



**Obara v Tuongo (Environment and Land Appeal 14 of 2021)
[2024] KEELC 14219 (KLR) (18 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 14219 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 14 OF 2021
GMA ONGONDO, J
NOVEMBER 18, 2024**

BETWEEN

PAUL OUMA OBARA APPELLANT

AND

JACOB OSINA TUONGO RESPONDENT

*(An appeal from the judgment of the Honourable R.K Langat S.R.M
delivered on the 4th March 2021 in Rongo ELC No 09 of 2018)*

JUDGMENT

1. On 4th of March 2021, the learned trial magistrate, Hon R. K Langat who was then SRM, delivered judgment in Rongo SRM’S Court Environment and Land Case No. 09 of 2018 and reasoned that the respondent who was the plaintiff at that court, had proved his case on a balance of probability and ordered thus;
 - i. Eviction order to issue against the defendant who is the appellant herein, from plaintiff’s land parcel No. Kamagambo/Kongundi/514, he suit land herein.
 - ii. A permanent injunction restraining the appellant by himself his servants, agents, family member or anybody under his directions whatsoever from re-entering and interfering with the suit land, to issue.
 - iii. Costs of the suit awarded to the plaintiff.
2. Being dissatisfied with the said judgment, the appellant lodged the present appeal through Tom Mboya and Company Advocates anchored upon the following grounds;
 - a. That, the trial magistrate erred in law and in fact in his evaluation of the evidence and the judgment against the Appellants’ weight of the evidence.



- b. That the trial magistrate erred in law and in fact by granting judgement based on title to the suit land without regarding the historical background of the matter.
 - c. That the trail magistrate erred in law and in fact by failing to address his mind to the fact that the appellant proved and even indicated that they have been using and staying on the land since 1995.
 - d. That the trail magistrate erred in law and in fact by refusing, ignoring and neglecting to consider the evidence of the appellant herein.
 - e. That the trial Magistrate misdirected himself in reaching his decision on wrong interpretation and application of land provisions.
 - f. That the trial magistrate erred in law and fact by failing to consider and analyze the appellant's evidence and thereby arrived at the wrong finding on the judgment.
 - g. That the trail magistrate was biased towards the appellant herein.
3. So, the appellant prays that the judgment and consequential order of the trial magistrate, be set aside in its entirety and this Honourable court be pleased to arrive at its own judgment and dismiss the trial magistrate's judgement with costs to the appellant. In the alternative, that this Honourable court be pleased to make its own findings and give appropriate orders and further that the costs in this Honourable court be granted to the appellant.
 4. On 31st January 2024, the court directed that the appeal be heard by written submissions herein.
 5. The appellant's counsel did not file any submissions herein.
 6. By the submissions dated 18th July 2024, learned counsel for the respondent made reference to the impugned judgment, the seven grounds of appeal and that the respondent proved by evidence (PExhibits 1, 2 and 3) that he is the absolute owner of the suit land. That DW1 trespassed into the suit land and is preventing PW1 from using it. Counsel submitted that there is nothing to defeat the title of PW1 under section 28 of the Registered Land Act Chapter 300 Laws of Kenya-the Repealed Act and asserted that the learned trial magistrate was right in reaching the impugned judgment.
 7. In the plaint (Fast Track) dated 14th March 2018, amended and filed on 17th September 2028, the respondent sued the appellant for the orders set out in paragraph 1 hereinabove alongside any other relief this Honourable Court may deem fit and expedient to grant
 8. By the statement of defence dated 22nd March 2018, the appellant denied the respondent's claim. He stated that the suit land belongs to him. That the respondent should leave him to stay on the suit land peacefully.
 9. In his testimony, the respondent (PW1) relied on his statement and list of documents namely title deed, certificate of official search and survey report in respect of the suit land (PExhibits1, 2 and 3 respectively) and testified that he is the registered owner of the suit land since 1981. That the appellant trespassed into the suit land, erected a structure thereon, planted avocados, destroyed yams, bananas and sugarcane of PW1. That the matter was reported to the police and the appellant was charged with a criminal offence in Rongo SRMC CR No. 633 of 2016 as per the proceedings (PExhibit 4).
 10. Under cross examination, PW1 stated that he owns the suit land into which the appellant encroached on 5th September 2016, built a homestead and was living thereon. That the appellant was not convicted of offence of trespass and that the surveyor made a report (PExhibit 3).



