



**Olongurro (Suing as the Legal Representative of Simingor Olonguro Oloiyonde) v Kimuyu & another (Environment & Land Case 19 of 2020) [2023] KEELC 22419 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22419 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 19 OF 2020  
LC KOMINGOI, J  
DECEMBER 14, 2023**

**BETWEEN**

**JOSHUA OLONGURRO ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF SIMINGOR OLONGURO  
OLOIYONDE**

**AND**

**NANCY DANSON KIMUYU ..... 1<sup>ST</sup> DEFENDANT  
KANINI HARAKA ENTERPRISES ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 20<sup>th</sup> March 2020 the Plaintiff states that his father the late Simingor Olonguro Oloiyonde was the owner of parcel of land Kajiado/Kisaju/998 which the 1<sup>st</sup> Defendant fraudulently acquired and caused its subdivision to Kajiado/Kisaju/4533 and Kajiado/Kisaju/4534 and parcel number Kajiado/Kisaju/4533 was subsequently subdivided into Kajiado/Kisaju/8450 to 8453. He outlined the particulars of fraud against the 1<sup>st</sup> Defendant as failing to enter a sale agreement with the deceased; obtaining registration by false pretence; failing to obtain consent from the deceased; failing to pay consideration and transferring the land without supporting documents or following due process. He thus prayed for:
  - a) A declaration that Simingor Olonguro Oloiyonde is the owner of Kajiado/Kisaju/8450, Kajiado/Kisaju/8451, Kajiado/Kisaju/8452 and Kajiado/Kisaju/8453 formerly Kajiado/Kisaju/4533 and Kajiado/Kisaju/4534.
  - b) That an order directing the land registrar to rectify the register for Kajiado/Kisaju/8450, Kajiado/Kisaju/8451, Kajiado/Kisaju/8452, Kajiado/Kisaju/8453 and Kajiado/Kisaju/4534



be rectified by deleting the names of the Defendants and inserting those of Simingor Olonguro Oloiyonde.

- c) Costs.
2. The 1<sup>st</sup> Defendant in her Statement of Defence dated 27<sup>th</sup> April 2020 contested the Plaintiff's claim but acknowledged that the late Simingor owned a large piece of land in Kajiado which was being sold by public auction by Agricultural Finance Cooperation to offset a loan he owed. He then subdivided his land and sold Kajiado/Kisaju/998 to her to offset the loan. That the allegation that the subdivision was fraudulent was not accurate because she purchased the land for valuable consideration and the late Simingor undertook the subdivision and subsequent transfer with all supporting documents. She added that the said transfer and subdivision was undertaken over thirty (30) years ago and there was no basis for cancellation of Title or surrender of the land. As such, the suit should be dismissed with costs.
  3. The Plaintiff filed a reply to the defence and put the Defendant to strict proof of her claim.
  4. The 2<sup>nd</sup> Defendant in its statement of Defence dated 8<sup>th</sup> March 2022 contested the Plaintiff's allegation stating that it purchased property Kajiado/Kisaju/8453 through a private treaty sale on 27<sup>th</sup> February 2019 from Moonwalk Investment Limited who had registered a charge over the said land in favour of Equity Bank (Kenya) on 13<sup>th</sup> August 2015 and a discharge of the charge was registered on 4<sup>th</sup> April 2019. Therefore the suit should be dismissed since the property was acquired legally and procedurally.

#### **Evidence of the Plaintiff**

5. PW1, Joshua Olongurro adopted his witness statement dated 20<sup>th</sup> March 2020 as his evidence in chief and adduced his bundle of documents as his evidence which was marked as P. Exhibits.
6. On cross examination he stated that his late father was the owner of land Kajiado/Kisaju/998 although he did not have evidence to prove this neither was he was not part of the transaction between his late father and the 1<sup>st</sup> Defendant.
7. On re-examination he stated that he resided on one part of the land but had never met the 1<sup>st</sup> Defendant.
8. This marked the close of the Plaintiff's case.

#### **Evidence of the Defendant's.**

9. DW1, Nancy Danson Kimuyu the 1<sup>st</sup> Defendant adopted her witness statement dated 27<sup>th</sup> April 2020 as her evidence in chief and adduced her bundle of documents as exhibit. She stated that the late Simingor approached her in 1989 in distress to sell the piece of land having taken a loan facility from Agricultural Finance Corporation and defaulted in paying it. She testified that she together with her husband met late Simingor who was accompanied by another gentleman in a hotel in Kitengela and present was also another lady who was interested in purchasing a portion of Simingor's land. After the meeting they all went to see the land and agreed to purchase it. She purchased 40 acres and the other lady purchased 10 acres. They agreed that she would repay the loan and give the balance to the late Simingor which she did in 1990. She indicated that she spent Kshs. 400,000 for the land. They then went to the Land Control board where the late Simingor signed all the documents. Consent was given, transfer documents signed and she was issued title to the land. She had been in occupation of the land since 1990 without any complaints and in 2010 and 2015 she sold part of the land to two people. She thus urged court for dismissal of the suit saying that she lawfully acquired it and should be allowed to enjoy it.



