



**Okaru v Onserio & 3 others (Environment & Land Case 1237 of 2016)
[2023] KEELC 17482 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1237 OF 2016**

M SILA, J

MAY 18, 2023

(FORMERLY KISII HIGH COURT CIVIL SUIT NO. 165 OF 2006)

BETWEEN

PRISCAH NYANCHAMA OKARU PLAINTIFF

AND

ANDREW ONSERIO 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

ANIL TAILOR 3RD DEFENDANT

COUNTY GOVERNMENT OF KISII 4TH DEFENDANT

(Both plaintiff and 3rd defendant having title to the suit property; 3rd defendant having purchased the title of the 1st defendant; 1st defendant having a registered Lease issued in 1994; plaintiff having a title purportedly registered on 17th August 2006; this suit having been commenced on 24th November 2006 with plaintiff suing on behalf of the estate of her deceased husband claiming that the land was allotted to him in 1986; while this suit was ongoing, plaintiff procuring title in her own name and amending plaint to sue on her own behalf; plaintiff calling Land Registrar as a witness to testify that the only records are of the plaintiff and that there are no records of the 1st and 3rd defendants; analysis of the evidence revealing that Lease of 1st defendant was registered and that there must have been title documents of the 1st and 3rd defendants in the Land Registry as plaintiff herself when she first filed suit produced a search in name of 1st and 3rd defendants; at time of filing suit plaintiff's case was that she had no title; apparent that plaintiff procured a title while the case was ongoing and backdated it to 2006; clear that plaintiff must have colluded with personnel from Land Registry to cause disappearance of the records of title of the 1st and 3rd defendants; plaintiff's title called out as fake and nullified; judgment entered for 3rd defendant pursuant to his counterclaim)



JUDGMENT

A. Introduction and Pleadings

1. The suit herein was commenced through a plaint filed on 24 November 2006 which plaint was subsequently amended a couple of times. When the plaint was filed in 2006, the plaintiff pleaded that she was presenting the suit on behalf of the estate of the late Francis Okaru Gisembe, who it was said is the person supposed to be registered as proprietor of the land parcel Kisii Municipality/Block III/339 (the suit property). It was pleaded that the 1st defendant was wrongfully registered as proprietor of the suit property on 17 October 1994 and that on 17 January 2006 he transferred his title to the 3rd defendant. Her case then, was that the land had previously been allotted to her late husband, one Francis Okaru Gisembe, and that the issue of title to the 1st defendant was fraudulent. In the original plaint, she inter alia sought orders to have the title of the 3rd defendant revoked, so that she is registered as proprietor thereof.
2. Before the case was heard, the plaintiff managed to procure a title in her name, which title was issued to her on 11 August 2011. This led to the 1st and 3rd defendants amending their defence so as to incorporate a counterclaim against the plaintiff and the Land Registrar, Kisii County, seeking orders for a declaration that they hold the proper title and for eviction of the plaintiff from the suit land. There followed two other amendments to the plaint; that filed on 3 October 2019 principally to substitute the Commissioner of Lands for the National Land Commission and the Kisii Municipal Council for the County Government of Kisii, who were sued as the 2nd and 4th defendants respectively; and the further amended plaint filed on 2 November 2021. In the last amended plaint, the plaintiff now sues on her behalf, no longer on behalf of the estate of the late Francis Okaru Gisembe, and asserts that she has proper title to the suit land.
3. The core question in this case, therefore, is who between the plaintiff and the 3rd defendant has good title to the land parcel Kisii Municipality/Block III/339.

