



Ogembo & another v Shah & 3 others (Environment & Land Case E046 of 2021) [2024] KEELC 6718 (KLR) (9 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6718 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E046 OF 2021**

E ASATI, J

OCTOBER 9, 2024

BETWEEN

SILPA ACHANDO OGEMBO 1ST PLAINTIFF

JOSEPHINE ANYANGO OGEMBO 2ND PLAINTIFF

AND

KETAN PRAVI SHAH 1ST DEFENDANT

I & M BANK LIMITED 2ND DEFENDANT

LAND REGISTRAR, KISUMU COUNTY 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. The Plaintiffs, SILPA ACHANDO OGEMBO and JOSEPHINE ANYANGO OGEMBO filed this suit in their capacity as the administratrixes of the estate of VALENTINE OGEMBO ONYANGO, deceased. Vide the plaint dated 10th September, 2021 they claimed that land parcel known as KISUMU MUNICIPALITY/BLOCK 7/162 originally described as Land Reference number 1148/5/XXXV or plot number 5 Paul Mboya Road (the suit land herein) belonged to the deceased. Their complaint was that the transfer of the suit land from the deceased to other parties and subsequently to the 1st Defendant was illegally and fraudulently carried out by the 1st Defendant and the officers of the 3rd Defendant. They further complained that the Defendants registered a legal charge in favour of the 2nd Defendant over the suit land thereby creating an encumbrance on the title. The Plaintiffs further complained that the Defendants' trespass, unlawful occupation and use of the suit land has caused the Plaintiffs and the beneficiaries of the deceased grave inconveniences and prevented confirmation of the Grant. The Plaintiffs therefore sought for the following relief against the Defendants: -



- a. A temporary injunction to restrain the Defendants, their agents or servants or any other person acting through their directions or order from continued trespassing, occupation, interfering, with and/or in any other manner whatsoever, dealing with the property known as KISUMU MUNICIPALITY/BLOCK 7/162 pending hearing and determination of the suit.
 - b. a permanent injunction to restrain the Defendants, their agents or servants or any other person acting through their directions or order from continued trespassing, occupation, interfering, with and/or in any other manner whatsoever, dealing with the property known as KISUMU MUNICIPALITY/BLOCK 7/162 pending hearing and determination of the suit.
 - c. an order that pending the hearing and determination of the suit, all rents being paid by the tenants in respect of the property known as KISUMU MUNICIPALITY/ BLOCK 7/162 be paid into the estate account or alternatively be deposited in an escrow account as directed by the court.
 - d. an order for the rendering of accounts for all rents collected by the 1st Defendant from the suit premises from the time of registration into the 1st Defendant's name i.e. 28th March, 2013 to date.
 - e. An order directed at the Land Registrar, Kisumu to cancel the registration and transfer to the 1st Defendant's name and rectify and revert the same back into the names of VALENTINE OGEMBO ONYANGO.
 - f. An order directed at the Land Registrar to cancel the registration of the legal charge created over the suit property in favour of the 2nd Defendant.
 - g. General damages against the Defendant for trespass.
 - h. Costs of this suit.
 - i. Interest on (c), (d) and (e) above from the date of filing this suit until payment in full.
 - j. Any other award that the court may deem fit, just and expedient in the circumstances, to award.
2. The 1st Defendant filed a Statement of Defence dated 13th October, 2021 in which he denied the Plaintiffs' claim and averred that the suit land was legally transferred into his name after paying the full purchase price of Kshs.32,000,000/=. That the suit land was secured to facilitate the 1st Defendant obtain finance so as to be able to purchase it and that the 1st Defendant dutifully transmitted the purchase price to the Plaintiffs together with their son or step son one Maurice Otieno Ogembo and that the Plaintiffs legally handed over proprietorship and physical possession since the year 2013 to date. That the suit is ill-instigated and is an abuse of court process and does not disclose any cause of action against the Defendants.
 3. The 2nd Defendant filed Written Statement of Defence dated 29th February, 2022 denying the Plaintiffs' claim. The 2nd Defendant averred that on the security of the suit land, it advanced to the 1st Defendant a loan of Kshs.28,000,000 after the 1st Defendant assented to the financial arrangement and executed all necessary documents including the legal charge and that the charge created was regular and legal. The 2nd Defendant denied the particulars of fraud and illegality pleaded in the plaint and prayed that the suit be dismissed.
 4. The 3rd and 4th Defendants filed a Statement of Defence dated 14th October, 2021 denying the Plaintiff's claim but admitted the jurisdiction of the court.



