



Okweso v Atieno (Suing as the Administratrix of the Estate of Jared Obila Abiga) & another (Environment and Land Appeal 42 of 2021) [2022] KEELC 12600 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12600 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 42 OF 2021
AY KOROSS, J
SEPTEMBER 22, 2022
[ORIGINALLY KISUMU APPEAL NO. E021/21]**

BETWEEN

JARED ARUNG OKWESO APPELLANT

AND

EVERLYNE ATIENO (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF JARED OBILA ABIGA) 1ST RESPONDENT

LAND REGISTRAR, BONDO SUBCOUNTY 2ND RESPONDENT

(Being an Appeal from the judgment of the Principal Magistrate Honourable J. P. Nandi delivered on 12 th March 2021 in Bondo ELC Case No.73 of 2018)

JUDGMENT

Introduction

1. The origin of this appeal can be traced back to a plaint filed by the 1st respondent dated November 30, 2016. From the 1st respondent's pleadings and evidence adduced, her father; the late Jared Obila Abiga (hereinafter referred to as 'the deceased'), was the registered proprietor of land parcel Uyoma/Kokwiri/4297 (hereinafter 'the suit property'). Prior to his demise on June 26, 2005, he had sold a portion of the suit property to one Peter Otieno Oyugi [hereinafter 'Peter']. However, the deceased died prior to subdividing and transferring a portion of the suit property to Peter.
2. That sometimes on July 12, 2016, she conducted an official search on the suit property and she found the registration intact save for a subsisting caution that had been registered by Peter who had claimed a purchaser's interest.



3. On a subsequent official search that she carried out on the suit property on October 14, 2016, she found out that the suit property had been subdivided into two portions; Uyoma/Kokwiri/4324 which was registered in the deceased's name and Uyoma/Kokwiri/4235 which was registered in the appellant's name.
4. The 1st respondent pleaded collusion, illegality and fraud against the appellant and 2nd respondent.
5. In a defence filed by the appellant dated February 20, 2020, he denied the averments in the plaint and stated that the suit property had been sold by the deceased to him in the year 2000 and that the deceased had participated in the subdivision and the registration of the resultant title documents and therefore, the resultant parcels of land were legally and lawfully registered. He averred that he lodged the registration documents in the year 2016. The 2nd respondent did not participate in the trial court's proceedings.
6. After the parties had testified and closed their respective cases, the court framed one issue for determination: whether the appellant had lawfully purchased the suit property from the deceased. The court, in its judgment dated March 12, 2021, found that the appellant had obtained the resultant title deed for land parcel number Uyoma/Kokwiri/4235 unprocedurally and entered judgment for the 1st respondent.
7. Aggrieved by the decision of the lower court, the appellant filed the instant appeal.

Appeal to this court

8. The appellant's memorandum of appeal sets down 4 grounds of appeal;
 - a. The learned trial magistrate erred in law and fact in failing to find that the appellant was a purchaser for value without notice of any defect in the vendor's title;
 - b. The the learned trial magistrate erred in law and fact in failing to find that the 1st respondent's suit was predicated on fraud and forgery and not on non-procedural acquisition of title;
 - c. The learned trial magistrate erred in law by failing to find that the respondent herein failed to prove allegations of fraud and forgery as pleaded in the plaint; and
 - d. The appellant was not accorded a fair hearing.
9. The appellant prayed that the judgment of the lower court delivered on March 12, 2021 be set aside with costs to him.

The appellant's submissions

10. The appellant who was represented by the firm of Omondi, Abande & Co. Advocates filed written submissions dated 16/05/2022.
11. Though the appellant identified 5 issues for determination, they all related to the 4 grounds of appeal and I need not restate them.
12. On the 1st ground of appeal, Counsel submitted that taking into consideration the definition of innocent purchaser for value as enunciated by Blacks Law Dictionary, he had qualified as an innocent purchaser and that Article 40(1) of *the Constitution* protected his right to property. He relied on the case of *Lawrence P. Mukiri vs Attorney General & 4 others* (2013) where the court cited with approval the case of *Katende v Haridar & Company Limited* which outlined who qualified as an innocent purchaser for value. Relying on the case of *Sinkeet Mapi (suing as the personal representative of Benjamin Mapi*



Ole Partim deceased) v Naisenyu Pargana Mutunkei [2020] eKLR, he submitted that by virtue of Statute Law (Misc. Amendments] No.2 of 2002, oral agreements which had been entered into prior to the year 2002 could be sustained.

