



**Oreje & 2 others v Omenda (Environment and Land Appeal
E024 of 2023) [2024] KEELC 4615 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E024 OF 2023
GMA ONGONDO, J
JUNE 11, 2024**

BETWEEN

KENNEDY ONYANGO OREJE 1ST APPELLANT

SELINE ADHIAMBO OREJE 2ND APPELLANT

ROSE OREJE 3RD APPELLANT

AND

TOBIAS ANDHALA OMENDA RESPONDENT

*(An appeal arising from the judgment/decree in Homa Bay Chief Magistrate's Court
Environment and Land Case number 46 of 2021 by Hon. J. S. Wesonga, PM on 14th April 2023)*

JUDGMENT

1. On 14th April 2023, the trial court (Hon. J. S. Wesonga, PM) rendered judgment in Homa Bay Chief Magistrate's Court Environment and Land Case number 46 of 2021 (The original suit) declaring that the plaintiff/respondent had proved his case to the requisite standard and entered judgment for him as against the defendants/appellants in the following terms:
 - a. A declaration that the plaintiff is the rightful registered owner of the parcel of land known as Kanyada/Kanyango/Kalanya 338 (the suit land herein).
 - b. The defendants to give vacant possession of the suit land within 30 days failure of which an eviction order to issue.
 - c. General damages for trespass Kshs.100,000/=
 - d. That costs of the suit and interest thereon are awarded to the plaintiff.



2. The said judgment attracted the instant appeal originated by way of a memorandum of appeal dated 9th May 2023 founded upon nine grounds, which include;
 - a. The honourable court erred in law and fact in upholding an alleged sale of land without sufficient evidence in the form of any agreement whatsoever, now that the respondent verily stated that all witnesses to the said sale had died as at the time of the suit.
 - b. The honourable court erred in law and fact in upholding the letters by the Chief as proof that there was a sale when from the evidence of the respondent, the said Chief was not a witness whatsoever, and in fact, he was not even the Chief in 1986 when the sale is alleged to have taken place.
 - c. In its judgment, the trial court tended to dismiss the fact that the suit property belonged to Nyambok Ombere (deceased 2 herein) at the first instance and that the respondent's father, despite being the first registered proprietor, obtained it from deceased 2, probably before the properties in that adjudication section were registered. This evidence was tendered by both sides and therefore the court erred in overlooking it.
 - d. That the honourable court erred in law and fact in ignoring the glaring proof that since there was no sufficient evidence that the respondent's father bought the land and further, since the respondent and his witness stated that the deceased proprietor transferred the land way after the time he died, the certificate of title obtained by the respondent's father and later transferred to the respondent had been fraudulently obtained.
3. So, the appellants urged this court to set aside the trial court's judgment and decree with costs to the appellants.
4. The appeal was heard by way of written submissions pursuant to this court's directions issued on 14th February 2024.
5. Accordingly, the appellants' counsel, Quinter Adoyo and Company Advocates, filed submissions dated 2nd April 2024 and identified three issues for determination thus:
 - i. Whether the respondent proved his case on a balance of probabilities.
 - ii. Whether the appellants proved their counter-claim to the required standard.
 - iii. Costs of the appeal.
6. Counsel submitted, inter alia, that the respondent did not establish the root of the title of the suit land reference number Kanyada/Kanyango/Kalanya 338 (the suit land herein) and could not explain how deceased 1 acquired the same. That although PW1 stated that the suit land was transferred to deceased 1 in 2003, PW2 testified that it was a first registration. That the appellants pleaded the particulars of fraud in their counterclaim and proved their counterclaim to the requisite standard.
7. In that regard, the appellants produced a death certificate showing that deceased 2 died in 2000. Clearly, the respondent did not produce a sale agreement, despite claiming that such existed. To fortify the submissions, counsel relied on the case of *Gitobu Imanyara and 2 others -v- Attorney General* (2016) eKLR.
8. By the submissions dated 13th May 2024, the respondent identified three issues for determination inter alia: whether the respondent has a good certificate of title to the suit land against the appellants, whether the appellants are trespassers on the suit land and who bears the costs of this appeal.



