



REPUBLIC OF KENYA



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**Ndalo v Sireno (Environment and Land Appeal 26 of 2018)  
[2022] KEELC 2567 (KLR) (15 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2567 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 26 OF 2018**

**A OMBWAYO, J  
JULY 15, 2022**

**BETWEEN**

**WALTER OSUWO NDALO ..... APPELLANT**

**AND**

**ROSE AMOLO SIRENO ..... RESPONDENT**

*(An Appeal from Judgment of the Principal Magistrates Court at Bondo delivered  
by Hon. M.O. Obiero PM on 15th October 2018 in Bondo ELC NO. 11 of 2018)*

**JUDGMENT**

**Brief Facts**

1. Rose Amolo Sireno the Respondent herein filed a suit *vide* a Complaint dated 11<sup>th</sup> March 2015 against the Appellant where she averred that she is the bonafide owner of land parcel No. 4801 Bondo Nyangoma Adjudication Section and the Appellant without her consent descended onto the said parcel of land and occupied her rental houses and constructed a house. The Respondent further averred that the Appellant entered into the suit property and has been illegally staying on it since the year 2004 without paying rent and even assumed ownership of the suit property in blatant disregard that the Respondent is the owner of the said land. The Respondent therefore prayed that Judgment be entered against the Appellant for an order against the Appellant to vacate the said premises, an order for payment of rent arrears and mense profits from the date of occupation till the date of vacation and costs of the suit and interest.
2. The Appellant on the other hand filed a Defence and Counterclaim on 14<sup>th</sup> May 2015. He denied the allegations of the Respondent and put the Respondent to strict proof and stated that he is the *bonafide* purchaser of a portion of land parcel measuring 20 meters by 30 meters on and from the Respondent's original land parcel no. 1301(now 4801) Bondo/Nyangoma Adjudication Section at an agreed price of Kshs. 28,000/= paid to the Respondent on 14<sup>th</sup> September 2004.



3. The Appellant in the Counterclaim pleaded breach on the part of the Respondent and prayed that Judgment be entered against the Respondent for the Respondent's claim to be dismissed with costs and interests, an order of Specific Performance for the Respondent to appear before the Bondo District Land Control Board to obtain consent to subdivide land parcel number 4801 Bondo/Nyangoma Adjudication Section and subsequently for the Respondent to initiate and complete the process of mutation of the said parcel and eventual subdivision and issuance of separate title documents to the respective parties therein, the Respondent to bear the costs of the suit and counterclaim plus interest thereon .
4. The matter came up for hearing before the Trial Court and Judgment was entered against the Appellant to vacate the parcel of land known as 4801 Bondo- Nyangoma Adjudication Section, a claim for rent arrears and mense profit was dismissed, the Appellant's counterclaim was dismissed and costs were awarded to the Respondent.

### **Grounds of Appeal**

5. Aggrieved by the decision of the Lower Court, the Appellant herein filed a Memorandum of Appeal which was based on the following grounds:
  1. That the Learned Principal Magistrate erred and misdirected himself in law in failing to take into account that Article 159 of *the Constitution* enjoins the court to administer justice without undue regard to technicalities of procedure.
  2. That the Learned Principal Magistrate erred in law and fact in finding that the Respondent had proved his case on a balance of probabilities against the preponderance of the evidence on record and in disregard of settled principles law.
  3. That the Learned Principal Magistrate erred in law and in fact in failing to appreciate the place of the Defendant's evidence in determination of this case and totally disregarded the signed and attested Sale Agreement between the Plaintiff and the Defendant for purchase of the suit property in dispute for a sum of Kshs.28,000/=.
  4. That the Learned Principal Magistrate erred in law and in fact by disregarding the testimony, evidence on record and the submissions made by the Appellant thereby failing to dismiss the Respondent's case which had not been proved as required by the law.
  5. That the Learned Principal Magistrate erred in law and in fact in denying the Appellant his fundamental constitutional right to a fair hearing by unreasonably, unfairly and unjudiciously denying the Appellant an opportunity to further cross-examine the Respondent.
  6. That the Learned Principal Magistrate erred in law and in fact in failing to address his mind on the evidence adduced and hence made erroneous findings allowing the suit even though the Appellant's evidence was corroborated.
  7. That the Learned Principal Magistrate erred and misdirected himself in law and in fact in failing to appreciate the import of section 67 and 65 of the *Evidence Act* Cap 80 Laws of Kenya regarding proof of documents to the detriment of the Appellant.
  8. That the Leaned Principal Magistrate misdirected himself in law and in fact in failing to appreciate that jurisdiction to permit a witness to be recalled for inter alia further cross-examination as provided for under section 146 (4) of the *Evidence Act* Cap 80 Laws of Kenya was discretionary and the same ought to be exercised fairly.



