



Onduso v Nyamboga & 2 others (Environment and Land Appeal 06 of 2021) [2022] KEELC 3285 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3285 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 06 OF 2021**

JM ONYANGO, J

JULY 27, 2022

BETWEEN

JAMES NYANGERA ONDUSO APPELLANT

AND

LUCAS A. NYAMBOGA 1ST RESPONDENT

ZACHARY NYAMBEGA MANYINSA 2ND RESPONDENT

MOIGE NYAMBEGA 3RD RESPONDENT

*(Being an Appeal from the Judgment of Hon. P. K. Mutai (SRM)
delivered on 26th May, 2021 in KISII CM ELC Case No 148 of 2019)*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 10th June 2021, the Appellant filed this appeal against the judgment of Hon. P. K. Mutai (SRM) delivered on 26th May, 2021 in Kisii CM ELC Case No. 148 of 2019.
2. As per Memorandum of Appeal dated 23rd May, 2019, the Appeal is premised on the following grounds:
 - a. The learned trial Magistrate erred in law and fact by finding that the Plaintiff had not proved his case on a balance of probability.
 - b. The learned trial Magistrate erred in law and fact by bringing in a new land parcel which was not in issue, land parcel No. Central Kitutu/ Mwamosioma/369.
 - c. The learned trial Magistrate erred by relying on the oral evidence of the Land Registrar which misled him on the issues.



- d. The learned trial Magistrate erred in law and fact by finding that land parcel Central Kitutu/ Mwamosioma/ 3262 was a resultant title from Central Kitutu/ Mwamosioma/369.
 - e. The learned trial magistrate erred in law by not considering the documentary evidence of the appellant.
3. Premised on the above grounds the Appellant prayed that the court sets aside the judgment of the learned trial Magistrate and substitute the same with an order allowing the Appellant's claim in the lower court with costs.

Brief Background of the Suit

4. Before delving into the merits of the appeal, it is important to give a background of the case. The Appellant filed suit in the lower court through his plaint dated October 29, 2019 seeking a declaration that he is the registered owner of land parcel No. Central Kitutu Mwamosioma/ 3262 (hereinafter referred to as the suit property). He sought a permanent injunction against the Respondents or any person acting for them, restraining them from interfering with his occupation and use of the suit property.
5. The Appellant alleged that he was the registered owner of the suit property. He averred that he bought the suit property from James Maobe Manyisa, (now deceased) *vide* a sale agreement dated 23rd January, 2014. He alleged that despite him being the registered owner of the suit property, the Respondents together with a group of goons entered into the suit property in 2019 and stopped him from farming on it.
6. Upon being served with the Plaint and Summons to enter appearance, the Respondent filed a Statement Defence denying the Plaintiff's claim. Together with the Statement of Defence they filed a Counterclaim seeking a declaration that the 3rd Defendant's title to the suit property be cancelled/ revoked and the land be transferred to the Plaintiff. In the Counterclaim they averred that the suit property is ancestral land as it originated from parcel No. Central Kitutu/ Mwamosioma/369 which was registered in the name of Matureti Neko - (Deceased).
7. The Respondents further averred that James Maobe Manyisa who previously held the title to the suit property only held the same in trust for them. It was their further contention that James Maobe Manyisa (deceased) was merely a beneficiary together with the Respondents in the estate of Matureti Neko - (Deceased).
8. They averred that the James Maobe Manyisa in breach of the said trust and without a Grant of Letters of Administration illegally subdivided parcel No. Central Kitutu/ Mwamosioma/369 into three portions thus causing two parcels to be registered in his name while the remaining parcel was transferred to the Respondents. The Respondents claimed that the said subdivision and subsequent transfer was carried out without consulting the Respondents.
9. After hearing all the parties and their witnesses, the trial Magistrate delivered his judgement on 26th May, 2021 where he held that the certificate of title to the suit property was acquired fraudulently thus dismissing the Appellant's case. The trial Magistrate directed that the parcel of land in dispute should revert to Matureti Neko (Deceased) who was the first registered owner as it had been transferred before Succession was done.
10. It is against the said holding by the trial court that the Appellant has lodged this Appeal based on the grounds highlighted above.



11. On 1st March, 2022, the Court directed that the Appeal be disposed of by way of written submissions and both parties complied.

Issues for Determination

12. Having considered the entire Record of Appeal and the submissions of the parties with respect to this Appeal, the issues for determination as follows:
 - a. Whether the trial Magistrate erred by holding that the suit property was irregularly obtained.
 - b. Whether the trial Magistrate erred by bringing in a new land parcel which was not in issue, land parcel Central Kitutu/ Mwamosioma/369.
 - c. Whether the trial Magistrate erred by not considering documentary evidence of the Appellant.

