



Akeyo v Nyarera ((Suing as the Legal Representative of the Estate of Selina Aoko Mbeche)) (Environment and Land Appeal 24 of 2021) [2023] KEELC 15680 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15680 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 24 OF 2021
GMA ONGONDO, J
FEBRUARY 15, 2023**

BETWEEN

LUCY AKEYO OGINGA ALIAS LUCY AKEYO APPELLANT

AND

**CALEB OCHIENG NYARERA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SELINA AOKO MBECHE) RESPONDENT
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SELINA AOKO MBECHE)**

((Being an appeal against the Judgment and Decree of Hon. R.B.N Maloba (Principal Magistrate) delivered on the 16th June 2021 in Homa-Bay CMCC ELC Case No. 35 of 2018))

JUDGMENT

1. The present appeal arises from the trial court’s judgment delivered on 16th June 2021 where the learned magistrate reasoned in part that;

“...Reasons, wherefore, the plaintiff’s suit is dismissed with costs while defendant’s counter claim succeeds in the following terms;

- a. An order of eviction against the plaintiff, agents and or servants from LR no KANYADA/KOTIENO/KATUMA “B”/686.
- b. A permanent injunction restraining the plaintiff either by herself, gents, servants and or agents from entering upon, trespassing onto, building on, cultivating alienating, selling, transferring, and or otherwise interfering with LR KANYADA/KOTIENO/KATUMA “B”/686



- c. Plaintiff to pay to the defendant general damages of ksh 500,000/- with interest of 14% P.A from date of judgment for trespass”
 - d. The defendant awarded costs of the main suit and the counter claim and interest at court rates.”
2. The appellant is represented by the firm of S.O Madialo and Company Advocates.
3. The firm of Oguttu Mboya, Ochwal and Partners Advocates is on record for the respondent.
4. At the heart of the appeal is land reference number Kanyada/Kotieno-Katuma “B”/686 measuring approximately Zero Decimal Zero Four Hectares (0.04 Ha) in area (The suit land herein).
5. Initially, the appeal was lodged at Migori Environment and Land Court. The same was transferred to this court for hearing and determination with effect from 22nd September 2021 in light of Articles 6 (3) and 48 of the *Constitution* of Kenya, 2010.
6. The instant appeal being the first one from the trial court, this court has the jurisdiction to review the evidence on record to determine whether the conclusion originally reached upon that evidence should stand. Nonetheless, this is a jurisdiction which should be exercised with caution; see *Watt v Thomas* (1947) 1 ALL ER 482 and *Peters v Sunday Post* (1958) EA 424 at 429.
7. The appellant who was the plaintiff before the trial court originated the suit by way of plaint dated 16th September 2013 seeking the orders;
 - a. An order of declaration that Salina Aoko Mbeche did not purchase the suit land and did not acquire the same lawfully and that her name should be removed from the register of the suit land.
 - b. An order for the rectification of the register of the suit Land by deleting therefrom entry no 4 and 5 in the proprietorship section part B and thus deleting the name Selina Aoko Mbeche therefrom and substituting in the place thereof the name of LUCY AKEYO MINWANGO as the sole registered proprietor.
 - c. General damages for fraud together with interest thereon at the rate of 12% p.a from the date of Judgment until payment in full.
 - d. Costs of this suit together with interest thereon at the rate of 14% p.a from the date of filing suit until payment in full.
8. In summary, the appellant (PW1) stated that he bought the suit land as disclosed in the sale agreement (PExhibit 1) and that the original land was LR no Kanyada/Kotieno/Katuma “B”/566 as per copy of the mutation (PExhibit 2). That in the year 2005, he discovered that title deed of the suit land got lost. Thus, she reported the incident to the police and was issued with an abstract (PExhibit 3).
9. In a statement of defence and counter claim dated 4th February 2014 and filed in court on 7th February 2014, the respondent denied the cause of action and stated that the suit land was lawfully and legally sold and transferred in his favour by the appellant. That he has been in occupation of the same without any interruption save for trespass at the instance of the appellant which precipitated Homa Bay SRM’s Court Civil case no 45 of 2010.
10. Further the respondent urged the court to dismiss the suit with costs and enter judgment in terms of the counter claim for;



