



REPUBLIC OF KENYA



**KENYA LAW**  
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**Aloo v Aseyo (Environment and Land Appeal 7 of 2022)  
[2023] KEELC 18030 (KLR) (6 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18030 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 7 OF 2022  
GMA ONGONDO, J  
JUNE 6, 2023  
(FORMELY MIGORI ELC APPEAL NO. E009 OF 2021)**

**BETWEEN**

**GRADUS OCHIENG ALOO ..... APPELLANT**

**AND**

**EMMY MILLICENT ASEYO ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Mary A. Ochieng, Principal Magistrate, delivered on 16th February 2021 in Ndhiwa Law Courts Environment and Land Case No. 57 of 2018)*

**JUDGMENT**

1. This is an appeal that arises from the trial court’s judgment delivered on the 16<sup>th</sup> February 2021 by the Honourable Mary A. Ochieng, Principal Magistrate, in Ndhiwa Law Courts Environment and Land Case No. 57 of 2018 where she held, inter alia;  
  
“... The plaintiff’s claim against the defendant fails with costs to the defendant. The defendant’s counterclaim also fails...”
2. The appellant namely Gradus Ochieng Aloo through the firm of Nyauke and Company Advocates mounted the appeal by way of a memorandum of appeal dated 17<sup>th</sup> February 2021 and filed herein on 24<sup>th</sup> February 2021. The Appeal is anchored on grounds 1 to 5 as set out on the face thereof and the same are:
  - a. The honourable subordinate court failed to appreciate that the counter claim by the respondent in the subordinate court was statute barred in terms of time.
  - b. The honourable court failed to appreciate the law and fact regarding adverse possession.



- c. The learned honourable magistrate failed to appreciate that there was no contract between the respondent and the appellant.
  - d. The learned honourable magistrate failed to appreciate that there was long standing dispute between the appellant and the respondent over her stay at the suit parcel of land. The said fact having been acknowledged by the respondent vide her paragraph 6a of the amended plaint.
  - e. The learned trial magistrate failed to appreciate the law of contract and instead, ventured into rewriting a contract for the parties where it was evident that the respondent had failed to perform certain obligations of the alleged contract.
3. Wherefore, the appellant has sought the order that the judgment of the trial court be quashed and set aside and the applicant's claim be allowed with costs.
  4. Originally, the appeal was lodged at Migori Environment and Land Court. The same was transferred to this court on 3<sup>rd</sup> February 2022 for hearing and determination in the spirit of Articles 6 (3), 48 and 159 (2) (b) and (e) of the *Constitution of Kenya, 2010*.
  5. The appeal was heard by way of written submissions pursuant to this court's directions of 1<sup>st</sup> February 2023.
  6. Accordingly, the appellant's counsel filed submissions dated 2<sup>nd</sup> February 2023 on 6<sup>th</sup> February 2023 and submitted on the following four issues:
    - a. Who is the owner of the suit parcel of land?
    - b. Was there any contract between the appellant and the respondent?
    - c. Sustainability of the sale agreement between the respondent and Antonious Ogina Orwa; and
    - d. The judgment
  7. In discussing the issues, learned counsel submitted, inter alia, that the appellant is the legal owner of the suit land. That there was no contract between the appellant and the respondent and that payment for what the respondent claims was not completed. That the judgment of the trial court was not based on any law.
  8. The respondent, acting in person, filed submissions dated 22<sup>nd</sup> March 2023 on even date. She submitted that since her deceased husband purchased a portion of the suit land measuring 3 acres in area, the appellant is holding the land in trust for himself and the respondent. That even though there existed no contract between the parties herein, the appellant had an obligation to take care of the liabilities of the estate of Antonious Ogina Orwa, before transmitting the suit land to himself. That the sale agreement between the respondent's deceased husband and Antonious Ogina Orwa (deceased) having been frustrated by the death of the latter, it was the responsibility of the appellant herein as the administrator of the said estate, to complete the sale. She urged the court to dismiss the instant appeal with costs. Reliance was placed on various authoritative pronouncements, including the case of *Independent Electoral and Boundaries Commission and Another –vs- Stephen Mutinda Mule & 3 others* (2014) eKLR, to fortify the submissions.
  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 must be noted 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-vs Kenya Bus Services Ltd* (1982-88) 1KAR 278 applied in other cases, *inter alia*, *Titus Ong'ang'a Nyachico-vs-Martin Okioma Nyauma and 3 others* (2017) eKLR.
11. At the trial court, the suit was commenced by way of a plaint dated 1<sup>st</sup> March 2017 mounted by the plaintiff/appellant against one Jacktone Okiru (deceased). The latter was later substituted by the defendant/respondent herein, upon his demise, pursuant to the orders of the trial court issued on 24<sup>th</sup> July 2019. The plaintiff sought the following orders;
  - a. An order of specific performance, evicting the defendant from the suit land parcel.
  - b. Costs of the suit.
  - c. Any other remedy the court deems fit to grant.
12. The appellant, Gradus Ochieng Oloo (PW1), testified that the defendant trespassed onto the suit land herein, which is registered in the appellant's name. That he registered the suit land in his name following succession. That his in-law, Isabella Omboya (deceased) who was wife to Antonis Ogina Orwa (deceased), sold to the defendant's late husband 1 acre of the suit land, although the said purchaser wanted to purchase 3 acres thereof. That he witnessed the transaction. He averred that the defendant had refused to vacate the premises, despite the appellant requesting him to do so. He produced in evidence, a certificate of official search dated 5<sup>th</sup> February 2017 relating to the suit land, complainant report, summon letter dated 5<sup>th</sup> July 2016 and Chief's letter dated 9<sup>th</sup> December 2016 (PExhibits 1, 2(a), 2(b) and 2(c) respectively).
13. PW1 admitted being a witness to the land sale agreement between Isabella Omboya and the respondent herein but stated that the defendant did not complete payment of the purchase price. That the defendant only paid Kshs 15,000/=. He also expressed willingness to transfer to the defendant 1 acre of the suit land and not 3 acres as indicated in the said sale of land agreement.
14. In cross-examination, PW1 admitted that the defendant had been occupying the suit land since the year the purchase occurred. That at the time he carried out succession in the estate of Antonious Ogina Orwa, the defendant was already occupying the disputed portion of the suit land.
15. In the amended statement of defence and counterclaim dated 14<sup>th</sup> August 2019, the defendant denied the claim. She stated that the plaintiff had failed to transfer a portion of the suit land measuring 3 acres to herself, which her late husband Jactone Ukiru had purchased from its original owner Isabella Ombonya on 29<sup>th</sup> March 2006, with the knowledge and participation of the plaintiff herein and which the defendant's family occupied since the year of purchase to date. She stated that her deceased husband purchased the said portion at a purchase price of 45,000/= and paid a deposit of 21,000/= to the seller who passed on before the sale could be completed. Thus, she urged the trial court to compel the plaintiff to accept the balance of the purchase price being 24,000/= and execute transfer of the 3 acres of the suit land parcel number Kanyamwa/Kabonyo/Kwandiku/3178 to her accordingly.
16. In her counterclaim, the defendant sought the following orders:
  - a. An order of declaration that the defendant and her family are legitimately occupying land parcel number Kanyamwa/Kabonyo/ Kwandiku/3178 (the suit land herein) and that they are entitled to rightful ownership of three acres thereof.



