



Owande (Suing as a Legal Representative of the Estate of Karen Obingo Owande - Deceased) v Omenda (Suing as Legal Representative of the Estate of Elmad Omenda Adhala - Deceased) (Environment and Land Appeal E001 of 2023) [2024] KEELC 4597 (KLR) (11 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4597 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

GMA ONGONDO, J

JUNE 11, 2024

BETWEEN

SAMWEL YOYA OWANDE (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF KAREN OBINGO OWANDE - DECEASED) APPELLANT

AND

TOBIAS ADHELA OMENDA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF ELMAD OMENDA ADHALA - DECEASED) RESPONDENT

(An appeal from the judgment of Honourable B.O Omwansa (SPM) rendered on 21st December 2022 in Oyugis Senior Principal Magistrate's Court Environment and Land case numbers 11 of 2019 and 17 of 2019-Consolidated)

JUDGMENT

1. The instant appeal radiates from the judgment of the learned trial magistrate (Hon B.O Omwansa, SPM) rendered on 21st December 2022 in Oyugis Senior Principal Magistrate's Court Environment and Land case numbers 11 of 2019 and 17 of 2019, the 1st and second suits respectively (Consolidated) where the trial court did find in favour of the respondent and rejected the appellant's claim with each party to bear own costs.
2. The appellant was aggrieved by the said decision thus, through S.M Sagwe and Company Advocates, lodged the appeal by way of the memorandum of appeal dated 6th January 2023 based on the grounds infra;
 - a. That the Honourable Trial Senior Principal Magistrate erred in law by adopting a consent which was minuted at the registry which is still being challenged by the appellant.



- b. That the Honourable trial Senior Principal Magistrate erred in law by allowing a court clerk to record a consent which ordinarily would have been done by an advocate.
 - c. The Honourable trial Senior Principal magistrate erred in law by not explaining every issue and give a decision and a reasoning for that decision.
 - d. The Honourable trial Senior Principal Magistrate relied on the writing of the court staff as consent which did not emanate from a free and genuine consent of parties with all legal formalities.
 - e. The Honourable trial Senior Principal Magistrate only relied on the registry staff who did not ascertain the existence or non-existence of certain facts and to apply substantive law to ascertain facts and to declare the rights or liabilities of parties in respect of those facts.
 - f. The Honourable Trial Senior Principal Magistrate only endorsing the consent made by the registry staff and use of registry staff did not apply the substantive law as it has to shift out from the mass of contradictions, misconceptions, errors and sometimes dishonesty, fraud and altogether falsehood.
 - g. In the circumstances, the Honourable Trial Senior Principal Magistrate's judgment was oppressive to the appellant as it amounted to aiding a trespasser.
 - h. The trial Magistrate's Judgment was bad in law and against the weight of evidence.
3. So, the appellant has sought thus;
 - a. The appeal be allowed.
 - b. The Trial Magistrate judgment be set aside and the illegal title be cancelled by the court.
 - c. The respondent be compelled to pay taxed costs of the appeal.
 4. The appeal was heard by way of written submissions pursuant to the court's directions given on 7th February 2024.
 5. By the submissions dated 5th April 2024, the appellant through S. M Sagwe and Company Advocates stated that there is an error in the signature in consent in question as the deceased Karen Obingo Owade never signed it and the Honourable court didn't see her do so. That the consent was done by a court clerk and not an advocate. That her signature thereto was not obtained through her free and genuine consent.
 6. Also, counsel submitted that there is no clarity in the trial court's proceedings as regards consolidation of first and second suit as shown at page 8 of the record of appeal. That the impugned judgment does not disclose concise statement of the case, points for determination, the decision and the reasons thereon. Counsel implored the court to allow the appeal with costs.
 7. The respondent's submissions dated 3rd May 2024 referred to the impugned judgment, the parties' respective cases before the trial court, evidence to be relied on, inter alia, the said judgment, the consent of 11th April 2017, and the [Land Registration Act](#) 2016 (2012) and the sub county surveyor's report dated 21st April 2017. It was submitted in part that the trial court erred in adopting the consent. That after the defendant's death, her son obtained *Ad Litem* and filed a statement of defence in the original suit.
 8. Further, counsel submitted that the defendant signed transfer, applied for consent obtainable from the local Land Control Board, consent was given, the suit land transferred to him and title deed issued



