



**Abondo & 14 others v Okado & another (Environment & Land Case
58 of 2021) [2023] KEELC 17105 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17105 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 58 OF 2021**

AY KOROSS, J

APRIL 27, 2023

BETWEEN

**VINCENT OCHUNG ABONDO 1ST PLAINTIFF
PHILIP OTIENO ABONDO 2ND PLAINTIFF
CLEMENTINA AYUGI ABONDO 3RD PLAINTIFF
THOMAS OCHIENG ABONDO 4TH PLAINTIFF
GLORIA AKINYI ABONDO 5TH PLAINTIFF
ATHANASIOUS OMONDI ABONDO 6TH PLAINTIFF
POTAMIA AKECH ABONDO 7TH PLAINTIFF
JAMES ODHIAMBO ABONDO 8TH PLAINTIFF
CYTHIA SILVIA ADHIAMBO 9TH PLAINTIFF
MAUREEN AMONDI ABONDO 10TH PLAINTIFF
ANTHONY ONDIJPO ABONDO 11TH PLAINTIFF
JANET ACHIENG ABONDO 12TH PLAINTIFF
MAURICE KENNETH OBURA ABONDO 13TH PLAINTIFF
CHRISTINE ATIENO ABONDO 14TH PLAINTIFF
VITALIS VINCENT AGUNDA ODUOR 15TH PLAINTIFF**

AND

**LUCAS AWADHA OKADO 1ST DEFENDANT
OLIVER OTIENO ARIKA 2ND DEFENDANT**

(Originally Kisumu ELC Case No. 170 of 2017)



JUDGMENT

Background

1. Land parcel No North Sakwa/Nyawita/82 (referred to as ‘the mother parcel’) which was originally registered in the name of Othoro Alal (‘Alal’) has had a chequered history with several litigations between the 1st Plaintiff, 1st Defendant and Samuel Odongo Ambasa (‘Ambasa’). I will highlight the salient facts.
2. In HC Succession Cause No 18 of 1986, Ambasa was issued grant of letters of administration on Alal’s estate on 19/8/1986. Alal had died on 31/12/1980. Even before grant was confirmed, Ambasa swiftly subdivided the mother parcel into two; North Sakwa/Nyawita/1063 and North Sakwa/Nyawita/1062. These properties shall jointly be referred to as (‘the disputed properties’).
3. Ambasa sold North Sakwa/Nyawita/1063 to the 1st Plaintiff. As for North Sakwa/Nyawita/1062, he secured a loan with Kenya Commercial Bank Ltd (‘bank’) and on default, the 1st Plaintiff purchased it.
4. In 2010, the 1st Plaintiff subdivided North Sakwa/Nyawita/1062 (one of the disputed properties) into North Sakwa/Nyawita/3317, 3318, 3319, 3320, 3321, 3322, 3323, 3324, 3325, 3326, 3327 and 3328 and in 2014, subdivided North Sakwa/Nyawita/1063 (one of the disputed properties) into North Sakwa/Nyawita/3511, 3512, 3513, 3514, 3515, 3516 and 3517 (collectively referred to as ‘the suit properties’) which the 1st Plaintiff registered in his names and those of his Co-Plaintiffs who were his relatives.
5. Meanwhile, at the 1st Defendant’s instigation, Alal’s grant was revoked on 4/03/1992. Grant of letters of administration on Alal’s estate was issued to the 1st Defendant on 6/06/2012. Confirmation of grant was issued and by which, the disputed properties were wholly conferred to him.
6. On 03/07/2014, the probate Court in HC Succession Cause No 18 of 1986 issued an order which reversed the disputed properties, ordered that they be reverted to the 1st Defendant unconditionally and restored the mother parcel. The mother parcel was registered in the 1st Defendant’s name on October 15, 2015.
7. The 1st Defendant then subdivided the mother parcel into North Sakwa/Barkowino/6101 and 6102. North Sakwa/Nyawita/6101 has since been subdivided into North Sakwa/Barkowino/6421, 6422 and 6423 which are all registered in the 1st Defendant’s name while North Sakwa/Barkowino/6102 is registered in the 2nd Defendant’s name. These properties shall jointly be referred to as (‘the subsisting properties’).
8. During the intervening period between the revocation of grant and its confirmation, the 1st Defendant made a plethora of attempts to recover the mother parcel and or the disputed properties to wit Succession Cause No 35 of 1994, HCCC No 199 of 1997 and HCCC No 138 of 2004; all of which were filed at Kisumu High Court.

