



Oniango (Suing as the Administrator of the Estate of Raphael Oniango Olweny, Deceased) v Auma & 2 others (Environment and Land Appeal E059 of 2021) [2023] KEELC 18670 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18670 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E059 OF 2021
SO OKONG'O, J
JULY 13, 2023**

BETWEEN

ANN AUMA ONIANGO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF RAPHAEL ONIANGO OLWENY, DECEASED) APPELLANT

AND

MORINE LEAH AKECH AUMA 1ST RESPONDENT

LAND REGISTRAR KISUMU 2ND RESPONDENT

HON.ATTORNEY GENERAL 3RD RESPONDENT

(Being an appeal from the judgment and decree of Hon. W.K. Onkunya SPM delivered on 30th June 2021 in Kisumu CMCELC No. 65 of 2018)

JUDGMENT

Background

1. All that parcel of land known as Title No. Kisumu/Kanyawegi/5397 was registered in the names of Oniango Olweny, Owala Olweny, Ayo Olweny and Osodo Wambuka (hereinafter together referred to as “the co-owners” and separately as “Oniango”, “Owala”, “Ayo” and “Osodo” respectively) on 17th February 2005 as tenants in common in equal shares of ¼ each. This appears to have been late registration. The co-owners are all deceased. Oniango died on 20th September 1995. The Appellant is the administrator of Oniango’s estate. On 17th November 2006, the whole of the suit property was transferred to Morine Leah Akech Auma, the 1st Respondent herein.



The case before the lower court

2. The Appellant filed a suit before this court (Kisumu ELC No. 91 of 2015) against the Respondents through a plaint dated 14th April 2015 in her capacity as the administrator of the estate of Oniango. The Appellant averred that on or about 17th November 2006, the 1st and 2nd Respondents jointly and severally fraudulently and unlawfully caused the suit property to be transferred to the 1st Respondent without succession having been undertaken in respect of the estates of the co-owners thereof. The Appellant sought judgment against the Respondents for; a declaration that the transfer of the suit property to the 1st Respondent was void, an order compelling the 2nd Respondent to rectify the register of the suit property and restore the co-owners as the proprietors of the suit property, general damages for trespass, and costs and interest.
3. The 1st Respondent was served with Summons to Enter Appearance but failed to enter appearance and file a defence to the Appellant's claim. Interlocutory judgment was entered against her in default of appearance. The 2nd and 3rd Respondents filed a defence dated 5th May 2015 to the Appellant's claim. The 2nd and 3rd Respondents denied that the 2nd Respondent fraudulently and unlawfully caused the suit property to be transferred to the 1st Respondent. The 2nd and 3rd Respondents averred that if the suit property was transferred from the co-owners to the 1st Respondent then the 2nd Respondent effected the transfer procedurally in accordance with the law.
4. The suit was transferred from this court to the Chief Magistrate's Court at Kisumu and assigned a new number, Kisumu CMELC No. 65 of 2018(hereinafter referred to as "the lower court"). At the hearing of the suit in the lower court, only the Appellant gave evidence. The 2nd and 3rd Respondents did not tender any evidence in their defence. After hearing, the lower court delivered a judgment on 30th June 2021 in which it dismissed the Appellant's suit with costs to the Respondents. The lower court made a finding that the Appellant had failed to prove her case on a balance of probabilities. The lower court framed three issues for determination namely; whether the Appellant had the capacity to file the suit, whether the suit property was fraudulently transferred to the 1st Respondent and whether the Appellant was entitled to the reliefs that she had sought. On the first issue, the court held that the Appellant only had the capacity to institute the lower court suit on behalf of the estate of Oniango in respect of his ¼ share in the suit property. The court found that the Appellant had no capacity to sue on behalf of the other co-owners of the suit property since she did not have the consent of the administrators of their estates. The court finally held that the Appellant did not have capacity at all to file the lower court suit since she did not obtain consent of the administrators of the estates of the other co-owners of the suit property to file the suit.
5. On the second issue, the lower court cited several authorities and found that the Appellant had failed to prove that the 1st and 2nd Respondents transferred the suit property to the 1st defendant fraudulently. The court found that a part from enumerating particulars of fraud, the Appellant failed to adduce evidence in proof of the fraud and illegality alleged against the 1st and 2nd Respondents in the transfer of the suit property to the 1st Respondent to the required standard. On the final issue, the court held that since the Appellant had no capacity to file the lower court suit and had also failed to prove fraud in the transfer of the suit property to the 1st Respondent, the Appellant was not entitled to the reliefs sought in the lower court.



