



**Tailor v Rosana (Environment and Land Appeal E018 of 2023)
[2024] KEELC 13533 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E018 OF 2023**

M SILA, J

DECEMBER 4, 2024

BETWEEN

DR ANIL RATILAL TAILOR APPELLANT

AND

NUHU NYANAMBA ROSANA RESPONDENT

*(Being an appeal against the judgment of Hon. P.K Mutai, Principal Magistrate,
delivered on 1 November 2023 in the case Kisii CMCC/ELC No. 1 of 2018)*

JUDGMENT

1. The subject matter of the dispute herein is the plot described as Gekomu Plot 7 Sec A/14 (the suit plot) which is a market plot that was under the now defunct Municipal Council of Gusii, and now under the County Government of Kisii. Both the appellant and the respondent claim ownership of the suit plot.
2. Through a plaint filed on 4 January 2018, the appellant contended to be the owner of the suit plot and he claimed that the respondent had interfered with his possession. He pleaded that he purchased the suit plot from the previous proprietor, one Erick Nyandusi Omae, through a sale agreement dated 14 July 2017, and the plot was duly transferred to his name. He pleaded that he took possession and fenced it but was accosted by the respondent's employees. In the plaint he asked for a declaration that the suit plot belongs to him and for an order to permanently restrain the respondent from it.
3. The respondent filed a defence and counterclaim. He asserted that it was him who was the registered proprietor of the plot. He pleaded that he entered the plot in 1979 as a tenant and he subsequently purchased the plot on 1 December 1989 from the sons of the previous proprietor, Barnabas Omae (deceased). He contended that the plaintiff's documents were forged by him and Erick Nyandusi Omae, and the transfer of the property to the appellant was fraudulent. In the counterclaim he sought for an order to have the register at the County Government of Kisii rectified to reflect him as the proprietor.



4. Subsequently, the County Government of Kisii was joined to the proceedings as interested party but she did not file any document though she participated in the proceedings by cross-examining the witnesses.
5. The parties filed their respective documents and witness statements. It was common ground that the suit plot first belonged to Barnabas Omae (Barnabas) who died in 1967. Barnabas was married to two wives, Bathseba Nyamisa Nyamoita and Nyorita Omae. Bathseba had two sons, Peter Ratemo Omae (father to Erick Nyandusi Omae) and Alloys Omae. Nyorita also had two sons, namely Tom Omae and Lumumba John Omae (John). Bathseba died in 1982 whereas Nyorita died in 1989. There was a sale agreement availed by the respondent showing that he purchased the suit plot from the four sons of Barnabas through a sale agreement dated 1 December 1989. In 2004, Alloys Omae filed a succession cause in respect of the estate of his late father Barnabas being Kisii High Court Succession Cause No. 67 of 2004. Within the succession cause, the suit plot was listed as one of the properties of Barnabas and the respondent was listed as a purchaser of the suit plot. In the succession case, the suit plot was confirmed to the respondent through a confirmation hearing conducted on 28 March 2006 before Bauni J. The confirmed grant issued on the same day shows that the plot was indeed confirmed to the respondent. That is the basis of the contention by the respondent that he is the rightful owner of the suit plot.
6. In his evidence, the appellant testified that he purchased the suit plot from Eric Nyandusi Omae (Erick) whom he asserted was the recognized proprietor of the suit land and he produced various documents in support of his case. He purchased the plot for Kshs. 2,000,000/= which he testified he paid in full. Erick submitted to him his card for the plot and he was issued with a new market plot card by the County offices. In December 2017, he sent some people to fence the plot but they were stopped and he thus filed the case.
7. PW – 2 was Erick Nyandusi Omae. He was born in 1978. He is son of Peter Ratemo Omae, and thus Barnabas is his grandfather. His evidence was that the suit plot belonged to his grandfather, who transferred the same to his father. He claimed that his father in turn transferred the plot to his wife (mother of Eric) one Teresia Kerubo Ratemo (Teresia). He averred that his mother then transferred the plot to him in the year 2010 after obtaining consent from the Municipal Council which consent, dated 10 September 2010, was exhibited. He refuted that his father signed the sale agreement dated 1 December 1989. He also faulted the succession cause filed by his uncle Alloys Omae pointing out that in it he claimed to be the only child. He also testified that his mother, Teresia, was illiterate and denied that she signed the succession documents since she could not write. Cross-examined he was not aware that his mother (Teresia) got married into the home in 1967. He claimed not to know John Gichana Omayo or that he is also known as Lumumba Omae. He denied using his mother's particulars to transfer the land to himself. He stated that his mother died in 2013. He had seen the respondent using the land when he was growing up as he had leased it. He acknowledged that his father had died when Kisii High Court Succession Cause No.67 of 2004 was filed and his mother represented his late father.
8. PW – 3 was Fredrick Maranga, the Director Land Administration in the County Government of Kisii. He testified that the suit plot initially belonged to Barnabas and that he transferred it to Teresia Kemunto. Teresia then transferred the plot to Erick Nyandusi who subsequently transferred the plot to the appellant. He confirmed that their records reflect a consent to transfer dated 10 September 2010 to facilitate transfer of the plot from Teresia to Erick. Erick was then put in their system and he later transferred the plot to Dr. Taylor (the appellant) in 2017. He testified that the person they recognise as proprietor in their system is now the appellant whom he asserted is the legitimate owner. Cross-examined, he testified that the suit plot was transferred from Barnabas to Teresia Kemunto in the year



