



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ELC APPEAL CASE NO. E038 OF 2024**

**RASHID MWANGANGI MUSINGI .....**

**.....APPELLANT**

**VERSUS**

**1. GABRIEL KAMAU KIMANI .....1<sup>ST</sup>**

**RESPONDENT**

**2. GEORGE NJENGA WAKAHIU.....2<sup>ND</sup>**

**RESPONDENT**

**3. BAKARI KHAMISI AKA BAKARI MGANGA.....3<sup>RD</sup>**

**RESPONDENT**

**4. LAND REGISTRAR-LAMU COUNTY.....4<sup>TH</sup>**

**RESPONDENT**

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

**RESPONDENT**

*(Appeal from Mpeketoni Senior Resident Magistrate’s Court by Hon. P. E. Nabwana (SRM) delivered on July 18, 2024, at Mpeketoni in ELC Case No. E006 of 2022)*

**JUDGMENT**

- 1.** This is an appeal against the judgment of Hon. P.E. Nabwana (SRM) issued on July 18, 2024, in Mpeketoni in **ELC case No. E006 of 2022.**
- 2.** The appellant, based on the Memorandum of Appeal dated August 13, 2024, appeals the decision of the trial court on the following grounds:
  - a) The learned magistrate made errors in both fact and law by siding with the 1st and 2nd respondents.**
  - b) The learned magistrate made errors both in fact and law by neglecting to consider the appellant’s evidence and written submissions.**
  - c) The learned magistrate erred both factually and legally by failing to recognize the disparity in the exhibits presented by the 1st and 2nd respondents.**

- d) The learned magistrate was biased against the 1st and 2nd respondents.**
- e) The learned magistrate erred both in fact and law by failing to recognize that the 1st and 2nd respondents' Exhibit 4 (PDP Form) did not show or indicate that the 1st respondent's designated parcel included two plots of land, specifically plot No. 70 and plot No. 71.**
- f) The learned magistrate erred in fact and law by siding with the 1st and 2nd Respondents' argument that they had proved the title origin concerning the land parcel reference Lamu/Mpeketoni Township/153.**
- g) The learned magistrate erred in fact and law by holding that the allotment plot number 71 was registered as Lamu/Mpeketoni Township/153 without any supporting evidence.**
- h) The learned magistrate erred in fact and in law by holding that the appellant belatedly raised a complaint about the differences in acreage on the allotment letter for Plot No. 71 and land parcel**

**referenced Lamu/Mpeketoni Township/153. In contrast, the same had been included in the pleadings. Additionally, the magistrate erred in fact and in law by misunderstanding the role of the PDP issued to the 3rd respondent, leading to a wrong conclusion.**

**i) The learned magistrate erred in fact and law by failing to find that the 1st and 2nd respondents did not establish the connection between allotment Plot No. 71 and land parcel referenced Lamu/Mpeketoni Township/153.**

**j) The learned magistrate also erred in ignoring that the appellant had acquired Plot No. 71 by purchasing it from the original allottee, the late Omar Abdulrahman Cheka.**

**3.** In the lower court suit, the 1st and 2nd respondents (plaintiffs in that court) sought the following reliefs:

**a) An order directing the 3<sup>rd</sup> defendant to re-issue Certificate of Lease of the suit premises Mpeketoni**

**Township/153 with correct details of the size of the suit land indicated to be 0.11 Ha;**

**b) An order for eviction to issue for the 1<sup>st</sup> Defendant and 2<sup>nd</sup> defendants to give vacant possession of the suit premises vide plot number Mpeketoni Township /153 to the plaintiffs;**

**c) Alternatively, compensation of the value of the suit premises from all the defendants for the wrongful allocation of title of ownership for the suit premises; and**

**d) Costs of the suit together with interests.**

**4.** In response, the appellant and the 3rd respondent filed a defense and counterclaim. The counterclaim sought the following prayers:

**a) A declaration that the 1st defendant is the legal and beneficial owner of the land known as Lamu/Mpeketoni Township/567.**

**b) A declaration that the 2nd defendant is the legal and beneficial owner of the land known as Lamu/Mpeketoni Township/568.**

- c) An order of permanent injunction restraining the plaintiffs, their servants, agents, or anyone claiming their authority from entering, remaining, occupying, and/or dealing with the plots of land referenced as Lamu/Mpeketoni Township/567 and 568.**
- d) Costs of the suit and interest.**
- e) Any other relief that this Court may deem just and appropriate to grant in the interest of justice.**

