



**Monyenye & another v Onyoni & 5 others (Environment & Land Case
1228 of 2016) [2023] KEELC 21082 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21082 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1228 OF 2016
M SILA, J
OCTOBER 26, 2023
(FORMERLY KISII HCCC NO. 144 OF 2001)**

BETWEEN

**MANSON MOREKA MONYENYE 1ST PLAINTIFF
CLIFFORD NYAGAKA MAGARE 2ND PLAINTIFF**

AND

**DAVID OMURWA ONYONI 1ST DEFENDANT
HARUN OMURWA MWAMBA 2ND DEFENDANT
JAMES NYABARO MWAMBA 3RD DEFENDANT
DISTRICT LAND REGISTRAR, KISII DISTRICT 4TH DEFENDANT
DISTRICT SURVEYOR, KISII DISTRICT 5TH DEFENDANT
THE ATTORNEY GENERAL 6TH DEFENDANT**

JUDGMENT

Suit by plaintiffs seeking orders inter alia for the eviction of the 1st – 3rd defendants from their parcels of land; suit against 2nd defendant declared null and void as he was sued after he had died; 1st and 3rd defendants claiming that the plaintiffs obtained registration by way of fraud by forging the documents of transfer and because the land had earlier been sold to them by the original proprietor; evidence showing that the original proprietor subdivided his land into three and sold two of the subdivisions to the plaintiffs; there being evidence of the sale agreements and consents of the Land Control Board sanctioning the subdivision and the transfers to the plaintiffs; no evidence that any of these documents were obtained by way of fraud and in any event no complaint raised by the seller or his successors; 1st and 3rd defendants’ agreements contested, but even then, no consent of the Land Control Board approving the same; 1st and 3rd not lodging any suit against the person



who allegedly sold to them the land; clear that the plaintiffs obtained good title and the 1st and 3rd defendants have no right to be on the land; judgment entered for the plaintiffs against the 1st and 3rd defendants

A. Introduction and Pleadings

1. It is unfortunate that this case has been dawdling in court for more than twenty two years, given that it was commenced through a plaint filed on 10 September 2001. The suit is not even complicated and it is really nothing more than a simple claim of trespass by the plaintiffs against the defendants.
2. In the plaint, the plaintiffs pleaded that they are respectively the registered proprietors of the land parcels Nyaribari Chache/B/B/Boburia/6042 (measuring 0.36 Ha) and Nyaribari Chache/B/B/Boburia/6044 (measuring 0.58 Ha) (the suit lands) having purchased the same from the original owner, one Oboge Nyakenucha alias Ochora (referred to hereinafter simply as 'Oboge'). They pleaded that around the year 2000, the 1st – 3rd defendants, started claiming ownership of their land on the contention that they also purchased the same land from Oboge. It is averred that on 30 November 2000, the 1st – 3rd defendants went to the offices of the 4th and 5th defendants (respectively, the District Land Registrar, and District Surveyor, Kisii) and that the 4th and 5th defendants unlawfully purported to hear a land ownership dispute. It is averred that the 4th and 5th defendants destroyed the existing boundary features, and erected new ones, and awarded the plaintiffs' land to the 1st – 3rd defendants. It is pleaded that the 1st – 3rd defendants have wrongfully taken possession of the suit lands and that the 4th and 5th defendants are in the process of making new mutation forms. In this case, the plaintiffs seek the following orders :-
 - a. Eviction and delivery of possession of the portions of parcel Nos. Nyaribari Chache/B/B/Boburia/6042 and 6044 unto the plaintiffs and restoration of the old boundary features in the original positions before 30 November 2000.
 - b. Mesne profits
 - c. Damages
 - d. Interest at court rates on (b) and (c) above
 - e. A permanent injunction restraining the defendants or any person claiming through them from trespassing or interfering with the plaintiff's quiet possession of the suit lands.
 - f. Costs and interest.
3. The 1st, 2nd and 3rd defendants filed a joint statement of defence dated 2 October 2003, which was more or less a general denial of the plaintiffs' claim. On 12 February 2004, it was mentioned that the 2nd defendant is dead but no application for substitution had been made. I will get back to the issue regarding the suit against the 2nd defendant shortly.
4. On 29 March 2006, the 1st and 3rd defendants filed an amended defence and counterclaim. They averred that if the plaintiffs are registered as proprietors of the suit lands, then their registration was by way of fraud, inter alia by purchasing the plots when they knew that the 1st and 3rd defendants had purchased them earlier and presenting forged documents to facilitate registration into their names. They pleaded that they purchased the plots on diverse dates in 1997 and 1994 and that they took vacant possession respectively on 15 March 1997 and 5 December 1994. They denied that the plaintiffs have ever taken possession of the suit lands. In the counterclaim, they elaborated that they purchased portions of the land parcel Nyaribari Chache/B/B/Boburia/3736 from Oboge but the plaintiffs fraudulently



