



**Omari v Gumba; Ngoma & 2 others (Interested Parties) (Environment & Land  
Case 76 of 2015) [2024] KEELC 3548 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3548 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 76 OF 2015**

**E ASATI, J**

**APRIL 25, 2024**

**BETWEEN**

**ASMAN CHUMBA OMARI ..... PLAINTIFF**

**AND**

**JOHN OUMA GUMBA ..... DEFENDANT**

**AND**

**JANE ACHIENG NGOMA ..... INTERESTED PARTY**

**ANNE ADHIAMBO OLANG ..... INTERESTED PARTY**

**VITALIS ONYANGO ANJAO ..... INTERESTED PARTY**

**JUDGMENT**

1. The Plaintiff's case as per the plaint dated 16<sup>th</sup> March, 2015 is that on 17<sup>th</sup> February, 2010, he bought from the Defendant land parcel known as Kisumu/Kigony/1394 measuring approximately 0.30 hectares at a consideration of Kshs.250,000/- which he paid in full at the execution of the agreement. That the Defendant signed all the requisite documents for transfer of the sold parcel of land and obtained consent of the Land Control Board for the transfer. That, however, the transfer documents could not be registered upon presentation as there was a subsisting caution lodged by a 3<sup>rd</sup> party. That on 11<sup>th</sup> September, 2014, the Defendant unlawfully and fraudulently caused the sold parcel of land to be sub-divided into five portions and registered as Kisumu Kigony/7046, 7047, 7048, 7049 and 7050 in the Defendant's name and the name of one Vitalis Onyango Anjao Aketch thereby dispossessing the Plaintiff of the land. That by reason of the Defendant's unlawful actions, the plaintiff has suffered loss and damage as he has been denied his right to access, own, use and occupy the subject land.
2. The Plaintiff therefore sought for orders of;



- a. A declaration that the sub-division of land parcel NO. Kisumu/Kigony/1394 into land parcels No. Kisumu/ Kigony/ 7046, 7047, 7048, 7049 and 7050 and their subsequent transfer and registration in the names of the Defendant and Vitalis Onyango Anjao Akech were fraudulent, null and void ab initio hence illegal.
  - b. An order that the sub-division of land parcel No. Kisumu/Kigony/1394 into land parcel number Kisumu/Kigony/7046, 7047, 7048, 7049 and 7050 and their subsequent transfer and registration into the name of the Defendant and Vitalis Onyango Anjao Akech be cancelled and the register and the map in respect of the same be rectified by reinstating land parcel No.Kisumu/Kigony/1394 in the name of the Defendant thereafter the same be transferred into the name of the Plaintiff.
  - c. An order calling upon the Defendant and the said Vitalis Onyango Anjao Akech to surrender back to the District Land Registrar, Kisumu, title deed in respect to land parcel No. Kisumu Kigony 7046, 7047, 7048, 7049 and 7050 and the same be cancelled.
  - d. An order of permanent injunction restraining the Defendant either by himself or through his agents, employees, wife, children, relatives or any other person deriving authority from him from claiming, entering, using, cultivating, occupying, alienating, transferring or disposing off the same to third parties or in any other way or manner interfering with the Plaintiff's subject land.
  - e. Costs of the suit.
  - f. Any other or further remedy that this court may deem fit and just to grant.
3. As there was no response to the claim by the Defendant, judgement was entered in favour of the Plaintiff on 11<sup>th</sup> October, 2016. However, vide the court order dated 8<sup>th</sup> December, 2022, the judgement was set aside and the interested parties joined as parties to the suit.

