



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Oliech v Oliech (Environment and Land Appeal E023 of 2023)
[2024] KEELC 4838 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4838 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E023 OF 2023**

E ASATI, J

JUNE 20, 2024

BETWEEN

JOSEPH OKELLO OLIECH APPELLANT

AND

NATAHANIEL OLUOCH OLIECH RESPONDENT

*(Being an appeal from the Judgment by the Principal Magistrate
Hon. M. Agutu in Kisumu CM ELC NO.3548 of 2021 – Joseph Okello
Oliech –vs- Nathaniel Oluoch Oliech – delivered on the 9th May, 2023)*

JUDGMENT

Introduction

1. The Appellant was the Plaintiff in Kisumu Chief Magistrate’s Court ELC No 54 of 2021 (the suit) wherein he had sued the Respondent over a parcel of land known as Kisumu/Ojola/945 (the suit land). The Appellant’s claim in the suit was that the suit land belonged to his father Andrew Oliech Opiyo – deceased. That in the year 2000, the suit land was given by the deceased to the Appellant and he (Plaintiff) established his home thereon.

That in the year 2013, the suit land was fraudulently registered in the name of the Defendant and title deed issued to him. The Appellant therefore sought for orders of;

- a. Permanent injunction directed at the Defendant and restraining him either by himself, his servants, employees authorized agents and/or anybody acting under his authority from disposing off, selling, leasing, charging, mortgaging, letting or in any other way interfering with land parcel number Kisumu/Ojola/945.
- b. an order directed at the Land Registrar Kisumu to cancel the name of Defendant on the land parcel No Kisumu/Ojola/945 and register the same in the name of the Plaintiff.



- c. Costs of the suit together with interest at court rates.
 - d. Any other remedy the honourable court deems fit and just to grant in the circumstances.
2. The Defendant (Respondent herein) filed a defence and counter-claim dated 10th January, 2022 denying the Appellant's claim.
- Vide the counter-claim, he claimed that he bought the land from his father who transferred the land to him on 1st July, 2013. He prayed for order of:-
- a. permanent injunction directed at the Defendant (in the counter-claim) restraining the Defendant either by himself, his servant, employees, authorized agents and or anybody acting under his authority from disposing off, selling, leasing, charging, mortgaging, letting or in any other way interfering with the land parcel number Kisumu/Ojola/945.
 - b. costs of the suit.
3. The suit was heard before the trial court which vide the judgement delivered on 9th May, 2022 found that the Plaintiff had not proved the particulars of the fraud he pleaded. That he had failed to prove his case on a balance of probabilities. The suit was therefore dismissed with costs to the Defendant.
4. Aggrieved by the judgement, the Appellant filed the appeal herein vide the Memorandum of Appeal dated 29th May, 2023. He sought that the appeal be allowed and the judgement of the lower court dated 9th May, 2023 be set aside and substituted with a judgement cancelling the name of the Respondent on land parcel number Kisumu/Ojola/945 and register the same in the name of the Appellant and that costs of the suit and of the appeal be awarded to the appellant.
5. The grounds of appeal as set out in the Memorandum of Appeal dated 29th May, 2023 are that:-
- a. The learned Trial Magistrate grossly misdirected herself in holding that the Appellant failed to prove his case on the balance of probabilities despite overwhelming evidence adduced by the Appellant.
 - b. The learned Trial Magistrate erred in law and facts in holding that Title Deed and not Green Card is the sufficient proof of ownership of land parcel.
 - c. The learned Trial Magistrate erred in law and facts in holding that the Appellant failed to prove the particulars of fraud as pleaded despite overwhelming evidence adduced and produced by the Appellant to prove the fraud.
 - d. The learned Trial Magistrate erred in law and facts in totally ignoring the minutes of the meeting of 3rd September, 2000, between Mzee Andrew Oliech and his sons chaired by the Chief, South West Kisumu location in which the suit land Kisumu/Ojola/945 was given to the Appellant.
 - e. The learned Trial Magistrate erred in law and fact in failing to give reasons for the court decision on each point.
 - f. The learned trial Magistrate failed to judicially and adequately evaluate the evidence placed before her and thereby arrived at a decision unsustainable in law.

Submissions

6. Directions were taken that the appeal be argued by way of written submission and pursuant to those directions, written submissions dated 30th January, 2024 were filed on behalf of the Appellant by the



firm of Amos O. Oyuko & Company Advocates. Counsel submitted on behalf of the Appellant that the issues for determination in the appeal are:-

- a. Whether or not the trial Magistrate erred in holding that the title deed and not green card is proof of ownership of land.
 - b. Whether the trial Magistrate erred in ignoring the minutes of the family meeting of 3rd September, 2000.
 - c. Whether the trial Magistrate erred in holding that the Appellant failed to prove fraud.
 - d. Whether the appellant failed to prove his case on a balance of probabilities.
7. Counsel submitted that a green card is conclusive proof of ownership of land and not title deed as held by the trial court hence the trial court erred in its holding.

