



**Nyakweba v Obongo (Environment & Land Case 159 of 2014)
[2023] KEELC 21815 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21815 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 159 OF 2014**

**M SILA, J
NOVEMBER 28, 2023**

BETWEEN

CHARLES MAGOMA NYAKWEBE PLAINTIFF

AND

SIMEON OBONGO DEFENDANT

JUDGMENT

(Plaintiff filing suit to have the defendant restrained from the suit land; plaintiff asserting ownership of the suit land and having a title in his name; plaintiff also recognized in the Land Registry as being the owner of the suit land and the register therein bearing his name; plaintiff stating that he purchased the suit land from the initial allottee of the land; defendant contending that the plaintiff cannot be holding a legitimate title and filing a counterclaim for nullification of his title; position of the defendant being that the suit land was allocated to his mother by the National Housing Corporation under the Kisii Site & Service Scheme at Nyanchwa; defendant producing evidence of the allocation and a letter from the Corporation affirming him to be the allottee and directing the Commissioner of Lands to issue title to him; analysis of the documents provided by the plaintiff disclosing that the same are of dubious origin or completely not related to the suit land; court of opinion that such documents were planted by the plaintiff in order to confuse the court; the documents of the defendant appearing consistent and the confirmation letter from the National Housing Corporation given significant weight; court of opinion that the land could not have been allocated as claimed by the plaintiff and the plaintiff could not have acquired any good title; court dismissing the plaintiff's case and upholding the counterclaim of the defendant).

A. Introduction And Pleadings

1. The plaintiff filed this case on 16 April 2014, vide a plaint, seeking the following orders against the defendant;



- i. Declaration that the plaintiff is the registered and/or lawful owner of LR Kisii Municipality/Block 1/491.
 - ii. Permanent injunction restraining the defendant either by himself, servant and/or anyone claiming under him from entering upon, re-entering, trespassing onto, laying a claim to, sinking trenches, laying foundation, depositing building materials, building on, chasing away the plaintiff's workers, interfering with and/or in any other manner dealing with the suit land, that is, LR Kisii Municipality/Block 1/491 and/or any portion thereof.
 - iii. General damages for trespass
 - iv. Interest on (iii) hereof at court rates
 - v. Costs of this suit be borne by the defendant
 - vi. Such further and/or other relief as the honorable court may deem fit and expedient so to grant.
2. The plaintiff claimed that on 10 January 1984 the suit property was allotted to one Paul Nyakweba Ongwacho who was later issued with a Certificate of Lease by the Commissioner of Lands upon him making requisite incidental payments and he thus became the lawful owner of the suit property. The plaintiff claimed further that the said Paul Nyakweba Ongwacho later transferred the suit property to him through a legal process that culminated into the suit property being registered in his name on 18 April, 2000. He averred that on 14 April, 2014, the defendant through his agents, servants and/or employees, trespassed into the suit property and while thereon destroyed the fence around the suit property and commenced to sink trenches, lay foundations and deposited thereon building materials. Following the said actions, he proceeded to report the matter at Kisii Central Police station vide OB NO. 31/14/04/2014 with a view of having the defendant restrained from carrying on the illegal actions. He decried that as a result of the said illegal actions of defendant, he has been deprived of his right of usage of the suit property and thus he is bound to suffer loss.
3. In response, the defendant filed a statement of defence and counterclaim on 25 April, 2014 which he later amended on 5 May, 2014 denying all the claims raised against him by the plaintiff. In his amended defence, the defendant stated that he is rightfully and legally entitled to Plot Number 59 Site and Service Scheme, Nyanchwa within Kisii town, which is the administrative reference, pending issuance of a proposed title Kisii Municipality/Block 1/491. He averred that he is in occupation, possession and ownership of the said Plot Number 59 since 2006 pursuant to legal arrangements and programs that commenced in 1977 with the defunct Kisii Municipal Council (the predecessor of the Kisii County Government) and the National Housing Corporation and has all along been paying the requisite charges. He contended that Site and Services Scheme Number 59, Nyanchwa was not available for allocation, has never been free for allocation to the plaintiff, and was incapable of being registered in the name of the plaintiff or his purported transferor.
4. He claimed too that the plaintiff's title or that of his transferor in respect to LR Kisii Municipality/Block 1/491 was a product of a flawed and illegal process riddled with contradictions, misrepresentation and fraud. He listed the particulars of fraud, forgery and misrepresentation as follows :
- a) The plaintiff purports to own a lease over a property whose records are not available or maintained by the lessor and therefore in possession of a title borne of unknown procedure and incapable of legal force.