### **The Evidence.**

4. The evidence placed before court by the Plaintiff consisted of the testimonies of PW1 and PW2 and the exhibits they produced. PW1 was the Plaintiff. He adopted the contents of his earlier recorded and filed witness statement dated 16<sup>th</sup> March, 2015 as his evidence in chief. He had stated in the said witness statement that on 17<sup>th</sup> December, 2010 he had entered into a land sale agreement with the Defendant for the sale of the Defendant's land parcel known as Kisumu/Kigony/1394 measuring 0.3Ha. at a consideration of Kshs.250,000/- which he paid in full at the execution of the agreement. That the Defendant executed all the relevant transfer documents in his (Plaintiff's) favour. That they obtained consent of the Land Control Board for transfer of the sold parcel of land into his name.
5. The Plaintiff testified further that upon presentation of the transfer documents at the lands office for registration after paying the requisite charges, the same could not be registered as there was a caution lodged on the sold land by a 3<sup>rd</sup> party.
6. That on 11<sup>th</sup> September, 2014, the Defendant caused the sold parcel of land to be sub-divided into five portions which he caused to be registered in his name and the name of Vitalis Onyango Anjao Akech thereby dispossessing him of the land and rendering him and his family landless and squatters in their own land. That the sub-division, transfer and registration were done fraudulently.
7. PW1 produced as exhibits, land sale agreement dated 17<sup>th</sup> December 2010, application for consent of the Land Control Board, Letter of consent dated 3<sup>rd</sup> December, 2010 from Land Control Board,



duly signed Transfer form, payment receipts for stamp duty, mutation form, title deed for Kisumu/ Kigony/1394, certificate of official search for Kisumu/ Kigony/ 7046, 7047, 7048, 7049 and 7050 and title deeds for Kisumu Kigony/ 7046, 7047, 7048, 7049 and 7050.

8. On cross-examination, he stated that he bought the whole land and as at the time of purchase, there was a structure on the land made of mud which he was told belonged to Vitalis. That when he bought the land, Vitalis moved out and the structure later collapsed. That one Anne Olang, later built a house on the suit land where she now lives. That he does not know how Vitalis got title to the land. That one Johannes Ondu used to live on the land. that when he bought the land, Joannes also moved out. That Anne Olang has a permanent house on the land. That when he bought the land, it was in the name of John Ouma Gumba. That John Ouma Gumba had never lived on the land. That he bought the entire of land parcel number KisumuJ Kigony/1394. And on re-examination, he stated that John Auma Gumba works at a posho mill in the neighbourhood and appears to be a normal person.
9. PW2 was Musa Otieno Omari who through his witness statement dated 29<sup>th</sup> September, 2023 testified that he was present and witnessed as the Plaintiff and John Ouma Gumba signed the sale of land agreement dated 17<sup>th</sup> December, 2010. That Jane Achieng Ngoma was also present and signed the agreement as a witness. That he was also present when they went to the Land Control Board and obtained a consent for transfer of land parcel No.Kisumu Kigony/1394 in favour of the Plaintiff.
10. On cross-examination, he described himself as a brother and a neighbor of the Plaintiff. He stated that he attended a public meeting on 6<sup>th</sup> June, 2014. That he does not know whether Joannes has ever lived on the land. That Anne Olang stays on the suit land. That he did not know whether the land was vacant when it was being sold.
11. The evidence of the defence comprised of the testimonies of DW1, DW2 and DW3. DW1 was Anne Adhiambo Olang, the 2<sup>nd</sup> Interested Party in the suit. She relied on her averments in her Affidavit sworn on 19<sup>th</sup> November, 2022 and the contents of her witness statement dated 4<sup>th</sup> July, 2023. She had stated in the witness statement that she is the absolute owner of land parcel known as Kisumu/ Kigony/7050 measuring 0.07 Ha having purchased it from Joannes Ouma Ondu in 2003. That after purchase, she fenced off her portion of the land and begun to develop the same. That she built a 3-bedroom permanent house which serves as her only home.  
  
