



REPUBLIC OF KENYA



**Kandiawo v Chianda & another (Environment and Land Appeal
7 of 2021) [2024] KEELC 6584 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6584 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 7 OF 2021
GMA ONGONDO, J
SEPTEMBER 30, 2024
(FORMERLY MIGORI ELC APPEAL NO. E009 OF 2021)**

BETWEEN

WALTER ODOYO KANDIAWO APPELLANT

AND

VICTOR OTIENO CHIANDA 1ST RESPONDENT

JOASH ODHIAMBO JONYO 2ND RESPONDENT

(Being an appeal from the judgment of Hon. Celesa Okore, Principal Magistrate, delivered on 8th July, 2021 in Oyugis Principal Magistrate's Court Environment and Land Case No. 6 of 2019)

JUDGMENT

1. This appeal emanates from the judgment delivered on the 8th July, 2021 by the Honourable Celesa Okore, Principal Magistrate, in Oyugis Principal Magistrate's Court Environment and Land Case No. 6 of 2019 where the learned trial magistrate held in part;
 - a. An Order be and is hereby issued directing the 1st defendant and/or the Registrar to remove the restriction on that entire land parcel known as Central Kasipul/Kamuma/2840 (the suit property herein).
 - b. An eviction order be and is hereby issued against the 1st defendant, his agent, assignees, tenants, servants or employees from the entire land parcel known as Central Kasipul/Kamuma/2840.
 - c. The 1st defendant's counter-claim be and is hereby dismissed with no orders as to costs.
 - d. Each party shall bear its own costs.
2. The appellant namely Walter Odoyo Kandiawo through the firm of Oguttu Mboya, Ochwal and Partners Advocates got aggrieved at the judgment hence, mounted the appeal by way of a



memorandum of appeal dated 9th July 2021 and duly filed on 12th July 2021 based on thirteen (13) grounds, inter alia;

- a. The learned trial magistrate erred in fact and law in finding that the appellant failed to prove the averments contained in the counter-claim as against the respondents herein on balance of probabilities thus dismissing the counter-claim against the respondents.
 - b. The learned trial magistrate erred in law and fact in finding and holding that because the 1st respondent was the registered owner of the suit property, the appellant's counter-claim against the respondents could not stand.
 - c. The learned trial magistrate misdirected himself by dismissing the appellant's counter-claim against the respondents herein while the evidence on record in favour of the appellant were cogent and/or weighty.
3. So, the appellant has sought the following orders;
- a. The judgment and decree of the Learned Trial Magistrate dated 8th day of July 2021, be set aside and/or quashed and same be substituted with an order dismissing the 1st respondent's suit vide Oyugis Principal Magistrate's Court Environment and Land Case No. 6 of 2019.
 - b. The Honourable court be pleased to vary and/or set aside the limb of the judgment dismissing the appellant's counter-claim vide Oyugis Principal Magistrate's Court Environment and Land Case No. 6 of 2019 and in lieu thereof, grant an order allowing the counter-claim, dated 16th August 2019.
 - c. The respondents herein be condemned to bear costs incurred in the subordinate court.
 - d. Costs of the appeal be borne by the respondents.
 - e. Such further and/or other orders be granted as this honourable court may deem fit and expedient.
4. Originally, the appeal was lodged at Migori Environment and Land Court. On 16th September 2021, it was transferred to this court for hearing and determination.
5. The 2nd respondent failed to participate in the hearing of the appeal and judgment was entered against him on 21st September 2022. By this court's ruling rendered on 13th May 2023, the judgment was set aside being guided by *Kanwal Sarjit Singh Dhiman v Kashavji Jivraji Shab* [2015] eKLR, James Kanyita Nderitu and another v Marios Philotas Ghikas [2016] eKLR, Butt v Rent Restriction Tribunal [1979] eKLR, Articles 25 (c), 48 and 50 (1) of the *Constitution* of Kenya 2010 and Sections 3 and 3A of the *Civil Procedure Rules* 2010.
6. On 5th May 2022, the court directed that the appeal be heard by way of written submissions.
7. Consequently, learned counsel for the appellant filed submissions dated 13th June 2022 on 14th June 2022 and stated, inter alia, that the suit property was not available for sale to the 1st respondent who failed to conduct due diligence thereof. That at the trial court, the appellant testified that he had entered into a valid contract with the 2nd respondent and obtained consent from the Land Control Board within the statutory timelines after payment of the purchase price in full. That the appellant took possession of the suit property in 2013 and commenced construction of a house.
8. Furthermore, the appellant's counsel submitted that the transfer instrument complied with Sections 44, 45 and 46 of the *Land Registration Act* 2016 [2012] and that stamp duty was paid but the 2nd



