



**Opondo v Onyango (Suing as the administrator of the Estate
of Charles Gucha Onyango) (Environment and Land Appeal
E014 of 2020) [2023] KEELC 218 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 218 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E014 OF 2020
MN KULLOW, J
JANUARY 18, 2023**

BETWEEN

JOSEPH ABWAO OPONDO APPELLANT

AND

**ISAIAH CHELUGET ONYANGO (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF CHARLES GUCHA ONYANGO) RESPONDENT**

JUDGMENT

1. This Appeal emanates from the Judgment and Decree of Hon. D. Onyango delivered on 14th December, 2020 in Migori CMELC Case No. 71 of 2018, in which the Plaintiff's claim against the Defendant was allowed as prayed. The grounds in the Memorandum of Appeal are that: -
 - i. The Trial Magistrate erred in law and in fact in issuing an Order of eviction and permanent injunction against the Appellant without taking into consideration that there was no enough evidence in support of the same.
 - ii. The Learned Trial Magistrate erred in law and in fact in granting the Respondent the reliefs sought while relying on the wrong principal of the law.
 - iii. The Learned Trial Magistrate erred in law and in fact in finding that the Appellant was a trespasser into parcels of land LR Nos. Suna West/Wasimbete/1201,1202,1213,1171,1135 and 1137 without taking into consideration on how the said parcels of land were acquired by the Respondent even after the agreement produced by the Respondent did not even tally with the said suit properties.
 - iv. The Learned Magistrate erred in law by failing to properly evaluate the evidence on record and only relying on the purported land sale agreements produced by the Respondent dated



1/4/1990, 16/7/1994, 22/2/1997 and 27/2/1997 of which the sale agreement talked of only land parcel No. Suna West/ WASIMBETE/ 250 which was not even pleaded for.

- v. The Learned Trial Magistrate erred in law and in fact in pronouncing judgment outside the basis of pleadings and/or issues and/or evidence on record.
 - vi. The Learned Magistrate erred in law and in facts in disregarding the evidence adduced by the Appellant, his witness and the exhibits tendered and the submission filed herein by the Appellant.
 - vii. The Learned Magistrate erred in law and in facts by shifting the burden of proof to the Appellant.
 - viii. The Learned Magistrate erred in law and facts in failing to write a judgment which was in accordance with the Law and the evidence on record and the issues raised before the court.
 - ix. The Learned Trial Magistrate erred in law in making extraneous orders which was erroneous in law.
 - x. The Learned Trial Magistrate erred both in law and facts and manifested clear bias against the Appellant which was unfair and unjust in awarding the case to the Respondent while relying on the technicalities.
 - xi. The Learned Trial Magistrate erred in both law and facts in failing to find that the Respondent's case was not proved on a balance of probability as required by the law.
2. Consequently, the Appellant sought the following orders against the Respondent: -
- a. The Appeal filed herein be allowed with costs
 - b. Judgment delivered on 14th December, 2020 be set aside.
 - c. Any other remedy that the court may deem fit, just and expedient to grant in the circumstances.
3. A brief background to bring the Appeal into perspective; the Plaintiff/ Respondent instituted the suit vide a Plaint dated 04.06.2018 seeking, an order of eviction against the Defendant from suit parcels Suna West/ Wasimbete/1201,1202,1213,1171,1135 and 1137, an Order of Permanent Injunction restraining the Defendant from entering, trespassing, encroaching onto, occupying or in any way interfering with the plaintiff's possession, occupation and peaceful enjoyment of the suit parcels together with costs of the suit. It was the Plaintiff's claim that the late Charles Onyango Gucha was and still is the registered proprietor of the suit parcel Nos. Suna West/ Wasimbete/ 1201,1202,1213,1171,1135 and 1137. That sometimes 1/2/2017, the defendant without the express or implied authority of the plaintiff; unlawfully and without any justifiable cause trespassed into the suit properties, occupied the same and continues to commit wanton waste thereof and outlined the particulars of trespass.
4. The Defendant/Appellant in response to the Plaint filed a Statement of Defence dated 27.06.2018 wherein he maintained that he was the registered proprietor of parcel No. Suna West/ Wasimbete/ 1150. He further stated that the Plaintiff fraudulently obtained land documents after deliberately failing to return the original title deed and purporting to be the owner of land parcel numbers Suna West/ Wasimbete/ 1201,1202 and 1213.
5. The suit was heard and judgment was delivered on the 14.12.2020, whose effect was to allow the Plaintiff's claim against the Defendant and issue an order permanent injunction and eviction against the Defendant from the suit property hence the instant Appeal.



