



**Waciama v Mwongera & 2 others (Environment & Land Case 146 of 2016 & Petition 4 of 2019 (Consolidated)) [2024] KEELC 1232 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1232 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 146 OF 2016 & PETITION 4 OF 2019 (CONSOLIDATED)**

**MAO ODENY, J**

**MARCH 7, 2024**

**BETWEEN**

**JOYCE MUTHONI WACIUMA ..... PLAINTIFF**

**AND**

**FRANK K MWONGERA ..... 1<sup>ST</sup> DEFENDANT**

**PHILIP NDOLO ..... 2<sup>ND</sup> DEFENDANT**

**LA MARINA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 9<sup>th</sup> June 2016 the plaintiff herein sued the Defendants seeking the following orders:
  - a. A declaration that the defendants by themselves, their servants and/or agents are trespassers on the plaintiff's property known as Chembe/Kibabamshe/424.
  - b. A permanent injunction restraining the defendants by themselves, their servants and/or agents from entering, trespassing, remaining, interfering, alienating, transferring or in any manner dealing with the property comprised in title No Chembe/Kibabamshe/424.
  - c. An order of eviction against the defendants by themselves, their servants and/or agents, evicting the defendants and their servants and agents from all that parcel of land comprised in title number Chembe/Kibabamshe/424.
  - d. A permanent injunction restraining the defendants, their servants and/or agents from re-entering, occupying or continued occupation/possession and/or wasting the plaintiff's parcel of land comprised in title number Chembe/Kibabamshe/424 and/or from doing anything that will interfere with and/or violate the plaintiff's proprietary rights and/or quiet possession in/over that parcel of land comprised in Title No Chembe/Kibabamshe/424.



- e. Mesne profits for occupation of the land from January 2009 up to the date of handing over vacant possession.
  - f. The Officer Commanding Malindi Police Station be ordered to enforce the court order provide security to effect the orders of eviction.
  - g. The costs of the suit be awarded to the plaintiff.
  - h. Any other relief which the honorable court may deem fit and just to grant.
2. The second suit, Petition No 4 of 2019 was filed by the 1<sup>st</sup> Defendant against the respondents seeking the following orders:
- a. A declaration that the 1<sup>st</sup> respondent as the legal custodian and repository of land records and facilitator of land transactions is subject to the provisions of Article 10, 40 and 64 in the lawful discharge of its constitutional mandate.
  - b. A declaration that the reparation and sub-division of Title Number Malindi/Chembe Kibabamshe/424 into two (2) parcels Title Number Malindi/Chembe Kibabamshe/655 and Title Number Malindi/Chembe Kibabamshe/720 was unauthorized and in utter violation of the petitioner's rights under Article 40 of *the Constitution*.
  - c. A declaration that the registration of Title Number Malindi/Chembe Kibabamshe/655 in the name of the 3<sup>rd</sup> respondent was in contravention of the petitioner's rights under article 40 and 64 of *the Constitution*.
  - d. An order of certiorari to remove to the High Court and quash the decision of the 1<sup>st</sup> respondent sanctioning the reparation and sub-division of Title Number Malindi/ Chembe Kibabamshe 424 into to (2) portions Title Number Malindi/Chembe Kibabamshe/655 and Title Number Malindi/Chembe Kibabamshe/720.
  - e. An order of certiorari to remove to the High Court for purposes of being quashed, the Certificate of Title Number Malindi/Chembe Kibabamshe/655 registered in the name of the 3<sup>rd</sup> respondent.
  - f. An order of mandamus, compelling the 1<sup>st</sup> respondent to cancel all the entries made in the register sanctioning the reparation/sub-division of Title Number Malindi/Chembe Kibabamshe/424.
  - g. An order of mandamus compelling the 1<sup>st</sup> respondent to cancel all entries in the Kilifi land Registry in respect of title number Malindi/Chembe Kibabamshe/655.
  - h. An order of mandamus compelling the 1<sup>st</sup> respondent to issue a certificate of title over title number Malindi/Chembe Kibabamshe/424 in favour of the petitioner.
  - i. An order of injunction prohibiting the 1<sup>st</sup> and 3<sup>rd</sup> respondents from effecting any transfer, charge, mortgage, or in any manner dealing with Title Number Malindi/Chembe Kibabamshe/655.
  - j. An order for compensation for violation of the petitioner's constitutional rights by way of an award of damages.
3. The plaintiff and the 1<sup>st</sup> Defendant filed separate suits that were consolidated by an order of the court dated 5<sup>th</sup> July 2021 and issued on 26<sup>th</sup> July 2021 with ELC Case No 146 of 2016 being the lead file.



