



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndege v Oyugi & 3 others (Environment and Land Appeal 41 of 2021)  
[2022] KEELC 15381 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15381 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 41 OF 2021  
GMA ONGONDO, J  
DECEMBER 19, 2022**

**BETWEEN**

**PANCRAS ABONYO NDEGE ..... APPELLANT**

**AND**

**CHRISANTUS BONDO OYUGI ..... 1<sup>ST</sup> RESPONDENT**

**WILLYS ANDAGO ..... 2<sup>ND</sup> RESPONDENT**

**MAURICE ADEDE OYUGI ..... 3<sup>RD</sup> RESPONDENT**

**WILSON ANDAGO OYUGI ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. R.B.N. Maloba-  
Principal Magistrate delivered on 15th May 2019, in Homa Bay Chief  
Magistrate's Court Environment and Land Case No. 29 of 2016))*

**JUDGMENT**

1. On June 14, 2019, the appellant namely Pancras Abonyo Ndege through M/S Nyauke & Company Advocates, filed a Memorandum of Appeal dated June 13, 2019, being an appeal from the judgment delivered by the Honourable R B N Maloba (Principal Magistrate) in Homa Bay Chief Magistrate's Court Environment and Land Case No 29 of 2016 on the May 15, 2019.
2. The Appeal is anchored on four (4) grounds as set out on the face of the memorandum of appeal and the same include:
  - a. The learned trial magistrate erred in law and in fact in failing to find that the suit is statute barred due to effluxion of time.



- b. The learned trial magistrate erred in law and fact in failing to appreciate that no court of law ought to enforce an illegal contract and/or allow itself to be made the instrument of enforcing obligations that are not supported by law or statute.
    - c. The learned trial magistrate erred in law and fact in failing to appreciate the clear legal issues which relate to first registration of titles and the provisions of the Land Adjudication Act.
  3. In that regard, the appellant is seeking the orders as *infra*:
    - a. Quashing of the decree dated May 15, 2019 and substituting the same with an order allowing the appellant's suit in the subordinate court.
    - b. The respondent be condemned to pay the costs of this appeal and the costs arising out of the proceedings at the subordinate court.
    - c. The respondent to pay interests on costs under paragraph (b) above.
  4. On February 16, 2022, M/s Nyauke & Company Advocates made an oral application in court to cease acting for the appellant. Counsel for the respondents, G S Okoth & Company Advocates, did not oppose the application. Thus, the appellant now appears in person.
  5. Initially, the appeal was lodged at Migori Environment and Land Court. On October 19, 2021, the same was transferred to this court for hearing and determination. Further, the appeal was heard by written submissions following this court's orders dated November 24, 2021.
  6. Accordingly, Learned Counsel for the respondents filed submissions dated May 26, 2022 on June 8, 2022. It was submitted that the dispute at the trial court was in respect to land parcel number Kabuoch/Konyango-Kawere-Karading/2158 measuring 10.24 Hectares in area (the suit land herein). That the suit land is registered in the name of Flentinus Ndege Odundo. That the trial court entered a consent order on May 15, 2019. That all the defendants, including the appellant herein, agreed to vacate the suit land within diverse periods.
  7. Counsel relied on Section 67(2) of the *Civil Procedure Rules, 2010* submitting, *inter alia*, that a consent order is binding on all parties and those claiming under them and cannot be varied or set aside unless it is shown to have been obtained by fraud or collusion, misapprehension of material facts or if the agreement is contrary to the policy of the court. Therefore, counsel urged the court to dismiss the appeal with costs to the respondents. Reference was made to the case of [Accredo A.G & 3 others -vs- Steffano Uccelli & Another](#) (2017) eKLR, to fortify the submissions.
  8. The appellant did not file any submissions in respect to the appeal herein.
  9. From the foregoing, the issues for determination herein are as contained in the grounds of appeal and condensed to: Whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal.
  10. The instant appeal is the first one from the trial court in the matter. So, this court is obliged to review the record of the trial court, evaluate it afresh and arrive at its own findings herein; see [Mwanasokoni-vs-Kenya Bus Services Ltd](#) 1982-88 1KAR 278 applied in the case of [Titus Ong'ang'a Nyachieo-vs-Martin Okioma Nyauma and 3 others](#) 2017 eKLR.
  11. It must be noted that the suit was commenced by way of a plaint dated 20<sup>th</sup> June 2016 and filed in court on June 28, 2016 by the 1<sup>st</sup> to 4<sup>th</sup> respondents herein seeking the following orders;