9. Briefly, the respondent submitted that he holds good title to the suit land. That the same was purchased in 1986 by deceased 1 from deceased 2 and witnessed by, among others, PW2, who testified to that effect. That consequently, deceased 1's name was entered into the adjudication register, awaiting registration of certificate of title which was issued in 2003 as a first registration. That he acquired title to the suit land in 2017, following a transfer by way of gift from deceased 1. Thus, the respondent submitted that the title he holds is valid and that the appellants are trespassers thereon. Therefore, he urged the court to dismiss the instant appeal with costs. Reliance was placed on various authorities including the case of Willy Kipsongok Morogo -v- Albert K. Morogo (2017) eKLR, to buttress the submissions.
10. It is noteworthy 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-v-Sunday Post* (1958) EA 424 at 429.
11. By way of an amended plaint dated 12th November 2021, the respondent who was the plaintiff sued the appellants over the suit land herein, measuring zero decimal six eight hectares (0.68 Ha) in area. He sought the orders infra:
 - a. A declaration that the respondent is the rightful registered owner of the suit land.
 - b. An eviction order against the appellants, their family members, agents, employees and or servants from the suit land.
 - c. General damages for trespass
 - d. Costs of the suit with interest thereon at court rates.
12. The respondent contends that his father, Elmard Omenda Andhala (deceased 1 herein), purchased the suit land from the appellants' grandfather, deceased 2, in 1986. That deceased 1 took possession of the suit land. That a transfer of the suit land to the name of deceased 1 occurred in 2003. That on 27th March 2017, deceased 1 transferred the suit land to him as a gift.
13. The appellants denied the claim in their joint statement of defence and counterclaim dated 4th April 2022. They averred that deceased 2 who died on 22nd June 2000 was the rightful owner and proprietor of the suit land. That the suit land is ancestral and that they reside thereon. On that score, they prayed for:
 - a. An order of declaration that the suit land was illegally registered during first registration and subsequently illegally transferred to the respondent herein and that the respondent holds the same in trust for the appellants and therefore an order of rectification to the Homa Bay County Land Registrar do issue so that the appellants be registered as the joint owners of the same.
 - b. General damages for fraud and fraudulent misrepresentation.
 - c. Costs of the suit together with interest at 14% p.a from the date of filing suit until payment in full.
 - d. Interest on (a) and (b) at the rate of 12% p.a from the date of judgment until payment in full.
 - e. Such further or other alternative relief as this Honourable Court deems fit to grant.
14. In his evidence, the respondent (PW1) relied on his statement on record dated 12th November 2021. Also, he relied on his list of documents dated 30th August 2021 serial numbers 1 to 7, to wit, a copy of



the chief's letter dated 11th January 2019, summons from the Chief dated 17th August 2018, summons from the chief dated 19th November 2018, a copy of the chief's letter to the Land Registrar dated 11th January 2019, a copy of certificate of official search dated 10th August 2018, a copy of the green card in respect of the suit land, a copy of title deed in the name of deceased 1 and a copy of title deed in the name of the respondent (PExhibits 1 to 7 respectively).

15. In cross-examination, he reiterated that deceased 1 purchased the suit land from deceased 2 in 1986. That he has not built on the suit land, which is occupied by the family of deceased 2. That he took possession of the same in 2018.
16. PW2, Syprosa Oyoo, relied on her statement on record dated 12th November 2021 which was adopted as her evidence-in-chief. During cross-examination, she stated that the appellants had trespassed onto the suit land and put up a house thereon. That there was an agreement for sale of the suit land between deceased 1 and 2.
17. The 1st appellant (DW1) relied on his statement dated 3rd April 2022 which was adopted as his evidence in chief. Further, his list of documents dated 4th April 2022 serial numbers 1 to 7, to wit, limited grant of letters of administration dated 25th March 2022, chief's letter dated 25th February 2022, a green card in respect of the suit land, a search certificate in respect of the suit land, a certificate of title in the name of deceased 1, a certificate of title in the name of the respondent and death certificate for deceased 2 (DExhibits 1 to 7 respectively) are part of his evidence.
18. During cross-examination, he stated that the original owner of the suit land was his grandfather, deceased 2. That deceased 1 obtained the suit land fraudulently since it got registered in his name in 2003, yet deceased 2 died in 2000. That he had not seen transfer forms in relation to the suit land.
19. DW2, Priscilla Awino Oreje, relied on her statement on record which was adopted as her evidence-in-chief. During cross-examination, she stated that she was wife to the late John Oreje, a son to deceased 2. That she could not recall when she discovered the fraud.
20. Seba Atieno Oreje, DW3, relied on her statement on record which was adopted as her evidence-in-chief. Under cross-examination, she stated that she was also a wife to the late John Oreje, deceased 2's son. That she discovered the fraud between 2017 and 2018.
21. Monica Otieno Oreje, the second wife to the late John Oreje, deceased 2's son, testified as DW4 and relied on her statement on record which was adopted as her evidence-in-chief. During cross-examination, she stated that she did not know the person who sold the suit land to the respondent or how the same was transferred to the respondent herein.
22. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to:
 - a. Whether the instant appeal is tenable?
 - b. Just orders to issue herein.
23. It is noteworthy that the learned trial magistrate set out the parties' respective cases, identified five issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment was consistent with Order 21 Rule 4 of the [Civil Procedure Rules](#), 2010.



