



**Owiti v Jalaram Academy Registered Trustees & 2 others (Civil Appeal
207 of 2019) [2023] KECA 575 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 575 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 207 OF 2019
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
MAY 12, 2023**

BETWEEN

ENOCK ISRAEL OWITI APPELLANT

AND

JALARAM ACADEMY REGISTERED TRUSTEES 1ST RESPONDENT

ERICK OUMA OKEYO 2ND RESPONDENT

THE KISUMU DISTRICT LAND REGISTRAR 3RD RESPONDENT

*(Being an Appeal from the judgment and decree of the Environment
& Land Court at Kisumu (Kibunja, J.) dated 6th February, 2018 in
Kisumu ELC No. 283 of 2016 formerly Kisumu HCC No. 190 of 200)*

JUDGMENT

JUDGMENT OF TUIYOTT, JA

1. Land known and described as Kisumu Municipality Block 10/568 (the suit land) is the subject of the dispute in this appeal. It measures 0.3575 hectares and is adjacent to a school owned by Jalaram Academy Trustees Registered (Jalaram or the 1st Respondent).
2. At the material time to the proceedings before the Environment and Land Court (ELC) at Kisumu, Enock Israel Owiti (Enock or the 1st appellant), a Kenyan, was resident and working for gain in the United States of America. He visits his family in Kenya from time to time. It was his case before the ELC that on one of those visits he purchased the suit property from one Joshua Obegih Orinah (Joshua). This would be on 7th December, 2001. Prior to the purchase, his lawyers conducted a search over the property and the result was that it was registered in the name of Joshua. After the transaction, he conducted another search and the search certificate dated 7th December, 2001 showed the land to be now registered in his favour. Yet another search conducted on 17th July, 2010 yielded the same outcome.



3. After buying the property, Enock paid the rates at the Kisumu Municipal Council and was issued with a rates clearance certificate dated 10th October, 2008. He subsequently paid the annual rates and has receipts for 9th July, 2008, 2009, 2010 and 2011.
4. All was well for Enock until the year 2009. While on a visit to Kenya, his daughter Stacy Adhiambo Owiti (Stacy) conducted a search on 11th August 2009 which showed that the suit land was registered not in the name of her father but in favour of Jalaram. On receiving this information, Enock immediately traveled to Kenya and to Kisumu. He visited the then Kisumu Municipal Council (the council) where a Mr. Momanyi, the deputy Town Clerk confirmed to him that his name was still in the Council's roll of rate payers. He thereafter lodged a complaint with Kisumu Central Police Station.
5. At trial, answering questions under cross-examination, Enock stated that although the consideration for the purchase was Kshs. 1,000,000.00 as set out in the sale agreement, the transfer reflected Kshs. 500,000.00 but that he was happy to pay any shortfall of stamp duty if called upon to do so. It was also his testimony that he was aware that the interest in the property was a lease from the Government of Kenya (GOK) and while he believed that Joshua had the lease document, he did have a copy with him.
6. Peter Simon Kayila (PW2) is an ICT officer with the County Government of Kisumu. His evidence was that the records at the County, inherited from the Council, showed Enock to be on the roll of rate payers in regard to the suit land from 8th August, 2006. In July, 2009, one Erick Okeyo (Okeyo or the 2nd respondent) visited the Council with a title in his name whereupon PW2 informed him that the land was already registered in favour of Enock. For that reason, PW2 declined to register Okeyo as a rate payer. Later, Okeyo returned with a letter dated 30th July, 2009 from the District Land Registrar asking that PW2 amends the roll to read him (Okeyo) instead of Enock.
7. Three witnesses testified on behalf of the defence. One of them was Gordon Ochieng (PW3). At the time of his testimony, PW3 was a Senior Assistant Director of Land Administration with the Ministry of Lands. The suit land is a leasehold property leased from the Government of Kenya to Okeyo. Following an allotment vide a letter dated 18th June, 2009 a lease of 99 years from 1st July 2009 was prepared in favour of Okeyo and the lease forwarded to the Land Registrar Kisumu for registration on 6th July, 2009. Regarding the alleged lease in the name of Joshua, his evidence was that he had not seen any such lease and the only lease document in respect to the suit property was that to Okeyo and transferred to Jalaram.
8. Commenting on the official searches in favour of Enock, DW3 stated that an official certificate of search is prepared by the Land Registrar from documents in the registry over a specific plot.
9. Jalaram is an incorporated and registered trust and Ashok Khesi Shah (DW2) is one of the trustees. The suit land is adjacent to Jalaram Academy, an educational facility from nursery school to form four. The school purchased the suit land from Okeyo. The transaction was conducted by Mitchell Menezes (DW1), advocate on their behalf. DW1 narrated how he carried out those instructions.
10. Okeyo gave him a copy of a letter dated 3rd November, 2008 in which he applied to the Commissioner of Lands for allocation of the suit land. A letter of 5th March 2009 from the District Land Registrar informed the Commissioner there had been no registration over the suit land. There was then a letter of 8th June, 2009 from the Town Clerk Kisumu to the Commissioner confirming that the land was open space and no title had issued over it. DW1 also produced a copy of a letter of allotment dated 18th June, 2009 from the Commissioner to Okeyo and his acceptance of 22nd June, 2009 in which he also forwarded a cheque for payment of the fees required. Okeyo also gave the advocate a lease over the property registered on 7th July, 2009.



