



Ouko & 2 others v Opapo & 2 others (Environment and Land Appeal 20 of 2021) [2022] KEELC 3645 (KLR) (11 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3645 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 20 OF 2021
GMA ONGONDO, J
MAY 11, 2022**

BETWEEN

**CHRIS ANTONE OUKO 1ST APPELLANT
JOHN NYANDONGO OLWERO 2ND APPELLANT
JAMES OTIENO OLWERO 3RD APPELLANT**

AND

**JOSEPH OTIENO OPAPO 1ST RESPONDENT
PETER OMOLO OPADO 2ND RESPONDENT
MARGARET ENDESIA 3RD RESPONDENT**

(Being an appeal from the judgment of HON. R.B.N Maloba (Principal Magistrate) in HOMA BAY Chief Magistrate’s Court Land Case No. 5 of 2018 delivered on 20th February 2020.)

JUDGMENT

1. The present appeal arose from the trial court’s judgment delivered on February 20, 2020 where the learned trial magistrate (Hon RBN Maloba, PM) found no merit in the appellant’s suit namely Homa-Bay Chief Magistrate’s Court Land Case No 5 of 2015. Therefore, she dismissed it with costs to the respondents.
2. The learned trial magistrate noted that the respondents were not trespassers on land reference numbers Kabuoch/KK/Konyango/3199 and 3473 (the suit parcels of land herein) excised from the original land, LR No Kabuoch/K K/Konyango/4. That the respondents had legally purchased the suit parcels of land for valuable consideration from the original proprietor, Peter Linus Ogola Owero (deceased).
3. The appellants are represented by the firm of GS Okoth and Company Advocates.



4. The respondents are represented by the firm of Nyauke and Company Advocates.
5. The appeal was admitted on November 18, 2020. It is the first one from the trial court in this matter hence, this court is bound to reconsider and re-evaluate the evidence and reach its own conclusions bearing in mind that I neither saw nor heard the witnesses in that respect as noted in *Kenya Ports Authority v Kuston (K) Limited* (2009) 2 EA 212.
6. Be that as it may, an appellate court will not ordinarily interfere with the findings of fact by the trial court unless the same are based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings; see *Mwanasokoni v Kenya Bus Services Limited* [1982-88] 1 KAR 278.
7. Initially, the appeal was lodged at Migori Environment and Land Court. On October 5, 2022, the appeal was to transferred to this court, upon it's establishment, for hearing and determination.
8. The appellants herein were the plaintiffs before the trial court. They originated the suit by way of an amended plaint dated June 3, 2010 seeking;
 - a) An order of declaration that the suit parcels of land excised from the original land parcel No 'Kabuoch/KK Konyango/4 are improperly created and the same be deleted from the Land Adjudication register.
 - b) An order of prohibitory injunction to restrain all purchasers, proposed beneficiaries and any person claiming any interest in the estate of Peter Linus Ogola Owero from entering into, cultivating, planting trees and crops, erecting any buildings or developments on the suit parcels of land until succession proceedings have been heard and their interests and rights proven therein.
 - c) Costs of this suit together with interest thereon at the rate of 14% per annum from the date of filing suit until payment in full.
 - d) Such further or other alternative relief as this honourable court deems fit to grant.
9. The 1st appellant (PW1), Land Adjudication Officer, Ezekiel Kilimi Kiania (PW2) and Land Adjudication officer Kipkuto Toromo (PW3) testified that the respondents bought the suit parcels of land created out of the sub division of the original land from the deceased. P Exhibits 1 to 16 including letters objection and records, are in evidence herein.
10. The respondents in this appeal were the defendants before the trial court. In their joint statement of defence dated April 20, 2011 and filed in that court on April 27, 2011, they stated in part that the deceased sold undivided share of the suit parcels of land to them. They denied the appellants' claim.
11. DW1 and DW2 are the 1st and 2nd respondents respectively herein. They relied on sale agreements and receipts as they confirmed having bought the suit parcels of land from the deceased.
12. The learned trial magistrate analyzed the appellants' case, the respondents' case and framed three issues for determination in regard to purchase, fraud and trespass into the suit parcels of land. Therefore, she arrived at the decision as captured in paragraphs 1 and 2 hereinabove.
13. The appellants commenced this appeal by way of memorandum of appeal dated March 21, 2020 founded on grounds;
 - a) The learned trial magistrate misdirected herself on matters of law and fact.



