



**Omondi v Odongo (Environment and Land Appeal E018 of 2023)
[2024] KEELC 774 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 774 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E018 OF 2023
GMA ONGONDO, J
FEBRUARY 21, 2024**

BETWEEN

ALICE AKINYI OMONDI APPELLANT

AND

GIDEON OBUYA ODONGO RESPONDENT

(An appeal arising from the judgment/decree in Oyugis Senior Principal Magistrate's Court Environment and Land Case number 91 of 2018 by Hon.Celesa Okore, PM on 16th March 2023)

JUDGMENT

1. On 16th March 2023, the trial court (Hon. Celesa Okore, PM) rendered judgment in Oyugis Senior Principal Magistrate's Court Environment and Land Case number 91 of 2018 (The original suit) declaring that land title number West Kasipul/Kodera Karabach/629 (the suit land herein) belongs to the plaintiff/respondent absolutely and an order evicting and restraining the defendant/appellant from interfering therewith issued. That each party to bear their respective costs.
2. The said judgment attracted the instant appeal originated by way of a memorandum of appeal dated 12th April 2023 founded upon twelve grounds inter alia;
 - a. The learned trial magistrate erred in law and fact in disregarding the evidence of the appellant which proved that the suit before the trial court was statute barred by dint of Section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya thus, the trial court had no jurisdiction to hear the suit therein but was only bound to hear and determine the counterclaim.
 - b. The learned trial magistrate misdirected himself by dismissing the appellant's counterclaim against the respondent herein while the evidence on record in favour of the appellant was cogent and/or weighty.



- c. The judgment of the learned trial magistrate contradicted and/or is at variance with the evidence on record with regards to the true identity of the suit land.
 - d. The learned trial magistrate erred in law and fact in disregarding evidence adduced by the appellant as concerns fraudulent transfer of the suit land in the name of the respondent herein who only dangled a title deed in respect of the said parcel of land without explaining by way of documentary evidence as pertains to application for consent and consent from the Land Control Board, transfer instrument and proof of payment of stamp duty etc. that the procedure that followed the alleged transfer was valid and/or lawful.
 - e. The judgment of the learned trial magistrate does not capture the issue(s) for determination, the determination thereof and the reasons for such determination. Consequently, the judgment of the learned trial magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the *Civil Procedure Rules*, 2010.
3. So, the appellant has prayed for the following orders:
- a. The judgment and decree of the learned trial magistrate dated 16th March 2023 be set aside and/or quashed and same be substituted with an order dismissing the respondent's suit at the trial court.
 - b. The honourable court be pleased to vary and/or set aside the limb of the judgment, dismissing the appellant's counter-claim in the trial court and in lieu thereof, grant an order allowing the counter-claim dated 16th June 2019.
 - c. Costs of this appeal and costs incurred in the subordinate court with respect to the main suit and counterclaim be borne by the respondent.
 - d. Such further and/or other orders be granted as this honourable court may deem fit and expedient.
4. The appeal was heard by way of written submissions pursuant to orders of this court given on 30th October 2023.
5. The appellant's counsel, M/s Oguttu Mboya, Ochwal and Partners Advocates, filed submissions dated 22nd January 2024 on 23rd January 2024 and submitted, inter alia, that the appellant proved that she has been in occupation and/or possession of the suit property since 1995, a period in excess of 12 years. That the said possession has been open, quiet, continuous and uninterrupted. That the respondent's suit at the trial court was statute barred. Thus, counsel urged the court to allow the instant appeal as prayed. Counsel relied on various authoritative pronouncements to fortify the submissions, including the case of *Joshua Omiti and another -vs- Josinter Atieno Ouma & another* Kisumu CACA No. 71 of 2018.
6. By the submissions dated 29th January 2024, Kisaka and Company Advocates, learned counsel for the respondent, submitted that the error in the reference number of the suit land is one that can be rectified by way of review. That the appellant did not lead any evidence to illustrate how the respondent's claim is statute barred by dint of the provision of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. Thus, counsel urged the court to dismiss the instant appeal in its entirety with costs to the respondent. Reliance was placed on the case of *Daniel Kimani Ruchine and others -vs- Swift, Rutherford Co. Ltd. And another* (1977) eKLR, to buttress the submissions.
7. It is important to note that the instant appeal being the first one from the trial court, I have the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion



originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters-vs-Sunday Post* (1958) EA 424 at 429.

