



REPUBLIC OF KENYA



**Osundwa v Buluma & 3 others (Environment & Land Case  
18 of 2014) [2024] KEELC 4938 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4938 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 18 OF 2014**

**EC CHERONO, J**

**JUNE 13, 2024**

**BETWEEN**

**MARY N. OSUNDWA ..... PLAINTIFF**

**AND**

**FRED BULUMA ..... 1<sup>ST</sup> DEFENDANT**

**EDWIN BARASA ..... 2<sup>ND</sup> DEFENDANT**

**BARASA BULUMA ..... 3<sup>RD</sup> DEFENDANT**

**GLADYS KWENDO ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**a. Introduction And Pleadings**

1. By way of a plaint dated 28<sup>th</sup> October, 2019 the Plaintiff sought for the following orders against the Defendants;
  - a. An order of eviction as prayed in paragraph no (7) above.
  7. The plaintiff now claims that the defendants herein be evicted from land parcel No. Ndivisi/Muchi/198 so as to give the plaintiff vacant possession.
  - b. Costs and interest.
  - c. Any other relief this Honourable Court may deem fit and just to grant.
2. It is the plaintiff's case that vide Succession Cause No. 206 of 1997, she was confirmed as the sole administratrix of the estate of her deceased husband Andrew Osundwa Ekumba who was the registered owner of land parcel no. Ndivisi/Muchi/198(hereinafter referred to as the 'suit land'). She averred that



the defendants have occasionally encroached on the said parcel of land restricting her use of the land. It is her contention that the defendant's claim on the suit land was unlawful and baseless.

3. The defendants on their part entered appearance and filed a joint statement of defence dated 26<sup>th</sup> May, 2021 in which they averred that the suit land was initially registered in the name of Andrew Osundwa Ekumba who disposed off the same by way of sale to Francis Barasa Buluma on 9<sup>th</sup> May, 1983 and therefore any transfer to the plaintiff was fraudulent. The defendants deny ever encroaching the suit land as they are innocent purchasers for value and that they had a right to occupy the suit land. They urged this Honourable Court to dismiss the plaintiffs claim with costs.
4. This Court fixed this case for pre-trial conference and the Parties agreed to comply with Order 11 of the *Civil Procedure Rules* and thereafter, the matter proceeded for hearing whereby the plaintiff called two witnesses while the defendants called one witness.

#### **b. Parties Evidence**

5. PW1 Mary Osundwa adopted her witness statement dated 3<sup>rd</sup> November, 2017 as her testimony-in-chief. She was referred her list of documents containing 4 items dated 27/01/2014 which she produced in evidence as P-Exhibit 1-4. She asked the Court to allow her prayers since no objection was ever raised in the succession cause in the year 1997. When she was cross-examined, she stated that she was not aware of any sale agreement entered into regarding the suit land between her husband and one Fred Mukoya. It was her evidence that she obtained a title after following the due process. She testified that she has never lived in the suit land and that if anyone was living thereon, such occupation was unlawful. In re-examination she reiterated her testimony-in-chief
6. PW2 James Osundwa testified on oath and stated that he is the plaintiff's son and referred to his witness statement dated 30<sup>th</sup> November 2022 which he adopted as his testimony-in-chief. During cross-examination, he testified that his deceased father was planting maize on the suit land and that he was not aware that the suit land had been sold and that there were people in occupation of the land. The witness was cross-examined by the Court and re-examined by the plaintiff's counsel and reiterated his testimony-in-chief.
7. DW1 Fred Mukoya Was referred to his witness statement dated 6<sup>th</sup> February, 2021 which he adopted as his testimony-in-chief. He was also referred to the list of documents containing 11 items dated 26<sup>th</sup> May 2021 which he produced into evidence as DExhibit 1-11. On cross-examined, he stated that he is also known as Fred Buluma or Fred Mukoya Barasa. He stated that the 3<sup>rd</sup> defendant is his son and that Francis Barasa Buluma is his father. It was his testimony that he was aware of the agreement between Andrew Osundwa and Francis Barasa Buluma although he was not a witness. The witness testified that his father exchanged his land LR No. Wanga/khalaba/411 with LR No. Ndivis/muchI/198 which belonged to Andrew Osundwa. It was his further testimony that he does not know the person in occupation of LR No.wanga/khalaba/411 and denied the allegation that one Ramadhan Shiteshe Mutali was the owner of the said land.
8. When referred to D-Exhibit1, the witness stated that in that agreement, his father was to pay a consideration of Ks279,900/= and he paid a deposit of Kshs.40,000/= leaving a balance which was payable in installments of Kshs 1,500/= by check off through his pay slip. He testified that a sum of Kshs. 160,762/= was to be paid to AFC through two account numbers i.e. [particulars withheld] and [particulars withheld] in the name of Andrew Osundwa and that the same was paid as per D-Exhibit 1,2,4 and 5. He denied knowledge of Bungoma SRC CC NO. 24 of 1992 a suit where his father Francis Barasa Buluma had allegedly been sued by Andrew Osundwa. It was his evidence that a title deed was to be issued to his father after the entire debt owed to AFC had been paid. He testified that a caution



