



**Odima v Ombwayo (Environment and Land Appeal 11 of 2022)
[2023] KEELC 17339 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17339 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 11 OF 2022
SO OKONG'O, J
MAY 11, 2023**

BETWEEN

LILIAN ATIENO ODIMA APPELLANT

AND

ERICK OMONDI OMBWAYO RESPONDENT

(Being an Appeal from the judgment and decree of Hon. F. Rashid (PM) dated 18th February 2022 made in Winam Magistrate's Court ELC Case No. 115 of 2018)

JUDGMENT

Background:

1. Through a further amended plaint dated October 4, 2019, the appellant sought judgment against the respondent for:
 - a. An order of eviction from land parcel number Kisumu/Kasule/8236(hereinafter referred to as “the suit property”).
 - b. A permanent injunction restraining the respondent from trespassing on the suit property.
 - c. Cost of the suit and interest thereon.
 - d. Any other relief that the court deemed fit and just to grant.
2. The appellant averred that she was the registered owner of the suit property and that the respondent had without any justifiable reason or cause encroached onto the suit property in December 2011, cut down the appellant’s trees and constructed a home on a portion of the suit property. The appellant averred that the respondent’s said act of trespass had greatly inconvenienced and denied her the right to quiet, peaceful, uninterrupted occupation, use and enjoyment of her land. The appellant averred that the respondent was intent on grabbing the suit property.



3. The respondent filed amended defence dated 30th October 2019. The respondent admitted that the suit property was registered in the name of the appellant but denied that the property belonged to the appellant. The respondent averred that the suit property was purchased by his father, one Jared Ombwayo Agola (hereinafter referred to only as “the respondent’s father”) from the appellant’s deceased husband, one Ranson Odima Seda (hereinafter referred to only as “the deceased”) in 2006 when it was still part of a larger parcel of land known as Land Parcel 112, Kasule Adjudication Section (hereinafter referred to only as Title No. 112). The respondent averred that the appellant was a witness during the execution of the agreement of sale of the suit property between the respondent’s father and the deceased.
4. The respondent averred that his father who was the owner of the suit property gave it to the respondent and the respondent had occupied the same. The respondent averred that the appellant was supposed to transfer the suit property to the respondent’s father and that she had failed to do so. The respondent averred that it was the appellant who was out to grab the suit property. The respondent urged the court to dismiss the appellant’s suit. The respondent also sought judgment against the appellant. The respondent sought an order compelling the appellant to transfer the suit property to the respondent’s father and a permanent injunction restraining the appellant from interfering in any way whatsoever with the suit property.
5. The lower court heard the suit and delivered a judgment on February 18, 2022. The lower court dismissed the appellant’s suit and entered judgment for the respondent as prayed in the counter-claim (sic) with costs to the respondent. The lower court made a finding that the respondent had acquired the suit property through purchase from the appellant’s husband and that although the appellant had denied witnessing the said agreement for sale, the appellant did not prove that the thumbprint in the said agreement that was said to be hers was not hers. The lower court held that the transaction between the respondent’s father and the deceased was valid and that the respondent was not a trespasser on the suit property and as such could not be evicted therefrom.
6. The appellant was aggrieved with the said judgment and filed this appeal on March 9, 2022 through a Memorandum of Appeal dated March 8, 2022. The appellant challenged the lower court’s judgment and decree on the following grounds;
 1. That the learned magistrate erred in law and fact by dismissing the appellant’s suit against the weight of the evidence adduced.
 2. That the learned magistrate erred in law and fact by ordering for transfer of the suit land parcel into the name of a stranger who was never a party to the suit neither did he have a claim against the appellant.
 3. That the learned magistrate erred in law and fact in shifting the burden of proof to the appellant against the principle that he who alleges must prove.
 4. That the learned magistrate erred in law and fact in ordering the transfer of the suit land parcel into the name of the respondent yet he never purchased it from the appellant who was the registered owner.
 5. The learned magistrate erred in law and fact in making a finding that the respondent was a purchaser yet no agreement was produced to that effect.
 6. That the learned magistrate erred in law and fact by making a finding that the land should be transferred to a stranger yet the stranger’s claim was against a deceased person who had no representation in the suit.



