



Wambia (Suing as the Legal Representative of the Estate of Silvanus Wambia Raburu, Deceased) v Odep & another (Environment & Land Case 248 of 2014) [2025] KEELC 1115 (KLR) (4 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1115 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 248 OF 2014**

SO OKONG'O, J

MARCH 4, 2025

BETWEEN

**CHARLES WAMBIA PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SILVANUS
WAMBIA RABURU, DECEASED**

AND

**HENRY OTIENDE ODEP 1ST DEFENDANT
JOSEPH WASUNA ORAMBO 2ND DEFENDANT**

JUDGMENT

1. Silvanus Wambia Raburu, deceased (hereinafter referred to only as “the deceased Plaintiff”), brought this suit against the Defendants on 25th August 2014 through a plaint dated 20th August 2014. The deceased Plaintiff died on 10th August 2020 and was initially substituted by Domnick Juma Keya on 22nd November 2021 and subsequently by Charles Wambia on 1st February 2024 as the administrator of his estate.
2. In his further amended plaint, the deceased Plaintiff averred that before the land adjudication exercise in West Kisumu (Karateng) location, Marera sub-location, the land currently known as Kisumu/Marera/1112 measuring about 0.7 hectares (hereinafter referred to as “the suit property”) registered in the name of the 2nd Defendant was part of land parcel No. Kisumu/Marera/1114 (hereinafter referred to as “Plot No. 1114”) belonging to the deceased Plaintiff.
3. The deceased Plaintiff averred that the whole land was ancestral land originally owned by Raburu Aloo, the deceased Plaintiff’s father, and the suit property was within Plot No. 1114. The deceased Plaintiff averred that when it became apparent that the deceased Plaintiff’s father, the late Raburu Aloo, was temporarily migrating to Muhoroni, Raburu Aloo entrusted the suit property with his brother



- Oyuech Aloo (hereinafter referred to as “Oyuech”) for temporary use. The deceased Plaintiff averred that when the said land was being used by Oyuech, Oyuech allowed a lady he had inherited to use the land temporarily, and it was during this time that the 1st Defendant and his late father Odep requested to use the land temporarily for gain in trust for the deceased Plaintiff.
4. The deceased Plaintiff averred that it was understood that the 1st Defendant and/or his father would only use the said land temporarily in trust for the deceased Plaintiff, after which the same would be restored to the deceased Plaintiff. The deceased Plaintiff averred that during the land adjudication exercise in the area, the deceased Plaintiff was made to understand that the suit property was adjudicated together with Plot No. 1114. The deceased Plaintiff averred that he had been and was still using the suit property even though the 1st Defendant had fraudulently sold the same to the 2nd Defendant who had registered the same in his name fraudulently since the purported sale was not approved by the Land Control Board.
 5. The deceased Plaintiff prayed for judgment against the Defendants for an order cancelling the title issued to the 2nd Defendant in respect of the suit property and reverting the suit property to the name of the deceased Plaintiff. The deceased Plaintiff also prayed for the costs of the suit
 6. The Defendants filed a joint statement of defence on 23rd April 2014 to the original plaint. The Defendants denied that the suit property belonged to the deceased Plaintiff’s father, Raburu Aloo and that the property was ancestral land as alleged. The Defendants averred that the suit property was separate and distinct from Plot No. 1114 and was registered independently during the land adjudication.
 7. The 2nd Defendant averred that he purchased the suit property from the 1st Defendant in 1986 at a consideration of Kshs. 138,000/- and that at the time of the purchase, the same was registered in the name of the 1st Defendant, and as such, he was an innocent purchaser for value without notice. The 2nd Defendant averred that upon purchasing the suit property, the same was legally transferred to his name and a title deed subsequently issued in his favour. The 2nd Defendant averred that he was the lawful registered owner of the suit property.
 8. The Defendants averred that the deceased Plaintiff had filed a suit against the Defendants in 1999 at the High Court of Kenya in Kisumu being HCCC No. 37 of 1999 which suit was on 25th January 2001 withdrawn with costs to the Defendants. The Defendants averred that the said costs were on 16th July 2001 assessed in the sum of Kshs.42,450/- and the same had not been paid by the deceased Plaintiff. The Defendants averred that the claim giving rise to this suit was heard and determined by the Kisumu District Land Disputes Tribunal in Tribunal Case No. 46 of 2002, whose decision was adopted as judgment of the court. The Defendants averred that the deceased Plaintiff was dissatisfied with the decision of the Tribunal and appealed to the Nyanza Provincial Appeals Committee, which determined the appeal on 17th July 2008. The decision was also adopted as a judgment of the court on 11th August 2008 by the Resident Magistrate’s Court at Kisumu in Misc. Civil Application No. 28 of 2008.
 9. The Defendants averred that they were dissatisfied by the said decision of the Nyanza Provincial Appeals Committee and lodged an appeal against the decision at the High Court in Kisumu in Kisumu HCCCA No. 85 of 2008, which appeal was decided in their favour. The Defendants averred that the deceased Plaintiff, being dissatisfied with the decision of the High Court allowing the said appeal, appealed against the High Court decision to the Court of Appeal at Kisumu in Kisumu Court of Appeal Civil Appeal No. 154 of 2012, which appeal was heard and dismissed. The Defendants averred that the deceased Plaintiff’s suit was misconceived, bad in law and an abuse of the court process as it was res judicata and should be dismissed with costs.



