



Okioga & another (Suing as administrators of the Estate of Mary Kwamboka Okioga) v Kisii County Land Registrar & 3 others (Environment & Land Case 8 of 2021) [2025] KEELC 763 (KLR) (19 February 2025) (Judgment)

Neutral citation: [2025] KEELC 763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 8 OF 2021
M SILA, J
FEBRUARY 19, 2025**

BETWEEN

**CHARLES KOMBO OKIOGA 1ST PLAINTIFF
KEFA ATANDI NYABARO 2ND PLAINTIFF
SUING AS ADMINISTRATORS OF THE ESTATE OF MARY KWAMBOKA
OKIOGA**

AND

**KISII COUNTY LAND REGISTRAR 1ST DEFENDANT
CHRISTOPHER ONSONGO 2ND DEFENDANT
ZACHARY ONDIEKI ONCHURU 3RD DEFENDANT
VINCENT MACHOGU ONGARO 4TH DEFENDANT**

JUDGMENT

(Two titles contested in the suit for the same land; plaintiffs holding a title in name of the person whose estate the represent; 4th defendant also holding a title with a root from the 2nd and 3rd defendants; court's assessment of the two titles being that the proper root of title is that of the plaintiff; judgment entered in favour of the plaintiff; title of the 4th defendant cancelled)

1. This suit was commenced through a plaint filed on 18 March 2021. The plaintiffs are the legal representatives of the estate of Mary Kwamboka Okioga (deceased) who died on 21 April 1996. They assert that the deceased was the registered proprietor of the leasehold interest in the land parcel Kisii Township/Block I/190 (the suit property) holding a 99 years from 1 December 1980 from the County Council of Gusii. They pleaded that sometime in 2016, they discovered that the register at the Kisii Land Registry had been interfered with and it no longer reflected the name of the deceased



as proprietor. Instead, it showed that the initial lease was issued to Christopher Onsongo, the 2nd defendant, then transfer to Zachary John Ondieki Onchuru, the 3rd defendant, and a further transfer registered on 18 March 2016 to Vincent Machogo Onchuru, the 4th defendant. The plaintiffs contend that all these entries are fraudulent. They aver that the defendants, acting in concert, took advantage of the death of the proprietor, to fraudulently manipulate the property register and deprive her estate of the suit property. They pleaded that the 4th defendant has now taken illegal possession of the suit property and commenced construction. In the suit, they more or less seek orders that it be declared that the suit property belongs to the estate of the deceased; rectification of the register; vacant possession; a permanent injunction against the 4th defendant; general damages against the 2nd – 4th defendants; mesne profits; and costs.

2. The State Law Office entered appearance for the Land Registrar, sued as the 1st defendant and filed defence. In it, it is pleaded that the 1st defendant is a stranger to the allegations of the plaintiffs and they are put to strict proof.
3. The 2nd defendant was served with summons by an advertisement in the Dailies but he did not enter appearance.
4. The 3rd defendant entered appearance and filed defence through M/s Ochwangi & Company Advocates. He disputed that the suit property was ever registered in the name of Mary Kwamboka Okioga and contended that it is Mary who is the fraudster. It was asserted that the documents relied upon by the plaintiff are fake and fraudulent. He pleaded to have been the one in possession before title got registered in name of the 4th defendant. He asked that the plaintiffs' suit be dismissed.
5. The 4th defendant entered appearance and filed defence through the law firm of M/s Bosire Gichana & Company Advocates. He pleaded that he genuinely purchased the suit property from the 3rd defendant and that he is a bona fide purchaser for value without notice of any unprocedural or unlawful acts committed by the 1st – 3rd defendants. He pleaded that he was given vacant possession by the 3rd defendant and that he has since made substantial developments to the tune of more than Kshs. 30 million.
6. PW-1 was Kefa Atandi Nyabaro, the 2nd plaintiff and son to Mary Kwamboka Okioga (Mary Okioga). His evidence was that his mother was issued with a Certificate of Lease in 1985. She died in 1999. Thereafter they filed in Nairobi High Court Succession Case No. 1493 of 1999 and obtained a grant of letter of administration. The grant was confirmed on 20 June 2018. He produced a search dated 6 February 2002 showing that title at that time was in name of Mary Okioga and added that they used to pay land rent and rates up to 2016. On 25 September 2017, he went to pay land rates and was surprised to be told that the property had changed hands. He did a search and found the property registered in name of the 4th defendant. He produced various documents to support the allotment of the land to Mary Okioga including a letter of allotment dated 26 January 1981, copies of banker's cheque to show payment for the amounts in the allotment letter, a list of land rates defaulters published on 11 November 1992 where Mary Okioga appeared as rate payer, rates payment demands and receipts.
7. He was cross-examined on the documents also availed by the defendants. He could see that the defendants have a letter of allotment in name of Christopher Onsongo issued on 31 March 1980 which appears to be earlier than that issued to Mary Okioga on 26 January 1981. The leasehold register indicated that Christopher Onsongo got registered on 30 May 1985 which also appears to have come earlier than the registration of Mary Okioga on 8 August 1985. In essence he could see that the documents of the defendants appear to have been issued earlier in time than those of Mary Okioga. He was of the view that these documents were backdated. He testified that Mary Okioga had taken possession and he fenced the plot with posts and barbed wire. Building plans were drawn and approved



