



**Atinga v Ogumbo & 7 others (Environment & Land Case
26 of 2019) [2024] KEELC 6531 (KLR) (1 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 26 OF 2019
SO OKONG'O, J
OCTOBER 1, 2024**

BETWEEN

JOHN OLUOCH ATINGA PLAINTIFF

AND

**DALMAS ADERO OGUMBO 1ST DEFENDANT
JECTONE OWOKO ODUOR 2ND DEFENDANT
SUPER TEN WOMEN GROUP 3RD DEFENDANT
SOPHIA ATIENO WADULO 4TH DEFENDANT
EMMA ACHIENG ORITA 5TH DEFENDANT
OWISSO WINNIE STELLA 6TH DEFENDANT
GERALD ODHIAMBO OPONDO 7TH DEFENDANT
REGISTRAR OF TITLES, KISUMU 8TH DEFENDANT**

RULING

1. The full facts of this case are set out in the judgment delivered by this court on 14th March 2024. The Plaintiff brought this suit against the Defendants on 19th August 2019 seeking the following reliefs;
 - a. A declaration that the transfer to the 1st Defendant of all that parcel of land known as Kisumu/ Wathorego/1852 (hereinafter referred to only as “the suit property”) and all subsequent transactions involving the property are unlawful and thus null and void.
 - b. A declaration that the Plaintiff is the rightful and legal owner of the suit property now fraudulently and illegally subdivided into eight parcels namely, Kisumu/ Wathorego/ 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014 (hereinafter together referred to only as “the



subdivisions” and individually as “Plot Nos. 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014” respectively).

- c. An order compelling the 8th Defendant to revoke all the said titles issued in respect of the subdivisions.
 - d. An order compelling the 8th Defendant to restore the ownership of the suit property to the Plaintiff.
 - e. The costs of the suit.
2. In his plaint dated 19th August 2019, the Plaintiff averred that he was at all material times the lawful owner of the suit property which measured approximately 0.28Ha. which he acquired on 11th December 2006. The Plaintiff averred that in May 2016, he discovered that the 1st Defendant had fraudulently registered a transfer in the 1st Defendant’s favour in respect of the suit property thereby causing the property to be registered in his name. The Plaintiff averred that the 1st Defendant subsequently pretended that he had lost his title deed for the suit property and proceeded to obtain a provisional title deed.
 3. The Plaintiff averred that the 1st Defendant immediately thereafter subdivided the suit property into Plot Nos. 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014. The Plaintiff averred that the 1st Defendant retained Plot Nos. 5007, 5011 and 5014 in his name and transferred Plot Nos. 5013, 5012, 5010, 5009, and 5008 to the 2nd, 3rd, 4th, 5th, and 6th and 7th Defendants respectively. The Plaintiff averred that he discovered the said acts of fraud when he noticed one of the Defendants putting up a flat on a portion of the suit property. The Plaintiff averred that it was upon carrying out a search that he discovered that the suit property had been fraudulently transferred to the 1st Defendant and subsequently subdivided and transferred to the 2nd to 7th Defendants.
 4. The Plaintiff averred that the said transfers were illegal and did not pass a good title to the 1st to 7th Defendants. The Plaintiff pleaded several particulars of fraud against the 1st Defendant. The Plaintiff averred that as a consequence of the said acts of fraud, he was deprived of his right to own property guaranteed under Article 40 of *the Constitution*.
 5. The 6th and 7th Defendants filed a joint statement of defence to the Plaintiff’s claim on 7th November 2019. The 6th and 7th Defendants averred that they were a wife and a husband respectively. The 6th and 7th Defendants averred that they were strangers to the Plaintiff’s claim over the suit property. The 6th and 7th Defendants averred that the 1st Defendant after subdividing the suit property transferred to them Plot No. 5008 around 29th May 2017. The 6th and 7th Defendants averred that they were registered as the owners of Plot No. 5008 and issued with a title deed on 19th July 2017 in respect thereof. The 6th and 7th Defendants averred that the transfer of Plot No. 5008 to them was legal and denied that the 1st Defendant did not pass a good title to them. The 6th and 7th Defendants averred that they were innocent purchasers of Plot No. 5008 from the 1st Defendant for value without notice of the Plaintiff’s interest in the suit property. The 6th and 7th Defendants averred that they purchased Plot No. 5008 from the 1st Defendant at a consideration of Kshs. 460,000/- and had invested heavily in the property.
 6. The 3rd Defendant filed its defence on 9th December 2019. The 3rd Defendant averred that it conducted due diligence and established that Plot No. 5012 was owned by the 1st Defendant before it purchased the same. The 3rd Defendant denied that the Plaintiff was the lawful owner of the suit property. The 3rd Defendant averred that it purchased the suit property for valuable consideration in good faith without notice of any defect in the 1st Defendant’s title.



