



**Omuso v Omuso & 3 others (Environment & Land Case 10 of 2017)
[2023] KEELC 15682 (KLR) (14 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 10 OF 2017
MN KULLOW, J
FEBRUARY 14, 2023**

BETWEEN

DANIEL ONYANGO OMUSO PLAINTIFF

AND

PIUS OLIMA OMUSO 1ST DEFENDANT

CHRISTINE ADHIAMBO OBOGE 2ND DEFENDANT

EDWARD OWINO RAPELA 3RD DEFENDANT

MIGORI COUNTY LAND REGISTRAR 4TH DEFENDANT

JUDGMENT

1. The Plaintiff herein commenced this suit by way of a Plaint dated February 6, 2017 against the Defendants seeking the following Orders: -
 - i. An Order for nullification of parcels LR No Kanyamkago/ kawere/1/1255,1256,5183,5184,5185 and 5186 respectively and the same do rebut to the original LR No Kanyamkago/ Kawere 1/716 pending proper filing of succession cause and equal distribution thereof.
 - ii. An Order for injunction restraining the Defendants from interfering, alienating, selling and/ or disposing of the above listed parcels to any third party pending the outcome of this pending suit.
 - iii. Cost of this suit.
 - iv. Any other relief this honourable court may deem fit to grant.
2. The plaintiff avers that at all material times; the original parcel of land LR No Kanyamkago/ Kawere 1/ 716 measuring 8.13Ha, was jointly registered in the names of Ndege Omusoand Onyango Omuso;



who are brothers and fathers to the 1st Defendant and him. It is his contention that upon the death of both the registered owners of the suit land; the suit parcel was to be shared equally between the him and the 1st Defendant with each party getting a portion measuring 4.07Ha.

3. It is his claim that the 1st Defendant, without any color of right or consultation; deliberately and in collision with the 4th Defendant proceeded to subdivide the original suit land LR No Kanyamkago/ Kawere 1/ 716 into two parcels LR No Kanyamkago/ Kawere 1/ 1256 and LR No Kanyamkago/ Kawere 1/ 1255.
4. That the subdivision of No 1/1255 further culminated to the subdivision of 4 parcels; namely LR No Kanyamkago/ Kawere1/5183 measuring 5.2Ha, 1/5184 measuring 0.73Ha, 1/5185 measuring 1.6Ha and 1/5186 measuring 0.4Ha.
5. He now contends that the said subdivisions from the original parcel No 1/716 were illegally done and ought to be nullified and for the parcel to revert to its original number pending the filing of Succession Cause by both the Plaintiff and the 1st Defendant's in respect to the deceased registered owners' estates.
6. The 1st – 3rd Defendants jointly Entered Appearance and filed their separate Statements of Defence all dated May 2, 2017 in response to the allegations raised in the Plaintiff. The 1st Defendant denied the allegations made against him and it was further his contention that the Plaintiff is not the son of Onyango Omuso and therefore has no right over the suit land, he maintained that Plaintiff's father was one Nelson Oyengo. It was his position that the right family members should be given time to commence succession proceedings of the late Ndege Omuso and Onyango Omuso.
7. The 2nd Defendant in her defence also stated that the Plaintiff is not a beneficiary of the estate of either Ndege Omuso or Onyango Omuso since his father was one Nelson Omuso. It was her contention that her late husband Joseph Aboje Orero bought a portion of the suit land measuring 1 Acre from the late Nelson Oyengo Omuso and fully paid the purchase price.
8. She further accused the Plaintiff for inserting his name in the land register without following the due process of succession and denied the existence of parcel Nos 1/5183,5184,5185 and 5186. She was of the view that the said subdivision was done erroneously.
9. The 3rd Defendant on his part also denied that the Plaintiff is a beneficiary or the son of Onyango Omuso and is therefore not entitled to a share of the estate. He denied the existence of parcel Nos 1/5183, 5184, 5185 and 5186 and put the Plaintiff to strict proof thereof.

