



**In the Matter of the late Muhambi Gogo Mwangari (Environment & Land Case 7 of 2017) [2023] KEELC 20069 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20069 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 7 OF 2017  
NA MATHEKA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**KHAMIS KOMBO GOGO ..... PLAINTIFF  
SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE  
MUHAMBI GOGO MWANGARI (DECEASED)**

**AND**

**BENSON KAHINDI TSANJE ..... DEFENDANT**

**JUDGMENT**

1. It is the Plaintiff's claim that the late Muhambi Gogo Mwangari (deceased) is the lawful registered owner of the suit property namely Kilifi/Chasimba/374. The Plaintiff avers that the late Muhambi Gogo Mwangari (deceased) held the said property on his own behalf and on behalf of the late Mwangala Gogo (deceased) and the late Joseph Hanzari Gogo (deceased) each owning one third (1 / 3) share of the suit property and they all occupied the suit property. The Plaintiff avers that the beneficiaries to the estate of the late Muhambi Gogo Mwangari (deceased); the estate of the late Mwangala Gogo (deceased) and the estate of the late Joseph Hanzari Gogo (deceased) have at all material times resided, occupied and utilized the suit property for farming and other activities and the beneficiaries have continued to occupy the suit property following the death of the three (3) deceased. The Plaintiff avers that the suit property was demarcated in 1972 and the Defendant's biological father was allocated property known as Kilifi/Chasimba/232 which was registered in his name, Tsanje Gogo Mungu.
2. The Plaintiff avers that plot Kilifi/Chasimba/232 was sub divided into Kilifi/Chasimba/444 and Kilifi/Chasimba/445 with the latter being sold off to Francis Kaingu Mole. The Plaintiff also avers that plot Kilifi/Chasimba/374 was registered on 15<sup>th</sup> August, 1990 and that plot Kilifi/Chasimba/232 was sub divided into Kilifi/Chasimba/444 and Kilifi/Chasimba/445 on 2<sup>nd</sup> April, 2001. The Plaintiff avers that Plot Kilifi/Chasimba/444 is distinct from plot Kilifi/Chasimba/374 and the Defendant has no



beneficial interest in the suit property being Kilifi/Chasimba/ 374. The Plaintiff prays for judgment against the Defendant for:

- a. A declaration that the late Muhambi Gogo Mwangari (deceased) is the lawful registered proprietor of the suit property known as Kilifi/Chasimba/374.
  - b. A declaration that the late Muhambi Gogo Mwangari (deceased) held the said property on his own behalf and on behalf of the late Mwangala Gogo (deceased) and the late Joseph Hanzari Gogo (deceased) each owning one third (1/3) share of the suit property.
  - c. A permanent injunction to restrain the Defendant/ Respondent by himself his servants, agents, assigns and any other person acting under his authority from trespassing on, wasting, constructing on, alienating or in any other way interfering or dealing with the suit property known as Kilifi/Chasimba/374.
  - d. General damages.
  - e. Costs of the suit and Interest therein at court rates.
3. The Defendant avers that the title deed obtained by the Plaintiff was an act of fraud and that it should be revoked and to be issued to the family of the Defendant. That Plot Kilifi/Chasimba/232 and Kilifi/Chasimba/374 are part and parcel of Kilifi/Chasimba/232 which is situated at Chasimba Scheme making a total of 32 Acres which belongs to the Defendant's family. That the suit property is owned by Tsanje Gogo Mungu (deceased) and whose estate is represented by the two Administrators namely Chizi Tsanje Gogo and Kombo Kahindi Tsanje. That Mombasa High Court Environment and Land Court Cause No 113 of 2013 was dismissed for lack of capacity to sue and that there is a pending suit in the High Court of Mombasa being Cause No 7 of 2015 and is awaiting taxation and settlement. The Defendant prays that the Plaintiffs suit be dismissed with costs and for the following orders;
- a. A Declaration that Defendant and his family are the owners of the suit property and that the Plaintiffs title deed should be revoked.
  - b. Any other relief that this Honourable Court deems fit expedite.
  - c. Costs of this suit and interest at court rates.
4. This court has considered the evidence and the submissions therein. PWI the Plaintiff testified that the late Muhambi Gogo Mwangari (deceased) is the lawful registered owner of the suit property namely Kilifi/Chasimba/374. The Plaintiff avers that the late Muhambi Gogo Mwangari (deceased) held the said property on his own behalf and on behalf of the late Mwangala Gogo (deceased) and the late Joseph Hanzari Gogo (deceased) each owning one third (1 / 3) share of the suit property and they all occupied the suit property. He produced the certificate of title as an exhibit. The Defendant avers that the title deed obtained by the Plaintiff was an act of fraud and that it should be revoked and to be issued to the family of the Defendant. Section 24 (a) of the [Land Registration Act](#) stipulates as follows:
- “subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....”



