



**Odera v Odera & 2 others (Environment & Land Case 181 of 2013)
[2024] KEELC 13741 (KLR) (9 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 181 OF 2013
SO OKONG'O, J
DECEMBER 9, 2024**

BETWEEN

CONSOLATA OYENGA ODERA PLAINTIFF

AND

BLASTO OGADA ODERA 1ST DEFENDANT

GEORGE ANTHONY SEMPE 2ND DEFENDANT

RICHARD ODONGO OUKO 3RD DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit through a plaint dated 25th June 2013 filed on 10th July 2013. The Plaintiff averred that at all material times to this suit, she was the beneficial owner of all those parcels of land known as Kisumu/Tamu/ 217 and Kisumu/Tamu/617 (hereinafter referred to together as “the suit properties” and individually as “Plot No. 217” and “Plot No. 617” respectively). The Plaintiff averred that she inherited the suit properties from her deceased husband, Athanasio Odera Ocholla (hereinafter referred to as “the deceased”) who was the registered owner thereof. The Plaintiff averred that the 1st Defendant was her stepson, the son of her husband’s first wife also deceased. That on or about December 2011, the Plaintiff learnt that the suit properties had been sold to third parties when the 3rd Defendant came with a tractor and ordered her and her family to vacate their homestead on Plot No. 617 claiming to be the registered owner of the parcel of land.
2. The Plaintiff averred that the 1st Defendant fraudulently obtained letters of administration intestate in respect of the estate of the deceased, Athanasio Odera Ocholla and transferred the suit properties to his name and thereafter to the 2nd and 3rd Defendants. The Plaintiff averred that the 1st Defendant sold Plot No. 217 and Plot No. 617 to the 2nd and 3rd Defendants respectively thereby depriving the Plaintiff and her family of their source of livelihood. The Plaintiff averred that the transfer and registration of the suit properties to the name of the 1st Defendant and subsequently to the names of the 2nd and 3rd



Defendants were carried out fraudulently as she never consented to the same, and to her knowledge, no grant of letters of administration intestate was taken out in respect of the estate of the deceased.

3. The Plaintiff prayed for judgment against the Defendants for:
 - a. An order of a temporary injunction against the Defendants, their agents and servants or any other person acting through their direction or order restraining them from using or in any manner whatsoever interfering with the Plaintiff's occupation and user of the suit properties pending the hearing of the suit or further orders of the court.
 - b. An order of a permanent injunction against the Defendants, their agents and servants or any other person acting through their direction or order restraining them from using or in any way interfering with the Plaintiff's occupation and use of the suit properties.
 - c. A declaration that the 2nd and 3rd Defendants' registration as the owners of the suit properties was illegal.
 - d. An order prohibiting any dealing with the suit properties until the suit was heard and determined.
 - e. General damages.
 - f. Costs of the suit with interest thereon at court rates.
 - g. Any other relief the court deems fit to grant.
4. The Defendants entered an appearance and filed a joint statement of defence on 16th August 2013. The Defendants denied the allegations in the plaint and averred that even if there was a relationship between the deceased and the Plaintiff which was denied, such relationship did not give rise to beneficial ownership of the suit properties. The 1st Defendant averred that the Plaintiff was a busybody out to benefit from the estate of a deceased without the right to do so.
5. The Defendants averred that if it was true that the Plaintiff was a wife of the late Athanasio Odera Ochola which was denied, the Plaintiff ought to direct her claim to the late Athanasio Odera's land situated in Seme. The Defendants averred that the suit properties were held by the deceased in trust for the 1st Defendant who purchased the same for a valuable consideration. The 1st Defendant denied the Plaintiff's claim that the 1st Defendant was her stepson.
6. The Defendants averred that the suit properties were owned by the 1st Defendant who purchased the same for valuable consideration. The Defendants averred that following the death of the deceased, the suit properties were transferred to the 1st Defendant's deceased mother, Dorina Akongo Odera who also held the same in trust for the 1st Defendant. The 1st Defendant averred that the estate of the deceased, Athanasio Odera Ocholla was intact and if the Plaintiff believed that she had any claim over the same, she was at liberty to lodge a claim against the said estate. The Defendants averred that the 2nd and 3rd Defendants were innocent purchasers of the suit properties for valuable consideration in an overt market without notice of any defect in the title held by the 1st Defendant hence they owed no duty of care to the Plaintiff.
7. The Defendants averred that if the grant of letters of administration were obtained in respect of the estate of the deceased, Athanasius Odera which was denied, then the same was never obtained by the 1st Defendant. The Defendants averred that the said grant of letters of administration was obtained by the deceased's legal wife, Dorina Akongo Odera also deceased. The Defendants averred that the issue of fraud, non-disclosure of material facts did not arise.



