



Wadegu v Weda (Suing as the Official of Obiny Group) & another (Environment and Land Appeal E036 of 2023) [2025] KEELC 4148 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E036 OF 2023**

**E ASATI, J
MAY 29, 2025**

BETWEEN

VITALIS AJUMBO WADEGU APPELLANT

AND

**GEORGE OTIENO WEDA (SUING AS THE OFFICIAL OF OBINY
GROUP) 1ST RESPONDENT**

COUNTY LAND REGISTRAR - KISUMU 2ND RESPONDENT

*(Being a first appeal from the decision, judgement and decree of the Hon.
K. Cheruiyot, Senior Principal Magistrate delivered on 02. 11. 2023 at the
Chief Magistrate's Court -Environment and Land Case No. 53 of 2019)*

JUDGMENT

Introduction

1. The Appellant and the Land Registrar Kisumu were the 1st and 2nd Defendants in Kisumu CMC EL CASE No.53 of 2019 (the suit). The record of appeal shows that they had been sued by the 1st Respondent herein vide the plaint dated 7th May 2019 over a parcel of land known as Kisumu/Kapuonja/2428 which had allegedly been sub-divided to create Kisumu/Kapuonja/2828 and 2829. The 1st Respondent filed suit as an official of and on behalf of an entity known as Obiny Group. The 1st Respondent sought for orders of a declaration, rectification of register, permanent injunction and costs of the suit.
2. In response to the claim the appellant filed Statement of Defence and Counterclaim dated 11th June 2019 vide which he denied the 1st Respondent's claim and by way of counterclaim sought for an order of permanent injunction, an order lifting a caution registered on land parcel No. Kisumu/Kapuonja/2829 and cost of the suit.



3. The record shows that the suit was heard before the trial court which vide the judgment delivered on 2/11/2023 found in favour of the 1st Respondent and made orders that sub-division of land parcel number Kisumu/Kapuonja/2428 into the resultant parcels was illegal, null and void and should be cancelled and that as a result the title should revert to its original parcel number Kisumu/Kapuonja/2428 in the name of Obiny Group. The court allowed the 1st Respondent's claim with costs.

The Appeal

4. Aggrieved by the judgment, the Appellant filed the present Appeal vide the Memorandum of Appeal dated 24th November 2023 and sought for orders that the decision, judgment and decree of the learned trial Magistrate be set aside and, in its place, the 1st Respondent's suit be dismissed with costs and the appellant's counter-claim allowed with costs and that the 1st Respondent be ordered to pay costs of the appeal.

Submissions

5. Pursuant to directions taken by consent on 24th June, 2024, the appeal was disposed of by way of written submissions. It was submitted on behalf of the Appellant that the plaintiff did not produce any document to prove that he was an official or member of the Obiny Group.
6. That the parcel of land could only be classified as community land as provided in Article 63 of *the Constitution* and the *Community Land Act*. That no minutes were brought to court to prove that the 1st Respondent was in fact a Secretary to the Group and that the group had actioned him to move to court as their representative.
7. Relying on the provisions Order 1 Rule 8 of the Civil Procedure Rules Counsel submitted that there's no evidence that notices were given and whether the other members commissioned the suit.
8. Counsel also referred to order 1 Rule 13 of the Civil Procedure Rules and submitted that the 1st Respondent did not offer proof that he had authority of the group to present the suit. That the plaintiff therefore lacked locus standi to bring the suit. That the 1st Respondent did not prove the allegations of fraud. Relying on the Supreme Court case of Pet No.17 (E021) of 2022 consolidated with Petition No.24 (E027)- Zehrabanu Janmuhammed (SC) (suing as the executrix of the estate of the late H.E Daniel Toroitich Arap Moi & Another -vs- Nathaniel K. Lagat and 4 others.
9. Counsel submitted that the history of a parcel of land is a factor to be considered by the court. That the 1st Respondent's claim was time barred as he was aware that the property had been sub-divided and that the appellant had had possession in the year 2006.

Submissions by the 1st Respondent

Written submissions dated 3rd February 2025 were filed on behalf of Omondi Abande & Company Advocates.

10. On whether the 1st Respondent had locus standi to institute the suit counsel submitted that the 1st Respondent brought the suit in his capacity as the Secretary of the Obiny Group which he described to be a family group. That at no stage did the appellant during the proceedings contest that the 1st Respondent was a member of the Obiny Group or that the suit land parcel number Kisumu/Kapuonja/2428 was registered under the name of Obiny Group.



