



REPUBLIC OF KENYA



**Kandiawo v Chianda & another (Environment and Land Appeal
7 of 2021) [2022] KEELC 4782 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4782 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 7 OF 2021
GMA ONGONDO, J
SEPTEMBER 21, 2022
FORMERLY MIGORI ELC APPEAL NO E009 OF 2021**

BETWEEN

WALTER ODOYO KANDIAWO APPELLANT

AND

VICTOR OTIENO CHIANDA 1ST RESPONDENT

JOASH ODHIAMBO JONYO 2ND RESPONDENT

(Being an appeal from the judgment of Hon. Celesa Okore, Principal Magistrate, delivered on 8th July, 2021 in Oyugis Principal Magistrate's Court Environment and Land Case No. 6 of 2019)

JUDGMENT

1. The present appeal arose from the trial court's judgment delivered on the July 8, 2021 by the Honourable Celesa Okore, Principal Magistrate, in Oyugis Principal Magistrate's Court Environment and Land Case No 6 of 2019 where the learned trial magistrate held, *inter alia*;
 - a. An order be and is hereby issued directing the 1st defendant and/or the registrar to remove the restriction on that entire land parcel known as Central Kasipul/Kamuma/2840 (the suit property herein).
 - b. An eviction order be and is hereby issued against the 1st defendant, his agent, assignees, tenants, servants or employees from the entire land parcel known as Central Kasipul/Kamuma/2840.
 - c. The 1st defendant's counter-claim be and is hereby dismissed with no orders as to costs.
 - d. Each party shall bear its own costs.
2. The appellant namely Walter Odoyo Kandiawo through the firm of Oguttu Mboya, Ochwal and Partners Advocates mounted the appeal by way of a memorandum of appeal dated July 9, 2021 and



- duly filed on July 12, 2021. The appeal is anchored on grounds 1 to 13 as set out on the face thereof and these include:
- a. The learned trial magistrate erred in fact and law in finding that the appellant failed to prove the averments contained in the counter-claim as against the respondents herein on balance of probabilities thus dismissing the counter-claim against the respondents.
 - b. The learned trial magistrate erred in law and fact in finding and holding that because the 1st respondent was the registered owner of the suit property, the appellant's counter-claim against the respondents could not stand.
 - c. The learned trial magistrate misdirected himself by dismissing the appellant's counter-claim against the respondents herein while the evidence on record in favour of the appellant were cogent and/or weighty.
3. Wherefore, the appellant has sought the orders that:
- a. The judgment and decree of the learned trial Magistrate dated July 8, 2021, be set aside and/or quashed and same be substituted with an order dismissing the 1st respondent's suit vide Oyugis Principal Magistrate's Court Environment and Land Case No 6 of 2019.
 - b. The honourable court be pleased to vary and/or set aside the limb of the judgment dismissing the appellant's counter-claim vide Oyugis Principal Magistrate's Court Environment and Land Case No 6 of 2019 and in lieu thereof, grant an order allowing the counter-claim, dated August 16, 2019.
 - c. The respondents herein be condemned to bear costs incurred in the subordinate court.
 - d. Costs of the appeal be borne by the respondents.
 - e. Such further and/or other orders be granted as this honourable court may deem fit and expedient.
4. The appeal was transferred to this court for hearing and determination from Migori Environment and Land Court on September 16, 2021.
5. The appeal was heard by way of written submissions pursuant to this court's directions of May 5, 2022.
6. Accordingly, the appellant's counsel filed submissions dated June 13, 2022 on June 14, 2022. Counsel submitted, *inter alia*, that the suit property was not available for sale to the 1st respondent who failed to conduct due diligence thereof. That the appellant adduced evidence that he had entered into a valid contract with the 2nd respondent and obtained consent from the Land Control Board within the statutory timelines after payment of the purchase price in full. That the appellant even took possession of the suit property in 2013 and commenced construction of a house.
7. Furthermore, it was the appellant's submission that the transfer instrument complied with sections 44, 45 and 46 of the [Land Registration Act](#) and that stamp duty was paid but the 2nd respondent declined to surrender the original title deed for purposes of effecting a transfer of the suit property to the appellant. Thus, counsel urged this court to set aside the judgment of the trial court, allow the counter-claim with costs and dismiss the 1st respondent's case with costs to the appellant. Counsel also cited various authorities including the case of [Virani t/a Kisumu Beach Resort v Phoenix of East Africa Ltd.](#) (2004) 2KLR 269 and [National Land Commission v Afrison Export Import Limited and 10 others](#) (2019) eKLR, to buttress his submissions.



