



**Sangoro v Thure & another (Environment and Land Appeal E039 of 2021)  
[2023] KEELC 20310 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20310 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E039 OF 2021  
E ASATI, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**DENNIS ODUOR SANGORO ..... APPELLANT**

**AND**

**OYANGE THURE ..... 1<sup>ST</sup> RESPONDENT**

**ANDREA GILA AMOLO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Appellant vide the Memorandum of Appeal dated 9<sup>th</sup> June 2021 appealed to this court against the judgement of Hon. H.M. Nyaberi – Chief Magistrate in Wiman CMC ELC no 12 of 2018. He seeks for orders that;
  - i. The appeal be allowed and the lower court judgement be set aside and in its place there be judgement in favour of the Appellant as per the plaint.
  - ii. Cost of the appeal.
2. The grounds of appeal as set out in the Memorandum of Appeal are that;
  - i. The learned trial magistrate erred in law and fact by failing to appreciate that the land parcel no Kisumu/Nyahera/2280 was legally sold to the Appellant for consideration and that the order for cancellation of the title deed for Kisumu/Nyahera/2280 was premature because in doing so, the court deprived the Appellant his right to own property.
  - ii. The learned chief magistrate erred in law by failing to appreciate that the 1<sup>st</sup> Respondent legally transferred Kisumu/Nyahera/2280 to the Appellant herein and further no evidence was adduced by the 1<sup>st</sup> Respondent to demonstrate that he did not sign the transfer forms that were produced as evidence in court.



- iii. The learned magistrate erred in law when he did not consider all the evidence that was tabled before him by the Appellant in regards to possession of Kisumu/Nyahera/2280 which was given to Appellant knowingly.
- iv. The learned Chief Magistrate erred in law by failing to appreciate the findings of the Land Registrar as well as the District Surveyor as the same pointed out to the fact that the 2<sup>nd</sup> Respondent staying on Kisumu/Nyahera/2141 had actually encroached on the Applicant's land Kisumu/Nyahera/2280.
- v. The learned Chief Magistrate erred in law and fact by failing to rely on the weight of evidence on record that clearly pointed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents clearly falsely misrepresented the facts before the court and the court without considering the evidence as a whole found in favour of the Respondents.
- vi. That learned magistrate erred in law and fact by relying solely on the false evidence of the Respondent against the evidence of the Appellant.
- vii. The learned magistrate erred in law and fact by failing to consider the Appellant's evidence and representation in court and instead relying wholly on the 1<sup>st</sup> Respondents testimony that he acknowledged selling Kisumu/Nyahera/2280 to the Appellant but he conveniently does not remember what portion he hold to the Appellant and the 2<sup>nd</sup> Respondent.

## **Background**

3. The record shows that the Appellant was the plaintiff in Winam CMC Environment & Land Case no 12 of 2018 (the suit). He had, vide the plaint dated 23<sup>rd</sup> June, 2011, sued the Respondent Claiming that he was the registered owner of the land parcel no Kisumu/Nyahera/2280 measuring 1.5Ha (the suit land). That the Respondents who own neighbouring parcels of land had colluded and deprived the Appellant of part of the suit land leaving the Appellant with only 1/3 (one third) thereof. He therefore sought the following relief;
  - a. An order of that the Land Registrar Kisumu do visit parcel nos. Kisumu/Nyahera/2280, 2142 and 2281 and together with neighbouring parcel numbers Kisumu/Nyahera/2161, 1617 and 1615 put each of the parties in his right place.
  - b. An order of eviction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in portion of land no Kisumu/Nyahera/2280 belonging to the Plaintiffs.
  - c. Costs of the suit.
  - d. Any other or further relief the honourable court may deem just to grant in the circumstances.
4. The Respondent defended the suit vide their statement of defence and Counter-claim dated 26th July, 2011. They denied the Appellant's claim, contended that the 2<sup>nd</sup> Respondent owned a parcel of land known as Kisumu/Nyahera/2142 measuring 1.3Ha which he bought from the 1<sup>st</sup> Respondent and which he had peacefully occupied for the past 25 years. He claimed that the Appellant had acquired title to the suit land illegally. He, therefore, vide the counter-claim prayed for:
  - a. An order that the register of parcel of land numbers Kisumu/Nyahera/2280, 2281 and 2142 be rectified to correct the illegality in the acreage increased by the Plaintiff and reflect the correct position on the ground.