registered the portions so purchased in their names. They reiterated that they took possession and developed them. In the counterclaim, the 1st and 3rd defendants seek the following orders:-

- a. A declaration that the 1st and 3rd defendants are entitled to one acre each from the suit plots, the plaintiffs' titles to the suit plots be cancelled and the register rectified accordingly to bear the names of the 1st and 3rd defendants as proprietors of the suit plots and the plaintiffs be permanently restrained from in any way interfering with the suit plots.
 - b. Costs of the counterclaim
 - c. Interest on (b) above.
 - d. Any other relief that the honourable court may deem fit to grant.
5. A reply to defence and defence to counterclaim was filed where the plaintiffs joined issue with the defendants. They pleaded that they are total strangers to the claim that the defendants had purchased the land from Oboge, and averred that if they did, then they ought to have sued him, and asked him to transfer the land to them. They pleaded that the 1st and 2nd defendants were put into unlawful possession of the suit lands in the year 2000 by the 4th and 5th defendants and they have not done any great developments as alleged.
6. The State Law Office filed defence for the 4th – 6th defendants. They denied any knowledge of the pleadings in the plaint and invited strict proof thereof.
7. The hearing of the matter commenced before Sitati J, who was sitting in the High Court, on 24 March 2011, when the 1st plaintiff testified. The matter was thereafter adjourned for further hearing. With the creation of the Environment and Land Court in 2012, the case was transferred to this court. On 15 October 2015, when the parties appeared before Mutungi J for directions, they agreed to start the case de novo.
8. On 20 March 2017, two applications for substitution were made. One to substitute the 2nd defendant, who it will be recalled had been mentioned as having died when the matter was in court on 12 February 2004, and the other to substitute the 3rd defendant who was also now said to be dead. It turned out that the 2nd defendant had actually died on 7 April 2001, before this suit was instituted, and the court, through a ruling dated 16 March 2018, declined to allow for substitution, declaring the suit against him as null and void ab initio. As to the 3rd defendant, it was discerned that he died on 3 September 2016, and the application to substitute him with Rose Moraa Orwochi was allowed. From 2019 to 2022, the parties indicated that they would wish to attempt to negotiate the matter, or mediate it before the Assistant County Commissioner, and they in fact asked for more time for this process when they first appeared before me on 19 October 2022. I felt that the matter had taken too long and fixed it for hearing in the event that nothing came out of the negotiations. The negotiations did not bear fruit and the matter had to proceed for hearing with hearing commencing on 19 June 2023, twenty two years since the suit was filed.

B. Evidence Of The Parties

Plaintiffs' Evidence

9. PW-1 was Manson Moreka Monyenye the 1st plaintiff. He is a retired Chief of Gachuba Location in Kisii, and currently lives in Kitale. He testified that he started looking for land around the years 1992 and 1993. Oboge was selling some land out of his land parcel Nyaribari Chache/B/B/Boburia/3736 (referred to hereinafter simply as parcel No. 3736), and on 18 September 1995, they entered into



a written agreement before an advocate. They proceeded to the Keumbu Land Control Board and subdivision was done. He was then issued with his title deed on 21 December 1998 bearing the description Nyaribari Chace/B/B/Boburia/ 6042 (hereinafter simply referred to as parcel No. 6042). He testified that he sent people to plant trees and tea but they were chased away by the defendants who claimed to have title to the same land. He proceeded to the land and the defendants gave out their parcel number as 3399. He reported to the Criminal Investigations Department (CID) who wrote a letter summoning the defendants. They came and the CID sent them to the Lands office for a determination. They proceeded there but the Land Registrar informed the 1st to 3rd defendants that he could not find any title reading parcel No. 3399. They were referred back to the CID and he opted to file this suit. He testified that his tea and trees are still on the land.

