



Alando alias Angura Alando v Odera & another (Environment and Land Appeal E044 of 2021) [2023] KEELC 18422 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E044 OF 2021
SO OKONG'O, J
JUNE 29, 2023**

BETWEEN

JOANES OTIENO ALANDO ALIAS ANGURA ALANDO APPELLANT

AND

CONSELETA JUMA ODERA 1ST RESPONDENT

ISAIAH ODHIAMBO ODERA 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. C.N.Oruo PM dated 3rd May 2021 and delivered on 18th May 2021 in Maseno PMCELC No. 7 of 2019)

RULING

Background

- 1 The Respondents filed a suit against the Appellant at the Principal Magistrate's Court at Maseno on 17th May 2019 namely, Maseno PMCELC No. 7 of 2019 (hereinafter referred to only as "the lower court suit") seeking the following reliefs;
 - a. A declaration that the acts and omissions of the Appellant be declared illegal and unconstitutional.
 - b. A mandatory injunction restraining the Appellant whether by himself, his agents or servants or anyone claiming through him from trespassing upon or remaining in possession of all that parcel of land known as Title No. Kisumu/Kombewa/3908 (hereinafter referred to as "the suit property") or otherwise until the hearing and determination of the suit.
 - c. General damages.
 - d. Costs and interest.



- 2 In the lower court, the Respondents averred that they were the widow and son respectively of one, James Odera Oloko, deceased (hereinafter referred to only as “the deceased”) who died on 25th August 2005. The Respondents averred that the deceased owned ancestral land within Kombewa in Kisumu which was registered as Title No. Kisumu/Kombewa/3908 (“the suit property”). The Respondents averred that they had occupied and cultivated the suit property openly and peacefully without any interruption for a period of more than 35 years. The Respondents averred that for the entire period that they cultivated the suit property, no one came up to claim ownership of the property. The Respondents averred that the deceased was out of the country during the land adjudication and demarcation in Kombewa area, and he had asked his brother who was around to have the suit property registered in his (the deceased’s) name. The Respondents averred that the deceased’s brother who was the Appellant’s father maliciously caused the suit property to be registered in the name of his son, the Appellant herein who was then a minor of 2 years instead of registering the same in the name of the deceased.
- 3 The Respondents averred that the Appellant’s father already had his own share of the ancestral land that was distributed equally between him and the deceased by their father. The Respondents averred that the suit property belonged to the deceased and that its registration in the name of the Appellant was erroneous, fraudulent, and illegal. The Respondents averred that they enjoyed quiet and peaceful possession of the suit property until they went to the land registry to conduct a search for the purposes of applying for a title deed for the suit property. The Respondent averred that the search revealed that the suit property was not registered in the name of the deceased but in the name of the Appellant. The Respondents averred that when they asked the Appellant to explain the circumstances under which the suit property was registered in his name, his response was that the registration of the property in his name meant that the property belonged to him. The Respondents averred that the Appellant thereafter went to the land office and obtained a title deed for the suit property. The Respondents averred that after obtaining the said title deed, the Appellant had been threatening them with eviction from the suit property.
- 4 The Appellant filed a defence in the lower court denying the Respondents’ claim in its entirety. The Appellant averred that the suit property was registered in his name during the process of land adjudication and that neither the deceased nor the Respondents raised an objection to the registration. The Appellant averred that he was subsequently issued with a title deed for the suit property on 28th January 2019. The Appellant denied that the suit property was registered in his name illegally and fraudulently. The Appellant averred that the Respondents’ claim was defective, illegal, and an abuse of the process of the court.
- 5 At the trial, the Respondents gave evidence and called witnesses in support of their case against the Appellant. The Appellant also gave evidence and called witnesses in his defence. The parties thereafter made closing submissions in writing. In a judgment dated 3rd May 2021 and delivered on 18th May 2021, the lower court after analysing the evidence and the submissions that were made before it by the parties made a finding that the Appellant acquired title to the suit property after the Respondents had been in occupation thereof for about 38 years. The lower court also made a finding that the Respondents had acquired the suit property by adverse possession. On the issue of whether the Respondents had the locus standi to institute the suit having failed to take out a grant of letters of administration in respect of the estate of James Odera Oloko, deceased (the deceased), the court held that the issue of locus standi was “a mere technicality” that could not warrant the dismissal of the Respondents’ suit. On the basis of the said findings and holding, the lower court entered judgment for the Respondents against the Appellant. The court declared that the Respondents were entitled to be registered as the owners of the suit property by adverse possession and cancelled the title that was held by the Appellant in respect of the property.



The appeal

- 6 The Appellant was aggrieved by the said judgment and lodged the present appeal. In his memorandum of appeal dated 16th June 2021, the Appellant challenged the lower court’s judgment on the following grounds;
1. The Learned Magistrate erred in law and fact in holding that the Respondents had the locus standi to institute the lower court suit although they had not taken out a grant of letters of administration in respect of the estate of the deceased.
 2. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the Appellant was the first registered owner of the suit property and that his rights over the property were indefeasible under the provisions of the Land Registration Act 2012.
 3. The Learned Trial Magistrate erred in law and fact when he entered judgment for the Respondents as adverse possessors of the suit property while there was no adverse possession claim lodged by the Respondents.
 4. The Learned Trial Magistrate erred in law and fact when he considered irrelevant matters and issues thereby arriving at a wrong decision.
 5. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the Respondents’ evidence did not support their claim.
 6. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the Respondents allegedly purchased a portion of the suit property from a person who was not the registered owner thereof and the original parcel of land that gave rise to the suit property had been subdivided and portions thereof shared between the Respondents and the Appellant.
 7. The Learned Trial Magistrate erred in law and fact in holding that the Appellant had failed to adduce evidence to controvert the Respondents’ claim that they had been in continuous and uninterrupted occupation of the suit property.
- 7 The Appellant urged the court to allow the appeal, set aside the lower court judgment and substitute it with an order that the Appellant retains the ownership of the suit property. The Appellant also prayed for the costs of the appeal.
- 8 On 23rd January 2023, the court directed that the appeal be heard by way of written submissions and gave timelines within which the parties were to file their respective submissions. The Appellant filed his submission on 17th March 2023 while the Respondents did not file submissions.

