



**Arika v Omwaga (Suing as the Legal Representative of the Estate of Yuvinalis Omwaga Mokuu - Deceased) (Environment and Land Appeal E026 of 2024) [2025] KEELC 6705 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6705 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E026 OF 2024**

**M SILA, J**

**OCTOBER 2, 2025**

**BETWEEN**

**STEPHEN ARIKA ..... APPELLANT**

**AND**

**FLORENCE NYAMOITA OMWAGA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF YUVINALIS OMWAGA MOKUA - DECEASED) ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. P. K Mutai, Principal Magistrate, delivered on 26 June 2024 in the suit Kisii MCELC No. 124 of 2021)*

**JUDGMENT**

1. Both appellant and respondent assert title to the same land i.e the parcel Kisii Municipality/Block I/518 situated in Nyanchwa area within Kisii Municipality. The suit was commenced by one Yuvenalis Omwaga Mokuu (the original plaintiff, now deceased) through a plaint filed on 7 September 2015 before the superior Environment and Land Court. The original plaintiff died before the case was heard and he was substituted by his wife, Florence Nyamoita Omwaga, the respondent herein. In the plaint, the original plaintiff pleaded that he was allocated the suit land by the Commissioner of Lands through an allotment letter Reference No. 31002/XVI dated 25 November 1985. He pleaded that he paid the requisite allotment fees and got a lease which was registered, and he was subsequently issued with a Certificate of Lease. He claimed to have taken possession and fenced the land. He pleaded that between 15 and 25 August 2015 the appellant started laying claim to the land contending that it is Plot No. 49 Site and Service Scheme. In the suit he asked for a declaration that he is the rightful owner of the suit land, a permanent injunction to restrain the appellant from the land, general damages for trespass, costs and interest.



2. The appellant filed defence wherein he averred that he is the rightful owner of the suit land and claimed that the original plaintiff obtained registration by fraud.
3. After the demise of the original plaintiff, the respondent filed an application for substitution, which was allowed, and the plaint subsequently amended to reflect this position. The defence was also amended accordingly. The matter was transferred to the Magistrates' Court for disposal on the basis that the pecuniary value of the subject matter fell within the jurisdiction of the Magistrates' Court.
4. Before the Magistrates' Court, only the respondent (as plaintiff) and the appellant (as defendant) testified without calling any witnesses. They also produced documents in support of their respective positions. The respondent's case was that the suit land was allocated to the original plaintiff through an allotment letter dated 25 November 1985. The respondent produced the allotment letter, a receipt No. G116385 dated 16 January 1986 indicating payment of the monies noted in the allotment letter, a Lease executed on 26 April 1994 and registered on 10 May 1994, a letter dated 26 April 1994 from the Commissioner of Lands to the District Land Officer, Kisii, forwarding the lease for registration, a Certificate of Lease dated 18 May 1994, and Certificates of Official Search dated 5 November 2014 and 28 April 2015.
5. On the other hand, the appellant testified that he purchased the suit land from one Albert O. Mogusu through a sale agreement dated 24 January 2003. He stated that this sale got consent from the Municipal Council of Kisii on 27 November 2003 and he was issued with a Clearance Certificate dated 3 December 2004. What he purchased was described as Plot No. 49 Site and Service Scheme under the auspices of the National Housing Corporation. He stated that the vendor had bought the land after it was advertised in a gazette notice of 16 August 1976 as part of 168 plots. He stated that at the time he purchased the suit land the vendor still had an unpaid balance of Kshs. 36,460/= with the National Housing Corporation which he committed to pay. He added that on 26 August 2013, a forwarding letter was prepared by the Kisii County Government to the National Housing Corporation with a banker's cheque of Kshs. 36,460/= being the final payment, and it was recommended that a lease could be processed in his name. He stated that through a letter dated 28 August 2013, the National Housing Corporation acknowledged payment of the arrears and recommended processing of his title documents. He stated that he was fencing the suit land when he was arrested on the allegation of trespass. As exhibits, he produced an advertisement in the Daily Nation newspaper of 16 August 1976 placed by the National Housing Corporation inviting applications for allocation of 169 plots at Site and Service Scheme Kisii; a receipt of Kshs. 50/= dated 24 August 1976 paid to Kisii Town Council by Albert O. Mogusu as application fee for a site and service scheme plot; a letter dated 23 March 1977 from the Town Clerk Kisii Town Council and Secretary Plot Allocation Committee advising Albert Onkundi Mogusu that he has been allocated Plot No. 49 Site & Service Scheme Phase I; payment receipt dated 7 April 1977 for Kshs. 760/= being deposit for Site and Service Scheme Plot No. 49; the sale agreement dated 24 April 2003; a letter dated 27 November 2003 from the Kisii Municipal Council being a letter of consent for the transfer from Albert O. Mogusu to the appellant; a Clearance Certificate dated 22 December 2004 from the Kisii Municipal Council; a banker's cheque for Kshs. 36,460/= dated 28 August 2013 to National Housing Corporation; a letter dated 28 August 2013 from National Housing Corporation to the Commissioner of Lands, advising that the appellant has cleared the loan in respect of Site & Service Scheme Plot No. 49 and recommending the processing of title in his name for Kisii Block I/518.
6. In his judgment, the trial Magistrate found that the respondent had displayed the allotment letter, lease instrument, certificate of lease, and search for the suit property, indicating that the original plaintiff is the registered proprietor of the suit land. He did not find any evidence that the title was acquired fraudulently, unprocedurally or through a corrupt scheme. He thus found in favour of the respondent.



