



**Simeka v Abwabi (Environment and Land Appeal E001 of 2023)
[2024] KEELC 14177 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 14177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

E ASATI, J

OCTOBER 9, 2024

BETWEEN

PATRICK AMIANDU SIMEKA APPELLANT

AND

JOSEPH ASIACHI ABWABI RESPONDENT

*(Being an appeal from the judgement of Hon. R. M Ndombi SRM Vibiga
in Vibiga ELC Case No 4 of 2021 delivered on the 19th day of June 2023)*

JUDGMENT

Background

1. As can be gathered from the record of appeal filed herein dated 28th March 2024, the appellant, Patrick Amiandu Siemekha, was the plaintiff in Vihiga PMC ELC Case No. 4 Of 2021 (the suit). Vide the plaint dated 15th January 2021, the appellant claimed that he was the absolute owner of a parcel of land known as West Bunyore /Emusire /1200 (the suit land) which he had lawfully purchased from one Martha Atulo Asiachi, deceased, and step- mother to the Respondent. He further claimed that he had been in occupation of the suit land but that the Respondent who has his own land parcel No. West Bunyore /Emusire /1186 on 12th January 2021 unlawfully uprooted and destroyed trees and other crops which the appellant had planted on the suit land. He therefore sought against the Respondent for an order of permanent injunction restraining the Respondent whether acting by himself or through his agents from interfering, trespassing onto, cultivating, claiming or in any manner whatsoever dealing with the suit land.
2. Vide the Statement of Defence dated 25th February 2022, the Respondent denied the appellant's claim. He denied that the appellant purchased the suit land and averred that the appellant did not have the locus standi to institute the suit.



3. The record of appeal shows that the suit was heard before the trial court which vide the judgment dated 19th June 2023 found and held that since the appellant was not the registered owner of the suit land he was not entitled to the orders sought.

The appeal

4. Aggrieved by the judgment, the appellant preferred the present appeal vide the Memorandum of Appeal dated 5th July 2023. His prayers in the appeal are that the court sets aside the judgment of the lower court and all consequential orders and decree emanating therefrom, enters judgment in his favour as per his reliefs sought in the lower court and orders the Respondent to bear the costs of the appeal and of the lower court.
5. The grounds of appeal as contained in the Memorandum of Appeal are that; -
 - a. the honourable trial Magistrate erred in law by declining to grant a permanent injunction based on application of wrong principles of the law in regard to grant of the said orders against the evidence that was before her.
 - b. the learned trial Magistrate erred in declining to grant the orders sought by the appellant when the Respondent by his own admission had admitted that he was aware the appellant purchased the land from his step-mother in 2012 and had been in occupation therein to date.
 - c. the learned trial Magistrate erred in law and fact by failing to appreciate that prior to the appellant filing the instant suit before her, the appellant had been previously sued by the Respondent vide Kakamega Chief Magistrate's court MCL & E NO. 13 OF 2010 which had been dismissed.
 - d. the trial Magistrate erred in law and fact by failing to appreciate the fact that when the appellant bought Land Parcel No. West Bunyore /Emusire /1200 from the late Martha Atuwu, she was the registered owner having successfully transmitted the same vide Kakaemga High Court Succ Case No. 81 of 2007 and was therefore legally permitted to sell the same to the appellant.
 - e. the trial Magistrate erred in failing to appreciate that the late Martha Atuwu had initiated the transfer of the suit parcel into the name of the appellant and indeed had left a valid will upon her death for the Executor to complete the transfer of the suit parcel into the name of the appellant and which fact had not been challenged at the trial.
 - f. the trial Magistrate erred in finding that only a registered proprietor of land could enjoy the relief of injunction from court which was a wrong application and misapprehension of the law.
 - g. the trial Magistrate otherwise ignored the evidence placed before her by the appellant and took a complete tangent away from what was presented before her leading to the skewed judgment.
 - h. the trial Magistrate erred in law by finding that the appellant had no proprietary interest in the suit land when during the trial had found the Respondent to be in contempt of court order and sentenced him to imprisonment with an option of fine of Kshs 50,000/= which he paid.
 - i. the trial Magistrate erred in law and fact by failing to appreciate that there was no evidence before her which had revoked the certificate of confirmation of grant issued in Kakamega High Court Succ Cause No. 81 of 2007 and it could not nullify the sale between the appellant and Martha Atumo under the established law.



