



REPUBLIC OF KENYA



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**Okinyi v Ochieng & 2 others (Environment and Land Appeal E025 of 2021)
[2022] KEELC 13368 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13368 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E025 OF 2021
A OMBWAYO, J
SEPTEMBER 30, 2022**

BETWEEN

JOSEPH OKINYI APPELLANT

AND

HENRY MICHAEL OCHIENG 1ST RESPONDENT

KORU CATHOLIC CHURCH 2ND RESPONDENT

COUNTY REGISTRAR LANDS, KISUMU 3RD RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Principal Magistrates Court
(Hon. P.K. Rugut) given at Tamu on 18th March 2021 in Tamu PMCC No. 32 of 2018)*

JUDGMENT

Introduction

- 1 Henry Michael Ochieng the 1st respondent herein filed a suit vide a plaint dated November 9, 2018 against the appellant and the 2nd and 3rd respondents herein where he averred that he is the registered owner of land parcel number Kisumu/ Fort Ternan 495 and Kisumu/Fort Ternan 497 and in the year 1991, he intended to donate 8 acres of his land to the catholic church and sell 24 acres to the said church at Kshs 1,200,000/=.
- 2 He stated that the 2nd respondent had paid a consideration of Kshs 600,000/= and remained with a balance of Kshs 600,000/= which is yet to be paid to date. The plaintiff was in constant communication with Father Tony Clarke who was facilitating the transaction on behalf of the church. Due to the impending medical operation that the plaintiff was to undergo and Father Tony Clarke's trip abroad, the 1st defendant was allowed to sign various land documents for the church and keep them.



- 3 It was the 1st respondent's case that after the priest travelled abroad, the transaction came to a halt as he did not come back. That the appellant herein approached the 1st respondent with a certain gentleman and a lady who intimated that they were interested in buying the 1st respondent's parcel of land and the 1st respondent learnt that the appellant a former driver to the 2nd respondent had sold all the 32 acres of land to prospective buyers and that the appellant was in possession of the title deeds for the suit properties and it was not clear how the appellant came into possession of the titles to the suit properties.
- 4 The 1st respondent herein discovered that the appellant had purported to sell the same portion of land that he had donated to the church to a certain man and after conducting a search at the land s registry, he discovered that the appellant had sold land parcel number Kisumu/Fort Ternan 497 to Mr James Aggrey Omole and Mrs Immaculate M Omole who were issued with title deeds. It was averred that the 1st respondent wrote a letter to the appellant and the 2nd respondent herein seeking clarification on the irregular transactions with regards to the land donated to the church and the 1st respondent was of the opinion that if the irregularities with regards to the transactions were true, then the appellant and the 2nd respondent needed to pay him Kshs 500,000/= as adequate compensation.
- 5 The 1st respondent in his plaint pleaded particulars of violations of the law by the appellant and the 2nd and 3rd defendants, particulars of loss and damage suffered and particulars of fraud and prayed that judgment be entered against the respondents for orders that;
- a. A declaration that the plaintiff is the legitimate owner of plot No Kisumu/Fort Ternan 495 and Kisumu/For Ternan 497.
 - b. A permanent injunction restraining the defendants by themselves, their agents, servants and/or employees from trespassing, selling, wasting, intermeddling and/or interfering in any manner whatsoever with regards to plot No Kisumu/Fort Ternan 495 and Kisumu/For Ternan 497.
 - c. The 3rd defendant be ordered to rectify the register in respect of the suit property Kisumu/ Fort Ternan 495 and Kisumu/For Ternan 497 to read Henry Michael Ochieng Obiero as the sole proprietor.
 - d. General damages.
 - e. That the defendants be evicted from the two properties.
 - f. Costs of this suit and interest thereon.
 - g. Any other relief or remedy as this honourable court may deem fit.
- 6 The appellant herein filed his defence on December 20, 2018 where he denied the allegations in the plaint and averred that the 1st respondent willingly and knowingly sold the suit properties to the appellant, signed the application form to the Land Control Board and the consent was issued. He alleged that the 1st respondent executed the transfer documents and the suit properties were transferred to the appellant herein.
- 7 The 2nd respondent herein did not enter appearance while the 3rd respondent herein filed a defence on February 5, 2019 where he denied the allegations in the plaint and averred that if any transfer was effected in his office, the same was done following the laid down procedures and the law. The matter came up for hearing before the trial court and judgment was entered in favour of the 1st respondent as per the orders sought in the plaint.



