



**Malambo & another v Mwiwa (Environment and Land Appeal
17 of 2023) [2024] KEELC 121 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 121 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 17 OF 2023
NA MATHEKA, J
JANUARY 23, 2024**

BETWEEN

MUMBO NYANGE MALAMBO 1ST APPELLANT

KILEMA MWAMBURI 2ND APPELLANT

AND

MICHAEL MUSYOKA MWIWA RESPONDENT

*(An appeal against the Judgment of the Hon. D. Wangeci PM delivered on
the 22nd August 2022 in Principal Magistrates ELC No. E002 of 2022)*

JUDGMENT

1. The Appellants appeal against the Judgment of the Hon. D. Wangeci PM delivered on the 22nd August 2022 in Principal Magistrates ELC No. E002 of 2022 based on the following;
 1. That the learned magistrate erred in law and in fact in failing to exercise her discretion in favor of the Appellants.
 2. That the learned magistrate erred in law and in fact by disregarding the Appellant evidence and submissions.
 3. That the learned magistrates erred in law and in fact by failing to do proper legal analysis of law on the Judgment to show why she rejected the Plaintiff's submissions and evidence.
 4. That the learned Magistrate erred in law and in fact by disregarding the previous decisions made on the ground regarding the ownership of the suit property.
2. The appellants seek the following orders;
 - a. That the Judgment delivered on 22nd August 2022 be set aside and/ or varied.



- b. That the costs of this Appeal to be paid borne by the Respondent.
3. This court has considered the appeal and the submissions therein. The learned magistrate dismissed the plaintiffs' case with no order as to costs and found that the plaintiffs ought to have produced the original map of the area to prove that the defendant had fraudulently apportioned a portion of land hived off the plaintiffs' parcel of land and registered it in his name.
 4. The appellants in their plaint dated 14th February 2022 averred that, the 1st appellant is the registered owner of Parcel No. Taita Taveta/Mwachabo Phase II Settlement Scheme/876 while the 2nd appellant is the registered owner of Parcel No. Taita Taveta/Mwachabo Phase II Settlement Scheme/875. While the respondent was said to be the alleged registered owner of Parcel No. Taita Taveta/Mwachabo Phase II Settlement Scheme/875 is situated between the appellants' parcels. That was the appellants' case that they acquired their parcels of land through inheritance. The 1st appellant was gifted Plot No. 876 by his late father-in-law Mwandango Benja, while the 2nd appellant inherited his parcel of land from his late father Mwaiwo Senge. The appellants maintained that at all material times, all three parcels Plot No. 874, 875 and 876 were one parcel of land belonging to their family since, the 1st appellant's father-in-law and the 2nd appellant's father were cousins. The parcel of land as a whole was said to be unsurveyed with the appellants aware of their boundaries to their respective parcels.
 5. In 2008 the respondent's mother laid claim to the suit property, the appellants escalated the dispute with the office of the Assistant County Commissioner at Mwatate. The dispute was heard on 26th October 2018, where Sera Mwau mother of the respondent claimed that the suit property together with the farm produce were sold to her at Kshs 11,000/= by one Munyao Matheka. However, Munyao Matheka denied selling land to Sera Mwau's husband and claimed that he only asked to be compensated for the farm produce on the land. He maintained that he had requested to use the land for cultivation from the village elder Mwachofi Myaro. The Assistant County Commissioner recommended that Sera Mwau did not own the suit property and her son (the respondent) to plan of her relocation to their land where they had buried their deceased after plantation season by 28th February 2019. It was the appellant's case that despite the directive from the Assistant County Commissioner the respondent has not only refused to vacate from the suit property but has gone head and acquired title to the same illegally.
 6. The respondent neither entered appearance nor filed a defence to the appellants case. The appellants gave both oral and documentary evidence in support of their claim. There is therefore no doubt that the appellants are the registered proprietors of Land Parcel No. Taita Taveta/Mwachabo Phase II Settlement Scheme/876 and Land Parcel No. Taita Taveta/Mwachabo Phase II Settlement Scheme/875 respectively. While the respondent is the registered owner of Parcel No. Taita Taveta/Mwachabo Phase II Settlement Scheme/875, the appellants maintain that the same was obtained fraudulently and urges the court to cancel the respondent's title.
 7. Section 26 (1) of the *Land Registration Act* states that a certificate of title can be challenged on the ground of fraud or misrepresentation to which the person is proved to be party to. Once fraud has been successfully proven, the court can base it as a ground for cancellation of a title. The Court of Appeal of Uganda held in *Katende V Haridas and Company Limited* (2008) EA 173 that;

for a party to plead fraud in registration of land a party must first prove fraud was attributed to the transferee. It must be attributed either directly or by necessary implications that is, the transferee must be guilty of some fraudulent act or must have known such act by someone else and taken advantage of such act. Fraud can be participatory that is, the party participates in the fraudulent dealings. Fraud can also be imputed on a person, that is, when he or she



was aware of the fraud and condoned it, or benefited from it or used it to deprive another person of his rights. All those people who actually participate in the fraudulent transactions and who had knowledge of it are privy and had notice of fraud.”

