



**Sabastiano v Onyiego & 2 others (Environment & Land Case
310 of 2014) [2023] KEELC 18970 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18970 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 310 OF 2014**

**M SILA, J
JULY 27, 2023**

BETWEEN

NYARIKI ONYIEGO SABASTIANO PLAINTIFF

AND

JULIUS RIOBA ONYIEGO 1ST DEFENDANT

LAND REGISTRAR, KISII COUNTY 2ND DEFENDANT

THE HON. ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

(Plaintiff filing suit on behalf of the estate of his late father and alleging that the 1st defendant, his half-brother, fraudulently caused transfer to himself of land that was owned by their father inter alia without first undergoing succession; plaintiff demonstrating that transfer was effected after death of their father and contending that the land formed the free property of the deceased; defence of 1st defendant being that their father had obtained consent to transfer the land to him as a gift and had executed the transfer documents before his death; no evidence that the Land Control Board consent was obtained fraudulently or that their late father did not sign the transfer instrument; assessment of the law and authorities showing that there is no bar to lodging a transfer after death of the proprietor; plaintiff's suit dismissed)

1. This suit was commenced through a plaint which was filed on 13 August 2014 and twice amended. The plaintiff sues on behalf of the estate of the late Henry Onyiego Akama (deceased) and is also one of his sons. The 1st defendant is his step- brother. The case of the plaintiff is that the deceased was the proprietor of the land parcel West Kitutu/Bokingoina/1860 (the suit land). The plaintiff contends that the defendant fraudulently obtained a title deed to this land inter alia because no succession had ever been done and without consent of the Land Control Board. He avers that he only came to learn that the 1st defendant has title after he (plaintiff) was arrested and charged in Kisii Criminal Case No.



- 190 of 2013 for trespassing into the suit land. In this case, the plaintiff seeks orders to have the title of the defendant revoked, eviction of the defendant from the suit land, an order that the suit land vests in the estate of the deceased, a permanent injunction to restrain the 1st defendant from the land, costs and interest.
2. The 1st defendant filed defence. He claimed that the plaintiff does not represent the estate of the deceased and that he does not have the blessings of his brothers to commence this suit. He asserted that the suit land belongs to him as the eldest son of the second house of the deceased.
 3. The 2nd and 3rd defendants, respectively the Land Registrar Kisii and the Attorney General, filed a joint statement of defence which inter alia avers that the 1st defendant obtained title legally.
 4. In his evidence, the plaintiff testified that he is the first born son of the deceased and that he was born in the year 1934. The 1st defendant was born in the year 1969. He testified that their father died in the year 2000. He had the register showing that the 1st defendant obtained registration on 5 February 2013. This was through a transfer instrument dated 4 September 1992 which transferred the land to the 1st defendant as a gift. He testified that he was not aware of this transfer and the 1st defendant never mentioned that the land had been transferred to him as a gift. He stated that the land was ancestral land and that the 1st defendant wished to evict him. After the plaintiff testified, he was stood down for cross-examination which was to be on 14 March 2023. However, on this date, neither the defendants nor their counsel attended court. Mr. Nyamurongi, learned counsel for the plaintiff, applied to have the hearing closed, which I obliged. I then directed parties to file submissions but only Mr. Nyamurongi complied. Thus, the only evidence and submissions I have is that of the plaintiff.
 5. I have gone through the material presented before me. The case of the plaintiff is that the 1st defendant fraudulently obtained registration of the suit land for reason that he did so without first undergoing succession. I have seen the Certificate of Death of Henry Onyiego Akama and it shows that he died on 11 August 2000. The transfer was effected on 5 February 2013 which would raise eyebrows. However, among the exhibits produced by the plaintiff are an application for consent to the Marani Land Control Board dated 22 July 1992, a letter of consent from the said Land Control Board dated 28 August 1992, and the transfer of land instrument dated 4 September 1992 and which appears to be duly executed by the deceased as transferor with the 1st defendant as transferee. That transfer instrument shows that the land was being transferred to the 1st defendant as a gift. It appears that all these documents, which are required for any transfer of land to be effected, were obtained while the deceased was still alive. It is only that they were registered after his demise.
 6. Among the particulars of fraud pleaded in the further amended plaint are that the 1st defendant forged the consent of the Land Control Board as no record exists of any meeting of the Board and there are no minutes vide which consent was issued. No evidence has been led by the plaintiff that there is no record of the consent or that the Board did not sit to issue the consent. There is also no evidence before me that the application for consent and the consent were forged. It is also contended that as part of the fraud, the 1st defendant presented a transfer form after the death of the deceased knowing that such transfer form was ineffectual. I have no evidence that the transfer form is a forgery and no document examiner was called by the plaintiff to demonstrate that the transfer form was not signed by the deceased. The burden was on the plaintiff, not the defendants, to demonstrate that the application for consent was forged, that no consent of the Land Control Board was issued, and that the transfer instrument was forged. This is despite the fact that the proceedings were ex parte. Indeed, Mr. Nyamurongi, learned



counsel for the plaintiff, did avail to me the decision in the case of Karugi & Another v Kabiya & 3 Others (1983) eKLR, where the Court of Appeal stated as follows:-

“Neither can I agree with Mr. Waweru that the burden of proof is in any way lessened because the case is heard by way of formal proof. The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge.”