Plaintiffs’ case and evidence

9. With the consent of his Co-Plaintiffs, the 1st Plaintiff filed a Plaint dated May 16, 2015 against the Defendants. He alleged they were illegal trespassers and alluded they had defied sanctity of title.
10. He sought several reliefs inter alia; general damages, the court order issued on February 3, 2014 be declared illegal, null and void, a declaration that the Plaintiffs were the absolute and indefeasible owners



of the suit properties; the land registrar do cancel the registrations of the subsisting properties and revert them to the suit properties; permanent injunction and costs.

11. The 1st Plaintiff testified as PW1. His evidence was contained in his oral testimony, witness statement dated May 16, 2017 and documents he produced in support of his case. His evidence was earlier captured in the background of this Judgment and this court need not reiterate them.
12. On cross examination, he admitted he was aware the grant issued to Ambasa was revoked. He had not sued Ambasa or the bank's auctioneers. He had no evidence to show he bought the disputed properties from Ambasa or bank's auctioneers. He prayed for the court to assist him get justice against Ambasa and the bank's auctioneer.
13. On re-examination, the 1st Plaintiff testified that he was not aware that Ambasa did not have capacity to transact over the disputed properties. He had legitimately bought the disputed properties. Further, his application to join HC Succession Cause No 18 of 1986 as an Interested Party was disallowed for not being an administrator or beneficiary of Alal's estate.

Defendants' case and evidence

14. The 1st Defendant filed a Defence dated May 31, 2017 in which he denied the averments made in the Plaintiff. He asserted the 1st Plaintiff did not have good title to pass to his Co-Plaintiffs. Proceedings in HC Succession Cause No 18 of 1986 superseded all other proceedings and orders.
15. He asserted he and the 2nd Defendant were not trespassers and the Plaintiffs should lay claim against Ambasa and the bank. The 1st Defendant prayed for the suit to be dismissed with costs.
16. The 2nd Defendant filed his Defence dated 06/06/2017. He denied the claims made in the Plaintiff and stated he was a stranger to most of the averments since he was an innocent purchaser for value without notice. It was the 2nd Defendant's case that there was no cause of action against him and that the suit should be dismissed with costs. He did not testify and his pleadings were unsubstantiated.
17. Apolo Onyango Okado, the 1st Defendant's son and a donee via Power of Attorney dated October 13, 2022 testified as DW1. His evidence was contained in his oral testimony and 1st Defendant's witness statement dated 2/06/2017. Similar to PW1, his evidence in chief is contained in the background of this judgment. On cross examination, he asserted the 1st Plaintiff was not an innocent purchaser.

Plaintiffs' written submissions

18. Mr Mingo, Counsel representing the Plaintiffs, filed submissions dated March 1, 2023. Counsel identified 3 issues for determination;
 - (a) whether the 1st Plaintiff acquired valid title to the disputed properties;
 - (b) whether the 1st Plaintiff was a bona fide purchaser for value without notice; and
 - (c) whether there was fraud in the acquisition of the disputed properties.
19. On the 1st, 2nd and 3rd issues, Mr Mingo submitted the 1st Plaintiff acquired good title over the disputed properties from Ambasa, was an innocent purchaser, conducted due diligence and paid all rates and outgoings to the government either before or after the transaction.
20. Counsel submitted the 1st Plaintiff was not aware Ambasa did not have capacity to apply for letters of administration on Alal's estate. Counsel relied on the case of Fletcher v. Peck 10 US 87 (1810) which



was quoted in Eunice Grace Njambi Kamall & another v. the Honourable Attorney General & 5 others Civil suit Number 976 of 2012 that :-

‘If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded.’

