



**Nyangoto (Suing as a legal representative of the Estate of Reuben Nyangoto
Omboga alias Reuben Nyangoto (Dcd) v Samwel & 5 others (Environment &
Land Case E012 of 2021) [2023] KEELC 19262 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19262 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E012 OF 2021**

**EC CHERONO, J
JULY 28, 2023**

BETWEEN

**KENNEDY NYANGOTO (SUING AS A LEGAL REPRESENTATIVE OF THE
ESTATE OF REUBEN NYANGOTO OMBOGA ALIAS REUBEN NYANGOTO
(DCD) PLAINTIFF**

AND

**MARY WAMBUI SAMWEL 1ST DEFENDANT
IBRAHIM CHEGE SAMWEL 2ND DEFENDANT
GACHECHE MICHAEL 3RD DEFENDANT
JANE MWENESI WERENGARI 4TH DEFENDANT
THE COUNTY LAND REGISTRAR BUNGOMA 5TH DEFENDANT
THE HON ATTORNEY GENERAL 6TH DEFENDANT**

JUDGMENT

1. The plaintiff, vide a plaint Amended on 15th April 2022 and filed in court on 26th April 2022 seeks the following orders;
 - a. A declaration that the title deeds issued to the 1st, 2nd, 3rd and 4th defendants being No E.bukusu/S.kanduyi/15350, 15351, 20391, 20390, 15349 and any subsequent transfers from the original number LR No E.bukusu/S.kanduyi/1084 are null and void and an order of cancellation and rectification of the register in respect to E.bukusu/S.kanduyi/15350, 15351, 20391, 20390, 15349 and 15352 and any subsequent transfers, have the same revert to the original Number LR No E.bukusu/S.kanduyi/1084



- b. An order of permanent injunction do issue restraining the 1st, 2nd, 3rd, and 4th defendants by themselves through their agents, servants, anybody claiming through them from entering, selling, alienating, developing, leasing and or charging LR No E.bukusu/S.kanduyi/1084 and further an order of eviction against the 1st, 2nd, 3rd and 4th defendants by themselves, their agents, servants, anybody claiming through them from LR No E.bukusu/S.kanduyi/1084 and demolition of any development and structures erected by the 1st, 2nd, 3rd and 4th defendants.
 - c. Costs of this suit
 - d. Any other relief the Honourable court may deem fit to grant.
2. The 1st, 2nd, 3rd and 4th defendants entered appearance and filed a joint statement of defence denying the plaintiff's claim. After filing their respective compliance documents under Orders 3, 7 and 11 CPR, the suit was fixed for hearing and proceeded between 23/2/2023 and 8/5/2023

Plaintiff's Case

3. After the plaintiff testified on oath, he referred to his witness statement dated 18/10/2021 which he sought to be adopted as his testimony-i-chief. He also referred to his list of documents dated the same date containing 13 items which he produced as exhibits in support of his claim herein. According to the plaintiff, he is the legal representative of father Reuben Nyangoto Omboga Alias Reuben Nyangoto (Deceased) who died on 2/4/2002 who before his demise was the registered owner of LR. No E.bukusu/S.kanduyi/1084. He further stated that since they had not commenced succession to succeed the estate of their late father, they visited Bungoma lands office and after obtaining the records, he established that the 5th defendant without succession and the knowledge of the beneficiaries of the deceased's estate and/participation, fraudulently effected subdivision and subsequently transferred the suit property to the 1st to 4th defendants and new numbers were created being No E.bukusu/S.kanduyi/15350, 15351, 20391, 20390, 15349 and 15352 respectively.
4. The plaintiff stated that the 1st to 4th defendants purport to have purchased the suit property belonging to the deceased person and fraudulently purported to have the same transferred to their names without the blessings of the deceased and/or his administrator who is yet to be appointed and have developed the suit property. He further averred that the subdivision and subsequent transfer of the suit property to the 1st to 4th defendants by the 5th defendant and new numbers being E.bukusu/S.kanduyi/15350, 15351, 20391, 20390, 15349 and 15352 emerging is fraudulently and intermeddling with estate of the deceased thus the new numbers/or any subsequent transfer should be cancelled and an order be issued reverting the emerging numbers to the original owner. He set out particulars of fraud on the part of the 1st, 2nd, 3rd, 4th and 5th defendants
5. On cross-examination, the plaintiff confirmed that his mother is known as Yunes Nyanduko Nyangoto. He was referred the green card for the suit property which was registered in the name of his father Reuben Nyangoto Omboga(deceased) on 2/1/69 and transferred to his mother on 8/11/2006. He also admitted that his mother is the only one who knows how she acquired the suit property and that he has not sued her to explain how she acquired the same. He stated that from the green card produced as P-Exhibit NO 3, the title was closed on subdivision on 1/9/2011 and five new resultant portions were created as can be seen from the mutations registered in the lands office and produced as exhibits.



