



REPUBLIC OF KENYA



**Osir & another v Mburu & 3 others (Land Case E031 of 2021)
[2023] KEELC 19080 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19080 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE E031 OF 2021**

**E ASATI, J
JULY 27, 2023**

BETWEEN

SIMON LUO OSIR 1ST PLAINTIFF

PENINA AKEYO LUO 2ND PLAINTIFF

AND

JOHN GORDHARD MBURU 1ST DEFENDANT

HELLEN NAUTUTU 2ND DEFENDANT

OWUOR ALICE 3RD DEFENDANT

LAND REGISTRAR – KISUMU 4TH DEFENDANT

JUDGMENT

Introduction

1. Vide the plaint dated May 3, 2021, the Plaintiffs sued the Defendant seeking for orders that: -
 - a. The court be pleased to issue orders nullifying and cancelling the register in respect of parcel Kisumu/dago/492 and have the same registered in the names of Simon Luo Osir
 - b. General damages for trespass
 - c. Costs of the suit
2. The plaintiffs' case was that land parcel known as Kisumu/dago/492 the suit land herein measuring about 9 acres is ancestral land which belonged to the 1st Plaintiff's father and later registered in the name of the 1st plaintiff. That the Defendants colluded and caused the suit land to be fraudulently transferred to the 3rd Defendant thereby depriving the Plaintiffs of the same.
3. The 1st and 2nd Defendants did not respond to the Plaintiffs' claim.



4. The 3rd Defendant responded to the plaintiffs' claim vide the 3rd Defendant's Statement of defence and Counter-claim dated October 7, 2021. The 3rd Defendant denied the Plaintiffs' claim and claimed for orders that: -
 - a. The caution lodged against land title number Kisumu/dago/492 be removed by the Registrar
 - b. The honourable court issues an order of permanent injunction restraining the Defendants and their servants by themselves or others from interfering with the 3rd Plaintiff's parcel of land
 - c. The court be pleased to issue an order of eviction and permanent injunction to restrain the Defendant from interfering with her proprietary interest in the land title No Kisumu/dago/492
 - d. Any other or further relief that the court could deem fit and just to grant,
 - e. The costs of the counterclaim
5. The 4th Defendant denied the Plaintiff's claim vide the 4th Defendant's Statement of Defence dated May 13, 2021.

The Evidence

6. The evidence of the plaintiff comprised of the testimony of the Plaintiffs and the exhibits they produced. The 1st Plaintiff testified as PW1. He adopted the contents of his witness statement dated May 3, 2021 as his evidence. He had stated in the witness statement that he is the original owner of the suit land which was registered in his name on October 23, 1973. That his parents, siblings and himself had their homes on the suit land. That he constructed his home on the suit land in the year 1970 and lived thereon till the year 1982 when he moved with his family to Kawabwaye in Homabay because the suit land had monkeys which destroyed his crops. That at Kawabwaye they bought a parcel of land and utilized it for farming.
7. That on the suit land he had planted eucalyptus trees(ojuok) which acted as the fence before leaving for Kawabwaye. That he returned to the suit land in the year 1990 because he was sickly. That at the suit land he found that there were people who had trespassed and constructed certain foundations and structures and that it was difficult to identify the exact trespassers as it seemed to be a whole syndicate that was in control. That to avoid tension the 1st plaintiff bought a portion of land known as Kisumu/dago/640 Measuring 5 Acres From Thomas Lango and that is where he put up a new home and is where he stays to date. That he followed up on the suit land and found out that there had been fraudulent change in ownership. That there was a fraudulent claim that he sold the suit land to one John Gordherd Mburu & Hellen Naututu at kshs.27,000/= that he had never sold the suit land to any person. that another aspect of fraud he discovered was a claim that one Charles Ogada Akech who died in or about the year 2009 and who was the plaintiffs' relative was registered owner of the suit land on January 21, 1982. that he has never transferred or given his consent for transfer of the suit land to any person. that he reported the complaint to the police vide a letter written by his advocate Ken Omollo but the police did not assist.
8. That in the year 2020 the 3rd Defendant visited him and claimed to be the new owner of the suit land. He prayed for nullification of the register and for the registration of the suit land to revert to his name as the original owner.