7. Aggrieved, the appellant has now preferred this appeal, the main ground being that the learned trial magistrate erred in failing to find that it is the appellant who is the lawful owner of the suit land. The appeal was argued through written submissions and I have taken note of the submissions filed by both counsel for the appellant and counsel for the respondent.
8. This is a first appeal and I am guided by the decision in the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the court of appeal stated as follows :

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
9. As I stated at the beginning of this judgment, both appellant and respondent assert title to the same land. Whereas the respondent claims that the land was allocated by the Commissioner of Lands, paid for, and a lease issued and registered in the name of the original plaintiff, the appellant contends that the lease is yet to be drawn as the land is Plot No. 49 under the National Housing Corporation Site & Service Scheme. He avers that the last payment under the National Housing Corporation loan purchase scheme was completed in 2013 and the National Housing Corporation wrote a letter to the Commissioner of Lands recommending issuance of the lease to him. That is why he contends that the lease and certificate of lease of the original plaintiff were procured fraudulently.
10. In a case such as this, the documents speak volumes and it is the duty of the court to critically analyse the same. I have done so. I have looked at the allotment letter produced by the respondent dated 25 November 1985 which allots an ‘unsurveyed residential plot – Kisii Municipality.’ I observe that what was allotted is not described in any other form. It does not say where this ‘unsurveyed residential plot’ is located and neither is there a Part Development Plan to point it out. Indeed, the part for the PDP number in the allotment letter is blank. I have also looked at the fees outlined in the allotment letter as payable. They are stand premium of Kshs. 9,000/=, rent from 1 December 1985 to 31 December 1985 of Kshs. 133/=, conveyancing fees of Kshs. 1,250/=, registration fees of Kshs. 250/=, stamp duty of Kshs. 440/=, and survey fees of Kshs. 2,290/=. The Government Lands Act, Cap 280, provided for fees payable for registration and conveyancing in respect of Government land. These fees were contained in schedules to the Government *Land Act*. Two Schedules are relevant in our case, that is, The Government Lands (Fees) Rules (Legal Notice No. 172 of 1976) and The Government Lands (Conveyancing Fees) Rules (Legal Notice No. 173 of 1976). These were the fees applicable as at 1985. In respect of a lease, conveyance, agreement, concession, or licence, the amount payable under the Government Lands (Conveyancing Fees) Rules was Kshs. 350/=. In respect of registration, the Government Lands (Fees) Rules provided that the amount payable was Kshs. 50/= per title. When I compare these figures with what is in the allotment letter, they do not tally. The allotment letter has Kshs. 1,250/= for conveyancing, and Kshs. 250/= for registration.
11. I have also looked at the receipt that purported to pay the amounts in the purported allotment letter. It is indicated as receipt No. G116385. I have compared this with the purported forwarding letter dated 26 April 1994. That forwarding letter says that the monies were paid vide receipt No. G116390 which is different.
12. Another significant issue is that I have no record of any survey of this alleged ‘unsurveyed plot’ following the purported allotment letter of the respondent which led it to being titled as Kisii Municipality/Block I/518.



