



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 177 OF 2014**

**ALEX NGADE KARISA**

**MARGARET MWANRY ONYARI.....PLAINTIFFS**

**VERSUS**

**1. ZIPPORAH WAMBUI GICHUHI**

**2. JAYESH VIJAYSING DHUTIA**

**3. THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT**

**4. THE LANDS REGISTRAR KILIFI COUNTY.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By their Complaint dated and filed herein on 26<sup>th</sup> September 2014, Alex Ngade Karisa and Margaret Mwanry Onyari (the Plaintiffs) pray for Judgment against the four Defendants for:

*a) A declaration that the registration of the suit property in favour of the 1<sup>st</sup> Defendant and subsequent transfer to the 2<sup>nd</sup> Defendant was irregular, fraudulent, null and void hence (of) no legal consequence;*

*b) An order against the 3<sup>rd</sup> Defendants to prepare, rectify, reconcile and harmonize the maps, records and/or other relevant documents in respect of the suit property to reflect the property actually occupied by the 2<sup>nd</sup> Plaintiff to wit the suit property;*

*c) A permanent injunction against the 2<sup>nd</sup> Defendant whether by himself and/or through his agents, servants and/or representatives from in any way whatsoever dealing and/or interfering with all that parcel of land located at Kijipwa Settlement Scheme known as Plot No. 210 (or) Kilifi/Kijipwa/210 to the detriment of the 2<sup>nd</sup> Plaintiff's interests herein (sic) and/or to defeat the Plaintiff's proprietary rights thereto;*

*d) Costs of this suit;*

*e) Interests on (d) above at Court rates; and*

*f) Any other relief this Court may deem fit to grant.*

2. These prayers are based on the Plaintiff's averment that they moved into and occupied the property described as Plot No. 210 Kijipwa and measuring 2.5 acres way back in 1977. However when the Government conducted land adjudication in the area sometime in 1983, the Director Land Adjudication and Settlement (the 3<sup>rd</sup> Defendant) failed to allocate them numbers for the portions they occupied and lived on. Instead they were allotted Plots elsewhere which Plots were already being occupied by other people.

3. It is the Plaintiffs case that despite visiting the affected plots of land and verifying the position, the 3<sup>rd</sup> Defendant has to-date failed to

rectify the same. Instead the Land Registrar Kilifi (the 4<sup>th</sup> Defendant) proceeded on 24<sup>th</sup> October 1996 to issue a title deed to Zipporah Wambui Gichuhi (the 1<sup>st</sup> Defendant) who in turn proceeded to transfer the same to Jayesh Vijaysingh Dhutia (the 2<sup>nd</sup> Defendant).

4. It is accordingly the Plaintiffs case that the Defendants have no colour of right over the suit property and hence the prayers sought herein.
5. From a perusal of the record herein the 1<sup>st</sup> Defendant neither entered appearance nor filed a defence to the Plaintiffs' claim.
6. However by a Statement of Defence and Counterclaim dated 16<sup>th</sup> October 2014 and filed herein on 17<sup>th</sup> October 2014, the 2<sup>nd</sup> Defendant denies that the Plaintiffs are either legally or beneficially entitled to and or that they have been in actual possession of the suit property. The 2<sup>nd</sup> Defendant further denies that he was put in possession of the land by the 1<sup>st</sup> Defendant in 1986 as stated by the Plaintiffs and/or that there was a transfer by way of exchange of the parcels of land.
7. It is the 2<sup>nd</sup> Defendant's case that he is the registered owner of the suit property and the issue of cancellation and injunctive orders sought herein cannot issue against him.
8. By way of the Counterclaim the 2<sup>nd</sup> Defendant avers that he purchased the suit property from the 1<sup>st</sup> Defendant who was at all times the registered owner thereof since the year 1996. He accused the Plaintiffs of employing and/or authorizing their servants, agents and hirelings to trespass onto the suit property and to erect illegal structures thereon.
9. Accordingly the 2<sup>nd</sup> Defendant prays that the Plaintiffs' suit be dismissed and that instead the Court makes the following orders:-

***a) A declaration that the suit property Kilifi/Kijipwa/210 was lawfully and procedurally acquired by the 2<sup>nd</sup> Defendant;***

***b) A permanent injunction(does issue) restraining the Plaintiffs, their servants, agents, family members, hirelings or whomsoever(sic) from interfering with the 2<sup>nd</sup> Defendants quiet possession and enjoyment of the suit property;***

***c) Costs of this suit;***

***d) Interest on (c ) above; and***

***e) Any other relief this Court may deem fit to grant.***

10. The Honourable the Attorney General (the A-G) filed a Statement of Defence on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants on 8<sup>th</sup> March 2015. The A-G generally asserts that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were neither privy to the many issues narrated in the Plaint nor were they responsible for matters giving rise to the dispute. It is accordingly the A-G's case that the reliefs sought against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants by the Plaintiffs are neither available nor merited and he urges this Court to dismiss this suit with costs.

