



**Aridi (Suing as the Administrator of the Estate of Samwel Aridi
Ongwede) v Agik & 3 others (Environment and Land Case
E004 of 2022) [2023] KEELC 17169 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17169 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE E004 OF 2022**

AY KOROSS, J

MAY 4, 2023

BETWEEN

**JARED OTIENO ARIDI PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF SAMWEL ARIDI
ONGWEDE**

AND

**BENTER OLOO AGIK 1ST DEFENDANT
GLADYS OWUONDO 2ND DEFENDANT
RICHARD AYOMA OMACH 3RD DEFENDANT
DISTRICT ADJUDICATION & SETTLEMENT OFFICER BONDO &
RARIEDA 4TH DEFENDANT**

JUDGMENT

1. By way of a plaint dated 4/02/2022, the plaintiff who is the administrator of the estate of Samwel Aridi Ongwede (Samwel) instituted suit on behalf of his estate against the defendants. Samwel is the alleged registered proprietor of land parcel no.1684/Nyamonye/Abidha Village ('suit property').
2. The plaintiff averred in 2013, he discovered the suit property had been irregularly and fraudulently subdivided by the defendants. The hived off portions created 1685/Nyamonye/Abidha Village registered in Daniel Agik's name (Daniel), 2417/Nyamonye/Abidha Village registered in George Owuondo's name (George) and 1683/Nyamonye/Abidha Village registered in Richard Ayoma Omach's name (Richard). These properties shall jointly be referred as 'subdivisions.'
3. The plaintiff particularised fraud, irregularity and illegality against the defendants and sought several reliefs *inter alia*, permanent injunction, the subdivisions be declared fraudulent, illegal and unlawful,



revocation of all the subdivisions and their reversal to the plaintiff's name or as required by law, eviction and costs.

4. By the firm of M. Korongo & Co. Advocates, the 1st, 2nd and 3rd defendants filed a statement of defence and a defence and counterclaim both dated 09/05/2022 and filed on the same date.
5. The defence and counterclaim are not accompanied by a verifying affidavit as required by Orders 4 Rule 1(2) and 7 Rule 5(a) of the *Civil Procedure Rules*. It appears they were erroneously filed. The defence and counterclaim are incompetent and improperly on record and I hereby expunge them from the court record.
6. In their defence, the 1st to 3rd defendants denied assertions made against them by the plaintiff. The 4th defendant did not participate in these proceedings.

Plaintiff's Evidence

7. The plaintiff testified as PW1. His evidence was composed of his oral evidence, witness statement dated 04/02/2022 and documents he produced in support of his case.
8. In brief, it was his testimony the suit property was registered during land adjudication of section 67 Nyamonye in 1973. In 1975, the 1st, 2nd and 3rd defendants with connivance of the 4th defendant hived portions of it to create the subdivisions. The subdivisions commenced in 2013.
9. On cross examination, he admitted that he did not have any documents to demonstrate Samwel was the suit property's owner or the subdivisions emanated from it. Some of the defendants were administratrices of estates of registered owners of the subdivisions.

1st to 3rd Defendants' Evidence

10. The defence witnesses' evidence was composed of their oral testimonies and written witness statements all dated 09/05/2022. In addition, the 1st defendant produced documents.
11. The 1st defendant testified as DW1. In summary, Nyamonye/Abidha/1685 was registered in Daniel's name who was her deceased husband and it never bordered the suit property. She had always resided therein peacefully from 1975. All parties were neighbours.
12. On cross examination, she testified Nyamonye/Abidha/1685 was allocated by her father in law to her family in 1975. It was a 1st registration. Title documents were issued in 2015.
13. Bernard Otieno Ononda testified as DW2. He was a son of the 2nd defendant and George who was deceased. They had always lived peacefully on Nyamonye/Abidha/2417. On George's demise, the plaintiff started pestering his family.
14. On cross examination, he testified George died in 2004. He was unsure if registration took place in 1980's but title documents were issued in 2015.
15. Isabela Odindo Ayoma testified as DW3. In brief, it was her testimony Nyamonye/Abidha/1683 was registered in Richard's name who was her deceased husband. Richard was a 1st registered proprietor. Richard died in 2020 and probate proceedings were yet to be filed. The parties had always lived peacefully from 1975 until when the 3rd defendant died.
16. On cross examination, she testified that she picked her title document in 2015.