Evidence/ Trial

10. On December 14, 2021, the matter proceeded for hearing; the Plaintiff testified as PW1. He adopted his witness statement dated February 6, 2017 as his evidence in chief. He further stated that the suit land was originally registered in the names of Ndege Omuso and Onyango Omuso (who are both since deceased) and that he is the son of the late Onyango Omuso.
11. He claimed that the 1st Defendant subdivided the original parcel No 1/716, into several new parcels to wit; 1255,1256,5183,5184, 5185 and 5186 even though no succession has been done in respect to the estate of both Ndege Omuso and Onyango Omuso.
12. He also produced the following documents on his list of documents as exhibits in further support of his case: -
 - a. Letter dated July 22, 2016 – PExhibit 1
 - b. Letter dated January 31, 2016- PExhibit 2



- c. Letter dated July 11, 2016 - PExhibit 3
 - d. Official search dated November 6, 2016 - PExhibit 4
 - e. Demand letter dated August 30, 2016 - PExhibit 5
 - f. Chiefs letter dated May 12, 2019 - PExhibit 6
13. On cross-examination by the 1st Defendant; he stated that he had documentary evidence to show that he is the son of the deceased Onyango Omuso and that he had filed the instant suit to get the rightful share belonging to his father.
 14. On re-examination, he reiterated that he had produced a copy his father's death certificate and a letter from the chief for purposes of succession of his father's estate which has not been done to date.
 15. Peter Otok Osawa testified as PW2; he adopted his witness statement dated February 6, 2017 as his evidence in chief. He reiterated that the original suit parcel No 1/716 belonged to the late Alexander Ndege Omuso and Onyango Omuso, who is the Plaintiff's father. It was his claim that in 2017, the 1st Defendant subdivided the original parcel unlawfully hence the instant suit.
 16. On cross-examination by the 1st Defendant; he conceded that he was not a member of the family neither did he know Nelson Oyengo. He further stated that the late Ndege Omuso sold to the 2nd and 3rd Defendants a portion of land in the year 1977 without informing the Plaintiff. The Plaintiff thereafter closed his case.
 17. The matter proceeded for Defence hearing on March 1, 2022. The 1st Defendant testified as DW1; he adopted his witness statement dated May 2, 2017 as his evidence in chief. He further stated that the Plaintiff was the son of his Aunt who was married in Uyoma but came back. That the Plaintiff was however given a portion of land but has since been claiming for more.
 18. On cross-examination by the Plaintiff's advocate; he confirmed that the original suit land NO 1/716 was registered in the name of Ndege Omuso who is his father and Onyango Omuso. He however denied that the Plaintiff was the son of the late Onyango Omuso and maintained that the plaintiff's father is Nelson Onyego.
 19. He conceded that he subdivided parcel No 1255 was subdivided into Parcel Nos 5183, 5184, 5185 and 5186 but did not give the Plaintiff his portion. The said new parcels were registered in the name of the 1st -3rd Defendants. He further conceded that he had not done succession proceedings in respect to the deceased estate but that he only presented his father's death certificate to the Lands Office.
 20. The 2nd Defendant testified as DW2; she adopted her witness statement dated May 2, 2015 as her evidence in chief. She further stated that the portion of the suit land No 5186 measuring 0.4Ha which she occupies was legally purchased by her late husband and there were witnesses to the said transaction.
 21. On cross-examination she maintained that the portion of the suit land was sold to her deceased husband by Ndege Omuso though she conceded that she did not provide a sale agreement to confirm the same. She added that they went to the Land Control Board and followed the right process to have the same registered in her name.
 22. The 3rd Defendant testified as DW3; he adopted his witness statement dated May 2, 2017 as his evidence in chief. He further stated that Haru Rapela (his grandfather) bought a parcel of land measuring 5 Acres from Ndege Omuso in 1977. That upon purchase of the said land, they been have occupying and using the land until they were interrupted by the Plaintiff who also destroyed their belongings. He urged the court to grant him the rightful portion of land that they purchased.



23. On cross-examination; he maintained that the land was sold to him by one Ndege Omuso but conceded that he had not produced a copy of the sale agreement since the same was destroyed when the plaintiff destroyed their belongings. He maintained that he is the owner of parcel No 1/1255 and that he lives on the same parcel.
24. Joel Okoth Ndege testified as DW4; he adopted his witness statement dated May 4, 2017 as his evidence in chief. He further stated that his late father had sold a portion of the suit parcel to the 2nd and 3rd Defendants.
25. On cross-examination, he stated that at the time of registration of the suit land in the 1st Defendant's name; the Plaintiff was away and they did succession of his father's estate in his absence. He also maintained that the documents used at the Lands Registry were approved for registration. He thus urged the court not to nullify the title deeds in question.
26. John Omeso Orero testified as DW5; he adopted his witness statement dated May 4, 2017 as his testimony and evidence in chief. On cross-examination, he stated that he was aware that there were 2 titles registered in the name of the Plaintiff and the 1st Defendant. He however denied the issue of succession. The Defence thereafter closed their case.
27. Upon close of the Defence case, I issued directions on the filing of final submissions within 14 days. Both parties filed their rival submissions which I have read and taken into consideration in arriving at my determination.