Analysis and Determination

13. With regard to the first issue, learned counsel for the Appellant submitted that the trial Magistrate solely relied on the testimony of the Land Registrar (DW1) to determine the matter. He argued that even in his reliance on the testimony of the Land Registrar, the trial Magistrate failed to take into account the fact that the Land Registrar did not produce any document to prove that the suit property originated from parcel 369. He also argued that there was no evidence showing that the said parcel, 369 existed and that the same was registered in the name of the late Matureti Neko.
14. In response to the above arguments, learned counsel for the Respondent submitted that the Land Registrar (DW1) being in charge of the Land Registry has powers to discharge all functions under section 12 of the [Land Registration Act](#) and thus his evidence cannot be wished away by a court of law in determining the authenticity of documents relating to the suit property. He argued that the Land Registrar confirmed that parcel 3262 originated from parcel 369 albeit illegally.
15. Counsel contended that the Land Registrar explained that parcel 369 was registered in the name of the late Matureti Neko who died in 1974 and that there was no evidence in his records that a succession process had been carried out to warrant subsequent subdivision of the said parcel to give rise to the suit property.
16. Counsel also contended that the trial Magistrate had relied on the evidence of DW2, a brother to James Maobe Manyisa, who sold the suit property to the Appellant. DW2 testified that his brother who was the registered owner of parcel 1954 instead of selling a portion of the same, illegally subdivided parcel 369 into three portions and transferred the suit property to the Plaintiff without consulting them.
17. Having perused the judgment of the lower court, I note that the trial Magistrate relied on the testimony of the Land Registrar (DW1) to determine that the suit property was an illegal subdivision that was carried out of parcel 369 without succession being carried out. However, the question is whether it was correct for the trial Magistrate to solely rely on the evidence of the Land Registrar to determine the suit.
18. As the first appellate court, I am required to evaluate the evidence and reach my own conclusion. From my analysis of the evidence presented before the trial Magistrate and the testimony of all witnesses including that of the Land Registrar, I am of the view that it was erroneous for the trial Magistrate to solely rely on the testimony of the Land Registrar without taking into account the evidence of the Appellant which painted the testimony of Land Registrar as not being factual. For instance, the trial Magistrate failed to consider the documents produced by the Plaintiff which included among others a sale agreement, a search certificate in respect of parcel 1954 and a copy of the title deed to the suit property.



19. Unfortunately, the trial court believed that the suit property originated from parcel 369 without any evidence that such a parcel existed or had any relationship with the suit property. Had the trial court considered the copy of the title deed produced by the Appellant, he would have established that the suit property originated from parcel 1954 a parcel of land that was registered in the name of the person who sold the suit property to the Appellant and not from parcel 369 as the court was made to believe by the Land Registrar.
20. Furthermore, had the court looked at the certificate of official search produced as evidence by the Appellant, he would have established that parcel 1954 was a subdivision of parcel 1804 whose relationship to parcel 369 was never established by the Defendant or Land Registrar.
21. As pointed out by the counsel for the Appellant, the Land Registrar referred to parcels Central Kitutu/ Mwamosioma 2662 and Central Kitutu/ Mwamosioma/2632 which have no relation to the suit property that is Central Kitutu/ Mwamosioma/ 3262. It was therefore erroneous for the trial Magistrate to rely on the testimony of the Land Registrar that referred to properties that had no relationship to the suit property to arrive at the finding that the suit property was illegally obtained.
22. Turning to the second issue, the Appellant argued that the trial Magistrate considered Land parcel 369 which was not a subject of the suit and as I have stated herein above, there is no relationship between the suit property and parcel three 369.
23. It is clear from the evidence of the Land Registrar that the lower court relied on the evidence of DW1 to dismiss the Plaintiff's case. Parcel No. Central Kitutu/ Mwamosioma 369 is said to have given rise to parcels Central Kitutu/ Mwamosioma 2662 and Central Kitutu/ Mwamosioma/2632 which have no relation to the suit property which is Central Kitutu/ Mwamosioma/ 3262.
24. It was therefore erroneous for the trial Magistrate to rely on the evidence relating to a property that had no relation to the suit property to determine that the title to the suit property was illegal.
25. With regard to the last issue, it is clear that the trial Magistrate solely relied on the testimony of the Land Registrar which as I have observed was not based on any facts. The evidence on record shows that the suit property originated from parcel 1954 which has no relation to with parcel 369, a fact this court would have established by considering, the copy of the sale agreement, copy of a search for parcel 1954 and the title deed for the suit property as these documents were produced by the Plaintiff. It was therefore erroneous for the court to reach the finding that the suit property was obtained fraudulently.
26. The upshot is that the appeal has merit. Consequently I allow it and set aside the judgment of the lower court dated 26th May, 2021 and substitute it with an order allowing the Appellant's claim in the lower court.
27. The Respondent shall bear the costs of this Appeal and the suit in the lower court.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF JULY, 2022.

J.M ONYANGO

JUDGE

