

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCC NO. E007 OF 2023

SAMUEL MOKAYA MOMANYI 1ST PLAINTIFF

STANLEY MEMBA MOKAYA 2ND PLAINTIFF

VERSUS

KEVIN ONG'ERA ONGWAE 1ST DEFENDANT

THE NATIONAL LAND COMMISSION 2ND DEFENDANT

THE KISII COUNTY LAND REGISTRAR 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. The subject matter of this suit is the land parcel Kisii Municipality/Block I/185. Both plaintiffs and the 1st defendant have titles to the suit land albeit through two different origins. The plaintiffs contend that they were the ones who were allocated the suit land through an allotment letter dated 29 January 1981 and they were subsequently issued with a lease and certificate of lease which is still valid. They therefore assert title on the basis of allocation to them and contend that they are the first and only proprietors of the suit land. On the other hand, the 1st defendant claims that he is a bona fide purchaser of the suit land from one Japhet Barongo Omanwa, who had in turn acquired the suit land through a transfer by way of gift from one Simon Omanwa Osoro who is said to be the first lessee of the suit land. On the suit property is a partly developed block of apartments with the 1st defendant as developer. The task of this court is therefore to ascertain who between the two protagonists is the rightful proprietor of the suit land.

2. The suit itself was commenced through a plaint filed on 5 June 2023. The plaintiffs averred that the suit plot was among those advertised by the Commissioner of Lands through Gazette Notices of 19 October 1979 and 29 February 1980; that they applied for a plot and were successfully allotted the disputed plot. They pleaded that they were issued with a Lease dated 13 November 1981 and a Certificate of Lease dated 14 November 1981. They pleaded that the purported allotment letter of Simon Omanwa Osoro, dated 4 January 1979 was fraudulent, for reasons that it came into existence prior to the advertisement by the Commissioner of Lands contained in the Gazette Notices; that the allocation was for an unsurveyed plot No. 12, yet the suit plot had already been surveyed and described as Block I/185; and that the rent charged was from 1 January 1979, a date before the suit plot became available for allocation. It was contended that the lease issued to Simon Omanwa Osoro was fraudulent as it was founded on a letter of allotment that was illegal, null and void, and incapable of being acted upon; that it was drawn when already a lease and certificate of lease had been issued to the plaintiffs; and that it could not feasibly have been in existence considering the chronology of events. They claimed that the subsequent dispositions were fraudulent, inter alia because no lawful consents were issued, and that no statutory duty was paid. The transfer to the 1st defendant was assailed for reasons that the transfer of lease instrument dated 12 July 2018 was a nullity as it was based on the repealed Registered Land Act, that it did not accord to the lawful transfer form prescribed by the Land Registration (General) (Regulations) 2017 in force at that time; that the same is unregistered and unstamped; and the transfer and transferee were not identified. They contended that the register being maintained by the Land Registrar, Kisii, which reflects the dispositions leading to the registration of the 1st defendant as proprietor, is a fraud.

3. In the suit, the plaintiffs seek the following orders (slightly paraphrased for brevity) :
 - (a) A declaration that it is them who are the bona fide proprietors of the land parcel Kisii Municipality/Block I/185 and the 1st defendant's activities therein amount to forcible detainer and trespass.
 - (b) The 3rd defendant (Land Registrar, Kisii) be compelled to rectify the register to reflect the plaintiffs as proprietors.
 - (c) A permanent injunction restraining the 1st defendant from trespassing into the suit land.
 - (d) General damages for forcible detainer and trespass as assessed by the court.
 - (e) Eviction of the 1st defendant from the suit land.
 - (f) Demolition of the structure erected on the suit land by the 1st defendant or alternatively by the plaintiffs at the cost of the 1st defendant.
 - (g) Interest on (d) at court rates from the date of judgment until payment in full.
 - (h) Costs of the suit.
4. The 1st defendant appointed counsel and filed defence. He pleaded that he purchased the land as vacant and conceded to be developing a commercial building which had reached the 7th storey. He wondered where the plaintiffs had been for the two years that he had been putting up the building. He asserted that the land was allocated to Simon Omanwa Osoro, who legally and procedurally transferred it to Japhet Barongo Omanwa, who in turn transferred the land to him. He pleaded to be a bona fide purchaser for value and asked that the suit be dismissed with costs.

