



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 104 OF 2009**

**JOHNSON MKALA MWERO.....PLAINTIFF**

**VERSUS**

**CHARO KAMBI TUVA.....1<sup>ST</sup> DEFENDANT**

**AHMED SHARIFF SHEIKH.....2<sup>ND</sup> DEFENDANT**

**ASCOLARIO ADRIANO.....3<sup>RD</sup> DEFENDANT**

**SBF WATAMU LIMITED.....4<sup>TH</sup> DEFENDANT**

**AND**

**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 99 OF 2009**

**ABDULKADIR SAYYED AHMED MOHAMED.....PLAINTIFF**

**VERSUS**

**KITSAO NGUMBAO NZAI *a.k.a***

**HARRISON NZAI TSUMA.....1<sup>ST</sup> DEFENDANT**

**AHMED SHARIFF SHEIKH.....2<sup>ND</sup> DEFENDANT**

**ASCOLARIO ADRIANO.....3<sup>RD</sup> DEFENDANT**

**SBF WATAMU LIMITED.....4<sup>TH</sup> DEFENDANT**

**SETTLEMENT FUND TRUSTEES.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. This Judgment is in respect to two matters which were consolidated: Malindi ELC Civil Case No. 104 of 2009 and Malindi ELC Civil Case No. 99 of 2009.

**a) The Pleadings in ELC No. 104 of 2009**

2. In his Complaint, the Plaintiff averred that he is the bona fide owner of the land known as Kilifi/Jimba 394/B having bought it from the 1<sup>st</sup>

Defendant, that he developed the suit land by putting up a permanent house; that the 3<sup>rd</sup> Defendant is claiming to be the owner of the suit land and that the Title Deed that was issued to the 3<sup>rd</sup> Defendant should be cancelled.

3. In his Defence, the 2<sup>nd</sup> Defendant averred that parcel of land number Kilifi/Jimba/394/B does not exist in Watamu; that he is aware of land known as Kilifi/Jimba/394 measuring 1.3 Ha; that he was registered the proprietor of the said land on 15<sup>th</sup> July, 2012 and that the 1<sup>st</sup> Defendant was a mere squatter on the said land who vacated after he was compensated.

4. It is the 2<sup>nd</sup> Defendant's case that he sold the land to the 3<sup>rd</sup> Defendant and that in any event, the Sale Agreement between the Plaintiff and the 1<sup>st</sup> Defendant is null and void for want of consent of the Board.

5. The 3<sup>rd</sup> Defendant averred in his Defence that he is not aware of land known as Kilifi/Jimba/394/B and that land known as Kilifi/Jimba/394 is registered in the name of S.B.F. Watamu Limited. The 4<sup>th</sup> Defendant (*S.B.F. Watamu Limited*) averred in its Defence that it purchased the said land from the 2<sup>nd</sup> Defendant and that it is this rightful owner of the land.

#### **b) Pleadings in ELC No. 99 of 2009**

6. The Plaintiff's claim is that he purchased a parcel of land known as Kilifi/Jimba/1020 measuring 0.4Ha from one Isaiah Wanjogu Ngatara; that Isaiah had been allocated the land during the adjudication process and that originally, the said land was a portion of land known as parcel number 394 measuring 3 acres which was sub-divided into three portions each measuring 0.4 Ha.

7. The Plaintiff averred that upon sub-division of the said land, the 1<sup>st</sup> Defendant was allocated parcel number 394, William Gandi was allocated parcel number 1019 while Isaiah Wanjogu was allocated parcel number 1020. It is the Plaintiff's case that the Defendants conspired to have the title for the entire land issued to the 2<sup>nd</sup> Defendant inclusive of his portion.

8. The Plaintiff is seeking to be declared the proprietor of parcel of land number 1020 and for the cancellation of the Title Deed for Kilifi/Jimba/394.

9. The 2<sup>nd</sup> Defendant denied that parcel number 394 was ever sub-divided into three portions; that portions number 1019 and 1020 do not exist within Kilifi Jimba Registration Section and that a Title Deed for Kilifi/Jimba/394 was issued on 15<sup>th</sup> July, 2002 before the Plaintiff purported to buy portion number 1020 on 10<sup>th</sup> August, 2007.

