



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndiege v Amuse & 59 others (Environment & Land Case E004 of 2023)  
[2024] KEELC 6869 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6869 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE E004 OF 2023**

**M SILA, J**

**OCTOBER 2, 2024**

**BETWEEN**

**JOSEPH OBIERO NDIEGE ..... PLAINTIFF**

**AND**

**FREDRICK OMINO AMUSE & 59 OTHERS & 59 OTHERS & 59  
OTHERS ..... DEFENDANT**

**JUDGMENT**

(Plaintiff filing suit against defendants seeking their eviction from the suit land; suit land having been purchased by the plaintiff in a public auction; defendants filing defence and counterclaim asserting that they contributed towards the purchase of the land in the auction and therefore the plaintiff holds it in trust for them; no evidence of any arrangement between the plaintiff and defendants that he would buy the land on their behalf at the auction; no evidence of any contribution made by the defendants and given to the plaintiff for purposes of buying the land; no proof of any trust; in those circumstances defendants' counterclaim dismissed and judgment entered for the plaintiff)

1. This suit was commenced vide a plaint filed on 24 October 2023 against 60 defendants. The plaintiff pleads to be the registered proprietor of the land parcel Suna West/Wasweta II/1037 measuring 27.01 hectares. He averred to have obtained registration after purchasing the land at a public auction conducted by Consolidated Bank Limited. He pleaded that over a period of time stretching before and after the sale, the defendants have illegally invaded the suit land and continue to trespass in it. He pleads that they have built homes and structures, undertake cultivation, and generally commit waste, which has caused him loss. In the suit, the plaintiff seeks the following orders :
  - a. An order/declaration that the plaintiff is the sole owner of the suit land.
  - b. A permanent injunction restraining the defendants from interfering with his possession or trespassing into the suit land.



- c. Eviction.
  - d. Costs.
2. Not much happened in the case, and indeed no appearance was even entered by the defendants, until the plaintiff filed an application dated 1 March 2024 whereby he sought an order of injunction to stop the burial of the 11<sup>th</sup> defendant, who had died as his sons, the 12<sup>th</sup> and 13<sup>th</sup> defendants, wished to bury him on the suit land. The defendants filed appearance and filed a replying affidavit to oppose the motion which was eventually compromised by consent with the parties agreeing to status quo being maintained and the hearing fast tracked.
  3. The defendants (except the 11<sup>th</sup> defendant who had since died) filed a joint statement of defence and counterclaim dated 17 April 2024. They pleaded that they had been living on the suit land for more than 20 years and that when it was imminent that the suit land would be sold through auction, they deliberated with the plaintiff, who was then the area Member of Parliament (MP), and he agreed to assist the defendants pay the auction amount. They contend that they contributed Kshs. 1,000/= each towards the auction and the plaintiff made them believe that he was holding the title in trust for them. They aver that this is why, since 2013, the plaintiff never raised any alarm nor sought for their eviction. They plead that they have acquired title through proprietary estoppel and constructive trust.
  4. In the counterclaim they have elaborated the history of the land as follows :

