



Ontubi & another v Mokuia & another (Environment & Land Case 57 of 2021) [2022] KEELC 3131 (KLR) (30 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3131 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 57 OF 2021**

JM KAMAU, J

MAY 30, 2022

BETWEEN

CHARLES MOMANYI ONTUBI 1ST PLAINTIFF

NAFTALI ABASI ONDIEKI 2ND PLAINTIFF

AND

DANIEL NYANARO MOKUA 1ST DEFENDANT

JASPER GETANGE NYANARO 2ND DEFENDANT

JUDGMENT

1. The plaintiff's claim is that the 1st defendant, the absolute registered owner of Title Nos North Mugirango/boisanga/862 and 3499 which are agricultural lands within the meaning of the [Land Control Act](#) (cap 302 Laws of Kenya) caused 2 separate portions to be carved out of LR No North Mugirango/boisanga/3499 and sold to the plaintiffs in 2 separate transactions. In November 1996 the 1st defendant applied for and was given consent by the land control Board, Ekerenyio to transfer the aforesaid portions together with the improvements thereon to the plaintiffs. Before the said transfer, the 2nd defendant fraudulently and without the 1st defendant's consent caused the entire land ie No North Mugirango/ Boisanga /3499 transferred to himself. This the 2nd defendant did in the absence of the original title deed. The plaintiffs' cause of action arose at Ikonye and they now pray that the register in respect of North Mugirango/ Boisanga/3499 be rectified in order to cancel the 2nd defendant's name as the sole proprietor and reinstate the first defendant's name and also that the court do compel the 1st defendant to transfer the 2 portions to the plaintiffs. They also pray for mesne profits for the unlawful occupation and costs of the suit. In his statement dated November 29, 2012 that provides flesh to the plaint, the 1st plaintiff said that the 2nd defendant is the son to the 1st defendant, now deceased. He says that he and the 2nd plaintiff bought 2 separate pieces of land out of LR North Mugirango/ boisanga/3499 and which were never transferred to them. The 2nd plaintiff Naftali Abasi Ondieki



- adopted the 1st plaintiff's witness statement word for word in his statement of even date. The 2 named themselves as the sole witnesses. In his statement of defense dated November 19, 2009, the 1st defendant denies the entire claim by the plaintiff.
2. The 2nd defendant equally denied the entire claim together with the fraudulent transactions attributed to him the 2nd defendant buttressed his denial by putting in a written statement dated 24/1/2013 filed in court on 29/1/2013. In the said statement Jasper Getange Nyanaro said that the suit land was their ancestral land which his father, the 1st defendant, who at the time of recording this statement had not died, had transferred to him so that he could hold it in trust for the other family members. He further said that the plaintiffs had acquired consent to have the land transferred to them outside the 6 months required by them after the purchase as required by law.
 3. Josiah Biticha Nyangau also recorded an undated statement which was filed in court on 7/11/2016 claiming that he also bought a piece of land 50 X 100 by measurements at Kshs 120,000 in 1986 from the 1st defendant which was later transferred in the name of the 2nd defendant. His area chief is said to have "ordered" the 2nd defendant to return the title deed to the lands office for revocation. But one wonders how Nyangau is related to this suit.
 4. Both sets of parties agreed on the statement of issues dated November 19, 2012 which were filed on 22/1/2013 as follows:
 1. Did the plaintiffs purchase from the 1st defendant (deceased) two separate portions of land comprised in LR NO North Mugirango/Boisanga/3499?
 2. Did the 2nd defendant fraudulently transfer the entire land to his name in total disregard of the plaintiffs' interests.
 3. Do the plaintiffs have a locus standi to institute the present suit.
 4. Is the suit herein statutorily time barred?
 5. Is the plaintiffs' suit defective, misconceived and incompetent?
 6. Do the plaintiffs deserve the order herein?
 7. Who is to bear the costs of the suit?
 5. The matter finally came up for Hearing on 27/6/2013 when the 1st plaintiff, Charles Momanyi Ontubi testified that the late 1st defendant, Daniel Nyanaro Mokuia prior to his death sold him a 30 X 150 feet parcel of land out of North Mugirango/ Boisanga/860
 6. The transaction began on 30/3/1996 and ended on 19/2/1997. The total purchase price was Kshs 93,924. The 1st plaintiff said that no title number was indicated during the written sale agreement. He also said he had bought 0.027 hectares portion out of the same parcel of land. According to his Advocate the witness looked confused and mixed up and was stood down before concluding his evidence, never to return to court and his Advocate Mr Motanga chose to proceed with the 2nd plaintiff, Naftali Abasi Ondieki.
 7. PW 2 stood by his statement dated November 29, 2012 and added that in 1996, the 1st defendant sold to him a portion measuring 50X100 feet out of LR No North Mugirango/boisanga/3499 at Kshs 100,000. He did produce a copy of sale agreement dated October 23, 1996 which did not indicate the land LR NO of the parcel sold because, as he said he had not been given the details of the parcel of land he was buying. He then said that he got the details of the property when he appeared before the land control board and that he still holds the mother title to date which he showed the court and which he



said was given to him by the 1st defendant in 2003. But unknown to the other parties by this time, the 2nd defendant had already transferred the entire land to himself.

