



**Ogweno v Onyango & another (Environment and Land Appeal
43 of 2021) [2023] KEELC 348 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 43 OF 2021
GMA ONGONDO, J
JANUARY 31, 2023**

BETWEEN

JOHN OGWENO APPELLANT

AND

JACKTON ONYANGO 1ST RESPONDENT

STEPHEN OTIENO 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. T. Olando, Principal Magistrate,
delivered on 17th March 2021 and decree issued thereto in Homa Bay
Chief Magistrate's Court Environment and Land Case No. 84 of 2018)*

JUDGMENT

1. At the heart of the instant appeal is a portion of land reference number Gem/Kowuor/Kotieno/610 measuring approximately 2 acres subsequently subdivided into land reference numbers Gem/Kowuor/ Kotieno/1366, 1367 and 1368 registered in the names of John Ochola, Joseph Ngoche Ochola and James Kenneth Ooko Ochiel respectively (the suit land herein). The same is contained in Registry Map Sheet Number 7 and located within Homa Bay County.
2. The appellant is represented by the firm of Robert Ochieng and Company Advocates.
3. The respondents are represented by the firm of H.O Mimba and Company Advocates.
4. In its judgment delivered on March 17, 2021, the trial court held that the defendant sold part of the suit land measuring 2 acres to each of the plaintiffs and issued the following orders:
 - a. An order compelling the defendants to transfer the purchased portion of the suit land to the plaintiffs measuring 2 acres each, failing which the executive officer Homa Bay Law Courts to do so.



- b. An order of permanent injunction restraining the defendant, his agent and/or employee from evicting the plaintiffs from their respective portions of land or interfering with their land.
5. Aggrieved by the judgment, the appellant initiated this appeal by way of a memorandum of appeal dated March 12, 2021 premised on grounds 1 to 7 which include:
 - i. The learned trial magistrate erred on several matters of fact to wit:
 - a. Holding and/or finding that the authenticity of the alleged sale of land contract was not challenged by the appellant when it clearly was in evidence and submissions.
 - b. Holding and/or finding that the appellant did not deny receiving the alleged purchase price forming the causes of action in trial when the same was denied clearly in evidence and submissions.
 - ii. The learned trial magistrate erred on several matters of law:
 - a. Holding and/or finding that a lease agreement must be in written form
 - b. Admitting a joinder of two plaintiffs in a suit with different alleged sale of land contracts drawn and executed on different dates.
 - c. Holding and/or finding that an alleged contract made contrary to the provisions of section 45(1) of the *Law of Succession Act* is valid.
 - d. Failing to hold and/or make a finding that the suit was incompetent as even if a valid sale existed then the filing of the same was made contrary to the provisions of section 4(1) (a) of the *Limitation of Actions Act*.
 - iii. The learned trial magistrate erred in the law of contract and in the principles regarding capacity to enter a contract and completion of a sale agreement/conveyance.
6. On that account, the appellant has sought that the instant appeal be allowed with costs and that the judgment of the learned trial magistrate be set aside with costs.
7. Initially, the appeal was lodged at Migori Environment and Land Court but it was transferred to this court with effect from October 26, 2021 for hearing and determination. The same was heard by way of written submissions further to the court's orders of July 25, 2022 and extended on October 5, 2022.
8. The appellant's counsel filed submissions dated November 7, 2022 on November 14, 2022. Counsel identified twin issues for determination thus: whether there was a legal, binding and enforceable contract for disposition of land between the respondents jointly or severally and the appellant herein capable of being enforced and who is to pay costs of this appeal and the trial court's costs?
9. Learned counsel relied on section 45 of the *Law of Succession Act*, chapter 160 Laws of Kenya as well as section 82 of the same Act, submitting that without a confirmed grant, a party does not have the capacity to enter into a binding agreement for the sale of immovable property. That therefore, the appellant did not have capacity to dispose of the suit land which was registered in the name of his deceased father, one Ocholla Nyarasi hence, there was no contract worth enforcing between the appellant and the respondents. That the appellant denied ever signing the contracts, which were forgeries. That the respondents did not meet the threshold to be innocent purchasers for value without notice. Thus, counsel submitted that the instant appeal has merit. Also, counsel relied on various



