



REPUBLIC OF KENYA



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**Mwalungo v Merry Beach Limited & 3 others (Environment & Land Case 53 of 2014) [2022] KEELC 4867 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4867 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT & LAND CASE 53 OF 2014**  
**JO OLOLA, J**  
**SEPTEMBER 22, 2022**

**BETWEEN**

**WANJE NYAU MWALUNGO ..... PLAINTIFF**

**AND**

**MERRY BEACH LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .... 2<sup>ND</sup> DEFENDANT**

**COUNTY LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. By the plaint dated and filed herein on March 20, 2014, Wanje Nyau Mwalungo (the plaintiff) prays for judgment against the defendants for the following:
  - (a) A declaration that any dealings and/or registration of land parcel known as Chembe/Kibabamshe/374 during the active period the embargo was pending prohibiting any dealings within the Chembe/Kibabamshe area is null and void;
  - (b) A declaration that the registration of the land parcel known as Chembe/Kibabamshe/374 in the names of other people other than the late Nyau Wanje Mwalungo and subsequently to Merry Beach Limited is null and void;
  - (c) An order directing the Land Registrar Kilifi to cancel all entries and registration of title in the names of the 1<sup>st</sup> defendant herein and rectify the register by inserting the names of the plaintiff in place of the 1<sup>st</sup> defendant;
  - (d) Vacant possession;



- (e) Demolition order directing all buildings erected by Merry Beach Limited (the 1<sup>st</sup> defendant herein) on plot number Chembe/Kibabamshe/374 to be pulled down and/or fully demolished at the 1<sup>st</sup> defendant's expenses; and
- (f) Costs and interest.
2. Those prayers arise from the plaintiff's position that at all times material to this suit, the late Nyau Wanje Mwalungo had been the beneficial and/or real owner of the parcel of land known as Chembe/Kibabamshe/374 which is their ancestral land. The plaintiff as the son and administrator of the estate of the late Nyau Wanje Mwalungo avers that the suit property was formerly a freehold title registered under the now repealed Registered Land Act (Cap. 300) before it was changed to a leasehold property under circumstances that are unknown to the plaintiff.
  3. The plaintiff avers that the deceased who had been utilizing the land for a long period of time was rightfully identified as the owner of the land during the process of land adjudication. However as the adjudication process was on-going, the Ministry of Lands declared an embargo in the registration section thereby stopping the process. The deceased passed on before the embargo was lifted and title deeds were issued in the area.
  4. The plaintiff avers further that during the existence of the embargo, they came to discover that the suit property had been secretly and fraudulently registered in the name of other people before it was subsequently registered in the name of the 1<sup>st</sup> defendant herein. The plaintiff avers that he vehemently protested against the registration of those other people and asserts that the 1<sup>st</sup> defendant had full knowledge of the plaintiff's claim on the land as at the time it purchased the same.
  5. On its part, Merry Beach Limited (the 1<sup>st</sup> defendant) denies that the plaintiff's father was the beneficial and/or real owner of the suit property and/or that the same was their ancestral land. The 1<sup>st</sup> defendant adds that the plaintiff is not the sole administrator of the estate of the late Njau Wanje Mwalungo.
  6. The 1<sup>st</sup> defendant avers further that if indeed the late Njau Wanje Mwalungo was a squatter in the suit property, that did not give him an interest in the land as he was only a trespasser thereon. The 1<sup>st</sup> defendant asserts that the deceased was at no time registered as a freehold proprietor of the suit property or as a proprietor of any interest in the land. It further denies that the plaintiff's father was in possession of the suit premises or cultivating the same and invites the plaintiff to strict proof.
  7. The 1<sup>st</sup> defendant further denies that there was any embargo placed on the suit property during the adjudication process and asserts that there is no provision under the law empowering the Minister for Lands to impose or place any embargo on any land. The 1<sup>st</sup> defendant avers that when it acquired the land, there was no embargo thereon and any embargo placed on the land whether before or after the death of Nyau Wanje Mwalungo was illegal, unlawful, *ultra vires*, amounted to an abuse of power and was null and void.
  8. The 1<sup>st</sup> defendant further denies that the suit premises was secretly registered in the names of other people and invites the plaintiff to strict proof. It further avers that if there was any fraud in the first registration of the suit premises, it did not participate nor was it aware of the same. The 1<sup>st</sup> defendant further asserts that the plaintiff's suit is time barred under the provisions of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya.
  9. The Director of Land Adjudication & Settlement, the County Land Registrar as well as the Honourable the Attorney General who are sued herein as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively entered appearance through the Attorney General but did not file any pleadings herein.



