



**Ochola v Ochola & 4 others (Environment & Land Case E007 of 2021)
[2024] KEELC 5100 (KLR) (12 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 5100 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE E007 OF 2021
MN KULLOW, J
FEBRUARY 12, 2024**

BETWEEN

EUNICE ACHIENG OCHOLA PLAINTIFF

AND

STEVE WEMA OCHOLA 1ST DEFENDANT

MOLLY ELSA OKOTH 2ND DEFENDANT

GRACE ATIENO OWINO 3RD DEFENDANT

SUSAN ABORO 4TH DEFENDANT

THE COUNTY LAND REGISTRAR, MIGORI 5TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of an Originating Summons dated 5th February, 2021; seeking a determination of the following issues and/or Orders THAT: -
 - i. Land parcels No. SUNA EAST/ WASWETA 1/17160, SUNA EAST/ WASWETA 1/24483 and SUNA EAST/ WASWETA 1/24484 all form part of the estate of MARY ATIENO OCHOLA (deceased) who died intestate on the 13.12.2015 domiciled in Kenya.
 - ii. The Plaintiff being the eldest daughter of the deceased, is a surviving dependant and heir to the deceased and is as such entitled to a portion of the deceased's estate together with other beneficiaries and/or dependants.
 - iii. Having died intestate, the estate of the deceased and dispositions and transactions thereon are governed and subject to the provisions of the *Law of Succession Act* upon appropriate Probate and Administration proceedings.



- iv. This court be pleased to issue an Order of Declaration that the transfer and registration of the 1st Defendant as the sole proprietor of all the suit parcels in place of the deceased MARY ATIENO OCHOLA is null and void and confers no proprietary rights or interest upon the said 1st Defendant the same having been obtained by fraud and/or non-compliance with the *Law of Succession Act*.
- v. This Court be pleased to issue an Order of Declaration that the subsequent transfer of land parcel No. Suna East/ Wasweta 1/17160 by the 1st Defendant to the 2nd Defendant is null, void and fraudulent and confers no rights and interest upon the said 2nd Defendant.
- vi. This Court be pleased to issue an Order of Declaration that the purported transfer of land parcel No. Suna East/ Wasweta 1/ 24483 from the 1st Defendant to the 3rd Defendant is null and void and confers no proprietary rights or interests upon the said 3rd Defendant.
- vii. This Court be pleased to issue an Order of Declaration that the purported transfer of land parcel No. Suna East/ Wasweta 1/ 24484 from the 1st Defendant to the 4th Defendant is null and void and confers no proprietary rights or interests upon the said 4th Defendant.
- viii. This Court be pleased to issue an Order of Declaration that all the transactions, dispositions and/or entries in the registers of all the suit parcels effected after the date of death of the deceased i.e. the 13.12.2015 by the 5th Defendant against all the suit parcels are irregular, unlawful, illegal, null and void and of no legal effect at all.
- ix. This Court be pleased to issue an Order of nullification of all transactions, dispositions and entries in the registers of the suit parcels and all the resultant title deeds issued to the 2nd, 3rd and 4th Defendants after the death of the deceased Mary Atieno Ochola.
- x. This court be pleased to issue an Order compelling the 5th Defendant to rectify the registers of land parcel Nos. Suna East/ Wasweta 1/ 17160, Suna East/ Wasweta 1/24483 and Suna East/ Wasweta 1/24484 by deleting all the entries thereon made after the death of the deceased herein and reverting the titles to the name of Mary Atieno Ochola – deceased.
- xi. The 5th Defendant be compelled by an Order of this Court to enter a restriction of the title to the suit parcels barring any further or other transactions pending the finalization of probate proceedings as appropriate.
- xii. This Court be pleased to grant such other or further Order of a Conservatory nature as may in the interim period preserve the nature and status of the suit parcels.
- xiii. The costs of this Summons be borne by the Defendants.

Plaintiff's Case

2. The Plaintiff avers that the deceased Mary Atieno Ochola, who is her mother, was the sole registered of the suit parcels Nos. Suna East/ Wasweta 1/17160 and 14135; and she has retained the custody of the original title deeds to the said parcels.
3. It is her claim that sometimes around 11/5/2016, after the death of her mother; the 1st Defendant in collusion with the 5th Defendant cause the whole of land parcel No. 17160 to be transferred from the name of the deceased to the 1st Defendant.



