



**Oludhe & 2 others (All Suing as the Administrators of the Estate of Jackson Oludhe Aloo – Deceased) v Benken Enterprises Limited & another; Benken Enterprises Limited (Plaintiff); Oludhe & 3 others (Defendant) (Environment and Land Case Civil Suit 228 of 2018) [2023] KEELC 22334 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22334 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 228 OF 2018**

**LN MBUGUA, J**

**DECEMBER 14, 2023**

**BETWEEN**

**SAMWEL ODHIAMBO OLUDHE ..... 1<sup>ST</sup> PLAINTIFF  
DAVID ODUOR OLUDHE ..... 2<sup>ND</sup> PLAINTIFF  
DAVID OWUOR OLUDHE ..... 3<sup>RD</sup> PLAINTIFF  
ALL SUING AS THE ADMINISTRATORS OF THE ESTATE OF JACKSON  
OLUDHE ALOO – DECEASED**

**AND**

**BENKEN ENTERPRISES LIMITED ..... 1<sup>ST</sup> DEFENDANT  
THE GOVERNMENT LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**BENKEN ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**SAMWEL ODHIAMBO OLUDHE ..... DEFENDANT  
DAVID ODUOR OLUDHE ..... DEFENDANT  
DAVID OWUOR OLUDHE ..... DEFENDANT  
THE GOVERNMENT LAND REGISTRAR ..... DEFENDANT**



## JUDGMENT

1. By a plaint dated 11.5.2018 and amended on 26.8.2020, the Plaintiffs contend that their father Jackson Oludhe Aloo lawfully purchased the suit parcel Land Reference No. 1870/x/72 in 1965. He passed away on 4.5.1998. The suit property and the buildings erected thereon have remained in possession of the beneficiaries of his estate since then.
2. They aver that on 26.4.2018, unknown people forced their way into the suit property and kidnapped the Plaintiffs' guard/gardener known as Benjamin Andoli and left a person unknown to them to guard the suit property. That when the 1<sup>st</sup> Plaintiff and the father to the said gardener/guard went to Kileleshwa Police station to report the incident, one Mr. Kandie, a director of the 1<sup>st</sup> Defendant appeared and claimed that the 1<sup>st</sup> Defendant had purchased the suit property from their father, Jackson Oludhe Oloo (deceased) vide a sale agreement of year 2003.
3. They aver that the incident prompted them to visit the lands office to establish the status of the suit property but they could not obtain official search results since the suit parcel file was missing. They also visited the rating section of the Nairobi City County and obtained a rates demand note which indicated that the ownership of the suit property had changed from Jackson Oludhe Aloo (deceased) to the 1<sup>st</sup> Defendant.
4. The plaintiffs contend that the transfer and registration of the 1<sup>st</sup> Defendant as owner of the suit parcel is illegal and fraudulent, and they therefore pray for judgement against the Defendants jointly and severally for;
  - a. A declaration that LR No. 1870/x/72 is the property of Jackson Oludhe Aloo (deceased) and the issuance of a title deed in favour of the 1<sup>st</sup> Defendant is illegal, fraudulent, null and void and the resultant transfer/title deed thereof should be ordered cancelled by this Honourable Court and the one issued and possessed by the Plaintiffs be maintained as the legally correct and appropriate one.
  - b. An order directing the 2<sup>nd</sup> Defendant to rectify the register by cancelling all the entries therein registering the 1<sup>st</sup> Defendant as the owner of LR No. 1870/x/72.
  - c. A permanent injunction do issue restraining the 1<sup>st</sup> Defendant, its servants or agents and others claiming through it from entering, remaining upon, using, dealing with or otherwise transacting or interfering with the Plaintiff's quiet possession of the property known as LR No.1870/x/72.
  - d. The 1<sup>st</sup> Defendant to be ordered to pay the annual rates and associated penalties to Nairobi City County in respect of the suit property as long as the records at the Ratings Section reflects the 1<sup>st</sup> Defendant as the ratable owner.
  - e. The 1<sup>st</sup> Defendant be ordered to meet the costs of and any incidentals to this suit.
  - f. Any other or further relief this Honourable Court deems fit to avoid miscarriage of justice in respect of the Plaintiffs' proprietary interest in the suit property.
5. The suit is opposed by the 1<sup>st</sup> Defendant vide its statement of defence and counterclaim dated 6.8.2020, where it contends that it purchased parcel LR No. 1870/x/72 from Jackson Oludhe Aloo for ksh.50 million via his agent, one Erick Kiptanui Naibei by virtue of an indenture dated 14.8.2003 and it has been in occupation of the suit premises since then.



