



**Oyongo v Otiu (Environment and Land Appeal 16 of 2021)  
[2022] KEELC 3561 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3561 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 16 OF 2021  
GMA ONGONDO, J  
MAY 11, 2022**

**BETWEEN**

**GLADYS MORAA OYONGO ..... APPELLANT**

**AND**

**AMOS AINEA OTIU ..... RESPONDENT**

*((Being an appeal from the judgment of Honourable Jacinta Orwa (Mrs.) SPM in Mbita SPM's Court Environment and Land case No. 23 of 2018 delivered on 27th June 2019))*

**JUDGMENT**

1. This appeal arose from the judgment of the trial court rendered on June 27, 2019 where the learned trial magistrate (hon Mrs Jacinta Orwa, SPM) held that the respondent had proved his case against the appellant on a balance of probabilities. Thus, the trial court proceeded to enter judgment for the respondent against the respondent for;
  - a) An order of eviction issued against the defendant out of land parcel number Rusinga/Waware/1551.
  - b) The defendant to give vacant possession of land parcel no Rusinga/Waware/1551 within 90 days from the date thereof.
  - c) The officer commanding police division Suba north to provide security to ensure law and order is maintained at the time of eviction.
  - d) Costs of the suit to the plaintiff.
2. The appellant, Gladys Moraa Oyongo was aggrieved by the trial court's decision hence, mounted the present appeal. She appears in person herein.
3. The respondent, Amos Ainea Otiu is represented by the firm of H Obach and Partners Advocates.



4. The subject matter of this appeal is land reference number Rusinga/Waweru/1551 (Hereinafter referred to as the suit land).
5. The respondent's counsel was duly notified of the date of judgment via email by this court's Deputy Registrar. The appellant was present in court when the date was fixed.
6. In the instant appeal, it is the duty of the court to reconsider the evidence on record and come to its own conclusions and inferences; see *Kamau vs Mungai and another* (2006) 1 KLR 150.
7. The respondent herein was the plaintiff (PW1) before the trial court. He initiated the suit by way of a plaint dated June 26, 2018 and filed in court on July 18, 2018 seeking the orders infra;
  - a) An order of eviction directed at the defendant evicting her from the suit land.
  - b) Costs of this suit.
8. In his evidence, PW1 relied on his statement dated June 26, 2018 and filed in court on July 18, 2018 and a copy of green card in respect of the suit land (PEXhibit 1). He stated in part that he bought the suit land from Millicent Sophia Awino (PW2) in the year 2010. That the appellant and her husband mistakenly occupied the suit land and that the former has refused to vacate the same. PW2, an administrator of the estate of Samson Oyugi Ndege (deceased herein) confirmed that position.
9. The appellant was the defendant (DW1) before the trial court. The gist of her case is as set out in her statement of defence dated August 11, 2018 and duly filed in court on August 13, 2018 where she denied the respondent's claim and sought dismissal of the suit with costs. She stated that any ownership of the suit land by the respondent as alleged or at all, was created fraudulently and to the actual or constructive knowledge of the respondent. She set out particulars of the alleged fraud in paragraph 9 of the statement of defence.
10. In her testimony, DW1 relied on her statement dated August 13, 2018 and a list of documents of even date (DEXhibits 1 to 7). She stated that one Mary Auma Member purportedly sold LR No Rusinga/Waware/707 (the other parcel of land) to her late husband and herself. That thereafter, the couple constructed houses thereon, among other things.
11. In arriving at the decision as stated in paragraph 1 hereinabove, the learned trial magistrate framed triple issues for determination namely whether PW2, Millicent Sophia Awino had *locus standi* to sell the suit land to the appellant (DW1), the validity of the sale as alleged by DW1 and whether the respondent (PW1) was entitled to the reliefs sought in the plaint.
12. The trial court observed, *inter alia*;
  - a) DW1 admits that the mother in law of PW2 ( Mary Auma Membwa) sold the suit land to her and her husband in the year 2012 which belonged to the Deceased at Kshs 250,000/=
  - b) DW1 produced the grant of letters of administration confirming that Millicent Sophia Awino is the administrator of estate of the late Samson Oyugi Ndege *vide* succession cause no 72 of 2013 Homa-Bay High Court.
  - c) Mary Auma Member had no capacity to sell any parcel of land belonging to the late Samson Oyugi Ndege hence could not pass any title in the suit land to DW1 herein in 2012 or 2014.
  - d) DW1 is therefore, illegally residing on the suit land.
13. This appeal was commenced by way of a memorandum of appeal dated August 19, 2019 and duly filed on even date founded on the grounds;



