



**Osinde v Mosoti & 2 others (Environment & Land Case 392 of 2014)
[2024] KEELC 3372 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3372 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 392 OF 2014**

M SILA, J

APRIL 24, 2024

BETWEEN

CALLEN NYANCHAMA OSINDE PLAINTIFF

AND

MARIAH MOSOTI 1ST DEFENDANT

OMANWA MOENGA JOHN 2ND DEFENDANT

LAND REGISTRAR, KISII COUNTY 3RD DEFENDANT

JUDGMENT

1. This suit was commenced through a plaint which was filed on 15 October 2015. In the plaint, the plaintiff avers that she filed the suit Kisii High Court Originating Summons No. 155 of 2003 against the 1st defendant herein, Mariah Mosoti, seeking to be declared as having acquired title to the whole of the land parcel West Kitutu/Bomatara/3794 upon which the 1st defendant entered appearance and steps were taken to have that suit heard on 27 November 2014. She pleads that as a precautionary measure, her husband placed a caution on the disputed land on 23 March 2010 and the caution was in place when the Originating Summons was filed. She avers that while the Originating Summons was pending hearing, the 1st defendant purported to sell the suit land to the 2nd defendant, Omanwa Moenga John, in the last week of September 2014. She states that she did a search on the title of the land on 3 October 2014 and discovered that the caution placed by her husband had been removed on 1 October 2014. She continues to plead that on 6 October 2014, she filed her own caution based on an application filed in court on the same date seeking a prohibitory order to stop dealings on the suit land. She contends that on 8 October 2014, the 1st defendant in collusion with the 2nd and 3rd defendant (3rd defendant being the Land Registrar, Kisii) fraudulently transferred the suit land to the 2nd defendant. The following particulars of fraud are pleaded :



- a. When purporting to sell the suit property to the 2nd defendant the 1st defendant knew that the plaintiff had filed an Originating Summons claiming title to the same.
 - b. The defendants, jointly and severally knew that the suit property was cautioned and colluded to have the same removed without the knowledge of the plaintiff or her husband.
 - c. The 3rd defendant in flagrant violation of the registration procedures, failed to register the plaintiff's caution filed on 6 October 2014.
 - d. The 3rd defendant in collusion with the 1st and 2nd defendants proceeded to register the title to the suit land in the names of the 2nd defendant on 8 October 2014 despite the plaintiff's caution filed on 6 October 2014.
2. It is pleaded further that by reason of the fraud the plaintiff stands to suffer irreparable loss and stands to lose the only home she has known since 1992. In this suit the plaintiff seeks the following orders :
- a. A declaration that the purported sale and transfer of the suit West Kitutu/Bomatara/3794 by the 1st defendant to the 2nd defendant and effected by the 3rd defendant in collusion is fraudulent, null and void ab initio.
 - b. A prohibitory order restricting the 2nd and 3rd defendants from transferring, charging or in any way disposing of the suit property until this suit is heard and determined.
 - c. An order of injunction restraining the defendants, their agents and/or servants from in any way evicting or interfering with the plaintiff's quiet possession of the suit land until this suit is heard and determined.
 - d. Costs of this suit.
 - e. Any other or further relief as the court may deem fit to grant.
3. I need to mention that together with the plaint, the plaintiff filed an application seeking orders that are in line with prayers (b) and (c) of the plaint. Interim orders, pending inter partes hearing, were given by Okong'o J on 16 October 2014. The application was never really heard substantively, since on 12 October 2015, the parties agreed to maintain the status quo pending hearing of the suit. It was agreed that there would be no sale nor transfer effected in the title of the suit land until the case was determined. That dealt with the interlocutory application and I guess that also sorted out prayers (b) and (c) in the plaint.
4. The 1st and 2nd defendants filed a joint defence on 12 October 2015. The 1st defendant denied being served with Kisii High Court Originating Summons No. 155 of 2013 and denied filing an appearance. She pleaded to be a stranger to that suit. The 2nd defendant pleaded that at the time he purchased the suit land, there was no caution. He also pleaded that he was not aware of any pending suit and called for strict proof. The defendants denied the particulars of fraud and averred that all legal processes were followed (before the 2nd defendant obtained title). It is pleaded that the land was registered in the name of the 1st defendant; that the 2nd defendant purchased and got a transfer after attending the Land Control Board and consent obtained; that there was no collusion between the 1st and 2nd defendants to defeat the interests of the plaintiff, if any. It is also pleaded that the suit is fatally defective and irregular before court as the plaintiff has no locus standi and cannot claim adverse possession. It was contended that the suit is an abuse of the court process and sub judice and the 1st and 2nd defendants gave notice that they would raise a preliminary objection. I have seen no preliminary objection filed and the matter proceeded for hearing. No defence was filed on behalf of the 3rd defendant.



