



Matagaro & another v Ouko (Sued as the Co-Administratrix of the Estate of the Late Jason Atinda Ouko) & 5 others (Environment & Land Case 214 of 2017) [2024] KEELC 1197 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1197 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 214 OF 2017**

**MN KULLOW, J
FEBRUARY 14, 2024**

BETWEEN

ELIJAH OUKO MATAGARO 1ST PLAINTIFF

BENARD MOEGI OUKO 2ND PLAINTIFF

AND

ROSELYNE DOLA OUKO (SUED AS THE CO-ADMINISTRATRIX OF THE ESTATE OF THE LATE JASON ATINDA OUKO) 1ST DEFENDANT

AARON TAFARI OUKO (SUED AS THE CO-ADMINISTRATOR OF THE ESTATE OF THE LATE JASON ATINDA OUKO) 2ND DEFENDANT

ANDREW ATINDA OUKO 3RD DEFENDANT

LAND REGISTRAR MIGORI COUNTY 4TH DEFENDANT

JOHN OTIENO OGALLO 5TH DEFENDANT

DORINE ATIENO OTIENO 6TH DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit by way of a Plaint dated 05/02/2016 and Amended on the 14th May, 2018 against the Defendants jointly and severally, seeking the following Orders: -
 - i. A declaration that the subdivision of Land Parcel No. Suna East/ Wasweta 1/ 658 into the new Land Parcel No. Suna East/ Wasweta 1/ 21046 and Land Parcel No. Suna East/ Wasweta 1/ 21047 was unlawful, irregular, fraudulent and in breach of Trust.



- ii. A declaration that the sale and transfer of Land Parcel No. Suna East/ Wasweta 1/ 21047 by the 1st, 2nd and 3rd Defendants to the 4th and 5th Defendants was in breach of Trust and the same ought to be declared null and void.
- iii. An Order compelling the 6th Defendant, Land Registrar Migori County to cancel the new titles of Land Parcel No. Suna East/ Wasweta 1/ 21046 and 21047 and to restore it to the original Title Suna East/ Wasweta 1/ 658.
- iv. The Honourable Court be pleased to grant a Permanent Order of an Injunction restraining the 1st, 2nd and 3rd Defendants herein, their agents, servants, representatives and assigns from the sub-division, disposal, excavation, fencing, building and/or in any way whatsoever interfering with the original Land Parcel No. Suna East/ Wasweta 1/ 21046 in breach of the Trust with the beneficiaries – Plaintiffs.
- v. The Honourable Court be pleased to grant a Permanent Order of an Injunction restraining the 4th and 5th Defendants herein, their agents, servants, representatives, assigns and relatives from the sub-division, disposal, excavation, fencing, building gaining entry and/or in any way whatsoever interfering with Land Parcel No. Suna East/ Wasweta 1/ 21047.
- vi. An eviction Order be issued against the 4th and 5th Defendants from Land Parcel No. Suna East/ Wasweta 1/ 21047.
- vii. Mesne Profits
- viii. Costs.
- ix. Interest.

Plaintiffs' Case

- 2. The Plaintiffs, the 2nd and 3rd Defendants are all siblings while the 1st Defendant is the Plaintiffs' step mother.
- 3. The Plaintiffs aver that the original land parcel No. Suna East/ Wasweta 1/ 658 was owned by their late father Jason Ouko Atinda. However, upon their father's demise, the 1st and 2nd Defendants became the registered proprietors of the suit land through transmission; as Trustees to hold the suit parcel in trust for all the family members and beneficiaries of the estate thereof.
- 4. It is their claim that the 1st and 2nd Defendants unlawfully subdivided the original suit parcel No. 658 into 2; Suna East/ Wasweta 1/ 21046 measuring approx. 1.4Ha and 21047 measuring approx. 3.2Ha.
- 5. It is their contention that the original suit parcel No. 658 was to be subdivided amongst all the beneficiaries of the late Jason Ouko Atinda; inclusive of themselves.
- 6. The Plaintiffs' further claim that the 1st, 2nd and 3rd Defendants colluded, without consulting the Plaintiffs or the family at large, in breach of Trust and with the intent to defraud, secretly sold parcel No. 21047 to the 4th and 5th Defendants for Kshs. 14,000,000/= vide a purported sale Agreement dated 19/10/2015.
- 7. They outlined the particulars of breach of trust on the part of the 1st, 2nd and 3rd Defendants; subdividing and selling a portion of the suit land which they held in trust without consulting the other family members/ beneficiaries despite the fact that the succession cause is still pending in court.



