



**Atika v Shah & 2 others (Environment & Land Case 197 of 2017)
[2024] KEELC 13773 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 197 OF 2017**

M SILA, J

DECEMBER 10, 2024

BETWEEN

ESTHER KERUBO ATIKA PLAINTIFF

AND

SHANTILAL KANJI SHAH 1ST DEFENDANT

COUNTY LAND REGISTRAR, KISII 2ND DEFENDANT

COUNTY GOVERNMENT OF KISII 3RD DEFENDANT

JUDGMENT

(Both plaintiff and 1st defendant holding title to the same land; need to demonstrate root of title; court’s assessment is that it is the plaintiff who has demonstrated the proper root of title; judgment entered for the plaintiff; 1st defendant’s title ordered cancelled; Land Registrar to reconstruct the records using the documents of the plaintiff)

A. Introduction And Pleadings

1. The plaintiff commenced this suit through a plaint filed on 10 October 2017. In the plaint, the plaintiff pleaded that she is the legitimate proprietor of the land parcel Kisii Municipality/Block III/323 having acquired title on 31 August 2005. She averred that she thereafter took possession and retained possession until 11 February 2016 when she established that the 1st defendant also has title to the same land. She contends that the title of the 1st defendant was acquired by way of fraud. In her suit she seeks orders for a declaration that she is the lawful proprietor of the suit property; cancellation of the title of the 1st defendant; a permanent injunction against the 1st defendant from the suit property; general damages for trespass; costs and any other relief deemed fit.
2. The 1st defendant filed defence and counterclaim where he asserted to be the rightful proprietor of the suit property. He pleaded that the property was originally allotted to one Nyangau Osoro who got



registered as proprietor on 3 June 1992 and he thereafter transferred his interest to Simon Omanwa on 15 July 1994. He pleaded that he purchased the property from Simon Omanwa on 4 February 2016. He contended that it is the title of the plaintiff which is fraudulent. In his counterclaim, he sought a declaration that he is the bona fide proprietor of the suit property and cancellation of the certificate of lease purportedly held by the plaintiff.

3. The Attorney General, on behalf of the Kisii Land Registrar, sued as 2nd defendant, filed defence wherein it is pleaded that if the land was transferred to the 1st defendant, then it was legally done.
4. I have not seen any defence on record filed by the 3rd defendant, the County Government of Kisii.

B. Evidence of the Parties

I. Plaintiff's evidence

5. PW-1 was the plaintiff. She testified that she is a farmer and businesslady in Kisii. She testified that she purchased the suit property from one Margaret Bosibori Sagini (Margaret Sagini) who was then registered as proprietor. She testified that she was given a copy of the Certificate of Lease in the name of Margaret Sagini which she surrendered to the Land Registry when a new one was prepared in her name. She testified that she did a search in the year 2011 which showed her name as proprietor but when she did another search on 16 May 2016 it showed the name of the 1st defendant as proprietor. She stated that prior to 2016 the land had not been interfered with and that she was the one paying land rent and rates. She did not know Simon Omanwa from whom the 1st defendant allegedly purchased the land from.
6. Cross-examined, she averred that when title was in name of Margaret Sagini, it was charged to Kenya Commercial Finance Company Limited. The discharge of charge that she produced did not show that it was registered. She acknowledged that she had not produced any sale agreement to demonstrate purchase of the land nor any transfer form. She testified that she was given consent to transfer from the Municipal Council of Kisii which she produced as an exhibit but she did not have consent to transfer from the Commissioner of Lands. She conceded that she did not produce any allotment letter as an exhibit. She did not lodge any complaint to the police over the title. She stated that she did the search of 2016 as she wished to develop the property but she did not have any building plans.
7. With the above evidence, the plaintiff closed her case.

