



REPUBLIC OF KENYA



KENYA LAW
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**Amollo v Okong'o & 2 others (Civil Appeal 73 of 2019)
[2023] KECA 789 (KLR) (23 June 2023) (Judgment)**

Neutral citation: [2023] KECA 789 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 73 OF 2019
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
JUNE 23, 2023**

BETWEEN

JAMES OWUOR AMOLLO APPELLANT

AND

PETER ADONGO OKONG'O 1ST RESPONDENT

JOHN AGINA ODUKE 2ND RESPONDENT

MARY AWACH 3RD RESPONDENT

(An appeal against the judgment and decree of the Environment & Land Court of Kenya at Migori (George Ongondo, J.) dated 20th March, 2019 in ELC No. 744 of 2017)

JUDGMENT

Judgment of Tuiyott, JA

- [1] The dispute over land described as Kanyamkago/Kajulu/488 (the suit land) is old and was described by the Uriri Land Dispute as an imbroglio. But as will be apparent presently, there is hardly anything confusing or complicated about it.
- [2] Prior to his death, Jackton Amollo Oyare (Oyare) was the plaintiff in Kisii Environment and Land Court (ELC) Civil Case No. 156 of 2010 which was later transferred to Migori as ELC Case No. 744 of 2017. James Owuor Amollo, the appellant, is the legal representative of the Estate of Oyare. Oyare had commenced those proceedings against Peter Adongo Okongo (the 1st Respondent) claiming to be the sole registered owner of the suit land having bought it from Pius Okongo Odero (Odero) in 1970. Odero is the deceased father of the 1st respondent. It was the case of Oyare that when, on 22nd September 2009, he applied for an official search to the suit land, he found it to be registered in the name of the 1st respondent. He alleged fraud on the part of the 1st respondent. During the pendency of the suit, the 1st respondent sold the suit land to John Agina Oduke (the 2nd respondent) and Mary Awach (the



- 3rd Respondent) who were joined as defendants in the ELC proceedings. This sale, pendente lite, is a matter taken up in this appeal.
- [3] Before the ELC, Oyare's estate sought the cancellation of the title issued over the suit land to the 2nd and 3rd respondents and rectification of the register to have the name of James Owuor Amolo entered in its place.
- [4] The defence of the 1st respondent was that he became the bona fide proprietor of the suit land as beneficiary to the estate of Odero, who before his death was the registered proprietor of the suit property. It was alleged that Oyare wrongfully, illegally and/ or fraudulently altered transfer documents at the District Land Registry at Migori purporting that Odero had transferred the suit property to him in 2000. Subsequently, Oyare was arraigned before court in Migori Criminal Case No. 519 of 2002 *Republic v Caleb Owuor Agik & Peter Amolo Oyare* in which he was convicted of forging title in respect of the suit property, amongst other offences.
- [5] Upon hearing the evidence of the parties, which followed their respective pleadings, Hon. Ongondo, J made the following key findings:
- “The purported transfer of the suit property on 20th April, 2000 as per D. Exhibit 9 and on 22nd September 2009 as shown on P. Exhibit 1 was fraudulent and irregular. This is notable from D. Exhibit 10 that the deceased father of DW1 died on 30th June, 1988 yet the court held that the said deceased died in 1998 see (D. Exhibit 5 at page 3). It is quite clear from the D. Exhibit 5 that the deceased original plaintiff did not appeal for judgement. Wherein he was guilty and convicted; see Esther Wanjiru case (*supra*).
- It must be borne in mind that section 143 repealed Registered *Land Act* (Cap 300) under which the suit property was registered provided for title cancellation through order of the court; see Musharu case (*supra*). Interestingly, the plaintiff did not lay a claim for adverse possession in respect of the property and has not proved the same or all as per the dictates espoused by the Court of Appeal in *Wilson K. Katana and 101 others v Salim Abdallah Bakshwein and another* [2015] eKLR. Article 40 (1) of *the Constitution* of Kenya 2010 anchors secure protection of right to property as read with section 152 of the *land Act* prohibits unlawful occupation of public, community and private land apply in favour of the 2nd and 3rd defendants in the present suit.”
- [6] In this first appeal, the appellant raises 5 (five) grounds but which really are that the decision of the learned Judge was against the weight of evidence, on a misapprehension of the evidence or on reliance upon irrelevant evidence.
- [7] The appellant submits that the suit property was transferred to the 2nd and 3rd respondents inspite of an injunction and pendency of the suit. It is argued that the title in favour of the two was a nullity since it was against an existing court order.
- [8] The appellant contends that he lived, farmed and developed the suit land since 1971 whereas the suit before the ELC was instituted on 3rd June 2010 and had therefore succeeded in a claim of adverse possession. He cites many authorities including *Mtana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR in support of his proposition that he satisfied all the essentials of a claim for adverse possession. The appellant asks us to find that although he did not plead adverse possession in his plaint, his plea can be inferred from the pleadings and during cross-examination in which he asserted that he and his family stayed on the suit property for over 39 years.



