



**Odungo v Ndisho & 2 others (Environment & Land Case 554 of 2017)
[2024] KEELC 14024 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14024 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 554 OF 2017
MN GICHERU, J
DECEMBER 20, 2024**

BETWEEN

NGOTETE OLE ODUNGO APPLICANT

AND

CECILIA NANEU NDISHO 1ST RESPONDENT

PATRICIA NJIARE GICHIRU 2ND RESPONDENT

REGISTRAR OF LAND KAJIADO COUNTY 3RD RESPONDENT

JUDGMENT

1. The plaintiff seeks the following reliefs against the defendants.
 - a. A declaration against the three defendants that the plaintiff herein is the legal owner of all that parcel of and originally known as Kajiado/Olchoro Onyore/1927, suit land.
 - b. A declaration that the transfer of the suit land to William Ndisho Ole Kaurai from the plaintiff was fraudulent and illegal.
 - c. A declaration that the subdivision of the suit land caused by the late William Ndisho Ole Kaurai was null and void.
 - d. A declaration that the transfer of the land known as Kajiado/Olchoro Onyore/3445 from the late William Ndisho Ole Kaurai to Patriciah Njiare Gichiru was illegal and unlawful and ought to be cancelled.
 - e. A declaration that the transfer by way of transmission of L.R. Kajiado/Olchoro-Onyore/3444 from the late William Ndisho Ole Kaurai to Cecilia Naneu Ndisho was illegal, unlawful and ought to be cancelled.



- f. An order of rectification of the register so that the plaintiff becomes the owner of the suit land and a title deed to be issued to him.
 - g. A permanent injunction to restrain the 2nd and 3rd defendants from entering into, fencing, building, selling, transferring and/or in any way interfering with the plaintiff's lawful use of the suit land upon consolidation of the parcels known as Kajiado/Olchoro-Onyore/3444 and 3445.
 - h. An order to the 1st defendant to pay general damages for the unlawful and illegal activities of the late William Ndisho Ole Kaurai.
 - i. An order to the 4th defendant to pay general damages for the abating (sic) and aiding unlawful activities on the land of the late William Ndisho Ole Kaurai resulting in the transferring of land belonging to the plaintiff.
 - j. Costs of the suit.
2. The plaintiff's case is as follows. One, he was the owner and occupier of L.R. No. Kajiado/Olchoro-Onyore/1927 (suit land) and L.R. No. 1928 which he inherited from his ancestors through Olchoro-Onyore Group Ranch. He was member number 83 in the group ranch membership list and his land was Plot No. 1579 in the original area list. Two, in December 2016, strangers started clearing a portion of the suit land. They were chased away by the plaintiff's son Joseph Kiyien Ngetete. Three, it later turned out that the 2nd defendant and her sons were the ones claiming that the suit land had been bought by the late William Ndisho Ole Kaurai and upon his death the land was transmitted to the 2nd defendant. Four, the plaintiff never sold his land to the deceased and the deceased had obtained title to the suit land through fraud. This was only seven days after the land was registered in the name of the plaintiff. Five, the deceased subdivided the suit land into two parcels namely Kajiado/Olchoro-Onyore/3444 and 3445. He transferred L.R. No. 3445 to the 3rd defendant who is the current registered owner thereof. Upon the death of Ole Kaurai, L.R. No. 3444 was transferred to the 2nd defendant. Six, fraud was committed by Ole Kaurai and the Land Registrar Kajiado which included presenting and accepting forged transfer documents, forging the signatures and authority of the plaintiff, fraudulently causing the suit land to be subdivided into L.R. No. 3444 and 3445, misrepresenting himself as the true owner of the suit land among other instances of fraud. Seven, the 3rd defendant also participated in the fraud by failing to exercise due diligence before having the land transferred to him, failing to set foot in the suit land for over 25 years among other instances of fraud. Finally, the plaintiff only discovered the fraud recently when the defendant attempted to occupy the land.

