



REPUBLIC OF KENYA



**Omunyin & another v Ekakiti & 6 others (Environment & Land Case
158 of 2017) [2022] KEELC 15109 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15109 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 158 OF 2017
AA OMOLLO, J
NOVEMBER 17, 2022**

BETWEEN

ANGELIN AMODIN OMUNYIN 1ST PLAINTIFF

SIMON FAVE CHEMWANDA 2ND PLAINTIFF

AND

JOHN ETYANG EKAKITI 1ST DEFENDANT

MOSES OPUYO MAPESA 2ND DEFENDANT

PAUSTINE SERENI 3RD DEFENDANT

ELISHA OMOKO OBONYO 4TH DEFENDANT

PATRICK OKWARA OMUKAGA 5TH DEFENDANT

ROSE OBARI WANYAMA 6TH DEFENDANT

ANN AUMA WANYAMA 7TH DEFENDANT

JUDGMENT

1. The Plaintiffs brought their claim through a plaint filed 12th of September, 2017 impleading the Defendants in this suit and prayed for judgement against them for:
 - a. An order that the Defendants jointly and severally do surrender 9½ acres of LR. Bukhayo/kisoko/2630 to the Plaintiffs and eviction order do issue against the Defendants; and
 - b. Costs of the suit.
2. The Plaintiffs avers that on the 21st of May, 1971 LR. Bukhayo/kisoko/784 was jointly registered in the names of Omunyin Ikakiti and Sebastiano Ikakiti who were brothers to be equally shared. That on the 5th of May, 1992 the said parcel of land was subdivided into L.R No. Bukhayo/kisoko/2630,



- 2631 and 2632 with the two brothers retaining LR. Bukhayo/kisoko/2630. That the two brothers died in 1991 and 1994 respectively and the 1st Defendant through Busia P&A No. 357 of 2013 initiated succession proceedings in respect of the entire parcel of land comprising LR. Bukhayo/kisoko/2630 to the exclusion of the estate of Omonyin Ikakiti Omokopil.
3. The Plaintiffs aver further that the entire succession cause was shrouded in falsehood, misrepresentation and fraud resulting in them missing out on their father's inheritance. They listed the particulars of fraud and misrepresentation on the part of the 1st Defendant as below:
 - a. Misrepresenting to the Court in P&A No. 357 of 2013 that he had the authority to initiate succession proceedings in respect of the estate of Omonyin Ikakiti Omokopil;
 - b. Fraudulently averring that Omonyin Irakitand Sebastiano Irakitwere one and the same person;
 - c. Failing to inform the court that he did not have the consent or the capacity to initiate succession proceedings in respect of Omonyin Ikakiti Omokopil;
 - d. Fraudulently suppressing the fact that the family of Omonyin Ikakiti Omokopil has all along resided on part of L.R No. Bukhayo/kisoko/2630.
 4. That the 2nd to 7th Defendants have despite the fraud, registered themselves as the proprietors of the land.
 5. The Defendants filed a joint Statement of Defence on the 3rd of October, 2018. They denied the allegation that LR. Bukhayo/kisoko/784 was jointly registered in the names of Omonyin Ikakiti and Sebastiano Ikakiti on equal shares, nor the resultant subdivided parcel L.R. No. Bukhayo/kisoko/2630. They stated that the 1st to 3rd Defendants' father Omapesa Ikapili Omokopil and Sebastiano Ikakiti are one and the same person and that Omonyin Ikakiti Okapili was also referred to as Paul Omonyin.
 6. The Defendants admit that the 1st Defendant initiated the succession proceedings through Busia P&A No. 357 in respect of LR. Bukhayo/kisoko/2630 but deny that he did that to the exclusion of the estate of Omonyin Ikakiti Omokopil as the said estate was not part of LR. Bukhayo/kisoko/2630. They denied all the allegations of fraud, falsehood and misrepresentation levelled against them by the Plaintiffs. The Defendants stated further that this Court was not seized of the jurisdiction to handle this case as this was a succession matter since the main objection is for cancellation and/or nullification of the grant. They prayed for the dismissal of the Plaintiffs' case with costs.

