



**Achoki v Nyaroo (Environment and Land Appeal E013 of 2022)
[2023] KEELC 18978 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E013 OF 2022**

JM KAMAU, J

JULY 25, 2023

BETWEEN

STEVE BOSIRE ACHOKI APPELLANT

AND

JULIUS ONDIEKI NYAROO RESPONDENT

(Being an Appeal from the Judgment and Decree of the Magistrate's Court at Nyamira by Hon. W.K. Chepseba - CM delivered on the 20th day of September, 2022 in Nyamira CMC ELC Case No. 65 of 2018)

JUDGMENT

1. According to the Amended Complaint dated 18/02/2021 and the statement of facts, the Appellants' case in the lower court before the Chief Magistrate Nyamira Hon. William Chepseba is that the Appellant is the registered proprietor of LR. No. West Mugirango/Siamani/3032 which was registered in his name on 24/06/2015, initially the property of one Kiaombe Omanwa Ogoi (Deceased). It is the Appellant's case that the Respondent did trespass on the suit property and claimed to have purchased the suit land from the Appellant's father who was never registered as proprietor. The Respondent also destroyed the Appellant's house thereon. The Respondent falsified documents to have the suit property registered in his name as a result of which there are now 2 Title Deeds over the same property in 2 different names. The Appellant hence prayed for the following orders: -
 - a. A declaration that the Plaintiff is the legal owner of all that parcel of land known as LR. NO. WEST MUGIRANGO/SIAMANI/3032.
 - b. An order of eviction evicting against the Defendant his agents and/or servants from LR. NO. WEST MUGIRANGO/SIAMANI/3032.
 - c. Permanent injunction restraining the Defendant by either himself, agents, servants and/or anyone claiming under the Defendant from entering into, re-entering, trespassing onto,



building structures, cultivating, converting the suit land, abusing the Plaintiff's rights, interring with and/or in any other manner dealing with the suit property that is, LR. NO. WEST MUGIRANGO/SIAMANI/3032.

- d. General damages for trespass and/or conversion.
 - e. Interest on (f) above at court rates.
 - f. Costs of this suit be borne by the Defendant.
 - g. Such further and/or other relief as the Honorable court may deem fit and expedient so to grant.
2. On his part the Respondent denied the Appellant's claim and averred that the suit property was never registered in the name of the late Kiaombe Omanwa Ogoi. He averred that he has exclusive possession of land parcel LR. NO. WEST MUGIRANGO/SIAMANI/6966 and has no claim whatsoever over LR. WEST MUGIRANGO/SIAMANI/3032.

As a first Appeal this court is obliged to ascertain the facts.

