



Ongechi {Suing as the administratrix of the Estate of Zedekiah Ongechi Onyambu (Deceased) v Orito & 5 others (Environment & Land Case 788 of 2016) [2024] KEELC 927 (KLR) (22 February 2024) (Judgment)}

Neutral citation: [2024] KEELC 927 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 788 OF 2016
M SILA, J
FEBRUARY 22, 2024**

BETWEEN

PERUS CAROLINE ONGECHI {SUING AS THE ADMINISTRATRIX OF THE ESTATE OF ZEDEKIAH ONGECHI ONYAMBU (DECEASED) PLAINTIFF

AND

**JAMES O ORITO 1ST DEFENDANT
PETER ONGARO RAINI 2ND DEFENDANT
LAND REGISTRAR, KISII 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT
WILLIAM NYANG’AU NYABANDO 5TH DEFENDANT
GEOFFREY MATOKE OMURWA 6TH DEFENDANT**

JUDGMENT

(Original plaintiff holding an allotment letter to the suit land; three other certificates of title issued for the same land; evidence demonstrating that the land was duly allotted to the original plaintiff for purposes of developing a soft board manufacturing factory; the other three titles being of dubious origin and nullified; title to issue to the plaintiff as administratrix of the original plaintiff; defendants ordered to give vacant possession and pay general damages for trespass)

A. Introduction And Pleadings

1. This is a rather interesting case where four persons claim title to the same property, the property being the land parcel Kisii Municipality/Block III/405. The original plaintiff, Zedekiah Ongechi Onyambu, held an allotment letter and contended that he was the rightful allottee of the suit property. On



- the other hand, the 1st defendant, the 2nd defendant, and the 5th and 6th defendants, have different Certificates of Lease bearing the same title number.
2. The genesis of the suit was a plaint filed on 28 March 2012 by Zedekiah Ongechi Onyambu (now deceased, also referred to herein as the original plaintiff) initially against James O. Orito, Peter Ongaro Raini, the Land Registrar Kisii, and the Attorney General respectively as the 1st to 4th defendants. In this original plaint (for there were subsequent amendments) the original plaintiff pleaded that through a letter of allotment dated 17 February 1997, he was allotted an unsurveyed industrial plot in Kisii Town being Kisii Municipality/Block III/405 for putting up a soft board factory. He averred that he paid the stand premium of Kshs. 240,000/= and annual rent of Kshs. 40,000/= and he had the property surveyed and beacons put in place. He pleaded that he qualified to be allotted the land after a meeting of the Kisii Development Committee which was held in June 1993 vide Minute ex-min DDC 11/02/93 and a report from the Kenya Bureau of Standards certified his ceiling products as acceptable and he was thus eligible to set up a factory on the suit property.
 3. He pleaded that on 22 May 2009 he conducted an official search and found out that the 1st and 2nd defendants had separate Certificates of Lease for the same property. The 1st defendant had a Certificate of Lease for the suit property dated 7 November 2006, whereas the 2nd defendant had a Certificate of Lease dated 1 November 2007. He averred that they procured registration through fraud as they were cognizant that he was the true owner and further that they colluded to have a double registration of the suit property. The original plaintiff pleaded that through a letter dated 22 May 2009, he complained to the Commissioner of Lands, and through a response dated 29 October 2009, the Commissioner of Lands advised the Land Registrar, Kisii, to lodge a caution on the suit property pending investigations. He pleaded that he made persistent efforts to have the certificates of lease in the names of the 1st and 2nd defendants cancelled but all was in vain thus necessitating the filing of the suit. In the original plaint, he sought a declaration that he is the owner of the suit property; cancellation of the titles of the 1st and 2nd defendants; a permanent injunction to restrain the 1st and 2nd defendants from the suit property; and costs of the suit.
 4. On 21 May 2014, the original plaintiff filed an application of even date seeking to amend the plaint so as to join two other persons, being William Nyang'au Nyabando and Geoffrey Matoke Omurwa, as the 5th and 6th defendants. He sought to join them because he had found out that they also hold a Certificate of Lease to the same property. Before that application could be heard, William Nyang'au Nyabando and Geoffrey Matoke Omurwa filed their own application dated 24 October 2014 to be joined to the suit. The latter application was allowed by consent on 15 June 2015 and the plaint amended to include the two persons as the 5th and 6th defendants. That is how the 5th and 6th defendants came into the case. The case of the original plaintiff remained the same as initially pleaded only adding pleadings against the 5th and 6th defendants to contend that their certificate of lease was also procured by way of fraud and ought to be cancelled and that there was a triple false registration of the suit property.
 5. In his defence filed on 19 February 2013, the 1st defendant pleaded that the suit property was allotted to him by the Commissioner of Lands through an allotment letter dated 16 July 1995. He averred that he became registered as proprietor of the suit property and was issued with a Lease and Certificate of Lease after following due process. He further pleaded that he was the one in possession of the suit property and asked that the plaintiff's case be dismissed.
 6. The 2nd defendant did not enter appearance nor file any defence.
 7. The 3rd and 4th defendants filed a defence on 21 March 2013 where they merely pleaded that they have been wrongly joined and that the plaintiff should prove his claim of ownership against the 1st and 2nd defendants.



8. The 5th and 6th defendants filed defence and counterclaim on 22 September 2015. They refuted that the original plaintiff was ever allotted the suit property as claimed. They also denied that the suit property has ever been registered in the name of the 1st and 2nd defendants. They averred that if any title was issued to the 1st and 2nd defendants then the same was procured through fraud, misrepresentation and concealment of material facts. They contended that the suit property was allocated to one Zachary John Ondieki who was issued with a lease dated 1 March 1999. They averred that they purchased the suit property from the said Zachary John Ondieki and they became registered as proprietors on 30 May 2000. They pleaded that they took possession and fenced the property with a barbed wire fence all round. They added that the original plaintiff's suit is time barred. In the counterclaim, they asked for an order of cancellation of the title of the original plaintiff, and the titles of the 2nd and 3rd defendants; a permanent injunction to restrain the original plaintiff, the 2nd and 3rd defendants from the suit property; general damages for trespass with interest at court rates; costs and any further relief that the court may deem fit to grant.
9. On 23 September 2018, the original plaintiff died. He was substituted by his wife Perus Caroline Ongechi. Upon substitution, the plaint was re-amended but only to demonstrate the substitution of the plaintiff.
10. It is against the above pleadings and background that the matter proceeded for trial.