8. The 2nd plaintiff presented in court copies of the Application forms for consent to transfer and mutation forms. The consent to subdivide was granted and all the documents of sub-division and transfer were handed over to the Land Registrar for transfer only to find that the land had already been transferred to the 2nd defendant. A copy of the register was opened on October 17, 1996.
9. The 2nd plaintiff testified that he initially wanted to buy plot No LR North Mugirango/Boisanga/862 but the 2nd defendant objected because it had tea and he then settled for the suit land as an alternative and plot no LR North Mugirango/Boisanga/862 was then transferred by the 1st defendant to the 2nd defendant. He then relied on his documents as follows:
 1. Copies of land sale agreements in respect of LR No North Mugirango/ Boisanga/3499.
 2. Copies of the application for consent and the letter of consent.
 3. Copies of the mutation forms of the resultant parcels thereof upon the subdivision of LR No North Mugirango/boisanga/3499 being parcels Nos 3534, 3535 and 3536.
 4. Letter dated 17/4/1997 from the District Land Registrar, Nyamira.
 5. A copy of the register of LR No North Mugirango/boisanga/862.
 6. A copy of the register of LR No North Mugirango/boisanga/3499.
10. On cross examination by Mr Nyambati, Mr Ondieki said that the agreement was entered into on October 23, 1996 and that he did not carry out a search before contracting to buy the suit land and that the 2nd defendant backdated the consent to transfer the suit property to himself and had it dated 11/9/1996. He also denied having induced the 1st defendant to sell to him the suit property. He concluded his answers to cross-examination by saying that he has not developed the suit property and that he has no documents to prove the mesne profits he claimed. In re-examination, the witness said that the consent to sub-divide the suit property was given on 7/11/1996 and when asked by the court, PW 2 said that he does not know if the mutation was registered by the Land Registrar and that the Land Registrar did not sign the mutation.
11. After failure to recall the 1st plaintiff due to his habitual absenteeism in court, the 1st plaintiff's counsel voluntarily closed his case. This paved way for the defence case.
12. By the 24/3/2022, when the matter came up for defense hearing the 2nd plaintiff was said to have passed on. But no evidence was brought to court to this effect. Defense witness 2, Jasper Getange Nyanaro adopted his recorded statement dated 24/1/2013 as his evidence in chief. He added that by the time the plaintiffs herein were transacting to purchase the suit property, the title to the suit land LR No North Mugirango/boisanga/3499 had already been transferred to him in 1996 after his late father, the 1st defendant obtained consent to transfer from the Land Control Board, Nyamira in September 1996. He concluded that there was no blood relationship between him and the plaintiffs. The 2nd defendant produced the following documents to fortify his case.
 1. Application for consent of the Land Control Board.
 2. Letter of consent.
 3. Transfer forms of land.
 4. Green card in respect to LR No North Mugirango/boisanga/3499.



5. Copy of the title deed in respect to the above.
13. When I retired to write the judgment and having been notified that the 2nd plaintiff, who had concluded his evidence in court though no documentary evidence had been produced, had died, I pondered whether to write the same or not. My comfort was found in *John Omondi Nallo (the administrator of the Estate of the late Jared Nallo Otieno) v Francis Aliaro Mapesa* [2018] eKLR Civil Appeal NO. 317 OF 2009 Kisumu where the Court of Appeal (EM Githinji, Hannah Okwengu & J Mohammed, JJ A) held that:
- “As provided by rule 1 of order XXIII of the *Civil Procedure Rules*, which was in place at the time the judgment was delivered, (now order 24 rule 1 of *Civil Procedure Rules*, 2010), the death of a party to a suit does not cause the suit to abate if the cause of action survives or continues.
- There is no doubt that the cause of action survived the death of the deceased defendant as it related to title to land. The judgment delivered determined title to property and thus it was a judgment in rem. Moreover, the deceased had no further role to play after the conclusion of the trial. What remained was a judicial function of pronouncing the judgment. The estate of the deceased could be represented at the delivery of the judgment by a legal representative of the deceased or by a counsel instructed by the estate.
- The counsel for Jared Nallo did not apply for leave to cease acting and indeed continued to act for the legal representative including filing the present appeal. It is reasonable to infer in the circumstances that counsel was acting for the estate at the time of the pronouncement of judgment. Moreover, no prejudice has been alleged.
- In the circumstances, the death of Jared Nallo did not render the court incompetent to pronounce the judgment and the judgment so pronounced was valid.....”
14. The 1st plaintiff never completed his evidence and did not even tell the court what he wanted. He looked confused and had to be stood down at the request of his Advocate.
15. As for the 2nd plaintiff, it is unfortunate that a trend has been engrained in our land offices where it is now very common for vendors to hand over the physical title deeds in exchange for money to a purchaser and then run to the lands office to transfer the same land to another purchaser without the mother title deed. This culture must be uprooted. Apparently, this is what happened here between the 1st defendant and the 2nd plaintiff. The latter produced a copy of the sale agreement dated October 23, 1996 which clearly shows that he bought a piece of land at Kshs 100,000/= measuring 50 by 100 feet. His Identity card number was indicated as 008xxxx and that of the vendor, the 1st defendant being 1600xxxx. Those who witnessed the execution of the Agreement were Stephen Nyandwiga ID No 2705xxxx and Evans Ondieki ID No 879xxxx/70. Unfortunately, the letter of consent was issued by the Land Control Board Nyamira on November 28, 1996 and another one had been issued on 11/9/1996 by the same panel in respect to LR No North Mugirango/Boisanga/3499. The one for 11/9/1996 showed that the transfer was done as a gift. The latter one was to the 1st defendant himself. On 17/4/1999, the District Land Registrar, Nyamira. Mr S M Muthari wrote to the 2nd defendant to the effect that the 1st defendant had disowned any transfer from himself to the 2nd defendant in respect of LR NO North Mugirango/Boisanga/3499. By this time the land had already changed hands from the 1st defendant to the 2nd defendant on 6/12/1996 the day a title deed was issued.
16. The 2nd plaintiff has met the threshold required in that he entered into a written sale contract for a piece of land measuring 50 x 100 feet from the late 1st defendant and paid Kshs 100,000/= for the same



and was even given the mother title deed. It is unclear how the 2nd defendant ended up transferring the entire land void of the original title deed which he never explained to the court. This kind of transfer without the original title deed and in the absence of the gazette of loss of the original Title cannot amount to anything short of fraud. The initial registered owner went to the lands office to complain that he had not transferred the land to the 2nd defendant, his son and could not understand how he got the suit land in his name. This despite mutation forms having been applied for by the 1st defendant and approved on November 15, 1996.

17. In *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR the Court of Appeal at Nyeri in Civil Appeal No 239 of 2009 held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

18. The moment the 2nd plaintiff showed the original title deed in respect to the parcel of land in dispute and produced a letter from the District Land Registrar to the effect that that the 1st defendant had disowned any transfer from himself to the 2nd defendant in respect of LR NO North Mugirango/ Boisanga/3499 it was incumbent upon the 2nd defendant to go beyond the instrument of Title and prove the legality of how he acquired it as well as showing that the procedure of acquisition was legal. Due to the sacrosanct nature of a title deed, the procedure of acquiring it must be above board.
19. This is a judgment in rem and although the 1st defendant died before the conclusion of this case, the claim does survive the deceased. The subject matter is still intact and even if it has changed hands, that was done without taking into consideration the 2nd plaintiff’s interests. Consequently, the 2nd plaintiff’s case succeeds and I order that: -
- a. The parcel of land known as North Mugirango/boisanga/3499 be sub-divided into two to create a parcel of land measuring 50 by 100 feet to be registered in the name of the 2nd plaintiff.
 - b. Should the 2nd defendant fail to do so within the next 30 days from the date hereof, the Deputy Registrar of this court do execute sub-division and transfer instruments in respect of a parcel of land measuring 50 by 100 feet in favour of the 2nd plaintiff.
 - c. The Land Registrar, Nyamira do rectify the register in respect to LR No North Mugirango/ boisanga/3499 to reflect 1 and or 2 above.
 - d. The prayer for mesne profits is hereby disallowed.
 - e. The 1st plaintiff’s claim is hereby disallowed for want of complete trial.
 - f. I grant the costs of this suit to the 2nd plaintiff to be borne by the 2nd defendant.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 30TH DAY OF MAY 2022.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Joyce Sibota



plaintiff – Mr. R. M. Onyancha for Mr. Orina
defendants – Mr. Okemwa for 2nd Defendant

