Onsongo v Matara (Environment & Land Case 175 of 2016)
[2023] KEELC 20655 (KLR) (11 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20655 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 175 OF 2016

M SILA, J

OCTOBER 11, 2023

BETWEEN

KEBASO ONSONGO ..... PLAINTIFF

AND

PETER NYAMWANGE MATARA ..... DEFENDANT

JUDGMENT

(Plaintiff filing suit contending that the defendant fraudulently obtained a title measuring 1.59 Ha yet the land sold to him only measured 110 x 200 feet; defendant presenting the Land Control Board consent and mutation form supporting his title; precedence of documentary over oral evidence; presumption on the validity of official documents and presumption of documents over 20 years old; plaintiff not presenting any tangible evidence to rebut the documentary evidence of the defendant; in any case suit time barred; plaintiff's suit dismissed with costs)

1. This suit was commenced through a plaint filed on 27 June 2016. In essence the plaintiff contends that he transferred land to the defendant measuring 110 X 220 feet, but the defendant proceeded to fraudulently obtain title to land measuring 1.59 Ha.

2. In the plaint, the plaintiff pleaded that he owned the land parcel West Kitutu/Mwagichana/102 measuring 3.8 Ha. He averred that sometimes in the 1980s he sold a portion thereof, measuring 110 X 200 feet, to one Barnaba Onchwangi, who in turn sold this portion to the defendant. The plaintiff has pleaded that he was aware of this sale and he agreed to obtain the requisite consents to transfer this portion directly to the defendant. He thus obtained consent to subdivide from the Land Control Board. He however contends that no consent to transfer was ever obtained and that the defendant engaged a surveyor in his absence and carved out land that measured 1.59 Ha, which was bigger that the 110 X 200 feet sold. This land measuring 1.59 Ha came to be registered as West Kitutu/ Mwagichana/2045 in the name of the defendant. It is the contention of the plaintiff that the defendant acquired this title fraudulently inter alia by causing a subdivision without following the laid down

procedures. He pleads that the defendant has indeed only been in occupation of land measuring 110 X 200 feet. In the suit, the plaintiff seeks orders to have the title of the defendant to the land parcel West Kitutu/Mwagichana/2045 cancelled and for an order to rectify his title to reflect the rightful portion sold. The plaintiff also seeks an order of permanent injunction to restrain the defendant from dealing with the land parcel No. 2045 together with costs of the suit.

3. The defendant filed defence refuting the claims of the plaintiff. He pleaded that he purchased a large portion of the land which was marked on the ground and confirmed by surveyors. He averred that he took possession of the land in 1976 and fenced it and he has since been enjoying peaceful possession. He raised issue that the suit is statute barred. He pleaded that it is the plaintiff and his sons who encroached and blocked a road of access in 2013 which road is duly marked in the Registry Index Map (RIM). The plaintiff filed a reply to defence where he insisted that the plaintiff has only been in possession of the portion sold to him by Barnaba Onchwangi. He denied the existence of the road as pleaded by the defendant and also refuted the claims of encroachment.

4. PW-1 was Barnaba Onchwangi. His evidence was taken by Mutungi J. He stated that he is a retired teacher and that in the 1970s he purchased land measuring 110 X 200 feet from the plaintiff out of the land parcel West Kitutu/Mwagichana/102 for Kshs. 2,700/=. He paid Kshs. 2,000/= leaving a balance of Kshs. 700/=. He stated that the plaintiff gave him possession but after a short period he resold the land to the defendant for the same sum. He was paid Kshs. 2,000/= and he asked the defendant to pay the plaintiff what he still owed him, i.e Kshs. 700/=. He then introduced the plaintiff to the defendant and explained to the plaintiff their transaction which the plaintiff approved. In 2014 he heard of a boundary dispute between the two and that the defendant had a title for 1.59 Ha. He stated that all along he was aware that the defendant occupied a portion measuring 110 X 200 feet and he has no knowledge of the extra land claimed by the defendant.

5. PW-2 was the plaintiff and his evidence was taken before Onyango J as Mutungi J had been transferred. His evidence was that he had sold land measuring 110 X 200 feet to Barnabas Ochwangi. Barnaba used the land for a short while before the defendant occupied it. He stated that they went to the Land Control Board and obtained consent and that the defendant brought surveyors in his absence. He later discovered that his land was subdivided into two portions. He denied signing any transfer form. He stated that he has no problem with the portion sold to Barnaba but contended that the defendant obtained title to a bigger portion that what he had sold.

