**Oanya & another v Onywere (Suing as personal representative and administrator of the Estate of Aloys Machini Nyangeri) & 2 others (Environment and Land Appeal E004 of 2023) [2025] KEELC 2955 (KLR) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2955 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ENVIRONMENT AND LAND APPEAL E004 OF 2023**

**M SILA, J**

**MARCH 25, 2025**

**BETWEEN**

**CALLEN KWAMBOKA OANYA ..... 1ST APPELLANT**

**OLIPHA NYABOKE OANYA ..... 2ND APPELLANT**

**AND**

**NYABOKE ONYWERE (SUING AS PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF ALOYS MACHINI NYANGERI) ..... 1ST RESPONDENT**

**ALOYS KENANI OKEMWA ..... 2ND RESPONDENT**

**COUNTY LAND REGISTRAR, KISII COUNTY ..... 3RD RESPONDENT**

## JUDGMENT

(Appellants sued by 1st respondent on basis that they acquired title to land that had not undergone the process of succession; appellants filing defence contending inter alia that succession had been done; 1st respondent providing evidence that the land was transferred without any succession being done; no evidence presented by appellants; appellants benefiting from numerous adjournments and eventually court closing their case without any evidence being offered; on appeal, appellants inter alia contending that they were denied a right to be heard; appellant's given seven adjournments in the matter and cannot claim to have been denied an opportunity to be heard; only evidence tendered was that of the 1st respondent and it demonstrated that no succession had been done; appeal dismissed)

1. The suit was originated by the 1st respondent through a plaint filed on 11 November 2019. In that plaint, she sued the 2nd respondent, Alloys Kenani Okemwa as the 1st defendant, the appellants Callen Kwamboka Oanya and Olipha Nyaboke Oanya as the 2nd and 3rd defendants, and the County Land

Registrar – Kisii, as the 4th defendant. She commenced the plaint as the legal representative of Aloys Machini Nyangeri (deceased). She pleaded that the said Nyangeri died on 19 March 2001 while registered as the proprietor of the land parcel Nyaribari Chache/B/B/Boburia/3259 measuring 0.22 Ha. She averred that without undertaking succession, one Onywere Machini (also deceased) was caused to be registered as proprietor of the said parcel No. 3259 on 19 February 2010. Thereafter on 28 December 2010, the title was closed upon subdivision into the land parcels Nyaribari Chache/B/B/Boburia/9340 and 9341 (parcels No. 9340 and 9341). On 29 April 2019, the parcel No. 9340 was registered in the name of the 2nd respondent. It was then closed on subdivision into the land parcels No. 11021 and 11022. For the parcel No. 9341, it was transferred from the name of Onywere Machini to the appellants on 28 December 2010. The 1st respondent pleaded that all the transfers and subdivisions were carried out through an unlawful process inter alia without succession being done for the estate of the late Nyangeri. In the suit the 1st respondent asked for the following orders :

a. Declaration that the transfer of the land parcel No. 3295 from the name of Aloys Machini Nyangeri to Onywere Machini and subsequent transfer to the 1st – 3rd defendants is unlawful.

b. Declaration that closure of the title No. 3295 and creation of parcels No. 9340 and 9341 was unprocedural, unlawful and therefore a nullity ab initio.

c. An order directing the Land Registrar, Kisii to cancel all entries arising from subdivision of the parcel No. 3295.

d. General damages for unlawful subdivision and/or conversion.

e. Interest at court rates.

f. Costs of the suit.

g. Such other relief that the court may deem fit and expedient to grant.

2. The 2nd respondent (sued as 1st defendant) did not enter appearance. The appellants (sued as the 2nd and 3rd defendants) entered appearance and filed a joint defence. They pleaded that they entered into a genuine land transaction and purchased the land which is in their names from Onywere Machini the son of Machini Nyangeri. They denied that the parcels of land were transferred without succession. They pleaded that it was untenable for the Land Registrar to effect transfer of a deceased person's property without having sight of the grant. They averred that Onywere Machini transferred the parcels of land to them in 2010 before he died in 2013. They pleaded that the 1st respondent had knowledge of the sale and her claim is an afterthought after she has had a change of mind due to pressure from some of her sons. They pleaded that they have stayed on the land and have even erected some permanent buildings. They pleaded that they have been on the land since 2005 and the transaction took about 5 years to be completed and they eventually got their titles in 2010. They pleaded that they have therefore acquired title through adverse possession.

3. Hearing commenced on 17 June 2021 when the 1st respondent testified and closed her case. Her evidence was along the lines of her pleadings i.e that the late Nyangeri left behind the land parcel No. 3295 when he died in 2001. She stated that she stays on this land and according to her it has not been subdivided. She stated that she does not know the defendants that she sued and they are not on the land. She produced various exhibits including the grant ad litem that she holds, the Certificate of Death of the late Nyangeri and the late Onywere Machini, the green cards to the parcels of land in issue and the mutation forms.

