



REPUBLIC OF KENYA



**Odipo v Makanda & 3 others (Environment & Land Case 24 of 2018)
[2022] KEELC 12616 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12616 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 24 OF 2018
AA OMOLLO, J
SEPTEMBER 27, 2022**

BETWEEN

AUGUSTINE MARTIN RAPADO ODIPO PLAINTIFF

AND

AMBROSE GRADUSE MAKANDA 1ST DEFENDANT

FREDRICK ESEBE MUNYONGORI 2ND DEFENDANT

CHARLES WESIBGA HYNA 3RD DEFENDANT

GOEFREY MAKOKHA ODANGA 4TH DEFENDANT

JUDGMENT

1. The plaintiff, Augustine Martin Rapado Odipo sued the four defendants vide the plaint dated March 22, 2018. He pleaded that in 1984, Leonard Makanda Makanda – deceased sold to him L.R No. South Teso/Angoromo/1206. That upon the deceased complying with the legal and procedural requirements, the sold land was duly transferred and registered in his name on December 28, 1984 and he was issued with a title on February 22, 1985.
2. The plaintiff further pleaded that he took possession of the sold land by fencing it. However, in 2014 when he moved on to the subject matter to commence development, he found the 3rd defendant had encroached on to the land. This made him to conduct a search at the lands office which revealed that on March 13, 2000 the land reverted back to the deceased who then sub-divided it into four parcels. The sub-divided portion were subsequently sold and transferred to the 2nd and 3rd defendants.
3. The plaintiffs avers that the said transactions was illegal and fraudulent and listed the particulars as follow;
 - a. The plaintiff never ever sold the subject matter to the deceased.



- b. Deregistering the plaintiff as the sold absolute owner without signing/executing any transfer documents.
 - c. Effecting transfer, subdivision and registration without the relevant documents.
 - d. Effecting deregistration of the plaintiff without surrender of the original land certificate/title deed.
 - e. Dealing with and or effecting transfer, subdivision and registration of a controlled transaction without the relevant Land Control Board Consent.
 - f. Disposing off the subject matter from the plaintiff without his consent authority and or knowledge.
 - g. Creating two or more copies of registers of the same parcel.
 - h. Disregarding all requirements of the law and procedures in the purported transfer, subdivision and subsequent transfer and registration.
4. The plaintiff brought this claim seeking orders;
 - a. Cancellation of L.R No. South Teso/Angoromo/7468, 7469, 7470 and 7471 to restore L.R No. South Teso/Angoromo/1206, thereafter cancel registration of the deceased entry No. 7 to restore the plaintiff entry No. 5 & 6.
 - b. Eviction order against the defendants, their family, agents or those claiming on their behalf from the restored L.R No. South Teso/Angoromo/1206.
 - c. Costs.
 5. Leonard Makanda Makanda – deceased through his legal representative (1st defendant) filed a statement of defense on May 18, 2018. The 1st defendant denied that he initiated and participated in the transfer and the sub-division of the suit title. They denied the allegations of fraud levelled and denied that any of the purchasers are in occupation of the suit land with the administrator’s consent or instruction. He further pleaded that the deceased never indicated to his family the existence of L.R South Teso/Angoromo/1206.
 6. The 4th defendant filed his statement of defence on May 18, 2018. He pleaded that on September 19, 2013, the 2nd defendant offered to sell to him L.R South Teso/Angoromo/7468 and 7469 which he agreed to buy. That after doing searches that ascertain L.R South Teso/Angoromo/7468 and 7469 were registered in the 2nd defendant’s name, he proceeded to buy. The 4th defendant pleads that the 2nd defendant applied for and obtained the requisite Land Control Board consent to transfer the two parcels and on October 2, 2013 the land got registered on his name. He pleaded that he is an innocent purchaser for value and should not be blamed for the errors committed by the deceased. The 4th defendant also pleaded that the plaintiff’s suit is statutorily time barred.
 7. The 2nd defendant entered appearance on August 13, 2018 and filed a statement of defence on August 20, 2018. He denied the plaintiff’s claim and stated that he purchased L.R Nos South Teso/Angoromo/7468 and 7469 from Leonard Makanda – deceased on February 4, 2011 and December 24, 2010 respectively. That he subsequently sold the same to the 4th defendant. According to him, there is no basis for cancelling their title. He urged the court to dismiss the claim for want of merit and also as time barred.