had been placed over the title of the suit land but the same was removed and a title issued to the plaintiff through transmission. ON re-examination, he reiterated his testimony-in-chief.

### **c. Parties Submissions**

9. The plaintiff filed submissions dated 6<sup>th</sup> May, 2024 where she submitted on three issues. On the first issue, they submitted that the agreement between her late husband and the said Francis Buluma did not meet the requirements of Section 3(3) of the *Law of Contracts Act* and was therefore unenforceable. She submitted that the said agreement was not attested by either of the parties herein and therefore cannot stand. Secondly, they submitted that the defendants have not proved fraud on her part and therefore her title is protected under Section 24 of the *Land Registration Act*, 2012. Thirdly, it was her contention that having proved ownership of the suit land, she is entitled to quiet occupation and that the defendants ought to be evicted therefrom.
10. The defendants on the other hand filed submissions dated 28<sup>th</sup> May, 2024 where they submitted that the plaintiff illegally transferred the suit land to herself despite knowing that Francis Buluma had an interest on the land since 1983 and that the issue of ownership had never been cleared. They submitted that the loan amount owed to AFC was fully paid and therefore Francis Buluma was entitled to the suit land having completed such payment. It was argued that the plaintiff's suit was misplaced and that there was indeed a contract between her late husband and Francis Buluma and it was trite that the respective contractual obligations were fulfilled.

### **d. Analysis and Determination**

11. I have considered the pleadings, supporting documents, oral evidence, submissions and authorities cited by both parties and it is my considered view that the issues that commend for determination are;
  - a. Whether the plaintiff is entitled to orders of eviction as sought.
  - b. Who bears the costs of this suit.
12. The plaintiff claims that she is the legal and lawful owner of the suit land having acquired it through transmission as the wife and administrator of the estate of Andrew Osundwa. It is her claim that as the holder of title to the suit land, she is entitled to quiet enjoyment of the same to the exclusion of the defendants who have encroached onto the property. In support of her claim, the plaintiff produced a title deed in her name in relation to the suit land issued to her on 21/08/2012 as P-Exhibit 2. She also produced a green card of the suit land as P-Exhibit 3. The said green card confirms the proprietorship history of the suit land. P-Exhibit 4 was a certificate of search showing that the plaintiff was issued with a title and that a restriction was registered over the suit land on 22/07/2013.
13. The defendants on the other contend that they are lawfully on the suit land since it belongs to their father, one Francis Barasa Buluma. The defendants contend that their father purchased the suit land from one Andrew Osundwa for a consideration of Kshs 279,900/=vide an agreement dated 9<sup>th</sup> May, 1983 produced as D-Exhibit 1. It is alleged that a deposit of Kshs. 71,900/= was paid on the date of signing of the agreement. It is argued that the purchaser also transferred to the seller/vendor land parcel no. N.Wanga/Khalaba/411 worth Kshs,40,000/=being part of the consideration for the suit property leaving a balance of Kshs.167,400/= which was to be paid to AFC where Andrew Osundwa had taken up a loan and that a title would only issue to Francis Buluma upon full payment of the outstanding balance as agreed by the parties. The defendants further contend that the loan amount was paid by the purchaser Barasa Buluma(deceased) but the title deed was not released to him since the seller, Andrew Osundwa died before he could effect transfer. The defendants stated that Francis



Buluma took occupation of the suit land in 1983 and remained in occupation until he passed on in 2014, leaving them in occupation.