10. The trial of the suit commenced before Kibunja J. on 29th November 2016, before whom the deceased Plaintiff, Silvanus Wambia Raburu (PW1) and his witness in the suit gave evidence. The deceased Plaintiff told the court that the suit property was registered in the name of the 1st Defendant, who sold the same to the 2nd Defendant. The deceased Plaintiff stated that the suit property belonged to his father, Raburu Aloo (Aloo), who left it to his brother Oyuech Aloo (Oyuech) when he moved to Kopere in Muhoroni. He stated that Oyuech inherited a woman called Andega Okumu from Mukumu, and died later. He stated that at the time, he was living in Kopere, and when he returned to Kisumu, he asked the elders where his father's land was. He stated that he was shown a parcel of land, and he built his home on a portion of it while the 1st Defendant's father used the other portion. He stated that after the death of the 1st Defendant's father, the 1st Defendant planted sugarcane on the land.
11. The deceased Plaintiff (PW1) stated that his family asked the 1st Defendant's family to stop using the land but they said they were only using it temporarily. He testified that the 1st Defendant sold the land to 2nd Defendant. The deceased Plaintiff adopted his witness statement dated 17th January 2016 as part of his evidence in chief and produced the documents in his supplementary list of documents dated 17th January 2016 as exhibits. He stated that the suit property belonged to his deceased father. He stated that the title that was being held by the Defendants over the property was fake.
12. On cross-examination by the advocate for the Defendants, PW1 stated that the documents in his list of documents contained evidence that the suit property had been registered in the names of the Defendants. He stated that he had no documentary evidence showing that his father, Raburu Aloo (Aloo), had been registered as the owner of the suit property. He stated that he applied for a Grant of Letters of Administration in respect of the estate of his father in the High Court in 2001, in which he listed the suit property as part of the estate of his father Aloo. He stated that the Defendants applied in the same Succession Cause to remove the suit property from the assets of his deceased father, an application which was allowed by consent. He stated that the suit property was removed from the list of the assets of his late father.
13. PW1 stated that the 2nd Defendant was registered as the owner of the suit property in 1996. He stated that according to the register for the suit property, the first registered owner of the property was Odep Okelo. He stated that his father's name did not appear in the register as having owned the property. He stated that he filed this suit on behalf of the estate of his late father. He stated that the 2nd Defendant was registered as the owner of the suit property in 1996 while this suit was filed in 2014 which was after a lapse of about 18 years. The deceased Plaintiff's witness was Pitalis Aono Opeyo (PW2) who adopted his witness statement dated 17th January 2016 as his evidence in chief and was not cross-examined.
14. The hearing of the defence case started before me on 11th March 2024 after a hiatus of 5 years from the time the deceased Plaintiff's case was closed. The 1st Defendant, Henry Otiende Odep (DW1), was the first to give evidence. DW1 adopted his witness statement filed on 23rd October 2014 as part of his evidence in chief. He stated as follows in his oral testimony in court: The suit property was registered in the name of his deceased father, Odep Okelo. After the death of his father, he sold the suit property to the 2nd Defendant. He produced the agreement of sale between him and the 2nd Defendant as D.EXH.1. He stated that they had had several cases with the deceased Plaintiff over the suit property, some in court and others before tribunals. He stated that the suit property was registered in the name of the 2nd Defendant. He produced the documents in the Defendants' list of documents dated 17th October 2014 as D.EXHS. 2-11, and the documents in the Defendants' further list of documents dated 18th March 2019 as D.EXHS. 12,13 and 14. He stated that the suit property belonged to his father.



