



**Owuor v Ogambo & another (Suing as the Joint Administrators with Limited Grant of Letters of the Estate of Raphael Opell Kinda - Deceased) (Environment and Land Appeal 11 of 2021) [2022] KEELC 2795 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2795 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL 11 OF 2021**

**AY KOROSS, J**

**MAY 5, 2022**

**BETWEEN**

**AGABITUS OKOTH OWUOR ..... APPELLANT**

**AND**

**MARY OUNGA NDEDA ..... 1<sup>ST</sup> RESPONDENT**

**REDEMTA AKINYI OGAMBO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE JOINT ADMINISTRATORS WITH LIMITED GRANT OF  
LETTERS OF THE ESTATE OF RAPHAEL OPELL KINDA - DECEASED**

*(Being an appeal from the judgment and decree of the Principal Magistrate  
Hon.L.Simiyu delivered on 22/03/2021 in Siaya PM ELC Case Number 114 [of 2018])*

**JUDGMENT**

**Introduction**

1. Via a plaint dated April 22, 2016, the respondents filed suit against the appellant in Kisumu ELCCase No.87 of 2016. By an order of the court dated April 4, 2018, the matter was transferred to Siaya lower court for hearing and determination. In the plaint, the respondents prayed for several orders against the appellant including permanent injunction, cancellation and rectification of the register of land parcel number Siaya/Obambo/2345 (suit property) and Siaya/Obambo/2344, eviction of the appellant from the suit property and costs.
2. It was their contestation that the suit property was illegally and fraudulently subdivided by their deceased brother Gabriel Aloma Opel and the appellant from the original parcel of land known as Siaya/Obambo/1437 which was registered in the name of their deceased father Raphael Opell Kinda. They alleged that the illegal subdivision had led to the creation of two parcels of land; Siaya/Obambo/



2344 that was registered in the name of Gabriel and the suit property that was registered in the appellant's name.

3. The firm of Julius Nyakiangana & Co. Advocates without entering appearance filed a defence dated August 12, 2016. Probably in hindsight of the unprocedural manner in which this defence was filed, the firm of Ochieng Oginga & Co. Advocates entered appearance and filed a defence dated January 25, 2019 in which he denied the averments in the plaint and asserted that the defendant was an innocent purchaser in good faith and for value.
4. After hearing the parties, the court by its judgment dated March 22, 2021 entered judgement as prayed for in the plaint and ordered the restoration of land known as Siaya/Obambo/1437 in the name of Gabriel Aloma Opel.

### **Appeal to this court**

5. Aggrieved and dissatisfied by the decision of the court, the appellant filed a memorandum of appeal dated March 29, 2021 which set down 7 grounds of appeal which he later consolidated in his submissions into three grounds of appeal;
  - i. The Learned Trial Magistrate erred in law and fact by failing to find that the respondents did not prove their case to the required standard.
  - ii. The Learned Trial Magistrate descended into matters not pleaded before court by the respondents and no sufficient evidence to substantiate it and thus arrived at a wrong conclusion and further erred in shifting the burden of proof upon the appellant.
  - iii. The Learned Trial Magistrate erred in law and fact by failing to find that the appellant was a creditor of the estate of Gabriel Aloma Opel (deceased).
6. The appellant prayed for the appeal to be allowed with costs and for the judgment and decree of the trial court to be set aside.

### **Appellant's submissions**

7. The appellant filed his written submissions dated January 20, 2022. On the 1<sup>st</sup> ground, he asserted that despite the trial court finding that he did not participate in the illegality that was allegedly orchestrated by Gabriel, it entered judgement against him. He relied on the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR where the court stated that fraud must be distinctly alleged and proved.
8. On the 2<sup>nd</sup> ground, he averred that the respondents never proved that the creation of the suit property was as a result of fraud, illegality or corrupt scheme.
9. On the 3<sup>rd</sup> ground, the appellant contended that despite the trial court ordering restoration of land known as Siaya/Obambo/1437 in the name of Gabriel, it failed to find that he had a claim over Gabriel's Estate.

### **Respondents' submissions**

10. The Respondents filed their written submissions dated February 7, 2022. In it, they highlighted 3 issues for determination; (i) whether the appellant was a party to the illegality or fraud, (ii) whether the appellant was a bona fide purchaser of the suit property for value (iii) whether respondents in an appeal from a magistrate's courts decision can rely on a ground of appeal not in the memorandum of appeal.



