



REPUBLIC OF KENYA



KENYA LAW

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Osuo v Osuo & another; District Land Registrar, Bondo (Defendant) (Environment & Land Case 53 of 2021) [2022] KEELC 14788 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14788 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 53 OF 2021
AY KOROSS, J
NOVEMBER 17, 2022
ORIGINALLY KISUMU ELC CASE NO. 345 OF 2016)

BETWEEN

MARTIN OKOTH OSUO PLAINTIFF

AND

ALFRED OCHOLA OSUO 1ST DEFENDANT

MILLICENT AKINYI OTIENO 2ND DEFENDANT

AND

DISTRICT LAND REGISTRAR, BONDO DEFENDANT

JUDGMENT

Background of the case

1. By way of a plaint dated 15/12/2016, the plaintiff instituted suit against the 1st and 2nd defendant who were respectively his step brother and sister in law. The latter being a wife to his deceased step brother Walter Otieno Osuo ('Walter').
2. He averred that he was the registered owner of South Sakwa/Barkowino/1414 ('the suit property') and that sometimes around 11/12/2016 and in anticipation of Walter's burial, the defendants trespassed onto it and started construction of two houses.
3. He contended that all family meetings to resolve the impasse had hit a dead end and in total disregard to sanctity of title, they had to trespassed onto the suit property. Their actions had caused him loss and damage.



4. The reliefs that he sought were inter alia: permanent injunction restraining the defendants from interfering with his peaceful enjoyment of the suit property; vacant possession and eviction against the defendants; general damages for trespass; assistance from the OCS Bondo and costs.
5. The 1st and 2nd defendant's defence dated 10/07/2017 was later amended by an amended defence and counterclaim dated 26/06/2021. The plaintiff was the 1st defendant in the counterclaim and the district land registrar, Bondo the 2nd defendant.
6. In their defence and counterclaim, the defendants admitted that though the suit property was registered in the name of the plaintiff, it was ancestral land and the plaintiff acquired it with the aid of the 2nd defendant in the counterclaim in a manner that was fraudulent, irregular, unlawful and illegal.
7. They contended that the plaintiff and the 1st defendant's mothers who were wives of the 1st registered owner John Osuo Oyele ('the deceased') resided on the suit property and their joint surviving children resided on it too.
8. The reliefs that they sought against the plaintiff and 2nd defendant in the counterclaim were inter alia: a declaration that the transfer of the suit property to the plaintiff from the name of the deceased was fraudulent, unlawful, illegal, irregular and void ab initio; an order that the 2nd defendant in the counterclaim do cancel, annul, revoke and reverse all entries in the register leading to the registration of the plaintiff and revert it back to the name of the deceased and costs of the counterclaim.
9. In a reply to defence dated 06/02/2017, the plaintiff asserted that all due processes were adhered to leading to his registration as the owner of the suit property and that the transfer took place during the lifetime of the deceased and the deceased had every right to deal with the suit property in a manner he deemed fit.

Plaintiff's evidence

10. It was the plaintiff's case that during the deceased's lifetime, he bequeathed various parcels of land to his sons including the suit property that was bequeathed to him on 17/7/2007. Walter had his own bequeathed parcel of land yet despite this, the 1st defendant had commenced construction of a house for the 2nd defendant in the suit property and had even cultivated it. He produced copies of the title document of the suit property and death certificate in support of his case.
11. In cross examination, he testified that he did not have evidence of transfer by way of gift, bequeathments, transfer instruments or land control board consent. Additionally, his father and step mother were buried on the suit property while his mother resided on it. He had not constructed a house on it.
12. On re-examination, he testified that he did not own any ancestral parcel of land.
13. His evidence was led by his brother James Ambujo and the land registrar Diana Nasimiyu Wanyama who respectively testified as PW2 and PW3.
14. PW2 corroborated the plaintiff's testimony that all the deceased's sons were bequeathed parcels of land and that some of his brothers bought their own individual parcels.
15. He testified that South Sakwa/Barkowino/1001 which was a 1st registration and was still registered in the deceased's name was bequeathed to him, South Sakwa/Barkowino 2460 which was a 1st registration and was still registered in the deceased's name was bequeathed to his brothers Joseph Onyango and Samuel Ochieng, South Sakwa/Barkowino/3673 and 3672 were sold to 3rd parties by the deceased during his lifetime with the former being sold for the benefit of the 1st defendant who later bought



