



**Ago v Ako (Environment and Land Appeal 1 of 2021)
[2023] KEELC 876 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 876 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 1 OF 2021
A OMBWAYO, J
FEBRUARY 16, 2023**

BETWEEN

PAUL BETE AGO APPELLANT

AND

JESIKA ACHOLA AKO RESPONDENT

(Being an appeal from the judgment of the Senior Principal Magistrate Hon. C L Yalwala delivered on the 18th day of December, 2020 in the principal Magistrate Court at Maseno in Environment and Land case No.006 of 2018)

JUDGMENT

1. Paul Bete Ago, (hereinafter referred to as the appellant) has appealed from the decision of the Senior Principal Magistrate Hon. C. L Yalwala delivered on the 18th day of December 2020. In the Principal Magistrates Court at Maseno in the Environment and Land Court case No 006 for 2018. Jesika Achola Ako (hereinafter referred to as the respondent) was the plaintiff in the lower court. The appeal is on the grounds that the trial magistrate erred in law and in fact by issuing an injunctive order against the appellants herein knowing very well that the plaintiff now respondent had no locus to institute and/or prosecute the suit against the defendant now the appellant.
2. The appellant contends that the trial magistrate erred in law and in fact by dismissing the Appellants case in utter disregard of the fact that the grant which was used by the respondent to register herself issued on 3rd day of November, 2010 vide Succession Cause No. 564 of 2010 at Kisumu High Court had been issued to David Opuk Obewa in the estate of one Margaret Agere.
3. Further that the trial magistrate erred in law and in fact by dismissing the appellants case without ascertaining and confirming that the said grant that had been tendered to register the respondent was actually of the estate of Oyoo Oindo



4. That the trial magistrate erred in law and fact in finding that the respondent was the rightful owner of the suit property notwithstanding she registered herself fraudulently. The appellant prays for orders that the appeal be allowed and that the judgment delivered on the December 18, 2020 be set aside and or expunged. Moreover, that cost of the appeal be borne by the respondents.
5. The background facts of this appeal are that the respondent approached the lower court by way of plaint claiming to be the registered owner of parcel number Kisumu/Ojola/606. She claimed that the appellant has trespassed on the parcel of land. The respondent prayed for an order of permanent injunction restraining the appellant from encroaching, trespassing invading and alienating the suit property. Moreover, the appellant to be ordered to remove the restriction. The respondent ultimately prayed for costs of the suit with interest.
6. The appellant filed defence and stated that the respondent had concealed material facts as the suit property had been purchased by the appellant's father from one Oyo Oindo that in the 1950's and that the appellant's father took possession before 1982. The appellant stated that the respondent obtained letters of administration fraudulently through succession cause number 564 of 2010 in Kisumu High Court. The appellant filed a counter-claim, claiming to have been in possession of the property from 1962 when he was born and was married, sired 2 children, one died and was buried on the land. The appellant claimed that the land was fraudulently transferred in the respondent name through fraud. The appellant prayed that the suit be dismissed and that the land registrar be compelled to cancel the title document issued on July 23, 2014 in respect of the suit property and the grant of letters of administration ad litem issued under succession cause No.564 of 2010 be revoked. The respondent to pay special and general damages, costs and interest.
7. The respondent testified that land registration Number Kisumu/Ojola /606 belonged to Oyoo Oindo who is deceased. She stated that the appellant used to pay her husband rent in respect of the suit land. When asked to vacate he refused. He has put up a semi-permanent house where he used to sell alcohol. She stated that the suit land belonged to Oyoo Oindo, a brother to her husband and that she did succession and the land was transferred into her name. She produced the green card but when asked about the grant of letters of administration intestate in succession cause number 564 of 2010, she states that she cant know about it and that she can't understand the dates on the document. She states that the title deed was prepared by her son Cornel Odole.
8. PW2 Ruth Atieno Akoth a business woman and co wife to the respondent stated that the land belonged to Oyoo Oinda, a brother to her husband. According to PW2, the land belonged to the respondent and on cross-examination she states that the land was given to the appellant in 2001 to use for a while in and that he vacated in 2004.
9. PW3 Kennedy Hongo Ondingo, a painter in Kisumu and grandson of the respondent knew the owner of the land as Oyoo Oinda. The appellant used to reside in the land but vacated in 2004.
10. On his part the appellant testified that the land belonged to Oyoo Oindo. The succession cause relied upon by the respondent to cause her name be entered in the land register in respect of the suit property was Kisumu succession cause number 564 of 2010 which was in the Estate of Margaret Agere and not Oyoo Oindo. He testified that Oyoo Oindo sold land to his father and his father took possession. They were brought up on the land and they have brought up their children on the land and now the respondent intends to evict them from the land. His father, mother siblings were buried on the land. On cross examination he did not produce any agreement of sale. He stated that the parcel was encompassed with L.R No. 477. He insists Jesika committed a fraud.



