



REPUBLIC OF KENYA



**Ojwang v Hongo & another (Environment and Land Appeal
1 of 2020) [2022] KEELC 14456 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 1 OF 2020
A OMBWAYO, J
OCTOBER 27, 2022**

BETWEEN

JUDITH ANYANGO OJWANG APPELLANT

AND

JOHN NYANGWARA HONGO 1ST RESPONDENT

DALMAS OTIENO HONGO 2ND RESPONDENT

*(An appeal from the judgment by the Learned Hon. W. K Onkunya
delivered on 16th December 2019 in the CM ELC No.232 of 2018)*

JUDGMENT

1. Judith Anyango Ojwang (herewith referred to as the appellant) have come to this court by way of appeal against the respondent from the judgment and decree of Hon.W.K Onkunya Senior Resident Magistrate in Kisumu ELC No. 232 of 2018 delivered on 16th December 2019. The appellant prays for order that the judgment of Hon W K Onkunya Senior Resident Magistrate in Kisumu CM ELC No. 232 of 2018 delivered on 16th December 2019 be set aside in the entirety and substituted with an order allowing the appellant suit as prayed for in the further amended plaint dated 23rd July 2012. In the further amended plaint the appellant asserted that she was the registered owner of land parcel number Kisumu/Kochieng/219 measuring an estimate 1.7 Ha.
2. She contended that the land parcel No.Kisumu/Kocheing/219 no longer exists and has been subdivided into Kisumu/Kochieng/4326, Kisumu/Kochieng/4327 which are in the names of the plaintiff who is the absolute owner and totally authorized to deal in the same.
3. According to the appellants, on or about the 10th day of May 2010, the 1st and 2nd respondents without any colour of right and without any reasonable justification of lawful excuse or authority or the consent or express permission of the appellant, encroached upon or invaded the plaintiffs land



- Kisumu/Kochieng/4226. Kisumu/Kochieng/4227 using hired workmen to dig holes in the process destroying the sisal marking the boundary, and thereafter the respondents fenced off the occupied part of the said parcel of land under a false and malicious claim of ownership.
4. By reason of the said unlawful actions, the 1st and 2nd defendants, the plaintiff has been denied quiet and peaceful possession user and enjoyment of her property and hence the plaintiff has suffered great loss and damages in terms of loss of user.
 5. The 1st and 2nd respondents actions were calculated to deprive the appellant of her quiet and exclusive possession of the said land parcel No. Kisumu/Kochieng/4326, Kisumu/Kochieng/4327 and to deny the appellant any access into use and enjoyment of the same, and it was thereof necessary for the respondents be restrained from further encroaching into and trespassing on the said parcel of land. The appellant claimed damages.
 6. The appellant in the lower court prayed for an order that the defendant by himself or his family servant agents or proxies or themselves, their families and their servants or agents proxies or any of then do vacate all portions of land parcel No. Kisumu/Kochieng/4326, Kisumu/Kochieng/4327 forthwith or be evicted there from and a permanent order of injunction restraining the defendant by himself or his family or servants, or agents or proxies or themselves, their families and their servants or agents or proxies or any other them from entering, occupying, remaining on, cultivating, developing or in any other way using the said land parcel No. Kisumu/Kochieng/4226, Kisumu Kocheing/4327 or any portion thereof.
 7. She further prayed for a declaration that land parcel No. Kisumu/Kochieng'/4326 and Kisumu/Kochieng'/4327 wholly belongs to the plaintiff. Ultimately, she prayed for costs of the suit and interest thereon at court rates.
 8. The respondents on their part filed defence wherein they stated jointly and severally that the appellant fraudulently, unlawfully and without right had all that parcel of land known as Kisumu/Kocheing/210 formerly in the name of Ogot Sana (deceased) transferred into her name and that on the basis of an agreement and understanding between them and the person (s) entitled as beneficiaries of the estate of the deceased (Ogot Sana), they acquired equitable interests in the said parcel of land pending taking up of the letters of administration of the estate of Ogot Sana.
 9. They further alleged that the appellant has no lawful, rightfully, legal and or equitable claim to the said parcel of land and hence has no known right to occupy, use, fill or in any way exercise proprietary rights over the same to have been denied peaceful and quiet possession, use or enjoyment thereof.
 10. They denied that they were liable to the appellant as claimed or at all and stated that having lawfully acquired equitable interests in and over the said parcel of land from the beneficiaries of the deceased's estate and having done so prior to the actions by the appellant, they are entitled to occupation, possession and use of the said parcel of land. Accordingly, they have a counter-claim. In the counter claim the respondent stated that appellant had unlawfully transferred into her name all the parcel of land known as Kisumu/Kochieng/219. Their claim was for an order an inhibition be lodged pending the issue of a permanent order of injunction restraining the appellant, he servants, agents and or persons claiming her authority from moving into, remaining on/in or evicting the respondents from all the parcel of land known as Kisumu/Kochieng/219.
 11. They further prayed for an order cancelling the registration of the appellant as the owner and or proprietor of all that parcel of land known as Kisumu/Kochieng/219 and reinstatement of the name of Ogot Sawa, the original owner and proprietor of the said parcel of land.



