



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Opete v Awinde (Environment and Land Appeal E001 of 2022)
[2022] KEELC 12741 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E001 OF 2022
AY KOROSS, J
SEPTEMBER 29, 2022**

BETWEEN

MONICA OPETE APPELLANT

AND

MICHAEL OWINO AWINDE RESPONDENT

*(Being an appeal from the judgment of the Principal Magistrate Hon.
J. Ong'ondo delivered on 15/04/2021 in Siaya ELC Case No.74 of 2021)*

JUDGMENT

Background of the appeal

1. The appellant's husband Richard Odindo Odero [Richard] who died in the course of the lower court proceedings was the then defendant and the registered proprietor of land parcel number of North Gem/Malunga/219 [suit property] together with his brother Wadago Odero as tenants in common with equal shares. During pendency of proceedings, it was subdivided into two parcels; North Gem/Malunga/2389 and North Gem/Malunga/2390.
2. The respondent and Richard are distant relatives and their ancestry can be traced back to their common great grandfather one Ogol.
3. By a plaint dated February 27, 2018 and amended on February 15, 2021, the respondent who acted in person instituted suit contending that at the time of adjudication, Richard consolidated the portion allocated to him [respondent] and registered it in his name [Richard's].
4. He contended that he discovered Richard's actions sometimes in 2013 when he conducted a search on the suit property and pleaded illegality against Richard and or the appellant for entering the suit property without his consent. He sought permanent and mandatory injunctive orders and a declaration that he was entitled to 0.6 HA of the suit property.



5. Richard who acted in person filed a defence which was headed “Submission of Richard Odindo Odera”. He asserted that during land adjudication, the respondent absconded the process hence he was not registered as a proprietor of any of the several ancestral parcels of land. That in any case, the respondent’s portion fell in land parcel number “254” which was registered in the name of Mola Odera. Upon Richard’s death, the appellant substituted him.
6. After the parties had testified and closed their respective cases, the court framed one single issue for determination: whether the respondent acquired the suit property by customary trust. It found in the affirmative and held that Richard [then deceased] held a portion of the suit property measuring 0.6 HA in trust for the respondent.
7. By a ruling dated 23/7/2021, the court ordered the cancellation of land parcels numbers North Gem/Malunga/2389 and North Gem/Malunga/2390 and for them to be reverted back to the original suit property.
8. Aggrieved and dissatisfied by the judgement and ruling dated 23/7/2021, the appellant appealed to this court.

Appeal to this court

9. By the firm of Wakla & Co Advocates, the appellant’s amended memorandum of appeal dated December 20, 2021 was filed and it set down 6 grounds. Some of them replicate each other and I have taken the liberty of summarising them as follows;
 - a. That the Learned Trial Magistrate erred in law and fact in declaring that Richard held a portion of 0.6 HA of the suit property in trust for the respondent and that the said portion be registered in the name of the respondent; and
 - b. That the Learned Trial Magistrate erred in law by issuing *ex parte* substantive orders post judgment.
10. The appellant prayed that the judgment of the lower court be set aside and the appeal be allowed with costs of both the appeal and that of the lower court. Further, the court do issue orders stopping the cancellation of North Gem/Malunga/2389 and North Gem/Malunga/2390.
11. The respondent filed a strange document called “reply to the memorandum of appeal”. This document is improperly before court and I hereby strike it out from the court record.
12. The parties mutually agreed to dispose off the appeal by way of written submissions and the court acquiesced.

The appellant’s submissions

13. Counsel for the appellant Mr Ooro F filed written submissions dated May 19, 2022. In it, he identified 4 issues for consideration: (i) whether the Trial Court made an error in finding that Richard held part of the suit property in trust for the respondent (ii) whether the respondent had demonstrated any intervening circumstances as to why his name was not included in the title deed (iii) whether the decision of the trial court in failing to appreciate that the respondent did not live on the suit property and that he had another land parcel was key in assisting the Trial Court in making a just determination and (iv) whether the Trial Court made an error in issuing substantive orders *ex parte* post judgment.
14. On the 1st issue, Counsel submitted that the legal framework for trust was governed by Sections 28 (b) and 126 (1) of the Registered [Land ACT](#). He also relied on several authorities including the Supreme



Court of Kenya decision of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR which stated that each case has to be determined on its own merits and quality of evidence and that it did not matter whether one was in occupation or possession. Counsel contended that the relationship between the respondent and Richard was far off removed; they shared a common great grandfather. That the register of the suit property spoke for itself; it was a 1st registration.

