



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 679 OF 2017**

**(formerly Kisii Elcc no. 121 of 2013)**

**BENARD OTIENO OKORE.....PLAINTIFF**

**-VERSUS-**

**RUSANEL AKEYO OINGA.....1<sup>ST</sup> DEFENDANT**

**TOBIAS OTIENO OINGA.....2<sup>ND</sup> DEFENDANT**

**KENNETH GOGA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A. Introduction**

1. This suit was initially heard before Honourable Justice Mohamed Kullow in Kisii Environment and Land court up to the close of the plaintiff's case. However, upon establishment of the Environment and Land Court in Migori, the learned Judge, by his order of 24<sup>th</sup> May 2017, transferred the matter to this court for further hearing and determination.

2. The suit property is comprised of L.R No. Suna East/Wasweta1/16422, 16105 and 1606. The same was originally LR No. Suna East/Wasweta1/302 measuring approximately 9.4 hectares in area (the original suit land) within Migori County. The property was registered in the name of Okore Matu (Hereinafter referred to as the Deceased).

3. The plaintiff is represented by Moerwa Omwoyo and Company Advocates. The defendants are represented by Kwanga Mboya and Company Advocates.

**B.The plaintiff's Case**

4. By a plaint dated 21<sup>st</sup> March, 2013 and filed in court on even date, the plaintiff, **Benard Otieno Okore**, has sued the three Defendants, **Rusanel Akeyo Oinga, Tobias Otieno Oinga and Kenneth Goga** over the suit property. It is the plaintiff's claim that he is the grandson of the deceased who owned the original suit land. That he obtained letters of administration intestate **ad-litem** of the deceased's estate thus making him the legal representative of the estate.

5. The plaintiff further claims that the defendants fraudulently and illegally executed transfer documents in respect of the original suit land by purporting to be the beneficiaries of the estate of the deceased. That on that basis, they caused the original suit land to be transferred to their names illegally. That the defendants invaded the land, damaged property thereon, caused further subdivisions of the land and illegal transfer to other people who purported to be purchasers of the same.

6. It is the plaintiff's contention that as a result of the fraudulent transfer of the original suit land, subsequent sale of its subdivided portions to third parties and refusal by the defendants to vacate the suit land, he has suffered loss and damage. Thus, the plaintiff is seeking orders set out in his plaint as hereunder:-

*i. An order for a revocation/cancellation of the illegally and un procedurally acquired titles SUNA EAST/WASWETA I/16422,16106 and restoration of the original title SUNA EAST/WASWETA 1/302 belonging to the plaintiff.*

*ii. A permanent injunction to restrain the defendant either by themselves, agents servants, and/or agent from trespassing, encroaching onto and/or otherwise interfering with demised properties SUNA EAST/WASWETA 1/16422,16105, 19106 SUNA EAST/WASWETA 1/16422,16105,16106 respectively (herein referred to as the suit property).*

**iii. An order for eviction against the defendant, agents and/or servants from demised properties SUNA EAST/WASWETA 1/16422,16105,16106.**

**iv. Cost of and incidental to this suit.**

**v. Such other or further relief that this Honourable court may deem fit and just to grant.**

7. On 30<sup>th</sup> March 2017, the plaintiff (PW1) being represented by his counsel, Mr. Marigi holding brief for Omwoyo, testified that the original suit land belonged to the deceased. He denied the existence of any relation between the deceased, the 1<sup>st</sup> defendant (DW1) and her husband Nahashon Odwera-deceased (Hereinafter referred to as Nahashon) as well as the 3<sup>rd</sup> defendant. That the defendants were only his neighbours. That the suit land was approximately nine (9) acres in area but the defendants subdivided it into three (3) parcels and registered the same in their names. PW1 produced the relevant green cards as PExhibits 1(a) (b) and (c) and prayed for the orders sought in the plaint.

8. During cross-examination, PW1 testified that he had been authorized by his siblings; Edward Hezron Okore, George Dege Okore, Francis Pete Okore (all deceased), Norah Atieno and Maureen Atieno, to sue on their behalf. During cross-examination, he stated;

***“I am the plaintiff...the grandson of the deceased Okore. He has children....Edward Hezron Okore, George Okore. They are my family members and they asked me to sue on behalf of the deceased. We are yet to file a succession cause in court.”*** (Emphasis laid)

9. Moses Hamisi Ogeda (PW2) testified that he knew the deceased because he was his brother in law and as the owner of the original suit land. That he (PW2) was a cousin to Nahashon who started occupying the land upon the demise of the deceased and chased away the children of the deceased from the original suit land. That as a result, they filed a suit at Land Disputes Tribunal, Suba East Division where orders were made requiring Nahashon to move out of the original suit land. That Nahashon’s appeal from the tribunal’s verdict was dismissed. That upon taking title deed to the Land office, it was found that the original suit land had been subdivided into three (3) parcels comprising the suit property.

