



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

ELC NO. 102 OF 2009

CHENGO KATANA KOI

PLAINTIFF

VERSUS

PROTUS EVANS MASINDE..... 1ST

DEFENDANT

CHAIRMAN, NATIONAL LAND COMMISSION ... 2ND

DEFENDANT

CHIEF LAND REGISTRAR 3RD

DEFENDANT

DIRECTOR OF LAND ADJUDICATION AND

SETTLEMENTS.....4TH DEFENDANT

JUDGMENT

1. By a plaint dated May 12, 2009, subsequently amended on August 25, 2014, the plaintiff prays that:

- a) He be declared the legal and absolute owner of Kilifi/Madeteni/396;**
- b) The purported allotment of the suit property by the 2nd,3rd, and 4th defendants to the 1st defendant be revoked;**
- c) The title registered in the name of the 1st defendant in Kilifi/Madeteni/396 be cancelled;**
- d) The title for Kilifi/Madeteni/396 be registered in the name of the plaintiff;**
- e) The actions of the 2nd,3rd, and 4th defendants be declared *ultra vires*, arbitrary and illegal;**
- f) A permanent injunction be issued against the 1st defendant, himself or his agents or servants, from trespassing or from any other form of interference with the suit property.**

2. In response, the 1st defendant filed his statement of defense and counterclaim dated December 19, 2009, in which he prays for:

- a) The suit by the plaintiff /defendant in the counterclaim be dismissed with costs.**
- b) The defendant to the counterclaim to vacate the plot No: Kilifi/Madeteni/396 forthwith.**

c) A permanent injunction against the defendant to this counterclaim, restraining him, whether by himself, his agents, or any other person, from interfering with the plaintiff's quiet enjoyment of use and possession of the plot No. Kilifi/Madeteni/396, and from dealing with the suit land in any manner.

d) Costs of the suit and counterclaim.

e) Interest in (d) above.

3. The 1st defendant later filed an application under a Certificate of Urgency on the 18th of March 2010, which was heard *ex parte*, seeking orders to restrain the plaintiff from cultivating, erecting any structures, continuing to trespass on, transacting and/or dealing, and in any manner interfering with the quiet enjoyment of the defendant on plot No. Kilifi/Madeteni/396.

4. On March 19, 2010, the court issued orders granting an injunction that restrained the plaintiff from cultivating, erecting any structures, continuing to trespass on, transacting and/or dealing, and interfering in any manner with the defendant's quiet enjoyment of plot No. Kilifi/Madeteni/396, pending the

inter partes hearing. Consequently, the court dismissed the 1st defendant's application with costs on March 8, 2013.

5. On May 15, 2014, the plaintiff filed an application seeking to join the chairman of the National Land Commission, the Chief Land Registrar, and the Director of Land Adjudication and Settlement, as the 2nd, 3rd, and 4th defendants, respectively, and to seek leave to amend the plaint in the manner proposed therein. The plaintiff was granted the orders sought and filed an amended plaint on August 25, 2014, seeking, *inter alia*, that the purported allotment by the 2nd, 3rd, and 4th defendants be revoked, that the title for Kilifi/Madeteni/396 be registered in the name of the plaintiff, and that a permanent injunction be issued against the 1st defendant, himself or his agents, from trespassing or engaging in any other form of interference. The 2nd-4th defendants never entered an appearance, notwithstanding service.

6. The matter came up for hearing on July 25, 2017, and the plaintiff testified, produced exhibits, and closed his case. Due to the unavailability of the defendants and/or their witnesses,

the defendants' case was closed, and consequently, the parties agreed to file and exchange written submissions.

