



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CIVIL CASE NO. 327 OF 2015**

**CONSOLATA PANDE & JENIFER OLOO OLIECH**(*suing as the legal representative*  
*in the estate of ABOMA OTENGO (Deceased)*).....**PLAINTIFFS**

**VERSUS**

**ASHISH BHUPENDRA PATEL**.....**1<sup>ST</sup> DEFENDANT**

**KARIA NISHIMA RAMESH KARIA**.....**2<sup>ND</sup> DEFENDANT**

**SHADRACK OKELLO CHAN**.....**3<sup>RD</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KISUMU**.....**4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL**.....**5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 25<sup>th</sup> November 2015 the plaintiffs herein sued the defendants jointly and severally for the following orders:

- a) A declaration that the transfer of land parcel No. **Kisumu/ Ojola/2103** from the name of **Aboma Otengo (deceased)** to the 3<sup>rd</sup> defendant's name was fraudulent/illegal and thus null and void.
- b) That this Honourable court be pleased to revoke the title deed of land parcel No. **Kisumu/ Ojola/2103** as currently held and revert the title deed back to Aboma Otengo (deceased) and further order the 4<sup>th</sup> defendant to rectify the land register to reflect the same.
- c) The 1<sup>st</sup> and 2<sup>nd</sup> defendants be ordered to surrender the title deed to land parcel No. **Kisumu/ Ojola/2103** to the 4<sup>th</sup> defendant and vacate the said parcel of land.
- d) Any other order this court may deem fit and just to grant in the circumstances.
- e) Costs and interest of this suit.

The plaintiffs filed a notice of motion contemporaneously with the suit seeking for an order restraining the defendants from disposing of or sub dividing the suit land until the case is heard and determined. The application was canvassed by way of written submissions and a ruling rendered dismissing the application on the grounds that the plaintiffs had failed to establish a prima facie case against the defendants as there was no contract between the 3<sup>rd</sup> defendant and the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

The matter was later listed for dismissal for want of prosecution but the court gave a date for hearing where the plaintiff was to appear failure of which the matter stood dismissed.

**Plaintiff's Case**

It was the plaintiff's case that the co-plaintiff is her sister and that the deceased Aboma Otengo was their brother. She produced a copy of a death certificate and copies of their National Identification cards which indicated that they were both born in 1947.

PW1 further produced a copies of limited grant, a chief's letter, green card, title deed, letter from the Deputy Registrar, demand letters and a certificate of official search.

PW 1 gave evidence on behalf of the co-plaintiff who was unable to come to court even though she did not have authority to give evidence on her behalf. From the statement which was adopted as evidence before the court, PW1 stated that the first registered owner was Aboma Otengo who was registered as such in 1978 and that he is survived by the two plaintiffs.

It was further PW1's evidence that since the death of Aboma Otengo the plaintiffs and the 3<sup>rd</sup> defendant who is their step uncle have been using the suit land. The plaintiff faulted the 3<sup>rd</sup> defendant for obtaining a title deed and transferring without their consent.

The plaintiff prayed that judgment be entered in their favour as prayed in the plaint.

On cross examination by Counsel for the 4<sup>th</sup> and 5<sup>th</sup> defendants, PW1 admitted that they were 7 children and 5 are deceased leaving the two of them as the beneficiaries. She also confirmed that the 3<sup>rd</sup> defendant is their uncle a brother to their late father. The plaintiff also stated that she was not aware that the 3<sup>rd</sup> defendant had been registered as an owner of the suit land. She confirmed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the ones in possession and occupation of the suit land and that she has never been in possession.

On re-examination PW1 stated that they used to cultivate the suit land more than 10 years ago with her mother and that there is a temporary structure on the suit land. The plaintiff therefore closed her case. The 4<sup>th</sup> and 5<sup>th</sup> defendant's Counsel indicated that he was not calling any witness and therefore their case was closed.

