



**Opuya & another v Wambuti (Environment and Land Appeal E007 of 2021)
[2023] KEELC 19822 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19822 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E007 OF 2021
DO OHUNGO, J
SEPTEMBER 19, 2023**

BETWEEN

HASSAN SHIKHUTSI OPUYA 1ST APPELLANT

ALIMA HASSAN SHIKHUTSI 2ND APPELLANT

AND

FRANCIS RICHARD WAMBUTI RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kakamega (Hon. Eric Malesi, Principal Magistrate) delivered on 23rd February 2021 Kakamega MCELC No. 15 of 2017 Francis Richard Wambuti v Hassan Shikhutsi Opuya & Alima Hassan Shikhutsi)

JUDGMENT

1. Litigation leading to this appeal commenced through plaint dated June 4, 2012, which the respondent filed in the High Court, against the appellants herein. The matter was later transferred to the subordinate court, where it was heard and determined. The respondent averred in the plaint that he was the registered proprietor of the parcel of land known as Butsotso/Esumeyia/1147 measuring 9 acres (the suit property) which he purchased in 1976. That he enjoyed use and occupation of the suit property until 1997 when the appellants returned to the area. He prayed for judgment against the appellants for an order restraining them as well as their agents and relatives from surveying, occupying, utilizing, or interfering with the suit property. He also prayed for an eviction order against the appellants, their agents, and relatives from a ¼ acre portion of the suit property as well as costs of the suit.
2. The appellants filed a defence and counterclaim in which they admitted that the respondent was the registered proprietor of the suit property and averred that the respondent voluntarily invited them to the suit property and agreed to surrender to them 4 acres thereof which he was holding in trust for them. They further averred that the respondent entered into an agreement to purchase 5 acres of land



but only paid for 3 acres. That the respondent fraudulently acquired 9 acres which included 2 acres that he did not pay for and 4 acres which were to remain in the 1st appellant's name. They further averred that they had acquired the 4 acres by adverse possession and prayed for judgment against the respondent for a declaration that the respondent holds the 4 acres of the suit property in trust for them and an order directing the respondent to transfer the 4 acres held in trust and the 2 acres in respect of which no consideration was paid. They also prayed for costs of the suit.

3. The respondent filed a reply to defence and defence to counterclaim on October 1, 2012.
4. The matter was then set down for hearing but was adjourned severally. Ultimately, the respondent's case was dismissed for non-attendance and the appellants proceeded with their counterclaim. Judgment was delivered on February 23, 2021 by Hon Eric Malesi, Principal Magistrate. The learned magistrate found that the appellants had not proved their counterclaim and accordingly dismissed it with no order as to costs. Dissatisfied with the outcome, the appellants filed this appeal on March 17, 2021, through memorandum of appeal dated March 15, 2021. A total of six grounds of appeal are listed on the face of the memorandum of appeal. The said grounds can be compressed into one: that the learned magistrate's findings were against the weight of the evidence thereby leading to miscarriage of justice.
5. At the request of both sides, it was ordered that the appeal be canvassed through written submissions. Despite being given the opportunity to file submissions within a period proposed by his own advocates, the respondent did not file any submissions.
6. The appellants argued in their submissions that they had adduced evidence showing that the land that was to be sold to the respondent was only 5 acres and that the respondent did not tender any documentary evidence to support his claim. They further argued that there was evidence that the land sale agreement was breached by the respondent when he failed to pay the entire purchase price and that having failed to pay the balance of the purchase price, he could not be entitled to the entire 5-acre portion, let alone the 9 acres. Relying on the case of *Kibuba Holdings Limited v Charo Karisa Ngulu* [2021] eKLR, they argued that there was no valid sale agreement and urged the court to order cancellation of all entries in the register of the suit property so that it reverts to the first appellant.
7. This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.
8. I have considered the grounds of appeal, the pleadings, the evidence, the parties' submissions, and the authorities cited. The issues that arise for determination in this appeal are whether the appellants established fraud and whether they established adverse possession.
9. From the onset, I must remind the appellants that their case must be confined within their counterclaim, a reading of which shows that they attacked the respondent's title only on two grounds: fraud and adverse possession. I find it necessary to make that clear from the onset since the appellants did not address their case in their submissions in this appeal and seemed to labour under the impression that their case ought to have succeeded simply because the respondent did not offer any evidence. The rule remains: he who alleges must prove. Just like the respondent's case failed for failure to attend court to prosecute it, the appellant's counterclaim had to be sustained by evidence. The appellants failed, as I will now show.



10. The appellants did not dispute that the respondent is the registered proprietor of the suit property. Being a registered proprietor of land, the respondent is entitled to the rights, privileges, and benefits under section 24 of the [Land Registration Act](#). Further, section 26 of the Act obligated the court to accept his certificate of title as conclusive evidence of proprietorship, unless of course the provisos under section 26 (1) (a) or (b) were established. In other words, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
11. The appellants chose to attack the respondent's title on account of fraud. Having chosen that path, the appellants were bound to not only prove fraud but to additionally show that the respondent was party to such fraud. Fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See [Kuria Kiarie & 2 others v Sammy Magera](#) [2018] eKLR and [John Mbogua Getao v Simon Parkoyiet Mokare & 4 others](#) [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See [Kinyanjui Kamau v George Kamau Njoroge](#) [2015] eKLR.
12. I have perused the sale agreement that the appellants have made the basis of their allegations of fraud. It does not specify the title number of the concerned land and does not specifically state that the land sold was only 5 acres. I have read the testimonies of the appellants in the subordinate court. They did not tender any evidence to support the allegations of fraud. They left it to the court to infer fraud, a venture that is not allowed. A party who alleges fraud cannot just sit back and expect their case to somehow coast by gravity to success. I agree with the learned magistrate that the appellants failed to establish fraud. Even if fraud had been established, the appellants would still have met another major obstacle: they did not pray for cancellation of the respondent's title.
13. Now onto the question of whether the appellants established adverse possession. The ingredients of adverse possession were discussed by the Court of Appeal in [Richard Wefwafwa Songoi v Ben Munyifwa Songoi](#) [2020] eKLR as follows:

Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It must start with a wrongful dispossession of the rightful owner. (See comparative Indian cases of *S. M. Kenni alias Tamanna Sabeel v Mst Bibi Sakina* AIR 1964 SC 1254; and *Parsimi v Sukhi*, 1993 4 SCC 375).

39. In *Wambugu v Njuguna*, (1983) KLR 173, this court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

40. A person who claims adverse possession must inter alia show:

- (a) on what date he came into possession.
- (b) what was the nature of his possession?
- (c) whether the fact of his possession was known to the other party.



- (d) for how long his possession has continued and
- (e) that the possession was open and undisturbed for the requisite 12 years.

14. Although the appellants pleaded in their counterclaim that they had been in occupation of the 4 acres of the suit property from 1978, the first appellant testified that the appellants had stayed on the 4 acres since the year 2004. By June 2012 when the counterclaim for adverse possession was filed, the appellants had not accumulated the requisite 12 years of open and undisturbed possession. I agree with the learned magistrate that the appellants did not establish adverse possession or even trust.
15. In view of the foregoing discourse, I find no merit in this appeal, and I therefore dismiss it. Considering that the respondent did not file any submissions in the appeal, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF SEPTEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Eroba for the Appellants

No appearance for the Respondent

Court Assistant: E. Juma

