



REPUBLIC OF KENYA



**Ouko v Ogachi & 2 others (Environment and Land Appeal E003 of 2022)
[2025] KEELC 1052 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 1052 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E003 OF 2022
E ASATI, J
FEBRUARY 27, 2025**

BETWEEN

MARTIN ONYANGO OUKO APPELLANT

AND

MARY OTITA OGACHI 1ST RESPONDENT

JOSPER MOSE 2ND RESPONDENT

DELIVERENCE CHURCH KONDELE 3RD RESPONDENT

(Being an appeal from the judgement and decree of Hon. H.M. Nyaberi the Chief Magistrate at Winam in WINAM CMC E&L CASE NO. 63 OF 2018 delivered on 21st July 2021)

JUDGMENT

1. Vide the Memorandum of Appeal dated 25th January, 2022, the Appellant herein instituted this appeal challenging the judgement and decree in Winam CMC ELC No.63 of 2018 dated 21st July 2021 on the grounds that;
 1. The learned trial Magistrate erred in law and fact in ruling in favor of the 1st Respondent despite overwhelming evidence tendered which weighed against the 1st Respondent.
 2. The Learned trial Magistrate erred in law and in fact in holding that land Parcel No. Kisumu/Manyatta "A"/4037 registered in the name of the 1st Respondent was legally and procedurally acquired when evidence furnished demonstrated that the suit parcel of land is non-existent.
 3. The Learned trial Magistrate erred in law and in fact in holding that the Appellant's title is suspect when the root of ownership of the Appellant's land Parcel No. Kisumu/Manyatta "A"/3419 was well established.



4. The Learned trial Magistrate erred in law and in fact in failing to appreciate that the Appellant being the registered proprietor of land Parcel No. Kisumu/Manyatta "A"/3419 was entitled to exclusive use of his property by virtue of Section 24 of the *Land Registration Act*.
 5. The learned trial Magistrate erred in law and in fact by failing to consider and analyze the entire evidence on record and thereby arriving at wrong findings on the issues before court
 6. The Learned trial Magistrate erred in law in exercising its direction wrongly in the circumstances
 7. The Learned trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions and judicial authorities thus leading to resultant miscarriage of justice to the Appellant
2. He seeks for orders that:-
- a. The appeal be allowed and the judgement and decree of the trial court dated 21st July, 2021 be set aside and/or vacated in its entirety and be substituted by judgement dismissing the 1st Respondent's suit with costs.
 - b. Costs of the appeal be borne by the Respondents.
 - c. Such further or other relief as the court may deem necessary.
3. A brief background of the appeal, as can be gathered from the record of appeal, is that the Appellant was the 1st Defendant in WINAM CMC ELC NO.63 OF 2018 (the suit). Vide the amended plaint dated 2nd August, 2018, he had been sued together with the 2nd and 3rd Respondents by the 1st Respondent.
 4. The 1st Respondent claimed that the Appellant who was owner of land parcel number Kisumu/Manyatta "A"/3419 had encroached onto land parcel number Kisumu/Manyatta "A"/4037 (the suit land) belonging to the 1st Respondent. The 1st Respondent therefore sought for orders of eviction, permanent injunction, an order for restoration of the boundary of land parcel number Kisumu/Manyatta "A"/4037 and costs of the suit.
 5. The record shows that the Appellant and the other Defendants filed a defence to amended plaint dated 24th August, 2018 denying the Plaintiff's (1st Respondent's) claim.
 6. The suit was heard by the trial court at Winam which vide the judgement dated 21st July, 2021 found that the 1st Respondent was a legitimate owner of her land and therefore entitled to protection of the law. The court found that the orders of injunction and eviction sought by the 1st Respondent were legitimate. The court therefore entered judgement in favour of the plaintiff against the Appellant and the 2nd and 3rd Respondents jointly and severally in terms of prayers (a) and (c) of the amended plaint. Prayers (a) and (c) were prayers for orders of eviction, injunction and costs.
 7. Aggrieved by the judgement, the Appellant preferred the present appeal.