5. No appearance was filed by the 2nd defendant (the National Land Commission) whereas the State Law Office entered appearance for the Land Registrar, and the Attorney General, sued as the 3rd and 4th defendants. I have however not come across any defence filed the State Law Office.
6. PW -1 was Samuel Mokaya Momanyi who testified that he is a retired teacher. He largely relied on a pre-recorded witness statement which outlined how they obtained title to the suit land as pleaded in the plaint. He had with him the original allotment letter and the original receipt for payment of the monies noted therein which was among the exhibits that he produced. He stated that after obtaining the lease they fenced the land and occasionally planted maize and other crops; at other times the land would be bare because of their personal engagements which made it impossible for them to utilise it. In September 2021, he was alerted by some friends that there was construction being undertaken on the suit plot. They made several visits to the Land Registry at Kisii to establish who was undertaking the development but they were denied access to the information. They opted to file a suit being *Kisii CM Miscellaneous Application No. 12 of 2021* to have the Land Registrar compelled to supply them with the documents. The application was allowed and the Land Registrar supplied them with documents which comprised of the allotment letter in name of Simon Omanwa Osoro dated 4 October 1979; a lease registered on 11 February 1994 in the name of Simon Omanwa Osoro; a White Card; the transfer of lease from Simon Omanwa Osoro to Japhet Barongo Omanwa dated 7 January 2000; the transfer of lease dated 12 July 2018 from Japhet Barongo Omanwa to the 1st defendant; a rates clearance certificate dated 16 July 2018; a letter dated 17 July 2018 from the Kisii County Coordinator of the 3rd defendant; and a Kenya Gazette Notice No. 11398 of 17 November 2017 which advertised that Japhet Barongo Omanwa had lost the Certificate of Lease. He stated that despite

demand, the Land Registrar did not supply the letter forwarding the lease for registration, copies of receipts for payment of the lease, and receipts for stamp duty for the transactions. He reiterated that these documents supplied by the Land Registrar were fraudulent as it was them (plaintiffs) who had earlier been issued with the lease to the suit property. Regarding the transfer to Japheth Barongo Omanwa, he pointed out that it has no signature of the person certifying it. On the transfer to the 1st defendant, he stated that it has no date received for registration, has no presentation book number, no indication of it ever being registered, and no receipt number. Neither was there proof of any payment of stamp duty.

7. He was cross-examined on the allotment to themselves and he stated that he does not have the minutes of allotment. He acknowledged that the allotment letter was dated 29 January 1981 and it required payment within 30 days but they paid on 16 March 1981 outside the 30 days. He could also see that the first Gazette Notice of 19 October 1979 did not have the plot Block I/185 but Block II/185. He also acknowledged that the lease he produced did not have indication of it being registered. Regarding the construction, he stated that they made several attempts to have the developer stop it.
8. PW – 2 was Dr. Stanley Memba Mokaya, the 2nd plaintiff. He is the elder brother of the 1st plaintiff. He resides in Nairobi and is a retired pharmacist. His evidence was that in 1984 they applied for a loan of Kshs. 30,000/= from Barclays Bank and a charge was duly registered on 11 April 1984. He had a search confirming this registration of charge. He further stated that through a letter dated 5 November 1987, written by M/s Mereka Musyoka & Company Advocates, the Municipal Council of Kisii demanded rates from them. They duly paid the rates and rents and were issued with a receipt. He added that around 2010, they applied for a search to ascertain that their title was still intact as rumours of theft of land were rampant at the time. He produced the

search. He stated that after they paid the loan they were issued with a discharge of charge in 2018 which they did not register immediately, but when they eventually went to register it, they were told that they could not as the land was registered in the name of somebody else. He was surprised that other people are claiming to own the land yet they have been paying rates and rents for it all this time. He testified that he does not know the 1st defendant or his predecessors in title.