- b) Letter dated 10 January 1984 does not particularize the plot purportedly earmarked for allotment or allotted to the purported transferor or the plaintiff by any authority rendering the purported title contentious, dubious and or suspect.
 - c) The receipt serial Number E444430 is not issued in respect of LR Kisii Municipality Block 1/491 or any specified title related thereto.
 - d) The lease dated 7 January 2000 and purportedly registered on 4 February 1994 does not have date of receipt for registration or day book number and its authenticity thus diminished or extinguished.
 - e) The purported letter from the Commissioner of Lands dated 28 November 1994 refers to Kisii Municipality Block 1/545 and not LR Kisii Municipality Block 1/491.
 - f) The registry index map annexed to the plaint is not certified, not approved provisionally or finally and that the same has numbers 491 and 545, and only one of the two relates to the location of the plot Site and Service Scheme 59 which on processing derives LR Kisii Municipality Block 1/491.
 - g) The certificate of lease dated 4 February 1994 in the name of Paul Nyakweba Ongwacho and the Certificate of Lease dated 18th April 2000 in the name of Charles Magoma Nyakweba (the plaintiff herein) bears the same National Identity Card Number.
 - h) The Certificate of title dated 18 April 2000 indicates the lessee as Paul Nyakweba Ongwacho and the proprietor as Charles Magoma Nyakweba which displays a fundamental error in terms of entries to the purported title.
 - i) The certificate of lease dated 4 February 1994 indicates that Paul Nyakweba Ongwacho is the lessee and proprietor of the property LR Kisii Municipality Block 1/491 which contradicts the Registrar's letter of 20 November 1994 referring to Kisii Municipality Block 1/545.
 - j) The certificate of official search dated 4 February 1994 is not accompanied by official receipts of payment properly serialized rendering the search unofficial and fraudulent.
 - k) The transfer of lease dated 4 April 2000 is not endorsed, verified or certified before registration rendering the end product defective and incapable of creating and sustaining a competent title or certificate of lease.
 - l) The purported certificate of official search dated 18 April, 2000 has no serialized receipt or payment of the same to verify the claim of official search.
 - m) The purported certificate of official search dated 10 April 2014 is not authentic therefore incapable of presentation as an official document.
 - n) The undated statement of Charles Magoma Nyakweba indicates that he is 44 years old on the 16 April 2014 and that his father was allocated the purported land in 1984 yet in his letter dated 15 April 2014, he indicates that he had not registered his parcel of land with the municipality which serves to discredit the existence, legality and propriety of the lease LR Kisii Municipality/Block 1/491 to the extent of purported registration in the name of the plaintiff or his purported transferor.
5. He averred that he has been in possession of the Plot No. 59 Nyanchwa which on the ground is the same as LR Kisii Municipality/Block 1/491. He asserted that he is the one entitled to be issued with a Certificate of Lease in respect of Kisii Municipality/Block 1/491 as per documents exchanged



between the County Government of Kisii or its predecessor, the National Housing Corporation, and the Commissioner of Lands. He pleaded that he purchased the plot on 2 October 2006 and was readying himself to develop it when the plaintiff emerged from thin air on 14 April 2014 claiming to own the plot. In his counterclaim, he seeks the following orders :-

