



Oyieko & another (Suing as the joint administrators with limited grant of letters of administration on the Estate of Othoro Alal - Deceased) v Awandha (Environment & Land Case E001 of 2022) [2023] KEELC 658 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELC 658 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E001 OF 2022
AY KOROSS, J
FEBRUARY 9, 2023**

BETWEEN

PERES ARUA OYIEKO 1ST PLAINTIFF

ANASTACIA AKOTH OGONGO 2ND PLAINTIFF

**SUING AS THE JOINT ADMINISTRATORS WITH LIMITED GRANT OF
LETTERS OF ADMINISTRATION ON THE ESTATE OF OTHORO ALAL -
DECEASED**

AND

LUCAS OKADO AWANDHA DEFENDANT

JUDGMENT

1. The plaintiffs who are the daughters of Othoro Alal ('Alal') obtained limited grant of letters of administration on his estate dated 4/01/2022 and sued the defendant who was the administrator of the estate of Alal having obtained full grant on 2/12/1996. Anastacia Akoth Ogongo who was one of the plaintiffs died in the course of these proceedings.
2. By a plaint dated January 11, 2022, the plaintiffs asserted they were the beneficiaries of Alal's estate and in the course of probate proceedings of Alal's estate, a certificate of confirmation of grant that had been issued to Samwel Odongo Ambasa ('Samwel') was revoked and a fresh certificate of confirmation grant was issued to the defendant who was to hold land parcel no North Sakwa/Nyawita/82 ('mother parcel') in constructive trust for them.
3. They contended that their understanding with the defendant was that he would register the mother parcel in their names as beneficiaries of the estate of Alal. They pleaded constructive trust and proprietary estoppel applied to the circumstances of this case. They contended that by virtue of Kisumu HC Succession Cause No 35 of 1994, it came to their knowledge that the defendant



had subdivided the mother parcel into two portions; North Sakwa/Nyawita/6101 and 6102 ('suit properties'). They described the defendant as Alal's herd's boy.

4. The orders they sought were *inter alia*, declarations that the defendant's actions were unfair, illegal and unlawful; he was not the absolute owner of the suit properties but rather the plaintiffs were the rightful and lawful owners; a cancellation of the defendant as the registered proprietor of the suit properties and their subsequent registration; permanent injunction; eviction, general damages for fraud and misrepresentation and costs.
5. By the firm of M/s Ken Omollo & Co Advocates, the defendant filed a defence dated February 18, 2022. He denied the averments made in the plaint and asserted that by conduct, the plaintiffs waived their interests over the mother parcel and were estopped from laying hands on the suit properties. He admitted that Samwel's grant had been revoked by the probate court. He stated that he was a nephew of Alal and had always resided with him on the suit properties. According to him, several suits against him as the administrator of Alal's estate were pending in court. He contended the plaintiffs were guilty of laches; they raised the issues of constructive trust 28 years too late.
6. In their reply to defence dated May 18, 2022, the plaintiffs asserted that Ogombe Oketch alias Agnes Ogombe alias Othoro Ogombe who was one of the daughters of Alal died on November 20, 1987 and could not have issued the consent that was executed on June 18, 1993. The confirmation of grant was obtained fraudulently and in the succession cause, the defendant was a mere trustee and the grant confirmed that the mother parcel was bequeathed to them jointly. According to them a claim of constructive trust could be the subject of laches and a foster son could never be a beneficiary of an estate.

