



**Opija v Oranga (Environment and Land Appeal 1 of 2020)
[2022] KEELC 14774 (KLR) (8 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14774 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 1 OF 2020
MN KULLOW, J
NOVEMBER 8, 2022**

BETWEEN

DENIS ODIWUOR OPIJA APPELLANT

AND

MIKE OTIENO ORANGA RESPONDENT

JUDGMENT

A. Introduction

1. This Appeal emanates from the Judgment and Decree of Hon JP Nandi (Principal Magistrate) delivered on December 30, 2019 at Oyugis SPM'S Court ELC Case No. 16 of 2018, in favour of the Plaintiff/ Respondent and whose effect was to issue an Eviction Order against the Defendant/ Appellant together with costs of the suit. The grounds in the Memorandum of Appeal are that: -
 - i. The Trial Magistrate erred in law and in fact, by holding that the Appellant is a beneficiary of land parcel number West Kasipul/ Kotieno Kokech/60 registered in fraud in the name of the Respondent.
 - ii. The Trial Magistrate misdirected himself when he held that ownership of the land on which the house of the Respondent stands he has occupied the same in excess of 12years was mere legal technicality and thus arrived at a wrong decision.
 - iii. The Learned Trial Magistrate erred in law when he failed to distinguish between proprietorship of land registration of the Respondent indeed was done when he obtained Letters of Administration of the estate of the late Remjius Olare Onditi being Oyugis PM SUCC Cause No 60 of 2012 estate of their deceased grandfather both the Appellant and the Respondent.
 - iv. The Trial Magistrate adopted a partisan approach to the case before he arrived at a biased and unjustified decision not taking into account and consideration that the said matter.



- v. The Respondent erred in law and colluded with the Assistant Chief Kawino Sub-location and made a letter dated March 25, 2012 leaving other beneficiaries including the Appellant.
 - vi. The Learned Trial Magistrate made permanent order of eviction against the Appellant without first making a finding that indeed, the Defendant was a beneficiary to the estate of the deceased and in case evicted he will be disinherited his family and other dependants.
 - vii. The Trial Magistrate made a decision against the weight of the evidence.
2. Consequently, the Appellant sought the following orders: -
 - a. That the Appeal be allowed and the decision of Hon JP Nandi dated December 30, 2019 in Oyugis ELC No 16 of 2018 be set aside.
 3. On November 17, 2020, my predecessor Ong'ondo J issued directions that the Appeal be canvassed by way of written submissions. Both parties filed their respective submissions together with authorities which I have taken into consideration in arriving at my decision.

Appellant's Submissions

4. The Appellant submitted on 4 issues collectively; It was his submission that the suit parcel LR No West Kasipul/ Kotieno Kokeck/ 60 was initially registered in the name of his the late Remjius Olare alias Olare Onditi and was subsequently transferred to the Respondent by way of transmission. It is his claim that the Respondent secretly and unlawfully filed Succession Cause No 68 of 2012 at Oyugis Court, in his capacity as a grandson to the deceased and left out other beneficiaries including him, even though he has occupied the suit land for more than 10 years. He maintained that the acts of the Respondent of fraudulently transferring the suit property in his name was aimed at disinheriting him and other beneficiaries of the parcels of land which they are entitled to.
5. It was further his submission that the Respondent colluded with the Assistant Chief Kawino Sublocation and made an introductory letter dated March 25, 2012 leaving him and other beneficiaries who also depended on the deceased's estate out.
6. It was also his contention that he stands to lose his lawful inheritance from the estate of the late Remjius Olare alias Olare Onditi, which he acquired long before the death of the said Remjius Olare alias Olare Onditi whereas they both have equal rights over the suit property. He urged the court to allow the Appeal in its entirety.

Respondent's Submissions

7. The Respondent submitted on the grounds of Appeal as follows; that the trial court did not make a finding on who was a beneficiary entitled to the suit property LR No West Kasipul/ Kotieno Kokeck/60, as the same was not an issue for determination. He further stated that the registration of the property in his name was after obtaining a grant in Succession Cause No 68 of 2012 and followed the due process of law. It was also his submission that the said succession proceedings in the lower court were never challenged either by the Appellant or his father.
8. He maintained that the trial court was not a succession court and therefore the trial magistrate could not make a finding on the issue of revoking the grant or determine whether the Appellant was a beneficiary of the estate of the deceased. Further, he stated that the issue of revocation of the title deed which was not sought. It was thus his submission that the trial court made a proper finding by holding that the Appellant did not challenge the succession cause.



9. Lastly, he submitted that the findings of the trial court were based on the evidence on record which pointed to the fact that he is the legally registered owner of the suit property LR No West Kasipul/ Kotieno Kokeck/60 and the process leading to his registration was done according to the law and the same has never been challenged and further relied on the provisions of section 26 of the [Land Registration Act](#). He thus urged the court to dismiss the Appeal with costs.
10. He relied on the following cases in further support of his case; [Margaret Njeri Wachira v Eliud Waweru Njenga](#) [2018] eKLR, [Agripina Khati v Richard Livondo Wiranga & Another](#) [2020] eKLR, [Racheal Njango Mwangi \[Suing as the Personal Representative of the estate of Mwangi Kibaiuku \(deceased\) v Wanjiru Kiniti & Another](#) [2020] eKLR.

