



Oketch (Suing as the legal representative of the Estate of Joash Oketch Ochieng) v Oketch & 3 others (Environment & Land Case 14 of 2021) [2022] KEELC 14684 (KLR) (10 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14684 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 14 OF 2021
AY KOROSS, J
NOVEMBER 10, 2022
[ORIGINALLY KISUMU ELC CASE NO. E1 OF 2020]**

BETWEEN

**SELLINE ATIENO OKETCH PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOASH
OKETCH OCHIENG**

AND

**GEORGE MGERE OKETCH 1ST DEFENDANT
DISTRICT LAND REGISTRAR, BONDO 2ND DEFENDANT
ADJUDICATION OFFICER, BONDO LANDS OFFICE 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

JUDGMENT

1. The plaintiff and 1st defendant are siblings; they share one father but different mothers. By way of a plaint dated September 18, 2020, the plaintiff who was the administrator of the estate of their father Joash Oketch Ochieng (hereinafter “deceased”) who died on 12/2/1998 instituted suit on behalf of his estate against the defendants.
2. The plaintiff averred that the deceased’s parcel of land East Yimbo/Nyamonye/155 which was approximately 24 acres (hereinafter referred to as “the suit property”) was fraudulently and unlawfully subdivided by the 1st and 2nd defendants. In essence, the suit property reduced in size. The hived off portions created East Yimbo/Nyamonye/4542, 4543, 4544, 4545, 4546, 4547, 4548, 4549 and 4550 (“subdivisions”) which were registered in the names of the deceased’s sons including the 1st defendant. She blamed the 1st defendant for collecting the adjudication records on his own behalf and on behalf



- of his other brothers some of whom were deceased. She particularised fraud against the 1st and 2nd defendants.
3. She contended that the 1st and 2nd defendants' actions were committed in the year 2015 long after the deceased had died and it was conducted without consent of the deceased or his beneficiaries. Their actions were conducted without a formal hearing.
 4. The reliefs that she sought were *inter alia*, a declaration that all subdivisions of the suit property be declared illegal and unlawful; the 2nd defendant do revoke all the subdivisions and revert them back to the deceased's name and costs of the suit and interests.
 5. In response, the 1st defendant who acted in person filed a defence dated October 13, 2020. He admitted the suit property and subdivisions were in the names of the deceased and those of his sons and the adjudication process was above board. Further, no appeal had ensued. He contended that as the then administrator of the deceased's estate, he merely collected the adjudication records on behalf of his brothers two of whom were at the time deceased. Some of his brothers later own died. He averred that he was innocent of the allegations postulated against him.
 6. The 2nd to 4th defendants who were represented by the 4th defendant filed a defence dated October 13, 2020 in which they denied the assertions made against them. They admitted that there was no suit pending between the parties.
 7. After pretrial directions were conducted, the plaintiff and 1st to 3rd defendants testified.

Plaintiff's Evidence

8. The plaintiff testified as PW1. She reiterated the averments made in her pleadings. It was her case the deceased did not participate in the objection proceedings that had been instigated by Gideon Onyango Oketch ['Gideon'] and therefore all ensuing proceedings were fraudulent and were tantamount to interfering with the estate of a deceased person. She testified that all transactions that were conducted after the demise of the deceased were void ab initio. She declined to be awarded costs. She produced several documents in support of her case.
9. In cross examination, she testified that she was an administrator together with her sister Pamela. That the suit property was initially 40 acres but had been reduced to 2.33 hectares and PEX 1 was signed by the deceased. In the adjudication process, the objector was Gideon and not the 1st defendant. However, at the time the 1st defendant collected the adjudication records, Gideon was deceased.
10. In re-examination, she admitted that she was not privy that an objection was ever filed during adjudication.
11. Her evidence was led by Philister Okech Atieno (PW2) who was the deceased's 3rd wife and only surviving widow. It was her case that the 1st defendant had fraudulently subdivided the suit property and her homestead was no longer registered in the deceased's name. Her evidence was not challenged by the defendants.

Defendant's Evidence

12. The 1st defendant testified as DW1. It was his case that he had an alias; George Seth Otieno Okech. The deceased was the one who initiated the subdivision process. As at 2005, he had been an administrator of the deceased's estate together with his sister Pamela hence he was authorised by family members to collect adjudication records. He produced documents in support of his case.



