



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onyuna v Njoga & another (Environment and Land Appeal  
13 of 2021) [2023] KEELC 17811 (KLR) (7 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17811 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 13 OF 2021  
GMA ONGONDO, J  
JUNE 7, 2023**

**BETWEEN**

**BENJAMIN ORIEKO ONYUNA ..... APPELLANT**

**AND**

**SOLOMON ODUNGU NJOGA ..... 1<sup>ST</sup> RESPONDENT**

**GORDON OCHIENG NYAKITI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Honourable Celesa Okore (PM) delivered on 16th September 2021 in Oyugis Law Courts Environment and Land Case number 72 of 2019)*

**JUDGMENT**

1. The instant appeal radiates from the learned trial magistrate’s judgment rendered on September 16, 2021 where she held inter alia;

“... The upshot of the foregoing is that the plaintiff’s case against both defendants is baseless and unfounded, the same is hereby dismissed in its entirety...”

2. The appeal was commenced by way of a memorandum of appeal dated October 4, 2021 and lodged on October 6, 2021 through the firm of Oduk and Company Advocates, founded upon eleven grounds including;
  - a. That the learned trial magistrate erred in fact and in law by making a finding that the appellant herein has admitted to giving an oral power of attorney during cross examination to one Phillip Jowi to subdivide and to transfer his land to the 1<sup>st</sup> respondent, an issue which was neither pleaded by the respondents nor proved during the hearing.
  - b. That the learned trial magistrate erred in fact and in law and misdirected herself by shifting the burden of proof to the appellant herein, requiring him to prove that he did not give a power



of attorney to one Phillip Jowi to transfer his land, yet it is the 1<sup>st</sup> respondent who admitted that the documents of transfer were not executed by the appellant and alleged that they were executed by one Phillip Jowi who had a power of attorney and hence the burden of proof of existence of the said power of attorney lay on the 1<sup>st</sup> respondent.

- c. That the learned trial magistrate erred in fact and in law and misdirected herself by making a finding that land can be transferred through an oral power of attorney a concept that is contrary to Kenyan Law
  - d. That the learned magistrate erred in fact and in law when she upheld the certificate of title of the 2<sup>nd</sup> respondent on land which was sold to him by the 1<sup>st</sup> respondent who did not have good title to the land having knowingly fraudulently, irregularly and illegally acquired title to the land that belonged to the appellant without his knowledge and or consent.
3. Therefore, the appellant prays that;
- a. This appeal be allowed, and the judgment of the lower court be set aside.
  - b. The honourable court do find and hold that the 1<sup>st</sup> respondent acquired the suit property illegally, fraudulently and irregularly and to revoke his certificate of title to the land.
  - c. This honourable court to find and hold that the certificate of title held by the 2<sup>nd</sup> respondent is null and void and to revoke his certificate of title.
  - d. The honourable court to find and hold that subdivision of land parcel number Central Karachuonyo/Konyango/658 (the original land herein) was fraudulently, illegally and irregularly conducted and to revoke land parcel number Central Karachuonyo/Konyango/2970 (the suit land herein) and order that the title to revert back to its original number Central Karachuonyo/Konyango/658 held by the appellant herein.
  - e. Under the circumstances this court to make such orders as may meet the cause of justice as the court may deem fit.
  - f. Cost of the appeal and the lower court be borne by the respondents.
4. On October 3, 2022, the court directed that the appeal be heard by way of written submissions.
5. So, by the submissions dated October 30, 2022 and filed on November 17, 2022, the appellant's counsel made reference to the grounds of appeal and delineated four issues for determination namely:
- i. Whether the trial magistrate erred in fact and in law by making a finding that the appellant gave an oral power of attorney for the transfer of his land
  - ii. Whether the trial magistrate erred in fact and law and ignored the appellant's evidence that the 1<sup>st</sup> respondent had fraudulently transferred his land and subsequently sold it to the 2<sup>nd</sup> respondent
  - iii. Whether the 2<sup>nd</sup> respondent is an innocent purchaser for value and whether he got good title for the suit property; and
  - iv. Whether the trial magistrate erred in fact and in law by shifting the burden of proof to the appellant.
6. Counsel submitted that the 1<sup>st</sup> respondent fraudulently transferred the appellant's land to himself and subsequently sold the land to the 2<sup>nd</sup> respondent herein. Thus, counsel urged the court to find that the trial court erred in fact and law by holding that the appellant gave an oral power of attorney to his agent



