Adika & another v Panyako (Environment and Land Appeal 14 of 2022) [2025] KEELC 956 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELC 956 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND APPEAL 14 OF 2022

FO NYAGAKA, J

JANUARY 30, 2025

BETWEEN

DAMARIS NYAMISI ADIKA ..... 1ST APPELLANT

GEOFFREY OMONDI ADIKA ..... 2ND APPELLANT

AND

HARRISON PANYAKO ..... RESPONDENT

(Being an appeal from the decision and judgment of Hon. Moses Obiero, SRM delivered on 7th June 2022 in the original Migori SRMC. ELC cause No. 67 of 2019)

JUDGMENT

1. The appellants were the Plaintiffs in a suit they filed in the subordinate court, being Migori SPMC Cause No. 67 of 2019. They did so through a Plaint dated 10 May 2019 and verified by a Verifying Affidavit sworn by Damaris Nyamisi Adika, the 1st Plaintiff, on the same date. It was the Plaintiffs' claim that Peter Adika Magio (deceased) was the legal and sole beneficial owner of all that parcel of land known as title number Migori Township Suna West/78B (Formerly known as Plot No. 95A). Further, the Defendant had conspired to try and defraud the Estate of the said Peter Adika Magio of its rightful asset, the suit property. They listed the particulars of fraud (of the Defendant) as follows:-

    1. Forging minutes of meeting held at Town Hall which can be evidenced from the fact that the said the minutes are distinctively similar., signed by the Town Clerk on 24th October 2007, yet the meetings apparently were held in the years 1993 and 1994 respectively.

    2. Without prejudice to the above, in the event that the minutes were valid, providing false information to the meetings by stating that the 2nd Respondent was the administrator of the Estate of the deceased yet letters of administration were yet to be granted to the estate.

    3. Proving (sic) a forged letter that the deceased had sold the property to the 1st Respondent.

2. The Plaintiffs averred that by virtue of the Minutes, the 1st Respondent took possession of the property and had been utilizing it for his own benefit to the detriment of the beneficiaries of the estate of Peter Adika Magio (deceased). Further, despite demand and notice of intention to sue the Defendants being issued they failed, refused and ignored to surrender the property to the Estate of the deceased. The court had jurisdiction over the cause of action.

3. They prayed for the following reliefs:-

    1. An order for restitution of property known as Migori Township Suna West/78B (Formerly known as Plot No. 95A) to the estate of Peter Adika Maggio.

    2. A permanent order of injunction Restraining the Respondents either acting by themselves, their servants, staff and/ or agents from trespassing, entering, occupying, transferring, alienating, leasing and/ or in any other manner dealing and/ or interfering with the property known as title number Migori Township Suna West/78B (Formerly known as Plot No. 95A).

    3. An order forming profit against the 1st Respondent for the use of the property known as title number Migori Township Suna West/78B (Formerly known as Plot No. 95A) on indemnity basis to compensate the estate of Peter Adika Maggio for loss of use and loss of profit for the entire period of deprivation.

    4. Cost of the suit.

    5. Any other order is Honourable Court may deem fit to grant.

4. Following an order granted on 1/08/2029, the Plaintiffs filed an Amended Plaint dated 6th August 2019. They deleted the name of the 2nd Defendant. Further, they deleted paragraph 4 of the original Plaint which was about the description of the 2nd Plaintiff. At Paragraph *6*, as was in the original Plaint they amended it to include an averment that the Defendant conspired with Mzee Yusto Magio Alango (deceased) to try and defraud the Estate of Peter Adika Magio. Further, he amended the second of the particulars of fraud to include the name of Mzee Yusto Adika Alango in the place of 2nd Respondent. Lastly, he amended the 2nd relief, being the prayer for an order of injunction to read, in part, that, "restraining the Defendant either acting by himself, his servants..."

