



Catherine Wanjeri Wamaitha (Suing as the Legal Representative Ad Litem of the Estate of Esther Wamaitha Mbugua (Deceased)) v Chutha & 2 others; Family Bank (Third party) (Environment & Land Case 537 of 2008) [2022] KEELC 12699 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEELC 12699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 537 OF 2008**

JA MOGENI, J

MAY 25, 2022

BETWEEN

**CATHERINE WANJERI WAMAITHA PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE AD LITEM OF THE ESTATE OF
ESTHER WAMAITHA MBUGUA (DECEASED)**

AND

**JOHNSON NG'ANG'A CHUTHA 1ST DEFENDANT
LAND REGISTRAR KIAMBU 2ND DEFENDANT
THE ATTORNEY GENERAL 3RD DEFENDANT**

AND

FAMILY BANK THIRD PARTY

JUDGMENT

1. By a plaint dated October 30, 2008 and an amended plaint dated May 12, 2021, the plaintiff herein sought for judgment against the defendants jointly and severally for the following orders: -
 - i. A declaratory order that the estate of Esther Wamaitha Mbugua (deceased) is the sole lawful registered owner and proprietor of Title Number Githunguri/Kanjai/993.
 - ii. An order directing the 2nd defendant to forthwith cancel entries number 11,12,13,14,15 and 16 in the proprietorship section of the register of title number Githunguri/Kanjai/993.
 - iii. An order of eviction against the 1st defendant, his servants and/or agents and/or any other person howsoever occupying title number Githunguri/Kanjai/993.



- iv. An order of permanent injunction restraining the defendants whether by themselves, their servants and/or agents from trespassing, selling, advertising for sale, conveying, transferring and/or in any manner interfering with the plaintiff's quiet ownership of Title Number Githunguri/Kanjai/993.
 - v. Costs of the suit.
2. The suit is opposed. The 1st defendant entered appearance on November 20, 2008 filed a defence dated December 9, 2008. The 2nd and 3rd defendant entered appearance on January 3, 2009 but did not file any defence. The 3rd Party entered appearance on August 20, 2010 and filed a defence dated September 20, 2010. The suit proceeded by way of viva voce evidence. The plaintiff called one witness, the 1st defendant called one witness and the 3rd Party called one witness. The parties testified on April 20, 2015 (the plaintiff only) and on October 21, 2021. The 2nd and 3rd defendants did not call any witnesses as they did not appear in court.

Plaintiffs' Case

3. It was the plaintiff's contention that at all material times to this suit the estate of Esther Wamaitha Mbugua (hereinafter referred to as "plaintiff") was and is the legal owner and proprietor of all that parcel of land known as Title Number Githunguri/Kanjai/993.
4. The plaintiff avers that she purchased the said suit premises from Kenya Commercial Bank Limited in the year 1988 pursuant to the said bank's exercise of their statutory power of sale wherein the plaintiff was declared the highest bidder and a sale contract entered into.
5. The plaintiff states that upon her registration as the proprietor of the suit property the then former owner Mr James Njuguna Mira (deceased) filed a suit namely HCCC 2867 of 1988 against the plaintiff and Kenya Commercial Bank Limited and which suit abated in the year 2005 upon the demise of the said James Njuguna Mira (deceased).
6. The plaintiff states that upon the abatement of the suit filed by James Njuguna Mira (deceased) the plaintiff commenced measures to take possession of the suit premises but established that certain persons unknown to the plaintiff had unlawfully trespassed upon the suit premises and purported to lay claim of ownership thereof.
7. It is her contention that with a view to verifying the claims of ownership and the identities of trespassers the plaintiff undertook an official search at Kiambu Lands Registry on August 7, 2007 and noted to her shock that one Johnson Ng'ang'a Chutha, the 1st defendant, had been purportedly registered as the proprietor of the suit property on November 18, 2004 and a title deed issued in his favour on September 14, 2005.
8. The plaintiff further states that upon further search at the Kiambu Lands Office she established the following findings:-
 - i. that on March 22, 1995 the 2nd defendant made an entry number 11 in the proprietorship section of the register of the suit property registering Mr James Njuguna Mira (deceased) as the proprietor of the suit premises.
 - ii. On April 7, 1995, the 2nd defendant issued a title deed in favour of Mr James Njuguna Mira (deceased).
 - iii. That the 2nd defendant purported to register entry number 11 in the proprietorship section pursuant to an order that was alleged to have been issued in HCCC Number 2953/95.



