



REPUBLIC OF KENYA



**Ogonyo v Ajuoga & 3 others (Environment & Land Case 682 of 2015)
[2024] KEELC 1038 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1038 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 682 OF 2015
SO OKONG'O, J
FEBRUARY 26, 2024**

BETWEEN

PHOEBE ACHIENG OGONYO PLAINTIFF

AND

MILCAH AOKO AJUOGA 1ST DEFENDANT

CHURCH OF CHRIST IN AFRICA 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

KISUMU MUNICIPAL COUNCIL 4TH DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the 1st, 2nd and 3rd Defendants in the High Court on 10th June 2009 through a plaint dated 4th June 2009. The plaint was amended on 3rd July 2012 to join the 4th Defendant to the suit before the suit was transferred to this court and given its current case number. In her amended plaint, the Plaintiff sought judgment against the Defendants for;
 1. An order of eviction of the 2nd Defendant and demolition of the illegal fence constructed on the disputed land;
 2. Damages for trespass;
 3. Mesne profits;
 4. Cancellation of Title No. Kisumu/ Manyatta "A"/3692;
 5. Rectification of the register with regard to Title No. Kisumu/ Manyatta "A" / 3692 and,
 6. Costs of the suit plus interest.



2. The Plaintiff averred that all that parcel of land known as Title No. Kisumu/ Manyatta “A”/3873 (hereinafter referred to only as “Plot No. 3873”) was formerly known as Title No. Kisumu/Manyatta “A”/213 (hereinafter referred to only as “Plot No. 213”). The Plaintiff averred that a portion of Plot No. 213 was compulsorily acquired by the 4th Defendant for road construction and the remainder of that parcel of land was given Title No. Kisumu/Manyatta “A”/3435 (hereinafter referred to only as “Plot No. 3435”). The Plaintiff averred that since the remainder of Plot No. 213 namely, Plot No. 3435 was not required for the road construction, the 4th Defendant resolved that the ownership of the same should revert to Wilson Owade Odhiambo from whom it was compulsorily acquired.
3. The Plaintiff averred that on or about 28th January 1998, the said Wilson Owade Odhiambo (hereinafter referred to only as “Wilson”) agreed to sell to the Plaintiff a portion of the said Plot No. 3435 which upon subdivision was given Title No. Kisumu/Manyatta “A”/3873 (Plot No. 3873). The Plaintiff averred that the subdivision of Plot No. 3435 gave rise to Title Nos. Kisumu/Manyatta “A”/3871, 3872 and 3873. The Plaintiff averred that the subdivision of Plot No. 3435 was approved by the 4th Defendant before it was presented for registration and new titles issued for the subdivisions on 17th February 1998.
4. The Plaintiff averred that in or about 2003, the Plaintiff discovered that the 1st and 2nd Defendants were encroaching on Plot No. 3873 owned by the Plaintiff. The Plaintiff averred that she requested the 1st and 2nd Defendants to stop the encroachment but they refused to heed the demand. The Plaintiff averred that the 1st and 2nd Defendants thereafter unlawfully erected a perimeter fence around Plot No. 3873 thereby depriving the Plaintiff of access and use of the property.
5. The Plaintiff averred that a search conducted at the Kisumu District Land Registry revealed that a subdivision of Plot No. 3435 had been done resulting in Title No. Kisumu/Manyatta “A”/3692 (hereinafter referred to only as “Plot No. 3692”) which was registered in the name of the 2nd Defendant. The Plaintiff averred that the purported second subdivision of Plot No. 3435 and the documents of title held by the 2nd Defendant were fraudulent. The Plaintiff averred that she was the lawful proprietor of Plot No. 3873.
6. The 1st and 2nd Defendants filed a joint statement of defence to the original plaint on 23rd July 2009. The 1st and 2nd Defendants denied the Plaintiff’s claim in its entirety. The 1st and 2nd Defendants averred that Plot No. 3435 was subdivided on 25th July 1996 which subdivision resulted in Title Nos. Kisumu/Manyatta “A”/3692 and 3693 (hereinafter referred to only as “Plot No. 3692” and “Plot No. 3693” respectively). The 1st and 2nd Defendants averred that Plot No. 3693 was subsequently subdivided to give rise to Title Nos. Kisumu/Manyatta “A”/3871 and 3872. The 1st and 2nd Defendants averred that the 2nd Defendant was registered as the proprietor of Plot No. 3692 on 23rd April 1998. The 1st and 2nd Defendants averred that there could not have been any further subdivision of Plot No. 3435 after the subdivision of 25th July 1996 that resulted in the parcel of land claimed by the Plaintiff.
7. The 1st and 2nd Defendants averred that Plot No. 3692 did not result from the purported subdivision of Plot No. 3438. The 1st and 2nd Defendants reiterated that Plot No. 3692 was a subdivision of Plot No. 3435. The 1st and 2nd Defendants denied that they acquired Plot No. 3692 fraudulently. The 1st and 2nd Defendants averred that it was the Plaintiff who obtained a title to a non-existent parcel of land. The 1st and 2nd Defendants averred that the 2nd Defendant was the lawful registered owner of Plot No. 3692.
8. The 3rd Defendant filed a statement of defence to the original plaint on 10th August 2011. The 3rd Defendant denied that the Plaintiff had at any time been registered as the owner of Plot No. 3873. The 3rd Defendant averred that if any subdivision was done concerning the suit properties and there