- b. An order of permanent injunction restraining the plaintiff, his agents, relatives or any person deriving authority from him from interfering with the defendant's peaceful occupation of the said three acres of the suit land they occupy and from making any claims thereto.
  - c. An order compelling the plaintiff to sub-divide and/or execute transfer of three acres of the suit land parcel to the defendant and/or in the alternative, the Executive Officer of the honourable court be authorized to do so in place of the plaintiff.
  - d. An order of eviction do issue against the plaintiff's son namely Geoffrey Ochieng, from the portion of the suit land owned by the defendant.
  - e. Costs of the suit and any other relief as the honourable court deems just and expedient.
17. DW1, Emmy Millicent Aseyo Okiru, the defendant/respondent herein testified that her late husband purchased a portion of land parcel number Kanyamwa/Kabonyo /Kwandiku/1147 measuring 3 acres in area on 29<sup>th</sup> March 2006 from Isabella. That the parcel was subdivided into parcel number 3006 and 3178, registered in the name of the plaintiff herein. That payment was to be made in installments. That the initial payment was Kshs. 15,000/=, the second installment was Kshs. 6,000/= which was paid on 17<sup>th</sup> June 2006. That thereafter, the seller died before they could complete making payments. That the plaintiff and his son later came to the land and the defendant reported the matter to the Chief, Mirogi. That the chief summoned the plaintiff and the defendant's late husband, and it was agreed that the latter was to pay to the former the balance of 24,000/= as well as Kshs. 3,000/= for title deed processing.
  18. Furthermore, DW1 testified that the plaintiff herein declined to accept the said payment. She averred that she has stayed on the disputed portion since June 2006 and urged the court to grant her the orders sought in her counterclaim. August 1983 from the deceased. She relied on her list of documents dated 14<sup>th</sup> August 2019 and filed on even date, serial numbers 1 to 5, to wit, a copy of the defendant's identity card, a copy of the sale of land agreement dated 29<sup>th</sup> March 2006, a copy of green card for land reference number Kanyamwa/Kabonyo/ Kwandiku/1147, a certificate of official search for land reference number Kanyamwa/Kabonyo/Kwandiku/3178 and a bundle of letters from the Chief and Assistant Chief, which were admitted as DExhibits 1 to 5 respectively.
  19. In cross-examination, DW1 stated that her deceased husband paid Kshs. 21,000/= and not Kshs. 15,000/= as stated by the plaintiff. She noted that there was a discrepancy in the ID number of the plaintiff in the sale agreement. She averred that she is entitled to 3 acres of the suit land and not 1 acre.
  20. DW2, Margret Awwino Akoth, Assistant Chief Lower Kabonyo, testified that she witnessed the sale of land between Isabella Ombonya and Jackton Okiru (both deceased) on 29<sup>th</sup> March 2006. That the latter paid to the former Kshs. 15,000/=, being part of the purchase price. He stated that the plaintiff (PW1) was also a witness.
  21. During cross-examination, DW2 stated that although the defendant was present during the sale, she did not sign the sale agreement as a witness, despite a faint signature of the defendant being visible on the agreement.
  22. DW3, Philip Leore Damba, testified that he witnessed the sale of land between Isabella Ombonya and Jackton Okiru (both deceased) on 29<sup>th</sup> March 2006. That the latter paid to the former Kshs. 15,000/= upon execution and later added Kshs. 6,000/= on 17<sup>th</sup> June 2006 as the second installment.
  23. Upon cross-examination, DW3 stated that the defendant's husband paid a total of Kshs. 21,000/= as purchase price.