B. Evidence of The Parties

i. Plaintiff's Evidence

11. PW – 1 was Perus Caroline Ongechi whom I have already described as the wife of the deceased original plaintiff and administratrix of his estate. Her evidence was that the suit property was allotted to the original plaintiff and she produced various documents to demonstrate that the suit property belonged to the original plaintiff. She testified that the original plaintiff applied to the District Development Committee to be allotted land and it is through this committee that he was issued with an allotment letter. She stated that initially they were only aware of the Certificates of lease of the 1st and 2nd defendants and it is this that was addressed in the letter to the Commissioner of Lands in 2009.
12. Cross-examined, she affirmed that the original plaintiff applied for a plot in 1993 and was issued with a letter of allotment in 1997, though she did not have an application letter. The allotment letter issued to the original plaintiff was for an unsurveyed industrial plot without a parcel number. She mentioned that she had produced receipts for payment of rates for the suit property as an unsurveyed plot. She stated that the original plaintiff made the necessary payments required for issuance of title to him. She acknowledged that the allotment letter required payment to be made within 30 days. He was however not issued with a Certificate of Lease. She confirmed that the original plaintiff never took possession of the land her position being that he was not given a chance by the 1st and 2nd defendants. She reiterated that the basis of her claim is the letter of allotment.
13. With the above evidence the plaintiff closed her case.

ii. Defendants' Case

14. DW – 1 was the 1st defendant. His evidence was that he is the registered proprietor of the suit property. He testified that he presented his case for land to the Kisii Municipal Council and he was given minutes from the Council for registration of the property. He was issued with a letter of allotment and paid the requisite fees. He was then presented with a Lease. He had his original letter of allotment and original Certificate of Lease in court. He had a letter dated 14 July 2004 forwarding the Certificate of Lease



for registration. He testified that he was paying land rates until his documents were removed from the Land Registry. He had a clearance certificate for the year 2012 dated 16 November 2012 and a rates demand dated 24 October 2015. He also had a White Card (copy of the Leasehold register) showing him as registered proprietor. The same shows that he became registered on 7 November 2006 and he stated that he was issued with his Certificate of Lease on the same day. The term of Lease is 99 years from 1 July 1995 with the lessor shown as the Gusii County Council. He testified that he did a search and got surprised to find the 5th and 6th defendants also registered as proprietors with a lease issued on 30 May 2000 originally to Zachary John Ondieki Onchuru. Their lease is for 99 years from 1 May 1996 the lessor again being the Gusii County Council. On the documents of the plaintiff, he testified that they do not show the suit land but refer to an unsurveyed industrial plot.

15. Cross-examined, he reiterated that he applied to the Municipal Council of Kisii to be allotted land but he did not have a copy of the said application. He could not recall the date of his application letter but he stated that it was in early 1995. He testified that he gave this letter to a Councillor named Monari Mokundobe who is now deceased. He testified that he had gone to the site with the Councillor and his application indicated where the land was located. He testified that the Councillor came back with documents which he took to Nairobi including the minutes of the Council. He acknowledged that he did not produce the said minutes. He affirmed that the land is in Kisii Industrial Area, near the slaughterhouse. He testified that the minutes did not have the plot number allotted and did not indicate the size until the surveyor went to the ground. According to him, the surveyor went to the ground in 1995 to survey the land, but this was before he got his allotment letter. He testified that he was issued with the allotment letter after the land had been surveyed. He stated that he had already taken possession before the survey was done and had planted napier grass. He stated that he was issued with a beacon certificate but he did not have it. He testified that he did not have the receipts for payment of the amount in the allotment letter because it was the Councillor who made the requisite payments on his behalf and he remained with the receipts. He testified that he signed the Lease at the Lands office which he left with the Land Registrar hence he could not produce it. This was 10 years after the allotment of the land. He could see that the allotment letter he produced shows the land as 1.690 Ha which is not the same size as what is indicated in his Certificate of Lease. He testified that in 2014 he found another registration, that of the 5th and 6th defendants, after doing a search, which he did not produce, and his name did not appear as proprietor. He did not find his records in the Lands office and he stated that they must have been removed by the Land Registrar. He stated that he does not know the 2nd defendant and he was not aware that he was also registered as proprietor of the land. He however knows the 5th and 6th defendants. According to him the 5th defendant is his cousin as his mother and the mother of the 5th defendant are sisters. The 6th defendant is his friend and they come from the same area. He also knew Zachary Onchuru Ondieki who was a retired Assistant Chief of his area. According to him, the 5th and 6th defendants would have been too young to buy the land from Zachary Onchuru and he alleged that the records at the Lands office must have been altered by a Land Registrar whom he named in exchange for some land that he was given at Nyanchwa. He stated that the 5th and 6th defendants had sworn an affidavit to include him as proprietor of the property and they caused removal of his documents. He denied colluding with the 5th and 6th defendants.
16. Cross-examined by counsel for the 5th and 6th defendants, he testified that he was Assistant Director of Finance/Procurement in the County Government of Kisii though he was on his terminal leave. Previously, he worked with the National Government as a Senior Clerical Office in the Office of the President before switching to the County Government in 2015. He acknowledged not producing his letter of application for the land or the minutes of the Council allotting him the land. Neither did he have any document from the Commissioner of Lands making reference to any minutes of the Council. He was not sure if the land had a title number when he applied for it. He stated that it had been surveyed