8. Learned counsel for the 1st respondent filed submissions dated June 2, 2022 on June 3, 2022. Counsel relied on section 24, 25 and 26 of the *Land Registration Act, 2016 (2012)*, stating that courts are mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land. That the same can only be challenged as outlined under section 26(1) (a) and (b) of the same Act. That since the appellant failed to provide evidence of fraud at the trial court as against the 1st respondent, the latter acquired good title to the suit property and his rights to the suit property is absolute and indefeasible.
9. Counsel further submitted that the 1st respondent conducted due diligence before purchasing the suit property. Thus, counsel urged the honourable court to dismiss this appeal with costs. Counsel relied on the case of *Nancy Chepkirui Soi v Gideon Maritim* (2021) eKLR, to fortify the submissions.
10. The 2nd respondent did not file any submissions in respect to the instant appeal.
11. In the foregone, the issues for determination are as captured in the grounds of appeal and compressed thus:
 - a. Whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal;
 - b. Who should bear the costs of this appeal and the court below?
12. I have carefully considered the parties' respective pleadings, the trial court's proceedings inclusive of evidence as well as the judgment of the learned trial magistrate. It is noteworthy that it is the duty of this court to reconsider the evidence on record afresh and come to its conclusions and inferences; see *Selle and another v Associated Motor Boat Co Ltd and others* (1968) EA 123 and *Williamson Diamonds Ltd v Brown* (1970) EA 1.
13. It must be noted that the suit was commenced by way of a plaint dated January 21, 2019 and filed in court on even date for the following orders;
 - a. An order directing the defendant and/or the registrar to remove the restriction on the suit property.
 - b. An eviction order against the defendant, his agents, assignees, tenants, servants or employees from the entire suit property and an order for account and recovery of any mesne profits made by the defendant.
 - c. Cost and interest from the date of filing this suit.
 - d. Any other further relief as the court may deem just and fit to grant.
14. PW1, Victor Otieno Chianda who was the plaintiff before the trial court (the 1st respondent herein), testified on July 4, 2021 and adopted his witness statement dated January 15, 2019 as part of his testimony. He stated that he conducted due diligence on the suit land through his counsel, Odongo Awino, prior to executing a sale agreement dated May 24, 2016. That subsequent to the purchase, a transfer was done and title deed issued to him on June 7, 2017. That the appellant placed a restriction on the land on May 21, 2017 and he only learnt of the same when he applied for a loan facility and sought to use the suit property as security. He produced in evidence a copy of certificate of official search, copy of the title document, Land transfer form, application for consent from Land Control Board, Land sale agreement as well as plaintiff's identity card (PExhibits 1, 2, 3, 4, 5 to 6 respectively).



15. During cross-examination, PW1 admitted that when he conducted a physical search on the suit property, there was an incomplete structure thereon. That the building was later completed and it is where the appellant lives.
16. The 1st defendant (appellant herein) in response filed an amended statement of defence and counter-claim dated August 16, 2019 denying all the claims in the 1st respondent's plaint. He further stated in the counter-claim that the 1st respondent's transfer and subsequent registration of the suit property was procured and/or obtained by fraud.
17. The 1st defendant (DW1) testified on April 16, 2021 and adopted his witness statement dated August 6, 2019 as part of his testimony. He stated that he purchased the suit property in 2013 from the 2nd respondent herein after conducting due diligence. That he entered into two separate sale agreements with the 2nd respondent. That in the first one the purchase price had been agreed at Kshs 350,000 in 2014 but the 2nd respondent later revised the price to Kshs 445,000 thereby necessitating execution of the second sale agreement. That he paid the entire purchase price and obtained consent from the Land Control Board in September 2014. However, the 2nd respondent declined to surrender the original title for transfer to his name. He stated that he has been in occupation of the suit property since 2013 and has erected structures thereon. That the same is his family home. He urged the court to cancel the title issued to the 1st respondent, and in the alternative he sought special damages totaling to Kshs 4,495,000/- against the 1st and 2nd respondents. He produced in evidence a copy of green card, certificate of official search, Land sale agreement, 2nd Land sale agreement, application for consent, letter of consent, transfer instrument, agreement for the plaintiff, application to land control board, caution, certificate of search, photographs and valuation report (1st DExhibits 1 to 14 respectively).
18. Upon cross-examination, DW1 admitted that he was aware that the Land control board consent is only valid for six months and that the transfer to him was never registered. He also did not have evidence to prove that the plaintiff illegally registered the title in his name.
19. DW2, George Lochi Okello, testified on April 16, 2021 and adopted his witness statement dated January 29, 2021 as part of his evidence. He stated that he was a witness to the agreement for sale between the 1st defendant and the 2nd defendant dated July 18, 2014. That the 1st defendant has taken possession and lives on the suit property. He added that the 2nd defendant later refused to transfer the suit property to the 1st defendant.
20. The 2nd defendant (2nd respondent herein) did not respond to the counter-claim. He also failed to participate in this appeal.
21. In arriving at the impugned judgment, the learned trial magistrate cited sections 24 (a), 25(1) and 26 of the [*Land Registration Act 2016 \(2012\)*](#), and observed at page 4 of the judgment, inter alia;

“...it is my considered opinion that the plaintiff's right to the suit land is absolute and indefeasible...”
22. Further the learned trial magistrate at page 6 noted thus:

“...the 1st defendant has gone further to lodge a counter-claim against the plaintiff, but he has not provided proof that the plaintiff illegally, unprocedurally and fraudulently acquired the suit property in this case... It is the 2nd defendant who duped and illegally obtained the 1st defendant's cash... the 1st defendant should therefore direct his demands to the 2nd defendant and even apply for execution if his monetary claim is not fully paid and/or refunded...”