9. He was cross-examined on the Certificate of Lease in their favour by counsel for the 1st defendant for it showed no registration of charge. He explained that when they charged the land, they handed over the Certificate of Lease to the Bank. They received it back from the bank without endorsement of the charge. Cross-examined by counsel for the 3rd & 4th defendant, he acknowledged that he did not have the banker's cheque paying for the allotment. He also acknowledged an anomaly in the letter by the Commissioner of Lands indicating the receipt number used to pay and the receipt itself, as one digit was missing. He attributed this to a typographical error. He gave an elaborate explanation of the payments made during re-examination.

10. With the above evidence, the plaintiffs closed their case.

11. The 1st defendant called Julius Onyoni Opini as his witness in addition to his own evidence. Mr. Opini is an advocate of the High Court of Kenya with 29 years of experience and having a practice in Nairobi in the name and style of M/s Onyoni Opini & Gachuba Advocates. He previously served as the County Attorney for the County Government of Kisii between 2014 and 2017 and thereafter worked with the Postal Corporation of Kenya from 2017 to 2023. He testified that he did not know that there was any issue regarding the property until he was called by the 1st defendant to record a witness statement for this suit. He testified that in 2018, he acted for the 1st

defendant who wished to purchase the suit land. Through his law firm, he prepared the sale agreement between the seller, Japhet Barongo Omanwa, and the 1st defendant. He stated that the 1st defendant was personally known to him and he personally acted for him. He stated that he came to Nairobi with the vendor who had a title deed that he showed him. He did not prepare the sale agreement on this day as he first needed to do a search. A search was done which showed Mr. Barongo as proprietor and with that he was comfortable preparing the sale agreement which he did and it was signed. He also received various documents of title from the vendor. The documents received were photocopies. He testified that it was his office that conducted the actual conveyance of the transfer to the 1st defendant through his office survey clerk. What the 1st defendant did was deposit with his firm the money required to pay the statutory payments such as stamp duty together with the legal fees. He testified that there was an assessment of stamp duty done and he believed that it was paid. He closed his evidence in chief by stating that his office file was either misplaced or destroyed because he could not find it.

12. Cross-examined, by Mr. Wabwire, learned State Counsel, for the 3rd & 4th defendants, he stated that he personally prepared the sale agreement but he did not have a copy of it. He explained that it is because he could not find the office file. He did not know whether the 1st defendant kept a copy of it. He testified that his office did a search in April (of 2018) but the same is not filed in court and he acknowledged that it cannot be confirmed that such a search was ever done. He could see that the search on record is that done after the transfer to the 1st defendant. He was not privy to the advertisement of the plot or its first allocation. He testified that the seller (Japheth Barongo) brought to him the letter of allotment and indicated that he got the land after being gifted by his father (Simon Omanwa Osoro, the alleged first owner). He did not confirm if the first owner had met the terms in the allotment

letter. He could see that the allotment letter was for an unsurveyed plot No. 12 and he was not given subsequent documents to show how the land was surveyed to become Block I/85. He could also see that the transfer displayed by the 1st defendant to demonstrate that the land was transferred to him by Japheth Barongo is unregistered, though he stated that they had one which was received at the Lands office and which came with the title. He had no document showing that the stamp duty was paid.

13. Cross-examined by Mr. Nyamurongi, learned counsel for the plaintiffs, he testified inter alia that he did not suspect any issue with the allotment letter. He testified that in most transactions they do not even get to see the allotment letter. He could see that the transfer of lease from the first to the second proprietor was not attested. He could also see from the documents the plaintiffs received from the Land Registrar, that the transfer of lease to the 1st defendant does not indicate that it was received for registration. He was surprised that no stamp duty receipts were availed by the Land Registrar. He testified that the sale price was Kshs. 5 million but the valuation for stamp duty indicated Kshs. 2 million. He was not aware that in such a case it would be the higher value that would be used. He testified that one needed to pay Kshs. 1,000/= for issue of consent to transfer. He did not have the receipt but he believed that his office paid it.

