



**Khamisi (Suing as the Legal Representative of the Estate of Juma Omari Mwendo) v Jiwan & 5 others (Environment & Land Case E006 of 2023) [2024] KEELC 6032 (KLR) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6032 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E006 OF 2023  
AE DENA, J  
SEPTEMBER 17, 2024**

**BETWEEN**

**MASUDI TSUMO KHAMISI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JUMA OMARI MWENDO) ..... PLAINTIFF**

**AND**

**ZAHIR HABIB JIWAN ..... 1<sup>ST</sup> DEFENDANT  
EUNICE WANJIRU KAIGAI ..... 2<sup>ND</sup> DEFENDANT  
LAND ADJUDICATION & SETTLEMENT OFFICE ..... 3<sup>RD</sup> DEFENDANT  
KWALE LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT  
HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT  
ABSA BANK KENYA LIMITED ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced by the Plaintiff against the 6 Defendants on 30<sup>th</sup> Jan 2023 and amended on 31/5/24. On 6/12/23 the Plaintiffs suit against 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants was withdrawn. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant were served by substituted service with leave of the Court. They neither entered appearance nor filed statement defence, the Affidavit of Service sworn by ....on 19/12/23 is on record.
2. The Plaintiff avers that his grandfather Juma Omar Mwendo (deceased) was at all material times relating to this suit the registered allottee of the parcel Kwale/Msambweni 'A'/2185 (hereinafter referred to as the suit property) was registered. That a search conducted at the Kwale Land Registry in the year 2019 indicated that the 2<sup>nd</sup> Defendant was the registered proprietor of the suit property. The Plaintiffs states that he temporarily stopped following up on same due to health reasons. However, in January 2022 the Plaintiff conducted a search which indicated that Juma Omar Mwendo (deceased)



was the original allottee of the suit property. The Plaintiff discovered that the suit property had been illegally and fraudulently procured by the 2<sup>nd</sup> Defendant.

3. It is further averred that later in June 2022 the Plaintiff obtained the parcels green card which showed that the 1<sup>st</sup> Defendant had procured the suit property through impropriety and corrupt dealing and in the same manner sold it to the 2<sup>nd</sup> Defendant in a bid to defeat the Plaintiffs beneficial right. That the 2<sup>nd</sup> Defendant in collusion with the 6<sup>th</sup> Defendant proceeded to irregularly registered a charge against the suit property.
4. The particulars of fraud, illegal, unprocedural and corrupt scheme by the Defendants are stated in paragraph 14 of the Plaint. The Plaintiffs seek the cancellation of the title herein and rectification of the register to reflect the registration of the deceased as the proprietor of the suit property. The reliefs are discussed in detail later in this judgement.
5. The matter was heard virtually on 21<sup>st</sup> may 2023. PW1 was Masudi Tsumo the Plaintiff. The witness adopted his witness statement dated 27<sup>th</sup> January 2023 as his evidence in chief and produced the documents in the Plaintiffs list of documents dated 27<sup>th</sup> January 2024 and 28<sup>th</sup> February 2024 as PEX 1- 17. PW1 echoed the facts pleaded in the Plaint. He added that upon inquiry he did not get satisfactory explanations on the disparity between the land adjudication record and the Green card. On the particulars highlighted in paragraph 13 and 13 of the Plaint PW1 told the court that the defendants shown in the green card were not his relatives. That his grandfather never sold the suit property and if he had, he would have informed his children or his siblings. That there was no way his grandfather who died in March 1978 would have sold the land to the 1<sup>st</sup> Defendant in July 1978. That based on the Land adjudication records the 1<sup>st</sup> Defendant should not have appeared as the 1<sup>st</sup> owner of the suit property but PW1 grandfather. That the 6<sup>th</sup> Defendant granted a loan to an individual who was not the owner of the suit property. That he was never shown the documents in relation to the court order alluded to in entry 5 of the green card.
6. The witness further told the court he was representing their entire family comprising the 7 children of the deceased grandfather in the proceedings.
7. PW2 was Ismail Mohamed Kideme a resident of Msambweni and a grandson of Juma Omar Mwendu who sired 7 children. He testified that the Plaintiff was his cousin. That sometime in 2019 some people encroached into the suit property by depositing building material. That he always accompanied the Plaintiff to the Land Registry during the follow up on the titles herein. The witness testimony echoed PW1. The witness stated they blamed the land registrar because he failed to protect the suit property. That the registrar failed to re-confirm ownership and authenticity of the documents used in granting the loan before registering the other proprietors and the charge.