That the suit land arose from subdivision of the land parcel Suna West/Wasweta II/724 which was registered in the names of Mango Matho, George Kisundi, Aulo Nyabungo, Warioba Aulo, and Odira Rabera. Upon subdivision the same five original proprietors became registered as owners of the suit land. That in 1981, the proprietors agreed to sell 12 acres of the land to Samson Kaguai Nganga who was working with the DCs office then. They claim that Mr. Nganga took advantage of their illiteracy and registered the whole land into his name, instead of only 12 acres, and proceeded to take a loan using the suit land. However, the original five proprietors continued to stay on the land in the belief that only 12 acres is sold and disposed portions of it to other persons who consist of the defendants. It is pleaded that the plaintiff was then area Chief and he convinced some of the defendants to purchase the portions being sold and that he witnessed several of the contracts of purchase. It is pleaded that in 2013 the plaintiff had just won the MP seat for a did not understand the history and injustice that had arisen. In addition the plaintiff was also protecting his name having cnewly created constituency under the 2010 Constitution, when the defendants got information that the suit land was due for sale on the debt taken by Mr. Nganga. Several of the defendants placed blame on the plaintiff who it is claimed had acted as an agent and enticed and assured them that the registration of the land was proper. Analyzing the situation, they called several meetings with the defendants and they agreed that the plaintiff would be the representative of the persons who were on verge of being evicted and agreed that they would contribute Kshs. 1,000/= for every acre that they were occupying. It is averred that it was further agreed that the plaintiff would pay the balance amount of Kshs. 1,000,000/= to avoid the land being bought by a stranger who onvinced several of the defendants to purchase and also wanted to protect his constituents from possible eviction. They plead that the title of the plaintiff was acquired through collaboration and contribution of both plaintiff and defendants and therefore the plaintiff holds it in trust. They contend that it is this act of collaboration that made the plaintiff not raise any issue over the occupation of the land since 2013 and that the defendants know and believe that they each own the portions that they are living on. They plead that the plaintiff has been visiting the suit land and has attended funerals of people on the suit land. They aver that the family of the



deceased 11<sup>th</sup> defendant are dismayed with the action of the plaintiff of stopping his burial and his body is now accumulating a mortuary bill of Kshs. 700/= per day.

5. They ask for the following orders in the counterclaim (slightly paraphrased):
  - a. A declaration that the defendants/counterclaimants have acquired the suit land by either proprietary estoppel or constructive trust.
  - b. A mandatory order compelling Migori Land Registrar and Migori Land Surveyor to immediately within fourteen (14) days survey the suit land, rectify the register by deleting the name of the plaintiff, and register each defendant by issuing each of them with a title deed to their respective portions.
  - c. An order compelling the plaintiff to pay the mortuary bill at the time of judgment.
  - d. Costs of the suit.
  - e. Any other/further relief that the court may deem fit to grant in the circumstances.
6. The plaintiff filed a reply to defence and defence to counterclaim. He denied that the plaintiffs have lived on the land for more than 20 years as claimed and no defence of adverse possession is available to them. He denied that the plaintiffs contributed Kshs. 1,000/= or any other amount as claimed towards the auction and denied being their agent. He denied knowing Mr. Nganga or being party to the alleged fraud that he is said to have committed. He pointed out that no suit has been filed against the said Mr. Nganga or Consolidated Bank Limited (the chargee). He pleads that on the contrary, after buying the land, it is the defendants who approached him asking him to donate to them the land which he refused. He denied attending funerals on the suit land and added that attendance of funerals does not make one lose land. He pleaded that the time lapse from the time he acquired the land to the time he filed suit was occasioned by the defendants expressing willingness to purchase the land which expression did not materialize hence the suit. He denied the particulars of proprietary estoppel and trust and denied being liable to pay the mortuary fees.
7. With pleadings closed hearing commenced.
8. PW-1 was the plaintiff. He testified that he bought the land in 2013 through a public auction conducted by Consolidated Bank. He got registered as proprietor on 6 December 2013. At the time he bought the land some of the defendants were on it and he wanted them out. He denied that they used him to buy the land and denied that they contributed to the purchase price. He explained that he took some time to sue them as some approached him to negotiate so that he can give them a portion of the land but nothing conclusive came out of it. He has no deal with them and they are therefore on the land as squatters. He went through all the documents availed by the defendants and discounted them.
9. Cross-examined, he revealed that he served as Chief of Suna South Location where the land is located from 1990 to 2007. The land is in Magoto Village in Suna South Location which borders Kuria area. He stated that he had not visited the land before buying it and first saw it after the sale. In 2007 he vied to be the area MP but he was unsuccessful. He won the seat in 2013. He agreed that he traversed the area looking for votes. When he saw the advertisement for the auction of the land, he observed that it described land that is within his constituency. He knew that there were people on the land but he did not consult them before buying. He allowed them to remain there. Others came into the land after sales from those who were in possession. Some approached him to sell land to them which led to delay in him filing the suit. No agreement ensued and he opted to come to court. He stated that he visited the land only once in 2023 after buying it and he also visited the land in 2017 when looking for votes. He was also in a home of one of the occupants at this time. He described these as political and nothing else.



