



REPUBLIC OF KENYA



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**Atieno & another v Nyasita (Civil Appeal 107 of 2019)
[2025] KECA 428 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KECA 428 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 107 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 28, 2025**

BETWEEN

KENNEDY OCHIENG ATIENO 1ST APPELLANT

GRADUS ATIENO OTHIM 2ND APPELLANT

AND

ELISAPHAN OMOLLO NYASITA RESPONDENT

*(Being an Appeal from the judgment of the Environment and Land
Court at Migori (Ongondo, J.) dated 20th November, 2018 in Migori
ELC Case No. 218 of 2017 Formerly Kisii HCCC No. 46 of 2010)*

JUDGMENT

1. This appeal arises from the judgment of the Environment and Land Court (Ongondo, J) dated 20th November, 2018. The judgment relates to a suit filed by Elisaphan Omollo Nyasita (Elisaphan), the respondent herein. The subject of the suit is a property known as LR No. Kamagambo/Kamwango/1115 (herein suit property).
2. In the suit, which was originally filed in the High Court, Elisaphan sought judgment jointly and severally against Gradus Atieno Othim (Gradus) and Kennedy Ochieng Atieno (Kennedy) as follows:
 - i. a declaration that he (Elisaphan) is the registered and or lawful owner of the suit property;
 - ii. an order of eviction and demolition of the structures erected on the suit property by Gradus and Kennedy;
 - iii. a permanent injunction restraining Gradus and Kennedy by their agents, servants, or anyone claiming under them from re-entering, trespassing, cultivating, building or in any way interfering with the suit property;



- iv. general damages for trespass;
 - v. Costs of the suit be borne by Gradus and Kennedy.
3. Elisaphan's claim as pleaded in his plaint, is that, on 8th October 1988, he purchased the suit property from one Mathew Opiyo Othim, who is deceased (herein late Mathew). Elisaphan became the absolute registered proprietor of the suit property as per title deed issued to him on 19th October 1988. The late Mathew was an uncle to Gradus and a father to Kennedy.
 4. On 15th April, 2004, Kennedy and Gradus trespassed upon the suit property and destroyed the common boundary features between the suit property and property known as LR No. Kamagambo/Kamwango/198, which is registered in the name of Gradus. Elisaphan lodged a complaint at Rongo Police Station which resulted in Gradus and Kennedy being arraigned in Rongo Senior Resident Magistrate's Court and charged with malicious damage to property in Criminal Case No. 1122 of 2004.
 5. Pursuant to a complaint lodged by Elisaphan, the District Land Registrar, and the Surveyor of Migori and Rongo Districts, on 14th October 2009, visited, ascertained and established the boundary to the suit property. Elisaphan contended that as a result of the acts of trespass by Gradus and Kennedy, he has been dispossessed and deprived of a substantial portion of the suit property, hence the suit.
 6. In their joint defence, Gradus and Kennedy denied Elisaphan's claim, maintaining that he procured registration as a registered proprietor of the suit property through fraud. They indicated the particulars of fraud as the forging of the signature of the late Mathew by Elisaphan, and causing the land to be transferred to him. Gradus and Kennedy also claim that they have had uninterrupted and continuous occupation of the suit property since they were born. They therefore denied trespassing onto the suit property, and prayed for Elisaphan's suit to be dismissed as he was not entitled to the orders sought.
 7. The suit was transferred to the ELC at Kisii where hearing commenced before Okong'o, J., who heard the evidence of Elisaphan and his two witnesses. The witnesses were Edward Kennedy Bosire Mose (Mose), who was at the material time the Land Registrar Migori County, and John Agoro (Agoro), who was at the material time the Chief of North Kamagambo Location.
 8. Elisaphan testified that the late Mathew sold him a portion of his land which was Kamagambo/Kamwango/199. The land was subdivided and the portion sold to Elisaphan registered as Kamagambo/Kamwango/1115, which is the property in dispute. He produced a title deed in his name. He also produced a search certificate which showed that the property was registered in his name and the Green Card which showed that the suit property is a subdivision of plot No. 119. The suit property borders parcel No. 198 which belongs to Gradus, a brother to the late Mathew. He explained how Gradus and Kennedy trespassed onto his land and removed the boundary beacons.
 9. He reported the matter to Rongo Police Station, and Gradus and Kennedy were arrested and charged, but were subsequently acquitted; and he was advised to sort out the boundary issue. He therefore referred the matter to the Land Registrar who came with a surveyor and fixed the boundary and also gave a report. However, Gradus and Kennedy did not respect the boundary, but entered his land and started cultivating, and have continued in occupation. He claimed that he had suffered injury as he had been unable to cultivate the suit property from where he used to get twenty-four to twenty-five bags of maize two seasons in a year. He therefore prayed for damages. He denied forging the signature of the late Mathew and maintained that the late Mathew signed the documents by himself before the Chairman of the Land Board, and that no complaint arose during the lifetime of the late Mathew.



