



Onyimbo & another v Wamalwa & another (Environment and Land Appeal E016 of 2023) [2024] KEELC 14157 (KLR) (11 December 2024) (Judgment)

Neutral citation: [2024] KEELC 14157 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E016 OF 2023
EC CHERONO, J
DECEMBER 11, 2024**

BETWEEN

MARGARET WANJIRU ONYIMBO 1ST APPELLANT

SIMON WAHINYA ONYIMBO 2ND APPELLANT

AND

COLLINS SIMIYU WAMALWA 1ST RESPONDENT

THE REGISTRAR OF LANDS, BUNGOMA COUNTY 2ND RESPONDENT

(Being an appeal arising from the Judgment and decree delivered by Hon. T.M.OLANDO (PM) in Bungoma CMELC No.91 of 2019 delivered on 22/02/2022)

JUDGMENT

Introduction.

1. The Appellants herein were the plaintiffs in the primary suit while the Respondents were the defendant's therein.
2. The Appeal seeks to set aside the judgment of the trial court delivered on 22/02/2023, a retrial of the case and for costs of the appeal.
3. In the impugned judgement, the trial court dismissed the Appellants' case with costs. Aggrieved by the said judgment, the Appellants preferred the current appeal. The Grounds of appeal as can be discerned from the Memorandum of Appeal can be summarized as follows;
 - a. The learned magistrate erred in law and in fact in failing to give proper reasons for his findings, hence failing to give proper reasoned judgment.



- b. The learned magistrate erred in law and in fact in failing to determine and or to do a finding on the legal ownership of the disputed boundaries to the two suit parcels of land.
- c. The learned magistrate erred in law and in fact in failing to highlight and analyse the issues for determination as required by law.
- d. The learned magistrate erred in law and in fact in failing to determine the issues raised in the pleadings and proceedings thereto.
- e. The learned magistrate erred in law and in fact in failing to give a reasoned judgment.
- f. The learned magistrate erred in law and in fact in failing to analyse the evidence and facts as were presented by the appellants.
- g. The learned magistrate erred in law and in fact by ignoring and failing to consider the submissions and evidence of counsel of the appellants.
- h. The learned magistrate erred in law and in fact in giving judgment against the weight of the evidence by quoting and relying on Plot Number E.Bukusu/S.kanduyi/2372 that was not subject of pleadings.
- i. The learned magistrate erred in law and in fact in failing to consider that the major issue was whether the 1.1 acre registered as title number E.Bukusu/S.kanduyi/9763 comprises a portion of title number E.Bukusu/S.kanduyi/2373 on which the appellants matrimonial house sits on.
- j. The learned magistrate erred in law and in fact in failing to take judicial notice that the appellants never forcefully or maliciously established their homestead on the suit of the parcel land.
- k. The learned magistrate erred in law and in fact in failing to find that the 1st respondent failed to avail succession proceedings, judgment and/or any form of Grant of letters of administration granted to him and a confirmation thereof in respect of the alleged succession cause under which he was allocated the parcel of land known as title number. E. Bukusu/S.kanduyi/9762 measuring 1.1 acres.
- l. The learned magistrate erred in law and in fact in failing to take cognizant that no document was tendered to show how the said 1.1 acres in title number E.Bukusu/S.kanduyi/9762 was exercised from the bigger title number E.Bukusu/S.kanduyi/2372 in the absence of a proper mutation process and clear record or the evidence of a surveyor against the evidence of the court record.
- m. The learned magistrate erred in law and in fact in failing to consider the evidence by the chief who was not aware of the succession cause referred by the 1st respondent and was not also aware of any disputes as to the ownership of the suit property by the appellants.
- n. The learned magistrate erred in law and in fact in failing to determine the role of the 2nd respondent more so the implication of the absence of the 2nd respondent during the hearing and determination of the case.
- o. The learned magistrate erred in law and in fact in failing to find that the burden of proof to ownership and boundaries to land lies with the 2nd respondent during the hearing and determination of the case.