- (a) A declaration that the Certificate of Lease for LR Kisii Municipality/Block1/491 purportedly registered in the plaintiff's name is a product of forgery, misrepresentation, fraud and deceit on the part of the plaintiff hence incapable of the attributes germane to a good title.
 - (b) A declaration that the location of the property Site & Service Scheme Plot Number 59, Nyanchwa, vests in the defendant and is related to the property presented as LR Kisii Municipality/Block1/491 earmarked for registration in his favor.
 - (c) An order recalling, cancelling and nullifying the land records and the Certificates of Lease dated 14 February, 1994 and 18 April 2000 pertaining to LR Kisii Municipality/Block1/491 in so far as the same relate to the plaintiff and his purported transferor.
 - (d) An order of permanent injunction restraining the plaintiff, his agents his successors in title, servants, employees and/or persons acting on his behalf from interfering with or trespassing onto his parcel of land Site & Service Scheme Number 59, Nyanchwa earmarked as LR Kisii Municipality/Block1/491 for issuance of title to the defendant.
 - (e) Costs of the defence and counterclaim.
 - (f) Any other relief this court deems fit to grant.
6. The plaintiff filed a reply to defence and defence to counterclaim which more or less joins issue with the defendant.

B. The Evidence Of The Parties.

i. The plaintiff's evidence

7. The plaintiff is the Chief Officer, Administration and Enforcement, of the County Government of Kisii. He testified that the suit land was allocated to his father, Paul Nyakweba Ogowancho, vide an allotment letter dated 10 January, 1984. He elaborated that prior to the said allotment, there was an advertisement placed in the Daily Nation newspaper of 16 August 1976, inviting applicants to apply for plots at the Kisii Site and Service Scheme. He averred that his father saw the advert and applied to be allotted a plot. He stated that after the application, his father received a letter dated 23 March, 1977 from the Town Clerk which was subsequently followed with a letter of confirmation dated 19 January, 1982. That on 7 November, 1994, his father received a letter confirming that he was the owner of an unsurveyed plot No. 59 Site & Service Scheme. He alleged that the allocation was discussed in the Works & Physical Planning Committee on 15 October 1992 and he produced the said minutes. He mentioned that his father paid Kshs. 225/- for the plot and he was issued with a receipt which he produced. He continued that his father was issued with a letter of allotment and that he paid the required Kshs. 20,010/= (presumably for stand premium) to which he produced the receipt. That he (defendant's father) received a letter from the Ministry of Lands indicating that a Lease had been prepared, which letter he produced, and his father was issued with a Lease. He added that his father conducted an official search which confirmed that he was the registered owner of the suit property which search he also produced as an exhibit. He testified that his father got demands to pay rates which he paid. He stated that his father transferred to him the suit property on 4 April 2000. He (plaintiff) was thereafter issued with a Certificate of Lease on 18 April 2000, and he did a search on the same day



- to confirm the transfer. He also had a rates clearance certificate issued on 25 April 2000. He stated that he paid rates and had a receipt dated 20 February 2002. He went on to produce an official search he carried out prior to the filing of this suit which showed that he was at that time the registered owner of the suit property.
8. He explained that he sued the defendant after getting information that someone had deposited building materials on his property. He visited the land and confirmed the position. He thereafter reported the matter to the Kisii Central Police Station and he produced a copy of the statement that he made at the police station. He also wrote a letter to the Town Administrator complaining that the defendant had encroached onto his property. He stated that the defendant destroyed his fence and started digging trenches while having no ownership documents for the plot. He added that when the County Government of Kisii came into being he was served with demand notices dated 11 October, 2017 and 7 February, 2019 for rates.
 9. Cross-examined, the plaintiff reiterated that his father applied for the plot pursuant to an advertisement inviting applications for plots at Site and Service Scheme. He however did not have the application his father had made. He acknowledged that the allotment letter dated 10 January 1984, did not refer to plot number 491, but an unsurveyed residential plot. He also acknowledged that the receipt he produced (dated 13 February 1984 for payment of stand premium) did not indicate the plot number being paid for. He was questioned on the letter said to have forwarded the lease for registration and he could see that it is for the Plot Kisii Municipality/Block 1/545 and not the suit land which is Kisii Municipality/Block I/491. He did not have a receipt for the official search of 4 February 1994. He could also see that the Certificate of Lease for his father and his own Certificate of Lease have the same ID number and the ID number recorded conformed with his ID number. He claimed that he cannot tell whether his father and himself share the same ID number. He was questioned on his letter to the Town Administrator and it was pointed out to him that he stated therein that the plot was yet to be registered in his name.
 10. Questioned by the court, he could not tell whether the unsurveyed Plot No. 59 is the one that was given the number Kisii Municipality Block 1/491. He however acknowledged that the plot initially had a Site & Service number and he was later given a map showing the Plot as No. 491. He conceded that the receipt he had produced to demonstrate that stand premium payments had been made by his father did not bear a plot number. He yielded too that his national identity card number, 107***** was the ID number in his father's lease certificate and his own lease certificate and he could not explain the anomaly.
 11. PW-2 was Mr. Steve Mokaya, the Land Registrar, Kisii. He produced a certified copy of the White Card in respect of the parcel Kisii Municipality/Block 1/491. The same shows that the plaintiff is the current registered owner of the property as per entry 3 of same after transfer from Paul Nyakweba Ogwanchu. The first and second entries in that card show registration of Paul Nyakweba Nyangwacho as proprietor on 4 April 1994 and issue to him of a Certificate of Lease on the same day. He had in his file a copy of the lease prepared on 1 January 1984 in name of Paul Nyakweba Ongwacho and the forwarding letter from the Commissioner of Lands dated 10 January 1994 to the District Land Registrar. He also had a certified copy of the letter of allotment to Paul Ongwacho. He produced the transfer of lease to the plaintiff dated 18 April 2000 and the surrendered Certificate of Lease in name of Paul Ongwacho. He testified that according to his records, the property belongs to the plaintiff. Cross-examined, he acknowledged that the allotment letter did not have the plot number and it shows that it was issued in respect of unsurveyed land. The transfer of lease had a receipt annexed but he could see that it was not for the said transfer of lease. He did not have in his records a receipt for the Certificate of Lease and could not tell if it was paid for. There was a different ID number in the transfer of lease for Paul Ongwacho compared to what was in the Certificate of Lease.



