



**Getonto v Onkundi & 3 others (Environment & Land Case  
421 of 2014) [2024] KEELC 1374 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1374 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 421 OF 2014**

**M SILA, J**

**MARCH 12, 2024**

**BETWEEN**

**JOSEPH OINDI GETONTO ..... PLAINTIFF**

**AND**

**CHARLES MONARI ONKUNDI ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**EXECUTIVE OFFICER, KISII LAW COURTS ..... 3<sup>RD</sup> DEFENDANT**

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

**JUDGMENT**

1. This suit was commenced through a plaint filed on 31 October 2014. The plaintiff avers that he was the registered owner of the land parcel West Kitutu/Mwagichana/3895. He contends that the 1<sup>st</sup> and 3<sup>rd</sup> defendants, respectively Charles Monari Onkundi and the Executive Officer, Kisii Law Courts, sometimes in August and September 2014, fraudulently caused the subdivision of his land into two portions registered as West Kitutu/Mwagichana/4953 and 4954 with the latter parcel being transferred to the 1<sup>st</sup> defendant. The following particulars of fraud are pleaded (paraphrased for brevity):
  - i. Executing application for consent of the Land Control Board for subdivision of the land parcel No. 3895 and application for transfer of land parcel No. 4954 without the consent of the plaintiff and without any lawful court order.
  - ii. Executing the transfer form for the parcel No.4954 in favour of the 1<sup>st</sup> defendant without the authority or consent of the plaintiff and without any lawful court order.
  - iii. Transferring the land parcel No. 4954 in favour of the 1<sup>st</sup> defendant without the permission of the plaintiff and without any lawful court order.



2. In the suit the plaintiff seeks the following orders:
  - a. A declaration that the subdivision of the parcel West Kitutu/Mwagichana/3895 into the parcels No. 4953 and 4954 and the subsequent transfer of the latter to the 1<sup>st</sup> defendant be cancelled and/or nullified.
  - b. General damages.
  - c. Costs.
  - d. Any other relief that the court may deem fit.
3. The 1<sup>st</sup> defendant appointed counsel and filed a defence. In it he pleaded that the subdivision of the land parcel No. 3895 was done pursuant to a court order. It is further pleaded that the plaintiff is aware of and participated in the suit Kisii CM LDT case No. 108 of 2011 and did not file any appeal.
4. The Attorney General entered appearance for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and filed a joint statement of defence. It is more or less a general denial of the pleadings in the plaint and the plaintiff is put to strict proof.
5. The plaintiff testified as the sole witness in respect of his case. He testified that he is the registered proprietor of the land parcel West Kitutu/Mwagichana/3895 and that this land is now subdivided into the parcels No. 4953 and 4954. He testified that he was not involved in the subdivision and that it was done by the 1<sup>st</sup> defendant. He testified that the documents relating to the subdivision and transfer were signed by the Executive Officer of the Court yet he was not involved in any suit with the 1<sup>st</sup> defendant. He testified that the register now shows that he is the registered proprietor of the land parcel No. 4953 and the 1<sup>st</sup> defendant the registered proprietor of the land parcel No. 4954. This registration was effected on 12 March 2014.
6. Cross-examined, he testified that he was aware of the case before the Land Disputes Tribunal which was in relation to the land parcel No. 2435 and an award was made, which he was not contesting. This land parcel No. 2435 was in his name. According to him the award led to the subdivision of the parcel No. 2435 into the parcels No. 3895 and No. 3896. The subdivision was done by the Executive Officer of the court. He had no issue with this subdivision. He was to benefit from the parcel No. 3895 while the 1<sup>st</sup> defendant was to benefit from the parcel No. 3896. He had his original title deed to the parcel No. 3895 reading 0.19 Ha. He wondered why his land was subdivided further yet it was not subject to the case before the tribunal and there is no order for its subdivision. He stated that now the 1<sup>st</sup> defendant has two titles, that is, title to the parcel No. 3896 and No. 4954. He refuted that a meeting was held where it was found that the parcel No. 3896 as subdivided fell on the land of somebody else (Changamwe Oyugi) so that it was necessary to further subdivide his land. He however acknowledged that a meeting was held and the surveyor proposed a further subdivision of his land which he refused. He testified that he leased his land parcel No. 3895 to a school in 2014 after obtaining title and this lease is registered against his title.
7. With this evidence, the plaintiff closed his case.
8. The 1<sup>st</sup> defendant testified that in the year 2009 he bought land from one Joseph Ongati Abuya, took possession, and started cultivating. When he went to check on the parcel number, he found it to be parcel No. 2435 in the name of the plaintiff. He stated that his land was on the lower side and because there was interference with the boundaries, he filed a dispute before the Land Disputes Tribunal. He stated that the tribunal ordered the plaintiff to subdivide the land. He proceeded to engage a private surveyor who prepared the mutation and the land was subdivided into the parcels No. 3895 and 3896