- p. The learned magistrate erred in law and in fact in failing to find that the burden of proof to ownership and boundaries to lands lies with the 2nd respondent upon an allegation of ownership and the burden of proof automatically shifted to the 2nd respondent.
- q. The learned magistrate erred in law and in fact by failing to issue a declaration that the encroachment, hiving off and issuing illegal notice to vacate against the appellants quiet possession of land parcel known as title number E.Bukusu/S.kanduyi/2373 is illegal and unlawful and that the appellants be declared the rightful, legal occupant, allottee, registered and/or beneficial owners of the suit property.
- r. The learned magistrate erred in law and in by failing to warn himself that the consequences of his judgment is likely to cause the eviction of the appellant from their matrimonial property.

Proceedings before the subordinate court

4. In order to contextualise the basis of the present appeal, it is necessary to briefly set out the facts of the case before the subordinate Court.
5. The Appellants commenced his suit at the trial court by way of a plaint dated 09/09/2019 seeking for;
 - a. A permanent injunction restraining the defendant's, their agents, servants, representatives and/or assigns from trespassing, encroaching, interfering, hiving off, issuing illegal notice to vacate thereon, eviction and or demolition in any way and not to interfere with the plaintiffs quiet enjoyment and peaceful occupation and enjoyment of suit parcel of land known as E.Bukusu/S.kanduyi/2373 (approximately 5.0ha) within Bungoma county and the order of this court be enforced with assistance of OCS Bungoma Police Station and Deputy County Commissioner Bungoma County.
 - b. A revocation, cancellation or annulment of title of land parcel known as E.Bukusu/S.kanduyi/9762(approximately 1.1 ha) within Bungoma County which was hived off from the suit parcel of land known as E.Bukusu/S.kanduyi/2373 (approximately 5.0 ha) within Bungoma County.
 - c. A declaration that the encroachment thereto, hiving off part of the land, any sale, and issuing illegal notice to vacate, fencing thereon is illegal and unlawful and void that the plaintiff is hereby declared the rightful, legal occupant allottee, registered and or beneficial owner of suit parcel of land known as E.Bukusu/S.kanduyi/2373 (approximately 5.0 ha) within Bungoma County and the order of this court be enforced with assistance of OCS Bungoma Police Station and Deputy County Commissioner Bungoma County respectively.
 - d. The defendant's be barred from the suit parcel of land known as E.Bukusu/S.kanduyi/2373 (approximately 5.0 ha) within Bungoma County and the order of this court be enforced with assistance of OCS Bungoma Police Station and Deputy County Commissioner Bungoma County respectively.
 - e. Costs and interest of this suit.
6. The 1st Respondent filed a statement of defence dated 22/11/2019 where he denied the Appellants' claim. He stated that he acquired land parcel no. E.Bukusu/S.kanduyi/9762 after due process and that his prayer was to have the Appellant sign off the transfer of 3.5 ha from land parcel no. E.Bukusu/S.kanduyi/2373 which they illegally obtained. That the Appellants fraudulently were misguiding the land Registrar to register 5.0ha in their names while they are entitled to 9.0acres.