### **Submissions**

8. The Plaintiffs submissions were filed on 25<sup>th</sup> June 2024 and the same identified three issues for Determination. Whether the Plaintiff is the rightful owner of the suit property, Whether the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants lawfully procured their suit property and whether the Plaintiff is entitled to the prayers sought. Analysing the documents produced in court by the Plaintiff coupled with the fact that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not give the reason for the inconsistency in the land adjudication search and certificate of official search, it was submitted that the Plaintiff had proved that the suit property belonged to their grandfather.

As to whether the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> lawfully procured their titles it was submitted that the Defendants could only have obtained the suit property through a sale agreement with the deceased. However, it



was not plausible that the deceased could have sold the suit property to the 1<sup>st</sup> Defendant in 1979 when he died in 1978.

9. The Plaintiffs further relied on the provisions of section 143 of the Registered [Land Act](#) and Section 26 of the [Land Registration Act](#) to buttress the prayer for rectification of the register since the 1<sup>st</sup> registered owner ought to have been the deceased as per the adjudication record. That this points to fraud and irregularity and the 1<sup>st</sup> Defendant should not enjoy the protection of the law. Reliance is further placed in the holding in *Alice Chemutrai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR. It was further submitted that the 1<sup>st</sup> Defendants title being marred by fraud and irregularity; he could not pass good title to the 2<sup>nd</sup> Defendant. That the charge could not have been registered without the lifting of the prohibition order registered in entry No.7. Further reference was made to Section 80 of the [Land Registration Act](#) on the court jurisdiction to rectify the register if the title is obtained irregularly.

### **Analysis And Determination**

10. I have considered the pleadings, the evidence led before court and the submissions. The main issue for determination is whether the Plaintiff is entitled to the orders sought in the Amended Plaint dated 31/5/24.
11. It is the Plaintiffs case that the suit property was at adjudication allocated to his deceased grandfather but the said grandfathers name was fraudulently removed from the adjudication list to pave way for the registration of the 1<sup>st</sup> Defendant as proprietor of the suit property.
12. The law requires under Section 107 (1) of the [Evidence Act](#) Chapter 80 of the laws of Kenya that; -  
“Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Arising from the foregoing it did not matter that the suit is undefended. The Court of Appeal in *Charter House Bank Limited (Under Statutory Management v Frank N. Kamau* [2016] eKLR, when discussing the burden of proof upon the Plaintiff in a situation where the Defendant failed to adduce evidence stated that:

“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff’s case is not controverted or is proved on a balance of probability by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant.... The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified”

13. It was incumbent upon the Plaintiff to prove that he was a beneficiary of the deceased estate and that he was properly before this court as well on behalf of the other beneficiaries. PW1 produced a grant of letters of administration ad Litem issued by the Resident Magistrate Msambweni Court on 27<sup>th</sup> July 2022 in respect of the Estate of Juma Omari Mwendu (see PEX4). A family consent was also produced dated 3<sup>rd</sup> January 2023 which the court noted was signed by 5 beneficiaries. PW2 corroborated the evidence that PW1 was in court with the blessings of the rest of the beneficiaries. Other documentary evidence produced in proof was a letter dated 8/4/22 from the office of the Chief Msambweni location, a family agreement of 4/4/2022 and A family tree. The court was therefore convinced that the Plaintiff was properly before court.



14. My next task was to interrogate and make determination on the Plaintiffs claim that the initial allottee of the land at adjudication was Juma Omari Mwendo the deceased Plaintiffs grandfather. That the said name was illegally and fraudulently removed from the records to pave way for the registration of the 1<sup>st</sup> Defendant as proprietor. PW1 tendered in evidence a certified copy of a search from the Land Adjudication and Settlement office dated 24/5/2022 (PEX 7) which I perused. Indeed, the same confirms that at the time of demarcation plot No. 2185 was recorded in the names of Juma Umari Mwendo as it exists in the departments demarcation books.
15. At this juncture I found it pertinent to briefly look at the relevant legal regime and the effect of the record. My review of the Green card or register revealed that the register was opened on 2/7/1979. The legal framework in place was the *Land Adjudication Act Cap 284 of 1968* which was operationalised through the Land Adjudication Regulations 1970. The objectives of the Act were to provide for the ascertainment and recording of rights and interests in Trust Land and for purposes connected therewith. Section 23 of the Act is on Preparation of adjudication record and provides as follows
- 23 Preparation of Adjudication record
1. The form prepared by the recording officer under section 19 of this Act shall together comprise the adjudication record.
  2. In preparing the adjudication record, the recording officer, if he is satisfied that –
    - a. Any person has, under recognised customary law, exercised rights in or over land which should be recognised as ownership, shall determine that person to be the owner to be owner of that land.
16. Based on the above legal provisions it would therefore be expected that Juma Umari Mwendo would be the first registered owner of the suit property. I say so because had there been any changes to the record pursuant to any objection or appeal the said letter would not have issued. But this was never to be. PW1 told the court that he later discovered after follow up with the Land registry Kwale that the above allocation did not reflect in the register for the suit property but instead the 1<sup>st</sup> registered proprietor was one Zahir Habib Jiwan. This was confirmed by entry No. 1 of 2/7/79 in the Green Card. PW1 evidence was that there was no way Zahir would appear as the 1<sup>st</sup> registered owner when the allottee at adjudication was the Plaintiffs grandfather and when the said Zahir was not a relative. Indeed, upon the courts review of the family tree presented no such name featured in the lineage therein. PW1 evidence was that they never got any adequate explanation as to how this could have happened despite several inquiries at the Land Registrar.
17. Arising from the above legal provisions it is safe for this court and in the absence of evidence to the contrary to recognise that Juma Umari Mwendo having been recorded in the adjudication record is the original owner of the land. The court therefore makes this finding in favor of the Plaintiff.
18. The Plaintiff case is that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants illegally and fraudulently obtained titles to the suit property. It is important to remember at this juncture that the claim against the rest of the Defendants was withdrawn except the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. I will now embark on the determination whether the registration of the 1<sup>st</sup> Defendant was lawful. The standard of proof in civil cases is on a balance of probabilities. Fraud must be specifically pleaded, particularised and proved. However, the standard for proof of fraud is slightly higher than the balance of probability. In this regard I find support in *Central Bank of Kenya Limited v Trust Bank Limited & 4 Others* [1996] eKLR, *Vijav Morajaria v Nansingh Madhusingh Darbar & Anor* [2000] eKLR, *Umilla w/o Mahendra Shah v Barclays Bank International Limited & Anor* [1979] KLR,