6. The 1<sup>st</sup> Defendant also contends that the alleged gardener/guard, one Benjamin Andoli is its employee.
7. In its counterclaim, the 1<sup>st</sup> defendant accuses the plaintiff and the 2<sup>nd</sup> defendant of fraud and misrepresentation and prays for the following orders;
  - a. A declaration do issue that LR No. 1870/X/72 situate in Westlands, within Nairobi County is the Plaintiff's lawful property.
  - b. An order of eviction to issue and a permanent injunction to issue restraining the Defendants whether by themselves, agents, servants, employees or otherwise howsoever from further trespassing by remaining upon, entering upon, encroaching and/or doing anything else to alienate an interest by way of sale, transfer and /or anything inconsistent with the rights of the Plaintiff over the property known as LR No. 1870/X/72 situate in Westlands, Nairobi county.
  - c. General damages for trespass against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  - d. Mesne profits per month from the date the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants started trespassing on the suit property to the date they stop.
  - e. Payment of rent arrears for the period that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been in occupation of the suit premises without paying any rent to the registered owner of the property.
  - f. General damages for nuisance.
  - g. Punitive and/or exemplary damages against the Defendants for their apparent malicious and/or fraudulent acts.
  - h. Costs of this suit together with interest thereon for such period and as such rate this Honourable Court may deem appropriate.
  - i. Any such other or further relief as this Honourable court may deem fit and appropriate to grant.
8. The 2<sup>nd</sup> Defendant did not file a defence, despite their participation in these proceedings where they even filed a replying affidavit sworn by its Senior Land Registration Officer, one Edwin Munoko Wafula on 17.6.2019.
9. During the trial, only the plaintiffs tendered evidence where their case was closed on 18.7.2022. The defence side was given a last adjournment but no witnesses were availed as per directions given by the court.
10. PW1 is the 1<sup>st</sup> plaintiff and the sole witness of the plaintiff's case.  
He adopted his witness statement dated 26.8.2020 as his evidence. He produced the 12 items contained in their bundle of documents as P. Exhibit 1-12.
11. PW1 reiterated the averments set out in the plaint, that their father bought the suit property in 1965, and the family moved there until 1969 when they vacated and moved to a cheaper rental house in Eastleigh in order for the suit premises to be rented out to earn the family some rental income. Their 1<sup>st</sup> tenant was Department of Defence, while the last tenant was Ms. Anajali Mediratta of Polyphase Systems Limited who vacated the premises on or about 25.6.2017.



12. That his late father died on 4.5.1998 and the Plaintiffs were appointed as the administrators of his estate in Nairobi Succession Cause No. 2455 of 1999, In the matter of the Estate of the Late Jackson Oludhe Aloo.
13. That the suit property and developments thereon have remained in the name of the deceased and are occupied by his beneficiaries who have been paying the requisite land rates to Nairobi City County including for the year 2018.
14. PW1 points out that there is a 4 bedroomed house erected on the suit property and he has been using the guest wing as his personal office where all personal documents belonging to the estate of their late father are kept.
15. That upon the exit of the last tenant on 25.6.2017, the suit property was seriously vandalized which prompted him to hire a guard /gardener known as Benjamin Angola Andoli to guard the suit premises and on 26.4.2018, he received information that the said gardener was missing. He later learnt that the said Benjamin had been kidnapped by unknown people while on the suit premises and a guard unknown to them was left there to guard the property.
16. That the administrators of the estate of Jackson Oludhe Aloo have not sold the suit premises and its rightful heir is a family company known as Windline Investment Company Limited.
17. He points out that the signature appearing on the last page of the agreement for sale and the Special Power of Attorney registered on 11.7.1996 do not belong to his father and that the indenture dated 14.8.2003 between Jackson Oludhe Aloo purports to have been signed by his father on 14.8.2003, yet by then, his father was long dead.
18. In cross-examination, PW1 availed the original title to the suit premises which was in tandem with the copy availed at page 34-36 of their bundle. He further reiterated that they obtained a grant where the suit property was part of the estate of his late father and it was allocated to a family company known as Windline Investment Company Limited by consent of all family members.

