



REPUBLIC OF KENYA



**Waigwa v Shambe & 4 others (Environment & Land Case 3 of 2014)  
[2024] KEELC 918 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 918 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 3 OF 2014  
MAO ODENY, J  
FEBRUARY 26, 2024**

**BETWEEN**

**CHARLES KIARA WAIGWA ..... PLAINTIFF**

**AND**

**MOHAMED MAHMOUD SHAMBE ..... 1<sup>ST</sup> DEFENDANT**

**FATHI MAHMOUD AHMED ..... 2<sup>ND</sup> DEFENDANT**

**ABUBAKAR SALIM AHMED ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR LAMU ..... 4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By an Amended Plaintiff dated 9<sup>th</sup> November, 2020 the Plaintiff sued the Defendants seeking the following orders:
  - a. A declaration that the transfer of the land Title No. Lamu/Hindi Magogoni/253 from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was fraudulent, illegal and the Registrar of Titles Lamu be directed to register the Plaintiff as the absolute proprietor of Land Title No. Lamu/Hindi Magogoni/253.
  - b. A declaration that the title in the name of Abubakar Salim Ahmed the 3<sup>rd</sup> Defendant in respect to the suit land has been extinguished by the Plaintiff's adverse possession thereof for a period of more than 12 years in terms of the Limitations of Actions Act and the Plaintiff has become entitled to the suit land.
  - c. That the land Registrar Lamu be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the 3<sup>rd</sup> Defendant to the Plaintiff.



- d. Order of prohibition.
  - e. In the alternative and without prejudice to the aforesaid, the defendants do jointly and/ or severally pay the plaintiff the current market commercial value of the said land with interest up to payment in full.
  - f. Costs of and incidental to this suit.
  - g. Interests thereon at courts rates.
  - h. Any other or further relief this Honorable Court may deem fit to grant.
2. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a Defence and Counterclaim dated 8<sup>th</sup> February 2021 whereby they sought the following reliefs:
- a. A permanent injunction restraining the Plaintiff by himself and/or his agents, servants, representatives, assigns, or any other person claiming under him from laying claim of ownership, trespassing into and encroaching, grabbing, developing, constructing temporary or permanent structures, selling, alienating or adversely dealing with the suit property being Lamu/hindi Magogoni/258 situated at Hindi Magogoni Area within Lamu County registered in the name of the 3<sup>rd</sup> Defendant herein.
  - b. A declaration that the 3<sup>rd</sup> Defendant is the legitimate and lawful proprietor all that property known as Lamu/ Hindi/ Magogoni/258 situated at Hindi Magogoni area within lamu County registered in the name of the 3<sup>rd</sup> Deefendant.
  - c. Costs and incidentals to the suit.
  - d. Any other or further relief that the court shall deem fit and just to grant

### **Plaintiff's Case**

3. PW1 adopted his witness statement dated 9<sup>th</sup> November 2020 and stated that he got onto the suit land in 2000 as a squatter where he started cultivating. It was PW1's evidence that the owner came to the suit land and allowed him to continue cultivating and later told Samuel Kiarie to inform me to see him to negotiate the sale of the suit land.
4. PW1 stated that on 20<sup>th</sup> September 2005, he entered into a sale agreement with the 1<sup>st</sup> Defendant for the sale of the suit property known as Lamu/hindi Magogoni/253 at a consideration of of Kshs 60,000/. PW1 stated that he paid Kshs 43,000/ to the 1<sup>st</sup> Defendant and Kshs 30,000/ to clear the Settlement Fund Trustee loan in respect of the suit land on behalf of the 1<sup>st</sup> Defendant.
5. PW1 testified that on 28<sup>th</sup> November 2012 he conducted a search at the land registry and was shocked to find that the suit land had been illegally transferred to Fathi Mamoud Mohamed an Agent of the 1<sup>st</sup> Defendant. He stated that he registered a caution claiming purchaser's interest.
6. It was PW1's case that the 2<sup>nd</sup> Defendant proceeded to transfer the suit land to the 3<sup>rd</sup> Defendant one Abubakar Salim Mohamed. He stated that he has been in occupation of the suit land for over 20 years without interruption and urged the court to grant the orders as prayed.
7. PW 2 and 3 also adopted their witness statements and corroborated the Plaintiff's evidence that he entered the suit land in 2000 as a squatter and later bought and paid for the land pursuant to a sale agreement with the 1<sup>st</sup> Defendant.



