



**Obonyo & 3 others v Lisaye (Environment and Land Appeal
18 of 2021) [2022] KEELC 2476 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2476 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 18 OF 2021
AY KOROSS, J
JULY 21, 2022
[FORMERLY KISUMU ELC APPEAL NO.18 OF 2021]**

BETWEEN

**JUMA OBONYO 1ST APPELLANT
ALFRED OUMA OMORO 2ND APPELLANT
VITALIS ANYANGO OMORO 3RD APPELLANT
OWINO MAKONYANGO 4TH APPELLANT**

AND

WILSON ODENYO LISAYE RESPONDENT

*(Being an appeal from the judgment and decree of the Principle Magistrate
Hon.L.Simiyu delivered on 16/6/2021 in Siaya SPM ELC Case Number 2 of 2015)*

JUDGMENT

Introduction

1. A summarised background of this record is paramount in understanding the nature of the appeal that is the subject of this determination.
2. Kathieno “A” [formerly Kathieno “B”] was declared an adjudication section. During adjudication, land parcel number East Ugenya/Kathieno A 491 [suit property] was registered on October 18, 1973 in the name of Ochieng Sijenyi [hereafter Sijenyi] but occupied by the 1st to 3rd appellants family while East Ugenya/Kathieno A 494 [hereinafter 494] was allegedly registered in the name of Donatus Obonyo Obond[hereafter Donatus] who was the appellants’ patriarch but occupied by the family of Sijenyi.
3. The respondent in his testimony contended that during land adjudication process, the family of Donatus and Sijenyi colluded to oust him out of the suit property which belonged to his family by



interchanging the registration numbers of the two parcels. Upon confirmation of grant of the Estate of Sijenyi, the respondent transferred the suit property to his name and filed suit against the appellants.

4. By dint of a plaint dated February 20, 2015, the respondent instituted suit against the appellants. He pleaded fraud and illegality. He asserted that the 1st, 2nd and 3rd appellants had entered the suit property and cultivated it without any colour of right. He contended that the 4th appellant had threatened to encroach on the suit property and erect structures thereon. He prayed for permanent and mandatory injunctive orders and costs of the suit.
5. By a defence dated 07/10/2019, the 1st, 2nd and 3rd appellants denied the averments made in the plaint but admitted that the respondent was the registered owner of the suit property. They asserted that Sijenyi was the respondent's father and they had been in occupation of the suit property from the year 1934 and that the remains of Donatus were buried on the suit property. That they discovered that the suit property which they occupied was erroneously registered in the name of Sijenyi while 494 which was occupied by Sijenyi was erroneously registered in Donatus's name. That the parties were aware of the mishap of the registration. They urged the court to dismiss the suit.
6. On hearing the parties, the court found that the respondent was the registered owner of the suit property and entered judgment in his favour with costs.

Appeal to this court

7. Aggrieved and dissatisfied with the judgment of the lower court, the appellants appealed to this court on 9 grounds. Because some of them are replications, this court has summarized them as follows;
 - i. The learned trial magistrate erred in law and fact by failing to appreciate the totality of evidence adduced thus arriving at an erroneous conclusion; and
 - ii. The learned trial magistrate erred in law and fact by shifting the balance of proof to the appellants to prove misrepresentation or fraud.
8. The appellant prayed that the appeal be allowed with costs and lower court judgement be set aside.

Appellants' submissions

9. The appellants' Counsel Namatsi & Co. Advocates filed written submissions dated 28/03/2022. They submitted on 4 issues; (i) whether the respondent was rightfully registered as a proprietor of the suit property (ii) whether the suit was time barred, (iii) whether the appellants were duty bound to file a counterclaim and, (iv) in what capacity did the appellants bring their claim.
10. Counsel submitted that the respondent was not the son of Sijenyi but a neighbour's son one Lisaye hence the succession proceedings conducted by him on the Estate of Sijenyi were irregular. That there had been various proceedings between the respondent and Sijenyi but he had never executed the decrees. He contended that the respondent was bound by the actions of his predecessors in title and that the appellants had occupied the suit properties from the 1940's. That the suit was time barred and that the appellants had another suit pending in court against the respondent.