12. With the above evidence, the plaintiff closed his case.

(ii) Defendant's Evidence

13. DW- 1 was the defendant. He is also an employee of the County Government of Kisii where he works as an accountant. He testified that the Plot No. 59 Nyanchwa was allocated to his mother through an allotment letter dated 23 March 1977 which he produced. He stated that his mother transferred to him the plot in October 2006. He elaborated that the Municipal Council of Kisii gave consent to the transfer after his mother wrote a letter dated 20 November 2006 and the Municipal Council approved the transfer through the letter dated 6 December 2006. He averred that his mother used to pay the land rents and he produced some receipts to that effect. He testified that his mother had not developed the plot and only used to plant kale vegetables. He started developing the land in 2014 after his development plans were approved. He produced the plan as an exhibit together with the receipt used to pay the approval fees. He also produced a clearance certificate confirming that rates were paid before the approval of the plans. That is when he found somebody fencing the plot. He testified that he was awaiting issuance of a title to him and had no knowledge that the plot bears the title Kisii Municipality/Block 1/491 which he claimed is not the same as Site & Service Plot No. 59. He stated that the County Records show Plot No. 59 and was not aware that the description has changed. He mentioned that he wrote a letter to the National Housing Corporation (NHC) and the Department of Criminal Investigations (DCI) to complain about the encroachment. His letter was not responded to. He added that he has paid the requisite fees to the NHC and produced a receipt showing payment of Kshs. 65, 280/=. He closed by saying that the plaintiff should go and trace where his plot is.
14. Cross-examined, he acknowledged that he does not yet have a Certificate of Lease. He could see that his allotment letter looked different from that of the plaintiff. He reiterated that his mother sold to him the plot; his mother died around the year 2011/2012. He did not have a document where his mother applied for the plot. He acknowledged that the letter of allotment to his mother required payment of Kshs. 760/=. He did not have a receipt for such payment. He acknowledged that the receipt issued in 2003 (2 December 2003, being payment of Plot rent for Site & Service No. 59) did not indicate it is from which County Council and he did not have the demand leading to that payment. He could see that the NHC letter dated 22 April 2014 recommended issue of title to LR No. Kisii Municipality/Block 1/491 and that he be registered as owner of the plot. He asserted that this is the title that he should get. He stated that he started paying rates in the year 2010. He had no letter from NHC informing him to pay the amount that he paid.
15. With the above evidence, the defendant closed his case.
16. I invited counsel to file written submissions, which they did, and I have taken note of these before arriving at my disposition.

