



Nyachae & 4 others v Nyabera & 6 others (Environment & Land Case 1216 of 2016 & Civil Suit 159 of 2008 (Consolidated)) [2024] KEELC 5963 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEELC 5963 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1216 OF 2016
& CIVIL SUIT 159 OF 2008 (CONSOLIDATED)**

M SILA, J

SEPTEMBER 18, 2024

(FORMERLY KISII HCCC NO. 185 OF 2008)

BETWEEN

**THOMAS M NYACHAE 1ST PLAINTIFF
ELIJAH OGETO ONGECHI 2ND PLAINTIFF
BENARD MAKORI GETETE 3RD PLAINTIFF
LEONARD BOGONKO NYAMBEGERA 4TH PLAINTIFF**

AND

**ISAAC MOINDI NYABERA 1ST DEFENDANT
EAGLE & BISON LIMITED 2ND DEFENDANT
DAVID KENYANYA MAGARE 3RD DEFENDANT
SAMWEL MOBEGI OKIAGERA 4TH DEFENDANT
JOHN JOSEPH MOKAYA 5TH DEFENDANT**

**AS CONSOLIDATED WITH
CIVIL SUIT 159 OF 2008**

BETWEEN

TERESA KEMUNTO MASESE PLAINTIFF

AND

DAVID KENYANYA MAGARE 1ST DEFENDANT



SAMWEL MOBEGI 2ND DEFENDANT

DISTRICT LAND REGISTRAR, KISII 3RD DEFENDANT

JUDGMENT

1. This suit was commenced through a plaint filed on 17 December 2008. The suit as originally filed was against two defendants, that is Isaac Moindi Nyabera and Eagle & Bison Limited. The plaint was later amended to add David Kenya Magare and Samwel Mobegi respectively as the 3rd and 4th defendants. The four plaintiffs averred that the 1st defendant held himself out as the owner of the land parcel Kisii Municipality/Block III/57 (the suit premises). They plead that acting on that representation they entered into a lease agreement with the 1st defendant in February 2003 where they leased the suit premises at a monthly rent of Kshs. 3,000/= for purposes of operating a motor repair garage. They aver that they put up sheds and operated in the premises until 14 November 2008 when agents of the 1st and 2nd defendants descended on the premises, destroyed the sheds, carted away cars undergoing repairs and other tools and garage equipment and fenced off the premises to keep away the plaintiffs. In the plaint the plaintiffs ask for the following orders :
 - a. Delivery of motorvehicle spare parts, tools of trade and office equipment or their equivalent in value.
 - b. An injunction to restrain the defendants from interfering with their possession of the suit premises unless the tenancy is lawfully terminated.
 - c. Damages for conversion and trespass.
 - d. Special damages and/or inquiry as to damages.
 - e. Costs.
 - f. Interest.
 - g. Any other relief that the court may deem fit to grant.
2. The 1st defendant filed a defence where he denied the allegations in the plaint. He pleaded that the actions complained of were committed solely by the 2nd defendant without his involvement. He also filed a counterclaim respectively against the 2nd defendant in the main suit i.e Eagle & Bison Limited, David Kenya Magare, Samwel Mobegi Okiagera, and John Joseph Mokaya T/A Abagusii Theatre Cinema Company as the 2nd – 5th defendants in the counterclaim. In the counterclaim, he pleaded that the suit premises was owned by the 5th defendant in the counterclaim i.e John Joseph Mokaya and one Yuvinalis Michael Motuka Mageka (Yuvinalis) who died intestate on 24 October 2008. He pleaded that they had a letter of allotment issued on 1 September 1970 but had not processed the title. He pleaded that the two were partners trading under the name and style of Abagusii Theatre Cinema Company. He averred that he purchased the suit premises through a sale agreement entered into on 25 March 1997 between himself and Yuvinalis, and that this purchase was with the consent and knowledge of the 5th defendant in the counterclaim. He pleaded that David Kenya Magare and Samwel Mobegi (the 3rd and 4th defendants in the counterclaim) through fraud obtained an order from the subordinate court to have the suit land registered in their names and later transferred title to the name of the 2nd defendant in the main suit and counterclaim (Eagle & Bison Limited). He claimed that



this was fraudulent inter alia as it was in disregard to his unregistered interest which they were aware of. In the counterclaim he asks for the following orders :

