



**Otieno v PWO (Environment and Land Appeal 19 of 2021)
[2023] KEELC 763 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 19 OF 2021
AY KOROSS, J
FEBRUARY 16, 2023**

BETWEEN

HELLEN ABIDHA OTIENO APPELLANT

AND

PWO RESPONDENT

*(Being an appeal from the judgment of Principal Magistrate Honourable
J.P. Nandi given on 10/06/2021 in Bondo PM ELC Case Number 44 of 2019)*

JUDGMENT

Background of the appeal

1. From the record, the appellant and respondent are step siblings. Their father Joanes Olal Amolo [‘Joanes’] was married to the appellant’s mother Arnoda Alare Olal [‘Arnoda’] with whom they sired 3 children all of whom are deceased except the appellant. Joanes subsequently married the respondent’s mother Sekina Thure Obota [‘Sekina’] with whom they sired one child; the respondent.
2. The property that was at the heart of contention was land parcel number West Asembo/Siger/xxxx [‘suit property’] which was registered at 1st registration in the respondent’s name. At that time, the respondent was a minor aged 15 years.
3. In a plaint dated October 7, 2019, the appellant who was the plaintiff in the lower court, contended that the respondent who was then the defendant, held the suit property in trust for her and their siblings since at adjudication, their father was deceased. She contended that the respondent intended to dispose of the suit property. She sought orders of permanent injunction together with costs and interests.
4. By the firm of Odongo Awino & Company Advocates, the respondent filed a defence dated November 21, 2019 in which he denied the allegations made in the plaint. He denied the appellant and Arnoda ever lived on the suit property. He averred he was a stranger to Sekina’s alleged marital inheritance and



denied that Joanes and Sekina were his parents. He contended that it was not feasible for a minor to hold property in trust for an adult and the appellant had long been married before he was born and she had been staying in her matrimonial home since 1968. In addition, the respondent averred that the appellant's claim was statutory barred.

5. In rendering his judgment after the respective parties had testified and closed their cases, the Trial Magistrate found that, in the absence of evidence to challenge the title, the respondent by virtue of Section 28 of the [Land Registration Act](#) was prima facie the registered owner of the suit property. The Trial Magistrate asserted that he had not been invited by the appellant's pleadings to interrogate the existence of customary trust hence he was constrained from issuing permanent injunctive orders. The Trial Magistrate ultimately found the appellant had not proved her case to the required standard and dismissed her case.

Appeal to this court

6. Aggrieved by the lower court judgment, the appellant preferred an appeal to this court. In her memorandum of appeal dated July 8, 2021, which was filed by her counsel Dola Magani & Co Advocates, she raised the following grounds of appeal;
 - a. That the Honourable Trial Magistrate erred in law and fact by failing to appreciate that the suit property was the appellant's home and her parents were buried on it;
 - b. That the Honourable Trial Magistrate failed to interrogate the circumstances under which the respondent was registered as the proprietor of the suit property during adjudication;
 - c. That the Honourable Trial Magistrate erred in law and fact in ignoring the fact that female children had the right to their parents' property; and;
 - d. That the Honourable Trial Magistrate erred in law and fact by failing to find that the respondent failed to establish the root of the suit property's title.
7. The appellant sought inter alia, an order restraining the respondent from transferring the suit property pending the hearing and determination of the appeal and for this court to set aside the judgment.
8. A supplementary record of appeal containing the decree was subsequently filed in court.

Parties' submissions

9. As directed by the court on October 24, 2022, parties disposed of the appeal by way of written submissions. In his undated written submissions that were filed on December 7, 2022, the appellant's counsel, Mr Dola, rehashed the background of the appeal. Counsel asserted that it would be in the best interests of justice if the court considered the appellant as a beneficiary of the suit property and entitled to a slice of it.
10. Mr Odongo, the respondent's counsel, filed written submissions dated December 5, 2022. In his submissions, counsel submitted that the appellant's assertion that the respondent held the suit property in trust for her was not supported by any shred of evidence and that the appellant's plaint had failed to meet the criteria of Order 2 Rule 10 (1)(a) of the [Civil Procedure Rules](#).
11. It was counsel's submission the appellant had failed to lay a basis upon which the prayers in her plaint could be granted. Counsel asserted that the appellant's grounds introduced new evidence at an appellate stage.



