



**Ogoti v Onderi & another (Environment & Land Case 41 of 2019)  
[2023] KEELC 21685 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21685 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 41 OF 2019**

**M SILA, J**

**NOVEMBER 22, 2023**

**BETWEEN**

**MARY KERUBO OGOTI ..... PLAINTIFF**

**AND**

**TERESA BITUTU ONDERI ..... 1<sup>ST</sup> DEFENDANT**

**MARSELLA MORAA OGORI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

(Plaintiff filing suit against defendant seeking for the defendant to be evicted and be permanently restrained from the suit land; plaintiff filing suit on basis that she holds the title to the land; defendant having purchased the land from the children of the plaintiff's brother in law and briefly holding title after a dispute was lodged before the Land Disputes Tribunal which ruled in her favour; title of the defendant cancelled after the plaintiff filed a petition to contend that the tribunal did not have jurisdiction and title thus reverting back to the plaintiff; land having previously been owned by the plaintiff's mother in law; defendant's position being that the land was supposed to be inherited by the persons she bought land from; no succession having been done over the estate of the erstwhile owner; plaintiff could not have acquired good title without first going through succession; in the same vein, the persons who sold the land to the defendant also did not have title; court proceeding to nullify the title of the plaintiff and making an order for title to revert back to the ownership of the plaintiff's mother in law and the same be subjected to succession)

**A. Introduction And Pleadings**

1. This suit was commenced through a Plaint filed on November 26, 2019. The plaintiff avers that she is the registered proprietor of the land parcel Nyaribari Chache/B/B/Boburia/6939. In her pleadings, she has mentioned that the defendant had lodged a claim for the land before the Land Disputes Tribunal and obtained registration in her favour which was however reversed after she (plaintiff) filed the suit



Kisii Constitutional Petition No 22 of 2014, *Mary Kerubo vs The Chief Magistrates' Court Kisii & 5 others* and the Land Registrar effected cancellation of the defendant's title. Her complaint is that despite this judgment, and the cancellation of her title, the defendant has forcefully detained the suit land and has denied her access and use of the land. In the suit, the plaintiff wants the defendant evicted and permanently restrained from the land.

2. The defendant filed a defence and counterclaim which she subsequently amended. She pleaded that the constitutional petition did not determine with finality the ownership rights of the parties to the suit land and restricted itself to whether due process was followed by the Kiogoro Land Disputes Tribunal. She averred that she purchased the suit land from one Merisera Moraa Ogori, on May 22, 2005, and took possession of the land in December 2006, and that she is the one who deserves title to the land. She pleaded that the plaintiff's title is illegal and fraudulent as it was procured without going through the process of succession. She contended that the plaintiff got title despite not being a beneficiary of the estate of Aligisina Bosibori Kinara (deceased) and dealt with the property despite not having a grant. Her counterclaim is against the plaintiff and Marisela Moraa Ogori. She has elaborated that Marisela sold to her the suit land in 2005 while accompanied by Stephen Kinara Ogori and Josphat Mogere Ogoti. At that time, the land was then in the name of Marisela's mother in law, Aligisina Bosibori Kinara. She paid the purchase price, took possession, and constructed a storey building. In 2007, she learnt that the plaintiff was also laying claim to the same land, and in 2013, the plaintiff threatened to evict her, which led Marisela and Stephen Ogori to institute a case against the plaintiff before the Kiogoro Land Disputes Tribunal. The decision was in their favour, but this was successfully challenged in the constitutional petition. She seeks orders that she has acquired good title to the suit land, having purchased it from Marisela, or in the alternative that she has acquired good title by way of adverse possession, as she has been in open continuous, uninterrupted possession since the year 2005. In the alternative, she seeks an order for Marisela to refund to her the purchase price together with interest at commercial rates from May 22, 2005 until payment in full and compensation for the developments that she made on the land.
3. The plaintiff filed Reply to Defence and Defence to Counterclaim and denied procuring title by fraud and joined issue with the defendant.
4. Marisela filed defence to the counterclaim. She pleaded that her sons and the defendant entered into an agreement to purchase the land and she has no claim over it. She contends that she legally sold the land to the defendant who took possession of it.

