



Omoding (Suing as the Administrator of the Estate of Omoding Omailo) v Orupia & another (Environment & Land Case 36 of 2019) [2023] KEELC 21823 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 36 OF 2019
BN OLAO, J
NOVEMBER 23, 2023**

BETWEEN

JIFNAL OMAILO OMODING PLAINTIFF

SUING AS THE ADMINISTRATOR OF THE ESTATE OF OMODING OMAILO

AND

MELANIA A ORUPIA 1ST DEFENDANT

FLORENSIO OKITUK OPILIO 2ND DEFENDANT

JUDGMENT

1. If a list of shame containing the names of fraudsters who, propelled by unbridled greed, have walked through the gates of Busia Court purporting to seek justice is finally prepared, it will certainly contain the name of Jifnal Omailo Omoding (the Plaintiff herein). I would advise him to ensure that his children and grandchildren do Not access this judgment. He should swallow his shame in private.
2. The Plaintiff (suing as the Administrator to the Estate of the late Omoding Omailo – the deceased – who is infact Omoding Opilo as per the Death Certificate No. 43xxxx issued on October 4, 2016) filed this suit on May 15, 2019 seeking judgment against Melenia Orupia and Florencio Okituk Opollo (the 1st and 2nd Defendants respectively) in the following terms in respect to the land parcel No South Teso/Apokor/590 Now divided to create the land parcels No South Teso/Apokor/4349 and 4350 (the suit land):
 1. An order that the registration of the Plaintiffs as common owners of the land parcel No South Teso/Apokor/590 was fraudulent, illegal, unlawful thus null and void.



2. An order that the purported sub-division of the land parcel No South Teso/Apokor/4349 and 4350 and the registration thereof is null and void for the reason that the transacting parties had not obtained a good title over the mother land.
 3. An order cancelling the registration of the Plaintiffs as owners of the land parcel No South Teso/Apokor/590 and any subsequent registrations over the sub-divisions emanating therefrom and a reversion of the subsisting registration back to the names of the deceased Omoding Opilio.
 4. An eviction order against the Defendants jointly and severally, their agents, servants and family members from the land parcel No South Teso/Apokor/590.
 5. An order of permanent injunction restraining the Defendants, their agents, servants and/or any other person through them from interfering with the land parcel No South Teso/Apokor/590.
 6. An order of mesne profits in favour of the Plaintiff for Non-user of the land parcel No South Teso/Apokor/590.
 7. Costs of this suit.
 8. Any other relief this Honourable Court may deem just and expedient.
3. It is the Plaintiff's case that at all material time he was the Administrator to the Estate of Omoding Opilio (hereinafter Omoding) having obtained Letters of Administration in respect to his estate on 19th September 2017 vide Busia Chief Magistrate's Sicection Cause No 178 of 2017 and which was confirmed on September 28, 2018. That the said Omoding was, prior to his demise on August 15, 1973, the registered proprietor of the suit land since August 1, 1972.
4. The Plaintiff discovered that sometime on March 19, 1991, the Defendants' registered themselves as the proprietors, of the suit land and obtained title thereto on October 15, 1998. The Plaintiff pleads that the Defendants actions of registering themselves as the proprietors of the land parcel No South Teso/Apokor/590 was fraudulent particulars whereof he has pleaded as follows in paragraph 7:
- i. Dealing in a deceased person's land without a grant of letters of Administration.
 - ii. Making false documents to facilitate/procure a transfer of land from the deceased's names.
 - iii. Making documents with false entries and/or forged entries and presenting/uttering the same for purposes of procuring registration of land in the names of the Defendant and obtaining a title deed thereto.
- And in paragraph 10 of the plaint, the Plaintiff has added an additional particular of fraud as:
- 1: Dealing in land the Defendants did Not have a good title over in the first place.
- That following the above fraudulent activities, the Defendants have since taken possession of the suit land and the Estate of Omoding has suffered significant loss and damage. Despite Notice having been issued, the Defendants have refused to vacate the land in dispute.
5. The Plaintiff also filed his statement dated May 15, 2019 which is basically a rehash of what is contained in the plaint and I need Not revisit it.
 6. He also filed two lists of documents dated May 15, 2019 and June 15, 2019.
 7. The list of documents dated May 15, 2019 contained the following:



1. Copy of certificate of death for Omoding Opilo dated October 4, 2016.
2. Copy of Grant of Letters of Administration issued in Busia Chief Magistrate's SiceSSION Cause No 178 of 2017 on September 19, 2017 by Hon. C M Wakahiu Deputy Registrar.
3. Copy of Green card for land parcel No South Teso/Apokor/590.
4. Copy of official search for the land parcel No South Teso/Apokor/590.
5. Copy of chief's letter Kaujakito Location dated July 7, 2017.
6. Copy of Mutation Form No 0430xxxx.
7. Copy of letter dated March 2, 2018 from J P Makokha Advocates addressed to Land Registrar Busia.
8. Copy of confirmed Grant dated September 28, 2019.