- a. A declaration that the suit property belongs exclusively to him (i.e 1st defendant, Isaac Moindi Nyabera).
 - b. An order directing the Land Registrar, Kisii, to cancel all previous entries and register the title in the name of Abagusii Theatre-Cinema Company and thereafter the proprietors to transfer the parcel to him.
 - c. An order directing the Deputy Registrar to sign all relevant documents to effect transfer of lease to him in the event that the proprietors of Abagusii Theatre and Cinema refuse to do so.
 - d. A declaration that the certificate of lease given to the 2nd – 4th defendants in the counterclaim is void ab initio as the suit land was to be registered in name of Abagusii Theatre – Cinema Company.
 - e. An award of aggravated and general damages costs and interest.
3. The 2nd defendant (to main suit and counterclaim i.e Eagle & Bison Limited) filed defence and pleaded that she purchased the suit land from the 3rd & 4th defendants (David Kenyanya Magare and Samuel Mobegi Okiagera) . She pleaded that the suit land was previously registered in the names of the 3rd & 4th defendants and that the transfer of the land to herself by the 3rd & 4th defendants was lawful and procedural. She pleaded that the 1st defendant/counterclaimant was never registered as proprietor of the land and was incapable of dealing with it. She denied forcefully entering the premises or towing away vehicles and tools. She pleaded that any tenancy entered into on 12 February 2003 as claimed by the plaintiffs for a term of 5 years and 3 months has in any event been determined by effluxion of time and/or re-entry. She lodged a counterclaim and pleaded that the occupation of the land by the plaintiffs amounts to trespass and deprives her the rights of ownership, occupation and use of the land. In the counterclaim she sued for the plaintiffs to be ejected and restrained by a permanent injunction, general damages for trespass, costs, interest and any further relief deemed fit. The 2nd defendant also filed a notice of claim against the 3rd & 4th defendants. She claimed full indemnity in respect of the plaintiffs' claims, and damages, loss, expenses and costs occasioned by their actions/omissions leading to the suit.
4. The 3rd & 4th defendants filed a reply to the counterclaim where they denied the contents thereof.
5. The 5th defendant to the 1st defendant's counterclaim (John Joseph Mokaya) filed defence which he later amended on 15 July 2014. He denied entering into any sale agreement with the 1st defendant. He also denied any knowledge of the sale of the suit land to the 1st defendant. He also lodged a counterclaim of his own. In the counterclaim, he pleaded that the suit land was registered in the name of Abagusii Theatre Cinema Company; that in 1997, there was a change of particulars and that it is him and Yuvinalis Motuka who are still the proprietors. He pleaded that Yuvinalis and the 3rd & 4th defendants were partners in other properties and that they divided the properties amongst themselves; that in respect of the suit property they ceded their interest to Yuvinalis and the 5th defendant. He pleaded that the 3rd & 4th defendants sued Yuvinalis in the suit Kisii CMCC No. 291 of 2007 and obtained judgment but the same was subsequently set aside and the ruling and orders were secretly removed from the file. He pleaded that the defendants have however proceeded as if the judgment was never set aside and got themselves registered as proprietors of the suit land. He pleaded that acquisition of the suit property by the 3rd and 4th defendants was tainted with fraud and they could not pass a clean title to the 2nd defendant. Inter alia it is pleaded that the suit Kisii CMCC No. 291 of 2007 was filed in a court without jurisdiction; that the 3rd & 4th defendants conspired to remove orders setting aside



the judgment from the court file; that they failed to include him in the suit. In the counterclaim he wants an order that the Certificate of Lease issued in favour of the 3rd & 4th defendants is null and void and an order to cancel it and in the alternative the 3rd & 4th defendants be ordered to pay one half of the proceeds of sale to the 5th defendant together with interest. The 1st defendant in defending this counterclaim, pleaded that the 5th defendant was aware of the sale of the suit property to him as he was a silent partner in Abagusii Theatre Cinema and that he delegated the issue of obtaining title to him (1st defendant). He further pleaded to have been in occupation since 1997 with the knowledge and consent of the 5th defendant.

