



**Agenga v Alango (Environment and Land Appeal E008 of 2023)
[2024] KEELC 13791 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E008 OF 2023
GMA ONGONDO, J
DECEMBER 10, 2024**

BETWEEN

FRANCISCA AKINYI AGENGA APPELLANT

AND

PHOEBY WARIA ALANGO RESPONDENT

(Appeal from the Judgment /Decree of Hon. B. Omwansa, SPM dated 18th January, 2023, in the original Oyugis Elc 70 Of 2018 (Formerly kisii elc no. 125 of 2014, Kisumu Hcc No 193 Of 2014 & Migori Elc No. 497 Of 2017)

JUDGMENT

1. This appeal radiates from the trial court’s judgment rendered on 18th January 2023 where the learned trial Magistrate entered judgment against the respondent who was the defendant in favour of the plaintiff who is the appellant herein as follows:
 - a. A declaration that the plaintiff is the lawful owner of land parcel Numbers Central Kasipu/ Kamuma/5076 and Central Kasipul/Kamuma/5814. (The 1st and 2nd suit parcels of land respectively)
 - b. A declaration that the defendant holds the 1st and 2nd suit parcels of land in trust of the plaintiff.
 - c. A permanent injunction is hereby issued against the defendant restraining the defendant by herself, her agents, employees or any other person purporting to derive title from her, from interfering with the plaintiff’s peaceful occupation, possession and use of the 1st and 2nd suit parcels of land.
 - d. An order is hereby issued for the rectification of the Registers in respect of the titles of the 1st and 2nd suit parcels of land be registered unto the plaintiff’s name



- e. Each party bear own costs.
2. The appellant was aggrieved at the judgment hence, on 13th February 2023 lodged this appeal by way of the memorandum of appeal premised upon six grounds which include;
 - a. The Learned Trial Magistrate erred in law and fact in failing to award Kshs 1,900,000 being the value of destroyed residential house, fish ponds and fence when the evidence proving the same to be standard required in law was uncontroverted and unchallenged.
 - b. The Learned Trial Magistrate erred in law and fact in failing to award Kshs 1,900,000 being the value of destroyed residential house, fish ponds and fence having made a finding that the Appellant is the lawful owner of the 1st and 2nd suit parcels of land and that the Respondent held the said titles of land in trust for the Appellant and ordered for the rectification of the Register in respect thereto to be registered unto the Appellant's name.
 - c. The Trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and authorities in support thereof.
 3. Therefore, the appellant has sought the orders as follows;
 - a. That the appeal be allowed and judgment in plaint in Oyugis Elc 70 of 218 be set aside in part.
 - b. That the Honourable Court to award Kshs 1,900,000 being the value of destroyed residential house, fish ponds and fence.
 - c. Costs of the appeal be awarded.
 4. The respondent through M/S Ashioya and Company Advocates who came on record in place of Neto Otieno and Company Advocates, filed a cross appeal out of time further to this court's ruling delivered on 13th February 2024 in regard to the notice of motion dated 1st November 2023. The cross appeal as captured in the memorandum of appeal dated 13th February 2024, is based upon the grounds infra;
 - a. That the learned trial magistrate erred in law and in fact in making a finding that the cross appellant had rights in the 1st and 2nd suit parcels of land when such rights had not been established nor proved at all.
 - b. That the learned trial magistrate erred in law and in fact in failing to make a finding that the cross-appellant's rights to the 1st and 2nd suit parcels of land were indefeasible both being first registration and therefore the ultimate finding of the court was in error and a travesty of justice.
 - c. That the trial court was in error in cancelling title deeds belonging to the cross appellant when there was no evidence to support that decision.
 5. So, the respondent/cross appellant has sought the orders thus;
 - a. That the judgment of the lower court and the order cancelling the title deed were done in error and that such be set aside.
 - b. That the respondent's appeal be dismissed with costs.
 - c. That judgment be entered in favour of the cross appellant.
 - d. Costs of this appeal and the cross appeal to be awarded to the cross appellant.
 6. Hearing of the appeal and cross appeal was by written submissions further to the directions given on 28th May 2024.



