



Okwach (suing as the administrator and legal representative of the estate of George Okwa Aboge (Deceased)) v Othiwo & another (Environment & Land Case 522 of 2015) [2022] KEELC 13419 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13419 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 522 OF 2015
A OMBWAYO, J
OCTOBER 7, 2022

BETWEEN

PHELGON AKINYI OKWACH PLAINTIFF
SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE
ESTATE OF GEORGE OKWA ABOGE (DECEASED)

AND

MAURICE OURU OTHIWO ALIAS OWAK OTHIWO 1ST DEFENDANT
JOHN ODIYO ADERO 2ND DEFENDANT

JUDGMENT

1. Phelgona Akinyi Okwach (hereinafter referred as the plaintiff) suing as the administratrix and as legal representative of the estate of George Okwach Aboge (hereinafter referred to as deceased) has come to this court against Maurice Ouru Othiwo also known as Owak Othiwo(hereinafter referred to as the 1st defendant) and John Odiyo Adero (hereinafter referred to as the 2nd defendant) stating that at all the material times the parcel of land known as East Kisumu/Dago/250 (hereinafter referred to as the suit property) was and is still registered in favour of George Okwach Aboge as the proprietor of the same having purchased it for valuable consideration from Owak Othiwo alias Maurice Ouru Othiwo sometimes on or about February 28, 1994 upon which it was transferred in his favour by the 1st defendant.
2. Pursuant to the said sale of the suit property the 1st Defendant gave vacant possession of the said parcel of land to the deceased), but sometimes in the year 2006 after the death of the deceased in the year 2002, while the plaintiff was away in Nairobi, the 2nd defendant erected a mud thatched house on a portion of the said parcel of land and on inquiry from the plaintiff, he alleged that he had bought the said portion of the land from one Pius Oloo Okello.



3. Following this allegation by the 2nd defendant, the plaintiff's inquiry at the Land Registry at Kisumu, established that the said parcel of land was still registered in favour of the deceased and a caution lodged on July 12, 1994 by the said Pius Oloo Okello allegedly as a Purchaser's interest against said parcel of land had been withdrawn on May 29, 1997 and against the register of the land there was an entry indicating the existence of a court order arising from Kisumu HCC No 197 of 1994.
4. On further inquiry at the Court the plaintiff established that the said civil suit known as Kisumu HCC No 197 of 1994 had been filed by the deceased against the 1st defendant seeking to restrain the 1st defendant from re-selling the said parcel of land to the said Pius Oloo Okello after the said parcel of land had already been transferred to the deceased, but the said suit was later withdrawn by the deceased.
5. Sometimes in December, 2011 the plaintiff discovered that the 1st defendant had moved into a portion of the said parcel of land and on inquiry by the plaintiff she established that he had done so at the invitation and purported consent of the 2nd defendant.
6. The plaintiffs claim against the defendants is for an order of eviction from the suit property that they now occupy purportedly on the basis of the allegation of having purchased the same from Pius Oloo Okello who from the records has never had any proprietary interest in the said parcel of land capable of transferring any interest whatsoever to the 2nd defendant who in turn has no legal capacity to purport to invite and allow the 1st defendant to occupy a portion of the said parcel of land.
7. According to the plaintiff, the defendants' continued use and occupation of the portion parcel of land constitute wanton and blatant acts of trespass upon the said parcel of land without the authority, permission and or consent of the estate of the deceased hence this suit.
8. Demand has been made and notice of intention to sue given but the defendants have ignored to vacate the said parcel of land and instead has opted to institute proceedings at the Land Disputes Tribunal at Kisumu *vide* Kisumu District Tribunal case No 354 of 2011 between *Pius Olima Oloo Okello v Phelgona Okwach* purportedly pursuant to the provisions of the [Land Disputes Tribunals Act 1990](#) which by law has no jurisdiction to deal with such a matter but which proceeded to do so despite the plaintiffs protest and the said Tribunal ultimately rendered its decision thereon purporting to allow the 2nd defendant to continue residing on the said portion of the parcel of land through the same has not been adopted by the magistrate's court in accordance with the said Act.
9. The plaintiff prays for an order of eviction of the defendants from the suit property together with an order of demolition of all the illegal structures erected thereon by the defendants at the expense of the defendants and an order of permanent injunction against the 1st and 2nd defendants, their servants or agents from entering, using or whosoever interfering with the plaintiff's peaceful and quiet possession and use of the suit property after execution of the eviction order. Costs of this suit with interest thereon from the date of filing this suit until payment in full.
10. The defendant in response filed a statement of defence and joint counter-claim whose import is that the 1st defendant never executed transfer documents in favour of the deceased and no consent of the Land Control Board was obtained. That the 1st defendant did not surrender the original title. He avers that the title was procured fraudulently moreover that the defendant and plaintiff have never had possession of the suit property. He states that the deceased paid Kshs 10, 000 being the initial of Kshs 30, 000/= and was refunded the same after failing to pay the balance of Kshs 20, 000/=.
11. The defendants have filed a counter claim for the rectification of the register of suit property as the registration was procured fraudulently. The defendant prays for orders that a declaration that the names of George Okwach Aboge were inserted fraudulently and illegally as the registered proprietor



of all that piece of land No East Kisumu/Dago/250 and an order directing the District Land Registrar Kisumu to rectify the Register, by canceling the name of George Okwach Aboge and substitution it with the names of the original owner, Owak Othiwo alias Maurice Ouro Othiwo as the registered owner of East Kisumu/Dago/250. Costs of the suit together with interest thereon as from the date of filing this matter till payment in full.

