



Osiemo v Angoi (Suing as the legal administrator of the Estate of Joseph Nyamari Nyagaka (Deceased) (Environment and Land Appeal E025 of 2022) [2024] KEELC 3982 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3982 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E025 OF 2022**

M SILA, J

APRIL 30, 2024

BETWEEN

MAURICE ONDITI OSIEMO APPELLANT

AND

ROBERT ANGOI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF JOSEPH NYAMARI NYAGAKA (DECEASED) RESPONDENT

(Being an appeal against the judgment of Hon. P.K Mutai, Senior Resident Magistrate, delivered on 19 October 2022 in the case Kisii CMCC/ELC No. 50 of 2019)

JUDGMENT

(Both appellant and respondent claiming leasehold title to the same land; respondent filing suit asserting that the good title is for the deceased whose estate he represents and from whom he had purchased the land; trial court entering judgment in his favour inter alia on the basis that his documents of title appear to be first in time; scrutiny of the documents of title of the respondent showing that the lease was purportedly executed by Wilson Gacanja before it was registered in 1987; lease of the respondent cannot be genuine as Wilson Gacanja was appointed Commissioner of Lands on 18 January 1989; clear that the purported lease of the respondent is fraudulent; judgment entered for the appellant)

1. The respondent (as plaintiff) commenced suit through a plaint filed on 23 April 2019. He filed suit as the legal representative of Joseph Nyamari Nyagaka (deceased). His case was that the land parcel Kisii Municipality/Block I/587 (the suit property) belonged to Joseph Nyamari Nyagaka who had sold it to him on 6 May 2017 before his death, although transfer was not effected, with title remaining in the name of the deceased. He averred that after the purchase he took possession and started construction. He sued the appellant for disturbing his possession and also for having a parallel title to



the suit property which he claimed to be a fraudulent one. In the suit he asked for the following orders (paraphrased for brevity) :

- a. Declaration that the suit property forms part of the estate of the deceased;
 - b. Cancellation of the Certificate of Lease held by the defendant;
 - c. Eviction against the defendant;
 - d. Permanent injunction to restrain the defendant from the suit property;
 - e. General damages for trespass and interest;
 - f. Costs.
2. The appellant filed a defence and counterclaim. He denied that Joseph Nyamari Nyagaka (deceased) ever held title to the suit property. He asserted that it was him who held good title to the suit property. He averred that the property was originally allotted to one Aloys Joseph Tumbo (deceased) who acquired a lease registered on 4 March 1991 and the property was thereafter transmitted to Mary Nyamechi Tumbo after his death. Mary Nyamechi then sold the land to him through a sale agreement dated 4 March 1991. He contended that it was the respondent who held a fraudulent title. In his counterclaim he asked for the following orders (paraphrased for brevity) :
- a. Declaration that it was him (appellant) who was the *bona fide* proprietor of the suit property;
 - b. Cancellation of the title of the respondent;
 - c. Special and general damages for trespass with interest;
 - d. Costs.
3. The respondent filed a defence and defence to counterclaim more or less joining issue with the appellant. The matter then proceeded for trial.
4. I see that the first witness was Steve Mokaya, who served as the Land Registrar, Kisii. He was considered to be an independent witness. He testified that according to him the property belongs to Joseph Nyamari Nyagaka. He stated that the appellant does not have any record as relates ownership of the land. He nevertheless confirmed that the appellant lodged a complaint to his office and he corresponded with the Chief Land Registrar. The Chief Land Registrar wrote to him informing him that there was tampering of records and that there was fraud. He stated that he was however not presented with any certified copies of documents.
5. PW-1 was the plaintiff/respondent. He testified and produced various documents. The totality of his documentary and oral evidence was that the suit property was first allotted to one Nathan Achinga Siringi who was issued with an allotment letter dated 12 January 1984 and a lease that was registered on 30 April 1987. The title was then transferred to Joseph Nyamari Nyagaka on 18 December 1998 and he was issued with a Certificate of Lease. The leasehold register (white card) produced indicated these transactions. There was also produced some rates payments in name of Joseph



Nyamari Nyagaka for the years 1998,2003, 2018 and 2019. The respondent testified that Joseph Nyamari Nyagaka sold to him the property because he was sick. He purchased the land for Kshs. 1,600,000/= which he stated he paid in cash as money was urgently needed to pay the hospital bills. Mr. Nyagaka however died before he could effect the transfer and the title still bears his name.

