



Otieno v Otieno (Suing as the legal representative of the Estate of Patrice Otieno Ochola - Deceased) & 2 others (Environment and Land Appeal E005 of 2022) [2024] KEELC 13836 (KLR) (17 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E005 OF 2022
SO OKONG'O, J
DECEMBER 17, 2024**

BETWEEN

MAURICE OTIENO APPELLANT

AND

JAMES OKOTH OTIENO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PATRICE OTIENO OCHOLA - DECEASED) 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

THE LAND REGISTRAR 3RD RESPONDENT

JUDGMENT

1. The 1st respondent brought a suit against the Defendants before this court on 20th December 2016. The suit was transferred to the lower court and assigned case number, Kisumu CMCELC No. 194 of 2018 (hereinafter referred to only as “the lower court” or “the lower court suit”). In his plaint, the 1st respondent averred that during land adjudication, all that parcel of land known as Title No. Kisumu/Nyalunya/926 (hereinafter referred to only as “the suit property”) was fraudulently registered in the name of the appellant instead of the name of the 1st respondent’s deceased father, Patrice Otieno Ochola (hereinafter referred to only as “the deceased”). The 1st respondent averred that the land adjudication committee awarded the suit property to the appellant and the deceased lodged an appeal to the land adjudication arbitration board which overturned the decision of the land committee and awarded the suit property to the deceased.
2. The 1st respondent averred that the land adjudication officer failed to correct the land demarcation map and the adjudication record to reflect the said decision of the arbitration board with the result that the appellant remained on record as the owner of the suit property and was upon the finalisation of the adjudication register registered as the owner of the suit property. The 1st respondent averred that the



- deceased's family had been in possession of the suit property from the pre-adjudication period and were still in occupation of the same. The 1st respondent averred that the appellant had been threatening to interfere with the deceased's family's occupation of the land. The 1st respondent sought a declaration that the suit property was irregularly registered in the name of the appellant and an order for the cancellation of the title held by the appellant in respect of the suit property and the rectification of the register of the suit property to reflect the name of the 1st respondent as the owner of the property according to the findings of the land arbitration board made on 10th October 1979.
3. The appellant filed a statement of defence on 29th June 2017. The appellant denied that the suit property was registered in his name fraudulently during the land adjudication instead of being registered in the name of the deceased. The appellant denied that the deceased appealed the decision of the land committee to the land arbitration board and that the board awarded the suit property to the deceased. The appellant denied further that the land adjudication officer failed to correct the adjudication register by deleting the name of the appellant and inserting that of the deceased in accordance with the decision of the arbitration board.
 4. The appellant averred that he was registered as the first registered owner of the suit property in 1991. The appellant averred that if there was a decision by the arbitration board, the decision was in his favour. The appellant averred that he had been in continuous and uninterrupted occupation of the suit property since 1979. The appellant averred that the court had no jurisdiction to hear and determine the suit. The appellant filed a witness statement dated 24th February 2017 in which the appellant stated that he was the registered owner of the suit property having acquired the same during the land adjudication exercise in 1978. The appellant admitted that there was a dispute over the ownership of the suit property during land adjudication which was referred to the land adjudication arbitration board in Arbitration Board Case No. 5/79/80. The appellant averred that the decision of the arbitration board was in his favour. The appellant averred that he had over the years been cultivating the suit property. The appellant averred that he was not aware of the land arbitration board's decision on the said dispute in favour of the deceased until 2016 when he applied for the correction of his name in the land register which was wrongly spelt. The appellant averred that it was at that time that he was informed of the said decision in favour of the deceased.
 5. The 2nd and 3rd respondents filed a statement of defence on 16th January 2017 in which they denied the 1st respondent's claim in its entirety. The 2nd and 3rd respondents averred that if at all there was a title issued to the appellant in respect of the suit property, the same was issued in accordance with the law. The lower court suit was heard and a judgment thereon was delivered on 19th January 2022 by Hon. S.N.Telewa, SRM. The lower court made a finding that the suit property was irregularly registered in the name of the appellant and ordered the register of the property to be rectified by the cancellation of the name of the appellant and the registration of the property in the name of the 1st respondent. The lower court also awarded the costs of the suit to the 1st respondent.
 6. The appellant was aggrieved by the said judgment and filed the present appeal against the same on 16th February 2022. In his memorandum of appeal, the appellant challenged the judgment of the lower court on several grounds. The appellant contended that the lower court erred in its finding that the 1st respondent had proved his case against the appellant on a balance of probabilities. The appellant contended further that the lower court erred in its failure to consider the evidence adduced by the appellant which showed how he acquired the suit property and the fact that he had been in occupation of the property for over 12 years. The appellant contended further that the lower court erred in ordering the rectification of the register of the suit property while there was no evidence on record to support such an order. The appellant averred that the court erred in its failure to appreciate that the appellant having been the first registered owner of the suit property, his title was indefeasible.