respondent declined to surrender the original title deed for purposes of effecting a transfer of the suit property in favour of the appellant. Thus, counsel urged this court to set aside the judgment of the trial court, allow the counter-claim with costs and dismiss the 1st respondent's case with costs to the appellant. Counsel also cited various authorities including the case of *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Ltd.* [2004] 2KLR 269 and *National Land Commission v Afrison Export Import Limited and 10 others* [2019] eKLR, to buttress his submissions.

9. Learned counsel for the 1st respondent filed submissions dated 2nd June, 2022 on 3rd June 2022 and relied on Section 24, 25 and 26 of the *Land Registration Act*, 2016 (2012), stating that courts are mandated by statute to consider a title document as prima facie evidence of ownership to land as conclusive evidence of proprietorship to land. That the same can only be challenged as outlined under Section 26(1) (a) and (b) of the same *Act*. That since the appellant failed to provide evidence of fraud at the trial court as against the 1st respondent, the latter acquired absolute and indefeasible good title to the suit property.
10. Further, counsel submitted that the 1st respondent conducted due diligence before purchasing the suit property. Therefore, counsel urged the Honourable court to dismiss this appeal with costs and cited the case of *Nancy Chepkirui Soi v Gideon Maritim* [2021] eKLR, to fortify the submissions.
11. Pursuant to this court's rulings delivered on 13th May 2024 and 11th July 2024 on the 2nd respondent's Notice of Motion applications dated 21st November 2023 and 7th June 2024 respectively, the court allowed the 2nd respondent to file submissions on the appeal out of time.
12. Accordingly, the firm of Omuthe and Company Advocates for the 2nd respondent filed submissions dated 2nd June 2024 making reference to the two applications mentioned in paragraph 11 hereinabove and submitted in part that the appellant did not prove his case on a balance of probabilities as provided for under section 107 of the *Evidence Act* Chapter 80 Laws of Kenya. That in particular, the appellant did not prove the cost of purchase price and that he paid Kshs. 445, 000/= for the suit property.
13. In addition, counsel submitted that special damages can be proved by receipts, invoices and others but valuation report is incapable of such proof. Counsel relied on decisions in *Anne Wambui Nderitu-vs-Joseph Kiprono Ropkoi and another* (2005) 1 EA 334, *Great Lakes Transport (U) Ltd-vs-Kenya Revenue Authority* (2009) eKLR and *Guardian Coach Ltd and another-vs-Kiptoo* (2022) eKLR. Counsel termed the appeal unmerited and urged the court to dismiss the same with costs.
14. It is important to remember that the suit was originated by way of a plaint dated 21st January 2019 and filed in court on even date for the orders infra;
 - a. An order directing the defendant and/or the registrar to remove the restriction on the suit property.
 - b. An eviction order against the defendant, his agents, assignees, tenants, servants or employees from the entire suit property and an order for account and recovery of any mesne profits made by the defendant.
 - c. Cost and interest from the date of filing this suit.
 - d. Any other further relief as the court may deem just and fit to grant.
15. In the amended statement of defence and counter-claim dated 16th August 2019, the appellant who was the 1st defendant in the suit denied all the claims in the 1st respondent's plaint. He further stated in the counter-claim that the 1st respondent's transfer and subsequent registration of the suit property was procured and/or obtained by fraud.