9. He produced a green card in respect of the suit land, certificate of official search dated April 27, 2021 for the suit land, map (sheet 4) for Kisumu/ Dago registration section, letter dated October 28, 2021 by Ken Omollo advocate, 3 photographs as exhibits.
10. On cross examination, the 1st Plaintiff stated that the suit land was his father's land where his father was buried in the year 1940. That he was born and raised on the suit land. That his 2 siblings died and were buried thereon. That his father had 30 wives all of whom lived on the suit land. That at the time of land adjudication the ancestral land was shared out between himself and Francis Obura each having his respective share registered in his name. That he bought the land which he currently occupies; namely Kisumu/dago/'640 at Kshs.3million.
11. PW2 was the 2nd Plaintiff. She adopted her witness statement dated 3/5/2021 as her evidence. She stated that she was married by the 1st Plaintiff in the year 1970 and brought to the suit land where her husband and his other wife were residing. That she and her co-wife had their homes on the suit land until the year 1982 when they moved to Kawa Bwaye in Homabay. That they stayed with a family friend called Guda who introduced them to one Andericus Olewe from whom they bought a parcel of land at Kshs.30,000/= which money was raised by her husband who was a mason and therefore had means of raising money. That they used to plant maize and beans whose yield was good and hence they had good income.
12. That because her husband became sick and the sellers of the land were hostile, she planned and caused the family to go back to Dago in the year 1990. That at Dago they found that there were people who had trespassed onto the suit land and constructed. The rest of her statement was similar to that of PW1.
13. On cross examination PW2 testified that because hyenas used to disturb them on the suit land, that is why they moved to Kawabwaye. That she did not know the size of the land they bought from Andericus Olewe. That they paid Kshs.100,000/= for the land and that she did farming on the land that the Kshs.100,000/= is money they made from selling their goats and cows. That when they left Kawabwaye they did not seek for refund of the purchase price because Andericus was the father-in-law of her daughter
14. That it was one Charles Oganda Akech a brother to her father who gave them the land to stay on. That they sold the land Charles Ogada gave them to Afya Sacco at Kshs.3 million. That they did not get title to the land. That with the money from Afya Sacco they bought land from Thomas Lango and that is where they live. That they stayed on the land Charles Ogada gave them and later moved to the land they bought from Thomas Lango.
15. The evidence of the 3rd Defendant comprised of her testimony, the exhibits she produced and the 3 witnesses she called. She testified as DW1. She relied on the Defence and Counter-claim dated October 7, 2021 and her witness statement of same date. It was her evidence that she is the registered owner of the suit land which she purchased from Samson Masaba Munikah Advocate who was the previous registered owner. That consent of the Land Control Board for transfer was obtained. That she has been enjoying quiet possession of the suit land. That a caution was lodged on the suit land on May 4, 2021. That as an innocent purchaser for value, she obtained a clean title to the land and the plaintiff should pursue their exhibit produced claim against the persons whom they claim were involved in illegality.
16. That the caution lodged does not meet the threshold under section 71 of the *Land Registration Act* as the Plaintiffs have no known or recognized interest in the land and prayed for removal of the caution under section 73 of the *Land Registration Act*.
17. She produced the documents attached to her list of documents dated October 7, 2021 namely title deed for Kisumu/dago/492, Green Card For Kisumu/dago/492, agreement for sale of Kisumu/dago/492



dated December 2, 2010, Application for consent of Land Control Board dated May 26, 2010, KRA Stamp Duty Declaration Assessment & Pay-in-slip dated September 10, 2013, Application for Registration dated September 11, 2013 and Certificate of Official search dated September 14, 2013.

18. DW2 Samson Masaba Munikah adopted his witness statement dated November 25, 2021 as his evidence. He testified that he was the registered owner of the suit land between the year 1984 and 2013. That he had bought the land from Agnes Angelica Ochieng in the year 1984 and transferred it to the 3rd Defendant in the year 2013. That he entered into the land sale agreement with the 3rd Defendant and unlawfully transferred the land to her after obtaining consent of the Land Control Board that he obtained and passed a clean title to the 3rd Defendant.
19. DW3 was the Land Registrar Kisumu County. She testified and produced as exhibit, the green card, the adjudication record dated 19/1/1971 and transfer documents. She also produced a transfer form that transferred the suit land from the 1st Plaintiff to the 1st and 2nd Respondents. She testified that the transfer form was signed by both parties to the transfer.
20. The 4th Defendant relied on the evidence of DW.3.

Submissions.

21. At the close of the evidence Counsel appearing for the parties agreed to file written submissions on the case. Written submissions dated January 23, 2023 were filed by the firm of Amondi & Co advocates on behalf of the Plaintiff. Counsel submitted that the gravamen of the Plaintiffs' case is that the Respondents through a series of breaches, without the Plaintiffs' consent fraudulently transferred parcel Kisumu/dago/492. That the suit land being agricultural land, transaction involving transfer thereof are controlled by virtue of Section 6 of the *Land Control Act* Cap.6. That the Plaintiff denied ever having sold the suit land to the 1st Defendant and that in the absence of Consent of Land Control Board in respect of the transfer from the 1st Plaintiff to the 1st and 2nd Defendants, that transfer was fraudulent.

