



REPUBLIC OF KENYA



**Alal v Okello & 2 others (Environment & Land Case 4 of 2022)
[2022] KEELC 14750 (KLR) (8 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14750 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 4 OF 2022
GMA ONGONDO, J
NOVEMBER 8, 2022**

BETWEEN

CHRISTOPHER OTUK ALAL PLAINTIFF

AND

JOSHWA OTIENO APIYO 1ST DEFENDANT

MICHAEL ONYANGO OKELLO 2ND DEFENDANT

LAND REGISTRAR –MIGORI COUNTY 3RD DEFENDANT

JUDGMENT

A. Introduction

1. The suit property herein is land reference number Kanyamkago/Kawere II /4506 measuring approximately three decimal four eight hectares (3.48 ha) in area (The suit property herein). It is captured in Registry Map Sheet number 49. The same emanated from land reference number Kanyamkago/Kawere II/850 measuring approximately forty nine decimal five hectares (49.5 Ha) in area (The original land herein).
2. The plaintiff is represented by the firm of Kwanga Mboya and Company Advocates.
 1. The 1st defendant is unrepresented while the 2nd and 3rd defendants are represented by the firm of Okong'o, Wandago and the Attorney General respectively.
 2. This suit was originally lodged at Kisii Environment and Land Court. For purposes of hearing and determination in line with Articles 6 (3), 48 and 159 (2) (b) of *the Constitution of Kenya, 2010*, it was transferred to Migori Environment and Land Court on February 22, 2017 and then to this court on March 3, 2022.



B. The Plaintiff's Case

5. The plaintiff generated this suit by a way of a plaint dated November 12, 2015 and lodged on November 13, 2015 seeking the orders infra;
 - a. A declaration that the plaintiff is the lawful owner of the suit property.
 - b. Restoration of the suit property into the names of the plaintiff.
 - c. Costs of the suit,
 - d. Any other relief this Honourable Court will deem fit to grant.
6. In a nutshell, the plaintiff laments that is he is jointly registered together with one Okiki Odongo as the proprietors of land reference number Kanyamkago/Kawere II/4509 (The plaintiff's land). That the plaintiff's land is a sub division of the original land. That on July 3, 2015, the 1st defendant fraudulently transferred the suit property being a portion of the plaintiff's land, to the 2nd defendant thus, precipitating this suit.
7. The plaintiff (PW 1) relied upon his statement dated November 12, 2015, his bundle of documents dated November 12, 2015 serial numbers 1 to 7 (PExhibits 1 to 7 respectively) and his supplementary list of documents dated July 10, 2016 serial numbers 1 to 4 (PExhibits 8 to 11 respectively) as part of his testimony. His statement reads, inter alia;

“The transfer of Land Parcel Number Kanyamkago/Kawere II/4506 into the names of the 2nd Defendant is illegal.”
8. By the submissions dated January 10, 2022 and filed on February 7, 2022, learned counsel for the plaintiff stated brief background of the matter, framed and analysed seven issues for determination including whether the plaintiff's claim of fraud is proven and whether he is entitled to the reliefs sought. Counsel submitted that the 1st defendant offended section 45 of the *Law of Succession Act* (*supra*) by the transfer and registration of the suit property. That in light of section 14 of the *Land Registration Act*, 2016 (2012) and the proviso to section 27 of the *Civil Procedure Act* Chapter 21 Laws of Kenya, the plaintiff's claims at the foot of the plaint be allowed and that the defence be dismissed with costs.

C. The Defendants' Case

9. The 1st defendant was served as revealed in the affidavit of service sworn on September 27, 2020 and the proceedings of October 1, 2020 herein. However, he never entered appearance and or filed any statement of defence in this suit.
10. By a defence statement dated December 16, 2015 and duly filed on even date, the 2nd defendant denied the plaintiff's claim and prayed that the same be dismissed with costs. He stated, inter alia, that on June 26, 2015, he transferred the suit property upon the registration of a transfer. That thus, no fraud, mistake or misrepresentation resulted in the 2nd defendant's proprietorship of the suit property.
11. The 3rd defendant denied the plaintiff's claim and implored upon the court to dismiss it with costs by the statement of defence dated 13th July 2016 and filed in court on July 19, 2016. The 3rd defendant stated in part that the suit property was legally registered in the name of the 1st defendant and that it was never carved out of the plaintiff's land.
12. The evidence of the 2nd defendant (DW1) is premised partly on his statement dated August 20, 2018 and his list of documents dated May 30, 2017 serial numbers 1 to 12 (DExhibits 1 to 12 respectively).



He requested the court to dismiss the suit. During cross examination by Mr Kwanga Mboya, learned counsel for the plaintiff, DW1 stated-

“I obtained the suit land LR No. 4506.....the 1st defendant.....gave me as a gift and transferred it accordingly.....”

13. By the submissions dated March 3, 2022 and filed on even date, learned counsel for the 2nd defendant made reference to the parties’ pleadings and evidence and requested the court to dismiss this suit with costs. That there is fundamental and fatal departure of the plaintiff’s evidence from the pleadings and that there is no evidence to point to fraudulent sub division, transfer and registration of land as alleged by the plaintiff. Counsel relied upon, among others, the case of *Raila Amolo Odinga and another-vs-IEBC and 2 others* (2017) KLR, *Galaxy Paints Co. Ltd -vs-Falcon Guards Ltd* (2000) 2 EA 385, section 82 (a) of the *Law of Succession Act* Chapter 160 Laws of Kenya and Re estate of Veronica Njoki Wakagoto (Deceased) (2013) KLR, to buttress the submissions.

