



Nyawuor (Suing as the legal administrator of the Estate of Timothy Owino Koyo - Deceased) v Ododa (Environment and Land Appeal E049 of 2022) [2024] KEELC 640 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEELC 640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E049 OF 2022
GMA ONGONDO, J
FEBRUARY 13, 2024**

BETWEEN

CHARLES ORICHO NYAWUOR (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF TIMOTHY OWINO KOYO - DECEASED) APPELLANT

AND

PETER AMOLLO ODODA RESPONDENT

(Being an appeal from the judgment and decree of Hon. E. M. Onzere, Principal Magistrate, delivered on 5th October 2022 in Ndhiwa Principal Magistrate's Court Environment and Land Case No. E002 of 2022)

JUDGMENT

1. This appeal emanates from the trial court's judgment delivered on the 5th October 2022 by the Honourable E. M. Onzere, Principal Magistrate, in Ndhiwa Principal Magistrate's Court Environment and Land Case No. E002 of 2022 where she held inter alia:

“...the plaintiff has proved his case to the required standard. The counterclaim has not been proved...”
2. The appellants through the firm of Robert Ochieng Advocates mounted the appeal by way of a memorandum of appeal dated 6th October 2022 and filed herein on even date. The Appeal is anchored on grounds 1 to 6 as set out on the face thereof and they include:
 - a. The learned trial magistrate erred in law in holding that there was need for a first registered proprietor of land to prove acquisition of the same when fraud was neither alleged in the plaint nor particularized and proven by the plaintiff and thus shifted the burden of proof upon the defendant.



- b. The learned trial magistrate egregiously erred in law in holding that a purported unsigned and uncorroborated minutes amounted to an agreement capable of revoking a first registered proprietor's title to land contrary to Section 26 (1) of the [Land Registration Act](#).
- c. The learned trial magistrate misdirected herself on issues of law by failing to rule on or render a reasoned decision on issues raised by the appellants in their submissions to wit:
 - i. Whether the court has jurisdiction to entertain proceedings relating to a dispute which purportedly arose in the year 1991 but only filed in the year 2022 well beyond Section 4(1) of the [Limitation of Actions Act](#) in relation to contracts and Section 4(1)(e) of the [Limitation of Actions Act](#) for actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law or Section 7 of the [Limitation of Actions Act](#).
 - ii. Whether the respondent sought the relief of specific performance and proved that the basis for granting the orders of specific performance had been proven.
 - iii. Whether the respondent had locus to institute the suit without an ad litem when the claim made by him over the suit land was that the same was owed to the estate of his deceased father.
3. So, the appellant prays that this appeal be allowed with costs and the trial court's judgment be set aside with costs.
4. The appeal was heard by way of written submissions pursuant to this court's directions of 30th May 2023.
5. The appellants' counsel filed submissions dated 21st August 2023 and identified five issues for determination to wit:
 - a. Whether the trial court misdirected itself on matters of law in holding that there was need for a first registered proprietor to prove acquisition.
 - b. Whether the trial court erred in law in holding that unsigned and uncorroborated minutes amounted to an agreement capable of revoking a first registered title.
 - c. Whether the trial court possessed jurisdiction to entertain proceedings relating to a dispute which arose in 1991 but was filed in 2022.
 - d. Whether the trial court erred in fact and law by granting orders of specific performance to the respondent although it was not prayed for in the plaint.
 - e. Whether the respondent had locus to institute the suit without letters of administration ad litem.
6. Learned counsel submitted, inter alia, that the onus of proof was improperly shifted to the appellant herein to prove ownership of the suit property L. R. Number West Nyokal/Wanjawa/38, yet the respondent neither alleged nor proved any fraud or misrepresentation by the appellant as provided for under Section 26 of the [Land Registration Act](#), 2016 (2012). That the trial court relied on the minutes of 19/8/1990, although the same were unsigned and were not produced in court by their maker thereof. That in any event, the suit was filed out of time and the respondent lacked locus to institute the same. That further, the respondent neither sought an order of specific performance nor proved the same. Thus, counsel urged the court to allow the appeal with costs. To buttress the submissions,



