



**Monda v Nyakweba & 3 others (Environment & Land Case  
20 of 2020) [2024] KEELC 670 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 670 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 20 OF 2020**

**M SILA, J**

**FEBRUARY 15, 2024**

**BETWEEN**

**YUCABETH MONDA ..... PLAINTIFF**

**AND**

**PAUL MICHIRA NYAKWEBA ..... 1<sup>ST</sup> DEFENDANT**

**ABEL MOSETI OGARO ..... 2<sup>ND</sup> DEFENDANT**

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

**HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction and Pleadings**

1. This suit was commenced by way of a plaint which was filed on 2 July 2020. In the plaint, the plaintiff has pleaded that on 28 March 2008, she became registered as proprietor of the land parcel Nyaribari Masaba/Bokimotwe/1657. She averred that on 5 June 2020, the 2<sup>nd</sup> defendant (Abel Mosei Ongaro) deposited building materials onto the land with intention to develop it claiming that he has title to it. The plaintiff avers that she undertook a search and discovered that on 28 March 2008, the 3<sup>rd</sup> defendant (Land Registrar Kisii), without knowledge of the plaintiff and without following any legal procedure had made entries into the register alleging that the transfer of the land into the name of the plaintiff was done without the knowledge of the owner. She pleaded that there was never any complaint from the previous owner one Samwel Mose Otwor. The plaintiff avers that the entries made by the Land Registrar in the register of the suit land led to issuance of title to the 1<sup>st</sup> defendant (Paul Michira Nyakweba) who transferred his interest to the 2<sup>nd</sup> defendant. In the suit, the plaintiff seeks the following orders :



- a. A declaration that the plaintiff is the rightful owner of the land parcel Nyaribari Masaba/Bokimotwe I/1657 and an order of permanent injunction to restrain the defendants from interfering with her ownership and possession.
  - b. An order of rectification directing the Land Registrar, Kisii, to cancel the comments made after entry No. 3 in the register and also entries numbers 4, 5, 6 and 7 and reinstate entry numbers 2 and 3 in the register.
  - c. General damages for rectification.
  - d. Costs of the suit.
2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a joint statement of defence which was later amended inter alia to incorporate a counterclaim by the 2<sup>nd</sup> defendant. In the amended defence and counterclaim, it is denied that the entries made by the Land Registrar on 28 March 2008 were made without legal procedure. The 2<sup>nd</sup> defendant asserted to have good title to the suit land. He pleaded that the suit land was bought by the plaintiff's estranged husband, one Evans Monda Okworo (Evans Monda) from Samwel Mose Otworu (Samwel Otworu) in the year 1986. That in turn, Evans Monda sold the land to the 1<sup>st</sup> defendant (Paul Michira Nyakweba); that Samwel Otworu directly transferred the land to the 1<sup>st</sup> defendant to avoid delays and expenses; that the 1<sup>st</sup> defendant then sold and transferred the land to the 2<sup>nd</sup> defendant; that at the time the 1<sup>st</sup> defendant sold the land, he had been in open occupation of it for over 12 years. In the counterclaim, the 2<sup>nd</sup> defendant reiterated that he purchased the suit land from the 1<sup>st</sup> defendant through a sale agreement dated 27 April 2020 for a consideration of Kshs. 300,000/= . That at the time of this sale agreement, the 1<sup>st</sup> defendant had been in occupation for over 12 years, having purchased the land from Evans Monda through an agreement dated 12 March 2008. He pleaded that the title held by the plaintiff was obtained fraudulently and is a nullity on the particulars that the plaintiff knew that she had not purchased the suit land yet purported to have so purchased from the original owner; obtaining title without the consent of the Land Control Board; purporting that her title was issued on the same day as that of the claimant in order to defeat his title; lodging a claim to the land despite the 1<sup>st</sup> defendant having been in possession for over 12 years; that vacant possession was given to the 1<sup>st</sup> defendant and not the plaintiff. In his counterclaim, the 2<sup>nd</sup> defendant seeks the following orders :-
- a. A declaration that he is the bona fide proprietor of the suit land;
  - b. Eviction of the plaintiff from the suit land;
  - c. A permanent injunction to restrain the plaintiff from the suit land;
  - d. Mesne profits as may be assessed by the court;
  - e. Costs of the suit and interest.
3. I probably need to add that upon filing the suit, the plaintiff sought orders of injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants from the land pending hearing and determination of the suit. The application was heard by Onyango J, who granted the orders. I think this is what prompted the 2<sup>nd</sup> defendant to amend his pleadings to have a counterclaim and the above prayers. The plaintiff filed a reply to amended defence and defence to counterclaim, which more or less joins issue with the pleadings therein.
4. The 3<sup>rd</sup> and 4<sup>th</sup> defendants (respectively the Kisii Land Registrar and the Attorney General) also filed a joint statement of defence. It is pleaded that though the plaintiff was registered as owner of the suit land, the said registration was illegally procured without following due process. It is averred that the 3<sup>rd</sup> defendant has never processed documents of registration of title in the name of the plaintiff for the suit



land, and does not know how the plaintiff was able to process a title deed without such documents. They pleaded that the alleged transfer of title to the name of the plaintiff was erroneous, unprocedural, and fraudulent, and not supported by any documentation. They pleaded that the title issued to the plaintiff was erroneous and based on a forged entry made on 28 March 2008, without any registration documents, which entry was subsequently reversed. It is pleaded that the 3<sup>rd</sup> defendant acted bona fide within her statutory and constitutional mandate to rectify the anomaly. They asked that the plaintiff's suit be dismissed.

