



REPUBLIC OF KENYA



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**Okoth & another v Aloo (Environment and Land Appeal E006 of 2023)  
[2024] KEELC 821 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 821 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E006 OF 2023  
E ASATI, J  
FEBRUARY 22, 2024**

**BETWEEN**

**HANNINGTON STEPHEN OKOTH ..... 1<sup>ST</sup> APPELLANT**

**CHARLES HERALD OKOTH ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RAMJUS OPEYO ALOO ..... RESPONDENT**

*(Being an appeal from the judgement and orders of the Principal Magistrate's Court at Maseno (Hon. Mitey J SRM) issued, delivered and dated 31st January 2023 in Maseno PMC ELC NO. 5 OF 2019 Hanington Stephen Okoth & another vs Ramjus Opeyo Aloo)*

**JUDGMENT**

1. The appellants were the Plaintiffs in Maseno PMC ELC NO.5 OF 2019 (the suit) wherein vide the plaint dated 29<sup>th</sup> March, 2019 they had sued the Respondents claiming that they were registered owners of a parcel of land known as Kisumu/Marera/496. That on 24<sup>th</sup> April, 2014, the Respondent trespassed onto the suit land, cut down trees thereon and cultivated a portion thereof and annexed the said portion and prevented the appellants from using the same. The appellants prayed for an order of permanent injunction to restrain the Respondent's acts of trespass.
2. The record of appeal shows that the Respondent, vide the Defendant's statement of Defence and Counter claim dated 3<sup>rd</sup> December, 2019, denied the appellant's claim and averred that he had occupied and cultivated the suit land since the year 2008 and that the appellants were strangers to the suit land. The Respondent counter-claimed for mesne profits, nullification of the title, eviction and costs.
3. The record further shows that the suit was heard before the trial court which vide its judgement delivered on 31<sup>st</sup> January, 2023 found that the appellants had not proved their claim and dismissed the suit and allowed part of the Respondent's counter-claim.



4. Aggrieved by the judgement, the appellants, vide the Memorandum of Appeal dated 16<sup>th</sup> February, 2023, filed the present appeal seeking for orders that the judgement and consequential decree of the trial court delivered on 31<sup>st</sup> January, 2023 be quashed and/or set aside, the defence and counter-claim be dismissed with costs to the appellants, the appellants' prayers in the plaint dated 29<sup>th</sup> March 2019 be allowed and costs of the appeal and of the trial court be provided for.
5. The grounds of appeal as set out in the Memorandum of Appeal are that;
  - a. the learned Magistrate erred in law and in fact by dismissing the Plaintiffs' suit even though it was amply supported by legally competent evidence.
  - b. the learned Magistrate erred in law and in fact by making orders without corresponding prayers and without considering whether they were legally available and not statute barred as at the time of making the orders.
  - c. the learned Magistrate erred in law and in fact by failing to appreciate the evidence of the Appellants.
  - d. the learned Magistrate erred in law and in fact by failing to appreciate that the Respondent's suit and Counter Claim against the Appellants could only be sustained through an amendment of statement of Defence and Counter Claim upon substitution made through an order of the 23<sup>rs</sup> August, 2022.
  - e. the learned Magistrate erred in law and in fact by making a finding that the dealings in the suit parcel of land was marred by irregularities that amounted to misrepresentation, non-disclosure, fraud and dirty dealings within the land registry, while in fact the Defendant (deceased) had not pleaded and/or particularized fraud in his pleadings.
  - f. the learned Magistrate erred in law and in fact by failing to appreciate that parties are bound by their pleadings and thus it was wrong for the trial court to issue judgment on issues that were not pleaded by the Defendant either in the Defence and/or Counter Claim.
  - g. the learned Magistrate erred in law and in fact by holding that the late Michael Abuto Keya held the title to the suit land Kisumu/Marera/2496 in trust for himself and the deceased defendant whereas the same was not pleaded in the defence and/or Counter Claim by the Defendant.
  - h. the learned Magistrate erred in law and in fact by making orders on which neither party had addressed the court on.
  - i. the learned Magistrate erred in law and in fact by failing to appreciate that the deceased reliefs could only be in respect to the half share of the suit property Kisumu/Marera/2496 0.28 Ha and not the entire suit property and thus was wrong to order for cancellation of the entire suit title in favour of the Respondent.
  - j. the learned Magistrate erred in law and in fact by failing to appreciate that the late Michael Abuto Keya was registered as the owner of the suit property on the 13<sup>th</sup> February, 2003 as absolute and thus his proprietorship of the suit property was only a subject to a challenge on fraud and/or illegality within three (3) years as at the date of registration as provided for by the Limitations of Actions Act.
  - k. the learned Magistrate erred in law and in fact by deliberating a matter which even the evidence produced during the hearing showed clearly that the Appellants were genuine.