- iv. On November 18, 2004, the 2nd defendant made an entry Number 15 in the proprietorship section of the register of the suit property registering Johnson Ng'ang'a Chutha the 1st defendant as the proprietor of the suit property.
 - v. On April 14, 2005, the 2nd defendant issued a title deed for the suit property to the 1st defendant.
9. The plaintiff further established that the 2nd defendant had caused a notice dated April 7, 1995 to be published in the Kenya Gazette under Gazette Notice No 1893 purporting that the High Court in Nairobi had issued an order in HCCC 2853 of 1993 transferring the suit property to James Njuguna Mira (deceased).
 10. The plaintiff has since further established that the trespassers occupying the suit property include the 1st defendant and/or are occupying the same at the instructions of the 1st defendant.
 11. The plaintiff avers and shall maintain that the entries made in the title to the suit property on March 22, 1995, April 7, 1995, November 18, 2004 and April 14, 2005 respectively and the purported Gazette Notice dated April 7, 1995 were fraudulent, illegal, deceitful amounted to conspiracy and are null and void ab initio and which fraudulent acts were undertaken by the 1st and 2nd defendants respectively with the sole intention of defeating the plaintiff's title and ownership to the suit premises.
 12. Lastly, the plaintiff contended that the particulars of fraud included: -
 - i. Fraudulently purporting that there existed a civil case namely HCCC 2953 of 1993 within which a vesting order in respect of the suit property was issued in favour of Mr James Njuguna Mira (deceased) whilst having full knowledge no such suit ever existed.
 - ii. Fraudulently and falsely purporting that an order was issued in HCCC 2953 of 1993 transferring the property to Mr James Njuguna Mira (deceased) whilst having full knowledge that no such order existed and/or was ever issued in favour of the deceased.
 - iii. Falsely and fraudulently causing a gazette Notice No 1893 to be published in the Kenya Gazette purporting that an order was issued by the High Court in HCCC 2953 of 1993 transferring the property to the 1st defendant.
 - iv. Fraudulently and illegally conspiring to make entries numbers 11,12,13,14,15 and 16 in the proprietorship section of the register of the suit property.
 - v. Fraudulently attempting to deprive the plaintiff her legal and lawful ownership of the suit property whilst having full knowledge that the same were not supported by any consideration or at all.

Evidence By The Plaintiff

13. PW1 – Esther Wamaita Mbugua adopted her witness statement dated February 24, 2012 and relied on list and bundle of documents dated February 11, 2009 together with a supplementary bundle of documents dated March 14, 2012 as her evidence.
14. It is her testimony that she bought the suit property Githunguri/Kangai/993 from the Kenya Commercial Bank at a public auction from auctioneers known as Rosan Enterprises. She relied on the memorandum of sale produced at page 18 of her documents as her exhibit 1.
15. She averred that the auction was at Githunguri market. She added that she paid Kshs 15,000/= as deposit and got a receipt No 143 at page 23 of her bundle (exhibit 2). She contended that she was sent