13. On the 2nd and 4th grounds, Counsel submitted that parties were bound by their pleadings and hence, it was erroneous for the trial court to make a finding that Uyoma/Kokwiri/4324 had been unprocedurally acquired. He relied on several authorities including *Raila Amolo Odinga & another v IEBC & 2 others* (2017) eKLR where the court stated that it was only evidence that had emanated from parties' pleadings that could be considered by courts.
14. On the 3rd ground, he contended that allegations of fraud must be strictly pleaded and proved and he relied on the case of *Benson Wandera Okuku v Israel Wakbo* (2020) eKLR. Counsel submitted that the 1st respondent had not proved fraud against the appellant.

The 1st respondent's submissions

15. The 1st respondent who was represented by the firm of Odongo Awino & Co. Advocates filed written submissions dated May 23, 2022.
16. On the 1st ground, he submitted that the appellant neither pleaded that he was a bona fide purchaser nor did he produce a sale agreement to confirm that he purchased the suit property.
17. On the 3rd ground, Counsel asserted the 1st respondent's pleadings articulated the particulars of fraud, illegality and unprocedural acquisition of title which had been proved before the trial court. On this, he relied on the Court of Appeal decision of *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019)[2021] KECA 144 KLR (Civ) (19 November 2021) where the court stated that courts could not sanction title documents that were illegally or unprocedurally acquired. He contended that the definition of fraud was well articulated in the persuasive decision of the Supreme Court of Uganda in *Betty Kizito v David Kizito Kanonya* Civil Appeal No. 8 of 2018.
18. He submitted that the failure by the appellant to join the land registrar as a party in these proceedings was fatal.

Analysis and determination

19. In dealing with appeals, an appellate court is guided by the evidence from the lower court record and is called upon to re-examine, re-evaluate and reassess it. This was aptly spelt out in the case of *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd*[1985] eKLR and *Abok James Odera t/a A.J. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR. In the former, Madan, JA (as he then was) in this Court of Appeal decision stated thus;

“... The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

20. Having considered the lower court record, record of appeal, parties' written submissions, and authorities cited and procured to this court, this court will determine the grounds of appeal in a



sequential order however, because the appellant's submissions on grounds 2, 3 and 4 are intertwined, they shall be handled together.

21. On the 1st ground, while appellant found issue with the learned trial magistrate for failing to find that he was a bona fide purchaser for value without notice of any defect in the vendor's title, the 1st respondent asserted that this was never pleaded. I have had a chance to examine the record and indeed such a defence was never proffered by the appellant. In the absence of such a plea, could the court trial decide on a non-pleaded issue? In my considered view, the answer is in the negative.
22. It is trite law that courts are bound by pleadings presented before it by the parties and the court cannot enter into the arena of litigation. As an independent arbiter, it was not available for the trial court to infer the intent of the parties and make a finding of innocent purchaser for value. In the case of *Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 others* [2016] eKLR, the court cited with approval the decision of *Malawi Railways Ltd. -vs- Nyasulu* [1998] MWSO 3 which equally quoted an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." published in [1960] Current Legal problems, at page 174 which stated thus;

"Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation".
23. Even if the appellant had pleaded that he was a bona fide purchaser which he did not, the appellant failed to: produce a written agreement of sale; call witnesses who witnessed the agreement to testify; prove that he had paid valuable consideration to the deceased; demonstrate that he paid stamp duty at the point of registration; prove that the mutation form that he produced was duly registered in accordance with Section 42 of the *Land Registration Act* and that he submitted the deceased's ID card, marriage certificate or statutory declaration, PIN certificate and passport size photographs as required by Section 44(5) of the said Act.
24. The appellant's argument that the agreement entered into between him and the deceased was made prior to the commencement of Section 3(3) of the *Law of Contract Act* which came into effect on June 1, 2003 does not hold water. Section 2 (3) of the repealed *Law of Contract Act* was on oral agreements and, a party needed to prove that the agreement had been partly performed by taking possession or done some act in furtherance of the contract. This provision of law was not available to the appellant because he testified in the trial court that the alleged agreement was in writing. The appellant fails on the 1st ground.
25. On the 2nd, 3rd and 4th grounds, the trial court found, as follows;

