



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 84 OF 2017**

**(Formerly Kisii ELCC NO. 437 OF 2013)**

**MICHAEL FRANCIS OKUMU NGWALA**

**GEORGE OUMA THAROGE, ( suing as the Legal representatives of**

**JOHANES THOROGE KATHETHI and**

**LUCAS NGWALA KATHETHI (Deceased).....PLAINTIFFS**

**VERSUS**

**MILTON ACHIENG ODHUL alias OCHIENG ODHUL.....DEFENDANT**

**JUDGMENT**

1. The suit land herein is LR. number Suna West/Wasimbete/793 (the original parcel of land) now subdivided into LR. Number Suna West/Wasimbete/1575 and LR. Number Suna West/Wasimbete/1576 (the 1<sup>st</sup> and 2<sup>nd</sup> subsequent subdivisions respectively) in Migori County within the Republic of Kenya.
2. The plaintiffs are represented by the firm of O.M. Otieno and Company Advocates. The defendant is represented by the firm of Oguttu, Ochwangi, Ochwal and Company Advocates.
3. By a plaint dated 1<sup>st</sup> November 2013 and amended on 18<sup>th</sup> July, 2017, the plaintiffs have sued the defendant for the following reliefs:-

***a) Deregistration of LR. Number Suna West/Wasimbete/793 now LR number 1575 and 1576 in the names of 2<sup>nd</sup> plaintiff and the defendant herein and there be subsequent registration of the whole portion in the names of Micheal Francis Ngwala Okumu and Tharoge Kathethi.***

***b) Permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from re-entering, trespassing onto cultivating, interfering with and/or in any other manner whatsoever dealing with the suit land is LR. Number Suna West/Wasimbete/793 now sub-divided into LR number 1575 and 1576.***

***c) Cost of this suit be borne by the defendant.***

***d) Such further and/or other relief as the Honourable court may deem fit and just to grant in the circumstances.***

4. The gist of the plaintiffs' claim is that prior to the first registration of the original parcel of land and now the 1<sup>st</sup> and 2<sup>nd</sup> subsequent subdivisions, the same belonged to Kathethi Nyakogra (deceased 1) who was the father of LUKAS NGWALA KATHETHI (deceased 2) and JOANES THAROGE KATHETHI (deceased 3). The defendant fraudulently caused the registration of the suit land in his name in lieu of deceased 2 and 3 without involving the entire family of deceased 1 and without the Land Control Board consent. That on or about 27<sup>th</sup> October 2013 at about 10:00 am, the defendant trespassed into the suit land and caused wanton destruction including felling down ancestral trees, digging trenches and cultivation thereon causing the plaintiffs to suffer irreparable loss. That since the plaintiffs are the legal administrators of the estate of deceased 3, they instituted the present suit.

5. In his statement of defence and counterclaim dated 6<sup>th</sup> December 2013, the defendant denied the plaintiffs' claim, and sought dismissal of the same with costs. He stated that on 24<sup>th</sup> April 1985, the original parcel of land was registered in the name of the 2<sup>nd</sup> plaintiff and the defendant pursuant to the completion of the adjudication and demarcation process in the area. That the 2<sup>nd</sup> plaintiff and the defendant sought and obtained the requisite Land Control Board consent and thereafter caused the 1<sup>st</sup> and 2<sup>nd</sup> subsequent subdivisions in favour of the

2<sup>nd</sup> plaintiff and defendant respectively. That the 2<sup>nd</sup> plaintiff continues to illegally occupy LR No. Suna West/Wasimbete/1588, a subdivision of the 2<sup>nd</sup> subsequent subdivision. Thus, the defendant counterclaims against the plaintiffs for :-

*i. An order of eviction against the 2<sup>nd</sup> plaintiff, agents and/or servants from LR. Number Suna West/Wasimbete/1588.*

*ii. Permanent injunction restraining the plaintiffs either by themselves, agents, servants and/or agents from entering upon, trespassing onto, building on, cultivating and/or otherwise interfering LR. Number Suna West /Wasimbete/1588, whatsoever and/or howsoever.*

*iii. Costs of the cross suit be borne by the plaintiffs.*

*iv. Such further and/or other relief as the Honourable Court may deem fit and expedient.*

6. The plaintiffs filed a reply to the defendant's statement of defence and defence to the counterclaim dated 17<sup>th</sup> June 2014. They denied the counterclaim and the particulars of fraud therein. They also sought dismissal of the defence and counterclaim with costs and that judgment be entered in their favour in terms of the plaint.

