



REPUBLIC OF KENYA



KENYA LAW
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**Ndege v Oduru (Environment and Land Appeal 14 of 2021)
[2022] KEELC 13262 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13262 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 14 OF 2021
GMA ONGONDO, J
OCTOBER 4, 2022**

BETWEEN

LUKAS FINN JUMA NDEGE APPELLANT

AND

GRACE ATIENO ODURU RESPONDENT

(Being an appeal from the judgment of Hon. R. B. N Maloba (Principal Magistrate), delivered on 5th November, 2020 in Homa Bay Chief Magistrate’s Court Environment and Land Case No. 15 of 2016)

JUDGMENT

1. This appeal arose from the trial court’s judgment delivered on the November 5, 2020 by the Honourable R. B. N Maloba (Principal Magistrate) in Homa Bay Chief Magistrate’s Court Environment and Land Case No. 15 of 2016 where she held, *inter alia*;

“... it may be proper to conclude that the defendant was himself to blame for the predicament he now finds himself in. As the registered proprietor, the plaintiff duly enjoys protection of the law...”

2. The appellant namely Lukas Finn Juma Ndege through the firm of M.A. Okumu and Company Advocates originated the appeal by way of a memorandum of appeal duly filed on December 11, 2020. The Appeal is anchored on grounds 1 to 5 as set out on the face of the same and these include:
 - a. The learned trial magistrate erred in law and fact in failing to find that the suit is statute barred due to effluxion of time.
 - b. The learned trial magistrate erred in law and fact in failing to appreciate the fact buyer and second buyer of the said suit land case of Kanyada/Kalanya/Kanyango/5494 relate to first registration.



3. So, the appellant prays that the instant appeal be allowed and that judgment be entered against the respondent in the following terms:
 - a. An order quashing the decree and substituting the same with an order allowing the appellant suit in the subordinate court.
 - b. The respondent be condemned to pay the cost of this appeal and the cost arising out of the subordinate court.
 - c. The respondent to pay interest on cost under paragraph (b) above.
4. On October 4, 2021, the appeal was transferred to this court from Migori Environment and Land Court for hearing and determination.
5. The appeal was heard by way of written submissions further to this court's directions of March 1, 2022.
6. In that regard, the appellant's counsel, now Edward Kisia and Associates Advocates, filed submissions dated July 15, 2022 on July 18, 2022. Counsel abandoned grounds 1 and 3 of the appeal as stated in paragraphs 2 (a) and (b) hereinabove. Counsel thus, framed one issue for determination, to wit, whether in the circumstances of the case, the lower court erred both in fact and law by finding for the respondent. In discussing the issues, learned counsel submitted, inter alia, that the appellant was the first purchaser of the suit property, having purchased the same on July 3, 2007. That the appellant fulfilled his obligations under the contract for sale of the suit land. Further, that the respondent has never been in possession of the suit land.
7. Counsel cited various authorities including the Court of Appeal decision in [Chauvan -vs- Omagwa](#) (1980) eKLR, to buttress his submissions. Therefore, it was urged that the honourable court do find that the appellant was a victim of fraudulent collusion between the respondent and one Peres Anyango Odongo and that this appeal is merited and the same ought to be allowed with costs.
8. Learned counsel for the respondent, Aluoch Odera and Nyauke Advocates, filed submissions dated June 30, 2022 on July 5, 2022. Counsel analysed the grounds of appeal by submitting in part that the initial suit was initiated within the prescribed timelines envisioned in Section 7 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya. That the issue at the trial court was trespass. Counsel relied on Section 26 of the [Land Registration Act](#), 2016 (2012) as read with Section 24(a) of the same Act. Counsel cited the case of [Abednego Otundo Ayuku -vs- Laban Masinjira](#) (2021) eKLR, to fortify the submissions.
9. In light of the above, the issues for determination herein are as captured in the grounds of appeal and condensed as follows:
 - a. Whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal;
 - b. The orders to be made in this appeal to meet the best ends of justice.
10. It is noteworthy that the instant appeal being the first one from the trial court in the matter, this court is obliged to review the record of the trial court, evaluate it afresh and arrive at its independent findings herein; see [Mwanasokoni-vs Kenya Bus Services Ltd](#) (1982-88) 1KAR 278 applied in the case of [Titus Ong'ang'a Nyachico-vs-Martin Okioma Nyauma and 3 others](#) 2017 eKLR.
11. Originally, the respondent sued the appellant before the trial court by way of a plaint dated March 30, 2016 and filed in the trial court on 31st March 2016 seeking the following orders;