That the trial court erred in ignoring the minutes of the family meeting and holding that the Plaintiff would have taken steps to have the land transferred in his name if at all the land was given to him by his father. That the Appellant demonstrated fraud on the part of the Respondent and therefore the trial Magistrate was wrong to hold that the Appellant failed to prove fraud and/or particulars of fraud.

That the Appellant proved his case on a balance of probabilities and the trial Magistrate erred in holding that the Appellant failed to prove his case on balance of probability. That the Appellant was entitled to the relief sought.

8. Written submissions dated 23rd April, 2024 were filed by the firm of Nyangacha & Associates on behalf of the Respondent. Counsel submitted and framed the following as the issues for determination in the matter;
- a. Whether the trial court ignored or failed to evaluate the evidence on record.
 - b. Whether the Appellant proved the particulars of fraud despite the evidence.
 - c. Whether the court erred in holding that a title deed and not a green card is sufficient proof of ownership.
9. Counsel submitted that the trial court did evaluate the evidence contained in the minutes produced as exhibit alongside that which was filed by the Respondent and decided that on a balance of probabilities the Appellant had not proved his case.

That the minutes of 3rd September, 2000 must be weighed against the evidence of the sale agreement on the part of the Respondent, transfer of land, valuation for stump duty, Land Control Board consent as well as the entries in the green card.

10. Relying on Section 7 of the Land Act, 2012, Counsel submitted that one of the modes by which land can be acquired is by transfer and that that Appellant has not demonstrated by which law minutes of 'baraza' can constitute a method of acquisition of title. That evidence on the green card shows that the proprietor of the suit parcel was the Appellant's father Andrew Oliech Opiyo, deceased. That the minutes have no force of law and that the deceased was at liberty to dispense with his property wherever way he chose. That the deceased chose to confer title to the Respondent.

That part of the evidence was handwritten and in Luo language. That the Appellant who never took steps to have the documents translated cannot now be heard to say that the trial court ignored them.

11. Counsel submitted that none of the particulars of fraud was proved. Counsel relied on the case of Kinyanjui Kamau v George Kamau [2015]eKLR to submit that it is not enough to infer forgery from



the facts. That the claim that the signature of Andrew Oliech was forged was not proved. That hence the trial court was well placed when it concluded that the Appellant had not proved the particulars of fraud.

12. On whether or not the trial court erred in holding that a title deed and not a green card is sufficient prove of ownership, Counsel relied on the provisions on Section 26 of the *Land Registration Act* and submitted that the position in law is that certificate of title is conclusive evidence of ownership that can only be impeached on grounds of fraud or where the title has been acquired illegally. Counsel urged the court to uphold the trial court's findings and award costs of the appeal to the Respondent.

Issues for Determination

13. The issues for determination as framed by the Appellant and the Respondent herein are the same. The court therefore adopts them as the issues for determination herein.

Analysis and Determination

14. This being a first appeal, the court reminds itself of the duty to re-evaluate the evidence placed before the trial court.
15. The first issue for determination is whether or not the trial court erred in holding that a title deed and not a green card is sufficient proof of ownership.

A reading of the judgement appealed against shows that the trial court held that:

“that the plaintiff has only produced a green card to prove that Andrew Oliech is the owner of the parcel of land. This is insufficient proof of ownership. A title deed would have been sufficient”.

The Appellant faults this finding. A green card is an extract of the register of land. Unlike the certificate of official search and title deed that shows ownership of the land as at a given date, the green card or copy of register shows the entire history and details of the subject land from the time the register in respect of the subject land was opened to the date the green card is obtained. The green card also contains records of encumbrances, charges, cautions or restrictions.

All transactions in respect of the subject land must be contained in the green card, including transfer of land and issuance of a title deed to a party.

It is not therefore correct that a green card is not sufficient proof of ownership. I find that the trial magistrate erred in holding that a green card is insufficient proof of ownership of land.

16. The next issue for determination is whether or not the trial court erred in ignoring the minutes of the family meeting of 3rd September, 2000. The record of appeal shows that the Appellant produced as one of his exhibits, Minutes of meeting held on 3rd September, 2000 chaired by the District Commissioner and claimed that he was given land No Kisumu/Ojola/1945 and the Respondent Kisumu/Ojola/4253 through the said minutes.
17. The record shows further that after considering the evidence, the trial court held that;

“it is my opinion that if the parcel of land was indeed given to the Plaintiff, he would have taken appropriate action to have the land registered in his name.”
18. I have keenly read the minutes dated 3rd September, 2000. The same were expressed to have been signed by Andrew Oliech Opiyo and other people on 7th September, 2000. From the recommendations in the



minutes, there were some steps to be undertaken by the Mzee Oliech. The conclusion of the minutes was as follows;

“The panel of elders moved aside to examine all the facts raised at the meeting by the Claimant Objector and clan elders discussed and arrived at the following conclusion: -

- i. That the six sons had genuine reason for their claim.
- ii. That the distribution of plots by Mzee Oliech to his sons was done today in good faith.
- iii. That the sale of part of plot parcel number 958 between Oliech and Burno Agonga be revoked and the money refunded to him and the portion be divided between the three wives.
- iv. That it would be unfair to refund the money to Mr. Aginga because that portion was sold a long time ago. Even the first Commission of 1997 did not visit this site.
- v. That Mzee Oliech to avail himself with his sons on Thursday 7th September, 2000 at 9.00a.m. He will identified practically each plot for each son.
- vi. That Mzee Oliech must not sell any more land as from the date 3rd September, 2000”.

