



REPUBLIC OF KENYA



**Nyaundi v Oyaró & 2 others (Cause 420 of 2016)  
[2019] KEELC 2930 (KLR) (14 June 2019) (Judgment)**

*Joash Ongubo Nyaundi v Francis Aburi Oyaró & 2 others [2019] eKLR*

Neutral citation: [2019] KEELC 2930 (KLR)

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

**CAUSE 420 OF 2016**

**JM MUTUNGI, J**

**JUNE 14, 2019**

**BETWEEN**

**JOASH ONGUBO NYAUNDI ..... PLAINTIFF**

**AND**

**FRANCIS ABURI OYARÓ ..... 1<sup>ST</sup> DEFENDANT**

**NANCY MORAA BOSIRE ..... 2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, KISII DISTRICT ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction and Pleadings;**

1. In this case both the Plaintiff and the 2<sup>nd</sup> Defendant lay claim of ownership to land parcel Kisii Municipality/Block I/758 hereinafter referred to as “the suit property.” The parties hold two sets of documents of title to the suit property and each claim the documents of title they hold are the authentic documents in respect of the suit property. The issue for determination therefore in the present suit is who between the Plaintiff and the 2<sup>nd</sup> Defendant is the owner of the suit property.
2. The Plaintiff initiated the suit by a plaint dated 18<sup>th</sup> March 2011 filed in court on the same date. The plaint was amended on 28<sup>th</sup> November 2011 and filed on 29<sup>th</sup> November 2011. The Plaintiff as per the amended plaint prayed for judgment against the Defendants jointly and severally for:-
  - a. A declaration that the Plaintiff is the lawful proprietor of the leasehold property Kisii Municipality/Block I/758.



- b. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents, servants or employees from trespassing into and/or in any way interfering with the Plaintiff's occupation, possession and use of the leasehold property Kisii Municipality/Block I/758.
  - c. An order directing the 3<sup>rd</sup> Defendant to reconstruct and put in place the records for land parcel No. Kisii Municipality/Block I/758 on the basis of the certificate of official search dated 21<sup>st</sup> day of February 2011 and the certificate of lease dated 16<sup>th</sup> day of August 2010 and cancel all later registrations.
  - d. Costs of the suit.
  - e. Interest at court rates.
3. The 1<sup>st</sup> Defendant did not appear and/or file any defence. The 2<sup>nd</sup> Defendant filed a defence dated 20<sup>th</sup> January 2012 and denied the allegations and claim of ownership of the suit property by the Plaintiff. The 2<sup>nd</sup> Defendant averred that if the Plaintiff held any documents of ownership of the suit property the documents could not be genuine. The Defendant contended she was the registered owner of the suit property having regularly purchased the same from the 1<sup>st</sup> Defendant.
  4. The 3<sup>rd</sup> Defendant entered appearance and filed a statement of defence dated 1<sup>st</sup> February 2012 on 3<sup>rd</sup> February 2012. The 3<sup>rd</sup> Defendant stated their record showed the Plaintiff was registered as the owner of the suit property and not the 2<sup>nd</sup> Defendant.
  5. The suit was part heard before Okongo, J. before whom the Plaintiff testified as the sole witness in support of the Plaintiff's case. Mr. Gordon Ochieng, a land administration officer with the National Land Commission was called as a witness by the 2<sup>nd</sup> Defendant and testified as DW1 while the 2<sup>nd</sup> Defendant testified as DW2. The 3<sup>rd</sup> Defendant did not offer any evidence. The Plaintiff and the 2<sup>nd</sup> defendant filed final written submissions after the closure of the trial. The 3<sup>rd</sup> Defendant though having made intermittent appearances during the hearing did not file any submissions.