8. The 3rd defendant filed his statement of defence on September 14, 2018. He pleaded as having purchased L.R No. South Angoromo/7470 & 7471 in August 2009 and which was registered in the name of Leonard Makanda Makanda – deceased. That the sale agreement was prepared by Ouma-Okuta & Co. Associates and paid the agreed purchase price of Kshs.500,000. The 3rd defendant avers that the deceased applied and obtained Land Control Board consent and the sold land got transferred to his name in January and February 2011. The 3rd defendant stated he immediately took over possession and still remains in possession todate. He also pleaded the doctrine of innocent purchaser for value without notice.
9. The Land Registrar, Wilfred Nyaberi gave evidence as PW1. In his record, the green card produced as Pex 1 showed that entry No. 1 made on 3/1/1980 of Gabriel Okitui Oteba. Entry No. 2 made on 21/10/1981 in favour of Leonard Makanda Makanda. Entry No. 5 made on December 28, 1984 in favour of the plaintiff. Entry No. 7 made on 13/3/2000 was made in favour of Leonard Makanda Makanda – deceased. PW1 continued that there was no entry No. 8 as the title was closed on sub-division creating numbers 7468, 7469, 7470 and 7471. The Land Registrar stated there were no documents held in their records supporting entry number 7 and left it to the court to find out what could have transpired.
10. In cross-examination, PW1 stated that it was not possible to make entry No. 7 without any supporting documents. That it is clerical staff who make entries in the land records then the Land Registrar approves but he could not confirm if entry No. 7 was approved. The mutation form sub-dividing L.R No. 1206 was registered on 8/9/2010. That the original title ought to have been surrendered before entry No. 7 was made. That he did not retrieve copies of ID cards to support entry No. 7 in the green card.
11. The plaintiff testified as PW2 on 2/11/2020. He is a management consultant practising in Nairobi. He stated that he acquired the suit land through purchase in 1984 and got title in 1985 after following due process. He produced the documents in his lists dated March 21, 2018 and November 28, 2018 as Pex 1 – 20. PW2 avers that he never transferred the land to anyone not even re-transferring it back to the deceased. He added that he still has his original title deed and he has not come across any gazette notice advertising loss of the suit title. That before they filed this case, they wrote to the Land Registrar and requested for documents to support entry No. 7. The Registrar replied that there were no transfer form pertaining to the transaction between him and Leonard Makanda – deceased. He urged the court to grant the orders sought.
12. During cross-examination, PW2 stated that he never signed any transfer in favour of the deceased. That he purchased the property and fenced it but he did not live on it. That he later learnt there was a charge to the bank which the deceased defaulted in repaying but did not get into the details of how the property was discharged. That part of the money he paid was used to settle the debt/charge. PW2 denied receiving any money or Kshs.90,000 from the deceased. He admitted finding the 3rd defendant living on the land when he visited in 2014. That any title held by the 3rd defendant was irregularly acquired.
13. PW2 admitted he could not ascertain who committed the fraud but suspected the 2nd defendant was part of it. In further cross-examination by the 4th defendant, PW2 stated that when he did the search, the properties were bearing the names of 2nd & 3rd defendants only before the 2nd defendant transferred to the 4th defendant. That after purchasing this land, he did not expect the deceased to register his name on it again. That he did not need a caretaker then because the level of trust those days was high.



