



**Ogutu & another v Tamia (Environment and Land Appeal
17 of 2021) [2023] KEELC 72 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 72 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 17 OF 2021
AY KOROSS, J
JANUARY 19, 2023
(ORIGINALLY KISUMU ELCA CASE NO. E051 OF 2021)**

BETWEEN

BEDINA AKELLO OGUTU 1ST APPELLANT

EFFIE AKINYI MISACHI 2ND APPELLANT

AND

MARGARET NANJALA TAMIA RESPONDENT

*(Being an appeal from the judgment of Principal Magistrate Honourable
J.P. Nandi given on 18/06/2021 in Bondo PM ELC Case Number E1 of 2020)*

JUDGMENT

Background to the Appeal

1. In order to place the appeal in context, a brief background of the salient facts are necessary. By a plaint dated September 14, 2020 the respondent who was the plaintiff in the lower court averred that that she was the wife of one Ezekiel Tamia Oyoo (deceased and hereinafter ‘Ezekiel’) who had purchased a portion measuring two acres of Barkowino/682 (hereinafter ‘the suit property’) from the 1st appellant’s late husband, one Dickson Ogutu Oyungu (hereinafter ‘Dickson’).
2. She averred the transaction was completed on December 19, 1987 which was after Ezekiel had paid the full purchase price. However, a transfer of the purchased portion was never effected.
3. Upon conducting probate proceedings on Dickson’s estate and gaining title to the suit property, the 1st appellant instead of effecting transfer of the purchased portion to the respondent, sold part of it to the 2nd appellant who was the 2nd defendant in the lower court suit. This was after she had subdivided the suit property into several portions.



4. It was the respondent's position that the 1st appellant's actions were fraudulent and illegal and the purported sale to the 2nd appellant was unlawful.
5. The respondent sought *inter alia*, an injunction be issued restraining the appellants, their heirs, servants, agents and any other person from entering, selling, alienating or howsoever dealing with the purchased portion without her express authority, a declaration that the respondent was the owner of the purchased portion, revocation of the 2nd appellant's title to Barkowino/9198 and an order for transfer of the purchased portion to the respondent.
6. By the firm of Lawi Ogutu & Company Advocates, the 1st appellant filed a defence dated April 26, 2021. She denied the allegations asserted in the plaint and contended that she was a stranger to the respondent's allegations. She sought for the dismissal of the suit with costs.
7. The 2nd appellant who acted in person filed a defence dated October 29, 2020. She contended she was a stranger to the allegations made in the plaint and put the respondent to full proof. She averred that after following due process, she purchased land parcel no South Sakwa/Barkowino/9198 from the 1st appellant before having it registered in her name. She sought for the dismissal of the suit with costs.
8. After the parties and witnesses had testified and closed their respective cases, the trial magistrate in his judgment framed 2 issues for his determination; (i) whether Ezekiel had purchased 2 acres or one quarter of an acre from Dickson and (ii) whether the respondent was entitled to two acres.
9. On the 1st issue, the trial magistrate found that the agreement of sale between Ezekiel and Dickson was on 2 acres of the suit property and not one quarter of an acre. On the 2nd issue the trial magistrate found that though the 2nd appellant was a bonafide purchaser, the purchased portion was not available for sale.
10. The trial magistrate entered judgment for the respondent as follows; (a) issued injunctive orders against the appellants, their agents, assignees and any person acting under their authority from selling or in any way dealing with a portion measuring 2 acres out of the suit property and now South Sakwa/Barkowino/9198, (b) declared the respondent was entitled to 2 acres of the suit property, (c) ordered the land registrar Bondo to cancel the titles to land parcel no South Sakwa/Barkowino/9198 and a restoration of the suit property in the name of the 1st appellant, (d) ordered the 1st appellant to transfer 2 acres out of the suit property to the respondent and in default, the court administrator to transfer the same to the respondent and, (e) costs to the respondent.

Appeal to this Court

11. Aggrieved and dissatisfied with the above judgment, the appellants filed a joint amended memorandum of appeal dated June 8, 2022 in which they raised several grounds. On September 29, 2022, the 2nd appellant withdrew her appeal. This withdrawal was adopted on 4/10/2022 as an order of the court with costs to the respondent. As a result of the withdrawal, the only pending grounds of appeal by the 1st appellant have been condensed as follows: -
 - a. The learned magistrate erred in law and fact by considering irrelevant and extraneous factors hence arrived at a wrong conclusion;
 - b. The learned magistrate misdirected himself in law and fact in failing to consider that the 1st appellant had been utilising South Sakwa/Barkowino/8937 and its subsequent subdivision peacefully and uninterrupted from 19/12/1987;



- c. The learned magistrate erred in fact in failing to appreciate that South Sakwa/Barkowino/682 had been subdivided and sold to 3rd parties and title documents issued to them including South Sakwa/Barkowino 9198 which was a subdivision of South Sakwa/Barkowino/8937;
 - d. The learned magistrate erred in law and fact by relying entirely on the agreement of sale allegedly executed by Ezekiel and Dickson without considering the 1st appellant's evidence and failing to find that she had proved her case; and
 - e. The learned magistrate erred in law and fact by failing to consider the 1st appellant's submissions.
12. The 1st appellant sought the following reliefs; the appeal be allowed with costs and the lower court judgment and decree be set aside.

