



REPUBLIC OF KENYA



KENYA LAW
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**Nyamanga v Makabongo & 2 others (Environment & Land Case
860 of 2017) [2023] KEELC 22581 (KLR) (29 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22581 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 860 OF 2017
MN KULLOW, J
DECEMBER 29, 2023**

BETWEEN

JOSEPH OKECH NYAMANGA PLAINTIFF

AND

PHILIP ODERO MAKABONGO 1ST DEFENDANT

LAND REGISTRAR, MIGORI COUNTY 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of a Plaint dated 27th October, 2017; seeking the following Orders: -
 - i. Declaration that the cancellation and/or nullification of the Plaintiff's Title to and/or in respect to L.R. No. Kamagambo/ Kanyajuok/ 1640, and the issuance of the secondary Title in favor of the 1st Defendant, was fraudulent, unlawful, illegal, null and void.
 - ii. An Order cancelling and nullifying the Title in respect of L.R. No. Kamagambo/ Kanyajuok/ 1640, in the name of the 1st Defendant and restoration of the Register in respect of L.R. No. Kamagambo/ Kanyajuok/ 1640 to and in favor of the Plaintiff, as the lawful and legitimate proprietor thereof.
 - iii. Permanent Injunction restraining the 1st Defendant either by himself, agents, servants and/or anyone claiming under the said Defendant from entering upon, re-entering, taking possession, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with L.R. No. Kamagambo/ Kanyajuok/ 1640 and/or any portions thereof.
 - iv. General damages for trespass.



- v. Costs of this suit be borne by the Defendants.
- vi. Such further and/or other reliefs as the Honourable Court may deem fit and expedient so to grant.

Plaintiffs' Case

2. The Plaintiff avers that he is the lawfully and legitimately registered proprietor of the suit land L.R. No. Kamagambo/ Kanyajuok/1640; having been issued with the requisite title deed on the 9/10/2016 to that effect and is thus vested with absolute rights over the suit property to the exclusion of all and sundry including the defendants.
3. It is however his claim that sometimes about 10/04/2017; the 1st and 2nd defendants conspired with each other and proceeded to cancel and/or nullify the title deed issued in his favor and proceeded to transfer and reissue a secondary title in favor of the 1st defendant without following the due process of law. He thus contends that the actions and/or omissions of the 1st and 2nd defendants were unlawful, fraudulent and illegal. He thereafter outlined the particulars of fraud and illegalities on the part of the 1st and 2nd defendants.
4. It is therefore his contention that the suit parcel was fraudulently, irregularly and illegally transferred and registered in the names of the 1st defendant without his sanction or authority, despite him holding a valid title to the said land. Further, the 2nd defendant in an effort to conceal the fraudulent and illegal activities, proceeded and caused a fraudulent gazette notice to be published in the Kenya Gazette, purporting that the original title belonging and issued to the 1st defendant had been misplaced.
5. It is further his assertion that as a result of the fraudulent actions of the defendants; he has been denied and deprived the suit property which is under his occupation and possession and that he is at the verge of being evicted from the suit land and which may occasion him irreparable loss and damages. It is also his claim that the 1st defendant has since instituted criminal complaint against him for the offence of forcible detainer. He thus urged the court to allow his claim and to grant the orders sought in his plaint.
6. In his reply to defence and counter-claim dated 22/3/2018; the Plaintiff contends that even though the vendor was the registered owner of the suit property at the time the 1st defendant was purchasing it, he had acquired the same through an illegal process. He maintained that the 1st defendant had no lawful and legitimate rights over the suit property.
7. It was further his claim that the Ruling of Rongo District Land Tribunal dated 5/7/2011 and the subsequent adoption by the Rongo SRMCC on the 27/12/2011 was final and has never been challenged and/or reviewed by any court whatsoever and thus stands effective. That no party has ever appealed against the decision of the Tribunal challenging its jurisdiction.
8. He argued that there was no order required to cancel the registration of the 1st defendant as the owner of the suit land since there was a decree issued on the 27/09/2011 which required the vendor, one Anton Ochieng Okal, to transfer back the title to the plaintiff hence the reason why the 2nd defendant transferred the title in his name.
9. With regards to the Kisii Misc. Application No. 249 of 2012 relied on by the 1st defendant; it was his assertion that nothing has been availed as to the contents of the said Application to show that one of the grounds in the alleged Application was touching on the issue of jurisdiction or the Rongo District Tribunal or that the same was dismissed for want of prosecution.