1999. He was not aware of any grant issued in respect of the estate of Barnabas nor aware of Kisii High Court Succession Case No. 67 of 2004.

9. With the above evidence the appellant closed his case.
10. The respondent testified and called two witnesses.
11. DW – 1 was Alloys Omaa. He is a son of Barnabas from the first house, and thus an uncle to Erick Nyandusi. He is a retired teacher. He testified that the suit plot belonged to his father who died in 1967. On his demise his mother used the plot to sell busaa (traditional liquor) which was subsequently outlawed. The plot was then leased to the respondent in 1978 and he used it to store timber. His step mother died in 1982 and the four siblings took over the land. They eventually sold it to the respondent in 1989 for Kshs. 64,000/= which proceeds they shared. He testified that Teresia Ratemo got married to his brother Peter Ratemo in 1968. In 2004 the succession case No. 67 of 2004 in the High Court at Kisii was filed in respect of the estate of his late father and the plot was confirmed to the respondent. Teresia was present during the succession case and consented to the suit plot being confirmed to the respondent vide a consent dated 6 April 2004. She was also present during the confirmation hearing together with himself, his brother John Gichana and the respondent. Cross-examined, he acknowledged that when they sold the land to the respondent in 1989 they did not have a grant in respect of the estate of their late father. He also affirmed that at the succession proceedings there were other beneficiaries, notably his sisters, who were not included therein and who did not appear at the confirmation hearing. At that time only two of the four sons were alive. He conceded that some of the information he gave in the succession case was not correct one being that he indicated that he was the only son of the deceased. There was also information regarding what was left as the property of the deceased, which was not correct, as three parcels of land were included but they were not registered in the name of his deceased father; they were in fact registered in name of his mother and step-mother. He testified that despite selling the plot to the respondent they did not go to have it changed to his name at the Council.
12. DW – 2 was John Gichana Omaa, also a son of Barnabas from the second house. He testified that Teresia was not yet married to Peter Ratemo when his father died in 1967. She got married in 1968. Teresia herself died in 2014. He affirmed that they sold the suit land to the respondent and he received Kshs. 9,000/= as his share. He has no claim over the land and according to him it belongs to the respondent. Regarding the succession matter he testified that they gave authority to Alloys and Teresia to pursue it. He attended court and they agreed on the distribution whereby the suit plot was given to the respondent.
13. DW – 3 was the respondent. His evidence was that he was previously a tenant before buying the suit land from the children of Barnabas in 1989. They wrote a sale agreement dated 1 December 1989 before an advocate. He recalled that a succession case was filed and that Teresia was present. He described Erick Nyandusi as a thief.
14. There was a counterclaim hearing which was certainly not necessary for the witnesses simply repeated their evidence.
15. Counsel were invited to file submissions, which they did, and judgment was eventually delivered on 1 November 2023 in favour of the respondent. The trial Magistrate was persuaded that it is the respondent who is the rightful proprietor of the suit plot. The court found no evidence that the property was transferred to Teresia and later to Erick Nyandusi. He further held that the grant issued remains as it was never revoked.