6. Cross-examined, he testified that he sold the land to Barnaba in 1980, or thereabout, and that what he sold was land measuring 110 X 200 feet. He did not have a (written) sale agreement with Barnaba. He also never saw the sale agreement between Barnaba and the defendant. He stated that he did not know when the defendant occupied the land that he sold to Barnaba but affirmed that he was still in occupation. He was shown Land Control Board forms dated 9 November 1976 but he denied signing them. He stated that he was not aware of the letters of consent from the Bogetutu Land Control Board dated 12 January 1977 and claimed to be unaware that his land was subdivided following that consent. He stated that he was not aware that the original land parcel West Kitutu/Mwagichana/102 no longer exists. Interestingly however, he did testify that he was aware that he is the registered owner of the parcel No. 2044 and he subsequently changed his evidence to state that he was aware that the parcel No. 102 was subdivided legally into the parcels No. 2044 and 2045. He acknowledged that according to the said subdivision, the defendant was his neighbor. He affirmed that he has never complained anywhere that the defendant was occupying his land. He was shown the mutation form which had a road of access and he testified that the defendant has never used that road. He insisted that the defendant obtained title to a bigger portion than that which he sold to Barnaba.

7. PW-3 was Joseph Orero Kebaso. He is son to the plaintiff. His evidence was to the effect that his father sold to Barnaba land measuring 110 X 200 feet at Kshs. 2,700/= in 1980. He claimed that he was present when the land was sold though he was not then an adult. He testified that his father did not give Barnaba title and that Barnaba later sold the land to the defendant and he took possession. He stated that sometimes in 2015, the defendant approached his father claiming that he had no access road and he wanted one carved out of his father's land. They went to check at the Lands officeand found that the parcel No. 102 has been subdivided into two portions without his father's knowledge. He stated that he never saw a surveyor come to the land. He wished to have the defendant confined to land measuring 110 X 200 feet.

8. Cross-examined, he testified that he was not involved in the sale agreement between his father and Barnaba though he claimed to have seen the sale agreement. He stated that he has never seen the agreement between Barnaba and the defendant. He testified that he had never seen the LCB application and consent. He testified that the defendant was not their neighbor and lives on a different parcel of land but used the land that he bought from Barnaba.

9. PW-4 was Steve Mokaya, the Land Registrar, Kisii. He had the original parcel file for the land parcel No. 102 and the resultant subdivisions. He testified that the land parcel No. 102 measured 3.8 Ha. It was first registered in name of the plaintiff on 28 August 1975. On 15 January 1985, the title was closed on subdivision into the land parcels No. 2044 and 2045. The parcel No. 2044 is in name of the plaintiff and measures 2.06 Ha whereas the parcel No. 2045 is in name of the defendant and measures 1.59 Ha. On 15 January 1985, the parcel No. 2045 was transferred into the name of the defendant upon a sale for a consideration of Kshs. 3,000/=. He had the transfer form. The title was surrendered for re-issuance of a new title on 8 November 1993. On 29 January 1994, the land was charged to Kenya Commercial Bank for Kshs. 200,000/=. In 1995, there was a variation of charge, and a discharge in 2003. He elaborated that before subdivision, one obtains consent of the Land Control Board upon an application. The application in this instance was made by Kebaso Onsongo (plaintiff) and the nature of transaction indicated as subdivision and transfer. He however testified that the application forms are new forms that did not exist in 1985 and that the acreage in the application forms and the green card do not tally. He also stated that the consent is no signed by the Chairman of the Land Control Board and has no serial number. It also does not indicate which Land Control Board issued it. The consent is dated 14 April 1977. There was however a second consent dated 12 January 1977 from Bogetutu Land Control Board for subdivision. According to the application, the defendant was to get title measuring 1.8 Ha and the plaintiff was to remain with 2.0 Ha. He had the mutation forms in his records. The same show division into 2.0 Ha and 1.8 Ha. The titles issued however measure 1.59 Ha and 2.06 Ha respectively to the defendant and plaintiff. His office has never received a complaint regarding the two parcels of land.

10. Cross-examined, he testified that the plaintiff has never applied for issuance of a title deed. The register shows that his land is bigger than indicated in the LCB consent and the mutation. The documents he had affirmed that the defendant purchased about 4 acres from the plaintiff. He testified that it was not true that the defendant has deprived the plaintiff any land. He stated that despite the discrepancies in the acreage all other procedures were followed.

11. PW-5 was Thomas Ongeri Orangi. He is a surveyor working with the Ministry of Lands, Kisii. He had the area map for Mwagichana registration section and the mutation forms for parcel No. 102. He testified that the mutation forms were prepared on 24 August 1977 by the Government surveyor who signed the same. They were also signed by both plaintiff and defendant. He testified that there was to be a road passing through the parcel No. 102. Upon subdivision, there was to be a road that was

to serve the parcel No. 2045 (of the defendant). The parcel No. 2044 was to measure 2.0 Ha and the parcel No. 2045 was to measure 1.8 Ha. There were identity cards attached to the mutation forms.

