

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII
ELCLA E007 OF 2025

STELLA KWAMBOKA MAGETO APPELLANT

VERSUS

PAUL OGEKA NYATWANGA RESPONDENT

JUDGMENT

(Being an appeal from the judgment of Hon. P.K Mutai, Principal Magistrate, delivered on 27 January 2025, in the suit Kisii MC/ELC NO. 374 OF 2018)

1. The suit before the Magistrates' Court was commenced through a plaint filed by the respondent on 15 April 2015. The respondent contended that he is the rightful proprietor of the land parcel Kisii Municipality/Block I/177. He averred that the suit land was on 9 January 1989 allotted to one Maria Bonareri Machuka (Maria) and that upon survey the land was registered as Kisii Municipality/Block I/177 and title issued to Maria on 4 July 1990. He pleaded that the said Maria subsequently sold the suit land to him and he became the registered proprietor on 30 December 1999. He pleaded that on 25 March 2015 the appellant invaded the suit land and deposited building materials. In the plaint, the respondent asked for a declaration that the suit land belongs to him, eviction of the respondent from the suit land, a permanent injunction against the appellant, general damages for trespass, costs and interest.
2. The appellant filed defence and counterclaim. She refuted the averments in the plaint save that she admitted depositing building materials on the suit land. She pleaded that the suit land was originally owned by David Kengere and Japhet Mlchori Nyakundi who got registered as proprietors on 31 July 1982. She pleaded that her late husband, Wyclife Mageto, purchased the suit land from the original proprietors on 15 August 1989. She asserted that the registration documents displayed by the respondent showing allotment and registration in name of Maria and later to himself were all fraudulent. She contended that the respondent colluded with the Land Registrar, Kisii, (sued as 2nd defendant in the counterclaim) to maintain a fraudulent parallel register to the suit land. In the counterclaim, she asked for orders that she is

the rightful proprietor of the suit land; cancellation and destruction of the records of the respondent; and costs.

3. The respondent filed a reply to defence and defence to counterclaim more or less joining issue with the appellant and contending that it was in fact the documents of the appellant that were fraudulent.
4. Pleadings having closed, the matter proceeded for hearing. The parties testified to their respective cases more or less in accordance with their pleadings. The respondent testified that he purchased the suit land from Maria Bonareri on 10 November 1999. A transfer in his favour was then executed on 23 November 1999. The property was subsequently transferred into his name and he was issued with a Certificate of Lease. He testified that upon being registered as proprietor, he took possession and fenced the suit land with barbed wire pending further developments. On 25 March 2015, the appellant came to the land, deposited building materials and started construction. He produced the various documents in support of his title. Regarding the documents of the appellant, he contended that they are not for the same land as his land, since her title reads Kisii Town Block I/177 whereas his title reads Kisii Municipality/Block I/177. Cross-examined, he acknowledged that he had not produced the sale agreement. He claimed not to be aware that one needed a clearance certificate before the title is transferred. On possession, he acknowledged that the appellant had made developments by the time he came to court. He contended that he was evicted by the appellant though he made no report to the police. He acknowledged not having any documents from the Municipal Council on his ownership.
5. On her part, the respondent testified that the suit land was owned by David Ogega and Josphat Misori and her husband bought the land from them. He however died before the land could be transferred to him and transfer was later effected to her. She testified that her uncle was using the land planting napier grass and maize without any disturbance. She later developed it without any interruption.
6. DW-2 was Harriet Ceclia Oswera, the Land Registrar, Kisii. She came to court with the parcel file but testified that it had limited documents. What she had was a letter dated 6 August 1982 from the Land Registrar Kisii, to the Commissioner of Lands, forwarding a lease in favour of David Kengere Nyakundi and Josphat Mishori Nyakundi. She testified that this was the normal procedure of forwarding a lease for registration. The other document

she had was a letter dated 22 November 2010 written by the Kisii Municipal Council to the Land Registrar for consent to transfer in favour of the appellant. The other correspondence was summoning the parties to appear before the Land Registrar apparently to resolve the ownership dispute. She was cross-examined on the title of the appellant reading 'Kisii Town' and her view was that this was an error.