7. The 2nd Responded filed a witness statement dated 07/08/2020 denying the Appellants' claim.
8. In support of their claim, the Appellants called 2 witnesses while the 1st Respondent testified as a sole witness.
9. PW1 Margaret Wanjiru Onyimbo Was referred her witness statement dated 30/03/2022 which She adopted as her testimony-in-chief. She was also referred to a title deed which She produced as D-Exhibit NO 1. She testified that she doesn't know when the suit land was bought as She found her husband owning it when they got married. She produced Letters of administration as P-Exhibit NO 2. In cross-examination, she testified that her husband has been on the suit land before 1983 having bought it from one Pius Wamalwa, the 1st Respondents' father. She testified that the land Registrar has issued a title encroaching onto her land. In re-examination, it was her evidence that the title deed is in her husband's name. She stated that her claim is over land parcel no. E. Bukusu/S.kanduyi/2373 and that land parcel No. E. Bukusu/S.kanduyi/9767 had encroached into her land.
10. PW2 Chrispinus Simiyu Barasa testified that he was the chief of Musikoma area. He referred to his witness statement dated 13/12/2022 which he adopted in his testimony-in-chief. It was his evidence that the suit land was bought from the late Pius Wamalwa, the 1st Respondents' father. In cross-examination, he testified that he was not aware of when the suit land was bought and the acreage he bought. He stated that his office was not approached to resolve any dispute regarding the land
11. Collins Simiyu(DW1) Was referred his witness statement dated 22/11/2019 which he adopted as his testimony-in-chief. He testified that his father died in the year 1995 and he filed a succession cause and was issued with letters of administration. He produced a Kenya gazette Notice as D-Exhibit No 2, and a title deed as D-Exhibit No 3. He testified that land parcel no. E. Bukusu/S.kanduyi/9767 is a sub-division of the original title. He produced a map as D-Exhibit No 5 and a mutation form as D-Exhibit No 6. On cross-examination, he testified that he engaged a surveyor to show him his portion of land.

Submissions on the appeal.

12. When this appeal came for directions, the parties agreed to have the same canvassed by way of written submissions. The Appellant filed her submissions dated 03/06/2024 while the Respondent did not file submissions within the timelines given.
13. In their submissions, the Appellants reiterated their testimony-in-chief and written submissions. They cited on the case of *Gitwany Investment LTD vs. Tajmal LTD & 3 Others (2006) KLR* and the provisions of Section 26(1) of the Land Registered Act and Article 40 of *the Constitution*.

Legal Analysis And Determination .

14. I have read the Memorandum of Appeal, the Record of Appeal, written submissions filed by the parties and the court record generally. The seventeen (17) grounds of appeal in the Memorandum of Appeal revolve around two issues for determination namely;
 - a. Whether or not the evidence adduced was sufficient to sustain or support the appellants case.
 - b. Whether or not the trial court erred in allowing the respondents suit
 - c. What order to make on costs
15. This being a first appeal, this court shall be guided by the established principles of handling a first appeal. The court is under a duty to reconsider the evidence adduced and re-evaluate it so as to arrive at its own independent conclusions and thus determine whether the conclusions reached by the trial



court are consistent with the evidence adduced and the applicable law. See case of Peter M. Kariuki vs Attorney General [2014] eKLR.

16. 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.”

17. Guided by the above stated principles, I now proceed to determine the issues on the basis of the evidence adduced and the applicable law.

Whether or not the evidence adduced was sufficient to sustain or support the appellants case.

18. The Appellant instituted the current suit where She averred that the 1st Respondent has been issued with a title whose acreage overlaps/encroaches into her land. She contends that the 1st Respondent has hived off approximately 1.1 ha of her land i.e land parcel no. E.Bukusu/S.kanduyi/2373 and obtained a title for the said portion land parcel no. E.Bukusu/S.kanduyi/9762.

19. From the record, it is clear that the Appellants’ claim flows from the estate of one Jactone O’Andera Onyimbo -deceased who is said to have purchased land from the 1st Respondents’ father namely Pius Wamalwa. The Appellant claims that her late husband settled in the suit land long before the year 1983 when she got married to him and where he established his home and cultivated for a long period of time and was eventually buried. The 1st Respondent on his part alleged that Jactone O’Andera Onyimbo -deceased illegally got 3.5 acres registered in his name while his rightful share was meant to be 9 acres.

20. During the hearing, Parties testified and produced various documents in support of their respective cases. The Appellant’s claim for 5.0ha is based on her title deed which is now being contested by the 1st Respondent who contends that the Appellant was allocated more acreage than she was entitled. Section 24 of the *Land Registration Act* No 3 of 2012 states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act.

