



**Oyugi v Oyoo & another (Environment and Land Appeal 25 of 2022)
[2024] KEELC 7076 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7076 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 25 OF 2022**

E ASATI, J

OCTOBER 24, 2024

BETWEEN

JOSHUA OWINO OYUGI APPELLANT

AND

EDWIN MICHAEL OYOO 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Senior Principal Magistrate
at Winam delivered by Honourable R.M. Oanda on the 14th April, 2022.)*

JUDGMENT

Background

1. Vide the Memorandum of Appeal dated 12th May 2022, the appellant, Joshua Owino Oyugi, filed the appeal herein challenging the judgement and decree dated 14th April 2022 of the SRM in Winam SRM E & L Case No 103 OF 2018 on the grounds that: -
 - a. the Magistrate erred in law and fact by over-relying on the letter written by the 2nd Respondent, who did not participate in the hearing of the matter and needless to state that the Land Registrar was not a party to the suit as proof that the Appellant acquired the registration of the Land parcel title no. Kisumu/Konya/3012 by fraud/forgery/unprocedurally instead of evaluating the evidence on record and arriving at independent and impartial decision/judgment
 - b. the Learned Magistrate erred in law and fact in failing to appreciate that the 1st Respondent had not produced any documents including but not limited to the sale agreement , Application for consent of the Land Control Board , Letter of consent to transfer the property , Valuation for stamp duty , stamp duty payment receipts , Transfer instrument, KRA PIN certificates,



Passport size photographs, Receipts for Registration and the issuance of the Title deed in support of the 1st Respondent's claim on how he acquired the Land parcel title number Kisumu/Konya/3012 but nevertheless allowed the 1st Respondent's claim

- c. the learned Magistrate erred in law and fact when he held that the 1st Respondent had proven his case on a balance of probabilities yet the standard of proving forgery which is tantamount to fraud is higher than balance of probabilities but below reasonable doubt
 - d. the learned magistrate erred in law and fact in allowing the 1st Respondent's suit and totally disregarding the Appellants uncontroverted, overwhelming, un-contradictory evidence, pleadings, submissions and material placed before Court
 - e. the learned Magistrate erred in law and fact in ignoring and failing to appreciate the long-established principle of stare decisis, precedents, legal principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant in allowing the 1st Respondent's suit in the trial Court thus inviting uncertainty in the practice of law
2. The appellant sought for orders that the appeal be allowed, the judgement and decree of the trial court and all consequential orders emanating therefrom be set aside and substituted with an order dismissing the plaintiff's suit in the lower court. The appellant also prayed for costs of the appeal and of the suit.
 3. A brief background of the appeal as can be gathered from the record of appeal dated 1st August 2023 is that the appellant was the 1st Defendant in the suit. The suit was first filed in Kisumu ELC as Kisumu ELC Case No 124 OF 2016 but vide court order made on 17th September 2018, transferred to the PM's Court at Winam for hearing and disposal.
 4. Vide the amended plaint the appellant, 2nd and 3rd Respondents were sued by the 1st Respondent over a parcel of land known as Kisumu/Konya/3012 measuring 1.9 hectares. The 1st Respondent's claim in the suit was that he and his late wife Jael Adhiambo Oyoo were the owners of the suit land. That by a certificate of official search dated 3rd February 2015, the District Land Registrar Kisumu certified that the suit land measuring 0.4 hectares was registered in the name of the appellant. That the transfer and registration of the suit land in the name of the appellant was fraudulent. The 1st Respondent sought for orders of revocation of the appellant's title and reinstatement of the size and ownership of the suit land.
 5. The appellant filed amended 1st Defendant's Statement of Defence dated 4/12/2019 denying the 1st Respondent's claim and contending that he was the registered owner of the suit land and holder of valid title in respect thereof.
 6. The record of appeal shows that the suit was heard by the trial court which vide the judgement delivered on 14th April 2022 found that the 1st Respondent had proved his case on a balance of probabilities, entered judgement in his favour as prayed in the plaint and awarded him costs.

