



**Developing Africa Limited v Oland & another; Aduwo & another
(Interested Parties) (Environment & Land Case 15 of 2014)
[2023] KEELC 21252 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21252 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 15 OF 2014**

E ASATI, J

NOVEMBER 2, 2023

BETWEEN

DEVELOPING AFRICA LIMITED APPLICANT

AND

FRED OLAND 1ST DEFENDANT

JENNIFER OTIENO 2ND DEFENDANT

AND

JARED OCHIENG ADUWO INTERESTED PARTY

NANDI OWUOR YUSTO INTERESTED PARTY

JUDGMENT

1. Vide the Originating Summons dated 17th April, 2014, the Plaintiff sought for the following orders against the Defendants herein: -
 - a. an order for eviction of Fred Olando and Jeniffer Otieno being the 1st and 2nd Respondents from land known as L.R. No.Kisumu/Nyalenda“B”/1556 and Kisumu/Nyalenda “B”/1568 respectively and vacant possession of the suit lands to the applicant.
 - b. Costs of the application be to the applicant.
2. The Plaintiff’s case as contained in the Originating Summons was that it was the registered owner of land described as Kisumu/Nyalenda“B”/1556 and Kisumu/Nyalenda“B”/1568 (the suit lands herein) which lands it sold to the 1st and 2nd Interested Parties. That the 1st and 2nd Respondents illegally encroached onto the suit lands and refused to vacate despite numerous demands. That the Interested



- Parties are demanding vacant possession which the Plaintiff is unable to deliver as a result of the Respondents' unlawful actions. That it is in the interest of justice that the orders sought be allowed.
3. The Originating Summons was supported by the contents of the Supporting Affidavit sworn on 17th April, 2014 by one Patricia Githu and the annexures thereto.
 4. The case against the 1st Defendant was settled along the way as the 1st Interested Party took over vacant possession of land Parcel No. Kisumu/Nyalenda "B"/1556 and withdrew from this case.
 5. The case of the 2nd Defendant was that on 29th April 2004 her husband and her bought a portion of land parcel known as Kisumu/Nyalenda "B"/630 at a cost of Kshs.150,000/= which they paid in full and took possession of the sold portion of land to date. That they bought the land from one Nyabute Otiato who was the son of the registered owner of the land.

The Evidence

6. The Plaintiff called only one (1) witness one Oscar Agutu Moriwho testified and adopted the contents of his witness statement dated 6/2/2022 as his evidence in chief. He had stated in his witness statement that he is employed by the Plaintiff as the General Manager. That at all material times, the Plaintiff was the registered owner of the suit lands. That the Plaintiff was at the time known as Social Capital Group Limited but subsequently changed its name to Developing Africa Limited. That by a Letter of Offer dated 28th September 2012, the Plaintiff sold Kisumu/Nyalenda "B"/1556 to Jared Ochieng Aduwo, the 1st Interest Party and the property has since been registered in his name.
7. He testified further that by another letter of offer dated 27th January, 2014, the Plaintiff sold Kisumu/Nyalenda "B"/1568 to Nandi Owuor Justo the 2nd Interested Party herein and similarly the property has been registered in his name.

That the case against the 1st Defendant is settled. That the 2nd Defendant is not the registered owner of the property as alleged. That the 2nd Defendant has illegally encroached on the land and has refused to vacate the same despite various demands. That the 2nd Interested Party is demanding vacant possession of the suit land No. Kisumu/Nyalenda "B"/1568.

8. On cross examination, he stated that at the time of purchase, a letter was written to the 2nd Defendant who was already on the land to vacate after which the present suit was filed.
9. He produced exhibits in support of the Plaintiff's case.
10. The 2nd Interested Party testified and produced exhibits. He confirmed that since he bought the land, he has never occupied it because the 2nd Defendant Jenifer Otieno was in occupation. That his purchase of the land from the Plaintiff was not disputed.
11. On behalf of the 2nd Defendant, the 2nd Defendant testified and adopted her witness statement dated 5th March, 2023 as her evidence in chief. She had stated in her witness statement how her together with her husband bought a portion of land parcel No. 630 and took possession. She produced documents as exhibits namely; land sale agreement dated 29/4/2004, acknowledgement for payment of purchase price (acknowledgement receipts), final payment acknowledgement receipt, adjudication record dated 16/12/1981, certificate of confirmation of grant and correspondences and prayed that the suit be dismissed. She stated that she has occupied the land since the year 2004 when she purchased the land for value. That she is not a trespasser on the land. On cross examination, she stated that it was a typing error where it was indicated that that the final payment of the purchase price she did was Kshs.300,000/= . That the land sale agreement does not show the size of the land she bought. That she did not have Land Control Board consent for transfer of the land.