7. The appellant's counsel filed submissions dated 12th October 2023. Counsel referred to the parties' respective pleadings, the impugned judgment and identified twinned issue for determination namely proof of the claim of Kshs. 1,900,000/- being value of the property to the requisite standards and costs as sought in the further re-amended plaint dated 4th September 2019. In examination of the issues in favour of the appellant, counsel relied on the testimonies of witnesses including the appellant (PW1) and PW2, Kennedy Anthony Osoi who produced the valuation report (PExhibit 4) in evidence, the case of Richard Okumu Oloo-vs-South Nyanza Sugar Company Ltd (2013) eKLR, the evidence of the respondent (DW1) regarding removal of things or development and the meaning of the term 'Removal' in Black's Law Dictionary 9th Edition at page 1409, among others.
8. Further, counsel filed submissions dated 3rd July 2024 and delineated two issues; whether the appeal is tenable and the orders to issue herein. In discussing the issues, counsel submitted that the appellant proved her claim on the destroyed properties as disclosed in PExhibit 4, termed the trial court's judgment sound and implored the court to allow the appeal with costs herein and the court below.
9. By the submissions dated 22nd October 2024, learned counsel for the respondent stated that the appellant a busy body, a stranger and lacks privity of contract to transactions in relation to the 1st and 2nd suit parcels of land thus, urged the court to dismiss the appeal and allow the cross appeal with costs. Counsel gave the history of this matter inclusive of the purchase of the original land, the suit before the trial court and the respondent is entitled to the 1st and 2nd suit parcels of land. That the appellant failed to pay full purchase price and the court would be reluctant to order specific performance herein and relied on the case of Twalib Kassayan and another-vs-KECA 2015 /713 to fortify the submissions.
10. At the trial court, the appellant alleged that the respondent breached trust and got registered herself as proprietor of the 1st and 2nd suit parcels of land which the appellant and her ex-husband bought in the year 2005. That the respondent took advantage of the appellant's absence from Kenya and destroyed the plaintiff's residential fully furnished house and fish ponds on the said suit parcels of land hence, occasioning loss and damage to the appellant.
11. Therefore, in the further re-amended plaint, the appellant sought the following orders;
 - a. A declaration that the Plaintiff is the lawful owner of the 1st and 2nd suit parcels of land and is entitled thereto be by law and the defendant to transfer the same to the names of the plaintiff.
 - a.(i) A declaration that the Defendant holds the 1st and 2nd suit parcels of land in trust for the Plaintiff
 - b. A permanent injunction restraining the defendant by herself, agents, employees or any other person purporting to derive title from her, from interfering with plaintiff's peaceful occupation, possession and use of the 1st and 2nd suit parcels of land.
 - c. An order directing the Plaintiff to execute all documents to transfer all the suit properties that the plaintiff purchased through the defendant to the name of the plaintiff herein and in default, the Executive Officer of this Honourable Court do execute the same.
 - c (i) In the alternative, an order for rectification of the Registers in respect of the 1st and 2nd suit parcels of land by directing that the registration of the defendant be cancelled and the 1st and 2nd suit parcels of land be registered unto the Plaintiff's name.
 - d. An order directing the defendant to pay the Plaintiff the total sum of Kshs 1,900,000/- being the value of the destroyed residential house, fish ponds and fence.



