



**Oudia v Okelo & 2 others (Environment and Land Appeal 31 of 2021)
[2022] KEELC 14553 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14553 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 31 OF 2021
AY KOROSS, J
NOVEMBER 3, 2022
ORIGINALLY KISUMU ELCA E7 OF 2020**

BETWEEN

JAMES OMOLLO OUDIA APPELLANT

AND

JOTHAM OPATA OKELO 1ST RESPONDENT

SAMSON OGOLA OKELO 2ND RESPONDENT

JEREMIAH OKACH OKELO 3RD RESPONDENT

(Being an appeal from the judgment of the Hon Principal Magistrate JP Nandi delivered on 18/9/2020 in Bondo PM ELC Case Number 4 of 2018)

JUDGMENT

Background of the Appeal

1. The appellant; then plaintiff; filed a plaint dated May 31, 2017. It was his case that the respondents; then defendants had trespassed on land parcel number North Sakwa/Maranda/1897 (“the suit property”) that was registered in his name.
2. It was his case that he had purchased the suit property from the previous registered owner one David Ogola Odera [‘David’] in the year 2015 and he had followed all due processes towards the purchase and registration.
3. He averred that sometimes in the year 2016, the respondents trespassed onto the suit property, erected semi-permanent houses, denied him access, threatened him with physical harm, misused, damaged, wasted and degraded the suit property. The respondents’ actions had deprived him quiet use and enjoyment of the suit property.



4. The appellant sought *inter alia*, a declaration that he was entitled to exclusive and unimpeded right of possession and occupation of the suit property; a permanent injunction restraining the respondents from occupation of the suit property; an order of eviction against the respondents; demolition of all structures they had constructed; general damages for trespass and, costs and interests.
5. The respondents filed a defence dated August 2, 2017. They denied the averments made in the plaint and contended that they had legally been in occupation of the suit property for 30 years. They alleged it was their ancestral property. They contended that the appellant's purchase was illegal, unlawful and unprocedural. They urged the Trial Court to dismiss the appellant's case with costs. Despite putting a spirited defence, they did not testify and their case was closed on September 13, 2020.
6. After the appellant had testified and closed his case, the Trial Court in its judgment framed 2 issues for determination; (i) what was the effect of a party not tendering evidence and (ii) whether the appellant was the registered owner of the suit property.
7. On the 1st issue, the Trial Court reasoned that because the respondents failed to adduce evidence, their defence was a mere statement of fact that was unsubstantiated. On the 2nd issue, the Trial Court found that the appellant acquired title to the suit property unprocedurally and dismissed his case. He ordered a cancellation of the title document to the suit property and reverted it back to David's name.

Appeal to this Court

8. Being dissatisfied with the judgment of the Trial Court, the appellant raised 6 grounds in his memorandum of appeal dated February 21, 2022. However, he condensed them into a singular ground; the Trial Court erred by deviating from the issue for determination.
9. The appellant sought the following reliefs; the appeal be allowed with costs; the lower court judgement be set aside and the judgment be substituted with judgment as sought in the plaint.

The Appellants' Submissions

10. As directed by the court, the appellant's Counsel Mr Olel disposed of the appeal by way of written submissions dated June 20, 2022. Counsel submitted that within the provisions of Section 26 of the [Land Registration Act](#), courts were to prima facie deem the registered proprietor as the absolute and indefeasible owner of it.
11. According to the Counsel, the Trial Court deviated from the issues that were before him and interrogated an extraneous factor; the legality of the agreement of sale between the appellant and David. Counsel submitted that courts were bound by parties' pleadings and to buttress the appellant's case, he relied on the case of [Raila Amollo Odinga & Anor v IEBC & 2 Others](#) (2017) eKLR and [Gandy v Caspair Air Charters Limited](#) [1956] 23 EACA 139 in the latter decision the court expressed itself thus;

“The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.”
12. Despite service, the respondents failed to participate in these proceedings. Nevertheless, the appeal shall be determined on merits.



Analysis and Determination

13. As rightfully submitted by Counsel, the role of a first appellate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the Trial Court stood or not and give reasons either way. See *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 which was cited with approval in the case of *Barnabas Biwott v Thomas Kipkorir Bundotich* [2018] eKLR.
14. Having considered the lower court record, the memorandum and record of appeal and the singular ground proffered by Counsel, this court has identified two issues for determination; (i) whether the Trial Court erred in failing to consider the evidence adduced and considered matters that were not pleaded (ii) what orders should this court issue.
15. Section 26 of the *Land Registration Act* states as follows;

“26

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.
16. Though the respondents pleaded that the appellant acquired the title to the suit property in a manner that was illegal, unlawful and unprocedural, they did not testify and as correctly found by the Trial Court, their pleadings were mere allegations. It is not in doubt that the appellant pleaded trespass and his testimony was uncontroverted.
17. The appellant produced several documents to prove his ownership over the suit property, inter alia, a title deed, sale agreement, consent from the land control board and a transfer form. The Trial Court took issue with two of these documents; the agreement of sale and transfer form. It stated thus;

“The plaintiff did not indicate the correct price in the transfer documents that is Kshs 6,000,000/= instead of Kshs 12,500,000/=, which leads to the logical conclusion that he did so to avoid paying the requisite statutory stamp duty...This clearly shows that the plaintiff has not demonstrated that he complied with the terms and conditions of the sale agreement...the plaintiff got the suit land unprocedurally.”
18. I agree with the Trial Court that there was a variation between the agreement of sale and the transfer form; the latter was less by kshs 6,500,000/-. I also agree with the Trial Court that the appellant by his conduct deliberately undervalued the suit property in order to circumvent payment of full payable tax.