10. On cross examination she stated that the sale agreement was made orally. She paid the owner a consideration of Kshs. 295,000 in cash and paid Agricultural Finance Corporation Kshs. 105,000 which was the debt owed to them. She indicated that there were witnesses when the purchase and payment took place. She was then issued title to her 40 acres which she later subdivided and sold part of it to other persons.
11. On re-examination she affirmed that the agreement was orally made and an acceptance receipt of Kshs. 105,000 was issued by the Agricultural Finance Corporation. She pointed out that a caveat had put against the title and could not make any transactions with it.
12. DW2, Bernard Mwangi Kimaru, the 2<sup>nd</sup> Defendant's Manager adopted his witness statement dated 8<sup>th</sup> March 2022 as his evidence in chief and adduced his bundle of documents as his evidence. He testified that the 2<sup>nd</sup> Defendant got into a sale agreement for Kajiado/Kisaju/8453 measuring about 5 acres with Moonwalk Investment and paid a consideration of Kshs. 65,000,000. All consents were sought and granted and a title was consequently issued in the 2<sup>nd</sup> Defendant's name. He testified that from the documents adduced as evidence, Moonwalk Investment bought the said property from the 1<sup>st</sup> Defendant who bought it from the owner on 12<sup>th</sup> May 1989.
13. DW2 stated that the suit was filed 21 years after the land was purchased which meant that the suit was time barred and should be dismissed with costs to the Defendants.
14. On cross examination he stated that the balance of the purchase price was paid after consent was obtained and indicated that he was not aware whether there was an agreement between the 1<sup>st</sup> Defendant and the Plaintiff.
15. This marked the close of the Defendant's case.
16. At the close of the oral testimonies, parties tendered final written submissions.

### **The Plaintiff's Submissions**

17. In the submissions dated 20<sup>th</sup> July 2023 counsel for the Plaintiff submitted that the 1<sup>st</sup> Defendant's allegation that she purchased the suit property from the late Simingor prior to his death was unsupported because she neither produced a sale agreement nor proof of payment. This was contrary to Section 3 of the Law of Contract Act and Section 44 of the Land Registration Act which stipulate that a sale of land contract must be in writing. Reference was made to Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura V Attorney General & 4 Others [2017] eKLR, Wallis v Learonal (UK) PLC [2003] EWCA Civ 98 and Metra Investment Limited v Gakweli Mohamed Warrakah [2006] eKLR which supported that sale of land should have evidence of a written contract. Therefore, the 1<sup>st</sup> Defendant did not have a valid title to pass to the 2<sup>nd</sup> Defendant.
18. Counsel submitted that the 2<sup>nd</sup> Defendant's allegation that they acquired the suit property legally was not supported because they did not evidence that they undertook due diligence as was pronounced in Daudi Kiptugrn vs Commissioner of Lands & 4 others (2015) eKLR. Counsel added that the 1<sup>st</sup> Defendant could not pass good title since she did not have good title to the suit property as was held in Macfoy vs United Africa Co. Ltd and Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others [2015] eKLR. Therefore, the property should be returned to the estate of the late Samingor.

### **The 1<sup>st</sup> Defendant's Submissions**

19. In the submissions dated 20<sup>th</sup> July 2023, counsel outlined that the issues for determination were whether the suit was time barred and whether the Plaintiff was entitled to the prayers sought.



20. Counsel submitted that the 1<sup>st</sup> Defendant acquired parcel Kajiado/Kisaju/998 through an oral agreement from the late Simingor and title issued to her on 15<sup>th</sup> May 1990 and caused subsequent subdivisions and transfers from the year 2010. As such she had been in possession for over 30 years prior to the suit being initiated which was contrary to Section 4(2) of the Limitation of Action Act which stipulates that an action founded on tort should not be brought after three years and Section 7 of the Limitation of Action Act which provides that an action for recovery of land should not be brought after the end of 12 years. Counsel submitted that the late Simingor passed away in 1992 and the Plaintiff's grant adduced in court was issued on 7<sup>th</sup> June 2000. As such the Plaintiff had all the time to file the suit but instituted it 20 years later which was unreasonable delay citing Edward Moonge Lengusuranga vs James Lanaiyara & Another [2019] eKLR, Sobanlaldurgadass Rajput & another vs Divisional Integrated Development Programmes Co Ltd [2021] eKLR, Rawal vs Rawal (1990) KLR 275. Counsel added that statute limitation was an issue of jurisdiction and the court should down its tools and dismiss the suit.
21. Counsel concluded by submitting that the claim of fraud had also not been proved and the suit should be dismissed with costs to the Defendants.
22. It appears the 2<sup>nd</sup> Defendant did not put in submissions despite being given Seven (7) days to do so on 26<sup>th</sup> September 2023.