- 5.** The suit was heard on merits, and judgment was delivered in favor of the 1st and 2nd respondents, hence this appeal.
- 6.** According to the appeal record, the evidence presented in the lower court shows that on July 15, 1998, the 1st plaintiff (now deceased) was issued a Letter of Allotment for a parcel of land known as UNS, Residential Plot No. 71 - Mpeketoni - Lamu, measuring approximately 0.11 hectares. The letter was issued by the then Commissioner of Lands, Mbogori M.K., Authority 102749/GA/II.
- 7.** The 1st plaintiff then took possession of the said plot by planting trees and erecting a fence as soon as it was shown to him. On July

17, 2012, the 1st plaintiff entered into a sale agreement for the property with the 2nd plaintiff for a total of Kshs. 300,000. Before the sale, the 1st plaintiff provided ownership documents, including the Letter of Allotment dated July 15, 1998, and an approved PDP plan dated April 6, 1997, which the 2nd plaintiff reviewed and found authentic.

- 8.** The 2nd plaintiff then voluntarily executed the agreement and, upon viewing the plot, took possession, occupied, developed, and fenced it from 2012.
- 9.** Having fulfilled the conditions outlined in the letter of allotment, the 1st plaintiff was issued a Certificate of Lease on February 12, 2014. It was noted that Plot No. 71 was now titled as Mpeketoni Township/153, and the size of the plot had been unilaterally reduced from 0.11 hectares to 0.0688 hectares.
- 10.** Subsequently, the plaintiffs discovered that Mpeketoni Township/153 had been illegally subdivided into two portions, with approximately 0.0402 hectares allocated and registered to the 2nd defendant without the 1st plaintiff's knowledge or consent. This was

despite the original title remaining valid and no court order having been issued to cancel or subdivide it.

- 11.** In 2021, the 1st and 2nd defendants attempted to trespass onto the plaintiffs' property, claiming the 3rd defendant had allocated it to them. The plaintiffs reported this to the authorities, where it was resolved at the offices of the Ward Administrator, Mpeketoni, with the defendants being informed that the rightful owners were the plaintiffs.
- 12.** Later, in late March 2022, the defendants again attempted to trespass by entering and cutting down the plaintiffs' trees. They also tried to re-fence the property and install a gate in preparation for constructing illegal structures.
- 13.** The plaintiffs argue that if the 3rd defendant did allocate the property to the defendants, such allocation was fraudulent, illegal, null, and void, as it was carried out while a valid and existing allocation to the 1st plaintiff remained in effect without any cancellation or subdivision order from a court. This formed the basis of the dispute before the lower court and in this appeal.

**14.** The 1st defendant testified that he is the legal and beneficial owner of the parcel of land known as UNS. Residential Plot No. 71 - Mpeketoni - Lamu, having purchased the said land from the former allottee, Abdulrahman Cheka (Deceased). The 1st defendant further states that the said plot, approximately 0.045 hectares, was allocated to the deceased by a Letter of Allotment dated July 1, 1998, supported by an approved Part Development Plan dated September 11, 1998. The 1st defendant claimed that during the Mpeketoni Township plots regularization, the plot was blacklisted without any plausible reasons, and he has yet to receive a title deed due to disputed ownership by the plaintiffs. He notes that the plot allegedly transformed to Mpeketoni Township/182 and finally to Mpeketoni Township/567.

**15.** The 2nd defendant, on the other hand, alleges that he was issued a Letter of Allotment for the parcel known as UNS. Residential Plot No. 70 in Mpeketoni, measuring 0.048 hectares, dated April 16, 1999, supported by an approved Part Development Plan dated July 15, 1998. The 2nd defendant further claims that during the Mpeketoni Township regularization, the plot was renamed to

Mpeketoni Township/183 and ultimately to Mpeketoni Township/568, for which he holds a freehold title. He also admits that before receiving the freehold title, he was issued a Grant Certificate with title number CR 45208 registered at the Mombasa Lands Registry, which he used to obtain his current freehold title.

**16.** The 3rd defendant, acting as the custodian of land records, filed a defense but did not submit any documents or call witnesses. As a result, the evidence of irregular and fraudulent allocation by the 3rd defendant, presented by the plaintiffs, remained uncontroverted.

**17.** The appeal was considered through written submissions. I acknowledge receipt of submissions from learned counsel for the parties, Mr. Mutethia for the appellant and Mr. Kedeki for the respondents, which contributed significantly to resolving the issues at hand.

**18.** Based on the appeal record, submissions, and materials before me, I identify the issues for the court's decision as follows: whether the learned magistrate considered the appellant's evidence and submissions; whether the learned magistrate erred in failing to recognize the role of the PDPs for the parties; whether the root of

title for parcel number Lamu/Mpeketoni Township/153 was traced correctly to the allotment plot number 71; whether the appellant had any legal rights to the suit premises; whether the learned magistrate erred in ruling in favor of the 1st and 2nd respondents and whether he was biased; and who should bear the costs of this appeal.

