



**Sidede v Kizito & another (Environment and Land Appeal
30 of 2021) [2022] KEELC 3485 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 30 OF 2021**

AY KOROSS, J

MAY 26, 2022

BETWEEN

PAUL OMUKO SIEDEDE APPELLANT

AND

JAMES OKUMU KIZITO 1ST RESPONDENT

JAMES JUMA OPENJIH 2ND RESPONDENT

*(Being an appeal from the judgment and decree of the Senior Resident Magistrate
Hon.E.N.Wasike delivered on 19/12/2019 in Bondo PM ELC Case Number 71 of 2018)*

JUDGMENT

Introduction

1. The root of this appeal can be unearthed from a plaint filed by the appellant in which he pleaded that he had purchased parcels of land known as North Sakwa/Nyawita/7070 and North Sakwa/Nyawita/7071 (suit properties) at Kshs. 70,000/- from one Leonard Kizito Odemba [deceased] who was the father of the 1st respondent in the year 1990. It was his case that he had paid the full purchase price in 1990.
2. He contended that on 6/04/2018 he discovered that the 1st respondent had sold the suit properties to the 2nd respondent without his authority, consent or agreement yet he had built houses thereupon. In short, the transactions between the 1st and 2nd respondent were fraudulent. He sought for declaratory and permanent injunctive orders together with costs.
3. The 1st respondent kept off from the lower court proceedings. The 2nd respondent who filed a defence admitted he purchased the suit properties from the 1st respondent and asserted that he was not privy to prior dealings over the suit properties and he was an innocent purchaser for value. Bearing in mind the suit was founded on contract, he was of the view that the suit was statutory barred.



4. On hearing the parties, the court framed two issues for determination; (i) whether the appellant had a valid claim and (ii) whether the 2nd respondent had a valid defence. On the 1st issue, it found that the appellant's claim and evidence were rather contradictory and lacked specificity and found that there was no cause of action against the 2nd respondent because he had not sought cancellation of the 2nd respondent's titles to the suit properties. On the 2nd issue, it stated that the 2nd respondent was an innocent purchaser for value. It dismissed the appellant's case with costs to the 2nd respondent.

Appeal to this court

5. Aggrieved and dissatisfied with the entire judgment of the lower court, the appellant filed an appeal to this court on 7 grounds which are repetitive and they all boil down to two grounds; (i) the Learned Magistrate erred in law and fact by holding that the appellant had failed to prove his case on a balance of probabilities and, (ii) the Learned Magistrate misdirected himself by holding that the appellant had no cause of action against the 2nd respondent.
6. The appellant prayed for; the appeal be allowed with costs and lower court judgment be set aside and judgment be entered for the appellant as prayed for in the plaint.

The appellant's submissions

7. Through the firm of Rodi Orege & Company the appellant filed written submissions dated 11/04/2022 and identified 3 issues for determination. The 1st and 2nd issues are related and they can be summarised as whether the respondents had acquired titles to the suit properties illegally, fraudulently and unprocedurally; which in his view were in the affirmative. It was his case that despite the respondents not being the owners of the suit properties, they did not seek his consent as an owner. He argued that the respondents had failed to prove that they carried out due diligence. He urged the court to nullify the agreement between the respondents and cancel their registration over the suit properties. He relied on the case of *Ngere Tea Factory Company v Alice Wambui Ndome* [2018] eKLR.
8. The other issue was whether the appellant was an adverse possessor over the suit properties. It was his case that by virtue of section 28 (h) of the *Land Registration Act*, adverse possession was an overriding right over land and that from the evidence adduced in the trial court, he had proved that in accordance with sections 7, 13, 16, 17 and 38(1) and (2) of the *Limitations of Actions Act*, he was an adverse possessor. He relied on the authorities of *Karnataka Board of Wakf v Government of India & others* [2004] 10 SCC 779 (purportedly an Indian Supreme Court decision) and the Court of Appeal decision of *Peter Thuo v Kuria Gacheru* [1988] 2 KLR 111.
9. He asserted that the absence of the 1st respondent in the trial court was suspicious and the trial court should have summoned him to testify.
10. It was his submission that the burden of proof shifted to the 2nd respondent to discharge prove that he was an innocent purchaser for value and without notice; which he did not. Relying on the case of *Katende v Haridar & Company Limited* (2008) 2 EA 173, it was his case that there was no evidence of payment of any consideration by the 2nd respondent to the 1st respondent.
11. The respondent did not bother to avail copies of the decisions he relied upon to this court and the court will not belabour in making reference to them.

The respondent's submissions

12. The 1st respondent who never participated in the lower court proceedings resurfaced in these proceedings. Acting in person, he filed undated written submissions on 25/04/2022. His written



submissions were very brief and he stated that he agreed with the findings and decision of the trial court. He urged the court to dismiss the appeal with costs.

