



**Ogutu v Odawa & another (Environment and Land Appeal
E026 of 2023) [2024] KEELC 4410 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4410 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E026 OF 2023**

E ASATI, J

MAY 30, 2024

BETWEEN

JOHN ODHIAMBO OGUTU APPELLANT

AND

JOSHUA OTIENO ODAWA 1ST RESPONDENT

JAMES ODHIAMBO OWINO 2ND RESPONDENT

(Being an Appeal from the Judgement and Decree of HON. P. KOSKEY (SPM) delivered on 11th May, 2023 by HON. AK. MOKOROSS (SPM) at Tamu Law Courts case Number NO.E017 2022)

JUDGMENT

1. The Appellant was the Defendant in Tamu PMC EL Case No.E017 OF 2022 (the suit) wherein he was sued by the Respondents herein over a parcel of land known as Kisumu/Wangaya 1/25xx (the suit land). In the suit, the Respondents claimed that the 1st Respondent was the registered owner of the suit land, that the Appellant violently and without any legal rights invaded the suit land and destroyed maize crops planted by the 2nd Respondent and forcefully took possession of the land. Further that the Appellant made fraudulent and illegal attempts to acquire the land and illegally sub-divided it to create Kisumu/Wangaya 1/57xx. The Respondents therefore sought for orders against the Appellant for;
 - a. A permanent injunction do issue restraining the Defendant (appellant herein), his agents, servants invitees and his representatives from entering upon or trespassing, occupying , ploughing cultivating and tilling, planting crops on, disposing off, charging, sub-dividing ,dealing, alienating, letting or otherwise using or any way whatsoever interfering with the 1st plaintiff's proprietary rights over the land known as Kisumu/Wangaya 1/25xx and as sub divided to create Kisumu/Wangaya 1/57xx and the 2nd plaintiff's rights over the portion of Ksumu/ Wangaya /25xx sold to him by the 1st plaintiff.



- b. A declaration that the sub division of Kisumu/Wangaya 1/25xx to create land parcel number Kisumu/Wangaya 1/57xx is invalid, null and void and the title issued to the defendant is revoked.
 - c. A mandatory injunction directing the District Surveyor, Nyando to rectify and amend Map sheet No. 23 for Wangaya I adjudication section by deleting the entries and drawing creating the parcel number Kisumu/Wangaya 1/57xx and reinstating the original acreage of Kisumu/Wangaya 1/25xx.
 - d. An order of eviction of the Defendant from the land parcel No. Kisumu/Wangaya 1/25xx.
 - e. An order directing the OCS, Chemelil Police Station/post to enforce the orders of the Honourable court.
 - f. General damages for trespass.
 - g. The costs of the suit.
2. The record of appeal shows that in response to the Respondents' claim, the Appellant filed Defence titled "Defendant's Objection to the suit" filed in court on 3rd November, 2022. He denied that land parcel number Kisumu/Wangaya 1/57xx was an extract of the suit land. That no sub-division of the suit land was done. That land parcel No. Kisumu/Wangaya/57xx was lawfully acquired by him.
 3. The record further shows that the suit was heard by the trial court which vide the judgement dated 11th May 2023 found that the appellant obtained land parcel No. Kisumu/Wangaya 1/57xx fraudulently and cancelled it. The court made orders declaring that the registration of property known as Kisumu/Wangaya 1/57xx to the Appellant was illegal, null and void. The court further made an order to the Land Registrar - Muhoroni to cancel the title of the suit property known as Kisumu/Wangaya 1/57xx issued to the Appellant and for the land to revert to its original position as part of Kisumu/Wangaya 1/25xx. The court further made an order for the Land Registrar Nyando/Muhoroni to rectify the register accordingly, an order of permanent injunction, an order of eviction of the appellant and awarded costs to the Respondents.
 4. Dissatisfied with the judgement, the Appellant filed the present appeal vide the Memorandum of Appeal dated 9th June 2023 seeking for orders that the appeal be allowed, the judgement delivered on 11th May, 2023 in Tamu PM ELC Case No. E017/2022 be set aside and be substituted with an order dismissing the Respondents' suit with costs, that the order dismissing the Objection be set aside.
 5. The grounds of appeal set out in the Memorandum of Appeal are that;
 - a. That the learned Magistrate erred in law and in fact by drawing a conclusion that land parcel number Kisumu/Wangaya 1/57xx is a sub division of land number Kisumu/Wangaya 1/25xx
 - b. That the learned Magistrate erred in law and in fact in failing to appreciate what the defendant meant by "fixed" and when the certificate of search (DEXH 4) was taken to the cyber to be "fixed".
 - c. That the learned Magistrate erred in fact and in law by failing to appreciate that Festus Ogotu Ojwang was the first registered owner of the land parcel number Kisumu/Wangaya 1/57xx.
 - d. That the learned Magistrate erred in law and in fact by failing to appreciate first registration through adjudication process where the adjudication records were forwarded to the land registrar who registered the same at a later date notwithstanding the proprietor's death.



