



REPUBLIC OF KENYA



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Otieno & 3 others v Juma & 4 others (Environment and Land Appeal E063 of 2022) [2024] KEELC 1015 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1015 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E063 OF 2022
GMA ONGONDO, J
FEBRUARY 27, 2024

BETWEEN

ROSEMARY ATIENO OTIENO 1ST APPELLANT
MBOGO OCHOLA 2ND APPELLANT
KUJA SELF HELP GROUP 3RD APPELLANT
SIRPHINA ADONGO ODUNDO 4TH APPELLANT

AND

ROSE ATIENO JUMA 1ST RESPONDENT
CHARLES ORWA OYOMBE 2ND RESPONDENT
JOHN OKUKU OYOMBE 3RD RESPONDENT
MARTIN ADERA OYOMBE 4TH RESPONDENT
STEPHEN OCHIENG 5TH RESPONDENT

(Being an appeal from the judgment and decree of Hon. E. M. Onzere, Principal Magistrate, delivered on 7th December 2022 in Ndhiwa Principal Magistrate's Court Environment and Land Case Nos. 397, 398 and 399 of 2017))



JUDGMENT

1. This is an appeal that arises from the trial court's judgment delivered on the 7th December 2022 by the Honourable E. M. Onzere, Principal Magistrate, in Ndhiwa Principal Magistrate's Court Environment and Land Case Nos. 397, 398 and 399 of 2017 where she held, inter alia:

“...the plaintiff has failed to prove her case to the required standard and the case is dismissed with costs to the defendants...”
2. The appellants were aggrieved thereby hence, through the firm of G. J. M. Masese Advocate, mounted the appeal by way of a memorandum of appeal dated 21st December 2022 and filed herein on even date. The Appeal is anchored on grounds 1 to 4 as set out on the face thereof and the same are:
 - a. That the learned trial magistrate erred in law and fact in dismissing the appellants' claims when they (appellants) have titles issued by the Government of Kenya.
 - b. That the learned trial magistrate erred in law and fact in not calling expert evidence to determine who between the appellants and the respondents were telling the truth.
 - c. That the learned trial magistrate erred in law and fact in shifting the burden of proof from the respondents to the appellants as regards land parcel number Kabuoch/Kobita/Kowuor/1702 (the original land herein) which the respondents claim to be occupying.
 - d. That the learned trial magistrate decided the case against the documentary evidence availed in court.
3. Thus, the appellants pray that the trial court's judgment be set aside and the appellants' claims be allowed as prayed in their respective complaints.
4. The appeal was heard by way of written submissions pursuant to this court's directions of 11th October 2023.
5. The appellants' counsel did not file any submissions herein.
6. The respondents' counsel filed submissions dated 11th December 2023 on 12th January 2024 and identified three issues for determination as below:
 - a. Whether the 1st appellant bought the suit land.
 - b. Whether the sale of the suit land was marred with fraud and illegality; and
 - c. What orders should this court make?
7. Learned counsel submitted that the 1st appellant did not produce a valid sale agreement as proof of purchase. That the title held by the 1st appellant was procured by way of fraud or misrepresentation to which the 1st appellant was a party. Thus, counsel urged the court to dismiss the present appeal with costs to the respondents. Reliance was placed on the case of Arthi Highway Developers Ltd. -vs- West End Butchery Limited & 6 others (2015) eKLR, to fortify the submissions.
8. In the foregone, the issues for determination are as captured in the grounds of appeal and crystallize to whether the appellants:
 - a. Have demonstrated that this appeal is tenable and



