



**Ngaywa (Suing as the Legal Administrator of the Estate of Willys Odhiambo Ahango) v Nganyi & another (Environment and Land Appeal E007 of 2022) [2023] KEELC 17421 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17421 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E007 OF 2022**

**AY KOROSS, J  
MAY 18, 2023**

**BETWEEN**

**CAREN AWINO NGAYWA (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF WILLYS ODHIAMBO AHANGO) ..... APPELLANT**

**AND**

**THE HON. ATTORNEY GENERAL (SUED FOR THE ACTS OF LAND REGISTRAR SIAYA) ..... 1<sup>ST</sup> RESPONDENT**

**BEN OYUGI NGANYI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of the Hon. PM L.Simiyu delivered on 23/02/2022 in Siaya PM ELC Case Number 144 of 2018)*

**JUDGMENT**

**Background**

1. Ben Oyugi Nganyi, (the ‘1<sup>st</sup> respondent’ herein) sued Willys Odhiambo Ahango (the ‘deceased’) who died during the pendency of this appeal. Upon obtaining limited grant and moving this court, this court granted Caren Awino Ngaywa leave to substitute the deceased and prosecute the appeal (the ‘appellant’ herein).
2. The Hon. Attorney General (the ‘2<sup>nd</sup> respondent’) was sued for the acts of a government office; Land Registrar-Siaya.
3. In his amended plaint dated March 1, 2021, the 1<sup>st</sup> respondent asserted he was the bona fide owner and registered proprietor of East Gem/Nyamninia/2273 (hereinafter referred to as ‘the suit property’). He had purchased the suit property from Ahango Lawi Kaiya (‘Kaiya’) who was the deceased’s father in



two separate transactions that took place in February 1999 and 2003. Kaiya allegedly died in 2016. He was in occupation of the suit property.

4. According to him, during the pendency of Kisumu ELC Case No 325 of 2014 in which Kaiya had allegedly sued him, the deceased and 2<sup>nd</sup> respondent fraudulently and illegally cancelled his title document over the suit property and had it registered in Kaiya's name before transferring it to the deceased's name.
4. A scrutiny of his pleadings demonstrates that his particulars of fraud and illegality were centred on two main grounds; the cancellation was conducted without a court order or a confirmed grant over Kaiya's estate. A court order barred the transfer.
6. The 1<sup>st</sup> respondent sought several reliefs; a declaration his cancellation as proprietor of the suit property was illegal and void, an order directing the 2<sup>nd</sup> Respondent to re-enter his names as proprietor of the suit property, general damages for wrongful cancellation of title, costs and interest thereon.
7. In response, the deceased who was represented by the firm of Otieno Okanda & Company Advocates filed his amended defence dated September 9, 2020. It was mostly composed of denials. He contended the cancellation was legal because the 1<sup>st</sup> respondent had acquired the suit property fraudulently. He had obtained a confirmation of grant over Kaiya's estate.
7. He challenged the jurisdiction of the trial court; the 1<sup>st</sup> respondent should have moved the court by judicial review and in view of probate proceedings, the trial court was bereft of jurisdiction.
9. Despite filing a defence dated June 12, 2019, the 2<sup>nd</sup> respondent did not testify and its defence case was closed.
9. In its judgment, the trial court stated it was satisfied the 1<sup>st</sup> respondent was a bona fide purchaser from Kaiya for value. The 2<sup>nd</sup> respondent by underhanded means capriciously cancelled the 1<sup>st</sup> respondent's registration over the suit.
9. The trial court found it had jurisdiction and the 1<sup>st</sup> respondent had proved his case on a balance of probabilities. With the exception of general damages, the trial court granted the orders sought by the 1<sup>st</sup> respondent.

### **Appeal to this court**

9. Aggrieved by the impugned judgment, an appeal was lodged before this court on several grounds. From the appellant's submissions, it is apparent he collapsed some of the grounds and abandoned others. The grounds can aptly be summarised as: -
  - a. The trial court erred in finding the 1<sup>st</sup> respondent was a bona fide purchaser of the suit property yet he never tendered any cogent evidence.
  - b. The trial court erred when it found it had jurisdiction to hear and determine the matter yet the matter had been adjudicated upon by a superior court.
13. The appellant sought for the appeal to be allowed, the impugned judgment be set aside and costs of the appeal. The appeal was canvassed by way of written submissions.

### **Appellant's submissions**

14. The appellant's counsel, Mr Okanda, filed written submissions dated February 9, 2023 in which he submitted on the two grounds of appeal.



