



**Okuso v Omega (Environment & Land Case 125 of 2019)  
[2023] KEELC 21708 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21708 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 125 OF 2019  
DO OHUNGO, J  
NOVEMBER 21, 2023**

**BETWEEN**

**FRANCIS ALIGA OKUSO ..... PLAINTIFF**

**AND**

**DORCUS OMEGA ..... DEFENDANT**

**JUDGMENT**

1. Litigation in this matter commenced when the plaintiff filed plaint dated 23<sup>rd</sup> January 2015 at ELC Bungoma. The matter was later transferred to this court. The plaintiff averred in the plaint that he was the registered proprietor of the parcel of land known as Kakamega/Sango/1541 (the suit property) which he purchased from one Ben Simwa Zablon on 1<sup>st</sup> October 2003. That sometime later in the 2006, when the said Ben Simwa Zablon moved out of the suit property, the defendant who is a daughter in law to Ben Simwa Zablon refused to vacate the suit property despite notice and instead constructed a temporary structure thereon. The plaintiff therefore prayed for judgment against the defendant for her eviction from the suit property, costs, and interest thereon.
2. The defendant filed a defence in which she denied that the plaintiff was the registered proprietor and that any notice to vacate had been served upon her. She averred that if the plaintiff was the registered proprietor, then he obtained registration fraudulently, corruptly and that Ben Simwa Zablon did not have any good title to pass. She added that the suit property was ancestral land on which there was a matrimonial home and that she would raise a preliminary objection that the suit was res judicata in view of orders made in Bungoma CMCC No. 92 of 2010. The defendant therefore prayed that the plaintiff's suit be dismissed with costs and that a declaration be issued that registration of the plaintiff as the proprietor of the suit property was fraudulent, corrupt, and illegal for want of spousal consent.
3. At the hearing, the plaintiff testified as the sole witness in support of his case. He adopted his witness statement dated 23<sup>rd</sup> January 2015 as his testimony. He stated in the said statement that that he purchased the suit property from Ben Simwa Zablon on 1<sup>st</sup> October 2003 at a consideration of KShs



- 147,000 which he paid, and that the defendant who is a daughter in law to Ben Simwa Zablou was a witness to the transaction. That the suit property was transferred to him on 30<sup>th</sup> May 2007 and that sometime later in the 2006, when the Ben Simwa Zablou moved out of the suit property, the defendant remained thereon without his consent and even constructed a temporary home thereon. He added that he filed Bungoma CMCC No. 92 of 2010 but the case was dismissed for want of prosecution. He produced the documents in his list of documents dated 23<sup>rd</sup> January 2015 as his exhibits and urged the court to render judgment in his favour. The plaintiff's case was then closed.
4. Since the defendant did not attend the hearing and considering that evidence of service of hearing notice was availed, the defence case was closed upon an application by the plaintiff's counsel. Parties were then ordered to file and exchange written submissions. The plaintiff filed his submissions, but the defendant did not file any.
  5. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the suit is res judicata and whether the reliefs sought are available.
  6. *Res judicata* is a doctrine that has found statutory expression at Section 7 of the [Civil Procedure Act](#). For an objection based on *res judicata* to succeed, there must have been a previous suit in which the matter was in issue; the parties in both matters are the same or litigating under the same title; the previous matter was heard and determined by a competent court and the issue is raised once again in the new suit. See [John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) [2015] eKLR.
  7. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See also [Maitihene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others](#) [2018] eKLR. As the Supreme Court stated in [Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another](#) [2016] eKLR, *res judicata* prevents a multiplicity of suits which clog the courts and occasion unnecessary costs to the parties. It also ensures that litigation ends.
  8. I have perused the certified proceedings in Bungoma CMCC No. 92 of 2010 which the plaintiff produced. The pleadings were however not produced. I note that on 14<sup>th</sup> September 2010, counsel for the defendant in the said case who is also the defendant in this case argued a preliminary objection to the effect that the Subordinate Court did not have jurisdiction. The Subordinate Court upheld the preliminary objection and proceeded to dismiss the suit with costs to the defendant.
  9. For *res judicata* to apply, it is a requirement that the issue in dispute ought to have been heard and determined on the merits. That was not the case in Bungoma CMCC No. 92 of 2010. Further, in the absence of pleadings in Bungoma CMCC No. 92 of 2010, this court is unable to accurately ascertain what the issues in dispute in the said case were. I find and hold that *res judicata* has not been established.
  10. As noted earlier, the defendant neither offered any evidence to controvert the plaintiff's case nor to support her counterclaim. Consequently, her counterclaim has no leg to stand on and fails.
  11. There is no dispute that the plaintiff is the registered proprietor of the suit property. His proprietorship is confirmed both by the copy of certificate of official search as on 24<sup>th</sup> May 2013 and the copy of title deed dated 30<sup>th</sup> May 2007 which show that he became registered proprietor on 25<sup>th</sup> May 2007. The defendant did not dispute the plaintiff's proprietorship but pleaded in her defence that it was not validly obtained.
  12. By virtue of his registration, the plaintiff is entitled to the rights, privileges, and benefits under Section 24 of the [Land Registration Act](#). Additionally, Section 26 of the [Act](#) obligates the court to accept the certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1)



- (a) or (b) are established. In other words, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
13. The defendant attacked the plaintiff's title on allegations of fraud and corruption. Fraud and corruption are serious allegations of a criminal nature. Consequently, the defendant was bound to not only prove fraud but to additionally show that the plaintiff was party to such fraud. Fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
14. The defendant did not offer any evidence to support her allegations of fraud and corruption. The plaintiff's title therefore remains intact and his rights as a proprietor must be upheld. That includes the right to possession of the suit property. He is thus entitled to the relief of eviction.
15. In the result, I enter judgment in favour of the plaintiff as follows:
- a. The defendant's counterclaim is dismissed.
  - b. The defendant to vacate the parcel of land known as Kakamega/Sango/1541 within ninety (90) days from the date of service upon her of the decree herein. In default, eviction order to issue.
  - c. The plaintiff shall have costs of the suit.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 21<sup>ST</sup> DAY OF NOVEMBER 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Ligare holding brief for Ms Nanzushi for the Plaintiff

No appearance for the defendant

