



**Ogutu (Personal Representative of the Estate of Nelson Ogutu Onyango) v Makanda
(Legal Representative of the Estate of Jura Ongeso) (Environment and Land
Appeal E016 of 2023) [2024] KEELC 1337 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1337 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E016 OF 2023
AY KOROSS, J
MARCH 14, 2024**

BETWEEN

**CHARLES ODHIAMBO OGUTU (PERSONAL REPRESENTATIVE OF THE
ESTATE OF NELSON OGUTU ONYANGO) APPELLANT**

AND

**JOSEPH OTIENO MAKANDA (LEGAL REPRESENTATIVE OF THE ESTATE
OF JURA ONGESO) RESPONDENT**

*(Being an appeal from the judgment of the CM Hon. M.O.Wambani
delivered on 27/04/2023 in Siaya CM ELC Case No.75 of 2019)*

JUDGMENT

(Being an appeal from the judgment of the CM Hon. M.O.Wambani delivered on 27/04/2023 in Siaya CM ELC Case No.75 of 2019)

Background of the appeal

1. As an appellate court, it is pertinent I outline the background of the appeal in which the appellant was the defendant and the respondent was the plaintiff. Their substituting parties obtained limited grant to enable them represent estates of deceased persons.
2. At the center of the dispute were land parcels no. Siaya/Nyadorera 'A' 2000, 2003 and 2004 (suit properties). From produced greencards, the 1st property was registered in the joint names of the appellant and that of Gabriel Onyango (Gabriel), the 2nd one in the name of Richard Opondo Onyango (Richard) and the last one in the appellant's name.



3. The parties' pleadings were numerously amended and some of them are missing from the lower court record. This notwithstanding, the record of appeal availed all documents that were before the trial court.
4. Now, turning to the pleadings, in the amended plaint dated 7/09/2020, the respondent averred that prior to adjudication and eventual registration of the suit properties, the respondent was the original owner of the suit properties portions of which were gifted to the appellant's father one Onyango Osaho (Osaho).
5. That upon Osaho's demise, the respondent showed the appellant boundaries of the portion that belonged to Osaho and even took care of the appellant. However, the respondent (Jura Ongeso) died before adjudication process and consequently, the appellant took advantage and ostensibly demarcated the suit properties in his name and that of Richard.
6. According to the respondent, the appellant fraudulently allocated more land to himself other than what was gifted to Osaho and he pleaded the appellant had given false information to the adjudication officer and facilitated demarcation of a single block to his name to create the suit properties thus disinheriting the respondent's heirs.
7. As a consequence of this alleged fraud, the respondent sought that it be declared the suit properties belonged to the respondent's heirs, an amalgamation of the suit properties into a singular block be done and a reversion of the suit properties to the respondent's estate be conducted. He also sought for costs.
8. In the further amended defence and counterclaim dated 6/10/2021 which was mostly composed of denials, the appellant who died in the course of the trial court proceedings admitted that though Osaho was gifted land by the respondent, there was no fraud during adjudication. The appellant further averred that he, Gabriel and Richard were siblings and the adjudication process was conducted procedurally without objections from the respondent or his heirs.
9. However, post adjudication, the respondent and other heirs of the respondent raised objections which were dismissed by the land adjudication officer (LAO) and as a matter of fact, they had failed to exhaust various statutory appellate mechanisms.
10. In his counterclaim, the appellant contended that as a result of conservatory or injunctive orders issued by the trial court, he suffered crop loss to the tune of kshs. 212,000/-. He sought permanent injunctive orders, general damages, special damages, costs and interests.

Trial

11. The matter proceeded for trial and the appellant, respondent and their respective witnesses testified, submissions were filed and the matter was eventually reserved for judgment.
12. In the impugned judgment that was rendered on 27/4/2023, the learned trial magistrate framed issues for determination which were whether the parties had established their respective claims.
13. In her finding on the respondent's claim, the learned trial magistrate stated that on a balance of probability, the respondent had tendered sufficient evidence on fraud against the "1st and 2nd defendants" and held the respondent's claim was meritorious. On the 2nd issue, the court awarded the appellant special damages of kshs. 212,000/- together with costs and interests.