- to Waruhiu and Munti Advocates who were advocates for the bank to pay the balance of Kshs 60,000/= . The receipt is at page 21 of her bundle of documents (exhibit 3.)
16. It was her evidence that after she paid the deposit, she went to Lands office and was given a title deed (exhibit No 4). She did a search and found that the land was registered in someone else's name, Johnson Ng'ang'a Chutha (the 1st defendant). The certificate of official search was marked as exhibit No 5.
 17. She contended that when she inquired about the same, she was told that the land had been in the Kenya Gazette on April 7, 1995 and that it had been transferred by her to one James Njuguna Mura. A copy of the Gazette Notice No 1893 published in the Kenya Gazette vol XCVII No 17 of April 7, 1995 was marked as exhibit No 6.
 18. It is her evidence that she went to the High Court to inquire about the civil case No 2953 of 1993 indicated in the gazette Notice. She was told that it was relating to a land matter but was an accident case. It is her testimony that she was never called by the land office to return her title. She produced the green card (exhibit No 7) (original produced in court) which showed that she was still the registered owner of the suit property - entry No 6 - and that the title has never been cancelled by the Land Registrar. Therefore, the suit property has two titles.
 19. She contends that she paid for all the services from the Land Registry for the green card at page 14 and 15 of the documents and produced them as the plaintiff's exhibit 8. It is her case that she got the land legally. That she bought it at the auction and got the title procedurally, from the registrar. It is her testimony that the registrar destroyed the title of the person referred to in the Gazette Notice - James Njuguna Mura - he is the one who had loan with Kenya Commercial Bank and his title was destroyed after PW1 bought the land at the public auction.
 20. During cross examination, she reiterated that she bought the land at an auction at Githunguri Market. She testified that she did not have the advertisement of the auction in her documents. She contended that she was just informed that there was an auction and that she proceeded to go for the same. She averred that the case in the gazette notice involved a road accident. The file is there but she did not see the file as it was not her file. She avers that she did not know of HCCC 1958 of 1991 (OS) in Nairobi High Court. She contends that she knew of the case as she was a defendant. She testified that there were 3 defendants and that they were served by James Njuguna Mura.
 21. She added that the matter went to the Court of Appeal and was finalized. It is her testimony that she was given the suit property by the Court of Appeal. She contends that she did not follow up on the suit property after that as she was focusing on her children who were in school. She averred that she has not used the land since she bought it.
 22. The Kenya Gazette said the court order returned the suit property to James Njuguna Mura. She was not informed when the Gazette Notice was being published. The day the Gazette Notice was published is the same date James Njuguna Mura was given the title deed and not after 30 days as indicated in the gazette notice.
 23. She added that it would not have made any difference even if PW1 had seen Gazette Notice. She contended that she was given papers to take to Lands office by Waruhiu and Muite and that is when the title of James Njuguna Mura was destroyed. She avers that her name is in the green card has never been cancelled.
 24. She reiterated that the gazette notice was for April 7, 1995. It referred to the case for a road accident. She averred that she saw this file for the case. There was a 30 days' notice given by the Gazette Notice but James Njuguna Mura was given a title on the same day April 7, 1995. This is shown as entry No 12 of the green card. However, the page of the green card was not produced in evidence.



25. When matter was adjourned until it came up for hearing on October 21, 2021 when the plaintiff's daughter took the stand on behalf of the plaintiff as the plaintiff was deceased.
26. PW1 - Catherine Wanjeri Wamaitha testified that the plaintiff died and that she had taken over her case by virtue of her letters of administration. She adopted her witness statement dated May 12, 2021 and relied on the evidence produced by her mother.
27. During cross examination, she testified that her mother never said that the title had been cancelled. She averred that the advocate had receipts of the purchase. That her mother bought the suit property through an auction by the bank. That her mother later found out that someone else's name had been registered when she carried out a search.
28. She testified that she has been to the land at least 3 times and that she last visited the land in January 2020. That her mother bought the land in March 1, 1988 and the same was transferred in 1990. That in 2005, there was someone else who alleged to have bought the land in 2005. Her mother carried out a search in 2007.
29. During re-examination, PW1 reiterated that the receipts from the purchase of the land had been produced in court as exhibit 8 and the search was also produced as exhibit 5. She added that her mother had the title deed and that it had never been canceled.
30. She contended that from the green card, it indicated that her mum's title was issued on March 30, 1990.
31. With that evidence, the plaintiff closed her case.

Defendant's Case

32. The 1st defendant entered appearance on November 20, 2008 filed a defence dated December 5, 2008. The 2nd and 3rd defendant entered appearance on January 16, 2009 but did not file any defence and they did not appear in court to adduce any evidence in court.

1st Defendant.

