



Ombaso & 2 others (Suing as legal representatives and on behalf of the Estate of Ombaso Ombongi) v Ombaso & 2 others (Environment & Land Case 17 of 2021) [2023] KEELC 16588 (KLR) (27 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16588 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 17 OF 2021
JM KAMAU, J
MARCH 27, 2023
[FORMERLY AT ENVIRONMENT AND LAND COURT AT KISII CASE NO. 461 OF 2014]

BETWEEN

AARON OGENCHE OMBASO 1ST PLAINTIFF
ENOSH MOMANYI OMBASO 2ND PLAINTIFF
FLORENCE KWAMBOKA LUCA 3RD PLAINTIFF
SUING AS LEGAL REPRESENTATIVES AND ON BEHALF OF THE ESTATE OF OMBASO OMBONGI

AND

YUNUKE OSEBE OMBASO 1ST DEFENDANT
DISTRICT REGISTRAR, NYAMIRA COUNTY 2ND DEFENDANT
NYAMIRA COUNTY 3RD DEFENDANT

JUDGMENT

- On 04/11/2014, the Plaintiffs herein obtained letters of administration Ad Litem in respect to the Estate of Ombaso Ombongi who died on 11/11/2011. Subsequently on 27/11/2014 they filed a suit against their step mother, Yunuke Osebe Ombaso and the Land Registrar, Nyamira. The 1st Defendant was the 2nd wife of their late father. The first wife, mother to the Plaintiffs had 7 children while the 1st Defendant had 2. Their claim is that the 1st Defendant with the help of the 2nd Defendant had Gesima Settlement Scheme/512 transferred to her long after the death of its registered owner, Ombaso Ombongi and without having obtained letters of administration as a result of which the Plaintiffs were disinherited. This, they aver, was not only irregular but also illegal. They therefore made prayers seeking: -



- a. An order directing the Defendants to cancel Entry No. 3 and 4 on the green card/register of Title No. Gesima Settlement Scheme/512 hence returning the said parcel to the name of the deceased.
 - b. An order of declaration that the transfer of parcel No. Gesima Settlement Scheme/512 from the name of Ombaso Ombongi to the name of the 1st Defendant without a proper grant is null and void.
 - c. An order to issue directing the 1st Defendant to give an account of all the proceeds that the 1st Defendant has been receiving from the tea earnings from parcel No. Gesima Settlement Scheme.512.
 - d. Costs of this suit.
 - e. Interest on (2) above at court rates.
 - f. Any such further relief as this Honourable Court deem fit to grant.
2. In her statement of Defence, the 1st Defendant denied the Plaintiffs' claim and averred that her late husband had already distributed his Estate and did not therefore die intestate and that she has always resided and farmed on Gesima Settlement Scheme/512 which she was allocated and that the 1st wife, mother to the Plaintiffs was bequeathed parcel No. Majoge/Bosoti/1387. She avers that she has massively developed Gesima Settlement Scheme/512 where she has planted tea bushes. To which the Plaintiffs in their Reply to Defence responded by saying that the tea was planted by their mother. The 2nd Defendant never filed any Defence but the court issued witness summons on him during the Hearing of the case.
 3. Professor Aaron Ogenche Ombaso, the 1st Plaintiff, a Professor of Philosophy in Curtin University, Australia took to the witness stand and adopted his recorded statement dated 04/11/2014. He said that the 1st Defendant is his step-mother and that his father died on 11/11/2011 and he produced a copy of the death certificate to prove this. He also produced a copy of the letters of Administration Ad Litem to show that he and his Co-Plaintiffs have obtained a Grant to institute this suit. He produced a copy of certificate of official search showing that Gesima Settlement Scheme /512 was now registered in the name of Yunuke Osebe Ombaso, the 1st Defendant since 25/05/2012 when a Title Deed was issued to her. He also produced a copy of the Green Card showing that the same had first been issued to her. He equally produced a copy of the Green Card showing that the same had first been registered in the name of his late father, Ombaso Ombongi on 09/03/2005. The witness produced another official search showing that Majoge/Bosoti/1387 was registered in the name of Ombaso Ombongi on 22/05/1969 and a Title Deed issued on 05/02/2007. He further produced a letter dated 1/11/2022 from the Land Registrar, Nyamira.
 4. It is therefore his evidence that after his father's death, the 1st Defendant illegally transferred the parcel of land L.R. NO. Gesima Settlement Scheme/512 to herself without probate yet the same ought to have been placed together with Majoge/Bosoti/1387 and distributed to all the beneficiaries through a succession cause. He said that Majoge/Bosoti/1387 measures 2.63 Hectares whilst Gesima Settlement Scheme/512 measures 6.37 Hectares. He said that his mother, Naomi Matonga Ombaso who died in 2018 had 7 children while the 1st Defendant had 2. He wound up his evidence by testifying that his father left no written will and that his prayer is for the cancellation of Entry No. 3 in the Title Deed No. Gesima Settlement Scheme/512 dated 25/05/2012 so that the Land reverts to the late Ombasa Ombongi before succession of the latter's estate is done. On cross-examination, Professor Ogenche said that his late mother was living in Gesima Settlement Scheme/512 until 1972, 3 years after the