9. That the Learned Principal Magistrate erred in fact in failing to acknowledge the fact that the Appellant sought to have the Respondent to be recalled for further cross examination on material and/or information directly connected with documents and/or evidence produced by her during hearing.
  10. That the Learned Principal Magistrate erred and misdirected himself in a law and in fact in failing to appreciate the importance of section 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya conferring upon him powers to ensure ends of justice are met.
  11. That the Learned Principal Magistrate erred in both law and fact for considering irrelevant matters in arriving to the said decision in favour of the Respondent as against the Appellant.
6. The Appellant therefore prayed for orders that the Judgment made on 15<sup>th</sup> October 2018, be set aside and/or varied, that the Appeal be allowed and that the costs in the Appeal and in the lower court be paid by the Respondent.
  7. The Appeal was canvassed by way of written submissions as directed by this court.

### **Appellants' Submissions**

8. The Appellant filed his submissions on 21<sup>st</sup> October 2021 where he raised a number of issues for determination as discussed below:

#### **a) – Whether the Learned Trial Magistrate misdirected himself in dismissing the Appellant's suit.**

9. It was stated that *the Constitution* of Kenya 2010 provides that every party to suit must be accorded the right not only to be heard but to be heard conclusively taking into consideration all factors. It was the Appellant's contention that the Trial Magistrate failed to consider the merits of the Appellant's case and that the Appellant's Defence and documentation therein demonstrated the frivolity of the Respondent's case as against the Appellant in the Lower Court proving that the Respondent only had an intention to irregularly and illegally dishonor an agreement which they had duly entered into with the Appellant for sale of land but the Trial Magistrate relied on the technicalities and dismissed the same.
10. It was submitted that Article 159(2) (d) of *the Constitution* of Kenya as well as the Overriding Objective principles in civil litigation as contained in sections 1A,1B,3A and 3B of the *Civil Procedure Act* invite the courts to deliver justice without undue regard to technicalities. The Appellant relied in the case of Civil Appeal No (Application) 228 of 2013, *Nicholas Korir vs IEBC and Others, Bakari Ali Ogada & 245 Others vs Uniliver Kenya Ltd* (2009) eKLR, *Trust Bank Ltd vs Amalo Co. Ltd* (2003) 1 EA 350 and *Githere vs Kinungu* (1976-198) E.A 101.
11. It was stated that the Appellant's case was dismissed on alleged fact that the Appellant failed to produce documentary evidence to prove that he had purchased the suit property. That the Appellant's Advocate wrote a letter to the court indicating that they had not been served with the Respondent's submissions in order to file the Appellant's response. The Appellant was unable to file his submissions and Judgment was delivered without the same being considered. The Appellant submitted that the Trial Magistrate should have determined the suit on merits without due regard to a technicality.