The Evidence

5. The Plaintiffs testified and called 3 witnesses. The 1st Defendant testified and called one witness. On behalf of the 2nd Defendant, one witness testified. The 3rd and 4th Defendants adduced no evidence.
6. PW1 was the 1st plaintiff she adopted the contents of her witness statements dated 10/9/2020 and 31/1/2022 as her evidence in chief. She denied selling the suit land to the 1st Defendant or receiving any money for the purchase of the suit land. She denied signing any land sale agreement.
7. On Cross examination she stated that succession to the estate of her late husband, Valentine Ogembo, had not been completed to date. That Valentine Ogembo had sued Dr. Onyango Ogembo in KSM HCC No. 131 of 1996 because Dr. Onyango Ogembo wanted to take the property of Valentine Ogembo the suit land herein.
8. That the suit property was a commercial property and that it was one Maurice Otieno Ogembo collecting the rents from there after the deceased mandated him to. That forged documents were used to transfer the land.
9. PW2 was the 2nd plaintiff. She stated that she was a widow of Valentine Ogembo Onyango deceased. She adopted the contents of her witness statements dated 10/9/2020 and 31/1/2022 as her evidence in chief. She denied selling land to the 1st Defendant.
10. On Cross examination she stated that Dr. Onyango Ogembo, deceased, was her son. That he had a case with her husband.
11. PW3 was Morris Otieno Ogembo he adopted the contents of his witness statement dated 31/1/2022 as his evidence in chief. He produced documents in support of the plaintiffs' case. These were Grant of Letters of Administration Ad Litem, Agreement between the deceased and Amerali Ibrahim Habib, transfer of lease dated 20/11/1974, letter dated 27th November 1973, discharge of charge dated 8th May 1979, Letter dated 8/8/1977, application for registration of lease dated 6/10/1977, a copy of lease between the deceased and Lalani Emporium Ltd for the period starting 1/8/1987, Insurance policy dated 20/9/1997, Certificate of Official Search dated 4/7/1997, lease dated April 1974, court order dated 28/6/2005 in Kisumu HCCC No. 131 of 1996. Green card, Certificate of Official Search dated 15/3/2018, letters for tenants, pleadings (Certificate of urgency and Notice of Motion) in Succ. Cause No. 545 of 2001, certified copy of proceedings in Kisumu HCCC No. 131 of 1996, green card certified on 28/1/2004, Certificate of Official Search dated 23/1/2003 and an order in Kisumu HCC No. 131 of 1996 issued by Justice Wambilyanga on 19/10/1999.
12. On cross examination PW3 stated that the property used to bring in rent of Kshs 250,000/= per month. That they agreed with Mr Ketan to lend him Kshs 25,000,000/= which money was transferred into his account by I & M Bank. That the property was charged to the Bank. He denied signing the land sale agreement in favour of the 1st Defendant.
13. He stated that his father died on the 25/6/2001. That the suit land was last in the name of the deceased in the year 1997.
14. He stated further that the Kshs 25,000,000/= which he received from the 1st Defendant was not for the family but for himself. That he gave Ketan (1st Defendant) the authority to collect rent as one of the administrators of the estate. That the estate of the deceased never sold the land. He stated that the money he got from the 1st Defendant was to help him vie for the position of MCA (Member of County Assembly). That also his son had a murder case and needed money to use. That incase he succeeded to be elected as MCA he could repay the money using his salary and benefits. That Mr. Ketan was to take



- the rent for 5 years as a way of repaying the loan. That for the five (5) years, he (PW3) did not collect the rent as it was the 1st Defendant collecting. That the court orders were not implemented because the Land Registrar was a friend of Dr. William Onyango Ogembo.
15. He stated further that he had not seen any transfer form in favour of Ketan, that there is no evidence of payment of stamp duty, that he never provided his photograph or Identity card to facilitate the transfer in favour of the 1st Defendant. That the firm of Olel Onyango Ingutya Advocates has never acted for him. That the said firm acted for Dr. William Onyango Ogembo in Kisumu HCCC No. 131 of 1996.
 16. PW4 was Anthony Muchika the in charge of High court Kisumu. He testified that together with the in charge of the Archives Kisumu High Court, they had tried to trace file No. KSM HCCC No. 131 of 1996 without success. That judgment was delivered in the case. PW5 produced the court file in respect of KSM HC SUCC Cause No, 545 of 2001 as exhibit. He testified that it was a reconstructed file and that the Grant in the file had not been confirmed.
 17. The 1st Defendant testified as DW1. He relied on the contents of his witness statements dated 22/11/2021 and 8/3/2022. He produced certificate of lease, land sale agreement, petty cash vouchers, tenancy agreement, letter dated 12/1/2017 and letter dated 24/1/2012 as exhibits.
 18. He testified that he bought the suit land from the plaintiffs and Maurice Otieno Ogembo who introduced themselves to him as personal representative of the deceased Valentine Ogembo. That he paid the purchase price in full. That he conducted search. That he saw original title deed in the names of the widows and Maurice Otieno Ogembo before he bought the land. That he did not witness the plaintiffs and Maurice sign the agreement. That he did not have the transfer form and that he paid Kshs 1.3 million as stamp duty but did not have the receipt in respect thereof. That he was not a tenant in the premises.
 19. The 1st Defendant testified further that the purchase price of the land was Kshs 32,000,000/=. That he did bank transfers of kshs 5,000,000/= on 28/6/2013 from I & M bank to Family Bank, Kshs 4,000,000/= on 17/6/2013 and Kshs 14,500,000/= on 30/7/2013. That he did not escape to the UK in the year 2017 because a report had been made to the DCIO inquiring how he got the land.
 20. DW2 Hon. Francis Rayola Olel, J. testified that he was previously practicing as an Advocate in Kisumu in the firm of Olel Onyango Inguya Advocates. He testified that the plaintiffs and Maurice Otieno Ogembo appeared before him and he witnessed their signatures on the land sale agreement. That the only document he saw at the time of signing of the land sale agreement was a certificate of lease. That the lease was in the name of the plaintiffs and PW3 and he had no reason to doubt them because they had the certificate of lease. That they were people he knew before.
 21. On behalf of the 2nd defendant Doreen Otieno testified as DW3 she relied on the contents of her witness statement dated 2/4/2022. She testified that the Bank (2nd defendant) has no liability save that it holds a charge that was properly registered by the 1st Defendant as owner of the property. On cross examination, DW3 testified that there is a valid charge held by the bank. That the bank did due diligence.

