



REPUBLIC OF KENYA



Owiti (Suing as the Administrator ad litem of the Estate of Peter Otieno Owiti) v Owiti & 2 others (Environment and Land Appeal E021 of 2022) [2023] KEELC 762 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELC 762 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E021 OF 2022
AY KOROSS, J
FEBRUARY 16, 2023**

BETWEEN

**THOMAS ODHIAMBO OWITI APPELLANT
SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF PETER
OTIENO OWITI**

AND

**ANTONY ABONYO OWITI 1ST RESPONDENT
REGISTRAR OF LANDS, BONDO 2ND RESPONDENT
HON. ATTORNEY GENERAL 3RD RESPONDENT**

(Being an appeal from the judgment of Principal Magistrate Honourable J.P. Nandi given on 9/06/2022 in Bondo PM ELC Case Number E34 of 2021)

JUDGMENT

Background of the Appeal

1. The genesis of this appeal emanated from the lower court when the appellant; then the plaintiff; instituted a suit via a plaint dated 28/06/2021 against the respondents claiming that his deceased brother Peter Otieno Owiti ('Peter') was apportioned land amongst his five brothers by their father Nelson Owiti Audi. Peter was allegedly apportioned East Yimbo/Nyamonye/3697 (hereinafter referred to as 'the suit property').
2. Allegedly, the suit property was a subdivision of land parcel number Siaya/Nyamonye 267; the suit property's particulars had been changed by cancelling Peter's name and replacing it with the name of the deceased Okello Owiti ('Owiti').



3. According to the appellant, the 2nd respondent informed him that Peter had been erroneously been issued with a title document and as a result, his name was cancelled and replaced with Owiti's name. He contended he had established that there had been irregularities in Owiti's registration as the proprietor of the suit property; he had been a minor and at the time of registration, was deceased and his father had not allocated any land to him.
4. The appellant asserted that the 1st respondent was culpable because he collected Owiti's title document from the 2nd respondent's offices.
5. The appellant prayed inter alia, a declaration that Owiti was illegally and fraudulently registered as the proprietor of the suit property; the suit property's title deed be cancelled and a title document be issued in Peter's name; permanent injunction and costs of the suit.
6. By the firm of Okello Adipo & Company advocates, the 1st respondent filed a defence and counterclaim dated 14/9/2021. By a ruling issued on 31/3/2022, the 1st respondent's witness statement together with those of his witnesses were expunged from the court record. The net effect was that the 1st respondent did not testify.
7. Despite the 3rd respondent filing a joint defence dated 29/07/2021 on behalf the 2nd and 3rd respondents, the 2nd respondent did not testify.
8. After the appellant had testified and the Trial Magistrate closed the parties' respective cases, the Trial Court in its judgment identified 2 issues for determination; whether the appellant had specifically pleaded fraud and the effect of a party failing to give evidence. On the 1st issue, the Trial Magistrate was of the opinion that from the evidence adduced, the 1st respondent merely collected the title document from the 2nd respondent's offices whilst the 2nd respondent never participated in the adjudication process. The Trial Magistrate ultimately found that the plaintiff had not proved fraud against the 1st and 2nd respondents. On the 2nd this issue, the Trial Magistrate found the 1st respondent's counterclaim had failed.

Appeal to this Court

9. Aggrieved and dissatisfied with the above judgment, the appellant filed a Memorandum of Appeal dated 01/07/2022 in which he laid 2 grounds of appeal: -
 - a. That the Honourable Trial Magistrate erred in law and fact in failing to appreciate the appellant's submissions; and
 - b. That the Honourable Trial Magistrate erred in law and fact in finding that the appellant did not prove his case to the required standards.
10. The appellant sought the following reliefs: the appeal be allowed with costs, the lower court judgment be set aside and the appellant be awarded the prayers sought in the plaint.

