



Omanwa v Marwanga; Marwanga (Counter Claimer); Omanwa & 2 others (Defendant to the Counterclaim) (Environment & Land Case 303 of 2014) [2024] KEELC 1456 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 303 OF 2014**

**M SILA, J
MARCH 19, 2024**

BETWEEN

DENIS MOGIRE OMANWA PLAINTIFF

AND

CHARLES A. ONYANCHA MARWANGA DEFENDANT

AND

CHARLES A. ONYANCHA MARWANGA COUNTER CLAIMER

AND

DENIS MOGIRE OMANWA DEFENDANT TO THE COUNTERCLAIM

MOSES KIRIAGO RATMO DEFENDANT TO THE COUNTERCLAIM

ATTORNEY GENERAL DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

A. Introduction and Pleadings

1. This suit was commenced through a plaint which was filed on 7 August 2014. The plaintiff pleaded to be the registered proprietor of the land parcel Kisii Municipality/Block 1/544 (the suit land). He pleaded that through a letter of allotment dated 10 January 1984, the Commissioner of Lands allotted the suit land to one Simon Omanwa Osoro who was subsequently issued with a Certificate of Lease on 8 February 1994. He pleaded that thereafter the suit land was transferred to him by way of gift and he got registered as proprietor on 6 September 2000. He complained that the defendant, on 17 July 2014, trespassed into the land, destroyed the fence, pulled down the cedar posts and confiscated assorted building materials, which had been deposited in the suit property in readiness for construction. He pleaded that the acts of trespass have denied him the right of usage and development of the property and



that he is exposed to suffer loss and incur damages and averred that he would claim general damages for trespass as well as mesne profits. He pleaded that the defendant lays claim to the suit land contending that it comprises of Plot No. 40 , Nyanchwa Site & Service Scheme, which plot he claimed is not registered nor does it exist on the ground. In this suit the plaintiff seeks the following orders :

- i. Declaration that he is the registered and lawful owner of the land parcel Kisii Municipality/Block I/544.
 - ii. Declaration that LR No. Kisii Municipality/Block I/544 does not correspond with Site & Service, Plot No. 40, Nyanchwa, the latter which is non-existent.
 - iii. Permanent injunction to restrain the defendant from the suit land.
 - iv. General Damages for trespass.
 - v. Interest on (iv) at court rates.
 - vi. Costs of the suit.
 - vii. Such further and/or other relief that the court may deem fit and expedient to grant.
2. The defendant filed defence which he later amended to include a counterclaim. He averred that the Plot No. 40 Site & Service Scheme became Kisii Municipality/Block I/544 upon amendment of the Registry Index Map. He contended that the document of title of the plaintiff is a fraud. In his counterclaim, he sued the plaintiff, Moses Kiriago Ratemo, and the Attorney General as defendants. He pleaded that he was allotted the Plot No. 40 on 23 March 1977 and was in quiet possession of it until July 2014 when the plaintiff started claiming to own the land. It is further pleaded that between August 2014 and April 2016 the plaintiff transferred the title of the suit land to Moses Ratemo, and that a wall was constructed fencing off the suit land together with an adjoining plot. He contended that the title of Moses Ratemo is a fraud inter alia because when the suit was filed in August 2014, the title was in the name of the plaintiff yet the said Moses Ratemo claims to have obtained registration on 23 June 2011. He avers that the transfer was done without consent from the Lands officer and consent from the Land Control Board. In his counterclaim he seeks orders to have the transaction between the defendants to the counterclaim declared null and void, a permanent injunction to restrain them from the land, and an order of eviction.
3. Moses Kiriago Ratemo (Moses Ratemo) the 2nd defendant to the counterclaim, appointed counsel and filed defence to the counterclaim. He pleaded that he purchased the suit land from the plaintiff and that the title Kisii Municipality/Block I/544 is currently registered in his name. He pleaded that title was transferred to him on 23 June 2011 after he obtained consent to transfer from the Lands Registry. He invited strict proof that the suit title is the same as Plot No. 40. He further pleaded that any claim to the land by the counterclaimant is extinguished by Section 7 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya.

