



**Rongai v Busia District Land Registrar (Environment & Land Case E001 of 2020) [2022] KEELC 2206 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2206 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E001 OF 2020**

**AA OMOLLO, J  
JUNE 23, 2022**

**IN THE MATTER OF ARTICLE 40 CLAUSE (2) (A) READ TOGETHER WITH ARTICLE 22, CLAUSE (1), ARTICLE 20 CLAUSE(1), (2), (3)(B), ARTICLE 24 CLAUSE (1) AND ARTICLE 23 CLAUSE (3)(E) OF THE CONSTITUTION OF KENYA 2010 ON THE BILL OF RIGHTS**

**BETWEEN**

**NOVA OGOTI RONGAI ..... PETITIONER**

**AND**

**BUSIA DISTRICT LAND REGISTRAR ..... RESPONDENT**

**JUDGMENT**

1. For determination is a Petition dated 18<sup>th</sup> September, 2020 wherein the Petitioner avers that his rights under Article 40 clause 2 (a) of *the Constitution* of Kenya and the Bill of Rights have been contravened and seeks for the judgement against the Respondent and orders that:
  - a) Compensation for the deprived 16 years rights of absolute quiet possession and substantial loss of user;
  - b) Interest from filing this petition until full payment at court interest rates; and
  - c) Any other relief that the Court may deem fit to grant.
2. The Petitioner avers that he is the legal representative of the estate of Hellen Kwamboka Rongai and consequently Bukhayo/bugengi/1533. That vide a judgement of the Court of Appeal sitting in Kisumu in case No. 85 of 2015 delivered on the 20<sup>th</sup> of July, 2017, the Court rectified the registry on entry No. 13 by nullifying and cancelling the registration executed by the Busia District Land Registrar on 19<sup>th</sup> December, 2001 as entry No. 7 and on 17<sup>th</sup> November, 2009 as entry no. 10 and ordered that the title revert to the deceased's name as entry no. 5. The Petitioner further avers that it is due to the unlawful registrations executed by the Respondent by failing to exercise reasonable due diligence and



- disregarding the law on the prescribed procedure of the verification of registration instruments that he was deprived of his absolute fundamental rights of possession to the property number Bukhayo/Bugengi/1533 in violation of Article 40 clause 2 (a) of *the Constitution*.
3. The Respondent filed its Replying Affidavit on the 8<sup>th</sup> of December, 2020 deposed by one Wilfred Nyaberi, the County Land Registrar in charge of Busia Land Registry. The Respondent enumerated the functions of its office which include: keeping records and registering ownership documents or any documents affecting interests in land when duly presented and upon verifying and confirming that the documents are duly executed and registrable. With regards to the Petitioner's averments, the Respondent deposed that the entries alluded to in relation to the suit land, Bukhayo/bugengi/1533 were registered in the ordinary way of business without any notice of fraud upon confirmation that the documents presented were registrable.
  4. The Respondent deposed further that the Petition lacked precision of facts and did not clarify the alleged breach of infringement by the Land Registrar for his to respond to the allegation and that he was unable to reconcile how the entries made in the register in the course of discharging his duties and in good faith can amount to damages and breach of any person's rights. That the Petition was a non-starter and a waste of the Court's time as the entries complained of were initiated and presented to the Respondent by the Petitioner's father who was the husband of Hellen and that the sales were nullified when the Petitioner took out the grant of administration. That the entries in the record that form the basis of this Petition were placed by the purchaser's claiming purchaser's interest which claims were well within the law and hence cannot form the basis of a petition and particularly when no person moved the Land Registrar to remove the same while the case was pending in Court. The Land Registrar urged this Court to dismiss the petition with costs.
  5. The matter was listed for directions on the 8<sup>th</sup> of December, 2020 and the Court directed that the same proceed by way of *viva voce* evidence. The hearing kicked off on the 8<sup>th</sup> of March, 2021. The Petitioner testified as PW1. He stated that he complaints related to the registrations done on 19<sup>th</sup> December, 2001 and 17<sup>th</sup> November, 2009 because they stopped him from carrying out his subsistence on the land being a jua kali car wash when the buyer, Samuel Osoro took possession of the land in December, 2001 and displaced him. That he resumed occupation on the 22<sup>nd</sup> of December, 2017 which is entry number 14. PW1 stated that he is seeking compensation because he used to earn K.Shs. 1,500 a day from the carwash on portion of the land adjacent to the weighbridge and on the other portion, he grew vegetables. That the Land Registrar failed to verify the documents therefore registering the wrong parties and giving the people permission to enter the land. He concluded by producing a copy of the green card as PEx 1 and the valuation report as MFI 2 and urged this Court to give him the orders contained in his petition.
  6. On cross-examination, PW1 confirmed that James Masaki Rongai was his biological father and Hellen was his mother and he was not aware that his father had a power of attorney and only learnt of the same during the case in previous proceedings. That he did not have the letters of administration in 2001 and that in the same year, the property was charged to NBK Ltd, Kisii Branch. He stated that he became aware that the money paid by one Samuel Osoro was what was used to offset the loan. PW1 also confirmed that he was aware that Samuel had instituted a suit against his father and him K.Shs10.5m. He confirmed that entry number 11 in PEX 1 is in his name and the same was entered by the Land Registrar who has power under section 4 of the *Land Registration Act* to register documents. The Land Registrar was not a party to ELC No. 30 of 2013 and later 85 of 2015 and his father was not a witness nor a party to the case. He stated that he had not sued his father because he did not see his role in the case despite the fact that it was him who had initiated the purchase price with the bank. PW1 concluded