10. Mose, who produced a copy of the land register for the suit property, testified that it was a subdivision of Plot No. 199, which was originally registered in the name of the late Mathew. He produced a copy of the Land Control Board Consent for the subdivision, as well as the mutation forms. He also produced a copy of a consent for transfer of the suit property to Elisaphan and a copy of the transfer which was duly executed by the late Mathew and Elisaphan, before the D.O. Rongo Division. He testified that following a complaint, Mr. Joel Atuti Ogise, who was Land Registrar before him, visited the site on 14th October, 2009, in the presence of both Elisaphan and Gradus, and observed that the boundary to the suit property had been uprooted.
11. Agoro testified that the appellant complained to him about his boundary features that had been interfered with and uprooted by Gradus and Kennedy. He referred Elisaphan to the Land Registrar Migori and on 14th October, 2009, the Land Registrar visited the site accompanied by two Administration Police Officers. He testified that he accompanied them to the site of the disputed boundary. The Land Registrar established the boundary but later Elisaphan complained that the re-established boundary had been uprooted.
12. Hearing was adjourned; and on 7th November, 2016, Mr. Justice Okong'o, having been transferred, the parties sought directions from the court and directions were given for the proceedings to be typed. The matter was then transferred to the Migori Environment and Land Court, where on 29th May, 2018, defence hearing proceeded before Ongondo, J.
13. Kennedy was the only witness who testified for the defence. He testified that he is a farmer on LR No. Kamagambo/Kamwango/199, and that he cultivates the whole of that land. He stated that the land was originally Kamagambo/Kamwango/198, which belonged to the late Mathew, his uncle who died in 1996. He relied on his statement that he had filed in support of the defence, wherein he maintained that the subdivision of his uncle's land and the registration of the suit property in the name of Elisaphan were done fraudulently because his uncle did not sign any document for sale of the land to Elisaphan and that the purported signature on the document was a forgery.
14. Kennedy testified that the title deed purportedly issued in the name of Elisaphan was also a forgery. He pointed out that there was contradiction in the report of the Land Registrar and the Chief, as to whether Gradus was present during the site visit.
15. In his judgment, the learned Judge identified three issues for determination. These were whether Elisaphan is the lawful registered proprietor of the suit property; whether Gradus and Kennedy have trespassed into the suit property; and whether Elisaphan is entitled to the reliefs sought in the plaint.
16. The learned Judge found that Elisaphan had proved that he was the registered owner of the suit property; that neither Gradus nor Kennedy had any locus standi with regard to the estate of the late Mathew as they did not have any letters of administration for the estate of the late Mathew; and that Gradus and Kennedy had failed to prove the alleged fraud against Elisaphan. The learned Judge concluded that Gradus and Kennedy were in unlawful occupation of Elisaphan's land, and therefore were liable to him for the tort of trespass. The learned Judge awarded damages for trespass at Kshs.75,000/-, and issued a permanent injunction against Gradus and Kennedy restraining them from interfering with the suit property.
17. Being aggrieved, Gradus and Kennedy filed an appeal before this Court raising five grounds which we reproduce herein verbatim as follows:
 - i. the trial Judge erred in failing to appreciate that the plaint of the plaintiff (now the respondent) failed to establish a prima facie case with a probability of success;