- l. the learned Magistrate erred in law and in fact by failing to deliver a reasonable judgement based on the evidence adduced before her.
6. The appeal was argued by way of written submission.
7. Written submissions dated 13<sup>th</sup> October, 2023 were filed on behalf of the Appellants by the firm of Odhiambo Opar & Company Advocates Number submissions were filed by the Respondent.

### **Issues for Determination**

8. By their written submissions, the appellant framed the issues for determination in this appeal to be;
  - a. whether or not the trial Magistrate erred in dismissing the Appellants' suit.
  - b. whether or not the trial Magistrate erred in partly allowing the Respondent's counter-claim in terms of paragraphs 13(b), (c) and (d).
  - c. whether or not the Appellants herein were entitled to the relief sought in the plaint dated 29<sup>th</sup> March, 2019.
  - d. which orders to grant in the circumstances?

I adopt these as the issue for determination herein.

### **Analysis and Determination**

9. It is true as submitted by Counsel for the Appellant that this court, as an appellate court of first instance, has a duty to re-evaluate the evidence placed before the trial court and come to its own independent conclusion and that the court is not bound by the findings of fact by the trial court. Guided by this the court proceeds to determine the issues in this appeal on the basis of the evidence placed before trial court.
10. The first issue for determination is whether or not the trial Magistrate erred in dismissing the Appellants' suit. The Appellants pleaded in their plaint dated 29<sup>th</sup> March, 2019 that they were at all material times the registered proprietors of the land parcel known as KISUMU/MARERA/2496 (the suit land). That the Respondent had unlawfully trespassed there onto and prevented the Appellants from accessing and using parts of the land and the appellants had suffered loss and damage. They therefore sought primarily for an order of permanent injunction restraining the Respondent's actions.
11. The record of appeal shows that on behalf of the Appellants only one witness testified and that was the 2<sup>nd</sup> Appellant herein. He adopted the contents of his earlier recorded and filed witness statement filed on 29<sup>th</sup> March, 2010 as his evidence in chief. In the witness statement, he had stated that he is the joint registered owner of the suit land which he transferred into their names on 25<sup>th</sup> April, 2014 and subsequently planted crops and trees thereon and have since then fully utilized the same. That in or about April, 2014, the Respondent without any colour of right unlawfully trespassed onto the suit land cut down trees and planted a portion of the land with crops. That the Respondent was charged in court. That the Respondent has since the said illegal acts prevented the Appellants from accessing, using and entering onto the suit land and the appellants' crops and trees thereon are going into waste hence the suit.
12. The record further shows that the witness (2<sup>nd</sup> Appellant) produced certain documents as exhibits namely; agreement for sale of land dated 9<sup>th</sup> April, 2008, application for consent of Land Control Board, Letter of Consent, Land Transfer form, certificate of official search and valuation of registration for stamp duty.



