

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC CASE NO. 19 OF 2022 (O.S)

MARIEA ROZEND OLIVER TAVARES
PLAINTIFF

VERSUS

LAWRENCE SHUME CHARO
REGISTRAR OF TITLES MOMBASA
THE ATTORNEY GENERAL
DEFENDANTS

JUDGMENT

PLEADINGS

Originating Summons

1. By an Originating Summons dated **28th June, 2022**, the Plaintiffs prays against defendants:
 - a. That a declaration be and is hereby issued that the registration of the suit property 1996(Original No. 1935/25) Malindi in the name of the 1st Defendant (Lawrence Shume Charo) was illegally procured through fraud and misrepresentation and as such null and void and no legal effect whatsoever;
 - b. That the court hereby orders cancellation of the 1st Defendant's registration of the suit property ie Title No. 1996 (Original No. 1935/25) Malindi and consequent rectification of the Land Register to have the suit property registered in the name of the Plaintiff.
 - c. That this Honourable court be pleased to issue an order revoking/cancelling the registration of title deed of land

Parcel 1996 (Original No. 1935/25) Malindi in the name of the 1st Defendant (Lawrence Shume Charo).

- d. That the register/record of the land parcel 1996(Original No. 1935/25) Malindi be rectified, so as to remove the entries in favour of Lawrence Shume Charo the 1st Defendant, and the title register to revert back to the proprietorship of Mr. Erwin Otto Kuhn and Maria Christine Kuhn.**
 - e. That subsequently Registrar of Title Mombasa, be ordered to register the plaintiff herein Mariea Rozend Oliver Tavares as the proprietor of the suit property land Parcel 1996 (Original No. 1935/25) Malindi in compliance with the court decree issued in CMELC No. 22 of 2020 (O.S) on 27th August 2021.**
 - f. That this Honourable Court do issue an order vesting the land parcel known as Plot No. 1996 (Original No. 1935/25) Malindi (hereinafter the suit property) in the names of the Plaintiff herein.**
 - g. That the costs be in the cause.**
2. The Originating Summon is based on the following grounds:
- a. That the Plaintiff obtained judgment on 18/8/2021 and decree vesting the title in his name through adverse possession on 27th August, 2021.**
 - b. That the 1st Defendant fraudulently proceeded to forge the Judge's signature and letters of administration and proceeded to obtain registration in his favour on 13th September, 2021.**
3. The Originating Summons is supported by the sworn affidavit of the plaintiff dated **28th June 2022** in which he depones as follows: that he used to work

for the registered owners of the suit land. The owners left Kenya in **2007**. They left him with the title documents for the suit land. He has been paying for the utilities and outgoings for the suit land. He filed suit for adverse possession in **MALINDI CMELC Number 22 Of 2020** and judgment was delivered on **18th August 2021** and a decree issued on the **27th August 2021**. He proceeded to have the decree registered but found that the first defendant had allegedly been illegally and fraudulently registered as owner of the property. He wrote letters to the Land Registrar seeking and explanation as to how that registration was effected but he never received any response. He also learned that the first defendant had purportedly used documents from **Malindi HC Succession Cause Number 13 Of 2020** to register himself as owner over the suit land. However, on inquiry, he found that **Malindi HC Succession Cause Number 13 Of 2020** is not in respect of the Estates of the owners of the suit land but in respect of the Estate of one **Rawson Mwambogo Mbura**. It is alleged that both the first and second defendants were involved in the fraud. Upon the discovery, the plaintiff lodged a complaint with the police, and it is alleged that investigations are ongoing into the alleged forgery. The plaintiff avers that instead of exhibiting a will that could have entitled him to such registration, the first

defendant attached untranslated documents written in German language. The plaintiff also avers that since it is evident that the registration of the defendant as proprietor was fraudulent, the first defendant's title should be revoked under the provisions of **Section 26** of the **Land Registration Act** and there should be a rectification of the register so that the title reflects the name of the original owners in order for the suit land to be transferred to him by virtue of the decree of the lower court issued on **27th August 2021**.

