



Alego (Suing as the administrator of the Estate of Boaz Alego Orendo - Deceased) v Imbooba & 3 others; Municipal Council of Kisumu & another (Third party) (Environment & Land Case 18 of 2012) [2024] KEELC 13639 (KLR) (3 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13639 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 18 OF 2012
SO OKONG'O, J
DECEMBER 3, 2024**

BETWEEN

JAMES OMONDI ALEGO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF BOAZ ALEGO ORENDO - DECEASED) PLAINTIFF

AND

FIDELIS OGWANG IMBOBA 1ST DEFENDANT

PHILEMON JOS ORIGA 2ND DEFENDANT

LAND REGISTRAR KISUMU 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

AND

MUNICIPAL COUNCIL OF KISUMU THIRD PARTY

COUNTY GOVERNMENT OF KISUMU THIRD PARTY

JUDGMENT

1. The Plaintiff initially instituted this suit in the lower court on 20th March 2003 against the 1st and 2nd Defendants only in Kisumu SPMC Civil Suit No. 291 of 2003. The 1st third party was added to the suit through a 3rd party notice issued by the 1st and 2nd Defendants on 4th June 2004 while the 3rd and 4th Defendants and the 2nd third party were added to the suit on 22nd September 2021 on the application by the 1st and 2nd Defendants. The suit was transferred to this court in 2012 and given the current case number.
2. The plaint was amended, and further amended on 1st December 2021. In his Further Amended Plaint, the Plaintiff averred that he was initially a donee of a power of attorney by Boaz Alego Orendo over



- a land parcel known as Kisumu Manyatta 'A'/53 (hereinafter referred to as “the suit property”). The Plaintiff averred that following the death of Boaz Alego Orendo, he became the administrator of his estate pursuant to a grant of letters of administration issued to him on 14th October 2021. The Plaintiff averred that he was the son of Boaz Alego Orendo, deceased (hereinafter referred to only as “the deceased”). The Plaintiff averred that the deceased was the registered proprietor of the suit property.
3. The Plaintiff averred that the 1st Defendant was the administrator of the estate of one Samuel Nyagoya Ogwang. The Plaintiff averred that the deceased purchased the suit property from one Peter Ayieyo Nyaiga in the early 1970s at a consideration of Kshs. 3,300/-. The Plaintiff averred that after purchasing the suit property, the deceased took possession and constructed thereon a two-room semi-permanent structure and a permanent toilet at a cost of Kshs. 9,325/-.
 4. The Plaintiff averred that the deceased was the first registered owner of the suit property following the land adjudication exercise which took place in the area in 1978 and the closure of the register in 1995. The Plaintiff averred that the deceased worked mostly in Tanzania and relied on second hand information on the status of the suit property. The Plaintiff averred that sometime in 1984, the deceased learnt that the Municipal Council of Kisumu, the 1st third party had purported to acquire the suit property among others and was in the process of compensating the registered proprietors of the affected land. The Plaintiff averred that the deceased followed up the compensation with the 1st third party and the District Commissioner Kisumu with no success. The Plaintiff averred that the 1st and 2nd Defendants purported to have acquired the suit property from the Municipal Council of Kisumu. The Plaintiff averred that the Municipal Council of Kisumu purported to have acquired the suit property from the deceased in exchange for compensation that was paid to the deceased. The Plaintiff averred that the purported allotment of the suit property to the 1st and 2nd Defendants by the 1st third party was unlawful as the suit property was still owned by the deceased who had not received any compensation in respect thereof.
 5. The Plaintiff averred that the 1st and 2nd Defendants purporting to be an allottee and a purchaser respectively of portions of the suit property illegally entered upon the suit property and erected two illegal structures thereon. The Plaintiff averred that as a result of the above mentioned illegal activities of the Defendants, the estate of the deceased had suffered loss which was continuing. The Plaintiff sought judgment against the Defendants jointly and severally for; a declaration that the deceased was the duly registered proprietor of the suit property, a mandatory injunction compelling the 1st and 2nd Defendants to vacate the suit property, and in the alternative an order for the eviction of the 1st and 2nd Defendants from the suit property, and mesne profits for trespass.
 6. The 1st Defendant entered appearance and filed a statement of defence on 6th June 2003. The 1st Defendant amended and further amended her defence on 30th April 2004 and 6th June 2021 respectively. In her further amended defence and counter-claim filed on 4th October 2021, the 1st Defendant denied the Plaintiff's claim in its entirety. The 1st Defendant denied that the deceased, Boaz Alego Orendo was the registered proprietor of the suit property. The 1st Defendant contended that the Plaintiff lacked the *locus standi* to file the suit. The 1st Defendant contended that the donor of the power of attorney on the strength of which the suit had been instituted having died, the Plaintiff lacked capacity to sue and maintain the suit.
 7. The 1st Defendant averred that if at all the deceased was registered as the proprietor of the suit property, such registration was done fraudulently without following due process. The 1st Defendant averred that the suit property was compulsorily acquired by the Government through Kenya Gazette Notice No. 3400 dated 6th November 1976, and the Plaintiff was duly compensated for the acquisition. The 1st Defendant averred that the Plaintiff fraudulently caused the suit property to be registered in his name



as the owner thereof after receiving compensation in the sum of Kshs. 13,815/- from the Government. The 1st Defendant averred that as at the time the Plaintiff was fraudulently registered as the owner of the suit property, the 1st Defendant already had a house on the suit property which he erected in 1986. The 1st Defendant averred that the Plaintiff's title to the suit property was extinguished following the said compulsory acquisition undertaken by the Government for Migosi Site and Service Scheme.

