



**Oteng v KOJ (Suing on behalf of FAJ (Minor) and SAJ (Environment and Land Appeal E008 of 2021) [2022] KEELC 13279 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13279 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E008 OF 2021  
GMA ONGONDO, J  
OCTOBER 5, 2022**

**BETWEEN**

**LYNETTE ADHIAMBO OTENG ..... APPELLANT**

**AND**

**KOJ (SUING ON BEHALF OF FAJ (MINOR) AND SAJ ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. J. S Wesonga, Principal Magistrate, delivered on 20th September, 2021 in Homa Bay Chief Magistrate's Court Environment and Land Case No. 26 of 2020)*

**JUDGMENT**

1. The instant appeal arose from the trial court's judgment delivered on the September 20, 2021 by the Honourable J S Wesonga, Principal Magistrate, in Homa Bay Chief Magistrate's Court Environment and Land Case No 26 of 2020 where the learned trial magistrate held, *inter alia*;
  - a. The defendants are hereby ordered to vacate from a portion of land parcel number Kanyada/ Kanyango/xxxx (the suit land herein) and remove all the buildings structures within 45 days from the date of this judgment.
  - b. I further order the OCS of Rodi Kopany Police Station to supervise the eviction and provide adequate security to the auctioneer/ court broker and further ensure that peace and order is maintained during the eviction exercise.
  - c. Cost of this suit.
2. The appellant namely Lynette Adhiambo Oteng through the firm of Onyango Owaka and Associates Advocates mounted the appeal by way of a memorandum of appeal dated October 14, 2021 and duly filed on October 15, 2021. The Appeal is anchored on grounds 1 to 5 as set out on the face thereof and these include:



- a. The learned trial magistrate erred in law and fact by ignoring the appellant's evidence of entry into the suit property as a result of lawful purchase of the suit property.
  - b. The learned trial magistrate erred in failing to establish that the appellant was a caretaker of her deceased co-wife's property and not a trespasser as held by the trial magistrate.
  - c. The learned trial magistrate failed to consider the fact that the appellant's co-wife was an innocent purchaser for value, having not participated in any fraud nor having knowledge of any fraud in the acquisition of the suit property.
3. Wherefore, the appellant has sought the orders that:
    - a. The appeal be allowed and the judgment delivered on the September 20, 2021 be set aside.
    - b. Costs of the appeal and the original suit be awarded.
  4. The appeal was heard by way of written submissions pursuant to this court's directions of May 30, 2022.
  5. Accordingly, the appellant's counsel filed submissions dated July 24, 2022 on July 26, 2022. Counsel identified twin issues for determination, to wit, whether the appellant's entry and/or occupation of a portion of the suit property was lawful or not and whether the appellant's co-wife, one Alice Atieno Odhiambo, was a bona fide purchaser of 0.05 Ha of the suit parcel or not. learned counsel submitted, inter alia, that the appellant was neither a party nor was she aware of any fraud that might have occurred in the suit land, leading to the revocation of grant issued to the seller and subsequent nullification of title.
  6. Furthermore, it was the appellant's submission that the respondent did not plead any fraud or collusion between the appellant's co-wife and his uncle at the trial court. Thus, the appellant's co-wife was a bona fide purchaser for value and her title to a portion of the suit property should defeat the claim by the respondent herein. Counsel relied on the case of [\*Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney Genenral and 4 others\*](#) (2017) eKLR, to buttress his submissions.
  7. Nyauke and Company Advocates, learned counsel for the respondent filed submissions dated June 22, 2022 on June 30, 2022. Counsel submitted that the appellant did not have the locus to address court on a sale agreement that she was not a party to. That title to the parcel of land claimed by the appellant was revoked by the High Court and an appeal was never preferred against that decision. That therefore, the trial magistrate lacked jurisdiction to determine the validity of the sale agreement relating to the suit land. Furthermore, that the appellant is a trespasser on the suit land within the definition in the [\*Trespass Act\*](#), Chapter 403 Laws of Kenya.
  8. Learned counsel cited section 26 of the [\*Land Registration Act\*](#), 2016 (2012) and section 3 of the [\*Trespass Act\*](#), Chapter 403 Laws of Kenya. Thus, counsel urged the honourable court to dismiss this appeal with costs and uphold the lower court's decision. Counsel also relied on the case of [\*Hassan Mohammed Haji v Mohamed Keynan & Another\*](#) (2019) eKLR, to reinforce the submissions.
  9. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed thus:
    - a. Whether the appellant has demonstrated that the appeal is tenable to attract the orders sought in the memorandum of appeal;
    - b. Depending on the outcome in (a) above, what final orders can this court make to meet the ends of justice?



