



REPUBLIC OF KENYA



**Mwasarai v Omar & another (Environment & Land Case 79 of 2021)  
[2023] KEELC 16778 (KLR) (12 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16778 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 79 OF 2021**

**AE DENA, J**

**APRIL 12, 2023**

**(FORMERLY MSA ELC 264 OF 2016)**

**BETWEEN**

**FATUMA OMAR MWASARAI ..... PLAINTIFF**

**AND**

**OMAR BAKARI OMAR ..... 1<sup>ST</sup> DEFENDANT**

**HALIMA OMARI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction and Pleadings**

1. The plaintiff *vide* a plaint dated September 19, 2016 sued the defendants. The plaintiff averred that in 2002 her husband Mwinyi Haji Raguma and Bakari Omari Mwachinyongo were allocated plot No 867 at the Bububu (B) Squatter Settlement Scheme in Likoni. That the same was then subdivided into plot 867A and 867B and allocated to the said Mwinyi Haji Raguma and Omar Bakari Omari Mwachinyongo respectively now both deceased. That in the year 2015 plot 867a was transferred to the plaintiff.
2. The plaintiff averred that in 2011 the beneficiaries of Bakari Omari Mwachinyongo who included the 1<sup>st</sup> and 2<sup>nd</sup> defendants disposed of plot 867B. That later in 2014 the defendants without the plaintiffs authority encroached and constructed structures in plot 867A causing the plaintiff loss and damage. That the plaintiffs efforts to resolve the issue through administrative structures were unsuccessful.
3. The plaintiff prayed for the following reliefs; -
  - a. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as Bububu (B) Squatter Settlement Scheme/867a.



- b. A declaration that the defendants whether by themselves or their servants or agents and or otherwise howsoever are wrongfully in occupation of the suit land and are accordingly trespassers on the same.
  - c. A declaration that the defendants whether by themselves or their servants or agents and or otherwise howsoever are not entitled to remain on the suit land
  - d. An order that the defendants and all other trespassers do forthwith vacate and deliver vacant possession of the suit property to the plaintiff.
  - e. A permanent and or perpetual injunction restraining the defendants whether by themselves or their servants or agents and or otherwise howsoever from remaining on and or continuing in occupation of the suit land
  - f. General damages for trespass
  - g. Mesne profits for wrongful occupation of the suit land as trespassers
  - h. An order directed to the county commander, Mombasa, the officer commanding police division, Likoni and all police stations in the vicinity of the suit land to execute the orders of this honorable court and evict all trespassers and unauthorized occupants of the suit land including the defendants and their servants and agents
  - i. Costs and interest of this suit at such rate and for such period of time as this honourable court may deem fit and just.
  - j. Any further relief as this honorable court may deem fit and just.
- 4 The defendants filed an amended statement of defence where they contended that the plaintiff did not have locus standi to file the suit. That the plot No Bububu Squatter Settlement Scheme 867 belonged to Bakari Omari Mwachidyongo the 1<sup>st</sup> defendants father and stated the plaintiff fraudulently obtained the same in collusion with the Ministry of Land officials. The particulars of fraud were stated. The defendants averred they were as of right using the suit property and the plaintiff having no proprietary interest cannot suffer any loss. They prayed that the suit be dismissed and a declaration that the suit property belongs to the late Bakari Omari Mwachinyongo and the letter of offer be revoked and re-issued appropriately.

### **Evidence Of The Parties**

- 5 The plaintiff called three witness to buttress her case.
- 6 PW1 was Salim Hamisi Baya a resident of Mtongwe who during adjudication of the Bububu settlement scheme was the area sub chief but has since retired. His testimony was he had known the plaintiff for over 40 years as well as the defendants. He confirmed that during squatter identification for the scheme plot 867 was allocated to Mwinyi Haji Raguma who was the plaintiff's husband and Bakari Omari Mwachinyongo as evidenced by a letter of offer dated January 31, 2000 and who were both deceased. He also testified that the 1<sup>st</sup> defendant who was the said Bakari Omari son intention was to remove the plaintiff from plot 867. He made reference to a sale agreement dated April 26, 2011 showing that part (48'x 82') of plot no 867B was sold to one Zainab Abdalla Seif by the 1<sup>st</sup> defendant and his brothers. He clarified that the plaintiff was claiming plot 867A belonging to her husband but which was registered in the plaintiff's name and where her house was built. He further testified that the 1<sup>st</sup> defendants plot was 866 where he resided todate though he had constructed business kiosks on plot 867A.



