



REPUBLIC OF KENYA



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**Olang'o v Odidi & another (Environment and Land Appeal 38 of 2021)  
[2022] KEELC 15167 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15167 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 38 OF 2021  
GMA ONGONDO, J  
DECEMBER 7, 2022  
(FORMERLY MIGORI ELC APPEAL NO. E020 OF 2021)**

**BETWEEN**

**NAFTALI NYAGOL OLANG'O ..... APPELLANT**

**AND**

**GEORGE KWANYAH ODIDI ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF HOMA BAY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. T. Olando, Principal Magistrate, delivered on 24th March 2021 and decree issued thereto in Homa Bay Chief Magistrate's Court Environment and Land Case No. 46 of 2019)*

**JUDGMENT**

1. This is an appeal that arises from the trial court's judgment delivered on the March 24, 2021 and the decree issued thereto by the Honourable T Olando, Principal Magistrate, in Homa Bay Chief Magistrate's Court Environment and Land Case No 46 of 2019 where he held, *inter alia*;
  - a. A declaration is made that the suit land, plot No 3 Pala Market, belongs to the deceased Johnson Odidi Obongo (the deceased herein).
  - b. An order of permanent injunction is issued against the defendant, their, agents, servants and/or employees from interfering with the suit land.
  - c. Since the case was necessitated by the actions of the 2<sup>nd</sup> defendant I order that the 2<sup>nd</sup> defendant to pay cost to the plaintiff and the 1<sup>st</sup> defendant.
2. The appellant namely Naftali Nyagol Olang'o through the firm of Robert Ochieng Advocates mounted the appeal by way of a memorandum of appeal dated March 12, 2021 and duly filed on April



- 14, 2021. The appeal is anchored on grounds 1 to 3 (i) as set out on the face thereof and the same include:
- a. The learned trial magistrate erred on several matters, to wit, holding and/or finding that the alleged ownership and/or proprietorship of the suit land by the plaintiff/respondent was not challenged by the appellant when it clearly was in evidence and submissions.
  - b. The learned trial magistrate erred on several matters of law, to wit:
    - i. Holding and/or finding that a receipt is proof of ownership/proprietorship of land by the plaintiff.
    - ii. Holding and/or finding that the 2<sup>nd</sup> respondent/ 2<sup>nd</sup> defendant needed to prove that the right procedure was followed in forfeiting the suit property when the same amounted to shifting the burden of proof from a plaintiff to a defendant.
    - iii. Failing to consider the evidence that the appellant has been paying rents on the suit property from the year 1985 and that the 2<sup>nd</sup> respondent had even approved building plans for the suit property.
3. Wherefore, the appellant has sought the order that the instant appeal be allowed and the judgment of the learned trial magistrate be set aside, with costs to the appellant.
  4. The 1<sup>st</sup> respondent is represented by the firm of Olel, Onyango, Ingutiah Advocates LLP.
  5. The 2<sup>nd</sup> respondent is represented by the firm of Nyauke and Company Advocates.
  6. The appeal was transferred to this court for hearing and determination from Migori Environment and Land Court on October 25, 2021.
  7. The appeal was heard by way of written submissions pursuant to this court's directions of November 24, 2021.
  8. Learned counsel for the appellant relied on the submissions filed at the trial court as captured between pages 85 and 98 of the record of appeal and highlighted the same, *inter alia*:
    - a. At page 118 of the trial court's judgment, fraud is noted but reference to page 27 of the record of appeal shows that fraud was not pleaded at all. The suit was fatal.
    - b. At page 121 of the record of appeal, the trial court indicated that the appellant did not tender any evidence of forfeiture and referred to page 19 of the said record.
    - c. The forfeiture was done in 1981 but the person who did so died in 1983. So, the forfeiture was done during the lifetime of the 1<sup>st</sup> respondent's father.
  9. However, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not file any submissions in respect to the appeal herein.
  10. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed to whether the appellant:
    - a. Has demonstrated that this appeal is tenable and
    - b. Is entitled to the orders sought in the memorandum of appeal.
  11. It is noteworthy that the instant appeal being the first one from the trial court in the matter, this court is obliged to review the record of the trial court, evaluate it and arrive at its own conclusions herein; see



*Mwanasokoni-vs Kenya Bus Services Ltd* (1982-88) 1KAR 278 applied in the case of *Titus Ong'ang'a Nyachico-vs-Martin Okioma Nyauma and 3 others* (2017) eKLR.

