



Case Number:	Environment and Land Appeal Case N27 of 2021
Date Delivered:	28 Apr 2022
Case Class:	Civil
Court:	Environment and Land Court at Siaya
Case Action:	Judgment
Judge:	Anne Yatich Koross
Citation:	Mary Awino Obiero v Washington Otieno Muluare; National Bank of Kenya & another (Interested parties) [2022] eKLR
Advocates:	Mr. Sala for 1st respondent M/s Anyango for 2nd respondent
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Siaya
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIIAYA

ELC APPEAL CASE NO. 27 OF 2021

MARY AWINO OBIERO (Suing as the legal representative

of the estate of EVEREST ABIERO AMENY.....APPELLANT

VERSUS

WASHINGTON OTIENO MULUARE..... RESPONDENT

NATIONAL BANK OF KENYA.....1ST INTERESTED PARTY

COLINET AUCTIONEERS.....2ND INTERESTED PARTY

JUDGEMENT

(Being an appeal from the judgment and decree of the Principal Magistrate Honourable J.Ogondo delivered on 3/6/2021 in Siaya SPM ELC Case Number 219 of 2018)

Introduction

1. By a plaint dated 30/11/2018, the appellant who was the plaintiff in the lower court and one of the legal representatives to the Estate of Everest Abiero Ameny filed a suit against the respondent.
2. The subject matter of the suit was alleged trespass and encroachment by the respondent on land parcel **Siaya/Karapul Ramba/1599 (“the suit property”)** that allegedly belonged to Everest. The appellant prayed for permanent injunctive orders against respondent and sought for his eviction from the suit property and costs of the suit. The suit property was ostensibly charged by the 1st interested party.
3. By a memorandum of appearance dated 23/01/2019, the firm of Sala & Mudany Advocates entered appearance on behalf of the respondent and filed a defence and counterclaim dated 6/02/2019 in which he denied the assertions in the plaint and contended that he was the proprietor of the suit property. In his counterclaim, he averred that he purchased the suit property on 26/09/2018 from one Elizabeth Auma Abungu (**DW 2**). He prayed for possession of the suit property, permanent injunctive orders against the appellant, general damages for loss of use of construction materials and rental income from November 2018 until payment in full and costs of the suit and interest.
4. When the 1st interested party advertised to sale the suit property by auction during the course of the proceedings in the trial court through the 2nd interested party, the respondent by a motion dated 25/07/2019 sought several orders including joinder of the 1st and 2nd interested parties; which was allowed by the trial court.
5. By a memorandum of appearance dated 17/09/2019, the firm Otieno Yogo Ojuro & Company Advocates, entered appearance for the 1st interested party.
6. Upon hearing the parties, the court by its judgment dated 3/06/2021 dismissed the appellant’s claim and allowed the respondent’s counter claim and permanently restrained the appellant and interested parties from advertising the suit property for sale. It is noteworthy that the appellant did not file a defence to counterclaim and in essence, the respondent’s claim was unchallenged.
7. Dissatisfied by the judgment of the trial court, two separate and substantive appeals were filed; **the instant one that is the**

subject of this court's determination and **Siaya ELC Appeal No. 7 of 2021 National Bank of Kenya v Mary Awino Abiero (suing as the Legal Representative of the Estate of Everest Ameny) & Another**. The two appeals were not consolidated and are both pending determination before this Court.

Memorandum of appeal

8. Though the memorandum of appeal dated 12/06/2021 sets out 12 grounds of appeal, the appellant's written submissions dated 12/02/2022 condensed them into four grounds of appeal;

a) The Learned Trial Magistrate was biased in his analysis and made a decision that was contrary to adduced evidence.

b) The Learned Trial Magistrate erred in law and fact by shifting the prove and arriving at the decision that the defendant had good title to the suit property and/or land parcel number East Alego/Karapul Ramba/1599.

c) The Learned Trial Magistrate erred in law and fact by failing to find that the appellant was the administrator of the Estate Everest Abiero Ameny.

d) The Learned Trial Magistrate failed to find that the 2nd respondent had an interest in the suit property and/or land parcel number East Alego/Karapul Ramba/1599 that ought to be protected.

9. The appellant prayed for; (i) the appeal be allowed with costs, (ii) the judgment and decree of the lower court be set aside, and (iii) upon setting aside, there be retrial.