8. That as a result of the 1st, 2nd and 3rd Defendants' breach of trust and unlawful actions; the 4th and 5th Defendants have denied them access into the said portion and are intent on developing the suit land, which in turn would permanently interfere with the texture of the said portion.
9. They consequently urged the court to allow their claim and grant the orders sought against the defendants jointly and severally.
10. The matter proceeded for hearing of the Plaintiffs' case on 06/02/2020. The 1st Plaintiff testified as PW1, on his own behalf and that of the 2nd Plaintiff. He adopted his witness statement dated 8/2/2016 as his evidence in chief and urged the court to grant the orders sought in the Amended Plaintiff.
11. He also produced the documents on his List of Documents dated 05/02/2016 as PExhibits 1- 15 as follows; Death Certificate as Pexh. 1, Green Card for land parcel Suna East/ Wasweta 1/658 as Pexh. 2, subdivision plan for land parcel No. Suna East/ Wasweta 1/ 658 as Pexh. 3, Application to correct name in the Register by the late Jason Ouko Atinda as Pexh. 4, Application to be registered as proprietor by Transmission in land parcel No. Suna East/ Wasweta 1/658 as Pexh. 5, transfer by Personal Representative to person entitled under Will or Intestacy as Pexh. 6, Sworn Affidavit by Aaron Tafari Ouko on loss of title deed as Pexh. 7, Green Card of land parcel Suna East/ Wasweta 1/ 658 duly subdivided into land parcel Suna East/ Wasweta 1/ 21406 and 21407 as Pexh. 8, title deed of land parcel No. Suna East/ Wasweta 1/658 as Pexh. 9, Certificate of search and receipt of land parcel No. Suna East/ Wasweta 1/ 658 as Pexh. 10, Green Card for land parcel No. Suna East/ Wasweta 1/21406 as Pexh. 11, Green Card for land parcel No. Suna East/ Wasweta 1/21407 as Pexh. 12, Agreement dated 19th October, 2015 as Pexh. 13, Bank documents/slips as Pexh. 14 and photos as Pexh. 15.
12. On cross- examination by counsel for the 2nd and 3rd Defendants; PW1 reiterated that the 2nd plaintiff who is his step brother and lived out of the country gave him the authority to file the suit and plead on his behalf, he however conceded that the said letter of authority was not part of the documents produced as exhibits.
13. It was his testimony that the original owner of the suit parcel No. 658 was his late father and that their father intended to subdivide the suit parcel among all his family members. He further stated that the succession cause before the High Court in Nairobi is still ongoing and all the 24 beneficiaries of his late father are included in the said cause.
14. He further stated that he became aware that the suit land had been subdivided into parcel Nos. 21046 and 21047 and sold to third parties sometimes around December, 2015, through his wife. He conceded that some of the beneficiaries were given Kshs. 560,000/= out of the proceeds of the purported sale. The 2nd plaintiff and himself however declined the money. He maintained that he expressed his view that he did not intend to sell his portion of the suit land.
15. On cross-examination by counsel for the 4th and 5th Defendants; he confirmed that Pexh. 13 refers to the parcel No. 21047. He also conceded that he had not given any document to support the averments made at paragraph 10(h) of his Amended Plaintiff and confirmed that even though he is the maker of Pexh. 15, there were no Affidavits in support of the same.
16. It was also his testimony that he was not aware of any conditions placed on the title to the suit land at the time of the purported sale. He maintained that he did not receive a sum of Kshs. 560,000/=being part of the proceeds of the sale of the suit land as stated at paragraph 10(d) of the Amended Plaintiff.
17. On re-examination, he clarified that parcel No. 21047 is registered in the names of the 4th and 5th Defendants. The Plaintiffs thereafter closed their case.