## **B. Evidence of the Parties**

### **(i) Plaintiff's Evidence**

5. PW-1 was the plaintiff. She testified that she purchased the suit land from Joseph Keya Otworu (Joseph Otworu) in the year 1994 and took possession and that she was subsequently issued with title on 31 March 2008. She testified that before getting title, they went to the Keumbu Land Control Board for consent, and that she was accompanied by Samwel Mose, Onchiri Mararo and one Apoko, who were also purchasers from the same vendor. In the year 2020, she found someone had deposited building bricks on the land and she reported to the Chief. The Chief informed her that the depositor of the bricks had a title deed to the land. She went to the Lands office and obtained a Green Card. She testified that her title has never been recalled or surrendered and asserted to be the rightful owner of the land.
6. Cross-examined, she testified that her sale agreement got destroyed when her house got burnt sometimes in 1994. She mentioned that the sale agreement indicated that the parcel No. 1657 was what was being sold. She stated that at that time she was a farmer growing maize and napier grass. She reiterated that she bought the land from Joseph Otworu who died about two years later. She testified that Joseph Otworu had died when they went to the Land Control Board. The person who took them to the Board was Samwel Otworu who was Joseph Otworu's brother. She acknowledged that she did not produce any document from the Land Control Board. What she produced was a mutation form dated 16 August 1994 and registered on 25 August 1994 for the mutation of the land parcel Kisii/Bokimotwe/1630. She nonetheless testified that when she entered into the sale agreement with Joseph Otworu, the land was registered in his name. She acknowledged that Samwel Otworu needed to file succession in respect of the estate of his late brother before he could be able to transfer the land to her and she did state that Samwel Otworu obtained a grant of letters of administration. She however never saw it.
7. She was cross-examined on the relationship she had with Evans Monda. She acknowledged that Evans Monda was her husband and that they got married in 1981. They have five children together. She testified that she lived with her husband up to 1988 when she fell ill and she went back to the home of her parents. She was later taken to Kenyatta National Hospital in Nairobi for treatment by her brothers. She stated that this was because her husband was unemployed and could not afford her treatment. She testified that she no longer lives with her husband as he left the home in 1988 after she fell ill (though at some point in her evidence she also testified that they still live together). She stated that she was then trading in maize at a small scale. She stated that between 1994 and 2008 the land was idle. Between 2008 and 2020 she testified that she did not know who was cultivating it. She denied that her husband sold the land to the 1<sup>st</sup> defendant, though under further cross-examination she testified that she was not sure. She stated that she went to see the Chief in 2021 after she found bricks and sand deposited on the land.
8. Cross-examined by counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendants, she testified that she purchased the suit land from Joseph Otworu for Kshs. 15,000/= which she paid in cash. She was asked who witnessed the



agreement and she mentioned Chweya and Arama who she said are both deceased. The agreement was done in her matrimonial home which is different land from the suit land but which she mentioned is in the same locality. She testified that it is the kitchen of her home which got burnt and this is where she had kept her documents. She could not now recall when the said kitchen got burnt and she affirmed that she did not make a report of the incident. She stated that she got her title deed in 2008 by which time Joseph Otworu had died. She stated that the transfer was effected by his brother Samuel Otworu. She stated that she paid money at the Land's Office for the transfer but she did not have the receipts. She mentioned that it was Samuel Otworu who drew the mutation form to subdivide the land parcel No. 1630 into the parcels No. 1654 – 1658. The parcels of land first came to the name of Samuel Otworu before he transferred title to the parcel No. 1657 to her. The Green Card to the parcel No. 1657 therefore does not have the name of Joseph Otworu. She reiterated that Joseph Otworu had died before he could transfer the land to her and to the other purchasers and transfer to her was thus effected by Samuel Otworu. She did not have a copy of the transfer form. She testified that she used to cultivate the suit land but did not develop it. She stated that she obtained a title deed in her name but she later found that in the Green Card her name had been cancelled by the Land Registrar.