15. On the 2nd issue, Counsel submitted that the respondent did not call any close family members to corroborate the veracity of his claims and the respondent had not satisfied the Trial Court as to why he was not allocated land during adjudication process.
16. On the 3rd issue, Counsel proffered that for one to demonstrate that trust existed, he needed to prove that he lived on the parcel of land and on this he relied on the case of *Monica Mukulu Muteti v Mutava Maingi* [2019] eKLR. It was the appellant's position that the respondent did not prove that he occupied the suit property.
17. On the last issue, he contended the application was heard without giving the appellant an opportunity of being heard.

Respondent's submissions

18. The respondent who acted in person filed written submissions dated June 10, 2022. He adopted the appellant's issues save for the 2nd one.
19. On the 1st issue, he asserted that he had proved his case that the appellant held the suit property in trust for him and that he had met the ingredients of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari (Supra)*. He relied on several other authorities to buttress his case.
20. On the 3rd issue, he asserted that the issue of whether or not he had another property was not a subject for determination and that in any case, the Trial Court had established that North Gem/Malunga/254 had not been administered by the estate of its registered proprietor.
21. On the last ground, he proffered that the application was unopposed and the court rightfully so, allowed it.
22. He urged the court to uphold the decision of the Trial Court and dismiss the appeal with costs.

Analysis and determination

23. 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 to 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.
24. 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.



25. I must hasten to add that none of the parties proffered copies of their cited authorities to this court. Having considered the lower court record, record of appeal and parties' rival submissions, I will proceed to handle the two grounds in a sequential manner.

I. That the Learned Trial Magistrate erred in law and fact in declaring that Richard held a portion of 0.6 HA of the suit property in trust for the respondent and that the said portion be registered in the name of the respondent

26. Order 2 Rule 10 of the *Civil Procedure Rules* provides that every pleading shall contain the necessary particulars of claim or defence. In my considered view, the mischief behind this provision of law was to ensure that parties are well informed of the case they are up against so that they can prepare well in advance.

27. Pleadings are a shield and a sword for both sides and courts as independent arbiters are restrained from entering into the arena of litigation. They cannot issue orders from the air.

28. An expository of Order 6 rule 4 of the Indian Code of Civil Procedure commentary by authors of Mulla, *The Code of Civil Procedure* by Mulla DF, 8th Ed at p 442 on "Every pleading must state material facts in a concise form" stated thus on the intent of this provision of law as follows;

"The object of particulars is to prevent surprise at the trial by informing the opposite party what case he has to meet, to define and narrow the issues to be tried and save unnecessary expenses"

29. In its judgment the Trial Court stated thus;

"I am satisfied that the plaintiff has proved on a balance of probabilities that there exists a customary trust on the suit land" Emphasis mine.

30. This court has scrutinized the respondent's pleadings in the Trial Court and there is no whiff of evidence that the respondent pleaded customary trust. The respondent merely pleaded impropriety by Richard in the manner in which he acquired the suit property during 1st registration inter alia, Richard or his agents had illegally dealt with the suit property. Paragraph 5 of his plaint stated thus;

"That during adjudication process the plaintiff who was away working for employment gain in Arusha in Tanzania was allocated his portion in his absentia next to the defendant who later took advantage of his absence and consolidated his portion to be part of his share"

He did not plead fraud. He particularized trespass when he pleaded as follows;

"The defendant by herself...illegally entering (sic) the suit property without mandate or authority from the plaintiff. The defendant, without any colour of right, has started leasing the suit property..."

He sought reliefs of mandatory and permanent injunctive orders and that a portion measuring 0.6 HA be hived off the suit property and transferred to him.