Defence and Counterclaim of the First Defendant

4. In that pleading dated **16th August 2022**, the plaintiffs claim was denied.
5. In the defence, it is stated that the first defendant worked for the owners of the suit land as a mechanic from the year **1980** until **2014** when the last of the owners traveled back to Germany and eventually died in that country in **2015**. It is stated that the suit land belongs to the first defendant and that the plaintiff has never been in possession thereof, and that if the plaintiff ever resided on the suit property he was thereon with the consent of the first defendant who inherited it from the original owners by virtue of a will as the only beneficiary. He averred that all the documents pertaining

to the suit land are in his custody. Fraud is denied. It is stated that the first defendant was not a party to **Malindi HC Succession Cause Number 13 Of 2020**. It is averred that possession by a person cannot be adverse if it is by virtue of that person being a tenant or licensee of the legal owner. It was averred that the suit offends **Section 38** of the **Limitation of Actions Act CAP 22** of the Laws of Kenya **Order 5 rule 25** of the **Civil Procedure Rules, Section 7** of the **Magistrate's Court Act 2015** and **Section 150** of the **Land Act**. It is denied that the plaintiff has any interest in the suit land or that his suit discloses any reasonable cause of action against the first defendant. It is also alleged that the suit is premature and calculated at intercepting the investigation process being conducted over the matter by the police.

6. In the counterclaim, the first defendant retreated the matters contained in his defence. He undertakes to rely on various documents that purportedly include a will made by one of the deceased owners of the property. He avers that the trial magistrate in **Malindi HC Succession Cause Number 13 Of 2020** had no pecuniary jurisdiction to hear and determine the claim based on adverse possession. He accuses the plaintiff of attempting either by himself, his agents and or servants to forcefully take possession of,

utilize and fence the suit land, intending to take it away from the first defendant. The following prayers are sought in the counterclaim:

- a. **A declaration that the first defendant is the rightful and lawful owner of all that parcel of land known as plot number 1996 (original number 1935/25) Malindi;**
 - b. **A declaration that the first defendant has the right to continue occupying and owning the suit property;**
 - c. **Declaration that the consequential judgment in Malindi CMCLC Number 22 Of 2020 Maria Rozend Oliver Tavares versus Erwin Otto Kuhn and another dated 18th August 2021 is null and void;**
 - d. **A permanent injunction restraining the plaintiff or his agents servants, workers, from encroaching upon and/or remaining on or taking possession of or continuing fencing off, the first defendant's referenced land known as plot number 1996 (original number 1935/25) Malindi.**
 - e. **Costs and interest.**
7. On **26th August 2022** the second and third defendant file grounds of opposition as follows, *verbatim*:

- a. **That this application offends the doctrine of adverse possession of *nec vi, nec clam nec precario*, having admitted at paragraph 2 of the supporting affidavit that she has been occupying the suit property with permission from the true owner;**
- b. **That the judgment in Land Case Number 22 Of 2020 could not issue and the same was erroneous plaintiff having failed to include the**

first defendant as part (sic) to the suit with the registered title to the same;

- c. That judgments and decrees should not be issued in vain, having failed to sue the defendants at the lower Court in land case number 22 of 2020 then the same as incapable of being enforced against them;
- d. That the issue before (court) is about ownership of land which is highly convoluted therefore the same cannot be adequately addressed through an originating summons;
- e. That this supplication is a waste of both the court and defendant's time and the same should be dismissed with costs to the respondents.

Reply to Defence and Counterclaim

8. This pleading was filed by the plaintiff on **31st August 2022**. It denies the matters set out in the defence and counterclaim while reiterating the matters set out in the Originating Summons. In it, the plaintiff also claims that he used to work for the owners of the suit land as a caretaker since **1989**, and that he moved fully to the suit land in **2007** after being asked to do so by the said owners as they were leaving the country. They then left, after which they never returned. He claims to be in possession of the ownership documents regarding the suit property which were allegedly

handed over to him by the original owners. He avers he has resided on the suit property for a period of **15** years, and accuses the first defendant of referring to documents which he has not produced before the court. He also points out that the reason is that he does not have them, and that the magistrate who dealt with his adverse possession claim had pecuniary jurisdiction to handle the matter. He also states that in any event, her judgment had not been challenged. It is also stated that commencing the suit by way of originating summons is not fatal.