7. On October 11, 2018, Olola J issued a judgment granting the plaintiff's claim, which included revoking the allotment and title of the 1st defendant and ordering that the suit property, Kilifi/Madeteni/396, be registered in the plaintiff's name. Following this judgment, the 3rd defendant issued a title deed to the plaintiff for the property. However, the 1st defendant successfully challenged Olola J's decision to deny an adjournment to the 1st defendant. The appellate Court then remitted the case for a new hearing.
8. The matter was heard on June 18, 2025. The plaintiff, PW1 Chengo Katana Koi, testified under oath, adopted his witness statement dated August 25, 2014, and produced documentary evidence in support of his case as Exhibits No. 1-15.
9. It is the plaintiff's evidence that the suit property, Kilifi/Madeteni/396, is his ancestral land, owned by the Koi clan and registered in the name of his late father, Katana Koi Mungumbo (now deceased). The Koi clan has lived on the suit property for many generations. Several members of the clan,

including his late father and grandfather, were born, raised, and buried on the suit property. Over the years, they have planted hundreds of coconut trees on the property, some dating back more than forty years. His deceased grandfather, father, and brothers all built houses on the suit property, where he was born and raised. The suit property has never been vacant.

10. At some point in 1983, his late father, Katana Koi Mugumba, applied to the Director of Land Adjudication and Settlement for allocation of the Suit Property, and the application was granted. He testified during cross-examination that the Land Adjudication Committee established at that time followed the laid-out procedure, including the establishment of their occupation and boundaries. On the 30th day of May 1983, his late father, Katana Koi Mugumba obtained the Letter of Consent from the Land Control Board in Kilifi for the subdivision of the suit property. Further, on the same 30th day of May 1983, he also obtained the Clearance Certificate from the County Council of Kilifi.

11. On October 10, 1983, his late father paid Kshs. 375/=, the amount due for the mutation and survey fees for the suit property. On July 17, 1988, the plaintiff's father passed away before he was issued a title to the suit property. The plaintiff obtained letters of Administration, and the grant of the suit property, with interest, was confirmed to him. The plaintiff presented the Confirmation of Grant to the 3rd defendant, who, on April 8, 2008, wrote to the District Land Registrar, Kilifi, authorizing the registration of the succession documents (transmission from Katana Koi Mugamba to the plaintiff) against the suit property. When the plaintiff conducted a search of the suit property on April 25, 2009, he discovered that it had been registered in the name of the 1st defendant and lodged a complaint with the District Commissioner. Thereafter, the local administration wrote to the 3rd and 4th defendants on numerous occasions, informing them that the Koi clan was the legal owner of the suit property and had resided there since the 1970s, but they refused to respond.

12. The 1st defendant, PWI Protus Evans Masinde, gave testimony and presented a certified copy of the letter of offer

dated December 9, 2002, from the Director of Land Adjudication and Settlement. The letter of offer was issued on behalf of the government by the Settlement Fund Trustees (SFT) and granted him Plot No. 396 at the Madeteni Settlement Scheme in Kilifi District. The 1st defendant confirmed that he had made the necessary payment for the allotment of the property, as evidenced by documents numbered 3 to 7. Having complied with the payment requirements, he was entitled to receive the title deed for the property. However, he did not obtain the title deed, as each time he visited the Kilifi land registry to request it, he was informed that the parcel file was missing. The 1st defendant contended that, despite not possessing the physical copy of the title deed, he had been duly registered as the owner of the property, as demonstrated by the official search conducted by the plaintiff.

13. The 2nd, 3rd, and 4th defendants did not enter an appearance, and therefore the matter proceeded in their absence.

14. At the close of both the plaintiff's and the 1st defendant's cases, the Court directed the parties to file written submissions.

I acknowledge receipt of the parties' submissions with appreciation, particularly regarding whether we were dealing with ownership of the suit property on the basis of adjudication or under the SFT program. Learned counsel for the parties provided insightful precedents on the procedures for acquiring land under the two regimes, which were very helpful to the Court in reaching its verdict.

