



**Atingo v Ndonga & another (Environment and Land Appeal  
E046 of 2021) [2024] KEELC 4482 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4482 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E046 OF 2021**

**E ASATI, J**

**JUNE 6, 2024**

**BETWEEN**

**JOHN ONDUTO ATINGO ..... APPELLANT**

**AND**

**STEPHEN NDONGA ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF OF SOUTH NYAKACH LOCATION ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling of the Hon. S.O. Temu, delivered at  
Nyando on the 10th Day of June, 2021 in NYANDO ELC NO.42 OF 2018)*

**JUDGMENT**

**Introduction**

1. This appeal is against the Judgement and Decree by Hon. S.O. Temu delivered on 10<sup>th</sup> June, 2021 in Nyando PMC EL Case No.42 Of 2018 (herein the suit). The record of appeal shows that the suit was first filed by the Appellant at the Environment and Land Court at Kisumu as Kisumu ELC Case No.198 Of 2016 vide the plaint dated 3<sup>rd</sup> August, 2016.
2. In the suit, the Appellant claimed that he was the lawful owner of a parcel of land known as Kisumu/ Kimnua/Keyo Oguro/453 measuring approximately 141.0 acres (the suit land) on which he had lived with his family members since the year 1974. That in the year 2015, the 1<sup>st</sup> Respondent without any colour of right encroached onto the suit land and started planting trees and carrying out other activities without consent of the appellant. That the 2<sup>nd</sup> Respondent issued a letter on 26<sup>th</sup> June, 2016 asking the appellant and his family to cease carrying out any activities on the land as the land belonged to the 1<sup>st</sup> Respondent.
3. Hence, the Appellant sought as against the Respondents for orders that: -



- a. Possession of the whole of Kisumu/Kimnua/Keyo Oguro/453.
  - b. An order of injunction permanently restraining the Defendants, their employees, servants, workers and/or agents from interfering with the Applicant's peaceful occupation of the parcel of land known as Kisumu/Kimnua/Keyo Oguro/453, also carrying out any brick laying, building, fencing, cutting down trees or any other activity whatsoever on the same parcel of land or any part thereof, alienating or interfering by any means howsoever.
  - c. Costs of the suit.
  - d. Any other relief that the honourable court deems fit to grant.
4. In response to the Appellant's claim, the record shows that the 1<sup>st</sup> Respondent entered appearance and filed Defence dated 1<sup>st</sup> March, 2018. He denied the Appellant's claim and contended that the registered owners of the suit land were Amolo Sigu, SHeM Nybwala, Justo Okora, Benjamin Miri and Kepha Odiko. That the Appellant did not have locus standi to bring the suit and that the suit was misconceived, bad in law and an abuse of the court process and that the same should be dismissed with costs.
  5. The record also shows that by a court order made on 22<sup>nd</sup> March, 2018 by Hon. Justice Kibunja, the matter was pursuant to the provisions of section 18 *Civil Procedure Act* transferred to Nyando Law Courts for hearing and determination.
  6. The record further shows that the suit was heard by the trial court which vide the judgement delivered on 10<sup>th</sup> June, 2021 found that the Appellant failed to prove that he had any individual rights over the subject land or that he had locus standi to institute the suit. The court dismissed the suit and awarded costs to the Respondents.
  7. Dissatisfied with the judgement, the Appellant filed the appeal herein vide the Memorandum of Appeal dated 23<sup>rd</sup> June, 2021 seeking that the appeal be allowed, the ruling of the learned trial Magistrate be set aside and the Appellant be awarded the costs of the appeal.
  8. The grounds of appeal as contained in the Memorandum of Appeal are that: -
    - a. The trial Magistrate erred in fact and in law in finding and holding that the Appellant failed to prove their case on a balance of probability as required by law, thus dismissing the Appellant's suit.
    - b. The trial Magistrate completely misunderstood the evidence before him, wrongly analysed the evidence thus dismissing the Appellant's suit.
    - c. The trial Magistrate erred in law and fact by failing to appreciate the totality of the evidence before him and the submissions made on behalf of the Appellant thus reaching a conclusion that was contrary to the evidence before him.
    - d. The trial Magistrate erred in law and fact by disregarding all the evidence that was adduced by the Appellant as proof that the suit parcel of land belonged to his deceased father hence rightfully his.

