



REPUBLIC OF KENYA



**Amolo & another v Oluwaso & 2 others (Environment and Land Appeal
16 of 2021) [2022] KEELC 13391 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13391 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIIAYA
ENVIRONMENT AND LAND APPEAL 16 OF 2021
AY KOROSS, J
OCTOBER 6, 2022**

BETWEEN

JUMA PAUL AMOLO 1ST APPELLANT

FREDRICK ONYANGO 2ND APPELLANT

AND

LUCIA ACHIENG OLUWASO 1ST RESPONDENT

ANDREW ODHIAMBO OLWASO 2ND RESPONDENT

DOMINIC OUMA AMOLO 3RD RESPONDENT

*(Being an appeal from the judgment of the Principal Magistrate Honourable
L. Simiyu delivered on 10/02/2021 in Siaya ELC Case Number 52 of 2018)*

JUDGMENT

Background of the appeal

1. The gravamen of the appeal is on land parcel number Uholo/Asango/115 (“suit property”) which is registered in the name of the 2nd appellant and previously was registered in the name of the 1st appellant who is his father. The 1st appellant’s registration was a 1st registration.
2. The genesis of this appeal can be found in a plaint dated November 14, 2011 that was filed by the 1st respondent. It was the 1st respondent’s case that the suit property was her ancestral home. It was her case that her great grandfather one Ayidha Otieno (“Ayidha”) invited the 1st appellant’s father one Amolo Paulo (“Amolo”) to the area and gave him a portion of Uholo/Asango/288 (“288”).
3. That the 1st appellant’s mother cultivated the suit property and merely held it in trust for her lineage including the 1st respondent. The 1st respondent never objected to this utilization. In 2007, the 1st respondent’s son Andrew Odhiambo Oluwaso (“Andrew”) established a home on the suit property.



When he conducted an official search in the year 2008, he found out that the suit property had during the 1st registration been registered in the name of the 1st appellant and subsequently transferred it to the name of the 2nd appellant. Andrew registered a caution over it which was subsequently removed by the land registrar.

4. She asserted that the appellants had never been the descendants of Ayidha and their registration over the suit property was fraudulent. She averred that during the adjudication process, the 1st appellant took advantage of the illiteracy of the original owners and colluded with officials at the lands' registry who effected the 1st registration in his name.
5. She sought *inter alia*, (i) a declaration that the 1st appellant did not acquire proper title to the suit property and (ii) an order be directed to the land registrar, Siaya to cancel the registration of the suit property and restore it to her as a trustee.
6. The 1st and 2nd appellants entered appearance and filed an amended defence and counterclaim dated May 24, 2013. They denied the averments made in the plaint and contended that the suit property was on 1st registration registered in the name of the 1st appellant who subsequently transferred it to the 2nd appellant. The appellants also stated that all the parties reside on 288. The appellants averred that the suit property was given to the 1st appellant by his father Amolo.
7. In the counterclaim, the 2nd appellant sued Andrew and Dominic Ouma Amolo ("Dominic") for trespass over the suit property; they had constructed houses on it. He contended that he had sought for their eviction vide Siaya Land Disputes Tribunal Case No Siaya/75/2011 ("Tribunal") in which he was successful. However, the court could not adopt it in Siaya SRMC Land Case No 109 of 2011 because the [Land Dispute Tribunal Act](#) had been repealed. He prayed for their eviction and costs of the suit and counterclaim.
8. In her reply to amended defence and defence to counterclaim dated November 12, 2012, the 1st respondent reiterated the averments made in her plaint and prayed that the appellants' amended defence be struck out and counterclaim be dismissed with costs.
9. After the parties had testified and closed their respective cases, the trial court in its judgment found *inter alia*, that the registration of the appellants as proprietors was not without challenge and the 1st respondent's actual occupation and possession was recognized and protected by section 30 (f) of the [Registered Land Act](#). She granted the 1st respondent the reliefs sought in her claim. She found the defence and counterclaim weak because the appellants had failed to demonstrate how they acquired it.

Appeal to this court

10. Dissatisfied with the above judgment, the appellants filed a memorandum of appeal dated March 9, 2021 in which they raised 11 grounds. Upon appraising the grounds, it is my considered view that they can be condensed as follows;
 - a) The learned magistrate erred in law and fact by failing to consider the parties submissions; and
 - b) The learned magistrate erred in law and fact by failing to appreciate the totality of the evidence that was before her.

The appellant sought the following reliefs; the appeal be allowed with costs, the lower court judgment be set aside and the judgment be substituted with judgment as sought in the counterclaim.