- [9] An interesting argument is made regarding the criminal conviction of Oyare. The appellant contends that although his father was found guilty and a fine imposed against him, the proceedings were not a civil claim but a criminal case touching on falsification of documents of transfer of the suit property to his name. Further, the criminal matter proved that Oyare knew the suit property to be in the name of Odera and that even if, by virtue of the criminal matter, Odera had asserted his right over the suit property, his title to it had long been extinguished in 1987.
- [10] The appellant makes a further submission that the Land Tribunal did not have jurisdiction to determine title or land ownership. The appellant was referring to Uiri Land Dispute Tribunal Case No. 06 of 2010 in which the 1st respondent had brought a complaint against Oyare seeking eviction of Oyare from the suit land. The Tribunal found in favour of the 1st respondent and ordered that Oyare vacates the land. That order was subsequently adopted as an order of the court in SPMCC Migori Misc. Case No. 37 of 2011 *Peter Adongo Okongo v Jacton Amolo Oyare*.
- [11] In response, counsel for the respondent draws ten (10) issues on which he submits. This fragmentation of issues is not helpful. In addition, some of the arguments are on matters which were not raised at all in the appeal and are therefore irrelevant. These include the capacity of the appellant to bring the suit and whether the superior court below could grant the order for cancellation of title on the basis of fraud without joinder of the Land Registrar as a party. The respondents did not give a formal notice seeking to affirm the decision of the superior court below for reasons other than or in addition to those in the decision (Rule 94 of the [Court of Appeal Rules](#) 2010, now Rule 96) and do not have a platform to make those arguments.
- [12] It is submitted that none of the particulars of fraud pleaded against the respondents was proved by the appellant. The old argument being made that fraud must not only be specifically pleaded but also proved on a standard above a balance of probability although below beyond reasonable doubt.
- [13] On the appellant's claim for adverse possession, the respondents assert that the claim was not specifically pleaded or made pursuant to Order 37 of the [Civil Procedure Rules](#).
- [14] Turning to the appellant's complaint that the sale and transfer of the suit land to the 2nd and 3rd respondents was in disobedience of the court order of 30th June, 2010, the response is that neither the order nor the application was served upon the respondents. Nor was it even clear that it was extracted. The respondents contend that they were not and are still not aware of the existence of such order against the 1st respondent.
- [15] This is a first appeal in which the role of this Court is to re-appraise the evidence and to draw inferences before arriving at its own impartial conclusion always aware that, unlike the trial court, we did not see and hear the witnesses testify and due allowance must be made for that. See. *Selle v. Associated Motor Boat Company Limited* (1968) EA 123.
- [16] It seems to me that the following issues call for our determination:
- (1) Did the appellant successfully impugn the cancellation of the registration of the suit land in the name of Oyare and the subsequent transfer to the 1st respondent?
 - (2) If not, did the appellant properly set up and prove a claim for adverse possession against the respondents?
 - (3) Was the transfer of the suit property from the 1st respondent to the 2nd and 3rd respondents in disobedience of a court order or the doctrine of *lis pendens* and if so what is the effect?