3. From the evidence tendered in court, I would condense the facts of the case as hereunder. The parcel of land known as LR. NO. WEST MUGIRANGO/3032 belonged to the late KIAOMBE OMANWA OGOI, grandfather to the Appellant which according to the certificate of official search dated 18/04/2011 was registered in his name on 18/06/1992. On 12/09/2012 the High Court, Kisii issued a Grant of letters of Administration in respect of the Estate of Ogoi Kiaombe Omanwa who died on 21/06/1994 at Nyamira District Hospital to Samson Achoki Agai and Evans Morwabe Achoki in Kisii High Court Succession Cause No. 57 of 2012. The same was gazetted on 28/03/2012. According to the certificate of confirmation of Grant dated 07/11/2014 the property known as LR. NO. WEST MUGIRANGO/SIAMANI/3032 was given to one Gladys Moraa Achoki. This was preceded by another Succession Cause of the Estate of Ogoi Kiaombe Omwanwa which had been gazetted on 04/03/2011 in the Principal Magistrate's Court, Nyamira in Succession Cause No. 7 of 2010 with Andrew Achoki Ogoi the son of the Deceased being the Administrator and a Grant issued to him on 05/05/2014 a month after he had died on 01/04/2011 and before the same was completed and his sons took over and filed another Succession Cause No. 57 of 2012 at Kisii High Court. Part of the suit land WEST MUGIRANGO/SIAMANI/6966 was then allegedly transferred to one Julius Nyaroo Ondieki on 30/05/2012, the Respondent herein but which transfer the Land Registrar Nyamira Mr. Charles Mwendwa Mutua says was erroneously carried out because in his own words "there is an error of the No. WEST MUGIRANGO/SIAMANI/6966. Mutation forms show 6166 was from 3032 and 6966 was transferred to Julius and that the owner was Deceased during the sub-division. It was irregular and unlawful. We have no minutes of the sub-division and transfer. The minutes are kept by the D.C and D/C/Commissioner's minutes are unavailable. LR. NO. 3032 and 6966 belong to Stephen. It is clear from the minutes of 14/10/2010 christened as "minutes of the Tribunal Land Board, Nyamira Division at the Tribunal Chambers" that the said Andrew Achoki Ogoi was not granted any consent to transfer WEST MUGIRANGO /SIAMANI/3032 to the Respondent. Only his interest was expressed. The Agreement dated 05/01/2010 cannot be anything other than a piece of paper since the alleged Vendor, Andrew Achoki Agai was not the owner of the suit property. He did not even become a legal representative in respect of the Estate of the Deceased. He therefore had no capacity to sell the suit land. From the sale Agreement, he sold the parcel of land known as LR. WEST MUGIRANGO /SIAMANI/3032 measuring 0.0559 Hectares at Kshs. 1,500,000/= to Julius Nyaroo Ondieki of P.O. Box 3, Nyamira, Identity Card Number 11493847. At the time of the sale, the land should have been in the name of the late Ogoi Kiaombe Omanwa. On 28/11/2010 the Land Control Board, Nyamira Division gave consent to Andrew Achoki Agai to sell a portion of WEST MUGIRANGO/ SIAMANI /3032 to the Respondent herein. This was also before the



completion of the Succession Cause. The Board said that according to the Report of a Surveyor Fred Onyancha Mawenga of service number 335428 of Nyamira Division, Nyamira District Plot Number 3032 had already been subdivided with 6966 as a sub-division thereof registered in the name of the Respondent herein. A Title Deed in the name of the Respondent was issued on 24/06/2015. But according to the Green Card dated 19/09/2016, the Title Deed was issued to Samson Achoki Agai and Evans Marwabe Achoki on 05/01/2015 and on 24/06/2015 transferred to one Steve Bosire Achoki, the Appellant herein. In an interesting twist on 30/05/2012 WEST MUGIRANGO/SIAMANI/6966, a sub division of WEST MUGIRANGO/SIAMANI /3032 had already been registered in the name of the Respondent and a Title Deed issued. This again was long before the certificate of confirmation of Grant in respect to the Deceased, Ogoi Kiaombe Omanwa had been issued. I would therefore agree with the Land Registrar Mr. Mutua that the owner of the suit land was already Deceased at the time of the sub-division and the process of succession had not been completed. This is buttressed by a letter from the Assistant County Commission, Nyamira Division dated 21/09/2010 to the effect that there was no consent sought for the sub-division of WEST MUGIRANGO /SIAMANI/3032 from the Nyamira Land Control Board. These being the facts of the case and in view of the said evidence, I agree with the Appellant that the Learned Trial Magistrate erred in law in finding that the suit land had already been sold and a good title had already passed to the Respondent when the same was done before the process of Succession was complete. The alleged seller Andrew Achoki Agai died before obtaining the initial Grant of letters of Administration and worse of even before confirmation and distribution of the Estate of the late Ogoi Kiambe. The same had to be done afresh. Achoki never inherited an inch of the suit land and could therefore never pass Title to the same. He even never became a personal representative because he died on 01/04/2011 and the Grant came out on 05/05/2011 about a month after he had died. If ever the late Andrew Achoki Agai ever attempted to sell any parcel of land to the Respondent, then he did so without capacity. He was not even registered as the proprietor of the suit property. The Green Card does not show that the suit land was ever registered in the name of the alleged seller, Andrew Achoki Agai.

