



Ogola (Donee- Suing on Behalf of Oliver Owuor Tambo- Donor) v Oloo & 3 others (Environment and Land Appeal E003 of 2023) [2024] KEELC 621 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEELC 621 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E003 OF 2023
GMA ONGONDO, J
FEBRUARY 14, 2024**

BETWEEN

**ELIZABETH WANJIRO OGOLA APPELLANT
DONEE- SUING ON BEHALF OF OLIVER OWUOR TAMBO- DONOR**

AND

**LAWRENCE OCHIENG OLOO 1ST RESPONDENT
OGADA OSUTA 2ND RESPONDENT
AUMA ADEK OKECH 3RD RESPONDENT
JIM OTIENO 4TH RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. E. M. Onzere,
Principal Magistrate, delivered on 15th December 2022 in Ndhiwa Principal
Magistrate’s Court Environment and Land Case No. E008 of 2021)*

JUDGMENT

1. The instant appeal radiates from the trial court’s judgment delivered on the 15th December 2022 by the Honourable E. M. Onzere, Principal Magistrate, in Ndhiwa Principal Magistrate’s Court Environment and Land Case No. E008 of 2021 where she held, inter alia;

“...In light of the above, the plaintiff has failed to prove his case to the required standard and it is dismissed. The defendants have also not proved their respective counterclaims to the required standard. The counterclaims are dismissed...”

2. The appellant was aggrieved thereby. As a result, she lodged the appeal herein through the firm of Everlyne Kuke and Company Advocates.



3. By a memorandum of appeal dated 12th January 2023, the appellant anchored the appeal on grounds 1 to 7 as set out on the face of the same and these include:
 - a. That the learned magistrate erred in law and misdirected herself as relates and/or in the interpretation of the provisions of Section 26 of the [Land Registration Act, 2016 \(2012\)](#).
 - b. The learned magistrate erred in fact and in law in failing to enter judgment in favour of the plaintiff, based on the merits of the plaintiff's case.
 - c. The learned magistrate erred in fact in holding that there was no transfer of title in respect of land parcel number Kabuoch/Kachieng/622 (the suit land herein) to the appellant herein.
4. Wherefore, the appellant prays that the instant appeal be allowed, judgment of the trial court be set aside and that costs at the trial court and in this appeal be awarded to the appellant.
5. The appeal was heard by way of written submissions pursuant to this court's directions of 9th November 2023.
6. Accordingly, the appellant's counsel filed submissions dated 4th September 2023 and submitted on the following three issues:
 - a. Who is the legal owner of the suit property?
 - b. Whether the suit land was fraudulently obtained.
 - c. Whether the decision of the trial magistrate was wrongful.
7. In analyzing the issues, learned counsel submitted that since the respondents failed to prove fraud by the appellant in obtaining title to the suit land, the appellant's claim ought to have succeeded. To fortify the submissions, counsel relied on Sections 24 and 26 of the [Land Registration Act, 2016 \(2012\)](#) as well as the case of [Dennis Moya -v- Virginia Wanjiku Ngunjiri and another](#) (2019) eKLR, among others.
8. Quinter Adoyo and Company Advocates, learned counsel for the 1st and 3rd respondents filed submissions dated 29th January 2021 and urged the court to dismiss the instant appeal with costs to the 1st and 3rd respondents.
9. The 4th respondent's counsel also filed submissions dated 30th January 2024, to the effect that the appellant has failed to disclose how the donor herein, Oliver Owuor Tambo, became registered as proprietor of the suit land. Counsel urged the court to dismiss this appeal with costs to the 4th respondent.
10. In light of the above, the issues for determination herein are as contained in the grounds of appeal and condensed as follows:
 - a. Whether the appeal is tenable?
 - b. The orders to be made in this appeal to meet the best ends of justice.
11. It is important to note that the instant appeal is the first one from the trial court in the present dispute. Therefore, this court is obliged to review the record of the trial court, evaluate it afresh and arrive at its own findings herein; see *Peters -v- Sunday Post* (1958) EA 424 at 429.
12. The appellant who was the plaintiff before the trial court lodged the suit by way of a plaint dated 22nd February, 2021 and filed on 23rd February 2021 seeking the following orders;