The plaintiff's case was reopened to allow the in charge of the Environment and land Court registry to produce Kisumu Succession Cause No. 38 of 2002 which is in respect of the Estate of Barrack Odhiambo Gumbe which was a Limited grant Ad colligenda bona. He stated that the old files had been taken to the archives and that was the only file that they were able to retrieve.

PW2 on cross examination by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendant confirmed that Succession Cause No 38 of 2002 was a limited grant and that the register for Succession Causes was not available and that there have been instances where succession files have been given same numbers for limited grant and substantive succession causes. He also stated that the only way of resolving the issue of double registration is getting the two files. It was further his evidence that he cannot verify whether the grant shown to him was from the court without the original file. The plaintiff therefore closed her case.

### **Defence Case**

The 2<sup>nd</sup> defendant gave evidence on behalf of the 1<sup>st</sup> defendant and stated that they are the registered owners of the suit land having acquired it from one Silvanus Onyiego Nyawaga who had bought it from Shadrack Okello Chan. She stated that the seller showed her the title to the suit land and later she did a search at the lands registry. DW1 produced a copies of the title deed, a sale agreement, consent from the Land Control Board, receipt for payment of stamp duty, filled forms from Kenya Revenue Authority, certificate of official search, confirmed grant, application to be registered by transmission by Shadrack Okello Chan and a title deed in the 1<sup>st</sup> and 2<sup>nd</sup> defendant's names. It was further DW1's evidence that she obtained a green card which indicated that they were the registered owners of the suit land. She also stated that she has never been told that the suit title documents are being investigated for any forgery or irregular transfer.

DW1 therefore urged the court to dismiss the plaintiff's case as the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired the property legally and procedurally. On cross examination DW1 stated that she saw the copy of the grant in court. The defence therefore closed their case.

### **PLAINTIFF'S WRITTEN SUBMISSION**

Counsel for the plaintiffs submitted that the plaintiffs fall under the category of dependents as per the provisions of the Law of Succession Act Cap 160 Laws of Kenya section 39 which states that:

***Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following priority-***

***"..... brothers and sisters, and child or children of deceased brothers and sisters, in equal shares".***

It was Counsel's submission that the first registered owner of the suit parcel of land No. KISUMU/OJOLA/2103 was the deceased herein who died intestate on the 12<sup>th</sup> September, 1978 and that the plaintiffs are the legal representatives of the estate of the deceased as per the Limited Grant of Letters of Administration Ad Litem.

Counsel reiterated the facts of the case and submitted that the plaintiffs are the only surviving dependants of Aboma Otengo(deceased) and that the 3<sup>rd</sup> defendant fraudulently and without any right procured the transfer of land parcel Kisumu/Ojola/2103 into his name using forged Court papers purporting to emanate from Kisumu court in Succession Cause no 38 of 2002.

Counsel submitted that from the evidence of PW2 the grant in respect of Succession Cause No. 38 of 2002 were a forgery. He therefore submitted that a party who does not have a good title to a property cannot transfer such property to a third party.

Mr. Okoth Counsel for the plaintiffs submitted that the 3<sup>rd</sup> defendant fraudulently acquired the suit property from the plaintiffs and

transferred the same to one Silvanus Onyiego Nyamwaga who in turn transferred the same to the 1<sup>st</sup> and 2<sup>nd</sup> defendants which is evident from the green card produced in court. It was further Counsel's submission that the 3<sup>rd</sup> defendant did not have a good title to the property and therefore could not pass a good title to a third party.

Counsel cited Article 40(6) on protection of right to property which states that " .....(6) **The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**" Having submitted that the 3<sup>rd</sup> defendant had fraudulently acquired the suit title. He further relied on the Nemo Dat Quod Non Habet Rule which states that the transferor of goods cannot pass a better title than he himself possesses.

Mr. Okoth also cited the provisions of Section 26 of Land Registration Act 2012 which states as follows;

**"(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 the 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 uprocedurally or through a corrupt scheme

He further cited the cases of **Peter Muiruri Kamau v Mary Mwhaki Kamau [2017 e KLR** and **Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) Eklr** to illustrate the issue of fraudulent acquisition of property.

