



**Mohamed v Fadhil & 2 others (Environment & Land Case  
68 of 2016) [2022] KEELC 3278 (KLR) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3278 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 68 OF 2016**

**MAO ODENY, J  
JULY 26, 2022**

**BETWEEN**

**HUBUU SEIF MOHAMED ..... PLAINTIFF**

**AND**

**SULTANA FADHIL ..... 1<sup>ST</sup> DEFENDANT**

**FATEMI TAYABAL ABDULHUSSEIN ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES MOMBASA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By an amended Plaint dated 12<sup>th</sup> September 2018 the Plaintiff herein sued the Defendants jointly and severally seeking the following orders: -
  - a. A Declaration that the purported invasion by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and/or their agents is illegal and an act trespass.
  - b. A permanent injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant from dealing leasing Plaintiff's Plot of land CR 65740 measuring 7.927 Hectares situated at Takaungu Trading Centre in Kilifi County.
  - c. A Declaration that the 3<sup>rd</sup> Defendant's cancellation of the Plaintiff's Title was illegal.
  - d. An order reinstating the Plaintiff as the lawful owner of the said parcel of land.
  - e. General damages.
  - f. Cost of the suit plus interest at court rates.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Defence, list of documents, list of witnesses and witness statements on the 5<sup>th</sup> April, 2016 but the 3<sup>rd</sup> Defendant did not participate in the proceedings.



### **Plaintiff's Case**

3. PW1 Hubuu Seif Maohamed adopted her statement and stated that in March, 2016 some hooligans went to their farm in Takaungu and invaded the suit land which they claimed to belong to the 1<sup>st</sup> Defendant.
4. On cross examination by Mr. Kilonzo PW1 stated that she is the registered owner of Plot No. 75 Takaungu since 2016 having inherited the same from her grandparents and that she has letters of Administration which she produced in court.
5. It was PW1's testimony that Nahila Fadhila is also a registered owner and further that the 2<sup>nd</sup> Defendant is the one who sold the property to Nahila Fadhili. PW1 confirmed that the Certificate of Ownership issued on 12<sup>th</sup> January 1974 shows Nahila Fadhil as the registered owner and that the same was issued before hers. That the Deed Plan for the title issued to him in 2016 is also the same No. 93539.
6. On further cross examination PW1 stated that she had a certified copy of an original Deed Plan and not the original Deed Plan which was issued on 19<sup>th</sup> June 2015 and that the Deed Plan in favour of Nadila Fadhil was issued on 15<sup>th</sup> October 1973. Her explanation was that a certified copy is supposed to be issued to the registered owner but she was issued with the copy because the land belonged to her grandparents. She stated that it was true that the certificate issued in 1974 shows how Nahila obtained the land but the signatures on the document are different. She also stated that she was aware of a letter dated 3<sup>rd</sup> March 2016 addressed to her by the District Land Registrar asking her to surrender her title for cancellation.
7. PW1 stated that she did not surrender the title but the Registrar went ahead to cancel her title. Further that there was an existing title but she registered a new grant as the original got lost and was given a new number because there were no records. She confirmed that by the time she came to court, her grant had been cancelled and that Nahila's title came first before hers.
8. On cross examination by Mr. Munga, PW1 told the court that her lawyer sued the Registrar of Titles because he cancelled her title and that her lawyer appeared before the Registrar but did not surrender the title.

### **Defense Case**

9. DW1 Sultana FadhiL adopted her statement dated 5<sup>th</sup> April 2016 as her evidence in chief and produced a list of documents as Dexh. No. 1 to 6. She stated that she was a stranger to the parcel of land CR 65740 and that she did not have any interest in the same.
10. DW1 testified that the Certificate of Title CR 65740 dated 18<sup>th</sup> August 2015 is attached to a certified copy of Deed Plan for Plot 75 Group 1 Takaungu dated 19<sup>th</sup> June, 2015 which was owned by Shabbirhussein Tayabali Abdulhussein and registered vide CR 14387/1 dated 12<sup>th</sup> January, 1974 with Deed Plan No. 93539 dated 15<sup>th</sup> October 1973.
11. It was DW1's evidence that upon the death of Shabbirhussein Tayabali Abdulhussein she was involved in the administration and distribution of his estate as an executor and as a such she was aware that the said Plot No. 75 Group 1 Takaungu CR 143871 of 12<sup>th</sup> January, 1974 was transferred to his heirs Murtaza and Qutbdin Shabbir who later sold and transferred the same to Nahla Fadhil on 27<sup>th</sup> May, 2010 who is the registered owner of the suit land.