Aggrieved by the judgement, the appellant filed the present appeal.

Submissions

7. The appeal was argued by way of written submissions. Written submissions dated 26th March 2024 were filed by Paul Mungla & Co Advocates on behalf of the 1st Respondent. No submissions were filed on behalf of the appellant, the 2nd and 3rd Respondents. Affidavit of Service sworn by Isaac Okach a Court Process Server shows that the appellant's Advocates namely; National Legal Aid Service at Kisumu were served with a Judgement Notice dated 3rd June 2024 which also notified the appellant that he had 14 more days to file submissions.



Issues for determination

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

Analysis and determination

9. This being a first appeal, the court reminds itself of the duty to re-examine and analyse 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.
10. The 1st ground of appeal is the trial Magistrate erred in over-relying on the letter written by the 2nd Respondent who do not participate in the hearing of the matter and needless to state that the Land Registrar was not a party to the suit as proof that the applicant acquired the registration of the suit land parcel number Kisumu/Konya/3012 by fraud/forgery/un-procedurally instead of evaluating the evidence on record and arriving at independent and impartial decision/judgement.
11. The proceedings show that the letter complained of was dated 20th April 2018 written by the 2nd Respondent through the State Counsel to the 1st Respondent's Counsel. The letter was in response to the 1st Respondent's Notice to Produce. The letter forwarded a green card in respect of the suit land. It read in part;

“Kindly find attached a certified copy of the green card for L. R. No. Kisumu/Konya/3012. Since entry No. 7 and 8 have been indicated as forgery, the Land Registrar does not have any transfer documents in respect of the same.

Kindly therefore note that the suit property indicated in the green card is registered in the name of Edwin M. Oyoo and Jael Adhiambo Oyoo.”
12. A copy of the green card mentioned in the letter was attached to the letter. It shows that entry No. 7 was a registration of the suit land in favour of the appellant and entry No. 8 was to the effect that title deed was issued to the appellant. The green card further shows that entry No 9 was registration of a caution in favour of one Joseph Owino Oyugi claiming a purchaser's interest. After entry No. 9 there is a remark that entry No.s 7 and 8 were forgeries.
13. The appellant faults the trial court for over-relying on the letter in arriving at its decision. There is however no evidence produced to counter or controvert the contents of the letter or the attached green card. Production of the letter and attached green card was not objected to.
14. A green card is a copy of register in respect of a specific parcel of land and reflects or ought to reflect the true history and current status of the land. The disputed letter was authored by the Land Registrar and under sections 7 and 9 of the *Land Registration Act* the Land Registrar is the lawfully recognized custodian of the green cards/registers to land. In *Mwangi -vs- Thiro & 2 others* (Environment & Land Case 122 of 2014) [2022] KEELC 14423 (KLR) the court observed that the Land Registrar is the custodian of all the documents in the Land Registry with power/mandate to produce the same as evidence in court or other proceedings. In the absence of any other evidence to controvert the contents of the disputed letter and green card, I find that the trial court did not err in relying on the contents of the letter and green card.

I find that ground 1 of the appeal has not been proved.