### **Submissions**

19. The Plaintiffs filed submissions dated 10.8.2023 where they reiterated that the suit property belonged to their late father Jackson Oludhe Aloo. It was argued that while the 1<sup>st</sup> Defendant pleads that its title to the suit property emanates from Jackson Oludhe Aloo pursuant to purchase from him, there is no evidence tendered by the 1<sup>st</sup> Defendant to show how the conveyancing was done after the death of Jackson Oludhe Aloo.
20. The case of *Loice Wanjiru Meru & 3 others v John Migui Meru* [2017] eKLR is put forward to Submit that the Power of Attorney in the name of Erick Kiptanui Naibei cannot come to the rescue of the 1<sup>st</sup> Defendant's case since the same could not be used to convey the suit property after the death of the donor.
21. It is also submitted that the *Law of Succession Act* forbids intermeddling with the property of a deceased person without reference to court. The case of *Anne Murambi v John Munyao Nyamu & another* [2018] eKLR is relied upon.
22. The case of *Christine Arara Omolo & another v Kenya Power and Lighting Company Limited* [2019] eKLR, *Greco International Limited v Rift Valley Railways Limited* [2018] eKLR, and *Mary Njeri Murigi v Peter Macharia & another* [2016] eKLR were proffered to submit that the Defendant's counterclaim must fail since the evidence of the Plaintiffs was not rebutted by the 1<sup>st</sup> Defendant.



23. The 1<sup>st</sup> Defendant's submissions are dated 8.11.2023 and address the following issues;
  - a. Whether the Plaintiffs have locus standi to institute and prosecute this suit;
  - b. Whether the Plaintiffs are the legal proprietor of the suit property LR No. 1870/x/72;
  - c. Whether the Plaintiffs have proved their allegations of fraud.
  - d. Whether the Plaintiffs have trespassed upon the 1<sup>st</sup> Defendant's property.
24. On the 1<sup>st</sup> issue, it was submitted that PW1 had confirmed that the suit property was given to Windline Investment Company as per the confirmed grant issued in relation to the estate of Jackson Oludhe Aloo, thus the role of the Plaintiffs as administrators came to an end and they have no locus to institute this suit, adding that there is no nexus between the plaintiff and the aforementioned company.
25. To this end, the case of *Christopher Mutiembu Machimbo & 3 others v County Surveyor, Trans-Nzoia & 4 others* [2022] eKLR as well as the case of *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR were proffered.
26. On the 2<sup>nd</sup> issue, it was submitted that the 1<sup>st</sup> Defendant paid the full purchase price for the suit parcel, thus is entitled to its title which can only be impeached under Section 26 of the *Land Registration Act* and that grounds to impeach the title have not been established by the Plaintiffs. To this end, the case of *Mombasa Autocare Ltd v Japhet Pasi Kilonga & 9 others* [2014] eKLR was relied upon.
27. On the 3<sup>rd</sup> issue, it was submitted that the position of law is established that a claim founded on the basis of fraud must be distinctly alleged and proved by the party alleging and that the Plaintiffs did not discharge the said burden. To that end, the case of *Kuria Kiarie v Sammy Magera* [2017] eKLR was relied upon.
28. On the 4<sup>th</sup> issue, the 1<sup>st</sup> Defendant argues that since it has proven that the Plaintiffs wrongfully entered the suit property and illegally took possession on or around 23.5.2018, and that it has been unable to enjoy its proprietary right to the said land, then it is entitled to damages. To this end, the case of *M'Mukanya v M'Mbijiwe* (1984) KLR 761 as well as the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR were proffered.