33. The 1st defendant prays that the plaintiff's suit be dismissed with costs. He avers that he purchased land reference number Githunguri/Kanjai/993 from Family Bank in a public auction and further avers that he was a bona fide purchaser for value without notice.
34. He avers that he attained registration of the suit property legally in a public auction and denies being a trespasser. He further contends that he is the rightful proprietor of the suit premises and legally occupying land reference number Githunguri/Kanjai/993. He also denies having being issued with any notice of intention to sue.

Evidence By The Defendants

35. DW1 – Johnson Ng'ang'a Chutha adopted his witness statement dated December 19, 2014 and relied on list and bundle of documents dated December 19, 2014 as his evidence.
36. He averred that he knew the land was available for sale because it was advertised in the newspaper by Jomwaka auctioneers acting on behalf of Family Bank in 2004. He contends that he paid for the land, and it was consequently transferred to him.
37. During cross examination, he contended that he bought the land through public auction. He added that he produced the advert by Jomwaka Auctioneers. That there is a memorandum of sale. That there is a 2007 suit and another one for 2008. That he carried out a search and it did not show the plaintiff's



name and that the green card did not show the plaintiff's name either. It was his testimony that he is the owner of the land.

38. He averred that he is in possession and occupation of the land. That he has never seen the plaintiff. He added that he was not aware of any interest by any person on the suit. That he never found any person on the land when he went to take land. He has never been disturbed by anyone about occupation of the same. He reiterated that he had never seen the plaintiff.
39. He reiterated that he bought the land from the bank from an auction by Jomwaka and he was given the title by Family Bank after he took the documents for registration in Thika. It is his evidence that he is the owner of the suit property.
40. During re-examination, DW1 testified that Jomwaka Auctioneers were the ones who carried out the public auction. He averred that he had seen the green card and that his title was registered in 2004. According to him, the legal owner of the land was family bank and that is who he bought the land from.
41. The 1st defendant closed his case.

Third Party's Case

42. The 3rd party entered appearance on August 20, 2010 and filed a defence dated September 20, 2010.
43. The third party maintains that it is non-suited. In the alternative and without prejudice, the third party maintains that it charged the property known as Githunguri/Kanjai/993 as security for a loan advanced to James Njuguna Mira who was at the time of sale was indebted to the third party hereof in the total sum of Kshs 1,401, 517.80.
44. It is their contention that they realized the said security through EW Gachomba & Company Advocates who instructed Jo-Mwaka traders to sell the same by way of a public auction. The said property was properly charged by the third party who lawfully sold the same in exercise of its statutory power of sale by way of a public auction. The third party did not have notice of any perceived or intended interest in the suit property by Kenya Commercial Bank Ltd or the plaintiff.

Evidence By The Third Party

45. Dennis Kiama Kariuki adopted his witness statement dated October 19, 2021 and relied on list and bundle of documents dated January 23, 2013 as his evidence.
46. During cross examination, he testified that the property had been charged by the bank, but the charge document is not before the court, so he wasn't able to tell what interest the bank had on the property. He testified that they sold the property to the 1st defendant.
47. During re-examination, he averred that the property had been charged by the bank as can be seen on the search document that they did in 2003 (Exhibit No 2). He also relied on a valuation report (exhibit 3). He contends that they had instructed their advocates to instruct an auctioneer. He averred that before they charged the property, there was no other person but the 1st defendant .
48. With that evidence, the 3rd party closed his case.

Submissions

49. The plaintiff, the 1st defendant and the 3rd party filed submissions dated February 11, 2022, March 25, 2022 and March 3, 2022 respectively that I have considered.



Issues For Determination

50. Having considered all the pleadings filed in this matter, the following arises as the issues for determination before this court.
- a. Who is the *bona fide* owner of the suit property?
 - b. Who should bear the costs of the suit?

