



REPUBLIC OF KENYA



KENYA LAW
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**Ojiambo v Owindi (Environment & Land Case 35 of 2018)
[2024] KEELC 382 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 382 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 35 OF 2018
BN OLAO, J
JANUARY 30, 2024**

BETWEEN

YESE LIVINGSTONE KAMAU OJIAMBO PLAINTIFF

AND

CHRISTOPHER MASINDE OWINDI DEFENDANT

JUDGMENT

1. Yese Livingstone Kamau Ojiambo Ouma (the plaintiff) moved to this Court vide his plaint dated 22nd March 2018 but filed on 25th April 2018 seeking against Christopher Masinde Omondi (the Defendant), judgment in the following terms with respect to the land parcels No Bukhayo/Ebusibwabo/3254 and 2371 (the suit land):
 - a. A permanent injunction to restrain the Defendant, his family, agents or any other person claiming on their behalf from trespassing onto the land parcels No Bukhayo/Ebusibwabo/3254 and 2371 and interfering with the plaintiff's quiet peaceful use and enjoyment of the same.
 - b. Costs.
2. The thrust of the plaintiff's case is that he is the sole and absolute registered proprietor of the suit land (parcel No Bukhayo/Ebusibwabo 3254 measuring 0.18 hectares and Bukhayo/Ebusibwabo/2371 measuring 1.3 hectares) which he purchased for value and complied with all the legal requirements before he was issued with the title deeds thereto.
3. That sometimes in 2017 and February 2018, the Defendant without any colour of right or probable cause trespassed onto a portion of the suit land, destroyed the boundary and chased way the plaintiff's family members and agents who were ploughing it. He then proceeded to plant cassava on a portion thereof.



4. The plaintiff made a formal report to the area Administration but when the Police intervened, the Defendant became violent and adamant yet he has no interest in the suit land his claim against the plaintiff having been dismissed in Busia ELC Case No 64 of 2014. Despite demand and notice of intention to sue, the Defendant has refused to abandon his illegal activities hence this suit.
5. Together with his plaint, the plaintiff filed his statement dated 22nd March 2018 which is basically a rehash of what is contained in his plaint. I need not repeat the same.
6. He also filed the following documents vide his list of documents of even date:
 1. Copy of title deed for the land parcel No Bukhayo/Ebusibwabo/2371.
 2. Copy of title deed for the land parcel No Bukhayo/Ebusibwao/3254.
 3. Copy of plaint in Busia Elc Case No 64 of 2014 – Christopher Masinde Owindi (sic) -V- Yese L. K. Ojiambo Ouma.
4. Copy of order dated 19th April 2018 dismissing Busia ELC Case No 64 of 2014.
7. The Defendant, acting in person, filed his defence dated 18th June 2018 in which he denied the allegations of trespass levelled against him. He added that the plaintiff, if indeed he obtained title to the suit land, must have fraudulently interfered with the Estate of the Defendant's deceased father being land parcel No Bukhayo/Ebusibwabo/1240 which was closed on sub-division to give rise to the suit land. He pleaded further that the family of the deceased Ounoi Omuchiro Ironi is yet to file any succession cause and therefore any dealings with the estate is null and void and the plaintiff is invited to show this Honourable Court how he obtained the title deeds to the suit land. He urged this Court to strike off the suit for not disclosing any cause of action. The firm of Calistus Nyegenye came on record for the Defendant on 24th September 2018 and filed the Defendants' statement dated 8th October 2018 in which the Defendant averred that in 1994, he entered into an agreement to sell to the plaintiff 2 acres of land to be excised from the land parcel No Bukhayo/Ebusibwabo/1240 at a consideration of Kshs.29,000. However, the said agreement was signed by the plaintiff's father one James Ouma Musumba. The plaintiff was then issued with the title deed to the land parcel No Bukhayo/Busibwao/3254.
8. Then in 2023, the plaintiff went with a surveyor to re-survey the suit land. This made the Defendant suspicious and so he went and obtained the certificate of search from the Lands office only to discover that although he had only sold the plaintiff 2 acres, the plaintiff had fraudulently added for himself another parcel of land being land parcel No Bukhayo/Busibwao/2371. The Defendant therefore reported this fraud to the Assistant chief and also to his advocate Mr Wanyama who summoned him. However, the plaintiff did not heed the summons and further complaints to the District Officer also bore no fruits. The Land Registrar consequently placed cautions on the suit land. The Defendant therefore seeks from this Court an order compelling the plaintiff to return the title deed to the land parcel No Bukhayo/Busibwao/2371 to the Lands Office for cancellation and correction so she that the 1¼ acres can be returned to him.
9. The Defendant filed the statement of his brother Chrispinus Etyang Oundi (DW2) as his witness dated 5th June 2020. The said witness sates in the statement that he is a younger brother to the Defendant and out of their eight (8) siblings, only five are still alive. That their late father Ounoi Omuchiro Ironi left land parcel No Bukhayo/Ebusibwabo/1240 which was registered in his names and did not transfer any portion thereof to the plaintiff. Therefore, all transactions purportedly done by their late father are fraudulent as no succession has been carried out in respect to his late father's Estate.



