Osodo v Akama (Environment and Land Appeal 25 of 2022)
[2022] KEELC 13276 (KLR) (6 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13276 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND APPEAL 25 OF 2022

AY KOROSS, J

OCTOBER 6, 2022

[ORIGINALLY KISUMU ELCA 6 OF 2021]

BETWEEN

FREDRICK OULA OSODO ..... APPELLANT

AND

JAMES NDOLO AKAMA ..... RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate Honourable J. P. Nandi delivered on 17/12/2020 in Bondo ELC Case No.84 of 2018)

JUDGMENT

Background of the appeal

1. The gravamen of the appeal is on land parcel number Siaya/Nyangoma/2473 ("suit property") measuring approximately 1.57 ha which is registered in the respondent's name.

2. The history of this appeal can be traced to a plaint dated 17/12/2018 in which the respondent averred that he purchased portions of the suit property from the appellant's father one Martin Osodo Oula ("Martin") and one Ogango Ochieng Odero ("Ogango") who was the appellant's uncle and a brother to Martin in the respective years of 1986 and 1988.

3. When land adjudication process commenced in the area in 1988, the alleged purchased portions were amalgamated and the suit property was registered in the respondent's name. An adjacent portion known as Siaya/Nyangoma/1563 ("1563") was registered in the appellant's name.

4. The respondent asserted that the appellant had fraudulently, maliciously, unlawfully and or illegally laid a claim on the suit property and had registered a caution against it claiming beneficiary interest. He prayed for permanent injunction, mandatory injunction compelling the appellant to lift the caution and costs of the suit.

5. The appellant filed a defence and counterclaim dated 8/04/2019.He denied the averments in the plaint and asserted that 1563 was bequeathed to him by Martin. The respondent in collusion with officials from lands offices had fraudulently and illegally hived of a portion of 1563 and amalgamated it with a bordering parcel of land thus creating the suit property. He contended the respondent had not been a purchaser but a mere licensee of the appellant's father having leased a portion of an undisclosed parcel of land from the appellant's father.

6. The appellant contended that upon investigations, he discovered that the maps of undisclosed parcels of land had been interfered with thus connoting fraud. He pleaded and particularized fraud and sought permanent injunctive orders, cancellation of the registration of the suit property and general damages for trespass.

7. The respondent filed a reply to defence and defence to counterclaim dated 23/04/2019 in which he reiterated the averments in his claim and denied the averments in the counterclaim.

8. After the parties had testified and closed their respective cases, the trial magistrate in his judgment found inter alia, that the respondent had been in occupation of the suit property for over 12 years; the appellant's rights over it had extinguished and the respondent had proved his case on a balance of probabilities. He granted the respondent the reliefs sought in his claim.

Appeal to this court

9. Dissatisfied with the above judgment, the appellant filed a memorandum of appeal raising 7 grounds. In his submissions, he narrowed them into two themes without particularizing their respective thematic areas. However, upon appraising the grounds and submissions, it is my considered view they can be condensed as follows;

    a. Whether the learned trial court erred in law and fact in failing to appreciate the respondent failed to adduce evidence of when the limitation period of 12 years started accruing; and

    b. Whether the learned trial court erred in law and fact in finding that the respondent had proved his case on a balance of probabilities.

10. The appellant prayed that the appeal be allowed with costs and lower court judgement be set aside.

Appellant's submissions

11. As directed by the court, the appeal was disposed of by way of written submissions. By the firm of Ouma Njoga & Company Advocates who had since come on record for the appellant, the appellant's Counsel filed written submissions dated 2/07/2022.

12. On the 1st ground, Counsel asserted that regardless of the period of time the respondent occupied the suit property, his occupation had been sanctioned by a license that was granted to him by Martin and therefore a claim of adverse possession could not suffice. To buttress his case, Counsel placed reliance on the case of *Gabriel Mbui v Mukindia Maranya* (1993) eKLR where the court stated a licensee or a person in occupation as a result of permission could not be deemed an adverse possessor. He also relied on the Court of Appeal decision of Samuel Kihamba v Mary Mbaisi (2015) eKLR where the court relived the principles of adverse possession, inter alia, occupation must be open, without force, secrecy, license or permission of the land owner.

