



Magati & another v Mohamed & 2 others (Environment & Land Case 18 of 2017) [2024] KEELC 14216 (KLR) (19 November 2024) (Judgment)

Neutral citation: [2024] KEELC 14216 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 18 OF 2017
GMA ONGONDO, J
NOVEMBER 19, 2024**

BETWEEN

JOSEPH ONYANGO MAGATI 1ST PLAINTIFF

DAVID WANKURU MAGATI 2ND PLAINTIFF

AND

JEMILA ALUOCH MOHAMED 1ST DEFENDANT

LAND REGISTRAR, MIGORI 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. By a plaint dated 15th February 2016, the plaintiffs represented by Geoffrey Otieno and Company Advocates, sued the defendants for;
 - a. An order of temporary injunction restraining the 1st defendant herein whether by herself, her agents and/or servants from in any manner whatsoever dealing with or disposing or in any other manner alienating all the parcel of land registered as LR No. Suna East /Wasweta 1/530 [The suit land herein].
 - b. An order of permanent injunction restraining the 1st defendant herein whether by herself, her agents and/or servants from in any manner whatsoever dealing with or disposing or in any manner alienating the suit land.
 - c. A declaration that the Plaintiff herein is still the bona fide owner and proprietor at law of all that property registered as the suit land.
 - d. An order that the 2nd defendant do rectify the Register by cancellation of the current title for the suit land and have the same registered as proper title under the proprietorship of the Plaintiffs.



- e. Costs of this suit.
 - f. Interest on costs at court rates.
2. Briefly, the plaintiffs claim that following the adjudication process, they became the duly registered and lawful owners jointly with three others being John Ogola Magati [Deceased-1], Mwangari Magati Mwangari [Deceased-2] and Charles Nyamwanga Magati [Deceased-3] of the suit land under the Registered Land Act Chapter 300 Laws of Kenya-Repealed Act. That sometime in the year 2015 they were surprised to learn that the suit land had been fraudulently transferred to Mohammed Eggie [Deceased-4] and the title deed thereafter had been issued to his widow, the 1st defendant without their knowledge or consent hence, provoking this suit. They pleaded particulars of fraud in the plaint.
 3. The 1st plaintiff [PW1] relied on his statement dated 15th February 2016 and their list of documents dated 15th February 2016 [PExhibits 1 to 4]. He stated that his brothers namely the 2nd plaintiff, deceased-1, deceased-2 and deceased-3 and himself are registered proprietors of the suit land with effect from 15th July 1973 and cultivate it but no person stays thereon. That in the year 2015, they discovered that the suit land was registered in the name of the 1st defendant.
 4. Under cross examination, PW1 stated that he used to live together with his deceased parents on the suit land which belonged to his parents. That they did not sell the suit land in 1973 and he was not aware of the defendant's list of documents. That his brothers who were not parties to the alleged title deed of the 1st defendant, died in the years 2006, 2007 and 2014 as per PExhibits 2a, b and c.
 5. During further cross examination on 6th December 2022, PW1 could not recall the exact number of the suit land. He stated that he is one of the co-owners of the suit land. That the other four co-owners of the suit land are all deceased. That he has been in occupation of the suit land since 1973 but has no title to it. That the 1st defendant took occupation of the same in the year 2015. That he is not aware of any succession filed in court. That the 2nd defendant was issued with title in respect of the land without his knowledge hence, rendering this suit necessary.
 6. In re-examination, PW1 stated that he has sued on behalf of his brothers who were all in occupation of the suit land and they were alive in the year 2004. That they realized that the suit land was transferred to the 1st defendant. That he could not remember the land parcel number in dispute.
 7. In the submissions dated 20th October 2023, learned counsel for the plaintiffs referred to the plaint inclusive of the orders sought therein, the testimonies of PW1, the 1st defendant [DW1] and DW2, Carol mutai, Land Registrar Migori. Issues for determination identified in the submissions include whether the plaintiffs were the beneficial and original proprietors of the suit land, whether fraud in acquisition of the suit land is pleaded and proved against the defendants and whether there is merit in the counterclaim. Counsel cited section 26 of Land Registration Act 2016 [2012], the case of Elijah Makeri Nyangwarav Stephen Mungai Njuguna & another [2013] eKLR and urged the court to allow plaintiffs' case and dismiss the 1st defendant's counter claim with costs.
 8. By her defence and counter claim dated 9th March 2019, the 1st defendant through Mogeni and Company Advocates, denied the plaintiffs' claim, termed the suit bad in law and that same be dismissed. She stated that the plaintiffs were registered as proprietors of the suit land not jointly but as tenants in common with three others [Deceased-1, 2 and 3] on the ration 1/5 share of five shares. That the land was transferred to one Deceased-4 and later to the 1st defendant on the strength of a transfer executed by the plaintiffs and the three deceased persons in the year 1973.



