



**Ogut v Ogut (Environment and Land Appeal 356 of 2017)  
[2023] KEELC 259 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 259 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 356 OF 2017  
SO OKONG'O, J  
JANUARY 26, 2023**

**BETWEEN**

**CALEB GUNDE OGUT ..... APPELLANT**

**AND**

**JACOB OLOO OGUT ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Resident Magistrate's  
Court at Tamu, Hon. R.M.Oanda, RM delivered on 17th September 2009)*

**JUDGMENT**

1. This appeal is against the judgment of Hon. R.M.Oanda, RM made on 17<sup>th</sup> September 2009 in Tamu Senior Resident Magistrate's Court Civil Suit No. 27 of 2008 (hereinafter referred to as "the lower court/lower court suit"). The respondent filed a suit against the appellant in the lower court seeking; vacant possession of all that parcel of land known as Plot No. 062-298 Songhor Settlement Scheme (hereinafter referred to as "the suit property"), general damages and costs of the suit.
2. In his plaint filed in the lower court dated 5<sup>th</sup> August 2008, the respondent averred that he was the registered proprietor of the suit property and that in April 2008, the appellant unlawfully entered the suit property and started staying thereon without the consent of the respondent. The respondent averred that as a result of the appellant's acts of trespass aforesaid, the respondent had been denied the use of the suit property and had suffered a loss in respect of which he was claiming general damages from the appellant. The respondent averred that despite demand and notice of intention to sue, the appellant had refused to vacate the suit property leaving him with no alternative but to file the lower court suit.
3. The appellant filed a defence dated 25<sup>th</sup> August 2008 to the respondent's claim in the lower court. In his defence, the appellant denied the respondent's claim in its entirety. The appellant averred that he had stayed on the suit property for a very long time with his mother and was the one who was looking



- after it. The appellant averred that the suit property was owned by four people and that the respondent lacked the locus standi to institute the suit. The respondent filed a reply to defence dated 7<sup>th</sup> July 2009.
4. The lower court suit was heard on 14<sup>th</sup> August 2009 and the judgment was delivered on 17<sup>th</sup> September 2009. The lower court entered judgment for the respondent against the appellant for vacant possession of the suit property and the costs of the suit. In its judgment, the lower court found that the respondent had proved his case against the appellant. The lower court found that the respondent was the absolute proprietor of the suit property and that the appellant had no lawful cause for entering and occupying the suit property.
  5. The lower court found that whereas the respondent had a title deed issued in his favour as the owner of the suit property on 18<sup>th</sup> April 1994, the appellant was staking a claim to the property through a purported Will that was made in his favour by one, Mama Julia Ajwang Ogut on 26<sup>th</sup> September 2007. The lower court held that the purported Will could not override the respondent's title that was issued over 10 years prior to the Will. The lower court found that the respondent was entitled to possession of the suit property.
  6. The appellant was dissatisfied with the said judgment and preferred this appeal. In his memorandum of appeal dated 23<sup>rd</sup> December 2010, the appellant challenged the decision of the lower court on 4 grounds namely;
    - (a) That the lower court erred in law and fact by failing to consider the evidence of the appellant.
    - (b) That the lower court erred in law and fact by failing to give directions for the Land Registrar to come to court and give evidence.
    - (c) That the lower court erred in law and fact by failing to consider the fact that the transfer of the suit property to the respondent from one, Julia Ajwang Ogut was effected without a grant of letters of administration in respect of the estate of the said Julia Ajwang Ogut having been obtained.
    - (d) That the lower court erred in law by failing to consider the fact that a title deed is only a prima facie evidence of ownership of land and that the same is subject to all the entries in the register.
  7. The appeal was heard orally on 17<sup>th</sup> November 2022. In his submissions in support of the appeal, the appellant reiterated the grounds of appeal as set out in his memorandum of appeal and urged the court to allow the appeal. In response, the respondent submitted that the appellant was a trespasser on the suit property that was registered in the name of the respondent. The respondent submitted that the appellant had no right to be on the suit property. The respondent submitted that the issue of the suit property having been bequeathed to the appellant could only be raised in the succession proceedings. The respondent submitted further that the court could not be blamed for not summoning the Land Registrar to attend court to give evidence since the appellant did not make such a request to the court. The respondent submitted that the appellant did not prove that the respondent's title suffered from any illegality.
  8. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind the fact that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, *Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269 and *Selle v Associated Motor Boat Co. Ltd.* [1968] E.A 123 on the duty of the first appellate court.