10. In further response to the allegations raised in the Counter-claim; it was his contention that even though the suit land was transferred via a Land Control Board transfer, the process was carried out in a vacuum as the vendor has acquired the title in a fraudulent manner and the counter-claimer was involved in the said process. That the said vendor was neither a representative nor a beneficiary of the Estate of one Nyamanga Opiyo.
11. He dismissed the counter-claim as being an abuse of the due process of court, misconceived and untenable and thus urged the court to strike out and/or dismiss the same with costs.
12. The matter proceeded for hearing of the Plaintiffs' case on 24/05/2023. The Plaintiff testified as PW1 and adopted his witness statement as his evidence in chief. It was also his testimony that the suit relates to the suit land No. 572, which was originally registered in the name of Nyamanga Opiyo, who was his father.
13. He testified that sometimes in the year 2009, he realized that one Anthony Ochieng Okal, who is since deceased, took the land through succession and registered the same in his name since the original owner was deceased. He thereafter sold a portion measuring 1.4Ha to the 1st defendant and he remained with a portion measuring 1.6Ha.
14. He confirmed that he had previously sued the 1st defendant before the Land Disputes Tribunal in Rongo; in which a determination was made and thereafter adopted by the Senior Resident Magistrate's Court in Rongo as a judgment of the court. Upon lapse of the Appeal period and there being no appeal lodged, he took a copy of the judgment to the Registrar, who issued him with a title deed, replacing the 1st Defendant's name.
15. He confirmed that he still has the title deed issued to him and has never been asked the same. He only confirmed the changes made in the Green Card in favor of the 1st Defendant through a search the Green card hence the instant suit.
16. He also produced the documents on her List of Documents as PExhibits 1- 11 as follows; copy of Proceedings before the Land Disputes Tribunal, Rongo District dated 9/06/2009 as Pexh. 1, copy of the Decision and/or award of the Lands Disputes Tribunal, Rongo District dated 05/07/2011 as Pexh. 2, copy of the Decree issued vide Rongo SRMCC Misc. Application No. 20 of 2011 as Pexh. 3, copy of the Green card in respect of L.R. No. Kamagambo/ Kanyajuok/ 1640 as Pexh. 4, Copy of the Title Deed in respect of L.R. No. Kamagambo/ Kanyajuok/ 1640, in favor of the Plaintiff issued on the 4/10/2016 as Pexh. 5, copy of the Gazette Notice No. 921 published on the 03/02/2017 as Pexh. 6, copy of the Title Deed in respect of L.R. No. Kamagambo/ Kanyajuok/ 1640, in favor of the 1st Defendant issued on the 10/04/2017 as Pexh. 7, copy of letter by the DCIO Rongo Division and addressed to the Land Surveyor, dated 08/05/2017 as Pexh. 8, copy of the letter by County Surveyor, Migori County addressed inter alia to the Plaintiff and the 1st Defendant and dated 13/07/2017 as Pexh. 9, copy of the Demand Notice dated 04/09/2017 as Pexh. 10 and the Pleadings, Affidavits and all other documents filed in respect of the instant suit as Pexh. 11.
17. On cross- examination by Mr. Osebe for the Defendant; he reiterated that his late father was the original registered owner of the suit land No. 572. However, one Anton Ochieng Okal, who is his cousin, took out succession proceedings in respect of his father's estate without his knowledge and was issued with the Grant.
18. He further stated that he discovered in the year 2009 that Anton Ochieng Okal, had registered the land in his name and was holding the title thereto.



19. On re-examination, it was his testimony that the Gazette Notice stated that the 1st Defendant's title was lost and the same was used to remove his name from the Register