6. I need to mention that upon filing suit, the plaintiffs filed an application for injunction. The same was allowed by Musinga J (as he then was) in a ruling delivered on 27 February 2009. He also ordered joinder of David Kenyanya Magare and Samwel Mobegi to the suit. That is why the original plaint was amended to include the two as the 3rd & 4th defendants.
7. It will be observed that the land in dispute is the parcel Kisii Municipality/Block III/57. This land was also being claimed by another person, that is, Teresa Kemunto Masese. She filed her own suit, being Kisii HCCC No. 159 of 2008 and sued David Kenyanya Magare, Samwel Mobegi and the District Land Registrar, Kisii. She alleged to be the registered proprietor of the suit land and that the first two defendants in her suit obtained title to the suit land by fraud. She alleged that they tampered with the records and removed her name from the register. In the suit she asked for an order terminating the registration of the 1st and 2nd defendants and eviction against them.
8. Through an application dated 28 May 2009, the 2nd defendant in this suit applied to have the two cases consolidated. This was allowed through an order made on 28 May 2009 by Musinga J. Subsequently on 20 July 2011, Makhandia J, (as he then was) gave directions that Teresa Kemunto Masese be treated as 6th defendant in the consolidated suits and the Land Registrar be treated as 7th defendant.
9. The 1st defendant died on 21 May 2016 while the suit was ongoing. He was substituted by his wife and personal representative, Finola Alividza Moindi Nyabera, who continues the suit on behalf of his estate. The 5th defendant also died. He was substituted with his legal representative George Mokaya. I also observe from the record that on 17 June 2020 it was mentioned that the 3rd and 4th defendants had also died. No application for their substitution was made and I take it that the case against them has abated.
10. Hearing of the matter commenced on 20 May 2013 before Okong'o J with Elijah Ogeto Ongechi testifying on behalf of the plaintiffs. He testified that he is a mechanic and worked together with the other plaintiffs. He stated that they leased the plot from the 1st defendant from 2003 and used to pay him rent of Kshs. 3,000/= . On 14 November 2008, they came to work as usual but at around 8.00am a group of people came with crude weapons and destroyed their fence. They had 11 cars that they were working on, ten small vehicles and a minibus. The small vehicles were pushed out of the garage but they were unable to move the minibus which he stated was still in the plot. He stated that the mob also destroyed their sheds and carried away what they could. He stated that they lost spares, their tools of trade and office equipment. He testified that they reported to the police and came to know that the 2nd defendant was claiming ownership. He stated that they were evicted and the 2nd defendant erected a new fence, posted security guards and erected mabati houses on the property. Cross-examined, he absolved the 1st defendant from the act of eviction and stated that the 1st defendant had no knowledge of their eviction and was also caught by surprise. He stated that they sued him because he was the one who rented the premises to them. No order nor notice had been served upon them before the eviction. They went back to the property after the order of injunction but claimed that they do not work as they used to because they lost their tools. They have not been paying rent since 2008 because no one has



come to claim rent. He claimed that they had a written agreement with the 1st defendant though none was produced. He alleged that they did a search before the agreement which he did not have though he did concede that they did not investigate its ownership in great detail. He was aware, nonetheless, that the property was not in the name of the 1st defendant. He did not see Michael Nyachae, the director of the 2nd defendant, during the eviction. He did not know the other parties in the suit and did not know that they have any interest in the property. He also did not see them during the eviction. He was not claiming anything against the 3rd & 4th defendants. He did not have supporting documentation of the cost of putting up sheds or the costs of lost items because he said that they were in the office which was destroyed during the eviction. He could not pinpoint who carried what items claimed in the suit.

