



REPUBLIC OF KENYA



**Obiba v Bwire & 6 others (Environment & Land Case 29 of 2018)  
[2022] KEELC 145 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 145 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 29 OF 2018**

**AA OMOLLO, J  
JUNE 22, 2022**

**BETWEEN**

**PETER JOLANA OBIBA ..... PLAINTIFF**

**AND**

**MARY NABWIRE BWIRE ..... 1<sup>ST</sup> DEFENDANT**

**REGINA WANGIRA ..... 2<sup>ND</sup> DEFENDANT**

**JONANES BOY OKOBA ..... 3<sup>RD</sup> DEFENDANT**

**JAMES WAFULA WANGIRA ..... 4<sup>TH</sup> DEFENDANT**

**LEONORA APONDI ..... 5<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR BUSIA COUNTY ..... 6<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff brought a suit against the defendants praying for judgment as follows;
  - a. An order directing the Registrar of Lands Busia Land Office to cancel the title deed issued to the 5<sup>th</sup> defendant and restore the former title deed in the register of Land Parcel No. Bunyala/Bulemia/309.
  - b. An order directing the registrar of Lands Busia Land Office to honour the award by the Land Dispute Tribunal by having the said parcel of land subdivided into two portions. Consequently, two title deeds to be issued to the plaintiff and the other to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.



- c. That a permanent injunction be issued against the defendants, their servants and or employees from entering into carrying out any activities or interfering with the plaintiff's enjoyment of his 2.1HA portion of the said parcel of land.
  - d. Costs of this suit.
  - e. Any other relief this court may deem fit and just to grant.
2. The plaintiff impleaded that sometime in 1972 or thereabout he left home for Tana River County where he stayed and set up some business and left the suit parcel of land in the possession of his late uncle Joram Ouma Wangira. That he returned home in 1982 and discovered that his uncle had passed on with the suit land had been registered in the deceased's uncle name. In the year 2009, one Mathias Nawiri, a purchaser of a portion of the said parcel of land lodged a complaint at Budalangi Land Dispute Tribunal which ruled that the parcel of land Bunyala/Bulemia/309 be shared between Jackson Oloo Wangira and the plaintiff each having to occupy approximately 2.1HA and the present boundary between the two be retained. The plaintiff further pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants applied for Letters of Administration vide Succession Cause No. 108 of 2012 in the estate of Jackson Oloo Wangira and caused the registration of the suit title their names.
  3. Subsequently, the 1<sup>st</sup> and 2<sup>nd</sup> defendants donated power of attorneys to the 3<sup>rd</sup> and 4<sup>th</sup> defendants who then transferred the said parcel of land to the 5<sup>th</sup> defendant who is the current purported owner. The plaintiff alleged that the actions by the defendant was unlawful and fraudulent which he outlined their particulars follows;
    - i. Concealing relevant information to the relevant authorities.
    - ii. Transferring the entire parcel of land to the 5<sup>th</sup> defendant without taking care of the plaintiff's interest.
    - iii. Acquiring the said parcel of land by fraud.
  4. He further outlined the particulars of fraud against the 6<sup>th</sup> defendant as follows;
    - i. Transferring the suit land fraudulently.
    - ii. Ignoring the rights of the plaintiff.
    - iii. Conspiring with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants to defeat the legal rights of the plaintiff.
    - iv. Purporting to transfer a parcel of land to the 5<sup>th</sup> defendant who has no proprietary interest in the suit land.
  5. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants entered appearance and filed a joint statement of defence dated 22<sup>nd</sup> May 2018. The 5<sup>th</sup> defendant pleaded that at no point in time did one Joram Ouma Wangira hold the subject property in trust for the plaintiff and that she is the lawfully registered proprietor of L.R. No. Bunyala/Bulemia/309 jointly together with Kiloyi Ongawo Oloo. The defendants averred that if at all the plaintiff had been adjudged in land dispute no. 108 of 2009 to be entitled to a portion of the subject land then he ought to have objected to the proceedings in Succession Cause no. 108 of 2012. The defendants denied the particulars of fraud as raised and demanded strict proof thereof.
  6. The 3<sup>rd</sup> to 5<sup>th</sup> Defendants raised a counterclaim and averred that the plaintiff without any justifiable cause has trespassed and invaded on their property and has proceeded to erect thereon some structures which are temporary which the Defendants now seeks eviction and demolition orders. They prayed for judgment to be entered against the plaintiff as follows;



