



REPUBLIC OF KENYA



KENYA LAW

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Odhiambo & another v Kenya Tourist Development Corporation & another (Commercial Case 11 of 2019) [2024] KEHC 16267 (KLR) (13 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE 11 OF 2019
RE ABURILI, J
DECEMBER 13, 2024**

BETWEEN

WILLIS OCHIENG ODHIAMBO 1ST PLAINTIFF

BEATRICE AKINYI OPAR 2ND PLAINTIFF

AND

KENYA TOURIST DEVELOPMENT CORPORATION 1ST DEFENDANT

BIG FIVE HOTEL LTD 2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiffs herein, vide a re-amended plaint dated the 2nd October 2007, sued the defendants jointly and severally seeking the following orders:
 - a. A declaration that the Land Control Board obtained by the 1st defendant in favour of the 2nd defendant to charge the plaintiff's title No. Kisumu/Pandpier/1399 is illegal, null and void.
 - b. A declaration that the third-party charge registered at the encumbrance section of the plaintiffs' title No. Kisumu/Pandpier/1399 is null and void ab initio and the entry be cancelled.
 - c. An injunction restraining the defendants and each of them by themselves, their servants or agents or otherwise from disposing of the property situated on title No. Kisumu/Pandpier/1399 and/or exercising the statutory power of sale in respect of the said title.
 - d. Damages
 - e. Costs
 - f. Interest on (d) and (e) above



- g. Any other or further relief that this Honourable Court may deem just to grant.
2. The plaintiffs averred that they are the joint administrators of the estate of the late John Odhiambo Opar, the registered owner of the suit land title No. Kisumu/Pandpier/1399.
 3. It was their case that on or about the 28th March 2007, the 1st plaintiff received a statutory notice dated 6th March 2007 from M/S Keysian Auctioneers of an intention to sell the suit land for recovery of Kshs. 10,376,375.
 4. The plaintiffs averred that they subsequently discovered that between 16th August 2004 and 18th October 2004, the defendants unlawfully conspired with each other with the purpose of using the plaintiffs' suit land as security to advance Kshs. 5.2 Million from the 1st defendant to the 2nd defendant wrongfully and without their consent.
 5. The plaintiffs averred that the 1st defendant applied to the Land Control Board with another person unknown to them to charge the suit land and subsequently obtained consent with the 1st defendant causing other unknown persons to them to sign the third-party charge.
 6. The 1st plaintiff testified in support of the plaintiffs' case. He adopted his witness statement dated 19/9/2012 as his evidence in chief and produced his list of documents dated 305/2023 as PEx 1 – PEx 8. The 1st plaintiff reiterated that he did not sign the application for consent to the Land Control Board. He further reiterated that the identity card number in the application for consent was not his as his is 11663624 which he produced as an exhibit and which the court has seen. The 1st plaintiff further testified that the signatures on the documents for the application for consent are different from the signature on his national identity card.
 7. In cross-examination, the 1st plaintiff testified that entry No. 4 on the 1210/2004 shows that the suit land was registered in the names of the plaintiffs and entry No.5 shows that subsequently, a title deed was issued. The 1st plaintiff further testified that he was not aware that a title deed had been issued in their joint names and that he was not aware where the original title deed was and neither had he sought for its replacement.
 8. The 1st plaintiff admitted that his mother, the 2nd plaintiff could have been in custody of the original title deed. He further admitted that the 2nd defendant is his uncle. He testified that the title must have been fraudulently obtained and fraudulently charged to the 1st defendant though he had not raised the issue of the title being fraudulently obtained.
 9. It was his testimony that he had not presented a forensic report before the court showing that the signature on the consent application was forged. He testified that the ID card number used to apply for consent was not his and thus it proved conspiracy. He admitted that the third-party charge provided that he and the 2nd plaintiff appeared and signed the document before the advocate, a fact that he denied in reexamination by his counsel, denying the allegations that he appeared before any advocate to sign any document.
 10. The 1st defendant filed an amended defence dated 5th October 2007 denying the plaintiffs' averments but admitting that a statutory notice was issued by Keysian Auctioneers on their instructions.
 11. It was the 1st defendant's defence that the plaintiffs offered the suit property as security for a loan obtained by the 2nd defendant from them and that they willingly executed instruments establishing a charge on the title to the suit land, which charge was drawn, executed and registered after all the requisite legal consents were sought and obtained.



