



**Njagua & another v Onyango & 2 others (Environment and Land Appeal  
09 of 2020) [2022] KEELC 14625 (KLR) (17 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14625 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND APPEAL 09 OF 2020  
MN KULLOW, J  
OCTOBER 17, 2022**

**BETWEEN**

**ALSENTUS OTIENO NJAGUA ..... 1<sup>ST</sup> APPELLANT**

**MOLINE AWINO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ISAIAH CHELUGET ONYANGO ..... 1<sup>ST</sup> RESPONDENT**

**KAMBONA ONYANGO OSCAR ..... 2<sup>ND</sup> RESPONDENT**

**DAVID ANGIRA ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. This Appeal emanates from the Judgment and decree of Hon M O Obiero dated January 30, 2020 in Migori Chief Magistrates' Court ELC Case No 23 of 2019, in which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' claim instituted by way of Plaint dated February 18, 2019 was allowed against the Appellants herein. The grounds in the Memorandum of Appeal are that: -
  - i. The Learned Trial Magistrate erred in law and fact when he failed to consider evidence and pleadings thereby reaching at a wrong conclusion that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants took part in the fraud involving subdivision of the subject Land Parcel No Suna West/ Wasimbete/ 1074 into Land Parcel Nos Suna West/ Wasimbete/2010 – 2019 yet no evidence was led to prove that the Appellants were part of the fraud.
  - ii. The Learned Trial Magistrate erred in law and fact when he failed to take into consideration the fact that the Plaintiffs/ 1<sup>st</sup> & 2<sup>nd</sup> Respondents intentionally failed to disclose/prove to this court or to plead to this court the person who were the registered owners of the alleged land parcel Nos Suna West/ Wasimbete/ 2010 – 2019.



- iii. The Learned Trial Magistrate erred in law and fact when he failed to take into consideration the fact that the Plaintiffs/ 1<sup>st</sup> & 2<sup>nd</sup> Respondents intentionally failed to disclose or prove the persons who were the registered owners of the alleged Land Parcel numbers Suna West/ Wasimbete/ 2110 – 2119 yet they pleaded and prayed for the cancellation of the said titles.
- iv. The Learned Trial Magistrate erred in law and fact when he failed to take into consideration the fact that the Plaintiffs/ 1<sup>st</sup> & 2<sup>nd</sup> Respondents had failed to prove that the purported Land Parcel Numbers Suna West/ Wasimbete/ 2110 – 2119 if in any event do exist arose from the subdivision of the subject Land Parcel No Suna West/ Wasimbete/1074 as pleaded and prayed for.
- v. The Learned Trial Magistrate erred in law and fact when he proceeded and cancelled titles which were never pleaded and whose registered owners if any were not party to the case and were not given time to be heard or to defend themselves or given a notice to file a counter-claim.
- vi. The Learned Trial Magistrate erred in law and fact when he held that the Appellants were the ones who orchestrated the fraud yet the Land Registrar who is the custodian and the author of the registers at the Land Registry was not called to testify and was not even a party to the case.
- vii. The Learned Trial Magistrate erred in law and fact when he failed to consider the fact that the Plaintiffs/ Respondents had failed to prove that the records in regard to the subject land was actually missing at the Land Registry as alleged by the Plaintiffs yet the Plaintiffs did not even produce any document to prove that they even attempted to conduct official searches in regard to the subject parcels at the Lands Registry and were told that the documents could not be found.
- viii. The Learned Trial Magistrate erred in law and fact when he held that the Appellants had no right on the subject land without putting into consideration the fact that the Appellants had occupied the subject land since they were born in full knowledge of the deceased and also without taking into consideration the fact that even the Plaintiffs themselves testified and confirmed to the court that their deceased father had given to the community some parts of the subject land.
- ix. The Learned Trial Magistrate erred in law and fact when he ordered the Appellants to vacate the subject property within 60days failure to which execution to issue upon application without putting into consideration the fact that the Appellants had occupied the subject land since they were born and also without taking into consideration the fact that even the plaintiffs themselves testified and confirmed to the court that their deceased father had given to the community some parts of the subject land.
- x. The Learned Trial Magistrate erred in law and fact when he held that the 3<sup>rd</sup> Respondent acted on behalf of the 1<sup>st</sup> Appellant in subdividing the land yet no document was produced to prove that. Not even transfer or mutation forms allegedly signed by the 1<sup>st</sup> Appellant.
- xi. The Learned Trial Magistrate erred in law and fact when he failed to take into consideration the fact that the document produced by the 3<sup>rd</sup> Respondent as title deed could not be taken as a title deed under the [Land Registration Act](#), 2012 because the said title number could not be traced to any register at the Lands Registry.
- xii. The Learned Trial Magistrate erred in law and fact when he went ahead to nullify imaginary and unknown parcels which were never pleaded or prayed for by the Plaintiffs.



