



Odera (Suing as grandson and lega representative of the Estate of Roida Kihanga (Deceased) & another v Vikiru & 3 others (Environment and Land Case 244 of 2016 & Civil Case 180 of 2009 (Consolidated)) [2024] KEELC 4955 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4955 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE 244 OF 2016
& CIVIL CASE 180 OF 2009 (CONSOLIDATED)

DO OHUNGO, J
JUNE 27, 2024

BETWEEN

JONATHAN MAHUGI ODERA (SUING AS GRANDSON AND LEGA REPRESENTATIVE OF THE ESTATE OF ROIDA KIHANGA (DECEASED)) PLAINTIFF

AND

JOHNSTONE OGADA VIKIRU 1ST DEFENDANT
LAND REGISTRAR VIHIGA COUNTY LAND REGISTRY 2ND DEFENDANT
HON ATTORNEY GENERAL 3RD DEFENDANT

AS CONSOLIDATED WITH
CIVIL CASE 180 OF 2009

BETWEEN

JOHNSTONE O VIKIRU PLAINTIFF

AND

NATHAN KADUKA SUBSTITUTED WITH JOHNSTONE OGADA VIKIRU DEFENDANT

JUDGMENT

1. Litigation in this matter traces its roots to four suits Kakamega HCCC No. 154 of 2009, Kakamega ELCC No. 163 of 2016, Kakamega HCCC No. 180 of 2009 and Kakamega ELCC No. 244 of 2016.



- Kakamega HCCC No. 154 of 2009 was transferred to this court, whereupon it became Kakamega ELCC No. 354 of 2014. Even though Kakamega HCCC No. 180 of 2009 was also transferred to this court, it seems not to have been assigned a new case number upon its registration in this court.
2. The four suits were variously consolidated through orders made in the different files. Subsequently, the court was informed on 24th February 2022 that the Plaintiff in Kakamega ELCC No. 354 of 2014 passed away on 25th August 2016. Parties recorded a consent on 24th February 2022 pursuant to which Kakamega ELCC No. 354 of 2014 was marked abated since there had been no substitution while Kakamega ELCC No. 163 of 2016 was withdrawn with no order as to costs.
 3. In effect therefore, only two suits now remain for determination: Kakamega ELCC No. 244 of 2016 and Kakamega HCCC No. 180 of 2009. The parties further recorded a consent on 24th February 2022 Kakamega ELCC No. 244 of 2016 and Kakamega HCCC No. 180 of 2009 were consolidated afresh and Kakamega ELCC No. 244 of 2016 made the lead file. Additionally, since the original Defendant in Kakamega HCCC No. 180 of 2009 had passed away, a consent order was made that he be substituted with Jonathan Mahugi Odera who held a grant ad litem in respect of his estate.
 4. Jonathan Mahugi Odera (Jonathan) commenced Kakamega ELCC No. 244 of 2016 through plaint dated 28th November 2016. He averred that prior to her demise on 20th June 1976, Roida Kihanga (Roida) was the registered proprietor of the parcel of land known as Kakamega/Bugonda/2069 (the suit property) and that on 21st July 1995, Mathews Vikiru Kihanga (since deceased) colluded with the Second and Third Defendants and fraudulently transferred the suit property to himself. He further averred that on 30th March 2009, Mathews Vikiru Kihanga and the Defendants fraudulently transferred the suit property to Johnstone Ogada Vikiru (Johnstone).
 5. Jonathan further averred that upon obtaining title, Johnstone embarked on a process of evicting Roida's heirs from the suit property. He therefore prayed for judgment against the Defendants jointly and severally for:
 - a. An order for cancellation of Title No. Kakamega/Bugondo/2069 from Mathew Vikiru Kihanga (entry No.2) and Johnstone Ogada Vikiru (Entry No.6) names and restoration in the name of Roida Kihanga. (Entry No.1).
 - b. A permanent order restraining the defendants by themselves, their agents/servants or otherwise whosoever from evicting the plaintiff and Roida Kihanga's dependants from the Title Kakamega/Bugonda/2069 and from interfering with the suit Title in any manner.
 - c. An inhibition be registered on the suit parcel No. Kakamega/Bugonda/2069.
 - d. Costs.
 - e. Interest.
 - f. Further or other relief.
 6. The Defendants in Kakamega ELCC No. 244 of 2016 filed statements of defence through which they denied Jonathan's averments and urged the court to dismiss the suit with costs.
 7. On the other hand, Johnstone commenced Kakamega HCCC No. 180 of 2009 through plaint dated 18th November 2009. He averred therein that he was the registered proprietor of the parcel of land known as Kakamega/Bugonda/2069 (the suit property) and that Nathan Kaduka had trespassed onto the suit property and was claiming ownership of it. He prayed for judgment for a permanent injunction to restrain Nathan Kaduka together with his agents and servants from further trespass, an order of eviction of Nathan Kaduka from the suit property, Mesne profits, costs of the suit and interest.