10. The 2<sup>nd</sup> Defendant finally averred that the Sale Agreement between the Plaintiff and one Isaiah is null and void for want of the consent of the Board and that the prayer for cancellation of the Title Deed for Kilifi/Jimba/394 was heard and finally determined in Malindi SPMCC No. 187 of 2009.

#### **The Plaintiff's case (ELC No. 104 of 2009)**

11. The Plaintiff in ELC No. 104 of 2009, PW1, informed the court that he bought the suit property, being plot number 394, from the 1<sup>st</sup> Defendant; that he paid the purchase price in installments after paying a deposit of Kshs. 200,000; that they signed the agreement of 11<sup>th</sup> July, 2005 in respect of Plot number 394B and that the 1<sup>st</sup> Defendant acknowledged receipt of the said installments. PW1 produced in evidence the Sale Agreement and the acknowledgement slips as PEXB 1 and 2.

12. It was the evidence of PW1 that he later on build a permanent house on the suit land; that when he bought the land, there was an embargo in respect to the Kilifi/Jimba Registration Section and that he was unable to secure a Title Deed.

13. It was the evidence of PW1 that the 2<sup>nd</sup> Defendant had a piece of land neighbouring plot number 394 measuring 0.4Ha and that it was plot number 395; that he was the first one to purchase the suit land; that the 2<sup>nd</sup> Defendant was unlawfully issued with a Title Deed for land measuring 1.3Ha and that he could not have been issued with the Title Deed because there was an embargo on the land in the year 2002.

14. In cross-examination, PW1 stated that the 1<sup>st</sup> Defendant did not have a title document when he sold the land to him; that the land he bought had beacons and that the 1<sup>st</sup> Defendant has never denied selling the land to him. It was the evidence of PW1 that the 1<sup>st</sup> Defendant was living on the land when he sold it to him and that the land had been allocated to him.

15. PW1 stated that that the 1<sup>st</sup> Defendant's name was not in the list of the allottees and that it had been recommended that he should be included in the list of allottees; that the 1<sup>st</sup> Defendant's land was plot number 394B while the neighbouring portions were plot numbers 394C and 394D.

16. PW2 stated that the Plaintiff is his neighbour having bought a portion of plot number 394; that plot number 394 is 3 acres and that the Plaintiff bought one (1) acre of the said land; that he also bought a portion of plot number 394 which became to be known as Plot No. 1020 and that he bought his portion together with his partner from one Isaiah Wanjogu; that the 2<sup>nd</sup> Defendant's plot is number 399 and that he was surprised when the 2<sup>nd</sup> Defendant obtained a Title Deed for the whole land.

17. It was the evidence of PW2 that by the time the 3<sup>rd</sup> Defendant bought the land from the 2<sup>nd</sup> Defendant, the Plaintiff had already put up a house on his portion of land and that it was his partner (*the Plaintiff in ELC No. 99 of 2009*) who bought plot number 1020 which is now inside plot number 394.

18. The Assistant Chief of Debaso sub-location, PW3, informed the court that according to the records held by the lands office, the 1<sup>st</sup> Defendant was the owner of plot number 394B, and that plot number 394 was a big piece of land.

19. It was the evidence of PW3 that the 1<sup>st</sup> Defendant was living on the small portion of land known as portion number 394B and that plot number 394 was sub-divided into smaller portions.

#### **The Plaintiff's case in ELC No. 99 of 2009**

20. The Plaintiff in ELC No. 99 of 2009, 2PW1, stated he bought a portion of plot number 394 on 10<sup>th</sup> August, 2007; that the plot had been sub-divided into three portions and that the plot he bought was known as portion number 1020. According to the Plaintiff, the seller, Mr. Isaiah Ngatara showed him the letter of allotment of plot number 1020 and that he paid him Kshs. 300,000 for the plot.

21. 2PW1 produced in evidence the Sale Agreement, the Letter of offer and the receipts that were issued by the Land and Settlement office.

22. It was the evidence of 2PW1 that the 2<sup>nd</sup> Defendant's plot was 399 but he has since registered the entire plot number 394 into his name and sold it. The Plaintiff produced in evidence the map of the area and several letters from the Ministry of Lands.

