



**Desilo v Omela (Environment and Land Case Civil Suit
110 of 2014) [2022] KEELC 3953 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND CASE CIVIL SUIT 110 OF 2014**

BN OLAO, J

JULY 29, 2022

FORMERLY KIMILILI SRMCCC NO 25 OF 2011

BETWEEN

**DAMARY KEBIN DESILO (SUBSTITUTED WITH DAMARY KEBIN
DESILO) PLAINTIFF**

AND

PETER OKIRU OMELA DEFENDANT

JUDGMENT

- 1 This suit was first filed at the Senior Resident Magistrate’s Court Kimilili as Civil Suit No 25 of 2011. The record shows that Joseph Taabu Desilo (the plaintiff herein and later substituted with Damary Kebin Desilo on October 8, 2020) was able to obtain an ex parte Judgment against Peter Okiru Omela (the defendant). However, that Judgment and the subsequent decree were later set aside. The suit was later transferred to this Court on 27th May 2014 following an order issued by A. Omollo J.
- 2 By his plaint dated March 25, 2011 and filed in the Subordinate Court, the plaintiff had sought Judgment against the defendant in the following terms: -
 - a. The defendant be evicted from the land parcel No Bungoma/ Kamakoiwa/4976.
 - b. The Officer Commanding (OCS) Kapchonge Police Station to provide security for the said eviction.
 - c. Costs of the suit be provided for.
- 3 The basis of the plaintiff’s claim is that between December 2, 1995 and October 15, 1996, he purchased the land parcel No Bungoma/Kamakoiwa /4976 (the suit land) from one Joseph Wabwile Mungau and constructed two houses thereon. He later obtained the title thereto but in or about the year 2009, the defendant without any colour of right encroached onto the said land and occupied the two houses.



- Then in the year 2011, the defendant obstructed the plaintiff from tilling his land. Despite demand and notice to sue, the defendant has continued encroaching onto the suit land thus necessitating this suit.
- 4 In his short statement dated March 25, 2011 and filed together with the plaint, the plaintiff states that on or about December 2, 1995 he purchased 1 acre of land from Joseph Wabwile Mung'au followed by another 3 acres on February 10, 1996 and finally 2 acres on October 15, 1996 making a total of 6 acres. The suit land was eventually transferred to him. He erected two houses on the land although he lived in Saboti where he has other land. In the year 2009, he discovered that the plaintiff was encroaching on the suit land alleging that it belonged to him. That on March 13, 2011, the defendant obstructed him from tilling the land and so he instructed his then advocate J. S. Khakula to serve him with a notice to vacate.
- 5 The plaintiff also filed the following documents in support of his case: -
1. Agreement dated December 2, 1995.
 2. Agreement dated February 10, 1996.
 3. Agreement dated October 15, 1996.
 4. Consent for transfer of land dated February 17, 2009.
 5. Title deed for the land parcel No Bungoma/Kamakoiwa/4976.
- 6 When he testified on May 5, 2016 led by his then Counsel Mr Bwonchiri, the plaintiff produced the title deed to the suit land as well as the sale agreements showing how he purchased the suit land measuring 6 acres and which was hived from the land parcel No Bungoma/kamakoiwa/308. That his brother Nicodemus Eroto Omela (deceased) died, he allowed his body to be interred on the suit land since he had no land of his own. That the deceased had a wife called Esther Ndunge Mutyota but they had no child and the defendant only came to the funeral as the deceased's friend. That when the deceased's wife died, the defendant remained on the suit land which he has continued to use destroying trees and turning it into a desert. He denied that the defendant is the deceased's son adding that traditions demand that the house where the deceased was living has to be demolished and another one built.
- 7 Wilfred Omera Ejakait (PW 2) testified that he was a witness to the sale agreements dated February 10, 1966. Ephas Barasa testified that he drew the sale agreement dated 2nd December 1995 between the plaintiff and Joseph Wabwire Mungao (PW3).
- 8 On his part, Joseph Wabwire Munga'u (PW 3) told the Court that he sold the suit land to the plaintiff and executed the 3 sale agreements. He denied having sold the suit land to anybody else and added that he did not know the defendant.
- 9 The defendant filed his defence dated January 26, 2012 in which he denied that the plaintiff purchased 6 acres of land from Joseph Wabwire Mung'au. He added that infact it was his deceased father Nicodemus Eroto Omela who is a brother to the plaintiff who purchased the land but the plaintiff transferred it into his name fraudulently. The particulars of fraud were pleaded in paragraph 4 of the defence as follows: -
- a. Taking advantage of the fact that the defendant's father passed away before the transfer was effected.
 - b. Taking advantage of the fact that the defendant left behind young children and an ailing mother who could not immediately follow up on the transfer process.