That in the year 2005, one Vitalis Onyango Anjao also bought land from Joannes Ouma Oundu, fenced it and built a semi-permanent house. That Vitalis's land is parcel No. Kisumu/Kigony/7049.
12. That the Plaintiff was the last one to purchase land and he purchased the portion of land now registered as Kisumu/Kigony/7048 in the year 2010. That the piece which remained was for John Ouma Ondu. That the same was fenced and remains so to date. That she placed a caution on the land on 30<sup>th</sup> December, 2010 when she got news that the Plaintiff intended to transfer the entire land to himself.
13. She testified further that there was a meeting on 6<sup>th</sup> June, 2014 where the dispute concerning occupation of the land was resolved and that, that is why she removed the caution to allow the purchasers get their titles. That in the meeting, the Plaintiff was represented by his brother one Musa as the plaintiff lived in Nairobi at that time.
14. That the Plaintiff gave her the title of the land parcel No. Kisumu/Kigony/1394 to enable her process title to her portion as he had no money to process his own title. That the Plaintiff had obtained the title from Jane Achieng Ngoma. That the Plaintiff later on gave Vitalis Onyango Anjao the title to process his title which was made on 20<sup>th</sup> November, 2014.



15. DW1 testified further that in the year 2015, the Plaintiff placed a caution on the land. That she reported to the Land Registrar who wrote a letter to the Plaintiff to show cause why his caution should not be removed and when he failed to show up, the Land Registrar removed the caution and she was able to get her title deed in the year 2020. That she is a bona fide purchaser for value of land parcel No. Kisumu/Kigony/7050.
16. DW1 produced as exhibits copy of title deed for Kisumu/Kigony/7049, copy of title deed for Kisumu/Kigony/7050, copy of minutes for meeting held on 6<sup>th</sup> June, 2014 in respect of land parcel No. Kisumu/Kigony/1394. She testified that on the ground, the pieces of land are clearly marked. That John Ouma Gumba has a relative by the name of Jane who was assisting him in the transactions because he is not mentally stable.
17. On cross-examination, she stated that sub-division of the land was done in the year 2015 and that John Ouma Gumba signed all the documents for transfer and that the Plaintiff did not buy the whole of land parcel No.1394. That during the public meeting, the Plaintiff was represented by his brother and his uncle.
18. DW2 was Vitalis Onyango Anjao Akech. He adopted the contents of his witness statement dated 4<sup>th</sup> July, 2023 as his evidence in chief. He stated that he entered the land in the year 2004 and built his house and the Plaintiff came to the place in the year 2010. On cross-examination, he stated that he bought his land from Joannes Ondu and Lazaro Gumba. That his land was No. Kisumu/Kigony/7049 to which he got title in the year 2015. That he has a case NO.24 of 2015 against the Plaintiff herein. On re-examination, he stated that he stayed on land parcel No.Kigony/7049 from the year 2004 to 2011. DW3 was one Raphael Wamburu, a clinician who produced a medical report in respect of John Ouma Gumba. He stated that John Ouma had a condition called schizophrenia (moderate intellectual disability) and that as at the time of examination, he was not in a position to follow court proceedings. That the condition is on and off.

### **Submissions**

19. At the close of the evidence, parties filed submissions in support of their case. Written submissions dated 29<sup>th</sup> January, 2024 were filed by Owino Kojo & Company Advocates on behalf of the Plaintiff. Similarly, written submissions dated 6<sup>th</sup> February, 2024 were filed on behalf of the Interested Parties by the firm of Ben Oduol Nyanga & Company Advocates.

### **NIssues for determination**

20. From the pleadings filed, the evidence adduced and the submissions made, the following emerge as the issues for determination herein
  - a. Whether or not the Plaintiff bought the entire or only part of land parcel known as Kisumu/Kigony/1394.
  - b. whether or not sub-division of the original parcel NO Kisumu/Kigony/1394 and subsequent transfer and registration of the resultant portion in the name of the Defendant, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties was fraudulent.
  - c. whether or the Plaintiff is entitled to the relief sought.
  - d) cost of the suit.