12. Counsel avowed that where property is registered in the name of a minor, then there is a presumption that the property was not to be held in trust. To buttress this position, counsel placed reliance on the persuasive decision of *Njenga Kimani & 2 others v Kimani Nganga K Wainaina [2017] eKLR* where Munyao J stated: -

‘The general law on resulting trusts, as noted in Snell’s *The Principles of Equity*, 27th Edition at pg 177, is that when a father buys a property and puts it in the name of his son or daughter, prima facie, it is a gift to the child. There is therefore a presumption that when property is registered in the name of a child by his parent, the property is not held in trust but is property that is meant to be owned by that child.’

13. Counsel contended that being a minor at the time of 1st registration, it was not feasible for the respondent to hold the suit property in trust for the appellant and the suit was statutory barred. Counsel submitted that the appeal was devoid of merit and urged that it be dismissed with costs.

Analysis and determination

14. As a first appeal, I am enjoined to revisit the evidence that was before the lower court afresh, analyse it, evaluate it and arrive at my own independent conclusion, but always bearing in mind that the Trial Magistrate had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that – see the case of *Selle vs Associated Motor Boat Company Ltd, [1968] EA 123*.
15. Section 78 (1) (d) of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules are the legal basis upon which additional evidence can be adduced on appeal. See also the Supreme Court of Kenya decision in *Mohammed Abdi Mobamud v Ahmed Abdulabi Mobamad & 3 Others [2018] eKLR*. I agree with the respondent’s counsel that the 1st and 3rd grounds of appeal introduced new evidence. The appellant has neither sought leave to adduce new evidence nor has she laid a basis upon which this court could entertain these grounds of appeal. I hereby strike out these offending grounds of appeal.
16. Strangely, the appellant’s submissions did not address any of the grounds of appeal. Instead, the appellant’s counsel seemed to have departed from the prayers sought in the memorandum appeal. Counsel sought for this court to deem the appellant a beneficiary of the suit property. Parties and advocates as the case may be must be reminded that submissions are not pleadings or evidence but are merely parties’ arguments.
17. The residual grounds of appeal touched on one primary issue; a consideration of the evidence produced by the parties in the lower court of how the respondent acquired title to the suit property. In the impugned judgement, the Trial Magistrate in paragraphs 18 and 19 expressed himself thus;
- ‘Pertinent question (sic) that must concern this court are such as; how was the land first registered? Was it clan, communal or family land before registration? I would have endeavoured to answer this (sic) questions had the plaintiff prayed for an order that the court declares that the defendant is holding the suit property in trust for the plaintiff. The plaintiff has not led evidence showing the defendant unlawfully obtained registration. There is no evidence upon which court will base on in granting the permanent injunction against the defendant who is the registered owner.’
18. My understanding of this extract of the impugned judgement was that the Trial Magistrate was constrained from rendering judgment against the respondent for two reasons; insufficient evidence to support the appellant’s claim and an unsupported prayer for permanent injunction. Bearing



this extract in mind and considering the outstanding grounds of appeal, record of appeal and rival submissions; the issue for this court's determination is whether the appellant's evidence supported her stand-alone prayer for permanent injunction.

19. David Bean, in his book *'Injunctions' 12th Edition, Sweet & Maxwell* at pages 13-15 had this to say on permanent injunctions,

'Where the claimant has established that a legal wrong such as nuisance has been committed, then he will prima facie be entitled to an injunction to restrain the defendant from committing that legal wrong although the grant of an injunction is discretionary, the court should grant an injunction necessary to uphold legal rights against a threatened invasion unless there is some factor sufficiently weighty to displace the general rule.'

