



**Otieno & 2 others v Aoko ((Sued on his own behalf and as the Legal Administrator of the Estate of Elizafan Aoko Gumbo, Deceased)) (Environment & Land Case 15 of 2021) [2022] KEELC 2249 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 2249 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 15 OF 2021  
GMA ONGONDO, J  
APRIL 28, 2022**

**BETWEEN**

**ELISHA OKOTH OTIENO ..... 1<sup>ST</sup> PLAINTIFF  
FANUEL ACHOLA OTIENO ..... 2<sup>ND</sup> PLAINTIFF  
ISAIAH OJOWI OTIENO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JARED OTIENO AOKO ..... DEFENDANT  
(SUED ON HIS OWN BEHALF AND AS THE LEGAL ADMINISTRATOR OF  
THE ESTATE OF ELIZAFAN AOKO GUMBO, DECEASED)**

**JUDGMENT**

**A. INTRODUCTION**

- 1) At the heart of the instant dispute is the whole of land parcel number Kamagambo/Kongudi/1111 measuring approximately one decimal five seven hectares (1.57 Ha) in area (The suit land herein). It is a sub division of land parcel number Kamagambo/Kongudi/334 measuring an approximate area of forty three decimal zero hectares (43.0 Ha) in area (The parent land). The same is contained in Registry Map Sheet numbers 2 and 6 and located in Migori County within the Republic of Kenya.
- 2) The three plaintiffs namely Elisha Okoth Otieno, Fanuel Achola Otieno and Isaiah Ojowi Otieno are represented by the firm of Oguttu Mboya, Ochwal and Partners Advocates.
- 3) The firm of O.M Otieno and Company Advocates is on record for the defendant, Jared Otieno Aoko.



- 4) Originally, the present suit was lodged at Kisii Environment and Land Court but it was transferred to Migori Environment Court on 23<sup>rd</sup> May 2017. It was further transferred to this Honourable court, upon its establishment, with effect from 21<sup>st</sup> September 2021.
- 5) On 5<sup>th</sup> April 2018, this suit was consolidated with Migori ELC Case NO. 146 of 2017 (the cross suit herein) thus, this is the lead file as revealed in the proceedings of the said date in the twin files. The defendant namely Jared Otieno Aoko and the 1<sup>st</sup> plaintiff, Elisha Okoth Otieno herein, are the plaintiff and defendant respectively in the cross suit.
- 6) It is noteworthy that Migori Land Registrar's report dated 19<sup>th</sup> September 2019 and Migori County Surveyor's report of even date were duly filed in court on 25<sup>th</sup> October 2019 and 30<sup>th</sup> September 2019 respectively. They were filed pursuant to this court's orders of 1<sup>st</sup> July 2019 which directed, inter alia,
  - a) "The Land Registrar and County surveyor, Migori to visit land reference numbers Kamagambo/Kongudi/1111, 1106 and 1107 and to establish and or ascertain the original homes of the plaintiffs and their parents graves and the current occupation and file their reports(s) within the next sixty(60) days from this date.
  - b) During the visit in order number (1) herein above, tow elders from the plaintiff's side and two elders from the defendant's side to accompany the officers and participate during the exercise."

## **B. THE GIST OF THE PLAINTIFFS' CASE**

- 7) The plaintiffs' complaint in the lead file was originated by way of a plaint dated 19<sup>th</sup> January 2015 and filed in court on 23<sup>rd</sup> January 2015 seeking the orders infra;
  - a) Declaration that the defendant holds the suit land, on Trust for the plaintiffs.
  - b) Pursuant to the Declaration, the Honourable Court be pleased to grant an Order cancelling the registration of the suit land in the name of the defendant and directing the defendant to transfer the suit land, in favour of the plaintiffs.
  - c) In default, the Deputy Registrar of this Honourable Court be ordered and/or be at liberty to sign the relevant Application for Land Control Board Consent and Transfer Documents to facilitate compliance with Orders in (ii) above.
  - d) Permanent Injunction restraining the Defendant either by himself, agents, servants and/or anyone claiming under the defendant, from entering upon, evicting, interfering with and/or in any other manner, whatsoever, dealing with the suit land.
  - e) Costs of this suit be borne by the defendant.
  - f) Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.
- 8) On 26<sup>th</sup> October 2020, the 1<sup>st</sup> plaintiff (PW1) testified and relied on his list of documents dated 19<sup>th</sup> January 2015 and filed in court on 23<sup>rd</sup> January 2015 serial numbers 1 to 12 (PExhibits 1 to 12) which include a mutation (PExhibit 3) and photographs in respect of the suit land (PExhibit 12). He stated that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are his brothers. That the parent land was ancestral land belonging to one Ado (Deceased-1) but subsequently registered in the name of Elizaphan Aoko Gumbo (Deceased-2) who was their uncle and the defendant's father, to the exclusion of other members including Daudi