but shortly stated that he did not know whether it had been surveyed. He claimed to have taken a surveyor to the ground and issued with a beacon certificate but he did not have it. He could see that the allotment letter has the plot number but when he applied for the land he did not know the number. He stated that the amounts in the allotment letter were paid but he did not have the receipts. He did not have a banker's cheque showing payment of the monies in the allotment letter. He did not have a letter of acceptance. He could see that payment of the monies in the allotment letter were to be made in thirty days but he could not demonstrate payment within this period. He thought that it was unfortunate that he left all his documents with the Councillor. He insisted that there was compliance and that is why he was issued with a Lease. He acknowledged that he had not produced any Certificate of Official Search bearing his name. He affirmed that he got his allotment letter in 1995 and his Certificate of Lease in 2006. He stated that he was verbally told to wait for the Certificate of Lease. The letter forwarding the lease was one dated 14 July 2004. His certificate of Lease is dated 29 December 2005. He testified that he knew the original plaintiff who was his personal friend. He was surprised by the letter of 22 May 2009 which was written by the original plaintiff for it mentioned him and the 2nd defendant as having grabbed the suit property. He was also surprised by a letter dated 20 September 2010 by the Land Registrar Kisii, expunging his lease. He testified that he has structures on the land. He mentioned that he knew one Sibia Mwangi and he stated that he had a boundary dispute with her.

17. Cross-examined by counsel for the plaintiff, he reiterated that he obtained his letter of allotment dated 16 July 1995. The letter did not show the County Council nor the Plan number, which are blank. He affirmed that he did not produce the PDP. He stated that he signed the lease instrument in triplicate and left all copies at the Lands office. He could see that his white card shows the land as measuring 0.110 Ha. Interestingly he testified that he does not know the actual measurement of the land on the ground. He acknowledged that a caution was placed at which time he was the registered owner of the land. He could see that in the letter of 10 December 2009, the Land Registrar stated that there were two sets of ownership documents, one set for himself and the other for the 2nd defendant, and in the same letter he stated that there was no lease instrument in his name, only a white card and green card. He did not know when the Registry Index Map first reflected the plot No. 405. He denied that his allotment letter was a forgery on the basis that the plot number did not exist at that time. His view about the title of the 5th and 6th defendants was that it emerged in 2014 after this case was already in court. He acknowledged that he has not filed any suit of his own against the other title holders.
18. He was questioned by the court on possession of the land. He testified that possession is with himself, and the 5th and 6th defendants. He has two temporary structures made of mud walls and iron sheet roof. One is used as a hotel and the other is a small shop. The 5th and 6th defendants on the other hand have one structure made of iron sheets all round used for selling furniture. He stated that there are about 10 other temporary structures made by his uncle which houses some orphans. He still could not tell the size of his land.
19. DW – 2 was the 5th defendant who described himself as a businessman selling “mitumba” clothes and charcoal. He described the 6th defendant as his friend and co-purchaser of the suit land. He testified that he did not know the original plaintiff but knows the 1st defendant. He asserted that it is he and the 6th defendant who own the suit property. He testified that the suit land was owned by one Zachary Onchuru Ondieki (Zachary Onchuru or Zachary) and in the year 2000 he sold the property to him and the 6th defendant. He produced a copy of the Lease and Certificate of Lease in the name of Zachary Onchuru, the White Card bearing his registration, the transfer of lease instrument, their own Certificate of Lease and official search of 2014 showing them as proprietors. He testified that they took possession of the land which according to him measures two acres, and leased it to some people to operate an open air garage, a carpentry workshop, and a church which has put up a tent to



conduct services. He testified that there are also some kiosks on the property which are there without their permission.

20. Cross-examined, he testified that he purchased the land in the year 2000 when he was 22 years old. He testified that he had money as he started undertaking business in the year 1997. He stated that the 6th defendant in 1999 and 2000 was working in South Africa with an international NGO and that he is currently a pastor and chaplain at a Secondary School. He testified that they bought the land for Kshs. 3,000,000/= with each contributing Kshs. 1,500,000/= and that they paid the seller in cash. He testified that Zachary is alive though they had no intention of calling him as a witness. He acknowledged that the letter of 29 October 2009 does not mention their proprietorship of the land but only refers to the proprietorship of the 1st and 2nd defendants despite them also having ownership of the land at the time. He conceded that the search he produced is of 2014 and he does not have a search of an earlier date nor a search showing the name of Zachary Onchuru as proprietor. He also acknowledged that he has not produced any land rates payments. His explanation was that when they went to register themselves at the County Offices they were informed that the 1st defendant is the recognized proprietor and they could do nothing because the 1st defendant was working at the County. He stated that the 1st defendant's name was eventually removed from the County records and they started paying rates in 2018. He refuted the claim that they are just fronts of other individuals and denied that they had no capacity to buy the land.
21. Cross-examined by counsel for the 3rd and 4th defendants, he acknowledged that he has not produced a search done in the year 2000 before buying the land. He mentioned that Zachary gave them many other documents related to his proprietorship including his allotment letter though he did not produce these letters nor the allotment letter. He testified that they paid in cash at the seller's advocate's office. He stated that the advocate only prepared the sale agreement and the transfer was prepared in the Lands office. He stated that he was the first to sign the transfer form when it had no signature nor advocate stamp and he left it at the Lands office for Zachary to deal. He later brought to them the transfer document and he never inquired if it was ever registered. He also did not know if the Lease in favour of Zachary Onchuru was ever registered.
22. Cross-examined by counsel for the plaintiff, he testified that they went to see the land before purchasing it and they found it vacant. They negotiated the price and Zachary informed them that he would transfer the land to them which was done. He stated that he was not aware of the documents required to transfer land to them. He was not aware if Zachary paid rates and it was in 2012 that they came to learn that the Council also needed to be involved. He reiterated that he conducted a search before buying the land though he did not have it. He refuted the claim that they only came into the picture in the year 2014. He claimed that this was his first leasehold property to buy and he was not familiar with the documentation required or how they were to be prepared. He mentioned that they took possession but leased the land in 2013 and their lessees developed structures in 2018.
23. DW – 3 was Oswera Cecilia Harriett, a Land Registrar in Kisii. She has been in Kisii for three years. She had with her the parcel file relating to the suit property. She stated that her file has two White Cards. One was opened in the name of Zachary Ondieki Onchuru on 8 March 1999 with the lessor as the Gusii County Council. The land is shown as measuring 0.800 Ha and the term is 99 years from 1 May 1996. A Certificate of Lease was issued to him on 8 March 1999. She did not have documents to show how Zachary Onchuru came to be registered as proprietor for there was no allotment letter nor letter forwarding the lease for registration. Entries 1 and 2 in this White Card show registration of Zachary Onchuru and issue of Certificate of Lease to him on 8 March 1999. Entry No. 3 is registration of the 5th and 6th defendants and Entry No. 4 is issue of Certificate of Lease to them. She had no documents of transfer from Zachary Onchuru to the 5th and 6th defendants. She could see that the White Card



