



Ngoje (Suing on his own behalf and as a Legal Representative of the Estate of Isack Ngoje Mifuongo - Deceased) & 2 others v Ongalo (Environment and Land Case Civil Suit 60 of 2019) [2023] KEELC 537 (KLR) (30 January 2023) (Judgment)

Neutral citation: [2023] KEELC 537 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND CASE CIVIL SUIT 60 OF 2019
MN KULLOW, J
JANUARY 30, 2023**

BETWEEN

**JAPHETH ORIMBA NGOJE (SUING ON HIS OWN BEHALF AND AS A LEGAL REPRESENTATIVE OF THE ESTATE OF ISACK NGOJE MIFUONGO - DECEASED) 1ST PLAINTIFF
JUMA ACHAR 2ND PLAINTIFF
HORACE SIGANA 3RD PLAINTIFF**

AND

NASHON OTIENO ONGALO DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of a Plaint dated 06.08.2019; seeking the following Orders: -
 - i. A Declaration Order that the Title Deed over Title Number Nyatike/ Kanyuor/ 3609 issued in the names of Nashon Otieno Ongalo be cancelled forthwith by the Land Registrar.
 - ii. An Order directing the County Land Surveyor and County Land Registrar to rectify the land parcel number Nyatike/ Kanyuor/ 3609 issued in the names of Nashon Otieno Ongalo to conform with the judgment in the land case number 42 of 1953 between the late Isack Ngoje Mifuongo and Ongalo Ogola.
 - iii. Costs of and incidentals to this suit.
 - iv. Any other/ further relief that this honourable court may deem fit and proper to grant in the circumstances.



2. It is the Plaintiff's contention that sometimes in the year 1954; Ndhiwa Law Courts issued a judgment in Land Case No. 42 of 1953, whose effect was to direct that the suit parcel be divided into two halves between the parties therein. The Late Isack Ngoje Mifuongo was ordered to take the West part while the Defendant was to take the East part and both parties were further directed to maintain their boundaries thereof.
3. It is their claim that during the Adjudication process; the Defendant misrepresented facts to the adjudication officers that his land extended to the southern part of the suit parcel No. Nyatike/Kanyuor/3609, including the Kuja Plain area thereby ignoring the boundary that was created by the court vide its decision in Ndhiwa Case No. 42 of 1954.
4. It is further their claim that the land adjudication officers acted on the falsification, misrepresented facts, fraud and concealment of material facts and registered a portion of the suit land in the name of the Defendant when in fact; it is the Plaintiff's family that had been in occupation and use of the said Kuja Plain area. They outlined the particulars of fraud, misrepresentation and concealment of material evidence on the part of the Defendant and urged the court to grant the orders sought.
5. The Defendant entered Appearance on 17.09.2019 and filed his Statement of Defence dated 15.10.2019, through the firm of M/S Kamau Kuria & Company Advocates. It is the Defendant's contention that the suit is barred by the doctrine of res judicata, as the same issues were raised by the Plaintiff before the Land Adjudication Committee and the Land Adjudication Officer and were heard and determined in accordance with the [Land Adjudication Act](#).
6. He further contends that upon the determination of the said objections, the Adjudication register became final and titles were thereafter issued. Thus, the Plaintiffs have no valid claim against him.
7. It is also the Defendant's claim that the suit is bad in law as it seeks to question and/or rectify the first registration under the [Land Registration Act](#) and the same is therefore untenable.
8. In the alternative, he averred that the suit is barred by the Limitations of Actions Act to the extent that the Plaintiff seeks to enforce a stale judgment delivered on 11/3/1954. He also denied all the averments made against him and urged the court to dismiss the suit with costs.