The appellants' submissions

11. The appellant's counsel Mr Nyanga filed his written submissions dated May 20, 2022. He identified one issue for determination; whether the appellants proved that they were the true owners of the suit property.
12. Counsel submitted that allegations of fraud required a standard of proof that was higher than a balance of probabilities but lower than beyond reasonable doubt. He asserted that the 1st respondent had failed to meet this threshold. Counsel relied on the case of *Ulmila Mabindra Shab v Barclays Bank International and another* [1979] KLR where the court stated that fraud had everything to do with one's state of mind and intentions and not the outcome of actions.
13. He asserted that from evidence adduced before the trial court, the 1st respondent did not lead evidence that the suit property had never been in possession of the 1st appellant and that from the record, the appellants had asserted their rights over the suit property and that their patriarch Amolo had acquired it by way of purchase.
14. He submitted that the 1st appellant had acquired the suit property from Amolo who had himself bought it from Mbaya Nywende ("Mbaya") who had similarly bought it from the 1st respondent's husband Oluwaso Oduol ("Oluwaso") who acquired it from his father Oduol Okere. He asserted that the 2nd appellant had therefore legally acquired the suit property.
15. Counsel submitted that at the time of filing suit, the applicable law was the repealed *Registered Land Act* and pursuant to section 28 of the repealed *act*, the title document of the 1st appellant as the 1st registered owner was indefeasible except as provided for under the act.

The 1st respondent's submissions

16. By the firm of Amondi & Co. Advocates, the 1st respondent filed undated written submissions on June 6, 2022. Counsel identified five issues for determination; (i) whether the 1st appellant fraudulently registered the suit property in his name (ii) whether the 2nd appellant obtained a good title over the suit property (iii) whether the 1st respondent was entitled to remedies sought (iv) whether the 1st respondent was entitled to reliefs sought and (v) who should bear costs.
17. Counsel submitted that the 1st appellant had neither proprietary nor beneficial rights over the suit property. That the 1st appellant had failed to produce any evidence that the suit property was sold to him by a member of Ayidha's family; therefore, the suit property had been acquired fraudulently. Counsel averred that at the end of the day, the 1st appellant did not have good title to pass on to the 2nd appellant.
18. Counsel submitted that by virtue of section 26 of the *Land Registration Act*, absolute ownership as envisaged by section 24 of the same *Act* could be challenged on grounds of fraud, misrepresentation or where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme. Counsel urged the court to dismiss the appeal with costs.

Analysis and determination

19. This being a first appellate court, this court is reminded that the task at hand is to reappraise, reassess and reanalyse the evidence as asserted by the parties and to establish if the findings reached by the learned trial court should stand and give reasons if they do not. This court has power to frame issues it considers pertinent for the determination of a dispute between the parties. The Court of Appeal in



the case of *Ratival Gova Sumaria & another v Allied Industries Limited* [2007] eKLR expressed itself on the role of a 1st appellate court as follows:

“This being a first appeal we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor heard the witnesses – see *Peters v Sunday Post Ltd*[1958] EA 424. *Selle & another v Associated Motor Boad Co Ltd & others* [1968] EA 123 And *Ephantus Mwangi & another v Duncan Mwangi Wambugu*[1982-88] 1 KAR 278. In the last case *Hancox JA* (as he then was) put it thus at p 292 of the Report: -

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding he did.””.

20. Having considered the lower court record, the memorandum and record of appeal and the issues proffered by the respective counsel’s submissions, the court will decide on its condensed grounds of appeal.

a. The learned magistrate erred in law and fact by failing to consider the parties submissions;

21. *Black’s Law Dictionary*, 11th Edn, p 1724 which quoted PG Pagone, “Written advocacy; Writing with Effect and Persuasion,” in *Essays in Advocacy* 119,127 (Tom Gray et al.eds., 2012) described the intent of submissions as tools of mere persuasion. This position was succinctly captured by the Court of Appeal in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR where the court stated thus;

“Submissions cannot take the place of evidence... Such a course only militates against the law... submissions are generally parties’ “marketing language””

22. In its judgment, the trial court expressed itself thus;

“At the time of preparation of this judgment I did not benefit from submissions by either parties (sic). I have evaluated the evidence on record and draw the following conclusions;...”

23. Though the appellant’s counsel Mr Ochanyo informed the trial court on October 14, 2020 that he had filed his submissions, I have had an opportunity to scrutinise the entire trial court record and I have equally not stumbled upon the submissions.
24. The record of appeal bore the appellants’ and 1st respondent’s written submissions. The 1st respondent’s submissions were neither assessed nor stamped. On the other hand, the appellants’ submissions were duly assessed, stamp and receipted. If indeed the appellants’ submissions were duly filed, it obviously points to laxity on the part of court registry officials for failing to proffer the submissions to the trial court.
25. Bearing in mind that submissions are merely persuasive and not substantive, it is my considered view that their absence from the court record did not prejudice any party for two reasons; one, the trial court evaluated the evidence that had been tendered before it and two, the parties have had a chance before this court to put forth their submissions. It is my finding that in the absence of written submissions in the court record, the trial court did not err in law and fact by failing to consider them.