5. The 1st Defendant before but the sole Defendant after the amendment, filed his written Statement of Defence dated 28th June 2019. He amended it on 26th September 2018 and filed it on 30th September 2019. It was his case in the Amended Defence that he made no admission of Paragraph 5 of the Amended Plaint. The said paragraph *5* was to the effect that Peter Adika Magio was the legal and sole beneficial owner of the suit land. Further, he denied the contents of paragraph 6 of the Amended Plaint which was regarding the allegations of fraud and the particulars thereof. He added that he bought the suit parcel of land from Peter Adika Magio at a valuable consideration which he paid in full. Specifically, he denied the particulars of the fraud enumerated in paragraph *6*. Further, he pleaded that upon the purchase of the suit property known as Plot No. 95A, he was put into occupation and continued to own it from 1990 to 2018. He added that the disposition of the suit property was above board and with the full knowledge, consent and acquiescence of the Plaintiffs.

6. Further, the Defendant averred that the Plaintiffs' claim in paragraph 6 of the Amended Plaint that the Minutes relied on were untrue, he pleaded that the copies of the minutes held by the plaintiffs had been wantonly and deliberately falsified and tampered with by them to rend credence to their false claim because he, the Defendant, had in possession the original and true Minutes supplied to him. In response to paragraph 7 of the Amended Plaint which was to the effect that by virtue of the minutes he, Respondents (sic), took possession of the suit property and had been utilizing it for his own benefit

to the detriment of the beneficiaries of the Estate (of the deceased), the Defendant admitted it to the extent that he had been in occupation of the suit premises with the full knowledge of the Plaintiffs since 1990. In further response to paragraphs 8, 9 and 10 of the Amended Plaint, the Defendant denied receipt of any demand for notice of intention to sue but he admitted both the jurisdiction of the court and that there was no suit pending between them. Nevertheless, he denied cause of action against him.

7. The suit proceeded to full hearing 20th January 2022 when the Plaintiff testified as PW 1 and called her witness, Zedekia Otieno Osumba, as PW 2. She also called two more witnesses, PW3, Samuel Odoyo and Geoffrey Omondi Adika who testified on 8th February 2022. The defendant testified on 01/03/2022 and called Zakaria Alango Magio as his witness. The learned trial magistrate analyzed the pleadings, the evidence and the law together with the submissions of the parties and delivered judgment on 7th June 2022. He found that,

    1. The Plaintiffs had failed to prove their case against the defendant to th standard required by the law.

    2. The Plaintiffs' case was time-barred and lacked merit hence, it was dismissed with costs to the defendant.

8. It was upon this finding that the plaintiffs filed the appeal herein and based it on the following grounds,

    1. The learned trial magistrate erred in law in believing the evidence of the Respondent without subjecting it to suitable interrogation or analysis and thereby failed to discern the fraudulent conduct on the part of the Respondent.

    2. The learned trial magistrate erred in law in disregarding and ignoring the submissions mounted and filed by the Appellants without assigning any plausible explanation and/ or reason whatsoever. Consequently, the appellants were subjected to unfair treatment. hence suffered a miscarriage of justice.

    3. The judgement of the learned trial magistrate was convoluted and the issues raised by him were slanted and thereby camouflaging the judicial mind from appreciating, discerning and/ or understanding the true nature of the dispute. Consequently, the judgment was a nullity.

    4. The decision of the trial magistrate was made without jurisdiction, and it was made based on belief and anticipation not warranted by the evidence on the record.

    5. The learned trial magistrate erred in law and fact by failing to appreciate that before and at the trial, there were material irregularities in the alleged sale of agreement produced by the Respondent as Exhibit 1 which indicated that the property was 50 by 100 feet yet it was 25 by 100 feet as per the Surveyor's report.

    6. The trial magistrate erred in the law by ignoring and not respecting Sections 45, 25 and 71 of the *Law of Succession Act*.