14. In re-examination, PW2 said he discovered the illegality in 2015 after finding a structure on the land in December 2014 and conducting a search. There is no dispute on how he acquired his title. PW2 does not know who caused the entry No. 7 to be made or the subsequent sub-divisions. This marked the close of the plaintiffs' case.
15. The 1st defendant testified as DW1 on November 2, 2020. DW1 stated that he is the son of Leonard Makanda Makanda – deceased and had obtained letters of administration in respect of his estate. The witness said that his father – deceased transferred the suit property in 1984 when they were very young and never told them the land reverted back to him. DW2 concluded by stating that the estate of the deceased is not laying any claim to the land.
16. In cross-examination DW1 said the grant he produced did not list any property of the deceased. That when the land was sold in 1985, he was 10 years so he knew nothing about that transaction. DW1 was shown the agreement executed between the deceased and the 2nd defendant on October 19, 2010 and February 4, 2011 regarding sale of L.R Nos 7468 and 7469 and admitted not having challenged the same. DW1 admitted that at the time of death of his father on August 11, 2012, the suit parcels had been transferred to the 3rd defendant so it did not constitute his estate.
17. The 2nd defendant, Fredrick Osete testified as DW2 by adopting his written statement dated August 16, 2018. He stated that the deceased caused L.R 1206 to be sub-divided on June 23, 2009 into four numbers 7468-7471. He purchased L.R 7469 vide agreement dated November 19, 2010 for consideration of Kshs.500,000 which was paid in two instalments. DW2 avers that the Land Control Board authorized the transfer to his name on October 28, 2010, the deceased executed a transfer on November 18, 2010. The second transaction was entered into February 4, 2011 for L.R No. 7468 for which he paid a price of Kshs.560,000 with Land Control Board consent obtained on January 20, 2011. DW2 asserted that he conducted a search before getting into either of the transactions. That the transactions were above board. He added that in 2013, he sold the suit properties to the 4th defendant who then took possession.
18. DW2 produced the agreements for sale as Dex 1(a) & (b), certificate of official search as Dex 2, letter of consent – Dex 3(a) & (b), Transfer form – Dex 4(a) & (b); Stamp Duty forms Dex 5(a) & (b), Registration fees - Dex 6(a) & (b); Mutation form – Dex 7. According to DW2, he visited the land and found it was the deceased wife who was cultivating the land. That since he was away, he allowed her to continue with the cultivation.
19. Under cross-examination, DW2 stated he never engaged a broker during the land buying transaction. That he did due diligence before buying. In further cross-examination, DW2 said he sold the land to the 4th defendant in the year 2013 at Kshs.1,470,000. That he executed transfers in favour of the 4th defendant. DW2 stated he did not have application for Land Control Board consent and that the transfer form does not indicate the date of registration since they are copies he made before presenting them for registration. In re-examination, DW2 stated it is the deceased who processed the Land Control Board consent.
20. The 4th defendant gave his evidence as DW3. The witnesses stated that on September 19, 2013, the 2nd defendant offered to sell him L.R Nos 7468 and 7469 at an agreed consideration of Kshs.1,470,000. That he agreed to buy and paid the whole amount in full. The witness avers that the 2nd defendant obtain the requisite consent and on October 2, 2013, the titles were registered in his name. He pleaded that he is an innocent purchaser for value and in actual possession. DW3 added that he had no knowledge of the particulars of fraud enumerated by the plaintiff and should not be blamed.