Analysis and determination

- 9 I have considered the pleadings and proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the Appellant, and the submissions by the Appellant. 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. The court has however 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.

10 I will consider the Appellant’s first ground of appeal alone and the rest together. Order 4 Rule 4 of the [Civil Procedure Rules](#) provides as follows:

“Capacity of parties.

4. Where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises.”

11 It is not clear to me from the pleadings and the evidence that was adduced in the lower court whether the Respondents filed the lower court suit in their personal capacities or as legal representatives of the estate of James Odera Oloko (the deceased). In their plaint filed in the lower court, the Respondents did not indicate that they had brought the suit in their capacities as the legal representatives of the estate of James Odera Oloko (the deceased). The Respondents merely described themselves as the widow and son respectively of the deceased and nothing more. Whether this was intentional or not, only the Respondents can tell. I have noted that in all other documents filed together with the plaint, the Respondents indicated that they were bringing the suit as joint administrators of the estate of the deceased. Curiously, the limited grant of letters of administration which they purported to have given them the locus standi to file the suit was not among the documents in the Respondent’s list and bundle of documents. The limited grant was also not produced in evidence at the trial. I am therefore persuaded by the Appellant’s argument that the Respondents did not obtain a grant of letters of administration in respect of the estate of the deceased that could have given them the locus standi to sue as legal representatives of the deceased. Contrary to the holding by the lower court, legal standing was a substantive issue of law and not a mere technicality. That said, the Respondents did not plead as required under Order 4 Rule 4 of the Civil Procedure Rules that they had brought the suit in a representative capacity as administrators of the estate of the deceased. The lower court did not also enter judgment in their favour as legal representatives of the estate of the deceased. The Respondents brought the suit in their personal capacities and were granted judgment in the same capacities. Due to the foregoing, I find no merit in ground one of appeal save as I will say later in the judgment.

12 On grounds 2, 3, 4, 5, 6, 7 and 8 of appeal, the following is my view. Looking at the plaint that was filed by the Respondents in the lower court, I am at a loss as to what their cause of action could have been. The facts as narrated in the plaint and in the witness statements that were adopted as evidence at the trial disclosed claims based on customary trust and adverse possession. These were however not the causes of action that were pleaded. The case as presented was based on the tort of trespass as the cause of action. Trespass as a cause of action must however be anchored on some interest in land either of ownership or lawful occupation of land. The Respondents claimed that the suit property was owned by the deceased and that the deceased died and left them in occupation. The Respondents claimed further that the Appellant acquired title to the property fraudulently and was threatening them with eviction from the property. As I have stated earlier, the lower court suit was not brought on behalf of the estate of the deceased. The Respondents did not come out clearly in the pleadings as to the interest that they as individuals had in the suit property that was registered in the name of the Appellant as the first registered owner.

13 From the lower court judgment, it is clear that after failing to discern from the pleadings what the Respondents’ cause of action was, the lower court took it that the Respondents’ claim was based on adverse possession of the suit property. I am in agreement with the Appellant that the procedure for



making an adverse possession claim is well set out in the law and that the Respondents did not seek any relief connected with adverse possession. The lower court therefore granted orders that were neither sought nor supported by the pleadings. The lower court had no jurisdiction to determine issues that were not pleaded and to grant reliefs that were not sought. Even if the court was satisfied that the Respondents had established that they had acquired the suit property by adverse possession, the court should have been hesitant in granting orders relating to adverse possession that were not sought by the Respondents. The court should have left the Respondents to file a proper suit for adverse possession. In *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others* [2014]eKLR, the Court of Appeal cited with approval the Malawi Supreme Court of Appeal case of *Malawi Railways Ltd. v. Nyasulu* [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled “The present Importance of Pleadings” published in 1960 Current Legal problems, at P.174 where the author stated as follows:

As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

- 14 I am in agreement with the Appellant that the lower court somehow failed to appreciate precisely the issues that were before it for determination and veered to irrelevant issues. The only issue that was before the lower court for determination was whether the Appellant was a trespasser on the suit property and whether the Respondents were entitled to an order of injunction restraining the Appellant from interfering with their occupation and use of the property. The lower court should have determined those issues and left the matter to rest there. The court had no business considering whether the Respondents had established an adverse possession claim over the suit property. It is immaterial that the parties made submissions on the issue. The orders made by the court for the cancellation of the Appellant’s title and registration of the suit property in the name of the Respondents were not sought by the Respondents. As I have already stated above, the court fell into error when it determined issues that were not before it and granted reliefs that were not sought.

Conclusion:

- 15 The upshot of the foregoing is that I find merit in the Appellant’s appeal. The judgment of the lower court dated 3rd May 2021 and delivered on 18th May 2021 is set aside and substituted with an order dismissing the Respondents’ suit in the lower court. The Respondents are at liberty to file a proper suit for adverse possession should they be advised to do so. Since the parties are related, each party shall bear its own costs of the lower court suit and of the appeal.



DELIVERED AND DATED AT KISUMU ON THIS 29TH DAY OF JUNE 2023

S. OKONG'O

JUDGE

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

Ms. Abir h/b for the Appellant

N/A for the Respondents

Ms. J. Omondi-Court Assistant

