



**Odero v Wagaka (Environment and Land Appeal 19 of 2020)
[2022] KEELC 14836 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 19 OF 2020
MN KULLOW, J
OCTOBER 31, 2022**

BETWEEN

SAMWEL ONYANGO ODERO APPELLANT

AND

ZACHARY OTIENO WAGAKA RESPONDENT

JUDGMENT

A. Introduction

1. This Appeal emanates from the Judgment and Decree of Hon. D. Onyango delivered on 25th June, 2020 in Migori CMELC Case No. 52 of 2018, in which the Plaintiff's claim against the Defendant was allowed as prayed. The grounds in the Memorandum of Appeal are that: -
 - i. The Learned Trial Magistrate erred in law and in fact in failing to dismiss the Respondent's suit in the lower court as he had not proved his case on a balance of probability
 - ii. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Respondent herein did not tender any evidence to prove that the Appellant was entitled to ½ (half) an Hectare of Land Parcel No. L.R. No. Suna West/ Wasweta II/ 6172 and not 5 Acres.
 - iii. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Appellant had occupied a portion of land parcel L.R. No. Suna West/ Wasweta II/ 6172 measuring 5 acres since the year 1978 to date hence did not trespass on the suit land sometimes in January, 2018 as alleged.
 - iv. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Respondent had failed to prove that his father (now deceased) never sold a portion of the suit land to the Appellant.



- v. The Learned Trial Magistrate erred in law and in fact in failing to make a finding that the Respondent lacked the capacity to prove the authenticity of the agreement produced by the Appellant as proof of purchase of a portion of L.R. No. SUNA West/ Wasweta II/ 6172 in so far as at the time the judgment was made, he was still a minor.
 - vi. The Learned Trial Magistrate erred in law and in fact in failing to make a finding that the different dates in the agreement indicating 22/12/1978 and 30/12/1978 were bonafide excusable typographical errors that did affect the substratum of the Appellant's defence case.
 - vii. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that even though the said agreement did not describe the parcel of land bought by the Appellant, the Respondent had conceded that the Appellant bought the same land parcel being L.R. No. Suna West/ Wasweta II/ 6172 save that he bought only ½ an acre hence the issue of description of the land was in dispute.
 - viii. The Learned Trial Magistrate erred in law and in fact in rendering a decision based on extraneous issues that were not canvassed by either the Appellant or the Respondent.
 - ix. The Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions and legal authorities relied upon in support of the defence hence arriving at an erroneous conclusion.
 - x. The Learned Trial Magistrate erred in law and in fact in awarding the Respondent costs of the suit without any lawful justification.
 - xi. The Learned Trial Magistrate's decision albeit discretionary one, was plainly wrong.
2. The backdrop to this Appeal is that; the Plaintiff/ Respondent instituted the suit vide a Plaint dated 27.08.2018 seeking against the Defendant/Appellant, an order of Permanent Injunction restraining him from invading and trespassing into the suit land measuring approx. 3.96Ha and to further stop illegal acts of cutting down trees, building structures and destruction of boundary marks, an Order of eviction and costs of the suit. It was the Plaintiff's claim that he is the registered proprietor of the suit parcel L.R No. Suna West/ Wasweta II/ 6172 measuring 3.69Ha. That sometimes in January 2018, the defendant without his consent or authority, trespassed and encroached into the suit property and begun to cut down trees indiscriminately, destroying the boundary and illegally building structures on the suit parcel.
 3. The Defendant/Appellant in response to the Plaint filed a Statement of Defence dated 20.05.2019 wherein he denied all the allegations made in the Plaint and the cause of action and further put the plaintiff to strict proof thereof.
 4. The suit was heard and judgment was delivered on the 25.06.2020 whose effect was to allow the Plaintiff's claim against the Defendant and order permanent injunction and eviction of the Defendant from the suit property hence the instant Appeal.
 5. On 25.01.2020, this court issued directions that the Appeal be canvassed by way of written submissions, to be filed and exchanged within 30 days. Both parties filed their respective submissions and authorities which I have read and taken into consideration in arriving at my decision.

Appellant's Submission

6. He summarized the grounds of Appeal into 5 and submitted on the same separately; on the first issue he submitted on grounds 1,2 and 4. It was his submission that the Respondent did not table any evidence



whatsoever save to admit that the Appellant had only bought ½ an acre but gave no evidence in support of the said assertions. He maintained that the Respondent's deceased father never raised any issues challenging his occupancy of the 5 acres of the suit property as from 1978 until his death in 2010. It is his position that the credibility of his evidence and the testimony of his witnesses remained unchallenged and stated that the Respondent had not discharged the burden of proof in proving his claim against him.