**b) – Whether the Trial Magistrate erred in law and fact in failing to consider the agreement for sale between the Respondent and the Appellant and denying the Appellant an opportunity to further cross-examine the Respondent on the said Agreement for Sale.**

12. It was stated that the sale agreement between the parties indicated that parties agreed to sale and purchase part of the suit property for a consideration of Kshs.28,000/= and the agreement was signed and attested. That the Respondent’s Advocate wrote a letter dated 17<sup>th</sup> September 2018 to the court informing the court that they intend to re-examine the Respondent on the contents of the Agreement for Sale and the same was not allowed. The Appellant submitted that the Respondent came to court with unclean hands and the Trial Magistrate assisted her. Reliance was placed in the case of *Esther Akinyi Odidi & 2 Others vs Sagar Hardware Stores Limited and Another* (2006) eKLR, *Johnson Kimeli vs Barclays Bank of Kenya Limited*, Kisumu HCCC No. 171 of 2003 and Machakos HCCC No. 215 of 2008 - *Jopa Villas LLC vs Private Investment Corp & 2 Others*.
13. He further stated that the Trial Magistrate should have considered the law on the right to be adequately heard the law on the right to be heard by both parties and the right to fair administrative action ,thus according the Appellant the opportunity to be rightfully heard .He submitted that the court has the power to correct the wrong committed against the Appellant and his rights should be considered as his bona fide actions in purchasing the property stands to result in losses because of the orders of the Trial Magistrate.
14. The Appellant stated in his submissions that the Trial Magistrate was in total disregard of sections 65 and 67 of the *Evidence Act* Cap 80 Laws of Kenya regarding proof of documents to the detriment of the Appellant. The Agreement for Sale being primary evidence, it ought to have been considered by the Trial Court as the same would have substantively affected the outcome of the matter. That the Appellant had a right to recall the Respondent for further cross examination regarding the Agreement for Sale in accordance with section 146 (4) of the *Evidence Act* and therefore the Trial Magistrate misdirected herself with regards to the import of section 3A of the *Civil Procedure Act* conferring him powers to ensure the ends of justice are met.
15. The Appellant therefore prayed that the Appeal be allowed and the Judgment of the Trial Court be set aside and/or varied and costs be paid by the Respondent.

**Respondents’ Submissions.**

16. The Respondent herein filed her submissions on 21<sup>st</sup> October and raised a number of issues for determination as follows:

**i. Whether the Respondent is the lawful registered proprietor of the suit parcel.**

16. It was stated that the Respondent is the registered owner of the suit parcel and it was upon the Appellant to prove beyond reasonable doubt that the Respondent is not the registered owner of the suit property. The Respondent relied on section 26 of the *Land Registration Act* and stated that the Appellant did not demonstrate illegality ad the letter dated 3<sup>rd</sup> December 2014 was prima facie evidence of proprietorship since the Certificate of Title had not been issued as the property is still under adjudication.



**ii. Whether the Sale Agreement entered into on 14<sup>th</sup> September 2004 should be allowed as proof of ownership.**

17. The Respondent submitted that the Agreement for Sale being relied upon by the Appellant is for land parcel number Bondo/Nyangoma /1301 and not 4081 Bondo /Nyangoma. That the said agreement does not prove ownership and is not on record and the Appellant has not demonstrated that he paid the full purchase price but instead made baseless allegations that she had sold the land to him.

**iii. Whether this Appeal should be dismissed for want of prosecution.**

18. It was the Respondent's submission that this Appeal should be dismissed as the Appellant had failed to prosecute his case for about 3 years. The Respondent relied on Order 42 Rule 35 (2) and Order 17 Rule 2 of the *Civil Procedure Rules* and the case of *Peter Kipkirui Chemoiwo vs Richard Chepsergon* Civil Appeal No. 58 of 2018.
19. The Respondent further submitted that this Appeal lacks merit as the Appellant has not demonstrated that he was wrongfully ordered to vacate the suit property and that the Appellant has not given sufficient reason as to why Judgment of the lower court should be set aside and what prejudice he would suffer if the same was upheld.
20. The Respondent therefore prayed that the Appeal be dismissed with costs.

