



Obonyo & 3 others v Odhiambo & 2 others (Environment & Land Case E023 of 2022) [2024] KEELC 5682 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E023 OF 2022**

SO OKONG'O, J

JULY 24, 2024

BETWEEN

**FREDRICK OTIENO OBONYO 1ST PLAINTIFF
MILDRED AKINYI OTIENO 2ND PLAINTIFF
MESHACK ODUOR OTIENO 3RD PLAINTIFF
WILFRED MIYAI OTIENO 4TH PLAINTIFF**

AND

**ROSE ACHIENG ODHIAMBO 1ST DEFENDANT
MUHORONI/NYANDO DISTRICT LAND REGISTRAR 2ND DEFENDANT
THE ATTORNEY GENERAL 3RD DEFENDANT**

RULING

1. The Plaintiffs brought this suit against the 1st Defendant on 12th July 2022. The plaint was amended on 7th February 2023 to add the 2nd and 3rd Defendants as parties to the suit. In their amended plaint, the Plaintiffs averred that they were registered as the joint proprietors of, all that parcel of land known as Kisumu/Sidho East/2840 (hereinafter referred to as “Plot No. 2840”) around 16th May 2013 and all that parcel of land known as Kisumu/Sidho East/2761 (hereinafter referred to as “Plot No. 2761”) around 21st June 2016. The Plaintiffs averred that they were innocent purchasers for value of Plot No. 2840 and Plot No. 2761(hereinafter together referred to as “the suit properties”).
2. The Plaintiffs averred that around 13th March 2018 and 14th February 2022, the 1st Defendant and/or 2nd Defendant registered restrictions against the titles of Plot No. 2840 stopping any dealings with the said parcel of land. The Plaintiffs averred that on or about 31st January 2020, the 1st and 2nd Defendants registered a restriction against the title of Plot No. 2761 pending the determination of a suit that the



- 1st Defendant had filed against the Plaintiffs which suit was struck out on 4th February 2021. The Plaintiffs averred that despite the striking out of the said suit, the 2nd Defendant refused to remove the said restriction from the title of the said property. The Plaintiffs averred that in December 2020, the 1st Defendant entered Plot No. 2840 without the Plaintiffs' permission and planted bananas, sugar cane and maize thereon. The Plaintiffs averred that the 1st Defendant also destroyed the beacons and the boundaries of the suit properties. The Plaintiffs averred that they were claiming damages from the 1st Defendant for wrongful entry onto the suit properties and the lifting of the restrictions placed against the titles of the suit properties.
3. The Plaintiffs sought judgment against the Defendants for among others; a permanent injunction to restrain the Defendants from interfering with the suit properties, general damages for trespass and an order for the removal of all restrictions registered against the titles of the suit properties.
 4. The 1st Defendant filed a defence and a counter-claim against the Plaintiffs on 4th May 2023. In her defence, the 1st Defendant averred that the Plaintiffs acquired Plot No. 2840 and Plot No. 2761 (the suit properties) unprocedurally, irregularly, fraudulently and illegally. The 1st Defendant averred that she had a legal and beneficial interest in the suit properties. The 1st Defendant averred that she had lived with her family on the suit properties for over 20 years. The 1st Defendant averred that she was justified in registering restrictions against the titles of the suit properties after the fraudulent transfer of the same to the Plaintiffs.
 5. In her counter-claim, the 1st Defendant averred that she was a daughter-in-law to Oruko Angonga deceased who had two wives, Margaret Odongo Oruko and Serfina Mbai Oruko. The 1st Defendant averred that she was the widow of James Odhiambo Oruko who was the son of Serfina Mbai Oruko with Oruko Angonga. The 1st Defendant averred that Oruko Angonga deceased was the registered owner of the parcels of land known as Title Nos. Kisumu/Sidho East/764, 1799 and 802 (Plot No. 764, 1799 and 802 respectively). The 1st Defendant averred that her stepmother-in-law, Margaret Odongo Oruko without first obtaining a Grant of Letters of Administration in respect of the estate of Oruko Angonga caused Plot No. 764, 1799 and 802 to be transferred to her name. The 1st Defendant averred that she subsequently subdivided; Title No. Kisumu/Sidho East/764 into Title Nos. Kisumu/Sidho East/2785 and 2786, Title No. Kisumu/Sidho East/2785 into Title Nos. Kisumu/Sidho East/2839 and 2840, and Title No. Kisumu/Sidho East/1799 into Title Nos. Kisumu/Sidho East/2759, 2760 and 2761. The 1st Defendant averred that in collusion with the Plaintiffs, the said Margaret Odongo Oruko caused Plot No. 2840 and Plot No. 2761 (the suit properties) to be fraudulently transferred and registered in the names of the Plaintiffs without succession proceedings having been undertaken in respect of the estate of Oruko Angonga. The 1st Defendant averred that since she was married into the family of Oruko Angonga, her matrimonial home had been and still was on Plot No. 2840 which was hived from Plot No. 764. The 1st Defendant averred further that she had all along been doing subsistence farming on Plot No. 2761 which was hived from Plot No. 1799.
 6. The 1st Defendant sought judgment against the Plaintiffs in her counter-claim for among others; an order restraining the Plaintiffs from interfering with her peaceful use and occupation of the suit properties, an order cancelling the subdivision of Plot Nos. 764, 1799 and 802, the cancellation of the titles held by the Plaintiffs in respect of Plot Nos. 2840, 2761 and 2786, and the reversion of the titles for Plot Nos. 764, 1799 and 802 to the name of Oruko Angonga, deceased.
 7. The Plaintiffs filed a reply to defence and a defence to the 1st Defendant's counter-claim on 31st May 2023. The Plaintiffs denied that they acquired titles to the suit properties through collusion, fraud, illegally and unprocedurally and put the 1st Defendant to strict proof thereof. The Plaintiffs averred



