



**Odhul v Othina (Environment & Land Case 31 of 2021)  
[2022] KEELC 15257 (KLR) (7 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15257 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 31 OF 2021  
GMA ONGONDO, J  
NOVEMBER 7, 2022**

**BETWEEN**

**WERE ODHUL ..... PLAINTIFF**

**AND**

**SHEM OWUOR OTHINA ..... DEFENDANT**

**JUDGMENT**

**A. Introduction**

1. Article 260 of the *Constitution of Kenya, 2010*, defines the term “property” to include any vested or contingent right to, or interest in or arising from land, or permanent fixtures on, or improvements to, land. In the same article, the term “land” includes the surface of the earth.
2. At the heart of the instant suit is land reference number Kanyamwa/K/K/Kadwet/1469 measuring approximately three decimal four nine hectares (3, 49 Ha) in area (The suit land herein). It is contained in registry map sheet number 18 and located within Homa Bay county.
3. The suit land is a sub division of land reference number Kanyamwa/K/K/Kadwet/ 339 (Hereinafter referred to as the parent land).
4. The plaintiff appears in person in this matter.
5. The defendant is represented by learned counsel, Mr Oyoo of the firm of Edward Kisia and company advocates.

**B. The Plaintiff’s Case**

6. Briefly, by a plaint dated April 11, 2011 and lodged in court on May 4, 2011, the plaintiff has sued the defendant for;
  - a. A declaration that the defendant is holding the suit land in trust for the plaintiff.



- b. An order cancelling title documents of the suit land in the name of the defendant and same be reconvened into the name of the plaintiff.
  - c. Costs of the suit.
  - d. Any other relied the honourable court may deem just and fit to grant.
7. The plaintiff's complaint is that the original land was registered in the name of Rosalina Kaumba Aran (the deceased herein). That the plaintiff obtained limited grant of letters of Administration Ad litem regarding the estate of the deceased (P Exhibit 3). That on March 30, 2011, the plaintiff discovered that the defendant had fraudulently registered the suit land in his (defendant) name with effect from May 15, 2007 as revealed in a copy of register and a copy of certificate of official search of the suit land (P Exhibits 1 and 2, respectively). Therefore, it provoked this suit.
  8. The evidence of the plaintiff (PW1) is partly premised upon his statement dated May 4, 2011 and list of documents dated April 11, 2011 (P Exhibits 1 to 5). Also, in examination in chief, he stated, inter alia;
 

“LR No Kanyamwa/K/K/Kadwet/1409 and originally LR No Kanyamwa/K/K/Kadwet/339. It is registered in the name of the defendant. The suit land belongs to deceased, Martin Aran Were and his wife Rosalina Kamba Aran (deceased).
  9. PW2 was Piterlis Ogutu Odhul whose testimony is partly anchored on his statement dated April 11, 2011. Further, he testified that the defendant is in possession and occupation of the suit land.
  10. As part of his evidence, one Hezron Waiyaki Odhul (PW3) relied on his statement filed simultaneously with the plaint. Also, he stated that that initially, the suit land was registered in the name of the deceased and it is now, in the name of the defendant.
  11. In his submissions dated August 25, 2022 and filed on August 29, 2022, the plaintiff gave background facts of the case and identified three issues for determination including whether the defendant fraudulently transferred the suit land to his (defendant) name. He submitted, inter alia, that the suit land was illegally transferred to the defendant. He cited section 3 (3) of the *Law of Contract Act*, section 26 of the *Law of Succession Act* (Cap 160 Laws of Kenya) and the case of *Justus Maina Muruku v Jane Waitihira Mwangi* (2018) eKLR, among others, to fortify his claim herein.

### C. The Defendant's Case

12. In a statement of defence dated June 30, 2011 and filed herein on July 1, 2011, the defendant questioned the capacity of the plaintiff to lodge this suit. That this court lacks jurisdiction over the dispute. That this suit be dismissed with costs to the defendant.
13. The defendant (DW1) relied upon his statement dated June 30, 2021 and documents of even date serial numbers 1 to 13 (D Exhibits 1 to 13) as part of evidence. He told the court in part thus;
 

“That Rosalina kaumba Aran (deceased) who went to Ndhiwa Land Control Board which allowed her to transfer the same in my favour. That was done before she died.”
14. DW2 was Moses Juma Othin who testified and relied on, inter alia, his statement dated June 30, 2021 as part of his evidence.
15. As part of his evidence, the defendant's third witness, Jeremiah Odare (PW3) relied upon his statement dated June 30, 2011.



16. By the submissions dated September 6, 2022 and filed in court on October 13, 2022, learned counsel for the defendant made reference to D Exhibits inclusive of an application for consent to transfer the suit land by the deceased, consent, transfer and title deed in favour of DW1. That the deceased did not transfer the suit land to PW1. Counsel urged the court to dismiss the suit with costs to the defendant.