- b) The learned trial magistrate erred in law in failing to appreciate the procedures provided for by the *Land Adjudication Act*.
 - c) The learned trial magistrate erred in law in holding that the first and 2nd respondents could be duly heard and proceedings on objection taken without him paying objection fees.
 - d) The learned trial magistrate erred in law of evidence and procedure in failing to note that the name of the 1st and 2nd respondents were irregularly inserted between other proceedings in a manner which was in all respects fraudulent.
 - e) The learned trial magistrate erred in law of evidence in deciding the case against the weight of evidence.
 - f) The appellants may file supplementary grounds of appeal after being furnished with certified copies of proceedings.
14. On the basis of the grounds of appeal, the appellants are seeking to set aside the orders of dismissal, vary the judgment and enter judgment as prayed in the plaint
 15. It must be noted that no supplementary grounds of appeal duly filed herein as envisioned on ground 6 of the memorandum of appeal and as stated in paragraph 13 hereinabove.
 16. The appeal was canvassed by way of written submissions further to this court's orders made on November 16, 2021.
 17. I bear in mind the appellants' submissions and the respondents' submissions dated February 21, 2022 and filed on February 22, 2022. Sections 24 and 26 of the *Land Registration Act, 2012* (2016) and the case of *Sophie Wanjiku v Jane Mwalaki Kimani* [2013] eKLR, amongst others, are cited therein and are hereby taken into consideration.
 18. So, I approve the issues identified in the respondents' submissions in this appeal. Thus, the issues are condensed to whether the appeal has merit.
 19. Notably, Fraud and misrepresentation as grounds of impeaching a certificate of title be distinctly pleaded and proved; see the Court of Appeal decision in *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR.
 20. The appellants stated that the deceased during his life time sold portions of his undivided share of the original land. The 1st appellant (PW1) relied on his statement dated May 7, 2013 and filed in court on May 8, 2013 alongside the list of documents dated July 19, 2020 as part of the appellants' evidence
 21. During cross examination, PW1 stated;
 - “ The defendants (respondents herein) paid money for the suit property....”
 22. During further cross examination, PW1 said;
 - “ Parcel No 4 is now in the name of Peter Linus Ogolla”
 23. PW2 affirmed the testimony of PW1 that the deceased sold the suit parcels of land to the respondents. That thereafter, the objection amendment was done accordingly.



24. During cross-examination, PW2 stated in part:
- “..... Land can be sold before the adjudication is completed.....”
25. PW3 stated that the original owner of the original land was the deceased. That he was the sole owner thereof.
26. DW2 told the court that the suit parcels of land were created from the original land. That they are registered in the name of the respondents as the deceased sold the same to them.
27. DW2 confirmed that the respondents bought the suit parcels of land from the deceased. That after the objection proceedings, the said parcels are theirs and the records were amended accordingly.
28. In her decision, the learned trial magistrate observed that the respondents obtained registration of title to the suit parcels of land. She was emphatic that-
- “..... They (respondents) legally purchased their respective parcels of land from the deceased for valuable consideration. Their subsequent registration as proprietors of those parcels was with the consent and or approval of the deceased seller who duly took part in the objection proceedings that culminated in the subsequent subdivision of parcel No 4 to create for them their respective parcels Nos 3199 and 3473.....”
29. The trial court further noted-
- “.....There is no doubt that the defendants’ bought their respective parcels of land from the deceased Peter Linus Ogola Owero.....”
30. It is trite that when the registered proprietor’s root of title is under challenge, the registered proprietor must go beyond the instrument of title and prove the legality of how he acquired the title. That the acquisition thereof was legal, formal and free from any encumbrances; see *Munyu Maina v Hiram Gitibiha Maina* [2013] eKLR
31. The appellants pleaded fraud on the face of pleadings (paragraph 10 of the plaint). This was distinctly done. Be that as it may, did they prove fraud to the required standard?.
32. In *Gladys Wanjiru Ngacha v Treresia Chesaat and 4 others* [2013] eKLR, the Court of Appeal cited *RG Patel v Lalji Makani* [1957] EA 314 at 317, where it was held-
- “Allegations of fraud must be strictly proved. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
33. According to the trial court-
- “.... PW2 and PW3 both being Land Adjudication Officers gave contrary evidence whose effect was to validate the objection proceedingsgave rise to creation and allocation of the two parcels to the respective defendants.....”
34. This court is aware of the definition of the term “trespass” being an unjustifiable entry by one person upon the land in possession of another; see *Clerk and Lindsell on Torts* 18th edition paragraph 18-01.



35. Black's Law Dictionary 12th edition at page 1733, defines "trespass" as;
- "An unlawful act committed against the person or property of another; especially wrongful entry on another's real property."
36. It was the observation of the trial court that the deceased during his life time, lawfully sold the suit parcels of land to the respondents. Therefore, she declined to injunct the latter therefrom.
37. The testimonies PW1, PW2, PW3, DW1 and DW2 as well as the trial court's decision firmly show that the respondents lawfully purchased the suit parcels of land from the deceased. Fraud allegations though distinctly pleaded are not proved to the requisite standard herein. Thus, the respondents are not trespassers on the suit parcels of land. I find no reason to disturb the trial court's correct findings in the circumstances.
38. The registration of the suit parcels of land in the name of the respondents arose on account of lawful transaction. The same was not fraudulent as alleged by the appellants since the respondents are bona fide purchasers for valuable consideration and cannot be disregarded as held in the case of Fletcher v Peck 10 under section 87 [1810].
39. Moreover, equity as provided for under article 10 (2) (b) of the Constitution of Kenya, 2010, will not subject the respondents to penalties; see also the decision in Willy Kimutai Kitilit v Michael Kibet [2018] eKLR and Fletcher case (*supra*).
40. Thus, the finding of this court is that the instant appeal is devoid of merit. I dismiss the same.
41. Costs of this appeal and the court below be borne by the appellants.
42. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 11TH DAY OF MAY 2022

GMA ONG'ONDO

JUDGE

Present;

- a. Mr Kisukwa holding brief for Nyauke, learned counsel for the respondents.
- b. Ms LK Obwanda holding brief for GS Okoth, learned counsel for appellants.
- c. Okello, Court Assistant.

GMA ONG'ONDO

JUDGE

