



Onsongo (Suing as Personal Representative of Zacharia Onsongo Momanyi - Deceased) v Manase & 2 others (Environment & Land Case 86 of 2010) [2025] KEELC 1055 (KLR) (5 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1055 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 86 OF 2010**

M SILA, J

MARCH 5, 2025

BETWEEN

ASKAH MOKEIRA ONSONGO (SUING AS PERSONAL REPRESENTATIVE OF ZACHARIA ONSONGO MOMANYI - DECEASED) PLAINTIFF

AND

ERASTO NANGA MANASE 1ST DEFENDANT

DAVID NYAMOTA ORWENYO 2ND DEFENDANT

EVANS OMURWA ONCHAGWA 3RD DEFENDANT

JUDGMENT

(Plaintiff claiming to own certain land; in his pleadings plaintiff claiming that he was surprised to find it subdivided and that the defendants have title to a portion thereto; evidence disclosing that it was the plaintiff himself who subdivided the land in 1975/1976 and the title in question was issued to the 1st & 2nd defendants in 1978; suit land sold to 3rd defendant in 2010; court not persuaded on the genuineness of the plaintiff's claim; in any event if there was any cause of action same is out of time since the title was in existence for 32 years before suit was filed; plaintiff's case dismissed)

1. Zacharia Onsongo Momanyi (the original plaintiff, now deceased) commenced this suit through a plaint filed on 31 March 2010 against Erasto Nanga Manasse and David Nyamota Orwenyo. He pleaded that he has been the registered proprietor of the land parcel Central Kitutu/Mwabundusi/612 but was surprised to learn that the two persons have trespassed into his land and carved out a title bearing the number Central Kitutu/Mwabundusi/638 yet he had not sold any land to them. He contended that this title Central Kitutu/Mwabundusi/638 was fraudulently obtained and the principal prayer in his plaint was that this title be cancelled. The plaint was amended on 19 May 2010 to include a third defendant, Evans Omurwa Onchangwa. The claim remained the same only that it



was added that the 1st and 2nd defendants had since transferred the title of the said land parcel No. 638 to the 3rd defendant hence his addition to the suit. The defendants did not enter appearance and the matter proceeded ex parte culminating in a judgment delivered by Makhandia J (as he then was) on 14 October 2011 in favour of the original plaintiff. The good judge allowed the suit principally because it was not defended. Subsequently the 3rd defendant filed an application to set aside the judgment which application was allowed in a ruling delivered on 17 March 2017 and he filed his defence. He pleaded that he is the registered proprietor of the suit land having purchased it for value from the 1st and 2nd defendants. He otherwise denied each allegation in the plaint.

2. The original plaintiff gave evidence on 16 October 2019. His evidence was that he used to work as a Public Health Officer and that the 2nd defendant was his friend and colleague. He testified that he bought the land parcel No. 612 in 1975 which land measured 2 acres. He stated that he sold a portion measuring 0.26 Ha to Kisii Parish Women Group on 30 March 1998 and they were issued with a title being Central Kitutu/Mwabundusi/637. He claimed that he then remained with the suit land i.e Central Kitutu/Mwabundusi/638 measuring 0.14 Ha. He testified that he later gave to the 2nd defendant, for free since he was his friend, a portion measuring 80 x 100 feet and he remained with a portion measuring 132 x 80 feet which was on the lower side next to the river. He claimed that the 3rd defendant has now taken up the land and put up buildings. He exhibited title to the said land parcel No. 638 issued on 14 December 2012. He also produced Green Cards of the original parcel No. 612 and the parcels No. 637 and 638 that resulted from its subdivision. He alleged that all he gave the 2nd defendant was land measuring 80 x 100 feet but the 2nd defendant took the whole land. Cross-examined he stated that they did not have any written agreement. He was shown a mutation form of 1976 subdividing the land parcel No. 612 and he acknowledged that the signature therein was his. He stated that he does not know the 1st defendant as he did not give him any land though his name appears in the mutation form. He acknowledged that the 2nd defendant obtained title to the land parcel No. 638 on 1 December 1978 and he sold his interest to the 3rd defendant who obtained title on 19 July 2010. He refuted that he gave the 2nd defendant the entire parcel No. 638.
3. With that evidence the plaintiff closed his case.
4. Unfortunately, the plaintiff subsequently died on 31 December 2021. He was substituted with his wife one Askah Mokeira Onsongo who now continues the suit on behalf of his estate.
5. The 3rd defendant testified as the sole defence witness. His evidence was that he purchased the suit land i.e parcel No. 638 from the 1st and 2nd defendants through a sale agreement dated 16 February 2010. He got title to the suit land on 19 February 2010. He then put up some buildings. He exhibited the mutation of the land parcel No. 612 which was done on 11 February 1976. He pointed out that the title deed to the suit land, that the original plaintiff exhibited when he testified, was obtained after he got the ex parte judgment which was later set aside. He stated that what he bought was land measuring 0.14 Ha though he could see the mutation form shows 0.1 Ha. He had no issue if the land is surveyed and he keeps 0.1 Ha. There was an order for survey issued by Onyango J on 18 November 2020 but it appears as if no party was keen to pursue it.
6. When the matter first came before me on 18 October 2022, I gave more time to the parties to follow up on the survey but none of the parties did so despite the matter being mentioned a couple of times. I directed the case be heard on 2 October 2024 if any party wished to present any other evidence. None of the parties presented any additional evidence on the said date and I proceeded to close the hearing of the matter. I gave liberty for counsel to file submissions but only Mr. Soire, learned counsel for the 3rd defendant, filed submissions which I have taken into account before arriving at my decision.