1st Defendant's Case

6. Wambui Samwel, the first defendant was sworn and identified herself as a resident of Bungoma County. She referred to her witness statement dated 25/10/2021 which was adopted as her testimony –in-chief. She also referred to her list of documents dated the same date and produced as exhibits. She recalled that in early April 2011, one female lady by the name Yunes Nyanduko Nyangoto came to their shop at Mufutu area and asked whether they were interested in purchasing some land within the said Mufutu area. She informed them that she was in the process of subdividing the mother title registered as E.bukusu/S.kanduyi/1084 Measuring 0.36 Ha. into 5 portions of 0.05 Ha. each. Since she was interested, she asked the lady to take her to the land so that she can see and carry out due diligence. She said that she visited the land Registry Bungoma and conducted an official search and confirmed that indeed the said Yunes Nyanduko Nyangoto was the registered proprietor of the said land with effect from 8th November, 2006.
7. She stated that she agreed to purchase 3 plots after the completion of the subdivision process. She stated that on 22/4/2011, the said Yunes Nyanduko Nyangoto brought her applications for consent to transfer which she duly signed and on 10/5/2011, they appeared before the land control board at Kanduyi where the LCB consent was given for the transfers. She further stated that on 15/9/2011, they reduced their agreement into writing before M/S Onyango & co. Advocates and paid Kshs 600,000/= for each plot making a total of Kshs 1,800,000/= for the three (3) plots. She further stated that on 28/9/2011, the three plots were duly transferred into her names and immediately thereafter, she commenced extensive developments whereby in one of the properties, she has constructed a 4 storey apartment. She stated that the transaction was above board and that she followed all the procedures necessary in acquiring the property and that she never participated in any fraud as she is an innocent purchaser for value without knowledge of any or alleged fraud. She stated that she bought three plots being plots No 50, 51 & 52 at KSHS 600,000/= each making a total of Kshs 1,800,000/= and paid through her lawyers in full after which she was issued with title deeds.
8. On cross-examination, the 1st defendant confirmed that she did search at the lands office and it showed that the land was registered in the name of seller, Yunes Nyanduko Nyangoto.

2nd Defendant's Case.

9. The 2nd defendant, Ibrahim Chege Muiruri identified himself as a businessman and a resident of Bungoma County. He referred to his witness statement dated 25/10/2021 which he the court adopted upon his request. In his testimony-in-chief, the 2nd defendant stated that sometime in the year 2018, his Pastor, one Elijah Gitene informed him that his neighbour by the name of Jane Mwenesi Werengari had a plot in Mufutu area She wanted to sell. He went with him to check the plot and he liked it. They negotiated the price after ascertaining from the lands office that indeed she was the registered owner.
10. Before buying the plot, he was referred to one Samuel Anyango Nyangoto who said that he was the son of the previous owner, one Reuben Nyangoto. He discussed with him and he indicated that there was no problem in him buying the plot.

3rd Defendant's Case

Dw1-Jane Wanjiru Karuga

11. Jane Wajiru Karuga was sworn and identified herself as the mother and co-Administrator of the estate of the late Gacheche Michael, 3rd defendant herein. She further stated that she is a business lady and



a resident of Bungoma Township. She stated she was appointed co-Administrator of the estate of her son Gacheche Michael (deceased) by the High Court of Kenya vide Succession Cause No 09 of 2020 (Bungoma). She also stated that prior to his death, the deceased was the registered owner of land parcel No E.bukusu/S.kanduyi/15349 Measuring 0.08Ha. which he purchased from one Yunes Nyanduko Nyangoto sometimes in September, 2011. The witness stated that before he purchased the said land, the deceased took her to the site and she advised him to carry due diligence before paying the purchase price. She stated that from the year 2011 when he purchased the said land, the deceased and the family have used the same openly, peacefully and uninterrupted from any quarters.