Submissions

22. At the close of the evidence, parties filed written submissions on the case. Written submissions dated 3rd March, 2024 and further submissions dated 5th April, 2024 were filed by the firm of Otieno Yogo & Ojuro Advocates on behalf of the Plaintiffs.



23. Written submissions dated 19th March, 2024 were filed by the firm of D.O.E. Anyul & Company Advocates on behalf of the 1st Defendant. Written submissions dated 22nd May, 2024 were filed by the firm of L.G. Menezes on behalf of the 2nd Defendant. No submissions were filed on behalf of the 3rd and 4th Defendants.

Issues for Determination

24. From the pleadings, the evidence tendered and submissions made, the following emerge as the issues for determination herein;
- a. Whether or not the suit land belonged to the deceased.
 - b. Whether or not transfer of the suit land into the name of other parties and subsequently the name of the 1st Defendant was illegal and fraudulent.
 - c. Whether or not the charge created over the suit property in favour of the 2nd Defendant should be discharged.
 - d. Whether or not the Plaintiffs are entitled to the relief sought.
 - e. Who pays the costs of the suit?

Analysis and Determination

25. The provisions of Order 21 Rule 4 and 5 of the Civil Procedure Rules require this court to determine each of the framed issues by making a finding or decision on each of them and the reasons therefor.
26. The first issue for determination is whether or not the suit land belonged to the deceased.
27. The Plaintiffs pleaded in paragraph 6 of the plaint that at all material times to the suit, the late Valentine Ogembo Onyango, deceased, was the registered owner of parcel of land known as KISUMU MUNICIPALITY BLOCK 7/162 originally described as Land Reference Number 1148/5/XXXV or Plot No.5 Paul Mboya Road.
28. In paragraph 8 of the same plaint, the Plaintiffs pleaded on how the deceased acquired the suit land; that he bought it from one Amirali Ibrahim Habib and Mrs Shah Sultan vide land sale agreement dated 20th November, 1973. This information was repeated in the testimony of PW1 and PW2 whose witness statements were adopted as their evidence in chief.
29. To support their claim that the land belonged to the deceased, the Plaintiffs produced as exhibits; memorandum of sale dated 20th November, 1973 in respect of the suit land. The Memorandum of sale was between Amarali Ibrahim Habib and Mrs Shah Sultan as the sellers and Valentine Ogembo Onyango as the buyer. The Plaintiff also produced Transfer of lease in respect of the suit land in favour of the deceased.
30. The Plaintiffs also produced Certificate of Official Search dated 4th July, 1997. The same shows that the suit land was first registered in the name of the deceased on 28th September, 1975 which was the same date when the register in respect of the suit land was opened the suit land registered in the name of the deceased as a first registration.
31. The 1st Defendant vide his Statement Defence dated 13th October, 2021 denied the contents of the plaint and specifically denied that the suit land at all material times belonged to the deceased. He averred that at the time he bought the suit land, it was registered in the name of the plaintiffs and Maurice Otieno Ogembo. He testified vide his witness statement dated 22nd November, 2021 that at the time



of negotiation to buy the suit land, he was shown an original certificate of lease. He produced a copy thereof as exhibit. The same was dated 17th January, 2013. It showed that the registered owners of the suit land were Maurice Otieno Ogembo (PW3), Silpa Achiando Ogembo and Josephine Anyango Ogembo. He stated on cross-examination, that the sellers of the land introduced themselves to him as the representatives of Valentine Ogembo Onyango, deceased.

