



**Jobuyi v Oilo & another (Environment and Land Appeal E018 of 2021)
[2024] KEELC 723 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 723 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E018 OF 2021
SO OKONG'O, J
FEBRUARY 15, 2024**

BETWEEN

WALTER ADE JOBUYI APPELLANT

AND

BENNY PETE OILO 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. W.K. Onkunya
SRM in Kisumu CMC ELC No. 109 of 2018 delivered on 17th March 2021)*

JUDGMENT

Background

1. This appeal is against the judgment and decree of Hon. W.K. Onkunya SRM made in Kisumu CMC ELC No. 109 of 2018 (hereinafter referred to only as “the lower court”) on 17th March 2021. The Appellant herein instituted a suit in the High Court on 1st March 2011 (Kisumu HCCC No. 24 of 2011) against the Respondents seeking several reliefs. The suit was transferred to this court in 2013 and subsequently to the Chief Magistrate’s Court on 19th February 2018 where it was assigned case reference Kisumu CMC ELC No. 109 of 2018.
2. In the lower court suit, the Appellant averred that on 1st March 1994, the Appellant entered into a sale agreement with the 1st Respondent under which the Appellant sold to the 1st Respondent a specific portion of all that parcel of land known as Kisumu/Nyalenda “B”/1460 (hereinafter referred to only as “the suit property”) measuring 21 metres by 22 metres by 19 metres by 26 metres. The Appellant averred that he agreed with the 1st Respondent that they would appear before the Land Control Board for the requisite consent to subdivide and transfer the said portion of the suit property to the 1st Respondent.



3. The Appellant averred that the 1st Respondent without the authority and participation of the Appellant engaged the services of a surveyor who surveyed the suit property and erroneously subdivided the same with the result that the 1st Respondent ended up getting a portion of the suit property far bigger than what was agreed between the parties. The Appellant averred that the 1st Respondent unilaterally proceeded to obtain the consent of the Land Control Board to subdivide the suit property and fraudulently executed the mutation form on behalf of the Appellant with the said wrong dimensions of the portion of the suit property that was sold to him.
4. The Appellant averred that the 1st Respondent subsequently obtained consent of the Land Control Board to transfer the said portion of the suit property to his name without the 1st Respondent's authority. The Appellant averred that the 1st Respondent ended up unlawfully and fraudulently obtaining a title for the said portion of the suit property which was registered as Kisumu/Nyalenda 'B'/1502 with the erroneous measurement of 0.05 of a hectare (hereinafter referred to only as "Plot No. 1502"). The Appellant averred that he only learnt of the fraudulent schemes by the 1st Respondent when the 1st Respondent commenced the process of fencing and developing Plot No. 1502. The Appellant pleaded several particulars of fraud against the 1st Respondent. The Appellant averred that there was a need to resurvey the suit property so that the 1st Respondent could get a portion thereof in conformity with the terms of the agreement executed on 1st March 1994 between the Appellant and the 1st Respondent. The Appellant sought judgment against the Respondents for; a declaration that Plot No. 1502 measuring 0.05 of a hectare was erroneous, revocation of the title for Plot No. 1502 and a resurvey of the suit property, rectification of the register for Plot No. 1502 to reflect the actual measurement thereof in terms of the agreement executed on 1st March 1994 between the Appellant and the 1st Respondent and the costs of the Suit.
5. The 1st Respondent entered an appearance and filed a statement of defence in the lower court on 1st April 2011. The 1st Respondent admitted that through a sale agreement dated 1st March 1994, he bought a portion of the suit property measuring 21 metres by 22 metres by 19 metres by 26 metres from the Appellant at a consideration of Kshs. 60,000/- which was paid in full. The 1st Respondent averred that at the time he was buying the said portion of the suit property, the suit property was registered in the joint names of four brothers namely, Walter Ade Jobuyi (the Appellant), James A. Jobuyi, George Otieno Jobuyi and Samuel Odoyo Jobuyi as tenants in common in undivided shares. The 1st Respondent averred that two of the said co-owners, James A. Jobuyi and George Otieno Jobuyi had passed on.
6. The 1st Respondent averred that it was the duty of the Appellant and his brothers under the said agreement of sale to apply for the consent of the Land Control Board to subdivide the suit property. The 1st Respondent averred that it was the Appellant and his brothers aforementioned who; (i) applied for and obtained the consent of the land control board to sub-divide the suit property, (ii) instructed a surveyor to survey and sub-divide the same, (iii) executed the mutation form jointly, and (iv) obtained two separate titles (Kisumu/Nyalenda "B"/1501 and 1502) out of the sub-division. The 1st Respondent averred that it was the Appellant who applied for and obtained the consent of the Land Control Board to transfer Plot No. 1502 to the 1st Respondent.
7. The 1st Respondent averred that the suit property was incapable of being resurveyed as the same ceased to exist in 1994 when the same was subdivided into land parcel Nos. 1501 and 1502, and further; (i) land parcel No. Kisumu/Nyalenda "B"/1501 had been subdivided further into two, being land parcel Nos. Kisumu/Nyalenda "B"/1595 and 1596; and (ii) land parcel No. Kisumu/Nyalenda "B"/1595 had in turn been subdivided further into land parcel Nos. Kisumu/Nyalenda "B"/ 2082, 2083 and 2084. The 1st Respondent averred that the Appellant had no authority, capacity or *locus standi* to institute