- ii. the trial Judge erred in holding that there was evidence of purchase while at the same time conceding that he could not understand the contents of the alleged sale agreement (sic) which was unable to be read and comprehend at the cross examination of PW1;
 - iii. the trial Judge erred in failing to appreciate that the suit was incompetent as the same should have been dismissed for terrible contradictions and forgery;
 - iv. the trial Judge erred in pronouncing judgment favouring the plaintiff on the basis of alleged sale agreement when the same if it ever existed was null and void under the *Land Control Act* (Cap 302);
 - v. the trial judgment was bad in law and against the weight of evidence.
18. In support of the appeal, Gradus and Kennedy filed written submissions prepared by their advocate SM Sagwe & Company Advocates. In the submissions, it is contended that Elisaphan did not produce the sale agreement in evidence and the learned Judge therefore erred in relying on it; that since the land purchased by Elisaphan was said to be 1.5 acres, and the price was indicated in the agreement as 5,000/- per acre, Elisaphan could not have paid 30,000/- for the suit property as he claimed; that the letter of consent showed the consideration as Kshs.10,000/-; that the signature on the sale agreement was suspicious; that the signature on the transfer form did not tally with the signature on the sale agreement and this was evidence of fraud; and that the learned Judge therefore erred in failing to find that Elisaphan did not establish a prima facie case. Counsel for Gradus and Kennedy concluded that the evidence adduced by Elisaphan and his witnesses, was “short of glory and full of contradictions and the same cannot be entertained by this higher court on the grounds of irregularities and fraud.”
19. The respondent also filed written submissions through his counsel, M/S Oguttu, Mboya, Ochwal & Partners. In the submissions, it was conceded that it was the respondent’s legal duty to prove his case on a balance of probability; that the respondent adduced evidence which established that he purchased the suit property from the late Mathew in 1998; that although the sale agreement was not legible, Mose, the Land Registrar Migori who testified, produced the land register and explained that the suit property is a subsequent subdivision of LR No.Kamagambo/Kamwango/199, which originally belonged to the late Mathew.
20. In addition, it was submitted that Mose produced the necessary documents from the land registry including the transfer instruments and confirmed that all necessary procedures were followed, before the transfer of the suit property was registered in favour of Elisaphan; and therefore, Elisaphan was established as the registered proprietor of the suit property. The case of James Kagunya -vs- Boniface K. Muli & 3 others was relied on in support of the contention that the appellant had established that the process leading to his registration as the proprietor of the suit property was procedural and legal.
21. As regards the trespass, it was submitted that there was clear evidence that the suit properties share a common boundary with the parcel of land belonging to Gradus, and in his evidence, Agoro confirmed that there was a dispute despite the boundary determination, and that Gradus and Kennedy had interfered with the boundary and were still in occupation of the suit property carrying out agricultural activities as at the time he was testifying. It was submitted that Gradus and Kennedy had no locus standi to plead fraud on behalf of the estate of the late Mathew; and that in any case there was no counter claim lodged in regard to the alleged fraud.

Vijay Morjaria -vs- Nansingh Madhusingh Darbar & another [2000] eKLR, was cited for the proposition that to succeed in a claim for fraud, the appellant needed not only to plead and particularize it, but also lay a basis by way of evidence upon which the court would make a finding. The Court was therefore urged to find the appeal unmerited and dismiss it with costs.



22. This being a first appeal, and as has been reiterated in several decisions of this Court, it is this Court’s primary duty to subject the evidence on the record to afresh evaluation in order to come to its own independent conclusion, on the evidence and the law. This is the purport of Rule 31(1)(a) of the Court of Appeal Rules.

23. Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates [2013] eKLR, is one case in which this Court has reiterated its duty as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:

‘On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself, and draw its

own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly 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.’”

24. Having considered the record of appeal, the grounds of appeal, the contending submissions and the law, three substantive issues present themselves for determination. These are, whether Elisaphan established that he is the lawful registered and rightful owner of the suit property; and if so, whether Kennedy and Gradus unlawfully trespassed or encroached onto the suit property; and whether the orders issued by the learned Judge were proper.

25. Under Sections 107 and 108 of the *Evidence Act*, the onus is on the respondent to establish the proprietorship of the suit property and the alleged encroachment by Gradus and Kennedy, in order to prove the tort of trespass.

26. We have already adverted to the evidence that was adduced before the learned Judge. The record confirms that in his judgment the learned Judge, considered and evaluated the evidence adduced before him, and considered the contents of the documents placed before the court, ultimately making his independent determination. This is how the learned Judge rendered himself:

19. It is evident that PW1 followed laid down procedure including Pexhibits 6 to 8 in the purchase of the suit land from the deceased. He obtained Pexhibit 1 which is held as conclusive evidence of proprietorship in respect of the suit land by virtue of Sections 26 and 30 of the Land Registrar(sic) Act, 2012...

.....

22. During cross examination DW1 stated, inter alia:

‘it was registered in the name of my uncle Opiyo Mathew Othim, he is deceased. I have not obtained any letters of administration regarding the estate of Opiyo Mathew Othim.’

23. To that extent, am of the considered view that PW1 is the registered owner of the suit land. Since neither the 1st defendant nor DW1 is an appointed administrator of the estate of the deceased or grant thereof probate as envisaged under Sections 79 and 82 of the Laws of



Succession Act [Cap 160 Laws of Kenya] they have no locus standi with regard to the estate of the deceased; see *Omari Kaburu vs Industrial and Commercial Development Corporation* [2007] eKLR, *Charles Nyambati Case (Supra)*.