Parties' submissions

11. The appeal was disposed of by written submissions. Mr. Ojienda filed the appellant's submissions dated 21/11/2022. Despite service, the 1st respondent did not participate in these proceedings. Mr. Kobimbo who was present for the 2nd and 3rd respondents was given 7 days from 7/12/2022 to file his submissions. As at the time of penning this judgement, the 2nd and 3rd respondents submissions were not in the court file. If at all they will be filed, this court will consider them as having been filed out of time.



12. Mr Ojienda's submissions were centred on the two grounds of appeal. On the 1st ground of appeal, counsel submitted that his submissions before the Trial Court were not considered by the Trial Magistrate. He contended that in the erstwhile submissions, he had placed reliance on *Black's Law Dictionary*, *Bullen & Leake & Jacobs*, *Insurance Company of East Africa v The Attorney General & 3 others* HCCC 135 of 1998, *Arthi Highway Developers Limited v West End Butchery & others* Civil Appeal Number 246 of 2013 and *Joseph Arap Ngok v Justice Moiwo ole Keiwua & 5 others* Civil Appeal Number 60 of 1997.
13. On the 2nd ground, counsel submitted that Section 26 of the *Land Registration Act* protected the interests of innocent proprietors from unscrupulous land transactions and urged this court not to perpetuate such an injustice. Counsel placed reliance in the persuasive decisions of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another* (2013) eKLR and *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* (2015) eKLR. In the latter, the court held;

“Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.”
14. Counsel concluded in his submissions that it was erroneous for the Trial Magistrate to arrive at a decision that was contrary to law and evidence.

Analysis and Determination

15. I fully concur with the decision that was cited by Mr. Ojienda on the often-cited decision of *Mbogo & another v. Shab* [1968] EA 98 which held that the duty of a 1st appellate court is to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In this decision Sir Charles Newbold, P. aptly expressed himself as follows:

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”
16. I have thoroughly considered the records, grounds of appeal and appellant's submissions and I will adopt the grounds of appeal as the issues for this court's determination.

a. That the Honourable Trial Magistrate erred in law and fact in failing to appreciate the appellant's submissions

17. From the impugned judgment, the Trial Court did not address its mind on the appellant's submissions. I have anxiously scrutinised the entire lower court record and I have not caught a glimpse of the said submissions.
18. The appellant's counsel informed the Trial Magistrate on 28/4/2022 that he had filed his written submissions. The record of appeal bears witness the submissions were filed. It would appear that the registry staff did not carry out due diligence by ensuring the submissions found their way to the Trial



Court file. Having not accessed the submissions, it was not humanely possible for the Trial Magistrate to scrutinise them. Where does that leave us?

19. Be that as it may, submissions are merely arguments and the substance of the appellant's case lay with his pleadings and evidence. With or without submissions, The Trial Magistrate had the duty of applying the law and evidence in arriving at a determination. A look at the judgment demonstrates that despite the absence of the appellant's submissions in the court file, the Trial Magistrate not only analysed the evidence that was before him court but applied the law. I am not convinced that the appellant suffered any prejudice by the absence of his submissions being placed in the court file. In the case of *Nancy Wambui Gatheru v Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 the court aptly stated thus on submissions;

“Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

b. That the Honourable Trial Magistrate erred in law and fact in finding that the appellant did not prove his case to the required standards.

20. Section 26 of the [Land Registration Act](#) states that the certificate of title issued by the land registrar 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 on the grounds of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
21. This provision of law has been applied in a line of judicial decisions including [Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another](#) (*Supra*) and [Alice Chemutai Too v Nickson Kipkurui Korir & 2 others](#) (*Supra*).
22. In accordance with the provisions of Order 2 Rules 4 and 10 of the [Civil Procedure Rules](#), the appellant pleaded and particularized fraud against the respondents. The particulars of fraud, mistake and misrepresentation that the appellant pleaded against them were inter alia;
- a. Fraudulently transferring the suit property to Okello Owiti without family permission;
 - b. Causing the suit property to be transferred to Okello Owiti's name mistakenly without his knowledge and permission; and
 - c. Misrepresentation of facts to the registration (sic) of lands that Okello Owiti was an adult capable of holding title as a proprietor. Emphasis added.
23. Having pleaded fraud, the appellant was required to prove these particulars to a standard above a balance of probabilities but obviously not beyond reasonable doubt. This was well settled in the Court



of Appeal decision of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR where the court expressed itself as follows:

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.’

