



Osiye & 2 others v Onunga (Environment and Land Appeal E028 of 2023) [2024] KEELC 4761 (KLR) (19 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4761 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E028 OF 2023**

DO OHUNGO, J

JUNE 19, 2024

BETWEEN

GEORGE OSIYE 1ST APPELLANT

VICTOR ODUOR 2ND APPELLANT

PAUSTINA OWINO 3RD APPELLANT

AND

OLOO ONUNGA RESPONDENT

(Being an appeal from the judgment and decree of the Senior Principal Magistrate’s Court at Mumias (Hon. Thomas Obutu, Senior Principal Magistrate) delivered on 25th May 2023 in Mumias MCELC No. E023 of 2022)

JUDGMENT

1. Litigation leading to this appeal started in the Subordinate Court on 13th May 2022, when the respondent filed plaint dated 12th May 2022, against the appellants. The first and second appellants are the respondent’s sons while the third appellant is the respondent’s daughter-in-law. The respondent averred in the plaint that he was the registered proprietor of land parcel number North Wanga/ Lung’anyiro/1573 (the suit property) and that on 7th August 2020, the appellants together with other persons pressured him, a person of advanced age, into surrendering to them the original of the certificate of title in respect of the suit property.
2. The respondent further averred that that despite sharing out the suit property between the appellants and his other children, the appellants refused to remain on their portions and instead encroached on the respondent’s homestead where they cut down trees and engaged in illegal farming activities. Further, that the second appellant established his home on the respondent’s homestead. The respondent therefore prayed for judgment against the appellants jointly and severally for a permanent



injunction restraining them, their agents, servants and other persons claiming under them from accessing or interfering with his use and occupation of his homestead within the suit property. He further sought eviction of the second appellant from his homestead and an order for return to him of the certificate of title. He also sought costs of the suit.

3. The appellants filed a joint statement of defence in which they averred that the respondent was not an authentic owner of the suit property since he shared it out to the first and second appellants and to the third appellant's husband all of whom were his sons. They further averred that the respondent handed over the certificate of title to the Assistant Chief who in turn handed it over to a surveyor on 7th August 2020 for purposes of subdivision. They denied that they had trespassed onto the homestead and added that the homestead ceased to belong to the respondent because the respondent allocated it to the second appellant. They therefore urged the Subordinate Court to dismiss the suit with costs.
4. In view of the close family relationship between the parties and the nature of the dispute, the Subordinate Court referred the matter to court annexed mediation. Nothing positive came out of the mediation. Hardly a week after the referral, the parties were again before the Subordinate Court on an application for an interlocutory injunction.
5. Upon hearing the case, the Subordinate Court (Hon. Thomas Obutu, Senior Principal Magistrate) delivered judgment on 25th May 2023 and allowed the respondent's case as prayed.
6. Dissatisfied with the outcome, the appellants filed this appeal, through Memorandum of Appeal dated 6th June 2023. They prayed that the judgment be set aside and that they be awarded costs.
7. The grounds of appeal are that the decision went against the weight of the evidence, that the learned trial magistrate did not consider the appellants' evidence on record, that the court failed to consider the relationship between the parties and that the suit property is ancestral land and lastly, that the court erred in not holding that having divided the land among the appellants, the respondent had passed title in their favour.
8. The appeal was canvassed through written submissions. The appellants argued that in deciding as it did, the Subordinate Court deprived them, the appellant's children, a right to own their father's land thereby rendering them landless. They further contended that the respondent is a 93 year old person who is being used by the appellants' brother by the name Anthony Okello Oloo who has an intention of grabbing the whole of the suit property. That considering his age, the respondent will suffer neither prejudice nor benefit. The appellants also argued that they are beneficiaries of the respondent's estate, and that the respondent should come up with a criterion to distribute his estate to avoid any of his children being rendered landless. In conclusion, they urged that they be given their share.
9. On his part, the respondent argued that in his testimony, he demonstrated that he surrendered the title to the area chief due to pressure from the appellants, who did not want the respondent's other children to get a share of the suit property. That in particular, although the appellants claimed that Anthony Oloo Okello had been given another parcel known as East Ugenya/Murumba/234, the respondent was able to demonstrate that the said had been sold and proceeds thereof used to settle his medical bills.
10. The respondent further argued that although the appellants argued that he had shared out the suit property to four sons, a certificate of search which he produced proved that he was still the registered proprietor of the suit property. That pursuant to Section 24 (a) of the *Land Registration Act*, he is the absolute proprietor of the suit property with all the rights and privileges thereto. That the appellants having conceded that the suit property is ancestral land, they cannot claim to be entitled to it to the exclusion of other siblings. The respondent concluded by contending that as he stated during the



