



**Oluoch (Suing as the administrator of the Estate of Rose Akoth Nyamori - Deceased) v Abuya (Environment & Land Case 471 of 2015) [2024] KEELC 14047 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14047 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 471 OF 2015  
SO OKONG'O, J  
DECEMBER 19, 2024**

**BETWEEN**

**JONES OLUOCH (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ROSE AKOTH NYAMORI - DECEASED) ..... PLAINTIFF**

**AND**

**FRANCIS RICHARD ABUYA ..... DEFENDANT**

**JUDGMENT**

1. At all material times, all that parcel of land known as Kisumu/Chiga/2724 (hereinafter referred to as “the suit property” was registered in the name of Rose Akoth Nyamori, deceased (hereinafter referred to as “the deceased”). The suit property was a subdivision of a parcel of land known as Kisumu/Chiga/2129. The register for the suit property was closed upon subdivision on 3<sup>rd</sup> December 2001. The said subdivision gave rise to Kisumu/Chiga/2806 and Kisumu/Chiga/2807(hereinafter referred to as “Plot No. 2806” and “Plot No. 2807” respectively). Plot No. 2806 which measured 0.88Ha. remained in the name of the deceased while Plot No. 2807 which measured 0.27Ha.was transferred and registered in the name of the Defendant on 20<sup>th</sup> December 2001 and the Defendant was issued with a title deed on 22<sup>nd</sup> January 2002.
2. The deceased died on 7<sup>th</sup> February 2002. A dispute arose between the Defendant and the children of the deceased after the death of the deceased over the sale of the said portion of the suit property to the Defendant. The dispute was referred to the area Assistant Chief for resolution. It is not clear from the evidence on record as to what was resolved at the meeting that was convened by the said Assistant Chief. The Defendant and one of the deceased’s sons, Samuel Otieno Nyamori exchanged some correspondence between 24<sup>th</sup> February 2002 and 22<sup>nd</sup> May 2002 on the dispute and the meeting that was held before the said Assistant Chief. There was a lull between the parties for 6 years.



3. On 23<sup>rd</sup> April 2008, a limited Grant of Letters of Administration Ad Litem in respect of the deceased's estate was issued to Samuel Otieno Nyamori (hereinafter referred to as "the original Plaintiff").
4. The original Plaintiff filed this suit against the Defendant in the High Court on 24<sup>th</sup> April 2008 through a plaint dated 23<sup>rd</sup> April 2008. The original Plaintiff contended that the subdivision of the suit property into Plot No. 2806 and Plot No. 2807, and the registration of Plot No. 2807 in the name of the Defendant was carried out by the Defendant illegally through manipulation of records and forgery at the land registry.
5. The original Plaintiff sought judgment against the Defendant for;
  - a. A declaration that the purported subdivision of the suit property into Plot No. 2806 and Plot No. 2807 and the subsequent transfer of Plot No. 2807 to the Defendant was unlawful.
  - b. A permanent injunction restraining the Defendant by himself, his relatives, agents, servants and/employees or otherwise jointly and severally from trespassing, wasting, damaging, alienating, transferring, charging and/or continuing the construction and development of Plot No. 2807.
  - c. An order cancelling the titles for Plot No. 2806 and Plot No. 2807 and restoring the suit property in the name of the deceased.
  - d. Costs of the suit.
6. The Defendant filed a statement of defence in which he denied all the allegations in the plaint. The Defendant denied that he acquired the suit property illegally through forgery and manipulation of documents at the land registry. The Defendant urged the court to dismiss the Plaintiff's suit with costs. Following the establishment of the ELC in 2012, this suit was transferred to this court and assigned its current case number.
7. The hearing of the suit commenced on 21<sup>st</sup> May 2013 with the original plaintiff (PW1) as the first witness. PW1 told the court that a few days after the burial of the deceased, the Defendant came to their home accompanied by his brother and informed him that the deceased had sold land to him. PW1 stated that they told the Defendant that they were not aware of the sale. PW1 stated that the deceased did not inform him or any of his siblings of the sale of land to the Defendant. PW1 stated that they had a meeting with the Defendant and the area chief on the suit property and the Defendant was told that he had not purchased any portion of the property. PW1 stated that he did a search on the suit property and found that it had been subdivided into Plot No. 2806 and Plot No. 2807 and that Plot No. 2807 was registered in the name of the Defendant as the owner on 20<sup>th</sup> December 2001. PW1 stated that the Defendant entered Plot No. 2807 on a date he could not recall and PW1 obtained an injunction restraining his activities on the land. PW1 denied that the deceased sold a portion of the suit property to the Defendant. He also denied that his deceased brother, Julius Nyamori witnessed the agreement. He stated that the deceased was bedridden when the consent of the Land Control Board was said to have been issued by the Board and as such could not have appeared before the Board. He stated that the deceased had given him the title deed for the suit property for safe keeping and as such there was no way she could have applied for a provisional title deed on the ground that the original was lost. PW1 stated that they were well-to-do and as such were able to take care of the deceased's medical needs. He denied that the deceased sought help from the Defendant to meet her medical expenses. He stated that the purported agreement of sale between the deceased and the Defendant was over a portion of Kisumu/Chiga/2129 while the suit property a portion of which was transferred and registered in the name of the Defendant was Kisumu/Chiga/2724. He produced several documents in evidence as exhibits.