Analysis And Determination

- i. Who is the *bona fide* owner of the suit property?
 1. The court has now carefully read and considered the pleadings, the submissions and the evidence adduced and the exhibits thereto and renders itself as follows; -
 2. The bone of contention in this matter revolves around double allocation and duplicity of titles. The plaintiff has a title to the suit land, so does the 1st defendant. The question to determine therefore is not who the registered owner of the suit land is, but which title should be impeached.
 3. Proof of ownership of land is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities, but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.
 4. The plaintiff, PW1 testified that her deceased mother got her title on March 30, 1990 whereas the 1st defendant, DW1 testified that he got his title on July 14, 2005. Both parties contend that they bought the suit property through public auction but from different banks. The sheer fact of existence of two titles in respect of the same parcel of land is a clear manifestation of fraud and or misrepresentation and or corrupt schemes. Thus, to determine the dispute, the court must examine the root of the two tiles.
 5. In the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal number 239 of 2009, the Court of Appeal held as follows:

‘We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register’.
56. The Land registrar is the custodian of land records and any enquiry as to the validity or ownership of any land reference is usually approved by the Land Registrar and or his representatives. However, the 2nd and the 3rd defendant’s did not appear in court on November 24, 2021 and January 26, 2022 when they were required to come and produce the original green card.
57. The plaintiff has given a plausible account of how her deceased mother acquired the land by virtue of public auction. Her Exhibits demonstrate how Kenya Commercial Bank through Rosam Enterprises issued a notification of sale dated January 14, 1988. The said notification of sale indicates that James Njuguna Mura (deceased) was indebted to Kenya Commercial Bank. Rosam Enterprises also issued a memorandum of sale dated March 1, 1988 in favour of the bank in exercise of its statutory power of sale. The said exhibits include a receipt No 043 indicating that the plaintiff’s deceased mother paid a deposit of Kshs 15,000.00 at the public auction as was required and paid the balance to the chargees’



- advocates (receipt No6718). Consequently, Esther Wamaitha Mbugua (deceased) was issued with a title.
58. On the other hand, the 1st defendant claims that he bought the land from the third party herein. He claims that he has never met Esther Wamaitha Mbugua (deceased). His exhibits, a copy of the green card demonstrates that James Njuguna Mura (deceased) was issued with a title to the suit property on April 7, 1995 under entry No 12. However, Gazette Notice No 1893 issued on April 7, 1995 purported that the High Court in Nairobi had issued an order in HCCC 2853 OF 1993 transferring the suit property to James Njuguna Mira (deceased) within 30 days. This does raise a red flag.
59. Another point of concern is that the land was first registered in favour of James Njuguna Mira (deceased), who then took out a loan with Kenya Commercial Bank, failed to settle it which led to the public auction and subsequent sale to Esther Wamaitha Mbugua (deceased). Thereafter, an order is issued in HCCC 2953 of 1993 transferring the property back to James Njuguna Mira (deceased), who then charges the suit property with Family Bank and fails to settle his loan which leads to another public auction whereby the 1st defendant becomes a registered owner of the suit property.
60. It is admirable and remarkable to have expeditious delivery of crucial services. It is something that people in Kenya have yearned for in various sectors. However, when it comes to land transactions, keeping in mind the insatiable thirst that Kenyans have to own a piece of land, perhaps it would be prudent to let things move at a moderate and reasonable speed to give room for conduct of due diligence. And perhaps this due diligence should be taken a notch higher by getting to know the root of the title and the ground status of the land.
61. The Gazette Notice No 1893 of April 7, 1995 transferred the suit land to James Njuguna Mira (deceased) within thirty (30) days from April 7, 1995 and yet the copy of the green card produced in court indicates that the title was registered in favour of James Njuguna Mira (deceased) on the same day. The Land Registrar is missing in action. They would have been best placed to explain the Land Registry records to enable the court to catch a fraudster as they are the custodian of the crucial documents.
62. A look at the copy of the green card produced in court by the plaintiff shows that entry no 1 indicates that James Njuguna Mura was issued with a title in December 11, 1985. Entry No 6 indicates that the deceased Esther Wamaitha Mbugua's title was registered on March 30, 1990. A look at the encumbrances section of the green card cited that a charge was registered in favour of Kenya Commercial Bank on March 3, 1986 and the same was discharged on March 30, 1990, the same date that the title was registered in favour of Esther Wamaitha Mbugua (deceased).
63. I am inclined to agree with the plaintiff's deceased mother that the entries made in the title to the suit property especially on April 7, 1995 seem deceitful. Kenya Commercial Bank had a right as a lien holder to exercise their statutory power of sale to recover the money that James Njuguna Mira (deceased) owed. The sale through the public auction was final. The suit property was not available for any other transaction unless Esther Wamaitha Mbugua (deceased) purported to sell the same. It is not lost to court that the court order that led to Gazette Notice No 1893 being published was not produced in court. Therefore, I find that the third party could not have sold what it did not have. It follows that the Third party did not have a good title. A fraudulent title cannot be allowed to stand. See Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited and 6 Others* Civil Appeal No 246 of 2013 (2015) eKLR.
64. The maxim of equity which stipulates that; "when two equities are equal, the first in time shall prevail" applies in this case, - See the case of *Gitwany Investment Ltd v Tajmal Ltd & 3 Others*, as well as Nairobi HCC No 1114 of 2002, & *African Inland Church – Kenya (Registered Trustees) v Catherine Nduku & 12 others* [2017] eKLR.