- by stating that the Court of Appeal in case number 85 of 2015 at paragraph 25 stated that the Land Registrar should never have registered the transfer. This marked the close of the Petitioner's case.
7. The Respondent's case commenced on the 2<sup>nd</sup> of December, 2021 with the Busia County Land Registrar, Wilfred Nyandoro Nyaberi testifying as DW1. He stated that he started working in Busia in May, 2019. He adopted his replying affidavit filed on the 8<sup>th</sup> of December, 2020 as his evidence. He stated that the present dispute is in regard to entry number 7 in the green card which entry was a transfer made by their office. That the transfer of land documents was presented from Helen Kwamboka to Samuel Osoro. That on the 6<sup>th</sup> of September, 1984 Helen Kwamboka charged the property to National Bank of Kenya Limited to secure a loan of K.Shs. 5,000 and the same was discharged on the 16<sup>th</sup> March, 1987. That on the 18<sup>th</sup> of May, 1987 Helen charged the same property to National Bank of Kenya for a loan of K.Shs. 100,000 and the same was discharged through private treaty between James Rongai and the bank. That after the discharge, entry number 7 was made by a purchaser through private treaty vide a sale agreement between James Rongai and Samuel Osoro. That James Rongai initiated the transfer in entry No. 7.
  8. DW1 stated further that the entry was properly registered by his office as Samuel paid for the land as well as the documents presented for registration. That on the face of the documents he could not read any irregularity because he neither knew the owner of the property or that she was deceased. That they only did their statutory duty and similarly executed the judgement of the Court of Appeal accordingly. That the Petitioner took out letters of administration with respect to the estate of Hellen and initiated the transfer and registration of the suit property in the name of Jesse Ehingati.
  9. Upon cross-examination, DW1 stated that when documents are presented before them, they do not know who the parties are and it is expected that only the transferee, transferor or their agents present the documents. He confirmed that a transfer document was presented. He elaborated that for the bank to agree to discharge the title, it meant that James Rongai either presented them with a power of attorney or may have falsified documents. He confirmed that he had a letter from National Bank dated 15<sup>th</sup> March, 2001 addressed to James Rongai with the reference being: Your Debts in Our Books. DW1 concluded by stating that although he did not have any document that James Rongai signed, they did not assist him with the registration in any way and that they only referred to the documents presented for registration as there can be no transfer without documents which documents have to be verified.
  10. On re-examination, DW1 reiterated that in the Court of Appeal decision the 1<sup>st</sup> Respondent was Samuel Kabati Osoro and on page 2 of the Court of Appeal James is referred to as the husband of the registered proprietor and paragraph 25 shows that there is a power of attorney. The dispute with the transfer was because James Rongai did not have letters of administration.
  11. The Petitioner filed his submissions on the 13<sup>th</sup> of November, 2020 and further submissions on the 7<sup>th</sup> of January, 2022. He submitted that the Land Registrar erred in failing to find that James Masaki Rongai was not the registered owner of the suit land as he did not have the proper instruments to represent the registered proprietor and as such he could not possibly transact in the land in any manner. That the Land Registrar did not effect the registrations on the 19<sup>th</sup> of December 2001 with due diligence as he failed to properly confirm and verify the instruments of registration under section 14c of the *Land Registration Act*. That the registrations deprived him 16 years of absolute and quiet possession of the land in violation of Article 40(2)(c) of the Bill of Rights. That he was subjected to impoverishment and economic hardship in violation of Article 20(2) of the Bill of Rights and similarly due to the displacement and unfavorable social setting he had nowhere to start his youthful life contrary to Article 24(1)(a) of the Bill of rights. He urged this Court to award him compensation for the lost period of quiet possession that spanned from 19<sup>th</sup> December, 2001 to 22<sup>nd</sup> December, 2017.



