



Kabesa & another (Suing on Behalf of the Estate of James Kabesa Nyakundi) v Oanda & 3 others (Environment & Land Case 1218 of 2016) [2024] KEELC 4872 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4872 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1218 OF 2016**

**M SILA, J
JUNE 20, 2024**

BETWEEN

SALOME NYABONYI KABESA 1ST PLAINTIFF

RICHARD ONSONGO KABESA 2ND PLAINTIFF

SUING ON BEHALF OF THE ESTATE OF JAMES KABESA NYAKUNDI

AND

TOM OANDA 1ST DEFENDANT

ZABLON OANDA 2ND DEFENDANT

ZACHARIA OANDA 3RD DEFENDANT

TERESA NYATICHI OANDA 4TH DEFENDANT

JUDGMENT

A. Introduction and Pleadings

1. This suit was commenced by James Kabesa Nyakundi (now deceased and who was later substituted) through a plaint filed on 30 December 2008 against Tom Oanda, Zablun Oanda, Zacharia Oanda and Teresa Nyatichi Oanda. The fourth defendant (who died in the course of trial) was wife of Oanda Miranyi, alias Philip Oanda (deceased) and the first three defendants are their sons. The original plaintiff averred to be the owner of the land parcel Majoge/Magenche/44 which he claimed to have purchased from one Oanda Miranyi at Kshs. 20,000/= and that consent to transfer was obtained from the Land Control Board. He pleaded to have been in possession of the land since 1972 and constructed four houses and one kiosk, planted over 5,000 tea bushes, gum trees, and other subsistence crops. He pleaded that after 28 years of his occupation, Oanda Miranyi appeared and started laying claim to the suit land which led him to file the suit Kisii CMCC No. 175 of 2002 against him. He obtained orders of injunction to restrain Oanda Miranyi (Miranyi) from the land but while the suit was pending, Miranyi



filed a claim before the Kenya Land Disputes Tribunal being case No. 82 of 2006 claiming the suit land. He pleaded that he was never invited to attend the Tribunal which ruled in favour of Miranyi. He averred that in early November 2008, Miranyi died and the defendants moved to inter his body in the suit land and constructed two temporary structures. He filed suit, being the case Kisii CMCC No. 629 of 2008, to restrain the burial but the case was struck out on a technicality. He filed another case, Kisii CMCC No. 664 of 2008, but the case was returned to be presented at Ogembo Law Courts. In that process, Miranyi was buried on the suit land and that being the case, he withdrew the suit Kisii CMCC No. 664 of 2008 as it was overtaken by events. In this suit, the original plaintiff asked for the following orders (paraphrased for brevity) :

- a. A permanent injunction to restrain the defendants from the suit land.
 - b. An order of eviction against the defendants.
 - c. A declaratory order that the plaintiff is the sole lawful proprietor of the suit land and that the burial of Oanda Miranyi on the land is null and void ab initio and does not confer any proprietary rights upon the defendants.
 - d. An order of exhumation of the remains of Oanda Miranyi for burial in his parcel of land in Borabu District or in a public cemetery.
 - e. General damages for trespass.
 - f. Costs of the suit.
 - g. Interest.
 - h. Any other relief that the court may deem fit to grant.
2. The defendants filed a defence, and lodged a counterclaim on behalf of the estate of Oanda Miranyi. They pleaded that the suit land was owned by Oanda Miranyi. They averred that the original plaintiff was brother in law to Oanda Miranyi. They averred that since the plaintiff owned a neighboring parcel of land, being Majoge/Magenche/82, and because Miranyi had other land in Manga Settlement Scheme, he permitted the original plaintiff to take care of the suit land on his behalf, while he was in Manga. They pleaded that in 2006, the late Miranyi discovered that the original plaintiff had fraudulently caused the transfer of the suit land into his name, the particulars being that he prepared false transfer documents, presented false transfer documents to the Land Registrar (sued as 2nd defendant in the counterclaim) for registration, and failed to involve the family in the Land Control Board since this was ancestral land. They pleaded that upon this discovery, the late Miranyi filed the suit before the Kenya Land Disputes Tribunal which decided in his favour. They denied arranging the burial of Miranyi in the suit land which they claimed was done by a Committee. In the counterclaim they asked for the following orders :
- a. A declaration that the suit land belongs to Oanda Miranyi and an order for rectification of the register and general damages for rectification.
 - b. Costs of the suit.
 - c. Interest at court rates.
 - d. Any other relief that the court may deem fit and just to grant.
3. I mentioned earlier that in the course of trial the original plaintiff died. He was substituted with Salome Nyabonyi Kabesa and Richard Onsongo Kabesa. The 2nd defendant also died but he was not substituted. The 4th defendant also died. She died on 4 June 2019 and the case for the benefit of



the estate of Oanda Miranyi was continued by Zacharia Ontomwa Oanda and Peter Nchore Oanda. I need to mention that when substitution of the 4th defendant was done, there was attempt to not just substitute, but amend the prayers in the counterclaim. An objection was raised since at this time the plaintiffs had already testified and closed their case. I sustained the objection and ordered that the prayers will be in accordance with the original counterclaim, as the defendants could not take advantage of the amendment to substitute. to sneak in fresh pleadings without an application to do so.