11. With the above evidence the plaintiffs closed their case.
12. DW – 1 was Finola Alividza Moindi Nyabera the legal representative of the original 1st defendant. She largely relied on a pre-recorded witness statement as her evidence in chief. In it she stated that she is wife of the original 1st defendant; that she and her late husband purchased the suit property from Yuvinalis and the silent partner John Joseph Mokaya, the original 5th defendant, for Kshs. 2,800,000/= through a sale agreement dated 25 March 1997. She claimed that the plot belonged to the two persons through their registered business name of Abagusii Theatre Cinema Company. She stated that there was a letter of allotment in name of Abagusii Theatre Cinema Company and a record of particulars of the proprietors of the business name which showed that the enterprise was owned by Yuvinalis and Joseph Mokaya. It was these documents that convinced them to enter into the sale agreement. She elaborated that the agreement was signed by Yuvinalis. They started the process of transfer in 2006 and that it was her late husband following this up since Yuvinalis was ailing. Her husband procured the Lease from the Commissioner of Lands, paid stamp duty, and the lease was forwarded for registration at the Lands office a Kisii. She stated that immediately the lease reached the Lands registry many other strangers emerged claiming ownership of the plot. This forced Yuvinalis to seek legal redress and it is this that led to the filing of the case Kisii CMCC No. 291 of 2007. She stated that they took possession of the plot from April 1997 fenced it and constructed garage sheds, washrooms, a pit latrine and a well, and used the facility to run a garage until 2003. They then leased out the property to the plaintiffs in February 2003 for a monthly rent of Kshs. 3,000/=. They leased the property with their structures intact and a mini truck which they left behind. She stated that it is still there. Subsequently the land was invaded and whatever they had put up was destroyed. They did a search and were shocked to find the property registered in the name of the 2nd defendant. She produced various exhibits including the tenancy agreement, the letter of allotment in name of Abagusii Theatre Cinema Company and payment for it made on 20 September 1971, the particulars of proprietors of the business name Abagusii Theatre Cinema Company certified on 7 April 1997 showing the proprietors as Yuvinalis and John Joseph Mokaya, the sale agreement dated 25 March 1997 between the 1st defendant and Yuvinalis, various payments made to the Lands office in the year 2007 seemingly for registration of the lease to Abagusii Theatre Cinema Company, a letter dated 3 May 1997 from the Lands Registrar Kisii informing that the lease to Abagusii Theatre has been registered, and an affidavit sworn on 8 October 2007 by Yuvinalis in the suit Kisii CMCC No. 291 of 2007, and part proceedings in the said case. In her oral evidence in court, she stated that in 2003, someone came and demolished their garage and destroyed their property and they thereafter leased the property to the plaintiffs.
13. Cross-examined, she claimed that the spare parts were removed by the 1st plaintiff in collaboration with other people. She was not present when the items were removed and did not know what was involved in it. She was also not involved in the purchase of the land. She now claimed that her husband bought the land from David Kenyanya, Samuel Mobegi and Yuvinalis. She did not know if the Kshs. 2.8 million paid for the plot was paid at once. She claimed that it was paid through banker's cheque to Abagusii



Theatre but she did not have a copy of it. She stated that Yuvinalis died while they were processing the transfer.