He agreed that he attended a funeral on the neighbouring land parcel No. 1036 but denied attending any on the suit land. He acknowledged having heard of one funeral on the suit land, in 2023, but he did not stop it. He did not win the seat in 2017. He tried again in 2022 and lost. He did visit the area when campaigning. He stated that he opted to come to court when he realized that the defendants were not serious in their engagements; he thought that they were dragging their feet as they saw him as a leader. He was aware that the family of Rabera is one of the original owners. He denied that they approached him in 2003 when he was Chief to witness an agreement. An agreement dated 5 March 2003 was put to him. He agreed witnessing it but stated that the land being sold is not indicated. He denied that Rabera used to bring purchasers to him to witness their agreements. He was aware of a restriction placed in 2017 indicating 'no dealings without the original owner.' He did not know who registered this restriction and he sued for its removal. Re-examined, he reiterated that he allowed the people to remain in occupation as they negotiated. He came to court because negotiations have failed.

10. With the above evidence the plaintiff closed his case.
11. DW – 1 was Alois Rabera. He testified that he born in 1959 on the suit land and he has lived here all his life. He described the land as his ancestral land. He occupies 3 acres. He stated that he knows the plaintiff very well and they even went to school together. He testified that the plaintiff has not lived on the land and that he does not occupy the land with his permission. He produced various documents including agreements said to have been for sale of the land by the original occupants to some of the defendants. He also relied on a witness statement. In that statement, he stated that as early as 2003 he approached the plaintiff, who was then Chief, and informed him that they were selling the suit land and he could help find purchasers. He stated that he agreed to assist and some of the defendants are purchasers recommended by him. To assure them that the land had no encumbrances, he witnessed the contracts. In 2005, he was dismayed to find the land registered in the name of Samson Kaguai Nganga and that it had been used as collateral. He and other elders approached the plaintiff to clarify and he assured them of a positive feedback. They made several trips and were advised that there is no way they can get title unless they look for Mr. Nganga to pay the loan.
12. In 2013 the property was advertised for sale by public auction to be conducted on 27 September 2013. The occupants held a meeting and wrote a letter to the plaintiff explaining to them their predicament and asking if he can assist as he was then the MP. They also inquired from the auctioneer who informed them that the property would be sold unless they paid the required amount of Kshs. 1 million. He stated that the plaintiff reached out to them and scheduled a meeting. In the meeting they briefed him of what the auctioneer had communicated to them; he claimed that they shared his number with him and that he called the auctioneer. He stated that in the meeting, the plaintiff suggested, and it was agreed, that each could contribute Kshs. 1,000/= per acre that he/she resided on, and that the same was remitted to the plaintiff, who accepted to pay the balance and be their representative during the auction process. The intention was for the plaintiff to acquire the land in his name and hold it in trust for the persons who were residing therein. He stated that the plaintiff was elected to be their representative because he was the MP, knew the history of the land and that he is the one who brought in most of the people on the land. He stated that the plaintiff informed them that the process was successful and asked them to be patient and that after the land is transferred into his name he would invite a surveyor to subdivide it and titles to issue. He avers that they visited the plaintiff several times and even confronted him when he attended funerals and he told them that the title is yet to be registered in his name, that the process takes time, and encouraged them to do a search. He stated that in 2022 the plaintiff invited them and informed them that he has title in his name, showed it to them, and assured them that after the election, he will endeavour to transfer the same to them after the survey process. He averred that they are now shocked that the plaintiff has changed his mind and now wants to evict them. He asserted that the land is held in trust as they financially contributed either directly or through their representative at