- 1st Defendant got married to his father and that there was no transfer of the suit land in 2005. His mother had a permanent house in Kenyeny Majoge/Bosoti/1387 while the 1st Defendant had hers on Gesima Settlement Scheme/512 but that this had not been given to the 1st Defendant as a gift. On re-examination, Aaron said that his brother Enosh Momanyi Ombaso remained in Gesima Settlement Scheme/512 after his mother left in 1971 until he was chased away by the 1st Defendant in 2010 when his house was demolished.
5. PW2 – Zachariah Nyangena Omagwa, a retired teacher testified that the Plaintiffs are his first cousins and also that the 2nd Plaintiff was his student and that he knows that the 1st and 2nd Plaintiffs were the sons of the late Ombaso Ombongi. He also said that the 3rd Plaintiff is his daughter in law. He further said he knows the 1st Defendant who was his school mate and that her brother is married to his daughter. He also said that the late Mr. Ombongi was his uncle who had 8 children with his first wife Naomi Matonga but one died leaving behind 7 and that Ombongi had 2 children with his 2nd wife, the 1st Defendant. He said that Ombongi died on 11/11/2011 and that there is no way he could have transferred the suit land or any other without involving him.
 6. On cross examination, Mr. Omagwa said that the late Ombaso was his uncle and that the 1st Defendant was living on Gesima Settlement Scheme/512 at the time of Ombongi's death where she still lives. On re-examination, he said that Gesima Settlement Scheme/512 is about 15 to 16 Acres while Majoge/Bosoti/1387 is about 6 Acres and that he was not sure the 1st Defendant was living on Gesima Settlement Scheme/512 alone. She must have been living there together with the 1st wife's children.
 7. DW3 – Florence Kwamboka Lucas, who is also the 3rd Plaintiff and sister in law to the 1st and 2nd Plaintiffs testified that the late Ombongi was his father in law. Her husband, Lucas Ombaso is now deceased who died in September 2013. He stayed with her husband who was working for Kenya Air force on Gesima Settlement Scheme/512 until he died. Her late husband used to contribute towards the payment of the Settlement Funds Trustees loan in respect of Gesima Settlement Scheme/512. He used to pay Kshs. 300/= per month as her father in law paid Kshs. 700/=. She said that her father in law died intestate and was buried on L.R. No. Majoge/Bosoti/1387 by which time both parcels of land were in his name. She believes that parcel No. L.R. Gesima Settlement Scheme/512 was fraudulently and illegally transferred in the name of the 1st Defendant after her father in law had died. On cross-examination by Mr. Odhiambo, Florence said that she was not aware of any other person who was offsetting the Settlement Funds Trustees loan save her late husband and her late father in law.
 8. PW4 – Enosh Momanyi Ombaso, the 2nd Plaintiff testified that he is the son of the late Ombaso Ombongi who died on 11/11/2011 leaving behind his mother and her 7 children and the 1st Defendant and her 2 children. The Deceased had 4 parcels of land. He testified that he and his brother, the late Lucas had put up houses on Gesima Settlement Scheme/512 and that Lucas used to service the outstanding Settlement Funds Trustees loan by paying Kshs. 300/= per month. He said that there is no way his late father would have bequeathed to the 1st Defendant Gesima Settlement Scheme/512 measuring 16 Acres yet she had only 2 children and the 5.5 Acres in Majoge/Bosoti/1387 to him and his immediate sibilings who were all 7. Although his father was staying with the 1st Defendant on Gesima Settlement Scheme/512 prior to his death he was buried on Majoge/ Bosoti/1387, where the 1st wife was staying in accordance with Abagusii Customs. He testified that by the time his father married the 1st Defendant, he had already acquired Gesima Settlement Scheme/512 where his sibilings, his mother and himself were living but that Majoge/Bosoti/1387 was ancestral land, and that when differences arose between the 1st Defendant and the 1st wife, his mother Naomi relocated to the ancestral land. On re-examination, Momanyi said that the transfer of Gesima Settlement Scheme/512 was not carried out during his father's lifetime.



