



**Dudi (Suing as the administrator of the Estate of Joseph Kasera Obago alias Kasera Obago - Deceased) v Joel(Sued as the administrator of the Estate of the Late Consolata Awino Opiyo) & 4 others (Environment and Land Appeal E004 of 2023) [2024] KEELC 5694 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5694 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

**GMA ONGONDO, J**

**JULY 25, 2024**

**BETWEEN**

**JOSEPH NGUKA DUDI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH KASERA OBAGO ALIAS KASERA OBAGO - DECEASED) ..... APPELLANT**

**AND**

**MARY AUMA JOEL(SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE CONSOLATA AWINO OPIYO) ..... 1<sup>ST</sup> RESPONDENT**

**CALVINCE OTIENO JOEL ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR HOMA-BAY COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**THE COUNTY LAND ADJUDICATION OFFICER HOMA-BAY ..... 5<sup>TH</sup> RESPONDENT**

*(Being an Appeal arising from the Judgment of Hon. Onzere E.M. Principal Magistrate dated 27th June 2023 at Ndhiwa Principal Magistrate Court in MCELC NO. E 021 OF 2021)*

**JUDGMENT**

1. The present appeal emanated from the judgment of the trial court delivered on 27<sup>th</sup> June 2023 where the learned trial magistrate (Hon E. M Onzere, PM) reasoned that the appellant who was the plaintiff in that court, had failed to prove his case on a balance of probability. Therefore, the plaintiff's suit was dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants with no orders as to costs as regards the 3<sup>rd</sup> to 5<sup>th</sup> defendants since they did not actively participate in the suit.



2. Dissatisfied at the said determination, the appellant through Aluoch Odera and Nyauke Advocates filed the appeal by the memorandum of appeal dated 26<sup>th</sup> July 2023 based on the grounds infra;
  - a. The court failed to appreciate that whereas there was document showing that objection determination was there, there was completely no evidence with regards to the proceeding before the Adjudication officers.
  - b. The court failed to interrogate the validity of the evidence placed before it or to compel attendance of the land office as it always does in other cases.
  - c. The court was then biased.
3. Thus, the Appellant is seeking the following orders;
  - a. The entire Judgment of the lower court be quashed and set aside.
  - b. The Appeal be allowed with costs.
4. The appeal was heard by way of written submissions further to this court's directions of 9<sup>th</sup> April 2024
5. The appellant's counsel filed submissions dated 8<sup>th</sup> May 2024 and stated that the particulars of fraud were pleaded and proven by the appellant. Further, counsel did submit that since it was the Adjudication report that was being challenged, it was prudent that the court interrogates the adjudication proceedings. Reliance was placed on the case of Zacharia Wambugu Gathimu & another vs John Ndungu Maina (2019) eKLR, among others, to fortify the submissions.
6. By their submissions dated 7<sup>th</sup> June 2024, the 1<sup>st</sup> and 2<sup>nd</sup> respondents gave a background of the matter thus; that the suit land was originally owned by Consolata Awino Opiyo (deceased 1), who is the mother in law to the 1<sup>st</sup> respondent and who is buried thereon. That the 1<sup>st</sup> respondent's late husband is also buried thereon. That the 2<sup>nd</sup> respondent is a son to the 1<sup>st</sup> respondent. That the appellant is a distant grandson of the late Kasera Obago (deceased 2) who prior to adjudication occupied the suit land parcel Number, KABUOCH/KARADING/KONYANGO/KAWERE/1190 which was purchased by one Joel Opiyo (deceased 3) for his mother, deceased 1 herein.
7. Counsel identified twinned issues for determination to wit: whether there existed a contract for sale between deceased 2 and deceased 3 herein and whether the appellant proved forgery or not. He submitted that the appellant did not challenge the validity of the sale agreement (D Exhibit 4). That further, the appellant failed to prove any fraud or collusion between deceased 1 and the Land Adjudication Officer. Thus, counsel urged the court to dismiss the instant appeal with costs.
8. I have carefully considered the parties' respective pleadings, the trial court's proceedings inclusive of evidence as well as the judgment of the learned trial magistrate. It is noteworthy that it is the duty of this court to consider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another -vs- Associated Motor Boat Co. Ltd. and others* (1968) EA 123 and *Williamson Diamonds Ltd. -vs- Brown* (1970) EA 1.
9. It must be noted that at the trial court, the appellant/plaintiff sued the respondents by way of an amended plaint dated 1<sup>st</sup> February 2022 for the following orders;
  - i. Permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants in person, their relatives, employees, servants and or any other person deriving authority from them from wasting, cultivating, erecting anything, alienating, dealing with the suit land in a manner which is likely to interfere with its natural being.