8. The 1st Defendant averred that her late husband Samuel Ogwang Nyangoya bought the portion of the suit property she was occupying from one, Okwach Masudi in 1986. The 1st Defendant averred that Okwach Masudi was allocated the said parcel of land by the Municipal Council of Kisumu, the 1st third party herein which acted as a trustee of the National Government in respect of the land that the Government had acquired compulsorily. The 1st Defendant averred that together with her late husband, Samuel Ogwang Nyangoya, they embarked on the construction of a building on the said parcel of land in 1986 which on completion cost them over Kshs. 2,000,000/-. The 1st Defendant averred that the suit property belonged to the Municipal Council of Kisumu the predecessor of the County Government of Kisumu which had the power to allot the same to anyone. The 1st Defendant averred that she occupied the suit property in 1986 as a bona fide purchaser thereof for value without notice of any defect in the title that was passed to her. The 1st Defendant denied that she was a trespasser on the suit property. The 1st Defendant averred that the Plaintiff's suit was time barred under the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya). The 1st Defendant averred further that the court had no jurisdiction to entertain the suit.
9. In her counterclaim, the 1st Defendant reiterated the contents of her defence and averred that she had occupied the suit property peacefully and without any disturbance since 1986. The 1st Defendant averred that she had acquired the suit property by adverse possession. The 1st Defendant averred that she had been in occupation of the suit property for the last 35 years. The 1st Defendant averred in alternative and without prejudice to the foregoing that if the Plaintiff was registered as the proprietor of the suit property, such registration must be construed to be importing the principle of constructive and implied trust. The 1st Defendant averred that having purchased the suit property and completed the payment of the purchase price, although there was a failure of registration of her interest in the suit property, a resulting trust was created in her favour over the suit property which survived the fraudulent registration of the suit property by the Plaintiff in his name.
10. The 1st Defendant averred that the title held by the Plaintiff over the suit property was fraudulently obtained since the land in the area where the suit property is situated is not freehold but a leasehold the same having been acquired by the Government and handed to the 1st third party to hold in trust. The 1st Defendant prayed for judgment against the Plaintiff for;
 - a. A subdivision of the suit property and a declaration that the portion of the suit property she had built on belongs to her;
 - b. A declaration that a resulting trust or constructive trust had arisen in her favour concerning the suit property;
 - c. An order that upon the completion of the subdivision of the suit property, the portion of the suit property she had built on be transferred and registered in her favour;
 - d. Cancellation of Plaintiff's title to the suit property and a declaration that the 1st Defendant was the rightful owner of the property;
 - e. In the alternative, a declaration that the 1st Defendant had acquired prescriptive rights over the suit property;



- f. An order that the Deputy Registrar of the court execute all necessary documents for the transfer of the said portion of the suit property to the 1st Defendant;
 - g. General damages for trespass
 - h. Such other or further relief the court deemed fit to order.
11. The 2nd Defendant entered appearance and filed a statement of defence and a counter-claim on 22nd May 2003 which was later amended on 6th June 2021. In his amended defence and counter-claim filed on 4th October 2021, the 2nd Defendant denied the Plaintiff's claim in its entirety. The 2nd Defendant denied that the deceased, Boaz Alego Orendo was the registered proprietor of the suit property and that the deceased acquired the suit property from Ayieyo Nyaiga in the early 1970s.
12. The 2nd Defendant denied that he illegally entered upon the suit property and erected illegal structures thereon. The 2nd Defendant averred that the deceased Boaz Alego Orendo acquired the suit property fraudulently. The 2nd Defendant averred that the deceased misrepresented to the 3rd Defendant that he was the owner of the suit property when he knew that the suit property was compulsorily acquired by the Government and he was paid Kshs 13,815/- as compensation. The 2nd Defendant averred that he acquired his interest in the suit property from one Wilkister Awiti in 2000 by way of purchase. The 2nd Defendant averred that the said Wilkister Awiti had occupied the portion of the suit property which he acquired from her since 1987 and as such had acquired the same by adverse possession. The 2nd Defendant averred that Wilkister Awiti had been allocated the portion of the suit property by the 1st third party which was in charge of Migosi Site and Service Scheme as a trustee of the Government of Kenya.
13. The 2nd Defendant further averred that after acquiring the said portion of the suit property from Wilkister Awiti, he put up a house thereon which he had occupied for 21 years. The 2nd Defendant averred that he had acquired the suit property by adverse possession. The 2nd Defendant averred further that the suit was time barred by the *Limitation of Actions Act*, and that the court lacked jurisdiction to try and determine the same.
14. In the counter-claim, the 2nd Defendant reiterated the contents of his defence and averred that he had occupied the suit property peacefully and without any disturbances since 2000 after purchasing the same from the original allottee, Wilkister Awiti who had occupied the same since 1987. The 2nd Defendant averred that he had acquired the portion of the suit property in his occupation by adverse possession. The 2nd Defendant reiterated that the deceased obtained title to the suit property fraudulently since the property had been compulsorily acquired by the Government and the deceased was duly compensated. The 2nd Defendant prayed for judgment against the Plaintiff for:
- a. Cancellation of the Plaintiff's title to the suit property.
 - b. In the alternative, a declaration that the 2nd Defendant had acquired prescriptive rights over the suit property.
 - c. Cost of the counterclaim.
 - d. General damages for trespass.
 - e. Such other or further relief the court deemed fit to order.
15. As mentioned earlier in the judgment, the third party notice was issued by the 1st Defendant against the 1st third party. In the third party notice that was dated 30th April 2004 and filed on 4th June 2004, the 1st