- xiii. The Learned Trial Magistrate was biased against the Appellants.
2. The backdrop to this appeal is that at all material times, the original Suit Parcel No Suna West/ Wasimbete/1074 measuring 6.38Ha belonged to Charles Onyango Gucha, who is since deceased. That sometimes on May 28, 2015 the 1<sup>st</sup> Defendant (now 1<sup>st</sup> Appellant) without any color of right or justification, unlawfully and fraudulently transferred the unadministered original suit property of the deceased to his name and later fraudulently subdivided the same and transferred part thereof to the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants.
  3. The plaintiff outlined the particulars of the alleged fraud by the Defendants and listed the various new parcel numbers and acreages that arose from the said fraudulent subdivision. The plaintiffs thus urged the court to order for the cancellation of the new parcel numbers arising from the subdivision to wit, LR No's Suna West/ Wasimbete/ 2110 – 2119 and the restoration of the original parcel No 1074 in the name of the deceased Charles Onyango Gucha.
  4. The Defendants on the other hand filed a joint statement of defence dated June 17, 2019; wherein they denied all the claims made by the plaintiffs and put them to strict proof thereof. In the alternative and without prejudice, it was the 1<sup>st</sup> and 3<sup>rd</sup> Defendants' contention that they have been in open occupation of the original suit parcel No 1074 together with their families since 1952 and 1975 respectively with their homesteads and several houses forming part of the Maembe Saba Market. That the said occupation was open and known to the Plaintiffs father before his death.
  5. On March 23, 2022, this court issued directions that the Appeal be canvassed by way of written submissions to be filed and exchanged within 30days for each party. Both parties filed their rival submissions which I have taken into consideration in arriving at my decision.

### **Appellants' Submissions**

6. The Appellants summarized the grounds of appeal and submitted on 3 main issues; the first issue was whether the court can cancel titles which were never pleaded by the plaintiff and which the registered owners were not known or parties to the proceedings. It was their submission that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents in their plaint prayed for the cancellation of titles of LR No's Suna West/ Wasimbete/ 2110-2119; however, they did not produce any evidence to prove the said titles are actually in existence or who the registered owners are, there was also no document to prove that the said subdivision of the parcel numbers aforementioned actually emanated from the original parcel No 1074, no evidence of the steps taken or attempts made to prove that the Respondents requested for the relevant records from the land registry.
7. Further, it was their contention that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents did not call the Land Registrar as a witness to testify on the authenticity of the purported titles. That the register of parcel No 1074 that was produced by the plaintiffs as their exhibit does not show that LR No Suna West/ Wasimbete/ 1074 was subdivided into LR Nos Suna West/ Wasimbete/ 2110- 2119 as alleged. They thus maintained that the trial magistrate erred in cancelling titles which were unknown, further the same were never pleaded and their registered owners were not parties to the suit.
8. On the second issue of whether pleadings can be amended through submissions; it was their submission that parties are bound by their pleadings and the same cannot be amended through oral testimony by a witness on the stand or by way of written submissions. That the Plaintiffs specifically pleaded for an order of cancellation of LR Nos Suna West/ Wasimbete/ 2110 – 2119 and the same be restored to original parcel LR No Suna West/ Wasimbete/ 1074 and not LR Nos Suna West/ Wasimbete/ 2010



- 2119 as captured in the register. That the said two sets of numbers are significantly different and cannot be said to be the same.
9. It is their position that the court cannot proceed to cancel titles which were not pleaded in the plaint and whose registered owners were not parties to the suit or given notice of the same.
  10. In the end, it was their submission that the plaintiffs had failed to prove that the purported subdivision of LR Nos 2110 – 2119 emanated from the original suit parcel No 1074 and were actually available registers at the Land Registry which could be cancelled. They therefore urged the court to allow the Appeal by quashing/ setting aside the lower court judgment and substitute the same with an order dismissing the Plaintiffs’ suit with costs to the Appellants.

### **Respondent’s Submissions**

11. The Respondents’ also submitted on 3 issues; the first issue was whether the 1<sup>st</sup> Defendant had fraudulently transferred the suit property No 1074 to his name. It was their submission that the copy of the Green Card which was produced as PExhibit 2 showed that the 1<sup>st</sup> Appellant was registered as the proprietor on 28/5/2014 by virtue of transmission subject to succession proceedings. It was their testimony that the 1<sup>st</sup> Appellant is not a beneficiary of the deceased Charles Onyango Gucha and the same was uncontroverted and further buttressed by the testimony of the 1<sup>st</sup> Appellant where he categorically stated that he was not a beneficiary of the estate of Charles Onyango Gucha, neither has he ever filed any succession proceedings with regards to the said estate.
12. It is their position that the trial court found that the dealings by the Appellants and the 3<sup>rd</sup> Respondent amounted to intermeddling and offended the provisions of section 45(1) of the *Law of Succession Act*, particularly since the suit property was transferred by way of transmission.
13. They further submitted that the Appellants and the 3<sup>rd</sup> Respondent all admitted to holding titles of portions of the suit land but did not produce evidence of the said titles in court.
14. With regards to the second issue; it was their submission that the court found that there was a fraudulent activity undertaken by the Appellants. That there was no amendment of any pleadings by the court as suggested by the Appellants but rather the court noted that from the fraudulent transfer and/or subdivision of the original parcel No 1074, the same should be cancelled and the title revert to the deceased’s name.
15. They therefore urged the court to dismiss the Appeal.
16. 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. This mandate 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. The Court of Appeal in *Selle v Associated Motor Boat Co [1968] EA 123* 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.”