further that the 1st Defendant's counter-claim that was "fraud-anchored" was fatally defective and/or statute barred.

8. On 4th December 2023, the Plaintiffs filed a Notice of Preliminary Objection dated 1st December 2023 to the 1st Defendant's counter-claim. The Plaintiffs contended that the 1st Defendant's counter-claim was time-barred under Section 4(2) of the *Limitation of Actions Act* as read with Section 26 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya in that, the same was based on fraud whose limitation period was 3 years. The Plaintiffs contended that the 1st Defendant was aware of the alleged fraud by the Plaintiffs as early as "around" 17th March 2017 or 8th March 2018 or 24th January 2020 according to the 1st Defendant's witness statement and bundle of documents. The Plaintiffs contended that the 1st Defendant did not file her counter-claim based on the alleged fraud until 4th May 2023 over 3 years after she discovered the fraud without leave of the court. The Plaintiffs urged the court to strike out the counter-claim with costs to the Plaintiffs.
9. The Plaintiffs' Preliminary Objection was heard by way of written submissions. The Plaintiffs filed submissions dated 4th June 2023. The Plaintiffs submitted that the 1st Defendant's counter-claim was time-barred. The Plaintiffs submitted that the limitation period for tort was 3 years and if the action was based on fraud, the limitation period did not begin to run until the fraud was discovered. The Plaintiffs submitted that the 1st Defendant was aware of the alleged fraud during the period between 17th March 2017 and 20th July 2017 when the 1st Defendant appeared at Tamu Law Court as an accused person in Tamu SRM Criminal Case No. 90 of 2017 in which the 1st Plaintiff was the complainant. The Plaintiffs submitted further that the 1st Defendant could also have become aware of the alleged fraud between 24th January 2020 and 4th February 2021 when she prosecuted an Originating Summons filed in Kisumu ELC No. 4 of 2020(O.S) which was struck out. The Plaintiffs submitted that the 1st Defendant's counter-claim was based on the alleged fraud and that the same was filed on 4th May 2023 over 3 years from the time she became aware of the fraud. The Plaintiffs urged the court to strike out the counter-claim with costs.
10. The 1st Defendant filed grounds of opposition and submissions both dated 12th June 2024. The 1st Defendant contended that the Plaintiffs' preliminary objection lacked merit as it did not raise a pure point of law. The 1st Defendant submitted that her claim was not a tortious claim but a claim to recover land unprocedurally transferred to the Plaintiffs. The 1st Defendant submitted that the applicable limitation period for the claim was 12 years as provided in Section 7 of the *Limitation of Actions Act*. The 1st Defendant submitted that the Plaintiffs' preliminary objection did not raise a pure point of law based on undisputed facts. The 1st Defendant cited *Ahmed Said Mohamed v. Municipal Council of Garissa & Another* [2014]eKLR and submitted that fraud is a matter that cannot be determined on a preliminary objection. The 1st Defendant submitted that she should be allowed to prove her allegations of fraud. The 1st Defendant submitted that the Plaintiffs' preliminary objection lacked merit and should be dismissed with costs.

