



**Okoth v Kutu & 2 others (Environment and Land Appeal E028 of 2023)
[2024] KEELC 7304 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7304 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E028 OF 2023**

E ASATI, J

OCTOBER 24, 2024

BETWEEN

PENINA AKINYI OKOTH APPELLANT

AND

GEORGE OTIENO KUTU 1ST RESPONDENT

LAND REGISTRAR KISUMU 2ND RESPONDENT

THE HONORABLE ATTORNEY GENERAL 3RD RESPONDENT

(Appeal against a portion of the judgement and decree of the Honourable K.Cheruiyot Senior Principal Magistrate in Kisumu CM ELC No.159 of 2018 delivered on 3rd October, 2023)

JUDGMENT

Background

1. A brief background to the appeal herein is that the appellant together with the Land Registrar Kisumu County and the Attorney General were sued by the 1st Respondent in Kisumu CM El Case No 159 OF 2018 (the suit). Vide the plaint dated 15th May 2015, the 1st Respondent, in his capacity as the Administrator of the estate of one Raphael Orimba Otiende, deceased, claimed that land parcel number Kisumu/Nyahera/1708 (the suit land) belonged to the deceased having been registered in his name as a first registration on 17/1/1989 and subsequently issued with title deed. The 1st Respondent claimed further that on 19/1/1999 the appellant with the assistance of the 2nd Respondent caused the suit land to be fraudulently transferred to the appellant and title deed issued to her.
2. The 1st Respondent therefore sought for orders of a declaration that the deceased was the lawful registered proprietor of the suit land, a declaration that the 2nd Respondent lacked capacity to transfer the land to the appellant without the consent or knowledge of the 1st Respondent as the administrator



- of the estate of the deceased, cancellation of the registration of the suit land in favour of the appellant and rectification of the register so as to reflect the name of the deceased as owner, and costs of the suit.
3. In response to the 1st Respondent's claim in the suit, the appellant filed a Statement of Defence dated 23rd November 2015 denying the claim. Later the appellant amended her Statement of Defence and replaced it with the Defence and Counter-claim vide which the appellant denied the 1st Respondent's claim and sought for a declaration that she was an adverse possessor of the suit land and for an order that the Land Registrar registers her as owner of the suit land and costs of the suit.
 4. The 2nd and 3rd Respondents also filed a Statement of Defence dated 17th June 2015 denying the claim.
 5. The record shows that the suit which had originally been filed in the Environment and Land Court as CASE NO 121 OF 2015 was transferred to the Chief Magistrate's Court at Kisumu for hearing and disposal and assigned the current case number.
 6. The record further shows that the suit was heard by the trial court which vide the judgement delivered on 8/ 6/ 2023 found and held that the deceased (plaintiff) was the lawful owner of the suit property and allowed the 1st Respondent's claim as contained in the plaint. The court further found that the counter-claim had not been proved and dismissed it.

The appeal

7. Aggrieved by the judgement, the appellant filed the present appeal on the grounds contained in the Memorandum of Appeal dated 26/6/2023 namely;
 - a. the Learned trial Magistrate erred in both law and fact in allowing the 1st Respondent's suit against the appellant.
 - b. the Learned Magistrate erred in law and fact in dismissing the Appellant's counter-claim claiming adverse possession despite the appellant having been in uninterrupted possession of the suit property for a period of more than 12 years.
 - c. the Learned Magistrate erred in law and fact by making a finding that the Appellant cannot benefit from the bona fide purchaser for value doctrine despite the Appellant not being a party to any illegalities/irregularities that might have been occasioned during transfer of the suit property.
 - d. the Learned trial Magistrate erred in law in failing to appreciate the doctrine of adverse possession together with that of a bona fide purchaser for value hence arrived at the wrong conclusion
 - e. the Learned Magistrate erred in law and fact in failing to take into consideration the submissions made by the Appellant
 - f. the Judgment herein is against the weight of evidence on record and the law.
8. The appellant sought for orders that the appeal be allowed with costs and that the judgement be set aside in its entirety and be substituted with judgement dismissing the 1st Respondent's suit and allowing the counter-claim.

