



**Mwarania v Ongaki & 7 others (Environment & Land Case
1253 of 2016) [2024] KEELC 3876 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3876 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1253 OF 2016**

M SILA, J

MAY 15, 2024

BETWEEN

ELIMELITA NYAKOBOKE MWARANIA PLAINTIFF

AND

SAMWEL MOMANYI ONGAKI 1ST DEFENDANT

JAMES MUKO NYAMIRA 2ND DEFENDANT

HELLEN NYABOKE NYABIOSI 3RD DEFENDANT

EDWARD MWAMBA 4TH DEFENDANT

FRANSCISCA MORAA ORESI 5TH DEFENDANT

SUSAN KWAMBOKA 6TH DEFENDANT

THE LAND REGISTRAR 7TH DEFENDANT

HON. ATTORNEY GENERAL 8TH DEFENDANT

JUDGMENT

1. Before I embark on the pleadings, it is important to grasp at this early stage the parcels of land in dispute all of which originate from the land parcel Nyaribari Masaba/Bomobea/828.
2. This land parcel Nyaribari Masaba/Bomobea/828 (simply referred to herein as parcel No. 828) measuring 0.8 Ha, was first registered in the names of Mwandagani Ongaki and Momanyi Ongaki at the time of adjudication. The two were brothers and this was their ancestral land. On 7 September 1979, they applied to subdivide this land into two parcels and obtained consent to do so. The land was consequently subdivided into the land parcels Nyaribari Masaba/Bomobea/1272 measuring 0.62 Ha and the parcel Nyaribari Masaba/Bomobea/1273, measuring 0.1 Ha (simply referred to herein as parcels No. 1272 and 1273). The two brothers retained co-ownership of the parcel No. 1272 and the



land parcel No. 1273 was transferred to James Muko Nyamira (2nd defendant) who got registered as proprietor on 7 September 1979. Subsequently on 20 May 1980, the land parcel No. 1272 registered in the names of the two brothers was further subdivided into three, being the parcels Nyaribari Masaba/Bomobea/1387 measuring 0.13 ha, 1388 measuring 0.29 ha, and No. 1389 measuring 0.2ha. The two brothers retained ownership of the land parcel No. 1387; the parcel No. 1388 was transferred to George Nyamacharara Openda who got registered as proprietor on 1 July 1980; and the land parcel No. 1389 was transferred to Joseph Oriku Omari who got registered as proprietor on 25 September 1980. Following this, the only land that the two brothers retained in their ownership was the parcel No. 1387 measuring 0.13 ha. As to the parcel No. 1388, the transferee, George Openda, died and was succeeded by his wife Francisca Moraa Oresi, who got registered as proprietor on 27 October 2008. On 8 April 2010, the land got registered in the four names of Francisca, and her three children but the children are not parties to this suit. For the parcel No. 1389, the transferee Joseph Oriku Omari died and was succeeded by Susan Kwamboka Omari (6th defendant) who obtained title in her name on 9 July 2008. On 31 May 2010, the land was subdivided into the land parcels Nyaribari Masaba/Bomobea/ 2196 and 2197 (parcels No. 2196 and No. 2197). She retained proprietorship of the parcel No. 2196 and transferred the parcel No. 2197 to Christopher Ondieki. Christopher Ondieki is not a party to this suit.

3. For the parcel No. 1273, carved out of the original parcel No. 828, and which it will be recalled was transferred to the 2nd defendant on 7 September 1979, it got subdivided into the parcels Nyaribari Masaba/Bomobea/1441 and 1442 (parcels No. 1441 and 1442). He transferred the parcel No. 1441 to Joseph Nyabiosi Nyakundi (original 3rd defendant) who got title on 6 June 1986 and the parcel No. 1442 to Edward Mwamba (4th defendant) who got title on 15 September 1982. On 12 July 2011 the land parcel No. 1441 was transferred to the widow of the original 3rd defendant, Hellen Nyaboke Nyabiosi (current 3rd defendant) upon succession. The 3rd defendant, on 15 July 2011, subdivided the said land parcel No. 1441 into the land parcels Nyaribari Masaba/Bomobea/2461 and 2462 (parcels No. 2461 and No.242). She retained the parcel No. 2461 and transferred the land parcel No. 2462 to Aligesi Sitanga Omari on 15 July 2011. Aligesi is not a party to this suit.
4. The plaintiff commenced this suit through a plaint filed on 13 December 2007 which plaint was amended several times culminating in the Re-Amended Plaint filed on 8 October 2015. In that plaint, the plaintiff avers that she has filed suit as the administratrix of the estate of Mwandagani Ongaki, one of the original proprietors of the land in dispute. Mwandagani Ongaki died on 27 December 2000. In the re-amended plaint, the plaintiff contends that on diverse dates between the years of 1970 and 2007, the 1st defendant (brother of her late husband and his co-proprietor in the original parcel No.828) undertook various fraudulent transactions which affected the original parcel No. 828 without the knowledge and/or participation of her husband, who held a half share of it. The following particulars of fraud are pleaded :
 - i. Carrying out the transaction over the parent title without notice and/or regard to the deceased.
 - ii. Misrepresenting facts to the 7th defendant (Land Registrar) touching and/or concerning ownership of the parent title.
 - iii. Impersonating the deceased in the execution of the mutation, transfer and attendant documents.
 - iv. Forging the signature of the deceased.
 - v. Executing and/or procuring the execution of the transfer instrument by fraud.