65. In this case, the plaintiff's title was issued in 1990, fifteen years before the issuance of title to the 1st defendant. The Land Registrar is the custodian of land records and any enquiry as to the validity or ownership of any land reference is usually approved by the Land Registrar and or his representatives. The 2nd defendant is also responsible for the issuance of the invalid title to the 1st defendant.
66. From the foregoing, I am persuaded that the documents annexed to the affidavit in support of the plaintiff's suit have met the evidentiary threshold for proof of title to land. It therefore followed that the deceased was the registered proprietor of the suit property known as Title Number Githunguri/Kanjai/993.
67. The plaintiff having been able to show the root of her title, the court finds and holds that it has then proved that it is the absolute and indefeasible owner of the suit property.
68. Having found that the plaintiff is the absolute and indefeasible owner of the suit property, then the court finds that the plaintiff is entitled to enjoy the rights of an absolute owner of the property as provided by section 24 and 25 of the Land Registration Act. As the court finds that the plaintiff acquired the suit property regularly and without any evidence of fraud, then it is evident that the plaintiff is entitled to protection of their property as provided by article 40 of the Constitution and therefore entitled to the Injunction orders sought.
- b. Who should bear the costs of the suit?
69. Section 27 of the Civil Procedure Act gives the court the discretion to grant costs. It is trite that costs usually follow the events. In this instant case, the plaintiff is the successful party and is therefore entitled to the costs of the suit.
70. Having carefully considered the pleadings herein, the available evidence, the exhibits produced in court, the written submissions and the relevant provisions of the law, the court finds that the plaintiff has proved her case on the required standard of balance of probabilities.
71. Consequently, the court enters judgement for the plaintiff against the defendants jointly and severally as prayed in the plaint dated October 30, 2008 and amended plaint dated May 12, 2021, in the following terms: -
- i. A declaration be and is hereby issued that the Estate of Esther Wamaitha Mbugua (deceased) is the sole lawful registered owner and proprietor of Title Number Githunguri/Kanjai/993.
 - ii. An order be and is hereby issued directing the 2nd defendant to forthwith cancel entries number 11,12,13,14,15 and 16 in the proprietorship section of the register of title number Githunguri/Kanjai/993.
 - iii. An order of eviction be and is hereby issued against the 1st defendant, his servants and/or agents and/or any other person howsoever occupying title number Githunguri/Kanjai/993. The court bailiff to supervise the eviction and to prepare a report.
 - iv. A permanent injunction be and is hereby issued restraining the defendants whether by themselves, their servants and/or agents from trespassing, selling, advertising for sale, conveying, transferring and/or in any manner interfering with the plaintiff's quiet ownership of Title Number Githunguri/Kanjai/993.
 - v. I award the plaintiff the costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF MAY 2022



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MOGENI J.

JUDGE

In the presence of

Ms. Mathenge for the Plaintiff

Mr. Kosgei for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant

Ms. Apolot for the Third Party

Vincent Owuor Court Assistant