- a) That the learned trial magistrate failed to find that the matter before her was in respect of LP No Rusinga/Waware/1551 but NOT LP No Rusinga/Waware 707 where homestead of DW1 lies.
  - b) That the trial court failed to find that LP No Rusinga/waware 707 was sold to the appellant's husband Peter Nyangoto Ongocho by one Mary Auma Memba who acquired the land from one Millicent Sophia Awino (copy of sale agreement is attached herein and marked exhibit 1)
  - c) That the trial court failed to find that home of DW1 where she stays is built in LP No Rusinga/Waware 707 where there is no outstanding dispute at all but not LP No Rusinga/waware 1551 as alleged by the respondent.
  - d) That the trial court misdirected itself by believing that home of DW1 is in LP No Rusinga/Waware 1551 without the report from the land surveyor whom she strongly believes would have found that her home is in LP No Rusinga/Waware 707.
  - e) That the trial court allowed itself to be misled by the respondent and one Sophia Awino whose intentions were to take over the LP No Rusinga/waware away from DW1 since she stays among them but she belongs to another ethnic group.
  - f) That the trial magistrate failed to observe that as much as DW1 agrees that LP No Rusinga/Waware is registered in the name of Millicent Sophia Awino but the same does not warrant her to claim ownership even after selling it to Mary Auma Memba who later sold it to the appellant's husband.
  - g) That the appellant humbly urge the honourable court to find that her home is in LP No Rusinga/Waware 707 which has no dispute but not LP No Rusinga /Waware 1551 therefore evicting her as ordered by the trial court without the land surveyors report will amount to a violation of her right as she has nowhere to relocate to.
14. Wherefore, the appellant has sought the following orders;
- a) The appeal be allowed.
  - b) The trial court's order that she vacates the land, be overturned.
  - c) The respondent to pay the cost.
  - d) Any other remedy that court deems necessary under the circumstances.
15. Notably, there is another memorandum of appeal filed on September 23, 2019 based on grounds a) to g) set out in paragraph 13 hereinabove. There are additional grounds thereon namely-
- h) That the trial court failed to observe that neither the appellant's husband nor Sophia Awino sold the portion of land to the respondent because he even failed to produce the sale agreement form.
  - i) That the trial Magistrate made ruling against DW1 while failing to find that Rusinga/Waware 1551 and LP No Rusinga/Waware 707 are different parcels but registered in the name of one person: Millicent Sophia Awino as per the attached (copy of confirmation of grant issued on October 28, 2014 and marked as exhibit 2).
16. Wherefore, the appellant is seeking the same orders as stated in paragraph 14 hereinabove.



17. On September 16, 2021, the appeal was transferred from Migori Environment and Land Court to this court, upon its establishment, for hearing and determination; see articles 6 (3) and 48 of the Constitution of Kenya, 2010.
18. On February 28, 2022, the court ordered and directed that the appeal be heard by way of written submissions.
19. Accordingly, the appellant filed her submissions dated August 24, 2021 and on even date where she stated that the respondent gave contradictory evidence as to the person who sold the land in question thus, failed to prove his case properly. That she has no issue with the suit land but the other parcel of land where her homestead is located, among other things. She urged the court to adopt her submissions and hold that the trial court erred in the impugned decision.
20. Moreover, the appellant filed herein a request for judgment dated February 15, 2022 against the respondent. She stated in the request that the respondent has failed to respond in this appeal.
21. Indeed, the respondent's counsel did not file and serve submissions herein.
22. In view of the foregoing, the issues for determination are condensed to whether the grounds of this appeal as set out in paragraphs 13 and 15 hereinabove, are tenable. Further, is the appellant entitled to the orders sought in the appeal as stated in paragraphs 14 and 16 hereinabove?
23. It is important to note that the parties' respective pleadings before the trial court relate to the suit land.
24. The testimonies of PW1, PW2 and DW1 herein, are all in respect of the suit land.
25. It is further noted that the findings of the trial court were based on the pleadings and evidence. The impugned judgment is in regard to the suit land.
26. The appellant submitted that the trial court entered a wrong judgment against her. That she stays on the other parcel of land and not on the suit land.
27. Paragraph 3 of the appellant's submissions reads in part-

