



REPUBLIC OF KENYA



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Odam (suing as the administrator of the Estate of Konel Adam Omollo (Deceased) & another v Odingo & 11 others (Environment & Land Case 160 of 2015) [2022] KEELC 14446 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14446 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 160 OF 2015
A OMBWAYO, J
OCTOBER 27, 2022

BETWEEN

JOSEPH OMOLLO ODAM (SUING AS THE ADMINISTRATOR OF THE ESTATE OF KONEL ADAM OMOLLO (DECEASED)) 1ST PLAINTIFF
RICHARD OMOLO OYOO 2ND PLAINTIFF

AND

JILL OWINO ODINGO 1ST DEFENDANT
DOROTHY NEREA OPONDO 2ND DEFENDANT
FREDRICK ADIWUOR RALAK 3RD DEFENDANT
JOHN ODHIAMBO AKINYI 4TH DEFENDANT
CHAGANBHAI MOTIBHAI PATEL 5TH DEFENDANT
NICHOLAS RANDA OWANO OMBIJA 6TH DEFENDANT
JOHN ROBERT ODHIAMBO 7TH DEFENDANT
JOHN ALEX GENGA 8TH DEFENDANT
CHARLES OKEYO OGOLLA 9TH DEFENDANT
HAPPY TWINS FREIGHT FORWARDERS LTD 10TH DEFENDANT
THOMAS OTIENO OBAT KWASA 11TH DEFENDANT
COUNTY LAND REGISTRAR, KISUMU 12TH DEFENDANT



JUDGMENT

1. The plaintiff Joseph Omollo Odam suing as the administrator of the estate of Konel Adam Omollo- (deceased) and Richard Omolo Oyoo have sued Jill Awino Odingo claiming that the parcel of land title No Kisumu/Konya/817 measuring 1.1 Ha was at all material times registered in the names of (1) Magdaline Olang' Chek (2) Jacob Oyoo Muok and (3) Odama Omolo from March 14, 1991.
2. The 1st plaintiff is a son and the administrator of the estate of Konel Odam Omollo also known as Odama Omolo- deceased while the 2nd plaintiff is the son of Jacob Oyoo Mwok also deceased. The plaintiffs stated that sometime in 1990 when the land adjudication was nearly completed, the 1st defendant approached Jacob Oyoo Mwok and Magdalina Olang' Chek with the intention of buying a portion of the suit land. The portion was identified and marked on the ground and the purchase price was agreed at Kshs 220, 000/=.
3. The 1st defendant then took the said Jacob Oyoo Mwok and Magdalina Olang' Chek to an advocate's office where they were paid Kshs 85, 000/= and were made to thumb print some papers which they were told was an acknowledgment for the money received. The balance of Kshs 135,000/= has never been paid to date. Cornel Odam Omollo was never a party to this transaction.
4. The purpose of selling the said portion of the 1st defendant was to enable meet the sub-division expenses for the portion sold to the 1st defendant and for each of the co-proprietors.
5. The plaintiffs stated that the 1st defendant has never taken possession of the portion he was buying or any other portion of the suit land.
6. According to the plaintiffs, sometimes in December 1994 Jacob Oyoo Mwok took the 2nd plaintiff to the suit land and showed him the location of his intended share and authorized him to build there. The 2nd plaintiff initially constructed a semi-permanent house and has added other structures and he has over the years resided over there openly continuously and without any interruption from any person to date now for a period of over 20 years. The plaintiff states that sometimes in 2010 the 8th defendant sued the 2nd plaintiff claiming that the plaintiff is occupying his land. This caused the 2nd plaintiff to carry out investigations and was very shocked to learn that the 1st defendant had transferred all the suit land into her name and caused the same to be sub-divided and quickly sold most of it to other people. Currently the suit land is owned by the 1st to the 11th defendants.
7. Upon further investigations the plaintiffs discovered; the papers thumb- printed by Jacob Oyoo Muok and Magdalina Olang Chek were in fact not an acknowledgment but transfer of land forms which the 1st defendant used to transfer the whole land to herself.
8. The plaintiffs contends that Konel Odam Omollo was not a party to the intended sale of a portion of the suit land and he never signed any papers and what appears to be his signature on the transfer form is a forgery because he was illiterate and could not write. The plaintiffs further contended that the transfer to the 1st defendant of the entire suit land and its subsequent sub-division was fraudulent, irregular and illegal and the same together with its sub-divisions are void and should be canceled.
9. The 2nd plaintiff states that the sub-divided parcel of land were sold in the year 1992 and none of the defendants or their successors in title have dislodged him from his continuous occupation of the land as aforesaid and he continues to so occupy the land as of right to date.