15. The issues I frame for the Court to determine are whether the plaintiff is entitled to the suit property; whether the land alienation procedure was followed in allocating the suit property to the 1st defendant; whether fraud was proven in issuing the title to the 1st defendant; and which party should be registered as the proprietor of the suit property and the appropriate reliefs under these circumstances.

16. Regarding the alienation of the suit property, the plaintiff submits that the procedures for adjudication of land rights were never followed to have the land rights concerning the suit property ascertained in favor of the 1st defendant under the Land Adjudication Act. Additionally, if it was allocated under the

SFT program, the 1st defendant did not fulfill the conditions attached to the allocation; hence, his title cannot stand.

17. On the other hand, the 1st defendant submits that the plaintiff's father (deceased) never acquired any title, registered in his name under the Land Adjudication Act, or any known regime. Therefore, this Court has no jurisdiction to interfere with processes legislated under Statute, and the Court is bereft of the authority and jurisdiction to issue the reliefs sought by the plaintiff, as it will amount to allocating the land without due process as provided by law. On the contrary, the 1st defendant has shown that he was allotted this land under the SFT program after fulfilling all conditions prescribed by the relevant law. Therefore, his title cannot be impeached in the manner proposed by the plaintiff. His title is protected and is indefeasible in law as provided under section 26 of the Land Registration Act.

18. The process of acquiring land through adjudication is set out in the Land Adjudication Act as follows: The Minister declares an adjudication area by order. The Minister then appoints an adjudication officer for the adjudication area by notice in the

Gazette. The adjudication officer establishes adjudication section(s) in the adjudication area. The Adjudication Committee for the adjudication section is appointed. Interests in land are ascertained from those who make claims. The Adjudication Record is prepared after the adjudication process. The Adjudication Register is compiled, comprising the demarcation map and the Adjudication Record. The Adjudication Officer certifies the Register and delivers a duplicate to the Director of Land Adjudication. The original Adjudication Register is displayed at a convenient place within the adjudication section, with notice of a 60-day inspection period. Objections to the Register may be made within 60 days. A No-Objection Register is prepared for each parcel of land that did not receive an objection after the 60-day period. After objections and any appeals, the Director of Adjudication certifies the Adjudication Register and sends it to the Chief Lands Registrar. The Chief Lands Registrar registers the parcels of land in accordance with the Adjudication Register.

19. On the other hand, allocation under the SFT Program was governed by the Agriculture Act, Cap 318, Laws of Kenya (now

repealed). Section 167 of the Agriculture Act created a body corporate known as the Settlement Fund Trustees, while Section 168 of that Act established the Agricultural Settlement Fund, which was vested in the Settlement Fund Trustees. The Settlement Fund Trustees could use the fund to purchase any land for resale. Therefore, settlement schemes could be created either by purchasing private land or by utilizing public land (unalienated Government land). With the enactment of the Land Act No. 2012, the procedure for creating settlement schemes and allocating land therein is now governed by Sections 134 and 135 of the Land Act. See the decisions in **George Mwandoe & 8 others v Director of Land Adjudication & Settlement & 2 others; Austin Vita Mzee (Interested Party) [2019] eKLR** and **Stephen Wambua Kithuka suing for and on behalf of Getrud Bint Ali & Crispus Singo vs Abdul Karim Omar [2013] KEHC 1708 (KLR)**.

20. The 1st defendant's title ostensibly arises from an SFT process, not an adjudication process. His letter of allotment, dated 9th December 2009, by the Director of Land Adjudication

and Settlement suggests that the Ministry of Land and Settlement allocated him this land in Nairobi and advised him thus:

“In pursuant thereto, please note that you are required to report to the District Land Adjudication and settlement Officer, Kilifi District so that you can be shown the plot boundaries and issued with a letter confirming this before documentation.

This offer is valid for 90 days from the date of this letter, within this period you should pay the 10% deposit for the plot and be documented accordingly, failure to which will lead to cancellation of the offer without further reference notice.”

