



Nyaila (Suing as the Legal Representative of the Estate of Bonifas Nyaila Jowi- Deceased) v Osino (Sued as the Legal Representative of the Estate of Kasera Ondwalo- Deceased) & 4 others (Environment and Land Appeal E007 of 2023) [2024] KEELC 1321 (KLR) (12 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1321 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND APPEAL E007 OF 2023

GMA ONGONDO, J

MARCH 12, 2024

BETWEEN

EDWARD OWUOR NYAILA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BONIFAS NYAILA JOWI- DECEASED) APPELLANT

AND

PETER ARIYO OSINO (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KASERA ONDWALO- DECEASED) 1ST RESPONDENT

SALINA ACHIENG OWUOR (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETER OLAWO OCHIENG- DECEASED). 2ND RESPONDENT

JOSEPH ARUM ANYANGA 3RD RESPONDENT

THE LAND REGISTRAR, HOMA BAY 4TH RESPONDENT

THE HON. ATTORNEY GENERAL 5TH RESPONDENT

(Being an appeal from the judgment of Hon. J. S. Wesonga Principal Magistrate, delivered on 16th January 2023 in Homa Bay Chief Magistrate's Court Environment and Land Case No. 37 of 2019)

JUDGMENT

1. This appeal arises from the trial court's judgment delivered on the 16th January 2023 by the Honourable J. S. Wesonga, Principal Magistrate, in Homabay Chief Magistrate's Court Environment and Land Case No 37 of 2019 where she issued the orders infra:



- a. A declaration that all that parcel of land now comprising Kanyada/Kanyadier/922 and 925 (the suit parcels of land herein) originally belonged to Kasera Ondwalo (deceased) and that at no one time did they ever belong to Bonface Nyaila Jowi (deceased).
 - b. An order of permanent injunction stopping the plaintiff, his personal representatives, agents and assignees from ever laying claim on and/or interfering with the quiet possession and enjoyment of the suit properties by the respective registered owners.
 - c. That costs of the suit and interest thereon are awarded to the defendants/counterclaimants.
2. The appellant who was initially represented by the firm of Omonde Kisera and Company Advocates but is presently acting in person, was aggrieved thereby and mounted this appeal by way of a memorandum of appeal dated 15th February 2023 and filed herein on even date. The Appeal is anchored on grounds 1 to 8 as set out on the face thereof and the same include:
- a. The learned trial Magistrate erred in law and fact in failing to find and hold that the appellant had properly pleaded fraud and overwhelmingly proved the same against the respondent.
 - b. The learned trial Magistrate erred in law and fact in failing to find that torrens system could not be invoked in favour of the respondents in the circumstances and evidence tendered before the court.
 - c. The learned trial Magistrate erred in law and fact in faulting the sale of land agreements tendered by the appellant when the adjudication records clearly corroborated the appellant's case.
3. Wherefore, the appellant prays that:
- a. The appeal herein be allowed, judgment/decree of the trial court be set aside/ quashed and/or varied.
 - b. The court be pleased to substitute in lieu of the decree dated 16th January 2023, an order allowing the appellant's case and dismissing the respondent's counterclaim.
 - c. Costs of this appeal and costs incurred in the subordinate court be borne by the respondents.
 - d. Such further orders/reliefs as the court may deem fit, expedient and just.
4. The appeal was heard by way of written submissions.
5. The appellant filed submissions dated 19th January 2024 and stated that his late father, Bonface Nyaila Jowi (deceased 1) purchased the suit parcels of land from one Ager Onyango on 1st February 1969. That deceased 1 was the first registered owner of the suit parcels of land. That the proceedings of the adjudication board dated 22nd March 1995 which changed the ownership of the said parcels, was fraudulent.
6. The 1st, 2nd and 3rd respondents' counsel, Quinter Adoyo and Company Advocates, filed submissions dated 16th February 2024 and identified the following issues for determination:
- a. Whether the appellant proved that his father was a bona fide purchaser of the suit parcels of land.
 - b. Whether the appellant established fraud against the respondents.
 - c. Whether the 1st, 2nd and 3rd respondents have trespassed onto the suit parcels of land.



