



**Rombo v Rapolo (Environment and Land Appeal E061 of 2022)  
[2024] KEELC 14206 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 14206 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E061 OF 2022  
GMA ONGONDO, J**

**JULY 4, 2024**

**BETWEEN**

**ZACHARY ASEDA OMONDI ROMBO ..... APPELLANT**

**AND**

**WILLIAM OMITI RAPOLO ..... RESPONDENT**

*(An appeal arising from the judgment/decree in Oyugis Senior  
Principal Magistrate's Court Environment and Land Case number  
13 of 2019 by Hon. B. Omwansa, SPM on 30th November 2022)*

**JUDGMENT**

1. On 30<sup>th</sup> November 2022, the trial court (Hon. B. Omwansa, SPM) rendered judgment in Oyugis Senior Principal Magistrate's Court Environment and Land Case number 13 of 2019 (The original suit) declaring that the title the plaintiff/appellant holds is not recognized by equity. Thus, he dismissed the suit with costs.
2. The said judgment attracted the instant appeal originated by way of a memorandum of appeal dated 16<sup>th</sup> December 2022 founded upon ten grounds, inter alia;
  - A. That the Learned Trial Magistrate erred in Law and fact in disregarding the proof of ownership as presented by the appellant and failing to properly analyse the same and considering the evidence before him thus arriving at an erroneous decision.
  - B. That the Learned Trial Magistrate erred in Law and fact by failing to consider that the appellant is the registered owner of the suit property known as Central Kasipul/Kamuma/7116 (the suit land herein) and thus entitled to exclusive rights to the exclusion of all else.



- C. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate the law on unimpeachable title considering the appellant obtained the title to the suit land by following due process as prescribed by law.
- D. That the Learned Trial Magistrate erred in law and in fact by deciding that the defendant is not a party to the matter when evidence shows otherwise.
3. So, the appellant has prayed for the following orders:
- A. That the Appeal be allowed.
- B. That the costs of this Appeal be granted.
4. The appeal was heard by way of written submissions pursuant to this court's directions issued on 7<sup>th</sup> February 2024.
5. Accordingly, the appellants' counsel, O. H. Bunde and Company Advocates, filed submissions dated 27<sup>th</sup> March 2024 and identified six issues for determination thus:
- A. Whether the trial court's judgment is from its face, correct in principle.
- B. Whether the appellant is the bona fide registered legal owner of the suit land.
- C. Whether the respondent is asserting possessory claims that are trespassory and inconsistent with the appellant's title to the suit land.
- D. Whether the respondent has disclosed any valid legal right in the suit land.
- E. Whether the respondent's allegations and arguments of fraud, contract and adverse possession are legally competent and merited herein.
- F. Whether the appellant is entitled to damages herein.
6. Briefly, counsel submitted that the respondent did not demonstrate how he validly acquired a substantive interest in the suit land. That the trial court failed to adjudge the claim before it. Counsel relied on various authoritative pronouncements to fortify the submissions, including the case of Industrial and Commercial Development Corporation -vs- Kariuki & Gatheca Resources Ltd [1977] eKLR, to fortify the submissions.
7. By the submissions dated 14th May 2024, Bana and Company Advocates, learned counsel for the respondent noted that trespass and adverse claims had been raised in the plaint and statement of defence respectively. Counsel referred to the parties' respective evidence and submissions on record as well as the trial court's observation upon visit to the disputed site as captured in paragraph 4 of the plaint. Counsel collapsed the grounds of appeal to whether the appellant is the registered proprietor of the suit land and whether the respondent was a principal/substantive party in the suit.
8. In the analysis of the grounds of appeal, counsel stated that the trial court observed that constructive trust was construed in favour of Sila Omiti. That adverse possession was established in the suit. That thus, the appeal lacks merit, misconceived and urged the court to dismiss the same with costs.
9. It is noteworthy that the present appeal is the first one from the trial court. So, my mandate is to reconsider the evidence on record with caution and reach my own independent conclusions and inferences; see Kiruga-vs-Kiruga and another (1988) eKLR.