7. In his pleadings, the plaintiff denied selling any land to the 1st and 2nd defendants and wondered how they came up with a title to the parcel Central Kitutu/Mwabundusi/638. It was indeed his contention that this title was fraudulently created and he wanted it cancelled. The documents produced herein actually outline the history of the suit land. I see that the land was originally comprised in the land parcel Central Kitutu/Mwabundusi/612 measuring 0.41 Ha which was registered in name of the plaintiff on 26 April 1973. The plaintiff himself applied to subdivide this land into two portions through a mutation form dated 11 February 1976. That mutation form shows that he proposed to subdivide this land parcel No. 612 into two portions, one measuring 0.31 Ha i.e parcel No. 637, and the second, measuring 0.1 Ha i.e the parcel No. 638. There is also a document indicating that he was selling land jointly to the 1st and 2nd defendants. The green card to the parcel No. 612 shows that the title was closed on 25 October 1976 upon subdivision into the land parcels No. 637 and 638. There is a search produced for the parcel No. 638 which shows that it was opened on 25 October 1976 and title issued to the 1st and 2nd defendants on 1 December 1978. This search shows that the land was registered as measuring 0.14 Ha. It is this land that was eventually sold to the 3rd defendant in the year 2010.
8. I am at a complete loss as to what dispute the original plaintiff thought he had. It is clear from the records that he subdivided his land parcel No. 612 in the year 1976 and sold it to the 1st and 2nd defendants. The mutation form was indeed produced as an exhibit. The original plaintiff could not be heard to pretend not to know the 1st defendant because there is a document indicating that he was selling a portion of the land parcel No. 612 to both of them. It was a blatant lie for him to allege that he does not know the 1st defendant. Moreover, it is also very clear that it was himself who subdivided the land parcel No. 612 into the parcels No. 637 and 638. When the mutation form was put to him he acknowledged that he signed it. In his pleadings he claimed that he did not know how the land parcel No. 638 came about which is another blatant lie. He knew how the land parcel No. 638 came about because it was him who subdivided the land parcel No. 612 into two portions one of which was the parcel No. 638.
9. I really have no idea why the original plaintiff came to court. Was it just a case of greed for land because he appears to have sold his entire parcel No. 637 to Kisii Parish Women Group who obtained title on 30 March 1998 ? Or is it that he had a grievance because the emanating title to the parcel No. 638 measured 0.14 Ha and not 0.1 Ha ? We will never know because his pleadings and evidence was littered with numerous falsehoods.
10. If the issue is about the land being 0.14 Ha and not 0.1 Ha, the case will be statute barred as this subdivision and release of title took place in 1978. The suit was filed in 2010, which is 32 years later. It is certainly out of the limitation period of 12 years set out in Section 7 of the *Limitation of Actions Act*, Cap 22, which is the time period allowed for one to lodge a claim over land. He cannot allege not to have been aware of its size because he must have gotten his title to the parcel No. 637 for the remainder. Neither could he assert his right to the suit land based on the title that he got in his name after the ex parte judgment since the said judgment was set aside.
11. From the above, it will be seen that I am not persuaded as to the case of the plaintiff. It is hereby dismissed with costs. I will order that the title that the original plaintiff obtained after he got the ex parte judgment be revoked and the register to revert back to the entry in the name of the 3rd defendant. This court affirms that it is the 3rd defendant who should retain title to the land parcel Central Kitutu/Mwabundusi/638 reading 0.14 Ha.
12. Judgment accordingly.

DATED AND DELIVERED THIS 5TH DAY OF MARCH 2025



JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in the presence of :

Mr. Sagwe for the plaintiff - Present

Mr. Soire for 3rd defendant – Absent

No appearance entered for 1st and 2nd defendants

Court Assistant – Michael Oyuko

