



Oriri & 2 others v Ojwang & another (Environment and Land Appeal E009 of 2021) [2022] KEELC 3793 (KLR) (20 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E009 OF 2021
GMA ONGONDO, J
JUNE 20, 2022**

BETWEEN

**ONYANGO ORIRI 1ST APPELLANT
AGNES ATIENO ORIRI 2ND APPELLANT
WILFRIDA ADERO OTIENO 3RD APPELLANT**

AND

**BENARD ONYANGO OJWANG 1ST RESPONDENT
DANIEL ONYANGO OTIENO 2ND RESPONDENT**

*(Honourable J Bii delivered on the 23rd September, 2021
in Mbita SPM's Court Land Case Number 8 of 2018)*

JUDGMENT

1. The instant appeal arose from the judgment of Hon Japhet Bii (SRM) delivered on September 23, 2021 in Mbita Senior Principal Magistrate's Court Land Case No 8 of 2018 where the learned trial magistrate held in favour of the plaintiff (the 1st respondent herein) in the terms infra;
 - a. There be a permanent injunction against the 3rd and 4th defendants (3rd appellant and 2nd respondent herein respectively), whether by themselves, their servants, agents or nobody howsoever, restraining them from selling, transferring, trespassing and/or in any way interfering with LR No Kasgunga/Kamreri 4158 (The suit property herein).
 - b. An order is hereby made that the plaintiff (1st respondent herein) is the rightful, bona-fide and legal owner of the suit property.



- c. An order is hereby made that the registration of the 1st and 2nd defendants (1st and 2nd appellants herein respectively) as joint proprietors of the suit property be cancelled and the same be registered in the name of the 1st respondent.
 - d. The 1st, 2nd and 3rd appellants herein will bear the costs of the suit.
2. The suit property is a sub division of the mother property, land reference LR No.Kasigunga/Kamreri/756. It is contained in Registry Map Sheet Number 8 and located within Homa Bay County.
 3. The three appellants herein are represented by the firm of S N Otinga Advocates.
 4. The two respondents are represented by the firm of O H Bunde and Company Advocates.
 5. The appellants were aggrieved by the trial court's decision as stated in paragraph 1 (a), (b), (c) and (d) hereinabove. Thus, it precipitated the instant appeal.
 6. The appeal was commenced by way of a memorandum of appeal dated October 18, 2021 and duly filed in court on even date. The same is founded on the following grounds:
 - a. That the learned trial magistrate erred in law and in fact in failing to find that the contract between the 3rd appellant, 1st and 2nd respondents was unenforceable for the reason that the 3rd appellant did not inherit the agreed 1.5 hectares of land from the mother property.
 - b. That the learned trial magistrate erred in law and in fact in revoking the 1st and 2nd appellants' absolute and indefeasible title to the suit property without considering and determining the grounds set out in section 26(1) of the [Land Registration Act, 2012](#).
 - c. That the learned trial magistrate erred in law and in fact in holding that the contract between the 3rd appellant and 1st respondent was not repudiated by the letter dated May 18, 2012.
 - d. That the learned trial magistrate erred in law and in fact in holding that the 1st respondent paid the full purchase price of Kshs 280,000 to the 3rd appellant.
 - e. That the learned trial magistrate erred in law and in fact in arriving at a judgment based on his own personal view instead of the law and evidence on record.
 - f. That the learned trial magistrate erred in law and in fact in allowing parole evidence to absolve the 2nd respondent from breach of the contract between the 3rd appellant, 1st and 2nd respondents.
 - g. That the learned trial magistrate erred in law and fact in failing to address, consider and/or determine the issues submitted on by the parties in their written submissions.
 - h. That the learned trial magistrate erred in law and in fact by failing to consider other remedies available to the 1st respondent for breach of contract.
 - i. That the learned trial magistrate's judgment is against the evidence and submissions placed before him.
 7. In that regard, the proposed orders in the appeal are that:
 - a. The appeal be allowed and the judgment of the learned trial magistrate delivered on September 23, 2021 together with all the consequential orders and decree be set aside and/or dismissed.
 - b. The costs of this appeal be provided for.