B. Evidence of the Parties

4. PW – 1 was the plaintiff who described himself as a businessman cum politician. He testified that his father, Simon Omanwa Osoro, was issued with an allotment letter by the Commissioner of Lands on 10 January 1984 for an unsurveyed plot. That his father paid the requisite fees and a lease was subsequently prepared in his name bearing the title Kisii Municipality/Block I/544. He stated that his father took possession and dug a pit. He then transferred the land to him as a gift on 6 September 2000 and he took possession. He testified that on 17 July 2014, the defendant trespassed into the land, pulled down the cedar posts, and damaged the fence and building materials, alleging that this land was



- Plot No. 40. According to him the two plots are not the same and he did not know where Plot No. 40 was located. He produced the allotment letter, the lease, the white card (leasehold register), the Part Development Plan (PDP), certificates of lease and search dated 18 July 2014. He testified that he paid rates for the property and produced some rates demand notices and rates payment. He denied forging any document or that his title is fraudulent.
5. Cross-examined by counsel for the defendant, he testified that he is no longer the registered proprietor of the land as he sold it to Moses Ratemo on 27 June 2014, though curiously, he stated that he effected transfer to him on 23 June 2011. He was categorical that as at 7 August 2014 (when he filed suit) he was not the registered owner of the suit property and had relinquished title to Moses Ratemo. He claimed that he filed suit because the person he sold the land to was complaining. He asserted that he does not know the Plot No. 40 Site & Service though he conceded not to have sought the services of a surveyor. He did not have the consent to transfer the land from his father to himself. He acknowledged that he was 13 years old (in the year 2000) when the land got registered in his name. On the transfer to Moses Ratemo he stated that he applied for consent to transfer from the Commissioner of Lands but he did not have the application. He mentioned that he had made an application for consent of the Land Control Board but realised that it is not needed. He stated that he last went to the property in 2014 when the fence was destroyed.
 6. Cross-examined by counsel for the 2nd defendant to the counterclaim, he testified that he sold the land to Moses Ratemo in 2011 and payment was made in instalments. He reiterated that Plot No. 40 Site & Service is not the same as Kisii Municipality/Block I/544. He acknowledged that he was arrested and charged in connection with the suit property and the case was then pending. He stated that he did not know the counterclaimant there before and only came to know about him when he trespassed into the property.
 7. PW – 2 was Steve Mokaya, the Land Registrar, Kisii. He had with him the parcel file for Kisii Municipality/Block I/544. He testified that the first registration was done on 8 February 1994 in the name of Simon Omanwa Osoro. On 6 September 2000 the property was transferred to the plaintiff by way of gift. On 23 June 2011 transfer was effected to Moses Kiriago Ratemo. He testified however, that this entry was cancelled on 23 May 2016 with remarks “Restriction: Suspected dealings, fraud detected for further investigation.” He had two letters dated 27 October 2014 and 18 October 2019 from the Directorate of Criminal Investigations (DCI) asking for documentation as they were conducting investigation on fraud.
 8. Cross-examined, he testified that in his file there is a transfer of lease from the plaintiff to Moses Ratemo and that there was also an application for consent and a letter to the Land Registrar. He explained that since it was a leasehold it did not require consent of the Land Control Board but a consent from the Land Administration Officer. He did not have in his file any record relating to the transaction between Simon Omanwa and the plaintiff. He was not stationed in Kisii when the entry relating to suspected fraud was made. He testified that title is registered in name of Denis Mogire Omanwa (the plaintiff) though he held the opinion that all the documents in the parcel file are fake including the lease instrument. According to him these documents were merely planted in the file. He stated that they have phased out the documents in Block I, with a view of registering them afresh.
 9. With the above evidence the plaintiff closed his case.
 10. DW – 1 was Alfred Moffat Omundi Michira. He testified that the defendant/counterclaimant lives in the United States of America and donated a power of attorney to him. He testified that he went to the land in 2016 and found that someone had put up a perimeter wall. He produced various documents to support the ownership of the land by the defendant/counterclaimant including documents from



the National Housing Corporation directing issuance of title to the defendant/counterclaimant for the suit land.