9. After the close of the Plaintiffs' case, the 1st Defendant, Yunuke Osebe Ombaso started giving evidence by saying that she is the widow of the late Ombaso Ombongi whom she married in the sixties, sometime in 1966 upon which she says she was tasked to manage Gesima Settlement Scheme/512 where she has been living to date. The Plaintiffs never stayed there but the children of her co-wife, Naomi Matonga used to visit the suit land for school fees which came from the tea crop she was taking care of.
10. The 2 co-wives had no issues amongst themselves and when she married Ombongi, Gesima Settlement Scheme/512 was bushy. She cleared it and started farming maize and could grow as much as 100 bags of maize per season and as time went by, she planted tea bushes and kept adding more. She also planted pyrethrum. Yunuke testified that her late husband had given her the suit land and Majoge/Bosoti/1387 was given to her co-wife, Naomi and the Deceased had even made this known to his siblings. She said that Majoge/Bosoti/1387 was not ancestral but bought by the deceased. She denied having secretly transferred Gesima Settlement Scheme/512 to herself but that she only transferred the land to herself as a way of accomplishing the wishes of her late husband. On cross-examination by Mr. Momanyi, Yunuke said that when she got married, Naomi was not staying on Gesima Settlement Scheme/512. She said that she transferred the suit land to herself in 2012 and that she had obtained consent from the Land Control Board which she did not produce in court. She even admitted that she never bothered to apply for letters of administration and when asked by the court, the witness said that her late husband had already commenced the process of transfer of the suit land to her before he died. She then changed her earlier evidence and said she can't remember whether she had consent from the Land Control Board. She summed up her testimony by saying that she signed the transfer forms on the part of the transferor on behalf of her late husband and that she executed the transfer in the company of her first-born son, Joel Okemosi Ombaso and that it was the wish of her late husband to give her the bigger portion.
11. The last witness, George Maina, Land Registrar, Nyamira produced in court the Register in respect to L.R. No. Gesima Settlement Scheme/512. He said that the transfer to the 1st Defendant was effected on 25/05/2012 and is recorded as Entry No. 3 and the Transferee is Yunuke Osebe Ombaso of ID NO. 7307166. A Title Deed was issued the same day and the transfer was an ordinary one and not by way of transmission. No transfer forms could be traced in the Registry. The transfer was endorsed by Mr. Momanyi, the then Land Registrar who also issued and signed the new Title Deed. Surprisingly, the Presentation Book for that day does not reveal this transaction since nothing is indicated thereon in respect to the same. No transfer thereof was ever booked in the lands office that day. Mr. Maina said that this was very strange and when answering Mr. Momanyi's questions in cross-examination, he said that since the transfer was not by way of transmission yet the transferor had died on 11/11/2011, this transfer effected by his colleague was not only irregular but also illegal. He also testified that he could not trace any consent from the Land Control Board from the Land Registry and that if the same had been presented but hds been misplaced in the Registry, then the same ought to have been reflected in the Presentation Book, which is a statutory requirement. But this was not the case. He further maintained on re-examination by Mr. Odhiambo that the non-entry of the Land Control Board consent in the Presentation Book could not have been an error or mere oversight.

That is the evidence on record.

12. It is not in dispute that the 1st Defendant is registered as owner of the suit land. Section 26 of the [Land Registration Act](#) states that a certificate of Title issued to a proprietor shall be taken as prima facie evidence that the named proprietor is the absolute and indefeasible owner subject to such



encumbrances, easements restrictions and conditions endorsed on the Title. As was held in the case of *Esther Ndegi Njiru & Another vs Leonard Gatei* [2014] eKLR :

