



REPUBLIC OF KENYA



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**Bunduki v Yoge & 3 others (Civil Suit 427 of 2014)  
[2023] KEELC 21238 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21238 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
CIVIL SUIT 427 OF 2014  
M SILA, J  
NOVEMBER 1, 2023**

**BETWEEN**

**SAMWEL OSORO BUNDUKI ..... PLAINTIFF**

**AND**

**WILFRED MONYENYE YOGI ..... 1<sup>ST</sup> DEFENDANT**

**LUCAS SANGARA OSINO ..... 2<sup>ND</sup> DEFENDANT**

**EDMOND OBAE OSINO ..... 3<sup>RD</sup> DEFENDANT**

**ROBINA KEMUNTO ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

(Plaintiff filing suit to bar the defendants from interfering with land to which he has title to; plaintiff allegedly having purchased the land from the brother of the 1<sup>st</sup> – 3<sup>rd</sup> defendant who was husband to the 4<sup>th</sup> defendant; defendants filing defence and counterclaim seeking cancellation of the title of the plaintiff on the basis that no succession had ever been done in respect of the estate of their late father who held the original title before it was purportedly subdivided so as to bring forth the title of the plaintiff; no evidence demonstrated of any succession cause in respect of the estate of the original owner; without succession being conducted, the original title could not have been legally subdivided and portions sold, including that sold to the plaintiff; moreover plaintiff not demonstrating any consent of the Land Control Board; title of the plaintiff thus illegally created and is subject to nullification; court nullifying the title of the plaintiff and the other subdivisions and making an order to have the title revert to its original number and be subjected to succession in the normal way)

**A. Introduction And Pleadings**

1. This suit was commenced through a plaint which was filed on 5 November 2014 originally against the 1<sup>st</sup> – 3<sup>rd</sup> defendants. In the plaint, the plaintiff averred to be the owner of the land parcel



Nyaribari Chache/B/B/Boburia/11187 measuring 0.03 Ha. He pleaded that the 1<sup>st</sup> – 3<sup>rd</sup> defendants had unlawfully interred the remains of the late Thomas Ombui Osino on the land, and he wished to have orders of exhumation of this body, and a permanent injunction to restrain the 1<sup>st</sup> – 3<sup>rd</sup> defendants from the land. Together with the plaint, the plaintiff filed an application seeking to have the body exhumed pending hearing of the suit, but this application was withdrawn. On 16 July 2018, the plaint was amended to add the 4<sup>th</sup> defendant to the suit. The amended plaint appears to have abandoned the prayer for exhumation and seeks the following orders:-

- i. A declaration that the plaintiff is the lawful bona fide and registered owner of LR No. Nyaribari Chache/B/B/Boburia/11187.
  - ii. An order of eviction against the defendants from the suit land.
  - iii. A permanent injunction to restrain the defendants from the suit land.
  - iv. General damages for trespass and conversion.
  - v. Such other relief that the court may deem fit.
  - vi. Costs of the suit.
2. There was an original defence filed towards the original plaint, which defence was amended, after amendment of the plaint, to inter alia include a counterclaim. The four defendants opposed the plaintiff's suit and put him to strict proof. In the counterclaim, they pleaded that the late Thomas Ombui Osino (the deceased) was the husband to the 4<sup>th</sup> defendant. They pleaded that the plaintiff colluded with the deceased to cause subdivision of the land parcel No. Nyaribari Chache/B/B/Boburia/1674, which was in name of Getate Okoa alias Osino Getate, before the grant was confirmed, thus the beneficiaries of the estate of Getate Okoa have suffered loss. In the counterclaim they seek the following orders :-
- a. A declaration that all subdivisions, registrations and transfers out of LR No. Nyaribari Chache/B/B/Boburia 1674 being land registration numbers Nyaribari Chache/B/B/Boburia 10958, 10959, 10960, 10961, 11186 and 11187 which comprised an estate of a deceased person before confirmation of grant was null and void.
  - b. An order for nullification, cancellation, rectification of the register and transfers of all subdivisions out of LR No. Nyaribari Chache/B/B/Boburia/1674 being land registration numbers Nyaribari Chache/B/B/Boburia 10958, 10959, 10960, 10961, 11186 and 11187 and revert to the deceased Osino Getate until a grant is confirmed.
  - c. Costs of the counterclaim.
3. It is with the above pleadings that the matter proceeded for trial. For brevity, I will mostly refer to the land parcels with their numbers only, without the prefix Nyaribari Chache/B/B/Boburia, but all references herein do refer to land containing the said prefix.