8. The Defendants averred that the 2nd and 3rd Defendants had been prejudiced by the invasion and illegal settlement by the Plaintiff on the suit properties which did not belong to her. The Defendants averred that the 1st Defendant followed due process of law in acquiring the suit properties which his late parents held in trust for him. The Defendants averred that the fact that the suit properties were held in trust for the 1st Defendant was the reason why his other siblings did not lay a claim to the same as they were aware that the properties were purchased by the 1st Defendant. The Defendants averred that the Plaintiff should have laid a claim to the ancestral land of the deceased. The Defendants urged the court to dismiss the Plaintiff's suit with costs and judgment be entered for the Defendants against the Plaintiff for the eviction of the Plaintiff from the suit properties.
9. The Plaintiff filed a reply to defence on 22nd August 2013 in which the Plaintiff denied all the allegations in the Defendants' defence particularly that the deceased held the suit properties in trust for the 1st Defendant and that the suit properties had been transferred to the 1st Defendant's deceased's mother, Dorina Akongo Odera as the administrator of the estate of the deceased, Athanasio Odera Ocholla. The Plaintiff averred that the Defendants' defence was a sham and urged the court to enter judgment in her favour as prayed in the plaint.
10. The hearing of the suit commenced on 8th September 2016. The Plaintiff who gave evidence as PW1 adopted her witness statement dated 25th June 2013 as part of her evidence in chief. She further stated as follows in her oral testimony: She was the widow of Athanasio Odera Ocholla (the deceased). The deceased established a home for her. They got 8 children with the deceased of whom two died and 6 were alive. The deceased had a first wife when he married her. The 1st Defendant who was her stepson tried to sell the suit properties to other people. She was not aware that her co-wife did succession in respect of the deceased's estate. The deceased was buried at her co-wife's home in Seme.
11. The next witness was PW1's son, Samson Odera (PW2). PW2 stated as follows: The Plaintiff was his mother. He was the son of the deceased, Athanasio Odera Ocholla. The deceased had three wives, Dorina Akongo Odera, Consolata Oyenga Odera and Blista Odera. The deceased had two homes, one in Seme and the second in Tamu, Muhoroni. The first home was occupied by Dorina Akongo Odera and Blista Odera while the second home was occupied by the Plaintiff. The second home was on the suit properties. Plot No. 217 was a commercial plot while Plot No. 617 was for subsistence. Plot 217 was for cash crops like sugarcane while Plot No. 617 was for the homestead and subsistence farming.
12. The 1st Defendant was his stepbrother from the deceased's first wife. They sued him because he had sold the suit properties. When they discovered the sale, they reported the matter to the lands office. The suit properties were initially in the name of the deceased. He did not know that the ownership of the properties had changed from the deceased to the 1st Defendant. They obtained copies of the registers for the suit properties. The name of the deceased did not appear in the said registers as having been the owner of the suit properties. The registers showed that the suit properties were first registered in the name of the Settlement Trustees. From the Settlement Trustees, the suit properties were registered in the name of the 1st Defendant. The 1st Defendant then transferred Plot No. 217 to one, Shadrack who thereafter transferred it to the 2nd Defendant. The 1st Defendant transferred Plot No. 617 to the 3rd Defendant.
13. The 1st Defendant's mother, Dorina Akongo was deceased and she was buried at her home in Seme where the deceased was also buried. They did not get a copy a confirmed grant of letters of administration in respect of the estate of his deceased father from Tamu Law Court where it was alleged that Succession Causes Nos. 2 of 1976 and 13 of 1997 had been filed. He had lived on the suit properties since childhood together with PW1. On cross examination, PW2 stated that he was born in 1976 three years after the death of the deceased, Athanasio Odera Ocholla who died in 1973.