10. By reason of the matters hereinbefore pleaded the 1st plaintiff claims that the purported sale to the 1st defendant was illegal and fraudulent as his father Konel Odam Omollo aka Odama Omolo who was a co-proprietor of the suit land was not consulted and did not give his consent to the transaction hence all the titles emanating from Kisumu/Konya/817 be cancelled so that the land reverts to its original owners.
11. As for the 2nd plaintiff, he claims that he has acquired an overriding interest over some 2.5 acres he occupies by adverse possession and any person claiming ownership is registered only as trustee for the plaintiff.
12. There is a suit being Kisumu HCCC No 138 of 2010 by John A Genga, the 8th defendant herein against the 2nd plaintiff still pending. The subject matter of the suit is different from this one in that in that suit the 8th defendant is seeking eviction orders against the 2nd plaintiff herein.
13. The plaintiffs prays for a declaration that the purported transfer of the suit parcel title No Kisumu/Konya/817 to the 1st defendant Jill Awino Odingo was illegal, null and void and a declaration that also the sub-division and transfer of the sub-divisions Kisumu/Konya/3476 To 3487 to the 1st – 11th defendants was similarly illegal, null and void. Further the plaintiffs pray for an order nullifying the transfer to the 1st defendant and the subsequent transfers to the 2nd – 11th defendants.
14. In the alternative, the plaintiffs pray for an order that the 1st plaintiff is entitled to 1/3 share of his father's share in the suit land. Alternatively, a declaration that the 2nd plaintiff is entitled to 2.5 acres in the suit land having acquired the same by way of adverse possession. Costs of this suit and interest.
15. The 6th defendant filed a statement of defence whose import is that he is a stranger to the plaintiffs claim and contends that there are no letters of administration ad litem of the estate of the late Jacob Oyoo Mwok for the 2nd plaintiff to sue on behalf of the estate. The 6th defendant avers that he was not privy to the sale of a portion in land title No Kisumu/Konya/817 between Jacob Oyoo Mwok, Magdalena Olang' Chek and the 1st defendant herein. The 6th defendant further avers that he bought parcel No Kisumu/Konya/3482 from the 1st defendant who was in possession of the parcel of land at the time of the transfer. The 6th defendant states that he bought parcel No Kisumu/Konya/3482 from the 1st defendant who was in possession of the parcel of land at the time of the transfer and that he is a total stranger to the sale agreement between Jacob Oyoo Muok, Magdalena Olang Chek and the 1st defendant but avers that at the time of purchase of parcel No kisumu/Konya/3482, the records at the land offices showed that the 1st defendant was the registered owner. The 6th defendant pleads that he is protected by the provisions of section 39 of the *Registered Land Act* cap 300 (now repealed) but which was in force at the time the 6th defendant acquired title to the property Kisumu/Konya/3482. The 6th defendant states that he purchased parcel No Kisumu/Konya/3482 on or about May 4, 1992 from the 1st defendant and sold it to a third party in 2014 for a valuable consideration. The transfer of the parcel of land was completed on November 18, 2014.
16. According to the 6th defendant the land parcel No Kisumu/Konya/3482 is not part of the land which the 2nd plaintiff is claiming adverse possession of. The 6th defendant contends that this suit does not disclose any cause of action against the 6th defendant.
17. The 4th defendant filed a statement of defence on July 31, 2015 whose import is that the plaint is bad in law as it does not disclose any or any reasonable cause of action and that the suit is misconceived and ought to be struck out.



