



Ochogo v Kairu Enterprises Limited (Environment & Land Case E356 of 2022) [2023] KEELC 21220 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21220 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E356 OF 2022**

**MD MWANGI, J
OCTOBER 31, 2023**

**IN THE MATTER OF A CAVEAT REGISTERED AGAINST L.R NO. 12596/62,
TITLE NO. 40871 RELATING TO THE PURCHASE OF SUBDIVISIONS
L.R NOS. 12596/123 AND 12596/124 BY TOM OCHONGO ONDITI,
CAVEATOR, DECEASED FROM M/S KAIRU ENTERPRISES LIMITED**

AND

**IN THE MATTER OF TOM OCHONGO ONDITI, DECEASED FOR EXECUTION
AND REGISTRATION OF TRANSFER OF SUBDIVISIONS L.R NOS.
12596/123 AND 12596/124 OF L.R NO. 12596/62 AND TITLE NO. I.R 40871**

BETWEEN

STEPHEN OMONDI OCHOGO PLAINTIFF

AND

KAIRU ENTERPRISES LIMITED DEFENDANT

JUDGMENT

Background

1. By an Originating Summons (OS) dated 26th October, 2022, the Plaintiff seeks orders
 - a. That the Estate of Tom Ochogo Onditi, deceased, is the true and beneficial owner of parcels of Land Reference No. 12596/123 and 12596/124. Sub-divisions of L.R. No. 12596/62 and Title No. 40871, being a bona fide purchaser for value from the Respondent pursuant to a sale agreement dated 27th July, 1994.
 - b. That the Defendant/Respondent do execute instruments of transfer of land in respect of the parcels known as subdivisions LR Nos. 12596/123 and 12596/124 of L.R. No. 12596/62, Title No.40871 in favour of the administrators of the estate of Tom Ochogo Onditi



- c. That in default of execution of the instruments of transfer by the Respondent, the same be executed by the Registrar of the High Court in lieu thereof in favour of the administrators of the estate of Tom Ochogo Onditi (deceased), and the same be registered in the usual manner.
 - d. The Defendant/Respondent do bear the costs of this application.
2. The basis of the OS is That the deceased entered into a sale agreement with the Defendant for purchase of the subject properties on 27th July, 1994 and paid the full purchase price. Though the deceased had taken possession of the suit properties, the transfers in his favour were not effected by the time of his death on 3rd November, 1999.
 3. It is alleged in the OS That the efforts of the administrators of the estate of the late Tom Ochogo Onditi to effect the transfers have not borne fruits as the vendor's Advocates cannot be traced. The estate has therefore not been able to fully enjoy ownership of the suit premises in the absence of title documents.
 4. The OS was backed by the supporting affidavit of Stephen Omondi Ochogo, sworn on 26th October, 2022. He deposes the affidavit on his own behalf and That of his co-administrators. He has attached a copy of the Certificate of Confirmation of grant as an annexure to confirm That he is the administrator of the Estate of his deceased father, Tom Ochogo Onditi.
 5. The deponent reiterates the grounds on the face of the OS. He too has attached the agreement entered into by his late father and the Defendant/Respondent.
 6. The deponent states That at one point, the main Certificate of Title for the property L.R. No. 12596/62 got misplaced and the Advocates acting for the Defendant/Respondent applied for a provisional certificate, a copy of which he has attached as an annexure. His late father had lodged a Caveat against the title L.R. No. 12596/62, which was registered on 5th October, 1994 claiming a purchaser's interest and forbidding registration of any dealings with the land.
 7. The deponent asserts That his late father had taken possession of the subject properties though the transfers in his favour had not been effected. His father died on 3rd November, 1999, before the transfers of the suit properties had been registered.
 8. The Administrators' efforts to pursue execution of the transfers have not been successful since, as the deponent deposes in the affidavit, the vendor's Advocates cannot be traced and the vendor's place of business is unknown to the Administrators despite searches made at the Companies' registry.
 9. The deponent asserts That he has been advised by his Advocates That the vendor has never disputed receipt of full payment nor challenged the caveat placed on the title by the deceased neither the purchaser's possession of the suit property. It is therefore fair and just That the purchaser be registered as the owner of the suit properties.
 10. The deponent further deposes That he has been advised by his Advocate That since the Directions of the Defendant Company cannot be traced, it is fair and just That the instruments of transfer be executed in favour of the Estate of Tom Ochogo Onditi – deceased, by the Registrar of the High Court.