1st Defendant's Case

20. The 1st Defendant filed a Statement of Defence and Counter-claim against the plaintiff dated 27/2/2018. He denied the allegations levelled against him in the Plaintiff and put the Plaintiff to strict proof thereof. He denied the claims by the plaintiff that he is the lawful and legitimately registered property and stated that he purchased the suit land for value from one Anton Ochieng Okal, on a willing buyer willing seller term and at the time of sale and transfer, the land was registered in the vendor's name and he held a title deed issued on 12/05/2003.
21. It is his claim that the suit land was transferred into his name via normal process and he was issued with a title deed dated 26/09/2003. He thus contends that the purported registration of the land in the plaintiff's name done on 9/10/2016 was unlawful, as it was pivoted on the ruling of Rongo District Land Tribunal dated 05/07/2011 and subsequent adoption by the Rongo SRMC on 27/12/2011; both of which lacked the requisite jurisdiction. Consequently, the registration process was rendered illegal, unlawful and a nullity for lack of requisite jurisdiction by the 2 institutions to hear and determine matters of the registered title.
22. It is further his contention that the Plaintiff moved to the High Court and filed a suit vide Kisii Misc. Application No. 249 of 2012 after realizing that the previous fora lacked jurisdiction. However, the said suit was subsequently dismissed under Order 17 Rule 2(1) of the Civil Procedure Rules, for want of prosecution.
23. The 1st defendant denied any fraudulent actions and conspiracy with the 2nd defendant, to cancel the title registered in the name of the plaintiff and maintained that the said title was issued via voidable orders and was therefore unlawful.
24. He maintained that the 2nd defendant acted within the law and his mandate, especially having been informed that the Kisii Misc. Application No. 249 of 2012 had since been dismissed. He argued that he had indeed lost his title; he made a report at Kamagambo Police Station, acquired an OB number as confirmation of the loss and hence the Gazette Notice was an exercise of the lawful process of replacing his title.
25. It was his assertion that his proprietorship rights over the suit land is absolute, lawful and the same originates from a purchase for value.
26. In his counter-claim; the 1st defendant/ counter-claimant sought the following orders against the Plaintiff/ defendant: -
- a. That the Ruling of Rongo District Land Tribunal as well as the Decree of Rongo SRMCC vide Misc. Application No. 20 of 2011 are illegal, unlawful and a nullity in the circumstances and are therefore set aside.
 - b. That the 1st defendant/ Counter-claimant is the absolute owner/proprietor of L.R. No. Kamagambo/ Kanyajuok/ 1640 measuring approx. 1.4Ha.
 - c. Permanent Injunction restraining the Plaintiff either by himself, agents, servants and/or anyone claiming under the Plaintiff from entering upon, taking possession, trespassing onto, cultivating, erecting structures, interfering with and/or any other manner or dealing with L.R. No. Kamagambo/ Kanyajuok/ 1640 and/or portions thereof.



- d. Costs of the Counter- Claim suit and interests thereupon at Court rates be provided for.
27. It is his position in the Counter-claim that he is an innocent purchaser for value, having obtained his title via normal Land Board transfer done by the vendor one Anton Ochieng Okal, who is since deceased. He dismissed the plaintiff's suit as being a delaying tactic aimed at denying him the rights to peaceful possession of the suit land by illegal means and further stated that the validity of the transfer is not affected by revocation of the grant so long as the said transfer was done with a person of representation.
28. He reiterated that the findings and orders of the Rongo District Land Tribunal giving raise to the registration and/or issuance of a title in the name of the plaintiff were illegal, unlawful and irregular.
29. It was further his claim that he has continuously done farming on the suit land without interference until the plaintiff started encroaching and laying claims on the portion sold to him. He urged the court to allow the counter-claim against the plaintiff and grant the orders sought.
30. Despite being served with the Hearing Notice, neither the 1st Defendant nor his advocate was present in court to prosecute his case and no explanation was given to court for their absence. The 1st Defendant's case was therefore deemed closed.