7. The 1<sup>st</sup> plaintiff (PW1) testified on 1<sup>st</sup> March 2018 and was recalled on 28<sup>th</sup> May, 2018. In his evidence in chief, he relied on his statement filed on 18<sup>th</sup> June 2014. He called two (2) witnesses namely JULIUS AGWARA OMBWEGE (PW2) and JAPHET RIOGI RIOGI (PW3), a farmer and a community leader of the area where the suit land is situate respectively.

8. PW1 urged the court to order, inter alia, that the suit land do revert to the family of Kathethi Nyakogra (deceased 1). He referred to and produced in evidence, a list of documents dated 17<sup>th</sup> June 2014 (PExhibits 1 to 8) which include :-

*a) A grant of letters of administration in Kisii High court Succession Cause No. 38 of 2016 issued to PW1 on 6<sup>th</sup> July 2016 (PExhibit 1).*

*b) A grant of letters of administration in respect of estate of the deceased 2 ( Lucas Ngwala Kathethi), the father of PW1 issued in Rongo PM's court Probate and Administration cause Number 345 of 2013 (PExhibit 2).*

9. The defendant (DW1) adduced evidence on 20<sup>th</sup> November 2018. He testified that he owned the suit land jointly with deceased 3 prior to its first registration and the subsequent subdivisions. He relied on his statement dated 6<sup>th</sup> December 2013 as part of his evidence in chief. He also did rely on his list of documents of even date (DExhibits 1 to 13). He urged this court to enter judgment in terms of his counterclaim.

10. Learned counsel for the plaintiff filed submissions dated 10<sup>th</sup> March 2019. The same exceeded ten (10) pages contrary to **Practice Direction number 33 (b) of the Environment and Land Court Practices Directions, 2014**. Nonetheless, I consider ten (10) pages of the submissions and treat the other pages superfluous.

11. Counsel submitted on the background of the case, the evidence adduced by PW1, PW2, PW3 and DW1. He framed and analysed issues (i) to (iv) for determination relating to fraudulent registration of DW1 as the proprietor of the suit land and whether the parties are entitled to the reliefs sought in their respective pleadings.

12. Counsel also cited **section 26(1) of the Land Registration Act, 2016** and **section 107 of the Evidence Act (Cap 80)**. He further relied on the case of **Nicodemus Mokaya Oriku –v- Monica Mwikali Mwanzia (2018) eKLR** and the decision in **Paskal Ouma Mudaki and 3 others –vs- Habil Ndisi and 10 others (2014) eKLR**, in support of his submissions.

13. Learned counsel for the defendant filed submissions dated 21<sup>st</sup> March 2019 wherein reference was made to the background of the suit, identification and analysis of the issues for determination thus:

*i. Whether the 1<sup>st</sup> plaintiff herein is seized of the requisite locus standi to mount and/or originate the instant suit.*

*ii. Whether the suit by the plaintiffs and more particularly, the plea of fraud, is barred by the Limitation of Actions Act, Chapter 22, Laws of Kenya.*

*iii. Whether the sub-division of the original parcel of land and the creation of the resultant LR. Number Suna West/Wasimbete/1575 and 1576, was unlawful.*

*iv. Whether the defendant is entitled to the reliefs at the foot of the counterclaim.*

14. To buttress the submissions, counsel cited **section 82 of the Law of Succession Act (Cap 160)**, **section 4 of the Limitation of Actions Act (Cap 22)** and **sections 107 and 108 of the Evidence Act (Cap 80)**. Counsel further relied of authorities, inter alia, **Charles Ratemo Nyambati –vs- Jacton Ocharo and others Kisii ELC Petition number 33 of 2013 (UR)** and the Court of Appeal decision in **Virani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Limited (2004) 2 KLR at 269 to 280**.