15. On cross-examination, DW1 stated that Leonida Onundo (Leonida) was married to Aloo Oyuech. He stated that Leonida had her own land which was occupied by the deceased Plaintiff. He stated that his father had his own land. He stated that Leonida was married when his father was using the land. He stated that it was not true that Leonida gave his father the land to use temporarily. He stated that it was not true that he stopped using the land when the deceased Plaintiff came back. He stated that when he sold the land to the 2nd Defendant, there was no dispute over it. He stated that Plot No. 1114 was owned by Leonida, and she was not holding the land in trust for the deceased Plaintiff.
16. DW1 stated that the deceased Plaintiff's father went to live in Muhoroni in 1800s. He stated that Aloo Oyuech was the husband of Leonida. He stated that Leonida was entitled to Plot No. 1114. DW1 denied that his father took over the suit property without the knowledge of Leonida and that the suit property and Plot No. 1114 were one parcel of land.
17. In re-examination, DW1 stated that the suit property and Plot No. 1114 were different parcels of land and whereas the suit property belonged to his father Odep Okelo, Plot No. 1114 belonged to Leonida Onundo.
18. The 2nd Defendant, Joseph Wasuna Orambo (DW2), was the last witness. DW2 stated that the suit property was sold to him by the 1st Defendant and that the land was registered in his name, and he was issued with a title deed. He denied that he acquired the suit property illegally. On cross-examination, DW2 reiterated that he acquired the suit property lawfully and had used the property since he bought it.
19. After the close of evidence, the court directed the parties to make closing submissions in writing. The Plaintiff filed submissions dated 20th May 2024 while the Defendants filed undated submissions.

The Plaintiff's submissions

20. In his submissions, the Plaintiff rehearsed the history of the suit property as given by the deceased Plaintiff and his witnesses in evidence. The Plaintiff reiterated that the deceased Plaintiff, Silvanus Wambia Raburu, who was the son of Raburu Aloo, was entitled to inherit the suit property, which Raburu Aloo had left for his brother Oyuech Aloo to hold in trust for him. The Plaintiff submitted that the 1st Defendant's father, Odep Okelo caused himself to be registered as the owner of the suit property fraudulently during the land adjudication exercise when the deceased Plaintiff, Silvanus Wambia Raburu' family was away and upon his death, the 1st Defendant who is his son illegally transferred the suit property to the 2nd Defendant before obtaining a Grant of Letters of Administration in respect of the estate of Odep Okelo and consent of the Land Control Board. The Plaintiff cited *Umlila Mahindra Sha v. Barclays Bank International and Another* [1979]KLR, *Vijay Morjaria v. Nansingh Madhusingh Darbar & Another* [2000]eKLR, *Elijah Makeri Nyangwara v. Stephen Mungai Njuguna & Another*, Eldoret ELC No. 609(B) of 2012 and Section 26 of the *Land Registration Act* 2012 and submitted that a certificate of title is enviously guarded but the same can be impeached where the title has been acquired through fraud, misrepresentation, illegality, procedural impropriety or corrupt scheme. The Plaintiff submitted that he had proved his case against the Defendants and should be granted the reliefs sought. The Plaintiff also prayed for the costs of the suit.