- ii. A permanent order directing the 3<sup>rd</sup> and 5<sup>th</sup> defendants to rectify the register by deleting the name of the 1<sup>st</sup> defendant and insert the name of JOSEPH KASERA OBAGO alias KASERA OBAGO (deceased) until the grant of letters of administration is obtained to his estate in the suit land.
  - iii. An order declaring that Consolata Awino Opiyo is not legally registered owner of the suit land and the 3<sup>rd</sup> and 5<sup>th</sup> defendants be directed to cancel the title deed issued in the name of CONSOLATA AWINO OPIYO.
  - iv. Cost and interest of the suit
  - v. Any other relief this Honourable court may deem fit and just to grant.
10. PW1, Joseph Nguka Dudi, relied on his statement filed on 22<sup>nd</sup> June 2021 which was adopted as part of his evidence as well as a certificate of official search in respect to the suit land, letters of administration ad litem, letters of administration intestate and adjudication record (PExhibits 1 to 4 respectively). He testified that the suit land belonged to his grandfather, deceased 2, who is buried thereon. That both his parents are also buried thereon. That deceased 1 got registered as proprietor thereof in 2008, long after the demise of deceased 2. That deceased 2 never appeared before the Land Control board to consent to the transfer of the suit land to deceased 1.
  11. On cross-examination, he conceded that the 1<sup>st</sup> respondent's late husband is buried on the suit land. He averred that deceased 1 procured registration of the suit land in her name through fraud.
  12. PW2 Julius Agunga Oyaga relied on his statement on record. On cross-examination, he admitted that he did not witness any fraud perpetrated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  13. On 29<sup>th</sup> March 2022, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed an amended statement of defence of even date denying the claim and prayed that the suit be dismissed with costs.
  14. The 3<sup>rd</sup> and 4<sup>th</sup> respondents filed a statement of defence dated 11<sup>th</sup> August 2021, opposing the suit. They urged the court to dismiss the same with costs.
  15. The 1<sup>st</sup> defendant (DW1) who is the 1<sup>st</sup> respondent herein relied on her statements dated 29<sup>th</sup> March 2022 and 30<sup>th</sup> June 2021 as well as a copy of the official search certificate for the suit land, letters of administration intestate, chief's letter and a copy of the sale agreement (DExhibits 1 to 4 respectively). She stated that the suit land was purchased by her late husband, deceased 3, for deceased 1 herein. That she has been living thereon since 1998. That the appellant does not stay on the suit land.
  16. In cross-examination, she stated that deceased 2 is a step grandfather to the appellant. That the suit land was purchased in 1998 and the purchase price was duly paid.
  17. DW2, Joseph Ogare, relied on his statement dated 29<sup>th</sup> March 2022, which was adopted as his evidence in chief. It was his testimony that he witnessed the execution of DExhibit 4 between the 2<sup>nd</sup> deceased and 3<sup>rd</sup> deceased. On cross-examination, he stated that the purchase price was paid in instalments. That deceased 3 purchased the suit land for his mother, deceased 1. His National Identification Card Number was confirmed to be the same as that indicated in the sale agreement (DExhibit 4).
  18. It is important to note that the learned trial magistrate stated the parties' respective cases, delineated five issues for determination, discussed them and reached her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
  19. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed thus:



- a. Whether the appellant has demonstrated that the appeal is tenable to attract the orders sought in the memorandum of appeal;
  - b. What final orders can this court make to meet the ends of justice?
20. The appellant contends that the trial court failed to appreciate that whereas there was a document showing that the objection lodged by deceased 1 had been determined, no proceedings relating to the same were produced in evidence.
  21. In that regard, I bear in mind that the trial court relied on the Adjudication Record (PEXh 4) which shows that the suit land initially belonged to deceased 2. Following determination of objection number 1235 lodged by deceased 1 herein, the same got registered in her name.
  22. I note that the appellant had made an application to compel the 5<sup>th</sup> respondent to produce the land adjudication records in respect to the suit land. A notice to produce them is dated 1<sup>st</sup> February 2022 was duly filed by his counsel.
  23. It is clear that vide a sale agreement dated 17<sup>th</sup> October 1998 (DEXh 4), deceased 2 sold 1 ½ acres thereof to Owino Joel Opiyo (deceased 3) who purchased the same for his mother, deceased 1. It was subsequently registered in the name of deceased 1.
  24. Notably, the appellant did not produce the Objection proceedings that he alleges were disregarded by the trial court.
  25. The appellant laments that the court failed to interrogate the validity of the evidence placed before it or to compel attendance of the land office as it always does in other cases. That therefore, the court was biased.
  26. In that respect, it is observed that the appellant did not make an application for court to issue summons to the Land Adjudication Officer or Land Registrar to attend court to give evidence. Is the appellant implying that the court should have done so suo moto?
  27. Besides, no evidence was adduced to show that the trial court was biased. The trial court simply decided the case based on the evidence placed before it by the parties.
  28. As a general preposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Sections 107 to 109 of the [Evidence Act](#), Chapter 80 Laws of Kenya.
  29. The standard of proof in civil matters including the instant case, is on a balance of probabilities. In that regard, did the appellant prove to the requisite standard, his case before the trial court?
  30. Considering the entire evidence on record in this appeal, the facts of the case alongside the legal principles stated above, the appellant who was the plaintiff before the trial court did not prove his case as required by law. I therefore, would endorse the learned trial magistrate's reasoning in the matter.
  31. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is sound at law. I hereby uphold it in entirety.
  32. Wherefore, the instant appeal originated by way of a memorandum of appeal dated 26<sup>th</sup> July 2023, be and is hereby dismissed.
  33. By dint of the proviso to Section 27(1) of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya, costs of this appeal to be borne by the appellant.



34. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT HOMA BAY THIS 25<sup>TH</sup> DAY OF JULY, 2024.**

**G.M.A. ONG'ONDO**

-

In the presence of: -

1. Mr. S Nyauke, Learned Counsel for the appellant
2. Mr. Owaka, Learned Counsel for the respondent
3. Mr. T. Luanga, Court Assistant