- any suit concerning the suit property since; (i) the said parcel of land was registered in the joint names of Walter Ade Jobuyi, James A. Jobuyi, George Otieno Jobuyi and Samuel Odoyo Jobuyi as tenants in common in undivided shares; and (ii) two of the said co-owners, namely, James A. Jobuyi and George Otieno Jobuyi had since passed on, and the Appellant was not the administrator of their respective estates.
8. The 1st Respondent averred further that the lower court suit was misconceived and bad in law. The 1st Respondent averred that the suit was *res judicata* in that the same issues raised in the suit had been raised earlier in the following suits;
- (i) Winam RMCC No.177 of 2003 (*Benny Pete Oiko -v-Dennis Nyandusi and Kennedy Mayaka*).
 - (ii) Kisumu East/West District Land Disputes Tribunal Case No.29 of 2009 (*Walter Ade Jobuyi-v-Benny Pete Oiko*)
 - (iii) Nyanza Land Disputes Appeals Committee Case No.26 of 2010(*Walter Ade Jobuyi-v-Benny Pete Oiko*)
 - (iv) Kisumu CMC Land Case No. 2 of 2011 (*Walter Ade Jobuyi-v-Benny Pete Oiko*)
9. The 1st Respondent contended that the Appellant's suit was barred by the statute of limitation as the 1st Respondent had been in continuous and uninterrupted possession of Plot No. 1502 since 1st March 1994; a period exceeding 17 years. The 1st Respondent averred that the Appellant's title if any to any portion of Plot No. 1502 had been extinguished by operation of law. The 1st Respondent prayed that the Appellant's suit be dismissed with costs.
10. The 2nd Respondent entered an appearance and filed a statement of defence on 26th October 2011 denying the Appellant's claim in the lower court in its entirety. The 2nd Respondent averred that it was a stranger to the matters pleaded in the Appellant's plaint.
11. The lower court heard the Appellant's suit. In a judgment delivered on 17th March 2021, the lower court found no merit in the suit and dismissed the same with costs to the Respondents. The lower court found that the Appellant had failed to prove the allegations of fraud pleaded against the 1st Respondent. The court found further that the Appellant did not prove that there was illegality and/or fraud in the transfer of Plot No. 1502 to the 1st Respondent and that the 1st Respondent participated in the alleged fraud and/or illegality. The lower court held that the Appellant having admitted that he and his brothers signed the mutation form in which the area of Plot No. 1502 was indicated as 0.05 of a hectare, the 1st Respondent could not turn around and claim that the mutation was fraudulent.