The appellant contended further that the lower court erred in relying on a non-existent decision of the arbitration board instead of the decision of the land adjudication committee. The appellant averred that the lower court erred when it failed to appreciate that the 1st respondent's suit was time-barred and as such could not be sustained. The appellant urged the court to set aside the judgment of the lower court and substitute it with an order dismissing the 1st respondent's suit.

7. The appeal was heard by way of written submissions. The appellant filed submissions dated 15th July 2024. The appellant submitted that the burden of proof was upon the 1st respondent to prove that the suit property was registered in the name of the appellant illegally which burden he failed to discharge. The appellant submitted that he had denied putting his left thumbprint on the proceedings of the arbitration board of 10th October 1979. The appellant submitted that the burden was upon the 1st respondent to adduce expert evidence in proof of the fact that the thumbprint was that of the appellant which he never did. The appellant submitted that there was no evidence upon which the lower court could hold that the suit property was registered in the name of the appellant irregularly. The appellant submitted further that the lower court failed to appreciate the evidence adduced by the appellant to the effect that he had had physical occupation of the suit property for several years. The appellant submitted that the appellant having occupied the suit property since 1967 had superior rights over the same and could not be dispossessed of the same using forged proceedings. The appellant submitted further that even if it was assumed that the 1st respondent's father (the deceased) was awarded the suit property by the arbitration board on 10th October 1979, the deceased's right to recover the land from the plaintiff ran from that date and expired in 1991. The appellant submitted that the 1st respondent's suit filed in 2016 was time-barred. The appellant submitted that the 1st respondent did not prove the fraud that was alleged against the appellant. The appellant urged the court to allow the appeal.
8. The 1st respondent filed his submissions dated 2nd December 2024. The 1st respondent submitted that contrary to the appellant's submissions, he proved his claim on a balance of probabilities. The 1st respondent submitted that he proved that his deceased father was awarded the suit property by the arbitration board. The 1st respondent submitted that the appellant did not deny that there were proceedings before the arbitration board. The 1st respondent submitted that the parties only deferred as to the proceedings of the said board. The 1st respondent submitted that he produced in evidence the proceedings of the arbitration board dated 10th October 1979 the authenticity of which was confirmed by an officer from the Land Adjudication office, Kisumu. The 1st respondent submitted that the said officer disowned the proceedings purported to be of the arbitration board which were produced in evidence by the appellant. The 1st respondent submitted that the letter dated 2nd September 2016 by the Land Adjudication Officer produced in evidence by the said officer from the Land Adjudication office was clear that the appellant was registered as the owner of the suit property as a result of a mistake on the part of adjudication officer who failed to correct the adjudication register following the said decision of the arbitration board.
9. The 1st respondent submitted further that a land title can be impeached on the grounds of fraud, misrepresentation, illegality, procedural impropriety and corruption. The 1st respondent averred that he could not be blamed for the mistake of the adjudication officer. The 1st respondent submitted that he had made out a case for the rectification of the register of the suit property. On the appellant's contention that the suit was time barred, the 1st respondent submitted that the cause of action arose on 2nd September 2016 when the adjudication officer acknowledged that there was an omission on their part to implement the decision of the arbitration board. The 1st respondent submitted that it was the 1st respondent who had been in possession of the suit property as was confirmed by the chief's letter dated



12th August 2016 that was produced in evidence by the 1st respondent. The 1st respondent submitted that the appeal by the appellant had no merit and urged the court to dismiss the same with costs.

Analysis and determination

10. I have considered the pleadings and proceedings of the lower court, the judgment of the court, the grounds of appeal filed by the appellant and the submissions by the parties. This being a first appeal, this court has to consider and re-evaluate the evidence on record and draw its own conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2 E.A 212 the Court of Appeal stated that:

On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

11. See also, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 and *Abok James Odera t/a Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013]eKLR on the duty of the first appellate court.

12. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.

13. From the Appellant’s grounds of appeal, the issues arising for determination in this appeal in summary are; whether the 1st respondent proved before the lower court that the land adjudication arbitration board awarded the 1st respondent’s deceased father the suit property and that the land adjudication officer failed to correct the demarcation map and the adjudication record to accord with the said decision of the arbitration board, and whether the lower court erred in granting the 1st respondent the reliefs he had sought in the lower court. I am satisfied from the evidence that was placed before the lower court that during the land adjudication in Kisumu Nyalunya Adjudication Section, there was a dispute over the ownership of the suit property. The dispute was considered in the first instance by the adjudication committee which reached a finding that the land belonged to the appellant. This was in Land Committee Case No. 11/77/78. The 1st respondent’s father who was a party to the land committee case appealed against its decision to the land arbitration board in Arbitration Board Case No. 5/79/80. In a decision made on 10th December 1979, the arbitration board set aside the decision of the land committee and awarded the suit property to the 1st respondent’s father. Under Section 19(3) of the *Land Adjudication Act*, Chapter 284 Laws of Kenya, the recording officer was supposed to rectify the demarcation map and the adjudication record as per the said decision of the arbitration board. From the evidence on record, that was not done as a result of which at the time of the finalisation of the adjudication register, the appellant remained recorded as owner of the suit property and was ultimately registered as the proprietor of the property in 1991.