10. That on 12th June 2017 while at his place of work in Kisumu, he heard about this case and when he went to carry out a search at the Lands Office, he discovered that the land parcel No Bukhayo/Ebusibwabo/1240 had been sub-divided to create the land parcels No Bukhayo/Ebusibwabo/2369, 2370 and 2371. He therefore placed a caution on the mother title being land parcel No Bukhayo/Ebusibwabo/1240 on the ground that no succession had been done in respect to his late father's Estate.
11. The Defendant filed his list of documentary evidence dated 5th November 2018 comprising the following:
 1. Copy of land sale agreement dated 27th May 1994 between himself and one James Ouma Masinde for 2 acres out of the land parcel No Bukhayo/ebusibwabo/1240 at a consideration of Kshs.29,000.
 2. Copy of land sale agreement dated 9th September 1995 between the Defendant and the plaintiff for 1 acre of land at a consideration of Kshs.13,000.
 3. Copy of letter of consent to sub-divide the land parcel No Bukhayo/Ebusibwabo/1240.
 4. Copy of certificate of official search for the land parcel No Bukhayo/Ebusibwabo/3254.
 5. Copy of Register for the land parcel No Bukhayo/Ebusibwabo/3254.
 6. Copy of Register for the land parcel No Bukhayo/Ebusibwabo/2371.
 7. Copy of certificate of official search for the land parcel No Bukhayo/Ebusibwabo/2371.
 8. Copy of letter dated 6th March 2018 from the Chief Officer Lands Departmental Busia addressed to the plaintiff.
 9. Copy of demand letter from Wanyama & Company Advocates dated 13th December 2013 and addressed to the Plaintiff.
12. The plaintiff filed a reply to the defence dated 28th June 2018 in which he reiterated that he is the absolute registered proprietor of the suit land and denied having obtained the same through any fraudulent acts. He denied having dealt with the Defendant's father over the suit land and insisted that the Defendant has trespassed thereon.
13. The plenary hearing commenced before Omollo J on 27th October 2021 when the plaintiff and Defendant testified. They adopted as their respective testimonies the contents of their written statements contents of which I have already summarised above. They also produced the documents filed herein as their documentary evidence.
14. For several reasons including an attempted settlement of the dispute between the parties and which did not materialise, it was not until 3rd October 2023 that the Defendants witness Chrispinus Etyang Oundi (DW2) testified before me. He too adopted as his testimony the contents of his statement dated 5th June 2020 which I have already summarised above.
15. Submissions were thereafter filed both by Mr Fwayainstructed by the firm of Gabriel Fwaya & Company Advovates for the plaintiff and by Mr Nyegenyeinstructed by the firm of Calistus & Company Advocates for the Defendant.
16. I have considered the evidence by the parties in support of their respective pleadings and the submissions by counsel.
17. The following issues in my view, call for determination in this dispute.