23. The Senior Clerical Officer at the Kilifi Lands Office, 2PW2, produced the certified copies of the documents in relation to Kilifi/Jimba/394 including the green card for the said land, the transfer document, the consent of the Land Control Board and the Letters from the Land Adjudication and Settlement office.

24. It was the evidence of 2PW2 that the parcel file for Plot No. 394 did not have any letter of offer in favour of the 2<sup>nd</sup> Defendant. According to 2PW2, the Settlement Fund Trustees never discharged the land that was transferred to the 2<sup>nd</sup> Defendant. 2PW2 produced in evidence the presentation book of 15<sup>th</sup> July, 2002 and the entries of 15<sup>th</sup> July, 2002. According to 2PW2, there were entries in the presentation book showing that the land was transferred from the Settlement Fund Trustees to the 2<sup>nd</sup> Defendant on the said date.

25. According to 2PW2, an entry that is not entered in the Presentation Book is illegal.

#### **The Defence case:**

26. The 2<sup>nd</sup> Defendant in both matters, DW1, informed the court that he was the registered proprietor of plot number 394 before he sold it. It was the evidence of DW1 that he was given the letter of offer by the Land Adjudication and Settlement office in the year 2000; that Plot No. 394 was one single parcel of land and that it has never been sub-divided as alleged.

27. According to DW1, the 1<sup>st</sup> Defendant in ELC No. 104 of 2009 was his neighbor; that he discovered the 1<sup>st</sup> Defendant had encroached on plot number 394 and that he paid him Kshs. 800,000 to vacate the plot. It was the evidence of DW1 that the 1<sup>st</sup> Defendant had a plot neighbouring his land and that he was eventually registered as the proprietor of the land.

28. In cross-examination, DW1 stated that he was allocated plot numbers 394 and 399 by the Settlement Fund Trustees and that the list of allocation shows that he was allocated plot number 399.

29. The 1<sup>st</sup> Defendant in ELC No. 104 of 1999, DW2, stated that the Plaintiff was his neighbour in Watamu; that the 2<sup>nd</sup> Defendant is also his neighbour and that he sold Plot No. 394B to the Plaintiff. It was the evidence of DW2 that the 2<sup>nd</sup> Defendant gave him Kshs. 800,000 and informed him to repay the Plaintiff the money the Plaintiff had paid for the land and that the Plaintiff refused to take the money.

30. According to DW2, the land he sold to the Plaintiff was one (1) acre and that he had not been issued with a Title Deed when he sold the land to the Plaintiff and that the 2<sup>nd</sup> Defendant owned plot number 399 and not 394.

31. The 3<sup>rd</sup> Defendant informed the court that he was a Director of S.B.F Watamu Limited; that they purchased the suit land from the 2<sup>nd</sup> Defendant and that they purchased the land after conducting an official search.

#### **Submissions:**

32. The Plaintiff in ELC No. 104 of 2009 submitted that the Plaintiff purchased plot number 394B from the 1<sup>st</sup> Defendant and that the 2<sup>nd</sup> Defendant was fraudulently issued with a Title Deed for the entire land known as plot number 394.

33. According to counsel, the 2<sup>nd</sup> Defendant's title was a forgery because the stamp duty was paid after the valuation of the plot; the information in the green card was not in the presentation book and that he did not have a letter of allotment.

34. The 2<sup>nd</sup> Defendant's advocate submitted that Isaiah Wanjogu Ngatara has never occupied plot number 1020; that a letter of offer is not a title and that it is the 2<sup>nd</sup> Defendant who is in possession of the title document.

35. The 1<sup>st</sup> Defendant's advocate in ELC No. 104 of 2009 submitted that the 1<sup>st</sup> Defendant agrees with the Plaintiff's claim; that the 2<sup>nd</sup> Defendant obtained the Title Deed for plot number 394 fraudulently and that the 1<sup>st</sup> Defendant's claim should be disallowed.