12. The witness stated that the transaction was above Board and the deceased followed all the procedures necessary in acquiring the property and never participated in any fraud as the deceased was a purchaser for value without knowledge of any or alleged fraud. She stated that the deceased carried out all the due diligence needed from a purchaser to confirm that indeed the land was owned by Yunes Nyanduko Nyangoto. She further stated that the land was lawfully transferred to the deceased by the said Yunes Nyanduko Nyangoto as she was the registered owner at the time the deceased was purchasing. In conclusion, the witness stated that at the time the deceased purchased the land, there was no indication or any information that the said land belonged to a deceased person and at no given time did the deceased conspire with anybody or authority to defraud the beneficiaries of the estate of Reuben Nyangoto.

Dw2-Anne Wangui Andrew.

13. The second witness called in support of the 3rd defendant's defence was Anne Wangui Andrew who identified herself as a business lady based in Bungoma and wife and a co-Administrator of the estate of the late Gacheche Michael. She stated that she was appointed as such vide Bungoma High Court Succession Cause No 09 of 2020. She stated that prior to his death, the deceased was the registered owner of land parcel No E.bukusu/S.kanduyi/15349 Measuring 0.08Ha which he purchased from one Yunes Nyanduko Nyangoto some times in the year 2011. The witness further stated that before he purchased the said land, the deceased took her to the site and she advised him to carry out due diligence before paying the purchase and since the land was purchased, they have used the same openly, peacefully and without interruption.
14. In conclusion, the witness stated that the deceased bought the suit land after genuinely carrying out all due process required from a purchaser and at no time did the deceased conspire with anybody or authority to defraud the beneficiaries of the estate of Reuben Nyangoto

4th Defendant's Case

15. Jane Mwenesi Warengari, the 4th defendant herein was sworn and referred to her witness statement dated 25th October, 2021 which upon request, was adopted by the court as her testimony-in-chief. According to her recollection, sometimes in 1987, her together with her husband and mother-in-law were engaged by one Reuben Nyangoto, the original registered owner of LR No E.bukusu/S.kanduyi/1084 as a caretakers. After a while, they were not seeing the proprietor and they a word to kisii where he came from to trace the beneficiaries. She stated that the first person to come was one Samwel Anyango Nyangoto and later one Robert Omari Nyangoto and Yunes Nyanduko nyangoto who identified themselves as sons and wife to the registered owner. The 4th defendant further stated that after visiting the lands office, they named beneficiaries told her that they had changed the ownership of the land from the original owner to Yunes Nyanduko Nyangoto. She further stated that on 21/6/2013, she further stated that the new registered owner, Yunes Nyanduko Nyangoto subdivided the land and sold her a resultant plot Measuring 50ftx 100ft together with a house registered as LR No E.bukusu/



S.kanduyi/15353 at a consideration of KSHS,800,000/=. She said that she later subdivided the plot into two portions namely e.bukusu/s.kanduyi/20391 and 20391 measuring 0.028 and 0.022Ha. respectively and on 16/4/2018, She sold land parcel No E.bukusu/S/kanduyi/20390 to Ibrahim Chege Muiruri and LR No E.bukusu/S.kanduyi/20391 to one Hussein Aboud Bwanamkuu

Plaintiff's Written Submissions.

16. The plaintiff who is acting in person framed two issues for determination and submitted as follows;

Whether The Plaintiff Is The Legal Owner Of The Land Parcel LR No E.Bukusu/S.kanduyi/1084

17. The plaintiff who is acting in person submitted that referred to Section 23 of the *Registered land Act* (now repealed) and submitted that a plain reading of the said Section suggests that previous dealings might be shown to have mired in fraud. The plaintiff also submitted that one Reuben Nyangoto Omboga(deceased) is the original owner of land parcel No No E.bukusu/S.Kanduyi/1084 and that he had not done succession yet.

Whether the Defendants Committed Fraudulent and Illegal Acts.

18. On this issue, the plaintiff submitted that it is common ground that the plaintiffs' suit is founded on the tort of fraud as a cause of action. He submitted that on 29th April 2021, he discovered after obtaining certified copies of the register and official searches from lands office with a view of commencing Succession that the 6th defendant without succession and their knowledge as beneficiaries of the deceased's estate succession or participation fraudulently effected subdivision and subsequently transferred the suit property to the 1st to the defendants and new numbers E.bukusu/S.kanduyi15350, 15351, 20391, 20390, 15349, 15352 and 15353 respectively having emerged.
19. He further submitted that upon learning of the fraudulent transfer, he visited his father's property and realized that the 1st to 4th defendants have purportedly done extensive developments on the suit property. He believes that the subdivision and subsequent transfer of the suit property to the 1st to 4th defendants by the 5th defendant and new numbers being E.bukusu/S.kanduyi/15349, 15351, 15352, 15353, 20390 and 20391 was fraudulent and tantamount to intermeddling with estate of the deceased
20. In conclusion, the plaintiff submitted that it would be unjust that the defendants' actions which are unlawful deny and continue denying the plaintiff's rightful use and enjoyment of the said land properties.