19. However, the Trial Court failed to consider that the process of payment of stamp duty did not end with a declaration of the consideration. Well knowing the ingenious ways of men and women in evading tax, the drafters of the *Stamp Duty Act* left the ultimate assessment of stamp duty of purchased or gifted parcels of land to either an approved or government land valuer. Regardless of whether one had overpaid, underpaid or underassessed a property, it would still be subjected to an independent market rate assessment by a valuer. Underdeclaration of the true value of the suit property by the appellant was inconsequential because within the provisions of the *Stamp Duty Act*, the ultimate tax payable had to be assessed by a chief government valuer.
20. The repealed Section 10 (A) (1) of the *Stamp Duty Act* which was the applicable law when the appellant submitted his documents for assessment of stamp duty tax in the year 2015 stated as follows;

“The Collector of Stamp Duties shall refer to the Chief Government Valuer any conveyance or transfer on sale of any immovable property before or after registration of the relevant instruments in order to determine the true open market value of such property as at the date of conveyance or transfer for purposes of ascertaining whether any additional is payable”
21. I agree with Counsel’s submissions that the Trial Court considered matters that were not pleaded. The issue of whether or not the appellant complied with the terms of the agreement was never pleaded by the parties. It is trite law that courts are bound by the pleadings of the parties. It is my finding that the Trial Court erred in law and fact in considering matters that were not pleaded. I find that the Trial Court erred in finding the suit property was unprocedurally acquired. I also find that the Trial Court erred in cancelling the appellant’s title to the suit property. On this I rely on the case of *Gandy v Caspair Air Charters Limited* (supra) and *Caltex Oil (Kenya) Limited v Rono Limited* [2016] eKLR where the Court of Appeal stated thus;

“In the circumstances, having not made a claim for general damages, there cannot be a basis for awarding the same. The court has no inherent jurisdiction to award damages ... To find otherwise would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead to total disorder and abuse of the judicial process.”
22. The appellant pleaded trespass which is a tortious action. The Trial Court was silent on a finding on trespass and it behoves this court to decide on it.
23. The Trial Court was satisfied that the appellant was the registered proprietor of the suit property. I have interrogated the pleadings and evidence adduced. It was his case that in 2016, the respondents wrongfully intruded and occupied portions of the suit property without his consent, and, had damaged, misused, polluted and degraded it. They had constructed semi-permanent houses upon it and essentially, had denied him quiet use and occupation.
24. His plea for them to vacate fell on deaf ears. He produced copies of demand letters as evidence. His evidence was not controverted. It is trite that uncontroverted evidence is weighty and ordinarily courts will consider them to prove facts in dispute.
25. Trespass is an act of intrusion by a person onto the land of another who is in possession and ownership. From the evidence, the appellant never authorized the respondents to enter the suit property. I am not inclined to hold otherwise but find the respondents trespassed on the suit property.



26. What orders should this court grant? The appellant pleaded general damages for trespass but failed to quantify the damages he suffered. In the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR Obaga J expressed himself as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less”

27. The appellant did not lead evidence on the value of the land, the nature of semi-permanent structures that had been constructed on it and, the level of pollution and degradation. Additionally, he did not tender evidence on the status and value of the suit property before and after trespass. In the absence of these relevant parameters, this court is constrained but to award him nominal damages. See *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR where the court which expressed itself as follows;

“...If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss”.

I will exercise my discretion and award him nominal damages of Kshs 350,000/=. See *Nakuru Industries Limited v S S Mehta & Sons* (supra).

28. Based on the reasons given, I ultimately find that this appeal is merited and because costs follow the event, I award the costs of this appeal to the appellant and hereby set aside the entire judgment and decree of the Trial Court and in its place, I substitute it with a judgment in favour of the appellant in the following terms;

- a. A declaration be and is hereby made that the appellant is entitled to exclusive and unimpeded right of possession and occupation of North Sakwa/Maranda/1897.
- b. A declaration be and is hereby made that the respondents are trespassers on land parcel number North Sakwa/Maranda/1897.
- c. An order of permanent injunction be issued against the respondents by themselves, their servants or any other person authorized by them from encroaching, constructing, and/or trespassing on land parcel number North Sakwa/Maranda/1897.
- d. The respondents to give vacant possession of North Sakwa/Maranda/1897 and demolish their structures at their own costs within 90 days from the date of service of the orders of this court failure of which eviction to issue.
- e. The appellant is awarded general damages of Kshs 350,000/=.
- f. Costs of the suit in the lower court together with costs of the appeal are awarded to the appellant.

It is so ordered

DELIVERED AND DATED AT SIAYA THIS 3RD DAY OF NOVEMBER 2022.

HON. A. Y. KOROSS

JUDGE

3/11/2022



Judgment delivered virtually through Microsoft Teams Video Conferencing Platform:

In the Presence of:

Ms. Omollo h/b for Mr. Olel for the appellant

N/A for the respondent

Court assistant: Ishmael Orwa