14. DW – 2 was the 1st defendant. He stated that he is a businessman who lives in Nairobi and that he does farming and animal husbandry. He relied on a witness statement wherein he stated that he bought the suit land from Mr. Japheth Barongo who was the then registered proprietor. He stated that he did a search which showed him (Mr. Barongo) as proprietor and also obtained various documents as part of his due diligence. What he obtained was the initial allotment letter in name of Simon Omanwa Osoo dated 4 January 1979, the lease in name of Mr. Osoo registered on 11 February

1994, copy of the white card, copy of transfer of lease from Mr. Osoro to Mr. Barongo, clearance certificates, cancelled lease certificate for Mr. Osoro, and copy of the Kenya Gazette Notice dated 17 November 2017 (advertising the lost title of Mr. Barongo). He stated that he visited the land which was bare and unfenced, and having satisfied himself that the land was available and the documents genuine, he entered into the sale agreement. After he obtained title he commenced construction which had reached the 7th floor. In his oral evidence in court, he acknowledged that he does not have a single original document in support of his case save for his Certificate of Lease.

15. Cross-examined by counsel for the 3rd and 4th defendants, he acknowledged that he does not have a sale agreement to show that he purchased the suit land. He testified that he paid the purchase price of Kshs. 5 million in cash. He stated that he was issued with a receipt which he misplaced. He mentioned that Mr. Barongo informed him that Mr. Osoro was his father and that he gave him the land as a gift. He was not sure of the whereabouts of Mr. Barongo as he has not interacted with him since the sale. He did not have the consent of transfer from Mr. Osoro to Mr. Barongo. He could see that the letter of allotment was for an unsurveyed residential Plot No. 12. He did not find out when the land was surveyed so as to generate the title number. He did not see a beacon certificate. He never obtained any minutes of allocation of the land to Mr. Osoro. He had no evidence of allocation of the plot to Mr. Osoro or any evidence of payment of the monies in the allotment letter. He could see that his own transfer form has no indication of it being registered and neither did it have a presentation book number. He did not have the registration fee receipt, his explanation being that he paid a lumpsum fee to his advocate inclusive of registration fees. He did not have a receipt for stamp duty payment either. He could not see any consent to transfer from the County Government of Kisii. He had a demand for rates

but did not have any receipt showing payment thereof. He denied colluding with the Land Registrar to have the title registered in his name.

16. Cross-examined by Mr. Nyamurongi, he could see that what he exhibited is a Certificate of Lease issued to Mr. Barongo on 9 January 2000. He did not have a reissued Certificate of Lease in name of Mr. Barongo despite the advertisement in 2018 that the title was lost. He did not have a cancelled Certificate of Lease in name of Mr. Barongo to indicate that the same is now transferred to him. He was not given any rates payment receipts from the previous owners despite the first owner being alleged to have been registered in 1994. He did not have any receipts for the transfer of the property to himself. His explanation was that it was his advocate making the payments. He did not have a receipt issued to him by his advocate to show the monies that he claimed to have deposited with the said law firm to facilitate the transfer of the property to him.

17. With the above evidence, the 1st defendant closed his case.

18. The 3rd and 4th defendants did not offer any evidence.

19. Counsel filed their final submissions which I have taken into account before arriving at my decision.

20. This is another case where two persons appear to have title to the same land. In such a case, a lot depends on the documentation provided. It is upon an assessment of the same that the court can make a decision on who has good title to the suit land and whose title is bad. As I mentioned in the first paragraph of this judgment, the origin of title for the two parties is different. The plaintiffs assert that the suit land was allocated to them and they have been title holders since then. The position of the 1st defendant is that the suit land was allotted to Simon Omanwa Osoro as the first proprietor, then

transferred to Japheth Barongo as the 2nd proprietor, before eventually being transferred to him as the 3rd proprietor.