13. The record further shows that on cross-examination, the 2<sup>nd</sup> Appellant stated that he resided on the suit land. That he acquired the suit land by buying it from Abuto Keya. That the purchase price was KShs.330,000/= for two (2) parcels. That the land was bought by his mother who transferred it to him (2<sup>nd</sup> Appellant) and his brother. That he had the title deed in respect of the suit property. That when buying the land, he did due diligence and that Abuto and his brother were present and that payment for and fencing of the land were done in their presence. That the Respondent started staying there in April, 2014. That the land was transferred to him on 23<sup>rd</sup> April, 2014. That he followed all due procedures in acquiring the land. That valuation for stamp duty was done on 10<sup>th</sup> September, 2008.
14. And on re-examination, he stated that by the date of death of Abuto Keya, they had obtained consent from the Land Control Board and had signed the transfer form. That the decision of the Tribunal was done after the death of Abuto and that payment of the purchase price was completed.
15. The record shows that the original Defendant Ramjus Opeyo Aloo passed on before he testified and was substituted with Yohannes Obara Opiyo who testified as DW1. The evidence placed before the trial court on behalf of the Respondent comprised of the testimony of Yohannes Obara Opiyo (DW1) and Francisah Akinyi Auma (DW2).
16. DW1 adopted the contents of his witness statement dated 3<sup>rd</sup> December, 2019 as his evidence in chief. He had stated in the witness statement that he was a son of Ramjus Opiyo Oloo. That Michael Abuto Keya held part of the suit land in trust for Ramjus Opeyo Aloo and that the land was ancestral land having been bequeathed to Marikus Odongo Njaga who was a brother to Remjus Opeyo Aloo and Michael Abuto Keya. That upon the death of Marikus Odongo Njaga, the land reverted to the family and was sub-divided between Ramjus Opeyo Aloo and Michael Abuto Keya by the family.
17. That Michael Abuto Kenya later registered the entire land in his name and there was a case that ordered the same to be sub-divided between them. That Michael Abuto Keya died on 26<sup>th</sup> September, 2009. That Ramjus Opeyo Aloo has cultivated his portion of the land since 2004 without any interruption and the land is clearly demarcated. That during distribution of the land, it was allocated to Josephine Awino Amolo, Ramjus Opeyo Aloo and Florence Akinyi Osen but that the Appellants had encroached there onto hence the case.
18. DW1 produced Ramjus Opeyo Aloo's witness statement, the decision of Land Dispute Tribunal, Decree dated 17<sup>th</sup> December, 2010 and amended version thereof dated 22<sup>nd</sup> September, 2020, certificate of death in respect of Michael Abuto Keya, Grant of Letters of Administration for the estate of Michael Abuto Keya, Certificate of Confirmation of Grant, Green Card in respect of land parcel No.Kisumu/Marera/1422 as exhibits in the case.
19. He testified that the suit land was never sold. That the Appellants entered the land in the year 2008 and that they used to till it and sought for their eviction. The record shows that on cross-examination DW1 stated that his late father Ramjus Opeyo Aloo had sued Michael Abuto Keya and obtained judgement in 2010. That Abuto Keya was not mentally fit to transact.
20. DW2, Francisca Akinyi Auma, similarly adopted her witness statement dated 3<sup>rd</sup> December, 2019 as her evidence in chief. She stated that she was the widow of Michael Abuto Keya. That they had done succession to the estate of Michael Abuto Keya and that her husband was not mentally sick.
21. After considering this evidence, the record shows that the trial court found that the dealings in the suit land were marred by irregularities that amounts to misrepresentation, non-disclosure, fraud, dirty dealings within the land registry propagated by the subsequent registered owners or their agents upon the demise of the original owner Marikus Odongo Njaga.



22. The trial court further found that the Appellant having been in occupation of the suit parcel were fully aware of the happenings but rather played an instrumental role in the fraudulent dealings in the suit parcel that saw their names registered as joint proprietors of the suit parcel thus disinheriting the bona fide legal beneficiaries. The court proceeded to dismiss the suit and allow the counter-claim in part.
23. The Appellants fault the court for these findings and decision. In ground 1 of the appeal, the Appellants claim that the trial court erred in dismissing the Plaintiffs' suit even though it was amply supported by legally competent evidence. In ground 3, the Appellant fault the court for failing to appreciate the evidence of the Appellants. In ground 5 that the court erred by making a finding that the dealings in the land were marred by irregularities while in fact the deceased defendant (Remjus Aloo) had not pleaded and/or particularized fraud in his pleadings. In ground 11, that the Magistrate erred in deliberating a matter which even the evidence produced showed that the Appellants were genuine.
24. In their submissions in this appeal, the Appellants relied on the provisions of Section 24(c) and 25(1) of the [Land Registration Act](#) on ownership of land and the case of *Elijah Makeri Nyaugwira –vs- Stephen Mungai Njuguna & Another (2013)eKLR* where it was held that title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through corrupt scheme. That the law is extremely protective of title and provides only two instances to challenge title. Relying on the case of *Kuria Kiarie & 2 Others – vs- Sammy Magera [2018]eKLR* and *Kinyanjui Kamau –vs- George Kamau [2015]eKLR* counsel submitted that fraud was not pleaded, particularized or proved to the required standard by the Respondent. That as such, the trial court erred by pronouncing itself and making a finding that the dealings in the suit property were marred by irregularities that amounted to misrepresentation, non-disclosure, fraud and dirty dealings within land registry.
25. It is clear that the basis for dismissal of the Appellants' case was the finding by the trial court that the dealings which led to their registration as proprietors of the suit land were marred with irregularities. It was not in dispute that the Appellants were the registered owners of the suit land. They produced title deed to show this. Their case is that they bought land from Abuto Keya who transferred the land to them. They produced the land sale agreement as exhibit P1. The agreement is dated 9<sup>th</sup> April, 2008. The vendor in the agreement was Abuto Keya ID No.0921652 and the purchaser Seline Angeline Aduogo ID .No.6057986. The property being sold were two parcels of land namely; KSM/Marera/2496 and KSM/Marera/1422. The purchase price was kshs.330,000/- of which Kshs.30,000/- was paid on the execution of the agreement and the balance of Kshs.300,000 was to be paid on or before 30<sup>th</sup> August, 2008. No further document/evidence was produced to show whether the balance was ever paid or not.
26. The green cards produced by the Respondent show that parcel No.1422 was transferred in favour of the purchasers Seline Angeline Aduogo and Simon Jaram Okeo within the same year of purchase on 31<sup>st</sup> July, 2008. The green card in respect of the suit land shows that a restriction was placed on 30<sup>th</sup> May, 2008 pending determination of the land dispute Tribute case No.24 of 2008.
27. There is no evidence that Seline Angeline Aduogo the purchaser transferred her interest in the land to the Appellants. The Appellants were not the purchasers as per the agreement.
28. The Respondent's case was that the suit land was not sold to the Appellants. That when the original Respondent (Ramjus Opeyo) discovered that Abuto Keya had transferred the entire land in his name, he (Ramjus Opeyo) placed a restriction on the land and filed a suit in the Tribunal. If indeed the Appellants had a transfer form signed in their favour as at the year 2008, they must have encountered the restriction at the Land Registry. There is no evidence that the Appellants took any step then to remove the restriction or to find out what the case at the Tribunal was all about.