**Analysis and Determination**

21. I have considered the pleadings, the evidence on record and submissions filed by both parties and I am of the view that the following issues need to be determined:
- a. Whether the Trial Magistrate erred in law and fact in failing to consider the Agreement for Sale between the parties herein.
  - b. Whether the Appellant was denied an opportunity to Cross-examine the Respondent on the Sale Agreement.
  - c. Whether the Trial Magistrate misdirected himself in dismissing the Appellant's suit.
  - d. Who is the rightful owner of the of the suit property

**Whether the Trial Magistrate erred in law and fact in failing to consider the Agreement for Sale between the parties herein and whether the Appellant was denied an opportunity to Crossexamine the Respondent on the Sale Agreement.**

22. There is an Agreement for Sale between the parties herein for land parcel number Bondo1301for a consideration of Kshs. 28,000/=. The suit property in question is land parcel number 4801 and not 1301.The Respondent averred in the Plaint that she is the bonafide owner of land parcel number 4801 Bondo Adjudication Section and the Adjudication Section is registered under her name. The Appellant on the hand in his Defence pleaded that he is the bonafide purchaser of a portion measuring 20 meters by 30 meters from the Appellant's original land parcel 1301(now 4801) Bondo/Nyangoma Adjudication Section at an agreed price of Kshs. 28,000/=.



23. Order 18 Rule 10 of the *Civil Procedure Rules* grants the Court powers to recall any witness who has been examined. It provides thus:
- “The Court may at any stage of the suit recall any witness who has been examined, and may, subject to the Law of evidence for the time being in force; put such questions to him as the Court thinks fit.”
24. Section 146(4) of the *Evidence Act* which states:
- “The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have a right of further cross-examination and re-examination respectively.”
25. It should be noted that the court has discretionary powers to recall a witness. The Appellant through his Advocates on record wrote a letter to the Court on account that the Respondent be recalled so that she can be cross-examined on the Agreement for Sale. It should be noted that parties herein had already closed their case by the time the Appellant was writing a letter to have the Respondent re called and Cross examined on the Agreement for Sale. The Appellant ought to have filed a formal application seeking orders to have the Respondent Cross examined.
26. In the case of *State v Hepple*, 279265, 271 {1977} it was stated as follows:
- “The Judge must consider whether the party deliberately withheld the evidence preferred in order to have it presented at such time as to obtain an unfair advantage by its impact on the trier of facts.”
27. While the dictum in *Cason v State* 140 MD App 379 {2001} espouses the principles such as:
- “Whether good cause is shown, whether the new evidence is significant; whether the jury or Judge would be likely to give undue emphasis, prejudicing the party against whom it is offered; whether the evidence is controversial in nature, and whether re-opening is at the request of the jury or Judge or a party to the claim. Or is the additional evidence new or merely to corroborate and clarify the earlier testimony.”
28. In the case of *Oakley v Royal Bank of Canada* {2013} ONSC 145 {2013} OJ NO. 109 SC, it was stated as follows;
- “The Court requires the parties to mitigation to bring forward their whole case, in both civil and criminal matters, the crown or plaintiff must produce and enter in its own case all clearly relevant evidence it has. On the other hand, a trial judge has the discretion to permit a plaintiff to re-open its case. This discretion however must be exercised judicially. It must involve a scrupulous balancing of the accountability of counsel for decisions regarding the prosecution of its case and the interest of justice.”
29. The Trial Magistrate considered the Agreement for Sale since in his Judgment he noted that in as much as the Appellant alleged that he bought land parcel number 1301 from the Respondent, the Respondent on the hand testified that the Appellant rented two of the Respondent’s houses and paid rent of Kshs. 1000/= per month. The Respondent paid rent of Kshs. 20,000/= for one year which amount is not disputed.



30. Although there is an Agreement for Sale on record indicating that the Appellant bought land parcel 1301 Bondo/Nyangoma, the Appellant failed to demonstrate that he bought the said piece of land from the Respondent since he decided to construct a house on land parcel number 4801.