- to deal with his land. To buttress the submissions, reliance was placed on various authorities including the case of *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others* (2015) eKLR.
7. The 1<sup>st</sup> respondent, through Bana and Company Advocates, filed submissions dated March 23, 2023. Counsel relied on the submissions filed by the 1<sup>st</sup> respondent at the trial court dated July 8, 2021 and submitted, inter alia, that the appellant, through his agent one Philip John Osendi, had contracted the 1<sup>st</sup> respondent, a land surveyor, to undertake subdivision of the original property on behalf of the appellant. That the transfer of the suit land to the 1<sup>st</sup> respondent was part payment in kind of his professional fees, which the appellant, through his agent, was not able to fully pay. To fortify the submissions, counsel relied on various authorities including the case of *Serab Njeri Mwobi vs John Kimani Njoroge* (2013) eKLR.
  8. The 2<sup>nd</sup> respondent, through OH Bunde and Company Advocates, filed submissions dated December 5, 2022 on even date and identified four issues for determination thus: whether the transfer of the subject parcel from the appellant to the 1<sup>st</sup> respondent was valid in law, whether the transfer of the subject parcel from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent was valid in law, whether the title held by the 2<sup>nd</sup> respondent is otherwise impeachable and whether the instant appeal is legally competent in as far as some of the prayers it seeks are concerned. Counsel cited Section 26 of the *Land Registration Act*, 2016 (2012) and submitted that the 2<sup>nd</sup> respondent was a *bona fide* purchaser for value. That a master is liable for the acts of his agent. Thus, counsel urged the court to dismiss the instant appeal with costs. Counsel relied on the case of *Ndoo t/a Ngomeni Bus Service vs Kakuzi Limited* (1984) KLR 554, among other authoritative pronouncements, to buttress the submissions.
  9. The present appeal is the first one from the trial court. Therefore, 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. At the trial court, the plaintiff/appellant herein sued the defendants/ respondents by way of a plaint dated October 2, 2019 and filed on even date. The plaintiff's claim was that the 1<sup>st</sup> defendant who is a land surveyor within Kendu Bay town had fraudulently transferred land parcel number LR No Central/Karachuonyo/2970 to himself. The plaintiff sought the following orders;
    - a. A declaration that parcel number LR No Central/Karachuonyo/ 2970 (the suit land herein) belongs to the plaintiff.
    - b. Cancellation of the title deed of the plaintiffs (I think meant, 2<sup>nd</sup> defendant) and the title deed of the suit land to revert back to the plaintiff.
    - c. Costs of suit to be awarded to the plaintiff.
  11. PW1, Benjamin Orieko Onyuna (the plaintiff), adopted his statement as part of his evidence and relied on a copy of green card, mutation form for the original land, official search certificate, a copy of land transfer form and a copy of consent of the Land Control Board (PExhibits 1 to 5 respectively). He testified that he was the registered owner of the original land. That he requested the 1<sup>st</sup> respondent, a surveyor to subdivide the original land through his agent, Philip Jowi. He averred that he never sold the suit land to the 1<sup>st</sup> respondent herein. That he never went to the Land Control Board for approval of the subdivision and the same was provisional.
  12. During cross examination, PW1 stated that he gave his agent, Philip Jowi, overall power of attorney. That although he did not sign the mutation forms, the resulting subdivision of the original parcel was okay. That the Criminal Investigation Department once investigated the matter and concluded that



- Phillip Osendo sold the suit land to the 1<sup>st</sup> defendant with the permission of the plaintiff. He admitted that he did not pay the 1<sup>st</sup> respondent fees for the subdivision.
13. PW2, Martin Osano, Land Registrar Rachuonyo, produced in evidence' a copy of the green card, transfer documents, consent of the Land Control Board and mutation form for the original land (Exhibits 1 to 4).
  14. In cross examination, PW2 stated that the original land produced 20 parcels and an access road, including the suit land herein. That the title to the suit land was issued legally and due process was followed.
  15. In his statement of defence dated December 10, 2019 and filed on December 11, 2019, the 1<sup>st</sup> defendant denied the claim of PW1 and urged the court to dismiss the same with costs. The 2<sup>nd</sup> defendant also denied the claim through a statement of defence dated October 28, 2019 and filed on October 30, 2019.
  16. DW1, Solomon Njoga Odungu, testified that he was contracted by the plaintiff, through his agent Phillip Jowi, to subdivide the original parcel of land. That he was to be paid a fee of Kshs 360,000 but was only paid Kshs 104,000/-. That the balance of Kshs 200,000/- was not paid, but the plaintiff gave him the suit land instead. That the transfer form relating to the suit land was signed by the said Phillip Jowi. That he reported to Oyugis Criminal Investigation Department when he learnt that the plaintiff had alleged that he fraudulently acquired the suit land but he was found not to be culpable of any wrong doing. He produced in evidence application for consent of the Land Control Board to subdivide, consent from the Land Control Board, transfer dated September 16, 2014, application for consent to transfer, consent to transfer and a copy of the register (DExhibits 1 to 6 respectively).
  17. On cross examination, DW1 stated that it is Phillip Jowi who signed the transfer forms and appeared before the Land Control Board. That he did not have a power of attorney authorizing the said Phillip Jowi to act on behalf of the plaintiff. That he later sold the suit land to the 2<sup>nd</sup> respondent herein.
  18. Gordon Ochieng Nyakiti (DW2), adopted his statement dated October 29, 2019, as part of his evidence. He relied on a copy of title deed in the name of the 1<sup>st</sup> respondent, title deed in the name of the 2<sup>nd</sup> respondent, sale of land agreement, sketch map, transfer documents, a copy of Land Control Board consent, banker's cheque and application for consent (DExhibits 7 to 14) in his testimony. He stated that he purchased the suit land from the 1<sup>st</sup> defendant for a consideration amount of Kshs 250,000, after conducting due diligence.
  19. In cross examination, DW2 stated that he was agreeable to being compensated in the matter. This is in the event the court issues directions to that effect.
  20. In this regard, the issues for determination herein are as contained in the grounds of appeal which are condensed to;
    - a. Whether the respondents fraudulently acquired ownership of the suit land.
    - b. Subject to issue number (a) hereinabove, does the appellant deserve the orders sought in the memorandum of appeal?
  21. On the 1<sup>st</sup> issue, the appellant contends that the trial magistrate erred in fact and in law by making a finding that the appellant gave an oral power of attorney for the transfer of his land. That the trial magistrate ignored the appellant's evidence that the 1<sup>st</sup> respondent had fraudulently transferred his land and subsequently sold it to the 2<sup>nd</sup> respondent.



