



**Owino (Suing as the legal representative of the Estate of Mbero Owino alias Peter Mbero Owino - Deceased) v Omer (Sued as the legal representative of the Estate of Pamela Ochieng Rombo - Deceased) & 2 others (Environment & Land Case E026 of 2022) [2024] KEELC 7435 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7435 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE E026 OF 2022**

**E ASATI, J  
NOVEMBER 7, 2024**

**BETWEEN**

**JUSTUS OWINO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MBERO OWINO ALIAS PETER MBERO OWINO - DECEASED) ..... PLAINTIFF**

**AND**

**SHEILA ADHIAMBO OMER (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PAMELA OCHIENG ROMBO - DECEASED) 1<sup>ST</sup> DEFENDANT  
THE COUNTY LAND REGISTRAR, KISUMU ..... 2<sup>ND</sup> DEFENDANT  
THE HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. Vide the plaint dated 25<sup>th</sup> August, 2022 Justus Owino Oduny, in his capacity as the legal representative of the estate of Mbero Owino alias Peter Mbero Owino, deceased, sued the Defendants herein.
2. His case was that at all material times Mbero Owino alias Peter Mbero Owino, deceased, was the registered and beneficial owner of a parcel of land known as Kisumu/Kanyawegi/1544 measuring 0.43Ha ( the suit land herein)on a first registration. He pleaded that after the death of the deceased, the suit land became part of the deceased's estate.
3. That sometime in the year 2005, Pamela Achieng Rombo, deceased fraudulently and in collusion with the 2<sup>nd</sup> Defendant got herself registered as proprietor of the suit land. He sued the 1<sup>st</sup> Defendant in her



capacity as the legal representative of the estate of Pamela Achieng Rombo. The Plaintiff sought for the following orders: -

- a. A declaration that the estate of Mbero Owino alias Peter Mbero Owino – deceased is the legitimate owner of land parcel No. Kisumu/Kanyawegi/1544.
  - b. An order for cancellation of the title deed for land parcel number Kisumu/Kanyawegi/1544 in the name of Pamela Achieng Rombo – deceased and the issuance of a new title for the said parcel of land in favour of Mbero Owino alias Peter Mbero Owino – deceased.
  - c. A permanent injunction to restrain the Defendants whether by themselves, their agents, servants, assigns, guards or anybody howsoever acting on their behalf or behest from entering, intermeddling or in any manner dealing with the land parcel Kisumu/Kanyawegi/1544.
  - d. General damages for deliberately intermeddling with the estate of a deceased person.
  - e. Costs of the suit.
  - f. Any other further relief that the court may deem just and fit to grant.
4. In response to the Plaintiff's claim, the 1<sup>st</sup> Defendant filed a defence and counterclaim dated 11<sup>th</sup> October, 2022. The 1<sup>st</sup> Defendant denied the Plaintiff's claim and averred that the deceased sold the land to Pamela Ochieng Rombo, also deceased, vide agreement dated 21<sup>st</sup> April, 1992 before his death. Vide the counterclaim, the 1<sup>st</sup> Defendant sought for orders;
- a. That the suit be dismissed with costs to the 1<sup>st</sup> Defendant
  - b. A declaration that the estate of Pamela Achieng Rombo (deceased) is the proper, current and legal proprietor of parcel of land No. Kisumu/Kanyawegi/1544.
  - c. Judgement be entered on the counterclaim in the 1<sup>st</sup> Defendant's favour against the Plaintiff for trespassing and intermeddling with the estate of Pamela Ochieng Rombo (deceased).
  - d. An order of permanent injunction be issued against the Plaintiff preventing the Plaintiff or the Plaintiff's servants, agents, assigns or representatives from entering onto or dealing with or interfering with the quiet and peaceful enjoyment of parcel number Kisumu/Kanyawegi/1544.
  - e. Costs of the suit.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their Statement of Defence dated 21<sup>st</sup> September, 2022 denying the Plaintiff's claim.

### **The Evidence**

6. The Plaintiff testified as PW1 and called one witness. He adopted the contents of his witness statement dated 25<sup>th</sup> August, 2022. He had stated in the witness statement that the suit land belonged to the deceased who occupied it till his death on the 10<sup>th</sup> June, 1992. That after the death of the deceased, the Plaintiff has been occupying and utilizing the land by planting food crops like maize, without disturbance.
7. That in January, 2022 some strangers trespassed onto the land claiming ownership. That upon inquiry, he found out that they were agents of Pamela Achieng Rombo, deceased, and that the land had become registered in the name of Pamela Achieng Rombo in the year 2005 or thereabout.



