



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otim & another v Elsek and Elsek Company Limited & 2 others (Environment & Land Case 833 of 2017) [2023] KEELC 17462 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17462 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 833 OF 2017  
MN GICHERU, J  
MAY 16, 2023**

**BETWEEN**

**DR. BENNY BEN OTIM ..... 1<sup>ST</sup> PLAINTIFF**

**KENYA RANCHING COMPANY LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ELSEK AND ELSEK COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KENYA COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, KAJIADO ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff seeks the following reliefs against the Defendants.
  - a. A permanent injunction restraining the Defendants, their servants and/or agents from trespassing, transferring, disposing or in any way adversely dealing with L.R. Kajiado/Kisaju/7947, suit land.
  - b. A declaration that the freehold transfer of agricultural land by the Plaintiffs to the first Defendant was non procedural and contrary to the Law of Kenya.
  - c. An order for cancellation of the title to the suit land issued to the first Defendant.
  - d. The court to order the directors of the first Defendant to deposit their travel documents in court.
  - e. The court to order the Defendants to provide security for costs.
  - f. Costs and interest of this suit.
  - g. Any other relief that the court deems fit.



2. The first Plaintiff's case is as follows. In the year 1998 together with Dr. Joseph Gitari, they purchased L.R. Kajiado/Kisaju/506 measuring 40.5 hectares from Jacaranda Holding properties Limited through Kenna Ranching Company Limited, a company that the first Plaintiff and Dr. Gitari owned jointly. At that time, the first Plaintiff was a Ugandan Diplomat employed by the United Nations working and living outside of Kenya.
3. In July 2013, L.R. No. 506 was subdivided into two parcels namely Kajiado/Kisaju/7947 and 7948 measuring 16.22 and 24.282 hectares respectively. L.R. No. 7947 was transferred to the first Defendant while L.R. No. 7948 remained in the name of the Kenna Ranching Company Limited.  
The first Plaintiff contends that the transfer of the suit land to the first Defendant is not only void ab initio but also tainted with fraud for the following reasons.
4. Firstly, the first Defendant being a foreign owned company could not own land in Kenya under a freehold tenure.
5. Secondly, no consent of the Land Control Board was ever obtained to authorize the transfer of the suit land to the first Defendant.
6. Thirdly, the first and third Defendants transferred the suit land to the first Defendant when there was no agreement for sale.
7. Fourthly, there were other irregularities such as failure to pay consideration by the first Defendant to the first Plaintiff, failure by the second and third Defendants to carry out due diligence and establish that the first Defendant could not lawfully own a freehold interest in land in Kenya, to name but a few of the failures.
8. As a result of the above shortcomings, the first Defendant was able to obtain a loan of about Kshs. 48 million from the second Defendant which it failed to service. The first Plaintiff is in danger of losing his land due to the unlawful activities of the three Defendants.
9. Earlier on, the first Defendant had approached the first Plaintiff through its director, Mr. Osman Erdnic Elsek and convinced the first Plaintiff to enter into a development agreement whereby the two would partner and develop a housing project, build houses and later sell the houses at a profit. Even though the Plaintiff verbally accepted the offer, the development agreement was never signed by the two parties. It is for the above reasons that the Plaintiff instituted this suit seeking for the above orders.
10. In support of his case, the first Plaintiff filed the following evidence:-
  - i. His witness statement dated 5/3/2018.
  - ii. Copies of title deeds for Kajiado/Kisaju/506, 7947 and 7948.
  - iii. Copy of mutation form for L.R. 506.
  - iv. Copy of draft development agreement.
  - v. Copy of an incomplete transfer form between the Plaintiffs and the first Defendant.
  - vi. Copy of consent of the Land Control Board dated 10/7/2013 in respect to the suit land.
  - vii. Copy of CR 12 for the first Defendant dated 25/9/2015.
  - viii. Email communication between the first Plaintiff and the first Defendant's director.
  - ix. Other relevant documents.



11. The first Defendant, in a written statement of defence dated 26/2/2016 denies the first Plaintiff's claim. It is its defence that the first Plaintiff willingly transferred the suit property to the first Defendant. The first Defendant contends that it is the first Plaintiff who frustrated the housing project by selling some of the houses at Kshs. 1.5 million instead of Kshs. 4.5 million and directing the proceeds of sale from the project instead of paying the loan advanced by the second Defendant. Consequently, the housing project failed due to the first Plaintiff's own fault.
12. In support of its case, the first Defendant filed:-
  - i. A witness statement by Osman Elesek dated 26/2/2016.
  - ii. Copy of email communication between the first Plaintiff and Mr. Elsek dated 16<sup>th</sup> and 17<sup>th</sup> July, 2013.
13. The second Defendant in a written statement of defence dated 12/3/2018 denies the Plaintiff's claim in general and the fraud in particular. It is the second Defendant's contention that the first Defendant obtained credit facilities from the second Defendant by securing two legal charges over the suit land. The first Defendant defaulted in its loan repayment obligations. A dispute arose regarding the sale of the suit land by the chargee. It culminated in HCCC 236 of 2015 at the Nairobi Commercial Division which case has been stayed pending the determination of this suit.