I need to clarify that although document No 8 reads confirmed Grant issued on September 28, 2019, it was infact issued on September 28, 2018.

8. In the list of documents dated June 15, 2020, the Plaintiff annexed the following document:
 1. Copy of Limited Grant of Letters of Administration (*ad Litem*) dated June 7, 2022.
 The Defendants, then acting in person, filed a joint defence and counter-claim dated June 21, 2019 in which they pleaded, inter alia, that the Plaintiff himself facilitated the transfer of the suit land by attending the Land Control Board and therefore they denied all the allegations of fraud levelled against them. They added that they have since been in occupation of the suit land for more than 21 years and are therefore in adverse possession of the same.
9. That the Plaintiff misled the area chief during the succession proceedings in Buia Chief Magistrate Succession Cause No 178 of 2017 and did Not disclose all the beneficiaries of the Estate of Omoding. The Defendants add that they were infact already in actual occupation of the suit land during those proceedings and this suit is meant to intimidate them.
10. The Defendants sought the following orders in their counter-claim.
 1. An order of specific performance from the date of the land sale.
 2. An order for adverse possession from the time they have been in actual utilization of the land parcels No South Teso/Apokor/4349 and 4350.
 3. Any other relief that this HoNourable Court may deem fit and expedient to grant.

Both the Defendants filed their statements dated 21st June 2019 in support of their cases.

11. The 1st Defendant stated that on July 17, 1995 her late husband Joakim Ekapolon purchased from the Plaintiff 3 acres of land to be hived off from the land parcel No South Teso/Apokor/590 at a consideration of Kshs.33,000 of which Kshs.15,000 was paid as a deposit. The Plaintiff's right eye had been pierced by a palm tree thorn and he needed money urgently. The balance was subsequently paid.
12. Then on September 3, 1998, the Plaintiff took them to the Amakura Land Contol Board and the land parcel No South Teso/amukura/590 was transferred to him and the 2nd Defendant. Then on August 29, 2017 he was issued with the title to the land parcel No South Teso/Apokor/4349 where he has lived peacefully for the last 22 years.



13. He was therefore surprised to be served with summons for this case yet the Plaintiff still owes him one (1) acre in terms of the sale agreement dated July 19, 1995.
14. The 2nd Defendant in her statement also dated June 21, 2019 stated that she purchased from the Plaintiff a portion of land measuring two (2) acres out of the land parcel No South Teso/Apokor/590 at a consideration of Kshs.37,000 which was paid in full before the village elder and other witnesses.
15. That on July 7, 1998, the Plaintiff took her and the 1st Defendant to the Land Control Board where they obtained the consent to transfer the Land parcel No South Teso/Apokor/590 into their names. They later partitioned the said land among themselves where they have peacefully lived for 22 years. They were therefore surprised to be served with the summons to attend Court for this case. The Defendant filed statements of the following witness in support of his case.
 1. James Okwenye Elungat (DW4)
He also called as his witness Lentete Saiteyu the Assistant Commissioner of Amukura Division (DW3) who however did Not sign any statement.
16. In his statement dated June 21, 2019, James Okwenye Elungat (DW4) states that on February 5, 1997, he witnessed the 2nd Defendant purchase two (2) acres of land from the Plaintiff at a consideration of Kshs37,000 which was paid in full. Apart from himself and the village elder one Clement Iluku, there was also one Felix Amuya who witnessed the same.
17. The area Assistant County Commissioner Lentete Saiteyu (DW3) produced the minutes of the Land Control Board dated September 3, 1998 where consent was granted for the transfer of the land parcel No South Teso/Apokor/590 to the Defendants. He confirmed that the minutes were genuine and that the Plaintiff would be lying if he said he did Not attend any Board meeting.
18. The 1st Defendant filed two lists of documents dated June 21, 2019 and February 14, 2022.
19. The list of documents dated June 21, 2019 had the following:
 1. Land sale agreement dated July 17, 1995.
 2. Land sale agreement dated February 5, 1997.
 3. Certificate of death for Omoding Opilio.
 4. Grant of Letters of administration dated September 19, 2017 issued to Jifnal Omailo Omoding In Busia Chief Magistrate's Court Succession Cause No 178 of 2017.
 5. Green Card for the land parcel No South Teso/Apokor/590.
 6. Certificate of search for the land parcel No South Teso/Apokor/590.
 7. Mutation Form for the land parcel No South Teso/Apokor/590.
 8. Copies of the title deeds for the land parcel No South Teso/Apokor/4349 and 4350.
 9. Copy of the title deed for the land parcel No South Teso/Apokor/590.
 10. Minutes of the Land Control Board meeting held at Amukura on September 3, 1998.
 11. Register for the Land Control Board.
20. I need to confirm at this stage that the above list contained annexed thereto the following Grant of Letters of Administration i.e.:



1. Letters of Administration Intestate issued on September 19, 2017 in Busia Chief Magistrate's SiceSSION Cause No 178 of 2017 signed by Hon. G. N. Wakahiu.
2. Certificate of confirmed Grant issued on September 28, 2018 in Busia Chief Magistrate's Court Succession Cause No 178 of 2017 and signed by Hon. M. A. Odhiambo Resident Magistrate.

The Defendants also filed a further list of documents dated February 14, 2022 containing the following documents:

1. Ruling delivered by Hon. T. Madowo Resident Magistrate on October 13, 2020 revoking the grant issued on September 28, 2018 in Busia Chief Magistrate's Court Succession Cause No 178 of 2017.

The plenary hearing commenced on February 14, 2023 and terminated on May 4, 2023.

21. The Plaintiff testified and adopted as his evidence the contents of his statement. He also produced as his documentary evidence the documents filed as per the list herein. He was the sole witness who testified in support of his case.
22. The Defendants similarly adopted as their evidence the contents of their statements and produced as their documentary evidence the documents filed as per the lists filed herein.
23. Although the Defendants filed their pleadings in person, the firm of M. Korongo & Company Advocates entered appearance to act on their behalf on June 4, 2019 before that role was taken over by the firm of Okeyo Ochiel & Company Advocates on October 14, 2021.
24. At the end of the plenary hearing, both counsel filed their respective submissions.
25. I have considered the evidence by the parties both oral and documentary as well as the submissions by counsel. I need to point out that the Plaintiff has been referred to in these proceedings and documents both as JIfnal Omailo Omoding, Jovinal Omailo Omoding and Givinal Omailo Omoding. I have No doubt in my mind that all those names refer to one and the same person and that is the Plaintiff herein.
26. I have identified the following as the issues that call for my determination in the dispute:
 1. Whether the Plaintiff has the necessary *locus standi* to file this suit.
 2. Whether the Plaintiff has proved fraud on the part of the Defendants in the manner in which they obtained title to the suit land.
 3. Whether the Defendants are entitled to the order sought in their counter-claim.

Does the Plaintiff have the Locus Standi

27. The term *locus standi* is defined in Black's Law Dictionary 10th Edition as follows:

“The right to bring an action or to be heard in a given forum.”

In *Alfred Njau & Others -v- City Council of Nairobi* 1982 KAR 229, the Court held that:

“The term *locus standi* means a right to appear in Court and conversely to say that a person has No locus standi means that he has No right to be heard in such and such proceedings.”



Therefore, if a party has no *locus standi* in a given matter, all that it means is that Notwithstanding the merit of his case, he has No right to prosecute his claim. It is a matter that goes to the jurisdiction of the Court and may even be taken up as a Preliminary Objection.

28. Mr Okeyo counsel for the Defendant has taken the view that the Plaintiff had no *locus standi* to file this suit. This is what counsel has submitted at page 4 of his submissions:

“From the onset, it is worth Noting that the Plaintiff’s claim is wanting in form. The Plaintiff as averred at paragraph 3 of the plaint sued as the Administrator of the Estate of Omoding Omailo (deceased) pursuant to a grant issued in Busia Cmc Succession Cause No 178 of 2017 which grant was revoked on October 13, 2020 before the hearing commenced as per the ruling produced by the Defendants in their further list of documents dated February 14, 2022. It is our humble submission that by that revocation, the Plaintiff lost the legal capacity to sustain the claim herein as the grant which he was relying on was revoked. This is specifically so given the fact that the Limited Grant that was obtained was limited for purposes of filing suit as opposed to prosecuting the present suit.”

29. On his part Mr Makokha for the Plaintiff has submitted as follows on the same issue:

“In the entire dealings relating to parcel No South Teso/Apokor/590, the Defendants were at No point legal administrators of the estate of Omoding Opilio. To the contrary, the Plaintiff was appointed administrator vide Succession Cause Busia Cmcc No 178 of 2017. The Grant of Letters of Administration to that effect is dated September 28, 2018 (Document No 4 in the Defendant’s list of documents) and upon it’s revocation, grant *ad Litem* dated June 7, 2022 (Document 9 the Plaintiff’s further list of documents).”

