



**Mwanengo & another v Kahindi & 2 others (Environment & Land
Case 15 of 2020) [2024] KEELC 5058 (KLR) (3 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5058 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 15 OF 2020**

EK MAKORI, J

JULY 3, 2024

BETWEEN

KADZO GONA MWANENGO 1ST PLAINTIFF

FIKIRI CHARO BOKOLE 2ND PLAINTIFF

AND

WILLIAM NGUMBAO KAHINDI 1ST DEFENDANT

ABDULRAHMAN SHARI MOHSEN 2ND DEFENDANT

KILIFI COUNTY REGISTRAR 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs herein are the Administrators of the Estate of the late Charo Bokole Thoya, who died on 19th January 2018, vide a Grant of Letters of Administration Intestate issued on 22nd June 2020. In acquiring Letters of Administration to inherit the Estate, they became aware that the 3rd Defendant, the Kilifi County Registrar, registered the suit properties in the names of the 1st and 2nd Defendants without conducting the proper procedure and visiting the suit premises to determine the genuine occupants on the ground.
2. The Plaintiffs brought this claim seeking the following reliefs:
 - a. A declaration that the 1st and 2nd Defendant acquired the titles to parcels of land within the Ngomeni/Squatters Settlement Scheme, a government initiative to settle squatters fraudulently. Thus, an order of this Court should cancel them.
 - b. A declaration that Charo Bokole Thoya (deceased) was the rightful and legal proprietor of all those parcels of land known as Ngomeni/Squatters Settlement Scheme/1641 and Ngomeni/Squatters Settlement Scheme/1642.



- c. A mandatory injunction directing the 3rd Defendant to register the parcels of land Ngomeni/Squatters Settlement Scheme/1641 and Ngomeni/Squatters Settlement Scheme/1642 in the names of the heirs and beneficiaries of the late Charo Bokole Thoya.
 - d. Costs be in the cause.
3. The 3rd Defendant filed a written statement of defence on 30th April 2021 and a witness statement on 20th May 2022. However, the 1st and 2nd Defendants, crucial parties in this case, did not enter an Appearance nor place a Defence on record.
 4. Fikiri Charo Bokole PW1 testified and adopted his statement dated 12th March 2021 as his evidence in chief. He also produced his list of documents dated 12th March 2021 and further lists dated 2nd June 2022 and 11th January 2024 as evidence supporting his case. His evidence was that the Plaintiffs are the Administrators of the Estate of the late Charo Bokole Thoya, who died on 19th January 2018, vide a Grant of Letters of Administration intestate issued on 22nd June 2020. He testified that the late Charo Bokole Thoya was the lawful owner of all those parcels of land known as Ngomeni/Squatters Settlement Scheme/1641 and Ngomeni/Squatters Settlement Scheme/1642. He said he is the son of the late Charo Bokole Thoya, who met his demise on 19th January 2018 while occupying and possessing the two parcels of land. He stated that at the time of his death, the deceased lived with his widow and his other eight siblings. He further affirmed that his mother, siblings, and himself continue to live on the suit property and are in occupation and possession of the same to date. He informed the Court that upon the deceased's death, they acquired letters of administration intestate to legally inherit and administer the two parcels of land that formed part of the deceased's estate. In the pursuit, he noted that he became aware that the suit premises had been adjudicated and title deeds were issued to third parties by the 3rd Defendant without them being informed while they were in occupation and possessing the same. Copies of alleged title deeds to the suit properties were first available to them when they visited the Kilifi Land Registry, showing that the same had been registered in the name of one Tiraus Nyingi Ngahu on 25th May 2018. PW1 testified that the 3rd Defendant's officers declined to register a caution against the two titles and permit the Plaintiffs to conduct an official search of the suit properties without justifying such denial. He stated that it took the intervention of his advocates on record to acquire an official search for the two parcels of land, which, upon being conducted, they found out that Ngomeni/Squatters Settlement Scheme/1641 had been registered in the name of Abdulrahman Sharif Mohsen and Ngomeni/Squatters Settlement Scheme/1642 registered in the name of William Ngumbao Kahindi. He stated that he has been in occupation and possession of the suit properties from birth. All the persons mentioned above registered as proprietors of the suit properties are strangers to him. It was his testimony that the 3rd Defendant fraudulently registered the suit properties in the names of the 1st and 2nd Defendants without conducting proper procedure and visiting the suit premises to confirm the true and rightful owners of the suit premises to adjudicate the property to them. He finally noted that the Defendants' actions have jeopardized the Plaintiffs' proprietary rights over the suit properties. His claim against the Defendants is for a cancellation of the titles of the suit parcels of land and registration of the same in the names of the heirs and beneficiaries of the late Charo Bokole Thoya.
 5. Joseph K. Shen PW2 – testified and adopted his statement dated 10th January 2024 as his evidence-in-chief. He said he was the area Assistant Chief of the Ngomeni sub-location and, therefore, knew the late Charo Bokole Thoya (Deceased), who resided and owned two parcels of land currently known as the Ngomeni Settlement Scheme/1641 and 1642. He stated that he had known the deceased and his family for a very long time and continued to have a good relationship with his heirs and beneficiaries of his estate. He confirmed that he was aware that the deceased's family recently discovered that the two



parcels of land had been registered in the names of the 1st and 2nd Defendants. He noted that the 1st and 2nd Defendants are unknown to him and further confirmed that the two parcels of land have always been occupied and in the possession of the late Charo Bokole Thoya's family.

