



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 52 OF 2010**

**YAWA CHOME SHUME.....PLAINTIFF**

**VERSUS**

**PHILEMON MAKUPE YAWA**

**HUSSEIN ABDALLA SAID**

**THE DISTRICT LAND REGISTRAR-KILIFI....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By a Plaint originally filed herein on 20<sup>th</sup> May 2010 as amended on 29<sup>th</sup> May 2012 and filed herein on 31<sup>st</sup> May 2012, Yawa Chome Shume(hereafter the Plaintiff) prays for Judgment against the three Defendants jointly and severally for:-

- a) A declaration that the Plaintiff is the bona fide owner of the suit property known as Kilifi/Ngerenyi/1075;*
- b) A declaration that the acquisition of the suit plot number Kilifi/Ngerenyi/1075 was illegal and the allocation and registration into the 1<sup>st</sup> Defendant's name and subsequently into the 2<sup>nd</sup> Defendant's name is null and void;*
- c) An order directing the Registrar of Lands Kilifi to cancel the title No. Kilifi/Ngerenyi/1075 and re-register the Plaintiff as the owner thereof;*
- d) A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, children, servants and agents from trespassing on, farming and/or disposing or transferring or selling or in any other manner dealing with Plot No. Kilifi/Ngerenyi/1075;*
- e) Costs of the suit.*

2. The said prayers by the Plaintiff are anchored in his contention that he was the original allottee, legal and registered owner of a parcel of land known as Plot No. 727/Kilifi/Ngerenyi measuring 4.9 Ha. The Plaintiff avers that being illiterate, he entrusted his son Philemon Makupe Yawa (hereafter the 1<sup>st</sup> Defendant) to help him process title for the land.

3. It is the Plaintiff's case that sometime in the year 2002 when he embarked on the process of distributing his property to his family consisting of four wives and 23 children, he came to learn that the original parcel of land measuring 4.9 Ha had been sub-divided without his knowledge and/or consent and the only portion that now belonged to him after the said sub-division was a portion measuring 2.47 Ha.

4. It is further the Plaintiff's case that he subsequently came to learn that the 1<sup>st</sup> Defendant was claiming ownership of about half of the original parcel of land and that in or about April 2010, he came to learn upon conducting a search at the Kilifi Land Registry that the 1<sup>st</sup> Defendant had sold and transferred Kilifi/Ngerenyi/1075 into the name of Hussein Abdallah Said (hereafter the 2<sup>nd</sup> Defendant).

5. The Plaintiff avers that he has never disposed off his land to the 1<sup>st</sup> and/or the 2<sup>nd</sup> Defendant and asserts that all efforts to have the property reverted to him have proved futile hence the institution of this suit.

6. In his Written Statement of Defence initially dated 13<sup>th</sup> July 2010 as amended on 10<sup>th</sup> July 2012 (and filed herein on 31<sup>st</sup> July 2012), the

1<sup>st</sup> Defendant denies that the Plaintiff paid the required fees for processing of the title to the original parcel of land. In particular he denies that there was any illegality or fraud in the process of the sub-division of the land as alleged in the Plaintiff and invites the Plaintiff to a strict proof of the said allegations.

7. The 1<sup>st</sup> Defendant asserts that all dealings in the suit property was done overboard with the express consent of the Plaintiff. In the alternative, the 1<sup>st</sup> Defendant avers that he acquired the ownership of the suit property being the share and or interest of the Plaintiff's brother which share he purchased with the knowledge of the Plaintiff and the family.

8. It is further the 1<sup>st</sup> Defendant's case that this suit was brought in bad faith since he was the registered owner of the suit property since the year 2002. It is further his case that the 2<sup>nd</sup> Defendant is an innocent purchaser for value and ought not to be affected by internal wrangles in the Plaintiff's family.