21. I have analysed both allotment letters. I opt to start with the allotment letter displayed by the 1st defendant. In my considered opinion, it is dubious at best, and I am really being kind in describing it as such. I never saw the original of it as it was not availed and I wonder if it even exists. This allotment letter is dated 4 January 1979 and of course purports to allot an 'unsurveyed residential plot No. 12 – Kisii Municipality' to one Simon Omanua Osoro (sic). What is allotted is allegedly land measuring 0.0684 Ha. There is no Part Development Plan (PDP) annexed to that allotment letter and the section for the PDP number is blank. The said land is said to be allotted for a term of 99 years from 1 January 1979 at an annual rent of Kshs. 2,000/=. There are some monies indicated in that allotment letter that are supposed to be paid if acceptance is received. I have had a close look at the monies noted in that allotment letter and they do not tally with the gazetted fees for that time. The conveyancing fee indicated is Kshs. 1,250/= , and the registration fees indicated is Kshs. 250/= . 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 1979 when the suit land was purportedly allotted. 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 not the figures indicated in the purported allotment

letter. Besides, there is no letter of acceptance displayed, no evidence of any banker's cheque made to pay these monies, and no receipt indicating payment of the monies therein.

22. Let me now turn to the allotment letter of the plaintiffs. I see that their allotment letter is backed up by the Gazette Notice which advertised the suit plot for allocation, a letter applying for allocation, a letter of acceptance, and receipts indicating payment of the monies in the allotment letter.

23. I observe that in their submissions, Mr. Masore Nyang'au and Mr. Bosire Gichana, learned counsel appearing for the 1st defendant, attempted to cast aspersions on the allotment letter of the plaintiffs. Inter alia they submitted that there was no evidence of a banker's cheque to show that the plaintiffs paid for the allotment letter. They also pointed out that the land was allotted for development and not for keeping it idle or for planting maize as these would be contrary to the conditions of allotment. They referred to the terms of allotment which required acceptance within 30 days which they averred was violated. They also submitted that there is no proof of payment of the monies in the allotment letter and made reference to the letter dated 21 March 1981 which shows a different receipt number from what the plaintiffs provided. They contended that given that there was failure to abide by the special conditions of allotment the Commissioner of Lands and the local authority had power to terminate the lease. I see no substance in these arguments and even if there was, it does not change the dubiousness of the allotment letter purportedly issued in the name of Samuel Osoro.

24. Starting with the gazette notices there is absolutely no issue. There were two gazette notices displayed by the plaintiffs; one dated 19 October 1979 and the second dated 29 February 1980. I agree that the first gazette notice advertised the plots as Block II but I am persuaded that this was a typographical error. In any event, it is the second advertisement, which

advertised the lands to be allocated, including the suit land, that was acted upon. The same included 'Block I/185' which is the suit land. The plots were being allocated by the Commissioner of Lands on behalf of the Gusii County Council and the advertisement invited persons to apply for the advertised plots. The plaintiffs exhibited their letter of application and the receipt for the application. They exhibited the allotment letter dated 29 January 1981. The allotment letter shows that the plot being allocated is Block 1/185 Kisii Town. I have looked at the monies noted therein. The conveyancing fee is Kshs. 350/= and the registration fee is Kshs. 50/=. They tally with the fees that were payable at the time in accordance with The Government Lands (Fees) Rules (Legal Notice No. 172 of 1976) and The Government Lands (Conveyancing Fees) Rules (Legal Notice No. 173 of 1976).

25. It is true that the plaintiffs delayed in making payment and this is probably what prompted the Town Clerk, Kisii Town Council, to write to them a reminder, through a letter dated 13 March 1981, that they need to provide their acceptance and pay the monies. I have seen that the plaintiffs wrote a letter of acceptance on the same day. The allotment letter indicated monies payable directly to the Commissioner of Lands and some monies payable to the Town Council of Kisii. In the letter of 13 March 1981, the Town Clerk reminded the plaintiffs of the fees payable, less Kshs. 1,000/= that they had paid as deposit. I have seen the receipts showing that the monies due to the Town Council of Kisii were paid on 16 March 1981 and the monies due to the Commissioner of Lands paid on 21 March 1981. The receipt number for the monies paid to the Commissioner of Lands is No. A 433455. The argument that no banker's cheque was exhibited holds no water since the receipts are available. The plaintiff in fact exhibited the original receipt No. A433455. Although the payments were made late, there is no indication that the allotment was revoked because of this. There is also no indication that

because the plaintiffs did not develop the plot as indicated in the special conditions, then the lease was forfeited.