- a. An order of Eviction against the plaintiff, agents and/or servants from the suit land.
 - b. A permanent Injunction restraining the plaintiff either by herself, agents and/or agents from entering upon, trespassing onto, building on, cultivating, alienating, selling, transferring and/or otherwise interfering with the suit land whatsoever and /or howsoever.
 - c. General damages for trespass, together with interests thereon at court rates (14%) from the date of Judgment.
 - d. Costs of the cross be borne by the plaintiff.
 - e. Such further and/or other relief as the Honourable may deem fit and expedient.
11. In his evidence, the respondent (DW1) relied on his statement dated 4th February 2014 as part of his evidence. He told the court, *inter alia*, that he entered into a sale of land agreement with the appellant and relied on his list of documents dated 4th February 2014 and filed in court on 7th February 2014 (DExhibits 1 to 13) which include copies of title deed, application for consent of land control board, letter of consent of the said board and transfer instrument in respect of the suit land in his favour. That he took possession of the suit land in 1995 until 2010 when the appellant trespassed into the same. That thus, he acquired the suit land lawfully.
 12. In arriving at the impugned judgment, the learned trial magistrate observed, inter alia, the appellant's case collapsed and the respondent holds good title in respect of the suit land. That the appellant admitted that he entered into the suit land hence, he was a trespasser thereon.
 13. As provided for under Order 42 Rule 1 of the *Civil Procedure Rules, 2010*, this appeal was commenced by way of a memorandum of appeal dated 24th June 2021 and filed on 20th December 2021 which is premised upon grounds namely;
 - a. The learned magistrate erred in law and in fact in failing to properly consider the evidence placed before court.
 - b. The learned magistrate erred in law in subjecting the Appellant to a higher standard of proof than that required in civil proceedings.
 - c. The learned magistrate erred in law and in fact in finding that the Respondent had proved her case against the Appellant on a balance of probabilities.
 - d. The learned magistrate inadvertently misdirected himself in law and in fact in determining matters that were not properly before him to determine by taking into account irrelevant and failing to consider matters of critical relevance.
 14. So, the appellant has sought orders;
 - a. The appeal be allowed and the Judgement and Decree of the Chief Magistrate's Court dated 16th June 2021 be set aside.
 - b. The court allows the prayers as in the plaint.
 - c. Costs of this appeal be provided for.
 15. On 2nd February 2022, this court ordered and directed that the appeal be heard by written submissions. The court extended the orders on 20th July 2022.



16. The appellant’s counsel filed submissions on 18th March 2022 and summarized the background of the case and discussed the grounds of appeal in favour of the appellant. Counsel referred to section 3 (3) of the applicable version of the Law of Contract Act and the case of National Bank of Kenya Ltd v Anaj Warehousing Ltd (2015) eKLR, among others. Counsel implored the court to allow this appeal and set aside the impugned judgment.
17. Further, counsel urged the court to enter judgment for appellant against the respondent for; orders(a) (b) (c) (d) as stated in paragraph 7 hereinabove. That Costs of this Appeal together with interest thereon at the rate of 14% p.a from the date of judgment until payment in full.
18. In the submissions dated 20th October 2022 and filed on 2nd November 2022, learned counsel for the respondent stated inter alia, the case including the appellant’s case before the trial court and analyzed the grounds of appeal against the appellant. That the appellant admitted to having erected structures and planting trees on the suit land hence trespassed thereon.
19. Counsel further submitted that the appellant failed to plead and prove her case to the requisite standard as noted in the case of Kuria Kiarie & 2 others v Sammy Magera (2018) eKLR and sections 107 and 108 of the Evidence Act Chapter 80 Laws of Kenya, among others. That as a result, the appeal be dismissed with costs to the respondent.
20. In that regard, the issues for determination are contained in the five grounds of appeal which boil down to whether;
 - a. The appellant and the respondent proved their respective cases before the trial court to the requisite standards.
 - b. The learned trial magistrate considered irrelevant matters in her judgment.
 - c. The appellant is entitled to the orders sought in the memorandum of appeal?
21. On the first issue, the appellant alleged fraud against the respondent in the acquisition of ownership of the suit land. The particulars of fraud are set out at paragraph 6 of the plaint. She then sought, inter alia, general damages for fraud in the plaint.
22. Order 2 Rule 4 CPR, 2010 governs matters which must be specifically pleaded any fact showing illegality. In Kinyanjui Kamau v George Kamau (2015) KLR, the Court of Appeal held-

“It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged. It is not enough to infer from the facts.”
23. I take into account the burden of proof as provided for under sections 107 to 110 of the Evidence Act Chapter 80 Laws of Kenya. In the case of R.G Patel v Lalji Makani 91957) EA 324 at 327, the court stated-

“Allegations of fraud must be strictly proved.....something more than a mere balance of probabilities is required.....”
24. Similarly, in the case of Ndolo v Ndolo (2008) 1 KLR (G &F) 742, it was noted that allegations of fraud must be proved to a standard of proof which is obviously higher than that required in ordinary civil cases namely proof upon a balance of probabilities. That certainly, the standard should not be one beyond any reasonable doubt as in criminal cases.



