



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oswago v Sule (Environment and Land Appeal 37 of 2021)  
[2022] KEELC 4893 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4893 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 37 OF 2021  
GMA ONGONDO, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**SILBIA OTIENO OSWAGO ( SUING AS THE ADMINISTRATOR TO THE  
ESTATE OF SAMUEL DIBOGO OSWAGO) ..... APPELLANT**

**AND**

**JAMES OOKO SULE ( SUED AS THE ADMINISTRATOR OF THE ESTATE OF  
DANIEL SULE ABONDO) ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. T. Obutu, Senior Principal Magistrate,  
delivered on 26th August, 2020 and the decree issued thereafter on 26th October, 2020  
in Homa Bay Chief Magistrate's Court Environment and Land Case No. 9 of 2016)*

**JUDGMENT**

1. This is an appeal that arises from the trial court's judgment delivered on the August 26, 2020 and the decree issued thereafter on October 26, 2020 by the Honourable T Obutu, Senior Principal Magistrate, in Homa Bay Chief Magistrate's Court Environment and Land Case No 9 of 2016 where he held, inter alia;
  - a. A permanent injunction against the defendant, their employees, agents, representatives, assigns or any other person acting through their direction from trespassing upon, building upon or in any other way dealing in or interfering with the plaintiff's land parcel No Kanyamwa/Kachola/Kajwang/Kadwet/1465 is hereby issued.
  - b. An eviction order against the defendant, their employees, agents, representatives, assigns or any other person from parcel number Kanyamwa/Kachola/Kajwang/ Kadwet/1465 (the suit land herein) is hereby issued.
  - c. General damages of Kshs 100,000 awarded to the plaintiff.



- d. Costs of the suit together with interest from the date of the judgment to the plaintiff.'
2. The appellant namely Silbia Otieno Oswago through the firm of Quinter Adoyo and Company Advocates mounted the appeal by way of a memorandum of appeal dated January 4, 2021 and duly filed on January 12, 2021. The appeal is anchored on grounds 1 to 6 as set out on the face thereof and the same include:
  - a. The honourable court erred in law and in fact by ignoring the order for stay of proceedings issued by the High Court at Kisii on the July 28, 2016 despite being made aware of the same.
  - b. The honourable court erred in law and in fact by ignoring the glaring possibility that the alleged sale of land was procured fraudulently as evidenced by the wanting agreement.
3. Wherefore, the appellant has sought the order that the instant appeal be allowed and the judgment of the learned trial magistrate be set aside and/or vacated in entirety, with costs to the appellant.
4. The appeal was transferred to this court for hearing and determination from Migori Environment and Land Court on October 27, 2021.
5. The appeal was heard by way of written submissions pursuant to this court's directions of November 18, 2021.
6. Accordingly, the appellant's counsel filed submissions dated June 17, 2022 on even date. Counsel identified six issues for determination thus:
  - a. Whether the honourable court erred in law and fact by ignoring the order for stay of proceedings issued by the High Court at Kisii on the July 28, 2016 despite being made aware of the same.
  - b. Whether the honourable court erred in law and fact by entertaining and presiding over the suit and rendering a judgment and issuing a decree on the same despite the binding orders for stay of proceedings.
  - c. Whether the honourable court erred in law and fact by overlooking the glaring inconsistencies, gaps and falsehoods in the written agreement for sale of land, the subject of the suit, as well as the established fact that the name in the agreement does not belong to the alleged vendor.
  - d. Whether the honourable court erred in law and fact by ignoring the material evidence that the appellant had tilled the land for over fifty (50) years openly, continuously, peacefully and notoriously, and that the suit property was the only known home of the appellant.
  - e. Whether the honourable court erred in law and fact in awarding the respondent general damages when clearly the respondent had never claimed, used or occupied the land ever.
  - f. Whether the honourable court erred in law and fact by ignoring the glaring possibility that the alleged sale of land was procured fraudulently as evidenced by the wanting agreement.
7. In discussing the issues, learned counsel submitted, inter alia, that the learned trial magistrate erred in law and in fact by ignoring the order for stay of proceedings issued by the High Court at Kisii on the July 28, 2016 despite being made aware of the same. Counsel relied on articles 165 and 169 of the Constitution of Kenya, 2010 as well as section 6 of the Civil Procedure Act, Chapter 21 Laws of Kenya. Further, counsel submitted that the learned trial magistrate overlooked the glaring inconsistencies in the written agreement for sale of land as the same did not meet the threshold set out in section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya. Counsel also cited various authorities including