8. He stated further that the deceased never sold or transferred the land to anybody and that the Defendants colluded to cause registration of the suit land in favour of Pamela Achieng Rombo.
9. The plaintiff produced Grant of Letters of Administration Ad Litem, certificate of death for Mbero Owino, Chief's letter dated 8<sup>th</sup> February, 2022, photographs, green card and certificate of official search for the suit land, copy of adjudication record, Minutes dated 14<sup>th</sup> March, 2022 and demand notice dated 8<sup>th</sup> February, 2022.
10. On cross-examination, PW1 stated that he was a nephew of Mbero Owino. That the deceased had no wife or children. That Pamela's title was issued in the year 2007 and that there was fraud. That documents from lands office show that Peter Mbero's name was cancelled, a new green card prepared and title deed issued to Pamela Achieng.
11. That he never saw any transfer form. That he discovered the fraud in the year 2022. That when he went to the land registry, they told him that there was no transfer documents and they gave him the green card.
12. PW2 was Mike Odhiambo Opung. He adopted the contents of his witness statement dated 25<sup>th</sup> August, 2022 as his evidence. He had stated in the witness statement that since the deceased did not marry or have children, it was the Plaintiff who took over the responsibility of the land and was utilizing it by planting crops to date. That he (PW2) also utilizes a portion thereof. That the deceased did not sell or transfer any portion of the suit land. On cross-examination, he stated that he did not know how Pamela got the land.
13. On behalf of the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant testified as DW1 and called one witness. She adopted the contents of her witness statement dated 11<sup>th</sup> October, 2022 as her evidence in chief. She stated that Pamela Achieng Rombo was the lawful registered proprietor of the entire of the suit land. That Pamela purchased the suit land from the original owner one Peter Mbero Owino vide an agreement dated 21<sup>st</sup> April, 1992.
14. That at the time the land was bought, it was still in the adjudication stage so the necessary steps were taken to amend the records to show Pamela Ochieng Rombo as the new owner before title deed was eventually issued years later in 2005. That there was no fraud. That Pamela Ochieng had had peaceful and quiet enjoyment for 30 years and that it is only recently after the death of Pamela that the Plaintiff appeared and laid claim to the land. That the Plaintiff has recently been trying to plant crops on the land as a way to forcefully occupy the land.
15. That the plaintiff's claim was time barred by law as it has been lodged more than 12 years since title was issued.
16. That the adjudication record produced by the Plaintiff shows that there was an objection that was lodged, heard and allowed to the effect that the plot be transferred to Pamela Ochieng Rombo and that no formal appeal has ever been lodged.
17. DW1 produced Grant of Letters of Administration in respect of the estate of Pamela Achieng Rombo, certificate of confirmation of Grant and land sale agreement.
18. She testified further that it was her grandmother by the name of Margaret Lima who had been using the land. She prayed that the prayers in the counter-claim be allowed.
19. On cross-examination, DW1 stated that the name of Pamela Achieng was not on the sale agreement. That the adjudication record shows that there was a name that was cancelled and the name of Pamela Achieng Rombo inserted. That Margaret Lima had stated that it was only part of the land that was sold



- but the title deed issued was for the entire land. That Pamela Achieng was the first registered owner of the land. That there was no appeal on the adjudication proceedings.
20. DW2 was Margaret Lima. She adopted the contents of her witness statement dated 11<sup>th</sup> October, 2022 as her evidence. She stated that Pamela Achieng bought the suit land way back in the year 1992 and she was present when the transaction commenced.
  21. That by the agreement Mbero Owino did everything possible before his death to transfer the land to Pamela and that they went to the Lands office and effected the requisite transfer and change in the records and eventually title deed was issued sometimes in 2007.
  22. That she (DW2) together with her brother Benjamin Lima and their families have always peacefully occupied the land since the 1990s. That Pamela Rombo died in 2019 and nobody claimed the land. That the plaintiff started claiming the land in the year 2020 after the death of Benjamin Lima. That the Plaintiff has no right to the land.
  23. On cross-examination, DW2 stated that she had been using the suit land since the year it was bought. That it was the whole parcel of land that was sold.
  24. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants called no witnesses although they had filed a list of documents dated 11<sup>th</sup> April 2022 containing copy of green card in respect of the suit land.