Court's Directions:

11. The OS was served upon the Defendant/Respondent on 1st November, 2022 according to the Affidavit of Service filed in Court. The Process Server, Mueke Jeremiah deposed That he proceeded to the Defendant's offices situated at Roaster House, 6th Floor, along Moi Avenue, Nairobi and served the documents upon a Secretary by the name of Njambi who passed them on to a Director of the



Defendant Company. The Director acknowledged service by stamping on the reverse of the copy which was returned duly served.

12. The Court having confirmed service directed That the matter be set down for hearing in terms of the Provisions of Order 10 rule 9 of the *Civil Procedure Rules*. The Court further directed That the O.S. be considered on the basis of the affidavit evidence and be canvassed by way of written submissions.
13. The Plaintiff's Advocate filed his submissions which the Court has had an opportunity to read.

Issues for Determination:

14. Having considered the OS and the submissions by the Defendant, the issues for determination in this matter are;
 - i. Whether the Plaintiff has proved ownership of the suit properties on behalf of the Estate of the Late Tom Ochogo Onditi.
 - ii. Dependent on the finding in (i) above, whether the Court should issue the orders of execution of the instrument of transfer by the Registrar of the Court.

Analysis and Determination:

Whether the Plaintiff has proved ownership of the suit properties on behalf of the Estate of the Late Tom Ochogo Onditi.

15. The Plaintiff has brought this suit on behalf of, and for the benefit of the Estate of the late Tom Ochogo Onditi. In the supporting affidavit, he deposes That he is an administrator in the Estate of his deceased father. He has attached a copy of the Certificate of Confirmation of grant issued in the High Court at Nairobi in Succession Cause No. 2772 of 1999. The said grant was confirmed on 24th July, 2001 to Sylvia Atieno Ochogo and Stephen Omondi Ochogo, jointly.
16. Despite the grant of administration of the Estate of the deceased being joint, the Plaintiff filed the suit alone on behalf of the Estate of the deceased. In the affidavit in support of the OS, he deposes That he has the authority of his Co-administrator. He has not however, attached a signed authority of his Co-administrator.
17. In the case of *Re Estate of Mary Ng'ondou Mwanunga (Deceased)* (2019) eKLR, the Court rightly held That where there are more than one administrator in the estate of a deceased, all the administrators must act jointly.
18. I have further keenly looked at the copy of the Certificate of Confirmation of grant and note That the suit properties L.R. No. 12596/123 and L.R. No. 12596/124 have not been included in the distribution schedule in the Certificate of Confirmation. The only property in Nairobi That has been included is what has been described as a house in Tena, without any further description.
19. The Court wonders why the suit properties were left out of the list of properties of the deceased, if as the deponent of the supporting affidavit states, the deceased was in possession and had paid the full purchase price for them.
20. Essentially from the analysis of the OS, what the Plaintiff is seeking is an order of Specific Performance of the Agreement of 27th July, 1994. That being the case, he should have approached the Court by way of a Plaint, or at least, at the point of directions under the provisions of Order 37 of the *Civil Procedure Rules*, requested That his OS be converted into a Plaint to enable him bring forth evidence to prove his claim for Specific Performance.



21. To be entitled to an order of Specific Performance or as the Plaintiff puts it in the OS, for a declaration That the estate of the deceased is the true and beneficial owner of the suit properties and orders on execution of the transfer instruments, the Plaintiff has to prove That the titles actually exist. My concern is That L.R No. 12596/123 and 124 are described as subdivisions of L.R. No. 12596/62, Title No. 40871. The one-million-dollar question is whether the subdivisions have been registered as individual titles on their own. The Plaintiff has not provided any evidence to show That they were registered as such. The Caveat That the Plaintiff has attached as an exhibit That was registered on 14th October, 1994 against L.R. No. 12596/62; meaning That the subdivisions had not been individually registered by then.
22. I further must point out That the OS is stated to have been brought under the Provisions of the Section 57 of the Registration of Titles Act, Cap 281, Laws of Kenya. This is a non-existent Law. It was repealed, way back in the year 2012 by the [Land Act](#), 2012.
23. I must also remind the Plaintiff That the Environment and Land Court is a Court on its own, independent of the High Court. It is not a division of the High Court. I am surprised That the Plaintiff seeks That the orders of execution of the transfer documents be effected by the Registrar of the High Court. The Environment and Land Court has its own Registrar created under the Provisions of the [Environment and Land Court Act](#).
24. Consequently, from the foregoing, I have no other option but to strike out the OS dated 26th October, 2022; but with no orders as to costs. I have deliberately struck it out rather than dismissed it to give the administrators of the Estate of the deceased an opportunity to re-think their strategy and approach the Court appropriately.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 31ST DAY OF OCTOBER, 2023.

M. D. MWANGI

JUDGE