12. Originally, the suit was commenced by way of an amended plaint dated August 6, 2020 and duly filed on September 23, 2020, mounted by the plaintiff/1<sup>st</sup> respondent herein against the defendant/appellant seeking the following orders;
  - a. A declaration that the suit land herein, plot No 3 Pala Market, belongs to the deceased.
  - b. An order of permanent injunction against the defendants, their agents, servants and/or employees.
  - c. General damages.
  - d. Eviction order
  - e. Cost of the suit with interest.
  - f. Any other relief that this honourable court may deem fit and just to grant.
13. PW1, George Kwanya Odidi (the 1<sup>st</sup> respondent herein), testified on November 18, 2020 and adopted his witness statement on record as part of his evidence. He stated that the suit land belonged to his late father, the deceased, having been allocated the same in 1962. That the appellant who was the 1<sup>st</sup> defendant at the trial court later informed him that he had bought the suit land at an auction. That the appellant claimed to have acquired the suit land in 1985 yet PW1's father died in 1983 thus, the transfer was done without due notices being issued.
14. In his evidence, PW1 produced a copy of the limited grant, a copy of the death certificate for the deceased, Details of payment of plot rates for the suit land, notice from Ministry of Health- County Government of Homa Bay dated December 5, 2018, a copy of receipts and a copy of the plot card (Pexhibits 1 to 6 respectively). In cross-examination, he stated that he has been paying rent for the suit land following his father's demise.
15. PW2, Harrison Obonyo Amayo adopted his witness statement dated December 21, 2019 as part of his evidence. He stated, inter alia, that the suit land belonged to the deceased.
16. PW3, Davis Oriko Kwanya, relied on his witness statement dated December 5, 2019 as part of his evidence. He testified in part, that the suit land had a permanent structure that was demolished by the 1<sup>st</sup> respondent herein. That later, the plot was claimed by the appellant.
17. In the statement of defence dated September 30, 2019, the 1<sup>st</sup> defendant through Robert Ochieng Advocates, denied the claim. He sought dismissal of the suit with costs.
18. The 2<sup>nd</sup> defendant, through M/s Nyauke and Company Advocates, also filed a statement of defence dated November 18, 2019 on December 11, 2019, denying the claim. He urged the court to enter judgment against the plaintiff with costs to the 2<sup>nd</sup> defendant.
19. DW1 (the appellant herein), testified on February 3, 2021 and adopted his statement dated July 15, 2020 as part of his evidence –in-chief. He produced in evidence a copy of application for plot dated February 15, 1985, a copy of a letter of offer of allotment dated July 1, 1985, a copy of the plot card, bundle of receipts, building approval plan, Rachuonyo County Council plot status record, a bond to appear (4) as well as 4 demand notices as regards plot rent payment (Dexhibits 1 to 10 respectively).



20. During cross-examination, DW1 stated that he acquired the suit land in 1985 after the demise of the deceased, who died in 1983. He stated that the plot was forfeited in 1981 but did not have the notice of advertisement.
21. Notably, the learned trial magistrate stated the parties' respective cases, framed one issue for determination, analysed it and arrived at his decision based on reasons. So, the impugned judgment complied with order 21 rule 4 of the [Civil Procedure Rules, 2010](#).
22. The appellant asserted that the honourable trial court erred in law in finding that a receipt is proof of ownership/proprietorship of land by the plaintiff. That the 2<sup>nd</sup> respondent/ 2<sup>nd</sup> defendant needed to prove that the right procedure was followed in forfeiting the suit property when the same amounted to shifting the burden of proof from a plaintiff to a defendant.
23. It is, however, noted that it was PW1 to 3 who testified that the suit land belonged to the deceased. This evidence was not controverted by the appellant herein. In fact, the appellant himself confirmed the said position in his testimony that:

“The plot was owned by Johnson Odidi Obongo”
24. The appellant stated that he acquired the suit land in 1985 following the demise of the deceased, who died in 1983. That the suit land was forfeited in 1981 as it had not been developed. Yet, I note that there was evidence that the 1<sup>st</sup> respondent, being the administrator of the estate of the deceased, received a notice from the 2<sup>nd</sup> respondent dated December 5, 2018, asking him to either salvage the building on the suit land or demolish it. The suit land being forfeited if communication regarding the same was still being done to the administrator of the estate of the deceased begs an answer.
25. On that account, being guided by the decision of Madan JA (as he then was) in the case of [CMC Aviation Ltd –vs- Kenya Airways Ltd \(Cruisair Ltd\)](#) (1978) eKLR, did the 1<sup>st</sup> respondent establish to the requisite standards his case before the trial court?
26. The standard of proof in civil matters including the instant case, is on a balance of probabilities. So, what amounts to proof on a balance of probabilities? In [Kanyungu Njogu –vs- Daniel Kimani Maingi](#) [2000] eKLR the honourable court stated that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.
27. Having taken into account the entire evidence on record in this appeal, the facts of the case alongside the legal principles stated above, evidently, the 1<sup>st</sup> respondent who was the plaintiff before the trial court proved that the suit land belongs to Johnson Odidi Obongo (deceased) and that no notices were issued to the estate of the deceased before the alleged forfeiture occurred. Thus, he proved his claim to the requisite standard as noted in [CMC Aviation Ltd](#) case (*supra*). Therefore, the grounds of appeal are untenable.
28. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is faultless at law. I hereby uphold the same.
29. Wherefore, the instant appeal mounted by way of a memorandum of appeal dated March 12, 2021 and duly filed on April 14, 2021 is hereby dismissed with costs to the 1<sup>st</sup> respondent.
30. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 7TH DAY OF DECEMBER 2022.**



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

**JUDGE**

Present

Appellant- in person

Ms. Adingo holding brief for Mr. Ochieng, learned counsel for the appellant

Okello, Court Assistant