- b. Are entitled to the orders sought in the memorandum of appeal.
9. Notably, the instant appeal being the first one from the trial court in the matter, I am obliged to review the record of the trial court, re-evaluate it and arrive at own conclusions; see *Mwanasokoni - vs- Kenya Bus Services Ltd (1982-88) 1KAR 278* applied in, inter alia, *Titus Ong'ang'a Nyachieo-vs-Martin Okioma Nyauma and 3 others (2017) eKLR*.
10. At the trial court, Environment and Land Case No. 397 of 2017 whose proceedings form the record of appeal, was commenced by way of a further amended plaint dated 7th May 2021 mounted by Rosemary Atieno Otieno, the 1st appellant herein against the respondents seeking the following orders;
- a. A permanent injunction against the defendants restraining them, either by themselves, their agents, servants and or anyone claiming under the said defendants from entering upon, re-entering, trespassing into, cultivating, interfering and or in any manner dealing with land parcel number Kabuoch/Kobita-Kowuor/2332 measuring 2.7 Ha in area (the 1st suit land herein).
- b. General damages for trespass onto the 1st suit land and loss of mesne profit.
- c. Costs of this suit.
11. The 1st appellant contended that she is the registered owner of the 1st suit land, which she also holds in trust for her sons. That in 2010, the respondents trespassed and encroached onto the 1st suit land and forcefully started cultivating the same. That despite demand being issued, the respondents continued to trespass onto the 1st suit land thus, occasioning the 1st appellant loss of mesne profit.
12. It must be noted that Ndhiwa Principal Magistrate's Court Environment and Land Case No. 398 of 2017 was instituted way of a plaint dated 31st October 2017 by the 2nd appellant on behalf of the 3rd appellant against the 3rd and 5th respondents herein and three others, who are not parties to the instant appeal. The same sought the orders infra:
- a. An order evicting the defendants, their agents and or servants from land parcel number Kabuoch/Kobita Kawuor/2335 measuring 0.54 Ha in area (the 2nd suit land herein).
- b. Costs of the suit.
13. Ndhiwa Principal Magistrate's Court Environment and Land Case No. 399 of 2017 was initiated by way of a further amended plaint dated 7th May 2021 mounted by Sirphina Adongo Odundo, the 4th appellant herein against the respondents. The former claimed that the latter trespassed onto land parcel number Kabuoch/Kobita Kawuor/2458 measuring 0.39 Ha in area (the 3rd suit land herein) and sought an order of injunction against the respondents.
14. PW1, Rosemary Atieno Mbogo, relied on her statement dated 7th May 2021 as part of her evidence. She testified inter alia, that the respondents are cultivating the 1st suit land without her consent and prayed that they be evicted therefrom. She produced in evidence title deed and certificate of official search relating to the 1st suit land (PExhibits 1 and 2 respectively).
15. During cross-examination, PW1 stated that she purchased the 1st suit land at a cost of Kshs.200,000. She admitted that she had not carried the sale agreement to court.
16. Mbogo Ochola (PW2) stated that he is husband to PW1 and relied on his statement on record as part of his testimony. He corroborated PW1's assertion that the respondents are cultivating the 1st suit land without her consent, which land is registered in the name of PW1.



17. In cross-examination, PW2 averred that PW1 purchased the 1st suit land for Kshs.200,000-. That at the time of purchase, they were not aware that the 1st suit land had already been sold to the respondents.
18. In a statement of defence dated 21st July 2021 and filed on 6th August 2021, the respondents denied the claim. They averred that they reside on the original land which belongs to their late father, Barnabas Oyombi Wajero (deceased) who purchased the same from Nashon Awuor on 12th January 1999, upon payment of a consideration of Kshs.55,000/-. They averred that there were other suits over the same subject matter and involving the same parties, to wit, Ndhiwa Civil Suit Number 398 and 399 of 2017. Thus, they urged the trial court to dismiss the suit with costs.
19. DW1, Charles Orwa Oyombe, the 2nd respondent herein, relied on his statement filed on 6th August 2021 as part of his evidence. He testified that he stays on his late father's land, the original land herein, and not the suit land. That the deceased purchased 10 acres thereof from Nashon Awuor who had earlier bought the land from one Patricia Anyango but the said Patricia died before transferring the land to Nahashon. He averred that he has lived on his late father's land parcel for 33 years and his late brother, Vincent Oyombe, who died in 2013, and a husband to the 1st respondent herein, is buried thereon. That the suit land is a subdivision of the original land. He produced in evidence a land sale agreement dated 12th October 1981, a land sale agreement dated 12th January 1999 and a copy of green card relating to the suit land (DExhibits 1 to 3 respectively).
20. In cross-examination, DW1 admitted that at the time of purchase of the original land, the same was still registered in the name of one Barnabas and not the seller as per DExhibit 2.
21. DW2, Martin Adera Oyombe, relied on his statement dated 21st July 2021 which was adopted as part of his evidence. He testified that his late father purchased 10 acres of the original land. That he has been cultivating the said property since 1999 and his late brother, Vincent is buried thereon.
22. On cross-examination, DW2 denied cultivating the 1st suit land. He admitted that the 1st suit land is registered in the name of the 1st appellant herein and two others.
23. Stephen Ochieng Oyombe testified as DW3 and adopted the statement of the 2nd respondent filed on 6th August 2021. On cross-examination, he denied cultivating the 1st suit land and averred that the land he utilizes is the original land, which belongs to his deceased father.
24. On 20th September 2022, the trial court directed that the proceedings of DW4 taken in ELC No. 399 of 2017, to also apply ELC No. 397 and 398 of 2017. So, DW4, John Okuku, relied on his statement on record. He denied trespassing onto and utilizing any of the land parcels belonging to the appellants. That the land he uses is the original land, which belongs to his deceased father. During cross-examination, he admitted that the said land has since been subdivided.
25. In arriving at the impugned judgment, the learned trial magistrate observed, inter alia;