18. The Plaintiffs' case was however reopened on the Application by counsel for the 1st Defendant, for purposes of re-examining PW1. On further cross-examination by Mr. Oduk for the 1st Defendant; PW1 stated that he is related to the 1st, 2nd and 3rd Defendants, the 1st defendant is his step mother, the 2nd defendant is his step-brother from house 1 while the 3rd defendant is his step- brother from house 2.
19. He stated that from the Green Card (Pexh. 2) of the original suit land No. 658, Entry No. 2 reveals that the land was registered in the name of their late father Jason Atinda Ouko, in the year 1978.
20. He reiterated that he did not get a share of the proceeds from the sale of a portion of the suit land.
21. PW1 was also cross-examined by Mr. Holi for the 2nd and 3rd Defendants. It was his testimony that he is aware of the Succession Cause No. 353 of 1997 and confirmed that he had never challenged the grant of representation issued therein.
22. He conceded that he received Kshs. 200,000/= through his account but maintained that they have never sat down as a family to agree on the administration of the estate of their late father, which family comprises of 24 siblings from different houses.
23. Mr. Awiti for the 4th and 5th Defendants also cross-examined the plaintiff. It was the testimony of PW1 that the sale agreement produced is in respect of the sale of parcel No. 21047. He also confirmed that there is a grant in respect of the estate of his late father which was issued to his step mother and brothers but conceded that he had not produced any document to show that he challenged the said grant.
24. On further re-examination; he stated that he was neither aware of the sale of a portion of the suit land nor was he involved in it but only learnt of the same after the sale took place.

1st Defendant's Case.

25. The 1st Defendant entered appearance through the firm of Oduk & Co. Advocates and filed a Statement of Defence dated 22nd February, 2016. She admitted that she was registered as a Co-proprietor of the original suit parcel No. 658, together with the 2nd Defendant and one David Scott Ongosi, by way of transmission. She however denied unlawfully subdividing or being a party to the said subdivision of the original land into 2 parcels; No. 21046 measuring 1.2Ha and 21047 measuring 3.4Ha.
26. She further admitted that she was appointed as a Co-Administrator of the estate of the late Jason Ouko Atinda, under a Grant in Succession Cause No. 353 of 1997, which cause is still pending final determination in Nairobi.
27. She denied the averments of sale of the subdivided portion No. 21047 as alleged and the particulars of breach trust and fraud as outlined. It was her contention that she was also a recipient of Kshs. 560,000/= which was secretly deposited into her bank account and the same was brought to her knowledge by her bank manager sometimes around the month of January, 2016. She thus urged the court to dismiss the suit against her with costs.t
28. The 1st Defendant's case proceeded for hearing on 23/10/2023; the 1st defendant testified as DW1 and relied on her witness statement as her evidence in chief. It was also her testimony that the late Jason Atinda was her husband. He left several properties among them the suit parcel where the 1st plaintiff's mother was living.
29. She confirmed that Succession proceedings were instituted in court and the grant of representation was issued to her together with Aaron Tafari and Atinda Ouko. David Scott Ongosi was however not appointed as one of the Administrators.