11. The appellant (DW1) testified that he was allocated the suit land by his grandfather, Oguttu Obare who died in 1995 and was buried thereat. That the respondent was his uncle who was not allocated the land by the said grandfather.
12. In cross examination, DW1 stated that his grandfather who died in 1994 gave him land on which he cultivates maize and built a homestead in the 2016. That PW1 owns the suit land since 1981 as revealed in PExhibit 3.
13. DW2, Joseph Adingo Obara adduced evidence that he is a co-owner with Oguttu Obara in respect of the suit land which he gave to DW1 in the year 2016. That DW1 resides thereon. Under cross examination, he stated that he has no title deed and search certificate in respect of the suit land.
14. DW3, Paul Atieno stated that PW1 was her grandson who does not own the suit land. That when her husband passed on and got buried on the suit land, PW1 did not raise any complaint. DW1 testified that she owns the suit land.
15. It is trite law that an appellate court has, indeed jurisdiction to review the evidence of the trial court in order to determine whether the conclusion reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Mbogua Kiruga v Mugecha Kiruga and another* [1988] eKLR, *Peters v Sunday Post* [1958] EA 424, *Watt v Thomas* [1947] 1 All ER 582.
16. In the foregone, the issues for determination are as captured in the grounds of appeal. The same are condensed and discussed as three sets namely; (a) 1, 4, 6 and 7 (b) grounds 2 and 3 and (c) ground 5.
17. On the first set of grounds, it was the duty of the trial court to evaluate and analyze all evidence; see *PIL Kenya Ltd v Oppong* [2009] eKLR 442.
18. In his evidence, PW1 produced PExhibit 1 and 2 which show that the suit land is registered under the Registered Land Act-Repealed in the name of PW1. That the said registration was with effect from 21st October 1981.
19. In examination in chief PW1 stated;

“.....I was registered in 1981. I was first registered owner.....”
20. The testimony of PW1 was fortified by DW1 who in cross examination, stated that;

“.....The owner of the land is Jacob Osina. It was issued in 1981.....”
21. The trial court observed that PW1 was the absolute owner of the suit land since the year 1981 as proved by PExhibits 1 and 2. That DW1 failed to prove in the contrary as stated in paragraph 15 of the impugned judgment.
22. In that regard, the learned trial magistrate held that PW1 had proved that DW1 trespassed into the suit land and built a homestead thereon. During cross examination, DW1 confirmed that he cultivates the suit land and built a homestead thereon since the year 2016 thus, trespass thereon.
23. It is noteworthy that the term ‘Trespass’ means being an unjustifiable entry by one person upon the land in possession of another; see *Clerk and Lindsell on Torts* 18th Edition paragraph 18-01.
24. As regards the second set of grounds, the learned trial magistrate set out in the parties’ respective cases as even disclosed in paragraph 17 of the judgment. He noted in part that PW1 was registered as the proprietor of the suit land in the year 1981. That the grandfather of DW1 died in 1995.



25. The trial court pointed out that the appellant proved that he has been using and staying on the suit land since 1995. DW1 stated that he erected a homestead thereon in the year 2016.
26. Concerning the third set of grounds, the trial court referred to section 24 of the [Land Registration Act](#) 2016 [2012] on absolute proprietorship of the suit land by PW1. That DW1 did not prove any interest over it .
27. Further, the learned trial magistrate opined that the appellant merely alleged that he obtained the suit land from his grand father as a gift inter vivos. Thereby the court applied the decision [In Re Estate of Godana Sungoro Guyo](#) [2020] eKLR .
28. The respondent has the right to acquire and own the suit land under Article 40 of the [Constitution of Kenya 2010](#). He did not acquire it unlawfully as envisaged under section of 26 of the [Land Registration Act](#) 2016 [2012].
29. Clearly, there is nothing to discern that there are any encumbrances over the suit land; see [Munyu Maina v Hiram Gathiba Maina](#) [2013] eKLR.
30. The title over the suit land held by PW1 is absolute and indefeasible as provided for under sections 27 and 28 of the Repealed Act. There is nothing to establish that DW1 has any overriding interest in respect of the suit land as provided for in section 30 of the Repealed Act; see also sections 24, 25 , 26 and 28 [Land Registration Act](#) 2016 [2012]. So, DW1 was a trespasser thereon.
31. To that end, it is my considered view that the learned magistrate correctly applied his mind to the evidence on record and interpreted the relevant law in reaching his informed judgment. I find no fault in the judgment and I endorse the same unreservedly.
32. A fortiori, the instant appeal is devoid of merit and the same is hereby dismissed with costs to the respondent.
33. It is so ordered.

DATED AND DELIVERED AT MIGORI THIS 18TH DAY OF NOVEMBER 2024

G M A ONGONDO

JUDGE

Present;

Mr Oseno instructed by Brian Mboya learned counsel for appellant

Mr Kerario Marwa learned counsel for the respondent

Tom Maurice, court assistant