- b. The 1<sup>st</sup> Defendant in the counter-claim paid the 1<sup>st</sup> Plaintiff cash of ksh 40,000/- plus interest from 2002 until payment in full.
  - c. Costs and interest of the suit.
5. The suit was first filed in the High Court at Kisumu as KSM HC Civil Suit no 95 of 2011 but later vide the consent order made on 8<sup>th</sup> February, 2018, the suit was transferred to Winam Law Courts for which heard the suit and delivered its judgement on 26<sup>th</sup> May, 2021. The court found that the manner in which the Plaintiff obtained his title was illegal and made the following orders:
- a. The Plaintiff's suit is dismissed;
  - b. A declaration is hereby issued that title deed no Kisumu/Nyahera/2280 is null and void.
  - c. The Plaintiff to pay the costs of the suit and the costs of the counter-claim.
6. Aggrieved by the judgement, the Appellant proffered the present appeal.
7. Directions on the manner of disposal of the appeal were taken on 2<sup>nd</sup> February, 2023 that the appeal be argued by way of written submissions. Consequently, the Appellant filed written submissions dated 28<sup>th</sup> March, 2023 through the firm of Ben Aduol Nyanga & Company Advocates. The Respondents filed written submissions dated 5<sup>th</sup> July, 2023 through the firm of Olel, Onyango, Ingutya Advocates.

### **Issues for Determination**

8. The Appellant framed two issues for determination herein namely:
- i. Whether the Plaintiff (Appellant) legally owns the land parcel number Kisumu/Nyahera/2280;
  - ii. Who should bear the costs;
- The Respondent similarly framed two (2) issues for determination namely;
- i. Whether the plaintiff obtained registration and title to L.R. no Kisumu/Nyahera/2280 in a manner that is legally and procedurally correct.
  - ii. Whether or not the trial court erred in its finding that the counter claim had been proved
  - iii. Who ought to pay the costs of the suit.

From the issues framed by both parties, one substantive issue arises for this court's determination in this appeal and that is whether or not registration of the suit land in favour of the Appellant was lawful.

### **Analysis and Determination**

9. This court reminds itself of its duty as a court handling a first appeal to reconsider and reanalyse the evidence afresh with a view of arriving at independent conclusion.
10. The evidence placed before the trial court comprised of the testimony of the Appellant who testified as PW1 and the exhibits he produced, the testimony of the 1<sup>st</sup> Respondent who testified as DW1 and the exhibit that he produced and testimony of DW2 a Land Registrar.
11. The Appellant had pleaded in paragraph 3 of the Plaint that at all material times, he was registered as the owner of land parcel number L.R. no Kisumu/Nyahera/2280 measuring 1.50Ha. He pleaded in paragraph 5 that he petitioned the Land Registrar to show the parties and their neighbours, their



boundaries but the Land Registrar could not reach the ground due to the warlike and outright hostility of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants towards the Land Registrar and his team”

12. In response, the Respondents in paragraph 12 to 14 their defence and counter claim pleaded that in the year 2002, the 1<sup>st</sup> Respondent sold a portion of his parcel of land to the Appellant for ksh 200,000/- but was only paid ksh 160,000. That the Appellant did not give him any formal agreement to sign nor did he bring a Surveyor to measure the portion sold. That the Appellant illegally acquired the title fraudulently without following due process and acquired a portion of land larger than what was agreed on.

The 1<sup>st</sup> Respondent itemized the particulars of fraud and illegality under paragraph 14 of the defence and counterclaim to include:

- a. Forging court official signature or agreement dated 25<sup>th</sup> October, 2002 (an agreement I did not sign).
  - b. Forging 1<sup>st</sup> Respondent’s signature on various transfer forms and mutation forms.
  - c. Having the RIM map wrongly drawn to reflect bigger acreage than what was sold.
  - d. Acquiring title without proper consideration.
13. In his testimony, the Plaintiff (appellant herein) adopted the contents of his witness statement dated 23<sup>rd</sup> June, 2011 as his evidence in chief. In the witness statement, he had narrated what transpired when the Land Registrar and Surveyor visited the suit land on 9<sup>th</sup> September, 2010. In court, he added that the 1<sup>st</sup> Respondent sold him a parcel of land. That he took possession by living on it. That the 2<sup>nd</sup> Respondent is his neighbour, that the Defendants trespassed onto the land he bought and took a portion of it. That according to the title deed that he holds in respect of the suit land, the land measure 1.50 hectares. Among the exhibits he produced was a title deed for the suit land and Certificate of Official Search in respect thereof, a land sale agreement dated 25<sup>th</sup> October, 2004, sheet map no 12 (Diagram no 12), Summons issued by Land Registrar (Boundary Dispute Summons), demand Letter dated 9<sup>th</sup> March, 2011, Letter dated 15<sup>th</sup> March, 2011 and letter dated 31<sup>st</sup> March, 2011.
14. On cross-examination, he stated that the Respondent had encroached onto his land, the suit land. That he had bought the land from the 1<sup>st</sup> Respondent at a consideration of ksh 200,000/= which he paid. That the agreement he produced in court was not signed by both the seller and the buyer and that the size of the sold land was not indicated in the agreement. That as at the time he was buying the portion of land, the Respondents were already in occupation of their respective portions. That the original parcel was no 2160 and that he and the 1<sup>st</sup> Respondent visited the land office and on the same day each of them got his title deed.
15. The 1<sup>st</sup> Respondent who testified as DW1 stated that he sold the Appellant land parcel no Kisumu/Nyahera/2280. That although he sold the land to the Appellant, they did not enter into any agreement. That he did not sign an agreement. That the agreed purchase price was ksh 200,000/= but the Appellant only paid ksh 160,000/- leaving a balance of ksh 40,000. That the Appellant has never paid the balance to date. That the title held by the appellant contain more land than what was being sold. That they never went to the Land Control Board. He claimed for the extra portion that the Appellant took and the balance of the purchase price of ksh 140,000/=.
16. On cross-examination, the confirmed that he sold land to the Appellant. That the 2<sup>nd</sup> Respondent was the first to buy land from him. That he later in 2004 sold 2 acres to the Appellant. That he has never



appeared before a Magistrate. That he never signed a mutation form and that the signature on the mutation is not his.