was involvement of the District Land Registrar and District Land Surveyor, the same was lawful, procedural and free from any irregularity. The 4th Defendant did not file a defence.

The evidence

9. The hearing of the suit commenced on 30th May 2012 before Aroni J. (as she then was) who took the evidence of the Plaintiff in part. After the establishment of this court, the hearing of the suit started afresh before Kaniaru J. on 17th March 2014. The Plaintiff (PW1) told the court that she purchased a portion of Plot No. 3435 from Wilson Owade Odhiambo in 1998. She stated that Plot No. 3435 originated from Plot No. 213. She stated that the sale was approved by the 4th Defendant who had claimed that Plot No. 3435 was a road reserve. She stated that Plot No. 3435 was subdivided into three portions namely, Plot No. 3871, 3872 and 3873. She stated that after the subdivision, she acquired Plot No. 3873. She stated that Plot No. 3871 remained in the name of the 4th Defendant while Plot No. 3872 was sold to one, Osore Jura. She stated that she was issued with a title deed for Plot No. 3873 on 24th March 1998. The Plaintiff produced a copy of her title deed as P.EXH.1. The Plaintiff stated that a lady entered and occupied Plot No. 3873 (hereinafter referred to only as “the suit property” where the context so permits) and refused to vacate the same when asked by the Plaintiff to do so claiming that the property belonged to the 2nd Defendant. She stated that when she conducted a search on Plot No. 3692, she found that the same was registered in the name of the 2nd Defendant who had acquired the same from the 1st Defendant. She stated that according to the extract of the register for Plot No. 3692, the property was registered in the name of the 4th Defendant on 19th February 1997. She stated that the 4th Defendant transferred the property to the 1st Defendant on the same date who in turn transferred the property to the 2nd Defendant on 24th April 1998. The Plaintiff stated that Plot No. 3692 was said to be a subdivision of Plot No. 3455.
10. The Plaintiff stated that the 2nd Defendant showed her a survey map which had Plot No. 3692 but not the suit property. She stated that the location of the suit property in the map was taken by Plot No. 3692. She produced the map as P.EXH.5. She stated that although the map did not show the suit property, there was a mention of the suit property in the map. The Plaintiff stated that the 1st Defendant told her that she did not know anything about Plot No. 3692 in that in 1998 when she was said to have acquired the land, she was a student in Nairobi. The Plaintiff stated that the 1st Defendant told her that she had never been allocated land by the 4th Defendant. The Plaintiff stated that the 2nd Defendant produced a letter dated 20th June 1986 from the Town Clerk of the 4th Defendant addressed to 2nd Defendant. She stated that according to the letter, the 2nd Defendant was allocated Plot No. 2-522, which was different from Plot Nos. 3692, 3873 and 3435. She stated that there was no evidence that Plot No. 2-522 changed to 3692 or 3873 or 3435. The Plaintiff produced a notice to sue the 3rd Defendant as P.EXH.7 and the 3rd Defendant’s reply as P.EXH.8. The Plaintiff stated that the extract of the register for Plot No. 3692 produced by the 2nd Defendant showed that Plot No. 3692 was a subdivision of Plot No. 3455. She stated that she conducted a search on Plot No. 3455 on 16th February 2010 which showed that the land was registered in the name of SAMDAVE NYARIDI KAGALI. She stated that that showed that Plot No. 3455 was in existence as of 16th February 2010. She produced the extract of the register as P.EXH.10. She stated that the title for Plot No. 3692 was not genuine.
11. The Plaintiff stated that she conducted a search on the suit property on 14th April 2009 which showed that she was the owner of the property. She produced the certificate of official search as P.EXH.11. The Plaintiff produced; a letter before action dated 3rd February 2006 as P.EXH.12 and an extract of the register for the suit property as P.EXH.4.