6. The 3rd Defendant closed their case without calling any witnesses, but the parties agreed to have the documents filed produced as evidence.
7. Parties were directed to file written submissions. They did comply.
8. From the materials placed before me, I frame the issues for this Court to determine as follows: whether the plaintiffs are the actual owners of the suit properties, whether the reliefs pleaded for can be granted, and who should bear the costs of this suit.
9. The plaintiffs submit that the 3rd Defendant registered the suit properties in the names of the 1st and 2nd Defendants without conducting the proper procedure and visiting the suit premises to confirm the true and rightful owners of the suit premises and ultimately to adjudicate the property in their favour. The Plaintiffs herein, therefore, believe that they deserve the orders sought to safeguard their proprietary rights, which are protected under the law as provided under Article 40 of *the Constitution* of Kenya. The Plaintiffs have cited the decision in *Zacharia Wambugu Gathimu v David Wangari Maina* [2019] eKLR, where the Court stated that the law is highly protective of title. Still, the protection can be removed and the title impeached when it is shown the same was obtained by fraud or misrepresentation to which the holder must be proved to be a party and where the certificate of title was acquired illegally, unprocedurally, or through a corrupt scheme.
10. The Plaintiffs further submitted and referred this Court to the Supreme Court decision in *Dina Management Limited v County Government of Mombasa & 5 others* [2021] eKLR, which elaborately considered a thread of decisions from this Court and the Superior Courts on the manner a title can be impeached and the power of this Court to annul titles obtained through grabbing and corrupt practices.
11. The 3rd Defendant submitted that the Plaintiffs claim that the Land Registrar acted fraudulently by registering the suit properties in the names of the 1st and 2nd Defendant. The 3rd Defendant strongly disputes this fact as the search in its official records revealed that the properties in issue did not have any green cards; neither were any title deeds issued. The Plaintiffs did not prove allegations of fraud on the required beyond reasonable doubt basis as held in *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR.
12. The 3rd Defendant avers that the Plaintiffs have failed to prove any wrongdoing on the part of the 3rd Defendant, who undertook the registration exercise diligently as required by the laws of the land and as eloquently stated in the classic Supreme Court judgment of *Dina Management Limited v County Government of Mombasa & 5 others* [2021] eKLR on the processes that should be followed before any allocation of unalienated Government Land is done. The Plaintiffs did not shoulder the burden of proof that they were the rightful owners of the suit properties and how they acquired the same. The 3rd Defendant asserts that they failed to ascertain beyond any reasonable doubt that they are the rightful owners of the suit properties.
13. On their claims that they have had the land since the 1st Plaintiff was born, the 3rd Defendant contends that these claims are not backed by any offer letter, receipts, or documentation to indicate that they own the property and undertook to pay any requisite fees in respect of the same to the Land Settlement Board. Moreover, since the properties are within a settlement scheme, they should have raised any issues in allocating the properties with the Land Adjudication and Settlement office, which has not been sued.



14. According to the records held by the 3rd Defendant, the properties in question have been reserved for Abdulrahman Shariff Mohsen and William Ngumbao Kahindi, the 1st and 2nd Defendants. The land is currently charged to the Land and Settlement Fund Trustees on behalf of the government. The fact that the land has been reserved for the 1st and 2nd Defendants does not mean they own it. The payment of the prescribed fees to the land and Settlement Fund Board is pending to acquire the title. Therefore, there is no title available for cancellation as it stands. The land still belongs to the Government of Kenya and is being held by the Settlement Fund Trustees (SFT).
15. The 3rd Defendant avers that it has been held several times that Courts should not be too quick to assume the task where a function is vested in the Executive Office in allocating resources. Reliance is placed on the case of *Francis Musyoki Makenzi & 61 others v Director of Land Adjudication and Settlement & 2 others; Njiru Cimba & 65 others & 26 others* [2020] eKLR.
16. The 3rd Defendant states that in the Plaintiff's submissions, they claim that they own the suit properties by virtue of a Court order; therefore, their rights shall not be liable to be defeated except as provided in law. However, the same Court order relied on was not provided before this Court. One can only assume that the same does not exist, and the assertion is aimed at hoodwinking the Court into granting the Plaintiffs' ownership to the suit properties that they don't have any right to enjoy.
17. The Plaintiffs' claim in acquiring the suit properties is by dint of a prolonged stay and intergenerational. And that when allocations were being done to 'settlers' in the Settlement Scheme under focus, there was no ground report provided, nor was there a visit to the site to discover that the land was occupied by the father of the Plaintiffs (now deceased) and their occupation on the land since birth as a matter of right.
18. We are acquiring land under the Settlement Fund Trustee. It has a procedure. Under this scheme, the government allocates its land or purchases private land that it offers to settlers, with conditions that they have to pay a certain amount of money before the title is discharged to the said settlers. In *Kamau Mbogo v Settlement Funds Trustees* [2019] eKLR, Oundo J. narrated the status of land under the SFT regime as follows:

“The Settlement Fund Trustees, which is a body of Trustees established pursuant to the provisions of Section 167 of the Agriculture Act, Cap 318, and is mandated to settle “settlers” on either un-alienated Government land or on land purchased from private owners by the Settlement Fund Trustee.

26. The Court of Appeal in the case of *Eliud Nyongesa Lusenaka & another v Nathan Wekesa Omacha*, [1994] eKLR held as follows;

The short answer to that proposition is that land owned by the SFT is not land owned by the Government. Under section 167(1) of the Agriculture Act, the SFT is a body corporate with a perpetual succession and can acquire and own property on its own right and can sue and be sued. The interest of the Settlement Fund Trustees (SFT) is that of a chargee over the parcel of land that it owns.

27. Further, the Court of Appeal in the case of *Boniface Oredo v Wabumba Mukile*, Civil Appeal No 170 of 1989(unreported), held as follows:

“The interest of the Settlement Fund Trustees is really that of a chargee. “It lends money for development to persons to whom it has allocated land, and the repayment of such money is secured by a charge upon the property.”



19. The record, as provided by the 3rd Defendant, shows that the two parcels in question are under the SFT scheme and were allocated to the 1st and 2nd Defendants, who are yet to clear the loan accrued to the SFT, and, therefore, no titles have been issued yet. Plaintiffs have not shown that SFT extended an offer to their father or themselves and that they have paid the necessary monies to the SFT to acquire the said land under the SFT regime. The Plaintiffs have also not shown how the 3rd Defendant acted fraudulently since it should be acknowledged that the 3rd Defendant has no role in administrating the SFT fund or the allocation. The role of the 3rd Defendant is purely registration of disposition on the Land Register as done from time to time, as the situation will demand. As held in *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR, where the Court held as follows:

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of the balance of probabilities.”

20. No fraud can be assigned to the 3rd Defendant. It was not pleaded and proved on a basis beyond reasonable doubt. Besides, the SFT has not been sued to explain how it allocated these parcels and whether the allocation of this land and the processes followed were above board. The *Dina Management Limited Case* (*supra*) is not in pari materia.

21. The land is due to the 1st and 2nd Defendants, who have not paid all the requisite monies to the SFT for discharge. We are not dealing with adverse possession to bolster the Plaintiffs' assertion that they have been in the suit property since time immemorial (read tangu jadi in Swahili). The Plaintiffs got it wrong by suing the parties they did but leaving out the SFT and the Land Adjudication and Settlement Department, who were necessary parties on the question of the process of identification and allocation of the settlers on the concerned scheme. It is not the role of the judiciary to do so, as held in *Francis Musyoki Makenzi & 61 others v Director of Land Adjudication and Settlement & 2 others; Njiru Cimba & 65 others & 26 others* [2020] eKLR, where Angima J. stated as follows:

“It has been held that where there is competition for allocation of resources which allocation falls within the competence of the executive, the judiciary should not usurp the jurisdiction of the executive and make the allocation itself. In the case of *Lucy Mirigo & 550 others v Minister for Lands & 4 others* [2014] eKLR, the appellants had sought orders compelling the Respondents to allocate them a portion of a government forest whose allocation had allegedly been approved by a former President of the Republic of Kenya. In dismissing the Appellants' claim, the court held, among other things, that;

“In the case of *R v Lancashire County Council Ex p Gaver* (1980) 1 WLR 1024, it was stated that they do not usurp the role of the administrator by assuming the task of deciding how resources are to be allocated as between competing claims. We adopt the above dicta in *R v Lancashire County Council Ex p Gaver* (*supra*) and observe that it is not the duty of the courts to allocate land and decide how national resources are to be allocated between competing claims.”

22. The 1st and 2nd Defendants did not participate in these proceedings. Still, according to the records with the 3rd Defendants, significantly the latest postal search, they were allocated the land and are entitled to it under the SFT program. They have yet to settle their SFT loan; hence, the land still belongs to the Government.

23. Due to the preceding, the Plaintiffs' suit is dismissed with costs to the third Defendant.



DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 3RD DAY OF JULY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Mwadilo, for the Plaintiff

Mr. Ojwang for the 3rd Defendant

Happy: Court Assistant