- Defendant averred that the suit property was owned by the 1st third party which allocated the same to Okwach Masudi who in turn sold it to the 1st Defendant's deceased husband, Samuel Ogwang. The 1st Defendant averred that the Plaintiff had threatened to evict the 1st Defendant from the suit property that she had occupied for over 12 years.
16. The 1st third Party filed a statement of Defence dated 13th March 2007. The 1st third party averred that it allotted its leasehold interest in Plot No. 326 Migosi Site and Service Scheme to one Okwach Masudi on terms and conditions that were contained in the head lease. The 1st third party averred that it was not a party to the creation of the suit property and as such no liability would attach to it in respect thereof. The 1st third party averred that if there is any liability, it would only attach to the person from whom the 1st Defendant's husband bought the suit property in terms of the agreement between them.
 17. The 1st third party averred that its leasehold interest in the suit property allotted to Okwach Masudi was acquired by the Government of Kenya compulsorily through Gazette Notice No. 3400 dated 6th November 1976 and compensation was duly paid. The 1st third party averred that it did not know how Plot No. 326 Migosi Site and Service Scheme was connected to the suit property the creation of which it was not a party. The 1st third party averred that no claim for indemnity or contribution lied against it and that the 1st Defendant's claim against it was misconceived and bad for misjoinder. The 1st third party averred that the Third Party Notice against it for indemnity or contribution was filed out of time without leave of court. The 1st third party averred that the 1st Defendant's claim against it was unsustainable and the entire third-party Proceedings were a nullity and void *ab initio*. The 1st third party denied the jurisdiction of the court to hear and determine the third-party proceedings as it was time-barred. The 1st third party prayed that the 1st Defendant's Third Party Notice be dismissed with costs.
 18. The 3rd and 4th Defendants were served but neither entered appearance nor filed a statement of defence.
 19. The Plaintiff filed a reply to the amended defence and a defence to the 1st Defendant's amended counter-claim on 24th May 2004 in which he denied the 1st Defendant's claim and contended that the same was incompetent. The Plaintiff also filed a reply to the defence and a defence to the 2nd Defendant's counter-claim on 7th April 2004 in which the Plaintiff reiterated the contents in his plaint and denied all the allegations made against him in the defence and counter-claim. The Plaintiff denied that the suit property was compulsorily acquired by the Government and that the deceased was compensated for the same. The Plaintiff averred that the suit property was not affected by the compulsory acquisition of 1976. The Plaintiff denied that the deceased acquired title to the suit property fraudulently.
 20. The hearing of the suit commenced on 20th April 2023 when the Plaintiff testified and closed his case. The Plaintiff adopted his witness statement dated 30th March 2022 as his evidence in chief and produced the documents attached to his list of documents dated 1st July 2022 and filed on 5th July 2022 as exhibits. The Plaintiff told the court that he brought the suit as the administrator of the estate of Boaz Alego Orendo, deceased (the deceased).
 21. On cross-examination by the 1st and 2nd Defendants' advocate, the Plaintiff stated that when he filed the suit, the deceased was alive but sick. He stated that the deceased gave him a power of attorney on the strength of which he brought the suit. He stated that the deceased died in 2017 and he was the administrator of his estate pursuant to a Grant of Letters of Administration that was issued to him on 14th October 2021 at Ukwala Law Courts. He stated that after obtaining Grant of Letters of Administration, he took it that the same was sufficient to enable him continue with the suit. The Plaintiff stated that through a letter dated 5th August 1985, the 1st third party informed the deceased