7. On the second issue on ground 3 on his possession and occupation of the suit land, he stated that he led evidence and called witnesses who testified that they knew the Appellant and had seen him enter the property in 1978 and has been occupying and using the same peacefully and openly until 2018 when the suit was filed. To the contrary, he contended that the trial court held in favor of the Respondent who did not adduce any evidence or called witnesses to corroborate his averments.
8. It is his claim that DW1 and DW2 both testified that they were aware that the portion sold to the Appellant was 5 acres and not ½ an acre as claimed.
9. Grounds 5,6,7 and 8 which were on the sale agreement produced as DExh 3, were discussed as issue number 3. It was his submission that the Respondent had no capacity to challenge the said agreement and/or to disprove its authenticity since at the time of making the agreement the Respondent was a minor, he neither witnesses the said agreement nor was privy to terms thereof and further that the Respondent had not produced any evidence to the contrary.
10. With regards to the different dates appearance on the face of the sale agreement produced as DExh 3; it was his submission that the payment of the purchase price was paid in instalments hence the different dates.
11. On the description of the land being sold as per the sale agreement; it was his contention that the Respondent did not dispute the sale of the suit land taking place and actually admitted that his deceased father sold a portion of the suit land measuring ½ an acre and not 5 acres as alleged. That the fact that both parties agreed that there was a sale of a property but only differed on the acreage sold, it was his contention that the trial magistrate ought to have taken judicial notice that by implication, the parties had intended to deal with the suit property in question and not any other. That no evidence was led to mean that there could have been any other property apart from the suit parcel. He thus maintained that the description of the land was not in dispute.
12. He averred that the trial magistrate delved onto matters that were not in dispute before him instead of being guided by the pleadings, testimony and evidence led in trial and urged this court to find that the same led to a miscarriage of justice.
13. His submission on ground 9 was that the trial magistrate failed to consider the issues raised by the Appellant during trial and submission together with the evidence & witness testimonies. In his opinion, the trial magistrate in framing the issues in his judgment; shifted the burden of proof from the Respondent to the Appellant herein, which was against the rules of evidence. Particularly, it was his submission that the trial magistrate failed to address the payment in the sale agreement and what the same was meant for.
14. He lastly submitted on grounds 10 and 11 on the issue of costs and stated that, no evidence was produced by the Respondent in the form of a Demand Letter in trying to resolve the dispute between them before proceeding to court and thus awarding the Respondent costs of the suit would amount to making him suffer twice; being faced with eviction and having to pay costs. This according to him was against the rules of natural justice and the trial court ought to have directed each party to bear their own costs to lessen the burden on the Appellant.



15. He thus urged the court to allow the Appeal and set aside the judgment of the lower court and the same be substituted with an order dismissing the Plaintiff's suit together with costs of both the trial court and Appeal.

Respondent's Submissions

16. On grounds i, ii, iii and iv; it was the Respondent's submission that he tendered evidence in court to prove that he was the proprietor and registered owner of the suit property and maintained that he also adduced evidence showing that the Appellant only occupied a portion measuring approx. ½ an acre.
17. On grounds v, vi and vii, he stated that even though the Appellant occupied ½ an acre, sometimes in January 2018, he made attempts to occupy more land after the death of the Respondent's father. With regards to the sale agreement, he stated that the same does not disclose a portion of the land being sold, the same was not witnessed by any person and further that the Land Control Board Consent was not obtained as required. It was his position that the sale agreement did not meet the requirements at Section 3 (3) of the Contract Act and hence was null and void.
18. On grounds viii, ix, x and xi; he submitted that the trial magistrate drew issues and answered the same. He reiterated that he held a valid certificate of title and pursuant to section 26 26 (1) of the [Land Registration Act](#), the same was a conclusive evidence of proprietorship. He thus urged the court to dismiss the Appeal with costs.
19. I have looked at the grounds of Appeal and it is my considered opinion that the main issue arising for determination is whether this Court should interfere with the exercise of discretion by the trial court by setting aside and substituting its judgment delivered on 25.06.2020 and I will proceed to discuss the same on account of;
- i. Validity of the Sale Agreement dated 22.12.1978
 - ii. Ownership of the suit parcel L.R. No. Suna West/ Wasweta Ii/ 6172
 - iii. Whether the Appellant is entitled to the reliefs sought in the Memorandum of Appeal.
20. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion and the same does not entail taking on board matters which were never brought to the trial court's attention or were not subject of the said court's consideration. In *Selle v Associated Motor Boat Co.* [1968] EA 123) the Court of Appeal held as follows:
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- “ this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
21. The dispute between the parties herein is on the ownership of suit parcel No. Suna West/ Wasweta II/ 6172, measuring approx. 3.69Ha. The Appellant contends that he is the rightful owner of the suit property having purchased a portion thereof measuring approx. 5 acres, from the Respondent's deceased father sometimes in the year 1978. He thereafter took possession and has been in open and



peaceful occupation of the said portion until sometimes in the year 2018. He contends that he led evidence in support of his ownership claims and called witnesses (DW2 & DW3) who corroborated his averments. It is therefore his claim that he has acquired rights and interests over the suit parcel adverse to the Respondent's title and rights over the same.

