



REPUBLIC OF KENYA



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**Omar v Obondo (Environment and Land Appeal E012 of 2023)
[2023] KEELC 20631 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20631 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E012 OF 2023
GMA ONGONDO, J
OCTOBER 3, 2023**

BETWEEN

HAMIDA OMAR APPELLANT

AND

GEORGE NYANGOR OBONDO RESPONDENT

(Being an appeal from the ruling (I think meant judgment herein) and order of Honourable ONZERE E.M, Principal Magistrate in Ndhiwa Principal Magistrate's court Environment and Land case number 195 of 2016 rendered on 22nd day of November 2022)

JUDGMENT

1. The instant judgment radiates from the judgment and order of the trial court (E M ONZERE, PM) rendered on 22nd November 2022 where the learned magistrate opined that the respondent who was the plaintiff before the trial court had proved his case against the appellant and another to the requisite standard. So, she entered judgment as follows;
 - a. The plaintiff is the lawful owner of land number Kanyamwa/Kabonyo/Kwandiku/2628 measuring 0.7 hectares (The suit land herein)
 - b. The 2nd defendant trespassed on the suit land by 0.44 hectares and as such the 2nd defendant is ordered to vacate the suit land where she has trespassed and demolish any structure on the trespassed portion within the next thirty (30) days.
 - c. Should the 2nd defendant fail to comply with order (2) above, the plaintiff be at liberty to have the 2nd defendant evicted from the portion of the land she has trespassed under supervision of the OCS Ndhiwa Police Station and the plaintiff to comply with section 152(G) of the [Land Act](#) (2012) during the eviction process.



- d. Upon vacation by or eviction of the defendants from the suit land, the defendants are permanently restrained from trespassing on, cultivating, erecting structures on or in any other manner interfering with the plaintiff's proprietorship of the land.
 - e. Costs of the suit are awarded to the plaintiff.
2. Being aggrieved by the said decision, the appellant, Hamida Omar who was the 2nd defendant before the trial court through Ongoso and Company Advocates, lodged this appeal by way of a memorandum of appeal dated 8th March 2023 on 26th May 2023 founded on the following eight (8) grounds;
- a. The Honourable Learned Principal Magistrate erred in fact and in law in misdirecting herself as per dictates of law in totally overlooking the fact that sub-division of the said land in question being land Parcel Number. KANYAMWA/KABONYO/KWANDIKU 618 (the parent land) prior to the creation of new land parcels Number 2627 and 2628 (the 1st subdivision and the suit land respectively) was ongoing and whereof the plaintiff transferred the said land to himself yet subdivision was ongoing yet the respondent buying the same from the late SILVANUS WARINGA KASERA (The Deceased) in the year 1995 before the respondent.
 - b. The Honourable Learned Principal Magistrate erred in fact and in Law in misdirecting herself as per the dictates of law procedure in delivering a one sided judgment which was flawed and totally failed to address the counter claim filed by the appellant and totally failed to address and any issue raised in the counter claim yet the same touched on the said core/heart and history of the said original land numbers 618 which were later on sub-divided into the 1st sub division and the suit land and also overlooked the fact that the appellant has similarly raised the issue of the respondent also encroaching into his land being land parcel Number KANYAMWA/KABONYO/KWANDIKU/3342 (the appellant's land) rendering the judgment flawed in the circumstances thus failed to tender judgment and finding on the counter claim as was advanced in the counter claim by the appellant of which the appellant feels that the entire judgment was full of mis-directions and errors.
 - c. The Honourable Learned Principal magistrate erred in fact and in Law in misdirecting herself as per the dictates of law and practice in failing to differentiate the legal mandate of a land surveyor and a land register in issues pertaining to encroachment of land and their constitutional scope of work especially as to the roles played by the surveyors in the delivery of spatial data for land information management services, mainly in the surveys and conveyance measuring longitudinal and latitudinal features of the said disputed land in question and determination of the boundaries whilst the said magistrate only relied upon the finding of a land registrar whose findings are not conclusive especially in cases of encroachment.
 - d. The Honourable Learned Principal Magistrate erred in fact and in Law in misdirection herself as per the dictates of law and entered a judgment that was totally flawed and went against the land laws, by ignoring his submissions and counter claim filed by the appellant there by reaching an unsound judgment devoid of the appellant's counter claim.
 - e. The Honourable Learned Principal Magistrate erred in fact and in Law in misdirecting herself as per the dictates of law by overlooking serious legal applications of the law in rendering her judgment which is full of errors and misdirection.
 - f. That the said judgment was full of errors, ambiguity and flawed in the circumstances.