9. Re-examined, she testified that she bought the suit land with her own savings since she was trading in maize and beans. She stated that her husband was not engaged in any business and did not contribute to the purchase price but witnessed the agreement. She testified that at no point was she ever asked to return her title deed and she stated that she still has it.
10. PW – 2 was Samuel Mose Otworu. He mentioned that he was born in 1940. He testified that the plaintiff purchased some land from his brother Joseph Otworu and he was a witness to the sale. He testified that at the time of sale the land was registered in his name. He elaborated that the land was originally owned by his father but it came to be registered in his (Samuel's) name. He testified that he is the one who caused the plaintiff to be registered as proprietor of the suit land when he was also transferring portions of the larger parcel of land to other persons. At this time his brother, Joseph Otworu, was already deceased. He testified that he never dealt with the 1<sup>st</sup> and 2<sup>nd</sup> defendants and never sold any land to them. He asserted that the plaintiff never stole any land from him and he never made any report to the Land's office.
11. Cross-examined by counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendants, he testified that Joseph Otworu did not have title in his name at the time of his death and he reiterated that it was him who transferred title to the plaintiff. He testified that there was a written agreement and that the land was sold to the plaintiff for Kshs. 16,000/=. He explained that his brother's wife came from Meru and he wished to sell his land so that he could move to Meru. She had two daughters. He alleged that she engineered the killing of her husband and thereafter fled to Meru with her two daughters. He testified that no succession was done in respect of the estate of Joseph Otworu since the land had already been distributed by their late father and title was already in his (Samuel's) name because he was the eldest son. He also did not file a succession cause in respect of their late father. He could not recall the land parcel No. 1630 but he affirmed that he is the one who subdivided the land and transferred the subsequent titles. He stated that Joseph Otworu transferred the whole of his share to the plaintiff. He testified that he never went to the Land Control Board with the plaintiff but he nevertheless transferred the title to her.
12. Cross-examined by counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendants, he testified that he subdivided the land and distributed it to persons who purchased land from his brothers. The purchasers were Francisco, Onchiri, Aboko, Mosigari, and the plaintiff. He testified that when the plaintiff bought the land her husband was not present. This evidence however changed when it was put to her that the plaintiff had testified that her husband was present at the time of sale. He did not know whether they went to the



- Land Control Board. He stated that he lives about 100 metres from the land and stated that it is the plaintiff who cultivates the land.
13. Re-examined, he testified that his father owned the land but it got registered in his (Samuel's) name at the time of adjudication. He now stated that he took the plaintiff to the Keumbu Land Control Board before the transfer of title to her.
  14. PW -3 was Sabina Gesare Mose. She is wife to Samuel Otworu. She testified that the plaintiff purchased land from Joseph Otworu, brother to her husband. She was however not present at the time of sale and only came to know that the land had been sold after the death of Joseph when the plaintiff pronounced this during his funeral. She testified that the title was in the name of Samuel Otworu who subdivided the land and transferred the subdivisions to the plaintiff and other persons who had purchased the land. She testified that they went to Keumbu Land Control Board and she also attended. She testified that she went to the Board on two occasions. She testified that the plaintiff built a brick house to mid-level but she did not complete the structure though she used the land.
  15. Cross-examined, she testified that title was in the name of her husband though she never saw it. She stated that her husband agreed to transfer the land to the plaintiff since she purchased it from her brother in law. She testified that after the death of her brother in law, his affairs were closed since he left no wife and no children as they had left. She stated that Joseph Otworu died of illness and was not killed. She thought that her husband is old and his memory is not very good. She stated that her husband held the land on behalf of his four siblings. The land was thus subdivided into four portions. She could not recall the year that she went to the Land Control Board but she stated that by this time Joseph Otworu was already dead. She testified that Joseph had sold land to the plaintiff and one Francisca and had no more land. She mentioned that they have no relation with the plaintiff.
  16. Cross-examined by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, she testified that the family of her husband is made up of four sons and one daughter who got married, and her husband thus divided the land to the brothers. She stated that at the time of subdivision, Joseph Otworu was already deceased and his family had left. She was not present when Joseph Otworu sold the land and she did not know why he sold it. She did not know Evans Monda. She asserted that she attended the Land Control Board despite not having any proof in form of documentation. She stated that Onchiri, Mosigari and Aboko bought portions of land from her, and that Joseph's land was sold to the plaintiff and Francisca.
  17. Re-examined, she stated that the purchasers had taken possession before Joseph Otworu died.
  18. With the above evidence, the plaintiff closed her case.

## **(ii) Defence Evidence**

19. DW – 1 was Paul Michira Nyakweba, the 1<sup>st</sup> defendant. He lives in Eldoret and is engaged in the business of engineering petrol pumps. His evidence was that he wished to buy some land and his mother scouted for the suit land. He proceeded to purchase the land from Evans Monda through an agreement dated 12 March 2008. The agreement was witnessed by two of the brothers of Evans Monda, namely Francis Ogega Ombworo and Mark Makori Ogero. He stated that he inquired from Evans Monda where his wife was and he stated that she was in hospital and that is why he was selling the land because he needed money to release her from the hospital. He testified that he insisted to talk to her and Evans made the call and he spoke to the plaintiff. He testified that Evans Monda showed him documents of his own purchase of the land and Land Control Board (LCB) documents, but he had not processed title to himself, which still read the name of Samuel Otworu. The documents were an LCB application dated 25 August 1994 signed by Samuel Otworu and Evans Monda, an undated application for a search which he stated was prepared by Evans, and a search dated 26 August 1994. He testified



that they proceeded to the home of Samuel Otworu and Evans Monda informed him that he has sold the land to him and requested that transfer be effected directly to the 1<sup>st</sup> defendant. He testified that they proceeded to the Land Control Board and Samuel executed transfer documents to him. He stated that his mother, Evans Monda and Samuel Otworu, followed up on the transfer to him and he used to send money for their facilitation. He testified that Samuel signed the transfer to him and he obtained title in his name in August 2008 and he was issued with a title deed. He testified that his mother took possession of the land on 13 March 2008 which was the day after the sale agreement and she used it for years without anybody, including Samuel and the plaintiff, raising issue. Her mother however started ailing and he brought her to Eldoret for treatment and there was now nobody on the land. He decided to sell the land since he lived in Eldoret and there were threats of boundary encroachment. He proceeded to sell the land to the 2<sup>nd</sup> defendant through a sale agreement dated 27 April 2020. The 2<sup>nd</sup> defendant built some structures but they were destroyed one night. The 2<sup>nd</sup> defendant then called him to inform him of this. He averred that if indeed the plaintiff had a title in her name, she would have sued him a long time ago, as he obtained title in 2008 and used the land thereafter without any disturbance.