Plaintiffs' evidence

7. Peres Arua Oyieko who was one of the plaintiffs testified as PW1. Her testimony was contained in her oral Evidence, adopted witness statement and documents contained in her lists of documents. Her witness statement was handwritten and some of the writings were not legible. From what I could decipher, the defendant was from a different clan from her; he came from Alego Nyajuok while she descended from Sakwa Kolaka. After revocation of Samwel's grant, the mother parcel was reverted back to Alal. In the probate proceedings, the defendant was merely to register the mother parcel in the plaintiffs' names.
8. It was her testimony that Alal had 3 daughters; the plaintiffs and Agnes Ogombe. 10 years after confirmation of grant, she discovered the mother parcel had not been transferred to the beneficiaries but rather the defendant had fenced it off and sold portions to 3rd parties. Her sibling Agnes Ogombe died in 1997 while her co-plaintiff died in the course of the proceedings.
9. In cross examination, she testified that Anna Ogombe was never Alal's sister and she had never permitted the defendant to either succeed Alal's estate or to sale Alal's land. The plaintiffs were the administrators of the estate of Alal and not the defendant. Although they were present during the probate proceedings, the court did not hear them. She asserted that she had never been privy the defendant had been sued by 3rd parties in respect of Alal's estate. According to her, the defendant was merely to ensure the mother parcel was to revert to the plaintiffs and they would later apportion a share to him.
10. In reexamination, she testified that she did not object to the confirmation of grant since in her view, it was to be registered in the defendant's name who would remit it to them and thereafter they would give him a slice of the mother parcel.



Defendant's Evidence

11. The defendant who was a sickly and elderly, donated a power of attorney to his son Apolo Onyango Okado who testified as DWI. His testimony is contained in his oral evidence, the defendant's witness statement which he adopted and documents contained in the defendant's bundle of documents.
12. He testified that the mother parcel was at 1st registration registered in Alal's name. The defendant who was a son of Anna Ogombe Alal -a sister to Alal, was fostered by Alal in 1967. The defendant always lived peacefully on the suit property. Alal had 3 daughters; the plaintiffs and Agnes Ogombe. With the blessings of the said daughters, the defendant objected to the grant issued to Samwel and subsequent thereafter, the grant was revoked. Alal's daughters issued consents to the defendant to enable him obtain letters of administration; the defendant did so in Kisumu HC Succession Cause No 35 of 1994.
13. The registrations and subdivisions that had been conducted by Samwel were cancelled and the mother parcel was transferred to the defendant by transmission. The defendant had always defended the estate of Alal in court proceedings and had even assisted the plaintiffs by selling 2 acres of the mother parcel in 2014 in order to assist the plaintiffs financially. The defendant was willing to offer 2 acres of the suit properties to the plaintiffs.
14. In cross examination, he testified that Agnes Ogombe died in July 1998 and he did not know the reason why the defendant sold a portion on behalf of the plaintiffs yet they had waived their interests. The mother parcel was 34 acres and Alal's daughters had sired children.
15. In re-examination he testified that Alal's daughters were all married and that was why Alal requested the defendant to live with him and his wife. The defendant took care of them to the date of their demise. Agnes Ogombe's death certificate that was produced by one of the plaintiff's was not that of Agnes Ogombe.

Parties' Written Submissions.

16. As directed by the court, Mr Oketch, counsel for the plaintiff filed his written submissions dated 7/11/2022 while Mr. Omollo counsel for the defendant filed his written submissions dated 5/12/2022.
17. In his submissions, Mr Oketch identified 5 issues for determination; (i) whether this court had jurisdiction to hear and determine the suit (ii) whether there was intent between the parties to create trusteeship (iii) whether there was constructive trust (iv) whether the defendant was guilty of unjust enrichment and, (v) whether eviction should issue.
18. On the 1st issue, counsel submitted that by virtue of articles 162(2) (3) and 165(5) of the Constitution and section 13 of the ELC Act, he was alive that this court was not a probate court and because the plaintiffs had pleaded constructive trust, this court had jurisdiction.
19. On the 2nd and 3rd issues, counsel submitted that before commencement of the probate proceedings, the mother parcel belonged to Alal and that the plaintiffs would have been registered as proprietors or beneficiaries of the mother parcel was it not for the illiteracy and incapability of the plaintiffs to initiate probate proceedings; this amounted to intervening circumstances. Counsel placed reliance on several authorities including the case of Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari & another [2018] eKLR where the apex court laid out guidelines for determination of whether a claim of customary existed.
20. According to counsel, there was clear intent to create trust and the act of the defendant selling portions of the suit properties and remitting the proceeds of sale to the plaintiffs signified trust and the



continued occupation by the defendant was fraudulent. Counsel submitted the probate proceedings were tainted with fraud. Counsel also placed reliance on the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR where the apex court cited with approval the case of *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others* [2015] eKLR in which the court examined the law on trusts including constructive and resulting trusts.

