



Mariera & another v Ongwancho & 2 others (Environment & Land Case 958 of 2016) [2023] KEELC 21423 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21423 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 958 OF 2016**

M SILA, J

NOVEMBER 9, 2023

BETWEEN

ISAAC OMWONGA MARIERA 1ST PLAINTIFF

**ISAAC OMWONGA MARIERA (SUING AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF THE LATE PASTOR SOSPETER MARIERA
OONGO) 2ND PLAINTIFF**

AND

ABEL MORANGA ONGWANCHO 1ST DEFENDANT

LAND REGISTRAR, KISII COUNTY 2ND DEFENDANT

HONOURABLE ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

(Both plaintiffs and 1st defendant holding title to the suit land; no dispute over the first proprietor of the suit land; plaintiffs contending that they purchased the suit land from the first proprietor in 1984 who then transferred title to them in the year 2003; 1st defendant alleging that he bought the land from a third party (Nikora) in the year 2008, who had in turn purchased it in 1984 and obtained proprietorship from the first proprietor and thus claiming to be an innocent purchaser for value without notice; first proprietor giving evidence and affirming that he sold the land to the plaintiffs and transferred title to them; first proprietor categorically denying that he ever dealt with or sold land to Nikora who was a complete stranger to him; plaintiffs producing evidence that the first proprietor was the recognized rate payer and was even sued for non-payment of rates in 1990; no Certificate of Lease exhibited indicating the name of Nikora; no evidence of any rate payments in name of Nikora; no ID card nor PIN of Nikora displayed; impossible for any such person to have held title so as to transfer it to the 1st defendant in 2008; purported transfer of the 1st defendant, his Certificate of Title, and entries in the leasehold register registering him as proprietor, purportedly made by a Land



Registrar who had since retired and was not capable of effecting such transfer or registration; clear that the title of the 1st defendant is the fraudulent title; fraud perpetrated inter alia by removing the genuine documents and White Card from the lands records and in place planting fake documents to allege that the 1st defendant is the rightful owner; 1st defendant must have participated in the fraud; title of 1st defendant nullified and Land Registrar directed to reconstruct the genuine records and genuine register in name of the plaintiffs; damages; 1st defendant constructing the land despite an order of status quo; court making an award of general damages in the sum of Kshs 5 million).

A. Introduction And Pleadings

1. This suit was commenced through a plaint filed on 9 August 2012 by the 1st plaintiff on his own behalf and on behalf of the estate of the late Sospeter Mariera Oongo. It is pleaded that on 5 June 1984, the 1st plaintiff and the late Pastor Sospeter Mariera Oongo jointly purchased the leasehold interest in the land parcel Kisii Municipality/Block III/240 (the suit land) from one Fredrick Ayienda Makoyo (Fredrick Ayienda), and they subsequently became registered as proprietors in common on 5 March 2003. It is pleaded that on 5 May 2011, the 1st plaintiff was called by their caretaker and informed that the premises was being fenced on instructions from the 1st defendant. They visited the office of the Land Registrar Kisii and discovered that the 1st defendant had obtained a title to the suit land on 10 November 2008 allegedly from one Nikora Isaboke Kingara (Nikora), who had in turn purportedly obtained title from Fredrick Ayienda on 9 August 1984. It is contended that the title of the 1st defendant was obtained by fraud, inter alia, by destroying records in the original register to indicate that Nikora had obtained title from Fredrick Ayienda; opening a fresh register; issuing a certificate of lease to Nikora notwithstanding that the Certificate of Lease of Fredrick Ayienda had not been delivered for destruction; purporting that the Green Card and Certificate of Lease were signed by one Joshua James Awuor, a Land Registrar, when he had already retired from service. Principally, it is denied that Fredrick Ayienda ever executed any document or transferred his title to the alleged Nikora. It is pleaded that the 1st plaintiff lodged a complaint with the Commissioner of Lands and the Criminal Investigations Department (CID) which led to the 1st defendant being charged at the Chief Magistrate's Court with various criminal offences.
2. In this suit, the plaintiffs seek the following orders (paraphrased for brevity):-
 - i. A declaration that the registration of the 1st defendant as proprietor of the leasehold comprised in the title Kisii Municipality/Block III/240 and the issuance to him of a Certificate of Lease by the 2nd defendant (Land Registrar, Kisii) is a nullity ab initio.
 - ii. Cancellation of the registration of the 1st defendant as proprietor of the suit land.
 - iii. A permanent injunction to restrain the 1st defendant from dealing with the title to the suit land.
 - iv. A mandatory injunction to compel the 1st defendant to remove the fence erected around the suit land and damages for trespass with interest from the date of assessment till payment in full.
 - v. Costs and interest.
3. The 1st defendant filed a defence wherein he asserted to be the lawful owner of the suit property. He pleaded that he purchased the land from Nikora and subsequently obtained a Certificate of Lease on 10 November 2008. He denied obtaining registration by way of fraud. In the alternative, he pleaded that he purchased the suit property from Nikora without any notice of defect in his title, and contended to be a bona fide purchaser without notice. He admitted fencing the suit property. He also admitted being charged in Kisii Magistrates' Court Criminal Case No 119 of 2012 but averred that his prosecution was borne out of malice and calculated at harassing and intimidating him. He also pleaded that the plaintiff's suit is time barred and asked that it be dismissed.