14. DW – 2 was Michael Muragia Nyachae. He and his wife are the directors of the 2nd defendant. He relied on a witness statement which he adopted as his evidence in chief. He stated that in October 2008 he was approached by David Kenya Magare with an offer to purchase the suit land. The vendor had various documents to prove ownership including a registered lease and a certificate of lease which showed that he owned the suit land jointly with Samwel. He carried out a search which confirmed the ownership. He visited the land and observed that it had some sheds and it was used as a garage. The sellers informed him not to worry as they would deliver vacant possession to him. They entered into a sale agreement for the 2nd defendant to buy the land at Kshs. 3,000,000/= net of any rates and other charges on the land. The sale agreement had a clause that vacant possession will be given by the vendors. He did notice from the documents reference to Yuvinalis Michael Medi Motuka as one of the partners of Abagusii Theatre. He was however aware that Yuvinalis had died on 24 August 2008 by which time the lease had not even been registered. The sellers informed him that the property was jointly owned and not held in common. He paid the outstanding rates and rents and had the transfer registered in name of the 2nd defendant. He was issued with a Certificate of Lease on 18 November 2008. He stated that at no time was he made aware of any suit between the sellers and Yuvinalis. After the transfer he visited the land and confirmed that it was now vacant. He took possession and fenced it and remained in possession until the orders of injunction were issued on 27 February 2009. He denied that the eviction was carried out by the 2nd defendant. After the filing of this suit he came to know of the suit Kisii CMCC No. 291 of 2007 and Kisii HCCC No. 145 of 1991 relating to the suit land. The latter case had settled the issue of ownership of the land to Abagusii Theatre and held that its proprietors were David Kenya, Samwel Mobegi and Yuvinalis Motuka albeit in unspecified proportions. He was convinced that the 2nd defendant held good title to the land and deserved the prayers in the counterclaim including the prayer for mesne profits against the plaintiffs. He produced various exhibits including documents on the history of the land, the judgment in Kisii HCCC No. 145 of 1991, documents relating to the purchase, proof of payment of the purchase price, extract of the register, and the title in name of the 2nd defendant.
15. Cross-examined, he testified that he entered into the sale agreement on 21 October 2008, and the final payment was acknowledged on 19 November 2008. He stated that the court order issued in the case Kisii CMCC No. 291 of 2007 directed registration in the name of the two persons who sold to him the land. He was not aware of this order having been set aside and had no reason to go and check. He asserted that if there was an eviction it was done by the vendors and the 2nd defendant is not responsible for what happened to the plaintiffs. The transfer to the persons who sold to him the land was done by the Executive Officer of the court. Payment of stamp duty for this transfer was not fully paid and he had to pay further stamp duty of Kshs. 60,000/= when transferring to the name of the 2nd defendant. He did a search which confirmed ownership by the two vendors and he did not dig deeper into the history of the land. He was not privy to the controversies surrounding the file Kisii CMCC No. 291 of 2007 or its alleged disappearance. There was an issue on whether registration to the 2nd defendant was done on 17 November or 18 November but his view was this was a matter for the land registry.
16. DW – 3 was Cecilia Harriet Oswera, the Land Registrar, Kisii. Her evidence was that the suit property is registered in the name of Gusii County Council and it was leased to three proprietors, Yuvinalis Michael Medi Motuka Mageka (Yuvinalis Motuka), David Kenya Magare (David Kenya) and Samuel Mobegi (Samuel Mobegi) on 30 August 2007. On 3 September 2007, an order was registered restricting any transaction until the suit Kisii CMCC No. 291 of 2007 was decided. She testified that this suit was decided on 17 September 2007 in favour of the plaintiffs i.e David Kenya and Samuel