11. Prior to completing the transaction, attention was brought to DW2 regarding a claim by Enock over the property. DW2 made certain inquiries and was eventually satisfied that Okeyo was the lawful owner of the suit land. Those inquiries and the outcome, in my view, implicate on the determination of this matter and are discussed in detail later in this decision.
12. In a counterclaim dated 7th January, 2010, Jalaram prayed for the following orders (slightly paraphrased):
 - a. A declaration that it is the sole legal and registered owner of Kisumu Municipality Block 10/568 and is entitled to exclusive and unimpeded right of possession and occupation of the suit property in terms of the Certificate of Lease issued to it.
 - b. A declaration that Enock, whether by himself or his servants, agents, employees, relatives or any other person acting through or under or otherwise howsoever, is wrongfully in occupation of the suit property and is accordingly, trespassing on the same.
 - c. A declaration that Enock, whether by himself or his servants, agents, employees, relatives or any other person acting through or under or otherwise howsoever, is not entitled to remain on the suit land.
 - d. A temporary injunction restraining Enock, his agents, servants, employees, relatives and/or any person claiming any interest under him or acting through him or otherwise in respect of the suit land, from trespassing on, developing, erecting any structures on, transferring, alienating, interfering and in any way dealing with the said piece of land.
 - e. A permanent injunction restraining the Enock whether by himself or his servants, agents, employees, relatives or any other person acting through or under him or otherwise howsoever, from remaining on or continuing in occupation of the suit property.
 - f. Vacant possession of the suit property.
 - g. General damages for trespass.
 - h. Mesne profits for the period Enock has illegally and wrongfully occupied the land to date of vacating and/or eviction.
 - i. Costs of this suit.
13. After considering the evidence at trial, which I have abridged, Hon. Kibunja, J delivered a judgment on 6th February, 2019 where he held:

“That the documentary and oral evidence adduced by, and for, the plaintiff, 1st and 3rd defendants confirms that unlike the plaintiff who does not have the lease document upon which the certificate of lease in his favor could have been based, the 1st defendant has both the lease document and certificate of lease. That the contention by DW3 that the certificate of lease in favour of the plaintiff could not have been lawfully, procedurally and regularly procured is therefore without any challenge. That though the 2nd defendant did not testify, the testimony of DW3 on which person was lawfully and procedurally allotted the suit property suffice. DW3 has further confirmed the authenticity and genuineness of the title document in favour of the 1st defendant as far as the Land Administration office is concerned.”