indicates consideration of Kshs. 3,000,000/= which she found unusual, because, according to her, this is never indicated in a White Card, and all they note is the word ‘transfer.’ She testified that for transfer of leasehold property the Land Administrator visits the land and does a ground report before issuing consent to transfer. In this instance, she did not have the transfer instrument, the consent to transfer, nor a surrendered Certificate of Lease in name of Zachary Onchuru.

24. The second White Card that she had was opened on 31 October 2007 in the name of Peter Ongaro Raini. The Lessor is the County Council of Gusii, the term is for 99 years from 1 March 1997. The acreage is 0.800 Ha. The record shows that he was issued with a Certificate of Lease on 31 October 2007. There is no other entry in this White Card. She had in her records the letter forwarding the lease, which is one dated 3 October 2007, and also the Lease document.
25. In addition to the above, her file had a copy of an allotment letter dated 11 February 1997 in the name of Z.O Onyambu. She however did not have a lease issued to him.
26. She did not have any document in her file showing the name of James Orito the 1st defendant.
27. She was not able to tell which of the documents shows the genuine proprietor of the suit property.
28. Cross-examined she testified that the letter dated 29 October 2009 is not in their file and she does not know the writer, one Otieno Apida. On the letter dated 10 December 2009, she could see that it mentions proprietorship of Peter Raini and James Orito, but she testified that she has not come across any record in the name of James Orito. She could see that the record of Zachary Onchuru bore an earlier date as compared to that of Peter Raini. She was not familiar with the manner of allocation of land by the former County Councils. She acknowledged instances where documents go missing from their files. She could see that the letter of 29 October 2009 recognized the original plaintiff as the proprietor.
29. The hearing of the matter closed with the above evidence from the defence.
30. I invited counsel to file submissions and I have seen the submissions of Mr. Bosire, learned counsel for the plaintiff, Mr. Begi, learned counsel for the 1st defendant, and Mr. Ochwangi, learned counsel for the 5th and 6th defendants. Mr. Ndiritu, learned State Counsel, for the 5th and 6th defendants mentioned that he would not be filing submissions. I have taken note of the submissions filed before arriving at my disposition.

C. Analysis and Disposition

31. As I stated at the beginning of this judgment, I have an interesting situation where three persons appear to have title to the same land with four people are claiming it. The task of this court is to unravel the mystery of who between the four persons is entitled to ownership of the suit property. The plaintiff acknowledges that the original plaintiff was yet to be issued with a Lease and Certificate of Lease but contends that title ought to have issued to him and that the other three Certificates of Lease were fraudulently procured and are null and void.
32. I will assess the plaintiff’s position after which I will look at the position of the defendants.
33. The plaintiff’s case is that through a meeting of the Kisii District Development Committee held on 7 June 1993, the original plaintiff was considered for allocation of a plot for industrial use, that is, for setting up a factory to make cardboard ceilings. The first exhibit of the plaintiff was the minutes of this meeting. I have gone through the same. Agenda 4 of the meeting is titled “Certification of Mr. Onyambu’s ceiling products.” The matter was discussed and this was the outcome :
 - a. “A report by the Kenya Bureau of Standards (KBS) certified Mr. Onyambu’s Ceiling Products as acceptable.



- b. Resolution : The District Lands Officer, DPPO & District Lands Officer should meet and identify land for Mr. Onyambu's ceiling industry."

34. There are some correspondences that follow the above meeting. I have seen a copy of a letter dated 15 May 1993 written by E.M Kambogo of the Office of the Commissioner of Lands to the Minister of Lands & Settlement, the Permanent Secretary, Ministry of Lands & Settlement, and the Commissioner of Lands and the reference in that letter is "Application for a Plot for Soft Board Factory Kisii – Z. O Onyambu."

35. That letter forwards a form No. GA 102749/29/GA II which is said to be duly filled. I must say that I am not too sure what this form GA 102749/29/GA may be but given that it came from the office of the Commissioner of Lands I believe it must relate to allocation of land. The next letter is dated 1 July 1993 from the District Commissioner Kisii, addressed to Mr. Onyambu. It states as follows :

Re : Application for Land for A Soft Board Manufacturing Project

I am happy to inform you that your application for a two acre plot to set up a soft board manufacturing plant was discussed and approved by the DDC sitting on 7th June 1993 vide (not clear).

By a copy of this letter, the District Physical Planning Officer and the District Land Officer are asked to identify a suitable site for the project and prepare a PDP.

I congratulate you and wish you success in your endeavor to contribute to our National Development.

E.S Mwavali

For : District Commissioner, Kisii.

36. The next correspondence from the plaintiff is a letter dated 7 September 1993 from the District Physical Planning Officer – Kisii to the Commissioner of Lands and Director of Surveys through the offices of the Director of Physical Planning, the Provincial Planning Officer, the District Commissioner, the District Land Officer, the District Works Officer, the District Surveyor, the District Water Engineer, the Town Clerk KMC, the District Industrial Development Officer, and Zedekiah Ongechi Onyambu.

