



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 72 OF 2015**

**SAIDI OMAR MWITU (On Behalf of**

**SAWA SAWA JAMIA MOSQUE).....PLAINTIFF**

**-VERSUS-**

**HAMISI SELEMANI MUHINDI.....1<sup>ST</sup> DEFENDANT**

**FREUDENBERG KARIN ILONA.....2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF LANDS KWALE.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 21<sup>st</sup> April 2015, the plaintiff Sawa Sawa Jamia Mosque brought this suit against the three defendants. It sought for judgement to be entered for the following prayers;

**a) Declaration that the registration of Pot Number KWALE/MSAMBWENI A 2608 in the names of the 2<sup>nd</sup> Defendant was obtained by fraud and/or misrepresentation.**

**b) An order directing the 3<sup>rd</sup> Defendant to cancel the registration of Plot Number KWALE/MSAMBWENI A 2608 from the names of the 2<sup>nd</sup> Defendant.**

**c) An order directing the 3<sup>rd</sup> Defendant to register Plot Number KWALE/MSAMBWENI A 2608 in the names of the Plaintiff.**

**d) Cost of the suit.**

2. The pleadings was served against the defendants as evidenced by the affidavit of service of Peter Simiyu. Mr Simiyu deposed that on 28.5.2015 in the company of the plaintiff's representative Mr Saidi Omar Mwituu they proceeded to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' residence. The defendants were pointed out by the plaintiff's representative. He served them but they declined to receive service. On the same day, he proceeded to Kwale Lands' registry and served the receptionist. He returned the documents as duly served.

3. The 2<sup>nd</sup> defendant filed an appearance on 2<sup>nd</sup> July 2015 but did not file a defence. The 1<sup>st</sup> and 3<sup>rd</sup> defendants did not file any documents. The plaintiff filed for a request for judgement on 28<sup>th</sup> July 2015

and the same was endorsed by the deputy registrar on 30<sup>th</sup> July 2015. The plaintiff therefore set down the suit for formal proof on 11<sup>th</sup> May 2016.

4. On the 11<sup>th</sup> May 2016, Mr Mwadzogo advocate appearing for the plaintiff informed the Court that the plaintiff shall adopt the statement of its witness filed as her evidence. He requested for a date for mention for submissions and the Court set judgement date for 14<sup>th</sup> October 2016.

5. It is on the basis of this background that this Court is tasked to determine whether the plaintiff has proved her case on the balance of probabilities as required by law. The plaintiff filed two witnesses' statements. These are statements of Said Omar Mwituu and Mwinyi Hamisi Siwa Mwakuluzo.

6. Mr Said Omar stated that he is a resident of Sawa Sawa Msambweni and the Chairman of the Mosque Committee for the last 30 years. He named the other committee members as Ali Yusuf Boi, Ali Ali Boi and Bakari Hassan Ndaro. Mr Omar said that on or around the year 2004, they got into an agreement with Mwinyi Hamisi Sawa and his brothers for the purchase of plot No 2608 on behalf of Sawa Sawa Jamia Mosque. The purchase price was made in instalments as follows;

1990 – Kshs 20,000

24.2.04 – Kshs 3000

19.8.04 – Kshs 20,000

10.5.05 – Kshs 2000

28.9.05 – Kshs 5000

24.5.09 – Kshs 80,000

23.7.09 – Kshs 120,000

7. After completing payment they went to the land registrar to process title only to be told the land was registered in the name of the 2<sup>nd</sup> defendant. On hearing this, they lodged a complaint with the Msambweni Land Disputes tribunal which tribunal agreed with them. The award of the tribunal was however quashed by the High Court. The plaintiff thereafter filed this suit. The witness urged the Court to grant the orders sought.

8. Mwinyi Hamisi Siwa Mwakuluzo stated he is a resident of Sawa Sawa in Msambweni. He stated that his brothers Hassan Hamisi and Selemani Hamisi agreed to sell their land A/2608 to the plaintiff at a consideration of Kshs Two Hundred Fifty Thousand (250,000=) only. He signed the agreement and payment was made in instalments as set out in paragraph 6 above. Mr Mwinyi said they never authorised any other person to sell this land. Therefore any other purported sale amounts to fraud.