- that the Government of Kenya had compulsorily acquired the suit property and asked him to collect compensation. The Plaintiff stated that the deceased went to the District Commissioner's office where the compensation was being processed but he did not receive the same. The Plaintiff stated that at the time, he was about 10 years old and did not accompany his father to the District Commissioner's office. He stated that what he was telling the court was what he was told. He stated that he did not know when the Defendants entered the suit property.
22. On cross-examination by the advocate for the third parties, the Plaintiff stated that the suit property was to be compulsorily acquired by the Government but the acquisition was fraudulent. He stated that the land was being acquired on behalf of the Municipal Council of Kisumu but it was the Government that was to pay compensation.
 23. After the Plaintiff closed his case, the 2nd Defendant gave evidence as DW1. The 2nd Defendant adopted his witness statement that was filed in court on 31st August 2020 as his evidence in chief and produced documents attached to his list of documents filed in court on the same date as exhibits. He stated that he went to the suit property around August 1998 when he was approached by the owner, Wilkister Awiti who wanted to sell it. He stated that the land in the area was developed and the only undeveloped land was the suit property. He stated that the 1st Defendant was staying in a property in the immediate neighborhood. The Plaintiff stated that the 1st Defendant had already developed her property and was staying in it. He stated that Wilkister Awiti had not developed her plot and she was not staying on the land. He stated that he did not find the deceased on the suit property. He stated that after purchasing the property, he put up a house thereon which took him two years to construct. He stated that he moved into the house in May 2003 and was still staying there. He stated that the suit property was part of Migosi Site and Service Scheme which belonged to the 1st third party, the Municipal Council of Kisumu. He stated that he was surprised that the deceased had a title to the suit property. He stated that the said title held by the deceased was fraudulently acquired since the suit property was compulsorily acquired by the Government and the deceased was duly compensated. He urged the court to dismiss the Plaintiff's suit and to grant the prayers sought in his counter-claim with costs.
 24. On cross-examination by the Plaintiff, the 2nd Defendant stated that the suit property was acquired by the Government and that it was the 1st third party who allotted the suit property to Wilkister Awiti. He stated that he did not know whether the 1st third party followed the law while acquiring the suit property. He stated that he obtained the compensation list which he produced in evidence from the 1st third party which also informed him that the people in the list were compensated. He stated that he purchased the suit property from Wilkister Awiti at Kshs. 178,000/-. He stated that he was paying land rates for Plot No. 542, Migosi Site and Service Scheme which was part of the suit property. On examination by the court, the 2nd Defendant stated that he had not been issued with a title for the suit property because of this suit.
 25. The 2nd Defendant called Patrick Opiyo Adero (DW2) as a witness. DW2 stated as follows in his evidence in chief: He was a licensed surveyor. He had practiced as a surveyor for 36 years. He prepared a report on the suit property. He was asked to determine whether the suit property belonged to the 1st third party or was private land. He found that the suit property was initially adjudicated as private land. He stated that the land was acquired by the World Bank and the 1st third party but was unfortunately also given an adjudication number. He stated that the 1st third party divided the suit property into two equal parts. One portion was given land reference number Migosi S.S.S 542 and the other, Migosi S.S.S 326. The 1st third party's land was leasehold. He stated that the persons whose land was acquired compulsorily and were compensated could not come back and claim their parcels of land. He stated that if that were to be allowed, it would lead to chaos. He stated that the title that was issued to the



- Plaintiff must have been issued through an oversight and the same was not valid. DW2 adopted his witness statement as part of his evidence in chief and produced his report as D.EXH.2.
26. On cross examination by the Plaintiff, DW2 stated the land in the area where the suit property was situated was leasehold and that there were no freehold titles in the area. He stated further that those whose land was compulsorily acquired were compensated. He stated that the suit property appeared in the Registry Index Map as parcel number 53.
 27. On examination by the court, DW2 stated that when the 1st third party acquired the suit property, it subdivided the same and gave it new numbers, Migosi SSS 542 and Migosi SSS 326. He stated that these were the 1st third party's numbers and the same were not registered. He stated that this explained why the numbers were not appearing in the registry Index Map.
 28. The last witness was the 1st Defendant who gave evidence as DW3. DW3 stated as follows in her evidence in chief: She was the administrator of the estate of Samuel Ogwang Nyangoya deceased who died on 22nd June 1997. She had recorded a witness statement on 23rd January 2020 which she adopted as her evidence in chief. She had also filed a list and bundle of documents with the heading further list of documents on 23rd January 2020 and an addendum to the further list of documents on 18th July 2023. The documents attached to the further list of documents filed on 23rd January 2020 were produced as D.EXH.3 and the documents attached to the further list of documents filed on 31st August 2020 were produced as D.EXH.4. The documents attached to the Defendants' addendum to the further list of documents filed electronically on 18th July 2023 were produced as D.EXH.5.
 29. DW3 stated that she had explained how they acquired the suit property from Mr. Okwach Masudi and had produced a copy of the sale agreement among other documents. DW3 stated that the deceased had been compensated for the suit property. She stated that she had stayed on the suit property for 24 years. DW3 stated that the title held by the deceased was fraudulent as he had received compensation for the suit property. She stated that the deceased could not receive compensation and also keep the land at the same time. She stated that at the time the deceased obtained title to the suit property, she was already staying on the property. She urged the court to grant the reliefs sought in her counter-claim together with costs.
 30. On cross-examination by the plaintiff, DW3 stated that they bought the suit property from Okwach Masudi and that they completed development and occupied the house on the suit property in 1990. She stated that at the time, the 1st third party had not started giving out titles. She stated that the deceased went behind their back and obtained a fraudulent title. She stated that although the land still had the reference number Kisumu/Manyatta 'A'/53, the number had been changed. She stated that the purchase price for the suit property was Kshs. 9,000,000/-. She stated that the deceased was paid compensation for the suit property in the sum of Kshs. 13,815/-. She stated that she did not know if the 1st third party acquired the suit property lawfully. She stated that her buildings on the suit property were approved and that her husband did due diligence before purchasing the suit property. She stated that they occupied the land for 16 years without anyone coming up to claim it. She stated that the suit property and Plot No. 326 are one and the same parcel of land. She stated that the suit property belonged to the 1st third party and that they were to be issued with titles later but she had not received the title because the Plaintiff had filed this case. She stated that they acquired the suit property in 1986 and between 1986 and 1990 the construction was in progress.
 31. The third parties closed their case without calling evidence. The court thereafter directed the parties to make closing submissions in writing. The Plaintiff filed submissions and further submissions dated 2nd March 2024 and 24th April 2024 respectively. The 1st and 2nd Defendants filed separate submissions dated 13th March 2024.