4. After the 1st respondent closed her case, the appellants applied for adjournment for defence hearing and they were given 25 October 2021. On that day, Ms. Masese who was then on record for the appellants,

applied for adjournment on the basis that she misdiarised the matter. The case was adjourned to 28 October 2021. On that day, Ms. Masese again applied for adjournment on the ground that she was unable to reach her clients as their phones were switched off. The court gave the defendants a last adjournment and adjourned to 20 January 2022. On 19 January 2022, on the eve of the hearing, the appellants appointed M/s Ocharo Kaba & Company Advocates in place of M/s Reuben Masese & Company. On 20 January 2022, the day listed for defence hearing, Mr. Kaba was present and he sought an adjournment on the ground that he needed to amend the defence. The application was opposed and the adjournment denied. The court observed that it had given the appellants adjournments on 17 June 2021, 25 October 2021 and 28 October 2021 when it was marked a last adjournment. The trial court was of opinion that the appellants had adequate time to appoint an advocate since 28 October 2021 and opined that there was a trend to delay the matter. He directed the appellants to proceed with defence hearing. It appears that he placed the file aside for about an hour to 12.30pm. When counsel appeared, he stated that he has relayed the information to Mr. Kaba who sought leave to appeal the decision. The court was not moved and closed the hearing of the case. Counsel were given time to file their final submissions and the matter was mentioned on 21 February 2022. On that day, Ms. Shilwatso appeared for the plaintiff and informed court that she has filed submissions. Mr. Kimaiyo was present holding brief for Mr. Kaba. He asked for more time to file submissions. Time was extended and the court directed that the matter be mentioned on 24 March 2022. On 24 March 2022 there was no appearance for the appellants. Judgment was eventually delivered on 12 June 2022.

5. The court held that the case of the 1st respondent was uncontroverted as the appellants and the 2nd respondent presented no evidence. He found that she had proved her case on a balance of probabilities and granted the prayers (a) – (d) in the plaint. In essence he ordered that all entries relating to subdivision of the parcel No. 3295 be cancelled meaning that the title thereof reverted back in the name of Aloys Machini Nyangeri (deceased).

6. Aggrieved, the appellants have now preferred this appeal and have raised grounds inter alia that the appellants were not served and did not participate in the proceedings; that the principle of estoppel was not appreciated; that the court erred in finding that transfers from the parcel No. 3295 were unlawful; that the court erred in not considering the appellants' defence; that the appellants were not heard after their advocate on record fell ill; that the appellants were condemned unheard contrary to the rules of natural justice; and that the court erred in finding the case proved on a balance of probabilities.

7. The appeal was argued through written submissions and I have taken note of the submissions filed by Mr. Nyambati, who came on record after judgment for the appellants, and those of Mr. Ochoki for the 1st respondent. I have taken these submissions into account before arriving at my decision.

8. In his submissions, Mr. Nyambati submitted that the 1st respondent participated in the sale and even received the proceeds of sale and that it was later that she changed her mind on the transaction. He submitted that the appellants were not heard despite filing a defence which raised triable issues. He submitted that they were condemned unheard despite Article 50 of *the Constitution*. He submitted that it is trite that if a party raises a defence which has triable issues he needs to be heard. He submitted that the appellants did not appear in court because they were not informed by their counsel and the ex parte judgment was therefore irregular and ought to be set aside. He referred me to several authorities touching on setting aside an ex parte judgment.

9. On his part, Mr. Ochoki, learned counsel, submitted that the court afforded the appellants countless opportunities to be heard which they opted not to utilize. He submitted that litigation must come to an end and a party cannot be allowed to hold the judicial process at ransom under the pretext of delaying tactics. He submitted that the appellants did not annex any document to demonstrate that succession was ever carried out before the land was transmitted from the late Nyangeri to Onywere Machini. He

further submitted that the green cards do not show that the land was transferred to Onywere after succession pursuant to Form LR 7 and LR 19. He submitted that in absence of succession, all the subdivisions were unlawful and amenable to be cancelled. He also pointed at some discrepancies in the acreages of the subdivisions showing that they were bigger than the parent title which he argued demonstrated a distortion of the records.

10. I have taken all the above submissions together with the authorities relied upon by counsel into consideration.

11. First let me make clear that I am not dealing with an application to set aside an ex parte judgment under Order 12 Rule 7. I am handling an appeal not an application. Neither am I handling any appeal arising from a ruling made pursuant to Order 12. If the appellants had wished to set aside any ex parte proceedings, they had avenue to file such application but I have not seen any application on record. I reiterate that what is before me is an appeal from the substantive decision of the trial court and not an appeal against any ruling for setting aside ex parte proceedings. But even then, there are no proceedings that are ex parte. When the plaintiff testified, the appellants were represented and their counsel cross-examined the 1st respondent. What happened subsequently cannot be termed as ex parte proceedings. They were proceedings where the appellants applied for adjournment and finally on 20 January 2022 their case was closed when they did not appear nor offer any witness to testify on their behalf. There are therefore no ex parte proceedings to be set aside.