14. The judgment aggrieves Enock who is now before us on a first appeal on ten (10) grounds which he later collapsed into two (2) grounds namely that;
 - a. The learned Judge erred in law and fact by dismissing the appellant's suit and proceeding to allow the 1st respondent's counter claim which was based on no evidence.
 - b. The learned trial court acted on wrong principles in arriving at his finding to allow the counter claim.
15. At plenary hearing learned counsel Mr. Onsongo appeared together with learned counsel Mr. Odeny for the appellant, learned counsel Mr. Okongo for the 1st respondent, learned counsel Mr. Okoth Odera represented the 2nd respondent while learned counsel Ms. Masaka appeared for the 3rd respondent.
16. Mr. Onsongo counsel for the appellant submitted the only issue arising is that there are two sets of documents both originating from the 3rd respondent's office in respect to land that is registered. Counsel contended that the document relied upon by the 1st respondent is dated much later than that relied upon by the appellant. In the appellant's written submissions dated 22nd June, 2022, the appellant cited the decision in Dr. Joseph N.K. Arap *Ng'ok v Moiwo Ole Keiwa & 4 others* Nairobi Civil Appeal No. 60 of 1997 and argued that since the registration of his title was earlier than of that of the 2nd respondent, his title takes precedence unless it was nullified by a court of law.
17. The appellant criticizes the reliance by the trial court on documents in possession of the 1st respondent. The appellant submitted that the 2nd respondent did not tender evidence in support of the challenged documents and further kept away evidence of a witness who was a link between the 3rd and the 1st respondents. Counsel maintained that in the absence of the said link, the trial court was wrong in relying on those documents and making a finding that they were authentic or genuine as against those held by the appellant. It was further submitted that the 3rd respondent ought to have called the maker of the documents, Mr. Ngaanyi, the then District Land Registrar.
18. Lastly it was argued that the authenticity of the documents held by the appellant had not been challenged and that the allegation by the respondents that the suit property was free and registered as public property for a school could not be true. Counsel maintained that as it stood, the suit property was already registered hence not available for registration in favor of the 2nd respondent who then purported to sell it to the 1st respondent.
19. In response to a question by the Court whether the appellant had a lease document similar to that produced by the 2nd respondent and if so why he did not produce it at the trial, Counsel Onsongo stated that the 3rd respondent's office was in a mess and the documents in favor of the 2nd respondent had been replaced with those of the appellant. Therefore, the appellant could not retrieve similar documents as those held by the 2nd respondent. Counsel further explained that the appellant did not produce the lease because it was in possession of the seller, Joshua who was the original registered owner and who held an authentic title. But, as will be apparent shortly, that was a less than satisfactory response.
20. In rejoinder, Mr. Okongo submitted that the decision by the trial court was sound and argued that all the events that purported to have conferred ownership to the appellant from the previous owner appeared to have been taken on 7th December 2001, and all documents dated the same day, thus speaks to fraud and a fraudulent scheme, as opposed to uncommon efficiency in land transaction. That this was a pointer to the fact that no due diligence was carried out as captured in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR.



21. Counsel sought to draw our attention to the transfer document which was allegedly omitted in the record by the appellant and introduced through a supplementary record dated 28th June, 2022. It was submitted that the said transfer of lease does not have a presentation book number, is undated, and does not show the Registrar who actually affected it.
22. It was contended that as much as there are two competing titles, the appellant's title does not have a root as he produced a standalone certificate of title that is not supported. We were asked to contrast this with the evidence in support of the 1st respondent's title; the Commissioner of Lands evidence that the only allotment was the one in favour of Erick; the application for and letter of allotment and receipts for payment made therefor; the instrument of lease and certificate of lease. That the entire process could be verified unlike the documents relied upon by the appellant. We were asked to give regard to the decision in *Sukhdev Singh v Philip Ojwang Kamau & 3 Others* (2018) eKLR where the Court cited *Samuel Kamere v Land Registrar Kajiado*, Nairobi Civil Appeal No. 28 of 2005 on who is a bonafide purchaser for value.
23. The 2nd respondent associated himself with the submissions of the 1st respondent noting that they have always taken a similar position to that of the 1st respondent.
24. The arguments by Ms. Masaka, counsel for the 3rd respondent, were not dissimilar to those of the 1st respondent and need not be rehashed. Perhaps just one aspect. It was submitted that the appellant failed to call any evidence to demonstrate how Joshua obtained the suit land that he bought and the only reason given was that the Land Registrar, Mr. Ngaanyi had confirmed that the records as held in the County Office were fraudulent and had been expunged. In response to the court's question as to why the 3rd respondent did not call Mr. Ngaanyi as a witness, counsel stated that Mr. Ngaanyi was no longer the Land Registrar at the material time.
25. The role of this Court sitting on a first appeal is set out in a plethora of decisions. The Court has to re-appraise the evidence and to draw inference before arriving at its own impartial conclusion always aware that, unlike the trial court, we did not see and hear the witnesses testify and due allowance must be made for that. See. *Selle v Associated Motor Boat Company Limited* (1968) EA 123.
26. The critical issue for determination, in my view, is who between Enock and Jalaram holds a lawful lease from the lessor of the suit property, the Government of Kenya.
27. There is evidence that Enock paid Kshs. 1,000,000.00 to Joshua for the purchase of the suit property. Although the transfer reads a consideration of Kshs. 500,000.00, that is obviously understated, perhaps to avoid full payment of stamp duty. Of course an illegality. Anyhow, the evidence of Enock is that prior to entering into the contract for purchase, he carried out a search on 27th November, 2001. The search showed that as of that date, the nature of interest in the suit land was a leasehold registered in favour of Joshua Obegih Orinah on 29th October, 2001 and a certificate of lease issued to him on the same date.
28. So as to transfer that interest to Enock, the District Land officer, Kisumu District supposedly granted Joshua a consent to transfer in a letter dated 7th December, 2001 but because of contestation at hearing, the letter of consent was not admitted in evidence. But successfully shown to the ELC was a transfer of lease executed by Joshua in favour of Enock. Yet as pointed out by counsel for Jalaram in his submissions, the transfer of lease does not show the date it was received for registration, the presentation book or the fees paid for registration. Indeed, it does not seem to have been registered at all.
29. It emerges, however, that on 7th December, 2001 Enock became the proprietor of the leasehold interest, at least because a search carried out on that date and certified copy of the register to the suit property,