18. The 4th defendant denies allegations that a parcel of land titles as Kisumu/Konya817 measuring 1.1 Ha. was at all material time registered in the name of) 1) Magdalena Olang' Chek (2) Jacob Oyoo Muok and (3) Odama Omolo from March 14, 1991
19. The 4th defendant states that he is not aware and could not have been aware of the matters pleaded therein. The defendant stated that the plaintiffs at all times are not intent on allowing the defendant to peacefully enjoy the suit land. The 4th defendant states that, there is no homestead or any structures in the portion of the parcel purchased by the defendant Kisumu/Konya/3480.
20. The 4th defendant contends that the matters alleged in the plaint are not sufficient to warrant cancellation of the titles as the defendant is a bonafide purchaser for valuable consideration and that adverse possession as pleaded over some 2.5 acres he allegedly occupies or any portion thereof is misconceived, bad in law and not maintainable under the Limitation of Actions Act cap 22 laws of Kenya or under any other enabling law. That his occupation and possession of the suit land has been continuous peaceful and uninterrupted for over 25 years and as such has acquired possessory rights.
21. The defendant states that the 2nd plaintiffs' admission of encroaching on a small portion of the land is wrongful and is without justification whatsoever and shall seek and order evicting and restraining the plaintiff permanently from interfering or occupying the suit land. The 4th defendant prays for orders that :-
 - a. That the plaintiff's suit be dismissed with costs in its entirety.
 - b. An order of eviction and/or ejection of plaintiffs his agents and or servants on the suit land on their admission of occupation of portion of parcel No Kisumu/Konya/3480.
 - c. A permanent injunction restraining the defendant or their agent or representative from occupying the suit land.
22. The 12th defendant filed a defence generally denying the claim by the plaintiffs.
23. When the matter came up for hearing the 1st plaintiff Joseph, Omollo Odam adopted his statement dated June 20, 2015 and filed with the plaint on June 29, 2015. The gist of the statement is that the owners of the land were Cornel Odema Omollo, Jacob Oyoo Mwok and Magdalena Olang Chek who are all deceased. He produced the green card for Kisumu/Konya/817. He stated that Jill Awino Odingo was registered fraudulently. His uncle Richard Omollo Oyoo went to the land office and found that Jill had taken the land and divided it into pieces. His father did not sign the transfer.
24. On cross examination by Mr Wasuna, learned counsel for the 6th defendant, he stated that when the transfer was done between Jill and his father he was 8 years old. The information that his father did not sign the transfer in his name is not on the transfer form. He admitted that his father died 20 years after Jill had been registered and that his father knew five years before he died that Jill had defrauded him but did not file any case. Jacob Oyoo Muok and Magdalena Olang knew five years before death that they had been defrauded but did not file any case in court. He knows that the suit land was registered in 1991. According to PW1, the parcel purchased by the 6th defendant was not in the homestead.
25. PW2 Rose Anne Omollo, wife to Richard Omollo Oyoo is the administratrix of the estate of the deceased. She also claims interest in Kisumu/Konya/817. The parcel belonged to Jacob Oyoo Mwok, Magdalena Olang' Chek and Odam Omollo also known as Konel Odam Omollo. Their father in law died on April 6, 2011. She has been in possession of the land for more than 20 years hence she claims adverse possession. She is in possession of parcel number Kisumu/Konya3478,3483, 3484,3486,3487,7434,7435,3481,3479and3480. According to PW2 Jill did not pay all the money. She



