



**Nyaloo & 5 others v Ochieng (Environment and Land Appeal
32 of 2021) [2022] KEELC 13341 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13341 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 32 OF 2021
GMA ONGONDO, J
OCTOBER 5, 2022**

BETWEEN

**FELIX NYALOO 1ST APPELLANT
BENARD NYOLOO 2ND APPELLANT
PETER NGOTHO KILONZO 3RD APPELLANT
TERESIA ADHIAMBO NYOLO 4TH APPELLANT
ALICE ACHIENG RIARO 5TH APPELLANT
GEORGE OMONDI PAUL 6TH APPELLANT**

AND

RAPHAEL SUMBA OCHIENG RESPONDENT

(Being an appeal from the judgment of Hon. Nicodemus N. Mosei (Senior Resident Magistrate) delivered and dated 2nd December, 2020 in Mbita Principal Magistrate's Court Environment and Land Case No. 6 of 2019)

JUDGMENT

1. The present appeal arose from the trial court's judgment delivered on the December 2, 2020 by the Honourable Nicodemus N. Mosei (Senior Resident Magistrate) in Mbita Principal Magistrate's Court Environment and Land Case No. 6 of 2019 where he held, inter alia;
 - a. I declare that the plaintiff is the registered and lawful owner of land parcel number Kasgunga/Kamreri/3003 (the suit land herein). The defendants counter-claim is thus dismissed.
 - b. An order of eviction be and is hereby issued evicting the defendants from the suit land. The eviction order shall be enforced 30 days from the date hereof. The O.C.S Mbita Police Station shall provide security to implement this order.



- c. The plaintiff is awarded nominal general damages of Kshs.150,000/= for trespass to the suit land.
 - d. The plaintiff is awarded costs of this suit.
2. The appellants were aggrieved thereby. As a result, they lodged the appeal herein through the firm of Robert Ochieng and Company Advocates.
 3. By a memorandum of appeal dated December 7, 2020, the appellants anchored the appeal on grounds 1 to 7 as set out on the face of the same and these include:
 - a. The learned trial magistrate erred in law in holding that there was no evidence of fraud when the conduct of the respondent in the light of his absolute and total failure and/or refusal to adduce any evidence as to how he acquired the suit land clearly inferred fraud.
 - b. The learned trial magistrate misdirected himself on issues of law by failing to rule on or render a reasoned decision on issues raised by the appellants in their submissions, to wit:
 - a. Whether the court has jurisdiction to entertain proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with section 18 of the *Land Registration Act* as read with the *Survey Act* cap 299.
 - b. Whether the 3rd appellant, who is the director of a body corporate and having established a business structure upon an adjacent land to the suit land through that body corporate, could have in any event been sued in his own private capacity.
 - c. The learned trial magistrate erred in law of civil practice and procedure in ruling on an issue which was not pleaded by the respondent in that the respondent expressly prayed for eviction orders whereas the court made a ruling about, and awarded damages for trespass, which had not been prayed for, pleaded, particularized in the plaint nor proven during trial by the applicant.
 4. In that regard, the appellants are seeking the orders as infra:
 - a. The judgment of the learned trial magistrate be set aside.
 - b. The counterclaim be allowed as prayed.
 - c. Costs of this appeal and that of the lower court be awarded to the appellants.
 5. Initially, the appeal was lodged at Migori Environment and Land Court. On July 28, 2021, the same was transferred to this court for hearing and determination. Further, the appeal was heard by written submissions following this court's orders dated December 6, 2021.
 6. The appellants' counsel failed to comply with the court's orders as regards filing and service of submissions. Nonetheless, in the spirit of articles 48, 50(1) and 159 (2) (b) and (e) of *the Constitution* of Kenya, 2010 as well as section 3 of the *Environment and Land Court Act*, 2015 (2011) and Order 51 Rule 16 of the *Civil Procedure Rules*, 2010, counsel was permitted to orally submit herein.
 7. Learned counsel for the respondent filed submissions dated July 5, 2022 on July 13, 2022 and stated in part that the only parties that participated in the suit before the trial court were the 1st, 2nd and 3rd appellants herein. That the 4th, 5th and 6th appellants herein never participated in the initial suit. Counsel analysed the grounds of appeal, submitting inter alia, that the burden of proving the existence of fraud



