



**Omolo v Odiwuor (Sued as the Legal Representative of the Estate of Isaac Maurice Kibuye Odede- Deceased) (Environment & Land Case 35 of 2021) [2023] KEELC 22189 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22189 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 35 OF 2021  
GMA ONGONDO, J  
DECEMBER 14, 2023  
(FORMERLY MIGORI ELCC NO. 124 OF 2018)**

**BETWEEN**

**DANSON GILBERT ADEDE OMOLO ..... PLAINTIFF**

**AND**

**LILIAN ACHIENG ODIWUOR (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ISAAC MAURICE KIBUYE ODEDE- DECEASED) ..... DEFENDANT**

**JUDGMENT**

**a. Introduction**

1. The instant suit concerns land reference number West Kasipul/Kodera Karabach/760 measuring approximately one decimal five hectares (1.5 Ha) in area (The suit land herein). The same is located within Homa Bay County.
2. The plaintiff is represented by the firm of M/s Agure Odero & Company Advocates.
3. The defendant is represented by O. P. Ngoge and Associates Advocates.
4. In the first instance, the defendant was Isaac Maurice Kibuye Odede (deceased 1) but he died on 27<sup>th</sup> September 2022. He was substituted by Lilian Achieng Odiwuor, who obtained a grant of letters of administration ad litem to his estate on 14<sup>th</sup> April 2023, and pursuant to leave of court granted on 15<sup>th</sup> June 2023.
5. Originally, the matter was filed at Migori Environment and Land Court but was transferred to this court on 1<sup>st</sup> November 2021 for hearing and determination.



## **b. Summary of the Parties' Respective Cases**

6. On 11<sup>th</sup> October 2018, the plaintiff, through his Advocates, filed the suit by way of a plaint dated 3<sup>rd</sup> September 2018 seeking the orders infra:
  - a. A declaration that the plaintiff is the registered owner of the suit land.
  - b. An order for eviction against the defendant from the suit land.
  - c. Costs of the suit.
  - d. Any other relief the court shall deem fit to grant.
7. The plaintiff contends that he is the registered owner of the suit land, having purchased the same from one Musa Adede (deceased 2), who was a father to deceased 1. That on or about January 2018, the defendant trespassed onto the suit land and erected structures thereon. Thus, he urged the court to issue eviction orders against the defendant.
8. The plaintiff herein, Danson Gilbert Adede (PW1), relied on his statement and further statement filed herein on 11<sup>th</sup> October 2018 and 18<sup>th</sup> June 2021 respectively, which were adopted as part of his evidence. He also relied on his list of documents dated 3<sup>rd</sup> September 2018 Serial numbers 1 to 6, to wit; a copy of the title deed in respect of the suit land, a copy of two official search certificates dated 16<sup>th</sup> November 2017 and 6<sup>th</sup> March 2018, a notice by plaintiff's advocate dated 9<sup>th</sup> March 2018, a copy of green card, a copy of sale of land agreement written in Luo language and the English translated version and a copy of a letter dated 16<sup>th</sup> March 2018 from the Ministry of Lands and Physical Planning (PExhibits 1 to 6 respectively).
9. PW1 clarified that the suit land is land reference number West Kasipul/Kodera Karabach/760 and not land reference number West Kasipul/Kodera Karabach/1760, as indicated in the plaint. That he purchased the same in 1967. That the defendant has been cultivating the suit land through lease to date. That the defendant also erected structures, to wit a house thereon in 1980. He averred that the suit land is registered in his name and urged the court to grant him the prayers sought in the plaint.
10. In cross-examination, he stated that the sale agreement (PExhibit 5) was made between deceased 2 and deceased 3. That deceased 3 did so on his behalf. That he paid the purchase price. He averred that the defendant trespassed onto the suit land and erected the said structures thereon in 1980. That he did not report the trespass to the police but his advocate issued a demand notice to the defendant. He admitted that no spousal consent was obtained when PExhibit 5 was executed. That he paid Kshs. 1,300/- for the suit land, through deceased 3. That deceased 1 erected a house for his sons on the suit land and leased it to third parties who cultivate the same.
11. In re-examination, he clarified that the said structures were erected by the defendant in 2018 and not 1980.
12. The defendant opposed the suit vide a statement of defence and counterclaim dated 16<sup>th</sup> September 2019 and filed herein on 19<sup>th</sup> September 2019. In the counterclaim, the defendant averred that he constructed his homestead on the suit land in the year 1965 and has continued to reside thereon and cultivate the suit land to date. That his wives and children are buried thereon. He averred that the plaintiff has never been in possession of the suit land. That deceased 2 could not have executed the sale agreement as he was illiterate.
13. The defendant contended that the plaintiff got registered as a first owner of the suit land during adjudication process through fraud. That deceased 2 did not seek his permission as the first born son



