



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Olwanda v Chapia (Environment and Land Appeal E007 of 2021)
[2023] KEELC 19925 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19925 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E007 OF 2021**

E ASATI, J

SEPTEMBER 21, 2023

BETWEEN

HEZEKIAH OUYA OLWANDA APPELLANT

AND

JAPHETH ONG'ONDA CHAPIA RESPONDENT

*(Being an appeal from the judgement and decree of VIHIGA LOWER COURT
ELC APPEAL NO. 52 OF 2019 BY R. M. NDOMBI PM delivered on 4/11/2021)*

JUDGMENT

Introduction

1. Hezekiah Ouya Olwanda the Appellant herein, was the Defendant in Vihiga SPMC ELC Case No.52 Of 2019 (herein referred to as the suit). He was sued by Japheth Ongonda Chapia, the Respondent herein who sought for orders of permanent injunction and costs. The suit land, the subject matter of the suit was L.R NO. West Bunyore/ekwanda/1039.
2. In response to the claim, the appellant filed a defence and counterclaim dated 14th March, 2021 denying the Respondent's claim and *vide* the counter-claim claiming for an order of permanent injunction restraining the Respondent from interfering with the appellant's quiet use and occupation of the suit land.
3. The case was heard before the trial court which rendered its judgement on 4th November, 2021. The court found that the Appellant's counter-claim lacked merit and dismissed it with costs to the Respondent. The court found further that the Respondent had proved his case on a balance of probabilities and entered judgement in favour of the Respondent for permanent injunction against the Appellant restraining him from dealing with the suit land, issued an order of eviction for the eviction of the Appellant from the suit land within 60 days of the judgement and awarded costs of suit to the Respondent.



4. Aggrieved by the judgement, the Appellant proffered the appeal herein *vide* the Memorandum of Appeal dated 20th December, 2021 seeking that:-
 - a. the appeal be allowed.
 - b. the judgement and all other consequential orders/decrees emanating therefrom be set aside.
 - c. Maseno Succession Cause No.29 of 2018 in respect of the revocation proceedings be allowed to completion.
 - d. Costs of the appeal.
5. Pursuant to directions taken on 11th May, 2023, the appeal was argued by way of written submissions.

Issues for Determination

6. The issues for determination in the appeal are the grounds of appeal presented in the Memorandum of Appeal namely:-
 - a. The learned trial magistrate erred in law by failing to recognize that the existence of concurrent proceedings on the same matter being Maseno Succession Cause No.29 Of 2018 in which matter we had appellant in respect of the same suit property.
 - b. The learned trial Magistrate erred in law by failing to recognize that it was indeed the Appellant who was in actual possession of the suit property at the time of the purported sale to the Respondent and as such no due diligence had been conducted in the purported sale.
 - c. The learned trial magistrate indeed erred in holding that the Respondent obtained a good title to the suit property as at the time of sale, the property was subject to judicial proceedings and had been restricted on the register.
 - d. The learned trial magistrate erred in law by failing to consider the Appellant's counter-claim which was uncontested in the lower court proceedings.
 - e. The trial magistrate otherwise erred in law and fact by failing to consider the totality of the evidence on record, the submissions filed by the appellant as against the facts and evidence of the Respondent.
 - f. The learned trial magistrate failed or misapprehended in applying the law appropriately against the evidence presented by the Appellant.

Analysis and Determination

7. This is a first appeal and as such this court has a duty to analyse and re-examine the evidence adduced before the trial court.
8. From the record, the evidence placed before the trial court by the Respondent comprised of his testimony and exhibits produced by him. He testified as PW1 and adopted the contents of his witness statements filed earlier as his evidence. He had stated in the said witness statement that sometime on 20th April, 2019 he entered into a land sale agreement with Moses Arunga Muduwa who sold to him land parcel No. West Bunyore/ekwanda/1039 measuring 0.29 Ha. That he paid Kshs.272,000/- being the full purchase price. That the sale process was completed and he got the title deed. That the Defendant (Appellant herein) forcefully entered onto the land and was using it without his (Respondent's) permission. That the Defendant (appellant herein) should be ordered to vacate the land.