6. The Appeal was canvassed by way of written submissions, both parties filed their respective submissions and authorities which I have read and taken into consideration in arriving at my decision.
7. The main issue arising for determination is whether this Court should interfere with the exercise of discretion by the trial court by setting aside and substituting its judgment delivered on 14.12.2020 and I will proceed to discuss the same on account of;
 - i. Whether the Application dated 12/11/2021 is merited.
 - ii. Whether the registration of the Respondent as the proprietor of the suit parcels was fraudulent
 - iii. Whether the Appellant is entitled to the reliefs sought in the Memorandum of Appeal.
8. Before delving into the merit of the Appeal herein, I wish to first determine the Application dated 12/11/2021 by the Appellant; which seeks the introduction of additional evidence. It is the Applicant's contention that the said documents were not in his possession at the time of defending the suit. He further stated that since he was unrepresented during trial, he was unable to know the importance of production of documents. He further averred that due to his old age, he forgot where he had kept some the said documents which he now seeks to adduce as evidence. He urged the court to admit his additional evidence and the same to be marked as exhibits C-001-11 in support of his case. The Application was opposed, the Respondent filed a Replying Affidavit dated 31/01/2022.
9. Section 78 of the *Civil Procedure Act* and at order 42 rule 27 of the *Civil Procedure Rules* provides for the taking of additional evidence at the appellate stage. Order 42 rule 27 provides as follows: -
 - “(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if
 - a. The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - b. The court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
 - (2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.”
10. In *Safe Cargo Ltd vs Embakasi Properties Ltd & 2 Others* [2019] eKLR it was held that;
 - “14. Following the guidelines as given by the Supreme Court, it is our duty to consider and determine if the instant application fulfills the principles as laid out in the case above. Of significance is whether the additional evidence sought to be introduced by the applicant is directly relevant to the appeal before this Court and if given, it would influence or impact upon the result of the verdict, and whether it could not have been obtained with reasonable diligence for use



at the trial, was not within the knowledge of, or could not have been produced at the time of trial by the applicant.”

11. Further, I am guided by the Court of Appeal decision in the case of *Republic vs Ali Babitu Kololo* (2017) eKLR where it was held that;

“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.”
12. I have carefully looked at the said additional evidence; it is apparent that the said documents being the Mutation Forms, copies of the title deeds, certificate of official search and the Sale Agreement dated 1/1/1986, were not only obtainable with due diligence but were also within the Applicant’s knowledge as confirmed at paragraph 10 of his Supporting Affidavit.
13. Further, the copy of Title Deed annexed and marked “COO8 & 9” relate to L.R. No. Suna West/ Wasimbete/ 1169 which is not one of the properties in dispute between the parties herein. The Sale Agreement dated 1/1/1986 is between the Appellant and one Zakayo Karakacha, who was neither a party in the Subordinate court or Appeal herein nor is he an interested Party.
14. The Applicant has also annexed various copies of Mutation Forms marked “COO1- COO6”, again, I have noted that the said Mutation Forms are in relation to parcel numbers L.R. Suna West/ Wasimbete/ 1150, 253, 251, 1212, 1242 and 1937 which are significantly differently from the suit properties herein L.R. Nos. 1201,1202,1213, 1171, 1135 and 1137; no nexus has been provided by the Applicant between the 2 sets of the parcel numbers and the same cannot now be left for the court to infer. Without prejudice to the foregoing, a critical look at the said Mutation Forms cannot prove any claims of Fraud which is at the center of the Appellant’s claim. Moreover, some of the persons named as the registered proprietors are not parties to the dispute herein.
15. In view of the foregoing, I find that the said additional evidence sought to be included as exhibits by the Appellant, will not make a significant impact in the determination of the Appeal herein. The Application dated 12/11/2021 is therefore not merited and the same is hereby dismissed.
16. I will now proceed to determine the substantive Appeal as hereunder;
17. This court’s jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion and the same does not entail taking on board matters which were never brought to the trial court’s attention or were not subject of the said court’s consideration. See Court of Appeal decision in *Selle v Associated Motor Boat Co.* [1968] EA 123.
18. The issue in dispute between the parties herein is the ownership of suit parcel Nos. Suna West/ Wasimbete/ 1201,1202,1213,1171,1135 and 1137 and whether there was fraudulent transfers and registration of the said parcels in the name of the Respondent. The Appellant contends that the Respondent fraudulently acquired the suit parcels and maintains that he is the registered owner of parcel No. 1150 where he has lived all his life. He further avers that the he sold and transferred a portion of his parcel to one Zakayo Karakacha and further that the Respondent fraudulently took the original title from the said Zakayo Karakacha and effected the subsequent transfers and registration in his name.
19. The Respondent on the other hand maintained late Charles Onyango Gucha was and still is the registered proprietor of the suit parcel Nos. Suna West/ Wasimbete/ 1201,1202,1213,1171,1135 and 1137. It is his claim that sometimes on 1/2/2017; the Appellant without his express or implied authority; unlawfully and without any justifiable cause trespassed into the suit properties.