- a. Eviction from the suit land and a permanent injunction restraining the defendants, their servants, workmen and agents from entering on and/or from erecting or causing to be erected thereon any structures, cultivating, ploughing, planting thereon or causing the same to be ploughed, cultivated or planted or from in any way interfering with the plaintiff's use and enjoyment of the plaintiff's said property.
 - b. Provision of security by the OCS Ndhiwa Police Station when enforcing the decree.
 - c. Damages.
 - d. Costs and interest.
 - e. Any other relief the court deems fit to grant.
13. The appellant contended that the donor is the registered owner of the suit land which measures approximately 3.3 Ha in area. That sometimes in 2005, the 1st respondent trespassed upon the suit land and erected temporary structures, to wit, a hardware, posho mill and rental houses thereon. That similarly, the 2nd to 4th respondents trespassed onto the suit land, damaged the boundary and established a home thereon. Thus, the appellant sought that eviction orders do issue as against the respondents.
 14. PW1, Elizabeth Wanjiro Ogola, holder of power of attorney of the donor, relied on her statement filed on 23rd February 2021, which was adopted as part of her evidence in chief. She produced in evidence a power of attorney, a copy of title deed in respect of the suit land, copies of demand letters for each of the respondents, a copy of the official search certificate for the suit land and an affidavit sworn on 7th August 2013 (PExhibits 1 to 5 respectively). She testified inter alia, that the suit land initially belonged to her aunt, one Pamela (deceased 1), who transferred the same to the donor herein after which the latter was duly registered as proprietor thereof on 21st November 2016.
 15. During cross-examination, PW1 admitted that she did not sign consent from the Land Control Board authorizing the transfer of the suit land nor transfer forms thereto. That the donor has never lived on the suit land. That the respondents entered the suit land when deceased 1 was still alive and deceased 1 never sued the respondents to vacate the same. That deceased 1 had no children. That the donor, who is her son, is a grandson to deceased 1.
 16. The 1st and 3rd respondents through Quinter Adoyo and Company Advocates, filed a statement of defence and counterclaim dated 28th February 2022 on 7th March 2022. They denied the claim and averred that deceased 1 had sold a portion of the suit land measuring approximately 0.25 Ha in area to them to one Domnicus (DW3), who later sold the same to them. That during her lifetime, deceased 1 did not object to the 1st and 3rd respondents' occupation of the said portion, even though no transfer was effected in their names. So, they sought an order compelling the appellant to transfer the said portion to them and costs of the counterclaim with interest at court rates.
 17. The 2nd respondent did not participate in the case.
 18. The 4th respondent through Ongoso Ayoma and Company Advocates, filed a statement of defence and counterclaim dated 13th September 2021 on even wherein he denied the claim. He stated that the same is time barred and sought dismissal of the same.
 19. In the counterclaim, the 4th respondent averred that he inherited the suit land from his father, Dickens Otieno Ouko (deceased 2), who had purchased it from deceased 1 in 2005. That the appellant procured registration of the suit land in his name through fraud, particulars which were listed under paragraph 6 of the counterclaim. Therefore, he sought the orders infra:



- a. An order of declaration that the registration of the appellant as proprietor of the suit land was obtained fraudulently and the honourable court has powers to cancel the same and subsequently rectify the register of the suit land to include the name of the 4th respondent to be registered as owner of the suit land measuring approximately 1 acre in area.
 - b. An order for cancellation of title issued to the appellant and subsequent rectification of the register for the suit land measuring 1 acre to be recorded in the name of the 4th respondent's father.
 - c. An order of injunction directed to the appellant restraining him by himself, his agents, servants, employees and/or anybody deriving authority from him from cultivating, constructing, developing or dealing in any manner adverse to the 4th respondent's interest and possession of the suit land measuring 1 acre.
 - d. That the OCS Ndhiwa to enforce compliance of this said order.
 - e. General damages for fraud together with interest thereon at 12% p.a from the date of judgment until payment in full.
 - f. Costs of this suit.
 - g. Any other alternative relief as this court deems just and fit to grant in the circumstances.
20. DW1, Lawrence Otieno Oloo, relied on his statement dated 9th September 2021, which was adopted as part of his evidence in chief. He testified that he purchased the suit land from Dominicus Ogur (DW3) in 2018. That he built two permanent houses, eight iron sheet structures, a toilet and bathroom thereon. That at the time, deceased 1 was still alive and never sought eviction orders against him. He produced in evidence an agreement for sale of land dated 3rd October 2018 between himself and DW3 and an agreement for sale of land dated 19th June 2002 between deceased 1 and DW3 (PExhibits 1 and 2 respectively).
 21. In cross-examination, DW1 admitted that at the time of executing PExhibit 1, the suit land was already registered in the name of the appellant herein. That he did not conduct a search at the land's registry to ascertain ownership of the same prior to purchase.
 22. The 3rd respondent (DW2) testified that she purchased the suit land from DW3 on 15th April 2015. That she built four mud houses thereon. That at the time, deceased 1 was still alive and knew of her possession of that portion of the suit land but never sought eviction orders against her. She produced in evidence an agreement for sale of land dated 15th April 2015 between herself and DW3 (DExhibit 3). On cross-examination, she admitted that she did not conduct a search at the land's registry to ascertain ownership of the suit land prior to purchase.
 23. Dominicus Odenyo Ogur testified as DW3 and relied on his statement dated 15th December 2021, which was adopted as part of his evidence. He stated that he purchased a portion of the suit land from deceased 1 vide a sale agreement dated 19th June 2006 (DExhibit 2) at a cost of Kshs. 3,000/-. He admitted selling portions of the suit land that he had purchased to the 1st and 3rd respondents herein. In cross-examination, he stated that although he entered into a land sale agreement with deceased 1 for a portion of the suit land, they did not obtain the consent of the Land control Board to effect transfer of the said portion to his name.
 24. DW3 also testified as DW4 and stated that deceased 2 also purchased the suit land from deceased 1 in 2005. That at the time of purchasing the suit land from deceased 1, the title was still registered in the