Plaintiff's Submissions

28. It is the Plaintiff's submission that the 1st Defendant proceeded and obtained title deed over the suit parcels without following the due process of law and thus contravened the provisions of the law of succession. That the evidence on record proved that the original suit land was jointly owned by Ndege Omuso and Onyango Omuso, who are both since deceased.
29. He further submitted that the suit land measuring 8.13Ha was to be shared equally between the beneficiaries of the two registered owners with each party getting 4.07Ha respectively.

1st 3rd Defendants' Submissions

30. The Defendants' submission was majorly anchored on the fact that the Plaintiff was neither a beneficiary of the estates of Ndege Omuso and Onyango Omuso nor is he entitled to a share of the suit property.

Analysis And Determination

31. I have carefully considered the pleadings herein, the respective evidence and exhibits and the rival submissions in totality. On that account, it is this court's considered view that the following issues arise for determination: -
 - a. Whether the subdivision of the original parcel LR No Kanyamkago/ Kawere1/716 into parcel No 1/1255 and 1256 and the subsequent subdivisions was lawful.
 - b. Whether the Plaintiff is entitled to the reliefs sought.



A. Whether the subdivision of the original parcel L.R. No. Kanyamkago/ Kawere1/716 into parcel No. 1/1255 and 1256 and the subsequent subdivisions was lawful

32. The Plaintiff has sought the nullification of parcel Nos Kanyamkago/ Kawere1/ 1255, 1256, 5183, 5184, 5185 and 5186 and the resulting titles and for the same to revert to the original parcel No 1/716. It is his claim that the resultant subdivisions were fraudulently done by the 1st Defendant in collusion with the 4th Defendant; who proceeded with the subdivision without following the proper procedure to attain the requisite capacity to deal with the estate of the deceased person.
33. The 2nd and 3rd Defendants maintained that they were bonafide purchasers of a portion of the suit land, having purchased the same from one Ndege Omuso, who was one of the registered owners of the original suit parcel. It is their claim that they are entitled to peaceful occupation and use of the purchased share.
34. The 1st Defendant on the other hand maintained that the Plaintiff was not the son of the late Onyango Omuso but was the son of Nelson Onyego. It was therefore his claim that the Plaintiff is neither a beneficiary of the said estate nor is he entitled to a share of the suit property thereof. It was his testimony that instituted the subdivision process at the Land Registry where he presented his father's death certificate and the said subdivision and subsequent registration was approved. DW4, who was his witness however maintained that they filed succession proceedings for their deceased father's estate but at the said time the Plaintiff was away.
35. I have noted that the Defendant's central point of defence was on the fact that the Plaintiff was not the son of the late Onyango Omuso and hence he is neither a beneficiary nor is he entitled to a share of the suit property thereof. In this regard; I wish to restate that the jurisdiction of this court to hear and determine disputes relating to the environment, use and occupation of and title to land flows from Article 162 (2) (b) of the Constitution as read with Section 13(2) of the Environment and Land Court Act.
36. Matters touching on the determination of the beneficiaries and/or dependants of the estate of a deceased person are matters within the preserve of the Probate court, which is vested with the requisite jurisdiction. To this extent, I find that this court has no jurisdiction to determine whether PW1 is a beneficiary of the estate of the late Onyango Omuso or not or whether he is entitled to a share of the suit parcel or not.
37. From the pleadings and evidence in court, it is apparent that the original suit parcel was registered in the names of Ndege Omuso and Onyango Omuso. It is also not in contention that there has been a subdivision of the said original parcel into new parcel Nos 1255,1256, 5183, 5184, 5185 and 5186. Further, it is common ground that no succession proceedings have been instituted in the matter, no Grant of Representation has been adduced as evidence in respect of both Ndege Omuso's estate or Onyango Omuso's estate. The same has been confirmed by the Defendant at paragraph 6 of each of their respective Statements of Defence and by the testimony of DW1.
38. Even though DW4 testified that they filed succession cause in respect to his father's estate; he did not produce any Letters of Administration or Certificate of Grant or copy of the alleged proceedings as filed in court. His averments therefore remain unsubstantiated and holds no probative value.