The Appeal

- 12 The Appellant was aggrieved by the decision of the lower court and filed this appeal on 8th April 2021. In his Memorandum of Appeal dated 7th April 2021, the Appellant challenged the lower court's judgement on the following grounds;
- 1. The Learned Magistrate erred in law and fact by failing to find that sufficient cause had been demonstrated by the Appellant.
 - 2. The Learned Magistrate erred in law and fact in holding that the Appellant had not adduced evidence to prove the allegations of fraud on the part of the 1st Respondent.



3. The Learned Magistrate erred in law and fact in failing to consider that on 1st March 1994, the Appellant entered into a formal agreement for the sale of the suit property in which he specifically sold to the 1st Respondent a portion thereof measuring 21metres by 22metres by 19metres by 26metres.
4. The Learned Magistrate erred in law and fact in failing to consider that the size of the portion of the suit property that the Appellant sold to the 1st Respondent was not in dispute.
5. The Learned Magistrate erred in law and fact in holding that the Appellant had not adduced evidence to prove that the 1st Respondent participated in a fraudulent transfer of the suit property even after the 1st Respondent expressly admitted the size of the portion that was sold to him by the Appellant in his defence and thus it would have been only fair that the 1st Respondent got only what he bought and paid for.
6. The Learned Magistrate erred in law and fact in failing to consider that the 1st Respondent without any authority or participation of the Appellant, enlisted the services of his surveyor who surveyed the suit property and erroneously obtained a portion thereof that was bigger than what was sold to him by the Appellant.
7. The Learned Magistrate erred in law and fact in failing to consider that there was no evidence produced by the 1st Respondent that the Appellant ever attended or participated in any proceedings before the Land Control Board that was to issue a consent to subdivide the suit property into Plot No. 1501 and Plot No. 1502 with the 1st Respondent holding a title to Plot No. 1502 that was much bigger than what he bought from the Appellant.
8. The Learned Magistrate erred in law and fact in holding that the Appellant had not adduced evidence to prove that there was illegality and/or fraud in the transfer of Plot No. 1502 to the 1st Respondent.
9. The Learned Magistrate erred in law and fact in holding that the Appellant had not proved his case on a balance of probabilities considering the fact that the 1st Respondent obtained unilaterally consent of the Land Control Board to subdivide the suit property and fraudulently executed the mutation form on the Appellant's behalf reflecting the wrong dimensions of the land sold to him and consequently further obtained consent to transfer the land without the Appellant's authority that resulted into him obtaining a title for the land sold to him with erroneous measurements thus unlawfully appropriating a portion of the suit property that belonged to the Appellant.
10. That the Learned Magistrate erred in law and fact by dismissing with no orders as to costs (sic) the Appellant's suit, regardless of the strong evidence presented before the court for its success.
13. The Appellant prayed that the Appeal be allowed with costs and that the judgment dated 17th March 2021 by the lower court be set aside with costs.

The Submissions

14. The Appeal was argued by way of written submissions. The Appellant filed submissions dated 18th July 2023. The 1st Respondent filed submissions dated 8th September 2023 while the 2nd Respondent filed submissions dated 30th November 2023. The Appellant submitted that the lower court rendered a judgment that was too simplistic. The Appellant submitted that the lower court completely failed to evaluate the entire evidence and material that was placed before it and the submissions filed by both parties thereby occasioning a serious miscarriage of justice. The Appellant submitted that the judgment



did not clearly demonstrate the reasoning based on the evaluation of the evidence and material placed before the lower court to justify the court's findings against the Appellant.

