<sup>st</sup> respondent’s evidence was unsupported or it was wanting for not being corroborated. It was not necessary for the 1<sup>st</sup> respondent to secure an independent witness to corroborate his case as alleged. The onus was on him to discharge the burden of proof to the required standards.

41. The 1<sup>st</sup> respondent produced documents before the trial court which were credible and consistent. The 1<sup>st</sup> respondent’s evidence was not refuted by the appellant. I do not see any errs in the conclusions arrived at by the trial court. The 1<sup>st</sup> respondent proved his case on a balance of probabilities. It is my finding this ground of appeal fails.

42. It is my ultimate finding the trial court exercised its discretion properly and arrived at a proper determination and this court finds no reason to upset it.

43. For the reasons stated above, the upshot is that the appellant’s appeal is not merited and accordingly, the appeal herein is disallowed and dismissed entirely and the judgment of the trial court is upheld. I award costs to the 1<sup>st</sup> respondent.

**DELIVERED AND DATED AT SIAYA THIS 25<sup>TH</sup> DAY OF MAY 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**25/05/2023**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

**In the Presence of:**

Mr. Ochieng for the appellant

1<sup>st</sup> respondent acting in person present

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Court assistant: Ishmael Orwa