- c. Coercing Joseph Wabwire Mung'au to prepare forged documents to effect the transfer to himself.
 - d. Presenting the said forged documents to the Lands Officer for registration.
- 10 Therefore, the plaintiff does not have a good title and an order be made that the title to the suit land be cancelled. The defendant denied having encroached on the suit land in 2009 adding that he has lived on it since 1996 when he moved therein with his parents and that he still resides therein in his parents' house. Therefore, the prayer for his eviction is misconceived and the plaintiff's suit should be dismissed with costs.
- 11 And although he filed statements of his witnesses namely Joab Onyapidi Wanyonyi and the District Land Registrar Bungoma, they were not called to testify during the plenary hearing.
- 12 The defendant however filed the following documents as per his list dated January 26, 2012: -
1. Sale agreement dated April 19, 1996.
 2. Letter dated July 25, 2011 from the plaintiff to his Assistant Chief.
 3. Letter dated August 20, 2009 from the plaintiff.
 4. Application for consent and transfer forms in favour of Esther Ndunge Mutueta.
 5. Death Certificates of Nicodemus Eroto Omela and Esther Ndunge Mutueta.
- 13 In his statement dated January 26, 2012, the plaintiff states that he is the first born child of the deceased together with Esther Ndunge Mutueta also deceased. That following his father's death on April 9, 1998, his mother Esther Ndunge Mutueta also became sick and passed away on February 13, 2007. That due to her illness, Esther Ndunge was unable to pursue the formalities regarding the suit land which the deceased had purchased from Joseph Wabwire Mung'au. That he and his siblings were then minors and were unable to enter into any transactions regarding the suit land where their parents set up their matrimonial home and where they all still reside. That the plaintiff took advantage of their mother's ailment to collude with the vendor and execute forged documents to have the suit land transferred into his name. The plaintiff's prayer for the eviction of the defendant is therefore unfortunate and unlawful. The plaintiff's suit should be dismissed with costs.
- 14 The plaintiff filed a reply to the defence on February 14, 2012 in which he reiterated the contents of his plaint and denied the allegations of fraud levelled against him. He urged the Court to strike out the defence.
- 15 The defendant commenced his testimony before Mukunya J on April 11, 2017. He told the Court that the deceased was his father and died in 1998 while his mother Esther Ndunge Mutueta died on February 13, 2007. They were both buried on the suit land. He produced their Death Certificates and his Birth Certificate as exhibits and added that he had two siblings a sister who died in 2015 and his brother Collins Ewalata Omela born in 1994. He added that before the deceased passed on, he had purchased 3 parcels of land from Joseph Wabwire to be carved out of the land parcel No Bungoma/Kamakoiwa/308.
- 16 In the course of the trial, it transpired that the defendant had filed a further list of documents dated August 29, 2017 without leave of the Court. However, following objections raised by the plaintiff's Counsel Mr Bwonchiri on October 12, 2017, that list was expunged from the record in a ruling delivered by Mukunya J on February 21, 2017.



