



Ouma v Mwaga (Sued as the legal administrative of the Estate of Peter Mwaga Ombura-Deceased) (Environment and Land Appeal 6 of 2022) [2023] KEELC 170 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELC 170 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 6 OF 2022
GMA ONGONDO, J
JANUARY 25, 2023

BETWEEN

MORRIS ODHIAMBO OUMA APPELLANT

AND

MARY JUMA MWAGA (SUED AS THE LEGAL ADMINISTRATIVE OF THE ESTATE OF PETER MWAGA OMBURA-DECEASED) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J.P Nandi, Senior Resident Magistrate dated and delivered on the 20th day of June 2018 in the original OYUGIS PMCC ELC NO. 59 of 2011)

JUDGMENT

1. At the outset, it must be noted that by an application dated March 10, 2022, the current respondent, Mary Juma Mwaga sought permission of the court to substitute her husband who was the original respondent, Peter Mwaga Ombura (Deceased, hereinafter referred to as the respondent). On March 30, 2022, the court allowed the application accordingly.
2. The land in dispute in the present appeal is land reference number Central Kasipul/Kamuma/5031 measuring approximately one decimal Two Five hectares (1.25 Ha) in area. It is contained in Registry Map Sheet number 7 and located within Homa Bay County.
3. The appeal arises from the trial court's judgment rendered on June 20, 2018 where the learned trial magistrate held in part that the respondent had proved his case against the appellant on a balance of probabilities. Thus, he proceeded to grant the orders including a permanent injunction as sought in the plaint dated May 27, 2011.
4. On January 28, 2019, the court granted leave to the appellant to file the appeal out of time against the trial court's judgment and decree.



5. Accordingly, the appellant through the firm of Oguttu Mboya, Ochwal and Partners Advocates formerly, M/S Oguttu, Ochwangi, Ochwal and Company Advocates, lodged the appeal by way of a memorandum of appeal dated January 25, 2019 on January 28, 2019. The same is anchored on the following grounds;
 - a. The Learned Trial Magistrate erred in fact and Law, in failing to find and hold that LR No Central Kasipul/ Kamuma/5031, (hereinafter referred to as the suit property), was registered in the name of the Respondent, albeit to hold on trust for the Appellant.
 - b. The Learned Trial Magistrate erred in law, in ordering and/or directing eviction of the Appellant from the suit property, without regard to the Appellant's legitimate rights and/or interests over the suit property, which had accrued on account of longevity of occupation.
 - c. In ordering and/or directing eviction of the appellant from suit property, the Learned Trial Magistrate ignored and/or disregarded, the provisions of section 7 of Limitations of Actions Act, Chapter 22, Laws of Kenya as well as the provisions of section 27 of the [Land Registration Act](#), No 3 of 2012.
 - d. The Learned Trial magistrate failed to cumulatively and/or exhaustively evaluate the entire Evidence on record and hence failed to capture and decipher the salient and/or features of the suit before him (Trial magistrate) and thus arrive at an Erroneous conclusion, contrary to and in contradiction of the Evidence on Record.
 - e. The Learned Trial Magistrate arrived at a slanted and erroneous Judgment, based on the failure to appreciate and/or discern the claim by and/or at the instance of the Appellant.
 - f. The Judgment of the Learned Trial Magistrate does not capture the Issues(s) for determination, the determination thereof and the reasons for such determination. Consequently, the Judgment of the Learned Trail Magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.
6. In that regard, the appellant has sought the orders thus;
 - a. The Judgment and Decree of the Learned Trial Magistrate dated June 20, 2018, be set aside and/or quashed and same be substituted with an order dismissing the Respondent's suit vide Oyugis Pmcc Elc Case No 59 of 2011.
 - b. Cost of the Appeal be borne by the Respondent.
 - c. Such further and/or other orders be granted as this Honourable Court may deem fit and expedient.
7. The appeal was heard by way of written submissions pursuant to the consent of the parties and this court's orders of June 6, 2022.
8. By the submissions dated June 27, 2022 and filed in court on June 28, 2022, learned counsel for the appellant stated the background of the case including the plaint, the statement of defence dated February 13, 2012 and the impugned judgment. Counsel submitted on the six grounds in favour of the appellant. That since trust was pleaded in the plaint, the learned trial magistrate failed to make a pronouncement on the same.
9. In support of the submissions, counsel cited the case of Isack M'Inanga Kiebia-vs-Isaaya Theuri M'Lintari and another (2018) eKLR on some of the elements of a trust, section 28 of the [Land Registration Act , 2016 \(2012\)](#) and section 30 (g) of the repealed Registered Land Act Chapter 300



Laws of Kenya (the repealed RLA herein) as well as Order 21 Rule of the Civil Procedure Rules, 2010. Therefore, counsel urged the court to allow the appeal as prayed.

