



**Migai v Nyambuga & 5 others (Environment and Land Appeal
E055 of 2022) [2023] KEELC 21427 (KLR) (7 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21427 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E055 OF 2022
GMA ONGONDO, J
NOVEMBER 7, 2023**

BETWEEN

HELLEN AKINYI MIGAI APPELLANT

AND

CLEMENTINA ADHIAMBO NYAMBUGA 1ST RESPONDENT

WALTER OCHIENG OTIENO 2ND RESPONDENT

PAMELA ROSEMARY ADHIAMBO 3RD RESPONDENT

TOM OCHIENG OWAGA 4TH RESPONDENT

ANNE ACHIENG ONUNGA 5TH RESPONDENT

LAND REGISTRAR, KOSELE 6TH RESPONDENT

*(Being an appeal from the judgment of Hon. Celesa Okore, Principal
Magistrate, delivered on 19th May 2022 in Oyugis Homa Bay Senior
Principal Magistrate's Court Environment and Land Case No. 17 of 2020)*

JUDGMENT

1. This appeal emanates from the trial court's judgment delivered on May 19, 2022 by the Honourable Celesa Okore, Principal Magistrate, in Oyugis Senior Principal Magistrate's Court Environment and Land Case No. 17 of 2020 where she held, inter alia;

“... I find that the plaintiff has not proved her case on a balance of probabilities as required by the law, the plaintiff's case is hereby dismissed in its entirety with no order as to costs...”



I find that their defendants have proved their claim as stated in the counterclaim. The orders sought in the counterclaim are hereby granted as prayed save for costs which shall be borne by each party...”

2. The appellant namely Hellen Akinyi Migayi through the firm of Odoni Awino and Company Advocates mounted the appeal by way of a memorandum of appeal dated 24th October 2022 and duly filed on 31st October 2022 is anchored on grounds 1 to 4 as set out on the face thereof. The grounds are:
 - a. The learned magistrate erred in law and fact by failing to appreciate the evidence on record that the appellant had built rentals and has been in occupation for the past 39 years.
 - b. The learned trial magistrate erred in law and fact by failing to appreciate that change of ownership cannot extinguish the right of appellant in the circumstances.
 - c. The learned trial magistrate erred in law and fact by failing to appreciate that the occupation by the appellant has been open, notorious, peaceful and without interruption for more than 12 years.
 - d. The learned trial magistrate erred in law and fact by failing to consider whether the succession cause alluded to herein was done by concealment of material particulars.
3. Wherefore, the appellant has sought the order that the instant appeal be allowed and that:
 - i. Judgment dated May 19, 2022 be quashed and set aside and the respondents’ counter-claim be dismissed.
 - ii. The appeal be allowed with costs and the appellant be declared the proprietor of the suit property.
4. The appeal was heard by way of written submissions pursuant to this court’s directions of 31st May 2023.
5. Learned counsel for the appellant filed no submissions herein.
6. The 1st to 5th respondents’ counsel, Everlyne Kuke and Company Advocates, filed submissions dated 10th January 2023 on even date. Counsel gave a background of the matter and framed three issues for determination thus: who is the legal owner of the suit property, to wit, land parcel number Karachuonyo/Kanjira/1285? whether the certificate of title in respect to the suit property was fraudulently obtained and/or a forgery and whether the appellant acquired a portion of the suit property adversely. Counsel relied on sections 24 and 26 of the *Land Registration Act, 2016* (2012) and submitted, inter alia, that a registered owner of property is the absolute owner and has an indefeasible title and that the appellant failed to prove that the respondents acquired title to the suit property through fraud. That the sale agreement that the appellant relied on at the trial court did not bear a plot number.
7. Counsel further submitted that although the appellant claimed to have acquired the suit property by way of adverse possession, she did not produce any evidence to show that she was in possession thereof. That in case there was possession, then the same was with consent by virtue of the sale agreement. To buttress the submissions, counsel relied on various authoritative pronouncements, including the case of *Mombasa Teachers Co-operative Savings and Credit Society Limited v Robert Muhambi Katana and 15 others* (2018) eKLR.
8. It must be noted that the 6th respondent did not participate in this appeal.