Applicant's Case

7. The hearing commenced on the 13th of July, 2021 with Angelina Amoding Omonyin testifying as PW1. She adopted the joint witness statement dated 12th September, 2017 as the evidence in chief and produced the documents in their list dated 19th September, 2020 as PEx.1-7. Pw1 stated that the 2nd Plaintiff is her brother and their father was known as Omonyin Ekaket-deceased. She averred that their father jointly owned land parcel number Bukhayo/Kisoko/784 with Sebastian Ekaket. That their father sold ½ an acre of the land and Sebastian sold one (1) acre. Therefore, the land was subdivided into three portions from which they retained one block comprised in parcel number Bukhayo/Kisoko/2630. That out of L.R 2630, Omonyin was to get 9½ acres while Sebastian was to get 9 acres. That after the subdivision of parcel number 784, their father's name was omitted in the title for 2630. She contended that Sebastian Ekaket and Omapesa Ikapili is one and the same person. She urged the court to give them the share of the land that belonged to their father.



8. During cross-examination, PW1 stated that they filed an objection to the succession cause taken out by the 1st Defendant, Succession Cause No. 347 of 2013. That their father was not called Sebastian Ekakit and their father died in 1994 at a very old age. She confirmed that they have their home on the land but there is no boundary both on the map and on the ground. That John Panyako only allowed them to plough a small portion. In re-examination, PW1 reiterated that the objection they filed was in respect to the estate of Sebastian adding that they have never sold any portion of their land to any person.
9. The second plaintiff, Simon Fave Chemwada confirmed that they took out a limited grant with respect to their father's estate before filing the case. He also aligned himself to the joint witness statement filed on the 12th of September, 2017 already adopted by PW1. Upon cross-examination, PW2 stated that they filed an objection in Succession cause No. 357 of 2019 and that the summons for revocation of grant (Dex-3(a)) stated the print indicating that their father was Sebastian Ekakit an error. That the land was jointly owned by Sebastian Ekakit and Omapesa Ekakit. He confirmed that the copy of summons produced as Dex 3(b) was signed by them. In re-examination, PW2 stated that their father's name Omunyin Ekakit appeared in the register for parcel No. 784. That their father left them the home they live in to date. This marked the close of the Plaintiffs' case.

Defence Case

10. The defence case kicked off on the 28th of February, 2022 with John Etyang Ekakiti testifying as DW1. He adopted his witness statement filed on the 14th of January, 2021 and produced the documents on their list dated 2nd November, 2020 as exhibits DEx 1-8 respectively. He stated that Omapesa Ikapeli Omokopil was his father and his baptismal name was Sebastian Ikapeli alias Sebastian Omapesa. That the entry in the register that they were two different people was a mistake. He confirmed that he knows the Plaintiffs who are children to Omunyin. DW1 continued in evidence that he took out succession proceedings in respect of his father's estate and which proceedings the Plaintiffs filed objection. That Paul Omunyin Ikakit was his father's last born brother and that after the subdivision of the original land parcel no. 784; he got his share comprised in parcel number 2630 and registered in the name of the 1st Defendant's father. That the 2nd Plaintiff and his brother live on the said portion and each of them have their own shares on the ground representing their respective fathers' shares. He stated that he had no interest in the Plaintiffs' land and prayed that their suit be dismissed.
11. During cross-examination, DW1 reiterated that his father was called Sebastiano Omokopil Ikapel and Dominic Oroni was his elder brother. That after Dominic's death, Sebastiano inherited his mother and although Dominic sired him, Sebastiano is the one who brought him up. That Sebastiano Omapesa Ikapili Omokopil and Sebastian Ekakiti are names that belong to one person. That the Plaintiffs' father's name was Paulo Omunyin and he died in 1994 while Sebastiano died in 1991. He stated further that a portion of land was sold to the Church by both Paulo and Sebastiano and that Paulo signed the agreement as the owner of the land. He confirmed that he has also sold a portion of the land. That he did not know the size of his land but the Plaintiffs' share where they live is comprised in L.R. No. 2630.
12. On re-examination, DW1 stated that the land where the Plaintiffs' stay is demarcated and that they do not use part of his land. That before the creation of L.R. No. 2630 its original number was 784. That the Plaintiffs took out the grant in respect of Omunyin Ekakiti.
13. DW2, Moses Opuya stated that the 1st Defendant is his brother, the 3rd Defendant is his sister-in law and the 4th to 7th Defendants are purchasers. He adopted his witness statement dated 2nd November, 2020 where he stated that Sebastian Mapesa Ikakiti their father who was also known as Omapesa Ikapili Omokopil. That their father's brother was called Paul Omunyin. That the original parcel number was Bukhayo/Kisoko/784 and that Paul Omunyin had no land and their father allotted the land to him.



That the land was subdivided into three parcels namely Bukhayo/Kisoko/2630, 2631 and 2632. That parcel number 2631 was registered in the name of Dina Lusenje, 2632 was registered in the name of St. Mary's Okatikok Catholic Church and parcel number 2630 remained in the name of Sebastiano Ikakiti aka Omapesa Ikapili Omokopil Ikakiti.