17. I have considered the Memorandum of Appeal, Record of Appeal, herein and the rival submissions, the proceedings and exhibits produced in the trial court in totality and I am of the view that the main Issue for determination is whether this Court should interfere with the exercise of discretion by the trial court and set aside its judgement.
18. The gist of the Appeal herein is the ownership and/or proprietorship of the suit parcel No 1074 and whether the resultant transfer and subsequent subdivision was fraudulent and unlawful. The Appeal further seeks to determine whether the trial magistrate erred in finding in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on account of the cancellation of the titles and the order of eviction issued against the Appellants.
19. It is the Appellants' claim that the trial magistrate erred in cancelling titles which were never pleaded by the Respondents and whose registered owners were not a party to the case and in addition holding that the Appellants took part in the fraudulent transfer and subdivision of the suit property. They further contend that they have occupied the subject land since 1952 and 1975 respectively. It is also their position that the cancellation of titles sought in the in the pleadings is of LR No Suna West/ Wasimbete/2110- 2119 which is significantly different from the parcels captured in the register of LR No Suna West/ Wasimbete/2010 – 2019.
20. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents on the other hand maintained that there was no amendment of pleadings by the court as alleged by the Appellants. It is their contention that the decision by the court to cancel the various titles and direct that the title of the suit land to revert to the deceased name was informed by the fraudulent transfer of the original suit land No 1074 to the 1<sup>st</sup> Appellant's name on May 28, 2014 by virtue of transmission when in fact the 1<sup>st</sup> Appellant was not a beneficiary of the deceased Charles Onyango Gucha. The said transfer thus amounted to intermeddling contrary to the provisions of section 45 (1) of the *Law of Succession Act*.
21. I will now proceed to re-evaluate and re-assess each of the party's claim, their witnesses' testimonies and exhibits produced and the judgment of the lower court from the record of appeal.
22. It is not in dispute that the original parcel LR No Suna West/ Wasimbete/1074 was registered in the name of the deceased Charles Onyango Gucha prior to and even after his death in the year 1997. Thus, the deceased was the lawful registered proprietor of parcel No 1074 and upon his death the said property formed part of his estate. The title deed to the original parcel No 1074 was produced as PExhibit 1 in support of the plaintiffs' case. It is therefore common ground that any dealings on the original suit parcel would only be sanctioned by a grant of representation.
23. Section 45(1) of the *Law of Succession Act* provides that: -
  - “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”
24. It is important to note that the gist of the dispute herein is fraud. It is my considered opinion that the plaintiffs' case was pegged on a fraudulent transfer of the title of the suit property in the name of the 1<sup>st</sup> Appellant on the one hand and the subsequent subdivision of the original parcel on the other hand, it was thus a simultaneous claim. The same is captured as Entry No 4 and Entry No 5 on pexhibit 2.
25. The Appellants either by design or inadvertently have failed to address the issue of fraud in their Memorandum of Appeal. The Appeal is centered on the cancellation of titles created by the subsequent