B. Evidence of the Parties

4. PW -1 was Steve Mokaya, the Land Registrar, Kisii. His evidence was that the plaintiff was registered as proprietor of the suit land on 17 August 2006 and issued with title on 12 August 2011. She then charged the property to Family Bank on 10 December 2014 to secure the sum of Kshs 700,000/= and a further charge was registered on 11 January 2016 to secure Kshs 500,000/=. He produced the extract of the register (white card) for the plaintiff's title. Cross-examined, he could see that the allotment letter of the plaintiff did not have the entity issuing it. He also did not have the Lease instrument in favour of the plaintiff in his records; he affirmed that for a Certificate of Lease to issue there must first be a registered lease. He thought that some documents must be missing in his file. He testified that leases come in triplicate; one copy kept in the Lands Registry, a second copy remains with the owner, and a third copy is kept with the Land Administration Department in Nairobi, and thus the plaintiff ought to have a copy of the lease. He also testified that a lessee pays a sum of money for registration of the lease and the receipt is kept by the lessee, thus the plaintiff ought to have it. He affirmed that registration is entered in the Presentation Book but he did not carry it. He testified that the white card shows that the plaintiff was registered on 17 August 2006, but could not reconcile that with the pleadings in the original plaint, which was that at the time of filing it (ie, 24 November 2006) the plaintiff had no title and that an allotment letter had been issued to Francis Gisembe (deceased). Put to him that the Certificate of Lease was backdated, his evidence was that he would be speculating if he answered that



- question. He testified that the letter of allotment in his records is to the plaintiff (Priscah) and not to her late husband Francis. He testified that Municipal Councils used to allocate land and there would be minutes to that effect which would be forwarded to the Commissioner of Lands for issue of an allotment letter. He did not have the minutes allocating land to the plaintiff. It surprised him that the 3rd defendant has title for he had no documents showing the 3rd defendant as proprietor.
5. The documents relied upon by the 3rd defendant were put to him and he acknowledged that they inter alia comprise of a Lease instrument showing registration with a Presentation Book Number, and the transfer of Lease also showing that it was registered on 18 January 2006. He acknowledged that these documents indicate that the 3rd defendant has a title but he did not have these records in his file. He testified that the plaintiff's letter dated 24 July 1986 was a licence to occupy land and was not an allocation for a lease. He testified that the records show that Francis died in the year 2003, and thus, if a letter of allotment was to issue in 1998, it would issue in his name and not that of Priscah. He affirmed that the land was owned by the Municipal Council which would be the allocating entity and records would be forwarded to the Commissioner of Lands to prepare an allotment letter based on the minutes of the Council.
 6. PW-2 was the plaintiff. Her evidence was that her husband was allotted the plot through a letter dated 24 July 1986 which she produced. She also produced various other documents that go to support her title. She testified that she is the one in possession of the plot which she uses to operate a carpentry business. Cross-examined, she testified that at the time she commenced the suit, she did not have title in her name. She testified that she was issued with an allotment letter in 1998. She affirmed that her husband died in 2003. She stated that after her husband died, the Chief wrote to her a letter which she used to follow the properties of her late husband and she used the Chief's letter to get title. She testified that no allotment letter was issued in the name of her late husband and that the land was surveyed after her husband had died. She was asked whether she has a lease instrument and she said she has none but she holds a Certificate of Lease. On the loans from Family Bank, she stated that she has paid them and had an executed discharge of charge with her.
 7. With the above evidence the plaintiff closed her case.
 8. DW-1 was Dr. Anil Tailor, the 3rd defendant. He is a pediatrician by profession. His evidence was that he purchased the suit land from the 1st defendant through an agreement dated 21 December 2005, and title was transferred to him in the year 2006. He produced the documents supporting his title including an original lease instrument in name of the 1st defendant, the consent to transfer from the Municipal Council of Kisii, the transfer instrument duly registered, stamp duty payment receipts, and the Certificate of Lease in his name. He testified that when he bought the land there were arrears of rates, stand premium, and rent, which he paid. He had the original receipts with him and he produced copies thereof as exhibits. He testified that he had been paying rates on the land until the year 2020 when the County declined to accept rate payments from him owing to the dispute in court. He testified that when the plaintiff filed suit, she availed a search which showed him as registered proprietor. He pointed out that when she filed suit, she never presented any allotment letter or Certificate of Lease, and neither did she avail a search to show that she is the registered proprietor. Cross-examined, he stated that he did not go further to investigate how the 1st defendant got allotted the land. He testified that when he bought the land there was a carpentry workshop and that he spoke to the late husband of the plaintiff who showed him a temporary occupation licence. He was examined on the Certificate of Lease of the 1st defendant which he could see that it did not have an Identity Card number. He knew the 1st defendant as he had been treating him when he was young. He could not however tell his age and had no knowledge that he was a minor in the year 1994.



9. With the above evidence the 1st and 3rd defendants closed their case. The 4th defendant closed her case without calling any evidence and the State adopted the evidence of PW-1. The National Land Commission did not participate in the case and offered no evidence.