21. On the 4th issue, counsel submitted the confirmation of grant issued to the defendant should be revoked and the title documents be deemed as having been acquired illegally.
22. On the 5th issue, counsel submitted the act of the defendant retaining the suit properties at the expense of the plaintiffs amounted to unjust enrichment. He placed reliance on several cases including the Court of Appeal decision of *Chase International Investment Corporation and Another v Laxman Keshra and 3 others* [1978] eKLR where the court expressed itself as follows;

‘According to Goff and Jones’ Law of Restitution, the principle of unjust enrichment presupposes three things: (1) that the defendants has been enriched by the receipt of a benefit; (2) that he has been so enriched at the expense of the plaintiff; and (3) that it would be unjust to allow him to retain the benefit.’
23. Mr Omollo identified 7 issues for determination; (i) was the grant obtained by consent of the plaintiffs (ii) whether the plaintiffs relinquished their interests over the mother parcel in the defendant’s favour (iii) whether the plaintiffs relinquished their interests over Alal’s estate (iv) whether the plaintiffs were guilty of acquiescence (v) whether the defendant held the suit properties in trust for the plaintiffs (vi) whether the plaintiffs claim could succeed and, (vii) what of costs.
24. On the 1st and 2nd issues, counsel submitted that from the face of the confirmed grant, the defendant never held the mother parcel in trust for the plaintiffs and the plaintiffs were present when the grant was confirmed. Counsel submitted the court must have satisfied itself that all parameters were fulfilled before confirming the grant. Counsel placed reliance on section 71 (2) and (2A) of the *Law of Succession Act*.
25. Counsel submitted that virtue of section 120 of the *Evidence Act*, the plaintiffs were restrained from denying the existence of the consents which the defendant had acted upon.
26. On the 3rd and 4th issues, counsel submitted that the plaintiffs had slept on their rights and if at all they had any rights, it was too late for them to claim constructive trust; they were guilty of laches for having not pursued their rights 34 years down the road. Further, by the equitable doctrine of acquiescence, the plaintiffs who had seen the defendant transferring the mother parcel to his name and utilizing it without raising any qualms demonstrated that the plaintiffs acceded to the defendant’s actions.
27. Counsel equated the plaintiffs’ actions to the legal maxim of ‘*qui non negat, fatefur*’ which meant silence means consent. Counsel also placed reliance on the persuasive decision of *Jaswantsingh Mathurasingh & Another v Ahmeddabad Municipal Corporation & Others* where the court in explaining the doctrine of waiver of rights held that anyone had a right to waive a legal right that was conferred upon her.
28. On the 5th, 6th and 7th issues, counsel submitted that the estate of Alal was confirmed, estate distributed and closed and there was no basis upon which the plaintiffs obtained limited grant for purposes of filing this suit and the plaintiffs’ actions were illegal and an abuse of the court process. Counsel urged this court to dismiss the suit with costs.



Analysis and Determination

29. I have considered the parties' evidence including documents they produced in support of their respective cases as well as counsels rival submissions. Being guided by the provisions of law and judicial precedents, I shall now proceed to consider the merits or otherwise of the plaintiffs' claim to the suit properties and plausibly the issues for determination are;
- I. Whether this court has jurisdiction.
 - II. If the answer to (I) above is in the affirmative, whether the limited grant that was obtained by Peres Arua Oyieko subsequent to a full grant being issued to the defendant was competent.
 - III. If the answer to (I) above is in the affirmative, whether Peres Arua Oyieko proved her claim of constructive trust to the required standards.
 - IV. What orders should this court issue.
 - V. What about costs.