b. The learned magistrate erred in law and fact by failing to appreciate the totality of the evidence that was before her

26. The suit property was registered under the Registered Land Act (now repealed by the Land Registration Act, 2012). I agree with the appellants' counsel that when the suit was filed in the year 2011, the Registered Land Act was still in force, its repeal having come on May 2, 2012 when the Land Registration Act came into force. The trial court appreciated this when it stated as follows in its decision;

“The actual occupation and possession by the plaintiff is recognized and protected under section 30 (f) of the Registered Land Act”. Emphasis added

27. The Court of Appeal in the case Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another [2018] eKLR considered the effective date within section 2 of the Land Registration Act and the saving and transitional provisions under sections 105 (1) (a) (i), 106, 107 (1) 109 of the same Act and held thus;

“The rights and the liabilities that the parties were agitating had accrued and the suit before the learned judge was filed on May 31, 2002, long before the commencement of the Land Registration Act. It would follow, therefore, that by dint of the foregoing provisions, the learned judge should have applied provisions of the Registered Land Act, which was the law applicable to the suit property immediately prior to the commencement of the Land Registration Act. (See also Ashit Patani & 2 others v. Dhirajlal v Patani & 2 others, CA No 316 of 2014)”.

28. The 1st respondent in her claim pleaded that the 1st appellant took advantage of the illiteracy of the original owners and colluded with officials at the land's registry to effect 1st registration of the suit property to his name. In paragraph 14 of her claim, the 1st respondent pleaded and particularised fraud albeit with a typographical error in her claim.

29. Having established the applicable law in this appeal was the Registered Land Act (repealed). Did this repealed Act provide a window of opportunity for a party to plead fraud against a proprietor of land who had been registered during 1st registration? My answer is in the negative and I say so because the express provisions of this repealed Act recognised the indefeasibility of title that had been acquired during 1st registration. Section 27 of this repealed Act provided that the registration of a person as the proprietor of land vested in him the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto while section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act. Section 143 of the Act provided as follows;

“ 143.

- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had



knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.” Emphasis added.

30. The efficacy of section 143 was given judicial interpretation by the Court of Appeal in decision of *Joseph Marisin v Joseph Kibilat S Bargalliet* NKR Civil Appeal No 306 of 1997 which was cited with approval in the case of *Chacha v Mwita Manini* [2002] eKLR as hereunder;

“Quite clearly this section envisages that the title by way of a first registration is indefeasible even if obtained by fraud. This must be of necessity be so because the Land Adjudication Committee goes into all claims of ownership of the particular land prior to issuance of the first registration title. That is the law and a court of law cannot interpret the law otherwise than what it clearly lays down.”

31. The registration of the suit property was a culmination of ascertainment of customary rights pursuant to the *Land Adjudication Act*. It is the considered view of this court that it is paramount that it restates the intricate procedures that were undertaken under this particular Act which laid a basis for the rationale of sections 28, 29 and 143 of the *Registered Land Act*.
32. Once an area had been declared an adjudication area, a parcel of land would be demarcated, surveyed and recorded. It had elaborate opportunities within which a party would lodge a complaint. The land owners and government officials would be involved. There would be public publications with elaborate complaint mechanisms. The 1st complaint mechanism started with the district land adjudication committee (“LAC”) where an aggrieved party would challenge a recording. If one was dissatisfied with the decision of LAC, she would appeal to the land arbitration board (“LAB”). The section would then be published as complete. The publication would be displayed for inspection by various land owners. Any objection to the register would be raised and determined by the land adjudication officer (“LAO”). She would hear the parties and render her decision and registration index maps (RIM’s) would then be drawn. The LAO would then forward the original adjudication record together with a list of objections, maps and area list to the director of land adjudication and settlement. The director would amend the duplicate copy of the adjudication register so that it would tally with the original register. Once that was done, she would certify the adjudication as final subject to an appeal to the minister. The director would send the original adjudication register together with a list of all the appeals that had been lodged before the minister to the chief land registrar who would then cause registrations to be effected. If one had appealed to the minister, a restriction was registered to endure until determination of the appeal. An appeal to the minister was the final appellate mechanism.
33. Sections 28 (b) and 30 (g) provided a leeway to a party who had overriding interests of occupation and possession. Section 30 made provisions of overriding interest on a registered title as follows: -

“Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same without their being noted on the register –

- (a) ...
- (g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where an enquiry is made of such person and the rights are not disclosed”.