4. Secondly, under Section 7 of the [Land Control Act](#), consent of the Land Control Board is mandatory for either the sub-division or transfer of an agricultural land and the same was requisite before the transfer or any sub-division of WEST MUGORANGO/ SIAMANI/3032. The documents produced by the Respondent i.e. copy of the Title Deed in respect of WEST MUGIRANGO/SIAMANI/6966, copy of search and a copy of the Green card and photographs do not in any way show how the Title Deed in respect of WEST MUGIRANGO/SIAMANI/6966 was obtained, whether consent was ever obtained for any of the 2 transactions and how and from whom he acquired LR. NO. WEST MUGIRANGO/SIAMANI/6966.
5. Thirdly, what the late Andrew did amounted to intermeddling with the Deceased's Estate under Section 45 of the [Law of Succession Act](#) Cap 160 laws of Kenya. It is not contested that the land comprised in L.R. WEST MUGIRANGO/ SIAMANI/3032 belonged to the Estate of the late Ogoi Kiaombe Omanwa. This land therefore formed part of the Estate of the late Ogoi Kiaombe Omanwa. The late Andrew Achoki Ogoi could not have purported to lay claim to this land. He was neither a beneficiary nor an Administrator and therefore had no business disposing of an Estate that belonged to the late Ogoi Kiaombe Omanwa. It was therefore wrongful and illegal for Andrew to sell off the land.
6. Section 45 of the [Law of Succession Act](#) prohibits dealing with properties belonging to a deceased person before obtaining the Grant of letters of administration. The Section provides that: -
 - “(1) Except so far as expressly authorized by this Act, or by any other written law or by a grant of representation under this Act, no person shall, for any purpose



take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.”

7. This provision would render any act(s) of a person or persons in relation to the estate of the deceased person illegal, null and void if that person has not obtained Letters of Administration. This is because it is only by the Grant that a person or persons are clothed with the legal authority to deal with the estate or any part of the estate of the deceased. Otherwise a person acting contrary to this provision of law becomes an intermeddler. An intermeddler is a person who assumes the authority of an executor. He becomes an executor de son tort. Intermeddling includes assuming authority to dispose of the estate of another when a person does not have such authority.
8. In the case of *BENSON MUTUMA MURIUNGI vs. C.E.O. KENYA POLICE SACCO & ANOTHER* [2016] eKLR the court observed that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”
9. No right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction. The Respondent can therefore not benefit from an illegal contract.
10. Consequently, having very carefully gone through the testimonies and submissions of both sides in the lower Court, I struggled to find any basis upon which the late Andrew Achoki Ogoi would seek to administer the estate of his late father before the Grant of letters of Administration was issued.
11. Should this Court find that there was a proper sale, then it would be blessing the confiscation of part of an Estate by a stranger. This Court cannot be party to the Respondent’s underhand dealing. I agree with the Appellant that the Judgment of the lower Court is unbalanced, perfunctory and not only substantially but quite entirely at variance with the law after the latter is juxtaposed on the evidence tendered by the parties. As a result, the Appellant’s appeal succeeds with costs.
12. The upshot of the above is that the entire Judgment and Decree of the Learned Chief Magistrate W.K. Chepseba dated 20/09/2022 in Nyamira CMCC No. 65 of 2018 is hereby set aside, varied and quashed and the same is hereby substituted with Judgment for the Appellant as follows: -
13.
 - a. A declaration be and is hereby issued that the Plaintiff be registered the owner of all that parcel of land known as LR. NO. WEST MUGIRANGO / SIAMANI/ 3032 to hold the same in trust for the Estate of the late Kiaombe Omanwa Ogoi.



- b. An order of eviction be and is hereby issued evicting the Defendant, his agents and/or servants from LR. NO. WEST MUGIRANGO/SIAMANI/3032.
- c. A Permanent injunction be and is hereby issued restraining the Defendant by either himself, agents, servants and/or anyone claiming under the Defendant from entering into, re-entering, trespassing onto, building structures, cultivating, converting the suit land, abusing the Plaintiff's rights, interfering with and/or in any other manner dealing with the suit property that is, LR. NO. WEST MUGIRANGO/SIAMANI/3032.
- d. And in order to avoid confusion, it is hereby further ordered that Title No. L.R. WEST MUGIRANGO/ SIAMANI/6966 be and is hereby forthwith cancelled.

The Appellant will also have the costs of this Appeal in addition to the costs of the lower court with Interest on both.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 25TH DAY OF JULY 2023.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Appellant: N/A

Respondent: Mr. Onyancha holding brief for Mr. Nyamwange