The Defendants' submissions

21. The Defendants submitted that the issues arising for determination by the court were; whether the suit property belonged to the deceased Plaintiff's father, Raburu Aloo also deceased, whether the suit was competent, whether the Plaintiff had proved his case on a balance of probability as required by the law and, who was entitled to the costs of the suit.



22. The Defendants submitted that from the death certificate submitted in evidence, Raburu Aloo died on 20th March 1970 at Marera aged 48 years. The Defendants submitted that there was no evidence that the deceased Plaintiff's father, Raburu Aloo moved to Kopere in Muhoroni with his family. The Defendants submitted that there was also no evidence that the suit property was part of land parcel No. Kisumu/Marera/1114(Plot No. 1114) and that it belonged to Raburu Aloo.
23. The Defendants submitted that from the evidence on record, the suit property was registered in the name of Odep Okelo as the first registered owner. The Defendants submitted that the deceased Plaintiff should have sued the administrators of the estate of Odep Okelo and challenged the registration of Odep Okelo as the owner of the property, which he claimed was procured by fraud. The Defendants submitted that the suit had not brought out any illegality committed by the Defendants to justify the grant of the orders sought by the deceased Plaintiff.
24. The Defendants submitted that there was no evidence that the deceased Plaintiff's father, Raburu Aloo and the 1st Defendant or the 1st Defendant's father were related and that the suit property was their common ancestral land that would warrant a claim based on trust. In support of this submission, the Defendants cited Juletabi African Advertisement Ltd & Another v. Christopher Michael Lockley [2017] eKLR, Gichuki v. Gichuki [1982] eKLR 285 and Mbothu & 8 Others v. Wairimu & 11 Others [1986] eKLR 171. The Defendants submitted that the Plaintiff had not proved his case on a balance of probability as required by law, and the same should be dismissed with costs to the Defendants.

Analysis and determination

25. I have considered the pleadings, the evidence tendered by the parties, and the submissions by counsel. In my view, the main issue arising for determination in this suit is whether the Plaintiff has proved his claim against the Defendants on a balance of probabilities and, as such, is entitled to the reliefs sought.
26. Although Silvanus Wambia Raburu, deceased (the deceased Plaintiff) claimed at the trial that he brought this suit as the administrator of the estate of his father, Raburu Aloo also deceased, it is clear from the plaint filed on 25th August 2014 that the deceased Plaintiff brought the suit in his personal capacity. In paragraph 1 of the plaint, he described the plaintiff as follows: "The Plaintiff herein is a male adult of sound mind...". Neither in the heading nor in the body of the plaint did the deceased Plaintiff refer to himself as an administrator of the estate of his father, Raburu Aloo. That explains why, upon his death, those who substituted him were the administrators of his estate rather than the administrators of the estate of Raburu Aloo. The deceased Plaintiff claimed that the suit property belonged to his deceased father at the time it was fraudulently registered in the name of the 1st Defendant's deceased father, Odep Okelo, during the land adjudication in Kisumu Marera Adjudication Section. Such a claim could only be maintained by the administrator of the estate of the deceased Plaintiff's father, Raburu Aloo, deceased.
27. As pointed out by the Defendants, the fraud complained of by the deceased Plaintiff is alleged to have occurred during the land adjudication in Kisumu Marera Adjudication Section when the 1st Defendant's deceased's father, Odep Okelo got himself registered as the owner of the suit property which he allegedly held in trust for the deceased Plaintiff. The deceased Plaintiff did not sue Odep Okelo, who is alleged to have engineered the fraud against him. The 1st Defendant, although a son of Odep Okelo, is not the administrator of the estate of Odep Okelo and, as such, cannot answer to the fraud alleged against him. The deceased Plaintiff seeks the revocation of the title held by the 2nd Defendant in respect of the suit property. From a copy of the extract of the register of the suit property produced in evidence by the Defendants, the suit property was registered in the name of Odep Okelo as the first registered owner of the property on 22nd March 1974. From Odep Okelo, the suit property



