



REPUBLIC OF KENYA



KENYA LAW
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**Kola v Agola & another (Environment and Land Case Civil Suit
E007 of 2023) [2025] KEELC 1133 (KLR) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1133 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E007 OF 2023
SO OKONG'O, J
MARCH 4, 2025**

BETWEEN

SYLVANO OTIENO KOLA PLAINTIFF

AND

DANIEL OTIENO AGOLA 1ST DEFENDANT

COUNTY LAND REGISTRAR, KISUMU 2ND DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the Defendants through a plaint dated 7th August 2023. The Plaintiff averred that at all material times to this suit, the Plaintiff was and still is the bona fide owner of all that parcel of land known as Kisumu/Kanyakwar “B”/384 (hereinafter referred to as “the suit property”). The Plaintiff averred that, sometime in 2013, he was notified by the land office that one of his parcels of land adjacent to the suit property had been irregularly transferred to another person.
2. The Plaintiff averred that he conducted an official search on the suit property, which confirmed that the suit property had been transferred to the 1st Defendant without his knowledge, consent and/or authority. The Plaintiff averred that he thereafter wrote to the 2nd Defendant notifying it of the irregularity and seeking a correction of the land records. The Plaintiff averred that on or about 16th December 2013, the 1st Defendant was summoned by the 2nd Defendant to return the title that had been issued to him on 12th September 2013 for the suit property for cancellation, but the 1st Defendant ignored the summon. The Plaintiff averred that the 1st Defendant was charged in Criminal Case No. 189 of 2014 with the offence of procuring registration of the suit property in his name by false pretences. The Plaintiff averred that the criminal case court found that someone had presented himself as the Plaintiff and fraudulently sold the suit property to the 1st Defendant.
3. The Plaintiff averred that the transfer of the suit property to the 1st Defendant was illegal and fraudulent and that the illegality and the fraud were within the knowledge of the 1st and 2nd Defendants. The



Plaintiff averred that he had never met the 1st Defendant nor sold and/or transferred the suit property to the 1st Defendant. The Plaintiff averred that despite notifying the 2nd Defendant of the irregularities on the face of its records and the outcome of the criminal case, the suit property remained registered in the name of the 1st Defendant. The Plaintiff averred that the 1st Defendant had since filed Kisumu HCC No. 44 of 2021(O.S) and Kisumu ELC No. E006 of 2023 in which the 1st Defendant had sought an order of eviction against the Plaintiff, among others.

4. The Plaintiff prayed for judgment against the Defendants for:
 - a. A declaration that the Plaintiff was the bona fide owner of the suit property.
 - b. Cancellation by the 2nd Defendant of any title held by the 1st Defendant in respect of the suit property.
 - c. A permanent injunction restraining the 1st Defendant by himself, his agents, servants and/or any other persons claiming through him from trespassing on the suit property, cultivating, constructing and/or in any other way whatsoever interfering with the Plaintiff's ownership and/or usage thereof or in any other way dealing with the said property.
 - d. Costs of this suit.
 - e. Such further and/or other relief as the court may deem fit to grant.
5. The 1st Defendant entered appearance on 31st August 2023 but did not file a statement of defence. The 2nd Defendant entered appearance through the office of the Attorney General and thereafter filed a statement of defence dated 4th September 2023. The 2nd Defendant averred that its office had maintained proper records for the suit property and that approval of registration is based on documents presented to it. The 2nd Defendant averred that its office exercised due diligence and believed that the documents that were presented to it for registration by the 1st Defendant were genuine and were thus registered. The 2nd Defendant prayed that the suit be dismissed.
6. At the trial, the Plaintiff, Sylvano Otieno Kola (PW1) adopted his witness statement dated 7th August 2023 as his evidence in chief and produced as a bundle the documents attached to his list of documents of the same dated as P.EXH.1. He stated he was the bona fide owner of the suit property which he acquired through purchase. He stated that a copy of the extract of the register of the suit property which he produced in evidence, showed that he was the first registered owner of the suit property, having been registered on 23rd February 1982. He stated that he never sold the suit property to the 1st Defendant and did not know how the 1st Defendant got registered as the owner of the suit property. He stated that he was not issued with a title deed. He stated that he travelled a lot and when he went for the title deed, there was already a restriction registered against the title of the suit property. He stated that he was not residing on the suit property. He told the court that he fenced the property and had put up a farm house thereon. He stated that he had planted trees on the property and had a caretaker living on the same.
7. The Plaintiff's first witness was his wife, Pamela Nereah Kola (PW2). PW2 adopted her witness statement dated 7th August 2023 as her evidence in chief. PW2 told the court that the Plaintiff was the registered owner of the suit property. The Plaintiff's next witness was Joshua Ochieng Ogalo (PW3). PW3 was a nephew of the Plaintiff. He adopted his witness statement dated 7th August 2023 as his evidence in chief. He told the court that he knew the suit property. He stated that the Plaintiff had planted normal trees and fruit trees on the suit property and had put up a structure thereon. He stated that the Plaintiff was also keeping animals on the property.