15. Ground 2 of the appeal is that the Learned Magistrate erred in law and fact in failing to appreciate that the 1st Respondent had not produced any documents including but not limited to the sale agreement , Application for consent of the Land Control Board , Letter of consent to transfer the property , Valuation for stamp duty , stamp duty payment receipts , Transfer instrument, KRA PIN certificates, Passport size photographs, Receipts for Registration and the issuance of the Title deed in support of the 1st Respondent's claim on how he acquired the Land parcel title number Kisumu/Konya/3012 but nevertheless allowed the 1st Respondent's claim.
16. The 1st Respondent pleaded in the amended plaint that together with Jael Adhiambo Oyoo, deceased, they were the registered absolute proprietors of the suit land measuring 1.9 Hectares. The record shows that among the documents produced by the 1st respondent was a certificate of official search dated 24th January 1997 showing the size of the suit land to be 1.9 hectares and the owners thereof as the 1st Respondent and Jeal Adhiambo Oyoo.
17. The proceedings show that the 1st Respondent testified that it was him and his wife who purchased the suit land from Mr. Gumba Onywera and were issued with title deed on 24th October 1997. The court upon analysing the documents and the evidence adduced concluded that the land belonged to the 1st Respondent and that even if the appellant had a title deed, it had been established that the same was a forgery.
18. The appellant's position is that the trial court erred in allowing the appellant's claim without the documents listed being produced.
19. The appellant testified before the trial court as DW1. He adopted the contents of his witness statement dated 4/12/2019 as his evidence. He stated in the witness statement that he was the current registered owner of the suit land which was initially owned by his father one Jacob Oyugi Odongo. That his father died testate and left the appellant as the executor of his Will. That he has been in occupation of the suit land since the demise of his father. He denied that the 1st respondent bought the land from Gumba Onywera.
20. On cross-examination, the record shows that the appellant stated that he never did succession to the estate of his father. That it is his father who prepared the title deed in his (appellant's) name and gave it to him.
21. The green card produced as exhibit shows that the register in respect of the suit land was opened on 14/3/1991 and the land registered in the name of Robert Gumba Onywera as a first registration. The green card further shows that the land was later transmitted to Caren Auma Gumba and Duncan Daniel Omondi on 8.6. 1996. It shows further that on 24/1/1997 the land was registered in the name of the 1st Respondent. There is nothing on the green card to show that the land ever belonged to the appellant's father. The appellant produced no evidence that the land ever belonged to his father or that the father transferred it to him and prepared the title deed in his name.
22. I find that the evidence placed before the trial court without the documents listed by the appellant was sufficient to support the findings and decision arrived at by the trial court.
23. The third ground of appeal is that the learned Magistrate erred in law and fact when he held that the 1st Respondent had proven his case on a balance of probabilities yet the standard of proving forgery which is tantamount to fraud is higher than balance of probabilities but below reasonable doubt
24. While it is true that the standard of proof on cases based on forgery or fraud is higher than proof on a balance of probabilities, I find that the evidence placed before the trial court met the standard of proof.



It was clear that the suit land by the year 1997 was registered in the name of the 1st Respondent and his wife and that it measured 1.9 hectares -see certificate of official search. A certificate of official search issued subsequently showed that the ownership and size of the land had changed. There is no evidence from the appellant on how this happened. The letter from the Land Registrar indicated that it was a forgery. I find that fraud had been proved to the required degree.

25. The 4th ground of appeal is that the trial court erred in law and fact in allowing the 1st Respondent's suit and totally disregarding the Appellants uncontroverted, overwhelming, un-contradictory evidence, pleadings, submissions and material placed before Court
26. The pleadings and evidence of the appellant before the trial court have already been summarized herein. The record of appeal shows that the exhibits produced by the appellant before the trial court included the appellant's national identity card No. 30569279, title deed dated 6th July 2010 for parcel number Kisumu/Konya/3012, Kenya gazette of 5th may 2017 No. Vol. CXIX- NO. 56 NO. 4328 for issue of new green card in respect of the suit land, letter dated 1st February 2017 forwarding profoma and receipts for Kshs 3480 being payment for advertisement of green card, searches and green card certified on 15/1/2015.
27. The contents of the green card produced by the appellant were the same as the green card produced by the 1st respondent save that the one produced by the appellant ends at entry numbers 7 and 8. The green card does not show how or by what transaction or instrument the suit land got registered in the name of the appellant. The appellant has not pointed out the specific evidence which was disregarded and which if considered would have made the trial court arrive at a different finding and decision.
28. Having carefully re-examined the evidence and all the material placed before the trial court I find no reason to interfere with the findings and decision of the trial court as the grounds of appeal have not been proved. The appeal is hereby dismissed. Each party to bear own costs of the appeal.

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:

Maureen: Court Assistant.

Ogenga h/b for Godia for the appellant.

Shikola h/b for Mungla for the 1st Respondent.

No appearance for the 2nd Respondent.