The Appeal

6. The Appellant was aggrieved by the said decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 30th June 2021, the Appellant challenged the lower court's judgment on the following grounds;
 1. The Learned Magistrate erred in law and fact in finding that the Appellant had failed to prove her case on a balance of probabilities.
 2. The judgment of the Learned Magistrate was against the weight of evidence.
7. The Appellant prayed that the appeal be allowed and the judgment and decree of the lower court made on 30th June 2021 be set aside and substituted with an order granting the reliefs that were sought by the Appellant in the lower court. The Appellant also prayed for the costs of the appeal.

The submissions

8. The appeal was argued by way of written submissions. The 2nd and 3rd Respondents filed their submissions on 20th January 2023 while the Appellant filed her submissions on 21st March 2023.

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 parties. 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] EA 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] EA 424 and *Makube v. Nyamuro* [1983] KLR 403.
10. The Appellant's two grounds of appeal raise only one issue for determination by the court namely, whether the lower court erred in dismissing the Appellant's suit. The lower court gave two reasons for dismissing the Appellant's suit. The first was that the Appellant had no legal capacity to file the suit. The second reason was that the Appellant had failed to prove that the suit property was transferred to the 1st Respondent fraudulently.
11. It is common ground that the co-owners held the suit property as tenants in common in equal shares. In Megarry & Wade, *The Law of Real Property*, 17th Edition at pages 493 and 494 paragraphs 13-009 to 13-012, the authors have stated as follows regarding the nature of a tenancy in common:
 - "1. The tenants hold in undivided shares. Unlike joint tenants, tenants in common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. Thus tenants in common have quite separate interests. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular parcel of land.



2. There is no right of survivorship. The size of each tenant's share is fixed once and for all and is not affected by the death of one of his companions. When a tenant in common dies, his interest passes under his will or intestacy, for his undivided share is his to dispose of as he wishes...
3. Only the unity of possession is essential. Although the four unities of a joint tenancy may be present in a tenancy in common, the only unity which is essential is the unity of possession. In particular, it should be noted that the unity of interest may be absent and the tenants may hold unequal interests, so that one tenant in common may be entitled to a one –fifth share and the other to four-fifths, or one may be entitled for life and another in fee simple”.

12. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated that:

“By definition, a tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, with each person having the right to possess the whole property but no right of survivorship. The central characteristic of a tenancy in common is that each tenant is deemed to own by himself, a physically undivided part of the entire parcel (see. *Black's Law Dictionary*, 9th Edn and Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future interests* 54 2nd Edn, 1984)”.

13. The suit property was registered under the *Registered Land Act*, Chapter 300 Laws of Kenya (now repealed). Section 103 of the *Registered Land Act* provides as follows on the characteristics of a tenancy in common:

- “(1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor, his share shall be administered as part of his estate. (emphasis added)
- (2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.”

14. It is common ground that the Appellant was the administrator of the estate of Oniango. It is also common ground that Oniango was the owner of $\frac{1}{4}$ undivided share in the suit property. It follows that on the death of Oniango, his $\frac{1}{4}$ share in the suit property devolved to his estate. The Appellant as the administrator of Oniango's estate had a right to bring a suit on behalf of the estate to protect Oniango's $\frac{1}{4}$ share in the suit property. The Appellant, therefore, had the capacity to bring the lower court suit to challenge the transfer of Oniango's $\frac{1}{4}$ share in the suit property to the 1st Respondent. The Appellant did not bring the suit on behalf of the other co-owners of the suit property. She did not, therefore, require their consent to file the suit. Due to the foregoing, I am in agreement with the Appellant that the lower court erred in its finding that the Appellant required the consent of the administrators of the estates of the other co-owners of the suit property to file the lower court suit. The court, therefore, erred in its holding that the Appellant lacked the capacity to file the lower court.