13. On cross examination, he testified that his brothers Jacob Ouma Oketch, Amos Fredrick Oduol Oketch, Peter Mthiga Oketch and Seje Omondi Oketch authorised him to collect the adjudication records on their behalf. He also collected adjudication records on behalf of his deceased brothers namely Charles Oyugi and Martin Mbare and that of the deceased. He testified that it was his brother Gideon who had lodged the objection.
14. Joel Ogise Othuti, a principal land registrar testified as DW2. It was his testimony that the suit property and the subdivisions were 1st registrations and they emanated from an adjudication record that was completed on 24/1/1990 and titles issued on April 15, 2015. Subdivision had never emanated therefrom. He produced documents in support of his case. The subdivisions alluded to by the plaintiff emanated from an objection by Gideon.
15. On cross examination, he testified that he was not sure whether the deceased was unwell at the time of adjudication.
16. Floice Ochieng a land adjudication and settlement officer testified a DW3. It was her case that adjudication in the area commenced in early 1970's and publication published in 1991. An objection was lodged by Gideon on 20/2/1997 which was allowed. Though the deceased was alive at that time, he was incapacitated. There had never been an appeal. There were no fraudulent activities.
17. On cross-examination, she testified that the objection did not show who represented the deceased and she was uncertain how a deceased person could appeal. She contended that at the time, patriarchy was eminent and only male members of a family inherited land. The 1st defendant did not commit any fraud but merely collected the records on behalf of his brothers which was acceptable in the adjudication process.

Parties Submissions

18. The plaintiff's Counsel Mr Ogunda filed written submissions dated September 17, 2022. Counsel identified 6 issues for determination: (i) whether the deceased was the adjudicated and registered owner of the suit property measuring 24 acres and whether he died on February 12, 1998 (ii) whether at the time of adjudication, the suit property neighboured East Yimbo/Nyamonye/158, 157, 156 and 163 (iii) whether the 1st and 3rd defendants jointly subdivided the suit property fraudulently and without authority (iv) whether the deceased participated in the subdivision of the suit property (v) whether the subdivision of the suit property was illegal and the resultant subdivisions could be revoked and (vi) who would meet the costs of this suit?
19. On the first issue, Counsel submitted that the adjudication record that was produced as Pex. 2 evidenced that the suit property was registered in the deceased's name. On the second issue, Counsel submitted that as per the map that was produced as Pex 3, the suit property as at 1973 adjoined parcel numbers East Yimbo/Nyamonye/158, 157, 156 and 163.
20. On issues number 3, 4 and 5, it was Counsel's submissions that the suit property was the subject of a land adjudication officer's decision of February 20, 1997 that emanated from objections numbers 577 and 578 which had been produced as evidence. The 1st defendant signed adjudication records on 6/09/1988 and similarly signed on his own behalf and on behalf of his brothers on April 18, 2005 and May 30, 2005; at that time some of his brothers were deceased. Counsel submitted that these actions



connoted fraud. Counsel placed reliance on Section 26(2) of the [Land Adjudication Act](#) which provides inter alia;

“The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection”

21. Counsel submitted that the import of this section was that it behoved an adjudication officer to be impartial which was not so in the circumstances of this case. Counsel urged this court to make a finding on fraud and prayed for costs.

The Defendant’s Submissions

22. The 1st defendant filed written submissions dated July 28, 2022. He submitted that the plaintiff had failed to prove her case. He contended that the process of adjudication was carried out during the survival of the deceased and the objection was carried out by Gideon and not him. He proffered that a right of appeal was never exercised.

23. M/s Juma Counsel for the 2nd, 3rd and 4th defendants filed her written submissions dated 19/09/2022. She identified two issues for determination; (i) whether there was fraud on the part of the 2nd defendant and (ii) whether the court had jurisdiction.

24. Counsel submitted that the law was settled that fraud must be specifically pleaded and she placed reliance on the case of [Vijay Morjaria v Nansingh Madhusingh Darbar & another](#) [2000] eKLR where the Court of Appeal expressed itself as follows;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading.... and it is not allowable to leave fraud to be inferred from the facts”

25. Counsel submitted that fraud had not been proved against the 2nd defendant because he did not play any role during the adjudication process. She contended that the 2nd defendant’s functions were limited to post adjudication functions of processing title documents and greencards. Counsel proffered that it would be unjust to issue orders against parties who were not joined to these proceedings.

26. Counsel submitted that adjudication began in 1988, objections were raised on September 27, 1991 and heard on February 20, 1997. After determination, parties had several avenues to ventilate their grievances; appeal to the minister pursuant to Section 29 of the [Land Adjudication Act](#) or file a suit or institute judicial review proceedings under Section 30 of the same Act. Counsel contended that this court lacked jurisdiction to interfere with the process of adjudication because it was quasi-judicial in nature. Counsel placed reliance on the case of [Robert Kulinga Nyamu v Musembi Mutunga and Another](#) [2022] eKLR where Kimani J found thus;

“I agree with the findings of the Court in the above case that the court has no jurisdiction to ascertain and determine interests in land in an adjudication area and that the role of the court is supposed to be supervisory only of the adjudication process”.

Analysis and Determination

27. I have considered the parties’ pleadings, evidence and rival submissions and in my considered view, the issues falling for determination are; (i) whether the plaintiff’s suit was competent (ii) whether the adjudication process over the suit property was fraudulently conducted by the 1st and 2nd defendants



and (iii) what appropriate orders should be granted. On the 1st issue, I will address my mind on two pertinent issues that have arisen in this suit that may well dispose of the case; jurisdiction and failure to join parties whose title documents would be affected if adverse orders would be made against them. I will deal with the issues sequentially.

