



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO.169 OF 2017**

**JOYCE MUTETE MAWIOO**

(Suing in her capacity as the personal representative of the estate of the Late

**NICHOLAS MAWIOO MUTEVU (DECEASED).....PLAINTIFF**

**VERSUS**

**1. PAULINE WANJIRU NGANGA.....1<sup>ST</sup> DEFENDANT**

**2. SETTLEMENT FUND TRUSTEES.....2<sup>ND</sup> DEFENDANT**

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

**4. REGISTRAR OF TITLES LAMU COUNTY.....4<sup>TH</sup> DEFENDANT**

**5. THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. In her Complaint dated and filed herein on 31<sup>st</sup> July 2017, Joyce Mutete Mawioo suing in her capacity as the personal representative of the estate of Nicholas Mawioo Mutevu (hereafter the Plaintiff) prays for Judgment against the five Defendants jointly and severally for:-

*i) A declaration that the 1<sup>st</sup> Defendant's title to the suit property known as Plot No. LMM/HMSS/572 measuring approximately 7.1 Hectares or thereabouts and formerly known as Plot No. 572 Hindi/Magogoni Settlement Scheme situate in Lamu County is illegal, irregular, fraudulent, null and void;*

*ii) An order that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants do forthwith annul, cancel and /or revoke from the register of records the 1<sup>st</sup> Defendant's title to Plot No. LMM/HMSS/572 measuring approximately 7.1 Hectares or thereabouts and formerly known as Plot No. 572 Hindi/Magogoni Settlement Scheme situate in Lamu County and in lieu thereof issue the Plaintiff with a title to the said suit property;*

*iii) A permanent injunction do issue restraining the 1<sup>st</sup> Defendant by herself, her servants, agents and/or employees and/or through any one of them from entering, constructing on, using, occupying, alienating, charging, leasing, selling and/or in any other manner howsoever and whatsoever from dealing with the said Parcel Known as Plot No. LMM/HMSS/572 measuring approximately 7.1 Hectares or thereabouts and formerly known as Plot No. 572 Hindi/Magogoni Settlement Scheme situate in Lamu County adversely to the rights of the Plaintiff;*

*iv) Any other or further relief which this Court may deem fit to grant; and*

*v) Costs of this suit and interest thereon at Court rates.*

2. The Plaintiff's prayers arise from the contention that her husband the late Nicholas Mawioo Mutevu was the first registered allottee and/or owner of the said parcel of land. The deceased had paid the requisite Settlement Scheme Charges upon receipt of a letter of offer on 1<sup>st</sup>

February 1988. Subsequently the Plaintiff and her deceased husband moved into the suit property in 1992 before moving away to Makueni in 1995.

3. The Plaintiff asserts that her husband passed away in 2006 and later on after obtaining Letters of Administration in the year 2013, she applied to be registered as proprietor of the suit property by transmission. To her utter shock and dismay, she was informed by the Settlement Fund Trustees (the 2nd Defendant) that the parcel of land had been transferred and a title deed issued in favour of Pauline Wanjiru Nganga (the 1<sup>st</sup> Defendant).

4. The Plaintiff avers that the purported transfer and issuance of a title deed by the Chief Land Registrar (the 3<sup>rd</sup> Defendant) and the Registrar of Titles Lamu (the 4<sup>th</sup> Defendant) in favour of the 1<sup>st</sup> Defendant was illegal, fraudulent and wrongful and hence this suit.

5. The 1<sup>st</sup> Defendant was served with summons by way of Substituted Service. She did not however enter appearance and/or file a Statement of Defence.

6. However in a Statement of Defence filed on their behalf by the Honourable the Attorney General (the 5<sup>th</sup> Defendant), the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants deny all the allegations contained in the Plaint. In particular the Defendants assert that a letter of offer is not conclusive evidence of ownership of land and that the payment of the deposit was but one of the several conditions to be fulfilled.

7. The Defendants aver that the registration on the 1<sup>st</sup> Defendant as the proprietor of the suit property was done in good faith and within the law and state that they are strangers to the allegations of fraud or any illegality.

### **The Plaintiff's Case**

8. At the trial herein, the Plaintiff testified as her sole witness. She told the Court that the land in dispute was initially allocated to her husband who later passed on on 16<sup>th</sup> May 2006. She was issued with a Confirmed Grant of Letters of Administration Intestate on 11<sup>th</sup> October 2013.

9. The Plaintiff told the Court that on 1<sup>st</sup> February 1988, her deceased husband received a Letter of Offer from the Lamu District Plot Selection Committee for allocation of the suit property upon payment of a deposit fee and fulfillment of the necessary terms and conditions of the Settlement Scheme. Her husband paid as required and executed the Settlement Scheme terms and conditions on 26<sup>th</sup> November 1989.

10. The Plaintiff further testified that on 17<sup>th</sup> August 1990, her husband applied for a loan to the Director of Land Adjudication and Settlement to develop the property. The Plaintiff's family started residing on the land in 1992 and used the proceeds of the loan to clear the bushes, build a makuti-thatched house and to plant cashew nut trees.

11. The Plaintiff told the Court that in 1995, they moved to Makueni where her husband later died in 2006. After being issued with Letters of Administration for the deceased's estate in 2013, the Plaintiff applied to be registered as proprietor of the suit property. To her shock and dismay she discovered that the property had been transferred from her husband's name and that a title deed had since been issued in favour of the 1<sup>st</sup> Defendant.

12. The Plaintiff told the Court that the said registration was fraudulent and unlawful as at that time, the suit land had not been discharged by the 2<sup>nd</sup> Defendant and no notice whatsoever was issued to the deceased or herself of the changes.