14. The law is very clear on the position of a holder of a title in respect to the land. Section 24(a) of the [Land Registration Act](#) which is a substantial reproduction of Section 23(1) and 27(1) of the repealed [Registered Land Act](#) which is the [Act](#) under which the suit land was registered provides for the interest conferred by registration. It provides as follows;

“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”

15. Section 26(1) of the [Land Registration Act](#) a replica of Section 28 of the [repealed Registered Land Act](#) provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as *prima facie* evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party or;
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

16. The plaintiff being the holder of title to the suit land relies on its indefeasibility conferred by statutes to protect her rights. As can be noted from the above provisions, the protection is removed and title can be impeached if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. The defendants in this case allege that the plaintiff acquired title to the suit land by misrepresentation.

17. The defendants have attached a sale agreement where they assert that the suit land was sold by the plaintiff's late husband. The plaintiff on her part asserts that she was not aware that her husband sold the property. However, the plaintiff's claim is shaken by the green card produced by both parties as P-Exhibit 3 and D-Exhibit 2 and 3. In that green card, it emerges that there have been questions of ownership of the suit land as can be seen by the multiple cautions and restrictions placed by both parties. The plaintiff herself placed a caution over the title on 25/07/1989, which raises credibility questions about her denial of any knowledge of the sale between her late husband and Francis Buluma. This is particularly noteworthy considering that Francis Buluma had initially placed a caution registered on 19/08/1986. From the green card, it seems there was a court case involving the land. However, neither of the parties have given details of that case and this court can only speculate on the reasons why the same was not disclosed by the parties.

18. Further, the plaintiff claims that the agreement presented by the defendants does not meet the requirements of Section 3(3) of the [Law of Contracts Act](#) since the same was not attested by witnesses. On examination of the said agreement, it is apparent that the same was signed/executed by Andrew Osundwa and Francis Buluma in the presence of an advocate namely J.M.Wafula who attested their signatures by appending his signature and stamp as the attesting witness. Furthermore, the agreement in issue herein is dated 9<sup>th</sup> May, 1983. It has been observed by our superior courts for umpteen times that the legal framework in Section 3(3) of the [Law of Contract Act](#) was informed by the desire to avoid



the uncertainties that prevailed in the pre-2003 era when unexecuted and unattested memoranda and the doctrine of part-performance were considered to be saving elements in non-compliant land disposal contracts.

19. Indeed, in Civil Appeal Number 22 of 2013, *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, the Court of Appeal emphasized the ramifications of non-compliance with the requirements of Section 3(3) of the *Law of Contracts Act* in the following words:

“Section 3(3) of the *Law of Contracts Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the *Law of Contracts Act* excludes the application of Section 3(3) of the said *Act* to contracts made before the commencement of the subsection. Section 3(3) of the *Law of Contracts Act*, came into effect on 1st June, 2003. .... Prior to the amendment of Section 3(3) of the *Law of Contracts Act* in 2003, the subsection read as follows: -

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (i) Has in part performance of the contract taken possession of the property or any part thereof; or
- (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.” (Emphasis added)”

20. Therefore, it is my view that the agreement between Francis Buluma and Andrew Osundwa in respect of the suit land is valid. Upon payment of a deposit of Kshs.71,600 and Andrew Osundwa having handed possession of land parcel No. N.wanga/Khalaba/411, Andrew Osundwa passed his interest over the suit land to Francis Buluma who now was to settle the balance payable to AFC.
21. The defendants in support of their defence further produced letters dated 27/01/1991 and 17/12/1998 as D-Exhibit 4 and 5 which support their claim that their father Francis Buluma was to pay the balance of the purchase price to AFC through check off to the loan account of Andrew Osundwa as prescribed in the sale agreement. The defendants testified that their father completed all the payments as required through direct remittance from his salary through his employer, Teachers Service Commission (TSC). The plaintiff in her evidence did not rebut this assertion by the defendants. This court on examination of D-Exhibit 4 and 5, notes that AFC threatened to exercise their statutory power of sale to recover the outstanding debt. This Court has not been informed of any sale conducted by AFC for the purpose of recovery. I agree with the defendants that such a sale was unnecessary since the arrears were paid by Francis Buluma through his employer TSC.
22. It is my considered view therefore, that the plaintiff indeed misrepresented information in the succession cause and at the lands office resulting to a title being issued in her name.



23. Finally, Section 27 of the *Civil Procedure Act* provides that costs follow the event/cause unless the Court for some good reason orders otherwise. In my considered view the defendant being the successful party in this case is entitled to costs.
24. In the upshot, I find that the plaintiff's suit is devoid of merit and the same is hereby dismissed with costs to the defendants

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Juma Waswa for the plaintiff
2. Mr. Wanjala for the defendants
3. Bett C/A