- Otieno Ajwang alias Otieno Nyangweso (Deceased-3) Ajwang Ado (Deceased-4) and Gumbo Ado (Deceased-5) of the family of Deceased-1. That the plaintiffs belong to the family of Deceased-3.
- 9) That upon the death of the deceased, the defendant obtained letters of administration in respect of the estate of the deceased-2, sub divided the original land into LR Nos. Kamagambo /Kongudi/1093 to 1119, among them, the suit land, where the plaintiffs live without their authority. That the defendant proceeded to register the suit land in his name and holds the same in trust for the plaintiffs. Therefore, it precipitated the present suit as per the lead file.
  - 10) PW2, Samwel Odhiambo Magambo, the chief East Kamagambo Location in Rongo Division relied on his statement dated 16<sup>th</sup> February 2021 and filed herein on 23<sup>rd</sup> February 2021, in his testimony. He stated that the suit land was ancestral land of the plaintiffs who reside thereon. That it belonged to Deceased-1 who was grand-father to the plaintiffs and the defendant in the lead file. That therefore, the plaintiffs are not trespassers on the suit land. That the defendant holds the land in trust for the plaintiffs.
  - 11) By his statement of defence dated 17<sup>th</sup> November 2011, the 1<sup>st</sup> plaintiff denied the defendant's claim in the cross suit and urged the court to dismiss the claim which was commenced as noted in paragraph 17 herein-below with costs. He termed the cross suit incurably defective, discloses no or no known cause of action and that the orders sought therein are incapable of being granted, among others.
  - 12) In the submissions dated 29<sup>th</sup> January 2022 and filed herein on 31<sup>st</sup> January 2022, learned counsel for the plaintiffs gave the background of the case making reference to, the adjudication and demarcation process, the parent land, the testimonies of PW1, PW2 and DW1 herein. Four (4) issues for determination including whether the plaintiffs have proved that the defendant is the registered owner of the suit land, albeit on trust for them are framed in the submissions.
  - 13) Counsel cited sections 24, 25, 26 and 28 (b) of the *Land Registration Act*, 2016 (2012), the Land Registrar's report dated 19<sup>th</sup> September 2019, the cases of *Kanyi Muthiora v Maritha Nyokabi Muthiora* (1984) eKLR and *Mbui Mukangu v Gerald Mutwiri Mbui* (2004) eKLR, to fortify the submissions. In that regard, it was urged that judgment be entered in favour of the plaintiffs in terms of the orders sought in the plaint in the lead file herein.

### C. THE GIST OF THE DEFENDANT'S CASE

- 14) By the amended statement of defence dated 1<sup>st</sup> November 2019, the defendant denied the jurisdiction of this court and the cause of action as he referred to Kisii High Court Misc Application No. 2 of 2012 and the cross suit herein. He stated, inter alia, that he is a stranger to Deceased-4 and Deceased-5 and that the plaintiffs are not entitled to the parent land which was adjudicated, demarcated and ultimately registered in the name of Deceased-2 by way of first registration on his personal account on 2<sup>nd</sup> January 1973. That deceased-2 settled the plaintiff's father (Deceased-3) on three parcels of land as stated in DExhibits 11, 12 and 13 at paragraph 16 (infra). That the parent land has since been sub divided into the other parcels of land including the suit land which was first registered in the name of Deceased-2 and that the defendant obtained the same by way of transmission.
- 15) The defendant also stated that PW1 is a trespasser on the suit land since year 2011 and that the plaintiffs' suit is an afterthought and an attempt by the plaintiffs who are ungrateful invitees and or guests on the suit land to unlawfully enrich themselves.
- 16) The defendant (DW1) testified on 10<sup>th</sup> November 2021 and relied on his 10-paged statement dated 8<sup>th</sup> November 2014 as part of his evidence. He stated in part that deceased-2 brought the plaintiffs' father (deceased -3) to the parent land which is shown in the certificate of official search dated 19<sup>th</sup>