11. The 1<sup>st</sup> and 2<sup>nd</sup> issues are related, they contended that the manner in which the subdivision and transfer of the suit property was made to the appellant, demonstrated that the appellant was a party to the illegality and asserted that the trial court properly concluded that the title of an innocent person is impeachable even if he did not contribute to the vitiating factors. They relied on the case *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another* [2013] eKLR which held that the title of an innocent purchaser can be impeached if the title was obtained illegally, unprocedurally or through a corrupt scheme. They submitted that the appellant could not hide under the defence of innocent purchaser without notice and on this they relied on the case of *Lawrence Mukiri v Attorney General & 4 others* [2013] eKLR which defined who qualified as a bona fide purchaser for value.
12. On the 3<sup>rd</sup> issue, they contended that it was obvious the trial magistrate erred in ordering a reversion of Siaya/Obambo/1437 to Gabriel instead of Raphael. They relied on Order 42 Rule 32 of the *Civil Procedure Rules* and the case of *Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission [IEBC] & 2 others* (2014) eKLR where the court held that it had jurisdiction to decide an appeal including making a decree in favour of a respondent who had not cross appealed.

### **Analysis and determination**

13. Having considered the condensed grounds of appeal, the parties' submissions and authorities cited, this court will make its determination on the condensed grounds of appeal. Because of the similarity of grounds 1 and 2, this court will handle them together. Ground 3 will be dealt with together with the issue of whether an appellate court has jurisdiction to invoke the slip rule. Before I proceed, I wish to clarify that typed proceedings in the record of appeal were incomplete with the even numbers missing. None of the parties brought this to the attention of the court. Bearing in mind the just and expeditious disposal of court cases, I relied on the typed proceedings in the court record. I will now consider the law and jurisprudence.
14. As was stated in the case of *Abok James Odera t/a A. J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, this court is alive that its role as a first appellate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate stand or not and give reasons either way.
  - i. Whether the learned trial magistrate erred in law and fact by failing to find that the respondents did not prove their case to the required standard and arrived at a wrong conclusion.
15. It was the trial magistrate's finding that ,
 

“ There is no evidence that the procedure set down for removal of the restriction was followed or that succession had been done. It is clear that an illegality, fraud or corrupt scheme was employed in facilitating the transfer...there is no clear evidence that the defendant was party to the illegality as provided under Section 26 (1) (a) however as stated in the above authorities and under Section 26 (1) (b) a title for (sic) an innocent party stands impugned if it is clear that the registration was done unprocedurally without following the succession process. A clear illegality was committed and thus the transfer is fraudulent...it is not clear from either party how the restriction was removed”
16. The appellant questioned the finding of the trial court by contending that contrary to the provisions of Section 109 of the *Evidence Act*, that stated that the burden of proof of particular facts lay with the person who relied upon them, the respondents had failed to prove impropriety against him and Gabriel.



17. In rebuttal, the respondents contended that a court can impugn the title of an innocent third party on grounds of illegality, improper procedure or corrupt scheme a court. They contended that the speed and manner in which the appellant acquired title to the suit property was evidence of complicity between the appellant and their brother Gabriel.
18. From the pleadings, the respondents specifically pleaded illegality and fraud against Gabriel and the appellant for not having capacity to subdivide or transact on Siaya/Obambo/1437 because they were not the administrators of the estate of Raphael.
19. PW-I in her testimony contended that Gabriel illegally subdivided Siaya/Obambo/1437 and sold the suit property to the appellant. In cross examination, she testified that fraud was committed by the land registrar and Gabriel. PW-2 corroborated the testimony of PW-I and testified that Gabriel was never the administrator of the estate of their father and that she discovered the fraud when the appellant started construction on the suit property.
20. From the respondent's testimony, the appellant was exonerated and I agree with the submissions made by the appellant and authorities cited that fraud must be strictly proved by the person alleging it. I agree with the finding of the trial court that fraud was not proved against the appellant. My understanding of the appellant's grievance is that despite the court absolving him, it cancelled his title to the suit property? Did the trial court err in cancelling this title?
21. The respondents' testimony that probate proceedings were never undertaken on Raphael's estate were never controverted by the appellant and the trial court was satisfied by the testimony of the respondents.
22. Under Section 82 of the [Law of Succession Act](#) only a personal representative has power to sell and contrary to the provisions of Section 45 of the same Act, Gabriel intermeddled with the estate of a deceased person, and having no grant, had no title to pass to the appellant. It therefore follows that the appellant obtained title from a fraudulent person who had no capacity to transfer the suit property to him and he cannot seek refuge in Section 24 of the [Land Registration Act](#) on indefeasibility of title because the transfer by Gabriel was according to the provisions of Section 26 (2) (b) of the [Land Registration Act](#) shrouded with illegality, improper procedure and corrupt scheme and his title to the suit property was null and void abinitio and I will not disturb the finding of the trial court. I am persuaded by the decision of [Martha Wangui Thurura & another v Henry Gitabi Thurura & 3 others](#) [2021] eKLR which held thus;
 