20. Cross-examined, he reiterated that Evans Monda and Samuel Otworu had an earlier transaction and all that Evans was waiting for was issuance of title to him. He never met Joseph Otworu and he was not aware that this was family land. He stated that he was not aware of the entries made in the Green Card showing issue of title to the plaintiff and the subsequent cancellation of her name. He denied collaborating with the Land Registrar to cancel out the name of the plaintiff. He testified that he did a search before he bought the land in 2008 but he did not have it. When he bought the land he was aware that it was in the name of Samuel Otworu and he was shown the sale agreement between him and Evans Monda. He however acknowledged that he did not exhibit the said sale agreement. He testified that he was not much involved in the transfer of title to his name as he had delegated the same. He did not go to the Land Control Board and he conceded that he has not produced the consent to transfer. He also did not have the receipts paid for transfer of the land to him. He stated that he did not appear before an advocate to sign a transfer but he gave out his photographs to the Land Registrar for use in the transfer. On the alleged call to the plaintiff, he stated that it was her husband who made the call, and he wouldn't know if the husband had called somebody else who may not have been the plaintiff since he did not know her. He was shown his sale agreement and he acknowledged that it does not indicate the parcel number. The agreement was not written before an advocate.
21. DW – 2 was the 2<sup>nd</sup> defendant. He is a Secondary School teacher. His evidence was that he wished to buy land and he was taken to the Assistant Chief who showed her a copy of the title deed and the land. He was informed that the owner lives in Eldoret. He did a search and dealt with the 1<sup>st</sup> defendant. They wrote a sale agreement dated 30 April 2020 which was witnessed by the Assistant Chief and he subsequently obtained a title deed in his name. On the land was some maize which he was informed was planted by the mother of the 1<sup>st</sup> defendant and this maize was factored in the purchase price of Kshs. 300,000/=. He took possession and dug a pit latrine without any complaint. He then commenced developments. He put up a fence made of posts and barbed wire. He also made a house of bricks up to the window level. This structure was however demolished. He had photographs of the development before and after it was demolished. He was informed that it was one Wycliffe, a son of the plaintiff, who demolished the structure.
22. Cross-examined, he testified that when he was looking for land he did meet Samuel Otworu. He (Samuel) was also selling land but which he found unsuitable and he never interacted any further with him. He had no idea that the land he subsequently purchased was there before owned by Samuel Otworu. He first met the plaintiff and her son Wycliffe in the office of the Assistant Chief after his structure had been demolished. At this time he was yet to get his title. He got his title on 27 May 2020 after his structure had been demolished. The Assistant Chief could not resolve the issue and she advised



them to go to court and it after this that this suit was filed. He testified that the plaintiff is the one currently on the land and uses it to make bricks. He stated that he did a search to check on the history of the land but he did not check the Green Card. He did not know from whom the 1<sup>st</sup> defendant had bought the land and he was not aware that there had been previous transactions on it. He stated that he would not have bought the land if he had known that it had issues. He testified that they went to the Land Control Board and got consent but he did not exhibit it.

23. DW- 3 was Evans Monda Ombworo, the husband to the plaintiff. His evidence was that the suit land was his land having purchased it from Joseph Otwor. At the time of sale the title deed was in the name of Samuel Otwor. He testified that they went to the Land Control Board at Keumbu in 1994 for consent but they did not effect transfer. He subsequently sold the land to the 1<sup>st</sup> defendant in the year 2008 for Kshs. 170,000/= . He testified that he was paid in full and the 1<sup>st</sup> defendant took possession. He testified that before 2008, he was the one in possession since the plaintiff was indisposed and was being treated at Kenyatta National Hospital and was living with her brother in Nairobi while undergoing treatment. He was also unwell and so too one of his sons and he decided to sell the land because he was pressed for money. The plaintiff was not there when he sold the land since she was in Nairobi but he asserted that she was aware that he was selling the land and she raised no complaint. In 2020, he was called by the Chief and informed that there was an issue regarding the land. He was informed that the 1<sup>st</sup> defendant had sold the land and the structure built by the new buyer had been demolished. He testified that he was not aware that the plaintiff held a title to the land and that she never informed him of such. He testified that when he sold the land to the 1<sup>st</sup> defendant, the title deed was still in the name of Samuel Otwor, and that he went to the Land Control Board together with Samuel and the 1<sup>st</sup> defendant for consent. He identified the sale agreement he had with the 1<sup>st</sup> defendant, the LCB application signed by him and Samuel Otwor in 1994, and the application for official search which he signed in 1994 during his dealing with Samuel Otwor. On how he came to know Joseph Otwor, he testified that they worked together in Meru where they were doing the work of splitting timber. He informed him that he wished to sell his land so as to get money to build. He sold to him land measuring 100 X 28 feet for Kshs. 5,000/= and Joseph built his house. He later sold more land to him measuring 28 X 45 feet in 1987. He stated that he married the plaintiff in 1980 and she was a housewife who was not doing any business. He stated that the plaintiff is still his wife and he has come to testify out of his own volition so as to help resolve the dispute.
24. Cross-examined, he affirmed that he married the plaintiff in 1980 and they have five children one of whom is his son Wycliffe. He however does not live together with the plaintiff because he stated that she lives in the home of her parents where she has been living since 2015. He stated that from 1980 to 2015 they lived together and what made her go back to her paternal home is her illness. He explained that when she comes to the matrimonial home she falls sick and she opted to stay at her father's home though she still visits him. He mentioned that she has been ill since 2006. He reiterated that he bought the land in 1984 using his own money as the plaintiff was not working. He had no knowledge of Joseph Otwor selling the land to the plaintiff. He was aware that the land was family land in the name of Samuel Otwor and what he bought was the share of Joseph. He testified that Joseph Otwor died about the year 1988 and he started following up on the title in the year 1994 but did not complete the process since he fell ill. He however used the land for farming while they resided in his ancestral home which is in the same village. He explained that the land is about 500 metres away from his ancestral home. He testified that he called Samuel Otwor and informed him that he was selling the land to the 1<sup>st</sup> defendant and instructed him to transfer the land directly to him. He refuted the evidence of Samuel Otwor that it was not him who purchased the land. He did not know how the plaintiff obtained title in her name as he never told Samuel to transfer title to the plaintiff. He asserted that he does not have a bad relationship with the plaintiff. He explained that if title goes to her he would still owe the 1<sup>st</sup>



