



**Kiri v Onyango (Suing as the Legal Representative of Abednego
Onyango Owiro – Deceased) (Environment and Land Appeal
E025 of 2021) [2023] KEELC 19195 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 19195 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E025 OF 2021**

MN KULLOW, J

JUNE 21, 2023

BETWEEN

MANYONGA KIRI APPELLANT

AND

**DEBORAH ADHIAMBO ONYANGO (SUING AS THE LEGAL
REPRESENTATIVE OF ABEDNEGO ONYANGO OWIRO –
DECEASED) RESPONDENT**

JUDGMENT

1. This Appeal emanates from the Judgment and Decree of Senior Principal Magistrate Hon MO Obiero delivered on April 27, 2021 in Migori CMCC ELC No 35 of 2019, in the court held that the Plaintiff had proved her case against the Defendants and accordingly entered judgment in favor of the Plaintiff vide judgment delivered on April 27, 2021. The grounds in the Memorandum of Appeal are that: -
 - i. The Learned Magistrate erred in law and fact in disregarding the Appellant’s evidence.
 - ii. The Learned Trial Magistrate erred in law and fact in disregarding the contents of the Surveyor’s report dated 27/7/2012 and failing to properly analyse the same and considering the evidence before him thus arriving at an erroneous decision.
 - iii. The Learned Magistrate erred in law and fact by entertaining the Respondent’s suit as administrator of the late Abednego Onyango Owino without the Respondent taking out the letter of Administration ad litem and/or certificate of confirmation of grant.
 - iv. The Learned Trial Magistrate erred in law and fact by failing to consider that the Appellant was the original owner of the suit property known as North Sakwa/ Kadera Lwala/ 784 before it was sold to the Respondent’s husband (Deceased) and that he has been in occupation of



the alleged portion of land since time immemorial, hence acquiring the same by operation of the law.

- v. The Trial court erred in law and in fact in making a finding and issuing an order of permanent injunction in respect of the suit property by disregarding the evidence of the surveyor's report stating that the Appellant has been in occupation for many years.
 - vi. The Learned Trial Magistrate erred in law and fact by failing to appreciate the law on adverse possession and consequently failing to consider that the Appellant has been in open and notorious occupation of the land parcel known as North Sakwa/ Kadera Lwala/ 784 for many years exceeding 12 years.
 - vii. The Learned Trial Magistrate erred in law in deciding the matter against the weight of evidence that had been adduced.
 - viii. The Judgment of the Trial Magistrate has occasioned a failure of justice and/or a miscarriage of justice.
2. Consequently, the Appellant sought the following Orders: -
- a. That this Appeal be allowed.
 - b. That the costs of this Appeal be granted.
3. A brief background to contextualize the matter is that the Plaintiff/ Respondent instituted a suit vide a Plaint dated September 3, 2014 against the Defendants/Appellant, seeking an order of eviction, permanent injunction restraining the defendants from trespassing into the suit parcel No North Sakwa/ Kadera Lwala/ 784 and costs of the suit.
4. It was her claim that her late husband is the registered owner of the suit land No 784 measuring approx. 1.3Ha while the defendants own parcel Nos. 85, 82 and 83 bordering one another. It was her case that the defendants have jointly trespassed/ encroached into a portion of her suit land measuring approx. 2 Acres since the year 2010 hence the suit.
5. The Defendants/Appellants filed a Joint Statement of Defense dated September 17, 2014 in response to the allegations raised in the Plaint. It was their claim that the plaintiff fraudulently obtained the ownership of the title of the suit land after fraudulently extending the boundaries of the suit land No 784 without their consent and therefore the title obtained fraudulently should be revoked. Further, that the plaintiff falsely presented the size of the parcel No 784 and obtained title of the misrepresented size thereof. The case was heard and determined vide the judgment rendered on the April 27, 2021 in favor of the Plaintiff hence the instant appeal.
6. By consent, parties agreed to canvass the Appeal by way of written submissions. Both the Appellant and the Respondent filed their rival submission together with authorities which I have read and taken into consideration in arriving at my decision.