- a. A declaration that the 5<sup>th</sup> Defendant is duly registered proprietor of L.R. No. Bunyala/Bulemia/309.
  - b. An order do issue directed to the plaintiff to remove the structures he has erected on L.R. No. Bunyala/Bulemia/309.
  - c. A declaration that the plaintiff is a trespasser on L.R. No. Bunyala/Bulemia/309.
  - d. An eviction order to issue against the plaintiff for his eviction from occupation of the property compromised in L.R. No. Bunyala/Bulemia/309.
  - e. The Police Officer Commanding Port Victoria Police Station, do assist in supervising and effecting the eviction of the Defendant from the property known as L.R. No. Bunyala/Bulemia/309.
  - f. Any other relief the court deems fit.
  - g. Costs of this suit and interest thereon.
7. The 6<sup>th</sup> and 7<sup>th</sup> Defendants entered appearance and denied the averments of fraud as contained in paragraph 16 of the plaint and put the plaintiff to strict proof. They averred that the suit parcel of land No. Bunyala/Bulemia/309 as per the records held by the 6<sup>th</sup> defendant show that the suit land was never at any time owned by the plaintiff. They averred that the plaintiff's claim is statute barred as per the provisions of the *Limitation of Actions Act*.
  8. Thereafter, the plaintiff filed a reply to the defendants' defence and counterclaim on 31<sup>st</sup> May 2018. He denied the counterclaim in toto and pleading that without prejudice to the foregoing, he has been staying on the suit land since 1982, way back before the 5<sup>th</sup> defendant and one Koloyi Ongawo Oloo obtained the purported title deed hence he cannot be a trespasser on his own land.
  9. The matter proceeded for hearing on 19<sup>th</sup> October 2021 when Peter Jolana Obiba testified that L.R. No. Bunyala/Bulemia/309 was initially his but was later registered in the late one Joram Ouma Wangira, his uncle. That in 1972 he left home to live and work in Tana River County and stayed there until 1982 when he returned home. As per his evidence, he left his land in the possession of his late uncle who held it in his trust and upon his return in 1982, he occupied the Southern part of the said parcel of land where he put up a home where he is staying todate.
  10. The plaintiff continued his evidence that in the year 2009, one Mathias Nawiri, a purchaser of part of his land lodged a complaint with Budalangi Land Dispute Tribunal which was heard and the tribunal ruled that Bunyala/Bulemia/309 be shared between Jackton Oloo Wangira and him and the award by the Tribunal was adopted by court on 29/11/2009 but was never implemented. The plaintiff avers that the succession cause was filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants while he was serving a jail term of 2 years and therefore he had no chance to file his objection. That had the 1<sup>st</sup> and 2<sup>nd</sup> defendant disclosed relevant information to the court, his interest in the estate would have been catered for. He said that in order to defeat justice, the 2<sup>nd</sup> defendant circumvented the law and transferred the said parcel to the 5<sup>th</sup> Defendant and upon his discovery of the said interference, he conducted official search which revealed to his serious disbelief that his portion of the land, the subject of this suit had been transferred to the 3<sup>rd</sup> defendant. He filed this suit to his land back and produced the documents in his list as PEX 1-6 in support of his claim.
  11. Upon cross-examination by counsel for the defendant, the plaintiff stated that Joram Wangira is a brother to his mother. He was born on L.R. No. 309 but he did not know the 1<sup>st</sup> and 2<sup>nd</sup> defendants and was not they were wives to Joram. He confirmed that the case before the Tribunal was filed by



Mathias who he sold a portion of his share to land and which portion Mathias used to cultivate. He was in Tana River so he did not know how long Mathias ploughed the land and he did not know succession cause No. 108 of 2012 because they did not tell him. He did not file any objection proceedings in that succession cause and he has never had any title in his name. That he did not get the suit land from his uncle but it is an inheritance from his father. In re-examination, the plaintiff reiterated that when he went to Tana River, he left the land under the care of his uncle. That the tribunal shared the land between himself and Patrick yet none of the defendants have challenged the Land disputes tribunal award.