Submissions

8. Directions were taken on 23rd January, 2024 that the appeal be argued by way of written submissions.
9. It was submitted on behalf of the 1st Respondent vide the written submission dated 24th January, 2024 that the issues that arise in the appeal for determination are:-



- a. whether the suit property exists and whether the same is properly registered in the name of the 1st Appellant.
 - b. whether the Appellant has encroached upon the said suit property by fencing it off and leasing it to the 2nd and 3rd Respondents.
 - c. whether the trial court was right to issue orders for the preservation and protection of the suit property in the name of the 1st Respondent.
 - d. who ought to pay the costs of the suit.
9. On whether the suit land exists and whether the same is registered properly in the name of the 1st Respondent, Counsel submitted that the 1st Respondent produced an agreement dated 19th July, 2000 through which she bought the suit property. That the 1st Respondent initially bought a portion of land Parcel No. Kisumu/Manyatta "A"/862 from one Hezekiah Chadiva Abukidu. That the 1st Respondent produced mutation that sub-divided the land to produce land parcel NO.4036 and the suit land herein. The suit land was subsequently registered in the name of the 1st Respondent while the other portion was maintained in the name of the seller.
 10. That the 1st Respondent also produced a title deed and green card showing registration of the suit land in her name. Counsel referred the court to the evidence of the other witnesses called by the 1st Respondent and the provisions of Section 24 of the *Land Registration Act* on the effect of registration of a person as proprietor of land.
 11. That the 1st Respondent produced a report by the Land Registrar accompanied with a sketch map showing the exact location and size of the suit land demonstrating that the suit land exists.
 12. On whether or not the Appellant encroached onto the suit land, Counsel submitted that the Appellant and 2nd and 3rd Defendants did not deny encroachment onto the suit land but explained their action that the land had been awarded to the Appellant by the Land Disputes Tribunal and secondly, that the land had been repossessed by the Municipal Council of Kisumu and allocated to him. Counsel submitted that the award of the Tribunal had been quashed vide Misc. Application No.267 of 2002 in a decision dated 31st March, 2009. And that concerning the allegation of repossession of the land by the Municipal Council, there was no evidence produced.
 13. On whether the trial court was right to issue the orders that it did Counsel submitted that no case has been made to hold that the trial court was wrong in its findings and orders.
 14. No submissions were filed by or behalf of the Appellant.

Issues for Determination

15. From the grounds of appeal presented and the submissions filed, the following are the issues that emerge for determination: -
 - a. whether or not the trial Magistrate erred in holding that the suit land was legally and procedurally acquired by the 1st Respondent and whether the suit land exists
 - b. whether the trial court erred in holding that the Appellant's title in respect of land known as Kisumu/Manyatta "A"/3419 is suspect.
 - c. whether the trial court failed to analyse the entire evidence, to exercise its discretion properly and to consider the Appellant's submissions and judicial authorities presented



- d. who pays costs of the appeal.

Analysis and Determination

16. This being a first appeal, this court is under a duty to reconsider and analyze the evidence adduced before the trial court and arrive at its own independent conclusion. In the case of *Selle and another vs Associated Motor Boat Company Ltd and others* 1968 E.A 123 it was held that:

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not- necessarily bound to follow the trial court’s findings of fact if it appears either that he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