31. In his exam in chief, he testified as PW1 and stated that his claim was pegged on trespass. Although the evidence he largely led was on customary trust, it was not open to the Trial Court to render judgment on an issue not pleaded. The Trial Court never addressed its mind on trespass which was the substratum



of the respondent's claim. Had the Trial Court done so, it would have found that by virtue of Section 4 (2) of the *Limitation of Actions ACT*, the suit was time barred. This section of law states as follows;

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date”.

32. Trespass is a tortious action. From the respondent's pleadings, the cause of action occurred when the appellant or Richard allegedly consolidated the suit property at the time of adjudication. From the pleadings, adjudication took place in the year 1977 and registration took place on 1/7/1977. It therefore follows that the respondent's cause of action lapsed sometimes on 2/7/1980 which was 3 years from the date the course of action accrued.

33. Even if the claim was on land, Section 7 of the *Limitation of Actions ACT*, prohibits an action to recover land being brought after the end of twelve years from the date from which the right accrued. Bearing in mind the date of 1/7/1977, the cause of action would have lapsed on 2/7/1989. Section 7 of the *Limitation of Actions ACT* provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”

34. Both the appellant's and respondent's submissions did not assist the court, just like the trial court, they too, submitted on issues not pleaded in the Trial Court; customary trust.

35. It is trite law that courts are bound by the pleadings of the parties and it is my finding that the Trial Court erred in law and fact in finding that Richard held the suit property in trust for the respondent. On this I rely on the case of *Caltex Oil (Kenya) Limited v Rono Limited* [2016] eKLR where the Court of Appeal stated thus;

“In the circumstances, having not made a claim for general damages, there cannot be a basis for awarding the same. The court has no inherent jurisdiction to award damages ... To find otherwise would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead to total disorder and abuse of the judicial process”

The appellant succeeds on the 1st ground of appeal.

II. Whether the trial magistrate erred in issuing substantive orders ex parte post judgment

36. The appellant contended that orders issued post judgment had the effect of adversely interfering with the judgment.

37. After judgment had been rendered, the Trial Court ordered the Siaya County Land Registrar to execute the decree. As the Registrar was carrying out his mandate, it came to his attention that in the course of the proceedings, the appellant had subdivided the suit property; North Gem/Malunga/2389 and North Gem/Malunga/2389 had been created.

38. By an application dated July 22, 2021, the respondent sought to review the orders ordering the Registrar to execute the decree and, in its place sought an order for cancellation of the resultant subdivisions. The application was unopposed and the same was allowed by the Trial Court on 23/7/2022.



39. The Trial Court had powers under Order 45 of the *Civil Procedure Rules* to review its orders upon the discovery of a new and important matter or evidence which was not within the respondent's knowledge at the time, when there is some mistake or error apparent on the face of the record or for any other sufficient reason.
40. The appellant's contravention with the course of justice in the course of the proceedings flouted the common law doctrine of lis pendens which ensures that properties that are the subject of proceedings are not interfered with. The import of this doctrine is to ensure that decisions are orderly, expeditious and efficacious. In applying this doctrine and the extend of its application in Kenya, the Court of Appeal in the case of *Naftali Rutbi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR cited with approval the case of *Mawji vs US International University & another* [1976] KLR 185 which expressed itself thus;
- “The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the *RTA* and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”
41. The appellant was the author of her own misfortune by circumventing the court process. Whether or not she was served with the application for review was inconsequential because the Trial Court would still have arrived at the decision it did by reverting the suit property to the position it was at the time of the hearing and determination of the judgment. I find the 2nd ground of appeal unsuccessful.
42. Ultimately, I hereby set aside in entirety the judgment and decree of the Trial Court together with the orders issued on July 23, 2021 and in its place, I substitute it with a judgment dismissing the suit. It is trite law that costs follow the event. From the record, the appellant and respondent are distant relatives and the appeal was partly successful. For these reasons, each party shall bear their respective costs of this appeal and that of the lower court.

DELIVERED AND DATED AT SIAYA THIS 29TH DAY OF SEPTEMBER 2022.

HON. A. Y. KOROSS

JUDGE

29/9/2022

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

In the Presence of:

Mr. Ooro F for the appellant

N/A for the respondent

Court assistant: Ishmael Orwa