on 4 May 1992 but they did not construct. He conceded not to have complied with the terms of the lease requiring development of the plot within 6 months of the lease. He stated that his mother allowed a neighbour to plant napier grass on the land though he had no proof of this. He stated that she left the land between 2010 and 2014. He could see that the current White Card does not have the name of Mary Okioga. He stated that he first came to know of the change of title in 2014 when he did a search on 29 August 2014. It showed the name of the 3rd defendant as proprietor. He did not take any action until the 4th defendant acquired title in 2016. He filed suit in 2021 which was 7 years after discovery of the change of proprietorship. He conceded that as at 2016, the register reflected the name of the 3rd defendant as proprietor and that the 4th defendant may not have been aware of the issues with the title of the 3rd defendant. In 2017 he wrote a letter to the National Land Commission and in 2018 his advocate wrote to the Land Registrar.

8. Regarding the allotment of the plot he referred to the allotment letter of 26 January 1981. It required acceptance to be made within 30 days. He conceded that acceptance was made on 21 April 1981 which was outside the 30 days. The banker's cheque to pay the monies therein was done on 22 April 1981. Though late, their acceptance was not rejected. The title that his mother got read Kisii Township/Block I/190. He never saw the White Card indicating his mother as proprietor. He thought it probable that this was uprooted from the binder. They asked to be supplied with documents by the Land Registrar and they were supplied in 2018. What was supplied was records indicating the title as Kisii Municipality/Block I/190 and the entries were in favour of the 2nd – 4th defendants. He elaborated that the description Kisii Township or Kisii Municipality refer to the same property and other documents also referred to the property simply as Block I/190, or Block I/190 Nyanchwa. He stated that he made a report to the police but so far nobody has been charged.
9. PW- 2 was Martin Esakina Papa, a document examiner with 24 years experience. He previously worked for the DCI. He inter alia examined the letters of allotment in favour of Mary Okioga and that in favour of Christopher Onsongo. In his opinion, the signatures of the issuer, one Chesya E.C was not similar in the two documents. He nevertheless conceded that he had not contacted Mr. Chesya and he could not tell which of the two indicated his correct signature. What he was certain of is that they did not come from a common origin. He also identified some overwriting in the allotment letter of Christopher Onsongo. It appeared to have borne the name Zacharia John Ondieki Onchuru which was erased and overwritten Christopher Onsongo. He also found that this allotment letter was computer generated but in 1981 computer generation was not there and what was in use was either a manual or electric typewriter.
10. With the above evidence the plaintiffs closed their case.
11. DW – 1 was Zachary John Ondieki Onchuru. He used to be a Chief of Kisii Township up to the year 2005 when he retired and went to do business. His evidence was that he purchased the suit land from Christopher Onsongo who had documents to support his title. He testified that Christopher showed him a letter of allotment, a forwarding letter dated 19 December 1984 (forwarding the lease for registration), a lease in Christopher's name, and his Certificate of Lease. He produced these as exhibits. He stated that on 8 January 1999 they entered into a sale agreement and he bought the land for Kshs. 300,000/=. He produced the sale agreement and the transfer of lease dated 25 February 1999. He stated that he was issued with a Certificate of Lease which he also produced. He stated that he later sold the land and transferred it to the 4th defendant. The sale agreement he entered into was with one Nyachae Ombese who was a brother of the 4th defendant as the 4th defendant lived in the USA. He transferred title to the 4th defendant who obtained a Certificate of Lease in his name. He stated that he was not aware of any fraud on the part of Christopher Onsongo. Cross-examined, he testified that he did not apply for a search when he bought the land nor apply for the White Card. He conceded