- 32 It was the Plaintiffs' case that during the lifetime of the deceased, one of his sons Dr. William Onyango Ogembo caused the land to be transferred in favour of an entity called Ogembo Family Holdings Limited. That the deceased filed a suit against the said son and obtained orders that the land reverts back to the deceased. The Plaintiffs produced proceedings in respect of the suit No. Kisumu HCC NO.131 OF 1996 as exhibit. The proceedings show that parties in the case were Valentino Ogembo Onyango and Dr. Onyango Ogembo. The proceedings further show that on 19th October, 1999 the court allowed an application for injunction restraining the Respondent (Dr. William Onyango Ogembo) from interfering with the suit land, an order committing the Respondent to jail for contempt of court and an order that the transfer and registration of the suit property in the name of Defendant's Company was declared null and void and cancelled. Costs were awarded to the plaintiff (the deceased herein)
- 33 The green card produced by the plaintiffs exhibit shows that on 22nd May, 2000 a court order in CIVIL SUIT NO.131 OF 1996 was registered.
- 34 From the evidence, the deceased died on 25/6/2001. At that time, the entry subsisting in the register was that of the court order registered on 22/5/2000 in Civil Suit No.131 of 1996.
- 35 The next entry (which was the first entry made after the death of the deceased) was an entry in favour of Ogembo Family Holdings Limited as the proprietor. The green cards produced do not provide explanation on how this happened. There are no remarks to show whether any consideration was made, whether it was a transfer, a gift or transmission or whether succession to the estate of the deceased had been undertaken or not.
- 36 The proceedings in KISUMU HCCC NO 131 OF 1996 also show that later on, on 28th June, 2005, an order was made by consent to the effect that;
- QUOTE{startQuote “}
- (a) ...Kisumu Municipality block 7/162 be registered in the name of the estate, in particular to Valentine Ogembo Onyango. The said transfer be effected within a week.
 - (b) the Land Registrar is hereby directed or ordered to effect the said transfer within the next seven (7) days from the date hereof,
 - (c) the Respondent to forgo the committal proceedings for contempt against the applicant,”
37. It was submitted on behalf of the 1st Defendant that the suit land did not belong to the deceased because the suit land had not been in his name since the year 1977 or thereabout. That as from 2nd September, 1998, the suit property was in the name of Ogembo Family Holdings. That there was no case against Ogembo Family Holdings Limited. That the court order in Kisumu HCC NO.131 OF 1996 that declared the transfer of the suit land from the deceased null and void and cancelled it was never registered at the Lands office even though there was an order that it be perfected within seven (7) days.
38. I have considered the evidence and submissions. The plaintiffs were able to explain how the deceased acquired the suit land and how it got transferred and registered in his name. The Certificate of Official



Search dated 4th July 1997 confirmed that as at that date the suit land was in his name. In his lifetime, the deceased obtained a court order for cancellation of the transfer of the land to Ogembo Family Holdings Limited. The green card shows that there was a court order emanating from Kisumu HCC NO.131 OF 996 registered on 22nd May, 2000.

39. The order was followed and reinforced by the consent order that the land be reverted and registered in the name of the estate of the deceased. The submission that the last time the suit land was in the name of the deceased was in 1977, is therefore not correct.
40. There is no evidence that the orders in Kisumu HCC NO.131 OF 1996 dated 19th October 1999 and 28th June 2005 were ever set aside on appeal or upon review. The consent order expressly directed that the land be reverted back to the estate of the deceased within 2 weeks.
41. I find that at all material times and particularly at the time of the alleged sale to the 1st Defendant, the suit land belonged to the deceased.
42. The second issue for determination is whether or not transfer of the suit land into the names of other parties and subsequently to the 1st Defendant was illegal or fraudulent.
43. The Plaintiffs pleaded in paragraph 14 of the plaint that the transfer of the suit land from Valentine Ogembo Onyango, deceased, to other parties and subsequently to the 1st Defendant was illegally and fraudulently carried out by the 1st Defendant and the officers of the 3rd Defendant.