8. The original Plaintiff died on 2<sup>nd</sup> April 2015 and Jones Oluoch was appointed as the new administrator of the estate of the deceased on 8<sup>th</sup> October 2019. The plaint was amended on 7<sup>th</sup> May 2020 to substitute the original Plaintiff, Samuel Otieno Nyamori with Jones Oluoch (hereinafter referred to only as “the Plaintiff”).
9. The Plaintiff’s next witness was Peter Okong’o Onyoro (PW2). PW2 adopted his witness statement filed on 27<sup>th</sup> January 2022 as his evidence in chief. PW2 stated as follows: He was a retired Senior Assistant Chief in Kolwa East Location. The deceased and her family were known to him. The deceased owned the suit property. The sale of a portion of the suit property by the deceased to the Defendant was not brought to his attention. He learnt of the Defendant’s claim over a portion of the suit property after the death of the deceased.
10. After the close of the Plaintiff’s case, the Defendant gave evidence as DW1. DW1 told the court that the deceased approached him and informed him that she had land that she wished to sell as she needed money. He stated that he purchased the land that was on sale from the deceased at Kshs. 40,000/-. He stated that he entered into a written agreement of sale with the deceased dated 8<sup>th</sup> February 1999 which he produced as an exhibit. He stated that he purchased a portion of Plot No. 2129. He stated that Plot No. 2129 was subdivided into Plot No. 2724 and Plot No. 2725 and that it was Plot No. 2724 (the suit property) that was registered in the name of the deceased.
11. He stated that the deceased sold him a portion of the suit property measuring 50m by 50m. He stated that Plot No. 2724 was subdivided into Plot No. 2806 and Plot No. 2807, and Plot No. 2807 was the portion of the suit property that he purchased. He produced the mutation form for the subdivision of the suit property, the consent of the Land Control Board, his title deed for Plot No. 2807 and certificates of official search for Plot No. 2806 and Plot No. 2807 as exhibits. He stated that when the deceased approached him to purchase the suit property, the deceased was sick and he was the one who used to take her to the hospital. He stated that the allegation that he acquired the suit property illegally was raised after the death of the deceased. He prayed that the Plaintiff’s suit be dismissed and the Plaintiff ordered to remove the building he had put up on Plot No. 2807.
12. The Defendant called the land registrar, Nicholas Abeyo Obiero(DW2) as his witness. DW2 told the court that Plot No. 2806 and Plot No. 2807 were subdivisions of Plot No. 2724 (the suit property) which was registered in the name of the deceased. He stated that Plot No. 2807 was registered in the name of the Defendant and according to their records, the Defendant acquired the property lawfully. He produced the extract of the registers for the suit property and Plot No. 2807 as exhibits.
13. After the close of evidence, the parties were directed to make closing submissions in writing. The Plaintiff filed submissions dated 27<sup>th</sup> May 2024 while the Defendant filed submissions dated 4<sup>th</sup> June 2024.
14. I have considered the pleadings, the evidence on record and the submissions by the advocates for the parties. The following in my view are the issues arising for determination in this suit;
  - a. Whether the registration of Plot No. 2807 in the name of the Defendant was lawful.
  - b. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.
  - c. Whether the court should make any other orders in the matter.
  - d. Who is liable for the costs of the suit?



**Whether the registration of Plot No. 2807 in the name of the Defendant was lawful.**

15. The suit property was registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed), and Sections 24, 25 and 26 of the [Land Registration Act](#) 2012, protect land ownership. 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.

16. Section 143(1) and (2) of the Registered [Land Act](#) provides that:

- (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.

17. Sections 24, 25 and 26 of the [Land Registration Act](#), 2012 provide 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

SUBPARA (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.