### **Analysis and Determination**

23. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:
  - i. Whether the Plaintiff is the owner of property Kajiado/Kisaju/998 subdivided to Kajiado/Kisaju/4533 (later subdivided to Kajiado/Kisaju/8450-8453) and Kajiado/Kisaju/4534.
  - ii. Is the suit time barred?
  - iii. Whether the Plaintiff entitled to the reliefs sought
  - iv. Who should bear costs of the suit?
24. Upon careful analysis of the evidence presented, it is undisputed that the suit property, Kajiado/Kisaju/998, was originally owned by the Plaintiff's deceased father, Simingor Ole Olonguro. The Plaintiff contends that the 1<sup>st</sup> Defendant acquired this property through fraudulent means, lacking a sale agreement or necessary consent and transfer documents. To support this assertion, the Plaintiff provided documents, including a title deed in the 1<sup>st</sup> Defendant's name and a mutation form dated 14<sup>th</sup> May 1990, subdividing Title number Kajiado/Kisaju/33 into Kajiado/Kisaju/997, 998, and 999. Notably, this mutation form was certified as a true copy by the District surveyor in Kajiado.
25. In response, the 1<sup>st</sup> Defendant contested the fraud allegations, asserting that she legally acquired the suit property from Simingor for value, adhering to due process by obtaining necessary consents and transfer documents. Supporting her claim, the 1<sup>st</sup> Defendant presented an array of documents, including a receipt dated 12<sup>th</sup> May 1989 of Kshs. 105,000 paid in cash to Agricultural Finance Corporation for Simingor Ole Olonguro account; Land control Board Consent application form dated 11<sup>th</sup> May 1990 from Simingor to her for parcel Kajiado/Kisaju/998; consent letter from the Land Control Board dated 15<sup>th</sup> May 1990; transfer form for parcel Kajiado/Kisaju/998 from Simingor to Nancy dated 15<sup>th</sup> May 1990; title deed dated 15<sup>th</sup> May 1990 in her name; mutation form dated 20<sup>th</sup> April 2010 subdividing parcel Kajiado/Kisaju/998 to Kajiado/Kisaju/4533 and 4534 and mutation form for parcel Kajiado/Kisaju/4533 to Kajiado/Kisaju/8450, 8451, 8452 and 8453 among others.



26. Additionally, the 2nd Defendant furnished documentation demonstrating their legitimate acquisition of property Kajiado/Kisaju/8453 from Moonwalk Investment Limited, including a sale agreement dated 27<sup>th</sup> February 2019 for a consideration of Kshs. 65,000,000, funds transfer, consent application form, transfer forms, stamp duty payment and a copy of the title deed in favour of the 2<sup>nd</sup> Defendant.
27. Recognizing the legal principle that he who alleges must prove on a balance of probability, Section 107 of the *Evidence Act*, provides as follows:-
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
28. I have considered the evidence adduced and supporting the cited authorities such as the Court of Appeal in *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR which held:
- “... Even where a plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities. In *R. G. Patel vs Lalji Makanji* [1957] EA 314, at page 317 the former Court of Appeal for Eastern Africa stated that:
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required:
- And in *Richard Akwesera Onditi v. Kenya Commercial Finance Co. Ltd.*, CA No 329 of 2009 this Court expressed itself on the issue as follows:
- “Needless to say fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability, and the bare allegations put forward by the appellant do not therefore avail him.”
29. From the foregoing, the court finds that the Plaintiff failed to establish, to the required standard, that the 1<sup>st</sup> Defendant illegally acquired the suit property. Conversely, based on the documents presented by the 1<sup>st</sup> Defendant, the court concludes that she procured the property regulatory & procedurally. Consequently, having lawfully acquired the property, the 1<sup>st</sup> Defendant had the right to utilize it as she deemed fit. The 2<sup>nd</sup> Defendant’s evidence was also duly considered, and it was established that they too acquired their property legally from Moonwalk Investment Ltd.
30. Section 7 of the *Limitation of Actions Act* provides;
- “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 just accrued to same person through whom he claims, to that person”.
31. It is not in dispute that the plaintiff has filed this suit twenty years after the 1<sup>st</sup> Defendant was issued with the title. The delay has not explained.



In the case of *Sohanlaldurgadass Rajput & Another vs. Divisional Integrated Development Programmes Co. Ltd* (2021) eKLR it was held;

“In the case of *Bosire Ongero vs. Royal Media Services* (2015) eKLR the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.”

32. As stated earlier the allegation of fraud has not been proved against the 1<sup>st</sup> Defendant.
33. I find that the plaintiff is not entitled to the reliefs sought.
34. In conclusion I find that the plaintiff has failed to prove his case as against the defendants on a balance of probabilities. The suit is hereby dismissed with costs to the defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14<sup>TH</sup> DAY OF DECEMBER 2023.**

**L.KOMINGOI**

**JUDGE.**

In the presence of:

N/A for the Plaintiff.

Ms Samin for Ms. Kitaa for the 1<sup>st</sup> Defendant.

Ms. Kinyua for the 2<sup>nd</sup> Defendant

Court Assistant - Mutisya