16. Aggrieved, the appellant has now preferred this appeal citing the grounds that the trial Magistrate erred in upholding the sale of the plot in the year 1989 yet the sale was a nullity and contrary to Section 45 of the *Law of Succession Act*, Cap 160, Laws of Kenya; that the trial Magistrate erred by holding that the confirmed grant vested the suit property in the respondent; that the trial Magistrate erred in finding that there was no evidence that the suit plot was transferred to Teresa notwithstanding the evidence of the Land Administration Officer; that the trial Magistrate erred in directing rectification of the register maintained at the Kisii County Government to reflect the respondent as proprietor; that the judgment was against the weight of evidence. The appellant wishes to have the judgment set aside, the reliefs in his plaint granted, and the counterclaim to be dismissed.
17. I directed the appeal to be argued by way of written submissions and I have seen the submissions of both Mr. Nyamurongi, learned counsel for the appellant, and Mr. Mariaria, learned counsel for the respondent. I have taken the same into consideration before arriving at my decision.
18. This is a first appeal and I stand guided by the principles laid down in the case of *Selle & Another vs Associated Motor Boat Company Limited & Others* (1968) EA 123 where it was stated as follows by Sir Clement De Lestang, VP at page 126 :

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this aspect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.
19. This court, thus has a duty to reconsider the evidence, evaluate it itself, and draw its own conclusions.
20. The core issue in the case is who between the appellant and respondent deserves to be declared the rightful owner of the plot in dispute. In such instances, the protagonists need to demonstrate the root of their titles, and the title that prevails is that which is shown to have a solid root without a break in the chain. In our case, the task has been made a little less onerous by the fact that both parties acknowledge that the first proprietor of the disputed plot is Barnabas Omae. They therefore trace their titles to the same source but their point of departure is proprietorship that followed that of Barnabas Omae.
21. The appellant's case is that he purchased the disputed plot from from Erick Nyandusi Omae, but did Erick ever get a good title to the land which he could then pass to the appellant ? Erick of course claims that the land was transferred to him by his mother Teresa. In his evidence, he alleged that his grandfather (Barnabas) transferred the plot to his father (Peter Ratemo) and that his father subsequently transferred the land to his mother (Teresa) and that Teresa then transferred the land to him.
22. Now, we have a problem here, because there is absolutely no evidence of any transfer of the suit plot from Barnabas to Peter Ratemo. In fact, Erick's evidence that the plot was first transferred to his father, then to Teresa, is contradicted by the evidence of the County Land Administrator who claimed that the plot was transferred from Barnabas to Teresa. But yet again there is an issue here because it is not conceivable that Barnabas could have transferred the suit plot to Teresa. Barnabas died in 1967 and Teresa came to the family in 1968 or thereabouts as wife of Peter Ratemo, a son of Barnabas. There is no evidence that Barnabas ever knew of the existence of Teresa prior to his death and I do not see how



he could have transferred the plot to her before she got married into the family. In essence I am not persuaded that Teresa ever got a transfer of the plot from Barnabas.

