



Mbadi (Suing as the Administrator of the Estate of Musa Mbadi Philipo alias Musa Mbadi Bwodo - Deceased) v Odinga & 2 others (Environment and Land Appeal E049 of 2022) [2024] KEELC 6180 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6180 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E049 OF 2022
E ASATI, J
SEPTEMBER 26, 2024**

BETWEEN

EPHRAHIM OTIENO MBADI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MUSA MBADI PHILIPO ALIAS MUSA MBADI BWODO - DECEASED) APPELLANT

AND

**MARGARET ACHIENG ODINGA 1ST RESPONDENT
PAULINE ATIENO ARUM 2ND RESPONDENT
JOHN OTIENO OBIERO 3RD RESPONDENT**

(Being an appeal from the judgement in Kisumu CMC EL Case No. 200 Of 2018 delivered on 17th November 2022)

JUDGMENT

1. Vide the Memorandum of Appeal dated 17th November 2022, Ephrahim Otiemo Mbadi, the Appellant appealed against the Judgement dated 17th November, 2022 in Kisumu CMC ELC 200 of 2018 on the grounds that;
 - a. the trial Magistrate erred in law and fact in allowing the claim that had absolutely no evidence support.
 - b. the learned Magistrate erred in law and fact in dismissing the appellant’s case when the evidence was clear that the Appellant’s father had obtained the title deed after purchasing the same and acquiring all the required land documents legally.



- c. the learned Magistrate erred in law and fact by allowing the Respondents' claim when it had no legal basis.
2. The Appellant sought that the appeal be allowed with costs, that the lower court judgement in favour of the Respondent herein be dismissed with costs and Kisumu ELC Case No.200 of 2018 be allowed as prayed.
3. A brief background to the appeal is that the Appellant in his capacity as an administrator of the estate of one Musa Mbadi Philipoalias Musa Mbadi Bwodo, deceased, sued the Respondent vide the plaint dated 14th December, 2016 in Kisumu ELC Case No 342 Of 2016. He claimed that the deceased had bought land parcel No. Kisumu/Pandpieri/207 (the suit land) from one Joseph Odinga Ogwema who passed on before the land could be transferred. He claimed that the 1st Respondent caused the suit land to be sub-divided into parcel Numbers Kisumu/[Pandpieri/1227](#) and 1228 and caused No. Kisumu/[PANDPIERI/1228](#) to be transferred in favour of one Anna Nyandiko Mbadi deceased. That the 1st Respondent further sub-divided Parcel No.1228 to create Numbers 2834, 2835 and 2836 registered in her name and in the names of the 2nd and 3rd Respondents respectively.
4. The appellant claimed that the Respondents' actions were fraudulent, negligent and reckless. He sought for a declaration that the registration of the land in the name of the Respondents was irregular, illegal and therefore null and void, an order for rectification of the register, an order for vacant possession, a permanent injunction and costs of the suit.
5. Vide the 1st, 2nd and 3rd Defendants' Statements of Defence dated 6th February, 2017, the Respondent denied the Appellant's claim and prayed that the suit be dismissed and/or struck out with costs.
6. The record shows that the suit was later transferred to the Chief Magistrate's court vide court order made on 23rd March, 2018 and registered as Kisumu CMC EL Case No.200 of 2018 (the suit). The suit was subsequently heard by the trial court which vide the judgement dated 17th November, 2022 found that the Appellant had not proved his case and dismissed it with costs to the Respondents. Dissatisfied with the judgement, the Appellant preferred the present appeal.
7. 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 v 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.
8. The evidence placed before the trial court by the Appellant comprised of his own testimony, the testimony of the 2 witnesses that he called and the exhibits produced. The Plaintiff who testified as PW1 ststed that his father bought land from Joseph Odinga, deceased who was the husband of the 1st Respondent. That the land parcel number for the sold land was 2007, the purchase price 8700/= and the size of the land 144 x 169 x 120 x 170 feet. He produced the land sale agreement dated 1st August, 1993 in respect thereof as exhibit. He stated further that there was a subsequent agreement dated 27th January, 1994 for the sale of a piece of land parcel number 2007 measuring 81 x 77 x 89 x 55 feet at a purchase price of Kshs.1300 which was paid in full. He produced the agreement as an exhibit. That the land was subsequently sub-divided on 14th May, 1987 to create parcel Numbers 1227 and 1228. That his late mother was given No.1228 while No.1227 was further sub-divided and parcel No.2835 was registered in the name of the 2nd Defendant while the 3rd Defendant got No.2836. He produced green card in respect thereof as exhibit.



