



Baya & another v Kithuku (Environment and Land Appeal E009 of 2024) [2025] KEELC 3103 (KLR) (3 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3103 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E009 OF 2024**

FM NJOROGE, J

APRIL 3, 2025

BETWEEN

JULIUS YAA BAYA 1ST APPELLANT

LINUS CHARO JEFWA 2ND APPELLANT

AND

KAINGU KALAMA KITHUKU RESPONDENT

*(An Appeal from The Judgment and Decree of HON J N MWANIKI CHIEF MAGISTRATE
Delivered at Malindi ON 21ST FEBRUARY 2024 In CMELC LAND CASE NO E 033 OF 2023
–JULIUS YAA BAYA & LINUS CHARO JEFWA VERSUS KAINGU KALAMA KITHUKU)*

JUDGMENT

1. The background to the present appeal is that the appellants filed Chief Magistrates Court Case Number 33 Of 2023 At Malindi against the respondent seeking the following orders:
 - a. Vacant possession of the suit property situated at Ramada / Adu Settlement Scheme within Kilifi County containing by measurement 12.7 hectares or thereabouts and known as land title number Malindi /Adu /12 and for orders of the eviction of the defendant from the suit property and orders for the demolition of the semi-permanent house or structures erected on the suit property by the defendant;
 - b. Permanent injunction restraining the defendant by himself his servants or agents from continuing to remain on the suit property from trespassing onto the suit property, cultivating, selling, charging, constructing or from dealing with a suit property in any manner whatsoever;
 - c. General damages for trespass and unlawful use of the suit property;
 - d. Cost of this suit and interest thereon at court rates;



- e. Any other relief that this court may deem just to Grant.
2. Alongside the plaint, the plaintiffs filed their witness statement and a list of documents comprising of a copy of the title deed in the name of the plaintiffs, a copy of certificate of official search showing that the plaintiffs were the registered owners of the suit land, a copy of grant of letters of administration issued on 29th November 2021 to the 1st appellant in Malindi CM Succession Cause Number 212 Of 2021 in the estate of Charo Jefwa Yaa, a copy of title deed in the name of Charo Jefwa Yaa and 2 photographs showing a part of the suit property.
 3. In the plaint, the appellants claimed to be registered owners entitled to the exclusive possession of Malindi /Adu/12 (hereinafter also referred to as “the suit land”), having acquired the same through transmission pursuant to succession in the estate of Charo Jefwa Yaa, their father, the original registered owner thereof. They pleaded that the government of Kenya established the Ramada/Adu Settlement Scheme and after the planning and demarcation and mapping of the Scheme, the late Charo Jefwa Yaa was allocated the suit property and after payment of the requisite fees, he was registered as the absolute owner thereof on 11th August 2006, and subsequently he was issued with the title deed on 18th October 2018. However, subsequently and without any colour of right, the respondent, trespassed onto a portion of the suit property measuring about 3 acres or thereabouts within the suit land, claiming that the same belongs to him and started cultivating the land and in the year 2021. He erected as semi-permanent house thereon without the consent of the appellants. The appellants maintain that attempts to have the matter resolved by way of alternative dispute resolution failed and the respondent refused vacate the property thus denying them user thereof, hence the suit.
 4. In response to the suit, the respondent filed a written statement of defense dated 3rd July 2023 through Richard O. and Company Advocates, incorporating a counterclaim against the appellants. The respondent denied the claim. The respondent however admitted that the Appellants’ names are currently registered against the suit property as pleaded, but maintained that the appellants were holding it in trust for him, and that he was in actual occupation and possession of the same. He further narrated that the suit property was once fraudulently registered in the names of Charo Jefwa Yaa now deceased, before it was transmitted to the appellants.
 5. In giving a further history of the suit land, the respondent stated that he bought the suit property long before adjudication from one Kadzamba Ngala in the year 1978 and took possession of the same immediately. When the adjudication exercise commenced in the 1990s, the respondent was identified as the occupier of the sold property and his name was captured in the adjudication register as Number 12. When the respondent finally went to pick his title, he learned that title to the suit land had been issued in the name of Charo Jefwa Yaa. He made a complaint to the adjudication office and upon being summoned by that office, Charo Jefwa Yaa admitted that the registration was erroneous and proceeded to hand over the original title to the respondent. Thereafter Charo Jefwa Yaa died before signing and necessary transfer documents in favour of the respondent.
 6. In the counterclaim, the respondent joined issues with the appellant and reiterated the matters in the defense and claimed for the following orders:
 - a. Dismissal of the plaintiff’s suit with costs and interests at court rates;
 - b. Cancellation of the title in respect of land parcel known as Malindi/Adu/12 and have the same reissued in the names of the defendant;
 - c. Costs to the counterclaim;
 - d. Interest on costs at court rates;