Whether the suit is competent

28. On the 1st issue of jurisdiction, I agree with Counsel M/s Juma that it is settled law jurisdiction is everything and without which a court must down its tools. See [*Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd*](#) [1989] KLR 1.
29. Though Counsel blankety contended that this court did not have jurisdiction to determine suits that emanated from adjudication proceedings because they were quasi-judicial in nature, in my considered view, there are instances where this court has jurisdiction.
30. Upon 1st registration, titles can be challenged under Section 26 (2) (b) of the [*Land Registration Act*](#) if they were acquired by fraud, misrepresentation, illegality, unprocedural means or through a corrupt scheme and it raises a new cause of action. See [*Robert Kulinga Nyamu v Musembi Mutunga*](#) (Supra) where the court cited with approval [*Dume Deri Mumbo & 19 others v Cabinet Secretary of Lands, Housing & Urban Development & 6 Others*](#) [2016] eKLR. The Court of Appeal when similarly dealing with circumstances obtaining to the facts of this case in [*Nicholas Njeru v Attorney General & 8 others*](#) [2013] eKLR had this to say;

“ However we do not entirely agree with the learned Judge’s observation that the court had no jurisdiction to grant a declaratory order... We will also look at what the appellants referred as ‘the new cause of action.’”
31. I have scrutinised and analysed the entire record and I am satisfied that the suit introduces a new cause of action; fraud, which squarely falls within the paradigm of Section 26 (2) (b) of the [*Land Registration Act*](#). It is my finding that I have jurisdiction to deal with this suit.
32. On the 2nd issue, I agree with Counsel M/s Juma that audi alteram partem rule is a cardinal principle of law that provides that parties must be given an opportunity to be heard before adverse orders can be made against them. The [*Constitution of Kenya*](#) recognizes the right of protection of properties and they cannot be capriciously extinguished or cancelled without according them an opportunity to be heard. This goes hand in hand with fair hearing as envisaged by Article 50 of the [*Constitution of Kenya*](#). See the Court of appeal decision of [*Pashito Holdings Limited & Another v Paul Nderitu Ndungu & 2 Others*](#) [1197] eKLR.
33. It was undisputed that the registered owners of East Yimbo/Nyamonye/4542, 4543, 4544, 4545 and 4547 were deceased. The plaintiff sought reliefs against the properties East Yimbo/Nyamonye/4542, 4543, 4544, 4545, 4546, 4547, 4548, 4549 and 4550 yet as evidenced by the adjudication records and pleadings, none of the registered owners or their respective legal representatives were joined in these proceedings save for the 1st defendant who was the registered owner of East Yimbo/Nyamonye/4548. Failure by the plaintiff to join them or their legal representatives was fatal. It is my finding on this issue that the plaintiff’s suit was incompetent. Even if this suit was competent, which it is not, what would have been my finding on whether the adjudication process over the suit property was fraudulently conducted by the 1st and 2nd defendants.



Whether the adjudication process over the suit property was fraudulently conducted by the 1st and 2nd defendants

34. The 2nd defendant played a very limited role during the adjudication process and his responsibility was merely to effect registrations in accordance with the adjudication register. See Section 28 of the [Land Adjudication Act](#). None of the allegations against it ever stood a chance of being proved. The plaintiff's allegations of fraud against the 2nd defendant was misplaced, rather, she should have pleaded and particularised fraud against the 3rd defendant; which she did not. It is my finding that she did not prove her case against the 2nd defendant.
35. I now turn to the 1st defendant. From the evidence adduced, the only role the 1st defendant participated in, in the adjudication process, was the collection of adjudication records for land parcels numbers East Yimbo/Nyamonye/4542, 4543, 4544, 4545, 4546, 4547, 4548, 4549 and 4550. The 1st defendant testified that he only collected the records from the 3rd defendant's office on his own behalf and those of his siblings some of whom were deceased. The documents produced established this position.
36. The 3rd defendant testified that indeed, there was nothing wrong with the process of collection. Was there? My answer is negative. I say so because by the provisions of Section 13 (5) of the [Land Adjudication Act](#), the 1st defendant was empowered to do so. This provision provides as follows;

“Where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors, unless the adjudication officer otherwise directs”.

It is my finding that the actions of the 1st defendant was not fraudulent.

37. For reasons that I have already found, it is my ultimate finding that the suit is unmeritorious. It is trite law that costs follow the event. However, because of the special circumstances of the relationship between the plaintiff and 1st defendant, each party shall bear their respective costs. I hereby issue the following disposal orders;
- a. The plaintiff's suit hereby stands dismissed; and
 - b. Each party shall bear their respective costs.

DELIVERED AND DATED AT SIAYA THIS 10TH DAY OF NOVEMBER 2022.

HON. A. Y. KOROSS

JUDGE

10/11/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform:

In the Presence of

Ms. Essendi for 2-4th defendants

1st defendant acting in person

N/A for plaintiff

Court assistant: Ishmael Orwa