25. The appellant and the respondent both asserted that they bought the suit land from one George Adongo Adha and the appellant respectively. DExhibits 1 to 13 overweigh DExhibits 1 to 4 and firmly reveal that the respondent obtained title deed to the suit land legally, formally and free from any encumbrances.
26. In the case of *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR, the Court of Appeal held thus:
 “...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.....and the registered proprietor must go beyond the instrument and prove the legality of ow he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.....”
27. The testimonies of DW1 was that the transfer of the suit land in his favour, was not fraudulent. In re-examination, PW1 affirmed that she signed transfer of land and application for consent of Land Control Board (D Exhibits 3 and 5 herein) in line with *Munyu Maina* case(*supra*)
 “The Signatures of these documents are not similar to those in my witness statements and verifying affidavit. I have not been shown any minutes of the Land Control Board”
28. In the foregone, the appellant’s allegations cannot hold as he failed to distinctly establish that the respondent acquired title to the suit land by fraudulent transfer. See also *Kuria Kiarie, Ndolo and Kinyanjui Kamau* cases (*supra*).
29. Concerning the second issue, it is important to note that the trial court set out the parties’ respective cases, framed two issues for determination, analysed the issues and reached the finding with reasons in line with Order 21 Rule 4 of the *Civil Procedure Rules, 2010*.
30. The learned trial magistrate only considered relevant matters as stated in the judgment and as pointed out at paragraph 29 hereinabove. She reinforced her decision with authoritative pronouncements, *inter alia*, *David Oguttu Onda v Walter Ndege Owino* (2014) eKLR
31. The learned trial magistrate held
- “...there are documents related to the sale and transfer. These were a copy of Letters of consent dated 6th June 1999 as exhibit 4 and a copy of Transfer Instrument over suit land as exhibit 5. Both exhibit 4 and 5 affirm that the plaintiff fully participated in the transfer of the said property....”
32. Moreover, she held that the appellant’s case was not proved to the required standard thus, the same collapsed. That it followed that the defendant holds a good title to the land by virtue of purchase at a valuable consideration as confirmed by the instrument of transfer (PExhibit 5).
33. It must be borne in mind that the tort of trespass is actionable without proof of any damage. The trial court correctly observed that the plaintiff/appellant had entered the suit land and erected some structure thereon. That the same constituted trespass to the suit land.
34. Notably, where trenches were dug across the plaintiff’s land amounted to trespass and attracted general damages; see *James Njeru v Erickson Kenya Ltd* (2015) eKLR



35. Evidently, the appellant (PW1) gained an unjustifiable entry into the suit land which was in possession of the Respondent (DW1). In Clerk and Lindsell on Torts (18th Edition) paragraph 18-01, the term “Trespass” is defined thus;

“ An unjustifiable entry by one person upon the land in possession of another.....”

36. In the premises, the defendant was entitled to the orders sought in the counter claim as the appellant’s entry into the suit land was unjustifiable. So, the appellant failed to prove her suit to the requisite standard.

37. On the other hand, the respondent proved his counter claim against the appellant on a balance of probabilities.

38. It is the considered view of this court that there is no ground to fault the trial court’s judgment. I proceed to affirm the same.

39. In conclusion, the present appeal is devoid of merit. Therefore, the appellant is not entitled to the orders sought in the memorandum of appeal herein.

40. Wherefore, this appeal is hereby dismissed with costs to the respondent.

41. It is so ordered.

DELIVERED AND DATED AT HOMABAY THIS 15TH DAY OF FEBRUARY 2023

G. M.A ONG’ONDO

JUDGE

Present

1. Mr. R. Ochieng, holding brief for Madialo, learned counsel for the appellant.

2. Okello, Court Assistant.

