



REPUBLIC OF KENYA



**Oloo v Oyore (Environment and Land Appeal E015 of 2021)
[2024] KEELC 6839 (KLR) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E015 OF 2021
GMA ONGONDO, J
OCTOBER 15, 2024**

BETWEEN

MASLIANA AKUMU OLOO APPELLANT

AND

PETER ANYANGO OYORE RESPONDENT

(An appeal arising from the judgment/decree in Homa Bay Chief Magistrate's Court Environment and Land Case number 96 of 2011 by Hon. T. Obutu, CM on 31st January 2019)

JUDGMENT

1. On 31st January 2019, the trial court (Hon. T. Obutu, CM) rendered judgment in Homa Bay Chief Magistrate's Court Environment and Land Case number 96 of 2011 (The original suit) declaring that the plaintiff/respondent had proved his case to the requisite standard and entered judgment for him as against the defendant/appellant in the following terms:
 - a. An eviction order do issue against the defendant from parcel of land Kanyamwa/K.K/Kakaeta/1334.
 - b. Costs of the suit to the plaintiff.
2. The said judgment attracted the instant appeal commenced by way of an amended memorandum of appeal dated 6th November 2023 founded upon seven grounds, including:
 - a. The Learned Trial Magistrate erred in law relating to land tenure and land law by failing to take into consideration the fact that the appellant herein was and has been in occupation of a portion of the suit land since the year 1993.



- b. The learned trial Magistrate erred in law in that he failed to appreciate the provisions of Section 28 of the [Land Registration Act](#), 2012 and the role of overriding interest and customary trust in land law.
 - c. The Learned Trial Magistrate erred in Law of evidence in holding that the appellant ought to have pleaded and proved fraud and misrepresentation on the part of the respondent whereas the respondent admitted having seen the homestead of the appellant on the land but went ahead to purchase the same portion.
 - d. The Learned Trial Magistrate erred in Law of procedure in failing to admit the copy of a court decision in Civil Case No. 172 of 1997 which decision was made in favour of the appellant and was very relevant to the matter in issue.
3. So, the appellant has prayed that this Honourable court do quash the decision of the trial court, set aside the eviction order and make the following orders:
- a. An order that the appellant has acquired title to a portion measuring 2.1 hectares of Land Parcel Number Kanyamwa/K-K-Kakaeta/1276 (the original title) now registered as Land Parcel No. Kanyamwa/K-K-Kakaeta/1333 and 1334 (the 1st parcel of land and the suit land respectively) and should be duly registered as the proprietor thereof.
 - b. Alternatively, an order that the appellant's occupation of the suit land is an overriding interest over the titles registered in the names of Romans A. Opielo and Peter Oyore Anyango.
 - c. An order that the documentary evidence which were not produced in the trial court be admitted as additional evidence and be duly considered by this court.
 - d. The costs of the original court and this appeal be awarded to the appellant/defendant.
4. The appeal was heard by way of written submissions pursuant to this court's directions issued on 6th March 2023.
5. Accordingly, the appellants' counsel, G. S. Okoth and Company Advocates, filed submissions dated 10th June 2024 and urged the court to admit into evidence the appellant's list of documents dated 16th December 2012 which though filed at the trial court, were not produced during her oral testimony hence, not considered. That the appellant purchased 4 acres of Land Parcel No. Kanyamwa/K-K-Kakaeta/367 in 1993 from one Paul Ouma Ounda. That the said parcel was subdivided and one of the resulting subdivisions was Land Parcel No. Kanyamwa/K-K-Kakaeta/1276, the original title herein, registered in the name of Romanus Opiel Yuga (deceased 1). That deceased 1 later on subdivided the original title into two portions, to wit: Land Parcel No. Kanyamwa/K-K-Kakaeta/1333 and Land Parcel No. Kanyamwa/K-K-Kakaeta/1334, the suit land herein. The latter was registered in the name of the respondent, although the appellant was and is residing thereon. Counsel cited Section 78 (1)(d) of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya, among others, and relied on the case of Wensley Barasa -vs- Immaculate Awino Abongo [2017] eKLR, to fortify the submissions.
6. By the submissions dated 21st May 2024, P. R. Ojala and Company Advocates, learned counsel for the respondent submitted that the appellant did not prove her claim that she had an overriding interest over the suit land. That no documentary evidence was produced to show that the appellant owns the suit land. That the appellant failed to demonstrate to the trial court that the respondent obtained title to the suit land through fraud or illegality thus, the trial court could not impeach the respondent's title. To buttress the submissions, reliance was placed on various authoritative pronouncements including the case of Kadzo Charo -vs- Alex Dzombo (2019) eKLR, to buttress the submissions.