24. DW4, Allan Ketoyo Okiru, the defendant's son, testified that they have been in occupation of the disputed portion since 2006. During cross-examination, DW4 stated that his late father, the buyer, owed Isabella, the seller, Kshs. 24,000/=, being the balance of the purchase price.
25. It is noted that the learned trial magistrate set out the parties' respective cases, framed six issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the [Civil Procedure Rules, 2010](#).
26. In arriving at the impugned judgment, the learned trial magistrate observed, inter alia;  

“...having established that the suit parcel herein was a subdivision of parcel number 1147 that was subject of succession and owing to the fact that the defendants have resided on the suit land since 2006 when the first installment was paid to the widow of the initial registered owner of the suit land, the plaintiff has not persuaded the court to grant eviction orders...”
27. Further, the learned trial magistrate noted thus:  

“...as at the time the plaintiff became a registered owner of the suit land, the defendant was staying in the said land. Title deed for the suit parcel of land was issued to the plaintiff on 27<sup>th</sup> October 2015, nine years after the defendant settled on the suit land...”
28. Regarding the counterclaim, the learned trial magistrate noted that the defendant's claim is on the original parcel number 1147. That the defendant did not produce a report by the Land Registrar in court, showing that after the original parcel number 1147 was subdivided, the home of the defendant stands on the suit parcel of land. Thus, the trial court declined to issue the orders sought in the counterclaim and advised the defendant to pursue her claim on the original parcel of land so that the 3 acres of land can be curved from it on condition that she pays to the plaintiff the balance of the purchase price amounting to Kshs. 24,000/=.
29. The appellant contends that the trial court failed to appreciate that the counter claim by the respondent was statute barred in terms of time. That the trial court failed to appreciate the law and fact regarding adverse possession.
30. In that regard, I note that the counterclaim was not allowed by the trial court. However, the trial magistrate advised the defendant to pursue her claim on the original parcel of land so that the 3 acres of land can be curved from it on condition that she pays to the plaintiff the balance of the purchase price amounting to Kshs. 24,000/=. It is also important to note that the issue of adverse possession did not arise at the trial court.
31. The appellant further contends that the learned honourable magistrate failed to appreciate that there was no contract between the respondent and the appellant.
32. From the judgment of the trial court, the learned magistrate determined that there existed an agreement for sale of land between Isabella Ombonya and Jackton Okiru (both deceased). That there was an intention by the former to sell to the latter 3 acres of the original parcel number 1147. That further, there was no evidence to show that the defendant deliberately refused to clear the balance of the purchase price as had been agreed by the parties. Indeed, the authenticity of DExhibit 2 was corroborated, particularly by DW2 and DW3, who were witnesses to the execution of the same.



33. 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.
34. I, thus, endorse the learned trial magistrate's considered finding that neither the appellant nor the respondent herein, proved their respective cases before the trial court to the requisite standard.
35. Bearing in mind the entire evidence on record in this case, and applying the facts of the case as well as legal principles stated above, it is clear that the appellant who was the plaintiff before the trial court failed to prove that the respondent is a trespasser on the suit land. As a consequence, an order of specific performance, evicting the defendant from the suit land parcel, could not issue.
36. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is faultless at law. I proceed to uphold the same.
37. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 17<sup>th</sup> February 2021 and filed herein on 24<sup>th</sup> February 2021 is hereby dismissed.
38. Each party to bear own costs of this appeal and the original suit. with costs to the respondent.
39. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 6<sup>TH</sup> DAY OF JUNE, 2023.**

**G.M.A ONG'ONDO**

**JUDGE**

**Present**

1. Mr. S. Nyauke, learned counsel for the appellant
2. The respondent in person
3. Terrence, Court Assistant