" ...the 1st defendant obtained the title deed unprocedurally..."
26. Was unprocedural subdivision of the suit property pleaded by the 1st respondent against the appellant and 2nd respondent? Was fraud specifically pleaded and proved? This court has looked at the plaint and though the 1st respondent pleaded fraud against the appellant and 2nd respondent, she not did specifically plead that Uyoma/Kokwiri/4324 was unprocedurally acquired by the appellant.
27. It is not in doubt that the 1st respondent pleaded and particularised fraud against the appellant and 2nd respondent in accordance with the provisions of Order 2 Rule 10(1) of the Civil Procedure Rules. The standard of proof in fraud is on a pedestal higher than a balance of probabilities but not beyond reasonable doubt See *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000). The decision of the trial court was silent on a finding of fraud.



28. Fraud has been defined by *Black's Law Dictionary*, 11th Edition at Page 802 as:

“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment...”

It further defines fraud as;

“Unconscionable dealing especially in contract law, the unfair use of power arising out of a parties' relative positions and resulting in unconscionable bargain”

29. The persuasive decision of Betty Kizito v David Kizito Kanonya (*Supra*) cited with approval in the Ugandan Supreme Court decision of *Senkungu v Yakobo* Supreme Court Civil Appeal No.35 of 2006 which cited with approval the book of *Kerr on the Law of Fraud and Mistake*, 5th Edition, Part 1, page 1 described fraud as follows;

“Fraud includes all acts, commissions, and concealments which include a breach of legal duty, trust confidence...fraud in all cases implies a wilful act on the part anyone, whereby another is sought to be deprived, by illegal or inequitable means of what he is entitled to”

30. The 1st respondent did not lead any evidence that the appellant fraudulently forged documents and impersonated the deceased person as particularized in his claim and I am not satisfied that he proved fraud against the appellant to the required standard. Though the 1st respondent did not prove fraud against the appellant, the 1st respondent's testimony against the 2nd respondent was uncontroverted.

31. The documents produced by the appellant before the trial court leaves a lot to be desired. How was an application dated February 2, 2000 made to the land control board for consent to transfer Uyoma/Kokwiri/4325 when this parcel of land was non-existent? See Section 42 of the *Land Registration Act*. How was the transfer dated March 1, 2000 made on Uyoma/Kokwiri/4325 when this land was non-existent? How did the resultant subdivision come into existence in the year 2016 without the deceased 1st subdividing it and registering it in his name before transferring a portion to the appellant? How was a transfer which did not meet the ingredients of Section 44(5) of the said Act pass the test of registration?

32. All these unanswered questions leads to the logical conclusion that the suit property was fraudulently and illegally subdivided and a portion fraudulently transferred to the appellant. Though fraud was not proved against the appellant, fraud was proved against the 2nd respondent while illegality was pleaded and proved against the appellant and 2nd respondent. From the record, all parties were accorded a fair hearing.

33. My net findings on these consolidated grounds is that I find that the trial court erred when it found that the title deed for Uyoma/Kokwiri/4325 was unprocedurally acquired. I further find that the 1st respondent did not prove fraud against the appellant to the required standard. However, I find that she proved fraud against the 2nd respondent. I find that the 1st respondent proved illegality against the appellant and 2nd respondent.

34. The upshot is I hereby affirm and uphold the judgment of the trial court. However, I hereby vary the said judgment and set aside its finding that that the title deed for Uyoma/Kokwiri/4325 was unprocedurally acquired and in its place, substitute it with the following findings; the appellant and 2nd respondent illegally subdivided the suit property and transferred the resultant subdivision known as land parcel number Uyoma/Kokwiri/4325 and that the 1st respondent proved fraud against the 2nd



respondent. The appeal partly succeeds and because it is trite law that costs follow the event, I award three quarters of the costs of this appeal to the 1st respondent.

DELIVERED AND DATED AT SIAYA THIS 22ND DAY OF SEPTEMBER 2022.

HON. A. Y. KOROSS

JUDGE

22/9/2022

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

In the Presence of:

Ms. Mabalau h/b for Mr. Abande for the appellant

Nr. Odongo for the 1st respondent

Court assistant: Ishmael Orwa