15. On the 1<sup>st</sup> ground, counsel submitted that by the 1<sup>st</sup> respondent alluding he had purchased the suit property from Kaiya who was the previous owner, then on that basis, the 1<sup>st</sup> respondent had invited a scrutiny of the root of his title to the suit property.
16. According to him, the 1<sup>st</sup> respondent never produced any contract for sale which was in contravention of Section 3(3) of the *Law of Contract* which came into effect in 2002 and required contracts in land to be writing. Further, the 1<sup>st</sup> respondent did not produce instruments of transfer or subdivision.
17. To buttress his position, counsel placed reliance on the Court of Appeal decision of *Munyu Maina vs Hiram Gathiba Maina [2013] eKLR* which affirmed it was trite that if a party's title had been called to question, then he had the onus to prove its root. In this decision, the court stated: -  

‘We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.’
18. Counsel submitted that it was erroneous for the trial court to state it was satisfied the 1<sup>st</sup> respondent was a bona fide purchaser for value who bought two parcels from Kaiya and later amalgamated them.
19. On the 2<sup>nd</sup> ground, counsel submitted the deceased was registered as the proprietor pursuant to grant of letters of administration being issued to him in Kisumu HC Succession Cause Number 309 of 2017. Consequently, the trial court was bereft of jurisdiction.

### **Respondents’ submissions**

20. The 1<sup>st</sup> respondent’s counsel, Mr Ooro E, filed written submissions dated March 12, 2023 on the two grounds of appeal.
21. On the 1<sup>st</sup> ground, it was counsel’s submission the trial court correctly analysed the material before it before properly arriving at its decision.
22. On the 2<sup>nd</sup> ground, counsel submitted the appellant was misleading the court; probate proceedings were conducted in Kisumu CM’s court and not the High Court and that the confirmation of grant was never produced before the trial court.
23. The 2<sup>nd</sup> respondent did not participate in these proceedings.

### **Analysis and determination**

24. Being a 1<sup>st</sup> appellate court, this court is alive that before reaching its own conclusions, its duty is to analyse and re-assess the evidence on record and not introduce extraneous matters not dealt with by the parties in their evidence. It will bear in mind that it neither saw nor heard the witnesses and shall give allowance in that respect. See *Abok James Odera T/A AJ Odera & Associates vs John Patrick Machira T/A Machira & Co Advocates [2013] eKLR* and *Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2EA 212*,
25. Before I proceed further, I must address certain disconcerting issues that have emerged from the appellant’s submissions. In his submissions, he submitted that one of the 1<sup>st</sup> respondent’s alleged contract was entered in 2009 yet from the record, it is evidently clear it was 1999. Additionally, I agree with Mr Ooro E that a grant was never issued by the High Court but the Chief Magistrate’s court.



26. A careful consideration of this line of submissions reveals the appellant was determined to mislead the court. This court has not taken this kindly and it casts aspersions on the uberrima fides of the appellant and his counsel. This action is tantamount to an abuse of court process.

27. Having carefully considered the record of appeal, submissions of counsels, and provisions of law and cited authorities, I will adopt the two grounds which were earlier highlighted in this judgment as the issues for determination.

**a) The trial court erred in finding the 1<sup>st</sup> respondent was a bona fide purchaser of the suit property yet he never tendered any cogent evidence.**

28. Within the provisions of Section 25 of the *Land Registration Act*, a registered proprietor holds title subject to leases, charges, encumbrances, conditions, restrictions, liabilities, rights and interests including overriding interests.

29. By the provisions of Section 26 (1) of the *Land Registration Act*, a court shall prima facie deem the certificate of title issued by a registrar as evidencing the person named as proprietor is the absolute and indefeasible owner. It cannot be challenged except on grounds of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

30. The Court of Appeal in *Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR* cited with approval the Ugandan case of *Katende v Haridar & Company Limited [2008] 2 EA 173* which stated: -

‘A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.’

31. *Black’s Law Dictionary, 11<sup>th</sup> Edn*, defined bona fide as follows;

‘1. Made in good faith; without fraud or deceit. 2. Sincere; genuine.’

32. In its judgment, the trial court stated: -

‘The title of the Plaintiff in this instance would only lose protection of the *Constitution* if the Plaintiff is proved to have acquired the property fraudulently and/or had knowledge of the fraud. In the present case, the Plaintiff has demonstrated that he was a bona fide purchaser for value and that it was the father of the Plaintiff who subdivided the land and sold him the two parcels separately upon which the same was amalgamated.’

33. From the amended plaint, the 1<sup>st</sup> respondent stated he was a bona fide owner meaning he obtained ownership in good faith, sincerely and bereft of fraud or deceit.

34. From the case *Katende v Haridar & Company Limited (Supra)*, a plea of bona fide purchaser is a defence against any equitable owner who had made adverse claims.

35. Ordinarily, this should have been a defence against claims made against the 1<sup>st</sup> respondent by a claimant pursuant to the provisions of Section 26 of the *Land Registration Act*. Be that as it may, courts as independent arbiters cannot advise litigants but must steer away from the arena of litigation.

36. I agree with the appellant that the 1<sup>st</sup> respondent did not produce agreements for sale. However, he testified the agreements were entered in 1999 and 2003. No evidence was led whether they were in writing or oral. He testified in 1999, he purchased East Gem/Nyamnina/1750 from Kaiya and East Gem/Nyamnina/1749 from him 2003.