#### **Evidence by the Parties;**

6. The Plaintiff testified that he purchased the suit property Kisii Municipality/Block I/758 from one Tiberias Nyanchoka Mogaka in 2009 for kshs. 500,000/= . The property was undeveloped and he stated that before agreeing to purchase the property he verified the ownership by carrying out a search at the lands office. A certificate of official search dated 4<sup>th</sup> November 2009 ("PEX.1") was issued which confirmed the property to be in the name of Tiberia Nyanchoka Mogaka. He stated that Tiberias informed him he had bought the property from James Monari Makondobe who was the original owner. The Plaintiff produced as ("PEX.4") the certificate of lease in the name of Tiberias Nyanchoka Mogaka. He stated that after he was satisfied that Tiberias was the owner of the property they entered into the agreement of sale dated 6<sup>th</sup> November 2009 ("PEX.5") and after payment of the purchase price the property was transferred to him and he was issued with the Certificate of Lease dated 16<sup>th</sup> August 2010 ("PEX.6"). The Plaintiff stated that after the property was transferred to him he took possession and commenced using the same. He stated further that around November 2011 some people came to the suit property and claimed the land belonged to them. He said that prompted him to go back to the Municipal Council to reconfirm the actual status of the property. The Plaintiff stated at the Municipal Council he was informed the original owner of the property was Francis Aburi Oyaro although when he had inquired earlier he had been informed James Monari was the original owner.
7. The Plaintiff stated that a search he had carried out on 21<sup>st</sup> February 2011 had confirmed that he was still the registered owner ("PEX.7"). The Plaintiff stated that when Francis Aburi was summoned to



attend before the Municipal Clerk (“PEx.8”) for verification of the ownership documents he did not attend. Further the Plaintiff stated the records at the Lands Office were unavailable and produced correspondence from the land registrar (“PEx. 11-14”) affirming the records were missing and he could not therefore issue a certificate of official search. The Plaintiff however stated when he conducted a search on 30<sup>th</sup> January 2013 he was issued with a search certificate which showed Nancy Moraa Bosire (2<sup>nd</sup> Defendant) was registered as the proprietor of the property (“PEx. 15”).

8. In cross examination, the Plaintiff stated he was not aware that consent to transfer was required. He admitted no rates clearance certificate was sought for or obtained to facilitate the transfer to himself. The Plaintiff further stated as per the search certificate of 30<sup>th</sup> January 2013, the 2<sup>nd</sup> Defendant was shown to be the registered owner of the suit property having been so registered on 30<sup>th</sup> June 2011. The Plaintiff affirmed that he has never paid any land rents or rates for the suit property. The Plaintiff further stated when he checked with Commissioner of Lands who the owner of the suit property was, he found Francis Aburi was shown as the owner. The Plaintiff further admitted he had no documents from the Municipal Council that showed Tiberias Nyanchoka was the owner of the suit property.
9. DW1 Gordon Ochieng testified that he was previously working under the Commissioner of Lands in land administration before moving to work with the National Land Commission. He explained that the records and documents relating to land previously under the custody of the Commissioner of Lands were handed over to the National Land Commission under whose mandate that function fell. He stated that documentation relating to allotment of land and issue of leases at the National Land Commission was under his charge. He stated land parcel LR Kisii Municipality/Block I/758 the subject matter of the suit had records and there was a file on the property held at the National Land Commission. He explained that upon receiving witness summons in the instant matter, he retrieved the file and made copies of the various documents in the file which were duly certified and were in accordance with the various documents filed by the 2<sup>nd</sup> Defendant in her bundle.
10. The witness testified that the suit property resulted from the survey of unsurveyed Plot No. 6 Kisii Municipality. He stated the Plot was allocated to one, Francis Aburi Oyaro, the 1<sup>st</sup> Defendant vide an allotment letter issued by Commissioner of Lands dated 5<sup>th</sup> January 1998 (“DEx.1”). He affirmed the allottee paid the charges set out in the letter of allotment and was issued receipt no. 1889256 on 28<sup>th</sup> May 2010. After payment of the charges the witness stated the Commissioner of Lands wrote to the Director of Survey to release the Registry Index Map to confirm the plot had been surveyed and the exact acreage on the ground. The letter was produced as (“DEx.2”). He stated the Director of Surveys submitted the Registry Index Map on 14<sup>th</sup> October 2010 which affirmed the allocated plot existed as parcel No. 758 and measured 0.0261 of a hectare approximately (“DEx.3”). He explained that at allocation the plots are not surveyed and are set out on a part development plan (PDP) which is merely intended to assist in the identification of the Plot to the owner and also to assist the person who would carry out the survey.
11. DW1 explained that after receipt of the letter dated 14<sup>th</sup> October 2010 (“DEx.3”) from the Director of Survey the Commissioner of Lands commenced the processing of the lease in favour of the allottee. He stated a new grant (lease) could not have been prepared without the Registry Index Map being submitted. He stated that after the lease was processed it was duly executed by the Commissioner of Lands on 15<sup>th</sup> February 2011 (“DEx.5”). The executed lease was forwarded to the District Land Registrar, Kisii on 7<sup>th</sup> March 2011 for registration at the registry.
12. The witness testified that the consent of the Commissioner of Lands or his representative is a prerequisite before any transfer of lease can be effected. The witness upon being shown the certificate of official search dated 4<sup>th</sup> November 2009 produced by the Plaintiff as “PEx.1” pointed out the search