- e. That the learned Magistrate erred in law and in fact by upholding the plaintiff's unsubstantiated allegation that there are no documents supporting the existence of land parcel number Kisumu/Wangaya 1/57xx, notwithstanding a certificate of search (DEXH-8)
- f. That the learned Magistrate misdirected herself in law and in fact by shifting the burden of proof to the defendant.
- g. That the learned Magistrate erred in law and exceeded its jurisdiction by holding that High Court Succession cause number. 289 of 2010 was a misrepresentation.
- h. That the learned Magistrate erred in law and in fact by holding that land parcel number Kisumu/Wangaya 1/57xx was acquired illegally, un procedurally and through a corrupt scheme.
 - i. That the learned Magistrate erred in law and in fact by directing the Registrar to cancel the defendant's tittle for the land to revert back to a no- existent original position.

Submissions

- 6. Directions were taken on 12th February, 2024 that the appeal be urged by way of written submissions. Consequently, written submissions dated 8th March 2024 were filed by the firm of Tawo & Company Advocates on behalf of the Appellant. Similarly, written submissions dated 2nd April, 2024 were filed on behalf of the Respondents by O. J. O. Asudi, Advocate of Odhiambo Owino & Company Advocates.

Issues for Determination

- 7. The grounds of appeal form the issue for determination herein

Analysis and Determination

- 8. This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. In *Selle & another v Associated Motor Boat Company Ltd & Another* (1968) IEA 123) it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court. The court stated; -

“an appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

- 9. The first ground of appeal raises the issue of whether or not the trial court erred in law and fact by drawing a conclusion that land parcel number Kisumu/Wangaya 1/57xx was a sub-division of the suit land parcel number Kisumu/Wangaya 1/25xx.

The Respondents pleaded in the plaint that the Appellant had illegally caused the suit land to be sub-divided and a portion therefore registered in favour of the appellant as Kisumu/Wangaya 1/57xx. In paragraph 12 of the plaint, they pleaded the particulars of illegalities to include sub-dividing the suit land without the knowledge or consent of the Respondents, creating a new parcel without having the mutation signed by the 1st Respondent, sub-dividing land without consent of the Land Control Board,



- forging mutation and transfer forms and obtaining fake title deed through corrupt means and failing to close the mother title upon sub-division.
10. The Appellant denied the claim and alleged that land parcel No. Kisumu/Wangaya 1/57xx was not extracted from the suit land.
 11. The proceedings in the record of appeal show that the Respondents' evidence before the trial court comprised of the testimonies of the Respondents (who testified as PW1 and PW2) PW3 and the exhibits that they produced. The 2nd Respondent, (PW1), testified that when a Surveyor came to the land, he noticed a problem namely; that there was a parcel number 57xx which had been created without due process being followed. That the parcel arose out of a sub-division. That there were no records for the parcel. There was no green card or search available. That nobody could tell how the parcel came into being. That the said parcel partly covered the portion he had bought from the 1st Respondent. That the Appellant claimed ownership of parcel No. Kisumu/Wangaya 1/57xx and forcefully took occupation of a portion of it. That the appellant brought documents showing that originally the land belonged to his father one Cosmas Oguttu Ojwang. On cross-examination, PW1 stated that he had seen a search in respect of land parcel No. Kisumu/Wangaya 1/57xx. That the land arose from a succession process.
 12. PW2 who was the 1st Respondent testified that the suit land measured 6 acres and PW3 testified that he did not know how parcel number Kisumu/Wangaya 1/57xx came into being.
 13. The Appellant testified as DW1. He stated that parcel No. Kisumu/Wangaya 1/57xx was not hived out of the suit land parcel No. Kisumu/wngaya 1/25xx.
 14. After hearing this evidence, the record shows that the trial court stated that it had perused the map produced as P. exhibit 3. That the same showed that land parcel No. Kisumu/Wangaya 1/57xx was hived out of the suit land. That the surrounding parcel numbers are 25xx, 25xx, 25xx. That all the surrounding numbers bear the numbers 2500s. That it is only parcel No. Kisumu/Wangaya 1/57xx that stands out and has a totally different synchrony of number. The court considered and found that Kisumu/Wangaya 1/57xx is a sub-division of Kisumu/Wangaya 1/25xx.
 15. In this appeal, it has been submitted on behalf of the Appellant that the Respondents had a duty to prove that they were the rightful proprietors of land parcel No. Kisumu/Wangaya 1/25xx. That the said land parcel was originally 6 acres and that 2 acres were hived off to create land parcel Kisumu/Wangaya 1/57xx. Counsel relied on the case of *M'Bita Ntiro v Mbae Mwirichia & Another* [2018]eKLR where it was held, inter alia, that in Civil proceedings, the onus is on the Plaintiff or other claimant to prove the position he or she postulates on a balance of probabilities.
 16. Counsel submitted that the Respondents produced certificates of official search dated 23rd September, 2022 and 7th April, 2022. That the certificates show partly that land parcel number Kisumu/Wangaya 1/25xx measures 1.53 Ha which is approximately 3.825 acres. That the trial court relied on the statement and opinion of PW1. That trial court did not establish whether there is a legal requirement that surrounding parcels must have same series of numbers and whether parcel number Kisumu/Wangaya 1/57xx belonged to another land given numbering of parcels of land is a continuous process. That instead the trial court shifted the burden of proof to the appellant on the creation of parcel number Kisumu/Wangaya 1/57xx.
 17. It was submitted further on behalf of the Appellant that the trial court ignored obvious facts and procedures, that procedures relating to creation of parcels during adjudication process did not require closing of the mother title and opening of new ones. That land parcel No. Kisumu/Wangaya 1/57xx was an original number given during adjudication process. That the appellant acquired the land