Defendants’ written submissions

21. Mr Ken Omollo, representing the Defendants, filed written submissions dated January 28, 2023. Counsel submitted the 1st Plaintiff did not prove he purchased the disputed properties. According to Counsel, this was contrary to Section 6 of the [Sale of Goods Act](#) and Section 3 (3) of the [Law of Contract Act](#) which called for proof of transactions.
22. On the 2nd issue, Counsel submitted Ambasa transacted on an unconfirmed grant which was contrary to the provisions of Section 82 (b) (ii) of the [Law of Succession Act](#); any sale and registration made before the confirmation of grant was illegal and void. Ambasa’s actions amounted to intermeddling with Alal’s estate contrary to Section 45 (1) of the [Law of Succession Act](#). In that regard, Counsel cited the case of [Re-estate of Jamin Inyanda Kadambi \(deceased\)](#) [2021] eKLR.
23. On the 3rd and 4th issues, it was Mr Omollo’s submission that the court had no jurisdiction to review orders issued in HC Succession Cause No 18 of 1986 and there was no cause of action by the Plaintiffs against the Defendants but rather against Ambasa and the bank.

Analysis and determination

24. Having considered the parties’ pleadings, evidence, rival submissions, together with provisions of law and precedents cited by Counsels, this court is of the considered view the issues falling for determination are:
 - a. Whether this Court has jurisdiction to declare the decision of HC Succession Cause No 18 of 1986 that was rendered on July 3, 2014 illegal, null and void.
 - b. If (a) is in the affirmative, whether the Plaintiffs have proved their case on a balance of probabilities.
 - c. What orders should this court issue?
 - d. What about costs?

a. Whether this Court has jurisdiction to declare the decision of HC Succession Cause No 18 of 1986 that was rendered on 03/07/2014 illegal, null and void.

25. Article 162 (2) (b) of the [Constitution](#) establishes this Court. The [Environment and Land Court Act](#) sets out the functions and jurisdiction of this Court. Section 13 (4) of the same Act confers this Court with appellate jurisdiction against the decisions of Subordinate Courts and Tribunals while within Section 13(7)(b) of the [Act](#), this Court is conferred with jurisdiction to issue prerogative orders. The High is established by Article 165 of the [Constitution](#). This Court and the High Court are Courts of equal status. Put in another way, they have concurrent and or coordinate jurisdiction.
26. Jurisdiction is everything and without it, a Court cannot move one step further. The jurisdiction of a Court is laid out either by the [Constitution](#) or Statute. The Supreme Court of Kenya in the case of



Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR stated: -

‘A Court’s jurisdiction flows from either the *Constitution* or legislation or both... It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.’

27. It is obvious there was a typographical error in the claim. The order that was issued by the Probate Court was made on 03/07/2014 and not 3/02/2014. In their pleadings, the Plaintiffs were calling upon this Court to declare the decision of a coordinate Court illegal, null and void.
28. I have scrutinised the various reliefs sought by the Plaintiffs in their claim. It is evident what this Court is being called upon to do by this relief is for this Court to review and or set aside the orders issued on July 3, 2014 whereby the High Court cancelled the disputed properties that were registered in the 1st Plaintiff’s name, reverted them to the mother parcel and ordered that they be registered in the 1st Defendant’s name.
29. Bearing in mind the provisions of Article 162 (2) (b) and Article 165 of the *Constitution*, this Court cannot exercise appellate or review jurisdiction over the decision of the High Court in HC Succession Cause No 18 of 1986. If aggrieved by the decision of the High Court, the Plaintiffs should have appealed to the Court of Appeal or sought for a review from the same High Court but not to this court.
30. This Court has no supervisory jurisdiction over judges of the High Court and neither can a judge of this Court nullify the proceedings or decisions of a judge of the High Court and vice versa. Such jurisdiction has not been conferred upon this court either by the *Constitution* or Statute. In *Greenfield Investments Limited & another v. State of the Republic of Kenya & 3 others* [2013] eKLR, the court observed that:

‘...it is trite that this Court cannot purport to sit as a supervisor or superintendent of a concurrent Court or purport to determine by way of an appeal (by whatever other name called) a decision of such a Court.’

31. The orders issued on July 3, 2014 that cancelled the 1st Plaintiff’s title to the disputed properties was done by a Court of competent and concurrent jurisdiction. It is therefore clear this Court is bereft of jurisdiction to overturn this decision. I need not say more.
32. I ultimately find the Plaintiffs’ suit incompetent. It is hereby struck out. Pursuant to the provisions of section 27 (1) of the *Civil Procedure Act*, I award costs to the Defendants.

DELIVERED AND DATED AT SIAYA THIS 27TH DAY OF APRIL 2023.

HON. A. Y. KOROSS

JUDGE

APRIL 27, 2023

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Miss Letuya for the Plaintiffs

No appearance for the Defendants

Court assistant: Ishmael Orwa

