



REPUBLIC OF KENYA



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**Okumu (Suing as the Legal Representative of the Estate of Bonface
Okumu Opondo-Deceased) v Akuk (Environment & Land Case
E003 of 2021) [2022] KEELC 13452 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13452 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E003 OF 2021**

AY KOROSS, J

OCTOBER 13, 2022

BETWEEN

**PHILLIP ODUOR OKUMU (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF BONFACE OKUMU OPONDO-DECEASED) PLAINTIFF**

AND

OSCAR OKECH AKUK DEFENDANT

JUDGMENT

1. By way of a plaint dated October 6, 2021, the plaintiff who held a limited grant of letters of administration ad litem authorizing him to institute suit on behalf of the estate of his deceased father Bonface Okumu Opondo (hereinafter 'Bonface') who died on November 5, 2014, filed suit.
2. The plaintiff averred that on February 11, 1974, Bonface, Ongesa Opondo, Oweru Opondo and John Oweru Opondo were registered as proprietors of land parcel number East Ugenya/Kathieno 'B'/457 (hereinafter '457').
3. He contended that with the intent to sever joint ownership, Bonface in the year 2012 partitioned 457 into 3 parcels of land inter alia; East Ugenya/Kathieno 'B'/1084, 1085 (hereinafter referred to as 'the suit property') and 1086. However, before Bonface completed the process, he died.
4. He averred that when he wanted to carry out succession proceedings on Bonface's estate, he discovered the suit property had been fraudulently and illegally transferred to the defendant on December 22, 2014.
5. The reliefs that he sought were inter alia; a declaration that the transfer of the suit property to the defendant was illegal, null and void ab initio; an order for rectification of the land register by cancelling the certificate of title issued to the defendant and restoring the suit property to the name of the deceased



or his legal representative; a declaration that the defendant was a trespasser over the suit property; permanent injunction; general damages for trespass; mesne profits and costs of the suit.

6. In response, the defendant filed a defence dated October 30, 2021. He averred that 457 was not partitioned but subdivided by the then proprietors Bonface, Christopher Opondo and Blasio Ongesa Opondo on December 27, 2012. He averred that prior to Bonface's demise, he, together with other proprietors subdivided 457 and transferred to him one of the subdivided portions; the suit property.
7. He contended that at the time of Bonface's demise, he (Bonface) had already executed the transfer instruments and the suit was factious, frivolous, misinformed and an abuse of the court process. He prayed for the suit to be dismissed with costs.
8. The plaintiff filed a reply to defence dated November 15, 2021 in which he denied the averments in the defence and reiterated the averments of the plaint.

Plaintiff's evidence

9. It was the plaintiff's case that after Bonface's demise, nobody claimed interest over the suit property. It was his position that when he wanted to undertake succession proceedings over Bonface's estate, he discovered that from the green card of the suit property, which he produced as evidence, the suit property had been transferred to the defendant on December 22, 2014. This was done after Bonface's demise. He produced Bonface's death certificate. He averred that the defendant neither had an interest over the suit property nor was he (defendant) Bonface's heir. It was his position that Bonface occupied the suit property from the 1970's and upon his death, he continued being in occupation.
10. In cross examination, he testified that he did not know the phase at which Bonface had reached in subdividing 457 and that Bonface, Christopher Opondo and Blasio Ongesa Opondo were related.

Defendant's evidence

11. It was the defendant's case that Bonface sold the suit property to him in the presence of Christopher Opondo and Blasio Ongesa Opondo and transferred it to him prior to his demise. He averred that he had never had a dispute over the suit property. However, he had misplaced the agreement of sale. It was his case that upon subdivision of the 457, the suit property was transferred to him whilst East Ugenya/Kathieno 'B'/1084 was retained by Bonface. It was his position that he was in occupation of the suit property.
12. He contended that he and the plaintiff were relatives and that upon purchase, Bonface, Christopher Opondo and Blasio Ongesa Opondo obtained a consent to subdivide and transfer from the land control board.
13. During cross-examination, it was his testimony that: he could not recall the year the agreement of sale was executed; he did not have documents to support his assertion that consents were obtained from the land control board by Bonface, Christopher Opondo and Blasio Ongesa Opondo and he did not have a transfer form or did he know how much the purchase price was.