37. The letter states as follows :

Re : proposed Site for Soft Board Factory Part Development Plan No.KSI/37/93/16

Please find enclosed a Print Copy of the above Plan for your relevant comments.

The preparation of the above Plan was authorised by the DDC Meeting of the 7th June, 1993 vide MIN : DDC 03/06/93 EX-MIN. DDC 11/02/93.

Please kindly forward your comments so as to reach the undersigned within three weeks from the date of this letter.

And, if favourable comments will have been received, the Plan will be submitted to the Commissioner of Lands for his final approval.

Okayana J.S

District Physical Planning Officer – Kisii

38. The plaintiff presented a letter of application made by Mr. Onyambu applying to be allocated land measuring 0.8 Ha for industrial purposes. She also supplied a Letter of Allotment dated 17 February 1997 bearing the reference number 31002/XXIII/4. That letter of allotment allots an unsurveyed



industrial plot – Kisii and references a Part Development Plan (PD) No. KSI/37/93/16. The land being allotted measures approximately 0.8 Ha and the proposed term is 99 years from 1 March 1997 at an annual rent of Kshs. 48,000/-. The plaintiff did produce a copy of the said PDP as part of her exhibits.

39. Apart from the above, there is a letter dated 19 June 1997 from the Kisii Municipal Council addressed to the original plaintiff. It states as follows :

19 June 1997

Re : Payment of Stand Premium and Annual Rent

I write to bring to your attention that you were allocated unsurveyed commercial plot within Kisii Municipality Vide allotment letter Ref No. 31002/XXIII/4 dated 17th February 1997. Be informed that you are supposed to pay to the Council a stand premium of Kshs. 240,000/= and an annual rent of 40,000/= both amount totaling to Kshs. 280,000/=.

The Council hereby gives you a notice of thirty (30) days to pay the above shown amount failure to do so, the Council will assume that you have not accepted the allotment offer and the Council will inform the Commissioner of Lands to allocate the plot to any different interested party.

Yours Faithfully,

David Omenge

For. Town Clerk.

40. I have seen two receipts issued by the Kisii Municipal Council being numbers 16518 and 16519 respectively bearing the dates 11 September 1997 and 12 September 1997, showing payment of Kshs. 30,000/= and Kshs. 10,000/= as annual rent for an unsurveyed commercial plot- Kisii. These two receipts total to Kshs. 40,000/= which is the same amount indicated in the letter of 19 June 1997 that I have copied above.

41. The other receipts produced by the plaintiff are two payments made on 20 February 2008, one for Kshs. 96,000/= for annual rent and the other Kshs. 104,000/= as site value rates for an unsurveyed industrial plot – Kisii.

42. Apart from the above, the plaintiff also supplied some documents indicating survey of the land. Among them is a letter dated 8 August 1997 from the District Surveyor – Kisii, addressed to the Director of Surveys, Nairobi. That letter states as follows :

Re : Submission of Survey Data for Industrial Plot Kisii Township

Enclosed find the following documents for your favour of checking and authentication.

One (1) survey plan No. 3

One (1) field note cover.

Four (4) leaves of field notes.

Fifteen (15) leaves of survey computation forms.

One (1) Copy of letter of allotment and P.D. Plan used for the survey.

One (1) copy of beacon certificate form.

S.M Mwenga

District Surveyor – Kisii

CC Provincial Surveyor, Nyanza.



43. The plaintiff did provide survey computations showing survey of land measuring 0.8000 Ha under survey plan No. FR 76/40. She also produced a beacon certificate dated 12 June 1997 issued to Zedekiah Ongechi Onyambu being survey for a proposed site for a soft board factory.
44. It is not clear whether the plaintiff took possession or not, but in the year 2009, he complained about other people having title to the said land and accused them of being land grabbers. He did write a letter dated 22 May 2009 to the Commissioner of Lands complaining that two different people have been issued with leases to the same land that was allotted to him. He mentioned that one of the persons, Peter Ongaro Raini, the 2nd defendant herein, has already been registered with the Kisii Municipality and the other James O. Orito, the 1st defendant herein, 'has been trying to have his Certificate of Lease registered.' He wrote a further letter to the Commissioner of Lands dated 7 June 2009 annexing copies of his documents to demonstrate that he is the rightful owner of the land.
45. There is a letter ref : 189183 TC/18 dated 29 October 2009 from the Commissioner of Lands to the District Land Registrar. It states as follows :

Re: UNS. Industrial Plot – Kisii Municipality(Now Kisii Municipality/Block III/405

Please refer to two certificates of leases in respect of the above parcels which have been registered in favour of Peter Ongaro Raini and James O. Orito.

Investigations in this office has revealed that the two certificates were obtained fraudulently as they do not have their genesis from Lands Office in Nairobi. You are therefore directed to give a comprehensive explanation as to how the documents found their way into the Lands Registry. Kindly treat this matter as very urgent.

Meanwhile put a Government caution pending the registration of the same to a Mr. Zedekiah Ongechi Onyambu who is the rightful owner.

Otieno Appida

For : Commissioner of Lands.

46. The District Land Registrar, through his letter reference KSI/LND/B/3/(44) dated 10 December 2009 replied to this communication by the Commissioner of Lands in the following manner :

Re : Kisii Municipality BlockIII/(405)

Your letter reference 189183 TC/18 dated 29th October, 2009 refers.

There seems to be two sets of leases issued in respect of the above mentioned parcel of land. One set to James O. Oritowas issued on 7th November, 206 (sic) and the other in favour of Peter Ongaro Raini was issued on 31st October, 2007.

However, from the records in the parcel file, only the lease issue (sic) in favour of Peter Ongaro Raini is filed while the register (white card and green card only shows the lease in favour of James O. Orito.

Please find copies of all the relevant documents in respect of parcel no. Kisii Mun.Block III/405.

Thanks.