23. Notably, despite being accorded the opportunity to lead evidence to demonstrate the existence of fraud on the part of both the 1st and 2nd respondents, the appellant only lead evidence of fraud against the 2nd respondent herein during trial. Section 107 and 108 of the *Evidence Act*, Chapter 80 Laws of Kenya are clear that he who asserts or pleads must support the same by way of evidence.
24. I therefore, endorse the learned trial magistrate's reasoning, particularly her finding that the appellant did not provide proof that the plaintiff illegally, unprocedurally and fraudulently acquired the suit property in this case. That it is the 2nd defendant (2nd respondent herein) who duped and illegally obtained the appellant's cash in the circumstances.
25. So, did the 1st respondent prove to the requisite standard, his case before the trial court and did the appellant prove to the standard, his counter-claim? (See also *Ahmed Abdulkarim v Member for Lands and Mines* [1958] EA 436 at 441).
26. Bearing in mind the entire evidence on record in this case, and applying the facts of the case as well as legal principles stated above, it is clear that the 1st respondent who was the plaintiff before the trial court proved that he is the lawful registered owner of the suit property. That he obtained the title deed in a procedural and legal manner.
27. On the other hand, the appellant who was the 1st defendant at the trial court also proved that there was indeed a contract for sale of the suit property between himself and the 2nd respondent. That he paid the full purchase price, obtained consent from the Land Control Board, only for the 2nd respondent to decline to avail the original title to the suit property for purposes of effecting transfer. Such evidence was not contested by the 2nd respondent who failed to defend the suit at the trial court and in this appeal. It is therefore, treated as the gospel truth.
28. Plainly, in the amended counter-claim dated August 16, 2019 and filed at the trial court, the appellant herein sought various orders as against the 1st and 2nd respondents. However, the court having established that the 1st respondent obtained title to the suit property legally and procedurally, prayers (i) to (v) as well as (vii) and (viii) sought in the counter-claim, must fail.
29. As regards prayer (vi) in the counter-claim, the appellant sought to be compensated by the respondents on account of the value of the suit property and the improvements thereon in the sum of Kshs 4,495,000/-. The same was broken down as below: Costs of purchasing the land Kshs 445,000/- Value of improvements Kshs 4,000,000/- Valuation fees Kshs 50,000
30. In his written submissions, learned counsel for the appellant submitted that the trial court established that the 2nd respondent duped the appellant in the land transaction. That therefore, the trial court ought to have awarded the appellant special damages.
31. It is trite that special damages must be both strictly pleaded and proved, before they can be awarded by the Court. In the case of *Hahn v Singh*, Civil Appeal No 42 of 1983 [1985] KLR 716, at P 717, and 721, the Learned Judges of Appeal (Kneller, Nyarangi JJA, and Chesoni Ag JA) held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.” (Empasis added).

The same was restated in the case of *Jivanji vs Sanyo Electrical Company Limited* [2003] 1 EA 98.
32. So, did the appellant prove his claim for special damages as against the defendants to the counter-claim?



33. The appellant produced in evidence a copy of the Valuation Report of the suit property by Michigan Valuers indicating the value of the suit property to be Kshs 4,000,000 and a copy of receipt of Kshs 50,000 in respect of valuation of the same. Again, this evidence was not controverted by the respondents. However, no evidence was availed to support the claim for costs of purchasing the suit property.
34. I subscribe to the Court of Appeal decision in *Jubilee Insurance Company of Kenya Ltd v Zabir Habib Jiwan & another* [2017] eKLR where the Learned Judges stated in part:
- “...the best form of evidence would obviously be in the form documentary e.g. receipts but where such evidence was not available, other form of cogent evidence may be adduced to prove ownership and the value of an item (Emphasis added).
35. It therefore, follows that the appellant proved on a balance of probability his claim for special damages, in part, at the trial court.
36. In light of the foregoing, I hereby award special damages of Kshs 4,050,000/- to the appellant as against the 2nd respondent.
37. In the result, the instant appeal hereby succeeds in part, with respect to only the issue of special damages awarded to the appellant as against the 2nd respondent.
38. By dint of the proviso to section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and given the nature of the matter as well as the circumstances herein, costs of this appeal and the court below to be borne by the 2nd respondent.
39. Orders accordingly.

G.M.A ONG'ONDO

JUDGE

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 21ST DAY OF SEPTEMBER 2022.

Present

1. MS B. Nyakwama holding brief for MS W. Ochwal, learned counsel for the appellant.
2. A. Okello, Court Assistant