## **Defendant's Case**

8. DW1 Mohamed Mohamud Shambe adopted his statement dated 7<sup>th</sup> April 2017 and stated that he was allocated the suit land by the government in 1999, issued with a title deed and sold it to the 2<sup>nd</sup> Defendant.
9. On cross – examination by Mr. Soita, DW1 stated that he had agreed to sell the land to the Plaintiff for a consideration of Kshs . 60,000/ of which he received Kshs 43,000/ from the Plaintiff. He however denied that the plaintiff paid Kshs 30,000/ to SFT to clear the loan. He admitted that after receiving money from the Plaintiff he went ahead and sold the land to the 2<sup>nd</sup> Defendant which amount he has not refunded the Plaintiff.
10. DW1 stated that he got a discharge of charge from SFT but he did not know who paid the loan and that he has never resided on the suit land.
11. DW2 adopted his witness statement dated 7<sup>th</sup> April 2017 and stated that he carried out a search and found out that the land was in the 1<sup>st</sup> Defendant's name, bought it for Kshs 100,00/ and later sold it to the 3<sup>rd</sup> Defendant. He stated that the Plaintiff was residing on the suit land.
12. DW3 also adopted his witness statement and stated that he is the Deputy Land Registrar Lamu County and that he issued a title for Lamu/Magogoni/258 and the current registered owner of the suit land is Abobakar Salim Mohammed. The suit land was originally allocated to Mohamed Mohamoud Shambe who was issued with a title deed on 28<sup>th</sup> August 2006.
13. It was DW3's evidence that a caution was registered in favour of Charles Kiara Waigwa claiming a purchaser's interest on 1<sup>st</sup> October 2012 but the same was removed on 24<sup>th</sup> April 2018 after the Registrar summoned the concerned parties twice for a hearing of the removal.
14. DW3 stated that according to the records in the parcel file, legal procedures were followed in the registration of the current owner. On cross – examination DW3 stated that the transfer was done by virtue of irrevocable Power of Attorney which he did not have in the parcel file. He also stated that there was no Land Control consent and that they had an option of registering a Power of Attorney directly, subject it to the LCB process, and further that he did not have a copy a receipt for payment of stamp duty.

## **Plaintiff's Submissions**

15. Counsel listed the following issues for determination:
  - a. Was there a valid sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant?
  - b. Was there a valid sale and Transfer of the suit property from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and subsequently to the 3<sup>rd</sup> Defendant?
  - c. Without prejudice to the foregoing, has the Plaintiff acquired the suit property vide adverse possession?
  - d. Is the Plaintiff entitled to the reliefs sought)
  - e. Who bears the costs of this suit?
16. On the 1<sup>st</sup> issue, counsel reiterated the evidence on record and submitted that the Plaintiff entered into a valid sale agreement of which the 1<sup>st</sup> Defendant admitted in his evidence. That the Plaintiff paid



- the full purchase price to the 1<sup>st</sup> Defendant being Kshs . 43, 000/ directly and Kshs 30,000/ to the 1<sup>st</sup> Defendant's Settlement Fund Trustee loan account.
17. On the 2<sup>nd</sup> issue whether there was a valid transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's, counsel submitted that the Plaintiff having entered into a valid agreement with the Plaintiff and paid the full purchase price, there was no valid transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  18. Counsel relied on the cases of *Eliud Nyongesa Lusena & Another vs Nathan Wekesa Omacha*, [1994] eKLR, *Boniface Oredo vs Wabumba Mukile*, Civil Appeal No. 170 of 1989(unreported) and submitted that the land being under Settlement Fund Trustee, the Defendant never produced any documents to show that they had obtained a consent of SFT before the land was transferred to the 2<sup>nd</sup> Defendant. Further that there was no discharge of charge produced and the parcel file that was produced by the Land Registrar did not have a discharge of charge.
  19. Mr. Soita further relied on the case of *Joel Kazungu Yaa Mangi v Director of Land Adjudication and Settlement & another; David Rodney Green & another (Interested Parties)* [2020] eKLR where the court stated that it was pertinent for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to explain and demonstrate when exactly the subject matter ceased to be Settlement Fund Trustees land after 1981 when the Fund was registered as the proprietor of the land.
  20. On the issue of adverse possession counsel submitted that the Plaintiff had been in occupation of the suit land for more than 20 years without interruption and relied on the cases of *Njeri Kimani v Edwin Onesmus Wanjau* [2022] eKLR, *Wambugu vs Njuguna* [1983] KLR 172, and *Mweu v. Kiu Ranching & Farming Co-operative Society Ltd.* [1985] KLR 430 and urged the court to find that the Plaintiff has acquired the suit land by way of adverse possession.

