

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCLA NO. E050 OF 2024

ALLOYS MATENTO ONKWARE APPELLANT

VERSUS

DAVID ROBERTS NYAGWOKA MBOGA RESPONDENT

JUDGMENT

A. INTRODUCTION AND PLEADINGS

1. The suit from which this appeal emanates was commenced through a plaint which was filed on 28 February 2018 by the respondent. The respondent filed the suit as the administrator of the estate of the late Nelson Mboga Monubi, his deceased father, in respect of the land parcel West Mugirango/Nyamaiya/3147. The respondent pleaded that in the month of December 2017, the appellant trespassed into this land and in the plaint he asked for the following orders which I copy verbatim :
 - (a) An order of injunction restraining the defendant, his agents and/or servants from trespassing onto or in any way interfering with land parcel No. West Mugirango/Nyamaiya/3147 until this suit is heard and determined (sic).
 - (b) An order evicting the defendant, his agents and/or servants from land parcel No. West Mugirango/Nyamaiya/3147 until this suit is heard and decided (sic).
 - (c) Costs of this suit.
 - (d) Any other or further orders as the court may deem fit to grant.
2. The appellant filed a defence and counterclaim on 25 September 2018. He denied the averment in the plaint that he entered the land in December 2017 and pleaded that he has been in possession of the land being claimed by the respondent since time immemorial and way before the respondent was born. He contended that the registration of the land in the name of the late father of the respondent was done through fraud on the part of the respondent and his late father. In the counterclaim, it was pleaded that the appellant has been in occupation of part of the land known as West Mugirango/Nyamaiya/3147 which originated from the land parcel West Mugirango/Nyamaiya/2040. He pleaded that this original parcel No. 2040 was registered in name of his uncle, one Andrew Onyoka Ogora,

who sold a portion measuring 2 acres to the defendant's late father. He pleaded that instead, the deceased fraudulently transferred to himself 2 hectares, instead of the agreed 2 acres. It was claimed that he fraudulently altered the land records to reflect this bigger acreage and got registered without consent of the Land Control Board. He pleaded that the houses he lives in were constructed before the respondent was born. In the counterclaim he asked for the following orders :

- (a) A declaration that the counterclaimant is the rightful owner of LR No. West Mugirango/Nyamaiya/3147.
- (b) A declaration that the defendant to the counterclaim is holding the parcel of land known as West Mugirango/Nyamaiya/3147 in trust for the counterclaimant.
- (c) An order for the reversion and cancellation of the subdivision transfer and registration of LR No. West Mugirango/Nyamaiya/3147 unto the names of the defendant and that the same reverts to its original state.
- (d) A declaration that the registration of the defendant's father as proprietor of the land known as West Mugirango/Nyamaiya/3147 was fraudulent and therefore null and void.
- (e) Permanent injunction to restrain the defendant to the counterclaim either by himself, his agents/servants from evicting the counterclaimant from LR No. West Mugirango/Nyamaiya/3147.
- (f) Such further and/or other relief as the Honourable Court may deem fit and expedient to grant.
- (g) Costs of the suit to be borne by the defendants.

B. EVIDENCE OF THE PARTIES

(i) Respondent's Evidence (as plaintiff)

3. The respondent testified as the sole witness. He testified that he is a retired teacher and that his father, Nelson Mboga, died in 1995 while owning the suit land. He is the administrator of the estate of his late father. He testified that his brother, Daniel Chweya Mboga, stays on the land. He continued that the appellant trespassed into the land in December 2017 and put up a kiosk. He described the appellant as son of the person who sold the land to his late father ; that his father got title in 1981 and got buried on the suit land. Cross-examined, he testified that his father purchased 2 Ha from Charles Onkware, father of the appellant, and Andrew, his uncle. He stated that this was a long time back and he has never seen the sale agreement. He acknowledged that the land was originally

West Mugirango/Nyamaiya/63. He denied that what his father purchased was 0.8 ha, i.e 2 acres. He testified that at no time did the seller complain and that they have all along been in occupation of 2 ha.