9. On cross-examination, the Appellant stated that his family bought parcel No.1228. That the entire size of the land was 0.9 hectares but that his family got 0.14 hectares. That the case was filed in the year 2016 which was about 33 years since the land was purchased.
10. That he does not know whether his father obtained consent of the Land Control in respect of the portion of land that he bought. That there is a boundary dispute pursuant to which he was summoned by the Land Registrar.
11. PW2 was Elina Mboga Ngige. She adopted the contents of her witness statement as her evidence. She had stated in the witness statement filed in court on 24th October, 2019 that she was the sister of the deceased. That the deceased had informed her that he had bought land at Nyalenda. That he had taken her to the land where she saw that the deceased had built 4 houses and a toilet and that the land was fenced with live fence all round.
12. PW3 was Lawrence Nakhukwa Ongowe who adopted his witness statement as his evidence in chief. He stated in the witness statement that he lived with the deceased Musa Mbadi Philip as an adopted son. That he was aware that Musa Mbadi bought a parcel of land in the year 1983 from one Odinga and that on the parcel, he constructed temporary rental houses and planted trees.
13. That later Musa Mbadi bought another piece of land from the same seller and utilized the two sold pieces of land as one as they were adjacent to each other. That upon Musa Mbadi's death, his widow obtained title to one of the pieces namely land title No. Kisumu/[Pandpieri/1227](#) on which Musa Mbadi had constructed rental apartments.
14. That the family of the late Odinga maliciously grabbed the land parcel No. Kisumu/[Pandpieri/1227](#) illegally sub-divided and sold it. That Musa Mbadi bought the adjacent parcel on diverse occasions.
15. On cross-examination, he stated that he did not know whether Odinga went to the Land Control Board to transfer the land to Mr. Mbadi.
16. The evidence placed before the trial court by the Respondents comprised of the testimonies of the Respondent and the exhibits they tendered. The 1st Respondent testified as DW1. He adopted the contents of his witness statement dated 9th February, 2017 as his evidence in chief. He had stated in the witness statement that the deceased only bought a portion of land parcel No. Kisumu/pandpier/207 from the late Joseph Odinga Ogwema and that the portion was transferred to the deceased's widow Anna Nyandiko Mbadi.
17. That the land she sold to the 2nd and 3rd Defendant was in her name. that there was no illegality or fraud committed. That she was not party to the agreement produced by the Appellant. That the suit was filed outside the time provided for in law and brought in malice and bad faith. She prayed that the suit be dismissed with costs.
18. On cross-examination, the 1st Respondent stated that she had never seen the land sale agreement between her husband and Anne, the widow of the deceased. That the portion of land that had houses built by Philip Mbadi is the one she transferred to her name then sub-divided and sold to the 2nd and 3rd Defendants. That she followed procedure when she transferred the land to the 2nd and 3rd Defendants. The 1st Respondent produced 25 documents as exhibits. The 2nd Respondent testified through her witness statement dated 9th February, 2017 which was adopted as her evidence in chief. She stated that sometime in the year 2008, he purchased a portion of land parcel No. Kisumu/[Pandpieri/2678](#) from the 1st Respondent. That at the time of purchase, the land was registered in the name of the 1st Respondent. That she did due diligence and that she paid the entire agreed amount. That she is an