39. Section 45 (1) of the [Law of Succession Act](#) is clear on this regard and provides as follows: -

' (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

40. I have also noted that no copy of the Green Card was adduced by either parties for purposes of ascertaining the history and some of the claims made by the 2nd and 3rd Defendants. From the record, it is not clear when the said subdivisions of the original parcel were done or when the late Ndege Omuso sold a portion of the suit parcel to the 2nd and 3rd Defendants or when he died. It cannot therefore be ascertained whether the subdivision and registration of the property into the names of the 2nd and 3rd Defendants was done during the lifetime of Ndege Omuso or whether the same was done after his death and which would amount to intermeddling with the estate of the deceased. No supporting documents were produced as evidence by the 1st – 3rd Defendants to support the said subdivision of the original parcel and the subsequent subdivisions thereof. The 4th Defendant on the other hand did not file any defence in response to the said allegations or to give an explanation as to why the said subdivisions were effect and what documents were relied on in support of the same.

41. It is therefore my considered opinion that the subdivision of the original suit parcel LR No Kanyamkago/ Kawere1/716 was unlawfully done without following the laid out procedure in law; the same was done without the requisite capacity to deal with the property of a deceased person and thus amounts to intermeddling with the estate contrary to the provisions of section 45 of the [Law of Succession Act](#). There was therefore no lawful basis and/or justification for the said subdivision of the original title.

42. However, I have noted that the Plaintiff, did not challenge the sale of a portion of the suit land to the 2nd and 3rd Defendants and the same is therefore not in dispute. In view of the same, I accordingly find that the 2nd and 3rd Defendants are innocent/ bonafide purchasers for value of the said portion and are therefore entitled to the portion thereof.

B. Whether the Plaintiff is entitled to the reliefs sought

43. Section 26(1) of the [Land Registration Act](#) provides that a title deed is a prima facie evidence that the person named as the proprietor of the land, is the absolute and indefeasible owner of the said land. However, this court cannot turn a blind eye and sanitize irregularity and fraudulently acquired properties all in the name of indefeasibility of title. See *Chemel Investments Limited –vs- The Attorney General & Others Nairobi Petition No 94 of 2005*)

44. Section 26(1) of the [Land Registration Act](#) provides as follows;

- (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.



45. In the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR* Justice Sila Munyao held that:

It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.'

46. Having held that the subdivision of the original parcel of land No 1/716 was illegally and unprocedurally done, guided by the above dictum by Munyao JI find that the titles arising from the said subdivision of the original warrants being impeached. The Plaintiff is therefore entitled to the relief of nullification as sought in his plaint.
47. However, I have also noted that some of the parties are in occupation, have built and extensively developed their respective portions of the suit land. I therefore direct that the status quo obtaining be maintained pending the filing and determination of the succession cause.

Costs

48. Costs generally follow the event. However, in this case, I have noted that the parties herein are related and the same is therefore a family dispute. I therefore direct that each party to bear their own costs of the suit.

Conclusion

49. The upshot of the above is that the Plaintiff has proved his case on a balance of probabilities and I partially allow the Plaint dated February 6, 2017 on the following terms;
- i. A Declaration is hereby made that the suit parcel LR No Kanyamkago/ Kawere 1/716 is jointly owned by Ndege Omuso and Onyango Omuso and further that the 2nd and 3rd Defendants are purchasers for value and are entitled to a portion of the suit parcel LR No Kanyamkago/ Kawere 1/716 measuring 0.4Ha and 5 Acres respectively as beneficiaries to the estate claiming Purchasers' Interest.
 - ii. An Order be and is hereby issued for the nullification of parcels LR No Kanyamkago/ kawere/1/1255,1256,5183,5184,5185 and 5186 respectively and the same do revert to the original LR No Kanyamkago/ Kawere 1/716 subject to; the proper filing of succession cause and determination thereof and the transfer of the parcels acquired by the 2nd and 3rd Defendants herein.
 - iii. The Plaintiff and the 1st Defendant are hereby ordered to file the Succession Cause within 60 days from the date of this Judgment.
 - iv. The Status Quo obtaining be maintained pending the filing and determination of the Succession Cause. Parties are however restrained from alienating, selling and/or disposing of the said parcels to third parties pending the determination of the Succession Cause.
 - v. Each party to bear their own costs of the suit.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 14TH DAY OF FEBRUARY, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Plaintiff present in court in person

Defendants present in court in person

Court Assistant - Tom Maurice/Victor