He produced title deed, the land sale agreement, certificate of official search, copy of register (green card,) receipt and current certificate of official search as exhibits.

On cross-examination, he stated that the land was transmitted to Moses Amunga Muduwa through succession. That he became the registered owner of the land in the year 2019.

9. The evidence of the Appellant (Defendant in the lower court) comprised of his testimony and the exhibits he produced. The Appellant who testified as DW1 stated that he bought the suit land from one Risper Muduwa Ogoma in the year 2005. That the seller was the widow of Naftali Muduwa Ogoma deceased. That the purchase price was Kshs.65,000/= which he paid in full and that the witnesses were the area Assistant Chief one Gregory Odhiambo and a son of the seller by the name Moses Arunga. That there was a time he was registered as the owner of the land and given title deed. That later the title deed was cancelled and registration of the land reversed to Moses Muduwa. That on 3rd April, 2019, the same land was transferred to the Plaintiff (Respondent) herein).

That the Plaintiff as the area chief ought to have known that the land belonged to him. That he filed Summons for revocation of grant in a succession cause in Maseno court which is still ongoing. That the court in Maseno issued an order of status quo and as a result he is the one using the land. He produced exhibits.

On cross-examination, he stated that Risper sold him land before succession was done in the year 2005. That he got the title in the year 2018.

That Moses Arunga did succession in Maseno court. That although he has not built a house on the land, he has been ploughing it to date.

10. The first ground of appeal is that the trial court erred in failing to recognize the concurrent proceedings on the same matter being Maseno Succession Cause No.29 Of 2018.

In paragraph 11 and 12 of the Defence and Counter-claim, the record shows that the Appellant did raise the issue of the existence of the Succession Cause before the trial court. The appellant stated;

(11) In further buttress to his counter-claim, the Defendant avers that the same suit property is subject to Maseno Principal Magistrate's Court Succession Cause No.29 Of 2018 in which the said court ordered the retention of status quo. The implication of which the court directed the Defendant to continue to be in occupation of the same.

(12) Pursuant to the Defendant's pleadings in 11 above, this suit is thus subjudice and ought to await the outcome of the cause stated in paragraph 11 above as its subsistence in this court would amount to duplicity of pronouncement."

11. In his testimony in court, the Appellant (Defendant in the lower court) referred to the Succession Cause. The record shows that in his final submission before the trial court, the Appellant also referred to the Succession Cause at Maseno court and submitted that the title held by the Respondent was subject to challenge *vide* Maseno Succession Cause No.29 of 2018, that if the revocation proceedings filed by the Defendant (Appellant herein) in the succession cause succeeds, then the title will automatically be cancelled. He also submitted that because the trial court could not issue eviction orders, there was a subsisting order by a court of concurrent jurisdiction in Maseno Succession Cause No.29 of 2018 which had not been appealed against or set aside and that if the court granted eviction orders, it will be usurping appeal powers over a court of concurrent jurisdiction leading to a judicial conflict.

12. There is no evidence on record that the Plaintiff (Respondent herein) ever filed Reply to defence and defence to Counter-claim to respond to the issues of existence of the Succession Cause.



In his final submission before the trial court, the Respondent herein (Plaintiff in the lower court) submitted that on 27th February, 2019 Moses Arunga Muduma was the legally registered owner of the suit land which land was sold to him (Respondent) on 30th April, 2019. That the status of the land thus changed and there is no ground in law to base it on the succession cause at Maseno.