4. The 2nd and 3rd defendants (Land Registrar, Kisii and the Attorney General) also filed defence. They pleaded that the 1st defendant has never been legally registered as proprietor of the suit land. They averred that if the 1st defendant ever got registered as proprietor, then this was by mistake. They added that if the 1st defendant has any document of title, then the same is not genuine and is not reflected in their records, and was irregularly obtained.
5. It is on the basis of the above pleadings that the matter proceeded for hearing.

B. Evidence Of The Parties

6. PW1 was Fredrick Ayienda Makoyo. He recalled that in 1975, he applied for a plot within Gusii County Council. He received an allotment letter which he accepted and he subsequently got a lease and Certificate of Lease to the suit land. He later decided to sell the plot to Sospeter Mariera Oongo (deceased) and his son Isaac Onwonga Mariera (1st plaintiff) for Kshs 45,000/= and a sale agreement dated 5 July 1984 was drawn. He stated that he handed over to the buyers the original lease, the original Certificate of Lease and the allotment letter. He testified that he never transacted with one Nikora Isaboke Kingara. He was shown a transfer in favour of Nikora dated 6 August 1984 and he testified that it is a strange document to him. He denied that the signature therein was his signature and denied appearing before any advocate for attestation. He pointed out that the transfer was under the Registration of Titles Act, and his land was never registered under this statute.
7. PW2 was Isaac Onwonga Mariera, the plaintiff. He testified that Fredrick Ayienda was his brother in law. He wished to sell the suit land and they entered into the agreement dated 5 June 1984. The purchasers were himself and his late father (Sospeter). They completed payment and the seller gave them documents related to the land, including the allotment letter, the lease, the Certificate of Lease and payment receipts. They did not apply for transfer immediately and the plot remained in name of Fredrick Ayienda. In 1999, they applied for development permission and their building plans were approved but they did not commence the development. In the year 2003, they eventually transferred the property into their names and they obtained title. They now started paying rates in their names and he produced the rates payment receipts. He testified that the 1st defendant commenced occupation of the land in 2011 and has occupied it since. He lodged a complaint to the police which led to the 1st defendant being charged.
8. With the above evidence, the plaintiffs closed their case.
9. The Attorney General called Oswera Cecilia Harriet, the Deputy Land Registrar, Kisii, as her witness. She testified that the Green Card in the records of the Land Registry show that the suit land was leased by the County Council of Gusii to Fredrick Ayienda Makoyo for a period of 99 years from 1 August 1975. A White Card (the register of the leasehold proprietor) was opened on 15 November 1979, and on 26 January 1981, the said Fredrick Ayienda was issued with a Certificate of Lease. She testified that the White Card in the registry bears an Entry No 3 dated 9 August 1984 in name of Nikora Isaboke Kingara and it shows that he was issued with a Certificate of Lease. On 10 November 2008, the White Card shows that the property was transferred to the name of the 1st defendant and he was duly issued with a Certificate of Lease. A restriction was placed by the Department of Criminal Investigations (DCI) to stop dealings in the register pending investigations. She stated that the issue of ownership was subjected to a criminal inquiry and the then Land Registrar wrote a statement dated 5 December 2011 to the DCI. She testified that the entries in the register in favour of the 1st defendant showed that they were made by one Joshua James Owuor, who served as Land Registrar, Kisii. She affirmed that Mr. Owuor retired from service on 1 July 2008 and he could not therefore have been able to sign the



entries in favour of the 1st defendant which were made on 10 November 2008. In her opinion, the land belonged to the plaintiffs.