- on the part of the respondent lay on the appellants in accordance with the provisions of the Law of *Evidence Act*, Chapter 80 Laws of Kenya.
8. Furthermore, counsel submitted that the claim before the trial court was not a boundary dispute but one for trespass and/or encroachment by the 1st, 2nd and 3rd appellants on the suit land. Thus, the honourable court had jurisdiction to entertain the suit. That the trial court found that the 3rd appellant trespassed into the suit land directly in his personal capacity and not in his capacity as director of the body corporate as stated by the appellants.
 9. Counsel further submitted that where trespass is proved then an award of damages ordinarily follows whether the same is specifically pleaded or not. That in any event, the respondent sought an award of damages through submissions dated 26th October and filed on October 28, 2020. Counsel cited the case of *Demutila Nanyama Pururmu v LSalim Mohamed Salim* (2021) eKLR, among other authorities, to fortify the submissions.
 10. The parties highlighted their respective submissions on 1 July 8, 2022.
 11. 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 learned trial magistrate erred in law in holding that there was no evidence of fraud on the part of the respondent.
 - b. Whether the trial court had jurisdiction to entertain the claim.
 - c. Whether it was proper for the 3rd appellant, who is the director of a body corporate to be sued in his own private capacity.
 - d. Whether the learned trial magistrate erred in law by making an award of damages for trespass, the same having not been pleaded by the plaintiff.
 - e. The orders to be made in this appeal to meet the best ends of justice.
 12. It must be remembered that the instant appeal is the first one from the trial court in the matter. Therefore, this court is obliged to review the record of the trial court, evaluate it afresh and arrive at its own findings herein; see *Mwanasokoni v Kenya Bus Services Ltd* 1982-88 1KAR 278 applied in the case of *Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma and 3 others* 2017 eKLR.
 13. It is noteworthy that the subject matter of the appeal is land reference number Kasgunga/Kamreri/3003 (0.14 Ha). The same is contained in Registry Map Sheet number 8 and located in Homa Bay County.
 14. The respondent who was the plaintiff before the trial court sued the appellants 1 to 3 who were defendants/counter claimers' numbers 1 to 3 by way of a plaint dated April 3, 2019 seeking the following orders:
 - a. An order of eviction evicting the defendants from the suit land.
 - b. Costs of the suit.
 15. PW1, Raphael Sumba Ochieng (the respondent herein), testified on November 13, 2019. He stated, inter alia, that he purchased the suit land from one Paul Nyoloo in 1982 and was subsequently issued with a title deed on September 1, 2008. That the 1st and 2nd defendants are sons of the said Paul Nyoloo while the 3rd defendant is a person he found on his land. That the defendants encroached on the suit land by building houses thereon. Thus, he urged the court to evict the defendants to enable him have