- with the latter being registered in his name. He found himself sandwiched between the plaintiff and another buyer. The plaintiff came with a tractor and ploughed his land. He went to the surveyor and it was discovered that the title number given to him was in another person's land, that is Joseph Nyarweru, who had no title himself. He went to complain at the Lands office and the Land Registrar called a meeting on the land and asked each person to stand on his land. He testified that the Land Registrar gave the option of cancelling the titles for a fresh survey. He testified that the Land Registrar handed the title No. 3896 to Joseph Nyareru and subdivided the plaintiff's land so as to issue title to him and that is how he got the title to parcel No. 4954. He denied that he has two titles.
9. Cross-examined by counsel for the 2<sup>nd</sup> – 4<sup>th</sup> defendants, he stated that the person he bought land from had earlier purchased it though he did not have title. What was sold was land measuring 162 X 70 feet which was within the title No. 2435. He went to the plaintiff since the title was in his name but the plaintiff told him that he does not have land to give and that is how they ended up at the tribunal which ordered for subdivision of the land. He stated that the land was owned by three people, that is, himself, Nyareru and the plaintiff. It was him (1<sup>st</sup> defendant) who engaged the surveyor who prepared the mutation form which was signed by the Executive Officer as the plaintiff refused to sign it. He testified that the plaintiff leased the land to a school which put up some buildings which are on his land save for a portion measuring 12 X 10 feet which the plaintiff cultivates together with his land.
  10. Cross-examined by counsel for the plaintiff, he stated that after he got title it was discovered that the land belonged to somebody else. He did not go back to court for a rectification. Instead, he went to the Chief who sent him to the Land Registrar to rectify the error. The Land Registrar decided to subdivide the land parcel No. 3895. He claimed that the Executive Officer of the Court signed the mutation and transfer though he did not see him sign. He stated that they went to the Land Control Board but he did not have any document to support this.
  11. DW – 2 was Charles Amboro Omwando. He served as secretary of the Land Disputes Tribunal, Marani. His evidence was that they heard the dispute between the plaintiff and 1<sup>st</sup> defendant over the parcel No. 2435 and they made an award which was adopted by court. He testified that the parties who were to get a share of the land were the plaintiff, the 1<sup>st</sup> defendant, and a lady called Kerosi Ontita. Later he got to hear that there was confusion in the allocation of the parcel numbers an issue that did not involve them as they had already made their award. Cross-examined he asserted that their decision was that the land be subdivided into three portions.
  12. DW – 3 was Oswera Cecilia Harriett, a Land Registrar in Kisii. She had with her the land parcel files for the titles No. 2435 and its resultant subdivisions. She testified that the parcel No. 2435 was originally owned by Evans Gichana who became registered as proprietor on 9 April 2010. The title was transferred to the plaintiff on 12 October 2010. Thereafter the land was subdivided into the parcels No. 3895 and 3896 pursuant to the decree of the Land Disputes Tribunal. She testified that the parcel No. 3896 was transferred to the 1<sup>st</sup> defendant on 5 April 2013 who then transferred it to Joseph Nyareru Abincha on 5 October 2015. On the plaintiff's parcel No. 3895, she testified that there is no record that it is subdivided and that it is leased to a third party for 15 years starting 19 March 2014. On the mutation form, presented as the mutation form for the parcel No. 3895, she testified that she has no record of its registration. She elaborated that mutation forms are prepared by surveyors then brought for registration. According to her, they have no record in their registry of parcel numbers 4953 and 4954. What she has is the parcel numbers 3895 and 3896 without any subdivision.
  13. DW – 4 was David Lemaiyan, a surveyor working with the Ministry of Lands in Kisii. He testified that he was conversant with the issues surrounding the disputed land for he interacted with it. He testified that he visited the land in 2014 together with the Land Registrar pursuant to a court order that sanctioned a subdivision. The mutation form was signed by the Executive Officer of the Court.