## **B. Evidence of the Parties**

4. PW-1 was the plaintiff. He is a businessman. He testified that he purchased land from Thomas Ombui Osino (Thomas) on 14 October 2013 for a consideration of Kshs. 600,000/=. What he purchased was a portion measuring 49 by 79 feet out of the land parcel Nyaribari Chache/B/B/Boburia/10958, which land was in name of Thomas. The land was subdivided and he got his title to the parcel No. 11187. He stated that despite owning the land, he has not had peaceful occupation as he is being threatened by the 1<sup>st</sup> defendant who owns no land within the locality. He stated that when he bought the land,



- the wife of Thomas was not present as she had been sent away, and had been away for over ten years, and that Thomas sold the land in order to pay school fees for his son. He testified that a dispute arose after the death of Thomas. Cross-examined, he testified that he sued the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as they acted in cahoots with the 1<sup>st</sup> defendant to deny him possession. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are brothers to Thomas and are sons to Osino Getate (deceased). Osino Getate died on 13 September 1976 and owned the parcel No. 1674. He stated that he has no problem with the family of Osino Getate but only with the 1<sup>st</sup> defendant.
5. PW-2 was Steve Mokaya, the Land Registrar, Kisii. He elaborated that the suit land emanates from the land parcel No. 1674, registered on 7 January 1971 in name of Osino Getate. On 4 March 2012, this land was subdivided into four, being numbers 10958, 10959, 10960 and 10961. The parcels No. 10958 and 10961 were registered in favour of Thomas Ombui Osino, whereas Lucas Ongara Osino, and Edmond Omae Osino (2<sup>nd</sup> and 3<sup>rd</sup> defendants) got registered as owners of the parcels No. 10959 and 10960 respectively. He stated that this subdivision was done without undergoing succession and the entry was not signed by the Land Registrar. This, he stated, was irregular. He testified that the parcel No. 10958 was further subdivided into the parcels No. 11186 and 11187 on 13 November 2013.
  6. With the above evidence, the plaintiff closed his case.
  7. DW-1 was Wilfred Monyenye Yoge, the 1<sup>st</sup> defendant. He is a member of County Assembly, Kisii. He testified that he is aware of the history of the suit land and mentioned that it was originally parcel No. 1674 owned by Osino Getate who died in 1976. He stated that no succession for his estate was ever done. He testified that purportedly the four sons of Getate got registered vide succession cause No. 29 of 2012 but such cause is for a different person known as Gesare Okoa. He thought that it is the plaintiff and Thomas Ombui who changed the title. He testified that when Thomas died, they buried him on the land and that is when the plaintiff emerged and claimed to have purchased the land from Thomas. He testified that the plaintiff is not on the land and the land is not subdivided on the ground, and further, that it is the 4<sup>th</sup> defendant (wife of Thomas) who occupies all of it with her children. He stated that the plaintiff is not in possession and has never put up any developments.
  8. Cross-examined, he testified that he is a first cousin of Thomas. He did not know if there was any land registered in his name at the time of his death. He was not aware whether it was Thomas who applied for subdivision of the parcel No. 10958 and did not know that Thomas had sold a portion of it to the plaintiff. His written statement however mentioned that there was an unpaid balance which he could not substantiate. He stated that what he recognizes is the parcel No. 1674 and insisted that no succession was done.
  9. DW-2 was Lucas Sangara Osino, the 2<sup>nd</sup> defendant. He affirmed that he is son of Osino Getate, the proprietor of the original parcel No. 1674, and brother to the late Thomas Ombui. He testified that they never filed any succession cause for the estate of their late father who died in 1976. He stated that this parcel No. 1674 was ancestral land and they never authorized Thomas to sell it. When he died, they buried him on land that he used to cultivate. He wished that all subdivisions be cancelled to enable them file a succession cause.
  10. Cross-examined, he testified that they are seven brothers and they have divided the land amongst themselves on the ground. He testified that it was Thomas who filed the succession cause and they have not been called for confirmation of the grant. He now stated that his complaint is not that no succession cause was filed but that the grant is yet to be confirmed. They have not filed any application for revocation of grant and he does not know how far the succession matter has gone. He testified that he was not aware that the land parcel No. 1674 was subdivided into the parcels No. 10958 to 10961.



He testified that he was not there when Thomas sold the land though his statement did mention the sale and claimed that there was a balance.

