



Ponge (Suing as an Administrator of the Estate of the Late Claudio Ochieng Atieno alias Atieno Atieno) v Ponge & another (Both Sued on their Own Behald and on Behalf of the Estate of the Late Walter Amoke) (Environment and Land Appeal E026 of 2022) [2024] KEELC 14062 (KLR) (16 December 2024) (Judgment)

Neutral citation: [2024] KEELC 14062 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E026 OF 2022
SO OKONG'O, J
DECEMBER 16, 2024**

BETWEEN

DIXON OMONDI PONGE APPELLANT

**SUING AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE CLAUDIO
OCHIENG ATIENO ALIAS ATIENO ATIENO**

AND

JOSEPH OTIENO PONGE 1ST RESPONDENT

JUSTINE ATIENO ODHIAMBO 2ND RESPONDENT

**BOTH SUED ON THEIR OWN BEHALD AND ON BEHALF OF THE ESTATE
OF THE LATE WALTER AMOKE**

*(Being an appeal from the judgment and decree of Hon. C.L. YALWALA
SPM delivered on 25th May 2022 in Maseno CMC ELC No. 69 of 2018)*

JUDGMENT

Brief facts

1. This appeal is against the judgment of Hon. C.L. Yalwala SPM delivered on 25th May 2022 in Maseno CMCELC No. 69 of 2018 (hereinafter referred to only as “the lower court”). The Appellant sued the Respondents together with the Land Registrar Kisumu County and the Attorney General in the lower court through a plaint dated 12th November 2018.
2. The Appellant averred that his deceased brother Claudio Ochieng Atieno alias Atieno Atieno owned a parcel of land known as Kisumu/Marera/1897 (hereinafter referred to only as “the suit property”) measuring approximately 2.6Ha. jointly with one Walter Amoke also deceased with each party



indicated in the register as owning half undivided share of the property. The Appellant averred that during land adjudication in the early 1970s and 1980s, his family entered into a land exchange arrangement with Walter Amoke, under which his family gave Walter Amoke a parcel of land that was owned by his family known as Kisumu/Marera/1900 in exchange with the share of the suit property that Walter Amoke owned. The Appellant averred that following that agreement, Walter Amoke retained only a small portion of the suit property and ceded the remaining portion to the Appellant's family.

3. The Appellant averred that without involving the estate of Claudio Ochieng Atieno alias Atieno Atieno who was the co-owner of the suit property, the Respondents who were the administrators of the estate of Walter Amoke illegally, unprocedurally and fraudulently subdivided the suit property into three portions namely; Kisumu/Marera/ 4499, 4500 and 4501 measuring 0.65Ha,0.65Ha and 1.3Ha respectively and registered the same in the names of the 1st Respondent, the 2nd Respondents and Atieno Atieno deceased respectively.
4. The Appellant averred that the Land Registrar Kisumu County colluded with the 1st and 2nd Respondents to defraud the Appellant of his rightful share in the suit property by authorising and approving an illegal process which he knew or ought to have known was invalid thereby causing the Appellant to suffer loss and damage. The Appellant averred that as a result of the foregoing, the Appellant had suffered serious loss and damage for which he held the Respondents wholly liable.
5. The Appellant averred that their share of the suit property through usage from time immemorial was 1.79Ha. excluding the late Walter Amoke's home and the area he ploughed. The Appellant averred that Walter Amoke consistently ploughed land parcel Kisumu/Marera/1900 measuring 1.7Ha. until he died, and that after his death, one Conseleter Arua who was a sister-in-law to the 1st Respondent settled thereon. The Appellant averred that they never had any dispute with the late Walter Amoke regarding the use of the suit property and the dispute before the court had been fueled by the 1st and 2nd Respondents who wanted to unjustly enrich themselves by getting a larger portion of the suit property than was due to them. The Appellant averred that although the land register indicated that the suit property was held by Atieno Atieno deceased and Walter Amoke deceased in undivided half share each, due to the said agreement between the families, and custom and use of the said parcel of land, they were entitled to a portion thereof measuring 1.79Ha. The Appellant averred in the alternative that the 1st and 2nd Respondents who were the administrators of the estate of the late Walter Amoke held a portion of their half share of the suit property measuring 1.3Ha in trust for the estate of the late Atieno Atieno and sought a declaration to that effect.
6. The Appellant prayed for judgment against the Respondents jointly and severally for;
 - a. A declaration that the parcels of land known as Kisumu/Marera /4499,5400 and 4501 were illegally carved out of land parcel known as Kisumu /Marera/1879 and that the titles in respect thereof should be cancelled and the land parcel Kisumu/Marera/1897 be restored.
 - b. A declaration that the Appellant was entitled to a portion of the land parcel, Kisumu/Marera/1897 measuring 1.79ha and that the register of the said parcel of land should be amended and/or rectified to indicate the same.
 - c. In the alternative, a declaration that a resultant trust existed in favour of the Appellant entitling him to a portion of land measuring 0.48Ha. of the half share of Kisumu/Marera/1897 held by the 1st and 2nd Respondents and the same be transferred to the estate of Atieno Atieno.
 - d. A permanent injunction restraining the 1st and 2nd Respondents, their servants, employees, agents and or anybody claiming through them from trespassing onto, selling, disposing of,



