



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wanga v Opembi (Environmental and Land Originating Summons
E007 of 2023) [2025] KEELC 211 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2023**

AY KOROSS, J

JANUARY 24, 2025

BETWEEN

HENRY ALANDO WANGA PLAINTIFF

AND

WILSON OPEMBI DEFENDANT

JUDGMENT

Background

1. The subject matter of the land in dispute is land parcel no. East Gem/Nyandiwa/623 (suit property) that is registered in the parties' names as tenants in common.
2. This registration took place on 22/11/2021 purportedly changing the name of one of the previous owners Henry Odego (Odego) who was registered together with the defendant as co-owner on 22/5/1973.
3. The plaintiff contends he is Odego whereas the defendant contends the plaintiff is an imposter as Odego who was his brother is long dead.

Parties' case

4. This suit was instituted by an originating summons (OS) dated 1/03/2023 in which the plaintiff stated he was a tenant in common entitled to a ½ share of the suit property and sought a determination of the following questions: -
 - a. Whether the suit property should be subdivided in equal shares between the registered proprietors.



- b. Whether the registrar of lands should determine the appropriate boundary on the ground for the subdivision based on the current usage or features on the ground delimiting the respective shares of the parties.
 - c. Whether adjustments need to be made to ensure each party gets a ½ share of the suit property.
 - d. Whether on any disagreement between the parties as to how the suit property should be subdivided, the registrar of lands should propose an equitable subdivision plan to be approved by the court.
 - e. Who should bear the cost of the subdivision of the suit property?
 - f. Who should bear the costs of the suit?
5. The OS was founded on grounds that the defendant had declined to subdivide the suit property, the plaintiff had been deprived of his entitlement to his ½ share and, the parties' relationship was irretrievable and the co-tenancy was unsustainable.
 6. The OS was also supported by the plaintiff's affidavit which was deposed on 4/01/2023. This affidavit was adopted as his evidence in chief.
 7. The defendant who acted in person strenuously opposed the OS by filing a defence and counterclaim dated 24/04/2023. He denied the contents therein and put the plaintiff to strict proof.
 8. He contended the suit property was previously registered in his name and that of his deceased brother Odego and the plaintiff was a stranger, he had never occupied the suit property and his actions were fraudulent and criminal.
 9. In the counterclaim, he pleaded fraud and though he particularised fraud against the plaintiff, they were not drawn in the usual way.
 10. Be that as it may, he particularised the fraud by stating at the land's office, the plaintiff on 22/11/2021 fraudulently changed and substituted Odego's name who had died in 1985 with his yet, Odego's estate had not been succeeded.
 11. That even so, the introductory letter from the chief of Central Gem described the defendant as Henry Alando Waga alias Henry Ondego which was contrary to the names contained in the green card's entries.
 12. According to him, the plaintiff took advantage of the similarity of names between Odego and himself and fraudulently misled the land's office to effect the change of names and was attempting to use the court to sanitize his fraudulent actions.
 13. Thus, he sought the following reliefs from this court: -
 - a. A declaration the entry of 22/11/2021 on the correction of names was illegal, null and void.
 - b. A declaration the affidavit sworn by the plaintiff on 22/07/2022 was illegal.
 - c. An order directing the land registrar- Siaya County to register him as the proprietor of land parcel 623.
 - d. Costs of the counterclaim be borne by the plaintiff.



Issues for determination

14. Having heard the evidence of the parties during the hearing, the following issues commend themselves for determination: -
 - a. Whether the defendant specifically pleaded and proved his counterclaim of fraud to the required standards.
 - b. If (a) is in the negative, whether this court should sever the tenancy in common.
 - c. What orders should this court issue including an order as to costs?
15. Having framed the issues for determination, I shall summarise the parties' evidence that they led on these issues.

Plaintiff's evidence

16. The matter thereafter proceeded for hearing by viva voce evidence and the plaintiff testified as PW1 and his evidence was led by Francis Achila Owino and Joseph Ongaro Opisi, Monica Akoth Were and Richard Ojwang Okida who respectively testified as PW2, PW3, PW4 and PW5.
17. Apart from documents that PW1 and PW2 produced as Pex 1-7, all witnesses' evidence was composed of their oral testimonies and adopted witness statements.
18. PW1 stated he was a tenant in common together with the defendant as evidenced by the certificate of official search which showed his name as Henry Alando Wanga. That this "Wanga" name was a typographical error as it should read "Waga".
19. As to the relationship with the name Henery, he stated when he was young, he was called Henry Ondego Waga and that this 1st registration name of Henery Odego was an error as it should have read Henry Ondego Waga. He further stated his ID card bore his name Henry Alando Waga as his childhood name Ondego was discarded.
20. He averred the names Henery Odego, Henry Alando Wanga and Henry Alando Waga were his names and he first applied for an ID in order to effect changes on the registration status of the suit property.
21. PW2 who testified as the plaintiff's independent witness and was a records officer at the Ministry of Civil Registration- Births and Deaths testified according to records held at his office, Odego died on 21/05/1985 and his death was registered as a late registration and due process was followed towards issuance of the death certificate. The application form was produced as Pex.7.
22. PW3 who was the defendant's brother testified he never had a brother by the name of Henry Odego Opisi. Further, Henry Ondego, Henry Ondego and Henry Alando Waga referred to the plaintiff who was known to him.
23. PW4 who was the plaintiff's sister testified the change of name in the title was by a court order and the parties occupied a defined portion of the suit property. She stated the defendant never had a brother called Henry Odego and the plaintiff's names were Henry Alando Waga and Henry Ondego.
24. Lastly, PW5 stated each of the parties tilled their respective portions of the suit property and disagreements between them occurred in August 2022. Further Ondego was also known as Henry Alando Wanga.