- a. An order of rectification of the register by correcting the acreage of the suit land from reading 10.24 hectares to read 0.6 of a hectare and to add the remainder thereof of 9.6 hectares to land parcel number Kabuoch/Konyango-Kawere-Karading/2683 in the name of Enos Ondago Waruku.
  - b. An order of eviction ordering the defendants, their kinsmen and anybody claiming title through them to vacate the portion of the suit land beyond the homestead awarded to him by the Objection Board.
  - c. An order that a proper survey be carried out on the lands originally belonging to Oyugi Andango and Odundo Andango and a proper numbering and acreage be determined for each title holder.
  - d. Costs of this suit together with interest thereon at 14% p.a from the date of filing suit until payment in full.
  - e. Such further or any other alternative relief as this Honourable Court deems fit to grant.
12. The defendants, including the appellant herein, in response to the suit, filed a statement of defence on August 9, 2016 denying all the claims in the plaint. They prayed for dismissal of the suit with costs.
  13. Two witnesses testified in support of the suit. Briefly, the testimonies of Willis Juma Orodho (PW1) and Maurice Adede Oyugi (PW2), who were the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs respectively before the trial court was that they were given only a small portion of the suit land measuring 1.5 acres. That the defendants got a large portion thereof.
  14. However, when the matter came to court on April 17, 2019, parties requested to be allowed time to pursue alternative dispute resolution (ADR) mechanisms.
  15. On June 15, 2019, the parties informed the trial court that they had reached a consent. However, the appellant herein stated as below as noted at page 13 of the trial court's proceedings:
 

“...I don't agree with what has been agreed upon between my father and the plaintiffs...”
  16. The 2<sup>nd</sup> defendant, Augustine Olago Ndege, also disagreed with the consent stating:
 

“...I don't agree with the consent...”
  17. The learned trial magistrate noted at page 14 of the proceedings as follows:
 

“... The primary parties herein that is the plaintiffs and the 4<sup>th</sup> defendant have essentially reached a settlement in this matter. The rest of the defendants, that is, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> are merely assignees of their father, the 4<sup>th</sup> defendant who has duly ceded part of disputed land to the plaintiffs measuring 9.6 hactes. This is out of parcel no. Kabuoch/Konyango/Kawere/Karading/2158.... He has indicated that he owns other parcels of land which he has duly allocated to his sons, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants... In the circumstances it follows that the interests which the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant held in parcel 2158 technically gets extinguished...”
  18. Thus, the learned trial magistrate directed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to vacate the suit land within 6 months from the date of the consent judgment and occupy the respective parcels that their father, the 4<sup>th</sup> defendant, allocated to them.



19. The appellant contends that the trial court failed to find that the suit is statute barred due to effluxion of time. That the trial court failed to appreciate that no court of law ought to enforce an illegal contract. That the court failed to appreciate the clear legal issues which relate to first registration of titles and the provisions of the Land Adjudication Act
20. It is key to note that the appellant did not raise any of the above issues at the trial court. Moreover, he did not anchor his disagreement to the consent on any reason for the court to disturb the consent.
21. In *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR, the Court of Appeal stated as follows with regards to a consent judgment:

“A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”
22. Similarly, in the case of *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266, it was held:-

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”
23. This court is guided by Sections 107 to 110 of the *Evidence Act* Chapter 80 Laws of Kenya on the burden of proof. On that account, has the appellant met the threshold as stated in paragraph 9 hereinabove?
24. It is my considered view that in the instant appeal, the appellant has not placed before the court any evidence to demonstrate that the consent entered into between the parties at the trial court on May 15, 2019, which was adopted as a judgment of the court, was obtained illegally or through fraud. Therefore, the grounds of appeal are quite untenable.
25. It is the finding of this court that the impugned judgment herein, is sound at law. I hereby uphold the same.
26. In the result, the instant appeal lodged by way of a Memorandum of Appeal dated June 13, 2019, be and is hereby dismissed with costs of the appeal and the original suit to be borne by the appellant.
27. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 19<sup>TH</sup> DAY OF DECEMBER 2022.**

**G.M.A ONG'ONDO**

**JUDGE**

**Present**

1. Appellant in person
2. Ms. Odhiambo holding brief for G.S. Okoth, learned counsel for the respondents
3. Okello, Court Assistant