4. Further, sometimes around 16/5/2018; the 1st Defendant again in collusion with the 5th Defendant caused land parcel No. 14135 to be subdivided into 2 portions giving rise to parcels Nos. 24483 and 24484.
5. Consequently, after the said transfer of the suit parcels in his name; the 1st Defendant caused the transfer of parcel No. 17160 to the 2nd Defendant and a minor, parcel No. 24483 was transferred to the 3rd Defendant while parcel No. 24484 was transferred to the 4th Defendant.
6. It is her contention that the homestead of the deceased stands on the said suit parcels where some of the dependants of the deceased still reside to date and despite the said transfers, the respective Defendants have never taken possession of the respective parcels.
7. It is also her claim that the deceased died intestate on 13.12.2015 and they have never commenced/undertaken any process of succession in respect of her estate and no letters of administration have been granted to any person.
8. She thus maintained that the dispositions effected on the suit parcels of land amounts to intermeddling with the estate of the deceased and the same are therefore null and void of no legal effect. That the Defendants are now threatening to unlawfully evict her and the dependants of the estate of the deceased claiming to have acquired the same hence the instant suit.
9. Parties were granted an opportunity to engage in negotiations with a view of reaching an out of court settlement and solve the matter amicably. Unfortunately, the negotiations failed and the matter proceeded for hearing.
10. The matter proceeded for hearing of the plaintiff's case on 17/5/2023. The plaintiff testified as PW1; she adopted her supporting affidavit and witness statement as her evidence in chief.
11. She also produced the documents annexed to her supporting affidavit as Plaintiff Exhibits 1 – 7 as follows; copy of the Death Certificate as pexh.1, copies of Title Deeds of parcel Nos. Suna East/Wasweta I/17160 and 14135 as pexh.2 and 3 respectively, copy of Green Card of parcel No. Suna East/Wasweta I/17160 as pexh.4, copies of Green Cards of parcel Nos. Suna East/Wasweta I/24483 and 24484 as pexh.5 and 6 respectively and copy of the Advocate's letter dated 15/1/2021 as pexh.7 in further support of her case.
12. On cross-examination by counsel for the 5th defendant, she stated that the 1st defendant, who is her brother, illegally and fraudulently transferred the suit land to his name and later sold the same on 11/5/2016 and illegally transferred the same in the year 2021. That she was not shown how the transfer had taken place. The plaintiff thereafter closed her case.

3rd Defendant's Case.

13. The 3rd Defendant entered Appearance through the firm of Ngeri, Omiti & Bush Advocates LLP, filed a Statement of Defence and Counter-claim dated 27th April, 2021, wherein she denied all the allegations levelled against her by the Plaintiff.
14. She averred that she never colluded with the 1st Defendant or the 5th Defendant to acquire the title to the land parcel No. 24483 either illegally, unprocedurally or through corrupt schemes.
15. It is her claim that she was approached by the 1st Defendant who fraudulently misrepresented to her that he was the registered, absolute and indefeasible owner of the suit land. That she carried out her due diligence and satisfied herself that suit property was duly registered in the name of the 1st Defendant as



