



REPUBLIC OF KENYA



KENYA LAW
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**Oraro v Oraro (Civil Appeal 84 of 2021)
[2023] KEELC 20981 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20981 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
CIVIL APPEAL 84 OF 2021
E ASATI, J
OCTOBER 26, 2023**

BETWEEN

JANE AUMA ORARO ALIAS JANE TABU OILO APPELLANT

AND

JANE PAMELA WILLIAM ORARO RESPONDENT

*(Being an appeal from the Judgement of Hon. S.N.
Telewa (SRM) delivered on 8th December, 2021)*

JUDGMENT

1. Vide the Memorandum of Appeal filed in court on 16th December, 2021, the Appellant herein appealed against the judgement of Hon. S.N. Telewa (Senior Resident Magistrate) in Kisumu CMC EL Case No.227 of 2018 delivered on 8th December, 2021. The grounds of appeal were that;
 - a. The trial Magistrate erred in law and fact in finding that the Respondent is the rightful owner of land parcel known as Kisumu/Kogony/996 despite the Respondent's contradicting evidence which fell below the required degree of proof.
 - b. The trial Magistrate erred in law and in fact in finding that the Respondent is the rightful owner of the land parcel No. Kisumu/Kogony/996 since the year 1994 without interference.
 - c. The trial Magistrate erred both in law and fact in issuing a permanent injunction and making an order of eviction against the Appellant despite overwhelming evidence emerging on the record that the Appellant is a wife to William Oraro and that the Appellant has lived on land parcel No. Kisumu/Kogony/996 since the year 1994 without interference at all.
 - d. That the judgement was against the weight of evidence.
2. The Appellant sought for orders that;



- a. the judgement and/or decisions of the trial court be set aside and the appeal be allowed.
 - b. costs of the appeal and those incurred in the subordinate court be borne by the Respondent.
3. The Appellant was sued in Kisumu CMC EL Case No. 227 of 2018 (referred to herein as the suit.) by the Respondent over a parcel of land known as Kisumu/Kogony/996 (herein the suit land). The Respondent claimed that she was at all material times the registered owner of the suit land. That sometimes on 1st June, 2017 the Defendant without the Plaintiff's consent or permission entered upon the Plaintiff's land and put up a semi-permanent structure thereby preventing the Plaintiff from enjoying the land.
 4. The suit was heard by the trial court which delivered its judgement on 8th December, 2021. The court found that the Respondent had proved her case on a balance of probabilities and entered judgement in her favour for;
 - a. A declaration that the Plaintiff was the rightful owner of the suit land.
 - b. An order of eviction of the appellant from the suit land.
 - c. A permanent injunction against the appellant, her agents, servants, assigns, relatives or whomsoever claiming title or acting on their behalf from remaining in occupation, continuing to occupy, constructing structures on the same, selling, burying, trespassing and or encroaching and in any other manner interfering with land reg No. Kisumu/Kogony/996
 - d. Costs.
 5. Dissatisfied with the judgement, the Appellant proffered this appeal.
 6. Directions were taken on 17th May, 2023 that the appeal be argued by way of written submissions.
 7. Written submission dated 31st August, 2023 were filed on behalf of the appellant by the firm of Peter Warindu & Company Advocates. Counsel submitted that since the Appellant had been in peaceful occupation of the suit land since the year 1994, the doctrine of adverse possession applies in her favour. Counsel relied on the provision of the *Limitation of Actions Act* and the *Land Registration Act* to submit that the title of the proprietor has been extinguished in favour of the adverse possessor at the expiry of the 12 years of occupation.
 8. Counsel relied on the provisions of Section 28(h) of the *Land Registration Act* to submit that the law recognizes overriding interests on land including adverse possession. Counsel also relied on the case of *Kasuve v Mussami Investments Limited & 4 Others* [KLR 184 to submit that the right of adverse possession accrued and vested in the Appellant as at the years 2006.
 9. That the Appellant testified that she had been in exclusive control of the suit land and demonstrated *animus possidendi* in developing the suit land. That evidence was led that the Defendant had knowledge of the Plaintiff's occupation of the suit land. That the Respondent did not establish legality of her title.
 10. Written submissions dated 27th June 2023 were filed on behalf of the Respondent by the firm of Mwamu & Company Advocates. Counsel submitted that the Respondent was the legal proprietor of the suit land and that article 40 of *the Constitution* guarantees every person the right to property, article 60(1) the principle of security of land and article 64 private ownership of land. Counsel relied on section 26 of the *Land Registration Act*, the cases of *Margaret Njeri Wachira v Eliud Wawere Njenga* [2018] eKLR and *Esiroyo v Esiroyo* [1973]EA 388 to submit that the suit land belongs to the appellant because it was given to her by her husband.



11. Relying on the case of *Ephantus Mwangi & another v Dancun Mwangi Wambugu* 91982-1988) 1KAR 278 Counsel submitted that there is no ground for the court to interfere with the orders and findings of the trial court
12. On costs, Counsel relied on section 27 of the *Civil Procedure Act* and prayed that costs be awarded to the Respondent.

