



REPUBLIC OF KENYA



**Ongoro v Ouma (Environment and Land Appeal E043 of 2022)
[2024] KEELC 534 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E043 OF 2022
GMA ONGONDO, J
FEBRUARY 7, 2024**

BETWEEN

CLEMENT KOTONYA ONGORO APPELLANT

AND

OON OUMA RESPONDENT

*(Being an appeal from the judgment and decree of Hon. J. M. Nang'ea
Chief Magistrate, delivered on 30th August 2022 in Homa Bay Chief
Magistrate's Court Environment and Land Case No. E001 of 2022)*

JUDGMENT

1. This appeal arises from the trial court's judgment delivered on the 30th August 2022 by the Honourable J. M. Nang'ea, Chief Magistrate, in Homabay Chief Magistrate's Court Environment and Land Case No. E001 of 2022 where he held that the plaintiff/respondent had proved his claim to the requisite standard and dismissed the counterclaim lodged by the defendant.
2. The appellant through the firm of Rapando and Odunga Advocates was aggrieved thereby and mounted the appeal by way of a memorandum of appeal dated 12th September 2022 and filed herein on even date. The Appeal is anchored on grounds 1 to 10 as set out on the face thereof and the same are:
 - a. The learned Magistrate erred in law and misdirected himself by refusing or failing to find that the Respondent had not proved any fraud or misrepresentation on the Appellant's registration as the lawful proprietor of the suit properties known as Homa Bay Kawere Kanyango/ Karading/3017 and 3021 (the suit properties herein) pursuant to section 25 and 26 of the [Land Registration Act](#) 2012.
 - b. The Learned Magistrate erred in law and misdirected himself by refusing or failing to find that Appellant's registration as the lawful owner of the suit properties was pursuant to adjudication proceedings which have never been challenged by the respondent.



- c. The learned Magistrate erred in law and misdirected himself in failing to find that the Appellant had been in occupation of the suit properties for more than 30 years.
 - d. The learned Magistrate erred in law and misdirected himself in interpreting the provisions of section 7 of the [Limitation of Actions Act](#) in holding that the limitation period took effect from the date of registration of the Appellant's titles instead of the date of transaction and occupation.
 - e. The learned Magistrate erred in law and fact in finding that the parties had not understood the Land Adjudication proceedings.
 - f. The learned Magistrate erred in law and misdirected himself by shifting the burden of proof to the appellant.
 - g. The learned magistrate erred in law and misdirected himself by refusing or failing to consider the pleadings filed and evidence by the appellant's witnesses and thereby arrived at erroneous and/or wrong decision that the respondent is the lawful owner of the suit properties.
 - h. The learned Magistrate misdirected himself by failing to find that the respondent had not proved his case against the appellant.
 - i. In finding that the agreement between the Appellant and the respondent required witness, the learned magistrate misdirected herself in law and in fact by misapplying the provisions of section 3(3) of the [Law of Contract Act](#).
 - j. The learned Magistrate erred in law and in fact by refusing or failing to consider the pleadings filed and the evidence on record thereby arrived at erroneous and/or wrong decision that the appellant was not the lawful registered owner of the suit properties.
3. Wherefore, the appellant prays that:
- a. The instant appeal be allowed;
 - b. The judgment of the trial court be set aside;
 - c. The appellant's counterclaim lodged in the trial court be upheld and the reliefs sought therein be granted; and
 - d. Costs of the appeal be awarded to the appellant.
4. The appeal was heard by way of written submissions pursuant to this court's directions of 26th September 2023.
5. Accordingly, the appellant's counsel filed submissions dated 18th October 2023 and submitted on the following four issues:
- a. Whether the respondent's claim at the trial court was statute barred.
 - b. Whether the appellant was lawfully registered as the owner of the suit properties?
 - c. Whether there was a valid agreement between the appellant and respondent?
 - d. Whether the respondent proved his case against the appellant?
6. In discussing the issues, learned counsel submitted that the appellant has been in occupation of the suit properties since 1992 thus, the respondent's rights to the same have been extinguished by dint of the provision of Section 7 of the [Limitation of Actions Act](#), Chapter 22 of the Laws of Kenya. That the



suit at the trial court was bad in law as the respondent failed to lodge an appeal against the adjudication objection proceedings as provided for under the [Land Adjudication Act](#), Chapter 284 Laws of Kenya. That the same is a nullity as held by the Court of Appeal in [Bhajee & another v Nondi & another](#) (2022) KECA 119 (KLR).