Machora Mogare

District Land Registrar

Kisii/GuchaDistricts



47. The District Land Officer also wrote to the Commissioner of Lands requesting that a lease be prepared in favour of Mr. Onyambu. In his letter dated 20 September 2010, he wrote as follows to the Commissioner of Lands :

Attention Mr. Otieno Appida

RE : UNS.Industrial Plot Kisii Municipality/BlockIII/405

I refer to your letter Ref 189183 TC 18 of 29th October, 2009 and the letter from District Land Registrar Ref No. KSI/LND/B/3/44 of 10th December, 2009.

It is obvious that the registered leaser did not originate from our office in Nairobi.

I therefore request you to prepare the lease in favour of Zedekiah Ongechi Onyambu who is the rightful owner and expunge the fraudulent leases to enable Mr. Onyambu enjoy the right to his property.

Onyino Mukobe

For : District Land Officer

Kisii District

48. From the tenor of the above letters, it is apparent that the Commissioner of Lands, who was the allocating authority recognized that his office had allocated the land to the original plaintiff. This is apparent in the last paragraph of the letter dated 29 October 2009 where he stated :

Meanwhile put a Government Caution pending registration of the same to a Mr. Zedekia Ongechi Onyambu who is the rightful owner.

49. This statement of the Commissioner of Lands is supported by the District Land Officer in the letter of 20 September 2010 where he gave an opinion that the leases in the Kisii Land Registry did not originate from their office in Nairobi and requested the Commissioner of Lands to prepare a lease in favour of Mr. Onyambu and expunge the fraudulent leases in the registry.

50. I think this is a good time to assess the assertion of the 1st defendant and the 5th and 6th defendants that they are the rightful owners of the suit property and also look into whether the proprietorship of the 2nd defendant.

51. Starting with the 1st defendant, it was his evidence that the suit land was allotted to him through a letter of allotment dated 16 July 1995 after he had made an application for the land. He of course did not have this application letter which he claimed was taken by a Councillor to the Land office in Nairobi. He alleged that the allotment letter came about after deliberation by the Kisii County Council but he did not have the said minutes of the Council. Yet again, it was purported that the minutes were taken by the Councillor to Nairobi. I of course do not believe the contention of the 1st defendant that there were such minutes. He worked at the County Government of Kisii and if there were any such minutes he would have easily accessed the same and provided them to court, for the record of minutes is retained and only a copy could be obtained for forwarding to other offices. I have also looked at the letter of allotment of the 1st defendant. It has the reference number 31002/XXVI and states that what is being allotted is the land parcel Kisii Municipality Block 3/405, measuring 1.690 hectares for a term of 99 years from 1 July 1995. The stand premium required to be paid is Kshs. 7,200/= and the annual rent is stated at Kshs. 1,440/=. I have serious doubts on the veracity of this allotment letter and many problems arise from an analysis of it. First it does not have any reference to a PDP and the 1st defendant did not avail any PDP. Secondly, what is being allotted is an already surveyed parcel of land in the year 1995 but the survey records available show that the suit property was surveyed in the year 1997. The



1st defendant did not bring any survey record to demonstrate that the suit land was surveyed any time before 1995 and it is dubious that the allotment letter, which is of 1995, would make reference to the suit property as if it had already been surveyed and allocated a parcel number, yet the survey was done in 1997. It is thus clear to me that the allotment letter is backdated to purport that it was the first in time. Thirdly, the size of the land allotted is approximately 1.690 hectare which is more than 4 acres of land. However, the Certificate of Lease held by the 1st defendant is only of 0.110 Ha, which is just about one quarter of an acre. If the land was already surveyed in 1995 as indicated in the allotment letter how come then the Certificate of Lease is of land that is about eight times smaller? That math simply does not add up. Fourthly, it will be recalled that the annual rent indicated in the allotment letter is Kshs. 1,440/=. However, the Certificate of Lease indicates the annual rent payable to be Kshs. 2,800/= which is different. Fifthly, there is absolutely no evidence whatsoever that the stand premium and registration fees and all other sums of money indicated in the allotment letter totaling Kshs. 14,240/= was ever paid within the 30 days of the purported allotment letter or at all. No receipt was produced by the 1st defendant to prove payment of these monies. Moreover, the letter which purportedly forwarded the lease for registration, which is dated 14 July 2004, purports to state that registration fees of Kshs. 250/= was paid on 23 August 1999. The registration fee is in the allotment letter and is among the amounts that are supposed to be paid within 30 days of the allotment. If the allotment letter was prepared in 1995, then clearly any payment made in 1999 would be four years too late, within which time, there was issued an allotment letter to the plaintiff which was fully paid for and the Government would have no mandate to then accept a payment in 1999.

52. Apart from the above, you would also expect the 1st defendant to have a copy of the Lease in his favour since it is his contention that he was the first allottee and a Lease was executed in his favour. He did not have any Lease, his explanation being that he signed the same in triplicate and left all copies in the Lands office. Again, it does not add up since it was the practice that one copy is left to the Lessee, one was kept with the Commissioner of Lands, and the other with the Lands Registry. There does not appear to be any office with the purported lease of the 1st defendant. The 1st defendant doesn't have it; the Commissioner of Lands never had it; and the Lands Registry also never had it. I do not believe that there was any such lease that was executed in favour of the 1st defendant. Even assuming that he lost all copies, he could have availed the Presentation Book to demonstrate that such lease in his favour was registered on 7 November 2006 as he alleges but he brought no such evidence.
53. Ms. Oswera, the Land Registrar who testified, was categorical that they have no document in the name of the 1st defendant. Where the 1st defendant got his Certificate of Lease and White Card in his name showing land measuring 0.110 Ha is a mystery as all records indicate that the suit land measures 0.800 Ha. The dubiousness of the purported title of the 1st defendant was revealed by the 1st defendant himself when he testified. When asked what the size of the land that he holds is, he couldn't even tell. How can one purport to own land and not even know its size? In his submissions, Mr. Begi, learned counsel for the 1st defendant, inter alia submitted that the issue of the size of the land needs to be unraveled and that this court should go a step further to establish the true size of the property. I am afraid that this, in the circumstances of this case, was the business of the parties and not the business of the court. The 1st defendant knew or ought to have known that among the issues raised to attack his title was the size indicated in his Certificate of Lease. The onus was thus on him to table evidence to demonstrate that the suit property is truly 0.110 Ha and not 0.8 Ha which he has hopelessly failed to do. As I had stated above, but it is worth repeating, even the 1st defendant himself did not know the size of the land that he claims. How can he then purport to have title?
54. My analysis of the purported title of the 1st defendant is that it is non-existent. There was never any discussion held by the Gusii County Council or the Kisii Municipal Council to allocate land to the