in addition to the certificate of lease, supports that position. Subsequent searches conducted by Enock on 17th July, 2002 and 18th March, 2008 show him to be the proprietor.

30. The story of Jalaram is that prior to purchasing the suit property, DW1 acting on its behalf sought clarification regarding the status of the ownership of the suit property from the Commissioner of Lands. The letter is dated 22nd July, 2009. In it the advocate explains why the clarification was necessary. He notes that a certificate of lease was issued to Joshua on 29th October, 2001, a search carried out on 22nd June, 2009 shows that a certificate of lease was issued to Sterling Investments Limited on 24th June, 2003 and a certificate of lease dated 7th July, 2009 was issued to Okeyo.
31. The response to this letter came, not from the Commissioner of Lands, but from R.W. Ngaanyi the District Land Registrar Kisumu East/Kisumu West/Nyando. The response dated 24th July, 2009 is of significance to the controversy at hand and needs to be reproduced in full: -

“REF: L R KSM/MUN/BLOCK 10/568

Your letter referenced 156/4447/M dated 22.7.09 on the above subject refers. I wish to acknowledge receipt and wish to state the following regarding the property in question.

A lease document in favor of one Erick Ouma Okeyo was forwarded for registration by the Chief Land Registrar through courier service. However, there existed another land register (White card) in respect of the same parcel but vesting interest to a different person. I sought clarification from the Head Quarters as to which one was the authentic owner. The lease existing in our register was thus declared fraudulent and as such expunged from the records. I have hereby attached a copy of an internal memo originating from the Deputy Commissioner of Lands and addressed to the Director of Surveyors for your scrutiny. The forwarding letter for the lease is also attached. Please take note that it bears the name and signature of the acting Chief Land Registrar (now Re-designed to read Deputy Commissioner of Lands- Registration) For this reason, treat Mr. Erick Ouma Okeyo as the confide owner of the property.

R.w. Ngaanyi

District Land Registrar

Kisumu East/kisumu West/nyando”

32. For purposes of the dispute the assertion by the District Land Registrar that “the lease existing in our register was thus declared fraudulent and as such expunged from the records” needs to be examined further. To be gleaned from this sentence is that there seems to have been a lease in favour of Enock. Enock became aware of the difficulty his title was facing hence the proceedings before the ELC in which he complains that cancellation of his title was illegal, wrongful, unlawful and fraudulent. In the end one of the prayers he seeks is an order directing the 3rd respondent to rectify the lands record by striking out the names of the Jalaram and Okeyo from the register and replacing them with his as the bona fide registered proprietor of the suit property.
33. It is evident therefore that Enock acknowledged that his interest in the suit land no longer appeared in the register to the suit land. While the position of the 3rd Respondent was that he had expunged the lease from the record because it was fraudulent, it is doubtful that the 3rd respondent had such powers to cancel or expunge the title issued in favour of Enock. At the material time the suit land was registered



under the Registered Land Act, 2010 which gave the registrar limited powers to rectify the register in terms of Section 142 which read;

“ 142.