- d. Whether the respondents proved their counterclaim and
 - e. Whether the decision of the trial magistrate was right.
7. Learned counsel submitted, inter alia, that the sale agreement dated 1st February 1969 (PExhibit 3) did not indicate the land being sold. That the same was also written in Luo Language and no certificate of translation was attached thereto. That the appellant did not prove to the required standard the allegations of fraud as against the 1st, 2nd and 3rd respondents, particularly with regards to the proceedings of 22nd March 1995. That the 1st, 2nd and 3rd respondents are not trespassers to the suit parcels of land. That further, the 1st, 2nd and 3rd respondents proved how they acquired interest in the suit parcels of land. Thus, counsel urged the court to dismiss the instant appeal with costs to the respondents. To fortify the submissions, counsel relied on various authorities including the case of *Kinyanjui Kamau v George Kamau Njoroge* (2015) eKLR.
 8. The 4th and 5th respondents did not participate in this appeal.
 9. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to whether the appellant:
 - a. Has demonstrated that this appeal is tenable and
 - b. Is entitled to the orders sought in the memorandum of appeal.
 10. It is noted that the instant appeal being the first one from the trial court in the matter, I am obliged to review the record of the trial court, evaluate it and arrive at own conclusions in this appeal; see *Mwanasokoni v Kenya Bus Services Ltd* (1982-88) 1KAR 278 applied in other cases, *inter alia*, *Titus Ong'ang'a Nyachio v Martin Okioma Nyauma and 3 others* (2017) eKLR.
 11. At the trial court, the suit was generated by way of a plaint dated 11th July 2019 mounted by the plaintiff/appellant against the defendants/respondents seeking the following orders;
 - a. An order/declaration that deceased 1 is the lawful owner of the 1st and 2nd suit parcels of land measuring approximately 0.50 Ha and 0.48 Ha in area respectively.
 - b. An order revoking the registration of the 1st and 2nd suit parcels of land in the name of Peter Ariyo Osino and Salina Achieng Owuor respectively and instead both the parcels be registered in the name of deceased 1 and the Land Registrar Homa Bay be ordered to effect the changes.
 - c. Permanent injunction restraining the respondents by themselves, servants, agents or otherwise howsoever from trespassing upon the 1st and 2nd suit parcels of land.
 - d. Eviction
 - e. Costs
 - f. Interest
 12. The appellant contended that his late father, deceased 1, was the original owner of the suit parcels of land. That Kasera Ondwalo (deceased 2) and one Peter Olawo Ochieng (deceased 3) had lodged objections before the land adjudication arbitration board cases number 24 and 25 of 1985 in respect to the suit parcels of land. That however, deceased 1 died on 23rd October 1992 before the said adjudication cases were heard and determined. That on 23rd March 1995, the land adjudication board conducted a hearing of both cases wherein it indicated that deceased 1 physically attended and



- consented to the suit parcels of land being awarded to deceased 2 and 3. That the said fraud was discovered in the year 2010 when the register had closed.
13. PW1, Edward Owuor Nyaila, relied on his statement dated 11th July 2019 which was adopted as part of his testimony. He testified that the 3rd respondent has encroached onto the suit parcels of land which belong to deceased 1, who purchased the same from Ager Onyango. That the same was transferred to the 1st and 2nd respondents, through fraud.
 14. He produced the following documents: a copy of death certificate for deceased 1, certificate of grant of letters of administration to the estate of deceased 1, sale of land agreement dated 1st February 1969, proceedings of the Kanyada Section Adjudication Committee, chief's letter dated 24th September 2010, letter from the adjudication officer dated 24th September 2010, letter from the adjudication officer dated 8th January 2011, court proceedings in Environment and Land Case No 111 of 2013, copies of photographs and copies of adjudication records in respect to the suit parcels of land (PE Exhibits 1 to 11(b) respectively).
 15. During cross-examination, PW1 admitted that the title of the parcel being sold is not indicated in the sale agreement (PE Exhibit 3). That further, page 2 thereof is written in Luo language and the same was not translated.
 16. Kipkuto Toromo, Land Adjudication Officer, Homa Bay Sub County (PW2) testified that initially, both suit parcels of land were in the name of deceased 1. That cancellation of the name of deceased 1 with respect to the 1st suit parcel of land was due to arbitration board case number 24 of 1985 which was heard on 22nd March 1985. That with respect to the 2nd suit parcel of land, cancellation was done following arbitration board case number 25 of 1985 which was also heard on even date. That later, deceased 3's name was also cancelled following objection case number 1175 of 2010. He produced in evidence a demarcation book (PE Exhibit 12).
 17. In cross-examination, he stated that deceased 1 passed on before determination of the arbitration case. That the records of the aforesaid two cases do not identify who substituted deceased 1 in the arbitration proceedings.
 18. In their statement of defence and counterclaim dated 24th July 2019, the 1st, 2nd and 3rd respondents denied the claim and sought the orders infra:
 - a. A declaration that the 1st and 2nd suit parcels of land originally belonged to deceased 2 and that at no time did they ever belong to deceased 1.
 - b. An order of permanent injunction stopping the plaintiff, his personal representatives, agents and assigns from ever laying a claim on and/or interfering with the quiet possession and enjoyment of the 1st and 2nd suit parcels of land by the respective registered owners.
 - c. Costs and interest thereon at court rates.
 19. The 4th and 5th respondents filed a statement of defence dated 30th July 2019 on 1st August 2019, denying the claim.
 20. DW1, Joseph Aram Anyango, the 3rd respondent herein, relied on his affidavit filed on 25th July 2019 and testified that he owns a separate land parcel title number Kanyada/Kachar/ Kanyadier/920, having purchased the same from one Dinda Onyango. He produced in evidence; title deed in respect to the said LR Number Kanyada/Kachar/ Kanyadier/920 (DE Exhibit 1). During cross-examination, he averred that he has no claim whatsoever in respect to the 1st and 2nd suit parcels of land.