15. The Appellant referred the court to his Submissions before the lower court and submitted that the dispute that was before that court was the exact portion and size of the land that the Appellant sold to the 1st Respondent and which he intended to transfer to him according to the agreement of sale between the parties. The Appellant submitted that the 1st Respondent admitted the size of the land that was sold to him by the Appellant. The Appellant submitted that following this admission, the next issue that the lower court was supposed to determine was whether the size of the portion of the suit property that was registered in the name of the 1st Respondent (Plot No. 1502) was the same as the admitted size. The Appellant submitted that the parties agreed that the size of the portion of the suit property (Plot No. 1502) that was registered in the name of the 1st Respondent was bigger than the size that was agreed upon by the parties. The Appellant submitted that what he sought from the lower court was to have the suit property resurveyed to establish whether the portion of the suit property that was fenced by the 1st Respondent (Plot No. 1502) was bigger than the land that was agreed upon by the parties and if so, for the 1st Respondent's title to be revoked so that the 1st Respondent could have a portion of the suit property with the agreed size.
16. The Appellant submitted that the lower court completely ignored the evidence by the Appellant in its bid to justify its assertion that the size of the land that was transferred to the 1st Respondent was much smaller than what was sold to the 1st Respondent. The Appellant submitted that the 1st Respondent did not act in good faith and took advantage of the Appellant's age and ignorance. The Appellant submitted that the appeal had merit and should be allowed.
17. The 1st Respondent submitted that the dispute before the lower court was over the exact size of the land which the Appellant sold to the 1st Respondent. The 1st Respondent submitted that to determine this issue, the Appellant had maintained throughout, firstly that the survey was carried out without his authority and participation and secondly, that he did not sign the Mutation Form. The 1st Respondent submitted that the truth was that it was the Appellant who pointed out to the surveyor the portion of the suit property that he was selling to the 1st Respondent. The 1st Respondent submitted that the Appellant subsequently signed the mutation form with his three brothers and obtained the requisite consent to subdivide the suit property and transfer a portion thereof to the 1st Respondent. The 1st Respondent submitted that the Appellant did not prove the allegations of fraud that he pleaded against the 1st Respondent. The 1st Respondent submitted that the dimensions of the land that the Appellant sold to the 1st Respondent were pointed out to the surveyor by the Appellant who took the surveyor to the suit property and that that was the land that was transferred to the 1st Respondent. The 1st Respondent submitted that the appeal lacked merit and should be dismissed with costs to the Respondents.
18. The 2nd Respondent cited Section 107 of the *Evidence Act* and submitted that the lower court held that the Appellant failed to prove fraud against the 1st Respondent in the transfer of Plot No. 1502 to the 1st Respondent. The 2nd Respondent submitted that no evidence was adduced to prove the allegations of fraud to the required degree or at all. The 2nd Respondent submitted that the Appellant alleged that there was a discrepancy between the size of the portion of the suit property that he sold to the 1st Respondent and the size of the portion of that property that was transferred and registered in the name of the 1st Respondent. The 2nd Respondent submitted that it was the Appellant who instructed a surveyor to carry out the subdivision of the suit property and pointed out to the surveyor on the ground the measurement of the portion of the said property that he sold to the 1st Respondent. The 2nd Respondent submitted that the Appellant also signed the mutation form with his brothers who



were the co-owners of the suit property. The 2nd Respondent submitted that the lower court was right in its finding that the Appellant had failed to prove his case. The 2nd Respondent submitted that the Appellant failed to prove that there was illegality in the transfer of Plot No. 1502 to the 1st Respondent.

19. The 2nd Respondent submitted that the size of Plot No. 1502 was correct and that the Appellant did not contest the surveyor's measurements. The 2nd Respondent submitted that the Appellant had the opportunity to contest the disparities in the measurements if any by refusing to sign the mutation form. The 2nd Respondent termed the contest over the size of Plot No. 5102 an afterthought and urged the court to dismiss the appeal with costs to the Respondents.

Analysis and Determination

20. 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 to reconsider and re-evaluate the evidence on record and 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 stated 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.”

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] EA 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.

21. While re-evaluating the evidence, this court will also not interfere with the findings of fact by the trial court unless in the court's opinion, 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.
22. I will consider all the Appellant's grounds of appeal together as they raise only one issue namely, whether the lower court erred in its finding that the Appellant had not proved his case against the Respondents. According to the agreement of sale dated 1st March 1994 between the Appellant and the 1st Respondent, the Appellant sold to the 1st Respondent a portion of the suit property measuring “approximately 21 metres by 22 metres by 19 metres by 26 metres”. The suit property had to be surveyed and subdivided so that the portion thereof measuring approximately 21 metres by 22 metres by 19 metres by 26 metres could be excised and transferred to the 1st Respondent. The exercise required a surveyor to go to the ground and take the actual measurements of the portion of the suit property that was sold to the 1st Respondent by the Appellant and convert such measurements into hectares. I have looked at the mutation form at page 55 of the record of appeal through which the suit property was subdivided by the surveyor. In his sketch drawing, the surveyor who was taken to the suit property by the Appellant according to the evidence on record gave the measurements of the land that was sold by the Appellant to the 1st Respondent as 21metres by 25 metres by 19metres by 33 metres. There is no doubt that these measurements were not the same as those contained in the agreement of sale. There



