



REPUBLIC OF KENYA



KENYA LAW
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**Jecton & 3 others v Bugo (Environment and Land Appeal E010 of 2021)
[2023] KEELC 21666 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21666 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E010 OF 2021
GMA ONGONDO, J
NOVEMBER 21, 2023**

BETWEEN

**JANE OMOLO JECTON ALIAS JENNIFER OLANDO 1ST APPELLANT
MAURICE ODOYO 2ND APPELLANT
WYCLIFFE ODOYO 3RD APPELLANT
HASSAN ODOYO 4TH APPELLANT**

AND

NIXON OTIENO BUGO RESPONDENT

(Being an appeal from the judgment of Hon. Mary A. Ochieng', Principal Magistrate, delivered on 28th September 2021 in Ndhiwa Principal Magistrate's Court Environment and Land Case No. 22 of 2020)

JUDGMENT

1. This is an appeal that arises from the trial court's judgment delivered on the 28th September 2020 by the Honourable Mary A. Ochieng', Principal Magistrate, in Ndhiwa Principal Magistrate's Court Environment and Land Case No. 22 of 2020 where she held that the defendants'/appellants' stay on the suit land is not justified and accordingly issued eviction orders against them.
2. The appellants through the firm of H. Obach and Partners Advocates mounted the appeal by way of a memorandum of appeal dated 15th October 2021 and duly filed on 21st October 2021. The Appeal is anchored on eight grounds as set out on the face thereof and the same include:
 - a. The learned trial magistrate erred in law and in fact by misinterpreting the provisions of Sections 7, 13, 17 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya in arriving at her impugned decision.



- b. That the learned trial magistrate erred in law and in fact in failing to find and hold that the 1st appellant herein was a wife of the deceased, Wellington Odoyo Olango and the 2nd to 4th appellants their sons and as such entitled to the land belonging to Bugo Omondi, the late father of the respondent.
 - c. That the learned trial magistrate erred in law and in fact in failing to find and hold that the act of the respondent of filing an objection against the suit properties and failing to inform the appellants who were also living on the suit properties in itself resulted in concealment of material fact which amounted to fraud on the part of the respondent.
 - d. That the learned trial magistrate erred in law and fact in that she disregarded the appellants' submissions and judicial authorities with the resultant miscarriage of justice to the appellants.
3. Wherefore, the appellant prays for orders that:
 - a. The appeal be allowed.
 - b. The judgment of the learned trial magistrate dated 28th September 2021 be quashed and/or set aside and the same be substituted with an order allowing the appellants' suit in lieu of the reliefs sought in the Environment and Land Case No. 222 of 2020.
 - c. The costs of this appeal and in the subordinate court be awarded to the appellants.
 4. The appeal was heard by way of written submissions pursuant to this court's directions of 8th February 2023.
 5. Learned counsel for the appellants filed submissions dated 10th July 2023 and identified three issues for determination thus: whether ownership begins at registration or upon issuance of the certificate of title, whether the claim for adverse possession was proven and whether the appellant is entitled to the reliefs sought. Counsel submitted that the claim for adverse possession was substantially proven on a balance of probability as the appellants herein proved to be in possession of the suit land by adducing photographs to the effect that they have a home established thereon. That further, the appellants have been in occupation of the suit land for an uninterrupted period exceeding twelve years. To fortify the submissions, reliance was placed on the case of Gachuma Gacheru -vs- Maina Kabuchwa (2016) eKLR, among other authoritative pronouncements.
 6. The respondent's counsel, L. K. Obwanda Advocates, filed submissions dated 15th September 2023 and identified three issues for determination to wit: whether the record of appeal herein is valid or not; whether the trial court erred in holding that the respondent and his late brother Tom Onyango were the registered proprietors of the suit properties and granting the incidental orders thereto and who should bear the costs of the appeal?
 7. Learned counsel submitted that the appellants failed to comply with this court's ruling delivered on 23rd February 2021 directing the appellants to deposit a sum of Kshs 50,000/- as security for costs, failure to which the stay order so granted would lapse. That further, the record of appeal was filed out of time and without leave of court hence, should be struck out with costs. That the allegation by the 1st appellant that she was not aware of the adjudication process was without basis since DW3 testified that they made numerous site visits. That further, the 2nd, 3rd and 4th appellants were fully aware of the matter and filed Environment and Land Case Number 48 of 2018 at Migori Chief Magistrate's Court, which they later withdrew.
 8. Also, counsel submitted that the appellants' claim for adverse possession over the 1st suit parcel of land is unsustainable since she admitted to having established her home on the 2nd suit parcel of land.