21. The 2nd respondent, Salina Achieng’ Owuor (DW2), relied on her affidavit on record and stated that she owns the 2nd suit parcel of land, having purchased the same from deceased 3 before commencement of the objection proceedings. That her son and daughter-in-law are buried thereon. She produced in evidence a copy of the official search certificate in respect to the 2nd suit parcel of land (DExhibit 2).
22. On cross-examination, she averred that she did not have a sale agreement between her and deceased 3 for the sale of the 2nd suit parcel of land. That she did not know how the said deceased 3 acquired the suit parcel of land. That she was not a party to any fraud.
23. DW3, Peter Ariyo Oyino, the 1st respondent herein, testified that his late brother, deceased 2, owns the 1st suit parcel of land. That deceased 3 bought the 2nd suit parcel of land from deceased 2, after which he sold the same to the 2nd respondent herein. That an appeal to the objection proceedings was done but he did not know the outcome of the same.
24. During cross-examination, he admitted that deceased 1 was already dead when the arbitration proceedings were concluded. That therefore, the same could not bear his thumbprint.
25. It is noteworthy that the learned trial magistrate set out the parties’ respective cases, framed four issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
26. In her judgment, the learned trial magistrate observed, inter alia;

“...the fraud pleaded by the plaintiff is attributed to the land adjudication board while the involvement of the 2nd and 3rd respondents remain hazy or non-existent. There seems to be obvious fraud in the proceedings because it is purported that deceased 1 was in attendance and appended his signature to the proceedings...”
27. The learned trial magistrate further observed that;

“...the 2nd and 3rd defendants acquired their properties for valuable consideration from the previous proprietors, thereby making them bona fide purchaser for value without any notice of any defect in the titles...

...That the torrens system is applicable in Kenya to the effect that title of a bona fide purchaser for value without notice of fraud cannot be impeached...”
28. The appellant contends that the trial court erred in law and fact in failing to hold that the appellant had properly pleaded fraud and overwhelmingly proved the same against the respondent.

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.”
29. Section 26 (supra) provides thus:
 - (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. (Emphasis added)

30. In the instant appeal, I note that although no evidence was adduced by the appellant at the trial court in support of the allegations of fraud as against the 1st, 2nd and 3rd respondents, it is clear that due process was not followed in issuing certificates of title of the 1st and 2nd suit parcels of land to deceased 2 and 3. The adjudication proceedings were unprocedural as it is purported that deceased 1 attended the same and appended his signature to the proceedings, yet the proceeding was conducted on 23rd March 1995, long after the demise of deceased 1 on 23rd October 1992.

31. In *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR, the Court of Appeal stated thus:

“We have stated that when a registered proprietor of title is challenged, it is not sufficient to dangle the instrument of instrument as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (Emphasis supplied)

32. Moreover, in *Dina Management Limited v County Government of Mombasa & 5 others* (2023) eKLR, the Supreme Court of Kenya held that the protection offered to a bona fide purchaser for value without notice does not apply where the title to the property was obtained irregularly or illegally. That a title document is not sufficient proof of ownership of property where the origin of that title has been challenged. That the holder of the title document must go beyond the instrument itself and show that the process of acquisition from inception was legal. That the ownership of land whose title was not acquired regularly is not protected under Article 40 of the *Constitution* of Kenya, 2010 on the protection of right to property.

33. Clearly, the above decisions of the superior courts, which bind this court, upset the torrens system which is predicated upon the sanctity of the register.

34. In the present case, the 2nd respondent averred that she purchased the 2nd suit parcel of land from deceased 3. However, no sale agreement, transfer instruments or consent of the land control board was availed to prove how title was acquired.

35. Regarding the 1st respondent, deceased 2 acquired title to the 1st suit parcel of land following arbitration board case number 24 of 1985 which was heard on 22nd March 1985. However, it has been established that due procedure was not followed in how the said proceedings were conducted. Indeed, the allocation of the suit property to deceased 2 and deceased 3 was unprocedural and as a result, no good title capable of transfer was acquired either by them, or subsequent purchasers.

36. As pertains the 3rd respondent, it is clear that the parcel of land he occupies is distinct and separate from the suit parcels of land herein.

37. In light of the foregoing, it is my considered view that the 1st and 2nd respondents herein do not hold valid title to the 1st and 2nd suit parcels of land. That the counterclaim dated 24th July 2019 and filed at the trial court was not merited in the circumstances.



38. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:
- i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
39. To this end, I find that the appellant who was the plaintiff at the trial court proved his claim to the requisite standard.
40. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 15th February 2023 and filed herein on even date is merited. The same is hereby allowed in terms of prayers (a) to (c) and as set out in paragraph 3(a) to (c) hereinabove.
41. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 12TH DAY OF MARCH 2024.

G.M.A ONG'ONDO

JUDGE

Present

Appellant- present in person

Luanga, Court Assistant