Plaintiff's submissions

32. In his submissions, the Plaintiff framed the following issues for determination;
1. Did Boaz Alego deceased purchase the suit property and become the lawful registered owner thereof following land adjudication?
 2. Which parcels of land were compulsorily acquired through Gazette Notice dated 6th November 1976, for what purpose was the acquisition, and was compensation paid?
 3. Did the 3rd Defendant have the right to take the suit property from the deceased and confer ownership of the same upon the 1st and 2nd Defendants?
 4. On the counter-claim; is the Plaintiff holding his title in trust for the 1st and 2nd Defendants? Or have the Defendants acquired prescriptive rights over the suit property?
33. The Plaintiff submitted that he had through evidence proved that the deceased purchased the suit property in 1978 and was registered as the proprietor of the suit property following land adjudication process through which the suit property was given land reference Kisumu/Manyatta "A"/53. The Plaintiff submitted that the register for the suit property was opened in 1995 and the Plaintiff was registered as the owner of the property in 2003. The Plaintiff submitted that there was no evidence of any wrongdoing on the part of the deceased in the acquisition of the suit property. The Plaintiff submitted that although the 1st and 2nd Defendants claimed that the deceased acquired title to the suit property fraudulently, no evidence was produced to prove the allegation. The Plaintiff submitted further that the 1st and 2nd Defendants purchased Plot No. 326 and Plot No. 542. The Plaintiff submitted that it was not clear how the two plots changed to be Kisumu/Manyatta "A"/53.
34. The Plaintiff admitted that the suit property was situated at Migosi where land was compulsorily acquired by the Government for housing and industrial development. The Plaintiff submitted that the deceased had already constructed a house on the suit property and as such was qualified to retain the property and receive a loan to develop the same like the other allottees, Okwach Masudi and Wilkister Awiti who got loans but never developed nor occupied the suit property having put the loans to other uses and immediately sold the property to the 1st and 2nd Defendants.
35. The Plaintiff submitted that there could not be compulsory acquisition of land without compensation to the land owner. The Plaintiff submitted that although the 1st and 2nd Defendants claimed that the deceased was compensated for the suit property, no evidence was produced by them in proof of this fact. The Plaintiff submitted that the document produced by the Defendants to prove payment to the deceased was not signed by the deceased in acknowledgement of the purported payment. The Plaintiff submitted further that the document was not dated, and its origin and maker were not known. The Plaintiff submitted that from the letters written by the deceased which were produced in evidence, no compensation was made to the deceased for the purported compulsory acquisition of the suit property.
36. The Plaintiff submitted further that there was no evidence showing how the original allottees of the suit property acquired the same before they sold the same to the 1st and 2nd Defendants. The Plaintiff submitted that letters of allotment of the suit property to the said allottees were not produced in evidence. The Plaintiff cited ELC No. 1257 of 2014, John Otieno Obade v. Teresia Wairimu Kirima and Supreme Court Petition No. 5 (E 006/2022) Torino Enterprises Ltd v. Attorney General in support of this submission.
37. On the Defendants' counter-claim based on adverse possession/prescriptive rights, the Plaintiff submitted that for the claim to be entertained, the 1st and 2nd Defendants had to admit the deceased's



title to the suit property and that they knew that they were occupying the property against the interests of the deceased. The Plaintiff submitted that the 1st and 2nd Defendants never recognised the deceased as the owner of the suit property and as such could not claim the suit property by adverse possession. The Plaintiff submitted that he had proved his case against the Defendants to the required standard and prayed for all the orders sought in his further amended plaint dated 1st December 2021 to be granted.

38. In his further submissions dated 24th April 2024, the Plaintiff submitted that the power of attorney which was donated to him by the deceased was properly executed, stamped and registered on 5th March 2003. The Plaintiff submitted that the power of attorney was valid. On the collapse of the power of Attorney following the death of the deceased, the Plaintiff submitted that Order 24 of the Civil Procedure Rules contemplated the substitution of a deceased party to a suit. The Plaintiff submitted that in the instant case, the deceased was not a party to the suit and as such it was not necessary that he be substituted in the suit within one year. The Plaintiff submitted that if there were any procedural infractions committed by the Plaintiff concerning the substitution of the deceased with the Plaintiff in the suit, the same was curable under Article 159 of *the Constitution*.