Appellant's Submissions

7. Counsel for the Appellant submitted on one main issue; whether the trial court's decision was properly founded in evidence and legal principle. It was his contention that the Surveyor's report dated July 27, 2012 clearly indicated that the portion claimed as an encroachment by the Respondent as been in exclusive use by the Appellant for a very long time and that the same is substantively part of the Appellant's land No North Sakwa/ Kadera Lwala/ 85. He thus maintained that the Respondent was estopped in law from claiming the said portion by virtue of adverse possession.



8. He therefore dismissed the Respondent's claim as being artificial and devoid of any substantive basis and cannot stand in law pursuant to the provisions of section 7 and 17 of the *Limitation of Actions Act*. He further referred to the surveyor's report dated July 27, 2012 and maintained that from the said report, it was clear that the said portion claimed by the Respondent as an encroachment had never been part of the Respondent's land No North Sakwa/ Kadera Lwala/ 784.
9. In conclusion, it was his submission that the trial court accorded selective and unwarranted evidential weight and probative value to the evidence adduced by the Respondent and he thus urged the court to dismiss the Respondent's suit with costs.

Respondent's Submissions

10. Counsel for the Respondent submitted on the grounds of appeal as outlined in the memorandum of appeal separately. On ground 3 of the appeal; it was his submission that the Respondent instituted the suit in the subordinate court in his capacity as the personal representative of the estate of Abednego Onyango Owiro and that he produced a copy of the letters of administration ad litem as Pexh. 1 to that effect.
11. On grounds 1,2 and 5 of the Appeal, it was counsel's submission that the claims of adverse possession and entitlement to the subject land were not pleaded in their joint statement of defence. To the contrary, the Appellant maintained that he was in possession of the Respondent's land as a matter of right and challenged the Respondent's title as having been obtained fraudulently.
12. Counsel's submission on grounds 4 and 6 of the Appeal was that the issue of adverse possession has been raised in the Appellate stage and that the same was not pleaded before the trial court. The trial court could not therefore grant orders that the Appellant did not seek and he relied on the case of *Chepkwony v Malenya* (Civil Appeal No 90 of 2018).
13. Without prejudice to the foregoing, he added that even if the issue of adverse possession was pleaded before the trial court; the court lacked the requisite jurisdiction to grant such relief. Further, it was his contention that the Appellant cannot allege that he has acquired title of the portion in dispute by virtue of adverse possession on the one hand and challenge the Respondent's title as having been acquired fraudulently and illegally on the other hand. No evidence of dispossession of the Respondent as adduced by the Appellant as a perquisite of his claim under adverse possession. In conclusion he maintained that the Appellant's evidence and pleadings at the trial court do not show adverse possession and thus urged the court to dismiss the Appeal with costs.

Analysis and Determination

14. Having looked at the Memorandum of Appeal, Record of Appeal, the herein and the rival submissions in totality; I find that the main issue for determination is whether this Court should interfere with the exercise of discretion by the trial court and set aside its judgment and decree delivered on April 27, 2021 and I will proceed to address the same on account of:-
 - a. Adverse Possession
 - b. Ownership and/or proprietorship of the suit land parcel No North Sakwa/ Kadera Lwala/ 784
 - c. Whether the Appellant is entitled to the reliefs sought in the Memorandum of Appeal.
15. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. However, this mandate does not entail taking on board new issues which were never brought to the trial court's attention or matters that were not



subject of the trial court's consideration. See the Court of Appeal decision in *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR.

16. The Court of Appeal in *Selle v Associated Motor Boat Co.* [1968] EA 123) held as follows: -

“ this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

17. The Appellant has heavily relied on the Surveyor's Report dated July 12, 2021 which in his view proved that the alleged encroachment into the Respondent's parcel had lasted many years. He thus contends that owing to the said long possession he has acquired overriding rights and interest over the said portion measuring approx. 2 Acres by virtue of adverse possession.

18. Before delving into the merits of the said assertions and whether indeed the Appellant has acquired prescriptive rights and interests capable of registration on account of adverse possession; it is important to consider whether the said issue was addressed by the trial court.