## Analysis and findings:

36. The Plaintiff's claim in ELC No. 104 of 1999 is that he bought plot number 394/B from the 1<sup>st</sup> Defendant and that plot number 394/B was a portion of plot number 394. According to the 1<sup>st</sup> Defendant, he is the one who was allocated plot number 394B by the Settlement Fund Trustees and that he sold the land measuring one (1) acre to the Plaintiff for Kshs. 520,000. However, it is the Plaintiff and the 1<sup>st</sup> Defendant's case that the 2<sup>nd</sup> Defendant had the whole land, including Plot No. 394B registered in his name.

37. The Plaintiff's claim in ELC No. 99 of 1999 is that plot number 394 which was registered in the name of the Plaintiff was a big piece of land; that the land had been sub-divided into three portions and that one Isaiah Wanjogu Ngatara was allocated a portion thereof known as plot number 1020 which he bought.

38. The only issue that I am supposed to determine is whether parcel of land known as Kilifi/Jimba/394 measuring approximately 1.3Ha (*approximately 3.25 acres*) was initially allocated to three individuals: the 1<sup>st</sup> Defendant in ELC No. 104 of 2009, Isaiah Wanjogu and the 2<sup>nd</sup> Defendant or not and whether the registration of the entire parcel of land in the name of the 2<sup>nd</sup> Defendant was lawful.

39. The parcel file in respect of Plot No. 394 was produced by 2PW2. According to the letter dated 28<sup>th</sup> March, 2002, the District Land Adjudication and Settlement officer of Malindi stated the Plot No. 394 was allocated in 1999 to three persons. He however did not state the people who were allocated the land in his letter.

40. However, in his letter dated 4<sup>th</sup> April, 2002 to the Director of Land Adjudication and Settlement, the District Land Adjudication and Settlement Officer in his ground report stated that during the re-allocation of plot number 394 measuring 1.3Ha, the plot was allocated to three persons who were issued with the letters of offer, namely Kitsao Ngumbao, William Ngandi (0.4Ha) and Isaiah Wanjogu Ngatara (0.4Ha). The said officer stated that none of the three individuals had developed their respective portions.

41. The parcel file shows that although the suit land had been allocated to three individuals, a Title Deed in respect to the entire land was issued to the 2<sup>nd</sup> Defendant on 15<sup>th</sup> July, 2002. The 2<sup>nd</sup> Defendant then sold the entire land to S.B.F Watamu Limited vide a Transfer document dated 10<sup>th</sup> March, 2009 and registered on the same day.

42. The copy of the green card produced by 2PW2 shows that the register for the suit land was opened in the name of the Government on 22<sup>nd</sup> December 1986. The land was then transferred to the Settlement Fund Trustees on 15<sup>th</sup> July, 2002 before it was transferred to the 2<sup>nd</sup> Defendant on the same day.

43. The Plaintiff in ELC No. 99 of 2009 produced evidence an official search to show that the 2<sup>nd</sup> Defendant was allocated plot No. 399 in the same settlement scheme and was issued with a Title Deed for the land in the year 2000. After paying for the requisite fees to the Settlement Fund Trustees, the Settlement Fund Trustees discharged Plot No. 399 and transferred it to the 2<sup>nd</sup> Defendant. The documentations that facilitated the transfer for Plot No. 399 from the Settlement Fund Trustees to the 2<sup>nd</sup> Defendant was not produced in respect of Plot No. 394. Indeed, it was the evidence of the clerk from the Land Registry that the parcel file for Plot No. 394 did not have the supporting documents that led to the issuance of a Title Deed like the letter of offer, the discharge of charge by the Settlement Fund Trustees and the Transfer of the land by the Settlement Fund Trustees to the 2<sup>nd</sup> Defendant.

44. The Plaintiff in ELC No. 99 of 2009 produced the copies of the letters of allotment that was issued to Isaiah Wanjogu Ngatara for Plot No. 1020 and the list of the people who were offered land by the Settlement Fund Trustees in the scheme. From the said list, the 2<sup>nd</sup> Defendant was only allocated Plot No. 399 which was duly discharged by the Settlement Fund Trustees and a Title Deed issued.

