



**Omondi (Suing as the Administrator of the Estate of Joshua Omondi
Obuor (deceased)) v Opiyo & another (Environment & Land Case
24 of 2021) [2022] KEELC 13474 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13474 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 24 OF 2021
AY KOROSS, J
OCTOBER 13, 2022**

BETWEEN

**ELIZABETH AKINYI OMONDI APPELLANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSHUA OMONDI
OBUOR (DECEASED)**

AND

**BENSON OCHIENG OPIYO 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT**

*(Being an appeal from the judgment of the Senior Resident Magistrate Honourable
T.O.Olando delivered on 25/07/2019 in Siaya ELC Case Number 23 of 2018)*

JUDGMENT

Background of the appeal

1. Before dealing with the issues raised in this appeal, it is necessary to set out the relevant facts which were established by pleadings in the lower court.
2. The appellant, who was the plaintiff in the lower court case filed a claim dated June 7, 2010 and amended by a plaint dated March 5, 2014. It was her case that the 1st respondent had sometimes in July 2009, trespassed on land parcel number North Gem/Siriwo/202 (“suit property” that was registered in her late husband’s name Joshua Omondi Obuor (“Joshua”) and wantonly destroyed her crops.
3. It was the appellant’s case that sometimes in November 2010, the 1st respondent in collusion with the district land registrar, Siaya, fraudulently transferred the suit property from the name of Joshua to the 1st respondent. This was done while the suit was pending determination.



4. The appellant sought *inter alia*, cancellation of the 1st respondent's name from the register of the suit property; a permanent injunction restraining the 1st respondent by himself, his agents and servants or any other person claiming through him from cultivating, remaining on, entering or in any manner interfering with the suit property; an order of eviction of the 1st respondent from the suit property and costs of the suit and interest thereon.
5. Upon entering appearance, the 1st respondent filed a defence dated December 7, 2012 which was later amended by an amended defence and counterclaim dated September 19, 2018. He denied the averments made in the amended plaint and contended that sometimes on June 4, 1993, Joshua, one Fredrick Okore Arek ("Fredrick") and officers of Siaya land registry fraudulently mutilated the register of the suit property by having the name of the registered owner Okore Arek (who had allegedly long died) to be fraudulently changed and registered in the names of Fredrick Okore Arek who fraudulently entered into an agreement of sale with Joshua. Fredrick had the suit property transferred to Joshua.
6. In his counterclaim, the 1st respondent sought *inter alia*, the appellant's suit be dismissed with costs and judgment entered in his favour; alternatively, the suit property do revert to the original proprietor, Okore Arek and a declaration be made that he had legitimate customary rights over the suit property.
7. The 2nd respondent entered appearance and filed a defence dated July 18, 2014. It denied the averments made in the amended plaint and stated that if registration was effected and a title deed issued, then it was done in adherence with the law.
8. The appellant filed a reply to amended defence and defence to counterclaim dated October 24, 2018. She reiterated the averments contained in her amended plaint and put the 1st respondent to strict proof thereof. She sought for the defence and counterclaim to be dismissed with costs.
9. After the parties had testified and closed their respective cases, the trial magistrate in his judgment framed 3 issues for determination; (i) was Joshua the owner of the suit property (ii) had the 1st respondent entered into the appellant's land and (iii) was the appellant entitled to the prayers sought.
10. On the 1st issue, the trial magistrate found that the suit property had been fraudulently transferred to Fredrick who fraudulently transferred it to Joshua. On the 2nd issue, the trial magistrate found that the 1st respondent was the legitimate owner of the suit property and consequently was not a trespasser. On the 3rd and last issue, the trial magistrate found that the appellant had not proved her case on a balance of probabilities and dismissed her case with costs and allowed the reliefs sought in the counterclaim.

Appeal to this court

11. Dissatisfied with the entire judgment, the appellant filed a memorandum of appeal dated March September, 2021 that raised 5 grounds. Upon appraising these grounds, it is my considered view that they can be condensed into a singular ground;
 - a. The learned magistrate erred in law and fact by failing to appreciate the totality of the evidence that was before him.
10. The appellant sought the following reliefs; the appeal be allowed with costs; the lower court judgement be set aside and the judgment be substituted with judgment as sought in the amended plaint.

The appellants' submissions

12. The appellant's counsel Mr Ko'winoh filed written submissions dated June 20, 2022. He abandoned some of the grounds of appeal. Counsel submitted that the process in which the 1st respondent



acquired title to the suit property was shrouded with irregularity and fraud; from the register of the suit property, the 1st respondent acquired title from Joshua yet he was never an administrator of Joshua's Estate; police abstract and a statutory declaration were allegedly issued long after Joshua's demise and allegedly executed; re-issuance of a title document to the suit property was issued in the 1st respondent's name instead of Joshua's and issued prior to the lapse of the statutory period of 60 days.