- plaintiff and there will be no benefit to the family. He denied that he colluded with the Land Registrar to take away the title of the plaintiff. He stated that he was also called by the Chief when the structure of the 2<sup>nd</sup> defendant was demolished. The plaintiff and his son Wycliffe were present. He stated that the plaintiff complained that he sold land without her knowledge yet she does not wish to have any discussion over the land when she comes to visit.
25. Cross-examined by counsel for the plaintiff, he reiterated that the plaintiff is still his wife. He did not have the consent of the Land Control Board for the transfer of the land from Samuel Otworu to the 1<sup>st</sup> defendant and he explained that he did not attend the Board for this transaction. He elaborated that he went to Meru in 1977 and left in 1987 by which time he had been married to the plaintiff for seven years. He reiterated that he bought land from Joseph Otworu but the land was in Samuel's name. He stated that they went with Samuel to the Land Control Board at Keumbu in 1994 with other purchasers who got title. He did not go to the Board with his wife who was just at home. He testified that consent was given and he was to get his title but he did not have money to effect the transfer into his name. He did not have the consent but only the application. He testified that the plaintiff went to Nairobi in 2007 for treatment. He stated that the plaintiff was not working the land at this time. He repeated his evidence that he opted to sell the land owing to illness of his wife, his son, and his own illness. He stated that he had informed the plaintiff, even before she proceeded to Nairobi, of his intention to sell the land, and that she had no problem with the sale. He elaborated that it was Samuel who transferred the land directly to the 1<sup>st</sup> defendant. He stated that his wife was not doing business other than farming pyrethrum on separate land that they owned and that they bought other land out of the pyrethrum proceeds.
26. With the above evidence, the 1<sup>st</sup> and 2<sup>nd</sup> defendants closed their case.
27. DW – 4 was Oswera Cecilia Harriet, a Land Registrar in Kisii from the year 2021. She testified that the register of the suit land resulted from subdivision of the land parcel No. 1630. Its register was opened on 25 August 1994 in name of Samuel Otworu but no title deed was issued to him. The second entry in the card is dated 28 March 2008 in the name of the plaintiff and the Card shows that she was issued with a title deed. This entry was however crossed with the notes that transfer is forged without knowledge of the registered owner. She had in the file the transfer document from Samuel Otworu to the plaintiff. She testified that it was received for registration on 28 March 2008. There were however no passport photographs affixed on the transfer and no signature on the part of the transferee though it is attested. The title deed issued was dated 31 March 2008 though the register bears the date 28 March 2008. She testified that the crossing out of the name of the plaintiff was done by the Land Registrar at that time. There was no document from Samuel complaining about the transfer to the plaintiff and she did not know if the plaintiff was informed of this. A search done on 16 June 2008 shows the land belonging to Samuel Otworu given that the plaintiff's title was invalidated. She testified that this search was applied for by Samuel Otworu for purposes of the Land Control Board. She testified that the entry that follows is transfer from Samuel Otworu to the 1<sup>st</sup> defendant. She stated that the transfer is signed by both parties though there are no photographs affixed. There were however passport photographs and copies of IDs in in the file. She also had a Land Control Board application and the consent to transfer. The application is undated but the consent is dated 19 June 2008. She stated that Entry No. 6 is transfer to the 2<sup>nd</sup> defendant effected on 27 May 2020 and title deed was issued to him on the same day. This transfer is supported by the requisite documentation though she could not see the Land Control Board consent in her file. Questioned on the cancellation of the name of the plaintiff from the register, she testified that this must have been at the instance of Samuel Otworu. She pointed out that he did a search and must have been aware of the cancellation.