- e. Any other relief this honorable court deems fit to grant in the circumstances.
7. The appellants filed their reply to defence and defence to counterclaim dated 23rd August 2023. In those pleadings they deny that registration of the suit land in their father's name or the transmission to them, was fraudulent, they denied that the defendant bought the suit land from one Kadzamba Ngala in 1978, or that the respondent had had possession thereof since that year. They maintained that the suit land did not belong to the said Kadzamba Ngala, stating that it was not located in an adjudication scheme but in a settlement scheme, and that the appellant was not identified as the settler on the suit land. They denied that any complaint was made to the Adjudication Office or that their father admitted that the issuance of title in his name was erroneous, or that he surrendered his title, or that he agreed to transfer the suit land, to the respondent.
8. In the defense to counterclaim they maintained that it was barred by Section 7 of the Limitations of Actions Act Cap 22 notwithstanding the grant of leave in Malindi ELC Case Number 25 Of 2022 OS; that the counterclaim was thus incompetent and bad in law and that the respondent lacked any color of right or interest in the sold property hence the orders he sought in the counter claim were unmerited.

Trial Process

9. The two appellants testified in their case adopted their written witness statements and were cross-examined on 1st November 2023.
10. The respondent testified alone in his case on 6th December 2023.
11. The parties then filed written submissions and judgment was delivered on 21st February 2024.
12. In his judgment the learned trial Magistrate noted the uncertainty of the 1st appellants' evidence. He also noted that the respondent had availed documents showing that there had been complaints made by the respondent over the land and that the issue had been referred to the area Chief who had in turn referred the issue to the Settlement Officer at Magarini; that the letter by the Chief to the Settlement Officer dated 6th November 2013 was requesting to have the ownership changed from the deceased Charo Jefwa Yaa to the respondent. In conclusion he found that from a totality of the evidence on record, the issuance of title to the deceased Charo Jefwa Yaa and the subsequent registration of the land in the names of the appellant was erroneous and the land rightfully belonged to the respondent, and he dismissed the suit before him with costs to the respondent and issued the following orders:
 - a. A declaration that the respondent is the rightful owner of the land;
 - b. An order cancelling the title in the appellants' names and compelling issuance of the title in the respondent's name.

Analysis and Determination

13. At the hearing, the parties' evidence matched the contents of their pleadings which were also replicated in their written witness statement almost word for word.
14. When PW1 Julius Yaa Baya was cross-examined by Mr. Otara for the respondent he stated that he does not recall when the respondent started encroaching on the land. He admitted that the respondent has built on the land and has been utilizing the land. He did not know whether his father gave the original title to the land to the respondent. He admitted that there have been meetings between his father, the respondent and the area Chief. He intimated that his father had reported about loss of his title deed but was unable to produce any Police OB report to that effect. He also admitted that his father passed on