9. In his Statement of Defence dated 7<sup>th</sup> July 2010 as amended and filed herein on 30<sup>th</sup> January 2014, the 2<sup>nd</sup> Defendant admits that he is the registered proprietor of Plot No. Kilifi/Ngerenyi/1075 having purchased the same from the 1<sup>st</sup> Defendant. He however asserts that he is unaware of any relationship between the Plaintiff and the 1<sup>st</sup> Defendant and that the Plaintiff's claim of right of an interest in the property is wanting and misplaced.

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

10. At the trial herein, the Plaintiff called six witnesses who testified in support of his case.

11. PW1-Yawa Chome Shume (the Plaintiff) told the Court that the 1<sup>st</sup> Defendant is his first born son. Sometime in 1967, he decided to get a piece of land where he could settle his large family consisting of four wives and many children. He was then allocated Plot No. Kilifi/Ngerenyi/727 measuring 4.9 Ha by the Government. He settled on part of the land and used other parts for cultivation and for purposes of planting trees.

12. PW1 testified that between 1967 and 2002, he encountered many difficulties as he tried to get a title deed for his parcel of land at the Department of Lands in Kilifi. He therefore decided every time he was going there to be accompanied by his eldest son-the 1<sup>st</sup> Defendant. Sometimes PW1 would send the 1<sup>st</sup> Defendant alone to go make the requisite payments as PW1 was illiterate and he trusted him as his son to do the right thing.

13. Later on the 1<sup>st</sup> Defendant informed PW1 that the title deed had been issued. PW1 however never saw it. Thereafter, PW1 decided to distribute the land to his family. When he visited the Area Chief and told him of his intention, the Chief advised PW1 that his parcel of land was smaller in size than he was stating. When PW1 asked the 1<sup>st</sup> Defendant about it, the 1<sup>st</sup> Defendant claimed ownership of half of the land.

14. PW1 told the Court that his son subsequently became violent and threatened him. It was his testimony that he never attended any Land Control Board and that he never gave his first born son the piece of land the son was claiming nor did he know the 2<sup>nd</sup> Defendant.

15. PW2-Nazi Yawa Chome is the 2<sup>nd</sup> wife to the Plaintiff. She told the Court that they got married in 1965. At that time, they were living in Chonyi Area. Sometime around 1967, her husband was allocated the suit land in Tezo Roka measuring about 12 acres.

16. PW2 told the Court that thereafter, PW1 started the process of getting a title deed from the Kilifi Lands Office. PW1, PW2 and PW2's co-wife Masika Yawa were illiterate but the 1<sup>st</sup> Defendant had already concluded secondary school. PW1 would therefore be accompanied by the 1<sup>st</sup> Defendant whenever he went to Kilifi to pursue the issue of the title.

17. PW2 testified that she was later told the title deed had been issued although she never saw it. Later on, she came to learn that the 1<sup>st</sup> Defendant had sub-divided the land without PW1's authority.

18. PW3- Nazi Easter Yawa Chome is the Plaintiff's 4<sup>th</sup> wife. She told the Court that she was married in 1973. PW3 testified that she was aware at one point PW1 invited his brother Ngala Chome Shume to live with them on the suit property. The said Ngala however returned to the family's ancestral land in Chonyi about ten years after PW3 was married. Ngala demolished his houses but left the coconut trees which the Plaintiff's family bought.

19. PW3 further told the Court that she was aware her husband was processing title deed for the suit property. Sometimes PW1 would go alone but sometimes he would send the 1<sup>st</sup> Defendant. Later on, they were told the land was only six acres and not 12 acres as they had known. The family then came to learn that the 1<sup>st</sup> Defendant had sub-divided the land and taken away six acres. When the 1<sup>st</sup> Defendant was summoned to Area Chief's Office, he declined to attend.

20. PW4- Charles Yawa Chome is the Plaintiff's son with PW2. He told the Court he was born on the suit property in 1977. Sometime in 2010, members of the family saw some beacons being erected on the family property. When they followed up, they realised that the 1<sup>st</sup> Defendant who is his eldest brother had sub-divided the land. His brother was then summoned to the Ngerenyi Location Chief's Office but he never attended.