14. The Plaintiffs' last witness was Kilion Ogosi (PW3). He stated as follows in his evidence in chief: The Plaintiff was married to the deceased, Athanasio Odera in 1967. He was present at the home of the Plaintiff's parents where he accompanied the deceased during the dowry negotiations. The deceased established a home for the Plaintiff where they lived together. The Plaintiff was still living in the said home. The Plaintiff got children with the deceased. The 1st Defendant was not known to him. The 1st Defendant had sold the Plaintiff's land. The Plaintiff had used the land from 1967 to the date of his evidence. The Plaintiff was the second wife of the deceased who died in 1973. The deceased established the Muhoroni home in 1966 and married the Plaintiff in 1967. The Muhoroni home was built for the first wife before the deceased married the Plaintiff.
15. The suit was fixed for defence hearing on 20th February 2024 when the Defendants and their advocates did not turn up. The Defendants' case was closed without evidence. The court had been informed earlier that the 1st and 3rd Defendants were deceased. The two were not substituted and the suit against them abated. After the close of the defence case, the court directed the parties to make closing submissions in writing. The Plaintiff filed submissions while the 2nd Defendant did not do so.

The Plaintiff's submissions

16. In her submissions dated 11th March 2024, the Plaintiff framed two issues on which she submitted on namely; whether the 2nd and 3rd Defendants were the rightful proprietors of the suit properties, and whether the Plaintiff was the wife and a beneficiary of the estate of the deceased, Athanasio Odera Ocholla for the purposes of succession.
17. The Plaintiff submitted that the 1st Defendant purported to have acquired ownership of the suit properties notwithstanding the fact that he did not have any grant of letters of administration in respect of the estate of the deceased and proceeded to dispose of the same to the 2nd and 3rd Defendants. The Plaintiff submitted that in the absence of a grant in respect of the estate of the deceased, the 1st Defendant could not purport to transfer the suit properties to himself and the subsequent owners, the 2nd and 3rd Defendants. In support of this submissions, the Plaintiff cited Section 45 of the *Law of Succession Act*, Chapter 160 Laws of Kenya and *Robe v. Muria*, Environment and Land Appeal No. E084 of 2022 [2024] KEELC 74 (KLR) and *Wangu & Another v. Sacilia Magwi Kivuti (Deceased)* substituted with *Riberita Ngai (2021) eKLR*. The Plaintiff submitted that the dealings with the suit properties by the Defendants amounted to intermeddling with the estate of the deceased and as such the tiles resulting therefrom were illegal, null and void.
18. On whether the Plaintiff was married to the deceased, the Plaintiff cited Sections 3 (5) and 29 (a) of the *Law of Succession Act* and submitted that from the evidence on record, the Plaintiff had proved that she was married to the deceased. The Plaintiff submitted that as a wife of the deceased, she was a beneficiary of his estate which included the suit properties. The Plaintiff submitted that she had been in actual possession of the suit properties for over 50 years.