17. The first issue for determination is whether the trial Magistrate erred in holding that the suit land was legally and procedurally acquired by the 1st Respondent and whether or not the suit land exists.
18. The 1st Respondent who was the Plaintiff in the suit had pleaded in paragraph 5 of the amended plaint dated 2nd August, 2018 that she was the registered owner of land parcel known as Kisumu/Manyatta “A”/4037 and the Appellant the register owner of Kisumu/Manyatta “A”/3419.
19. In her evidence in court, she testified that she bought the land from Ezekiel A. Chadiva in 2002. She produced land sale agreement as exhibit. She testified that the land she bought was part of L.R. NO. Kisumu/Manyatta “A”/862 which she bought at Kshs.90,200/-, that sub-division was done and she got title. She produced the title deed and a report by the Land Registrar dated 16th July, 2024 among other exhibits.
20. She called 3 witnesses.
21. On his part, the Appellant vide his amended defence dated 24th August, 2018 denied that the 1st Respondent was the registered owner of land parcel number Kisumu/Manyatta “A”/4037. He also denied that the said land was adjacent to his land parcel number Kisumu/Manyatta “A”/3419. The record shows that the Appellant testified as DW1. He stated vide his witness statement dated 30th March, 2017 adopted as his evidence in chief that though previously there existed a parcel of land known as Kisumu/Manyatta “A”/862 owned by one Abdiku, the owner was compensated for the road that passed through it and the other piece of land and after the compensation, the land became property of the Kisumu Municipal Council. That Abdiku had fraudulently sold a portion of the land to one Mary Otita well knowing that he had already been adequately compensated. That Mary Otita is claiming to be the owner and is relying on a former map which had mistakes that had been cancelled by Surveyor.
22. He testified further that the land Parcel No. Kisumu/Manyatta “A”/4037 does not exist. That the portion of land claimed by the 1st Respondent is his and that the 1st Respondent should be evicted.
23. He produced title deed for land Parcel No. Kisumu/Manyatta “A”/3419, proceedings of Land Disputes Tribunal dated 13th January, 1991, letters dated 1st December, 2000, 6th February, 2001, 6th March, 2001,



- 9th March, 2001, 11th March, 2001, 10th March, 2001, 10th March, 2002, 11th September, 2002 and a letter dated 21st January, 2010 from the Municipal Council of Kisumu.
24. The trial court upon considering the evidence found vide the judgement appealed against that the Plaintiff (1st Respondent) had shown on how she went through the process of purchase of a portion of parcel number Kisumu/Manyatta “A”/862. The court found and held that it was satisfied that the Plaintiff (1st Respondent) acquired the suit property legally and procedurally.
 25. The Appellant faults the court for this finding and avers that the evidence furnished demonstrated that the suit parcel of land is non-existent.
 26. I have keenly considered the evidence that was placed before the trial court. The following facts are not denied by the appellant: existence of land Parcel No. Kisumu/Manyatta “A”/862, the fact that the same originally belonged to one Abdiku and that a portion thereof was sold to the 1st Respondent by the said Abdiku.
 27. The appellant’s contention is that the sale to the 1st Respondent was fraudulent as the entire land had already been compulsorily acquired and the owner adequately compensated. And further that the land had been subsequently allocated to him.
 28. From the Appellant’s own exhibits namely; letter dated 6th March, 2021 by J.S. NO. Ong’weno, District Surveyor Kisumu, the land parcel number KISUMU/ MANYATTA “A”/862 existed and measured 0.11Ha. The position of that land in relation to the Appellant’s parcel of land No.3419 is demonstrated in the Appellants exhibit – letter dated 9th March, 2001 and the attached sketch map. The letter dated 10th March, 2002 also produced as exhibit by the Appellant acknowledged the existence of land parcel No.862 and stated that the Appellant’s parcel of land should run up to the road of access and that it was directly opposite parcel number 862 which also terminated at the road of access.
 29. None of these exhibits indicated that Parcel No. Kisumu/Manyatta “A”/862 did not exist. They all showed that the Appellant’s land co-existed first with the mother parcel number 862 and after subdivision of parcel number 862, with parcel number 4037 belonging to the 1st Respondent.
 30. The Appellant also produced a letter dated 21st July, 2010 signed by one George Opiny for Town Clerk Municipal Council of Kisumu. The letter claimed that land parcel number Kisumu/Manyatta “A”/3419 was as a result of compulsory acquisition which was done in 1976 vide Gazette Notice No.3400. That the same parcel was part of Kisumu/Manyatta “A”/862 that belongs to Mr. Zekariah Chadiva Abukidu. That the said Abdiku was compensated at the tune of 101,737/-. The contents of this letter are however not believable.
 31. This is because, firstly, there is no evidence to support the contents thereof. There is no evidence of compulsory acquisition of the said parcel of land by the Municipal Council of Kisumu or any other government organ or agency. There is also no evidence of compensation of the owner of the land.
 32. Secondly, it is not conceivable how land parcel No.3419 could be as a result of land compulsorily acquired and part of No.862 yet survey reports and records as contained in the letters and sketch maps produced by both the Appellant and the 1st Respondent showed that the two parcels co-existed as distinct parcels each with its defined position, size and extent.
 33. Even assuming that the contents of the letter to the effect that the land was compulsorily acquired by the Municipal Council of Kisumu and Mr. Abdiku, the registered owner, compensated, are correct,