17. The evidence of DW2, a Land Registrar, Kisumu County was that according to the green card, a certified copy whereof he produced as exhibit, the suit land belonged to the Appellant having been registered an owner on 30<sup>th</sup> May, 2005. He also produced Land Control Board Consent from Kisumu Municipality Land Control Board as exhibit, a transfer form and a report dated 30<sup>th</sup> July, 2014 by the Land Surveyor and Land Registrar.
18. The trial court framed three (3) issues for determination and the first issue is the substantive issue in this appeal – namely, whether or not the Plaintiff acquired land parcel Kisumu/Nyahera/2280 legally. On the issue, the court concluded that;

“having considered the submissions by the parties, their oral evidence and documentary evidence, I have come to the conclusion that the Plaintiff has failed to prove his claim on a balance of probability ..... the 1<sup>st</sup> Defendant has proved his claim on the counter-claim above the threshold of balance of probability”.
19. Counsel for the Appellant submitted that any allegation of fraud must be pleaded and strictly proved. Counsel relied on the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR and *Kinyanjui Kamau v George Kamau* [2015] eKLR to support the submissions that the Respondent did not adduce evidence to support their allegation of fraud hence did not prove that the Plaintiff/Appellant acquired the title fraudulently. That therefore the trial magistrate erred in finding in favour of the Respondent.
20. Counsel for the Respondents submitted that in the face of provision of Section 26 of the *Land Registration Act*, it is not enough for a party whose title is impugned to waive the same title in the face of the court. That such a party need to do more to prove that the title was not obtained through fraud, misrepresentation or illegality, unprocedurally or through a corrupt scheme. That the first fraudulent conduct of the Appellant was to present to the court an agreement that was not signed by the parties and did not contain acreage of the sold piece of land. Counsel relied on the case of *Hassan Mohammed Haji v Mohammed Keynan & another* (2019) eKLR and *Jobna Omoyoma v Bonface Oure & 2 Others* (2021) eKLR to support the submissions.
21. Counsel also relied on Section 3(3) of the *Law of Contract Act* and the Case of *Patrick Tarzan Matu & another v Nassim Shariff Abdulla & 2 Others* (2209) eKLR to urge the court to find that the agreement relied upon by the Appellant in the suit was in contravention of Section 3(3) of the *Law of Contract Act*. Counsel relied on the case of *Daudi Ledama Morintat v Mary Christine Kiarie & 2 Others* (2017)eKLR where it was held that contracts which were in contravention of Section 3(3) of the *Law of Contract Act* cannot be relied upon in a suit.
22. The fact that the Appellant bought land from the 1<sup>st</sup> Appellant is not denied. The fact that title no Kisumu/Nyahera/2280 was issued pursuant to the said sale is also not in dispute. What is in dispute is the size of the sold portion of land and whether the appellant followed due process to acquire the title thereto. The 1<sup>st</sup> Respondent admitted in his testimony that he sold a piece of land measuring 2 acres land to the appellant. Further in his counterclaim he prayed for an order that the register of land parcel numbers 2280, 2281 and 2142 be rectified to correct the illegality in acreage increased by the plaintiff and reflect the correct position on the ground and payment of the balance of the purchase price of ksh 40,000/=. But although the trial court found that the counterclaim had been proved on a balance of probabilities, the orders it ultimately made were not the orders prayed for in the counter claim. The court made a declaration that the title deed no Kisumu/Nyahera/2280 is null and void. This was not



prayed for in the counter claim. I find that the trial court erred in not entering judgement as per the counter claim after finding that the counterclaim had been proved.

23. I find that the appeal succeeds to the extent that the judgement is set aside and replaced with judgement in the following terms: -

- a. The Plaintiff's suit is dismissed.
- b. Judgement is entered on the Counter-claim for;
  - i. An order that the register of parcel of land Numbers Kisumu/Nyahera/2280, 2281 and 2142 be rectified so that land parcel no Kisumu/Nyahera/2280 measures 2 acres and reflect the correct position on the ground.
  - ii. A sum of ksh 40,000/- be paid by the Plaintiff to the 1st Defendant.
- c. Costs of the suit and counter-claim are awarded to the Defendants.
- d. Each party to bear own costs of the appeal.

Orders accordingly.

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

**E. ASATI**

**JUDGE.**

**In the presence of:**

Maureen: Court Assistant.

Miss Ochieng for the Appellant.

Odhong for the Respondents.