Defendant's evidence

25. The Defendant testified as DW1 and his evidence was led by Ibrahim Ouma Ayako and his son Joseph Okoth Opembi and they respectively testified as DW2 and DW3.
26. Apart from documents DW1 produced as Dex1-7, all witnesses' evidence was composed of their oral testimonies and adopted witness statements.
27. DW1 testified Odego who was his deceased brother was at 1st registration registered with him as a co-tenant over the suit property. He stated Henry Odego died in 1985 and strangely, the plaintiff fraudulently and with the assistance of the area chief and land registrar made changes to the register of the suit property and the plaintiff had never been in occupation.
28. He denied any relations with the plaintiff and stated he processed Odego's death certificate using several documents including a letter from a chief. He stated this particular letter could not be obtained from his area chief as he was already compromised.
29. DW2 testified Odego's 3rd name was Opsi and was the defendant's brother. Further, the plaintiff and defendant were 1st cousins, the plaintiff was never in occupation of the suit property and was a stranger to Odego's estate. Lastly, he stated that Odego and Henry were not the same person and the area chief was compromised.
30. DW3 reiterated that Odego and the defendant were siblings and he (DW3) lived on the suit property to the plaintiff's exclusion. Further, Odego died when he was a minor. He stated the plaintiff took advantage of the similarity of names to fraudulently register himself as the co-owner of the suit property.

Common Witness's evidence

31. The land registrar Mr. Alex Mutua was summoned as a common witness and he testified that due process was followed towards effecting the change of names from Henery Odego to Henry Orlando Wanga.
32. To carry out the registration, he used documents presented to him which included an affidavit, ID card, letter from the chief Central Gem, Land Control Board (LCB) application and LCB consent. He testified he verified the information presented to them by scrutinising the ID.

Parties' submissions

33. Despite being directed by the court to file written submissions within stipulated timelines, the plaintiff who was represented by counsel Mr. Charles B.G. Ouma did not file any submissions. If at all they will be filed, this court will consider them as having been filed out of time.
34. The defendant complied with court directions and filed his undated written submissions on 30/10/2024 and the issues framed were whether the plaintiff had locus standi, whether the plaintiff is entitled to the orders sought and who bears the costs of the suit.
35. The issues for determination were identified earlier in the judgment. As this court proceeds with its analysis and determination, it shall consider the defendant's arguments on the particular issue and also consider provisions of law and authorities he relied upon to advance his arguments.



Analysis and Determination

36. The issues that were earlier identified as arising for resolution shall be dealt with shortly in a consecutive manner.

a. Whether the defendant specifically pleaded and proved his counterclaim of fraud to the required standards.

37. The legal framework on the legitimacy of title documents is governed by Sections 24 and 25 of the [Land Registration ACT](#). Even so, a title document can be challenged on grounds set out in Section 26 of this Act which includes fraud.

38. Section 24 recognizes the registered owner as the absolute owner of the land and this proviso of the law provides as follows: -

“Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

39. While Section 26 of the [Land Registration Act](#) states as follows;

“26

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

40. By these statutory provisions, courts consider title documents as prima facie evidence of ownership of land. This proprietorship allows the registered owner to enjoy rights of possession, occupation, and quiet use of his land. Still, the registered owner’s proprietorship can only be challenged on grounds set out in Section 26.



41. Fraud has been defined by Black's Law Dictionary, 11th Edn at pg 802 in the following words: -
- “ 1. A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when conduct is willful) it maybe a crime.)- Also termed intentional fraud...
 2. A reckless misrepresentation made without justified belief in its truth to induce another to act.
 3. A tort arising from a knowing or reckless misrepresentation or concealment of material fact made to induce another to act to his or her detriment. Additional elements in a claim of fraud may include reasonable reliance on the misrepresentation and damages resulting from this reliance.
 4. Unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain.”
42. When one pleads fraud as the defendant in his counterclaim did, Order 2 Rule 10 (1) (a) of the Civil Procedure Rules (CPR) provides that such claims have to be particularised, and this proviso states: -
- “ (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
 - (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and”
43. It is also settled law that fraud must procedurally be specifically pleaded and proved on parameters beyond a balance of probability but below that of beyond reasonable doubt. This principle of law was well elucidated in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar (Civil Appeal 106 of 2000)* [2000] KECA 223 (KLR) (Civ) (1 December 2000) (Judgment) where the Court of Appeal held: -
- “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. 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” Emphasis added
44. Accordingly, having set down the law, I now turn to the pleadings and evidence. In his submissions, the defendant argued that the plaintiff's title was by Section 26 of the *Land Registration Act* impeachable.
45. In consideration, this court will delve into two crucial questions- was the claim properly pleaded? If so, were the particulars proved to the required standards?
46. Since fraud is a serious allegation, a party's case hinges on its proper particularization as this enables the opposing party to appreciate the case against him and also for the court to comprehend the nature of the case that is before it. In other words, there must be particularity in the defendant's allegations of fraud.



