



Tombe & another (Suing as the legal representatives of the Estate of Charles Ongeru Nyakundi - Deceased) v Ouma & another (Environment & Land Case 265 of 2017) [2023] KEELC 684 (KLR) (1 February 2023) (Judgment)

Neutral citation: [2023] KEELC 684 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 265 OF 2017
MN KULLOW, J
FEBRUARY 1, 2023
(FORMERLY KISII CIVIL CASE NO. 221 OF 2015)

BETWEEN

MARGARET KERUBO TOMBE 1ST PLAINTIFF
DALPHINE J CHERUIYOT 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF CHARLES
ONGERA NYAKUNDI - DECEASED)

AND

JOYCE MONG'INA OUMA 1ST DEFENDANT
DISTRICT LANDS REGISTRAR, MIGORI 2ND DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of a Plaint dated 25.06.2015; seeking the following Orders: -
 - i. A Declaration that the entire suit land belongs to the Estate of the deceased and that the transfer and registration of the parcel in the name of the 1st Defendant was wrongful, factually and legally unjustifiable and without legal basis hence null and void ab initio.
 - ii. A Declaration that the 1st Defendant did not have and does not have the requisite legal capacity to transfer and to have registered in her name the suit property belonging to the estate of the deceased herein in the factual and legal circumstances obtaining.
 - iii. A Mandatory Injunction or Order directing and requiring the 2nd Defendant to forthwith cancel or cause to be cancelled the Registration and transfer of the suit land in the name of the 1st Defendant.



- iv. A Permanent Injunction preventing the Defendants and/or any other persons acting on their behalf or under their authority of whatsoever nature from selling, charging, transferring or causing to be transferred or trespassing into the suit land or interfering in whatsoever manner with the suit land or any portion of the same or in any other way interfering with the deceased's family's quiet enjoyment and possession of the suit property or any part thereof.
 - v. Mesne profits against the 1st Defendant for the wrongful and illegal use of the suit property with interest thereof at Court's rates from the date of judgment until payment in full.
 - vi. Costs of this suit.
2. The Plaintiffs contend that vide an Agreement for Sale of Land dated 03/09/1991; the deceased acting through his father Samuel Bosire Nyakundi (deceased) purchased the suit land L.R. No. West/Wasweta II/ 1654, from Benson Abuga Moturi. That the said sale agreement was duly executed and witnessed by the respective parties thereto and the deceased thereafter took immediate vacant possession of the said land. They further aver that the fact that suit land was purchased by Samuel Nyakundi on behalf of the deceased was clearly captured on the sale agreement.
 3. It is their claim that the deceased used the suit land for agricultural purposes by various persons from time to time. Sometimes on 11/03/2004; the deceased in writing, terminated the activities of all other persons on the suit land and only authorized the 1st Defendant and her husband, Stephen Ouma, to act as the caretakers of the suit land, by taking over utility thereof and to conduct any development activities on his behalf as advised from time to time.
 4. They maintained that the authority granted by the deceased to the 1st Defendant and her husband did not and could not have conferred legal ownership and rights over the suit parcel to the 1st Defendant or her husband.
 5. It is their claim that at the time of the deceased's death; the suit land was registered in the name of his father, Samuel Bosire Nyakundi who is also since deceased. However, the 1st Defendant wrongfully, fraudulently and illegally conspired with the 2nd Defendant to have the suit land transferred and registered in her name without any color of right and outlined the particulars of the alleged fraud. Further, after the said registration in her name; the 1st defendant's activities and actions have clearly been aimed at disposing and selling the land to third parties.
 6. They contend that as a result of the said actions by the Defendants; the estate of the deceased and its legitimate beneficiaries stands to suffer irreparable loss and damage by losing a portion legally entitled to the deceased's estate. They thus urged the court to grant the reliefs sought.
 7. The 1st Defendant filed a Memorandum of Appearance dated 08/09/2015 and a Statement of Defence dated 21/09/2015. It is her contention that the suit land is the property of her late father, Samuel Bosire Nyakundi and the same forms part of his estate.
 8. She stated that her late father purchased the suit property from one Nislaus Obwako Obong'o and the same was subsequently registered in his name and a title deed issued to that effect. She thus denied the claims by the Plaintiffs that the property was bought from one Benson Abuga Moturi.
 9. She also denied the claims of fraud and the particulars thereto and maintained that the title document pertaining to the suit property is in the custody of her brother as a custodian of the estate of the late Samuel Bosire Nyakundi awaiting succession and distribution of the estate.