- that the allotment letter had no plan number. He stated that he was given the plan but he did not have it. On payment for the allotment letter he had a receipt showing that the amount was paid on 4 July 1983, more than 3 years later. He acknowledged that he had not produced consent to transfer in the transaction between himself and Christopher Onsongo. He also acknowledged that stamp duty and registration fees are paid but he did not have them. He also conceded that he had not produced any receipts for rates in his name.
12. DW – 2 was Vincent Machogo Ongaro. He is a nurse and lives and works in Minnesota, USA. He is the 4th defendant. He testified that he intended to buy land in Kenya and his brother James Ombese informed him that he had found one, which is the suit land. It was John Ombese who signed the sale agreement on his behalf. He stated that he told him that he had checked with the Land Registry and all documentation looked fine. He stated that he paid outstanding rates of Kshs. 81,000/= which were in name of the previous proprietor and the property was transferred to him. It was the 3rd defendant who sold the land to him. He stated that he took possession and started erecting an apartment block which has gone up to the 2nd floor. He elaborated that he purchased the land at kshs. 3,200,000/=. Cross-examined, he acknowledged that he had no stamp duty receipts. He stated that it was his brother who dealt with the transfer and was the one with the documents.
 13. DW- 3 was James Simon Nyachae Ombese, the brother of the 4th defendant. He was previously employed as an administrative officer in the Kisii County Government in the Lands Department. He is the one who dealt with the transfer of the land to the 4th defendant as he was away in the USA. He testified that he went to the Municipal Council and confirmed that the recognized proprietors were Christopher Onsongo and Zachary Onchuru. He also did a search which showed the name of Zachary Onchuru. He did not know the plaintiffs and did not know that the suit property was previously in the name of their mother. Cross-examined, he did not have the receipts for registration nor any receipts showing payment of stamp duty.
 14. Mr. Wabwire, learned State Counsel appearing for the Land Registrar, did state that he contacted the office of the Land Administration in Nairobi, but the information he received was that the file could not be traced. He closed the case of the 1st defendant without calling any witness.
 15. With the above evidence the defendants closed their case.
 16. I invited counsel to file submissions and I have taken note of the submissions filed.
 17. This is a suit where two persons contest title to the same land and it is trite that there can only be one good title. What this court is enjoined to do is to determine which of the titles displayed by the plaintiff and the 4th defendant is the better title. Much will of course turn on the documentation presented and an analysis of the root of title which is what I now embark on.
 18. Let me start with the title of the plaintiffs. It is of course their case that what they have displayed in name of Mary Okioga is the good title. They trace this title to the Letter of Allotment dated 26 January 1981 issued to Mary Okioga indicating allotment of the parcel Block I/190. This allotment letter required an acceptance within 30 days and also payment of the monies indicated therein by way of banker's cheque. The plaintiffs exhibited a banker's cheque dated 22 April 1981 for Kshs. 1,499/= . They also exhibited a Lease signed on 23 May 1985 by James Raymond Njenga, the Commissioner of Lands and a letter dated 9 August 1985 from the Land Registrar, Kisii, to the Commissioner of Lands, forwarding a copy of the lease for his records. That Lease shows that it was received for registration on 1 May 1983 vide Presentation Book No. 0005 1983. It also indicates that registration fees was paid vide Receipt No. A4812351. The Lease therein is for 99 years at an annual rent of Kshs. 92/=. Exhibited was the Certificate of Lease in name of Mary Okioga issued on 8 August 1985. They also produced various



receipts for payment of rates. Among them were rates clearance certificates of 1984 and 1985 from the Kisii Town Council. Significantly, they produced a demand letter dated 3 August 1989 from M/s Mereka & Company Advocates demanding from Mary Okioga accumulated rates of Kshs. 7,950/= . They also produced a Plaint in the suit Kisii CMCC No. 553 of 1990 whereby the Kisii Municipal Council sued Mary Okioga for rates arrears of Ksh. 1,292/= being arrears up to 1989. In addition, they produced an advertisement placed in the Kenya Times Newspaper of 11 November 1992 being an advertisement placed for rates defaulters. In the advertisement, Mary Okioga appears as proprietor of the suit land with accumulated rates of Ksh. 16,177.20/=. There were produced various receipts indicating payment of land rates and land rents spanning the 1980s, 1990s, 2007 and a rates demand dated 25 September 2017, all in the name of Mary Okioga. They had an official search dated 6 February 2002 that showed Mary Okioga as the registered proprietor.