4. With that evidence, the respondent closed his case.

(ii) Appellant's evidence (as defendant)

5. The appellant largely relied on a pre-recorded witness statement and brief oral evidence in court. In the statement, he stated that he is son of Charles Onkware Ogora. Charles had a brother called Andrew Anyoka Ogora (deceased), his uncle. He stated that the suit land i.e parcel No. 3147, originated from the land parcel No. West Mugirango/Nyamaiya/2040 measuring 0.8 ha and which was registered in name of his uncle Andrew. He stated that his uncle sold a portion measuring 2 acres from this parcel No. 2040 to the father of the respondent, but instead of his father occupying 2 acres, he caused transfer of 2 ha to himself. He stated that the suit land, which measures 2 ha, far exceeds the original land parcel No. 2040 which measured 0.8 ha. He stated that prior to the suit being filed, he was in continuous, uninterrupted occupation of the suit land for over 15 years, cultivating and planting crops. He contended that the respondent was using the documents fraudulently altered by his late father (Nelson) to infringe on his right to his ancestral land. In court, he testified that he has not trespassed into the suit land, i.e the parcel No. 3147. He testified that the respondent's father bought 2 acres and what he has on the ground is not the land that he purchased. He testified that his father gave him the land and he built on it. He produced various documents to support his case including the mutation form for the parcel No. 2040 and the search for the suit land (parcel No. 3147). He also produced a demand notice from M/s Mose Nyambega & Company Advocates dated 29 January 2015 and a report from M/s J.R.R Aganyo & Associates Surveyors.
6. Cross-examined, he reiterated that he is not in the parcel No. 3147 and claimed that he built on land shown to him by his father. He acknowledged that he built a kiosk in 2016 and he conducts a hotel business in it. He asserted that what the respondent's father bought was 2 acres. He did not have the sale agreement. He stated that it was his father and his uncle Andrew who sold the land to him. He was not there at the time of sale as he was young. He testified that the respondent's father was buried in the land that he bought. He acknowledged that he got title in 1981. He testified that the land he bought and their land is separated by a road and that they are on one side. His own father died in 2017 and he stated that he had commenced the process of suing for the land.

7. The appellant called Charles Mokuu, the County Land Registrar, Nyamira. He testified that the suit land resulted from subdivision of the parcel No. 2040. He testified that the parcel No. 2040 was supposed to measure 0.8 ha but it was registered as measuring 2.09 Ha on 23 October 1981. He testified that 0.8 ha measures 2 acres. He continued that on 19 January 1995, the parcel No. 2040 was subdivided to produce the parcels No. 3147 and 3148 respectively measuring 2 Ha, and 0.09 ha. Nelson transferred the parcel No. 3148 to one Jeremy Matenyu and retained the parcel No. 3147. He testified that on 10 December 2012, they received a complaint through M/s Nyambega & Company Advcoates complaining about the acreages and a restriction was registered in the register of the suit land. He thought it would be best if the measurements on the ground were taken. Cross-examined, he testified that the parcel No. 2040 was registered as measuring 2.09 ha. He stated that it was 0.8 ha in 1981 and thereafter there was an amendment. The date of cancellation was not shown.
8. At this juncture the parties agreed by consent to have the Land Registrar and Surveyor, Nyamira, to visit the parcels No. 3147 and 3148 to determine their boundaries and acreages and for the Registry Index Map to be availed. A report dated 31 January 2024 was filed. It is a very brief report. It states that the parcels No. 3147 and No. 3148 were visited on 18 January 2024 and they measure 1.69 ha and 0.08 ha respectively and a sketch was drawn. Nobody was called to elaborate on that report and the defence closed its case.

C. FINDINGS OF THE MAGISTRATE'S COURT AND BASIS OF APPEAL

9. In her judgment the trial Magistrate found that the father of the respondent got registered as proprietor of the suit land in 1995 after the subdivision of the parcel No. 2040. She also found that the Land Registrar could not clearly explain how the parcel No. 2040 ended up having an acreage of 2.09 ha but which records date back to 1981. She held that the counterclaim of the appellant was not only time barred but the appellant lacked capacity to sue on it. She held that he was pursuing an interest of the estate of his late father without first obtaining a grant. She held that the respondent had demonstrated possession of the suit land until 2017 when the appellant entered the land without his permission. She proceeded to issue an order of injunction and eviction against the appellant who was given 60 days to vacate. She also awarded the costs of the suit and counterclaim to the appellant.

10. Aggrieved, the appellant has preferred this appeal on the grounds that the trial Magistrate erred in :
- (1) Holding that the appellant was not in occupation and possession of the suit property.
 - (2) Holding that the respondent proved being exclusively in possession.
 - (3) Failing to find that the evidence showed that the appellant was in actual occupation of the property.
 - (4) Misdirecting herself in that the appellant's evidence remained uncontroverted.
 - (5) Failing to find that the appellant had proved fraud on the respondent's part.
 - (6) Holding that the appellant's defence and counterclaim were unmerited.
 - (7) Failing to properly analyse the evidence and scrutinize the documents.
 - (8) Failing to apply the relevant case law presented to her.
 - (9) Failing to consider the submissions filed by the appellant and selectively analysing the evidence to that supporting the arguments of the respondent.
 - (10) That the judgment was against the weight of evidence.
11. The appellant proposes that the appeal be allowed and the judgment be set aside and for this court to find that the counterclaim is proved.
12. The appeal was argued through written submissions and I have taken into account the submissions filed.