6. PW-2 was one Felix Nyamari, a son of Mr. Nyagaka. His evidence was that his late father owned the suit land and that he sold it to the respondent. The respondent is his cousin and they agreed that he could take out letters of administration for the estate of his late father since the land had already been sold to him.
7. With the above evidence the respondent closed his case.
8. The appellant called Festone Nyagaka Orare, an officer working in the office of the Chief Land Registrar. He testified that the Land Registrar had written to his office through a letter dated 29 January 2019 on the issue of ownership of the suit land. He responded saying that there was doctoring of documents and tampering of their records and that the anomaly needed to be rectified. He testified that the allotment letter relied upon by the respondent was doctored and not authentic. He stated that it was tampered to read the name of Nathan Siringi. According to him the respondent was not the owner of the suit property.
9. DW – 2 was the appellant. His evidence was that the land was first owned by Aloyce Joseph Tumbo. He died and the property was succeeded by Mary Nyamache Tumbo. She sold the land to him on 16 July 2009 and he was issued with a Certificate of Lease on 6 February 2009. He occupied the land by putting a caretaker. He wanted to construct the land in 2019 but another person came claiming to own it. He produced documents to support his position.
10. With the above evidence the appellant closed his case.
11. In the judgment delivered on 19 October 2022 the court held in favour of the respondent and dismissed the counterclaim. According to the trial Magistrate the evidence showed that Mr. Nyagaka was the first to obtain a lease certificate. He held that the records held in the Lands Office in the form of the White Card fortified this position. He acknowledged that there was conflicting evidence from the Land Registrar and the Chief Land Registrar. He appeared to uphold the evidence of the Land Registrar by saying that the documents allegedly said by the Chief Land Registrar to have been altered were never produced.
12. Aggrieved, the defendant filed this appeal. There are ten grounds listed, but taken as a whole, they more or less seek a reversal of the judgment of the Magistrate and for the counterclaim to be allowed.
13. I invited counsel to file submissions to argue the appeal and I have seen the submissions of both Mr. Ayienda, learned counsel for the appellant, and Mr. Ochwangi, learned counsel for the respondent.



14. This being a first appeal, I stand guided by the dictum made in *Selle & Another vs Associated Motor Boat Company Limited & Others* (1968) EA 123 where it was stated as follows by Sir Clement De Lestang, VP at page 126 :

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this aspect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

15. The case was one where two persons claimed title to the same land. Where there is such a claim the court must go to the root of the title of each person and trace its path to the current title holders. The good title, and that which is to be upheld, is the one which has a genuine origin. The time of issue of the titles is irrelevant in such instance. It could be that one title bears an earlier date but if it is not a genuine title that early date does not help. The title remains fraudulent whether or not it purports to contain a date that is earlier than the genuine title.
16. In our case the appellant's position was that the first allottee of the suit property was Aloyce Tumbo, whereas the respondent's assertion was that the first allottee of the suit property was Nathan Siringi. There was evidence produced that the appellant had lodged a complaint at the office of the Land Registrar, Kisii, who then wrote a letter dated 24 January 2019 to the Chief Land Registrar for advice. Mr. Orare, who testified, replied through his letter dated 29 January 2019. His response was as follows :

We acknowledge receipt of your letter dated 24th January 2019 on the above and wish to respond as here below :

A perusal of correspondence file of the parcel of land, it shows that the original documents were doctored by a fraudster by erasing and inserting different names instead of the genuine ones, for instance, the letter of allotment dated 12th January, 1984 by inserting the name of Nathan Achieng Siringi instead of Aloyce Joseph Tumbo.

In fact even the receipt payment is forgery so I recommend your good office to put a restriction on the title pending the hearing of Kisii Chief Magistrate ELC 5 of 2019 between Robert Angoi verses Maurice Onditi Osiemo who bought the land from Aloyce J. Tumbo.

We are in the process of rectifying the anomaly to issue the right Lease to the owner unless advised by the Court otherwise.

Be advised accordingly.

Yours Faithfully,

F.N. Orare



For : Chief Land Registrar."