The Plaintiffs itemized the particulars of illegality and fraud as;

- a. effecting transfer from the name of the deceased without a confirmed Grant as required by law.
 - b. using forged documents to transfer the land from name of Valentine Ogembo Onyango, deceased to the 1st Defendant.
 - c. illegally registering a legal charge in favour of the 2nd Defendant thereby creating an encumbrance on the title hence delaying confirmation of the Grant.
 - d. illegally dispossessing the beneficiaries of the late Valentine Ogembo Onyango of their rightful inheritance.
 - e. making false entries against the title number Kisumu Municipality Block 7/162.
 - f. illegally making transfers using inadequate and forged documents thereby dispossessing the beneficiaries of the estate of the late Valentine Ogembo Onyango.
 - g. illegally collecting rent from the tenants on the said premises and misappropriating the same to the detriment of the beneficiaries.
 - h. illegal conversion of property by the Defendants.
46. The Plaintiff rehashed the particulars of fraud in their witness statements adopted as part of their evidence in chief. The 1st Plaintiff who testified as PW1 stated in court that she never sold the suit land to the 1st Defendant and that she was not paid any money for the purchase of the suit property. She denied ever dealing with the law firm of Olel, Onyango, Ingutya Advocates.
 47. Similarly, the 2nd Plaintiff testified and denied ever participating in the sale of the suit land to the 1st Defendant. PW3 Morris Otieno Ogembo, a son of the deceased testified vide his written witness statement dated 31st January, 2022 that he was one of the administrators of the estate of the deceased. He stated that the sale agreement was a forgery as they never processed any title in their names as



the court order was clear that the land was to be transferred back to his late father's name. That the documents used to transfer the suit land in favour of the 1st Defendant have never been traced at the Lands Registry. That the dispatch book at the Lands office shows that no one was issued with the Certificate of Lease exhibited by the 1st Defendant. That the facts which show fraud on the part of the 1st Defendant are that the Certificate of Lease was allegedly issued on 17th January, 2013 while the alleged sale agreement was allegedly executed on 25th January, 2013 and payments made in June 2013 long after the completion period had elapsed without any extension of the same. That there is no transfer form to show that he executed a transfer form in respect of the suit property in favour of the 1st Defendant. That there is no evidence of payment of stamp duty for the transaction. That the estate did not sell the suit land as the Grant of Letters of Administration is yet to be confirmed and no one is capable of disposing of the assets of the estate without a court order.

48. He stated that the 1st Defendant lent him Kshs. 25 million as a loan to aid him deal with a murder case his son had and to vie for the position of MCA (Member of County Assembly) which the 1st Defendant was to recover from the rents from the suit premises. PW3 denied that Mr. Rayola Olel Advocate, as he then was, was ever his Advocate. That the signature on the land sale agreement to the 1st Defendant was not his. That the signature on the petty cash vouchers were not his. That he did not sign any transfer form or provide his photograph or Identity card for transfer of the suit land in favour of the 1st Defendant.
49. It was submitted on behalf of the Plaintiffs on this point that unless and until the Grant is confirmed and property distributed or ordered to be sold by the court, no legal transfer can be effected in respect to property of a deceased person. That section 26 of the [Land Registration Act](#) and Article 40 of [the Constitution](#) of Kenya is only available to a party if the title was legally and procedurally acquired.
50. That there is no transfer of lease executed by the parties which is the only documents that is mandatorily required as a primary document to transfer an interest in land.
51. Counsel submitted that there is no evidence that stamp duty was paid. That there is no evidence that there was consent from the Land office allowing transfer. That the certificate of lease in the names of the Plaintiffs and PW3 which was exhibited by the 1st Defendant was disowned by the Plaintiffs. That they had never seen it or applied for the land to be transferred from the deceased's name to their names.
52. Counsel relied on the case of *Funzi Island Development Ltd & 2 Others –vs- County Government of Kwale & 2 Others* (2014)eKLR where it was held that a registered owner of land enjoys absolute and indefeasible title if the allocation was legal, proper and regular. Counsel also relied on [Kasim Ahmed Omar & Another –vs- Awuor Ahmed Abel & Others, Malindi ELC NO.18 OF 2015](#) where it was held that a certificate of title is an end product of a process that if the process followed in issuing the title did not comply with the law, then such title can be cancelled by the court. Counsel further relied on the cases of *Kenya National Highway Authority –vs- Shalien Masood Mughal & 5 Others* [2017eKLR and *Mureithi & 2 Others (for Mbari ya Murathimi Clan –vs- Attorney General & 5 Others – Nairobi HCMCA NO.158 OF 2005 [2006] I KLT 443* to support the submissions.
53. Counsel submitted that the 1st Defendant held no valid title that could confer any interest in land, nor is it capable of being used to secure a legal charge from the 2nd Defendant. Counsel submitted that the court has power to cancel title that was improperly acquired or acquired through fraud.
54. The 1st Defendant on the other hand pleaded vide his Statement of Defence dated 13th October, 2021 and denied the allegations of fraud and put the Plaintiffs to strict proof thereof. In paragraph 5 of the Statement of Defence he averred in response to the particulars of illegality listed in paragraph 14 of the plaint that the Plaintiffs and Maurice Otieno Ogembo consciously got registered as the proprietors of



