



Ongaria (substituted with Agripina Wafula Ongaria) v Opiyo (Environment & Land Case 112 of 2015) [2022] KEELC 15659 (KLR) (10 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15659 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 112 OF 2015
BN OLAO, J
NOVEMBER 10, 2022**

BETWEEN

**WILLIAM ONGARIA PLAINTIFF
SUBSTITUTED WITH AGRIPINA WAFULA ONGARIA**

AND

JOHN DINDI OPIYO DEFENDANT

JUDGMENT

1. In the book of Genesis, a story is told of Cain and his brother Abel. Cain was so angry and jealous of his brother that he killed him. Later, God asked him.

“Where is Abel”

and Cain replied:

“Am I my brother’s keeper?”

What Cain was saying was that Abel was not his problem. But that phrase is really understood to mean being responsible for the welfare of a brother, sibling or, by extension for other human being.

2. I am also reminded of this short poem by Suzie Huitt:

“Brother and sister together as friends, ready to face whatever life sends. Joy and laughter or tears and strife,

Holding hands tightly as we dance through life”.

3. It is of course rather late to remind William Ongaria Okello (now deceased and substituted as plaintiff with his daughter Agripina Wafula Ongaria) about the above Bible verse or the poem by Suzie Huitt.



What is important is that William Ongaria (the deceased herein) and John Dindi Opiyo (the defendant) were related. In his statement dated August 25, 2017 and filed in support of his claim against the defendant, the deceased states in paragraph 5 that when his late father Alexander Okello passed away in the year 1961, his mother one Isabella Ajuma was inherited by his late father's brother one Bandasaro Dindi and it was from that union that the defendant was born. On his part, however, the defendant states in his statement dated April 3, 2017 that in fact he too was the son of Alexander Okello who prior to his demise, was the registered proprietor of the land parcel No Bukhayo/Kisoko/5851 which was later sub-divided to give rise to 3 other portions of land including the land parcel No Bukhayo/kisoko/6025 (the suit land). Whether the defendant was in fact also a son of Alexander Okello or was actually born out of the levirate union between Alexander Okello's brother one Bandasaro Dindi and Isabella Ajuma is not really a big issue in this dispute because even when she was cross-examined by Mr Ouma counsel for the defendant, Agripina Wafula Ongaria said:

“The defendant is a brother to my father.”

That is not surprising because levirate unions usually involve a widow and a male from the family of her deceased husband. It is not therefore surprising that Agripina Wafula Ongaria refers to the defendant as a brother to the deceased.

4. By a plaint filed herein on October 6, 2015, the deceased sought the following claim against the defendant with respect to the suit land.

1. Compensation to the plaintiff of the value of 1½ acres comprised in the land parcel No Bukhayo/Kisoko/6025.
2. Costs of this suit.
3. Any other relief this honourable court will deem fit to grant.

The basis of the deceased's claim was that on or about 2010, the defendant fraudulently transferred the suit land in his names. The particulars of fraud are pleaded in paragraph 3 (i) to (iv) as follows:

- i. Transferring into his names the land parcel No Bukhayo/Kisoko/6025.
- ii. Obtaining consent to transfer the land parcel No Bukhayo/Kisoko/6025 into his names through concealment of material facts.
- iii. Misleading the Land Control Board and the Land Registrar that the entire parcel of land No Bukhayo/Kisoko/6025 is legally his and is to be so registered.
- iv. Retaining the land parcel No Bukhayo/Kisoko/6025 for his exclusive use.

Together with the plaint, the deceased filed his “affidavit evidence” dated August 25, 2017 together with that of his witness Paul Odanga (PW2) dated November 30, 2017.

5. In his “affidavit evidence,” the deceased states that he was the registered proprietor of the suit land which is a sub-division of the land parcel No Bukhayo/Kisoko/5851 which originally belonged to his father, Alexander Okello. That when his father died, his wife Isabella Ajuma was inherited by his late father's brother one Bandasaro Dindi who bore with her the defendant. That therefore, the defendant is entitled to inherit the property of his father Dandasaro Dindi since he is not the son of Alexander Okello. That the defendant fraudulently transferred the suit land into his names and the deceased did not attend any Land Control Board. The title to the suit land as registered in the defendant's name should therefore be cancelled.