(ii) 1st Defendant's evidence

8. DW-1 was the 1st defendant. He introduced himself as a businessman. His evidence was that the leasehold title that he has started running from 1 December 1986 whereas that displayed by the plaintiff shows that it started running from 1 May 1991. He testified that the first owner of the land was Nyangau Osoro who became registered as proprietor on 3 June 1992. He testified that before he purchased the land from Simon Omwanwa, he did a search and obtained consent to transfer. The property was valued and he paid stamp duty after which it was transferred to him. He exhibited receipts for the payments that he made and various documents in support of his title. He did not know how Simon Omanwa obtained title from Nyangau Osoro though he thought that Simon was son of Nyangau Osoro.
9. DW-2 was Simon Omanwa. He testified that in 1994, he purchased the suit land from Nyangau Osoro, who was his neighbor in Suneka, Kisii. He was then handed over the original allotment letter in name of Francis Nyangau Osoro which he had with him in court. He was also given the original lease instrument which he also carried to court. He testified that he gave money to the seller to pay the charges noted



in the allotment letter. He then took possession and built a house of iron sheets without anybody claiming the land. He never saw anyone come to the land to value it so as to obtain a loan and never saw Margaret Sagini on the land. He affirmed selling the land to the 1st defendant for a consideration of Kshs. 8 million and he acknowledged the sale agreement produced by the 1st defendant. He testified that he used to pay rates and was given a rates clearance certificate and he duly executed the transfer instrument in favour of the 1st defendant. Cross-examined by counsel for the plaintiff, he testified that there was no sale agreement written when he purchased the land from Nyangau Osoro. Nyangau is now deceased. He stated that it is Nyangau Osoro who transferred the title to him and he handed over to him his Certificate of Lease. He gave Nyangau the money required to transfer title to him. He paid him Kshs 400,000/= as consideration on top of other monies which he used to process title.

10. With the above evidence, the 1st defendant closed his case.
11. The Attorney General and the Kisii County Government did not offer any witness.

(iii) Other evidence

12. At this juncture, I closed the hearing of the matter and invited counsel to file submissions. I thereafter retired to write the judgment. However, in the course of writing the judgment, I felt handicapped as there were too many gaps in the evidence that I was unable to reconcile. I particularly wished to have the evidence from the Land Registrar who kept the records of title and also from the County Government of Kisii, since this was land that was said to have been allotted by the now defunct Gusii County Council.
13. Ms. Oswera Cecila Harriet, the Land Registrar, duly attended court armed with the parcel file. Her evidence however was that the parcel file is empty without a single document. She therefore could not tell anything regarding ownership of the land. She did not know what happened to the documents. She acknowledged that the parcel file should have the lease, the forwarding letter, and the lease certificate. Other documents relating to dispositions ought also to be in the file. She stated that she had written to the Land Administration office in Nairobi for particulars but got no reply.
14. The other witness who testified courtesy of court summons was Nyamache Harun, the Director, Land Administration, Kisii County. He came armed with the records in their office. His evidence was that according to their records, the land originally belonged to Margaret Sagini Bosibori. He had in his file a lease certificate given in 1991. He also had a clearance certificate for Land Rates issued in May 2005 and several miscellaneous receipts showing payment of land rent to the Municipal Council. He had a letter dated 31 March 1994 from the Ministry of Lands to the District Land Officer surrendering copies of lease for registration. The lease certificate was presented on 14 March 1994 and was registered on 29 March 1994 by the Land Registrar, Kisii. He testified that Margaret Sagini transferred her title to the plaintiff. He had a second file now in name of the plaintiff. In it there is a letter dated 20 June 2005 which states that Margaret has applied to transfer the property to the plaintiff. The Council approved the same. He had in his records a new lease certificate issued to the plaintiff on 31 August 2005.
15. Cross-examined, he acknowledged that his file did not have the allotment letter nor minutes discussing the allocation of the land. He testified that there was a minute book. He was cross-examined on the rates demands and rates receipts produced by the 1st defendant but he could not authenticate the same. On the lease in his file, he acknowledged that it does not show that it was registered.
16. The other witness from the County was Tom Nyagami Gai, an Administrative Officer in charge of Land Rates. He came with the original rates register and also testified on the rates demand and rates payment made. Regarding the register, he testified that it shows the original allottee to be Margaret Sagini Bosibori. Her name was cancelled upon transfer to the plaintiff. On payment of rates, he testified



that there are two people paying rates, that is the plaintiff and the 1st defendant. Cross-examined, he testified that the register was used up to 2008 when they transferred to a digital data base. According to him the name of Simon Omanwa does not appear in their records.