- innocent purchaser for value without knowledge of the Plaintiff's claim. That the land was lawfully and procedurally transferred to her name. she prayed that the Plaintiff's case be dismissed.
19. She produced 11 documents as exhibits. She testified further that her land parcel was No.2835.
 20. On cross-examination, the 2nd Respondent stated that when she conducted search on the land, it showed the name Margaret. That she did not know whether the 1st Respondent had done succession or not.
 21. The 3rd Respondent adopted his witness statement dated 9th February, 2017 as his evidence in chief. He had stated in the witness statement that in the year 2008 he purchased a portion of land parcel number Kisumu/[Pandpieri/2678](#) from the 1st Respondent. That at the time of purchase, the land was in the name of the 1st Respondent. That he did due diligence and that he paid the entire of the agreed amount and that he was an innocent purchaser for value without notice of the Plaintiff's claim. That the land was lawfully and procedurally transferred to him. That his land parcel is No.2836. that he went to the ground before purchase and there was nothing built on the land. He produced title deed and notice on boundary dispute.
 22. The record of appeal shows that after hearing this evidence, the trial court found that the Appellant had not proved his case to the required degree and dismissed it with costs to the Respondents.
 23. The 1st ground of appeal is that the trial Magistrate erred in law and fact in allowing the claim that had absolutely no evidential support. A reading of the decree appealed against shows that no claim was allowed by the trial court. All that the trial court did was to dismiss the Appellant's claim with costs to the Respondents. I am therefore in agreement with the submissions made on behalf of the Respondents in respect of this ground of appeal that this ground raises no point for submission by the parties or determination by the court.
 24. The second ground of appeal is that the learned trial Magistrate erred in law and fact in dismissing the Appellant's case when the evidence was clear that the Appellant's father had obtained the title deed after purchasing the same and acquiring all the required land documents legally.
 25. It was indicated in the heading and paragraph 1 of the plaint that the Appellant had brought the suit as an Administrator of the estate of his father Musa Mbadi Bwodo. His claim was that his father had bought all that parcel of land known as title number Kisumu/[pandpieri/207](#) from Joseph Odinga Ogwema but passed on before the land could be transferred to his name. That the 1st Respondent fraudulently sub-divided the land and transferred portions thereof to the 2nd and 3rd Respondents. He produced 2 land sale agreements to prove the purchase. One of the agreements was dated 1st August, 1983. It is between Joseph Odinga Ogwema and Musa Mbadi Philip. The size of the land sold is indicated as 144 x 169 x 120 x 170 feet. The purchase price was indicated as Kshs.8,700/- paid at once in cash. At the top of the agreement it is indicated P/No.207.
 26. The agreement bears the name and thumbprint of the seller Joseph Odinga Okwora and the signature of the buyer and the signatures of the witnesses.
 27. The second agreement was dated 27th January, 1984. It was between the same parties. The piece of land to be sold measured 81 x 77 x 89 x 55 feet at a cost of Kshs.1,300/-. At the top of the page of the agreement, No.207 is indicated. While the agreement bears the signature of the buyer, there is no thumbprint or signature of the seller. Only the name Odinga Ogwera is indicated.
 28. It was submitted on behalf of the Appellant that the appellant produced two land sale agreements as evidence that the 1st Respondent's husband sold the suit land to the Appellant's father. That the evidence placed before the trial court was enough for the court to make a finding that the second



agreement was properly executed. That the second agreement was witnessed by two witnesses. That it was erroneous for the trial court to hold that the Appellant had failed to call witnesses who witnessed the sell agreement.

29. Counsel relied on the contents of the Section 97(1) of the *Evidence Act* to support his submissions. Section 97(1) of the *Evidence Act* provides that;

“When the terms of a contract or of a grant, or of any other disposition of property have been adduced to the form of a documents and in all cases any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself or secondary evidence of its contents in which secondary evidence is admissible under the provisions of this Act”.