15. I have anxiously considered the pleadings, evidence of PW1 to PW3 and iDW1 as well as submissions of counsel for the respective parties in this matter. Being guided by the Court of Appeal decision in **Galaxy Paints Company Ltd –vs- Falcon Grounds Limited**

(2002) 2EA 385 and bearing in mind the entire case, I do embrace the issues in the submissions of the counsel for respective parties in this matter. Succinctly put, the issues for determination are whether :-

- a) *The plaintiff has legal capacity (locus standi) to mount the instant suit*
- b) *The plaintiff's plea of fraud is barred by section 4 of the Limitation of Actions Act (Cap 22).*
- c) *The parties are entitled to the reliefs sought in their respective pleadings.*

16. On the issue of locus standi on the part of the plaintiff (PW1), it is pretty clear from paragraph 1 of the amended plaint that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs bought this suit on their own account and as the legal administrators of the estate of Joanes Tharoge Kathethi (deceased 3). PExhibits 1 and 2 are letters of administration ad Litem issued in Kisii High Court Succession cause No. 38 of 2018 issued on 6<sup>th</sup> July, 2016 and a limited grant of administration Ad litem issued on 29<sup>th</sup> October 2013 in Rongo PM's court P&A Number 343 of 2013 respectively. Quite clearly, PExhibit 1 is in respect of the estate of Joanes Tharoge Kathethi (deceased 3) while PExhibit 2 is with regard to the estate of Lucas Ngwala Kathethi (deceased 2) and the legal administrators thereof are both plaintiffs and PW1 respectively. Furthermore, PExhibits 1 and 2 were issued further to **section 54 of the Law of Succession Act (Cap 160)** and have not been revoked thus are valid with regard to the estate of deceased 2 and 3.

17. Be that as it may, at paragraph 3 of the amended plaint, it is stated that the suit land belonged to deceased 1. PW1 testified that the suit land is in the name of 2<sup>nd</sup> plaintiff and DW1. He further testified that :-

***“It belonged to Kathethi family. It belonged to Kathethi Nyakogra who sired Magolo Kathethi, Lucas Ngwala Kathethi and Joanes Thoroge Kathethi. He was my grandfather.”***

18. It was the testimony of PW2 that the suit land belonged to deceased 1. He stated in part that :-

***“The suit land is LR. number Suna West/Wasimbete/793. It initially belonged to Kathethi Nyakogra (deceased),”***

19. **Section 2 of the Civil Procedure Act (Cap 21)** defines the term “**Legal representative**” thus:-

***“A person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”***

20. It is clear from PExhibits 1 and 2 that the plaintiffs are legal representatives of deceased 2 and 3. However, they are not legal representatives of the estate of deceased 1 as recognized by the Court of Appeal in the case of **Trouistik Union International and another –v- Jane Mbeyu and another (1993) eKLR** which was **applied** by Mutungi J in **Ratemo Nyambati case (supra)** and the decision of Wanjiru Karanja J (as she then was) in the case of **Omari Kaburu –vs- ICDC (2007) eKLR**.

21. The powers of personal representatives include to enforce by suit or otherwise, all other causes of action as provided under **section 82 of the Law of Succession Act (Cap 160)**. On the role of legal representatives.

, I endorse the decision of H. Ongundi J in **Republic =vs= Attorney General and Another ex-parte John Mugo (2013) eKLR** where she held that:-

***“...And a legal representative in a person who has been issued letters of a grant. This is provided under Section 82 (a) of the Law of Succession Act..... The applicant cannot fail to follow this procedure and hide under Article 22 (1) and (2) of the Constitution..... The applicant has to show that he is the Legal representative. He therefore lacks locus standi specific to this State....”*** (Emphasis laid)

22. In that regard, the plaintiffs lack locus standi to institute the instant suit for and on behalf of the estate of deceased 1 who was the owner of the suit land; See **Trouistik Union International** case (supra).