10. Cross-examined he testified that the land was vacant when he took possession in 1994/1995 and that is when he started cultivating it. He testified that it is the 1st defendant who is currently on his land and is the one harvesting the tea that he planted. He testified that none of the defendants bought Oboge's land and that those who purchased it are one Arasa, then himself, followed by Clifford Nyagaka (2nd plaintiff) and Josephine Nyakundi. He elaborated that Oboge's land was subdivided into three portions and he referred to the mutation form. He testified that Arasa had purchased his land earlier and had his title, thus those who were to benefit from the mutation were himself, Nyagaka and Josephine. He stated that when they went to the Land Registrar, what he did was write a letter to the CID that his title was genuine. He had no issue with the Land Registrar and he was categorical that his dispute is with the 1st - 3rd defendants.
11. PW-2 was the 2nd plaintiff, Clifford Nyagaka Makere. He is a secondary school teacher. He testified that he owns the land parcel Nyaribari Chache/B/B/Boburia/6044 (hereinafter simply referred to as parcel No. 6044) and has a title deed to it. He testified that it was in 1998 that he was introduced to Mzee Oboge by one Rebecca Nyakundi (his mother in law) as Oboge was selling land. Oboge was then living in Migori. He visited him and they agreed that he will come and show him the land. He did come and they inspected the land. He stated that he had by that time sold land to two people, that is the 1st plaintiff and Joyce Nyakundi who had taken the portions No. 6042 and 6043. What remained was the parcel No. 6044, which Mzee Oboge now wished to sell. He wanted to sell so that he could buy more land in Migori and move there. He did a search and they wrote an agreement dated 7 January 1998, which was witnessed by one of his sons Joseph Ondieki, Manson Monyenye (1st plaintiff) and Rebecca (his mother in law). He paid the money in instalments. They applied for LCB consent and he was eventually issued with a title deed. He wished to develop the land and plant eucalyptus trees but was told that some people are claiming the same land. He thereafter received summons from the Land Registrar who held a session with all claimants. He stated that the defendants claimed to own the land parcel No. 3399. He testified that the Land Registrar asked him to surrender his title deed without explaining why but he declined to surrender it and filed this case.
12. Cross-examined, he testified that the parcel No. 6043 is owned by Joyce Nyakundi who is elder sister to his wife. He affirmed that his land is based on the mutation form registered on 12 February 1998. His sale agreement was written on 7 January 1998. The Land Control Board (LCB) consent was obtained on 6 January 2000. His title deed was issued to him on 20 November 2000. He testified that he did a search before the purchase though he did not have it. He stated that he took possession of the land in 1998, by which time Mzee Oboge's land had already been subdivided into three portions. He tried to plant trees but was threatened and he moved out. The LCB application showed the land as 0.33 Ha but he testified that when surveyed it measured 0.58 Ha. The sale agreement showed 0.58 as the land being sold and his title is for 0.58 Ha. He affirmed that it is the mutation dated 12 February 1998



which created his land. There was an issue regarding his transfer form which showed the amount of Kshs. 20,000/= as consideration and appeared not to have been signed on the part of the transferee.