- g. The Honourable Learned Principal magistrate erred in fact and in Law by arriving at a ruling that is unconstitutional and illegal in nature and the statutes which are against the nature cause of justice.
 - h. That the judgment of the learned trial magistrate goes against the rules of natural justice consequently the said ruling and decision is a nullity in law.
3. Wherefore, the appellant has prayed that the trial court's judgment be reversed and make an order against the appellants thereby:
- a. Allowing the appeal and/or setting aside the said judgment dated the 22nd of November 2022 and, in the alternative, enter a judgment on the counter -claim as filed by the appellant by revoking the plaintiffs mistakenly and/or fraudulent acquired title over the suit land and the same to revert back into the names of DISMAS OBUNGA KASERA, the administrator of the estate of the Deceased.
 - i. That in the alternative, do find that the respondent is a trespasser on the appellant's land as per the counter claim filed by the appellant which was not addressed by the Honourable Court.
 - ii) Holding and finding that the respondent has no valid title over the suit land as the same had been acquired fraudulently as per the counter claim which the court totally failed to address anywhere in its judgment.
 - b. Cost of the Appeal is borne by the respondent.
 - c. Any Further relief and orders be granted by Honourable Court as dimmed fit in the circumstances.
4. On 30th May 2023, the court directed that the appeal be heard by written submissions.
5. Consequently, counsel for the appellant filed submissions dated 12th September 2023 and stated that the Land Registrar overstepped mandate in this matter. To buttress the submissions, counsel relied on Patel-vs-EA Cargo Handling Services Ltd (1974) EA 71, James Kanyiita Nderitu and another-vs-Marios Philota Ghikas and another (2016) eKLR and Mrao Ltd-vs-First American Bank of Kenya Ltd and 2 others (2003) KLR 125 and urged the court to allow the appeal.
6. By the respondent's submissions dated 19th July 2023, reference was made to sections 24, 25 and 26 of the *Land Registration Act*, 2015 (2012) as well as Order 21 Rules 1 to 20 of the Civil Procedure Rules, 2010 and Order 42 Rule 13 (4) of the said Rules. His counsel submitted that no joint statement of defence and counter claim were filed in the trial court. That the trial magistrate duly considered all issues in the case and that the appeal is meant to delay the course of justice.
7. Notably, the respondent generated the original suit against the 1st defendant and the appellant by a plaint dated 29th April 2016 for, inter alia, an order of eviction to forcibly remove the buildings and erections affixed on the suit land by the 2nd defendant/appellant/appellant, her employees, servants or agents or by anybody claiming title through the defendants and general damages for trespass to the suit land.
8. In his evidence, the respondent (PW1) relied upon his statement filed on 16th December 2021 and P Exhibits 1 to 10 which include; certificates of official search (P Exhibits 2 and 3), agreement (P Exhibit 5) and Land Registrar's report (P Exhibit 10) as part of his evidence in chief. He stated that he bought the suit land from Sylvanus Kasera (Deceased) in 1994 as per P Exhibit 5. That the parent land was



subdivided into the 1st sub division and the suit land in 2010. That the 2nd defendant encroached on the suit land and built rental houses thereon as confirmed by P Exhibit 10.

9. In a statement of defence and counter claim dated 23rd May 2016, the 1st defendant, denied the respondents claim and stated that there was no valid land sale contract with the deceased who falsified claims over the parent land. That due to his ignorance and mistake, he caused the transfer of the suit land to the respondent and set out particulars of fraud on the part of the respondent in the counter claim. Therefore, he sought the principal order of annulment of the respondent's fraudulently acquired title over the suit land and same revert back to the name of the 1st defendant, among other orders.
10. Further, by a statement of defence dated 20th May 2016, the appellant denied the respondent's claim and prayed that the same be dismissed with costs. She stated that the respondent unlawfully invaded her land and stated the particulars thereof at paragraph 4 of the statement of defence. That the suit land and her land have different origins and that they are distinct and separate hence, the respondent's case is misconceived, frivolous, vexatious and an abuse of the court process.
11. The trial court summarized the plaintiff's case, inter alia, the plaint dated 3rd May 2016, the evidence of the respondent and the testimony of Land Registrar, Tiberius Ndege (PW1) who produced in evidence a report dated 17th January 2018 prepared by Land Registrar V.K Lamu (PExhibit 10). Also, the court set out in brief the defendant's case including the 1st defendant's statement of defence and counter claim alongside the 2nd defendant's statement of defence as well as the testimonies of the 1st defendant (DW1) and the appellant (DW2) herein.
12. The learned trial magistrate relied on, inter alia, the Land Registrar's report (P Exhibit 10) in due consideration of the case. So, she rendered herself in favour of the respondent's case as stated in paragraph 1 hereinabove.
13. It must be borne in mind that my duty in this case is to reconsider the evidence on record, assess the same and come to my own appropriate conclusions; see *Selle and another-vs-Associated Motor Boat Co. Ltd* (1968) EA 123.
14. In the foregone, the issues to determine herein are captured as per the grounds of this appeal which boil down to whether;
 - a. The grounds of appeal are tenable and
 - b. Subject to issue (a) above, is the appellant entitled to the orders sought in the appeal?
15. As regards grounds 1, 2 and 4 of appeal, the trial court identified the history of the suit land as the first issue for determination and discussed the same. The court took into consideration the evidence on record, including that the respondent bought the suit land of the parent land from the deceased. That the parent land was still registered in the name of the deceased as revealed in P Exhibit 1.
16. Further, after the death of the deceased, the 1st defendant, a brother to the deceased, succeeded his estate and caused the 1st sub division and the suit land as confirmed by the 1st defendant. In *Rajesh Pranjivan Chudasama-vs-Sailesh Pranjivan Chudasama* (2014) eKLR, the Court of Appeal held-

“A litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in case of intestate succession.....”
17. The trial court referred to P Exhibits 3 and 7 and noted that the respondent obtained title deed to the suit land. By the said exhibits alongside the sale agreement (P Exhibit 5), the respondent proved that



his acquisition of the suit land was legal, formal and free from any encumbrances as noted in the case of *Munyu Maina-vs-Hairam Gathiha Maina* (2013) eKLR.