- the suit land and thereafter caused it to be transferred in his favour after receiving the full purchase price of the said land.
55. He further pleaded in paragraph 7, 8 and 9 of the Statement of Defence that at the time of transfer in his favour, the land was not the property of Valentine Ogembo Onyango. That he paid Kshs.32,000,000/- to the Plaintiff and Maurice Otieno Ogembo before the land was transferred to him. That the suit property was secured to facilitate the 1st Defendant obtain finance so as to be able to purchase the property. That the Plaintiffs legally handed over proprietorship and physical possession since the year 2013.
 56. That the Lease Title document was verified at the Lands Registry Kisumu that it was a genuine document and that it was the Plaintiffs and Maurice Otieno Ogembo who transferred the suit land to him.
 57. He testified further that upon payment of the purchase price, the Plaintiff handed over to him the premises and the existing tenants. That the rent proceeds from the premises are being used to service the loan. That sometimes in the year 2020 during the Covid-19 pandemic, Maurice Otieno Ogembo informed him that the Co-vendors wanted him to add to them Kshs.8,000,000 since the actual price of the property should have been Kshs.40,000,000. That the present suit is meant to blackmail him to pay the Kshs.8,000,000 more which is unwarranted. That he purchased the subject property legally and the same was procedurally charged to the 2nd Defendant.
 58. He stated on cross-examination that he did not witness Maurice Ogembo, Josephine and Silpa Ogembo sign the sale agreement. He stated further that he did not have the transfer form and that although he paid Kshs.1.3 million for stamp duty, he did not have receipts for it and that he did not have consent for transfer of lease. That his lease certificate was issued on 28th February, 2013.
 59. DW2 was Hon. Francis Rayola Olel J testified that Maurice Ogembo and the Plaintiffs appeared before him and he witnessed their signature. That the 1st Defendant's signature was witnessed by someone else.
 60. It was submitted on behalf of the 1st Defendant that the suit land had been in the name of Ogembo Family Holding Limited since the year 1998 then was transferred into the name of the Plaintiffs and PW2 on the 17th January, 2013 who eventually transferred it to the 1st Defendant. That the Plaintiffs have not complained that Ogembo Family Holdings Ltd did not transfer to them the subject suit land. That Ogembo Family Holdings Limited has not complained that the Plaintiff and PW3 procured the registration of the suit land on 24th January, 2013 fraudulently.
 61. That the Plaintiffs and PW3 are running away from their conscious actions just because the entire family wants them to account for their legitimate actions. That the sale agreement and the transfer of the subject suit land is valid and the charge created thereto is legal and valid. Counsel relied on the case of Eldoret HC ELC NO.132 OF 2013 Mary Cherono Mengich –vs- David Kipletting Rugut & 2 Others.
 62. I have considered the pleadings, the evidence tendered and the submissions on this point. The transactions that led to the transfer of the suit land in favour of the 1st Defendant took place in the year 2013. I have already found in issue No. 1 hereinabove that as at the time of death of the deceased the suit land belonged to him because of the court order that reverted the land to him and cancelled registration of the same in the name of Ogembo Family Holdings Ltd. The evidence and particularly the proceedings in HCCC No. 131 OF 1996 show that there was a further order in the case entered later by consent that gave the land Registrar timelines within which to revert the land to the deceased.



This means that from the date of the order, the suit land formed part of the estate of the deceased and could only be transacted in, in accordance with the provisions of the *Law of Succession Act*.

Section 2(1) of the *Law of Succession Act* provides that:

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

63. Section 79 of the same Act vests the property of a deceased person in the deceased person’s personal representative while the provisions of section 45 makes it an offence for any person not appointed as personal representative or administrator of the deceased to deal with property of the deceased.
64. There is no evidence that any Letters of Administration were taken out and/or confirmed in the names of the Plaintiffs and PW3 who are named as the sellers in the land sale agreement in favour of the 1st Defendant. Apart from the Grant of Letters of Administration ad Colligenda bona dated 5th September, 2001 and the Limited Grant of Letters of Administration ad Litem dated 2nd November, 2021 produced herein as exhibits, no Grant of Letters of Administration or Certificate of Confirmation of Grant was produced herein to demonstrate that the Plaintiffs and Maurice Otieno Ogembo had capacity to sell the land. The Letter of Administration and Colligenda bona was issued and limited for the purpose only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the estate until further representation.
65. The Grant of Letter of Administration ad Litem was limited to the purpose only of filing suit and was limited to 90 days. The Grant was issued on 10th August, 2021 and extracted on 2nd November, 2021.
66. Although the Plaintiffs and PW3 denied involvement and knowledge of the land sale agreement in favour of the 1st Defendant, the evidence adduced by the 1st Defendant and DW2 Hon. F. Rayola Olel J shows that the Plaintiffs and PW3 did execute the agreement before Hon. F. Rayola Olel J, then practicing as an Advocate. No reasons were given why the Advocate could come to court to lie that the parties appeared before him and signed the agreement. Their National Identity card numbers captured in the agreement were not denied. It was submitted on behalf of the 1st Defendant that the land was as at the time of sale to him, registered in the names of the Plaintiffs and PW3. The Plaintiffs have denied this. Although the 1st Defendant produced a certificate of lease in the names of the plaintiffs and PW3, no evidence was availed from the Lands office to authenticate the same and explain the circumstances leading to the registration of the Plaintiffs and PW3 as the proprietor of the suit land. There is no evidence that the registration of the suit land in the names of the Plaintiffs and Maurice Otieno gave them a good title that they could pass to a third party.
67. The Plaintiffs denied receipt of any money for sale of the land. Although the sale agreement for the 1st stated that Kshs 1 million was paid at the execution of the agreement, DW2 did not testify that he saw any money exchange hands at the execution of the agreement. The 1st Defendant provided evidence by way of Petty Cash voucher of payment of monies to PW3 (Maurice Otieno Ogembo). He also testified that he transferred money to PW3’s account. PW3 on his part acknowledged receipt of Kshs.25,000,000 from the 1st Defendant but alleged that the same was a soft loan advanced by the 1st Defendant to him which loan was to be repaid through collection of rent by the 1st Defendant from the suit premises and from salary and benefits if he succeeded to be elected as MCA.