## Submissions

9. The appeal was argued by way of written submissions pursuant to directions given on 29<sup>th</sup> February, 2024. It was submitted on behalf of the Appellant vide written submissions dated 17<sup>th</sup> March, 2024 filed by the firm of Sala Mudany Advocates that the issues for determination in the appeal are whether



the Defendant has a good title, whether the 1<sup>st</sup> Defendant trespassed onto the suit land, whether the 2<sup>nd</sup> Defendant's actions were in contravention of *the Constitution* and whether fraud on the part of the Plaintiff or his family has been established.

10. On behalf of the 1<sup>st</sup> Respondent, written submissions dated 25<sup>th</sup> April, 2024 were filed by the firm of Ayoo – See & Associates Advocates. It was submitted on behalf of the 1<sup>st</sup> Respondent that the trial court was right in dismissing the suit with costs.

### **Issues for Determination**

11. The grounds of appeal form the issues for determination herein.

### **Analysis and Determination**

12. This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. See section 78 of the *Civil Procedure Act* and *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123) where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.
13. The first issue for determination as raised in the first ground of appeal is whether or not the trial court erred in finding that the Appellant had not proved his case on a balance of probabilities. Perusal of the plaint shows that the Appellant claimed to be the owner of the suit land having inherited it from his father. His evidence before the trial court as contained in his witness statement dated 8<sup>th</sup> August, 2016 which was adopted as his evidence in chief was that he was at all material times the lawful owner of the suit land. That he was one of the surviving sons of Atingo Obande who was the owner of the suit land. That the land was acquired on 25<sup>th</sup> July, 1974 by his father and later registered under trustee of five people each person representing a family. That his father appointed one Justo Okora, deceased, to represent the Atingo family, that Waria family was represented by Benjamin Miri, deceased, Alala family by Shem Nyabwala, deceased, Gogo family by Kepha Odiko also deceased and Nyakwaka family by Amolo Sigu also deceased.
14. He testified further that all the above-mentioned families have always lived on the suit property peacefully without any interference until early 2015 when the 1<sup>st</sup> Respondent unlawfully encroached onto the suit land. That the Chief of the area handled the dispute regarding the encroachment and on 29<sup>th</sup> March, 2015 declared that the Appellant were the lawful owners of the land and ordered the 1<sup>st</sup> Respondent to stop all the activities he was doing on the land and to give vacant possession thereof to the appellant.
15. Further that on 26<sup>th</sup> June, 2016 he was given a letter from the 2<sup>nd</sup> Respondent asking them to cease carrying out any activities on the suit land as the same belonged to the 1<sup>st</sup> Respondent. That consequently the 1<sup>st</sup> Respondent fenced off a portion of the suit land and has been carrying out brick laying, farming and other activities thereon without the consent of the appellant. That the Respondents' actions were intended to dispossess the appellant and the other family members of the suit land.
16. The Appellant produced among other documents, certificate of official search dated 21<sup>st</sup> January, 2016 in respect of the suit land and on cross-examination, he stated that both his name and his father's name were not on the search.



