



**Mwangaya v Kambi & 3 others (Environment and Land Case
125 of 2015) [2024] KEELC 1796 (KLR) (25 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1796 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE 125 OF 2015**

**MAO ODENY, J
MARCH 25, 2024**

BETWEEN

CHANGAWA SHOMI MWANGAYA PLAINTIFF

AND

SIDI KATANA KAMBI 1ST DEFENDANT

MARY KENGO MWELEKA 2ND DEFENDANT

GEOTHAM NGUI KUMI MUTHURI 3RD DEFENDANT

KATANA KAHINDI KAMBI 4TH DEFENDANT

JUDGMENT

1. By a Plaint dated 27th July 2015 the Plaintiff herein sued the Defendants seeking the following orders:
 - a. A declaration that the Plaintiff is the rightful owner of all the subdivision portion Nos.Malindi/Singwaya 'A'/244, 554, 448 & 626 registered in the names of the Defendants herein.
 - b. Cancellation of the title deeds in respect of Plot Nos.Malindi/Singwaya 'A'/244, 554, 448 & 626 in the names of the Defendants herein and the Plaintiff registered as owner of the said Plots as the administrator of the estate of the deceased.
 - c. Costs of this suit.
 - d. Any other relief and or further orders this Honourable Court may deem just and fit to grant.
2. The Defendants filed a defence and counterclaim dated 1st October 2018 seeking the following orders:



- a. A declaration that the registration of the Plaintiff as owner of Title No.Malindi/Singwaya 'A'/544, Title No.Malindi/Singwaya 'A'/244 and Title No.Malindi/Singwaya 'A'/448 was null and void.
 - b. An Order to the Land Registrar-Kilifi to rectify the register of Title No. Malindi/Singwaya 'A'/544, Title No.Malindi/Singwaya 'A'/244 and Title No.Malindi/Singwaya 'A'/448 by cancelling the registration of the Plaintiff as owner of the said parcels of land and instead register the 1st Defendant as the absolute owner of Title No.Malindi/Singwaya 'A'/544 and the 2nd Defendant as the absolute owner of Title No.Malindi/Singwaya 'A'/244 and Title No.Malindi/Singwaya 'A'/448.
 - c. Costs of this suit and interest thereon at Court rates.
 - d. Any other relief that this Honourable Court may deem just to grant
3. This matter had proceeded ex -parte and judgment dated 4th November 2016 entered in favour of the Plaintiff against the Defendants and a decree issued. Pursuant to the decree the registration of the 1st and 2nd Defendants as owners of the respective suit properties was cancelled and in their place the Plaintiff was registered as the owner thereof.
 4. The Defendants filed a Notice of Motion dated 17th July 2017 whereby the judgment and decree was set aside and the suit heard de novo.

Plaintiff's Case

5. PW1 Shomi Mwangaya adopted his Witness Statement dated 22nd March 2022 as his evidence and produced documents in the list of documents as PEX No. 1 to 6. PW1 testified that he is the administrator of the estate of the late Mukambe Shomi Mwangaya, the deceased who owned the suit parcels of land measuring 200acres and 28.52 acres respectively prior to the adjudication exercise.
6. It was PW1's case that the deceased died before the adjudication exercise commenced and that the Defendants fraudulently had the land subdivided and adjudicated in their favour whereby they were subsequently registered as owners.
7. PW2 Paul Mbitha Mwambire adopted his Witness Statement dated 20th June 2020 and stated that he was the Chief of Marafa Location and that the Plaintiff filed a complaint against the Defendants in respect of the suit land. He stated that he involved village and church elders but were not able to sole the dispute.