12. The Respondent filed their submissions on the 8<sup>th</sup> of February, 2022. They submitted that the Petition is based on Article 40 of *the Constitution* (the Bill of Rights) and arises from the judgement of the Court of Appeal sitting at Kisumu vide Civil Appeal No. 85 of 2016 in which the Court at paragraph 25 and 26 ordered for rectification of entry No. 13 by nullifying and cancelling the registrations executed by the Respondents on 19.12.2001 as entry No. 7 and 17.11.2009 as entry No. 10 and ordered that the title revert to the deceased's name as entry No. 5. The Respondent submitted that the issues for determination was whether the Petitioner laid a basis for the grant of the orders sought.
13. The Respondent while relying on the cases of *Anarita Karimi Njeru vs. The Republic* (1979-1980) KLR 1272 and *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR submitted that this being a constitutional petition, the Petitioner ought to have set out to a reasonable degree of precision on why he complained of and particularly the provisions said to be infringed by the Respondent. That the Petitioner failed to do so and no cogent evidence was tendered to support the allegations if any. That the Land Registrar performed his statutory underpinned duties in accordance with the law. That the Petitioner was fully aware and benefitted from the sale by way private treaty which was initiated by his father for the offsetting of a loan that then facilitated the discharge of the title. The Respondent invited this Court to declare the Petitioner as a vexatious litigant.
14. The Respondent also submitted that the suit property has been subject to litigation dating back to 2012 vide Busia ELC No. 30 of 2012 which was a suit between Samuel Kabati Osoro and Charles Oyaró Orangi with the Petitioner being the Plaintiff in the suit where he sought orders for the cancellation of the transfer of the property from the deceased to the Defendants on the grounds that his father who transferred the property did not have capacity. That the Petitioner did not seek compensation against the Defendants in the case. That he has failed to prove loss of user suffered by documentary evidence and or the farming he used to carry out on the suit land. That the Petitioner's father gave the purchasers the permission to occupy the suit land and the purchasers not being the Respondent's agents and/or representatives, therefore the Petitioner cannot claim that the Respondent deprived him quiet possession and occasioned him loss. That the petition does not raise any constitutional question and even if it did the allegations were not substantiated. They urged this Court to find that the Petition lacks merit and to dismiss the same with costs.
15. After considering the aforementioned submissions, the main question for determination herein is whether or not this Petition has merit and consequently whether the orders sought can be granted. The Petitioner's averments are that the registration of entries No. 7 and 10 on the title of the suit property deprived him of 16 years of quiet possession, and in turn loss of user for business and farming. His petitioned is grounded on article 40 (2) (a) of *the Constitution* and buttressed by the provisions of articles 20 (1), (2), (3)(b), 22 (1), 23(3)(e) and 24 (1). Article 40 (2) (a) provides thus:

“Parliament shall not enact a law that permits the State or any person-

- a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description;”

16. The gist of the Petitioner's claim is that the Respondents failed to exercise due diligence when they failed to examine the documents presented for registration. According to him, it was the duty of the Land Registrar to note the forgeries. Section 14(1) of the *Land Registration Act*, CAP 300, Laws of Kenya lists the general duties of Land Registrars as hereunder;

The Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by this Act



- a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;
  - b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;
  - c) refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;
  - d) cause oaths to be administered or declarations taken and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration;
  - e) order that the costs, charged and expenses as prescribed under this Act, incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of this Act shall be borne and paid by such persons and in such proportions as the Registrar may think fit.
17. The Land Registrar in his evidence stated that the entries were made on the request of one Samuel Osoro who had bought the suit land vide private treaty with James Rongai, who the Petitioner confirmed was his father. He elaborated further that registration can be initiated by a transferor, a transferee or their respective agents. He submitted that from the documents presented for registration and transfer, he did not detect any fraud or suggestion of fraud from the face of it hence the decision to proceed with the registration. He added that James Rongai had successfully managed to discharge the charge on the title and as such figured that he had authority to transfer the title.
18. The Petitioner has not provided evidence to confirm that the actions by the Land Registrar were ultra vires those listed in the Act and as a consequence of the said action he incurred loss of user nor the law under which his right to property were deprived or were threatened to be deprived. The Petitioner did not present evidence that the Respondents colluded with the parties while executing their statutory mandate. The principle of precision in setting out allegations of constitutional violations and infringements were clearly and specifically laid out in the case of *Anarita Karimi Njeru v. Republic* (1979 – 1980) KLR 1272 to include the following:-
- a) Constitutional violations must be pleaded with a reasonable degree of precision;
  - b) The articles of *the Constitution* which entitles rights to the Petitioners must be precisely enumerated and how one is entitled to the same;
  - c) The violations must be particularized in precise manner;
  - d) The manner in which the alleged violations were committed and to what extent must be clearly stated.”
19. The Petitioner sought to rely only on the judgement of the Court of Appeal that ordered the cancellation of the entry and the subsequent title that had been issued. I have read the determination rendered by the Court of Appeal in paragraphs 18-27 and there is nowhere the Respondent is faulted. The Court of Appeal instead faulted the Petitioner’s father who sold the suit land without capacity to do so for lack of letters of administration of the estate of his deceased wife. The Petitioner was the plaintiff in the matter that resulted in the court of appeal determination did join the Respondent in that suit so that he cannot wholly rely on the findings of the court of Appeal when the Respondent



was not heard. Thus, the Petitioner was under an obligation in this petition to establish the allegations of negligence of the Respondent.

20. The *Land Registration Act* provides for the right to indemnity under Section 81 which arises where a person suffers damage by reason of any rectification of the register under the Act or by reason of any error in a copy of, or extract from the register or document or plan certified under the Act. The cancellation of the entries in the register were occasioned by the decision of the Court Appeal and on the basis that James Rongai did not have the capacity to transfer the land. The Court of Appeal in its judgement stated that, “as the Appellant’s father, James Masaki Rongai, who is not a party to the proceedings, has brought about the unhappy state of affairs...” There was no blame apportioned to the Land Registrar by the Court of Appeal and as such he cannot be blamed for doing his work.
21. Assuming the Petitioner proved that the Respondent was negligent (which he failed to do), he was still under a duty to demonstrate that he suffered loss entitling him to compensation. The loss complained was being deprived of quite possession and that he was carrying out a carwash business where he earned Kshs.1,500. Besides the title deed exchanging hands, the Petitioner does not tell the court when and how he was dispossessed of the land if he was in occupation at the first instance. Secondly, if he is claiming loss of business, he is under obligation to show that indeed such a business was on going which proof is by way of either certificate of registration of the business, receipts for levies paid to the county government (or municipal council), income tax returns for the business or receipt for purchases made for operating the business. For the agricultural products, was the petitioner buying seedlings, fungicides, engaging helpers and paying them? No such evidence was led to entitle him to compensation. The valuation report by Dunhill Africa Valuers Ltd produced gave the value of the land in view of advising on its open market value. The report does not make any reference to any activities being carried out on the land.
22. In light of the foregoing, I am therefore persuaded to find as I hereby do that the Petition lacks merit and the same is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 23\*RD DAY OF JUNE, 2022.**

**A. OMOLLO**

**JUDGE**