Submissions

12. Written submissions dated 13th June, 2023 were filed on behalf of the Plaintiff by the firm of Oundo Muriuki & Company Advocates. Counsel identified 3 issues for determination namely;
- what is the genesis of Kisumu/Nyalenda“B”/1568?
 - whether the 2nd Defendant is entitled to a portion of Kisumu/Nyalenda “B”/630
 - whether the 2nd Defendant should be evicted.

13. On the genesis of the Kisumu/Nyalenda“B”/1568, Counsel submitted that as it is evidence from Affidavit of Nyabute Otiato, the land was a resultant parcel of the sub-division of Kisumu/Nyalenda“B”/630 which was sub-divided to produce Nyalenda“B”/1545 to 1573. That the owner of No.630 was one Shabbir Ahmed. That the Provincial Land Tribunal decreed in 2003 that the parcel belonged to Shabbir Ahmed but Shabbir Ahmed was directed to give Nyabute two parcels of land being Kisumu/Nyalenda“B”/1572 and Kisumu/Nyalenda“B”/1573.

That this information was confirmed by P.Ex.10 a certified copy of decree in KisumuCMCC.27 of 2007 which is admissible under the provisions of Section 35(2(a) and 44(a) of the *Evidence Act*.

14. On whether the 2nd Defendant is entitled to a portion of Kisumu/Nyalenda “B”/630, Counsel submitted that the 2nd Defendant did not complete the purchase as envisaged under the sale agreement. That even if she completed paying the purchase price, she could only be entitled to a portion of either Kisumu/Nyalenda“B”/1572 or Kisumu/Nyalenda “B”/1573.

15. On whether the 2nd Defendant should be evicted, counsel submitted that the subject properties were repossessed by ABC Bank Ltd from Shabbir Amhed due to loan default. That it is the ABC Bank Ltd who then sold the lands to Developing Africa Limited.

That section 26 of the *Land Registration Act* No.3 of 2012 provides that a certificate of title issued by the Land Registrar upon registration or upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named is the proprietor of the land and the absolute and indefeasible owner.

Counsel submitted further that if indeed the 2nd Defendant purchased property from Nyamute Otiato then it could only be either Nyalenda “B”/1572 or 1573 as Nyamute Otiato would have no right to sell Kisumu/Nyalenda “B”/1568.

16. That the Plaintiff produced title to show that it was the owner of the property as at 15th June, 2012. That the Plaintiff's witness testified that the Plaintiff was unable to give the property to the buyer Mr. Nandi Owuor because the 2nd Defendant was in occupation. Counsel invited the court to find that the 2nd Defendant was in wrongful occupation of the property and that she ought to vacate or be evicted so as to enable the 2nd Interested Party take vacant possession.

17. Written submissions dated 23rd June, 2023 were filed on behalf of the 2nd Interested Party by the firm of S.O. Madialo & Company Advocates. Counsel submitted that the Plaintiff on 27th January, 2014 issued a letter of offer to the Interested Party for the disposal of plot No. Kisumu/Nyalenda “B”/1568 measuring 0.03Ha at a total price of kshs.60,000/=.

That the 2nd Interested Party accepted the offer and vide cheque numbers 2684 and 2685 paid the entire of the purchase price. That the parties entered into the land sale agreement dated 3rd February, 2014 and signed by all the parties and thereafter legally got registered owner of the suit land.



