



REPUBLIC OF KENYA



**Abuto v Nyakundi & 3 others (Environment and Land Appeal
36 of 2022) [2024] KEELC 1325 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1325 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 36 OF 2022
GMA ONGONDO, J
MARCH 13, 2024**

BETWEEN

MERCELINE AWUOR ABUTO APPELLANT

AND

JAMES OMARI NYAKUNDI 1ST RESPONDENT

SAMWEL OMONDI OKUMU 2ND RESPONDENT

THE LAND REGISTRAR, RACHUONYO SUB- COUNTY ... 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

*((An appeal arising from the judgment and decree in Homa Bay Chief Magistrate's Court
Environment and Land Case number 18 of 2019 by Hon. Tom Olando, PM on 3rd August 2022.))*

JUDGMENT

1. On 3rd August 2022, the trial court (Hon. Tom Olando, PM) rendered judgment in Homa Bay Chief Magistrate's Court Environment and Land Case number 18 of 2019 (The original suit) declaring that land title number West Kasipul/Konyango/Kokal/2084 (the suit land herein) belongs to the 2nd respondent absolutely and awarding the appellant special damages of Kshs 48,800 and general damages of Kshs 100,000. That each party to bear their respective costs.
2. The said judgment attracted the instant appeal originated by way of a memorandum of appeal dated 22nd August 2022 founded upon nine grounds, inter alia;
 - a. The learned trial Magistrate misdirected himself on several matters of law and fact, in that;
 - i. The judgment did not comply with Order 21 rule 4 of the *Civil Procedure Rules* and did not relate to the issues raised by the joinder of issues raised by the pleadings,



- ii. The judgment delivered to the appellant in court flouts the provision of Order 21 rule 3(1) and 3(3) of the *Civil Procedure Rules*.
 - iii. The trial Magistrate failed to read the submissions and instead merely copied and pasted written judgment thus raising an issue “whether the suit land belongs to Johnson Odidi Obongo” when no such person was a party in the instant suit.
- b. The learned trial Magistrate erred in law in failing to note that an order of inhibition having been issued by the court on the 13th day of February 2015 there is no way that the 2nd defendant/respondent could acquire any lawful title from the 1st defendant/respondent
 - c. The learned trial Magistrate erred in law of evidence, procedure and practice in failing to note that the 3rd and 4th defendants having entered appearance and filed a defence but failed to adduce any evidence in support thereof the plaintiff’s suit was uncontroverted by them and therefore the plea in the plaint (that the Land Registrar erred in Land Law in registering the fraudulently obtained transfer form in the name of the 1st defendant/respondent and issuing to him the title deed) stands uncontroverted and so there is no proper title in the name of the 1st defendant capable of being transferred to the 2nd defendant.
 - d. The learned trial Magistrate erred in law of evidence in ignoring the glaring contradictions in the pleadings, documentary exhibits and the oral evidence of the 1st defendant on the purchase price and holding that the purchase and transfer of the land from the deceased proprietor to the 1st defendant was proper, thus flouting the provisions of section 62 of the *Evidence Act*.
 - e. The learned trial Magistrate erred in law relating to the registered land in failing to note that as at 2014 when the 1st defendant issued a notice to the plaintiff to vacate the suit land the plaintiff had been in possession of the said land for over 12 years, openly, notoriously, peacefully and continually and had thus acquired title to the same by adverse possession and other than illegally erecting a building on the suit land the 1st defendant has not to date filed any court action to attempt to assert his title to the land.
 - f. The learned trial Magistrate erred in law in failing to note that since the appellant had acquired title thereto by adverse possession, the entry onto the said land by the 2nd defendant/respondent is liable to pay damages.
 - g. The learned trial Magistrate erred in law in failing to note that there was a dialectical contradiction in his judgment in that having awarded general damages for trespass to land and for special damages he could not at the same time hold that the 2nd respondent’s ownership of the land was valid.
 - h. The learned trial Magistrate erred in law in failing to note that the appellant having been in possession of the suit land for 12 years, on thereabout her interest over the suit land was overruling any other interest in accordance with section 28(h) of the *Land Registration Act*.
 - i. The learned trial Magistrate erred in law of evidence in deciding the case against the weight of evidence and in creating evidence which was not adduced by plaintiff such as alleging that the husband sold the land surreptitiously without disclosing to his wife, the plaintiff, when no such allegation was made in the evidence and that the sale of land between the deceased owner and the 1st defendant, and between the 1st defendant and 2nd defendant was not challenged.
3. So, the appellant has prayed that this Honourable Court quashes the decision of the trial magistrate save for the award of special and general damages, and allow this appeal with costs to the appellant.