- Mobegi, and she had the decree with her. The land was then registered in name of David Kenyanya and Samuel Mobegi on 19 September 2008. On 18 November 2008, the title was transferred to the 2nd defendant. She did not see any irregularity in the transfer of the land to the 2nd defendant.
17. DW – 4 was George Mokaya, the son and legal representative of John Joseph Mokaya, the 4th defendant in the counterclaim, who is described in the suit as the 5th defendant. He testified that his father died on 7 October 2014. His evidence was that it was his father and Yuvinalis Motuka who were the proprietors of Abagusii Theatre Cinema Company and that his father had not sold the land before his death. His father came to learn that Yuvinalis had sold the land to the 1st defendant. Cross-examined, he testified that he was not aware that the suit land came to be registered in name of David Kenyanya, Yuvinalis Motuka and Samuel Mobegi. He was aware that Yuvinalis sold the land to the 1st defendant and that David Kenyanya and Samuel Mobegi had sold it to the 2nd defendant. He did not know how David Kenyanya and Samuel Mobegi came to be registered as proprietors. He did not know who undertook the eviction but he thought that it was the 2nd defendant. He acknowledged that the name of his father does not appear in the allotment letter and he never got registered as proprietor. His father never sued and was never sued in the previous cases and his first participation came through this suit.
 18. With the above evidence the hearing of the matter closed.
 19. I invited counsel to file submissions and I have taken note of the submissions filed and I hold the following view of the matter.
 20. There is of course the main suit that was commenced by the plaintiffs and the several countersuits that came up by way of counterclaims. The main suit by the plaintiffs relates to the manner in which they were evicted from the suit property. From the evidence, it is clear that their claim on the eviction and the alleged loss that they subsequently covered is squarely against the 2nd defendant. When he testified PW-1 absolved the 1st defendant from blame and also stated that he had nothing against the 3rd & 4th defendants. In any event, any claim against the 3rd & 4th defendants would fail as the case against them abated. The question with the case of the plaintiff is whether they have proved that the eviction against them was carried out by the 2nd defendant. On this, I am afraid that there is very little or no evidence against the 2nd defendant. It would appear to me that the plaintiffs blame the 2nd defendant for the eviction for no other reason other than the fact that the 2nd defendant purchased the suit property. They insinuate that because of this purchase then it must be the 2nd defendant who undertook the eviction. I am afraid that this is not good enough in the circumstances of this case. The eviction took place on 14 November 2008. At this time the property had not yet been transferred to the 2nd defendant and the 2nd defendant was not proprietor. What was concurrent at this time is that the 2nd defendant had entered into a sale agreement that was yet to be completed and part of the agreement of the parties was that the vendors, who are the 3rd & 4th defendants, had a duty to give vacant possession of the suit premises to the 2nd defendant. In those circumstances, there was incentive on the 3rd and 4th defendants to undertake the eviction. Bar any concrete evidence that points at the 2nd defendant, and there is none, I would not rush to conclude that it was the 2nd defendant who directed the eviction. Save that the 2nd defendant was in the process of purchasing the land, there is no evidence connecting her to the eviction.
 21. I am afraid that the mere fact that the 2nd defendant was purchasing the property, with no other supporting evidence, is not sufficient for this court to conclude that the plaintiffs have proved to the required standard that the eviction was carried out by the 2nd defendant. I wouldn't therefore burden the 2nd defendant with any loss that may have been occasioned to the plaintiffs and since they blame nobody else their case must fail. In essence they have failed to prove liability on the 2nd defendant and they pursuant to their admission they have no claim against any of the other defendants.