12. On cross-examination by the advocate for the for 1st and 2nd Defendants, the Plaintiff stated that her parcel of land was Title No. Kisumu/Manyatta “A”/3873(the suit property) and that it measured 0.02Ha. She stated that the suit property was situated in front of the 2nd Defendant’s church. She stated that the suit property was vacant and that she sued the 2nd Defendant when it fenced the same in 2008 and converted it to a children’s playing area in 2009. The Plaintiff stated further that she acquired the suit property in 1998 when she was issued with a title in respect thereof. She stated that she did not put the land to any use after acquiring it. She stated that the 2nd Defendant was claiming that the property was Plot No. 3692 measuring 0.04Ha. She stated that although the suit property and Plot No. 3692 had different titles, they were on the same location on the ground. She stated that Plot No. 3692 was in the survey map that she produced as P.EXH.5 while the suit property was not in the same map. She stated that she purchased the suit property on 28th January 1998 and that a search that she carried out at the time showed that it belonged to the seller. She stated that the suit property was a portion of Plot No. 3435 and that she purchased it after the subdivision. She stated that she did not see the seller’s title. She stated that it was the suit property that the 2nd Defendant fenced and put up a children’s playing facility. She stated that she did not have a survey map showing where the suit property was situated.
13. On cross-examination by the advocate for the 3rd Defendant, the Plaintiff stated that she sued the Land Registrar because all the documents she was complaining about came from the Land Registry. She stated that the suit property was not on the survey map and that it was the Land Registry that had failed to put the parcel of land on the map.
14. On re-examination, the Plaintiff stated that when she purchased the suit property, the same had already been excised from Plot No. 3435. She stated that the mutation had already been prepared but the title deed had not yet been issued. She stated that she was registered as the owner of the suit property on 24th March 1998 and was issued with a title deed. She stated that there was no evidence of how Plot No. 3692 was transferred to the 1st Defendant and subsequently to the 2nd Defendant.
15. The hearing of the suit continued before Ombwayo J. on 3rd December 2020 when the Plaintiff’s second witness, Eunice Adhiambo Odhiambo (PW2) gave evidence. PW2 adopted her witness statement filed on 23rd August 2016 as her evidence in chief. PW2 was the wife of Wilson Owade Odhiambo who gave evidence as PW2 but died before he could be cross-examined. She stated that her deceased husband (hereinafter referred to only as “the deceased”) owned Plot No. A/213. She stated that the 4th Defendant took the said parcel of land and subdivided it into three portions namely; Plot Nos. 3871, 3872 and 3873. She stated that these three parcels of land were subdivisions of Plot No. 3435. She stated that the 4th Defendant acquired the land for road construction and then returned part of it to the deceased. She stated that the Plaintiff was known to her and that the deceased sold to her the suit property.
16. PW2 stated that the 1st Defendant was not known to her. She stated that the 2nd Defendant was known to her because it was situated adjacent to the suit property. She stated that she was not aware if the deceased sold any land to the 1st and 2nd Defendants. She stated that the deceased transferred the suit property to the Plaintiff.
17. On cross-examination by the 1st and 2nd Defendant’s advocate, PW2 stated that she got married to the deceased in 1994. She stated that the Plaintiff acquired title to the suit property on 24th March 1998 while the 2nd Defendant acquired Plot No. 3692 on 23rd April 1998. She stated that the two parcels of land were different in title number and size.
18. The 1st and 2nd Defendants called one witness, Arch Bishop Emeritus Dr. Habakkuk Onyango Abogno (DW1). DW1 told the court that he was Arch Bishop Emeritus and a trustee of the 2nd Defendant. He



