



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT SIAYA**

**ELC APPEAL NO.33 OF 2021**

**ODONGO FITINA.....APPELLANT**

**VERSUS**

**ODABA FITINA.....1<sup>ST</sup> RESPONDENT**

**FREDRICK NYAWALA OUDIA.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL [Sued on behalf of Ministry**

**of Lands-Bondo Land Registry].....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**(Being an appeal from the judgment and decree of the Principal Magistrate Honourable J. P. Nandi given on 31/05/2021 in Bondo PM ELC Case Number 24 of 2019)**

**Introduction**

1. The backdrop of this appeal is pertinent in understanding the case before this court. By a plaint dated 26/04/2019 and amended on 20/9/2019, the appellant who was a registered owner as a tenant in common together the 1<sup>st</sup> respondent and their deceased father one Fitina Odhiambo instituted this suit against the respondents for illegally hiving off a portion of land parcel number East **Yimbo/Nyamonye/1522 (“suit property”)**, giving it a new number and rectifying the map in a manner that was illegal and unprocedural.

2. He prayed for; (a) a declaration that the hived off portion being occupied by the 2<sup>nd</sup> respondent belonged to him under Luo customary law, (b) a declaration that the sale of the hived portion by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent was unlawful, null and void, (c) a declaration that the act of hiving of the suit property and giving a portion of it a new number was illegal, null and void, (d) an order for cancellation of the new number known as **Siaya/Nyamonye Adjudication section parcel number 6149** and rectification of the registry index map restoring the partitioned portion to the suit property, (e) an order evicting the 2<sup>nd</sup> respondent from the suit property, (f) an order of permanent injunction restraining the respondents either by themselves or by any person authorized by them from encroaching, constructing and trespassing on the appellant’s portion of the suit property and (g) costs of the suit .

3. The 1<sup>st</sup> respondent who was acting in person filed a memorandum of appearance dated 13/05/2019. He filed a defence dated 13/05/2019 which was amended on 13/12/2020 in which he denied the averments in the amended plaint and contended that he sold the hived off portion before land adjudication process took place in the section and that this portion was yet to be registered in the name of the 2<sup>nd</sup> respondent.

4. By a Memorandum of Appearance dated 3/03/2020, the Honourable Attorney General entered appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and filed a defence dated 3/03/2020 in which they denied the averments in the amended plaint.

5. By a Notice of appointment of advocates dated 13/05/2019, Charles Ochieng advocate entered appearance for the 2<sup>nd</sup> respondent and filed a defence dated 13/05/2019 which was amended on 13/05/2019. He denied the averments in the claim and contended that the hived off portion known as land parcel number **East Yimbo/Nyamonye/6149** was legally sold to him and it was a distinct parcel of land from the suit property.

6. After hearing the parties, the court by its judgment and decree dated 31/05/2021 found that the agreement of sale between the 1<sup>st</sup> and 2<sup>nd</sup> respondent was unlawful and that by constructive trust, the 1<sup>st</sup> respondent held the purchased portion for the 2<sup>nd</sup> respondent. It ordered for a

partition and transfer of the purchased portion to the 2<sup>nd</sup> respondent and a cancellation of **land parcel number 6149**.

7. Being partially aggrieved and dissatisfied with the judgment of the court, the appellant filed a memorandum of appeal dated 16/06/2021 and record of appeal dated 29/09/2021.

### **Memorandum of appeal**

8. Though the memorandum of appeal sets out 11 grounds of appeal, the appellant's written submissions dated 23/12/2021 condensed them into 5 grounds of appeal;

*a) The Learned Magistrate erred in introducing new issues not pleaded by ordering the partitioning of the suit property and transferring the partitioned portion to the 2<sup>nd</sup> respondent.*

*b) The Learned Magistrate erred in law and fact by failing to find that the portion of the suit property that had been sold by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent belonged to the appellant.*

*c) The Learned Magistrate erred in law and fact by treating the appellant's evidence and submissions superficially and without adequate weight and thereby grossly misdirected himself.*

*d) The Learned Magistrate failed to properly analyse the evidence on record and proceeded on wrong principles and arrived at a wrong conclusion.*

*e) The Learned Magistrate misapprehended the evidence adduced by the appellant and arrived at the wrong conclusion and failed to award the appellant costs.*

9. He urged the court to allow the appeal and set aside the judgment of the trial court in dismissing prayers (a) (b) (e) (f) and (g) of the amended plaint and substitute it with an order allowing the appellant's claim.