- paid 85,000 out of 200,000/-. Jill transferred the property to her husband in 1999. She subdivided and sold. She prays for a declaration that she is in adverse possession of the property.
26. On cross examination by Mr Wasuna learned counsel for 6th defendant she states that she has no claim against parcel number Kisumu/Konya 3482. She prays that the whole transfer be cancelled.
 27. PW3 Patrick Opiyo a licensed land surveyor testified that he surveyed the suit land and presented a report. He was instructed by Rose Omolo to survey the property and do a report. On cross examination she states that all the parcels are in the homestead which is not fenced but there is a live hedge as a boundary. The report does not indicate the date of survey. He does not have the acreage of Kisumu/Konya 817. Rose Omollo is not registered in any of the parcels of land but Kisumu/Konya 3482 is in the homestead of 2nd plaintiff. He was cross examined by Mr Odhiambo and stated that Kisumu/Konya 3480 and Kisumu/Konya 3481 are within the homestead. There are no homes on Kisumu/Konya 3480 and Kisumu/Konya 3481. The plaintiffs closed their case.
 28. The 6th defendant, Nicholas Randa Owano Ombija testified that he is a retired judge of the High Court of Kenya. He filed his defence and witness statements and documents. He produced the sale agreement of Awino Odingo. He produced a transfer of land, certificate of official search dated December 1, 2019. He produced a green card for Kisumu/Konya/3482. He produced proceedings for Kisumu HCCC No 138 of 2010, *John Genge -vs Richard Oyoo*. He produced the mutation form. He stated that the transaction was above board.
 29. On cross examination by Mr Odeny, he reiterated that the transaction was above board. He went on site to identify the land. He sold the land to a 3rd party. The sale agreement which was not signed was produced. He purchased the land in 1992 but does not own the land any more. The 6th defendant produced the original green card and certificate of land search for Kisumu/Konya /3482. The land is however registered in the names of Millicent Adayo Opiyo and Lilian Adhiambo Otieno. He admitted being the owner of the land on November 18, 2014.
 30. The 4th defendant John Odhiambo Akinyi, an advocate of the High Court of Kenya practicing in Kisumu relied on a witness statement dated July 30, 2015 and filed on July 31, 2015 which was adopted as evidence in chief in this matter. He stated that he purchased the suit property from the 1st defendant. He did due diligence and found the property without any encumbrance. He looked at the face value of the register and the same reflected a true picture of the record. He looked at the green card. He does not have a certificate of official search before the land was transferred into his name. He does not have a green card. He does not have a sale agreement. He is physically in control but has not put up any structures.
 31. The plaintiff submitted that the transfer of the original land parcel Kisumu/Konya/817 from Magdalena Olang Chek, Jacob Oyoo Muok and Odama Omollo was unlawful. He submitted that his father the late Konel Odam Omollo was a joint owner of the suit property alongside Jacob Oyoo Mwok and Magdalena Olang Chek but that his father never signed any sale agreement or transfer form in favour of the 1st defendant. A look at the transfer form, shows that the signature of the deceased Konel Odam Omollo is missing. Hence her acquisition of the property without the consent of one of the joint owners was illegal. Despite being afforded an opportunity to attend court and defend the accusations leveled against her, the 1st defendant did not come to justify the transfer of Kisumu/Konya/817 to her name and her subsequent subdivisions.
 32. According to the plaintiff, the 4th and 6th defendants who testified did not lead evidence to verify the genuinity of the 1st defendant's title before the subdivision and eventual transfer to them and the other defendants. In brief, the defence did not give any evidence to support their title hence the plaintiff's



testimony and evidence that the 1st defendant's title was obtained through fraud and/or un-procedural means has gone uncontroverted. Hence, this issue ought to be answered in the negative that the transfer of the original land parcel Kisumu/konya/817 from Magdaline Olang Chek, Jacob Oyoo Muok and Odama Omollo all deceased persons was not lawful.