**19.** Ordinarily, the first appellate court should review the evidence anew and draw its own conclusions, although it must keep in mind that it did not have the chance to see or hear the witnesses firsthand.

**20.** This duty bestowed on the 1st appellate court was explained in the case of **Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123** as follows:

***“An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not***

***bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”***

**21.** Having reviewed the record of appeal and the body of the judgment regarding whether the trial magistrate considered the appellant's evidence, this is what the magistrate stated in paragraph 4 of the judgment concerning the appellants testimony:

***“The 2nd Defendant, BAKARI KHAMIS aka BAKARI MGANGA in his testimony stated that he is the registered and lawful owner of Plot No. 0.048Ha Plot No. LAMU/MPEKETONI TOWNSHIP/70. He was issued with an allotment letter on April 16, 1999, with reference to a part development plan Ref. No. 230. LMU.IV.7.98. He duly paid survey fees and later the Mombasa Land Registry issued him with a certificate of lease for 99 years on March 5, 2009. He took possession of the Plot and stated that the 1<sup>st</sup> Defendant is his neighbour having purchased the parcel from one Abdulrahman Cheka. That in the year 2021 he received information from his neighbours that there were unknown people visiting the Plots inquiring***

***about the plots. This prompted the 2<sup>nd</sup> Defendant to act to ward off any land grabbers. The matter was referred to the Mpeketoni Township Regularization Committee. During the meeting, the 1<sup>st</sup> Defendant had his plot marked as in dispute while the 2nd Defendant had his plot affirmed to be his because of the title documents he produced. “***

**22.** This clearly indicates that the trial magistrate considered the appellant's evidence and submissions before reaching his conclusion.

**23.** From the record of appeal and the judgment of the lower court, acknowledging the importance of the PDPs for the parties, the appellant presented two arguments related to the PDPs, claiming that the learned magistrate erred both factually and legally by not recognizing that the 1st and 2nd respondents' Exhibit 4 (PDP Form) did not indicate that the 1st Respondent's allocated parcel included two plots of land, specifically plot No.70 and plot No.71. The appellant also contended that the learned magistrate erred both factually and legally by misinterpreting the function of the PDP issued to the 3rd respondent, resulting in an incorrect conclusion.

**24.** In recognizing the role of the PDPs in this case, the learned magistrate noted in paragraph 13 of the judgment that:

***“This court finds that no evidence has been adduced by the 1st Defendant to demonstrate that the 1<sup>st</sup> Plaintiff forged, falsified and/or altered records to obtain lawful ownership of all that parcel of land known as LAMU/MPEKETONI TOWNSHIP/153 measuring 0.0688HA. In any event his title corresponds to the letter of allotment issued to him and which letter of allotment was issued in accordance with the PDP referenced 230 LMU.III.8.97. The 1<sup>st</sup> Defendant relied on a PDP referenced 230.LMU.IV.7.98 whilst his letter of allotment referred to a PDP referenced 230. LMU.IV.3.95 for a Plot allegedly measuring 0.045HA. Consequently, this court finds that the 1<sup>st</sup> Plaintiff is the lawful owner of all that parcel of land known as LAMU/MPEKETONI TOWNSHIP/153 measuring 0.0688HA. “***

**25.** The record shows that the 1st defendant relied on a PDP referenced 230.LMU.IV.7.98, while his letter of allotment referred to a PDP referenced 230. LMU.IV.3.95. It follows that the PDP he held never resulted in any plot because it referred to a different allotment letter. I do not fault the trial court on this point.

- 26.** The question of whether the origin of the title for parcel number Lamu/Mpeketoni Township/153 was correctly traced to allotment plot number 71, as involved in this appeal and indeed by the lower court, warrants consideration.
- 27.** It is important to note that under both **Section 26** of the **Land Registration Act** and **Article 40** of the **Constitution** of Kenya 2010, a title is not protected by law if it was obtained illegally. In this case, the 1st plaintiff lawfully acquired the title to the suit premises. There is no allegation or proof by the defendants that the title was acquired illegally.
- 28.** Upon reviewing the appeal record and the trial court's judgment, the defendants did not present any testimonial or documentary evidence to suggest—and have not even proven—that the plaintiffs' title was obtained unlawfully. The Certificate of Lease with title number Mpeketoni Township/153, issued on February 12, 2014, is the first such title issued by the Commissioner of Lands in this case. This document remains valid and retains its legal effect.
- 29.** Title number Mpeketoni Township/153, originally known as UNS, Residential Plot No. 71 - Mpeketoni - Lamu, inhere in the first

plaintiff, now represented by his wife and legal representatives, who were properly authorized to transfer ownership interests to the second plaintiff through the sale agreement dated July 17, 2012.