11. Cross-examined he testified that the defendant is yet to obtain a certificate of lease. He stated that the Plot No. 40 was transferred to the defendant in the year 2008. In the year 2014 payment of Kshs. 65,000/= was made to the National Housing Corporation by way of Banker's Cheque. He testified that the defendant took possession in 2008, dug a foundation, a well, and put up a fence and had materials on site. He testified that the plot was surveyed around 2008 and he had a beacon certificate though it showed the date 20 March 1990. He stated that the plot was initially in the name of Henry Marwanga who is the father of the defendant. He knows Simon Omanwa Osoro, who he stated is married to his first cousin and is still alive. On relation of the Plot No. 40 to the title Kisii Municipality/Block I/544, he referred to the letter dated 20 August 2014 from the National Housing Corporation wherein the Corporation requested title for Plot No. 40 to be processed in name of the defendant under the title Kisii Municipality/Block I/544. He testified that the title is yet to be processed. He stated that he made reports to the police and the Lands office and that the plaintiff and his father were charged with forgery but they were acquitted due to insufficient evidence. He testified that he knows Moses Ratemo who is married to a daughter of his cousin, and that he owns the Plot No. 41. He had a problem with the documents showing that the land was transferred to Moses Ratemo on 23 June 2011 since when the plaintiff filed suit in 2014 he claimed to be the owner of the land. He elaborated that the plots at Nyanchwa were Site & Service Plots under the National Housing Corporation and one has to clear the Corporation Loan in order to get title. He was cross-examined on the allocation and payment to the National Housing Corporation (NHC). He could see the allocation letter to Henry Marwanga that he had was dated 23 March 1977 and required Kshs. 700/= to be paid by 30 April 1977. He could see that payment was made on 4 May 1977. He did not have a report from a surveyor to show that Plot No. 40 is the same as Kisii Municipality/Block I/544. He was also questioned on the beacon certificate which bore the name of Henry Marwanga but not the surveyor. He did not have an approval document for the transfer of the Plot No. 40 from Henry Marwanga to the defendant.
12. With the above evidence the defendant/counterclaimant closed his case.
13. Moses Kiriago Ratemo testified in defence of the counterclaim against him. He works as an accountant at the Kisii County Assembly. He testified that he met Simon Omanwa who informed him that he was selling a property that was registered in the name of his son. He did a search and confirmed that the title was in the name of his son Dennis (the plaintiff). He stated that Simon and Dennis then sold the land to him and he became registered as proprietor. He got registered as proprietor on 23 June 2011 and was issued with a Certificate of Lease. He affirmed that he did some developments on the land. He also raised issue that the counterclaim has no verifying affidavit.
14. Cross-examined, he testified that he developed the land as nothing was served upon him stopping him from developing. He has worked with the Kisii County Government since 2013 and prior to that he was working for the Municipal Council of Kisii. He denied that because he works in the County he has influence. He stated that he visited the property in 2011 before buying and he found it vacant with a live fence. He did a search which confirmed that the land is registered in the name of Dennis. He took possession in 2011. He affirmed that he was summoned by the Police after Alfred Michira had filed a complaint. He was not charged. He stated that he has never been summoned by the Land Registrar, the Court, the NHC or the Commissioner of Lands over his title. Regarding the Plot No. 40, he stated that he does not know where it is and did not know if there exists a relationship between the Plot No. 40 and Kisii Municipality/Block I/544.
15. Cross-examined by counsel for the counterclaimant, he affirmed that he owns the neighbouring plot Kisii Municipality/Block I/543 which he stated he also bought from somebody else. He did not know