- reliance was placed on various authorities including the case of Independent Electoral and Boundaries Commission and anor. -vs- Stephen Mutinda Mule and 3 others (2014) eKLR.
7. Counsel highlighted the submissions on 14th December 2023. He stated that although the respondent indicated in his viva voce evidence that he intended to enforce his father's rights over the suit property, he had not taken out a grant of letters of administration ad litem prior to instituting suit. That further, the minutes dated 19/08/1990 do not amount to a sale agreement.
 8. The respondents' counsel filed submissions dated 7th December 2023 on 14th December 2023 and submitted that it is the respondent and not his father who was entitled to half of the suit property therefore, occasioning him to sue in his own capacity. That among the orders sought at the trial court by the respondent was one compelling and/or directing the appellant to execute requisite transfer forms and to transfer/transmit half of the suit property to the respondent which in essence is an order of specific performance. That having lodged a counterclaim, the appellant had a burden to prove the facts alleged therein.
 9. Also, counsel stressed that the suit was not time barred since letters of administration to the estate of the original proprietor, the appellant's father, were only taken out by the appellant herein on 7th July 2021, upon being cited by the respondent. That in addition to the same, the respondent's interest on the suit property was a customary trust thus, the provisions of Sections 20 as well as 23 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya are applicable herein. That the minutes dated 19/08/1990 were corroborated by the respondent's witnesses. Thus, counsel urged the court to dismiss the present appeal with costs. To fortify the submissions, counsel cited, inter alia, the case of Joseph Muriuki Kithinji -vs- Peterson Ireri Mwaniki & 3 others (2021) eKLR.
 10. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to whether the appellants:
 - a. Have demonstrated that this appeal is tenable and
 - b. Are entitled to the orders sought in the memorandum of appeal.
 11. It is important to remember that the instant appeal being the first one from the trial court in the matter, I am obliged to review the record of the trial court, evaluate it and arrive at own conclusions in this appeal; see *Mwanasokoni -vs- Kenya Bus Services Ltd (1982-88) 1KAR 278* applied in other cases, inter alia, *Titus Ong'ang'a Nyachio-vs-Martin Okioma Nyauma and 3 others (2017) eKLR*.
 12. By way of a plaint dated 18th January 2022 filed at the trial court, Peter Amollo Ododa, the respondent herein sued the appellant for;
 - a. An order declaring that the respondent is rightfully entitled to half of the property known as West Nyokal/Wanjawa/38 measuring approximately 2.1 Hectares (the suit property herein).
 - b. Orders directing the appellant to execute valid mutation, forms for seeking Land Control Board consent to sub-divide and transfer, as well as transmission/transfer forms in favour of the respondent, for the transfer/transmission of half of the suit property to the respondent.
 - c. Any other orders that the honourable court might deem just to grant.
 - d. Costs and interests at court rates.
 13. The plaintiff/respondent contended that the suit property initially belonged to his late father Wilson Ododa (deceased 1) who allowed the appellant's late father, Timothy Koyo (deceased 2) to settle thereon. That during adjudication, the suit property inadvertently got registered in the name of



- deceased 2. That nevertheless, deceased 2 allowed him to establish his home thereon. That at the meeting held on 19/08/1990, it was agreed that deceased 2 would subdivide the suit property and transfer half of it to the respondent herein. That unfortunately, deceased 2 passed on before doing such transfer. That the respondent then cited the appellant herein, so as to take out a grant of letters of administration and defend the suit.
14. PW1, Peter Amollo Ododa, relied on his statement on record which was adopted as his evidence in chief. He produced in evidence, a copy of search, a copy of grant, a copy of citation proceedings, a copy of agreement dated 19th August 1990 in Luo language and a translated version of the same, a copy of letter dated 26th February 2019, a copy of letter dated 6th March 2019, a copy of letter dated 5th April 2019 and a copy of minutes of 17th December 2020 (PExhibits 1 to 8 respectively).
 15. During cross-examination, PW1 stated that the suit property belonged to deceased 1. That he wishes to enforce the rights of deceased 1 over the same. He admitted that he had not obtained a grant of letters of administration to the estate of deceased 1.
 16. Marceline Odira Owiti (PW2) testified that she was wife of PW1 and relied on her statement filed on 29th March 2022 as part of her evidence. In cross-examination, she stated that together with PW1, they moved into the suit property in 1989 at the instance of deceased 1.
 17. PW3, Nicholas Otieno Amollo, relied on his statement on record, which was adopted as part of his evidence. On cross-examination, he admitted that he was a minor aged 10 years when the meeting culminating into the minutes dated 19th August 1990 took place. He clarified that the appellant's mother, one Miriam Auma, attended the meeting.
 18. Dominic Odhiambo Oluoch (DW4) stated that he was a cousin to PW1 and relied on his statement on record, which was adopted as part of his evidence. During cross-examination, he stated that the suit property belonged to deceased 1.
 19. In his statement of defence and counterclaim dated 28th January 2022 and filed on 1st February 2022, the appellant denied the claim and prayed that the same be dismissed. He averred that the suit property is registered in the name of deceased 2. That the respondent put up structures on the same in 2016. Therefore, he urged the court to enter judgment as against the plaintiff/respondent for:
 - a. An eviction order as against the plaintiff, his agents, servants, employees, kith, kin or anyone else drawing authority from him from the suit property.
 - b. General damages for trespass
 - c. Mesne profits
 - d. Costs of the main suit alongside costs of the counterclaim together with interest at 14% p.a from the date of filing the counterclaim until payment in full.
 - e. Such other or further alternative relief as this honourable court deems fit to grant.
 20. DW1, Charles Oricho Nyawuor, the appellant herein, relied on his statement filed on 1st February 2022, which was adopted as part of his evidence. He also produced a copy of grant ad litem, a copy of official search certificate for the suit property and a copy of official search certificate for land parcel number 642 (DExhibits 1 to 3 respectively) in evidence. He denied that the respondent moved into the suit property in 1985 and averred that no meeting took place in 1990.
 21. During cross-examination, he stated that deceased 2 purchased the suit property from one Zedekiah Omiya around 1972-1973. That the respondent only established his home thereon around 2016.