Appeal and cross appeal to this court

14. Both parties were partially aggrieved by the decision of the learned trial magistrate and both preferred appeals to this court.
15. In his memorandum of appeal dated 18/05/2023, the appellant raised 6 grounds of appeal which faulted the learned trial magistrate for inter alia; failing to find the respondent's suit was by the provisions of the *Land Adjudication Act* incompetent, finding the respondent had proved his case to the required standards, ordering a reversion of the suit properties to the original owners and for a fresh demarcation to be conducted, issuing orders against non-parties, ignoring the appellant's evidence and submissions and, failing to grant prayer (a) of his counterclaim.
16. Thus, the appellant implored upon this court to partially set aside the impugned judgment by dismissing the respondent's case, allowing prayer (a) of his counterclaim and granting him costs of the suit, counterclaim and of the appeal.
17. In his cross appeal dated 26/05/2023, the respondent faulted the learned trial magistrate on 3 grounds; awarding the appellant special damages of kshs.212,000/-, applying wrong principles and ignoring rulings rendered by the trial court on diverse dates of 1/10/2019 and 13/02/2020 and rendering a decision that was against the weight of evidence.
18. As a consequence of these grounds, the respondent urged this court to allow the cross appeal with costs.
19. As directed by the court on 16/10/2023, the appeal and cross appeal were canvassed by written submissions with the appellant's law firm on record M/s. ROW Advocates LLP filing written submissions dated 30/10/2023 and the respondent's counsel Mr. Ochayo B. Onyango filing his on 14/11/2023.

The appellant's submissions

20. On the 1st ground of appeal, counsel submits the respondent's claim was statute barred because prior to filing his suit, he had failed to exhaust statutory appellate mechanisms envisaged by various provisions of the *Land Adjudication Act*.
21. Further, he submits that as indicated by the evidence on record, some of these mechanisms had been exhausted and in them, the respondent lost his respective cases. To buttress his position on this ground, counsel relies on the case of Robert Kulinga Nyamu v Musembi Mutunga & another [2022] eKLR.
22. In arguing all the other 5 grounds of appeal as a singular condensed ground, counsel submits the respondent did not prove his case to the required standards and further, Gabriel and Richard who were proprietors of the some of the suit properties were never made parties and therefore, it was erroneous for the learned trial magistrate to enter judgment against non-parties.
23. Counsel submits the respondent was inconsistent in his evidence because though he admitted he was privy of proceedings before the land adjudication officer (LAO) in 2017, he contradicted himself.
24. On the cross appeal, counsel concurs with the findings of the trial court and submits that as a consequence of injunctive orders issued by the learned trial magistrate, the appellant's daughter who carried out farming activities on the suit properties proved she incurred loss of kshs. 212,000/- and urged this court to dismiss the cross appeal with costs.



Respondent's submissions

25. The respondent's submissions did not address the cross appeal but in rehashing the respondent's pleadings and evidence, counsel submits this court should not find merit in the appeal, dismiss it and uphold the learned trial magistrate's decision. To bolster his position, counsel relies on the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR.

Issues for determination

26. I have carefully considered the appeal and cross appeal, records, rival submissions, authorities cited and the law and considering this is a first appeal, this court is reminded that the task at hand is to reappraise, reassess and reanalyse the evidence as asserted by the parties on record and to establish if the findings reached by the learned trial magistrate should stand and give reasons if they do not. See *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR.
27. As a result, the following 5 issues commend themselves for determination namely: -
- a. Whether the trial court was competent to entertain the dispute.
 - b. Whether the respondent proved fraud to the required standards.
 - c. Whether the learned trial magistrate erred in issuing orders against non-parties.
 - d. Whether the learned trial magistrate erred in awarding special damages to the appellant.
 - e. In determination of this appeal, what orders ought to be made including orders on costs.

Analysis and determination

28. Having earlier in this judgment identified the issues that arise for resolution, I will proceed to handle them in a chronological manner.

a. Whether the trial court was competent to entertain the dispute.

29. Section 13 (1) of the *Land Adjudication Act* states as follows: -

“Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.”

30. It follows that succeeding declaration of an area as an adjudication section and on application of this Section 13 (1), every person who has an interest in land as the respondent alleges he did, could assert his rights. The essence of this is to ascertain the rights and interests of persons in an adjudication section.
31. The process of adjudication is comprehensive, public and parties are given opportunities to ventilate their grievances at various stages. This process usually starts with the land adjudication committee and if dissatisfied, to the arbitration board and if still aggrieved, they can approach the land adjudication officer (LAO) before a final appeal to the minister. See Sections 20, 21, 22, 26 and 29 (1) and (2) of the *Land Adjudication Act*.
32. This court disagrees with the appellant's counsel that exhaustion of these adjudicative mechanisms locked out the respondent from approaching this court.