2nd and 3rd Defendants' Case

31. The 2nd and 3rd Defendants filed a Joint Statement of Defence dated 11.01.2018, wherein they denied all the allegations levelled against them in the Plaint and put the plaintiff to strict proof thereof.
32. It was their contention that the due process of law was followed in the issuance of title deed to the 1st defendant and thus denied the particulars of fraud made against them.
33. They maintained that the transfer and registration of the suit land in favor of the 1st defendant was done after and upon a proper presentation of documents to the land's office, the proper procedure in law was complied with and everything was done in good faith with no intention to defraud the plaintiff of his property. They thus urged the court to dismiss the case against them with costs.
34. During hearing, the Land Registrar testified as DW1; It was her testimony that the suit land, Kamagambo/Kanyajuok/572 appears in work sheet No. 21. She explained that on 17/11/1977 the land was registered in the name of Nyamanga Opiyo, the 2nd entry was made on 5/8/1992 and a restriction was registered.
35. Further, on 13/3/1998 the Registration was removed by the land Registrar and transfer to Anton Ochieng Okal and a title deed was issued to that effect. The title deed was closed on 7/1/2003 on subdivision of the land into 2 parcels giving rise to title Nos. 1639 and 1640.
36. She went further to explain that the transmission in 1998 was vide succession cause No. 13/1997 in Kisii High court and a certificate of Confirmation of Grant was issued, she confirmed that the correct was followed.
37. It was also her testimony that Parcel No. Kamagambo/Kanyajuok/1639 arose from parcel 572 and the 1st entry was a registration in the name of Anton Ochieng Okal and title was issued to that effect. Later a restriction was entered on 17/2/2009 restricting transfer of the land.
38. Entry No. 4 was made on 4/10/2016 and the restriction lifted after judgment and decree was served in Rongo Misc. Application 20/2011 was presented.



39. Entry No. 5 was made on 4/10/2016, transferring the suit land to the plaintiff and title deed issued, consequently, entry No. 7 closed the sub-division.
40. On parcel 1640 the 1st entry was made on 7/1/2003 in respect of Antoine Ochieng Okal. The 2nd entry was on 12/5/2003 while the 3rd entry was on 19/9/2003 to Philip Odera by nature of transfer and a title deed issued on 23/6/2009.
41. A restriction entry was made pending the hearing of a tribunal dispute and a further restriction was made on 22/9/2016 directing that there was no dealing with the suit land until determination of the Kisii High Court case.
42. The above restrictions were however lifted on 4/10/2016 through a court order in Misc. Application No. 11 of 2016. There was another entry on 4/10/2016 in the name of the plaintiff and a title deed issued. On 24/11/2016 another restriction was registered.
43. On 5/12/2016 entry No. 7-11 were cancelled after the registrar found errors on the file issued. There was also a Kenya Gazette Notice 3/2/2017 after the 1st defendant reported title deed lost and subsequently on 10/4/2017, a new title was re-issued vide gazette No. 921 of 3/2/2017.
44. She confirmed that Parcel No. 1640 is currently registered in name of 1st defendant while No. 1639 closed on subdivisions. She denied there being any collusion with anybody on the registration of the land and maintained that she has produced the documents that explain all the entries made.
45. On cross-examination, she confirmed that both parcel Nos. 1639 and 1640 emanated from parcel No. 572. She further confirmed that as at 4/10/2016, the Plaintiff was registered as the owner of parcel No. 1640 and the said registration was made pursuant to an Order from Senior Resident Magistrate's Court in Rongo in Misc. Application No. 20 of 2011.
46. She conceded that there was no court Order to cancel the registration made in the name of the Plaintiff or the Title Deed issued in his favor.

Analysis and Determination

47. After a careful analysis, it is this court's considered view that the following issues arise for determination: -
 - a. Jurisdiction of the Rongo Land Disputes Tribunal and the Senior Resident Magistrates Court in Rongo to determine the dispute before it.
 - b. Who is the rightful and/or legal owner of the suit property.
 - c. Whether the Plaintiffs is entitled to the reliefs sought in the Plaintiff.

I. Jurisdiction of the Rongo Land Disputes Tribunal and the Senior Resident Magistrates Court in Rongo to determine the dispute before it;

48. It is the 1st Defendant's claim that the Plaintiff's title was obtained as a result of a flawed process. That the Rongo Land Disputes Tribunal lacked the requisite jurisdiction to hear and determine disputes touching on a registered title. Consequently, the decision of the Rongo Land Dispute Tribunal rendered on the 5/7/2011 and which was adopted as an order of the court in Rongo SRMCC on the 27/12/2011 was void with no legal effect.