Defence Case

8. DW1 Mary Kengo Mwaleka adopted her Witness Statement dated 1st October 2018 as her evidence and produced exhibits as per the list of documents. She stated that her husband was given the land by his father and that she is the registered owner of the suit land.
9. DW1 further stated that the deceased was never given the land during adjudication and that when she died the family requested that she be buried on the suit land. It was her testimony that she entered the suit land in 2008 and that there was nobody on the land at that time.
10. DW2 Sidi Katana Kambi also adopted her Witness Statement dated 1st October 2018 as her evidence and stated that she knew Mkambe Shombe who had requested to be given a piece of land to cultivate temporarily and thereafter was to vacate. She further stated that they gave the deceased 4 acres to cultivate but the land was registered in her name.



11. DW3 also gave evidence confirming that the suit land belonged to the Defendants who are the registered owners. It was DW3's testimony that the suit parcels of land were ancestral and when the deceased came to the area from Bungale village. She was allowed by the 2nd Defendant's late husband to stay on a parcel of land measuring 4 acres on a temporary basis. That she was allowed to carry out subsistence farming until she acquires her own land but that she died before that could happen.

Plaintiff's Submissions

12. Counsel for the Plaintiff reiterated the evidence of the parties and submitted that the Defendants fraudulently acquired the titles to the suit parcels of land hence should be cancelled.

Defendants' submissions

13. Counsel listed two issues for determination namely, whether the suit properties belonged to the deceased prior to the adjudication exercise, and whether the Defendants were registered as owners of the suit properties fraudulently, irregularly or unlawfully.
14. On the first issue counsel submitted that the Plaintiff has failed to prove that suit properties belonged to the deceased prior to adjudication and relied on Sections 107, 108 and 109 of the Evidence Act on burden of proof.
15. Counsel further submitted that the evidence on record shows that the deceased was not originally a resident in the area as her ancestral home was at Bungale village. That she arrived in the area in the year 1979.
16. It was counsel's submission that PW1 and PW 2 did not give evidence to show how the deceased acquired the suit parcels as no sale agreement produced in support of the claim that she had bought the land. Further that PW2 was not present when the deceased allegedly purchased that land and no witness to that transaction was called by the Plaintiff to corroborate this testimony.
17. Mr. Shujaa stated that the mere fact that the deceased was buried on the suit land does not prove ownership. DW2 and DW3 testified that it is the Plaintiff who sought for permission to bury the deceased on the portion she had been allowed to carry out subsistence farming which fact was not disputed by PW1.
18. Counsel also submitted that PW1 did not inform the court where he was during the adjudication exercise in the year 2012 or 2013 or why he did not raise any objection as provided as per the Land Adjudication Act Chapter 284 of the Laws of Kenya.
19. Mr. Shujaa submitted that the evidence adduced by the Defendants is that the suit properties were registered in their favour pursuant to an adjudication exercise whereby no objection was raised during the adjudication process as provided for in the Land Adjudication Act and urged the court to dismiss the Plaintiff's suit and allow the Defendants' counterclaim as prayed.
20. Counsel submitted that ex parte Judgment and decree was subsequently set aside by an order of this Court, however the registration was not reversed and urged the court to order for the reversal.

Analysis and Determination

21. This case had been heard ex – parte and judgment entered in favour of the Plaintiff against the Defendants on 4th November 2016. The Defendants filed a Notice of Motion for setting aside the ex parte Judgment and the same was allowed whereby the court ordered that the matter be heard de novo.