- name of one Auma Simbiri. That deceased 1 could not transfer title of the portions of the suit land that had been purchased since she had not carried out succession in the estate of the said Auma Simbiri. That it is therefore, unclear how the appellant came to be registered as proprietor of the suit land.
25. Vincent Jim Otieno (DW5) relied on his statement filed herein on 6th September 2022, which was adopted as part of his evidence. Also, he produced in evidence original sale agreement between deceased 1 and deceased 2, a copy of grant of letters ad litem to the estate of deceased 2, a letter dated 13th September 2021, surrender of ID dated 14th February 1997, a copy of the death certificate for Auma Simbiri, a note from Rachieng Adjudication Section and a receipt for Kshs. 2,000 from Ochieng Okuche Advocates (DEXhibits 4 to 10 respectively). He averred that deceased 2 took possession of the suit land in 2005, after purchasing the same from deceased 1. That they cultivate the land, grow maize, beans and other crops thereon.
26. In the impugned judgment, the learned trial magistrate observed, inter alia;
- “...The plaintiff has failed to prove that the land was transferred to him using the correct procedure and as such the process through which Oliver Tambo got to be registered as owner of the land was unprocedural and flawed and as such the gist inter vivos was not made perfect and complete...”
27. Further, the learned magistrate noted that deceased 1 did not possess good title to the suit land, capable of being transferred to DW3 and deceased 2. This is because at the time of the alleged sale, the suit land was still registered in the name of one Amolo Omari Obondo and not the deceased 1 herein. Therefore, DW3 could not purport to sell the same to DW1 and DW2 respectively. That in any event, DW3 only purchased a portion thereof measuring ¼ acre which he purportedly sold to the 1st respondent herein so, he had no land to sell to the 3rd respondent.
28. 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.
29. In [Dina Management Limited -v- 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.
30. Similarly, in [Munyu Maina -v- Hiram Gathiba 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.”

31. In the present case, the appellant was constrained to explain how the donor came to be registered as proprietor of the suit land. She admitted that she did not have a signed consent from the Land Control Board authorizing the transfer of the suit land nor transfer forms thereto.
32. This court is guided by Sections 107 to 109 of the *Evidence Act*, Chapter 80 Laws of Kenya which stipulate that he who alleges must prove.
33. Also, it is settled law that the burden was always on the plaintiff to prove his or her case on a balance of probabilities; see *Kanyungu Njogu -v- Daniel Kimani Maingi* (2000) eKLR.
34. To that end, it is my considered view that the appellant failed to prove her case on a balance of probabilities. Similarly, the defendants failed to prove their counterclaims on a balance of probabilities.
35. In the foregone, the trial magistrate’s judgment delivered on 15th December 2022 is sound at law. I hereby endorse the same.
36. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 12th January 2023 and filed herein on 16th January 2023 is devoid of merit. The same is hereby dismissed accordingly.
37. Costs of this appeal to be borne by the appellant.
38. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 14TH DAY OF FEBRUARY 2024.

G.M.A ONG’ONDO

JUDGE

Present

1. Mr. Jack Otieno holding brief for Quinter Adoyo, learned counsel for the 1st and 3rd respondents
2. Mr. Ongoro holding brief for Ms. Everlyne Kuke, learned counsel for the appellant
3. Luanga, Court Assistant