5. Hearing of the suit commenced on 14 June 2022 before Onyango J, when the plaintiff testified. She stated that she lives on the suit land and occupies the whole of it. She averred that she and her husband jointly purchased the land from the defendant in 1992 and that she has been in occupation since then. She elaborated that her husband left her but she and her children have continued occupying the land. She acknowledged that the land was registered in the name of the 1st defendant but when she conducted a search she discovered that title had been transferred to the 2nd defendant. She added that before filing this suit she had earlier filed an Originating Summons against the 1st defendant being the case Kisii HCCC No. 155 of 2013 (OS). She stated that she filed the suit in 2013 and the land was transferred to the 2nd defendant in 2014. She testified that the 1st defendant was aware of the Originating Summons. She testified that she placed a caution on the suit land and filed this case though I also observe that she stated that she placed a caution in the year 2014. She produced a caution instrument as an exhibit which was the only exhibit for her case. She contended that her husband had lodged a caution but it was removed. She asked that the transfer of the suit land to the 2nd defendant be declared fraudulent and that it be declared that she is the owner of the suit land. She also asked for a prohibitory order to issue to prohibit transfer of the suit land to the 2nd defendant.
6. She was cross-examined on the sale agreement of 1992 and she acknowledged that it was between Samwel Atika and the 1st defendant and her name does not appear in it. She conceded that she had not produced any document to demonstrate that Samwel Atika is her husband. She confirmed that the 1st defendant obtained consent to transfer to the 2nd defendant and that there is a search which shows that there was no caution. She could see that the caution instrument that she produced has no date of registration. She however claimed that the caution that was registered was removed from the Lands office. She affirmed that the Originating Summons has not been heard and she was still in occupation of the suit land.
7. I took over the hearing of the case after PW-1 had testified as Onyango J was moved to another station.
8. PW-2 was Joseph John Aminga Sagwe. He testified before me on 31 May 2023. He introduced himself as a village elder and chairman of the clan elders. He stated that he has known the plaintiff since 1992 and that he was aware that she bought land from the 1st defendant. He added that this is where the plaintiff resides to date. Cross-examined, he acknowledged that he did not witness the sale agreement between the plaintiff and the 1st defendant. He asserted that it is the plaintiff who resides on the suit land.
9. With the above evidence, the plaintiff closed her case. After the plaintiff closed her case, Mr. Mokaya, learned counsel for the 1st and 2nd defendants, sought an adjournment as his clients were not present which adjournment I allowed. The defendants did not however appear during defence hearing and their case was closed without them presenting any evidence. I invited counsel to file submissions and I have seen the submissions of Mr. G.J.M Masese, learned counsel for the plaintiff and Mr. Mokaya, learned counsel for the 1st and 2nd defendants. No submissions were filed on behalf of the 3rd defendant. In his submissions, Mr. Masese submitted that the plaintiff and her husband purchased the suit land in 1991 and established a home where the plaintiff and her children live. He submitted that the estranged husband of the plaintiff colluded with the defendants to have the caution that he had placed on the title removed resulting in the sale of the suit property to the 2nd defendant. He was of opinion that the plaintiff has established her case on a balance of probabilities and she should be granted the prayers sought. He added that if the court pleases, it should proceed to declare that the plaintiff has acquired title by prescription saving the plaintiff from reverting to the Originating Summons that she had filed. On his part, Mr. Mokaya, learned counsel, submitted that the sale agreement shows that it was Samwel Atika who bought the land and not the plaintiff. He wondered on whose authority the plaintiff has



come to court. He pointed out that in her evidence the plaintiff testified that the present owner (2nd defendant) was given consent to transfer by the 1st defendant. He submitted that this court cannot grant an order that the plaintiff has acquired title by prescription to save her from reverting to the Originating Summons. He was of opinion that even if the court is to consider that prayer the plaintiff has not proved the ingredients thereof. Counsel also pointed out that prayers (b) and (c) of the plaint have been overtaken by events. He asked that the suit be dismissed.