9. It is settled that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or they were based on 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.
10. I have carefully reviewed the evidence that was tendered before the lower court by the respondent in proof of his case and by the appellant in his defence. I am unable to disturb the findings by the lower court on the issues that were before it for determination. The respondent's case was that he was the registered owner of the suit property and that the appellant had entered the suit property and occupied the same without his permission. The respondent contended that the appellant was a trespasser on the suit property and sought the assistance of the court to have him evicted therefrom.
11. From the evidence on record, I am satisfied that the respondent proved that he was the registered owner of the suit property. The respondent produced in evidence a title deed issued on 18<sup>th</sup> April 1994 in his favour in respect of the suit property. The said titled deed showed that the suit property was registered in the name of the respondent on 18<sup>th</sup> April 1994. The appellant did not challenge this title deed in any material respect. The appellant did not place before the court evidence showing that the respondent was not the registered owner of the suit property or that the respondent acquired the suit property illegally or fraudulently.
12. The respondent having proved that he was the registered owner of the suit property, the burden shifted to the appellant to show that he had lawful cause or reasonable excuse for entering and occupying the suit property. The excuse given by the appellant for his entry and occupation of the suit property was that the same was bequeathed to him by one, Mama Julia Ajwang Ogut (hereinafter referred to only as "Ajwang") in her will dated 26<sup>th</sup> September 2007. The appellant did not place before the court evidence showing that the suit property or any portion thereof was owned by Ajwang. The appellant's claim that Ajwang was given a portion of the suit property by the appellant's father was not supported by evidence. In any event, as of 26<sup>th</sup> September 2007 when Ajwang was purportedly bequeathing the suit property to the appellant by a Will of the same date, the property was not in her name. Ajwang could not bequeath by Will a property that was owned by a third party. Due to the foregoing, the appellant's claim over the suit property based on the alleged Will of Ajwang had no basis and the lower court was right in rejecting the same.
13. The appellant had also contended that the respondent acquired the suit property from Ajwang without first obtaining a grant of letters of administration in respect of her estate. No evidence was placed before the court showing that Ajwang had owned the suit property at any time. Secondly, there was no evidence showing that Ajwang was deceased and if she was, when she died. In any event, the fact that Ajwang allegedly wrote a Will on 26<sup>th</sup> September 2007 means that she was alive as at that date. It follows therefore that even if it is assumed that the suit property was at any time registered in the name of Ajwang, the respondent who acquired the property on 18<sup>th</sup> April 1994 could not have required the grant of letters of administration in respect of Ajwang's estate before having the suit property transferred to his name since Ajwang was alive. I therefore find no merit in the appellant's claim before the lower court that the respondent acquired the suit property before obtaining a grant of letters of administration in respect of the estate of Ajwang.
14. In the final analysis and for the foregoing reasons, I find no merit in the appeal before the court. The appeal fails on all the grounds put forward by the appellant. On the first ground of appeal, I am satisfied that the lower court considered and evaluated all the evidence that was tendered before it including the appellant's evidence. On the second ground of appeal, it was not the duty of the court to call witnesses for the appellant. There is no evidence on record that the appellant had asked the court to summon



the Land Registrar to appear and give evidence on his behalf and the court failed to do so. The lower court could only act at the request of the appellant. In the absence of such a request, the lower court cannot take the blame for the appellant's failure to call relevant witnesses in his defence.

15. On the third ground of appeal, I have already made a finding that the appellant did not adduce any evidence showing that Ajwang had owned the suit property at any time and that she died before the respondent acquired the suit property. In the absence of such evidence, the allegation that the respondent acquired the suit property that was in the name of Ajwang after her death without first obtaining a grant of letters of administration has no basis. On the last ground of appeal, I am in agreement with the appellant that a titled deed is only prima facie evidence of ownership. However, the burden was on the appellant to adduce evidence to rebut the information on the title deed that was produced by the respondent. The appellant did not adduce any evidence showing that the appellant was not registered as the owner of the suit property as stated in the title deed produced by the appellant. In the absence of evidence to the contrary, the lower court was entitled to find on the basis of the said title deed that the respondent was the owner of the suit property.
16. Due to the foregoing, I am in agreement with the lower court that the respondent was the owner of the suit property and that the appellant was a trespasser thereon. An order for the eviction of the appellant from the suit property was therefore properly issued.
17. In conclusion, I find no merit in the appeal before the court. The appeal fails wholly and the same is dismissed with each party bearing its own costs.

**DELIVERED AND DATED AT KISUMU ON THIS 26<sup>TH</sup> DAY OF JANUARY, 2023**

**S. OKONG'O**

**JUDGE**

Judgment read through Microsoft Teams Video Conferencing platform **in the presence of;**

The Appellant in person

N/A for the Respondent

J. Omondi-Court Assistant