68. The process of transfer in favour of the 1st Defendant was not explained. The green card produced by the 1st Defendant was not authenticated. It starts from the entry that is in favour of the plaintiffs and PW3. That green card does not give the full history of the land.
69. Hence the root of the 1st defendant's title was not explained. There is no evidence as to what documents were used to transfer the land to the plaintiff and later to the 1st Defendant.
70. What emerges is that the 1st Defendant either fell victim or was part of a fraudulent deal to defraud the estate of the deceased. The deal involved the plaintiffs and PW3 and other people probably from the 3rd Defendant's office. This is because it is apparent from the evidence that the Plaintiffs and PW3 processed an invalid certificate of lease in their names which certificate of lease was shown to the 1st defendant and DW2 (the advocate) and signed the land sale agreement in favour of the 1st Defendant in the presence of DW2 knowing that the land belonged to the deceased. PW3 received money from the 1st Defendant and the 1st Defendant managed to have the land transferred in his favour without due process. It is my finding that neither the plaintiffs and PW3 nor the 1st Defendant is without blame. The plaintiffs are however before this court herein on behalf of the estate of the deceased.
71. The 1st Defendant filed no counter-claim to seek redress against the Plaintiffs and PW3.
72. I find that the transfer in favour of the 1st Defendant was fraudulent and did not convey a good title to the 1st Defendant.
74. The third issue is whether the charge in favour of the 2nd Defendant should be discharged.
75. Vide its 2nd Defendant's written Statement of Defence dated 29th January, 2022, the 2nd Defendant pleaded that after requisite negotiation between the 1st Defendant and 2nd Defendant as per bank procedures and rules, a letter of offer dated 17th April, 2013 was issued by the 2nd Defendant to the borrower to-be for a loan of Kshs.28,000,000/- to be accrued to the 1st Defendant on the security inter alia of KISUMU/MUNICIPALITY BLOCK 7/162. In paragraph 9, the 2nd Defendant pleaded that it has always conducted due diligence to the maximum in so far as to establish the 1st Defendant's claim to ownership of the suit property. It denied the particulars of illegality and fraud itemized under paragraph 14 of the plaint.
76. The 2nd Defendant called one witness who testified as DW3. She reiterated the contents of the Statement of Defence through the contents of her witness statements dated 2nd April, 2022. She produced documents in support of the 2nd Defendant's case.
77. The documents included Letter of Offer dated 17th April, 2013 offering credit facilities of a total of Kshs.28,000,000 to the 1st Defendant. The last page of the letter of offer shows that the offer was accepted by the 1st Defendant on 23rd April, 2013. The other document was another Letter of Offer dated 28th April, 2013 for Kshs.4.5 million and another Letter of Offer dated 27th May, 2015. DW3 also produced a charge instrument dated 11th June, 2013 between the 1st Defendant and the 2nd Defendant over the suit land to secure a loan facility of Kshs.28,000,000/- in favour of the 1st Defendant, a copy of certificate of lease dated 28th February, 2013 in respect of the suit land showing that the suit land was registered in the name of the 1st Defendant.
78. The certificate of lease also shows the existence of the charge, certificate of official search dated 11th June, 2013 shows that the charge was registered on 11th June, 2013.
79. On cross-examination, DW3 stated that there is a valid charge held by the bank. That the bank did due diligence and there was no indication or entry of a subsisting suit in respect of the suit property.