C. Analysis and Disposition

10. I invited counsel to file written submissions and I have seen the submissions filed by counsel for the plaintiff, and counsel for the 1st and 3rd defendants in the main suit. Other parties did not file submissions. I have taken these into account before arriving at my decision.
11. Both plaintiff and 3rd defendant hold titles to the suit land and in order to make a decision on who has a better title, it is necessary to analyse the documents that support the respective titles.
12. Starting with the title of the 3rd defendant, he produced a lease instrument in name of the 1st defendant dated 14 October 1994, revealing that it was registered on 17 October 1994 and entered in the Presentation Book as No. 110/10/94. There is indication of registration fee of Kshs 250/= which was paid vide receipt no. 963049. I am not in any doubt that this Lease instrument was duly registered. The other document produced was a Certificate of Lease in name of the 1st defendant which shows that it was issued on 17 October 1994. It is a lease from the Gusii County Council for a term of 99 years from 1 September 1994. There is an agreement dated 21 December 2005 demonstrating that the 1st defendant sold the title to the 3rd defendant for the sum of Kshs 1, 100,000/=. There is a letter dated 6 December 2005 from the 1st defendant to the Town Clerk, Kisii Municipal Council, applying for consent to transfer, and there is a letter of even date from the Kisii Municipal Council giving consent to the transaction. There is a similar consent from the Ministry of Lands and Housing dated 18 January 2006. The property was duly valued and there was produced the valuation form for stamp duty purposes. There was produced the transfer of lease dated 23 December 2005, registered on 18 January 2006 vide presentation book number 033, and the transfer instrument is duly paid for and stamped by the Land Registry. Receipts for payment of stamp duty were exhibited and finally there was availed the Certificate of Lease in name of the 1st defendant.
13. On the other hand, the plaintiff produced a letter dated 24 July 1986 from the Kisii Municipal Council addressed to Francis Okaru Gisembe Machora, who was said to be the late husband of the plaintiff and who died in the year 2003. That letter states as follows :-

Allocation for Plot

This is to inform you that during Town Planning Committee held on July 15, 1986, you were recommended under Minute No. 53/86 for allocation of a plot to set up a workshop for making coffins.

W. O Orwenyo

For Town Clerk

CC. District Physical Planning Officer,

Box 2180

Kisii.

(Please identify the site for plot allocation committee)

14. The other document that the plaintiff has produced is a letter of allotment dated 15 August 1998, which is in her own name, ie, Priscah Nyanchama Okaru. That letter allots an unsurveyed commercial



Plot Z – Kisii Municipality. The plaintiff also produced a letter dated 3 November 2006 from the Permanent Secretary, Ministry of Local Government addressed to the Town Clerk, Municipal Council of Kisii. It states as follows :-

RE : Kisii/Block III/339, The Late Francis Okaru Machora

We are in receipt of a copy of a letter from Mrs. Priscah Nyanchama Okaru on the above matter.

You are advised to consider her request in the relevant council committee to facilitate the transfer.

