



REPUBLIC OF KENYA



**Midiwo v Onjiro & 3 others (Environment & Land Case 37 of 2021)  
[2022] KEELC 15199 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15199 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 37 OF 2021**

**AY KOROSS, J**

**DECEMBER 8, 2022**

**BETWEEN**

**JOACHIM RAGUMA MIDIWO ..... PLAINTIFF**

**AND**

**CAMLUS ODANGA ONJIRO ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF SIAYA ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR SIAYA COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, BONDO ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 23/09/2020, the plaintiff instituted suit against the defendants. He purported he was the lawful and beneficial owner of land parcels no. North Ugenya/Masat/1578 and North Ugenya/Masat/1539 (hereinafter referred to as 'the suit properties').
2. He averred that he enjoyed quiet possession of the suit properties and resided thereupon together with his family and that sometimes on 16/09/2020, the 1<sup>st</sup> defendant sought to evict him from one of the suit properties; North Ugenya/Masat/1578.
3. He averred that the defendants had fraudulently, unlawfully, illegally and/or without proper procedure colluded and caused the registration of the 1<sup>st</sup> defendant's father one Onjiro Mganda as the registered proprietor and had subsequently caused the registration of the 1<sup>st</sup> defendant as the proprietor of North Ugenya/Masat/1578.
4. He pleaded and particularized fraud inter alia; his registration and that of his brothers were removed from the registers of the suit properties; at registration, the whereabouts of Onjiro Mganda were unknown and the defendants failed to consider his interests; title documents to the suit properties were improperly issued and the defendants had merged two distinct interests in land.



5. He sought reliefs inter alia; a declaration that the plaintiff was the legal owner of one half share of North Ugenya/Masat/1539 and North Ugenya/Masat/1578; a rectification or/and cancellation of the existing records on the suit properties; subdivision and issuance of new title deeds on the suit properties in accordance with the apportioned shares which were to be registered in his and the 1<sup>st</sup> defendant's name; cancellation of title to land parcel no. North Ugenya/Masat/1578 that was issued to the 1<sup>st</sup> defendant and costs of the suit.
6. By a defence dated 15/11/2020 that was later amended by an amended defence dated 12/03/2021, the 1<sup>st</sup> defendant denied the averments made in the plaint. He averred that the plaintiff had encroached onto a portion of North Ugenya/Masat/1578. He averred that this court lacked jurisdiction, the suit against him was statutory barred and was incompetent. He prayed for dismissal of the suit with costs.
7. In a rebuttal to the defence, the plaintiff filed a reply to amended defence dated 29/03/2021 wherein, he took issue with the 1<sup>st</sup> defendant's amended defence and reiterated the averments made in the plaint.
8. Despite the 2<sup>nd</sup> defendant filing a memorandum of appearance, it did not participate in these proceedings. Similarly, the 3<sup>rd</sup> and 4<sup>th</sup> defendant did not participate too.

### **The plaintiff's case**

9. The plaintiff who testified as PW1 adopted his witness statement. In his exam in chief, he testified that during land adjudication, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants allocated the suit properties to him and his two brothers Patrick Okumu and Okumu Midiwo as children of his mother Catherine. At adjudication, North Ugenya/Masat/1578 was registered in his name, that of his two brothers and the 1<sup>st</sup> defendant's father Onjiro Mganda. While land parcel North Ugenya/Masat/1539 was registered in his name and that of his brother.
10. He recently discovered that his name and those of his brothers were removed from the suit properties and only Onjiro Mganda's name was retained. At the time of adjudication, Onjiro Mganda was absent and his whereabouts were unknown to date. The 1<sup>st</sup> defendant was registered as proprietor of the suit properties without obtaining grant of letters of administration on Onjiro Mganda's Estate.
11. On cross-examination, he testified that the 1<sup>st</sup> registered owner of the suit properties was Onjiro Mganda who was the only child of Mganda Midiwo who survived to adulthood. He and his siblings were children of Philip Midiwo who married Catherine upon Mganda Midiwo's demise. At adjudication he was an adult. At adjudication, he and his brothers were registered in their individual family's parcels of land. The 1<sup>st</sup> defendant was a minor at adjudication and could not have participated in the adjudication process. Onjiro Mganda was entitled to the suit properties because he was Mganda Midiwo's son. He had built on North Ugenya/Masat/1578 because it was Catherine's parcel of land. He discovered fraud in 2020. He (plaintiff) had no problem if the suit properties were handed over to the 1<sup>st</sup> defendant. He entered the suit properties with the 1<sup>st</sup> defendant's consent.
12. On cross exam, he testified that his interests on the suit properties accrued from his grandfather. Catherine had previously ploughed North Ugenya/Masat/1578.
13. In support of his case, he produced greencards of the suit properties and demand letters.