30. She admitted that the estate is yet to be finally distributed and the cause of still ongoing and pending in court. She maintained that she was not aware of the sale of a portion of the suit land No. 658 and did not give the 3rd defendant the authority to sell the said land. She also added that she had never heard that the court allowed the sale of the estate.
31. She however admitted that she was given a share of the proceeds from the sale of the said portion but that she has never used the money after she learnt that her name was mentioned in court as being part of the said sale.
32. On cross-examination by Mr. Ochwangi for the Plaintiffs; it was her testimony that she was never consulted on the sale of the suit land and reiterated that the Succession Cause is still ongoing and the estate has never been fully distributed among all the beneficiaries. She maintained that she did not sell the suit land but only learnt of the said sale later. That she never signed any sale agreement or appeared before any board.
33. She also confirmed that she gave the 3rd Defendant, who is her son, Power of Attorney to plead on her behalf in the succession cause. She further admitted that some of the children/ beneficiaries of the estate of her late husband refused to have the land sold.
34. On cross-examination by Mr. Holi for the 2nd and 3rd Defendants; she admitted that she received Kshs. 560,000/= in her account and it is then that she was told what the amount was about. She maintained that the Power of Attorney issued to the 3rd Defendant was with regards to the other properties of the deceased in Nairobi and not the suit land even though her instructions were verbal. She however conceded that all the beneficiaries benefitted from the proceeds of the sale of the estate.
35. On cross-examination by Mr. Awiti for the 4th and 5th Defendants; she confirmed that there was a succession cause in respect of the estate of her late husband and that she was appointed as one of the Administrators of the estate.
36. It was her testimony that her late husband subdivided the suit land into 2 parcels, one portion was sold and the 1st plaintiff's mother is buried on the other portion. She reiterated that she gave her son, the 3rd Defendant a Power of Attorney due to her old age, to represent her on her issues in Nairobi. She further confirmed that the proceeds from the sale was given to her and all the children of her deceased husband.
37. On re-examination, she clarified that the Power of Attorney to the 3rd Defendant is in respect to the pending Succession Cause in Nairobi. She thereafter closed her case.

2nd and 3rd Defendants' Case

38. They entered appearance through the firm of J.A. Omolo & Associates and filed a joint Statement of Defence dated 4th May, 2016 in response to the allegations raised against them in the Plaint.
39. They admitted that they were registered as the proprietors of the original suit parcel No. Suna East/ Wasweta 1/658 by way of transmission, as the Administrators of the estate of the Jason Atinda Ouko. They however maintained that the said parcel of land was subsequently transferred to them in their capacity as beneficiaries.
40. They thus denied illegally subdividing the original land No. 658 into parcel Nos. 21046 and 21047. It was their claim that it was common knowledge that their late father Jason Atinda Ouko had intended to subdivide and sell part of parcel No. 658 and thus the said subdivision and sale should not be taken to have offended anyone in any way. They denied the allegations of fraud and breach trust.



41. In the alternative and without prejudice, it was their claim that they carried out subdivision while acting on instructions of all the beneficiaries of the estate of the late Jason Atinda Ouko and the subsequent sale was done in good faith and with full knowledge, participation and authority of all the 24 beneficiaries. Further, the proceeds were equitably shared as outlined in the agreed schedule of distribution in Probate and Administration No. 353 of 1997.
42. They clarified that the purchase price of the suit property No. 21047 was Kshs. 21,000,000/= which was paid in full. That Kshs. 7,000,000/= out of the said amount was used to pay the sales agents as commission and the balance of Kshs. 14,000,000/= was distributed among all the beneficiaries.
43. With regards to parcel No. 21046; they denied having any interest in the said parcel as alleged. They also dismissed the suit as being sub judice as the issues for determination are matters pending before the High Court Probate and Administration Cause No. 353 of 1997 and the same amounts to an abuse of the court process. It was also their contention that this court lacks the requisite jurisdiction to determine matters touching on succession. They therefore urged the court to dismiss the suit against them with costs.
44. The 3rd Defendant testified as DW2. It was his testimony that he is one of the Administrators of the estate of the late Jason Atinda, who is his father. He stated that the 1st Defendant donated a general Power of Attorney to him, which has never been challenged and that he had been using the same to attend to cases involving the family.
45. It was also his testimony that after the subdivision of the suit land into 2; they were requested to get a buyer for one of the portions No. 21047. They got a buyer, sold the land and distributed the proceeds from the sale among 21 of the beneficiaries except the plaintiffs. That after the sale of the suit land, all the family members gave him their bank accounts and he deposited their shares in the respective accounts.
46. It was his contention that the said power of attorney has been used in the sale of other properties for the benefit of the family and no one has ever challenged the position.
47. On cross-examination by Mr. Ochwangi for the Plaintiff; he maintained that he is one of the Administrators of the estate of his father but conceded that from a look at the Grant of Administration, his name does not appear on the list.
48. He conceded that the discussion to sell the suit land was neither written anywhere or recorded nor were there minutes to show the way the money was to be shared. He admitted that he had not produced any documents to show where else he had used the power of attorney as alleged. He however confirmed that the distribution of the estate is not yet complete.
49. On cross-examination by Mr. Oduk for the 1st Defendant, he stated that the Power of Attorney was not specific, he stated that he represented the 1st Defendant in the succession cause in Nairobi and the sale at her request. That the succession cause was filed in the year 2017 and the power of attorney was donated in 2011.
50. With regards to the sale of the suit land No. 21047, he confirmed that they did not get the court's permission to sell the said land.
51. Further, it was his testimony that the Administrators of the estate were registered as the proprietors of the original title No. 658 and a title deed issued on 14/4/2015 since they could not trace the original title in the name of their late father.