26. Given my above analysis, I find the allocation of the suit land to the plaintiffs to be proper. As I said, the purported allotment of the suit land to Simon Omanwa Osoro is dubious at best. But let us move on.

27. Upon allotment, a lease is issued and registered. The lease would come from the Commissioner of Lands and would be sent to the District Land Registrar for purposes of registration. Let us look at this process and again I will start with the chain of events for the title of the 1st defendant. There is no evidence of any letter forwarding the purported lease of Simon Omanwa Osoro for registration. There is also no evidence of any registration fees paid for the lease. On the other hand, the plaintiffs exhibited a forwarding letter dated 10 July 1981 from the Commissioner of Lands to the Registrar, Kisii Land Registry. That letter of course states that the registration fees were paid and there is reference to 'receipt No. A43455.' Counsel for the 1st defendant tried to make a meal out of this description for the plaintiffs exhibited a receipt No. A433455. This is nothing more than a typographical error. I am not in doubt that the lease was duly received and registered for a Certificate of Lease was issued to the plaintiffs. There was indeed exhibited a letter dated 18 November 1981 from the District Land Registrar, Kisii, to the Commissioner of Lands forwarding a copy of the registered lease. The Certificate of Lease was exhibited, and it shows that it was issued on 14 November 1981. There is no way that a second lease could be registered subsequently on 11 February 1994 and a Certificate of Lease issued on the same day in the name of Simon Omanwa Osoro as there was already an existing registered lease and certificate of lease in favour of the plaintiffs. But even then, there is no receipt displayed for registration of any lease in

favour of Simon Omanwa Osoro and no evidence of any payment of stamp duty.

28. There is in fact ample evidence to support the position that the lease to the plaintiffs was registered. There is for example the letter dated 5 November 1987 from M/s Mereka Musyoka & Company Advocates demanding land rents and rates from the plaintiffs. The plaintiffs exhibited payment receipts in compliance with this demand letter. I did not see a single rates or rent payment receipt in favour of Simon Omanwa Osoro. There is also evidence that the land was charged to Barclays Bank Limited and the charge was exhibited. In their submissions, counsel for the 1st defendant submitted that the Certificate of Lease has no notification of the charge. The duty of the plaintiffs was to deposit the Certificate of Lease with the chargee and they cannot be held at fault if the chargee omitted delivering it for endorsement of the charge. There is a search dated 26 May 2010 showing the plaintiffs as the proprietors of the suit land with the charge registered against the title. There can be no question that by this time the plaintiffs' records were at the Lands registry in Kisii.

29. It is alleged that Mr. Osoro transferred his interest to his son Japhet Barongo Omanwa as a gift. I am not persuaded that there was any such transfer. There is no consent to transfer, no stamp duty payment receipt, and no registration fee receipt. I am persuaded, for those reasons, that the purported transfer of lease purporting that there was a transfer to Mr. Barongo on 9 January 2000 is a total fraud.

30. Now, the 1st defendant claims to have purchased the suit land from Japheth Barongo Omanwa. Despite this allegation, there is not even displayed the sale agreement exhibiting such a sale. It was alleged that the purchase price was Kshs. 5 million. There is no proof of payment of such money. The 1st defendant claimed that he paid this Kshs. 5 million in cash. I do not believe

him. Who pays such colossal amount of money in cash for purchase of land ? It is highly improbable. That aside, there was not displayed any registered transfer and neither was there exhibited any stamp duty payments or registration fees. The 1st defendant of course alleged that he paid a lumpsum amount to his advocate to facilitate the transfer and the advocate alleged to have lost his file and all relevant documents. I don't believe them. How did he pay the money to the advocate ? Was it in cash also, or was it by way of deposit, mpesa or bank transfer ? No deposit transaction note, mpesa statement, or bank transfer document was displayed. Whether in cash or through other methods, when one deposits money with an advocate, he is issued with a receipt. No such receipt was displayed. Even assuming that the advocate lost his file and all documents, that does not explain the lack of a sale agreement, for this is a document that the buyer of land must keep a copy of. In any event, if there was any payment of stamp duty and such other fees, the Land Registry would have a record of it, but none were displayed. Such monies are paid to a bank and the bank would also have a record which is retrievable.