7. The 5th Defendant filed her defence on 18th December 2019. The 5th Defendant averred that she was a stranger to the Plaintiff's claim. The 5th Defendant averred that she acquired Plot No. 5009 lawfully and procedurally. The 5th Defendant averred that she was not involved in any fraud in the acquisition of the suit property. The 5th Defendant urged the court to dismiss the Plaintiff's claim and to declare that the 5th Defendant was an innocent purchaser of Plot No. 5009 without notice of the defect in the 1st Defendant's title.
8. The suit was heard and a judgment delivered on 14th March 2024. In the judgment, the court found that the 1st Defendant acquired his title to the suit property illegally and fraudulently and as such the purported title was null and void. The court found further that the void title could not confer any valid interest in the suit property upon the 1st Defendant. The court found that since the 1st Defendant had no valid interest in the suit property, he had no right to subdivide the property.
9. The court found the purported subdivision of the suit property on 22nd March 2017, which gave rise to Plot Nos. 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014 illegal, null and void. Due to the illegality of the said subdivision exercise, the court found that the 1st Defendant had no valid interest in the resultant Plot Nos. 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014 that he could convey to himself and third parties.
10. The court found the registration of Plot Nos. 5007, 5011 and 5014 in the name of the 1st Defendant void, the same as the transfer of Plot Nos. 5013, 5012 and 5010 to the 2nd, 3rd and 4th Defendants, Plot No. 5009 to Okatch Emmanuel Oyugi from whom the 5th Defendant acquired the same and Plot No. 5008 to the 6th and 7th Defendants. The court held that the 2nd to 7th Defendants could not acquire a better title in the suit property and its subdivisions than that which the 1st Defendant held. The court held that the 2nd to 7th Defendants did not acquire any valid interest in the suit property and its subdivisions, Plot Nos. 5013, 5012, 5010, 5009, and 5008. The court held that the 2nd to 7th Defendants' titles were tainted with fraud and illegality committed by the 1st Defendant and as such the same were null and void.
11. The court entered judgment for the Plaintiff against the Defendants for:
 - a. A declaration that the transfer of all that parcel of land known as Title No. Kisumu/Wathorego/1852 to the 1st Defendant, the subdivision thereof by the 1st Defendant and the transfer of the resultant plots to the 2nd to 7th Defendants and other parties were unlawful and as such null and void.
 - b. A declaration that the Plaintiff is the lawful owner of all that parcel of land known as Title No. Kisumu/Wathorego/1852 which was illegally and fraudulently subdivided by the 1st Defendant into eight (8) parcels namely; Title Nos. Kisumu/Wathorego/ 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014.
 - c. An order compelling the Land Registrar, Kisumu County to forthwith; cancel the transfer of Title No. Kisumu/Wathorego/1852 to the 1st Defendant and the title that was issued to him in respect thereof, cancel the subdivision of Title No. Kisumu/Wathorego/1852 into eight (8) parcels namely, Title Nos. Kisumu/Wathorego/ 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014 and cancel the transfer and/or registration of Title Nos. Kisumu/Wathorego/ 5007, 5011 and 5014 in the name of the 1st Defendant, Title Nos. Kisumu/Wathorego/ 5013, 5012, 5010, and 5008 in the names of the 2nd, 3rd, 4th, and 6 and 7th Defendants respectively and Title No. Kisumu/Wathorego/ 5009 in the names of Okatch Emmanuel Oyugi and the 5th Defendant.



- d. An order compelling the Director of Surveys to amend the relevant Registry Index Map for Kisumu/Wathorego to effect the cancellation of the subdivision of Title No. Kisumu/Wathorego/1852 into eight (8) parcels namely, Title Nos. Kisumu/Wathorego/ 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014 and the cancellation of the titles issued in respect of the said resultant plots.
 - e. An order compelling the Land Registrar Kisumu County to forthwith restore the ownership of Title No. Kisumu/Wathorego/1852 to the Plaintiff.
 - f. The costs of the suit to be paid to the Plaintiff by the 1st Defendant.
12. The Plaintiff never sought an order for possession of the suit property. The court did not therefore grant an order for the eviction of the Defendants who were in occupation of the property. What is now before the court is an application by the Plaintiff dated 22nd July 2024 seeking an order that the 1st to 7th Defendants be evicted from the suit property and that the structures that they have erected thereon be demolished and/or removed under the supervision of the Officer Commanding Gita Police Station who shall provide security during the exercise. The Plaintiff's application which was brought under Sections 152A, 152B, 152E and 152F of the Land Act, 2012 was based on the ground that the Plaintiff was the lawful owner of the suit property which position was confirmed by the judgment delivered herein on 14th March 2024. The Plaintiff averred that the Defendants had failed, refused or neglected to vacate the suit property and remove the structures that they had put up on the property despite the said judgment and the notice served upon them on 15th June 2024 to do so.
 13. The Plaintiff's application was opposed by the 5th Defendant through a Notice of Preliminary Objection in which the 5th Defendant contended that the advocates who filed the application on behalf of the Plaintiff were not properly on record and as such the application was vexatious and amounted to an abuse of the process of the court.
 14. I have considered the Plaintiff's application and the Notice of Preliminary Objection filed in opposition thereto by the 5th Defendant. I find no merit in the 5th Defendant's contention that the Plaintiff's application is incompetent for having been filed by a firm of advocates not properly on record. The advocates on record for the Plaintiff were granted leave to come on record on 8th July 2024. The application by the Plaintiff was therefore filed by advocates who were properly on record.
 15. Sections 152A, 152B, 152E, 152F and 152 G of the Land Act, 2012 (as amended) provide as follows:
 - 152A. A person shall not unlawfully occupy private, community or public land.
 - 152B. An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.
 - 152E. If, with respect to private land the owner or the person in charge is of the opinion that a person
 - (1) is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
 - (2) The notice under subsection (1) shall –
 - (a) be in writing and in a national and official language;
 - (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;