#### **Issues for Determination.**

17. Generally, the issues for determination in a suit flow from either the pleadings or as framed by the parties for the court's determination; see *Galaxy Paints Co Ltd v Falcon Guards Ltd* (2000) eKLR.
18. Agreed issues dated June 27, 2013 and filed on June 27, 2013 (plaintiff's version) and order 15 of the *Civil Procedure Rules, 2010* in respect of issues in a case, are borne in mind in this suit.
19. On that score, the of jurisdiction of this court over this suit, the capacity of the plaintiff to file this suit as well as fraud and trust in respect of the suit land, are issues that arise from the pleadings for this court's determination.

#### **D. Discussion and Determination**

20. Concerning the issue of jurisdiction, at paragraph 12 of the statement of defence, the defendant questioned the mandate of this court over the suit.
21. *Halsbury's Laws of England Edn 4<sup>th</sup> Vol 9* at page 350, defines jurisdiction thus;  

“The authority which a court has to decide matters that are litigated before it or take cognizance of the matters presented in a formal way for decision.”
22. In the case of *Republic v Karisa Chengo and 2 others* (2017) eKLR, the Supreme Court of the Republic of Kenya held-  

“Lack of jurisdiction thus renders a court's decision void as opposed to it being merely voidable.....”
23. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Company Ltd* (1969) EA 696, the Court of Appeal observed-  

“.....a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and if argued as a preliminary objection, will dispose of the suit. Examples are an objection to jurisdiction of the court.....”
24. It is trite that a preliminary objection is a threshold question and best taken at inception. That the same calls for a definitive, determinative and prompt pronouncement; see *Kakuta Maimai Hamisi v Peris Pesi Tobiko and 2-others* (2013) eKLR.
25. Sections 5, 6, 11, 17 and 18 of the *Civil Procedure Act* (Chapter 21 Laws of Kenya) are quite instructive on jurisdiction of courts.
26. More importantly, I bear in mind, article 162 (2) (b) of the *Constitution of Kenya, 2010* and the decision in Karisa Chengo case (supra). By section 13 (1) *Environment and Land Court Act*, 2015 (2011), this court has both original and appellate jurisdiction over the instant suit.
27. On the issue of capacity, I note the contents of paragraphs 4 and 5 of the plaint. PW1 obtained PExhibit 3 regarding the estate of the deceased.



28. It is trite that a litigant is clothed with locus standi upon obtaining a limited of full grant of letters of administration in cases of intestate succession; see [Rajesh Chudasama v Sailesh Chudasama](#) (2014) eKLR
29. Moreover, the estate of the deceased person is vested in the legal representative; [Troustik Union international and another v Jane Mbeyu and another](#) (1993) eKLR
30. Plainly, PExhibit 3 and burial permit (DExhibit 3) reveal that the proprietor of the original land is deceased.
31. Be that as it may, it is discerned in DExhibits 1 to 13 that the deceased transferred the suit land during her lifetime. The same is registered in the name of DW1 herein held in [Munyu Maina v Hiram Gatbiha Maina](#) (2013) eKLR.
32. As regards fraud, the plaintiff set out particulars of same at paragraphs 6a to 6c of his plaint. No doubt, this is in line with the Court of Appeal decision in the case of [Kinyanjui Kamau v George Kamau](#) (2015) eKLR and [Ndolo v Ndolo](#) (2008) KLR (G & F) 742.
33. The standard of proof of fraud in civil cases is well settled; see [Gladys Wanjiru Ngacha v Treresa Chepsaat and 4 others](#) (2013) eKLR.
34. Furthermore, did the plaintiff strictly prove the allegations of fraud in this suit? Whereas he pleaded fraud in the plaint, the evidence of DW1 inclusive of DExhibits 1 to 13, disclose that the suit land was lawfully transferred to the DW1 who in turn holds the absolute and indefeasible title thereto as noted in Munyu Maina case (supra).
35. Regarding trust, the same is strictly pleaded at paragraph 8 of the plaint.
36. This court is guided by sections 25 and 28 of the [Land Registration Act](#), 2016 2012 which provide for trusts including customary trusts as overriding interests over registered land.
37. It is trite that trust is a question of fact to be proved by way of evidence; see [Mumo v Makau](#) (2002) 1 EA 170
38. In the instant suit, I am guided by the [Wambugu-vs Kimani](#) 1992 2 KAR 58, [Isaack MInanga Kiebia v Iaaya Theuri M Lintari and another](#) (2018) eKLR on the essentials of a customary trust. However, the plaintiff has failed to strictly provide sufficient evidence to show that the suit land is held in trust for him by the defendant.
39. To that end, I find that the plaintiff has not proved his case against the defendant to the requisite standards. I proceed to dismiss this suit with costs to the defendant.
40. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**G.M.A ONG'ONDO**

**JUDGE**

**Present**

1. Mr. C Oyoo, Learned Counsel for the defendant.
2. Plaintiff
3. Court Assistant, Okello.