31. There is absolutely nothing to suggest any sale or transfer by the alleged Japheth Barongo to the 1st defendant. Even the alleged title of Japheth Barongo exhibited by the 1st defendant is not a re-issued Certificate of Lease despite it being alleged that Mr. Barongo lost his title and there was gazettelement for reissuance of another Certificate of Lease. This reissued Certificate of Lease was said to have been issued on 18 January 2018. It was never exhibited by the 1st defendant. If it is this which was used to transfer title to the 1st defendant, you would expect that a copy of it be exhibited, and also it be shown as cancelled upon transfer. Nothing of that sort was exhibited and I wonder if this purported reissued Certificate of Lease ever existed at all.

32. What I am driving at is that there is nothing to support the alleged leasehold register (white card) held at the Lands Registry at Kisii, which purports that there was a first lease to Simon Omanwa Osoro, then a transfer to Japheth Osoro Barongo, then a subsequent transfer to Kevin Ong'era Ongwae, the 1st defendant. This is a fraudulent register which was filled in to allege that such dispositions existed when in fact they never existed. In short, this alleged title of the 1st defendant is none existent and what he holds purporting to be a Certificate of Lease for the land parcel Kisii Municipality/Block I/185 is a fraud. Such certificates of lease are subject to cancellation and nullification by dint of 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.

33.It will be seen from the above that a title procured through fraud or misrepresentation to which the title holder is proved to be a party is subject to challenge. So too a title that has been acquired illegally, unprocedurally or through a corrupt scheme. Such title cannot be protected by law.

34.I am persuaded from the evidence presented that it is the 1st defendant who perpetrated the fraud and engineered the manufacturing of documents purporting that there was a first title to Simon Omwanwa, then a transfer to Japheth Barongo, then a transfer to himself. If it was not him who engineered this fraud, then who ? If the 1st defendant was not the author of this fraud and was a bona fide purchaser for value as he alleges, then at the very least, he would have a copy of the sale agreement. There would also be a record either with him, his advocate, or with the Land Registry, of payments for stamp duty and registration fees. We would also have seen a duly registered transfer instrument. We have seen none of this. It is this that buttresses my holding that the 1st defendant was the perpetrator of the fraudulent title that he holds. His purported title is thus subject to nullification pursuant to Section 26 (1) (a) of the Land Registration Act. But even assuming that he is not party to the fraud, his title would still be impeachable under Section 26 (1) (b) for being a title acquired illegally, unprocedurally, or through a corrupt scheme.

35.In their submissions counsel for the 1st defendant urged that the title ought not to be nullified since the previous proprietors were not parties. There is no substance in this argument. In the first place, who are these two earlier proprietors ? Nobody seems to know them, including the 1st defendant himself. Do they even exist ? We cannot tell. The plaintiff cannot be faulted for not bringing them to the suit as there is every indication that they never held any title to the suit land.

36. There is also submission on behalf of the 1st defendant that the suit herein is time barred. It is urged that the plaintiffs discovered the fraud in 2018 but filed the suit in 2023 which is 5 years later. I was referred to the three year limitation period for torts. Clearly, the 1st defendant is clutching at straws. The plaintiffs never knew that their land had been snatched away from them, or by who, as the Land Registrar declined to avail to them the records that he held in the registry. Indeed, the plaintiffs had to file a suit being the suit *Kisii CMCC Miscellaneous Application No.12 of 2021*, so as to obtain an order to compel the Land Registrar to furnish them with the documents in the land registry. The order was issued on 18 January 2022. Prior to the issuance of that order, the plaintiffs had no idea of what is in the land records and no idea that they had been defrauded of their land. The limitation period for claiming land is 12 years as outlined in Section 7 of the Limitation of Actions Act. But even if I am to take the 3 years limitation period asserted by the 1st defendant, the suit was filed within three years of the plaintiffs being provided with the particulars of the purported title held by the Land Registrar, Kisii.

