



Owiti (Suing in Her Capacity as the Executor of the Estate of the Late Martin Owiti Odero (Deceased)) v Muriuki & another; Kenya Commercial Bank Limited (Interested Party) (Environment & Land Case 76 of 2019) [2023] KEELC 20790 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20790 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 76 OF 2019
LC KOMINGOI, J
OCTOBER 12, 2023**

BETWEEN

**CANON MACRINE ADHIAMBO OWITI PLAINTIFF
SUING IN HER CAPACITY AS THE EXECUTOR OF THE ESTATE OF THE
LATE MARTIN OWITI ODERO (DECEASED)**

AND

**ERASMUS KIMATHI MURIUKI 1ST DEFENDANT
REGISTRAR OF LANDS, KAJIADO 2ND DEFENDANT**

AND

KENYA COMMERCIAL BANK LIMITED INTERESTED PARTY

JUDGMENT

1. By a plaint dated 13th August 2019, the plaintiff seeks judgement against the defendants jointly and severally for;
 - a. A declaration that all the entries made in the Register of the suit property, being Title number Ngong/Ngong/27691, including the purported transfer from the name of Martin Owiti Odero (deceased) to the 1st Defendant were irregular, unlawful and fraudulent and therefore null and void ab initio.
 - b. A declaration that all the entries made on the encumbrance section of the title to the suit property, being Title number Ngong/Ngong/27691, including the illegal and fraudulent registration of charge for a sum of Kenya Shillings Three Million Five Hundrend Thousand



Only (Kshs.3,500,000/= to the Interested Party were irregular, unlawful and fraudulent and therefore null and void ab initio.

- c. An order directing the 2nd Defendant, through Chief Land Registrar, to cancel the registration of the 1st Defendant as proprietor of all that piece of land known as Ngong/Ngong/27691 and to reinstate the name of Martin Owiti Odero, now deceased as the legal owner.
 - d. An order directing the 2nd Defendant, through Chief Land Registrar, in custody of the subject registers to rectify the register of the suit property, being Ngong/Ngong/27691 to reflect that the name of Martin Owiti Odero, now deceased as the legal owner.
 - e. An order directing the 2nd defendant, through Chief Land Registrar, to issue the plaintiff with an Original Title over the suit property, being Title Number Ngong/Ngong/27691, in the name of Martin Owiti Odero, now deceased as the legal owner.
 - f. A permanent injunction do issue against the 1st by himself, his agents, servants, workers, employees and/or those claiming through or under them from entering, occupying, leasing, mortgaging, transferring, alienating, disposing of, intermeddling, trespassing or otherwise interfering with the plaintiff's quiet possession, ownership and/or in any way dealing with all that piece of land known as Ngong/Ngong/27691.
 - g. General damages against the 1st defendant for fraudulently and illegally processing the purported transfer of title from the late Martin Owiti Odero (Deceased) to the 1st Defendant herein and subsequently issuing an illegal title in the 1st Defendant's name to the detriment of the rights of ownership by the Estate of the late Martin Owiti Odero.
 - h. General damages against the 1st Defendant procuring registration of charge over the suit property to the Interested Party unlawfully, unprocedurally or through corrupt means which is inconsistent with the rights of ownership of the suit property by the Estate of the late Martine Owiti Odero.
 - i. Cost of the suit.
 - j. Interest on prayers (g) (h) and (i) from the date of judgement until payment in full.
2. It is the plaintiff's case that she is the executor of the will of the late Martin Owiti Odero (deceased). She also stated that she was his wife. That the late Martin Owiti Odero (hereinafter referred to as "the deceased") bought LR. NO. Ngong/Ngong/27691 from Edward Kirrinkai Lewett, who transferred the same in favour of Martin Owiti Odero who was issued with a title deed on 26/10/2007.
 3. It is also the plaintiff's case that Martin Owiti Odero passed on, on 18th March 2005 leaving behind the last will and testament. She applied and was issued with a grant of probate with written will vide Succession cause No. 1775 of 2015 (In the matter of the Estate of Martin Owiti Odero (Deceased). It is then that she discovered the original title deed for the suit property was missing. She made a report at Loresho Police Station.
 4. On conducting a search at Ngong Land Registry, she discovered that the suit property had been illegally and fraudently transferred and registered in the name of the 1st Defendant. A charge had been registered in favour of Kenya Commercial Bank (Interested Party).
 5. In response, the 1st Defendant, filed a statement of defence dated 14th October 2020. He maintained that the transfer in his favor was legal and due process was followed. He denied the allegations of fraud and/or misrepresentation in the plaint. He urged that the plaintiff's suit be dismissed with costs.