1st, 2nd, 3rd and 4th Defendants' Submissions

21. The 1st, 2nd, 3rd and 4th defendants through the firm of Makokha Wattanga & Luyali Associates Advocates submitted on the following issues;

Whether the Plaintiff Has Proved His Case on a Balance of Probabilities

22. Mr. Makokha, instructed by the firm of Makokha Wattanga Luyali Associates Advocates submitted that based on the evidence on record, the plaintiff has totally failed to prove his case against the 1st, 2nd, 3rd and 4th defendants on the balance of probability. They further submitted that although the plaintiff in his pleadings averred that the defendants herein had committed fraud by transferring the suit property to themselves without any legal authority but the evidence produced in court shows that the 1st, 2nd, 3rd and 4th defendants purchased the suit property from one Yunes Nyanduko Nyangoto who was the then registered owner after following all the necessary procedures required under the law.



They submitted that the plaintiff did not prove any of the allegations and particulars of fraud pleaded in the plaint.

Whether the 1st, 2nd, 3rd and 4th Defendants are Innocent Purchasers for Value.

23. The learned counsel on this issue submitted that in determining whether the 1st, 2nd, 3rd or 4th Defendants are innocent purchasers for value, it is imperative to look at the evidence of both the plaintiff and the evidence of the said Defendants. He further submitted that it is not in dispute that the plaintiff's Mother Yunes Nyanduko Nyangoto sold 3 portions of land to the 1st Defendant namely E.Bukusu/S.kanduyi/15350, 15351 & 15315352 while the 2nd Defendant purchased two portions accumulatively measuring 0.05 Ha. from the 4th Defendant who had purchased the said land known as E.bukusu/S.kanduyi/15353 from the plaintiff's mother and subdivided the same into two portions while the 3rd Defendant purchased a portion of land measuring 0.08Ha. from one Allan Bikeri Onkware who in turn had purchased the same from the plaintiff's mother. The learned counsel submitted that all the defendants produced documents on how they acquired the land. He cited Section 26(1) of the [Land Registration Act](#), 2011 and submitted that the certificates of title produced by the defendants in their evidence and duly issued by the Registrar are prima facie evidence that they obtained the land through valid means and process and that there is evidence to the contrary that the title deeds were obtained through fraud or misrepresentation or that the titles were acquired illegally, unprocedurally or through a corrupt scheme. He cited the case of *R.g Patel V Lalji Makanji* (1957)EA 314.

Who Should Pay the Costs of the Suit

24. The Counsel submitted that although costs of an action or proceedings before the court of law or Tribunal are at the discretion of the judge, the general rule is that costs shall follow the events in accordance with the proviso to section 27 of the [Civil Procedure Act](#).

Legal Analysis And Decision

25. I have taken into consideration the pleadings, the evidence by the parties and their witnesses and the rival submissions as well as the relevant law. From the totality of the materials placed before me, the issues that commend itself for determination are as follows;
1. Whether the plaintiff has proved his claim on the required standard?
 2. Whether the 1st, 2nd, 3rd and 4th defendants are purchasers for value and their title indefeasible?
 3. Who is liable to bear the costs of this suit?

Whether the Plaintiff Has Proved His Claim to the Required Standard?

26. From his Amended plaint dated 15th April 2022, the plaintiff is seeking substantive order for inter-alia a Declaration that the 1st, 2nd, 3rd and 4th defendant's Title Deeds LR No E.bukusu/S.kanduyi/15350, 15351, 15353, 15349, 20390 and 20391 and any subsequent transfers from the original Number LR No E.bukusu/S.kanduyi/1084 are null and void and an order for cancellation and rectification of the register in respect to land parcels No E.bukusu/S.kanduyi/15350, 15351, 20391, 20390, 15349 & 15352 and subsequent transfers from the original Number LR E.bukusu/S.kanduyi/1084.
27. It is a basic principle of evidence that he who alleges must prove. Sections 107, 108 and 109 of the [Evidence Act](#) Cap 80 Laws of Kenya provide as follows;

107.