July 2002 (DExhibit 1). He relied on his list of documents dated 8<sup>th</sup> November 2018 serial numbers 1 to 10 (DExhibits 1 to 10). That his deceased -2 settled the plaintiffs on LR numbers Kamagambo/Kongudi/106, 107 and 109 as revealed in the defendant's supplementary list of documents dated 1<sup>st</sup> November 2019 (DExhibits 11, 12 and 13) and that the plaintiffs did not raise any complaint thereof. That the plaintiffs live on the suit land instead of the parcels of land shown on DExhibits 11, 12 and 13.

- 17) The defendant's claim in the cross suit was generated by way of a plaint filed in court on 1<sup>st</sup> November 2011 where he stated that he is the legal representative of the estate of Deceased-2 who was the registered proprietor of the suit land. That PW1 fraudulently executed transfer documents, obtained title deed in respect of the suit land without his consent and trespassed thereunto by erecting structures thereon and is in the process of transferring and or sub dividing the same for sale. As a result, he has sought the orders, inter alia;

“A permanent injunction restraining the defendant thereof from trespassing, alienating and encroaching the parcel of land known as Kamagambo/kongudi/1111 with mesne profits thereof.”

- 18) By the defendant's submissions dated 21<sup>st</sup> February 2021 and filed on even date, reference was made to the orders sought in the plaint in the lead file and the cross suit as well, the background of the case, the origin of the suit land, the orders of 1<sup>st</sup> July 2019 and the plaintiffs' case in brief. Counsel for the defendant framed five issues for determination including whether the defendant held the suit land in trust for the plaintiffs and whether plaintiffs have established trust to warrant the orders sought in their favour.
- 19) To buttress the submissions, reliance was made on the case of *Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule and 3 others* (2014) eKLR and *Paul Kirinya v Delfina Katbiri* (2019) eKLR and it was submitted that the plaintiffs have never had any homestead or graves on the suit land. That thus, the plaintiffs' claim should be dismissed with costs and the defendant's cross suit should be allowed with costs to the defendant.

#### D. ISSUES FOR DETERMINATION

- 20) It is established law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see *Galaxy Paints Company Ltd v Falcon Grounds Ltd* (2000) 2 EA 385
- 21) I have carefully considered the parties' respective pleadings alongside their evidence and the submissions on record as regards both the lead file and the cross suit. On that score, I am of the considered view that the issues for determination in this suit are as hereunder;
- a) Who is the proprietor of the suit land?
  - b) Has the defendant (DW1) established the allegations of fraud on the part of the 1<sup>st</sup> plaintiff as alleged in the plaint in the cross suit?
  - c) Have the plaintiffs proved trust over the suit land as alleged in the plaint in the lead file?
  - d) Are the parties entitled to the orders sought in their respective pleadings?