7. Further, counsel stated that the appellant is the bona fide owner of the suit properties, having lawfully been first registered as such. Thus, counsel urged the court to allow the appeal as prayed. Counsel relied on various authoritative pronouncements, including the Court of Appeal decision in the case of [Peter Mbiru Michuki v Samuel Mugo Michuki](#) (2014) eKLR, to fortify the submissions.
8. The respondent's counsel, Kerario Marwa and Company Advocates, filed submissions dated 30th November 2023 and stated, inter alia, that the respondent's claim was not time barred since it was based on fraud thus, the proviso to Section 26(a) of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya, was applicable. That the appellant failed to produce the written objection, which commenced the objection proceedings that he sought to rely on. Therefore, counsel urged the court to be guided by the provision of Section 80 (1) of the [Land Registration Act](#), 2016 (2012) and affirm the trial court's decision. To buttress the submissions, counsel relied on the case [Mintina Ene Keton Koponi \(Suing as the legal representative of the Estate of keton Ole Koponi Parsena \(deceased\) v Francis Njakwe Gathiri and 2 others](#) (2018) eKLR, among others.
9. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down 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.
10. It is noteworthy 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 v Kenya Bus Services Ltd](#) (1982-88) 1KAR 278 applied in other cases, *inter alia*, [Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma and 3 others](#) (2017) eKLR.
11. At the trial court, the suit was generated by way of a plaint dated 22nd November 2021 mounted by the plaintiff/respondent against the defendant/appellant seeking the following orders;
 - a. A declaration that the appellant's transfer of the suit properties to himself was fraudulent.
 - b. An order directing the County Land Registrar to cancel the appellant's registration as proprietor of the suit properties and registering the respondent as proprietor in his place.
 - c. Costs of the suit.
12. The plaintiff contended that he was the proprietor of the suit properties measuring approximately one decimal eight five hectares (1.85Ha) in area. That in 2015, the defendant fraudulently caused himself to be registered as owner of the suit properties.
13. By consent of parties, the plaintiff's witness statement dated 22nd November 2021 was adopted as his evidence. His bundle of documents filed on 21st January 2022 was also admitted as exhibits in support of his case.
14. In his statement of defence and counterclaim dated 2nd March 2022, the defendant /appellant herein denied the claim and sought the orders infra:
 - a. A declaration that the Plaintiff's entry into the suit properties and interference with the defendant's quiet possession thereon is unlawful and amounts to trespass on the properties.



- b. A mandatory injunction restraining the plaintiff, his servants and/or agents from trespassing, encroaching, using, cultivating, leasing, occupying, remaining upon or in any other manner whatsoever interfering with the defendant's possession and use of the suit properties.
 - c. A mandatory injunction restraining the plaintiff by himself, servants, agents, employees, proxies and any other persons acting on his behalf from cultivating and or in any manner blocking the public access road leading to the river and bordering parcel numbers 3017, 3018, 3019, 3020 and 946.
 - d. A mandatory injunction compelling the plaintiff by himself, servants, agents, employees, proxies and other persons acting on his behalf to restore/reinstate the blocked public access road leading to the river and bordering parcel numbers 3017, 3018, 3019, 3020 and 946 within 7 days from the date of judgment herein failure of which the defendant to restore the same and recover the costs uncured from the plaintiff by way of execution.
 - e. An order directed at the Police Officer in Charge of Magina Police Station or of the police station and/or post nearest to the suit properties to ensure compliance with and/or to enforce the orders granted herein.
 - f. Material damages.
 - g. General damages for trespass.
 - h. Any other further orders that the court may deem necessary to make.
 - i. Costs of this suit and interest thereon at court rates with effect from the date of filing suit.
15. DW1, Ndege Tiberius, the Land Registrar, Homa Bay County, testified that he has records of the suit properties, which are registered in the name of the appellant, being a first registration. In cross-examination, he stated that he was not stationed at Homa Bay when the registration occurred.
 16. DW2, the appellant herein, relied on his witness statement dated 3rd March 2022, which was adopted as part of his evidence. He also relied on his bundle of documents, and testified that he purchased the suit properties from the respondent at a cost of Kshs.10,000. That the sale agreement was entered during objection proceedings, wherein the respondent agreed to subdivide his land and transfer the suit properties to the appellant. That he started cultivating the suit properties in 1990 and was later issued with title deeds thereof.
 17. During cross-examination, DW2 clarified that the parties did not sign a sale agreement. He stated that:

“...No sale agreement was signed between us and the plaintiff...”
 18. Millicent Awuor Achieng (DW3), relied on her witness statement dated 9th April 2022 as part of her testimony. She averred that the suit properties belong to the appellant, who purchased the same from the respondent. That the purchase price was paid in two installments and she was a witness to the same. That it is the respondent's sons who are opposed to the appellant's ownership and use of the suit properties.
 19. DW4, Joseph Oguta, relied on his witness statement dated 10th April 2022 which was adopted as his evidence. He testified that the appellant had hired him to plough one of the suit properties, to wit, land parcel no. 3017 but the respondent stopped him from doing so in 2014.



20. Peter Odhiambo Oganya testified as DW5 and relied on his witness statement dated 9th April 2022, which was adopted as part of his evidence. He stated that the appellant had hired him to plough one of the suit properties, to wit, land parcel no. 3017 in 2014.
21. In cross-examination, he admitted that he did not know the history of the disputed land.
22. DW5, Kuto Toromo, the Land Adjudication Officer Homa Bay County, produced adjudication records relating to the suit properties (DExhibit bundle of documents). He testified that adjudication process in the area began in 1972 and concluded in 2015. That the suit properties are subdivisions of the original land, Plot numbers 1294 and 946, which belonged to the respondent.
23. On cross-examination, DW5 stated that a sale agreement between the parties does not form part of the adjudication records. That there were no witnesses to the transaction between the parties. He conceded that although an appeal against the land committee's decision is made to the arbitration board then to the land adjudication officer, there were no records of the deliberations of the land committee over the present dispute.
24. In the impugned judgment, the learned trial magistrate observed, inter alia;

“...on the material on record and in the several circumstances, no sufficient evidence that the plaintiff did in fact sell or lawfully sold the suit property to the defendant...”
25. The appellant contends that he has been in occupation of the suit properties since 1992 thus, the respondent's rights to the same have been extinguished by dint of the provision of Section 7 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya. That the suit at the trial court was bad in law as the respondent failed to lodge an appeal against the adjudication objection proceedings as provided for under the *Land Adjudication Act*, Chapter 284 Laws of Kenya. That further, he is the *bona fide* owner of the suit properties, having lawfully been first registered as such.
26. Nevertheless, I concur with the submissions of the respondent's counsel that Section 26 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is applicable herein. The Section provides:

Extension of limitation period in case of fraud or mistake Where, in the case of an action for which a period of limitation is prescribed, either—

 - (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:
27. Moreover, 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)

28. 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. The Court observed in part:

“...If the process that was followed prior to issuance of the title did not comply with the law, then such a title could not be held as indefeasible...”

29. 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.” (Emphasis added)

30. In the present appeal, it is crystal clear that the appellant failed to prove the legality of the process of obtaining title to the suit properties.

31. 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.

32. In that regard, I find that the respondent who was the plaintiff at the trial court proved his claim on a balance of probabilities. That the appellant’s claim failed in the circumstances. I approve the trial court’s decision accordingly.

33. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 12th September 2022 and filed herein on even date is unmerited. The same is hereby dismissed with costs to the respondent.

34. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 7TH DAY OF FEBRUARY 2024.

G.M.A ONG’ONDO

JUDGE

Present

1. Mr. Odunga, learned counsel for the Appellant
2. Mr. Acholla, learned counsel for the Respondent
3. Terrence, Court Assistant