## Analysis and Determination

21. Under Order 21 Rule 4 Civil Procedure Rules, 2010 this court is enjoined to ensure that its judgments in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue.
22. The first issue for determination is whether or not the Plaintiff bought the entire or only part of the suit land parcel No. Kisumu/Kigony/1394. The Plaintiff pleaded that he bought the whole of the suit land and that the seller one John Ouma Gumba signed all the documents for transfer of the sold land in favour of the plaintiff but was unable to register them because of a caution that had been placed by a third party. He produced, as his exhibit P.1, a land sale agreement dated 17<sup>th</sup> December, 2010. Clause (b) on page 1 of the agreement indicates that the vendor was selling the parcel known as Kisumu/Kigony/1394 measuring approximately 0.30Ha together with all the developments and improvements thereon which property had been identified to the purchaser who was willing to buy the property at an agreed consideration of Kshs.250,000/=.
23. The Plaintiff also produced application to the Land Control Board showing that the registered owner, John Ouma Gumba applied for Consent of the Land Control Board to transfer the whole of land parcel No. Kisumu/Kigony/1394 in favour of the Plaintiff. He produced Letter of Consent giving consent of Land Control Board for transfer of Land parcel No. Kisumu/Kigony/1394 in favour of the Plaintiff. The Plaintiff further produced a transfer form duly executed by himself and John Ouma Gumba before a lawyer for transfer of land parcel number Kisumu/Kigony/1394 in favour of the Plaintiff.
24. The case of the Interested parties is that the Plaintiff bought only a portion of the suit land. The 2<sup>nd</sup> and 3<sup>rd</sup> claim to have bought portion of the suit land long before the Plaintiff came to the scene. The 2<sup>nd</sup> Interested Party claimed that she bought a portion of the suit land from one Joannes Ouma Ondu in the year 2003. The 3<sup>rd</sup> Interested Party claimed to have bought apportion of the suit land from Joannes Ondu and Lazaro Gumba. There was however no evidence of the purchases. No land sale agreement was produced by the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties. The provisions of section 3 (3) of the [Law of Contract Act](#) require that a land sale agreement be in writing, executed by all parties and the signatures be attested by a witness. There is no evidence that Joannes Ouma Ondu owned any portion of the suit land or had capacity to sell any portion thereof. There is no evidence of the exact date when the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties bought the pieces of land and at how much. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties have no application to Land Control Board for Consent, no Consent of Land Control Board or transfer form signed by the then registered owner of the suit land. A party whose title to land is being questioned must explain and/or prove how he /she acquired the title. In this case, the interested parties have not. And as such, the titles they claim to hold to portions of the suit land are not protected by the law.
25. In the case of Dina Management Limited –versus- The County Government of Mombasa Petition No. 8 (E010) of 2021, the Supreme Court of Kenya held that under Article 40(6), the protection of the right to property does not extend to unlawfully acquired property. The court stated “Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of [the Constitution](#). The root of the title having been challenged as we have already noted above the appellant could not benefit from the doctrine of bona fide purchaser”.
26. The Interested parties called DW3 to produce evidence that the Defendant is not mentally stable. At the same time it was the interested parties case that it was the Defendant who signed the documents



for transfer of the land to them. If it be true that the Defendant is mentally sick, then it means that even their own transactions with the Defendant are not valid for reason of mental instability on the part of the Defendant as the transferor.