through transmission from Cosmas Ogutu Ojwang who died on 28th October, 1994 and could not have possibly known what happened during adjudication. That the Appellant had no obligation to fill in the gaps left by the Respondent as to the origin of the suit land. That there was a boundary dispute between the suit land and land parcel number Kisumu/Wangaya 1/57xx as evidenced by exhibit P.5 and D.6.

18. That the trial court erred in its finding as there was no evidence adduced that land parcel number Kisumu/Wangaya 1/25xx originally measured 6 acres and that a portion thereof measuring 2 acres was hived off to create land parcel number Kisumu/Wangaya 1/57xx.
19. It was submitted on behalf of the Respondents that land parcel number Kisumu/Wangaya 1/25xx was originally approximately 6 acres (about 2.42 Ha). That the whole land is surrounded by a live fence and that the 1st Respondent is in occupation. That the Appellant fraudulently “cut off” 2 acres from the land and currently created parcel number of Kisumu/Wangaya 1/57xx without due process. That the Appellant created a fictitious number which could not be ascertained even through search. That parcel number Kisumu/Wangaya 1/57xx was not created through adjudication but from Kisumu/Wangaya 1/25xx without following due process.
20. I have considered the pleadings filed, the evidence and submissions on this issue. The gravamen of the Respondent’s case was the contention that land parcel number Kisumu/Wangaya 1/57xx was unlawfully hived out of the suit land which belongs to the Respondents and which originally measured 6 acres. It was therefore critical for the Respondents to produce documentary evidence in the form of copy of register, certificate of official search, adjudication records or surveyor’s report to demonstrate and prove that the suit land belonged to them, that the same originally measured 6 acres and that the appellant unlawfully caused 2 acres thereof to be hived off and registered as parcel No Kisumu/Wangaya 1/57xx.
21. The Respondents produced 2 certificates of official search for the suit land and a map. Both certificates of official search were bought in the year 2022. They show that the suit land parcel number Kisumu/Wangaya 1/25xx measures 1.53 Ha and was registered in the name of the 1st Respondent jointly with one Thomas Oluoch Oyoo on 7th November, 2012. That the registration of the suit land in the name of the 1st Respondent and Thomas Oluoch Oyoo was a second entry in the register. There was no evidence produced as to who was the first registered owner or what the first entry in that register was. There was no evidence that whatsoever on the said certificates of search that the suit land number Kisumu/Wangaya 1/25xx at any time measured 6 acres.
22. The map produced as exhibit on the front page contains numbers. On the reverse side it contains details of parcels that had been sub-divided or amended. The suit land is not one of them. The map has no certification or authentication. It carries no information as to the sizes the parcel numbers shown therein and when and how they came into being. Yet the trial court relied on the map to hold that the suit land had been sub-divided to create parcel No. Kisumu/Wangaya 1/57xx.
23. As rightly submitted on behalf of the Appellant the burden of proof rests with the Plaintiff or claimant as provided for in Section 107, 108, 109 and 112 of the *Evidence Act* Cap.80 Laws of Kenya.
24. I find that the Respondent did not discharge the burden. I find that the findings by the trial court that land parcel number Kisumu/Wangaya 1/57xx was a sub-division of the suit land was not supported by the evidence placed before the court. The finding was hence erroneous.