19. There is no further evidence to show that there was follow up on the recommendations as contained in the Minutes. There is no evidence that the parties ever availed themselves on Thursday 7th September, 2000 and whether Mzee Oliech did identify practically each plot for each son. And more importantly, there is no evidence from the Minutes of 3rd September, 2000 that the suit land was given to the Appellant. The Appellant testified on re-examination that he did not know to whom parcel No 945 was given.

20. I find that the trial court did not ignore the minutes of 3rd September, 2000 and that the said minutes contain no evidence that the suit land was specifically given by Mzee Oliech to the Appellant.

21. The next issue for determination is whether or not the trial court erred in holding that the Appellant failed to prove fraud.

A reading of the plaint shows that the Appellant had pleaded in paragraph 5 thereof that in 2013 the suit land was fraudulent registered in the name of the Defendant and title deed issued. He pleaded the particulars of the fraud as;

- a. Confusing and/or forging the signature of Andrew Oliech Opiyo on the transfer documents
- b. Misleading the lands office that the suit land has been rightfully transferred to him by Andrew Oliech Opiyo.
- c. Causing the suit land to be registered in his name knowing quite well that the same belongs to the Plaintiff.

22. The evidence of the Appellant in regard to this as contained in his witness statement dated 17th December, 2021 which was adopted as the Appellant’s evidence in chief was that in the year 2019 upon doing search on the suit land, he discovered that the same was registered in the name of the Defendant herein in the year 2013 and the same was on 1st April, 2019 charged as security for loan of Kshs 100,000/- from Kisumu County Trade Loan Fund. And in his testimony before the court, the



- Appellant mentioned nothing about the fraud. He only stated that “Nathaniel (Respondent) states he bought the land from my father for Kshs 100,000/-. No one witnessed the agreement.”
23. The record shows that the Appellant’s witnesses (PW2 and PW3) also said nothing about fraud.
 24. The trial court after taking into account the Appellant’s evidence held that the Appellant had not proved the particulars of fraud which he had pleaded.
 25. The burden of proof was on the Appellant, under the provisions of Section 107, 108, 109 and 112 of the *Evidence Act* Cap 80 Laws of Kenya, to prove his claim and all the element thereof and particularly the allegations of fraud. The standard of proof of cases based on fraud is higher than a balance of probabilities. The Court of Appeal in *Vijay Morjaria v Nansingh, Madhusingh Darbar & another* [2000]eKLR held that:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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 distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”
 26. 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.”
 27. And 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.
 28. In the present case although fraud was pleaded and the particulars thereof itemized in the plaint, the appellant was required to bring evidence to prove that Andrew Oliech Opiyo’s signature on the transfer form was forged as pleaded. He also needed to produce credible evidence that the Respondent did mislead the Lands office that the suit land had been rightfully transferred to him by Andrew Oliech Opiyo. And evidence that the Respondent knew that the suit land belonged to him (Appellant) but none the less proceeded to have it registered in his (Respondent’s) name. Such evidence was not produced.
 29. In the premises, I find that the trial court was justified to find as it rightly did, that the Appellant had not proved the allegations of fraud.
 30. The next issue for determination is whether the trial court erred to find that the Appellant had failed to prove his case on a balance of probabilities. The Appellant’s suit in the lower court was based on the



grounds, firstly, that the suit land belonged to him as it was given to him by his father Andrew Oliech Opiyo and secondly that the Respondent fraudulently caused the suit land to be transferred to him (Respondent).

Having found that the Appellant failed to prove that the suit land was given to him by his father and further having found that the Appellant had failed prove fraud and the particulars thereof that were pleaded, the Appellant's suit had no other fate but to fail. I find that there was no basis for the trial court to hold otherwise. I further find no reason to interfere with the findings and decision of the trial court.

31. Regarding costs of the appeal, although the law as contained in section 27 of the of the *Civil Procedure Act* is that costs follow the event, in the circumstances of this case, I find that it is in the interest of justice that the parties who are siblings bear own costs of the appeal.
32. For the foregoing reasons, this court finds that the appeal lacks merit. The appeal is hereby dismissed. Each party to bear own costs of the appeal.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 20TH DAY OF JUNE, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Omondi T. holding brief for Oyuko for the Appellant.

Kobimbo holding brief for Nyangacha for the Respondent.