stated that when the founder of the 2nd Defendant died in 2009, he took over as the Arch Bishop of the 2nd Defendant a position that he held until 2019. He stated that he joined the 2nd Defendant in 1957. DW1 adopted his witness statement filed on 5th July 2011 as his evidence in chief and produced the documents in the 1st and 2nd Defendants' bundle of documents as D.EXH. 1 to 8. He stated that Plot No. 3692 was registered in the name of the 2nd Defendant. He stated that the property came about following the subdivision of Plot No. 3435 on 25th July 1996 which gave rise to Plot Nos. 3692 and 3693. He stated that Plot No. 3692 had never been subdivided. He stated that it was Plot No. 3693 that was subdivided and whose subdivision gave rise to Plot Nos. 3871, 3872 and 3873. He stated that it was Plot No. 3873 (the suit property) that was being claimed by the Plaintiff. He stated that the suit property was different from Plot No. 3692 owned by the 2nd Defendant in all material respects. He stated that the 2nd Defendant had occupied and used Plot No. 3692 since 23rd April 1998.

19. On cross-examination by the advocate for the 3rd Defendant, DW1 stated that the suit property and Plot No. 3692 resulted from subdivisions of different parcels of land. He stated that the 2nd Defendant was in possession of Plot No. 3692 and that the same was fenced.
20. On cross-examination by the Plaintiff's advocate, DW1 stated that he did not have an allotment letter for Plot No. 3692. He stated that the 1st Defendant who was the first registered owner of Plot No. 3692 was the General Secretary of the 2nd Defendant. He stated that the land was subsequently transferred to the 2nd Defendant as its registration in the name of the 1st Defendant in 1997 was an anomaly. He stated that the 2nd Defendant acquired Plot No. 3692 from the 4th Defendant. He stated that the property was offered to the 2nd Defendant through a letter of offer. He reiterated that Plot No. 3692 was a portion of Plot No. 3435.
21. On re-examination, DW2 stated that the 3rd Defendant produced two mutation forms. He stated that the mutation form dated 19th February 1997 showed that the subdivision of Plot No. 3435 gave rise to Plot Nos. 3692 and 3693 which mutation was registered on 19th February 1997. He stated that the second mutation form was dated 17th February 1998 and the same showed that Plot No. 3435 gave rise to Plot Nos. 3871, 3872 and 3872. He stated that the mutation form was registered on 20th February 1998. DW1 stated that he was giving evidence on behalf of the 1st and 2nd Defendants.
22. This court took over the conduct of the matter on 3rd November 2022 after the close of the Plaintiff and, the 1st and 2nd Defendants' cases. The 3rd Defendant called one witness, DOROTHY CHEPKORIR LETING(DW2). DW2 was the Kisumu County Land Registrar. She produced the list and bundle of documents filed by the 3rd Defendant on 26th October 2022 and 4th November 2022 as D.EXH. 9 and D.EXH. 10 respectively. On cross-examination by the advocate for the 1st and 2nd Defendants, DW2 stated that according to the mutation register which was part of D.EXH.10, Plot No. 3435 was subdivided on 15th July 1996 and the subdivision produced Plot Nos. 3692 and 3693. She stated that according to her records, Plot No. 3692 had not been subdivided and that this was clear from the sketch plan and field diagrams attached to the mutation form for Plot Nos. No. 3872 and 3871. She stated that she was not aware if the title for Plot No. 3692 had been cancelled or recalled for cancellation.
23. On cross-examination by the Plaintiff's advocate, DW2 admitted that she had not produced the extract of the register for Plot No. 3692. She stated that Plot No. 3692 was not in the official records that she had produced. She stated that the extract of the register that was produced as D.EXH. 7 showed that Plot No. 3692 was a subdivision of Plot No. 3455 and not Plot No. 3435. She stated that it was in the mutation register where they recorded all the mutations. She stated that the mutation register which she produced as D.EXH.10 showed that the subdivision of Plot No. 3435 gave rise to Plot Nos. 3692



and 3693. She stated that they did not have any document in the Land Registry to support this entry. She stated that according to the adjudication record for Plot No. 3435 (part of D.EXH. 9), the parcel of land measured 0.13 Ha. She stated that the size of the land should have remained the same even upon subdivision. She stated that the mutation register is normally filled by the surveyor. She stated that the entries in the register showed that the area of Plot No. 3692 was 0.04 Ha. while that of Plot No. 3693 was 0.10 Ha. making a total of 0.14 Ha. She stated that that increase in the area was not possible unless there was a re-survey. She stated that in the same register at No. 118, there was another Plot No. 3435 which according to the register was subdivided on 6th February 1998 into 3 portions namely Plot Nos. 3871, 3872 and 3873 measuring 0.08 Ha., 0.03 Ha. and 0.02 Ha. respectively making a total of 0.13Ha. which was the correct size of Plot No. 3435. She stated that they had records supporting this subdivision.