**30.** In his judgment, the learned magistrate acknowledged this and noted that it was incumbent upon the plaintiffs to prove their title's validity, as well as for the defendants to prove that their ownership documents were genuine. The magistrate correctly cited the Court of Appeal decision in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**, thus:

***“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”***

**31.** The learned magistrate observed that the plaintiffs presented their Letter of Allotment dated July 15, 1998, for Plot No. 71 measuring 0.11 HA as P. Exh. 1. They also submitted, as P. Exh. 4, the PDP related to the said plot of land. Importantly, they produced

P. Exh. 3, the certificate of lease issued to the 1st plaintiff as proof of ownership. The learned magistrate reasoned that these exhibits suggest, on a balance of probabilities, that the 1st plaintiff was able to have the property registered in his name procedurally.

- 32.** Whether the appellant had any legal right to the suit premises, the determination of this issue by the lower court forms the basis of this entire appeal. A letter of allotment acts as an offer to the allottee, who can then choose to accept or reject it. The Court of Appeal has supported this position in the case of **Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] KECA 457 (KLR)**, where it was concluded that allotting an interest in land is a transaction *in rem*, which is attached to and follows a specific parcel of land. See also **Stephen Mburu & 4 Others v Comat Merchant Ltd & Another [2012] KEHC 1617 (KLR)** and **Solomon v Agalo & 3 others (Environment & Land Case 41 of 2016) [2023] KEELC 16627 (KLR) (27 March 2023)**.
- 33.** A letter of allotment cannot transfer ownership or title to the allottee without the issuance of a formal title document. From the record of appeal, it is unclear whether the deceased accepted the

offer or if he fulfilled the conditions outlined in the letter. The Certificate of Lease issued in the name of the 1st Plaintiff was the earliest and only valid title unless it was lawfully canceled. There is no evidence showing that the deceased obtained any land title through that offer.

**34.** No record shows a title issued to Omar Abdulrahman Cheka (deceased). The allotment in his name expired when the land was sold, and a Certificate of Lease was issued to the 1st plaintiff. Ownership cannot pass from the deceased to the appellant without a grant of letters of administration, which the appellant does not possess. The appellant admitted he did not involve the deceased's legal representative or family. Therefore, he lacks the legal capacity to sue, as his claim is based only on an agreement with the deceased.

**35.** The appellant argued that the learned magistrate erred both in fact and law by shifting the burden of proof in the cases of the 1st and 2nd respondents onto him. Since the title of both parties was under challenge, it was incumbent on the appellant to show how he acquired it - this does not constitute shifting the burden of proof.

Furthermore, he had a counterclaim against the respondents, which he needed to support. The burden of proof was never shifted to him. Specifically, he needed to demonstrate that Omar Abdulrahman Cheka (Deceased), from whom he claimed to have purchased the plot, had a legal title to transfer and that he had the capacity to claim property from a deceased person without having obtained a grant of letters of administration for the deceased's estate. He failed to meet this burden. The appellant's counterclaim in the lower court was correctly dismissed. Consequently, the lower court's dismissal of his counterclaim was justified, and this appeal also fails on the same grounds.

**36.** On the issue of bias, having reviewed the record, I find that the trial court carefully examined the case, considering all the facts and legal principles involved. The appellant was unable to support his counterclaim, while the 1st and 2nd respondents demonstrated they held valid titles, obtained lawfully. This meant their ownership was protected under **Section 26** of the **Land Registration Act** and **Article 40** of Kenya's **Constitution of 2010**. It is clear to me that the trial court applied the law correctly, thoughtfully analyzing the

evidence before reaching a fair decision. His judgment was based on sound reasoning and was free from bias, favoritism, or undue influence. Since the appellant has not shown any bias, I agree that the appeal should be dismissed, and I do so accordingly.

**37.** In summary, based on the foregoing, the current appeal lacks merit and is dismissed. Since costs follow the event, the appellant will bear the costs of this appeal and those in the lower court.

**38.** Orders accordingly.

**Dated, signed, and delivered virtually at Malindi on this 8<sup>th</sup> day of October, 2025.**

**E. K. MAKORI**

**JUDGE**

**In the presence of:**

**Mr. Mutethia for the Appellant**

**Mr Wakahiu for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

**Mr. Nyoike for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.**

**Happy: Court Assistant**