They proceeded to subdivide the land in accordance with the court order into two parcels that is No. 4953 and 4954 and the Registry Index Map was amended accordingly. He stated that the mutation form was forwarded to the Land Registrar for registration but he did not know if it was registered or not. Cross-examined he affirmed that he prepared the mutation form dated 25 August 2014 and it was signed by the Executive Officer of the Court. He however did not see him sign since he is the one who signed first. He did not have the court order that they were implementing. When they did the subdivision, the Chief and other people were present but the plaintiff was not. He testified that once a mutation is prepared it is forwarded to the Land Registrar with an amended RIM showing the new numbers. The Land Registrar then closes the original title and opens new registers for the subdivisions. He was not aware whether the register for the parcel No. 3895 was closed nor whether new registers for the subdivision was done. He did not have any document forwarding the mutation form to the Land Registrar for registration and what he had was an unregistered copy. He explained that mutation forms are done in triplicate; two are forwarded to the Land Registrar for registration, and the surveyor keeps one copy.

14. With the above evidence the defence closed their case.
15. In invited counsel to file submissions and I have taken note of the submissions filed.
16. It is common ground that the disputed land emanated from the land parcel No. 2435. This land parcel No. 2435 was registered in the name of the plaintiff when a dispute ensued and was presented before the Land Disputes Tribunal. The minutes and award of the tribunal were exhibited. I see that the 1<sup>st</sup> defendant had sued seven respondents in that case, the 7<sup>th</sup> respondent being the plaintiff herein. An award was made and it would appear that the tribunal decided that the land parcel No. 2435 be subdivided and title to issue to the 1<sup>st</sup> defendant and to the plaintiff and one Kerosi Ontita. That award is however not clear on the exact entitlements of the three people. The award of the tribunal was adopted by the Court and the 1<sup>st</sup> defendant engaged a surveyor who proceeded to subdivide the land into two portions, that is the land parcel No. 3895 in name of the plaintiff and the land parcel No. 3896 in name of the 1<sup>st</sup> defendant. The mutation for subdivision of the parcel No. 2435 is dated 6 January 2012 and it is clear that it was duly registered.
17. It would appear that the 1<sup>st</sup> defendant thought that the subdivision was not in accordance with the award and he proceeded yet again to cause a further subdivision of the land parcel No. 3895 which was in the name of the plaintiff, and it is this subdivision which brought forth the parcel numbers 4953 and 4954, the former being in the name of the plaintiff and the latter in the name of the 1<sup>st</sup> defendant.
18. I am in agreement with the plaintiff that there was never any dispute presented to the tribunal or to the court over the parcel No. 3895. There could therefore not be any court order that would have led to the mutation of the land parcel No. 3895. The Executive Officer of the court, if ever it was him/her who signed the mutation form to further subdivide the land parcel No. 3895, could not do so, because there was no court file relating to the parcel No. 3895 and no court order directing the subdivision of the parcel No. 3895. The only order that was there was the order directing the subdivision of the parcel No. 2435 and nothing else. There was therefore no basis for subdivision of the parcel No. 3895 in the name of the plaintiff.
19. It would appear that the 1<sup>st</sup> defendant took the law into his hands and purported to implement what he thought was the judgment of the court. If at all the 1<sup>st</sup> defendant thought that the judgment of the court was not properly implemented in the first instance, by a subdivision of the land into two portions rather than three, what he needed to do was to go back to court and make the necessary application that would befit the circumstances, not to proceed and purport to subdivide the land parcel No. 2435 when there was no order to do so.



