



REPUBLIC OF KENYA



KENYA LAW
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Adigo v Etole (Civil Appeal 15 of 2019) [2025] KECA 318 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 318 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 15 OF 2019
HM OKWENGU, SG KAIRU & HA OMONDI, JJA
FEBRUARY 21, 2025

BETWEEN

MOSES ONYANGO ADIGO APPELLANT

AND

JULIUS ONIANGO ETOLE RESPONDENT

(An Appeal from the Judgment and Decree of the Environment & Land Court at Kisumu (S.M. Kibunja, J.) dated 5th September 2018 in ELC No. 826 of 2015)

JUDGMENT

1. Julius Oniango Etole, the respondent herein, filed a suit in Kisumu ELC No. 826 of 2015 against Moses Onyango Adigo, the appellant, seeking an order of permanent injunction and eviction in respect of land parcel No. North Gem/Marenyo/140, the suit property, general damages, mesne profits costs, and interest. The respondent stated that he was the registered owner of the suit property, which he inherited from his late father, who in turn had inherited it from the respondent's grandfather, Wadore Wahore, and that in the year 2004, the appellant trespassed thereon by constructing houses and cultivating on a portion of the suit land.
2. The appellant disputed the respondent's claim averring that he had constructed his homestead on the suit property lawfully and that the respondent had fraudulently obtained registration for a bigger portion than his entitlement of the suit land. According to the appellant, the respondent was only entitled to 0.5 hectares and not 0.7 hectares.
3. The respondent was categorical that the said common boundary comprised trees and banana crops which he planted sometime in the year 1963, while demarcation was done by the officers from the Lands Office and in the presence of the appellant's late father, Mr. Joel Adigo Oyangore. The respondent lamented that as a result of the encroachment upon the land, the Chief and his Assistant presided over the dispute and found that the appellant had encroached upon the respondent's land and asked him to move out of the land. However, the appellant declined and even planted trees on the land.



4. On realizing that the Chief's decisions were not in his favor, the appellant filed a case with the Siaya Land Disputes Tribunal which advised that the District Surveyor should visit the land and survey it to confirm who had encroached on the land. The decision of the Tribunal was adopted by the Siaya Principal Magistrate's Court Award No. 97 of 2009, in a finding by the District Surveyor that the appellant had no rightful claim over the disputed portion and had in fact trespassed on the respondent's land. Undeterred, the appellant demanded that the Provincial Surveyor should visit the land to confirm the District Surveyor's report- the outcome was a confirmation of the report.
5. Still not satisfied, the appellant demanded that the Land Adjudication Officer should visit the land and erect beacons. The Land Adjudication Office declined to engage itself in the adjudication process which was a closed chapter. Subsequently, the Court at Siaya advised the parties to seek redress from the High Court. That led to the respondent filing the suit seeking an order for the eviction of the appellant, an injunctive order, General Damages and Costs.
6. The appellant's testimony was that he had been in possession and use of the suit land even during his father's lifetime, having inherited the said land from his father (the late Adigo Senior), who also inherited it from his grandfather. He explained that the late Wadore Wahore came from his family in the Western Province and joined the appellant's father in Marenyo Sub- location, East Gem within Nyanza Province. Subsequently, the appellant's father married one Otindore, a sister to Wadore in the year 1961. At some point, Wadore Wahore was chased away by his family in Buyangu in Western Province, he requested the appellant's father to provide hospitality for him. When land registration began, the appellants had gone to South Nyanza to attend the burial of his sister, so Wadore happened to register the suit land in trust that when Adigo Senior returned from South Nyanza he would subdivide it so that Wadore would get a portion of it. Since then, the two old men lived on the land peacefully and both enjoyed possession by knowing their common boundary on the ground, pending official subdivision, which both died before it was realized.
7. According to the appellant, the suit land contains old trees planted by his late father and young ones planted by himself. He confirmed that when the dispute arose, they visited the chief's office but were advised to pursue succession in the High Court to get letters of administration to enable them to proceed with subdivision, but after one week, the respondent produced a Title Deed to the chief reading North/Gem Marenyo 140. However, the chief warned him that he risked arrest as his intention was to grab the land; and his next move was the suit filed in court seeking the appellant's eviction from the land.
8. The appellant questioned the respondent's legal capacity to file action or claim this land because Wadore Wahore did not have a son; that since his childhood, the respondent was a herdsman for the late Wadore; and was son to one Etole who died in Western Province. He reiterated that if at all the respondent had any entitlement then it was only limited to the portion which was subdivided to the late Wadore Wahore measuring 0.7 or 0.76 hectares; the Title Deed is a forgery because even the Plaintiff and his witnesses are stating that they reside in Marenyo Sub- location; and termed the title which the respondent relied on, as a forgery.
9. The Environment and Land Court (Kibunja, J.) after considering the evidence on record found that only the respondent had availed documentary evidence supporting his entitlement to the suit property; and that the copy of the title deed and search to the suit property confirmed that the respondent became registered proprietor on 15th May 2009 under entry number 2.

Drawing from the provisions of section 26(1) of the Land Registration Act, the learned Judge pointed out that the court was obliged to take documents as prima facie evidence that the respondent is the absolute and indefeasible owner of the suit land.