18. Relying on the case of ELC Misc. Appl. (JR) No.48 of 2018, Republic –vs- Chief Land Registrar & Another ex-parte Philip T.S. Counsel submitted that title acquired by the Interested Party was for a consideration and all legal procedures were followed. That no objection or any legal action was lodged to challenge the sanctity of the 2nd Interested Party’s title. Counsel prayed that the court finds in favour of the 2nd Interested Party as against the 2nd Defendant.
19. Written submissions dated 16th August, 2023 were filed on behalf of the 2nd Defendant by the firm of Ogejo Omboto & Kijala Advocates LLP. Counsel presented one substantive issue as the issue for determination in the suit namely; whether or not the 2nd Defendant was entitled to a portion of the land known as Kisumu/Nyalenda “B”/630. Counsel relied on the provisions of section 107, 108 and 109 of the *Evidence Act* Cap.80 Laws of Kenya and the case of Evans Nyakwara –vs- Cleophas Bwana Ongaro (2015) eKLR to submit that he/she who alleges must prove. That it is not disputed that the 2nd Defendant has been in occupation of a portion of the suit property originally known as Kisumu/Nyalenda “B”/630 which she bought for valuable consideration as captured in the sale agreement dated 29th April, 2004.
20. Counsel submitted further that although the Applicant claims to be registered owner of the suit land, it has not produced any registered title in respect of the suit property in its name. That the applicant has not proved that the 2nd Respondent is not entitled to the portion they originally bought. That the acreage of what is owned by the 2nd Defendant is squarely what is captured in the now sub-divided portion being Kisumu/Nyalenda “B”/1568. Counsel prayed for costs to be paid by the Plaintiff.

Issues for Determination

21. From the pleadings, the evidence adduced and the submissions made, it emerges that the contest herein has been narrowed down to ownership of land parcel No. Kisumu/Nyalenda “B”/1568. While the 2nd Defendant has occupation, the Interested Party has the title and the Plaintiff the duty and obligation to deliver vacant possession of the suit land to the 2nd Interested Party to whom it sold the land. This presents one substantive issue for determination namely: who is entitled to own land parcel No. Kisumu/Nyalenda “B”/1568?

Analysis and Determination

22. Each of the parties and particularly the Plaintiff and the 2nd Defendant have a different narration of the history and genesis of land parcel No. Kisumu/Nyalenda “B”/1568
23. Both parties agree however that the land is a resultant parcel of sub-division of land known as Kisumu/Nyalenda “B”/630.
24. According to the Plaintiff, land parcel No. Kisumu/Nyalenda “B”/630 belonged to one Shabbir Ahmed after the Provincial Land Dispute Tribunal awarded it to him. For this position, the Plaintiff relied on the Affidavit of one Nyabute Otiato sworn on 25th November, 2016 and produced by the Plaintiff as exhibit.

The said Nyabute Otiato deponed in paragraph 4 that after 15 years of ownership dispute between him and Shabbir Ahmed over land parcel No. Kisumu/Nyalenda “B”/630 the Provincial Land Disputes Tribunal decreed in 2003 that the parcel belonged to Shabbir and that Shabbir should grant him (Nyabute Otiato) two resultant parcels numbers Kisumu/Nyalenda “B”/1572 and Kisumu/Nyalenda “B”/1573.



25. The Plaintiff also produced a decree in KSM/CMC Land Case No.27 of 2007 dated 10/9/2007 adopting the award of the Tribunal as a decree of the court. The decree reads in part

“ That the award of Land Dispute Tribunal is hereby adopted as the judgement of the court. That the parties agreed that Shabbir will part with appropriate plot for the old man to subsist his family. It was agreed in the site visit that Shabbir will surrender two parcel No.1573 and 1572 of 46 feet by 65 fees each to Nyabute Otiato. That the two parties should meet cost of the survey.”
26. The Plaintiff contended that land parcel No.630 had been sub-divided to produce Numbers Kisumu/NyalendaB/1545 to 1573 which plots belonged to Shabbir Ahmed. That the suit lands were charged by Shabbir Ahmed to ABC Bank Ltd for a loan who upon default by Shabbir to repay the loan, sold the suit lands to the Plaintiff. In support of this, the Plaintiff relied on the contents of the Affidavit of Nyabute Otiato.
27. The Plaintiff further testified that it was previously known as Social Capital Group Limited and so ABC Bank Ltd transferred the land to Social Capital Limited. In support of this, the Plaintiff relied on the title deed dated 15th June, 2012 for land parcel No. Kisumu/Nyalenda “B”/1568 in the name of Social Capital Group Ltd. The Plaintiff further contended that vide the certificate of change of name dated 26th January, 2012, it changed its name to the current name; Developing Africa Limited.
28. It was the Plaintiff’s case that it subsequently sold the suit land parcel No Kisumu/NyalendaB/1568 to the 2nd Interest Party and transferred it to him. That the 2nd Interest Party ought to have occupation thereof but is prevented by the 2nd Defendant who is trespassing on the land.
29. I have read the letter of offer dated 27th January, 2014, the land sale agreement and the title deed dated 18th February, 2014 in the name of Nandi Owuor Yusto which were produced as exhibits in support of the Plaintiff’s case. The case of the Interested Party supports the case of Plaintiff.
30. The version of the 2nd Defendant is however different. According to her, her husband and her on 29th April, 2004 bought a portion of land parcel known as Kisumu/Nyalenda “B”/630 for Kshs.150,000/- from Nyabute Otiato Abongo who was the beneficial owner of the property. That she paid the purchase price in full through instalments and paid Kshs.300,000/- being the final instalment in settlement. She produced land sale agreement as exhibit to show this.
31. That the seller was the son of one Okech Obongo deceased, who was awarded the land by Land Adjudication Board. She produced a copy of adjudication record to support this. That it is the Surveyor who showed her where to settle on land parcel No.630. That the suit land is a result of illegal sub-division of land No.630 and that a Surveyor’s report filed in court shows that she occupies the suit land herein.
32. I have read the documents produced by the 2nd Defendant. While the purchase price is indicated in the land sale agreement was Kshs.155,000/- in her evidence she stated that the same was Kshs.150,000/- and that she paid it in full and final settlement was Kshs.300,000.
33. The person who sold the land to the 2nd Defendant according to her agreement was Nyamute Otiato. The 2nd Defendant recognizes Nyamute Otiato as one who had beneficial interest in the land and capacity to sell it. However, the said Nyamute Otiato in his Affidavit did acknowledge that there was an attempt by the 2nd Defendant to buy a portion of the land from him but the 2nd Defendant frustrated the agreement by failing to pay the balance of the purchase after paying the initial deposit of Kshs.40,000/=.