Analysis and Determination

11. I have looked at the Memorandum of Appeal, the Record of Appeal and the rival submissions in totality; I find that the main issue arising for determination is whether this Court should interfere with the exercise of discretion by the trial court and set aside its Judgment issued on December 30, 2019.
12. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion but does not entail taking on board matters which were never brought to the trial court's attention or which were not subject of the said court's consideration. See the Court of Appeal decision in [Ol Pejeta Ranching Limited v David Wanjau Muboro](#) [2017] eKLR.
13. In *Selle v Associated Motor Boat Co* [1968] EA 123) the court held as follows: -

“this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
14. The main issue before the trial court was on the ownership and/or proprietorship of the suit property No West Kasipul/ Kotieno Kokech/60 and claims of trespass and/or encroachment. It was the Plaintiff's contention that he is the registered owner of the suit parcel measuring approx. 0.7Ha and he further averred that the Defendant without any color of right encroached onto the suit land, occupied and refused to vacate. The Defendant on the other hand maintained that he is rightfully entitled to the suit land and further that the title deed of the suit land held by the Plaintiff was obtained by fraud.
15. I will now proceed to re-evaluate and re-assess each of the party's claim from the trial court record and the judgment; in order to determine whether the trial magistrate rightly exercised his discretion in holding in favour of the Plaintiff/ Respondent.
16. The Appellant's Appeal is premised on the 7 grounds in his Memorandum of Appeal upon which he sought to challenge the judgment of the learned trial magistrate. The said grounds can be summarized into issues of ownership of the suit land, the evidence presented in support of the respective claims by both parties in the trial court and evaluation of the testimony and exhibits, issues of fraud in the acquisition and registration of Respondent as the legal owner of the suit land and whether the Appellant is entitled to a share of the suit land by virtue of being a beneficiary.



17. At the centre of the dispute between the parties herein is the ownership of suit property measuring approx. 0.7Ha. The Appellant contends that the Respondent fraudulently acquired the title to the suit land; by colluding with the Assistant Chief in getting the introductory letter containing the names of the beneficiaries of the estate of the deceased, secretly instituting succession proceedings and obtaining Grant of Letters of Administration and subsequently having the land registered in his name by transmission. He maintained that the land initially belonged to his late grandfather and that he is a beneficiary of the said estate thus entitled to a share of the said estate. He thus contends that effect of the judgment delivered on December 30, 2019 is to disinherit him from his lawful share of the estate of his late grandfather.
18. The Respondent on the other hand has maintained that he is the rightful owner of the suit parcel having followed the due process in having the same registered in his name by virtue of transmission. He urged the court to dismiss the claims by the Appellant.
19. I will now seek to determine the issues arising from the Appeal as hereunder. I have critically looked at the record, the testimony of the various witnesses and exhibits produced by the parties in support of their respective cases; I do note that the testimony of the Defence, DW1 and DW2 was mainly centered on the issue of being a beneficiary of the estate of their deceased grandfather and the Confirmed Grant issued in Succession Cause No 68 of 2012 in the estate of Lemjius Olare Onditi. The Defendant/ Appellant did not produce any exhibit in support of the claims of fraud on the part of the Plaintiff/ Respondent as alleged.
20. The Respondent on the other hand produced a copy of the title deed of the suit land, a copy of the certificate of official search and the proceedings in the Succession Cause No 68 of 2012. All of the said documents proved the process of registration of the suit land in the Respondent's name, which in my view was a legal process. The said exhibits produced were not challenged and thus remain uncontroverted. Section 26 of the [Land Registration Act](#), provides that a certificate of title shall be held as the prima facie evidence of ownership. It further provides the 2 instances where a title can be cancelled; the Appellant has not satisfactorily demonstrated why the said title should be cancelled. In the absence of proof, I agree with the trial court's finding that the Respondent is the registered proprietor of the suit parcel.
21. I have also noted with concern the heavy reliance by the Appellant that he is a beneficiary of the estate of his deceased grandfather Remjius Olare Onditi and the allegations of fraud in obtaining the confirmed grant of Letters of Representation. I wish to restate that the jurisdiction of this court is limited to matters involving the environment and use, occupation and title to land as aptly stated under Article 162 (2) (b) of the [Constitution](#) as read with section 13 of the [Environment and Land Court Act](#). This court is therefore not vested with the requisite jurisdiction to entertain and/or determine who are the beneficiaries and dependants in the estate of a deceased person. To this end I am unable to determine grounds 1,3,5 and 6 of the Memorandum of Appeal.
22. It is trite law that he who alleges must prove. Section 107(i) of the [Evidence Act](#) provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
23. The Respondent produced ownership documents to the suit title. Section 25 and 26 of the [Land Registration Act](#) is clear as to what amounts to conclusive evidence of ownership and the rights and privileges accruing to the registered proprietor thereto. In the absence of any proof to the contrary, I find that the documents produced by the respondent are sufficient proof of ownership. Section 24 of the [Land Registration Act](#) states that the registration of a person as the proprietor of land shall vest in



that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

24. In view of the foregoing, I find that the learned trial magistrate exercised his discretion properly in allowing the Plaintiff's claim. The analysis and subsequent decision took into account the evidence on record and the facts of the case.

Conclusion

25. In conclusion, I accordingly find that the memorandum of appeal dated January 8, 2020 is not merited and is hereby dismissed with costs to the respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 8TH DAY OF NOVEMBER, 2022.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

..... Appellant

..... Respondent

Tom Maurice – Court Assistant