10. Cross-examined by counsel for the plaintiff, inter alia, she observed that the transfer allegedly to Nikora, dated 7 August 1984, was computer typed and also that the transfer indicated a title under the Registration of Titles Act (RTA). The stamp date in the transfer of lease is dated 13 April 1984, which was a stamp before the date of the document, i.e 9 August 1984. The signature of the person attesting the signature of the seller appeared similar to the signature of the person registering the document. All these documents were allegedly presented in Nairobi. On the document of transfer to the 1st defendant, she observed that the document is dated 10 November 2008 yet the revenue stamp therein comes before, i.e 23 August 2008. The PIN number of the seller was also not indicated and none was attached. She stated that no registration can be done without a PIN number as it is the PIN numbers which are used to pay Stamp Duty. She had no stamp duty receipt in her file. She had a copy of the transfer in her file but it bore no presentation book number though the one produced by the plaintiff bore a certain number. These documents, she noted, were purportedly registered by J.O Owuor, but he had by then retired. She pointed out that Mr. Owuor testified in the criminal case and testified that he had retired when the entries in favour of the 1st defendant were made. She also pointed out that the letter written by the Land Registrar, during investigations, indicated the file numbers in the documents held by the 1st defendant as pointing at file references for a plot in Kisumu.
11. Cross-examined by counsel for the 1st defendant, she testified that she could not tell whether the 1st defendant participated in fraud to obtain registration. She however asserted that the entry in favour of the 1st defendant, made on 10 November 2008 was a fraudulent entry based on the documentation. She elaborated that if one merely looked at the White Card, one could not detect that the entry is fraudulent. She acknowledged that the White Card in the registry had no entry in favour of the plaintiffs.
12. The 1st defendant testified in respect of the case against him. He had the original lease document in favour of Fredrick Ayienda. He did not have the original transfer of 6 August 1984 from Fredrick Ayienda to Nikora, which he stated was in the Lands office. He also did not have the original transfer instrument from Nikora to himself. He produced the original Certificate of Lease in his name, and the Green Cards and White Cards, showing him as proprietor. He had a copy of rates demand for the year 2011 and a rates clearance certificate for the same year in his name. He explained that he purchased the land from Nikora. He testified that he did a search before the purchase and it showed his name. The land was vacant. He took possession and developed it before the plaintiff emerged.
13. Cross-examined, he reiterated that he purchased the suit land in 2008 but he did not have rates payment demands or rate payment receipts for the years 2008, 2009 and 2010. He acknowledged not producing any rate payment receipts in name of Nikora. He affirmed that he applied to put up a fence in the year 2011 and got approval, though it appeared that the approval came before the letter. He acknowledged that he had not produced any official search showing Nikora as proprietor. He had no comment to make on the documents showing that Fredrick Ayienda had made payment for rates even after 1984 and had been sued for non-payment of rates in 1990. His explanation was that he was not in the picture at that time. He insisted that it was Mr. Owuor (Land Registrar) who registered his documents and that he was in office at the time. He acknowledged not producing any stamp duty receipts for the transfer though he claimed to have them at home. He was also cross-examined on the transfer to Nikora and he stated that he could not explain them as he was not in the picture. On lack of a PIN number, he stated that PIN numbers were not required in 2008 to transfer land. He could not explain a document titled Memorandum of Registration dated 21 February 2011 and could not tell what was being registered



in 2011. He thought that the document was presented by mistake. He confirmed that on the land is a commercial building which he put up.

14. Cross-examined by counsel for the State, he testified that Nikora did not give him a copy of the sale agreement that he had with Fredrick Ayienda. Neither was he handed over any stamp duty receipts. He stated that the original Certificate of Lease was surrendered to the Lands Office. He acknowledged that he had not produced the sale agreement he allegedly had with Nikora. He had also not produced the consent to transfer nor the stamp duty receipts for his transfer. He acknowledged that at the criminal trial, Mr. Owuor testified and stated that he had retired when the transfer to him was allegedly done. He acknowledged that the Certificate of Lease that he holds is purportedly signed by the said Mr. Owuor.
15. With the above evidence, the defendants closed their respective cases.
16. I invited counsel to file written submissions, but only Mr. Mogeni, learned counsel for the plaintiff, did so. I have taken into account these submissions before arriving at my disposition.