21. Section 26 of the *Land Registration Act*, 2012 provides;

- (1) 1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or



(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

22. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In the present case, the title produced by the Appellants shows that the suit land is registered in the name of Jacktone O’Andera Onyimbo for an approximate area of 5.0ha. The said land is a sub-division of Land parcel NO. E.Bukusu/S.kanduyi/1204. However, the same Appellants have presented before the court a mutation form dated 02/07/1994. On examination of the said document, it is indicated that Pius Wamalwa-deceased and Kandawala Wangunda Wefwefwa caused the sub-division of land parcel No. E.Bukusu/S.kanduyi/1204 which measured 12.33ha into two portions forming land parcel No. E.Bukusu/S.kanduyi/2372 measuring 8.33ha while land parcel No. E.Bukusu/S.kanduyi/2373 measured 4.0ha.
23. From the document, it is evident that the intended size of land parcel no. E.Bukusu/S.kanduyi/2373 was 4.0 hectares, equivalent to approximately 10 acres. However, despite presenting conflicting documents, the Appellants failed to provide an explanation to reconcile the inconsistency. Where a parcel of land is subdivided, a mutation form is usually prepared as evidence of the subdivision and it is such mutation upon registration that is used to process the resultant titles. The Registry Index Map and mutation forms are crucial documents in determining the accurate surface area during land subdivision cases.
24. Further, despite the Respondent’s contradicting assertions of the Appellants’ acreage of the claimed land, the Appellants did not engage a surveyor to prepare a report that would have helped guide the court in proving that indeed the 1st Respondent’s land i.e E.Bukusu /S.kanduyi/ 9762 overlaps into her claimed parcel of land i.e E.Bukusu/S.kanduyi/2373 and what the position on the ground is viz-a-viz the Registry Index Map. In my view, this would have aided the Appellants’ case and perhaps would have demonstrated the alleged encroachment. As it stands, the Appellants’ assertion are mere averments unsupported by documentary evidence. This court’s attention is also drawn to the fact that this is more of a boundary dispute which could have easily been determined by a land Registrar under Section 18 and 19 of the [Land Registration Act](#).
25. From the foregoing, it is important to note that the standard of proof in civil cases is on a balance of probability and burden of proof is usually on the party alleging the existence of a fact which he wants the Court to believe.

Section 107 (1) and (2) of the [Evidence Act](#) provides as follows: -

107(1) “whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

(2) “When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

26. In *Miller.v. Minister Of Pensions* 1947 All E.r 372, Lord Denning puts this standard in the following terms: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way



or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

27. In *James Muniu Mucheru.v. National Bank Of Kenya Ltd C.a Civil Appeal No 365 OF 2017 [2019 eKLR]*, the Court stated as follows: -

“Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable.”

28. In respect of the case before the trial Magistrate, it was the Appellant who bore the evidential burden to lead evidence against the Respondents. On the other hand, once the Appellant discharged the burden of proof under the law, the Respondent was under a duty to rebut or controvert the evidence tendered by the Appellant.

29. From the above analysis of the evidence presented, it is my considered view that the burden of proof never shifted from the Appellants to the Respondents. Further, the issue as to whether or not the 1st Respondent obtained letters of administration of Paul Wamalwa is neither here nor there because it is not in that capacity that he was sued.

30. Arising from the above analysis, I find that the Appellants did not discharge their burden of proof on a balance of probabilities.

Whether or not the trial court erred in allowing the respondents suit

31. Having carefully evaluated and analysed the evidence adduced before the subordinate Court, I find no fault in the final determination by the Learned Trial Magistrate on the decision that he reached and therefore disallow this appeal.

What order to make on costs

32. It is generally agreed that award of costs is at the discretion of the Court and that under Section 27 of the *Civil Procedure Act* costs generally follow the event.

33. In the end, this appeal is not merited and the same is hereby dismissed with Costs.

34. Orders accordingly.

DATED SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF DECEMBER, 2024.

HON.E.C CHERONO

ELC JUDGE

In the presence of

M/S S. Nyang for the Appellant.

1st Respondent-present.

Bett C/A