Plaintiff's Further Affidavit of 7th September 2022 & 15th September 2022

9. The plaintiff's further affidavit dated **7th September 2022** and another one dated **15th September 2022** were filed, both primarily rebutting the grounds of opposition and the preliminary objection filed by the second and third defendants. Most prominent in those affidavits is the statement that commencement of the present suit by way of originating summons does not invalidate the proceedings.

EVIDENCE OF THE PARTIES

10. Only the plaintiff testified in his case. Only the first defendant testified in his case. The second and third defendants never called any witness.

Plaintiff's Evidence

11. When the plaintiff testified on **7th October 2024**, he adopted his sworn supporting affidavit attached to the Originating Summons, his further affidavit dated **7th September 2022** as his evidence-in-chief. He also produced his documents in the list dated **30th August 2022** and was subjected to cross-examination by Mr Obaga, then appearing for the defendant.

12. Under cross-examination, he stated that he entered the land as a caretaker. He had been living at Sabaki Flats there before. He had a verbal contract with his employer. He stated that the owner of the land left Malindi in **2004** and has never returned, referring to the owner as a "he". He did not have his contact. He was paying the utility bills us from the year **2007**. He was unable to answer the question as to how he served the lower court case summons upon the owners of the land. He stated that the owner left him his personal file for safekeeping, which he kept safely until he gave it to his lawyer. The owner used to come back to Kenya once or twice every year. However, in **2000** and **2006** he never came back.

13. Upon cross-examination by **Mr Ojwang, PW1** stated that he does not know where the first defendant lives, and maintained that the first defendant forged some documents in order to obtain registration of the suit land is his

name. However, he does not know whether the first defendant was prosecuted for forgery. He admitted that he has never been to the Land Registrar's office and he had relied only on his advocates advice that the first defendant's document were forged.

14. Upon re-examination he reiterated that he had been on the suit land for **17** years, since **2007**. He maintained that he has never seen the first defendant on the suit property. He asserted that the first defendant was not a registered owner of the suit property by the time the case in the lower Court was finalized.

Defendant's Evidence

15. The defendant testified on **18th February 2025**. He adopted his witness statement dated **17th December 2024** as his evidence-in-chief. His evidence remains the same as the contents of the defence and counterclaim and his replying affidavits except for some additions: he stated that he began repairing the cars belonging to the owners of the suit land in the year **2000**. He knows that the plaintiff was a caretaker in that household when the house owners were alive. The plaintiff used to pay the workers of the household. There were **3** employees: a househelp, a gardener and a security man. The caretaker however never lived on the suit premises. **DW1**

began serving in the premises before the caretaker was engaged. After the husband to Maria went to Germany and died, the first defendant began living in the suit premises with Maria. They then went to Germany. They stayed there for **3** months. Then he came back alone and he returned to the house. Later on, the first defendant went to Germany on three or four occasions, the last time being in the year **2010**. The first defendant did not have a passport before he came to know Maria. Maria visited Kenya in **2010** and left after Easter in **2011**. She never came back to Kenya, and in **2015** she died. A German lawyer called Stefan had her papers. She informed the first defendant of the death of Maria. At the time of Maria's death, the plaintiff was living far away near Premier School in Malindi. However, he now lives inside the house. The explanation as to how the plaintiff came to be living in the house was given as follows: the plaintiff told the first defendant that he had been locked out of his house. The first defendant gave him a key and he began living in the suit premises. When the first defendant was served with Court process by the plaintiff, he referred the matter to the CID. An investigation was conducted in conjunction with the embassy of Germany. The lawyer from Germany sent their report to the Kilifi DCIO. The defendant filed copies of those

documents in court. The will was written in German language. It was translated into English. The status that the first defendant has been bequeathed the suit house.

16. Under cross-examination by Mr Ojwang, he maintained that the plaintiff has been living in the house since **2014**. According to him, Maria died on **8th October 2015**. He stated that he never married Maria after Otto, her husband, died. He did not recall when the documents from Germany arrived in Kenya. He has the original title which was left to him. Investigations found him to be without guilt.