C. Analysis And Disposition

17. This is a case where two persons claim the same land. It is the contention of the plaintiff that his title, which reads Kisii Municipality/Block 1/491, is a good title, whereas the defendant asserts that the plot is still recognized as Plot No. 59 Site & Service Scheme, awaiting the formal issuance of title to him, and therefore whatever title the plaintiff holds is an illegal one. This is a case that will mainly fall on an examination and analysis of the documentary evidence tendered.
18. I have had a careful look at the documents that the plaintiff has tendered in support of his case and I identify some very glaring anomalies. The plaintiff's position is that his father, Paul Nyakweba Ongwacho (Paul Ongwacho) saw an advertisement in the Daily Nation newspaper of 16 August 1976



wherein persons were invited to apply to be allocated plots at the Site & Service Scheme at Kisii. I have looked at that advertisement which was placed by the National Housing Corporation. That advertisement inter alia provides that application forms be returned before 26 August 1976, together with an application fee of Kshs. 50/= to the Town Clerk. It is thus apparent that the allocation of the plots was a collaboration between the National Housing Corporation and the Kisii Town Council. The plaintiff asserted that his father was allocated the suit plot, as Plot No. 59, and he relied on a copy of a letter dated 23 March 1977 addressed to him by the Town Clerk, Kisii Town Council. I have seen that letter. It does state that Paul Nyakweba Ongwacho has been allotted the unsurveyed Plot No. 59 and was required to pay Kshs. 760/= no later than 30 April 1977. There is a rider that any plot holder who fails to pay the said fee within the required time will have their plots re-allocated to those in the waiting list. The next letter that the plaintiff has is a copy of that dated 19 January 1982. It is a letter from the Kisii Municipal Council addressed to the Commissioner of Lands. The letter confirms that Paul Nyakweba Ongwacho is the allottee of the Plot No. 59 Nyanchwa Site & Service Scheme. The next letter, is one dated 7 November 1991, again from the Kisii Municipal Council, to the Commissioner of Lands. It is another letter of confirmation of ownership of the unsurveyed Plot No. 59 Site & Service Scheme to Paul Nyakweba Ongwacho. Let me pause there for a moment and return to the letter dated 23 March 1977. It will be recalled that it required payment of Kshs. 760/=. The plaintiff did not produce any proof of payment of this money. Let me then revert to the next letter, that of 19 January 1982 which allegedly confirms that the plot has been allotted to Paul Nyakweba Ongwacho. I wonder why a second letter, again being a confirmation, was being written in 1991, close to 10 years later. Why was Mr. Ongwacho asking for a letter of confirmation in 1991 if one had already been issued to him in 1982. I am unable to fathom and no explanation was offered.

19. It will be recalled that it was further the plaintiff's evidence that his father was issued with an allotment letter dated 10 January 1984. If that is the case, why then, would Mr. Ongwacho need a letter of 1991 to confirm that the plot is allotted to him yet he would already be holding an allotment letter? It certainly doesn't add up. It will again be recalled that it was the plaintiff's evidence that the allocation was discussed in a meeting of the Works & Physical Planning Committee on 15 October 1992 and the said minutes were produced. Yet again, this does not add up. If the Municipal or Town Council of Kisii had allotted the plot to Mr. Ongwacho in 1977, issued a confirmation in 1982 and 1992, and an allotment letter was issued in 1984, would that really form an item for discussion in 1994? I am not persuaded. I will get back to these a little later for I now want to analyse the alleged payments said to have been made by Mr. Ongwacho.
20. The plaintiff alluded to two payments made by his father. He stated that his father paid Kshs. 225/- for the plot and he produced the alleged receipt which is one dated 19 October 1992. He also stated that his father paid Kshs. 20,010/= on 13 February 1984. These monies appear to me to be the monies indicated in the allotment letter of 10 January 1984. Now, I cannot tie up this receipt of Kshs. 225/- dated 19 October 1992 to the suit land. First, this is a receipt from Kisii Town Council under Miscellaneous Income. It does not say the money is received from who and for which purpose. It is simply a receipt for Kshs. 225/= issued on 19 October 1992. The plaintiff did not explain this receipt at all. It certainly is not payment of Kshs. 760/= that was required to be paid upon allotment of the land as recorded in the letter dated 23 March 1977. It is also not payment of the fees in the allotment letter of 13 February 1984. I am unable to tally this receipt or connect it to the suit land. I think it was simply put here to confuse the court and I refuse to be confused by it. My holding is that it has no bearing whatsoever to allocation of the suit land and neither is it payment in respect of anything done towards the suit land. I choose to ignore it.
21. Let me now turn to the receipt of Kshs. 20,010/= which is tied to the allotment letter of 10 January 1984. I am not persuaded that this allotment letter nor this receipt are in any way connected to the