- the time. He adds that by his conduct the plaintiff has been aware of their occupation but has neglected to sue or evict them from 2013 and they have therefore acquired title through proprietary estoppel and constructive trust. He added that the plaintiff attended several funerals on the same land and he cannot now want to evict their families.
13. Cross-examined, he claimed not to have known about the public auction, nor seen any newspaper advertisement for it. He nevertheless agreed that the auction took place on 27 September 2013. He conceded that he has presented no evidence that they raised Kshs. 1,000/= each and no evidence that they gave money to the plaintiff. He claimed not to have the evidence because they trusted the plaintiff. He had nothing where the plaintiff acknowledged receipt of any money nor any minutes of any meeting. He claimed that the plaintiff said they give him what they have and he would top up to buy the land. According to him, they raised Kshs. 60,000/=. He however did not have anything to show that this amount of money was raised or that they gave it to the plaintiff. He alleged that they handed it to him in cash. They did not record the date that the money was given. He himself could not recall the date. He acknowledged to be true that the plaintiff bought the suit land in the auction. He also acknowledged to be true that they asked him to help them. He said that it was true that he asked them to vacate the land. He stated that the plaintiff promised them that if they help him get to Parliament he will help them get title. He was aware that Mr. Nganga got title in 1981. The original proprietors never sued him. His brother, Joseph Odira Rabera, an original proprietor is alive and he has not sued Mr. Nganga. He stated that Mr. Nganga is now dead. No suit was filed to stop the auction nor was there any contest on how the auction was done. On the letter dated 17 August 2013 (a letter said to have been addressed to the plaintiff as MP asking him to intervene owing to the impending auction), he had nothing to show that it was received by the plaintiff or the area Chief. He was taken through the agreements he had produced as exhibits and acknowledged that they do not show the suit land. He testified that from 2013 they have been discussing with the plaintiff to see how he can give them the land but he has been refusing. They have called him five times to the Chief but he refused to attend save for one attendance by his wife. He was asked whether he has written authority from the other defendants and he acknowledged that he did not.
  14. Re-examined, he admitted that the plaintiff asked them to leave but they have no other land to go to as this is where their homes are located.
  15. DW – 2 was Carole Mutai, the Land Registrar, Migori. She testified on the entries in the register of the suit land. She confirmed that it is the plaintiff who is the registered proprietor having become so registered on 6 December 2013 and issued with a title deed on 11 December 2013. His registration was by way of transfer by chargee. There was a re-issue of his title deed in 2017. She explained that title could be re-issued if lost but she could not tell what led to the reissue as she did not have the supporting documents. She could tell that the suit land resulted from subdivision of the parcel No. 724. There was a record for proposed subdivision into two portions of 24ha and 2.0ha and transfer of 24 ha by way of sale. She could not however tell much about this as she needed to consult the parcel file for parcel No. 724 which she did not have. The title was however transferred to in 1981 (to Mr. Nganga), then charged to AFC before being charged to Business Finance Co Limited then transferred by chargee (to the plaintiff). Cross-examined, she did not know that Business Finance was among companies that were dissolved to form Consolidated Bank Limited.
  16. At this juncture, counsel for the defendants applied to recall DW-1 to produce the LCB consent for transfer of the suit land to Mr. Nganga and the Green Card for parcel No. 725 which were produced.
  17. The hearing closed with the above evidence and I invited counsel to file written submissions. I have taken note of the submissions filed and taken them into consideration before arriving at my decision.