C. Analysis And Disposition

17. I invited counsel to file written submissions, which they did, and I have taken these into account before arriving at my decision.
18. This is another suit where two persons claim title to the same land. It is a sad and curious state of affairs which is unfortunately not uncommon in our jurisdiction. It is advisable for any litigant faced with a scenario such as this to present all evidence at his disposal, for it is both the quality and quantity of documentation, that will tilt the balance in favour of one party. There cannot be two owners for the same land and at the end of the day, the court will have to make a decision, who, on a balance of probabilities, holds the better title. As I have mentioned, this determination will be made on analysis of the quality and quantity of evidence and the following factors will need to be taken into account :-
 - i. Whether a party can trace the root of his title;
 - ii. Whether the root of title arose from a lawful process;
 - iii. Who was first to be issued with a grant to the land;
 - iv. Who was in possession and use of the land;
19. I will have the above factors in mind while determining this case.
20. The 1st defendant traces his root of title to an allotment letter dated 13 January 1986 which allotment letter was issued to Nyangau Osoro. The same shows that it was an allotment of an unsurveyed residential Plot No. 52 – Kisii Municipality and there are some moneys therein that are to be paid, including stand premium, land rent, and registration fees, all totaling to the sum of Kshs. 14,130/= . There was produced a receipt dated 7 October 1986 being receipt No. D612408 indicating payment of this amount of Kshs. 14,130/= which receipt is in the name of Nyangau Osoro. DW-2 testified that he purchased the land from Nyangau Osoro in 1994 and that Mr. Nyangau handed to him the allotment letter. He then gave Mr. Nyangau money to pay the charges in the allotment letter. He did state in cross-examination that when he bought the land, Mr. Nyangau gave him a Certificate of Lease.
21. There is of course a contradiction here. DW-2 did not produce any lease in name of Nyangau Osoro. Instead the lease that he produced is in his name. It will be recalled that the allotment letter was not in his name and I have no evidence that Nyangau Osoro wrote to the Commissioner of Lands informing the Commissioner of Lands to issue the lease, not in his name, but in name of Mr. Omanwa (DW-2) . I am unable to reconcile how an allotment letter in name of Nyangau Osoro produced a lease in name of Simon Omanwa. DW-2 had the original Lease in court when he testified. That lease shows that it was registered on 3 June 1994 vide presentation book number 80 of 1994. The 1st defendant also produced a letter dated 11 July 1994, from the Commissioner of Lands to the District Land Registrar, Kisii, forwarding a lease duly signed and stamped for registration. I am similarly unable to reconcile how the lease was registered on 11 June 1994 yet the letter forwarding the lease for registration is of 11 July 1994.
22. The other issue relates to the extract of the leasehold register (white card) produced by the 1st defendant. The white card shows that the first lessee is Nyangau Osoro. Entries one and two in the register are dated 3 June 1992 and are respectively registration of Nyangau Osoro as proprietor and issue of Certificate of Lease to him. Entry No. 3 is dated 15 July 1994, and is registration of Simon Osoro Omanwa in consideration of Kshs. 500,000/=. On the same day is recorded that there is issued a



Certificate of Lease to Simon Omanwa. Again, I am unable to reconcile this with the fact that DW-2 produced an original lease in his name which shows registration on 3 June 1994. There is no entry in the white card of any registration having been made on 3 June 1994. Neither does the White Card demonstrate that Simon Omanwa was the first registered lessee of the land. What the register shows is that the first lessee was Nyangau Osoro and that he was issued with a Certificate of lease on 3 June 1992. The register shows that he then transferred his interest to Simon Omanwa and Simon became the second registered proprietor on 15 July 1994. No evidence of any Certificate of Lease in name of Nyangau Osoro was ever produced and indeed no lease was produced in name of Nyangau Osoro. Instead the lease we have is in name of Simon Omanwa. This brings into suspicion the purported registration of Nyangau Osoro as first proprietor of the suit land. If he never had a lease, and the lease was in name of Simon Omanwa, then there was no lease in name of Nyangau Osoro which could have been registered on 3 June 1992. The lease produced was in name of Simon Omanwa and it is one dated 3 June 1994. There could not have been a leasehold register (white card) without the lease first being registered. In other words, I find the white card produced by the 1st defendant to be suspect. If the lease was of 1994, there could not have been a white card opened in 1992.