- c. Any other alternative relief that this court may deem fit to grant.
8. Upon admission of the appeal, the court ordered and directed that the same be heard by way of written submissions. Accordingly, learned counsel for the appellants filed submissions dated March 9, 2022 on March 15, 2022 with a list of authorities of even date while learned counsel for the respondents filed submissions dated April 1, 2022 and duly filed herein on May 4, 2022.
 9. In their submissions, the appellants referred to the impugned judgment, the grounds of appeal and gave brief facts of the case. Counsel summarized the grounds of appeal to four (4) issues which include: whether the first agreement between the 1st respondent, 3rd appellant and 2nd respondent was enforceable and whether the respondent paid to the 3rd appellant the full purchase price of Kshs 280,000/= for the suit property.
 10. In analyzing the said issues, counsel relied on various authorities, inter alia,

Chon Jeuk Suk Kim and another v EJ Austin & 2 others (2013)eKLR, *Alfred O Michira v Gesima Power Mills Ltd*(2004)eKLR, section 26(1) of the *Land Registration Act, 2016 (2012)*, *Savings & Loan (K)Ltd v Kanyenje Karangaita Gakombe & another* (2015)eKLR, *Black's Law Dictionary* 10th Edition at page 236 and *Gurdev Singh Birdi & another v Abubakar Madhbuti* (1996)eKLR, to buttress the submissions. Counsel concluded that the learned trial magistrate failed to evaluate the evidence produced in court thus, arrived at a decision that was not supported by law and the evidence on record. Counsel then urged the court to allow the appeal as prayed in the memorandum of appeal.
 11. In the respondents' submissions, reference was made to the sale agreement of December 2, 2008 between the 3rd appellant and the respondents for the sale of an identified portion of the mother property and that the 1st respondent paid full purchase price thereof. That the 3rd appellant and the 2nd respondent were to subdivide the mother property to enable the 1st respondent register the said portion of land. That in the meantime, the appellants fraudulently and illegally sold the suit property to the 1st and 2nd appellants.
 12. Counsel identified triple issues for determination in this appeal, inter alia, whether the appellants fraudulently transferred the suit property and whether the learned trial magistrate did not consider the evidence and submissions before him. Counsel discussed the issues in the negative and urged the court to uphold the trial court's findings. Further, that the appeal be dismissed with costs to the respondents. Counsel relied on sections 3 (3) and 38 (1) of the *Law of Contract Act, Willy Kimutai Kitilit v Michael Kibet* (2018)eKLR, *Gladys Wanjiru Ngacha v Theresa Chepsaat and 4 others* (2013)eKLR, *Black's Law Dictionary* (supra), among other authorities, to reinforce the submissions.
 13. The present appeal being the first one from the trial court, this court is bound to revisit the evidence on record, evaluate the same and arrive at its own findings. Nonetheless, it must be borne in mind that an appellate court will not ordinarily interfere with findings of fact by the trial court unless the same are founded on no evidence at all, or on a misapprehension of it, or the court is shown demonstrably to have applied wrong principles in reaching the findings; see *Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma and 3 others* (2017) eKLR.
 14. Originally, the suit was filed at Kisii Environment and Land Court on May 19, 2014. Thereafter, the same was transferred to Migori Environment and Land Court before it was further transferred to Mbita Principal Magistrate's Court on February 20, 2018, for hearing and determination in the spirit of access to justice as provided for under articles 6 (3) and 48 of the *Constitution of Kenya, 2010*.