whether they fall within Kisii Site & Service Scheme. He averred that he does not have a good history of the Site & Service Scheme and could not confirm which of the two plots he came to own first. He testified that prior to purchase they made an application to the Land Control Board. The application he had is dated 30 June 2014. He stated that consent was given by the Land Control Board and after that they completed the transfer form (though he did later aver that he thought that consent was given by the Lands officer). He did not have the said consents. He had a transfer form dated 23 June 2011. He mentioned that he was issued with a Certificate of Lease on 23 June 2011 but he acknowledged that he had not produced it. He claimed that the same is with Simon Omanwa because they are family. He said that it was Simon Omanwa who was following up on the transaction on their behalf since they were young (though he did acknowledge that he was 34 years in 2011 and was working with the Municipal Council). He affirmed that it was Dennis and not himself who filed suit in 2014 despite him having obtained title in 2011. According to him, Dennis was protecting his (own) interest. He however changed to say that he thought that he requested him to file suit since he was the one who sold the land to him. He was not aware of any cancellation of the title of Simon, Dennis, or himself. He was referred to a letter dated 8 January 2019 from the Kisii County Government which required payment of Kshs. 65,230/= to get a lease, which letter was copied to him. He did not know whether he got the letter and could not recall if he paid this amount of Kshs. 65,230/=. He could not recall the sequence of events leading to this letter.

16. I questioned him on the developments on the plot. He testified that he developed a four storey building in the parcel Kisii Municipality/Block I/543 though the verandah pillars are in the disputed parcel Kisii Municipality/Block I/544. He also has a store used as a sentry in the suit land whereas the rest is used for parking.
17. The State relied on the evidence of the Land Registrar who had earlier testified.
18. With the above evidence the defendants in the counterclaim closed their case.

C. Analysis and Disposition

19. I invited counsel to file submissions, which they did, save for the State Counsel who mentioned that he would rely on the evidence on record. I have taken these into account before arriving at my decision.
20. What I find pretty interesting is that the person who filed this suit acknowledges not to have title to the suit property at the time that he filed suit despite him making pleadings as if he owned the property. It will be recalled that in his plaint he has sued contending to be the owner of the suit land and that the defendant had trespassed into it. It will again be recalled that his first prayer in the plaint is that it be declared that he is the registered owner of the parcel Kisii Municipality/Block I/544; his second prayer in the plaint is for a declaration that the title Kisii Municipality/Block I//544 is not the same as Site & Service Plot No. 40; his third prayer in the plaint is for a permanent injunction to be issued against the defendant; his fourth prayer in the plaint is general damages for trespass; his fifth prayer is for interest; his sixth prayer is for costs; and his seventh prayer is for any other relief. Now if it is the case of the plaintiff, as indeed it is, that in the year 2011 he sold and relinquished his interest in the suit property to the 2nd defendant in the counterclaim, then it follows that he had no interest in the suit land in the year 2014 to enable him file suit. When one sells land and transfer is effected, he ceases to be the owner of the property and his interest in the property ceases. The rights to the land are now no longer vested in him but are vested in the new owner. In any event, the plaint as drafted does not disclose that the plaintiff had sold the land in 2011. The pleadings assert ownership of the land, and indeed, as I have pointed out, his first prayer is that he be declared to be the registered and lawful owner of the suit property. He cannot get such a declaration if he had already sold and transferred the land. Even the other prayers cannot be granted to the plaintiff as he had already transferred his interest to



the 2nd defendant to the counterclaim. There is certainly no need of spending too much time on this plaint, for it has no substance, given that it was filed by a person without locus standi. I will proceed to straight away dismiss it with costs to the defendant in the main suit.