C. Analysis And Disposition

17. This is another unfortunate case where two parties claim to have title to the same land. The plaintiffs assert that they are the lawful owners having purchased the suit land from the first leasehold proprietor, Fredrick Ayienda. They contend that they were duly registered as proprietors but their documents were caused to vanish from the Lands Registry, and instead, a register indicating the 1st defendant as proprietor was fraudulently created. The 1st defendant on the other hand also asserts to be the one with a good title claiming to have purchased the same from one Nikora Isaboke Kingara (Nikora), who it is alleged purchased the land from Fredrick Ayienda. He contends that he was rightfully registered as proprietor and that the plaintiffs have no case against him.
18. The task of this court is to determine which of the two parties holds the legitimate title to the suit land and whether the entries in the register of the suit land in the Lands registry actually reflect the genuine entries for the suit land.
19. At the outset, I acknowledge that there is no dispute that Fredrick Ayienda was the first lessee of the suit land. What is disputed is whether he relinquished proprietorship to Nikora or to the plaintiffs. Helpfully, Fredrick Ayienda did testify, and he was categorical that he only sold the suit land to the plaintiffs, and that the person identified as Nikora is a total stranger to him for he never dealt with him. That evidence cannot be taken lightly, especially because the plaintiffs did produce the sale agreement between themselves and Fredrick Ayeinda, whereas no sale agreement between Fredrick Ayienda and Nikora was ever produced as an exhibit by the 1st defendant.
20. In fact, the alleged sale from Fredrick Ayienda to Nikora is dubious at best, nay, non-existent. I am even starting to doubt if there is anybody in this world called Nikora Isaboke Kingara. Importantly, am not in any doubt that there is nobody of the character portrayed in the fiction spun by the 1st defendant bearing the identity of Nikora Isaboke Kingara, who bought the suit land from Fredrick Ayienda, and in turn sold it to the 1st defendant. I already pointed out that there is no sale agreement displayed between Fredrick Ayienda and the alleged Nikora. What was displayed was a purported transfer instrument; actually, two transfer instruments, one dated 6 August 1984 and the other dated 9 August 1984. Now, pray, why would one need to prepare two transfer instruments? And so, which one of the two transfer instruments transferred the interest of Fredrick Ayienda to Nikora? It certainly cannot be the first of the two, that dated 6 August 1984 which is clearly a forged document. First, it is a computer laser printed transfer. A laser printer in Kenya in 1984 in an advocate's office? Kid me not. Whatever the case, this transfer instrument cannot be said to have transferred the title herein to Nikora, for it is a transfer under the "[Registration of Titles Act](#) (Chapter 300) Laws of Kenya" (sic) yet the land



herein is one registered under the [Registered Land Act](#). Moreover, being a title under the [Registered Land Act](#), the registration station was Kisii, but purportedly this document was received and franked in Nairobi on 7 August 1984. The stamp duty purportedly paid is Kshs 5/- for a transfer of the value of Kshs 250,000/=. Going to the second transfer instrument to Nikora, that dated 9 August 1984, again, it could not have transferred title from Fredrick Ayienda to Nikora. Yet again, the document is allegedly registered in Nairobi after stamp duty was purportedly paid on 13 April 1984. But even worse for this document, it purports that stamp duty was paid on 13 April 1984, before the document was prepared on 9 August 1984. How do you pay stamp duty in April for a document that is yet to be prepared, given that it was prepared later in August? In addition, and probably most significantly, there is nothing in the two purported transfer documents that show that they were paid for and registered in the Land Registry at Kisii. There is no stamp of the Land Registrar, Kisii, and absolutely nothing indicating that they were received by the Land Registry at Kisii. These two instruments of transfer cannot be said to have transferred title to the alleged Nikora.

21. To make matters more slippery for the 1st defendant, apart from the two shady transfer instruments, there was a document titled ‘Memorandum of Registration of Transfer of Lands’ purportedly from Fredrick to Nikora. That document is allegedly stamped by the District Land Registrar for Kisii/Gucha Districts. To say that the document is itself dubious is an understatement. First it is an instrument made for use in the Land Titles Registry in Nairobi or Mombasa. How is it being used for transfer of land under the [Registered Land Act](#), in Kisii? And why is it being signed by a Land Registrar, Kisii, if it is for land falling under the Land Titles registry? But let us leave all the above alone. The document is dated and stamped 7 February 2011. Now, you tell me how it can purport to be registering a transfer instrument of 1984, when already the alleged transferee has in his hands the title. I do not see how, without a proper sale agreement and a transfer instrument validly received and registered at the Kisii Land Registry, one can purport to claim that there was ever a transfer from Fredrick Ayienda to Nikora. I am very clear in my finding, that there was never any sale or transfer of title from Fredrick Ayienda to this purported person called Nikora Isaboke Kingara.
22. All the above notwithstanding, save for the White Card (the register that indicates the leasehold proprietor), there is nothing to suggest that Nikora ever held title to the suit land. The White Card currently in the Lands Registry shows that Nikora got registered as proprietor on 9 August 1984 and was duly issued with a Certificate of Lease. I have not been shown a Certificate of Lease in the name of Nikora Isaboke Kingara. You would expect the 1st defendant to have a copy of it, if it ever existed, because when a vendor sells land, he needs to hand over a copy of his title deed, or Certificate of Lease, to the purchaser for purposes of transferring the title. There is no official (or unofficial) search produced showing that Nikora had title. Again, you would expect a purchaser to undertake a search when buying land, but the 1st defendant had nothing to that effect. You would also expect Nikora to now be paying land rents and land rates and having some receipts thereof bearing his name after he became registered as proprietor. None were produced. In fact, as demonstrated by the plaintiffs, the rate payer as at 1991 was Fredrick Ayienda. Through a demand letter dated 7 August 1989, the Kisii Municipal Council, through the law firm of M/s Mereka & Company Advocates, wrote to Fredrick Ayienda, seeking immediate payment of rates and rents arrears of Kshs 3,830/=. There is proof that Fredrick Ayienda paid the rates demanded and he wrote a letter dated 9 October 1989 to Mereka & Company Advocates advising them that he has paid the sum of Kshs 3,830/= and he annexed the receipts thereof. If Fredrick Ayienda had sold the land and already transferred the title in 1984 to Nikora, why would he be bothered to be paying rates in 1989? I have seen that Fredrick Ayienda was subsequently sued by the Municipal Council of Kisii for non payment of rates in the year 1990 through the suit Kisii RMCC No 541 of 1990, Kisii Municipal Council vs Fredrick Ayienda, where the sum of Kshs 1,240/= for rates for the year 1990 were demanded. If Fredrick Ayienda had sold and transferred the land to Nikora, you would



