



**Kipkulei v Kissem & 6 others (Environment and Land Appeal
17 of 2022) [2023] KEELC 17485 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL 17 OF 2022**

L WAITHAKA, J

MAY 9, 2023

BETWEEN

PETER YEGON KIPKULEI APPELLANT

AND

SALAH TERIKI KISSEM 1ST RESPONDENT

ANNAH RINGOI CHEPSONGOL 2ND RESPONDENT

RUTH JESANG KIPSIGEN 3RD RESPONDENT

EZEKIEL KIMUTAI KIPSIGEN 4TH RESPONDENT

JOSHUA KIBET KIPSIGEN 5TH RESPONDENT

MAUREN JEBABAI KIPSIGEN 6TH RESPONDENT

JEPKEMOI AENGO 7TH RESPONDENT

*(Being at Appeal from the judgment of Judicaster Nthuku, SRM delivered
on 3rd October 2018 in Eldama Ravine SRMCC No. 64 of 2011)*

JUDGMENT

1. By a Plaint dated 7th October 2011 and amended on 2nd April 2012, the appellant herein instituted a suit in the lower court to wit Eldama Ravine Civil Suit Number 64 of 2011 seeking judgment against the respondents jointly and severally for:-
 - a. An order of injunction to restrain the defendants by themselves, their servants, agents and/or employees from interfering with his enjoyment and quiet possession of all that parcel of land known as Baringo/Perkerra 101/1087 (suit property) measuring 0.40 hectares.
 - b. Costs of the suit



- c. Any other relief the court may deem fit to grant.
2. The suit is premised on the ground that he is the owner of the suit property and that he acquired the suit property by way of purchase from Kipsigen Aengwo (deceased).
 3. The plaintiff (now appellant) accused the 1st to the 7th defendants (now respondents) of illegally/unlawfully preventing him from gaining entry to the suit property.
 4. As can be discerned from the pleadings, the 1st respondent is the wife/spouse of Jepkemoi Aengo (deceased) while the 2nd to the 7th respondents are children of the deceased.
 5. The respondents filed a statement of defence and counterclaim denying the allegations levelled against them and contending that the suit property was hived off family land without their consent or the consent of the 1st respondent who is the wife of the registered owner. The respondents further contended that the appellant's title deed is not genuine and/or legal.

Evidence

6. When the case came up for hearing, the appellant who testified as P.W.1, informed the court that he bought the suit property from Kipsigen Aengo (deceased) on 27th June 2005; that the suit property is a subdivision of Baringo Perkerra 101/210 (hereinafter referred to as the mother title). He Produced the sale agreement dated 27th June 2005 as Pexbt 1. He informed the court that they went to the Land Control Board on 9th March 2010, after subdivision. He produced the land board consent as Pexbt 2.
7. He further informed the court that he was issued with a title deed. He produced the title deed issued to him as Pexbt 3.
8. The court heard that when the plaintiff went to fence his land, the defendants barred him from fencing the suit property.
9. further informed the court that the 1st defendant attended the land control board and did not raise any objection.
10. In cross examination, he admitted that the sale agreement was done before his advocate on record but stated that his advocate was not involved in the transfer of the land to him. He bought the suit property at Kshs. 160,000/-. He paid the purchase price in instalments and finished paying on 9th March 2010. He paid 20,000/- on 9th March 2010 after getting consent from the Land Control Board.
11. The appellant acknowledged that the Kshs. 80,000/- which he had paid as deposit and part payment in respect of the suit property was returned to his advocate after the seller's family members complained to the police and the Officer Commanding Station (OCS) ordered that the money be taken to his advocate.
12. The appellant also conceded that the suit property is agricultural land and that the seller's family objected the sale when he applied for Land Control Board Consent.
13. The appellant acknowledged that his application for land control board consent, which he made in 2005, was rejected but explained that he made a fresh application for land control board's consent in 2010 after the seller and his wife, the 1st respondent, said they had agreed.
14. Even though the appellant had no proof of payment for the consent and stamp duty, he maintained that he obtained title to the suit property legally.