Counsel therefore submitted that it is trite law that the law does not support illegal transactions and that the titles of the 1<sup>st</sup> and 2<sup>nd</sup> defendants should be revoked as prayed in the plaint plus costs to the plaintiffs.

#### **1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANTS' WRITTEN SUBMISSIONS**

Counsel gave brief facts of the case and submitted that the two issues for determination are as to whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired the suit property legally and whether they acquired a good title.

On the first issue Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have a good title to the suit property as evidenced from the transfer documents dated 28<sup>th</sup> February 2014 from Silvanus Onyiego Nyawaga which were produced as exhibits before the court. Counsel further stated that the defendant produced proof of acquisition of the suit property by tendering copies of the transfer forms, stamp duty payment receipts, Land Control Board consent to transfer, an application for consent of Land Control Board, stamp duty declarations forms and certificate of official search.

Mr Yogo Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants also referred the court to the sworn affidavit by the Land Registrar who is the 4<sup>th</sup> defendant which confirmed that the transfer of the land was done procedurally without any illegality as alleged by the plaintiffs. Counsel also submitted that the DW1 confirmed that the title had been registered in the name of Silvanus Onyiego Nyawaga who bought the suit land from one Shadrack Okello Chan as per the records at the Lands registry.

Counsel further submitted that PW2 James Olwete who is the in charge of P&A registry who produced Succ 38/02 file which is a limited grant ad colligenda bona confirmed that he has encountered situations where same file numbers have been given in limited grants and substantive succession causes. It was therefore his submission that it is clear that the grant exhibited by the plaintiffs is a limited grant Ad Colligenda Bona under section 67 (1) by one Angeline Atieno Ngonga in respect to the estate of Barrack Odhiambo Gumbe while the 2<sup>nd</sup> defendant has exhibited the correct grant in respect to the estate of Aboma Otengo.

Mr. Yogo submitted that the grant obtained by the plaintiffs' being Kisumu HC Succ No. 918 of 2015 is thus erroneous as the estate of the said Aboma Otengo had already been administered and confirmed and the same has never been revoked. Counsel cited the case of **Eunice Grace Njambi Kamau and another v. The Hon. Attorney General and 5 others ELC Civil Suit No. 976 of 2012 where the court cited the decision of Tunoi JA** In **VijavMoriaria v Nansingh Madhusingh Darbar & another** [2000] eKLR Thus;

*"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts'.*

It was therefore Counsel's submission that from the evidence on record it is clear that the suit property was properly transferred using the correct legal documents and due process followed. That fraud is a serious allegation and the onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof. Counsel further relied on the case of **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR** where in the Appeal, the court rendered itself as follows:

*"The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case."*

On the second issue as to whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired a good title, Counsel relied on the 2<sup>nd</sup> defendant's replying affidavit

sworn on 20<sup>th</sup> May, 2016 as proof that both the 1<sup>st</sup> and 2<sup>nd</sup> defendants bought the suit property from Silvanus Onyiego Nyawaga for value as innocent purchasers without any notice of any defect on the title after following all the processes required in law. He cited the case of **Lawrence Mukiri v. Attorney General & 4 Others [2013] eKLR** the court stated what amounts to "bonafide purchaser for value, thus:

*A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:*

- a. *He holds a certificate of Title.*
- b. *He purchased the Property in good faith;*
- c. *He had no knowledge of the fraud;*
- d. *The vendors had apparent valid title;*
- e. *He purchased without notice of any fraud;*
- f. *He was not party to any fraud.*

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.