7. That the learned magistrate erred in law and fact by failing to analyse the appellant's submissions as well as evidence from cross-examination of the respondent thereby arriving at a wrong conclusion.
 8. The learned magistrate erred in law and fact by holding that the respondent had proved his counter-claim yet there was no counter-claim.
 9. That the learned magistrate erred in law and fact in making a finding that the counter-claim was proved yet the claim was against a deceased person who was not a party to the suit.
 10. That the learned magistrate erred in law and fact by holding that the sale of land was valid yet there was no application for land control board consent.
 11. That the learned magistrate erred in law and fact by failing to properly analyse the evidence on record thereby arriving at a wrong decision.
 12. That the learned magistrate erred in law and fact by proceeding on wrong principles and disregarding the generally applicable principles of law.
 13. That the learned magistrate erred in law and fact by ordering for transfer of the appellant's land parcel yet she never sold it.
 14. That the learned magistrate misapprehended the evidence adduced by the appellant in material degree and as a result arrived at a wrong decision.
7. The appellant prayed that the appeal be allowed and the judgment and decree of the lower court made on February 18, 2022 be set aside and substituted with an order allowing wholly the appellant's claim in Winam Magistrate's Court ELC No. 115 of 2018. The appellant also prayed for such other or further reliefs as the court may deem appropriate.

The appellant's submissions:

8. The appeal was argued by way of written submissions. The appellant filed her submissions on November 24, 2022 while the respondent filed his submissions on January 20, 2023. In her submissions, the appellant argued each ground of appeal separately.
9. The appellant submitted that the respondent produced copies of land registers which provided the history of the suit property. The appellant submitted that the said registers confirmed that by 2006 when the respondent's father purported to purchase the suit property from the deceased, the appellant was the owner of the suit property. The appellant submitted that the respondent did not purchase the suit property from her and that her suit in the lower court was based on trespass. The appellant submitted that the respondent confirmed that he had entered into the suit property in 2011 without the appellant's authority. The appellant submitted that the respondent's father who testified as DW2 alleged to have purchased a portion of Plot No. 112 on May 21, 2006. The appellant submitted that a copy of the register for Plot No. 112 showed that Plot No. 112 was registered in 1988 and that the title was closed in 1996 upon subdivision. The appellant submitted that Plot No. 112 was therefore not in existence on May 21, 2006 when a portion thereof was purportedly purchased by the respondent's father.
10. The appellant submitted that the suit property originated from Kisumu/Kasule/3454 ("Plot No. 3454") which was one of the resultant subdivisions from Plot No. 112. The appellant submitted that from the evidence that was adduced before the lower court, Plot No. 3454 was transferred to the appellant on April 28, 2000. The appellant submitted that the deceased who was alleged to have sold



the suit property to the respondent's father on 21st May 2006 ceased to be the owner of Plot No. 3454 from which the suit property originated on April 28, 2000. The appellant submitted that even if the said agreement between the respondent's father and the deceased was valid, the effect of the same would still be the same since the deceased could not sell what he did not own. The appellant submitted that from the evidence adduced by the respondent, the respondent admitted that he did not purchase the suit property from the appellant. The appellant submitted that the respondent sought to enforce an agreement that was allegedly entered between the deceased and a person who was not a party to the suit.

11. The appellant submitted further that the lower court erred in ordering that the suit property be transferred to the respondent who was not a party to the suit and who only appeared in court as a witness(DW2). The appellant submitted further that the burden was on the respondent who claimed that the appellant signed the agreement for sale between the respondent's father and the deceased to prove that fact. The appellant submitted that the lower court erred by shifting that burden of proof to the appellant.
12. The appellant submitted that the testimonies of the respondent's father and the respondent were that the respondent's father purchased the suit property from the deceased and not from the appellant and that as at the date of the said purchase, the suit property was in the name of the appellant. The appellant submitted that on the face of that evidence, the lower court erred in making a finding that there was a valid agreement for the sale of the suit property.
13. The appellant submitted further that the lower court erred by holding that the respondent had proved his counter-claim yet there was no counter-claim. The appellant submitted that the respondent filed an amended defence and purported to seek reliefs therein. The appellant submitted that there was no basis for the said reliefs since the respondent had not filed a counter-claim as known in law. The appellant submitted that the lower court erred in ordering the appellant to transfer the suit property to the respondent's father while she did not sell the said property to him. The appellant urged the court to allow the appeal with costs.

The respondent's submissions:

14. In his submissions dated January 19, 2023, the respondent supported the lower court's judgment. The respondent reiterated that he was the legal owner of the suit property having been given the same by his father who had purchased the same from the appellant's husband(deceased). The respondent submitted that the lower court did not err in dismissing the appellant's suit and allowing his counter-claim. The respondent urged the court to dismiss the appellant's appeal with costs.

Analysis and Determination

15. I have considered the record of appeal particularly; the pleadings, the evidence tendered in the lower court, the judgment of the lower court and the grounds of appeal. I have also considered the submissions by the advocates for the parties and the authorities cited in support thereof. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269 and *Selle v Associated Motor Boat Co. Ltd.* [1968] E.A 123 on the duty of the first appellate court. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v Sunday Post Ltd.* [1958] E.A 424 and *Makube v Nyamuro*[1983] KLR 403.



