



**John v Ocharo & another (Environment and Land Appeal 4 of 2021)
[2022] KEELC 14813 (KLR) (16 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14813 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT AND LAND APPEAL 4 OF 2021

JM KAMAU, J

NOVEMBER 16, 2022

FORMERLY AT SENIOR RESIDENT MAGISTRATE'S COURT ELC CASE NO. 15 OF 2018

BETWEEN

OSUMO KAREMI JOHN APPELLANT

AND

GEORGE MORARA OCHARO 1ST RESPONDENT

DISTRICT LAND REGISTRAR AT NYAMIRA 2ND RESPONDENT

(Being an Appeal against the Judgment of Honourable A C Towett Senior Resident Magistrate, Nyamira delivered on December 4, 2019 by Hon A C Towett– SRM in the original Nyamira PMCELC Case No 35 of 2018 Consolidated with ELC Case No 15 of 2018)

JUDGMENT

1. This is an Appeal from the Judgment of Honourable A Towett (Mrs); Senior Resident Magistrate, in Nyamira Chief Magistrate's Court Suit No ELC 35 of 2018 consolidated with ELC Case No 15 of 2018 delivered on December 04, 2019.
2. According to the Complaint filed in court on October 03, 2018 by the Appellant herein on behalf of the Estate of Osumo Omwando, his biological father who died on May 16, 2018 the Deceased was the registered owner of the parcel of land known as L R No West Mugirango/ Bomabacho/330. The Appellant obtained the letters of administration *ad litem* to file suit on behalf of the Deceased's Estate on September 17, 2018. He avers that the 1st Defendant is a grandson to the late Mr Osumo and who now holds another Title Deed in respect of the suit property which was allegedly issued to him by the 2nd Respondent. The Appellant pleaded that there is no way the Deceased would have transferred the suit property to the 1st Respondent because the original Title Deed to the suit land was and is still intact and bears the name of the Deceased and that he was unwell for a long time prior to his death. The



Appellant's mother was buried on the suit land prior to the Appellant's father's death but at the time of filing this suit the remains of the Appellant's father were still lying in the morgue. He sought for: -

- a. Permanent injunction restraining the 1st Defendant, his servants, workers and all others whether or not deriving Title in him or any other persons from entering into or occupying or trespassing on or claiming title to or in any way buying, or selling or charging or mortgaging or allowing others to enter into or erecting any structures on or in any manner whatsoever occupying or dealing with title to LR No West Mugirango/bomabacho/330 in any manner.
 - b. A declaratory Judgment declaring that any title deed issued to the 1st Defendant by the 2nd Defendant and any other interest in the said land that has been purportedly issued to any other person other than Mr Osumo Omwando (Deceased) is null and void.
 - c. The 2nd Respondent to rectify the land register and reflect the late Osumo Omwando as the owner of Mugirango/bomabacho/330 and pave way for proper succession.
 - d. Costs of the suit.
3. On October 15, 2022, the 1st Respondent (the 1st Defendant in the lower court) filed a Defence and denied all the substantive averments of the Appellant apart from the descriptive ones. He claimed that it is his Title Deed that is genuine and that the Title Deed held by the Appellant's late father is 'irregular and improper' as the Deceased had already transferred the suit land to the 1st Respondent.
 4. The trial of the case commenced on September 19, 2019 before the Honourable Alice C Towett, Senior Resident Magistrate with the Plaintiff taking to the witness stand and adopting his written statement of September 24, 2018. He started by lamenting that the body of his late father was still lying in the mortuary at the time of the trial due to the dispute over the suit property. He testified that the 1st Respondent was/is his nephew, son to his sister. He produced a copy of the Title Deed to the suit land which had been issued on August 5, 1996 and registered in his father's (Osumo Omwando's) name. He also produced a copy of the search certificate dated May 23, 2019 showing the land to be in the name of George Morara Ocharo. He said that his father who started ailing in 2008 was living on the suit land until he died and had suffered memory loss for quite some time such that he could not even recognize any of his children. At the time the 1st Respondent claimed to have bought the land from the Appellant's father, the latter was not in his right mind. On cross-examination by Mr Soire, the Appellant said that his late father had 3 wives, Sigara, Ndege and Hellen (his mother). He said he did not have any evidence in court to show that his father had lost his memory. On re-examination, the Appellant said that the land was now registered in the name of the 1st Respondent who was issued with a Title Deed in 2009 and that the Deceased's family has all along lived on the suit land.
 5. PW2, Wilfred Nyakundi of Bomabacho sub-location testified that he knew the land to belong to the Deceased Mr Osumo who had preferred that the land be sub-divided among 4 of his sons before he lost his memory in 2008. On cross examination the village elder said that the Deceased was living in West Mugirang/B/850 and that the house on West Mugirango/ Bomabacho/330 was built after he passed but he could not understand how West Mugirango/ Bomabacho/330 was transferred.
 6. After the close of the Plaintiff's (Appellant's) case, the 1st Respondent took to the witness Box and adduced evidence to the effect that he bought West Mugirango/ Bomabacho /330 from the Appellant's father Mr Osumo and Mr Osumo's eldest son, Joseph Osumo in 2009. He then went to the Land Control Board with the Deceased and his children where he obtained consent to transfer the land to himself. He produced in court a copy of the Title Deed in his name and a copy of the search certificate also showing that the land belonged to him. He said that his mother was taking care of the land before he bought it and that after buying it he uprooted the trees thereon and constructed a house since there