- j. the learned trial Magistrate erred in law by failing to recognise the admission by the Respondent that he had his own parcel of land to wit; West Bunyore /Emusire /1186 in which he resided and which was independent from the suit parcel.
- k. the learned trial Magistrate otherwise did not evaluate the entirety of the evidence presented to her by the appellant hence arriving at the conclusion that the appellant had no case,
- l. The trial Magistrate otherwise ignored the fact and principles applied in civil cases that only demanded of the appellant to prove his case on a balance of probability to warrant the grant of the relief sought.

Submissions

6. Pursuant to directions taken on 7/5/2024, the appeal was canvassed by way of written submissions. Written submissions dated 7th May 2024 were filed by D.C Chitwah Advocate on behalf of the appellant. Counsel submitted that the appellant bought the suit land from one Martha Atuwu who had transmitted the land unto her name vide Kakamega High Court Succession Cause No. 81 of 2007 as per the Certificate of Confirmation of Grant dated 27th July 2012. That the appellant carried out due diligence before buying the land. He then embarked on development of the land. That notwithstanding all these, the trial court found that in the absence of certificate of registration of title, there was no evidence of proprietorship in respect of the suit property and that hence the Plaintiff was not entitled to the relief sought. That the trial court failed to appreciate that the appellant had been sued by the Respondent in Kakamega Chief Magistrate's Court MCL & E No. 13 of 2020 which suit was dismissed.
7. That the trial court failed to appreciate that the sale transaction between the plaintiff and the said Martha Atuwu was clean and devoid of any allegations or fraud. That it was upon the trial court to uphold the interest of the appellant and grant the relief sought.
8. Counsel submitted further that the deceased Martha Atuwu had initiated the transfer of the suit land in favour of the appellant and left a Will upon her death for the executor to complete the transfer of the suit parcel in the name of the appellant and which fact was not challenged at the trial. That there was no evidence that the Grant given to Martha Atuwu had been revoked. That during the proceedings, the trial court had found the Respondent guilty of contempt of court and sentenced him and that this could not have happened if the appellant had no proprietary interest in the land. Counsel urged the court to allow the appeal.
9. Written submissions dated 5th June 2024 were filed by Koech Law Advocates LLP on behalf of the Respondent. Counsel submitted that the evidence produced before the trial court indicated that the sale agreement was entered into on 28th July 2012 by which time the land was registered in the name of one Safania Elisha deceased and that therefore Martha Atuwu Asiachi did not have legal right to sale the land. Counsel relied on the provisions of section 45 of the *Law of Succession Act* to support the submission. Counsel also relied on the case of Estate of Barasa Kanenje Many (deceased) Succ Cause No. 263 of 2002 (2020) KWHC 1 (KLR) where it was held, inter alia, that the mere fact that a person is a surviving spouse or child of the deceased does not make him or her a personal representative of the deceased, that one needs to be appointed by the court as such. That any transaction entered with a person who is not appointed as such over estate asset would be null and void as such person would have no standing in law to transact over such property.
10. Counsel submitted further that the appellant failed to produce before court evidence of payment of the purchase price, stamps duty, or any other requirement needed to fulfil a valid sale agreement. That



clause 3 of the agreement indicated that there was a balance of Ksh 820,000/= which was to be paid to the vender upon transfer of the land to the purchaser. That the agreement was null and void and therefore no rights can arise therefrom.

11. Relying on the case of Rajesh Pranjivan Chadasama –vs- Rajesh Pranjivan Chadasama (2014) eKLR where it was held that a litigant is clothed with locus standi upon obtaining a limited or full Grant of Letters of Administration, Counsel submitted that the appellant instituted the suit on his own behalf claiming property of a deceased person. That the appellant lacked locus standi to institute and prosecute the suit.
12. That the trial court was right in finding that the Appellant did not meet the threshold for grant of injunctive orders and was right in dismissing the suit against the Respondent. Counsel urged the court to dismiss the appeal.

Issues for Determination

13. From the grounds of appeal raised, the substantive issue that emerges for determination herein is whether or not the trial court erred in law and in fact in dismissing the appellant's suit.