9. The Appeal was disposed of by way of written submissions which this Court has extensively considered. It will factor their content into the analysis of the issues in judgment herein, rather than summarizing them separately.

Issue, Analysis And Determination

10. This Court has considered the appeal and the law as contended by the rival parties. It is of the view that five issues in life or determination. They are:-

a. Whether failure to consider submissions during the analysis of the judgment was a grave error by the trial magistrate.

b. Whether the Court had or did not have jurisdiction.

c. Whether the plaintiff's claim was time barred.

d. Whether the learned trial magistrate properly analyzed the evidence before him.

e. Who to bear the costs of the appeal.

11. In instances where an Appeal is made against a judgment (delivered on merits) the role of this Court as an appellate one is simple: it is to evaluate the law, the pleadings, and the entire evidence of the parties at the trial court as if the Court is re-hearing the case although it did not see and listen to the witnesses in person. This was stated by the Court of Appeal in Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, where it held that:-

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

12. Similarly, in Peters v Sunday Post Ltd [1958] EA 424, as quoted in the case of Jackson Kaio Kivuva v Penina Wanjiru Muchene (2019) eKLR the Court held:-

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide."

13. Additionally, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the court held that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

14. That said, this Court shall proceed to determine this appeal within that prism. As I do so, it is important to underscore the point that some of the issues I have given for determination go to the root of the entire appeal and if they succeed there would be no reason to consider the rest. Therefore, this Court now determines the issues in sequence.

a. Whether failure to consider submissions during the analysis of the judgment was a grave error by the trial magistrate.

15. In the second Ground of Appeal, the Appellants contended that the learned trial magistrate disregarded the submissions they mounted, without assigning an explanation thereof. By so doing it occasioned them unfair treatment, and a miscarriage of justice. As I consider this ground, it is important to restate the position of submissions in any determination by a court of law. Submissions neither

constitute pleadings nor the evidence of parties. They are merely arguments put forth by the parties with a view to convincing the court to agree to the parties' positions or views of the issues before the court. Basically, they are a marketing language of the parties as they sell their ideas to the court to convince it to lean to their side of argument. Therefore, in my humble view, failure by a court, and in this case, the learned trial magistrate did not in any way occasion prejudice or injustice to the appellants since the magistrate was under a duty to consider their case o merits. In any event there are many cases often decided rightly without basing the reasoning on submissions of parties because at times some of them are skewed and misleading regarding the law and issues before the courts. Thus, in the case of Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & Another [2014] EKLR, The Court of Appeal aptly put it. As follows.-

> " Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

16. I have extensively read the judgment appealed from, particularly, pages 75 and 76 of the proceedings. It is clear beyond peradventure that the trial magistrate considered the submissions of the parties, mor so the appellants. I do not see any reason for the complaint in this ground of appeal. I dismiss it.

b. Whether the Court had or did not have jurisdiction.

17. The Appellants raised the fourth ground of appeal that the trial magistrate made the decision without jurisdiction and the decision was based on the believe and anticipation not warranted by evidence.

18. Jurisdiction is everything in regard to decisions by courts of law. This was stated in the locus classicus case of Owners of the Motor Vessel "Lillian S' v. Caltex Oil (Kenya) Ltd [1989] KLR 1 wherein Nyarangi, JA. held as follows:

> " ...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

19. Additionally, the Supreme Court, In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 stated that since jurisdiction flows from the statute or *the Constitution*, a court cannot arrogate itself, weather by craft or design or acquiescence to jurisdiction over a subject where the law does not donate it. It held:-

> " ...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity."

20. Also, in Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the same apex Court reiterated follows:

> " (68). A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law."