28. Cross-examined by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, she acknowledged that the transfer form to the plaintiff is undated, and not supported by consent of the Land Control Board and neither did she have an LCB application. She stated that no title ought to have issued to the plaintiff without a consent and that her title was not procedurally acquired. There were however attached photocopies of the IDs of the plaintiff and Samuel Otworu though there were no photographs. The signature of the transferee was a thumbprint but it was not indicated which thumb. Regarding the transfer to the 1<sup>st</sup> defendant, she testified that there is an application for LCB consent dated 16 June 2008. The transfer is executed and received for registration. There was also a consent from the Land Control Board dated 19 June 2008. She affirmed that the application for consent was approved as it has a serial number LCR No. 24/2008. She could see passport size photographs of both Samuel Otworu and the 1<sup>st</sup> defendant. According to her the documents relating to transfer to the 1<sup>st</sup> defendant meet the threshold. On the registration of the plaintiff, she could see that the register shows her registration as 28 March 2008 and title deed issued to her on the same date. She testified that the plaintiff thus ought to hold a title deed showing the date 28 March 2008. Her title deed however bears the date 31 March 2008 and according to her such a title ought not to be in existence. She confirmed that there was a Land Control Board application dated 25 August 1994 in the file which shows the purchaser as Evans Monda Ombworo and consent ought to have issued as there is a reference No. LCR 239 of 1994. She did not have any other document relating to this transaction. She testified that it would have been improper for Samuel to transfer the title to the plaintiff and that the plaintiff cannot claim to have obtained a valid title. She pointed out that the application for consent to the plaintiff does not have an LCR number and could not have been presented for issuance of consent.
29. Cross-examined by counsel for the plaintiff, she testified that the transaction of 1994 could have been left midway as there was no transfer document presented. She did not have the LCB consent issued for this transaction and all that is there is the application for consent. She noted however that it does not match any record in the Green Card. There was a search done on 26 August 1994 by Samuel, the registered owner. She acknowledged that the title deed held by the plaintiff emanated from their office and is supported by the entry No. 3 in the register. She could not however tell how come her title deed bears the date 31 March 2008. On the cancellation of the plaintiff's name in the register, she could not see any date on it and no entry number. There was no document to support the said cancellation. The cancellation was noted to be because "transfer of land entry no. above is forged/without the knowledge of the registered owner" but there was nothing to support any forgery. She mentioned that if they discover forgery they do call the registered proprietor or report to the DCI if there is contention, but there was no document to show that this was done. She affirmed that they do not simply cancel a title. In this instance the documentation leading to the cancellation is missing. She nevertheless pointed out that the documents for the transfer of land to the plaintiff were insufficient. She affirmed that it is the cancellation of the plaintiff's title which enabled transfer from Samuel Otworu to the 1<sup>st</sup> defendant. On the transfer from the 1<sup>st</sup> to the 2<sup>nd</sup> defendant, she stated that what she has is the application for LCB consent but not the consent itself. She was not sure why title was nevertheless issued to the 2<sup>nd</sup> defendant.
30. Re-examined, she stated that according to her, the proper title is that of the 2<sup>nd</sup> defendant, and that the plaintiff's title no longer exists.
31. With the above evidence, the 3<sup>rd</sup> and 4<sup>th</sup> defendants closed their case.



### C. Analysis and Disposition

32. I directed counsel to file written submissions and I have seen on record the submissions of counsel for the plaintiff and counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The State Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendants did not file submissions and stated that they will rely on the evidence on record. I have gone through the submissions and taken them into account before arriving at my decision.
33. The plaintiff asserts title to the suit land. She claims that she purchased the land from Joseph Otworu in 1994. At that time the title was in the name of Samuel Otworu. She stated that she was taken to the Land Control Board in 1994 when Samuel Otworu was transferring land to other purchasers. She contends that the transfer was effected in her name. She complains that the Land Registrar illegally cancelled her title. She thus wants the same reinstated and the title of the 2<sup>nd</sup> defendant cancelled. On the other hand, the 2<sup>nd</sup> defendant also asserts title to the same land. He avers that he purchased the land from the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant's explanation is that he bought the land from Evans Monda, who was the owner. Evans Monda on his part averred that he is the one who purchased the land from Joseph Otworu and not the plaintiff, who happens to be his wife.
34. Each party gave his version of events and clearly the facts are disputed. It is thus the duty of this court to analyse the evidence and make a decision, which, on a balance of probabilities, appears to be the more plausible version of events.
35. I will start with the plaintiff's assertion that she purchased the suit property from Joseph Otworu in 1994 which assertion is of course supported by Samuel Otworu. She stated that they had a sale agreement which got burnt and so she did not have it. She stated during cross-examination that those who witnessed the sale agreement were Chweya and Arama who are both deceased. This evidence however changed in re-examination when she added her husband to the list of those who witnessed the agreement. It is also different evidence from that of Samuel Otworu who stated that he was among the witnesses to the sale agreement between his late brother and the plaintiff. It will be recalled that Samuel also testified that the plaintiff's husband was not present during the sale but this evidence quickly changed when it was put to him that the plaintiff had stated that her husband was present. It was also not explained why the plaintiff did not get title in the year 1994 if at all she purchased it at this time. She mentioned that during this period, Samuel Otworu subdivided and transferred land to the other purchasers but why then was she left out? I do not think that this was satisfactorily explained. I am also not persuaded that the evidence of the plaintiff is consistent on the question of the purchase price. She herself testified that she fell ill in the year 1988 and went to Nairobi for treatment. I wonder how then she was able to be in Kisii in 1994 to transact over the suit land. In any event, if she was very ill, how was she able to raise the purchase price between the years 1988 and 1994? She herself stated that her husband had no money to take her to hospital and she sought assistance from her brothers. If she was seeking assistance to be treated from her brothers, how can she then claim to have been in business and making money that was sufficient to buy the suit land? It simply doesn't add up. There is therefore no proof of her purchase of the land and there is serious inconsistency in the evidence of how the plaintiff allegedly purchased the land from Joseph Otworu, and if she purchased the land in 1994, why the same was not transferred to her at that time.
36. In her evidence, she testified that Joseph Otworu died about two years after the sale. That would mean that he died around about the year 1996, according to her version. However, it will be recalled that the plaintiff testified that when they went to the Land Control Board, which was 1994, Joseph was already deceased. Besides, there is actually no evidence of the plaintiff having gone or having been taken to the Land Control Board by Samuel Otworu. The plaintiff did state that the letter of consent got burnt with the agreement but I do not believe her as the Land Registrar was categorical that there is no