17. The 1<sup>st</sup> Respondent testified and stated that the registered owners of the suit land were all deceased and that succession had not been undertaken to their estates. That the Appellant was not using the land.
18. In his judgement, the trial court found that the Appellant had not proved his case on a balance of probabilities.
19. It has been submitted in this appeal on behalf of the Appellant that the Plaintiff (Appellant) and his family are the registered owners of the suit property as evidenced by the title deed on record. That the search dated 12<sup>th</sup> January, 2016 shows that the Plaintiff (Appellant) was in fact the true owner of the suit property and that there was no evidence to the contrary.
20. It was submitted on behalf of the 1<sup>st</sup> Respondent that neither the Appellant nor his late father acquired the land in dispute in the year 1974. That there was no documentary evidence produced by the Appellant to support his claim.
21. I have considered the pleadings and evidence placed before the trial court, the findings of the trial court and the submissions made herein. Ownership of land is proved by way of production of documents of title or ownership. The Appellant produced 5 exhibits in total. Exhibit P.5 (certificate of official search in respect of the suit land) shows that as at 21<sup>st</sup> January 2016 when the search was conducted, the suit land was registered in the joint names of Amolo Sigu, Shem Nyabwala, Justo Okora, Benjamn Miri and Kepha Odiko. The certificate of official search further shows that registration of the land in the names of these persons took place on 25<sup>th</sup> July, 1974. It was the Appellant's testimony that all these persons were since deceased. It was the 1<sup>st</sup> Respondent's case that succession had not been undertaken in respect of the respective estates of these persons.
22. I do not find any evidence on record that the suit land was at any time registered in the name of the Appellant's father or the name of the Appellant. Without such evidence, the Appellant could not able to prove his claim before the trial court that he was the lawful owner of the suit land or that he inherited the suit land from his father. The burden of proof under the provisions of sections 107, 108, 109 and 112 of the *Evidence Act* was with the appellant to produce evidence to prove his case to the required standard. Though Counsel for the appellant submitted that the certificate of title showed that the land belonged to the appellant, no such certificate of title was placed before the trial court.
23. Under Section 26 of the *Land Registration Act*, the certificate of title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person registered as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements restrictions and conditions contained in the certificate. The evidence produced by the appellant showed that the land belongs to the five persons whose names appear on the certificate of official search.
24. From the foregoing it is clear that the trial court did not err in making the finding that the Appellant had not proved his case on a balance of probabilities.
25. The next ground of appeal raises the issue of whether or not the trial court misunderstood the evidence before him, wrongly analysed the evidence thus dismissing the Appellant's suit. This ground of appeal is related to grounds 3 and 4 of appeal as they all concern the manner in which the trial court analysed and appreciated the evidence before it.

It has been submitted in this appeal on behalf of the Appellant that the 1<sup>st</sup> Respondent trespassed onto the suit land. Counsel relied on the provisions of Section 3(1) of the *Trespass Act* Cap 294 and the definition of trespass to land in *Clark & Lindsell on Torts* 18<sup>th</sup> Edition at paragraph 18 – 01 to submit that the Respondents had trespassed onto the suit property and interfered with the Appellant's peaceful occupation thereof.



Counsel also relied on the provisions of article 47 and 50(1) of *the Constitution* of Kenya, 2010 and further submitted that fraud on the part of the Appellant and his family had not been established therefore the title was beyond reproach and that the Respondents cannot claim ownership of the suit property.

26. The record shows that the 1<sup>st</sup> Respondent denied that the suit land is registered in his name. It was submitted herein on his behalf that the Appellant was a stranger to the land in issue since the Appellant had no right to claim land that belonged to deceased persons who were not his parents and whom he does not represent through Grant of Letter of Administration.

27. I have considered the findings of the trial court vis a vis the evidence and pleadings placed before it. Perusal of the judgement shows that the Appellant's suit was dismissed on two substantive grounds namely; that the Appellant failed to prove ownership of or any nexus to the suit land and secondly, that the Appellant had no locus standi to bring the suit. It was common ground that the suit land was registered in the names of deceased persons. A litigant pursuing a claim on behalf of deceased persons must first obtain capacity by petitioning the court for and being granted Letters of Administration to the estate. Section 2(1) of the *Law of Succession Act* provides that:

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this *Act* and to the administration of estates of those persons.

28. Section 82 of the same *Act* vests the power to file suit on behalf of the estate of deceased persons in the personal representative duly appointed through the process of succession as provided for in the Act and not in any other person. The Court of Appeal in the case of *Barnes Muema vs Francis Masuni Kyangangu* [2019] eKLR was in agreement with the High Court's finding that a litigant without Letters of Administration lacks locus standi. The Appellant did not produce any Grant Letters of Administration. He did not establish any nexus between the suit land and his deceased father or himself. I am in agreement with the holding of the court in *Julian Adoyo Ongunga & Another — Vs- Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi (Deceased))* eKLR where the court held

'...Simply put, a party without *locus standi* in a civil suit lacks the right to institute and/or maintain the suit even where a valid cause of action exists. *Locus standi* relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties...'

29. This court finds that the trial court correctly analysed the evidence before it and came to the correct conclusion. As such, the court will have no basis to interfere with the findings and decision of the trial court.

30. As regards costs of the appeal, the law in section 27 of the *Civil Procedure Act* is that costs follow the events. No reasons have been given to the court to exercise its discretion otherwise.

31. The upshot is that the appeal herein has no merit. The appeal is hereby dismissed. Costs to the 1<sup>st</sup> Respondent.



Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 6<sup>TH</sup> DAY OF JUNE, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Sala for the Appellant.

Nyagol for the 1<sup>st</sup> Respondent.