## E: DISCUSSION AND DETERMINATION.

- 22) In respect of the first issue, section 2 of the [Land Registration Act](#), 2016 (2012) (The LRA), is quite instructive. It reads, among others;
- ”The term ‘Proprietor’ means-
- a) In relation to land or a lease, the person named in the register as the proprietor;....”
- 23) It is stated in paragraph 10 of the plaint as well as paragraph 17 of the statement of defence that DW1 is the current proprietor of the suit land with effect from 14<sup>th</sup> October 2004 under the Registered *Land Act* Chapter 300 Laws of Kenya (Repealed Act). That is a position fortified by PExhibit 4, PExhibit 5 and DExhibit 9 further to PExhibit 11 and DExhibit 8 herein.
- 24) Notably, the proprietor of the parent land was Deceased -2 with effect from 2<sup>nd</sup> January 1971. Indeed, land certificate was issued to him on 21<sup>st</sup> October 1973 as revealed in a copy of Green card and a certificate of official search regarding the parent land (PExhibits 1 and 2) alongside a certificate of official search dated 19<sup>th</sup> July 2002 (DExhibit 1) herein.
- 25) In examination in chief, PW1 stated;
- “.....The suit land is registered in the name of the defendant further to the completion of succession process.....”
- 26) It is therefore, abundantly clear that DW1 obtained proprietorship of the suit land by way of transmission by virtue of DExhibit 2: see also section 26 (1) of the LRA.
- 27) It is well settled that the estate of the deceased person is vested in the legal representative; see [Trouwistik Union International and another-vs-Jane Mbeyu and another](#) (1993) eKLR.
- 28) After DW1 obtained a grant (DExhibit 2), he caused sub divisions of the parent land as discerned in a copy of Green card and a certificate of official search in regard to the suit land (PExhibit 4 and 5) and Green cards (DExhibits 3, 4, 5, 6 and 9).
- 29) By dint of the land certificate issued as shown in PExhibits 4 and 5 and DExhibit 9, DW1 is presumed to be the absolute and indefeasible owner of the suit land. Be that as it may, the certificate of title thereto was subject to section 30 of the Repealed Act and currently the exceptions under sections 25 and 26 (a) and (b) of the LRA.
- 30) Concerning the second issue, the defendant set out the particulars of fraud at paragraph 4 of the plaint in the cross suit. It is trite that fraud and misrepresentation as grounds for impeaching a certificate of title in any case must be strictly pleaded and proved; see [Kurira Kiarie and 2 others v Sammy Magera](#) (2018) eKLR.
- 31) Similarly, in [Kinyanjui Kamau-vs-George Kamau](#) (2015) eKLR, the Court of Appeal held in part-
- “It is trite law that any allegation of fraud must be pleaded and strictly proved in cases where fraud is alleged. It is not enough to infer from the facts.”
- 32) Entry numbers 2, 3, 4 and 5 in PExhibit 4 show that PW1 lodged a caution on 27<sup>th</sup> January 2011 over the suit land claiming beneficiary interest over the same. That he became proprietor thereof on 28<sup>th</sup> October 2011 pursuant to proceedings and award in Rongo Land Disputes Tribunal dated 6<sup>th</sup> September 2011 (PExhibit 6 and DExhibit 7). The award and the subsequent decisions thereof were



quashed as shown in the Judgment (PExhibit 11 and DExhibit 8). Therefore, DW1 has proved that PW1 became the proprietor of the suit land as pleaded in the plaint in the cross suit.

- 33) On the third issue, the *Concise Oxford English Dictionary* 12<sup>th</sup> Edition at page 1549 defines the term “Trust” thus;

“An arrangement whereby a person (a trustee) holds property as it’s nominal owner for the good of one or more beneficiaries.”

- 34) Article 10 (2) (b) of *the Constitution* of Kenya, 2010 has elevated equity which does not exclude trusts as a Principle of Justice to a Constitutional Principle. In exercising judicial authority under Article 159 of the same Constitution, the courts are required to protect and promote the principles of equity, among others, as I subscribe to the decision in the case of *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR. Trusts including customary trusts are overriding interests as they subsist and affect all registered land, without being noted on the register under section 28 (b) of the LRA. The plaintiff outlined the particulars of trust at paragraphs 14 and 15 of the plaint in the lead file.

- 35) It is settled law that trust is a question of fact and has to be proved by way of evidence; see *Wambugu-us-Kimani* (1992) 2 KAR 58.

- 36) Furthermore, in the case of *Isack M’inanga Kiebia v Isaaya Theuri M’lintari and Isack Ntongai M’lintari* (2018) eKLR, the Supreme Court of the Republic of Kenya set out some of the elements that would qualify a claimant as a trustee and stated, inter alia;

“..... The categories of a customary trust are therefore not closed. It is for the court to make a determination on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on it’s own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust....”