47. While bearing in mind the provision of Section 26 of the *Land Registration Act* on challenging a registered owner's title, scrutiny of counterclaim albeit drawn in an unorthodox way indeed shows the claim of fraud was specified to the required standards as evidenced by paragraphs 5, 6,7 and 9 of the counterclaim.
48. Having met the 1st threshold by pleading fraud, the 2nd test is to establish if the pleaded allegations were proved.
49. It is settled law that he who alleges must prove and on evidentiary burdens, courts are usually guided by Sections 107-109 of the *Evidence Act*.
50. In a tenancy in common, the share of a deceased tenant devolves not to the other co-owner, but to the estate of the deceased co-owner. The death certificate of Odego was produced by the defendant which showed he died on 21/05/2021. There was no evidence his estate had been succeeded. PW2 confirmed this document emanated from his office and was genuine.
51. The authenticity of this document was never dislodged and the plaintiff's evidence having been rebutted that he was not Odego, the legal and evidential burden shifted to the plaintiff to prove he was indeed Odego.
52. Section 108 of the *Evidence Act* provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Accordingly, the burden of proof shifted to the plaintiff to adduce evidence impeaching the contents of the death certificate.
53. The plaintiff was at pains to explain that he, Ondego and Odego were the same person. He testified when he was young he used to be called Henry Ondego Waga and that the name Henery Odego was not intended to be his name. Nonetheless, he did not produce a birth certificate to prove these assertions.
54. Although Sections 79(1)(e) and (3) of the *Land Registration Act* allow the land registrar to upon proof of the change of the name of the proprietor and on the written application of the proprietor, make an entry in the register to record the change, the application form shows it was made on 27/09/2021, the chief's letter purportedly in support of the application was issued on 21/07/2022 which was long after the change of name took place on 22/11/2021.
55. The contents of the chief's letter confirm the plaintiff was never Odego as he describes him as Ondego!
56. Worse is, the affidavit that allegedly supported the change of name could never at the very least meet the threshold to demonstrate proof of a change of name.
57. This is so because just as the chief's letter, it was executed on 22/07/2022 which was long after the changes were made in the register and in fact, states the plaintiff is Henry Alando Waga alias Henry Alando Wanga. At no point does it reference the name Henery Odego or Henry Ondego.
58. In my humble view, without proof of supportive documents to support the application for change of name which appears to have never been registered as there is no evidence of payment of stamp duty or execution by the land registrar one wonders how the registration of 22/11/2021 where the plaintiff was registered as co-owner ever took place.
59. It is obvious it was a choreographed fraud that involved the chief, plaintiff and land registrar. The actors made a poor act of manufacturing documents to cover up their fraudulent activities post-act. No wonder the defendant is suspicious of public officers more particularly the chief.
60. Significantly, as confirmation of the fraudulent activities, all participants overlooked the mandatory provisions of Section 91(6) of the *Land Registration Act*, which required the defendant as a co-tenant to



first give written consent before any dealings on the suit property could be conducted. I must, therefore, hold and find the defendant proved his counterclaim of fraud to the required standards.

61. Consequently, I need not say more. In the end, it is my ultimate finding the defendant was successful in his counter-claim. It is trite law costs follow the event and the defendant is awarded costs. In dealing with issue (c) I hereby issue the following disposal orders: -

- a. A permanent injunction is hereby issued against the plaintiff either by himself, his agents, and/or employees or assigns from interfering with and/or dealing with land parcel no. East Gem/Nyandiwa/623 either by selling, transferring or partitioning it.
- b. A declaration is hereby made that the registration of Henry Alando Wanga over land parcel no. East Gem/Nyandiwa/623 was fraudulent, null and void.
- c. The Land Registrar, Siaya district is hereby directed to revoke/cancel the title deed for land parcel no. East Gem/Nyandiwa/623 in the respective names of Wilson Opembi and Henry Alando Wanga and instead, register it in the names of Wilson Opembi and Henery Odego as tenants in common.
- d. Costs of the suit and the counterclaim are awarded to the defendant.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 24TH DAY OF JANUARY 2025.

HON. A. Y. KOROSS

JUDGE

24/01/2025

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Plaintiff

Defendant

Court assistant: Mr. Ishmael Orwa.