49. The 1st Defendant thus maintained that both the Rongo Land Dispute Tribunal and the Senior Resident Magistrate's Court in Rongo lacked the requisite jurisdiction to entertain the dispute and the title deed issued in favor of the Plaintiff was not a valid title.
50. The Plaintiff on the other hand contends that the 2 institutions were vested with the requisite jurisdiction and the decision rendered remains a valid order of the court. The decision was final and has never been challenged and/or reviewed.
51. It is not in dispute that the Plaintiff herein filed a dispute before the Land Dispute Tribunal against one Anton Ochieng Okal and the 1st Defendant in respect to the suit parcel vide MIG/RNG/LDT/09/LDN/572. The dispute was heard and determined in favor of the Plaintiff, the said award was produced as Pexh. 2. Subsequently, the said decision by the Land Tribunal was adopted by the Senior Resident Magistrate's Court at Rongo vide Misc. Application No. 20 of 2011 as a judgment of the Court and a Decree issued to that effect; the same was produced as Pexh. 3.
52. I have looked at the said Pexh. 3; which I have read and wish to reproduce verbatim as hereunder: -
- “The panel of elders award filed herein on 19th July, 2011 and read to the parties on 5th July 2011 adopted as judgment of this court as follows: -
- i. That Anton Ochieng Okal should return the land parcel No. Kamagambo/Kanyajuok/ 572 to the owner Joseph Okech Nyamanga.
 - ii. That in default the Executive Officer of the Court to sign transfer documents on behalf of Anton Ochieng Okal
53. In determining whether the Land Tribunal was vested with the jurisdiction to handle disputes touching on registered title, it is important to look at the jurisdiction of the now defunct Land Tribunals under the Land Disputes Tribunal Act and further to establish whether at the time of filing the dispute at the said Tribunal by the Plaintiff, the Tribunal had been declared defunct or not. It is trite that the law does not act retrogressively but it acts progressively.
54. The jurisdiction of the Land Dispute Tribunals was outlined under section 3 of the Land Disputes Tribunal Act (now repealed). It provided among other things that the Tribunal shall be vested with the jurisdiction to handle disputes relating to the division of land held in common, claim to occupy land and trespass to land. I have looked at Pexh. 1 and I note that the Plaintiff's issue fell within the limits of the said jurisdiction.
55. The question that therefore follows is whether at the time of filing the dispute at the Rongo Tribunal, whether the said Tribunal had the powers to hear and determine the dispute. Even though section 31 of the *Environment and Land Court Act* ousted the jurisdiction of the tribunals to determine any disputes relating to land; it is my considered opinion that at the time of filing the dispute before the Tribunal in the year 2009 and issuing the award, the said Tribunal was still vested with the requisite jurisdiction to entertain the dispute as filed.
56. Consequently, Pexh. 2 and which was adopted by the Senior Resident Magistrates Court in Rongo, vide Misc. Application No. 20 of 2011 as a judgment of the court was validly done.
57. Further, it is important to note that despite fully participating in the proceedings before the Tribunal; neither the 1st Defendant nor Anton Ochieng Okal (now deceased) challenged the jurisdiction of the said Land Disputes Tribunal at the time of filing, hearing and determining the said dispute. The 1st Defendant cannot therefore be seen at this point challenging the same when no Appeal and/or Review



has ever been filed seeking to set aside and/or challenge the said decision in his statement of defence. The orders sought in the counter-claim are akin to seeking an appeal against the award of the Tribunal and the Decree of the Magistrate's court.

58. In addition, no copy of the Kisii Misc. Application case was adduced in evidence by the 1st Defendant to prove his averments on the issue of jurisdiction and the said averment thus remain mere allegations without probative value.
59. Having held that the Rongo Land Disputes Tribunal was vested with the requisite jurisdiction to hear and determine the dispute filed before it by the Plaintiff, I will proceed to discuss the remaining issues on merit.

II. Who is the rightful and/or legal owner of the suit property

60. Section 26 (i) of the Registered *Land Act* provides: -

“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.”

