



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Omolo v Okech (Environment and Land Appeal 40 of 2021)
[2023] KEELC 349 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 40 OF 2021
GMA ONGONDO, J
JANUARY 31, 2023
FORMERLY MIGORI ELC APPEAL NO. E007 OF 2020**

BETWEEN

SAMWEL AKOKO OMOLO APPELLANT

AND

JOSEPH OGOLA OKECH RESPONDENT

*(Being an appeal from the judgment of Hon. J. S. Wesonga, Principal
Magistrate, delivered on 9th October 2020 and decree issued thereto in Homa
Bay Chief Magistrate's Court Environment and Land Case No. 4 of 2019)*

JUDGMENT

1. At the outset, it is noted that the subject matter of the present appeal is land reference number Kanyada/Kanyango/Kalanya/28xx measuring approximately zero decimal one one Hectares (0.11 Ha) in area (the suit land herein). It is captured in Registry Map Sheet Number 5 and located within Homa Bay County.
2. The appellant is represented by the firm of H.O Mimba and Company Advocates.
3. The respondent is represented by the firm of Robert Ochieng and Company Advocates.
4. The genesis of this matter is that by a Plaint dated 25th February 2019, the plaintiff/appellant sued the defendant/respondent for;
 - a. A declaration that the plaintiff is the sole registered proprietor of the suit land.
 - b. A permanent order of injunction restraining the defendant, agent, employee and/or servant from interfering with the suit land.
 - c. Eviction order



- d. Costs of the suit
5. PW1, Samwel Akoko Omollo (the appellant herein), testified that he is the registered proprietor of the suit land, having inherited the same from his late father, one Johannes Oloo (deceased) in 1982 during the land adjudication process. He produced in evidence a search certificate, a copy of the title deed, a demand notice and the reply to the demand notice (PExhibits 1 to 4 respectively).
6. In the statement of defence and counterclaim dated 29th April 2019, the defendant who is the respondent herein, denied the claim. The defendant stated in the counterclaim that the suit land originally belonged to his grandmother, Masliana Okendo (deceased 1) who passed it on to her son, Nyambok Ayewa (deceased 2), the defendant's uncle. That the said uncle and the defendant's father both decided that the defendant ought to build his home on the suit land and he did so in the year 1995. He further stated that the plaintiff illegally registered the suit land in his name during adjudication without the knowledge of the rightful owners. Thus, he sought the following orders;
- a. A declaration that the plaintiff/defendant to the counterclaim holds the suit land in trust for the defendant/counterclaimant and therefore an order of rectification to the Homa Bay County Lands Registrar do issue so that Joseph Paul Ogola be registered as the sole owner of the same.
 - b. General damages for fraud and fraudulent misrepresentation
 - c. Special damages of Kshs. 11,500/-
 - d. Cost of the suit together with interest at 14% p.a from the date of filing suit until payment in full.
 - e. Interest on (a) and (b) at the rate of 12%p.a from the date of judgment until payment in full.
 - f. Such further or other alternative relief as the honourable court deems fit to grant.
7. In his testimony, the respondent, Joseph Ogolla Oketch (DW1) relied on his statement and a copy of chief's letter dated 23rd April 2019, a search certificate, a receipt in proof of payment of search, valuation report dated 23rd April 2019, death certificate of Nyambok Ayewa and a map of the suit land (DExhibits 1 to 6 respectively).
8. DW2, Alfred Odero, adopted his statement filed on 16th September 2019 as part of his evidence. He stated that the suit land belonged to one Nyambok Ayewa (deceased) and that the defendant established his home thereon in 1996. That the plaintiff has never had a home on the suit land.
9. Norbert Otiego Alego, DW3, also adopted his statement dated 29th April 2019 in his testimony. He reiterated the averments of DW2, adding that the suit land originally belonged to the defendant's grandmother, deceased 1 who passed it on to her son, deceased 2.
10. Notably, the plaintiff did not deny the averments in the counterclaim.
11. The trial court's judgment rendered on 9th October 2020 was to the effect that the defendant's/counterclaimant's claim succeeds. The honourable trial court issued the following orders:
- a. An order of rectification to the Homa Bay County Lands Registrar do issue so that Joseph Ogolla Oketch be registered as the sole owner of the suit land.
 - b. Special damages of Kshs. 500/-
 - c. Costs of the suit