- vi. Uttering false documents to facilitate the subdivision and transfer of the parent title together with the resultant subdivisions.
 - vii. Using undue influence and/or corrupt practices to defraud the deceased of his rightful share of the parent title.
5. The above particulars are also alleged against the 2nd – 7th defendants. It is added that there was abuse of office, that they failed to carry out verification and authenticate identity of the parties, and colluded and/or connived to effect the fraudulent transactions. It is pleaded that in 2007, the 1st defendant disclosed the fraud to the plaintiff and removed his name from the parcel No. 1387. It is further claimed that the plaintiff has full possession of the parcel numbers 1388 and 1389; that the deceased resided in the parcel No. 1389; and that he was interred in the parcels No. 1388 and 1389.
 6. In this suit, the plaintiff seeks the following orders :
 - a. Declaration that the parcel No. 828 lawfully belonged to and was registered in the joint names of the deceased and 1st defendant and a declaration that the transactions touching on the parent title, including subdivision and transfers of the resultant titles, were irregular, illegal and fraudulent.
 - b. Revocation of the subdivisions arising from the parent title No. 828 and the other subdivisions of the resultant titles and restore the parent title No. 828.
 - c. Eviction of the 2nd – 6th defendants from the land parcels No. 1387, 1388, 1389, 1441, and 1442, together with the subsequent subdivisions thereof.
 - d. Permanent injunction to restrain the 2nd – 6th defendants from trespassing and using the land parcels No. 1387, 1388, 1389, 1441 and 1442 and the subsequent subdivisions.
 - e. General damages for trespass.
 - f. Costs.
 - g. Such other orders that may be deemed expedient.
 7. The 5th defendant filed defence and counterclaim on 12 July 2012 which she amended on 30 October . She denied the allegations of the plaint. In the counterclaim, she pleaded to be the widow and personal representative of George Nyamacharara Openda, who got registered as owner of the parcel No. 1388. She averred that the land was then transmitted to her. She pleaded that in the year 2003, the plaintiff took advantage of the sickness of her husband, came to the land, cultivated it and erected a structure, and generally interfered with the rights of the estate she represents. In the counterclaim she seeks eviction of the plaintiff, an order of permanent injunction against her, general damages for loss of use, and costs.
 8. The 7th defendant filed defence and also denied all claims of the plaintiff and put her to strict proof.
 9. There is a defence filed on behalf of the 1st and 2nd defendants who were the initial defendants, but I have not seen any defence filed for the 3rd, 4th, and 6th defendants. It is a denial of the plaintiff's claim.
 10. The 2nd defendant died in the course of this case and he was not substituted. The case against him abated.
 11. After many ups and downs, hearing commenced before me on 23 November 2023 when the plaintiff testified. She contended that prior to his death, her late husband had not sold his land to anyone, and that it was after his death that people claimed to have purchased the land. She testified that they need



to prove that he sold land to them and show the signature of her husband. Cross-examined, she could not recall when she got married but she got her first child in 1967. In 1973, she moved out of the home. She claimed that she did so in order to get treatment in Uganda as she was unwell. She came back in the year 2000 after her husband died. She was fetched by her nephew to come back home and she attended the burial of her husband. She claimed that her husband could not sell the land because he was sick but she had nothing to show any proof of illness. She alleged that it was the 1st defendant who sold her husband's land but she had nothing to that effect. She described the 2nd defendant as his brother in law as he is married to a sister of her husband. She stated that he did not buy land from her husband because she inquired from the Chief who denied the purchase. As for the 3rd defendant she acknowledged that she is on the land and has built a house. So too the 4th defendant. For the 5th defendant she contended that she occupies her (plaintiff's) land. As for the 6th defendant she affirmed that her husband was buried on the land. She had lodged a court case at Keroka to stop his burial there but she was not successful. She acknowledged that she did not know what her husband did with the land while she was away and did not know what was happening to the land between years 1973 and 2000. She denied that the land parcel No. 828 was owned by both her husband and the 1st defendant and asserted that her husband owned the land alone. She nevertheless acknowledged that this land was given by her father in law.