consent issued in favour of the plaintiff in her records. Even assuming that the consent letter got burnt, nothing prevented the plaintiff from providing minutes of the Land Control Board meeting which are kept and can be availed if required. I am also unable to reconcile the evidence of the plaintiff when she stated that at the time she entered into the sale agreement with Joseph, the suit land was registered in his (Joseph's) name. She also added that Samuel Otworu took out letters of administration in respect of the estate of Joseph Otworu so that he could transfer the land to her. This is certainly not true. There is no question whatsoever that the land was never registered in the name of Joseph Otworu at any one time and there is no evidence whatsoever of a grant of letters of administration issued in respect of his estate. In addition, the evidence shows that the plaintiff never took possession of the suit land at all. If indeed she purchased the land in 1994, you would expect that she will give possession of the land to somebody in the family. However, in her own words she stated that the land stayed idle.

37. There is also no evidence of consent or transfer to the plaintiff. Interestingly, when Samuel was cross-examined on whether they went to the LCB for consent, his evidence was that there was no Board at that time and he only effected transfer of title to the plaintiff. There was nothing whatsoever to indicate that the plaintiff applied for and was granted consent of the Land Control Board for transfer of the land to her in the year 1994, or even in the years after, prior to getting registered as proprietor of the suit land. Even the transfer instrument is suspect. It has no signature of the transferee and there were no passport photographs attached. The plaintiff herself had no evidence whatsoever of any registration of a transfer instrument to her.
38. When I compare the evidence of the plaintiff on purchase of the land to the evidence of her husband, I am persuaded that the version of her husband is the more probable one. Mr. Monda was very consistent in explaining how he came to purchase the land from Joseph Otworu. He testified that they were friends living in Meru and Joseph Otworu wished to sell some land to him. He elaborated how he purchased the land in bits and wished to have the land transferred to him in the year 1994 but he did not complete the process. He had the application for Land Control Board consent in his hands and the Land Registrar confirmed the booking of the application. He stated that he sold the land to the 1<sup>st</sup> defendant and they went to see Samuel Otworu so that Samuel can transfer the land directly to the 1<sup>st</sup> defendant instead of first transferring it to Mr. Monda.
39. Despite denying that he transferred the land to the 1<sup>st</sup> defendant, I am persuaded by the evidence, that Samuel Otworu indeed transferred the suit land to the 1<sup>st</sup> defendant upon the instructions of Mr. Monda, since he never had any direct dealing with him (the 1<sup>st</sup> defendant). There is a search which he did on 16 June 2008 as affirmed by the Land Registrar. If he had truly transferred title to the plaintiff, he would have raised alarm at this time but he did not. If he did not transfer his interest to the 1<sup>st</sup> defendant how come he has not complained to the police for investigations or taken the transfer instrument displayed by the 1<sup>st</sup> defendant to a document examiner? How did the 1<sup>st</sup> defendant get hold of his passport photographs for purposes of effecting the transfer? There is also on record an application for consent and consent to transfer was issued. The consent is dated 19 June 2008. If Samuel Otworu did not attend the Land Control Board why has he not lodged any complaint for investigations that there is a purported consent to which he is not privy to?
40. In the circumstances of this case, I cannot take lightly the evidence of the Land Registrar, that the transfer of the land to the 1<sup>st</sup> defendant from Samuel Otworu met the required threshold. Save for the oral evidence of Samuel Otworu and his wife, that he never transferred the title to the 1<sup>st</sup> defendant, there is absolutely nothing else to support this contention. As I have stated above, Samuel Otworu has not been bold enough to make a report for investigations as to how the title moved from him to the 1<sup>st</sup> defendant. He has also not brought any evidence to controvert the documents said to have been executed by him to transfer title to the 1<sup>st</sup> defendant.