ploughing and/or interfering with the deceased share of land parcel Kisumu/Marera/1897 or Kisumu/Marera/4501 measuring 1.79Ha.

- e. General damages for trespass and unlawful conversion.
 - f. Punitive damages as against the 3rd and 4th Defendants in the lower court.
 - g. Costs and interest.
7. The 1st and 2nd Respondents (the Respondents) entered appearance and filed a joint statement of defence on 15th February 2019. The Respondents denied all the allegations in the plaint. The Respondents averred that they lawfully acquired ½ share of the suit property that belonged to the estate of Walter Amoke having applied for and obtaining a confirmed Grant of Letters of Administration in respect of his estate. The Respondents averred that they never interfered with the ½ share of the suit property that belonged to the estate of Claudia Ochieng Atieno also known as Atieno Atieno which remained as land parcel, Kisumu/Marera/4501 measuring 1. 3Ha. The Respondents urged the court to dismiss the Appellant's suit with costs.
 8. The 3rd and 4th Defendants in the lower court suit who were not joined as parties to this appeal also entered appearance and filed a joint statement of defence on 5th December 2019 in which they also denied all the allegations in the plaint and prayed that the Appellant's suit be dismissed with costs.
 9. The lower court heard the Appellant's claim against the Respondents and rendered its judgment on 25th May 2022. In the judgment, the lower court framed 3 issues for determination namely; whether the suit property was lawfully and procedurally subdivided, whether the Appellant was entitled to an area measuring 1.79Ha. of the suit property, or in the alternative, whether the Appellant was entitled to a declaration that the Respondents as the administrators of the estate of Walter Amoke held a portion of the late Walter Amoke's share in the suit property measuring 0.48Ha. in trust for the Appellant, whether a permanent injunction should issue restraining the Respondents from interfering with the Appellant's portion of the suit property measuring 1.79Ha., whether the Appellant should be awarded damages, and who should bear the costs of the suit.
 10. On the first issue, the lower court found that the Respondents did not obtain the consent of the Land Control Board to subdivide the suit property and as such the subdivision that gave rise to Kisumu/Marera/4499, 4500 and 4501 was illegal, null and void. On whether the Appellant was entitled to a portion of the suit property measuring 1.79Ha., the lower court found that the registration of Atieno Atieno and Walter Amoke as joint proprietors of the suit property in undivided equal shares was a first registration that took place following the land adjudication exercise. The lower court found that if there were any agreements or arrangements regarding the exchange of a portion of the suit property owned by Walter Amoke with a portion of land parcel Kisumu/Marera/1900 owned by Atieno Atieno or his family, the same would have been captured during the registration of the suit property that was done in 1974 long after the date of the alleged exchange agreement which was said to have taken place in 1967. The lower court found that the adjusted shares owned by Walter Amoke and Atieno Atieno in the suit property would have been reflected in the register of the suit property when the same was opened in 1974. The lower court found that Walter Amoke and Atieno Atieno held half undivided share each in the suit property as indicated in the register and that, that was what the Appellant and the Respondents who were their legal representatives were entitled to. The lower court found that the Appellant did not place before the court any convincing evidence of the alleged exchange of land between Atieno Atieno and Walter Amoke. The lower court observed that the Appellant did not even place any evidence before the court as proof that Atieno Atieno owned land parcel Kisumu/Marera/1900 which he allegedly exchanged with Walter Amoke. The lower court found that there was no basis upon which the court



could impose a trust upon the Respondents in respect of the portion of the suit property in dispute. The lower court held that the Appellant did not establish that he was entitled to a share of the suit property measuring 1.79Ha. Save for their failure to obtain the consent of the Land Control Board, the lower court found no fault in the manner the Respondents subdivided the suit property which left Atieno Atieno's portion thereof measuring 1.3Ha. intact.