16. From the evidence on record, I am unable to find any basis on which the appellant's suit in the lower court could have been dismissed and judgment entered for the respondent against the appellant. From the evidence that was adduced in the lower court by the respondent, the following facts are not in dispute: The register for Plot No. 112 was opened on March 24, 1998 with one, Mathayo Odima Seda as the registered owner thereof. On May 2, 1995, the name of the registered owner of Plot No. 112 was changed from Mathayo Odima Seda to Ranson Odima Seda(deceased). On April 23, 1996, the register of Plot No. 112 was closed upon subdivision that gave rise to Plot No. 3454 and Plot No. 3455. On April 28, 2000, the deceased transferred Plot No. 3454 to the appellant. On March 27, 2012, the appellant subdivided Plot No. 3454 into three portions namely; Plot No. 5814, Plot No. 5815 and Plot No. 5816. The appellant once again subdivided Plot No. 5814 which subdivision gave rise to among others Plot No. 6255. The appellant subdivided Plot No. 6255 to give rise to Plot No. 6771, Plot No. 6772 and Plot No. 6773. The appellant subdivided Plot No. 6771 several times. One of the parcels of land that resulted from the multiple subdivisions was Plot No. 8236(the suit property). The suit property originated from Plot No. 3454 which was a subdivision of Plot No. 112. Plot No. 3454 ceased to be owned by the deceased on April 28, 2000 when the deceased transferred the same to the appellant. The appellant was therefore the owner of the land that later became the suit property from April 28, 2000. The suit property was therefore not owned by the deceased on May 21, 2006 when he purportedly sold the same to the respondent's father.
17. Since the appellant was the owner of the parcel of land which was later registered as Plot No. 8236 as at May 21, 2006 when it was purportedly sold to the respondent's father, it was only the appellant who could sell the same. I am in agreement that the deceased had no proprietary interest in the suit property that he could sell or transfer to the respondent's father. The respondent's father did not, therefore, acquire any valid proprietary interest in the suit property that he could give out as a gift to the respondent. It follows that the respondent had no valid interest in the suit property at the time he entered thereon in 2011. The appellant had made a demand upon the respondent to vacate the suit property and he declined to do so. In the absence of any lawful cause for his occupation of the suit property, the respondent was a trespasser and the appellant had a right to move the court for his eviction from the suit property.
18. The appellant having established that she was the owner of the suit property and that she never sold the same to the respondent or his father, the lower court erred in not finding that the respondent had no interest known in law in the suit property and as such he was a trespasser. The appellant having proved that the respondent was a trespasser on the suit property, the appellant was entitled to an order for the eviction of the respondent from the suit property and an injunction to restrain him from any further entry into the property.
19. The lower court also erred in entering judgment for the respondent in a counter-claim that never existed. Order 7 rule 7 of the *Civil Procedure Rules* provides as follows on pleading a counter-claim:

Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim.”
20. What was filed by the respondent was a defence. There was no mention of a counter-claim. To remove any doubt that the respondent had no intention of filing a counter-claim, the respondent only paid Kshs. 75 for the defence. The respondent did not also file a verifying affidavit that normally accompanies a counter-claim. Seeking a relief in a defence does not turn such defence into a counter-claim. I am in agreement that there was no counter-claim filed by the respondent on the basis of which the lower court could have entered judgment in his favour.



21. And if that was not enough, the lower court purported also to order the appellant to transfer the suit property to the respondent's father, Jared Ombwayo Agola. As correctly submitted by the appellant, the respondent's father was not a party to the lower court suit. He only attended court to give evidence as a witness. Since the respondent's father was not a party to the lower court suit, he had no claim against the appellant for which he could have been awarded a judgment against the appellant. I am in agreement with the appellant that the lower court issued orders in favour of a stranger to the suit. This was an error on the part of the court.

Conclusion:

22. In conclusion, it is my finding that the judgment of the lower court was not supported by the pleadings and the evidence tendered by the parties. I therefore find merit in the appeal before the court. Consequently, I allow the appeal, set aside the entire judgment of the lower court (Hon. F.Rashid P.M) made on February 18, 2022 and in place thereof, I enter judgment for the appellant against the respondent in terms of prayers (a) and (b) of the further amended plaint dated October 4, 2019 that was filed in the lower court. The respondent shall vacate and handover possession of all that parcel of land known as Kisumu/Kasule/8236 to the appellant within 90 days from the date hereof in default of which the appellant shall be at liberty to apply to the court for warrants for his forceful eviction from the property. The costs of the lower court suit and of this appeal are awarded to the appellant.

DELIVERED AND DATED AT KISUMU ON THIS 11TH DAY OF MAY 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Bagada for the appellant

Ms. Machuka h/b for Omondi T. for the respondent

Ms. J.Omondi-Court Assistant