30. It was submitted further that the 2nd and 3rd Respondents had admitted in their evidence that the parcel which the 1st Respondent sold to them had buildings which were erected by the Appellant’s father. That the trial court did not analyze the evidence well thereby leading to a miscarriage of justice.
31. It was submitted on behalf of the Respondents that there was no evidence placed before the trial court to confirm that the Appellant’s father had purchased the whole of the suit land. That the trial court rightly found that the portion of land bought by the Appellant’s father was transferred to the Appellant’s family and became parcel No. Kisumu/*Pandpieri/1228*. That the trial court rightly held that the Appellant did not bring witnesses who were present in the second agreement to confirm that his father bought the entire land parcel through the two agreements. That the Appellant did not explain why it took him over 33 years to bring the claim yet there had been boundary disputes between them and the Respondents.
32. That there was no evidence produced to support the allegations of fraud against the Respondents. That what the 1st Respondent subdivided and transferred to the 2nd and 3rd Respondent was what was registered in her name.
33. That the law on fraud is that fraud must be particularly pleaded and specifically proved by way of evidence. That order Section 107 to 109 of the *Evidence Act* the burden of proof is on the Appellant to prove. Counsel relied on the definition of fraud in Black Law Dictionary 11th Edition. Counsel also relied on the case of Kenya Broadcasting Corporation v Housing Finance Company of Kenya Limited & 2 Others [2019]eKLR where the Court of Appeal held, inter alia, that fraud must not only be pleaded but must also be strictly proved on a higher standard of proof than that of a balance of probability.
34. That the Respondents produced documents in support of their land parcels confirming that the procedure was proper and lawful hence the trial court was right in dismissing the suit with costs to the Respondent.
35. I have considered the pleadings, evidence and submissions on this issue.
36. The green cards produced as exhibit show that land parcel No. Kisumu/*Pandpieri/207* was originally registered in the names of one Odinga Ogwera, deceased, whom both parties agree was the husband of the 1st Respondent. That on 14th May, 1987, the title was closed on sub-division of the land so as to create new parcel numbers Kisumu/*Pandpieri/1227* and 1228.
37. That parcel No. Kisumu/*Pandpieri/1227* was registered in the name of Joseph Odinga Ogwera while No. Kisumu/*Pandpieri/1228* was transferred to one Anne Nyandiko Mbadi who was said



in the evidence to be the widow of Musa Mbadi, deceased father of the Appellant. Parcel No. Kisumu/[Pandpieri/1228](#) measure 0.14 Hectares.

38. According to the 1st Respondent, this was the only portion purchased by Musa Mbadi from Odinga Ogwera. The 1st Respondent denied knowledge of the 2nd agreement dated 27th January, 1984.
39. I have noted that the agreement bears no signature and/or thumbprint against the name of the seller, Odinga Ogwera.
40. Secondly, I have noted that though the agreement indicates that there were 2 witnesses present who witnessed the agreement by allegedly signing against their names, none of them was called to testify and corroborate the testimony of the Appellant.
41. The witnesses were R. Aandi and Patris Okunga. The essence of having witnesses in an agreement is that should there be any contest regarding any of the things they have witnessed, they can testify to confirm the correct position as to what transpired. No explanation was given why these witnesses were not called. It is a cardinal rule of evidence that where a party fails to call a critical witness, the court is free to draw an inference that the witness if called would have given adverse evidence against the party who failed to call the witness. See cases of David Katana Ngomba vs shafi Grewal Kaka [2014]eKLR and Stanley Mombo Amuti vs Kenya-Anti- Corruption Commission [2019]eKLR.
42. It was submitted that the Appellant called 3 witnesses and that their evidence was sufficient to corroborate the evidence of the Appellant regarding the agreement dated 27th January, 1984.
43. I have carefully read the evidence of PW2 and PW3 as summarized hereinabove. None of them was present during the sale. PW2 was informed by the deceased that he had bought land. PW3 only stated that he was aware that the deceased bought land.
44. In view of the fact that the agreement dated 27th January, 1984 was not signed by the seller, I find that there was no valid agreement hence no evidence to the effect that the Appellant's father bought an additional portion of land after the first agreement.
45. The 3rd ground of appeal was similar to the first one. The Respondent had no claim in the suit and no claim was allowed in their favour. I find no reason to interfere with the findings and decision of the trial court. The trial court keenly examined and analyzed the evidence placed before her and came to the correct and just decision.
46. It was admitted that the suit was filed 33 years after the cause of action. It is apparent that the suit was filed out of time under the provisions of section 7 of the [Limitation of Actions Act](#).

The appeal is therefore hereby dismissed. Costs to the Respondents.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 26TH DAY OF SEPTEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Obiero for the Appellant.

Bagada for the Respondents.