That since the respondent and his brother were only registered as proprietors in the year 2018 as first registered owners following an adjudication process that had been ongoing since 2010, the statutory timeframe for adverse possession had not lapsed by the time of filing suit. Counsel relied on various authorities, including the case of Virginia Wanjiku Mwangi -vs- David Mwangi Jotham Kamau (2013) eKLR, to buttress the submissions.

9. Counsel for the respective parties highlighted their submissions on 23rd October 2023. The appellants' counsel relied fully on the appellants' submissions dated 10th July 2023.
10. Learned counsel for the respondent, Ms. L. K. Obwanda and Mr. Willis Otieno, stated that the appellants did not comply with the condition issued for stay. That the record of appeal was filed 8 months out of time. That the appellants were aware of the adjudication process but did not file an objection under Section 29 of the Land Adjudication Act or appeal the decision. That the appellants filed a suit, Environment and Land Case Number 48 of 2018 at Migori Chief Magistrate's Court but withdrew the same. That the appellants claimed adverse possession over the 1st suit parcel of land yet they are in possession and occupation of the 2nd suit parcel of land. That the appellant was a wife of Wellington Odoyo.
11. In response, Ms. B. Ochieng for the appellants stated that there was a delay in procuring proceedings for appeal purposes. That the appellants' house has been destroyed by the respondent hence, the stay orders could not be implemented. That the appellant was initially married to Bugo (deceased) before getting married to Wellington Odoyo. That the allegations of fraud on the part of the appellants were not proved. Thus, counsel urged the court to allow the instant appeal.
12. In the foregone, the issues for determination are as disclosed in the grounds of appeal and compressed to whether:
 - a. The grounds are sustainable and
 - b. The appellant is deserving of the orders sought in the memorandum of appeal.
13. It is trite law that an appellate court has the jurisdiction to reconsider the evidence on record with caution and reach its own independent conclusions and inferences; see Kiruga-vs-Kiruga and another (1988) eKLR.
14. Nixon Otieno Bugo, the plaintiff/respondent herein, sued the defendants/appellants by way of a plaint dated 27th July 2020 and filed on even date at the trial court seeking the orders infra;
 - a. A declaration that the plaintiff and his late brother Tom Onyango Bugo are the proprietors of land parcel numbers Ndhiwa/Kamdari/1114 and 1115 respectively (the 1st and 2nd suit parcels of land respectively).
 - b. An order of permanent injunction restraining the defendants, employees, agents and/or servants from interfering with the suit land herein.
 - c. An order for general damages for loss of use.
 - d. Eviction order.
 - e. Cost of the suit and interest.
15. The plaintiff's claim was that the defendants had abandoned their parcel of land and trespassed onto the suit parcels of land, which are registered in the names of the plaintiff and his late brother Tom Onyango Bugo. That the defendants are cultivating the same without the plaintiff's consent.