8. Nathan Kaduka filed a statement of defence through which he averred that the suit property was ancestral land. He denied Johnstone's averments and urged the court to dismiss the suit with costs.
9. Jonathan Mahugi Odera was the sole witness in respect of the Plaintiff's case. He adopted his witness statement dated 28th November 2016 and produced a copy of register in respect of the suit property (PEXb. 1). He also referred the court to a copy of death certificate No. 0634766 in respect of Roida but did not produce it. He stated that Roida was his paternal grandmother and that she passed away in 1975 at a hospital in Mombasa. He conceded that according to PEXb. 1, Roida became registered owner of the suit property on 17th June 1976, yet the certificate of death stated that she passed away on 20th June 1975. He further conceded that the certificate of death showed her place of death as Mbithi sub-location in Vihiga, contrary to his testimony that she passed away in Mombasa. He also testified that he was the one who applied for and gave the information that went into the certificate of death.
10. Jonathan stated in the witness statement that the suit property was transferred to Mathews Vikiru Kihanga on 21st July 1995 without letters of administration being issued in respect of Roida's estate and that upon discovering the transfer, the family placed a restriction on 1st July 1997. That the Second Defendant removed the restriction on 25th March 2009 after which the suit property was transferred to Johnstone on 30th March 2009.
11. Jonathan went on to testify that Nathan Kaduka Kihanga who was his father passed away in 2018. That by 1997, his father was aware that Johnstone's father was the registered owner, but his father never lodged any claim in respect of the suit property against Johnstone's father while Johnstone's father was alive. He also conceded that by the time he filed ELCC No. 244 of 2016, over 21 years had passed since the suit property was transferred to Mathew.
12. The Plaintiff's case was then closed.
13. Johnstone Ogada Vikiru testified as the only defence witness. He adopted his witness statement dated 23rd December 2016 and produced copies of item numbers 1 to 4, 6 to 8 and 10 in the First Defendant's List of Documents dated 23rd December 2016 as well as a copy of the document in the First Defendant's Further List of Documents dated 8th September 2022 as his exhibits. He further adopted his witness statement dated 8th August 2011, which he filed in Kakamega HCCC No. 180 of 2009. He stated in the statements that he was the registered proprietor of the suit property and that he was issued with title on 30th March 2009. That before then, the registered proprietor of the suit property was Mathew Vikiru who was his father.
14. Johnstone further testified that Jonathan's father and his father were brothers and that both were Roida's sons. He also stated that Roida passed away in 1997.
15. The First Defendant's case was then closed. Further, upon an application by Johnstone's advocate, which application was supported by Jonathan's advocate, the Second and Third Defendants' case was closed.
16. Parties were thereafter ordered to file and exchange written submissions. Only Jonathan and Johnstone complied. The Second and Third Defendants did not file any submissions.
17. Jonathan argued that neither side of the dispute was able to establish whether the suit property was transferred during or after Roida's lifetime. He further argued that since the evidence on record is inconclusive as to the date of Roida's death, the transfer in favour of Johnstone was un-procedural and should be nullified pursuant to Section 26 (1) (b) of the *Land Registration Act*. That Johnstone's



- advocate, and Jonathan's fathers were Roida's sons who were raised on the suit property and that their families had a beneficial interest in it. That in those circumstances, an eviction order ought not to issue.
18. On his part, Johnstone referred to Section 26 (1) (b) of the *Land Registration Act* as well as the case of *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and argued that Jonathan failed to prove his claims of fraud since he did not produce the death certificate on which he founded his case. He added that he proved his case as pleaded in Kakamega HCCC No. 180 of 2009 and that his title is indefeasible.
 19. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether fraud has been established and whether the reliefs sought should issue.
 20. There is no dispute that Johnstone is the registered proprietor of the suit property. His proprietorship is confirmed by the certified copy of the register which shows that he was registered as such on 30th March 2009. A title deed was issued to him on the same date.
 21. The rights of a registered proprietor of land are well spelt out by the law. Such a proprietor is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Additionally, Section 26 of the *Act* obligates the court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
 22. Jonathan challenged Johnstone's title exclusively on grounds of fraud. As the courts have consistently stated, fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
 23. Jonathan's case on fraud is built around the theory that the suit property was transferred after Roida's death and in the absence of letters of administration in respect of Roida's estate. To establish those claims, Jonathan needed to demonstrate of Roida's death and further that transfer from Roida to Mathew Vikiru took place after the death.
 24. Jonathan did not produce any certificate of death. His testimony that Roida passed away in 1975 was not supported by any official document. I note that Johnstone testified that Roida passed away in 1997, which was after the transfer from Roida to Mathew Vikiru.
 25. The burden of proving fraud was on Jonathan. He is required to prove it to standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. Further, he cannot succeed if all he has done is to invite the court to simply infer fraud from the facts. He has not persuaded me that there was any fraud in the transfer to Mathew.
 26. Jonathan's argument the transfer in favour of Johnstone was un-procedural and should be nullified pursuant to Section 26 (1) (b) of the *Land Registration Act* is not founded on his pleadings. He did not plead that as a ground for nullification and cannot raise it at the stage of submissions. Parties are bound by their pleadings. See *Raila Amolo Odinga & Another vs. IEBC & 2 others* [2017] eKLR.
 27. Jonathan has failed to prove his case and is therefore not entitled to the reliefs that he is seeking.



28. Jonathan testified that he is not resident on the suit property. Johnstone confirmed as much and went further by testifying that it is only he (Johnstone) who is in occupation and use of the suit property. In those circumstances, the reliefs of permanent injunction and eviction which Johnstone sought are moot and cannot issue. As the Supreme Court stated in *Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated))* [2023] KESC 40 (KLR) (16 June 2023) (Judgment), a matter is moot when there exists no live controversy with the result that the court's decision would not have the effect of resolving any actual and present controversy.
29. In view of the foregoing discourse, both Kakamega ELCC No. 244 of 2016 and Kakamega HCCC No. 180 of 2009 are dismissed. No order on costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Ikhumba for the Plaintiff

Mr Nyikuli for the Defendants

Court Assistant: M Nguyayi