### **The appellant's submissions**

10. On the 1<sup>st</sup> ground, he submitted that constructive trust was neither pleaded by the parties nor was an order of partition and transfer of the purchased portion ever sought by the parties. He contended that there was evidence that he was never a party to the transactions between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and therefore the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents contravened the provisions of **Section 91 and 96 of the Land Registration Act**. He placed reliance on the case of **IEBC & Another v Stephen Mutinda Mule & Another CA No.219 of 2013** which cited with approval the case of **Malawi Railways Ltd v Nyasulu [1998] MWSC, 3** which held that parties are bound by their pleadings and a decision on a non-pleaded claim or defence amounts to denying a party a right to be heard. He also relied on the case of **David Sironga Ole Tukai v Francis Arap Munge & others, CA Number 76 of 2014** which similarly held that courts cannot grant a remedy or determine an issue that has not been pleaded by the parties.

11. On the 2<sup>nd</sup> ground, he contended that despite his and the 1<sup>st</sup> respondent's testimony which was not controverted by the 2<sup>nd</sup> respondent, the trial court failed to find that the portion sold by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent belonged to the him by virtue of customary law because in accordance with the Luo customs, he, being the youngest son, was entitled to inherit his parents homestead which was where the sold portion lay.

12. On the 3<sup>rd</sup> ground, he submitted that despite the trial court finding that the appellant had not issued a consent to sale to the 1<sup>st</sup> respondent and that the agreement of sale between the 1<sup>st</sup> and 2<sup>nd</sup> respondent was improper, it dismissed the plaintiff's prayer for the purported sale to be declared unlawful, null and void.

13. The 4<sup>th</sup> and 5<sup>th</sup> grounds were more or less a summation of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal. Additionally, he asserted that in awarding costs, the trial court contended that both parties were successful yet the respondents had not filed a counterclaim.

### **The 1<sup>st</sup> respondents' submissions**

14. The 1<sup>st</sup> respondent filed his written submissions dated 15/12/2021. He supported the appeal and contended that the trial court failed to consider his testimony that the sold portion belonged to the appellant and that the trial court did not consider his submissions. He submitted that the suit property had to be partitioned first before each one of the co-owners could individually transact on their respective portions.

### **The 2<sup>nd</sup> respondents' submissions**

15. The 2<sup>nd</sup> respondent filed written submissions dated 21/01/2022. He framed his submissions on 3 issues he identified for determination; constructive trust, the 2<sup>nd</sup> respondent as an innocent purchaser for value and lastly, that the 1<sup>st</sup> respondent's submission was evidence of collusion between the appellant and the 1<sup>st</sup> respondent.

16. On the 1<sup>st</sup> issue, he submitted that the trial court did not err in analysing the intent of the parties before arriving at its determination that the sold portion was held in constructive trust for the 2<sup>nd</sup> respondent. He relied on the case of **Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR** where the Court of Appeal stated that the vendor's action of receiving the full purchase price and

putting the purchasers in possession amounted to constructive trust in favour of the purchasers. He also relied on the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** where the Court of Appeal similarly upheld the doctrine of constructive trust in favour of the purchaser.

17. On the 2<sup>nd</sup> issue, it was the 2<sup>nd</sup> respondent's position that he was an innocent purchaser for value without notice and he relied on the now settled case of **Ugandan authority Katende v Haridar & Company Limited [2008] 2 EA 173** which held that for a person to be deemed an innocent purchaser he must prove that he had a certificate of title, purchased the suit property in good faith, had no knowledge of fraud, purchased the property for valuable consideration, vendor had an apparent and valid title and was not a party to the fraud.

18. On the 3<sup>rd</sup> ground, he contended that it could not be doubted that from the submissions of the appellant and 1<sup>st</sup> respondent there was collusion to disenfranchise him from the purchased portion of the suit property and at the same time retain the purchase price. He urged the court to dismiss the appeal with costs to him.

### **The 3rd respondent's submissions**

19. The 3<sup>rd</sup> respondent did not participate in the proceedings.

### **Analysis and determination**

20. This being a 1<sup>st</sup> appeal, it behoves this court to re-evaluate the evidence afresh, reassess the case and make its own independent finding and conclusions. See **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, which was quoted by the case of **Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR**. However, in re-evaluating the evidence, the court must bear in mind that it did not have the advantage of seeing and hearing the witnesses.

21. As a 1<sup>st</sup> appellate court, this court will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judicial officer misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion.

22. Having considered the original lower court record, memorandum of appeal, record of appeal and rival written submissions, this court will render its determination on grounds (a) to (e) as condensed in the appellant's written submissions. Because of a replication of the summarised grounds, this court shall consolidate grounds (c), (d) and (e) into a single ground.