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

11. The Plaintiffs called two witnesses at the trial which partially commenced before the Honourable Justice Angote of this Court.

12. PW1-Margaret Mwanry Onyari is the 2<sup>nd</sup> Plaintiff herein. She told the Court that in 1996, she bought a piece of land from one Kenga Mwando Kombe who was the first allottee of Plot No. 250 measuring 2.5 acres under the Kijipwa Settlement Scheme. Unfortunately due to the errors made by the Adjudication and Settlement Office, that Plot was already occupied by one Benjamin Mudzomba.

13. PW1 told the Court that the said Benjamin Mudzomba had ideally been allotted Plot No. 235 but this plot was already again occupied by one Odrenty Kaingu. As a result of these errors, five families found themselves in a situation where their allotment numbers did not match where they resided on the ground or in the map. Among those affected was one Alex Ngade Karisa who despite living on and developing Plot No. 214 ended up being allotted Plot No. 210 which was then vacant.

14. PW1 told the Court that a meeting was then called by the Land Control Board then chaired by the District Commissioner where the five allottees agreed by consent to the change of the maps so that the allotment numbers matched where they resided on the ground. Thereafter and since 1986, PW1 has been in possession of the suit property-Plot No. 210.

15. Sometime in the year 2014 when she was renovating her house on the property he was told by Police Officers from Majengo DO's Office to leave the site. Thereafter PW1 came to learn that a title deed had been issued in the 2<sup>nd</sup> Defendant's name on 26<sup>th</sup> August 2014. PW1 conducted inquiries and came to learn that it is the 1<sup>st</sup> Defendant who had sold the suit property to the 2<sup>nd</sup> Defendant.

16. PW2- Alex Ngade Karisa is the 1<sup>st</sup> Plaintiff herein. He told the Court that he had lived within what is now Kijipwa Settlement Scheme since 1977. When the area was declared a scheme around 1983, the Government sent officers to the ground to ensure all persons living on the land were allocated the portions they were using.

17. PW2 testified that following the process of adjudication, the 3<sup>rd</sup> Defendant's office issued them with Letters of Allotment but they immediately noticed there was an error on the Letters. While PW2 was allocated Plot No. 210, he was residing on Plot No. 214 which he had immensely developed. There was a similar problem with Plot No. 234, 214, 235 and 250. The errors would have required that the

concerned parties abandon the Plots many of which they had individually developed in order to take over the newly allocated ones.

18. PW2 told the Court that in light of their predicament, they had intense discussions in a meeting chaired by the District Commissioner and it was agreed that persons living on Plots 214, 234, 235 and 250 would retain their parcels subject to pursuing transfers by way of exchange. Since PW1 had not invested in any property, it was agreed that she occupies PW2's Plot No. 210 and she would leave her Plot No. 250 to Benjamin Mudzomba who was already occupying the same but had been allocated Plot No. 235.

19. PW2 further told the Court that subsequent to those discussions, officers from the 3<sup>rd</sup> Defendant's office visited the ground and assured them that they would make the necessary changes to rectify the names to reflect the correct numbers of the Plots as occupied on the ground. To-date however, those officers have not taken any action.

20. PW2 testified that PW1 took possession of Plot No. 210 in 1986 and has since developed it and used it for cultivation. Sometime in 2014 however, PW1 informed him that she had been told to leave the property as it belongs to the 2<sup>nd</sup> Defendant. PW2 responded by writing a letter to the 3<sup>rd</sup> Defendant to find out the position. The 3<sup>rd</sup> Defendant responded that the land is still registered in the name of PW2.

21. PW2 told the Court that they have since conducted investigations which have revealed that the 2<sup>nd</sup> Defendant purported to have bought the suit property from the 1<sup>st</sup> Defendant who had apparently been issued with a title thereto on 24<sup>th</sup> October 1996. The 2<sup>nd</sup> Defendant has since been trying to intimidate PW1 in order to forcefully take possession of the suit property.

### **The Defence Case**

22. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants called a total of five witnesses who testified in support of their respective cases.