17. It will be seen from the above letter that the Land Registrar, Kisii, was advised that there had been tampering and doctoring of the land records. Significantly, it was mentioned that there was forgery by inserting the name of Nathan Achieng Siringi instead of Aloyce Joseph Tumbo and even the receipt was a forgery.
18. This evidence needed to be given heavy consideration and not to be dismissed in the manner that the trial court did. The court ought to have been alive that there was now an allegation of fraud and forged documents, and needed not to take the documents produced by the respondent at face value. They needed deeper interrogation so that the allegation of forgery is dispelled. This was a case where parties needed to present their original documents for scrutiny so that it could be seen whether the documents appear whole or appear tampered. It was not now a case to be heard casually. What the trial court did was to take the documents produced at face value and hold that since the Lease of Mr. Nyagaka was issued first in time and the White Card showed him as registered proprietor then his title was good. The court was not alive to the reality that even White Cards are tampered with. There needed to be a good demonstration of a good allotment letter, a good first lease, and proper transfer thereafter, and a genuine White Card.
19. My own assessment of the documents produced is that the documents of the respondent were a forgery. I am certainly not in any doubt that the Lease instrument purported to be in favour of Joseph Nyamari Nyagaka was a forgery. That lease is alleged to have been signed by Wilson Gacanja as Commissioner of Lands on 31st May with the year not indicated which is extremely unusual. It was however said to have been registered on 30th April 1987. The earliest it could therefore have been signed by the Commissioner of Lands was 31st May 1986. However, I take judicial notice that Wilson Gacanja was not in office in the year 1986 or even 1987. Wilson Gacanja was appointed as Commissioner of Lands through Gazette Notice No. 233 of 18 January 1989 which Gazette Notice is in the public domain and anybody can take judicial notice of. That Gazette Notice is Volume XCI-No. 3 published on 20 January 1989. That Gazette Notice informs the public that with effect from 18 January 1989, Wilson Gacanja has taken the office of Commissioner of Lands. Before this date, the Commissioner of Lands was James Raymond Njenga, who was appointed Commissioner of Lands vide Gazette Notice No. 1571 of 1975. James Raymond Njenga was appointed Commissioner of Lands with effect from 1st April 1975. In Gazette Notice No. 233 of 20th January 1989, Wilson Gacanja was appointed to be Commissioner of Lands from 18th January 1989. Thus, it was James Raymond Njenga who was the Commissioner of Lands in the year 1986 or 1987 when the purported Lease instrument of Nathan Achieng Siringi was prepared and registered. It could not have been signed by Wilson Gacanja who was not the Commissioner of Lands then. The respondent and/or his predecessor/s in title were very smart in forging the land documents but they were not too clever in forgetting to consider that Wilson Gacanja took office much later than the date they indicated in the Lease instrument.
20. It is clear to me that the title of Joseph Nyamari Nyagaka was never a good title since there was never any, or any good title, issued to Nathan Achieng Siringi. I in fact think that the fraudulent title could have been the brainchild of the respondent himself.



Despite claiming to have purchased the land for Kshs. 1,600,000/= no evidence of such payment of money was produced. He said that he paid in cash but I doubt. He could at least have shown that he withdrew this money from somewhere.

21. The long and short of it is that it is clear to me that the purported lease of Nathan Achinga Siringi was a fraud. The purported registration of Joseph Nyamari Nyagaka as the next owner was also a fraud. My assessment of the evidence lead me to the conclusion that the good title is that first issued to Aloyce Tumbo, which eventually got to the appellant. That in fact is what the Chief Land Registrar informed the Court.
22. Given the above, I am persuaded to allow this appeal. I declare that it is the appellant who is the rightful proprietor of the land parcel Kisii Municipality/Block I/587. I find that the existing leasehold register (white card) is a fraud. I order that the register be rectified by cancellation of the existing register and a fresh register indicating the registration of Mr. Aloyce Tumbo, as the first proprietor, and subsequent transfers leading to registration of title in the name of the appellant be prepared. That new register will constitute the genuine register of the suit land. Having found that it is the appellant who is the true owner of the suit land, the appellant is entitled to an order of possession of the land and an order permanently restraining the respondent from the land. If the respondent is in possession then he is entitled to an order of eviction of the respondent which I hereby give. I will also award the appellant Kshs. 500,000/= as general damages for trespass which will accrue interest at court rates from the date of this judgment till settlement in full. The appellant will also have the costs of the main suit, the counterclaim, and the costs of this appeal.
23. Judgment accordingly.

DATED AND DELIVERED THIS 30 DAY OF APRIL 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Ayienda for the appellant

Ms. Nyaenya h/b for Mr. Ochwangi for the respondent

Court Assistant – David Ochieng’