was transferred to the 2nd Defendant on 1st October 1996. From that extract of the register, the suit property was transferred to the 2nd Defendant by Odep Okelo. Several issues arise here; first, it is only the estate of Odep Okelo that can be questioned on the circumstances under which and how the suit property was transferred from Odep Okelo to the 2nd Defendant. Secondly, even if the court were to cancel the registration of the suit property in the name of the 2nd Defendant, the suit property cannot revert to the name of the deceased Plaintiff since the deceased Plaintiff had never been registered as the owner of the suit property. The cancellation of the registration of the 2nd Defendant as the owner of the suit property would restore the ownership of the property in the name of the first registered owner, Odep Okelo, whose title the court has not been called upon to cancel and cannot cancel since he is not a party to the suit. Thirdly, since Odep Okelo, deceased, is not a party to this suit, the court cannot determine in the suit the issue of whether or not he was fraudulently registered as the owner of the suit property. Since the alleged fraud against Odep Okelo in the manner in which he acquired the suit property has not been established by the deceased Plaintiff who has not sued him, the allegations of fraud against the Defendants herein falls by the way side. The 1st Defendant has never been registered as the owner of the suit property and could not have transferred the property to the 2nd Defendant. The extract of the register produced in evidence showed that the suit property was transferred to the 2nd Defendant by the first registered owner, Odep Okelo, deceased. It was only the estate of Odep Okelo that could answer to the legality or otherwise of this transaction. Since the title that was held by Odep Okelo has not been impeached by the deceased Plaintiff due to his failure to join his estate in the suit, there is no basis upon which the deceased Plaintiff can attack the title held by the 2nd Defendant whose root is in the title that was held by Odep Okelo.

28. Even if the deceased Plaintiff's case was to be considered on merit, I would still not have found merit in the claim. The suit property was registered in the name of Odep Okelo during the land adjudication in Kisumu Marera in the 1970s. The *Land Adjudication Act*, Chapter 284, Laws of Kenya, has an inbuilt dispute resolution mechanism for resolving disputes that arise during land adjudication. There is no evidence that the deceased Plaintiff or any member of his family objected to the demarcation and recording of the suit property in the name of Odep Okelo during the land adjudication. The deceased Plaintiff's claim that his family had all along believed that the suit property was adjudicated and registered as part of land parcel Kisumu/Marera/1114 is not supported by any evidence. I also find no evidence to support the deceased Plaintiff's claim that Odep Okelo held the suit property in trust for him. In *Mumo v. Makau* [2004] 1 KLR 13, the court stated that:

- “ 1. Trust is a question of fact and has to be proved by evidence. Section 28 of the Registered *Land Act* contemplates the holding of land in trust.
2. There is nothing in the Registered *Land Act* which precludes the declaration of trust in respect of registered land, even if it is a first registration.”

29. In *Mwangi Mbothu & 9 others v. Gachira Waitimu & 9 Others* [1986] eKLR, the court stated that:

“The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”



30. In *Njenga Chogera v. Maria Wanjira Kimani & 2 Others* [2005] eKLR, the Court of Appeal stated as follows on the nature and proof of trust:

"It was argued on behalf of the appellant that there was no sufficient evidence to prove customary law trust. On our own re-evaluation of the evidence we are satisfied that there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did."

31. The Plaintiff has not persuaded me that Odep Okelo was registered as the owner of the suit property to hold the same in trust for the deceased Plaintiff. In any event, the issue of whether or not Odep Okelo held the suit property in trust for the deceased Plaintiff is a matter that can only be determined in a suit against the estate of Odep Okelo, which this is not.

Conclusion

32. In conclusion, it is my finding that the Plaintiff has failed to prove his claim against the Defendants to the required standard. The suit is dismissed with costs to the Defendants.

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

S. OKONG'O

JUDGE

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

Ms. Ochieng for the Plaintiff

Ms. Kosgey h/b for Mr. Omolo for the Defendants

Ms. J.Omondi-Court Assistant