21. What remains for determination is the counterclaim of the defendant. There had been an attempt, when the 2nd defendant to the counterclaim testified, to attack the counterclaim for want of a verifying affidavit. It appears that this issue was dropped as I have not seen any submissions on it. Whatever the case, in the circumstances of this case, I would have considered it a technicality as no party has been prejudiced by the lack of it, and I would still have maintained the counterclaim. I will now address myself on it. There is also another technical issue raised by Mr. Ochwangi, learned counsel for the plaintiff, contesting the power of attorney held by Mr. Michira but I see nothing in it because the power of attorney was produced and it looks fine to me.
22. The gist of the counterclaim is that the suit property is the same as Plot No. 40 Site & Service Scheme Nyanchwa and that the defendants to the counterclaim fraudulently manufactured a title reading Kisii Municipality/Block I/544. The first issue I wish to address myself is whether the Plot No. 40 Site & Service Scheme exists. Although the 1st and 2nd defendants in the counterclaim assert that there is no plot known as Plot No. 40 Site & Service Scheme, the fact of the matter is that such plot exists. There is indeed ample evidence of its existence as provided by the counterclaimant. First, the existence of the Site & Service Scheme in Kisii is notorious and this court can even take judicial notice of it for this court has dealt with several cases arising from the Kisii Site & Service Scheme. It is mischievous for the 1st and 2nd defendants in the counterclaim to feign ignorance of the Site & Service Scheme. Site & Service Schemes are housing schemes by the National Housing Corporation who collaborated with the now defunct local authorities to have persons allocated land and develop them. The allocation was on loan basis with the allottees being allowed to pay in instalments. That also is common knowledge. It is also elaborated in a newspaper excerpt exhibited by the counterclaimant. That excerpt is an advertisement placed by the National Housing Corporation in the Daily Nation newspaper of 16 August 1976. It invites applications for 169 plots for the Site & Service Scheme at Kisii. The advertisement provides that the application forms were to be returned before 26 August 1976 together with an application fee of Kshs. 50/= to the Town Clerk, Kisii Town Council.
23. In our case, the counterclaimant asserts ownership of the Plot No. 40 Site & Service Scheme and there is ample evidence that there was allocation of such a plot to Henry Marwanga. The counterclaimant produced a receipt number 12666 dated 26 August 1976 for Kshs. 50/= being application fee payment for plots in the Site & Service Scheme which is in tandem with the advertisement that I have alluded to above. The counterclaimant also exhibited the letter of allotment issued in favour of Henry Marwanga. That letter is dated 23 March 1977 and informs Henry Marwanga that he has been allotted the Plot No. 40 Kisii Site & Service Scheme Phase I. He was required to pay Kshs. 760/= for this allocation. The counterclaimant exhibited receipt number 17695 dated 4 May 1977 demonstrating payment of this amount for the allocation of the Plot No. 40. There is also exhibited a letter dated 29 June 1977 from the Town Clerk, Kisii Town Council, addressed to Henry Marwanga, asking him to attend a meeting scheduled for 6 July 1977 so that the procedure for payment of the loan can be explained. I wonder on what basis it is being alleged that Plot No. 40 is a non-existent plot. It certainly does exist.
24. From the documentation, I am persuaded that the Plot No. 40 was allotted to Henry Marwanga. This is discernible from the evidence I have alluded to above. There is also evidence that Henry Marwanga was required to pay rates and rents for I have seen a demand for rates from the Kisii Municipal Council asking for Kshs. 31, 550/= as rates from 1991 to 2002. The counterclaimant exhibited a receipt number 90203 for Kshs. 5,000/= being payment of rates. There are also other demands for rates dated 18 March 2004 asking for Kshs. 11,413/= as rates for the year 2004, and another demand issued on 15 September