it from a 3rd party one Linet Akinyi Osambo, South Sakwa/Barkowino/481 that was registered in Walter's name at 1st registration and sold by him [Walter] to a 3rd party one Angeline Achieng Akoth, South Sakwa/Barkowino/1571 which was bought by Walter from a 3rd party one Ogola Aulo Obondo and was the residence of the 2nd defendant and lastly, the suit property which was bequeathed to the plaintiff. He produced the greencards of these properties.

16. In cross examination, he testified that he had not seen any document conferring ownership of the suit property to the plaintiff save for the title document.
17. During re-exam, he testified that the deceased, his two wives, 2nd defendant and himself were present during the bequeathments.
18. PW3 testified that though the documents produced by the plaintiff and PW2 emanated from her office, she did not have the parcel file which had been misplaced and therefore she could not vouch for the transfer process from the deceased to the plaintiff.

Defendants' evidence

19. The 1st defendant testified that the deceased, his two wives and 16 children resided on and cultivated the suit property before he and PW2 vacated it in the year 1998 after they had purchased their respective individual parcels of land. The deceased, his mother who died in the course of the proceedings and a brother; Samuel Ochieng were buried on the suit property while Walter was buried in his [1st defendant's] parcel of land known as South Sakwa/Barkowino 4296 that he had bought from one Philip Rombe Opondo. He produced a copy of the title document of this property in support of his case.
20. That it was only upon issuance of a court order restraining them from burying Walter on the suit property that the family with the exception of PW2, discovered that it had been transferred to the plaintiff. His brother James Onyango was bequeathed South Sakwa/Barkowino 2460 but lived on the suit property and the suit property had been bequeathed to him and the plaintiff. He sought ownership of the portion that belonged to his deceased mother.
21. On cross examination he testified that during adjudication, Walter was an adult and South Sakwa/Barkowino/481 was registered in his [Walter's] name by their grandfather and therefore it was ancestral land. South Sakwa/Barkowino/3673 was never sold for his benefit. In Luo culture, the last-born child remained in the homestead and culturally he and the plaintiff were to build on the suit property because he and him were respectively the 1st and last sons of the deceased. The bequeathments of the suit property were done in the presence of the deceased, his wives, plaintiff and himself.

Parties written submissions

22. As directed by the court, the plaintiff and 1st and 2nd defendant's Counsel filed their respective rival written submissions.
23. Mr Sumba, the plaintiff's counsel, filed his submissions dated 25/08/2022. Counsel submitted that the transfer from the deceased to the plaintiff was conducted with due process. He placed reliance on the case of *William Oganga Guya v George Otiato Mbaye & Another* [2021] eKLR where Ombwayo J stated:

“However, it is my view that the property would have not been registered in the 1st Respondent's name if the relevant registering authorities were not satisfied that the relevant consents had been obtained.”



24. Counsel contended that the defendants' claim lay in a succession cause and not before this court. Additionally, this court only had jurisdiction on fraud if it emanated from a vendor-purchaser relationship and not otherwise.
25. According to Counsel, the 1st defendant contradicted himself. While giving his oral testimony, the 1st defendant testified that it was the deceased's wish that he and the plaintiff share the suit property yet in his pleadings, he averred that the suit property was ancestral land and should be shared by all the beneficiaries of the deceased's estate.
26. Counsel submitted that the defendants had not proved fraud to the required standard and to this end, he relied on the Court of Appeal decision of *Elijah Kipng'eno Arap Bii v KCB & Another* Civil Appeal Number 276 of 2018 which stated that;

“...it is trite that where fraud is alleged, it must be specifically pleaded, and it is not enough to deduce it from the facts. The standard of proof of an allegation of fraud is above a balance of probabilities and the onus is on the party alleging fraud to provide evidence and prove his case...”