10. It was her contention that the suit offends the mandatory requirements of Order 4 Rule 1 (1) (f) of the Civil Procedure Rules, 2010 and is hence incompetent and thus urged the court to dismiss the same with costs.
11. The 2nd Defendant filed their Statement of Defence dated 12/11/2020; wherein he denied the allegations made in the Plaint and particularly that he conspired with the 1st Defendant to have the suit land transferred into her name without following the due process of law of succession.
12. He further stated that the transfer to the 1st Defendant's name was done in error and the same had since been corrected and the title issued to her cancelled. He however maintained that all that was done in accordance with the documents presented in good faith with no intention of defrauding the estate of Samuel Bosire Nyakundi.

Plaintiffs' Case

13. On 27/10/2021; matter proceeded for the Plaintiffs' case. Margaret Kerubo Tombe testified as PW1; she adopted her witness statement dated 15/06/2015 as her evidence in chief.
14. She further stated that the Sale Agreement dated 3/9/1991, clearly indicated that the late Samuel Bosire Nyakundi was buying the suit land on behalf of her late husband. That upon payment of the purchase price in full, the land was registered in the name of Samuel Nyakundi since her late husband was not in town at the time. The land was later fraudulently transferred to Joyce Mong'ina Ouma. She maintained that even though the property was registered in her father-in-law's name, the property belonged to her late husband and now his estate.
15. It was further her claim that the 1st Defendant was appointed as the caretaker of the suit parcel vide a letter dated 11/3/2004 and that the suit land had been listed as part of the late Samuel Bosire Nyakundi's estate vide Succession Cause No. 45 of 2016, to be divided amongst the 1st Defendant and her siblings without her knowledge and/or consent.
16. She produced the documents in her list of documents dated as exhibits marked as PExhibit 1-10 in further support of her case
17. On cross- examination; she also conceded that the said sale agreement dated 3/9/1991 (Pexh 1) did not contain the land parcel number and further that at the time of purchase, the suit land was registered in the name of Nicholas Obwako Abongo and not Benson Abuoga Moturi, who was the vendor as per Pexh 1.
18. On cross- examination by Counsel for the 2nd Defendant; she stated that the 1st entry on the green card was made on 14/12/1993. She also confirmed that from the Sale Agreement, the purchaser of the suit land was one Samuel Bosire Nyakundi on behalf of Charles Nyakundi and that Benson Abuga signed the same as a witness.
19. Benson Abuga Moturi testified as PW2; he adopted his witness statement dated 19/6/2015 as his testimony and evidence in chief. He further stated that the suit land belonged to him before selling the same to the late Charles Ongeri Nyakundi. Pexh 1 was made to that effect and the same was signed by the late Samuel Bosire Nyakundi, who was purchasing the land on behalf of Charles Ongeri Nyakundi.
20. It was also his testimony that at the time of selling the land to the deceased Charles Ongeri Nyakundi, he had not obtained title from the previous owner (Nicholas Obwako Abongo), for the reason that he had not completed payment of the purchase price. He further stated that he was aware of the letter 11/3/2004 (Pexh 2) by the late Charles Nyakundi to the 1st Defendant allowing her to be the caretaker