Counsel further cited the case of **Eunice Grace Njambi Kamall and another v. The Hon. Attorney General and 5 others Civil Suit No. 976 Of 2012** where the court cited the case of **Fletcher Vs. Peck 10 U.S 87 (1810)** to illustrate how other jurisdictions have handled the issue of **sanctity of title and the plight of innocent third parties. In the said Fletcher Vs. Peck case (Supra) Marshall J** had this to say: -

*"If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect those who had held the property long before he acquired it of concealed defect cannot be set up against him".*

In conclusion Counsel therefore submitted that based on the facts and law, the plaintiffs have failed to prove their case against the defendants and urged the court to dismiss the entire suit with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

### **Analysis and determination**

This is a case where the plaintiffs who claim to be the sisters of the deceased Aboma Otengo who was the registered owner of the suit land and the surviving beneficiaries of the deceased want the court to revoke titles that were issued to the 3<sup>rd</sup> defendant and subsequently to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

The issues for determination are as to whether the 3<sup>rd</sup> defendant fraudulently transferred the suit land in his name without obtaining letters of administration and whether there was any collusion between the 3<sup>rd</sup> defendant and the 4<sup>th</sup> defendant. The other issue is as to whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired the title to the suit property legally and procedurally. Do they qualify as innocent purchasers for value without notice?

I will start by indicating that the plaintiffs contend that they are the only surviving relatives of the late Aboma Otengo. The plaintiffs also admitted that Shadrack Okello Chan the 3<sup>rd</sup> defendant herein is their uncle, a brother to their father. It is also admitted by the plaintiffs that they have not been in occupation of the suit land and the last time they used the land was over 10 years ago. It was further their evidence that the land was being used by family members whom they did not mention.

The plaintiffs also had an uphill task establishing a prima facie case against the defendants when they filed an application for injunction to restrain the defendants from interfering with the suit land at an interlocutory stage. The nexus between the parties and the resulting transfer from the deceased Aboma Otengo, Shadrack Chan, Silvanus Onyiego Nyawaga and the 1<sup>st</sup> and 2<sup>nd</sup> defendants is very important. The record and the documents produced by both the plaintiffs and the defendants indicate that the 3<sup>rd</sup> defendant became registered as proprietor on 13<sup>th</sup> November 2002 while Silvanus Onyiego Nyawaga was registered as such on 4<sup>th</sup> December 2002. The plaintiffs did not bother to enjoin the said Silvanus Onyiego Nyawaga even after the court indicated in the ruling dated 14<sup>th</sup> June 2017 that the failure had caused them the establishment of the nexus between them. The plaintiffs were clutching at straws.

On the issue as to whether the 3<sup>rd</sup> defendant fraudulently transferred the suit land without obtaining letters of administration, it is on record that the 3<sup>rd</sup> defendant filed a Succession Cause No. 38 of 2002 which was in respect of the estate of Aboma Otengo the deceased herein, obtained grant of letters of Administration dated 22<sup>nd</sup> April 2002 and later a certificate of Confirmation of grant was issued on 30<sup>th</sup> October 2002. These were documents from the Land's registry annexed by the Land Registrar in his reply affidavit.

It should be noted that from the grant of letters of Administration dated 22<sup>nd</sup> April 2002, the deceased is indicated to have died on 23<sup>rd</sup> May 1976. The death certificate which was issued in 2015 produced by the plaintiffs indicate that the deceased died on 12<sup>th</sup> September 1978 at

the age of 14 years. This alone raises suspicion as to the authenticity of this document. Did the deceased die as a minor, and if so was he capable of being registered as an owner of the suit land before attainment of the age of majority? The plaintiffs filed for a limited grant and not a full grant with death certificate that looks suspect. There is something not adding up in the plaintiffs claim.

Further the replying affidavit and the documents on record by the Land Registrar confirms that according to the adjudication records land parcel No. Kisumu /Ojola/ 2013 was originally allocated to ABOMA OTENGO in 1973. If the deceased died in 1978 as alleged in the death certificate produced by the plaintiffs at the age of 14 years then it means that he was allocated the suit land at the age of 9 years. Is this possible without an adult holding the land in trust on his behalf. There is no such evidence on holding the land in trust for the deceased.