4. The appeal was heard by way of written submissions pursuant to orders of this court given on 31st May 2023.
5. The appellant's counsel, G.S. Okoth and Company Advocates, filed submissions dated 18th July 2023 and submitted, inter alia, that the impugned judgment violates Order 21 Rules 3(1) and (3), 4 and 6 of the Civil Procedure Rules, 2010. That since no witness was called on behalf of the 3rd respondent, the evidence tendered by the appellant is uncontroverted. That the title deed in the name of the 1st respondent was either corruptly, illegally or fraudulently obtained. That further, the 1st respondent sold the suit land to the 2nd respondent when the title to the same had already been extinguished by virtue of the doctrine of adverse possession. That under Section 28 (a) of the Land Registration Act, 2016 (2012), spousal rights over matrimonial property are an overriding interest. Reliance was placed on the case of Gateway Insurance Company Limited v Jamila Suleiman and another (2018) eKLR, among others, to buttress the submissions.
6. By the submissions dated 12th February 2024, Omonde Kiseru and Company Advocates, learned counsel for the 1st and 2nd respondents, submitted that the 1st respondent duly proved how he acquired the suit land. That the trial court's award of Kshs 100,000 as general damages was erroneous since transfer of the suit land occurred in the year 2002, before the law requiring spousal consent came into force. That also, the special damages awarded by the trial court were not strictly proven. Counsel cited the case of Okeno v Republic (1972) EA 32 at 36 and urged the court to dismiss the instant appeal with costs.
7. Sarah Jumma, Senior Litigation Counsel for the Attorney General, filed submissions dated 16th February 2024 on behalf of the 3rd and 4th respondents and identified four issues for determination namely:
 - a. Whether there was fraud proved against the 3rd and 4th defendants
 - b. Whether the perusal of the sale agreement was necessary
 - c. Whether the 3rd respondent has the expertise to interrogate forged documents; and
 - d. What reliefs are available, if any?
8. Learned counsel submitted that the appellant failed to tender any evidence to support the alleged fraud and illegality by the respondents. That at the time the 1st respondent purchased the suit land from the appellant's late husband, there was no requirement that land agreements had to be in writing. That therefore, the 3rd respondent could not have demanded for a written sale agreement for perusal. That the 3rd respondent lacks expertise to detect fraud nor improper dealings, unless the same is evident on the face of the record. That the instant appeal is hence, unmerited in the circumstances and the same ought to be dismissed with costs to the respondents. Counsel relied on various authorities including the case of Kuria Kiarie and 2 others v Sammy Magera (2018) eKLR, to reinforce the submissions.
9. It is important to note that the instant appeal being the first one from the trial court, this court has the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see Peters v Sunday Post (1958) EA 424 at 429.
10. Thus, the appellant who was the plaintiff at the trial court sued the respondents by way of a further amended plaint dated 14th June 2021 over the suit land, West Kasipul/Konyango/Kokal/2084 for;