13. With the above evidence, the plaintiffs closed their case.

Defence Evidence

14. DW-1 was Oswera Cecilia Harriet, a Land Registrar, in Kisii. She elaborated that the parcel Nyaribari Chache/B/B/Boburia/3736 was owned by Mzee Oboge who subdivided it on 12 February 1998 to bring forth three parcels, being parcels No. 6042, 6043 and 6044. She verified that the process of subdivision was properly followed as there was consent to subdivide issued on 22 May 1997. There was no restriction in the register of the parcel No. 3736 before the subdivision was done. She could see a duly filled caution form in the file but which was never registered. She affirmed that the 1st plaintiff is currently the proprietor of the parcel No. 6042 and that he was issued with title on 23 December 1998, whereas the 2nd plaintiff is proprietor of the parcel No. 6044 and he was issued with title on 2 February 2000. She saw nothing wrong in the manner in which the land was transferred to them, though she did acknowledge during cross-examination, that the transfer form for parcel No. 644 appears not signed by the transferee but stamp duty was paid. She confirmed that there is no other proprietor in their records and there is no restriction in the register for either parcel of land. She had no documents in favour of the 1st to 3rd defendants in her parcel file.
15. DW-2 was David Omurwa Onyoni, the 1st defendant. He is a retired teacher. He testified that he bought land from Mzee Oboge in 1997 and that they wrote an agreement dated 15 March 1997. He testified that he bought one acre at Kshs. 100,000/= out of Oboge's land parcel No. 3736. He stated that he first paid Kshs. 80,000/= and he later made the second payment of Kshs. 20,000/=. He testified that he took immediate vacant possession upon signing the sale agreement. He claimed that the 1st plaintiff was not in possession of the land and that it was he who planted the tea and trees on the land. He is currently the one in possession. He denied chasing away the workers of the 1st plaintiff. He stated that he has never been to the CID offices, nor to the Land Registrar's office, as a result of a report made by the 1st plaintiff. He was only summoned by the Chief and informed that another person was claiming the land. He alleged to have placed a caution through his advocate Mr. Momanyi. He did not know whether the caution was registered. He produced the sale agreement and caution as exhibits. He denied being a trespasser. He testified that the seller allowed him entry and possession of the land and he made the developments on the land. He confirmed that he has a counterclaim seeking ownership of the land.
16. Cross-examined, he testified that he did a search before he bought the land but he did not have it. He testified that it was in 1998 that he got to know from the area Chief that some people are claiming the same land. He prepared a caution. He stated that what he wished to caution was the land parcel No. 3736 though the caution shows that what is typed is the parcel No. 6044 then altered by hand to read 6042. He stated that he was not aware that the parcel No. 3736 had already been subdivided and did not exist at the time. He nevertheless stated that he was aware of the existence of the parcels No. 6042 and 6044. He did not have the receipt paying for registration of the caution. He admitted that he had nothing to show that it reached the office of the Land Registrar. He admitted that there was nothing to stop issuance of titles to the plaintiffs given that the caution was never registered. He had nothing to show that he went to the Land Control Board for his transaction and had no consent of the Land Control Board. He claimed to have paid Advocate Momanyi Kshs. 2,000/= to register the caution and that he left it for the advocate to register, but he had no proof of this. It transpired that he actually had the original caution instrument in court. The caution was to be in respect of the parcel No. 6044. As at 6 March 2000, he was aware that the land parcel No. 3736 had already been subdivided as he had done a search.