21. In cross-examination, DW3 said that he visited the land and did a search at the lands office before he purchased it which search showed the 2nd defendant as the registered owner. That he produced a valid agreement and paid the agreed purchase price. DW3 stated that he followed due process when he got his title. That he did not investigate how the 2nd defendant acquired his title.
22. The 3rd defendant gave evidence as DW4 stating that he currently works with the British High Commission in Nairobi. That before buying the suit land, he lived in that area from the year 2000 so he knew the deceased. That the deceased had been farming the land in dispute. That he did a search for the two parcels and for the parent title L.R No. 1206 (Dex 17). DW4 said a sale agreement was then drawn for sale of L.R Nos 7470 & 7471 and he paid the agreed purchase price in full. Thereafter, the deceased obtained the Municipality Land Control Board consent to transfer for the two parcels and on January 6, 2011 L.R No. 7471 registered in his name on February 3, 2011.
23. The 3rd defendant also adopted the defence of innocent purchaser for value without knowledge and in possession. He averred that he is holding a valid registration certificate for the suit title adding that the claim herein is unfounded having been brought outside the limitation period. He produced the documents in his list ad Dex 16-23 to support his defence.
24. Under cross-examination, DW4 confirmed looking at the register which showed the deceased acquired ownership in the year 2000. That all documents of search confirmed Makanda – deceased as the owner and the possession was also in the hands of the deceased. That he took possession in 2011 by fencing it and enclosing it to his home in the nearby next plot. That Makanda – deceased stayed some 300m – 400m from the suit plot. DW4 admitted he has not produced the copy of search he conducted. That he began the transaction in 2009 which date is at variance with date when Dex 16 was issued. DW4 stated he was not involved in the process of sub-division of L.R 1206. The evidence of DW4 brought to a close the case by the 4th defendants.
25. The parties advocates agreed to file written submissions. The plaintiff submitted on the provisions of section 7 and 26 of the Limitation of Actions Act and stated that the events leading to the filing of this case was discovered in 2015 as pleaded and not in the year 2000 when the deceased re-transferred L.R No. 1206 to his name. It is on this basis they submit the plaintiff's suit is not time barred. In alluding to proof of the fraud levelled against the defendants, the plaintiff stated that section 31(1) and (2) of the Land Registration Act was not complied with when entry No. 7 was entered in register of L.R No. 1206. The plaintiff wondered why a certificate of title was not issued after entry No. 7 and he concluded this was because the defendants were aware of the fraud.
26. The plaintiff further submits that none of the 2nd – 4th defendants provided a transfer instrument that enabled their registration of the respective parcels of land. That the copies of Dex 4(a) & (b) produced by the 2nd defendant did not disclose the date they were registered which according to the plaintiff is a clear manifestation of fraud. Thus the defendants were in violation of section 43 (1) & (2) and 37 of the Land Registration Act. The plaintiff concluded that the defendants were aware of the fraud committed by the deceased and they colluded with him. He urged the court to find he had proved his case.
27. The 1st defendant made a brief submission stating that the estate of the deceased is not aware of any re-transfer of the suit parcel to the name of the deceased. They recognised the ownership of the suit land by the plaintiff unless he is the one who transferred the same to the 3rd parties.
28. The 2nd defendant filed his submissions on April 12, 2022 and raised three issues i.e. whether the suit is time-barred, if the 1st defendant fraudulently registered the suit land in his name, and whether the 2nd defendant submitted that the cause of action arose on January 13, 2004 when the 1st defendant caused registration of the suit land into his name and under the provisions of section 4(2) of cap 22, an action