19. When I look at these documents produced by the plaintiff, I see absolutely nothing untoward about them. I see the allotment letter, the payment for the allotment letter, the registered lease, the certificate of lease, the search, and the various payment in respect of rates meaning that it was Mary Okioga who was recognized as the rate payer from the 1980s and was even sued in 1990 for failure to pay the rates.
20. Let me now turn to the documents of the 3rd & 4th defendants.
21. I have seen the allotment letter dated 31 March 1980 in name of Christopher Onsongo. It is for an unsurveyed residential plot-Kisii Municipality, not for the land parcel Block I/190. The allotment letter states that the said plot is depicted in an attached plan number but there is no plan number indicated and that part is blank. Neither was any plan produced. The allotment letter required payment of some monies as well through cheque but no cheque was produced and no receipt was produced indicating that the money was paid. Assuming that it was an unsurveyed plot being allotted, you would expect that survey be done but no evidence of survey of the plot was ever exhibited. Regardless, there was produced a letter dated 19 December 1984 forwarding a lease to the Land Registrar, Kisii, for the land parcel Kisii Municipality/Block I/190 for registration, and it says that registration fees of Kshs. 250/= was paid vide receipt No. D613236. I have seen the lease that was produced and it shows that it was signed by the Commissioner of Lands on 18 December 1984. It indicates that it was received for registration on 30 May 1985 vide Presentation Book No. 047 1985. The document has no indication of the registration fees or the receipt number vide which the registration fees was paid. I have seen a Certificate of Lease in name of Christopher Onsongo issued on 30 May 1985 which shows cancelled upon transfer. It was said that the property was sold to Zachary Onchuru and a sale agreement dated 8 January 1999 was displayed. The transfer of lease form was also exhibited. It says that it was received for registration on 2 March 1999. There was not produced any receipt in respect of this transfer and neither was any payment of stamp duty exhibited. Neither was there exhibited any consent to transfer. I have not seen any Certificate of Lease in favour of Zachary Onchuru. It is the case of the 3rd & 4th defendants that Zachary Onchuru then sold the suit land to the 4th defendant and that is how the 4th defendant obtained title. There was exhibited the sale agreement, consent to transfer and the Certificate of Lease in favour of the 4th defendant. I however saw no stamp duty nor registration receipts.
22. From my analysis of the documentation above, I am not in doubt that the first registration of the suit property was that to Mary Okioga. As I earlier stated, I have seen nothing untoward in her documents. She was recognized as the rent and rate payer and was in fact sued by the Municipal Council of Kisii for non-payment of rates in 1990. I have seen absolutely no evidence of payment of rates either in name of Christopher Onsongo or in name of Zachary Onchuru. If indeed Christopher Onsongo got registered as proprietor in 1985 as alleged, why was Mary Okioga being sued for rates in 1990 and not Christopher Onsongo ? It buttresses the position that there were no records in favour of Christopher Onsongo throughout the 1980s and 1990s. Again, Zachary Onchuru, never supplied any receipt for