20. In fact, what happened was that there was never an actual and proper subdivision of the land parcel No. 3895 and all that was done was a paper subdivision reflected only in the Registry Index Map and in some purported title deeds for the parcel numbers 4953 and 4954. This came out clearly when the Land Registrar testified. She was succinct that the land registry records only reflect the parcels No. 3895 and 3896 and that the records show that these two parcels of land are intact and have never been subjected to any subdivision. Her evidence is buttressed by the fact that the 1<sup>st</sup> defendant was not able to avail any registered mutation form for the land parcel No. 3895. The purported mutation form that led to the subdivision of the parcel No. 3895 was actually never registered and it cannot therefore be said to have led to subdivision of the parcel No. 3895. The fact that it was never registered comes out clearly when you compare the mutation form for the subdivision of the parcel No. 2435 which is dated 6 January 2012 and the purported mutation form subdividing the parcel No. 3895 which is dated 25 August 2014. The first mutation form, for the parcel No. 2435, is registered and bears the signature of the Land Registrar and you can see its Presentation Book Number. The second mutation form, that purporting to subdivide the land parcel No. 3895 into the parcels No. 4953 and 4954, has no signature of the Land Registrar, no Presentation Book Number, and bears absolutely nothing to show that it was ever received by the Land Registrar for registration. The long and short of it is that this mutation form was never registered and having not been registered there could not have been any subdivision of the parcel No. 3895 into the parcel numbers 4953 and 4954.
21. Moreover, there is no way that the land parcel No. 3895 could have been subdivided on 25 August 2014 or thereafter. This is because the title thereto has an encumbrance of a lease that was registered on 10 July 2014, which is a lease for 15 years to Bridge International. To subdivide the land, this encumbrance would first need to be lifted.
22. What the 1<sup>st</sup> defendant did was wrong and fraudulent. He pretended that there was an order to subdivide the parcel No. 3895 when there was no such order. He pretended that the Executive Officer of the court has signed a mutation form for the land parcel No. 3895 when this was not the case. If ever the Executive Officer of the court signed the mutation form there was no mandate to do so. The 1<sup>st</sup> defendant went further to collude with the District Surveyor to purport that the Registry Index Map (or Preliminary Index Diagram) has been amended to subdivide the parcel No. 3895 into two when there was never any mandate to subdivide. He proceeded, by fraud, to procure title deeds reading the land parcels West Kitutu/Mwagichana/4953 and 4954 when such title deeds do not exist as there is no register of them in the land registry. They are merely paper title deeds that have nothing to back them up. The land records are intact in so far as the parcels No. 3895 and 3896 are concerned and there has never been any subdivision.
23. I am persuaded to allow the plaintiff's case. I issue a declaration that there has never been any subdivision of the land parcel No. 3895 into the land parcel No. 4953 and 4954. I issue a declaration that there does not exist any land identified as West Kitutu/Mwagichana/4953 and West Kitutu/Mwagichana/4954. Any title deed purporting to be a title of the land parcel West Kitutu/Mwagichana/4953 and West Kitutu/Mwagichana/4954 is an empty title that has no land upon which it is located. I issue an order to the Director of Surveys to ensure that the Registry Index Map (or Preliminary Index Diagram) is amended to only reflect the land parcels West Kitutu/Mwagichana/3895 and West Kitutu/Mwagichana/3896 as intact parcels without any subdivision. I further order the Director of Survey to expunge any record purporting that the land parcel West Kitutu/Mwagichana/3895 has been subdivided and also to expunge any record purporting to be a record of the land parcels West Kitutu/Mwagichana/4953 and West Kitutu/Mwagichana/4954.
24. The plaintiff has a prayer for general damages. The 1<sup>st</sup> defendant, as I have said committed egregious acts of fraud in purporting that there has been a subdivision of the plaintiff's land parcel No. 3895



when there never was. I will order him to pay damages to the plaintiff in the sum of Kshs. 500,000/=, this sum to attract interest from the day of this judgment till settlement in full. It was not clear whether there was any act from the Executive Officer of the court and I proceed to discharge the 2<sup>nd</sup> to 4<sup>th</sup> defendants. The plaintiff will have the costs of this case payable by the 1<sup>st</sup> defendant. I make no order as to costs for or against the 2<sup>nd</sup> to 4<sup>th</sup> defendants.

25. Judgment accordingly.

**DATED AND DELIVERED THIS 12 DAY OF MARCH 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

**Delivered in the presence of:**

Mr. Soire present for the plaintiff

Mr. Marita present for 1<sup>st</sup> defendant

Mr. Ndiritu present for 2<sup>nd</sup> – 4<sup>th</sup> defendants

Court Assistant – David Ochieng<sup>2</sup>