- a. An order of eviction compelling the defendant to vacate land parcel number Kanyada/Kanyango/Kalanya/5494 (the suit land herein).
 - b. An order of permanent injunction restraining the defendant himself, his agents, employees and/or proxies from howsoever trespassing on the suit land.
 - c. General damages for trespass.
 - d. Costs of this suit and interest thereon from the date of judgment till payment in full.
12. PW1, Grace Atieno Oduru (the respondent herein), testified on September 15, 2020 and adopted her statement dated March 30, 2016 as part of her evidence. She stated, *inter alia*, that she purchased the suit land measuring zero nought zero three hectares (0.03 Ha) from one Peris Anyango Odongo. That she was subsequently issued with a title deed to the suit land. That the defendant (appellant herein) trespassed into the suit land in 2015, a year after the same was acquired by the plaintiff, and erected a temporary mabati (iron sheets) structure thereon. That the defendant's acts of trespass have greatly inconvenienced her hence, she prayed for damages.
 13. Further, PW1 stated that the defendant has refused to vacate the suit land, despite demand. She produced in evidence a copy of official search certificate dated March 30, 2016 marked as PExhibit 1 herein.
 14. In his statement filed herein on April 23, 2018, the defendant (the appellant herein) denied the claim. He asserted that he is the rightful owner of the suit land, having purchased the same from one Elaris Odongo (the deceased husband to Peris Anyango Odongo). That following the demise of the said deceased, Peris Anyango Odongo promised to transfer the suit land to him after succession but failed to do so.
 15. The evidence of DW1, Lucas Finn Juma Ndege (the appellant herein), was that he purchased the suit land from Elaris Odongo, Peris Anyango Odongo and their son Paul Juma Odongo in 2007. However, the suit land was not transferred to him. That he lives on the suit land with his family and has planted trees thereon. He produced in evidence sale agreement dated 3rd July, 2007, sale agreement dated February 4, 2013 and Court proceeding in Criminal Case No. 893 of 2014, marked as DExhibit 1 to 3 respectively.
 16. During cross-examination, the witness stated that the vendors did not effect the transfer to him as his wife was ill. That the said Peris promised to effect transfer of the suit land to him, only for him to learn from the Land Registry that she had in fact sold and transferred the suit land to the respondent herein. Further, that the agreed purchase price for the suit land was Kshs. 65,000 and he paid the first installment of Kshs. 15,000 on 3rd July, 2007. He, however, did not indicate when the balance of the purchase price was paid.
 17. Notably, the learned trial magistrate stated the parties' respective cases, framed two issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the *Civil Procedure Rules*, 2010.
 18. In arriving at the impugned judgment, the learned trial magistrate observed at page 3 of the judgment, *inter alia*;
 - “...In criminal case no. 893 of 2014; *State –vs- Lucas Finn Juma Ndege* (defendant), the court found that the agreement between the plaintiff (complainant in the criminal case) and Peris Anyango Odongo came four years later than that between the defendant (accused in the criminal case) and her deceased husband. In the same judgment, the court further found



that the plaintiff completed paying for the land ahead of the defendant who paid his last installment six months later than the one between the complainant and PW2 (Peris was PW2 in the said case)..."

19. By relying on Section 26 of the *Land Registration Act* (*supra*), the learned trial magistrate held that although the defendant contended that the plaintiff and Peris (the seller) conspired fraudulently to take away his land, he never set out the particulars thereof in his pleadings nor offered concrete proof of it.
20. Besides, the said Peris was not party to the suit as the defendant never sought to enjoin her. This non-joinder coupled with a lack of a counter-claim, the learned magistrate noted, was fatal to the defendant's case.
21. Further, the Learned trial magistrate noted at page 4 of the judgment thus:

"....As to the rights that accrue to the defendant in terms of his initial agreement of sale, I would opine that the only logical thing he should do is to demand for his refund from Peris with interest or seek to be given an alternative altogether..."
22. This court is aware of the legal framework in Section 26 of the *Land Registration Act* (*supra*) as read with Section 24(a) of the same Act. The appellant contends that he was a victim of fraudulent collusion between the respondent and one Peres Anyango Odongo
23. It is important to observe that despite being accorded the opportunity to lead evidence to demonstrate the existence of fraud, the appellant failed to do so during trial. Sections 107 to 108 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.
24. In the case of *Vijay Morjaria vs Nansingh Madbusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) 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. Moreover, I subscribe to the Court of Appeal decision in *Kinyanjui Kamau vs George Kamau* [2015] eKLR where the Court of Appeal expressed itself 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. I therefore, approve the learned trial magistrate's reasoning, particularly her finding that the defendant appellant herein failed to prove how the respondent colluded with the seller to defraud him of the suit land.



27. So, it is the duty of this court to find whether the respondent proved to the requisite standards, his case before the trial court; per Madan JA (as he then was) in the case of *CMC Aviation Ltd. -vs- Kenya Airways Ltd. (Cruisair Ltd)* (1978) eKLR.
28. Bearing in mind the entire evidence on record in this case, and applying the facts of the case as well as legal principles stated above, it is clear that the respondent who was the plaintiff before the trial court established that she purchased the suit land from one Peris Anyango Odongo. A copy of the search from the land office produced as PExhibit 1 prove the transfer and subsequent registration of the suit land in her name. Thus, she proved her claim to the requisite standard as noted in *CMC Aviation Ltd. Case* (supra). On that score, the grounds of appeal are untenable.
29. In the foregone, it is the finding of this court that the learned trial magistrate's judgment is faultless at law. I proceed to affirm the judgment accordingly.
30. Wherefore, the instant appeal commenced by way of a memorandum of appeal duly filed on 11th December, 2020, be and is hereby dismissed.
31. By dint of the proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of this appeal and the original suit in the court below, together with interest on costs at court rates, to be borne by the appellant.
32. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 4TH DAY OF OCTOBER 2022.

G.M.A ONG'ONDO

JUDGE

Present

1. Mr. Oyoo, learned counsel for the appellant
2. Ms. Odera, learned counsel for the respondent
3. Angela and Fiona, Court Assistants