Parties' Submissions

13. Despite directions from the court, the 1st appellant who acted in person did not file her written submissions. If at all she will file them, this court will not consider them.
14. The respondent who acted in person filed her written submissions dated November 1, 2022. She submitted that the trial magistrate took cognisance of privity of contract and upheld the agreement of sale between Ezekiel and Dickson. The respondent relied on the Court of Appeal decision of *Savings and Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR where the court expressed itself as follows;
- "In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party."
15. It was therefore the respondent's submissions that the 2nd appellant did not have any rights to the suit property or South Sakwa/Barkowino/9198 as the contract between Ezekiel and Dickson stood.
16. She submitted that the onus to prove a claim of adverse possession lay with the 1st appellant which she had failed to discharge before the trial court and to this end, she placed reliance on the Court of Appeal decision of *Maweu v Ranching & Farming Cooperative Society* 1985 KLR 430. Though this decision was not tendered by the respondent, upon searching for it and finding it, I did not come across the paragraph cited by the respondent.

Analysis and Determination

17. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. The case *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 which was cited with approval in *Barnabas Biwott v Thomas Kipkorir Bundotich* [2018] eKLR enunciated the role of an appellate court as thus: -

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."



18. In the absence of the appellant's submissions, the only logical conclusion is that she wholly placed reliance on the record of appeal for the determination of this matter. Submissions are a party's arguments and the Supreme Court of Kenya in the case of *Airtel Networks Kenya Limited v Nyutu Agrovet Limited* (Civil Appeal 61 of 2012) [2021] KECA 177 (KLR) (5 November 2021) (Ruling) expressed itself as follows concerning submissions;

"Written submissions are neither obligatory nor a prerequisite to the hearing and determination of an appeal under the Act and the Rules (sic)...– whether failure to file written submissions within the period specified under an order of the Court, as was the case here, constitutes a proper case for dismissal for want of prosecution. In our considered judgment, it does not"

19. Having considered the lower court record, amended memorandum of appeal, the record of appeal, respondent's submissions and authorities cited, this court will consecutively render itself on the 5 condensed grounds of appeal.

a. The learned magistrate erred in law and fact by considering irrelevant and extraneous factors hence arrived at a wrong conclusion;

20. The amended memorandum of appeal did not substantiate on this ground. In the absence of written submissions, it is an uphill task for this court to identify the specifics of this ground. The trial magistrate identified two issues for determination and he analysed both the 1st appellant's and respondent's adduced evidence and I did not come across any irrelevant or extraneous factors that were allegedly considered by the trial magistrate. It is my finding that this ground fails.

b. The learned magistrate misdirected himself in law and fact in failing to consider that the 1st appellant had been utilising South Sakwa/Barkowino/8937 and its subsequent subdivision peacefully and uninterrupted from December 19, 1987

21. My understanding of this ground of appeal is that the 1st appellant is alleging that she was an adverse possessor of South Sakwa/Barkowino/8937 and its subsequent subdivision. It is trite law that parties are bound by their pleadings. The 1st appellant did not plead adverse possession.
22. Section 78 (1) (d) of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the *Civil Procedure Rules* lay the legal basis upon which additional evidence could be adduced on appeal. See also the Supreme Court of Kenya decision in *Mohammed Abdi Mohamud v Ahmed Abdulahi Mohamad & 3 Others* [2018] eKLR. The 1st appellant did not seek leave to adduce new evidence or lay a basis upon why this court should allow such evidence and I am constrained from entertaining this ground of appeal. I rely on the Court of Appeal decision of *Safe Cargo Limited v Embakasi Properties Limited & 2 Others* (2019) eKLR where the court stated thus;

"12. This Court in discussing its power to admit additional evidence under Rule 29 (1) stated as follows in Republic –v- Ali Babitu Kololo (2017) eKLR "It has been said time and again that the unfettered power of the Court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal."