Issues for Determination

13. From the grounds of appeal raised in this appeal, the record of appeal generally and the submissions made, the following emerge as the issues for determination;
 - a. whether or not the trial court erred in finding that the Respondent is the rightful owner of land parcel No. Kisumu/Kogony/996;
 - b. whether or not the Appellant had had adverse possession of the sit land;
 - c. Whether or not the trial court erred in issuing orders of injunction and eviction against the Appellant;
 - d. Who pays the cost of the appeal?

Analysis and Determination

14. This being a first appeal, this court will be guided by the established principles of handling a first appeal. The court is under a duty to reconsider the evidence adduced and re-evaluate it so as to arrive at its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence adduced and the applicable law. See case of *Peter M. Kariuki v Attorney General* [2014] eKLR. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court held that:

“ this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

15. The first issue for determination is whether the trial court erred in finding that the Plaintiff was the rightful owner of land parcel No. Kisumu/Kogony/996.

Jane Pamela William Oraro the Respondent herein had pleaded in paragraph 3 of the Plaint that at all material times to the suit, the Plaintiff is the legal/registered owner of land parcel known as Kisumu/Kogony/996. In her evidence before the trial court, she produced a copy of the title deed for the land as exhibit P1. The title deed issued on 29th December, 2015 was in her name.

16. The Defendant/Appellant on her part pleaded in paragraph 4 of her written statement of Defence dated 1st August, 2019 that land parcel No. Kisumu/Kogony/996 was assigned to her by her husband one William Oraro and she established her home thereon. She further pleaded in paragraph 6 of the defence that if indeed land parcel No. Kisumu/Kogony/996 is registered in the name of the Plaintiff, then the registration was done fraudulently.



17. In her evidence before the trial court, the Appellant testified that it is her husband who gave her the land and that is where she lives. She called 3 witnesses. DW2 testified that the suit land was bought by his brother and that the Appellant had been cultivating the land. On cross-examination, he stated that Jane Pamela (the Respondent herein) lives there. He further stated that the right person to remain on the land according to Luo custom is Jane Pamela, the 1st Wife (the Respondent herein). In re-examination, he stated that the suit parcel of land is occupied by the Defendant (Appellant herein) and that she is living there with her children).
18. Having listened to the evidence, the trial court found that under the provisions of Section 24, 25 and 26 of the Land Registration Act, registration vests in a person absolute ownership of the land. That William Oraro who was the original registered owner had the right to deal with his property the way he wanted. That he chose to transfer the land to the Respondent. The court found that the Plaintiff (Respondent herein) had proved her claim to be the rightful owner of the land.
19. I have considered the evidence adduced and the decision made thereon. The original owner of the land was said to be alive. No reason was given why the Appellant did not call him as the person who gave her the land to testify and clarify.

The Respondent on the other hand has title to the land. Her rights are secured by both the constitution and statute. No evidence was led to impeach her title. Although the Appellant claimed that if the land was registered in the name of the Respondent, the registration was obtained by fraud, she did not prove the fraud to the required standard or at all.

20. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In Koinange & 13 others v Charles Karuga Koinange 1986 KLR at page 23 the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

Similarly in the case of Kinyanjui Kamau v George Kamau [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see Ndolo v Ndolo (2008)1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases..”
In case where fraud is alleged it is not enough to simply infer fraud from the facts.

21. In the present case, fraud was not pleaded as required or proved to the required degree. Under section 107 of the Evidence Act the burden was on the appellant. I find that the trial court did not err in finding that the Respondent was the rightful owner of the suit land.
22. The next issue is whether or not the Appellant had had adverse possession of the suit land. In paragraph 6 of the written statement of defence, the Appellant pleaded that she had had peaceful occupation of the suit land since 1994 when one William Oraro assigned her the land. This was her evidence and



the evidence of her witnesses. According to this evidence, her entry onto the suit land was with the permission of the then registered owner. The Respondent became registered owner in the year 2015 and to the time the suit was filed in August, 2017 only 2 years had elapsed.

23. Adverse possession is a doctrine of law through which a person obtains legal title to land by reason of actual, open, hostile and continuous occupation of the land to the exclusion of the registered owner for a prescribed period, in Kenya twelve years. The doctrine is anchored on the provisions of Sections 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 prohibits filing of actions for recovery of land after the expiry of 12 years from the date the right of action accrued. This means that at the end of twelve years of occupation of land by an adverse possessor, where the occupation is without the consent or permission of the registered owner, the right of the registered owner of the land to recover the land is extinguished and the right of the adverse possessor to claim title to the land matured.
24. I find that there was no evidence that the Appellant had had a peaceful possession of the suit land as envisaged by law as against the Respondent herein.
25. The last issue for determination is whether the trial court erred in issuing orders of injunction and eviction against the Appellant.

Having found that the land rightfully belonged to the Respondent and that the Appellant's presence on the land was unjustified, the court was justified to grant the orders.

26. I find that the grounds of appeal have not been proved. I dismiss the appeal. No orders as to costs.
Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 26TH DAY OF OCTOBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

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E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the Appellant.

Omondi T. for the Respondent.