- in 2019 after receiving the title deed in 2018. The evidence of the 2nd appellant yielded scantier details than his brother's before him.
15. On cross-examination of PW1 by Mr Shujaa he stated that he bought the land from 3 people at Kshs 6,000 and an agreement was written down. Adjudication was then conducted and he was listed as the owner of the land. He admitted that he never got a letter of offer.
 16. This court has noted gaps appearing in both the appellants' and the respondent' respective cases.
 17. In respect of the appellant's case, their insistence that the suit land was allocated to their father in a Settlement Scheme was not supported by any evidence that such a Settlement Scheme existed. A perusal of the title document they produced as evidence does not evince the fact that the same originated from a Settlement Scheme. Curiously also, the appellants also do not know the date on which the alleged encroachment by the respondent commenced, which is indicative that the respondent was in occupation of the suit land before title was issued in the name of their father.
 18. It is also apparent that their father was engaged in some kind of dispute resolution mechanism with the respondent before the local Chief before he died. However, it is more curious that the appellants do not have any Letter of Offer issued to their father in his name in respect of the suit land. In this case they rely only on the title and the certificate of official search. It is correct that Section 25 and 26 of Land Registration Act (LRA) cumulatively provide for indefeasibility of title subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and save on the grounds of fraud or misrepresentation to which the person is proved to be a party, illegality, unprocedural acquisition or corruption. However, it has been stated before by the Court of Appeal in the *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR that where the validity of a title is in dispute, it is not sufficient for the person registered as the proprietor thereof to merely produce that title as evidence and claim that he has indefeasible title and do nothing more; rather he must demonstrate the manner in which that title came to be registered in his name and prove that the process that was followed was legal in order for that title to be declared valid and indefeasible. Their appellants in this case therefore lost their opportunity to establish before the trial court that the title was registered lawfully in the name of their father when they failed to present any evidence regarding the propriety of the process leading up to the issuance of the title in their father's name.
 19. In respect to the case of the respondent, he also never produced evidence that the land was adjudicated in the 1970s. However, a perusal of his exhibits this court has come across an inventory of documents apparently recovered from him on 1st November 2023. These include an original title deed for the suit land in the name of the appellants' father, a copy of a letter dated 6th November 2013 from the Chief, Adu Location addressed to the Settlement Officer, Magarini Settlement Project, a copy of a Citation Cause Number 1 Of 2021 extracted by Richard O. and Company Advocates, a copy of a letter from the Assistant Chief, Ramada to the area Chief, Adu, dated 3rd September 2020, a copy of a letter from Senior Chief Adu Location dated 4th November 2020, and a copy of a complaint against the Assistant Chief Ramada Sub-location, one Justin Furaha written by Richard O. And Company Advocates addressed to the County Commissioner Magarini Sub-County dated 28th September 2023. 6th November 2013 mentioned herein above was provided among the respondents exhibits. It is addressed to the Settlement Officer Magarini Settlement Project. It is on a letterhead of the Ministry of Interior and Co-Ordination of National Government Office of the Chief, Ado Location. It purportedly confirms that the respondent was the person seen in Plot Number 12 Adu Scheme when land officers were doing verification. It seeks the Settlement Officer's assistance to change the name on the title from that of the appellants' father to that of the respondent. It bears the official stamp of a Chief, Adu Location.



A copy of the letter the letter the 6th November 2013 mentioned herein above was provided among the respondents exhibits. It is addressed to the Settlement Officer Magarini Settlement Project. It is on a letterhead of the Ministry of Interior and Co-Ordination of National Government Office of the Chief, Adu Location. It purportedly confirms that the respondent was the person seen in Plot Number 12 Adu Scheme when land officers were doing verification. It seeks the Settlement Officer's assistance to change the name on the title from that of the appellants' father to that of the respondent. It bears the official stamp of a Chief, Adu Location.