10. It must be noted that the appellant who was the plaintiff at the trial court sued the respondent by way of a plaint dated 13<sup>th</sup> February 2019 over the suit land, Central Kasipul/Kamuma/7116, measuring zero decimal zero one hectares (0.01 Ha) in area. He sought the orders infra:
  - a. A declaration that the appellant is the legal owner of the suit land.
  - b. An order of eviction, evicting the respondent, his agents and/or servants from the suit land.
  - c. Permanent injunction restraining the respondent, his agents, servants and/or anyone claiming under the respondent from entering into, re-entering, trespassing onto, building structures, converting the suit land, abusing the appellant's rights, interfering with and/or in any other manner dealing with the suit land.
  - d. General damages for trespass and/or conversion.
  - e. Interest on (d) above at court rates.
  - f. Costs of the suit be borne by the respondent.
  - g. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.
11. The respondent denied the claim in his statement of defence dated 10<sup>th</sup> April 2019. He contended that he purchased the suit land from the initial owner, one John Oyata Omolo (deceased), vide a sale agreement dated 19<sup>th</sup> June 1988. That the plaintiff's purchase of the suit land is null since as at the time of such purchase, the respondent had already acquired title thereto by way of adverse possession thereby extinguishing the original proprietor's right to recover the same.
12. In his evidence, the appellant (PW1) relied on title deed to the suit land, a search certificate in respect of the suit land, transfer form, consent form, letter of consent, green card, transfer, consent letter dated 28<sup>th</sup> August 2015, application for consent and a demand letter. He stated that he purchased the suit land from one Charles Ayata, who was the registered proprietor at the time of sale.
13. During cross-examination, PW1 admitted that neither of the parties live on the suit land. That the respondent put up a structure thereon after 2018 and the same is occupied. That he did not have a copy of the sale agreement in respect to the suit land. He insisted that at the time of purchase, the suit land was unoccupied.
14. The respondent (DW1) relied on his statement on record which was adopted as his evidence in chief and photographs, application for consent, transfer and sale agreement (DExhibits 1 to 4 respectively). On cross-examination, he stated that he purchased the suit land from one John Omollo. He admitted that the sale agreement produced in evidence did not indicate him as the buyer, but rather a third party known as Sila Abongo Omiti. That he could not recall who signed the consent or transfer forms. That he could not remember when he purchased the suit land but the seller died before transferring the same to him. That he is in occupation of the same. He further acknowledged that the appellant had title to the suit land.
15. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to:
  - A. Whether the appellant proved that he was a bona fide purchaser of the suit land.
  - B. Whether the instant appeal is tenable.
  - C. Just orders to issue herein.



16. In the impugned judgment, the learned trial magistrate noted thus:
- “...It will be in vain if I grant the orders against a person who is not a party to this matter. The son of the defendant who is in possession of the said parcel of land is not a party to this matter...”
17. The appellant laments that the trial court failed to consider that the appellant is the registered owner of the suit land thus, entitled to exclusive rights to the exclusion of all else. That the court did not appreciate the law on unimpeachability of title considering the appellant obtained the title to the suit land by following due process as prescribed by law. From the evidence on record inclusive of PExhibit 1, the suit land is registered in the name of the appellant.
18. On impeachability of title, 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 supplied)
19. Moreover, in *Dina Management Limited -vs- County Government of Mombasa & 5 others* (2023) eKLR, the Supreme Court of the Republic of Kenya held that the protection offered to a bona fide purchaser for value without notice does not apply where the title to the property was obtained irregularly or illegally. 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. That the ownership of land whose title was not acquired regularly is not protected under Article 40 of *Constitution* of Kenya, 2010 on the protection of right to property.
20. Clearly, the above decisions of the superior courts, which bind this court, upset the torrens system which is predicated upon the sanctity of the register; see also Article 40 (6) (supra) and section 26 (1) of the *Land Registration Act* 2016 (2012).
21. In the present case, the appellant averred that he purchased the suit land from one Charles Ayata, who was the registered proprietor at that time. Vide a further list of documents dated 26<sup>th</sup> April 2019, he produced in evidence a land transfer form dated 9<sup>th</sup> October 2018, letter of consent dated 27<sup>th</sup> September 2018 as well as an application for consent of the Land Control Board of even date. However, no sale agreement was availed to fortify his averment.
22. This court is cognizant of Section 3 (3) of the *Law of Contract Act* Chapter 23 Laws of Kenya, which provides that:
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
    - (i) is in writing;
    - (ii) is signed by all the parties thereto; and



- (iii) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

23. The appellant admitted in cross-examination that he did not have a copy of the sale agreement in respect to the suit land. He stated emphatically that:

“...I do not have the sale agreement... I cannot trace it...”

24. It is pretty clear that the appellant’s failure to keep a copy of the sale agreement, if at all, raises more questions than answers and portrays him quite negligent in his business transactions. In my view, he cannot be described as a bona fide purchaser for value as I subscribe to the decision in the case of Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR. Interestingly, the appellant did not call the alleged vendor as a witness at the trial court.
25. The respondent’s assertion that he purchased the suit land before the appellant herein is also not supported by way of evidence. The sale agreement produced as DExhibit 4, indicates the buyer as one Sila Abong’o Omiti, who was not a party to the suit. Further, the application for consent of the Land Control Board attached thereto is incomplete and the transfer form is not duly filled.
26. It is therefore, my considered view that the learned trial magistrate was guided by the evidence on record and applied correct principles of law in reaching the impugned judgment. There is no reason to disturb his objective standpoint in the suit and I affirm the same.
27. To that end, I find that the grounds of appeal are untenable.
28. A fortiori, this appeal is devoid of merit. It is hereby dismissed with costs to the respondent.
29. This judgment was not delivered on 18th June 2024 as scheduled because it was declared Judiciary National Day of Mourning and the trial Judge proceeded on urgent official duties outside the station and requisite notice issued accordingly.
30. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 4<sup>TH</sup> DAY OF JULY 2024**

**G.M.A ONGONDO**

**JUDGE**

In the presence of;

O H Bunde learned counsel for the appellant

T. Luanga, court assistant