10. I already laid down the prayers of the plaintiff at the beginning of this judgment. I reiterate my opinion that prayers (b) and (c) of the plaint, as drafted, are already overtaken as they are only prayers seeking interim relief pending hearing of the suit. The substantive prayer left in this suit is therefore prayer (a) which seeks a declaration that the sale and transfer of the suit land from the 1st to the 2nd defendant was fraudulent. I am aware that in her evidence as supported by the submissions of her counsel, the plaintiff asks to be given title to the suit land by way of prescription. I am afraid that this prayer cannot be granted. First, it is not a prayer that has been asked for in the plaint and it is not even one that can be granted as an auxiliary prayer. The plaintiff has a pending suit on the question whether she has obtained title to the suit land by way of adverse possession and it is in that suit where the issue whether she deserves such order will be interrogated and not in this suit. This court does not have the pleadings to deal with that issue and neither does it have the power to hijack a suit that is separately pending, take it over, and make orders on it without first hearing the case. Thus, as I have said, the only issue for this court to deal with is whether the plaintiff deserves a declaration that the transfer of the suit land from the 1st to the 2nd defendant was fraudulent and null and void.
11. The plaintiff's case on this point is hinged on the contention that there was a caution that was placed by her husband which caution was irregularly removed so as to have the suit land transferred from the 1st to the 2nd defendant. At the hearing, the plaintiff produced what she purported to be the caution instrument. I have looked at it. It supposes to be a caution prepared by one Samwel Atika and it is dated 23 March 2010. That caution instrument does not bear any proof that it was ever registered. The registration section is blank and there is no endorsement by the Land Registrar. The part for the date received for registration is blank; there is no presentation book number; and there is no indication of any payment of registration fees. In other words this caution instrument was never registered. The allegation of the plaintiff that this caution was registered and illegally removed therefore does not hold any water. Apart from this, assuming that this is a valid caution that was duly registered, the person who would have locus to institute suit to contest its removal is the person who placed the caution; and that is Samwel Atika. Samwel Atika has not filed any complaint or suit that the caution he had placed was wrongly removed. He also never attended as a witness. In his submissions, Mr. Masese seemed to suggest that Samwel Atika partly colluded to have his caution removed. If indeed this is what happened, it was his caution, and if he wanted it removed that was his prerogative. Nothing stopped the plaintiff from placing her own caution. At the hearing of the case, the plaintiff appeared to suggest that she also had her own caution placed but no evidence of such caution was ever produced.
12. The long and short of it is that I have no evidence of any caution having been placed by Samwel Atika as claimed, or any caution placed by the plaintiff, and it cannot therefore be said that the transfer of the suit land from the 1st defendant to the 2nd defendant was fraudulent. If at all there was a caution placed by Samwel Atika, as I have elaborated, the plaintiff would have no locus to sue on it.
13. But even then, if the plaintiff's wish is to have the suit land registered in her name on account of adverse possession, the transfer of the land from the 1st to the 2nd defendant is immaterial and would not affect her case. Transfer of title does not interrupt possession as was affirmed in the case of *Githu vs Ndeete* (1984) K.L.R 776, where the Court of Appeal inter alia held that :-“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt



such person's adverse possession". Thus, in our case, the plaintiff's cause of action for the land under adverse possession is unaffected. Even assuming that there was an issue in removal of the caution (of which I have not found any) the filing of this suit was therefore completely unnecessary as the claim for adverse possession survived the transfer of the land.

14. There is truly no substance in the case of the plaintiff and it is hereby dismissed with costs to the 1st and 2nd defendants.
15. Judgment accordingly.

DATED AND DELIVERED THIS 24 DAY OF APRIL 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

The plaintiff herself in absence of her counsel Mr. GJM Masese

Ms. Mogeni for the 1st and 2nd defendants

Court Assistant : David Ochieng'