20. The appellant in the lower court sought permanent injunctive orders which are in the nature of prohibitory injunctions that would have restrained the respondent from dealing or interfering with the suit property. In *Principles of the English Law of Obligations*, edited by Andrew Burrows, Oxford University Press (2015) pages 381-385 the editor expounded on injunctions as follows;

'Injunctions are of two main types; prohibitory and mandatory. Prohibitory injunctions seek to prevent the commission or continuation of a wrong by enforcing negative duties. Mandatory injunctions, which are less common, require the defendant to do something: they enforce positive primary duties (other than for breach of contract where the appropriate remedy is specific performance) or in the form of mandatory restorative injunction. They require the defendant to 'undo' a wrong. Prohibitory injunctions are granted in tortious actions, breach of contract, equitable wrongs. For example, injunctions have been awarded to prevent a trustee in breach of trust.'

21. From this excerpts, it is evident that an injunction cannot be issued in vacuum or as a stand-alone remedy. The appellant in her pleadings had the arduous of laying the basis of her claim, identifying the legal wrong that the respondent had committed and in addition to seeking permanent injunctive orders, she was required to identify the specific remedies that emanated from the alleged legal wrong. This issue has been the subject of determination in several persuasive decisions as expounded as follows:-

In *Ernest Mwangi Waigi v Nation Bank Of Kenya Ltd [2010] eKLR*, Makhandia J (as he then was) expressed himself thus;

'The plaintiff should at least have included a prayer for a declaratory order seeking that this court declares the defendant's intended exercise of its statutory power of sale to be unlawful. In the absence of such prayer, the plaintiff's prayer for a permanent injunction has no legs to stand on. Prayer for injunction cannot exist in a vacuum.'

In *Kenya Power & Lighting Co Limited v Sheriff Molana Habib [2018] eKLR* W Korir J (as he then was) stated;

'Generally, an injunction is sought in addition to other remedies. It is often difficult to seek an injunctive relief as a stand-alone remedy. In most cases it accompanies declaratory orders.'

In *Jennifer Kobilu Kandie v James Ondiek [2019] eKLR*, Odeny J held;

'The plaintiff did not seek for an order of eviction of the defendant but a single prayer of a permanent injunction against the defendant. Supposing the court granted the order



as prayed in the plaint, how was she going to deal with the defendant who has been in occupation of the suit land for a period of time, who has developed the suit land?’

22. The respondent was the registered owner of the suit property and he committed no legal wrong in utilising it. He had the freewill to utilise it as he deemed fit. There was no basis for him to be prohibited from using the suit property.
23. An attentive reading of the plaint demonstrates that though the appellant averred that the respondent held the suit property in trust for her and her siblings, she did not seek a relief of customary trust. In essence, she failed to put a footstool upon which her prayer for permanent injunction could anchor itself upon and any evidence she tendered was bound to fail. I agree with the Trial Magistrate that he was constrained from making a finding on customary trust or illegality in the manner in which the respondent obtained the suit property.
24. I also agree with the respondent’s submissions that the appellant was bound by his pleadings. The Trial Magistrate as an independent arbiter was bound by them. In the case of *Raila Amolo Odinga & Another vs IEBC & 2 Others [2017] eKLR* the Supreme Court of Kenya quoted with approval, the following excerpt from the decision of the Supreme Court of India in *Arikala Narasa Reddy vs Venkata Ram Reddy Reddygari & Another, Civil Appeal Nos 5710-5711 of 2012 [2014] 2 SCR* where the court held;

‘In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings’
25. The persuasive decision of *Njenga Kimani & 2 others v Kimani Nganga K Wainaina (Supra)* that was cited by the respondent’s counsel is distinguishable from this case. In that decision, the court was dealing with a resulting trust which was not the circumstances obtaining in the suit that was the subject of this appeal.
26. In upshot, it is my finding that the Trial Magistrate exercised his discretion properly and arrived at a proper determination and this court finds no reason to upset it.
27. For the reasons stated above, the ultimate result is that the appellant’s appeal is not merited and accordingly, the appeal herein is disallowed and dismissed entirely and the judgment of the Trial Court is upheld. Although it is trite law that costs follow the event, the appellant and respondent are step siblings and because of the special relationship, each party shall bear their respective costs of this appeal.

DELIVERED AND DATED AT SIAYA THIS 16TH DAY OF FEBRUARY 2023.

HON. A. Y. KOROSS

JUDGE

16/02/2023

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

In the Presence of:



Mr. Odongo for the respondent.

N/A for the appellant

Court assistant: Ishmael Orwa