33. Even as a 1st registration, titles can be challenged under Section 26 (1) of the *Land Registration Act* if it is acquired by means of fraud, misrepresentation, illegality, unprocedural manner or through a corrupt scheme. This provision is a departure from Section 143 of the repealed Registered *Land Act* which provides that upon 1st registration, a claim of fraud or mistake is unsustainable over a suit property.
34. I say so because the persuasive decision of Robert Kulinga Nyamu (Supra) which he used to support his argument is not binding on this court. In converse, the Court of Appeal whose decision is binding on this court and whose position this court adopts elucidated the law's position on this issue in the case of Nicholas Njeru v Attorney General & 8 others [2013] eKLR whereby it stated: -
- “However we do not entirely agree with the learned Judge's observation that the court had no jurisdiction to grant a declaratory order... We agree with the trial Judge that during the various proceedings the issues in this appeal were perhaps thrashed almost to the pulp and the dispute over which clan owned the suit property had long been determined. We will also look at what the appellants referred as ‘the new cause of action.’”
35. A similar position was taken by the well cited persuasive decision of Dume Deri Mumbo & 19 others (suing on their behalf and on behalf of Wandarari Clan v Cabinet Secretary of Lands, Housing & Urban Development & 6 others [2016] eKLR which held: -
- “...although a litigant can file a suit in a matter where the adjudication register, pursuant to the provisions of the *Land Adjudication Act*, has been closed and a title deed issued,.. Consequently, the court can only interfere with the decision of the bodies established under the Act by way of Judicial Review proceedings or where a new cause of action is introduced after the proceedings of the Minister have closed. Then, and only then can the court interfere by way of an ordinary suit or Judicial Review Proceedings.”
36. The learned trial magistrate did not address herself on this issue albeit it being raised by the appellant. Therefore, having established the court could only entertain a suit in exceptional circumstances where a judicial review or a new cause of action arises, this court will endeavour to answer whether the suit before the learned trial magistrate raised a new cause of action.
37. Both parties produced a post adjudication ruling by the LAO of 7/04/2017. It is deciphered that contrary to the respondent's assertion that it was a different Joseph Makanda who had instituted proceedings concerning adjudication, it emerged the respondent actively participated in that post adjudication process and his identity card which he produced before the learned trial magistrate bears a similar no. as that contained in the adjudication proceedings.
38. Although this decision of 7/04/2017 did not alter the adjudication process, it shed light that some of the suit properties had been the subject of proceedings before the LAO whereby objections raised against some of the suit properties to wit Siaya/Nyadorera ‘A’ 2003 and 2004 were lodged by the respondent's family against the appellant's family and they were heard and determined with no appeals being preferred to the minister.
39. Therefore, I must conclude, find and hold that the learned trial magistrate did not have jurisdiction to entertain a dispute over land parcel nos. Siaya/Nyadorera ‘A’ 2003 and 2004.



b. Whether the respondent proved fraud to the required standards.

40. Order 2 Rule 10 (1) (a) of the [Civil Procedure Act](#) provides as follows: -

“(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a)particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies;”

41. It is trite law fraud must be proved on parameters beyond a balance of probability but below reasonable doubt. This principle of law was well elucidated in the well cited Court of Appeal decision of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR where the court expressed itself as follows: -

“As a serious accusation, fraud ought to be specifically pleaded and proved on higher balance of probability but not beyond reasonable doubt. It is not necessary that the word Fraud be stated or used, but the facts stated in the pleading must be so stated to show that fraud was used, and the circumstances leading to reasonable inference that fraud, illegalities and irregularities were the cause of the loss or damage complained.”

42. Even if the 1st issue determines some of the suit properties, it is pertinent I deal with the 2nd issue. In the impugned judgment, the learned trial magistrate stated thus on the issue of fraud: -

“...there is ample and/or cogent evidence by the plaintiff and his evidence that he (sic) adjudication was fraudulently done by the 1st and 2nd defendant and that they ascribed to themselves more acreage than what was gifted to their father...the plaintiff has established his suit against the defendants on a balance of probability.”

