



REPUBLIC OF KENYA



Otigo & 2 others v Nyarem (Environment and Land Appeal E050 of 2022) [2024] KEELC 294 (KLR) (30 January 2024) (Judgment)

Neutral citation: [2024] KEELC 294 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E050 OF 2022
GMA ONGONDO, J
JANUARY 30, 2024**

BETWEEN

CHARLES OTIENO OTIGO 1ST APPELLANT

NELSON ODHIAMBO OTIGO 2ND APPELLANT

KENNEDY ODHIAMBO OTIGO 3RD APPELLANT

AND

ATHIAMBO NYAREM RESPONDENT

(An appeal from the Judgment and Decree of the Chief Magistrate, HomaBay in ELC No. 87 of 2018 delivered on the 14th day of September 2022.)

JUDGMENT

1. This appeal emanates from the judgment of the trial court (Hon. J.M Nang'ea, CM) where the learned trial magistrate opined that the respondent who was the plaintiff in the suit originated by a plaint dated 8th February 2012 lodged on 13th February 2012, had proved his claim over land title number Kanyada/Kanyango/Kalanya/625 (The suit property) hence entered judgment in the following terms;
 - a. A declaration that the respondent is the rightful owner of the suit property.
 - b. The appellants be given 20 days to give vacant possession of the suit land failure to which the respondent will thereafter have the liberty to forcibly evict them from the suit property.
 - c. The appellants' counter claim dated 10th April 2012, be dismissed with costs.
 - d. The appellants to bear costs of the suit and the counter claim and interest thereon at court rates.



2. The appellants were aggrieved at the said decision hence, lodged the appeal through Quinter Adoyo and Company Advocates by way of a memorandum of appeal dated 12th October 2022 based on seven grounds;
 - a. The learned trial magistrate misdirected himself on numerous matters of law and fact.
 - b. The learned trial magistrate erred in law and fact by deciding the matter against the glaring weight of evidence presented.
 - c. The learned trial magistrate erred in law and fact by deciding the case against the establishment principles of the best interest of justice.
 - d. The learned trial magistrate erred in law and fact by ignoring the glaring admission by the plaintiff that the Defendant/Appellants are lawfully and legitimately entitled to part or whole of the suit property.
 - e. The learned trial magistrate grossly erred in law and fact and thus arrived at an extremely oppressive and unjust outcome whose effect is to render the Appellants homeless, destitute and vagabond against the glaring weight of evidence.
 - f. The learned trial magistrate erred in law and fact by holding for the respondent despite the respondent not having proved some of the allegations made to the required standard.
 - g. The learned trial magistrate erred in law and fact in shifting the burden of proof of facts alleged by the respondent herein to the appellant for example on the issue of the parcel of land belonging to the appellants.
3. Thus, the appellants have sought the following orders;
 - a. This appeal be allowed with costs and
 - b. The judgment of the trial court be set aside.
4. The appeal was heard by way of written submissions further this court's directions given on 6th June 2023.
5. By the submissions dated 24th November 2023, learned counsel for the appellants referred to the impugned judgment, the parties' respective pleadings, trust under section 28 of the [Land Registration Act](#), 2016 (2012) (The LRA) and case of [Gitobu Imanyara & 2 others v Attorney General](#) (2016) KLR, among others. Counsel submitted, inter alia, that the respondent holds the suit property in trust for the appellants and urged this court to overturn the said judgment and allow the appeal with costs.
6. On the other hand, the respondent through P R Ojala and Company Advocates made reference to the parties' respective pleadings, grounds of appeal, sections 24, 25, 26 and 103 of the [LRA](#) and [Kuria Kiarie & 2 others v Sammy Magera](#) (2018) KLR, among other authoritative pronouncements. Counsel submitted that whereas the respondent proved his claim to the requisite standard, the appellants failed to do so thus, implored the court to dismiss the appeal with costs.
7. At the trial court, the respondent sued the appellants for orders *infra*;
 - a. A declaration that he is the rightful owner of all the suit property and that the 1st, 2nd and 3rd defendants be evicted therefrom.
 - b. The costs of the suit including interest thereon at court rates.
 - c. Any other just and equitable relief as this Honourable court may deem appropriate.