- was none. He concluded his evidence in chief by saying that the Deceased had transferred the land to him.
7. On cross-examination, the 1st Respondent said that he didn't have a copy of the sale Agreement but that he bought the land from Joseph Osumo and the Deceased at Kshs. 500,000/=, and that the Deceased had handed over this piece of land to the first wife. He also said that he did not sign any transfer form. He was not aware that the Deceased had lost his memory and that he could not tell whether he paid any stamp Duty for the transfer but only transfer fees. But on re-examination the 1st Respondent said that he paid both transfer fees and stamp Duty.
 8. PW2 Joseph Morara Osumo Achoka testified that he was the late Osumo's son who had 2 wives and that the 1st Respondent is son to his sister. He substantiated that West Mugirango/ Bomabacho /850 belonged to the Appellant's mother where his father lived. He was allowed to sell West Mugirango/ Bomabacho /330 by his father because he didn't want to live there and he later sold the land to the 1st Respondent and finally that his father was supposed to be buried on West Mugirango/ Bomabacho /850 since he had already sold West Mugirango/ Bomabacho /330.
 9. On cross examination, Mr Achoka said that he did not want to live on West Mugirango/ Bomabacho/330 because his mother was not recognized. He said that the purchase price, Kshs 500,000/= was paid to Mzee Osumo and that he didn't bring to court a copy of the Sale Agreement. He said he did not know the cause of his father's death but that he went with him to the Land Control Board for consent and he was given the purchase price by his father which was paid in 2 instalments.
 10. The last witness, Charles Mutua, the Land Registrar, Nyamira came to Court and said that he had the records for West Mugirango/bomabacho/330 parcel file. He said that from his records the land was first registered on December 20, 1972 in the name of Osumo Omwando who transferred the land to George Morara Ocharo on November 18, 2009. He also said that he did not get time to find the transfer documents. The Land Registrar was then stood down at this juncture in order to get transfer documents. When he came back to Court, he produced a copy of the minutes of the Land Control Board dated November 6, 2009 and a copy of the consent issued to Morara Ocharo dated November 6, 2009. The Registry presentation is dated November 5, 2009. However, he could not find the transfer forms and he also stated that initially Land Registrars used not to insist on the surrender of the Title Deed before issuing a new one on transfer but things have now changed. The Title Deed later stood surety for someone in a criminal case and that the presentation book shows that the transfer is missing and that the transaction was paid for on November 18, 2009 and receipted. This is the evidence that was adduced in court.
 11. In her Judgment, the trial Magistrate found that the Appellant never tendered any evidence or proof of fraud on the part of the 1st Respondent, that there was consent in respect of the transfer, that the Appellants' witness No PW2 contradicted himself while trying to establish where the Deceased was living at the time of his death and that there was no evidence of the loss of memory by the Deceased. The Trial Magistrate in dismissing the suit opined that since the Land Registrar testified that the Lands office did not require the parties to surrender the old Title Deed before issuing a new one then failure to surrender the old Title Deed was not a perpetration of fraud. The Court also failed to consider the counter-claim advising the Appellant to file a separate suit for determination. The Trial Magistrate also dismissed the Appellants' prayer that the remains of the late Osumo Omwando be interred on the suit land i e West Mugirango/bomabacho/330.
 12. The grounds of Appeal were framed are as follows:



1. The Learned Magistrate erred in law and fact by finding that the Respondent herein is the rightful and legal owner of the parcel of land known as West Mugirango/bomabacho/330 whereas the Respondent failed to dispense his burden of proving how he acquired the Title.
 2. The Learned Magistrate erred in law and fact by failing to consider that the suit property, Osumo Omwando (Deceased) first registered owner in Title to the parcel of land known as West Mugirango/bomabacho/330 could not pass good Title since at the time of the alleged sell and transfer he was not of sound mind and disposition.
 3. The Learned Magistrate erred in law and fact by finding the Respondent herein to be the lawful and registered owner of the parcel of land known as West Mugirango/bomabacho/330 without the Respondent producing any document proving the alleged purchase of the land.
 4. The Learned Magistrate erred in law and fact by disregarding the both the Appellant and the 1st Respondent had Title Deeds to the parcel of land known as West Mugirango/bomabacho/330 and that the Appellant was the one registered first and that there was no prove of transfer to the 1st Respondent.
 5. The Learned Magistrate erred in law and fact by failing to find that the 1st Respondent fraudulently transferred the parcel of land know as West Mugirango/bomabacho/330 in his favour and that the Title Deed was acquired through a corrupt scheme.
13. In re-appraising the evidence tendered in the lower Court, the Court will however bear in mind and take account of the fact that it does not have the advantage that the trial court had of hearing and seeing witnesses as they testified. As a general rule therefore, the Court will not interfere with the findings and conclusions of the Trial Court unless it is satisfied that they are based on no evidence or on a misapprehension of the evidence or that the Trial Court is demonstrably shown to have acted on wrong principles of law in reaching the findings it did. I therefore take the entire evidence as what was adduced in Court. I will therefore concentrate on the principles applied in reaching the findings by the Trial Court.
14. To begin with the Court was wrong in not giving a verdict on the counter-claim. The same ought to have been considered and advising the parties to file a separate suit for determination was wrong.
15. When considering the ownership of land in every dispute, the starting point is Sections 24 and 25 of the [Land Registration Act](#) which provide as follows:
- Section 24
- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
- Section 25
- i. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all



privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

16. On the first ground of Appeal, I have profusely agonized over part of the evidence adduced before the lower Court by the Land Registrar, Nyamira, Mr Mutua:

".....when land is transferred the original Title has to be surrendered. However, some land Registrars before 2010 did not use (sic) to surrender. However, since 2011 we have Practice Directions which require that the Title Deed be surrendered before a new one is issued....."

17. In her Judgment the Trial Magistrate went ahead to hinge her dismissal of the Appellant's suit on the strength of the above assertion as follows:

".....The Land Registrar told the Court that before the year 2010 the Land Registrars did not require the sellers to surrender the Title Deed upon selling land. That in recent time it is now a requirement to surrender the seller's Title Deed after selling the land....."

18. My problem with the position taken by both the Trial Magistrate and the Land Registrar that initially Land Registrars used not to insist on the surrender of the Title Deed before issuing a new one stems from Section 26 (1) of the [Land Registration Act](#):

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (Emphasis mine)."

19. This Section in my view imposes a requirement that prior to issuing a new Title Deed, the old Title Deed ought to be surrendered at the Lands Office and the same cancelled. If the same is not available, the Land Registrar is required to gazette it as lost or revoked. Besides, no reasons were indicated as to why the said Title Deed was not surrendered. In this case however, the Land Registrar proceeded to issue a new Title Deed without either receiving and cancelling the old one, gazetting it as lost, or indicating any reason as to why it was not surrendered. This is a recipe for fraud. The Land Registrar was required to halt the transfer process and require that the old Title Deed be surrendered to him for cancellation. The actions of the Land Registrar in processing a new Title Deed in disregard to the standard procedure and requirements and without any valid reason whatsoever amounted to fraud and it doesn't matter whether the beneficiary was party to it or not.