Appellant's submissions

10. On the 1st ground, the appellant submitted that in the trial court, the parties dealt with the suit property and land parcel number **East Alego/Karapul Ramba/1599** as one parcel of land yet the trial court decided that they were two distinct properties. She averred that this determination was contrary to trite law that parties are bound pleadings.

11. On the 2nd ground, she submitted that the registration of a person as a proprietor of land can by virtue of **Section 26(1) of the Land Registration Act** be challenged on grounds of fraud or misrepresentation to which a party is proved to be a party or if the title document had been acquired illegally, unprocedurally or through a corrupt scheme. In support of this assertion, she relied on the case of **Munyu Maina v Hiram Gathiha Maina (2013) eKLR** which held that the root of a challenged title must be investigated to prove its legality. She also relied on the case of **Hubert L Martin & 2 others v Margaret J Kamar & 5 others [2016] eKLR** which stated that where there are two titles over the same parcel of land, the root of the titles has to be traced and interrogated so as to ascertain ownership.

12 She submitted, **DW 2** did not have a good title and therefore could not pass a good title to the respondent and that the respondent did not carry due diligence to establish the authenticity of **DW 2's** title to the suit property.

13. She submitted that the respondent could not seek refuge in the plea of bona fide purchaser for value for the reason that the Ugandan *locus classicus* case of **Katende v Haridar & Company Limited [2008] 2 EA 173** had been departed from in several court decisions including **Mwangi James Njehia v Janetta Wanjiku Mwangi & another [2021] eKLR** and **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** where in the latter, the court stated that the title of an innocent purchaser is impeachable as long as the title was obtained illegally, unprocedurally or through a corrupt scheme.

14. On the 3rd ground, the appellant contended that she had been appointed as an administrator of the Estate of Everest in **Siaya SRM Succession Cause No.89 of 2001** and by virtue of **Section 79, 82, 83 and 84 of the Law of Succession Act**, she had capacity to sustain the suit in the trial court. She placed reliance on the cases of **Alexander Mutunga Wathome v Peter Lavu Tumbo & another [2015] eKLR** **Machakos Succession Cause Number 80 of 2011**.

15. It was the Appellant's position that in filing the suit, she wanted to ascertain ownership of the suit property before including it as part of the estate of the deceased. In this regard she relied on the authority of **Re the Estate of Alice Mumbua Mutua (deceased)**

Succession Cause Number 3142 of 2003 [2017] eKLR which stated that where a dispute over property arises after confirmation of grant, then these disputes have to be determined by other courts.

16. On the 4th ground, she faulted the court for failing to find that the 1st interested party had an interest in the suit property.

Respondent's submissions

17. The respondent filed written submissions dated 22/02/2022. He submitted that he had proved his case in the trial court. He asserted that in the trial court, the certificate of official search dated 5/06/2012 was for **East Alego/Karapul Ramba/1599** and not of the suit property and that the appellant neither produced a title document or a "greencard" to assert ownership over the suit property and that the Attorney General and Land Registrar who were pertinent in the proceedings were not joined as parties. He asserted that fraud was never pleaded by the appellant and that the appellant and 1st interested party did not produce any evidence to prove that the 1st interested party had charged the suit property.

18. He contended that the certificate of confirmation of grant being waved by the appellant did not hold water because the suit property was not listed as one of the assets forming part of the estate of the deceased Everest.

19. He submitted that he was an innocent purchaser for value without notice of defect of title and he relied on the cases of **Lawrence Mukiri v Attorney General & 4 others [2013] eKLR** and **Eunice Grace Njambi Kamau and Another v The Honourable Attorney General & 5 others Civil suit Number 976 of 2012** that cited the case of **Fletcher v Peck 10 U.S. 87 1810** which stated that an innocent purchaser for value without notice should be protected. He asserted that he conducted due diligence before he purchased the suit property.

20. He contended that it was trite law that a title document could only be impeached if it was shrouded with fraud, illegality, corruption or misrepresentation. He relied on the case of **Eunice Grace Njambi Kamau and Another v The Honourable Attorney General (Supra)** which stated that a fraudulent conduct must be distinctly alleged and proved and cannot be inferred from the facts of the case. He submitted that fraud must be proved beyond a balance of probabilities and on this, he relied on the case of **Central Bank of Kenya Limited v Trust Bank Limited & 4 others [1996] e KLR**

1st Interested party's submissions

21. It filed written submissions dated 21/02/2022 and contended that the suit only dealt with one property and that it was uncontroverted that it had charged the suit property and/or land parcel number **East Alego/Karapul Ramba/1599** and that it was not feasible for it to auction the same property twice; to **DW 2's** husband and during the course of the trial court's proceedings.