The respondent's submissions

11. The respondent's counsel Ooro & Company Advocates filed written submissions dated May 17, 2022. They identified one issue for determination; whether the trial magistrate failed to appreciate the totality of the evidence adduced and therefore arrived at a wrong conclusion. They submitted that the judgment of the trial court complied with Order 21 Rule 4 of the [*Civil Procedure Rules*](#) and that the trial



court arrived at a proper finding. They contended that the respondent having established ownership, the burden of proof shifted to the appellants to prove fraud in the manner in which the respondent acquired title to the suit property and that in previous litigations, the appellants had admitted that the respondent owned the suit property. The issue that the respondent's suit was time barred had not been substantiated and lacked merit. They urged the court to dismiss the appeal with costs.

Analysis and determination

12. This being a first appeal, this court is reminded that the task at hand is to reappraise, reassess and reanalyse the evidence as asserted by the parties in the record of appeal and lower court record and establish if the findings reached by the learned trial magistrate should stand and give reasons if they do not. See *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR.
13. In line with the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212, the court must keep in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. Further, this court is called upon not to be quick to interfere with the discretion of the lower court unless it is satisfied that the decision of the trial magistrate was clearly wrong because of some misdirection, failed to take into consideration relevant matters, considered irrelevant matters and as a result arrived at a wrong conclusion or abused her discretion.
14. Having considered the lower court record, record of appeal and parties' submissions, I will now proceed with my analysis on the two condensed grounds of appeal.

i. Whether the learned trial magistrate erred in law and fact by failing to appreciate the totality of evidence adduced thus arriving at an erroneous conclusion.

15. I will shortly set the analysis of the evidence by the trial magistrate vis a vis the facts as they appear in the pleadings and documents that were adduced before the trial court. The learned magistrate rejected almost the entire evidence of the appellants and largely accepted that which was adduced by respondent.
16. The trial magistrate stated thus on the proceedings before the arbitration board case number AB.37 of 1969 between *Omondi Oluanda v William Adeny and Onyango Lisaye* as follows;

“...without an appeal to the minister the said decision stood and the land register ought to have placed the name of the plaintiff in the register by 1969 when the decision was made... letter dated April 17, 1989 from land adjudication officer...letter from chief land registrar dated 8/8/1989...and another letter emanated from land adjudication department...from the above letters it is clear to me that registration of the suit land ...was pursued with intention that the registration be done in the name of the plaintiff” [Emphasis added]
17. I have scrutinized the documentary evidence of the arbitration proceedings and the letters cited. The decision of the land adjudication committee was upheld by the arbitration board. Neither of the appellants nor Donatus were parties to these proceedings. The proceedings did not describe the parcel of land that was in dispute. Further, though the respondent's name did not appear in these proceedings, he led evidence in the trial court that he was a party; this was never controverted. The jury is out there whether the names William Adeny or Onyango Lisaye that appeared in these proceedings were his alias names or not. Be that as it may, the proceedings, found that the land belonged to one William Adeny. From the record, some of these letters that were produced are faint and illegible. However, the



legible ones shed light that the parcel of land that was the subject of the proceedings was East Ugenya/Kathieno “A” 462 and not the suit property.

18. From the court record, there was documentary evidence that there had been proceedings in Siaya District Land Disputes Tribunal case number SYA/87/2001 between the respondent as the claimant and Sijenyi and his son Raphael Omondi Ochieng as objectors. As at the time of these proceedings, Sijenyi was deceased. The 2nd appellant participated in these proceedings as Raphael’s witness. The trial court had this to say on these proceedings;

“Operatively, this is not the first time the several parties have had the registration of this land arbitrated”

19. From the record, there is no documentary evidence that that the matters in the trial court had already been adjudicated in another forum between the parties either at the tribunal or arbitration board. Further, entry 7 of the suit property’s “green card” demonstrated that the entry was made after the respondent had been registered as the proprietor of the suit property and a title deed issued to him. This entry read thus “entries nos.4, 5 & 6 cancelled vide c/order no.Misc.Civil Case No.21 of 2005”.

20. It is unfortunate that the proceedings of Misc. Civil case No.21 of 2005 were never tendered before the trial court. However, my understanding of this entry is that it was effecting a court order cancelling certain entries in the register and not effecting the tribunal award.