10. On cross-examination PW2 testified that the original suit land was initially in the name of the deceased. That it was transferred to Nahashon pursuant to succession cause No. 239/2008.

### **C. The Defendants’ Case**

11. The defendants did a joint statement of defence dated 15<sup>th</sup> April 2013 and filed in court on 17<sup>th</sup> April 2013, whereby they specifically denied the particulars of fraud and illegality attributed to them by the plaintiff. They claimed that Nahashon had authority of the court to register, sub-divide and transfer the suit land. They maintained that the orders sought in the plaint amount to an abuse of court process because they are in lawful occupation of the suit property.

12. In her testimony, the 1<sup>st</sup> Defendant(DW1) relied on her statement dated 19<sup>th</sup> July, 2013 and added that her deceased husband (Nahashon) was the registered owner of the suit land and that she has been staying on the land for the last fifty (50) years and that her husband was buried in the land. She further said that;

***“I have not petitioned the court for letters of administration in respect of the estate of my late husband.....The plaintiff did not sue my late husband for recovery of the suit land and during his lifetime.....”***

13. During cross-examination, DW1 testified that his son, the 2<sup>nd</sup> defendant did not petition Homa Bay law courts for grant of letters of administration in respect of the estate of her deceased husband. That she did not have mutation forms for subdivision of the suit land. That the 2<sup>nd</sup> defendant had never sold the original suit land to the 3<sup>rd</sup> defendant.

14. The 2<sup>nd</sup> defendant (DW2) basically fortified the evidence of DW1. He stated that the deceased never owned the suit land and that his (DW2) father, Nahashon sub-divided the suit land amongst his seven (7) sons including himself before his death. He produced the title deed issued to his late father on 21<sup>st</sup> April 2011 and the one issued to him in respect of part of the suit land LR NO. SUNA EAST/WASWETA 1/16105 (DExhibit 2), a certificate of official search in respect of another part of the suit land LR NO. SUNA EAST/WASWETA 1/16422 belonging to his father (DEXhibit 3). He further testified that his late father acquired the suit property through succession proceedings in court and that the 3<sup>rd</sup> defendant was not related to him.

15. During cross-examination DW2 testified that he received part of the suit land LR NO. SUNA EAST/WASWETA 1/16105 from his father as a gift upon sub-division of the original suit land. He further confirmed that his late father received the suit land through a sccession cause originating from the estate of the deceased, Okore Matu. He denied knowing one Jackson Okumu Indagasi ( Jackson) the person who allegedly sold LR NO. SUNA EAST/WASWETA 1/16106 to the 3<sup>rd</sup> defendant.

16. The 3<sup>rd</sup> defendant (DW3) testified that he bought LR NO. SUNA EAST/WASWETA 1/16106 a part of the suit property in the year 2011 from Jackson at Kshs 540,000/= through a sale agreement dated 23<sup>rd</sup> December 2011(DExhibit 4). He contended to have followed due process through a certificate of official search dated 22<sup>nd</sup> December 2011, transfer and was issued with a title deed (DExhibit 5) on 28<sup>th</sup> December 2011. According to him, no one had complained against his title. He denied knowing DW1 herein.

17. Upon cross- examination, (DW3) testified that there was an error on the date on DExhibit 4 and no correction was made on it. He further confirmed that he neither attended Land Control Board to obtain consent nor given a letter of consent from the said board. That he did not

pay for stamp duty for the transaction but denied indulging in fraud to acquire the land.

#### **D. Submissions of the plaintiff**

18. In his written submissions dated 19<sup>th</sup> July 2019 and filed in court on 22<sup>nd</sup> July 2019, the plaintiff contends that he obtained letters of administration ad litem vide succession cause No. 725 of 2012. He submitted that there was no relationship whatsoever, blood or contractual between the defendants and the deceased. He further submitted that according to the entries in the green card, the deceased appears as the first registered proprietor of the suit land and was issued with a certificate of title on 16<sup>th</sup> August 1977. That at the time of his death, he had not transferred the suit land to anyone.