Trial

9. On 21st September, 2022 the matter proceeded for hearing of the Plaintiffs' case; the Plaintiff testified as PW1. He adopted his witness statement as his testimony in court. He also produced the documents on his list of documents dated 06/08/2019 as Pexh 1 -6 in support of his case.
10. He further stated that the suit land was first owned by his late father; there arose a dispute between his father and the Defendant's late father, which led to the filing of a suit at the Ndhiwa District Magistrate's Court Case No. 42 of 1953. The said case was heard and determined vide a judgment whose effect was to divide the said land into 2 parcels with a road passing between the 2 portions. His late father was directed to retain the west side of the parcel while the Defendant's late father was to retain the East part of the suit parcel. The boundary between the two portions of land was marked by sisal.
11. He further added that the Defendant interfered with the boundary and his father reported the same to the Land Adjudication Committee in 1988 vide Adjudication Case No. 184 of 1988 which was heard and decided.
12. He stated that he also filed an objection at the Land Adjudication Tribunal in his capacity; his objection was not successful but he chose not to appeal against the said decision.



13. On cross-examination; he conceded that he had no proof to show that the suit land was registered in his late father's name Isack Ngoje as the first registered owner. He also stated that his dispute was a boundary dispute between parcel No. 3609 and 36021 which belonged to their family. He confirmed that the 2 parcels Nos. 3609 and 36021 were as a result of the decision in Ndhiwa Law Courts which was delivered on 11/3/1954.
14. He also admitted that the instant suit had been filed 65 years after the decision in Ndhiwa Law Court was made. He further stated he filed a second objection proceedings to the Tribunal on 2016/12 which was equally dismissed.
15. On re-examination he reiterated that the decision made in Ndhiwa Law Court should be respected and complied with and for the Defendant to respect the boundary. The Plaintiffs thereafter closed their case.
16. The matter thereafter proceeded for the Defence hearing; the Defendant testified as DW1. He adopted his witness statement as his testimony and produced the documents in his List of Documents dated 09/10/2020 as DExh. 1-13.
17. On cross-examination; he confirmed that objection proceedings were filed against him in respect to the suit parcel No. 3609. He also confirmed that there was a decision by the Ndhiwa Law Court which was made in 1954. He however maintained that he owns the entire suit parcel No. 3609.
18. On re-examination he clarified that the effect of the decision in Ndhiwa Law Court was that the Plaintiff's late father was to hold the eastern part while his late father was to hold the Western part of the suit parcel. He thereafter closed his case.
19. Upon close of the Defendant's case, I issued directions on the filing of the final submissions; both parties filed their rival submissions together with authorities which I have read and considered in arriving at my decision.

Plaintiffs' Submissions

20. He maintained that the decision of the court in Ndhiwa District Magistrate's Court in 1954 and later adopted by the Land Adjudication Committee in 1988 ought to be strictly complied/ adhered to and the boundary maintained.
21. With regards to the reliefs sought of cancellation of the title issued to the Defendant and rectification of the register; the Plaintiffs relied on section 79 of the *Land Registration Act* and maintained that the court was vested with the requisite jurisdiction to grant the orders sought since the Defendant's title was obtained in a frivolous manner. They urged the court to allow the suit with costs.
22. They also relied on the following cases in support of their case; *Hadkinson vs Hadkinson* (1952) ALL ER 567, *B vs Attorney General* [2004] 1 KLR 431, *Esther Ndegi Njiru & Anor vs Leonard Gatei* (2014) eKLR, and *Rosemary Wairimu Munene Ex-Parte Applicant vs Ihururu Party Farmers' Cooperative Society J.R. No. 4/2014*.

Defendant's Submissions

23. It was his submission that he is the registered proprietor of the suit parcel No. 3609 and he holds an indefeasible title over the said land; he is therefore entitled to all the rights and privileges appurtenant thereto in respect to the suit land as stipulated under sections 25 and 26 of the *Land Registration Act*.



