



REPUBLIC OF KENYA



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**Ochier & another v Okoth & another (Environmental and Land Originating
Summons E024 of 2022) [2025] KEELC 90 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 90 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E024 OF 2022**

E ASATI, J

JANUARY 23, 2025

BETWEEN

TOM ODHIAMBO OCHIER 1ST PLAINTIFF

MOSES OTIENO OCHIER 2ND PLAINTIFF

AND

LEONARD NYAMBOK OKOTH 1ST DEFENDANT

ROSE ACHIENG NYAMUOK 2ND DEFENDANT

JUDGMENT

1. Vide the Originating Summons dated 19th December, 2022, the Plaintiffs/Applicant herein sought for orders against the Respondents/Defendants that;
 - a. the Applicants have a right or interest in plot number Kisumu/Ojola/1522 by virtue of sale of the same to their late father Robert Ochier Ongonga by Elijah Anam Onyango and Onyango Isaiah Nyambok.
 - b. the subsequent sale of the suit property or a portion thereof to Rose Achieng Nyambok (the 2nd Respondent herein) by Leonard Nyambok Okoth (the 1st Respondent) is null and void ab initio and the court should so declare.
 - c. in the event that the 1st Respondent herein has already transferred the suit property or portion of the same to the 2nd Respondent then the said registration be nullified by this Honourable court and the Registrar of Lands be ordered to cancel the same.
 - d. Leonard Nyambok Okoth be ordered to transfer the suit property to the Applicant and/or the legal representative of the late Robert Ochier Ongonga.
 - e. The costs of the Originating Summons be borne by the Respondents.



2. The Originating Summons was supported by the averment in the Supporting Affidavit sworn by the 1st Plaintiff Tom Odhiambo Ochier on 19th December, 2022 and the annexures thereto.
3. The Plaintiffs' case is that they are the sons and heirs of Robert Ochier Ongonga who bought land parcel No. Kisumu/Ojola/1522, the suit land herein from Elijah Anam Onyango and Onyango Isaiah Nyambok on 6th December, 2001. That both the purchaser and the vendors died before transfer of the sold land in favour of Robert Ochier Ongonga, the purchaser. That the 1st Respondent took out Letters of Administration, transferred the land to himself and subsequently sold the suit land or a portion of the same to the 2nd Respondent fraudulently. That although the 2nd Respondent was informed that the suit land had been sold to the Plaintiffs' father, she has remained adamant to keep the plot.
4. In response to the Originating Summons, the 1st Respondent filed a Replying Affidavit sworn on 12th January, 2023. He deposed that he is the Administrator of the estates of both Elijah Anam Onyango and Samuel Onyango who were the registered owners of the suit land. That Samuel Nyambok had sold a portion of the suit land measuring 0.4Ha to the Plaintiffs' father on which the Plaintiffs' father (deceased) established a home for his son by the name of James Okare Ochier and that he (1st Respondent) has agreed to transfer to James Okare Ochier the said portion.
5. That he sold the remaining portion of the suit land measuring 0.3Ha to the 2nd Respondent. That the suit does not disclose a cause of action and should be dismissed.
6. The 2nd Respondent swore a Replying Affidavit on 12th January, 2023 wherein she stated that she bought a portion of the suit land measuring 0.3Ha after conducting due diligence. That she was never informed that the land had been sold to the Plaintiffs' late father. She prayed that the suit be dismissed.

The Evidence

The Originating Summons was disposed of by way of viva voce evidence.