The 1st and 2nd Defendants' submissions

39. The 1st and 2nd Defendants who were represented by the same firm of advocates filed separate submissions for unclear reasons. The submissions were similar save for minor variations which could have been accommodated in one set of submissions. I will consider the two submissions together as the issues submitted on are the same to a large extent.
40. On the issue of the capacity of the plaintiff to sue and his locus standi to maintain the suit, the 1st and 2nd Defendants submitted that the Plaintiff who was the son of Boaz Alego Orendo, deceased (the deceased) brought this suit initially on the strength of a power of attorney that was purportedly donated to him by the deceased. The 1st and 2nd Defendants submitted that the Plaintiff did not have the capacity and the locus standi to bring this suit. The 1st and 2nd Defendants cited Black's Law Dictionary, 9th Edition at page 1026 where locus standi was defined as; "The right to bring an action or to be heard in a given forum". The Plaintiff cited, Law Society of Kenya v. Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000 and Alfred Njau & Others v. City Council of Nairobi [1982] KAR 229 in support of this submission.
41. The 1st and 2nd Defendants submitted that although the Plaintiff indicated in the plaint that he was suing on the strength of the said power of attorney, the power of attorney was not attached to the verifying Affidavit. The 1st and 2nd Defendants submitted that a lawful power of attorney allows the person (donee) to whom it is directed by the donor (principal) to act in accordance with the instructions therein. The 1st and 2nd Defendants submitted that such donee (agent) acts as if he is the donor (principal). The 1st and 2nd Defendants submitted that the power of attorney must as of necessity contain the full name and address of the donor and donee, signed by both of them, and properly executed. The 1st and 2nd Defendants submitted that the power of attorney must be stamped and registered. The 1st and 2nd Defendants submitted that the power of Attorney that was produced in evidence by the Plaintiff was neither stamped nor registered as required by the law.
42. The 1st and 2nd Defendants submitted further that the said power of attorney did not comply with Section 44 (1), (2), (4), (5)(b) of the *Land Registration Act* as it did not have the signature of the Plaintiff to signify his acceptance. In support of this submission, the 1st and 2nd Defendants cited, Francis Mwangi Mugo v. David Kamau Gachago [2017] eKLR and Micheal Waweru Ngene v. Dorothy Ikamba Muturi [2012] eKLR. The 1st and 2nd Defendants submitted that in any event the said power of Attorney did not authorise the Plaintiff to file a suit. The 1st and 2nd Defendants submitted that the



- power of attorney was ambiguous and did not specify in which manner the donated power was to be exercised. The 1st and 2nd Defendants submitted further that the Plaintiff required leave of the court to file the suit being a holder of a power of attorney which he never obtained. The 1st and 2nd Defendants submitted that the Plaintiff's suit was incompetent and void ab initio. In support of these submissions, the 1st and 2nd Defendants cited Order 9 Rules 1 and 2 of the Civil Procedure Rules.
43. The 1st and 2nd Defendants submitted further that even if the power of attorney was valid, the same was terminated on the death of the donor, Boaz Alego Orendo on the 1st October 2017. The 1st and 2nd Defendants submitted that from that date, the Plaintiff lost the capacity to sue. In support of this submission, the 1st and 2nd Defendants cited *Loice Wanjiru Meru & 3 others v. John Migui Meru* [2017] eKLR and *Alfred Ngutuku Wamalwa v. Justus Mboya Ogunyo & 3 others* [2014] eKLR.
44. The 1st and 2nd Defendants submitted that after the death of the deceased on 1st October 2017, the Plaintiff had up to 1st October 2018 to substitute himself as the plaintiff on behalf of the estate of the deceased, Boaz Alego Orendo. The 1st and 2nd Defendants submitted that the moment the Plaintiff failed to do that, the suit abated pursuant to Order 24 rule 4 (4) of the Civil Procedure Rules. The 1st and 2nd Defendants submitted that the Plaintiff had an opportunity to revive the suit after obtaining Grant of Letters of Administration in respect of the estate of the deceased on 27th September 2021 which he never did. The 1st and 2nd Defendants submitted that at the close of the Plaintiff's case the suit was technically dead. In support of this submission, the 1st and 2nd Defendants relied on Order 24 rule 7 (2) of the Civil Procedure Rules and *Kenya Farmers' Cooperative Union Ltd. v. Charles Murgor (deceased) t/a Kiptabei Coffee Estate* [2005] eKLR.
45. On the merit of the Plaintiff's claim, the 1st and 2nd Defendants submitted that the Plaintiff did not prove that the deceased acquired the suit property in 1973 from Nyaiga Omune. The 1st and 2nd Defendants submitted further that the registration of the deceased as the owner of the suit property and the issuance of a title to him in respect of the property was fraudulently undertaken as such the same was impeachable. In support of this submission, the 1st and 2nd Defendants cited Section 26(1) of the [Land Registration Act](#), 2012 and several authorities. The 1st and 2nd Defendants submitted that there was no evidence of how the ownership of the suit property moved from Omune Nyaiga to the deceased. The 1st and 2nd Defendants submitted further that the suit property was compulsorily acquired by the Government in 1976 before the same was registered. The 1st and 2nd Defendants submitted that the deceased could not legally get registered and issued with a title for land that was set apart and compulsorily acquired by the Government. The 1st and 2nd Defendants submitted that the deceased in his correspondence with the District Commissioner, Kisumu in 1985 acknowledged that the suit property was compulsorily acquired by the Government. The 1st and 2nd Defendants submitted that it was an act of mischief and fraud for the deceased to purport to obtain a title to the suit property that had been acquired by the Government 27 years earlier. The 1st and 2nd Defendants cited several authorities in support of their submission that the title held by the deceased was fraudulent. The 1st and 2nd Defendants submitted that if the deceased was not compensated for the land, his remedy was to sue the Commissioner of Lands or the Government of Kenya for the recovery of the same but not to get registered as the owner of the compulsorily acquired land. The 1st and 2nd Defendants urged the court not to entertain the deceased's claim as it would open a Pandora box.
46. The 1st and 2nd Defendants submitted that the third parties did not call evidence at the trial. The 1st and 2nd Defendants submitted that they were entitled to costs against the third parties for their failure to support the 1st and 2nd Defendants' case. As concerns the 3rd and 4th Defendants, the 1st and 2nd Defendants submitted that they failed to participate in the suit. The 1st and 2nd Defendants submitted