24. He further submitted that this court lacked the requisite jurisdiction to hear the instant dispute as filed. That by virtue of section 29 of the *Land Adjudication Act*; the only recourse available for the plaintiffs was to lodge an Appeal within 60 days before the Minister and if aggrieved by the decision of the Minister, to file a Judicial Review Application within 6 months of that decision. It was his contention that since no such Appeal was lodged within the 60 days or the Judicial Review filed within the strict timelines of 6 months; the suit should be dismissed with costs.
25. It was further his contention that the present suit amounted to res judicata since the issues between the parties herein had already been heard and determined before the Land Adjudication Committee and Tribunal. He thus submitted that the suit should be barred by the doctrine of finality.
26. On the issue of execution of judgment delivered in the year 1954; he submitted that section 4 (4) of the Limitations of Actions Act limits the period of executing a judgment to 12 years. That the Plaintiffs' rights as Decree Holders was thus extinguished on 12/3/1966 upon lapse of the 12 years' period within which to execute the decision of the Ndhiwa Court. In conclusion he urged the court to dismiss the Plaintiffs' suit with costs.
27. He relied on the following cases in support of his case; Nairobi Civil Appeal No. 156 of 2013: Elizabeth Wambui Githinji & Others vs Kenya Urban Roads Authority & 4 Others, Watuku Mutsiemi Watuku & Anor vs Republic & 5 Others [2018] eKLR, Raphael Kangogo & Anor vs Kimetto Kandie Lal & 5 Others [2019] eKLR, Republic vs District Land Registrar Bondo & 2 Others Ex-Parte Chairman, Management Committee of Orengo Catholic Church, Ambrose Dennis Achieng [2017] eKLR, The Speaker of the National Assembly vs James Njenga Karume Civil Application No. Nai 92 of 1992, Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR, E.T.V. vs Attorney General & Anor (2012) eKLR, Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2007] eKLR, Nyeri Civil Appeal No. 124 of 2003 M'Ikiara M'Rinkanya Sebastian Nyamu vs Gilbert Kabeere M'Mbjiwe, Willis Onditi Odhiambo vs Gateway Insurance Co. Ltd (2014)eKLR and Republic vs Communication Authority of Kenya & Anor ex-parte Legal Advice Centre aka Kituo Cha Sheria [2015]eKLR.

Analysis and Determination

28. I have carefully considered the pleadings filed herein, the respective exhibits, rival submissions and the applicable law. On that account, it is this court's considered view that the main issue arising for determination is: -
 - a. Whether this court can order the cancellation of the title deed for Nyatike/ Kanyuor/ 3609 issued to the Defendant.
 - b. Whether the Plaintiff are entitled to the reliefs sought.
29. The Plaintiffs have sought the cancellation of the title deed issued to the Defendant in respect to the suit property Nyatike/ Kanyuor/ 3609 on the ground that the defendant used fraudulent means, concealment and misrepresentation of facts to the Adjudication Officer, to have the suit land registered as his land. They maintained that the earlier decision issued by Ndhiwa Law Court in case NO. 42 of 1953 should be respected and strictly complied with.
30. The Defendant on the other hand denied the allegations of fraud and misrepresentation and maintained that the issues raised in the instant case were res judicata; the same having been raised, heard and determined at the Land Adjudication Committee and the Land Adjudication Tribunal, where the Plaintiff's objections were all dismissed. It was his contention that he is the lawful proprietor and hold



an indefeasible title. He further stated that the Plaintiffs' did not follow the outlined procedure under the [Land Adjudication Act](#) and the suit should therefore be dismissed.

31. From the pleadings, it is clear that the cause of action herein arose as a result of the adjudication process. Sections 26 and 29 of the [Land Adjudication Act](#) provides an elaborate procedure in the event of any dispute and/or objection arising from adjudication exercise. The sections provide as follows: -

26. Objection to adjudication register

- (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
- (2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

29(1) on Appeals

- (1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—
 - a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final. (emphasis mine)

32. The question that follows is whether the Plaintiffs exhausted the outlined procedure and whether the suit is properly filed before this court. It has been said time and again that where there is a clear procedure for the redress of any particular grievance prescribed by [the Constitution](#) or an Act of Parliament; in this case the [Land Adjudication Act](#), that procedure must strictly be followed before the aggrieved party can file the claim in court. See the case Speaker of the National Assembly v James Njenga Karume [1992]

33. From the testimony of both the 1st Plaintiff and the Defendant together with DExhibits 5 -11 produced by the Defendant; it is clear that the 1st Plaintiff indeed filed objection proceedings in respect to the suit parcel No. 3609 as provided under section 26 above at the Land Adjudication Committee and at the Land Adjudication Tribunal. It is also apparent that the said objections were heard, both the Plaintiff and his late father were given an opportunity to ventilate their claims and after hearing the respective parties thereto, a decision was made. Both Objections filed were dismissed and the Objector therein, being the 1st Plaintiff was notified of his right to Appeal in accordance to section 29 above.