21. The plaintiff's claim rests on occupation and customary rights, passed down from his father, his predecessors, and clansmen, who had dwelt on the land since the 1970s. His late father applied for the property, and the application was approved by the Director of Land Adjudication and Settlement after proper procedures, including the Land Adjudication Committee's determination of occupation and boundaries.

22. It will seem to me that both the plaintiff and the 1st defendant were allotted the same land, and each was pursuing

title to it. As the plaintiff was pursuing his title, he discovered that the 1st defendant had already been registered, although the 1st defendant had never laid hands on the title document. He stated that, while following it, the necessary parcel file had gone missing.

23. From the record, and admittedly, the procedure for adjudication had not been followed to allocate the land to the father of the plaintiff. His father never got registered. The 1st defendant's title was also never issued following the adjudication process; rather, he claims it was issued under the SFT program.

24. But a clear look at the process resulting in the issuance of title to the 1st defendant shows that the process by which he acquired the title cannot be discerned and was neither under the adjudication process nor the SFT program. As shown, he was given an offer letter from Nairobi, and in the letter of offer he was referred to the Land and Adjudication and Settlement Officer, Kilifi, to be shown the boundary of the allotted parcel.

- 25.** The boundary of the allotted parcel was never shown to him. When he went to check the ground, he found that the plaintiff was in possession and that the land had never been vacant.
- 26.** The 2nd to 4th defendants never appeared before this Court to explain under which regime the suit property fell, whether we are dealing with an adjudication area or an SFT scheme. The 2nd to 4th defendants would have highlighted the anomalies in the allocation process to determine whether the plaintiff or the 1st defendant had the superior claim and whether the parcel of land fell under an adjudication section or an SFT program.
- 27.** This then leads me to deal with the ideal situations of allocation of land under the adjudication process and the SFT.
- 28.** The Land Adjudication Act was enacted to ensure that primary residents within an adjudication section acquire a primary interest in the land at the time of first registration. The Act stipulated that customary land rights be recognized and duly registered, with community involvement and consultation forming integral components of the process. The absence of

proper notification may lead to a lack of awareness among the residents.

29. The ascertainment and recording of rights and interests in trust land areas and/or customary land were determined by the procedure set out in the Land Adjudication Act. Section 13 of the Land Adjudication Act provides that the process should be commenced upon the request of the residents of an area that they wish their land to be adjudicated. Every person whose presence is required by the Adjudication Officer, Demarcation Officer, Recording Officer, Committee, or Board must attend in person or by a duly authorized agent at the time and place ordered.

30. In this matter, it is common ground that no Adjudication Committee was involved in the process leading to the acquisition of both the plaintiff's and the 1st defendant's rights and the ascertainment of the land rights, constituting a direct breach of a mandatory statutory provision.

31. Under the Land Adjudication Act, to extinguish customary land rights as provided by the Statute, consideration must be given to any interest encumbered by customary trusts that

embody ancestral customary land rights. The plaintiff's evidence suggests that this land fell within an adjudication area, but that the adjudication process was never initiated to involve the local and indigenous people of this area. The 4th defendant, in total disregard of the law, demarcated the suit property and recorded it in the name of the 1st defendant. Through a letter of offer dated 19 December, 2002, the Land Adjudication and Settlement Department in Nairobi asked the 1st defendant to report to the District Land Adjudication and Settlement scheme in Kilifi so that he could be shown the plot boundaries of the suit property. The 1st defendant admits that he is from Funyula (Busia) and not Mandeteni (Kilifi), where the suit property is situated. He further admits that until then, he had never been to the suit property. Section 23 (2) (b) of the Land Adjudication Act requires the Land Adjudication Officer to establish, according to the indigenous people and customary law, who is recognized as the *bona fide* owner of the land. The 4th defendant, therefore, ought to have recognized the Koi Clan and, by extension, the plaintiff as the owners of that land

under the law by dint of their usage, occupation, and recognizable customary land right.