19. He further submitted that Nahashon was an accused person in Suba Kuria District Magistrate's Court Criminal Case No 971 of 66 after maliciously damaging property on the deceased's land. That Nahashon was issued with a certificate of grant dated 11<sup>th</sup> May 2009 through fraud. The plaintiff relied on the case of **Alice Chemutai Too –vs- Nickson Kipkirui Korir and 2 others (2015) eKLR** to demonstrate the title acquired over a deceased person's land is invalid as the same had not been obtained through a valid succession process in court.

20. The plaintiff further relied on the provisions of **Article 40(6) of the Constitution of Kenya, 2010** that the right to protection of property does not extend to any property that has not been found to have been unlawfully acquired.

21. The plaintiff further submitted that the defendants are trespassers on the suit property. That his deceased grandfather Okore Matu had never conducted succession regarding his estate and that they were only there as neighbours. It was his further submission that the alleged sale and transfer of a part of the property land to DW 3 was a fraud because no transfer documents were produced to that effect. That Jackson, could not have purported to sell what he did not own and that he did not attend court to demonstrate ownership and valid transfer. The plaintiff relied on the decision in **Gitwany Investment Limited –vs- Tajmal Limited and 3 others (2006) eKLR** to show trespass and buttress invalidity of title that is otherwise procedurally acquired.

22. Challenging the defendants' good title to the suit land, the plaintiff found support in the case of **Arthi Highway Developers Limited v West Butchery limited and 6 others(2015) eKLR**, **Elijah Makeri Nyangwara vs- Stephen Mungai Njuguna and another (2013) eKLR** where in both cases, titles were impeached for having been acquired through illegal and irregular means. The plaintiff further submitted on the issue of the defendants' intermeddling with the property of the deceased and urged the court to find persuasion in the decision of Mabeya J in **Re-estate of John Gakunga Njoroge(2015)** where he held in part that;-

*“A person can only deal with the estate of the deceased person pursuant to a grant of representation made to him under the Law of Succession Act.”*

23. The plaintiff further submitted that as evidenced by the green card, it is not known how Nahashon and Jackson ended up as the proprietors of the suit land. He also urged the court to declare the transactions as invalid and that no good title passed from the deceased to Nahashon and DW 3. On the question of costs, the plaintiff urged the court to find the defendants liable to bear the costs for having precipitated this suit by their illegal actions.

#### **E. The defendants' submissions**

24. In their submissions dated 9<sup>th</sup> August 2019 and filed in court on 16<sup>th</sup> August 2019, the defendants stated that no evidence was led by the plaintiff to challenge the validity of the certificate of confirmation of grant issued to Nahashon and Jackson. They referred to **section 17 of the Evidence Act (Cap 80)** which provides that;

*“An admission is a statement, or documentary, which suggest any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned”*

25. The defendants urged the court to take judicial notice that Nahashon and Jackson were lawfully entitled to be administrators of the estate of the deceased. On that basis, they further submitted that the subdivision, transfer and subsequent sale to DW3 was proper in law.

26. Regarding the transaction between Jackson and (DW3), the defendants submitted that it was not a subject of determination by this court in so far as the plaintiff cannot allege fraud on the contract where he is not a party. That it was not open for the plaintiff to plead fraud on the land transfer to the other defendants arising from a lawful court order. The defendants submitted that failure by the plaintiff to meet the threshold of burden of proof requirement under **section 107 of the Evidence Act (Cap 80)**, disentitles him to the prayers sought in the plaint.

27. The defendants finally submitted that the dispute related to succession, a preserve for the High Court. As such, the Environment and Land Court has no jurisdiction to entertain the matter. That on costs, this court is bound by **section 27 of the Civil Procedure Act (Cap 21)** to award the same.

28. I have carefully examined the entire pleadings, the evidence and rival submissions including issues framed and the authorities cited therein as well as the plaintiff's statement of proposed issues dated 19<sup>th</sup> August 2013. Subscribing to the Court of Appeal decision in **Great Lakes Company(v) Ltd –vs- KRA (2009) KLR 720**, on issues for determination, it is my considered view that the issues that arise for resolution in this suit, are as hereunder;

**a) Jurisdiction of this court over the instant suit.**

**b) Who is the original registered proprietor of SUNA EAST/WASWETA 1/302, the suit land herein?**

c) *How did the defendants come into ownership and possession of the suit land?*

d) *Based on (b) above, what orders should this court make?*

29. The Black's Law Dictionary 10<sup>th</sup> Edition defines the term "**Jurisdiction**" as :-

**"A court's power to decide a case or issue a decree."**

30. By the locus classicus decision of Nyarangi J A in the **Owners of Motor Vessel Lilian "S" –vs- Caltex Oil Kenya Ltd (1989) KLR1** that **"jurisdiction is everything."** The defendants contends that this court is not vested with the requisite jurisdiction to determine this matter. That the High Court is the relevant court to resolve the dispute since it concerns distribution of an estate of the deceased and in particular, the suit land.