18. From the foregoing, a land title can be impeached on grounds of fraud, mistake, misrepresentation, illegality, corruption or procedural infraction. The Plaintiff contended that the Defendant was registered as the proprietor of Plot No. 2807 on 20<sup>th</sup> December 2001 illegally through manipulation and forgery of documents.

19. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“

- “(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

The Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: describes it thus:



- “13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)
20. 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”.
21. 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.”
22. I am not satisfied from the evidence on record that the registration of the Defendant as the proprietor of Plot No. 2807 was undertaken through manipulation and forgery of documents. The transaction was therefore not illegal as claimed by the Plaintiff. In his submissions, the Plaintiff anchored his impropriety claim to only one issue namely that the purported agreement between the deceased and the Defendant dated 8<sup>th</sup> February 1999 referred to the sale of a portion of Plot No. 2129 while the parcel of land that was subdivided and a portion transferred to the Defendant was Plot No. 2724. I am satisfied with the explanation given by the Defendant and DW2 on how Plot No. 2129 came to be in the agreement of sale dated 8<sup>th</sup> February 1999.
23. The Defendant explained that Plot No. 2724 was a subdivision of Plot No. 2129 and when the Defendant entered into the agreement of sale with the deceased, the parties were not aware that Plot No. 2129 had been subdivided and the deceased’s portion was now Plot No. 2724. DW2 produced in evidence a copy of the register for Plot No. 2724 (D.EXH.3(a)) which showed that the property was a subdivision of Plot No. 2129 and that the plot was created on 20<sup>th</sup> November 1998 following the said subdivision. The fact that the agreement dated 8<sup>th</sup> February 1999 referred to the sale of a portion of Plot No. 2129 and not Plot No. 2724 is therefore not evidence of illegality in the transaction. I am satisfied that due process was followed by the Defendant while acquiring the suit property. The



Defendant entered into a written agreement with the deceased, Plot No. 2724 was lawfully subdivided and the sold portion was transferred to the Defendant after the necessary consents and stamp duty was paid. DW1 who is the keeper of land records, told the court that the transaction was lawful.

24. Although the Plaintiff claimed that the deceased did not sign the agreement of sale and that his deceased brother, Julius Ogutu Nyamori who was said to have witnessed the agreement did not witness it, there was no evidence in the form of a report of a document examiner to support these allegations which remained just allegations. It is my finding therefore that the Plaintiff has not proved that the Defendant acquired the suit property illegally. The converse of that is that the property was acquired by the Defendant lawfully and procedurally.

#### **Whether the Plaintiff is entitled to the reliefs sought in the amended plaint against the Defendant**

25. It is my finding from what I have stated above that the Plaintiff has not proved his case against the Defendant on a balance of probabilities. The Plaintiff is therefore not entitled to any of the reliefs sought in the amended plaint.

#### **Who is liable for the costs of the suit?**

26. Under Section 27 of the *Civil Procedure Act*, the costs of and incidental to a suit is at the discretion of the court and as a general rule, costs follow the event. The Plaintiff has not succeeded in his claim against the Defendant. The Plaintiff has not given any reason why the Defendant should be denied the costs of the suit. The Defendant shall have the costs of the suit.

#### **Whether the court should make any other or further order in the matter.**

27. The Defendant had urged the court to find that the Plaintiff is in contempt of the order that had been issued earlier by the court restraining him from constructing a building and occupying Plot No. 2807. The Defendant submitted that the court had given directions that the contempt application be heard together with the main suit. I have perused the file and I have not come across such directions. Even if they existed, the parties did not provide evidence on the issue of contempt. I am in the circumstances not in a position to determine the application. I have noted from the record that the court issued an order on 12<sup>th</sup> May 2022 for the County Land Registrar and Land Surveyor to visit Plot No. 2807 and confirm that the construction that was being undertaken was on Plot No. 2807. I have noted that that order was not complied with. I am of the view that if there is a dispute over the boundary of Plot No. 2806 and Plot No. 2807 or if the boundary is uncertain, either party is at liberty to apply to the Land Registrar to determine the dispute or the boundary. I will therefore not make any order on the said contempt application.

#### **Conclusion**

28. In conclusion, I find no merit in the Plaintiff's claim. The same is dismissed with costs to the Defendant.

**DELIVERED AND DATED AT KISUMU ON THIS 19<sup>TH</sup> DAY OF DECEMBER 2024**

**S. OKONG'O**

**JUDGE**

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

Mr. Odeny for the Plaintiff

Mr. Mwamu for the Defendant



Ms. J.Omondi-Court Assistant