5. In the case of *Willy Kipsongok Morogo vs Albert K. Morogo* (2017) eKLR the Court held as follows;
- “the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under Sections 24, 25 and 26 of the *Land Registration Act*.”
6. While in the case of *Joseph N.K. Arap Ng’ok vs Moiyo Ole Keiwua & 4 others* (1997) eKLR, where the Court of Appeal held that;
- “Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”
7. Further, in Civil Appeal No. 246 of 2013 *Arthi Highway Developers Limited vs West End Butchery Limited and others*, the Court of Appeal expressly stated thus:
- “Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”
8. Be that as it may, Section 26 of the *Land Registration Act*, No.3 of 2012 provides that;
- “26.
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”



9. In the case of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another* (2013) eKLR the court held that:

“ the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme.”

10. Hon. Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows: -

“ ...the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

For the first limb, it appears to me that the title of the 1<sup>st</sup> defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1<sup>st</sup> defendant was a party to the fraud or misrepresentation. Indeed, to me the 1<sup>st</sup> defendant was an innocent purchaser for value. He was probably conned of his money by the 2<sup>nd</sup> Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2<sup>nd</sup> Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2<sup>nd</sup> defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).

Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.

11. The Plaintiff has among his documents, attached the title deed for the suit property namely Kilifi/Chasimba/374 (PEX4) and official search (PEX5) dated 10<sup>th</sup> March 2016 revealing that Muhambi Gogo Mwangari (deceased) was registered as the owner of the suit property on 15<sup>th</sup> August 1990 and was issued with a title deed. The said Muhambi Gogo Mwangari died on 5<sup>th</sup> July 2012. From the pleadings and annexures, it is clear that the suit property was demarcated in 1972 and the Defendant's biological father was allocated property known as Kilifi/Chasimba/232 which was registered in his name, Tsanje Gogo Mungu. Plot Kilifi/Chasimba/232 was sub divided into Kilifi/Chasimba/444 and Kilifi/Chasimba/445 with the latter being sold off to Francis Kaingu Mole. Plot Kilifi/Chasimba/374 was registered on 15<sup>th</sup> August, 1990 and that plot Kilifi/Chasimba/232 was sub divided into Kilifi/Chasimba/444 and Kilifi/Chasimba/445 on 2<sup>nd</sup> April, 2001. I find that Plot Kilifi/Chasimba/444 is distinct from plot Kilifi/Chasimba/374.

12. Although the Defendant alleges fraud on the part of the Plaintiffs on how they obtained their title, they have offered no explanation on how this happened way back in 1990. They have also provided



no proof that the Plaintiff knowingly took part in the alleged fraudulent dealings concerning the suit property. Section 109 of the Evidence Act Cap 80 is clear that;

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

13. The well-known mantra "he who asserts must prove" was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

"We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side."

14. It is the view of this court that it can only make a determination on the ownership of the suit property based on the title documents and the supporting documents thereto. In the instance suit the burden to prove the alleged fraud lies with the Defendant who have failed to adduced any evidence in support of those allegations. In associating myself with the cited decisions, the legal provisions cited above as well as the evidence before me, I find that the Muhambi Gogo Mwangari (deceased) is the lawful registered owner of the suit property namely Kilifi/Chasimba/374 hence entitled to protection of the law in accordance with the provisions of Section 24, 25 and 26 of the Land Registration Act. I find that the Defendant has failed to establish his counter claim on a balance of probabilities and I dismiss it with costs. I find that the Plaintiff has proved his case on a balance of probabilities and I make the following orders;

1. A declaration that the late Muhambi Gogo Mwangari (deceased) is the lawful registered proprietor of the suit property known as Kilifi/Chasimba/374.
2. A declaration that the late Muhambi Gogo Mwangari (deceased) held the said property on his own behalf and on behalf of the late Mwangala Gogo (deceased) and the late Joseph Hanzari Gogo (deceased) each owning one third (1/3) share of the suit property.
3. A permanent injunction to restrain the Defendant/ Respondent by himself his servants, agents, assigns and any other person acting under his authority from trespassing on, wasting, constructing on, alienating or in any other way interfering or dealing with the suit property known as Kilifi/Chasimba/374.
4. Costs of the suit.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**N.A. MATHEKA**

**JUDGE**