- 7 According to PW1 the plaintiff never remarried and her husband was buried elsewhere for lack of space at the plot in Bububu. PW1 also adopted his witness statement dated September 19, 2016 as part of his evidence in chief.
- 8 PW1 was rigorously cross examined. He could not state for how long the plaintiff was married to Mwinyi Haji Raguma and conceded there was no evidence of a marriage certificate thereto which he clarified in reexamination the Chiefs letter dated October 26, 2015 confirmed the plaintiff's marriage to Mwinyihaji. He affirmed there was no grant of letters of administration for the estate of the deceased. He confirmed the survey report was prepared in 2016 way after the initial exercise, by Edward Ndegwa a private surveyor since the communication didn't bear the usual court of arms. That an objection was raised during the survey that the plaintiff was not a resident but she was all the same listed because she was found in situ. He stated the plaintiff was complaining on behalf of her husband. According to him it was not strange to have a letter of offer to more than one person.
- 9 PW2 was the plaintiff and due to age she adopted her witness statement dated September 19, 2016 as her evidence in chief and which largely reiterated the averments in the plaint.
- 10 Her evidence in cross examination was that she was married to Mwinyihaji Ranguma at a young age. That though she understood marriages are done by the Kadhi she could not produce her marriage certificate as well as her husband's death certificate which she stated were stolen though she had not reported the loss to the police. She affirmed her husband was buried in Vijiweni and she did not undertake succession proceedings. She confirmed her husband was invited to the plot.
- 11 PW3 was Swalehe Salim Bongo. He adopted his witness statement dated September 19, 2016 which largely echoed that of PW1. That he was a resident of Vijiweni and was appointed by the beneficiaries of the settlement scheme to spearhead survey for boundary identification to forestall disputes on encroachment and illegal construction. He reiterated that initially plot 867 was allocated to Mwinyi Haji Ranguma and Bakari Mwachinyongo but later upon subdivision into plots 867 A and B respectively, plot 867 A was allocated to the plaintiff. His evidence during cross examination was that he lived in Vijiweni Mtongwe but owned a plot in Bububu settlement scheme though he could not remember the particulars. He could not remember when the plaintiff was married to Mwinyihaji. That for muslims, succession proceedings are usually spearheaded by the husband's family. He could not remember when Mwinyihaji died though he stated he was buried in Vijiweni but not Patuko where Mwinyihaji's family lived. He stated that Mwinyihaji and Bakari Mwachidyongo were not relatives. He admitted there was a survey exercise on May 30, 2016 when plot 867 was subdivided into two. He stated the squatters were not required to apply for allocation of the land but only to identify their plots. He was aware that grants are obtained upon death at the Kadhi's office but was not aware if the plaintiff had obtained one. He stated in reexamination that it was not a requirement to produce a grant during adjudication.

### **The Evidence Of The Defendants**

12. DW1 was Omar Bakari Omar the 1<sup>st</sup> defendant. He told the court that his father was Omar Bakari Mwachinyongo deceased. He produced a copy of a grant of letters of administration dated October 21, 2020. He averred that Mwinyi Haji Ranguma was a neighbor who approached his father because his land was flooded. According to him the plaintiff was Mwinyihaji Ranguma's friend and he could not tell if they were married. He stated his father was buried in his shamba in Vijiweni. His testimony was that the survey was akin to an invasion coordinated by the chief Salim Hamisi Baya PW1. He stated that the plot was initially in Mwinyihaji Rangumas name and the plaintiff's registration was a mystery. He confirmed he was present during the survey and which was undertaken by a private surveyor. His



evidence was that he was born on the land and he was on it as matter of right and he would never vacate and this was where he will be buried.

13. On cross examination he admitted he had no proof before court to show the plot was first registered in Omar Bakari Mwachinyongo's name (his father). He admitted he had no proof that the plaintiff changed the names in the title or that she fraudulently obtained the same. He admitted selling part of the plot to Zainab Abdalla in 2011 in the absence of a grant of administration. He stated that the plaintiff and Mwinyihaji Raguma lived in the same house but he could not confirm if they were married. He confirmed during the lives of his father and Mwinyihaji Ranguma there was no conflict. He clarified in reexamination that the entire plot 867 belonged to his father and though PW1 and PW3 also resided in it he had not sued them because he had no dispute with them.

