



REPUBLIC OF KENYA



KENYA LAW
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**Akoko v Akoko (Environment and Land Appeal E011 of 2021)
[2022] KEELC 14923 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14923 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E011 OF 2021
GMA ONGONDO, J
NOVEMBER 21, 2022**

BETWEEN

PAULINA AUMA AKOKO APPELLANT

AND

SAMSON NYANJA AKOKO RESPONDENT

(Being an appeal from the judgment of Hon. N. Mosei, Senior Resident Magistrate, delivered on 13th October, 2021 in Mbita Senior Resident Magistrate's Court Environment and Land Case No. 17 of 2019)

JUDGMENT

1. The present appeal arose from the trial court's judgment delivered on the 13th October, 2021 by the Honourable N. Mosei, Senior Resident Magistrate, in Mbita Senior Resident Magistrate's Court Environment and Land Case No 17 of 2019. The learned trial magistrate held, inter alia;

“It is apparent that registration of Lambwe West “B”/375 was done irregularly and unprocedurally.... In the premises, I find that the plaintiff has failed to prove her case as against the defendant. The upshot of this is that I hereby dismiss the plaintiff's case with costs to the defendant.”

2. The appellant namely Paulina Auma Akoko through the firm of Ogwe and Associates Advocates mounted the appeal by way of a memorandum of appeal dated 29th October 2021 and duly filed on 3rd November 2021. The Appeal is anchored on grounds 1 to 7 as set out on the face thereof and these include:
 - a. The learned magistrate failed to appreciate that the appellant herein is the first registered owner of parcel number Lambwe West “B” 375, pursuant to the land adjudication mapping.



- b. The learned trial magistrate erred in law and fact by failing to consider that Akoko Achach (deceased) despite being a polygamist, had died testate, having apportioned and bequeathed his rights over the unregistered parcel to each of his two wives. The land adjudication officers indeed granted his wishes by registering L.r. Lambwe West “B” 374 and 375 in the names of 1st and 2nd wives respectively.
 - c. The learned magistrate erred in law and fact by arriving at a finding that the appellant/applicant had failed to petition for letters of grant of administration intestate for the estate of Akoko Achach and yet the deceased had no property in his name.
 - d. The learned magistrate erred in law and fact by failing to invite the County Registrar Homa Bay to court to avail the Adjudication Register (AR) and/or the green cards for both the parcels as proof of ownership being the custodian of land records before arriving at the erroneous finding.
3. Wherefore, the appellant has sought the orders that the instant appeal be allowed and the proceedings and judgment of the trial court be quashed.
 4. The appeal was heard by way of written submissions pursuant to this court’s directions of 25th July 2022.
 5. Accordingly, the appellant’s counsel filed submissions dated 10th September 2022 on 20th September 2022 and compressed the grounds of appeal thus: whether or not the appellant ought to have undergone the process of succession. Counsel submitted, inter alia, that the suit land Lambwe West “B” 375 came into possession of the appellant by virtue of being given as a gift *intervivos* by her deceased husband, one Akoko Achach (deceased). That the same was registered in her name. That therefore, the appellant did not need to file any succession cause in the estate of her late husband. That further, the appellant’s deceased husband had no such property in his name capable of being succeeded. Counsel cited Sections 24 and 25 of the [Land Registration Act](#), 2012 (2016) as well as the case of [Waruingi Kamau v Karuga Kamau](#) (2008) eKLR, to buttress the submissions.
 6. Learned counsel for the respondent, P. R. Ojala and Company Advocates, filed submissions dated 13th October, 2022 on 18th October 2022. It was submitted that the appellant did not discharge the burden of proof at the trial court as stipulated under Section 107 of the [Evidence Act](#), Chapter 80 Laws of Kenya. That the appellant having procured registration of the title to herself illegally, the same should be nullified and ordered to revert to the Estate of the late Akoko Achach. Counsel relied on the case of [Dorothy Nelima Wafula v Hellen Nekesa Nielsen & Paul Fredrick Nelson](#) (2017) eKLR among other authoritative pronouncements, to fortify the submissions.
 7. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed thus:
 - a. Whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal;
 - b. Who should bear the costs of this appeal?
 8. I have carefully considered the parties’ respective pleadings, the trial court’s proceedings inclusive of evidence as well as the judgment of the learned trial magistrate. It is noteworthy that it is the duty of this court to reconsider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another v Associated Motor Boat Co. Ltd. and others* (1968) EA 123 and *Williamson Diamonds Ltd. v Brown* (1970) EA 1.