## **B. Evidence Of The Parties**

5. PW-1 was the plaintiff. She affirmed that she is the registered owner of the suit land and produced her title deed and search to demonstrate this. She otherwise relied on a pre-recorded witness statement as her evidence in chief. It is a brief statement where she avers that she is the registered owner of the suit land; that the title of the defendant was cancelled through the judgment and decree in Kisii Constitutional Petition No 22 of 2014; that despite the defendant knowing that she is no longer proprietor of the suit land, she has continued to keep possession of the land and that she now wants her evicted.
6. Cross-examined, she testified that the suit land, i.e parcel No 6939, was a subdivision of the parcel No 5718. This parcel No 5718 was registered in the name of Aligisina Bosibori (Aligisina) who was her mother in law. Aligisina died in 2002 whereas her husband died in 2005. She stated that she undertook succession in respect of Aligisina's estate and subsequently got registered as owner of the suit land. She however did not have any document to prove that she filed a succession cause. She testified that Aligisina had four children, two sons and two daughters. Marisera is her sister in law. She averred that



- she never found Marisera, or her son, Stephen Ogori, on the suit land and that they emerged long after Aligisina had died.
7. Re-examined, she reiterated that Marisera and Stephen have no right to claim the suit land. She affirmed that on the land there is a development which is occupied by 36 tenants.
  8. With the above evidence, the plaintiff closed her case.
  9. DW- 1 was Stephen Kinara Ogori. He resides in Kuria, Migori County. He affirmed that he is son to Marisera. His father is Mariko Ogori Kinara who was son of Aligisina. The plaintiff is his aunt, as she got married to Mariko's brother, one Joachim Ogoti Kinara. Aligisina was his grandmother and she died in the year 2000. He testified that his father died in 2004 and was buried on the suit land. He testified that their father was violent and his mother thus moved to Mosochi. He testified that his father (Mariko) had constructed five rental rooms on the suit land and this is also where he lived. He stated that they went back home (to the suit land) a few months after their grandmother died and lived in their grandmother's house. He also found the plaintiff on the suit land and would assist her graze her cattle and perform household chores. He confirmed that he is the one who sold the suit land to the defendant (Teresa Bitutu). What he sold was a portion of it. After Teresa purchased the land, she constructed some rental houses. They however did not effect transfer of title to her as the plaintiff was not cooperative. In the year 2010, he and his mother filed suit before the Kiogoro Land Disputes Tribunal against the plaintiff. An award was made in their favour. Cross-examined, he testified that they moved to Migori in 2006. They sold the land to Teresa in 2007. They did not have a title deed when they sold the land. He never filed succession proceedings in respect of the estate of his late father. He was aware that the award of the Tribunal was set aside by the High Court as the Tribunal did not have jurisdiction over the matter. They filed no appeal.
  10. DW- 2 was Peter Nyabwari Birundu. He is cousin to Joakim Ogoti the husband of the plaintiff. He affirmed that Marisera is wife to Mariko Ogori, and that Joakim and Mariko were brothers (sons to Aligisina). He was aware that the defendant (Teresa) bought land from the wife and sons of Mariko (i.e Marisera, Stephen Ogori and Josphat Ogori). Teresa then moved into the land around the year 2005 and developed a storey building. In the year 2013, the plaintiff claimed that Teresa has built on her land. He testified that his grandfather had divided his land to his father and Kinara (father of Joakim and Mariko) and there is no issue over what was assigned to his father. He testified that Mariko and Joakim divided their portions and there was no issue with their boundaries. He added that Mariko sold his portion to about 5 purchasers who live in peace and the only person with issues is Teresa. He testified that they have discussed the issue at home and it was resolved that the land in dispute belongs to Mariko. The tribunal also held that Teresa had properly purchased the land from the children of Mariko. He testified that the plaintiff has her own parcel of land which is separated by a road.
  11. DW- 3 was Josphat Mogere Ogori. He is son to Marisera and Marko. He affirmed that he, together with his brother Stephen (DW-1) sold land to the defendant through a sale agreement dated May 22, 2005. They had earlier sold the land to one James Onsongo Michira, who deposited Kshs. 50,000/=, but failed to complete payment, and they later sold it to Teresa through an agreement dated January 22, 2007. They sold to her more land than they had sold to Michira, and they entered into a consolidated agreement dated August 10, 2007. The land was in the name of their grandmother, Aligisina. At the time of sale, she was deceased and they had not taken out a grant in respect of her estate. He stated that what they sold to Teresa was land that was to be inherited by his father (Mariko). He elaborated that his grandfather had divided the land into two; one portion for Mariko and another for Joakim, and there was a boundary, and that what they sold was their father's share. He affirmed that the plaintiff (Mary) is wife of Joakim. He testified that she lives in the portion belonging to Joakim and has never