10. The trial court also determined that the suit land was first registered on 28th November 1967 in favour of the respondent's late father who then passed it to the respondent through succession; that although the appellant had pleaded that the respondent had fraudulently registered the suit property, the particulars of fraud were not pleaded nor any evidence tendered; that although the appellant's claim on the suit land was based on the disputed fact that his late father was using parcel 140, the adjudication process later placed the said parcel as part of the land registered to the respondent's father and there had been no objection, and that though the appellant settled on the disputed property in 2004 he failed to show a beneficial/customary right over the suit property.
11. The trial court having found that the two surveyors' report had not noted any encroachment of the appellant's land onto the respondent's, the court found and held that the appellant had no legal right to move onto the suit property.
12. The court went on then to hold that the respondent had proven his case against the appellant on a balance of probabilities with costs to the respondent. The judgment was entered in favour of the respondent in the following terms:
 - i. That the defendant do give the plaintiff vacant possession of that portion of North Gem/Marenyo/140 that he occupies within ninety (90) days and in default eviction order do issue.
 - ii. That upon the defendant giving vacant possession of, or being evicted from North Gem/Marenyo/140, an order of permanent injunction be and is hereby issued restraining him, his agents, servants, employees or any of them whomsoever from, trespassing upon, constructing, cultivating or in any other way interfering with the plaintiff's enjoyment and possession of the said land.
 - iii. The defendant do pay the plaintiff's costs of this suit and interests thereon.
13. This being a first appeal and has been reiterated in several decisions of this court, it is this court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per Rule 31 (1) (a) of the Court of Appeal Rules. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.
14. The Appellant challenges the judgment of the Superior Court on 12 grounds of appeal, which in our view raises the main issue of whether the respondent proved his case on a balance of probabilities.
15. It will be noted that even before this suit was filed the dispute was taken to the Siaya Land Dispute Tribunal Case No. 108 of 2009, where the Tribunal held that the suit land was originally registered in the name of Wandore Wahore, the respondent's father on 28th November 1967 and that the respondent became the registered proprietor of said suit property on 15th May 2009, that the surveyors' reports did not note any encroachment of respondent's land onto the appellant's and further held that the appellant's claim over a portion of Parcel 140 to be without merit.
16. The appellant in his submissions raises the issue that no succession documents were produced to prove that the respondents got the suit property via succession as per the respondent's evidence in the trial court. Looking through the proceedings nowhere did the appellant raise the issue questioning succession in the trial court. This is a new issue being raised at the appellate stage and as such this court cannot address it.
17. This Court, differently constituted, in *Wambui vs. Mwangi & 3 Others* (Civil appeal 465 of 2019) [2021] KECA 144(KLR) (19 November 2021)(Judgment) held that the sanctity of title vested in a



title holder under section 25 & 26 of the Act not only takes precedence over all other alleged equitable rights appurtenant thereto but it is also absolute and indefeasible and challengeable on grounds of fraud or misrepresentation to which the owner is proved to be a party.

18. This Court in *Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 Others* [2015] eKLR stated, ‘it is trite law that all titles to land are ultimately based on possession in the sense that the title of the man seised to prevail as against all who can show no better right to seisin. Seisin is a root of title. The 1st 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellants. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in *Ghana of Wuta-Ofei vs. Danuah*[1961] ALL ER 596 at 600, the slightest amount of possession would be sufficient.’
19. Section 116 of the *Evidence Act* provides: when the question is whether any person is the owner of anything which is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms he is not the owner.
20. The appellant therefore had the burden to establish his allegation that the respondent who was in possession of the suit property was tainted and obtained through fraud and misrepresentation, he failed to do so.
21. From the record it is clear that the respondent produced a copy of the title deed and the certificate of official search with regard to the suit property confirming the respondent was the registered proprietor of the suit property, and in line with the title being issued to the respondent under the provisions of section 26(1) of the *Land Registration Act* the same operates as prima facie evidence that the respondent is the absolute and indefeasible owner of the suit property.
22. Turning now to the element of fraud as alleged by the appellant.
The Black’s Law Dictionary, 8th Edition at page 131 defines fraud as ‘a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his/her detriment.’
23. This Court in *Ardhi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR in considering the issue of fraud 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 reasonable doubt. (See *Ratilal Gordhanbhai Patel vs. Lalji Makanji* [1975] EA 314,317.)
24. Bullen & Leakes & Jacobs, *Precedent and Pleadings* 13th Edition at page 427 states:
“where fraud is intended to be charged, there must be a clear and distinct allegation of fraud in the pleadings...the words must be so stated as to show distinctly that fraud is charged (See *Wallingford v Mutual Society* (1880) 5 App. Cas 685 at 697, 701, 709, *Garden Neptune vs. Occident* [1989] 1 Lloyd’s Rep 305,308). The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of.”
25. From the evidence on record, it is clear that the appellant only makes allegations of fraud and has been unable to substantiate the same, and as such the appellant’s evidence falls far short of proving any fraud and as such the appellant has failed to discharge the burden of proof and standard of proof required of him.
26. We do not detect any error in the learned judge’s evaluation and assessment of the evidence presented to the court, nor any misapplication of the law or legal principles, and there would be no reason to



interfere with the decision. Ultimately, it is this Court's finding that the appeal is not merited. The judgment of the High Court is upheld, and the appeal is dismissed. Costs of this appeal are awarded to the respondent.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