- indicated in the certificate of title. That they subsequently executed a sale of land agreement and paid a sum of Kshs. 4,000,000/= as purchase price for valuable consideration.
16. She further contended that at all material times prior to the execution of the said agreement; she had no knowledge or reason to believe that the certificate of title registered in the name of the 1st Defendant was acquired illegally, unprocedurally or through a corrupt scheme which rendered the title deed held by the 1st Defendant severely defective.
 17. She maintained that she is a bonafide purchaser for value without notice of any defect of title who relied on the certificate of title presented to her. Further, that the existence of any defect of title arising from the conduct and manner of acquisition of the title by the 1st Defendant was long before she paid the purchase price and acquired the suit land. She however admitted that she has never taken possession of the suit land.
 18. In her Counter- Claim against the 1st Defendant; she sought the following Orders: -
 - i. General Damages for breach of contract.
 - ii. General damages for Fraudulent Misrepresentation
 - iii. Special Damages of Kshs. 5,000,000/=
 - iv. Interests at commercial rates on special damages above from the date the cause of action arose to the date of payment.
 - v. Interest at commercial rates on general damages above from the date of the judgment to the date of payment.
 - vi. Costs of the Counter-claim and defending the suit.
 19. In the Counter-claim, it was her claim that the 1st Defendant fraudulent misrepresented to her that he had a clean title and was accordingly the absolute and indefeasible owner of the suit property. She outlined the particulars of the fraudulent misrepresentation.
 20. She averred that she purchased the suit property without notice of the Plaintiff's claim to the property and without actual or constructive notice of the defects or claim against the 1st Defendant's title.
 21. The 3rd defendant's case proceeded for hearing on 20/6/2023, she testified as DW1. She adopted her witness statement dated 27/4/21 as her evidence in chief. She also stated that she did an official search and found out that the suit land was registered in the name of the 1st defendant as per the title deed provided to her. On 18/8/2020, they entered into a Sale Agreement for the sale of the property for a consideration of Kshs. 4,000,000/=. The consideration price was paid in full vide an exchange of motor vehicle transferred to the 1st defendant, various payments made in instalments by way of cash on diverse and receipt thereof was duly acknowledged.
 22. That after the final payment of the purchase price, the land was duly transferred to her and a title deed issued in her name. she admitted to not knowing the history of the property or the plaintiff.
 23. She also produced the documents on her bundle of documents dated 27/4/21 as Defence Exhibits 1-3 and the annexures in her supplementary list of documents dated 05/05/2022 as Defence Exhibit 4 - 8 as follows; copy of sale of land agreement dated 18/8/2021 as dexh.1, acknowledgment of receipt of the purchase price dated 31/08/2021 as dexh.2, demand letter dated 8/4/2021 as dexh.3, transfer instruments in respect of Title No. Suna East/ Wasweta I/24483 dated 18/8/2020 as dexh.4, Affidavit sworn by Steve Wema Ochola dated 18/08/2020 18/8/2020 as dexh.5, copy of Valuation Requisition for stamp duty dated 10/11/2020 as dexh.6, copy of Kenya Revenue Authority stamp duty payment



slip dated 16/11/2020 as dexh.7 and copy of Kenya Commercial Bank payment slip dated 18/11/2020 as dexh.8 in further support of her counter-claim.

24. On cross-examination by counsel for the plaintiff, she conceded that she only received the title deed of the property and a certificate of official search but she did not visit the suit land to confirm the status before the purchase.
25. On cross-examination by counsel for the 5th defendant, she stated that both the sale agreement between herself and the 1st defendant and the transfer documents were duly executed, that her claim was not against the Land Registrar.

1st, 2nd and 4th Defendants' Case.

26. The 1st, 2nd, 4th and 5th Defendants neither entered appearance nor filed any statement of defence in response to the allegation levelled against them by the Plaintiff.
27. Further, the 1st Defendant did not respond to the Counter-Claim raised against him by the 3rd Defendant.
28. The 5th Defendant did not file any documents in response to the allegations raised by the Plaintiff. He however, took part in the hearing of the case and even cross-examined the plaintiff and the 3rd defendant.
29. Consequently; the claim by the Plaintiff against the 1st, 2nd, 4th and 5th Defendants stands unchallenged while the Counter Claim against the 1st Defendant also stands uncontroverted.

Analysis and Determination

30. It is this court's considered view that the following issues arise for determination: -
 - a. Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff.
 - b. Whether the 3rd Defendant is entitled to the reliefs sought in the Counter-Claim.

I. Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff.

31. The Plaintiff has sought among other orders; a declaration that the transfer, subdivision and registration of the 1st defendant as the sole proprietor of the parcels Nos. Suna East/ Wasweta I/ 17160, 24483 and 24484 (previously No. 14135) is null and void. Further, that the subsequent transfers and registration in the names of the 2nd, 3rd and 4th defendants respectively be declared fraudulent, null and void with no proprietary rights or interests, nullification of all the transactions and entries in the register and resultant title deed, rectification of the register and a restriction be placed on the title pending the finalization of the succession proceedings.
32. It is her claim that her mother, Mary Atieno Ochola, died intestate sometimes on 13/12/2015. At the time of her death, was the sole registered proprietor of parcel Nos. Suna East/ Wasweta I/17160 and 14135. However, on 11/5/2016, the 1st defendant in collusion with the 5th defendant caused the transfer of parcel No. 17160 into his name. Later, on 16/5/2018, he caused the subdivision of parcel No. 14135 into 2 portions; No. 24483 and 24484 and registration thereof into his names. He subsequently sold the said parcels of land and fraudulently caused the same to be transferred and registered in the names of the 2nd, 3rd and 4th defendants respectively and title deeds issued to that effect.