16. The plaintiff testified as PW1 and relied on his statement dated 21st September 2020 as part of his evidence. He stated, inter alia, that the 1st defendant's husband, Wellington Odoyo, used to sit on the local Land Board. That he tampered with the records relating to the suit parcels of land. That the 2nd, 3rd and 4th defendants are the sons of the 1st defendant and the said Wellington Odoyo. He produced in evidence a copy of grant ad litem in Ndhiwa Succession Cause No. 69 of 2020 and copies of title deeds for the suit parcels of land (PExhibits 1, 2a and 2b respectively).
17. During cross-examination, PW1 admitted to have appeared before the adjudication panel but he denied the findings of that panel. He also stated that although the chief via a letter dated 30th May 2018 confirmed that the 1st defendant was a wife to Jacton Bugo Omondi, the same chief later wrote another letter denying the confirmation.
18. PW2, Opot Omondi John, relied on his statement dated 21st September 2020, which was adopted as part of his evidence. In cross-examination, he stated that he was not aware that the defendant had filed an objection at the Lands Adjudication Office.
19. PW3, Serphine Adhiambo Odongo, relied on her statement dated 21st September 2020, which was adopted as part of her evidence. She stated that Syprosa Anyango Bugo, is the wife to Bugo, the plaintiff's late father. On cross-examination, she stated that she was not aware that the defendant had filed an objection at the Lands Adjudication Office in respect to the suit parcels of land.
20. PW4, George Odhiambo Daywa, a village elder in Kitota Village, relied on his statement dated 31st August 2020, which was adopted as part of his evidence.
21. Similarly, PW5, Joseph Awego Abade, relied on his statement dated 31st August 2020, which was adopted as part of his evidence. During cross-examination, he stated that he could not recall the land parcel on which the 1st defendant resides.
22. The defendants, on the other hand, filed Suit No. 46 of 2020 by way of Originating Summons dated 4th August 2020 at the Migori Environment and Land Court against the plaintiff and County Land Registrar Homabay and the Attorney General. They sought the following orders:
 - a. A declaration to be issued that the deceased and the plaintiff herein right to recover the 1st suit parcel of land in the names of Tom Onyango Bugo (deceased) is barred under the [Limitation of Actions Act](#).
 - b. An order that the respondents herein be registered as a proprietor of the 1st suit parcel of land.
 - c. The plaintiff herein be ordered to execute all requisite papers necessary to have the defendants registered as the proprietors of the said suit land and in default, the Deputy Registrar or Executive Officer be at liberty to do so.
 - d. An order nullifying the irregularity and fraudulent registration of the suit land in the names of the plaintiff herein and the register be rectified.
 - e. Costs of the originating summons be borne by the plaintiff.
23. On 25th November 2020, the Environment and Land Court at Migori transferred the suit to Ndhiwa Law Courts for hearing and determination alongside the environment and land case filed therein.
24. DW1, Jenipher Odoyo Lango alias Jane Omola Jecton, adopted her witness statement dated 4th August 2020 as part of her evidence. She testified that after the death of Jackton Bugo in 1972, a subdivision of his land was done during adjudication in 1978 and she was given the 1st suit parcel of land while



- her co-wife, Syphrosa Abugo, was given the 2nd suit parcel of land. That however, the said Syphrose constructed her house on the 1st suit parcel of land hence, she constructed her home on the 2nd suit parcel of land. That she has lived thereon for 35 years with her sons, i.e. the 2nd, 3rd and 4th appellants. That she was not aware of any objection proceedings hence, could not appeal against the decision. She produced in evidence, a letter dated 30th December 2016 (MFID 1), bundle of photographs (DExhibit 2) and a letter of authority dated 3rd September 2020 (DExhibit 3).
25. In cross examination, she stated that the suit parcels were never solely registered in her name. That she did not know one Wellington Odoyo. She admitted that she had no document to prove that she was the widow of Jackton Bugo (deceased), save for a letter from the chief. That she has no proof that the 2nd, 3rd and 4th appellants herein are the sons of the deceased Bugo. That she cultivates the 1st suit parcel of land which is registered in the name of Tom Bugo (deceased). That the said Tom did not give her consent to occupy the land parcel. That she did not know of a suit filed earlier which had been withdrawn.
 26. However, in re-exam, DW1 contradicted herself by stating that she was aware of the suit that had been filed prior to Migori Environment and Land Court O. S No. 46 of 2020 and which was withdrawn.
 27. DW2, Sakiel Odongo, relied on his statement which was adopted as part of his evidence. He testified that the 1st appellant was Bugo's wife having been married in 1972. That Bugo died in 1974, having paid dowry for the 1st appellant herein. That during adjudication, both the 1st appellant and Bugo's first wife were given land belonging to the deceased. He also confirmed that the 1st appellant had a relationship with Wellington Odoyo after the demise of Bugo (deceased).
 28. During cross-examination, he stated that the deceased did not accompany them to pay dowry for the 1st appellant. That the deceased and the 1st appellant only sired one child. That it is in fact Wellington Odoyo who constructed a homestead for the 1st appellant on the deceased's land. That the 1st appellant sired eight children with the said Wellington, of whom three are deceased. That the 1st appellant was a wife to the said Wellington.
 29. In re-examination, DW2 that the children sired by the 1st appellant and Wellington Odoyo are entitled to inherit the deceased, since it is the deceased who paid dowry for the 1st appellant. That further, the deceased's presence was nor required during dowry payment.
 30. DW3, Kipruto Talano, Principal Land Adjudication and Settlement Officer Homabay, denied that he authored the letter dated 30th December 2016. He confirmed that the 1st and 2nd suit parcels of land were initially registered in the names of the 1st appellant and Syprosa respectively. That an objection was raised by the respondent herein. That the suit parcels are currently registered in the names of Tom Onyango Bugo and Nixon Otieno Bugo respectively. He produced in evidence, a copy of the adjudication proceedings as DExhibit 5.
 31. On cross-examination, DW3 stated that the identity card number of the objector as indicated in DExhibit 5 is different from that of the respondent herein (PExhibit 3). That therefore, DExhibit 5 may not be the true copy of the proceedings. That the title deeds issued to the respondent and his brother were lawful, since no appeal was lodged.
 32. In re-examination, DW3 clarified that had the objection been dismissed, titles could not have been issued. That none of the widows of the deceased appeared before him.
 33. DW4, Daniel Otieno Okoro, Chief North Kwabwai Location, denied authoring the letter dated 30th May 2018. That he was not aware of the said letter and the signature affixed thereto did not belong to him. The witness was stood down and did not proceed with his testimony.



34. It is noted that the learned trial magistrate set out the parties' respective cases, framed five issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
35. The trial magistrate stated in part that:
- “... I see no evidence or proof of fraud on the part of the plaintiff considering the records being held in the Lands Adjudication Office and the evidence of the principal adjudication officer, DW3...”
36. The appellants contend that the learned trial magistrate erred in law and in fact in failing to find and hold that the 1st appellant herein was a wife of the deceased, Wellington Odoyo Olango and the 2nd to 4th appellants their sons and as such entitled to the land belonging to Bugo Omondi, the late father of the respondent. I note that the same was corroborated by DW2, who also stated that the 1st appellant was a wife to one Wellington Odoyo with whom she sired eight children, including the 2nd, 3rd and 4th appellants herein. Interestingly, the 1st appellant denied knowing the said Wellington. Notably, DW4 denied authoring the letter dated 30th May 2018 which purported that the appellant was a widow of the deceased. Therefore, it is my considered view that no sufficient evidence was adduced in support of this assertion.
37. The appellants lamented that the learned trial magistrate erred in law and in fact in failing to find and hold that the act of the respondent of filing an objection against the suit parcels of land and failing to inform the appellants who were also living thereon in itself resulted in concealment of material fact which amounted to fraud on the part of the respondent.
38. In his testimony, DW3 stated that they made numerous site visits during the process of resolving the objection filed by the 1st respondent herein. Besides, it is on record that the 2nd, 3rd and 4th appellants were fully aware of the matter and filed Environment and Land Case Number 48 of 2018 at Migori Chief Magistrate's Court, which they later withdrew. Although the 1st appellant initially denied knowledge of the suit at Migori Law Courts, she contradicted herself during re-examination by stating that she was aware of the suit. Indeed, it is crystal clear that the appellants herein were fully aware of the adjudication proceedings. Their denial of knowledge of it, in my view, is an attempt to mislead this court.
39. According to the evidence of DW3, the title deeds issued to the respondent herein and his brother are lawful. DW3 stated thus:
- “...I confirm the title deeds issued to Tom and Nixon were lawful since no appeal was lodged...”
40. Section 24 (a) of the [Land Registration Act](#), 2012 (2016) provides thus:
- Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto
41. Section 26 (1) of the same Act stipulates as below:
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie



evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

42. It is trite law that fraud must be specifically alleged and proven. In the case of Vijay Morjaria -vs- Nansingh Madhusingh Darbar & another [2000] eKLR, Tunoi, JA. (as he then was) 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts

43. In the instant case, it is my conserved view that the appellants failed to prove the existence of fraud by the respondent and his brother in obtaining title to the 1st and 2nd suit parcels of land. Besides, the appellants failed to exhaust the remedy of appeal as stipulated under Section 26(1) and Section 29 of the Land Adjudication Act, Chapter 284 of the Laws of Kenya.

44. Regarding the appellants’ claim to have acquired the suit parcels of land by way of adverse possession, the court in the case of Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein and another (2015) eKLR stated that adverse possession dictates thus;

- a. The parcel of land must be registered in the name of a person other than the applicant,
- b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
- c. The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner (Emphasis added)

45. The appellants’ counsel submitted that the claim for adverse possession was substantially proven on a balance of probability as the appellants herein proved to be in possession of the 1st suit parcel of land by adducing photographs to the effect that they have a home established thereon.

46. DW1 testified that after the death of Jackton Bugo in 1972, a subdivision of his land was done during adjudication in 1978 and she was given the 1st suit parcel of land while her co-wife, Syphrosa Abugo, was given the 2nd suit parcel of land.

47. I, however, note that in the suit No. 46 of 2020 lodged by way of originating summons dated 4th August 2020 at the Migori Environment and Land Court against the respondent herein and others, the appellants sought various orders including an order that they be registered as proprietor of the 1st suit parcel of land. How can the 1st appellant claim to have acquired by adverse possession a parcel of land which she alleges to have belonged to her until 2018? The 1st appellant further testified that she established her home on the 2nd suit parcel of land. Thus, it is my considered view that the appellants did not prove to the requisite standard to have acquired the 1st suit parcel of land by way of adverse possession; see Wilson Kazungu Katana case (supra).



48. I also note that the appellants filed the record of appeal out of time and without leave of court. Although the appellants' counsel stated while highlighting submissions that the delay was occasioned by challenges in procuring proceedings for appeal purposes, no certificate of delay was availed herein.
49. This court subscribes to decision in *Nicholas Kiptoo Korir Arap Salat v. Independent Electoral and Boundaries Commission & 7 Others*, SC Application No. 16 of 2014; [2014] eKLR where the court stated that –
- “...where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires...”
50. The Supreme Court in the *Nick Salat* case (*supra*) further noted that:
- “...No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court...”
51. In the foregone, I find that the record of appeal was inexcusably filed out of time and without leave of this court. So, this appeal must fail.
52. Section 107 to 109 of the *Evidence Act* Chapter 80 Laws of Kenya provides that he who alleges must prove. In *Kirugi and another–vs-Kabiya and 3 others* (1987) KLR 347, the Court of Appeal held that the burden was always on the plaintiff to prove his case on the balance of probabilities.
53. In the instant case, I find that the respondent who was the plaintiff at the trial court proved his case to the requisite standard. I therefore, find that the trial magistrate did not err in issuing eviction orders against the defendants/appellants herein, since the plaintiff/respondent proved to have acquired the titles to the suit parcels of land in a lawful manner.
54. In conclusion, it is the finding of this court that the learned trial magistrate’s judgment is faultless at law. I proceed to uphold the same.
55. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 15th October 2021 and duly filed on 21st October 2021 is hereby dismissed.
56. The appellants to bear the costs of this appeal and at the trial court.
57. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 21ST DAY OF NOVEMBER 2023.

G.M.A ONG’ONDO

JUDGE

Present

1. Mr. Migele holding brief for Ms. L. K. Obwanda, learned counsel for the respondent
2. 2nd appellant, present in person
3. Luanga, Court Assistant