52. It was also his testimony that the subdivision of the original land was done by the 1st and 2nd defendants; the 1st defendant put her thumbprint on the transfer documents while the 2nd Defendant signed. That the suit land was thereafter registered in the name of the 1st defendant on 4/9/2015 but was later transferred to the 4th and 5th defendants.
53. He stated that the purchase price was about Kshs. 21,000,000/-; Kshs. 15,000,000/- was shared amongst the beneficiaries of the estate while the balance was paid out as commission. He also conceded that he did not find it necessary to seek the permission of the court.
54. Mr. Awiti for the 4th and 5th Defendants cross-examined him; it was his testimony that the succession cause is complete with regard to the matter in court. He confirmed that he got power to deal with the suit land from the general power of attorney, donated by his mother, the 1st defendant. He used the same to transact in other properties and that the same was never challenged by any person. He entered into the sale agreement as his mother's representative, who was duly appointed and holder of the Grant of representation.
55. He confirmed that the purchasers of the suit land No. 21047 paid them 21,000,000/- and the property was released to the purchasers. The land was thereafter transferred and registered in the joint names of the 4th and 5th Defendants. He reiterated they are the ones who sold the suit land and not all the 24 beneficiaries, the 2nd defendant as an Administrator and himself with the Power of Attorney. However, when he informed the family members about the sale, they all gave him their bank accounts details except the Plaintiffs and the proceeds of the sale was shared accordingly. He maintained that there were no grounds for the nullification of the sale agreement, no breach of trust since they were not answerable to them.
56. The 2nd Defendant testified as DW3; it was his testimony that he was appointed as an Administrator and a Certificate of Confirmation issued. That his late father subdivided the suit land into 2 with the intention of selling it but he died before he could finish the same.
57. He confirmed that they sold a portion of the suit land and shared the proceeds from the suit land among all the family members and that it was a family decision as they felt that the proceeds from the sale could alleviate the problems of the family members. The land was sold for Kshs. 21,000,000/= and the money was divided among all the beneficiaries except the 2nd plaintiff. All the completion documents were signed and the suit land transferred to the 4th and 5th Defendants.
58. On cross- examination by Mr. Ochwangi for the Plaintiff; it was his testimony that he engaged the other family members about the sale of the suit land, everyone had no issue except the plaintiffs but conceded that he did not have the minutes of the family meeting. He also conceded that he did not have minutes to show what each and every member of the family but they supplied him with their bank accounts.
59. He maintained that he had the capacity to sell the land but conceded that he did not have anything to show that there was a land sale agreement. He however conceded that they did not approach the court for the sale of the suit land, he did not also visit the Land Control Board with respect to the suit land or remember if he had caused the transfer.
60. On cross- examination by Mr. Oduk for the 1st defendant; it was his testimony that he signed the transfer documents as the administrator and was identified as a joint proprietor in the transfer. He confirmed that by the time the suit land was sold, Daniel Scott had already died and that he did not know how his signature was on the transfer.
61. He also confirmed that they did not ask for permission before selling the suit land.



62. On cross examination by Mr. Awiti for the 4th and 5th Defendants; it was his testimony that there was no pending succession case and that he sold the suit land in his capacity as someone who was an Administrator of the estate of his late father. He also confirmed that they sold parcel No. 21047 and not 21046. That the process of subdivision started with his late father but he did not conclude it since he passed on shortly after.
63. He maintained that the land was sold with the full knowledge of all the family members and their consent.
64. On re-examination, he confirmed that the land was sold after the issuance of the grant and urged the court to find that the sale was proper and that the 4th Defendant should be found the owner of the suit land.