there is no evidence that the land compulsorily acquired was subsequently allocated to the Appellant. There was no nexus established by the appellant between his land and land parcel No. 862.

34. On the other hand, the 1st Respondent produced the land sale agreement, mutation forms, title deed and report by surveyor which explained the root of her title.
35. She also called witnesses, whose testimony augmented her testimony.
36. Further, the report by County Surveyor dated 16th July, 2014 confirmed the existence of the suit land No. Kisumu/Manyatta “A”/4037 side by side with the Appellant’s land and their respective acreages.
37. I find that the 1st Respondent proved before the trial court that she acquired title to the suit land Parcel No. Kisumu/Manyatta “A”/4037 procedurally and legally and that the said parcel of land exists. The trial court did not therefore err in so holding.
38. The next issue for determination is whether the trial court erred in finding that the title held by the Appellant in respect of land parcel number Kisumu/Manyatta “A”/3419 was suspect.
39. A reading of the judgement of the trial court shows that while determining the issue of whether or not land parcel number 4037 had been regularly and procedurally acquired by the Plaintiff and/or by the Defendant, the court observed as follows: -

“Definitely, a title cannot be issued if there were no documentation held at the lands office.

It is the view of this court that the 1st Defendant’s claim that he obtained his title through Kisumu Municipal Council on close scrutiny of his title, it is not a leave certificate. His claim is also not supported by an allotment letter from the Municipal Council. In the premises, the 1st Defendant’s title is suspect as he has failed to demonstrate on how he acquired the title procedurally”.

40. The Appellant faulted the trial court for this and averred that the trial court erred in holding that the Appellant’s title is suspect when the root of ownership of the Appellant’s land Parcel No. Kisumu/Manyatta “A”/3419 was well established.
41. As already observed hereinabove, the explanation by the Appellant that his title was as a result of compulsory acquisition and that it was part of land parcel No.862 is not conceivable as it is not supported by the evidence from survey as produced by the Appellant and the 1st Respondent. Secondly, the appellant’s claim that the land was awarded to him by the Land Disputes Tribunal is not sustainable because it was demonstrated that the award of the Land Disputes Tribunal was soon thereafter quashed by the High Court and could not form the basis of awarding the land to the appellant. It is clear from the record that those are the circumstances that the trial court was referring to. The record shows that the court proceeded to find that the appellant obtained his land through a corrupt scheme.
42. In view of the appellant’s explanations as to how he acquired the land claimed by the 1st Respondent which explanations were not supported by the evidence, I find that the trial court did not err.
43. The next issue for determination is whether the trial court failed to analyse the evidence, to exercise its discretion rightly and to consider the Appellant’s submissions.
44. It has not been pointed out what aspects of the evidence or submissions were omitted, ignored or not properly analysed and how this caused miscarriage of justice. My reading of the evidence and the judgement of the court reveals that the court considered the evidence, on the basis of which it proceeded to make its findings and decision. I find that the judgement was supported by the evidence presented by the Appellant and the 1st Respondent.



45. I find that the grounds of appeal have not been proved. I further find no reason to interfere with the findings and decision of the trial court.

46. The appeal is hereby dismissed. Costs to the 1st Respondent.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 27TH DAY OF FEBRUARY 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Omondi for the Appellant

C. Onyango for the 1st Respondent.

No appearance for the 2nd and 3rd Respondents.