32. Further, Section 23(2)(b) of the Land Adjudication Act provides that, in preparing the adjudication record, if the officer is satisfied that any group has, under the recognized customary law, exercised its rights in or over the land, the officer shall determine that group to be the owner of that land and that the parcel of land in question is entirely free from private rights, or that those rights have been relinquished in favor of another person. The plaintiff did not renounce his rights in the suit property to enable the 4th defendant to allocate the same to the 1st defendant.

33. The Koi clan lived on and owned the suit property. Adjudication of the suit property, without due consideration for the rights of the Koi clan, hinders their protection as enshrined in the Constitution of Kenya 2010. Moreover, the wording of the Act is mandatory regarding the procedure for adjudicating any parcel of land under a settlement scheme. Therefore, any deviation from such terms is a direct breach of the Provisions of the Land Adjudication Act and is thus illegal and unprocedural.

34. The 1st defendant does not state under what circumstances he applied to be allocated the suit property. He simply alleges that, although he comes from Funyula in Busia County, he was practicing as a nurse in Mombasa at the material time and that he applied as an ordinary Kenyan. He argues that the area was under the Settlement Division, not Land Adjudication. Even then, he admits he was neither a squatter there nor landless. The letter of offer indicates, in handwriting, that his case was to be treated as a squatter's case. He was not a squatter but a nurse at the time. He also admits he did not meet the mandatory conditions set out in the letter of offer. The offer was extended for 90 days, within which he ought to have accepted it and paid a 10% deposit for the property. He paid only 22 months later.

35. In **Stephen Wambua Kithuka, suing for and on behalf of Getrud Bint Ali & Crispus Singo v Abdul Karim Omar [2013] KEHC 1708 (KLR)**, the court held as follows:

“The Department of Land Adjudication and Settlement which was previously in the Ministry of Lands is comprised of two divisions, namely, the Land Adjudication Division and the Settlement Division.

The Land Adjudication Division deals with the ascertainment of land rights and interests of individuals on customary/trust lands pursuant to the provisions of the Land Adjudication Act and the administration of Group Ranches. The Division applies strictly the provisions of the Land Adjudication Act in the ascertainment of the said land rights.

The Settlement Division, on the other hand, settles the landless poor and also regularizes the ownership of land occupied by squatters on unalienated Government land. The said Division, through the Settlement Fund Trustees could also purchase private land and settle people.

The Settlement programmes were implemented under the Agriculture Act under sections 167 and 168, Cap 318. These programmes started in 1961 under the Land Development and Settlement Board to settle indigenous people on land bought from former European land owners. Later, the programme evolved and was mandated to settle poor landless Kenyans. The Settlement Programme was undertaken through the Settlement Fund Trustees on behalf of the Government (The National Land Commission has now been given the mandate to manage and administer Settlement

Programmes by dint of Section 134 and 135 of the Land Act, 2012).

Although the process of demarcation, surveying and identification of squatters for the purpose of allocating them land is the same as the process of ascertainment of rights over trust land, the Land Adjudication Act is not applicable when it comes to the ascertainment of the “claims “of the squatters on Government land.”

36. The 1st defendant failed to provide evidence indicating whether the property was Government Land, which would mean the Settlement Fund Trustee was applicable, or Trust Land, where Land Adjudication applied. Additionally, the 2nd and 4th defendants' absence did not assist in clarifying this matter.

37. In either case, whether under the Land Adjudication or Settlement Program, the standard procedures of demarcation, surveying, and identifying entitled persons were the same, but were not observed in the property, the allocation of the suit property to the 1st defendant.

38. A title's validity depends on its acquisition process; it is not enough to simply claim indefeasibility. One must demonstrate

the steps taken to acquire the title deed. The 2nd to 4th defendants, together with the 1st defendant, knowing that the 1st defendant had no claim to the property, proceeded irregularly to register the 1st defendant as the outright owner of the land under a settlement scheme (sic), thereby violating the procedures outlined in the Land Adjudication Act.