12. When the matter came up for hearing, the plaintiff testified that she is a widow to George Okwach Aboge who died on March 14, 2002. She is the legal representative of the estate of the deceased. Accordingly to the plaintiff, her husband purchased the suit parcel of land and paid Kshs 30, 000/=, she produced the agreement and acknowledgment of payment showing that the deceased paid the money. The 1st defendant executed a transfer of land on the February 28, 1994, the same day that a grant was made. The copy of transfer was produced. The certificate of search shows that her late husband was the owner of land. The plaintiff willingly allowed the 1st defendant to live on the land as he searched for land elsewhere to settle.
13. The 1st defendant, Maurice Ouru Othiwo in his testimony, admitted that he entered into a sale agreement with the deceased regarding parcel No East Kisumu/Dago/250. Aboge paid Kshs 10, 000/= but the purchase price for the land was Kshs 30, 000/=. The deceased never completed payment. He refunded the deceased Kshs.10, 000/= together with interest of Kshs 2, 000/=. He stated that he never signed the consent of transfer of the land and that he never signed the transfer documents to the deceased. However, he stated that he signed the application for consent to transfer the land to Pius Oloo Okello.
14. On cross examination he stated that he did not sell the property to the deceased but sold the same to the 2nd defendant and that he did not sign the transfer form as to signature isn't his.
15. He reiterated giving back the money to the deceased through the assistant chief but did not put it in writing. He refunded the money in 1994 and that between 1994 to-date the family of George Okwach Oboge is still in the land. He does not reside on the land and has never attempted to remove the deceased family from the land.
16. The 2nd defendant, John Odiyo Adero testified that he is a retired civil servant. He bought the suit land from Pius Oloo Okello who had been using the land since 1993. The purchase price was Kshs 320, 000.00. He moved into the land in the year 2006 and has had trees and a house on the land. The plaintiff a staunch member of PAG prayed for him when he took possession and encouraged him to plant trees. On cross examination by Mr Ragot he stated that he did not do a search when he undertook to purchase the land. The person who sold him the land was never registered as owner.

Plaintiffs Submissions

17. The gravamen of the plaintiff's submissions is that there was a valid agreement for sale between the deceased and the 1st defendant with no rescission of the same. The plaintiff argues the deceased was not in default hence there could have been no rescission. Rescission happens where one party is in default. The 1st defendant never gave any notice of rescission. The plaintiff submitted that the 1st defendant received the full purchase price and there is no evidence that the same was refunded. The plaintiff in conclusion argues that the agreement between the 1st defendant Maurice Ouru Othiwo and the plaintiff deceased husband George Okwach Oboge owned the suit land as contained in the sale agreement dated November 15, 1993 and February 28, 1994 are valid and were not rescinded.
18. The plaintiff further argues that the defendant did not demonstrate that the plaintiff's husband fraudulently registered the suit land in his name as the 1st defendant did not produce any evidence from



the land registrar concerning his allegation that the consent of the Land Control Board and transfer forms were not obtained and duly registered in favour of the deceased at the time of the deceased's registration as proprietor by way of transfer. The land registrar was not called to testify and has not made a report.

19. The plaintiff further submitted that the court should apply the presumption of regularity as things should be presumed to have been done rightly until the challenger presents tangible evidence to the contrary. That actions done by a public official are presumed to have been done properly and all procedures duly followed unless the contrary is proved.
20. On the import of the decision of the Kisumu District Land Disputes Tribunal that granted to 2nd defendant permission to continue being in occupation of the portion of the suit land where he erected his house allegedly on the basis of the sale of the said portion by Pius Oloo Okello, the plaintiff argues that this suit is not a judicial review to quash the decision of the Land Dispute Tribunal over ownership of East Kisumu/Dogo/250 and that the court lacks jurisdiction to entertain such a suit. The plaintiff argues that The Kisumu Land Disputes Tribunal did not have jurisdiction to determine title to or ownership of registered land. The determination of the tribunal on ownership of land was *ultra vires*.
21. The decision of the land dispute tribunal was never adopted by the magistrate court hence did not have and force in law. I have not seen submission by the defendants.