24. DW2 stated that according to the extract of the register that she had produced, Plot No. 3435 was first registered on 23rd November 1995 in the name of the 4th Defendant. She stated that according to the extract of the register, the parcel of land was subdivided on 20th February 1998 into three portions namely; Plot Nos. 3871, 3872 and 3873. DW2 stated that Plot No. 3871 remained in the name of the 4th Defendant while Plot Nos. 3872 and 3873 were transferred to Hezbone Ossorey Jura Odongo and Phoebe Achieng Ogunyo respectively. She stated that the mutation for Plot Nos. 3871 (D.EXH.9 page 6) showed the positions of Plot Nos. 3871, 3872 and 3873. She stated that in the mutation for Plot Nos. 3871 and 3872(D.EXH.9 page 11), she could see Plot Nos. 3872, 3692 and 3693. She stated that she could see that Plot No. 3692 had taken the position of Plot No. 3873 (the suit property).
25. She stated that she had no document showing how Plot No. 3692 was transferred to the 1st Defendant. She stated that according to their records, Plot No. 3435 was subdivided into Plot Nos. 3871, 3872 and 3873. She stated that at the Land Registry, they had documents supporting that subdivision. She stated that they did not have records for the subdivision of Plot No. 3435 to Plot Nos. 3692 and 3693. She stated that the letter of complaint dated 28th May 2008 (D.EXH.9 page 16) was not supported by any document.

Analysis and determination

26. The Plaintiff filed closing submissions dated 18th August 2023. I have not seen the Defendants' submissions on record. The Plaintiff submitted that she had proved her case against the Defendants on a balance of probabilities and as such she was entitled to judgment against the Defendants as prayed. I have considered the pleadings, the evidence tendered by the parties and the submissions by the Plaintiff. I am of the view that the issues arising for determination in this suit are the following;
 1. Whether Title No. Kisumu/Manyatta "A"/3873 (the suit property) claimed by the Plaintiff and Title No. Kisumu/Manyatta "A"/3692 (Plot No. 3692) claimed by the 1st and 2nd Defendants exist and if so, which one was created first?
 2. Whether the suit property and Plot No. 3692 are in the same location on the ground.
 3. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.
 4. Who is liable for the costs of the suit?



Whether parcels of land known as Title No. Kisumu/Manyatta “A”/3873 (the suit property) claimed by the Plaintiff and Title No. Kisumu/Manyatta “A”/3692(Plot No. 3692) claimed by the 1st and 2nd Defendants exist and if so, which one was created first?