15. The appellant acknowledged that when he filed the suit, the seller was alive and explained that he sued the respondents as opposed to the seller because it is the respondents who opposed his entry to the suit property.
16. In re-examination, the appellant stated that the sale agreement was between himself and the deceased and not the respondents; that the deceased did not object his entry to the suit property; that the deceased signed transfer documents for him and that the deceased's wife, the 1st respondent did not object the transfer. Concerning the money that had been refunded, he stated that the seller went to the advocate's firm later and the money was given to him in the presence of his children and wife.
17. D.W.1 Ezekiel Kigen, informed the court that the suit property is family land. He acknowledged that the suit property was sold by his father in 2005. He stated that they discovered the sale when their father came with strangers and went round the family land, Baringo/Perkerra 101/210. They found Kshs. 80,000/- in their father's bag and took it to Eldama Ravine Police Station. The purchaser followed them to the Police Station where they learnt that the money they found was the 2nd instalment for purchase of the suit property. He stated that the money they recovered from their father was returned to the buyer by the OCS Eldama Ravine Police Station after they complained to him.
18. Explaining that they never sold the land thereafter, he stated that they learnt that the suit property had been sold when they were served with court papers filed in this case.
19. Upon being served with the court papers, they conducted a search and discovered that the land had been subdivided and a portion therefrom registered in favour of the appellant. He produced mutation form dated 15th November 2011 as Dexbt 1.
20. He stated that the original title deed for the mother title was in the custody of his mother.
21. Explaining that they were born and brought up in the suit property, he asserted that his mother was not aware of the sale and transfer of the land. He urged the court to cancel the title held by the appellant.
22. D.W.2, Salah Tereki, informed the court that she was not aware of sale of the suit property. She produced the title in respect of the mother title as Dexbt 2. She acknowledged that the deceased sold the suit property but blamed the deceased for selling the suit property without informing her yet they had bought the land together and lived on the land together.
23. She denied having signed any document in respect of sale of the suit property.
24. She acknowledged that the appellant had paid some money in respect of the suit property but stated that they refunded it. She further stated that the deceased never told her that he sold the land.
25. Upon considering the cases urged by the respective parties the Learned Trial Magistrate (TM) held:-

“The plaintiff has not proved on a balance of probabilities that he legally acquired title to the land in dispute. There was fraud on the part of the plaintiff in getting the title deed. He has not proved his case on a balance of probabilities. I dismiss the plaintiff's suit and enter judgment for the defendants in the counterclaim as follows; I hereby order cancellation of the title deed to parcel of Land Baringo/Perkerra/101/1087. The plaintiff to bear the costs of this suit.”
26. Dissatisfied with the judgment, the plaintiff (now appellant) appealed to this court on seven (7) grounds which can be reduced to two (2) broad grounds namely; the TM erred by:-



- i. Failing to find that the defendants had no locus standi to file a counterclaim in respect of the suit property since they are not legal representatives of the estate of the deceased;
 - ii. Dismissing his case and allowing the respondent's counterclaim;
27. Pursuant to directions given on 6th October 2022 to the effect that the appeal be disposed off by way of written submissions, parties to the appeal filed submissions which I have read and considered.

Analysis and Determination

28. From the Memorandum of Appeal, the evidence adduced in the lower court and the submissions, the issues for the court's determination are found to be:-
- i. Whether the TM erred by failing to find that the respondents had locus standi to file a counterclaim in respect of the suit property;
 - ii. Whether the TM erred by dismissing the appellant's suit and allowing the respondents' counterclaim.
29. On whether the TM erred by failing to find that the respondents had no locus standi to file the counterclaim since they had not obtained a grant of letters of administration ad litem in respect of the estate of the deceased, based on the decision in the case of *Julian Adoyo Ongunga vs. Francis Kiberenge Abano* where it was held that a party without locus standi in a civil suit lacks the right to institute and/or maintain a suit even where a valid cause of action subsists, on behalf of the respondents it is submitted that the respondents had no locus standi to file the counterclaim on behalf of the estate of the deceased as none procured letters of administration to act or question what the deceased did when he was alive.
30. In reply, the respondents have pointed out that the issue of lack of the respondents' lack of capacity to file a counterclaim was not raised in the appellant's pleadings but was belatedly raised in his submissions and submitted that the court was justified in failing to consider the issue.
31. Concerning that issue, although it was raised belatedly in the appellant's submissions, the trial court ought to have addressed it and at least made a decision on it one way or the other. The parties had through their submissions, identified the issue of locus standi as one of the issues for the court's determination. That being the case, in line with the decision of the Court of Appeal in *Galaxy Paints Company Limited vs. Falcon Guards Limited* where it was held that issues for determination in a suit generally flow from pleadings or such issues as the parties have framed, the TM ought to have considered that issue.
32. Concerning the issue, from the submissions filed by both the appellant and the respondents, there appears to be general agreement that the counterclaim was filed at a time when the deceased had passed on. This is how the respondent's addressed the issue in their submissions before the lower court:-