had various irregularities. He stated the figures indicating the size as 0.045 acres differed with the words (Zero Point Zero Five acres) and further the tenure is shown as absolute (freehold) when the property is a leasehold for a term of 99 years from 1<sup>st</sup> January 1998. He pointed out that as per the records, the size of the property is approximately 0.0261Ha. The witness stated the Commissioner of Lands had no record of a lease issued on 19<sup>th</sup> January 2008. He stated further that the alleged certificate of lease issued to Tiberias Nyanchoka Mogaka for 99 years from 11<sup>th</sup> July 1997 for a parcel measuring 0.045Ha (“PEx.4”) is not recorded in their records. He stated there was no other parcel No. 758 in their records which measured 0.045Ha. He stated the Commissioner of Lands had no record for the Certificate of Lease produced by the Plaintiff as (“PEx. 6”) which refers to land parcel 758 measuring 0.045 acres.

13. In cross examination, the witness admitted that a Certificate of Official Search duly signed and sealed by the Land Registrar is deemed to be a true reflection of the status of the subject land according to the registry records. The witness agreed the Certificates of Lease in the name of the Plaintiff (“PEx.6”) was signed by the Land Registrar and so was the Certificate of Official Search dated 21<sup>st</sup> February 2011. The witness affirmed that the file he had before the Court was the only file held at the Commissioner of Lands office relating to the suit property and it showed that it was the 1<sup>st</sup> Defendant who was allocated the suit property. The witness further stated the Certificates of Leases and Certificates of official Searches produced in evidence by the Plaintiff have details as to size, tenure and effective date of the lease which vary with what the records at the Commissioner of Lands show.
14. The 2<sup>nd</sup> Defendant, Nancy Moraa Bosire testified as DW2. It was her evidence that she is the registered owner of land parcel Kisii Municipality/Block I/758 having purchased the same from Francis Aburi Oyaró. The witness stated that before she purchased the property she carried out due diligence by ascertaining the status of the property at the Kisii Municipal Council, the Lands Office Kisii and the Commissioner of Lands office Nairobi. She stated that she requested the seller (1<sup>st</sup> Defendant) to avail to her all the ownership documents he had relating to the property which he did. The 2<sup>nd</sup> defendant stated that she carried out a search on the suit property at the Lands Office at Kisii which confirmed the 1<sup>st</sup> Defendant was the registered owner. Further she stated that the records at the Municipal Council and at the Lands Office Nairobi affirmed the 1<sup>st</sup> Defendant was the owner of the suit property. Amongst the documents the 1<sup>st</sup> Defendant availed was the letter of allotment dated 5<sup>th</sup> January 1998 (“DEx.1”), Letter from the Municipal Council of Kisii dated 23<sup>rd</sup> January 2008 (“DEx.7”) confirming the property belonged to him, copy of Lease dated 15<sup>th</sup> February 2011 (“DEx.5”) and the Certificate of Lease dated 31<sup>st</sup> March 2011 (“DEx.6”) issued in the 1<sup>st</sup> Defendant’s name upon the registration of the Lease.
15. The 2<sup>nd</sup> Defendant explained that after being satisfied the 1<sup>st</sup> Defendant was the owner of the suit property, she entered into a sale agreement with the 1<sup>st</sup> Defendant to purchase the property on 12<sup>th</sup> April 2011 (“DEx.10”). After meeting the terms of the agreement the property was duly transferred by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> defendant pursuant to a transfer dated 27<sup>th</sup> April 2011 and registered on 30<sup>th</sup> June 2011 (“DEx.12”). A Certificate of Lease was following the registration of the transfer issued in favour of the 2<sup>nd</sup> Defendant dated 30<sup>th</sup> June 2011 (“DEx.14”). An abstract of title annexed as document No. 2 in the 2<sup>nd</sup> Defendant’s supplementary bundle of documents produced as (“DEx.15”) showed the 1<sup>st</sup> Defendant was the first registered owner of the suit property on 31<sup>st</sup> March 2011 and the 2<sup>nd</sup> Defendant was registered on 30<sup>th</sup> June 2011 and issued with a Certificate of Lease. The 2<sup>nd</sup> Defendant stated that the requisite consent and clearance certificate was obtained from the Municipal Council to effectuate the transfer to her. The 2<sup>nd</sup> Defendant further stated that from the time the property was transferred to her she had remained in occupation and had continued to pay the rates as evidenced by (“DEx.16”) included in the 2<sup>nd</sup> Defendant’s supplementary bundle of documents. It was the 2<sup>nd</sup>



Defendant's position that the documents relied upon by the Plaintiff were not genuine and should be disregarded. The 2<sup>nd</sup> Defendant prayed for the dismissal of the Plaintiff's suit.