“...it is true that the plaintiff holds a title to the land but the defendants have proved that the title was obtained illegally and/or unprocedurally since there is no evidence tabled as to how she acquired the land and how it was transferred and registered in her names without succession having been done...”
26. The learned trial magistrate further noted that:

“...it is not in contention that the land initially belonged to James Odundo. James Odundo was the husband to Patricia Anyango and Sirphina Adongo... the defendants have produced sale agreements touching on land no. 1702 to Nashon Awuor... the agreement meets the



requirements of a valid sale agreement and the court has no reason to doubt the existence and validity of the agreement. Sirphina gave her evidence in Environment and Land Case No. 399 of 2017 and testified that she was aware Patricia sold 10 acres of the land to Nashon and that the portion the defendants are occupying is the portion meant for Patricia’s children...”

27. Also, the trial magistrate observed that the appellants did not produce any evidence to show the ground location of the suit land. That they did not distinguish it from the original land so as to prove that the respondents are occupying the suit land herein.
28. On the appellants’ contention that the learned trial magistrate erred in law and fact in dismissing their claims when they have titles issued by the Government of Kenya, Section 26 (1) of the [Land Registration Act](#), 2012 (2016) provides as below:
 - (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. (Emphasis laid)
29. In *Dina Management Limited -vs- County Government of Mombasa & 5 others* (2023) eKLR, the Supreme Court of Kenya held that a title document is not sufficient proof of ownership of property where the origin of that title has been challenged. That the holder of the title document must go beyond the instrument itself and show that the process of acquisition from inception was legal. That the ownership of land whose title was not acquired regularly is not protected under Article 40 of [the Constitution](#) of Kenya, 2010 on the protection of right to property. The Court noted in part:

“...If the process that was followed prior to issuance of the title did not comply with the law, then such a title could not be held as indefeasible...”
30. Similarly, in *Munyu Maina –vs- Hiram Gathiha Maina* (2013) eKLR, the Court of Appeal stated thus:

“We have stated that when a registered proprietor of title is challenged, it is not sufficient to dangle the instrument of instrument as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (Emphasis added)
31. In the present case, the appellants were constrained to explain how they became owners of the suit parcels of land. They did not produce any land sale agreements, land control board consent or transfer forms in respect of the suit parcels of land to prove that they are bona fide owners thereof; see *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura -vs- Attorney General & 4 others* [2017] eKLR.
32. Furthermore, the appellants failed to produce any grant of succession proceedings showing that the alleged vendor, Sirphina, conducted succession over the estate of the late James Opiyo Odindo, the initial owner of the mother title, prior to the alleged sale and transfer of the suit parcels of land;



see Section 82(b) of the *Law of Succession Act*, Chapter 160 Laws of Kenya and Trouistik Union International & another -vs- Jane Mbeyu & another (1993) eKLR.

33. The appellants further contend that the learned trial magistrate erred in law and fact in not calling expert evidence to determine who between the appellants and the respondents were telling the truth. That the learned trial magistrate erred in law and fact in shifting the burden of proof from the respondents to the appellants as regards the original land, which the respondents claim to be occupying.
34. The law on opinion of an expert witness is well established; See Sections 48 to 54 of the *Evidence Act*, Chapter 80 Laws of Kenya. Expert evidence is a piece of evidence to be considered alongside other evidence on record as held in *Shah and Another -vs- Shah and Others* [2003] 1 EA 290.- In the instant case, no expert evidence was availed to show that the respondents occupy the suit parcels of land claimed by the appellants herein.
35. I note that in Environment and Land Case No. 398 of 2017, the 3rd appellant produced in evidence the proceedings and findings in Land Dispute Claim No. 250 of 2009 before the Riana Land Dispute Tribunal. A perusal of the report reveals that Nahashon Awuor purchased the land in 1981 after the 3rd appellant had purchased the same in 1980. That no succession had been carried out by Patricia Odundo at the time of purchase. Nonetheless, the tribunal awarded the 3rd appellant 2 ½ acres out of the original land and the families of both Nashon Awuor and Barnabas Oyombe ordered to move away from the said parcel. Although the parties were granted 30 days to appeal the decision which was rendered on 28th December 2009, I note that no appeal was preferred against the said decision.
36. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:
 - i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
37. In that regard, I find that the appellants who were the plaintiffs at the trial court did not prove their claim on a balance of probabilities. The impugned judgment is faultless at law and I endorse the same.
38. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 21st December 2022 and filed herein on even date is devoid of merit. The same is hereby dismissed with costs to the respondents.
39. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 27TH DAY OF FEBRUARY 2024.

G.M.A ONG'ONDO

JUDGE

Present

Ms. Quinter Adoyo learned counsel for the respondents

Mr. G. M. Masese, learned counsel for the appellants – virtually

Terrence, Court Assistant