11. Arising from the foregoing findings, the lower court found no basis for the injunction and general damages that had been sought by the Appellant against the Respondents. The lower court also exonerated the 3rd and 4th Defendants in the lower court suit from any wrongdoing in the subdivision of the suit property and registration of the portions thereof in the names of the Respondents and found no basis for the damages that were sought against them by the Appellant. Following the finding by the court that the subdivision of the suit property was null and void for want of the Land Control Board Consent, the court made a declaration that land parcels, Kisumu/Marera/4499, 4500 and 4501 were irregularly and illegally created from the suit property and ordered that their titles be cancelled and the title of the suit property restored to its status ante. Since the Appellant's suit succeeded in part, he was awarded half the costs of the lower court suit.

The Appeal

12. The Appellant was aggrieved by the said decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 8th June 2022, the Appellant challenged the lower court's judgment on the following grounds;
 - a. That the Learned Magistrate erred in law by making findings of fact not based on any evidence presented before him.
 - b. That the Learned Magistrate erred in law in not finding that the Appellant had proved his case when evidence had been presented to clearly show that the Appellant and his family did own and physically occupy a larger portion of the suit property and thus were entitled to a larger portion thereof measuring 1.79Ha.
 - c. That the Learned Magistrate erred in law by considering extraneous issues thereby arriving at a wrong determination as regards the usage and occupation of the suit property.
 - d. That Learned Magistrate erred in law by failing to apply the appropriate principles of law regarding land held in trust and thereby failed to direct his mind on the said issues based on evidence presented to court.
 - e. That the learned trial magistrate erred in law in failing to grant to the Appellant the prayers sought in the plaint when cogent evidence had been led to support the same.
 - f. That the decision arrived at was contrary to the law and the *evidence act*.
13. The Appellant prayed that the appeal be allowed, and the judgment of the lower court delivered on 25th May 2022 be set aside and substituted with an order granting prayers (b) to (e) of the plaint. The Appellant also prayed for the costs of the appeal and the lower court suit.
14. The appeal was heard by way of written submissions.

The Appellant's submissions

15. The Appellant submitted that the suit property was originally registered in the names of Atieno Atieno and Walter Amoke both deceased. The Appellant submitted that although the suit property had been subdivided into three portions by the Respondents, the said subdivision was nullified by the court in



the judgment the subject of the appeal and the title of the suit property was restored. The Appellant submitted that that part of the decision was not appealed.

16. The Appellant submitted that this being a first appeal, the court had a duty to independently appraise the evidence adduced at the trial and to arrive at its own decision. In support of this submission, the Appellant cited *Gitobu lmanyara & 2 others v. Attorney General* [2016] eKLR. The Appellant submitted that the registration of the late Walter Amoke as the owner of ½ share of the suit property must be deemed to be in trust for the appellant to the extent of 0.49 Ha. thereof which together with the Appellant's own ½ share makes a total of 1.79Ha. that the appellant had claimed in the lower court. In support of this submission, the Appellant cited *Peter Ndungu Njenga v. Sophia Watiri Ndungu* [2000] eKLR.
17. The Appellant submitted that the intention of the two deceased persons who were the registered proprietors of the suit property was discernible from the way they carried out their affairs regarding the suit property. The Appellant submitted that Atieno Atieno was allowed to take a larger share of the suit property while Walter Amoke took over the portion of the suit property that had been given to him by Atieno Atieno. The Appellant prayed that the court finds and holds that the Appellant on behalf of the estate of Atieno Atieno was entitled to a portion of the suit property measuring 1.79Ha. The Appellant also prayed for the costs of the suit.

The Respondents' submissions

18. The Respondents filed submissions dated 29th April 2024. The Respondents submitted on each ground of appeal separately. The Respondents submitted that all the grounds of appeal lacked merit. The Respondents submitted that the lower court made a well-reasoned judgment based on evidence and there was no reason to disturb the same. The court was urged to dismiss the appeal with costs.