11. DW2, Thomas Moth Otando relied on his statement whose import was basically that the appellant has resided on the land for a long period of time. DW3 also relied on his statement .

The learned Magistrate analyzed the evidence on the court record and with submissions and found the following issues ripe for determination:-

1. Whether or not the subject land parcel number Kisumu/Ojola/6060 belonged to the defendant's father.
 2. Whether or not the defendant has any legal or beneficial interest in the subject land.
 3. Whether or not the plaintiff was entitled to inherit the subject land.
 4. Whether or not the plaintiff is the rightful owner of the subject land.
 5. Whether or not the defendant has trespassed on the subject land
 6. What orders ought to be made on the plaintiff's claim and the defendant's counter-claim
12. On the 1st issue, the learned magistrate found no evidence that the subject land parcel number Kisumu/Ojola/606 ever belonged to defendant's father.
13. On the 2nd issue the court found that the defendant had no legal or beneficial interest in the subject land. On the 3rd and 4th issues the court found that it is the respondent who was entitled to inherit the subject land and she was the rightful owner thereof.
14. On issue number 5, the learned magistrate found that the defendant's act of erecting structure on the land was an act of trespass. The plaintiff claim was allowed but the counter claim failed.
15. This is a first appeal and the role of the first appellate court was stated In the case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 by Sir Clement De Lestang , it was held that:

This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

16. In the appeal the appellant basically raises the issue that the respondent had no capacity to commence the suit because her registration as the proprietor of the property was acquired fraudulently using a grant acquired in respect of another person's estate. According to the appellant, succession cause number 564 of 2010 at Kisumu High Court had been issued to David Opuk Obewa in the estate of Margaret Agere. The appellant raised this issue in the pleadings. The respondent did not join issue to the said allegation. The respondent did not produce a grant issued to her by the High Court to demonstrate that she was the legal administrator of the estate of Oyoo Oindo. There was no evidence of transmission after confirmation of grant if any. In absence of the above this court finds that the respondent was an intermeddler in the estate of Oyoo Oindo and that her name was inserted in the register unlawfully and fraudulently using a grant of letters of administration intestate issued in respect of the estate of Margaret Agere to David Opuk Obewa. Section 45 of the [Law of Succession Act](#) cap 160 Laws of Kenya provides:

45 No intermeddling with property of deceased person



1. 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.
 2. Any person who contravenes the provisions of this section shall-
 - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
17. I do agree with the appellant that the learned trial magistrate erred in law and fact in finding that the respondent was the rightful owner of the suit property when it was clear that she used a grant of letters of administration intestate in respect different deceased person and not Oyoo Oindo.
18. This court finds that the learned magistrate did not consider the factual background of the case as given by DW1, DW2, DW3 that the appellants fully had been using the parcel of land before 1982 to the date of the case and that it was evident that he had put up structures on the suit parcel of land. The upshot of the above is that I do set aside the judgment of the lower court and I do order that the plaintiffs suit be dismissed and that the Land Registrar Kisumu be and is hereby compelled to cancel entries numbers 2, 3 and 4 made on the July 18, 2014 and the title document issued on July 23, 2014 on property known as Kisumu/Ojola/606. Cost of the appeal and suit in the lower to the appellant.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU THIS 16TH DAY OF FEBRUARY 2023.

A. O OMBWAYO

JUDGE