expect that these demands for rates be addressed to Nikora and not Fredrick Ayienda, and that it would be Nikora and not Fredrick Ayienda to be sued for non payment of rates. I have receipts for payment of land rates in name of Fredrick Ayienda for the years 1999 to 2003 under receipt number 0586681 paid on 13 February 2003. In the year 1999, the Municipal Council of Kisii was receiving and approving a development application made in the name of Fredrick Ayienda.

23. The long and short of it is that I have nothing before me to remotely suggest that Nikora was ever recognized at any one time as holding title to the suit land from 1984 to 2008 when he purportedly transferred title to the 1st defendant. It is a mystery how his name ended up being entered in the White Card as proprietor upon a purported transfer from Fredrick Ayienda. To ask this court to find that there was ever a transfer from Fredrick to Nikora, based on the documents presented, and to hold that Nikora had title from 1984 to 2008, is asking this court to ridicule itself. That, I am not prepared to do.
24. I now turn to the purported transfer from Nikora to the 1st defendant.
25. It will be recalled that the storyline of the 1st defendant is that Nikora got registered as proprietor in 1984 and therefore he held title from that year until he transferred his title to the 1st defendant in the year 2008 after a sale. I have keenly looked at the documents presented by the 1st defendant to support his allegation that he purchased land from Nikora, and I am not in doubt there was no such alleged sale. To kick us off, the 1st defendant presented no sale agreement. You would expect, that given that doubt has been raised that the 1st defendant purchased the suit land, the very first instrument that the 1st defendant would present will be a sale agreement showing the date that he purchased the suit land and the consideration thereof. Nothing of this sort was produced. You would also expect the 1st defendant to be clear on the consideration paid and demonstrate how he paid it, say, by providing a cheque or bank deposit slips. We saw nothing in this regard. I already mentioned that there was no Certificate of Lease or official search in name of Nikora. No copy of ID and no copy of PIN of this alleged Nikora was ever presented yet it is trite that when you transfer land, you obtain a copy of ID and PIN of the seller.
26. Let us now take a closer look at the instruments of transfer that purportedly transferred land from Nikora to the 1st defendant. Again, just as there were two instruments of transfer for the purported transfer of land from Fredrick Ayienda to Nikora, we surprisingly (or is it unsurprisingly) also have two instruments for the alleged transfer from Nikora to the 1st defendant. They are in similar fashion to the two instruments of Nikora. The first, dated 5 November 2008 is drawn in the same manner to the first instrument of transfer to Nikora, for it is, yet again, a purported instrument under the Registration of Titles Act, where Nikora allegedly transfers land to the 1st defendant. Again, it bears a revenue stamp purportedly from the Nairobi land registry and stamp duty stamp shows what is paid is KShs 5/=, same as the stamp duty paid, in 1984. Even the collector of stamp duty rubberstamp is the same as the one used in the purported 1984 transfer, only now dated 7 November 2008. Being a document under the Registration of Titles Act, it could not have transferred land registered under the Registration of Land Act regime. The second transfer instrument is dated 10 November 2008. There is a purported Kenya Revenue Authority Stamp for £1. Did Kenya Revenue Authority really stamp with the currency of British pounds in the year 2008 ? Your guess is as good as mine. That aside, there is no PIN and no ID of Nikora. Importantly there is no indication of this transfer instrument having been paid for at the Land Registry Kisii, or even having been stamped by the Land Registry, Kisii. The 1st defendant never produced any receipts showing that he paid for the transfer, or paid for stamp duty. There is truly nothing to suggest that either of the two instruments were ever registered by the Kisii Land Registrar.
27. The 1st defendant contended that the transfer instrument (and I think it is in reference to the second of his two transfer instruments) was registered by Mr. James Owuor, Land Registrar. Now, that cannot be true. It will be recalled that the 1st defendant was charged in Kisii Chief Magistrate's Court Criminal