37. It was also submitted that the 1st defendant finds favour in the Torrens System. Maybe there could have been an argument pegged on the Torrens system if there was ever a title issued to Simon Omanwa Osoro, but there was none issued, and none acknowledged by the lessee i.e the Town Council of Kisii. In fact, cancellation of the title of the 1st defendant would be the exemplification of the Torrens system where only genuine titles are to be upheld. What happened in this case is that all the documents that supported the genuine title of the plaintiffs were made to disappear and instead illegitimate documents were planted in the Lands Registry at Kisii purporting that there was an allocation to Mr. Osoro, a transfer to Mr. Barongo, and a further transfer to the 1st defendant. The Torrens System is

premised on the protection of genuine documents of title, not fraudulent ones.

38. I am persuaded that the plaintiffs have proved that the purported title of the 1st defendant is one for nullification and I hereby proceed to cancel and nullify it. I order the Land Registrar, Kisii, to expunge all records purporting that there was a lease issued to Simon Omanwa Osoro, a transfer to Japheth Barongo Osoro, and a further transfer to Kevin Ong'era Ongwae in respect of the land parcel Kisii Municipality/Block I/185. I further order the Land Registrar, Kisii, to reconstruct the records for Kisii Municipality/Block I/185 using the documents exhibited by the plaintiffs indicating the allotment and issuance of title to them alongside the charge instrument. Essentially, I do grant prayers (a) and (b) as prayed in the plaint.

39. In their suit, the plaintiffs asked for general damages for forcible detainer and trespass. In his submissions, Mr. Nyamurongi, relied on the case of *Avid Developers Limited vs Blue Horizon Properties Limited & 2 Others (2021) KEELC 3355 (KLR)* to support this claim. He asked for the amount of Kshs. 5 million under this head. I have not seen any submissions by the 1st defendant challenging this submission. I have found that the land is indeed owned by the plaintiffs. I have also found that the 1st defendant could not be a bona fide purchaser for value. He knew that he was venturing into land that was legitimately owned by some other people. He basically trespassed and kept illegal possession of the suit land aiming to own it through fraudulent means. I am persuaded that his egregious acts of trespass and forcible detainer ought to invite an award of general damages in favour of the plaintiffs and also send a message that fraud does not pay. Given the size of the land, the user thereof, and the circumstances surrounding the trespass by the 1st defendant, I am persuaded to make an award of Kshs. 3,000,000/= (Kenya Shillings Three Million) against the 1st defendant in favour of the

plaintiffs. The said sum to attract interest from the time of this judgment until payment in full.

40. Prayer (e) in the plaint seeks an order of eviction and prayer (c) seeks that the 1st defendant be permanently restrained from the suit land. Prayer (f) seeks that the 1st defendant demolishes the structures that he has built therein. Being the owners of the suit land, it is the plaintiffs who deserve to enjoy the use and possession of the same. I have no hesitation in issuing an order of eviction of the 1st defendant from the suit land and the same is hereby issued. Regarding demolition of the structures therein, since the plaintiffs seek demolition, I issue an order directing the 1st defendant to so demolish the structures therein within the next 30 days. In default, the plaintiffs are at liberty to exercise the option of either taking possession of the suit property with the structures therein and keep the same on as is basis, or proceed to demolish the same in which event they will be entitled to pass over the costs of demolition to the 1st defendant. Whatever event, after lapse of the 30 days hereby given, the plaintiff is permanently barred by an order of injunction from entering, being upon, or in any other way interfering with the plaintiffs' quiet possession and use of the suit property.

41. The last issue is costs. The 1st defendant could not have obtained title without collusion by officers working under the Land Registrar, Kisii. I however see no culpability on the part of the National Land Commission, the 2nd defendant. I will thus grant the plaintiffs costs of the suit jointly and/or severally against the 1st, 3rd and 4th defendants. There will be no orders for or against the 2nd defendant.

42. Judgment accordingly.

DATED AND DELIVERED THIS 1ST DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT KISII

Delivered in the presence of :

Ms. Kebungo for the plaintiffs

Ms. Bosire for the 1st defendant

2nd defendant not entered appearance

Mr. Zadock Ondieki h/b for Mr. Wabwire for the 3rd & 4th defendants

Court Assistant – Michael Oyuko