B. Evidence of the Parties

i. Plaintiff's Evidence

4. Hearing commenced on 20 September 2017 before Mutungi J, when Salome Nyabonyi Kabesa, testified as PW-1. She testified that she got married to the original plaintiff in the year 1978 as his third wife. She averred that at that time the original plaintiff had already purchased the suit land and this is where he settled her. They built a house, planted tea and gum trees, and resided on the land. She produced the title deed and photographs showing four houses that they built on the land, the tea and a maize crop. She stated that her husband informed her that he had bought the land from Miranyi and that Miranyi went and bought other land in Sotik. She did not encounter any issues while living on the land until 2008 when the defendants started claiming it. She testified that the defendants have never occupied the land and never planted coffee in the year 2000 as alleged.
5. Cross-examined, she affirmed that they were related, as the brother to her husband had married a sister of Miranyi. She could not explain how her late husband got title to the land since he already had it when she got married in 1978. She was aware that this was the ancestral land of Miranyi. She knew of the dispute lodged at Kenyena Land Disputes Tribunal. She was aware of the family meeting held on 13 August 2009. According to her the defendants offered her husband 1 ½ acres of the land but he refused. She was not aware that her husband had been asked to take care of the land on behalf of the family of Miranyi. She lived on the suit land with one of her co-wives.
6. PW – 2 was Richard Onsongo Kabesa a step son of PW-1. He is the first born son of the first house and was born in 1973. Their house is on the neighbouring land parcel No. 82 which is their ancestral land. He testified that he has known the suit land (No.44) as their family property. He stated that they have planted tea, coffee, and blue gum trees on the land. He elaborated that they have five houses on the land, one of which was a permanent house. He acknowledged that he was not present when his father purchased the suit land but he witnessed his father plant the tea and trees around the year 1985. He was not aware of any negotiations to settle the matter.
7. With the above evidence the plaintiffs closed their case.

ii. Defence Evidence

8. DW – 1 was Zachary Oanda. His evidence was that his late father (Miranyi) had two parcels of land, that is the suit land and another at Manga Settlement Scheme. They reside in the land at Manga. He testified that his father left the original plaintiff on the suit land to take care of it and that the 2nd defendant (Zablon Oanda) resided on the land prior to his death. He stated that in 2006 his father found out that the original plaintiff had changed ownership of the suit land to his name and he proceeded to file a case at Kenyena Land Disputes Tribunal where he emerged victorious. He however died before the award could be filed in court. He was aware that the original plaintiff filed suit to stop the burial of Miranyi on the suit land; he was not successful and they proceeded with the burial. It is then that this suit was filed. He testified that they met with the local elders and reached a settlement in 2009 whereby it was agreed that the original plaintiff keeps 1 ½ acres. He produced the said agreement as an exhibit.



He stated that the original plaintiff died before the agreement could be actualized. He denied that his father sold the land to the original plaintiff. He testified that Zablun died in 2013 and was buried in the land at Manga Settlement Scheme. He asserted that his brother was using part of the land before his death. He mentioned that he had a temporary house and after his death his wife moved to live at Manga. He testified that the original plaintiff started using the land in 1963 which is the same time that they moved to Manga Settlement Scheme. He acknowledged that the original plaintiff built houses on the land and was plucking tea therein. He also acknowledged that there are trees on the land.