39. Section 26 of the Land Registration Act 2012 provides, inter alia, that:

"The certificate of title issued by the Registrar upon registration shall be taken upon registration to be prima facie evidence that the person named as proprietor is the absolute owner and shall not be subject to challenge except on the ground of fraud or misrepresentation or where the title has been acquired illegally, unprocedurally or through a corrupt scheme."

40. In **Nyangw'ra v Njuguna & another** [2013] KEELC 161 (KLR), the Court, when ruling under section 26(1)(b) on a title obtained illegally, unprocedurally, or through corruption, stated that evidence of such illegitimate or corrupt acquisition warrants cancellation of the title.

Additionally, the 2010 Kenyan Constitution affirms everyone's right to property ownership, though this right is limited. Article 40 states that:

"Every person has the right, either individually or in association with others, to acquire and own property of any description in any part of Kenya..... However, the rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

41. Further, in **Munyu Maina v Hiram Gathiha Maina, Civil Appeal No. 239 of 2009**, the Court of Appeal held as follows:

"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 in challenge 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 including any and all interests which would not be noted in the register."

42. It follows, then, that the allocation of the suit property to the 1st defendant, oblivious of the long stay and the customary

rights of the plaintiff, was a nullity. In the case of **Yaa Baya Mwaro v Karisa Kazungu Thoya [2013] eKLR**, the Court considered the use, occupation, and customary land rights while granting an order for the rectification of the Register relating to Malindi/Pumwani Phase 1/430 by canceling the registration of the defendant as the proprietor of the said title and instead registering Yaa Baya Mwaro as the proprietor. The court observed that:

“Although the Defendant averred at paragraph 7 of his defence that he bought L.R. No. 11623 at a public auction, he denied during cross-examination that the property was bought at a public auction.

The Defendant having been issued a Title Deed in respect to Malindi/Pumwani Phase 1/430 by the Director of Land Adjudication and Settlement on the basis that the Defendant was the legitimate owner of L.R.NO.11623, which was not the position, I find and hold that the issuance of a title deed to the Defendant for Malindi/Pumwani Phase 1/430 was unlawful null and void

The Settlement Fund Trustees should have allocated the suit property to the Plaintiff for having occupied it since 1948 and not to the Defendant.”

43. The plaintiff and his kin’s occupation of the suit property has been established. This was their clan’s ancestral land, and they have lived there for several generations. He was born there, as were his father and grandfather, and the generations after him. He produced several letters from the Assistant Chief confirming their occupation and use for several decades. The 1st defendant has not adduced any evidence to prove the contrary.

44. The upshot is that the plaintiff has proved his case on the balance of probabilities, warranting the orders sought in the plaint and the dismissal of the 1st defendant's counterclaim. I will issue the following final orders:

- a) The plaintiff is hereby declared the legal and absolute owner of Kilifi/Madeteni/396;**
- b) The purported allotment of the suit property by the 2nd, 3rd, and 4th defendants to the 1st defendant be revoked;**
- c) The title registered in the name of the 1st defendant in Kilifi/Madeteni/396 be cancelled;**

- d) The title for Kilifi/Madeteni/396 be registered in the name of the plaintiff;**
- e) The actions of the 2nd,3rd, and 4th defendants be declared *ultra vires*, arbitrary and illegal;**
- f) A permanent injunction be issued against the 1st defendant, himself or his agents or servants, from trespassing or from any other form of interference with the suit property.**
- g) Costs of the suit to the plaintiff**
- h) The counterclaim by the 1st defendant is hereby dismissed with costs to the plaintiff.**

Dated, signed, and delivered virtually in Nyeri on this 15th day of April, 2026.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Sagana for the Plaintiff

Mr. Munene for the 1st Defendants

Dennis: Court Assistant