9. It must be noted that the suit was commenced by way of a plaint dated 14th October 2019 and filed in court on 23rd October 2019 for the following orders;
 - a. An order of eviction to compel the defendant to vacate the portion of the land parcel number Lambwe West 'B'/375 (the suit land herein).
 - b. An order of permanent injunction restraining the defendant, his servants, family members, workmen and agents from entering on the suit land, or from dealing in or cultivating the said piece of land, or erecting any structures thereon, or in any way interfering with the plaintiff's use and enjoyment of the said land without the plaintiff's consent.
 - c. General damages for trespass to land together with interest thereon.
 - d. Cost of this suit together with interest thereon.
10. PW1, Paulina Auma Akoko who was the plaintiff before the trial court (the appellant herein), testified on 17th February 2021. She stated that she is the registered owner of the suit land, having been issued with title to the same by the Land Registrar. That her husband died in 1974 after subdividing his land between his two wives. However, he did not process the titles thereto. She further stated that succession was not done on the estate of the deceased. She produced in evidence, a copy of title deed which was marked as PExhibit 1.
11. During cross-examination, PW1 stated that she got married to her deceased husband in 1972. That her husband is buried on the suit land. That following her husband's demise, the appellant and her co-wife, the respondent's mother, invited officers from lands officers who visited the land and processed titles for them. However, she did not have minutes of the meeting with the land officers. She admitted that they did not obtain consent from the Land Control Board to subdivide the land, neither did they sign transfer forms. She further admitted that her co-wife resides on the suit land, having found her there. That one of her co-wife's children, Barnabas Akoko (deceased) is buried thereon. That she has two children while her co-wife has many children.
12. PW2, Benard Ochieng Akoko, the appellant's son testified on 5th May 2021. He stated that his deceased father had two parcels of land, to wit, Lambwe West 'B'/375 and Lambwe West 'B'/374 which he gave the appellant and the respondent's mother respectively. That the appellant has built a home and made developments on the suit land. In cross-examination, PW2 stated that he was five months old when his father passed on. That he only realized the land had been sub-divided when he visited the land's office.
13. PW3, Beatrice Agutu Kisaka, also testified on 5th May 2021. She testified that she went to the lands office and discovered that the suit land belongs to the appellant. During cross-examination, the witness admitted that the respondent's mother lives on the suit land and the respondent has built a small hut thereon.
14. The defendant (respondent herein) in response filed statement of defence dated 13th October 2020 on 9th November 2020 denying all the claims in the appellant's plaint. He urged the court to dismiss the suit with costs to the defendant.
15. The defendant (DW1) testified on 9th June, 2021 that the land was initially registered in the name of his deceased father. That there has been no land adjudication nor sub-division of the suit land. He urged the court to issue orders directing them to file a succession cause in respect to their late father's property. He produced in evidence a copy of death certificate for Akoko Achachi, a copy of minutes of the meeting held on 16th June 2013 and letter from chief dated 22nd November, 2019 (DExhibits 1,



- 2 and 3 respectively). During cross-examination, DW1 averred that the registration of the two parcels of land was done irregularly.
16. DW2, Dalmas Adek Akoko, testified that there was no subdivision done on the land. In cross-examination, DW2 clarified that the appellant herein resides on the suit land together with the defendant and the defendant's mother.
 17. DW3, Lewnida Orwa Akoko, adopted her witness statement dated 27th October 2020 as her evidence-in-chief. During cross-examination, DW3 stated that her husband had only one piece of land and she does not know how the suit land, Lambwe West 'B'/375 came into existence.
 18. DW4, Lazaro Odhiambo Achache, testified that the land was not sub-divided by Akoko Achachi (deceased). That when the said Akoko died, he was interred in the suit land, adjacent to the first wife's house. That a dispute arose on the suit land and the family had a meeting and resolved to apportion the defendant a portion of the suit land on the right side, close to his mother's house. The appellant was also allocated a portion of the land on the left side. That the land had no title at the time. During cross-examination, DW4 stated that he does not know how title to the suit land was obtained.
 19. It is noted that the learned trial magistrate set out the parties' respective cases, framed twin 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. In arriving at the impugned judgment, the learned trial magistrate cited Section 45 (1) of the [Law of Succession Act \(supra\)](#) and observed at page 5 of the judgment, inter alia;

“...The plaintiff did not lead evidence to demonstrate that she had capacity to proceed with registration of the suit property without commencing succession proceedings. She did not produce a will or grant of representation and/or certificate of confirmation of grant...”
 21. The appellant contends that the learned trial court erred in making a finding that the title to the suit land was obtained fraudulently yet the validity of the same had not been challenged. The appellant testified at the trial court that following her husband's demise, she and her co-wife, the respondent's mother, invited officers from lands office who visited the land and processed titles for them. However, she did not have minutes of the said meeting with the land officers. She further admitted that they did not obtain consent from the Land Control Board to subdivide the land, neither did they sign transfer forms. How then was the appellant able to subdivide the land and cause title to the suit land to be issued in her name? Clearly, due process was not followed as held in the case of [Munyu Maina v Hiram Gitbiha Maina](#) (2013) eKLR.
 22. The respondent herein submitted, at the trial court, that the appellant obtained the title to the suit land through fraud as she did not involve her co-wife and other beneficiaries. That therefore, registration of the suit land is a product of an illegality and the title thereof is irregular, null and void.
 23. Notably, the appellant admitted that her co-wife (DW3) resides on the suit land, having found her there when she got married to the deceased. Further, that one of her co-wife's children, Barnabas Akoko (deceased) is buried thereon. PW3 also confirmed that the respondent's mother (DW3) and the respondent reside on the suit land.
 24. I therefore, endorse the learned trial magistrate's reasoning, particularly his finding that registration of the suit land was done illegally and unprocedurally. Therefore, any existing title in respect of the suit land is null and void being guided by [Munyu Maina case \(supra\)](#).



25. Sections 107 and 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.
26. So, did the appellant prove to the requisite standard, her case before the trial court? (See also *CMC Aviation Ltd. v Kenya Airways Ltd. (Cruisair) Ltd.* (1978) eKLR).
27. Bearing in mind the entire evidence on record in this matter, and applying the facts of the case as well as legal principles stated above, it is clear that the appellant who was the plaintiff before the trial court failed to prove her case on a balance of probabilities as noted in *Eastern Produce (K) Ltd- Chemoni Tea Estate v Bonfas Shoya* (2018) eKLR.
28. Thus, the finding of this court is that the learned trial magistrate's ruling is faultless at law. I hereby uphold the same.
29. Wherefore, the instant appeal commenced by way of a memorandum of appeal dated 29th October 2021 and duly filed on 3rd November 2021, is hereby dismissed with costs to the respondent.
30. Orders accordingly.

G.M.A ONG'ONDO

JUDGE

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

Present

1. Mr. A. Ogutu holding brief for Mr. Ogwe, learned counsel for the appellant
2. Appellant- present
3. Mr. Ojala, learned counsel for the respondent