### **Submissions**

25. At the close of the evidence, parties filed written submissions. It was submitted on behalf of the plaintiff that the title held by Pamela Achieng Rombo was improperly acquired. Counsel relied on the provisions of sections 45 and 55 of the [Law of Succession Act](#) and the case of Bahola Mkalinda vs Michael Seth Ksema & 2 others to support the submissions. Counsel submitted that the registration in favour of Pamela Achieng Rombo was a nullity as the estate of the deceased could only have been dealt with under the [Law of Succession Act](#) after his death and not otherwise. That the deceased had never transferred the suit land in his lifetime.
26. Referring to Order 7 Rule 5 (a) of the Civil Procedure Rules, Counsel submitted that the Counterclaim filed without a Verifying Affidavit is defective and has to fail.
27. Counsel further submitted that from the evidence of DW2, it was only part of the suit land that Mbero Owino, deceased, had offered for sale yet Pamela Achieng got title for the entire land. That the Defendant did not produce documents to prove possession of the land since 1992.
28. Relying on section 26 of the [Land Registration Act](#), Counsel submitted that although the law is extremely protective of title, the protection can be removed and title impeached when the title is obtained by fraud or misrepresentation to which the person must be proved to be a party and secondly, where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. Counsel relied on the case of Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & another [2013]eKLR to support this submission.
29. It was submitted on behalf of the 1<sup>st</sup> Defendant that exhibit P. 7 produced by the plaintiff shows that the Pamela Achieng Rombo pursued an objection under the [Land Adjudication Act](#) and in the end, the name of the previous registered owner was substituted with that of Pamela Achieng Rombo. That the entry on the adjudication register was made on 12/4/1990 when the deceased was still alive. That if the deceased was dissatisfied he should have filed an appeal in accordance with the provisions of sections 26 and 29 of the [Land Adjudication Act](#) Cap 284 laws of Kenya, which he did not do.



30. That fraud was not proved. That it was the plaintiff who trespassed onto the suit land. That the minutes produced by the plaintiff showed that DW2 had been having possession of the land and that the plaintiff was trying to get her out. That the minutes also show that the plaintiff was the new comer onto the land.
31. That the claim is time barred because as early as 2005 the plaintiff was aware that the land was in the name of Pamela Achieng Rombo. That the plaintiff's submission that the counterclaim was invalid on account of a missing Verifying Affidavit is an afterthought as it was not raised before or during trial. That the overriding objective of the court under the *Environment and Land Court Act* and article 159 of *the Constitution* of Kenya is to do justice without undue regard to technicalities or procedures.
32. On behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, it was submitted that the burden is always on the party that alleges fraud to prove it. That fraud must be proved to a standard above a balance of probabilities but not beyond a reasonable doubt.

### **Issues for Determination**

33. From the material placed before the court, the following emerge as the issues for determination;
  - a. whether or not the deceased Peter Mbero Owino was the first registered owner of the suit land.
  - b. whether Peter Mbero Owino sold the suit land to Pamela Achieng Rombo deceased.
  - c. whether the registration of the suit land in the name of Pamela Achieng Rombo was fraudulent.
  - d. whether or not the Plaintiff trespassed onto the suit land.
  - e. whether or not the Plaintiff is entitled to the relief sought in the plaint.
  - f. whether the 1<sup>st</sup> Defendant is entitled to the relief sought in the counterclaim.
  - g. Costs.

### **Analysis and Determination**

34. The first issue for determination is whether or not the deceased was the first registered owner of the suit land.
35. The Plaintiff pleaded in paragraph 7 of the Plaint that the deceased Peter Mbero Owino was recorded as the first registered beneficial owner of the suit land in the adjudication record.
36. The Plaintiff testified and produced documents in support of his case. Adjudication record produced as exhibit was dated 23<sup>rd</sup> November, 1979. It shows that the name of Mbero Owino which had earlier been written thereon was deleted and replaced with the name of Pamela Achieng Rombo. On page 2 of the Adjudication record it shows that objection No. 1136 was allowed and land transferred to Pamela Achieng Rombo. The copy of adjudication record shows that the objection was submitted on 12/4/1990 by Pamela A. Rombo.
37. The green card produced by the Plaintiff shows that the register in respect of the suit land was opened on 17<sup>th</sup> February, 2005 and the suit land registered in the name of Pamela Achieng Rombo on the same date.
38. The same information is reflected in the certificate of official search produced by the Plaintiff. It is clear from these exhibits that indeed the name of the deceased was first entered on the adjudication record,



but through objection, the same was deleted and replaced with that of Pamela Achieng Rombo in the year 1990, deceased. Pamela Achieng Rombo subsequently became registered as first registered owner.