33. It is her contention that the said subdivision, transfer and registration into the name of the 1st defendant and subsequently into the names of the 2nd, 3rd and 4th defendants were done irregularly, illegally and unprocedurally against the provisions of the *Law of Succession Act* and the same should therefore be declared null and void. She further stated that no succession proceedings had ever been commenced in respect to her late mother's estate.
34. The 1st, 2nd and 4th Defendants neither filed any response or documents to the allegations raised by the Plaintiff. The 3rd defendant on her part denied any collusion with either the 1st or the 5th defendants to acquire title to parcel No. Suna East/ Wasweta I/24483. It was her claim that she purchased the suit land for valuable consideration without prior knowledge or reason to believe that the title deed held by the 1st defendant was acquired illegally and was therefore defective. She maintained that she was a bonafide purchaser for value.
35. The Plaintiff produced the copies of the original title deed as Pexh. 1 and 2 as proof that parcel Nos. 17160 and 14135 were originally registered in the names of the late Mary Atieno Ochola. These documents remained unchallenged. She also produced a copy of the Green Card of parcel No. 17160 as Pexh. 4 showing the transfer of the suit land from the name of the deceased to that of the 1st defendant. Further, she produced copies of the Green Cards of parcel Nos. 24483 and 24483 as Pexh. 5 and 6; as evidence of the subdivision from the original parcel No. 14135 and proof of the subsequent transfers and registration in the names of the 3rd and 4th defendants.
36. The 1st and 5th Defendants did not provide a lawful justification, basis or explanation of how and why the said transfers from the name of the deceased to that of the 1st defendant were effected especially when it is evident that no succession proceeding have been commenced in respect to the estate of the late Mary Atieno Ochola. The 5th defendant, as the custodian of all land records in the county ought to have provided the documents he relied before effecting the said transfers and subdivision. In the absence of any explanation or documents were provided to support the said entries and changes, it is clear that the same were done unprocedurally, irregular and the said transactions did not therefore comply with the lawful procedure that govern the transfer of parcels of land and hence are null and void.
37. The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR held that where an instrument of title is challenged, such proprietor must go beyond the instrument to prove legality:
- “We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
38. No such explanation was tendered by the defendants, particularly the 1st defendant. The 1st, 2nd, 4th and 5th defendants who neither filed a statement of defense in response to the averments made by the plaintiff nor adduced any evidence to challenge the averments by the plaintiffs. The 3rd defendant on her part accused the 1st defendant for misrepresentation and asked for a refund of the purchase price paid.
39. In the absence of any proof lawful justification and basis, I find that the subdivision and transfer of the suit parcels from the name of the deceased to that of the 1st defendant and the subsequent transfers to the 2nd, 3rd and 4th defendants without the strictly complying with the procedure outlined under the Laws of Succession was irregular, illegal, null and void.



40. Section 26 of the *Land Registration Act* provides two instances where a certificate of title may be impeached, that is, on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
41. Section 80 of the *Land Registration Act* on the Rectification by an Order of Court further provides that: -
- “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
42. In the case of *Chemai Investments Limited –vs- The Attorney General & Others Nairobi Petition No. 94 of 2005* it was held as follows:
- “*The Constitution* protects a higher value, that of integrity and the rule of law. These values cannot be sidestepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of *Milan Kumar Shah & 2 Others – vs – City Council of Nairobi & Another (supra)* where the court stated as follows, “ we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principal has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.
43. The 1st defendant caused the transfer, subdivision and registration of the suit parcels in his name unprocedurally and fraudulent; the said properties formed part of the estate of the deceased Mary Atieno Ochola, who died intestate and no succession proceedings had been commenced in respect to her estate. The 1st defendant therefore lacked the requisite capacity to deal with the unadministered estate of the deceased without letters of administration and his actions are contrary to the provisions of the *Law of Succession Act*. His registration therefore conferred no proprietary rights or interest and consequently, he did not pass a good title to the 2nd, 3rd and 4th defendants respectively. It is therefore my finding that the title of the 1st defendant and the subsequent registration and title deeds issued to the 2nd, 3rd and 4th defendants are liable to be cancelled and/or revoked.
44. In the premises; it is my considered opinion that the plaintiffs have proved their case to the required standard to warrant the grant of the prayers sought for cancellation of the title issued in the name of the 1st Defendant.