## The Plaintiff's Case

10. The plaintiff testified as the sole witness in his case. Testifying as PW1, he told the court he is one of the administrators of the estate of the late Njau Wanje Mwalungo and that he had the authority and consent of his co-administrators to file the suit. PW1 testified that his deceased father had been in actual possession of the suit property for a very long time and that he had been utilizing and cultivating the same to the exclusion of any other person.
11. PW1 testified that pursuant to Legal Notice No. 155 of 1970, the Minister for Lands & Settlement had applied the *Land Adjudication Act* to the Kilifi Chembe/Kibabamshe, Kilifi/Simba, Kilifi Madeteni and Kilifi Mtondia Roka adjudication sections. He further told the court the adjudication process in the area commenced on October 2, 1974 and concluded on May 26, 1978 with title deeds issued for 440 parcels under the provisions of the *Registered Land Act*.
12. PW1 told the court the suit property Chembe/Kibabamshe/374 was amongst the parcels that arose from the process and that the deceased was identified as the rightful squatter and occupant thereof with his name being entered in the adjudication register as the owner.
13. PW1 told the Court that following the conclusion of the adjudication process, the Commissioner of Lands vide gazette notice No 2505 of May 30, 1986 declared the concluded adjudication areas Government Land and therefore were not subject to the application of the *Land Adjudication Act* notwithstanding the fact that the area had since become private land. The Commissioner of Lands thereafter instructed the District Land Registrar Kilifi to cancel titles already registered and a government embargo was subsequently placed restricting any dealings therewith.
14. PW1 told the court that following the action taken by the Commissioner of Lands, parcels of land falling within Chembe/Kibabamshe were consequently allocated by the Commissioner of Lands under the *Government Land Act* thereby creating multiple titles. In 1998 following complaints by the local communities, the government again sought to establish settlement programmes over the area. A total of 443 parcels of land were allocated under the settlement programme.
15. PW1 testified that in view of the long standing historical land injustices in the coast region, the National Land Commission in exercise of its mandate went to the ground in a bid to identify the root cause of the underlying problems of land ownership within Kilifi Chembe/Kibabamshe area. Subsequently, the Commission gave notice in the Daily Nation Newspaper of November 10, 2017 of its intention to undertake a plot verification exercise in the area.
16. PW1 told the court the commission then conducted hearings of all land owners in the area and concluded that all parcels of land falling within Chembe/Kibabamshe area were trust lands and not government land. The commission also found as a matter of fact that the suit property was pursuant to the adjudication process allocated first to Nyau Wanje Mwalungo although the allottee was not issued with a title deed. The commission then made a determination published in a gazette notice dated July 17, 2017 that the property be registered in the name of the administrators of the deceased. The commission further determined that the 1<sup>st</sup> defendant's title was acquired in an unlawful manner.
17. On cross-examination, PW1 told the court his father was born in 1930 and that he had died in 1991. He further told the court it is his younger brothers who had testified before the National Land Commission. He told the court the suit property measures 2.4 acres and that he was unaware where the commission had got the 16 acres indicated in the commission's report.
18. PW1 testified that they took time after their father's death to decide what to do and that that was why they took time to institute the suit. PW1 conceded that by the time the National Land Commission



went to the ground for verification of the parcels in 2014, this suit was already pending in court. He further told the court he did not have the adjudication record having the name of his father in court.

### **The Defence Case**

19. The 1<sup>st</sup> defendant equally called one witness in support of its case at the trial.
20. DW1 – Walter Kilonzi is the 1<sup>st</sup> defendant’s Company Secretary. Relying on his statement filed herein on April 14, 2014, DW1 told the court that the 1<sup>st</sup> defendant is the registered proprietor of Plot No Chembe/Kibabamshe/374.
21. DW1 testified that there is no law in Kenya authorizing the Minister for Lands to impose any embargo upon any land in Kenya and that if any embargo was imposed, the minister had no such power and the embargo was ultra vires, incompetent, illegal, unlawful and null and void for all purposes.
22. DW1 further testified that so far as the 1<sup>st</sup> defendant and himself were aware, neither the plaintiff nor his late father Nyau Wanje Mwalungo filed any competent proceedings in any court against the 1<sup>st</sup> defendant within 12 years after registration of the suit premises.
23. DW1 told the court the 1<sup>st</sup> defendant and himself were neither aware nor did they participate in any alleged fraud relating to the first registration of the suit property. He further told the court this suit is time barred for all purposes under the provisions of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya.
24. DW1 testified that the plaintiff had attempted to grab the suit premises and had obtained a grant showing that the property was part of the estate of his late father in Malindi High Courts Succession Cause No 21 of 2011. He told the court the plaintiff has withheld the documents he relied on in the succession cause as they would indicate that the plaintiff had no right or any interest in the property at all. DW1 further told the court they were unaware of any crops or other cultivation or any development by the late Nyau Wanje Mwalungo on the suit premises.
25. On cross-examination, DW1 told the court the 1<sup>st</sup> defendant is a private limited liability company. He could not recall when the company was incorporated but told the court it was before 2006. DW1 joined the company in 2009. DW1 further told the court the 1<sup>st</sup> defendant was registered as the owner of the suit property on July 10, 1996.
26. DW1 told the court he is the country representative of the 1<sup>st</sup> defendant and that he was given its full history when he joined it.  
  