15. It is noteworthy that the 1st respondent generated the suit by way of a plaint dated May 19, 2014 filed on even date seeking orders of permanent injunction against the 3rd appellant and 2nd respondent and an order cancelling the registration of the 1st and 2nd appellants as joint proprietors of the suit property, among other orders. Briefly, the 1st respondent claimed that the 1st and 2nd appellants fraudulently obtained title in respect of the suit property. That the 3rd appellant and the 2nd respondent were parties to the alleged fraud. Thus, it provoked the suit before the trial court.
16. The 1st respondent (PW3) testified that he entered into a sale agreement dated December 2, 2018 with the 1st respondent (PExhibit 1). That one Alloyce Ooko Omboga (PW1) represented him in PExhibit 1 and that he paid Kshs 280,000/= to the 3rd appellant for the purchase of one decimal five hectares (1.5 Ha) of the mother property. That he was given land belonging to the 2nd respondent and not the one he bought from the 3rd appellant.
17. PW3 called his first witness (PW1) who relied on his statement, PExhibit 1 and further list of documents dated December 18, 2018 as part of his testimony. PW1 stated that he had no instruction in writing to represent PW3 in PExhibit 1. He told the court that he had no evidence of demarcation of 1.5 hectares of land in favour of PW3 who was issued with title deed for another portion of land.
18. His second witness was a retired area chief, Joseph Onyango Otieno (PW2) who stated that he prepared PExhibit 1. That he did not know the acreage of the mother property and the subdivisions thereof. That the 3rd appellant received Kshs 280,000/= being purchase price in regard to the 1.5 Hectares sold to the 1st respondent.
19. The 1st and 2nd appellants were the 1st and 2nd defendants in the suit. By their statement of defense dated August 28, 2014 and filed in court on August 29, 2014, they denied the 1st respondent's claim and prayed that the 2nd respondent's plaint be struck out with costs.
20. The 3rd appellant who was the 3rd defendant before the trial court lodged a statement of defence dated June 22, 2015 on even date. She denied the 1st respondent's claim.
21. The 2nd respondent was the 4th defendant before the trial court. On April 1, 2014, he filed a statement of defence dated December 29, 2014 and stated in part that the 3rd appellant failed to transfer a subdivision of the mother property to the 1st respondent and fraudulently re-sold the portion to the 1st and 2nd appellants. He prayed that the 1st respondent's case do succeed against the 1st, 2nd and 3rd appellants.
22. The 1st defendant (DW1) in the suit is the 1st appellant herein. He testified that his wife (the 2nd appellant) and himself bought the suit property from the 3rd appellant who was the registered proprietor as revealed in DExhibits 2 and 3. That title deed had been issued to the 3rd appellant on November 19, 2011. That there were no encumbrances over the suit property and that the 1st and 2nd appellants obtained land control board consent (DExhibit 8) in the purchase of the suit property. That the letter (PExhibit 3) rescinded PExhibit 1. A new agreement (DExhibit 4) was made and the 1st and 2nd appellants obtained title over the suit property (DExhibit 6)
23. The 3rd appellant (DW2) told the trial court in part that she sold the suit property to the 1st respondent who failed to pay Kshs 80,000/= being the balance of the purchase price thereof. That as a result, she decided to sell and transfer the suit property to the 1st and 2nd appellants.
24. DW3, the 2nd respondent herein stated that he was only a witness in PExhibit 1 whereby the 3rd appellant sold land to the 1st respondent. That he was not a seller of the suit property.



25. Upon hearing the parties in the suit, the learned trial magistrate framed and analyzed the issues for determination as revealed at page 390 of the record of appeal. He then reasoned in part that;
-”The contract was not repudiated. The plaintiff breached the terms thereof.....The 3rd defendant is at fault.....the 4th defendant is without blame.....”.
26. In the foregone, the issues for determination in this appeal are as per grounds 1 to 9 of the appeal which are compressed thus;
- a. Grounds 1, 3 and 4
 - b. Ground 2
 - c. Ground 5, 6, 7 and 9
 - d. Ground 8
27. As regards grounds 1, 3 and 4 of appeal, PExhibit 1 is to the effect that the 1st respondent (PW3) bought 1.5 hectares of the mother property. PExhibit 2 reveals that the suit property is a new parcel number after the partition of the mother property and PW3 is not listed as one of the persons interested thereof. PExhibit 4, DExhibits 1, 2, 3, 6 and 7 show that the suit property is a partition of the mother property.
28. During cross examination by Mr Otinga, learned counsel for the 1st and 2nd appellants, PW3 stated-
- “....my name does not appear in the mutation form. There cannot be any wrong on the part of the 1st and 2nd defendants.....”.
29. Plainly, PExhibit 3 rescinded PExhibit 1. Paragraphs 3 and 4 of PExhibit 3, are succinct thereof.
30. In the *Black’s Law Dictionary* at page 225 (supra), the term breach of contract means;
- “violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance.”
31. The 1st respondent (PW3) claimed that he paid the full purchase price of Kshs 280,000/= to the 3rd appellant for the purchase of the suit property.
- In examination in chief, PW3 stated in part;
- “..... Alloys was representing me. I made payments through cash and through bank.....The total money paid was Kshs 280,0000, there are other money paid which was not captured.....”
32. In cross examination by Mr Mbugua for the 3rd appellant, PW2 stated, *inter alia*;
- “.....Wilfrida had not received 280,000/= by 2/12/2008...”
33. The 3rd appellant (DW2) stated that whereas the purchase price of the suit property was Kshs 280,000/=, she only received from PW3 Kshs, 200,000 through the bank. That she did not receive any money through any other way. She maintained so during cross examination.
34. Clearly, the 3rd appellant is listed as a person interested in the mother property. Indeed, she obtained the suit property as per PExhibit 2. The 1st respondent failed to pay full consideration to the 3rd appellant for the purchase of the suit property thus, PExhibit 1 was rescinded by PExhibit 3. To that extent, PExhibit 1 is unenforceable