17. Under cross-examination by Ms Chepkwony, he admitted that his **D.Exh 5** showed that Joachim Bass inherited Maria's estate but asserted that he can get the land through Joachim. He is not the person who took the Confirmation of Grant to the Mombasa land registry for registration. He denied having visited Mr Obaga Muriuki advocate's office to have a stamp affixed on the signature, and that the said stamp was affixed in his absence. He denied being aware that the Hon Justice Nyakundi had recorded a statement denying that there was any succession cause that have been registered in respect of the Estate of the deceased owners of the house. He does not know whether stamp duty was ever paid for the transfer of land.

His agreement with a plaintiff to take up occupation of the house was oral. Apparently from his cross examination, it emerged that there is another property belonging to the deceased in Italy, and the Court in Italy had not ordered that it be given to the first defendant. He has also not pursued that house with Joachim Bass, who was its care taker.

18. Under re-examination by Mr Ogeto, he stated that someone whose name is not disclosed read to him a letter written and addressed to him by the advocate in Italy. That letter stated that he had been bequeathed the land.

Second and Third Defendant's Evidence

19. The second and third defendants closed their case without calling any witness.

SUBMISSIONS

20. The plaintiff filed written submission's dated **24th February 2025**. The defendant filed submissions written dated **27th March 2025**.

ANALYSIS AND DETERMINATION.

21. I have considered the originating summons, the supporting affidavit, the defendants' responses as well as the parties' submissions filed in the matter. The issues that arise for determination are as follows:

- a. Whether the registration of the suit land in the name of the first defendant and the issuance of title in his name were illegally procured through fraud and misrepresentation and thus liable be canceled by the order of this court?
- b. If so whether the said title in the name of the 1st defendants and the registration in his name should be canceled and the register be rectified to reflect first, Erwin Kuhn and Maria Kuhn and subsequently, the plaintiff as the registered owners of the suit land?
- c. Whether a vesting order should be issued, vesting the suit property in the name of the plaintiff here in;
- d. Who should bear the costs of this litigation.

22.All the above issues will be addressed by examining the manner in which each of the two principal opposing parties, the plaintiff and the first defendant, obtained what they call their title or interest in the suit land.

23.Regarding the first issue, the first defendant relies on his witness statement dated **17th December 2024**. From the statement of defence and the witness statement he has filed, his evidence regarding succession proceedings is quite hazy. He has defended his title to the suit now by stating that he got it by way of succession to the either the estate of Maria Christine Kosa, or the estates of both Maria Christine Kosa and Erwin Kuhn. He avers that the

transmission of the suit property to his name was done legally. He states that there was a will to which he was a beneficiary.

24. From the evidence of both parties it is certain that both Erwin Otto Kuhn and Maria Christine Kosa are deceased, having died on **13th April 2004** and **8th October 2015** respectively.

25. **D.Exh 5** is a copy of what is said to be a will dated **30th December 2004**. This court has perused that document. It is written in German language. Much as this court does not understand German, it can not help but note that that document is the same as the document **D. Exh1**. The translation to **D. Exh1** is provided on the flipside of the same paper **D. Exh 1** is printed on. It shows that Maria Christine Kosa inherited her husband Kuhn. Nowhere does it mention the first defendant. In this court's view, it is not a will in his favor. The question that now arises is: is there any other document that the first defendant can rely on for his claim? There is a letter from the Embassy of the Federal Republic of Germany dated **16th February 2022** addressed the Directorate of Criminal Investigations, Kilifi County Office. That letter states that the author, one **Stefan Koch** has received the following information from German Police authorities: Maria Christine Kosa died on **8th October 2015**; there are no relatives; Maria Kosa appointed a legal

guardian, a Mr Joachim Bass; Mr Bass transferred a handwritten testament to the German police; Ms Kosa bequeathed the property no 1996 to Lawrence Shume Charo of DOB **24th April 1962**, Kilifi Passport Number A127770. Ms Kosa also bequeathed 75,000 euros to Lawrence Shume Charo. Mr Bass is still in possession of the original inheritance documents.

26. There is a letter dated **18th February 2022** acknowledging receipt of Mr Koch's letter of **16th February 2022** which is seeking information from the German Embassy regarding the Passport Number of Maria Christine Kosa; the last day she left Kenya; address of Joachim Bass, the hand written last testament together with its translation into English language, and advice as to how Lawrence Charo would get his 75,000 euros.