Plaintiff's submissions

14. As directed by the court, the plaintiff's Counsel Mr Sambu filed written submissions dated June 29, 2022. Counsel identified 3 issues for determination by this court: (i) whether there was an agreement of sale of the suit property between Bonface and the defendant (ii) whether the transfer of the suit property from Bonface to the defendant was free from any misrepresentation, fraud and illegalities and (iii) what appropriate orders should be granted.



15. On the 1st issue, Counsel submitted that contrary to the provisions of Section 38(1) of the *Land Act* and Section 3(3) of the *Law of Contract Act*, the defendant had failed to demonstrate that an agreement of sale existed and that it was in writing, executed and attested. He placed reliance on the case of *Kimondo v Kenya Commercial Bank (2003) 1 EA 108* where the court expressed itself that failure to call a key witness would infer that the potential witness's evidence would not assist a party.
16. On the 2nd issue, it was Counsel's position that there were illegalities in the manner which the defendant's title over the suit property was acquired. Firstly, contrary to the provisions of Section 45, 79 and 80(2) of the *Law of Succession ACT*, the transfer was effected after the demise of Bonface yet grant of letters of representation had never been issued. That the transfer from the deceased to the defendant was carried out after the death of the deceased; the deceased died on November 5, 2014 and the transfer was done on December 22, 2014. He cited the case of *Esther Matoke Mogaka v Richard Ondieki Makori & 2 others [2022] eKLR* where the court stated that in the absence of letters of administration, a transfer of land had contravened the provisions of Section 45 of the said Act.
17. Lastly, the transfer was effected without the consent of the land control board which was contrary to the provisions of Section 6 of the *Land Control Act*. Counsel urged the court to cancel the defendant's title deed and rectify it pursuant to the provisions of Section 80 of the *Land Registration Act*. To this end, he placed reliance on several court decisions including the case of *William Washington Omakada v John Wanyonyi Etyang (2014) eKLR* where the court held that it could cancel a title deed if it was established that it was acquired by fraud or misrepresentation.
18. Counsel also referenced the case of *Mary Ngonyo Kiume v Charles Muisyo David & 2 others: Exams Housing Cooperative Society Limited (interested party) [2022] eKLR* where the court stated that when a person's root of title is questioned, that person ought to prove that she acquired the land legally and properly.
19. On the third issue, Counsel urged this court to grant the orders sought in the claim.

The defendant's submissions

20. When the defendant closed his case, the court gave his Counsel Mr Odera timelines to file his written submissions. Despite service by Mr Sambu, he did not comply. When Counsel appeared before me on July 12, 2022, he sought for an extension of 7 days. The court accommodated him. As this court pens down this judgment, the defendant has not complied with the directions of the court and if at all the submissions will be filed, which as at now it has not, this court will consider them as having been filed out time and will not examine them.

Analysis and determination

21. I have considered the parties' pleadings and evidence and the plaintiff's submissions and in my considered view, the issues falling for determination are; (i) whether the transfer of the suit property from the deceased and his co-proprietors to the defendant was free from fraud and illegalities and (ii) what appropriate orders should be granted.



22. The legal framework on legitimacy of title documents is governed by Sections 24, 25 and 26 of the [Land Registration Act](#). Section 24(a) recognises the registered owner as the absolute owner of land. This section provides as follows;