7. With that evidence the appellant closed his case.
8. Counsel were invited to file written submissions, which they did, and judgment was subsequently delivered on 27 January 2025.
9. In his judgment, the trial Magistrate did not consider the evidence of DW-2 as useful because her file was missing some documents. He opted to decide the matter based on the evidence and documents produced by the appellant and respondent. He found that what the appellant produced was a Certificate of Lease reading Kisii Town/Block I/177 (note the words 'Kisii Town') and her green card read Kisii Municipality Block I (note the words 'Kisii Municipality') without a land parcel number. He found that the respondent had produced a letter of allotment, dated 9 January 1989, a green card to Kisii Municipality/Block I/177, lease issued on 18 June 1990, transfer of lease dated 23 November 1999. He found that it was clear from these documents how title changed hands. He found that the respondent produced a green card with a complete parcel number whereas that of the appellant did not have the parcel number. He found that the documents of the appellant do not support title to Kisii Municipality/Block I/177. He held that either the documents of the appellant were incomplete or were for another parcel of land identified as Kisii Town/Block I/177. He thus found that it is the respondent who has good title to the suit land and he proceeded to dismiss the counterclaim. He gave the appellant 60 days to give vacant possession or she be evicted, and ordered that she be permanently restrained from the suit land. He however did not make any award in favour of the respondent for general damages.
10. Aggrieved, the appellant has preferred this appeal on the following grounds inter alia that the trial Magistrate erred in failing to take into account the expert evidence of the Land Registrar and should have held that Kisii Municipality/Block I/177 and Kisii Town/Block I/177 were indeed one and the same parcel of land; that the trial Magistrate erred in failing to find and hold that on the basis of the documents tendered the respondent had failed to

demonstrate that he had a clean title to the suit land; and that the evaluation of the evidence tendered by the appellant was perfunctory.

11. The appeal was argued through written submissions and I have taken note of the submissions filed before arriving at my decision.

12. This is another case where two persons claim title to the same land and it is trite that you can only have one valid title. In cases such as these, the court needs to pronounce itself on which of the two titles is the genuine one and this inevitably involves an analysis of the documentation presented by the parties. The duty of this court is now trodden ground. The court will reanalyse the evidence, evaluate it, and arrive at its own conclusion.

13. I have gone through the record. The appellant's position was that the suit land was leased to David Ogega and Josphat Misori in 1982 and they are the first proprietors. The contention of the respondent was that this land was allotted to Maria Bonareri in 1989 and she was issued with title in 1990 before selling the land to him.

14. Looking at the appellant's documents, I see that the appellant presented a Gazette Notice No. 3055 of 19 October 1979. The notice was an advertisement by the Commissioner of Lands inviting the public to apply for allocation of plots in Kisii Township. The successful applicants would then be issued with leases. Among the plots advertised was the suit plot, appearing as Block I/177, measuring 0.1035 ha, at the stand premium of Kshs. 2,480/- and annual rent of Kshs. 500/-. It would mean that as at 1979 the suit property had already been surveyed and it had a land parcel number. It was ready for allocation and was indeed so advertised. That being the case, it cannot be that the suit property was an 'unsurveyed residential plot- Kisii Municipality' as purported in the Letter of Allotment dated 9 January 1989 which is what the respondent claims to have been the origin of the suit land.

15. I believe this is an opportune time to take a closer look at this letter of allotment. It merely states that Maria Bonareri Machuka has been allotted an

‘unsurveyed residential plot- Kisii Municipality.’ It does not say where this unsurveyed plot is located and neither does it give it any sort of identification. Such plot would ordinarily be identified in an annexed Part Development Plan (PDP) but there is no PDP number indicated in the allotment letter and no PDP annexed. I am now looking at the stand premium indicated and the annual rent. What is shown is a stand premium of Kshs. 3,000/= and annual rent of Kshs. 600/= which is different from what the Gazette Notice of 19 October 1979 indicated (i.e stand premium of Kshs. 2,480/= and annual rent of Kshs. 500). The allotment letter bears other fees to be paid including conveyancing fees of Kshs. 500/=: registration fees of Kshs.100/= , stamp duty of Kshs. 140/= and survey fees of Kshs. 2,290/=. These figures do not conform with the figures that were payable at that time which were contained in The Government Lands Act, Cap 280 (now repealed). This Act provided for fees payable for registration and conveyancing in respect of Government land which fees were contained in Schedules. 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 1989. 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. These are certainly not the amounts contained in the allotment letter displayed by the respondent.