Case No 119 of 2012 and evidence was taken. Among those who testified were Joshua James Owuor. He is the person who the 1st defendant contends was the Land Registrar who registered his transfer instrument. Mr. Owuor did testify that he retired from the civil service on 1 July 2008 and handed over to Mr. Esau Aloo Odera on 31 July 2008. He surrendered his official rubber stamp. Clearly, he was not there in the month of November 2008 to register the transfer documents in favour of the 1st defendant or append his signature and rubberstamp on the instrument. Further, in his evidence before the criminal court, he denied ever signing the entries in the White Card in favour of the 1st defendant or signing the Certificate of Lease in favour of the 1st defendant, again pointing out that he couldn't have done so as he was not in office at that time. Esau Aloo Odera also testified. He confirmed that he reported to the Kisii Lands office on 31 July 2008 and took over from Mr. Oduor. He is the one who was in office in November 2008. If there was anyone to register the transfer of the 1st defendant, issue him with a Certificate of Lease, and update the entries in the White Card, it would have been Mr. Odera and he denied executing the said documents. He was categorical that the Certificate of Lease of the 1st defendant was not genuine.

28. If you put away the White Card, you will have nothing that shows that the 1st defendant was ever recognized in any quarter as having title from the year 2008. He never produced any rates or land rent receipts from the year 2008 to 2011. There is nothing in his favour from the year 2008. The first set of documents start emerging in 2011.
29. There is no question that the purported transfer of title from Fredrick Ayienda to Nikora, then from Nikora to the 1st defendant is a fraud. I find that Fredrick Ayienda only sold his land to the plaintiffs and nobody else. Fredrick Ayienda himself, affirmed as much. He verified that he sold the land to the plaintiffs in 1984 but the transfer was effected in 2003. There are indeed documents to support this. I have seen that the plaintiffs paid for the transfer of the lease on 13 February 2003 vide receipt number 0587712. There was also paid Kshs 500/= for consent vide receipt number 0587714. There are other receipts of the same date supporting the transfer of title from Fredrick Ayienda to the plaintiffs. The plaintiffs displayed their Certificate of Lease issued on 5 March 2003. There is nothing to insinuate that this Certificate of Lease was never issued to Sospeter Mariera Oongo and Isaac Onwong'a Mariera.
30. The case of the plaintiffs is that through fraudulent dealings, the original and genuine leasehold register (White Card) was destroyed and/or manipulated to indicate that title was transferred from Fredrick Ayienda to Nikora in 1984 then another transfer effected to the 1st defendant. I am in full agreement. A White Card bearing the name of Fredrick Ayienda, then the transfer to the plaintiffs, must have been there. Where did it go ? Where did another White Card, now purporting to show that Fredrick Ayienda transferred title to Nikora, and Nikora transferred title to the 1st defendant, come from ? It is not hard to find that this was a fraudulent scheme orchestrated by the 1st defendant in cahoots with some dubious characters at the Lands Office.
31. The fraudulent scheme is not difficult to decipher. From my assessment of the evidence herein, this is how the fraud works: The Land Registry manually keeps instruments of disposition in what they call a Land parcel file. They also keep registers to indicate entries of such dispositions. The registers, or cards, are in two colours; a Green Card for a freehold title, and a White Card for the leasehold title. Land fraudsters have discovered that they can cause to disappear the genuine register (Green Card or White Card) from the Lands registry. They have also discovered that they can cause to vanish the other genuine supporting title documents in the parcel file. Indeed, nothing complicated in doing so; you simply get crooked personnel in the Lands office to pluck out these documents physically from the records in the Lands registry. They are then spirited out of the registry. In place, other fraudulent documents purporting to be documents of dispositions related to the land in question will be planted. A new Green card or White card will also be created and planted in the register after the original



genuine one will have been made to evaporate into thin air. Thus, if a person interested in the land, say a buyer or chargor, goes to conduct a search or inspect the parcel file, it is the fraudulent documents and fraudulent register that they will find. A search will be issued indicating the name of the fraudster as the proprietor and the fraudster can then proceed to deal with the title as he so wishes. He can either sell or charge the title, or simply take over the land from the genuine owner if that was his intention. In all this, the fraudster is emboldened in the belief that if the genuine owner, or any other person goes to the Lands registry, what he will find are his documents, i.e the fraudulent ones, and that there will be no record of the genuine documents or register. If you call the Land Registrar to testify, he/she may very well tell you that their records indicate the fraudulent owner as the owner of the land. The genuine owner of the land is left in a limbo. If he has nothing in his hands to demonstrate what would be the genuine dispositions, and the hope and prayer that the court is going to believe him over the other evidence, he may very well lose his land through a devious scheme.