6. The 2nd defendant entered appearance and filed a defence of statement dated 18th April 2020 but no witness statement was presented.
7. The Interested Party (Kenya Commercial Bank) filed a statement of defence dated 7th October 2020 denying any knowledge of a charge created in its favour over the suit property and that it does not have a loan account in the name of the 1st Defendant.

Evidence of the Plaintiff.

8. PW1 Canon Macrine Adhiambo Owiti, the plaintiff herein, testified on 27th October 2022 and 26th January 2023. She adopted her witness statement dated 13th August 2019 as part of her evidence in chief. She also produced the documents in the bundle of documents dated 13th August 2019 as exhibits in this case.
9. She told the court, that she is Executor of the will of the late Martin Owiti Odero, dated 15th March 2015. Then she realized while undertaking verification of the deceased's assets that the suit property had been fraudently transferred to the 1st defendant and charged at Kenya Commercial Bank (Interested Party) for Kshs.3.5 million.
10. It is her testimony that the deceased never sold or transferred ownership of the suit property until his demise on 2nd June 2015. She told the court that she in possession of the suit property.

Evidence of the Defendants.

11. DW 1 Erasmus Kimathi Muriuki, the 1st Defendant, testified on 26th January 2023. He adopted his witness statement dated 14th October 2020 as part of his evidence in chief. He also produced the documents in his bundle of documents dated 14th October 2020 as exhibits D1 and D2 respectively.
12. He told the court that he has never been charged with any criminal offence in respect of this transaction.
13. When cross-examined by Mr. Mwango for the plaintiff he admitted that he did not file any transfer to support the sale. He also had no proof that he had paid stamp duty. He could not confirm if they appeared before the Land Control Bank to obtain consent. He stated that he paid the purchase price in 2014 through an advocate by cash and in instalments but he produced no documents to confirm. He also did not avail a letter of offer from Kenya Commercial Bank (Interested Party).
14. When he was cross-examined by Mr. Ngang'a for the Interested Party, he admitted that he had no letter of offer from the bank. He also stated that he guaranteed a company the loan. He said he was not a director of the said company but the company was to service the loan.
15. The Interested Party did not present any witness in this case despite being granted several opportunities. On the 23rd March 2023, counsel informed the court that they would not present any witnesses and closed their case.
16. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions.

17. They are dated 23rd May 2023. They raise;
 - i. Whether the title held by the 1st defendant with respect to the suit property is unconditionally indefeasible, and not subject to challenge?



- ii. Whether the Title held by Erasmus Kimathi Muriuki, the 1st defendant over the property known as Ngong/Ngong/27691 is subject to challenge?
 - iii. What orders are deserving in the present matter?
18. Counsel submitted that Article 40(6) of *the constitution* does not guarantee protection of any property where it was found to have been unlawfully acquired.
 19. It is also submitted that the transfer or acquisition by the 1st Defendant is unlawful and ought to be set aside. Further that the register ought to be rectified to reflect Martin Owiti Odero as the proprietor.
 20. The effect of the Provision of Section 26 is to establish two different standards or thresholds for impeaching or challenging a register owner's title. The first, if a registered owner's title is challenged on account of fraud or misrepresentation, it is necessary for the contender to establish that the registered owner was a party to the fraud or misrepresentation (Sec.26(1)(a) challenge). Secondly, where a contender challenges a registered owner's title asserting that the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme, then the contender is not required to prove participation of the registered owner in the illegal/unprocedural/or corrupt acquisition of the corrupt scheme.

He has put forward the cases of Alice Chemutai Too Vs. Nickson Kipkurui Korir & 2 Others (2015) eKLR ;

Githinga Kibutha Vs. Caroline Nduku (2017)eKLR .

21. It is submitted that by virtue of the will dated 18th March 2015, the late Martin Owiti Odero confirms that the suit property was part of his estate. Further that as at 3rd May 2017 the plaintiff had physical possession of the suit property.
22. Is it credible or authentic that a land owner who pays consideration to acquire title over the property would failed to move with haste to take up physical possession? Is it credible or authentic that a land owner would take more that 5 years (May 2018 to date) to take up physical possession of property lawfully acquired?
23. Counsel also submitted that the Bank maintained it was a stranger to the entry reflecting in the register held by the Land Registrar in respect of the suit property. That there is no credible evidence to support the transfer of title to the 1st Defendant and the encumbrance recorded in favour of the Interested Party.

He has put forward the cases of Munyua Maina Vs. Hiram Gathiha Maina (2013)eKLR ;

Samuel Kamere Vs. Lands Registrar, Kajiado (2015) eKLR.