### **Defendant's Submissions**

21. Counsel for the Defendants identified four issues, which were similar to the ones listed by the Plaintiff.
22. On whether the titles issued to the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were validly issued, counsel submitted that it is undisputed that the suit land was allocated to the 1<sup>st</sup> Defendant and relied on the cases of *Serab Mweru Mubu vs Commissioner of Lands & 2 Others* [2014]eKLR and *Margaret Njeri Wachira v Eliud waweru Njenga* [2018] eKLR.
23. Counsel submitted that the Plaintiff's conduct amounted to breach of statutory and contractual obligations by not paying the outstanding balance of the purchase price. Further that the Plaintiff did not obtain a Land Control Board rendering the agreement voidable by operation of the law.
24. Counsel therefore submitted that the Plaintiff is not entitled to the orders sought and urged the court to dismiss the suit with costs to the Defendants.
25. On the issue whether the Defendants 'counterclaim has merit, counsel submitted that the Plaintiff neither has a title to the suit land nor is he a licensee and relied on the case of *Lucy Jepchumba Murrey Rienoldt v Sammy Chula* [2005] eKLR . Counsel further stated that the Plaintiff is therefore a trespasser on the suit land.

### **Analysis and Determination**

26. The issues for determination are whether there was a valid agreement between the Plaintiff and the 1<sup>st</sup> Defendant, whether the Plaintiff paid the full purchase price, whether the sale and transfer of the suit land from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and from the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> defendant was legal and valid.



27. On the 1<sup>st</sup> issue whether there was a valid sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant, it is on record that the Plaintiff and the 1<sup>st</sup> Defendant entered into a sale agreement for the suit land on 20<sup>th</sup> September 2005 which was admitted by the 1<sup>st</sup> Defendant in his statement and testimony.
28. It is further not disputed that the Plaintiff has been in occupation of the suit land without interruption by either the 1<sup>st</sup> Defendant or the 3<sup>rd</sup> Defendant who is the current registered owner of the suit land.
29. Similarly the 1<sup>st</sup> Defendant corroborated the Plaintiff's and the PW2's testimony that he had called for the Plaintiff to negotiate the sale of the suit land which culminated into the sale agreement dated 20<sup>th</sup> September 2005 of which the purchase price was paid in full.
30. The Plaintiff produced the payment acknowledgment for Kshs 43,000/ which was the 1<sup>st</sup> Defendant admitted to have received and further produced a receipt of SFT loan repayment of Kshs . 30,000/ on behalf of the 1<sup>st</sup> Defendant. On cross- examination the 1<sup>st</sup> Defendant stated that Kshs 30,000/ was paid for the loan repayment but he did not know who paid the amount.
31. The 1<sup>st</sup> Defendant was being economical with the truth, if he had found that someone had repaid his loan, then he should have taken the trouble of establishing who had paid the amount and why. This only boils down to the fact that he knew that he had sold the suit land to the Plaintiff and had given him a go ahead to repay the loan to enable a transfer be effected form SFT and a discharge of charge issued.
32. The Plaintiff lodged a caution on the suit land but the Land Registrar later removed it. The lodging of such caution was an indication that the Plaintiff had a purchaser's interest on the suit land.
33. There is only one explanation for the 1<sup>st</sup> Defendant's action of selling the suit land to the 2<sup>nd</sup> Defendant while knowing that he had received the full purchase price from the Plaintiff, greed. He sold the suit land for almost double the price he had sold to the Plaintiff. The Plaintiff has always been in occupation; why did the 1<sup>st</sup> Defendant evict the Plaintiff, why did the 2<sup>nd</sup> Defendant sell to the 3<sup>rd</sup> Defendant knowing that the Plaintiff was in occupation, why has the 3<sup>rd</sup> Defendant not told the Plaintiff to vacate and yet he has a title to the suit land. This is because they know that the root of their title was tainted.
34. Section 26 (1) of the [Land Registration Act](#), provides that;
  - “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
    - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
    - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
35. The 1<sup>st</sup> Defendant orchestrated a chain reaction of misrepresentation, illegality in selling the suit land to the 2<sup>nd</sup> Defendant who subsequently sold to the 3<sup>rd</sup> Defendant without due regard to the fact that the land had been legally sold to the Plaintiff who had paid the full purchase price. The court cannot allow this kind of misrepresentation to stand where people driven by greed sell land to multiple people.