- a. An order of declaration that the appellant and the beneficiaries of the estate of Walter Abuto Goga have acquired title to the suit land by way of adverse possession.
 - b. An order of declaration that the registration of the 1st respondent as proprietor of the suit land was obtained by fraud caused or contributed to by the 1st respondent and the court has the power to rectify the register of the suit land.
 - c. An order for rectification of the register for the suit land by deleting the name of James Omari Nyakundi and registering the same in the name of Walter Abuto Goga or Merceline Awuor Abuto.
 - d. An order of eviction to remove the 1st and 2nd respondents or any person deriving title through him from the suit land.
 - e. General damages for trespass to land payable by both respondents.
 - f. An order of permanent prohibitory injunction directed at both the respondents restraining them from entering into, occupying, alienating, constructing on or in any other way dealing with the suit land adverse to the appellant's title and interest thereon.
 - g. Costs of the suit together with interest at 14% p.a. from the date of filing suit until payment in full.
 - h. Such further or other alternative relief as this Honourable Court deems fit to grant.
11. The 1st respondent opposed the claim vide a statement of defence dated 21st October 2014, wherein he urged the court to dismiss the appellant's suit with costs.
 12. The 3rd and 4th respondents denied the claim in their statement of defence dated 12th July 2021 and prayed that the plaintiff's suit as against them be dismissed with costs.
 13. In her evidence, the appellant (PW1) relied on her statement and supplementary statement dated 24th May 2014 and 14th June 2021 respectively and list of documents dated 22nd September 2019 (PExhibits 1 to 19) namely; a limited grant of letters ad litem to the estate of Walter Abuto Goga (the deceased herein), a letter dated 27th July 2014 from Kendu Adventist Hospital, a certified copy of the death certificate of the deceased, a copy of the Identity Card of the deceased, affidavit of proof of marriage between the appellant and the deceased, a copy of title deed for the suit land dated 18th March 2002, a certified copy of the register for the suit land, official search certificate dated 18th March 2002, police abstract dated 17th September 2012, a letter to the District Land Registrar dated 9th June 2014, documents furnished by the District Land Registrar Rachuonyo to wit: certified copy of application to Land Control Board, certified copy of consent of Land Control Board, transfer of land form and official receipt for Kshs 600,000/-; a letter from Chief- Oyugis dated 29th May 2014, public notice, photograph of the suit land, another photograph of the suit land, search certificate for the suit land dated 9th June 2014, a letter dated 18th June 2014 to the Chairman- Kasipul Division Land Control Board, a letter dated 1st July 2014 to the District Land Registrar and a notice of intention to sue dated 11th June 2014.
 14. She testified that her late husband purchased the suit land, measuring 0.02 Ha in area, in 2002 and was issued with a title deed. That she set up a home thereon in 2011. That she later discovered that the same was registered in the name of the 1st respondent.



15. During cross-examination, she stated that the suit land got registered in the name of the 1st respondent on 31st May 2002. That the application for consent of the Land Control Board was signed by her late husband. That there was also an executed transfer form thereof.
16. The 1st respondent (DW1) relied on his statement on record and testified that he is the registered owner of the suit land, having purchased the same from the appellant's husband, one Walter Abuto (deceased), in 2002 at a price of Kshs 100,000. That the deceased obtained consent of the Land Control Board and signed transfer forms, which transfer was duly registered. He averred that he did not demolish the appellant's house as there was none on the suit land. He produced in evidence a copy of the title deed to the suit land, application for consent, a letter of consent from the Land Control Board and transfer forms (DExhibits 1 to 4 respectively).
17. On cross-examination, DW1 insisted that in the copy of green card and transfer forms, the purchase price is erroneously indicated as Kshs 20,000 instead of Kshs 100,000. He admitted that he saw a building development on the suit land. That he sold the same to the 2nd respondent.
18. DW2, Samuel Omondi Okumu, the 2nd respondent herein, relied on his statement on record. He stated that he purchased the suit land from the 1st respondent in 2014 after conducting due diligence. That, however, the same has not been transferred to his name.
19. During cross-examination, he admitted that he has not obtained consent of the Land Control Board, despite six months lapsing. That he is building on thereon.
20. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to:
 - a. Whether the instant appeal is tenable?
 - b. Just orders to issue herein.
21. The appellant contends that the impugned judgment violates Order 21 Rules 3(1) and (3) and 4 of the *Civil Procedure Rules*, 2010. I note that the impugned judgment was duly dated and signed by the trial magistrate. Apparently, the date of delivery was amended but there is no indication that such alteration was done after delivery thereof. Besides, the trial magistrate affixed his signature against the said amendment.
22. Regarding the inclusion of the name of a person who was not a party to the suit, it is my considered view that the said error is not so grave as to void the trial court's judgment. The learned trial magistrate did set out the parties' respective cases, framed two issues for determination, inclusive of whether the suit land belongs to the plaintiff. So, the name 'Johnson Odidi Odongo' as shown in the finding is an error which is curable under Article 159 (2)(d) of the *Constitution* of Kenya, 2010. He then analysed the issues and arrived at his decision based on reasons. Hence, the impugned judgment complied with Order 21 Rule 4 of the *Civil Procedure Rules*, 2010.
23. The appellant averred that the learned trial Magistrate failed to note that an order of inhibition having been issued by the court on the 13th day of February 2015 there is no way that the 2nd defendant/respondent could acquire any lawful title from the 1st defendant/respondent. However, from the evidence on record, the 2nd respondent (DW2) purchased the suit land in 2014, prior to issuance of the prohibition order. He testified thus:

“...I bought the land from James Omari Nyakundi in 2014...”