suit land. First, the suit land was clearly identifiable as Plot No. 59 Site & Service Scheme. I do not see how and why the Commissioner of Lands would be issuing an allotment letter to an unsurveyed, unidentified residential plot, instead of clearly specifying that the allotment is in respect of Plot No. 59 Site & Service Scheme. The receipt dated 13 February 1984 also does not indicate that it is payment in respect of Plot No. 59 Site & Service Scheme. As far as my analysis goes, this letter of allotment and this receipt are red herrings. I am persuaded to find that the said allotment letter and the said payment is for a completely separate parcel of land that may have been allotted to the said Paul Nyakweba Ongwacho and not the suit land.

22. I think this is also a good place to exhaustively address the alleged minutes of 15 October 1992 which the plaintiff alleged constituted a discussion on the allotment of the suit plot. I already cast doubts on those minutes wondering how they could be discussing an allotment that has already been confirmed and paid for (since the plaintiff alleges that the plot had already been paid for by this time). I have had another look at the minutes and clearly they have nothing to do with allocation of plots for the Site & Service Scheme. What those minutes state in so far as they relate to Paul Nyakeba Ongwacho, is that he is allocated one of unsurveyed plots in Block I being Plots A – C. Certainly, it cannot be in relation to allocation for the suit land, for the suit land was identified as Plot No. 59 from the time of allocation. The minutes are another red herring to confuse the court that they were discussing allocation of the suit plot when this cannot be the position. I will again repeat that if the case of the plaintiff is that the allocation was already done in 1977, and confirmed in 1982, then there would be nothing to discuss in 1992 in so far as allotment of the plot is concerned. I proceed to completely disregard the purported allotment letter dated 10 January 1984, the receipt dated 13 February 1984, and the minutes dated 15 October 1992. I hold that these have absolutely nothing to do with the suit land and are documents that the plaintiff planted deliberately to mislead and confuse the court in order to construct a theory of allocation of the suit land through the said documents which is not the case.
23. Let me now turn to the Lease displayed by the plaintiff and the evidence given in relation thereto. The plaintiff did testify that his father was issued with a lease which lease was forwarded for registration through the letter dated 28 November 1994. Again that is an impossibility. First, the letter dated 28 November 1994 cannot be forwarding the subject lease, that is, a lease to a land parcel Kisii Municipality/Block I/491. Indeed it cannot, because that letter states that what is being forwarded is a lease for the land parcel Kisii Municipality/Block I/545. That letter cannot be related to the suit land and must be declared irrelevant to this case. Secondly, it cannot be forwarding the lease because the lease to Paul Nyakweba was allegedly registered on 7 January 1994. By November 1994, when the said letter purports to be forwarding the lease (assuming that it was forwarding the subject lease) the lease had already been registered earlier in January. How can you have a lease registered in January 1994, then it is forwarded for registration in November 1994 ? It can't be. This is yet another bit of false evidence coming from the plaintiff.
24. Anyway, let us take a closer look at this purported lease to Paul Nyakweba Ongwacho. First, we have established that we have no letter forwarding this lease for registration. Apart from that, there is no proof of registration of that Lease. The columns indicating date received for registration and the presentation book number are all blank with no entries at all. Moreover, no receipts for registration of this lease were ever produced. I am not persuaded that such lease was ever registered. This is buttressed by the rather dubious Certificate of Lease purportedly issued to Paul Nyakweba Ongwacho. The identity card said to be of Paul Nyakweba Ongwacho in that Certificate of Lease is the same identity card number of the plaintiff. I see that the said Certificate of Lease was allegedly issued on 4 February 1994. But the ID number noted therein could not be in existence. This ID card is that of the plaintiff and it is for the ID card issued in 1996. Such number did not exist in 1994 as purported in this Certificate of Lease, and whatever the case, this was certainly not the ID card number of Paul Nyakweba