21. The jurisdiction of this Court is governed by Article 160. To be of *the Constitution*. Of Kenya. And section 13 of the Environmental Land Court Act. These provisions state as. Follows respectively. Article 162(2)(b) - Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to- (b) the environment and the use and occupation of, and title to, land." Pursuant to that, Section 13 of the Act was enacted to read that provide, in the relevant parts in relation to the dispute herein as follows:-

    1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

    2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—— (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;"

22. In conclusion, it is worth noting regarding the dispute herein, that the Appellants were the ones who instituted the suit and the trial court. They pleaded, particularly at paragraph 9 of the Amended Plaint, that the cause of action arose within the local limits of the jurisdiction of the honorable court. Following that, the Defendant admitted the jurisdiction of the court in paragraph 11 of the Amended Defense. The issue in the suit was a prayer for restitution of the property comprising in title number Migori Migori Township Suna West/78B (Formerly known as Plot No. 95A). Further, the Plaintiffs prayed for an injunction against the Defendant and an order for mesne profits in relation to the Defendant's occupation of the suit property. All these reliefs fall within the jurisdiction of this Court. In any event the Appellants make a fallacious argument in this ground because if they knew that the court had no jurisdiction to determine their matter, they had no business filing it in the first place. They would herein shoot themselves in the foot if the court were to agree with their contention.

    c. Whether the plaintiff's claim was time barred

23. In his second and final finding the learned trial magistrate found that the Plaintiff's claim was time barred. This Court now considers whether the finding was correct. It was the plaintiffs' case that the Defendant used the Minutes which were false and incorrect to acquire the suit land by fraud. They pleaded at paragraph 7 of the Amended Plaint that using the said sets of Minutes, the Respondent took possession of the suit property and had since been utilizing it for his own benefit to the detriment of the beneficiaries of the estate of the late Peter Adika Magio. To this claim, the Defendant responded at paragraph 6 of the Amended Defence stating that he had been in occupation and continued use of and owned the parcel of land from 1990 to 2018 (when the suit was filed). Further, at paragraph *9* he stated that he admitted the averment in paragraph 7 of the Amended Plaint that he had been in occupation of the suit land since 1990 with the full knowledge of the plaintiffs.

24. Relying on two sets of Minutes they produced as evidence they showed that the Defendant claimed that he acquired the land fraudulently through minutes of a meeting held on 25 December 1993 and another on 3rd February 1994. It was their evidence that upon the acquisition, the plaintiff had been in occupation of the parcel or Plot since then to the time they instituted the suit. On his part the Defendant led evidence to the effect that he had been in occupation and use of the land since 1990 when he bought it from the deceased, Peter A. Magio.

25. The question that follows is whether the plaintiffs would sustain a claim for recovery of the land, they call it "restitution", given that it had been in possession, use of and occupation by the Defendant from the time of the alleged fraudulent acquisition to the time of the suit. Granted that the Defendant took

possession of the land in 1990, or as per the minutes, by the 21st of December 1993 or 3rd February 1994, and as further evidenced by the letter dated 18th February 1994 issued to him by Town Clerk, then he had been occupation for a period of more than 25 years, starting the 18th February 1994. What does the law say?

26. Section 7 of the *Limitation of Actions Act* provides that,

> " 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."

27. Also, Section 17 of the Act provides that,

> " Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished."

28. The two provisions, jointly import the legal position that a party who does not move the court to recover his land within twelve (12) years from the time of another party's illegal occupation or occupation without his consent or permission cannot successfully move the Court for recovery thereof. The totality of the Appellants' claims through the pleadings in the trial court and the evidence they adduced therein leads to one conclusion: their claim was more than stale: twice as much, if one were to quantitively loosely assess and put it as that. Even if there could have been ownership legally falling to the Estate of the deceased Peter Adika Magio, which the Court has not found to have been after the Plot was sold, it would have been extinguished completely, under Section 17 of the Act. Thus, the learned trial magistrate was correct in his finding. He needed not to even analyze the merits of the case. I will leave this appeal at this point and dismiss it entirely, with costs to the Respondent.

29. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THE 30TH DAY OF JANUARY 2025.

HON. DR. *IUR* NYAGAKA,

JUDGE

In the presence of,