11. Counsel relied on the case of Bahola Mkalindi Rhingho –vs Michael Seth Kaseme and Others (2012)eKLR and submitted that the 1st Respondent had locus standi.
12. On whether or not the 1st Respondent proved his case before the trial court on a balance of probabilities, Counsel relied on the provisions of Section 107 and 109 of the Evidence Act and section 24(a) of the Land Registration Act and submitted that there was sufficient evidence provided by the 1st Respondent proving that the Obiny Group was the registered owner and that in line with section 26 the title of the appellant ought to be revoked as the same was acquired by fraudulent means.
13. That the appellant acknowledged that the individuals who sold him the land were not affiliated to Obiny Group and thus were not the rightful owners of the land and had no legal claim on it. Counsel urged the court to dismiss the appeal with costs.

Issues for determination

14. Although the appellant presented 6 grounds of Appeal namely: -
 - a. The Learned Trial Magistrate erred in fact and law in finding and holding that the Appellant had fraudulently obtained title to land parcel number Kisumu/Kapuonja/2829 and erred in cancelling the Appellant’s title to the said parcel of land.
 - b. The Learned Trial Magistrate erred in fact and law in finding and hold that the 1st Respondent had proved his case based on fraud as against the Appellant and the learned trial Magistrate misconceived the law pertaining to fraud and the requisite standard of proof, in respect of claims and/or allegations of fraud. Consequently, the finding and holding of the learned trial Magistrate on burden and standard of proof, was erroneous and/or misconceived.
 - c. The Learned Magistrate erred in law and fact by failing to find that the 1st Respondent had not proved that he was a member of the Obiny Group thus lacked the locus standi to institute the suit against the Appellant.
 - d. The Learned Trial Magistrate erred in fact and law, in finding and holding that the 1st Respondent’s suit was proven on a balance of probabilities, which was properly direct and/or address his judicial mind to the incidence and standard of proof.
 - e. The Learned Trial Magistrate failed and/or neglected to cumulatively and/or exhaustively evaluate the entire evidence (both oral and documentary) on record and hence arrived at an erroneous and slanted conclusive, contrary to and in contradiction of the evidence or Record.
 - f. The Learned Trial Magistrate erred in law and fact by believing in each allegation stated by the Respondents against the Appellant yet the said allegations were not proved to the required standard by the respondent. All that was stated never proved and neither was it substantiated with any documents as it’s required by law, vide his submissions, the appellant compressed the grounds into 3 substantive issues for determination in the appeal namely: -
 - a. Whether or not the 1st Respondent proved that he was a member of the Obiny Group and whether he had locus standi to institute the suit.
 - b. Whether the 1st Respondent proved to the required standard that the appellant had acquired title to the suit land No, 2829 fraudulently and if so whether the trial Magistrate was right in cancelling the title.
 - c. Whether in the history of the land the conduct of the parties is material.



d. Costs of the appeal.

Analysis

15. This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. See section 78 of the *Civil Procedure Act* and *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123) where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.
16. The first ground of appeal is whether or not the 1st Respondent proved that he was a member of the Obiny Group and whether he had locus standi to institute the suit.
17. The 1st Respondent pleaded in the plaint that he was suing in his capacity as the Secretary of Obiny Group in whose name at all material times, the suit land parcel number Kisumu/Kapuonja was registered.
18. In his testimony, Vide the witness statement dated 7/5/2019, he stated that he was the Secretary of the registered proprietor of the suit parcel of land. He produced among his exhibits a letter dated 13/11/2019 written by the Assistant Chief concerning List of Dependents of Obiny Group. The assistant chief listed the said dependents and the 1st Respondent was included as No. 5 on the list.
19. There is no indication on the letter that the 1st Respondent was a Secretary of the Obiny Group. On Cross examination, the proceedings show that the 1st Respondent stated that he had been the Secretary of the group since the year 2003, that the group is not registered, that the land was family land and each family had its portion. He listed the families that owned the land. He further stated that he had authority to sue on behalf of the group.
20. The appellant's case concerning this issue was as pleaded in paragraph 10 of the Defence and Counterclaim that the 1st Respondent had no locus in the suit and no authority to institute the suit.
21. In his testimony, the appellant stated that Obiny group was not registered. That the land was under an amorphous group called Obiny Group.
22. The trial court made no finding on the issue of locus standi or whether the 1st Respondent had proved that he was a member of Obiny Group.
23. The appellant faults the court for this and holds that the trial court erred in law and fact by failing to find that the 1st Respondent has not proved that he was a member of the Obiny Group thus lacked the locus standi to institute the suit against the appellant.
24. The burden of proof as provided in Section 107, 108 and 109 of the *Evidence Act* rested with the 1st Respondent/plaintiff to prove on a balance of probabilities that he had locus standi to bring the suit.
25. Obiny Group was said to be a group of related members of families, it was not a registered organization/society. A party bringing suit on behalf of others needs to demonstrate locus standi by exhibiting authority of the people he claims to act for in terms of order 1 Rule 13 of the Civil Procedure Rules. In this case no evidence was adduced as to whether the members of Obiny Group had authorized the 1st Respondent to bring the suit.