12. The 1st defendant further averred that their intention to exercise their statutory power of sale against the suit land was lawful and in their proper exercise of its rights and consequently the plaintiffs were not entitled to the declarations sought.
13. DW1 Michael Keimoi Koros an accountant for the 1st defendant adopted his witness statement dated 17/10/2023 as his testimony in chief. He testified on oath that the plaintiffs signed the charge instrument produced as Defence Exh. 9 which instrument was attested by an advocate on the 7/10/2004.
14. In cross-examination, DW1 testified that the letter of consent was written by the plaintiffs and that at the time of the advancement of the loan, the suit property was not registered in the names of the plaintiffs.
15. He testified that the application for consent from the Land Control Board (P Exh 5) showed that the plaintiffs were the registered owners of the suit land. He admitted that the ID card for the 2nd plaintiff was not shown, that there was only one signature for the owner, for the chargee and chargor. DW1 further testified that in the application for consent, the chargor was not indicated but rather it was just signed. DW1 admitted that the signature on the 3rd party charge did not resemble the ones on the application for consent but that an individual could have several signatures.
16. DW1 further admitted that the ID card for the 1st plaintiff was not the same as that indicated on the application for consent to the Land Control Board. He admitted that when the consent from the Land Control Board was sought, the plaintiffs had not been registered as the proprietors of the suit land and that in the 3rd party charge, the Identity cards for the plaintiffs were not indicated.
17. DW1 testified that they gave Statutory Notices to the Director of the 2nd defendant and the plaintiffs; that the one issued to the plaintiffs was given on the 6/3/2007 while that given to the director of the 2nd defendant Ezra Odondi Opar was given in May 2016.
18. In re-examination, DW1 testified that the application for consent to the Land Control Board was lodged by the plaintiffs themselves, though he could not tell whose signature was on the application in the place where the owner/lessor appeared.

The Plaintiffs' Submissions

19. The plaintiffs through their counsel submitted that by virtue of non-compliance with the provisions of section 6 (1) of the [Land Control Act](#) that requires that the Land Control Board Consent must be obtained, the alleged charge is invalid and that therefore the 1st defendant does not have a legal charge as against the suit property.
20. It was further submitted that the alleged land control board consent presented by the defendants was irregular and given the fact that the suit land is within a controlled area, the charge cannot be said to be valid when consent of the land control board was not obtained. Reliance was placed on the case of [Karanja & 3 Others \(As Legal Representative of the Estate of the Late Walter Karanja Muigai\) v Kirundi & Another \(Civil Appeal 172 of 2010\)](#) [2016] KECA 292 (KLR) 29 July 2016).
21. The plaintiffs further submitted that the Statutory Notice pursuant to Section 74 of the Registered [Land Act](#) was not given rendering the exercise of statutory power of sale null and void and as such the charge registered in the encumbrances section of the plaintiffs' title was obtained unprocedurally and unlawfully as was held in the case of *In the Estate of Isaac Kaburu Marete (deceased) 2017 eKLR*.
22. The plaintiffs submitted that their suit be allowed and that they be granted general damages for trespass.



The 1st Defendant's Submissions

23. It was submitted that before commencement of the application for consent at the Kisumu Municipality Land Control Board, the Plaintiffs by their letter dated 22nd May, 2004 wrote to the 1st Defendant and authorized the 2nd Defendant to use the suit property to secure a loan.
24. The 1st defendant submitted that Section 55 of the Law of Succession Act which confers power to administrators to deal with capital assets constituting a net estate after the grant has been confirmed and by virtue of the letter authorizing the 2nd defendant to use the suit property to secure a loan, it is crystal clear that they had the requisite power to do so notwithstanding the fact that they had not formally transferred the suit property to themselves by way of transmission.
25. The 1st defendant submitted that they wholly relied on the equity maxim that Equity will treat as done that which ought to be done in respect hereof.
26. It was submitted that that it was not mandatory for the chargors to jointly and personally sign the application as an authorized agent is by law permitted to sign on behalf of applicants and that the jurat of the application for land control board bears a provision for 'an authorized agent or agents' to sign on behalf of the applicants as was held in the case of Isaac Lawis Maseno Mekenye v Kenya Industrial Estates Limited & Others [2010] eKLR.
27. The 1st defendant submitted urging the court to find that the land control board minutes was the most indisputable and singular document that bore the capacity of demonstrating to court whether or not the letter of consent was obtained regularly or otherwise, and failure by the Plaintiffs to produce a copy thereof should lead the court to make an adverse inference that if such evidence was called, it would have been averse to them.
28. It was submitted that the Plaintiffs failed to discharge their statutory imposed burden of proof by failing to demonstrate that the land control board consent dated 16th September, 2004 is illegal, null and void.
29. The 1st defendant further submitted that without fraud being specifically pleaded and particularized, the allegation of conspiracy cannot by itself found or constitute a cause of action as the plaintiffs have sought in this case and further that in the absence of the person with whom the 1st defendant allegedly conspired, the allegation of conspiracy cannot lie as was held in the case of Ndegwa Kabogo v Co-operative Merchant Bank Limited and Julius Maina.
30. It was further submitted that having failed to plead and particularize fraud by the Plaintiffs as is by law required, any evidence adduced in support thereof must be found at variance with the averments of the pleadings and therefore a non-issue as was held in the case of Joseph Mbuta Nzui v Kenya Orient Insurance Company Ltd [2015] eKLR.
31. The 1st defendant submitted that the 3rd party charge was executed by the plaintiffs upon obtaining the prerequisite consent from the land control board and registered as is required by law and that the court ought to find it curious and suspect that with the penal consequences that arise by the plaintiffs claim that their title was unlawfully used and signatures forged was not reported to the police.
32. It was thus submitted that the 3rd party charge was lawful, enforceable and proper and a declaration that the third-party charge registered at the encumbrance section of the plaintiffs' title of the suit property is null and void is not capable of being granted.



