



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ooko v Otuga & another (Environment & Land Case 334 of 2013)  
[2022] KEELC 12581 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12581 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 334 OF 2013  
A OMBWAYO, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**MARY AUMA OOKO ..... PLAINTIFF**

**AND**

**ENOCK OTIENO OTUGA ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL (SUED ON BEHALF OF MINISTRY OF LANDS**

**KISUMU REGISTRY ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Mary Auma Ooko (hereinafter referred to as the plaintiff) has come to court vide amended plaint filed on February 18, 2016 pursuant to leave granted on February 10, 2016 against Enock Otieno Otunga and the honourable Attorney General claiming that the plaintiff was the registered owner of land parcel number Kisumu/kogony/2587 measuring 1.0 Ha. That on or about the October 4, 2013, the plaintiff was surprised to find the said land parcel had been transferred to the 1<sup>st</sup> defendant and title deed issued.
2. The plaintiff avers that she has never sold the said land to the 1<sup>st</sup> defendant nor have any transaction with the 1<sup>st</sup> defendant with regard to the said land parcel.
3. The plaintiff avers that the said transfer of the suit land parcel to the 1<sup>st</sup> defendant was done without her knowledge, consent and/or authority.
4. The plaintiff claims further that the said land parcel was transferred to the 1<sup>st</sup> defendant illegally, fraudulently and/or un-procedurally in a collusion between the 1<sup>st</sup> defendant and the officials at the ministry of land in Kisumu.
5. The particulars of fraud are that:-
  - i) Transfer without the knowledge and/or consent of the plaintiff.



- ii) Transfer without consent being obtained from the land control board.
  - iii) Transfer without payment of any consideration or involvement of the plaintiff.
  - iv) Transfer without dealings with the registered owner.
  - v) Trespassing on the suit land parcel and fencing.
6. The plaintiff claims to have lost her land through the aforesaid fraud.
  7. The plaintiff prays for the nullification of the transaction and a declaration that:
    - a) The transfer and registration of the land parcel number Kisumu/kogony/2587 into the name of the 1st defendant is illegal, unlawful and unprocedural.
    - b) An order for nullification of the registration of the 1st defendant as the proprietor of land parcel number Kisumu/kogony/2587 and revocation of the title deed issued.
    - c) An order of permanent injunction barring the 1st defendant, his agents and/or servants from trespassing, selling, occupying, sub-dividing or in any other way dealing with the land parcel number Kisumu/kogony/2587.
    - d) General damages for trespass on the land parcel number Kisumu/kogony/2587.
    - e) Cost of the suit.
  8. The 1<sup>st</sup> defendant denies the allegations in the plaint and states that the plaintiff sold the said parcel of land to one Joseph Ouma Odemba who immediately thereafter sold the same to the 1<sup>st</sup> defendant with full knowledge and consent of the plaintiff and that the plaintiff wilfully transferred the land to the defendant.
  9. The defendant claimed to have obtained consent of the land control board in the presence of the plaintiff and that the plaintiff had received consideration for the parcel of land from the immediate purchaser one Joseph Ouma Odemba. The 1<sup>st</sup> defendant prayed for dismissal of the suit with costs.
  10. The 2<sup>nd</sup> defendant denied any wrong doing and stated that the transfer of the land parcel number Kisumu/kogony/2587 was conducted procedurally and within the law.
  11. When the matter came up for hearing, the plaintiff testified on oath that she is the legal beneficiary of the said land parcel number Kisumu/kogony/2587 having been registered as the proprietor on August 19, 2011 from her late husband John Ouko Walogo who was the 1<sup>st</sup> registered proprietor.
  12. That on or about the October 4, 2013, she was surprised to find that her said land parcel has been fenced by a person who is a stranger to her. She later conducted a search at the land registry which revealed that the said land parcel is in the name of the defendant (Enock Otieno Otuga) and was transferred to him on December 15, 2012.
  13. That she has never sold to the defendant the said land parcel neither has she ever transacted with him at any one time concerning the sale or transfer of the said land parcel and therefore the defendant is a trespasser who has acquired the ownership of the said land parcel by unlawful means and she would like the said registration to be revoked.
  14. On cross examination, she states that the identity card number in the transfer is hers but she did not know how the 1<sup>st</sup> defendant got her identify card. She never sold the land in dispute. Her Identity card has never been stolen.