Further to the above, the second Defendant avers that before advancing the loan to the first Defendant, it conducted due diligence and a search at the Kajiado Land Registry confirmed that the first Defendant was the registered proprietor of the suit land.
14. Finally, the second Defendant raises two fundamental issues vide paragraph 10A of the amended defence namely:-
  - a. The first Plaintiff has no locus standi to commence this suit.
  - b. The first Plaintiff did not file any authority from the second Plaintiff under seal to enable him file this suit. The second Defendant therefore called for the dismissal of the suit.
15. In support of the defence, the second Defendant filed the following evidence.
  - i. Witness statements by Francis Kiranga and Michael Ndungu.
  - ii. Copy of letter of offer dated 1/2/2013.
  - iii. Copy of letter of offer dated 19/7/2013.
  - iv. Copy of letter of offer dated 3/9/2013.
  - v. Copy of statement of account running from 21/6/2012 to 30/4/2015.
16. At the trial, only three witnesses testified. They included the first Plaintiff, a director of the first Defendant and a representative of the second Defendant. The witnesses adopted their witness statement and documents in their examination in chief. They were then cross –examined by counsel for the adverse parties. The Land Registrar who was expected to testify in court on 29/11/2021 did not turn up on that day. Neither did the counsel from the State Law Office.
17. On 6/4/2022, the second Plaintiff filed a notice of motion dated 1/3/2021 seeking leave to discontinue its suit against the Defendants herein. It also seeks to have the costs of the application borne by the first Plaintiff. The motion is supported by an affidavit by Joseph Bradley Gitari in which he deposes that he is the sole director of the second Plaintiff since the first Plaintiff resigned as director on 25/6/2013.



Secondly, this suit was filed without the authority or consent of the bonafide director and the unlawful actions of the first Plaintiff may cause irreparable loss and damage to the second Defendant.

18. To expedite the conclusion of this old matter, the court directed that the parties file and exchange written submissions covering the discontinuance of the suit as well as the other issues raised on the entire suit.
19. Counsel for the parties filed written submissions on 22/2/2022, 7/3/2022, 21/6/2022, 13/12/2022 and 14/12/2022. The issues raised in the submissions are as follows;-
  - i. Whether the suit land was legally and properly charged to the second Defendant?
  - ii. Whether the Plaintiffs transferred the suit parcel to the first defendant?
  - iii. Whether the Plaintiffs have proved any fraud on the part of the third Defendant?
  - iv. Whether a transfer of an interest in land without a sale agreement is valid in law?
  - v. Whether a foreign owned company can own land in Kenya?
  - vi. Whether the first and third Defendants illegally and fraudulently transferred the suit land?
  - vii. Whether the third Defendant illegally and fraudulently issued an absolute title to a parcel of agricultural land to the first Defendant, a foreign owned company?
  - viii. Whether the illegally, unprocedurally or fraudulently acquired land title can be impeached and cancelled?
  - ix. Whether the second Defendant connived with the first Defendant to charge the illegally or fraudulently acquired title to the suit land, and what is the effect of cancellation on the charge?
  - x. Whether the first Plaintiff is the registered owner of the disputed property?
  - xi. Whether the first Plaintiff has any legal interest in the suit property to have locus standi to institute this suit?
  - xii. Whether the first Plaintiff is recognised in law as the person to seek relief under Section 103 of the Land Act?
  - xiii. Whether the first Plaintiff is entitled to the reliefs sought?
  - xiv. Whether this suit is properly before the court?
  - xv. Whether the second Plaintiff can be compelled to proceed with the suit against the Defendants?
20. I have carefully considered all the evidence adduced by all the parties including the witness statements, documents and testimonies at the trial. I also considered the written submissions by the learned counsel for the parties, the issues raised therein including the law cited. I find that the following issues will determine the dispute.
  - i. Whether the second Plaintiff could properly have been joined as a Plaintiff to this suit without its consent?
  - ii. Whether the first Plaintiff, who has admitted that he is not a Kenyan national, can or could lawfully own freehold land in Kenya?
  - iii. Whether this suit is properly before this court?



21. On the first issue, I find that the second Plaintiff could not have been properly joined in this suit as a Plaintiff without its consent. This is because under Order 1, Rule 13(2) Civil Procedure Rules it must give its authority in writing. In this case, the first Plaintiff did not file any such authority together with the original plaint or the amended one dated 3/2/2018. The requirement for such authority prior to the filing of the suit is mandatory as per the wording of Order 1, Rule 13(2) Civil Procedure Rules and its absence is fatal to the inclusion of the second Plaintiff as a party to the suit.
22. On the second issue, I find that the first Plaintiff, not being a Kenyan Citizen cannot own or hold land in Kenya under a freehold tenure because of Article 65(1) of *the Constitution* which forbids such ownership.
23. On the third and final issue, I find that this suit is not properly before the court because the first Plaintiff who lacks capacity to own land under the freehold tenure and not owning the suit land under the leasehold tenure, has no locus standi to institute this suit. He could only have had capacity to sue if he owned the suit land with a Kenyan Citizen like it was the case before 25/6/2013 when he resigned as a director of the second Plaintiff.

For the above stated reasons, I find no merit in the Plaintiff's suit which I dismiss with costs to the second Plaintiff and the Defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16TH DAY OF MAY, 2023.**

**M.N. GICHERU**

**JUDGE**

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