The 1<sup>st</sup> Defendant admitted to receiving Kshs 43, 000/ from the Plaintiff but does not say anything about a refund. He wants to keep both the money and the land.

36. In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR, the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

37. Further In the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No.239 of 2009, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to 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.”

38. The 3<sup>rd</sup> Defendant who is the current registered owner of the suit land did not give evidence to defend his title. It would have been prudent for him to tell the court about the root of his title which did not. The 1<sup>st</sup> Defendant also confirmed to the court that he neither applied for nor obtained a Land Control Board consent as required by law.

39. The 2<sup>nd</sup> Defendant gave evidence that he bought the suit land for Kshs . 100,000/ went to the Land Control Board but neither had a consent from the LCB nor stamp duty receipt in court. He also confirmed that he has never taken any steps to remove the Plaintiff from the suit land.

40. The Land Registrar who is the 4<sup>th</sup> Defendant but was called as a witness by counsel for the 1<sup>st</sup> to 3<sup>rd</sup> Defendants stated that the land was initially allotted to Mohamed Shambe and was transferred vide a Power of Attorney to the 2<sup>nd</sup> Defendant Fathi Mohamed. He also stated that he neither the Power of Attorney nor the LCB consent in the parcel file produced in court. He further stated that he does not have a copy of stamp duty payment receipt in the file. This shows that there were anomalies in the registration of the suit land in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

41. Having found that there were anomalies in the acquisition and the registration of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, there would be no need of dealing with the issue of adverse possession as the registered owner’s title was flawed. In a case of adverse possession, a claimant must acknowledge the title that he/she seeks to claim adverse possession. If a claimant states that it was acquired illegally or fraudulently then a claim for adverse possession cannot crystalize on such title.



42. In the case of *Yaa v Nyaje* (Environment & Land Case 24 of 2015) [2022] KEELC 12662 (KLR) (26 September 2022) (Judgment) this court held that:

“It is noteworthy that the defendant who hinges her claim on adverse possession questions whether the original seller had capacity to sell the land from the plaintiff on the ground that neither an allotment letter nor payment for the allotment letter was produced.

For a party to succeed in a claim of adverse possession, such party must acknowledge the titleholder’s title. If you do not acknowledge the title, then you cannot hinge your claim on such title.”

43. Section 80(1) of the *Land Registration Act*, 2012 gives the court powers to direct the cancellation of a registration. Section 80(1) provides:

“Subject to subsection (2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

44. I have considered the pleadings, the evidence on record and the submissions by counsel and find that the plaintiff has proved his case on a balance of probabilities. I therefore make the following specific orders:

- a. A declaration is hereby made that the transfer of the land Title No. Lamu/Hindi Magogoni/253 from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was fraudulent, illegal and the Registrar of Titles Lamu is hereby be directed to register the Plaintiff as the absolute proprietor of Land Title No. Lamu/Hindi Magogoni/253 upon payment of the requisite fees.
- b. That Land Registrar is hereby directed to cancel the 3<sup>rd</sup> Defendant’s title and register in the Plaintiff’s name.
- c. The Defendants to pay cost of the suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 26<sup>TH</sup> DAY OF FEBRUARY 2024.**

**M. A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