43. The arrival of such a conclusion is bereft of any reasons so as to show how the learned trial magistrate arrived at such a conclusion. In addition, the learned trial magistrate applied the wrong parameters of standard of proof. It is on this basis that this court is called upon to reappraise the pleadings and establish if fraud was proved to the required standard.

44. In particularizing fraud, the respondent pleaded the appellant gave false information to the adjudication office, facilitating creation of the suit properties from a singular block and processing the suit properties into their names.

45. The onus was on the respondent to prove his case and from adduced evidence, I am not satisfied he discharged proof to the required standard. This is because he did not produce any adjudication maps to confirm his allegations, disclose the size of the initial unadjudicated land and what size the appellant had allegedly hived off from this unadjudicated land.

46. From evidence, neither the respondent nor his witnesses were present during the alleged gifting that apparently took place in 1931. In addition during this period some of witnesses were either unborn, too young or were absent during adjudication process. The logical conclusion one arrives at is that their evidence was hearsay and could not be substantiated.

47. The LAO’s decision dated 07/04/2017 which was produced by both parties and unchallenged confirms that in fact, both parties coexisted peacefully, the respondent had been an adult during adjudication, and during adjudication in 1975, each party was recorded based on “effective occupation



in the presence of the committee and entire village...”. Therefore, I find and hold the respondent did not prove his claim of fraud to the required standards.

c. Whether the learned trial magistrate erred in issuing orders against non-parties.

48. Article 40 (2) of *the Constitution* of Kenya recognizes protection of people’s properties and they cannot be capriciously extinguished or cancelled without according them an opportunity to be heard.

49. On the same breath, Article 50 of the same Constitution states that a party must be accorded a right to fair hearing which is tandem with the audi alteram partem cardinal principle of law which provides that parties must be given an opportunity to be heard before adverse orders can be made against them. The Court of Appeal had an opportunity to elucidate on this principle in the case of Pashito Holdings Limited & Another v Paul Nderitu Ndungu & 2 Others [1197] eKLR when it stated: -

“The rule of “audi alteram partem”, which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

“It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him”.

There is an unpronounceable Latin maxim which in simple English means: “He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right.”

50. From evidence, land parcel no. Siaya/Nyadorera ‘A’ 2000 is registered in the joint names of the appellant and Gabriel whilst 2003 is in Richard’s name. It arose that Gabriel and Richard were deceased and their estates not being party to these proceedings, orders could not be issued against their properties. I find and hold the trial court erred in issuing orders against properties belonging to non-parties.

d. Whether the learned trial magistrate erred in awarding special damages to the appellant.

51. In pleading and proving special damages of kshs. 212,000/=, the appellant testified the damages arose from an order issued by the trial court on 25/9/2019 which barred him and his family from “tilling and cultivating the subject land”.

52. In her decision, the learned trial magistrate in finding the appellant had proved special damages stated the respondent should have allowed the appellant to harvest his crops.

53. Upon considering the record in particular orders issued on diverse dates of 25/09/2019 and 13/02/2020 which are the dates the appellant alludes the trial court issued injunctive orders, I conclude the appellant was untruthful in his evidence.

54. From written record, the final disposal orders issued by the trial court were conservatory orders. Put another way, nothing restricted the appellant from using the suit properties. It appears the appellant misunderstood the orders and thus, he was the author of his own misfortune. Consequently, I find and hold the learned trial court erred in awarding the appellant special damages of kshs. 212,000/-.

e. What orders ought to be made including orders on costs.

55. Ultimately and for the reasons and findings stated above, I hereby set aside in entirety the judgment and decree of the learned trial magistrate which partially allowed the appellant’s counterclaim and allowed the respondent’s claim in entirety and hereby substitute it with an order dismissing both the appellant’s counterclaim and respondent’s claim.



56. It is trite law costs follow the event and since both parties were successful in their respective appeals, each party shall bear their respective costs of the appeal, cross appeal and suits before the trial court.
57. Ultimately, I substitute the lower court judgment by issuing the following final disposal orders: -
- a. That the appellant's counterclaim that was before the trial court is hereby dismissed.
 - b. That the respondent's claim that was before the trial court is hereby dismissed.
 - c. Each party shall bear their respective costs of this appeal, cross appeal and of the lower court's claim and counterclaim.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 14TH DAY OF MARCH 2024.

HON. A. Y. KOROSS

JUDGE

14/3/2024

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Okello for appellant.

Mr. Ochanyo for respondent

Court assistant: Ishmael Orwa