17. He was cross-examined on his sale agreement. He testified that the agreement shows that it was Mzee Oboge and his son, Peter Mose Nyamari selling land to him. The agreement was not signed by Peter. He testified that Mzee Oboge died around the year 2004 and he had already moved to Kuria (in Migori). It was in 1998/1999 that he came to know some people were claiming the land at which time Mzee Oboge was alive. He claimed that Mzee Oboge told him that he has not sold land to the 1st plaintiff. In 1999 he learnt that the land had been subdivided into three and that the parcel No. 6042 was in name of the 1st plaintiff. He alleged to have asked Mzee Oboge about the subdivision and he told him that he had not sold the land to the plaintiffs. He did not take any step until this case was filed. He testified that it was Mzee Oboge who breached their agreement. The agreement had a clause that if anyone was in breach he would pay twice the contract sum. He claimed that he went to Mzee Oboge to demand reimbursement of his money in accordance with the agreement but Mzee Oboge fell ill around that time. Oboge never wrote any statement in his favour for this case and made no report to the police about people claiming to have bought land from him when he never sold to them. He testified the person who wrote their agreement was Harun Mwamba (deceased 2nd defendant) who was his cousin. The agreement between Mzee Oboge and the 3rd defendant was also written by Harun Mwamba and has the same witnesses to his agreement. He insisted that the agreements were written in 1994 and 1997 and denied the insinuation that the agreements were written later, after this case was filed. Re-examined, he clarified that the land he wished to caution was parcel No. 6042. It is here that he has planted tea and trees. He however resides elsewhere. He affirmed that he purchased one acre but was not aware of the acreage of the parcel No. 6042.
18. DW-3 was the 3rd defendant, Rose Moraa Orwochi, who substituted the original 3rd defendant, Philip Nyabaro Mwamba (Philip). She is the wife of Philip, who is now deceased. He died on 3 September 2016. The 1st defendant is cousin to her husband and her husband was brother of Harun Omurwa (deceased 2nd defendant). Her evidence was that Philip had bought the disputed land in 1994. She did not know the parcel number that he purchased nor its size. She did not accompany him when he bought the land. He only came and told her that he had bought land. She stated that the land was vacant and that they took possession, planted tea, trees, coffee and avocados. She currently occupies the land though she is not aware of its size. She was aware that a dispute arose as the plaintiffs were claiming the land. She stated that a report was made to the Chief who summoned the plaintiffs but they failed to attend. She affirmed that there were also summons issued by the Land Registrar but she did not know what transpired there. She did not know if her husband had placed a caution on the land.
19. DW-4 was Teresia Moraa Monyenye. She is daughter in law to Mzee Oboge and wife of Monyenye Omari Oboge, the eldest son of Mzee Oboge. She claimed that Mzee Oboge sold land to Philip (deceased 3rd defendant) and Omurwa (1st defendant). She was not aware of sales to other people. She stated that they were living on the land in 1998. She could not recall the year that the land was sold nor the year that they vacated the land. She was not aware that Mzee Oboge subdivided the land into three. She claimed that Mzee Oboge had given herself and her husband 2 ½ acres of the land. She could not recall when this was done. She did not know what parcel number was given to them. She stated that her husband sold the land given to him to Nyabaro Mwamba (one acre) and another to a person called Misati (1/2 acre) who in turn sold to the 1st defendant. Her husband did not have title when he sold the land. She stated that there was a written agreement and she was present when the parcels of land were sold and sale agreements drawn which was done on the land. Mzee Oboge was not present when these sale agreements were written as he had already moved to Migori. She explained that those on the land are on it because her husband sold to them the land. She elaborated that Mzee Oboge had three children, her husband being the eldest, then one Isaac and Mohamed. Isaac and Mohamed were not present when her husband sold the land and they are now deceased. She however changed her



evidence to say that it was her husband and Mzee Oboge who jointly sold the land to the defendants and not her husband alone. Her evidence on whether she witnessed the sale agreement was extremely convoluted. She in fact readily admitted to signing as a witness the sale agreement dated 15 March 1997 this year in Kisii, and that she was called by Rose (3rd defendant) and Omurwa (1st defendant) to sign it. She acknowledged that Mzee Oboge purchased land in Kuria and divided it to his sons including her husband. Her husband was buried in Kuria and so too Isaac and Mohamed.

20. With the above evidence, the defendants closed their case. I invited counsel to make written submissions. Mr. Momanyi for the plaintiffs, and Mr. Nyambati for the 3rd defendant filed submissions. For the State it was said that they would fully rely on the evidence on record. I have not seen any submissions filed by Mr. Ayienda for the 1st defendant.
21. I have considered all the above.