23. DW1-Joseph Taura Bao was the Land Registrar Kilifi and a witness for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. He told the Court that according to their records, the suit property was first registered on 8<sup>th</sup> August 1990 under the Settlement Fund Trustees (SFT). On 24<sup>th</sup> October 1996, the Settlement Fund Trustees transferred it to the 1<sup>st</sup> Defendant and a Discharge of Charge was registered in favour of Settlement Fund Trustees.

24. DW1 further told the Court that on 26<sup>th</sup> August 2014, the 1<sup>st</sup> Defendant transferred the land to the 2<sup>nd</sup> Defendant and a title deed was issued on the same day in favour of the 2<sup>nd</sup> Defendant.

25. DW2-Jayesh Vijaysingh Dhutia is the 2<sup>nd</sup> Defendant herein. He told the Court that sometimes in 2014, he was told by a land agent that there was a plot that was being sold. He was shown the same and he liked it. Thereafter DW2 instructed his lawyer one Mr. Nyameta to follow up on the sale. At that time the property was registered in the name of the 1<sup>st</sup> Defendant who had been issued with a title deed on 24<sup>th</sup> October 1996.

26. DW2 testified that after carrying out a search on the title, his advocate prepared a Sale Agreement which they executed on 19<sup>th</sup> August 2014 with the 1<sup>st</sup> Defendant. The land was sold to him for Kshs 5.5 Million. The 2<sup>nd</sup> Defendant was issued with a title deed for the land on 26<sup>th</sup> August 2014. However when DW2 tried later on to put a fence on the land, some people stopped him.

27. DW2 denied that he colluded with the 4<sup>th</sup> Defendant to defraud anyone of the suit property. He urged the Court to grant his prayers in the Counterclaim.

28. DW3-Anthony Ngari is a Land Agent. He told the Court that PW2 is his uncle. He does not however know PW1. DW3 further told the Court that he is familiar with both the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. She met the 1<sup>st</sup> Defendant when she brought a title deed for the suit property to the 2<sup>nd</sup> Defendant's lawyer's offices in Mtwapa. That was the first time they met. The 1<sup>st</sup> Defendant was accompanied by two gentlemen one of whom DW3 knew by the name Wanjohi.

29. DW3 told the Court that DW2 had agreed by then to buy the suit property from the 1<sup>st</sup> Defendant at Kshs 5.5 Million. DW3 was there when the land was sold all the way until the final payment was done at Equity Bank Kilifi. He was paid a 10% commission based on the purchase price for his role.

30. DW3 however told the Court that later when the 2<sup>nd</sup> Defendant sent him to get the Plot fenced, someone else stopped him claiming to be the owner of the land. The matter then came to Court.

31. DW4-Bruno Tumaini Kazungu Katana is also a Land Agent. He told the Court that he was introduced to the 1<sup>st</sup> Defendant in May 2014 in Mtwapa. The 1<sup>st</sup> Defendant was looking for a buyer for her property. He was taken to the ground and saw the same. After carrying out a search, they embarked on the process of looking for buyers.

32. DW4 told the Court that later on one of his friends by the name James Kathengi approached the 2<sup>nd</sup> Defendant who offered to purchase the land at Kshs 5.5 Million. The 1<sup>st</sup> Defendant accepted the offer and a Sale Agreement was done and the deal concluded.

33. DW5-Felix Mwawasi Kitito was a witness for the 3<sup>rd</sup> and 4<sup>th</sup> Defendant. He testified that he was previously the Land Adjudication and Settlement Officer, Kilifi. He retired on 3<sup>rd</sup> March 2018.

34. DW5 told the Court that Kilifi/Kijipwa Settlement Scheme comprised of about 600 Ha and was started in 1989. The land was sub-divided into 355 plots averaging 2.5 acres each and the survey was completed in 1990. According to the records at their office, Plot No. 210 was allocated to the PW2. The allottee paid the required loan and on 4<sup>th</sup> March 2010, their office requested for a Discharge of Charge in favour of PW2.

### **Analysis and Determination**

35. I have perused and considered the pleadings filed herein by the parties. I have also considered the testimonies of all the witnesses who testified, the evidence produced before the Court and the submissions filed herein by the Learned Counsels acting for the parties.

36. It was the Plaintiffs' case that at all times material to this suit they were legally and beneficially entitled to be registered as the owners of the suit property-Plot No. 210 Kijipwa Settlement Scheme. They accused the Defendants of colluding to defraud them of the same by causing the resultant title to be registered in the name of the 2<sup>nd</sup> Defendant.