- quiet possession of the suit land. He produced in evidence, a copy of the title deed to the suit land marked as PExhibit 1.
16. During cross-examination, PW1 stated that he only had the copy of title as proof of ownership of the suit land. That the 3 witnesses to the transaction are deceased. Further, that the suit land is a portion of the large parcel and measures zero nought one four (0.14 Ha) in area.
 17. The appellants denied the respondent's claim by their statement of defence dated July 2, 2019. Simultaneously, they mounted a counter claim of even date for;
 - a. An order for the rectification of the register for the suit land by deleting the name of Raphael Sumba Ochieng (the respondent herein) as proprietor of the same and substituting in the place thereof the names of Teresia Adhiambo Nyolo, Alice Achieng' Riario and George Omondi Paul as applicable before the fraud.
 - b. General damages for fraud together with interest thereon at the rate of 12% per annum from the date of judgment until payment in full.
 - c. A permanent injunction be issued restraining the plaintiff/defendant to this counterclaim, their next of kin, workers, servants, agents or any person deriving authority through him from entering into, cultivating, alienating, selling, transferring or in any other way dealing with the suit land or the fence delineating the same.
 - d. Cost of the suit together with interest thereon at the rate of 14% per annum from the date of filing suit until payment in full.
 - e. Interest on (c) and (d) from the date of filing suit for (c) and from the date of judgment for (d) until payment in full.
 - f. Such further or other alternative relief as this honourable court deems fit to grant.
 18. DW1, Robert Paul Nyoloo, testified on October 7, 2020 and adopted his witness statement dated July 2, 2019 as part of his evidence. His testimony was that the proprietors of suit land are his mother, Alice Achieng Nyoloo and George Omondi, his half- brother. He produced in evidence, a copy of a title deed for L.R. No. Kasgunga/Kamreri/745, a copy of his National Identity Card, a copy of National Identity Card for Felix, marked as DExhibit 1 to 3 respectively.
 19. During cross-examination, DW1 stated that he was born in 1992 and his father died in 1993. That he was not aware of the adjudication process and that he cannot tell whether his father entered into an agreement with anyone. He admitted that he did not produce any document to confirm ownership of the suit land.
 20. DW2, Alice Achieng Riario, also testified on October 7, 2020 and adopted her witness statement dated July 17, 2019 as part of her evidence. In cross-examination, DW2 stated that she married Paul Nyoloo Nyandera in 1981. That she was not aware that the respondent herein bought land from her deceased husband. That her said husband Paul Nyoloo Nyandera had a title deed for L. R No. Kasgunga/Kamreri/745 to which she is presently a co-proprietor.
 21. Further, DW2 testified that she is not aware that L. R No. Kasgunga/Kamreri/745 and L. R No. Kasgunga/Kamreri/3003 are two distinct parcels. She, however, admitted that she was aware that a search of L. R No. Kasgunga/Kamreri/745 shows that the same has not been sub-divided.
 22. Similarly, DW3, Joseph Okinyi Odhiambo, testified on October 7, 2020 and adopted his witness statement dated July 17, 2019 as part of his evidence. He stated that his uncle, Paul Nyoloo Nyandera,



built a home in L. R. No. Kasgunga/Kamreri/745. He averred that the suit land is part of L. R. No. Kasgunga/Kamreri/745 and denied being aware of any sale agreement between his deceased uncle and the respondent herein.

23. It is noted that the learned trial magistrate set out the parties' respective cases, framed three issues for determination, analysed them and arrived at his decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the *Civil Procedure Rules*, 2010.
24. In reaching the impugned judgment, the learned trial magistrate observed at page 5 of the judgment, *inter alia*;

“...I have perused PExh 1. I take note that the 1st edition in respect of land parcel number L. R. No. Kasgunga/Kamreri/3003 was opened in 1.9.2008 and the proprietor is indicated to be Raphael Sumba Ochieng, the plaintiff herein. He is the first registered owner...”
25. The learned trial magistrate cited section 28 of the *Registered Land Act* cap 300 (repealed) in which regime the suit land was registered. Further, he noted that no evidence was adduced to show that the suit land was among the listed assets in the succession cause for the Estate of Paul Nyoloo (deceased). That there was no grant relating to the said estate produced as proof that succession was carried out thereof. Thus, he held that the plaintiff had proved on a balance of probability that he is the registered owner of the suit land.
26. On whether the plaintiff procured registration of the suit land through fraud, the learned trial magistrate found that the defendants did not provide evidence to prove the same.
27. I proceed to analyse each issue below.