To begin with, the Defendants have Not been sued as administrators of any estate. They did Not therefore require to be appointed as legal representatives having been sued in their personal capacities as the persons who fraudulently registered themselves as the proprietor of the land parcel No South Teso/Apokor/590 and the subsequent sub-divisions being parcels No South Teso/Apokor/4349 and 4350.

30. As for the Plaintiff, he approached this Court as the legal representative and Administrator to the Estate of Omoding Omailo as is clear from his plaint dated May 15, 2019 and filed herein on the same day. He annexed to the plaint the Grant of Letters of Administration issued in respect to the Estate of Omoding Opilio on September 19, 2017 in Busia Chief Magistrate’s Siccension Cause No 178 of 2017 by Hon. G N Wakahiu Deputy Registrar as well as the confirmed Grant issued in the same cause on September 28, 2018 by Hon. M. A. Odhiambo Resident Magistrate.
31. The Defendants however filed a ruling delivered in the same Cause by Hon. T. Madowo Resident Magistrate on October 13, 2020 where, upon hearing objections to the Confirmed Grant by the Defendants herein, she made the following orders:

- 1: “The Grant issued to the Petitioner jifnal Omailo Omoding on 28/9/2018 is hereby revoked.”
- 2: “There are No orders as to costs.”

The revocation stripped the Plaintiff of the *locus standi* which he had enjoyed. To make up for that *lacuna*, the Plaintiff obtained a Limited Grant of Letters of Administration *ad Litem* in Busia Chief Magistrate’s Court P&A No 178 of 2017 on June 7, 2022 “for the purposes of filing suit.”

32. To begin with, it is doubtful if the Plaintiff could have obtained such a Grant in the same cause. Most significantly, however, the said Limited Grant of Letters of Administration *ad Litem* was obtained



some 3 years after this suit had already been filed and was in progress. The issue therefore is whether the limited Grant of Letters of Administration issued to the Plaintiff on June 7, 2022 could act retrospectively to sanitize his plaint filed on May 15, 2019. The answer was provided by the Court of Appeal in the case of *Virginia Edith Wamboi Otieno -v- Joash Ochieng Ougo & Another* CA Civil Appeal No 31 of 1987 [1987 eKLR] where it said:

“But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do Nothing as administrator before letters of administration are granted. Section 80(2) of the *Law of Succession Act* provides that a grant of Letters of Administration, with or without the will annexed shall only take effect as from the date of the grant. In contrast Section 80(1) provides that a grant of probate shall establish the will as from the date of death and shall render valid all intermediate acts of the execution or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of fresh action because he derives title from the will and the property of the deceased vests in him from the moment of the deceased’s death ...

But an administrator is Not entitled to bring any action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of relation back on an administrator’s title, on obtaining a grant or letters of administration, to the date of the intestate’s death, cannot be invoked so as to render the action competent ...” Emphasis mine.

See also *Trouistik Union International & Another -v- Jane Mbeyu & Another* CA Civil Appeal No 145 of 1990 where the Court said that the obtaining of letters of administration after filing suit does Not validate the claim.

33. The result of the above is that the Plaintiff’s Grant of Letters of Administration having been revoked on October 13, 2020, he was deprived of any *locus standi* to further proceed with this suit and the Limited Grant of Letters of Administration issued on June 7, 2022 did not clothe him with any capacity to prosecute this suit.
34. The Plaintiff’s suit is therefore incompetent.
35. I will Nonetheless consider the Plaintiff’s claim and the Defendants’ counter claim on their respective merits should I be wrong on the issue of *locus standi*.
36. It is not in dispute that the Defendants were registered as proprietors of the land parcel No South Teso/Apokor/590 on October 15, 1998. That was following land sale agreements executed between the Plaintiff and the 1st Defendant’s husband on July 17, 1995 and with the 2nd Defendant on February 5, 1997. Both of them went into occupation of the said land which they later partitioned to create the land parcels No South Teso/Apokor/4349 and 4350.
37. The Plaintiff has made several allegations of fraud against the Defendants key of which is that they meddled with the property of a deceased person. Of course that is illegal. His counsel has referred to several flaws in the sale agreements including that the Plaintiff never appeared before the Land Control Board. However, there was the evidence of an independent witness James Okwenge Elung’ata (DW4) who testified that he witnessed the sale agreement between the 2nd Defendant and the Plaintiff dated February 5, 1997. A copy of the said agreement has his signature together with that of the 2nd Defendant and the thumb print against the Plaintiff’s name. I did not hear the Plaintiff case any aspersions on the integrity of the witness. I did not hear him deny having received Kshs.33,000 and Kshs.37,000 from the 1st and 2nd Defendants respectively.