23. I will proceed to analyse the legal and jurisprudential framework on the three condensed grounds of appeal in a sequential manner.

24. On the 1<sup>st</sup> ground, the appellant contended that constructive trust was never pleaded by the respondents while the 2<sup>nd</sup> respondent argued that the trial Court made a proper finding and determination on this.

25. To answer the 1<sup>st</sup> ground, this court has to investigate the pleadings of the respondents *vis a vis* the order by the court compelling the parties to partition and transfer a portion of the suit property to the 2<sup>nd</sup> respondent. In their amended defences, the respondents denied the averments in the claim and contended that the hived off portion known as land parcel **East Yimbo/Nyamonye/6149** was legally sold to the 2<sup>nd</sup> respondent and they urged the court to strike out the suit with costs for being an abuse of the court process.

26. Constructive trust and a prayer for partition and transfer of the purchased portion were never pleaded by the respondents yet the trial court reasoned that it was the intention of the 1<sup>st</sup> respondent who was a co-owner of the suit property to sell a portion of it to the 2<sup>nd</sup> respondent and proceeded to find that constructive trust had been established and ordered the parties to commence a partition and transfer of the purchased portion to the 2<sup>nd</sup> defendant.

27. The authorities cited by the 2<sup>nd</sup> respondent of **Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR** and **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** are distinguishable from the suit that is the subject of this appeal. In the cited authorities, there were valid agreements between the parties in those suits yet in the instant appeal, the trial court rightfully so in my view, found that in the absence of a written consent from the appellant who was a co-owner, the agreement of sale between the 1<sup>st</sup> and 2<sup>nd</sup> respondent amounted to nothing.

28. In an adversarial system such as ours and subject to the relevant provisions of the law on the structure of particular pleadings, each party has the burden to chart his own case which binds him. The essence of this is to ensure certainty and finality so that each party knows well in advance the case that he has to meet and cannot be taken by surprise. It is trite law that courts are bound by pleadings presented before it by the parties and the court cannot enter the arena of litigation. As an independent arbiter, it was not available for the trial court to infer the intent of the parties and make a finding of constructive trust which was never pleaded and erred in proceeding to grant an order that was never sought. This position of law was upheld in a line of Court of Appeal decisions including **IEBC & Another v Stephen Mutinda Mule & Another (Supra)** and **Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 others [2016] eKLR**. In **Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 others (Supra)**, the court cited the decision of **Malawi Railways Ltd. -vs- Nyasulu [1998] MWSC 3** which equally quoted an article by Sir Jack Jacob entitled "**The Present Importance of Pleadings.**" published in [1960] **Current Legal problems, at page 174** which stated thus;

*"Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation".*

29. The same fate applies to the 2<sup>nd</sup> respondent's plea that he was an innocent purchaser for value; this was never pleaded in his pleadings and in any case, the trial court found the agreement of sale between him and the 1<sup>st</sup> respondent as invalid. It is my finding that the trial court erred in construing constructive trust and granting an order that was never pleaded and the 1<sup>st</sup> ground of appeal succeeds.

30. On the 2<sup>nd</sup> ground of appeal, it is trite that he who alleges must prove. **Section 107 of the Evidence Act** states as follows:

***“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.***

31. The evidential burden to discharge the existence of Luo customary law that he, the appellant, as the youngest son of his parents was entitled to the sold portion because his parents' homestead was on it and was adjacent to a lake fell on him; which he did not. He neither called a Luo culture expert to assert his position. In his cross examination, he testified that he co-owned the suit property which had not been divided. Evidence of the existence of his parents' house on the sold portion was never adduced before trial court and it is my finding that the appellant did not prove his case on this ground and this ground of appeal fails.

32. On the 3<sup>rd</sup> ground of appeal, it was uncontroverted that the suit property was owned by the appellant, the 1<sup>st</sup> respondent and their deceased father as tenants in common.

33. A tenancy in common is a form of concurrent ownership where each co-tenant owns a separate and distinct share of the property. The shares they own may be equal or unequal. In the **Land Act, 2012**, a tenancy in common is defined as a form of concurrent ownership of land in which two or more persons possess the land simultaneously where each person holds an individual, undivided interest in the property and each party had the right to alienate or transfer their interest. In the present case, each party had a third share in the suit property.