- 2008 asking Henry Marwanga to pay Kshs. 29,550/=. Apart from rates demands, there is also evidence of demands for loan repayment for the plot. There is the demand dated 27 February 1995 asking Henry Marwanga to pay Kshs. 36,460/=. There is another demand dated 23 January 1997 informing Henry Marwanga that he is in arrears of Kshs. 16,740/= and informs him to pay this amount and thereafter to be paying instalments of Kshs. 372/= every month. I have seen receipts for loan repayment one of them being the receipt number 560636 for Kshs. 5,000/=. I am in no doubt that Plot NO. 40 Site & Service Scheme was indeed allotted to Henry Marwanga.
25. It is the counterclaimant's position that Henry Marwanga transferred the plot to him on 14 December 2008 and he exhibited a form of transfer for the same. I see nothing wrong in that instrument meaning that Henry Marwanga transferred his interest to the counterclaimant. I have seen evidence that the counterclaimant was recognized by the Municipal Council of Kisii as the rate payer for I have seen a demand for rates issued on 16 July 2014 asking the counterclaimant to pay rates of Kshs. 10,350/=.
26. Now, we know for sure that Plot No. 40 exists. The question is : is this Plot No. 40 same as the land parcel Kisii Municipality Block I/544. My answer is in the affirmative and this comes out in the letter dated 20 August 2014 written by the National Housing Corporation. The Corporation knows the Plots it allocated and their subsequent numbering in form of title. In that letter, the Corporation pronounces that Charles Onyancha Marwanga, the counterclaimant, has cleared the loan owed to the Corporation and recommends the processing of title to him. That letter provides the details of the property to be titled to be Kisii/Block I/544, which is the suit property. I am not in any doubt that the Plot No. 40 is the same as Kisii Municipality Block I/544. If the 1st and 2nd defendants to the counterclaim wished to contest this letter, they ought to have come with evidence to the contrary, showing that the Plot No. 40 is not the same as Kisii Municipality Block I/544. In fact, all they kept saying was just by way of words, that the Plot No. 40 does not exist, or it is not Kisii Municipality Block I/544. They brought nothing to contradict the letter of 20 August 2014 from the Corporation. If they thought that the Plot No. 40 did not exist, or was elsewhere, they could have brought a survey report to show that it does not exist or that it falls in other land. They did neither and I am sure that even they know that this Plot No. 40 is the same as Kisii Municipality/Block I/544 only that they wish to feign ignorance.
27. But before I go very far, let me assess the contention of the 1st and 2nd defendants that they are the ones who have good title to the suit property. Their case is that this property was allotted to Simon Omanwa Osoro through a letter of allotment dated 10 January 1984. I have seen that purported allotment letter and it requires payment of Kshs. 20,010/=. I have seen no evidence of payment of such amount of money whereas the counterclaimant did provide proof of payment for the allocation of the Plot No. 40 made by Henry Marwanga. It is also the case of the 1st and 2nd defendants to the counterclaim that a Lease in favour of Simon Omanwa Osoro was issued sometimes in 1994. I have seen what is displayed as the lease which is purportedly signed by the Commissioner of Lands on 7 January 1994 and forwarded for registration through a letter dated 10 January 1994. That lease has no evidence of it having been received for registration or having been booked in the Presentation Book. Those very important entries which would prove registration are blank in that purported lease. It was further the case of the 1st and 2nd defendants to the counterclaim that Simon Omanwa Osoro transferred his interest to Dennis Mogire Masese the 1st defendant to the counterclaim on 6 September 2000 as a gift. The transfer documents were never produced and the Land Registrar stated that he had none. Even if we say that the transfer instrument got lost where is a receipt to demonstrate payment for any transfer ? It in fact emerged in evidence that in 2000 the said Dennis Mogire was a minor aged 13 years. There is no entry in that register that the transfer is to a minor forget for a moment that there is not a single document evidencing this purported transfer. It will also be recalled that the plaintiff claimed to have



taken immediate possession after the land was transferred to him. Does he want this court to believe that he took possession and started using the land when he was 13 years old ?