16. The Plaintiff and the 2<sup>nd</sup> Defendant after the close of the trial filed their final written submissions. After consideration of the pleadings, the evidence by the parties and the submissions made on behalf of the parties, the issues for determination by the court can be summed up as follows:-
  - i. Who was the original allottee of land parcel Kisii Municipality/ Block I/758?
  - ii. Who between the Plaintiff and the 2<sup>nd</sup> Defendant holds a valid title to land parcel Kisii Municipality/Block I/758?
  - iii. What orders should the court make?

### **Analysis and Determination;**

17. The determination of the issues in this case will turn on the evaluation of the documentary evidence tendered by the parties. Both the Plaintiff and the 2<sup>nd</sup> defendant claim to have purchased the suit property from the original allottee of the suit property. The Plaintiff claimed that he purchased the property from one Tiberias Nyanchoka Mogaka pursuant to an agreement of sale dated 6<sup>th</sup> November 2009. The Plaintiff stated that the seller showed him ownership documents which included a Certificate of Lease ("PEX.5") which was in his name. The Plaintiff further stated he verified the ownership by carrying a search at the Lands Office and further confirmed with the Municipal Council of Kisii and he was satisfied that indeed the said Tiberias Nyanchoka Mogaka was the registered owner. The search the Plaintiff allegedly obtained was dated 4<sup>th</sup> November 2009 ("PEX.1"). This Certificate of Search as pointed out by DW1 who was a long serving Lands Officer had various irregularities. Firstly, he noted the search indicated the tenure of the title was absolute whereas the property was a leasehold. Secondly, he noted the size (area) shown as 0.045acres in figures differed to what was given in words (Zero Point Zero Four Five acres). Further, the Certificate of Lease in the name of Tiberias Nyanchoka Mogaka which the Plaintiff stated he was given by the seller dated 19<sup>th</sup> March 2008 ("PEX.4") indicated the area of the property to be 0.045Hectares. The property section of the Certificate of Lease relating to when the register was opened and the registration section and parcel number which should be shown was not completed and was blank. The Certificate of Lease issued to the Plaintiff on 16<sup>th</sup> June 2010 ("PEX.6") also indicates the approximate area of the parcel of land 0.045acres.
18. DW1 was emphatic the property described by the Plaintiff was not the property they had in their records. DW1 evidence was clear that as per their records the property LR No. Kisii Municipality/ Block I/758 was allocated to one Francis Aburi Oyaró as per the letter of allotment dated 5<sup>th</sup> January 1998 ("DEX.1"). The property after survey became Kisii Municipality/Block I/758 and measured 0.0261 hectares. A lease was issued in favour of Francis Aburi Oyaró for a term of 99 years from 1<sup>st</sup> January 1998 ("DEX.5") and was registered on 15<sup>th</sup> February 2011 and a Certificate of Lease ("DEX.6") was issued in favour of Francis Aburi Oyaró on 31<sup>st</sup> March 2011. DW1 affirmed that this was the property that was allocated by the Commissioner of Lands and in respect of which records are held. According to DW1, there was no evidence of any allocation of the property to Tiberias Nyanchoka Mogaka as claimed by the Plaintiff. The property allocated to Francis Aburi Oyaró and in respect of which a lease and Certificate of Lease was issued, is the property that DW1 described and was the property that the 2<sup>nd</sup> Defendant purchased from Francis Aburi Oyaró pursuant to the agreement dated 12<sup>th</sup> April 2011 ("DEX.10"). This property was transferred by the said Francis Aburi Oyaró to the 2<sup>nd</sup> Defendant pursuant to the transfer dated 27<sup>th</sup> April 2011 ("DEX.12") and a Certificate of Lease was issued to the 2<sup>nd</sup> Defendant on 30<sup>th</sup> June 2011 ("DEX.14").