7. Mr. Nyamurongi also, correctly, submitted that the burden of proof on fraud is higher than the ordinary balance of probabilities. However, in his submissions, Mr. Nyamurongi went further to submit that the 1st defendant failed to discharge the burden of explaining why he never lived on the land or why it took him until February 2013 to register the transfer. That, I am afraid, has no basis, since as pointed out above, it was the burden of the plaintiff to prove fraud, which again as I have stated above, I have no evidence of.
8. Mr. Nyamurongi did submit that the suit land was the free property of the deceased and referred me to Section 2 of the Law of Succession Act, Cap 160, on the definition of what is the free property of the deceased, and Section 45 of the same Act which forbids intermeddling with the fee property of the deceased without first obtaining a grant of representation.
9. The Court of Appeal in the case of Kagina v Kagina & 2 others (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment), had occasion to interrogate whether gifts *inter vivos* could take effect after the death of the proprietor. The court approved the dictum of Tanui, J in the case of Gitau & 2 Others v. Wandai & 5 Others [1989] KLR 231, where it was held as follows:-

“... if a deceased person has during his life time sold, transferred, disposed or in any manner given out his properties either in exchange of consideration or as gifts *inter vivos*, such gifts or properties whether transfer had been registered or not do not form part of the deceased’s estate. In fact, the Law of Succession in my view protects and preserve transactions made by the deceased during his life time.”
10. From the above, it will be observed that property sold, or gifted, irrespective of whether or not transfer has been registered, do not form part of the estate of a deceased person.
11. Mr. Nyamurongi did not provide me with any law or authority, which holds the view that a properly executed transfer, cannot be registered after the death of the erstwhile proprietor. I have on my part taken the trouble to look into this position and it would appear that authorities are consistent that a transaction done prior to the death of the proprietor is not invalidated because the registration is done after his death.
12. In the case of John Senema Sirimani v Okero Oyienga & Another, Kisii ELC No. 352 of 1996, (2019) eKLR, an application for review was made by the plaintiff. In the suit, the plaintiff had alleged that the defendants had fraudulently caused the subdivision of the land parcel Majoge/Bosoti/48 into the land parcels Majoge/Bosoti/1730 and 1731m and that fraud was perpetuated in the transfer to the 1st respondent of the parcel No. 1731. The evidence adduced demonstrated that the father of the applicant had entered into a sale agreement of a portion of the parcel No. 48 in the year 1968. Consent to subdivide and transfer was obtained in the year 1971. The deceased died in 1974. The transfer was



registered in 1992. The suit by the plaintiff to contest the transfer was rejected by Wambilyangah J. In dismissing the application for review, Mutungi J, stated as follows :-

“The transfer was executed before the death of the Plaintiff’s father and that being the case, the same could be presented for registration even after the death had occurred. A transfer takes effect from the date of execution and the registration is merely to vest the interest transferred on the transferee but otherwise a transferor transfers his interest as soon as he executes the transfer instrument.”

13. Similarly in the case of *Pardeep Singh Ghatabora (Suing as the Legal Representative of the Estate of Gurnam Singh Ghatabora) v Exotic Crafts Limited & Kenya Commercial Bank Limited*, Nairobi ELC No. 256 of 2017 (OS) [2018] eKLR, a suit was filed claiming that the 1st defendant had fraudulently caused registration of property belonging to the deceased after his death. The evidence was that there was a sale agreement entered into on 18 September 2015 and a transfer instrument was executed on 16 December 2016. The purchase price of Kshs. 21,000,000/= was paid to the advocate who was to hold it as stakeholder. The proprietor died on 28 January 2017 and the 1st defendant lodged the instrument of transfer on 30 January 2017. The transfer was effected and the property subsequently charged to the 2nd defendant. Together with the suit, the applicant filed an application for injunction. In dismissing the application for injunction, Okong’o J was of the following view :-

“From the material before me, I am not satisfied that the plaintiff has satisfied the conditions for grant of the temporary injunction sought. The plaintiff’s case is that the suit property was transferred to the 1st defendant and thereafter charged to the 2nd defendant after the death of the registered proprietor thereof. That fact is not contested. The plaintiff has contended that since the suit property was registered in the name of the deceased as at the time of his death, it formed part of his estate and as such should have been dealt with in accordance with the provisions of the *Law of Succession Act*, Chapter 160 Laws of Kenya. The plaintiff has also contended that it is doubtful whether the deceased executed the instrument of transfer of the suit property in favour of the 1st defendant. The plaintiff has also brought up the issue of the resulting trust arising from the estate of Jaswant Singh.

The defendants have placed sufficient evidence before the court showing that as at the date of his death, the deceased had signed the agreement for sale and instrument of transfer. What remained was the registration of the said transfer in favour of the 1st defendant. In the said instrument of transfer, the deceased acknowledged having received the purchase price in full. The plaintiff has not placed any evidence before the court showing that the purchase price for the suit property was not paid to the firm of Archer & Wilcock Advocates as contended by the defendants. The deceased having received the full purchase price for the suit property and having executed the instrument of transfer in favour of the 1st defendant and provided all the completion documents, I am of the view that the sale had been completed and there was nothing left for the estate of the deceased to do regarding the transaction.”

14. From the above authorities, it would appear that a transaction entered prior to death can indeed be completed after death. In our case, the material before me demonstrates that the father of the plaintiff had obtained consent to transfer the suit land to the 1st defendant prior to his death. He also executed the requisite transfer instrument. I have already stated that I have not seen any evidence of fraud in the acquisition or execution of these documents. It is true that the registration was done after a considerable period of death, but that by itself cannot be evidence of fraud. In essence, the plaintiff has not persuaded me that the transfer of the suit land to the 1st defendant was fraudulent.



15. The result is that the plaintiff's suit is dismissed.
16. The only issue left is costs. The plaintiff and 1st defendant are brothers and given that relationship I will make no orders as to costs.
17. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 27 DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