- e. In the alternative and without prejudice to the foregoing prays for an order that the defendant be directed to pay to the Plaintiff the total value of the suit properties being Kshs 3,700,000/- which includes the value of the destroyed residential house, fish ponds and fence.
 - f. An order for payment of mesne profit.
 - g. Interest thereon at court rates.
12. By the statement of defence dated 19th September 2019, the respondent denied the appellant's claim and sought documentary proof of the same. In the alternative, she stated in part that;
 - a. Paragraph 15(f) to (k) of the further re-amended plaint is denied and the defendant avers that the orders sought by the plaintiff are not merited she is the bona fide and registered owner of suit properties.
 - b. The 1st defendant reiterates that at no given time whatsoever had title in the parcels of land the subject matter herein passed from herself to the plaintiff and her ex-husband and the plaintiff is put to strict proof to the contrary.
 13. This being first appeal, the role of the court is to re-appraise the evidence and draw inferences before arriving at my own impartial conclusion always bearing in mind that, unlike the trial court, I did not see and hear witnesses testify and due allowance must be made for that; see *Selle-vs-Associated Motor Boat Company* (1968) 123.
 14. It was the testimony of PW1 that she trusted the appellant and paid the purchase price in respect of the 1st and 2nd suit parcels of land directly to the respondent's bank account. That the said parcels of land are registered in the name of the respondent who was their agent and has not transferred the said parcels of land to her. PW1 relied on, inter alia, bank receipts (P Exhibit 2) and valuation report (PExhibit 4) in support of her case.
 15. In his evidence, PW2, a valuer, relied on P Exhibit 4 being valuation report signed by Joel Nyamweya, Director of Hamason Valuers Ltd. He stated that PExhibit 4 contains photographs of the 1st and 2nd suit parcels of land. During cross examination, he stated that he had nothing to show that he worked with Amazon Valuers. That there were people living in old iron sheet structures and the new bonds had about 100 fish, among other things, as shown in P Exhibit 4.
 16. PW3, Salome Ongoro Oboyo stated that Wilson Ongoro was her husband who passed on in December 2019. That she witnessed her deceased husband sell the property in the instant dispute to both the appellant and her ex-husband who used to pay purchase price thereof through the respondent. That the property sold was to be transferred to the appellant and that the respondent destroyed the house of the appellant thereon.
 17. PW4, Samson Otieno Peter, a clan elder, testified that he witnessed the appellant and her ex-husband purchase the 1st and 2nd suit parcels of land. That the sellers paid the purchase price regarding the same by instalments through the respondent.
 18. Pw5, Crispine Benard Owuor stated, inter alia, that he had knowledge of the transaction involving the appellant and her ex-husband herein. That the respondent was an agent of the said purchasers who were abroad at the time of the transaction.
 19. DW1 did affirm that the appellant's ex-husband purchased the property in dispute from Wilson Ongoro and deposited Ksh 100,000 only and failed to pay the remainder due to quarrel between him



- and the appellant. That the appellant's ex-husband did start to refund the money but stopped the exercise because of the existence of this case.
20. In that regard, it is my considered view that the following issues fall for determination are whether;
- a. The appellant proved her claim of Kshs 1,900,000/= being the value of the destroyed residential house, fish bonds and fence to the requisite standards.
 - b. The learned trial magistrate failed to consider the appellant's submissions and authorities in the impugned judgment.
 - c. The trial court's finding was erroneous hence, the cross appeal is tenable.
21. In examination in chief, PW1 referred to the payment of the purchase price by the appellant and her ex-husband and stated;
- ‘.....they started paying but they stopped paying and I picked it up from there....Wilson and Caroline transferred the land to me officially.....I am willing to refund the money which I had received....’
22. It is also observed that during cross examination, DW1 stated that;
- ‘.....At the time I received the money George and Franciscah were still couple.....I received the money from the couple including 103050/-.....The transaction were converted to myself and Caroline and Wilson Ongoro.....I have both the land and the money....’
23. The learned trial magistrate opined that the appellant;
- ‘demonstrated that money was sent to the defendaans from 2005 to 2011; purposed to purchase parcels of land. A further demonstration that such parcels of land were purchased, through the sale of land agreements.....’
24. Also, the trial court noted that the respondent's answer to the question as regards her receipt of the money from the appellant, was in the positive. That the appellant did not adduce sufficient evidence in support of the alleged demolition of her structure as alleged in the suit.
25. The appellant claims the valued of her that the respondent destroyed property. The claim is a form of trespass and the measure of damages thereof is the difference in the value of the plaintiff's property immediately after the tort or costs of restoration whichever is less; Philip Aluchio-vs-Crispus Ngayo (2014) eKLR.
26. Similarly, it is the state of the property before and after the alleged demolition; see also Nakuru Industries Ltd-vs-S. S Mehta & Sons (2016) eKLR.
27. PW1 stated that the two fish bonds were still functional containing about 100 grown up fish. Under cross examination, she was emphatic as follows;
- ‘.....we did fence the fish bonds. I have not produced any receipt of Kshs 300,000/= for fencing the fish bond neither have I produced any receipt of Kshs. 800, 000/=
28. The judgment discloses that during the visit to the 1st and 2nd suit parcels of land, the court noted a permanent temporary structure on them. That there was fish bond constructed on thereon.