- [17] From the evidence placed before the trial court, Odero was first registered as proprietor of the suit land on 28th April, 1975. Oyare then became the registered proprietor on 25th April, 2000 but this was controversial because it turned out that the registration was achieved fraudulently by Oyare. In criminal proceedings (No.519 of 2002) brought against Oyare and one Caleb Owuro Agik, an employee of the Ministry of Lands, the two were charged with forging a transfer form in respect to the suit land purporting it to have been signed by Odero and in count II charged with making a false document regarding the same form.
- [18] Oyare was found guilty of the two counts in a decision dated 31st January, 2007 and in doing so the trial magistrate observed:
- “This transfer form was executed on 20th April, 2000, 12 years after the death of the deceased. It would appear that the 1st accused purported that the deceased was alive 12 years later and that he purportedly executed the transfer 12 years into the grave. The 1st accused could not have received authority from a dead person to lawfully transfer the land in his favour that in my view was fraudulent and amounts to forgery.”
- [19] No appeal was proffered against the said decision and the finding of the trial court in the criminal proceedings remains undisturbed.
- [20] Thereafter, the name of Oyare was cancelled from the register to the suit land and registration reverted back to Odero. It is however unclear whether or not the cancellation was on authority of a court order. Anyhow, things moved on and on 21st November, 2008 the 1st respondent was registered as proprietor as a successor of the Estate of Odero.
- [21] Parties are bound by their pleadings and my attention is drawn to paragraph 7 of the appellant’s amended plaint in which he pleads:
- “The plaintiff’s claim is for cancellation of the title issued to the defendants on ground of fraud.
- Particulars of fraud
- (a) Removal of the plaintiff’s name from the register without High court order or otherwise.
- (b) The CID has no authority to interview and purport to sway or convince the Land Registrar to alter or falsify land records, without notifying the plaintiff.
- (c) That allegation of fraud committed by the plaintiff was never proved in a court of law”
- [22] The *onus* was on the appellant to show that the Registrar cancelled registration of Oyare without a court order. He failed to do so. And even if the Registrar cancelled the registration of Oyare without a court order, it is preposterous and audacious for the appellant to ask a court of law to reinstate registration which had been found by another court of law to have been obtained through fraud. In effect asking the court to sanction an illegality. Once it was proved beyond reasonable doubt that the registration of Oyare was a work of fraud perpetrated by Oyare himself, then it could never be available for Oyare’s personal representative to seek reinstatement of a product of fraud.
- [23] It must have become apparent to the appellant that a claim based on the validity of the title to Oyare was on thin ice so he changed strategy and now asserts that he successfully established a claim for adverse



possession. But the appellant first had to surmount the reality that he did not plead a claim for adverse possession and so he argued that the case was apparent from the evidence adduced.

[24] It is true that in his evidence he makes mention of the length of time that he and his family had occupied the land. Yet emerging from the evidence, it is abundantly clear that this assertion is made, not in support of a claim for adverse possession, but to buttress the contention that his father had ownership of the land on account of a valid title.

[25] In addition, not once did the respondents, in answering the appellant's claim, create an impression that they are answering to a claim for adverse possession. Indeed, not even in the submissions made by the parties before the trial Court did the issue of adverse possession show itself. This is not one instance where, although not pleaded, a matter is one for determination in the sense of *Odd Jobs v. Mubia* [1970] EA 476 where Duffus P. stated:

“Generally speaking, pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the court. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the dispute between the parties”

[26] Clearly then the appellant could not and cannot sustain a claim for adverse possession.

[27] On 30th June, 2010 Makhandia, J (as he then was) granted an injunction restraining the 1st respondent from in any way or manner dealing with the suit property. The order was made in the presence of the 1st respondent who was in court. It is therefore apparent that the sale and transfer of the suit property to the 2nd and 3rd respondents, which happened on a date after the order, was in breach of that order. And even if there were no injunctive orders, there was a pending suit in respect to the suit land and any sale and transfer of the property was in disregard of the doctrine of *lis pendens* which is a jurisdictional power or control acquired by a court over property while a legal action is pending before it. Whichever way, the sale and transfer of the suit property would be troubling.

[28] But what was the remedy available to the appellant in those circumstances? One would have been to cite the 1st respondent for contempt of court and seek reversal of the transfer made in favour of the 2nd and 3rd respondents. The other was to allow the suit to run its course in which case the titles in favour of the 2nd and 3rd respondents would be subject to the outcome of the suit. The appellant chose to join the 2nd and 3rd respondents to the suit and cancellation of the registration in their favour but without taking out contempt proceedings.

[29] Unfortunately for the appellant, he could not succeed in his claim because the title he was riding on was premised on fraud which had been proved. So, while the appellant had a legitimate grievance against the 1st respondent for disobeying the court order and failing to respect the pendency of the proceedings before the ELC, still that grievance could not advance the appellant's claim to the suit land.

[30] Ultimately, the appeal is without merit and I would propose that it be dismissed with costs.

Judgement of Kiage, JA

I have had the benefit of reading in draft the judgement of Tuiyott J.A. I entirely agree with it and have nothing useful to add.

As Joel Ngugi, JA is in agreement, the appeal shall be dismissed along the lines proposed by Tuiyott, J.A.



Judgement of Joel Ngugi, J.A

I have had the benefit of reading in draft the judgement of Tuiyott J.A. I am in full agreement with it and therefore have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JUNE, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR.