16. The 2nd defendant who is the 2nd Respondent herein, was duly served with the suit papers. However, he neither responded to the same nor participated in the suit at the trial court.
17. I have anxiously considered the parties' respective pleadings alongside the trial court's proceedings inclusive of the evidence as well as the judgment of the learned trial magistrate and the rival submissions. It is trite law that the duty of this court to reconsider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another v Associated Motor Boat Co. Ltd. and others* [1968] EA 123 and *Williamson Diamonds Ltd v Brown* [1970] EA 1.
18. In the foregone, the issues for determination herein are as captured in the grounds of appeal compressed to whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal.
19. The 1st respondent, Victor Otieno Chianda (PW1) who was the plaintiff before the trial court testified on 4th July 2021 and adopted his witness statement dated 15th January, 2019 as part of his testimony. He stated that he conducted due diligence on the suit property through his counsel, Odongo Awino, prior to executing a sale agreement dated 24th May, 2016. That subsequent to the purchase, a transfer was done and title deed issued to him on 7th June 2017. That the appellant placed a restriction on the suit property on 21st May 2017 and he only learnt of the same when he applied for a loan facility and sought to use the property as security. In evidence, he produced a copy of certificate of official search, copy of the title document, Land transfer form, application for consent from Land Control Board, Land sale agreement and plaintiff's identity card (PE Exhibits 1, 2, 3, 4, 5 to 6 respectively).
20. During cross-examination, PW1 admitted that when he conducted a physical search on the suit property, there was an incomplete structure thereon. That the building was later completed and he lives thereat.
21. The 1st defendant (DW1) testified on 16th April, 2021 and adopted his witness statement dated 6th August 2019 as part of his testimony. He stated that he purchased the suit property in 2013 from the 2nd respondent herein after conducting due diligence. That he entered into two separate sale agreements with the 2nd respondent. That in the first one, the purchase price had been agreed at Kshs. 350,000 in 2014 but the 2nd respondent later revised the price to Kshs. 445,000 thereby necessitating execution of the second sale agreement. That he paid the entire purchase price and obtained consent from the Land Control Board in September 2014. However, the 2nd respondent declined to surrender the original title for transfer to his name. He stated that he has been in occupation of the suit property since 2013 and has erected structures thereon. That the same is his family home.
22. DW1 therefore, urged the court to cancel the title issued to the 1st respondent over the suit property. In the alternative, he sought special damages totaling to Kshs. 4,495,000/- against the 1st and 2nd respondents. He produced in evidence, a copy of green card, certificate of official search, Land sale agreement, 2nd Land sale agreement, application for consent, letter of consent, transfer instrument, agreement for the plaintiff, application to land control board, caution, certificate of search, photographs and valuation report (1st D Exhibits 1 to 14 respectively).
23. Under cross-examination, DW1 admitted that he was aware that the Land control board consent is only valid for six months and that the transfer to him was never registered. He also did not have evidence to prove that the plaintiff illegally registered the title of the suit property in his name.
24. DW2, George Lochi Okello, testified on 16th April, 2021 and adopted his witness statement dated 29th January, 2021 as part of his evidence. He stated that he was a witness to the agreement for sale between the 1st defendant and the 2nd defendant dated 18th July 2014. That the 1st defendant has taken possession