12. Cross-examined, he stated that the map he produced has provision for an access road. The mutation form also provided for an access road that was 10 feet wide. An amount of Kshs. 182/= was paid for the survey exercise and receipt issued. The surveyor visited the ground on 24 August 1977 and prepared the mutation form. The document was approved by the surveyor on 25 August 1977. He stated that the parties, plaintiff and defendant, appeared before the Land Registrar and signed/thumbprinted the form. However, the titles issued reflected more land to the plaintiff than indicated in the mutation form. He elaborated in re-examination that no subdivision can successfully be processed without providing for an access road.

13. With the above evidence the plaintiff closed his case.

14. It is at this stage that I took over the case and I recorded the evidence of the defendant. He denied that he fraudulently obtained his title deed to the land parcel No. 2045. He explained that he purchased the land from the plaintiff in 1973 and that they went to the Land Control Board at Manga. He produced the application for consent and the consent. He took possession of the land elaborating that the land slants and he is on the upper side whereas the plaintiff is on the lower side. He testified that there was a road on the ground and it was surveyed but the plaintiff blocked it in 2013 and he cannot now access his land. He accused him at the Lands office. He pointed out that both Land Registrar and Surveyor testified that he legitimately bought the land and in his opinion the case was a result of '*fitina*' (hate) from the children of the plaintiff.

15. Cross-examined, he testified that it was in 2013 that the plaintiff blocked the road though he did not sue him in court. He purchased the land in 1973. He stated that there was a sale agreement but he could not trace it owing to passage of time. He stated that he lived on the land for about 2 years before starting the registration process. He testified that both he and the plaintiff went to the Land Control Board. The land parcel No. 102 was to be subdivided into two portions measuring 2.0 Ha and 1.8 Ha. His title is for 1.59 Ha. His explanation was that what was noted in the LCB application was an estimate and that when the surveyor came to the ground he found 1.59 Ha. He testified that he knows Barnaba (PW-1) but according to him, he had no connection with the land. He insisted that he purchased the land directly from the plaintiff and not through Barnaba. He testified that they both applied for consent and the plaintiff signed it. They paid Kshs. 182/= for survey and Kshs. 25/= for preparing the mutation form. He did not have the minutes of the Land Control Board and stated that they are in their offices. He testified that he planted coffee and trees on his land and these are still there. He elaborated that he uses other people's land to access his land since the plaintiff blocked the road and converted it to be part of his land. He explained that after he got title he wasn't too keen in keeping the documents. He pointed out that this dispute is coming 50 years later and all witnesses are now deceased.

16. With the above evidence, the defendant closed his case.

17. I invited counsel to file their submissions, which they did, and I have taken these into account before arriving at my disposition.

18. The plaintiff's case in a nutshell is that the defendant only deserves land measuring 110 X 200 feet that was to be carved out of the land parcel No. 102. He claims that he sold this portion to one Barnaba who subsequently transferred his interest to the defendant with the knowledge of the plaintiff. The plaintiff contends that the defendant however proceeded to subdivide the land without his input so that he ended up getting a title that is of 1.59 Ha instead of land measuring 110 X 200 feet. He contends that no proper consent was obtained. He asserts that the defendant has all along been in possession of land measuring 110 X 200 feet and that he was surprised when the defendant wished to have a road created

on his land and that is when he discovered that the defendant held a bigger title than he deserves. All this is of course denied by the defendant, his case being that the plaintiff directly sold to him land that was to measure 1.8 Ha though he ended up with a title of 1.59 Ha because this is what the surveyor found on the ground.

19. The starting point is to appreciate that it is the plaintiff who lodged this suit and therefore the burden of proof is upon him. In essence, the plaintiff needs to prove that what he sold to the defendant is only land measuring 110 X 200 feet, that the consent from the Land Control Board that has been tabled by the defendant is forged, that the mutation form is forged, and that on the ground the defendant only occupied land measuring 110 X 200 feet before this suit was filed. Has the plaintiff proved all these ? I am not persuaded.

