



**Opiyo & another v Olunje (Civil Appeal 148 of 2018)
[2023] KECA 1539 (KLR) (8 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1539 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 148 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
DECEMBER 8, 2023**

BETWEEN

THOMAS MASEKO OPIYO 1ST APPELLANT

PETER OUMA MBAJA 2ND APPELLANT

AND

ALFRED OYOKO OLUNJE RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court (ELC) at Kisumu (S.M. Kibunja J.) delivered on 7th February, 2018 in ELC Case No. 51 of 2015)

JUDGMENT

1. This is an appeal arising from the judgment of the Environment and Land Court (ELC) which was delivered on 7th February, 2018, in which the learned Judge (S.M Kibunja, J.) found in favour of Alfred Oyoko Olunje (Alfred), and issued orders of permanent injunction against Thomas Maseko Opiyo (Thomas) and Boniface Mbaja Opiyo (Boniface) who were defendants in the suit.
2. In a memorandum of appeal dated 28th November, 2018, Thomas and one Peter Ouma Mbaja (Peter) have challenged the judgment of the ELC contending that the learned Judge erred in finding that Alfred was legally and procedurally registered as the proprietor of Kisumu/Kasule/3270, which was a subdivision from Kisumu/Kasule/1512 registered in the name of Alfred. The appellants also fault the learned Judge for ignoring the evidence of Boniface and failing to allow Thomas to testify, despite being a crucial party to the proceedings. They prayed that the appeal be allowed and the case referred back to the ELC for retrial, and that an eviction and injunction order do issue against Alfred.
3. The background to the appeal is that Alfred is the registered proprietor of land parcel No. Kisumu/Kasule/3270. He was registered as proprietor on the 3rd April, 1995 after Kisumu/Kasule/1512 was subdivided. It is Alfred's contention that Thomas and Boniface have encroached onto the land and purported to use it without Alfred's authority.



4. By a plaint dated 21st April, 2008, Alfred filed a suit against Boniface and Thomas for orders of permanent injunction restraining them, their servants and agents from trespassing onto Kisumu/Kasule/3270, or in any way interfering with Alfred's quiet use and occupation of the said property.
5. Thomas and Boniface filed a defence in which they denied that Alfred was the registered owner of Kisumu/Kasule/3270, or that they had encroached onto the said land parcel. They claimed that it was Alfred who had fraudulently subdivided the appellant's land parcel No. Kisumu/Kasule/1512 into two parcels Kisumu/Kasule/3270 and Kisumu/Kasule/3271.
6. Upon considering the evidence of Alfred, and that of Boniface and the submissions filed by the parties' respective counsel, the learned Judge found that the documentary evidence produced in form of a green card showed that Alfred was the registered proprietor of Kisumu/Kasule/1512 from 18th June, 1991, and that his title has never been successfully challenged; that Kisumu/Kasule/3270 was a subdivision from Kisumu/Kasule/1512 that was registered in the name of Alfred on 31st March, 1995; that though Boniface and Thomas moved on to the disputed land in 2007, their occupation has neither been peaceful nor uninterrupted but has been subject of litigation on several occasions; and that there is an eviction order issued against them by the court that is still in force. The learned Judge concluded that under Section 26 of the Land Registration Act Alfred is the absolute and indefeasible owner of Kisumu/Kasule/3270.
7. The appellants filed written submissions in which they reiterated that the disputed land was subject of a case in Nyando Case No 26 of 1950 between their grandfather and the appellant's father; that this case was determined by the creation of land parcel No 1512 that was given to their grandfather and parcel No. 3888 which was given to Alfred's father; and that the appellants father had filed objection proceedings that were allowed after he produced the judgment from the Nyando court. The appellants contended that the green card showed that despite a restriction that had been placed on the land, the appellant's father was irregularly registered as proprietor of parcel No 1512, before the appeal to the Provincial Lands Committee was heard and determined.
8. The appellants argued that the learned Judge erred in holding that they went into possession in 2002 and 2007, as the evidence showed that they had been in possession since the 1980s. They concluded that the learned Judge failed to consider these relevant factors and urged that the appeal be allowed, matter be referred back to the ELC for retrial, and issue orders of eviction and injunction against the respondent.
9. Alfred also filed written submissions in which he submitted that the learned Judge rightly found in his favour as he tendered sufficient evidence which proved his claim that the appellants were in unlawful occupation of the suit property. He maintained that his evidence and the documents that he produced, all confirmed that Kisumu/Kasule/3270 belonged to him. He urged that the appellants' submissions be struck out, as they were improperly on record having been filed by Odeny & Co advocates without the appellants having filed any notice of change from their previous advocate, Ngire Aduol and Associates Advocates.
10. The main issue that we discern in this appeal is whether Alfred was irregularly registered as the rightful owner of Kisumu/Kasule/1512; whether he fraudulently subdivided the said parcel into two parcels including Kisumu/Kasule/3270, and whether Boniface and Thomas unlawfully trespassed or encroached onto Kisumu/Kasule/3270.
11. At the outset, we note that Peter Ouma Mbaja who is indicated as the 2nd appellant was not a party in the ELC. As per the record of appeal, the only notice of appeal filed is that dated 16th February 2018. That notice was filed by Lumumba and Lumumba advocate on behalf of Thomas as the only