14. As correctly submitted by the 1st respondent, the appellant did not deny that there was an arbitration case between him and the deceased. The appellant’s own documents contained a notice inviting him to attend an arbitration board case No. 5 of 1979 on 10th October 1979. In evidence, the appellant



produced what he purported to have been the proceedings of the arbitration board that took place on 12th October 1979. A perusal of the document shows that the proceedings were not of the arbitration board but of the adjudication committee. The purported decision contained in the proceedings could not therefore have been of the arbitration board. The proceedings produced in evidence were disowned by Ms. Angela Ondoro from the Kisumu Land Adjudication office who gave evidence in the lower court as PW2. She stated that the proceedings were not from their office. PW2 stated that it was the proceedings and the decision of the arbitration board that was produced in evidence by the plaintiff which originated from their office.

15. As mentioned earlier, the appellant had denied knowledge of the proceedings and the decision of the arbitration board made on 10th October 1979. In his submissions, the appellant argued that the left-hand thumbprint in the said proceedings said to be his was not his and that he had obtained a document examiner's report dated 18th May 2021 to prove that fact. The said report is not in the record of appeal. The appellant submitted that the report was contained in his supplementary record of appeal. I have not come across such a record of appeal. In any event, the report was not produced in evidence before the lower court although it is said to have been prepared on 18th May 2021 before the lower court judgment was delivered.
16. Due to the foregoing, I am unable to fault the finding by the lower court that the 1st respondent had established on a balance of probabilities that the suit property was awarded to the 1st respondent's deceased father by the arbitration board and that there was a failure on the part of the recording officer who was working under the adjudication officer to correct the demarcation map and the adjudication record to accord with the said decision of the arbitration board. I am also unable to fault the lower court for making an order for the rectification of the register of the suit property by the cancellation of the registration of the appellant as the owner of the suit property and replacing him with the deceased. This was in accordance with the decision of the arbitration board. The appellant was registered as the owner of the suit property by mistake and the court had power to ensure that the mistake or error was corrected. I am of the view that the title of the appellant was not protected by the proviso to Section 143 of the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed) which shielded first registration from cancellation. In *Maingi Mutisya Nzioka v. Mbuki Kisavi* [2014] eKLR, court stated that:

The issue of a first registration being immunized from enquiry and rectification, even in the face of patent fraud, in which the registered proprietor is implicated, is a strange and peculiar one. It seems to us highly doubtful that a perpetrator of fraud can in conscience be permitted by statute to keep the fruits of his fraud and wave a statutory protection as a cloak and shield no matter what salutary public policy considerations, if any, may have informed the provision. As the matter was not urged before us in that precise formulation, however, we shall not further delve into it. It is enough that the learned Judge proceeded on the face value statutory bar to impeachment of a first registration.”

17. The appellant had also contended that the 1st respondent's suit was time barred. The appellant did not plead time bar in his statement of defence. Order 2 Rule 4 of the Civil Procedure Rules provides as follows:

4.

- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —



- (a) which he alleges makes any claim or defence of the opposite party not maintainable;
 - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
 - (c) which raises issues of fact not arising out of the preceding pleading.
- (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.” (emphasis added)

18. In *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others* [2014]eKLR, the Court of Appeal cited with approval the Malawi Supreme Court of Appeal case of *Malawi Railways Ltd. v. Nyasulu* [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled “The present importance of pleadings” published in 1960 *Current Legal problems*, at P.174 where the author stated as follows:

As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

19. The appellant having not pleaded that the 1st respondent’s suit was statute-barred, the lower could not have considered the issue. The lower court cannot therefore be faulted for not making a finding that the suit was time barred.

Conclusion

20. For the foregoing reasons, it is my finding that the appellant’s appeal has no merit. The appeal is dismissed save on the issue of costs. Since the parties are related and the suit was brought as a result of a mistake that was made by the recording officer who failed to correct the demarcation map and the adjudication record, each party shall bear his own costs of the lower court suit and the appeal.

DELIVERED AND DATED AT KISUMU ON THIS 17TH DAY OF DECEMBER 2024

S. OKONG’O

JUDGE



Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

The Appellant present in person

Ms. Raburu h/b Mr. Omondi for the Respondent

Ms. J.Omondi-Court Assistant