### **Plaintiff's Submissions.**

12. Counsel submitted that it is only the court that can declare a title illegal and that the Registrar of Titles does not have the requisite jurisdiction to do so. It was counsel's submission that the cancellation of the Plaintiff's title was done fraudulently as stated in paragraph 6 (a) of the Amended plaint and that once fraud is pleaded, it does not matter who is registered as the owner. Counsel urged the court to grant the prayers as per the plaint.

### **1<sup>st</sup> and 2<sup>nd</sup> Defendants' submissions**

13. Counsel filed submissions and identified the following issues for determination by the court: -
- a. Whether or not the Plaintiff is the legal owner of the suit property.
  - b. Whether or not the Plaintiff has established any cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  - c. Whether or not the reliefs sought by the Plaintiff against the Defendants in the Plaint ought to be granted.
  - d. Who should bear the costs of the suit?
14. On the first issue, Counsel submitted that neither the Plaintiff nor the Defendants herein are the registered owners of the suit property and that the suit property is registered in the name of one Nahla Fadhil who holds the same as absolute and indefeasible owner. That this is supported by the Certificate of Ownership CR 14387 dated 12<sup>th</sup> January, 1974 for subdivision No. 75 Group 1, Takaungu and that the certificate of postal search for CR. 14378 dated 3<sup>rd</sup> March, 2016 confirmed that Plot No. CR. 14378 belonged to one Nahla Fadhil who is not a party to this suit.
15. It was counsel's submission that the Plaintiff did not produce any evidence to show that the suit property was ever registered in the name of Hubuu Mohamed Khalfan Al-mazrui before she inherited the same from her grandparents and relied on the provisions of Section 26(1) of the [Land Registration Act](#).
16. Similarly, counsel submitted that there can never be two title deeds over the same piece of land and that there can only be one deed plan for one parcel of land. That Deed Plan No. 93539 could not be used to generate the two different title deeds over the suit property, that if it was a question of double registration, the Deed plan and title deed produced by the Plaintiff would still be defeated as the one produced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was first in time.
17. Counsel relied on the cases of [Samson Kagengo Ogeri vs Greenbays Holdings & 2 others \(2011\) eKLR](#) and [Hubert L. Martin & 2others v Margaret J. Kamar & 5 others \(2016\) eKLR](#) where the court discussed the issue of double registration.
18. Mr. Kilonzo also relied on Section 79(2) of the [Land Registration Act](#) which Section gives the Registrar power to rectify or direct the rectification of a register or document if the same has been obtained by fraud.
19. On the second issue, counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not the proper persons against whom the orders sought herein should issue as the Plaintiff did not disclose any lawful, proper or fit cause of action against the Defendants submitting that they are not the owners of the suit property as the same is registered in the name of Nahla Fadhil.



## Analysis and Determination

20. The issues for determination are as to whether the Plaintiff is the registered owner of the suit land and whether the Plaintiff has established a cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
21. From the evidence on record and the documents produced by both parties, it is evident that the suit property is registered in the name of one Nahla Fadhil, the Certificate of Ownership CR 14387 shows that the same was last issued to Nahla Fadhil. It is still not clear from the Plaintiff's case as to why she opted to sue the Defendants.
22. The 1<sup>st</sup> Defendant is the Executor of the Estate of Shabir Hussein Tayabali Abdulhussein Noorbhai (deceased) and that the beneficiaries of the Estate are the ones who sold the suit land to one Nahla Fadhil who is the registered owner of the suit land. The Plaintiff averred that she inherited the suit property from her late grandfather Hubuu Mohamed and produced a Certificate of Title and a copy of Deed Plan No. 93539 dated 19<sup>th</sup> June, 2015 but she did not produce anything to show how the land was transmitted to her. The Defendants produced a Certificate of Title No. 14387/1 and a similar Deed Plan showing that the suit property is owned by the said Nahla Fadhil.
22. When parties claim to have two titles in respect of the same parcel of land then investigations into the root of such titles must be carried out. A party must prove that the process that culminated into the issuance of such title was legitimate and legal. That all the requisite steps were followed and adhered to before the title was issued.
23. In the case of *Munyu Maina...Vs..Hiram Gathiba Maina*, Civil Appeal No.239 of 2009, where the Court of Appeal held that: -

"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."
24. The evidence before the court clearly shows how the title was transferred to Nahla Fadhil who is the present owner of the suit property which makes her the registered owner of the suit property but not a party to this suit.
25. I have considered the pleadings, the evidence on record and the submissions by counsel and find that the Plaintiff has not proved her case on a balance of probabilities and therefore it is dismissed with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 26<sup>TH</sup> DAY OF JULY, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

