



REPUBLIC OF KENYA



KENYA LAW
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**Opany v Odhiambo (Environment and Land Appeal 42 of 2021)
[2022] KEELC 3858 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 42 OF 2021
GMA ONGONDO, J
JUNE 21, 2022**

BETWEEN

SAMWEL ODOYO OPANY APPELLANT

AND

RONALD OCHIENG ODHIAMBO RESPONDENT

(Being an appeal from the judgment of Hon. Mary A. Ochieng- PM delivered on the 22nd April, 2020, in Ndhiwa Principal Magistrate's Court Civil Case No. 66 of 2018)

JUDGMENT

1. On May 4, 2020, the appellant, Samwel Odoyo Opany through M/S H O Mimba & Company Advocates, lodged this appeal by way of a memorandum of appeal dated April 29, 2020. The appeal is from the judgment delivered on the April 2, 2020 by the honourable Principal Magistrate in Ndhiwa Environment and Land Case No 66 of 2018.
2. The memorandum of appeal is anchored on eleven (11) grounds stated on the face of the same. Therefore, the appellant urged the honourable court to quash the decision of the trial magistrate and order that the title deed of the suit property, Homabay/Kawere//Konyango/Karading/3243 measuring one decimal two seven hectares (1.27 Ha) in area registered in the names of the respondent be revoked and/or cancelled. He further urged the court to order and direct the Registrar of Lands Homabay to issue fresh title deed to the appellant in respect of the suit property. The appellant also asked the honourable court to grant him costs of the suit.
3. On December 18, 2020, the appellant duly filed a record of appeal dated December 7, 2020.
4. Originally, this appeal was lodged at Migori Environment and Land Court. On October 19, 2021, Kullow J sitting at Migori Environment and Land Court directed that the appeal be transferred to this court as the suit property is located within Homa Bay County.



5. When the matter came up for directions on November 24, 2021, this court ordered and directed that the appeal be argued by way of written submissions.
6. Accordingly, Learned Counsel for the appellant filed submissions dated May 11, 2022 on May 12, 2022. Counsel submitted that appellant has always been in possession of the suit land. That there are three (3) parcels of land; Homabay/Kawere/Konyango/Karading 1639, 2743 and 3243. Counsel submitted that the court in Ndhiwa Environment and Land Case No 72 of 2018 awarded the appellant titles to the first two (2) parcels of land. That Homabay/Kawere/Konyango/Karading 2743 and 3243, were subdivisions of Homabay/Kawere/Konyango/Karading 1639, which is the original parcel registered in the name of Opany Maiko(deceased), the appellant's father.
7. The respondent's counsel failed to file submissions despite being present in court on November 24, 2021 when directions were given.
8. In that regard, the issues for determination are thus:
 - a. Whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal; and
 - b. Who should bear the costs of this suit?
9. I have thoroughly considered the pleadings, court proceedings, the evidence on record as well as the judgment of the learned trial magistrate. This court is duty-bound to review the evidence adduced before the trial court in order to determine whether the conclusion originally reached upon that evidence should stand as noted in *Peterson v Sunday Post* (1958) EA 424 at 429.
10. The plaint (fast-track) dated May 15, 2018 and filed on May 16, 2018 raises the issue of trespass by the defendant/appellant on the suit land, registered in the names of the plaintiff/respondent herein. The latter sought a permanent injunction order restraining the former, his agents, employees, proxies and/or anyone acting under his authority from trespassing on the suit land being Homabay/Kawere Konyango Karading/3243 measuring approximately one decimal two seven hectares (1.27 Ha) in area and further stop all illegal acts of cultivation, cutting down of trees and/or indiscriminate destruction of boundary marks. The respondent also claimed for costs of the suit.
11. PW1 to PW4 relied on their respective statements filed in court on diverse dates which were adopted by the court as part of evidence. They produced in evidence, sale of land agreement dated 1st July 2000, objection filed during the adjudication process, letter dated August 10, 2001, cane farming and supply contract with Sony sugar, survey certificate and job completion certificate (PExhibits 1-6 respectively).
12. The defendant/appellant herein filed a statement of defence dated June 12, 2018 where he stated that the title deed to the suit property was illegally obtained by the respondent. He urged the court to dismiss the plaintiff's claim with costs and proceed to cancel the respondent's title deed in respect of the suit property.
13. The defendant/appellant (DW1) testified on October 17, 2019. He produced a copy of search, objection proceedings, appeal to the minister, letter by land adjudication officer dated November 18, 2011 and letter dated April 15, 2009 as DExhibits 1 to 5 respectively.
14. The learned trial magistrate identified three issues for determination namely; Is title deed Homabay/Kawere/Konyango/3243 in the names of the respondent herein valid; if it is valid, has the plaintiff/respondent proved he is entitled to a permanent injunction being sought by him; and who shall bear the costs of the suit? The learned trial magistrate examined the evidence adduced by both parties and found in favour of the plaintiff/ respondent thereby granting the orders as sought in the plaint.



15. The learned trial magistrate noted at page 6 of the judgment that:
- “.....the question I ask myself is whether the appeal to the minister no 56 of 2010 had the effect of nullifying title deed number 3243 in respect of the suit parcel of land? The answer to this is no..... it could have been yes if the court had been persuaded an appeal before the District Commissioner was filed within 60 days after the verdict of 24th November 1993...”
16. The learned trial magistrate also noted that the respondent followed the due process of the law to become the registered owner of the suit parcel of land. See *Moses Parantai and anor v Stephen Njoroge Macharia* (2020) eKLR.
17. The rule of evidence is clear that “He who alleges must prove”. This is grounded in law under section 107 of the *Evidence Act* chapter 80 Laws of Kenya.
18. On that account, did the respondent discharge this duty before the trial court and has the appellant done so before this court? In *Kirugi and another v Kabiya & 3 others* [1987] KLR 347, the Court of Appeal held thus,
- “The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”
19. Considering the totality of the evidence availed in this case, and applying the requisite legal principles, it is clear that the respondent who was the plaintiff before the trial court proved her case to the requisite standard. Further, the grounds of appeal are quite untenable. It is the finding of this court that the learned trial magistrate’s judgment is sound at law. I hereby uphold the same.
20. In the result, the instant appeal is hereby dismissed with costs.
21. Orders accordingly.

G.M.A ONG’ONDO

JUDGE

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 21ST DAY OF JUNE 2022.

G.M.A ONG’ONDO

JUDGE

Present

H. Mimba, learned Counsel for the appellant

Appellant- present

Okello- Court Assistant