29. The alleged destroyed house is mentioned in the further re-amended plaint and evidence. However, the house is not captured in P Exhibit 4.
30. Additionally, prayers (d) and (e) for value of destroyed house, fence and fish bonds at the foot of the further re-amended plaint relate to a claim in form of special damages which must not distinctly pleaded and proved; see Nakuru Industries case (supra) and Great Lakes Transport Company Limited-vs-Kenya Revenue Authority (2009) KLR 720. However, the same was neither specifically pleaded nor proved in the suit.
31. The appellant laments that the trial court did not consider her submissions and authorities in the impugned judgment. Suffice it to state that in Daniel Toroitich Arap Moi-vs- Mwangi Stephen Muriithi (2014) eKLR, the Court of Appeal held;
- ‘.....submissions cannot take the place of evidence. The 1st respondent has failed to prove his claim by evidence What appeared in the submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ ‘marketing language’ each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.....’
32. The cross appellant cited Article 40 (supra) on the protection of right to property. It stipulates in part;
- Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property---’
33. Besides, Article 40 (6) reads;
- The right under this Article do not extend to any property that has been found to have been unlawfully acquired.
34. The cross-appellant’s complaint is that the learned trial magistrate was erroneously in his finding including that that the cross appellant was a trustee of the appellant in purchasing the 1st and 2nd suit parcels of land. It is established law that trust is a question of fact to be proved by way of evidence; see Wambugu-vs-Kimani 1992) 2 KAR 58.
35. The issue of trust and breach thereof is not disputed as revealed in the testimonies of PW1, PW4 and DW1. Further, the same position is contained in the impugned judgment.
36. As stated in paragraphs 21, 22, 23 and 24 hereinabove, the cross appellant received money being purchase price from the appellant and unlawfully acquired the 1st and 2nd suit parcels of land as provided for under Article 40 (6). So, the trial court had the mandate to invoke sections 26 and 80 of the Land Registration Act 2016 (2012) as sought in the further re-amended plaint.
37. Moreover, in Munyu Maina-vs.....Hiram Gathiha Maina (2013) eKLR, the Court of Appeal remarked;
- ‘...When a registered proprietor’s root of title is under challenge.....the registered proprietor must.....prove the legality of how he acquired the title and show that the acquisition was lawful, formal and free from any encumbrances.....’
38. In the premises, I am of the considered view that the learned trial magistrate was guided by the evidence on record and applied the correct principles of law in reaching the impugned judgment. I find no reason to disturb that informed decision and the same is endorsed accordingly.



39. A fortiori, the appeal and the cross appeal are devoid of merit. Both are dismissed and each party to bear own costs.

40. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 10TH DAY OF DECEMBER 2024.

G.M.A ONG'ONDO

JUDGE

Present

Mr J Bunde learned counsel for the appellant

Mr Ashioya learned counsel for the respondent

Mr Peter Adongo, court assistant