Counsel relied on, among others, the case of *David Ole Tukai v Francis Arap Muge & 2 Others* [2014]eKLR to support the submission.

22. On whether or not the 3rd Defendant was an innocent purchaser in good faith for value, Counsel submitted that in as much as the Plaintiff have demonstrated that there was no valid title that could pass to the 3rd Defendant, the 3rd Defendant was not acting in good faith. Counsel relied on the case of Nyahururu Environment and Land Court 119 of 2017 *Ngere Tea Factory Company Ltd. v Alice Wambui Ndombe* where it was held that it was the duty of the purchaser to conduct due diligence and inform himself of all the relevant aspects concerning the property before purchase.
23. On whether the Plaintiffs' suit is time barred, Counsel submitted that the Plaintiffs' right of action accrued in the year 2016 when the 2nd Defendant attempted to make physical entry onto the suit land. That hence the claim is not time barred.
24. On whether the Plaintiffs are entitled to damages for trespass, Counsel submitted that the Defendants' actions amounted to an illegal entry into private property. Counsel relied on the case of *Eunice Nkirote Ringera v Kenya Power and Light Cooperation* – Kajiado Environment and Land Court 869 of 2017. and concluded

that the Plaintiffs were entitled to the orders sought. Counsel submitted that bearing in mind the value of the suit property, being kshs.63,000,000 nominal damages for trespass of Kshs.3,000,000 should be awarded.



25. Written submissions dated April 24, 2023 were filed on behalf of the 3rd Defendant by the firm of Matem Katasi & Co. Advocates acting for her. Counsel framed 5 issues for determination namely:-
- Whether the court has jurisdiction to entertain the suit that is time barred
 - Whether the 3rd Defendant is an innocent purchaser for value without notice
 - Whether the plaintiffs proved the alleged fraudulent transfer of the suit land
 - Lack of consent of the land control board
 - Whether the 3rd Defendant is a trespasser onto the suit and
26. Counsel submitted that on the basis of the pleadings and evidence advanced by the plaintiffs it was in the year 1990 that they discovered that the land had been taken away from them. That under the provisions of section 7 of the *Limitation of Actions Act*, the suit is time barred. Counsel relied on the case of *Bosire Ongero v Royal Services* [2015] eKLR and *Sobanlaldurgadass Rajput & another v Divisional Integrated Development programme Co Ltd* [2021] eKLR and *Joshua Ngatu v Jane Mpinda & 3 others* [2019] eKLR to support the submission.
27. On whether or not the 3rd Defendant is an innocent purchaser for value, Counsel relied on the definition of bona fide purchaser in Blacks Law Dictionary 8th Edition as: -
- “one who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for the property without notice of prior adverse claims”
- Counsel also relied on the case of *Weston Gitonga & 10 Others v Peter Rugu Gikanga & Another* [2017] eKLR on what a claimant ought to prove in order to rely on the doctrine of innocent purchaser for value without notice and submitted that the 3rd Defendant acquisition of the suit land fits the elements of an innocent purchaser for value without notice as set out in the cited case.
- Counsel relied on the provision to Section 26 of the *Limitation of Actions Act* and Section 53 of the *Land Registration Act* and submitted that those provisions of the law protect innocent purchasers of property for value without notice of fraud hence the 3rd Defendant cannot be dragged into court to answer to the questions of the alleged fraudulent transfer of the suit land.
- That under the provisions of Section 24, 25 and 26 of the *Land Registration Act*, the 3rd Defendant is the sole registered proprietor of the suit land and that she has indefensible title.
28. On whether or not the Plaintiff proved allegations of fraudulent transfer of land parcel known as Kisumu/dago/492. Counsel submitted that the Plaintiff did not tender evidence to support their assertion that the transfer of the suit land in favour of the 1st and 2nd Defendants was fraudulent. That the Plaintiffs’ only evidence is that according to them, it is the 1st and 2nd Defendants who colluded with the 3rd Defendant to have the land transferred to her. Counsel relied on decided case to submit that the degree of proof in fraud cases is higher than proof on a balance of probabilities. That the Plaintiff did not discharge this burden.
29. On the issue of consent of the Land Control Board, Counsel submitted firstly that there is evidence on record that for transfer of the suit land to the 3rd Defendant, consent of the Land Control Board



was obtained. That even if such consent had not been obtained, transfer of land by a party to the other creates a constructive trust in favour of the transferee. Counsel relied *inter alia* on the case of [Willy Kimutai Kitilit v Michael Kibet](#) [2018] eKLR to support this submission.