E.N Torome

For Permanent Secretary

CC. Mrs. Priscah Okaru

15. In addition the plaintiff produced as exhibits rates payments receipts for the years 2017, 2018 and 2019, and the Certificate of Death of the late Francis Okaru which shows that he died on 3 September 2003.
16. Before we go too far, it should be recalled that the suit herein is no longer in respect of the estate of the late Francis Okaru, but the plaintiff herein is suing on her own behalf and asserting to be the legitimate owner of the suit land. Thus, what needs to be investigated is whether the plaintiff, in her own right, acquired good title to the suit land, not whether the land ought to have been allotted to the late Francis Okaru.
17. I have carefully interrogated the documents of the plaintiff and I am unable to reconcile some very glaring gaps. First, the letter of allotment which is dated 15 August 1998, does not state that the issue of the allotment letter is on behalf of which County Council, for the name of the County Council (or Municipal Council) is blank. The letter avers that the allocation is per an attached plan but the part for the filling in of the plan number is also blank. Neither did the allotment letter produced have any Part Development Plan annexed. I am also not able to reconcile this allotment letter with the letter from the Permanent Secretary, Ministry of Local Government, which is dated 3 November 2006, and which requests the Municipal Council of Kisii to consider allocating land to the plaintiff. If the plaintiff already had an allotment letter issued in the year 1998, in her own name, then she did not need to have the letter from the Permanent Secretary, requesting the Municipal Council to consider allotting her the suit land on account of her late husband. Moreover, if it is the plaintiff's case that it was her husband who was allotted the land, pursuant to the letter dated 24 July 1986, then you would expect that if an allotment letter would issue in the year 1998, then the same would be in the name of Francis Okaru (for he was alive) and not in the name of the plaintiff, for the plaintiff was never allotted land by the Municipal or County Council of Kisii. There is no document produced showing that Francis Okaru had made any request in writing that any allotment letter should not issue in his name but in the name of the plaintiff. For reasons above, I am not persuaded that the purported allotment letter dated 15 August 1998 is a genuine allotment letter.
18. Furthermore, the plaintiff has not displayed any evidence that she duly paid for the monies indicated in the allotment letter. No receipt was produced to demonstrate any payment of the monies therein. In addition, the plaintiff never produced any lease instrument or any letter forwarding a lease instrument for registration at the Lands Registry in Kisii. The evidence of PW-1 was that Lease instruments are in triplicate and the plaintiff as the original lessee was expected to have one copy of it. The plaintiff did not have it. Even assuming that this instrument was lost, the plaintiff could have availed an extract of the presentation book to demonstrate that there was a lease in her favour which was registered in the



year 2006 as claimed. In essence, there is absolutely nothing to support the Certificate of Lease now being waved by the plaintiff.

19. Apart from the above, the case of the plaintiff is belied and completely exposed by her initial pleadings. It will be recalled that this suit was commenced through a plaint filed on 24 November 2006, when the plaintiff filed it on behalf of the estate of the late Francis Okaru. In her pleadings, she did plead that the Municipal Council of Kisii recommended allocation of the land to the deceased through minute No. 53 of 1986 and she asserted that this land was duly allocated to her late husband. It was pleaded that in November 2005, she discovered from a certificate of official search that the property that was allotted to her late husband had been registered in the name of the 1st defendant which title was later transferred in the year 2006 to the 3rd defendant. In that plaint, she sought orders to have the title of the 3rd defendant cancelled and she be registered in place thereof on behalf of the estate of the deceased. She subsequently filed an application for injunction to have the defendants restrained from the land pending hearing and determination of the suit. Within that application, she swore an affidavit, where she deposed in terms that tallied with the averments in the plaint. In addition, she did state that she had earlier filed a suit, being Kisii HCCC No. 2 of 2006, filed on 21 March 2006 solely against the 1st defendant, which she had to withdraw after the land was transferred to the 3rd defendant. At no point did she ever contend that the suit land was allotted to her directly or that she has an allotment letter issued to her in the year 1998. It will be observed that the Certificate of Title, that the plaintiff has, purports to demonstrate that the plaintiff obtained registration on 17 August 2006. If this is truly the case, then you would expect that when she filed suit on 24 November 2006, she would file it in her own name, and also display documents indicating that she is already registered as proprietor of the suit land.
20. The totality of the above evidence makes me come to the conclusion that the purported letter of allotment is fake and that there was never any registration of title in the name of the plaintiff on 17 August 2006 or at all. I am persuaded to find that what happened is that the plaintiff, in collusion with some crooked personnel at the Kisii Land Registry, proceeded to manufacture the letter of allotment, the white card, and the Certificate of Lease. They also caused the disappearance of the records of the 1st and 3rd defendants from the Lands Registry. As I have mentioned, and demonstrated in my analysis above, there is no document whatsoever which would support the register (white card) in favour of the plaintiff. The plaintiff did call the Land Registrar to testify that whatever records that are in the Lands Registry are only those of the plaintiff and that there is none in the name of the 1st and/or 3rd defendants. Again this evidence is belied by the fact that when she lodged her application for injunction in the first instance, the plaintiff did assert that there is title issued in the name of the 1st defendant, which title was subsequently transferred to the 3rd defendant. She even annexed official searches which showed registration in the names of the 1st and 3rd defendants. How can she now avail a witness to say that there have never been any documents of registration in favour of the 1st and/or 3rd defendants? It is blatantly obvious that some personnel at the Lands office in Kisii proceeded to pluck out the documents of title of the 1st and 3rd defendants.
21. It was preposterous for the Land Registrar to come to court and claim that they are not aware of any documents in support of the titles of the 1st and 3rd defendants. The 3rd defendant produced a Lease instrument which shows that it was duly registered. There is a presentation book number there. He also produced receipts of payments made to the Lands Office for registration of the instruments of transfer to him. If at all the Land Registrar was sincere, and wished to be fully open, he should have come with the Presentation Book to show that there were no such entries of Registration of the Lease in name of the 1st defendant or transfer of lease to the 3rd defendant. He did not feel brave enough to come with these documents. I am in fact genuinely shocked and taken aback that the Land Registrar could attend court to defend a title that is so obviously fake and pour scorn on a genuine title. You