14. DW2 stated further that the Plaintiffs occupy about 5 acres of L.R. No. 2630 which was what the 1st & 2nd Defendants' father gave it to his brother Paulo Omonyin. That this was shared between their fathers before they died and denied that their fathers owned the land equally. That they had intended to carry out the succession of their father's land and give the Plaintiffs their share but the latter pulled apart and insisted they wanted to succeed their father. He stated that no one has trespassed on the other's share.
15. Upon cross-examination, DW2 stated that their grandfather was Omokopil Ekakit and Paul Omonyin was a brother to their father. That the Plaintiffs are living on their share. He confirmed that the portion sold to the church is on the part of the Plaintiffs' share as it was Paulo who sold to the church. That the entire land has never been surveyed and each party lives on their share of the land. He concluded by stating that they included the Plaintiffs' name in the succession proceedings. During re-examination DW2 stated that he included the Plaintiffs' names in the chief's letter but the Plaintiffs wanted to do succession in respect of their father's land. That the Plaintiffs also sold a portion of their share. He stated that they had no intention of interfering with the boundaries placed by their fathers.
16. The 3rd Defendant, Paustine Sereni, testified as DW3. She associated herself with the evidence of DW1 and DW2 and adopted her witness statement dated 2nd March, 2022. She stated that she was the widow to Adriano Odongo Mapesa (deceased) who died in the year 2010 and was a brother to the 1st and 2nd Defendants. That she got married in 1977 when both Sebastian Mapesa Omokopil Ekakit and his brother Paul Omonyin were both alive and that by that time, the land had already been subdivided between Paul and Sebastian. That the 1st and 2nd Defendants live on the portion demarcated to them by their father while the 2nd Plaintiff and his two sons live on the portion demarcated to them by their father and that both demarcations and positions still remain in force to date.
17. During cross-examination, DW3 reiterated that she was married in that home in the year 1977 and she found that the land had already been shared out between Sebastian and Paul. That she lives on the side owned by Sebastiano. She concluded by stating that during the lifetime of Paul and Sebastiano there was no dispute over the boundary. This marked the close of the defence case.

Submissions

18. The Plaintiffs filed their submissions on the 24th of May, 2022 which reiterated the respective parties' cases and stated that it was not in dispute that L.R Bukhayo/Kisoko/2630 was jointly co-owned between the two brothers in half share each. That Sebastian's family carried out succession in respect of the entire parcel of land instead of half a share. That the Plaintiffs have a limited grant in respect of the estate of Omonyin Ikakiti Omokopil and they urged this Court to find in favour of the Plaintiffs.
19. The Defendants filed their submissions on the 5th of July, 2022 submitting that both parties are involved in the dispute in Busia HCP&A No. 357 of 2013. They raised the following issues for determination:
 - i. Whether this Honourable Court had jurisdiction to hear and determine this matter;
 - ii. Whether the Plaintiffs' father was one a co-registered owner to L.R No. Bukhayo/Kisoko/2630; whether the Plaintiffs have locus standi to institute this case; and
 - iii. Whether the Plaintiffs have proved the allegations of fraud to the required standards.



20. On the first issue, the Defendants submitted that the Plaintiffs' claim is based on the allegation that the 1st Defendant initiated proceedings to succeed the entire parcel of land and left out the estate of one Omunyin Ikakit Omokopil who allegedly owned ½ share of L.R No. Bukhayo/Kisoko/2630. That the fact that there are pending summons for revocation renders the current suit subjudice and also takes away this Court's jurisdiction since it is a probate dispute. They relied on the case Daniel Kipkemei Bett & Another vs. Joseph Rono (2022) eKLR where the Court held that:

“Jurisdiction is everything and without it the Court must down its tools.”

20. On the second issue, the Defendants submitted that the original parcel of land number Bukhayo/Kisoko/784 was registered in the names of Omunyin Ikakit and Sabastiano Ikakit each owning ½ a share each. That, on 5th of May, 1992 after the land was subdivided into LR No. Bukhayo/Kisoko/2630, 2631 and 2632, number 2630 was solely registered in the name of Omapesa Ikapili Omokopil alias Sabastiano Ikakit. That the Plaintiffs' father, who was one of the original owners, was not registered as the owner of the subdivided land parcel no. 2630. That the Plaintiffs have attempted to import different names for their father to suit their narrative during the course of the trial in order to mislead the court. That the Plaintiffs claimed among other things that the summons for revocation of grant mentioned that their father was Sebastian Ikakit yet in the Plaint their father was Omunyin Ekakit Omokopil and their evidence affidavit, their father was Omapesa Ekakit Omokopil and in the limited grant they referred to their father as Omunyin Ekakit Omokopil.