accordingly. That the respondent lawfully acquired the suit land and that fraud was not proved. To buttress the submissions, counsel relied on *Selle* case (supra) as regards the jurisdiction of this court on a first appeal as well as *Flora Wasike-v-Destino Wamboka* (1988) KLR that consent order has contractual effect and can only be set aside on grounds which would justify setting a contract aside and *Vijay Morjaria-v-Nansingh Durbar and another* (2000) KLR that fraud should be specifically pleaded and proved. That thus, the appeal be dismissed with costs.

9. In the first suit, the respondent sued the original plaintiff (Deceased) by way of a plaint (Fast Track) dated 29th January 2019 (the first suit) for;
 - a. An order directing District Lands Registrar Rachuonyo South to remove the Restriction and/or Caution lodged on LR Central Kasipul Kamuma/7574. (The suit Land herein)
 - b. An order compelling the defendant to sign relevant transfer documents in respect to the suit land.
 - c. An order of permanent injunction restraining the defendant from trespassing, accessing, alienating, selling, mortgaging, cultivating, developing, occupying or in any other way interfering with the plaintiff's rights and privileges of pertinent hereto to the suit land situate at Kamuma Location, Homa Bay County.
 - d. Costs of this suit and interests.
10. In the statement of defence and counter claim dated 17th February 2022, the appellant prayed for;
 - a. An order cancelling Title deed for land parcel No. Central Kaspul/Kamuma/1261 and the same be reverted back into the name of Karen Obingo Owande (deceased) for succession to be done according to law.
 - b. That the defendant be condemned to pay for costs and interest.
11. In the second suit originated by a plaint (Fast Track) dated 30th October 2020, the appellant being the legal representative of the estate of the deceased sued the respondent and Land registrar Rachuonyo South District for;
 - a. An order that registration of the suit land be cancelled and title revert to original suit land registered in the name of the deceased Karen Obingo Owande and eviction of the 1st Defendant from the said land and he be restrained from intermeddling with the said deceased estate.
 - b. Costs of the suit to be awarded to the plaintiff.
12. By a statement of defence dated 22nd March 2021, the respondent through Kisaka and Associates Advocates, denied the appellant's claim in the second suit. He stated in part that the suit land was originally owned by his late father James Owande Ochoro and thereafter registered in her late mother's name/(deceased). He prayed that the suit be dismissed with costs.
13. It is trite law that this court has a duty to reanalyze and reassess the evidence on record to reach own conclusions though it always be borne in mind that that this court has neither seen nor heard the witnesses and should make allowance in this respect; see *Selle- v-Associated Motor Boat Co. Ltd* (1968) EA 123 which cited the case of *Abdul Hameed Saif- v-Ali Mohamed Sholan* (1955) 22 EACA 270.
14. In the foregone, the issues for determination are compressed to whether:
 - a. The consent order herein is valid.
 - b. The appeal is tenable.