### Submissions

14. I directed parties to file and exchange written submissions which they did.

### plaintiffs Submissions

15. The plaintiffs submissions focused on whether the plaintiff had proved her case to the required legal standard and if the prayers sought in the defence should issue. It was submitted that once an allotment letter is issued and the allottee meets the conditions therein, the plaintiff became the absolute proprietor of the land and it was not available for allocation. That the same could only be challenged by the allotting authority or on grounds of fraud or misrepresentation, mistake, or that it was outrightly illegal or against public interest. Reliance was placed upon *Rukaya Ali Mohamed v David Gikonyo Nambachia & Ano* Kisumu HCCA 9/2004. It was contended that the 1<sup>st</sup> defendant lost his interest in the suit property upon its disposal to Zainab Abdala.
16. Citing the provisions of section 26 of the *Land Adjudication Act* it was submitted that the 1<sup>st</sup> defendant being aggrieved with the adjudication never filed any objections as required upon notice of completion of the register. That the plaintiff being the only sole beneficiary of the estate of the deceased and the owner of the suit property was properly before the court pursuant to section 54 of the *Law of Succession Act* and paragraph 14 of the 5<sup>th</sup> schedule. That absence of a marriage certificate cannot be a reason to question existence of a union and but a presumption of marriage arose by dint of the long cohabitation between the plaintiff and Mwinyihaji Raguma. Reliance was placed on the case of *Hortensia Wanjiku Yawe v Public Trustee* HCA 13/976.
17. Citing several authorities on the need to specifically plead and prove fraud at a higher threshold than a balance of probabilities it was submitted that no evidence was adduced to show the manner in which the plaintiff caused the suit property to have been acquired by fraud. That failure to join the land registrar or the director of land adjudication in this regard was fatal.
18. On the defendant's prayer that the suit be declared to belong to the late Bakari Mwachinyogo, it was the plaintiffs submission that the orders could not be granted in the absence of a counterclaim supported by a verifying affidavit as well as an objection under section 24 of the *Land Adjudication Act*. The court was referred to *Jefitha Muchai Mwai v Peter Wangio Thuku* (2015) eKLR.

### Defendants Submissions

19. The defendants submitted that the plaintiff lacked locus standi to file this suit on the basis that she did not tender any documentary evidence of her marriage to Mwinyihaji Raguma (deceased) and had initiated the suit without obtaining letters of administration. It was urged that the suit was void ab initio. Reliance was placed on ELC Appeal No 14 of 2021 *Peter Asituba & 3 others v Olekia Mabindu*



Makunga & Ano and Virginia Edith Wambui Otieno v Joash Ochieng Ougo & another (1987) eKLR. That section 54 of the Law of Succession Act referred to a pending suit and was not applicable in the circumstances. That the chiefs letter dated October 26, 2017 was not proof of marriage neither had prolonged cohabitation been proved.

20. It was submitted that the survey was undertaken through intimidation and coercion by a private surveyor under heavy police presence. That the plaintiff did not produce any document to prove she was the owner of the suit property, how it was allegedly transferred to her in the absence of letters of administration neither did she produce any evidence of subdivision of plot 867 by the Ministry of Lands & Settlement. It was submitted that all this pointed to fraud. The case of ELC No 13 of 2019 Festo Ogeda Agutu v Richard Odumbe & Town Council of Awendo, Migori as to the burden of proof as required under section 107 of the Evidence Act.
21. The court was further urged to find in favor of the 1<sup>st</sup> defendant and declare the suit property as belonging to the late Bakari Omar Mwachinyogo based on the evidence tendered and the plaintiffs suit to be dismissed with costs.