- of the suit land on his behalf. He reiterated that the suit land belonged to the late Charles Ongera Nyakundi and not the late Samuel Nyakundi as alleged by the 1st Defendant.
21. On cross-examination; he maintained that the suit land was purchased on behalf of Charles Nyakundi, who was working in Mombasa at the time. He also stated that the letter dated 11/3/2004 was drafted after Samuel Nyakundi had passed on
 22. On cross-examination by the 2nd Defendant; he stated that he did not know how the land was transferred and registered in the name of the 1st Defendant.
 23. Joshua Otieno Gwako testified as PW3 on 25/11/2022; he adopted his witness statement dated 18/5/2015 as his evidence and testimony in chief. He confirmed that the suit land belonged to Charles Ongera Nyakundi. That his father, Nicholas Aboyo had initially sold the suit land to Benson Abuga, who thereafter sold the said land to Charles Ongera Nyakundi through his late father.
 24. On cross-examination he stated that he was present when the land was being sold and he witnessed the same. He further stated that he was the caretaker of the said land for the period between 1984 – 1996.
 25. On cross-examination by the 2nd Defendant's counsel, he reiterated that Benson Abuga purchased the suit land from his father Nicholas Obwako Abongo but later sold the same to Charles Nyakundi. The Plaintiffs thereafter closed their case.

Defendant's Case

26. The matter proceeded for defence hearing on the 02/03/2022; the 1st Defendant testified as DW1. She adopted her witness statement filed on 22/9/2015 as her testimony and evidence in chief. She further stated that the title deed has always been in her late father's name Samuel Nyakundi to date and that the same has never changed to her name or at all. She also denied any claims of fraud as alleged.
27. She produced the following documents as exhibits in support of her case;
 - i. Copy of Title Deed – DExh 1
 - ii. Certificate of confirmation of grant dated 16/2/2017 – DExh 2
28. On cross-examination; she stated that her late father bought the suit land from Nislaus Abwoko Obong'o, though she conceded that she did not have a sale agreement to support the said averments. She dismissed the sale agreement produced as Pexh 1 as not being legitimate for the reason that they were not informed of the same as a family.
29. She also maintained that her father is the rightful owner of the suit parcel by virtue of being the registered proprietor and holder of a valid title deed thereof. She further denied claims that the suit land was registered in her name and distanced herself from the entry on the green card showing the same; she averred that the name and the ID number thereon do not refer to her.
30. She however acknowledged the letter dated 11/3/2004 and produced as Pexh 2, wherein her brother Charles Nyakundi had given her authority to utilize the suit parcel without any interference. It was her contention that the said authority to use, meant that since both her parents were deceased and the late Charles Nyakundi was the eldest son, he was the custodian of the properties of her deceased parents and it is for that reason that he wrote the said letter and would advise them from time to time on the use of her late father's properties.
31. On cross-examination by counsel for the 2nd Defendant; she stated that her father purchased the suit land in the year 1992 and the same was subsequently registered in his name and a title deed issued to



- that effect. She maintained that the suit land has never been subdivided nor transferred to her or any party. She further denied effecting any changes on the suit parcel as per the entry on the green card made on the 18/8/2006.
32. On re-examination she clarified that the suit land was transferred to her late father by one Nislaus Obwako Obongo. She further stated that no objections had been filed in the succession proceedings filed.
 33. Phillip Makini, the Land Registrar Migori County testified as DW2; he outlined his duties as a Land Registrar and stated that he had in his possession the Transfer documents, letter of consent and Application to Land Control Board, in respect to the suit property.
 34. He further stated that from the register; there were 7 entries; 1st entry is dated 14/12/1992 and title deed was issued to Nislaus Obwako Oboya and Joshua Adungo Mbewa, the 2nd Entry is dated 14/12/1992 and is a transfer from the 1st entry to Samuel Bosire Nyakundi for consideration of Kshs. 28,000/= . The 3rd Entry is dated the same day and is on the issuance of title to Samuel Bosire Nyakundi. The 4th Entry is dated 3/10/1995 and the same was made under the Registered Land Act with the registration of a Charge.
 35. The 5th Entry is dated 18/8/2006, the same was in favor of Joyce Mong'ina Ouma which entry had since been cancelled. The 6th entry dated 27/2/2015 was a registration in favor of Margaret Kerubo Tombe as a Purchaser's interest. The 7th Entry is a restriction stating that there was to be no dealings pending the determination of ELC No. 221 of 2015.
 36. He further stated that all the entries referred above had supporting documents and were proper, having met the threshold of transfer. He clarified that entry 5 made on 18/8/2006 and later cancelled could have been an error but the same rectified by the cancellation of the said title deed issued. He confirmed that the suit parcel is registered in the name of Samuel Bosire Nyakundi and that there were no succession documents in the name of Samuel Nyakundi.
 37. He thereafter produced exhibits marked as DExh 3 – 9 as filed in his list of documents dated 12/11/2020 in further support of his case.
 38. On cross-examination; he stated that he cannot tell with certainty the mistake/ error made in Entry No. 5 as he was not the one who made the said entry. He further maintained that the writings on the deleted entry seemed to have been altered.
 39. On cross-examination by the advocate for the 1st Defendant, he reiterated that he is the custodian of the Register and that he has the powers to cancel any wrong entry made on the register. He also stated that there had never been any entry in favor of Charles Nyakundi. The Defence thereafter closed their case.
 40. After the close of the Defence case, I issued directions on the filing of final submissions. Both Parties filed their rival submissions which I have read and taken into account in arriving at my decision.