13. Counsel averred that in the absence of the land registrar and Fredrick, the trial court had no legal basis finding that Joshua's title was acquired fraudulently. In addition, counsel submitted that the 1st respondent did not prove that Okore Arek and Fredrick were not one and the same person, yet the trial magistrate concluded that Fredrick had impersonated Okore Arek.
14. It was the counsel's submission that the issue of the Land Control Board Consent was never raised in the 1st respondent's pleadings and the Land Disputes Tribunal did not have jurisdiction to determine ownership of land.

Respondents' submissions

15. The 1st respondent who was acting in person appointed the firm of JDOK Advocates LLP after he had filed his written submissions dated June 13, 2022. The issues he identified for determination were *inter alia*, whether Joshua was an innocent purchaser for value without notice and whether the appellant had proved her case on a balance of probabilities.
16. On the 1st issue, the 1st respondent submitted that Joshua did not meet the requirements of a bona fide purchaser for value without notice as stipulated in the case [Katende v Haridar & Company Limited](#) [2008]2 EA 173. It was the 1st respondent's submission that transfer of title from Fredrick to Joshua was done hurriedly and that Joshua could not have obtained the consent to transfer from the Land Control Board. Therefore, Joshua must have been privy to the fraud.
17. On the 2nd issue, the 1st respondent submitted that section 107 (2) of the [Evidence Act](#) provided that a party was bound to prove the existence of a fact. He placed reliance on the case of [Hellen Wangari Wangechi v Carumera Muthini Gathura](#) [2005] eKLR where the court expressed itself that the court's decision in every case depends on whether the party concerned had satisfied the particular burden and standard of proof imposed on him. He urged the court to dismiss the appeal with costs.

Analysis and determination

18. In [Kenya Ports Authority v Kuston \(Kenya\) Limited](#) [2009] 2EA 212 the Court of appeal held as follows: -

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

19. These are the words of Sir Charles Newbold, P expressed in this often-cited [Mbogo & another v Shah](#) [1968] EA 98 decision as follows:

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole



that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

20. This court will not interfere with the exercise of discretion by the magistrate in the court below unless satisfied that the decision of the trial magistrate was clearly wrong because of some misdirection, or because of failure to take into consideration relevant matters or because the trial magistrate considered irrelevant matters and as a result arrived at a wrong conclusion, or where there is a clear abuse by the magistrate of his discretion. Whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon showing a clear abuse of discretion.
21. Having considered the lower court record, the memorandum and record of appeal and the issues proffered by the respective parties’ submissions, the court will consider the singular condensed ground of appeal.
22. It is trite that he who alleges must prove. Section 107 of the Evidence Act states as follows:
 - “(1) 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. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.
23. Section 109 goes on to state that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.
24. Finally, section 110 states that:

“The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence”.
25. Within the provisions of order 2 rule 10(1) of the Civil Procedure Rules and settled law, fraud must be pleaded, particularized and proved to a standard higher than on a balance of probabilities but not beyond reasonable doubt. None of the parties pleaded innocent purchaser for value and without notice. The settled law has been upheld in several Court of Appeal decisions; Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000), Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR (Civil Appeal No 132 of 2005) and Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR. The latter case, cited this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427 and expressed itself thus:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App Cas 685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep 305, 308)”.



26. The appellant and 1st respondent both pleaded and particularised fraud against each other and it was incumbent upon each one of them to prove their respective cases against the other. After hearing the parties, the trial court stated and found thus;

“I find that the subject land was fraudulently transferred into the names of Fredrick Arek Okore and subsequently transferred into the name of Joshua Omondi...Joshua Omondi and the plaintiff cannot say the deceased Joshua Omondi was not an innocent purchaser for value...from the evidence and documents produced by the 1st defendant the defendant is the rightful owner of the land as he is the only surviving beneficiary to the estate of the deceased Okore Arek...”

27. I have interrogated the evidence that was adduced by the parties. The evidence of the appellant who was the widow of Joshua and the administrator of his Estate was consistent. To buttress her interests over the suit property, she produced several documents in support of her case including a copy of a title deed in Joshua’s name dated June 4, 1993, a sale agreement between Fredrick and Joshua dated April 11, 1993 and Joshua’s death certificate which showed that he died on March 17, 2006. The trial court discredited her case on two grounds; the vendor Fredrick and Okore Arek were not one and the same person and the transfer to Joshua was done hastily. Was that indeed proved?