19. I have carefully looked at the pleadings and the proceedings in trial court and I note that the Appellants did not raise the issue of adverse possession at all in the trial court. From their Joint Statement of Defence, their main ground of defence was that the Respondent fraudulently acquired the title deed to the suit parcel and misrepresented the acreage of the suit land No 784.

20. Therefore, in respect to the issue of adverse possession, this court is of the considered opinion that the Appellant has introduced a new issue at the Appellate stage. The defence and/or the issue of adverse possession was neither pleaded, canvassed nor tested by cross- examination before the trial court. In his judgment, the trial court did not consider the said issue on merit and thus this court is unable to entertain the same at this Appellate stage.

21. Further, it is trite that parties are bound by their pleadings. The said surveyor's report which the Appellant has heavily relied on as proof of his continuous possession and occupation for a period exceeding 12 years; was within the Appellant's knowledge at the time of filing his statement defence in the year 2014, he therefore has no justification or excuse for not raising the issue of adverse possession at the trial stage despite the same being within his knowledge.

22. Be as it may and without prejudice to the foregoing; the said Surveyor's Report cannot solely be taken as conclusive proof that the of Appellant has sufficiently demonstrated the doctrine of adverse possession to the required threshold. It is not ascertainable when such possession and occupation began, whether there was intention to dispossess, when the occupation became adverse and whether or not there was discontinuance of the said occupation and possession. This court is therefore unable to find in favor of the Appellant on the issue of adverse possession as alleged.

23. The main issue before the trial court was on the ownership of the suit parcel and whether or not there was trespass and/or encroachment on the part of the defendant into parcel No 784 and 85.

24. From a re-evaluation of the trial court evidence and judgment, I do note that Respondent in support of her case, produced 4 exhibits in support of his case against the Appellant, to wit, copy of letters of administration as litem as Pexh. 1, copy of the title deed as Pexh. 2, Surveyor's Report dated July 27, 2012 as Pexh. 3 and Surveyor's Report dated February 25, 2020 as Pexh. 4.



25. It was the Appellant's claim that the Respondent obtained the ownership of the title of the suit land fraudulently and further, he illegally extended the boundaries of the suit land. The Court in considering the standard of proof required in an allegation of fraud in *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others* Civil Appeal No 215 of 1996 held that: -

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case.”

26. The Appellant did not adduce any evidence in support of their assertions that the Respondent used any fraudulent methods in misrepresenting the acreage of the suit parcel No 784. There was no contrary evidence adduced by the Appellant as to the acreage of the suit land contained in the title deed and the green card. Further, he did not also adduce any evidence in support of his claims that the said 2 Acres forms part of his lawful parcel No 85. The survey report heavily relied on does not in any way contest the ownership of the said portion as forming part of the parcel No 784.

27. It is trite law that he who alleges must prove. Section 107(i) of the *Evidence Act* provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

28. Thus, in the absence of any evidence as to the contrary, this court is unable to find in favor of the Appellant. Guided by the provisions of sections 24,25 and 26 of the *Land Registration Act*, I accordingly find that the Respondent is the absolute owner/proprietor of the suit parcel No 784, measuring 1.3Ha including the 2 Acres which is subject to the present suit and she is therefore entitled to all the rights and interests appurtenant thereto as a registered proprietor, to the exclusion of the everyone including the Appellant. No lawful justification and explanation has been given by the Appellant as a basis for his continued use and occupation of the portion in dispute measuring approx. 2 Acres.

29. In view of the foregoing, I find that the Appellant did not adduce any evidence in support of his claims to the required threshold to warrant the grant of the orders sought. I accordingly find that the learned trial magistrate exercised his discretion properly in allowing the plaintiff's claim and this court therefore finds no reason to interfere with the findings of the trial court. The analysis and findings were based on an assessment and evaluation of all the facts of the case and the evidence presented in support of the rival positions taken by the parties.

Conclusion

30. In conclusion, I accordingly find that the Appeal dated May 11, 2021 is not merited and is therefore dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 21ST DAY OF JUNE, 2023.

MOHAMMED N. KULLOW

JUDGE

In the presence of: -

_____ for Appellants



_____ for Respondent
Court Assistant- Tom Maurice/ Victor