33. Counsel for the plaintiffs submitted that the 2nd plaintiff testified that she is in occupation of the entire original suit property that was subdivided into the resultant properties namely Kisumu/Konya/3476,3477,3478,3479,3480,3481,3482,3485,3486, and 3487 and hence should be registered as owner by way of adverse possession. The 2nd plaintiff submitted that she has been in occupation of the parcels for more than 12 years without interruption and therefore satisfies the principles of adverse possession.
34. The 6th defendant submitted that the suit is contrived deliberately and maliciously only to embarrass him due to the facts that the plaintiffs ought to have known, probably did, that the 6th defendant as at the date of filing suit, was not the registered proprietor of Kisumu/Konya/3482 which can be established by a simple search at the Kisumu Land Registry which the 6th defendant maintains should be a prerequisite to a suit of this nature.
35. According to the 6th defendant, he is the only party, out of 12 individuals in the plaint, who is described by his occupation and status and that the 2nd plaintiff's own survey report shows that the 2nd plaintiff is not in occupation of the parcel of land known as Kisumu/Konya/3482. Moreover, that there has been no plea, allegation, implication or proof in any of the pleadings documents and testimony of any party within these proceedings that the 6th defendant was fraudulent, reckless or negligent at any material time.
36. The 6th defendant further argues that the claim on fraud is not properly founded and is statute barred by sections 4(1), 17, 9(1) and 26(c), b and (i) of the Limitation of Action Act cap 22 laws of Kenya
37. The 6th defendant argues that the plaintiffs have not proved of fraud as required by law.
38. According to the 6th defendant the transfer document was exhibited by all parties to the transfer and that the parties appeared before an advocate, John Olago Aluoch. The 6th defendant argues that a case of forgery has not been proved. The 6th defendant argues that the 2nd plaintiff has not proved adverse possession.
39. The 4th defendant argues that that a claim of adverse possession must be brought by way of originating summons and not plaint. Moreover, that a claim of adverse possession is not maintainable in law as the plaintiffs are claiming in a representative capacity on behalf of their father.

Analysis and Determination

40. This court has carefully considered the pleadings and evidence on record and finds that on April 24, 2015, the 1st plaintiff Joseph Omollo Odam obtained a limited grant of letters of administration ad litem in respect of the Estate of Konel Odam Omollo who died domicile in Kenya on April 19, 2011. The grant was limited for a period of 90 days. The plaintiff filed this suit within the 90 days of the grant of the letters of administration ad litem. The suit was filed on June 29, 2015. The evidence and record shows that parcel number Kisumu/Konya/817 measuring 1.1 HA was created on May 14, 1991 and registered in the names of Magdalina Olang' Chek Jacob Oyoo Mwok and Odam Olloo. On July 26, 1991 the property was registered in the names of Jill Awino Oding'o and title was issued. On the October 11, 1991 the title was closed on subdivision and new titles created thus Kisumu/Konya/3476-3487. The plaintiff produced a transfer of land executed by the initial owners before John Olayo Aluoch and registered on July 26, 1991. The consent to sub-divide was applied for and granted



on October 14, 1991. The mutation form in respect of the subdivision was executed and registered on October 11, 1991. The respective parcels were registered in the names of Jill Awino Odingo. The defendant were registered as owners of various parcels of land but did not take possession. This court further finds that the defendants were registered as proprietors of the suit property between the years 1992-1994 but never took possession of the suit property. There is no evidence that the registration was done illegally. The transfer of land instrument was signed by the owners of the land and the purchaser and was attested by an advocate and duly registered at the lands office by the Land Registrar on the July 26, 1991. The 1st plaintiff was 8 years old and therefore cannot purport to know what transpired in the transaction other than what is depicted in the documents.

41. Section 100 of the *Evidence Act* cap 80 laws of Kenya provides that when language used in a document is plain, and it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. In this case, the language in the transfer clearly shows that the original land parcel was transferred by Magdalena Olang Chek who thumb Printed on the transfer, Jacob Oyoo Muok also thumb printed and Odama Omolo who signed the transfer form before an advocate Mr Olago Aluoch. It is this courts view that the plaintiffs cannot contradict the contents of the transfer form that clearly indicates that there was transfer of the property to the 1st defendant.
42. Moreover, there is a presumption in Law that all acts done by a public official has lawfully been done and all procedures have been duly followed. The onus is on the plaintiff to prove otherwise which has not been done. The Court of Appeal in *Mwinyi Hamisi Ali vs Attorney General*, Civil Appeal No 125 of 1997 (Tunoi, Shah & Bosire JJA) applied the presumption where the relevant facts were as follows:

“Captain Townsend was the registered proprietor of plot Nos LR 324/III/MN and LR 334/III/MN As regards plot 334, he was a co-owner with three other persons. Captain Townsend sought to sell the plots to Mr Hamisi Ali. Before he could sell, the then Colonial authorities wrote a letter dated November 7, 1955 to the four asking them to surrender the titles in exchange for allocation of residential beach plots. By letter dated January 26, 1956, Captain Townsend surrendered his title document in respect of plot 324 to the Government. The letter shows that the certificate of title in respect of plot No 324 was sent to the Commissioner.