hearing, his wish is to have the title returned to him so that he formally parcels out the suit property into eight portions, to all his children, both sons and daughters.

11. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR and *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123.
12. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. There is no dispute that the respondent is the registered proprietor of the suit property. That much is confirmed by the certificate of official search which the respondent produced in evidence and which states that the respondent became registered proprietor on 5th June 2009. It is also not contested that the respondent has eight children including the first and second appellants and the late husband of the third appellant.
13. The issue that arises for determination is whether the respondent was entitled to the reliefs that he sought.
14. To the extent that he is the registered proprietor of the suit property, the respondent is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the *Act* obligates the court to accept his certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. There was no challenge whatsoever to the respondent's title beyond the appellants' contention that they are beneficiaries of the respondent's estate, and that the respondent should come up with a criterion to distribute his estate to avoid any of them being rendered landless. The appellants must however be reminded that the respondent is alive and the issue of distribution of his estate does not arise.
15. It has become only too common nowadays for children to be in hurry to "inherit" from their parents even while the parents are alive. The courts have not hesitated to tell children that it is improper to literally hurry their parents off to their graves for selfish reasons. Suffice it to reproduce the words of Mugo Kamau, J. in *Teresia Kwamboka Mauti (suing as the Administratrix of the estate of David Mauti Nyarango (Deceased) & another v Ezekiel Nyarango Mauti & 5 others* [2022] eKLR:

It is very shameful, sickening, disgusting, dishonourable and disgraceful that the First Plaintiff has the audacity to urge this Court to grant orders:

“restraining the 1st Defendant from entering or interfering in any manner with the 14 Acres comprised in L.R. No. North Mugirango/nyankono Settlement Scheme/17”

on the misguided and misinformed basis that she has acquired “equitable interest” over the same.

Section 24(a) of the *Land Registration Act* states as follows: -

“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”.



No one can deny any proprietor of land such rights and privileges. I find it as spiting a parent when one goes to court to have him ordered not to enter his legally acquired land, from his hard earned labour and that he be ordered to distribute it among some of his children and more so when such children are living and earning a living out of the said land and particularly when the Defendant is on artificial oxygen with his health being very feeble. It is a sign of insensitivity, selfishness, thoughtlessness, heedlessness and ungratefulness. It is as if such children are concerned that he is taking too long to die.

16. The respondent has expressed a desire to distribute the suit property among all his children, the appellants included. He has a right to do so, and it is the right thing to do. The appellants must be disabused of any notion that they have a right to order the respondent around on the matter or that they have a better claim to the suit property than other siblings. If they do not co-operate with the respondent now, they will have themselves to blame when they ultimately get entangled in succession disputes only for the succession court to give them that which the respondent desires to give them now.
17. The reliefs of permanent injunction and eviction which the respondent sought were limited to his homestead. He did not seek to injunct or evict the appellants from the whole of the suit property. The appellants' claims of being rendered landless are therefore without basis.
18. I am satisfied that the respondent was entitled to the reliefs that he sought and that this appeal is without merit.
19. In view of the foregoing, I dismiss this appeal. Considering the family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The Appellants present in person

Ms Ikhumba for the Respondent

Court Assistant: M Nguyayi