' The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto'.
23. This absolute right is limited by Section 25 which provides that the land shall be held by the registered proprietor together with all other privileges appurtenant thereto but subject to charges, leases, encumbrances, restrictions, liabilities, rights and interests as stipulated in Section 28.
24. Section 26 states that courts shall prima facie deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
25. It is not in doubt that the plaintiff pleaded and particularised fraud and illegalities. It was also not in doubt that he held limited grant on behalf of the estate of Bonface. It was common ground between the parties that Bonface died on November 5, 2014.
26. This court is called upon to interrogate the evidence adduced and more so, establish the root of the title deed to the suit property that is currently registered in the name of the defendant.
27. From documentary evidence that were adduced, 457 was at 1st registration registered in the names of Okumu Opondo, Ongesa Opondo, Owera Opondo and John Owera in equal shares. It would appear, Owera Opondo died on or before August 1, 2011. Upon his demise, 457 was transferred to his heirs who were the remaining proprietors. It would appear that the proprietors had as at August 1, 2011 adopted western names; they were now known as Bonface Okumu Opondo (Bonface), Blasio Ongesa Opondo and John Owera Opondo.
28. On February 14, 2012, John Owera Opondo's name was removed from the register and replaced with that of Christopher Opondo Okumu. The three proprietors; Bonface, Blasio Ongesa Opondo and Christopher Opondo Okumu on July 27, 2012 subdivided the land into the following portions; East Ugenya/Kathieno 'B'/1084, the suit property and 1086. They were registered in their joint names.
29. The changes in the register from August 1, 2011 does not depict whether 457 was still held as a tenancy in common. In my humble opinion, it had been converted into a joint tenancy. I say so because the register from that time henceforth to the time of the subdivision prior to the alleged transfer to the defendant did not disclose any shareholding. To this end, I am guided by [Halsbury Law of England Fifth Edition, 2012 Volume 87](#) which stated that where land is granted to two or more persons for the same estate and where there are no words in the title document indicating that the registered owners held separate interests, then that parcel of land is held as a joint tenancy.
30. The background of the suit property upto July 27, 2012 is not in dispute save that the plaintiff contended that the subdivision that was done on July 27, 2012 was to sever the joint tenancy whilst the defendant argued that it was a mere subdivision. I have scrutinised the registers of 457, East Ugenya/Kathieno 'B'/1084, the suit property and 1086 and I agree with the defendant's assertions that the joint proprietors merely subdivided 457 and registered the emanating subdivisions in their joint names.
31. The substratum of the issue in dispute is the modality of which the transfer of the suit property was effected to the defendant allegedly by Bonface and the other joint proprietors. The transfer of the suit



property from the deceased and his co-proprietors is indicated as entry 2 in the green card and it is dated December 22, 2014. The deceased died on November 5, 2014.

32. Mr Sambu submitted that the transfer after the demise of Bonface contravened the provisions of Sections 45, 79 and 80(2) of the *Law of Succession Act*. The defendant on the other hand contended that all the instruments of transfer were prepared and executed by the Bonface and his joint proprietors prior to Bonface's demise. Whose evidence is credible between the parties? I agree with the decision relied upon by Mr Sambu of *Mary Ngunyo Kiume v Charles Muisyo David & 2 others (Supra)* where Angote J, expressed himself thus;

' It is trite that when the Certificate of Title granted to someone has been called to question, then it becomes the burden of that person to explain the root of the title.'

The Court of Appeal decision of *Munyu Maina v Hiram Gathiba [2013] eKLR* was cited with approval where it expressed itself inter alia;

' We have stated that when a registered proprietor's root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.'

33. In his testimony, the defendant admitted that all the joint proprietors had since died. He disclosed Christopher Opondo Okumu died in 2012 but he did not recall when Blasio Ongesa Opondo died. Section 60 of the *Land Registration Act* provides that if a joint tenant dies, the registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate. From the register, there is no evidence that any of the death certificates of the joint proprietors were ever registered. This shows beyond peradventure that the defendant's title deed was questionable.
34. During cross examination, the defendant was unable to explain how he acquired ownership of the suit property. He contended that the agreement of sale was lost. He did not remember the year the agreement was executed, when Blasio Ongesa Opondo died or the consideration he paid to acquire the suit property. He alluded that there were no independent witnesses who witnessed the agreement. He did not produce copies of the consent of the land control board, transfer forms or stamp duty acknowledgement of payments slips. In my view, in the absence of an agreement of sale as envisaged by Sections 3(3) of the *Law of Contract Act* and 38(1) of the *Land Act* which stipulates that a contract in land must be in writing, signed by the parties and their signatures attested by a person who was present when it was being executed, the defendant's defence plunged. In sum, the defendant's case was shaky and was not supported by cogent and credible evidence on how he acquired the suit property from the joint proprietors.
35. This leads to the logical conclusion that the defendant's actions amounted to intermeddling with the estates of deceased persons contrary to the provisions of Section 45(1) of the *Law of Succession Act* which provides as follows;

' 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'.



36. I am persuaded by the decision of [*Martha Wangui Thurura & another v Henry Gitabi Thurura & 3 others \[2021\] eKLR*](#) which held thus;

' The 1st defendant's title was null and void abinitio as it contravened the provisions of section 45 of the [*Law of Succession Act*](#) Cap 160. If this court were to validate the 2nd defendant's title, it would amount to abetting a criminal act under section 45(2) Cap 160.'

37. That being so, it is my finding that the defendant failed to prove to the required standards the root of his title. Additionally, I find that the title deed to the suit property was fraudulently and illegally acquired by the defendant.

38. The position that a fraudulent title cannot be allowed to stand has been affirmed in a line of Court of Appeal decisions which are binding on this court and they include, inter alia, [*Vijay Morjaria v Nansingh Madhusingh Darbar & another \[2000\] eKLR \(Civil Appeal No 106 of 2000\)*](#), [*Kinyanjui Kamau v George Kamau Njoroge \[2015\] eKLR \(Civil Appeal No 132 of 2005\)*](#) and [*Arthi Highway Developers Limited v West End Butchery Limited & 6 others \[2015\] eKLR*](#).

39. What orders should this court grant? This court cannot sit back and turn a blind eye to sanitize the fraudulently and irregularly acquired title deed to the suit property by the defendant. The actions of the defendant in my considered view is despicable and he has denied the genuine heirs of the estates of the registered owners from enjoying the fruits of their rightfully owned asset.

40. Section 80 of the [*Land Act*](#) empowers this court to order the rectification of a register of a suit property directing it be cancelled. Though, the plaintiff has sought the relief that the suit property be restored in the name of Bonface or his representative, that is not tenable in the circumstances of this case because all the joint proprietors are allegedly deceased and the hierarchy of their demise have not been registered or disclosed. Additionally, the plaintiff's capacity was merely limited to institution of this suit and it would only be legally proper if the suit property reverted back to the names of the three joint proprietors; Bonface Okumu Opondo, Blasio Ongesa Opondo and Christopher Opondo Okumu.

41. For the reasons and findings stated, I find the defendant a trespasser as envisaged by Section 3 of the [*Trespass Act*](#). The plaintiff pleaded general damages for trespass but failed to quantify the damages he suffered. I will exercise my discretion and award him nominal damages of Kshs 100,000/=. *Halsbury's 4th ed, Vol 45, at para 26, 1503* was cited with approval in the case of [*Nakuru Industries Limited v S S Mehta & Sons \[2016\] eKLR*](#) which expressed itself on computation of damages in an action of trespass as follows:

' (a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.(b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.(c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.(d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.(e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased'.



42. Though the plaintiff sought the relief of mesne profits, he did not state a figure or lead any evidence on it and I find that he is not entitled to it. I rely on the Court of Appeal decision of *Peter Mwangi Msuitia & another v Samow Edin Osman* [2014] eKLR where the court stated thus;

' It was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established'.

43. For the foregoing reasons and findings, I find that the plaintiff proved his case to the required standards and because costs follow the event and in the absence of special intervening circumstances, I award the costs of this suit to the plaintiff. The upshot is that the plaintiff's suit is allowed in the following terms;

- a) A declaration be and is hereby made that the transactions and/or entries entered and/or endorsed in the register of land parcel number East Ugenya/Kathieno 'B'/ 1085 on December 22, 2014 were illegal, null and void ab initio and ineffectual to confer any right, interest and title upon the defendant.
- b) The Land Registrar, is hereby ordered to rectify the register of land parcel number East Ugenya/Kathieno 'B'/ 1085 and to have the entry made thereon on December 22, 2014 cancelled and the proprietorship section of the said parcel of land to revert back to the names of Christopher Opondo Okumu, Bonface Okumu Opondo and Blasio Ongesa Opondo forthwith pending the process of succession.
- c) A declaration be and is hereby made that the defendant is a trespasser on land parcel number East Ugenya/Kathieno 'B'/ 1085.
- d) The defendant shall vacate land parcel number East Ugenya/Kathieno 'B'/ 1085 within 60 days from the date of service of the orders of this court or be evicted therefrom in accordance with the relevant provisions of Section 152 of the Land Act.
- e) A permanent injunction be issued restraining the defendant, his servants, agents or representatives or person acting on his behalf from leasing, transferring, charging, taking possession, trespassing onto, cultivating, building structures or in any other manner dealing with land parcel number East Ugenya/Kathieno 'B'/ 1085.
- f) The plaintiff is awarded general damages of Kshs 100,000/=.
- g) The Defendant shall shoulder the costs of this suit.

It is so ordered

DELIVERED AND DATED AT SIAYA THIS 13TH DAY OF OCTOBER 2022.

HON. A. Y. KOROSS

JUDGE

13/10/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Sambu for the plaintiff

N/A for the defendant



Court assistant: Ishmael Orwa