- lived on the disputed land. He testified that there was no issue there before and that issues arose after the plaintiff filed a succession cause on her own and got title.
12. Cross-examined, he testified that they have been living in Sirare (Migori) since 2006. They have no home in Kisii as they sold their land to Teresa. Their father, Mariko, had died at the time they sold the land. He claimed that their father had given them permission to sell so that they can move elsewhere as the land was small. He acknowledged that the land was in the name of Aligisina when they sold it and they had not filed succession. He also acknowledged that it is the plaintiff who has title to the suit land. He stated that she never involved them in the process of getting title. He stated that they only came to know that she has title when she sued them. They have not filed any suit to claim that her title is illegal.
  13. DW- 4 was the defendant, Teresa Bitutu Onderi. She testified that the land had a previous buyer, Mr. Michira, who then sold the land to her. She wrote an agreement with Josphat, Stephen and James. At the time she purchased the land, it was in name of Aligisina. She testified that she got into the land in the year 2006. In 2009, she received a letter from the plaintiff that she was in occupation of her land. They then filed a case before the Kiogoro Land Disputes Tribunal which held that the land belongs to Mariko. The decision was adopted in Court and Marisera got title in her name and she then transferred the title to her. She acknowledged that the suit land is a subdivision of the parcel No 5718. She produced the Green Card of the suit land and the documents that transferred title to her. She testified that she started developing the land but stopped for a while when the matter was before the tribunal. After she got title, she completed the development. This case was then filed. She stated that she bought the land in the knowledge that it belonged to Josphat.
  14. Cross-examined, she testified that before she bought the land, she did a search. It showed Aligisina as the registered proprietor. She was then deceased. She acknowledged that the sellers did not show to her that they had any authority to sell. They however told her that the land belongs to Mariko, who was then deceased. She affirmed that Marisera did not execute the sale agreement but she had no problem with the sale. It was her sons, Stephen and Josphat, who sold the land. She acknowledged that they did not have title when they sold the land to her but she nevertheless proceeded to purchase it. She testified in the case before the Land Disputes Tribunal. She affirmed that it was after the decision of the tribunal that Marisera got title to the suit land on September 14, 2011 and transferred it to her. She became registered as proprietor on October 5, 2011. She acknowledged that the tribunal decision was successfully challenged.
  15. Marisera opted not to testify.
  16. With the above evidence, the defence closed their case.
  17. I invited counsel to file written submissions, which they did, and I have taken note of these before arriving at my decision.

### **C. Analysis And Disposition**

18. The facts of the case are largely not in dispute. The suit land was carved out of the parcel No 5718 which was in name of Aligisina Bosibori Kinara (Alisigina). Aligisina was registered as the first proprietor of the suit land on January 17, 2002. I cannot tell with precision when Aligisina died but it is not disputed that the transactions herein took place after she had died. I have seen from the Green Card that title was transferred from Aligisina to the plaintiff on March 6, 2007 and there is an entry RL7 which would ordinarily be a transmission after succession. However, there is no indication of the particulars of the succession cause that led to the plaintiff becoming registered as proprietor on March 6, 2007. I observe that during the hearing of this suit, the plaintiff did not produce any grant of letters of administration



in her favour, and did not offer any particulars of any succession cause that she may have filed in respect of the estate of the late Aligisina.

19. Around about the year 2005, the sons of Marisera, Stephen and Josphat, sold a portion of the suit land to one James Onsongo Michira, and despite the evidence of DW-3 that Mr. Michira did not complete payment, I have seen an acknowledgement dated 27 May 2005 which states that Mr. Michira has completed payment in full. Whatever the case, the interest of Mr. Michira was sold to the defendant (Teresa) through a Memorandum of Sale dated January 22, 2007. An additional portion of the suit land was separately sold to Teresa on February 28, 2007 and more land sold on August 10, 2007. I think, probably, out of these three agreements, the whole of the suit land was thus sold to Teresa. These agreements affirm that the registered proprietor of the land is Aligisina and the vendors undertook to commence succession proceedings which was to be financed by the purchaser. Thus at the time of sale, the vendors did not hold any grant in respect of the estate of Aligisina. Teresa did take possession of the suit land but there was protest from the plaintiff which culminated in the filing of the case before the Kiogoro Land Disputes Tribunal being case No 4 of 2010. The claimants before the tribunal were Marisera and her son Stephen against the plaintiff. Their complaint before the tribunal was that the plaintiff had secretly transferred title to her name and they wanted it cancelled. The tribunal obliged and declared that the plaintiff has no valid title to the suit land. The tribunal found that the land had been properly sold to Teresa and directed title to be issued to her. This decision was adopted as a decree by the Magistrates' Court at Kisii, in the suit Kisii CMCC Miscellaneous Application No 77 of 2011 leading to the cancellation of the title of the plaintiff, and issuance of title to Teresa, the defendant herein. The plaintiff challenged the award and decree in Kisii ELC, Constitutional Petition No 22 of 2014 and judgment was entered in her favour on December 16, 2016. The court nullified the proceedings of the tribunal and also issued an order to cancel the title of Teresa. This was done and the result is that title reverted back to the name of the plaintiff. It is on the basis of this title that the plaintiff now wants the defendant out of her land.
20. The defendant has in turn claimed that the plaintiff wrongly obtained title. She contends that she properly purchased the land from the sons of Marisera thus entitled to the land, and in the alternative, she be declared to have acquired the land by way of adverse possession. I agree with the defendant that the dispute over ownership of the land was not decided in the Constitutional petition. That petition merely challenged the jurisdiction of the Land Disputes Tribunal to hear the claim and the court did affirm that the tribunal had no jurisdiction to hear such a dispute. The decision of the tribunal was quashed for reason that the tribunal had no jurisdiction. The merits or otherwise of the case were never gone into. The counterclaim of the defendant is thus properly before this court and needs to be interrogated.
21. I have not really seen much evidence from the plaintiff to contest the position of the defendant that she (plaintiff) fraudulently obtained title without first going through the process of succession. Indeed, apart from waving the title, there is really nothing that the plaintiff exhibited to demonstrate how she obtained transfer into her name from that of Aligisina. No particulars of any succession case which she may have filed was given and the only conclusion that I can reach is that the plaintiff never filed any succession case in respect of the estate of Aligisina. Without filing a succession cause, and obtaining a court order allowing for transmission of the land into her name, the plaintiff cannot purport to be holding a good title to the suit land. Her title is null and void and subject to cancellation.
22. It is of course the assertion of the defendant that she is entitled to be registered as proprietor of the suit land because of the sale agreements that she had with the sons of Marisera and in the alternative, by way of adverse possession. Let me interrogate the basis of these two claims.



