



**Tembo & another v Gichuhi & 2 others (Environment & Land Case
303 of 2018) [2022] KEELC 14928 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14928 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 303 OF 2018
NA MATHEKA, J
NOVEMBER 22, 2022**

BETWEEN

ESTHER JOHN TEMBO 1ST PLAINTIFF

**JULIUS MWAVITA TEMBO ALIAS JULIUS MWAVITA MWARUMBA
(SUING OR AND ON BEHALF OF THE LATE)TEMBO MWAVUNA
TEMBO 2ND PLAINTIFF**

AND

ZIPPORAH WAMBUI GICHUHI 1ST DEFENDANT

REGISTRAR OF LANDS, KILIFI 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs case is that at all material times to this suit, the Plaintiffs were and/or are the lawful owners of Plot No, Kilifi/Kijipwa/205, measuring approximately 0.855 Hectares, the suit premises herein having been allocated them through the original Plaintiff the late Tembo Mwavuna Ternbo him on July 17, 1985. On or around 2014, the Plaintiffs discovered that their parcel of land, the suit premises herein had been transferred to one Anwar Ali Mohamed Sadique without their knowledge and/or authority and/or permission and upon investigations, it was revealed that a transfer document had purportedly been made by the original Plaintiff, the late Tembo Mwavuna Tembo in favour of one Mohamed Akram Kaderdina who allegedly transferred the suit premises to the said Anwar Ali Mohamed Sadique but upon further investigations, it emerged that the transfer and/or registration of the said Anwar Ali Mohamed Sadique as the owner of the parcel of land was an error as there was no sale transaction between the original Plaintiff and the said Mohamed Akram Kaderdina or Anwar Ali Mohamed Sadique. However, and more shockingly the suit premises was subsequently re-allocated to the 1st Defendant by the 2nd Defendant, yet it was not available for allocation.



2. The Plaintiff avers that upon the said discovery, they reported the matter to the police who investigated the case thoroughly and found out that acts of forgery or fraud were committed but since they had no powers to revoke a title deed and the same being the position with the 2nd Defendant, they were advised to commence the current proceedings. The Plaintiff avers further that at no time did they sign any transfer documents in favour of the said Mohamed Akram Kaderdina, neither did they receive any consideration for the alleged sale of the suit premises and therefore the transfer of the suit premises to Anwar Ali Mohamed Sadique was fraudulent and correctly so as the 2nd Defendant corrected that error in the green card and deleted the name of Anwar Ali Mohamed Sadique as the owner of the suit premises on the very day the entry was made which was on October 24, 1996 but further acts of fraud were committed when the 1st Defendant was allocated the suit premises on October 24, 1996 (the very day the deletion was made) and a title deed issued instantly, yet the parcel of land was not available for allocation.
3. The Plaintiffs aver and maintains that the Defendants' actions herein are unlawful and/or illegal and/or unprocedural and/or without any colour of right, whosoever and as such appropriate remedies and/or reliefs ought to be issued herein. The Plaintiff prays for judgment against the Defendants, jointly and severally for: -
 1. A finding and/or a declaration that the plaintiffs through the original Plaintiff the late Tembo Mwavuna Tembo are the lawful and/or legal owners of the suit premises, being Plot No Kilifi/Kijipwa/205 situate at Msumarini-Kikambala within Kilifi County.
 2. A finding and/or a declaration to the effect that the suit premises, being Plot No Kilifi/Kijipwa/205 was fraudulently and/or illegally and/or unlawfully allocated to 1st Defendant and consequently revoke and/or nullify the title deed made in favour of the 1st Defendant herein and a new one be issued in favour of the Plaintiffs.
 3. Any and/or further consequential and/or incidental orders and/or reliefs and/or remedies as the Court may deem fit and just in the circumstances.
 4. Costs of this suit.
4. The 2nd and 3rd Defendants aver that at all material times to this suit, the registration process was conducted/ undertaken by the 2nd Defendant based on the executed documents presented to it at its registry in Kilifi and pursuant to their statutory duty. The 2nd Defendant categorically denies any fraud and illegality on their part as alleged or at all and maintains that they are not the entity responsible for allocation of Land and that their statutory duty is limited to,
5. This court has considered the application and submissions therein. It is the Plaintiffs' case that Tembo Mwavuma Tembo was the lawful owner of Plot No Kilifi/Kijipwa/205 measuring 0.855 ha which was allocated to him on July 17, 1985. The 2nd plaintiff produced an Allotment letter dated July 17, 1985 from the Kijipwa Settlement Fund Trustees (PEX-1). The allotment letter is further supported by a charge which Tembo Mwavuna Tembo took out against the suit property on May 13, 1988 (PEX-1). In 2014, the plaintiffs discovered that there was a fraudulent transfer purported to be signed by Tembo Mwavuma Tembo transferring the suit property to one Mohamed Akram Kaderdina, who allegedly transferred the suit property to Anwar Ali Mohamed Sadique who transferred the same to the 1st defendant. An extract of the green card for Plot No Kilifi/ Kijipwa/205 (PEX-7) indicate that the parcel file was opened on August 8, 1990 and was registered in the name of the Settlement Fund Trustees and transferred to Anwar Ali Mohamed Sadique on October 24, 1996 who later transferred the same to



Zipporah Wambui Gichuhi, the 1st Defendant and issued with a title deed on the same day, October 24, 1996.