11. Re-examined, he now stated that no succession cause was filed and they never went to the Land Registry to transfer the land.
12. The 3<sup>rd</sup> and 4<sup>th</sup> defendants did not testify, and with the above evidence, the defence closed its case.
13. I invited counsel to file submissions, which they did, and I have taken these into account before arriving at my disposition.
14. In a nutshell, the plaintiff asserts title to the parcel Nyaribari Chache/B/B/Boburia/11187 which he avers to have purchased from the late Thomas Ombui. The defendants on the other hand contend that the original title No. 1674 has never been subdivided and there cannot be such a title lawfully prepared in favour of the plaintiff. Interestingly, in their pleadings, the defendants did acknowledge filing a succession cause No. 29 of 2012, though no particulars of the court was provided, and pleaded that the grant therein has never been confirmed. Curiously, when he testified, DW-1 stated that no succession cause has been filed, whereas DW-2 was rather ambivalent, wavering between a succession cause having been filed, and none being filed. In his evidence, the Land Registrar was categorical that no succession has been done in respect of the estate of the late Osino Getate and even the entry on subdivision has never been signed.
15. I actually have no evidence of a succession cause having been filed in respect of the estate of the late Osino Getate, the deceased proprietor of the land parcel Nyaribari Chache/B/B/Boburia/1674. The plaintiff did not avail any evidence of any succession cause in respect of his estate. What the defendants exhibited was a grant in respect of Kisii High Court Succession Cause No. 29 of 2012 (their pleadings citing the same case number without mention of the court) but a look at this grant shows that it is in respect of the estate of a different person, i.e, Gesare Okoa, who died on 18 March 1992. It certainly cannot be in respect of the estate of Osino Getate who died in 1976. There is therefore nothing before me to suggest that there has ever been any succession cause filed in respect of the estate of Osino Getate and no grant issued despite the pleadings of the defendant that there is a grant that is awaiting confirmation. The fact of the matter is that there is nothing filed in respect of the estate of Osino Getate.
16. It follows that the entry No. 2 in the Green Card of parcel Nyaribari Chache/B/B/Boburia/1674, showing that Thomas Ombui Osino, Lucas Sangara Osino, and Edmond Omae Osino, have been registered as proprietors in common pursuant to Succession Cause No. 29 of 2012 is therefore a fraudulent entry. Without that entry, there is no way that the title could have properly been subdivided to bring forth the parcels Nyaribari Chache/B/B/Boburia/10958, 10959, 10960 and 10961. There was no proper creation of these titles No. 10958, 10959, 10960 and 10961. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants have disowned the titles numbers 10959 and 10960, which are in their names, and the 4<sup>th</sup> defendant (widow of Thomas Ombui) also does not support them. Without these titles having been properly created, the plaintiff cannot assert any good title to the land parcel No. 11187.
17. Apart from the irregularity in the creation of the title for want of a succession cause, there are other problems regarding this title as there is no evidence of any consent of the Land Control Board issued contrary to the provisions of Section 6 of the [Land Control Act](#), Cap 302, Laws of Kenya, which provides as follows :-
  6. Transactions affecting agricultural land
    - (1) Each of the following transactions that is to say—



- (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the *Development and Use of Land (Planning) Regulations, 1961* (LN 516/1961) for the time being apply;
- (c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

18. From the above, it will be discerned that dispositions over agricultural land require the consent of the Land Control Board or else they are null and void. The plaintiff exhibited no consent of the Land Control Board for subdivision and even for the transfer of the title No. 11187 to himself. How did he manage to get title without first going through the Land Control Board ? He couldn't, and his sale, if ever there was one, is null and void.

19. From the above, it is clear that other than merely dangling the title deed, the root of the title of the plaintiff is tainted and such title cannot be upheld. Under Section 26 of the Land Registration Act, 2012, titles acquired illegally are subject to cancellation. That law is drawn as follows.

26. Certificate of title to be held as conclusive evidence of proprietorship

- (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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

20. From the foregoing, it will be discerned that though the law does recognize the sanctity of title, titles that have been acquired fraudulently or by mistake, or illegally and unprocedurally, cannot be protected. In my opinion, at the very least, the title of the plaintiff was acquired illegally and unprocedurally, *inter alia* for having been created without first undergoing the process of succession and secondly for want of consent of the Land Control Board and is a title that cannot be protected by law.

21. Given the above, I proceed to dismiss the suit of the plaintiff and allow the counterclaim of the defendants. I proceed to declare all purported subdivisions and titles emanating from the land parcel Nyaribari Chache/B/B/Boburia/1674 to be null and void and hereby proceed to cancel the titles,



Nyaribari Chache/B/B/Boburia numbers 10958, 10959, 10960, 10961, 11186 and 11187. The Land Registrar, Kisii, is hereby ordered to proceed and effectuate the said cancellations in the registers of these titles. I order the title Nyaribari Chache/B/B/Boburia/1674 to be reinstated in the name of Osino Getate (deceased) and it be subjected through the normal succession process.

22. Finally, the defendants shall have the costs of the suit and the counterclaim.
23. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 1<sup>ST</sup> DAY OF NOVEMBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

In the presence of: -

Mr. Marita holding brief for Mr. Ochoki for the plaintiff

Mr. Nyambati for the defendants