25. The next issue for determination as contained in ground 2 of the appeal is whether or not the trial court erred in law and fact by failing to appreciate what the Appellant meant by “fixed” and when the certificate of search (exhibit D.4) was taken to the cyber to be fixed.

The record shows that in the course of his testimony, DW.1 (the Appellant herein) explained to the court that he did not forge any search certificate. That he had kept the search and retrieved it when he was sued, took it to the computer shop because it was torn, that he looked for the pieces of paper, that he took it for repair but it was not done well.

26. In his judgement, the trial court stated concerning the search;

“I have considered that search certificate that was produced as an exhibit 4. The defendant does not dispute having taken it to the cyber shop to have it “fixed” as he claims that the same was torn. I have considered the following features in that search certificate;

- a. On the face of it, its handwritten Wangaya 1 P. No.2255, 180,000.
- b. It has black line running through it
- c. It is indicated to be search number 494/08
- d. On the back side, the search number is indicated as 493/08.
- e. It was done on 16th October, 2008.
- f. It shows that Cosmas Ogutu Ojwang because the registered owner on 23rd October, 2003.”

27. The trial court then concluded that it was clear from the search number that there were two different searches that were combined in the cybershop.

28. It was submitted in this appeal on behalf of the appellant that the Defendant provided an old certificate of search indicating that Cosmas Ogutu Ojwang was the 1st Registered owner of land parcel Kisumu/Wangaya 1/57xx and that the appellant acquired the same through transmission vide Kisumu High Court Succession Cause No.289 of 2010.

29. On behalf of the Respondents, it was submitted that the search was made after cutting a search for another parcel so as to get the Land Registrar’s signature and to use it to conduct succession and obtain certificate of confirmation of grant. Counsel pointed out the irregularities on the certificate of official search.

30. I have perused the said certificate of official search produced by the Appellant as exhibit D.4. It indeed appeared to have been fixed or repaired at the cyber/computer shop as admitted by the appellant and noted by the trial court. There was no explanation given by the appellant as to why he could not do a fresh search and procure a new certificate of official search to use in the use; why he had to take an old search for repair. I find that the trial court did not fail to appreciate what the Defendant meant by having taken the search to have it fixed at the cyber. All the trial court did was to point out the strange features on the search that resulted from the fixing.

31. I have also noted that none of the parties produced the copy of register (green card) in respect of the suit land or the parcel No.57xx to authenticate their allegations and claims. None of the parties called the Land Registrar to testify as to what the records at the Land Registry show. As much as the certificate of official search appears strange, there is no evidence that the land it purports to be in respect of is or was ever part of the suit land.



32. Regarding grounds 3, 4, 5 and 7 of appeal, it was submitted on behalf of the Appellant that he who alleges must prove. Counsel relied on the case of Evans *Nyakwara v Cleophas Bwana Ongaro* (2015)eKLR in which it was held, inter alia, that the legal burden of proof lies with the party who invokes the aid of the law and substantially asserts the affirmative of the issues and that the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence.
33. That it was the duty of the Respondents to provide evidence indicating land parcel No. Kisumu/Wangaya 1/57xx was not among the original parcels from the adjudication process and that its existence is not known to the adjudication office. That documents/records leading to the creation of land parcel No.57xx as first registration are non-existent and produce expert evidence that certificate of official search dated 16th October, 2008 was a forgery. That the trial court erred in law and fact in drawing a conclusion from unqualified assertion that land parcel number Kisumu/Wangaya 1/57xx was illegally obtained without any evidence.
34. That the particulars of fraud pleaded in the plaint were not proved. That the Respondent did not include the Land Registrar as a party and that this was a fatal omission which the court ought not have overlooked. That the trial court shifted the burden of proof to the appellant and faulted the appellant for failing to fill the gaps on the Plaintiff's case.
35. That a perusal of the entire judgement shows that the trial court relied on the opinion of PW1 who was not an expert witness in matters of document examination, detecting fraud, illegality, boundary, interpretation of searches and maps and that the court ended up drawing a wrong conclusion contrary to the evidence on record. For these submissions, Counsel relied on the provisions of Section 48 of the *Evidence Act* Cap 80 Laws of Kenya.
36. For the Respondent, it was submitted that the documents relied on by the Appellant are forgeries and incredible. The Respondents highlighted the anomalies in the Appellant's case as follows: -
 - a. That the Appellant's father passed on in 1984, that the certificate of search shows that parcel No. Kisumu/Wangaya 1/57xx was registered in his name in the year 2003. That there is no explanation how the Appellant's father resurrected and got the title 9 years after his death.
 - b. That the parcel No.57xx was created around the year 2010 which was about 10 years after the suit land.
 - c. That the Appellant did not explain how his father acquired the land long after the adjudication process and after his death.
 - d. That there was no mutation recorded in the iNdex map for sub-division of any parcel leading to the Wangaya 1/57xx.
 - e. That the parcel number Kisumu/Wangaya 1/57xx does not have a green card and search at the lands office discloses no results. That the Appellant did not file a current search even after being granted leave to file further documents.
 - f. That the Appellant has never been in occupation of the land. That the 1st Respondent's home is on the land.
37. Counsel submitted further that the trial court cancelled the title in line with provisions of Section 26(1) (b) of the *Land Registration Act*. Counsel also relied on the case of *Daudi Kiptugen v Commission of Lands Nairobi & 4 Others* [2015]eKLR where it was held inter alia that the acquisition of title cannot