For the above and other reasons, the plaintiff prays for the orders as above.

3. In support of his case, the plaintiff filed the following evidence.
- i. Witness statements by himself, Kulikan Ene Odungo and Joseph Kiyien Ngotele.
 - ii. Copies of green cards for L.R. No. Kajiado/Olchoro-Onyore/1927, 1928, 3444 and 3445.
 - iii. Copy of mutation survey of L.R. No. 133, schedule of numbers and plot numbers.
 - iv. Copy of title deed for L.R. No. 3444 in the name of William Ndisho Ole Kaurai.
 - v. Copy of mutation form for L.R. No. 1927.
 - vi. Copy of certificate of official search for L.R. No. 3444 dated 17/8/2016.



- vii. Copy of letter by the director of Land Adjudication and Settlement dated 26/6/1986.
4. The 1st and 2nd defendants in a written statement of defence dated 20/9/2017 deny the plaintiff's claim and aver as follows. Firstly, the plaintiff's entire claim is denied generally. Secondly, it is averred that the plaintiff sold the suit land on 3/4/1984 for Kshs. 20,000/-. Thirdly, in November 1984 the plaintiff transferred the suit land to the deceased who took immediate possession together with the second defendant. The couple enjoyed quiet possession until sometime in November 2016. Fourthly, the plaintiff has all along known that he sold the suit land to the deceased. Fifthly, before clearing the suit land as pleaded in paragraph 8 of the plaint, the second defendant had notified the plaintiff of her intentions and the plaintiff was not opposed to it. Sixthly, the only issue that arose during a sitting convened by the area chief was the acreage of the land but not the sale of the suit land. Seventhly, the plaintiff contended that he had sold 8 but not 9 acres and it is only the plaintiff's son who claimed that their father had not sold the suit land. Finally, it is the defendants case that the purchase price of Kshs. 20, 000/= in the year 1984 was commensurate with the market rates for land in the area at the time and no fraud or other illegality was committed by any of the defendants.

For the above and other reasons, the 1st and 2nd defendants pray for the dismissal of the plaintiff's suit.

5. In support of their case, the 1st and 2nd defendants filed the following evidence.
- i. A witness statement by the 2nd defendant dated 20/9/2017.
 - ii. Copy of grant of letters of administration dated 9th February 2010.
 - iii. Copy of transfer form for the suit parcel duly thumbprinted by the Ngotete Ole Odungo on 30/11/1987.
 - iv. Copy of mutation form for the suit land duly registered on 15/4/1991.
 - v. Copy of title deed for L.R. No. 3444 dated 7/6/1991.
 - vi. Copy of sale agreement dated 3/4/1984 executed by the plaintiff and William Kaurai and witnessed by Joshua Ole Mulesi, P.C.S. Leroka, Samuel Kabati Kamau and Mrs. Rahab W. Kaurai.
 - vii. An acknowledgment of receipt by the plaintiff dated 3/4/1984 witnessed by five people who include P.C.S. Leroka, J.N. Simel, C. Ole Toimasi, M. Ketamonik and M.N. Ole Dikirr.
 - viii. Copy of certificate of official search for L.R. No. 3444 dated 17/8/2016.
6. The 4th defendant filed a written statement of defence dated 29/11/2019 in which the plaintiff's claim is denied in its totality. Secondly, the fourth defendant avers that the transfer of the suit land to the late William Ndichu was based on a transfer instrument being duly executed by the vendor and the purchaser. Thirdly, the transfers of the subdivisions of the suit land are supported by the legal instruments and the participation of the plaintiff was not necessary as he was no longer the owner of the land. Finally, all the transactions in question are backed by all necessary documents and were carried out procedurally.
7. In support of the case, the fourth defendant filed the following evidence.
- i. Application for consent of the Land Control Board, letter of consent, transfer form and stamp duty payment evidence for L.R. No. 1927.
 - ii. Mutation form for L.R. No. 1927 dated 15/4/1991.