- Ongwacho. How the plaintiff's ID card number ended up being in a Certificate of Lease in name of Paul Nyakweba Ongwacho was never satisfactorily explained by the plaintiff. It will be recalled that when he was questioned on this, his answer was that he could not tell whether his father and himself shared the same ID number. Is there any person who shares the same ID card number with another, let alone a father and son ? Impossible.
25. Apart from the foregoing, I am unable to reconcile how the purported lease and certificate of lease to Paul Nyakweba Ongwacho has the term of 99 years from 1 January 1984. I wouldn't expect this to be the case if the allotment was done in 1977. You would expect that the lease be one that commences from the time of allotment in 1977 and not sometime later in 1984.
 26. The other evidence that the plaintiff relied on was a search which was said to have been done on 4 February 1994. I have doubts regarding that search. It states that a fee of Kshs. 100/= was paid but no receipt was produced as an exhibit. But fair enough, maybe one can lose a receipt; assuming that this search is genuine, I have demonstrated that there could not have been any lease registered in favour of Paul Nyakweba Ongwacho for the suit land, such that a search showing him as proprietor counts for nothing. You can plant documents in the Land Registry so that when one does a search it reflects your name, but the fact remains that so long as the documents were planted, the search cannot be reflective of the authentic ownership of the suit plot and that is where we find ourselves in this case. There was no lease issued to Paul Nyakweba Ongwacho for the suit plot in 1994. That explains why the plaintiff has nothing in form of payment of land rents and land rates between the years 1994 to the year 2000 when he purportedly came into the picture.
 27. It was his evidence that the land was transferred to him on 4 April 2000 and he was subsequently issued with a Certificate of Lease which he displayed. Any purported registration of the plaintiff as title holder was null and void as no title ever issued to Paul Nyakweba Ongwacho. Indeed, despite the plots having been advertised by the National Housing Corporation, you see nothing from the Corporation in favour of Paul Nyakweba Ongwacho. I doubt if the plot was ever allocated to Paul Nyakweba Ongwacho, especially given that the form of the letter of allotment is different from that of the defendant. The alternative hypothesis is that probably the plot was initially allocated to Paul Nyakweba Ongwacho (which I seriously doubt), but he failed to effect payment of the sum of Kshs. 760/= that was required and the plot was re-allocated to somebody else. If that was not the case, you would have seen the plaintiff with receipts from the National Housing Corporation or the Town Council, or Municipal Council, of Kisii, in relation to payments for the Plot No. 59 but you will find none. As I have pointed out earlier, all the documents presented by the plaintiff have nothing to do with allotment of the Plot No. 59 Site & Service Scheme, save for the initial letters of 1977 which to me, are of doubtful authenticity.
 28. So was the plot allotted to the defendant ? Let me analyse that. It is the case of the defendant that the suit plot was allocated to his mother Pacifica Nyakerario and he produced a letter of allocation dated 23 March 1977. It also requires payment of Kshs. 760/=. It will also be recalled that the letter of allocation allegedly to Paul Nyakweba Ongwacho is also dated the same day. It is impossible for this court to know which of the two is the genuine letter of allotment, for despite bearing the same date, they have differences in the manner in which they are presented. But I have nothing to doubt the defendant's letter. The defendant stated that his mother made some payments. He did produce some receipts to demonstrate this including a receipt dated 2 December 2003 for Kshs. 15,000/- paid as Plot Rent for Site & Service No. 59 and a clearance certificate dated 9 December 2003. The defendant did state that his mother applied to transfer to him the plot and this was done. I have seen the letter dated 6 December 2006 written by the Municipal Council of Kisii to the Managing Director, National Housing Corporation, giving consent to the transfer of the Plot No. 59 from Pacifica to the defendant.