22. The Respondent on the other hand maintained that he was the registered owner of the suit land and produced a Certificate of title in support of his claims. It is his case that the Appellant was only entitled to ½ an acre of the suit property but since his father's death, the Appellant made attempts to occupy more land.
23. I will now proceed to re-evaluate each of the party's claim from the trial court record, the evidence adduced and the trial court judgment in determining whether the trial magistrate exercised his discretion correctly.

I. Validity of the Sale Agreement dated 22.12.1978

24. The validity of a contract is provided under Section 3 (3) of the *Contract Act* as read together with Section 38 of the *Land Act*, 2012; which provides that no suit shall be brought upon a contract for the disposition of an interest in land unless; the contract upon which the suit is founded is in writing, signed by all the parties, and the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
25. From a cursory look of the copy of Sale Agreement relied on by the Appellant and produced as DExh 1, captured at page 64 of the Record of Appeal, I note the following; the contract contains 2 different dates on its face 22/12/1978 and 30/12/1978, the signature of the parties was not attested by a witness as statutorily required, there is no clear description of the suit land being sold and the subject is only stated as sale of land.
26. The Appellant in his submission stated that the 2 different dates contained in the sale agreement is due to the fact that the purchase price was paid in installments hence the different dates. Respectfully, I find no sufficient explanation on the said averments; the dates for the payments of the balance have clearly been indicated below the outstanding amount and the said dates are significantly different from the 2nd date captured before the signature of the parties.
27. Secondly, the law provides that the signature of the parties to a sale of land contract must be attested by a witness who was present at the time of the signing. From the said agreement, there was no such witnessing of the signatures by the parties to the contract. Both DW2 and DW3 testified that they were not present when the written agreement was executed or during the payment of the purchase price. I therefore find that the sale agreement produced as DExh 1 did not fully comply with the statutory provisions and hence the same is not valid.
28. Further, there was no description of the property being sold in the said sale agreement and it is therefore not clear the parcel of land that the parties intended to sell and/or buy. The Appellant contends that since no evidence was led to mean that there could have been any other property apart from the suit parcel, it automatically meant that the sale was of the suit property in question. I find no sufficient basis and/or justification in the said explanation and to this end, I agree with the trial magistrate that there is nothing in the body of the agreement to show any nexus between land referred in the agreement and the suit parcel.
29. In view of the foregoing; I find that the sale agreement produced as DW1 was not a valid document capable of enforcement.



II. Ownership of the suit parcel L.R. No. Suna West/ Wasweta II/ 6172.

30. As earlier stated, the dispute between the parties herein is on the ownership of the suit parcel. The Appellant contends that he is the rightful owner of the suit having purchased a portion of the same measuring 5 acres and for being in occupation thereof since the year 1978; he thus maintains that he has acquired title over the same by virtue of adverse possession.
31. It is important to note that the Appellant has introduced the issue of adverse possession at the Appellate stage. The said averments were neither addressed in the Memorandum of Appeal nor in his Statement of Defence dated 20/05/2019. His statement of defence contains blanket denial of all the allegations made in the Plaintiff; there is no mention of any purchase of the suit land nor of occupation thereof since the year 1978 as alleged. It is trite law that parties are bound by their pleadings and I therefore find that the introduction of the issue of adverse possession at this stage by the Appellant amounts to making out a fresh case, by filling up omissions in his case and gaps in his evidence and I am thus inclined to disregard the same.
32. I have also looked at the documents produced by the Plaintiff/ Respondent in the lower court and I acknowledge that the same are in support of the transfer and the subsequent registration of the suit land in his name; the said process was never challenged and thus the resultant title remains a valid title. Having held that the Respondent is the registered owner of the suit parcel, I find that he is entitled to all the rights and interests over the suit land as provided under sections 24 and 25 of the Land Registration Act, to the exclusion of all and sundry. I further note from the testimonies and the judgment of the trial court, that the Respondent was not opposed to the Appellant's entitlement to the ½ an acre that he was given by his late father and had been using. In view of the foregoing, I find that the Respondent is absolute owner of the suit property L.R. No. Suna West/ Wasweta II/ 6172 save for the ½ an Acre portion that the Appellant is entitled to. Having held that the Respondent is the absolute owner of the suit property, it therefore follows that the Appellant is not entitled to the reliefs sought in his Memorandum of Appeal dated 09/07/2020.
33. In view of the foregoing, I find that the learned trial magistrate exercised his discretion properly in allowing the plaintiff's claim. The analysis and subsequent decision was purely made upon examination of the full facts of the case together with the documents and evidence adduced in support of each party's claim. I find no need to interfere with the said decision.

Conclusion

34. In conclusion, I accordingly find that the Appeal is not merited and is therefore dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 31ST DAY OF OCTOBER, 2022.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Mr. Adawo for the Appellant

Ms. Agadi for the Respondent

Court Assistant- Tom Maurice**