C. Analysis And Disposition

22. The case of the plaintiffs is that they purchased the suit properties from Mzee Oboge and the defendants have trespassed into them. Although there were allegations in the plaint against the Land Registrar, and claims that the Land Registrar and District Surveyor wished to draw another mutation form so as to recognize the interests of the 1st – 3rd defendants, there was no such evidence that presented itself to support such allegation. There was also no evidence that the Land Registrar and District Surveyors interfered with any boundary features as claimed in the plaint. There is really nothing that was brought forth against the Land Registrar or District Surveyor and it is clear to me that the gripe that the plaintiffs have is against the 1st and 3rd defendants, now that the 2nd defendant is deceased. I will proceed to dismiss the suit against the 4th – 6th defendants and I need not say more on it.
23. As to the claim against the 1st and 3rd defendants, from the evidence, it is apparent that Mzee Oboge owned the land parcel Nyaribari Chache/B/B/Boburia/ 3736. He wished to sell it. On 18 September 1995, he sold 300 x 250 feet of this land to the 1st plaintiff. The sale agreement was exhibited and no party raised any doubts on it. The parties proceeded to the Land Control Board and obtained consent to transfer. The consent was issued on 22 October 1998. A transfer of the portion sold was effected and the 1st plaintiff became registered as proprietor of the land parcel No. 6042; he was issued with a title deed on 23 December 1998. On 7 January 1998, Mzee Oboge entered into a second agreement whereby he sold land measuring 0.58 Ha to the 2nd plaintiff. The sale agreement was exhibited and no party disputed it. Yet again the parties proceeded to the Land Control Board and obtained consent to transfer on 20 January 2000. The 2nd plaintiff was thereafter issued with a title deed on 7 February 2000.
24. Mzee Oboge did subdivide his land parcel No. 3736 into three portions, being parcels No. 6042, 6043 and 6044, the parcels No. 642 and 6044 being the ones in dispute. The Land Registrar affirmed that the subdivision of the parcel No. 3736 was properly done and she also saw nothing untoward with the transfer of the parcels No. 6042 and 6044 to the plaintiffs. The complaint of the plaintiffs is that despite being owners, the 1st – 3rd defendants have interfered with their possession and they inter alia seek orders of eviction.
25. It will be recalled that in their defence, the 1st and 3rd defendants claimed that the sale to the plaintiffs was fraudulent for reason that the plaintiffs bought land that had earlier been sold to them and that they forged documents to facilitate transfer to them. There is not a single document that the 1st and 3rd defendants presented claiming to be a forgery. The only question is whether the sale to the plaintiffs was irregular on the basis that the land had earlier been sold to the 1st and 3rd defendants. On this, the evidence of the 1st defendant is that he purchased land through the sale agreement dated 15 March



1997. It will be recalled that the 1st defendant is in occupation of the land parcel No. 6042 which title is with the 1st plaintiff. It will again be recalled that the sale agreement between Mzee Oboge and the 1st plaintiff was entered into on 18 September 1995. It is clear that the sale agreement of the 1st plaintiff is the first in time, as the land to the 1st plaintiff was sold on 18 September 1995 whereas the sale agreement of the 1st defendant (forgetting for a moment that it is disputed) is dated 15 March 1997. It cannot therefore be argued that Mzee Oboge sold land to the 1st plaintiff after he had first sold it to the 1st defendant. Though it could be argued that the sale agreement of the 2nd defendant (and I am alive to the fact that it is contested) came before that of the 2nd plaintiff, it really wouldn't matter as I will demonstrate shortly.

26. There is indeed no need of deeply analyzing the sale agreements of the 1st and 3rd defendants, because even if genuine, for all intents and purposes, those sale agreements are null and void for want of consent of the Land Control Board. Whereas the sales to the plaintiffs are backed up by consents issued by the Land Control Board, the alleged sales to the 1st and 3rd defendant have no such backing and Section 6 (1) of the Land Control Act, CAP 302, Laws of Kenya, nullifies them. That provision of the law states as follows :-

6. Transactions affecting agricultural land

(1) Each of the following transactions that is to say—

- (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
- (c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

27. The purported agreements that the 1st and 3rd defendants allege to have with Mzee Obwoege are thus null and void and of no effect pursuant to Section 6 (1) above. They cannot be relied on by the 1st and 3rd defendants for purposes of obtaining proprietary interest in the suit lands.