### **Discussions And Determination**

22. Having considered the pleadings, the evidence adduced and the submissions of the parties I find that the main issues for determination are
  - a. Whether this suit is properly before this court
  - b. Whether the plaintiff has proved her claim to the required standard of proof
  - c. Whether the 1<sup>st</sup> defendant is entitled to the orders soughtLet me state that issue (b) above will be dependent upon whether the plaintiff has *locus standi*, the absence of which would require that the court downs its tools.
23. My understanding of this dispute is that the plaintiff has approached this court on the basis of being the widow of Mwinyi Haji Ranguma and in respect of the latter's portion of plot 867 being 867A. The reason for filing this suit is that the defendants who are the children of the allottee to the other portion 867B, had after selling the same encroached into her (the plaintiffs) late husband's portion 867A without her permission. I also observed from the proceedings that the plaintiff also appears to be claiming plot 867A as the registered owner. This is so because it is the plaintiffs case that the same had subsequently been allocated or transferred to her in the year 2016 during the survey herein.
24. The defendants on the other hand do not deny that they indeed sold a part of the plot and that they are indeed on the suit property, except that according to them this entire land originally 867 belonged to their father Bakari Omar Mwachinyogo who only invited the said Mwinyi Haji Raguma (the alleged plaintiff's husband) into the same. I hear them saying he should not at all have been allocated land in the settlement scheme as a squatter. The defendants case is that they are rightly in their father's land, they do not recognize the survey that resulted into the subdivision of the plot 867 into two for the reasons that it was carried out with high handedness with a view to fraudulently deny them their fathers land in favor of the plaintiff. But first things first, did the plaintiff have the requisite standing to bring this suit?
25. The 1<sup>st</sup> & 2<sup>nd</sup> defendants in opposition to the suit stated at paragraph 4 of their written statement of defence filed on February 16, 2018 thus  
  
The 1<sup>st</sup> and 2<sup>nd</sup> defendants denies (sic) paragraph 4 of the plaint and further states that the plaintiff has no locus standi to bring the suit herein against the defendants and hence the suit should be dismissed *abinitio*.



It is the defendants contention that the suit is a nullity *abi initio* for failure on the part of the plaintiff to obtain grant of letters of administration for the estate of Mwinyihaji Raguma who she alleges to be her husband before commencing this action. Indeed, it is not in dispute that the said Mwinyihaji Raguma is deceased.

26. The guiding law in matters succession is the [Law of Succession Act](#) chapter 160 of the Laws of Kenya. Section 2 of the Act provides Application of Act
- (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.
  - (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.
  - (3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.
  - (4) Notwithstanding the provisions of subsection (3), the provisions of part vii relating to the administration of estates shall where they are not inconsistent with those of muslim law apply in case of every muslim dying before, on or after the January 1, 1991.
27. To deal with the issue of locus I looked at the plaintiff's pleadings to appreciate the capacity under which the suit has been filed. Paragraphs 6 & 10 of the plaint is material in this regard where it is stated; -
- The plaintiff avers that on or about January 31, 2002, the Ministry of Lands and Settlement (as it then was) issued a letter of offer to the plaintiff husband one Mwinyi Haji Raguma (now deceased) and Bakari Omar Mwachinyogo allocating them plot No 867 at the Bububu Squatter Settlement Scheme.
28. At paragraph 10 of the plaint it is stated further as follows; -
- The plaintiff states that the suit land known as Bububu B Squatters Settlement Scheme/867a was allocated Mwinyi Haji Raguma (Deceased) whilst the parcel of land known as Bububu B Squatter Settlement Scheme/867b was allocated to Bakari Omar Machinyogo (deceased).
29. It is clear from the above that the plaintiff filed this suit on behalf of the estate of her alleged husband Mwinyi Haji Raguma who she expressly states was allocated the suit property herein which she wants to be declared hers by dint of being the deceased widow. It was the plaintiff evidence in chief that she was married to the said Mwinyi Haji Raguma when she was a young girl and which was corroborated by PW1, PW3 as well as a letter Ref MTG/MDS.16/5/vol II/17 dated October 26, 2015 from the Senior Chief Likoni Location. The plaintiff admitted during cross examination that she did not go through the succession process for the said Mwinyi Haji Raguma who was her husband and the initial owner of the suit property 867A.
30. Mr Nyange Counsel for the plaintiff in response referred the court to the provisions of section 54 of the [Law of Succession Act](#) and paragraph 14 of the 5<sup>th</sup> schedule. Section 54 of the Act is on powers of



the court to issue a grant limited for specific or special purposes. These are set out in schedule 5. The said paragraph 14 provides as follows;-

Administration limited to suit

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.

31 Mr Nyange does not state much in terms of the applicability of the above to the present case and only states that the plaintiff being the sole beneficiary of the estate of the late Mwinyi Haji and the owner of the land was properly before the court. To me firstly paragraph 14 applies to a pending suit, meaning the proceedings are envisaged to have been filed during the life of the property owner and not a suit that is filed after demise of the property owner. It is clear from the pleadings that by the time the suit was being filed on September 19, 2016 the said Mwinyi Haji Raguma was already deceased – see the chiefs letter dated June 20, 2016 which places the death as January 30, 2008 and the plaintiffs witness statement giving the date to be sometimes in 2004. In any case issuance of the grant of letters of administration to the nominee is still expected whereas none has been issued under these provisions. It cannot be automatic I respectfully disagree with Mr Nyange. Paragraph 14 cannot be invoked to the aid of the plaintiff.