34. Concerning the 2nd Defendant's occupation of the suit land, Nyamute Otiato deposed that;

“Jeniffer Otieno approached me in 2004 and requested that I sell her part of the parcel number Kisumu/Nyalenda“B”/630. I disclosed to her that the parcel was already awarded to Shabbir by the Provincial Land Tribunal and that the parcel had an ownership case pending in court but she insisted we do a contract on sale of the land which we did but she later frustrated. The purchase price was Kshs.155,000/- and she gave me a deposit of Kshs.40,000/= and the rest was to be paid after the court ruling. She then in April, 2004 occupied a section of the parcel (Kisumu/Nyalenda“B”/1568) which had been sub-divided from parcel No. Kisumu/Nyalenda“B”/630.”

This is contrary to her evidence that a Surveyor visited the land and showed her the suit land as the land to settle on.

35. The other issue is that Nyamute Otiato's land as per the court decree was comprised in number 1572 and 1573 which were given to him by the court hence if the 2nd Defendant was to buy any land from the said Nyamute Otiato then it should have been either of the two parcels.

36. I have noted from the title deeds produced that the register in respect of the suit land was opened on 13th February, 1995. This means that in the year 2004 when the 2nd Defendant was buying land, land parcel No.630 was not in existence as it had been sub-divided to produce the suit land, parcel No.1556 and the other parcels.

37. Further, a reading of the Adjudication record produced by the 2nd Defendant as exhibit shows that the same is dated the year 1981 and the decision on the objection on page 2 thereof signed on 10th August, 1988. However, from the contents of the Affidavit of Nyamute Otiato and the court decree of 2007, it is clear that subsequent legal actions overturned the adjudication decision.

38. The Interested Party holds title to the suit land. The same has not been challenged in any way. Under Sections 24, 25 and 26 of the *Land Registration Act* and article 40 of *the Constitution*, his rights over the land are protected.

39. I find that the Plaintiff rightfully owned the suit land and legally sold and transferred it to the 2nd Interested Party and that the 2nd Interested Party as the absolute proprietor is entitled to possession and occupation thereof. The 2nd Defendant can have recourse, if any, to the estate of Nyamute Otiato sold the land to her.

40. For the foregoing reason, I find that the Originating Summons has been proved on a balance of probabilities. I enter judgement in favour of the Interested Party against the 2nd Defendant for;

- a. an order for the 2nd Defendant to vacate and hand over vacant possession of Land No. Kisumu/Nyalenda “B”/1568 to the Interested Party within the next 60 days hereof in default the 2nd Defendant be evicted from the said parcel of land as by law provided.
- b. Cost of the suit to the 2nd Interested Party.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 2ND DAY OF NOVEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.



In the presence of:

Maureen: Court Assistant.

Bwire holding brief for Ouru for the Plaintiff.

Okidi for the 2nd Defendant.

No appearance for the Interested Party.

1st Respondent present in person