Analysis and Determination

41. It is this court's considered view that the following issues arise for determination: -
 - a. Who is the rightful and/or legal owner of the suit property.
 - b. Whether the Plaintiffs are entitled to the reliefs sought on account of permanent injunction and General damages.



I. Who is the rightful and/or legal owner of the suit property

42. Section 26 of the [Land Registration Act](#) provides as follows: -
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
43. It is the Plaintiffs' contention that the suit land was purchased by the deceased's father; one Samuel Bosire Nyakundi (who is also since deceased) on behalf of the deceased Charles Nyakundi. They maintained that at the time of the deceased's death, the land was registered in the name of his father Samuel Bosire Nyakundi.
44. They further contend that they later found out that the suit property had been registered in the name of the 1st Defendant and faulted the fraudulent actions of the defendants. They thus urged the court to make a finding that the suit land having been purchased on behalf of the deceased Charles Nyakundi and Pexh 1 made to that effect; that the suit land belonged to the estate of the deceased Charles Ongera Nyakundi.
45. The 1st Defendant on the other hand maintained that the suit land belonged to the estate of their deceased father, Samuel Bosire Nyakundi and any claims to a portion thereof should be made at the succession court. She dismissed the claims made by the Plaintiffs that the suit land belonged to the deceased Charles Nyakundi, who is her brother. It was her contention that the said property was neither bought from Benson Abuoga nor on behalf of the deceased Charles Nyakundi.
46. The 2nd Defendant on its part stated that the transfer and registration of the suit property in the name of the 1st Defendant was done erroneously and the same had since been corrected. The import of the said averments is that the registered owner of the suit property is Samuel Bosire Nyakundi. This court will not endeavour to delve into the accuracy of Entry 5 on the Green Card since the same has since been cancelled and the title issued revoked, hence the same has been overtaken by events.
47. I have considered the rival positions taken by the parties herein; the issue of the title deed in the name of the 1st Defendant having been settled by the 2nd Defendant; the next issue is whether the suit land forms part of the estate of the late Samuel Bosire Nyakundi or forms part of the estate of the late Charles Nyakundi.
48. It is not in dispute that the suit parcel is registered in the name of the late Samuel Nyakundi, who is the deceased's and 1st Defendant's father. I have carefully considered the pleadings by each party and the evidence tendered in court; the Plaintiffs' contend that the suit parcel was purchased by Samuel Nyakundi on behalf of their deceased husband and she produced Pexh 1 in support of the said averments. From a cursory look at the said sale agreement, it is clearly indicated that the sale of land is from one Benson Abuga Moturi to Samuel Bosire Nyakundi on behalf of Charles Ongera Nyakundi.