45. In his evidence, the 2<sup>nd</sup> Defendant stated that he was allocated the suit land by the Settlement Fund Trustees and that a Title Deed was subsequently issued to him. The 2<sup>nd</sup> Defendant produced a letter dated 17<sup>th</sup> July, 2009 in which it was stated that the suit land was allocated to him vide a letter of offer dated 8<sup>th</sup> December, 2000 and that the plot was discharged in the year 2002. However, no evidence was placed before this court to show that the Settlement Fund Trustees discharged the land in favour of the Plaintiff. As I have stated above, the copy of the register shows that the suit land was registered in favour of the 2<sup>nd</sup> Defendant the same day the land was registered in the name of the Settlement Fund Trustees. There was no entry for discharge of charge by the Settlement Fund Trustees.

46. Although the 2<sup>nd</sup> Defendant informed the court that he was offered the land directly by the Settlement Fund Trustees, he stated that he had to pay the 1<sup>st</sup> Defendant Kshs. 800,000 because the 1<sup>st</sup> Defendant had encroached on a portion of the land. If indeed the 2<sup>nd</sup> Defendant was in possession of the letter of allotment, then he could not have paid to the 1<sup>st</sup> Defendant such a substantial amount of money for the same land. The evidence by the 2<sup>nd</sup> Defendant that he paid the 1<sup>st</sup> Defendant Kshs. 800,000 supports the 1<sup>st</sup> Defendant's case that indeed he had been allocated portion of land known as 394B and the 2<sup>nd</sup> Defendant intended to buy him off. However, according to the 1<sup>st</sup> Defendant, he had already sold the portion of land known as Plot No. 394B to the Plaintiff in ELC No. 104 of 2009. The Plaintiff in ELC No. 99 of 2009 on the other hand had already bought a portion of parcel number 394 known as Plot No. 1020 from Mr. Isaiah.

47. The totality of the evidence before me shows that the suit land had been sub-divided into three portions and allocated to three individuals, including the 1<sup>st</sup> Defendant in ELC No. 104 of 2009 and Isaiah who sold his portion of land to the Plaintiff in ELC No. 99 of 2009. On the other hand, the 2<sup>nd</sup> Defendant had been allocated Plot No. 399 which he sold to a third party after acquiring a Title Deed in the year 2000. He then sought to buy a portion of Plot No. 394 from the 1<sup>st</sup> Defendant by paying him Kshs. 800,000 but fraudulently had the whole land registered in his favour without any supporting documents. Indeed, the presentation book produced by 2PW2 shows that the Transfer of the suit land from the Settlement Fund Trustees to the 2<sup>nd</sup> Defendant was never registered on 15<sup>th</sup> July, 2002.

48. Consequently, and on the basis of the evidence before me, I find that the 2<sup>nd</sup> Defendant caused parcel of land known as Kilifi/Jimba/394 to be fraudulently registered in his favour. The Title Deed that was registered in the name of the 2<sup>nd</sup> Defendant was therefore null and void and the same could not be passed to a third party. The 2<sup>nd</sup> Defendant did not have the legal capacity to pass to the 4<sup>th</sup> Defendant a valid title, having acquired it fraudulently.

49. For those reasons, I allow the Plaints filed in ELC Civil Case No. 104 of 2009 and ELC Civil Case No. 99 of 2009 in the following terms.

*a) An order be and is hereby issued that the Plaintiff in ELC No. 99 of 2009 is the lawful proprietor of parcel of land known as Kilifi/Jimba/1020 measuring approximately 0.4Ha comprised in land known as Kilifi/Jimba/394 while the Plaintiff in ELC No. 104 of 2009 is the proprietor of land known as Plot No. 394B measuring 0.4Ha in the same suit land.*

*b) The Title Deed issued to the 2<sup>nd</sup> Defendant and which was subsequently transferred to S.B.F Watamu Limited be and is hereby declared null and void, and the register in respect of land known as Kilifi/Jimba/394 be rectified by deleting the names of S.B.F Watamu Limited and the 2<sup>nd</sup> Defendant.*

*c) The County Surveyor to sub-divide parcel of land known as Kilifi/Jimba/394 and have the two portions enumerated in (a) above registered in favour of the Plaintiffs respectively.*

*d) The 2<sup>nd</sup> Defendant to pay the costs of the two suits.*

DATED AND SIGNED AT MACHAKOS THIS 6<sup>TH</sup> DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19<sup>TH</sup> DAY OF APRIL, 2018.

J.O. OLOLA

JUDGE