II. Whether the 3rd Defendant is entitled to the reliefs sought in the counter-claim.

45. The 3rd Defendant in her counter-claim sought a refund of the purchase price paid to the 1st defendant as special damages together with general damages for breach of contract and fraudulent misrepresentation.
46. The 1st defendant despite being duly served with the Statement of Defence and Counter-claim did not file any response or adduce any documents in response to the said allegation. The Counter-claimer’s claim is therefore deemed unopposed.



47. In determining whether the 3rd defendant/counter-claimant is entitled to the reliefs sought, this court must first establish whether she was a bonafide purchaser for valuable consideration.

48. Black's law Dictionary 8th Edition defines "bona fide purchaser" as:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

49. A bonafide purchaser was also defined by the Court of Appeal in the case of Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR where the court cited with authority the decision by the Court of Appeal in Uganda in KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173 where it was held as follows: -

"For the purposes of this appeal, it suffices to describe a bona fide purchaser as 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 that:

- (a) He holds a certificate of title;
- (b) He purchased the property in good faith;
- (c) He had no knowledge of the fraud;
- (d) He purchased for valuable consideration;
- (e) The vendors had apparent valid title;
- (f) He purchased without notice of any fraud;
- (g) He was not party to any fraud."

50. The question that therefore follows is whether the 3rd defendant/ counter-claimant fits the said definition. It is the counter-claimant's position that she was approached by the 1st defendant, who presented a certificate of title in his name. That she conducted her due diligence and carried out a search, which confirmed that the 1st defendant was the registered owner of the suit land. She produced the sale agreement entered between the as Dexh.1 for the sale of the suit land for Kshs. 4,000,000/= and an acknowledgement of the receipt of the entire purchase price as Dexh. 2.

51. It is also evident that the 1st defendant had an apparent valid title at the time of the said sale which he presented to the 3rd defendant and was confirmed by the search. No fraud and/or collusion was established against the 3rd defendant by the plaintiff and she has also demonstrated that she had no prior knowledge of the history of the suit land or any defects on the 1st defendant's title. It is therefore my finding that she was a bonafide purchaser for value without notice of any fraud by the 1st defendant.

52. What is the position in law of the refund of the purchase price over a contract on account of misrepresentation and what are the conditions.

53. It is the counter-claimant's position that the 1st defendant misrepresented material facts as to the ownership of the suit land despite knowing that his title to the said property was not a clean title. She maintains that she had no notice or prior knowledge or reason to believe that the said land did not



belong to the 1st defendant as represented or of fraudulent transaction by the 1st defendant over the suit land.

54. There is no dispute that the 1st defendant received the entire purchase price of Kshs. 4,000,000/-. The Counter-claimer produced a copy of the acknowledgement of receipt of the purchase price dated 18/8/2020 and various payments slips as Dexh.2 in support of her claims. These documents remain unchallenged/ uncontroverted by the 1st defendant, who neither entered appearance nor filed a statement of defence in response to the allegations raised in the counter-claim.
55. The 1st defendant received the entire consideration price even though he was fully aware that he lacked the requisite capacity to engage in the said transaction, no succession proceedings had been instituted neither had letters of administration been issued in respect of the estate of the deceased, his title was not clean and he could therefore not pass any proprietary rights and interests
56. In view of the foregoing, it is my finding that the 3rd Defendant has proved her Counter-claim against the 3rd Defendant to the required standard and is therefore entitled to the orders sought against the 1st defendant in the counter-claim.

Costs

57. Costs generally follow the event, and in this instant case, since the Plaintiffs have been inconvenienced, I find that they are entitled to costs of the suit.

Conclusion

58. The upshot of the foregoing is that the Plaintiff has sufficiently proved her case to the required standard and I accordingly allow the Originating Summons dated 5th February, 2021 in terms of Prayers Nos. 1,2,3,4,5,6,7,8,9,10 and 13 as sought.
59. Further, I accordingly find that the 3rd Defendant has proved her Counter- Claim dated 27th April, 2021 against the 1st Defendant in terms of Prayers Nos. (a) on General damages at Kshs.100,000/=, (c) on special damages of Kshs. 4,000,000/= which is a refund of the Purchase Price and a penalty of 5% of the purchase price which is Kshs. 200,000/= together with costs of the Counter-claim.
60. That refund of the purchase price should be effected within a period of 90 days from the date of this Judgment.

It is so Ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 12TH DAY OF FEBRUARY, 2024.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

No appearance for the Plaintiff

No appearance for the 3rd Defendant

No appearance for the 5th Defendants

No appearance for the 1st, 2nd and 4th Defendants

Court Assistants - **Tom Maurice/ Victor**



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