23. The other thing that I observe is that the Lease dated 3 June 1994 in name of Simon Omanwa shows that payment was made through receipt No. D 360184. The letter forwarding the lease, which I have already pointed out, is dated 11 July 1994 (a later date), and indicates that payment was made on 7 October 1986 vide a receipt number D612408. There is a difference in the receipt numbers which is not explained and which brings further suspicion.
24. Apart from the above, the County officials testified that they have no record of Simon Omanwa in their rates system. The original rates register which was produced shows the original rate payer to be Margaret Sagini, not Simon Omanwa. Indeed, neither Simon Omanwa nor Nyangau Osoro appear in the register as rate payer. I observe that the earliest rates record supporting the title of the 1st defendant is of 7 June 2011. The first payments for rates are those made in 2016 when the property was being transferred to the 1st defendant. Not a single receipt was produced to show that before 2016, Simon Omanwa paid any rates or rents.
25. What about the root of title of the plaintiff? The plaintiff testified that she purchased the suit land from Margaret Bosibori Sagini. She did not produce any allotment letter in name of Margaret Bosibori Sagini or any receipts indicating payment for stand premium and such other fees payable on allotment. Neither did she produce any lease in name of Margaret Bosibori Sagini or the register (white card) indicating that Margaret was indeed acknowledged in the register of the suit land as proprietor. What she produced in name of the person who sold to her the land was only a Certificate of Lease. The same indicates the said Margaret as holding a leasehold interest for 99 years from 1 May 1991 and that she was issued with the Certificate of Lease on 1 December 1998. Despite the above, there was produced an official search dated 20 July 1999 which shows that Margaret Sagini Bosibori got registered as proprietor of the suit property on 14 March 1994. The same official search shows that the Certificate of Lease was reissued on 30 January 1998. Subsequently, the title was charged to Kenya Commercial Finance Company on 14 July 1999. The charge was produced as an exhibit. The County officers confirmed that they have a draft lease in their records in name of Margaret Bosibori Sagini. They also recorded her name in the rates register as the first rate payer. There are rates receipts produced of the year 2005 including payments made to transfer the title to the plaintiff in the same year.
26. From the above, I am persuaded that the first allottee of the suit land was Margaret Sagini Bosibori and not Nyangau Osoro or Simon Omanwa. It follows that the proper root of title is that of Margaret Sagini Bosibori and not Nyangau Osoro or Simon Omanwa.



27. That being the case, it is clear to me that it is the title of the plaintiff which should be upheld and not that of the 1st defendant. From the evidence, my hypothesis is that the documents produced by Simon Omanwa were all doctored to show that he had a title to the suit property when in fact title was all along with Margaret Bosibori Sagini. In essence they are fraudulent documents. It therefore follows that Simon Omanwa had no good title to transfer to the 1st defendant. The title of the 1st defendant is therefore not worth the paper that it is written on. The 1st defendant may have been innocent in his purchase of the land but the fact remains that the person who sold to him the land held a fraudulent title. I am sorry to tell him that he bought hot air from Simon Omanwa.
28. From the foregoing it will be seen that I find that the person with good title to the suit property is the plaintiff. I allow her suit and dismiss the counterclaim. I declare the plaintiff as the rightful proprietor of the suit property. I issue an order that any purported title of the 1st defendant be cancelled forthwith. That title of the 1st defendant is declared null and void. I further order the Land Registrar, Kisii, to reconstruct the land parcel file using the documents of the plaintiff. I order the Land Registrar to cancel the existing register (white card) exhibited by the 1st defendant and to proceed and prepare a fresh register with the documents presented by the plaintiff. Given that the plaintiff is declared the owner of the suit land I issue an order of permanent injunction against the 1st defendant stopping him from interfering with the suit land. There was a prayer for general damages. I cannot fault the 1st defendant for making entry into the land and it would appear that he stopped any developments on the suit land once the case was filed. I will therefore not make any order for general damages for trespass against him. The plaintiff will have the costs of both the suit and the counterclaim jointly and/or severally against the defendants.
29. Judgment accordingly.

DATED AND DELIVERED THIS 10 DAY OF DECEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Ayienda for the plaintiff;

Ms. Kebungo h/b for Mr. Nyamurongi for the 1st defendant;

Mr. Ndiritu h/b for Mr. Wabwire, State Counsel, for the 2nd defendants;

Ms. Bonareri present for the 3rd defendant.