27. There is no document suggesting that the first defendant approached any court or that he obtained a grant of letters of administration either intestate or with the alleged will of either Maria or Otto Kuhn annexed. In fact, the very fact that the Directorate of Criminal Investigation was still seeking the original will and a translation as at **18th February 2022** implies that by that day no succession proceedings could have been filed by the first defendant which could have enabled him to have the property registered in his name by way of transmission.

28.All that the first defendant has produced as evidence of registration of the suit land in this name is a copy of the transfer to the personal representative of push on **Number Malindi/1996 Title Number LT NO. 408/ File Number 6097** Measuring **0.4923HA**. The transferor in that transfer is the first defendant. He is also the transferee. The date of Grant or will/letters of administration is given as **17th March 2020**. The transfer is attested to by Obaga Muriuki, Advocate. Endorsements on its face are faint but the visible parts thereof suggest that stamp duty was paid for it. It was registered on **27th May 2021** under **LT 36-FOLIO-NO 407/4 FILE-6097**. The transfer was prepared by Katsoleh & Company advocates. The postal search dated **10th September 2021** shows that Lawrence Shume Charo was registered as owner as beneficiary in respect of the land.

29.From the above, it is clear that the first defendant has not demonstrated that he followed the process of proof of will by way of succession proceedings file in a court of law as required by Kenyan law so as to be registered as the owner of the suit land. I therefore find that the suit land was irregularly registered in his name without following the due process. Due to that irregularity, both the registration of the land and the title issued in his name must be canceled. In saying this, I am not stating that he

did not inherit the land from Ms Maria Kosa. There is a different forum for proof of inheritance and succession matters. It is not for this court to deal with those issues.

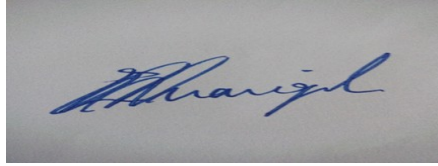
30. The second issue is whether the suit land should be registered in the name of the Estate of Erwin Otto Kuhn and Maria Kosa. While inquiring into this issue, this court cannot help but note that the plaintiff claims to have obtained interest in the suit land by way of orders of Court in **Malindi CM Land Case Number 22 Of 2020**. For brevity, it is hereby stated that a decree made by a court should be executed by that Court and not by any other unless the proper process resulting in execution by another court has been followed. It is not for this court to execute the decree of the lower Court. However, this Court appreciates that this matter may have reached it only due to the controversy between the plaintiff and the first defendant despite the existence of the lower Court decree. It is also noteworthy that by the time the plaintiff was filing suit for adverse possession, both Mr Erwin Otto Kuhn and his wife had already met their demises. The plaintiff, upon being cross-examined as to how he served them with summons in the adverse possession suit was at a loss. However, I have noted that from the judgment exhibited in this case service of process was by way of

substituted service by advertisement in the Daily Nation newspaper and the magistrate who tried the case confirmed that the advertisement was carried out on **27th October 2020** but the defendants did not enter appearance. In that judgment of the lower court, it is also evident from the summary of evidence that the plaintiff herein admitted that he had entered into the property by way of his being a caretaker on the property in **2005** when the owners thereof were alive. The claim for adverse possession was allowed.

31. The outcome of what I have discussed herein above is that the prayers in this court seeking vesting of the suit land in the name of the plaintiff must be rejected. the cancellation of the 1st defendant's title shall be followed by action on the part of the 2nd defendant who shall ensure that the registration of the suit land reverts to the estates of the previous owners, Maria Christine Kosa and Erwin Otto Kuhn.

32. In the end and save for the content of the immediately preceding paragraph, I dismiss both Originating Summons dated **28th June 2022** and the counterclaim dated **16th August 2022**. There shall be no orders as to costs.

Dated, signed and delivered at Malindi via electronic mail on this 30th day of September 2025.

A rectangular box containing a handwritten signature in blue ink. The signature is cursive and appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE
JUDGE, ELC, MALINDI.**