15. Consent dated 1st February 2019 (PEXhibit 5) herein reads;
- a. That an order be issued directing District Lands Registrar Rachuonyo south to remove the Restriction and/or Caution lodged on LR Central Kasipul/kamuma/7574.
 - b. That the defendant will sign relevant transfer documents in respect to L/R No. Central Kasipul/kamuma/7574 to the plaintiff.
 - c. That an order of permanent injunction do restraining the defendant from trespassing, accessing, alienating, selling, mortgaging, cultivating, developing, occupying or in any other way interfering with the plaintiff's right and privileges of pertinent hereto to that parcel LR No. Central Ksipul/kamuma/7574 situated at Kamuma Location, Homa Bay County.
 - d. That each party to bear the Costs of this suit and interests.
16. On 5th April 2019, the consent duly recorded and was signed by a magistrate. Accordingly, the consent order was issued on 11th April 2019.
17. On 17th November 2021, Kisaka learned counsel for the respondent urged the court to enter the consent settling the matter. The learned trial magistrate then directed thus;
- a. The previous consent recorded by the parties is hereby invoked.
 - b. The previous position reverts
 - c. The matter is deemed settled.
18. On 4th August 2021, the parties through their respective parties in the first suit, agreed to compromise an application dated 31st May 2021 on the terms, inter alia; that the first and the second suits be consolidated with the 1st suit. The learned trial magistrate ordered accordingly.
19. During hearing of the consolidated suits, the respondent (PW1) relied on his two statements and list of documents including the mutation form (PEXhibit 2), sale agreement (PEXhibit 4) and consent filed by the parties (PEXhibit 5) as part of his evidence herein.
20. Under cross examination, PW1 stated that;
- “.....This is the consent I filed in court.....She is the one who consented and signed it.....Callen signed the same at the civil registry....I went to the land board on the 25/7/2019.I got the application on 3/1/2019.....the transfer was signed on 31/1/2019....the land transfer was registered with the land registry after we got the ordered.....she declined to give me land in 2018.....PEXhibit 4.It is a sale of land agreement. It was made on 4/4/2017.It was between Callen as the vendor and I as the buyer.....”
21. The appellant (DW1) relied on his statement as well as letters of administration and death certificate of the original plaintiff/defendant (D Exhibits 2 and 3 respectively), green card in the name of the original plaintiff (D Exhibit 4) in examination in chief. He stated that at the time of death of the deceased, the suit land was registered in her name and that she did not attend land control board as alleged by the respondent.
22. During cross examination, DW1 stated that he was not aware that the consent order issued by the court. That the suit land belongs to his deceased mother/original plaintiff and not the respondent. That there was fraud as per the police investigation findings.



23. DW2, George Odhiambo testified that the suit land belongs to his late grandmother and that it was fenced. That he was not aware of the consent order and that respondent acquired it illegally
24. DW3, James Omondi Okech relied on his statement as part of his testimony. He is son of Walter Okech, a brother to the appellant. He stated that he was not aware of the consent and transfer of it.
25. Regarding the acquisition of title to the suit land, I bear in mind sections 25 and 26 of the *Environment and Land Court Act*, 2015 (2011). The appellant's allegations are unfounded as fraud was distinctly pleaded but not proved as held in *Morjaria case (supra)* and *Kinyanjui Kamau- v-George Kamau* (2015) eKLR.
26. The trial court considered the evidence including that of PW1 and the respondent and noted the parties' submissions in the impugned judgment. The consent was the issue for determination as noted at last paragraph of page 1 of the judgement.
27. The trial court observed;

“It appears hard for this court to appear to be persuaded that indeed there was fraud or acts of fraud played by the plaintiff. The recording of the consent by parties and the obtaining consequences appears to be valid. I thus find it unsafe to disturb the records.....”
28. Clearly, the consent recorded by the parties is solid at law. Parties are bound by terms of the consent which is their contract and there is no proof of coercion, fraud and undue influence in regard to its terms; see *National Bank of kenya Ltd- v-Pipe plastic Samkolit Ltd and another* (20020 EA 503 and *Brooke Bond Liebeg Ltd- v-Mallya* (1975) EA 266.
29. In the circumstances, the respondent proved that due process was followed in obtaining title to the suit land; see *Munyu Maina versus Hiram Gitihiba Maina* (2013) eKLR.
30. To that end, I find that the learned magistrate's considered view was in consonant with the evidence on record and the correct principles of law. There is no iota of reason to disturb the decision and I affirm the same.
31. Wherefore, the instant appeal generated by way of a memorandum of appeal dated 6th January 2023 is devoid of merit and the same is hereby dismissed with costs to the respondent.
32. It is hereby ordered.

DATED AND DELIVERED AT HOMA BAY THIS 11TH JUNE 2024

G. M. A ONG'ONDO

JUDGE

In the presence of;

- a. Respondent in person.
- b. Court Assistant, Mutiva.