Issues for determination

1. Locus Standi

The plaintiff has in his submissions raised the issue of locus standi. The plaintiff herein filed a suit against the defendants, who in turn filed a defence and, for purposes of defending what is theirs, a counterclaim.

The counterclaim was not brought by the defendants by virtue of them suing as the legal administrators of the deceased but by virtue of them defending what is their family land.



The suit land is family land and the defendants have resided there for all their lives. To the first defendant, the suit land is matrimonial property as the same was bought in the pendency of their marriage. The fact that the suit land is matrimonial property was brought out in defence case and was not controverted.

By virtue of those facts, the defendants, and most especially the first, does not need letters of administration to bring a suit that involves her land.

This is a diversionary tactic that is meant to bring none existent issues and we urge this court to disregard the same.”

33. On his part, the appellant had submitted as follows concerning the issue:-

“The plaintiff submits that the defendants have no locus standi to bring this suit on behalf of the estate of the deceased because none of them has procured letters of administration to act or question what the deceased did when he was alive.”

34. Although no evidence was tendered by either party concerning when the deceased died, it is clear from the court record that the deceased passed during the pendency of the suit in the lower court. The issue of the death of the deceased arose in the course of hearing of the suit. For instance, when D.W.2 testified, she informed the court that her husband (deceased) died four years before she testified. That would put the year of death as 2014. From the respondent’s response to the issue of locus standi, I deem the fact of the deceased having died before the counterclaim was filed to be either not in dispute or to be uncontroverted by the respondents.

35. Turning to the question framed, whilst it is true that the main suit was initiated by the plaintiff seeking to prevent the respondents from interfering with his title to the suit property, which is a subdivision of the mother title produced by D.W.2, cognizance of the fact that a counterclaim is a separate suit from the main suit, an issue of law arises concerning the capacity of the respondents to bring and maintain the counterclaim they filed. I say so because the evidence adduced before the lower court shows that the title deed for the mother title was in the name of the deceased. Whilst the defendants pleaded that the mother title and by extension the suit property which is a subdivision from the suit mother title is family land, a question of law arises concerning the legal capacity of the respondents to sue in respect of the mother title given the fact that it is registered in the name of the deceased and that they are not the administrators of the estate of the deceased. Under Section 82 of the *Law of Succession Act* Cap 160 Laws of Kenya, it is only a personal representative of the estate of a deceased person who has capacity to sue in respect of the estate of a deceased person.

36. There being evidence that the respondents did not obtain letters of administration or a limited grant allowing them to sue on behalf of the estate of the deceased, they clearly lacked capacity to institute and maintain the suit they filed in 2014.

37. In the special circumstances of this case, the respondents could only defend the suit filed against them on the alleged ground that it was family land but for them to sue in respect of the alleged family land, which was at the material time registered in the name of the deceased, they required a grant of letters of administration. They had none.

38. The upshot of the foregoing is that I agree with the appellant’s submission that the TM erred by failing to find that the respondents had no capacity to file the counterclaim filed on 20th January 2015.

