



Oyugi v Registered Trustees the Catholic Church Diocese of Kisumu & another (Environment and Land Appeal 2 of 2021) [2022] KEELC 15238 (KLR) (8 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 2 OF 2021
AY KOROSS, J
DECEMBER 8, 2022
[ORIGINALLY KISUMU ELCA 24 OF 2020]**

BETWEEN

LAWRENCE ATINGA OYUGI APPELLANT

AND

**THE REGISTERED TRUSTEES THE CATHOLIC CHURCH DIOCESE OF
KISUMU 1ST RESPONDENT**

THE HON.ATTORNEY GENERAL 2ND RESPONDENT

*((Being an appeal from the judgment of the Senior Resident Magistrate Hon.
E.N.Wasike delivered on 30/04/2020 in Bondo ELC Case Number 20 of 2018))*

JUDGMENT

Background of the appeal

1. The background to the dispute giving rise to this appeal as expressed in the pleadings may briefly be stated as thus: the appellant, who was the plaintiff in the lower court suit, averred that he was the owner of Siaya/Nyaguda/3655 (hereinafter referred to as ‘the suit property’). He contended that the 1st respondent had trespassed onto the suit property and commenced construction of a building thereon. The appellant prayed for an order of eviction of the 1st respondent from the suit property as well as costs.
2. By a defence and counterclaim dated on 18/12/2012 in which the 2nd respondent was joined in the proceedings, the 1st respondent contended that the suit property was fraudulently registered in the name of the appellant as he had sold the suit property to the 1st respondent before land adjudication process and the suit property had ultimately been adjudicated in favour of the 1st respondent. It was



the 1st respondent's position that the appellant had colluded with the district land adjudication officer and the district land registrar Bondo to have the suit property registered in his name.

3. It further averred that during adjudication, the appellant had allegedly filed a case with the demarcation officer and the case was determined in his favour. The decision was however nullified by the land adjudication officer and a fresh hearing ordered. The 1st respondent sought for the appellant's suit to be dismissed and the counterclaim be allowed and the proprietorship of the suit property be transferred to it.
4. By a defence dated 24/04/2013, the office of the attorney general averred that the district land adjudication officer- Bondo did not collude with the appellant to register the suit property in his name. It contended that the 1st respondent failed to file an appeal to the minister challenging the decision hence the suit property was registered in the name of the appellant.
5. After the parties had testified and closed their respective cases, the trial court in its judgment found that both parties had not proven their cases and proceeded to dismiss both claims; but ordered the land registrar and land surveyor Siaya to visit the suit property, establish the portions occupied by the parties and for the register to be rectified to reflect each party's entitlement.

Appeal to this court

6. Aggrieved and dissatisfied with the judgment of the trial court, the appellant filed a memorandum of appeal dated 15/06/2020. Though it raised 9 grounds of appeal, from the submissions, it is evident he abandoned 4 of those grounds and condensed some of them. The grounds for this court's determination are;
 - a. The trial magistrate erred in law in entering judgment for the 1st respondent after dismissing the counterclaim;
 - b. The trial magistrate erred in law and fact in dismissing the appellant's case yet it had been proved on a balance of probabilities as required by law;
 - c. The trial magistrate erred in law in finding that there was no prior sale agreement entered into between the parties while the pleadings by both parties clearly evidenced otherwise; and
 - d. The trial magistrate erred in law in nullifying the decision of the land adjudication officer while he had no jurisdiction to do so and when no appeal had been preferred against it.
7. The appellant prayed that the appeal be allowed, the lower court judgment be set aside and the appellant's suit in the lower court be allowed.

The appellant's submissions

8. As directed by the court, the appellant's counsel Mr. Ko'winoh filed written submissions dated 13/10/2022 in which he submitted on the four grounds of appeal.
9. On the 1st ground, counsel submitted that having dismissed both cases, the trial magistrate should have rested his laurels and refrained from issuing further orders.
10. On the 2nd ground, it was counsel's submission that the appellant had proved his case on a balance of probabilities. He had proven inter alia, there was a sale agreement, the 1st respondent had failed to pay the purchase price and the suit property ought to have been handed over back to the appellant.