(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

28. Section 26 of the [Land Registration Act](#) No 3 of 2012 provides two ways in which a certificate of title issued by a Registrar may be cancelled 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 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..”

29. The plaintiff at 13 of the Amended plaint has averred that the subdivision and subsequent transfer of the suit property to the 1st, 2nd, 3rd and 4th defendants is fraudulent and tantamount to intermeddling with the estate of a deceased person and set out the following particulars of fraud;

a. By 1st to 4th defendants transferring the said property to themselves without any authority.

b. By 1st to 4th Defendants presenting a forged transfer instrument or transfer not attested or no transfer at all

c. By transferring title belonging to a dead person without filing a succession cause.

d. By transferring the land without duly certified PIN, Identity Card and photograph of the transferor who had died about 10 years and 18 years before, respectively.

e. By transferring the land to themselves without paying any consideration to the deceased.

f. By conveying the said land secretly.

g. The 5th Defendant in collusion with the 1st to 4th Defendants effecting transfer without Succession, the knowledge of the beneficiaries of the deceased’s estate or participation.



- h. The 5th defendant proceeding to issue title deeds without considering the proprietary interest of the plaintiff/or other beneficiaries.
 - i. The 1st to 5th Defendants conspiring to defraud the beneficiaries of the deceased.
 - j. The 1st to 5th Defendants having knowledge that the transaction was riddled with forgery and misrepresentation.
 - k. The 5th Defendant authorising and issuing title to the 1st, 2nd, 3rd, and 4th Defendants without the consent, succession and/ or authority of the plaintiff
 - l. *Res ipsa loquitor*
30. To succeed in a claim for based on fraud, the plaintiff/claimant must not only plead but also strictly prove as held by the Court of Appeal in *Kuria kiarie & 2 Others v Sammy Magera* (2018) eKLR where it was held;
- “The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Marjaria v Nansingh Madhusingh Darbar & Another* (2000) eKLR where Tonui JA observed as follows;
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is settled law that fraudulent conduct must be distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
31. Again in the case of *Denis Noel Mukbulo Ochwanda & Another v Elizabeth Murungari Njoroge & Another* (2018) KLR, the court of Appeal held;
- “As regards standard of proof of fraud, the law is quite clear. In *R.G Patel v Lalji Makanji* (*supra*), the former court of Appeal for Eastern Africa stated thus;
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
32. In this case, the plaintiff made spurious allegations of fraud against the defendants without empirical evidence being adduced. From the evidence adduced, it is apparent that the 1st, 2nd, 3rd and 4th defendants bought the disputed parcels of land from one Yunes Nyanduko Nyangoto whom the plaintiff confirmed is his biological mother. Despite being alive and kicking, the said Yunes Nyanduko Nyangoto is not joined as a party in this suit. Since the plaintiff did not join Yunes Nyanduko Nyangoto or shows prove that his mother Yunes Nyanduko Nyangoto did not have capacity to transfer the suit properties, this Court cannot make any inference.

Whether the 1st, 2nd, 3rd and 4th Defendants are Purchasers for Value and Their Titles Indefeasible?

33. Section 26(1) of the *Land Registration Act*, N0. 3 of 2011 provide as follows;

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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
34. The 1st, 2nd, 3rd and 4th defendants gave sworn testimony and explained how they bought their respective parcels of land from one Yenes Nyanduko Nyangoto who was the registered proprietor of the original land parcel No E.bukusu/S.kanduyi/1084 before subdivision and transfer. The said defendants also stated that they did due diligence by conducting an official search and complying with all procedural requirements before issuance of their respective title deeds. Those averments given on oath were not challenged and/or controverted. I am satisfied that the discharged their evidentiary duty showing that their acquisition of the suit properties was beyond reproach and purchasers for value and their names as registered proprietors are absolute and indefeasible.

Who is liable to bear the costs of this suit?

35. The law provides that costs ordinarily follow the event except where the trial believes otherwise, in which the court must give reasons for the exception. In other words, the rule of the thumb is that costs follow the event but the courts are given discretion which discretion must be exercised judicially. In this case, the plaintiff has made serious allegations of fraud against the defendant and no iota of evidence was tendered to prove the same. I have no justiciable grounds to deny the winning party the costs of this suit.
36. The upshot of my finding is that the plaintiff's suit is devoid of merit and the same is hereby dismissed with costs.

READ, DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS 28TH JULY, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Plaintiff-present

Mr. Makokha for 1st, 2nd, 3rd and 4th Defendants-present

M/S Joy C/A-present