18. The plaintiff's case is simple. He avers to be the owner of the suit land and he wants vacant possession of it. The defendants have contested the suit by claiming that they contributed when the property was purchased at the auction and that the plaintiff therefore holds it in trust. They have pleaded in their defence and counterclaim that they are entitled to own the land through proprietary estoppel and a constructive trust. I opt to start with an assessment of the defendants' case because if they fail then I will have no reason to deny the plaintiff his prayers.
19. Before I go too far, let me make clear what this case is not. In his submissions, Mr. Begi, learned counsel, did mention adverse possession, clearly in passing, and gave an authority that outlines the ingredients thereof. I think we need to be clear, so that there is no ambiguity, that the case of the defendants is not one of adverse possession. They have not in their pleadings made any mention of adverse possession and the plaintiff did not need to address himself on it; it is apparent that they are not claiming this land through adverse possession. What they have asserted is that they are entitled to the suit land through proprietary estoppel and constructive trust. There are no pleadings for adverse possession and I am not going to make any determination based on adverse possession. There is certainly no case before me that is hinged on long occupation or acquisition of prescriptive rights as there are no pleadings to that effect. I thought it is good that I make this clear given the two or so lines that Mr. Begi added in his submissions concerning the doctrine of adverse possession.
20. Further in his submissions, Mr. Begi did make very elaborate and lengthy submissions, to urge that the title of the plaintiff was irregularly acquired and therefore liable to be cancelled. He questioned the manner in which the land was acquired by Mr. Nganga and the subsequent sale to the plaintiff by way of public auction. He did submit that the land records point at a fraudulent transfer to Mr. Nganga. He referred to the LCB consent which appeared to suggest that there was to be a subdivision of the land, and sale of a portion only, to Mr. Nganga, and he questioned how Mr. Nganga obtained title to the whole land. On the sale by chargee, he pointed to the Memorandum of sale and submitted that it is only signed by the auctioneer and not by the purchaser. He also referred to the transfer by chargee instrument that was exhibited by the plaintiff and disclosed that it does not appear to have been received for registration and that the signatures were not attested.
21. I am afraid that these are not issues that are for determination herein. I cannot, within the confines of the pleadings herein, go into the issue of the sale and transfer of the suit land to Mr. Nganga. For starters, Mr. Nganga or his estate is not a party in this case. I cannot question his title without him or his estate being parties to the case. If the defendants wished to nullify the sale of the suit land to Mr. Nganga, then they needed to sue him and he would have his day in court to explain himself. Even the prayers in the counterclaim have nothing suggesting that the defendants seek to have the title of Mr. Nganga cancelled. In the same vein, I cannot go into the question of how the land was transferred to the plaintiff. The bank is not a party to this suit and there is nowhere in the pleadings or prayers that the defendants allege that the sale by public auction and subsequent transfer of title to him was improper. Even when the plaintiff testified, he was never questioned on the documents relating to transfer of the land by chargee. In fact, the manner in which the title was transferred to the plaintiff has never been questioned by the defendants.
22. The defendants actually agree that the land was sold to the plaintiff and transferred to him. They have no issue regarding the manner of sale and transfer of the land to the plaintiff's name and subsequent issuance of title to him. What they allege is that they also contributed to the purchase of the land and that there was a promise by the plaintiff, that after he has obtained title, he will then subdivide it so that the defendants get titles to the shares that they occupy. Thus, the submissions by Mr. Begi questioning the transfer of the land to Mr. Nganga and the second transfer to the plaintiff are not matters that I



can take into account in this case. The plaintiff's title is thus not subject to be impeached based on these submissions.