22. It is noted that during cross-examination of PW1, (the appellant herein), he stated that he gave his agent, Philip Jowi, overall power of attorney. The 1<sup>st</sup> respondent (DW1) stated that he acquired the suit land as payment of the remainder of his professional fees amounting to Kshs 200,000/-, having acted as a land surveyor in the subdivision of the original parcel of land. Indeed, PW1 admitted that he did not pay the 1<sup>st</sup> respondent fees for the subdivision. Further, PW2 stated that the title to the suit land was issued legally and due process was followed.
23. Further, it is noted also important to note that the dispute which is the subject of the instant appeal, was investigated by the Directorate of Criminal Investigations officers from Oyugis, who found that Philip Jowi acted with the authority of the appellant herein. The said Phillip Jowi was not called as a witness by the appellant herein at the trial court, neither has the appellant lodged a formal complaint against him
24. In the case of *Vijay Morjaria vs Nansingh Madbusingh Darbar & Another* [2000] eKLR, Tunoi, JA (retired) 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).
25. Additionally, I subscribe to the Court of Appeal decision in *Kinyanjui Kamau vs George Kamau* [2015] eKLR where it was expressed 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).
26. On whether the 2<sup>nd</sup> respondent is an innocent purchaser for value and whether he obtained good title for the suit land, I note that the 2<sup>nd</sup> respondent purchased the suit land from the 1<sup>st</sup> respondent for a consideration amount of Kshs. 250,000, after conducting due diligence. Clearly, the 2<sup>nd</sup> respondent, DW2, produced in evidence documents to that effect (DExhibits 7 to 13).
27. In *Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others* [2017] eKLR, the Court of Appeal cited the case of *Katende V Haridar & Company Limited* [2008] 2 EA 173 where the Court of Appeal in Uganda held that:
- “For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:
- (a) he holds a certificate of title;
  - (b) he purchased the property in good faith;



- (c) he had no knowledge of the fraud;
- (d) he purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;
- (g) he was not party to any fraud.”

28. Despite being accorded the opportunity to lead evidence to demonstrate the existence of fraud on the part of the 2<sup>nd</sup> respondent herein, the appellant failed to do so during trial. Sections 107 to 109 of the Evidence Act, Chapter 80 Laws of Kenya are clear that he who asserts or pleads must support the same by way of evidence.
29. I therefore, endorse the learned trial magistrate’s reasoning that the plaintiff/appellant herein failed to discharge the burden of proof of fraud as alleged. Indeed, the 2<sup>nd</sup> respondent herein is a bona fide purchaser for value; see Lawrence P Mukiri Mungai case (*supra*).
30. So, did the appellant establish to the requisite standards his case before the trial court as held by Madan JA (as he then was) in the case of CMC Aviation Ltd vs Kenya Airways Ltd (Cruisair Ltd) (1978) eKLR?
31. Bearing in mind the entire 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 his case to the requisite standards. Therefore, the grounds of appeal are untenable.
32. In conclusion, it is the finding of this court that the learned trial magistrate’s judgment is faultless at law. I hereby uphold the same.
33. Wherefore, the instant appeal commenced by way of a memorandum of appeal dated October 4, 2021 and lodged on October 6, 2021 is hereby dismissed with costs to the respondents.
34. Orders accordingly.

**DATED AND DELIVERED AT HOMA BAY THIS 7<sup>TH</sup> DAY OF JUNE, 2023.**

**G. M. A. ONGONDO**

**JUDGE**

**Present**

Ms. B. Ochieng holding brief for Mr. Ashioya, learned counsel for the appellant

Ms. Amondi holding brief for Mr. Bana, learned counsel for the 1<sup>st</sup> respondent

Mr. H. Bunde, learned counsel for the 2<sup>nd</sup> respondent

Okello, Court Assistant