10. In the submissions dated June 20, 2022 and filed on June 15, 2022 through the firm of Quinter Adoyo and Company Advocates, the respondent, too, referred to the impugned judgment, the plaint and the statement of defence. Counsel summarized the grounds of appeal, the respondent's evidence, the appellant's case and urged the court to determine whether the appeal has merits and the issue of costs herein. It was submitted that the learned trial magistrate based his judgment entirely on the evidence and documents presented before him thus, implored the court to dismiss the appeal with costs to the respondent.
11. To fortify the submissions, counsel relied on Kiebia case (supra) as alongside the case of John James Barasa vs Charles Oloo Odwori and 5 others (2020) eKLR that the existence or not of a customary trust is a matter of fact that must be pleaded, particularized and proved. Also, that the same must be proved by leading evidence as stated in the case of Njenga Chogera vs Maria Wanjira Kimani and 2 others (2005) eKLR.
12. I am alive to the duty of this court on a first appeal to review the evidence of the trial court in order to determine whether the conclusion reached upon that evidence should stand. That however, this is a jurisdiction which should be exercised with caution; see the House of Lords' decision in Watt vs Thomas (1947) 1 All ER 582 applied in Peters vs Sunday Post (1958) EA 424 and Kiruga-vs-Kiruga and another 1988 KLR 348, among other authoritative pronouncements.
13. By the plaint, the respondent (PW1) who was the plaintiff before the trial court, sued the appellant for;
 - a. The plaintiff prays for judgment against the defendant is for: -An order compelling the defendant himself, his agents, servants and or persons claiming his authority to remove the said illegal structures and vacate the land and hand over vacant possession of the Plaintiff's said parcel of land forthwith and a permanent order of injunction restraining the Defendant's by themselves, their agents and or persons claiming through his authority from trespassing into the said Plaintiff Parcel of Land whatsoever.
 - b. Costs of the suit and interest.
14. In his testimony, PW1 stated, inter alia, he is in occupation of the land in dispute, he owns the same as revealed in the title deed (PEXhibit 1) and that the issues of it's ownership was dealt with as per the Land Disputes Tribunal award (PEXhibit 2). That the appellant (DW1) entered into the land and forcefully constructed a house thereon.
15. The appellant who was the defendant before the trial court denied the plaintiff's claim in his statement of defence dated February 13, 2012 where he alleged existence of trust and adverse possession in his favour. Thus, he prayed that the suit be dismissed with costs.
16. DW1 told the court that the respondent was his grandfather but could not tell how. That he entered into the land in dispute in the year 2006, his family was cultivating it and PW1 sued him in respect of the same.
17. In the foregone, the issues for determination in this appeal are contained in the grounds of appeal which crystallize to whether;
 - a. The land in dispute is registered in the name of the respondent subject to overriding interests of trust and adverse possession in favour of the appellant.