20. The issue I have with the position taken by the Land Registrar, Mr Mutua, who seems to suggest that before the Practice Directions were given it was lawful to issue a new Title Deed without demanding that the old one be surrendered is as follows, since the law allows the production of a Title Deed as prima facie evidence of ownership, doesn't this outlaw the issuance of more than one Title Deed in respect to the same parcel of land at any given time. My argument seems to be supported by Justice A O Ombwayo in the Environment and Land Court at Kisumu in the case of *Serfina Owidi Dodo v Carolyn Apundo* [2020] eKLR ELCA no 18 of 2016 where the Judge held that:
- ".....The fact that the appellant title deed was issued when another title was subsisting is in itself evidence of an irregularity that borders on fraud. It is illegal to issue a title deed without the surrender of a subsisting one. Secondly, without an instrument of transfer, real property can't be conveyed to another person.....The upshot of the above is that the Honourable trial Magistrate did not err in finding that the transfer of the property was whimsically done without a transfer instrument and without a surrender of the initial title deed.."
21. The second Ground of Appeal fails for want of production of documents to show that the late Osumo Omwando, the first registered owner of Title No West Mugirango/ Bomabacho/330 was at the time of the alleged sale and transfer not of sound mind and disposition.
22. On Ground number 3, the Land Registrar Mr Mutua admitted that:
- ".....I did not find the transfer forms... the production book shows that the transfer is missing. It is not normal for the same parcel of land to have two separate names".
23. The 1st Defendant did not also produce a copy of the sale agreement and he testified that he did not sign the transfer forms. He also claimed in cross-examination that Mzee Osumo Omwando gave him the Title Deed but he does not know whether he paid any stamp duty for the transfer. He was also not given any copy of transfer forms. How could he have been given the Title Deed by Osumo Omwando, the initially registered owner of the suit land, when the Title Deed was still in the latter's custody.
24. Secondly, he testified that the land was sold to him by the late Mzee Osumo Omwando and the latter's son Joseph Morara Osumo Achoka. The land belonged to Osumo Omwando and not Mr Achoka. The said Mr Achoka testified as follows:
- ".....We sold the land in question to 1st defendant. The money (Kshs 500,000/=) was paid to Mzee Osumo. I have not brought the sale agreement.....The money was paid in two instalments...Mzee gave me the money...."
25. This is clear evidence that the land was not sold by the original owner, Mzee Osumo Omwando since he is not the one who received the purchase price. What business did Mr. Achoka have in the whole transaction? He was not the registered owner of the suit land. This gives credence to the Plaintiff's case that the late Mzee Osumo never sold the land to the 1st Defendant and this explains why the initial Title Deed is still intact. Mr Achoka must have been in control of the entire process of transfer and should it be that the late Osumo ever appeared at the Land Control Board, he must have been dragged there.
26. It is interesting to observe that Mr. Achoka says that he did not know what ailment or cause his father Mr Osumo died of and where his step-mother Ndege was buried yet he is the first born of the late Osumo.



27. Grounds numbers 4 and 5 have already been addressed when considering the 1st Ground and I do not need to replicate my findings on the same.
28. In the premises, the Appellant's Appeal dated December 28, 2022 succeeds on all grounds in the Memorandum of Appeal save Ground Number 2. The upshot of the foregoing is that the Judgment of the Honourable A C Towett, Senior Resident Magistrate, Nyamira delivered on December 4, 2019 and all consequential orders issued in Nyamira PMCC ELC Case No 35 of 2018 are hereby set aside and overturned and the same substituted with the following Judgment:
- a. A Permanent injunction is hereby issued restraining the 1st Respondent, his servants, workers and all other persons deriving Title from him from entering into or occupying or trespassing on or claiming Title to or in any way selling or charging or mortgaging or allowing others to enter into or erecting any structures on or in any manner whatsoever occupying or dealing with Title to LR No West Mugirango/bomabacho/330 in any manner.
 - b. A declaration is hereby issued declaring that any Title Deed issued to the 1st Respondent by the 2nd Respondent and any other interest in the said land that has been purportedly issued to any other person other than Mr Osumo Omwando (Deceased) is null and void.
 - c. The 2nd Respondent do rectify the land register in respect of L.R Mugirango / Bomabacho/330 to read the name of the Appellant herein as the proprietor of the same to hold the same in trust for the Estate of the late Osumo Omwando pending the Succession and distribution of the Estate of the late Osumo Omwando.
 - d. I also award the Costs of this Appeal and that of the suit in the lower Court to the Appellant.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 16TH DAY OF NOVEMBER 2022.

MUGO KAMAU

JUDGE

In the Presence of:-

Court Assistant: Sibota

Appellant: Ms Akinyi

Respondent: Mr Soire