- appellant. Peter appears suddenly in the Memorandum of appeal filed by Ngire Aduol and Associates Advocates, where he is indicated as the 2nd appellant and Thomas as 1st appellant. In their submissions the appellants have not offered any explanation or justification of Peter's role in the appeal.
12. Among the documents included in the record of appeal we have come across a copy of letters of administration ad litem dated 8th October 2018 limited for a period of 90 days, that was issued to Peter Ouma Mbaja to administer the estate of Boniface Mbaja who died on 31st July 2017. The implication is that Boniface died and Peter replaced him in the appeal representing his estate. The problem is that Peter is not indicated as representing the estate of Boniface but is an appellant in his own capacity. Secondly, Peter did not file any notice of appeal, and thirdly the letters of administration having been limited to 90 days, there is no evidence that he has authority to prosecute the appeal. Peter's appeal is, therefore, incompetent.
 13. Be that as it may, we proceed to consider the appeal on merit, and being a first appeal, we have an obligation to consider, analyse and re-evaluate the evidence that was adduced in the trial court in order to arrive at our own conclusion. In doing so we take cognisance of the fact that the trial court had the advantage of seeing and assessing the demeanour of the witnesses, and therefore we should defer to the findings of facts made by that court and only interfere if satisfied that the trial court based its conclusion on no evidence or misapprehended the evidence or acted on wrong principles. (*Ephantus Mwangi & Another –vs- Duncan Mwangi*, [1982-1988] 1KAR 278; and *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2 EA 212).
 14. During the trial, Alfred testified that he was the registered proprietor of Kisumu/Kasule/3270 which was a subdivision of Kisumu/Kasule/1512. He produced the green card and title deed for both properties and explained the background to his registration. He stated that the original title Kisumu/Kasule/1512 initially belonged to his father. It was subject of a dispute between his father and the appellants' grandfather and went through several litigation processes.
 15. Alfred produced in evidence several exhibits, including: proceedings for Nyando Case No 26 of 1950, Appeal Committee Case No 40 of 1981, Letter dated 4th August 1988 on appeal to the Minister, High Court Miscellaneous Application No 73 of 1997, and Tribunal Case No 38 of 2003. He maintained that the documents showed the litigation process had ended in his favour after he took over the litigation following the death of his father.
 16. Under cross examination, Alfred conceded that the appellants' grandfather Okoth Maseko was the first registered proprietor of Kisumu/Kasule/1512 and their father Lazaro Opiyo Maseko was the 2nd registered proprietor. He explained that there was a dispute because the grandfather was actually settled on Kisumu/Kasule/1511. His ownership of Kisumu/Kasule/1512 was challenged by Alfred's father who claimed the land. Initially Alfred's father lost the case but he challenged the decision. Alfred took over the litigation after his father died and succeeded in the appeal, following which he was registered as the proprietor of Kisumu/Kasule/1512 in 1991. He had the said land subdivided into two parcels in 1993. He retained one parcel Kisumu/Kasule/3270, and sold the second subdivision Kisumu/Kasule/3271.
 17. Boniface who was the only witness who testified for the defence, maintained that the defendants were the rightful owners of the suit property. He stated that Kisumu/Kasule/1512 belonged to their grandfather, Obongo Modoti from whom his father Lazaro Opiyo Maseko acquired the land. He explained that as a result of a land dispute between Olunyi (Alfred's grandfather) and Obongo Madoti heard by the Nyando Court, the disputed land was divided into two portions. Following land adjudication Olunyi's portion was registered as parcel No 3888, and Obongo's portion was registered as parcel No 1512. However, Alfred, without their knowledge fraudulently subdivided Kisumu/



