



**Odongo also known as Jack Jakinda Ojuok v Okeno also known as
Dickson Odongo Okeno & another (Environment and Land Appeal
E012 of 2022) [2022] KEELC 15213 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15213 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E012 OF 2022
AY KOROSS, J
DECEMBER 8, 2022**

BETWEEN

**JAKINDA OJUOK ODONGO ALSO KNOWN AS JACK JAKINDA
OJUOK APPELLANT**

AND

**ALFONZO OMOLLO OKENO ALSO KNOWN AS DICKSON ODONGO
OKENO 1ST RESPONDENT
DISTRICT LAND REGISTRAR, BONDO 2ND RESPONDENT**

*((Being an appeal from the judgment of the Principal Magistrate Hon. Mr.
J.P.Nandi delivered on 11/03/2022 in Bondo ELC Case Number E14 of 2021))*

JUDGMENT

Background of the appeal

1. In order to place the appeal in context, a brief background of the salient facts are necessary. The appellant and the 1st respondent are distant relatives and share a common great grandfather.
2. By a plaint dated 08/03/2021, the 1st respondent; who was the plaintiff in the lower court, instituted suit against the appellant. The 1st respondent contended that he had built a homestead on a portion of land parcel no. North Sakwa/Nyawita/796 ('suit property') that was registered in the name of the late Ojuok Odongo also known as Joanes Joseph Ojuok Odongo ['Joanes'] who was the appellant's father. This portion shall hereafter be referred to as the 'the disputed portion'.
3. He averred that his [1st respondent's] father Eliakim Okeno Ligembe ['Eliakim'] was registered as the proprietor of North Sakwa/Nyawita/377 '377'. It was his case that his family had allegedly used a



- portion of the suit property since time immemorial. He contended in the year 1978, his father pointed out to him the place he could put up a house in the disputed portion; which he did.
4. He averred that well knowing his family's occupancy, possession and ownership, Joanes at registration fraudulently registered the disputed portion in his name. Consequently, the disputed portion was held in trust for him. He averred that the appellant's family owned only a portion of the suit property and another portion known as North Sakwa/Nyawita/424 that was registered in the name of the appellant's brother's name one Timothy Odhiambo Ojuok.
 5. He sought inter alia, a declaration the appellant held the disputed portion in trust for him and he was entitled to exclusive possession; the disputed portion be surveyed and subdivided and be transferred to the him; permanent injunctive orders from interference and costs and interests.
 6. By the firm of Manwari & Company Advocates, the appellant filed a defence dated 19/04/2021. He denied the averments made therein and asserted the 1st respondent trespassed onto the disputed portion in the year 2017 which prompted him to seek the 2nd respondent's intervention. Joanes registration was open and legal. Trust never existed between the parties or their respective families and, the 1st respondent was a trespasser.
 7. Save for producing a report in the lower court which was pursuant to a court order, the 2nd respondent did not participate in those proceedings. The appellant failed to join the 2nd respondent in these proceedings but in my considered view, this is a mere technical error that does not go to the substance of the appeal.
 8. After the parties had testified and closed their respective cases, the trial court in its judgment found inter alia, the reports by the 2nd respondent and sub county surveyor had settled that the 1st respondent was in possession of the disputed portion and there had been a presumption that the 1st respondent had been in continuous, uninterrupted occupation of the suit property which had not been discharged by the appellant lastly, by this occupation, the 1st respondent held an overriding interest over the disputed portion. The trial court granted the 1st respondent the reliefs sought in his claim.

Appeal to this court

9. Aggrieved by the above judgment, the appellant filed a memorandum of appeal dated 7/04/2022 which raised 12 grounds. In his submissions, he summarized them into two grounds. Upon appraising the grounds, it is my considered view that they can be consolidated into a single ground;
 - a. The trial court erred in law and fact by finding that the 1st respondent had proved his case to the required standard.
10. The appellant sought the following reliefs; the appeal be allowed with costs. The lower court judgment be set aside and be substituted with a dismissal.

Parties' submissions

11. As directed by the court, the appellant and 1st respondent disposed of the appeal by way of rival written submissions. The appellant filed supplementary submissions. The 2nd respondent did not participate in these proceedings.
12. The appellant's counsel Mr. Manwari filed his written submissions dated 07/08/2022. Though Counsel identified two issues for this court's determination; whether the period of encroachment by