25. There is a consensus that the suit property and Plot No. 3692 have their origins in Title No. Kisumu/Manyatta “A”/3435 (Plot No. 3435) which was owned by the 4th Defendant. There is also a consensus that Plot No. 3435 was subdivided. To determine the legal status of the two properties, we have to consider the process of subdivision of Plot No. 3435 which is said to have given rise to the same. According to the Plaintiff, Plot No. 3435 was subdivided on 6th February 1998 by the 4th Defendant into three (3) portions, Plot Nos. 3871, 3872 and 3873(the suit property). There is on record a mutation form dated 6th February 1998 registered on 20th February 1998 in proof of that subdivision. However, according to the 1st and 2nd Defendants, Plot No. 3435 was subdivided on 15th July 1996 by the 4th Defendant into two (2) portions, Plot Nos. 3692 and Plot No. 3693. Again, there is a mutation form on record dated 15th July 1996 registered on 19th February 1997 in proof of this subdivision. For these mutation forms, see the 3rd Defendant’s list of documents dated 24th April 2012 filed on 11th May 2012 where there are clear copies. They are also contained in the Plaintiff’s supplementary list of documents dated 23rd May 2012 filed on the same date and the 1st and 2nd Defendants’ list of documents dated 3rd June 2011 filed on 5th July 2011.
26. According to a copy of the Survey/Subdivision Register that was produced in evidence by DW2, Plot No. 3435 was subdivided by the 4th Defendant on 15th July 1996 into two (2) portions, Plot No. 3692 and Plot No. 3693. According to the said Register, another subdivision of Plot No. 3435 was carried out on 17th February 1998 by the 4th Defendant through which Plot No. 3435 was subdivided into three (3) portions; Plot Nos. 3871, 3872 and 3873(the suit property). This means that the two subdivisions giving rise to the suit property and Plot No. 3692 were registered in the Survey/Subdivision Register.
27. According to the Registry Index Map (RIM) that was produced in evidence by the Plaintiff (P.EXH.5), and the 1st and 2nd Defendants (D.EXH.3), the subdivision of Plot No. 3435 into two portions namely, Plot No. 3692 and Plot No. 3693 is reflected in the amendments section as No. 5 and Plot No. 3692 appears in that map. In the same Registry Index Map, the subdivision of Plot No. 3693 into two portions, Plot Nos. 3871 and 3872 is also reflected in the amendments section. The two plots are also shown on the map. A clear certified copy of the said Registry Index Map can be found in the 3rd Defendant’s Further List of Documents dated 28th November 2022.
28. Based on the foregoing evidence, it is my finding that it was Plot No. 3692 that was created first in 1996. The suit property was created subsequently in 1998. There is no evidence of the existence of the suit property in all the Registry Index Maps that were produced in evidence. The Plaintiff produced in evidence a copy of her title deed for the suit property, a copy of the certificate of official search and a copy of the extract of the register for the suit property to demonstrate its existence and the fact that it was owned by the Plaintiff. Similarly, the 1st and 2nd Defendants produced in evidence a copy of the 2nd Defendant’s title deed for Plot No. 3692, a copy of the extract of the register for Plot No. 3692 and a copy of a certificate of official search in proof of the existence of Plot No. 3692 and the fact that it was owned by the 2nd Defendant.
30. From the evidence before the court, I am convinced that of the two parcels of land, that is the suit property and Plot No. 3692, the genuine and lawful parcel of land is Plot No. 3692. The root of this title is sound. It is supported by a mutation form, Survey/Subdivision Register, Registry Index Map, extract of the register, a title deed and a search. In my view, nothing turns on the extract of the register produced in evidence by the Plaintiff for Plot No. 3692 that indicated that it was a subdivision of Plot



No. 3455. That was obviously an error on the part of the Land Registrar who issued the extract. There is overwhelming evidence on record showing that Plot No. 3692 was a subdivision of Plot No. 3435. The Plaintiff appears to be selective in the choice of evidence. The evidence must be considered as a whole rather than selectively. The Plaintiff produced in evidence as P.EXH.9 a copy of a certificate of official search for Plot No. 3693 that resulted from the subdivision of Plot No. 3435 which subdivision also gave rise to Plot No. 3692. I have also seen a copy of an official search for Plot No. 3692 in the Plaintiff's "Supplementary copies of documentary evidence or exhibits" dated 23rd May 2012 filed in court on the same date. In paragraph 10 of the amended plaint, the Plaintiff stated that a search that she carried out at the Kisumu Land Registry revealed that Plot No. 3435 had been subdivided and that Plot No. 3692 resulted from that subdivision. The evidence on record considered as a whole shows that these two parcels of land were subdivisions of Plot No. 3435.

31. On the other hand, I find the documentation produced in support of the existence of the suit property and its ownership irregular and unlawful. Plot No. 3435 having been subdivided on 15th July 1996 which subdivision was registered on 19th February 1997 to formally create Plot No. 3692 and Plot No. 3693, the same parcel of land could not again be legally subdivided on 6th February 1998 to give rise to among others, the suit property. I found the evidence of DW2 contradictory and unhelpful. This witness claimed that there were no records at the Land Registry regarding Plot No. 3692. The same witness did not comment at all on the documents that were produced by the 1st and 2nd Defendants including a title deed which originated from the Land Registry. It is the same witness who produced Survey/Subdivision Register in evidence which showed that Plot No. 3435 was subdivided in 1996 to give rise to Plot No. 3692 and 3693. The witness did not give any convincing explanation of how land that had been subdivided into two portions in 1996 could be subdivided again into three portions in 1998! There was also no explanation as to why the suit property whose records she claimed to exist in the Land Registry did not appear in the Registry Index Map. I am not surprised by DW2's claim that the records relating to Plot No. 3692 were missing from the Land Registry. The court has come across several cases where genuine records are made to disappear and fake ones are planted in place thereof. In *Mwangi James Njehia v. Janetta Wanjiku Mwangi & another* [2021] eKLR, the court stated as follows:

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- “37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that: -

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as 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 as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;