- founded on tort may not be brought after the end of 3 years. That the plaintiff pleaded at paragraph 14 discovering the fraud on January 13, 2015 and the period of 3 years ended on January 13, 2018. However these proceedings commenced on August 20, 2018 which was beyond the 3 years from the date when the fraud was discovered.
29. The 2nd defendant also submitted that a period of 14 years had lapsed from when the 1st defendant registered himself. This period of time passed made the suit as filed to be in contravention of the provisions of section 7 of the *Limitation of actions act*. The 2nd defendant referred the court to the case of *Kimani Ruchine & Ano vs Swift Rultherford & Co. Ltd & Ano*, (1980) KLR.
 30. On the issue of fraud the 2nd defendant placed reliance on several holdings *inter alia*, *Benson Wandera Okuku vs Israel Were Wakho* (2020) eKLR and submitted that the alleged fraud has not been proved. According to him, the plaintiff left it to the court to infer fraud. The 2nd defendant submitted that the plaintiff did not demonstrate to the court the party involved in the fraud and who carried out the fraudulent acts. He argued that the plaintiff failed to advance why he did not sue the Land Registrar and neither the Registrar in his evidence deny the authenticity of the impugned transactions.
 31. The 2nd defendant submitted that he is an innocent purchaser for value and he has met the threshold as set out in the case of *Katende vs Haridar & Co. Ltd* (2008) 2 EA 173. He referred the court to the exhibits he produced which include certificate of title and sale agreement that showed he paid the purchase price in full for L.R Nos 7469 and 7468. The 2nd defendant urged the court to dismiss the suit with costs.
 32. The 3rd defendant's submission was filed on June 13, 2022 and raised similar issues as the 2nd defendant. On fraud, the 3rd defendant submitted that fraud was not proved and quoted *Bullen & Leake* 13th Edition referred to in the cases of *Gaden Neptune vs Occident* (1989)1 Lloyd Rep. and *Wallingford vs Mutual Society* (1880) 5 App stated thus concerning fraud, "where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved."
 33. The 3rd defendant also submitted that he has met the threshold to be declared an innocent purchaser for value and qualifies for protection of this court. The 3rd defendant submits that time to bring the claim by the plaintiff started running on March 13, 2000. He cited the rationale for limitation of actions as captured in the case of *Gathoni vs Kenya Co-operative Creameries Ltd* (1982) KLR 104 where the Court of Appeal held thus; "the law of limitation of action is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take steps in his own interest. ... the Act does not help persons who whether through dilatoriness or ignorance, do not do what the informed citizen would reasonable have done."
 34. The 4th defendant filed his submissions on May 24, 2002 and asked the court to protect him as an innocent purchaser for value as the current owner of South Teso/Angoromo/7468 and 7469.
 35. From the pleadings, the evidence and submissions three issues feature for determination by this court as follows:
 - a. Whether the plaintiffs' suit is time barred.



- b. Whether the plaintiff has proved the claim as against the defendants.
- c. Whether or not the defence of innocent purchaser for value is available to the 2nd – 4th defendants.
36. The 2nd – 4th defendants have all pleaded and submitted that the plaintiffs’ suit was time barred. The 2nd, 3rd and 4th defendants pursued the time bar under the provisions of section 7 of cap 22 which provides thus;
- “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.”
37. The plaintiff in contrasting this submission submitted that his claim was based on fraud and illegalities hence time started to run from the time he discovered the fraud and not when the illegal action took place in March 2000. I agree with the plaintiffs’ argument that time could only be counted to run from the time he discovered the illegality. Thus the suit as filed was within the time lives set out in section 7 of the *Limitation of actions Act*.
38. The 2nd defendant went a notch higher to state that although the claim was brought under fraud, it was filed outside the three (3) period. The 2nd defendant filed his submissions in April prior to the filing of submissions by the plaintiff. The plaintiff’s counsel however did not address this aspect of the time limitation. The plaintiff referred the court to section 26(c) of cap 22 which provides on how time is computed thus; “... 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.”
39. From his pleadings and evidence, the plaintiff stated that he visited the suit land in December 2014 when he found the 3rd defendant had encroached on the land. This made him to carry out a search in January 2015 which search revealed the 1st defendant had re-transferred the suit land to his name. the plaintiff submitted the fraud was discovered in 2015 and the case filed in 2018 which according to him was within the 12 year period. The plaintiff also pleaded that his cause of action was founded on fraud and illegality as pleaded in paragraph 10 & 11 of the plaint. This means that the plaintiff’s suit was also subject to limitation provided on a claim for tort. The claim is for land and the cause of action is founded on the tort of fraud.
40. Section 4(2) of cap 22 provides thus;
- “An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”
41. As clearly submitted by the 2nd defendant, time started running in January 2015 when the plaintiff discovered the fraud. The 3-year period therefore ended on January 12, . The copy of search produced by the plaintiff as Pex 7 also show it was issued on July 25, 2013 to infer that the plaintiff may have discovered the fraud as early as July 2013. The plaint is dated March 22, 2018 and filed on March 28, 2018 was therefore filed out of time by a period of 2 months. The plaintiff had an option of seeking leave to file suit out of time but did not apply for extension. As it is, the suit premised under fraud is time barred and becomes a candidate for striking out.
42. I will however proceed to consider whether or not the plaintiff proved the fraud alleged. The burden to prove the fraud rested on the plaintiff and the standard required is above the balance of probabilities.