20. First no sale agreement was produced to demonstrate that the plaintiff sold land to Barnaba. In addition, there was no documentary proof that what was sold was only land measuring 110 X 200 feet. One cannot vouch, from the oral evidence presented, that what was sold was land measuring 110 X 200 especially given that there is documentary proof to the contrary. It is trite that proof of the existence of a sale agreement for land needs to be by way of documentary evidence (See *Law of Contract Act*, Section 3(3)) and where there are documents that contradict oral evidence, the documentary evidence must be given prevalence unless proved that the same were forged. The plaintiff did not bring any tangible evidence that what he sold to the defendant was land measuring 110 X 200 feet. I do not believe the evidence of PW-1 or PW-3, who was merely a minor when the transactions took place. There is also no evidence to demonstrate that the documents used to transfer land to the defendant were forged. The plaintiff of course claimed that he never signed any Land Control Board documents which would infer that he never attended any Land Control Board meeting and that he never signed the transfer form. The plaintiff never brought any evidence from a document examiner to demonstrate that the signatures in the Land Control Board application were not his signatures or the signature in the transfer form is not his signature. He also never brought the minutes of the Land Control Board to demonstrate that he never attended any meeting of the Board. I am aware that in his submissions, Mr. Miruka, for the plaintiff, made an argument that the defendant did not bring the minutes of the Land Control Board. This argument holds no place. I reiterate that the burden of proof was on the plaintiff, not the defendant. It is therefore the plaintiff who ought to have brought the minutes of the Land Control Board if he wished to assert that there was never any consent of the Board that was issued as displayed by the defendant. This is because the *Evidence Act*, makes a presumption on the genuineness of documents and thus proof to the contrary must be given. I particularly refer to Section 83 of the *Evidence Act* which provides as follows :-

> 83. Certified documents.
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> (1) The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is—
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> (a) declared by law to be admissible as evidence of any particular fact; and
>
> (b) substantially in the form, and purporting to be executed in the manner, directed by law in that behalf; and
>
> (c) purporting to be duly certified by a public officer.
>
> (2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document.

21. PW-4, the Land Registrar, who was the plaintiff's witness, did have in his records the application for Land Control Board consent, the consent itself issued from Bogetutu Land Control Board, and the transfer form. The defendant relied on the same documents. The plaintiff produced nothing to rebut the presumption that these documents were not genuine documents. As I have mentioned above, he did not produce any evidence, say from an expert document examiner, to support the allegation that he never signed the said documents. He also did not produce minutes of the Land Control Board to support the contention that there was never any application nor consent issued by the Land Control Board in the nature shown in the documents produced.

22. Even worse for the plaintiff, the documents herein are more than 20 years old to the time the suit was filed, and the presumption on their authenticity is buttressed by Section 96 of the *Evidence Act*, which provides as follows :-

> 96. Documents twenty years old.
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> (1) Where any document purporting or proved to be not less than twenty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.
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> (2) Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

23. As noted above, where documents are beyond 20 years old, there is an added presumption on their authenticity. I repeat, that other than mere word of mouth, the plaintiff brought nothing to support the contention that he never executed these documents, and I will again repeat, that the burden of proof was on him to rebut the presumption that he never executed the said documents.

24. There was an attempt by counsel for the plaintiff to make heavy weather on the evidence of PW-4. He submitted that he (PW-4) cast doubt on the Land Control Board documents. I have carefully gone through the evidence of PW-4. He never cast doubt on the documents of the Land Control Board. What he stated was that he had in his records some other documents of the Land Control Board which were unsigned. It would appear that there was another set of such in his file but they mean nothing as they were not signed. In so far as the documents relating to the application for Land Control Board consent, and the consent issued, that led to the subdivision and transfer of one of the subdivisions to the defendant, he never raised any issue. He did testify that he had the consent dated 12 January 1977 from Bogetutu Land Control Board. I have seen both the application for consent and the consent itself. In the application for consent, the plaintiff wished to subdivide his land into two portions of 2.0 Ha and 1.8 Ha, then transfer 1.8 Ha to the defendant for consideration of Kshs. 3,000/=. There is evidence of a mutation form which was prepared and paid for and signed by the parties and the surveyor. The mutation form was prepared on 1 April 1977 and paid for on 4 April 1977. It reflects exactly what was in the application for consent, i.e, that the land was to be subdivided into two portions of 2.0 Ha and 1.8 Ha. The land was duly subdivided and this is shown in the Registry Index Map (RIM). Amendment No. 3 in the RIM shows that the map was amended on 19 April 1978 and it reads: SUB DIV 102 TO 2044 2045 AC RD TO 2045. MUT/12/121/222/9/76). It is clear that what this entry says in summarized form is that the land parcel No. 102 is being subdivided into the land parcels No. 2044 and 2045 and that there is an access road to the parcel No. 2045. The mutation form number

is duly indicated. This is the same evidence that the Land Registrar gave, that the land parcel No. 102 was subdivided into the land parcels No. 2044 and 2045, the latter being the defendant's land and it ended up with a title of 1.59 Ha. The defendant appears to have ended up with less land but this does not in any way prejudice the plaintiff and the defendant himself is not complaining.