32. Courts need to be alive to this new kind of fraud and exercise caution when dealing with cases concerning two title holders. It is trite that only one title is the correct one; but which one? A careful and thorough analysis needs to be done. The court may need to call for, and look at the original documents. If a person has none, he should explain why he only has copies. Unless the documents overwhelmingly speak for themselves, persons shown in the dispositions need to be called as witnesses unless explanation is given as to why they cannot come to testify. At times, a court will need to go out of its way to call for evidence which none of the parties have produced. The root of title and paper trail needs to be carefully analysed. In all this, a judge needs to pray for God's wisdom and guidance, for it can at times be extremely difficult to distinguish between which is the genuine title and which is the fraudulent title. Many times, some of these fraudulent schemes are extremely complex, if not watertight. What is depicted in the Land Registry may very well be what is fraudulent. If a court is not careful, the genuine owner may end up being declared the fraudster, and the crook will go laughing all the way to I don't know where, alive to the fact that he will have deceived everyone, including the court.
33. In our case, the fraud that occurred was exactly what I have stated above. The genuine land records of the plaintiff were plucked out of the land parcel file. The genuine White Card bearing the name of Fredrick Ayienda, that recorded the transfer to the plaintiffs, was plucked out and caused to disappear. In place, a fake register was planted, now indicating that Fredrick Ayienda transferred his interest to Nikora, then Nikora to the 1st defendant. All these, as I have demonstrated above was fraudulent.
34. I actually believe that the fraud occurred in the year 2011 for that is the time that the 1st defendant starts appearing in the picture. He indeed has nothing in his favour starting from the year 2008, which is the year depicted in his purported title. I am also persuaded that the 1st defendant was the perpetrator of the fraud. I doubted if there was any person called Nikora Isaboke Kingara, and my doubts have been proved correct. There is no ID card or PIN number presented of this so called Nikora. There was never a genuine transfer of title from Fredrick Ayienda to Nikora and from Nikora to the 1st defendant. I say boldly, that the fraud was orchestrated by the 1st defendant and personnel from the Lands registry, for it is the 1st defendant who benefited from the corrupt scheme and nobody else. There was never any person called Nikora as I have stated above. The name Nikora Isaboke Kingara is of a fictitious and non-existent person, the name simply being used to create an impression that the 1st defendant is a bona fide purchaser for value without notice, of which he is not. He has certainly not demonstrated any traits of being a purchaser, forget the bona fide issue, for no sale agreement was presented, no proof of payment of the purchase price, and no proof of payment of any money and stamp duty for the purported transfer to him. He is not a bona fide purchaser for value without notice.
35. What the 1st defendant holds is a fraudulent title that he helped create and such title cannot be protected given the provisions of Section 26 of the [Land Registration Act, 2012](#), which provides as follows :-



26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
36. From the above, a title obtained through fraud or misrepresentation, for which the proprietor is proved to be a party, is liable to cancellation. So too a certificate of title obtained illegally, unprocedurally, or through a corrupt scheme. I am persuaded that the title of the 1st defendant was obtained through fraud or misrepresentation, and I have no doubt that the 1st defendant was party to such fraud. As I have taken quite some time to elaborate, and I will not tire repeating, there is no such person called Nikora. I have already explained that this is a fictional name created by the 1st defendant. If he ever held title to the suit land, we would have seen a copy of his Certificate of Lease and a search. We saw neither. There was never transfer of land from Fredrick Ayienda to this so called Nikora. The transfer of the land from Nikora to the 1st defendant was also fraudulent as it was demonstrated that the Land Registrar never signed the entries and never issued the Certificate of Lease to the 1st defendant for he had already retired. It was probably thought that Mr. Oduor was still serving as the Land Registrar, but the perpetrator of the fraud was not careful enough to confirm that he was still in office as at the date of the registration of the purported instrument of transfer in favour of the 1st defendant. As party to the fraud, the 1st defendant's title is liable to be cancelled under Section 26 (2) (a) of the [Land Registration Act, 2012](#). Whatever the case, the title of the 1st defendant could not have been obtained, procedurally, or without a corrupt scheme. It couldn't have, because the plaintiffs held the title to the suit land. Thus, the title is still liable to cancellation also under Section 26 (2) (b).
37. Given the foregoing, I hereby order the Land Registrar to expunge all records indicating that the suit land was transferred by Fredrick Ayienda to Nikora, then from Nikora, to the 1st defendant. I further order the Land Registrar, Kisii, to reconstruct the records to demonstrate that the land was transferred from Fredrick Ayienda to the plaintiffs. I order the Land Registrar to expunge the fake White Card depicting that Fredrick Ayienda transferred the suit land to one Nikora, then Nikora to the 1st defendant. I order the Land Registrar to draw a new White Card depicting the genuine and correct entry, which is, that Fredrick Ayienda transferred his title to the plaintiffs and that it is the plaintiffs who remain the rightful proprietors of the suit land. I hereby declare the title of the 1st defendant to be a fraud, null and void *ab initio*, and hereby cancel it. The Certificate of Title held by the plaintiff should not be used to register any disposition in the register of the suit land. I further declare that it is the plaintiffs who hold proprietorship to the suit land.
38. Apart from the orders above regarding title, the plaintiffs asked for orders to have the 1st defendant remove the fence he put up on the land, and also for a permanent injunction to restrain him from the