13. One of the issues framed by the trial court for determination in its judgement was whether or not the proceedings before it would amount to usurping appeal powers in Maseno Succession Case. The court considered the issues and found that the matter was rightfully before the Environment and Land Court for determination of ownership. That the Defendant could have moved the court to obtain stay of proceedings to await the succession matter.
14. In this appeal, the Appellant filed a supplementary record of appeal which contained documents from the succession cause file. It was submitted on behalf of the Appellant that the Appellant commenced proceedings to revoke the grant in Maseno Succession cause where he obtained orders directing that the status quo be maintained pending the determination of the cause. That the court ought to have taken judicial notice that both Vihiga and Maseno courts have concurrent jurisdiction and therefore issuing different orders directed the property would lead to judicial conflict and ought to have restrained from continuing the suit before it and wait for the determination of the succession cause. Counsel relied on Kisumu Court of Appeal Civil Appeal No.196 of 2019 to submit that a court sitting as a Succession Court has power to cancel title deed which had been gazetted irregularly.
15. On behalf of the Respondent, it was submitted on this issue that the Environment and Land Court and Succession are different and distinct each court has been given a clear mandate on how to operate. That the Appellant had no valid title.
16. I have perused the record of appeal and noted that after confirmation of the grant in the Succession Cause, the Appellant filed Summons for Revocation of Grant dated 14th March, 2019. That by the time the plaint was filed on 1st November, 2019, the Summons for Revocation of Grant was still pending hearing and determination before the Succession Court.

It is not in dispute that the suit land suit was the subject of the succession cause and until the succession court finally distributed it, its ownership could not be determined by Environment and Land Court. The succession court issued an order for status quo. As much as the court was aware of the existence of the succession cause, it required the appellant to move the court to stay the proceedings pending determination of the succession cause, particularly the Summons for Revocation.

17. The second ground of appeal is that the trial court failed to recognize that it was the Appellant who was in possession at the time the Respondent claims to have bought the land. Hence no due diligence was done. The Appellant testified that immediately he bought the land in the year 2005, he took possession thereof. The fact that the Appellant was in occupation was acknowledged by the Respondent who sought for eviction of the Appellant from the suit land.

However, the Respondent's version was that the Appellant only forcibly entered onto the suit land in the month of October, 2019.

There is no evidence that the Appellant raised the issue of due diligence in the pleadings, evidence or submissions or framed any issue around it for determination of the trial court. The Appellant cannot therefore fault the court for not making a finding thereon. The court was obligated to decide only issues placed before it

18. The next ground of appeal is that the trial court erred in holding that the Respondent obtained a good title as at time of sale, the property was subject to judicial proceedings and had been restricted on



the register. The green card produced as exhibit shows that on 20/9/2019, a restriction was removed and the land transmitted to one Moses Arunga Muduwa under Succession Cause No.29 of 2018 and transferred to the Respondent on 30/4/2019. Although the Appellant had filed Summons for Revocation of grant at the Maseno court, he never sought any stay of the proceedings before the trial court so as to await the outcome of the succession cause. On the face of the facts presented to the court, the court was justified to find that the Respondent had proved his case.

19. The next issue for determination is whether the trial court had erred in failing to consider the Appellant's counterclaim which was uncontested.

Vide his Defence and counterclaim dated 14th March, 2021, the Appellant counterclaimed for an order of permanent injunction restraining the Plaintiff (Respondent) herein from interfering with the Defendant quiet use and occupation of the suit land.

20. It is evident from the judgement that the trial court considered the counterclaim. The court stated;

“the defendant submitted that he has occupied the land since 2005 and paid value and has been using the said land. He stated that the title is subject to challenge in Maseno Succession Cause where he has filed Summons for Revocation of grant issued to Moses Muduwa. The Defendant avers that if the revocation succeeds, then the title automatically stands cancelled.

The plaintiff's counsel submitted that sale between Risper Muduwa and the Defendant herein was null and void. It is evident that the *Law of succession Act* provides a restriction that no immovable property shall be distributed before confirmation of grant.