- (1) The Registrar may rectify the register or any instrument presented for registration in the following cases-
 - a. in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
 - b. in any case and at any time with the consent of all persons interested;
 - c. where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.
- (2) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.”

34. The more involved rectification, which is cancellation or amended of the register, was the preserve of the court. section 143 provided:

“ 143.

- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequences of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

35. That said, in the proceedings before the superior court below, Enock does not raise the issue of the power of the 3rd Respondent to cancel title and instead challenges the cancellation on the grounds that his title was bona fide. The invitation by Enock to the ELC was not to examine the legality of the process by which the Registrar cancelled his title but rather whether there was any lawful reason for his title to be cancelled.

36. In respect to his title, Enock relied on the certificate of official search and the certificate of lease for the argument that the ownership legally moved from Joshua to him. There is no doubt whatsoever that



a certificate of lease had previously been issued to Joshua. DW3 admitted as much. Yet as to why he took the view that the title could be impeached, DW3 testified:

“I have heard of the certificate of lease in the name of Joshua Obina but there is no lease document upon which that certificate could have been issued. I have been shown the lease certificate issued to the plaintiff but I had not seen the lease document upon which it could have issued.

The only lease document over Parcel 568 is the one issued to the 2nd Defendant and transferred to the 1st Defendant.”

37. Regarding the lease PW1’s testimony was:

“The result of the search was that Joshua was legal owner and had a lease....

I have a certificate of lease. Mr. Ombegi gave me a copy of his lease.”

Notwithstanding this evidence, Enock did not produce a copy of the lease which the seller had allegedly given him. A failure that is not without ramifications.

38. The evidence marshalled by Enock must be put on a scale against the documents produced in support of the 1st and 2nd respondents case, namely: the letter of allotment dated 10th June, 2009 in favour of the 2nd defendant; the acceptance of that letter; receipts for payment of standing premium, annual rent for the period 1st July, 2009 to 31st December, 2009 and other fees; the lease from the Commissioner of Lands as lessor to Okeyo as lessee and; a copy of certificate of lease. Enock ought to have known that he would be called upon to prove the legality of the certificate of lease he held because in the counterclaim, Jalaram specifically pleaded that Joshua had never been allotted or registered as proprietor of the land and that the certificate of lease issued to him was fake and obtained fraudulently. Production of the lease, as I shall presently demonstrate, was crucial in Enock proving the authenticity of his title. When pressed by this Court as to why this important document was not produced, the response by Counsel for Enock was not helpful! He answered that it was not produced by Enock because it was in possession of the seller, Joshua, an assertion that was not borne out by the testimony of Enock himself who, in answer to a question in cross examination stated;

“I have a certificate of lease. Mr. Ombegi gave me a copy of his lease.”

39. So what is the importance of a lease? Section 27 of the [Registered Land Act](#) sets out the interest conferred by registration. Section 27 (b) reads:

“Subject to this [Act](#).

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

40. It is common ground that the nature of title in the suit land was a leasehold. The registration of a person of a lease over the land vests in that person the leasehold interest described in the lease. As Enock was not able to produce a copy of the lease or to prove that it existed, he was unable to demonstrate proprietorship of the leasehold interest for which he held a certificate of lease. Differently stated, a certificate of lease that was not undergirded by an actual lease was not ownership at all. For purposes of



proving ownership, it was the lease itself and not the certificate of lease that was crucial. Indeed, section 32(2) of the *Act* verbalizes the none-decisive nature of the certificate of lease alone:

“ A title deed or certificate of lease shall be only prima facie evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register.”

41. In the end I am in full agreement with the trial Judge when he holds:

“That flowing from the foregoing, the court finds and holds that the plaintiff has failed to prove his case against the defendants. The court further holds and finds that the 1st defendant has proved their counterclaim against the plaintiff to the standard required...”

42. I would propose that the appeal be dismissed with costs to the respondents.

JUDGMENT OF KIAGE, JA

1. I have had the benefit of reading in draft the judgment of Tuiyott, J.A and I am in full agreement with his reasoning, the conclusion he reaches, and the order he proposes.
2. As Joel Ngugi, J.A is in agreement, the appeal is dismissed with costs to the respondents.

JUDGMENT OF JOEL NGUGI, JA

1. I have had the advantage of reading in draft the judgment of Tuiyott, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 2023.

F. TUIYOTT

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