### Determination

29. The Property known as Land Reference No. 1870/x/72 is in contention between the Plaintiffs and the 1<sup>st</sup> Defendant as each of them claims to be the owner. Thus the issues falling for determination relate to the claims of ownership of the suit property as between the aforementioned parties.
30. Before delving into that question of ownership, the court will give its finding on the issue of locus raised by the 1<sup>st</sup> defendant in its submissions. The 1<sup>st</sup> defendant contends that the Plaintiffs have no locus standi to institute this suit on the basis that the suit property had already been distributed to Windline Investment Company Limited in Nairobi Succession Cause No. 2455 of 1999, *In the matter of the Estate of the Late Jackson Oludhe Aloo*.
31. It is trite law that issues for determination in a suit generally flow from the pleadings, See *Galaxy Paints Company Ltd V Falcon Guards Ltd* [2000] eKLR. Further, it has been held that pleadings are mere allegations unless proved. See *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR.
32. The 1<sup>st</sup> defendant has not precisely stated in its pleadings that the plaintiffs have no locus. What more, no evidence was adduced by the said party to proof the allegations of lack of locus of the plaintiffs.



The defendant is estopped from adducing evidence in the platform of submission, hence the claim that plaintiffs have no locus is baseless.

33. On the claim of ownership, I find that PW1 gave a consistent and plausible account to support their claim. He led evidence of how their father Jackson Oludhe Aloo (deceased) purchased the suit property in 1965. To this end, Pw1 availed the original indenture whose content mirror the copy at page 34 of plaintiff's bundle. The indenture was executed by the Standard Bank Limited and the late Jackson Oludhe Aloo on 1.11.1965 and registered in the Crown Lands Registry on 23.11.1965 as Presentation No. 612 Volume No. 41 Folio 134/5 File 12752. The plaintiffs are still in possession of the said original title. No evidence was adduced to rebut this evidence. It follows that in terms of registration, the plaintiffs have proved their case.
34. PW1 further led evidence that their late father took possession of the suit property upon purchase and they have been in possession of the same to date. He gave an account of how they had been renting out the suit property over the years. To this end, the plaintiffs availed evidence of tenancy vide the agreement at page 43 of their bundle. The photographs at page 56 of the plaintiffs bundle demonstrate that there is a mature residence with old trees in the homestead. This again buttresses the plaintiffs' claim that they have been in control of the suit property for decades.
35. The Plaintiffs also produced land rates receipts showing that they were paying rates before the alleged invasion by the 1<sup>st</sup> Defendant in 2018. That evidence too remains unchallenged.
36. As things stand, the 1<sup>st</sup> Defendant has not established how it acquired the suit property.
37. In *Daudi Kiptugen v Commissioner of Lands & 4 others* [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title.”
38. In *Samson S. Maitai & another v. African Safari Club Limited & another* [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”
39. From the analysis above, it is clear that the Plaintiffs have proofed on a balance of probabilities that their claim to the suit land is merited. On the other hand, the counterclaim of the 1<sup>st</sup> defendant was not proved and must therefore fail, See *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR.
40. Final orders
  1. The Counter claim of the 1<sup>st</sup> defendant is hereby dismissed.
  2. The plaintiffs' suit is allowed in the following terms;
    - i. An order is hereby issued declaring that the suit property LR No. 1870/x/72 is the property of Jackson Oludhe Aloo (deceased), and his title is to be maintained as the legally correct and appropriate title.
    - ii. An order is hereby issued declaring the title held by the 1<sup>st</sup> Defendant as illegal, and the same is hereby cancelled.



- iii. An order is hereby issued directing the 2<sup>nd</sup> Defendant to rectify the register by cancelling all the entries therein registering the 1<sup>st</sup> Defendant as the owner of LR No. 1870/x/72.
  - iv. A permanent injunction is hereby issued restraining the 1<sup>st</sup> Defendant, its servants or agents from dealing with or otherwise transacting or interfering with the Plaintiffs' quiet possession of the property known as LR No. 1870/x/72.
  - v. The 1<sup>st</sup> Defendant is estopped from paying any rates to Nairobi City County in respect of the suit property, the said rates shall be paid by the plaintiffs.
3. The 1<sup>st</sup> defendant is condemned to pay the costs of this suit plus interests on costs from the time of filing the suit. Such costs and interests to be paid to the plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF DECEMBER, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Kamotho for the Plaintiff

Shikanda holding brief for Asundwa for 1<sup>st</sup> Defendant

A.Kamau for Attorney General for 2<sup>nd</sup> Defendant

Court Assistant: Eddel