5. The Plaintiffs maintained that the Application for Consent of Land Control Board where Tembo Mwavuma Tembo applied to transfer the suit property to Mohamed Akram Kadardina was fraudulent and illegal. To support their claim, the plaintiffs produced a Forensic Document Examination Report dated March 10, 2016 prepared by C I Chania Geoffrey M, a forensic document examiner (PEX-3). The signatures in the application for consent to transfer the suit property were examined and it was reported that they were made by different authors. After the report was made by the Document examiner, the DCI Kilifi wrote to the Land Settlement and Adjudication Office, Kilifi on April 14, 2016 (PEX-4) and reported that investigations into the transfer of the suit property had revealed that they were fake and that the ID card and transfer form were forged. Upon receiving the letter from the DCI, the Chief Land Adjudication and settlement officer, Kilifi North Mr Felix Kiteto wrote to the Director, Land Adjudication and Settlement in Nairobi on May 2, 2017, to report that investigations had been carried out and into the transfer of Plot No 205 Kijipwa Settlement Scheme to Anwar Ali Mohamed Sadique, and requested the said plot be reverted back to the original allottee Tembo Mwavuma Tembo (PEX-5).
6. In their defence, the 2nd and 3rd Defendants denied the particulars of fraud and contended that at all material times the registration process was conducted by the 2nd Defendant (the Land Registrar) based on the executed documents presented at its registry in Kilifi pursuant to their statutory duty. The 1st Defendant and the registered proprietor of the suit property did not enter appearance nor did she file a defence to challenge the authenticity of the documents. The court must turn to Section 26 (1) of the Land Registration Act, 2012. The section reads as follows;

“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”

7. The process in which Tembo Mwavuna Tembo obtained title has been clearly set out, he was allocated the plot by Kijipwa Settlement Fund Trustees on July 17, 1985. One of the conditions for the allocation was that the land shall not be subdivided, charged, let, leased or transferred without the prior consent in writing of the Settlement Fund Trustees. The Plaintiffs have specifically pleaded fraud, they maintain that after acquiring title, Tembo Mwavuna never transferred the suit property to Mohamed Akram Kadernida who transferred it to Anwar Ali Mohamed Sadique, who later transferred to the 1st Defendant, the registered owner of the suit property. In *Katende v Haridas and Company Limited (2008) EA 173* the Court of Appeal in Uganda held,

“Fraud is a very serious allegation. It means actual fraud which means dishonesty of some sort but not constructive fraud. Fraud must be pleaded specifically and proved. The standard of



proof required is higher than the usual balance of probabilities in civil matters. However, the standard of proof is not so high to require proof beyond reasonable doubt.”

8. The Court also stated that fraud are actions seeking to effect registration of title in a dishonesty manner. The court stated that,

“Fraud can be participatory by this I mean the party participates in the fraudulent dealings. However fraud can be imputed on a person that is when he or she was aware of the fraud and condoned it, or benefited from it or used it to deprive another person of his rights. In short all those who actually participate in the fraudulent transaction and who had knowledge of it are privy and have notice of fraud.”

9. Where there are a series of forgoing transfers of title to the incumbent registered proprietor, as is in this case, the question before court is whether the incumbent registered proprietor was aware of the said fraud or whether she is a bonafide purchaser of value without notice of the fraud. The only reasonable inference that the court can make from the forensic report dated March 10, 2016 prepared by the Forensic document examiner at the DCI headquarters in Nairobi addressed to DCI Kilifi and the letter dated April 14, 2016 from DCI Kilifi addressed to the Land Settlement and Adjudication Kilifi, is that the sale and the transfer of the suit property was tainted with fraud. Having found that the transfer between Tembo Mwavuma and Mohamed Akram Kadernida was fraudulent, the subsequent transfers to Anwar Ali Mohamed Sadique and Zipporah Wambui Gichuhi were defective. By failing to enter appearance and defence, the 1st Defendant has failed to establish that she was not privy to the fraud or had notice of the fraud of the predecessor in title. The 1st Defendant has also failed to demonstrate to court that she conducted any due diligence on the title of her predecessor and she is therefore not a bonafide purchase of value without notice.

10. The 2nd and 3rd defendants did not call any of their officials in the registry to give evidence, the logical conclusion is that there was fraud that was committed in collaboration with some officers in the land registry. In *Gitwany Investment Limited v Tajmal Limited & 3 Others (2006) eKLR* Lenaola J held that,

“In fact the entire mess in which those parties find themselves in is the creation of and a matter that must be put squarely at the doorstep of the Commissioner of Lands, the 3rd Party. All documents leading to the issuance of title are not prepared, kept nor issued by any other party other than that office, sometimes in conjunction with the Directorate of survey. Any change in LR No or in acreage is a matter that is always in the hands of those offices and even if a private person in a professional capacity undertakes those tasks then those offices must always approve and thereafter take responsibility for those actions.”

11. The Plaintiffs have proved to court that fraud went to the root of the 1st Defendant’s title. There were serious irregularities that the court has inferred from the documents produced that could only have happened with the assistance of some officials from the land registry, who interfered with the records with the sole intention of depriving the Plaintiffs of their title to the suit property. In the results I find merit in the plaint filed on December 19, 2018 and amended on June 29, 2021 and grant the following orders;

1. A declaration that the plaintiffs through the original Plaintiff the late Tembo Mwavuna Tembo are the lawful and/or legal owners of the suit premises, being Plot No Kilifi/Kijipwa/205 situate at Msumarini-Kikambala within Kilifi County.



2. A declaration that the suit premises, being Plot No Kilifi/Kijipwa/205 was fraudulently and/or illegally and/or unlawfully allocated to 1st Defendant and consequently I revoke and/or nullify the Title Deed made in favour of the 1st Defendant herein and a new one be issued in favour of the Plaintiffs.

3. Costs to the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22TH DAY OF NOVEMBER, 2022.

N A MATHEKA

JUDGE