Analysis and Determination

14. This is a first appeal and the court reminds itself of its duty to re-examine and reanalyse the evidence placed before the trial court.
15. The evidence placed before the trial court by the appellant who was the plaintiff comprised of his own testimony and the testimony of 2 witnesses who testified as PW2 and PW3. The appellant adopted the contents of his witness statement dated 2/2/2022 as his evidence in chief. He narrated in the said witness statement how he bought the land from Martha Atuwu Asiachi, deceased. That the said Martha Atuwu Asiachi was suffering from terminal illness and so she needed the money for her medication. That he came to learn that Martha Atuwu Asiachi was step-mother of the Respondent. That he did due diligence and ascertained that the subject land parcel number West Bunyore / Emusire /1200 belonged to Martha Atuwu Asiachi. That he also found out that Martha Atuwu Asiachi was the widow of Zephania Asiachi Elisha who had died on 6th February 1999.
16. That in 2016 title deed to the suit land was issued to Martha Atuwu after confirmation of Grant in respect of the estate of her late husband.
17. That he paid a consideration of Kshs 1.3 million in addition to other financial assistance. He stated that he had been in exclusive quiet and interrupted possession of the land purchased from the year 2012 to date. That Martha signed all the relevant transfer papers which were surrendered to the lands office but that the Respondent lodged a caution. That when the Land Registrar summoned the Respondent to remove the caution, the Respondent filed suit namely; Kakamega MC E&L Case No 13 Of 2020 which case was dismissed.
18. That Martha Atuwu made a Will bequeathing the suit land to him.
19. That Martha Atuwu was buried on land parcel No. West Bunyore /Emusire /1301 in her matrimonial home which she bequeathed to David Bwabi. That he had done considerable developments on the suit land. That the Respondent has never challenged the succession. That he is only an innocent purchaser for value and therefore protected by the law. He produced land sale agreement, Certificate of Official Search for West Bunyore /Emusire /1200, Green card, Certificate of Confirmation of Grant, Certificate of Official Search for Parcel No. West Bunyore /Emusire /1186, Green card, Proceedings and ruling in respect of KAKAMEGA CM E & L Case No. 13 of 2020, Chief's letter and Will. On



- cross examination, he stated that he bought the land in the year 2012. That he did terraces, planted trees and farming on the land and that the house was recently constructed.
20. PW2 was one Daniel Makuma Were who adopted the contents of his witness statement dated 22/2/2022 as his evidence in chief. He stated that he is the one who approached the appellant to buy the land as Martha Atuwu was looking for a buyer for the land. That they ascertained that the land belonged to Martha Atuwu. That he was present as a witness when the agreement was done and land transferred to Patrick Simekha. That before Martha died she had made a will bequeathing the land to the appellant. On cross examination he stated that he witnessed the sale agreement and saw Kshs 1.3million and counted and Martha took the money to the bank.
 21. That Patrick has built a house on the land and stays there from 2012. That a search was done and confirmed that she was the owner. That the house has been on the land for the past about 7 years.
 22. PW3 was Charles Simbwa Njehi. He stated that he witnessed the sale agreement. That the appellant fenced the land, he built a house on it and that he had started tilling when Martha was alive. On cross examination he stated that he signed the agreement as a witness and that there was no balance left. That all the amount was given to the advocate. That he also witnessed the Will being drafted at Martha's advocate's.
 23. The Respondent testified as DW2 and called 2 witnesses. He adopted the contents of his witness statement dated 25th February 2022 as his evidence in chief.
 24. He had stated in the witness statement that on or about 2nd January 2017 they had held a family meeting and agreed that no land shall be sold or leased out to anyone. That his step-mother had leased out the land to one Patrick Acheche. That in the year 2018 the appellant entered the land with tractor to plough. That he went to the land registry to place a caution and realised that his step mother had taken out Letters of Administration without informing them. That he started the process of revoking and annulling the Grant but that his step mother died soon thereafter. On cross examination he stated that he did not challenge the Will because he did not know about it. That land parcel No. West Bunyore / Emusire / 1200 is fenced, it has a house and a toilet. That he was fined Kshs 50,000/= for contempt because he cut down the trees. That he is the one who had planted the trees. On re – examination he stated that the house was built in the year 2021 when the case was proceeding.
 25. DW2 was Beatrice Shimoli who adopted her witness statement as her evidence in chief. She stated that she was the village elder and that by virtue of her position, she attended a meeting held in the home of Martha Atuwu Asiachi on 2nd January 2017 where it was agreed that the land should be used by the said Martha Atuwu Asiachi and the Respondent herein and that it should not be sold. That since the land was already leased out to Patrick Acheche, he should be informed to stop ploughing it. That in 2018 he witnessed a tractor ploughing and destroying crops planted by the Respondent on the land. That he later learnt that it was the appellant who was ploughing. That she advised the Respondent to seek legal redress. On cross examination PW2 stated that she did not know if the Chief had written a letter that the land belonged to Martha.
 26. DW3 was Jairus Muhambi Okusi. He stated that he was present in the family meeting on 2/1/2017 at the homestead of Martha Atuwu Asiachi. The rest of the contents of his witness statement are similar to that of DW2. On cross examination he stated that he did not know that the land had been sold. DW4 Stephen Bwabi stated that the appellant was a person to whom Martha Atuwu had leased the land.
 27. The Respondent produced Chief's letter Minutes, Caution Search and certificate of death as exhibits.