33. The 1st defendant submitted that the Plaintiffs having, of their free will, deliberately and voluntarily charged the suit property as security to the 1st Defendant to secure the repayment of the loan in the event that the 2nd Defendant would be unable to repay the loan, the suit property became a commodity in this commercial transaction which should legitimately be available to the 1st Defendant in the lawful exercise of its statutory power of sale should the 2nd Defendant fail completely to repay the loan upon issuance of all statutory notices and thus in the premises, an injunction is not capable of being granted.
34. It was further submitted that the Plaintiffs seek damages albeit no loss suffered was pleaded and no evidence led in respect thereof.

Analysis & Determination

35. I have considered the pleadings filed by the respective parties, the oral testimonies as well as their written submissions and authorities supplied. I have also perused the exhibits and considered the decisions cited. The plaintiffs' case is that the defendants herein conspired and charged the suit land in acquisition of a loan that subsequently became due and that the 1st defendant now wants to exercise its statutory right of sale. The plaintiffs deny ever charging the suit property or consenting to the execution of the 3rd party charge against the title to the suit property. They also deny ever being served with the statutory notices as required by law prior to the purported intended sale of the suit property by the 1st defendant.
36. The plaintiffs averred that they were not consulted prior to the suit land being charged, that they did not give their consent for the same to happen and further that a valid Land Control Board consent was not gotten as required prior to the charging of the suit land.
37. The 1st defendant on its part contended that the plaintiffs gave consent for their land to be used by the 2nd defendant to secure a loan, that the plaintiffs made an application for the consent of the Land Control Board which approved the charging of the suit land and that the loan having become due, they commenced the exercise of their statutory power of sale by issuing the required notices to the plaintiffs and 2nd defendant.
38. From the above contestations, the issues that arise for determination are;
 1. whether the plaintiffs authorised the 2nd defendant to charge the suit land;
 2. whether the charge was lawfully executed;
 3. whether the 1st defendant could sell the plaintiffs' property; and
 4. whether the plaintiffs were served with statutory notices.
 5. What orders should this court make?
6. On the first issue, the plaintiffs averred that they never gave the 2nd defendant authority to charge the suit land and that the letter dated 22/5/2004 relied on by the 1st defendant as evidence of the same bore signatures that were not theirs.
7. I have considered this issue and the evidence on record. The plaintiffs denied giving authorization for the suit land to be used to secure a loan on behalf of the 2nd defendant from the 1st defendant and that the evidence relied on by the 1st defendant was a forgery as their signatures therein were a forgery.
8. The law places the burden of proof on the plaintiffs to prove their case on a balance of probability. Section 107 of the *Evidence Act* (Cap 80) provides that whoever desires the court to give judgment on



the basis of existence of certain facts, must prove that such facts exist. Further, section 108 provides that the burden of proof in a suit or civil proceedings lies on the person who would fail if no evidence was led at all by either party. In this regard, the plaintiff bore the burden to prove his case against the 1st defendant on this issue.