35. Further, the 1st respondent did not take possession of the suit property. In the circumstances, not even constructive trust and equitable estoppel can be invoked under article 10 (2) (b) of the [Constitution of Kenya, 2010](#); see also *William Kipsoi Sigei v Kipkoech Arusei and another* (2019) eKLR and Kitilit case (supra).
36. Moreover, the 1st respondent failed to demonstrate that he purchased a definite portion of the mother property. He should have exercised great caution before entering into the process of an apparent un-surveyed or undemarcated land as observed in the case of *Margaret Wanjiku v John Njoroge Gachuru* 2005eKLR.
37. Regarding ground 2 of the appeal, PW3 strictly pleaded the particulars of fraud and misrepresentation in paragraph 15 of the plaint. I bear in mind that cancellation of registration of the 1st and 2nd appellants as joint proprietors of the suit property was a relief sought at the foot of the plaint.
38. It is trite law that parties are indeed, bound by their pleadings; see *Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule and 3 others* (2014) eKLR.
39. It is common ground that the suit property was registered in the name of the 3rd appellant prior to its transfer and registration in the name of the 1st and 2nd appellants. This court is guided by sections 24, 25 and 26 of the [Land Registration Act, 2016 \(2012\)](#) as well as PExhibits 4 and 5.
40. Allegations of fraud and misrepresentation as grounds for impeaching a certificate of title must be strictly pleaded and proved; see *Kuria Kiarie and 2 others v Sammy Magera* (2018) eKLR.
41. In *Gladys Wanjiru Ngacha case* (supra), the Court of Appeal cited the decision in *R G Patel v Lalji Makani* (1957) EA 304 at 317 where it was held-
- “Allegations of fraud must be strictly proved; Although the standard of proof may not be so heavy to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
42. It is noteworthy that the protection of right to property is enshrined under article 40 (1) of [the Constitution of Kenya, 2010](#).
43. The 1st and 2nd appellants proved by way of DExhibits 1 to 8 as shown at page 423 of the record of appeal that their acquisition of title over the suit property was legal, formal and free from encumbrances; see *Munyu Maina v Hiram Gitiba* (2013) eKLR and *Moses Parantai and another v Stephen Njoroge Macharia* (2020) eKLR.
44. On that score, the 1st and the 2nd appellants’ registration of the suit land did not arise on account of a transfer arising from an alleged fraudulent purchase; see *Samwel Kamere v Land Registrar, Kajiado* (2015) eKLR.
45. Concerning the third set of grounds of appeal, the learned trial magistrate observed in part that;
- “.....The contract was not repudiated. The plaintiff breached the terms thereof.....”
46. According to DW2, PW3 failed to settle the balance of the purchase price for the suit property. There was implied repudiation of PExhibit 1 on the part of PW3 as disclosed in PExhibit 3.
47. It was the testimony of DW3 that he did not sell land. That DW2 sold her land to the 1st respondent/PW3. As already observed, PW3 repudiated PExhibit 1. To that extent, DW1, DW2 and DW3 were not to blame for the breach of PExhibit 1.



48. At page 389 of the record of appeal, the learned trial magistrate considered the evidence and the submissions alongside the authorities relied therein.
49. As regards ground 8, a breach of contract may be one by non-performance or by repudiation. Further, every breach of contract gives rise to a claim for damages, and may give rise to other remedies; see *Black's Law Dictionary* at page 225 (supra).
50. Other remedies available for breach of contract include; part performance. These are remedies grantable within the discretion of the court.
- Furthermore, PW1 did not seek to rely on part performance doctrine in the suit as it was not pleaded; see in *Sumaria and another v Allied Industries Ltd* 2007 2 KLR 1.
51. *A fortiori*, I find the instant appeal commenced by way of a memorandum of appeal dated October 18, 2021, quite tenable. I proceed to render the following final orders;
- a. The appeal be allowed and the judgment of the learned trial magistrate delivered on September 23, 2021 together with all the consequential orders and decree, be set aside.
 - b. By dint of the proviso to section 27 (1) of the *Civil Procedure Act* Chapter 21 Laws of Kenya, costs of this appeal and the original suit before the trial court to be borne by the respondents
 - c. By virtue of any other relief as proposed in the memorandum of appeal, it is further ordered that the original suit mounted by way of a plaint dated May 19, 2014, be and is hereby dismissed.
52. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 20TH DAY OF JUNE 2022

G M A ONGONDO

JUDGE

Present:

- a) The 1st appellant
- b) Miss Oriche holding brief for Mr H.Bunde, learned counsel for the respondents
- c) Okello, court assistant