28. The 1st and 2nd defendants continue to contend that Dennis Mogire transferred his interest to Moses Kiriago Ratemo (Moses Ratemo) on 23 June 2011 and a Certificate of Lease was issued to Moses Ratemo on the same day. Save for the transfer instrument there is nothing else to back up this transaction. There is no receipt produced for registration of the transfer and no receipt demonstrating payment of stamp duty. And despite Moses Ratemo claiming to have purchased the suit property, not only was the purchase price not mentioned, but no proof of its payment given. Interestingly, Moses Ratemo displayed no Certificate of Lease ! There was only produced a copy of the leasehold register (White Card) showing that Moses Ratemo got registered as proprietor on 23 June 2011 and a Certificate of Lease was issued to him. But even this copy of the register raises more questions than answers. When the plaintiff filed suit, he asserted to be the owner of the suit land and swore a verifying affidavit that what was drafted in the plaint was true. As part of his exhibits, he produced search certificates dated 8 April 2014 and 18 July 2014, showing that he is the registered proprietor of the suit property as at those dates. Where did the registration of Moses Ratemo as proprietor suddenly emerge when it was nowhere in August 2014 when this case was filed ? Even the rate payment receipts produced are only of 2014 and they are in the name of Dennis Mogire Omanwa and there is nothing that was produced to show who was paying rates in the years before that. If ever Simon Omanwa Osoro was registered as proprietor from 1994 you would at least expect some form of rate payment from him up to the year 2000, and after that, to the year 2011, some rate payments from the plaintiff. None were exhibited.
29. My hypothesis is that all these documents of the 1st and 2nd defendants to the counterclaim are manufactured documents aimed at hoodwinking all and sundry that there was an allotment to Simon Omanwa Osoro, then a transfer to Dennis Mogire Omanwa, then another transfer to Moses Kiriago Ratemo. These documents could not have been prepared without collusion and personal fraudulent involvement by the 1st and 2nd defendants in the counterclaim. As I have demonstrated in my analysis above, the documents are dubious and fake. In any event now that we know that Plot No. 40 is the same as the parcel Kisii Municipality/Block 1/ 544, and falls within the Site & Service Scheme, the only way that Simon Omanwa and the 1st and 2nd defendants, could have obtained title was through the National Housing Corporation but they have nothing from the Corporation.
30. It is thus my finding that neither the 1st nor the 2nd defendant to the counterclaim ever held, or hold, good title to the land parcel Kisii Municipality/Block 1/544. What they hold is a fraudulent title that is liable to be cancelled pursuant to Section 26 (1) (a) and (b) which provides as follows :

26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
31. As I have said earlier, the title herein that is being waved by the 1st and 2nd defendants to the counterclaim could not have been procured without their personal fraudulent involvement. Their title is thus subject to cancellation pursuant to Section 26 (1) (a) above. Whatever the case, such title is illegal and acquired unprocedurally since there is nothing affirming that it originated from the National Housing Corporation and could only have been obtained through a corrupt scheme. It is thus also subject to cancellation pursuant to Section 26 (1) (b) above. I proceed to order its cancellation.
32. I am persuaded that the counterclaimant has proved his case to the required standard. Indeed he produced evidence that title to the suit land is yet to be issued as the letter of the National Housing Corporation dated 20 August 2014 requesting the Commissioner of Lands to issue title to him was yet to be acted upon given that the 1st and 2nd defendants to the counterclaim purported to already be holding title and given the pendency of this suit. I proceed to order the Director of Land Administration and/or the National Land Commission or the office in charge of issuing leases to issue a leasehold title to Charles Onyanchara Marwanga, the counterclaimant herein. Upon issuance of the requisite title document the same be registered in the usual manner. I further order the Land Registrar, Kisii, to expunge all records purporting that title to the suit land was ever with Simon Omanwa Osoro or the 1st and 2nd defendants to the counterclaim. I nullify the register (white card) which indicates that title was ever with these three individuals. I grant the counterclaimant possession of the suit property forthwith and issue an order permanently restraining the 1st and/or 2nd defendants to the counterclaim from the suit land. If at all either the 1st and/or 2nd defendant are in possession, or in use of this land, they must cease forthwith and must immediately give vacant possession to the counterclaimant. From the date of this judgment the counterclaimant is at liberty to do whatever he wishes with the suit land and if he wants it restored to the vacant state that it was before the developments made by the 1st and/or 2nd defendants to the counterclaim, he can issue a notice of 14 days requiring the 1st and/or 2nd defendants to the counterclaim to cart away their developments otherwise the property will be taken as it is. The counterclaimant will have the costs of the counterclaim against all defendants in the counterclaim jointly and/or severally for the fake title of the 1st and/or 2nd defendants in the counterclaim could not have been generated without some sort of collusion by personnel in the Kisii Lands Registry.
33. Judgment accordingly.

DATED AND DELIVERED THIS 19 MARCH 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