Counsel prayed that the suit be dismissed and the Plaintiff be condemned to pay cost.

30. No submissions were filed on behalf of the 1st, 2nd and 4th Defendants.

Issues for Determination

31. From the pleadings filed by the parties, the evidence adduced and submissions made, the following are the issues that emerge for determination: -
- i. whether or not the Plaintiffs' claim to the suit land is time barred.
 - ii. whether or not transfer of the suit land to the 3rd Defendant was fraudulent.
 - iii. whether or not the 3rd Defendant holds a good title to the suit land.
 - iv. whether or not the Plaintiffs are entitled to the orders sought.
 - v. whether or not the 3rd Defendant is entitled to the prayers in the counter-claim.
 - vi. who pays the costs of the suit.

Analysis for Determination

32. This court is enjoined by the provisions of Order 21 Rule 4 [Civil Procedure Rules, 2010](#) to ensure that its judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue. With this in mind this court proceeds to analyse the evidence and decide the issues as framed herein.
33. On whether or not the Plaintiffs' claim is time barred, I have taken into account the submissions made. The Plaintiffs pleaded in paragraphs 8 of the plaint that it was in the year 1990 that they came back from Homabay and found that strangers had trespassed onto the suit land and put up some foundation and structured and that they thereafter obtained the green card (copy of register) in respect of the suit land, found out that the suit land was no longer in their name and reported to the police the fraud which they discovered had been committed.
- Under Section 7 of the [Limitation of Actions Act](#), a claim for recovery of land must be filed within 12 years of the cause of action. The suit herein was filed on 3rd of May, 2021 which was a period in excess of 20 years from the time the cause of action arose. This was out of time. Secondly it is clear that the Plaintiff have never had possession of the suit land since the year 1982 when they left for Homabay.
34. On whether or not transfer of land in favour of the 3rd Defendant was fraudulent, I find that the 3rd Defendant demonstrated how she acquired registration of the suit land in her favour. She followed due process and did due diligence. There is no evidence that the 3rd Defendant was involved in any of the fraudulent acts complained of by the Plaintiffs.
35. On whether or not the Plaintiffs are entitled to the relief sought, the substantive relief sought by the Plaintiff is cancellation and nullification of the register in respect of the suit land and registration of the land in the name of the 1st Plaintiff. The basis of the claim is that the land was transferred from the 1st Plaintiff fraudulently. However, the evidence placed before the court does not prove fraud. Moreover,



the claim based on fraud is also time barred under the Limitation of Actions Act. I find that the Plaintiffs are not entitled to the relief sought.

36. I also find that the 3rd Defendant holds a good title to the suit land, firstly as an innocent purchaser for value and secondly because evidence on record shows that she followed due process in acquisition of the title. She bought a search which confirmed that the land was registered in the name of DW.2 who was the seller. She entered into land sale agreement with DW.2. She obtained consent of the Land Control Board for transfer. She had a transfer form signed by the seller. She paid the requisite stamp duty and was ultimately issued with title deed. These she demonstrated through the exhibits produced as exhibits D.1 to 7. Her testimony was supported by the evidence of DW.2 the seller and DW.3 the Land Registrar.

Further, the green card produced shows that the suit land had been in the hands of several people before it finally reached the hands of the 3rd Defendant. It shows that the land was transferred from the 1st Plaintiff on 10th May, 29178 and transferred to various people thereafter and at some point charged to the bank.

37. I find that the 3rd Defendant has proved her case as contained in the counter-claim and that she is entitled to the relief sought therein.

38. On costs, the law as contained in Section 27 of the Civil Procedure Act is that costs follow the event.

39. The upshot is that I find that the Plaintiffs have not proved their case on a balance of probabilities and dismiss the suit with no orders as to costs. I find that the 3rd Defendant has proved her counter claim and hereby enter judgement in her favour on the counter-claim for:-

- i. An order that the caution lodged against land title number Kisumu/dago/492 be removed by the Registrar.
- ii. An order of permanent injunction restraining the Plaintiffs (in the suit) and their servants, by themselves or others from interfering with the 3rd Defendant's parcel of land parcel No Kisumu/dago/492.
- iii. An order of eviction for the eviction of the Plaintiffs from any portion of the suit land that they have encroached onto.
- iv. Costs of the counter-claim are awarded to the 3rd Defendant (in the suit).

40 Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 27TH DAY OF JULY, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

Nyambeki for the Plaintiffs.

Njoroge holding brief for Grace Katasi for the 3rd Defendant.