that their claim that the 3rd and 4th Defendants connived with the deceased in the fraudulent registration and issuance of a title to the deceased in respect of the suit property was not rebutted. The 1st and 2nd Defendants prayed for costs against them. In conclusion, the 1st and 2nd Defendants prayed that; the Plaintiff's suit be dismissed, the title issued to the deceased in respect of the suit property be cancelled, the 1st and 2nd Defendants be declared as the owners of half share each in the suit property, the third parties and the 4th Defendant be ordered to process titles in favour of the 1st and 2nd Defendants, and the Plaintiff and the 3rd and 4th Defendants to pay the costs of the suit and the counter-claims.

Analysis and determination

47. I have considered the pleadings, the evidence and the submissions filed by the parties. In my view the following are the issues that arise for determination in this suit;
1. Whether the Plaintiff had the locus standi to institute this suit.
 2. Whether the suit property was compulsorily acquired by the Government.
 3. Whether the deceased held a valid title to the suit property.
 4. Whether the Plaintiff is entitled to the reliefs sought in the further amended plaint.
 5. Whether the 1st and 2nd Defendants are entitled to the reliefs sought in their counter-claims.
 6. Who is liable for the costs of the suit and the counter-claims?
48. On the first issue, I have perused the power of attorney dated 5th March 2003 on the strength of which the Plaintiff brought this suit on behalf of the deceased. The power of attorney was signed before an advocate, stamped and registered. The power of attorney allowed the Plaintiff to generally do anything and everything that the deceased could do in relation to the suit property. It is my finding that the said power of attorney complied with the provisions of the law that was in existence when it was executed and as such the same was valid and conferred upon the Plaintiff the necessary locus standi to bring the suit on behalf of the deceased. I disagree with the 1st and 2nd Defendants that the Plaintiff required leave of the court to bring the suit as an attorney of the deceased. The requirement for leave was introduced through Order 9 Rule 2(a) of the Civil Procedure Rules 2010. There was no such requirement in Order III Rule 2 (a) of the Old Civil Procedure Rules which was in force when this suit was filed in 2003. I therefore overrule the 1st and 2nd Defendants' objection to the suit based on lack of locus standi.
49. The 1st and 2nd Defendants also contended that the Plaintiff's suit abated following the death of the deceased on 1st October 2017. Again, I find no merit in this argument. This suit was filed by the Plaintiff as an attorney of the deceased. The suit was not filed by the deceased in his own name. I agree that upon the death of the deceased, the power of attorney that was granted to the Plaintiff stood terminated and as such the Plaintiff lacked legal capacity to proceed further with the suit. The Plaintiff appreciated this huddle in the proceedings and applied for Grant of Letters of Administration in respect of the estate of the deceased which was issued to him on 14th October 2021. The Plaintiff thereafter with leave of the court further amended his amended plaint on 1st December 2021 to indicate that he was henceforth suing as an administrator of the estate of the deceased and not as his attorney. I am of the view that this was the proper way to proceed. It was not necessary for the Plaintiff to apply to substitute the deceased in the suit since the deceased did not sue in his own name. This objection based on abatement of the suit is also overruled.
50. On whether the suit property was compulsorily acquired by the Government, I am of the view that this fact was not disputed. From the evidence placed before the court by the Plaintiff, the



deceased was aware as at 23rd July 1985 that the suit property had been acquired compulsorily by the Government. In his letter to the Director, Housing Development Department of the Municipal Council of Kisumu, the deceased requested that he be allowed to retain the suit property. In the same letter, the deceased mentioned that he had not been compensated. In the letter dated 5th August 1985 written to the deceased by the Ag. Director, Housing Development Department of the Municipal Council of Kisumu in response to the said letter of 23rd July 1985, it was confirmed to the deceased that the suit property had been acquired compulsorily by the Government. In the same letter, the deceased was asked to collect compensation from the office of the District Commissioner, Kisumu. The correspondence that followed was between the deceased and the District Commissioner, Kisumu and the same concerned compensation. In this suit, the Plaintiff's contention is not that the suit property was not compulsorily acquired but rather that the deceased was not compensated for the suit property. From the Gazette Notice No. 3400 dated 6th November 1976, the correspondence I have referred to between the deceased and the Municipal Council of Kisumu and the District Commissioner, Kisumu District, and the compensation list that was produced by the 1st and 2nd Defendants in evidence, it is my finding that the suit property was compulsorily acquired by the Government.

51. On the issue of compensation, this is my view: The suit property was acquired by the Government pursuant to the provisions of the repealed Constitution and the Trust *Land Act*, Chapter 288, Laws of Kenya (now repealed). Trust *Land Act* had elaborate mechanisms for dealing with disputes over the setting apart of land for use by the County Councils or the Government and compensation for such land. Sections 10 and 12 of the Trust *Land Act* provided as follows:

10.