9. DW – 2 was Alfred Omogo Asiago. He was born in 1940. He testified that the late Miranyi was a brother to his father thus his uncle. They own land which borders the suit land. He affirmed that Miranyi moved from the suit land in 1963. He stated that his uncle left Zablun on the land. He testified that when Zablun started getting sick the original plaintiff came to live on the land and later the original plaintiff started claiming the land to be his. He alleged that there was an agreement in 2009 where the original plaintiff accepted to be given 1 ½ acres of the land. Cross-examined he testified that he was not present when Miranyi allowed the original plaintiff to reside on the land. He affirmed that Zablun was buried in Manga where he had a house.
10. DW – 3 was Joseph Okemwa Oanda alias Tom Oanda, the 1st defendant. He was born in 1971 at Manga Settlement Scheme and this is where he has lived all his life. He otherwise relied on a witness statement which more or less reiterated the evidence of the other defence witnesses.
11. DW – 1 was recalled to testify on behalf of the estate of his father. He more or less reiterated his earlier evidence. He asserted that before his death, the original plaintiff signed the agreement to only retain 1 ½ acres and was sorry for having changed the title. He acknowledged in cross-examination that the 4th defendant was buried in the Settlement Scheme. He revealed that when they moved to the Settlement Scheme, their father had one wife. He later married another wife. He affirmed that the defendants are all of the first house. He admitted that they no longer have a presence in the suit land.
12. With the above evidence the defendants closed their case.
13. I invited counsel to file written submissions, which they did, and I have taken note of these before arriving at my disposition.

C. Analysis and Disposition

14. In this suit, the plaintiffs more or less assert title to the suit land, and wish to have the defendants permanently restrained from it. The defendants on the other hand have a counterclaim, on behalf of the estate of Oanda Miranyi (deceased) to have the original plaintiff's name deregistered from the title of the suit land on the allegation that he obtained registration through fraud. It is of course claimed that the suit land was previously in the name of the late Miranyi and that the original plaintiff forged documents in order to obtain title to the suit land.
15. This suit was filed in 2009 when the operative law was the *Registered Land Act* (repealed in 2012 by the [Land Registration Act](#)). Sections 27, 28, 29 and 143 of the *Registered Land Act* are significant and I will restate the same. They provide as follows :
 27. Subject to this *Act* -
 - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;



(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this *Act*, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

29. Every proprietor who has acquired land, a lease or a charge by transfer without valuable consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it, and subject also to the provisions of the *Bankruptcy Act* and to the winding-up provisions of the *Companies Act*, but save as aforesaid the transfer when registered shall in all respects have the same effect as a transfer for valuable consideration.

143.

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

16. The position of the above law is that a registered proprietor is deemed to have good title to the land unless the contrary is proved. The burden is on he who claims that the registered proprietor did not obtain good title to demonstrate that the said title is a bad title. I will therefore start with the counterclaim, because if I dismiss it, then I have to allow the plaintiff's case.

17. In the instance of this case, the starting point has to be that prima facie, the original plaintiff had good title to the suit land and the onus is thus on the defendants to prove that the said title was acquired by fraud as they allege. It is common ground, and is indeed evidenced by the copy of the register, that the first proprietor of the suit land was Oanda Miranyi who got registered on 10 February 1970 and title was issued to him on 13 November 1970. James Nyakundi Kabesa, the original plaintiff, got registered as proprietor on 15 August 1972 and was duly issued with a Land Certificate. I can see that the original plaintiff charged the land to Agriculture Finance Corporation on 6 February 1979 to secure the sum of Kshs. 10,000/=. In their pleadings, the defendants claim that the plaintiff obtained title by forging documents. We must be alive to the legal position that proof of fraud is huge hurdle. Indeed, proof of it is beyond a mere balance of probabilities.