18. The appellant's statement of defence of six paragraphs has no counter claim. At paragraph 4 of the said defence, she alleged particulars of unlawful invasion of the appellant's land by the respondent. The only alleged particulars of fraud on the part of the respondent are contained at paragraph 7 of the 1st defendant's statement of defence. However, the 1st defendant has not lodged an appeal from the impugned judgment.
19. The learned trial magistrate considered the submissions including that of the defendants and at paragraph VI of the judgment, she observed-
 - a. ".....The defendants have submitted that the land sale agreement does not meet the legal requirements as per section 3 (3) of the *Law of Contract Act*. The land sale agreement was entered into....."
20. It is important to note that the learned trial magistrate summarized the parties' respective cases including the testimonies of the appellant (DW2) and the respondent (PW1), delineated four issues for determination, analyzed them and arrived at the impugned decision with reasons. So, she complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
21. Regarding ground 3, I bear in mind paragraphs XIV, XV and XVI of the judgment where the learned trial magistrate considered, among others, the Land Registrar's report dated 17th January 2018 (P Exhibit 10) which reads;

".....the surveyor's report shows the extent of Hamida's encroachment is 0.04 Ha.....The boundaries on the land are still intact but Hamida still trespassed on my land....."
22. At paragraph XV of the impugned judgment also found in page 16 of the record of appeal, the learned trial magistrate remarked thus;

".....the sketch of the parcels are contained in the mutation forms used during the subdivision of the parcels and they reflect what is contained in the land registrar's report....."
23. Further, the trial magistrate stated that in P Exhibit 10, the Land Registrar noted:

" The mabati houses built by the 2nd defendant occupy 0.04 Ha of land number 2628 belonging to the plaintiff and as such the land registrar concluded that the 2nd defendant has trespassed onto land number Kanyamwa/Kwandiku/2628 by 0.04 Ha."
24. The appellant asserted that her land does not border the suit land. However, P Exhibit 10 shows that the said two parcels of land border each other. Indeed, the trial court pointed out this position at paragraph XVI (1) of the impugned judgment.
25. It is the mandate of Land Registrar to deal with disputes relating to boundary of registered land. The Land Registrar is the custodian of the record of the land and has the technical ability to determine, establish and fix boundaries of such land under sections 18 and 19 of the *Land Registration Act*, 2016(2012) and as held in *Andrew Marigwa-vs-Josephat Ondieki Kebati* (2017) eKLR and *Registered Trustees Legio Maria* case (infra).



26. On the facts and circumstances of this case, the Land Registrar's report (P Exhibit 10) is cogent and the trial court correctly proceeded to accept it; see CD Desouza-vs-BR Sharma (1953) 26 KLR 41 at page 42, Registered Trustees Legio Maria Africa Church Mission-vs-Simeon Nyamweya Obwocha (2018) eKLR, among other authoritative pronouncements. and sections 48 to 54 of.... Cap 80 Laws of Kenya.
27. In respect of grounds 5, 6, 7 and 8, the learned trial magistrate took into account the submissions regarding P Exhibit 5 as stated in paragraph 19 hereinabove. She concluded that it was valid and there was no reason to interfere with the certificate of title (P Exhibit 7) having regard to sections 24, 25 and 26 of the *Land Registration Act*, 2016 (2012).
28. As discerned in the 1st defendant's pleadings before the trial court, fraud and misrepresentation were raised as grounds for impeaching the certificate of title in respect of the suit land. These grounds were distinctly pleaded but not proved in light of paragraphs 17 and 27 hereinabove as I subscribe to the case of Kuria Kiarie and 2 others-vs-Sammy Magera (2018) eKLR. Clearly, the proof of such grounds must be something more than a mere balance of probabilities as held in the case of Gladys Wanjiru Ngacha-vs-Treresa Chepsaat and 4 others (2013) eKLR.
29. To that end, it is my considered view that the learned trial magistrate correctly applied the evidence on record and the relevant principles of law in reaching her informed decision. I find no reason to disturb the impugned decision.
30. Thus, the instant appeal fails and is hereby dismissed with costs to the respondent.
31. It is so ordered.

DATED and DELIVERED at Homa Bay this 3rd day of October 2023.

G.M. A ONG'ONDO

JUDGE

PRESENT

1. Ongoso learned counsel for the appellant
2. P. Odhiambo instructed by G.S Okoth learned counsel for the respondent
3. Luanga, court assistant

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