12. Mathias Ouma Nawiritestified as PW2 by adopting his witness statement dated 13/4/2018 as his evidence in chief. He testified that the plaintiff was the initial owner of L.R. No. Bunyala/Bulemia/309 and in 1985 the late Joram Ouma Wangira registered the entire parcel of land in his name. He said that between 1970 and 1972, the plaintiff sold part of his land to him at Kshs.20,000/= and he cultivated the portion of land though he had not been able to get a title deed. He later lodged a complaint with the Bunyala Land Dispute Tribunal which ruled in his favour and ordered that the plaintiff occupies the southern part of L.R. 309. He stated that he has no issues with the plaintiff save that he is in the process of getting him a title deed. He continued that the 5<sup>th</sup> defendant fraudulently and unlawfully registered the entire parcel of land to her name. He prayed that the land registrar should cancel the said title and subdivide the said parcel of land into two portions and issue two new title deeds in the name of the plaintiff and the 5<sup>th</sup> defendant.
13. Upon cross-examination by counsel for the 3<sup>rd</sup> to 5<sup>th</sup> defendants, PW2 stated that he is the one who sold the plaintiff land and he cannot recollect the parcel of land number he sold. He denied that it was the plaintiff who sold him the land.
14. Leonora Apondi Oloothe 5<sup>th</sup> testified as the defendants' only witness, DW1 by adopting her witness statement dated 22/5/2018 as her evidence in chief. She stated that she is the registered proprietor of the property known as Bunyala/Bulemia/309. She stated that the land belonged to the plaintiff but he sold the land to her husband Jackton Oloo Wangira when she was at work in town. She said that Jackton sent Joram to go and pay the plaintiff on his behalf and Jackton and Joram were blood brothers. Jackton passed on and she did succession over his estate and had the land registered in her name. She further stated that the 1<sup>st</sup> defendant is the wife of Joram, 2<sup>nd</sup> defendant is a daughter of Joram, 4<sup>th</sup> defendant is her son and the 3<sup>rd</sup> defendant is a nephew. She continued that the plaintiff without any justification moved on to her property, put up structures and has refused to vacate despite efforts asking him to vacate. She produced as exhibits the documents in her list as Dex 1-4.
15. During cross-examination by counsel for the plaintiff, DW1 admitted knowing the plaintiff because he sold them land in 1971 and they started living on the land for about 7-10 years. She said that when the plaintiff started living on the land, she raised it with him but he stated that the court had given him the order. She did not have a sale agreement in court. She continued that Mathias also bought the same land from Pete It is her evidence that when her husband bought the suit land, he was working in Fort Hall in Muranga. The plaintiff sold the land and went to the place of his work and on return, she woke up to find the plaintiff had put up a temporary structure on the part she was cultivating. She stated that the plaintiff inherited the land from his father and grandfather. She had never heard of a case between Mathias and Patrick or Jackson over the suit land.
16. The parties agreed to exchange written submissions. The 1<sup>st</sup> to 5<sup>th</sup> defendants filed their submissions on 1<sup>st</sup> December 2021 and submitted that the plaintiff has not produced any documentary evidence in support of his acquisition of the parcel of land. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants have shown that they acquired the land procedurally and legally. They stated that the 5<sup>th</sup> defendant is the absolute and



indefeasible owner of the suit property and the law would come in aid of a registered proprietor in the absence of evidence that the same was acquired irregularly. In regards to their counterclaim, they submitted that the relief of a permanent injunction is appropriate having established that she is the registered proprietor and her property should and must be protected by law. They cited *inter alia*, *Sammy Kemoo Arekai v Eliakim W Olweny & another* [2021] eKLR where it was held that “where there is enough material placed before the court to warrant issuance of such a relief, the court would not hesitate to grant the relief in permanently protecting the right of a proprietor of land, and not otherwise, when no material evidence is adduced”.