Analysis and determination

19. I have considered the pleadings, the proceedings of the lower court, the judgment of the court, and the grounds of appeal by the Appellant. I have also considered the submissions by the parties. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2E.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.”
20. It is also settled that the appellate court will 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.
21. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya provides that the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:
 - (16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or



liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

22. The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“ 13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)”

23. Upon review of the pleadings and the evidence that was tendered in the lower court, I am unable to fault the lower court on its finding that the Appellant failed to prove that the deceased Atieno Atieno was entitled to a portion of the suit property measuring 1.79Ha. arising from the agreement that the Appellant's "family" had made with the late Walter Amoke under which the Appellant's family exchanged their parcel of land known as Kisumu/Marera/1900 with a portion of Walter Amoke's share in the suit property measuring 0.49Ha. The Appellant filed a lengthy written witness statement in which he gave details of this agreement which he claimed to have been made in the 1970s and 1980s during land adjudication with the help of the Adjudication Committee. The Appellant did not produce any documentary evidence to support the existence of this alleged agreement. The court takes judicial notice that all the decisions of the Adjudication Committee are written. While the Appellant referred to several pronouncements by the Adjudication Committee regarding the land exchange agreement between the Appellant's family and Walter Amoke, no document was placed before the court in proof of the same. The Appellant did not even produce a copy of the Adjudication Record for the two parcels of land from which the court could have confirmed if the alleged land exchange agreement was noted in the said record. As correctly observed by the lower court, there was also no evidence that the land parcel Kisumu/Marera/1900 allegedly given to Walter Amoke in exchange for his share in the suit property was ever owned by Atieno Atieno, the Appellant, or his family. I even wonder how Atieno Atieno whom the Appellant claimed in his statement to have been barely a year old during the land adjudication could have entered into a land exchange agreement with Walter Amoke. Since the suit property was owned by Atieno Atieno and Walter Amoke as tenants in common in equal shares, I agree with the lower court that the fact that Atieno Atieno occupied a larger portion of the property was without more not proof of the alleged agreement.

24. The Appellant in the alternative based his claim over the disputed portion of the suit property on trust. The Appellant claimed that Walter Amoke held a portion of the suit property measuring 0.49Ha. in trust for Atieno Atieno.

25. In John Gitiba Buruna & Another v. Jackson Rioba Buruna, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003, the court stated as follows:

“ Although the rights of a registered proprietor of land are indefeasible under section 28 of the Registered *Land Act*, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee.”



26. In *Mwangi Mbothu & 9 others v. Gachira Waitimu & 9 others* [1986] eKLR, the court stated that:

“The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”

27. The burden was upon the Appellant to establish that Walter Amoke held the said portion of the suit property in trust for Atieno Atieno. The trust argument was based on; the alleged land exchange agreement, and the manner of occupation and use of the suit property over the years. As I have stated earlier in the judgment, the existence of the alleged land exchange agreement was not proved. As concerns the occupation and use of the suit property, my view is that parties holding land as tenants in common in equal undivided shares can occupy and use any part or portion of the land. Until the land is partitioned and each issued with a title, none of the tenants in common can claim any particular portion of the land. In *Megarry & Wade, The Law of Real Property*, 17th Edition at pages 493 and 494 paragraphs 13-009 to 13-012, the authors have stated as follows regarding the nature of a tenancy in common:

“1. The tenants hold in undivided shares. Unlike joint tenants, tenants in common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. Thus tenants in common have quite separate interests. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular parcel of land.”

28. In *Kurshed Begum Mirza v. Jackson Kaibunga*(supra), the court stated that:

“By definition, a tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, with each person having the right to possess the whole property but no right of survivorship. The central characteristic of a tenancy in common is that each tenant is deemed to own by himself, a physically undivided part of the entire parcel (see. *Black’s Law Dictionary*, 9th Edn and *Thomas F. Bergin & Paul G. Haskell, ‘Preface to Estates in Land and Future interests* 54 2nd Edn, 1984”).

29. From the characteristics of a tenancy in common given in the above case law and text, the Appellant’s contention that Atieno Atieno’s occupation and use of a larger portion of the suit property entitled him to the said portion was untenable. Like the lower court, I find no basis upon which Walter Amoke can be said to have held his share in the suit property in trust for the Atieno Atieno. In other words, the existence of the alleged trust was not proved.

Conclusion

30. In conclusion, I agree with the Respondents that the lower court made a well-considered judgment based on evidence that was placed before it and the law. I find no merit in all the grounds of appeal put forward by the Appellant against the said judgment. Consequently, the Appeal is dismissed with costs to the Respondents.

DELIVERED AND DATED AT KISUMU ON THIS 16TH DAY OF DECEMBER 2024

S. OKONG’O



JUDGE

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

N/A for the Appellant

N/A for the 1st and 2nd Respondents

Ms. Muthoki h/b for Ms. Orege for the 3rd and 4th Respondents(in the lower court)

Ms. J. Omondi-Court Assistant