38. Then there is the evidence of the then Assistant County Commissioner Lentente Saiteyu (DW3) who produced the minutes of the meeting of the Amakura Land Control Board held on September 3, 1998. The minutes show that it was the Plaintiff who sought the consent to transfer the suit land to the Defendants. The consent was granted. The witness conceded, and rightly so in my view, that by then, the registered proprietor of the suit land was deceased. But I did not hear the Plaintiff challenge the authenticity of those records or impute ill motive on the part of the said Assistant County Commissioner. Another independent witness. Having participated in what was clearly a flawed process, having received the consideration for the suit land and having allowed the Defendants to go into possession of the suit land, it beats logic for the Plaintiff to now turn around over 20 years later and cry fraud. It is also strange that he is the only one from the family of Omoding Omailo making these allegations against the Defendants unless of course he is the only member from the family. His lack of candor is well captured in the ruling by hon. t. madowo in busia chief magistrate's court succession cause No 178 of 2017 in which he was the Petitioner while the Defendants were the Objectors seeking the revocation of the Grant of Letters of Administration issued to the Plaintiff. In revoking the grant, the Magistrate said as follows in paragraph 14:

“However, although he denies it, the Petitioner has been implicated in the land transactions with the objectors. Furthermore the petitioner relied on the official search over the land in question yet both the Objectors were noted as the registered proprietors of the land. He failed to reveal this material fact to the Court yet the land as he confirms in his supplementary affidavit was already sub-divided into two other parcels of land in favour of the Objectors.”

39. Clearly, the Plaintiff's dalliance with dishonesty appears Not to have started in this case. He can Not now complain about fraudulent conduct which he himself not only facilitated but also benefitted financially therefrom. The doctrine of equitable estoppel will certainly come to the aid of the Defendants rather than the Plaintiff.

40. Most importantly, the Plaintiff's claim is clearly statute barred. Section 7 of the Limitation of Action Act provides that:

7: “An action may Not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

In paragraph 6 of his plaint, the Plaintiff has pleaded thus:

6: “That through fraudulent dealings and corruption, sometimes on March 19, 1991, the Defendants herein got registered as the common (*sic*) of land parcel No South Teso/ Apokor/590 and on 15th October 1998, the Defendants obtained title deed in respect of the said land parcel.”

In paragraph 6 of his statement, the Plaintiff goes on to confirm:

6: “That the Defendants herein fraudulently transferred the said land to themselves on the 19/3/1991 after the death of Omoding Opilio (deceased) who had died on 15/8/1978”.

And in cases where fraud is alleged like in this case, Section 26(a) of the same Act reads:

“Where in the case of any action for which a period of limitation is prescribed –

- (a) the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agents, or



- (b) the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

Whether this Court applies Section 7 or 26 of the *Limitation of Actions Act*, the Plaintiff's claim is hopelessly time barred. Therefore, even if fraud had been proved to the required standard which is more than or a mere balance of probabilities – *Mustonga -v- Nyati* 1984 KLR 425 See also *Koinange & Others -v- Koinange* 1980 KLR 23 and *RG Patel -v- Lalji Makanji* 1957 EA 314 – the Plaintiff's claim would still be caught up by the statute of limitation.

41. The Plaintiff's suit is clearly for dismissal.
42. The Defendants seek by their counter-claim the orders of :
- a. Specific performance of the sale agreement.
 - b. An order that they have acquired the land parcels No South Teso/Apokor/4349 and 4350.

Having dismissed the Plaintiffs suit, it will be superfluous to grant the Defendants the prayer for specific performance because they remain the registered proprietors of the land parcel No South Teso/Apokor/4349 and 4350.

43. As regards the prayer for adverse possession, the Defendants are already the registered proprietors of the land parcels No South Teso/Apokor/4349 and 4350. A Claim for land by way of adverse possession is ordinarily directed at the proprietor of the suit land or his representative. That is clear from Section 38 of the *Limitation of Action Act*. The Defendants cannot therefore be declared to be in adverse possession of their own property. The Defendant's counter-claim in adverse possession is stuck out for being incompetent.
44. Ultimately, there shall be judgment for the Defendants against the Plaintiff in the following terms:
1. The Plaintiff's suit is dismissed with costs to the Defendants.
 2. The Defendant's counter-claim is dismissed with no orders as to costs.

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF NOVEMBER 2023
BY WAY OF ELECTRONIC MAIL.**

BOAZ N. OLAO

JUDGE