15. On his part the 1<sup>st</sup> defendant testified that he is the registered proprietor of land parcel number Kisumu/kogony/2587 having been registered on the December 15, 2011 and that the registration was lawful. The chronology of events that led up to this registration were as follows:
16. Sometime in the month of October 2011, he met one man by the name of Mr Joseph Ouma Odembo who offered to sell to him the plot that is the subject of the dispute herein. The said Mr Joseph Ouma Odembo explained to him that he had bought the said parcel of land from the plaintiff herein and that if the defendant was interested, he was willing to sell it to him. Upon conducting a search at the lands registry, he realized that the plot was still registered in the plaintiff's name and they (Mr Odembo and the defendant) then visited the plaintiff to find out if she could transfer the plot directly to him instead of Mr Odembo to minimize costs of transfer in terms of stamp duty and so forth. The plaintiff stated that she had no objection and agreed to accompany him to the hearing of the land control board for purposes of giving her consent, which she did.
17. They then executed a sale agreement with Mr Joseph Odembo and then the plaintiff attended to the land control board hearing with the defendant whereby she gave her full and unequivocal consent to the sale. He is now surprised and taken back that she can claim that she was unaware.
18. That on October 3, 2011, the plaintiff herself signed transfer documents handing over the parcel of land to the defendant and later on he obtained the title deed to the property.
19. He stated categorically that the plaintiff sold this parcel of land to Mr Joseph Ouma Odembo but that before transferring title to him, the defendant bought the same from Mr Joseph Odembo upon which transfer was then effected to him. This transfer was done by the plaintiff herself and it is dishonest and malicious to now claim that the defendant is a trespasser who has acquired this land by unlawful means.
20. It is therefore a transaction that was above board and this suit ought to be dismissed with costs to the defendant.
21. The gravamen of the plaintiff's submissions is that the plaintiff was the registered proprietor of the parcel of land in dispute and therefore protected the Constitution of Kenya and the Land Registration Act.
22. The plaintiff further submits that since the plaintiff denied transferring the land to the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant bear the burden of proof that the plaintiff transferred the land to the defendant and that the plaintiff sold the land to Joseph Ouma Odemba. The plaintiff submits that there is no written agreement between the plaintiff and Mr Odemba or between the plaintiff and the 1<sup>st</sup> defendant.
23. The plaintiff further submits that the registration of the suit land into the name of the 1<sup>st</sup> defendant was illegal and unprocedural as she did not sign the transfer document and that she did not know how the 1<sup>st</sup> defendant obtained her photos and national identity card.
24. The plaintiff submits that the transfer forms were signed on October 3, 2011 whereas the sale agreement between the 1<sup>st</sup> defendant and Mr Odemba was signed on December 14, 2011. The plaintiff further denies having applied for a consent of the land control board and that the consent obtained was irregular.
25. Ultimately, the plaintiff submits that the 1<sup>st</sup> defendant is a trespasser on the suit land.
26. The 1<sup>st</sup> defendant on his part submits that the plaintiff was the proprietor of the suit parcel of land before she transferred the same to the 1<sup>st</sup> defendant. The plaintiff sold the land to one Joseph Ouma Odemba who sold the land to the 1<sup>st</sup> defendant and therefore to minimise costs of transfer they decided to transfer the land directly from the plaintiff to the 1<sup>st</sup> defendant. It is alleged that the plaintiff gave



consent. She signed a transfer form and the land was registered in the 1<sup>st</sup> defendant's name. The 1<sup>st</sup> defendant ultimately submits that he is the holder of the title of the land after legally and lawfully acquiring the said land from the plaintiff. The 1<sup>st</sup> defendant submits that he bought the land from Mr Odemba who had purchased the land from the plaintiff.