17. The plaintiff filed his written submissions on 2<sup>nd</sup> December 2021 and submitted that he has demonstrated that he is the owner to date of part of L.R. Bunyala/bulemia/309 which he is in occupation of since he was born and even the land disputes tribunal of Budalangi found that the land be shared between the families of the plaintiff and Joram Ouma Wangira. The Attorney General for the 6<sup>th</sup> and 7<sup>th</sup> defendants did not put in any submissions.
18. From my analysis of the parties’ pleadings, evidence and submissions rendered, I frame the following questions for determination of the dispute;
  - a. Whether the plaintiff has proved the allegations of fraud;
  - b. Whether the plaintiff’s suit is time barred;
  - c. Whether the defendants counterclaim is merited;
  - d. Who should pay the costs of this suit?
19. The plaintiff listed the particulars of fraud against the defendants in paragraph 15 and 16 of the plaint alleging that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not disclose relevant information to the Probate court and therefore his interest in the estate were not catered for. The relevant information according to him was his share in the L.R. No. Bunyala/Bulemia/309. He averred that the suit land was wholly registered in the name of the late Joram Ouma Wangira his uncle because he had travelled away for work. The plaintiff produced an extract of the green card for L.R. 309 as PEX 1 which shows that Joram became the first owner of the suit land in October 1985. It is the plaintiff’s contention that the deceased Joram was registered in trust for his benefit. However, the 5<sup>th</sup> defendant as the only defence witness testified that she acquired proprietorship of the suit land as the plaintiff had sold the said land to her husband Jacton Oloo Wangira.
20. From the evidence, Joram Wangira is the brother to Jacton Wangira - the husband to the 5<sup>th</sup> Defendant. The 1<sup>st</sup> to 5<sup>th</sup> defendant because they counter-claimed put an obligation to also prove their claim. In their pursuit of proving their right over the land, the 5<sup>th</sup> defendant asserted that her deceased husband had assigned his brother Joram to buy for him land. That the land was purchased from the plaintiff which land is the subject of this case. The 1<sup>st</sup> and 2<sup>nd</sup> defendant took out letters of administration of the estate of Joram Wangira-deceased, and became registered owners through transmission on 10<sup>th</sup> January 2014 and 27<sup>th</sup> January 2017 after the issuance of the certificate of grant. According to the grant issued to the 2<sup>nd</sup> defendant, the suit land was to be registered in her name in trust for the 1<sup>st</sup> and 4<sup>th</sup> defendants.
21. Later, the 1<sup>st</sup> and the 4<sup>th</sup> defendant donated a power of attorney to the 3<sup>rd</sup> defendant (Dex 3). The power of attorney was specific to permit the 3<sup>rd</sup> defendant to manage the suit property by sourcing for a suitable buyer and do all transactions regarding the land on behalf of the donors. The reading of the power of attorney document on its face you get the impression that the 1<sup>st</sup> and the 4<sup>th</sup> defendant authorised the 3<sup>rd</sup> defendant to get them a buyer for the suit property. The 3<sup>rd</sup> defendant subsequently transferred the land to the 5<sup>th</sup> defendant. The 5<sup>th</sup> defendant said her husband bought land from the