39. It is not therefore correct that Peter Mbero Owino was the first register owner of the suit land. His name never went beyond the adjudication stage.
40. The second issue for determination is whether or not Peter Mbero Owino sold the suit land to Pamela Achieng Rombo.
41. The plaintiff and his witness denied that the deceased ever sold or transferred the suit land to any person.
42. The 1<sup>st</sup> Defendant produced a document titled Memorandum dated 21<sup>st</sup> April, 1992 as the sale agreement signed by S. Rombo and Mbero Owino among others. The 1<sup>st</sup> Defendant and DW2 testified that the document was the land sale agreement vide which the deceased sold the suit land to Pamela Achieng Rombo. It appears the agreement was done after the objection had been submitted as shown in the adjudication record. The agreement was in writing, signed by the deceased Mbero Owino and witnessed by the witnesses listed therein. The plaintiff produced no evidence to controvert the agreement.

I find that the deceased sold the suit land to Pamela Achieng Rombo.

43. The next question is whether or not registration of the suit land in the name of Pamela Achieng Rombo was fraudulent.
44. The Plaintiff pleaded in paragraph 10 of the plaint that the transfer and registration of the suit land in the name of Pamela Achieng Rombo was fraudulent. The Plaintiff pleaded and itemized the particulars of fraud as;
  - a. Cancelling the name of Mbero Owino alias Peter Mbero Owino, deceased from the adjudication records and replacing it with that of Pamela Achieng Rombo, deceased.
  - b. Transferring the property of a deceased person without any regards to the beneficiaries of the estate of the deceased.
  - c. Effecting the registration of Pamela Achieng Rombo, deceased as the registered owner of land parcel number Kisumu/Kanyawegi/1544 after the death of the deceased without the authority from the court.
  - d. Intermeddling with the property of a deceased person without any regards to the law of succession.
  - e. Substituting the name of Mbero Owino alias Peter Mbero Owino, deceased with that of Pamela Achieng Rombo in the adjudication record yet she is not a relative of the deceased, coming from that location or ancestry.
  - f. Recording the name of Pamela Achieng Rombo in the adjudication record without following the required procedure.
  - g. Colluding and illegally using manipulated documents.
  - h. Generating and processing falsified documents.
  - i. Consciously entering into and executing an elaborate fraudulent transaction.
  - j. An open deliberate and conscious abuse of office.



- k. Activation of criminal process for personal enrichment.
45. He pleaded that the suit land belonged to the deceased and that upon the deceased's death, the suit land became part of the deceased's estate.
46. The particulars of fraud pleaded revolve around the cancellation of the name of Mbero Owino from the adjudication record and replacement thereof by the name of Pamela Achieng Rombo. Under the provisions of section 107 to 109 of the *Evidence Act* Cap 80 Laws of Kenya, the burden of proof lay with the plaintiff. It was the plaintiff who had the burden to prove to the required degree that the transfer was done fraudulently, that it was done without the consent and or knowledge of the deceased or that it was done after the death of the deceased, that manipulated records and/or falsified documents were used to cause the registration and that a new green card was prepared after Mbero Owino's name was cancelled.
47. The standard of such proof is proof beyond the usual standard of proof in civil cases of a balance of probabilities. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that:
- “When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
48. Though the Plaintiff pleaded that the suit land became part of the estate of the deceased, no evidence was produced to show that as at the time the deceased died the suit land was in his name. As was held in the case of *Chief Land Registrar & 4 others vs Nathan Tirop Koech & 4 others* [2018]eKLR a party making a claim for declaration of title must succeed on the strength of his case and not the weakness of the defence.
49. No evidence was tendered of any acts of fraud on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
50. The 1<sup>st</sup> Defendant explained that the transactions that led to registration of Pamela Achieng Rombo as the registered owner were handled through the land adjudication process in the lifetime of the deceased.
51. The standard of proof required of claims based on fraud is higher because the consequences of proof of fraud are dire. In cases of land registration or transfer, under the provisions of sections 26 and 80 of the *Land Registration Act* proof of fraud leads to cancellation of the subject title. In the present case, one of the prayers in the plaint is that the title held by Pamela Achieng Rombo be cancelled. It was rightly submitted on behalf of the Plaintiff that the law is extremely protective of title to land. Indeed, under articles 40 of *the Constitution* of Kenya, a person shall not be arbitrarily deprived of property. Thus, sufficient proof of the exceptions under which the title can be lawfully impeached and cancelled must be provided.
52. It was submitted on behalf of the 1<sup>st</sup> Defendant that the Plaintiff's claim is time barred. The plaintiff testified vide the witness statement that it was in early January 2022 when he discovered the fraud when some strangers trespassed onto the suit land and upon inquiry, he found out that they were agents of Pamela Achieng Rombo who was claiming ownership of the land. However, perusal of the plaintiff's exhibits show that the plaintiff was aware much earlier of the fact that the land was in the name of Pamela Achieng Rombo. The green card was certified on 10/8/2021. The Minutes produced as exhibit