9. That position of the law notwithstanding, the plaintiffs denied authorizing the 2nd defendant to use the suit land to secure a loan from the 1st defendant. That authorization triggered the events that followed and are the subject of this dispute. The plaintiffs also argued that their signatures on the authorization letter dated 22/5/2004 were forged and not theirs. With this denial, the burden of proof shifted to the 1st defendant and its officials to prove that the plaintiff actually donated the power to the 2nd defendant and executed that letter of authorization.
10. Section 109 of the Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In that case, the 1st defendant wanted the court to believe that the plaintiffs authorized the 2nd defendant to use the suit land to secure a loan which the plaintiffs denied. The burden of proof, therefore, shifted to the 1st defendant on this issue.
11. The fact that evidential burden of proof can shift depending on the circumstance of the case, was stated by the Supreme Court in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR, thus:

(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
12. The burden having shifted to the 1st defendant, it was its duty to call evidence to prove that indeed the plaintiff donated the power to the 2nd defendant and that their signatures in the letter of authorization were valid, thus disprove the plaintiffs' claim that they did not authorize the 2nd defendant.
13. The 1st defendant did not call evidence to support its claim that the plaintiff voluntarily executed the disputed letter of authorization as it pleaded in its defence.
14. Section 112 of the *Evidence Act* provides that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. In that case therefore, where the party fails or refuses to adduce evidence to prove or disprove the fact in question, the court is entitled to make an adverse inference that if such evidence was called it would have been adverse to that party.
15. The fact of who executed the letter of authorization shifted to the 1st defendant. The 1st defendant did not call evidence to disprove the plaintiffs' contention that they did not donate the power to the 2nd defendant and that the signatures therein were valid. The evidence of who executed the letter of authorization was on the 1st defendant's officials and the 2nd defendant who never appeared to testify on that fact.
16. In *CMC Aviation Ltd v Crusair Ltd (No1)* [1987] KLR 103, Madan JA, (as he then was) stated:

The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence.



As stated in the definition of “evidence” in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.

17. The 1st defendant, apart from filing the letter of authorization dated 22/5/2004, failed to call evidence, specifically of the 2nd defendant, that proved that the signatures of the plaintiffs therein were valid. In his own testimony, DW1 admitted that the signatures of the plaintiffs in all the documents they sought to rely on differed. In addition, the identity card for the 1st plaintiff was not the same as the one used to apply for consent to the Land Control Board. Additionally, there is no evidence that the plaintiffs were the persons charging their land to secure a third party charge.
18. From the above analysis, and in the absence of evidence to the contrary, I find and hold that the plaintiffs did not donate authorize the 2nd defendant to 2nd defendant to charge the suit land vide the letter dated 22/5/2004.
19. The next issue is whether the third party charge dated 15th October 2004 against the suit land was lawful. The said third party charge was executed pursuant to the impugned letter of authorization.
20. Under Section 6 of the *Land Control Act*, CAP 302 Laws of Kenya, any transaction in land including the sale, transfer, lease, mortgage, exchange, partition, subdivision or other disposal of or dealing with any agricultural land situated in a land control area was void for all purposes unless the consent of the land control board for the land control area or was obtained.
21. The description of “agricultural land” is given under Section 2 of the said Act, which at Section 2(b) provides that agricultural land includes: -

“land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act, other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non- agricultural purpose;”
22. In addition, Section 8 (1) of the Act provided that: -

“(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.”
23. The plaintiffs averred that they did not execute the said charge; that their signatures therein were forged and that the said charge was registered without a valid consent from the Land Control Board having been obtained.