22. Damianus Odoyo Abele (DW2) relied on his statement on record, which was adopted as part of his evidence. In cross-examination, he stated that he had only known the appellant for four years.
23. It is noteworthy that the learned trial magistrate set out the parties' respective cases, framed four issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
24. In her judgment, the learned trial magistrate observed, inter alia;
- “...the defendant has challenged the minutes on the premise that they are not signed and have no resolution. The minutes clearly show what the agenda is and what each party stated is indicated...”
25. Also, the trial magistrate observed that the appellant alleged that deceased 2 purchased the suit property from one Zedekiah. Nonetheless, no witness was called to corroborate the same.
26. The appellant laments that the respondent lacked locus to institute the suit since he had not taken out letters of administration ad litem to the estate of deceased 1. However, I note that the respondent instituted the suit in his own capacity and not on behalf of the estate of deceased 1. In fact, among the prayers sought by the respondent in the plaint dated 18th January 2022 was one declaring that the respondent is rightfully entitled to half of the suit property herein.
27. The appellant averred that the suit was statute barred since the cause of action arose in the 1990s. The respondent, however, stated that letters of administration to the estate of the original proprietor, the appellant's father, were only taken out by the appellant herein on 7th July 2021, upon being cited by the respondent. That in addition to the same, the respondent's interest on the suit property was a customary trust thus, the provisions of Sections 20 as well as 23 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya, are applicable herein.
28. On that score, this court subscribes to the decision in the case of *Stephens & 6 others -vs- Stephen & another* (1987) eKLR, where the Court of Appeal stated that:
- “...Section 20(1)(b) of the *Limitation of Actions Act* (cap 22) provides that:
- “None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action:
- “to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.”
29. Further, in Civil Appeal No. 170/1993, *Macharia Kahiri vs Ngigi Kahiri*, the Court held as follows;
- “...Under customary law the land even after the right of action has accrued, is held in trust even for decades before or division. Limitation does not apply in customary law... we reject this ground of appeal...”
30. The appellant contends that the learned trial magistrate erred in law in shifting the burden of proof to the appellant, who is the first registered proprietor of the suit property. So, is that the position?
31. Section 26(1) of the *Land Registration Act*, 2016 (2012) provides as below:
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie



evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (Emphasis laid)

32. In *Dina Management Limited -vs- County Government of Mombasa & 5 others* (2023) eKLR, the Supreme Court of Kenya held that a title document is not sufficient proof of ownership of property where the origin of that title has been challenged. That the holder of the title document must go beyond the instrument itself and show that the process of acquisition from inception was legal.

33. Similarly, in *Munyu Maina –vs- Hiram Gathiha Maina* (2013) eKLR, the Court of Appeal stated thus:

“We have stated that when a registered proprietor of title is challenged, it is not sufficient to dangle the instrument of instrument as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (Emphasis added)

34. In the present case, the appellant alleged that deceased 2 purchased the suit property from one Zedekiah. However, no witness was called to corroborate the same. Similarly, no land sale agreement was produced in evidence in support of that assertion. Notably, the respondent had contended that the suit property initially belonged to deceased 1 but inadvertently got registered in the name of deceased 2 during adjudication.

35. On the issue of the trial court granting an order of specific performance, I note and concur with the respondent’s counsel that among the orders sought at the trial court by the respondent was one compelling and/or directing the appellant to execute requisite transfer forms and to transfer/transmit half of the suit property to the respondent. In essence, this is an order of specific performance.

36. It is also my conserved view that although the minutes dated 19th August 1990 do not amount to a sale agreement, there was no requirement that an agreement for sale of land needed to be in writing as Section 3(3) of the *Law of Contract Act*, Chapter 23 Laws of Kenya, had not come into effect then. Besides, the contents therein were corroborated by the respondent’s witnesses as well as minutes of subsequent meetings held at the chief’s office and dated 17th December 2020 and 5th April 2019.

37. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:

- i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

38. In that regard, I find that the respondent who was the plaintiff at the trial court proved his claim on a balance of probabilities. However, the appellant failed to prove his counterclaim to the requisite standard.

39. In the premises, the trial magistrate’s judgment delivered on 5th October 2022 is faultless at law. I hereby endorse the same.



40. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 6th October 2022 and filed herein on even date, is devoid of merit. The same is hereby dismissed with costs to the respondent.

41. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 13TH DAY OF FEBRUARY 2024.

G.M.A ONG'ONDO

JUDGE

Present

1. Ms. C. Adingo holding brief for R. Ochieng, Learned Counsel for the Appellant
2. Mr. J. Otieno holding brief for Quinter Adoyo, Learned Counsel for the Respondent