- (1) Any person who is dissatisfied with the rejection of his application for compensation under section 9 of this Act, or with the amount of the award, may, within thirty days after being notified of the award or rejection, as the case may be, appeal in writing through the District Commissioner to the Provincial Agricultural Board of the province in which the land to be set apart is situate, and that Board shall hear and determine the appeal and shall notify the appellant in writing of its decision.
- (2) If the Commissioner of Lands is dissatisfied with the making of an award, or with the amount of an award, he may appeal in like manner to the Provincial Agricultural Board, who shall hear and determine the matter accordingly.
- (3) The Minister may make regulations to provide for the practice and procedure to be followed in respect of appeals to a Provincial Agricultural Board under this section.
- (4) Any party to an appeal to a Provincial Agricultural Board who is dissatisfied with the decision of that Board may appeal to the Resident Magistrate's Court.
- (5) Any party to an appeal to the Resident Magistrate's Court who is dissatisfied with the decision may appeal to the High Court whose decision shall be final.

12. Notwithstanding anything in this Act, any person claiming a right or interest in land set apart under this Act shall have access to the High Court for—

- (a) the determination of the legality of the setting apart; and
- (b) the purpose of obtaining prompt payment of any compensation awarded.

52. The foregoing provisions of the Trust *Land Act* provided the deceased with remedies for the failure if at all by the Government to pay compensation for his land that was compulsorily acquired by the



Government. The deceased could appeal against the award that was made to him. The deceased also had a right to file a suit in the High Court to obtain prompt payment of the award. There is no evidence that the deceased appealed against the award of compensation that was made to him as provided in the Trust *Land Act* or that he moved the High Court to demand prompt payment of compensation. In the absence of an appeal or proceedings in the High Court challenging the setting apart of the suit property or for prompt payment, it is my finding that the suit property was lawfully acquired compulsorily by the Government.

53. On the issue whether the deceased held a valid title over the suit property, I have held that the suit property was compulsorily acquired by the Government of Kenya. Although the property was adjudicated and registered in the name of the deceased, the deceased was not the owner thereof. The property having been acquired by the Government compulsorily and compensation awarded to the deceased, the suit property belonged to the Government. Although there is no evidence that the suit property was illegally and fraudulently registered in the name of the deceased, I agree with the 1st and 2nd Defendants that the deceased acted in bad faith when he applied for a title for the property in 2003 with the full knowledge that the property belonged to the Government. It is my finding that the deceased held title to the suit property in trust for the Government of Kenya.
54. In view of the foregoing findings, the Plaintiff's suit must fail. The Plaintiff has not persuaded me that the 1st and 2nd Defendants who derive their titles over the suit property from the Government of Kenya through the Municipal Council of Kisumu are trespassers on the suit property. The Plaintiff is therefore not entitled to the reliefs sought in his further amended plaint.
55. Concerning the 1st and 2nd Defendant's counter-claim, this court is not inclined to grant the reliefs sought. The 1st and 2nd Defendants' claim is directed against the Plaintiff only. The 1st and 2nd Defendants had no dealings with the Plaintiff. The 1st and 2nd Defendants acquired their interest in the suit property from persons who had been allocated portions of the suit property by the Municipal Council of Kisumu. The 1st Defendant purchased a portion of the suit property that was referred to as Plot No. 326 Migosi S.S.S from Okwach Masudi to whom it was allocated by the Municipal Council of Kisumu. The 2nd Defendant on the other hand acquired a portion of the suit property referred to as Plot No. 542 Migosi S.S.S from Wilkister Awiti to whom it was allocated by the Municipal Council of Kisumu. Plot No. 326 S.S.S measured 14m by 16m which is equivalent to 0.02Ha. Plot No. 542 Migosi S.S.S also measured 0.02Ha. The suit property according to the evidence before the court measures 0.05Ha. According to the evidence placed before the court by the 1st and 2nd Defendants, the portion of the suit property that was compulsorily acquired measured 0.403 acres (approximately 0.163Ha.) of which the land that was acquired for the Migosi Site and Service Scheme measured 0.272 acres (approximately 0.055Ha.). Given these conflicting measurements, and the fact that the 1st and 2nd Defendants were not allocated Title Kisumu/ Manyatta "A"/53 but Plot No. 326 S.S.S and Plot No. 542 Migosi S.S.S, I decline to order that the suit property be subdivided into two equal portions and titles in respect of the portions issued to the 1st and 2nd Defendants. The 1st and 2nd Defendants told the court that it was this suit that was holding the issuance of titles to them for the two plots. I think that they can now pursue their titles from the National Government and the County Government of Kisumu. I will cancel the title held by the deceased and direct that the property be registered in the name of the Government of Kenya from whom the 1st and 2nd Defendants would be at liberty to pursue their titles.

Conclusion

56. In conclusion, I hereby make the following orders;



1. The Plaintiff's suit is dismissed.
2. The registration of the deceased, Boaz Alego Orendo as the proprietor of Title No. Kisumu/ Manyatta "A"/53 and the title deed issued to him are cancelled.
3. Title No. Kisumu/ Manyatta "A"/53 shall be registered in the name of the Government of the Republic of Kenya as the proprietor thereof.
4. Each party shall bear its costs of the suit and the counter-claims.

DATED AND DELIVERED AT KISUMU ON THIS 3RD DAY OF DECEMBER 2024

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

The Plaintiff present in person

Mr. Mwamu for the 1st and 2nd Defendants

Ms. Anuro h/b for Mr. Ndolo for the Third Parties

Ms. J. Omondi-Court Assistant