4th and 5th Defendants' Case

65. They filed a Joint Statement of Defence dated 11th May, 2016 through the firm of Rautta & Company Advocates, wherein they denied all the allegations levelled against them by the Plaintiffs.
66. They confirmed that the suit land No. 21047 was sold to them; they conducted their due diligence and confirmed that the suit land was indeed registered in the names of the 1st and 2nd defendants. They thereafter entered into an agreement for sale and they paid the agreed purchase price of Kshs. 21,000,000/- in full. The purchased portion was thereafter transferred to them after being granted the Land Control Board consent and a title deed issued to that effect. It is therefore their claim that they acquired the suit property for valuable consideration and without any knowledge of any claims, suit or encumbrances against the suit land, alleged omission, fraud or mistake.
67. It is their contention that they have been in exclusive possession, control and ownership of the suit property pursuant to the said sale. That the title deed they hold in respect to the suit land is indefeasible. Consequently, they urged the court to dismiss the suit against them with costs and to further issue an order of injunction against the plaintiffs, 1st, 2nd and 3rd defendants, restraining them from trespassing into the suit land or interfering with their title or possession.
68. The 4th Defendant testified as the DW4, on his own behalf and on behalf of the 5th defendant who is also his wife. It was his testimony that they jointly bought the suit land No. 21047 from the 1st and 2nd Defendants. They did their due diligence, conducted a search which revealed that the 1st and 2nd defendants were the proprietors of the suit land before proceeding with the sale.
69. They signed the sale agreement, paid the entire purchase price and followed the due process; completion documents were signed and the suit land was thereafter transferred and registered in their joint names and a title deed issued to that effect.
70. However, sometimes around August 2022, they learnt that there was a restriction registered against the suit land. It was his testimony that he was not aware of how the money was shared among the beneficiaries. He maintained that they bought the suit land in good faith and went through all the process and thus urged the court to find that the title in their name is valid and further an order of permanent injunction be issued against the 1st and 2nd Plaintiffs to allow them a peaceful enjoyment of the suit land.
71. On cross- examination by Mr. Ochwangi for the Plaintiffs; it was his testimony that he signed the sale agreement while he was in the country but concluded the sale transaction when he was back in the USA. He however conceded that the sale agreement was not dated



72. He further stated that he did not attend the Land Control Board as he was not required to attend the same or to sign anything to the best of their knowledge. He denied knowledge of the Grant of the Letters of Administration and admitted that he was seeing it for the first time after the suit was filed.
73. On cross-examination by Mr. Oduk for the 1st Defendant, it was his testimony that he checked with his lawyer that the Power of Attorney was proper and it is then that they relied on the said Power of Attorney dated 30/6/2011. He admitted that no date was indicated on the sale agreement but stated that the same was to be included upon signing. He maintained that all the completion documents were signed.
74. On cross-examination by Mr. Holi for the 2nd and 3rd Defendants; he confirmed that the sale agreement was signed by the 2nd and 3rd defendants and their advocates. The 4th and 5th Defendants thereafter closed their case.
75. Upon close of all the Defendants' case, I directed the parties to file their final submission. All parties filed their rival submissions which I have read and considered.

