



Opiyo (Suing as legal a representative of the Estate Of David Opiyo Oyungu, - Deceased) v Masara & another (Environment and Land Appeal E044 of 2022) [2024] KEELC 1104 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1104 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E044 OF 2022
SO OKONG'O, J
FEBRUARY 29, 2024**

BETWEEN

**FRANCIS OCHIENG OPIYO APPELLANT
SUING AS LEGAL A REPRESENTATIVE OF THE ESTATE OF DAVID OPIYO
OYUNGU, - DECEASED**

AND

**PETER NGESO MASARA 1ST RESPONDENT
LAND REGISTRAR, NYANDO 2ND RESPONDENT**

(Being an appeal from the judgment and decree of Hon. P.K.Rugut (P.M) delivered on 10th November 2022 in Tamu PMCELC No. E026 of 2021)

JUDGMENT

Background

1. David Opiyo Oyungu, deceased (hereinafter referred to only as “the deceased”) was at all material times the registered proprietor of all those parcels of land known as Title No. Kisumu/Muhoroni/1261 measuring 0.8 hectares and Title No. Kisumu/Muhoroni/1262 measuring 0.7 hectares (hereinafter together referred to only as “the suit properties” and individually as “Plot No. 1261” and “Plot No. 1262” respectively). The suit properties were subdivisions of land parcel Title No. Kisumu/Muhoroni/924 measuring 3.6 hectares (hereinafter referred to only as “the original parcel”). The deceased inherited the original parcel from his deceased wife, Isabela Awuor Opiyo (the Appellant’s mother). The Appellant was the son of the deceased, David Opiyo Oyungu with Isabela Awuor Opiyo(also deceased). Isabela Awuor Opiyo who was one of the two wives of the deceased, David Opiyo Oyungu predeceased him. The original parcel was subdivided on or about 16th October 2007 into four portions namely, Title Nos. Kisumu/Muhoroni/1261, 1262, 1263 and 1264. Title Nos. Kisumu /



Muhoroni/1261 and 1262 (the suit properties) were registered in the name of the deceased on the same date. On 27th September 2011, the suit properties were registered in the name of the 1st Respondent and title deeds were issued to the 1st Respondent thereafter.

2. The deceased died on 11th May 2010. The Appellant filed a petition for grant of letters of administration in respect of the estate of the deceased in 2016 and was issued with a Grant of Letters of Administration on 4th February 2017. On 15th December 2021, the Appellant filed a suit against the Respondents at the Principal Magistrate's Court at Tamu namely, Tamu PMCELC No. E026 of 2021(the lower court). The Appellant averred that the suit properties were at all material times registered in the name of the deceased. The Appellant averred that after the death of the deceased, the 1st and 2nd Respondents colluded and had the suit properties fraudulently transferred to the 1st Respondent before succession in respect of the estate of the deceased was conducted. The Appellant averred that the 1st Respondent disregarded the law and intermeddled in the estate of the deceased. The Appellant averred further that the 1st Respondent presented documents to the Ministry of Lands for registration purporting the same to be genuine which was not the case. The Appellant averred that the 1st Respondent fraudulently transferred the suit property to his name before the grant of letters of administration in respect of the estate of the deceased was issued by the court.
3. The Appellant averred that the 2nd Respondent unlawfully, illegally and unprocedurally processed the transfer of the suit properties in favour of the 1st Respondent in disregard of the law of succession. The Appellant averred that the 2nd Respondent registered a forged, fraudulent, illegal and unlawful transfer of land. The Appellant sought judgment against the Respondents jointly and severally for;
 1. Cancellation of titles issued to the 1st Respondent in respect of the suit properties and the properties to revert to the name of the deceased.
 2. An order of eviction and surrender of vacant possession of the suit properties by the 1st Respondent to the Appellant.
 3. An order for the 2nd Respondent to revoke the titles held by the 1st Respondent in respect of the suit properties.
 4. Costs of the suit.
4. The 1st Respondent filed a defence to the Appellant's suit in the lower court on 5th January 2022. The 1st Respondent amended the defence on 8th August 2022. The 1st Respondent averred that he purchased the suit properties from the deceased David Opiyo Oyungu on 29th August 2007 and 23rd December 2008. The 1st Respondent averred that the agreements that he entered into with the deceased were valid and the suit properties were lawfully transferred to him after Land Control Board Consents were issued save that there was a delay in the issuance of the title deeds which were not issued until after the death of the deceased. The 1st Respondent averred that the orders sought against him by the Appellant could not be issued because he was the lawful owner of the suit property. The 1st Respondent urged the court to dismiss the Appellant's claim with costs.
5. The 2nd Respondent filed a statement of defence on 1st March 2022. The 2nd Respondent denied that he colluded with the 1st Respondent to fraudulently and illegally transfer the suit properties to the 1st Respondent. The 2nd Respondent averred that if any transfer was effected by the 2nd Respondent then the same was done procedurally upon submission of all the requisite documents. The 2nd Respondent urged the court to dismiss the Appellant's suit with costs.