### **The Defence Case**

13. The 1<sup>st</sup> Defendant neither entered appearance nor filed a Defence. On their part, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants filed a Memorandum of Appearance as well as a Statement of Defence. They did not however call any witness at the trial herein.

### **Analysis and Determination**

14. I have perused and considered the pleadings filed, the testimony of the sole witness herein as well as the evidence adduced at the trial. I have also considered the Written Submissions filed herein by Mr. Kibunja, Learned Counsel for the Plaintiff.

15. The Plaintiff herein is the wife of one Nicholas Mawioo Matevu who passed away on 16<sup>th</sup> May 2006 at a place known as Ukia in Machakos County. It is the Plaintiff's case that prior to the death of her husband, he had been allocated the suit property situated at Hindi/Magogoni in Lamu County.

16. It was further the Plaintiff's case that following the allocation of the property as aforesaid, her husband paid the requisite fees as demanded after which they briefly settled on the land before moving to Makueni in 1995. Following the death of her husband, the Plaintiff was issued with a Grant of Letters of Administration for the estate of the late Nicholas Mawioo Mutevu on 11<sup>th</sup> October 2013.

17. When she applied to have the parcel of land registered in her name however, she discovered to her shock and dismay that the parcel of land had in the year 2010 been transferred from her late husband's name to that of the 1<sup>st</sup> Defendant. The Plaintiff accuses the Defendants of fraudulently and illegally facilitating the registration of the 1<sup>st</sup> Defendant as the owner of the suit property.

18. Despite service of summons through an advertisement in the Standard Newspaper of Monday 18<sup>th</sup> December 2017, the 1<sup>st</sup> Defendant neither entered appearance nor filed a Statement of Defence.

19. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants on their part filed a Statement of Defence asserting that the registration of the 1<sup>st</sup> Defendant as the proprietor of the suit property was done in good faith and within the law. The Defendants did not however testify and/or produce any evidence at the trial herein.

20. From the material placed before me, it is apparent that vide a Letter of Offer dated 1<sup>st</sup> February 1988 the Lamu District Plot Selection Committee through the District Commissioner Lamu allocated the suit property to the Plaintiff's husband. The said Letter of Offer required the deceased to report to the Lamu District Land Adjudication and Settlement Officer so that he could be shown the Plot boundaries and be given the necessary Settlement Fund Trustee (SFT) conditions.

21. It is also apparent that the deceased complied with the Committee's directive as on 26<sup>th</sup> September 1989, he executed a formal acceptance of the offer with the Settlement Funds Trustees after paying the requisite charges. On that same day, he executed a Charge on the suitland in favour of the Settlement Fund Trustees who are the 2<sup>nd</sup> Defendant herein.

22. According to the Plaintiff, they settled on the land between 1992 and 1995 and developed the suit land measuring 7.1 Ha by clearing the bushes, building a makuti-thatched house thereon and planting cashew nut trees. The Plaintiff and her husband thereafter moved up-country to Makueni and it would appear that the suit property was left unoccupied thereafter and that it is their absence that led other parties to develop an interest in the property.

23. In a Replying Affidavit sworn on behalf of the 4<sup>th</sup> Defendant by the Land Registrar Lamu one Benedict Nzae Mwangada and filed herein on 12<sup>th</sup> October 2017 in response to the Plaintiff's Notice of Motion dated 31<sup>st</sup> July 2017, the 4<sup>th</sup> Defendant avers at Paragraphs 3 to 6 as follows:-

**3. That according to the records held in the registry, Parcel No. Lamu/Hindi/Magogoni/572 is approximately 7.1 Ha (as per registry sheet No. 2.**

**4. That according to records the Plot was first registered on 10<sup>th</sup> June 1999 to the Settlement Fund Trustees.**

**5. That the office received a discharge of Charge and a transfer from the Settlement Fund Trustees dated 26<sup>th</sup> August 2010 and registered on the 7<sup>th</sup> September 2010. Attached herewith are copies of the said discharge of Charge and transfer marked BMM-1 and BMM-2 respectively.**

**6. That on the 7<sup>th</sup> September 2010 the land was transferred to Pauline Wanjiru Nganga, the 1<sup>st</sup> Defendant/Respondent herein and a title deed issued. Attached herewith and marked BMM-3 and BMM-4 are certified copies of the Green Card.**

24. I have studied the said Replying Affidavit and the attachments thereto. While the size of the suit property is correctly stated, it cannot be true that the parcel of land was first registered on 10<sup>th</sup> June 1999 to the 2<sup>nd</sup> Defendant. From the material placed before me, the Plaintiff's husband had some ten years earlier executed a Charge over the self-same property with the 2<sup>nd</sup> Defendant.

25. As at the time of the issuance of the title deed in the name of the 1<sup>st</sup> Defendant on 7<sup>th</sup> September 2010, the suit property had not been discharged by the 2<sup>nd</sup> Defendant and it remained encumbered by the legal Charge executed over it on 26<sup>th</sup> September 1989.

26. As it were there was no evidence placed before me to suggest how the 2<sup>nd</sup> Defendant took back the suit property and re-allocated it to the 1<sup>st</sup> Defendant and the assertion by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants that the registration of the 1<sup>st</sup> Defendant as the proprietor thereof was done in good faith and within the law is hollow, baseless and aimed at perpetuating an obvious illegality.

27. In the circumstances of this case, I am persuaded that the Plaintiff has proved her case and that the title issued in the name of the 1<sup>st</sup> Defendant on 7<sup>th</sup> September 2010 was obtained through fraud perpetrated by the Defendants jointly and severally.

28. In the premises Judgment is hereby entered for the Plaintiff as prayed in the Plaintiff's Plea.

29. The Plaintiff shall also have the costs of this suit.

**Dated, signed and delivered at Malindi this 30<sup>th</sup> day of January, 2020.**

**J.O. OLOLA**

**JUDGE**