D. ANALYSIS AND DISPOSAL

13. The case of the respondent (as plaintiff) was that the appellant had trespassed into the land registered in the name of his late father. Though the prayers were not elegantly drafted, I assume that what the respondent wished for, was for the appellant to be evicted and permanently restrained from the land. The appellant had a counterclaim asking for a declaration that he (respondent) is the rightful owner of the suit land; that the respondent is holding the suit land in trust for the appellant; cancellation of the title and for it to revert to its original state; declaration that the registration was fraudulent and null and void; a permanent injunction to restrain the respondent from the suit land; and costs.
14. At the trial, the respondent presented evidence of registration of the suit land in the name of his late father and he also presented a grant to demonstrate that he is the legal representative of his estate. That fact of registration, pursuant to Section 26 of the Land Registration Act, is a demonstration that prima facie, his late father was the rightful proprietor of the suit land and I feel the importance of laid down in full the whole of Section 26 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.

15. From the above, it will be seen that the registration of title in name of an individual is prima facie evidence that he is the rightful proprietor. Such registration can however be impugned if it is demonstrated that the registration was fraudulent, or unlawful, as depicted in Section 26 (1) (a) and (b) above. Now if one has title, it is not a case of two competing titles, the law already favours that title and one does not need to prove it. In other words once I have a title, and there is no second title to the same land, prima facie the law presumes that the title is good. The burden of proof is not on me, to prove the title is good, because the law already presumes that it is a good title. The burden of proof is now on the one asserting that the title is a bad title. Thus, once the title is demonstrated, and there is no parallel title, it is the one claiming that the title should be cancelled who bears the burden of proof. In his submissions, Mr. Ochoki for the appellant, argued that the burden of proof was on the respondent. He urged that the respondent did not produce the sale agreement to show that what his father bought was 2 ha and not 2 acres. Well, once the respondent produced the title as evidence, the respondent did not bear any burden of proving that it was a good title; it is the appellant who bore the burden of proving that it is a bad title. The burden of proof was thus on the appellant. So did the appellant prove these vitiating factors ?
16. The trial court did not think so. In fact, at the outset the trial Magistrate found that the appellant did not even have capacity to present the suit as he held no letters of administration for the estate of his late father, to vest upon him the capacity to complain on behalf of his estate. I have not seen any address in the submissions of Mr. Ochoki

regarding this issue of capacity. Now, if the appellant wished the land to revert back to its original state, it can only devolve to the persons who sold the land to the respondent's father, and thus to have capacity to present such claim, the appellant needed to have letters of administration for the estate of the sellers so as to complain on their behalf. He does not have and it was a correct finding that the appellant had no capacity to present the counterclaim. In other words, the appellant was not the right person to make the assertion that the title of the respondent's father was not properly procured and not the right person to seek orders for its cancellation.

17. The only way that the appellant could assert such orders is if he was claiming the land by virtue of his own independence possession i.e through adverse possession. But this was not a case for adverse possession and the claim by the appellant was not one based on possession. I am in full agreement that the appellant had no capacity and for that reason only, his counterclaim was for dismissal.
18. Assuming that he had capacity, the counterclaim was again time barred. The father of the respondent got registered as proprietor of the suit land in 1995. The suit was filed in 2018 and so too the counterclaim. A claim for land has the limitation period of 12 years pursuant to Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya. The appellant did not make any pleadings or present evidence to benefit from extension of the limitation period pursuant to Section 26 of the Limitation of Actions Act, which provides inter alia that in cases of fraud, time will start running from the time the fraud is discovered. Thus the trial court was again correct to make the finding that the counterclaim was out of time.
19. Not having capacity and lodging a late claim, there was no basis upon which the counterclaim could succeed and no basis upon which to deny the respondent his prayers. As I have said, the respondent displayed title to the suit land. The appellant did not deny being on the suit land and in fact acknowledged that he entered it in 2016 and built a kiosk. He had no right to do so as this was not his land. The respondent was thus within his rights to lodge the suit to seek his eviction and for him to be permanently restrained.
20. I think the trial court properly analysed the issues. My own independent analysis brings me to a similar conclusion.
21. I thus find no merit in this appeal and it is hereby dismissed with costs. The judgment of the trial court remains undisturbed.
22. Judgment accordingly.

DATED AND DELIVERED THIS 10 DAY OF DECEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Chepkorir h/b for Mr. Ochoki for the appellant

Mr. G.J.M Masese for the respondent

Court Assistant – David Ochieng