nor his mother's consent prior to disposing of the suit land. That further, the sale agreement does not specify the suit land as the parcel of land being purchased. He also stated that the plaintiff did not avail a copy of the Land Control Board Consent or transfer forms relating to the suit land. That therefore, the certificate of title held by the plaintiff should be impeached and declared null and void. Thus, he sought the orders infra:

- a. A declaration that registration of the plaintiff as the 1<sup>st</sup> registered owner of the suit land was fraudulent, null and void ab initio.
  - b. The defendant herein be registered as the true and bona fide owner of the suit land forthwith.
  - c. Costs of this suit.
  - d. Any other or further reliefs which the honourable court deems fit and just to grant in the circumstances.
14. DW1, Isaac Maurice Kibuye Odede (deceased 1) relied on his statement dated 16<sup>th</sup> September 2019 and filed herein on 19<sup>th</sup> September 2019 which was adopted as part of his evidence. He testified that he has been in possession of the suit land since 1962. That he lives thereon and his three sons and two wives are buried on the same. That further, he has planted trees, maize, beans and other crops on the suit land.
  15. In cross-examination, DW1 stated that he did not have any photos to show the grave sites of his wives and children buried on the suit land or the cultivation that he carries thereon. He admitted that his 3<sup>rd</sup> wife does not live on the suit land. That his father had a mental disorder but that he did not have any document to prove the same. He also stated that he was not aware of the existence of PExhibit 5.
  16. On 13<sup>th</sup> June 2022, the honourable court directed parties to file and exchange submissions.
  17. The plaintiff's counsel filed submissions dated 4<sup>th</sup> December 2023. Briefly, counsel submitted that the plaintiff has been holding proper title to the suit land for the last forty years and urged the court to grant the prayers sought in the plaint.
  18. The defendant's counsel filed submissions dated 6<sup>th</sup> June 2023 and submitted that the plaintiff's registration as the 1<sup>st</sup> proprietor of the suit land was fraudulent, unprocedural, illegal and unlawful. That the plaintiff did not prove how he came to be the proprietor of the suit land, given that the sale of land agreement (PExhibit 5) was made between deceased 2 and 3. That the plaintiff had not obtained a grant of letters of administration to the estate of deceased 3. That deceased 2 did not have an absolute and exclusive title to the suit land since it was ancestral land which had been allocated to deceased 1. That the plaintiff failed to produce a copy of the Land Control Board Consent or transfer forms relating to the suit land. That further, the plaintiff has never occupied the suit land. Reliance was placed on various authorities, including the case of Dina Management Limited -vs- County Government of Mombasa & 5 others (2023) eKLR, to fortify the submissions.
  19. The defendant's counsel also filed further submissions dated 11<sup>th</sup> December 2023, wherein he urged the court to dismiss the plaintiff's claim and allow the counterclaim.

### **c. Issues for Determination**

20. It is established law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; See *Galaxy Paints Co Ltd-vs-Falcon Guards Ltd* (1999) eKLR.
21. I have duly considered the entire pleadings, the testimonies of PW1 and DW1 and the rival submissions. So, the following issues fall for determination:



- a. Whether the plaintiff is the bona fide owner of the suit land.
- b. Whether the order of eviction should issue against the defendant
- c. Whether the defendant's counterclaim is merited
- d. What orders can this court issue to meet the ends of justice?