1. Whether the plaintiff acquired valid titles to the suit land or the same were obtained fraudulently.
 2. Whether the Defendant has trespassed onto the suit land and should therefore be enjoined permanently from doing so.
18. It is common ground that the plaintiff holds the titles to the land parcel No Bukhayo/Ebusibwabo 2371 issued on 16th July 1996 and Bukhayo/Ebusibwabo/3254 issued on 28th August 2000. He has pleaded that he acquired the suit land for value after complying with all the legal requirements. He has asserted therefore that he is “the sole absolute registered owner of the land parcels No Bukhayo/Ebusibwabo/3254 and 2371” as per paragraph 5 of his statement. The same is repeated in paragraph 3 of his plaint. That assertion is protected by Section 24(a) of the [Land Registration Act](#) which reads:

24. “Subject to this Act;

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privilege belonging or appurtenant thereto...”

However, the titles held by the plaintiff are only prima facie evidence of ownership of the suit land and the same are impeachable. Section 26(1) of the [Land Registration Act](#) says so in the following terms:

- 26(1) The certificate of title issued by the Registrar upon registration 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;
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

19. The Defendants does not believe that the plaintiff holds valid titles to the suit land. In paragraphs 3 and 4 of his defence, he has pleaded that the plaintiff fraudulently interfered with the original land parcel No Bukhayo/Ebusibwabo/1240 which was part of the Estate of the Defendant’s late father Ounoi Omuchiro Ironi which had not undergone succession and therefore the said titles are illegal, null and void. The same has been repeated by the Defendant’s younger brother and witness Chrispinus Ounoi (DW2) his statement dated 5th June 2020. Under Section 107(1) of the [Evidence Act](#), the burden of proof was on the Defendant to prove the allegations of fraud and illegality. It reads:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”



Other than pleading that the plaintiff fraudulently interfered with the Estate of Ounoi Omuchiro Iron with respect to the original land parcel No Bukhayo/Ebusibwabo/1240, the Defendant did not specify what those fraudulent activities were on the part of the plaintiff which led to the creation of the suit land. The law, as set out in the case of *Ratilal Patel -v- Lalji Makanji* 1957 EAR 314, is that any allegation of fraud must be strictly proved to the required standard which is something more than on a balance of probabilities. That standard has not been met by the Defendant.

20. If anything, the Defendant has himself confirmed in paragraph 2 of his statement dated 8th October 2018 that in 1994 he sold to the plaintiff 2 acres out of the land parcel No Bukhayo/Ebusibwabo/1240 which transaction was signed by the plaintiff's father James Ouma Musumba at a consideration of KShs.29,000. By another sale agreement dated 9th September 1995, the Defendant sold to the plaintiff an additional 1 acre. Both agreements were produced as part of the Defendant's documentary agreements. That means the plaintiff bought a total of 3 acres from the Defendant which is a total of 1.214 hectares. The land parcel No Bukhayo/Ebusibwabo/3254 measures approximately 0.18 hectares while land parcel No Bukhayo/Ebusibwabo/2371 measures approximately 1.3 hectares. Therefore, the plaintiff ended up with 1.48 hectares yet he was entitled to 1.214 hectares (3 acres) as per the sale agreements dated 27th May 1994 and 9th September 1995. Essentially, therefore, the plaintiff short-changed the Defendant by acquiring 0.27 hectares (0.667 acres) more than what he was entitled to. While this Court may have been persuaded to award the Defendant that land, that claim is clearly defeated by the relevant provisions of the *Limitation of Actions Act* since the events occurred in 1994 and 1995. Section 7 of the *Limitation of Actions Act* provides that:

7: "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

This suit was therefore filed some 23 years after what the Defendant alleges to be a fraudulent interference with the Estate of his late father's Ounoi Omuchiro Ironi in which the original land parcel No Bukhayo/Ebusibwabo/1240 was sub-divided to create the suit land. Even if the Defendant had proved fraud, his claim would have been defeated for being statute barred.