8. By a joint statement of defence and counter claim dated 10th April 2012, and filed on 24th April 2012, the appellants denied the respondent's claim. They stated that during land demarcation, the suit property was first recorded in the name of James Otigo Oguma (Deceased herein) and other next of kin who resided thereon. That during land adjudication, the respondent colluded with adjudication clerks and deleted the name of the deceased and substituted therein the respondent as the proprietor thereof.
9. Wherefore, the appellants/counter claimers sought that the suit be dismissed with costs and that judgment be entered for them in the counter claim for;
 - a. An order of declaration that the plaintiff holds land the suit property in trust for the family of the deceased which includes the defendants.
 - b. An order for the rectification of the register for the suit property by deleting the name of respondent and inserting in place thereof the name of the deceased.
 - c. An order that the plaintiff do vacate the said land failure to which he be forcibly evicted therefrom.
 - d. Costs of the counterclaim together with interest thereon at the rate of 14% PA from the date of filing suit until payment.
10. It is noteworthy that on 29th June 2022, Mr. G.S Okoth learned counsel for the appellants who were the defendants at the trial court, sought to amend the entire paragraph 2 of the defence and counter claim. Miss Miranda learned counsel for the respondent had no objection thereto. Therefore, the trial court allowed the application accordingly.
11. PW1 was Leonard Apiyo Odhiambo, a son of the respondent/plaintiff. He stated that they do not reside on the suit property. That his father gave the deceased the portion of land (5 acres) as a gift. That later, the Deceased sued his father claiming ownership of the suit property and the case was dismissed but there was no appeal therefrom. PW1 relied on his statement dated 30th August 2012 and bundle of documents filed on 8th February 2012 (P Exhibit 1) in his evidence.
12. DW1 was Charles Otieno Otigo (1st appellant/defendant) and relied on his statement dated 8th November 2017 and bundle of documents filed on 24th April 2012 (D Exhibit 1) as part of his testimony. He stated that he has lived on the suit property since his birth and that the respondent was his relative.
13. DW2, Jeremiah Oguta Ouno relied on his statement dated 8th November 2017 as part of his evidence. He told the court that he is a neighbour to the appellants who live on the suit property.
14. In reaching the impugned judgment. the learned trial magistrate noted that the land records do not show that the deceased was the owner of the suit property. That there was no evidence that the respondent acquired it fraudulently. That HomaBay SRMC Land case No 5 of 2003 was not heard on merits thus, not res judicata principle inapplicable in the suit. That the respondent had proved his claim on a balance of probability and that the appellants no longer rely on fraud in their counter claim.
15. In that regard, the issues for determination are as captured in the grounds of appeal and are compressed as follows;
 - a. Are the grounds of appeal tenable?
 - b. orders to issue to meet the ends of justice herein.



16. It is the mandate of this court to reconsider the evidence on record, assess the same and come to its conclusions and inferences with caution; see *Watt v Thomas* (1971) 1 ALL ER 482, *Kamau v Mungai and another* (2006) 1 KLR 150 and *Gitobu Imanyara Case* (*supra*).
17. Notably, the learned trial magistrate referred to the parties' respective pleadings and that since the counter claim was amended on 29th June 2022, the appellants' allegations of fraud, could not hold. The trial court correctly analyzed the testimonies and made an informed decision in favour of the respondent against the respondents as stated in paragraph 1 hereinabove.
18. Indeed, the trial court summarized the parties' respective cases, framed points for determination and arrived at the impugned judgment based on reasons in line with Order 21 Rule 4 of the *Civil Procedure Rules, 2010*. In process, he made reference to section 26 of the *Land Registration Act, 2015* (2011).
19. Also, the learned trial magistrate held that he was not satisfied that the suit was res judicata in light of Homa Bay SRMC Land Case No 5 of 2003. He stated that it was not shown that the said case or any other case alluded to in the proceedings, was determined on merits.
20. In *Black's Law Dictionary* 10th Edition at page 1504, the term "Res judicata" means;

"An issue that has been definitively settled by judicial decision.
It's three essential elements are; An earlier decision on the issue, 2. A final judgment on merits and the involvement of the same parties or parties in privity with the original parties."
21. The testimonies of PW1 and DW1 reveal that there existed Homa Bay SRMC Land case No 5 of 2003. However, there is nothing on record to show that it was determined on merits as stated in *Black's Law Dictionary* (*supra*) and this was pointed out in the impugned judgment.
22. PW1 stated that appellants erected structures on the suit property. Therefore, the respondent did not admit that the appellants are entitled to part of the suit property taking into account section 61 of the *Evidence Act* (Cap 80) on facts admitted in civil proceedings provided that the court has discretion to require facts admitted to be proved otherwise than by such admissions.
23. As noted at paragraph 10 hereinabove, the counter claim was amended and removed the particulars of fraud against the respondent as alleged by the appellants. Proof of fraud is spurred by particulars of fraud in a civil case.
24. It is trite law that any allegation of fraud must be pleaded and strictly proved; see *Kuria Kiarie case* (*supra*) and *Kinyanjui Kamau v George Kamau* (2015) eKLR.
25. Further, there was nothing to show ab initio ownership of the suit property by the deceased. The trial court noted;

"....the exhibited land records don't show the late James Otigo Oguma as owner of the suit property at any time."
26. The trial court's findings were not oppressive and unjust as alleged by the appellants. The same were in consonant with the pleading including eviction sought in the plaint. Therefore, the learned trial magistrate correctly gave time lines within which the appellants to vacate suit property; see *Mohamed Mubiddin (suing for and behalf of the Estate of Mohamed Mubiddin Mohammed Hatimy-Deceased) v Jackson Muthama and 168 others* (2014) eKLR.
27. The learned trial magistrate observed that the respondent had proved his claim on a balance of probabilities. That the counter claim lacked basis as the appellants no longer relied on fraud.



28. Burden of proof is governed by sections 107 to 110 of the *Evidence Act* chapter 80 Laws of Kenya. By amendment of the particulars of fraud in totality, the appellants' counter claim crumbled. In the circumstances, the trial court did not shift the burden of proof to the appellants in respect of the suit.
29. In the premises, I find the trial court's finding flawless at law. There is no reason to overturn the same.
30. Thus, this appeal is hereby dismissed with costs to the respondent.
31. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 30TH JANUARY 2024.

G.M.A ONG'ONDO

JUDGE

Present

1. Miss H. Kisaka instructed by Quinter Adoyo learned counsel for the Appellant
2. Mr. P. R Ojala learned counsel for the Respondent
3. Mr. Luanga, court assistant