12. Last but not least, the respondents prayed for a declaration that they are entitled to the ownership and or proprietorship of all that parcel of land known as Kisumu/Kochieng/219 and costs of the suit.
13. In the reply, the appellant stated that she never fraudulently, unlawful and without right acquired the land from Ogot Sana (deceased) by way of transfer. He avers that the land was lawfully acquired.
14. During hearing the appellant adopted her witness stated dated 22nd March 2011 and produced exhibits PEX1 to PEX8 and the further list of documents were produced as PEX 9-21. She stated that she was dealing with one Naaman Ogot whom she gave more money than required. The Land Dispute Tribunal gave her the land and therefore has title to the land. She admitted that the land was registered in the name of Ogot Sana who was a blood brother of Naaman Ogot. On cross examination she admitted that the land was registered in the name of Ogot Sana when she entered into agreement with Naaman Ogot and the latter had not obtained a grant of letter of administration and that Naaman Ogot had not transferred the suit parcel into his name.
15. PW2 William Onyango Osire a retired Chief of Kochieng Location stated that he knew the plaintiff and Naaman Nyajom Sana and the wife Flora Nyajom. According to Pw2, the appellant bought the suit property from Naaman Ogot but it was registered in the name of Ogot Sana. On cross examination by Mr Onsongo, he states that land parcel No. 219 was registered in the name of Ogot Sana. PW3 Benson Nyangoge Owiny stated that Ogot Sana had no children hence sold the land to the appellant.
16. John Hongo the 2nd respondent testified that he bought the land from Dorina Auma Onyango by way of agreement. He did a search. He fenced the land and poured construction materials. He fenced the land but the same was destroyed. He claimed 1.7 acres he bought from Dorina Aure Onyango. In her considered and properly evaluated judgment, the learned Magistrate found that it was not clear when the plaintiff was registered as the proprietor of the land that belonged to the deceased estate of Ogot Sana. On 20th April 1998 when the sale agreement was done, the registered owner Ogot Sana was deceased and no grant of the letters of administration intestate was taken out by the purported seller Naaman Ogot hence the transaction was illegal as they were dealing with a deceased property. The learned magistrate held that any letters of administration obtained from the appellant were illegal hence subdivision as to parcel of land 219 was illegal and the appellant was not entitled to the reliefs sought. The counter claim was allowed and the subdivision of Kisumu/Kochieng/219 was nullified and that the registration of the appellant as proprietor of Kisumu/Kochieng/4326 and 4327 was cancelled.

I have considered the appeal and submissions on record and do find that the learned magistrate applied the law properly by finding that the appellant acquired the parcel of land illegally. Section 45 of the [*law of succession act*](#) Cap 160 Laws of Kenya provides for no intermeddling with property of deceased person. It stipulates as follows:-

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall-
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.



17. The person known as Naaman Ogot had no capacity to sell the deceased land without first obtaining a grant of the letter of admission. Any property sold was illegal. The superior courts in Kenya have applied the law by finding that any transaction in respect of the property of a deceased person is illegal if done without a legal representative obtaining letters of administration intestate. In the case of *Virginia Mwari Thurania vs. Purity Nkirote Thurania* [2017] eKLR, where Gikonyo, J, observed that;

“The said sale agreement is null and void for violating Section 82 (b) (ii) of the *Law of Succession Act*, as the said Julia Thurania had not obtained Letters Administration of the estate of the deceased at the time of the alleged sale. The property of a deceased person vests in the legal representative and constitutes the estate of the deceased person. It is only the legal representative of the estate or a person under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of the written law or order of the court. In this case, there is not a will and so the principle of relation back does not apply. Under Section 80 (2) *Law of Succession Act*, Cap 160 a grant of letters of administration takes effect only as from the date of issue and not otherwise. Therefore, until a legal representative is appointed in intestacy, any act done in respect of the estate of a deceased by a person without authority of the law amounts to intermeddling, illegality and is a nullity.”

18. He also relied on *Re Estate of Paul M’Maria (Deceased)* [2017] eKLR, where the Court held that;

“The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the *Law of Succession Act* is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of the Constitution. See the claw-back provision of the Constitution that:- 40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. Therefore, applying the law and the Constitution, the sale of Plot 18A Mitunguu Market on 12th July 2004 was in contravention of the *Law of Succession Act* and therefore vitiated by that illegality. It is thus invalid, null and void transaction. Such contract is ex facie illegal and is unenforceable; no person can maintain an action based on or recover on the basis of a contract which is prohibited by statute”

19. Applying the above principles, the learned Magistrate applied the law rightfully by dismissing the suit. The appeal is dismissed with costs.

DATES AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER 2022

A. O OMBWAYO

JUDGE