6. In his affidavit in support of the deceased's claim, Paul Odanga also reiterated that the defendant fraudulently transferred the suit land in his names and that at no time did the deceased gift him the same. That on March 20, 2006 when the transfer forms are alleged to have been executed, the deceased was ailing and could not have signed such civil forms. The witness adds that he is a brother to the deceased and would have known if any such land transactions were carried out. He therefore supports the claim that the transfer of the suit land in the defendant's name was illegal and should be cancelled for having been obtained fraudulently.
7. The deceased also filed the following documents in support of his claim:
 1. Letter of consent for transfer of the land parcel No Bukhayo/Kisoko/6025.
 2. Application for consent for the transfer of the land parcel No Bukhayo/Kisoko/6025.
 3. Transfer form for the land parcel No Bukhayo/Kisoko/6025.
 4. Green card for the land parcel No Bukhayo/Kisoko/6025.
8. Following her substitution as the plaintiff in this case in place of the deceased, the plaintiff also filed her own "affidavit evidence" (surprisingly also dated August 25, 2017) in which she said that she is the daughter of the deceased and the niece to the defendant. That she had learnt from her grandmother Isabella Ajuma that the defendant was the son of Bandasaro Dindi and not Alexander Okello and therefore the deceased and the defendant only share a mother but are children of different fathers. Therefore, each of them should inherit from their respective fathers and that the suit land belongs to the deceased who had inherited it from his father Alexander Okello.
9. By his defence dated November 18, 2015, the defendant denied all the allegations of fraud as levelled against him with regard to the suit land. He added that this case is statute barred and there is Busia SPM CC No 331 of 2011 in which the deceased was a witness and a preliminary objection would be raised to the effect that this suit is *res judicata* and should be dismissed with costs.
10. In his statement dated April 3, 2017, the defendant states that Alexander Okello the then registered proprietor of the original land parcel No Bukhayo/Kisoko/5851 was his father. That the said land was sub-divided to create 3 other parcels including the suit land which the deceased who was holding it in trust on his behalf transferred to him.
11. That sometime in 2011 when one Wycliffe Webukha trespassed onto the suit land, the defendant sued him and the deceased was his (defendant's) witness and in fact testified that the (deceased) held the suit land in trust for the defendant. He denied this allegation of fraud adding that the deceased sold his share and now wants to claim the defendant's share and his suit should be dismissed.
12. The defendant filed a statement of his witness Christian Juma (DW 2) dated April 3, 2017 in which he confirms that the deceased and the defendant are brothers. That in 1981, the deceased called him and told him that his (deceased's) mother was ailing. They went to see the deceased's mother who told them that in case she dies, the deceased should be the administrator of her Estate and should share with the defendant. That after she died, the deceased took the defendant to the Land Control Board and they shared the land with the deceased getting 17 hectares and the defendant $6\frac{3}{4}$ hectares. That the deceased was given his share yet he is demanding the defendant's share.
13. The defendant also called as a witness Caroline Onchoka (DW 3) who testified but did not record any statement. She is the Assistant County Commissioner Nambale Sub County and the custodian of the Land Control Board records. She produced as evidence the record of the Land Control Board meeting for February 9, 2006 in which the deceased attended in respect of two applications. That first



application was for the transfer of the suit land to the defendant as a gift and the second application was for the transfer of the land parcel No Bukhayo/Kisoko/6027 to one Vera E. Esike at a consideration of Kshs 100,000. Consent was given for both transactions. The witness produced the records as part of the defendant's evidence.

