



**Bodo & 2 others v Oyugi (Environment and Land Appeal  
E074 of 2021) [2023] KEELC 556 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 556 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E074 OF 2021  
SO OKONG'O, J  
FEBRUARY 2, 2023**

**BETWEEN**

**JASHON ONYANGO BODO ..... 1<sup>ST</sup> APPELLANT**

**OSCAR OPIYO ONYANGO ..... 2<sup>ND</sup> APPELLANT**

**BASIL OCHIENG ONYANGO ..... 3<sup>RD</sup> APPELLANT**

**AND**

**GRACE ADOYO OYUGI ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's Court  
at Kisumu, Hon. W.K.Onkunya, SRM delivered on 22nd September 2021)*

**JUDGMENT**

1. This appeal is against the judgment of Hon. W.K.Onkunya, SRM made on 22<sup>nd</sup> September 2021 in Kisumu Chief Magistrate's Court ELC No. 04 of 2019 (hereinafter referred to as "the lower court/ lower court suit"). The appellants filed a suit against the respondent in the lower court seeking; an order for the transfer of all that parcel of land known as Kisumu/Seme-Kadero/524 (hereinafter referred to only as "the suit property") in the names of the appellants and in the alternative, a refund of Kshs. 230,000/- being the purchase price that was paid by the appellants to the respondent together with interest from August 2014 until payment in full and the costs of the suit.
2. In their plaint filed in the lower court dated 18<sup>th</sup> January 2019, the appellants averred that between August 2014 and July 2015, the respondent sold to them the suit property at a consideration of Kshs. 150,000/-. The appellants averred that in addition to the said sum of Kshs. 150,000/- they spent a further sum of Kshs. 80,000/- at the request of the respondent towards the process of obtaining a Grant of Letters of Administration in respect of the estate of the respondent's husband, Ogusi Mango Onyango, deceased who was the registered proprietor of the suit property.



3. The appellants averred that despite receipt of the purchase price in full, the respondent refused to complete the succession proceedings in respect of the estate of Ogusi Mango Onyango, deceased (hereinafter referred to only as “the deceased”) and to transfer the suit property to the appellants. The appellants averred that it was a term of the agreement that the appellants entered into with the respondent that the respondent would obtain a Grant of Letters of Administration in respect of the estate of the deceased after which she would transfer the suit property to the appellants.
4. The respondent filed a defence dated 5<sup>th</sup> March 2019 to the appellants’ claim in the lower court. The respondent denied the appellants’ claim in its entirety. The respondent denied that she sold the suit property to the appellants as alleged in the plaint or at all. The respondent denied that the appellants paid her a sum of Kshs. 150,000/- as the purchase price for the suit property. The respondent also denied that the appellants spent Kshs. 80,000/- at her request towards the process of obtaining a Grant of Letters of Administration in respect of the estate of the deceased.
5. The respondent averred that it is illegal to deal with the estate of a deceased person before obtaining a Grant of Letters of Administration and that in any event, there was no way she could have sold the suit property that was her only parcel of land where she was residing to the appellants. The respondent denied that she had breached an agreement of sale that she entered into with the appellants and that the appellants were entitled to the reliefs sought in the plaint.
6. The lower court heard the appellants’ suit and delivered a judgment on 22<sup>nd</sup> September 2021 dismissing the same with costs to the respondent. In the judgment, the lower court found that there was no valid agreement of sale between the appellants and the respondent that could be enforced through specific performance. The lower court held that since the agreement between the appellants and the respondent was invalid the same having been entered into in respect of a property owned by a deceased before a Grant of Letters of Administration had not been taken out, the appellants were not entitled to any of the reliefs that they had sought.
7. The appellants were dissatisfied with the said judgment and preferred this appeal. In their memorandum of appeal dated 14<sup>th</sup> October 2021, the appellants challenged the decision of the lower court on 10 grounds that can be summarized as follows;
  - (a) That the lower court erred in law and fact by making a finding that there was no valid sale agreement between the appellants and the respondent in respect of the suit property.
  - (b) That the lower court erred in law and fact by making a finding that the appellants had not proved their case against the respondent on a balance of probabilities.
  - (c) That the lower court erred in law and fact by failing to make an order for the refund of the purchase price paid by the appellants.
  - (d) That the lower court erred in law and fact by dismissing the appellants’ claim thereby allowing the respondent to keep the land and the purchase price.
8. The appellants urged the court to allow the appeal, set aside the judgment of the lower court delivered on 22<sup>nd</sup> September 2021 and substitute the same with an order allowing the appellants’ claim in the lower court with costs.
9. The appeal was heard by way of written submissions. The appellants filed their submissions dated 13<sup>th</sup> October 2022 while the respondent filed submissions dated 21<sup>st</sup> November 2022. In their submissions, the appellants submitted that the fact that the respondent purported to sell the suit property to the appellants before obtaining Grant of Letters of Administration in respect of the estate of the deceased



only made the agreement non-binding as against the estate of the deceased. The appellants submitted that the agreement was valid and binding as against the respondent as far as the monies that she had received were concerned. The appellants submitted that the lower court erred in denying the appellants judgment for a refund of the purchase price and other expenses incurred on behalf of the respondent. The appellants submitted that the respondent should not be allowed to keep the land and at the same time benefit from the invalid agreement by keeping the purchase price made to her and other monies paid at her request pursuant to the said agreement. The appellants cited several authorities in support of their submissions.