I. Whether this court has jurisdiction

30. As rightfully posited by Mr. Oketch, article 162(2)(b) of the [Constitution](#), relevant statutes and case law clothe this court with the jurisdiction to deal with issues appertaining to use, occupation and title to land and environment. It is also trite law that jurisdiction is everything and without which, a court must go no step further than to down its tools. The Supreme Court of Kenya in the decision of [Republic v Karisa Chengo & 2 others](#) [2017] eKLR stated that:

'John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol 3, at page 113 reiterates the latter definition of the term 'jurisdiction' as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

31. By section 2(1) of the [Law of Succession Act](#), the Act deals with the administration and distribution of the estates of deceased persons and within the provisions of section 47 of the same Act, the High Court is vested with jurisdiction to deal with matters emanating from the Act. However, within the provisions of rule 41(3) of the [Probate and Administration Rules](#), disputes as between the estate and third parties can be determined by other courts. The significance of these provisions of law is that in respect of the estate of a deceased person, all disputes between the heirs of an estate are dealt with within the probate cause. See [Re Estate of Alice Mumbua Mutua \(Deceased\)](#) [2017] eKLR .
32. On the face of it, the plaintiffs' claim cosmetically appears to be a claim of constructive trust over the suit properties but on scratching the surface, it becomes blatant that their claim is to overturn, set aside or review the confirmation of grant that was issued in favour of the defendant. It is clearly an attempt



to review the proceedings or orders that were issued in Kisumu HC Succession Cause No35 of 1994 whereby the defendant was on 4/06/1998 conferred with the mother parcel wholly and absolutely. Basically, they are contending that the confirmation of grant created a constructive trust in their favour. For clarity, it is paramount I extract a fragment of the grant which read in part: -

‘Name Description of property Share of heir

Lukas Akado Awadha North Sakwa/Nyawita/82 Whole’

33. It is without a shadow of doubt that no trusteeship was conferred by the said grant whether by constructive trust or otherwise.

34. *Craig Rotherham & Marc Hertogh in Proprietary Remedies in Context: A study in the Judicial Redistribution of Property Rights* (1st Edn) stated thus;

‘While it often asserted that the constructive trust is imposed irrespective of the intention of the parties, intention is an essential ingredient in many instances in which the device is employed.’ Emphasis added.

35. To unearth the culmination of this absolute conferment of the mother parcel upon the defendant, the intent of the plaintiffs during the probate proceedings is significant. In a ruling rendered by Nambuye J (as she then was) on 8/07/2011 in the probate court, the Learned Judge stated that the daughters of Alal; Anastacia Olal, Peris Arwa and Othoro Alal Ogombe had issued consents dated 18/06/1993 to the defendant. These consents were produced before this court and the three daughters all stated in part on their intention as thus;

‘...I am now a married woman and hereby give all my interest in the estate to Lukas Okado Awadha.’

36. It is my finding that the defendant does not hold the suit properties in constructive trust in favour of Peres Arua Oyieko or any of the children of Alal. It is also my finding that I do not have jurisdiction to review, set aside or sit on appeal against the decision of a court of concurrent jurisdiction and I hereby strike out the suit. A party aggrieved by the decision of the probate court can only pursue the appropriate mechanisms that are stipulated under the *Law of Succession Act*.

37. It is trite law that costs follow the event. Nevertheless because of the special relationship between Peres Arua Oyieko and the defendant, each party shall bear their respective costs of this suit.

38. In the end, I make the following disposal orders:

- a) The suit herein is hereby struck out.
- b) Parties shall bear their respective costs of the suit.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 9TH DAY OF FEBRUARY 2023.

HON. A. Y. KOROSS

JUDGE

09/2/2023

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Oreda h/b for Mr. Oketch for the plaintiff

Mr. Ken Omollo for the defendant



Court assistant: Ishmael Orwa