12. With the above evidence, the plaintiff closed her case.
13. DW – 1 was the 1st defendant. He testified that it was the plaintiff's husband who sold his land to the defendants. He has his title No. 1343 in his name. He testified that the plaintiff was not there as she had left her husband and they never heard of her until she came back after his brother's death. He denied that his brother was ill or that he had a mental illness. He elaborated that he sold his land and left a small portion for himself. This land is vacant as the plaintiff has built on one of the portions sold.
14. DW – 2 was the 3rd defendant. His evidence was that in 1980 he purchased land from James Muko Nyamira, the 2nd defendant who had title to parcel No. 1273. He subdivided it into two and he obtained title in his name for the parcel No. 1442 on 17 September 1982. He has been on the land since 1983 and has constructed four houses on the same. He lived side to side with the plaintiff's deceased husband without any issue. He first met the plaintiff in 2007.
15. DW – 3 was Susan Kwamboka Omari wife of Joseph Omari Orik. She testified that her late husband bought land from the plaintiff's husband which was parcel No. 1389. They built some lodgings on it. They lived as neighbours with the plaintiff's husband and his family with no issue. When her husband died in 2009, the plaintiff sued but she lost the case. Her husband was subsequently buried on the land and she resides on the land to date. She was aware that the plaintiff's husband also sold land to other people who lived with him peacefully with no issue.
16. DW - 4 was Francisca Moraa Oresi, the 5th defendant. She testified that her late husband, George Nyamacharara Openda (George Openda) bought the plot No. 1365 in 1979 and he got it registered in his name. He died in 2004. She filed succession and the title is now in her name and that of her children being Benadette, Cyprian and Gladus. She testified that they did not reside on the land but only used it for farming. She stated that the plaintiff is the one now cultivating it.
17. Counsel agreed to have the statement of Hellen Nyaboke Nyabiose (3rd defendant) produced as her evidence and they waived the right to have her cross-examined.
18. With the above evidence the defendants closed their case. I invited counsel to file submissions and I have taken note of the submissions filed.