Issue 1

28. The appellants contend that the learned trial magistrate erred in law in holding that there was no evidence of fraud when the conduct of the respondent in the light of his absolute and total failure and/or refusal to adduce any evidence as to how he acquired the suit land clearly inferred fraud.
29. I, however, note that despite being accorded the opportunity to lead evidence to demonstrate the existence of fraud, the 1st to 3rd appellants 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.
30. In the case of *Vijay Morjaria v Nansingh Madbusingh 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).
31. Additionally, I subscribe to the Court of Appeal decision in *Kinyanjui Kamau v George Kamau* [2015] eKLR where it was expressed as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v 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).

32. I therefore, endorse the learned trial magistrate's reasoning, that the defendants appellants herein failed to discharge the burden of proof of fraud as alleged.

Issue 2

33. The appellant averred that the learned trial magistrate misdirected himself on issues of law by failing to rule on whether the court has jurisdiction to entertain proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with section 18 of the *Land Registration Act* as read with the *Survey Act* cap 299.

34. The Court of Appeal sitting at Nairobi in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR stated the following in regard to jurisdiction:

"So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. courts, like nature, must not act and must not sit in vain." (Emphasis laid)

35. The Honourable Court proceeded to quote Nyarangi J.A in the case of *The Owners of the Motor Vessel Lillian S'v Caltex Kenya Ltd* [1989] KLR 1 thus;

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..." (Emphasis added)

36. I note that the 1st to 3rd appellants only raised the issue of jurisdiction at the submission stage and not at the earliest opportunity as envisaged hereinabove. Be that as it may, a perusal of the plaint filed in the trial court by the respondent herein clearly indicates that the claim therein was not a boundary dispute but one for encroachment by the 1st, 2nd and 3rd appellants herein on the suit land. Thus, it is my considered view that the honourable court had jurisdiction to entertain the suit.

Issue 3

37. On whether the 3rd appellant, who is the director of a body corporate and having established a business structure upon an adjacent land to the suit land through that body corporate, could have in any event been sued in his own private capacity, I am persuaded by the respondent's submissions that the trial court found that the 3rd appellant trespassed into the suit land directly. That he did so in his personal capacity and not in his capacity as director of the body corporate as stated by the appellants.



Issue 4

38. The appellants also lamented that the learned trial magistrate erred in law in ruling on an issue which was not pleaded by the respondent in that the respondent expressly prayed for eviction orders whereas the court made a ruling about, and awarded damages for trespass, which had not been prayed for, pleaded, particularized in the plaint nor proven during trial by the applicant.
39. This court subscribes to the decision in *Odd Jobs v Mubia* [1970] EA 476 where the Court of Appeal for East Africa held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision. The said decision was followed by the Court of Appeal in the case of *Vyas Industries v Diocese of Meru* [1982] KLR 114, among other authoritative pronouncements.
40. Thus, having established that the 1st, 2nd and 3rd appellants trespassed into the suit land which belonged to the respondent herein, I find that the learned trial magistrate did not err in awarding damages relating to the same. The Court of Appeal in the case of *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* [2017] eKLR stated that, “Trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damages or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course, depending on the facts of each case.”
41. So, did the respondent establish to the requisite standards his case before the trial court as held by Madan JA (as he then was) in the case of *CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd)* (1978) eKLR?
42. I bear in mind the entire evidence on record in this case, and the facts of the case as well as legal principles applicable and as stated above. Evidently, the respondent who was the plaintiff before the trial court proved his claim to the requisite standard as noted in *CMC Aviation Ltd Case (supra)*. Therefore, the grounds of appeal are untenable.
43. To that end, it is the finding of this court that there are no reasons or at all, to fault the learned trial magistrate’s judgment. I proceed to uphold the said judgment.
44. A fortiori, the instant appeal originated by way of a memorandum of appeal dated December 7, 2020 is hereby dismissed.
45. 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 1st, 2nd and 3rd appellants.
46. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 5TH DAY OF OCTOBER 2022.

G.M.A ONG’ONDO

JUDGE

Present

Mr. R. Ochieng’, learned counsel for the appellants

Ms. B. Ochieng’ holding brief for Mr. Omwoyo, learned counsel for the respondent

Okello and Mutiva, Court Assistants