Grounds of appeal

- 8 Aggrieved by the decision of the lower court, the appellant herein filed a memorandum of appeal which was based on the following grounds:
1. That the learned magistrate erred in fact and law by finding that the 1st respondent is the legitimate owner of the land parcel number Kisumu/Fort Ternan 495.
 2. That the learned magistrate erred in fact and law by finding that the transfer and registration of the title of the land known as Kisumu/Fort Ternan 495 by the appellant and the 3rd respondent illegal null and void.
 3. That the learned magistrate erred in law and fact in failing to take into consideration the provisions of section 26 of the [Land Registration Act](#) No 3 of 2012 in considering the sanctity of the appellant's title.
 4. The learned magistrate erred in law in finding that the 1st respondent proved on a balance of probabilities allegations of fraud and forgery despite no evidence being tabled and/or led by the 1st respondent.
 5. The learned magistrate erred in fact and law in failing to apply the cardinal principal of law that he who alleges has to prove in finding that the 1st respondent proved forgery and fraud.
 6. The learned magistrate erred in fact ad law in totally misdirecting herself in the evaluation of the evidence produced before her and arrived at a wrong decision thereby occasioning a miscarriage of justice.
 7. That the learned magistrate erred in fact and law in failing to pronounce herself on whether the suit was statutorily time barred as pleaded by the appellant.
 8. That the decision was against the weight of the evidence tendered.
- 9 The appellant therefore prayed for orders that the appeal be allowed, the judgment of the Principal Magistrate's Court (Hon PK Rugut) delivered on March 18, 2021 and subsequent decree be set aside and the costs of this this appeal be provided for. The appeal was canvassed by way of written submissions as directed by this court.

Appellants' submissions

- 10 The appellant filed his submissions on April 27, 2022 and raised a number of issues for determination.
- 11 On the issue of whether the learned magistrate had jurisdiction to determine the suit; it was submitted that the by dint of section 7 of the [Limitation of Actions Act](#), the 1st respondent was divested of the right to bring any action to recover land from the appellant and by extension the learned magistrate did not have jurisdiction to her and determine the suit. Reliance was placed in the case of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1, Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others – Supreme Court Civil Appeal (Application) No 2 of 2011 and [CMAW-M v PA W-M \(2018\) eKLR](#).*
- 12 On whether the learned magistrate erred in failing to correctly analyze the evidence in court in relation to the relevant laws to reach a just decision; it was submitted that the trial magistrate failed to properly analyze the evidence presented before her to come to the decision she rendered as. He relied in the case of [Janet Kalondu Musembi v Kabindi Katana Thoya & Another \(2021\) eKLR](#).



- 13 It was stated that the trial magistrate failed to consider section 24,25 and 26 of the [Land Registration Act](#) No 3 of 2012 yet the appellant was the absolute and indefeasible owner of the suit parcels of land and his right over the suit properties ought to be protected. He relied in the case of [Toroitich suter vs William Toroitich & 3 Others \(2017\) eKLR and Propwa Company Limited vs Justus Nyamo Gatondo & Another \(2020\) eKLR](#).
- 14 It was submitted that the 1st respondent did not specifically plead and/or allege that the certificate of title to the suit properties had been acquired illegally, unprocedurally or through a corrupt scheme. He relied in the case of [Vijay Morjaria v Nansingh Madbusingh Darbar & Another \(2000\) eKLR](#) and [Mirko Blaeterman \(Suing through his Power of Attorney Shabir Hatim Ali\) & Another v David Mwangi Muiruri & 2 Others \(2015\) eKLR](#).
- 15 On costs, it was submitted that the same is discretionary as they usually follow event.

Respondents' Submissions

- 16 I have perused the file and do find that the respondents herein failed to file their submissions.

Analysis and Determination

- 17 I have considered the pleadings, the evidence on record and submissions filed by both parties and I am of the view that the following issues need to be determined:

Whether the learned magistrate erred in law and fact in finding that the 1st respondent is the legitimate owner of land parcel number Kisumu / Fort Ternan 495.