9. The plaintiff filed documents in support of her claim to wit; sale agreement, acknowledgements of payments; proceedings of the Msambweni Land Disputes Tribunal Case No 9 of 2009. Order adopting the award; High Court JR Case No 29 of 2012; copy of the title deed for Kwale/Msambweni/2608 and copy of certificate of registration of the plaintiff.

10. I wish to point out that I will not make any reference to the proceedings of the tribunal in Land Disputes Case No 9 of 2009 the same having been quashed by proceedings of the High Court taken in JR Case No 29 of 2012. The same cannot therefore be considered as part of the documentary evidence produced by the plaintiff.

11. In paragraph 7, the plaintiff pleaded that she discovered around September 2010 that the suit plot was registered in the name of the 2<sup>nd</sup> defendant who claimed to have bought from the 1<sup>st</sup> defendant. It is the

plaintiff case that this registration was obtained by fraud and misrepresentation and proceeded to plead the particulars thereof. For instance, the plaintiff pleads in **“8 (c) changing the original names upon adjudication from Hamisi Selemani Siwa to Hamisi Selemani Muhindi. 8(d) causing the suit land to be registered in the 2<sup>nd</sup> defendant’s name without any colour of right whatsoever”**.

12. In the copy of the title deed annexed, the register for the suit land was opened on 2<sup>nd</sup> July 1979. The 2<sup>nd</sup> defendant is registered as entry No 2 on 23.6.2009 and title issued to him on the same date as entry No 3. In his submissions the plaintiff referred this Court to the provisions of section 143(1) of the Registered Land Act (repealed) and section 26 of the Land Registration Act. Section 26 provides that certificate of title is taken as prima facie evidence unless **“on ground of fraud or misrepresentation to which the person is proved to be a party”**.

13. According to the plaintiff’s submission, the fraud or misrepresentation was proved by production of the sale agreement and proceedings from Msambweni Land Disputes Tribunal (which by law does not form part of the evidence having been quashed). Further evidence relied on is the statement of Mwynyi Hamisi who confirmed that they sold the land to the plaintiff.

14. While I agree with the plaintiff that the 2<sup>nd</sup> defendant’s title can be challenged and cancelled she had an obligation to lay a basis for grant of such orders. The plaintiff or his witness did not present to this Court any document whether as green card or adjudication records that the land in question was at one time owned by Hamisi Selemani Siwa. The plaintiff has also not established by way of evidence that either of the defendants was a party to the fraud or misrepresentation she is alluding to as provided in section 26 of the Land Registration Act.

15. The plaintiff cited to this Court the case of **Kipkoros Arap Soi vs Abuya Maragia Mwembe & 2 Others (2014) eKLR** to support his claim. At page 3 paragraph 8 of the judgement, Okongo J in agreeing to cancel a first registration contrary to section 143 of Cap 300 (repealed) stated that this case was unique **“because the fraud alleged was not committed during the adjudication process but after the process was completed and the adjudication register presented to the 2<sup>nd</sup> Respondent for the preparation of the land register and issuance of titles”**. The facts of the second case cited of **Jackton Liech Mwayo vs Charles Rabel Liech (2014) eKLR** are distinguishable and does not aid the plaintiff’s case.

16. The standard of proof for fraud is required to be in the scale higher than balance of probability because fraud borders on criminal acts see the case of **Central Bank of Kenya vs Trust Bank Limited and 4 Others NBI Civ. Appeal No 215 of 1996 and Rosemary Wanjiku Murithi vs George Maina Ndirwa (2014) eKLR**. The Court of appeal held in the 1<sup>st</sup> decision that

**“The appellant has made vague and general allegations of fraud against the 1<sup>st</sup> Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant than in an ordinary civil case”**.

17. In the instant suit, it is my finding that the plaintiff did not attempt to establish any iota of fraud or misrepresentation against any or all of the three defendants. Probably she assumed the suit being undefended, the orders would be granted automatically. However this Court cannot cancel a person’s title merely because he has not come to defend the suit. In the result, I find the suit as presented to be lacking in merit and hereby dismiss it. Since the same was not defended no costs is awarded.

**Judgement signed and delivered at Mombasa this 14<sup>th</sup> October 2016.**

**A. OMOLLO**

**JUDGE**