The issue of formalization of surrender of the two plots dragged on for years.

The learned judges held that the return to the Government by Captain Townsend of his documents of title in respect of plot No 324 could only mean he could no longer sell the property. As regards section 44 of the RTA, the judges expressed:

The land in question was held under the Registration of Titles Act, cap 281, laws of Kenya. Section 44 of the Act requires that surrender of land leased by the Government to persons to be registered in order to terminate the interest of the lessees. Registration of such surrender is evidence of surrender. But section 44 does not envisage a situation whereby lack of such registration would make null and void de facto surrenders. From the evidence before the superior court, there can be no doubt that Captain Townsend and his three co-owners had factually surrendered plot No 334 to the Government and that all of them had in exchange been promised allotment of residential beach plots. Moreover, such lack of registration of surrender does not give Mr Hamisi any title to the suit land.....The Commissioner had de facto control of plot No 334 and if he proceeded, as he did, to allot the land to other persons...., their titles cannot be impugned except as provided for in section 24 of the



Act.....It is on these observations that, in our view, Mr Hamisi Ali's claim to the title to the suit land fails.”

43. Guided by the dicta in Mwinyi Hamisi Ali vs Attorney General, Civil Appeal No 125 of 1997, it was the considered view of the court of appeal in Chief Land Registrar & 4 others v Nathan Tirop Koeb & 4 others [2018] eKLR that the entry in the register that Eldoret Municipality Block 15/1 measuring 666.41 was surrendered to the Government *ipso jure* extinguished all rights and interest of the then registered proprietors over the suit property. The court noted that the 1st to 4th respondents contended that the surrender was unlawful. The court held that there is a presumption that all acts done by a public official have lawfully been done and that all procedures have been duly followed. The onus was on the 1st and 4th respondents to prove otherwise. They failed to do this. A bare allegation that a lawful procedure was not followed is not proof of the allegation. It was open to the 1st to 4th respondents to make an application before the trial court to compel the Commissioner of Lands to produce the original instrument of surrender, the memorial and the endorsement thereon. The 1st to 4th respondents failed to do so.
44. Further it was the view of the court of appeal that a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence. The court was however cognizant that where the defendant's case supports that of the plaintiff and contains evidence on which the plaintiff may rely, the plaintiff is entitled to rely on and make use of such evidence. The court observed that in a claim for declaration of title, as in that case, the onus was on the petitioners to satisfy the court on the evidence produced by them that they are entitled to the declaratory orders sought.
45. Coming back on the case before me, there is a duly executed transfer of land and registered by the land registrar. The land was transferred to the 1st defendant by virtue of the transfer instrument. The 1st defendant obtained consent of the Land Control Board to subdivide and caused the subdivided land to be transferred to third parties. Due to the above I do find that the plaintiffs have failed to prove fraud. Moreover, the claim based on fraud is clearly time barred as the transactions were done between 1991 and 1994 and the suit was filed on the June 29, 2015 more than 10 years thereafter. Section 4 (2) reads:
- “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”
46. The plaintiff claim is based on fraud which is a tort and therefore the limitation period is 3 years. I do dismiss the plaintiffs prayers number a, b, c and d.
47. However, this court finds that the plaintiffs have been in occupation of the suit property for more than 12 years without any action from the defendants. The plaintiffs have been in quiet exclusive and non- permissive occupation of the suit properties. I do find that an action for adverse possession can be commenced by way of plaint. I do grant the alternative prayer that the plaintiff is entitled to 1/3 share of his father's share in the suit-land and that the 2nd plaintiff is entitled to 2.5 acres in the suit land having acquired the same by way of adverse possession. The plaintiff to be awarded half costs against the defendants except the 6th defendant who was wrongly sued as he is not the registered owner and therefore a prescriptive order cannot be issued against him. Moreover, no evidence of fraud or illegality or corrupt scheme has been adduced against him. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER, 2022.

A. O OMBWAYO



JUDGE