24. Where the Land Control Board consent has not been availed we submit that under Section 6 of the *Land Control Act*, Chapter 302, Laws of Kenya, the transfer to the 1st Defendant is void for all purposes, and therefore subject to challenge on the ground of illegality and being an unprocedural transfer.
25. I agree with the Plaintiff's Submissions that where the registered chargee (interested party) expressly declines participating in acquiring an interest in the suit property, that similarly serves as an indication that the interest was recorded in the register illegally, unprocedurally, and/or through a corrupt scheme.
26. Counsel urged the court to find that fraud has been proved and this court ought to order that the powers bestowed upon the court under Section 80 of the *Land Registration Act* be exercised in favour of the plaintiff. He prays that the plaintiff be awarded costs of the suit.



27. On the 23rd March 2023, Mr. Isinta for the 1st defendant and Mwangi for the Interested Party were present when the court gave directions on filing of submissions. On the 26th June, 2023, when the matter came up for confirmation, none of them was present. By the time of writing this judgement the defendant's/Interested Party's submissions are not in record.
28. I have considered the pleadings, the evidence on record the written submissions and the authorities cited. The issue for determination are;
- i. Whether the title held by the 1st defendant with respect to the suit property is unconditionally indefeasible, and not subject to challenge?
 - ii. Whether the title held by Erasmus Kimathi Muriuki, the 1st Defendant over the property known as Ngong/Ngong/27691 is subject to challenge?
 - iii. What orders are deserving in the present matter?
29. It is not in dispute that the plaintiff is the Executor of the will of the late Martin Owiti Odero. The will is dated 18th March, 2015. In the said will the suit property is listed among the assets of the deceased. This means that by 18th March 2015 the suit property was in the name of the deceased.
30. The 1st Defendant stated that he bought the suit property from the deceased on 17th May 2014 for KShs.2,500,000/=. When he was cross examined, he admitted that he had not presented to court a registered transfer document, consent from Lands control board, evidence of payment of stamp duty, evidence of payment of the purchase price. He also was not viable to prove that he had obtained physical possession of the suit property. He had no letter of offer from the bank, (Interested Party). It should be noted that the bank has denied the existence of such charge in its favour.
31. The fact that the title deed is in his name does not mean anything. It was held in *Munyua Maina Vs. Hiram Gathiha Maina (2013)eKLR* thus;
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register”.
32. Section 26(b) of the *Land Registration Act* 2012 provides as follows;
- “b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”
- In *Alice Chemutai Too Vs. Nickson Kipkurui Korir & 2 Others (2015)eKLR*;
- “It will be seen from the above that title is protected, but the protection is removed and title can be impeached if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme”.
33. I find that the title held by the 1st defendant is challengeable for having been procured illegally, unprocedurally or through a corrupt scheme.



34. I am convinced that the 1st defendant obtained the title through fraud. It came out during cross examination that he did not have the documents to support the alleged sale from the deceased to himself. I find that the particulars of fraud have been proved against the 1st and 2nd defendants. This is because the late Martin Owiti Odero did not dispose of the suit property until his demise on 2nd June, 2015.
35. The upshot of the matter is that the plaintiff has proved her case against the defendants/Interested party on a balance of probabilities. The plaintiff has maintained she has possession hence she has not suffered any loss to warrant any grant of damages.
36. Accordingly judgement is entered in her favour as follows:
- a. That a declaration is hereby issued that all the entries made in the Register of the suit property, being Title number Ngong/Ngong/27691, including the purported transfer from the name of Martin Owiti Odero (deceased) to the 1st Defendant were irregular, unlawful and fraudulent and therefore null and void ab initio.
 - b. That a declaration is hereby issued that all the entries made on the encumbrance section of the title to the suit property, being Title number Ngong/Ngong/27691, including the illegal and fraudulent registration of charge for a sum of Kenya Shillings Three Million Five Hundred Thousand Only (Kshs.3,500,000/= to the Interested Party were irregular, unlawful and fraudulent and therefore null and void ab initio.
 - c. That an order is hereby issued directing the 2nd Defendant, through Chief Land Registrar, to cancel the registration of the 1st Defendant as proprietor of all that piece of land known as Ngong/Ngong/27691 and to reinstate the name of Martin Owiti Odero, (now deceased) as the legal owner.
 - d. That an order is hereby issued directing the 2nd Defendant, through Chief Land Registrar, in custody of the subject registers to rectify the register of the suit property, being Ngong/Ngong/27691 to reflect that the name of Martin Owiti Odero, (now deceased) as the legal owner.
 - e. That a permanent injunction do issue against the 1st by himself, his agents, servants, workers, employees and/or those claiming through or under them from entering, occupying, leasing, mortgaging, transferring, alienating, disposing of,, intermeddling, trespassing or otherwise interfering with the plaintiff's quiet possession, ownership and/or in any way dealing with all that piece of land known as Ngong/Ngong/27691.
 - f. Costs of the suit and interest.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12TH DAY OF OCTOBER 2023.

L.KOMINGOI
JUDGE.