Analysis and determination

11. I have considered the Plaintiffs' Notice of Preliminary Objection and the submissions by the advocates for the parties. In *Hassan Ali Joho & Another v. Sulaiman Said Shahbal & 2 others* (2014) eKLR, the Supreme Court stated as follows on preliminary objections:

"To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors* (1969) EA 696.



12. ‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.’

In *Oraro v. Mbaja* [2005] 1KLR141, the court stated that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

13. It is on the foregoing principles that the Plaintiffs’ Notice of Preliminary Objection falls for consideration. I agree with the 1st Defendant that the Plaintiffs’ preliminary objection was improperly taken. The point taken by the Plaintiffs in their preliminary objection does not raise a pure point of law. I have set out at the beginning of this ruling the Plaintiffs’ claim and the 1st Defendant’s counter-claim. In her counter-claim, the 1st Defendant contended that the registration of the suit properties in the names of the Plaintiffs was unlawfully, unprocedurally and fraudulently undertaken. The 1st Defendant contended that the suit properties originated from Plot Nos. 764, 1799 and 802 which were owned by Oruko Angonga, deceased. The 1st Defendant contended that without undertaking succession proceedings in respect of the estate of the deceased and obtaining a Grant of Letters of Administration, one of the deceased widows, Margaret Odongo Oruko illegally and fraudulently caused the said parcels of land to be transferred to her name and thereafter subdivided the same which subdivisions gave rise to among others the suit properties registered in the names of the Plaintiffs. The 1st Defendant who claims to be a beneficiary and an administrator of the estate of the deceased has sought the cancellation of the subdivision of Plot Nos. 764, 1799 and 802 and the titles held by the Plaintiffs in respect of the suit properties. The 1st Defendant has also sought an order returning Plot Nos. 764, 1799 and 802 to the name of Oruko Angonga deceased.
14. I agree with the 1st Defendant that her claim is a claim for the recovery of the suit properties rather than a claim based on tort. The fact that the 1st Defendant has pleaded fraud against the Plaintiffs does not make her claim a claim in tort. As correctly submitted by the 1st Defendant, the Limitation period for claims for recovery of land is 12 years. Section 26 of the *Limitation of Actions Act* provides that where the claim is based on fraud or mistake the limitation period does not run until the fraud or mistake is discovered. The 1st Defendant’s claim is not based solely on the Plaintiffs’ alleged acts of fraud. The 1st Defendant has also contended that the transfer of the suit properties to the Plaintiffs was illegal and unprocedural. Even if it is assumed that the claim was based solely on fraud and that the limitation period was 3 years as claimed by the Plaintiffs, the issue as to when the 1st Defendant discovered the alleged fraud is a matter of fact that requires evidence. The issue cannot be determined on a preliminary objection.
15. The upshot of the foregoing is that I find no merit in the Plaintiffs’ preliminary objection. The preliminary objection is dismissed with costs to the 1st Defendant.

DELIVERED AND DATED AT KISUMU ON THIS 24TH DAY OF JULY 2024



S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Okello for the Plaintiffs

Mr. Otieno H. for the 1st Defendant

N/A for the 2nd and 3rd Defendants

Ms. J.Omondi-Court Assistant