- and lives on the suit property. He added that the 2nd defendant later refused to transfer the suit property to the 1st defendant.
25. In arriving at the impugned judgment, the learned trial magistrate cited Sections 24 (a), 25(1) and 26 of the [Land Registration Act](#), 2016 [2012] and observed at pages 4 and 6 of the impugned judgment that;
- “.....it is my considered opinion that the plaintiff’s right to the suit land is absolute and indefeasible.....”
- “...the 1st defendant has gone further to lodge a counter-claim against the plaintiff, but he has not provided proof that the plaintiff illegally, unprocedurally and fraudulently acquired the suit property in this case... It is the 2nd defendant who duped and illegally obtained the 1st defendant’s cash... the 1st defendant should therefore direct his demands to the 2nd defendant and even apply for execution if his monetary claim is not fully paid and/or refunded...”
(Emphasis laid)
26. It must be noted that the appellant was accorded the opportunity to lead evidence to demonstrate the existence of fraud on the part of both the 1st and 2nd respondents. However, he only adduced evidence of fraud against the 2nd respondent herein during trial in consonant with the Court of Appeal decision in the case of [Kuria Kiarie and 2 others v Sammy Magera](#) [2018] eKLR.. Clearly, Section 107 and 108 of the [Evidence Act](#), Chapter 80 Laws of Kenya provides that he who asserts or pleads must support the same by way of evidence.
27. At this point, this court has to establish whether the 1st respondent and the appellant proved to the requisite standard, their case and counter-claim respectively before the trial court; see [Eastern Produce Ltd-Chemomi Tea Estate v Bonfas Shoya](#) [2018] eKLR and [CMC Aviation Ltd v Kenya Airways Ltd \(Cruisair\) Ltd](#) [1978] eKLR
28. Taking into account the evidence on record in this case in entirety, and applying the facts of the case as well as legal principles stated above, it is clear that the 1st respondent who was the plaintiff before the trial court proved that he is the lawful registered owner of the suit property. That he obtained the title deed to the property in a procedural and legal manner as observed in the case of [Munyu Maina v Hiram Gitiba Maina](#) [2013] eKLR.
29. On the other hand, the appellant who was the 1st defendant at the trial court also proved that there was indeed a contract for sale of the suit property between himself and the 2nd respondent. That he paid the full purchase price, obtained consent from the Land Control Board, only for the 2nd respondent to decline to avail the original title to the suit property for purposes of effecting transfer; see also [William Kipsoi Sigei v Kipkoach Arusei and another](#) [2019] eKLR. Such evidence was not contested by the 2nd respondent who failed to defend the suit at the trial court. It is thus, treated as the gospel truth.
30. It is pretty clear that in the amended counter-claim dated 16th August, 2019 and filed at the trial court, the appellant herein sought various orders as against the 1st and 2nd respondents. However, the court having established that the 1st respondent obtained title to the suit property legally and procedurally as held in Munyu Maina case (*supra*), prayers (i) to (v) as well as (vii) and (viii) sought in the counter-claim, must fail.
31. Regarding prayer (vi) in the counter-claim, the appellant sought an order namely compensation by the respondents on account of the value of the suit property and the improvements thereon in the sum of Kshs. 4,495,000/=. The amount was tabulated as below: Costs of purchasing the land Kshs. 445,000/- Value of improvements Kshs. 4,000,000/- Valuation fees Kshs. 50,000



32. Learned counsel for the appellant submitted that the trial court established that the 2nd respondent duped the appellant in the land transaction. That therefore, the trial court ought to have awarded the appellant special damages.

33. In that regard, it is trite that special damages must be both strictly pleaded and proved, before they can be awarded by the Court. In the case of *Hahn v Singh, Civil Appeal No. 42 of 1983* [1985] KLR 716, at P. 717, and 721, the Learned Judges of Appeal (Kneller, Nyarangi JJA, and Chesoni Ag. J.A.) held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.” (Emphasis added).

The same was restated in the case of *Jivanji v Sanyo Electrical Company Limited [2003] 1 EA 98*.

34. So, did the appellant prove his claim for special damages against the defendants to the counter-claim? Evidently, the appellant produced in a copy of the Valuation Report of the suit property by Michigan Valuers indicating the value of the suit property to be Kshs. 4,000,000 and a copy of receipt of Kshs. 50,000 in respect of valuation of the same as noted in Hahn and Jivanji cases (*supra*). Again, this evidence was not controverted by the respondents. However, no evidence was availed to support the claim for costs of purchasing the suit property.

35. This court subscribes to the Court of Appeal decision in *Jubilee Insurance Company of Kenya Ltd v Zahir Habib Jiwan & another* [2017] eKLR where the Honourable Learned Judges stated in part:

“...the best form of evidence would obviously be in the form documentary e.g. receipts but where such evidence was not available, other form of cogent evidence may be adduced to prove ownership and the value of an item (Emphasis added).

36. In the circumstances, I endorse the learned trial magistrate’s reasoning, particularly her finding that the appellant did not provide proof that the plaintiff illegally, un-procedurally and fraudulently acquired the suit property in this case. That it is the 2nd defendant (2nd respondent herein) who duped and illegally obtained the appellant’s cash as demonstrated by the testimonies of DW1 and DW2 at the trial court.

37. It is therefore, the finding of this court that the appellant proved on a balance of probability part of his claim in terms of special damages against the 2nd respondent at the trial court. To that extent, I would award special damages as pleaded and proved by the appellant.

38. *A fortiori*, this appeal succeeds in part. I hereby award special damages of Kshs. 4,050,000/- to the appellant as against the 2nd respondent.

39. Given the nature of the matter, the circumstances herein and by dint of the proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of this appeal and the court below to be borne by the 2nd respondent.

40. It is so ordered.

G.M.A ONG’ONDO

JUDGE

DATED AND DELIVERED AT HOMA-BAY THIS 30TH DAY OF SEPTEMBER 2024.

