



Nyagilo & another v Ochieng & 2 others (Environment and Land Appeal E041 of 2022) [2024] KEELC 4242 (KLR) (14 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E041 OF 2022
GMA ONGONDO, J
MAY 14, 2024**

BETWEEN

BENJAMIN OPIYO NYAGILO 1ST APPELLANT

JACK ODHIAMBO NYAGILO 2ND APPELLANT

AND

JACK OKOTH OCHIENG 1ST RESPONDENT

CALVINCE OCHIENG ODHIAMBO 2ND RESPONDENT

ESTATE OF PHILIP OCHIENG MUGESA 3RD RESPONDENT

(An appeal arising from the judgment/decree in Mbita Principal Magistrate's Court Environment and Land Case number 23 of 2019 by Hon. Nicodemus Mosei, PM on 17th August 2022)

JUDGMENT

1. On 17th August 2022, the trial court (Hon. Nicodemus Mosei, PM) rendered judgment in Mbita Principal Magistrate's Court Environment and Land Case number 23 of 2019 (The original suit) declaring that he lacked jurisdiction to grant the prayers including a permanent injunction against the 1st and 2nd respondents over the suit parcels as sought in the plaint dated 4th July 2019.
2. The said judgment attracted the instant appeal originated by way of a memorandum of appeal dated 31st August 2022 and filed herein on 7th September 2022 through Nchoe, Jaoko and Company Advocates, founded upon seven grounds, inter alia;
 - a. That the Learned Trial Magistrate erred both in law and in fact by holding that the court lacked jurisdiction to hear and determine the matter.



- b. That the Learned Trial Magistrate erred both in law and in fact by failing to appreciate that the suit land had not been gazetted for purposes of filing objections.
 - c. That the Learned Trial Magistrate erred both in law and in fact by making a decision contrary to the weight of the evidence adduced and failed to take cognizance of the fact that the appellants herein established a prima facie case.
3. So, the appellants have prayed for the following orders:
 - a. That the Appeal be allowed.
 - b. That the Judgment of the Learned Trial Magistrate in the original suit be set aside.
 - c. That the plaint be allowed as prayed.
 - d. That the appellants be paid the costs of this appeal.
 - e. Such further or other order be made as may be deemed just.
4. The appeal was heard by way of written submissions pursuant to this court's directions issued on 7th February 2024.
5. Accordingly, the appellants' counsel filed submissions dated 28th March 2024 on 3rd April 2024 and submitted that the trial court had jurisdiction to hear and determine the original suit, since consent had been obtained from Suba Sub County Land Adjudication Office to lodge the suit in court as the area in which the suit land is situated had not been gazetted for lodging objections. That the said consent was obtained in compliance with Section 30(1) of the *Land Adjudication Act*, Chapter 284 Laws of Kenya and produced in court by the 1st appellant herein hence, the trial court was seized of jurisdiction to entertain the original suit. Reliance was placed on the case of *Mwanasokoni-vs Kenya Bus Services Ltd (1982-88) 1KAR 278*, to buttress the submissions.
6. The respondents' counsel did not file any submissions herein, notwithstanding service having been effected as evidenced by an affidavit of service sworn by Jaoko Alexander Advocate on 11th December 2023.
7. 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-vs-Sunday Post (1958) EA 424 at 429*.
8. It must be noted that the appellants who were the plaintiffs sued the respondents by way of a plaint dated 4th July 2019 over suit parcel numbers 1659, 1660 and 1661, all located in East Kubia, Gendo Village, Seka Sub-Location, Gwasssi East Location, Suba Sub County (the 1st, 2nd and 3rd suit parcels of land herein). The appellants averred that they are the bona fide owners of the suit parcels of land. That however, on or about June 2019, the 1st and 2nd respondents encroached thereon and threatened to evict the appellants from the said suit parcels of land. Thus, the appellants sought the orders infra:
 - a. A declaration that the appellants are the rightful owners of the 1st, 2nd and 3rd suit parcels of land.
 - b. An order directed at the respondents singly, jointly and/or their heirs, representatives in interest, authorized agents and anyone claiming through them, restraining them from interfering with the appellants' quiet possession, occupation, use and enjoyment of the 1st, 2nd and 3rd suit parcels of land.