34. In my considered view, the trial court in its decision rightfully so addressed the 1st respondent's occupation and possession of the suit property albeit typographically citing "section 30 (f)" of the repealed Act instead of 30 (g). The trial court found thus;

"It is my finding that the defendants did not go this extra mile that is required of them and no adequate evidence was led to rebut the plaintiff's testimony that the plaintiff owned used and controlled the property".

35. In her pleadings the 1st respondent pleaded that the suit property had been left in her custody. She did not disclose who left it in her custody. She averred that the 1st appellant's mother Otieno Nyangacha ("Otieno") cultivated the suit property with permission from Oluwaso. In her pleadings she averred as follows;

"...during that period held the parcel in trust for the descendant of Otieno Nyangacha specifically the plaintiff...it was within the knowledge of the defendant and elders that the parcel belonged to Otieno Nyangacha and thereafter the plaintiff"

Without delving into the testimony of the parties, it is my humble opinion that the 1st respondent's pleadings were very forthright that the appellants' family had possessed and occupied the suit property and that Otieno and her descendants who included the appellants had a right to it. I am not certain the circumstances under which Otieno would have held the suit property in trust for the 1st respondent. Despite this glaring obviousness which may well settle the ground, I will analyse the respective testimonies that are on record.

36. The 1st respondent testified that Dominic and Andrew built houses on the suit property in the year 2007 and that the tribunal had found the suit property belonged to the 2nd appellant. Further, it was her testimony that Oluwaso had also gifted the family of one Amolo Otieno a portion of the suit property. In cross examination, she testified that she started cultivating the suit property upon her marriage to Oluwaso and that the appellants' family had only been given some portion to plant potatoes. She testified that she lived on 288 and that the appellant did not reside on the suit property. Her evidence was led by PW2 who corroborated her testimony that the appellants' family had utilised the suit property. PW3 testified that the 1st respondent had always utilised the suit property.

37. The 1st appellant testified that he had always cultivated the suit property and he had filed a suit before the tribunal against Andrew who had trespassed on it in the year 2008. The 2nd appellant testified that when he wanted to put up his house on the suit property in the year 2008, Andrew stealthily lodged a caution over it and constructed a house on it which culminated to him lodging a claim with the tribunal. In cross exam, he testified that Otieno had cultivated the suit property and his family had continued utilizing it in succession before interruption by Andrew.

38. The appellants and 1st respondent both contended that they had been in occupation and possession of the suit property. Whose testimony was credible? At the outset, the 1st respondent's pleadings admitted that it was common knowledge that Otieno owned the suit property before it was bequeathed to her. She did not disclose the testator. In her pleadings, she averred that Otieno held the suit property in trust for her [Otieno's] descendants. It was common ground that Otieno cultivated the suit property though there was contradiction on whether she cultivated the entire portion or a part of it. Otieno was the mother of the 1st registered owner; the 1st appellant. It was common ground that when Andrew trespassed on the suit property, the 2nd appellant lodged a claim before the tribunal. If Amolo Otieno had been given a portion of the suit property by Oluwaso as alleged by the 1st respondent why did the



1st respondent not call his son Dominic to testify? The 1st respondent's testimony left a lot to be desired and this leads to logical conclusion that the appellants and or their predecessors had been in occupation and or possession of the suit property. It is my finding that the court erred in finding otherwise and I find that the 1st respondent did not prove her case on a balance of probabilities.

39. In view of the foregoing, I find that the 2nd appellant is the registered proprietor of the suit property. It was common ground that Andrew and Dominic who are respectively the 2nd and 3rd respondents constructed houses on it without permission from the 2nd appellant who is the registered owner. It is obvious that their acts amounted to trespass. It is my finding that the 2nd appellant proved his case on a balance of probabilities. He did not seek general damages in his pleadings and consequently I shall not grant it.
40. Based on the reasons given, I ultimately find the appeal merited and because costs follow the event, I award the costs of this appeal to the appellants and hereby set aside the entire judgment and decree of the trial court and in its place, I substitute it with a judgment in favour of the appellants in the following terms;
- a) An order of eviction is hereby granted ordering the eviction of the 2nd and 3rd respondents from land parcel number Uholo/Asango/115.
 - b) The 2nd and 3rd respondents are granted 60 days from the date of service of the orders of this court to remove themselves and their developments from land parcel number Uholo/Asango/115.
 - c) An order of permanent injunction be issued against the 2nd and 3rd respondents by themselves, their servants or any other person authorized by them from encroaching, constructing, and/or trespassing on land parcel number Uholo/Asango/115.
 - d) Costs of the suit and appeal are awarded to the appellants.
 - e) Costs of the counterclaim are awarded to the 2nd appellant.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 6TH DAY OF OCTOBER 2022.

HON. A. Y. KOROSS

JUDGE

6/10/2022

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

In the Presence of:

Mr. Nyanga for the appellant

N/A for the respondents

Court assistant: Ishmael Orwa