- 17 Having been stepped down on October 12, 2017, the defendant continued with his testimony before me on December 2, 2021 when he adopted as his testimony the statement dated January 26, 2012 and produced his list of documents also dated January 26, 2012.
- 18 He told the Court that there was no objection when both the deceased and his mother Esther Ndunge Mutueta were buried on the suit land. That it was only after the demise of his mother that the plaintiff who is his uncle started causing problems. He denied that it was the plaintiff who purchased the suit land adding that it was infact the deceased who sent the plaintiff to purchase it on his behalf in 1995. That his late parents thereafter put up a home on the suit land from which they have never been evicted.
- 19 Submissions were thereafter filed both by Mr Murunga instructed by the firm of J. O. Makali & Company Advocates for the plaintiff and by Ms Ratemo instructed by the firm of Ocharo Kebira & Company Advocates for the defendant.
- 20 I have considered the evidence by both parties as well as the submissions by Counsel.
- 21 It is unfortunate that this suit which was filed on March 29, 2011 is coming to a close more than 11 years later. Part of the delay has been caused by the parties due to the high turn – over of Counsel instructed and the numerous application filed by them.
- 22 In my view, the following are the issues that call for my determination: -
1. Whether the plaintiff’s suit is statute barred.
 2. Whether the plaintiff obtained the suit land fraudulently and is entitled to orders for the eviction of the defendant.
 3. Whether the plaintiff’s title should be cancelled.
 4. Who meets the costs of the suit?
- 23 Although the defendant did not specifically plead limitation, that is a jurisdictional issue which the Court can consider even suo moto. I notice that in paragraph 9 of the defence, the defendant had pleaded that he would raise a Preliminary Objection on jurisdiction. The issue of limitation has also been highlighted in the submissions by Counsel for the defendant. It is a well settled practice that an issue of jurisdiction may be determined by a Court on it’s own motion – *Hafswa Omar Abdalla Taib & 2 others v Swaleh Abdalla Taib* [2015] eKLR.
- 24 Section 7 of the [Limitation of Actions Act](#) provides that: -
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
- 25 While the plaintiff claims that the defendant encroached onto the suit land in 2009, the defendant’s case is that he and his late parents have lived on the suit land since 1995 after the deceased purchased it. The plaintiff told the Court that the deceased died in 1998 and he allowed his body to be interred on the suit land. His explanation for that is because the deceased had no land of his own. Either way, that means that since 1998 when the deceased was buried on the suit land on which his wife Esther Ndunge Mutueta was also buried when she died in 2007 up to 2011 when this suit was filed to – date, the defendant and his family have continued to be in occupation and possession of the suit land. That means that by 2011, the defendant had been in occupation and possession of the suit land for over 12 years. By the time the defendant started testifying on July 7, 2015, that was a period of over 17 years.



The plaintiff's claim to the suit land was time barred by the time he moved to Court in 2011. On that basis alone, this suit is for striking out.

26 I will nonetheless consider the plaintiff's suit on its merit should I be wrong on the issue of limitation.

27 It is not in doubt that the plaintiff is the registered proprietor of the suit land. By virtue of the provision of Section 24(a) of the Land Registration Act, that title vests in him all the rights and privileges belonging or appurtenant thereto. Those rights include the power to seek orders for the eviction of the defendant from the suit land which is what he seeks. A similar provision exists in Section 27(a) of the Registered Land Act under which the title to the suit land was issued. However, any title is liable to challenge if it was obtained through fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme as set out in Section 26(1) of the Land Registration Act.

28 The defendant's case is that in fact the suit land was purchased by his deceased father through the plaintiff who however the however took advantage of the illness of his mother to register the suit land in his name fraudulently and particulars thereof have been pleaded in paragraph 4 of the plaint. The plaintiff produced sale agreements in support of his claim to have purchased the suit land. The defendant on the other hand also produced a sale agreement dated 19th April 1996 between his late father and Joseph Wabwire Mung'au (PW 3) for the purchase of the plot described as Plot No 308. It is clear from the title to the suit land that it was indeed a resultant sub – division of the Plot No. 308. The agreement is not signed by the vendor Joseph Wabwire Mung'au (PW 3) who testified in support of the plaintiff's case and denied having sold any land to the deceased. What strikes me as strange is that the three (3) agreements executed by the plaintiff and Joseph Wabwire Mung'au on 2nd December 2005, 10th February 1996 and 15th October 1996 were all executed at around the same time that the deceased father to the defendant was executing the sale agreement with the same Joseph Wabwire Mung'au (PW 3) on 19th April 1996. It was the plaintiff's testimony that indeed the deceased was a Police officer at the time of his death. He was therefore capable of purchasing land. I am persuaded that in fact the deceased sent money to his brother the plaintiff to purchase the suit land for him but being the fraudulent man he is, the plaintiff made sure that Joseph Wabwire Mung'au (PW 3) the vendor, did not execute it. Instead, what was executed were the sale agreements between the plaintiff and Joseph Wabwire Mung'au (PW 3). Fraud does not only have to be proved by direct evidence. Circumstantial evidence can suffice. As was held in *R v Taylor Weaver and Donovan* by Lord Herward CJ: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics.”