land. When this case was filed, the plaintiffs did file an application for injunction seeking to stop the 1st defendant from continuing to put up a fence around the suit property which was the only development taking place at that time. The court, upon hearing the application, made an order on 22 November 2023, that status quo be maintained. Neither party was to develop, sell, transfer, lease, charge or in any manner alienate the suit property. It would however appear that the 1st defendant proceeded to develop the land for he did state in his evidence that he has constructed a hotel in it. Whatever the case, from the day of this judgment, the 1st defendant is hereby barred from the suit land by an order of permanent injunction. He and/or his servants/agents and/or any person claiming under him shall not enter, be upon, utilize, or in any other way, disturb the possession of the plaintiffs in the suit land. From the date of this judgment, the plaintiffs be at liberty to take possession of the suit land. On the order to remove the fence, or any structures therein, the plaintiffs are at liberty to either receive and take over the property as it is, or if they so wish, demand through correspondence, that the 1st defendant removes whatever he has put up on that land. If such demand is issued, the 1st defendant to comply with it, and if the plaintiffs have to proceed and act because of the default of the 1st defendant, such costs be passed on to the 1st defendant and be payable on demand.

39. The plaintiffs also claimed damages for trespass. These are at the discretion of the court. In assessing such damages, the court ought to take into account the size of the land, the value of the land, the user of the land, the context in which the defendant took possession of the land, the conduct of the defendant, and all other surrounding circumstances. In our case, the 1st defendant took possession of the land owing to his own fraud. He appears to have developed the land despite an order of status quo. He wasted the land and benefited from its use. Taking all these factors into consideration, it is my considered view that the plaintiffs deserve to be paid a sum of Kshs 5,000,000/- in general damages for trespass by the 1st defendant. The same to attract interest at court rates from the date of this judgment till satisfaction in full.
40. On costs, the fraud herein could not have been perpetrated without involvement of personnel from the office of the Land Registrar, Kisii. Thus costs will be to the plaintiff jointly and/or severally against the defendants.
41. I should pen off here, but what revealed itself in this case is deeply disturbing. We wouldn't be here if it were not for the muck that has permeated our Land Registries. It is regretful that we are at an era where one can simply walk into a Lands Registry and walk out with a title after uprooting the genuine existing land records and planting his own that are non-authentic. It extremely disheartening as the public has entrusted the Land Registries to be their custodian when it comes to records related to land. A land registry should be a hallowed place. It ought to be a repository whose records are absolutely tamper proof and beyond reproach. It goes without saying that the Land Registries ought only to be placed in the hands of persons of absolute integrity. This is the office that the public has bestowed upon the responsibility of ensuring that the country's land records are properly kept and that they reflect the correct position regarding ownership of land.
42. We have every reason to demand that the Land Registries keep and maintain the proper and correct records of land ownership. Kenyans expect nothing less from the Land Registries and it is time for the land registries to either shape up or ship out. Land is probably the biggest factor of production in Kenya and we cannot afford to play around with this resource. If we fail to style up, banks will be afraid to lend credit on the security of land, and without that, you may fail to raise capital that is required for economic growth. People stand to lose very heavy investments, if not their entire livelihoods, by being defrauded of their land. People and companies are at a risk of being stripped bare of their hard earned assets and left to be paupers. The very land you think you own may very well be the target of the next land fraudster. Is that what we really want as a country? It is time that the public and the



Government stood up to land fraudsters. We must make a statement that we cannot live in this fashion any more. It cannot, and it shouldn't be, business as usual in our Lands Registries. The Government must use its machinery and put all its energies and resources towards cleaning up the rot in our land administration system, our Land Registries, and our land records. We expect nothing less. I pray that this will be seriously taken into consideration by the powers that be.

43. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 9 DAY OF NOVEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of: -

Mr. Kelvin Mogeni instructed by M/S Mogeni & Company Advocates, for the plaintiff.

Mr. Wabwire, State Counsel, for the 2nd & 3rd defendants.

No Appearance on the part of M/S Nyamwaro & Company Advocates, for the 1st defendant.

