



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

**AT MALINDI**

**ELC CIVIL CASE NO.5 OF 2004**

**ORNATO ORAZIO.....PLAINTIFF**

**=VERSUS=**

**BERNARD BAYA MWARO.....DEFENDANT**

**AND**

**BY WAY OF COUNTER CLAIM**

**BERNARD BAYA MWARO.....PLAINTIFF**

**=VERSUS=**

- 1. ORNATO ORAZIO**
- 2. MAINGI MWARO NGOKA**
- 3. BENNY TOURIST ENTERPRISES**
- 4. THE REGISTRAR OF LANDS KILIFI DISTRICT**
- 5. THE COMMISSIONER OF LANDS.....DEFENDANTS**

**J U D G M E N T**

**Introduction**

1. In the Amended Plaint dated 4<sup>th</sup> April 2009, the Plaintiff is praying for a declaration that he is the proprietor of land known as Chembe/Kibabamshe/318 (the suit property.)
2. The Plaintiff has averred in the Plaint that he purchased the suit property from Benny Tourist Enterprises Limited and that the land was transferred to him on 20<sup>th</sup> July 1994. He was then issued with a title deed on 16<sup>th</sup> August 1994.
3. In his Defence and Counter-claim, the Defendant averred that he is the registered owner of the suit property having been registered as such on 24<sup>th</sup> March 1983; that the Plaintiff fraudulently obtained the title deed in respect to the suit property and that Maingi Mwaro Ngoka,

the 2<sup>nd</sup> Defendant in the counterclaim misrepresented to the District Registrar of Lands that the Defendant died in 1994

**The Plaintiff's case:**

4. When the matter came up for hearing on 17<sup>th</sup> May 2011, the Plaintiff's advocate prayed for an adjournment which was disallowed by the court.

5. In the absence of the Plaintiff and his witnesses, the Plaintiff's suit was dismissed with costs. The matter proceeded for the hearing of the Defendant's counterclaim.

**The Defendant's case:**

6. DW1 informed the court that the Defendant is his son and that he is based abroad. DW1 produced the general Power of Attorney in which he was appointed to act for the Defendant in these proceedings.

7. DW1 informed the court that the Defendant was allocated the suit property in 1977 and was subsequently issued with the Title Deed. The copy of the Title Deed was produced in evidence as DEXB2.

8. However, later on, he discovered that someone was dealing with the suit property. It was the evidence of DW1 that when he inquired from the District Land Registrar, he was informed that the suit property had been transferred to one Mwangi Mwaru Ngoka after it was said that the Defendant had died.

9. DW1 stated that the Defendant is still alive and is in possession of the original Title Deed in respect to the suit property.

10. The Defendant's advocate did not file any submissions but relied on the evidence on record.

**Analysis and findings:**

11. The Plaintiff's allegations that he is the registered proprietor of land known as Chembe/Kibabamshe 318 were not proved. Indeed, the Plaintiff's suit was dismissed by the court for want of prosecution.

12. On the other hand, the Defendant's representative, DW1, produced in evidence the green card showing that the register for Chembe/Kibabamshe/318 was opened on 30<sup>th</sup> August 1977 with the Defendant as the first registered owner of the land.

13. The green card shows that the Defendant was issued with the Land Certificate on 24<sup>th</sup> March 1983 before the same was transferred to one Mwangi Mwaru Ngoka by way of Succession on 22<sup>nd</sup> June 1993. The said Mwangi Mwaru Ngoka then transferred the suit property to Benny Tourist Enterprises who sold the land to the Plaintiff.

14. There is no evidence before me to show that as at 22<sup>nd</sup> June 1993, the Defendant was dead to allow Mwangi Mwaru Ngoka to be registered as the owner of the suit property by transmission. Indeed the said Mwangi Mwaru Ngoka is not related to the Defendant and could not have been a beneficiary of his estate, even if he was dead.

15. In the circumstances, I find and hold that the Transfer of the suit property from the Defendant to Mwangi Mwaru Ngoka and the Plaintiff was fraudulent and unlawful.

16. Consequently, I allow the Defendant's Counter-claim dated 20<sup>th</sup> June, 2005.

Dated and delivered in Malindi this 2<sup>nd</sup> day of **October** 2015.

**O. A. Angote**

**Judge**