- the 1st respondent on the disputed portion took place in the years 1978 or 2017 and whether the 1st respondent proved his claim of fraud and breach of trust, he addressed them jointly.
13. It was counsel's submissions the trial court's findings and conclusions were not supported, were selective and chiefly, ignored the appellant's testimony and those of his witnesses; which were largely uncontroverted.
 14. It was counsel's submission that the trial court ignored the appellant's evidence that the 1st respondent trespassed on the disputed portion in 2017 and he had sought intervention from the 2nd respondent and this intervention had been the subject of judicial review proceedings in Kisumu ELC JR 46 of 2017 where the 1st respondent was the ex parte applicant, 2nd respondent was the 2nd respondent and the appellant was the interested party.
 15. Counsel submitted that the trial court erred in finding that the 1st respondent had produced credible evidence in support of his claim of fraud and breach of trust in relation to the disputed portion.
 16. Counsel submitted that it was erroneous for the trial court to find that that the appellant's family held the suit property in trust for the 1st respondent yet the relationship between them was too remote and that in any case, the 1st respondent had admitted in his pleadings that they did not share a hereditary lineage.
 17. Counsel for the 1st respondent Mr. Orenge filed his written submissions dated 12/08/2022. Counsel submitted that in lower court, Peter Akuno (DW3) and the land registrar (DW4) testified that they did not know how long the 1st respondent had been occupying the disputed portion and they confirmed the existence of his house on it. According to Counsel, the appellant's allegation that the 1st respondent encroached on the suit property in the year 2017 was unsupported and his evidence was contradictory as to where Eliakim's homestead was. It was counsel's submission that the trial court did not err in its findings.
 18. Counsel placed reliance on Section 28(b) of the [Land Registration Act](#) which according to him was in pari pasu with the repealed Section 30(g) of the [Registered Land Act](#) which gave overriding interests over land. Counsel cited the Supreme Court of Kenya decision of [Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari & another](#) [2018] eKLR where the court at paragraphs 53 and 54 stated thus:

'We also declare that, rights of a person in possession or actual occupation under section 30 (g) of the [Registered Land Act](#), are customary rights...A customary trust falls within the ambit of the proviso to section 28 of the [Land Registration Act](#)...the rights of a person in possession or actual occupation of land, as previously envisaged under Section 30(g) of the Registered Land Act, have now been subsumed in the 'customary trusts' under Section 25 (b) of the [Land Registration Act](#)'
 19. Counsel Mr. Manwari filed further submissions dated 26/09/2022. Counsel submitted that the 1st respondent submissions had cherry picked portions of the land registrar's report to demonstrate that he had always been in occupation of the disputed portion; which was not so.
 20. It was Counsel's submission that considering the evidence that had been adduced at the trial court, no reasonable and conclusive determination could have been arrived at.

Analysis and determination

21. At the outset, the 1st respondent's counsel submitted that he also relied on submissions he filed in the trial court. I find this proposition improper. I say so because submissions are parties' arguments and the issues being argued before this court and those in the lower are at variance. I shall only deal with his submissions in respect to this appeal.



22. In dealing with appeals, the appellate court is guided by the evidence from the lower court record and is called upon to look afresh at the lower court record and re-examine, re-evaluate and reassess it. The Court of Appeal expressed itself in the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212 on the role of an appellate court.
23. Having considered the lower court record, record of appeal and parties' rival submissions and the authority cited, this court will consider the singular ground of appeal.
24. It is trite that he who alleges must prove. Section 107 of the *Evidence ACT* states as follows:

“(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.
25. From the above background, it is evident that the 1st respondent laid stake on the disputed portion on two grounds; trust and fraud. The trial court did make a finding on customary trust but not on fraud. In my considered view, the two issues fall for determination; whether the 1st respondent proved customary trust subsisted over the disputed portion and whether he proved fraud to the required standard.

Whether the 1st respondent proved customary trust subsisted over the disputed portion

26. As rightfully submitted by the 1st respondent's counsel, Section 28 of the *Land Registration Act* recognizes customary trust as one of the overriding interests in land. In accordance with Section 25 (b) of the same *Act* it is an encumbrance on the land. These provisions of law have a founding on Sections 27, 28 and 30 of the repealed Registered Land Act which was the land regime under which the disputed portion was registered in.
27. The Supreme Court of Kenya in the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another (Supra)* settled the applicability of customary trust in Kenya and from this decision, one of the ways in which such a claim could be laid was by possession and actual occupation. In this decision, the court expressed itself thus at paragraph 58;

‘The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered Land Act, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*.’
28. In its findings, the trial court did not depart from the law when it stated; the plaintiff has been in occupation of the property openly and without interruption by the 1st defendant for over 40 years, which occupation as earlier held is an overriding interest...’. The subject of this appeal is whether the evidence adduced supported such a finding.
29. In his plaint at paragraph 10 the 1st respondent averred his homestead covers both the said portion of 796 lying between land parcel No. 795 and land parcel No.377...the plaintiff and his father were already in possession...’
30. The 2nd respondent and the land surveyor testified and produced reports which demonstrated that the owner of land parcel number North Sakwa/Nyawita/797 had encroached on the disputed portion. These reports were uncontroverted and they never established a relationship between the disputed portion, North Sakwa/Nyawita/795 ‘795’ and 377 as alleged by the 1st respondent.