23. Let me go to the crux of the matter and that is the allegation by the defendants that they contributed to the purchase of the suit land and the plaintiff therefore holds it in trust. And I need to be clear that this is a trust in the nature of a constructive trust arising where one has given another money to purchase property on their behalf. It is not in the nature of a customary trust. I say this because again in his submissions, Mr. Begi went to great lengths to submit that the plaintiff holds the land under a customary trust because the suit land is the ancestral land of the defendants. A customary trust arises out of customary law where it is not uncommon to find that one person could hold land on behalf of the rest of the family or clan. He would of course have title to the land but it would be recognised that he is not the sole and absolute owner of it because he has brothers, sisters, and other relatives who are already in occupation of the land, under a common ancestry with him, and his holding of the land would be in trust also for the rest of the family. That is not the situation here. Any ancestral holding of the land under a trust got extinguished when the property was sold to Mr. Nganga and he held title to it. In other words Mr. Nganga was not holding the title in trust for them under customary law. In fact Mr. Nganga was an outsider who bought the land so that he could do business with it. It cannot be said that he was a customary law trustee of the defendants. Neither is the plaintiff holding the land under a customary trust as he is not related to the defendants by any common ancestry and neither was the land registered in his name by virtue of custom. What I am trying to impress here is that the nature of trust pleaded by the defendants is not a customary trust but a constructive trust, that is, they say that they contributed to the purchase of the suit land. In essence they claim that the plaintiff was their agent and that the purchase price was a joint effort between themselves and the plaintiff. That is what I need to interrogate and is what I now proceed to do so.
24. Now, there is absolutely no evidence that the defendants contributed any money and that they gave any money to the plaintiff so that he can buy the land at the auction on their behalf. There is no letter, no memorandum of understanding, no agreement, no minutes of meetings, no acknowledgment, no telephone message; there is simply nothing. There is even no independent witness to corroborate what the sole witness of the defendants stated. In light of the denial by the plaintiff that he had absolutely no arrangement to purchase the suit land on behalf of the defendants, the defendants needed to bring evidence to prove that indeed this arrangement existed. In his evidence, DW – 1 stated that they raised Kshs. 60,000/=. You would expect that where a number of people raise money in varying amounts, there would be a record of their contribution, so that it is known who has paid, how much, and who has not. No such record was availed. I find it difficult to believe that so many people would make contribution and not a single document would be written to say who has contributed and what amount such person has contributed. Such document would of course be important to show who has paid and who has not; for it is the defendants' case that they were supposed to contribute Kshs. 1,000/= each for each acre occupied. I am not persuaded to find that the defendants made any contribution towards the purchase of the suit property by the plaintiff at the public auction.
25. I think with this finding the case of the defendants must collapse. They did of course mention proprietary estoppel but I think it was all tied to the assertion that they contributed towards the purchase price. In essence, my understanding is that they were saying that the plaintiff is estopped from evicting them or denying that they have a right to be on the suit land, because they contributed towards the purchase price and that the plaintiff is holding the property in trust for them. Estoppel applies where one has made a promise to another, and that person has acted on that promise to his detriment, the result being that the one who made the promise would be prevented from asserting his rights. In our case, the defendants claim that the plaintiff promised to buy the land on their behalf and they acted on that promise by giving him money, and therefore the plaintiff is barred from claiming to have



exclusive title and prevented from asserting individual exclusive rights over the suit land. That is the way I appreciate the invitation of the doctrine of estoppel in the defendants' case. But without proving any promise made, and without proving that they acted on that promise by contributing money, it cannot be claimed that the doctrine of estoppel will apply against the plaintiff. In proprietary estoppel, the estoppel applies so as to allow the beneficiary of the promise some right over property. That, as I have demonstrated above, cannot apply to the facts of our case.

26. It will be seen that I am not persuaded that there is any trust or estoppel that runs in favour of the defendants. I have no choice but to dismiss the case of the defendants.

Having dismissed the case of the defendants I have no reason to decline the plaintiff's case. The plaintiff is the registered proprietor of the suit land and as proprietor he is the one vested with proprietary rights as enshrined in Section 24 of the [Land Registration Act](#) which provides as follows :

24. Interest conferred by registration

Subject to this Act—

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

27. From the foregoing it is apparent that it is the registered proprietor who holds all rights and privileges appurtenant thereto. This includes the right of ingress and egress, and the right to occupation and use. These rights are vested in the plaintiff, not the defendants. Being alive to this, and in light of the fact that the defendants have failed to prove their case, I allow the case of the plaintiff. I declare the plaintiff to be the sole registered owner of the suit land and thus entitled to the prayers for eviction and permanent injunction. I appreciate that the defendants have been on the suit land for a considerable amount of time and I truly sympathise with them. But they failed in their case and they have to let the plaintiff enjoy his rights over the land. I will give them 90 days to give vacant possession and in default the plaintiff is at liberty to execute the order for eviction. In this period of 90 days, the defendants not to undertake any construction, enter any body on the suit land, or in any other way negatively alter the character of the suit land. After lapse of the 90 days the defendants shall be barred by an order of permanent injunction, restraining them from entering, being upon, utilizing, or in any other way interfering with the plaintiff's quiet possession of the suit land. The plaintiff will also get the costs of both the suit and the counterclaim.

28. Judgment accordingly.

**DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF OCTOBER 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**MIGORI**

**Delivered in the Presence of :**

Mr. Kiseru for the plaintiff



Ms. Onchweri h/b for Mr. Begi for the defendants

Court Assistant – David Ochieng'