22. It submitted that the issue for determination before the trial court was who between the appellant and respondent was the owner of suit property and/or **East Alego/Karapul Ramba/1599** and that the certificate of official search produced by the appellant demonstrated that Everest was the registered owner of the suit property and he was issued with a title document on 18/4/1991 and subsequently charged it. It submitted that the respondent equally produced a search which demonstrated that **DW 2** too obtained a title deed to the suit property on the same date as Everest who had allegedly also purchased it by auction from the 1st interested party.

23. It identified one issue for determination; who between the appellant and respondent was the owner of the suit property. On this issue, it submitted that as evidenced by the official search produced by the appellant, Everest obtained loan facilities from it and its interests had been recorded in the encumbrance section as entry no. 7.

24. He contended that **DW 2's** testimony did not produce documents in support of her assertion that the suit property was purchased from the interested party by auction and further, did not produce any transfer form. That the respondent neither paid stamp duty at the time of purchase of the suit property, produced a consent from the Land Control Board nor produced the transfer documents. Consequently, it was its submission that the respondent's title document was null, void and a fictitious registration and on this they relied on the case of **Macfoy v United Africa Ltd (1961) 3 ALL E.R 1169** where the court stated that where there is a nullity, everything founded on it is incurably bad. It submitted that the root of the respondent's title document was questionable and on this it relied on the case of **Daudi Kiptugen v Commissioner of Lands & 4 Others (2015) eKLR** which stated that if there's contention that a title was improperly acquired, the holder must demonstrate that he acquired it properly.

25. The 2nd interested party did not participate in the proceedings.

Analysis and determination

26. This being a 1st appeal, it behoves this court to re-evaluate the evidence afresh, reassess the case and make its own independent finding and conclusions. See **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, which was quoted by the case of **Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR**. However, in re-evaluating the evidence, the court must bear in mind that did not have the advantage of seeing and hearing the witnesses.

27. As a 1st appellate court, this court will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judicial officer misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion.

28. This court will render its determination on grounds (a) to (d) as condensed in the appellant's written submissions. Because there is a replication of the summarised grounds, this court shall consolidate grounds (a), (b) and (d) into a single ground.

I will proceed to analyse the legal and jurisprudential framework on the three condensed grounds of appeal in a sequential manner.

Grounds (a) (b) and (d)

29. Interests in land are registered so as to facilitate ascertainment of rights over a particular parcel of land. Within the provisions of **Section 6** of the **Land Registration Act**, the government constitutes areas of land into registration units which are subsequently divided into registration sections. These registration sections are identified by distinctive names and may further be divided into blocks which have distinctive numbers or combinations of numbers and letters. The name of the registration section, the number and the letter of the block is deemed sufficient reference to a particular parcel of land. This provision of law echoes the provision of **Sections 18(3)** and **(4)** of the repealed **Registered Land Act**. What these provisions of law imply is that each parcel of land has a unique reference that is distinct from any other parcel of land.

30. The case of **David Peterson Kiengo & 2 others V Kariuki Thuo [2012] eKLR** aptly pointed out the purpose of registration of titles as thus:

“The State maintains a central register of land title holdings which is deemed to accurately reflect the current facts about title”.

31. In her claim, the appellant asserted that the respondent had without colour or right trespassed and encroached on the suit property that belonged to her Everest. To buttress ownership of the suit property, she produced a certificate of official search of land parcel number **East Alego/Karapul Ramba/1599** and not that of the suit property; **Siaya/Karapul Ramba/1599**. Apart from the certificate of official search of **East Alego/Karapul Ramba/1599** which depicts that Everest was registered as the owner on 18/4/1991 which was charged by the 1st interested party on 11/7/1991, the appellant never produced title documents to this property or to that of the suit property.

32. On the other hand, the respondent filed a defence and counterclaim in which he claimed ownership of the suit property and armed himself with a certificate of official search and a copy of a title deed to the suit property. A defence to counterclaim was never filed and its averments were never challenged. From these two documents that were produced, it can be deduced that the register of the suit property was opened on 14/5/1987 and registered in Siaya/Karapul Ramba unit and section as parcel number 1599 and registered in the name of the respondent on 9/10/2018 and previously, it was registered in the name of **DW 2**.