The plaintiff pleaded and stated in evidence that he never sold back the suit land to deceased neither did he execute transfer documents giving back the land to the deceased. The administrator of the deceased denied that the deceased ever re-transferred the suit land to himself after he had sold the land to the plaintiff. The 1st defendant thus denied being party to the impugned entry No. 7 and the subsequent sub-division. The plaintiff also called the evidence of the Land Registrar who confirmed that they did not trace any transfer documents to support the entry No. 7 in the register of the suit title.

43. To support the evidence that the plaintiff had acquired a legal title, the witness produced Land Control Board application for consent which was approved on December 19, 1984 and consent to transfer issued. The plaintiff also produced a transfer form duly executed by the deceased and himself transferring L.R. No. 1206 to himself which transfer was registered on 28th December 1984 plus a certificate of title issued to him on February 22, 1985. Therefore as at February 1985, the ownership was in the hands of the plaintiff and the change back to the deceased could only be treated as regular if requisite documents were provided to support the entry. The 1st defendant sued as the deceased representative stated the deceased never committed such a transaction. The 1st defendant acknowledges the plaintiff as the owner. Thus the evidence of the plaintiff and the 1st defendant brings out the illegality of entry No. 7.
44. During cross-examination by the 2nd defendant, the administrator of the deceased said he saw the sale agreements for parcel Nos 7468 and 7469 when he was served with the court documents. DW1 also said that his father told them as a family about selling the suit land to the plaintiff. The proof of fraud did not depend on the plaintiff suing the defendant as submitted by the 2nd & 3rd defendants. In any event, the Land Registrar having participated as a witness filled the gap that may have been created had he not been sued. The Land Registrar having corroborated the evidence of PW2 that there were no documents to support entry No. 7 was sufficient evidence that the said entry was an illegality.
45. The question which begs answer in light of the evidence of DW1 is who carried out the subsequent sub-division of L.R. No. 1206. This question is important because the 2nd defendant argues that the plaintiff did not bring out the person who committed the fraud. The mutation produced by the 2nd defendant dated June 23, 2009 (May 27, 2009) does not bear the signature of the deceased. There was no application for consent to sub-divide neither was the letter of consent from the Municipality Land control Board availed. The plaintiff called the Land Registrar as his first witness said he could not confirm whether entry No. 7 was approved by the Registrar as he did not find documents supporting that registration. Once the 1st defendant denied undertaking the impugned entries Nos 7 and 8, it was incumbent upon the 2nd defendant to bring a claim against the co-defendant if indeed they did not collude or were not party to the fraud. It is my opinion that the plaintiff has answered the question of who committed the fraud – the person being the 1st defendant and the parties who benefitted from the illegal transaction.
46. Is the defence of innocent purchaser for value available to the 2nd, 3rd and 4th defendants? They argued that they have met the threshold of the principles to be satisfied for a party to enjoy the protection of the court. The 2nd & 3rd defendants argue they acquired their titles after following due process of the law? My opinion is that the law protects people equally so that the doctrine of innocent purchaser would also apply to the plaintiff's case. The plaintiff also acquired his title from the deceased after following due process. He produced copies of application for consent, Land Control Board consent to transfer, duly executed transfer, and an original title issued to him. He has the evidence of DW1 corroborating that the land was sold to him for a consideration. None of the defendants challenged the title in his possession. The doctrine of equity that the first in time prevails would then demand that the first innocent purchaser should enjoy the right in priority. If indeed the deceased was the engineer



of all these problems then the plaintiff's title cannot be vitiated by the doctrine of innocent purchaser for he is also an innocent purchaser.

47. Unfortunately, inspite of my findings in favour of the plaintiff in respect of the head of fraud and innocent purchase, the time-bar takes away from him any positive judgment. Consequently, the plaintiff's suit is dismissed for having been filed out of time without leave for extending time. Given the circumstances of this case, I order that each party to bear their costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 27TH DAY OF SEPT, 2022.

A. OMOLLO

JUDGE

