



Kodhiambo & another v Nyagaya & 3 others (Environment and Land Appeal E040 of 2022 & E020 of 2021 (Consolidated)) [2023] KEELC 22187 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22187 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E040 OF 2022 & E020 OF 2021 (CONSOLIDATED)
GMA ONGONDO, J
DECEMBER 14, 2023

BETWEEN

ATIENO KILI KODHIAMBO APPELLANT

AND

MARTIN OKOMBO NYAGAYA 1ST RESPONDENT

PHILISTA OLUOCH NYAGAYA 2ND RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND APPEAL E020 OF 2021

BETWEEN

CHRISTANS IMBOGI BOBAGI APPELLANT

AND

MARTIN OKOMBO NYAGAYA 1ST RESPONDENT

PHILISTA OLUOCH NYAGAYA 2ND RESPONDENT

ATIENO KILI KODHIAMBO 3RD RESPONDENT

SIMION ASIAGO ALOKA 4TH RESPONDENT

(An appeal from the judgment of Honourable E.M Onzere (PM) delivered on 22nd April 2020 in Ndhiwa Principal Magistrate's Court Environment and Land Case Number 44 of 2018)



JUDGMENT

1. The present judgment pertains to two consolidated appeals namely; Homa Bay Environment and Land Court Appeal No. E040 of 2022 and Homa Bay Environment and Land Court Appeal No. E020 of 2021 (the lead file and the other file herein respectively). The twin appeals were consolidated by consent of the parties on 8th June 2023 when Appeal No. E040 of 2022 made the lead file.
2. On 22nd April 2020, the trial court delivered judgment in favour of the plaintiffs/respondents in terms of prayers (a) to (d) sought in the plaint dated 10th September 2010.
3. The appellant in the lead file (1st appellant herein) was aggrieved at the judgment and through the firm of Kanyangi & Company Advocates, lodged this appeal by way of a memorandum of appeal dated 25th August 2022 based on nine grounds inter alia;
 - a) That the learned trial magistrate erred in fact and law in not finding that the appellant had not been properly served with hearing notice.
 - b) That the learned trial magistrate erred in law and fact by not finding that this was a first registration which is indefeasible except in the case of fraud and misrepresentation.
 - c) That the learned trial magistrate erred in law and fact by not finding that the person to whom she directed the suit land to be released to was long deceased and so was incapable of taking possession of the land as ordered.
4. On that score, the 1st appellant prays to this Honourable Court to:
 - a) Set aside the judgment and decision by the lower court.
 - b) Allow the appeal and set aside all the consequential orders flowing from the judgment of the lower court.
 - c) Declare that the parcel of land number Kanyamwa/Kayambo-Kwamo/324 is legally and lawfully owned by the appellant, Atieno Kili Kodhiambo, who is the first registered owner.
 - d) In the alternative and without prejudice to the foregoing prayers, the court to order a retrial of the case most preferably before another court of competent jurisdiction.
 - e) Award costs and interest thereon in respect of this appeal and the court below to the appellant.
5. In the other file, the 2nd appellant, Christans Imbogo Bobagi, through Bosire Gichana and Company Advocates, lodged the appeal by way of a memorandum of appeal dated 14th December 2021 and lodged herein on 17th December 2021 based on grounds 1 to 8 which include;
 - a) The learned magistrate erred in law and in fact in not holding that the draft defence filed by the appellant raised triable issues thus occasioning a miscarriage of justice.
 - b) The learned magistrate misdirected herself in exercise of her discretion to set aside default judgment.
 - c) The learned magistrate erred fundamentally by lightly taking away the appellant's right to be heard.
6. Thus, he prayed for orders that:



- a) The ruling against the appellant be reversed, varied and/or set aside.
 - b) The honourable court be pleased to make any other or further orders as may be just and expedient in the circumstances.
 - c) The appeal be allowed.
 - d) The appellant be granted costs of the appeal.
7. The appeal was heard by way of written submissions pursuant to this court's directions given on 8th June 2023.
 8. The 1st appellant's counsel filed submissions dated 16th June 2023 on 26th September 2023. Counsel referred to the particulars of fraud set out in the plaint in the suit and submitted that the 1st appellant bought her property, LR No. Kanyamwa/Kayambo-Kwamo/324 from one Silas Ndira Odul and holds a certificate of title thereof. Counsel relied on the decision in David Mburu Kamau-vs-National Industrial Credit Bank (2010) eKLR and submitted that the allegations of fraud on the part of the 1st appellant, were not proven to the requisite standard. That further, the defence filed by the 1st appellant raised triable issues and the trial court ought to have allowed the application dated 7th December 2021, which sought to have the judgment set aside and the case be heard and determined on the merit of evidence, in line with Article 159 (2)(d) of *the Constitution* of Kenya, 2010. Thus, counsel urged this court to quash the trial court's decision and allow this appeal with costs.
 9. The 2nd appellant's counsel did not file any submissions herein. Similarly, the 1st and 2nd respondents did not file submissions.
 10. It must be noted that the 1st and 2nd respondents sued the appellants including one Simon Asingo Aloka by way of the plaint dated 10th September 2010 at the trial court seeking the following orders;
 - a) An order of declaration that the 1st, 2nd and 3rd defendants hold land parcel numbers Kanyamwa/Kayambo-Kwamo/1277, 324 and 1316 (the 1st, 2nd and 3rd suit parcels of land herein) all measuring 5.02 hectares in trust for the estate of Nyagaya Obel Thomas.
 - b) An order that the said parcels measuring 5.02 hectares be merged with land parcel number Kanyamwa/Kayambo-Kwamo/325 now measuring 4.68 hectares and the 9.7 hectares be registered in the name of Nyagaya Obel Thomas as parcel number Kanyamwa/Kayambo-Kwamo/325.
 - c) An order of permanent prohibitory injunction to restrain the defendants, their nominees, assignees, family members or anybody claiming title through them or any one of them from entering into or taking possession thereof.
 - d) Costs of this suit together with interest thereon at the rate of 14% p.a from the date of filing suit until payment in full.
 - e) Such further or other alternative relief as this honourable court deems fit to grant.
 11. Initially, the matter was lodged at Kisii High Court (HCCC No. 251 of 2010) but was transferred to Migori Environment and Land Court (ELCC No. 405 OF 2017). Subsequently, the same was transferred to Ndhiwa Principal Magistrates' Court by orders issued on 15th October 2018, for hearing and determination.
 12. The evidence of the 1st plaintiff/1st respondent (PW1) was based on the plaint and verifying affidavit, inter alia, that his late father, Nyagaya Obel Thomas (Deceased) was the proprietor of the unregistered



- land measuring approximately 10 hectares situated in Nyawiso village in Kayambo Sub-location before land adjudication commenced. That during land adjudication process around 1977, the 2nd appellant, while working as an officer in the Lands Adjudication Department of the Ministry of Lands and Settlement attached to Kayambo-Kwamo Adjudication Section, fraudulently inserted his own name and that of the 1st appellant as well as Simon Asingo Aloka as owners of the suit parcels of land. That therefore, the appellants and Simon Asingo Aloka(deceased) hold the suit parcels of land in trust for the estate of Nyagaya Obel Thomas. He relied on a bundle of documents dated 13th November 2019 (PExhibits 1 to 10).
13. Philista Oluoch Nyagaya (PW2) relied on her statement filed herein on 17th July 2019 wherein she denied that her late husband, Nyagaya Obel Thomas (Deceased), ever sold the suit parcels of land to third parties. That they had lived on the whole of the suit land peacefully until 2010, when the 2nd appellant started laying claim to a portion thereof.
 14. PW3 was John Owii who relied on his statement dated 17th July 2019 as his evidence in-chief. He stated that the 2nd appellant started occupying the suit land in 2010 and was tilling the same, until 2018 when he stopped. He urged the court to revert ownership of the suit parcels of land to the respondents herein.
 15. Kisito Oyore Kawi (PW4) relied on his statement dated 17th July 2019 as part of his evidence in-chief, wherein he denied that his late brother, Nyagaya Obel Thomas (Deceased), ever sold the suit parcels of land to third parties. He averred that the deceased was living thereon and cultivating the same until his demise in 2005. That his children still utilize the suit land to date.
 16. The 1st appellant opposed the claim by way of a statement of defence filed on 30th May 2012. She averred that she is the legal owner of the 2nd suit parcel of land herein and that no fraud was used to acquire its ownership.
 17. The defendants did not participate in the hearing of the suit. Therefore, their case was marked as closed.
 18. In arriving at the impugned judgment the trial court identified three issues for determination to wit: was the 1st, 2nd and 3rd defendants titles to the suit land fraudulently obtained? Are the plaintiffs entitled to the suit parcels of land and who should be awarded costs of the suit?
 19. The learned trial magistrate noted thus:

“ ... The defendants chose not to participate in the hearing despite service of the summons and hearing notices to them by way of substituted service. The 2nd defendant filed a defence denying the averments in the plaint. He, however, did not attend the hearing to tell the court how he became the registered owner of the suit land and why the court should find his title deed to be valid ...”
 20. The instant appeal being the first one from the trial court, I have the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see Peters-vs-Sunday Post (1958) EA 424 at 429.
 21. In that regard, the issues for determination are contained in the grounds of appeal which crystallize to proprietorship of the suit parcels of land and whether the instant appeal is tenable.
 22. This court is not unaware of ownership of land pursuant to Sections 24, 25 and 26 of the [Land Registration Act](#) (supra). Besides, the 1st appellant has argued that title issued following a first registration is indefeasible except in the case of fraud and misrepresentation.



23. It is trite law that fraud and misrepresentation as grounds for impeaching a certificate of title be distinctly pleaded and proven; see *Kuria Kiarie & 2 others-vs-Sammy Magera* (2018) eKLR.
24. Indeed, the particulars of fraud against the 1st and 2nd appellants are set out at paragraph 7 of the plaint, a pleading in the suit; see also *Ndolo-vs-Ndolo* (2008) 1KLR (G & F) 742.
25. In the instant case, the respondents alleged that the 2nd appellant abused his office to defraud the late Nyagaya Obel Thomas, whose land he was to demarcate and register. That the 2nd appellant, while working as an officer in the Lands Adjudication Department of the Ministry of Lands and Settlement attached to Kayambo-Kwamo Adjudication Section, fraudulently inserted his own name and that of the 1st appellant as well as Simon Asingo Aloka(deceased) as owners of the suit parcels of land.
26. In *Dina Management Limited -vs- County Government of Mombasa & 5 others* (2023) eKLR, the Supreme Court of Kenya held that a title document is not sufficient proof of ownership of property where the origin of that title has been challenged. The holder of the title document must go beyond the instrument itself and show that the process of acquisition from inception was legal. That the ownership of land whose title was not acquired regularly is not protected under Article 40 of *the Constitution* of Kenya, 2010 on the protection of right to property. The Court noted in part:
- “ ... If the process that was followed prior to issuance of the title did not comply with the law, then such a title could not be held as indefeasible ...”
27. Similarly, in *Munyu Maina –vs- Hiram Gathiha Maina* (2013) eKLR, the Court of Appeal observed that:
- “We have stated that when a registered proprietor of title is challenged, it is not sufficient to dangle the instrument of instrument as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (Emphasis added)
28. Notably, the appellants did not adduce any evidence to show how they became first registered owners of the suit parcels of land as per adjudication records; PExhibits 6, 7 and 8. Thus, they failed to prove that they obtained title to the suit parcels of land legally, formally and free from encumbrances as held in *Maina Munyu* case (supra)
29. A court may apply Sections 26 and 80 of the *Land Registration Act*, 2016 (2012) regarding a title obtained fraudulently upon distinct proof. In *Gladys Wanjiru Ngacha-vs-Teresia Chepsaat & 4 others* (2018) eKLR where the decision in *Lalji Makani* (1957) EA 314 at 317 was applied, the Court of Appeal held;
- “Allegations of fraud must be strictly proved.....something more than a mere balance of probabilities is required.”
30. The 1st appellant laments that the learned trial magistrate erred in fact and law in not finding that the appellant had not been properly served with hearing notice. That the learned trial magistrate erred in law and fact by not finding that the person to whom she directed the suit land to be released to was long deceased and so was incapable of taking possession of the land as ordered. That further, the 3rd defendant, Simon Asingo Aloka, was already deceased at the time of filing suit at the trial court.



31. I note from the record that the appellants were served by way of substituted service vide the Daily Nation on 12th October 2017, Daily Nation of 17th October 2019 and the Standard Newspaper of 28th November 2019, in compliance with court orders. Further, I note that the trial court directed that the suit parcels of land be registered in the name of Nyagaya Obel Thomas (deceased), since it had found that the appellants were holding the same in trust for the estate of the deceased. Also, in her ruling dated 1st March 2022, Hon. Onzere E . M (PM) found that the suit against the 3rd defendant was a nullity ab initio, since he had died before the suit was instituted.
32. Regarding the impugned ruling, 2nd appellant deponed that the learned magistrate erred in law and in fact in not holding that the draft defence filed by the appellant raised triable issues thus occasioning a miscarriage of justice. That the learned magistrate misdirected herself in exercise of her discretion to set aside default judgment. Also, that the learned magistrate denied the appellants the right to be heard.
33. Order 10, rule 11 of the Civil Procedure Rules, 2010, provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside. It reads in part:
- “Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
34. It is trite law that a court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, and will not assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice; see, *Shah v. Mbogo & Another*, 1967 EA 116.
35. Thus, it is my conserved view that the appellants’ failure to attend court for hearing, despite service being effected, clearly shows that they were bent on delaying the course of justice. That the appellants were obliged to, but failed to show sufficient cause for depriving the respondents of the fruits of the judgment. That justice shall not be delayed as stipulated in Article 159 (2) (b) of *the Constitution* of Kenya, 2010.
36. In the foregone, I hereby find that the impugned judgment and ruling are sound at law. The same is hereby affirmed in entirety save for part of the finding that:
- a) The 3rd defendant holds land parcel number Kanyamwa/Kayambo-Kwamo/1316 in trust for the estate of Nyagaya Obel Thomas; and
 - b) The said parcel belonging to the 3rd defendant be merged with land parcel number Kanyamwa/Kayambo-Kwamo/325.
37. Wherefore, this consolidated appeal generated by way of a memorandum of appeal dated 25th August 2022 and another memorandum of appeal dated 14th December 2021 hereby substantially fails, save as stated in paragraph 38 hereinabove. The same is dismissed with costs to the respondents in the lead file.
38. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 14TH DAY OF DECEMBER 2023

G. M. A. ONGONDO

JUDGE

Present

1. Ms. Atieno Kanyangi holding brief for Charles Kanyangi, Learned Counsel for the 1st appellant



2. Ms. Bosire, Learned Counsel for the 2nd appellant
3. Ms. Otieno, learned Counsel for the respondent
4. Moses, Court Assistant