34. The Plaintiff in his testimony conceded that he has never lodged an Appeal against the dismissal of the objections filed at the Land Adjudication Committee and the Land Adjudication Tribunal, in compliance with Section 29 of the [Land Adjudication Act](#) stated above.



35. To this end therefore, I agree with the Defendant that the Plaintiff did not exhaust all the remedies provided under the [Land Adjudication Act](#). Thus the suit has not been properly filed before this court and the orders sought are untenable. The Plaintiff could only come to court after filing an Appeal to the Minister and the same can only be by way of a Judicial Review Application or Constitutional Petition. The same has not been done in the instant case.
36. Further and without prejudice to the foregoing; Section 80 of the [Land Registration Act](#) on the Rectification by an Order of Court provides that: -
- “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
37. It is the Plaintiffs’ claim that the registration of the suit land in the name of the Defendant was done by fraudulent means and misrepresentation of facts. The Defendant on the other hand denied the allegations of fraud levelled against him and maintained that he owns the entire suit parcel and holds an indefeasible title thereto.
38. Cancellation of title as stated above can only be done on grounds of fraud or mistake. It is a settled principle in law that he who alleges must prove. The Plaintiff must demonstrate/ prove the allegations of fraud and misrepresentation made against the Defendant, to the required threshold to warrant the grant of the reliefs sought. It is not enough to merely outline the particulars of fraud but he must also demonstrate to the required threshold.
39. The Court of Appeal in Mombasa, in Civil Appeal No. 312 of 2012; - Emfil Limited Vs Registrar of Titles Mombasa & 2 others [2014] eKLR held as follows; -
- “Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.
40. The Plaintiffs asked the court to mark as PExhibits the documents contained in his List of Documents dated 06/08/2019. However, from the court record, it is noteworthy that no documents were annexed, therefore, the contents of such documents and their probative value remains unclear.
41. In his testimony, he alleged that the suit parcel formed part of their land and urged the court to uphold the decision in the Ndhiwa Law Court. I have critically looked at the said decision and I note that the court directed the Plaintiff to retain the West part of the suit parcel while the Defendant was directed to retain the East part. However, the Plaintiff has not clearly demonstrated to this court the nexus between the Western part awarded to his late father and the southern part of the Kuja Plain area which is at the centre of this dispute or the connection between parcel Nos. 3609 and 36021. He has further not demonstrated that the boundary between the two land which is evidence by sisal plants and a road passage has been interfered with in any manner and/or the extent of such encroachment and/or interference if any.
42. At Prayer No. 2, the Plaintiff has urged the court to order for the rectification of the register in compliance with the decision of the Ndhiwa Law Court issued in 1954. Section 4(4) of the [Limitation of Actions Act](#) is clear on this regard. The Plaintiff cannot purport to execute a judgment which was issued 65 years ago.



43. A Certificate of Title is a prima facie evidence of ownership as provided under Section 26 of the *Land Registration Act*. In the absence of any sufficient and satisfactory evidence of fraud and misrepresentation; by virtue of DExh 1, I find and hold that the Defendant herein the absolute proprietor of the suit land and is entitled to all the rights and interests thereto to the exclusion of all others.
44. In view of the foregoing; I accordingly find and hold that the Plaintiffs have failed to prove their case to the required standard to warrant the grant of the reliefs sought.

COSTS

45. It is a general rule that costs follow the event, having held that the Plaintiffs have not sufficiently proved their case to the required threshold; I find that the Defendant is entitled to costs of the suit.

Conclusion

46. The upshot of the above is that the Plaintiffs have failed to prove their case to the required standard and suit instituted vide a Plaint dated 06th August, 2019 is hereby dismissed with costs to the Defendant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 30TH DAY OF JANUARY, 2023.

MOHAMED N. KULLOW

JUDGE

In presence of; -

Mr. Brian Mboya for the Plaintiffs

Mr. Munyori for the Defendants

Court Assistant - Tom Maurice/Victor