Plaintiff's Submissions

18. The plaintiff's counsel, Mr. Ochieng, filed his written submissions dated 27/01/2023. Counsel identified two issues for determination ;(a)whether the subdivisions were illegally excised from the suit property and (b)whether the defendants intermeddled with Samwel's estate.
19. On the 1st issue, counsel submitted that as evidenced from the adjudication records, there was interference with the suit property's actual measurements. It was initially 5.81 Ha. This was orchestrated by the defendants. The defendants had failed to produce documents to show how they acquired the subdivisions. If the grounds set out in Section 26 of the [Land Registration Act](#) were met, then the subdivisions should be revoked.
20. On the 2nd issue, counsel submitted that in 1989 to 1990, Samwel's relative in connivance with the defendants intermeddled with his estate. Counsel relied on [Re Estate of John Gakunga Njoroge](#) [2015] eKLR where Murithi J held that:

" A person can only deal with the estate of a deceased person pursuant to grant of representation made to him under the [Law of Succession Act](#). In this regard, the jurisdiction of court to protect the estate of the deceased person is set out in section 45 of the [Succession Act](#)."

1st to 3rd Defendants' Submissions

21. The 1st to 3rd defendants' counsel, Mr. Korongo, filed his written submissions dated 20/02/2023. He identified 2 issues; (a) who were the owners of land parcels no. East Yimbo/Nyamonye/2417, 1685 and 1683 and, (b) whether these properties were fraudulently acquired.
22. On the 1st issue, counsel submitted the adduced evidence demonstrated East Yimbo/Nyamonye/2417, 1685 and 1683 were registered during demarcation which occurred in 1978 and no objections were raised.
23. On the 2nd issue, counsel submitted the plaintiff's claim was not substantiated by evidence and had not been proved to the required standards. To buttress his position, counsel cited the Court of Appeal decision of [Kennedy Nyamumbo Sese v. Settlement Fund Trustees & 2 others](#) [2017] eKLR where the court stated;

" ...under section 109 of the [Evidence Act](#), the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless any law provides expressly that proof of that fact shall lie on any particular person."
24. Counsel also relied on [Vijay Morjaria v. Nansingh Madhusingh Darbar & another](#) [2000] eKLR Civil Appeal Number 106 of 2000 where the Court of Appeal held: -

" It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

Analysis and Determination

25. I have considered the parties' pleadings, evidence and rival submissions. I shall be guided by provisions of law and authorities that counsels have relied upon. In my considered view, the issues falling for determination are;



- a. Whether the plaintiff's suit was competent against the 1st to 3rd defendants.
- b. Whether the plaintiff's suit was time barred.
- c. Whether the plaintiff proved his claim.
- d. What appropriate orders should be granted.
- e. What of costs.

I will deal with the issues sequentially.

a. Whether The Suit Was Competent Against The 1st To 3rd Defendants

26. Section 2 of the *Civil Procedure Act* has defined a 'legal representative' as: -

" a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

27. Order 3 Rule 7 of the *Civil Procedure Rules* provides as follows: -

" No claim by or against an executor or administrator, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents."

28. The Court of Appeal decision of *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others* [2004] eKLR stated: -

" ...the proper defendant to the plaintiff's claim should have been the estate of Ndolo through the executrix of the will and not the beneficiaries."

29. From adduced evidence, the 1st defendant is the administratrix of Daniel's estate while the 2nd defendant is not the administratrix of George's estate. Paragraphs 2 and 3 of the plaint alludes the 1st and 2nd defendants have respectively been sued as administratrices of the estates of Daniel and George. However, despite this, he has sued them in their personal capacities. The plaintiff made several averments against them personally by asserting 'the 1st, 2nd, 3rd ...defendants.'

30. The issue of locus standi is a cardinal principle in law. If one lacked locus standi in a civil suit, then a suit should not be instituted by or maintained against her. The suit could not be maintainable against the 1st and 2nd defendants in their personal capacities. In the absence of locus standi, this court cannot exercise jurisdiction and such a suit against them is a nullity.

31. This goes in tandem with the audi alteram partem rule which is a cardinal principle of law that provides that parties must be given an opportunity to be heard before adverse orders can be made against them. David and George are allegedly the registered proprietors of some of the subdivisions and a suit had to be maintained against their respective estates.

32. From uncontroverted evidence, the 3rd defendant died in the year 2020 while the suit was filed on 8/08/2022. This was 2 years long after he had died. The parties are all neighbours and the plaintiff must have been privy to his demise.