It is my finding that this ground fails.



c. The learned magistrate erred in fact in failing to appreciate that South Sakwa/Barkowino/682 had been subdivided and sold to 3rd parties and title documents issued to them including South Sakwa/Barkowino 9198 which was a subdivision of South Sakwa/Barkowino/8937;

23. It was undisputed that the suit property had been subdivided into several subdivisions and some of these subdivisions had further been subdivided and one of these further subdivisions was land parcel no. South Sakwa/Barkowino/9198 that was transferred to the 2nd appellant by the 1st appellant. The import of this fact is that the suit property was non-existent at the time of filing suit.
24. It was the 1st appellant's uncontroverted testimony that at the time of conducting probate proceedings on Dickson's estate, she sought financial assistance from purchasers of various portions of the suit property to enable her succeed Dickson's estate and transfer their respective purchased portions to them; the respondent declined to accede to the request. Upon confirmation of grant, she transferred the respective subdivided portions to various purchasers except the respondent.
25. Apart from the 2nd appellant who was the purchaser of South Sakwa/Barkowino/9198 which emanated from the suit property, the other purchasers were not made parties to these proceedings and were not accorded an opportunity to be heard. Despite this, the trial magistrate made adverse orders against them by ordering a restoration of the suit property.
26. This decision of the trial magistrate was in contravention with Article 50 of the *Constitution of Kenya* on the right to fair hearing and audi alteram partem cardinal principle of law that provides that parties must be given an opportunity to be heard before adverse orders can be made against them. Their title documents could not be capriciously cancelled. I place reliance on the Court of Appeal decision of *Pashito Holdings Limited & Another v Paul Nderitu Ndungu & 2 Others* [1197] eKLR where the court expressed itself as follows;

"...the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "*audi alteram partem*", which literally means hear the other side, is a rule of natural justice."

27. The only purchaser who was made a party to the suit was the 2nd appellant who was the registered proprietor of South Sakwa/Barkowino/9198. She testified before the trial court and adverse orders were made against her property. She withdrew her appeal against the decision of the trial magistrate. From the official search that was produced by the respondent, this parcel of land was only 0.3ha and it behoved upon the respondent to establish where the remainder of her acreage lay and join such proprietors to the suit; which she did not.
28. It is my finding that the trial magistrate erred in restoring the suit property. It is my finding that this ground succeeds.

d. The learned magistrate erred in law and fact by relying entirely on the agreement of sale allegedly executed by Ezekiel and Dickson without considering the 1st appellant's evidence

29. By virtue of Section 3 (3) of the *Law of Contract Act*, a contract on disposition of land is valid if it is written, signed by all the parties and attested by witnesses. The trial magistrate found that the agreement of sale between Ezekiel and Dickson was valid and found that the agreement was for two acres of land.
30. Though the appellants averred in their respective defences that they were strangers to the said agreement of sale, the 1st appellant admitted that indeed there was an agreement of sale between Ezekiel



and Dickson for the portion the respondent had alluded to, the respondent held a beneficial interest over it and she was willing to transfer the portion to the respondent.

31. In her oral testimony, she testified that Ezekiel only purchased one quarter of an acre. However, she did not produce any agreement before the trial court to affirm this position.
32. The respondent's testimony was consistent and credible while that of the 1st appellant was inconsistent and full of half-truths and I agree with the finding of the trial magistrate. It is my finding that this ground of appeal fails.

e. The learned magistrate erred in law and fact by failing to consider the 1st appellants submissions.

33. The trial magistrate in his judgment did affirm that the parties had filed their written submissions. The appellants' submissions in the trial court contained factual arguments of the evidence adduced.
34. In his determination, the trial magistrate conducted an analysis of the facts before he rendered his findings. Therefore, it follows that the trial magistrate considered the 1st appellant's submissions. It is my finding that this ground of appeal fails.
35. Based on the reasons given, I ultimately find that this appeal is partly merited and because costs follow the event, I award three quarters of the costs of this appeal to the respondent. I hereby substitute it with a judgment in favour of the respondent in the following terms;
 - a. The Land Registrar, Bondo is hereby directed to revoke/cancel the title deed for land parcel number South Sakwa/Barkowino/9198 in the name of 2nd appellant Effie Akinyi Misachi and register the name of the respondent Margaret Nanjala Tamia as the proprietor;
 - b. The 2nd appellant Effie Akinyi Misachi do execute all documents of transfer in respect of land parcel number South Sakwa/Barkowino/9198 in favour of the respondent Margaret Nanjala Tamia failure to which the Deputy Registrar of the Court to execute the requisite documents in place of the 2nd appellant;
 - c. Three quarters of the costs of this appeal are awarded to the respondent; and
 - d. Costs of the lower court suit are awarded to the respondent.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF JANUARY 2023.

HON. A. Y. KOROSS

JUDGE

19/01/2023

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

1st appellant present

Respondent present

Court assistant: Ishmael Orwa