18. The defendants did not however produce a single document to say that ‘this is the document that was forged’ and which enabled James Kabesa to become registered as proprietor. I am afraid that it is not enough for one to claim that a person has committed forgery or fraud. One needs to present the actual evidence that goes to prove the said fraud. You cannot claim fraud and hope that the other party will be the one to bring evidence to prove what you have not proved in the first place. In our case, as I have mentioned, other than a mere verbal statement that the original plaintiff obtained title through fraud, nothing concrete was presented. All that the defendants presented was proceedings of the Kenya Land Disputes Tribunal. That does not help them. For starters, the tribunal did not have jurisdiction to determine a land ownership dispute and whatever they purported to do was nothing but a nullity. The tribunal proceedings therefore cannot help the defendants. The other document the defendants wished to rely on was a contested agreement purportedly drawn on 13 August 2009 where it is claimed that the original plaintiff accepted to keep only 1 ½ acres of the suit land. This document also cannot help the defendants. First it is contested and the defendants brought no evidence to prove that the purported signature of the original plaintiff was actually his signature. Secondly, if indeed this agreement was drawn while this case had already been filed, I wonder why the parties did not simply draw a consent which would have been filed in court, or dictated by their advocates, if indeed they had agreed to settle the matter. You would certainly expect, if at all there was such agreement, that the parties would have presented the same in court but nothing of the sort was done. I see from the record that the matter was in fact mentioned on 22 September 2009, 23 October 2009, 19 January 2010, 29 January 2010, and there was no mention that the parties have a settlement agreement. If ever there was, then the parties would have said so. The original plaintiff died on 13 May 2010 and this purported agreement only emerged after that date. I am not persuaded as to the genuineness of this agreement. Even then, the pleadings herein do not purport to try and enforce that agreement, but retain the assertion that the suit land was obtained by fraud, which as I have mentioned already, has not been proved.
19. In fact from the evidence, I am totally persuaded that Miranyi had relinquished his interest in the suit land to the original plaintiff. It is not in contest that Miranyi left the suit land to the original plaintiff in the year 1963 or thereabouts and went to settle at Manga Settlement Scheme with his family. The original plaintiff built houses, including a permanent house, and planted permanent crops on the land being tea and blue gum trees. He lived here with his second and third wives and this is where he raised his children. You would expect, if at all the land was only left to the original plaintiff as caretaker, that Miranyi would raise complaint that the original plaintiff has made permanent developments on the land and is living in it as if he owns it. No such complaint was raised. That is not the conduct of a person who has not sold land but has only offered it to a caretaker to oversee.
20. From 1963, Miranyi, and his sons from his first house, only started coming to the suit land in the year 2002 or thereabout, which is about forty years later. It is apparent to me that their motivation was to try and unfairly wrestle the suit land from the original plaintiff probably because this was their ancestral land. This action prompted the original plaintiff to file the suit Kisii CMCC No. 175 of 2002. I can see that Miranyi filed a defence on 26 March 2006, and in that defence he denied knowing the original plaintiff, and claimed that he had leased the land to one Fredrick Omoke Nyaundi for cultivation purpose only. When he appeared at the tribunal, forgetting for a moment that the tribunal proceedings were null and void, what Miranyi said was completely different. He now stated that he had left the suit land under the care of James Kabesa and there was no mention of Fredrick Omoke Nyaundi. Even in this suit there is no mention of Fredrick Omoke Nyaundi in either the defence and counterclaim. It simply tells you that there is no consistency in the story of the defendants and the defendants cannot therefore be believed. I also find it rather curious that it is said that the late Miranyi only came to know that the original plaintiff had title to the suit land in the year 2006. That cannot be the truth because he had been sued in the year 2002 and he had filed a defence. He was aware at



that time that the original plaintiff had title to the suit land. Miranyi upon being sued did not act like one who is flabbergasted and taken by surprise by the fact that the original plaintiff had title to the suit land. There is no evidence of him making any report to the police or actively asserting that the original plaintiff has a fraudulent title. He did not even bother to file a counterclaim in the 2002 case to seek the cancellation of the title of the original plaintiff. Instead, in a clear act of bad faith, while the suit was proceeding before the Magistrates' Court, he went to the Land Disputes Tribunal, a body that had no jurisdiction, so as to try and circumvent the legal proceedings in the court of law. All this tells you that Miranyi and his first family were acting maliciously and were ready to use unorthodox methods to steal the title of the original plaintiff. I am not persuaded that the defendants have made out any valid case and their counterclaim is hereby dismissed with costs.

21. Having dismissed the counterclaim of the defendants, I have no reason not to allow the suit of the plaintiffs. It is hereby allowed. I issue an order that it is James Kabesa who remains the legal registered proprietor of the land parcel Majoge/Magenche/44. The defendants are hereby permanently restrained from entering, being upon, using, cultivating, building, or in any other way interfering with the possession of the plaintiffs of the suit land. There was a prayer for exhumation of the remains of Miranyi. I would have readily given this order if the suit had been decided shortly after the interment of the body. But Miranyi was buried in 2008, which is now 16 years ago. I wonder what it is that is there to be exhumed. I see no purpose in granting the order of exhumation only that I will state that the fact that Miranyi is buried on this land means nothing in so far as his claim, or the claim of the defendants, for the suit land is concerned. It does not mean that because he is buried here then he owned the land or that the defendants have any entitlement to the suit land. They do not. They had no right to trespass into the suit land and inter the remains of Miranyi in it. They cannot feign that the burial was conducted by an amorphous committee without their participation. The act of burying Miranyi in the suit land was an act of trespass and the defendants are therefore liable to pay general damages for trespass. The acts of trespass were egregious as the defendants knew that the land was under dispute and that the issue of its ownership had not been resolved. Having this in mind, I will order the defendants to pay the sum of Kshs. 1,000,000/- as general damages for trespass. The said sum to attract interest at court rates from the date hereof until settlement in full. The defendants will also pay the plaintiffs the costs of the suit together with interest at court rates.

Judgment accordingly.

DATED AND DELIVERED THIS 20 DAY OF JUNE 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in the presence of :

Mr. Nyanhoga for the plaintiffs

Mr. Ombachi for the defendants/counterclaimants

Court Assistant – David Ochieng'