21. PW5-Mbodze Yawa Chome is the Plaintiff's 3<sup>rd</sup> wife. She told the Court her husband was allocated 12 acres of land. PW1 paid for the land at the Lands Office in Kilifi. In so doing, he was assisted by the 1<sup>st</sup> Defendant as PW1 is illiterate. Later on the family came to learn

that the 1<sup>st</sup> Defendant had sub-divided the land without PW1's authority or knowledge.

22. PW6-Charles Chai Baya Taura is the Plaintiff's neighbour at Tezo. He told the Court he had known PW1 from the time his (PW6's) family moved from Mavueni to Tezo. PW1's land was 12 acres just like the land belonging to PW6's family known as Kilifi/Ngerenyi/728.

### **The Defence Case**

23. On their part, the Defendants called three witnesses who testified in support of their case.

24. DW1-Philemon Makupe Yawa (the 1<sup>st</sup> Defendant) told the Court that he was the 1<sup>st</sup> born son of the Plaintiff. He testified that his father who is over 85 years old co-owned Land parcel No. Kilifi/Ngerenyi/727 with his brother Ngala Chome Shume. At the time of registration of the land, the said Ngala had gone back to the family's ancestral home in Chonyi and it was only PW1 who was found at the time of adjudication and was registered as the owner of the entire piece of land measuring 12 acres.

25. DW1 told the Court that both PW1 and the said Ngala used to pay money to the Settlement Fund Trustees. The title deed however only came out in PW1's name. By then, PW1 had sub-divided his portion of the land to his four wives while Ngala also sub-divided his portion to his three wives.

26. DW1 further told the Court that after the title came out, PW1 wanted his portion separated from his brother Ngala's portion. Ngala then decided to sell his six acres portion to DW1 for Kshs 300,000/- DW1 testified that the entire family knew about the sale transaction and the Sale Agreement which was executed on 7<sup>th</sup> February 2001. He produced the Agreement as Dexh 1.

27. DW1 testified that he paid the entire purchase price and Ngala then removed all his structures and returned to Chonyi. Thereafter, DW1 started developing the land. They went with Ngala to the Land Control Board whereafter Ngala's portion was sub-divided from PW1's portion. PW1's portion thereafter came to be known as Plot No. 1074 while the portion sold to DW1 came to be Plot No. 1075.

28. DW1 further then told the Court that about seven years after the sub-division, he sold his land to the 2<sup>nd</sup> Defendant vide an Agreement dated 24<sup>th</sup> March 2009, at a consideration of Kshs 1.5 Million. The land was thereafter transferred on 19<sup>th</sup> May 2009 and Surveyors moved thereon and placed beacons as appropriate.

29. DW1 told the Court that the 2<sup>nd</sup> Defendant was a great friend of PW1 and that PW1 knew about the sale transaction and had given his blessings thereto.

30. DW2-Justin Jilani Ngala is a cousin of DW1 and the son of Ngala Chome Shume. He told the Court that the suit property was registered in the Plaintiff's sole name at the time of adjudication due to the fact that at the time, his father Ngala had travelled back to Chonyi.

31. DW2 further told the Court that as at the time the title of the suit property was acquired, his father had lost the interest and desire of staying at Ngerenyi as a result of which he looked for a buyer for his six acres. DW1 thereafter agreed to buy the land at Kshs 300,000/-. The sale was done in the presence of all family members.

32. DW3-Hussein Abdalla Said (the 2<sup>nd</sup> Defendant) told the Court that he bought the disputed parcel of land at Kshs 1.5 million in the year 2009 from the 1<sup>st</sup> Defendant. He told the Court that when he visited the land prior to the purchase, the Plaintiff was occupying the adjacent plot and not the one he bought. He conducted a search at the Kilifi Lands Registry and it confirmed that the land was owned by the 1<sup>st</sup> Defendant.

33. DW3 told the Court that he was unaware of any illegal or fraudulent dealings by any person in respect of his title and asserted that he was an innocent purchaser for value. He averred that the Plaintiff has no claim whatsoever against him and urged this Court to dismiss this suit with costs.