9. In the foregone, the issues for determination herein are as contained in the grounds of appeal which are condensed to whether;
 - a. The grounds of appeal are tenable.
 - b. The appellant is deserving of the orders sought in the memorandum of appeal.
10. It is trite law that an appellate court has the mandate to reconsider the evidence on record with caution and reach its own independent conclusions and inferences; see *Kiruga v Kiruga and another* (1988) eKLR.
11. At the trial court, the plaintiff/appellant herein sued the respondents by way of a plaint dated 12th March 2020 and amended on April 30, 2021 seeking the following orders;
 - a. An order of permanent injunction restraining the 2nd, 3rd, 4th and 5th defendants. Their agents, servants and/or employees from trespassing, occupying, owning, disposing, alienating, transferring, leasing and/or in any other way interfering with any part thereof of land parcel numbers West Karachuonyo/ Kanjira/1619 and West Karachuonyo/ Kanjira/1620 (the subsequent parcels emanating from the suit property).
 - b. An order directing the 6th defendant to revert the records of subdivisions being West Karachuonyo/ Kanjira/1619 and West Karachuonyo/ Kanjira/1620, the suit property and all other subdivisions to the original land parcel number West Karachuonyo/ Kanjira/927.
 - c. An order thereby compelling the 1st defendant to execute subdivision and transfer of 0.05 Ha portion of the original land parcel in favour of the plaintiff's husband's estate.
In the alternative, an order directing the executive officer to sign all the necessary documents for subdivision and transfer of 0.05 Ha portion of the original land parcel in favour of the plaintiff's husband's estate.
 - d. Costs of this suit and interests thereon as from the date of filing the suit until payment in full.
 - e. Any other relief the honourable court deems just and expedient to grant.
12. Briefly, the plaintiff contends that on or about 30th April 1983, her late husband, one Zablun Migayi Otero (deceased 1), bought a portion of the original land parcel measuring approximately 0.05 Ha in area from Rusalia Achola Nyambuga (deceased 2). That at the time of purchase, the said parcel was registered in the name of her late husband and the 1st defendant's father, one Ambrose Nyambuga (deceased 3). That the purchase price of Kshs. 4,000/- was duly paid and the plaintiff together with deceased 1 took possession thereof and even constructed rental houses. That transfer was not effected in the name of deceased 1 since deceased 2 passed on without carrying out succession of the estate of deceased 3.
13. That thereafter, the 1st defendant carried out succession of the estate of deceased 3 and subdivided the original land parcel into 16 parcels. That under the mutation, the parcel that was to be transferred to the estate of deceased 1 was the suit property herein. That, however, the 1st defendant sold the same to the 2nd, 3rd, 4th and 5th defendants who further subdivided the same resulting into land parcel numbers West Karachuonyo/ Kanjira/1619 and West Karachuonyo/ Kanjira/1620. The plaintiff lamented that the defendants' actions have denied her peaceful use and enjoyment of the estate of deceased 1.
14. PW1, Hellen Akinyi Migai, adopted her statement on record as part of her evidence. She produced in evidence a green card, certificates of search, notice to vacate, mutation form (PExhibits 1 to 4), sale



- agreement (MFI 5), a letter dated 27th August 2004 (MFI 6), death certificate and a grant of letters ad litem (PExhibits 7 and 8 respectively).
15. In cross-examination, PW1 admitted that when deceased 1 purchased the suit property in 1983 from deceased 2, the title was still registered in the name of deceased 3 who had passed on earlier in 1976.
 16. PW2, John Okeyo, relied on his statement on record, which was adopted as his evidence in chief. During cross-examination, he stated that he was not a witness to the sale. That the agreement produced by PW1 and marked as MFI 5 neither indicates the land parcel allegedly sold to deceased 1 nor its size. He reiterated that at the time of purchase in 1983, the suit property was still registered in the name of deceased 3 who had passed on earlier in 1976.
 17. Similarly, PW3, Christina Ndalo Juma, relied on her statement on record, which was adopted as her evidence in chief. On cross-examination, she stated that although she is not listed as a witness in MFI 5, she saw the same being drafted. That the land parcel number was not indicated therein.
 18. The 1st to 5th defendants opposed the suit by way of a statement of defence and counterclaim dated 4th September 2020 and amended on 8th May 2021. The 2nd to 5th defendants averred that the plaintiff was a trespasser on the suit property who had refused to vacate the premises despite demand being issued. Thus, they prayed that the plaintiff's suit be dismissed with costs and judgment be entered in their favour for:
 - a. An injunction restraining the plaintiff, his servants, workmen and agents, from entering on and/or erecting or causing to be erected thereon any structures, or from in any way interfering with the counterclaimants use and enjoyment of the counterclaimants' said land parcels.
 - b. A declaration that the 2nd, 3rd, 4th and 5th defendants are the legal registered owners of all those land parcel numbers West Karachuonyo/Kanjira/1619 and 1620 respectively.
 - c. An order of eviction from the said premises.
 - d. Costs of the counterclaim and interest thereupon at such rate and for such period of time as this honourable court may deem fit to grant; and
 - e. Such further or other reliefs as may be appropriate in the circumstances.
 19. DW1, Walter Ochieng', relied on his statement on record, which was adopted as part of his evidence in chief. He stated that he owns land parcel number West Karachuonyo/Kanjira/1619 measuring 0.025 Ha in area jointly with his wife, the 3rd respondent herein. That he purchased the same from the 1st defendant/respondent, who effected a transfer in his name. That prior to the sale, he conducted due diligence and was satisfied that the title was free from encumbrance. He produced in evidence a copy of land sale agreement dated January 24, 2020.
 20. In cross-examination, DW1 stated that although he found structures when he visited the site, he was informed that the same belonged to the 1st defendant/respondent herein. That land parcel number West Karachuonyo/Kanjira/1619 emanated from the original land parcel.
 21. Pamela Rosemary Adhiambo, DW2, relied on her statement which was adopted as her evidence in chief. She testified, *inter alia*, that she purchased land parcel number West Karachuonyo/Kanjira/1619 together with DW1. She urged the court to restrain the plaintiff from interfering with the said parcel.
 22. On cross-examination, DW2 stated that they paid Kshs. 350,000/- as consideration for the land. She also stated that she found structures when she visited the site, which the 1st defendant confirmed belonged to her.