- 1st defendant. There was never any allotment letter issued to the 1st defendant for the suit land. The purported allotment letter displayed by the 1st defendant is fake and not worth the paper that it is written on. There was never any payment to settle the monies in the purported allotment letter. There was never any lease forwarded for registration of the 1st defendant as owner of the suit property. There was never any registration of the 1st defendant as owner of the suit property. The Certificate of Lease and the White Card displayed by the 1st defendant have no basis and no backing whatsoever. They are merely typed documents from a backstreet purporting that the 1st defendant has title to the suit land which he does not. My conclusion is that the 1st defendant has no title and no legal interest in the suit property.
55. Let me now turn to the title of the 2nd defendant. The Land Registrar did testify that she has on record a registration of the 2nd defendant. From her record, he became registered as proprietor on 31 October 2007 under a lease from the Gusii County Council for a term of 99 years starting 1 March 1997. She had the lease instrument and a letter forwarding the lease. The issue of registration of the 2nd defendant as proprietor was addressed in the letters between the Commissioner of Lands and the District Land Registrar upon complaint of the original plaintiff. The two officers were on fours that they never recognized the registration of the 2nd defendant as proprietor of the suit property. Apart from mentioning that there is a record in favour of the 2nd defendant, the Land Registrar did not have any allotment letter or any proof that whatever monies were required in such allotment letter were paid. Given that the plaintiff challenged the 2nd defendant's title, and it has no support from the Lands office, it was incumbent upon the 2nd defendant to appear in court to defend his title, but he did not, and it is apparent that he does not wish to contest the challenge of the plaintiff to his title. I have no reason to uphold the title of the 2nd defendant.
56. The other party claiming the land is the 5th and 6th defendant. Their case is that they purchased the suit property from the first allottee, one Zachary Ondieki Onchuru. The Land Registrar did affirm to have a White Card showing the name of Zachary Onchuru which was opened on 8 March 1999 and a Certificate of Lease issued to him on the same date. However, she did testify that she has limited documents that would support this registration of Zachary Onchuru. She did not have the allotment letter nor any letter forwarding his lease for registration. She did not mention that she has any Lease instrument in his favour. In their exhibits, the 5th and 6th defendants did produce what they purported to be a Lease instrument in favour of Zachary John Ondieki Onchuru. I have looked at it. It does not indicate any date received for registration, does not indicate any fees paid for registration, and most importantly has no entry in the section for the Presentation Book. The 5th and 6th defendants did not have any receipt to show that this Lease instrument was ever registered and never called Mr. Zachary Onchuru to testify on their behalf yet he is alive. I do not see how anyone can purport to claim that this lease instrument was ever registered for there is absolutely nothing to back up the claim of registration. Given that there was no evidence of any allotment letter or letter forwarding a Lease instrument for registration, I do not see how a genuine Certificate of Lease could issue to the said Zachary John Ondieki Onchuru nor a White Card prepared in his name. I am not persuaded that Zachary John Ondieki Onchuru had any title to transfer to the 5th and 6th defendants and therefore the 5th and 6th defendants cannot purport to have good title to the suit property.
57. Even then, the claim that the 5th and 6th defendants purchased the suit property from the said Zachary Onchuru is extremely doubtful. No sale agreement was listed in the list of documents of the 5th and 6th defendants and attempts to exhibit the same late at trial was rejected. No witness who may have witnessed the purported sale agreement was ever called to testify. In essence therefore, no sale agreement was ever exhibited by the 5th and 6th defendants, and no proof of it was ever provided. There was also no proof of payment of any consideration. The 5th and 6th defendants alleged that they paid Kshs.



3,000,000/= for purchase of the land in the year 2000 and that each contributed Kshs. 1,500,000/= Kenya Shillings 3,00,000/= was a colossal amount in the year 2000; it still is a big amount even at this moment. How Kshs. 3,000,000/= was moved in the year 2000 without there being any trace of it is highly improbable. Of course the 5th defendant averred that he used to keep his money in the house and paid in cash and therefore there cannot be any trace of the money. That, in my opinion, is merely a statement aimed at clouding the fact that there was never any such money that was exchanged in the year 2000 as claimed. As I have mentioned, Kshs. 3,000,000/= was a huge amount in the year 2000. In any case, the 5th defendant testified that the 6th defendant was then employed with an NGO in South Africa, which would mean that there needs to be some sort of transfer of money from South Africa that could be exhibited, but none was. Doubts were raised on whether the 5th defendant could have capacity to raise Kshs. 1,500,000/= in the year 2000 and I do not think that the 5th defendant dispelled the doubts. He of course claimed to have been selling clothes and charcoal since the year 1996. That must have been quite some business to enable him raise Kshs. 1,500,000/= in the year 2000 after just being in business for barely three years, not forgetting that it is alleged that all this amount was kept in a house with absolutely no banking. I appreciate that it is not impossible but in the circumstances of this case, it is highly improbable.