“ the 1<sup>st</sup> defendant's title was null and void abinitio as it contravened the provisions of section 45 of the [Law of Succession Act](#) Cap 160. If this court were to validate the 2<sup>nd</sup> defendant's title, it would amount to abetting a criminal act under section 45(2) Cap 160”
23. Though the appellant has abandoned the ground of appeal on innocent purchaser for valuable consideration which is related to the 1<sup>st</sup> ground. I wish to point out that the findings of the trial court were apt. The appellant failed to: produce an agreement of sale; adduce evidence that he paid valuable consideration to Gabriel; demonstrate that he paid stamp duty for the transfer (if any); produce a copy of the transfer, if at all there was indeed one. All these, raise more questions than answers. In my view, even if he would have pursued this ground, he could never be described as a bona fide purchaser for value.
  - ii. Whether the learned trial Magistrate erred in law and fact by failing to find that the appellant was a creditor to the estate of Gabriel Aloma Opel (deceased) and whether the appellate court has jurisdiction to invoke the slip rule



24. Despite the finding of the trial court that Gabriel had illegally and fraudulently transferred Siaya/Obambo/1437 to himself and subsequently subdivided it and transferred the suit property to the appellant, it went ahead to order the restoration of Siaya/Obambo/1437 to the estate Gabriel.
25. It is the considered view of this court, that there is a disconnect between the reasoning, findings and other orders of the trial court to this particular order which leads to the logical conclusion; there was an accidental slip or omission by the court which is curable by Section 99 of the Civil Procedure.
26. Section 1B Civil Procedure Act which is drawn from Article 159 (2) (b) provides that the overriding objective of this court is to ensure efficient and effective disposal of cases and in the interest of justice, a court can invoke its inherent powers. The Supreme Court of Kenya in the case of Fredrick Otieno Outa v Jared Odoyo Okello & 3 others [2017] eKLR Supreme Court stated thus;
- “the Slip Rule permits a Court of law to correct errors that are apparent on the face of the Judgment, Ruling, or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgment or decision of the Court... This being the case, the Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice”.
27. Order 42 Rule 32 of the Civil Procedure Rules reads thus;
- “The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal”
28. In interpreting this provision of law in the case of Twaber Abdulkarim Mohamed v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2014] eKLR, the court concluded that Order 42 rule 32 is in *pari materia* with, and apparently borrowed from, Order 41 rule 33 of the Indian Code of Civil Procedure and upon looking the commentary by authors of Mulla, The Code of Civil Procedure by Sir Dinshah Fardunji Mulla, 18<sup>th</sup> Ed. (2012) at p. 3561 on the this provision of law, the learned judge stated thus;
- “Civil Procedure Rules which under its Order 42 Rule 32 which makes reference to cross-appeal and appear to allow the court deal with a matter that is not pleaded in an appeal or cross-appeal”
29. I do find that this court has jurisdiction to rectify the error that is apparent on the face of the judgement and decree of the court. Bearing in mind this finding, it therefore follows that the appellant’s ground of appeal fails.
30. The upshot is I hereby affirm and uphold the judgment of the trial court dated March 22, 2021 that entered judgment in favour of the respondents However, I hereby vary the said judgment and set aside its order restoring of title number Siaya/Obambo/1437 to the names of Gabriel Aloma Opel and substitute it with an order that title number Siaya/Obambo/1437 be restored in the name of Raphael Opell Kinda. The appeal fails. Because it is trite law that costs follow the event, I award the costs of this appeal to the respondents.

Judgment delivered virtually.



**DATED, SIGNED AND DELIVERED AT SLAYA THIS 5<sup>TH</sup> DAY OF MAY 2022.**

**In the Presence of;**

Mr. Ooro F. for the respondent

Mr. Oduol for the appellant

Court assistant; Sarah Ooro

**HON. A. Y. KOROSS**

**JUDGE**

**5/5/2022**