Submissions

9. The appeal was urged by way of written submissions.



10. It was submitted on behalf of the appellant vide written submissions dated 14th March, 2024 that the appellant acquired the suit land procedurally. That the allegations of fraud by the 1st Respondent were not proved. That the Vendor who sold the land to the appellant, one Michael Okeno Orimba, obtained the suit property by transfer on 19/01/1999 notably while staying on the suit property as shown in the sale agreement.
11. That the Vendor's act of occupying the suit property even when the deceased was alive showed the deceased's intention of bequeathing the suit property and subsequently having the vendor also his son, enforce the gift, same having been enforced in the year 1999.
12. That the mere fact that the gift was not registered at the time of the death of the original registered owner does not invalidate the gift. Counsel relied on the case of Nyeri Appl. No. 108 of 2002 Registered Trustees Anglican church Kenya Mbeere Diocese vs David Waweru Njoroge (2007)EKLR and submitted that the suit property cannot therefore be regarded to form part of the property of the estate of Raphael Orimba Otiende, thus the vendor had capacity to sell. Counsel also relied on the case of Gitau & 2 others vs Wandai & 5 others (1989) IKR 231 to support the submission.
13. On whether or not the appellant had acquired title to the suit land by adverse possession, Counsel relied on the case of Mtana Lewa vs Kahindi Ngala mwagandi [2015]eKLR and submitted that although the appellant's initial entry onto the suit land was on the basis of the sale agreement, the same matured to adverse when it became material that the vendor had no capacity to sell the suit property rendering the sale void.
14. That the appellant had been in continuous, open, and peaceful occupation of the suit land with the full knowledge of the deceased's beneficiaries since 1998 until 2014 when the beneficiaries decided to lodge a restriction halting all dealings on the same.
15. On behalf of the Respondent it was submitted that the suit land was part of the estate of Raphael Orimba, deceased, and could only be dealt with or disposed of by executors or personal representatives of the deceased. That Michael Orimba did not possess the legal authority to deal with let alone sell the suit property. Counsel relied on the provisions of sections 55 and 82 of the *Law of succession Act*.
16. Counsel submitted further that there were inconsistencies in the appellant's account of the purchase of the suit land. That the appellant was not truthful as to how she purchased the suit property.
17. On the appellant's claim of adverse possession to the suit land, Counsel submitted that a claim of adverse possession is only applicable against the holder of the title and the appellant is not entitled to make a claim as succession proceedings in respect of the deceased are yet to be completed. That no evidence was produced to prove the appellant's claim of residency on the suit land for the long period.

Issues for determination

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

Analysis and determination

19. The court reminds itself of its duty as a court handling a first appeal. The principles guiding the handling of a first appeal are now settled that the appellate court has a duty to reconsider and analyze the evidence tendered before the trial court make its own independent conclusion and thereby determine



whether the trial court's decision/conclusion was in accordance with the evidence and applicable law. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

20. The first ground of appeal is that the Learned trial Magistrate erred in both law and fact in allowing the 1st Respondent's suit against the appellant.
21. The 1st Respondent had pleaded in the plaint that the deceased was the registered owner of the suit land and that the said land was transferred and registered in the appellant's name fraudulently. The particulars of fraud were itemized under paragraph 9 of the plaint.
22. The 1st Respondent testified as PW1 and stated that the deceased died in the year 1992. That the appellant got registered as owner of the land on 18/01/1999 by which time succession to the estate of the deceased had not taken place. He produced a Grant of Letters of Administration Intestate as exhibit 1. The same was issued on 29th April 2015. He also produced certificate of death No. 311768 in respect of the deceased. The certificate of death shows that the deceased died on 5th July 1992. The 1st Respondent also produced a green card in respect of the suit land. It shows that the suit land was registered in the name of the deceased Raphael Orimba Otiende on 17/1/1989 and title deed issued to him on 19/1/1989. The green card shows that the suit land remained in the name of the deceased until 9/1/1999 when it was registered in the name of one Michael Okeno Orimba by way of transfer. The green card further shows that on 18/1/1999 the suit land was transferred to Penina Akinyi Okoth, the appellant herein.
23. On her part, the appellant pleaded in her defence and counter-claim that she was the registered proprietor of the suit land, that she was not involved in any fraud or intermeddling with the estate of the deceased. The appellant averred that she had moved onto the suit land in the year 1998 and that she had had adverse possession thereof.
24. The trial court considered this evidence and the submissions placed before it and found that the 1st Respondent had proved his claim and granted him, on behalf of the estate of the deceased, the relief sought in the plaint.