- (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
- (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

152F. Any person or persons served with a notice in terms of sections 152C, 152D and 152E may (1) apply to Court for relief against the notice.

- (2) The Court, after considering the matters set out in sections 152C, 152D and 152E may-
 - (a) confirm the notice and order the person to vacate;
 - (b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
 - (c) suspend the operation of the notice for any period which the court shall determine; or
 - (d) order for compensation.

152G. Notwithstanding any provisions to the contrary in this Act or in any other written law, all (1) evictions shall be carried out in strict compliance with the following procedures-

- (a) be preceded by the proper identification of those taking part in the eviction or demolitions;
- (b) be preceded by the presentation of the formal authorizations for the action;
- (c) where groups of people are involved, government officials or their representatives to be present during an eviction;
- (d) be carried out in a manner that respects the dignity, right to life and security of those affected;
- (e) include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;
- (f) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction;
- (g) include mechanisms to protect property and possessions left behind involuntarily from destruction;
- (h) respect the principles of necessity and proportionality during the use of force; and
- (i) give the affected persons the first priority to demolish and salvage their property.

51. The foregoing provisions of the *Land Act*, 2012 (hereinafter referred to only as “the Act”) provide for the eviction of persons occupying land unlawfully. Section 152A of the Act prohibits unlawful occupation of land be it private, public or community land. Section 152E of the Act provides that a person unlawfully occupying private land may be served with a notice to vacate. Section 152F of the Act provides for relief against a notice of eviction. It gives the person served with the notice a right to apply to the court for whatever relief deemed appropriate in the circumstances. The court upon considering the application may give appropriate relief. Among the reliefs the court can grant are; cancellation,



variation or suspension of the notice. The court can also order compensation to be paid. In addition to the said reliefs, the court also has the power to confirm the notice and order the eviction of those in illegal occupation of land.

52. In the case before me, I am satisfied that some of the Defendants were served with a notice to vacate the suit property in accordance with the terms of Section 152E (1) of the Act. The Defendants who were served did not move the court for relief as provided for under Section 152F of the Act. I am of the view that since Section 152F of the Act empowers the court to grant relief to the person served with an eviction notice, and also to confirm the notice and order eviction, it is not inconsistent with that section of the Act for the person issuing the notice to apply to the court for confirmation of the notice and an eviction order where the person served with the notice has failed to seek relief from the court.
53. The said finding by this court notwithstanding, I am of the view that the proceedings under Sections 152A, 152B, 152E and 152F of the Land Act, 2012 should have been taken in a fresh suit or a miscellaneous application and not in the current suit. In this suit, the court declared the Plaintiff's rights over the suit property. If the Defendants have refused to vacate the suit property after the said findings that were made by this court, they became trespassers on the property and could be compelled to move out through separate proceedings brought under Sections 152A, 152B, 152E and 152F of the Land Act, 2012 or in a new suit. I am of the view that this court after delivering the judgment of 14th March 2024 became functus officio and cannot deal with the said acts of trespass. It must be noted that some of the Defendants did not enter appearance and as such have not had an opportunity to be heard in the present application which seeks a relief that was not sought in the original suit. The Applicant's application is in the circumstances not properly before the court.
54. Due to the foregoing, the application dated July 22, 2024 is struck out with no order as to costs.

DELIVERED AND DATED AT KISUMU THIS 1ST DAY OF OCTOBER 2024.

S. OKONG'O

JUDGE

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

Mr. Akello for the Plaintiff

Ms. Nyagol for the 1st Defendant

Mr. Kajo for the 8th Defendant

Ms. J. Omondi-Court Assistant