- the case of Mukunya *Mugo 'A' & Another –vs- Elizabeth Mugure Mukunya (2019) eKLR*, to buttress her submissions.
8. Learned counsel for the respondent filed submissions dated February 2, 2022 on even date. Counsel submitted that the appellant never provided any orders for stay issued in the High Court at Kisii during the entirety of the suit and that the appellant’s counsel consented to proceed with the matter at the trial court. Counsel also submitted that the respondent proved his case to the requisite standard at the trial court pursuant to section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya. Counsel also relied on section 24(a) of the *Land Registration Act*, 2016 (2012) as well as section 26(1) of the same act. Further, counsel submitted that parties are bound by their pleadings, thus the trial court could not decide on the issue of fraud as the same was not specifically pleaded. Counsel also urged the honourable court to expunge from the record, the stay order issued by the High Court at Kisii as the same did not form part of the record at the trial court and introducing new evidence at the appellate level is prejudicial to the opposing party and against public policy and the law. Thus, counsel submitted that the appeal lacks merit and the same should be dismissed with costs awarded to the respondent. Counsel relied on various authorities including the case of *David Sironga ole Tukai –vs- Francis Arap Muge & 2 others (Civil Appeal No 76 of 2014) (2014) eKLR*, to fortify the submissions.
  9. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed to whether the appellant:
    - a. Has demonstrated that this appeal is tenable and
    - b. Is entitled to the orders sought in the memorandum of appeal.
  10. It is noteworthy that the instant appeal being the first one from the trial court in the matter, this court is obliged to review the record of the trial court, evaluate it and arrive at its own conclusions herein; see *Mwanasokoni-vs Kenya Bus Services Ltd (1982-88) 1KAR 278* applied in the case of *Titus Ong’ang’a Nyachico-vs-Martin Okioma Nyauma and 3 others (2017) eKLR*.
  11. Originally, the suit was commenced by way of an amended plaint dated August 13, 2018 mounted by the plaintiff against the defendant seeking the following orders;
    - a. A temporary injunction pending the hearing and determination of this suit, against the defendant, their employees, agents, representatives, assigns or any other person acting through their direction from trespassing upon, building upon or in any other way dealing in or interfering with the plaintiff’s land namely the suit land.
    - b. An eviction order against the defendant, their employees, agents, representatives, assigns or any other person from the suit land.
    - c. General damages for trespass.
    - d. Cost of the suit with interest.
  12. PW1, James Ooko Sule (the respondent herein), testified on September 26, 2019 and adopted his witness statement on record as part of his evidence. He stated that the suit land was purchased by his late father Daniel Sule Abonde from Nehemiah Dibogo who then registered the same under his name. He produced in evidence a copy of sale agreement dated August 17, 1979, copy of official search certificates for 2016 and 2018, a copy of the title document as well as a copy of grant of letters of administration (PExhibits 1, 2(a), 2(b), 3 to 4 respectively). In cross-examination, PW1 denied that the title was obtained by fraud.



13. In the amended statement of defence dated February 10, 2020, the defendant denied the claim. She sought dismissal of the suit with costs.
14. Initially, the defendant in the suit was Samwel Oswago Dibogo. Following his demise on October 12, 2016, he was substituted by his widow, Roslida Auma Oswago pursuant to a ruling of the trial court dated July 18, 2018.
15. The evidence of DW1 (the defendant) who testified on February 13, 2020 was that her father-in-law, Nehemiah Dibogo, never sold the suit land to Daniel Sule Abondo, the plaintiff's father. In cross-examination, the witness stated that in 1978, the plaintiff's father did visit her father-in-law, Nehemiah Dibogo. However, she could not tell whether the two entered into a sale agreement regarding the suit land on the said day since she did not sit with them in her father-in-law's house.
16. DW2, Ochieng Oswago, also testified on February 13, 2020 and relied on his statement on record. He stated that the plaintiff has never cultivated the suit land. That they have established their homes in the suit land and that his late father, the initial defendant Silbia Otieno Oswago, is buried thereon. In cross-examination, DW2 admitted that he had no proof that the suit land belongs to them.
17. In arriving at the impugned judgment, the learned trial magistrate cited sections 24 (a), 25(1) and 26 of the [Land Registration Act](#) No 3 of 2012 and observed at page 2 of the judgment, inter alia;

' I do find that the sale herein and subsequent registration conferred the owner as per the title absolute rights which are not liable to be defeated unless proved that the title was obtained fraudulently and that the registered owner was party to such fraud. Under the provisions of the [Evidence Act](#) section 107(1) the defendant was duly bound that the agreement giving rise to the title and the title itself were obtained fraudulently. The defendant failed miserably to prove her case'
18. Further the learned trial magistrate noted thus:

' It is my considered opinion that once it has been established that the plaintiff is the registered owner of the suit property, then it follows that the defendant has no business on the land unless with authority of the owner'
19. Notably, the learned trial magistrate stated the parties' respective cases, framed four issues for determination, analysed them and arrived at his decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the [Civil Procedure Rules, 2010](#).
20. The appellant asserted that the honourable trial court erred in law and fact by ignoring the order for stay of proceedings issued by the Environment and Land Court at Kisii in Case No 113 of 2016 on the July 28, 2016 despite being made aware of the same. I, however, note that the stay order was neither presented at the trial court for compliance nor formed part of the record at the same court. I further note that the order has now been introduced to this court as new evidence without leave of court as envisioned under the law.
21. The applicable law as regards the admission of additional evidence by an appellate court is section 78 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya which provides that: -
  - (1) Subject to such condition and limitations as may be prescribed, an appellate court shall have power –
    - (a) to determine a case finally;



- (b) to remand a case;
  - (c) to frame issues and refer them for trial;
  - (d) to take additional evidence or to require the evidence to be taken; (Emphasis added)
  - (e) to order a new trial.
- (2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this act on courts of original jurisdiction in respect of suits instituted therein.'
22. The procedural rules that are hand maidens to section 78 (supra) provide under order 42 rule 27 of the Civil Procedure Rules, 2010 that:-
- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –
    - (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
    - (b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.
  - (2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for its admission.'
23. In *Mohamed Abdi Mahamud vs Ahmed Abdullabi Mohamad & 3 others [2018] eKLR*, the Supreme Court of Kenya laid down guidelines for admission of additional evidence before appellate courts in Kenya. The guidelines were set out as follows:
- (79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
    - (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
    - (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
    - (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
    - (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
    - (e) the evidence must be credible in the sense that it is capable of belief;



- (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
  - (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
  - (h) where the additional evidence discloses a strong prima facie case of willful deception of the court;
  - (i) The court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The court must find the further evidence needful.
  - (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
  - (k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.
- (80) We must stress here that this court even with the application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.'
24. Evidently, the appellant failed to comply with the legal provisions as outlined hereinabove. Thus, the court order issued on July 2016 by the High Court at Kisii is hereby duly expunged from the record herein.
25. The appellant contends that the learned trial magistrate erred in law and fact by ignoring the glaring possibility that the alleged sale of land was procured fraudulently. That it is evidenced by the wanting agreement.
26. It is important to observe that despite being accorded the opportunity to lead evidence to demonstrate the existence of fraud, the appellant failed to do so during trial. Sections 107 to 108 of the *Evidence Act*, Chapter 80 Laws of Kenya are clear that he who asserts or pleads must support the same by way of evidence.
27. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR*, Tunoi, JA (as he then was) stated as follows:

' 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.' (Emphasis added).



28. Additionally, I subscribe to the Court of Appeal decision in *Kinyanjui Kamau vs George Kamau [2015] eKLR* where the court expressed itself as follows;-

' It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo (2008) 1 KLR (G & F) 742* wherein the Court stated that: '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. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts' (Emphasis added).

29. I therefore, endorse the learned trial magistrate's reasoning, particularly his finding that the defendant appellant herein miserably failed to prove the existence of fraud in obtaining title to the suit land.

30. So, did the respondent establish to the requisite standards his case before the trial court as held by Madan JA (as he then was) in the case of *CMC Aviation Ltd -vs- Kenya Airways Ltd. (Cruisair Ltd) (1978) eKLR?*

31. Bearing in mind the entire evidence on record in this case, and applying the facts of the case as well as legal principles stated above, it is clear that the respondent who was the plaintiff before the trial court proved that the suit land was purchased by Daniel Sule Abonde, the father of the respondent herein, from one Nehemiah Dibogo. Searches from the land office and a title produced as PExhibit 3 proved the transfer and subsequent registration of the suit land. Such evidence was not contested. Thus, he proved his claim to the requisite standard as noted in *CMC Aviation Ltd Case (supra)*. Therefore, the grounds of appeal are untenable.

32. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is faultless at law. I hereby uphold the same.

33. Wherefore, the instant appeal is hereby dismissed with costs to the respondent.

34. Orders accordingly.

**GMA ONG'ONDO**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 21ST DAY OF SEPTEMBER 2022.**

*Present*

Ms P Odhiambo, holding brief for Ms Adoyo, learned counsel for the appellant

A. Okello, Court Assistant