### **Analysis and Determination**

34. I have considered the various testimonies of the witnesses for both the Plaintiff and the Defendants. I have equally considered the evidence adduced before me, the submissions filed herein by the Learned Advocates for the parties as well as the authorities to which I was referred to.

35. According to the Plaintiff, he was at all times material to this suit the original allottee and subsequently the registered owner of all that parcel of land known as Kilifi/Ngerenyi/727 measuring 4.9 Ha(12 acres) or thereabout. The Plaintiff asserts that having been allocated the land sometime in or about 1967, he was desirous of processing a title thereto. Accordingly he approached the office of the District Land Registrar Kilifi (the 3<sup>rd</sup> Defendant) for help in processing the title.

36. In the process, and being illiterate, the Plaintiff faced some challenges and he therefore enlisted the support of his first born son (the Defendant herein) to follow up on the documentation. It is the Plaintiff's case that later on in the year 2002 when he embarked on the process of sub-dividing his property to his four wives and 23 children, he came to learn that the original parcel of land had been sub-divided without his knowledge by the 1<sup>st</sup> Defendant who was now claiming ownership of six of the original 12 acres.

37. The Plaintiff contends that he later came to learn that despite his protestations, the 1<sup>st</sup> Defendant had again without his knowledge disposed off the said six acres to the 2<sup>nd</sup> Defendant who now claims ownership thereof.