The grant of letters of administration and the confirmed grant on record has not been challenged as a forgery. If there was any forgery then the plaintiffs could have kick started a process to bring the perpetrators to book through laid down criminal investigative procedures. There is no evidence that such was done, nothing was reported to the police or criminal Investigation department to investigate the issuance of title through forgery or obtaining a fraudulent grant of letters of administration.

The In charge of the Probate and Administration gave evidence as PW2 and confirmed that there are situations where two causes are registered with the same number when they involve limited grant and full grant. He stated that he could not conclusively verify that the grant was authentic or a forgery without the original file which files had been taken to the archives. He also confirmed that there was no register of Succession files at that time. Having no any other evidence to shatter the authenticity of the confirmed grant that gave the holder a right to transfer the land by way of transmission, the court therefore holds that the grant was authentic as it originated from the court and it has not been revoked according to law. This therefore answers the plaintiffs' claim that the defendant fraudulently transferred the suit land without letters of administration in the negative. This limb of their claim fails.

From the national identity cards of the plaintiffs, it is indicative that they were both born in 1947 which suggests that they were twins if they were born by the same mother. The plaintiffs did not clarify this fact that they were twins. Were they born of different mothers on the same day by the same father? The 2<sup>nd</sup> defendant's statement which was adopted as evidence before the court indicates that the two plaintiffs' details from the National Registration Bureau are that they were born in 1947 by the same mother and father. Are the plaintiffs' twins from this information or are they imposters? This might have been the reason why the co-plaintiff did not appear in court to give evidence due to the fact that they were not twins and the rightful beneficiaries of the estate of Aboma Otengo.

Having dealt with the contentious issue on the grant of letters of administration, the second issue is as to whether the 1<sup>st</sup> and 2<sup>nd</sup> defendant acquired the suit property legally and procedurally, the defendants produced documentation to prove that they were innocent purchasers for value. They produced a sale agreement between Shadrack Okello Chan and Silvanus Onyiego Nyamwaga, a title deed in Silvanus Nyawaga's name, transfer of land form by way of transmission, letter of consent from the Land Control Board, application for consent, KRA declaration form, KRA stamp duty receipts, certificate of confirmation of grant, application for registration as proprietor by transmission and a certificate of official search. All these processes are public in nature and if someone had an objection the same could have been raised at the opportune time.

Application for Land Board consents are done at the local level and the persons who sit in these boards are from the local level. If there was any anomaly, then the same could have been raised by either the relatives or the plaintiffs if they were rightfully entitled. Land transactions especially agricultural land that involves approval by the land control board are a process. It is even worse when it involves registration by way of transmission because a person has to seek for letters of administration and a certificate of confirmation of grant. It is not a walk in the park. With that I find that the 1<sup>st</sup> and 2<sup>nd</sup> defendant obtained their title to the suit land legally and procedurally.

This case does not fall under section 26 of the Land Registration Act whereby the court can impeach a title on the ground that it was acquired fraudulently, unprocedurally or by way of misrepresentation. The 4<sup>th</sup> and 5<sup>th</sup> defendants also vindicated the 1<sup>st</sup> and 2<sup>nd</sup> defendants by producing relevant documents in respect of the history of the suit land which helped the court come to a just conclusion. The 4<sup>th</sup> and 5<sup>th</sup> defendants further confirmed that all the requisite documents were used to effect the transfer and due process was followed. The defendants are not to blame for any wrong doing in the acquisition of the suit land.

I have considered the evidence on record, the rival submissions by Counsel and the relevant judicial authorities and come to the conclusion that the plaintiffs' case must collapse on all fours for failure of proof to the required standards. The plaintiffs have not proved their allegations of fraud against any of the defendants. I therefore dismiss the plaintiffs' suit with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

**DATED and DELIVERED at KISUMU this 25<sup>TH</sup> DAY of JANUARY, 2019.**

**M.A ODENY**

**JUDGE**

**Delivered in the presence of:-**