24. Was PW1 registered as owner of the suit land through lawful process? PW relied on land transfer instruments among them Pexhibit 4,5,6,8 and 9 in obtaining plaintiff's exhibit 1 as revealed in Plaintiff's exhibit 2 and 3 which show that he is the lawful registered owner of the suit land...
26. PW1 denied allegation of fraud against him, the material placed before this court fails to thwart the evidence of PW1 to the effect that he obtained Pexhibit 1 by lawful process. The defendants have failed to prove the allegations of fraud against him on a balance higher than a balance of probability..."
27. As per the certificate of title produced by Elisaphan, he was registered as the absolute proprietor of the suit property on 19th October, 1988, under the Registered *Land Act* (now repealed). Section 143(1) of the Registered *Land Act* gives the Court powers to 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 made or omitted by fraud or mistake. Section 143(2) of that section provides that:

“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.”
28. Of relevance is Section 24 and Section 26 of the *Land Registration Act* which is the statute that replaced the Registered *Land Act*. Section 24(a) of the *Land Registration Act* provides that:
 - 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;”
29. Under Section 26 of the *Land Registration Act*, a certificate of title in regard to land is conclusive evidence of ownership of the land. That section provides as follows:
 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.”
30. Since Elisaphan is the registered proprietor of the suit property, his title can only be impeached if it is established that the title was acquired through fraud, mistake or misrepresentation, illegally, unprocedurally or through a corrupt scheme.



31. In *Ardhi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) KECA 816, this Court (Waki, Nambuye Kariuki JJA) observed as follows:
- “It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond a reasonable doubt.”
32. This means that Gradus and Kennedy had to prove the fraud on that higher standard of above a balance of probabilities but not beyond reasonable doubt. From the evidence on record, Kennedy and Gradus did not challenge the validity of Elisaphan’s title deed or the Green Card of the suit property that was produced as exhibits. They challenged the purported transfer and registration of Elisaphan as the proprietor of the suit property contending that the same is irregular because the late Mathew’s signature was forged. Apart from the fact that Gradus and Kennedy had no locus standi to question the signature of the late Mathew, they did not produce any evidence to show that the purported signature of the late Mathew was a forgery. That could only have been done through expert evidence and no expert was called to testify.
33. Pursuant to Section 26 of the *Land Registration Act*, since there was no proof of fraud, illegality, or misrepresentation in the acquisition of Elisaphan’s title to the suit property, nor did Gradus and Kennedy demonstrate any right to have the title of Elisaphan rectified under Section 143 of the former Registered *Land Act*, the certificate of title produced by Elisaphan was conclusive proof of Elisaphan’s ownership of the suit property as his title remains absolute and indefeasible. In the circumstances, the learned Judge cannot be faulted for so holding.
34. As regards Elisaphan’s claim anchored on the tort of trespass Black’s Law Dictionary defines trespass as follows:
- “An unlawful act committed against the person or property of another esp., wrongful entry on another’s real property.”
35. In *Charles Ogejo Ochieng vs. Geoffrey Okumu* [1995] KECA 169 KLR, this Court (Akiwumi, Tunoi, Lakha JJA) described trespass in the following manner:
- “Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. See Halsbury’s Laws of England 3rd edition Volume 38 at pg 744.”
36. It is evident from the above that Elisaphan had title to the suit property and was in possession before the alleged act of trespass. The fact that the suit property shares a common boundary with the property of Gradus has not been denied. As to whether Kennedy and Gradus trespassed onto the suit property, Elisaphan’s contention was that on 15th April 2004, Gradus and Kennedy destroyed the boundary beacons of the suit property, and trespassed into the suit property; and that Gradus and Kennedy were arrested and charged with malicious damage to property at Rongo Court, but were acquitted. Elisaphan maintained that even after he sought the intervention of the Land Registrar and the Surveyor who re-established the boundary, Gradus and Kennedy still interfered with the boundary and trespassed onto the suit property making it impossible for him to farm the suit property. Gradus and Kennedy did not deny trespassing onto the suit property, but simply claimed that they have been in occupation of that property since birth. That allegation cannot be true in light of the evidence of



Elisaphan and the Chief. Moreover, Gradus and Kennedy did not lodge any counter claim raising the issue of adverse possession.

37. For the above reasons, we are satisfied that the learned Judge came to the correct conclusion in finding Elisaphan the lawful owner of the suit property, dismissing the allegations of fraud and holding that Kennedy and Gradus had trespassed onto the suit property. The damages awarded to Elisaphan were neither too excessive nor too low as to justify the intervention of this Court. In the circumstances, we find no merit in this appeal. It is dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