49. Further the said Vendor; Benson Moturi, testified as PW2 and he confirmed that indeed the sale was between him and Charles Nyakundi but since Charles Nyakundi was out of town at the time, the said agreement was made by Samuel on his behalf. To this end, I am convinced by the averments made by the Plaintiffs together with the exhibits produced to that effect.
50. The Plaintiffs also produced a copy of a letter dated 11/03/2004 by the late Charles Nyakundi as Pexh 2; duly authorizing the 1st Defendant and her husband to use the suit land and appointing them as caretakers thereof. The same was also acknowledged by the 1st Defendant in her testimony in chief.
51. It is important to note that while the 1st Defendant maintained that the suit land belonged to her late father, Samuel Bosire Nyakundi; who purchased the same from one Nislaus Abongo; she did not adduce any evidence in the form of a sale agreement to that effect. I therefore find that her allegations are unsubstantiated and the same do not hold any probative value. I further hold that the said parcel does not form part of the late Samuel Bosire Nyakundi's estate. The authority to use as evidenced by Pexh 2 cannot be interpreted to mean transfer of ownership and rights and interest over the suit land to the 1st Defendant.
52. Pw2 gave an explanation on how the sale of land transaction was done and outlined his previous sale from one Nicholas Abongo and the circumstances that led to the transfer and registration of the suit land from the said Nicholas Abongo to Samuel Nyakundi as evidenced from the green card produced as Dexh 3 by the 2nd Defendant vide Entry 2 & 3 on the Green Card. His averments were further buttressed by the testimony of one Joshua Abwoko PW3; who is the son of Nicholas Abongo and who confirmed the sale between his father and Benson Moturi and subsequent sale between Benson and Charles Nyakundi. I find such explanation satisfactory.
53. Matheka J. while addressing the concept of trust in the case of *Samuel Kadivane Kisago v Patrick Musungu* [2020] eKLR cited with approval the Snell's Equity 29th Edn, Sweet & Maxwell on 'resulting trust' and stated as follows: -
- “A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial.”
54. In light of the circumstances of the case, the evidence adduced on record and guided by the above decision; I am of the considered view that a resulting trust was created in favor of the Plaintiffs. Even though the suit land is registered in the name of the Samuel Bosire Nyakundi, pursuant to section 24 and 26 of the *Land Registration Act*; the intention of the parties was for the subject land to be held on behalf of the late Charles Ongera Nyakundi. It is therefore my finding that the late Charles Ongera Nyakundi is the rightful owner of the suit parcel and the same therefore forms part of his estate.



II. Whether the Plaintiff is entitled to the Reliefs sought

55. From the foregoing, having held that the suit property forms part of the estate of the deceased Charles Nyakundi, I accordingly find that the Plaintiffs have satisfactorily proved their case on a balance of probabilities and are therefore entitled to the reliefs sought in the Plaint.
56. However, Entry No. 5 in the register whose effect was to register the land in the name of the 1st Defendant having been canceled, I find that part of prayer no. 1, 2 and 3; seeking the declaration that the registration of the suit parcel in the name of the 1st Defendant was wrongful, without the requisite capacity and hence legally unjustifiable and an Order of Mandatory Injunction directed to the 2nd Defendant to cancel the registration; have since been overtaken by events and awarding the same would be an academic exercise.

Mesne Profits

57. The Court of Appeal in the case of *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR was of the opinion that it is upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows: -

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

58. It is trite law that he who alleges must prove; the plaintiffs have neither established the amount to be awarded as mesne profits nor substantiated the claim. Therefore, in the absence of proof of mesne profits, I find that the Plaintiffs are not entitled to the same.

Costs

59. The general rule is that costs follow the event; having held that the Plaintiffs have proved their claim against the Defendants, I find that they are entitled to costs of the suit.

Conclusion

60. In view of the foregoing, I find that the Plaintiffs have satisfactorily proved their case to the required threshold and the Plaint dated 25th June, 2015 is hereby allowed on the following terms: -
- I. A Declaration be and is hereby made that the entire suit land L.R. No. Suna West/ Wasweta II/1654 legally belongs to the Estate of the deceased Charles Onger Nyakundi
 - II. A Permanent Injunction be and is hereby issued restraining the 1st Defendant and/or any other persons acting on her behalf or under her authority of whatsoever nature from selling, charging, transferring or causing to be transferred or trespassing into the suit land or interfering in whatsoever manner with the suit land or any portion of the same or in any other way interfering with the deceased's family's (Charles Nyakundi) quiet enjoyment and possession of the suit property or any part thereof.
 - III. Costs of the suit to be borne by the Defendants.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 1ST DAY OF FEBRUARY, 2023.



MOHAMED KULLOW

JUDGE

In presence of; -

..... Plaintiffs

.....Defendants

Court Assistant- Tom Maurice/ Victor