21. On the issue of whether the Plaintiffs had locus standi, the Defendants submitted that the subject matter in this suit is LR Number Bukhayo/Kisoko/2630 which belonged exclusively to Omapesa Ikapil Omokopil aka Sabastiano Ikakit. That the status of the current ownership was obtained through a succession cause through which the Plaintiffs ought to claim. That the Plaintiffs lack the locus standi to bring this claim which touches on the 1st to 3rd Defendants' father's estate.

22. On whether the Plaintiffs had proved the allegations of fraud levelled against the Defendants, the Defendants submitted that the said allegations have not been strictly pleaded or proved in contradiction to the pronouncement in the case of Civil Appeal 326 of 2017 *Kuria Kiarie and 2 others vs. Sammy Magera* (2018). That the fraudulent conduct must be distinctly proved and it is not allowable to leave fraud to be inferred from the facts and that the same procedure applies to allegations of misrepresentation and illegality as provided under Order 2 rule 4 of the *Civil Procedure Rules*. The Defendants further relied on the case of *Kinyanjui Kamau vs. George Kamau* (2015) eKLR where the Court held that:

“On allegations of fraud, the burden of proof required is to be higher than required in ordinary civil cases, namely proof upon a balance of probabilities but it certainly should not be beyond reasonable doubt as seen in criminal cases.”

23. They concluded by submitting that the Plaintiffs have not tendered any satisfactory evidence on allegations of fraud or misrepresentation and they urged this Court to find this suit unfounded, baseless and a total waste of this Court's time. They prayed that the suit be dismissed expeditiously and with costs.

Determination

24. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:



- a. Whether this Court is seized of the jurisdiction to handle this matter;
 - b. Whether the suit property is jointly owned between the plaintiffs and the Defendants
 - c. Whether an order of surrender of 9½ acres and eviction should be granted against the Defendants;
 - d. Who bears the costs of this suit?
25. The Defendants raised the issue of jurisdiction alleging that this Court is not seized of the jurisdiction to deal with the matter. Jurisdiction is integral to a court’s functions and without it a court should down its tool. The Environment and Land Court derives its mandate from article 162(2) of *the Constitution* and the *Environment and Land Court Act*, section 13 provides that;
- “Jurisdiction of the Court;
1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land;
 2. In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes;
 - a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. Relating to compulsory acquisition of land;
 - c. Relating to land administration and management;
 - d. Relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and
 - e. Any other dispute relating to environment and land.
26. The Defendants confirmed that they initiated succession proceedings at the High Court to benefit the whole land parcel No. 2630 and that the Plaintiffs were part of the said proceedings. The Plaintiffs on the other hand have stated that the Defendants are entitled to half share in the suit land and the ongoing succession proceedings are part of the particulars of fraud levelled against them. This court is called upon to determine whether or not the suit property was owned in equal shares. The question of rights accruing to the parties through registration over L.R 2630 is purely a land matter to be determined by this court hence the objection on jurisdiction is misplaced.
27. The key issue in determining this dispute is whether or not the Plaintiffs have proved that they are entitled to an equal share in land comprised in L.R. No 2630. If there is proof, they must go further to demonstrate that the share was fraudulently taken away from them. One of the documents produced by the plaintiffs is the adjudication record produced as Pex. 7 which has entries made in respect of the title no 784. At paragraph (iv) of the record, it is written that the land is registered in equal ownership, brothers and signed off by Sebastian Ikakit ½ share and Auma w/o Omunyin ½ share. These entries were made on 6th March 1964. The 1st to 3rd Defendants in their evidence confirm that the Plaintiffs have always lived on this land on a share that belonged to their father. The 3rd Defendant stated that