14. The defendant also filed the following as his documentary evidence as per the list dated April 3, 2015:

1. Copy of his identity card
2. Copy of the title deed for the land parcel No Bukhayo/Kisoko/6025.
3. Copy of certificate of official search in respect to the land parcel No Bukhayo/Kisoko/6025.
4. Copy of Register for the land parcel No Bukhayo/Kisoko/6025.
5. Copy of mutation form for the land parcel No Bukhayo/Kisoko/5851.
6. Copy of letter of consent for the sub-division of the land parcel No Bukhayo/Kisoko/5851.
7. Copy of the witness statement of the deceased in Busia SPM CC No 331 of 2011 John Opiyo Dindi, V. Wycliff Webukha.
8. Copy of pleadings in Busia SPM CC No 331 of 2011 John Opiyo Dindi, v Wycliffe Webukha.

The defendant also filed a further list of documents dated April 8, 2019 containing the following:

1. Letter from the Assistant County Commissioner – Nambale division dated March 25, 2019 and addressed to the Registrar Busia High Court.
2. Copy of entries in the Register of the District Land Control Board Nambale.

The plenary hearing commenced before Omollo J on December 6, 2021 and ended on July 25, 2022 when the plaintiff, having substituted her deceased father, testified and adopted the deceased's affidavit. She also called as her witness Paul Odanga Okello (PW 2) who also adopted his affidavit. She produced as her documentary evidence the documents referred to above.

The defendant similarly testified and adopted as his evidence the witness statement dated April 3, 2017. He called as his witness Christian Juma (DW 2) who also adopted his statement as his evidence as well as Caroline Onchoka (DW 3) the Assistant County Commissioner Nambale Sub-county who produced the records of the Land Control Board Nambale Sub-county and the letter dated March 25, 2019. The defendant also produced as his documentary evidence the documents filed herein as indicated above.

15. Submissions were thereafter filed both on Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the plaintiff as well as on Mr Ouma instructed by the firm of B.M. Ouma & Company Advocates for the defendant.

16. I have considered the evidence by the parties as well as the submissions by counsel.

17. It is common ground that the suit land has since June 16, 2005 been registered in the names of the deceased. On March 28, 2006, it was transferred to the plaintiff who obtained the title deed thereto issued on March 30, 2006. It is also not in dispute that the suit land was a sub-division of the land parcel No Bukhayo/Kisoko/5851 which was originally registered in the name of Alexander Okello. However, that is where the parties part ways. According to the deceased who, as I had already stated above, has since been substituted as plaintiff by his daughter Agripina Wafula Ongaria (PW 1), the defendant



is not a son of the said Alexander Okello but was born out of the levirate union between Alexander Okello's Wife (isabella Ajuma) and his brother Bandasaro Dindi. The defendants' case however is that Alexander Okello was infact his father and that the deceased was his elder brother. Both the deceased and the defendant however admit that they were born of the same mother Isabella Ajuma. In Black's Law Dictionary 10th Edition, a brother is defined as:

“A male who has one parent or both parents in common with another person”

The deceased and the defendant, going by that definition, are brothers. In the case of *Mwongera Mugambi Rinturi & another v Josephine Kaarika & others* 2015 eKLR, the Court of Appeal accepted that:

“a child is a child none being lesser on account of gender or the circumstances of his or her birth. Each has a share, without shame or fear, in the parent's inheritance and may boldly approach to claim it.”

And whereas in the case of *Ndege Kabibi Kimanga & Another v Kiaranga Gachiani* 2016 eKLR I was dealing with a case involving parties who are Kikuyu by tribe (unlike in this case), I had no hesitation in finding that a son born out of a levirate union was entitled to claim as a beneficiary of property by virtue of a customary trust. It is also instructive to point out that some of the witnesses herein including the plaintiff herself, refer to the deceased and the defendant as brothers. This court will therefore treat them as such although, as will become clear later in this judgment, whether or not the deceased and the defendant are siblings is an issue which, in my view, plays a rather peripheral role in determining the dispute over the ownership of the suit land.