The appellant faults the trial court for this.

25. There is no evidence to explain how the land moved from the deceased to Michael Okeno Orimba in 1999 since the registered owner had died in the year 1992 and there had not been succession. The appellant pleaded in paragraph 13 of her Defence and Counterclaim that she moved onto the suit land in the year 1998 after purchase. In her witness statement dated 8/12/2015 which was adopted as part of her evidence in chief the appellant stated that sometime in the year 1999 or thereabouts one Michael Okeno Orimba sold the suit land to her and thereafter she had the suit land registered in her name and title deed issued to her. However, in her further statement dated 15/1/2022, also adopted as part of her evidence, the appellant stated that she purchased the suit land in the year 1998 from Raphael Orimba and that she moved onto the suit land in the year 1999. Her witnesses testified vide their witness statements that they witnessed the appellant buy the suit land from Raphael Orimba. A document produced by the appellant as D exh-1 as the land sale agreement dated 25/1/1998 shows



that the seller of the land was Michael Orimba of I/D No. 2645029. Michael Orimba was not owner of the suit land as at 25/1/1998. The defence witnesses were in agreement that Raphael Orimba Otiende and Michael Okeno Orimba were two different people.

26. The evidence contained in the appellants statements and testimony before court are inconsistent. It is not clear whether she purchased the land in the year 1998 or 1999 or whether she purchased it from the deceased or from Michael Okeno Orimba.
27. It is clear from the certificate of death that by the years 1998/1999 the deceased was already dead. He could not have sold the land to the appellant. And assuming that it is indeed Michael Okeno Orimba who sold her the land, there is no evidence that Michael Okeno Orimba had capacity to transact in the land which belonged to the deceased.
28. The appellant in her submissions contended that the suit land was not part of the estate of the deceased as the deceased had intended to bequeath the same to Michael Okeno Orimba. However, this contention was not supported by the appellant's pleadings and evidence.
29. I find that on the basis of the evidence placed before it, the trial court did not err in allowing the 1st Respondent's claim.
30. The second ground of appeal is that the Learned Magistrate erred in law and fact in dismissing the Appellant counter-claim claiming adverse possession despite the appellant having been in uninterrupted possession of the suit property for a period of more than 12years.
31. The appellant pleaded in the counterclaim that she had had occupation of the suit land for a period in excess of 12 years. That the occupation was open, continuous and peaceful. She stated in her further witness statement dated 15/1/2022 that she moved into the land in 1999, cleared the land and constructed a house for her parents after which she constructed her own house. That when her parents died they were buried on the suit land. That she had resided on the land without force without secrecy and without interruption for longer than 12 years before the 1st Respondent started laying claim to the land. She further stated in the same witness statement that if the court finds any anomaly with the procedure of issuance of title to her the same should not in any way take away her rights over the land as she had acquired prescriptive rights by adverse possession.
32. The record shows that on cross examination and re-examination the appellant insisted that she bought the land from Raphael Orimba, deceased, when he was still alive and that transfer of the land to her was done before his death. This claim however, is not supported by the evidence and particularly the sale agreement and the certificate of death.
33. The certificate of death shows the date of death of Raphael as 5/7/1992. This means that at the time the appellant claims to have bought and entered onto the suit land in 1998 or 1999, the land was property of a deceased person. Time cannot start running against a deceased registered owner who is not there to assert and protect his title. For the period between when the deceased died on in the year 1992 and the year 2015 when the Grant of Letters of Administration was issued to the 1st Respondent, there was no person with capacity to transact in the suit land, and against whose title time for purposes of adverse possession could run. The actions of the appellant and Michael Orimba of purporting to have the land transferred to Michael Orimba without Letters of Administration, purchase of the land by the appellant, entry and occupation of the land by the appellant were all acts of intermeddling with the estate of the deceased which could not convey any valid title or prescriptive rights upon the appellant.
34. Further, assuming that Michael Orimba had valid title at the time when the appellant claims to have bought the land, then it is against him or his personal representative that the claim of adverse possession