37. He later amalgamated them to form the suit property. He had utilised the suit property and or their portions from when he bought them. He produced copies of these titles in support of his case.
38. Although I agree with Mr Okanda that contracts in land must be in writing. The contracts were entered on diverse dates in the years of 1999 and 2003. The exact date of when the transaction took place in 2003 was not led.
39. Prior to Section 3 (3) of the Law of Contract Act amendments being operative from June 1, 2003, (See Statute Law (Misc Amendments] No 2 of 2002), the law gave allowance to contracts in land being made orally subject to certain conditions being met. This repealed Section 3 (3) stated thus: -
- ‘(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it, provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –
- (i) Has in part performance of the contract taken possession of the property or any part thereof or
  - (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in of the contract.’ Emphasis added.
40. The 1<sup>st</sup> respondent’s testimony that he had occupied the suit property since purchase was not challenged. This held credence the agreements were fulfilled. Titles to the purchased portions which eventually resulted to the suit property were issued to him on diverse dates of March 13, 1999 and January 15, 2004. From the evidence on record, his testimony was consistent, reliable and unshaken.
41. In his defence, the deceased merely stated the cancellation of the 1<sup>st</sup> respondent’s title document to the suit property was occasioned by fraudulent dealings by the 1<sup>st</sup> respondent.
42. It is trite law that fraud must be pleaded, particularized and proved to a standard above a balance of probabilities but below reasonable doubt (See Order 2 Rule 10(1) of the Civil Procedure Rules and *Elijah Kipng’eno Arap Bii v KCB & Another Civil Appeal Number 276 of 2018*).
43. The 1<sup>st</sup> respondent challenged the deceased’s title document. He pleaded and particularized fraud and illegality against him. Therefore, the onus was on the deceased to prove the root of his title. The deceased never challenged the 1<sup>st</sup> respondent’s title document to the suit property by filing a counterclaim and therefore, the root of the 1<sup>st</sup> respondent’s title could not come to test in such absence.
44. It is not lost to this court that in Kisumu ELC Case No 325 of 2014, Kaiya challenged the 1<sup>st</sup> respondent’s title to the suit property. It was subsequently withdrawn by a notice dated September 22, 2017. The import of this was that Kaiya’s legal representatives were no longer challenging the root of the 1<sup>st</sup> respondent’s title.
45. Having reanalyzed the totality of the evidence and applicable law on this ground, I find the trial court did not err when it found the 1<sup>st</sup> respondent was a bona fide purchaser. I find in the absence of challenging the 1<sup>st</sup> respondent’s title document, the trial court did not err in not scrutinizing the root of his title.



**(b) Trial erred court when it found it had jurisdiction to hear and determine the matter yet the matter had been adjudicated upon by a superior court.**

46. As earlier mentioned in this judgment, the appellant and his counsel misled this court. Probate proceedings were issued by the Chief Magistrate's court and not the High Court.
47. The jurisdiction of ELC and magistrates designated to hear and determine disputes relating to the environment, use and occupation of and title to land lies with Article 162(2)(b) of the Constitution of Kenya, Section 13 of the Environment and Land Court Act and Section 9 of the Magistrates' Courts Act. While the probate court's jurisdiction in intestate or testamentary succession to the estates of deceased persons are derived from Section 2 of the Law of Succession Act.
48. The Practice directions on proceedings in the environment and land courts, and on proceedings relating to the environment and the use and occupation of, and title to land and proceedings in other courts has provided a clear delineation on the jurisdiction of the ELC and probate courts as follows; 'All cases touching on inheritance, succession and distribution of land under the Law of Succession Act, Cap 160 Laws of Kenya shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction.'
49. The apex court in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR stated: -  
'A Court's jurisdiction flows from either the Constitution or legislation or both. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.'
50. In the impugned judgment, the trial court stated it had jurisdiction. On juxtaposing these provisions of law and authority, the trial court did not err when it found it had jurisdiction to handle the suit.
51. The suit was on ownership of land and not on revocation of grant. Obviously, the decision of ELC including that of the magistracy interfered with the administration of Kaiya's estate.
52. If grant had not been confirmed, the suit property would not form part of Kaiya's estate; it would have been removed from his schedule of assets. If grant had been confirmed, armed with the decision of the ELC, the deceased would have moved the probate court to review the grant under Rule 63 of the Probate and Administration Rules. I find the trial court did not err in finding it had jurisdiction.
53. It is my ultimate finding that the trial court exercised its discretion properly and arrived at a proper determination and this court finds no reason to upset it.
54. 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 18<sup>TH</sup> DAY OF MAY 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**18/05/2023**

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

**In the Presence of:**



Mr. Okanda for the appellant

N/A for the 1<sup>st</sup> respondent

N/A for the 2<sup>nd</sup> respondent

Court assistant: Ishmael Orwa