24. The evidence on record regarding this issue showed that the application for consent from the Land Control Board (P Exh 5) disclosed that the plaintiffs were the registered owners of the suit land despite the fact that at the time of executing the charge, the suit land was still registered in the name of John Odhiambo Opar, the deceased; that in the application for consent, the chargor was not indicated but rather it was just signed and further that the signature on the 3rd party charge did not resemble the ones on the application for consent. All these facts were admitted by DW1 in cross-examination. On being asked by the Court, DW1 testified that he could not tell whose signature it was on the application for consent from the Land Control Board in the place where the owner/lessor appeared.
25. In *Kiplagat Kotut v Rose Jebor Kipngok* [2019] eKLR, the Court of Appeal at Eldoret held that:
- “We hasten to state that the *Land Control Act*... was never intended to be an instrument or statute for unjust enrichment. It was never meant to exempt a mala fide vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another.”
26. From the evidence adduced, it is my finding that the application for consent was irregularly and unlawfully made and as such, the subsequent consent alleged to have been issued by the Land Control Board was void ab initio. I have no difficulty in finding that the actions of the 1st defendant in pursuing the aforementioned consent were not done in good faith, and in my view, they were done without the plaintiffs’ knowledge and were meant to unjustly enrich the defendants herein.
27. It is unfortunate that the chargee did not ensure that the person giving consent to the registration of a charge over the plaintiffs’ property was the owner of the property in question and if it was the agent of the owner, the chargee must ensure that the agent in question is identifiable by name and not just by some signature appended thereto. That is unacceptable.
28. I note that the provisions of Sections 6 and 7 of the *Land Control Act* make it mandatory for the consent of the Land Control Board to be obtained within six months for transactions involving sale of agricultural land like in this case. I am however aware that the Courts have repeatedly expressed the view that failure to obtain Land Control Board Consent does not invalidate such transactions. See the Court of Appeal cases of *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR, *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2014) eKLR and *William Kipsoi Sigei v Kipkoech Arusei & another* (2019) eKLR where the courts have sought to uphold the common intention of the transacting parties by seeking to apply the doctrines of constructive trust and proprietary estoppel and uphold the said transactions even in absence of the consent.
29. That said, the instant case is quite distinct from the ones dealt by the Court of Appeal in the cases above. There was no common intention of the defendants and the plaintiffs in having the suit land charged and further, the evidence on record points towards mischief in the application for consent from the Land Control Board.
30. The 1st defendant has in my view failed to convince the court of the authenticity of the documents that it sought to rely on in perfection of the 3rd party charge and as such this court cannot proceed to uphold the same.



31. I thus find that the Land Control Board consent obtained by the 1st defendant in favour of the 2nd defendant to charge the plaintiff's title No. Kisumu/Pandpier/1399 is illegal, null and void.
32. Consequently, I find and hold that the 3rd party charge registered over the suit land parcel No. Kisumu/Pandpier/1399 was void ab initio and is hereby cancelled. The said 3rd party charge registered on Land Parcel No. Kisumu/Pandpier/1399 shall be discharged forthwith upon this judgment and decree being served on the 1st defendant Bank.
33. Having found the 3rd party charge registered on Land Parcel No. Kisumu/Pandpier/1399 null and void and having cancelled the same, it follows that the 1st defendant has no legal authority to value or to sell the plaintiff's land parcel No. Kisumu/Pandpier/1399 for recovery of the loan advanced to the 2nd defendant. Accordingly, the 1st defendant, its agents, servants and or assigns are hereby permanently enjoined from disposing of, the plaintiff's parcel of Land herein described as Kisumu/Pandpier/1399 and or in any way exercising the statutory power of sale in respect of the said property.
34. Finally, in this case, from the evidence adduced, whether statutory notices were issued or not is immaterial for reasons that there was no legal basis for the said statutory notices to issue to the plaintiffs since there was no evidence that they had, in any manner, whether constructively or expressly, consented to the 3rd party Charge being registered on their property, whether their ownership was by virtue of their being administrators of the deceased's estate or otherwise. Furthermore, from one of the statutory Notices issued dated 6th March 2007, by the Auctioneer instructed by the 1st defendant, giving 45 days' Notice, the said Notice was issued to EZRA ODONDI OPAR and not the plaintiffs herein. It was never copied to the defendants herein.
35. The 1st defendant may therefore pursue the 2nd defendant to recover the loan allegedly advanced, subject to the law of limitations, but not using the suit land.
36. On whether this court should grant general damages for trespass as was prayed, submitted on and urged by the plaintiffs, I find no jurisdiction to do so. I shall therefore not delve much into that realm, the law being as clear as daylight on claims for trespass and the jurisdiction of the Environment and Land Court as established under Article, 162(2)(b) and 165(5)(b) of *the Constitution* as read with section 13(1) and (7) of the *Environment and Land Court Act*. Accordingly, the prayer for damages for trespass is declined for want of jurisdiction.
37. On costs, the plaintiffs are the successful parties and were heavily inconvenienced by the defendants. The battle has been fought right from 2007 until now which is 17 years, insisting on the validity of the 3rd party charge and defending a suit when it was obvious that the plaintiffs never consented to the registration of the 3rd party charge against their property. The defendants are hereby ordered to jointly and severally pay costs of this suit; which costs shall be taxed.
38. Mention before the Deputy Registrar 30th January, 2025, to confirm filing of the bill of costs for the plaintiffs.
39. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