31. I have scrutinised the map sheets that were produced by the 1st respondent and surveyor and they are in concurrence with the reports of the 2nd respondent and surveyor.
32. It is only in this appeal that the 1st respondent has alluded that he is the registered owner of North Sakwa/Nyawita/797. The reports and maps contradicted his claim on the location of the disputed portion.
33. It was his testimony, that he had lived on the disputed portion from 1957, his kin had been buried there, he had been cultivating it and Eliakim had shown him where to construct his house.
34. PW2 testified the 1st respondent had put up a house on the disputed portion in 1978. PW3's statement corroborated this date of 1978 but during cross exam, he contradicted himself when he testified the 1st respondent still resided on Eliakim's house which was on the disputed portion; he had never constructed his own house. PW4 contradicted her testimony in cross examination when she testified she did not recall when the 1st respondent constructed his house. The 2nd respondent testified that the owner of North Sakwa/Nyawita/797 had constructed a house partly on the disputed portion and on North Sakwa/Nyawita/797.
35. In opposition to the 1st respondent's testimony and those of his witnesses, the appellant testified his family's peaceful existence on the suit property was halted by the 1st respondent when he trespassed on the disputed portion in the year 2017. In his oral testimony, he testified Eliakim's house was on 795 and the 1st respondent's house was on it but in cross exam, he testified the 1st respondent's house was on Eliakim's parcel of land known as North Sakwa/Nyawita/797. DW2 testified the 1st respondent did not have a house on the disputed portion and his [1st respondent's] home was on 797. DW5 corroborated the testimonies that the 1st respondent was an encroacher and he [1st respondent] resided on 797. In my considered view, the 1st respondent's evidence was rebutted by the appellant and his witnesses.
36. The appellant's testimony was in congruence with the 1st respondent's evidence in Kisumu ELC JR 46 of 2017 where from this judgment, the 1st respondent discovered fraud on the disputed portion in 2017; he intended to put a homestead on the disputed portion on 7/06/2017 when he was stopped by the appellant and his brother and the deputy county commissioner, Bondo on 15/06/2017 stopped him from constructing a house or planting trees on it.
37. I agree with the appellant's counsel's submissions that the findings and conclusions arrived at by the trial court were not supported by the totality of the evidence on record. The 1st respondent's evidence was contradictory, full of half-truths and shaky. It is my finding that the 1st respondent did not prove his claim of customary trust. It is my finding, the trial court erred when it found the 1st respondent had been in occupation of the disputed portion since 1978. It is my finding that the trial court erred when it found that the reports had settled the 1st respondent's occupancy of the disputed portion.

Whether the 1st respondent proved fraud

38. Section 26 of the *Land Registration act* states that courts shall prima facie deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme.
39. Within the provisions of Order 2 Rule 10(1) of the *Civil Procedure Rules* and settled law, fraud and breach of trust must be pleaded and particularized. Fraud must also be proved to a standard higher



than on a balance of probabilities but not beyond reasonable doubt. The Court of Appeal's decision of *Elijah Kipng'eno Arap Bii v KCB & Another* Civil Appeal Number 276 of 2018 stated thus;

“...it is trite that where fraud is alleged, it must be specifically pleaded, and it is not enough to deduce it from the facts. The standard of proof of an allegation of fraud is above a balance of probabilities and the onus is on the party alleging fraud to provide evidence and prove his case...”

40. The trial court did not address the claim of fraud in its judgment. Nevertheless, as the court is called upon to rehear the case, it will address it.
41. In his claim, the 1st respondent pleaded the plaintiff and his father before him were already in possession and had their homestead there, and in the premises that registration was fraudulent...
42. Having found that the 1st respondent did not prove possession and occupation. His claim of fraud collapsed. Additionally, his claim of fraud was time barred. From his evidence in Kisumu ELC JR 46 of 2017, the 1st respondent allegedly discovered fraud in the year 2017. He ought to have filed suit by 31/12/2020; which he did not. The suit that is the subject of this appeal was filed before the trial court on 9/03/2021 which was outside the statutory period of 3 years; it was time barred. See the Court of Appeal decision of *Kenya Ports Authority v Timberland (K) Ltd* [2017] eKLR.
43. Based on the reasons given, I ultimately find that this appeal is merited and because costs follow the event, I award the costs of this appeal to the appellant and hereby set aside the entire judgment and decree of the trial court and in its place, I substitute it with a judgment dismissing the suit with costs to the appellant.

DELIVERED AND DATED AT SIAYA THIS 8TH DAY OF DECEMBER 2022.

HON. A. Y. KOROSS

JUDGE

8/12/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of

N/A for the appellant

Mr. Orenge for the 1st respondent

Court assistant: Ishmael Orwa