- plaintiff so there was need for explanation on what basis the 3<sup>rd</sup> defendant who had been instructed to source for a buyer was transferring the land to her.
22. From the evidence adduced by the plaintiff and the 5<sup>th</sup> defendant, it would seem like the parties to this suit all hail from the same family and the plaintiff is claiming that his late uncle Joram Ouma Wangira got the suit land registered in his name in 1985 to hold in trust for him. The plaintiff in cross examination stated that he got the suit land from his father. The 5<sup>th</sup> defendant corroborated this when she stated that the plaintiff inherited the land from his father and grandfather. The plaintiff has stated that he came back to the suit land in 1982 and put up a home on the southern part of the suit land where he currently stays.
  23. The plaintiff admits that the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired the title to the suit property by way of transmission. The order appointing the 1 and 2<sup>nd</sup> defendants as administrators of the estate of Joram Ouma has not been set aside. Therefore, if the transfer and registration of the 1<sup>st</sup> and 2<sup>nd</sup> defendants were pursuant to a valid court order, the court is unable to hold that such process of securing the title was fraudulent. The plaintiff's right if any lay elsewhere as against the first two defendants but fraud is not one of them. Secondly, the plaintiff pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants donated a power of attorney to the 3<sup>rd</sup> and 4<sup>th</sup> defendants to have the suit title be registered in their names (Dex 3). The plaintiff was not privy to the transaction regarding the power of attorney and even the subsequent transfer to the 5<sup>th</sup> defendant. In all these transactions, the plaintiff failed to tell the court which document was forged in the entire process. Consequently, I make a finding that there was no proof of the allegations of fraud.
  24. It is my considered opinion that the plaintiff's claim, based on his evidence and submissions is found to be premised on customary trusts but which was not pleaded. Secondly, the evidence adduced demonstrates that he has lived on the land for more than 12 years thus making him to be entitled to the land by operation of law. Although the plaintiff did not plead adverse possession in his plaint, the same became available to him on the basis of his reply to the counter-claim. At paragraph 5 of his reply to the counter-claim, the plaintiff pleaded that he has been staying on the land since 1982 before the 5<sup>th</sup> defendant acquired title in her name. Neither of the defendants denied occupation of the plaintiff from 1982. The occupation of the plaintiff is corroborated by the award of the land disputes tribunal which was adopted as an order of the court Busia PMCC land dispute Case No. 108 of 2009. In para 2(a) the order started thus; the parcel Bunyala/Bulemia/309 to be shared between Jacton Oloo Wangira and Peter Jolana Obiba, approx., 2.1Ha each, the present boundary between the two be retained (underline mine for emphasis).
  25. On the second issue, the plaintiff has prayed for an order directing the Lands Registrar to implement the decision of the Budalangi Land Dispute Tribunal directing that the land be divided between him and the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiff produced as order dated 28<sup>th</sup> November 2009 by the Principal Magistrate's court at Busia seeking to adopt the award of the Tribunal as PEX 3. The Tribunal's award sought to have L.R. 309 divided amongst Jacton Oloo Wangira and Peter Jolana Obiba. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are the legal representatives of the estate of the late Joram Ouma Wangira (the registered owner) and who have relinquished their interest in the suit land to the 5<sup>th</sup> Defendant (wife to Jacton Oloo Wandira-deceased). None of the defendants have sought to have the award of the Budalangi Land Dispute Tribunal set aside or reviewed. Besides the award, I have found above that the plaintiff is entitled to a part of the land he is in occupation of and described as the southern part. For clarity in execution of this finding, I adopt sharing as directed by the Land Disputes Tribunal and adopted in case no 108 of 2009 equal shares with the one half of 1.2 HA to be registered in the name of the plaintiff and the other half of 1.2 HA remaining in the 5<sup>th</sup> Defendant's name.



26. On the fourth issue, the defendant had filed a counterclaim against the plaintiff seeking eviction orders and costs. Since the plaintiff has been successful in their claim, the orders of eviction as sought fails and their counterclaim is hereby dismissed.
27. In light of the analysis and findings made, I enter judgement in favour of the plaintiff as follows;
- a. The plaintiff has acquired by way of adverse possession a portion of the L.R No. Bunyala/Bulemia/309 measuring 1.2Ha. Consequently, an order is hereby issued directing that the 5th defendant's title to L.R No. Bunyala/Bulemia/309 be rectified to allow for sharing of the land with the plaintiff through subdivision. The 5th Defendant & Kiloyi Oloo to surrender the original title as well execute requisite documents to facilitate the process.
  - b. An order is hereby issued directing the County Land Registrar and County Surveyor, Busia to subdivide L.R. Bunyala/Bulemia/309 into two portions being registered to the 5th Defendant & Kiloyi Oloo on one part and the plaintiff on the other part. The plaintiff to meet the cost of such subdivision and transfer.
  - c. A permanent injunction is hereby issued against the defendants, their servants and/or employees from entering into carrying out any activities or interfering with the plaintiff's enjoyment of his 1.2HA of the said parcel of land.
  - d. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 22ND DAY OF JUNE 2022.**

**A. OMOLLO**

**JUDGE**