10. I have carefully considered the parties' respective pleadings, the trial court's proceedings inclusive of evidence as well as the judgment of the learned trial magistrate. It is noteworthy that it is the duty of this court to reconsider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another v Associated Motor Boat Co Ltd and others* (1968) EA 123 and *Williamson Diamonds Ltd v Brown* (1970) EA 1.
11. It must be noted that the suit was commenced by way of a plaint dated July 6, 2020 and filed in court on July 7, 2020 by the plaintiff (respondent herein) seeking the following orders;
  - a. An order of eviction against the defendants from the suit land.
  - b. Cost of the suit and interest thereon as from the date of filing the suit.
12. PW1, Kevin Odhiambo Jomo, who was the plaintiff before the trial court, testified on April 19, 2021. He stated that the defendants had trespassed into his land Kanyada/Kanyango/Kalanya/ xxxx. That the suit land initially belonged to his father who died in 1999. That his uncle/step father succeeded his father's estate but he later challenged the same at the High Court. The grant earlier issued to his uncle was revoked and he was made the legal administrator of his late father's estate.
13. This witness further stated that by this time, the uncle had sub-divided the land into 9 portions which he sold to various people. That because of the revocation, all the subsequent titles were cancelled and reverted to the original title.
14. PW1 produced in evidence a copy of certificate of official search for the suit land, certificate of confirmation of grant in succession cause No 17 of 2019, ruling in succession cause No 17 of 2019 as well as green card in regard to the suit land (PExhibits 1, 2, 3 to 4 respectively).
15. During cross-examination and in re-examination, PW1 admitted that after the High Court decision, the other parties who purchased land from his step-father approached him and they renegotiated the sales afresh and paid him the agreed consideration. However, the defendants did not do so, insisting that they do not use the land. He thus, sought to have them evicted from the same.
16. The defendants including the appellant, filed a statement of defence dated July 20, 2020 on July 21, 2020 denying all the claims in the respondent's plaint. They urged the court to dismiss the plaintiff's suit with costs.
17. The 1<sup>st</sup> defendant (DW1) who is the appellant herein testified on August 5, 2021 and adopted her witness statement dated July 26, 2021 as part of her testimony. She also relied on her list of documents dated July 21, 2020 and July 29, 2021. She stated that land parcel Kanyada/Kanyango/Kalanya/xxxx is registered in the name of Alice Atieno Odhiambo, her co-wife who died in 2018. It was her testimony that the defendants had been wrongly sued.
18. It is important to note that the learned trial magistrate stated the parties' respective cases, framed three 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](#).
19. In arriving at the impugned judgment, the learned trial magistrate observed that the revocation of the grant earlier on issued to the plaintiff's uncle, one Benard Otieno Ndiege, in respect to the plaintiff's late father's estate and subsequent grant of letters of administration of the said estate to the plaintiff in Homa Bay High Court Succession Cause No 17 of 2019, had the ripple effect of cancelling all the subsequent subdivisions from the mother title Kanyada/Kanyango/Kalanya/xxxx (the suit land herein). That these sub-divisions, to wit, Kanyada/Kanyango/ Kalanya/xxxx, xxxx, xxxx, xxxx, xxxx, xxxx, xxxx and xxxx thus ceased to exist.



20. The learned trial magistrate noted at page 7 of the judgment thus:
- “...The 1<sup>st</sup> defendant argues that she resides on land parcel Kanyada/ Kanyango/ Kalanya/ xxxx from the copy of title deed and 3 green cards provided by herself. It’s clear that the said land was a subdivision of Kanyada/ Kanyango/ Kalanya/xxxx which stemmed from Kanyada/Kanyango/Kalanya/xxxx. From the foregoing evidence there is no doubt in mind and I find that Kanyada/Kanyango/ Kalanya/xxxx originated from the suit land and is currently non-existent, having been cancelled by the High Court in Succession Cause No 17 of 2019. Therefore, the aftermath would be that the plaintiff is the legal registered owner of the suit land...” (Emphasis added)
21. The learned trial magistrate went on to cite section 26 of the [Land Registration Act](#), 2016 (2012), relied on the definition of the term “Trespass” under the [Trespass Act](#), Chapter 403 Laws of Kenya and held at page 9 of the judgment, *inter alia*;
- “...The defendants’ occupation is illegal and any decision to the contrary will amount to this court overturning the high court decision...”
22. The appellant contends that the respondent did not plead any fraud or collusion between the appellant’s co-wife and his uncle at the trial court. Therefore, her co-wife was a bona fide purchaser for value and her title to a portion of the suit land should defeat the claim by the respondent herein.
23. I, however, note that no appeal was preferred against the court’s decision in Homa Bay High Court Succession Cause No 17 of 2019. Therefore, the said decision rendered the appellant’s title, Kanyada/ Kanyango/ Kalanya/xxxx, non-existent.
24. As a general preposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of sections 107 to 108 of the [Evidence Act](#), Chapter 80 Laws of Kenya.
25. The standard of proof in civil matters including the instant case, is on a balance of probabilities. So, what amounts to proof on a balance of probabilities? In [Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another](#) [2015] eKLR, the Judges of Appeal held that:
- “Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
- This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”
26. In that regard, did the respondent prove to the requisite standard, his case before the trial court?
27. Having taken into account the entire evidence on record in this appeal, the facts of the case alongside the legal principles stated above, evidently, the respondent who was the plaintiff before the trial court proved that he is the lawful registered owner of the suit land. Thus, any unauthorized entry into the



land by the defendants amounts to trespass as recognized in *Clerk and Lindsell on Torts (18<sup>th</sup>) Edition* Para 18-01.

28. I therefore, would endorse the learned trial magistrate's reasoning, particularly to the effect that the defendants' occupation is illegal. That any decision to the contrary would amount to the trial court overturning the high court decision in Succession Cause No 17 of 2019.
29. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is sound at law. I proceed to uphold the same.
30. Wherefore, the instant appeal originated by way of a memorandum of appeal dated October 14, 2021 and duly filed on October 15, 2021, 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 court below to be borne by the appellant.
32. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 5<sup>TH</sup> DAY OF OCTOBER 2022.**

**G.M.A ONG'ONDO**

**JUDGE**

**Present**

Ms. Odera, learned counsel for the respondent

Respondent

**Okello and Mutiva, Court Assistants**