23. In respect of issue of fraud, **Black's Law Dictionary 10<sup>th</sup> Edition** defines the term (fraud) thus:-

***“A tort arising from knowing or reckless misrepresentation or concealment of material fact made to induce another to act to this or her detriment.”***

24. Paragraphs 3, 4 and 5 of the amended Plaint speak to the issue of fraud in paragraph 5 thereof the particulars of fraud are pleaded. In the case of **Abiero =vs= Thabiti Finance Company Ltd and another (2001)KLR 496**, it was held that fraud must be specifically pleaded and particulars of fraud alleged must be stated on the face of the pleadings.

25. PExhibit 3 discloses that the suit land was registered in the name of the defendant (DW1) and PW2 on 24 April, 1985. Each of them holds a half share of the suit land as revealed therein.

26. It is important to note that rights and registration of land in dispute can be challenged, on the ground of fraud or representation, among

others, as envisaged under **Section 26 (1) of the Land Registration Act 2016 (2012)**; see also the case of **Kimani Ruchine and another vs= Swift Rutherford Company Ltd & another (1976 - 80) KLR 1500.**

27. PW1 asserted that the suit land belongs to the family of deceased 1 and that the original owner was deceased 1. As already observed PW1 testified so on 1<sup>st</sup> March 2018 and 28<sup>th</sup> May 2018.

28. In the case of **Isack M'inanga Kiebia vs= Isaaya Theuri M'lintari and another (2018)eKLR**, the Supreme Court of Kenya held that the rights and interests previously vested in a group, family or individual under African Customary Law are not extinguished upon registration of trust land. The court further gave some of the elements that would qualify a claimant as a trustee thereof. The elements include that the claimant belonged to that family and that the claim was directed against a registered proprietor who is a member of the family, clan or group.

29. This Court is alive to overriding interests over registered land and they include customary trusts as envisaged under **Sections 25 (1) (b) and 28 (b) of the Land Registration Act, 2016 (2012)**. However, PW1 who contended that DW1 is not a member of the family of deceased 1, has failed to establish some of the elements recognised in **Kiebia case (supra)**.

30. It was also the contention of PW1 that he discovered that the 2nd plaintiff and DW1 got registered as the proprietors of the suit land on 24<sup>th</sup> April, 1985 as shown in PExhibit3. The present suit was filed in November 2013. Under **Section 4 (2) of the Limitations of Actions Act (Cap 22)**, an action founded on tort, like in the instant case, may not be brought after the end of three years from the date on which the cause of action accrued. Accordingly, the instant suit is statute barred.

31. DW1 asserted that he is the registered proprietor of the suit land. That he lawfully acquired title to the land as demonstrated by DExhibits 1 to 13. He is entitled to secure protection of property under **Article 40 (1) of the Constitution of Kenya, 2010** in the circumstances.

32. It is evident that PW1 is in unjustified intrusion of the suit land as held in the case of **Zachariah Onsongo Momanyi –vs- Omurwa Onchagwa (2014) eKLR**. This court is mandated to grant preservation orders, among them, permanent injunction sought herein as provided for under **Section 13 (7) (a) of the Environment and Land Court Act, 2015 (2012)**.

33. The net result is that the plaintiffs have failed to establish their claim against the defendant on a balance of probability. On the other hand, the defendant has proved his counterclaim against the plaintiffs on a balance of probability.

34. Wherefore, I hereby dismiss the plaintiffs' suit commenced by way of a Plaint dated 15<sup>th</sup> November 2013 and amended on 18<sup>th</sup> July 2017. I then enter judgment for the defendant against the plaintiffs in terms of orders (a), (b) and (c) sought in his counter claim dated 6<sup>th</sup> December, 2013.

**DELIVERED, DATED and SIGNED at MIGORI this 23<sup>rd</sup> day of July 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. Kerario Marwa holding brief for O.M. Otieno learned counsel for the plaintiffs.

Mr. Oguttu Mboya learned counsel for the defendant

Tom Maurice – Court Assistant.