7. On behalf of the Plaintiffs, 5 witnesses testified. PW1 was Dennis Odongo Amisi. He adopted the contents of his witness statement dated 12th September, 2023 as his evidence in chief. He stated that he claimed the land through his grandfather one Ochier who was the father of his mother. That the grandfather had bought the entire of the suit land.
8. PW2 was Charles Nyambok. He relied on the contents of his witness statement dated 14th April, 2023 as his evidence in chief. He stated in the witness statement that Robert Ochier Ongonga was his close friend and neighbour. That the suit land was initially bought by one Linus Adero who was refunded his money by the seller when Robert Ochier bought it. That the land was sold to Robert Ochier at Kshs.100,000. That the 1st Defendant was given Kshs.70,000 by Robert Ochier to get Letters of Administration so that he could transfer the land to Robert Ochier.
9. That the sale to Robert Ochier was of the entire of the suit land. That Robert Ochier Ongongá occupied, possessed and used the land from the time he bought it around the year 2001.
10. That James Okare has his home on the suit land and Denis Odongo Amisi built a structure made of iron sheets on his portion. That it was Julius Ochier son of Robert Ochier and the 1st Defendant who witnessed when Robert bought the entire land.
11. On cross-examination, he stated that the suit land was registered in the name of Elijah and that as at the time the land was being sold, Elijah had died and succession to his estate had not been undertaken. That Robert Ochier who bought the land died in the year 2021.



12. That he did not sign the land sale agreement as a witness. That succession to the estate of Robert Ochier had not been done.
13. PW3 was Jane Atieno Owino. She adopted the contents of her witness statement dated 17th April, 2023 as her evidence in chief. She had stated in the witness statement that Robert Ochier Ongong'a was her father in law. That the deceased bought the suit land and occupied it until he gave a portion thereof to Jame Okare Ochier and a portion to Dennis Odongo Amisi (PW1).
14. That she witnessed the deceased calling his children and people from the village and informing them that he had given equal portions of the land to the two. That Jame Okare has a home on the land and Dennis Odongo constructed a structure using iron sheets.
15. That after the burial of Robert Ochier, family members went to the land and ascertained that both James Okare and Dennis Odongo got equal portions of the land and that this was done by counting steps. That it is not true that the deceased bought only a portion of the land. That the 1st Defendant's family did not complain when James Okare and Dennis Odongo occupied equal portions of the suit land.
16. On cross-examination, PW3 stated that she was not sure whether succession to the estate of Robert Ochier had been done.
17. PW4 was the 1st Plaintiff. He adopted the contents of his Affidavit sworn on 19th December, 2022 as his evidence in chief. He produced documents namely title deed dated 27th March, 1978. A grant of Letters of Administration dated 3rd August, 2016, land sale agreement and demand notice dated 2nd December, 2022.
18. On cross-examination, PW4 stated that they had brought the suit land on behalf of his father who died in the year 2021. That they had not undertaken succession to the estate of his father. That it is his brother James Okare who stays on the land.
19. PW5 was Hellen Adoyo Adongo who adopted the contents of her witness statement dated 17th April, 2023 as her evidence in chief. On cross-examination, she stated that the deceased was her brother in law. That she was present when the land was sold.
20. The evidence of the Defence comprised of the testimonies of the Defendants and two witnesses. The 1st Defendant testified as DW1. He adopted the contents of his Replying Affidavit sworn on 12th January, 2023 as his evidence in chief. He produced as exhibit copy of Grant of Letters of Administration. He stated that only a portion of the suit land was sold to the deceased father of the Plaintiffs. That the temporary structure built by Dennis Odongo was built outside the portion bought by Robert Ochier. That the structure was constructed in the portion belonging to the 2nd Defendant.
21. On cross-examination, DW1 stated that the deceased bought a portion of the suit land that belonged to Samuel Onyango Nyambok. That the deceased bought a portion measuring 0.4.Ha. That the agreement produced by the Plaintiffs is a forgery.
22. DW2 was the 2nd Defendant. She adopted the contents of her Replying Affidavit sworn on 12th January, 2023 as her evidence. On cross-examination, she stated that she did inquiries from James Okare, a neighbour, before she bought the land. She stated that there was a meeting at the Chief's office which resolved tht the land be divided into 3 portions to be shared between James Okare, Dennis Odongo and herself but the children of Robert Ochier did not agree with the proposal. That she had not taken possession of the land though she placed timber on the land and erected poles in preparation to develop the land.