Analysis and Determination

22. I have considered the pleadings, evidence and record in submission on record and do find that parcel number East Kisumu/Dago/250 is registered in the names of George Okwach Aboge (deceased) as proprietor with absolute interest.
23. Under section 26 (1) of the LRA, a certificate of title issued by registrar shall be taken by all courts to be conclusive evidence of proprietorship. Nonetheless, the section provides that the title of that proprietor is subject to challenge under the following circumstances: -
 - (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.
42. In the case of *Elijah Makeri Nyangw'ara v Stephen Mungai Njuguna & another* (2013) eKLR, the court held, inter alia:-

...is the title impeachable by virtue of section 26(1) (b) ? First, it needs to be appreciated that for section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”
24. The evidence on record is that the deceased purchased the suit property for Kshs 30, 000/= . There is no evidence that the agreement was rescinded and the money was refunded. There is no evidence that Kshs



10, 000/= was refunded with or without interest. The 1st defendant confirmed signing the agreement produced as PEX4. The 1st defendant acknowledged receipt of the balance of Kshs 20, 000/= after having received Kshs 10, 000/= earlier. The above facts demonstrate that there existed an agreement of sale of land between the deceased George Okwach Aboge and the 1st defendant. George Okwach Aboge fulfilled his terms of agreement and took possession of part of the land and allowed the 1st defendant to remain in the land as he sought for alternative land.

25. There was no rescission of the agreement as the said George Okwach Aboge fulfilled his terms of agreement. The 1st defendant never issued any notice of default to the deceased George Okwach Aboge. I do conclude that there was a binding agreement between the late George Okwach Aboge and the 1st defendant.
26. On the allegation of fraud this court finds that the allegations of fraud were made and particularized but not proved by the defendants. There was no evidence that the sale had been cancelled and the purchase price refunded as particularized by the defendants. There was no evidence of forgery or false documents presented to the officials at the lands office. , in *Kinyanjui Kamau-vs-George Kamau* (2015) eKLR, the Court of Appeal held;

It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged. It is not enough to infer from the facts.

Section 107, 108,109 of the *evidence Act* Chapter 80 Laws of Kenya provides:-

107. Burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

27. The 1st defendant alleged that the deceased obtained title fraudulently as there was no consent obtained from the Land Control Board and that the transfer was not executed by the 1st defendant. The plaintiff stated that she was aware that her husband was to registered proprietor and that she found the transfer documents in the deceased husbands documents. It was the 1st defendant duty to prove fraud as he is the one who alleged fraud. The 1st defendant did not enjoin the Land Registrar who is the custodian of the land transaction documents and the person in charge of the registration in the lands office. Moreover, the 1st defendant did not call for any evidence from the lands office to challenge the title. This court observes that the properly executed transfer form that is duly registered can only be found in the parcel file hence calling for the parcel file was the duty of the 1st defendant hence failing to do so rendered the allegations by the 1st defendant baseless. The green card in reference to East Kisumu/ Dago/250 indicate that George Okwech Oboge was the registered proprietor.



28. I do agree with the counsel for the plaintiff that there is a presumption of regularity that the instrument of transfer was executed and registered before the entry was made in the register of the suit parcel of land.
29. The [Land Registration Act, 2012](#) provides for the elaborate procedure of Registration of any person as a proprietor of land. Sections 14, 31, 43 and 44 of the [Land Registration Act, 2012](#) provides for the elaborate process and therefore there is a rebuttable presumption that where a certificate of lease or title deed has been issued by the Land Registrar, the same is regular. The person alleging the contrary has the onerous duty to rebut the presumption with evidence, the 1st defendant has not done so.
30. On the issue of the weight of the decision of the Land Dispute Tribunal, I do find that the same was not adopted by the magistrates court hence has no force of law. Moreover, the initial determination of land ownership as opposed to trespass and boundary. The parcel of land has a registered owner and therefore the Tribunal could not determine that the defendant were evicted from the same by virtue of purchase and occupation. Section 3(1) of the [Land Dispute Tribunal Act \(repealed\)](#) provide as follows:-
- 3.
- (1) Subject to this Act, all cases of a civil nature involving a dispute as to—
 - (a) The division of, or the determination of boundaries to land, including land held in common;
 - (b) A claim to occupy or work land; or
 - (c) Trespass to land, shall be heard and determined by a Tribunal established under section 4.
31. The upshot of the above is that the plaintiff suit succeeds and I do grant an order that the defendants do vacate the suit property within a period of 90 days failure of which an order of eviction of the defendants from the suit property together with an order of demolition of all the illegal structures erected thereon by the defendants at the expense of the defendants is hereby issued.
32. I do further issue an order of permanent injunction against the 1st and 2nd defendants, their servants or agents from entering, using or whosoever interfering with the plaintiff's peaceful and quiet possession and use of the suit property after execution of the eviction order. Costs of this suit with interest thereon from the date of filing this suit until payment in full. Orders accordingly.

DATED AND DELIVERED THIS 7TH DAY OF OCTOBER, 2022

A O OMBWAYO

JUDGE