- c. A permanent order of injunction restraining the 1st and 2nd respondents jointly and the 3rd respondent either singly or jointly, their heir, representatives in interest, authorized agents and anyone claiming through the respondents restraining them, their successors in title, assigns from interfering with the quiet possession of the appellants and/or alienating, selling, transferring or dealing with the suit parcels of land in any manner.
 - d. Costs of the suit together with interest thereon at court rates.
 - e. Any such and further relief as the honourable court may deem fit to grant.
9. The respondents denied the claim in their joint statement of defence dated 5th August 2020 wherein they urged the trial court to dismiss the appellants' suit with costs. Therefore, they prayed that:
 - a. An order of permanent injunction do issue restraining the appellants by themselves, servants and agents from entering or encroaching, trespassing upon or interfering in any manner whatsoever with the respondents' use and enjoyment of the portions of suit parcels of land.
 - b. Damages be awarded to the respondents in relation to the destroyed sisal and any other damaged property.
10. In his evidence, the 1st appellant, Benjamin Opiyo Nyagilo (PW1) relied on his statement dated 4th July 2019, which was adopted as his evidence in chief as well as a decision by the Land Adjudication Committee dated 2nd April 2009, a letter dated 22nd February 2000, a letter dated 4th March 2021, letter dated 4th August 2022, letter dated 24th June 2019 and consent of the Land Adjudication Committee (PExhibits 1 to 6 respectively). He stated that as he is in occupation of the suit parcels of land. That in the year 2000, the parties had a dispute regarding the suit parcels of land which was determined by the appeals board who awarded the same to the respondents. That they did not appeal the decision since the suit parcels of land had not been gazetted. That thus, they sought and obtained consent of the Land Adjudication Committee to lodge the suit in the trial court.
11. During cross-examination, PW1 admitted that there had been two Land Adjudication Committee sittings in relation to the disputes on the suit parcels of land. That both Committees awarded the suit parcels of land to the respondents herein.
12. Casmil Makambe, PW2, testified that the respondents neither live on the suit parcels of land nor cultivate the same.
13. Jacktone Okello Gichana (DW1) relied on his statement dated 26th April 2021, which was adopted as his evidence in chief. He testified that initial disputes on the suit parcels of land were determined in favour of the respondents.
14. In cross-examination, DW1 averred that the appellants have never resided on the suit parcels of land. That Philip Mugesha (deceased 1), the 3rd respondent herein, did in fact purchase the suit parcels of land from one Nyakembo (deceased 2) in 1981.
15. Meshack Odoyo Mugesha (DW2), relied on his statement on record. He testified that the deceased purchased the suit parcels of land and there was a sale agreement relating to the same. That there was a dispute relating to the suit parcels of land which was initially determined in favour of deceased 2. That nonetheless, an appeal was lodged against that decision, and the Appeal Board awarded the suit parcels of land to the 3rd respondent herein.
16. On cross-examination, DW2 insisted that the suit parcels of land were sold to deceased 1, the 3rd respondent.



17. DW3, Jane Ochieng Mwogesa, relied on her statement on record and her list of documents to wit: proceedings of the land adjudication committee and their decision delivered on 24th November 2012, sale agreement dated 10th August 1990, sale agreement dated 12th December 1990, a letter dated 10th February 2009, a letter dated 23rd April 2009 from Ministry of Lands and Settlement, Adjudication proceedings of 2011, a letter dated 26th October 2011 and a letter dated 9th January 2012 (DE Exhibits 1 to 8 respectively). According to the sale agreement dated 12th December 1990, the purchase price was paid in full by deceased 1 and the same was duly acknowledged by deceased 2.
18. Further, DW3 stated that she is a widow of deceased 1. That deceased 1 purchased the suit parcels of land from deceased 2 and that she has been tilling the same. That the appellants have never been in occupation of the suit parcels of land but only erected a structure thereon in the year 2022.
19. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to:
- a. Whether the trial court was seized of jurisdiction to hear and determine the original suit.
 - b. Whether the instant appeal is tenable.
 - c. Just orders to issue herein.
20. It is noteworthy that the learned trial magistrate summarised the parties' respective cases, identified two issues for determination, discussed them and arrived at his decision based on reasons. Thus, the impugned judgment was consistent with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
21. In the impugned judgment, the learned trial magistrate observed, inter alia;
- “...The plaintiffs have not led evidence with regard to whether or not an adjudication register was ever published and if at all an objection was ever lodged....
- It is therefore imperative to note that the suit herein was prematurely filed without fully exhausting the mechanism of resolution of disputes provided under the [Land Adjudication Act...](#)”
22. On the first issue, the appellants contend that the trial court had jurisdiction to hear and determine the original suit. That indeed, consent had been obtained from Suba Sub County Land Adjudication Office to lodge the suit in court as the area in which the suit land is situated had not been gazetted for lodging objections.
23. Section 30(1) of the [Land Adjudication Act](#), Chapter 284 Laws of Kenya provides thus:
1. Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.
24. In the case of *Bhajjee & another v Nondi & another* [2022] KECA 119 (KLR), the Court of Appeal stated that Section 30 of the [Land Adjudication Act](#) requires consent to be given before institution of civil proceedings concerning an interest in land in an adjudication section. Such consent is a condition precedent to a valid suit concerning disputes of land in an adjudication section. No doubt, Section 30 affects the power and jurisdiction of courts to hear and determine such disputes.