23. DW3, Tom Owaga Ochieng, relied on his statement which was adopted as his evidence in chief. He produced in evidence a copy of a handwritten agreement dated 31st December 2016, official search certificate, search dated 9th March 2020 and a search certificate in the name of DW1 and DW2. During cross-examination, DW3 stated that when he purchased his parcel of land, there was a vacant dilapidated structure thereon. That no indication was given that the plaintiff had purchased the land.
24. In her judgment, the learned trial magistrate found that the title deed for the original land parcel was closed on 9th August 1996 when it was subdivided into 16 new parcels, including the suit property herein. That the 1st defendant became the owner of the suit property through a legal process. That the suit property was subsequently subdivided into two parcels, West Karachuonyo/Kanjira/1619 and 1620 which were sold and transferred to the 2nd, 3rd, 4th and 5th defendants. That the said defendants acquired titles thereto procedurally. That further, the sale agreement that PW1 sought to rely on did not identify the land parcel being sold nor its size. The same was also drafted in Luo language and was not interpreted in the language of the court for ease of reference.
25. The appellant contends that the trial magistrate erred in law and fact by failing to appreciate that the appellant had built rentals and has been in occupation of the suit property for the past 39 years. That therefore, the change of ownership cannot extinguish the right of appellant in the circumstances. The appellant averred that she came into possession of the suit property upon completion of the alleged sale of the suit property on 30th April 1983.
26. It is noteworthy that at the time of the alleged sale, title to the suit property was still registered in the name of deceased 3 who had passed on earlier in 1976. No succession had been done. This was confirmed by the *viva voce* evidence of PW1 and PW2.
27. The [Law of Succession Act](#), Chapter 160 Laws of Kenya, protects property that is registered in the name of a deceased person. Section 45 (1) of the [Law of Succession Act](#) (*supra*) provides as follows:
- Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
28. Indeed, without a confirmed grant, a party does not have the capacity to enter into a binding agreement for the sale of immovable property belonging to a deceased person, see also section 82 of the [Law of Succession Act](#) (*supra*). Authority to handle the assets of a dead person emanates from grants of representation to the estate of such dead person and as noted in [Rajesh Chudasama v Sailesh Chudasama](#) (2014) eKLR, see section 2 of the [Civil Procedure Act](#), chapter 21 Laws of Kenya. Such property only vests in the person who holds the grant of representation and therefore, the only person who can enter into binding transactions with third parties. Any other person, who does not hold a grant has no authority to deal with the assets of a dead person, and cannot bind the estate or confer any valid title to any third party that they deal with. Any dealings between a non-holder of a grant and a third party offend the provisions of section 45 (*supra*).
29. It is therefore, my considered view that the basis for entry into the suit property was an illegality. This court cannot sanction the same under the guise of adverse possession; see also *Scott v Brown Doering McNab & Co.* (3) (1892) 2QB 724 at 728.
30. With respect to the 2nd, 3rd, 4th and 5th respondents, I find that they are purchasers for value who conducted due diligence before purchasing the suit property. This is evidenced by their testimonies as well as DExhibits 1 and 2. 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 E.A.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.”

31. The 2nd, 3rd, 4th and 5th respondents possess an indefeasible title to the suit property pursuant to the provisions of sections 24 and 26 of the *Land Registration Act*, 2016 (2012), having acquired title to the same through a lawful process since the appellant failed to prove that they acquired title to the suit property through fraud.
32. In the case of *Vijay Morjaria vs Nansingh Madhusingh 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).
33. Despite being accorded the opportunity to lead evidence to demonstrate the existence of fraud on the part of the respondents 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.
34. In view of the foregoing, the appellant herein was a trespasser on the suit property. Thus, the counterclaim was merited in the circumstances.
35. So, 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 on a balance of probabilities as held by Madan JA (as he then was) in the case of *CMC Aviation Ltd. v Kenya Airways Ltd. (Cruisair Ltd)* (1978) eKLR. Therefore, the grounds of appeal are untenable.
36. On the other hand, the respondents who were the defendants at the trial court discharged their duty and proved their amended counterclaim dated May 8, 2021 to the requisite standard.



37. 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.
38. Afortiori, the instant appeal commenced by way of a memorandum of appeal dated October 24, 2022 and duly lodged on October 31, 2022 is hereby dismissed with costs to the 1st to 5th respondents.
39. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 7TH DAY OF NOVEMBER 2023.

G.M.A ONG'ONDO

JUDGE

Present

1. Ms. Everlyne Kuke, learned counsel for the 1st to 5th respondents
2. Luanga Terrence- Court Assistant