- 37) It is important to note that the opinions in the reports generated pursuant to this court’s orders as stated in paragraph 6 hereinabove, are as follows:

- a) Land Registrar’s report dated 19<sup>th</sup> September 2019 and filed on 30<sup>th</sup> September 2019 concludes that-

“...The plaintiff’s parents grave, current occupation and home falls under Parcel No. Kamagambo/Kongudi/1106.”

- b) The conclusion and recommendation in the County Surveyor’s report dated 19<sup>th</sup> September 2019 and filed herein on 30<sup>th</sup> September 2019 read:

“It was therefore confirmed that the plaintiffs parents grave, their current occupation and their original homes all fall on parcel No Kamagambo/Kongudi 1106.

The other parcel No’s Kongudi 1107 also belonged to the plaintiffs whereas parcel No. 1111 belongs to Jared Otieno Aoko.”

- 38) The said expert reports completely disagree with PExhibit 12 and the allegations of PW1 that his house stands on the suit land. However, PW1 and DW1 were in agreement that the other three parcels of land were gifted to Deceased-3 and the plaintiffs who never raised any complaint thereto. PW2 stated that he was aware of the said reports and that there was no evidence of trust over the suit land. So, I



find every reason to endorse the said reports and the plaintiffs have failed to prove their allegations that DW1 holds the suit land on trust for them.

- 39) As regards the fourth issue, I bear in mind that the plaintiffs and the defendant have sought permanent injunctive orders in their respective suits. I guided by the criteria for the grant of injunctions as laid down in the case of *Giella v Cassman Brown & Company Ltd* (1973) E A 358....*Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 and *Nguruman Limited v Jan Bonde Nielsen and 2 others* 2014 KLR *National Bank of Kenya Limited v Shimmers Plaza Ltd* 2009 KLR 278 at 283 among other authorities. This court is mandated under section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011) to grant permanent preservation orders inclusive of injunctive relief. In light of the determination of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> issues herein above and in consonant with right to protection of the suit land, DW1 is entitled to permanent injunction sought in the cross suit.
- 40) DW1 has also sought mesne profit in his claim in the cross suit. The term “Mesne profit” is defined under section 2 of the *Civil Procedure Act* Chapter 21 Laws of Kenya and in the case of *Rioki Estate Co. (1970) v Kinuthia Njoroge* (1977) KLR 146. The relief is a form of special damage which must be strictly pleaded and proved as held in *Nakuru Industries Limited v S.S Mehta and sons* (2016) eKLR. Clearly, DW1 did not strictly plead and prove the same. Accordingly, I decline to grant mesne profit in favour of the defendant as sought in the plaint in the cross suit.
- 41) It is the finding of this court that the plaintiffs have failed to prove their case against the defendant on a balance of probabilities. Thus, they are not entitled to orders sought in the plaint in the lead file. On the other hand, the defendant has established his claim against the plaintiffs in the cross suit to the requisite standards and the claim partially succeeds.
- 42) Afortiori, the court makes the following final orders herein;
- a) The plaintiffs’ suit commenced by way of a plaint dated 19<sup>th</sup> January 2015 and filed in court on 23<sup>rd</sup> January 2015 in the lead file be and is hereby dismissed.
  - b) Judgment is hereby entered for the defendant against the 1<sup>st</sup> plaintiff in the cross suit initiated by way of a plaint dated on 1<sup>st</sup> November 2011 and duly filed in court on even date in terms of permanent injunction sought therein
  - c) Given the nature of the consolidated suits, the relationship between the parties and being guided by the decision in *Samuel Kamau Macharia and another v Kenya Commercial Bank and 2 others* (2012) eKLR, each party to bear his own costs in the twin suits.
- 43) It is so ordered.

**JUDGMENT DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**G.M.A ONG’ONDO**

**JUDGE**

**Present:**

1. E. Kijana, holding brief for Ms. Ochwal learned counsel for the plaintiffs
2. Ms. Opar, holding brief for O.M Otieno learned counsel for the defendant.
3. Terence, court assistant.

**G.M.A ONG’ONDO**



**JUDGE**