24. The appellant asserted that since no witness was called on behalf of the 3rd respondent, the evidence tendered by the appellant is uncontroverted. On that aspect, I subscribe to the Court of Appeal decision in *Kirugi and another v Kabiya and 3 others* (1987) KLR 347, where it was held that the burden was always on the plaintiff to prove his case on the balance of probabilities even if the case is heard by way of formal proof.
25. As pertains to ground 4 of appeal, the appellant lamented that the trial magistrate ignored the glaring contradictions in the pleadings, documentary exhibits and the oral evidence of the 1st respondent on the purchase price, thus flouting the provisions of Section 62 of the *Evidence Act* Chapter 80 Laws of Kenya. Instructively, Section 62 (supra) provides that:

‘All facts, except the contents of documents, may be proved by oral evidence’

Indeed, the 1st respondent (DW1) stated in his *viva voce* evidence that he purchased the suit land at a price of Kshs 100,000. In the letter of consent of the Land Control Board and transfer form (PExhibits 11(b) and (c)), the purchase price is indicated as Kshs 20,000. This discrepancy was not satisfactorily explained. Notably, the appellant’s counsel did not request the court to summon the Land Registrar to explain the discrepancies noted hereinabove. DW1 denied knowledge of the same and stated as follows:

“...I am not aware the application for Land Board and transfer reads Kshs 20,000...”

26. The appellant averred that as at 2014 when the 1st respondent issued a notice to her to vacate the suit land, she had been in possession of the same for over 12 years, openly, notoriously, peacefully and continually and had thus acquired title thereto by way of adverse possession. In the case of *Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshein and another* (2015) eKLR, the Court of Appeal stated that adverse possession dictates thus;
- a. The parcel of land must be registered in the name of a person other than the applicant,
 - b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
 - c. The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.
27. Furthermore, the applicant must show that such possession was without the permission of the owner; see *Richard Wefwafwa Songoi v Ben Munyitwa Songoi* (2020) eKLR.
28. Clearly, the appellant being a wife of the initial owner of the suit land, her entry onto the same was neither non-permissive nor non-consensual. The period of possession was also not proven to the requisite standard. The appellant (PW1) testified that she set up a home thereon in 2011. She stated:

“ ... in the year 2011 I set up a home on the land...”

29. Regarding fraud, it is trite law that a court may apply Sections 26 and 80 of the *Land Registration Act*, 2016 (2012) regarding a title obtained fraudulently upon distinct proof. In *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* (2018) eKLR where the decision in *Lalji Makani* (1957) EA 314 at 317 was applied, the Court of Appeal held;

“ Allegations of fraud must be strictly proved.....something more than a mere balance of probabilities is required.”



30. Moreover, I subscribe to the Court of Appeal decision in *Kinyanjui Kamau v George Kamau* (2015) eKLR, where the Court of Appeal expressed itself as follows;

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts...” (Emphasis added).

31. It is important to observe that despite being accorded the opportunity to lead evidence to demonstrate the existence of fraud, the appellant failed to do so during trial. Sections 107 to 108 of the *Evidence Act*, Chapter 80 Laws of Kenya are clear that he who asserts or pleads must support the same by way of evidence.

32. It is important to note that the *Matrimonial Property Act*, 2013 which requires one to obtain spousal consent when alienating an estate or interest in any matrimonial property, whether by way of sale, gift, lease, mortgage or otherwise, came into commencement on 16th January, 2014. The same does not apply retrospectively. Besides, spousal rights over matrimonial property are no longer an overriding interest under the *Land Registration Act*, 2016 (2012).

33. To that end, the instant appeal originated by way of a memorandum of appeal dated 22nd August 2022 is devoid of merit. It is hereby dismissed.

34. The appellant to bear the costs of this appeal.

35. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 13TH DAY OF MARCH 2024

G.M.A ONGONDO

JUDGE

Present

1. Odhiambo holding brief for G. S. Okoth, learned counsel for the appellant
2. Appellant - present in person
3. Luanga, Court Assistant