- Kasule/1512 and sold part of the land. The witness produced the title and copy of the green card for Kisumu/Kasule/1512 that was in his father's name. He claimed that Alfred has never used Kisumu/Kasule/1512.
18. Upon being cross examined by Alfred's counsel, Boniface conceded that Alfred filed an appeal which was successful and that the land was awarded to him in 1986. He also conceded that the Provincial Appeals Tribunal ruled in favour of Alfred and that the award was adopted as an order of the court and an eviction order issued against him and Thomas.
 19. From the above evidence it is apparent that there has been a dispute over Kisumu/Kasule/1512 that has persisted for several decades. However, that dispute was resolved through the adoption of the award of the Provincial Appeals Tribunal as a judgment of the court. That judgment has not been set aside. In fact, the defence witness conceded that eviction orders have been issued and are in existence against Boniface and Thomas in execution of that judgment. This means that the judgment against them in regard to Kisumu/Kasule/3270 is binding, valid and enforceable.
 20. Contrary to the appellant's complaint that the trial court failed to allow Thomas to testify, the proceedings of the trial court as reflected in the record of appeal shows that learned counsel Mr Adiso, who was appearing for the appellants, informed the court that he only wished to call Boniface as a witness and did not find it necessary to call Thomas as the evidence of the two witnesses was basically the same. That ground was, therefore, frivolous and is rejected
 21. It is evident that Kisumu/Kasule/1512 is no longer in existence having been closed upon subdivision and new titles Kisumu/Kasule/3270 and Kisumu/Kasule/3271 registered. The respondent is the current registered proprietor of Kisumu/Kasule/3270 whilst Kisumu/Kasule/3271 is registered in the name of a third party who was not joined in this suit
 22. Section 24(a) of the [Land Registration Act](#) provides as follows:
 - “(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”
 23. Under Section 26 of the [Land Registration Act](#), a Certificate of title in regard to land is conclusive evidence of ownership of the land. The section provides as follows:
 - “(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.”



24. Since Alfred is the registered proprietor of Kisumu/Kasule/3270, his title can only be impeached if it is established that the title was acquired through fraud, misrepresentation or illegality, or if the title was acquired un- procedurally or through a corrupt scheme.
25. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR Tunoi JA (as he then was), in considering the issue of fraud stated the law, as follows:
- It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* (1878) 7 Ch. D 473 at 489.
26. In *Ardhi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR this Court observed as follows:
- “It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond a reasonable doubt.”
27. The issue that we must address in regard to fraud, is whether the appellants who pleaded fraud proved it to the required standard as stated in the afore cited decisions. From the evidence on record, Boniface did not challenge the validity of Alfred’s Title Deed or the green card of the suit property that was produced as exhibits. He challenged the purported registration of the respondent in 1991 as the proprietor of Kisumu/Kasule/1512 as irregular because it was done while there was a restriction prohibiting any transactions and before the appellate process in the Appeal Board was finalized.
28. From the green card for Kisumu/Kasule/1512, it is clear that a restriction was placed on the title on 1st February 1990 restricting registration of any transaction until “the appeal before the Minister” is finalized. That restriction is indicated as having been removed on 18th June 1991 on the authority of the Chief Land Registrar, and on the same day in an entry that is signed by the Registrar, Alfred was registered as the proprietor of Kisumu/Kasule/1512.
29. The appellants have not demonstrated that the appeal before the minister had not been finalized, nor have they shown any irregularity in any of the entries. All the entries having been properly signed by the land registrar. Indeed, if there was any fraudulent registration then the appellants would have filed a counterclaim and included the Land Registrar as one of the defendants, but there was no such counter claim.
30. The appellants have relied on a letter dated 30th April 2008 from the Provincial Commissioner Nyanza, that talks of an appeal pending before the Provincial Appeals Committee. However, that letter is not of any assistance because if, indeed, there was an appeal pending before the Provincial Appeals Committee, that appeal was not the subject of the restriction registered against the title on 1st February 1990. The appellants’ assertions regarding fraud and irregularity therefore remained unsubstantiated and cannot pass muster.
31. Alfred, on the other hand, produced a copy of the Title Deed for Kisumu/Kasule/3270 registered in his name, a copy of the green card tracing the root of that title, and a ruling dated 30th September, 2020 ordering the eviction of Thomas and Peter, which orders have never been appealed against or vacated. We find that the evidence was sufficient to establish Alfred’s case on a balance of probability.



In addition, the appellants' prayer for an eviction and injunction order to issue against Alfred is misconceived as there was no counterclaim upon which such an order could be anchored.

32. Finally, under Section 26 of the *Land Registration Act*, since there was no proof of fraud, illegality or misrepresentation in the acquisition of Alfred's title to the suit property, the Title Deed provided conclusive evidence of Alfred's ownership of Kisumu/Kasule/3270 as his title remains absolute and indefeasible.
33. For the above reasons, we come to the conclusion that the ELC came to the correct decision in finding in favour of Alfred. This appeal has no merit; it is accordingly dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF DECEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

