



**Odongo v Olondo & 3 others (Environment & Land Case 108 of 2013)
[2024] KEELC 14046 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14046 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 108 OF 2013
SO OKONG'O, J
DECEMBER 19, 2024**

BETWEEN

MOSES OGUTU ODONGO PLAINTIFF

AND

JOHNSTONE OTIENO OLONDO 1ST DEFENDANT

RONALD AMOLLO OLONDO 2ND DEFENDANT

LOICE AKINYI ONYANGO 3RD DEFENDANT

DESTINY RECONCILIATION CHURCH 4TH DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendants through a plaint dated 25th April 2013. The plaintiff averred that at all material times, the plaintiff was the registered proprietor of all that parcel of land known as Plot No. 7130-Kakola Adjudication Section (hereinafter referred to as “the suit property”). The plaintiff averred that in or about 2011, the 1st and 2nd defendants unlawfully entered the suit property and forcibly buried one, Domnic Onyango Olondo thereon in total disregard of the plaintiff’s rights as the owner of the property. The plaintiff averred that the 3rd and 4th defendants had on their part put up structures on the suit property which they continued to occupy purporting to do so with the permission of the 1st and 2nd defendants. The plaintiff averred that the defendants’ occupation of the suit property amounted to trespass.
2. The plaintiff sought judgment against the defendants for;
 1. A permanent injunction restraining the defendants jointly and severally from selling, alienating, disposing of, interfering with the plaintiff’s interest or in any other way parting with possession or title of the suit property.



2. An order compelling the 1st and 2nd defendants to exhume the remains of their deceased brother buried illegally on the suit property.
 3. General damages for trespass.
 4. Costs of the suit.
3. The defendants filed a joint statement of defence on 13th June 2013. The defendants denied that the plaintiff was the registered owner of the suit property. The 1st and 2nd defendants denied that they unlawfully entered the suit property and forcibly buried their deceased brother thereon. The 1st and 2nd defendants averred that the deceased was not buried on the suit property. The 3rd defendant on her part denied that she had unlawfully entered the suit property and put up illegal structures thereon which she was occupying. The defendants denied that they were trespassers on the suit property. The defendants averred on a without prejudice basis that the plaintiff was registered as the owner of the suit property fraudulently. The defendants averred that the suit was misconceived and incompetent and urged the court to dismiss the same with costs.
 4. At the trial, the plaintiff told the court that he was the registered owner of the suit property. He stated that he purchased the property from one, James Otieno Olondo(PW2). He stated that when he filed the suit, the defendants wanted to bury the body of the 3rd defendant's husband on the suit property which burial never took place after the court stopped the same. He stated that the 3rd defendant had put up a house on the suit property which she was occupying and had also brought people who had put up Kiosks on the property who were paying her rent. He stated that the 4th defendant had occupied the suit property but vacated soon after the suit was filed against it. He urged the court to grant the reliefs sought. He produced several documents as exhibits in support of his case.
 5. The plaintiff called one witness, James Otieno Olondo(PW2). PW2 told the court that the 1st and 2nd defendants were his step-brothers. He stated that the suit property was occupied by the 3rd defendant who was his sister-in-law who was settled on the property by the 1st and 2nd defendants after the death of her husband. He stated that the 4th defendant had vacated the suit property although it left some structures thereon which were not in use.
 6. The 2nd defendant (DW1) who was the first to give evidence after the close of the plaintiff's case told the court that the suit property was family land. He denied that they buried the 3rd defendant's husband on the suit property and that he was the one who settled the 3rd defendant on the property. He stated that the 3rd defendant was taken to the suit property by her mother-in-law. The 3rd defendant (DW2) told the court that she had occupied the suit property for 14 years together with her children and grandchildren. She stated that she had nowhere to go. She stated that she was taken to the suit property by her mother-in-law. She stated that the suit property was registered in the name of PW2 as the firstborn son in the family to hold for the other members of the family because his mother (3rd defendant's mother-in-law) was not around during the land adjudication.
 7. After the close of evidence, the court directed the parties to make closing submissions in writing. The plaintiff filed submissions dated 28th March 2024. The 2nd and 3rd defendants filed separate but similar submissions both dated 21st February 2024. I have considered the pleadings and the evidence tendered by the parties both written and oral. I have also considered the submissions on record. The issues arising for determination in this suit in my view are the following;
 1. Whether the plaintiff is the lawful proprietor of the suit property.
 2. Whether the defendants trespassed on the suit property.



3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Who is liable for the costs of the suit?