31. This court notes that the challenge on jurisdiction of this court in the instant suit, arose for the very first time in the defendants' written submissions. It is trite law that it is reasonably plain to raise a question of jurisdiction at the earliest opportunity and not after the matter is heard and determined; see **Lilian "S" case (Ibid)**.

32. Admittedly, the decision of the Supreme Court of Kenya in **R –vs- Karisa Chengo and 2 others (2017) eKLR** sets out jurisdiction of superior courts and **Article 162 (2) (b) of the Constitution of Kenya, 2010**, stipulates the jurisdiction of this court. Accordingly, this court is guided as pertains its jurisdiction over the dispute.

33. It is trite law a court's jurisdiction flows from the Constitution or statute or both; see **Samwel Kamau Macharia –vs- KCB and another (2012) eKLR**.

34. Interestingly, in the defendants' joint statement of defence at paragraph 9, jurisdiction of this honourable court was admitted. It is also a laid down principle of law that parties are bound by their pleadings as recognized in **IEBC and another –vs- Stephen Mutinda Mule and 3 others (2014)**.

35. The defendants have questioned the jurisdiction of this court to entertain the instant suit owing to the nature of the subject matter as already observed. Thus, this court is bound to hear and dispose of that question without further ado because evidence has been adduced and the suit is pending determination.

36. It is common ground that the deceased died in 1988. He was the registered owner of the original suit land. To that extent, does the plaintiff have locus standi over the estate of the deceased?

37. In the case of **Omari Kaburu –vs- ICDC (2007) eKLR**, **Wanjiru Karanja, J** (as she then was ) took a stand point as regards locus standi under the Law of **Succession Act (Cap 160)** which I fully endorse and she reasoned thus:-

**" The law is that the grant is what clothes a personal with locus standi to stand in and sue on behalf of the estate of the deceased....."**

38. Similarly, I unreservedly approve the decision of H. Ongundi J in **Republic –vs- Attorney General and another exparte John Mugo (2013) eKLR** on the role of legal representative and the court held, inter alia;-

**"And a legal representative is a person who has been issued letters of grant. This is provided under section 82 (a) of the law of Succession Act....."**

39. I also agree with Mabeya, J in Re estate of **John Gakunga Njoroge (supra)** and take into account the powers of personal representative under section 82 (a) (Ibid). furthermore, I do note **section 2 of the Civil Procedure Act (Cap 21)** which provides the following definition;-

**" Legal representative means 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"**

40. More fundamentally, it is well settled that the estate of the deceased person is vested in the legal representative; see the Court of Appeal decision in **Trouistik Union International and another –vs- Jane Mbeyu and another (1993) eKLR**.

41. It was the testimony of PW1 that the deceased died in the year 1988. That succession in respect of the estate of the deceased has not been carried out. During cross examination, he stated that the defendants, too, do not have a grant with regard to the estate of the deceased. The defendants stated that Nahashon and Jackson were the legal administrators of the estate.

42. It is therefore evident that the original parcel of land was registered in the name of the deceased. Neither the plaintiff nor the defendants are legal representatives of the estate of the deceased. So, the plaintiff has no locus standi to mount the instant suit.

43. Moreover, the subject matter in the present dispute is predominantly hinged on distribution of the estate of the deceased. In view of **Article 162 (2) (b) and Karisa Chengo case (supra)**, the matter falls within the jurisdiction of the Probate and Administration Court and not the purview of this court.

44. On that score, this court has no mandate to make one more step as held in **Lilian “S” case (supra)**. I find that this court is devoid of jurisdiction over this matter.

45. To that end, it will be superfluous to deal with issues (b) and (c) set out at paragraph 28 hereinabove. Nonetheless, issue (d) thereat is available for determination.

46. Accordingly, I strike out this suit mounted by way of a plaint dated 21<sup>st</sup> March, 2013.

47. As regard costs, I order that in view of the circumstances, of this case each party will bear his or her own costs.

**DELIVERED, DATED and SIGNED at MIGORI this 9<sup>th</sup> day of OCTOBER 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :-**

Mr. Olao holding brief for Mr. Omwoyo learned counsel for the plaintiff.

Mr. Odero holding brief for Kwanga Mboya for the defendants

Court Assistant – Tom Maurice