21. In his pleadings, the respondent pleaded that the appellants fraudulently and illegally cultivated the suit property without his authority. Within the provisions of Order 2 Rule 10(1) of the *Civil Procedure Rules* and settled law, fraud must be pleaded, particularized and proved to a standard higher than on a balance of probabilities. The settled law has been upheld in several Court of Appeal decisions; *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000), *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR (Civil Appeal No 132 of 2005) and *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR.

22. The evidence led by the respondent were in variance with his pleadings. He led evidence that Sijenyi was fraudulently registered as the owner of the suit property after Donatus or his successors registered the suit property in the name of Sijenyi by interchanging the suit property’s particulars with that of 494. This was never pleaded in his particulars of fraud and illegality. During cross examination, he testified that illegality and fraud took place during land adjudication process. The court stated thus on the respondent’s case;

“In the case of East Ugenya/Kathieno “A”/491 as the adjudication officer and arbitration committee tried to resolve the myth...another gang by 1973 was first and furious making entries of registration...the defendants cannot say how they own the land”

23. In *Vijay Morjaria v Nansingh Madhusingh Darbar* [Supra] Tunoi JA as he then stated thus:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”



24. In my considered view, the particulars of fraud pleaded by the respondent hinged on trespass and not fraud. In any case, he did prove the alleged fraud to the required standard; higher than a balance of probabilities but certainly not one beyond a reasonable doubt.
25. As for illegality, the *Black's Law Dictionary*, 11th Edn, p. 896 has defined illegality to mean “an act that is forbidden by law”. The respondent pleaded that the appellants cultivated the suit property without his consent. He testified that the appellants’ encroachment on the suit property was illegal.
26. The trial magistrate rightfully stated that the appellants had never been registered as the owners of the suit property and that the respondent was registered as the proprietor of the suit property upon succeeding the Estate of Sijenyi. Succession proceedings were never the subject of the trial court’s determination. However, she did not address her mind on illegality.
27. The land was registered in the name of the respondent on 18/8/2014. Were the appellants occupation of the suit property illegal as at the time the respondent became the registered proprietor? My answer is in the negative. From the evidence tendered, by the time the respondent acquired title to the suit property, the appellants and or their families had been in occupation of the suit property prior to the date of 1st registration which was on or before October 18, 1973. This was close to 41 years. By virtue of Section 7 of the *Limitation of Actions ACT*, the respondent’s rights or those of his predecessors in title had long lapsed over the portion of suit property occupied by the appellants. His suit in the trial court was statutory barred. Munyao J in the case of *Maina Wabome v Esther Cherop Murey & 6 Others* [2013] eKLR stated thus;
- “The correct legal position is that time does not cease to run despite change of proprietorship (See for example the case of *Githu v Ndeete* (1984) KLR 776”
28. It is my finding that the trial magistrate erred by failing to appreciate the totality of evidence adduced thus arrived at an erroneous conclusion. The appellants succeed on the 1st ground.

ii. The learned trial magistrate erred in law and fact by shifting the balance of proof to the appellants to prove misrepresentation or fraud;

29. It is trite that he who alleges must prove. Section 107 of the *Evidence Act* states as follows:
- “(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.
30. The respondent pleaded fraud and illegality while the appellants’ did not file a counterclaim. In her judgement, the trial magistrate stated thus,
- “In this matter no misrepresentation or fraud was pleaded by the defendants nor have elements thereof been proved against the plaintiff or in relation to entry of his name in the register”



31. The Court of Appeal in the case of *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR cited with approval the case of *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 where the court in this case stated thus,

“We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him”

32. The onus of proving fraud and illegality lay at the doorstep of the respondent and not on the appellants. From the judgment, it is quite obvious that the trial magistrate erred. I need not say more. The appellants succeed on this 2nd ground.

33. Ultimately, I find that the evidence on record did not support the respondent’s claim that the appellants had fraudulently and illegally cultivated the suit property without his consent and that the trial court erred in finding that the respondent’s suit had succeeded. The appeal succeeds. It is trite law that costs follow the event. I hereby set aside the entire judgment and decree of the trial court and in its place, I substitute it with a judgment in favour of the appellants in the following terms;

- a. The respondent’s suit in the lower court is hereby dismissed; and
- b. The appellants shall have the costs of this appeal and that of the lower court

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 21ST DAY OF JULY 2022.

HON. A. Y. KOROSS

JUDGE

21/7/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Ooro. E. for the respondent.

N/A for the appellants

Court assistant: Ishmael Orwa