41. It will also be recalled that the evidence that the 1<sup>st</sup> defendant was in possession of the land through his mother from the year 2008 until the time he sold it in the year 2020 was not contested. If truly the land had not been transferred by Samuel Otwor, you would expect him to be complaining about the presence of the mother of the 1<sup>st</sup> defendant on the land. You would also expect the plaintiff to be completely uncomfortable if indeed she was the one who had purchased the land. But there was no such action from these persons.
42. My analysis of the evidence is that I am persuaded on a balance of probabilities that Samuel Otwor transferred the land to the 1<sup>st</sup> defendant and that is how the 1<sup>st</sup> defendant became registered as proprietor of the suit land. If at all Samuel Otwor purported to transfer the same land to the plaintiff, then this was irregular, inter alia because there was never a consent of the Land Control Board, but most importantly, there is really no evidence to demonstrate that there was ever such transfer that was actually registered. It is a mystery how the plaintiff got to be registered as proprietor of the suit land on 28 March 2008 and title issued to her.
43. My hypothesis is that the plaintiff was aware that her husband wished to sell the land in the year 2008 but she probably was not happy with this intention and what she did was to collude with some crooks in the Land Registry to cause the land to be registered in her own name. It is my further hypothesis that when preparing to transfer the land to the 1<sup>st</sup> defendant, it was discovered that the plaintiff has a title in her name. There must have been some sort of complaint raised from some quarter and that is how the Land Registrar proceeded to delete the name of the plaintiff from the register and record that the transfer to the plaintiff was forged and/or without the knowledge of the registered owner. I think that up to this time Samuel Otwor and Evans Monda and the 1<sup>st</sup> defendant were reading from the same script. I do not know what made Samuel Otwor shift alliance to the plaintiff at a later stage and that is why in this suit he has ended up defending the purported title of the plaintiff. I may of course be wrong in my hypothesis, but whatever the case, as I have stated, the evidence is stark that any transfer of title to the plaintiff was irregular and/or entered through fraud and or mistake.
44. The plaintiff has of course raised issue with the manner in which the Land Registrar cancelled her title. There was certainly no documented evidence of any complaint to the Land Registrar. I am not persuaded that the Land Registrar was within his rights to proceed to cancel the entry in the register in the manner that he did. There is no evidence of any hearing being accorded to the plaintiff or any evidence of the plaintiff's title gazetted for cancellation so that the plaintiff may be heard before such drastic action is taken. It was wrong for the Land Registrar to purport to cancel the title of the plaintiff without following due process, forget for a moment that it is even arguable whether the Land Registrar had such powers in the first instance.
45. However, in the case at hand, despite being of opinion that the Land Registrar went beyond his powers in cancelling the title of the plaintiff, I am afraid that it will count for nothing for this court to demand that this action be reversed, because I have already held that the plaintiff never held a good title to the suit land. I have held that I am persuaded that Samuel Otwor voluntarily transferred the title to the 1<sup>st</sup> defendant which transfer was registered on 3 July 2008. There is no issue regarding the transfer of the land from the 1<sup>st</sup> to the 2<sup>nd</sup> defendant. Thus, although I castigate the Land Registrar for taking matters into his own hands and not following due process, I cannot reinstate title to the plaintiff since she held no good title in the first place. I therefore regret my inability to give the plaintiff the order that her registration in the register be reinstated. Since I see nothing wrong in the title of the 2<sup>nd</sup> defendant, I will order the register of the suit land to remain as it is. In essence I find no merit in the plaintiff's case and it is dismissed with costs to the defendants.



46. I have not forgotten that the 2<sup>nd</sup> defendant has a counterclaim. He first seeks a declaration that he is the bona fide proprietor of the suit land. He deserves this order since I have found that the 1<sup>st</sup> defendant obtained good title to the suit land and the transfer from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant is not disputed. The 2<sup>nd</sup> defendant wants the plaintiff and all persons claiming under her title to be evicted. He also deserves this order. As the rightful proprietor of the suit land it is the plaintiff who is vested with exclusive rights over the suit land. The evidence showed that it is now the plaintiff and persons holding the land under her title that are in possession of the land. I order the plaintiff and all persons claiming under her title to give vacant possession of the suit land to the 2<sup>nd</sup> defendant within 14 days of this judgment. Upon lapse of the 14 days, if they have not given vacant possession, the 2<sup>nd</sup> defendant is at liberty to apply for their forceful eviction. I also issue the order that upon lapse of the 14 days given above, the plaintiff and her servants/agents and such persons claiming under her title, are permanently restrained from entering, being upon, occupying or making use of the suit land, or in any other way interfering with the 2<sup>nd</sup> defendant's quiet possession of the suit land. The 2<sup>nd</sup> defendant also sought mesne profits. However, he gave no evidence whatsoever on the mesne profits and I regret my inability to speculate in the circumstances of this case. I will thus make no order for mesne profits. Lastly the 2<sup>nd</sup> defendant asked for costs of the counterclaim. I award him costs of the counterclaim as against the plaintiff.

47. Judgment accordingly.

**DATED AND DELIVERED THIS 15 DAY OF FEBRUARY 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

**In the presence of: -**

Mr. Nyamurongi for the 1<sup>st</sup> & 2<sup>nd</sup> defendants.

N/A on the part of Mr. Ombachi for the plaintiff.

N/A on the part of the State Law Office for the 3<sup>rd</sup> & 4<sup>th</sup> defendants.

Court Assistant – Lawrence Chomba.