22. Be that as it may, even assuming that liability had been proved, I am not persuaded that the plaintiffs proved actual loss. In the plaint, they itemized that they lost new assorted spare parts of Kshs. 80,000/=, old assorted spare parts including four engines, three gear boxes, an injector pump, pressure plates, pistons, three starters, four alternators, brake buster diff, one programmer for Toyota Rav 4, and three non-serviceable engines. There was also a claim that they lost tools of trade being a battery charging machine costing Kshs. 90,000/-, a painting machine costing Kshs. 140,000/=, two complete tool boxes costing Kshs. 96,000/=, two bottle jacks of 15 tonnes costing Kshs. 18,000/=, an electrical welding machine costing Kshs. 75,000/=, a gas welding machine of Kshs. 60,000/=, a generator of Kshs. 150,000/=, ring spanners, combine spanners, fixed spanners, box spanners, screw spanners of Kshs. 65,000/=, office equipment of Kshs. 25,000/=. Now there was absolutely no proof that these items ever existed in the premises, or were destroyed, or were removed. There was not even a simple photograph, leave alone receipts or other documentary proof, to show the presence of these items in the garage or their loss. Of course, the plaintiffs said that the receipts were in the office which was destroyed and they therefore lost, but if they were keen, they could get some documentation proving purchase from where they bought the items or come up with some other corroborative evidence. It would be dangerous to say that the plaintiffs have proved that the items existed and were lost by the mere oral evidence of a single witness. Even if they had proved culpability on the 2nd defendant, and I find none, I would still dismiss the claim of loss of items and special damages or damages for conversion. At best they would get general damages for trespass and illegal eviction but given that liability is not proved this aspect of their case must unfortunately also fail. Given the foregoing, I have no option but to dismiss the case of the plaintiffs entirely.
23. Apart from the foregoing, there is also a question as to whether the plaintiffs actually held any valid lease. They could only hold a valid lease if they had the permission of the true owner of the land to be on the land. This now takes me to the various other claims of the other parties that were lodged in their counterclaims which relate to the right to title to the land.
24. I will start with the claim of the 5th defendant. His case is that John Joseph Mokaya was a proprietor of Abagusii Theatre Cinema Company . The issue regarding the ownership of Abagusii Theatre Cinema Company was settled in the case Kisii HCCC No. 145 of 1991. That was a case where two individuals, namely Raphael Ondieki and James Orina, had sued David Kenyanya, Yuvinalis Motuka, and Samwel Mobegi over the proprietorship of Abagusii Theatre Cinema Company. It was settled in that case that the owners of Abagusii Theatre Cinema Company were David Kenyanya, Yuvinalis Motuka, and Samwel Mobegi. The name of John Joseph Mokaya did not feature anywhere. In this case the 5th defendant produced particulars of business registration indicating that the business entity was owned by Yuvinalis Motuka and John Joseph Mokaya, but I am aware that within the case Kisii HCCC No. 145 of 1991, the judge, Mbaluto J, was alive to the issue that there had been fraudulent dealings made to claim ownership by different individuals of the business entity and he settled that the business entity is owned by the three defendants in that case. I cannot go against that judgment which is a binding judgment. The long and short of it is that the business entity Abagusii Theatre Cinema Company was settled as being owned by the three persons earlier named and John Joseph Mokaya was not one of them. It follows that the 5th defendant's counterclaim fails and is hereby dismissed with costs.
25. Let me now turn to the case of the 1st defendant. Her case is that Isaac Moindi lawfully purchased the suit land from Yuvinalis Motuka and his 'silent partner' John Joseph Mokaya through a sale agreement entered into on 25 March 1997. I have already dealt with the issue of John Joseph Mokaya and held that he had no interest in Abagusii Theatre Cinema hence no interest in the suit property. The 1st defendant cannot therefore hinge on any proper purchase of the suit land from John Joseph Mokaya. She also cannot, in my opinion, hinge any purchase solely from Yuvinalis Motuka. He could not, on his own,



or jointly with John Joseph Mokaya who had no interest in the suit property, sell the land without the involvement of the other two recognised proprietors of the suit land. The above aside, I have my doubts on the veracity of the sale agreement that was presented. First, I observe that as at 1997, Yuvinalis and his other two partners were still in court in the case Kisii HCCC No. 145 of 1991 as the judgment was delivered on 18 February 1998. I doubt if in light of the fact that the case was still proceeding, Yuvinalis would proceed to sell the land at that time. I also doubt that he would sell the land at that time without involving the two persons that they were still in court with. Moreover, apart from that sale agreement, which I cast doubt upon, there is no evidence of any payment of any purchase price to anyone. All in all I am not persuaded that the 1st defendant purchased the suit land from the rightful proprietors and the claim of the 1st defendant therefore fails.