13. On the 2nd ground, Counsel submitted that contrary to the provisions of Sections 107 and 108 of the *Evidence ACT*, the respondent did not discharge prove that there existed an agreement of sale between Martin and him and that Section 3(3) of the *Law of Contract ACT* provided that contracts on land

must be in writing, signed by the parties and attested; which was not so in the circumstances of this case. Further, failure by Martin to deny that he received Kshs. 5,000/- as purchase price could not be deemed to be an admission of an existing sale agreement. In addition, pursuant to the provisions of Section 56 of the Trustees ACT, only a court of law could sanction dealings on properties belonging to minors; which had not been so in the circumstances of this case. On this he relied on the case of *In RE KSN and RS Minors* (2021) eKLR.

14. Counsel contended that the respondent did not adduce evidence of an amalgamation record or subdivision. That the non-existence of these documents was admitted by the testimony of Bondo, land registrar. Further, the respondent was a mere licensee of Martin and there was no evidence that consent was obtained from the land control board. Additionally, mutation forms were not adduced before the trial court. None of the authorities cited were proffered to this court.

Respondent's submissions

15. The respondent who was represented by Counsel Mr. Jaoko filed submissions prior to the appellant filing his. The court granted him leave to file supplementary submissions; the former is dated 1/04/2022 and the latter 13/07/2022.

16. On the 1st ground, Counsel submitted that limitation of actions was a matter of law and that Section 7 of the *Limitation of Actions ACT* provided that no action could be brought on a claim to recover land after the end of 12 years and that the respondent had been in occupation from either 1962 or 1986.

17. On the 2nd ground, Counsel submitted that by virtue of Section 26(1) of the *Land Registration ACT*, documents produced, inter alia, title deed; green card; certificate of official search; agreement of sale dated 14/07/1988 for LR No. 1552, respondent's oral testimony and that of Martin, the respondent had laid ground that the title document was prima facie evidence that the respondent's title document to the suit property was absolute and indefeasible and the burden of proof shifted to the appellant pursuant to Section 26(1); which he failed to discharge.

18. Counsel averred that the appellant had failed to prove his case and he placed reliance on the case of *John Muriithi Kariuki v Charles Kariuki Kingori alias Kagika* (2018) eKLR where the court stated that fraud must procedurally be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.

Analysis and determination

19. This being a first appeal, this court is reminded that the task at hand is to reappraise, reassess and reanalyse the evidence as asserted by the parties in the record of appeal and lower court record and to establish if the findings reached by the trial court should stand and give reasons if they do not. See *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.

20. In line with the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212, the court must keep in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. Further, this court is called upon not to be quick to interfere with the discretion of the lower court unless it is satisfied that the decision of the trial court was clearly wrong because of some misdirection, failed to take into consideration relevant matters, considered irrelevant matters and as a result arrived at a wrong conclusion or abused her discretion.

21. Having considered the lower court record, the memorandum of appeal, record of appeal and parties' submissions, I will now proceed with my analysis on the two condensed grounds of appeal. However,

before I do that, I must address two issues. Firstly, either through oversight or otherwise, the appellant did not attach his memorandum of appeal to the record of appeal. However, despite this, I am satisfied that no prejudice had been occasioned to any party. Secondly, trusteeship or the appellants age was never pleaded or adduced during hearing before the trial court.Martin merely testified that the appellant was young at the time of adjudication. In my view, "young" is a relative word and cannot be equated to the word "minor"

> I. Whether the learned trial court erred in law and fact in failing to appreciate the respondent failed to adduce evidence of when the limitation period of 12 years started accruing

22. Limitation of actions is a jurisdictional issue and it can either be raised by a party or a court suo moto at any time in the course of proceedings. From the trial court record, there is no evidence that either party raised it and this leads to the logical conclusion that the court rightfully so raised it suo moto. I rely on the Court of Appeal decision of *Isaak Aliaza v Samuel Kisiavuki* (2021) eKLR, where Nambuye J.A held as follows;

> "I wish to reiterate that the position in law is therefore that a jurisdictional issue is a fundamental issue whether it is raised either by parties themselves or the Court suo motu (sic), it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."

It therefore follows that the trial court did not err in addressing it in its judgment. The question that then arises is whether the appellant's suit was statutory barred.

23. The legal framework for limitation of actions amongst private individuals is governed by the *Limitation of Actions ACT*. In the context of this appeal, the applicable provisions of law under this ACT were Sections 4(2), 7 and 26.

Section 4(2) reads as thus;

> "An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:..."

Section 7 provides as follows;

> "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

While Section 26 of the same ACT gives exceptions to the said Section 7 by providing as follows;

> "Where, in the case of an action for which a period of limitation is prescribed, either—
>
> (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:..."