- when she got married, she found a boundary existing between Sebastian Ikakit-deceased and Omunyin-deceased
28. There is also agreement that after subdivision of L.R. No 784, the shares of the two brothers was in parcel number 2630. The mutation form for the subdivision was produced as Pex. 3 and at page 4 of the mutation, both Omapesa Ikakit and Omunyin Ikakit signed by thumb print as the registered owners. The mutation was registered on 5th May 1992. One would then expect that the names coming out in the register for the new numbers would be these two who signed the mutation form. However, entry No. 1 in the register for L.R. 2630 was as follows; Omapesa Ikakit Omokopil – ½ share, Sebastiano Ikakit – ½ share.
29. The title to the suit land was registered under the Registered Land Act and Section 101(1) of the said Act provided that where an instrument of conveyance was made in favour of two or more persons, both the instruments and the resultant registration were required to specify whether the two or more persons were joint proprietors or proprietors-in-common. Where they were proprietors-in-common, the instrument and the resultant registration (parcel register) were required to show the share of each proprietor. Section 91(2) of the Land Registration Act provides thus:
- “Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.”
30. Both parties agree that Omapesa Ikakit and Sebastian Ikakit refers to one and the same person. If indeed it was intended that L.R. 2630 was to be registered solely in the name of the 1st and 2nd Defendant’s father, then there was no need to specify the shares in the register. The Plaintiffs alleged and the same has not been denied that the 1st Defendant took out letters of administration in the estate of his father Omapesa Ikakit Omokopil as the owner of whole of L.R 2630. The action, the Plaintiffs avers that it amounts to disinheriting them of their share in the suit property. The assertion by the Plaintiffs is corroborated by Dex. 2 which is the chiefs letter dated 27th Sept 2013 written on behalf of the 1st to 3rd defendants. The Chief listed the 1st and 2nd defendants as the dependants of Omapesa Ikakit-deceased and went on to state that, “the deceased had the following property; L.R. Bukhayo/Kisoko/2630” The Chief’s letter contained additional two names of the buyers but the interests of the plaintiffs was not mentioned at all.
31. The Plaintiffs have alleged and pleaded fraud against the Defendants in paragraph 10 of their Plaint. The Black’s Law Dictionary, 10th edition defines fraud as,
- ‘As knowing misrepresentation or known concealment of a material fact made to induce another to act to his/her detriment.’
32. DW1 admitted that the Plaintiffs are the children of Omunyin and that they lived on the suit land as well with their portions already demarcated. He also confirmed that Paulo Omunyin who was the Plaintiffs’ father executed an agreement for the sale of a portion of the suit land as an owner of the land. DW2 in his evidence confirmed as much and stated that their father and that of the Plaintiffs’ shared the land between them before they died and that the present demarcated portions are as they had subdivided and no one had trespassed on the other’s portion of the land. DW3 concurred with the evidence of both DW1 and DW2 and stated that by the time she got married in the home in 1977, the land had already been subdivided between Sebastian and Paul.
33. With this knowledge of the facts on the status of ownership of the suit land, what then would form the decision of the 1st to 3rd defendants and their family in dealing with the suit land as if it wholly



belonged to their father) They were at liberty to take out letters of administration in respect of the half share belonging to their father Omapesa-deceased but not to administer the other half share belonging to Omunyin-deceased. The evidence presented by the plaintiff does demonstrate fraud and or misrepresentation on the part of the Defendants as pleaded. The 1st to 3rd Defendants proceeded to sell portions of the suit land to the 4th to 7th defendants. The defendants are thus dealing with the land further misrepresenting that they own the entire land, a fact they know is not true.

34. Further, the registration of Sebastiano Ikakiti as the sole owner of the land was done without the consent of the other co-owner whose consent was integral as provided for under Section 95(6) of the Land Registration Act. Despite living on distinctly demarcated portions of the land the beneficiaries of the estates of Sebastiano Omunyin and Paul Omunyin Ikakiti are different estates and entitled to ½ a share each of the land. However, the witnesses confirmed that Plaintiffs' father sold ½ an acre of land and the 1st and 2nd Defendants' father sold one acre of land reducing their respective shares by the acreage that was sold during their lifetime.
35. On the final issue of eviction of the Defendants from the suit parcel is pegged on whether the Defendants have encroached on the Plaintiffs' father's portion of the suit land. Any of the defendants occupying part of the 9 acre share of the Plaintiffs must leave because they are doing so without the consent of the Plaintiffs. In view of the above analysis and observations, I am satisfied that the Plaintiffs have proved their case on the balance of probabilities. Section 80 of the Land Registration Act empowers this Court to order rectification or cancellation of a title and provides that:
1. Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 2. The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
36. Consequently, I enter judgement for the plaintiffs and so hold that:
- a. An order be and is hereby issued that the Defendants jointly and severally shall surrender 9½ acres out of L.R No Bukhayo/Kisoko/2630 to the plaintiffs
 - b. The Defendants shall surrender vacant possession for the 9½ acres within 90 days from the date of delivery of this judgment. In default, eviction shall issue.
 - c. Costs of the suit awarded to the Plaintiffs.

DATED, SIGNED & DELIVERED ONLINE AT MILIMANI THIS 17TH DAY OF NOVEMBER, 2022.

A. OMOLLO

JUDGE

Sent to advocates on record via email at BUSIA this 17th Day of November, 2022

DEPUTY REGISTRAR, ELC

BUSIA