19. The Plaintiff did not adduce any evidence to show how Tiberias Nyanchoka Mogaka acquired the property which he allegedly sold to him. No letter of allotment to Tiberias Nyanchoka Mogaka was exhibited and neither was any instrument of transfer from Tiberias Nyanchoka Mogaka to the Plaintiff exhibited. There was further no evidence tendered to show that the Municipal Council of Kisii approved allotment of the suit property to the said Tiberias Nyanchoka Mogaka. There was no document exhibited by the Plaintiff from the Municipal Council of Kisii to confirm that Tiberias Nyanchoka Mogaka was at any time registered as the owner of the suit property as per the records held by the Municipal Council. Tiberias Nyachoka Mogaka could not just have gotten the land from nowhere and there ought to have been origination documents such as letter of allotment and letter from the Commissioner of Lands forwarding the lease for registration by the Land Registrar, Kisii.
20. Having carefully evaluated the evidence and specifically after careful review and analysis of the documents tendered in evidence by the parties, I have come to the conclusion and finding that the person described as Tiberias Nyanchoka Mogaka perhaps in collusion with other persons within the Lands Office at Kisii engaged in unlawful manipulation of records held at the Lands Office. This explains the inconsistencies in the ownership documents purportedly held by the said Tiberias Nyanchoka Mogaka. The search Certificates and the Certificates of lease issued to Tiberias Nyanchoka Mogaka and to the Plaintiff as indicated earlier in this Judgment gave the area of the parcel of land as 0.045acres whereas the actual size of the property is 0.0261Ha as per the Lease and the Certificate of lease issued to Francis Aburi Oyaró. The allotment of the property to Francis Aburi Oyaró and the processing of the title to him was properly documented and I have no doubt that he was indeed the original allottee of the suit property and that he lawfully had the title processed in his favour. The sale and transfer of the suit property to the 2<sup>nd</sup> Defendant was lawfully and validly carried out. I hold that the 2<sup>nd</sup> Defendant was lawfully registered as the owner of the suit property.
21. It is unfortunate that the Plaintiff was a victim in what was a fraudulent transaction. There was no explanation offered as to why the Plaintiff did not get the said Tiberias Nyanchoka Mogaka to testify on his behalf. If he had, he could perhaps have shed light as to how he acquired the property that he purportedly sold to the Plaintiff. The evidence of the 2<sup>nd</sup> Defendant was crucially supported and given credence by the evidence of DW1 who for all purposes was a neutral witness as he was giving evidence on the basis of the records held at the Commissioner of Lands office. The Commissioner of Lands was the authority that was charged with the duty of allocating plots and there is evidence that the Commissioner of Lands did indeed make the allotment of the suit plot to Francis Aburi Oyaró through the letter of 5<sup>th</sup> January 1998. The 3<sup>rd</sup> Defendant, the Land Registrar Kisii did not attend court to testify and the defence filed by him remained mere statements of facts that were unproven. There is no basis to accept the defence in the face of the evidence by DW1 and DW2. All indications point to the occupant of the office at the time having been complicit in the fraud perpetrated against the Plaintiff.

## **Conclusion;**

22. On the basis of the evidence and the foregoing analysis, I determine that Francis Aburi Oyaró was the original allottee of land parcel Kisii Municipality/Block I/758 (previously Uns. Residential Plot No. 6 Kisii). Having made that determination, it follows that Tiberias Nyanchoka Mogaka could not have had a valid title over the same property which he could sell and transfer to the Plaintiff. The Plaintiff was conned of his money and he was a victim of fraudsters who through manipulation of land office records and/or outright forgery of the ownership documents hoodwinked the Plaintiff into believing the seller had land that he could validly sell and transfer to him. The alleged seller (Tiberias Nyanchoka Mogaka) had no land that he could sell to the Plaintiff. The Certificate of Lease he held was null and void and the transfer of the same to the Plaintiff could not pass any valid interest in the suit property.



23. As regards the second issue as to who between the Plaintiff and the 2<sup>nd</sup> Defendant holds a valid title, it is my determination that it is the 2<sup>nd</sup> Defendant holds a valid title over the suit property. The Certificate of Title held by the Plaintiff is null and void and should be cancelled. The abstract of title for the suit property produced in evidence by the 2<sup>nd</sup> defendant and the Certificate of Search tendered in evidence by the Plaintiff (“PEx.15”) both affirm the 2<sup>nd</sup> defendant is the registered owner of the suit property having been so registered on 30<sup>th</sup> June 2011. There will therefore be no necessity for the rectification of the register as it is in order as it is.
24. The upshot is that I find and hold that the Plaintiff has not proved his case on a balance of probabilities and I accordingly order the suit dismissed with costs to the 2<sup>nd</sup> Defendant.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 14<sup>TH</sup> DAY OF JUNE 2019.**

**J. M. MUTUNGI**

**JUDGE**