24. In its findings the trial court found thus;

> " DW1 and DW2 all agree that that (sic) the plaintiff has been in occupation of the suit land for more than 12 years now. This means that the defendant's rights over the suit land have extinguished, meaning the defendant (sic) counterclaim fails at this juncture."

25. From the court record, the appellant's counterclaim pleaded fraud over the suit property and therefore the limitation period of 12 years as provided by Section 7 did not apply to him. The appellant testified that he discovered fraud in the year 2017 and lodged a caution over the suit property. His counterclaim was filed on 10/3/2019 which was close to 2 years from when he discovered fraud. The three-year period as stipulated by the provisions of Section 4(1) and 26 had not lapsed and therefore his suit was subsisting. It is my finding on this issue that the trial court erred in finding that the appellant's counterclaim was statutory barred.

II. Whether the learned trial court erred in law and fact in finding that the respondent had proved his case on a balance of probabilities.

26. I agree with the appellant's submission that it is trite law that he who alleges must prove. Section 107 of the *Evidence Act* states as follows:

> " (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".

27. The legal framework on legitimacy of title documents is governed by Sections 24, 25 and 26 of the *Land Registration ACT*. Section 24(a) recognises the registered owner as the absolute owner of land. This section provides as follows;

> " The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto".

28. This absolute right is limited by Section 25 which provides that the land shall be held by the registered proprietor together with all other privileges appurtenant thereto but subject to charges, leases, encumbrances, restrictions, liabilities, rights and interests as stipulated in Section 28.

29. Section 26 states that courts shall prima facie deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

30. Martin who led the evidence of the appellant testified in his exam in chief that he never sold a portion of the suit property to the respondent and in my considered view, the alleged payment was controverted and in the absence of a receipt evidencing payment, the respondent did not prove that he paid Martin the alleged purchase price. It therefore followed that the alleged amalgamation did not hold water.

31. However, despite this, the respondent whose evidence was led by the land registrar, Bondo produced several documents which proved his ownership of the suit property which were, inter alia, a title deed of the suit property, a letter from Bondo, subcounty land adjudication and settlement officer dated 22/07/2014, green card and an adjudication record. These documents were never controverted by the appellant.

32. The appellant challenged the respondent's ownership on grounds of fraud. The authority cited by the respondent of *John Muriithi Kariuki v Charles Kariuki Kingori alias Kagika* (2018) eKLR indeed captures the position of law that fraud must be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. See *Vijay Morjaria v Nansingh Madhusingh Darbar& another* [2000] eKLR (Civil Appeal No. 106 of 2000). The decision of the trial court was silent on a finding on fraud.

33. The Court of Appeal in the case of *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR cited with approval the case of *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 where the court in this case stated thus,

> " 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"

34. The appellant pleaded that the respondent fraudulently and or illegally subdivided 1563 in order to create the suit property. He produced a map of the area which did nothing to assist his case because the size of land was not disclosed on the map. He produced an official search for 1563 which demonstrated that its size was 0.57 Ha. During cross examination, he admitted that he had not sourced the services of a land surveyor to ascertain the boundary of 1563. Further, he averred he did have any evidence to prove that 1563 was originally 2.5 Ha and that he had only pegged this allegation from Martin's communication to him.

35. Martin who was allegedly the source of this information contradicted the appellant in his testimony and averred that the appellant's parcel of land was 1.5 acres. Further, he admitted that he did not know the size of the suit property. Mathematically, 1.5 acres is approximately 0.6 ha which is the approximate size of the suit property. It is my finding that the appellant did not prove fraud against the respondent before the trial magistrate to the required standard. In the absence of proving fraud, I come to the same conclusion as the trial court that the respondent proved his case on a balance of probabilities.

36. The upshot is I hereby affirm and uphold the judgment of the trial court. However, I hereby vary the said judgment and set aside its finding that the appellant's counterclaim was statutory barred and, in its place, I substitute it with a finding that the appellant did not prove his case to the required standard and dismiss his counterclaim with costs to the respondent.The appeal partially succeeds and because it is trite law that costs follow the event (See Section 27 of the *Civil Procedure ACT*) and in the absence of special circumstances, I award one half of the costs of this appeal to the respondent.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 6TH DAY OF OCTOBER 2022.

HON. A. Y. KOROSS

JUDGE

6/10/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Jaoko for the respondent

N/A for the appellant

Court assistant: Ishmael Orwa