12. That aside, let me get to the gist of the appeal.

It is discernible that the 1st respondent's case was that there had been no succession done in respect of the estate of the late Nyangeri, and that being the case, there could not be any transmission of title to the parcel No. 3295 from the name of the late Nyangeri to the name of Onywere Machini. I have seen from the certificate of death annexed that the late Nyangeri died on died on 19 March 2001. I have also seen from the green card of the land parcel no. 3295 that at the time of death, the title thereto was in name of the late Nyangeri who got registered as proprietor on 26 August 1974. It was on 19 February 2010 that the title changed names and Onywere Machini became registered as proprietor. There is no indication that succession had been done or that the registration of Onywere Machini as proprietor was pursuant to a transmission upon succession. It remains a mystery how Onywere Machine obtained registration in his name. Without any explanation, and none was offered, the only conclusion one can reach is that this registration was done unlawfully and/or fraudulently in collusion with the Land Registrar who was sued as 4th defendant in the case. I have seen that on 28 December 2010 the title was closed upon subdivision into the parcels No. 9340 and No. 9341. The mutation form shows that the parcel No. 9340 was to measure 0.17 Ha and the parcel No. 9341 was to measure 0.05 Ha. I have seen the green card to the parcel No. 9341. It was first opened in the name of Onywere Machini on 21 December 2010 which does not add up because the parcel 3295 was closed on 28 December 2010. I see that on 28 December 2010, the appellants got registered as proprietors and were issued with title on the same day. Again their registration does not show that it was pursuant to any succession for the estate of the late Nyangeri. I have already found that the late Onywere Machini irregularly caused himself to be registered as proprietor of the parcel No. 3295 and it means that he could not pass a good title to the appellants. Their title was liable to be cancelled under Section 26 of the *Land Registration Act*, which provides as follows :

> 26. Certificate of title to be held as conclusive evidence of proprietorship
>
> (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

13. It will be seen from the above, particularly Subsection (1) (b) that a title that is acquired illegally and unprocedurally, is liable to be cancelled. It would of course be illegal and unprocedural, for one to procure a title without first undertaking a succession process where the proprietor is deceased.

14. The defence of the appellants was that they bought the land from Onywere Machini, but as I have demonstrated, Onywere Machini had not title that he could transfer to them as his title was not obtained after undertaking succession. It is a title that came from nowhere and it cannot be a good title. There was nothing that he could transfer to the appellants and the appellants cannot be heard to argue that they have a good title.

15. In any event, the appellants offered no evidence to demonstrate how they got the title in their names. Having offered no evidence, the trial court was correct in finding that the case of the plaintiff was uncontroverted. The trial Magistrate cannot be faulted for the conclusion that he reached.

16. There was insinuation that the appellants were not given a fair hearing and that they had a good defence which they ought to have been given an opportunity to ventilate. What a court does is to give a party an opportunity to be heard. It is the choice of that party as to whether to seize the opportunity or not. In our case, it is ridiculous for the appellants to contend that they were not given an opportunity of being heard. Four times before the hearing commenced, the appellants had applied for adjournment which they were granted. This was on 6 July 2020 , 1 October 2020, 28 January 2021 and 3 June 2021. After the 1st respondent closed her case, the appellants benefited from three adjournments. This was on 3 June 2021 when the plaintiff closed her case, 25 October 2021, and 28 October 2021. Thus, seven times, the appellants applied for adjournment and were granted. The court really bent over backwards to accommodate the appellants. They cannot fault the trial Magistrate for refusing to give them the eighth adjournment as litigation needed to come to an end.

17. Even then, it is claimed that the appellants were not made aware of the hearing date when their case was closed. There is no evidence to support this allegation. In fact, the record shows that the adjournment was sought so that the defence could be amended not because the appellants were not aware of the hearing date. Besides, I do not see how the appellants can even claim that they were not aware of the hearing. On the eve of the hearing date, they changed counsel. Their new counsel was in court during the hearing date. The timing of that notice of change shows that the appellants were aware of the hearing date and they wanted a new counsel present on that day. Nothing stopped them from being present on that day so that they could present their defence in the event that their application for adjournment was denied. They took a big gamble that the application for adjournment would be allowed which bet flopped. It was their bet and it will forever remain their loss. They opted not to come to court and present evidence and they have only themselves to blame. The trial Magistrate cannot be faulted for reaching the conclusion that he did with the evidence that was presented before him.

18. For the above reasons, I am not moved to disturb the judgment of the trial court. In essence, I find no merit in this appeal and it is hereby dismissed with costs.

**DATED AND DELIVERED THIS 25 DAY OF MARCH 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in presence of :

Mr. Nyambati for the appellants

Mr. Ochoki for the 1st respondent

Court Assistant – Michael Oyuko.