28. From the evidence, it is clear that the suit land is not registered in the name of the appellant. His claim was based on the contract of sale as evidenced in the land sale agreement he produced as exhibit. The land sale agreement was dated 28th July 2012. It emerges from the evidence and more particularly the Certificate of Official Search that the suit land was transmitted in favour of the deceased Martha Atuwu on 5th October 2016. The evidence also shows that in 2012, the suit land was in the name of the said Martha Atuwu's deceased husband and was the subject of succession proceedings in which Certificate of Confirmation of Grant was issued on 27th July 2012 a day before the land sale agreement. The Grant was issued in favour of the Public Trustee who were to transmit the land in favour of the deceased, Martha Atuwu.
29. The land sale agreement provided that the land being sold was No. West Bunyore /Emusire /1200, that the purchase price was Kshs. 1,300,000/= of which the appellant paid Kshs 430,000/= at the time of execution of the agreement and the balance was to be paid upon transfer. No further evidence was produced by the appellant to show that the balance of Kshs 820,000/= was ever paid. Both PW2 and PW3 claimed that the full purchase price was paid at the execution of the agreement. PW2 claimed that he witnessed Martha Atuwu being paid Kshs 1,300,000/= in full which money was counted and Martha took it to the bank. PW3 stated that all the money was given to the advocate. Although the appellant alleged that the deceased signed all transfer papers and had them lodged at the lands office for purposes of effecting the transfer, the said papers were not produced as exhibit. No evidence was called from the lands office to corroborate the claim that transfer documents in favour of the appellant had been lodged at the lands office by the deceased before her death.
30. The sole relief sought before the trial court was a permanent injunction. The burden of proof under the provisions of sections 107, 108 and 109 of the *Evidence Act* was with the appellant to prove his claim and particularly that he had a locus standi to bring the suit, that he was the absolute owner of the suit land as pleaded and that he was entitled to the relief sought.
31. It was common ground that as at the date of filing suit, the suit land was still registered in the name of Martha Atuwu. It was also common ground that Martha Atuwu died sometime in the year 2020 and succession to her estate had not been undertaken. This means that the suit land is property of a deceased person.
32. Part of the appellant's evidence was that the deceased left a Will in his favour that bequeathed the property to him. If this be so, then the matters in issue in the suit before the trial court were matters to be dealt with in accordance with the *Law of Succession Act* in a Probate and Administration cause. The appellant claims to be the one entitled to the property on the basis of the land sale agreement and the Will. While the Respondent claims to be a member of the deceased's family hence entitled to the land. It is the Probate and Administration court that can determine the rightful beneficiaries, the assets and liabilities of the deceased.
33. The trial court had no basis to grant the order of permanent injunction prayed for to permanently restrain the Respondent from interfering with the suit land. I find that trial court did not err in declining to grant the prayer.
34. I find no reason to interfere with the findings and decision of the trial court. The appeal therefore fails. It is hereby dismissed. Costs to the Respondent.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 9TH DAY OF OCTOBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.



E. ASATI,

JUDGE.

In the presence of:

Ajevi: Court Assistant.

Chitwah for the appellant.

Edaki h/b for Koech for the Respondent.