be construed only in the end result, the process of acquisition is material. That if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title.

38. I have considered the rival submissions. I have noted that none of the parties, and particularly the Respondents upon whom the burden of proof rested, produced the copy of register (green card) in respect of the suit land or the parcel No. Kisumu/Wangaya 1/57xx to authenticate their allegations and claims. None of the parties called the Land Registrar to testify as to what the records at the Land Registry show. The Respondents seem to have been content to rely on the gaps they pointed out in the appellants case to prove their claim. As held in the case of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018]eKLR, a party must succeed on the strength of his case and not the weakness of the Defence case. The appellant may have obtained parcel number Kisumu/Wangaya1/57xx lawfully or unlawfully but no nexus was established by the plaintiff between the said land and the suit land.
39. Fraud which was pleaded and particularized in the plaint was not proved. It was not enough for the Respondents to state that the documents the appellant relied on were forgeries, that land parcel No. 57xx had no green card at the lands office. The Respondents needed to call the Land Registrar who is the custodian of land records to testify to that. The standard of proof in claims based on the tort of fraud is higher than proof on a balance of probabilities. In *Koinange & 13 others v Charles Karuga Koinange* 1986 KLR at page 23 the court held that:
- “When fraud is alleged by the Plaintiffs, the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
40. Similarly, in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo v Ndolo* (2008)1KLR (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 the 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; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.” In case where fraud is alleged it is not enough to simply infer fraud from the facts.
41. The trial court ordered for reinstatement of the original acreage of Kisumu/Wangaya 1/25xx. But there was no evidence that the said parcel of land had any original acreage other than what was contained in the two certificates of official search produced by the Respondents which was 1.53Ha. The order for reinstatement of the original acreage was therefore erroneous.
42. The Respondents submitted that the Appellant has never occupied the land parcel No.57xx and that it is the 1st Respondent’s home which is built thereon and that it is fenced with live fence. However, perusal of the plaint reveals that in paragraphs 20, 21 and 25 thereof, the Respondents pleaded in in detail on the Appellant’s entry onto, presence and activities on the suit land and sought for, among others, an order for the eviction of the Appellant from the suit land and an order directing the OCS Chemelil police station/post to enforce the order.



Conclusion

43. This court has determined firstly, that no evidence was placed before the trial court that the suit land originally measured 6 acres. Secondly, that no evidence was tendered that land parcel No. Kisumu/Wangaya 1/57xx was a result of sub-division of the suit land. Further, that fraud that was pleaded was not proved. And lastly that it is the Respondents who had the burden of proof which burden they failed to discharge. Hence no nexus was established between the suit land and land parcel number Kisumu/wngaya 1/57xx.
44. On the basis of the above determinations, the court finds that the trial court erred in its findings and final decision. As to when an appellate court can interfere with the findings of the trial court, in *Mbogo & another v Shah* (1969) EA 93 it was held that

“an appellate court will interfere with the findings of the trial court if the exercise of the discretion is clearly wrong because the trial judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which should be taken into consideration and in doing so arrived at a wrong conclusion.”

In the present case I find that the trial court misdirected itself in its appreciation of the evidence placed before it and arrived at a wrong conclusion. I find that the appeal has merit and allow it as follows;

- a. The judgement of the trial court dated 11th May 2023 in Tamu PMC EL Case No. E017 of 2022 is set aside and substituted with a judgement dismissing the suit with no orders as to costs.
- b. Cost of the appeal to the appellant.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 30TH MAY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the Appellant.

Odhambo for the Respondents.