- authorities, including the case of *Re Estate of John Gakunga Njoroge* (2015) eKLR, to buttress his submissions.
10. The respondent's counsel filed submissions dated October 27, 2022 on even date. Learned counsel submitted that the respondents purchased the suit land from the appellant and paid the required purchase price, even educated the appellant's daughter. That the appellant, however, failed to transfer the suit land to the respondents despite the latter being in possession of the same, cultivating and living thereon. Counsel stated that the grounds of appeal lack merit thus, urged the court to dismiss the instant appeal with costs.
 11. In the foregone, the issues for determination are as captured in the grounds of appeal and as compressed to:
 - a. Whether there was a legal, binding and enforceable contract for disposition of the suit land between the respondents jointly or severally and the appellant herein capable of being enforced;
 - b. Is the appellant entitled to the orders sought in the memorandum of appeal?
 12. I have carefully considered the parties' respective pleadings, the trial court's proceedings inclusive of evidence as well as the ruling of the learned trial magistrate. On that score, it is the duty of this court to reconsider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another -vs- Associated Motor Boat Co. Ltd. and others* (1968) EA 123 and *Williamson Diamonds Ltd. -vs- Brown* (1970) EA 1.
 13. Originally, Jackton Onyango Sege and Stephen Otieno, the 1st and 2nd respondents respectively herein mounted a suit by way of an amended plaint dated October 28, 2019 and filed at the trial court on November 4, 2019. The plaintiffs lamented that the defendant had sold to them the suit land on diverse dates but failed to transfer the same. That at the time of the sale, the suit land was registered in the name of one Ochola Nyarasi (deceased) who was the defendant's father.
 14. Thus, the plaintiffs prayed that the trial court enters judgment against the defendant by issuing the following orders:
 - a. An order compelling the defendant to transfer the purchased portions of land measuring 2 acres each failing which the Executive Officer- Homa Bay Law Courts to do so.
 - b. An order for the refund of the purchase price by the defendant to the plaintiffs at the current market price and/or value.
 - c. An order of permanent injunction restraining the defendant, his agent and/or employee from evicting the plaintiffs from their respective portion of land or interfering with their land in any way.
 - d. Cost of the suit
 15. PW1, the 1st plaintiff/1st respondent herein, stated that the defendant/appellant was a brother and friend who sold him the suit land in 2012 at a purchase price of Kshs 90,000/-. That he paid the amount in full and executed a sale agreement. That he thereafter, took possession of the suit land and has lived thereon together with his family for 8 years. That later, the defendant entered into another sale agreement with the 2nd plaintiff for sale of 2 acres of the portion of the suit land at a purchase price of Kshs. 140,000/- PW1 admitted that at the time of sale, the suit land was registered in the name of the deceased, the defendant's father.



16. In his evidence, PW1 relied on a copy of sale agreement between the defendant and the 1st plaintiff, a copy of sale agreement between the defendant and the 2nd plaintiff, a copy of search certificate, a copy of land certificate, a copy of grant form 41, a copy of certificate of confirmation of grant, a copy of death certificate of deceased, copy of letter from P. R. Ojala Advocate dated February 5, 2018, copy of letter from Mimba Advocate dated February 5, 2018, a copy of search certificate showing current subdivision, bundle of searches (PExhibits 1, 3, 4, 5, 6 to 11). Also, he referred to bundle of receipts plus fee structure and letter of admission (PExhibit 12).
17. PW2, Emily Akinyi Sege wife of PW1 adopted her statement and testified that she paid school fees amounting to Kshs.50,000/- for the defendant's daughter. That the fee so paid formed part of the purchase price for the suit land. PW2 relied on fee structure deposit slips and receipts (PExhibits 12 (a) to (c).
18. In his statement of defence to amended plaint dated 15th October 2019 and filed on 28th January 2020, the defendant denied the claim. He prayed for the dismissal of the plaintiffs' suit with costs.
19. DW1, John Ogweni Ogola, the appellant herein, relied upon his statement dated January 28, 2020. He denied entering into written agreements. That he only entered into a verbal lease agreement with the parties but was not paid the full amount as agreed. That the 1st plaintiff only paid him Kshs. 40,000 out of the agreed amount of Kshs. 90,000 while the 2nd plaintiff only paid Kshs. 70,000 even though they had agreed that he would pay him Kshs. 140,000. He, however, admitted that the 1st plaintiff paid school fees for his daughter. That the suit land was later subdivided after succession
20. It is noted that the learned trial magistrate set out the parties' respective cases, framed twin issues for determination, analysed them and arrived at his decision based on reasons. So, the impugned judgment complied with order 21 rule 4 of the Civil Procedure Rules, 2010.
21. In arriving at the impugned judgment, the learned trial magistrate observed at page 3 of the judgment, inter alia;

“...the defendant testified and admitted that he received Kshs.40,000 from the 1st plaintiff but stated that the payment was for lease of land. The defendant did not produce the lease agreement to prove that there was a lease agreement neither did the defendant give an explanation why the plaintiffs moved to settle on the land if it was only leased to them for cultivation and why he did not stop them from settling on the land...”
22. Further, the learned trial magistrate noted thus:

“...The authenticity of the sale agreements was not challenged and the defendant did not deny that he signed the agreements...”
23. Notably, from his viva voce evidence, DW1 (the appellant herein), denied entering into a written agreement with the plaintiffs and stated in part:

“... I have seen the sale agreement but we agreed on lease... I did not enter into a written agreement with the plaintiffs...”
24. It is also noteworthy that that all the parties admitted that when the transactions were carried out, the suit land was still registered in the name of Ocholla Nyarasi (deceased), the father of the appellant herein. That no succession had been done. Therefore, it is common ground that the appellant herein was not the administrator of the estate of the deceased in light of the definition in section 2 of the Civil



Procedure Act, Chapter 21 Laws of Kenya and the decision in *Alfred Njau and others –vs- City Council of Nairobi* (1982-88) 1 KAR 229.

25. Section 45 (1) of the *Law of Succession Act* (supra) provides as follows:

Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

26. Section 79 of the *Law of Succession Act* (supra) reads:

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

27. Section 82 of the same Act stipulates the powers of personal representatives. In particular, section 82 (b) (ii) provides that:

No immovable property shall be sold before confirmation of the grant;

28. In essence, under section 45 (supra), authority to handle the assets of a dead person emanates from grants of representation to the estate of such dead person. Under section 79 (supra) and as noted in *Rajesh Chudasama –vs- Sailesh Chudasama* (2014) eKLR, such property only vests in the person who holds the grant of representation and therefore, the only person who can enter into binding transactions with third parties. Any other person, who does not hold a grant has no authority to deal with the assets of a dead person, and cannot bind the estate or confer any valid title to any third party that they deal with. Any dealings between a non-holder of a grant, and a third party offend the provisions of Section 45 (supra) and amount to intermeddling.

29. It is this court's considered view that the plaintiffs did not lead evidence to demonstrate that the defendant had capacity to enter into a binding agreement for the sale of the suit land.

30. This court is therefore, persuaded by the submissions of appellant's counsel that the appellant did not have capacity to dispose of the suit land which was registered in the name of his deceased father, one Ocholla Nyarasi. Therefore, there was no contract worth enforcing between the appellant and the respondents.

31. The learned trial magistrate stated in his judgment that the defendant neither produced the lease agreement to prove that there was a lease, nor give an explanation as to why the plaintiffs moved to settle on the land if it was only leased to them for cultivation. The trial court also observed that the appellant did not stop the defendants from settling on the land.

32. It is trite law that the legal burden of proof in a case is always static and rests on the claimant throughout the trial. This is provided in section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. The onus was therefore on the plaintiffs to adduce sufficient evidence in support of their claim.

33. With respect to the evidential burden of proof, the Supreme Court of Kenya pronounced itself as follows in the case of *Raila Amolo Odinga & another vs. IEBC & 2 others* (2017) eKLR:

“...Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential



burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced...”

34. It is this court’s considered view that the evidential burden of proof did not shift to the defendant at the trial court, since the plaintiffs did not adduce evidence to the satisfaction of the court that indeed the appellant herein had capacity to enter into the alleged sale agreements.
35. Sections 107 of the *Evidence Act* (supra) is clear that he who asserts or pleads, must support the same by way of evidence.
36. So, did the respondents prove to the requisite standard, their case before the trial court as held in the case of *CMC Aviation Ltd. v Kenya Airways Ltd. (Cruisair) Ltd.* (1978) eKLR?
37. Bearing in mind the entire evidence on record in this matter, and applying the facts of the case as well as legal principles stated above, it is clear that the respondents who were the plaintiffs before the trial court failed to prove their case on a balance of probabilities: see *Eastern Produce (K) Ltd- Chemoni Tea Estate –vs- Bonfas Shoya* (2018) eKLR and *CMC Aviation* case (supra).
38. In the premises, the instant appeal commenced by way of a memorandum of appeal dated March 12, 2021, is hereby allowed and the judgment of the trial court is set aside.
39. The proviso to section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides that costs follow the event, within the discretion of the court.
40. This court therefore orders and directs that the respondents shall bear the costs of this appeal and the costs arising out of the proceedings at the trial court.
41. Orders accordingly.

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

G.M.A ONG’ONDO

JUDGE

Present

H. Mimba, Learned Counsel for the respondent

Bigogo Onderi holding brief for R. Ochieng, Learned Counsel for the appellant

Okello, Court Assistant