It therefore follows that the sale of land parcel No.west Bunyore/ekwanda/1039 was in contravention of the *Law of Succession Act* and therefore initiated by illegality.....

The Defendant raised a counterclaim that he purchased land from Risper Matubwa the widow of the deceased Naftali Matubwa and witnessed by Moses Mutubwa.

Further that there being another case in Maseno Succession Cause No.29 of 2018 the Court orders places the Defendant in occupation by order of status quo.

I find that the counterclaim lacks merit for reasons stated hereinabove and the same is dismissed with costs.”

21. It is apparent that the Plaintiff (Respondent herein) filed neither Reply to Defence nor Defence to Counter Claim in accordance with the provisions of the *Civil Procedure Rules*. Nonetheless, the Defendant (Appellant herein) still had the burden to prove the counterclaim to the required degree of proof.

In the case of *Charter House Bank Limited (Under Statutory management -vs- Frank N. Kamau* [2016] e KLR the court of appeal when discussing the burden of proof on the plaintiff in a situation where the defendant failed to adduce evidence stated that:

“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probability by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant.

.....The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the



claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified”

Perusal of proceedings shows that the Appellant bought the land from the widow of the registered owner and took occupation. The sale transaction was however void for lack of capacity to transact on the part of the widow. Hence the title given to him was cancelled. The court was thus justified to dismiss a counterclaim premised on the sale transaction. I find that the court did consider the counterclaim and made a decision thereon.

22. The next ground of appeal is that the trial court failed to consider the totality of the evidence. It has not been pointed out in the appellant’s submissions what aspects of the pleadings, evidence or submissions were omitted in the trial court’s decision. I find that this ground has not been proved.
23. The last ground is that the trial court failed or misapprehended in applying the law. Similarly, this ground has not been expounded on in the submissions or proved.
24. The main contention in this appeal is the jurisdiction of the succession court vis a vis that of the Environment and Land Court in respect of land which is a subject of succession. The appellant’s complaint is that the Environment and Land Court did not wait for the succession court to determine the issue of ownership of the suit land with finality before entertaining a suit on ownership thereof. As at the time title was issued to the Respondent, there was pending in the succession court a Summons for revocation of grant. Secondly, that soon after the suit was filed on 1/11/2019, the succession court issued an order that the status quo in regard to the suit land be maintained pending the hearing and determination of the Summons for Revocation of Grant. Thirdly, the record shows that the trial court, aware of the order of status quo, in its ruling dated 23rd July 2020 declined to issue injunctive orders in the case because it would clash with the status quo order issued by Maseno court. Fourthly, as at the time the judgement was delivered by the trial court the statue quo order was still in place as the Summons for Revocation of Grant had not been determined. The Summons for Revocation of Grant the Supplementary Record of Appeal shows has since been resolved by the consent signed between the Petitioner in the Petition and Counsel for the appellant and filed in the Maseno court on 11th February 2023. The consent annulled the Grant and returned the title of the suit land to the deceased. This no doubt affects titles issued pursuant to the grant including the title held by the Respondent. In effect the dispute that brought the parties to court has not been resolved. Hence in my view, granting the orders sought in the appeal by allowing the appeal or dismissing the appeal and upholding the judgement of the trial court may not resolve the dispute as the grant has been annulled and title reverted the original owner(deceased).
25. The powers of an appellate court as contained in section 78 of the Civil Procedure Act include power to order a retrial. In view of this and the totality of the circumstances of this case, I find that the appeal has merit, allow it and make the following orders:
 - a. The judgement of the trial court is set aside.
 - b. there be a re-trial of the suit by the trial court.
 - c. the lower court file be returned to the trial court for retrial.
 - e. Each party to bear own costs.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 21ST DAY OF SEPTEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.



E. ASATI,

JUDGE.

In the presence of:

Maureen-----Court Assistant.

No appearance for the Appellant.

No appearance for the Respondent.