27. The defendant's Counsel Mr. Onsongo filed his submissions dated 03/08/2022 and he identified four issues for determination; (i) whether the registration of the plaintiff as proprietor of the suit property was as a result of transfer, (ii) if answer to issue (i) was in the affirmative, whether the transfer was regular, procedural and in compliance with the law (iii) if the answer to issue (ii) was in the negative what orders were the parties entitled to and (iv) who shall bear costs.
28. On the 1st issue, Counsel submitted that the plaintiff did not allude to the existence of a transfer form or even consent from the land control board.
29. On the 2nd issue, it was Counsel's submission that the suit property's greencard did not disclose the consideration that was paid. Further, the instruments of transfer were never produced by the plaintiff. Counsel contended that the defendants' cause of action lay within the provisions of Section 26 of the *Land Registration Act* and the burden to prove the title's root lay with the plaintiff; which he had failed to discharge.
30. Counsel placed reliance on the Court of Appeal decision of *Standard Chartered Bank Limited v Intercom Services Limited & 4 others* [2004] eKLR which cited with approval *Holman v Johnson* [1775-1802] ALL ER 98 where the court expressed itself thus;

“the principle of public policy is this, ex dolo malo, non oritur action. No court will lend its aid to a man who found his cause of action mon immoral or an illegal act. If from the Plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the Defendant, but because they will not lend their aid to such Plaintiff”.

Analysis and determination

31. Having considered the parties' pleadings, evidence tendered in court and parties' rival submissions, this court agrees with Mr. Sumba that some of the evidence that was adduced leaned on probate which does not fall within the jurisdiction of this court.
32. Article 162 (2) (b) of *the Constitution* is the enabling provision that establishes this court which provides that there shall be established courts with the status of the High Court to hear and determine



disputes related to the environment and the use and occupation of, and title to, land. While Section 13 of the *Environment and Land Court Act* gives this court original and appellate to hear disputes on environment and land. The parties' pleadings indeed raised issues that fall within the jurisdiction of this court. However, both parties digressed in their testimonies and this court will restrain itself from dealing with any issue or evidence that touches on areas that do not fall within its jurisdiction.

33. Having addressed the issue of jurisdiction, it is the considered view of this court that the issues that fall for determination are: (i) whether the plaintiff's title was acquired fraudulently, irregularly, illegally and unlawfully (ii) if (i) is in the negative, were the defendants' trespassers? (iii) what orders ought to issue and (iv) who shall bear costs. I will deal with the issues consecutively.