The appellant's objection had been upheld and he had been registered as the proprietor during 1st registration.

11. On the 3rd ground, counsel submitted that from the pleadings and witness statements, it was evident that there was a subsisting sale agreement between the appellant and 1st respondent; yet the trial magistrate found that there was no sale or agreement of sale.
12. On the 4th ground, counsel submitted that the trial magistrate had no jurisdiction to question the decision of the land adjudication officer as that was within the purview of judicial review which was a preserve of the superior courts. Counsel argued that the trial magistrate further erred by upholding the decision of the land adjudication officer who nullified the decision of his predecessor; who sat as if it was an appeal. Further, the adjudication officer did not follow any procedures laid down in Section 12 of the [Land Adjudication Act](#).
13. Counsel submitted that as the registered proprietor, the appellant was entitled to the orders sought.
14. Despite being given 14 days to file its submissions, the 1st respondent's counsel Mr. Odhiambo did not comply and at the time of penning this judgment, these submissions have not been filed and if at all they will be filed, this court will not consider them.

Analysis and determination

15. This Court will not interfere with the exercise of discretion by the trial magistrate in the court below unless satisfied that the decision of the trial magistrate was clearly wrong because of some misdirection, or because of failure to take into consideration relevant matters or because the trial magistrate considered irrelevant matters and as a result arrived at a wrong conclusion, or where there is a clear abuse by the magistrate of his discretion. Whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon showing a clear abuse of discretion. See the Court of Appeal decision in [Mwanasokoni v Kenya Bus Services Limited](#) [1985] eKLR where the court expressed itself thus;

‘Although this Court of Appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal’.

16. Having considered the lower court record, record of appeal and appellant's submissions, this court will sequentially render its determination on the four grounds of appeal but before I proceed, the appellant has tendered a strange document on page 13 of its record of appeal which was not part of the lower court record and I hereby expunge it from the record of this court. Whether by design or otherwise, this court abhors such an action whose intent may mislead a court and cause a miscarriage of justice.

I. The trial magistrate erred in law in entering judgment for the 1st respondent after dismissing the counterclaim

17. In [Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa \(Amicus Curiae\)](#) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) the Supreme Court of Kenya expressed itself as follows on orders issued by courts;

‘...interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order’

18. Indeed, in his judgment, the trial magistrate found that the appellant had not proved his case on a balance of probabilities. It also found the counterclaim unmeritorious and proceeded to dismiss both



cases. Despite this, it issued what it termed as ‘further orders’ and ordered that a portion of the suit property occupied by the 1st respondent be hived off and registered in its name. Clearly, this further order was in contradiction with the other orders. The decree issued on dated 28/05/2020 read as follows;

‘it Is Hereby Decreed:

- a. That the plaintiffs(sic) suit is without merit and is dismissed.
- b. That the defendants counterclaim is dismissed as being unmeritorious.
- c. That each party to bear his/her costs.
- d. That a further order is hereby issued to the land registrar and the land surveyor both of Siaya County to visit the site to wit land parcel no. Siaya/Nyaguda/3655 and establish each person’s portion of land putting more emphasis on the portion of which the church land occupies after which the register will be rectified to reflect each persons entitlement’

19. The final orders issued by the court are an issue of concern for the reason that they are contradictory and ambiguous. I say so because on one hand it dismissed the counterclaim and on the other hand rendered judgment in the 1st respondent’s favour. This leaves room for conjecture on the orders issued. The last order in the decree is a total departure from the first two orders. These conflicting orders leave a trail of disarray as parties have been left in doubt as to what to execute and what not to.
20. Considering the incongruent and unclear final orders in the trial court’s judgment and decree, it is my finding that the trial magistrate erred in issuing inconsistent final orders. I need not say more on the other grounds of appeal.
21. Based on the reasons given, I ultimately find that this appeal is merited and I award costs to the appellant. I set aside the entire judgement and decree appealed from and order that the suit be remitted back to the lower court for retrial. The suit that was the subject of this judgment has been in court for close to 11 years and I am optimistic that the trial court will fast track its hearing.
22. It is so ordered

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

N/A for the respondents

Court assistant: Ishmael Orwa