33. It is trite law a suit against a deceased person is a nullity from inception and a legal representative of his estate cannot be joined in the course of proceedings. The import of such a suit is that it is as if no suit had ever been filed against the deceased person. See *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* (2018) eKLR where the court cited with approval the Indian persuasive decision of *Pratap Chand Mehta v Chrisna Devi Mehta* AIR 1988 Delhi 219.
34. In the end, I find the 1st defendant could not be sued in her personal capacity, the 2nd defendant did not have requisite locus standi to be sued, while the suit against the 3rd defendant was incompetent. The suit against the 1st to 3rd defendants was a nullity which rendered the entire suit fatally defective against them. I hereby strike out the suit against them.

b. Whether The Plaintiff's Suit Was Time Barred.

35. Fraud is a tortious action. If at all the suit was competent against the 1st to 3rd defendant which it was not, then the plaintiff ought to have instituted suit against them within a period of 3 years. However, by the provisions of Section 26 of the *Limitation of Actions Act*, the period started running from when the plaintiff discovered fraud. From the plaint and evidence, the plaintiff discovered fraud against the defendants in 2013. His claim was filed on 8/03/2022. This was close to 9 years after he discovered fraud.
36. The 4th defendant is a public body. Section 3 (1) of the *Public Authorities Act* stipulates;
- " No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."
37. In *Richard Oduol Opole v Commissioner of Lands & 2 Others* (2015) eKLR, the Court of Appeal held:
- "it is evident that the *Public Authorities Limitation Act* in and of itself incorporates part III of the *Limitation of Actions Act* more particularly section 26 of the Latter Act."
38. From this decision, the Public Authorities Limitations Act subsumes Section 26 of the *Limitation of Actions Act*. Juxtaposing to this case, the plaintiff ought to have filed suit against the 4th defendant 12 months from 2013 which he did not.
39. It is my finding that the plaintiff's claim against the defendants was statutory barred and I hereby strike it out against them.

c. Whether The Plaintiff Proved His Claim

40. Notwithstanding the 1st and 2nd issues have disposed of the suit, it is important I address this issue.
41. Section 26 of the *Land Registration Act* states that courts shall prima facie deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme.
42. It is trite that he who alleges must prove. Section 107 of the *Evidence Act* states as follows:
- " (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

43. It is settled law that fraud must be pleaded, particularized and proved to a standard higher than on a balance of probabilities but not beyond reasonable doubt. See the Court of Appeal decisions of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000), *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR (Civil Appeal No 132 of 2005) and *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR.
44. The burden lay on the plaintiff to prove his allegations. It appears the plaintiff was on a fishing expedition. I say so because in his submissions, he asserts the defendants were to tender documents to him.
45. The plaintiff never produced any shred of evidence to prove his case. He never produced the adjudication records, map sheet, registry index maps or even a title document including that of the suit property or those of the alleged subdivisions. He was unsure if the subdivisions took place in 1975 or 2015.
46. In fact, the purported initial acreage of the suit property was not disclosed and it was only in his submissions that he alleges it was approximately 5.81 ha. He introduced evidence in his submissions. Parties must be reminded submissions are arguments and not evidence.
47. As evident by Pex. 10, the chief land adjudication and settlement officer- Bondo affirmed the suit property had neither been subdivided nor challenged within the provisions of the *Land Adjudication Act*. Pex. 9 which was a letter from the assistant county commissioner corroborated this position. In this Pex. 9, the public officer stated he had visited various government offices which informed him that 'parcels no.1684, 1685 and 2417' were 1st registrations.
48. The title documents the defence witnesses produced were those of East Yimbo/Nyamonye/2417, 1685 and 1683 and not of the subdivisions. It appears the plaintiff was unsure which properties his claim was directed against. The plaintiff's evidence was unsubstantiated while those of the defence witnesses were consistent and credible.
49. Ultimately, it is my finding the plaintiff did not prove his case to the required standards. Had I not struck out the plaintiff's case, I would have dismissed his claim. It is trite law costs follow the event. I hereby award costs to the 1st and 2nd defendants. I hereby issue the following disposal orders;
 - a. The plaintiff's suit is hereby struck out.
 - b. The plaintiff shall bear the 1st and 2nd defendants costs of this suit.

DELIVERED AND DATED AT SIAYA THIS 4TH DAY OF MAY 2023.

HON. A. Y. KOROSS

JUDGE

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

Mr. Mulinge h/b for Mr. Ochieng for the plaintiff

Mr. Orieyo h/bfor Mr. Korongo for the defendants

Court assistant: Ishmael Orwa