Analysis and determination

19. I have considered the pleadings, the evidence on record and the submissions filed by the Plaintiff. As I have mentioned earlier, the 1st and 3rd Defendants died while this suit was pending and were not substituted. The suit against the 1st and 3rd Defendants abated in the circumstances. That means that the Plaintiff's claim in respect of Plot No. 617 registered in the name of the 3rd Defendant was terminated by operation of law. That leaves only the claim against the 2nd Defendant who was registered as the owner of Plot No. 217. What I need to determine is whether the 2nd Defendant acquired Plot No. 217 lawfully and as such is the lawful owner of the said property. As mentioned earlier in the judgment,



the Plaintiff brought this suit in her capacity as a beneficial owner of Plot No. 217 “having inherited the same from her husband Athanasio Odera Ocholla now deceased.” Although the 2nd Defendant never tendered evidence at the trial, the burden was on the Plaintiff to prove her case against the 2nd Defendant. According to Exhibits 1, 2 and 3 produced by the Plaintiff in evidence, the suit properties which are situated within Tamu Settlement Scheme were allocated by the Settlement Fund Trustees to Athanasio Odera, deceased. Following the death of the deceased, the suit properties were inherited by the deceased’s wife, Dorina Akongo Odera through a Certificate of Succession that was issued in Tamu District Magistrate’s Court Succession Cause No. 2 of 1976. Dorina Akongo Odera also passed on and following her death, the suit properties were inherited by the 1st Defendant, Blasto Ogada Odera following succession proceedings that were undertaken at Tamu District Magistrate’s Court Succession Cause No. 13 of 1979 (See the letter dated 18th January 1980 in the Defendant’s list of documents). The particulars of this Succession Cause was wrongly indicated in Plaintiff’s exhibit 1 as Succession Cause No. 13 of 1997. Following the inheritance by the 1st Defendant of the suit properties, Plot No. 217 was transferred by the Settlement Fund Trustees to the 1st Defendant on 11th May 1992. On 11th March 1999, the 1st Defendant transferred Plot No. 217 to Shadrack Agwenge Owana who further transferred the property to the 2nd Defendant on 28th November 2010.

20. I am not persuaded that the 2nd Defendant acquired Plot No. 217 illegally and fraudulently. It should be noted that the *Law of Succession Act*, Chapter 160 Laws of Kenya (the Act) did not come into force until 1st July 1981. The Act did not therefore apply to the administration of the estates of Athanasio Odera Ocholla deceased who died in 1973 and his wife Dorina Akongo who died in 1978 and whose succession proceedings according to the documents filed in court by the Defendants took place in 1976 and 1979 respectively. According to the evidence before the court, the 1st Defendant inherited Plot No. 217 from the estate of his mother, Dorina Akongo who had also inherited the same from the deceased Athanasio Odera Ocholla. If the Plaintiff had any issue regarding the succession of the estate of Athanasio Odera Ocholla, she should have challenged the proceedings in Succession Cause No. 2 of 1976 which was initiated by Dorina Akongo, deceased. The Plaintiff having failed to challenge the said proceedings, cannot fault the process through which the 1st Defendant acquired Plot No. 217 from Dorina Akongo, deceased. I am not convinced by the Plaintiff that the 1st Defendant against whom this suit has abated acquired Plot No. 217 fraudulently and illegally. Since the 1st Defendant had a valid title, the 2nd Defendant similarly acquired a valid title from the 1st Defendant. It is therefore my finding that the 2nd Defendant holds a valid title to Plot No. 217. The Plaintiff has not persuaded me that she has a beneficial or any other valid interest in the property arising from the estate of Athanasio Odera Ocholla. In any event, this court has no jurisdiction to determine issues such as whether or not the Plaintiff was a wife to the deceased and whether or not she was entitled to inherit the suit properties.

Conclusion

21. In conclusion, I hereby make the following orders in the matter;
1. The suit against the 1st and 3rd Defendants has abated.
 2. The suit against the 2nd Defendant is dismissed.
 3. Each party shall bear its costs of the suit.

DATED AND DELIVERED AT KISUMU ON THIS 9TH DAY OF DECEMBER 2024.

S. OKONG’O

JUDGE



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

Mr. Odhiambo h/b for Mr. Yogo for the Plaintiff

N/A for the Defendants

Ms. J. Omondi-Court Assistant