19. The plaintiff has filed this suit as administratrix of the estate of her late husband. It follows that she is making a claim on behalf of the estate which should be a claim that, if alive, her husband would have been entitled to lodge. What she contends is that the original land parcel No. 838 was fraudulently subdivided and the various subdivisions fraudulently sold to the 2nd – 6th defendants. She thus wants all their titles revoked and for the land to be reinstated into the parcel No. 838.
20. The plaintiff claims fraud and of course the burden of proof is upon her.
21. From what I can see, the land parcel No. 828 was co-owned by the plaintiff's land husband and the 1st defendant. This land was subdivided to bring forth the land parcels No. 1272 and 1273 which subdivision was applied for in 1977. The plaintiff claims that this subdivision was fraudulent but she has produced nil evidence of any fraudulent subdivision. In her pleadings, she inter alia claims that her husband was impersonated and his signature forged. Nothing of the sort was availed by the plaintiff. This court was not pointed to any particular evidence of impersonation or the signature that is said to have been forged. The record I have shows that the two co-proprietors applied to the Irianyi Land Control Board for consent to subdivide on 19 October 1977 which consent was given on 21 October 1977. They were subdividing so as to sell and transfer one portion to James Muko Nyamira, the 2nd defendant. The land was then subdivided into the parcels No. 1272 and No. 1273 the latter being transferred to the 2nd defendant. I have no iota of fraud or illegality concerning this subdivision and transfer to the 2nd defendant and I am convinced beyond any shred of doubt that this sale was above board. I am therefore unable to nullify the sale to the 2nd defendant nor impeach his title to parcel No. 1273. That being the position, the 2nd defendant was within his rights to subdivide his land parcel No. 1273 into the parcels No. 1441 and 1442. The parcel No. 1441 got transferred to the original 3rd defendant then to the current 3rd defendant. There is nothing wrong in the manner in which the original 3rd defendant got title to the parcel No. 1441. That land is of course now subdivided into the parcels No. 2461 and 2462. I see nothing wrong with these titles and they cannot be vitiated. In any event the owner of the parcel No. 2462 was not even sued. But what is important is that this court finds no evidence that the parcel No. 1273 was wrongly acquired and therefore there is no basis upon which to affect the downstream titles No. 1441 and 1442, and No. 2461 and No.2462.
22. It will be recalled that after selling the parcel No. 1273, the two co-proprietors retained the parcel No. 1272 in their name. This parcel No. 1272 was subsequently subdivided into the parcels No. 1387, 1388, and 1389. I see that the two co-proprietors retained ownership of the parcel No. 1387. There is nothing to suggest that this parcel No.1272 was wrongly subdivided. The parcel No. 1388 was sold to George Openda on 21 July 1979 and the sale agreement was produced. The plaintiff never pointed out any issue with this sale agreement and there is absolutely nothing to suggest that there was any problem with the sale or transfer of the parcel No. 1388 to George Openda. He got registered as proprietor of the land parcel No. 1388 on 1 July 1980 and that title has been transferred to his wife (5th defendant) and children upon his demise. All this to me appears to have been above board and there is nothing to put me into suspicion.
23. On the parcel No. 1389, it was transferred to Joseph Oriku Omari who got registered as proprietor on 25 September 1980. Again I see nothing that would bring this court to question this transfer. That land was of course transferred to the 6th defendant after Mr. Omari died and she got registered on 9 July 2008. She then subdivided the land into the parcels No. 2196 and 2197. There is no shred of evidence to suggest that there was any fraudulent transfer to Mr. Omari and I have no reason to set aside the sale to him or the subsequent subdivision of the land by the 6th defendant.



24. I have seen from the record that the land parcel No. 1387 which was co-owned by the two brothers was transferred to the plaintiff after the 1st defendant consented to the whole of that land being transferred to her. That is all that the two co-proprietors left for themselves and the 1st defendant was gracious enough to have the plaintiff have the whole of it. There was nothing more left for the plaintiff as her husband and the 1st defendant who co-owned the land sold it.
25. I wonder where the plaintiff has gotten this impression that there was any illegal sale. She was not there from 1973 to the year 2000 when her husband died. As I explained earlier, given that she is administratrix, she is in essence advancing a case that her husband could have advanced if he was alive. But the evidence shows that her husband was very comfortable with the sales of the parcels of land and he lived side by side and in total bliss with the persons that he sold land to. If he had any problem with them, he could have sued them during his lifetime. The fact that he did not, yet the persons were there on the land and had titles, means that he voluntarily sold the land to them. Moreover, since this was an issue that the plaintiff's husband could have pursued if he was alive, and he did not, and there is no evidence to suggest that he was not aware of the sales, transfer and possession of the land by the purchasers, the suit would be time barred. The subdivision of the land parcel No. 828 was done before 1980. The titles No. 1272 and 1273 were issued before 1980. So too the parcels No.1387, 1388 and 1389. This was more than 20 years to the death of the plaintiff's husband. If he had any claim to lodge he had 12 years to do so which he did not. I do not see how the plaintiff can now emerge from nowhere and stake a claim which her husband did not. If at all she had any good case, and for the record she does not, such case is caught up by limitation of time.
26. The plaintiff will have to make do with what her husband left and that is only the land parcel No. 1387 for which she already has title to. She cannot come after 27 years of absence to create a problem where none existed. Her case is for dismissal and it is hereby dismissed with costs.
27. The 5th defendant has a counterclaim. It is hereby allowed as the plaintiff has no right to be on the land parcel No. 1388. I hereby allow the counterclaim and order the plaintiff to give vacant possession of this parcel of land within the next 14 days. In default she be forcibly evicted and she will bear any costs of eviction. I also issue an order to permanently restrain her from this land. She will also pay general damages of Kshs. 1 million to the 5th defendant for trespass together with the costs of the counterclaim.
28. Judgment accordingly.

DATED AND DELIVERED THIS 15 DAY OF MAY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Mageto for the plaintiff

Mr. Anyona for the 5th defendant

Mr. Wabwire for the 7th & 8th defendants

Mr. Sagwe for 1st, 3rd, 4th and 6th defendants – Absent

Court Assistant – David Ochieng'