22. The Judgment and decree were executed and the titles in the names of the Defendants were cancelled and registered in the name of the Plaintiff. The essence of a judgment that is set aside is that any decree or order emanating from the said judgment is null and void. Any action that had been taken pursuant to the said decree is also set aside.
23. The net effect is that the titles as at the time of the hearing de novo were or should be in the name of the Defendants. In military parlance, it should be “as it were.”
24. The issues for determination is whether the Plaintiff has proved that the deceased was the owner of the suit land and whether the Defendants’ acquired the suit parcels fraudulently.
25. It was incumbent upon the Plaintiff to lead evidence to show that the deceased whom he claims to have been the sister was the original owner of the suit parcels of land. The only evidence that the Plaintiff led was a letter from the chief confirming that the deceased was a resident of the location. It is not disputed that the deceased resided on the suit parcel of land. What is in dispute is how she came to be on the suit land.
26. Section 107 of the *Evidence Act* states as follows;
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
27. The Defendants gave evidence that the deceased was not an original resident of the area as she came from Bungale village whereby she was given land temporarily to cultivate as she looked for her own parcel of land. It is also on record that she was allowed to use 4 acres to cultivate and that upon her demise the family requested that she be buried on the suit parcel of land.
28. The Plaintiff hinged his evidence on the fact that the deceased was buried on the suit parcel of land. The fact that a person is buried on a suit parcel of land does not confer ownership. There has to be tangible evidence to show the root of ownership and how such land was acquired.
29. In the case of *Dinah Caren Ondick Akinyi v Leukadia Ajwang Ondoro & Thadius Otieno Ondoro* [2014] eKLR the court held that ;
- “As submitted rightly by the advocate for the 2nd defendant, the mere act of interring the remains of a deceased person on a parcel of land does not confer title to that land on the estate of the deceased or on her beneficiaries.”
30. The area where the suit parcels of land are situate was declared an adjudication section in 2012-2013 in accordance with the *Land Adjudication Act*. Adjudication exercise is an elaborate process where the people are identified and verification done before land is adjudicated. There are procedures in place for people who are dissatisfied with the process to file objections within a stipulated period to get redress.
31. Section 29 of the *Land Adjudication Act* provides that;
- “(1) Any person who is aggrieved by the determination of an objection under section 26 (1) & (2) of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—



- (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.
- (2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar”.
32. There is no evidence that the Plaintiff or the deceased engaged this process after finding out that the adjudication exercise had been done without recording their right to the parcel of land.
33. After the demise of the deceased why, did the Plaintiff not take action to assert their right to the suit land? They went to slumber, as they knew the real position as to the ownership of the suit land.
34. The Plaintiff did not give cogent evidence to show the link to the ownership of the suit land. The Plaintiff was also not in occupation of the suit land. The Plaintiff claimed that the Defendants obtained the titles to the suit land fraudulently, it is trite that for a claim of claim to succeed a party must specifically plead the particulars of fraud. The Plaintiff is also under an obligation to prove the particulars of fraud.
35. I notice that the Plaintiff neither particularized the fraud nor proved it specifically. It is not enough to shout at the rooftop that a party has committed fraud in acquisition of a parcel of land.
36. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, the court held that:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
37. On the other hand, the Defendants gave evidence on how they got the titles through adjudication by producing the adjudication records. There was no evidence that there was any objection to the adjudication exercise. The adjudication was made final and titles issued as per the adjudication records forwarded to the land registry.
38. The Defendants also produced copies of the titles that had been issued to them as proof of ownership of the suit parcels. Section 26 of the *Land Registration Act* provides two instances where a title can be impeached/challenged. The first is on the ground of fraud and/or misrepresentation to which the person is proved privy to and/or a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The Plaintiff has not met this threshold.
39. The court is empowered under Section 80 (1) of the *Land Registration Act*, 2012 to 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.
40. I find that the Plaintiff has failed to prove his case on a balance of probabilities and the same is dismissed with costs to the Defendants. The Defendants filed a counterclaim and led evidence to show that they



are the owners of the suit parcels of land. I find that the Defendants have proved their case and therefor make the following specific orders.

- a. Plaintiff's case is dismissed with costs and the counterclaim allowed as prayed.
- b. An Order is hereby issued to the Land Registrar-Kilifi to rectify the register of Title No.Malindi/Singwaya 'A'/544, Title No.Malindi/Singwaya 'A'/244 and Title No.Malindi/Singwaya 'A'/448 by cancelling the registration of the Plaintiff as owner of the said parcels of land and instead register the 1st Defendant as the absolute owner of Title No.Malindi/Singwaya 'A'/544 and the 2nd Defendant as the absolute owner of Title No.Malindi/Singwaya 'A'/244 and Title No.Malindi/Singwaya 'A'/448.
- c. Costs of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF MARCH 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*.