16. Apart from the foregoing, if indeed this allotment letter displayed by the respondent was genuine, the same would be followed up by a survey. I have no indication of any survey of the suit land being done pursuant to this purported allotment letter. That being the case, there is nothing to connect this allotment letter with the land parcel Kisii Municipality/Block I/177. We have nothing before us to suggest that this ‘unsurveyed residential plot’ in this allotment letter was subsequently surveyed and the parcel number Kisii Municipality/Block I/177 ensued out of that process. In essence I have nothing to connect this allotment letter with the suit land. However, from the blues we now have a lease and a Certificate of Lease in name of Maria Bonareri Machuka. There is a letter dated 19 June 1990 purporting to be a letter forwarding the lease to the Land Registrar, Kisii, for registration. It is claimed that the lease was registered and a Certificate of Lease in name of

Maria issued on 4 July 1990. The said Lease and Certificate of Lease were displayed. However, despite having these documents, there is nothing exhibited that shows that Maria was recognized as lessee of the suit land by the Gusii County Council. There was not exhibited a single rates and/or rents payment receipt in name of Maria.

17. The respondent of course contends that Maria sold to him the suit land in 1989. Even if we are to say, that the respondent was not the original allottee and therefore some documents may not be in his possession, one would expect the respondent to have all requisite documentation for the transfer of the suit land from Maria to himself. I have looked at what the respondent displayed and I am not convinced that there was any formal transfer of the suit land from Maria to himself. First, we have no sale agreement. Secondly, there is no consent to transfer. Thirdly, the transfer instrument bears no date received for registration. But importantly, there is no evidence of any fees paid for the transfer. There is no registration receipt and no stamp duty receipt. There is truly nothing to demonstrate that the Land Registry in Kisii processed any transfer of title from Maria Bonareri to the respondent. These would be documents processed by the respondent himself. They would in fact be documents that the respondent would readily avail and their absence is very telling. Moreover, even after the purported transfer, the respondent has nothing to demonstrate that he paid rates or rents. Save for the Certificate of title, there is nothing to suggest that he was ever recognized as the lessee of the suit property.

18. Let me go back to the documents of the appellant. I had pointed out the Gazette Notice that advertised the plot. We will need to recall the evidence of the Land Registrar, that her parcel file was stripped almost bare and much of the documentation is not available. Nevertheless, the Land Registrar alluded to a letter dated 6 August 1982 which was a letter from the Land Registrar Kisii, to the Commissioner of Lands enclosing the lease registered in the names of David Kengere Nyakundi and Japhet Michori Nyakundi. In his submissions, Mr. Ochwangi, learned counsel for the respondent, submitted that this letter is a forgery because it should have been issued by the Commissioner of Lands instead of the Kisii Land Registry. That cannot be the position. There would of course be a forwarding letter from the Commissioner of Lands to the Land Registrar forwarding the lease for registration. But this is now the letter from the Land Registrar to the Commissioner of Lands enclosing a copy of the registered lease for his

records. There is nothing untoward about this letter. Mr. Ochwangi further submitted that the Lease produced is not stamped but that lease shows registered on 31 July 1982 and there is stamp duty franking on it. It could be that this was an extra copy and indeed it does not look like the original copy to me. I am fully persuaded that there was a lease in name of David Kengere Nyakundi and Josphat Michori Nyakundi that was registered. Apart from this letter, I have seen that there were rates and rent receipts paid by David Kengere Nyakundi for the years 1992, 1996 ,1997 and 1998. I also see a rates and rent receipt of 8 June 2010 in their names. In contrast, the respondent produced not a single receipt in name of Maria Bonareri.

19.The appellant did state that the two original proprietors sold the land to her husband, Wyclife Mageto, and she displayed the sale agreement dated 15 August 1989. She explained that the suit property was not however transferred to him because he passed on and the property was subsequently transferred to her directly. In his submissions, Mr. Ochwangi submitted that the appellant did not produce letters of administration. I do not see how the respondent can complain on behalf of the estate of the deceased. If there was any party to complain it would be the administrators of the estate of the deceased but they have not complained. I have seen that consent to transfer was given by the Municipal Council of Kisii on 22 November 2010. What I have not seen is the actual transfer documents to the appellant, but again I have no evidence of any complaint by the previous proprietors regarding the transfer of the suit land to the appellant. I see that after 2010 rates and rents have been paid in the name of the appellant. In contrast the respondent does not have a single rent and/or rates receipt in his name. Importantly, the appellant produced an advertisement by the Municipal Council of Kisii which called for verification of documents for various plots. Among them is the suit land and the person named in that advertisement is ‘Michoki Nyakundi & Others’ which could only mean Michori Nyakundi and David Kengere. Nowhere is Maria Bonareri or the respondent recognized as proprietor of the land by the lessor.

20.In his pleadings, the respondent contended to have been in possession and claimed that the appellant had just taken possession and deposited building materials. That could not have been the case. I see that when he came to court the appellant had already made some developments almost to completion. That could not have taken a day or two. It means that the respondent was never in possession. I see that the applicant made an

application for approval of building plans and paid for the same on 6 March 2015. There is absolutely no evidence of any possession of the suit land by the respondent.