8. The Plaintiff's last witness was Maurice Okuta Kita (PW4). PW4 stated that he met and got to know the Plaintiff when he came to fence his parcels of land known as Plot No. 384 and Plot No. 385. He stated that he was staying adjacent to the suit property. He told the court that he knew the 1st Defendant. He stated that the 1st Defendant was the son of Agola Hongo, who was buried at Manyatta. He stated that he came from the same clan as the 1st Defendant. PW4 adopted his witness statement dated 7th August 2023 as his evidence in chief. He stated that the Plaintiff purchased the suit property, fenced it and planted trees thereon. He stated that the Plaintiff was also rearing goats on the land.
9. The Defendants did not appear in court during the hearing of the suit, and their cases were closed without evidence having been tendered. The court thereafter directed that the parties make closing submissions in writing. The Plaintiff filed his submissions dated 22nd May 2024, while the Defendants did not file submissions.

Analysis and determination

10. I have considered the pleadings, the evidence and the submissions on record. I am of the view that the issues arising for determination in this suit, which I will consider together, are the following;
 - a. Whether the Plaintiff was the first registered owner of the suit property;
 - b. Whether the 1st Defendant acquired the suit property lawfully; and
 - c. Whether the Plaintiff is entitled to the reliefs sought in his plaint.
11. The suit property was registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). The Registered [Land Act](#) was repealed by the [Land Registration Act](#), 2012. Sections 27 and 28 of the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed), provide as follows:

“27. 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;
 - 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 and expressed agreements, liabilities and incidents of the lease.
28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –
- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:



13. Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The two sections have been reproduced in Sections 24 and 25 of the [Land Registration Act, 2012](#) as follows:

“24. 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.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

14. Section 26(1) of the [Land Registration Act, 2012](#) provides 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.”

15. In *Munyu Maina v Hiram Gathiba Maina, Civil Appeal No. 239 of 2009*[2013] eKLR, the court stated that:

“...When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

16. The Plaintiff produced in evidence a copy of the extract of the register for the suit property certified by the Land Registrar on 4th May 2023 which shows that the suit property was registered in the name of the Plaintiff as the first registered owner on 23rd February 1982. The said extract of the register also shows that the suit property was purportedly transferred by the Plaintiff to the 1st Defendant on 12th September 2013, and the 1st Defendant was issued with a title deed for the property on the same date. The Plaintiff has contended that he neither sold nor transferred the suit property to the 1st Defendant and that the transfer and registration of the suit property in the name of the 1st Defendant was effected fraudulently and illegally. The Plaintiff reported the transfer of the suit property to the 1st Defendant to the police. The police, after investigations, arrested the 1st Defendant and charged him in the Chief Magistrate’s Court at Kisumu in Criminal Case No. 189 of 2014 with the offence of obtaining land registration by false pretences. The 1st Defendant denied the criminal charge, and at the trial of the criminal case, the 1st Defendant told the court that he purchased the suit property “from a person who represented himself to him as Silvano Otieno Kola”. The 1st Defendant admitted in the criminal case that the person who presented himself to him as Silvano Otieno Kola was not the person who had complained against him in the criminal case. The criminal case court stated that:

“Since the accused confirmed that he did not transact with him (Silvano Otieno Kola), then it means that the land the subject matter hereof was not sold or transferred to him by the complainant herein, Silvano Otieno Kola who was the rightful registered owner thereof at the time. It is possible as testified by the accused person that someone else could present himself to him as Silvanus Otieno Kola armed with fake/forged documents and deal with him as such in the guise of being the real Silvanus Otieno Kola.”

17. The court concluded that:

“I find that though the transfer and registration of the subject land parcel No. Kisumu/ Kanyakwar B/384 in the name of the accused person was fraudulent, there is no evidence to prove that the fraud was executed by the accused person or that it was executed by another person and that the accused person was aware of it; hence willfully procured himself to be registered as such.”

18. With that finding, the 1st Defendant herein was acquitted of the charge of obtaining land registration by false pretence. There is no evidence that the said decision in the criminal case was appealed. In the



absence of an appeal, the finding of that court that the suit property was fraudulently transferred to the 1st Defendant stands and binds the 1st Defendant. As mentioned earlier, the 1st Defendant did not defend the suit. The Plaintiff's averment that he was the first registered owner of the suit property and that he neither sold nor transferred the suit property to the 1st Defendant was not controverted. The Plaintiff's averment that the transfer of the suit property to the 1st Defendant was fraudulent was also not controverted. The Plaintiff having proved that he was the first registered owner of the suit property and that he did not transfer the property to the 1st Defendant who was the second registered owner of the property, the burden shifted to the 1st Defendant to explain how he acquired the suit property. In the absence of any explanation from the 1st Defendant on how he acquired the suit property, the only conclusion this court can make is that the property was transferred from the Plaintiff to the 1st Defendant fraudulently through a forged document of transfer. The transfer and registration of the suit property in the name of the 1st Defendant was, therefore, illegal and fraudulent.

19. The 1st Defendant's title having been acquired fraudulently, the same is void. The title deed issued to the 1st Defendant on 12th September 2013 could not, therefore, confer any interest in the suit property upon the 1st Defendant. In *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169, the court stated as follows concerning a void act:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

20. In the circumstances, the 1st Defendant did not acquire a valid title in the suit property.

Conclusion

21. The Plaintiff having established that he was the lawful registered owner of the suit property and that the property was unlawfully transferred and registered in the name of the 1st Defendant, the Plaintiff is entitled to the reliefs sought in his plaint dated 7th August 2023. I therefore enter judgment for the Plaintiff against the Defendants for;
1. A declaration that the Plaintiff is the lawful owner of the parcel of land known as Kisumu/Kanyakwar “B”/384.
 2. An order for the 2nd Defendant to cancel the registration of the 1st Defendant as the owner of the parcel of land known as Kisumu/Kanyakwar “B”/384 and the title deed that was issued to the 1st Defendant on 12th September 2013 (entries numbers 2 and 3 in the register).
 3. A permanent injunction restraining the 1st Defendant by himself, his agents, servants and/or any other persons claiming through him from trespassing on, cultivating, constructing and/or in any other way whatsoever interfering with the Plaintiff's ownership and/or usage of the parcel of land known as Kisumu/Kanyakwar “B”/384 or in any other way dealing with the said property.
 4. The costs of the suit to be paid by the 1st Defendant.

DELIVERED AND DATED AT KISUMU ON THIS 4TH DAY OF MARCH 2025

S.OKONG'O

JUDGE



Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Ms. Asunah for the Plaintiff

Mr. Agola the 1st Defendant in person

Ms. Lelei h/b for Mr. Kobimbo for the 2nd Defendant

Ms. J. Omondi-Court Assistant