37. On his part the 2<sup>nd</sup> Defendant denies the allegations of fraud labelled against himself and asserts that he was a bona fide purchaser for value of the suit property from the 1<sup>st</sup> Defendant from whom he purchased the property at a consideration of Kshs 5.5 Million. It is the 2<sup>nd</sup> Defendant's case that prior to the said purchase, he carried out due diligence and established that the property was indeed registered in the name of the 1<sup>st</sup> Defendant.

38. Testifying as PW2 before this Court, the 1<sup>st</sup> Plaintiff told the Court that he started living in the area that would eventually become Kijipwa Settlement Scheme way back in 1977. Around 1983, the Government declared the area a Settlement Scheme and the 3<sup>rd</sup> Defendant proceeded to demarcate the land and issue allotment letters to all persons who were already on the land.

39. As one of the residents of the area, PW2 was issued with an allotment letter dated 17<sup>th</sup> July 1985 for Plot No. 210. Prior to the demarcation of the land and the issuance of the letters, PW2 had developed the piece of land he was living in and had even constructed his dwelling house thereon. However, when he received the Letter of Allotment for the said Plot No. 210, he noticed that the details thereof did not tally with the location of the map on the ground.

40. According to PW2, while he had been allocated Plot No. 210, the one he was residing in and which he already developed was actually Plot No. 214 on the ground. As it turned out, a number of Plots within the Scheme had a similar problem. The errors also affected Plot Nos. 234, 235 and 250. As a result of the errors the concerned parties were greatly aggrieved as it would have required them to abandon the parcels they had developed in order to move into the ones they had been allocated.

41. To resolve this problem, PW2 told the Court that a meeting was called of the affected residents chaired by the area District Commissioner and it was then agreed that those persons living on Plots 214, 234, 235 and 250 would retain their portions subject to pursuing a transfer of the same prior to registration of the titles. As a result of these discussions, the 2<sup>nd</sup> Plaintiff (PW1) was allowed to take over PW2's Plot No. 210 which was then undeveloped while PW1 would retain Plot No. 214 which he had already developed.

42. From the record, it was apparent that PW1 was not one of the original owners of the Plots that were being allocated. She testified that she had bought Plot No. 250 measuring 2.5 acres from one Kenga Mwando Kombe who was the original allottee thereof. Due to the errors in adjudication however, the said Plot physically fell within a parcel that was already occupied by one Benjamin Mudzomba. The said Benjamin Mudzomba was in turn allocated Plot No. 235 but the Plot was already occupied by one Adrenty Kaingu.

43. As a result, PW1 like PW2 after her told the Court that a meeting was called under the Chairmanship of the Area District Commissioner wherein the five affected allottees agreed to change of the maps so that the allotment numbers matched where the allottees resided on the ground. Since then PW1 took over Plot No. 210 while PW2 remained in Plot No. 214 which he was already residing in.

44. According to PW1, it was this Plot No. 210 which she was renovating sometime in 2014 when Police Officers from Majengo DO's office moved in and stopped her on the basis that the land belonged to someone else. When PW1 carried out a search on the parcel of land, she came to learn that a title deed had indeed been issued in the 2<sup>nd</sup> Defendant's name on 26<sup>th</sup> August 2014.

45. In his Statement of Defence and Counterclaim, the 2<sup>nd</sup> Defendant asserts that he is the lawful registered owner of the suit property. He told the Court that he purchased the said property from the 1<sup>st</sup> Defendant after carrying out due diligence and upon establishing that the 1<sup>st</sup> Defendant was the registered owner thereof. In support of his case, he produced a copy of the Agreement of Sale Between himself and the 1<sup>st</sup> Defendant dated 19<sup>th</sup> August 2014 as well as a Certificate of Official Search dated 24<sup>th</sup> July, 2014 indicating that Zipporah Wambui Gichuhi (the 1<sup>st</sup> Defendant) was the registered proprietor of the property from 24<sup>th</sup> October 1996.

46. In order to help unravel the ownership of the suit property, the 4<sup>th</sup> Defendant testifying through one Joseph Taura Bao (DW1) told the Court that the suit property according to their records was first registered on 8<sup>th</sup> August 1990 under the Settlement Fund Trustees. However on 24<sup>th</sup> October 1996, it was passed over to the 1<sup>st</sup> Defendant. On the same day, a Discharge of Charge was registered in favour of the Settlement Fund Trustees. There were however no documents in the Land Registrar's Office or records in support of the Discharge. On 26<sup>th</sup> August 2014, the 1<sup>st</sup> Defendant transferred the land to the 2<sup>nd</sup> Defendant and a title deed was issued on the same day to the 2<sup>nd</sup> Defendant.