26. The trial court erred in law in failing to address its mind to it. The 1st Respondent did not prove that he had the locus standi to bring the suit and on that ground alone the suit was defective and fit for striking out.
27. The next issue for determination is whether or not the 1st Respondent proved to the required standard that the appellant had acquired the title to the suit land No, 2829 fraudulently and if so whether the trial Magistrate was right in cancelling the title.
28. The 1st Respondent's case in the plaint was that in November 2015, he discovered that the original parcel number 2428 had been sub-divided into 2 parcels illegally and fraudulently. That he discovered further that the new parcels were Kisumu/Kapuonja/2828 registered in the name of Obiny Group and Kisumu/Kapuonja/2829 registered in the name of the appellant. In paragraph 8 of the plaint the 1st Respondent itemized the particulars of fraud and misrepresentation as by the Respondent as; illegally sub-dividing the plaintiff's parcel of land, illegally transferring the said parcel of land to the Defendant (Appellant) without following due process of the law, illegally acquiring the plaintiff's interest in the land without his consent, authorizing to sub-division without the consent of the Land Control Board and authorizing transfer without the consent of the land Control Board.
29. In his testimony, he reiterated the contents of the plaint and stated that he informed the clan elder and group members of his discovery and that the matter was reported to the area Assistant Chief and the Land Registrar then placed a caution on the land.
30. The appellant on his part vide his statement of defence and counterclaim denied the 1st Respondent's claim and averred that he was the bona fide lawful owner of L.K. Kisumu/Kapuonja/2829. That he bought his land parcel number Kisumu/Kapuonja/2829 measuring 0.48 Ha from Margaret Okech Arege and her first-born son Philip Ogima Arege being shares from the Olwango's.
31. The testimony of the 1st Respondent was that the sub-division was fraudulent. The green card produced showed that land parcel No. 2428 was registered in the name of Obiny Group on 11/3/2013 the title was closed on sub-division of the land to produce parcel No 2828 and 2829.
32. Although the 1st Respondent complained that the sub-division was unlawful, he produced mutation form that showed that the sub-division was done by Obiny Group. He also produced a letter of consent of the Land Control Board for sub-division of the land.
33. The 1st Respondent did not produce any evidence of fraud hence fraud was not proved.
34. The law requires that fraud be specifically pleaded and proved to the required standard. The standard of such proof is proof beyond the usual standard of proof in civil cases of a balance of probabilities. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
35. The grounds upon which title to land can be cancelled under section 26 of the *Land Registration Act*, were not been proved.
36. As no fraud was proved, there was no basis for cancellation of title. The next issue for determination is whether or not the appellant proved his claim as contained in the counter claim.



37. On the basis of the document placed before the trial court, I find that the appellant proved his claim. He produced documents showing the process through which he acquired the land. He produced the title deed, compensation agreement between him and KPLC among other documents.
38. The court finds that the appeal has merit and hereby allows it in the following terms;
1. The judgement of the trial court is hereby set aside and replaced with a judgement in the following terms;
 - a. The 1st Respondent's suit is dismissed with no order as to costs.
 - b. Judgement is entered in favour of the appellant on the counterclaim for:
 - i. An order of permanent injunction restraining the 1st Defendant (1st Respondent herein) from interfering with the appellant's occupation of land parcel No. Kisumu/Kapuonja/2829.
 - ii. AN order lifting the caution registered by the 2nd Defendant (2nd Respondent herein) on land parcel number Kisumu/Kapuonja/2829.
 - iii. Costs of the counter claim.
 2. Costs of the appeal are awarded to the appellant.

Orders accordingly.

JUDGMENT DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 29TH DAY OF MAY 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Kouko for the Appellant.

Raburu for the 1st Respondent.

No appearance for the 2nd Respondent.