- iii. Green cards for L.R. No. 1927, 1928, 3444 and 3445.
- iv. Investigation form for L.R. 1927.
8. At the trial on 7/3/2022 and 18/4/2023, the plaintiff Josiah Ole Muresi and Joseph Kiyien testified on the part of the plaintiff. They adopted their witness statements as their evidence before being subjected to cross-examination. On the part of the defence, the 2nd defendant and John Matheka, Land Registrar testified and produced the documents that they had filed earlier on. Generally, both sides stuck to their guns with each side reiterating what is in their pleadings.
9. Counsel for the parties were to file and serve written submissions within set timelines. By 13/12/2024 no submissions had been received from counsel for parties.
10. I have carefully considered all the evidence adduced in the case by both sides including the witness statements, documents and testimony at the trial. I find the following issues arise.
 - i. Which party has the burden of proof?
 - ii. What is the standard of that proof?
 - iii. Whether that burden of proof has been met?

11. On the 1st issue, I find that it is the plaintiff who has the burden of proof in this case. The reason for saying this is that he is the one who would fail if no evidence was adduced on either side. He is not the registered owner of the suit land and he seeks to have the registration revoked and the suit land registered in his name. Section 107(1) of the *Evidence Act* provided as follows.

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

In this case, it is the plaintiff who seeks nine orders enumerated in paragraph 32 of the plaint dated 22/3/2017. Secondly, Section 108 of the same Act provides.

“The burden of proof in a suit or proceeding lies on that person who fails if no evidence at all were given on either side.”

It is clear that the plaintiff is the one with the burden of proof.

12. On the second issue, I find that the burden of proof on the plaintiff is higher than the ordinary burden in civil cases which is on a balance of probabilities. The burden on the plaintiff is one set in the case of *Ndolo –versus- Ndolo*, Civil Appeal No. 128 of 1995 as follows.

“We start by saying that it was the respondent who was alleging that the will was a forgery and the burden of proof that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities, but the burden of proof on the respondent was not one beyond reasonable doubt as in criminal cases”.

At paragraphs 16 and 18 of the plaint dated 22/3/2017, the plaintiff has made a total of 26 particulars of fraud and unlawful transfer against the deceased William Ndichu Ole Kaurai, the 3rd and the 4th defendants. It is those allegations that he is expected to prove to the standard set in the case of *Ndolo –versus- Ndolo* (supra).



13. I find on the third and final issue that the burden has not been discharged for the following reasons. Firstly, the plaintiff has only his word and those of his two (2) witnesses saying that he did not sell the land to William Ole Kaurai. This verbal evidence is not backed by any forensic evidence from a documents examiner to prove that the thumb prints in the sale agreement, acknowledgment receipt, application for the consent of the land control and the transfer of land form are not the plaintiff's.
14. Secondly, on the same issue, I find that the second and fourth defendants have adduced credible and consistent evidence in form of sale agreements, acknowledgment receipt, application for the consent of the Land Control Board and transfer of land instruments to prove that the plaintiff sold the suit land to William Ndicho Ole Kaurai. I believe this evidence because it is consistent and corroborated by other official documents which include the green card and the investigation form together with consent of the Land Control Board. The transfer of land instrument has even the identity card number of the plaintiff. The sale agreement has the names of four witnesses while the acknowledgment receipt for the purchase price has the purchase price, has the names of five (5) witnesses in addition to the names of the plaintiff and the late William Ndicho Ole Kaurai. I do not believe that any of those documents is forged. I am satisfied that they were all executed by the plaintiff when he sold the suit land to the late William Ndicho Ole Kaurai.
15. For the above stated reasons, I find no merit in the plaintiff's suit and I dismiss it with costs to the defendants.

It is so ordered.

CON

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 20TH OF DECEMBER 2024.

M.N. GICHERU

JUDGE

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