He told the court he did not participate in the acquisition of the suit property. Those who did were Mohamed Mowladeh and Mr Mowlazedeh who were the two directors then. The two are Italians who come to Kenya from time to time.
27. DW1 conceded he had no documents in court showing his appointment as the Company Secretary. There was a board resolution by the company appointing him in 2009 and also the one authorizing him to come testify on behalf of the company but he had not carried the same to court. DW1 further told the court he knew there was a sale agreement when the land was sold to the 1<sup>st</sup> defendant. He could not however recall how much the purchase price was. They bought the land from one Benson Njuguna Macharia but DW1 did not know if he had a title. DW1 told the court the company did a search on the land before purchase but he did not bring the certificate of search to court. DW1 further told the court he could not remember if the company had obtained a Land Control Board consent for the transfer of the land.



## Analysis and Determination

28. I have carefully perused and considered the pleadings filed herein, the testimonies of the two witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the rival submissions and authorities placed before me by the learned advocates representing the parties herein.
29. The plaintiff herein is seeking a declaration that any dealings and/or registration of the land parcel known as Chembe/Kibabamshe/374 during the active period an embargo was pending prohibiting any dealings within the Chembe/Kibabamshe area is null and void. He also prays for a declaration that the registration of the said parcels of land in the names of the other people other than the late Nyau Wanje Mwalungo as well as the subsequent registration of the 1<sup>st</sup> defendant herein is null and void.
30. In addition the plaintiff craves an order directing the Land Registrar Kilifi to cancel all entries and the registration of the title in favour of the 1<sup>st</sup> defendant and that the register be rectified by inserting the name of the plaintiff as the proprietor thereof. The plaintiff further prays for vacant possession of the suit land as well as an order directing that all buildings erected thereon by the 1<sup>st</sup> defendant be demolished and pulled down at the 1<sup>st</sup> defendant's expense.
31. It is the plaintiff's case that his father the late Nyau Wanje Mwalungo had been the one utilizing the land as the owner thereof before land adjudication commenced on the area. The plaintiff asserts that during the land adjudication process, the deceased was rightfully identified as the proprietor of the land. Before that adjudication process was completed, the plaintiff avers that the government through the Ministry of Lands declared an embargo on all land dealings in the area thereby stopping the adjudication process.
32. The plaintiff told the court that during the existence of the embargo, they came to discover that the suit property had been secretly and fraudulently registered in the names of other parties before it was subsequently registered in the name of the 1<sup>st</sup> defendant herein. The plaintiff told the court he had vehemently opposed such registration and that the 1<sup>st</sup> defendant was fully aware of his claim to the land at the time it purchased the same from the third parties.
33. The 1<sup>st</sup> defendant on the other hand denies that the plaintiff's deceased father had any beneficial interest on and/or that he owned the suit property as he was only a squatter and a trespasser thereon. It is the 1<sup>st</sup> defendant's case that there was no time whatsoever when the deceased was registered as a freehold proprietor of the suit land as contended by the plaintiff.
34. In addition, the 1<sup>st</sup> defendant denies that there was any embargo placed on the suit property during the adjudication process or at all. The 1<sup>st</sup> defendant told the court that when it did acquire the suit property there was no such embargo and that any embargo placed on the land by anyone whether before or after the death of the plaintiff's father was illegal, unlawful, *ultra vires*, amounted to an abuse of power and was therefore null and void.
35. The 1<sup>st</sup> defendant further told the court that there was no secrecy involved in the registration of its predecessors in titles. It was their case that if there was any fraud in the first registration of the suit premises, it was neither aware of the same nor did it take part in the fraud. It was further the 1<sup>st</sup> defendant's case that this suit as filed is time-barred by virtue of the provisions of the [Limitation of Actions](#) Act, Cap 22 of the Laws of Kenya.
36. The issue as to whether or not this suit was filed outside the period provided for under statute was first raised by the 1<sup>st</sup> defendant herein through their notice of motion dated August 11, 2014 wherein they sought to have the suit struck out on account that it had been filed out of time. In his ruling on the said application delivered on November 7, 2014 the Honourable Justice O Angote then seized of the



matter dismissed the application on account that it was not clear from the pleadings when the plaintiff had discovered about the suit property being registered in the 1<sup>st</sup> defendant's name.