12. The said findings precipitated this appeal mounted by way of Memorandum of appeal dated 30th October 2020 and duly filed on 6th November 2020. The Appeal is anchored on grounds 1 to 18 as set out on the face thereof and the same include:
 - a. The learned trial magistrate erred in law by delivering a judgment that was bias (*sic*) on the face of records and based on sympathy for the respondent but not justice at the expense of the appellant.
 - b. The learned trial magistrate erred in law by entering judgment in favour of the respondent merely due to the fact that there was no reply to the counterclaim.
 - c. The learned trial magistrate erred in law by delivering judgment that cancelled and revoked the appellant's title and even rectification of the register without proof of the alleged fraud and/or misrepresentation hence without justifiable cause.
13. So, the appellant prayed that the honourable court do quash the decision of the trial magistrate and issue the following orders;
 - a. A declaration that the appellant is the sole registered proprietor of the suit land.
 - b. A permanent order of injunction restraining the defendant, agent, employee and/or servant from interfering with the suit land herein.
 - c. Eviction order
 - d. Costs of the appeal to be provided.
14. The appeal was transferred to this court for hearing and determination from Migori Environment and Land Court on 25th October 2021.
15. The appeal was heard by way of written submissions further to this court's directions of 5th October 2022.
16. Learned counsel for the appellant filed submissions dated 30th October 2022 on 31st October 2022. Counsel submitted that the parcel of land being claimed by the respondent is Kanyada/Kanyango/Kalanya 28xx, which is adjacent to the suit land. That the respondent's allegations of fraud in the counterclaim were not proven. Therefore, counsel urged the honourable court to quash the trial court's decision and enter judgment in favour of the appellant.
17. Learned counsel for the respondent filed submissions dated 9th November 2022 on 14th November 2022. Briefly, counsel submitted that the appellant has introduced new documents without leave of court, to wit, a copy of search certificate and green card for land parcel no. Kanyada/ Kanyango/ Kalanya/28xx as well as a copy of death certificate, which documents did not form part of the exhibits at the trial court. That the said parcel of land is not even the subject of litigation. Counsel stated that the appellant omitted to file a defense to the counterclaim. Further, that the respondent proved his claim during trial. Thus, he urged the court to dismiss the appeal with costs to the respondent. Counsel relied on the case of *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR among other authoritative pronouncements, to fortify his submissions.
18. It is noteworthy that this court is obliged to review the record of the trial court, evaluate it and arrive at its own conclusions herein as this appeal is the first one from the trial court in the matter; see *Mwanasokoni v Kenya Bus Services Ltd* (1982-88) 1KAR 278 applied in the case of *Titus Ong'ang'a Nyachio-vs-Martin Okioma Nyauma and 3 others* (2017) eKLR.



19. In the foregone, the issues for determination are as set out in the grounds of appeal which boil down to whether the appellant:
- a. Has demonstrated that this appeal is tenable and
 - b. Is entitled to the orders sought in the memorandum of appeal.
20. Section 24 (a) of the [Land Registration Act, 2012 \(2016\)](#) provides thus:
Subject to this Act—
- (a) 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
21. Section 26 (1) of the same Act provides as below:
- (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. (Emphasis added)
22. The appellant produced at the trial court a certificate of title (PExhibit 2), indicating that he is the proprietor of the suit land. He stated that his father gave him the suit land. The trial magistrate at page 4 of the judgment noted that although the appellant claimed to have been registered as proprietor of the suit land in 1982, the evidence on record showed that the appellant was registered as a proprietor of the suit land on 15th December 2003. That he was issued with the certificate of title deed on 7th April 2009.
23. On the other hand, the respondent stated in the counterclaim that the suit land originally belonged to his deceased 1 who passed it on to her son, deceased 2, the defendant’s uncle who gave it to him. That he built his home thereon in the year 1995. He challenged the proprietorship of the suit land by the appellant, stating that the appellant illegally registered the suit land in his name during adjudication without the knowledge of the rightful owners.
24. It is borne in mind that the appellant did not file a defence to the counterclaim in the matter.
25. The learned trial magistrate cited the case of *Munyu Maina (supra)* where the Court of Appeal held that:
- “We have stated that when a registered proprietor of title is challenged, it is not sufficient to dangle the instrument of instrument as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (Emphasis added)
26. Thus, the learned trial magistrate found the appellant does not hold a good title to the suit land as the history of the title could not be traced.



27. The appellant contends that his title to the suit land was cancelled without proof of the alleged fraud and/or misrepresentation. The trial court held that the appellant having failed to file a response to defend his title to the suit land, his actions in acquiring title thereto were fraudulent. Therefore, he did not obtain a good title. Reliance was placed on Order 2 Rule 1, 2 and 3 of the Civil Procedure Rules, 2010.
28. The appellant further contends that the trial magistrate awarded special damages without proof of the same. I, however, note from the judgment that although the respondent sought an award of Kshs. 11,500/- as special damages, the learned trial magistrate awarded special damages of Kshs. 500-, being the amount that was proved as held in *Ratcliffe v Evans* (1892) 2QB 524, CA and *Great Lakes Transport Co. (V) Ltd. v Kenya Revenue Authority* (2009) KLR 720, among other authorities.
29. Section 80 (1) of the Land Registration Act (*supra*) empowers courts to rectify the Register. The section stipulates as follows:
- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
30. On that account, I subscribe to the decision of Madan JA (as he then was) in the case of *CMC Aviation Ltd. v Kenya Airways Ltd. (Cruisair Ltd)* (1978) eKLR regarding proof in civil cases. So, did the respondent establish to the requisite standards his case before the trial court?
31. I have taken into consideration the entire evidence on record in this appeal, the facts of the case alongside the legal principles stated above. Evidently, the respondent who was the counterclaimant before the trial court proved that the suit land was family land and that the appellant procured registration of the same in his name unprocedurally. Thus, he proved his claim to the requisite standard as noted in *CMC Aviation Ltd. Case (supra)*. Therefore, the grounds of appeal are untenable.
32. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is sound at law. I hereby uphold the same.
33. Wherefore, the instant appeal mounted by way of a memorandum of appeal dated 30th October 2020 and duly filed on 6th November 2020 is hereby dismissed with costs to the respondent.
34. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 31ST DAY OF JANUARY 2023.

G.M.A ONG'ONDO

JUDGE

Present

H. Mimba, Learned Counsel for the appellant

R. Ochieng, Learned Counsel for the respondent

Okello, Court Assistant