28. The 1st respondent testified Okore Arek and Fredrick Okore Arek were two different people and that Fredrick was the son of Okore Arek. His evidence was rather contradictory and full of disparities. In his witness statement, he testified that he and his brothers agreed that he would administer his uncle Okore Arek’s Estate who had one property; the suit property. In his evidence in chief, he testified that Okore Arek was his guardian and uncle who had given him the suit property in the year 2005. Was it Okore Arek who gave him the property or was it as a result of an agreement between him and his siblings. Additionally, in his defence, he averred that Okore Arek died in the year 1992. Did he resurrect from his grave in 2005? Why did he not produce copies of the death certificates of Fredrick and Okore Arek to prove his case that they were not one the same person? In his counterclaim he averred that Okore Arek had 3 children; Margaret Akello (deceased), Fredrick and Mary Atieno Odhone while in his witness statement Fredrick was left out and instead Margaret Akello (deceased), George Okoro Arek and Mary Atieno Odhone were listed as his [Okore Arek] children.

29. The change of name transpired when the repealed registered *Land Act* was subsisting. Section 142 (2) thereof permitted a registered proprietor to change his name in the register. This provision of law stated thus;

“Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change”.

30. It is my humble view that the 1st respondent neither discharged prove that the said laid down legal procedure was not adhered to nor did he discharge prove that the Fredrick and Okore Arek were not one and the same person. In view of this, the court must ride on the accuracy of the record in the green card that Okore Arek and Fredrick Okore Arek were one and the same person.

31. Though Fredrick and Joshua effected the transfer on the very day that a change of name was effected, the 1st defendant in his amended defence did allude that the prerequisite consent was obtained from the Land Control Board by Fredrick and Joshua prior to the transfer. Further, he did not prove that the decision of Siaya Land Disputes Tribunal was ever adopted as a judgement of the court in accordance with sections 7 of the repealed *Land Disputes Tribunals Act*. It is my finding that the 1st respondent did not prove his case to the required standard.



32. I now turn to the appellant's case. Having found judgment for the 1st respondent, the trial magistrate did not address his mind on the appellant's case and this court is called upon to decide on the appellant's case. The green card of the suit property depicts Joshua's title document to the suit property was cancelled on November 15, 2010 pursuant to a gazette notice which was done after his demise and shortly thereafter, a title document was issued to the 1st respondent by way of transmission. Why was the title document of Joshua cancelled by the land registrar pursuant to a gazette notice yet pursuant to section 143 (1) of the repealed Registered Land Act an order of cancellation was a preserve of the courts? Whose estate was the 1st respondent succeeding? Where is evidence that the certificate of confirmation of grant was ever issued to him? Why did he gazette a loss of title document on November 5, 2010 yet he was not Joshua? Why was a title deed issued in the name of the 1st respondent instead of Joshua's? Why was it issued prior to the expiry of the requisite 60 days? I need not say more. These questions leave a lot to be desired. I find that the appellant proved her case against the 1st respondent to the required standards. However, she did not join the land registrar in the proceedings and for that reason, she did not prove her case against the 2nd respondent and I dismiss her case against the 2nd respondent.
33. Based on the reasons given, I ultimately find this appeal merited and because costs follow the event, I award the costs of this appeal to the appellant and hereby set aside the entire judgment and decree of the trial magistrate and in its place, I substitute it with a judgment in favour of the appellant in the following terms;
- a. The Land Registrar, Siaya is hereby directed to revoke/cancel the title deed in the 1st respondent's name and register the name of Joshua Omondi Obuor as proprietor of North Gem/Siriwo/202.
 - b. The 1st respondent shall vacate land parcel North Gem/Siriwo/202 within 60 days from the date of service of the orders of this court or be evicted therefrom in accordance with the relevant provisions of section 152 of the Land Act.
 - c. An order of permanent injunction be issued against the 1st respondent by himself, his agents and or servants or any other person claiming through him from cultivating, remaining on, or invading and or in other manner whatsoever interfering with land parcel North Gem/Siriwo/202.
 - d. Costs of the trial court suit and counterclaim are awarded to the appellant.

DELIVERED AND DATED AT SIAYA THIS 13TH DAY OF OCTOBER 2022.

HON. A. Y. KOROSS

JUDGE

13/10/2022

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

In the Presence of:

Mr. Kowinoh for the appellant

Mr. Magisa h/b for Mr. Ochanyo for the 1st respondent

Court assistant: Ishmael Orwa