21. Most significantly however, the Defendant neither filed a counter-claim nor pleaded and proved fraud.
22. It is also common ground that by a plaint filed in BUSIA ELC Case No 64 of 2014, the Defendant had filed a suit against the plaintiff seeking the cancellation of the title to the land parcel No Bukhayo/Ebusibwabo/2371 and specifically, the transfer of 1¼ acres to him. That suit was dismissed by Kaniaru J on 10th May 2017 thus dashing any hopes which the Defendant herein had in challenging the plaintiff's title to the suit land and specifically the title to the land No Bukhayo/Ebusibwabo/2371. Clearly therefore, even if the Defendant herein had filed any counter-claim, it would have found its Waterloo in the provisions of Section 7 of the *Civil Procedure Act* which states:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

The issue of ownership of the land parcel Bukhayo/Ebusibwabo/2371 having been determined a year before this suit was filed, it is therefore not strange that the Defendant was well aware that he could



not litigate it again in this suit. That explains why in this suit, he only made a feeble half-hearted claim to the same land.

23. The answer to issue No (1) above is that the plaintiff holds valid titles to the suit land.
24. As to whether the Defendant has trespassed onto the suit land, the plaintiff has pleaded in paragraph 5 of his plaint that sometime in 2017 and in February 2018, the Defendant without his consent, colour of right or probable cause trespassed onto a portion of the suit land, destroyed the boundary, chased away the plaintiff's family member and agents and proceeded to plant cassava thereon. In paragraph 5 of his defence, the Defendant denied all those allegations and put the plaintiff to strict proof thereof. Notwithstanding that denial, the Defendant admitted the plaintiff's claim when he was cross-examined during the trial by Mr Fwaya. He said:

“We are in Court in respect of L.R No 2371 and 3254. At the Lands Office, the plaintiff is registered as owner of the two parcels. I am the one who has planted crops on the two parcels. I have refused the plaintiff from using the land because he has not honoured his part of the agreement. I have not sold land to the plaintiff.”

25. The Defendant is therefore blowing both hot and cold over the ownership of the suit land and speaking from both sides of his mouth. In one sentence, he denies having sold the suit land to the plaintiff and at the same time, he accuses the plaintiff of not honouring their agreement. What is important however, is that he admits that the suit land is registered in the names of the plaintiff and goes on further to admit that he is the one who has planted crops on the suit land. He therefore confirms the plaintiff's claim in paragraph 5 of the plaint where it is pleaded:

5: “That sometimes last year and this year in February, the Defendant without the plaintiff's consent, color of right or probable cause trespassed onto a portion of the subject matter, destroyed the boundary and prevented and chased the plaintiff's family members and agents who were to plough the subject matter and proceeded to plant cassava on a portion of the subject matter.” Emphasis mine.

He repeated the same in his statement which he adopted as his testimony during the trial.

26. Trespass is defined in Black's Law Dictionary 10th Edition as:

“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”

In Clark & Lindsell on Torts 18th Edition, it is defined as:

“any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the plaintiff to prove that the Defendant invaded his land without any justifiable reason.”

Section 3(1) of the *Trespass act* defines the same term as:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.”



27. It must be clear from all the above that indeed the Defendant has trespassed onto the suit land. In my view, therefore, the plaintiff has proved that he is entitled to the order permanently injunctioning the Defendant from further trespassing onto the suit land.
28. Ultimately therefore and having considered the evidence herein, I am satisfied that the plaintiff has proved his case against the Defendant. There shall be judgment for the plaintiff as against the Defendant in the following terms:
 1. The Defendant by himself, his family, agents or any other person(s) claiming through him are permanently injunctioned from trespassing or in any other way interfering with the plaintiff's quiet and peaceful use and enjoyment of the land parcels No Bukhayo/Ebusibwabo/3254 and 2371.
 2. The Defendant shall meet the plaintiff's costs of this suit.

BOAZ N. OLAO

JUDGE

30TH JANUARY 2024

Judgment dated, signed and delivered by way of electronic mail on this 30th day of January 2024.

Right of Appeal.

BOAZ N. OLAO

JUDGE

30TH JANUARY 2024