32 It is my view based on the law, the plaintiffs own pleadings and evidence that she had brought this suit as the widow of Mwinyi Haji Raguma the initial allottee or owner of the suit property, it was incumbent upon the plaintiff therefore to take out the requisite grant for purposes of filing this suit for the declaration she seeks herein in terms of the suit property if the property formed part of the estate of the said Mwinyi Haji Raguma. In the absence of such a grant the plaintiff has no legal capacity to sue on behalf of the said estate, infact she would be an intermeddler in law. It was not enough to state through her witnesses that under Islamic law it is the relatives of the deceased who ordinarily take out the grant. Nothing has been presented to this court to show the plaintiffs engagement with Mwinyi Haji's relatives in this regard or even her own efforts to have them cited. I'm also persuaded in this regard by the dictum of my learned brother Justice Sila Munyao in the case of [\*Hellen Jepkosgei Kipkorir v Petrolina Kipkurgat\*](#) (2013) eKLR

.....In any event, the applicant herein does not hold any grant of letters of administration. He cannot therefore purport to claim on behalf of the estate of Cherop. For the applicant to claim and sue on behalf of the estate of Cherop she must first obtain letters of administration of the estate of Cherop even if the same are limited only to filing suit. The applicant does not purport to hold any grant of letters of administration for the estate of Cherop. I find that she is incompetent to file any suit on behalf of the estate of Cherop. Prayer 2 therefore fails.

33 In the case of [\*Elijah Nderitu Gachaga v Francis Gakuu Gachaga & 2 others\*](#) [2019] eKLR the court in addressing the issue of locus standi had this to say; -

Black's Law Dictionary defines *locus standi* as the right to bring an action or to be heard in a given forum. The forum includes a court of law. In [\*Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama\*](#) [2014] eKLR the Court of Appeal held that;



“.....a litigant is clothed with locus standi upon obtaining a limited or full letter of administration in cases of intestate succession.....”

34 Consequently, this court makes a finding that the plaintiff lacked capacity to file this suit and it is not properly before this court. Having made this finding I find no need to delve into the issue whether the plaintiff has proved her case to the required standard of proof. I must stop here. This then takes me to the issue whether the orders sought by the defendants should issue.

35 The defendants have in their pleadings craved for orders that; -

- a. The plaintiffs suit be dismissed with cost
- b. A declaration that the alleged suit property herein belongs to the 1<sup>st</sup> defendant deceased father the late Bakari Omari Mwachidyogo
- c. The Court do revoke the letter of offer issued to the plaintiff and re-issue the same in the name of Bakari Omari Mwachidyogo.

36 The above orders are substantive orders. Had the defendants craved for these orders they would have lodged a counterclaim within the suit appropriately. Order 7 rule 8 of the [Civil Procedure Rules 2010](#) provide as follows; -

“Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence”.

37 From the above it is clear the requirements are obligatory and the defendant in the present case did not comply. I have keenly perused the statement of defence filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendant. There is no counterclaim pleaded. Nowhere in the said defence do the defendants state that they are pleading as administrators of the estate of their father. That in any case the said estate is not a party to this suit nor did they move to amend their pleadings accordingly. It is clear from the said defence that this is an ordinary or the usual reply to a plaint. No reference is made to any paragraph therein with a view to reiterating the same as a counterclaim. It is not enough to produce in evidence a grant of letters of administration issued to Omari Bakari Omari the 1<sup>st</sup> defendant for purposes of defending this suit stated therein as ELC No 264 of 2016 which I note is the number that was designated in Mombasa before its transfer to Kwale following the appointment of an ELC judge in Kwale. I respectfully agree with Mr Nyange’s submission that the orders cannot issue in the absence of a counterclaim. My hands are tied.

38 The upshot of the foregoing is that the plaintiffs suit is dismissed. I saw the plaintiff when she gave evidence in court, she was very elderly. This court formed the impression that she has no means to pay costs. I will therefore not make any orders as to costs.

39 Orders accordingly

**DELIVERED AND DATED AT KWALE THIS 12<sup>TH</sup> DAY OF APRIL 2023**

**HON LADY JUSTICE A.E. DENA**



## **JUDGE**

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No Appearance for the Plaintiff

Mr. Ngaira for the defendant

Mr. Daniel Disii- Court Assistant.