“.....I would urge the honourable court to find that the matter before the trial court was in respect of LP No Rusinga/Waware 1551 but not LP No Rusinga/Waware 707 where my homestead is.....”
28. The appellant further submitted-

“.....So any attempt to evict me from land parcel no Rusinga/Waware 707 in the pretext that am being evicted from LP No Rusinga/Waware 1551 as per the court order will amount to trespass and violation of any right particularly in the absence of the substantive report of the Government surveyor concerning where my home is exactly situate at...”
29. PExhibit 1 shows that the suit land is registered in the name of the respondent with effect from November 19, 2014. Previously, it was registered in the name of PW2 as at October 30, 2014.
30. DExhibit 1 reveals that a grant of letters of administration in respect of the deceased, Samson Oyugi Ndege was issued to PW2 on June 23, 2014 in Homa Bay High Court Succession Cause No 72 of 2013. On October 28, 2014, DExhibit 1 was confirmed as disclosed in DExhibit 2. Clearly, PW2 is the sole owner of the suit land and the other parcel of land as per the schedule shown in DExhibit 2.



31. The estate of the deceased person is vested on the legal representative; see *Trouistik Union International and another vs Jane Mbeyu and another* 1993 eKLR
32. The testimony of PW1 was that PW2 sold to him the suit land as confirmed by DW1 in paragraph 9 (5) of the statement of defence and as discerned in PExhibit 1. This position was affirmed by PW2 who stated that the transfer of the suit land to PW1 was effected after the completion of succession process in regard to the estate of the deceased.
33. DExhibits 5 to 7 allegedly relate to the activities of the appellant and the respondent on the suit land. DW1 stated at paragraphs 3 and 9 (1) and (7) of her statement of defence that she bought the suit land in the year 2012. During cross examination, DW1 stated that Mary Auma Memba sold to her the suit land which belonged to PW2. In cross examination, PW2 stated that she neither knew Mary Auma Member nor sold the suit land to her.
34. Moreover, DW1 testified that she did not have a copy of sale agreement or a transfer regarding the suit land. This portrays her negligence in the alleged sale of the suit land which did not belong to Mary Auma Member hence, she was not a *bona fide* purchaser as noted in the case of *Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura vs Attorney General and 4 others* (2017) eKLR.
35. This appeal is also hinged on grounds relating to the other parcel of land and not the suit land. It is unsuited in the circumstances.
36. The trial court's findings were correct based on the parties' respective pleadings, evidence on record and legal principles. I find reason to disturb the same. The findings are sound at law and are hereby upheld accordingly.
37. The grounds of appeal and prayers sought thereby as stated in paragraphs 13, 14, 15 and 16 hereinabove are untenable. This appeal fails.
38. Accordingly, the instant appeal is hereby dismissed.
39. Further, it must be noted that the appellant may be in possession and or occupation of the suit land.
40. So, I direct that the Officer Commanding Police Division, Suba North to first verify that the appellant is in occupation of the suit land on the ground as well as from the records and reports obtainable from the Land Registry and Survey Office, Homa Bay before execution of the of orders 1, 2, 3 to 4 as stated in paragraph 1 (a) and (c) hereinabove.
41. By dint of the proviso to section 27 (1) of the *Civil Procedure Act* chapter 21 Laws of Kenya, costs of the appeal and the court below be borne by the appellant.
42. It is so ordered

**DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 11<sup>TH</sup> DAY OF MAY 2022**

**G .M .A ONG'ONDO**

**JUDGE**

**PRESENT**

a) Mr V. Kisukwa, learned counsel for the respondent

b) Okello, Court assistant

**G. M.A. ONG'ONDO**

**JUDGE**