27. The defendant submits that the registration of the suit land in the names of the 1<sup>st</sup> defendant was legal and procedural because the plaintiff signed the transfer forms in favour of the 1<sup>st</sup> defendant. It is submitted that the plaintiff attended the hearing of the land control board where the consent was given.
28. On fraud, it is submitted by the 1<sup>st</sup> defendant that no evidence of fraud was produced as no evidence was adduced that the signature was a forgery.
29. The 1<sup>st</sup> defendant submits that any incidence of trespass does not arise as the plaintiff is the registered owner of the parcel of land.
30. I have considered the evidence on record, and rival submissions and do find the following issues ripe for determination.
  1. Whether there was a valid transfer of the land from the plaintiff to the 1<sup>st</sup> defendant.
  2. Whether the 1st defendant is a trespasser on the suit land.
  3. Which reliefs should the court grant.

**Whether There Was A Valid Transfer Of The Suit Land From Plaintiff To The Defendant.**

31. It is trite law that all contracts where a parcel of land is being disposed should be in writing and attested by a witness who in present when the contract is signed.

Section 3, (3) of the Law of Contract Act provides:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a)	the contract upon which the suit is founded—	
	(i)	is in writing;
	(ii)	is signed by all the parties thereto; and
(i)	is in writing;	
(ii)	is signed by all the parties thereto; and	
(b)	the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:	

32. Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”



33. There is no sale agreement between the plaintiff and one Joseph Odemba or between the plaintiff and the 1<sup>st</sup> defendant. Mr Joseph Odemba was not called to demonstrate to this honourable court that he bought the land from the plaintiff. The above findings demonstrate that the transaction, if any between the plaintiff, Joseph Odemba and the 1<sup>st</sup> defendant was in breach of the law.
34. Moreover, the plaintiff having denied signing the transfer form, the defendant shoulder the burden of proof that the plaintiff signed the transfer form. The defendant ought to have called a document examiner who is a handwriting expert to discern the plaintiff's signature on the transfer form. The defendant failed to call the advocate who attested to transfer of land and before whom the plaintiff is alleged to have appeared and signed the transfer form.
35. On the consent of the land control board, the defendant did not produce the minutes of the board meeting that gave consent hence it is difficult to believe the 1<sup>st</sup> defendant that the plaintiff applied for consent of the land control board and that the same was properly given.
36. Section 24 of the *Land Registration Act* provides:-

“Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

“Section 25 provides:

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

“Section 26 provides:-

- 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.”

37. Though the plaintiff has not proved fraud as required, I do find that the plaintiff has proved on balance of probabilities that the 1<sup>st</sup> defendant obtained the parcel of land in dispute un-procedurally, illegally and unlawfully. Hence his registration was not valid.

### **Whether The 1st Defendant Is A Trespasser On The Suit Parcel Of Land**

38. I have already found that the 1<sup>st</sup> defendant obtained registration of the suit land illegally and unlawfully.

“Section 3 (1) of the *Trespass Act* cap 294 provides:

Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

39. The 1<sup>st</sup> defendant entered the parcel of land through an illegal and unlawful transactions and therefore the 1<sup>st</sup> defendant is a trespasser.

### **Whether Reliefs Should The Court Grant**

40. The plaintiff having proved her case on balance of probability, I do grant prayer:

- a) The transfer and registration of the land parcel number Kisumu/kogony/2587 into the name of the 1st defendant is illegal, unlawful and unprocedural.
- b) An order for nullification of the registration of the 1st defendant as the proprietor of land parcel number Kisumu/kogony/2587 and revocation of the title deed issued.
- c) An order of permanent injunction barring the 1st defendant, his agents and/or servants from trespassing, selling, occupying, sub-dividing or in any other way dealing with the land parcel number Kisumu/kogony/2587.

41. On general damages, I do find that the land measures 1.0 Ha in Kogony and was illegally purchased from Mr Joseph Odemba in the year 2011 for Kshs 6,000,000 and therefore general damages of Kshs 500,000 would be sufficient to compensate the plaintiff for trespass for a period of approximately 9 years. I do award costs to the plaintiff. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2022**

**ANTONY OMBWAYO**

**JUDGE**



**This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020**