### **The 1<sup>st</sup> defendant's case**

14. The 1<sup>st</sup> defendant testified as DW1. It was his testimony that at adjudication Onjiro Mganda's name was registered in absentia; he was then a minor. The plaintiff had always been privy that the suit properties



were registered in Onjiro Mganda's name and before adjudication, they were owned by his grandfather Mganda Midiwo.

15. The plaintiff was not his biological relative and he could not claim ownership over the suit properties; he (plaintiff) had his own separate parcels of land. He [1<sup>st</sup> defendant] was improperly registered as the proprietor of North Ugenya/Masat/1578 while North Ugenya/Masat/1539 was registered in Onjiro Mganda's name. In support of his case, he produced several documents.
16. On cross examination, he admitted that succession was never done on North Ugenya/Masat/1578 but the land registrar had transferred it to him. North Ugenya/Masat/1539 was still registered in Onjiro Mganda's name.
17. His testimony was led by two witnesses. Pius Onyango Babu; a former administrative chief testified as DW2. He testified that the 1<sup>st</sup> defendant reported to him that the plaintiff had trespassed on North Ugenya/Masat/1578.
18. Dominic Omiyo Owino testified as DW3. He corroborated DW1's testimony. It was his testimony that the plaintiff had no right to the suit properties and it was too late for the plaintiff to raise issues that should have been well resolved within the regime of the Land Adjudication Act. The plaintiff had first attempted to trespass on his land and when he rebuffed him, he invaded the suit properties which neighboured his.

#### **Parties' written submissions**

19. As directed by the court, the plaintiff and 1<sup>st</sup> defendant's counsel filed their respective rival written submissions.
20. Counsel Mr. Olieti filed his written submissions dated 11/09/2022. He identified four issues for this court's determination;
  - (i) whether this court had jurisdiction
  - (ii) whether the court had denied the plaintiff a right to fair trial
  - (iii) whether the plaintiff had proved that he owned the suit properties and
  - (iv) what orders should this court issue.
21. On the 1<sup>st</sup> issue, it was counsel's submission that the cause of action accrued on 16/09/2020 when a demand letter was issued to the plaintiff.
22. On the 2<sup>nd</sup> issue, counsel submitted that the plaintiff was denied an opportunity to adduce his evidence; he was denied a fair trial. It was counsel's submissions that in the absence of all the plaintiff's witnesses testifying, the plaintiff's evidence should be considered favourably.
23. On the 3<sup>rd</sup> and 4<sup>th</sup> issues, it was counsel's submissions that the standard of proof was on a balance of probabilities but not beyond reasonable doubt.
24. Counsel argued that the 1<sup>st</sup> defendant's evidence was unreliable, contradictory and made up of falsehoods. He submitted that the greencard of North Ugenya/Masat/1578 was evidence that the plaintiff owned one half share of this particular parcel of land. Counsel urged the court to grant the orders sought.
25. Counsel for the 1<sup>st</sup> defendant M/s Aron filed her written submissions dated 13/10/2022. She identified four issues for determination;