23. On the claim to the land by way of purchase, the defendant cannot succeed. This is because she purchased land from people who had no title to it. The sellers could not have had capacity to sell the land unless and until they filed a succession cause and obtained a distribution of the land in their favour. Selling the land before obtaining a grant was akin to intermeddling in the estate of a deceased person. Neither can the plaintiff allege to be an innocent purchaser for value without notice. When she purchased the land, she was aware that the land was in name of Aligisina. She was also aware that Aligisina is deceased. Indeed, the agreement she entered into with the vendors pointed this out and acknowledged the need to file a succession case. The vendors never filed any succession case. Although the defence did bring witnesses to assert that what was sold was the rightful share of Marko, this can only be ascertained after a succession case is done. At this moment in time, we cannot tell whether the succession court will affirm what was sold as being the share of Marko, or not. It was a big risk for Teresa to buy the suit land from persons who held no grant and she can only have herself to blame for the tribulations that she has gone through. The long and short of it is that she cannot succeed in claiming title to the suit land by virtue of the sale agreements that she had with Stephen and Josphat and/or with Marisera.
24. Can her claim for adverse possession succeed? Certainly not. It is trite, and I need not cite any authority, that for one to claim land for adverse possession, such person must have occupied the land *nec vi, nec clam, nec precario*, that is without force, without any secrecy, and without the permission of the registered owner, for an uninterrupted period of at least 12 years. The plaintiff took possession of the suit land in the year 2007, but it wouldn't matter even if we say that she continued the possession of Mr. Michira, which commenced in the year 2005. She cannot succeed because there was a suit filed before the tribunal in the year 2010 against her possession of the land and she indeed testified in that case. She eventually got title in the year 2011 but shortly thereafter the constitutional petition was filed against her in the year 2014. The fact that she was battling court cases means that her possession was not peaceful. Indeed, the filing of suit constitutes an interruption to possession. She cannot by any stretch of imagination claim to have been in quiet, uninterrupted possession of the suit land for 12 years. Her claim to the suit land by dint of adverse possession cannot succeed.
25. The long and short of it is that the defendant also cannot sustain a claim to have title to the suit land.
26. Earlier on, I had found that the plaintiff cannot also assert title to the suit land as she has not demonstrated how she obtained title from Aligisina, who was deceased. Where does that leave us? The title to the suit land must revert back to the name of Aligisina so that any persons who feel entitled to benefit from her estate can proceed and file a succession cause. It is within that succession cause that it will be decided who is supposed to benefit from the suit land and who should have title to it.
27. Given the above, I order the title of the plaintiff to be cancelled. I also order the Land Registrar Kisii, to revert the register of the suit land back to the first entry, that of Alisigina Bosibori Kinara. Any entries thereafter to be subject to orders that may be given after a succession cause is filed in respect of the estate of Alisigina Bosibori Kinara. As to whether the defendant is entitled to refund and compensation from Marisera, it is best that this be determined after conclusion of the Succession Case and distribution of the Estate of Aligisina.
28. The end result is that both plaintiff and defendant have failed in their quest to have title to the suit land. I dismiss both the plaintiff's suit and the defendant's counterclaim.
29. The last issue is costs. Since both defendant and counterclaimant have failed, I make no orders as to costs.
30. Judgment accordingly.



**DATED AND DELIVERED AT KISII THIS 22 DAY OF NOVEMBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

In presence of: -

Mr. Begi for the plaintiff

Mr. Bitok for the defendant

Mr. Makori for 2<sup>nd</sup> defendant to counterclaim