9. In the counter claim, the 1st defendant/counter claimer stated, inter alia, that she is the Administrator of the estate of Deceased-4, a beneficiary and a widow of deceased-4. That Deceased-4 entered into an agreement for purchase of the suit land from the plaintiffs together with deceased-1, deceased-2 and deceased-3 who are tenants in common in 1973. That the said five tenants in common signed the consent for the transfer of the suit land in favour of deceased-4. That the 1st defendant has been in continuous and uninterrupted occupation of the suit land since 1973 to-date.
10. Thus, the 1st defendant prays that judgment be entered for her for the orders infra;
 - a. Declaration that the Plaintiff's title on the suit land is extinguished by way of adverse possession.
 - b. Costs of the suit.
 - c. Such other orders as to this Court may deem fit.
11. The 1st defendant [DW1] relied on her statement and other documents filed on 11th March 2016 as part of her evidence. She stated that deceased-4 died in 1994 after he bought the suit land from the plaintiffs in the year 1973. That she has been in possession of the suit land until 2022 when the plaintiffs started claiming it.
12. In cross examination by counsel for the plaintiffs, DW1 stated that her husband died on 9th July 1993 and she filed succession proceedings as regards his estate. That the suit land was part of the estate of her deceased-4 who purchased it.
13. Under cross examination by Opiyo for 2nd and 3rd defendants, DW1 stated that deceased-4 bought the suit land from all the five co-proprietors. That she has grant of letters of administration in respect of the estate of her deceased husband.
14. In the submissions dated 1st February 2024, learned counsel for the 2nd and 3rd defendants set out the plaintiffs' case and delineated issues which include; locus standi of the parties pegged on type of ownership of the suit land and distinguish between joint and common tenancies as held Isabel Chelangatv Samuel Tiro Rotich & 5 others [2012] eKLR and Land Act definition on common tenants who have no right of survivorship. Counsel submitted that the plaintiffs have no locus standi in this case and there was no fraud proved on the part of Deceased-4 who bought the suit land but died before its transfer to him and DW1 obtained title of the suit land by transmission. To fortify the submissions, counsel cited Musongav Nyati [1984] eKLR and Koinangev Koinange [1986] eKLR & other cases on proof of fraud and urged the court to dismiss the suit with costs to the defendants.
15. In the foregone, the issues for determination crystallize to whether; [a] the parties have locus standi in their respective suits
 - b. Subject to issue [a] above, have the parties proved their respective cases to the requisite standards to attract the orders sought herein?
16. Notably, this suit was dismissed on 16th December 2019 for non-appearance of the plaintiffs under Order 12 rule 3 [1] of the Civil Procedure Rules 2010. However, it was reinstated on 26th February 2020 pursuant to an application by way of notice of motion dated 17th December 2019.
17. The parties attempted to resolve the dispute through alternative dispute Resolution [ADR] mechanism but it failed as shown in proceedings of 9th May 2018 herein.



18. On the issue of Locus standi, I subscribe to the decision in the case of Alfred Njau and others v City Council of Nairobi [1982-88] 1 KAR 229 where the Court of Appeal reasoned;

“locus standi is the right to appear or be heard in court or other proceedings.....”