D. Issues For Determination

14. Order 15 of the *Civil Procedure Rules, 2010* governs framing of issues and materials from which issues may be framed in a civil court.
15. In view of the above and being guided by the Court of Appeal decision in *Galaxy Paints* (supra) restated in the case of *Great Lakes Transport Company (U) Ltd-vs-Kenya Revenue Authority* (2009) KLR 720, the issues that emerge for determination boil down to the following;
 - a. Did the defendant obtain registration of the suit property fraudulently?
 - b. Subject to issue (a) hereinabove, is the plaintiff entitled to the orders sought at the foot of the plaint?

E. Analysis And Determination

16. PW1 testified that he is son of Alal Onyuna (Deceased) who was one of the joint registered proprietors of the original land. That the suit property was curved out of the plaintiff’s land as disclosed in PExhibits 1, 5 and 6.
17. Precisely, in the statement of PW1 as noted in paragraph 7 hereinabove, PW1 stated that the transfer of the suit property to the name of the 2nd defendant by the 1st defendant, was illegal.
18. Particulars of fraud of the plaintiff’s claim against the defendants are set out at paragraph 13 (a) to (c) of the plaint. Therefore, PW1 distinctly pleaded fraud in this suit.
19. In cross examination by learned counsel for the 2nd defendant, PW1 stated that the suit property was hived off the plaintiff’s land. That he had no grant of letters of administration in respect of the estate of his father, Alal Onyuna (Deceased) who was one of the joint proprietors of the original land. That he had no evidence or order in support of his claim.
20. Furthermore, during cross examination by Esther Opiyo, learned counsel for the 3rd defendant, PW1 told the court that whereas he owned the suit property, he had no title thereto. That he had inherited the suit property but not obtained a grant of letters of administration over the estate of his deceased father, Alal Onyuna. That the plaintiff’s land was un-surveyed before the suit property was curved out of it.
21. To the foregone extent, PW1 is not a legal representative of the estate of his deceased father who was a joint owner of the original land; see *Rajesh Chudasama-vs-Sailesh Chudasama* (2014) eKLR. Clearly,



he stated that his land was un-surveyed before the suit property was allegedly carved out of it and admitted that he has no evidence to support his claim against the defendants.

22. Be that as it may, it was the testimony of DW1 that he was given the suit property as a gift by the 1st defendant who transferred it to him and signed PExhibit 2 in his (DW1) favour. That PExhibit 2 was made earlier than PExhibit 5 hence he has legal title to the suit property.
23. DW1 stated that he obtained title to the suit property by way of transfer as demonstrated by DExhibits 1 to 12; see Section 26 of the [Land Registration Act, 2016](#) (2012).
24. In particular, during cross examination by learned counsel for the 3rd defendant, DW1 stated thus;

“ The 3rd defendant followed transfer executed by the 1st defendant in my favour.....”
25. It is common ground that the suit property is registered in the name of the 2nd defendant. DW1 asserted that he lawfully bought it from the 1st defendant as discerned in DExhibits 1 to 12. So, the rights and interests of DW1 are secured under Sections 24 and 25 of the [Land Registration Act, 2016](#) (2012) aligned to Article 40 (1) of the [Constitution of Kenya, 2010](#).
26. The term “Register” under section 2 of the [Land Registration Act, 2016](#) (2012) and the mandate of this court to rectify register by under section 80 of the same Act, are borne in mind in this suit.
27. It is trite law that a certificate of title can be challenged on ground of fraud ; see [Kuria Kiarie and 2 others-vs-Sammy Magera](#) (2018) eKLR.
28. Further, it is established law that the burden is always on the plaintiff to prove his or her claim against the defendant on a balance of probabilities. That the burden is not lessened even if the claim is heard by way of formal proof-[Kirugi and another-vs-Kabiya and 3 others](#) (1987) KLR 347.
29. In the instant suit, the plaintiff has struggled to prove his claim against the defendants without success. Indeed, the evidence availed by the plaintiff does not support the allegations of fraud against the defendants. The same has missed to attain the threshold for entry of final judgment even against the 1st defendant who did not defend the suit in light of sections 107 to 110 of the [Evidence Act](#) Chapter 80 Laws of Kenya.
30. In sum, it is the finding of this court that the plaintiff has failed to establish his claim against the defendants to the requisite standards. He is not entitled to any relief sought in the plaint.
31. Wherefore, the plaintiff’s suit mounted by way of a plaint dated November 12, 2015 fails. The same be and is hereby dismissed.
32. By dint of the proviso to section 27 (1) of the [Civil Procedure Act](#) (supra), costs of this suit to be borne by the plaintiff.
33. It is so ordered.

VIRTUALLY DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 8TH DAY OF NOVEMBER 2022

G M A ONGONDO

JUDGE

PRESENT

Mr. D Adawo, learned counsel for the plaintiff



Mr. M Odero. Learned counsel for the 2nd defendant
Okello, court assistant