The judgment of the lower court

6. The lower court heard the Appellant's suit against the Respondents and delivered a judgment on 10th November 2022. In the judgment, the lower court framed three issues for determination namely; whether the deceased sold the suit properties to the 1st Respondent, whether the Appellant proved fraud against the Respondents and whether the Appellant was entitled to the reliefs sought. On the first issue, the court found that the two agreements of sale that were produced in evidence by the 1st Respondent were executed during the lifetime of the deceased and that the same were executed by the deceased and DW2 who acted as the agent of the 1st Respondent. The lower court found that the two agreements complied with the provisions of Section 3(3) of the *Law of Contract Act*. The court concluded that the deceased sold the suit properties to the 1st Respondent. On the second issue, the lower court cited Section 107 of the Law of *Evidence Act*, Chapter 80 Laws of Kenya and stated that the burden of proof was on the Appellant to prove the allegations of fraud pleaded against the Respondents. The court also cited *Kinyanjui Kamau v. George Kamau* [2015]eKLR on the standard of proof of fraud which is beyond a balance of probabilities but not beyond reasonable doubt. The lower court also cited Section 26 of the *Land Registration Act*, 2012 on the circumstances under which a land title can be challenged. On the issue of the consent of the Land Control Board, the lower court observed that although the 1st Respondent did not produce in evidence the consent of the Land Control Board, there was evidence that the deceased signed the applications for consent of the Land Control Board which was an indication that the deceased wished to transfer the suit properties to the 1st Respondent. The court noted that there was no evidence that the applications for consent that were lodged with the Land Control Board were rejected. The court found that the agreements between the deceased and the Respondents were not void for want of Land Control Board Consent. On the issue that the transfer of the suit properties to the 1st Respondent was effected after the death of the deceased, the lower court found that the deceased had executed the instruments of transfer of the suit properties to the 1st Respondent before his death and that what took place after his death was the registration of the said instruments of transfer and issuance of title deeds in favour of the 1st Respondent. The lower court cited case law and held that once the deceased executed the said instruments of transfer in favour of the 1st Respondent, the deceased ceased to have any interest in the suit properties that could pass to his estate upon his death. The court held that since the suit properties did not devolve to the estate of the deceased, the 1st Respondent did not need to wait until a grant of letters of administration was obtained in respect of the estate of the deceased before the said instruments of transfer could be registered and titles issued in his favour. Due to the foregoing, the lower court held that the Appellant had failed to prove that the suit properties were transferred to the 1st Respondent unprocedurally, illegally and irregularly. The court found the allegation of collusion and fraud on the part of the Respondents in the transfer of the suit properties to the 1st Respondent not proved.
7. In conclusion, the lower court held that the Appellant had failed to prove his case against the Respondents to the required standard and dismissed the suit with costs to the Respondents.

The appeal

8. The Appellant was aggrieved by the said judgment and lodged the present appeal. In his memorandum of appeal dated 17th November 2022, the Appellant challenged the lower court's judgment on the following grounds;
 1. The Learned Magistrate completely misunderstood the evidence before him, wrongly analysed the same and as a result came to a wrong conclusion on the facts and the law.