8. The appellants must have specifically pleaded fraud and proved it, since it’s a question of evidence as stated in Section 109 of the *Evidence Act*. In *R. G Patel vs Lalji Makanji* (1957) EA 314 it was stated,

Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
9. From the evidence before the court, the suit property is part of the Mwachabo Settlement Scheme managed by the Mwachabo Land Committee. Here the settlers of the scheme lived in harmony aware of their respective boundaries despite their portions being unsurveyed. Hence the appellants took their land dispute with the respondent’s mother to the Assistant County Commissioner Mwatate on 26th October 2018, and later to the Project Manager Mwachabo Settlement Scheme on 13th May 2019. The appellants’ acquisition of title to their parcels of land can be traced back to their fathers who were among the initial settlers of the settlement scheme. The respondent’s acquisition of title to the suit property is premised on his mother Sarah Mwau purchasing the same from one Munyao Matheka. Munyao Matheka told the Assistant County Commissioner that he did not own the suit property and had only been allowed to cultivate on it by the one Mwachofi Mnyaro who was the village elder at the time. The respondent did not demonstrate through evidence how he acquired title to the suit land. The Assistant County Commissioner only allowed his mother to use the land until 28th February 2019 since she had prepared the land for cultivation, and the respondent was to decide on their relocation to the parcel of land where they had buried their deceased father. The respondent therefore was never allocated the suit property by either a village elder or the Mwachabo Land Committee within the Mwachabo Settlement Scheme.
10. It is the finding of this court that the learned magistrate erred in law and facts when she found that the appellants ought to have produced an original map to prove that the respondent had fraudulently hived off a portion of their parcel of land. The facts of the case point to the suit land being part of the Mwachabo Settlement Scheme and there is a process to be followed when acquiring rights and interest in land within a settlement scheme. The appellants had demonstrated how they acquired rights over the suit land, through inheritance and allocation due to their families’ allocation of the parcels of land. The respondent did not avail any documentation that touched on the process of allocation of the suit land. From the evidence adduced, the respondent can attribute his interest to a sale purchase between his mother and Munyao Matheka, which has not been proven in the first place.
11. From the analysis of the evidence before the court it is apparent that the appellants gave a plausible history of the root of their title. Their fathers were beneficiaries in the settlement scheme, while the respondent’s mother was a mere licensee of an individual who had not proved to be a beneficiary of the scheme. The respondent’s registration as a proprietor of the suit land cannot be traced to any allocation but just a mere sprout. The respondent has not proved that he underwent a vigorous process which involves surveying the land, demarcation of the individual plots, the placement of beacons and being shown his parcel as a beneficiary to the settlement scheme. The appellants are in possession of their respective parcels as seen from the photos produced, yet the respondent did not make a case of the history of how he surveyed or demarcated his suit land.
12. It is the finding of this court that the appellants acquired title to the suit land following the pattern of occupation of the land in the village by their fathers and extended family at large. The respondent did not demonstrate that he hailed from any of the villages that made up the Mwachabo Settlement Scheme



for him to be a beneficiary of allocation and registration of title in his name. There is no evidence of him having ever settled on the suit land. It is clear to this court that the respondent as well as his mother were strangers in the area and were not part of the community of settlers in the Mwachabo Settlement Scheme. The appellants have successfully managed to challenge the respondent's title to the suit land. The respondent merely holds a paper title and has no slighted evidence to show how he came to acquire the same.

13. In conclusion, I find that the appellant's appeal is merited and the judgement delivered in the trial court is hereby set aside. The appellants' plaint dated 14th February 2022 is allowed and the court makes the following orders:
- a. A declaration that the appellants are the bonafide owners of Land Parcel No. Taita Taveta/Mwachabo Phase II Settlement Scheme/875.
 - b. A permanent injunction is hereby issued restraining the respondent by himself, representatives, agents, employees, servants or whatsoever acting on his behalf, selling, alienating, letting, subdividing, transferring, charging or in any other manner whatsoever interfering with the appellants' ownership, use, possession and occupation of the property known Land Parcel No. Taita Taveta/Mwachabo Phase II Settlement Scheme/875.
 - c. The title held by and registered in the name of the respondent, Michael Musyoka Mwiwa in Land Parcel No. Taita Taveta/Mwachabo Phase II Settlement Scheme/875 is declared invalid and the Land Registrar, Taita Taveta is hereby directed to cancel it within 30 days from the date of this judgement.
 - d. The Land Registrar, Taita Taveta is directed to register the appellants as tenants in common with equal shares to Land Parcel No. Taita Taveta/Mwachabo Phase II Settlement Scheme/875 within 30 days from the date of this judgement.
 - e. The respondent is directed to vacate from and remove all the structures on Land Parcel No. Taita Taveta/Mwachabo Phase II Settlement Scheme/875 within the next 30 days from the date of this judgement failure to which the plaintiff is at liberty to evict the respondent and demolish all the structures on the respondent's expense.
 - f. The appellants are awarded costs in the trial court and in this appeal.

14. It is so ordered.

DATED, SIGNED AND DELIVERED, ELECTRONICALLY VIA EMAIL THIS 23RD DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