18. Before I delve into the merits of the plaintiff's claim, the defendant has in his defence dated November 18, 2015 at paragraphs three (3) and four (4) pleaded that the plaintiff's claim is infact not only statute barred but is also *res judicata* Busia SPM CCC No 331 of 2011. Those are two important jurisdictional issues that I must first determine because they torch on the jurisdiction of this court to hear this dispute.
19. On *res judicata*, Busia SPMCC No 331 of 2011 involved the defendant herein and one Wycliffe Webukha. And although the dispute involved the suit land, the deceased was not a party and there is nothing to suggest that the deceased, in filing this suit, was pursuing any right in common with what Wycliffe Webukha was seeking in Busia SPMCC No 331 of 2011 with respect to the suit land. If anything, there is evidence that infact the deceased testified in that case on behalf of the defendant herein . Finally, this court has not been informed if Busia SPMCC No.331 of 2011 was heard and finally determined by the subordinate court and if so, with what result. This is because section 7 of the *Civil Procedure Act* which deals with the doctrine of *res judicata* states that:

7: “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same tile, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally denied by such court.” Emphasis mine

It is clear therefore that this suit is not barred by the doctrine of *res judicata*.

20. On the issue of the suit being statute barred, section 7 of the *Limitation of Actions Act* provides as follows:
7: “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first occurred to some person through whom he claims, to that person”



The plaintiff's claim as per paragraph (3) of the plaint is "that on or about 2010, the defendant by use of fraud transferred into his names and obtained registration of LR No Bukhayo/Kisoko/6025".

The documents produced herein show that the transfer documents with respect to the suit land were executed on March 20, 2006 and the defendant obtained his title on March 30, 2006. This suit was filed on October 6, 2015 and it therefore cannot be defeated by the statute of limitation as pleaded by the defendant.

21. Having dispensed with those jurisdictional issues, I now turn to consider the merits or otherwise of the plaintiffs case.

22. The plank of the plaintiff's case is that on or about 2010, the defendant fraudulently transferred the suit land into his names. The particulars of fraud have been pleaded in paragraph 3 (i) to (iv) as stated above. As was held in *Vijay Morjaria v Nansingh Madhusing Darbar & another* 2000 eKLR (As per Tunoi J.A):

"It is well established that fraud must be specifically pleaded and the particulars of the fraud alleged must be stated in the face of the pleadings. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

And as regards the standard of proof, the Court of Appeal held in *Kinyanjui Kamau v George Kamau* 2015 eKLR that:

"It is trite law that any allegation, of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* 2008 1KLR (G & F) 742 wherein the court stated that "we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.....". In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

As the party who had alleged fraud on the part of the defendant, the plaintiff bore the burden of proving that the defendant acquired registration of the suit land fraudulently as pleaded in his plaint. This is because, section 107 (1) of the *Evidence Act* states:

107(1) "whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

23. Section 109 of the same Act provides that:

"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."

24. Although the deceased pleaded, among the particulars of fraud, that the defendant obtained consent to transfer the suit land in his names through concealment of material facts and also misled the Land Control Board, no single iota of evidence was led to prove those serious allegations. And when she was



examined by Mr Ouma, the plaintiff did not even appear to know the particulars of the suit land or how the defendant acquired it. She said:

I don't know the number of land the plaintiff lives on. I don't know how he got the land he lives on."

25 There was no shred of evidence adduced by the plaintiff or indeed by any other witness to suggest that the defendant obtained registration of the suit land in his names by "misleading the Land Control Board and the Land Registrar" as pleaded in the plaint. If anything, Caroline Onchoka (DW 3) the Assistant County Commisisoner Nambale sub-county testified as to how the deceased attended the Land Control Board on November 9, 2006 and not only applied to transfer the suit land to the defendant as a gift but also went further to transfer land parcel No.Bukhayo/Kisoko/6027 to one Vena E. Esike at a consideration of ksh.100,000. The witness produced the relevant records including a letter dated March 25, 2019 confirming that transaction. The plaintiff did not controvert that documentary evidence nor was there any evidence to suggest the said Assistant County Commissioner misled the court. It was not therefore correct for the deceased to state in his affidavit dated August 25, 2017 at paragraph nine (9):

9: "That I have never attended Land Control Board nor signed a transfer form to transfer the suit land to the defendant."