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

13. The only issue for examination in this suit and which would dispose of the suit is whether the transfer of L.R. NO. Gesima Settlement Scheme/512 was properly transferred from the late Ombaso Ombongi to the 1st Defendant and therefore capable of protection. It is the evidence of the 1st Defendant that she has custody of the Title of the suit land.
14. It is agreed by all the parties and witnesses in equal measure that L.R. NO. Gesima Settlement Scheme/512 belonged to the late Ombaso Ombongi who, according to the documents produced in Court, died on 11/11/2011. On 25/05/2012 the suit land was transferred to the name of Yunuke Osebe Ombaso. But in a very enthralling manner. There are no transfer documents in the Lands Office. There was no copy of Grant presented in respect of the Estate of Ombaso Ombongi. And again, there was no certificate of confirmation of Grant. Interestingly, the transfer was not by way of transmission but directly by Ombaso Ombongi who had long died on 11/11/2011, almost a year earlier. Could this be yet another case of a dead man coming back to life for the sole purpose of transfer. No. Yunuke Osebe Ombaso testified that she is the one who executed the transfer forms on behalf of the Deceased and in the presence of her first-born, Joel Okemosi Ombaso since it was the wish of her late husband to give her the bigger parcel of land which is L.R. NO. Gesima Settlement Scheme/512. Equally surprising is the fact that the 1st Defendant finally owned up that the consent of the Land Control Board, which is mandatory for any unexempted agricultural land such as the suit land, was never sought, let alone granted. It is not even indicated whether any Stamp Duty was paid for the transfer.
15. The Land officials who transferred the property L.R. NO. Gesima Settlement Scheme/512 cannot escape blame. How could the Lands officials not be able to tell the difference between an ordinary land Transfer from Transfer by way of Transmission? Where are the Transfer documents and the Application forms for Registration? The Lands officials were privy to the fraud for entertaining and effecting a transfer of an agricultural land without consent of the Land Control Board and in respect of an Estate without the letters of administration.
16. Further, Section 45 of the Law of Suction Act (Cap. 160 Laws of Kenya) provides that: -
 - “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled



after deducting any payments made in the due course of administration.”

17. The Transfer to the 1st Defendant of L.R. No. Gesima Settlement Scheme/512 on 25/05/2012 contravenes the provisions of Section 45 of the Law of succession Act (CAP 160 Laws of Kenya) and consequently, the same is illegal. She has therefore failed to give a judicious explanation as to whether the same was issued in a lawful manner.
18. Evidence having been tendered on what is contained in the parcel file and taking into consideration the evidence adduced by the parties and particularly the Land Registrar in respect to how the 1st Defendant Title acquired Title to the suit land, the Court is of the view that the 1st Defendant’s Title over L.R. No. Gesima Settlement Scheme/512 is not capable of protection by the law on the basis that its acquisition was illegal, unlawful, fraudulent and contrary to statute.
19. Whatever was done in respect to the Transfer of property to L.R. No. Gesima Settlement Scheme/512 after 11/11/2011 was intermeddling with the Estate of the late Ombaso Ombongi and not lawful. Before 25/05/2012 the land parcel known as property L.R. No. Gesima Settlement Scheme/512 was still the property of the Deceased and no living person had a good Title over the same. The Transfer thereafter was therefore a nullity and this court hereby nullifies the same.
20. Consequently, having made a finding that the Transfer to the 1st Defendant of L.R. No. Gesima Settlement Scheme/512 on 25/05/2012 was illegal, I hereby invoke the provisions of Section 80 of the Land Registration Act. The Section provides that:
 - “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
21. and order that the Title Deed in the name of the 1st Defendant of L.R. No. Gesima Settlement Scheme/512 and/or any sub-Titles arising therefrom be returned to the lands office, Nyamira within the next 15 Days for cancellation and reversion to the name of Ombaso Ombongi until such time as the beneficiaries of the Estate of the late Ombaso Ombongi will apply and obtain letters of administration and certificate of confirmation of Grant of the said Estate where each one of them will get their rightful share of the Estate which cannot be determined by this Court.
22. The upshot of the above is that Prayers Numbers (a) and (b) in the Plaint dated 26/11/2014 are hereby granted. Prayer Number (C) should be addressed by the Succession Court.
23. For the avoidance of doubt, any other transfers made of any of the properties and assets that formed part of the Estate of the late Ombaso Ombongi at the time of his demise on 11/11/2011 in addition to L.R. No. Gesima Settlement Scheme/512 are hereby revoked as well and henceforth revert to the name of Ombaso Ombongi and the Registers in respect to the said properties should be rectified accordingly.
24. This being a family dispute who no doubt will need one another in the Succession Cause, it is necessary to create and/or restore harmony among them for a smooth succession race. I will therefore make no order as to costs but leave each party to bear his/her own costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 27TH DAY OF MARCH 2023.

MUGO KAMAU

JUDGE



In the Presence of:

Court Assistant: Sibota

Plaintiffs: Mr. Moracha holding brief for Momanyi Gichuki

Defendants: 1st Defendant physically present