6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased’ properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.” (emphasis added)
32. The evidence of DW2 regarding the alleged non-existence at the Land Registry of the records relating to Plot No. 3692 does not therefore change my view that Plot No. 3692 is the genuine title in existence. The Plaintiff had contended that there was no evidence of how the 1st Defendant acquired Plot No. 3692 from the 4th Defendant. A copy of the extract of the register of Plot No. 3692 produced in evidence showed that the plot was registered in the name of the 4th Defendant on 19th July 1997 and was transferred by the 4th Defendant to the 1st Defendant on the same date. The 1st Defendant subsequently transferred the property to the 2nd Defendant on 23rd April 1998. The 4th Defendant who was the original owner of Plot No. 3692 is a party to this suit. It has not denied transferring the property to the 1st Defendant. In the absence of such denial, this court has no reason to doubt the fact that Plot No. 3692 was lawfully transferred to the 1st Defendant by the 4th Defendant.
33. Due to the foregoing, it is my finding that between the suit property and Plot No. 3692, Plot No. 3692 was created first and is the one lawfully in existence.

Whether the suit property and Plot No. 3692 are in the same location on the ground.

34. Looking at the mutation form dated 15th July 1996 through which Plot No. 3435 was subdivided into two portions namely, Plot No. 3692 and Plot No. 3693 in 1996, and the mutation form dated 6th February 1998 through which Plot No. 3435 was purportedly subdivided again in 1998 to give rise to Plot Nos. 3871, 3872 and 3873(the suit property), it is clear that Plot No. 3873(the suit property) was superimposed on top of Plot No. 3692. Plot No. 3692 measures 0.04Ha. while the suit property measures 0.02Ha. The suit property was created over or superimposed on half of Plot No. 3692. This can be seen in the mutation form dated 6th February 1998. It is therefore my finding that the suit property; that is Plot No. 3873 is in the same location as Plot No. 3692.

Whether the Plaintiff is entitled to the reliefs sought in the plaint.

35. I have set out earlier in the judgment the reliefs sought by the Plaintiff in her amended plaint dated 3rd July 2012. The Plaintiff had contended that the subdivision of Plot No. 3435 that gave rise to among others Plot No. 3692 was fraudulent and illegal and that the title held by the 2nd Defendant for Plot No. 3692 being a product of that fraud and illegality was similarly fraudulent and unlawful. The Plaintiff sought the cancellation of the title for Plot No. 3692, eviction of the 2nd Defendant from the suit



property, damages for trespass and mesne profits. The suit property and Plot No. 3692 were registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered Land Act provide as follows:

“27. 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 privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

36. Section 143(1) and (2) of the Registered Land Act provides as follows:

- “(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

37. In *Munyu Maina v. Hiram Gathiha Maina*, Civil Appeal No.239 of 2009, [2013]eKLR, the Court of Appeal stated as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the



legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

38. In *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others*[2016] eKLR, the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain... Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

39. The term fraud is defined in Black’s Law Dictionary 9th Edition as follows:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, and intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

40. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya provides that the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. The burden of proof of the alleged fraud and illegalities in the subdivision of Plot No. 3435 and transfer of a portion thereof namely, Plot No. 3692 to the 1st and 2nd Defendants rested with the Plaintiff.

41. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another* [2000]eKLR, the court (Tunoi JA) stated as follows:

“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.”

42. In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:

“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”



43. In her plaint, the Plaintiff set out the particulars of fraud as follows:

- “A. The 1st, 2nd and 3rd Defendants causing a subdivision to be made resulting into creation of new parcels knowing very well that the original parcel title number Kisumu Manyatta “A”/3435 had already been sub-divided and new titles issued on 17.2.1998.
- B. The 1st, 2nd and 3rd Defendants purporting to transfer ownership of the suit parcel to the 1st Defendant and later the 1st Defendant transferring the same to the 2nd Defendant without any property documents or records of transactions indicating how the transfer was done.
- C. The 1st, 2nd and 3rd Defendants purporting to subdivide the original parcel of the suit parcel without the written consent of the original proprietor, Wilson Owade Odhiambo.”

44. I have held that the subdivision of Plot No. 3435 that gave rise to Plot No. 3692 was the first in time. The purported subdivision of Plot No. 3435 that gave rise to Plot No. 3873(the suit property) was the second subdivision of the same parcel of land. From the parcel numbers, it is apparent that Plot No. 3692 owned by the 2nd Defendant was created earlier than Plot No. 3873(the suit property). The Plaintiff therefore failed to prove the first particular of fraud pleaded in her amended plaint.