I. Whether the plaintiff's title was acquired fraudulently, irregularly, illegally and unlawfully

34. Section 26 of the *Land Registration ACT* 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 had been acquired illegally, unprocedurally or through a corrupt scheme.
35. The subsisting law that applied to the suit property on 17/7/2007 which was the date of transfer date was the repealed *Land Registration ACT*. Even if the transfer was by way of a gift inter vivos, the transfer form needed to be duly executed, consideration disclosed, stamp duty paid and KRA PIN certificates and national identity cards of both the transferee and transferor needed to be proffered to the ministry of lands' offices. See Sections 85, 108 and 111 of the same ACT and the rules thereon. These provisions are akin to the provisions of Sections 37, 44 and 46 of the *Land Registration ACT*.
36. Within the provisions of Order 2 Rule 10(1) of the Civil Procedure Rules and settled law, fraud must be pleaded, particularized and proved to a standard higher than on a balance of probabilities but not beyond reasonable doubt. See *Elijah Kipng'eno Arap Bii v KCB & Another* (Supra).
37. I agree with Mr. Onsongo that the burden to prove the root of the suit property's title lay with plaintiff. It was not sufficient for him to wave his title and assert that prima facie he was the registered owner, Nay, once the title had been subjected to challenge, he needed to prove how he acquired it. In the case of *Munyu Maina v Hiram Gathiba* [2013] eKLR, the Court of Appeal expressed itself thus;
- “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.”
38. None of the instruments of transfer were produced by the plaintiff or PW3. PW3 testified that the parcel file was lost or misplaced. However, even if that were so, the plaintiff who was the transferee and ordinarily ought to have retained copies of these documents after registration of the transfer, did not tender any document to this court to prove the root of his title. Contrary to laid down procedures, the “consideration and remarks” section merely stated “transfer”. Ordinarily, if it was a gift inter vivos it ought to have had the remarks “love and affection” or words similar to them. In the absence of a parcel file, PW3's evidence was of little probative value. It is my finding that the plaintiff did not discharge proof of how he acquired title to the suit property. It is my finding that the suit property was irregularly, illegally and unlawfully acquired.



39. Did the defendants discharge prove of fraud? The defendants asserted that the plaintiff fraudulently colluded with the 2nd defendant in the counterclaim to have himself registered as the proprietor. The defendants never led evidence on fraud and it is my finding that defendants' allegation was not proved to the required standard. This court places reliance on the Court of Appeal decision of *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR, where it held thus;
- “It is a principle of the law that the party who alleges must prove...In the case of *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another* [1979] eKLR, this Court took the view that the onus to prove fraud in a matter is on the party who alleges it”.
40. Mr Sumba's argument that fraud only obtains in circumstances of vendor-purchaser relationship is misplaced because the clear provisions of Section 26 of the *Land Registration ACT* does not state so. The decision of *William Oganga Guya v George Otiato Mbaye* (Supra) that was cited by Mr. Sumba was merely persuasive and distinguishable from the circumstances obtaining in this case. In it, the court was dealing with land that was purchased before adjudication commenced and the issue was whether the consent of the land control board was required prior to 1st registration. The issue in dispute in this case was transfer after 1st registration.
41. From the pleadings and evidence adduced by the plaintiff, the suit property was a 1st registration and indeed it was and still is ancestral land. The defendants did not plead customary trust and because it is trite law that parties are bound by their pleadings, I will not make a finding on it.
42. What orders should this court grant? This court cannot sit back and turn a blind eye and uphold the plaintiff's title to the suit property. Section 80 of the *Land Registration ACT* empowers this court to order the rectification of a register of a suit property by directing it be cancelled. This court will do so and revert the suit property to the deceased.
43. All the witnesses except PW3 were siblings. The court referred them to court annexed mediation but the process foundered. I hope that the parties will in future resolve their disputes amicably without submitting themselves to the judicial process because at times, the legal process may tear apart a family which is the basic unit that knits the larger society together. Because of the inherent relationship between the parties, each party shall bear their respective costs.
44. For the foregoing reasons and findings, I ultimately find that the plaintiff did not prove his case to the required standard while the defendants largely proved their case. The upshot is that the defendants' counterclaim 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 South Sakwa/Barkowino/1414 on 17/7/2007 were illegal, null and void ab initio and ineffectual to confer any right, interest and title upon the plaintiff.
 - b. The Land Registrar, is hereby ordered to rectify the register of land parcel number South Sakwa/Barkowino/1414 and to have the entry made thereon on 17/7/2007 cancelled and the proprietorship section of the said parcel of land to revert back to the names of John Oswo Oyele forthwith pending the process of succession.
 - c. Each party shall shoulder their respective the costs of this suit and counterclaim.

DELIVERED AND DATED AT SIAYA THIS 17TH DAY OF NOVEMBER 2022.



HON. A. Y. KOROSS

JUDGE

17/11/2022

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

Mr. Sumba for the plaintiff

Mr. Onsongo for the defendant

Court assistant: Ishmael Orwa