- 18 The trial magistrate found out that there was no agreement for sale that was signed between the 1st respondent and the appellant and that there was no Land Control Board Consent obtained from the board. From the evidence on record, there is no transfer document that was signed between the 1st respondent and the appellant and based on the evidence adduced by the Deputy Land Registrar, it was not clear how the title was issued in favour of the appellant.
- 19 The appellant in his submissions submitted that he is the registered proprietor of land parcel number Kisumu/Fort Ternan 495 pursuant to section 26 of the [Land Registration Act](#), 2012. I have looked at the evidence adduced at the trial court by the 1st respondent and it is clearly established that the 1st respondent had donated the suit parcels to the 2nd respondent herein and was not aware how the appellant managed to transfer the suit property to himself.
- 20 PW3 who was a member of the Muhoroni Land Control Board testified that he never saw the 1st respondent appearing before the board to obtain the Land Control Board Consent.
- 21 In [Civil Appeal No 246 of 2013 Arthi Highway Developers Limited vs West End Butchery Limited and Others](#), the Court of Appeal expressly stated thus:

Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the [Land Registration Act](#) set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the act. It is our law and law take precedence over all other alleged equitable rights of title. In fact the act is meant to give such sanctity of title,



otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.'

b. Whether the trial magistrate erred in fact and law in finding that the 1st respondent proved on a balance of probabilities allegations of fraud.

22 Sections 107 and 112 of the *Evidence Act* Chapter 80 of Laws of Kenya are relevant in this instance and states as follows;

107

- (1) Whoever desires any court to give judgment as to why any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.'

23 The 1st respondent in paragraph 21 of the plaint pleaded fraud and based on the evidence adduced at the trial court evidence showed that the suit land was transferred to the appellant without his consent and during hearing, the deputy land registrar noted that there was fraud on the transfer document of land parcel number 495 as the document had a serial number 518480 which was similar to another parcel number. The deputy land registrar stated that the transfer forms did not contain the signature of the land registrar and that there was no likelihood of a document photocopied in 2001 to have been copied from a document of 2000.

24 Section 26 of the *Land Registration Act* provides as follows:

26.

- (1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the registrar and sealed with the seal of the registrar, shall be received in evidence in the same manner as the original.



25 In *Kuria Kiarie & 2 others vs Sammy Magera (2018) eKLR*, Tunoi JA as he then was stated that:

it is well established that fraud must be specifically pleaded and particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and proved and not allowable to leave fraud to be inferred from the facts.'

26 In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR* Justice Sila Munyao held that:

'It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No 609 B of 2012* where I stated as follows:

...it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. 'I stand by the above words and I am unable to put it better that I did in the said dictum.'

27 For land parcel number Kisumu/Fort Ternan 495, a copy of the green card also indicated that the suit property had been transferred from the 1st respondent to the appellant at a consideration of Kshs 200,000/= . The appellant has failed to prove how the 1st respondent sold the suit properties to him and how transfer of the said parcels was effected.

28 I agree with the findings of the learned magistrate that the 1st respondent proved the allegations of fraud on a balance of probabilities in relation to the suit properties.



c. Whether the learned magistrate erred in fact and law in failing to pronounce herself on whether the suit was statutorily time barred as pleaded by the appellant.

29 Section 26 of the *Limitation of Actions Act* gives an extension of time and states as follows:

‘Where, in the case of an action for which a period of limitation is prescribed, either

- (a) The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) The right of action is concealed by the fraud of any such person as aforesaid; or
- (c) The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to

believe that any fraud had been committed; or

Subpara (ii)

in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.’

30 In the case of *Edward Moonge Lenguuranga vs James Lanaiyara & another (2019) eKLR*, the court defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. The court defined a cause of action to be the legal theory upon which a plaintiff brings a suit. That being the case, it is important to look at the averments and the prayers contained in the plaint to determine the cause of action raised by the plaintiff.

31 In the case of *Justus Tureti Obara v Peter Koipeitai Nengisoi [2014] eKLR* Justice Okongo observed that:

‘I would wish to point out further that the plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial. ‘the court went ahead and stated thus:



