



**Apeli & another v Abudiku & 3 others (Environment & Land Case
274 of 2017) [2022] KEELC 13442 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13442 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 274 OF 2017
DO OHUNGO, J
OCTOBER 12, 2022**

BETWEEN

OSONGO ONDABA APELI 1ST PLAINTIFF

OUCO ONDABA APELI 2ND PLAINTIFF

AND

JAMEN M. ABUDIKU 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

REMIGIUS NGAANYI WATIERI 4TH DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced on May 13, 2010 as Kakamega HCCC No 63 of 2010, when the plaintiffs filed plaint dated May 6, 2010. The matter was transferred to this court on July 25, 2017, whereupon it acquired its current case number.
2. As originally drawn and filed, the plaint had only the first to third defendants as defendants. Following various applications filed by the plaintiffs, the fourth defendant was joined to the suit on October 1, 2018. Oucho Ondaba Apeli who was the original second plaintiff passed away and was substituted by Oucho Ondaba pursuant to an order made on February 7, 2018. Jamen M Abudiku who was the original first defendant passed away and was substituted by Allan Manogo Mbwaya through a consent dated December 4, 2017 and filed in court on January 19, 2018. None of the substitutions and addition of new parties was accompanied with amendment of the plaint. The plaint remains as filed on May 13, 2010.
3. The plaintiffs averred in the plaint that they were legal representatives of the registered owner of the parcel of land known as N Wanga/Mayoni/722 (the suit property) and that the first defendant



fraudulently obtained title to the suit property. The plaintiffs therefore prayed for judgment against the defendants jointly and severally for:

- a. An order that the title of land parcel No N Wanga/Mayoni/722 registered in the names of the 1st defendant be cancelled.
 - b. Costs of the suit.
4. The first defendant filed a defence and counterclaim in which he denied the plaintiffs' allegations of fraud and stated that he lawfully purchased the suit property from one Apeli Ondaba. He prayed that the plaintiffs' case be dismissed and prayed for judgment against the plaintiffs jointly and severally for:
- a. Permanent injunction restraining the said Plaintiffs, either by themselves or their agents, from interfering with the ownership, use and/or occupation of the 1st defendant with respect to LR No North Wanga/Mayoni/722
 - b. Costs of the counter-claim.
5. The fourth defendant filed a defence and counterclaim in which he averred that the suit property was registered in his name on February 8, 2012 having purchased it from the first defendant without any knowledge of any defect. He added that the suit violates section 7 of the *Limitation of Actions Act* and prayed for dismissal of the suit and for a permanent injunction restraining the plaintiffs, their agents, servants or assignees from dealing with the suit property.
6. The second and third defendants neither filed defence nor participated in the hearing of the matter.
7. Osongo Ondaba Apeli testified as PW1. He stated that the registered owner of the suit property was Apeli Ondaba (deceased) who passed away in 1994 and who was his brother and that the plaintiffs are the administrators of the deceased's estate. That the first defendant had leased three acres of the suit property from the deceased and fraudulently registered the suit property in his name. He added that the deceased did not have any children and that he (PW1) was using the land as at the date of his testimony. That the deceased wrote a will through which he bequeathed to him the suit property. He produced a copy of a handwritten note that he referred to as the will as well as a certified copy of the register in respect of the suit property.
8. PW2 was Hamisi Masinde Wanjala. He described himself as a farmer and the village elder of Wetaba Village where both plaintiffs reside. That he knew the deceased who was the plaintiffs' brother and who was not married. That he also knew Jamen M Abudiku who leased the suit property from the deceased for purposes of growing sugar cane. That when the deceased was about to die, he left the suit property to the plaintiffs.
9. The plaintiffs' case was then closed.
10. The first defendant's case was closed without offering any evidence. As noted earlier, the second and third defendants did not participate in the hearing of the matter.
11. Remigius Ngaanyi Watieri testified as DW1. He stated that he is a farmer and that he previously worked as a land registrar. That he has been the registered prospector of the suit property since February 8, 2012 having purchased it from Jamen Abudiku around February 8, 2012 without any notice of defect of the title. That Jamen Abudiku had been the registered proprietor of the suit property since September 4, 1974. He added that the plaintiffs instituted this suit after twelve years from the date Jamen M Abudiku became the registered proprietor and took possession. That the suit is therefore statute barred. He



- added that the plaintiffs, their agents, and servants have been using the suit property and urged the court to issue a permanent injunction to restrain them.
12. DW1 further stated that as at April 19, 2010 he was working at Kisumu as land registrar and that he learnt later that there was a caution on the suit property, which was removed on January 18, 2012 through a court order, but he did not know who made the application for removal of the caution. When asked whether he had in court the sale agreement, transfer, the consent of the Land Control Board or the receipt in respect of stamp duty pursuant to which he became owner of the property, he answered in the negative. He added that he purchased the land for Kshs 450,000 and that he was not aware of any fraudulent acquisition by Jamen or of any pending court cases concerning the land. He also stated that he worked as land registrar in Kakamega from June 2006 to November 2007.
 13. The fourth defendant's case was then closed. Parties were ordered to file and exchange written submissions. All parties complied, save for the second and third defendants.
 14. The plaintiffs argued that the removal of the caution was fraudulent since there was no court order to that effect. That the transfer to the fourth defendant was fraudulent since the fourth defendant did not demonstrate that he obtained the consent of the land control board to transfer the suit property from the late Jamen Abudiku to himself. That the fourth defendant failed to produce a copy of a transfer form and a receipt for payment of stamp duty and that the suit property was transferred from the estate of the late Apeli Ondaba by making false entries on the register. Relying on the cases of *Marjorie Waitbera Wambugu & another v Grace Wairimu Gachie & 4 others* [2018] eKLR and *Pauline Chemuge Sugawara v Nairuko Ene Mutarakwa Kiruti (sued in her capacity as the Administratrix of the Estate of Mutarakwa Kiruti Lepaso & 3 others)* [2022] eKLR, the plaintiffs urged the court to grant them judgment as prayed.
 15. The first defendant argued that the title deed shows that he became the registered proprietor on September 14, 1974 during the lifetime of Apeli Ondaba and that under section 26 (1) (a) and (b) of the *Land Registration Act*, the title held by Jamen M Abudiku could only be challenged on the grounds that he had obtained it fraudulently or through a corrupt scheme, yet no such evidence was adduced. That Apeli Ondaba died in the year 1994 which was 20 years after Jamen M Abudiku had become the registered proprietor and that this suit was filed 16 years after the demise of Apeli Ondaba, thereby rendering it time barred by virtue of section 7 of the *Limitation of Actions Act*. That although Jamen M Abudiku had filed a counterclaim, it has been overtaken by events due to the transfer of the suit property to the fourth defendant who lodged a counterclaim against the plaintiffs.
 16. The fourth defendant argued that he is the current registered proprietor of the suit property, yet the plaintiffs have prayed for cancellation of the first defendant's registration. That parties are bound by their pleadings and therefore the court cannot issue the relief sought since it will be unenforceable. He further argued that the plaintiffs lack *locus standi* to bring this suit since they have not produced any letters of administration in respect of the estate of Apeli Ondaba and that the suit is barred by virtue of section 7 of the *Limitation of Actions Act*. That the plaintiffs did not prove fraud and that he is a bona fide purchaser. He went on to argue that the plaintiffs and their agents are illegally utilizing the suit property by growing food crops and they should therefore be restrained by an order of permanent injunction as sought in his counterclaim. In conclusion, he urged the court to dismiss the plaintiffs' case with costs and to grant him judgment as per his counterclaim.
 17. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the plaintiffs have *locus* to bring this case, whether fraud has been established and whether the reliefs sought are available.



18. The plaintiffs described themselves both in the plaint and in their evidence as the legal representatives of Apeli Ondaba who they assert was the registered owner of the suit property. A perusal of the certified copy of the register which was produced in evidence shows that Apeli Ondaba was registered as owner of the suit property on September 18, 1973. Jamen M Abudiku became the registered proprietor on September 4, 1974 while the fourth defendant took over proprietorship on February 8, 2012.
19. According to PW1's testimony, Apeli Ondaba passed away in 1994. The plaintiffs therefore seek to agitate a cause of action vested in Apeli Ondaba (deceased). They can only do so if they are personal representatives of the deceased. The Court of Appeal made that clear in the case of *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR where it stated:

... The common law is that "*action personalis moritur cum persona*", that is, a personal action dies with the person. ... To determine who may agitate by suit any cause of action vested in [a deceased person] at the time of his death, one must turn to section 82(a) of the *Law of Succession Act*, which confers that power on personal representatives and on them alone. As to who are the personal representatives within the contemplation of the Act, section 3, the interpretative section provides an all inclusive answer. It says "personal representative means executor or administrator of a deceased person".
20. The plaintiffs did not produce in evidence either an original or a copy of any letters of administration in respect of the deceased's estate showing that they are the administrators of the estate. They have thus failed to establish *locus standi* to bring this suit on behalf of the estate of Apeli Ondaba (deceased). That alone is sufficient to bring the plaintiffs' case to a sudden and conclusive end.
21. The plaintiffs' sole basis for seeking cancellation of Jamen M Abudiku's title is that he obtained it fraudulently. Fraud is a serious allegation that must be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR.
22. Among the particulars of fraud pleaded against Jamen M Abudiku are that he did not purchase the suit property but leased it, that registration was done without following the required procedure, that transfer documents were never signed by Apeli Ondaba and misleading the land control board and the land registrar to process the transfer. As narrated above, Jamen M Abudiku became the registered proprietor of the suit property on September 4, 1974 during the lifetime of Apeli Ondaba. Apeli Ondaba passed away 20 years later in 1994. It is not demonstrated that he ever complained about the transfer from himself to Jamen M Abudiku. It may very well be that he freely transferred the suit property. He was not obligated to inform the plaintiffs about such a transaction, more so considering that he neither had a wife nor a child, as the plaintiffs have themselves confirmed.
23. This suit was filed on May 13, 2010, some 36 years after the transfer from Apeli Ondaba to Jamen M Abudiku. Besides mere allegations, the plaintiffs have not offered any evidence to substantiate the allegations of fraud. There was an attempt in the plaintiffs' submissions to argue that a caution which the first plaintiff had registered against the suit property was irregularly removed. I have however noted that the plaintiffs' arguments in that regard were not supported by any evidence on record. Instead, the plaintiffs sought to introduce evidence through submissions, an undertaking which is totally unprocedural. The plaintiffs have therefore failed to establish fraud.
24. The evidence produced by the plaintiffs and the defendants shows that the fourth defendant became the registered proprietor of the suit property on February 8, 2012. The plaintiffs did not at all attack the fourth defendant's title in their plaint. The reliefs they sought target only the title of Jamen M Abudiku. Despite seeking joinder of the fourth defendant to the case, the plaintiffs did not deem it fit



to amend their pleadings so as to plead any case against the fourth defendant. Parties are bound by their pleadings. See *Raila Amolo Odinga & Another v IEBC & 2 others* [2017] eKLR.

25. As a registered proprietor, the fourth defendant is entitled to the rights, privileges and benefits accorded by section 24 of the *Land Registration Act*. The plaintiffs have not disputed the fourth defendant's case that they and their agents have been using the suit property. I am satisfied that the fourth defendant has proven his case on a balance of probabilities.
26. In view of the foregoing, I make the following orders:
 - a. The plaintiffs' case is dismissed.
 - b. The first defendant's counterclaim is dismissed.
 - c. A permanent injunction is hereby granted restraining the plaintiffs by themselves, their agents, servants, assignees, or anyone claiming through them from dealing in any manner with the parcel of land known as North Wanga/Mayoni/722.
 - d. The fourth defendant shall have costs both of the suit and the counterclaim. The costs shall be borne by the plaintiffs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 12TH DAY OF OCTOBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

No appearance for the first defendant

No appearance for the second and third defendants

Ms Anono holding brief for Mr Luchivya for the fourth defendant

Court Assistant: E. Juma