24. In the impugned judgment, the learned trial magistrate observed, inter alia;
- “...The Land Registrar is the custodian of all the documents in respect of the suit property but the defendants did not call him to demonstrate the history of the suit property and the circumstances under which the plaintiff came to be registered as proprietor...”
25. Whilst dismissing the appellants’ counter-claim, the trial court noted that:
- “...Having now considered the available evidence, the court finds no sufficient evidence to find and hold that the plaintiff fraudulently transferred the suit property to his name and deprived the defendants/counterclaimants ownership of the same...”
26. The trial court relied on Section 26(1) of the [Land Registration Act, 2016](#) (2012) as well as the evidence produced by the respondent, to wit, a copy of the green card and title deed in respect to the suit land. She then held that that the respondent was the rightful registered proprietor of the suit land thus, is entitled to protection of the law.
27. The appellants lament that the trial court upheld the alleged sale of the suit land without sufficient evidence in the form of a sale agreement. That the letters by the Chief were not sufficient proof of sale. That the trial court dismissed the fact that the suit land belonged to deceased 2 in the first instance. That further, since transfer of the suit land to deceased 1 occurred after the demise of the alleged seller, namely deceased 2, the certificate of title issued to deceased 1 and later transferred to the respondent herein had been fraudulently obtained.
28. It is well settled that a court may apply Sections 26 and 80 of the [Land Registration Act, 2016](#) (2012) regarding a title obtained fraudulently upon distinct proof. In [Gladys Wanjiru Ngacha-v-Teresa Chepsaat & 4 others](#) (2018) eKLR where the decision in [Lalji Makani](#) (1957) EA 314 at 317 was applied, the Court of Appeal held;
- “Allegations of fraud must be strictly proved.....something more than a mere balance of probabilities is required.”
29. Moreover, I subscribe to the Court of Appeal decision in [Kinyanjui Kamau v George Kamau](#) (2015) eKLR, where the Court of Appeal expressed itself as follows;
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. See [Ndolo v Ndolo](#) (2008) 1 KLR (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 that 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; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts...”
30. The appellants have argued that they proved the existence of fraud to the requisite standard by producing a death certificate showing that deceased 2 died in 2000, way before transfer of title of the suit land to deceased 1 occurred. That further, the respondent did not produce a sale agreement in respect to the suit land, despite claiming that such existed.
31. Evidently, the green card in respect of the suit land (PExhibit 6) shows that deceased 1 got registered as the first proprietor of the suit land on 15th December 2003. This was a product of adjudication process. There was no indication that the same was a transfer from deceased 2. Further, the failure by the



respondent to produce a sale agreement is not an indication of fraud on his part. Hence, the allegation that such registration was fraudulent since it occurred after the demise of deceased 2 is untenable. The suit land was later transferred to the respondent herein on 13th April 2017. I am therefore, satisfied that the respondent satisfactorily explained the root of his title as stated in *Munyu Maina –v- Hiram Gatbiha Maina* (2013) eKLR.

32. It is also my considered view that although the letter by the Chief, Kalanya Kanyango Location dated 11th January 2019 (PExhibit 1) does not amount to a sale agreement, there was no requirement that an agreement for sale of land needed to be in writing when the parties entered into a sale agreement in 1986. Section 3(3) of the *Law of Contract Act*, Chapter 23 Laws of Kenya, had not come into effect at the time. Oral agreements are enforceable on the basis of constructive trust as held in *Yaxley v Gotts & Anor.* (2000) Ch 162 and *Steadman v Steadman* (1976) AC 536, 540.
33. Besides, I note that in the said letter, it was indicated that the 1st appellant herein confirmed that the suit land had been purchased by deceased 1. The 1st appellant's contention that he had repurchased the suit land from deceased 1 was found to be unsubstantiated. The contents of the said letter are uncontroverted. Therefore, the 1st appellant was found to be illegally and unlawfully utilizing the suit land.
34. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:
- Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
35. In the premises, I find that the respondent who was the plaintiff at the trial court proved his claim on a balance of probabilities. However, the appellants failed to prove their counterclaim to the requisite standard. The trial magistrate's judgment delivered on 14th April 2023 is faultless at law. I hereby endorse the same.
36. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 9th May 2023, is devoid of merit. The same is hereby dismissed with costs to the respondent.
37. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 11TH DAY OF JUNE 2024.

G.M.A ONG'ONDO

JUDGE

Present

1. Respondent in person
2. Mutiva, Court Assistant