- ought to have been filed as the registered owner who took no action to assert his title against the appellant pursuant to the provisions of sections 7, 13 and 17 of the *Limitation of actions Act*.
35. Further, it was the appellant's evidence that she was the registered owner of the suit land, title having been issued to her after purchase. If that be so then her claim of adverse possession on the same land is not sustainable.
 36. The record shows that the trial court considered the evidence and found that the counter claim had not been proved. Having reanalysed the evidence, I find that on the basis of the evidence placed before it, the trial court was right in disallowing the counterclaim.
 37. The third ground of appeal is the Learned Magistrate erred in law and fact by making a finding that the Appellant cannot benefit from the bona fide purchaser for value doctrine despite the Appellant not being a party to any illegalities/irregularities that might have been occasioned during transfer of the suit property
 38. The appellant made no pleading in the Defence and Counterclaim that she was a bona fide purchaser of the suit land for value. Her Counter claim was based purely on the doctrine of adverse possession. This was also the gist of her evidence before the trial court
 39. The record shows that the issue of bona fide purchaser for value was introduced in the appellant's written submissions dated 11th May 2023 filed on her behalf before the trial court. It was submitted on the appellant's behalf that the appellant was a bona fide purchaser for value. That she had exhibited a valid land sale agreement that met the threshold of a valid contract within the provisions of section 3 (3) of the *Law of Contract Act*. That even if the vendor did not have the suit property registered in his name, the same was imminent having acquired beneficial interest awaiting registration in the same having established the deceased's intention of bequeathing the same to him.
 40. It was submitted further that the suit property was registered in the appellant's name and thus she was the legitimate owner as provided by section 26 of the *Land Registration Act*.
 41. The appellant faults the trial court for failing to make a finding that she was a bona fide purchaser for value.
Similar submissions been made in this appeal on the issue.
 42. Having analysed the evidence placed before the trial court and having found herein that the acts of the appellant and whoever purported to sell the land to her and put her in occupation amounted to intermeddling with the estate of the deceased, I find no basis on which the trial court could have made a finding that the appellant was a bona fide purchaser for value.
 43. The appellant acknowledged in her witness statement dated 15.1.2022 that the procedure for her acquisition may not have been proper and urged that her prescriptive rights based on adverse possession be granted. It was also acknowledged in the submissions that the seller had no title but was hopeful to get it as the deceased had intended to bequeath the land to him.
 44. The fourth ground of appeal is related to the 2nd and 3rd grounds of appeal as it deals with adverse possession and whether or not the appellant was a bona fide purchaser.
 45. Regarding the 5th ground of appeal I have read the detailed submissions of the appellant before the trial court. In its judgement the trial court indicated that it had considered the submissions filed.



46. As held by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

47. As much as submissions highlight the strengths of a party’s case and relate the facts to the law, thereby greatly aiding courts in arriving at well informed decisions, submissions cannot take the place of the evidence. The pleadings and evidence of the appellant did not prove her claim as already discussed herein.

48. The weight of the evidence was in favour of the 1st Respondent. The trial court was therefore right in making the findings and decision that it did.

49. I find that the grounds of appeal have not been proved. I find no reason to interfere with the findings and decision of the trial court. The appeal is hereby dismissed. Costs to the 1st Respondent.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 24TH DAY OF OCTOBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ann & Alex: Court Assistant.

Omondi for the appellant.

No appearance for the Respondents.