34. From the definition, each party has a right to alienate or transfer their interest. How does this occur? **Section 91 (6) of the Land Registration Act** states that when a tenant in common wants to deal with their undivided share, they must seek the consent in writing from the remaining tenants in common but the registrar may, under **subsection 8**, dispense with consent. **Section 94** of the same Act states that any of the tenants in common, with the consent of the other tenants in common, can make an application to the registrar for the partition of the land. Any co-tenant aggrieved by the decision of the registrar may apply to the court for review of that decision. Under **Section 96** of the same Act, if the land parcel is to be sold, one of the tenants may make an application to the court for an order of sale in a variety of forms. That is how dealing with tenancy in common operates.

35. The trial court found that in the absence of a written consent to sale from the appellant, the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondent fell to the ground. In other words, the agreement was null, void and unenforceable yet despite this finding, the trial court instead of making a declaration that the agreement of sale was null and void, went ahead and ordered the parties to partition and transfer the purchased portion to the 2<sup>nd</sup> respondent thus lending assistance to a party to benefit from an illegality. In the case of **David Sironga Ole Tukai v Francis Arap Muge & 2 others (Supra)** the Court of Appeal had this to say on illegal contracts;

***“No court of law will enforce an illegal contract or one, which is contrary to public policy. Decisions of this Court abound on the point. ...It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him”.***

36. Consequently, it is my finding that the trial court erred in failing to declare the sale of a portion of the suit property by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent as being unlawful, null and void.

37. On the issue of costs. It is trite law that costs follow the event. Courts award costs in a discretionary manner that is exercised judiciously. **Section 27 of the Civil Procedure Act** states the award of costs shall be at the discretion of the court and shall follow the event unless the court shall for good reason otherwise order.

38. In the case of **Supermarine Handling Services v Kenya Revenue Authority [2010] eKLR** which cited with approval the case of **Devram Dattan v Dawda [1949] EACA 35** stated thus;

***“...an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.***

39. In the appeal now before us, the learned magistrate in the suit that is the subject of this appeal, reasoned that because the appellant and respondents had partially succeeded, therefore each party should bear their own costs yet the respondents had not been successful in their prayer for the appellant's suit to be dismissed with costs and further, the court had found that the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondent was invalid and the appellant had been partially successful in his claim and it is my humble view that the trial magistrate did not exercise his discretion judiciously.

40. On the 3<sup>rd</sup> ground, it is my finding that trial magistrate erred in not declaring the sale of a portion of the suit property by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent as unlawful null and void and erred in not awarding costs to the appellant. The 3<sup>rd</sup> ground of appeal succeeds.

41. Based on the reasons given, I ultimately find that this appeal is partially merited and because costs follow the event, I award half of the

costs of this appeal to the appellant and hereby set aside the judgment and decree of the **P.M.Hon.J. P. Nandi** given on **31/05/2021** in **Bondo PM ELC Case Number 24 of 2019** ordering the partition and transfer of the purchased portion to the 2<sup>nd</sup> respondent by virtue of constructive trust and in its place, I substitute it with a judgment in favour of the appellant in the following terms;

- a) **A declaration that the sale of a portion of land parcel number East Yimbo/Nyamonye/1522 by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent was unlawful, null and void.**
- b) **A declaration that the partition of land parcel number East Yimbo/Nyamonye/1522 and subsequent issuance of land parcel number Siaya/Nyamonye/Adjudication Section/ 6149 was null and void.**
- c) **The Registry Index Map be rectified by cancellation of the partition of land parcel number East Yimbo/Nyamonye/1522 and the subsequent registration of land parcel number Siaya/Nyamonye/Adjudication Section/ 6149 be cancelled.**
- d) **An order of eviction is hereby granted ordering the eviction of the 2<sup>nd</sup> respondent from land parcel number East Yimbo/Nyamonye/1522.**
- e) **The 2<sup>nd</sup> respondent is granted 60 days from the date of service of the orders of this court to remove himself and his developments from the land parcel number East Yimbo/Nyamonye/1522.**
- f) **An order of permanent injunction be issued against the 2<sup>nd</sup> respondent by himself, his servants or any other person authorized by him from encroaching, constructing, and/or trespassing on land parcel number East Yimbo/Nyamonye/1522.**
- g) **Costs of the trial court is awarded to the appellant.**

**42. It is so ordered.**

**Judgment delivered virtually.**

**Dated, signed and delivered at Siaya this 21<sup>st</sup> Day of April 2022**

**In the Presence of:**

Mr. Onyango for the appellant

N/A for the respondents

Court assistant; Ishmael Orwa

**HON. A. Y. KOROSS**

**JUDGE**

**21/4/2021**