would imagine that the Land Registrar would come to court impartially and with candidness on who the genuine title holder is and what the valid title documents are. I wonder where we are heading if Land Registrars cannot be trusted to be honest and to tell the truth on the ownership of titles.

22. This to me is a classical case of a person (read the plaintiff) fraudulently colluding with personnel at the Land Registry to manufacture documents purporting that she has title to the land and causing the removal and disappearance of records of title of the genuine proprietor (read the 1st and 3rd defendants). It appears that this nefarious conduct has taken root in our Land registries and we should all be worried, very worried, about such practice. The people of Kenya have entrusted the Land registries to be the custodian of proper records relating to ownership of land. It is a breach of trust for personnel in the Land registries to proceed to remove documents of title of a genuine proprietor, and in place thereof, insert documents purporting that title is held in name of another person. It is conduct that is crude, wicked, and criminal. It is against the principles of national values as espoused in Article 10 of the Constitution. This shameful practice should be condemned in the strongest terms possible and ought not to be tolerated. People stand to lose their land and lifelong investments by such despicable behaviour. The economy stands to be adversely affected as land is a critical factor of production. In fact it will not be strange to see people shying away from investing in land if the true title cannot be given the protection and sanctity that it deserves. As society, we have sunk low, very low, and we should be ashamed of ourselves, that we can do anything to grab other people's land. Land officers need to pause and look at themselves in the mirror and ask themselves whether this is conduct that makes them proud of who they are. They need to also appreciate that if such practice continues, even they themselves, or their children and loved ones, may very well be affected by the conduct of a land officer dealing with their property. It is time that we called a stop to this despicable and malicious practice of causing disappearance of genuine land documents and planting false ones.
23. The long and short of it is that I am not persuaded that the plaintiff has demonstrated to this court that she ever got a good title to the suit land. Her title must be called out as fake. I proceed to order the Chief Land Registrar and the Land Registrar, Kisii, to proceed and cancel the purported register, the Certificate of Lease, and any other instrument that purports that the plaintiff holds title to the suit land. I issue an order permanently prohibiting the registration of any dealings in respect of the purported register bearing the name of the plaintiff as proprietor. It follows that the case of the plaintiff fails and is hereby dismissed with costs to the defendants named in her suit.
24. The 3rd defendant lodged a counterclaim against the plaintiff, the Land Registrar, Kisii, the Chief Land Registrar, the Kisii County Government and the Honourable Attorney General, though the case against the County Government was withdrawn. In the counterclaim, the 3rd defendant first sought a declaration that he is the *bona fide* proprietor of the suit land. I will make the order that as between the plaintiff and the 3rd defendant, it is the 3rd defendant who has good title to the suit land. The second prayer sought is the eviction of the plaintiff from the suit land. Having held that the plaintiff holds no title to the suit land, the plaintiff has no business continuing being in occupation and use of the suit land. I issue the order of eviction and order the plaintiff to give vacant possession within 30 days from the date hereof and in default she be evicted. Upon vacating the land, or being evicted as the case may be, there is issued a permanent injunction stopping the plaintiff and/or any person acting at her behest from entering, being upon, utilizing, dealing or in any other way interfere with the quiet possession and use of the suit land by the plaintiff.
25. The costs of the counterclaim will be shouldered by the plaintiff and the other defendants named in the counterclaim save for the County Government of Kisii as the suit against her was withdrawn as earlier stated.
26. Judgment accordingly.



DATED AND DELIVERED AT KISII THIS 18 DAY OF MAY, 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