33. Bearing in mind the provisions of **Section 6** of the **Land Registration Act** and **Section 18(3)** and **18(4)** of the repealed **Registered Land Act**, the suit property; **Siaya/Karapul Ramba/1599** and **East Alego/Karapul Ramba/1599** are two distinct parcels of land. If indeed the appellant and the 1st interested party had a stake in the suit property, nothing could have been easier than for them to adduce documentary prove of their interest in the suit property such as a Registry Index Map, title deed and charge documents; which they did not.

34. Indeed, as has been submitted by the appellant, it is trite law that parties are bound by their pleadings. The trial court record speaks for itself. Within the provisions of **Section 35** of the **Evidence Act**, the appellant produced an official search certificate of

East Alego Karapul Ramba as prove of ownership of the suit property. She laid foundation of its authenticity and relevance to the facts of the case and it became part of the trial court record. Once it was admitted as evidence and produced, the court was bound to apply its judicious mind on it. In the Court of Appeal decision of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR**, the court held thus on the stages of filing, production and prove or disprove of documents;

“First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence...Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case”.

35. Contrary to the assertion in the consolidated ground of appeal that the trial court introduced new issues, the pleadings of the parties and judgement demonstrates otherwise; the trial court applied its judicious mind on the evidence presented before it before arriving at a finding that the appellant had not proved her case on a balance of probabilities and entered judgement for the respondent.

36. In the case of **Edward Moonge Lenguuranga v James Lanaiyara & another (2019) eKLR**, the court defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. Looking at the appellant’s claim in the trial court, the cause of action was trespass to the suit property and not fraud. I need not say more.

Ground (c)

37. **Section 82** of the *Law of Succession Act* provides thus on the role of legal administrators of an Estate as thus;

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers; (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate” [Emphasis added]

38. My understanding of this provision of law is that if an Estate has more than one legal administrator, the administrators must jointly file suit or seek authority of the other if a suit has survived a deceased person. This position of law has been upheld in a line of persuasive court decisions including; **Simon Kamau Muhindi Suing as the Administrator of the Estate of Esther Nyokabi Muhindi v Monica Wambui Ngugi & Another [2014] eKLR, Misc. Civil Application No. 103B of 2013 Republic v Nairobi City Council**. In the case of *Simon Kamau Muhindi (Suing as the administrator of the Estate of Esther Nyokabi Muhindi (deceased) v Monica Wambui Ngugi & Another, HCCC No.207 of 2013*, the Court held thus:-

“The capacity to agitate any suit on behalf of the Estate of the deceased inheres in the administrators duly appointed by the court. They act jointly at all times.....one administrator out of the others lacks capacity to bind the estate or any of the administrators or file suit alone on behalf of the estate”.

39. On the basis of a point of law, the trial court found that the appellant’s suit was incompetent because she had not joined her co-administrator one Selina Awuor Abiero in the suit. In my view, that is the position of law and I will not disturb the finding of the trial court.

40. However, the trial court did not stop there, it went further and found that the plaintiff did not have locus standi to institute the suit because she was neither the registered owner, beneficiary nor was the property listed in the confirmation of grant.

41. Within the provisions of **Order 45 Rule 1** of the **Civil Procedure Rules** and **Rule 63** of the **Probate and Administration Rules**, administrators of an Estate of a deceased person have leeway to reopen a confirmed grant by making an application for review in the event of discovery of new and important fact such as an omitted property of a deceased person.

42. In my humble opinion, the appellant and her co-administrator had to first approach the trial court to establish whether indeed the deceased was the owner of the suit property. Upon such prove, they could approach the probate court to review the grant orders. It is therefore my finding that though the trial court did not err when it found the suit was incompetent, it erred in finding that the appellant did not have locus standi because she was not a beneficiary of the Estate of Everest or the property not listed in the Estate

of the deceased.

43. The upshot of this judgment is that the appellant's appeal partially succeeds to the extent that the trial courts' finding that the appellant did not have locus to sue because she was neither a beneficiary of the suit property nor the property listed in the confirmation of grant is hereby set aside. Costs follow the event and for the reason that the appeal was partially successful, I award two thirds of the costs of this appeal to the respondent.

44. It is so ordered.

Judgment delivered virtually.

Dated, signed and delivered at Siaya this 28th day of April 2022.

In the Presence of:

Mr. Obiero h/b for Mr. Sala for 1st respondent

M/s Anyango for 2nd respondent

N/A for the appellant

Court assistant: Ishmael Orwa.

HON. A. Y. KOROSS

JUDGE

28/4/2022



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