47. The Land Adjudication and Settlement Office sued herein as the 3<sup>rd</sup> Defendant had a slightly different position. Testifying herein as DW5 Felix Mwawasi Kitito who retired as the Kilifi Land Adjudication and Settlement Officer on 3<sup>rd</sup> March 2018, some two months before he testified herein, told the Court that Kilifi/Kijipwa Settlement Scheme was started in 1989 and all the 600 Ha piece of land was sub-divided into 355 Plots each measuring approximately 2.5 acres.

48. According to DW5, the records in their office indicate that Plot No. 210 was allocated to PW2. From those records the allottee paid for the land upto 18<sup>th</sup> June 2003 and by a Letter dated 4<sup>th</sup> March 2010, the then District Land Adjudication Officer requested for a Discharge of Charge in favour of the said allottee. DW5 further told the Court that where it was found that settlers occupied and developed plots other than the ones they were allocated, all the allottees were to remain in the places they had developed, make Settlement Fund Trustees Loan repayment for the Plots they occupied and wait the County Surveyors to organize the maps and make the necessary amendments.

49. Arising from the evidence of DW1 and DW5, it was evident to me that the suit property is the same parcel of land created as Plot No. 210 Kijipwa Settlement Scheme when that Scheme was declared by the Government in 1989. It was also clear that from the records held at the 3<sup>rd</sup> Defendant's office, that parcel of land was yet to be discharged by the Settlement Fund Trustees as at 24<sup>th</sup> October 1996 when title was allegedly issued in the name of the 1<sup>st</sup> Defendant.

50. That must be the reason DW1 told the Court that the records of the discharge of Charge of the title as at the said 1996 could not be found in their office. They could not be because as was stated by DW5 the records indicate that the suit property to-date remains registered in the name of PW2.

51. As was explained by DW5 whom I found to be a very truthful witness, the normal procedure is that once letters of allotment are issued, the parcel of land would be charged by the Settlement Fund Trustees and the allottee is therefore required to make payments and clear the amount required. It is only after the payments are cleared that a Discharge of Charge is prepared and all the documents are forwarded to the 4<sup>th</sup> Defendant to process a title deed. That process was not followed herein and that was why the 4<sup>th</sup> Defendant could not produce any documentation to justify how they issued a title deed for the suit property in the name of the 1<sup>st</sup> Defendant in 1996.

52. That being the case it was evident to me that the purported title deed allegedly issued by the 4<sup>th</sup> Defendant herein in the name of the 1<sup>st</sup> Defendant was a forgery and non-existent. That must explain why the 1<sup>st</sup> Defendant who was purportedly issued with the title vanished into thin air and never appeared in Court in response to the summons.

53. Surprisingly, even though he testified and produced documents indicating he purchased the suit property for Kshs 5.5. Million, the 2<sup>nd</sup> Defendant himself told this Court that he has never met the 1<sup>st</sup> Defendant or even communicated with her in any manner despite the challenges that became apparent soon after he purchased the land from her. In this regard, I think the 2<sup>nd</sup> Defendant was quite negligent if not reckless in acting on the advice of DW3 and DW4, the land agents who could not themselves confirm any proper knowledge of the Vendor (the 1<sup>st</sup> Defendant).

54. As it were, the suit property is yet to be discharged to-date and the purported title deed though registered presently in the name of the 2<sup>nd</sup> Defendant was obtained fraudulently, and is null and void and of no legal consequence. The 1<sup>st</sup> Defendant never acquired any title in the suit property and she could therefore not transfer what she did not have.

55. In the circumstances of this case, it was clear in my mind that the Plaintiffs have proved their case to the required standard. From the material placed before me, it was evident that the 2<sup>nd</sup> Defendant lost his money to fraudsters and must look for redress elsewhere. Otherwise I am satisfied that the balance of convenience tilts in favour of the Plaintiffs. The 2<sup>nd</sup> Plaintiff is in possession of the suit property courtesy of a local arrangement made by members of the Scheme with the full knowledge and support of the 3<sup>rd</sup> Defendant which created the mess during the process of allocation of the Plots.

56. Accordingly Judgment is hereby entered in favour of the Plaintiffs as prayed in the Plaint. The 2<sup>nd</sup> Defendant's Counterclaim is without basis and is dismissed.

57. The Plaintiffs will have the costs of both the suit and the Counterclaim.

**Dated, signed and delivered at Malindi this 11<sup>th</sup> day of July, 2019.**

**J.O. OLOLA**

**JUDGE**