8. Thus, the respondent who was the plaintiff sued the appellant by way of a plaint (Fast Track) dated 27th July 2017 over the suit land, West Kasipul/ Koderia Karabach/692 for;
 - a. A declaration that the suit property belongs to the plaintiff absolutely and an order evicting and restraining the defendant from interfering therewith.
 - b. Costs
 - c. Interest
9. The appellant denied the claim in her statement of defence and counterclaim dated 16th June 2019. She contended that the suit is time barred. That the respondent fraudulently and illegally registered the suit property in his name, particulars which are contained in paragraph 7 thereof. That she has been in occupation of the suit property for 27 years and is entitled to the same by virtue of the doctrine of adverse possession. In that regard, she prayed that:
 - a. The respondent's suit be dismissed with costs.
 - b. A declaration that the appellant is entitled to the suit land herein by way of adverse possession to issue.
 - c. An order that the respondent's name be removed from the register and be replaced by the appellant's name and a new title to issue.
10. In his evidence, the respondent (PW1) relied on his statement dated 5th June 2019 and PExhibits 1 to 6 namely; a sale agreement dated 10th December 1971, title deed and certificate of official search in respect to the suit property, letter dated 17th March 1975 and the translated copy, letter dated 13th April 1987, demand letter and a copy of the map. He testified that he purchased the suit land from one William Onyach Kaswa (deceased 1) and paid the full purchase price, albeit in installments, after which the transfer was done and a title deed duly issued to him. That he moved to Nairobi and in 2014, discovered that the appellant had encroached onto the suit land. That he reported the matter to the chief and instituted criminal proceedings as well as this suit against the appellant. During cross-examination, PW1 stated that he was absent from the land for 32 years, from 1982 to 2014, when he sought to repossess the same, among other things.
11. The appellant (DW1) relied on her statement on record as well as DExhibits 1 to 4 which include; death certificates for deceased 1 and one Samson Omondi Onyach, letter dated 30th January 2014, letter dated 17th February 2014 and a copy of a charge sheet. She stated that she was allocated the suit land by her father in law, deceased 1, and that she has occupied and utilized the same for 27 years, since 1995. That it was not until 2014 that she realized that the respondent was the registered owner of the suit land.
12. DW2, Wilfrida Achieng Onyach relied on her statement on record which was adopted as part of her evidence. She averred that the suit land is ancestral land which belongs to her late husband, deceased 1. That she occupies the same and is not aware that the same was sold to the respondent herein. In cross-examination, she averred that the respondent has never occupied the suit land nor cultivated it. That she has occupied the same since 1950 when she got married to deceased 1.
13. The trial court's finding was that the respondent proved ownership of the suit land. Further, that the appellant failed to provide proof that she has occupied the suit land for the period of over 27 years.



14. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to:
 - a. Whether the instant appeal is tenable?
 - b. Just orders to issue herein.
15. The appellant contends that the trial court disregarded the evidence of the appellant which proved that the suit before the trial court was statute barred by dint of Section 7 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya. That therefore, the trial court had no jurisdiction to hear the suit but was only bound to hear and determine the counterclaim.
16. Indeed, the appellant (DW1) testified that she has occupied and utilized the suit land for 27 years, since 1995. That it was not until 2014 that she realized that the respondent was the registered owner of it. This was corroborated by the evidence of DW2.
17. On the other hand, the respondent (PW1) stated that he was absent from the suit land for 32 years, from 1982 to 2014, when he sought to repossess the same. He averred that the appellant trespassed onto the suit land in 2014 which prompted him to report the matter to the chief and institute criminal proceedings as well as this suit against the appellant.
18. It is quite instructive that in the case of *Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshwein and another* (2015) eKLR, the Court of Appeal stated that adverse possession dictates that;
 - a. The parcel of land in question must be registered in the name of a person other than the applicant,
 - b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
 - c. The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.
19. Moreover, this court subscribes to the Court of Appeal decision in *Wambugu -vs- Njuguna* (1983) KLR 173 where Chesoni Ag JA (as he then was) stated in part:

“...I now turn to consider whether the respondent acquired title to the suit land by adverse possession. The following passage appears at p 490 of Megarry’s Manual of the Law of Real Property (5th Edn):

“...Before 1833 the word ‘adverse’ was used in a highly technical sense; but today it merely means that there must be possession inconsistent with the title of the true owner and not, for example, possession by a trustee on his behalf. Time does not begin to run merely because the owner abandons possession, for until some other person has taken possession of the land there is nobody against whom the owner is failing to assert his rights. If the owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner’s title ...” (Emphasis laid)
20. It is therefore, my considered view that although the first limb as stated in *Wilson Kazungu Katana case* (supra) was proven, no sufficient evidence was adduced by the appellant to prove open and exclusive possession of the suit land in an adverse manner to the title of the respondent. No other evidence such as photographs were produced in evidence in the suit. Further, the appellant failed to show that she has been in occupation thereof for a period in excess of twelve years. The respondent’s admission that he



was absent from the suit land for 32 years, thereby abandoning possession, is not an indication of when time started running, as observed in Wambugu case (supra). Clearly, in the absence of sufficient proof, the trial court could not find that the claim was statute barred by dint of Section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya.

21. With respect to the appellant's contention that the respondent fraudulently transferred the suit land in his name, it is trite law that fraud and misrepresentation as grounds for impeaching a certificate of title be distinctly pleaded and proven; see Kuria Kiarie & 2 others-vs-Sammy Magera (2018) eKLR.
22. Indeed, the particulars of fraud against the respondent are set out at paragraph 7 of the statement of defence and counterclaim, a pleading in the matter; see also Ndolo-vs-Ndolo (2008) 1KLR (G & F) 742.
23. A court may apply Sections 26 and 80 of the Land Registration Act, 2016 (2012) regarding a title obtained fraudulently upon distinct proof. In Gladys Wanjiru Ngacha-vs-Teresa Chepsaat & 4 others (2018) eKLR where the decision in Lalji Makani (1957) EA 314 at 317 was applied, the Court of Appeal held;

“Allegations of fraud must be strictly proved.....something more than a mere balance of probabilities is required.”
24. In the instant appeal, I note that no evidence was adduced by the appellant at the trial court in support of the allegations thereof. In fact, DW2 stated in cross-examination:

“... I did not establish fraud on the part of the plaintiff but I believe he obtained the land fraudulently...”
25. Regarding the appellant's contention that the judgment of the learned trial magistrate contradicted and/or is at variance with the evidence on record with regards to the true identity of the suit land, I concur with the respondent's counsel that the said error can be rectified through a review done at the trial court pursuant to Section 80 of the Civil Procedure Act, Chapter 21 Laws of Kenya and Order 45 of the Civil Procedure Rules, 2010.
26. The appellant averred that the trial court's judgment contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010. However, it is crystal clear that at page 3 of the judgment, the trial magistrate identified twinned issue for determination thus: whether the plaintiff has proved that he owns the suit parcel of land and whether the defendant has proved her claim on the suit land by adverse possession. The trial magistrate proceeded to make a determination thereof and indicated the reasons for such determination. In light of the foregoing, I find that this ground of appeal is untenable.
27. To that end, it is the finding of this court that the learned trial magistrate was guided by the evidence on record and applied correct principles of law in reaching the impugned judgment. There is no reason to disturb her reasoned judgment and I affirm the same.
28. A fortiori, this appeal is devoid of merit. It is hereby dismissed with costs to the respondent.
29. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 21ST FEBRUARY 2024

G.M.A ONGONDO

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JUDGE



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Present

1. Appellant
2. Respondent
3. Mr. B. Mulisa, learned counsel for the appellant
4. Mutiva, Court Assistant