7. Notably, the instant appeal being the first one from the trial court, I have the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters-vs-Sunday Post* (1958) EA 424 at 429.
8. It must be borne in mind that the respondent who was the plaintiff sued the appellant by way of a plaint dated 29th September 2011 over the suit land, Land Parcel No. Kanyamwa/K-K-Kakaeta/ 1334. He sought the orders infra:
 - a. The removal of the appellant from the suit land.
 - b. Costs of the suit.
 - c. Interest.
9. In his evidence, the respondent (PW1) relied on a copy of a sale agreement dated 1st June 2000, application for consent of the Land Control Board to subdivide the original title, Land Control Board Consent to transfer, copy of the mutation form, title deed in respect of the suit land, green card in respect of the suit land, a copy of the judgment in Civil Suit No. 172 of 1997, a court order issued on 15th May 2000 in Civil Suit No. 172 of 1997. (PExhibits 1 to 7 respectively). He testified that he purchased a portion out of the original title measuring 1.0 hectares in area from deceased 1. That following subdivision, the suit land got registered in his name and a title deed subsequently issued.
10. Further, PW1 stated that in 2002, he realized that the appellant had built on the suit land. That in Homa Bay Law Court's Civil Suit No. 172 of 1997, the appellant was ordered to vacate the suit land. That however, the decree issued to deceased 1 on 15th May 2000 was not executed hence, the appellant remained on the suit land. In cross-examination, he admitted that the appellant was already on the suit land at the time of purchase.
11. PW2, Alice Agolla Sinogo, the widow to deceased 1, confirmed that indeed, PW1 purchased the suit land from deceased 1. That the appellant built thereon without the consent of deceased 1. On cross-examination, she conceded that she was aware that the appellant lived on the suit land.
12. The appellant denied the claim in her statement of defence and counterclaim dated 6th December 2012. She averred that she purchased a parcel of land no. Kanyamwa/Kologo/Kochieng/364 on 8th August 1993 from one Peter Oua Ounda. That in 1997, a dispute arose between herself and deceased 1 over the purchased parcel. That the said dispute was arbitrated by the Office of the District Officer, who found in her favour. That she has built her home on the suit land and has lived thereon since 1993 to date. In that regard, she prayed for:
 - a. Orders of permanent injunction restraining the respondent from evicting the appellant.
 - b. Costs of the suit.
 - c. Interest on (b) at court rates.
 - d. Such further or other relief as the honourable court deems fit.
13. DW1, Maslina Akumu Oloo, testified that she lives on the suit land, whose title is registered in the name of the respondent herein. During cross-examination, she stated that she purchased a piece of land in 1993 but was not issued with a title thereto. That she does not know the title number and the same was not indicated in her sale agreement. That she does not know the acreage of the land.



14. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to:
 - a. Whether the instant appeal is tenable?
 - b. Just orders to issue herein.
15. In the impugned judgment, the learned trial magistrate observed, inter alia;

“...The defendant has never challenged the title as per the counterclaim. She did not prove any fraud towards obtaining of the title on the part of the plaintiff...”
16. The appellant laments that the trial court failed to take into consideration the fact that she was and has been in occupation of a portion of the suit land since the year 1993. That the trial court failed to appreciate the provisions of Section 28 of the *Land Registration Act*, 2012 and the role of overriding interest and customary trust in land law.
17. From the evidence on record, it is clear that the appellant was living on the suit land prior to the sale. PW1 stated that:

“...Yes, I noted that DW1 was on the property...”
18. Similarly, PW2 admitted that:

“...A certain woman constructed her home in this land... My husband sued her for that...”
19. The appellant averred that she has been living on the suit land since 1993. That the suit land was previously the subject of a dispute but the same was arbitrated by the Office of the District Officer, who found in her favour.
20. It is noteworthy that the appellant never produced any documents in support of her averments. Moreover, she called no witness to corroborate her testimony.
21. The appellant’s counsel has urged this court to admit into evidence the appellant’s list of documents dated 16th December 2012 which though filed at the trial court, were not produced during her oral testimony. To that end, I note that no leave to introduce additional evidence has been sought herein pursuant to Section 78 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 42 Rule 27 of the Civil Procedure Rules, 2010.
22. Additionally, no application for review was lodged by the appellant at the trial court as stipulated under Section 80 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 45 of the Civil Procedure Rules, 2010. Therefore, it is my considered view that allowing introduction of additional evidence in the present case may occasion prejudice to the respondent since he has not had an opportunity to interrogate the same.
23. It is not disputed that the appellant occupies the suit land but, it is not clear for how long she has been in occupation. Further, the portion of the suit land which she occupies is also not definite. Thus, it is my considered view that the appellant did not adduce sufficient evidence to show that there was an overriding interest over the suit land in line with Section 28 of the *Land Registration Act* (supra).
24. The appellant laments that the trial court erred in holding that the appellant ought to have pleaded and proved fraud and misrepresentation on the part of the respondent. That the respondent admitted having seen the homestead of the appellant on the land but went ahead to purchase the same portion.



In that regard, I subscribe to the Court of Appeal decision in *Kinyanjui Kamau vs George Kamau* [2015] eKLR where the court expressed itself as follows;

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts...” (Emphasis added).

25. Also, in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

“...It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts...” (Emphasis added).

26. Clearly, the existence of fraud cannot be inferred from the facts. Therefore, I am of the considered view that the appellant failed to lead evidence to demonstrate the existence of fraud on the part of the respondent, during trial.

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

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.

28. In light of the foregoing, it is my considered view that the respondent who was the plaintiff at the trial court proved his case to the requisite standard. However, the appellant who was the defendant in the original suit, did not prove her counterclaim on a balance of probabilities.

29. Therefore, I find 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 reasoned judgment and I affirm the same.

30. To that end, I find that these grounds of appeal are untenable.

31. A fortiori, this appeal is devoid of merit. It is hereby dismissed with costs to the respondent.

32. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 15TH DAY OF OCTOBER 2024

G. M. A ONGONDO

JUDGE

Present

1. Mr. G. S. Okoth, Learned Counsel for the appellant
2. Mr. Ojala, Learned Counsel for the respondent



3. Appellant

4. Luanga T, Court Assistant