38. The 1<sup>st</sup> Defendant does not deny that he helped his father in processing the title for the disputed parcel of land. Indeed he admits that his parents were illiterate and avers that he guided his father all through the process including going to the Lands Office in Nairobi to pay for the discharge of Charge from the Settlement Fund Trustees and obtaining the title deed for the original parcel of land. It is his case that all these processes were duly communicated to his father the plaintiff and his other siblings.
39. According to the 1<sup>st</sup> Defendant however while the title deed for the 12 acres comprised in Kilifi/Ngerenyi/727 was registered and came out in his father's name, his father was only entitled to ½ share of the same. This was because according to the 1<sup>st</sup> Defendant, his father the Plaintiff held the other ½ share of the land in trust for his brother one Ngala Chome Shume.
40. In support of this position the 1<sup>st</sup> Defendant testified that his father (PW1) and his uncle (Ngala) moved from Chonyi and settled at Ngerenyi where they owned the suit property jointly. However at the time of adjudication of the land, his uncle Ngala had for some reasons travelled back to Chonyi and the Plaintiff herein was registered as the sole proprietor of the parcel of land measuring 12 acres. It was however the 1<sup>st</sup> Defendant's case that his uncle later returned and resumed using his portion of the land until around the time when the Plaintiff was issued with a title deed for the land.
41. As at that time, according to the 1<sup>st</sup> Defendant, the Plaintiff wanted to have a title for his own portion separate from his brother Ngala. It was then that Ngala sold his portion to the Defendant for Kshs 300,000/- after which he permanently returned to his ancestral home in Chonyi.
42. While the said Ngala Chome Shume did not testify in these proceedings for the reason that he was said to be old and sickly, his son Justin Jilani Ngala (DW2) who informed the Court about the same testified in support of the 1<sup>st</sup> Defendant's case. DW2 supported the 1<sup>st</sup> Defendant's position that at the time of registration, his father had travelled back to Chonyi and that is how the Plaintiff came to be registered as the sole proprietor of the original parcel of land measuring 12 acres.
43. It was further DW2's case that by around 2001 when the Plaintiff was issued with title deed for the land, his father Ngala had lost the interest and desire of staying at Ngerenyi and it was due to this that he decided to sell his portion of land measuring six acres to the 1<sup>st</sup> Defendant.
44. The Plaintiff and his witnesses did not deny that the Plaintiff's brother Ngala used to live on and cultivate part of the suit property. It was however the Plaintiff's case that after moving from their ancestral home in Chonyi with his large family consisting of four wives and 23 children he looked for a place where he could settle. He then moved to Tezo where he applied for and was allotted Plot No. 727.
45. In support of his case, the Plaintiff produced (as pexh 1-5) letters from the Ministry of Lands and Receipts showing payments made to the Settlement Funds Trustees (SFTs) for the said Plot of land. While the 1<sup>st</sup> Defendant contended that the Plaintiff's brother Ngala and even himself (the 1<sup>st</sup> Defendant) contributed to some of the payments, there was no evidence adduced in support of any such payments.
46. As it were the 1<sup>st</sup> Defendant testified that a Discharge of Charge by the SFTs was issued in respect of the Plaintiff and the parcel of land was registered in his name. According to the Green Card for the parcel of land (Pexh 8) a Title Deed was issued in the Plaintiff's name on 12<sup>th</sup> January 2001.
47. One month later, by a Sale Agreement dated 7<sup>th</sup> February 2001, the 1<sup>st</sup> Defendant herein purported to purchase six acres of the said Plot No. 727 from the said Ngala Chome Shume for a consideration of Kshs 300,000/-. A perusal of the Sale Agreement (Dexh 1) reveals that even though the property was already recently registered in the Plaintiff's name, a fact which was well-known to the 1<sup>st</sup> Defendant having participated in the processing of the title, the Plaintiff did not participate in the Agreement either as a vendor or as a witness thereto.
48. When cross-examined during the trial herein, the Plaintiff categorically denied knowledge of the Sale Agreement and/or the fact that his brother Ngala was a co-owner of the land with power to dispose of the land in the manner alluded to by the Plaintiff. Indeed, the Plaintiff went ahead to deny any knowledge of a transfer done to his son-the 1<sup>st</sup> Defendant through the Land Control Board or in any other manner.
49. In my mind, even assuming that the land was held in trust for the Plaintiff's brother Ngala by the Plaintiff, I was unable to comprehend how the same having been registered in the Plaintiff's name could be transferred to the 1<sup>st</sup> Defendant without the Plaintiff's involvement in the absence of an illegality or fraud committed by the parties involved.
50. While the Defendants strongly submitted that the Plaintiff had held this land in trust for his brother Ngala, nothing was placed before me to demonstrate that any such trust existed between the two in regard to the suit property. As it were, both the Plaintiff and his brother hailed from Chonyi and the suit property was not their ancestral land. The doctrine of customary trust alluded to was therefore neither here nor there.
51. As I found earlier, the Plaintiff produced receipts evidencing payment for the land in his own name and nothing was placed before me to demonstrate that his brother who was not called as a witness herein contributed to the purchase of the land.
52. Arising from the foregoing, it was evident to me that the alleged transfer of six acres of the land from Ngala Chome Shume to the 1<sup>st</sup> Defendant was tainted by fraud and was therefore a nullity with no force in law as the said Ngala had no proprietary right or interest capable of being transferred to the 1<sup>st</sup> Defendant.
53. That being the case, there was also no valid title in the name of the 1<sup>st</sup> Defendant that was capable of being transferred to the 2<sup>nd</sup> Defendant in the manner alleged or at all. As it were, I was not persuaded that there had been a proper sub-division of the original Plot No.

727 as a result of which the 2<sup>nd</sup> Defendant would have acquired the new Plot No. 1075 Kilifi/Ngerenyi.

54. Indeed the 2<sup>nd</sup> Defendant did not adduce any evidence of Land Control Board Consents for any transfer between himself and the 1<sup>st</sup> Defendant and I was not persuaded in the circumstances that he was a bona fide purchaser for value without notice of the irregularity in the 1<sup>st</sup> Defendant's title.

55. In the result, I am persuaded that the Plaintiff has proved his case on a balance of probabilities. Accordingly, Judgment is hereby entered for the Plaintiff as against the Defendants jointly and severally as prayed in the Plaint.

56. The Plaintiff shall also have the cost of this suit.

**Dated, signed and delivered at Malindi this 26th day of June, 2019.**

**J.O. OLOLA**

**JUDGE**