There is a demand from NHC dated 3 December 2013 for payment of Kshs. 65,280/= being arrears. There is a letter dated 6 December 2013 from the County Government of Kisii forwarding a banker's cheque to the NHC for the sum of Kshs. 65, 280/= for the Plot No. 59 Kisii Site & Service Scheme. There is a receipt from NHC acknowledging payment of this amount. There is the letter dated 22 April 2014 from NHC to the Commissioner of Lands advising the Commissioner of Lands to issue a lease to the defendant in respect of the Plot No. 59 Site & Service Scheme, with advise that the title will be for the land parcel Kisii Municipality/Block 1/491. That letter must be given considerable weight for it is coming from the entity that sold the plots. The plaintiff has no such letter in his favour.

29. When I look at the documents of the defendant, they appear to tally, and are consistent. There is connection not only to the Municipal or Town Council of Kisii but also to the National Housing Corporation and it will be recalled that the sale of the plots was by the said Corporation. In my opinion, as between the plaintiff and defendant, it is the defendant who has demonstrated that the Plot No. 59 was allotted to his successor, who transferred her interest to the defendant. What the defendant is now waiting for is issuance of title to him.
30. . Within their testimonies, both plaintiff and defendant appeared to suggest that the other party should go and look for the ground covering his land. I don't know why both litigants chose to make such suggestions since they both know that the Plot No. 59 Site & Service Scheme is the same as the land parcel Kisii Municipality/Block 1/491. I am indeed persuaded that it is the same land given the letter of the NHC dated 22 April 2014. There is no land which is Plot No. 59 Site & Service Scheme then another which is Kisii Municipality/Block 1/491. There is only one parcel of land and it can only be owned by one person.
31. It is my persuasion that as between the plaintiff and the defendant, the defendant is the one who has demonstrated that he is entitled to be registered as proprietor of the title comprised in the description Kisii Municipality/Block i/ 491. The plaintiff came to court with dubious and fake documents claiming title to the suit land. He has not demonstrated to this court that his predecessor had any genuine title and he himself holds no good title to the suit land. His title could only have been the product of fraud, misrepresentation, mistake or a corrupt scheme. Such title is liable to be cancelled as provided by Section 26 of the [Land Registration Act](#), which is drawn as follows :-
26. Certificate of title to be held as conclusive evidence of proprietorship
- (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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
32. I do not hesitate to pronounce the plaintiff's title as one issued through fraud and/or misrepresentation and/or mistake. I am in fact persuaded that the plaintiff was party, if not perpetrator, of the fraud. I am particularly convinced by the fact that the Certificate of Lease held by the previous proprietor and



the lease held by the plaintiff bear the same Identity Card number. The plaintiff's ID number could not have appeared in the first Certificate of Lease without some involvement on his part. His title is thus liable to be cancelled under Section 26 (1) (a) of the Land Registration Act. But even assuming that he was not party to the fraud, his title is liable to be cancelled under Section 26 (1) (b) of the Land Registration Act. I proceed to cancel it. I order the Land Registrar, Kisii, to nullify the purported title of the plaintiff reading Kisii Municipality/Block 1/491. The Land Registrar, Kisii to proceed and record the nullification in the White Card and any other register in favour of the plaintiff. The Land Registrar, Kisii, is ordered not to register any dispositions in the register that shows the plaintiff as proprietor of the suit land. I further order that the defendant be registered as proprietor of the suit land in accordance with the letter of the National Housing Corporation dated 22 April 2014. In his counterclaim, the defendant asked for an order of permanent injunction against the plaintiff, to restrain him from the suit land. He deserves this order. I issue a permanent injunction against the plaintiff restraining him from entering, being upon, trespassing, building, or in any other way interfering with the possession of the defendant on the suit land.

33. The end result is that the plaintiff has failed and the defendant has succeeded. The plaintiff's suit is dismissed and the defendant's counterclaim is allowed to the above extent. The costs of both the main suit and the counterclaim will be shouldered by the plaintiff.

34. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 28 DAY OF NOVEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

In presence of: -

Mr. Ochwangi for plaintiff

Ms. Kwamboka holding brief for Mr. Mose Nyambega for the defendant