23. DW3 was Julius Odhiambo Ochier. He adopted the contents of his witness statement dated 12th January, 2023 as his evidence in chief. He stated in the witness statement that sometimes in the year 2001 Samuel Onyango who was one of the registered owners of the suit land approached his (DW3's) father, one Robert Ochier Ongongá deceased that he intended to sell his land to him. That the consideration was Kshs.100,000/-. That an agreement was drawn and he signed it. That it was agreed that sub-division would be done. That the seller later died. That it was agreed that after succession to the estate of the deceased, the suit property would be sub-divided, one portion given to Robert Ochier and the other portion to the 1st Defendant who was the next of kin of Elija Anam Onyango.
24. DW3 testified further that in February, 2019, his father took James Okare Ochier to the suit land and instructed him to build his home thereon. That a week later, his father again took Dennis Odongo to the suit land and allocated him the remaining portion which was meant for the 1st Defendant.
25. That his father informed him that he would talk to the 1st Defendant with a view of purchasing the said portion of land, but that this never transpired to date.
26. On cross-examination, he stated that his father did not buy the entire land. That when the matter was reported to the Chief, the resolution from the meeting at the Chief's office was that the portion bought by his father be shared between James Okare and Dennis Odongo and that the portion of Leonard Nyambok remains for Leonard Nyambok.
27. DW4 was James Okare Ochier. He adopted the contents of his witness statement dated 12th January, 2023 as his evidence in chief. On cross-examination, he stated that the mother of PW1 (Dennis Odongo) was his sister. That his father showed him where to built on the suit land. That Dennis Odongo built the temporary structure where his father told him to build but that his father had said he was going to sort out the outstanding issues with Leonard Nyambok.

Submissions

28. At the close of the evidence, parties filed written submissions on the case. Written submissions dated 22nd March, 2024 and further submissions were filed on behalf of the Plaintiffs by the firm of Odhiambo S.E. & Co. Advocates.
29. Written submissions dated 9th October, 2024 were filed by the firm of Omondi Abade & Company Advocates on behalf of the Defendants.

Issues for Determination

30. From the pleadings, evidence and submissions made, the following emerge as the issues for determination;
 - a. whether or not the Plaintiffs have locus standi to bring the suit
 - b. whether or not the deceased bought the entire of the suit land or only a portion thereof measuring 0.4Ha.
 - c. whether or not the Plaintiffs are entitled to the relief sought.
 - d. who pays the cost of the suit?

Analysis and Determination

31. The first issue for determination is whether or not the Plaintiffs have locus standi to bring the suit.



32. It was generally agreed by the witnesses that succession to the estate of Robert Ochier Ongongá had not been undertaken as at the time of filing suit. The Plaintiffs produced no Letters of Administration in respect of the said estate. They however stated that they brought the suit on behalf of the estate of Robert Ochier Ongongá deceased who was the purchaser of the suit land.
33. Regarding this it was submitted on behalf of the Plaintiff that the Applicant/Plaintiff filed the suit pursuant to the provisions of Order 37 Rule 1 which provides that Originating Summons can be taken out without the administration of the estate or trust for the court to determine any question affecting the right or interest of the person claiming to be a creditor, devisee, legatee, heir or cestui que trust and other issues. That the suit was therefore not an abuse of the process of the court.
34. On behalf of the Respondent/Defendant, it was submitted that the Plaintiffs have sued the Defendants as Administrators of the estate of their father but that the Plaintiffs have not placed any evidence before court to show that they obtained Letters of Administration so as to acquire capacity to sue on behalf of the estate of their deceased father. Counsel relied on the case of *Re Estate of Barasa Kanenje Manyá, deceased* (Succession Cause No.263 of 2002) KEHC 1(KLR)(30 July 2020) (Ruling) where it was held that one only becomes a personal representative upon being appointed by the court as such. That the property of the intestate would not vest in any person until such person was appointed administrator by court.
35. Counsel also relied on the provisions of Section 2(a) and 82 of the *Law of Succession Act* and the cases of *Barmas Muema -vs- Francis Masuni Kyangangu* (2019)eKLR and *Virginia Edith Wambui Otieno -vs- Joash Ochieng Ongo & Another* (1987)eKLR.
36. The Originating Summons was brought pursuant to the provisions of Order 37 Rule 1 of the Civil Procedure Rules 2010. The said provisions of the law provides for who may take out Originating Summons and in respect of what matters. It provides;