26 It cannot also be correct for the plaintiff's witness Paul Odanga (PW 2) to allege as he has done in paragraph four (4) of his affidavit:

4: "That during the period of March 20, 2006, the plaintiff was ailing and could not be able to sign transfer documents in favour of the defendant."

27 Surely it cannot be that the deceased was too ill to execute any transfer documents in favour of the defendant yet at the same time he executed documents to transfer another parcel to a purchaser before the same Land Control Board. The Assistant Sub County Commissioner Caroline Onchoka (DW 3) was an independent witness who had no motive to testify on falsehoods and there is nothing on the record suggesting that she misled the court. There is documentary evidence showing that the deceased passed away on October 20, 2020 some fourteen (14) years after the defendant had obtained the title deed to the suit land. If there was any fraud on the part of the defendant in the manner in which he obtained that title including forgery of the deceased's signature, nothing stopped the deceased or, following his demise, his daughter who succeeded him in these proceedings, from reporting that fraud to the police for investigations. Nothing of the sort was done.

28 It is clear that the plaintiff has not proved any of the allegations of fraud levelled against the defendant with regard to the manner in which he obtained the title to the suit land. This court is satisfied that the deceased voluntarily executed the transfer documents and appeared before the Land Control Board at Nambale and transferred the suit land to the defendant as a gift. The allegations of fraud are an afterthought which this court must dismiss.

29 Further, there is evidence that infact the deceased recorded a statement in Busia SPMCC No 331 of 2011 John Opiyo Dindi v Wycliffe Webukha in which he not only conceded that the defendant was his brother but went on to add that he (deceased) held the suit land "in trust" for the defendant. This is



what the deceased stated in paragraphs four (4) and five (5) of his statement dated November 22, 2011 filed in support of the defendant's case against Wycliffe Webukha with respect to the suit land:

4: "That the said acts I claim are misplaced that the plaintiff bought land from me as this land belonging to my father who passed away before adjudication and thus I was registered instead of my father to hold in trust of our children."

5: "That after my brother attained majority age, I transferred to him his share thus subdividing land parcel No.Bukhayo/Kisoko/559 to Bukhayo/Kisoko/6025 and the other member (sic) I issued the defendant".

In paragraph six (6) of the same statement, the deceased said as follows:

6: "That the claims hereby the defendant (sic) is malicious, ill advised and may be emotive in the village"

30 The defendant being referred to in that paragraph is Wycliff Webukah who was involved in a dispute with the defendant in this case (who was the plaintiff) over the suit land. And as is now abundantly clear from the deceased's own statement filed in Busia SPMCC case No.331 of 2011, he admitted that he held the suit land on behalf of his father "in trust" of the "other children". That was a clear admission that the defendant herein was rightfully entitled to the suit land which the deceased himself went ahead to transfer to the defendant. The deceased could not therefore move to this court, as he has done alleging fraud against the defendant yet at the same time conceding that he held the suit land "in trust" for the defendant. The deceased could not approbate and reprobate at the same time.

31 As I stated at the commencement of this judgment, we are supposed to be our brother's keepers. The deceased no doubt appreciated that he was responsible for the welfare of his younger sibling the defendant herein and even supported him as a witness in a dispute with another party over the ownership of the suit land. All that was in keeping with the Bible verse which I have quoted above. It is not clear why the deceased suddenly had a complete change of heart in 2015 and filed this suit alleging that the defendant had fraudulently transferred the suit land into his names yet on November 22, 2011, he had readily recorded a statement supporting the defendants claim to the suit land. This suit was clearly ill advised and the plaintiff's claim to the suit land is devoid of any merit. It is for dismissal.

31 On the issue of costs, the parties are family. The order that commends itself to make in the circumstances is that each party shall meet their own costs.

B.N. OLAO

JUDGE

Judgment dated and signed at BUSIA ELC on this 10th day of November 2022.

The same is delivered by way of electronic mail on this 10th day of November 2022.

Right of Appeal.

B.N. OLAO

JUDGE

10th November 2022

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