29. The Tribunal heard the case and made an award. A copy was produced by the Respondents as exhibit. The Tribunal decided that Remjus Opeyo Aloo to remain with the part given to him by the family measuring 28 paces by 164 paces and to get title for the portion. The Respondent also produced a decree showing that the award of the Tribunal was filed in court and judgement entered in terms thereof. The decree has not been challenged.
30. On the basis of the evidence adduced, I find firstly; that there is no evidence that the purchaser of the land (Seline Angeline Aduogo) paid the full purchase price for the purchase of the land. Secondly, that there is no evidence to connect the appellants to the purchaser of the suit land or to show that the purchaser transferred her interest in the suit land to them. Thirdly, that if indeed the appellants were the rightful transferees of the suit land, they were indolent in pursuing registration of the land in their respective names. Fourthly, that there is a valid decree in respect of the suit land awarding a portion thereof measuring 28 paces by 164 paces to the Respondent.

In view of these findings, I hold that the trial court was justified to dismiss the Appellants' suit.

31. The second issue for determination is whether or not the trial court erred in partly allowing the Defendant's count-claim in terms of paragraphs 13(b), (c) and (d). The counter-claim was for:-
- a. Mesne profits.
  - b. The nullification and/or revocation of the titles issued to the Plaintiffs.
  - c. Eviction of the Plaintiffs.
  - d. Costs.

The trial court allowed the counter claim except prayer (a) thereof.

32. The appellant's complaint is that the trial court erred in law and fact by failing to appreciate that the Respondent's suit and Counterclaim could only be sustained through an amendment to the statement of defence and counterclaim through substitution made via order dated 23<sup>rd</sup> August 2022.
33. It was submitted on behalf of the appellants that parties are bound by their pleadings and hence the trial court erred in pronouncing itself on issues of fraud which were not pleaded. Counsel relied on the case of IEBC & another vs Stephen Mutinda Mule & 3 others [2014]eKLR and Adetoun Oladeji (NIG) vs Nigeria Breweries PLC SC 91 of 2002 to support the submissions. Counsel submitted further that the evidence tendered by the Respondent did not support the pleadings hence the trial court should have disregarded it.
34. That the Respondent did not file suit to challenge the title of Abuto Keya on account of fraud within 3 years as per the provisions of section 4 (2) of the *Limitation of Actions Act*. That the proceedings at the Tribunal did not address the issue of fraud. Counsel relied on the case of Bosire Ongero vs Royal Media Services [2015]eKLR and Paul Kirinya vs Delfine Kathiri (2019)eKLR to support the submissions.
35. I have considered the submissions. The record shows that the original Respondent (Ramjus Opeyo Aloo) filed a suit in the Land Dispute Tribunal namely; Kisumu West Land Dispute Tribunal Case No.25 OF 2008.
- The respondent's complaint in the case was that Abuto Keya had registered the entire suit land in his name and was planning to sell the same.
36. I find that on the basis of the evidence produced and particularly the decree in respect of the suit land, the trial court did not err in allowing the counterclaim.



37. The result is that the court finds that the trial court was justified in making the orders it made. This court upholds the judgement of the trial court and dismisses the appeal.

Costs of the appeal are awarded to the Respondent.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Opar for the Appellants.

No appearance for the Respondent.