Whether the plaintiff is the lawful proprietor of the suit property

8. It is not disputed that the suit property was recorded in the name of James Otieno Olondo(PW2) as the owner thereof during the land adjudication in Kakola Adjudication Section. The plaintiff produced evidence showing that he purchased the suit property from PW2 on 15th August 2008 while the land adjudication exercise was still going on in Kakola Adjudication Section. The plaintiff also placed evidence before the court showing that following that sale, there was an objection to the recording of the suit property in the name of PW2 which was successful and the adjudication record was corrected to reflect the name of the plaintiff as the owner of the suit property. The plaintiff produced further evidence showing that after the finalisation of the adjudication record, the suit property was registered in his name as the absolute owner thereof on 25th August 2015 and he was issued with a title deed on 29th February 2016.
9. The suit property was registered under the Registered *Land Act*, Chapter 300 Laws of Kenya(RLA) (now repealed) and the *Land Registration Act*, 2012. Sections 27 and 28 of the Registered *Land Act* provide as follows:
 27. Subject to this Act -
 - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
 28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:
Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.
10. Section 143(1) and (2) of the Registered *Land Act* provides as follows:
 - (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.



- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.
11. Sections 24, 25 and 26 of the [Land Registration Act](#), 2012 that repealed the Registered [Land Act](#) provides as follows:
24. Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
- 25.
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
- 26.
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.



12. Both under the Registered *Land Act* and the *Land Registration Act*, 2012, the registration of a person as a proprietor of land or lease confers upon that person the absolute ownership of the land and in case of a lease, the leasehold interest in the land. Such registration can however be nullified where it is established that the same was made or obtained through fraud, mistake, misrepresentation, illegality, procedural impropriety or corruption. The defendants contended that the suit property was owned by the 1st and 2nd defendants and PW2's deceased father and that the same was given to the 3rd defendant's deceased husband. The defendants contended that after the death of her husband, the suit property belonged to the 3rd defendant. The defendants contended that the plaintiff acquired the suit property fraudulently.
13. The term fraud is defined in Black's Law Dictionary 9th Edition as follows:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, and intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.
14. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another*[2000]eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
15. The evidence before this court traces the ownership of the suit property from the time of land adjudication in Kakola Adjudication Section up to the time the land was registered and a title in respect thereof issued. There is no evidence in that ownership chain showing that the suit property was at any time registered in the name of the 1st and 2nd defendants and PW2's deceased father or the 3rd defendant's deceased husband. The defendants made no attempt to prove the allegation of fraud against the plaintiff. The defendants having failed to establish the grounds upon which the plaintiff's title can be impeached, it is the finding of the court that the plaintiff is the lawful owner of the suit property.

Whether the defendants trespassed on the suit property

16. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. I have made a finding that the plaintiff is the lawful owner of the suit property. The 1st defendant is deceased and as such not in occupation of the suit property. The 2nd and 4th defendants from the evidence on record are not in occupation of the suit property. The 3rd defendant admitted that she is in occupation of the suit property and that she has put up structures thereon. From the pleadings, the evidence on record and the submissions, I agree with the plaintiff that the 3rd defendant entered and occupied the



suit property after the death of her husband through the prompting of the 1st and 2nd defendants who were her brothers-in-law. In the absence of evidence that the defendants were allowed by the plaintiff to enter the suit property and occupy the same, their entry was illegal and amounted to trespass.

Whether the plaintiff is entitled to the reliefs sought in the plaint

17. As the registered owner of the suit property, the plaintiff is and was entitled to quiet possession and enjoyment thereof. The plaintiff sought a permanent injunction restraining the defendants from trespassing on the suit property or interfering with his proprietary interest in the suit property. The plaintiff has established that he is the owner of the suit property and that the defendants entered the suit property without his permission and built structures thereon for the 3rd defendant who has remained in occupation to date. I am satisfied that a case has been made for the grant of an order of injunction. The plaintiff had also sought general damages for trespass. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others* 2014 eKLR, the court stated as follows:

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

18. In *Halsbury’s Laws of England* 4th Edition Volume 45 para. 26 1503 the authors have stated as follows on assessment of damages for trespass:

- a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
- b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
- d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.”

19. The plaintiff has proved trespass on the suit property by the defendants. The plaintiff has however not proved that he has suffered any special or actual loss as a result of the defendants’ trespass. I will only award the plaintiff nominal damages for trespass. As concerns the prayer for the exhumation of the body of the 3rd defendant’s husband from the suit property, there was a consensus that he was not buried on the suit property. The order is therefore not necessary.

Conclusion

20. In conclusion, I hereby enter judgment for the plaintiff against the 2nd and 3rd defendants for;

- 1. A permanent injunction restraining the 2nd and 3rd defendants jointly and severally, their agents, employees, servants or representatives or any person claiming or deriving title from them



from selling, alienating, disposing of or interfering in any other manner whatsoever with the plaintiff's occupation and enjoyment all that parcel of land known as Nyando/Kakola/7130 (formerly Plot No. 7130-Kakola Adjudication Section).

2. The execution of the order granted in 1 above shall be stayed for 90 days from the date hereof to give time to the 3rd defendant who is in possession of the suit property to vacate the property.
3. Kshs. 20,000/- as nominal damages for trespass to be paid by the 3rd defendant.
4. Interest on 3 above at court rates from the date hereof until payment in full.
5. The costs of the suit.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF DECEMBER 2024

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Orengo for the Plaintiff

The 2nd and 3rd Defendants present in person

Ms. J. Omondi-Court Assistant