13. The 2nd respondent's submissions were of a similar fashion to that of the 1st respondent. He simply added that the appellant had failed to adduce evidence against him.

Analysis and determination

14. Having considered, the parties' submissions and authorities cited, this court will handle the two condensed grounds of appeal but before I do that, I will first address my mind to the role of a 1st appellate court.
15. As was stated in the case of *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, this court is alive that its role as a first appellate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate stand or not and give reasons either way.
16. At the outset, adverse possession, nullification of the agreement between the respondents and cancellation of the registration of the respondents as proprietors of the suit properties were never pleaded by the appellant in the lower court and it is futile for him to raise them on appeal.

I. The Learned Magistrate erred in law and fact by holding that the appellant had failed to prove his case on a balance of probabilities

17. 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 judgement 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”.

18. Within the provisions of Order 2 Rule 10(1) of the *Civil Procedure Rules* and settled law, fraud must be pleaded, particularized and proved to a standard higher than on a balance of probabilities. The settled law has been upheld in several Court of Appeal decisions; *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000), *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR (Civil Appeal No 132 of 2005) and *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR.

19. After hearing the parties, the trial court stated and found thus,

“In his plaint, he stated that the land he purchased from the deceased was North Sakwa/Nyawita/7070 and 7071. In his written statement the plaintiff states that he bought a portion of that parcel of land known as North Sakwa/Nyawita/2185 which was further subdivided to create parcel North Sakwa/Nyawita/7070 and 7071 which he occupies. However the sale agreement talks of parcel 1154 and no other... I find this claim to be quite contradictory and for want of specificity... there is no evidence on record to show that parcel numbers North Sakwa/Nyawita/7070 and 7071 are resultant of subdivisions from North Sakwa/Nyawita/2185 and that North Sakwa/Nyawita/1154 (sic)”

20. The appellant's claim in the lower court was grounded on fraud. He particularised that the 1st defendant had purchased portions of the suit properties without his consent and that they had made false claims in order to dispossess him.



21. I have had a chance to examine the pleadings and evidence adduced by the appellant in the trial court and save for the appellant's witness statement which stated that North Sakwa/Nyawita/2185 was a subdivision of North Sakwa/Nyawita/1154, the rest of the analysis of the trial court is a true reflection of the case and evidence that was presented before it. In fact, the purported agreements of sale are dated diverse dates of 8/4/1997, 17/03/2002 and 4/02/2003 and they are either acknowledgements of payment or letters. Only two of them refer to North Sakwa/Nyawita/1154. The plaint is devoid of particulars of North Sakwa/Nyawita/1154 and the appellant never produced a shred of documentary evidence to prove the relationship between North Sakwa/Nyawita/1154 and the suit properties.
22. Without this connection, the appellant's case tumbled. Suffice to say, there was no agreement adduced by the appellant to prove that he purchased the suit properties. I find that the plaintiff did not prove his case to the required standard and consequently, I shall not disturb the finding of the trial court.

II. The Learned Magistrate misdirected himself by holding that the appellant had no cause of action against the 2nd respondent

23. In the case of *Edward Moonge Lenguuranga v James Lanaiyara & another* (2019) eKLR, the court defined a cause of action as a set of facts sufficient to justify a right to sue, obtain property or enforce a right against a party.
24. The dispute that was before the trial court was on ownership of the suit properties which were purportedly sold by the 1st respondent to the 2nd respondent and the 2nd respondent did indeed admit that he purchased the suit properties as alleged by the appellant. It therefore follows that the appellant's pleadings disclosed a valid cause of action against the 2nd respondent and I find that the trial court erred in finding otherwise.
25. In conclusion, it is my humble opinion, the appellant needed to produce registers of North Sakwa/Nyawita/1154, North Sakwa/Nyawita/2185 and those of the suit properties before the trial court in order to connect the dots; which he did not and it is unfortunate that he placed the inadequacies in his case on the trial court.
26. Further, it is trite law that courts are bound by the pleadings of the parties and the trial court could not pick orders from the air and deem him an adverse possessor.
27. It is therefore my ultimate finding that though the trial court did not err when it found the appellant did not prove his case, it erred when it found that the appellant's pleadings did not disclose a cause of action against the 2nd respondent.
28. The upshot of this judgment is that the appellant's appeal partially succeeds to the extent that the trial court's finding that the appellant's pleadings did not disclose a cause of action against the 2nd respondent is hereby set aside. Costs follow the event and for the reason that the appeal was partially successful, I award half of the costs of this appeal to the respondents.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 26TH DAY OF MAY 2022

HON. A. Y. KOROSS

JUDGE

26/5/2022



Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Okumu h/b for Mr. Rodi for the appellant

James Juma Openjih - 2nd respondent acting in person present

No appearance for the 1st respondent

Court assistant: Ishmael Orwa