Analysis and Determination

76. I have read and carefully considered the pleadings, exhibits and submissions made by the parties herein. On that account, it is this court's considered view that the following issues arise for determination: -
- a. Whether the Administrators of the estate of the late Jason Atinda Ouko could sell the land belonging to the deceased before Confirmation of Grant
 - b. Whether the Plaintiffs are entitled to the reliefs sought in the Plaint.
- I. Whether the Administrators of the estate of the late Jason Atinda Ouko could sell the land belonging to the deceased before Confirmation of Grant
77. The Plaintiffs' claim is that the suit land herein was originally registered in the name of their deceased father, Jason Atinda sometimes in the year 1978 and he remained the owner thereof until his demise. They produced a copy of the Green Card of parcel No. 658 as Pexh 2 in support of the said averments.
78. Upon his death, succession proceedings were instituted vide Nairobi High Court Succession Cause No. 353 of 1997 in respect to his estate. The 1st and 2nd Defendants were then appointed as Administrators of the said estate and were subsequently registered as the proprietors of the suit land via transmission, to hold the suit parcel in trust, for the benefit of all the family members and beneficiaries of the estate of the deceased. The Plaintiffs produced copies of application to be registered as proprietor by transmission, title deed, green card and certificate of search as Pexh. 5, 9, 2 and 10 as exhibits. This fact was confirmed by both DW1 and DW3 in their testimonies in court and in their pleadings.
79. It is imperative to point out that even though DW2 and DW3 maintained that the suit parcel was registered in their names in their capacity as the beneficiaries, there was no evidence adduced to that effect. Moreover, it has been confirmed and admitted by both the Plaintiffs and DW1, who is one of the duly appointed Administrators of the estate of the deceased, that the Succession Cause is still pending in court and the estate of the deceased is yet to be fully and finally distributed among all the beneficiaries.
80. It is not in dispute that the suit land herein formed part of the estate of the deceased. The registration in the names of the 1st and 2nd Defendants was by way of transmission to hold the land in trust for the beneficiaries of the estate. It is also common ground that no Confirmed Grant has been issued in the Succession Cause in respect to the estate of Jason Atinda.



81. It is trite law that when personal representatives are appointed to administer the estate; the property of the deceased vests in the personal representatives by dint of section 79 of the [Law of Succession Act](#), as read with sections 82 and 83 of the Act, which set out the powers and duties of administrators. The duly appointed administrators would then be entitled to exercise the said powers conferred upon them by section 82 and they are subject to the duties that are imposed by section 83 of the [Law of Succession Act](#).
82. Section 82 (b)(ii) of the [Law of Succession Act](#) on the provides the powers of personal representatives and states as follows: -
- “ 82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—
- (i); and
- ii) no immovable property shall be sold before confirmation of the grant;
83. The effect of section 82 above is that personal representatives are vested with the powers to enter into contracts with respect to assets of the estate of a deceased person. However, section 82(b)(ii) of the Act outlaws the sale of any immovable assets of an estate before the confirmation of a grant. Thus, any such sale effected before the grant is confirmed would be unlawful and unenforceable unless it happened with the leave of the court.
84. In the instant case, it was the testimony of DW1 that the court never allowed the sale of any part of the estate. This fact was further confirmed by DW3 who stated that they did not ask the court for permission before selling the suit land.
85. Capacity of the 1st – 3rd Defendants to transact in the sale of the suit land is key. Capacity would determine whether the 2nd and 3rd Defendants indeed passed a good title to the 4th and 5th Defendants; as the latin phrase states; “nemo dat quad non habet”, you cannot pass that which you do not have. As stated above, the requisite capacity in this case could only be guaranteed upon the confirmation of the Grant in Succession Cause No. 353 of 1997, which had not been done at the time of sale.
86. In view of the foregoing, it is clear that the sale to the 4th and 5th Defendants contravened sections 82 (b) (ii) of the [Law of Succession Act](#) and consequently the 4th and 5th Defendants could not have acquired any valid title from the sale for lack of the confirmed grant in respect to the estate.
- II. Whether the Plaintiffs are entitled to the reliefs sought in the Plaint
87. The Plaintiffs have sought the grant of an order the cancellation of title Nos. 21046 and 21047 and a restoration of the same to the original title, restraining order against the Defendants in respect to the suit parcels and eviction orders against the 4th and 5th Defendants from parcel No. 21047. It is their claim that the subdivision of the original suit land No. 658, sale and transfer of the suit parcels was vitiated by fraud and a breach of trust and the said transactions are therefore unlawful, illegal, null and void.
88. The said averments were vehemently denied by the 1st – 3rd Defendants who maintained that the subdivision, sale and subsequent was done on instructions of all the beneficiaries and the sale was made



in good faith, full knowledge, participation and authority of all the beneficiaries. DW2 further stated that proceeds from the said sale was equitably shared among all the 21 beneficiaries except the Plaintiffs. I must however point out that there were no minutes of the meeting by the beneficiaries about the sale, no record to show how the money was to be shared or bank statements as proof of payment was adduced into evidence by the defendants.