19. The particulars of fraud or irregularity attributed to the Defendants are highlighted in paragraph 4 of the Amended Plaint. The 1<sup>st</sup> Defendant is stated to have colluded with the 3<sup>rd</sup> Defendant to alter the adjudication records by omitting the name of the Plaintiffs grandfather, illegally executed the transfer in favour of the 2<sup>nd</sup> Defendant and misrepresenting he was owner of the suit property.

20. The court has already analysed in the foregoing discussions the absence and or non-registration of the Plaintiffs grandfather being initial allottee as the first registered owner of the suit property. This alone confirms there was fraud in the absence of evidence to show there were any changes pursuant to an objection filed by the 1<sup>st</sup> Defendant. This is also an illegality. The court in this regard also finds support in the provisions of section 27 of the *Land Adjudication Act* as to Finalization of the Register and Appeals as well as section 28 thereof as to the action to be taken by the Land Registrar. Section 28 provides thus; -

28 Action by Chief Land Registrar

Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register:

Provided that, where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination.

21. Further it is noteworthy that according to the Limited Grant of Letters of Administration Ad Litem Juma Omari Mwendo the initial allottee died on 28<sup>th</sup> March 1978 and I must respectfully agree with counsel's submission he could not have transferred the land to the 1<sup>st</sup> Defendant in the year 1979 and most importantly to someone who is not in the family tree. I'm further emboldened and persuaded by the following dictum of M. A Odeny J in case of Kogo Flats Ltd v Sammy Cherunya & another [2019] eKLR; -

“.....The process of acquisition of a title is as good as the end result which is the title document. If certain steps are missing there has to be an explanation as to why there is an anomaly in the acquisition. There must be a checklist on the process which must be followed. You cannot be allowed to move from step one skip the other steps and jump to the last step where you get the title and expect eyebrows not to be raised on why certain steps are missing. In the current case it is glaring that something is not adding up on how the plaintiff got his title’.

22. For me based on the foregoing alone the court is emboldened to make a finding of irregularity and fraud in the registration of the 1<sup>st</sup> Defendant as the first registered owner of the suit property. It is trite that there is no need for proof that the holder of the title participated in the fraud or had knowledge of the same.

23. The above findings bring me to the question of whether the Plaintiff is entitled to the reliefs sought in the amended Plaint herein. These are; -

- a. A declaration that the land Kwale/Msambweni 'A'/2185 belongs to Juma Omar Mwendo
- b. A declaration that the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants procured the land Kwale/Msambweni 'A'/2185 through fraud, illegal and corrupt schemes thus the title deed is null and void.