45. Concerning, the second particular of fraud, the Plaintiff accused the 1st, 2nd and 3rd Defendants of transferring Plot No. 3692 to the 1st and 2nd Defendants without property documents or records. As I mentioned earlier, it was common ground that Plot No. 3435 was owned by the 4th Defendant when it was subdivided and a portion thereof transferred to the 1st Defendant and subsequently to the 2nd Defendant. The 4th Defendant did not challenge the 1st and 2nd Defendants’ titles. The 4th Defendant did not deny that it subdivided Plot No. 3435 and transferred a portion thereof namely, Plot No. 3692 to the 1st Defendant. When the property was transferred to the 1st Defendant on 19th February 1997, the Plaintiff was not in the picture. From the evidence on record, the Plaintiff is said to have purchased the suit property from Wilson Owade Odhiambo on or about 28th January 1998. As I mentioned earlier, the 1st and 2nd Defendants placed before the court proof of how they acquired the suit property. The burden was upon the Plaintiff to prove that the 1st Defendant never acquired the suit property from the 4th Defendant. With the 4th Defendant not denying the 1st and 2nd Defendants’ ownership of the suit property, the Plaintiff failed to prove that the transfer of the suit property to the 1st and 2nd Defendants was fraudulent.

46. In her third and final particular of fraud, the Plaintiff contended that the 1st, 2nd and 3rd Defendants subdivided Plot No. 3435 without the consent of Mr. Wilson Owade Odhiambo, the original proprietor thereof. The evidence produced in court by the Plaintiff showed that the suit property was registered in the name of the 4th Defendant. I cannot see any reason why the 4th Defendant which acquired Plot No. 3435 through compulsory acquisition would require the consent of the original owner thereof before subdividing it. I find no fraud in the subdivision of Plot No. 3435 that gave rise to Plot No. 3692 and Plot No. 3693.

47. From the foregoing, it is clear that the Plaintiff failed to prove that the subdivision of Plot No. 3435 carried out in 1996 that resulted in Plot No. 3692 was fraudulent. The Plaintiff also failed to prove that the transfer of Plot No. 3692 to the 1st Defendant and subsequently to the 2nd Defendant was fraudulent and illegal.



48. The Plaintiff having failed to prove fraud in the creation and transfer of Plot No. 3692 to the 1st Defendant and subsequently to the 2nd Defendant, there is no basis upon which the court can rectify the register of Plot No. 3692 by the cancellation of the registration of the 2nd Defendant as the owner thereof. The court has also found that the 2nd Defendant is the lawful owner of Plot No. 3692. For that reason, the court cannot issue an order for the eviction of the 2nd Defendant from the property. The Plaintiff has also not made a case for damages for trespass and mesne profits.

Who is liable for the costs of the suit?

49.. In Halbury's Laws of England, 4th Edition (Re-issue), [2010] Vol. 10, para 16 the authors have stated as follows on the court's discretion on costs:

“The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially, it must not be exercised arbitrarily but in accordance with reason and justice.”

50. Under Section 27 of the *Civil Procedure Act*, cost is at the discretion of the court. As a general rule, costs follow the event unless the court for good reason orders otherwise. In this case, the Plaintiff has failed in her claim against the 1st and 2nd Defendants against whom principal reliefs were sought. The Plaintiff is therefore liable to pay the costs of the suit to the 1st and 2nd Defendants. I am of the view however that the dispute over the suit property and Plot No. 3692 was brought about by the 3rd and 4th Defendants who purported to subdivide Plot No. 3435 twice and thereafter transferred the same land on the ground using different titles from the two subdivisions to the 1st Defendant and the Plaintiff. For that reason, I will spare the Plaintiff from paying the costs of the suit which will be borne by the 3rd and 4th Defendants.

Conclusion

51. In conclusion, I hereby make the following orders;

1. The Plaintiff's suit is dismissed.
2. The 1st and 2nd Defendants shall have the costs of the suit to be paid by the 3rd and 4th Defendants.

DELIVERED AND DATED AT KISUMU THIS 26TH DAY OF FEBRUARY 2024

S.OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. P.D.Onyango for the Plaintiff

Mr. M.C.Ouma for the 1st and 2nd Defendants

Ms. Moraa for the 3rd Defendant

N/A for the 4th Defendant

Ms. J. Omondi-Court Assistant