26. The other party with a claim is Teresa who was plaintiff in the consolidated suit. She did not prove her case and it is dismissed.
27. That leaves the 2nd defendant. I see nothing untoward in the manner in which the 2nd defendant obtained title. If we go back a little, it will be recalled that the suit land was owned by Abagusii Theatre Cinema Company, and it will be recalled that the ownership of this business name was settled and held that it is owned by Yuvinalis, David Kenyanya and Samwel Moindi. I have seen that the lease was duly prepared in the names of these three persons. The three individuals duly became registered as proprietors on 30 August 2007. Up to that point we have no issue. There was then the suit Kisii CMCC No. 291 of 2007 where David Kenyanya and Samwel Moindi sued Yuvinalis. I have not seen the pleadings in that case but there is a decree in favour of David Kenyanya and Samwel Moindi which decree was registered and pursuant to that decree the land transferred to David Kenyanya and Samwel Moindi. There was contention that this judgment was set aside but I have seen no proof of any setting aside of the judgment. It was mentioned that the file disappeared and that the record of setting aside the judgment was in the disappeared file. I am sorry that I cannot vouch that there was any setting aside of the judgment without documentation to that effect. Indeed, if at all the judgment was set aside, you would expect that an order setting aside the judgment be extracted and be in possession of Yuvinalis but there is nothing before me to suggest that the judgment was set aside. Whatever the case, it would appear that Yuvinalis died shortly thereafter and the issue about the land now being owned by two people instead of three was never pursued by the successors in title to Yuvinalis. If they were so aggrieved with the sale of the land by David Kenyanya and Samwel Moindi they could have filed suit to contest the sale but they did not. They let the matter lie. It was also raised that the subordinate court had no jurisdiction in the matter. I am afraid I cannot enter that arena. If any person was aggrieved by the judgment and decree of the court there was avenue to appeal or have it set aside and I have seen no proof of either appeal or the judgment being set aside. If there was anyone entitled to complain about the sale it was Yuvinalis. But it is clear that Yuvinalis and his estate let the chips lie where they lay and let go of the matter. I will thus take it that pursuant to the decree of the court in Kisii CMCC No. 291 of 2007 the suit land was ordered to be owned by David Kenyanya and Samwel Moindi and the title came to be registered in their names through a transfer effected by the court Executive Officer. Having title through a decree of the court I see nothing that could bar them from properly transferring the land to the 2nd defendant. I therefore see nothing untoward with the title held by the 2nd defendant vis-à-vis all other parties in this suit.
28. In her counterclaim, the 2nd defendant asked for an order of ejectment of the plaintiffs from the suit land. I have already mentioned that the plaintiffs took possession of the land under a person who had no title. I have no reason to deny the 2nd defendant this prayer. I give the plaintiffs 30 days to give immediate vacant possession and in default the 2nd defendant is at liberty to apply for their forceful eviction. After the lapse of the 30 days the plaintiffs are hereby permanently restrained from entering



or being in the suit property. The 2nd defendant also claimed general damages for trespass. I wouldn't give an award under this prayer. When the 2nd defendant took possession the land was vacant as the plaintiffs had already been ejected and therefore not in possession. They were not therefore in trespass when the 2nd defendant took over the land. The plaintiffs came back to the land through an order of court and thus their presence on the land cannot be tantamount to trespass as it was through an order of court. Probably the 2nd defendant would have been entitled to mesne profits for the duration of their stay, either against the plaintiffs or the 1st defendant who is the person who put them in possession, but the 2nd defendant made no claim at all for mesne profits in her amended defence and counterclaim. I am not persuaded to award what was not pleaded in the circumstances of this case. There was a notice of claim against co-defendant lodged by the 2nd defendant against the 3rd & 4th defendants. I need not go into that as the 3rd and 4th defendant died without substitution and the cases against them abated.

29. I think I have dealt with all issues in this case save for costs. The only person deserving costs is the 2nd defendant. She is awarded the costs of this suit and of her counterclaim payable jointly and/or severally by the plaintiffs and 1st defendant. The claims of all other parties are dismissed with each party bearing his/her own costs.

30. Judgment accordingly.

DATED AND DELIVERED THIS 18 DAY OF SEPTEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Nyaenya instructed by M/s Bosire Gichana & Co for the plaintiffs

Mr. Nyangena for the 1st defendant

Mr. Okenye for the 5th defendant

Mr. Wabwire for the 3rd defendant in Kisii ELC No. 159 of 2008

M/s Nyamweya Osoro & Nyamweya Advocates for the 2nd defendant – Absent

M/s G. M Nyambati & Co Advocates for the 3rd & 4th defendants – Absent

Mr. Nyariki for the plaintiff in Kisii ELC No. 159 of 2008 – Absent

Attorney General – 3rd defendant in Kisii ELC No. 159 of 2008 - Absent