27. However, DW3's evidence was that the condition he found the Defendant to be suffering from was on and off. That there are moments when he is well. PW1 testified that the Defendant is well and normal and works at a posho mill. There was no evidence that the Defendant was not of sound mind as at the time of the sale of the land to the Plaintiff and as at the time he executed the transfer documents. Furthermore, the undisputed evidence on record is that the Defendant was later able to cause the sub-division of the suit land and the transfer of the resultant parcels to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties and to himself. These actions of the Defendant, in my view, do not portray a person of unsound mind or a mentally sick person.
28. Having considered all the evidence placed before the court by both parties, I find that the Plaintiff lawfully bought the entire of land parcel No. Kisumu/Kigony/1394 measuring 0.30 ha.
29. The next issue is whether or not sub-division of the suit land and subsequent transfer of the resultant parcels to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties and the Defendant was fraudulent. The Plaintiff pleaded in the plaint that the purported sub-division and subsequent transfers and registration of the subject land into the names of the Defendant and 3<sup>rd</sup> Parties was fraudulent and unlawful. He pleaded the particulars of fraud by the Defendant to include permitting and/or causing the subject land herein to be sub-divided, transferred and registered in the name of the Defendant and a third party without the consent and/or authority of the Plaintiff, misleading the Land Registrar and Surveyor that the land was still his, failing to disclose to the Land Registrar and Surveyor that he had sold and transferred the land to the Plaintiff, failing to disclose to the Land Registrar and Surveyor that he had relinquished all his rights and claims over the subject land and therefore had no authority to cause the sub-division, circumventing the requirement of the Land Control Board, colluding with other scrupulous fraudsters to deprive the Plaintiff his proprietary rights over the subject land, purporting to sub-divide the subject land whereas he knew he had no power to do so and transferring a portion of the said land without the consent and authority of the Plaintiff.
30. The Plaintiff testified that the sub-division, transfer and registration was fraudulent.
31. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties pleaded and testified that they bought their respective portions of the suit land long before the Plaintiff came to the scene and that hence the sub-division, transfer and registration was not fraudulent. That a public meeting that took place on 6<sup>th</sup> June, 2014 decided that each party get title to the portion of land they were occupying.
32. The evidence produced show that the suit land as at the time of sale to the plaintiff was the property of the Defendant. He however relinquished his rights thereto when he obtained consent of the Land Cotrol Board for transfer and signed the transfer form in favour of the plaintiff. Henceforth, the suit land was not available for the Defendant to subdivide and transfer to the Interested Parties or any other person. The Defendant, 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties had no land sale agreement to prove the purchase, they had no documents to show that consent of the Land Control Board was obtained or the requisite duly executed transfer forms and proof of payment of the requisite charges in the form of stamp duty and registration fee.

I find that the plaintiff has proved to the required standard which is a standard beyond balance of probabilities that the sub-division of the suit land into the resultant land parcel number 7046, 7047, 7048, 7049 and 7050 and subsequent transfer of the resultant parcels in favour of the Defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties was fraudulent and hence unlawful.



33. The third issue for determination is whether or not the Plaintiff is entitled to the reliefs sought. Having found that the Plaintiff bought the entire of the suit land and that by obtaining transfer of the Land Control Board for transfer of the suit land in favour of the Plaintiff and signing all the requisite documents for transfer of the suit land, the Defendant relinquished his rights over the suit land, and that the sub-division, transfer and registration of the suit land by the Defendant was fraudulent, I find that the Plaintiff is entitled to the relief sought.
34. As concerns costs, under Section 27 of the *Civil Procedure Act*, costs follow the event. No reason has been advanced to cause the court exercise its discretion otherwise.

### **Conclusion**

35. For the foregoing reasons, I find that the Plaintiff has proved his case on a balance of probabilities and enter judgement in his favour for;
- i. A declaration that the sub-division of land parcel No. Kisumu Kigony/1394 into land parcel No. Kisumu/Kigony/7046, 7047, 7048, 7049 and 7050 and their subsequent transfer and registration in the names of the Defendant and other 3<sup>rd</sup> parties was fraudulent.
  - ii. An order for the cancellation of the sub-division of land parcel No. Kisumu/Kigony/1394 into land parcel number Kisumu Kigony 7046, 7047, 7048, 7049 and 7050 and cancellation of the transfer and registration into the name of the Defendant the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  - iii. An order for rectification of the register and the map in respect of the suit land by reinstating land parcel NO. Kisumu/Kigony/1394 in the name of the Plaintiff on the basis of the transfer documents earlier signed by the defendant.
  - iv. An order directing Defendant, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties to surrender back to the District Land Registrar, Kisumu within 30 days hereof, title deeds in respect to land parcel No. Kisumu/ Kigony/ 7046, 7047, 7048, 7049 and 7050 in their possession for cancellation.
  - v. An order of permanent injunction restraining the Defendant and the interested parties either by themselves or through their agents, employees, servants or any other person deriving authority from them, from claiming, entering, using, cultivating, occupying, alienating, transferring or disposing off the same to third parties or in any other way or manner interfering with the Plaintiff's possession of the suit land.
  - vi. Costs of the suit.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 25<sup>TH</sup> DAY OF APRIL, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen Court Assistant.

Kojo for the Plaintiff.

Nyanga for the Defendant and the Interested Parties.