#### **d. Discussion and Determination**

22. On the first issue, vide a plaint dated 3<sup>rd</sup> September 2018, the plaintiff sought among other orders, a declaration that he is the registered owner of the suit land. He contends that he is so registered, having purchased the same from deceased 2, who was a father to deceased 1, the original defendant.
23. The plaintiff produced in evidence a copy of the title deed in respect of the suit land, a copy of two official search certificates dated 16<sup>th</sup> November 2017 and 6<sup>th</sup> March 2018 and a copy of green card, all showing that the suit land is registered in his name, having been issued with a certificate of title on 9<sup>th</sup> February 1980. He also produced a copy of sale of land agreement dated 7<sup>th</sup> April 1967 relating to the suit land. The plaintiff explained that his late father, deceased 3, executed the agreement on his behalf. That he is the one who provided the money for payment of the purchase price.
24. On the other hand, the defendant averred that the plaintiff's registration as the 1<sup>st</sup> proprietor of the suit land was fraudulent, unprocedural, illegal and unlawful. That the plaintiff did not produce a copy of the Land Control Board Consent or transfer forms relating to the suit land to show how he came to be the proprietor of the same.
25. Section 26 (1) of the [Land Registration Act](#), 2012 (2016) provides as below:
  - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
    - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (Emphasis laid)
26. In *Dina Management Limited case* (supra), the Supreme Court of Kenya held that a title document is not sufficient proof of ownership of property where the origin of that title has been challenged. That the holder of the title document must go beyond the instrument itself and show that the process of acquisition from inception was legal. That the ownership of land whose title was not acquired regularly is not protected under Article 40 of [the Constitution](#) of Kenya, 2010 on the protection of right to property. The Court noted in part:
 

“...If the process that was followed prior to issuance of the title did not comply with the law, then such a title could not be held as indefeasible...”
27. Similarly, in *Munyu Maina –vs- Hiram Gathiha Maina* (2013) eKLR, the Court of Appeal stated thus:
 

“We have stated that when a registered proprietor of title is challenged, it is not sufficient to dangle the instrument of instrument as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the



legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (Emphasis added)

28. In the present case, the plaintiff produced a copy of a sale of land agreement that was entered into between his late father and the original defendant’s late father. The same was executed in line with Section 3(3) of the [Law of Contract Act](#) Chapter 23 Laws of Kenya as it was in writing, signed by both parties and each signature attested by witnesses accordingly.
29. Besides, it is not clear when the plaintiff’s father, deceased 3 passed on. Neither a death certificate nor a grant of letters of administration in respect of his estate was availed herein. Further, the plaintiff did not produce crucial documents in court such as Land Control Board Consent and transfer forms in respect of the suit land to prove that he was a bona fide owner thereof; see Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura -vs- Attorney General & 4 others [2017] eKLR.
30. Therefore, it is my considered view that the plaintiff has failed to prove to the satisfaction of the court how he came to be registered as the proprietor of the suit land herein. An order of eviction cannot issue against the defendant in the circumstances.
31. Section 80 (1) of the [Land Registration Act](#) (supra) empowers courts to rectify the Register. The section stipulates as follows:
  - (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
  - (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
32. In light of the foregoing, I hereby direct and order that the register of the suit land be rectified. That thus, the title of the suit land to revert back to the estate of Barnaba Omolo (deceased 3) for the purposes of carrying out succession.
33. As regards the counterclaim, I find that the same is partially merited to the extent that that the registration of the plaintiff as the 1<sup>st</sup> registered owner of the suit land is hereby nullified. However, the defendant has failed to prove why he ought to be registered as the bona fide owner of the suit land.
34. The defendant lamented that no spousal consent was obtained prior to the sale of the suit land. Also, that deceased 2 did not obtain his consent as the first born son.
35. It is important to note that the [Matrimonial Property Act](#), 2013 which requires one to obtain spousal consent when alienating an estate or interest in any matrimonial property, whether by way of sale, gift, lease, mortgage or otherwise, came into commencement on 16<sup>th</sup> January, 2014. The same does not apply retrospectively. Further, there was no documentary evidence produced to show that the suit land was being held in trust by deceased 2 for the defendant.
36. Sections 107 to 109 of the [Evidence Act](#) Chapter 80 Laws of Kenya provide that he who alleges must prove.
37. Also, it is settled law that the burden was always on the plaintiff to prove his or her case on a balance of probabilities; see Kanyungu Njogu -vs- Daniel Kimani Maingi (2000) eKLR.



38. To that end, it is my considered view that the plaintiff has failed to prove his case on a balance of probabilities. Thus, his claim fails.
39. On the other hand, the defendant has partially proved his counterclaim against the plaintiff on a balance of probabilities.
40. Wherefore, the plaintiff's suit is dismissed while judgment is entered in favour of the defendant in terms of the 1<sup>st</sup> prayer in his counterclaim as noted in paragraph 13(a) hereinabove.
41. Each party to bear own costs.
42. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 14<sup>TH</sup> DAY OF DECEMBER 2023**

**G.M.A ONG'ONDO**

**JUDGE**

**Present**

1. Mr. Agure Odera, Learned Counsel for the plaintiff- virtually
2. Mr. P. Ngoge, Learned Counsel for the defendant
3. Moses, Court Assistant