25. Counsel for the plaintiff also tried to raise issue that the map has no road. The plaintiff did indeed produce a RIM that has no road of access through the parcel No. 2044 to the parcel No. 2045 meaning that the parcel No. 2045 is landlocked. The Land Surveyor (PW-5) did produce another map which shows the road passing through the parcel No. 2044 so that the parcel No. 2045 can be accessed. My own assessment of the two maps is that they are similar in all respects save that the one the plaintiff is relying on does not have this road drawn. But this must be an error in whoever drew the map, or it is an obvious attempt, to smudge the fact that there is the road of access. This is because even in this map there is amendment No. 3 which shows what I recorded in the preceding paragraph (i.e SUB DIV 102 TO 2044 2045 AC RD TO 2045. MUT/12/121/222/9/76). Given this position the map needs to indicate the access road to the parcel No. 2045. I am buttressed in this holding by the fact that no title can be created without providing for access to the land. The title to parcel No. 2045 must have a road of access and that road of access is that drawn in the map produced by the surveyor.

26. I have not forgotten that part of the plaintiff's case is that all along the defendant has been occupying land measuring 110 X 200 feet. Despite so alleging, absolutely no evidence was tabled on this alleged occupation of 110 X 200 feet. No surveyor's report was produced by the plaintiff to demonstrate that the defendant has only been occupying land measuring 110 X 200 feet. Even the location of this land measuring 110 X 200 feet, within the original land parcel No. 102, was never shown, and no evidence was ever led as to show how this 110 X 200 feet is accessed. It was merely by word of mouth, devoid of any documentary support, that the defendant has been occupying land measuring 110 X 200 feet, and given the denial by the defendant, the onus was on the plaintiff to produce documentary evidence of this alleged occupation. None was provided.

27. The other issue that we cannot run away from is that the plaintiff's suit is clearly time barred given the provisions of Section 7 of the *Limitation of Actions Act*, which provides as follows :-

> 7. Actions to recover land
>
> An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

28. From the above, it will be seen that one has 12 years to file an action for recovery of land. In our instance, the title of the defendant was obtained in 15 January 1986. This suit was filed in the year 2016, which is 30 years later. I am aware that a party can benefit from the extension given in Section 26 of the same statute which provides as follows :-

> 26. Extension of limitation period in case of fraud or mistake
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> Where, in the case of an action for which a period of limitation is prescribed, either —
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> (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
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> (b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

29. From the above, in cases of fraud, one can benefit, so that time starts running from the time the plaintiff discovered the fraud or mistake, or could with reasonable diligence have discovered it. In this case, the plaintiff has tried to say that it was around the year 2013 that he discovered that the plaintiff wishes to extend his land beyond the boundaries of 110 X 200 feet. I have already elaborated that the plaintiff has brought absolutely nothing to show that the land that the defendant occupied was 110 X 200 feet. The only presumption I can make is that the defendant occupied the whole of the land comprised in the 1.59 Ha indicated in his title. The plaintiff must have seen him using this land at least from the year 1985. That title was indeed used to obtain a loan in the year 1994. In any event, the plaintiff knew that he was transferring land to the defendant in the 1970s. I have already held that he executed the requisite documents. He cannot pretend that he never proceeded to check what titles emerged upon subdivision. If he didn't, then this was a fact that he could have discovered with exercise of reasonable diligence. I am not persuaded that he can benefit from any extension of time. The plaintiff has not brought sufficient evidence to prove his case, but even if he had (which I emphasise that he has not), his suit would be time barred.

30. My assessment of the case is that the plaintiff and/or his children are motivated by sheer human cupidity. They want more land, and the land they are eyeing is that comprising of the road of access passing through their land, and also wish to have a chunk of the plaintiff's land. I am afraid that this court cannot endorse their nefarious intentions.

31. I don't see the point of saying more. I do hold that the defendant holds a good title to the land parcel West Kitutu/Mwagichana/2045 measuring 1.59 Ha. I also hold that there is a road of access connecting this land parcel West Kitutu/Mwagichana/2045 to the main road, which road of access passes through the plaintiff's land parcel West Kitutu/Mwagichana/2044. It is apparent that I am not persuaded that the plaintiff has proved his case on a balance of probabilities. I proceed to dismiss his suit with costs.

32. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 11TH DAY OF OCTOBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in presence of: -

Mr. Miruka for the plaintiff

Mr. Ochwangi for the defendant

Court Assistant: Lawrence Chomba