is no evidence on record on how the Appellant and the 1st Respondent arrived at the measurements of 21 metres by 22 metres by 19 metres by 26 metres in their agreement of sale. However, it is clear in the said agreement of sale that the measurements were approximate. What that meant was that they could decrease or increase during the survey. The fact that the measurements of some of the sides of the portion of the suit property that was sold to the 1st Respondent by the Appellant increased during the subdivision survey was not hidden but was expressly noted on the mutation form. The said mutation form was signed by Appellant.

23. The Appellant's contention that the measurements of the portion of the suit property that he sold to the 1st Respondent as indicated in the agreement of sale was different from the measurements of the same portion of land in the title that was issued to the 1st Respondent for Plot No. 1502 following the survey and subdivision of the suit property was correct. The issue that the lower court was to determine was whether the differences in the two sets of measurements were a result of fraud and/or illegal conduct by the 1st Respondent. The lower court considered the evidence that was adduced by both parties and found that the Appellant had failed to prove fraud or any illegality in the subdivision of the suit property and transfer of Plot No. 1502 to the 1st Respondent. I have carefully considered the evidence that was before the lower court. As I have already mentioned, the measurements of the land that was being sold, set out in the sale agreement between the parties were approximate. That left an allowance for the same measurements to be adjusted downwards or upwards upon survey. In this case, some of the measurements were adjusted upwards during the survey. The dimensions of the land that were adjusted upwards were shown in the mutation form. The mutation form contained the ground measurements taken by the surveyor when the Appellant showed him the land that he had sold to the 1st Respondent. The burden was on the Appellant to prove that the adjustments of the dimensions of the land that he sold to the 1st Respondent were carried out illegally or fraudulently. I agree with the lower court that with the Appellant's admission that he was the one who took the surveyor to the suit property and showed him the portion thereof that he had sold to the Appellant and that he signed the mutation form after the surveyor took the measurements of the said parcel of land, the Appellant did not prove fraud or illegality in the said survey and the subsequent transfer of the portion of the suit property namely, Plot No. 1502 to the 1st Respondent. The mere fact that the size of Plot No. 1502 was different from the size of the land that the Appellant sold to the 1st Respondent according to the agreement of sale was not evidence of fraud since the size in the agreement of sale was approximate and as such could go up or down. In this case, the size increased. That was possible under the agreement. It was up to the Appellant to demonstrate that the increase in the size of the parcel of land was beyond what was expected under the agreement and that the same came about as a result of fraud or illegality committed by the Respondents. The Appellant had contended that the 1st Respondent unilaterally engaged a surveyor, subdivided the suit property, signed the mutation form on behalf of the Appellant and had Plot No. 1502 transferred to his name after obtaining the consent of the Land Control Board without involving the Appellant. At the trial before the lower court, all these allegations were proved wrong. It is my finding that on the evidence that was before the lower court, there was no basis upon which the court could have held that the Appellant had proved his case against the Respondents. In *R.G. Patel v. Lalji Makanji* [1957] EA 314, the court stated that:

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

24. Upon my independent evaluation of the evidence on record, I have reached the same conclusion as the lower court. I therefore find no reason to disturb the lower court judgment.



Conclusion

25. For the foregoing reasons, I find no merit in the appeal before me. The appeal is dismissed with costs to the Respondents.

DATED AND DELIVERED AT KISUMU ON THIS 15TH DAY OF FEBRUARY 2024

S. OKONG'O

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JUDGE

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

Mr. M. C. Ouma for the Appellants

Mr. M. J. Orengo for the 1st Respondent

N/A for the 2nd Respondent

Ms. J. Omondi-Court Assistant