- (i) whether this court had jurisdiction;
  - (ii) whether the plaintiff was entitled to the orders sought
  - (iii) whether fraud was proved and
  - (iv) whether the plaintiff was entitled to the suit properties.
26. On the 1<sup>st</sup> issue, counsel submitted that on the basis that the claim emanated from a land adjudication process, pursuant to Sections 26 and 29 of the *Land Adjudication Act*, he was barred from instituting suit.
27. On the 2<sup>nd</sup> issue, it was counsel's submission that North Ugenya/Masat/1539 was registered in the name of the Onjiro Mganda while North Ugenya/Masat/1578 was irregularly acquired by the 1<sup>st</sup> defendant and consequently, the suit was incompetent. Counsel relied on the case of *Isaya Masira Momanyi v Daniel Omwoyo & another* [2017] eKLR where it was stated thus:
- “It is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorised to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person.”
28. On the 3<sup>rd</sup> issue, Counsel submitted the plaintiff did not prove fraud and cited the case of *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR where it was held:
- “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 fact...”
29. On the 4<sup>th</sup> issue, Counsel contended that the plaintiff's actions were illegal and he was not entitled to the suit properties.

### **Analysis and determination**

30. Having considered the parties' pleadings, their oral representations and the rival submissions, this court is of the considered view that the issues falling for determination are as follows;
- i. Whether this court has jurisdiction and whether the suit was statutory barred.
  - ii. Whether the suit was incompetent.
  - iii. Whether the plaintiff proved his case.
  - iv. What orders should this court issue.
31. Before I proceed in further, I must deal with the issue of the right to fair trial and the plea by counsel that I should tilt the scale in his favour.
32. This court rendered itself in two rulings; on 31/11/2021, it declined the plaintiff's application for an adjournment and on 2/6/2022, it declined to set aside its earlier orders but allowed a recall of the defence witnesses. The orders of this court have not been set aside and this court cannot sit on an appeal against its own decisions.
33. Additionally, impartiality is one of the cornerstones of every judge. The judicial code of conduct and oath of office are stark reminders of this and this court shall not depart from its inherent constitutional and statutory mandate. I will now delve into the issues for determination in a consecutive manner.



### **Whether this court has jurisdiction and whether the suit is statutory barred**

34. M/s Aron argued that the jurisdiction of this court was ousted by Section 29 of the [Land Adjudication Act](#). Mr Olieti did not address this court on this. In my considered view, there are instances where this court has jurisdiction.
35. Upon 1<sup>st</sup> registration, titles can be challenged under Section 26 (2) (b) of the [Land Registration ACT](#) if they were acquired by means of fraud, misrepresentation, illegality, unprocedural manner or through a corrupt scheme. A title can also be challenged if 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.
36. Unlike Section 143 (1) of the repealed [Registered Land Act](#) which proscribed courts from cancelling a 1<sup>st</sup> registration on account of fraud or mistake, Section 26 of the [Land Registration ACT](#) opened an avenue where a person could challenge a title document regardless of the circumstances of its registration. It is my finding that I have jurisdiction to hear and determine the claim.
37. Fraud is a tortious action and a claimant must file a claim within a period of 3 years. However, within the provisions of Section 26 of the [Limitation of Actions Act](#), the period starts running from when a claimant discovers fraud. The plaintiff was consistent that he discovered fraud on 16/09/2020. This evidence was not controverted. His claim was filed on 24/09/2022. It is my finding that his claim was not statutory barred.

### **Whether the suit was incompetent**

38. Mr. Olieti did not submit on this issue. On the other hand, M/s Aron argued that the 1<sup>st</sup> defendant was not the legal administrator of the estate of Onjiro Mganda and that regardless of whether or not he was the registered proprietor, the course of action could not accrue against him.
39. From the evidence adduced, the 1<sup>st</sup> defendant was and still is the registered owner of North Ugenya/Masat/1578 whilst North Ugenya/Masat/1539 was and still is registered in the name Onjiro Mganda.
40. The 1<sup>st</sup> defendant's argument did not hold water. He could only be exonerated from these proceedings once the provisions of Section 80 of the [Land Registration ACT](#) had been effected and his name cancelled from the register of Land parcel no. North Ugenya/Masat/1578.
41. It is my finding that the claim on North Ugenya/Masat/1578 was properly before court. However, the same position could not obtain in respect of North Ugenya/Masat/1539; the 1<sup>st</sup> defendant was not the administrator of the Estate of Onjiro Mganda. See [Isaya Masira Momanyi v Daniel Omwoyo & another \(Supra\)](#). It is my finding that in respect of North Ugenya/Masat/1539, the suit was incompetent against the 1<sup>st</sup> defendant.