“The executor or administrator of a deceased person, or any of them and the trustee under any deed or instrument or any of them and any person claiming to be interested in the relief sought as creditor devisee, legatee, heir or legal representative of the deceased person or as cestui que trust under the terms of any deed or instruments or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course an Originating Summons returnable before a Judge sitting in chambers for such relief of the nature or kind following, as may by summons be specified, and as circumstances of the case may require, that is to say the determination without administration of the estate or trust of any of the following questions

- a. any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que true;
- b. the ascertainment of any class of creditors, devisees, legatees, heirs or others;
- c. the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, or such accounts;
- d. the payment into court of any money in the hands of executors, administrators or trustees
- e. directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees.
- f. the approval of a sale, purchase, compromise or other transaction;



- g. the determination of any question arising directly out of the administration of the estate or trust.
37. A reading of the Originating Summons and the Supporting Affidavit reveals that the Plaintiffs do not fit into any of the classes of people listed in Order 37 Rule 1. The plaintiffs are not executors, administrators, or creditors, devisees, legatees or heirs under any deed or instrument.
38. Further the questions placed before this court to determine vide the Originating Summons are not among the questions specified in order 37(1). The Plaintiffs' claim in the Originating Summons is for recovery of land on the basis of land purchase contract. This does not fall under the categories of claims itemised in Order 37 Rule 1. The claim herein ought to have been brought by way of a suit and by persons with capacity to file the suit on behalf of the estate of the deceased.
39. A litigant pursuing a claim on behalf of deceased persons must first obtain capacity by petitioning the court for and being granted Letters of Administration to the estate. Section 2(1) of the [Law of Succession Act](#) provides that:
- “Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”
40. Section 82 of the same Act vests the power to file suit on behalf of the estate of deceased persons in the personal representative duly appointed through the process of succession as provided for in the Act and not in any other person. The Court of Appeal in the case of Barnes Muema vs Francis Masuni Kyangangu[2019] eKLR was in agreement with the High Court's finding that a litigant without Letters of Administration lacks locus standi.
41. I find that the Plaintiffs had no capacity to bring the present action for recovery of the suit land.
42. The remainder of the issues for determination relate to merit of the suit. Assuming that the Plaintiffs had capacity to bring the suit, could their case have succeeded on merit?
43. From the evidence adduced, the contest before court is the size of the land sold to the plaintiff's father; whether it was the entire parcel or only a portion thereof measuring 0.4Ha. The 1st Defendant admits that 0.4Ha of the suit land was sold to the Plaintiffs' father and that they have no problem with it and is willing to transfer it to James Okare Ochier who was placed in occupation by the buyer.
44. The Plaintiffs aver that it's the entire of the suit land that was bought; half of it given to James Okare and the other half to PW1. To prove this, the Plaintiffs produced a document titled Sale Agreement as exhibit P.1. However, the document is written in Dholuo language with no translation thereof into the language of the court.
45. The burden of proof was with the Plaintiffs to prove their claim in accordance with the provisions of sections 107 to 109 of the [Evidence Act](#). I find no evidence to support the claim. DW3 and DW4 who are brothers of the Plaintiffs testified that only part of the suit land measuring 0.4Ha, the portion occupied by DW4, was sold. There is no contest about the said portion as the 1st defendant who is the administrator of the estate of the seller/registered owner testified that he was willing to transfer the said portion.
46. On the basis of the evidence placed before the court and the findings already made, the Plaintiffs are not entitled to the orders sought in the Originating Summons.



47. Under the provisions of Section 27 of the *Civil Procedure Act*, costs of any action, cause or other matter or issue shall follow the event unless the court shall for good reason otherwise order. I find no reason to otherwise order.

48. The result is that the Plaintiffs have failed to prove their case on a balance of probabilities. The Originating Summons is hereby dismissed. Costs to the Defendants/Respondents.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 23RD DAY OF JANUARY 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Odhiambo for the Plaintiffs.

Raburu for the Respondents.