37. At Paragraphs 18 to 21 of the said ruling, the learned judge explains what informed the decision as follows:

“ 18. Section 7 of the *Limitation of Actions Act* provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom it claims, to that person;

19. The plaintiff's right of action, as I understand it, is based on the alleged fraudulent acquisition of the suit property by the 1<sup>st</sup> defendant. In that case, the period of limitation did not begin to run until when the plaintiff or his late father discovered the alleged fraud (see section 26 of the *Limitation of Actions Act*);

20. I have looked at the pleadings annexed on the defendant's further affidavit in Malindi Succession Cause Number 21 of 2012. Those pleadings do not show when the plaintiff discovered about the suit property having been registered in favour of the 1<sup>st</sup> defendant; and

21. Considering that the pleadings before me do not show how or when the plaintiff or his father became aware that the suit property was registered in favour of the 1<sup>st</sup> defendant, I cannot, at this stage, make a finding that the suit is time barred. That issue can only be dealt with at a full trial once viva voce and documentary evidence has been tendered.”

38. This court has of course now heard the parties and considered the evidence tendered by both sides. From the material placed before the court, it was not in contention that the 1<sup>st</sup> defendant was issued with a Certificate of Lease for the suit property on July 10, 1996. This suit was instituted by the plaintiff herein as one of the administrators of the estate of his father Nyau Wanje Mwalungo on March 20, 2014.

39. During his testimony before the court, the plaintiff testified that his deceased father was the first squatter on the suit property and that his interests thereon had been recorded in the adjudication register when land adjudication commenced in the Chembe Kibabamshe registration section between 1974 and 1978.

40. It was the plaintiff's case that some eight (8) years after the adjudication process was completed, the Ministry of Lands in the year 1986 did declare an embargo prohibiting any dealings with land in the said registration section. The plaintiff told the court that *vide* gazette Notice No. 2505 of May 30, 1986, the government declared the concluded adjudication areas government land and therefore not subject to the *Land Adjudication Act*, Cap 284 of the Laws of Kenya.

41. It was further the plaintiff's case that following the action taken by the Commissioner of Lands instructing the District Land Registrar to cancel titles already registered following the process of adjudication, the parcels of land falling within the Chembe Kibabamshe area were consequently allocated by the Commissioner of Lands under the *Government Lands Act*.

42. The plaintiff told the court that his father passed away in 1991 when the embargo was still in place and that it was during the pendency of that embargo that they had discovered that the suit property



had been secretly and fraudulently registered in the names of other people before it was subsequently registered in the name of the 1<sup>st</sup> defendant. The plaintiff told the court he had vehemently protested against the registration of those other people as proprietors of the land and that the 1<sup>st</sup> defendant had full knowledge of his claim to the land but went ahead to acquire the same.

43. Arising from the foregoing, it was apparent that the plaintiff and his family were aware as early as the year 1996 that the 1<sup>st</sup> defendant had acquired the suit property. It was also apparent that the 1<sup>st</sup> defendant took possession of the property and erected permanent buildings which by this suit the plaintiff now is seeking to have demolished. By filing the suit in 2014, the plaintiff was coming into court some 18 years after the fact and was clearly out of the time provided under statute. The plaintiff has not offered any explanation why his father or himself having discovered that the suit property was being registered in the names of the 1<sup>st</sup> defendant's predecessor in title, they failed to file a suit within the 12 years provided in law.
44. At any rate, while the plaintiff insisted that his father's name was entered in the register of adjudication during the land adjudication process that took place in the area between 1974 and 1978, no such register was produced in evidence to demonstrate that his late father had been allocated the land. The plaintiff did not produce any letter of allotment, any letter of allocation or offer that was issued to his father during the adjudication process.
45. Arising from the foregoing I was not persuaded that there was any merit in the plaintiff's case. The same is dismissed with costs.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 22<sup>ND</sup> SEPTEMBER, 2022.**

In the presence of:

Mr. Githinji for the Plaintiff

No appearance for the Defendant

Court Assistant - Kendi

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**J. O. OLOLA**

**JUDGE**