### **Whether the plaintiff proved his case**

42. Pursuant to the provisions of Section 26 of the [Land Registration ACT](#), the plaintiff laid a basis for his claim on fraud and illegality over the registration of the suit properties.
43. The case before this court was that fraud allegedly took place during the adjudication process and after registration. The parties adduced evidence that connoted customary trust, inheritance, uninterrupted long periods of occupation and fraud. This court must remind itself that it is trite law that parties are bound by their pleadings. The plaintiff pleaded unprocedural process, fraud and illegality and, it shall only render itself on what was pleaded.



44. Fraud must be proved beyond a balance of probabilities but obviously not beyond reasonable doubt. In the Court of Appeal decision of *Elijah Kipng'eno Arap Bii v KCB & Another* Civil Appeal Number 276 of 2018 the court held thus;

“...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...”

45. At the outset, it is not in dispute that the 1<sup>st</sup> defendant was unprocedurally registered as the proprietor of the North Ugenya/Masat/1578.

46. Even if I have found that the suit on North Ugenya/Masat/1539 was unsustainable against the 1<sup>st</sup> defendant. I have to render myself whether the plaintiff proved his case against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants on North Ugenya/Masat 1539 and whether the suit properties were fraudulently and illegally registered in the name of Onjiro Mganda.

47. It was not in dispute that neither the 1<sup>st</sup> defendant nor Onjiro Mganda participated in the adjudication process. It was not proved that the plaintiff participated in the adjudication process. It is not in dispute that the plaintiff and 1<sup>st</sup> defendant were not relatives. The plaintiff admitted that the Onjiro Mganda was entitled to the suit properties and they could be relinquished to the 1<sup>st</sup> defendant.

48. The plaintiff did not produce any adjudication records to prove that he or his brothers were ever recorded as the proprietors of the suit properties. He did not bother to join the land adjudication officer to these proceedings. The greencards did not show any iota of evidence that the plaintiff or any of his brothers were ever registered as the proprietors and that their names were mischievously cancelled from the registers. He did not even bother to call his siblings to adduce evidence.

49. Even if the register for North Ugenya/Masat/1578 showed one half share, one could not reach the logical conclusion that some one-half share existed elsewhere and it belonged to the plaintiff. He did not produce any evidence that the two parcels of land were ever consolidated. To recapitulate, there was no tangible evidence that was proffered to demonstrate that fraud was orchestrated by the 2<sup>nd</sup> to 4<sup>th</sup> defendants. Having evaluated the evidence adduced, it is my finding that fraud was not sufficiently proved.

50. What orders should this court grant? I will only allow the plaintiff's claim to the extent that North Ugenya/Masat/1578 was unprocedurally registered in the name of the 1<sup>st</sup> defendant. 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 Onjiro Mganda's name.

51. For the foregoing reasons and findings, I find that the plaintiff was partly successful in his claim and because costs follow the event, each party shall bear their respective costs of the suit. The upshot is that this court issues the following disposal orders;

- a. The plaintiff's claim that the suit properties were fraudulently and illegally registered in the name of Onjiro Mganda is dismissed.
- b. The transfer of land parcel number North Ugenya/Masat/1578 from the name of Onjiro Mganda to the 1<sup>st</sup> defendant is hereby cancelled.
- c. Land parcel number North Ugenya/Masat/1578 is hereby restored in the name of Onjiro Mganda.



d. Each party shall bear their respective costs of this suit.

**DELIVERED AND DATED AT SIAYA THIS 8<sup>TH</sup> DAY OF DECEMBER 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**8/12/2022**

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

In the Presence of

N/A for the plaintiff

N/A for the defendants

Court assistant: Ishmael Orwa