2. The Learned Magistrate erred in law and fact by holding that the 1st Respondent's titles were valid despite evidence of fraud adduced by the Appellant who demonstrated that the suit properties were transferred to the 1st Respondent after the death of the deceased and before a grant of letters of administration in respect of his estate had been issued, and without consent of the Land Control Board.
3. The Learned Magistrate erred in law and fact in relying on the agreements of sale between the deceased and DW2, Emma Atieno Awiti while the said Emma Atieno Awiti had no power of attorney to act for the 1st Respondent and was not the one registered as the owner of the suit properties.
4. The Learned Magistrate erred in law and fact by holding that the deceased had already applied for Land Control Board Consent for the transfer of the suit properties to the 1st Respondent and that that was an indication of the deceased's willingness to transfer the suit properties to the 1st Respondent while what was produced by the 1st Respondent were only forms for the application for consent.
5. The Learned Magistrate erred in law and fact by holding that the two agreements of sale that were produced in evidence were valid without taking into consideration that six months had lapsed after the said agreements were made and no consent of the Land Control Board had been obtained.
6. The Learned Magistrate erred in law and fact in relying on inconsistent evidence of the 1st Respondent.
7. The Learned Magistrate totally misunderstood and wrongly evaluated the evidence before him and thereby arrived at a wrong conclusion.
9. The Appellant urged the court to allow the appeal, set aside the lower court judgment and substitute it with the court's own decision after evaluating the evidence afresh. The Appellant also prayed for the costs of the appeal. The Appeal was heard by way of written submissions. The Appellant filed submissions dated 11th September 2023. The Appellant argued grounds 1, 2, 3 and 5 of appeal together. The Appellant submitted that the suit properties were transferred to the 1st Respondent illegally and fraudulently after the death of the deceased. The Appellant submitted that since the suit properties were transferred to the 1st Respondent after the death of the deceased, the documents that were used to effect the said transfer could only be false and/or a forgery. The Appellant submitted further that no consent of the Land Control Board was obtained in respect of the purported sale transaction between the deceased and the 1st Respondent and as such the same was void.
10. The Appellant also argued grounds 4, 6 and 7 together. The Appellant submitted that the lower court did not exercise its discretion judiciously. The Appellant submitted that although the court listened to all the witnesses, the court did not apply the correct principles of law in its assessment of the evidence and submissions. The Appellant submitted that on the evidence and submissions tendered by the Appellant, there was no way the impugned agreements of sale could be held to be valid. The Appellant submitted that the lower court decision was improper and as such the same should be set aside with costs to the Appellant.
11. The 1st Respondent filed submissions dated 12th September 2023. The 1st Respondent submitted that the agreements of sale that were entered into between the 1st Respondent's sister, DW2 on behalf of the 1st Respondent and the deceased were valid notwithstanding that the 1st Respondent had not donated a power of attorney to DW2 to act for him in the transaction. On the issue of the Land Control



Board consent, the 1st Respondent submitted that DW2 testified that she attended the Land Control Board meeting with the deceased at which consent to transfer the suit properties to the 1st Respondent was issued. The 1st Respondent submitted further that the evidence of DW2 was corroborated by that of DW3 who also confirmed that consent of the Land Control Board was obtained in respect of the transaction. The 1st Respondent submitted that there was no way the 2nd Respondent could have registered the transfers in favour of the 1st Respondent without the consent of the Land Control Board. The 1st Respondent submitted that he legally and lawfully acquired titles to the suit properties. The 1st Respondent submitted that the acts of fraud that were alleged by the Appellant against the 1st Respondent were not proved to the required standard. On the Appellant's claim that the lower court did not exercise its judicial discretion judiciously, the 1st Respondent submitted that the lower court delivered substantive rather than technical justice. The 1st Respondent submitted that the decision of the lower court was sound and just and urged the court to dismiss the appeal with costs.

Analysis and determination

12. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the Appellant, and the submissions by the advocates for the parties. As correctly submitted by the Appellant, this being a first appeal, this court has a duty to consider and re-evaluate the evidence on record and to draw its conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212 the Court of Appeal held among others that:

“On a first appeal from the High Court, the Court of Appeal should 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 allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

13. See also, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 and *Abok James Odera t/a Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013]eKLR on the duty of the first appellate court.

14. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.

15. From the Appellant's grounds of appeal, the issues arising for determination in this appeal in summary are; whether the lower court erred in its finding and holding that the 1st Respondent acquired the suit properties lawfully and regularly, whether the lower court erred in dismissing the Appellant's suit against the Respondents, and whether the appeal should be allowed. I will consider these issues together. The suit properties were registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). The Registered *Land Act* was repealed by the *Land Registration Act* No.3 of 2012. Sections 27, 28, and 143 of the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed) provide as follows:

27. Subject to this Act -



- (a) 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;
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:
- Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.
- 143.
- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.
16. Sections 24, 25, and 26 of the [Land Registration Act](#) No. 3 of 2012 that repealed the Registered [Land Act](#) provide as follows:
24. Subject to this Act—
- (a) 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; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
- 25.
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated



except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

17. It is clear from the foregoing that under the current land registration system and the land registration regime under which the suit properties were registered, the 1st Respondent's titles were indefeasible unless any illegality, procedural impropriety, corrupt scheme, mistake, or fraud in the manner in which the same were acquired was established. The issue that the lower court was called upon to determine was whether the Appellant had established the above-enumerated grounds upon which the 1st Respondent's titles to the suit properties could be impeached. The Appellant's case as pleaded in the lower court and in respect of which evidence was led by the Appellant was that the 1st Respondent in collusion with the 2nd Respondent caused the suit properties to be transferred to his name fraudulently after the death of the deceased before the grant of letters of administration in respect of the estate of the deceased was applied for and issued by the court. The Appellant pleaded particulars of fraud against both Respondents. The term fraud is defined in Black's Law Dictionary 9th Edition as follows:

Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly



reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

18. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another* [2000] eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

19. In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314, the court stated as follows on page 317:

“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a mere balance of probabilities is required.”

20. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya provides that the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. The burden of proof of the alleged fraud and illegalities in the transfer of the suit properties to the 1st Respondent rested with the Appellant. I am satisfied from the evidence on record that there were agreements of sale of the suit properties between the deceased and the 1st Respondent’s sister(DW2). The 1st Respondent and DW2 told the court that DW2 purchased the suit properties on behalf of the 1st Respondent who was out of the country at the material time. I am unable to see anything illegal or unlawful in DW2 entering into a sale agreement with the deceased in respect of the suit properties on behalf of the 1st Respondent and then having the suit properties transferred and registered in the name of the 1st Respondent rather than in the name of DW2. The agreements of sale dated 29th August 2007 and 23rd December 2008 allowed DW2 to assign her rights in the agreement to a third party. The agreement bound DW2’s “personal representative, heirs and assign...”. DW2 and the deceased having agreed that the suit properties although purchased by DW2 be transferred to the 1st Respondent, the arrangement was lawful. The only person who could complain about the transfer of the suit properties to the 1st Respondent was DW2. As I have stated above, DW2 told the court that the 1st Respondent was her brother and that she purchased the suit properties for him and arranged for the same to be transferred and registered in his name. I find no irregularity, illegality, or fraud in the transaction. The issue of a power of attorney does not arise since DW2 did not sign any registerable document on behalf of the 1st Respondent in the transaction.

22. On the Appellant’s claim that the suit properties were transferred to the 1st Respondent after the death of the deceased and before a grant of letters of administration was issued in respect of his estate, the evidence before the lower court showed that the deceased entered into the agreements of sale with DW2 and executed instruments of transfers in favour of the 1st Respondent during his lifetime. The evidence also showed that it was the said transfers that were lodged by the 1st Respondent for registration after the death of the deceased. I agree with the lower court that after the deceased executed the instruments of transfer in favour of the 1st Respondent in respect of the suit properties, the deceased ceased to have any interest in the said properties and upon his death, the properties did not form part of his estate. I am therefore in agreement with the lower court that the 1st Respondent did not require a grant of letters of administration in respect of the estate of the deceased to be issued before registering the transfer executed by the deceased in his favour.



23. On the issue of the suit properties having been transferred to the 1st Respondent without the consent of the Land Control Board, my view is that this issue was not pleaded by the Appellant in his plaint and he did not tender any evidence in proof of his allegation that no consent was obtained for the transfer of the suit properties to the 1st Respondent. It was not enough for the Appellant to argue that since the 1st Respondent produced in evidence only the applications for the consent of the Land Control Board and not the consent, that was evidence that the consent was not issued. Suits are determined based on the issues that are pleaded. The issue of the Land Control Board consent was raised by the Appellant's advocates during cross-examination of the 1st Respondent's witnesses and in the submissions. From the lower court judgment, I have not at all got the decision of the court on this issue. The court seems to have discussed the matter at length but left it undetermined. My view is that the court was not obligated to determine the issue since it was not pleaded and in any event, there was no proof by the Appellant that no consent of the Land Control Board was obtained. DW2 and DW3's evidence that the deceased applied for and obtained consent of the Land Control Board for the transfer of the suit properties to the 1st Respondent was not rebutted. I am therefore not in agreement with the Appellant's contention that the transaction between the deceased and the 1st Respondent was void for want of the consent of the Land Control Board.
24. Due to the foregoing, I agree with the finding of the lower court that the Appellant failed to prove that the suit properties were transferred to the 1st Respondent fraudulently, illegally, unprocedurally, and irregularly. The Appellant's case in the lower court was therefore not proved to the required standard. The lower court did not therefore err in dismissing the suit.

Conclusion

25. In the final analysis and for the foregoing reasons, I find no merit in the Appellant's appeal. The appeal is dismissed with costs to the 1st Respondent.

DELIVERED AND DATED AT KISUMU ON THIS 29TH DAY OF FEBRUARY 2024

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Otieno for the Appellant

Ms. Owenga for the 1st Respondent

N/A for the 2nd Respondent

Ms. J.Omondi-Court Assistant