28. It matters not that the 1st and 3rd defendants took possession of the suit properties. They had no valid sale agreement that could result in a title to them and they had no title to the land. They were trespassers. At best, by the time the suit herein was filed in 2001, they had been in possession since 1994 and 1997 respectively, which is just about seven and four years. They were yet to be in possession for more than 12 years thus their possession really counts for nothing.

29. The fact that the 1st and 3rd plaintiffs also never sued Mzee Oboge, yet he is the one who sold to them the land, is also fatal to their case. It is trite that you can only enforce a contract of sale of land against the person who sold the land to you. It is of course the case of the 1st and 3rd defendants that they bought land from Mzee Oboge. If they wished to have Mzee Oboge transfer the land to them, then they needed to sue him, but they did not. Mzee Oboge was alive when this suit was filed but they never lodged any counterclaim against him. They dared not face him to claim that they bought any land from him and



to try and enforce such sale. Even after he died, there was no attempt to sue his legal representative. How can they succeed in enforcing a contract for sale of land without suing the seller? They cannot, as the plaintiffs have no privity of contract with them.

30. On my part, I seriously doubt that Mzee Oboge ever sold land to the 1st and 3rd defendants. My instinct is that they may have dealt with his son, or the wife of his son (Teresa), without involving Mzee Oboge. However, his son and Teresa had no title, and could not sell land to the defendants without involving Mzee Oboge. If I am wrong, and they actually dealt with Mzee Oboge, then they ought to have sued him as I have discussed above. Whatever the case, as I have again elaborated above, any sale agreements that they have are null and void for want of consent of the Land Control Board.
31. It is therefore clear to me that it is the plaintiffs who hold good title to the disputed land parcels No. 6042 and 6044. They properly purchased these parcels of land and they were issued with title. There may have been some irregularity in the transfer instrument to the 2nd defendant, but in the circumstances of this case, that is irrelevant, as there is no issue from Mzee Oboge or his successors, contesting the sale and transfer of the title to him. Whatever irregularity can also not be to the favour of the defendants and cannot ascribe title to them. I thus hold that the plaintiffs are the legitimate registered proprietors of the land parcels Nyaribari Chache/B/B/Boburia/6042 and 6044. As proprietors, it is them, and only them, who are entitled to use and occupation of the suit lands. They are perfectly within their rights in demanding that the defendants do deliver vacant possession of the suit lands, and I hereby give the defendants 30 days from the date hereof for them to deliver vacant possession. If they do not do so, the plaintiffs are at liberty to apply for an order of eviction. Upon the lapse of the 30 days given above, the defendants are permanently restrained from entering, being upon, utilizing, or in any other way interfering with possession of the suit lands. There was a claim to restore original boundaries but I saw no substance in this allegation.
32. The other prayers of the plaintiffs relate to mesne profits and damages. There was no evidence led on mesne profits and I make no award under this head. However, I am persuaded to make an award for general damages. The defendants occupied the land of the plaintiff without any legal basis at all. Even after this suit was filed, they made no attempt to give vacant possession, despite not having title and despite not suing the person who allegedly sold land to them. They have by their unlawful action kept the plaintiffs away from their land for a significant amount of time. Taking into consideration the size of the land, the activities conducted by the defendants therein, and the time that this case has taken, I will award the 1st plaintiff Kshs. 1,500,000/= against the 1st defendant, and a similar sum of Kshs. 1,500,000/= to the 2nd plaintiff against the 3rd defendant as general damages for trespass and illegal occupation of land. Interest will accrue at court rate from the date of this judgment till settlement in full.
33. The last issue is costs. The plaintiffs will have the costs of this suit as against the 1st and 3rd defendants together with the costs of the counterclaim. I make no orders as to costs for or against the 4th to 6th defendants.

JUDGMENT ACCORDINGLY DATED AND DELIVERED AT KISII THIS 26 DAY OF OCTOBER 2023

JUSTICE MUNYAO SILA

JUDGE