15. On proof of fraud and illegality, this is my view: I am in agreement with the 2nd and 3rd Respondents that fraud must be pleaded with the necessary particulars and proved to a standard beyond a balance of



probabilities. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another* [2000] eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

16. In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] EA 314, the court stated as follows at page 317:

“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

17. In *Kursbed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

The *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)”

18. Apart from the legal burden of proof, there is the evidential burden of proof which keeps shifting during the trial. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, *Raila Amolo Odinga & another v. IEBC & 2 Others* [2017] eKLR had the following to say on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one



of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law...”

19. It is not disputed that the burden of proof of fraud and illegalities in the transfer of the suit property to the 1st Respondent rested with the Appellant. However, once the Appellant established that at the time the suit property was transferred to the 1st Respondent, Oniango and some of the other co-owners of the suit property were deceased and that for Oniango, the administrators of his estate were not involved in the transfer of his ¼ share in the suit property to the 1st Respondent, the burden shifted to the 1st and 2nd Respondents to prove that the suit property was legally transferred and registered in the name of the 1st Respondent. The 1st Respondent did not defend the suit. All the allegations of fraud and illegalities pleaded in the plaint against her by the Appellant were not controverted. The evidence adduced by the Appellant that the 1st Respondent caused the suit property to be transferred to herself after the death of Oniango and before a grant of letters of administration had been issued in respect of his estate was also not controverted. The 2nd Respondent is the custodian of land records. It was the 2nd Respondent who registered the transfer of the suit property from the co-owners thereof to the 1st Respondent. The 2nd Respondent had a duty to ensure that the process of transfer of the suit property that was owned by the co-owners as tenants in common was conducted in accordance with the law. Once the Appellant proved that the suit property was transferred to the 1st Respondent after the death of Oniango and some of the co-owners thereof and that they were not involved in the transfer, the 2nd Respondent had a duty to prove that the law was followed in the transfer of the suit property to the 1st Respondent. Although the 2nd Respondent claimed in its defence that the suit property was transferred to the 1st Respondent procedurally and in accordance with the law, the 2nd Respondent chose not to tender any evidence at the trial to prove the legality of the transaction. At the end of the trial, there was no evidence before the court showing how the suit property moved from the names of deceased persons to the name of the 1st Respondent. I am satisfied from the evidence that was before the lower court that the Appellant proved not only the illegality in the transfer of the suit property to the 1st Respondent but also that the transfer was fraudulent. Failure on the part of the 1st Respondent to defend herself against the Appellant’s claim that she had acquired the suit property fraudulently and that of the 2nd Respondent who is the custodian of land records to place before the court documents that were used to transfer the suit property to the 1st Respondent can only be construed as evidence that the whole process was carried out fraudulently. It is therefore my finding that the lower court erred in its holding that the Appellant had not proved fraud against the Respondents.

Conclusion

20. In the final analysis and for the foregoing reasons, I am in agreement with the Appellant that the lower court erred in its finding that the Appellant had failed to prove her case on a balance of probabilities. The Appellant proved her case to the required standard and was entitled to the reliefs sought save for general damages that was not proved. I will therefore make the following orders in matter:
1. The judgment delivered by Hon. W.K.Onkunya SPM on 30th June 2021 in Kisumu CMC ELC No. 65 of 2018 is set aside.
 2. Judgment is entered for the Appellant against the Respondents as follows;



- (i) I declare that the transfer of all that parcel of land known as Title No. Kisumu/Kanyawegi/5397 from Oniango Olweny, Owala Olweny, Ayo Olweny and Osodo Wambuka to the 1st Respondent was illegal, null and void.
- (ii) The Registration of the 1st Respondent as the proprietor of all that parcel of land known as Title No. Kisumu/Kanyawegi/5397 and the title deed issued to her in respect of the property are cancelled.
- (iii) The Land Registrar, Kisumu County, the 2nd Respondent herein shall forthwith cancel entries numbers 2 and 3 in the register of Title No. Kisumu/Kanyawegi/5397 and shall revert the property to the names of Oniango Olweny, Owala Olweny, Ayo Olweny and Osodo Wambuka.

3. Each party shall bear its own costs of the lower court suit and of the appeal.

DELIVERED AND DATED AT KISUMU ON THIS 13TH DAY OF JULY 2023

S. OKONG'O

JUDGE

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

Mr. Munuango for the Appellant

N/A for the 1st Respondent

Ms. Juma for the 1st and 2nd Respondents

Ms. J. Omondi-Court Assistant