61. It is the Plaintiff's claim that pursuant to the decision by the Tribunal (Pexh. 2) and which was adopted as a judgment of the court as per Pexh. 3; he was duly registered as the proprietor of the suit parcel by the 2nd Defendant and a Title Deed issued to that effect, which he produced as Pexh. 5. He maintained that he still holds the said title deed and has been in possession and occupation of the said land to date.
62. He contends that the 1st Defendant in collusion with the 2nd Defendant, sometimes around 10/4/2017 proceeded and cancelled the title deed issued in his name and fraudulently proceeded to re-issue a secondary title in favor of the 1st Defendant. It is also his claim that in an attempt to conceal the said fraudulent actions; the 1st and 2nd Defendants proceeded to publish a fraudulent Gazette Notice that the 1st Defendant's title was lost, as seen in Pexh. 6.
63. DW1, the Deputy Lands Registrar who testified on behalf of the 2nd Defendant, on her part maintained that due process was followed in the issuance of the secondary title deed in the name of the 1st Defendant. Further, it was her claim that the 1st Defendant presented proper presentation of the documents before the registration was done and a secondary title deed issued in his favor. It is however important to note that no such documentation was produced as an exhibit in support of the said averments.
64. The instant case presents a unique scenario; both the Plaintiff and the 1st Defendant are holders of title deed of the suit land issued by the 2nd Defendant. It is therefore important for this court to determine which between the 2 title deeds is the proper, valid and lawful title document conferring the respective rights and interests over the suit parcel and to which proprietor. This court cannot superficially accept every title document that is waved before it and disregard any challenges raised on its validity.
65. I have critically looked at the copy of the Green Card produced by the Plaintiff vis-à-vis the explanation tendered by DW1 for the various entries on the said Green Card (Pexh. 4). Entry No. 8 is on the registration of the Plaintiff as the proprietor of the suit land No. 1640 and title deed issued to that effect on the 4/10/2016. The next entry made on the Green Card was Entry No.10 on 24/11/2016 of a restriction and Entry No.11 on 5/12/2016 whose effect was to cancel Entries Nos. 7 – 9, including the Plaintiff's registration.



66. DW1 in her explanation with regards to Entry No. 11 stated that all the relevant documents were presented before the said Entry was cancelled and Entry No. 12 in favor of the 1st Defendant was made.
67. The 1st Defendant did not attend court to prosecute his case and no explanation was given for his absence. Consequently, he did not adduce any exhibit in support of his claim. Further, the 2nd Defendant did not also adduce any document as exhibit in support of their case to justify the cancellation of the Plaintiff's title and the issuance of the secondary title deed in favor of the 1st Defendant. On cross-examination, DW1 conceded that there was no Court Order directing the cancellation of the Plaintiff's registration or the Title Deed issued in his favor.
68. From a critical look at the Green card (Pexh. 4); the Registrar relied on the provisions of section 79 of the [Land Registration Act](#) in effecting the changes in the Green Card and cancelling Entries 7 – 9, including the Plaintiff's registration as the proprietor of the suit land. However, there was no demonstration of the circumstances outlined in the said section by DW1. The rectification of the register on Entry 11 materially changed the interests of the Plaintiff as a proprietor, there was no consent for the said cancellation by the affected parties. Further, no proof was adduced of fraud on the part of the Plaintiff or investigation conducted by the 2nd Defendant.
69. As held earlier in the judgment; the decision ordering the registration of the Plaintiff as the proprietor, as seen in Pexh. 2 and 3, has never been challenged, set aside and/or reviewed in any manner whatsoever.
70. The Kisii Misc. Application No. 249 of 2012 which has been relied upon by the 1st Defendant as a justification of the cancellation of the Plaintiff's title and the subsequent re-issue of the secondary title in his favor; was a dismissal for want of prosecution, the real issues in dispute were not determined on merit. The same cannot therefore be used as a basis for the cancellation of the title especially where there was a valid judgment of the court, which has never been challenged, set aside and/or reviewed.
71. Be as it may, no copy of the proceedings and or ruling of the dismissal in the said case was adduced into evidence. This court is therefore unable to hold with certainty the contents of the said case and whether the same touched the registration of the Plaintiff as the proprietor of the suit land.
72. It has been said time and again that a Title Deed is indefeasible evidence of the ownership of land. There has not been any challenge by the Defendants' on the Plaintiff's title by reason of fraud or otherwise as envisaged under section 26 (1) (a) and (b) of the [Land Registration Act](#). Further, no justifiable and sufficient explanation was given by the 2nd Defendant for the cancellation of the Plaintiff's title.
73. In the absence of any contrary proof, I find that the title held by the Plaintiff vide Entry No. 9 on the green Card (Pexh. 4) is a valid title and the same vests in the Plaintiff the rights and privileges appurtenant to the registered proprietor to the exclusion of others as statutorily provided. There was no basis for its cancellation.
74. Consequently, it is my finding that the Plaintiff is the rightful, absolute and indefeasible registered proprietor of the suit parcel No. Kamagambo/ Kanyajuok/1640, having been issued with the title deed and is thus entitled to protection of the law. He is therefore entitled the right to possession, right to a quiet and peaceful occupation and right to use of his property.