- c. An order directing the County Land Registrar Kwale to recall, cancel and revoke the title deed in possession of the 2<sup>nd</sup> Defendant and re-issue another title for the parcel Kwale/Msambweni 'A'/2185 in the names of Juma Omari Mwendo.
  - d. That the Kwale Land Registrar do delete, revoke and cancel green card for the parcel of land Kwale/Msambweni 'A'/2185 in the name of the 1<sup>st</sup> 2<sup>nd</sup> and 6<sup>th</sup> Defendants and reconstruct another green card in the name of its rightful owner Juma Omari Mwendo.
  - e. A declaration that the charge against the parcel of land Kwale/Msambweni 'A'/2185 is irregular, null and void
  - f. That an order of permanent injunction restraining the Defendants, their agents, servants, nominees, employees from entering, being upon, using, remaining or developing or in any way interfering with the parcel of land Kwale/Msambweni 'A'/2185
  - g. Costs and interest.
24. From my discussions and analysis it is clear that Juma Omari Mwendo is the bonafide original owner of the suit property pursuant to the process of land adjudication. That he ought to have been registered as the 1<sup>st</sup> registered proprietor of the suit property and consequently the registration of the 1<sup>st</sup> Defendant as the first registered proprietor was procedural, illegal unlawful and marred with fraud and irregularities. What then would be the legal implications of these findings?
25. The court is aware that the law is very protective of title of a registered proprietor which is the very essence of the provisions of Section 26 of the [Land Registration Act](#). However, a title can be impeached under section 26 (1) of the [Land Registration Act](#) which provides: -
- “26 (1) 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.”
26. Having made the findings herein about the unprocedural and fraudulent registration of the 1<sup>st</sup> Defendant title it follows therefore that the title cannot stand. A nullity is nullity and nothing valid can come out of it. I agree with the Court of Appeal dictum in Athi Highway Developers v West End Butchery & 6 Others [2015] while adopting the position taken by Lord Denning in Macfoy v United Africa Limited [1961] ALL FR 1169. I must add further that the subsequent transfer to the 2<sup>nd</sup> Defendant and the charge registered to secure facilities from the 6<sup>th</sup> Defendant were of no legal consequence and are null and void. See Athi Highway Developers Limited vs West End Butchery & 6 Others [2015] eKLR and Zephania Ngaira Angwere v Rodgers Senaji Mulemi & Anor [2021] eKLR where the Court of Appeal held that the transfer of title by a Vendor possessing a fake or fraudulent title cannot pass a good title. What therefore should the court do in the present circumstances guided by this dictum?



27. The court has been invited to rectify the register by recalling the titles held by the 2<sup>nd</sup> Defendant or any of the entries in the register made pursuant to the said registration. Clearly the titles cannot enjoy the protection of the law. I find support in SC Petition 8 (E010) of 2021 Dina Management Limited v County Government of Mombasa & 5 Others where the Supreme Court of Kenya pronounced thus; -
- (111) 111] Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the Constitution.<sup>7</sup>
28. The power of the court to rectify the register is conferred by Section 80 (1) of the Land Registration Act which provides that: -
- “Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
29. Based on the provisions of the law as well as decided cases including the findings herein I would not hesitate to grant the reliefs sought for rectification of the register for the suit property herein. It is imperative that the register in respect of the suit property be rectified accordingly as the registration of the 1<sup>st</sup> Defendant did not meet the legal compliance of a good title and is impeached.
30. On costs I will be guided by the provisions of section 27 of the Civil Procedure Act and grant costs of this suit to the Plaintiff.
31. The upshot of the foregoing is that this court finds that the Plaintiff has proved his case on a balance of probabilities against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Judgement is hereby entered for the Plaintiff against the said Defendants. The following orders hereby issue; -
- a. A declaration that the land Kwale/Msambweni ‘A’/2185 belongs to Juma Omar Mwendo
  - b. A declaration that the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants procured the land Kwale/Msambweni ‘A’/2185 through fraud, illegal and corrupt schemes thus the title deed is null and void.
  - c. An order directing the County Land Registrar Kwale to recall, cancel and revoke the title deed in possession of the 2<sup>nd</sup> Defendant and re-issue another title for the parcel Kwale/Msambweni ‘A’/2185 in the names of Juma Omari Mwendo.
  - d. That the Kwale Land Registrar do delete, revoke and cancel green card for the parcel of land Kwale/Msambweni ‘A’/2185 in the name of the 1<sup>st</sup> 2<sup>nd</sup> and 6<sup>th</sup> Defendants and reconstruct another green card in the name of its rightful owner Juma Omari Mwendo.
  - e. A declaration that the charge against the parcel of land Kwale/Msambweni ‘A’/2185 is irregular, null and void
  - f. That an order of permanent injunction restraining the Defendants, their agents, servants, nominees, employees from entering, being upon, using, remaining or developing or in any way interfering with the parcel of land Kwale/Msambweni ‘A’/2185
  - g. Costs are awarded to the Plaintiff
- Orders accordingly.



**DELIVERED AND DATED AT KWALE THIS 17TH DAY OF SEPTEMBER 2024**

**A.E. DENA**

**JUDGE**

**Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:**

Mr. Kabiaro for the Plaintiff

No Appearance for the Defendants

Mr. Daniel Disii – Court Assistant

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