**Whether the Trial Magistrate misdirected himself in dismissing the Appellant's suit.**

31. It is clear from the evidence on record that the Appellant was unable to produce any document to show that he had purchased land parcel number 4801. In his Defence, he pleaded that he had bought the Respondent's original land parcel number 1301 now 4801.
32. The Appellant further pleaded particulars of breach on the part of the Respondent at paragraph 16 of the Counterclaim where he stated that the Respondent failed to obtain the consent to subdivide land parcel 4801(1301) Bondo/Nyangoma Adjudication Section from the Bondo District Land Board, failure to initiate the process of mutation to enable the parties herein obtain separate title documents for their respective portions of land no. 4801(originally 1301) and denying the Defendant herein quiet possession of the suit portion of land despite the transaction being absolute and unconditional sale.
33. The Appellant failed to produce any document to show that land parcel number 4801 Bondo/Nyangoma Adjudication Section was as a result of land parcel 1301 Bondo/Nyangoma Adjudication Section, that he measured the land with a tape measure and did not engage a surveyor to confirm the measurement of the land. He confirmed that he constructed a house in land parcel 4801 Bondo/Nyangoma Adjudication Section and not 1301 Bondo/Nyangoma Adjudication Section.
34. This court finds that the Trial Magistrate did not misdirect herself in dismissing the Appellant's counterclaim as the Appellant failed to prove that he had purchased land parcel number 4801. If the Appellant's allegations are true that he bought a portion of land parcel 1301 Bondo/Nyangoma Adjudication Section, the Agreement for sale ought to have indicated that the Respondent is selling to the Appellant a portion of land parcel 1301 Bondo/Nyangoma Adjudication Section.
35. Although the Appellant in his counterclaim indicated that the Respondent had failed to obtain the necessary documents for subdivision, he was not able to prove that he had bought a portion of land parcel number 1301 Bondo/Nyangoma Adjudication Section, there was no evidence that the portion he had bought from the Respondent was land parcel number 4801 Bondo/Nyangoma Adjudication Section.
36. This court finds that the Trial Magistrate was right in dismissing the Appellant's case as he had not proved his case on a balance of probabilities.

**Who is the rightful owner of the of the suit property?**

37. The Trial Magistrate in his Judgment stated as follows:

"I have carefully considered the evidence on record together with the submissions. The land parcel number 4801 Bondo Nyangoma Adjudication Section is land which is still in the Adjudication process. As such, it is governed by the provisions of the provisions of the Adjudication Process Act Cap 284 Laws of Kenya. The ownership of such parcel of land can only be confirmed by an authorized officer. In this case, the Plaintiff produced exhibit 1 which is a letter dated the 3<sup>rd</sup> day of December, 2014 and authored by the sub-county Land Adjudication Officer in respect of Bondo sub-county. The Defendant has not challenged the authenticity of the letter. As such, I am of the considered opinion that



the Plaintiff has sufficiently demonstrated that the parcel of land number 4801 Bondo Nyangoma Adjudication Section is her property”

38. Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

39. This court agrees with the findings of the Trial Court as the Land Adjudication and Settlement Department issued to the Respondent a letter dated 3<sup>rd</sup> December 2014 confirming that land parcel number 4801 in Bondo Nyangoma Adjudication Section is registered under the name of the Respondent and that the land titles deeds for this section are not yet ready for issue to land owners since the Bondo/Nyangoma Adjudication Section is still under Adjudication process cap 284 Laws of Kenya.

40. It is also clear that the Appellant did not take necessary steps to produce evidence or call witness who could confirm that indeed land parcel number 4801 Bondo/Nyangoma Adjudication Section was registered in the Respondent’s name.

41. In Conclusion, this court upholds the Judgment of the Trial Court and dismisses this Appeal. The costs shall be borne by the Appellant.

**DATED AT KISUMU THIS 15<sup>TH</sup> OF JULY 2022**

**ANTONY OMBWAYO**

**JUDGE**

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.