10. In response, the respondent submitted that there was no valid agreement of sale between the appellants and the respondent that could have been enforced by the lower court. The respondent submitted that the agreement purportedly entered into between the appellants and the respondent was contrary to section 45 of the *Law of Succession Act*, Chapter 160 Laws of Kenya and amounted to intermeddling in the estate of the deceased. The respondent cited several cases in support of this submission. On the issue of the refund of the purchase price and other monies allegedly spent at the request of the respondent, the respondent submitted that the burden was on the appellants to prove that the amount claimed was paid to the respondent and that they failed to discharge that burden on a balance of probabilities.
11. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, *Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269 and *Selle v Associated Motor Boat Co. Ltd.* [1968] E.A 123 on the duty of the first appellate court.
12. The court will also not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.
13. I have considered the record of appeal particularly; the pleadings, the evidence tendered, the judgment of the lower court and the grounds of appeal. I have also considered the submissions by the advocates for the parties and the authorities cited in support thereof. From the evidence on record, I am unable to disturb the finding by the lower court that there was no valid agreement of sale of the suit property between the appellants and the respondent. When the parties were entering into the purported agreement, the suit property was registered in the name of the deceased. It was common ground in the lower court and before this court that the respondent had not obtained a Grant of Letters of Administration in respect of the estate of the deceased as of the date of the purported agreement of sale.
14. Since the respondent was not a legal representative of the estate of the deceased, she had no legal capacity to sell the suit property to the appellants. The purported agreement offended the provisions of Sections 45 and 82(b)(ii) of the *Law of Succession Act*, Chapter 160 Laws of Kenya and as such the same was null and void as rightly found by the lower court.
15. With regard to the alternative claim for Kshs. 230,000/- being a refund of Kshs. 150,000/- paid as purchase price and Kshs. 80,000/- allegedly spent by the appellants at the request of the respondent to facilitate the issuance of a Grant of Letters of Administration in respect of the estate of the deceased, the following is my view: I am in agreement with the appellants that the invalidity of the agreement of sale that the appellants entered into with the respondent did not entitle the respondent to keep any monies that may have been paid to her towards the purchase price of the suit property pursuant to the invalid agreement and any other payments lawfully made on her behalf or at her request.



16. From the evidence that was adduced by the appellants in the lower court, I am satisfied that the appellants proved on a balance of probabilities that they paid to the respondent a total sum of Kshs. 155,000/-. The sum of Kshs. 150,000/- was paid as purchase price for the suit property and a sum of Kshs. 5,000/- was paid as “bonus”. The appellants produced in evidence acknowledgment of payment receipts duly signed by the respondent in which the respondent acknowledged receipt of a total sum of Kshs. 155,000/-. Once the appellants produced the said acknowledgment receipts which were prima facie evidence of payment, the burden shifted to the respondent to prove that she did not sign the said acknowledgment receipts. The respondent did not prove that the thumbprints that were placed on the said acknowledgment receipts against her name were not hers. It was not enough to claim that she was illiterate and did not know how her identity card number and passport size photograph found their way into the said acknowledgment receipts.
17. With regard to the sum of Kshs. 80,000/- allegedly spent by the appellants at the request of the respondent pursuant to the terms of the said invalid agreement of sale, it is my finding that the same was not proved. No evidence of such expenditure was placed before the lower court neither was the authority of nor request by the respondent for such expenditure to be incurred. In the circumstances, the claim for a refund of the said sum of Kshs. 80,000/- had no basis.
18. In the final analysis and for the foregoing reasons, the appellants’ appeal succeeds in part. The appeal succeeds on two grounds. It is my finding that the lower court erred by failing to make an order for the refund of the purchase price the payment of which was proved by the appellants and that the court erred by dismissing the appellants’ entire claim including the alternative claim for the refund of the purchase price thereby allowing the respondent to keep the land and the purchase price.
19. In conclusion, I hereby make the following orders;
  - a) The appellants’ appeal succeeds in part.
  - b) The judgment delivered by Hon. W.K.Onkunya SRM on 22<sup>nd</sup> September 2021 is set aside and in place thereof judgment is entered for the appellants against the respondent in the sum of Kshs. 155,000/- being a refund of the purchase price paid by the appellants to the respondent together with interest at court rates from 22<sup>nd</sup> September 2021 until payment in full.
  - c) Each party shall bear its own costs of the appeal and of the lower court suit.

**DELIVERED AND DATED AT KISUMU ON THIS 2<sup>ND</sup> DAY OF FEBRUARY 2023**

**S. OKONG’O**

**JUDGE**

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

Mr. P.D. Onyango for the Appellant

Ms. Raburu for the Respondent

Ms. J. Omondi-Court Assistant