21. In his judgment the trial Magistrate gave prominent attention to the description of the land as Kisii Town/Block I/177 (note the words 'Kisii Town') which is what is shown in the Certificate of Lease of the appellant. He also held that the copy of register produced only showed Kisii Municipality/Block I without the parcel No. 177. With respect, he fell into error. That description, 'Kisii Town', was nothing more than a misnomer in the preparation of the Certificate of Lease. Indeed, this was explained by the Land Registrar. There was nothing to suggest that there was a separate parcel of land known as Kisii Town/Block I/177 which was not Kisii Municipality/Block I/177. There was certainly no evidence of a Block I 'Kisii Town', and another Block I, 'Kisii Municipality'. In my experience, there is only one Block I in Kisii. The trial court could not ignore all other documents suggesting that the title of the appellant should correctly read Kisii Municipality rather than Kisii Town, so as to disqualify the title of the appellant. Regarding the extract of register which showed Kisii Municipality/Block I, without the land parcel number, the trial Magistrate should have had it in mind that this is an extract of the register, which is typed from the actual register. A typing error could occur so that the person typing does not type the parcel number. This again could not be used to discount the title of the appellant. Whatever the case, the trial court needed to conduct an in-depth analysis of all the documents provided. When I read the judgment, I see no analysis of the Gazette Notice of 1979. I see no analysis of the letter dated 6 August 1982. I also see no analysis of the fact that the appellant produced numerous receipts in the name of her predecessors in title and also in her name demonstrating payment of land rents and receipts. The trial court needed to holistically assess all these documents before arriving at a conclusion. I am afraid that the failure to fully scrutinize and assess the documents made the trial Magistrate fall into error.

22. In a nutshell I am not convinced that Maria Bonareri or the respondent were ever registered in the Kisii Land Registry as proprietors of the suit land. I am persuaded that the persons who were first registered as proprietors were David Kengere Nyakundi and Josphat Michori Nyakundi. What I believe happened is that the respondent merely colluded with officers of the Kisii Land Registry to plant a title in the name of Maria Bonareri and purport that

she transferred her title to the respondent. They also arranged for a false register to be prepared. I saw nothing to suggest who this Maria Bonareri would be, or even whether she exists, and my conclusion is that it was the respondent who directly participated in fraudulently procuring these documents in the name of Maria Bonareri and the preparation of a false register in the Kisii Land Registry.

23. In essence, I am persuaded that what is being touted as a title by the respondent is a false title. Such titles are subject to nullification and cancellation pursuant to 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,—

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.

24. From the above, a title procured fraudulently, or through misrepresentation, or one procured illegally, unprocedurally, or through a corrupt scheme, is subject to cancellation. I am persuaded that the respondent was the perpetrator of the fraud. If he was not, then he would have been gracious enough to avail the receipts for stamp duty and registration of transfer to himself. He also knew that he paid no land rents and no land rates as he produced no receipts for the same. As far as I can tell, he is the fraudster and his title is subject to cancellation and nullification.

25. I am persuaded that the suit of the respondent was for dismissal and the counterclaim of the appellant fully merited.

26. I thus proceed to set aside the judgment of the trial court. I substitute that judgment with the following orders :

- (i) That as between the appellant and respondent, it is hereby declared that it is the appellant who has displayed good title to the land parcel Kisii Municipality/Block I/177.
- (ii) That it is hereby declared that the purported title of the respondent, purporting to be a transfer from one Maria Bonareri is a fraudulent title and the same is hereby cancelled and declared null and void ab initio.
- (iii) That the Land Registrar, Kisii, is hereby ordered to cancel and nullify all documents, registers, and/or instruments purporting that the suit land is registered in name of the respondent.
- (iv) That the Land Registrar, Kisii, is hereby ordered to reconstruct the parcel file and the register, using the documents provided by the appellant.
- (v) That the respondent is hereby barred by an order of permanent injunction from entering, being upon, utilising, or in any other way interfering with the appellant's quiet possession of the land parcel Kisii Municipality/Block I/177.

27. The last issue is costs. They will follow the event. What this means is that the suit by the respondent before the lower court is dismissed with costs and the appellant will have the costs of her counterclaim. The appellant will also have costs of this appeal payable by the respondent.

28. Judgment accordingly.

DATED AND DELIVERED THIS 16 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Kebungo for the appellant

Mr. Ochwangi for the respondent

Court Assistant – Michael Oyuko