p.8 contain the plaintiff's narration of his claim. In his testimony before the Chief as contained in the Minutes he stated;

“ in the year 2005, Lima Andaa, late went to the Asst- Chief Kanya wegi sub-location and was asked to produce search, on producing the search a name appeared of one Pamela Achieng Rombo. The Assistant Chief Kanyawegi Mr. Philip Otengo requested that the late Lima Andaa produce Pamela Achieng Rombo. The late Lima never came back.

53. It is clear that the plaintiff was aware of the registration of the suit land in the name of Pamela from the time the certificate of official search was shown to the Assistant Chief in the year 2005. From 2005 to the year 2022 when the suit was filed, the limitation period for a claim based on fraud and or a claim for recovery of land under sections 3 and 7 of the *Limitation of actions act* had long elapsed.
54. I find that the Plaintiff has not discharged the burden of proof of the alleged fraud.
55. The next issue for determination is whether or not the plaintiff trespassed onto the suit land.
56. The plaintiff claimed that he had been occupying the land till January 2022 when some strangers whom he found out were agents of Pamela Achieng Rombo trespassed onto the land. The Defendant on the other hand contended that since the land was bought in 1992, it had been in the possession of DW2 and her family as agents of Pamela Achieng Rombo. That it is only recently after 30 years that the plaintiff appeared and started laying claim to the land, planting crops and to forcefully occupy the land.
57. The documentary evidence and particularly the Minutes produced by the plaintiff support the defendant's contention. The minutes were in respect proceedings before the chief where the Plaintiff was claiming the suit land back. He stated in the minutes dated 16/1/2022 that the land had been leased by the deceased to Lima Andaa to farm. That at first it had been given out on a friendly basis and that he wanted DW2 to desist from farming on it.
58. In the case of Alex Waigara Mwaura -vs- China Power Company Limited and another [2020]eKLR the court defined trespass to land as  

“ an intrusion by a person into land of another who is in possession or ownership.”
59. I find that on the basis of the evidence on record that the Plaintiff's actions amount to trespass to the suit land.
60. The next issue is whether the Plaintiff is entitled to the relief sought.
61. On the basis of findings that the deceased was not the registered owner of the suit land as at the time of his death and that it has not been proved that registration of the suit land in favour of Pamela Achieng Rombo was fraudulent, I find no basis to award the reliefs sought by the Plaintiff.
62. The next issue is whether or not the Defendant is entitled to the relief sought in the counter-claim.
63. On the basis of findings herein that Pamela Achieng Rombo was the first registered owner of the suit land and that it is the plaintiff who trespassed onto the suit land, I find that the Defendant is entitled to the relief sought in the counter-claim. Although it was submitted on behalf of the plaintiff that the counter claim was invalid as it did not comply with the provisions of order 7 rule 5 of the Civil Procedure Rules, I note that this objection was raised at the submissions stage after parties had closed their cases yet it is a point that ought to have been raised preliminarily for the ends of justice.



64. The upshot is that the plaintiff has not proved his case on a balance of probabilities. The suit is therefore hereby dismissed. I find that the Counterclaim has been proved on a balance of probabilities and hereby enter judgement in favour of the 1<sup>st</sup> Defendant on the counterclaim for: -

- a. A declaration that the estate of Pamela Achieng Rombo (deceased) is the proper, current and legal proprietor of parcel of land No. Kisumu/Kanyawegi/1544.
- b. An order of permanent injunction against the Plaintiff restraining him by himself and/or his servants, agents, assigns or representatives from entering onto or dealing with or interfering with the Defendant's quiet and peaceful possession and enjoyment of land parcel No. Kisumu/Kanyawegi/1544.
- c. Each party to bear own costs of the suit and of the counter claim.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Alego for the Plaintiff.

No appearance for the Defendants.