- b. The learned trial court complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010 in the impugned judgment.
- c. The appellant is entitled to the orders proposed in the memorandum of appeal.
18. As regards the first issue, the respondent stated in the plaint and in his testimony that the land in dispute is registered in his name as per PExhibit 1 on April 30, 2008 and title deed issued on March 31, 2009 accordingly. Further, PExhibit 1 shows that the said land is a sub division of the parent land, LR No Central Kasipul/Kamuma/1032.
19. At paragraph 2 of the statement of defence, the appellant denied that the respondent is the registered owner of the land in dispute. However, he testified and maintained that the land is registered in the name of the respondent. This informed the learned trial magistrate to observe that;
- “.....it is not in dispute that the plaintiff is the registered owner of the suit land.....”
20. The appellant denied the respondent’s claim at paragraph 3 of the statement of defence and asserted that if the latter acquired registration of the land in dispute, such registration was effected in trust for the appellant and his family. This assertion was disputed by the respondent who relied upon PExhibits 1 and 2 in his testimony that the land in dispute was not held in trust for anyone. That he is not related to the appellant in any way hence, prayed for eviction of the appellant from the land in dispute.
21. Sections 25 (b) and 28 (b) *Land Registration Act, 2016 (2012)* provide for trusts including customary trusts as overriding interests in respect of registered land. Some of the elements that would qualify a claimant as a trustee were stated in Kiebia case (supra) by the Supreme Court of the Republic of Kenya.
22. In the case of Mumo vs Makau (2002) 1 EA 170, the Court of Appeal held that trust is a question of fact which should be pleaded and proved; see also Barasa and Chogera cases (supra). In the instant dispute, the appellant failed to set out particulars of trust in his pleading. More importantly, he did not prove, inter alia, that the land in dispute was before registration in the name of the respondent, family, clan or group land and that the appellant belonged to such family, clan or group as noted in Kiebia case (supra).
23. In respect of adverse possession, the appellant stated at paragraph 4 of his statement of defence that he has lived and occupied the land in dispute all his life. In examination in chief he told the court that he owns the land in dispute and he has been staying thereon since the year 2006. During cross examination, he maintained that;
- “.....I entered the land in 2006.....I am aware of the award in the miscellaneous 12 of 2010.....”
24. In examination in chief, the respondent stated that he is the one who is in occupation of the land in dispute. Further, during examination, he stated thus;
- “He (the appellant herein) entered into the land on 11.9.2006.
- I had a criminal case with him. It happened in this court.....It was Criminal, 789/2006.....”
25. It has emerged from the evidence on record that the respondent and the appellant have never had peace between themselves over the land in dispute as revealed in the award (PExhibit 2) and the criminal case at Oyugis Principal Magistrate’s Court as discerned in paragraph 24 hereinabove. Moreover, it is



- common baseline that the appellant entered the said land in the year 2006 and he is not in exclusive possession of it. Obviously, this does not amount to adverse possession being guided by the Court of Appeal decision in *Wilson Kazungu Katana and 101 others vs Salim Abdalla Bakshwein and another and another* (2015) eKLR and the case of *Elijah O Opar-vs-Tobias Odhiambo Abach* (2019) eKLR.
26. It is abundantly clear that the land in dispute was registered in the name of the respondent under sections 27, 28 and 30 of the repealed Registered Land Act (Cap 300 Laws of Kenya). Also, I bear in mind Sections 24, 25, 26 of the [Land Registration Act](#), 2016 (2012) as read with section 28 (b) and (h) of the same Act.
 27. Concerning the second issue, the learned trial magistrate did set out the gist of the parties' respective cases at paragraphs 1, 2 and 3 or pages 1 and 2 of the judgment.
 28. The issues for determination are identified at the first paragraph under discussion and determination in the judgment. They relate to proprietorship of the land in dispute and unlawful occupation of the same by the appellant.
 29. The trial court's decision and reasons are given at the last page of the impugned judgment. The final orders given in the judgment are three on the basis that order number 3 is a continuation of order number 2 therein. Clearly, the impugned judgment is in line with Order 21 Rule 4 (*supra*).
 30. On the third issue, since the respondent is the absolute registered proprietor of the land in dispute since 2009 under sections 27 and 28 of the repealed LRA as discerned in PExhibit 1, he is entitled to own the land under Article 40 (1) of the [Constitution of Kenya, 2010](#). Furthermore, there is no proof of overriding interests thereon. I am of the considered view that this court should not vilify the learned trial magistrate as the respondent was entitled to the orders sought in the plaint having proved on a balance of probabilities that DW1 trespassed into the land in dispute.
 31. So, it is the finding of this court that there is no iota of reason to disturb the trial court's judgment which is faultless. I proceed to affirm the same.
 32. A fortiori, this appeal lacks merit and is hereby dismissed.
 33. Costs of the appeal to be borne by the respondent by dint of the proviso to section 27 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya.
 34. At this end, it is noted that due to unavailability of the original record from the trial court for perusal to arrive at an informed decision, judgment was not delivered as earlier scheduled herein. Therefore, the court directed the Deputy Registrar to call for the record and a notice was issued accordingly. The record was not availed until December 18, 2022 as discerned in the proceedings of December 19, 2022 herein.
 35. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 25TH DAY OF JANUARY 2023.

G. M. A ONG'ONDO

JUDGE

PRESENT

1. M/s V. Migai holding brief for Adoyo learned counsel for respondent.
2. Respondent-Present
3. Luanga, Court Assistant.