III. Whether the Plaintiff is entitled to the Reliefs sought in the Plaintiff

75. The Plaintiff in his Plaintiff has sought for the grant of an order of cancellation of the title deed issued to the 1st Defendant by the 2nd Defendant and restoration of the Plaintiff's title, an Order of Permanent Injunction, General damages for trespass and costs of the suit.



76. This court has extensively addressed the issue on the validity of the title deed issued in the name of the Plaintiff above and further that the cancellation of his title and the issuance of the secondary title deed in favor of the 1st Defendant was not justified or legal. In the absence of any proof as to the contrary, without any lawful explanation and proof; I find that the cancellation of the respective entries was indeed fraudulent, null and void.
77. Section 80 of the [Land Registration Act](#) on the Rectification by an Order of Court provides that: -
- “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
78. The Court of Appeal in Mombasa, in Civil Appeal No. 312 of 2012; - Emfil Limited Vs Registrar of Titles Mombasa & 2 others [2014] eKLR held as follows; -
- “Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.
79. As earlier held, allegations of fraud are serious allegation and the plaintiff is under a duty to strictly prove the same. From a look at the evidence adduced by the plaintiffs in support of their claims of fraud, particularly Pexh. 4,5,6 and 7; it is evident that there were suspicious and/or fraudulent activities on the part of the defendants and which have not been sufficiently explained and proved.
80. It is therefore my finding that he is entitled to an order for cancellation of the title deed issued to the 1st Defendant and the restoration of his title.
81. On the issue of permanent injunction; the Plaintiff contends that he has been deprived and denied the suit land and further that he is at the verge of being evicted from the land by the 1st Defendant. That he will suffer irreparable loss and damage when he is evicted from the suit land and rendered destitute.
82. The principles governing the grant of Permanent Injunction are well settled and has been established by a long line of Authorities and this court does not seek to reinvent the wheels. An Order of permanent injunctions fully determines the rights of the parties and is meant to perpetually restrain the commission of an act and ensure the protections of the rights of the plaintiff.
83. Consequently, having held that the Plaintiff is the rightful owner of the suit land No. 1640; I accordingly find that he is entitled to an Order of Permanent Injunction against the 1st Defendant.
84. In the premises thereof, having held that the Plaintiff has proved his case to the required threshold and further that the 1st Defendant did not prosecute his counter-claim or produce any documents as evidence in support of his counter-claim, I find that the 1st Defendant’s Counter-claim is not merited and the same is therefore dismissed with costs to the Plaintiff.



Costs

85. Costs generally follow the event; in the case of Jasbir Singh Rai and 3 Others vs Tarlachan Singh Rai and 4 Others [2012] it was held as follows: -

“it emerges that the award for costs would normally be guided by the principle costs follow events. The effect being that the party who calls for the event by instituting suit will bear costs if the suit fails”

86. In this instant case, since the Plaintiff has been inconvenienced, I find that he is entitled to costs of the suit and of the counterclaim.

Conclusion

87. The upshot of the foregoing is that the Plaintiff has sufficiently proved his case to the required threshold and I accordingly allow the Plaint dated 27th October, 2017 on the following terms: -

- i. A Declaration be and is hereby made that the cancellation and/or nullification of the Plaintiff's Title to/in respect to L.R. No. Kamagambo/ Kanyajuok/ 1640, and the issuance of the secondary Title in favor of the 1st Defendant, was fraudulent, unlawful, illegal, null and void.
- ii. An Order is hereby issued cancelling and nullifying the Title in respect of L.R. No. Kamagambo/ Kanyajuok/ 1640, in the name of the 1st Defendant and restoration of the Register in respect of L.R. No. Kamagambo/ Kanyajuok/ 1640 in favor of the Plaintiff, as the lawful and legitimate proprietor thereof.
- iii. An Order of Permanent Injunction is hereby issued restraining the 1st Defendant either by himself, agents, servants and/or anyone claiming under the 1st Defendant from entering upon, re-entering, taking possession, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with L.R. No. Kamagambo/ Kanyajuok/ 1640 and/or any portions thereof.
- iv. Costs of this suit and Counter-claim be borne by the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 29TH DAY OF DECEMBER, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Mr. Oduk for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd and 3rd Defendants

Court Assistants - Tom Maurice/ Victor