20. Several relevant issues arise from a perusal of the appellants' and the respondents' documents.
21. First, they confirm that the original title to suit land was in the possession of the respondent yet there is no evidence of a complaint to the police stating that it has been lost or stolen. It is strange that this issue does not feature at all in the appellants' evidence save by way of a simple statement on cross-examination to the effect that their father had reported about the loss of his title deed. In the same cross-examination PW1 stated that his father never made any OB report with the police. These two statements are contradictory. In addition, PW1 upon cross-examination by Mr Otara admitted that he did not know whether his father had given the original title to the respondent. What this court is inclined to believe is that no report of loss of the title deed was ever made to the police by Charo Jefwa Yaa because he knew that he had willingly surrendered the original title to the respondent herein.
22. Secondly, it appears strange that the appellants do not have any single piece of documentation showing that their father was engaged in any form of dispute resolution with the respondent over the suit land.
23. Thirdly this court has no reason to doubt that the letter dated 6th November 2013 was indeed written by the Chief of Adu Location. By 2013 the appellant's father was still alive. The letter was written 10 years before the suit in the lower court was filed and 6 years before Charo Jefwa Yaa died. The suit herein was not filed by Charo Jefwa Yaa but by his sons who are the appellants here in. In this court's view, only the knowledge that the suit land was not properly registered in his name could have convinced Charo Jefwa Yaa not to lodge a suit for eviction against the respondent.
24. There is also a standalone issue of which other land the appellants had been settled on before they started claiming the suit land. The evidence of PW2 revealed that there may have been such land. However, its particulars including, number, description, location and size were not given. I find that there has been failure on the part of the appellants to render full disclosure of facts surrounding the allocation of either the other parcel they allegedly lost and the parcel involved in this case.
25. The present appeal is premised on the ground that the learned trial Magistrate erred in law and in fact in holding that the issuance of the title to the deceased and its transmission to the appellants was erroneous, and that he failed to properly evaluate the evidence adduced before him by the parties in coming to that decision.
26. It is also premised on the ground that the trial court erred in failing to find that the respondent had failed to prove that he had been initially allocated the suit land, and that the registration of the suit land was obtained by means of fraud mistake or error.
27. On the basis of the analysis set out here in above by this court there is no substance in grounds number 1 and 2 of the appeal and they must be dismissed.
28. Regarding the 3rd and 4th grounds in the Memorandum of Appeal, it is clear that the respondent was not relying on the cause of action of fraud in his counterclaim, but rather error on the part of the registration officers in assigning what was his land to Charo Jefwa Yaa, registering it in his name and issuing him with a title deed thereto. I find that the evidence that the respondent produced supported



his claim that an error had been committed and the parties had been jointly engaged in an attempt to correct that error before Charo Jefwa Yaa died.

29. The legal burden of proof in this case was the plaintiffs to establish that such an allocation to their father had been initially made, where upon the satisfaction of which the respondent would have been required to discharge the evidential burden of proof to disprove that allocation and establish that he had been initially allocated the land. No evidence whatsoever came from the appellants to demonstrate that their father had been allocated the said plot before the title was issued to him, and they therefore did not prove their claim on a balance of probabilities. The only conclusion to be arrived at from those facts is that there is no evidence to support the claim that Charo Jefwa Yaa was allocated the land initially, and so I find that the trial court never made any error as intimated in ground 3 in the Memorandum of Appeal.
30. Regarding ground 4 in the Memorandum of Appeal I find that there is satisfactory evidence before the trial court to the effect that the respondent had lodged complaints through the Chief to the Settlement Officer at Magarini hence that ground lacks merit.
31. Regarding ground 5 in the Memorandum of Appeal I do not find it in any part of the trial court record that the trial Magistrate expressly stated that the respondent's claim that he had been in occupation of the suit land since 1978 was correct. In any event, all that matters is that there was evidence before the trial Magistrate that the respondent was in possession of the land as at the time of trial.
32. Regarding ground 6 in the Memorandum of Appeal, this court finds that there was evidence that Charo Jefwa Yaa had surrendered his title deed to the respondent and this can only be deemed to be a symbol of his acceptance that his registration of the suit land in his name was erroneous, and that they had consented to change of the title from his name to that of the respondent before he died. Consequently, the counterclaim filed by the respondent had been proved before the trial court on a balance of probabilities and ground number seven in the Memorandum of Appeal has no merit.
33. The outcome of the foregoing analysis is that all the seven grounds of appeal set out by the appellant lack merit and therefore the appeal is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 3RD DAY OF APRIL 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