39. As to whether the TM erred by dismissing the appellant’s suit and allowing the respondents’ counterclaim, having reviewed the totality of evidence adduced in the lower court, I do find as a fact



- that the appellant and the deceased entered into a contract of sale of a portion of land measuring 0.40 acres. The portion was to be hived off from the mother title that was in the name of the deceased person.
40. It is acknowledged that the deceased received part payment in respect of the suit property and contended that on intervention of the deceased family, the consideration received was refunded. A review of the totality of the evidence adduced before the lower court shows that the deceased proceeded with the sale of the suit property, the objection of his family notwithstanding. That fact is discernable from the evidence of the appellant and the witness statements of D.W.1 and D.W.2.
41. Whilst in their oral evidence in court, D.W.1 and D.W.2 claimed that they were not aware of the sale of the suit property by the deceased, that position contradicts their filed statement where they acknowledge that the deceased proceeded with the transaction between him and the appellant, despite their objection. In that regard, see the statement of D.W.2, filed on 23rd July 2018, which at the relevant part is as follows:-
- “On 9th March, 2010 I learnt that my husband was to attend before the Chairman Eldama Ravine Land Control Board for purpose of obtaining a letter of consent from the said land control board having presented his application later on. I also attended the meeting with the intention to object issuance of the consent, which I did.....
- I suspect that my husband may have fraudulently applied for loss of the original title deed and he may have obtained another title...”
42. The above statement by D.W.2 was adopted as part of her evidence. That statement clearly contradicts D.W.2’s oral evidence to the effect that she did not know about the impugned transaction until she was served with suit papers.
43. D.W.1 in his oral testimony, contradicted his written statement filed on 26th June 2018, which at the relevant parts is as follows:-
- “...We gave the money back to the plaintiff (Kshs.80,000/) at the police station and informed him that we were not selling the land.
- The plaintiff however talked to our father and paid him the money behind our back and even acquired a title deed fraudulently.”
44. It is clear from the foregoing statement of D.W.1 and D.W.2 that they were aware of the transaction between the appellant and the deceased, which transaction they tried to frustrate but without success.
45. There is evidence that the deceased applied and obtained the consent of the Land Control Board, albeit long after the sale agreement was entered into. There is also evidence that the deceased applied for issuance of a new title deed in respect of the mother title. That fact is alluded to in the witness statement of D.W.2 and made bear by gazette notice number 3247 concerning application for issuance of a new title deed in respect of the mother title.
46. From the totality of the evidence adduced in the lower court, it is the considered view of this court that the suit property was transferred to the appellant by the registered owner, the deceased. There is no evidence of any fraud or wrong doing on the part of the appellant in the impugned transfer.
47. Whereas the evidence shows that the registered owner of the suit property transferred it to the appellant against the wishes of the respondents, that is not the kind of evidence required under Section 25 and/or 143 of the *Land Registration Act*, 2012 and the *Registered Land Act*, Cap 300 Laws of Kenya (repealed) respectively for challenging the title of a registered owner of land.



48. Whilst the suit property was hived off the mother title without the consent of the seller's spouse, at the time the impugned transaction was entered into, no consent of a spouse was required as a matter of law in disposing land with a known owner. In that regard see the case of *Margaret Muthoni Njoroge v Housing Finance Company Ltd & another* (2020) eKLR where it was held:-

“The requirement that consent of the spouse be provided before matrimonial property may be charged was not explicitly set out in our law until the *Land Act* of 2012 which came into effect on 2nd January 2012. There before there was no law that required spousal consent before a charge could be created and spousal rights were not recognized as overriding interests.”

49. For the foregoing reasons, I find and hold that in the circumstances of this case, the respondents' could not rely on the alleged lack of consent of D.W.2 to defeat the title issued to the appellant in full participation of the person who sold it to him and who did not require the sanction of the respondents to sale and transfer the land to the appellant.

50. I think I have said enough to demonstrate that the TM erred by dismissing the appellant's suit and allowing the respondents' counterclaim. Consequently, I find the appeal to be merited, set aside the judgment of the lower court; allow the appellant's claim in the lower court and dismiss the respondents' counterclaim with costs to the appellant.

51. I also award the appellant the costs of the appeal.

52. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 9TH DAY OF MAY, 2023.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Ms. Esang holding brief for Mr. Kipkenei for the appellants

Ms. Sitati holding brief for Mr. Gikonga for the respondents

Court Asst.: Christine