24. The Trial Magistrate found the appellant had not proved his case to the required standard. Was that so?
25. The appellant produced a green card of the suit property which evidenced that it was a 1st registration. The register was opened on 19/1/2015 and a title deed issued on 15/4/2015 and from that time, there had never been interference, transfer or dealings over it by the 2nd respondent. I do not see how the particulars of fraud could be imputed on the 2nd respondent who did not play any role during the adjudication process save for mandatorily issuing title documents in accordance with the Section 28 of the *Land Adjudication Act*. For clarity, the function of the 2nd respondent is well set out in this section as thus;

" Action by Chief Land Registrar

Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register:

Provided that, where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination.’ Emphasis added.

26. Once a 1st registration was effected, the 2nd respondent could make entries on registers of suit properties in accordance with Section 7 (6) and (7) of the *Land Registration Act*. As earlier stated in this judgement, the 2nd respondent had not interfered with the register of the suit property. I am in concurrence with the Trial Magistrate’s sentiments when he asserted in his judgment ‘Thus this means that the land registrar did not amend the adjudication record as that is done by a different department.’
27. According to the pleadings and evidence adduced, the 1st respondent merely collected the title document over the suit property from the 2nd respondent’s offices. Owiti was deceased at the time of collection. The appellant testified that there was nothing wrong with such a collection. Section 13 (5) of the *Land Adjudication Act*, empowered the 1st respondent to collect the title document. This provision states;
- “Where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors, unless the adjudication officer otherwise directs.”
28. There is no doubt from the material on record that the appellant was questioning the adjudication process yet the office which was conferred with the mandate of carrying out adjudication was not joined as a party.
29. The land adjudication record of the suit property was not produced before the Trial Magistrate. I have inspected the adjudication record of Siaya/Nyamonye/267 together with its green card and they show this particular parcel of land was a 1st registration and its acreage was 8.26 Ha and there was no documentary evidence to support the appellant’s allegation that the suit property emanated from Siaya/Nyamonye 267.



30. The appellant produced two registers; a registration section and a no objection register. The former does not reflect the name Peter while the latter does. These registers were issued by the land adjudication officer pursuant to Sections 26 and 26(A) of the *Land Adjudication Act*.
31. From the no objection register that was produced as PEX4, it would appear Peter's name was removed and replaced with that of Owiti. Owiti was allegedly deceased and a minor. Being a minor did not necessary bar a person from being registered as a proprietor as long as there was no objection.
32. The changes to the no objection register could only be attributed to Owiti's estate and the director of land adjudication and settlement or such delegated office and not the 1st and 2nd respondents. In the absence of these two persons in the proceedings, the appellant's suit was bound to fail. It is trite law that parties are bound by their pleadings.
33. Before making my final finding and disposal orders. I have made certain observations from the record. It is evident that the appellant and 1st respondent are siblings and Peter and Owiti were their brothers. From paragraph 20 of the impugned Judgement, it would appear that the suit property had been the subject of criminal proceedings in Bondo PM Criminal Case No.91 of 2019. Being siblings, I urge them to foster harmony and make attempts to resolve their disputes amicably without necessarily pitting each other through the court process since at the end of the day, they still remain family.
34. It is my ultimate finding that the Trial Magistrate exercised his discretion properly and arrived at a proper determination and this court finds no reason to upset it.
35. For the reasons stated above, the upshot 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. Considering the familial relationship between the appellant and the 1st respondent, each party shall bear their respective costs.

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

HON. A. Y. KOROSS

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

16/02/2023

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

In the Presence of :

Mr. Ayugi h/b for Mr. Ojienda for the appellant

N/A for 1st respondent

Miss Kimberly for 2nd and 3rd respondents

Court assistant: Ishmael Orwa