23. In fact, I am not persuaded that Teresa was ever registered as proprietor of the suit plot, at all. Teresa herself does not seem to have had any interest in the plot. She never used it nor laid any claim over it. Indeed, by virtue of her participation in the succession proceedings, and the consent that she gave therein, she acknowledged that the plot had been sold to the respondent by the direct descendants of Barnabas and she had no problem with the respondent being recognized as beneficiary of the estate of Barnabas by virtue of that purchase. She not only gave written consent that the grant can be confirmed so that Barnabas is recognized as the beneficiary of the suit plot but also attended court on 28 March 2006 before Bauni J, and affirmed that the grant can be confirmed in that fashion. It is improbable that Teresa could go through this process if the plot was already transferred into her name. If she had been registered as proprietor of the suit plot it would be going against her own interest to acknowledge that the plot was sold to the respondent. I would think that at this juncture she would protest and assert that she is the one who owns the plot and that the plot is not the free property of Barnabas and does not form part of his estate. I am convinced that Teresa was never registered in the Council as proprietor of the disputed plot in the year 1999. If she ever was, she was not aware of such registration and did not consent to it and such registration if it was done in 1999 was done without her knowledge and for purposes of perpetrating a fraud.
24. My conviction is that Teresa was never registered as proprietor of the suit plot in 1999. Alternatively, she had no knowledge that her name was in the records of the Council as proprietor. That being the case, she never transferred the disputed plot to Erick Nyandusi Omae. Assuming that Teresa was actually registered as proprietor in 1999 as alleged by Erick and the appellant, which I am not persuaded, her registration could only have been obtained by fraud since Barnabas was not there to transfer the land to her in 1999 and she could not have obtained transfer of the land from her husband Peter Ratemo for reason that Peter never got registered as proprietor in the Council records.
25. From this analysis, Erick Nyandusi could not have rightfully obtained registration of the suit land and had no title to pass to the appellant. I believe that what Erick did was to somehow collude and connive with Council officials to cause the records to be doctored so as to reflect Teresa as proprietor who then purportedly transferred the suit plot to him (Erick).
26. In his submissions, Mr. Nyamurongi, learned counsel for the appellant, urged that the sale agreement upon which the respondent asserts title is a nullity on the basis that the sellers did not have letters of administration in 1989. He referred to Section 45 of the *Law of Succession Act*, which bars the intermeddling of the estate of a deceased person and a couple of authorities emphasising the point that there ought to be no disposition of the free property of a deceased without the holder thereof being the legal representative of the deceased and having authority of court to do so. I appreciate the point that Mr. Nyamurongi is trying to put forth but it doesn't help his client. It doesn't because the respondent was bequeathed the land during the succession proceedings of the estate of the late Barnabas. It was appreciated within the said proceedings that he has a recognizable stake in the estate of the deceased and the court awarded him the suit plot. Any irregularity in the sale agreement was overridden by the confirmation that the respondent could succeed Barnabas as the proprietor of the suit plot. Mr. Nyamurongi further argued that the respondent could not have acquired title through the succession process. That is not an argument that can be made here as the decision of the High Court in respect of the confirmation of the grant has never been set aside and it stands. This court has no jurisdiction to interrogate whether what the High Court did was right or wrong. I cannot therefore enter the arena that Mr. Nyamurongi wishes this court to enter. In any case even assuming that the



title of the respondent is not good, that would not, by itself, confer title to the appellant. The title of the appellant remains a bad title either way.

27. Mr. Nyamurongi also urged that the evidence of the Land Administrator was not controverted. It was in fact controverted by the wealth of evidence presented by the respondent to demonstrate that Teresa could not have been registered as proprietor of the suit plot and that Teresa could not have transferred the suit plot to Erick Nyandusi. There was certainly fraud in the manner in which the proprietorship records at the Municipal Council and later the County Government of Kisii were manipulated. The allegations of fraud were not vague as claimed by Mr. Nyamurongi. Fraud and forging of documents was pleaded and I am persuaded that there was sufficient proof tendered to prove the fraud. The documents of proprietorship could not, without fraud, have demonstrated transfer of the plot to Teresa. I have already elaborated that Barnabas was dead at the time the transfer was made to Teresa and he was the only person who had capacity to transfer title to her. He never did so.
28. I see nothing wrong with the title of the respondent. The direct and immediate beneficiaries of the estate of Barnabas sold their interest in the plot to the respondent. The succession court recognized him as beneficiary and purchaser of the disputed plot. There is documentary evidence that the respondent applied for transfer of the plot to him. I have seen payment made on 23 May 2008 to transfer the plot to him. He paid Kshs. 20,000/= for transfer of the plot, Kshs. 200/= for a letter of consent, Kshs. 300/= for a special meeting, Kshs. 3,000/= for a clearance certificate and Kshs. 200/= as application fees. At this time, the payment receipt shows that the plot was still in the name of Barnabas. On the same day, accrued rates of Kshs. 12,200/= were paid with the rate payer still being Barnabas. There is a letter dated 25 June 2008 from the Municipal Council of Kisii being a no objection letter to the proposed transfer of the plot from Barnabas to the respondent. It is the respondent who deserves to be declared the rightful owner of the suit plot. That is the conclusion that the trial court came up with and I am in full agreement with that finding.
29. The records in the custody of the County Government of Kisii, purporting that title is with the appellant need to be expunged and I hereby issue an order that they be expunged. In place thereof, the records to reflect that title moved to the respondent after the first proprietorship of Barnabas.
30. It is clear from the foregoing that I find no merit in this appeal.
31. It is hereby dismissed with costs.
32. Judgment accordingly.

DATED AND DELIVERED THIS 4TH DAY OF DECEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Kebungo for the appellant instructed by M/s Nyamurongi & Company Advocates;

Mr. Mariaria for the respondent instructed by M/s Mariaria & Company Advocates;

Court Assistant – David Ochieng’ .