13. I have also looked at the date of registration of the lease in the Certificate of Lease and that in the Lease itself and they are different. Whereas the Lease purports to have been registered on 10 May 1994, the Certificate of Lease indicates registration on 18 May 1994. This contradiction in dates was never explained.
14. Given the foregoing, I do not see any basis for the issuance of a lease to the original deceased plaintiff for the land parcel Kisii Municipality/Block I/518.
15. On the other hand, I am persuaded that the documents of the appellant are actually the correct documents for the suit land. I have seen that there was an advertisement of plots for the Kisii Site & Service Scheme by the National Housing Corporation. I have seen that Albert Mogusu applied for a plot and I have seen that he was allotted the Plot No. 49 through the letter dated 23 March 1977. He transferred this plot to the appellant. I have seen that the appellant paid the final instalment to the National Housing Corporation through the banker's cheque dated 28 August 2013. The letter dated 28 August 2013 from the National Housing Corporation is extremely significant. It not only acknowledges that the Corporation loan has been paid but also confirms that Site & Service Plot No. 49 is the same as Kisii Municipality/Block I/518. In that letter, the Corporation advises the Commissioner of Lands to process the title documents to the appellant. The respondent did not cast aspersions against this letter and there is nothing on record to debunk it.
16. I have not seen any analysis by the trial Magistrate, in his judgment, of these documents of the appellant. The trial Magistrate seems to have been swayed by the mere fact of registration of the name of the original plaintiff as proprietor of the suit land. It is true that the registration of a person as proprietor demonstrates prima facie that the said proprietor is the registered owner of the suit land. However, this prima facie presumption can be vitiated by presentation of evidence that demonstrates that the said registration could not be proper and could only have been a result of fraud, misrepresentation or a corrupt scheme. This is outlined in Section 26 of the *Land Registration Act*, which provides as follows :
  26.
    - (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.
      - c) 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.
17. It will be seen from the above that a title that is obtained through fraud, misrepresentation, or a corrupt scheme by the proprietor, is not one that is to be protected. So too a title that has been procured illegally, unprocedurally, or through a corrupt scheme.
18. In our case, there is ample evidence that the title of the original plaintiff could not have been issued unless it was a product of fraud, misrepresentation or a corrupt scheme. A title to land under a



National Housing Corporation Site & Service scheme could not be issued without affirmation from the National Housing Corporation that the loan has been cleared. This was not a plot that could be allocated by the Commissioner of Lands without first going through the National Housing Corporation. Indeed, in my analysis, I have cast doubt on the genuineness of that letter of allotment. I am in fact persuaded that the said purported allotment letter is a forged letter and was fraudulently issued. Given the nature of the land, there is no basis upon which the original plaintiff, whom the respondent now represents, could have obtained title to the suit land through the route that the respondent purports. That purported title is a product of fraud, misrepresentation or a corrupt scheme. This fraud, misrepresentation, or corrupt scheme could not have been perpetrated by any other person apart from the original plaintiff. He was the purported first registered proprietor of the suit land and it was only him who could have been the mastermind of this fraudulent registration. His title is subject to nullification pursuant to Section 26 of the *Land Registration Act*.

19. From the foregoing, it will be seen that I am persuaded that the genuine proprietor of the suit land is the appellant. The title of the appellant is of course yet to be processed pursuant to the letter dated 28 August 2013 by the National Housing Corporation. That process of registration should proceed to its logical conclusion. There is however no genuine title issued to the original plaintiff. I proceed to nullify and cancel this purported title issued to Yuvenalis Omwaga Moku. I order the Land Registrar, Kisii, to expunge all records purporting that Yuvenalis Omwaga Moku is the registered proprietor of the land parcel Kisii Municipality/Block I/518. The Land Registrar to await the proper registration documents for this land pursuant to the advice of the National Housing Corporation and thereafter proceed to register the same.
20. In essence, I find merit in this appeal. I substitute the judgment of the Magistrates' court with an order dismissing the suit of the respondent and with a further order that the purported title of the original plaintiff be nullified.
21. The last issue is costs. They will follow the event. I award costs of the case before the trial court and the costs of this appeal to the appellant.
22. Judgment accordingly.

**DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF OCTOBER 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in presence of:

Ms. Nyaenya for the appellant

Mr. Ochwangi for the respondent

Court Assistant – Michael Oyuko