- subdivision of the original parcel No 1074 as Entry No 5 on PExhibit 2; which in their opinion were not pleaded, the new titles were not produced and further that the Respondents did not include the new registered owners as parties to the suit. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the other hand maintained that the transfer and the subsequent subdivision amounted to intermeddling with the property of the deceased contrary to the provisions of the Succession Act and hence the same was null and void.
26. The Appellant did not provide any proof of a Grant of Administration or a Certificate of Confirmation of the Grant, no basis was provided for the transfer of the original suit parcel to the name of the 1<sup>st</sup> Appellant, when the property in question was a property of the deceased person. They did not also provide any proof of being beneficiaries or dependants to the estate of the deceased to warrant being entitled to a share of the estate of the deceased. To the contrary, both Appellants testified that they were neither the beneficiaries to the estate of the deceased nor have they ever filed any succession proceedings in any court as contained at page 142-143 & 147 of the Record of Appeal.
  27. The Respondent on the other hand produced exhibits; a copy of the original Title Deed registered in the name of the deceased Pexb 1, a certified copy of the Register Pexb 2, a copy of the Death Certificate Pexb 3 and a copy of the Grant of Letters of Administration as PExhibit 4.
  28. The Title Deed of the original parcel No 1074, is conclusive evidence of proprietorship of the holder of the said title as provided under section 26 of the *Land Registration Act* stated above. A copy of the death certificate demonstrating when the deceased died and further, the certified copy of the register show to the various entries made on the title and the timelines. A critical look at the PExhibit 2, and particularly Entry No 4 shows that there was a transfer to one Alsentus Otieno Njagua, the 1<sup>st</sup> Appellant herein on May 28, 2014. This entry was evidently made after the death of the deceased Charles Onyango Gucha and the same was done without any grant of representation. This in my view amounts to Intermeddling with the estate of the deceased and the said transfer is therefore illegal, null and void. To this end, I agree with the finding of the trial magistrate.
  29. The trial magistrate in his judgment held that the transfer of the original suit land was illegal, null and void for the reason that there was no Grant of Administration obtained or a Certificate of Confirmation of the Grant. He further held that the subsequent subdivision done on July 16, 2015 was also illegal, null and void. No Consent of the Land Control Board was obtained as per the provisions of section 6(1) of the *Land Control Act*.
  30. In view of the foregoing, I find that the 1<sup>st</sup> Appellant failed to provide any proof and/or sufficient justification and basis for the transfer of the original suit parcel No 1074 from the name of the deceased Charles Onyango Gucha to his name. It was his contention that he has never been to any Lands Office and does not know how the transfer was done. He further blamed the 3<sup>rd</sup> Respondent for conducting all the process and even obtaining the title deeds. His assertions therefore remain mere unsubstantiated allegations that cannot pass the evidentiary test.
  31. To the second issue at the heart of the appeal; as earlier stated the Appellants claim is majorly centered on the cancellation of the titles which in their view were not pleaded. That the new numbers arising from the subdivision Nos 2010 – 2019 are significantly different from what was pleaded in the plaint to wit Nos 2110- 2119.
  32. I seek to reproduce trial court judgment with regard to the difference in the numbers pleaded and the numbers contained in the certified copy of the register as follows;  

“.....this is a case which presents a unique scenario. This is a case where transactions have been effected on a property and/or estate of the deceased by people who did not have locus standing to effect the transaction. In other words, the people decided to intermeddle with



the estate of the deceased. Section 45(1) of the Law of Succession Act confers upon the court the jurisdiction to protect the estate of the deceased person by unauthorized persons and where intermeddling has occurred this court has the jurisdiction...”

33. From the foregoing, it is clear that Entry No 4 whose effect was to transfer the suit property to the name of the 1<sup>st</sup> Appellant was fraudulent and illegal, contrary to the provisions of Section 45 of the Law of Succession Act. Regrettably, the assertions by the Appellants that the trial magistrate erred in cancellation of the titles arising from the subdivision; In my view does not apply in the present instance to sanitize an illegality. The court was called upon to determine the issue of fraud and having found that Entry No 4 was fraudulent, its effect was that all subsequent transactions and dealings on the suit property were null and void ab initio. Again, I agree with the findings of the trial court in this regard; the case presented a special scenario and even though I admit that advocates ought to be keen when drafting pleadings, I do also note that the said error; typographical or otherwise, does not negate the fact that there was an illegal act of intermeddling with the estate of the deceased and a fraudulent transfer and subdivision of the suit property thereof.
34. The Appellants also contend that they failed to take into consideration that they had occupied the subject land since they were born. In this regard, it is my considered view that long possession and occupation of a property of land does not automatically provide one with proprietary rights to the suit parcel overriding the rights of the registered owner. The onus was on the Appellant to prove that the said long possession and occupation indeed granted them with the requisite proprietary rights and interests over the original suit property to sanction the said transfer and the subsequent subdivisions and sale. It is trite law that he who alleges must prove. Section 107(i) of the Evidence Act provides that: -
- “Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
35. The Appellants did not adduce any evidence in support of their averments and I therefore find that the said claims are mere allegations with no evidentiary value.
36. In view of the foregoing, I find that the learned trial magistrate exercised his discretion properly in allowing the Plaintiff’s claim against the Defendants. The analysis and subsequent decision was purely made upon examination of facts presented before him and the evidence adduced in support of each party’s claim. I find no need to interfere with the said decision.

### **Conclusion**

37. In conclusion, I accordingly find and hold that the Appeal is not merited and is therefore dismissed with costs to the Respondent. It is so ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUALLY AT MIGORI ON THE 17<sup>TH</sup> DAY OF OCTOBER, 2022.**

**MOHAMMED N KULLOW**

**JUDGE**

**In presence of; -**

Non-Appearance for the Appellants

Non- Appearance for the Respondent

**Tom Maurice – Court Assistant**