25. In the present appeal, I note that the consent of the Sub-County Land Adjudication and Settlement Officer for Mbita and Suba Sub-Counties dated 2nd July 2019 was produced at the trial court by the 1st appellant herein as PExhibit 6. The same is addressed to the Resident Magistrate, Mbita Law Courts and gave consent to the appellants herein to institute civil proceedings involving the suit parcels of land. Evidently, such consent was obtained prior to lodging of the original suit, which was done on 8th July 2019. Therefore, it is my considered view that the trial court was seized of jurisdiction to hear and determine the original suit.
26. On the second issue, the appellants contend that they are the bona fide owners of the suit parcels of land. That however, on or about June 2019, the 1st and 2nd respondents encroached thereon and threatened to evict the appellants from the said suit parcels of land. In support of his claim, PW1 produced the following documents: a decision by the Land Adjudication Committee dated 2nd April 2009, a letter dated 22nd February 2000, a letter dated 4th March 2021, letter dated 4th August 2022, letter dated 24th June 2019 and consent of the Land Adjudication Committee (PExhibits 1 to 6 respectively)
27. The respondents opposed the claim and testified that deceased 1 purchased the suit parcels of land from deceased 2. DW3 did exhibit: proceedings of the land adjudication committee and their decision delivered on 24th November 2012, sale agreement dated 10th August 1990, sale agreement dated 12th December 1990, a letter dated 10th February 2009, a letter dated 23rd April 2009 from Ministry of Lands and Settlement, Adjudication proceedings of 2011, a letter dated 26th October 2011 and a letter dated 9th January 2012 (DExhibits 1 to 8 respectively).
28. It is borne in mind that initial disputes on the suit parcels of land were determined by the Land Adjudication Committee in favour of the respondents.
29. The appellants contend that the said sale agreements were not registered as required under the law and as such, are of no legal effect. On that aspect, I subscribe to the Court of Appeal decision in Kirugi and another–vs-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. Indeed, the burden of proof did not shift to the respondents herein.
30. I have perused the Land Adjudication Report dated 11th April 2022 which was generated following a court order dated 9th March 2022 as well as the documents attached thereto, that formed part of the trial court's record. Following a site visit on 4th April 2022, the Surveyor in charge of Suba North and South, observed that there are visible boundary features defining the three suit parcels of land. That the 1st, 2nd and 3rd suit parcels of land are allocated to deceased 1, the 1st respondent and the 2nd respondent herein respectively. Nevertheless, the suit parcels of land have no titles because they are still under the adjudication process.
31. It is noteworthy that the content of the Land Adjudication Report dated 11th April 2022 was not challenged by the appellants. The same remain uncontroverted.
32. Sections 107 to 109 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.
33. In the premises, it is my considered view that the appellants who were the plaintiffs in the original suit have not proved that they are the bona fide owners of the suit parcels of land. Therefore, their claim must fail.



34. In light of the foregoing, it is my considered view that although the learned trial magistrate had jurisdiction to hear and determine the original suit, the appellants have failed to prove their claim to the requisite standards. The same is hereby dismissed.
35. This appeal therefore succeeds only to the extent that the trial court did in fact have jurisdiction to entertain the original suit.
36. Each party to bear own costs of this appeal.
37. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 14TH DAY OF MAY 2024

G.M.A ONGONDO

JUDGE

Present

Mutiva, Court Assistant