29 In his submissions on whether the plaintiff obtained title to the suit land through fraud, Mr Murunga citing the well-known case of *Ratilal Godhanbhai Patel v Lalji Makanjii* [1957] EA 314 and Section 107 of the Evidence Act submitted that fraud had not been proved. However, in my view, the following circumstances prove otherwise. Firstly, as I have already stated above, there is the plaintiff's own testimony that the deceased was a Police Officer at the time the sale agreements were being executed. He was therefore able to purchase the suit property. Then there is the evidence of the defendant that



infact it was the deceased who purchased the suit land through the plaintiff. This is what he said in his evidence in chief when he testified on December 2, 2021: -

“It is not true that the plaintiff bought the suit land. He was sent money by my father to buy the land on his behalf. My father bought seven (7) acres. We live on the land in dispute since we bought it in 1995. It is my parents who put up a home on the land.”

30 I did not hear the plaintiff allege that the defendant had any reason to give false testimony against him. The inevitable conclusion is that the plaintiff received funds from the deceased to purchase land for him in trust but made sure that he executed sale agreements between himself and Joseph Wabwire Mung’au (PW 3) but did not get him to execute the sale agreement dated April 19, 1996 between him and the deceased. The plaintiff, like any other fraudsters, was selling up a stage to deprive his brother of the suit land.

31 The plaintiff’s witnesses were indeed witnesses to the sale agreements between him and Joseph Wabwire Mung’au (PW 3). Indeed, there is no doubt that the said Joseph Wabwire Mung’au (PW 3) executed the said sale agreements as he has said. What is clear, however, is that both Joseph Wabwire Mung’au (PW 3) did not know that the purchase money was infact provided by the deceased and not by the plaintiff.

32 Secondly, whereas the plaintiff would like this Court to believe that he was being magnanimous and sympathetic to the deceased’s wife and family by allowing the interment of the deceased on the suit land, the truth can only be that he knew all along that he was not doing any favour to the family of the deceased and that the suit land was infact the entitlement of the deceased.

34 Thirdly, there is the un – controverted fact that even when his sister in law Esther Ndunge Mutueta died almost 10 years after the deceased, she and her family were still residing on the suit land and more significantly, she was buried there. The plaintiff obviously still had some conscience at that time, to acknowledge that the deceased’s wife was entitled to the suit land and it was proper that she be buried thereon.

35 Finally, and being the fraud schemer that he was, the plaintiff decided that it was time for the defendant and his siblings to be evicted from the suit land. He took advantage of the fact that the defendant was a minor when all these transactions were taking place. He even had the audacity to deny the fact that the defendant is infact his nephew and son to his deceased brother. This is what he said in his evidence in chief on May 5, 2015.

“My brother Nichodemus Eroto Omera died as a Police Officer. I brought his body to my house for he had no land to be buried. He was married but had no child. I interred my brother. I buried him there. The defendant came from Machakos for the funeral. He came as a friend of Esther Ndunge Mutyota who was my brother’s wife. My sister in law. My brother’s wife died on February 13, 2007. The defendant was left in the house.”

36 When the defendant testified on July 7, 2015, he said: -

“I know the case in Court is about land my parents bought. My father was I.P Weigh Bridge Athi River. Then 19.4.96 he bought land from Joseph Wabwire Murunga. The land is 19 acres. He paid 352,506/=. He took the land. He lives there. His house is there upto now. It was built on the same year.”