58. Let us not forget that the Land Registrar did testify that she has no record of any document to support transfer of the purported title of Zachary Onchuru to the 5th and 6th defendants. She had no transfer instrument, no consent to transfer, and no surrendered Certificate of Lease in the name of Zachary Onchuru. In essence, she has nothing in her records to support any transfer of title from Zachary Onchuru to the 5th and 6th defendants. Given that the 5th and 6th defendants knew that their title was under challenge, you would have expected the 5th and 6th defendants to at least provide payment receipts to show that they paid the requisite stamp duty and registration fees for transfer of the title into their name. They provided nothing of that sort. All they presented was a copy of a purported transfer instrument from Zachary Onchuru to themselves which I have looked at. It does not have any date of registration on its first page. It does not have any entry for the Presentation Book. The part where the person certifying the signatures of the vendor and purchaser is blank. There is a stamp of an advocate said to be George Chemirmir of Town House, Nairobi. It will however be recalled that the 5th defendant testified that he did not appear before any advocate to execute the instrument of transfer. He said that he merely signed the documents at the Lands Office and left them there and I am at a loss how an advocate from Nairobi (assuming he exists) came to affix his stamp on the document.
59. Apart from all the above, it will be recalled that in the letters of 2009 and 2010 written by the Commissioner of Lands and the Lands Registrar, Kisii, there was never any mention of a Lease in favour of Zachary Onchuru. What they had in their records were purported leases of the 1st and 2nd defendant. How the 5th and 6th defendants sneaked into the scenario sometime in the year 2014 is a mystery. I am persuaded that what happened is that sometime in the year 2014 or thereabouts some documents were prepared purporting that Zachary Onchuru held a leasehold title to the suit property. Some documents were also prepared to purport that Zachary Onchuru sold the suit property to the 5th and 6th defendants. However, as I have taken some trouble to explain, there was never any lease in favour of Zachary Onchuru and there was never any transfer of title from him to the 5th and 6th defendants. I think that the 5th and 6th defendants orchestrated a corrupt scheme sometime in the year 2014 or thereabout to purport that one Zachary Onchuru held a leasehold title which he transferred to them when there was nothing of this sort. My holding is that there was never any good title held by Zachary Onchuru, nothing whatsoever transferred from Zachary Onchuru to the 5th and 6th defendants, and the 5th and 6th defendants hold no legally recognizable title to the suit property.



60. It is my finding that the person with good title is the plaintiff. I had already analysed the documentation presented by the plaintiff and they are very clear on how the plaintiff was allotted the land. It will be recalled that the plaintiff presented minutes where the request to allocate him land was discussed and approved and the said minutes were exhibited. There is a chain of letters exchanged by the relevant authorities authorizing issuance of title to the original plaintiff. There is an allotment letter exhibited by the plaintiff complete with a Part Development Plan. There is proof of payment of the land rents and rates as required in the allotment letter. I am aware that Mr. Begi for the 1st defendant, and Mr. Ochwangi for the 5th and 6th defendants, argued that there was no proof of payment of the money in the allotment letter and no proof of his registration. There is however proof of payment, at least of the annual rent amount in the receipts of 11 September 1997 and 12 September 1997. I have not seen any evidence where the Commissioner of Lands stated that the amounts in the allotment letter had not been paid, and in fact in the letters exchanged in 2009 and 2010, it is apparent that the Commissioner of Lands had no issue with the registration of the original plaintiff as proprietor of the suit property, and indeed, the Land Officer requested for a lease instrument to be issued to him. It appears to me that the purported records of the other parties interfered with his registration and that is why he came to court. Whatever the case, the 1st, 2nd and 5th and 6th defendants, have not demonstrated that they hold any recognizable title to the suit property.
61. There was pleading that the suit of the plaintiff is time barred. I have not seen any submissions in regard to that and I believe that this was dropped. Whatever the case, the plaintiff's suit is not time barred. The evidence shows that it was in 2009 that the plaintiff learnt of the other titles and this suit was filed in 2012. It cannot be said that the plaintiff's suit is time barred.
62. I have no reason not to declare that the person who was allotted the suit property was the original plaintiff and I so declare. I also issue an order to the successor of the 3rd defendant to issue title to the plaintiff as administrator of the estate of the original plaintiff. Having no recognizable title, the 1st, 2nd, 5th and 6th defendants cannot be allowed to continue being upon, utilizing, or deriving benefit, from the suit property. I issue an order that they vacate the suit property together with all persons who claim the land under their purported title within the next 30 days. In default, the plaintiff is at liberty to obtain an order for their eviction at their own cost. Upon lapse of the 30 days above, the 1st, 2nd, 5th and 6th defendants, and all persons claiming under their title, are hereby barred by an order of permanent injunction from entering, being upon, utilizing, or in any other way interfering with the plaintiff's possession of the suit property. The plaintiff did make a claim for damages. The 1st, 5th and 6th defendants, did trespass into the suit property without having any good title. They are liable to pay damages for trespass to the plaintiff. I make an order that the 1st defendant pays general damages for trespass in the sum of Kshs. 1,000,000/=, and the 5th and 6th defendants to pay general damages for trespass jointly and/or severally in the sum of Kshs. 3,000,000/=, this differentiation in damages being in recognition of the fact that the 5th and 6th defendants are in occupation of a larger portion of the suit property. It is unfortunate that the 1st, 2nd and 5th and 6th defendants got in the way of the intention of the original plaintiff to establish a soft board factory. The plaintiff shall also have costs jointly and/or severally against all the defendants, for any purported record of the 1st, 2nd, 5th and 6th defendant, could not have been obtained without some sort of collusion with the Land Registry, Kisii. I have seen no substance in the counterclaim of the 5th and 6th defendants and it is dismissed with costs to the plaintiff.
63. Judgment accordingly.

DATED AND DELIVERED THIS 22 DAY OF FEBRUARY 2024

JUSTICE MUNYAO SILA



JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Judgment delivered in the presence of :

Mr. Bosire Gichana for the plaintiff

Mr. Aboki Begi for the 1st defendant

N/A for the 2nd defendant

N/A for the State Law Office for the 3rd & 4th defendants

N/A on the part of Mr. Ochwangi for the 5th and 6th defendants

Court Assistant – Lawrence Chomba