20. I will now proceed to re-evaluate each of the party's claim from the trial court record, the evidence adduced and the trial court judgment in determining whether the trial magistrate exercised his discretion correctly.
- I. Ownership of the suit parcels Nos. Suna West/ Wasimbete/ 1201,1202,1213,1171,1135 and 1137.
21. As earlier pointed out, the dispute between the parties herein is on the ownership of the suit properties. The Appellant contends that the transfer and registration of the suit properties in the name of the Respondent was done fraudulently and is therefore null and void. He further maintains that he is the registered owner of parcel No. 1150 where he has lived all his life and urged the court to set aside the judgment of the trial court.
22. The Respondent on the other hand maintained that his late father is the rightful registered owner of the suit properties and accused the Appellant of trespassing and encroaching onto the same with an aim of defeating his ownership. It is his claim that his late father purchased the said parcels of land from the Defendant; parcel No. 1135 was bought from Odaga Jiwa and No. 1137 was bought from Lucas Ayaro.
23. On the issue of fraud as alleged by the Appellant both in the trial court and in the instant Appeal, I do note that the Appellant neither outlined the particulars of fraud nor satisfactorily proved the same to the required threshold. It was his testimony in the trial court, that the late Charles Gucha took his title deed for parcel no. 1150; which had been sold to one Zakayo Karakacha and the said title was subdivided into the new titles.
24. Further, even though he confirmed to be staying on parcel No. 1170 and which is significantly different from parcel No. 1150 in which he claimed to be the registered owner; he did not produce any title deed of the said parcel as an exhibit in support of his ownership claims. It was his contention that he has been occupying and cultivating parcel numbers 1201,1202,1213 and 1171 since the same belonged to him and were a subdivision of his original parcel no. 1150, no proof was adduced in support of the said averments.
25. Further, I have noted that even though the Appellant maintains that the original parcel No. 1150 belonged to him and consequently any new title numbers arising from subdivision also belong to him; I have noted that at paragraph 3 and 4 of his statement of defence, he confirms that he sold a portion of the suit land no. 1150 to Zakayo Karakacha and the said Zakayo out of his own volition and agreement exchanged his parcel with Charles Gucha.
26. The Court of Appeal in *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* [2013] eKLR cited with approval the case of R. G. Patel vs. Lalji Makani (1957) E.A. 314, where the court held that:
- “Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
- (See also *Ndolo -vs- Ndolo* [2008]1 KLR (G & F) 742)
27. I must point out that the Appellant neither pleaded fraud in his statement of defence at the trial court nor did he tender evidence to strictly prove the allegations of fraud to the required threshold to the satisfaction of the court. There was nothing to support the claims by the Appellant that the Respondent's father fraudulently took the original title deed or fraudulently effected the transfer, subdivision or registration of the suit properties in his name.



28. In the circumstances, I find that the Appellant did not prove his claims of fraud on the part of the Respondent or his father as alleged.
29. Section 24(a) of the *Land Registration Act* is clear on the issue of ownership of land and provides as follows:
- “Subject to this Act, 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.”
30. Further, Section 26 (1) (a) and (b) of the Act provides that a certificate of title will be held as the prima facie evidence that the person named as the proprietor is the absolute and indefeasible owner. The section provides as follows: -
- “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.”
31. I have also looked at the documents produced by the Plaintiff/ Respondent in the lower court as exhibits and I acknowledge that the same are in support of his ownership claims; he produced the various title deeds to the suit properties as Pexh 2 – 7, copy of the sale agreement as PExh 8 & 17, certificate of official searches as PExh 21- 26 and petty cash vouchers as PExh 9-16 to support his claim of purchase.
32. In the absence of any sufficient proof of fraud; it is the finding of this court that the Certificates of Title produced as Pexh 2-7 are prima facie evidence that the Respondent’s father, named as the proprietor of the suit properties, is the absolute and indefeasible owner of the said properties. The Respondent is therefore entitled to all the rights and interests over the suit land as provided under sections 24 and 25 of the *Land Registration Act*.
33. I have read the judgment of the trial court and in my considered opinion, the honourable magistrate exercised his discretion justifiably; the analysis and subsequent decision was guided by the evidence produced in court and the relevant statutory provisions in arriving at his judgment. To this end, I find no need to interfere with the said decision. The upshot of the above is that the Appellant is not entitled to the reliefs sought in the Memorandum of Appeal.

Conclusion

34. In conclusion, I accordingly find that the Appeal is not merited and is therefore dismissed with costs to the Respondent.
35. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 18TH DAY OF JANUARY, 2023.

MOHAMED N. KULLOW

JUDGE

In presence of: -

Non- Appearance for the Appellant

Non-Appearance for the Respondent

Court Assistant- Tom Maurice