80. That the bank relied on the information on the land register. That the information in the search was confirmed by the letter from the lands office. That it is the owner of the title who can explain how he obtained it and show the validity of the title.
81. It was submitted on behalf of the 2nd Defendant that the Plaintiffs' suit was anchored on fraud and illegality in the procedure in which the transfer and registration of the suit land in favour of the 1st Defendant was done and how the legal charge in favour of 2nd Defendant was done.
82. That the standard of proof in causes of action involving fraud is higher than proof on a balance of probabilities though not beyond a reasonable doubt as required in criminal cases. Counsel relied on the case of Ratalal Gordhanbhai Patel –vs- Lalji Makanji, Court of Appeal, Civil Appeal No.70 of 1956 (1957)EA 314 to support the submissions.
83. Counsel submitted further that the Plaintiff failed to discharge the legal burden to prove that the 2nd Defendant was involved in illegal and fraudulent acts. Counsel relied on the provisions of sections 107, 108 and 109 of the Evidence Act on the legal burden of proof.
84. Counsel submitted that the Plaintiffs have no legal proprietary interest on the suit property as they relinquished the interest to the 1st Defendant.
85. The Plaintiffs pleaded in paragraph 14(c) of the Plaint that there was an illegal registration of legal charge in favour of the 2nd Defendant creating an encumbrance over the suit property.
86. From the evidence, the 2nd Defendant took no part in the transactions that led to registration of the suit land in the name of the 1st Defendant. The 2nd Defendant demonstrated that it did due diligence. There is no evidence that the 2nd Defendant had notice of any defect in the 1st Defendant's title. The 2nd Defendant released loan facility to the 1st Defendant which money the 1st Defendant claims was paid to PW3 and the Plaintiffs as part of the purchase price.
87. That notwithstanding, given that the 1st Defendant did not have a good title and that the land belonged to the estate of the deceased, the charge over the suit land should be discharged on condition that the 1st Defendant provides alternative security to secure the 2nd Defendant's interest for the amount of outstanding loan.
88. The next issue is whether or not the plaintiffs are entitled to the relief sought.
89. Prayers 1 to 3 of the plaint are already spent as they sought for interim orders pending hearing and determination of the suit.
90. Prayer 4 which is an order for the rendering of accounts for all rents collected by the 1st Defendant from the suit premises from the time of registration of the suit land into the 1st Defendant's name i.e. 28th March, 2013 to date. It was the plaintiff's evidence through the testimony of PW3 that they allowed the 1st Defendant to collect the rent to recover money that he had advanced to PW3 as a soft loan. The 1st Defendant contended that the plaintiffs and PW3 allowed him to collect the rent to repay the loan. The 1st Defendant collected the rents with the permission of the plaintiffs and PW3. In view of the findings on ownership of the suit land, the estate of the deceased will be entitled to rendering of accounts in respect of the said rent so as to determine how much as so far been collected and whether the loan has been settled.
91. Prayer 5 is for an order directed at the Land Registrar, Kisumu to cancel the registration and transfer of the suit land to the 1st Defendant's name and rectify and revert the same back into the names of VALENTINE OGEMBO ONYANGO. The court has already found that registration of the suit land



in the name of the 1st Defendant was fraudulent. The estate of the deceased is entitled to cancellation of the title and an order that the land reverts to the name of the deceased after the 1st Defendant provides alternative security to the 2nd Defendant.

92. The next prayer is for an order directed at the Land Registrar to cancel the registration of the legal charge created over the suit property in favour of the 2nd Defendant. There was no evidence as to how much balance of the loan due from the 1st defendant to the 2nd Defendant is still outstanding. But should there be a balance, the 1st Defendant should provide alternative security to the 2nd Defendant in place of the suit land so as to have the charge over the suit land discharged.
93. Regarding general damages for trespass, it was the plaintiffs' evidence that they gave the 1st Defendant permission to enter the land and collect rent. Trespass has not been proved.
94. On costs of the suit, given the circumstances of this case, it is in the interest of justice that each party bear own costs.
95. For the foregoing reasons I find that the plaintiffs have proved their case on a balance of probabilities and enter judgement in favour of the estate of the deceased for: -
 - i. an order that the 1st Defendant provides alternative security to the 2nd Defendant in place of the suit land so as to cause discharge of the charge over the suit land.
 - ii. An order that after the 1st Defendant provides alternative security in terms of number (i) herein the transfer and registration of the suit land in favour of the 1st Defendant be cancelled and the land reverts to the deceased Valentine Ogembo Onyango.
 - iii. Each party to bear own costs of the suit.

JUDGMENT DATED AND SIGNED AT KISUMU AND READ THIS 9TH DAY OF OCTOBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the Plaintiffs.

Anyul for the 1st Defendant.

Maganga for the 2nd Defendant.

No appearance for the 3rd and 4th Defendants.

ELC APPEAL NO.3046/2022 JUDGEMENT Page 8