19. The statement of PW1 which was adopted as part of his evidence, is to the effect that he was jointly registered together with the 2nd plaintiff, deceased-1, deceased-2 and deceased-3 as well as the 2nd plaintiff as joint proprietors of the suit land. PExhibits 2 a, 2b and 2c are certificates of death regarding deceased-1 who died on 16th April 2006, deceased-2 who died on 25th March 2014 and deceased-3 who died on 16th July 2007 respectively.

20. The testimony of PW1 was that his co-proprietors are all deceased except the 2nd plaintiff. Also, this is in line with paragraphs 6, 7 and 8 of the plaint.

21. Further, it is alleged in paragraphs 8 and 9b of the plaint that the suit land was secretly transferred and registered in the name of Deceased-4 and then to the 1st defendant, widow of the deceased-4.

22. In paragraph 3, 4 and 5 of the defence, it is stated that the plaintiffs and three others [deceased-1, 2 and 3] are tenants in common on the ratio of 1/5 of 5 shares.

23. The term ‘Legal Representative’ is defined in section 2 of the *Civil Procedure Act* Chapter 21 Laws of Kenya. This court is not unaware of the relevance of Order 24 rule 5, Order 31, Order 3 rule 7, Order 2 rule 15 of the Civil Procedure Rules 2010 herein.

24. Plainly, the plaintiffs are not suing as legal representatives of deceased-1, deceased-2 and deceased-3 who had died as at time of filing this suit as revealed in PExhibits 2a, 2b and 2c. They owned the suit land as common tenants taking into account Isabel Chelangat case [supra] and Halsbury’s Laws of England 4th Edition Volume 39 paragraph 539.

25. Equally, the 1st defendant is not sued as legal representative of the deceased-4 in the suit. In light of paragraphs 11, 12 and 13 of the counter claim and the grant in respect of the estate of Deceased-4 [DExhibit 2] as well as DExhibits 1 and 3, the 1st defendant has not sued the plaintiffs on their own behalf and as legal representatives of the estates of deceased-1, deceased-2 and deceased-3, proprietors of the suit land.

26. The estate of the deceased person is vested in the legal representative; see Trouistik Union International and another v Jane Mbeyu [1993] eKLR

27. Further, in Omari Kaburu v Industrial Credit and Development Corporation [2007] KLR, Wanjiru Karanja J [Now, JA] held;

“The law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased.....”

28. Similarly, in Republic v Attorney General and another Ex parte John Mugo [2013] eKLR, H. Ong’undi J, stated;

“and a legal representative is a person who has been issued letters of grant. This is provided for under section 82 [a] of the *Law of Succession Act*.....the applicant can not fail to follow the procedure and hide under Article 22 [1] and [2] of *the Constitution*.....the Law of Succession is clear that it must be the legal representative.....”



29. A litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in cases of intestate succession; see *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR and *Alfred Njau* case [supra].
30. Clearly, there is no demonstration that the plaintiffs are the legal representatives of deceased-1, deceased-2 and deceased-3 and that they are suing as such in the suit. There is no revelation that the suit is against the 1st defendant in her capacity as the legal representative of deceased-4. Also, the counter claim does not disclose that the plaintiffs are sued in their capacity as the legal representatives of deceased-1, deceased-2 and deceased-3. Therefore, the plaintiffs' suit and the 1st defendant's counter-claim lack locus standi in their respective claims in the instant matter.
31. On that score, I find it absolutely pointless to delve into the 2nd issue for determination herein.
32. In the premises, the suit by way of the plaint and the counter in this matter are misconceived, incompetent and fail.
33. Thus, the present suits by way of the plaint and the counter claim herein, are hereby struck with no orders as to costs.
34. It is so ordered.

DATED AND DELIVERED AT MIGORI THIS 19TH DAY OF NOVEMBER 2024.

G M A ONGONDO

JUDGE

Present;

Joy Temba instructed by Otieno learned counsel for the plaintiffs

Opiyo Esther learned counsel for the 2nd and 3rd defendants

S. Mogeni instructed by for Chacha for the 1st defendant

Tom Maurice, court assistant