89. The 4th and 5th Defendants on their part denied any fraud and maintained that they are innocent purchasers who acquired the suit property No. 21047 for valuable consideration; upon conducting their due diligence and without knowledge of any claims, suits, encumbrances, alleged omission, fraud or mistake. It is their contention that the title they hold is a valid title.
90. A Bonafide purchaser for value without notice was defined in the case of Zebak Limited -vs- Nadem Enterprises (2016) eKLR which adopted the definition of bona fide purchaser in the Ugandan case of Ketende -vs- Haridas & Company Ltd (2008) 2 EA 174 where it had held as follows:

“A bona fide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove the following: He holds a certificate of title; he purchased the property in good faith; he has no knowledge of fraud; He purchased for valuable consideration; The vendors have apparent good title; He purchased without notice of any fraud; He was not party to any fraud.”
91. In determining whether the Plaintiffs are entitled to the reliefs sought in the Plaint, this court will be guided by the interest of justice and taking the circumstances of the case into account.
92. Among factors that this court needs to consider is the family composition. It is not in dispute that the Plaintiffs and the 1st – 3rd Defendants are all related. It is their testimonies that the estate of the deceased, Jason Atinda, was survived by 24 beneficiaries. DW2 confirmed that he distributed the proceeds from the sale among 21 beneficiaries except the Plaintiffs. It is also clear that only the Plaintiffs are complaining about the said sale, none of the other beneficiaries was called as a witness either to dispute the sale or state that they had not receive the amount shared as alleged.
93. It is also important to consider the purchase price paid upon sale by the 4th and 5th Defendants of Kshs. 21,000,000/-. It is not in dispute that the suit land was sold for Kshs. 21,000,000/= as seen in the undated Sale Agreement produced as Pexh. 13. The same was confirmed by DW2, DW3 and DW4 in their testimonies in court.
94. It is the evidence of DW2 and DW3 that the proceeds of the sale was paid out to 21 beneficiaries of the estate. DW1 also confirmed that she received her share of the proceeds in her bank account.
95. By granting the orders sought by the Plaintiffs, the purchase price paid by the 4th and 5th Defendants would have to be refunded by all the beneficiaries who received the said amount. Further, in determining the amount to be refunded, this court will have to consider the length of time since the purchase price was paid upto the time of filing the suit until the full and final payment. There is also need to factor the impact of inflation and the economy in general and its effects. In addition, if the purchase price at the time was Kshs. 21,000,000/= what would be the value of the land presently including the developments thereon?
96. Again, it is important to look at the possibility of refund of the said purchase price from all the beneficiaries of the estate who received the amount and had no issue with the sale and may have already used the money. It is also important to consider the inconvenience that may be occasioned the 4th and 5th Defendants and the developments made on the land.



97. In the interest of justice, it is the finding of this court that prayers Nos. 1, 2, 3, 5 and 6 are untenable.

Conclusion

98. The totality of the foregoing is that the Amended Plaint dated 14th May, 2018 is partially merited. I will accordingly proceed to issue the following Orders: -

- i. Upon the final distribution of the estate of the deceased in the Succession Cause No. 353 of 1997, the Plaintiffs herein be given a portion equivalent to what the others had received from the sale of the suit land herein No. Suna East/ Wasweta 1/ 21047 over and above their entitlement in the entire estate.
- ii. In the alternative, the Plaintiffs to be given an additional (acreage) depending on their entitlement to the suit land.
- iii. An Order of Permanent Injunction Is hereby issued restraining the 1st, 2nd and 3rd Defendants herein, their agents, servants, representatives and assigns from the sub-division, disposal, excavation, fencing, building and/or in any way whatsoever interfering with the original Land Parcel No. SUna East/ Wasweta 1/ 21046 in breach of the Trust with the beneficiaries – Plaintiffs.
- iv. Each Party to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 14TH DAY OF FEBRUARY, 2024.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

No appearance for the Plaintiffs

No appearance for the 1st Defendant

Mr. Holi for the 2nd and 3rd Defendants

Mr. Rautta for the 4th and 5th Defendants

Court Assistants - Tom Maurice/ Victor