- payment of rates in his name. I am not persuaded that he was ever registered as proprietor of the suit land in 1999 as he alleges particularly given that as at 2002, a search showing Mary Okioga as proprietor was issued to the plaintiffs. It means that as at 2002 there were records in the Lands Registry in favour of Mary Okioga's registration.
23. The very first document that I see which supports the purported registration of Zachary Onchuru as proprietor is the search dated 29 August 2014. Before that, there is nothing. On 22 December 2015, Zachary Onchuru purported to sell the suit property to the 4th defendant who then got registered as proprietor. My hypothesis is that sometimes in the year 2014 or thereabouts, Zachary Onchuru purported that the suit property was owned by Christopher Onsongo, and purported that Christopher has sold the property to him. I am persuaded that it was around this time that the documents of Mary Okioga were uprooted from the Kisii Land Registry, and those purporting that the suit property was initially leased to Christopher Onsongo were planted. Now fortified that he has succeeded, he resolved to quickly get the land out of his hands, and that is how the 4th defendant fell into his snare.
 24. The 4th defendant of course asserts that he is an innocent purchaser for value without any notice of previous fraud. I am not persuaded that the 4th defendant falls in the category of a bona fide purchaser. If he was a bona fide purchaser, you would expect him to demonstrate payment of the purchase price and also payment of stamp duty and registration fees. He produced none of these. I in fact wonder how he got registered as proprietor without first paying stamp duty. But even if we assume that he was a bona fide purchaser for value, that does not help him, as he purchased nothing. The 3rd defendant held no good title to the suit land and he could therefore sell nothing. His bad title was not sanitized and it did not morph into a good title by the mere transfer to the 4th defendant.
 25. In his submissions, Mr. Ochwangi, learned counsel for the 3rd defendant attacked the plaint on the basis that there is no verifying affidavit sworn by the 1st plaintiff and there is no authority annexed by the 2nd plaintiff who swore the verifying affidavit. That may be so, but to me, that is a red herring. In any event if at all this objection was intended to be raised, it ought to have been raised before the matter proceeded for hearing. I have not heard that any party was prejudiced by the lack of a verifying affidavit by the 1st plaintiff. It was also raised that the certificate of confirmation of grant in respect of the estate of Mary Okioga bears the land parcel Kisii/Nyanchwa Block I/190. That to me is immaterial. What is material is that the plaintiffs are legal representatives of Mary Okioga, and they have filed this suit in order to recover the suit land for the estate of the deceased. The land that is in dispute in this case is common to all parties and there is no allegation of ambiguity. It was also raised that the plaint as drawn seeks orders to restrain the Land Registrar by way of permanent injunction. The way I understand it is that the order of permanent injunction is being issued against the 4th defendant from dealing with the suit land and I do not see how the 3rd defendant can benefit from some inelegant drafting of the prayers.
 26. The submissions of Mr. Bosire Gichana, for the 4th defendant do not also move me. He urged that the 4th defendant is a bona fide purchaser for value but I have already discounted that, and also held that even if that was the position, it wouldn't change the fact that Zachary Onchuru had no title to pass to him. He also urged that the plaintiff did not call or sue the Commissioner of Lands who issued the allotment letter. I don't see how that helps his client. What we have established is that no proper allotment letter could ever have been issued to Christopher Onchuru.
 27. For the above reasons, I am persuaded that the plaintiff has proved his case to the required standard. I am fully convinced that it is the title issued to Mary Okioga that is the good title and not that displayed by the 4th defendant tracing its root to the purported title of Christopher Onsongo. The fact of the matter is that no title was ever issued to Christopher Onsongo and all documentation purporting him to be the proprietor of the suit land are fake. There was a prayer for general damages for trespass of



which I award a nominal sum of Kshs. 100,000/= jointly and/or severally against the 2nd, 3rd and 4th defendants. There was also a prayer for mesne profits and loss of user but these were never elaborated and I grant none.

28. I make the following final orders :

- a. It is hereby declared that the rightful registered proprietor of the suit land is Mary Kwamboka Okioga (deceased).
- b. The registers purporting to indicate that the suit land was initially owned by the 2nd defendant and subsequently the 3rd and 4th defendants are hereby declared null and void.
- c. That the Land Registrar, Kisii is hereby ordered to expunge the register indicating the proprietorship of the 2nd – 4th defendants as registered owners of the suit land and not make any entries therein save for the cancellation thereof.
- d. That the Land Registrar, Kisii is hereby ordered to reconstruct the records using the documents of the plaintiffs and construct the correct register indicating Mary Kwamboka Okioga (deceased) as proprietor of the suit land.
- e. That the 4th defendant has no good title to the suit land and must give vacant possession immediately upon pronouncement of this judgment.
- f. That the 4th defendant, and/or his servants/agents, is hereby restrained by a permanent injunction from entering, being upon, utilising, constructing, demolishing, or in any other way interfere with the land parcel Kisii Municipality Block I/190 or any of the structures therein, or in any other way interfere with the quiet possession of the suit land by the plaintiffs or the beneficiaries of the estate of Mary Kwamboka Okioga (deceased).
- g. The 2nd, 3rd and 4th defendants to pay general damages for trespass jointly and/or severally in the sum of Kshs. 100,000/= to attract interest at court rates from the date of this judgment till settlement in full.
- h. The plaintiffs shall have the costs of the suit jointly and/or severally against all the defendants.

29. Judgment accordingly.

DATED AND DELIVERED THIS 19 DAY OF FEBRUARY 2025.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of

Mr. Ochwangi for the 3rd defendant

Ms. Nyaenya for the 4th defendant

M/s Ochoki & Co for the plaintiff – Absent

Attorney General for the 1st defendant – Absent

No appearance entered for 2nd defendant – Absent

Court Assistant – Michael Oyuko