37 And when he testified before Mukunya J on April 11, 2017, among the documents he produced was his Birth Certificate. It shows the name of his father as Nicodemus Eroto Omela and his mother as Esther



Ndunge Mutueta. It cannot therefore be correct that the defendant was only friend to Esther Ndunge Mutueta and came to the deceased's burial in that capacity and continued to live on the suit land even after the burial of the deceased. Even the bravest of men cannot accompany his lady friend to bury her husband and then remain in the friend's matrimonial home with the knowledge of her brother in law unless he wants to be lynched or skinned alive. The truth of the matter is that the defendant is the son of the deceased and lives on the suit land in that capacity. He cannot be a trespasser on the suit land as the plaintiff would like this Court to believe. The plaintiff simply wanted to keep the defendant away from the suit land for his own selfish reasons. It must be clear from all the above that the plaintiff obtained the registration of the suit land fraudulently. The suit land belongs to the deceased and therefore, the defendant, his siblings and their families are entitled to live on it. They cannot be evicted therefrom.

38 It is also instructive to note that the plaintiff only obtained the title deed in 2011 some 4 years after the death of Esther Ndunge Mutueta. This Court is entitled to make the inevitable conclusion that the only reason why he did so was to ensure that she would not be there to challenge the title.

39 Having obtained the title to the suit land fraudulently, it is obvious that the same must be cancelled forthwith. Article 40(6) of *the Constitution* makes it clear that property which has been unlawfully acquired cannot benefit from the protection of the law. Having said so, I notice from the defence that the defendant did not file any Counter – Claim. Indeed, the record shows that the defendant had filed an application dated October 26, 2016 and filed on October 28, 2016 seeking the main order that he be allowed to amend his defence to include a Counter – Claim. That application was however withdrawn by Mr Keter then acting for defendant on March 23, 2017. I must also add that the defence filed on January 27, 2012 cannot pass the test of elegance. It is therefore worthy of repealing to Counsel, as I have done before, that they are paid inter alia, to draft proper pleadings and their clients expect them to be on top of their work. Having said so, however, the defendant pleaded in paragraph 5 of his defence that: -

5 “The defendant therefore states in view of the above that the plaintiff does not have a good title to the land and any order shall be sought to cancel the title.”

40 Of course the order that ought to have been “sought to cancel the title” should have come by way of a Counter – Claim specifically seeking that order. Nonetheless, and notwithstanding the not so elegant pleadings, it must follow as a matter of course that once the Court has found that the title to the suit land was obtained fraudulently, the same must be cancelled not only for purposes of bringing the dispute over the ownership to an end but also to prevent further mischief whereby a fraudulent document will be used by the holder perhaps to the detriment of unsuspecting third parties as well as the rightful owners. The plaintiff simply stole the suit land and as was held in *Jane Gachoki Gathecha v Priscilla Nyawira Gitungu & another* CA Civil Appeal Nos 343 and 345 of 2002 [2008] KECA 212 (KLR), “a thief acquires no right or interest which is transferrable in stolen property”

41 Guided by the provisions of Article 159(2)(d) of *the Constitution*, the overriding objectives under Section 3A of the *Civil Procedure Act* as well as the provisions of Section 19(1) of the *Environment and Land Court Act* and also taking into account the defendant's pleading in paragraph 5 of the defence cited above and in the broader interest of doing substantive justice, this Court will proceed to cancel the title issued to the plaintiff in respect to the suit land. Appropriate orders shall be made shortly with regard to the suit land.

42 On the issue of costs, although they follow the event, it is clear from the preceding paragraphs that the parties are a family. Each shall therefore meet their own costs.



Ultimately therefore and having considered all the evidence herein, I make following orders in disposal of this suit: -

1. The plaintiff's suit is dismissed.
2. The title to the land parcel No Bungoma/kamakoiwa/4976 issued to the plaintiff by the Land Registrar Bungoma on 15th February 2011 is hereby cancelled.
3. The plaintiff shall within 15 days of this Judgment surrender the original title to the land parcel No Bungoma/Kamakoiwa/4976 to the said Land Registrar for cancellation.
4. The Land Registrar Bungoma shall within 30 days of this Judgment issue a new title deed for the land parcel No Bungoma/ Kamakoiwa/4976 in the names of the defendant Peter Okiru Omela to hold in trust for himself and his surviving sibling Collins Ewalata Omelo.
5. Each party to meet their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA BY WAY OF ELECTRONIC MAIL ON THIS 29TH DAY OF JULY 2022.

Right of Appeal explained.

BOAZ N. OLAO.

J U D G E

29TH JULY 2022.