4. In response to the first suit, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed statements of defence and denied the averments in the plaint and sought that the plaintiff's suit be dismissed with costs.
5. In response to the Petition Philip Munge Ndolo a director of La Marina Limited filed a replying affidavit sworn on 24<sup>th</sup> March 2019 and denied the averments in the petition and deponed that land parcel No Chembe/Kibabamshe/424 reverted to the Government of Kenya who then subdivided it into two with resultant parcel Nos' Chembe/Kibabamshe/655 and 720.
6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in the petition filed grounds of opposition dated 28<sup>th</sup> November 2018 and stated that all the entries made by the 1<sup>st</sup> Respondent on the register over the suit property Chembe/Kibabamshe/424 were done in accordance with section 14 of the Land Registration Act hence the application is an abuse of court process.
7. The Interested Party filed a replying affidavit and a cross petition on 29<sup>th</sup> November 2021 and denied the averments, filed a cross- petition and sought the following orders;
  - a. A declaration that she is the registered owner of all that parcel of land known as Chembe/Kibabamshe/424;
  - b. A declaration that the alleged parcelization and sub-division of parcel number Chembe/Kibabamshe/424 and the resultant titles thereto namely Chembe/Kibabamshe/655 and Chembe/Kibabamshe/720 is illegal, unlawful and to that extent null and void;
  - c. A declaration that the alleged transfer and registration of the cross-petitioner's parcel of land being Chembe/Kibabamshe/424 and the illegal subdivisions thereto namely Chembe/Kibabamshe/655 and Chembe/Kibabamshe/720 to Dr. Frank Mwongela and La Marina Limited respectively as illegal and unlawful and makes it necessary the cancellations of title number Chembe/Kibabamshe/720 and Chembe/Kibabamshe/655;(sic)
  - d. That the Land Registrar, Kilifi County be compelled to register orders a, b and c above and
  - e. That the cost of this suit be awarded to the cross-petitioner;
  - f. Any other relief that this honorable court may deem fit and just to grant.

#### **plaintiff's Case**

8. PW1 Joyce Muthoni Waciuma adopted her Witness Statements dated 10<sup>th</sup> June 2016 and 23<sup>rd</sup> November 2021 as part of her evidence and also produced the documents dated 2<sup>nd</sup> October 2019 as PEX 1 to 26.
9. PW1 stated that she purchased the suit land parcel known as Chembe/kibabamshe/424 from Thomas Anarati Nyikuri and David Masinde Anarati Nyikuri and was issued with a certificate of title on 21<sup>st</sup> December 1978.
10. PW1 stated that she took possession of the suit land but in 2008 she learnt of some illegal activities involving land in Chembe / Kibabamshe area and an attempt to subdivide her parcel of land.
11. PW1 was referred to the gazette notice dated 20<sup>th</sup> June 1986 and stated that the said gazette notice was challenged and was found to be null and void. PW1 further stated that the gazette notice did not cancel her title and that she was never summoned to surrender her title.
12. PW1 was referred to a letter dated 3<sup>rd</sup> September 2015 in the 1<sup>st</sup> Defendant's bundle of documents and stated that the suit property was not available for allocation since she was already a registered owner.



13. It was PW1's evidence that she was neither aware that the suit property was allocated to the 1<sup>st</sup> defendant nor that it had been subdivided into land parcel No's Chembe/Kibabamshe/655 and 720. PW1 testified that she instituted the present proceedings because the 1<sup>st</sup> Defendant had trespassed onto her property Chembe/Kibabamshe/424
14. Upon cross-examination by Mr. Masese, PW1 stated that she had bought the suit property from Thomas Nyikuri and David Masinde Nyikuri who approached her and told her that he was selling the suit property and that he had a letter of allotment.
15. She also told the court that she went to see the land in the year 1978 in the company of two community elders, and to the land registry where he did a search and confirmed that the land belonged to the vendor. That they entered into an agreement for purchase of the suit property dated 6<sup>th</sup> September 1978 for a consideration of Kshs 60,000 which she paid in cash.
16. PW1 further stated that after payment of the purchase price, the vendors wrote a letter to the Town Clerk for consent which indicated that the transfer was for love and affection but she had paid them Kshs. 60,000/= That she was given an allotment letter as she waited for the title to be processed in her name.
17. It was PW1's evidence that in 2009 she found structures on her land, which led to her filing of Petition No 14 of 2013 and urged the court to declare that she is the rightful owner of the suit land.
18. Upon cross examination by Mr Mkomba, PW1 told the court that she was aware of the gazette notice of 1986 but was not aware that the land reverted back to the government after cancellation of the title. Further that a search done on 25<sup>th</sup> August 1998 showed that the land belonged to the government of Kenya.
19. It was her evidence that she had only sued the government in Petition No 14 of 2013 for the government to confirm that No 424 was still her plot. That in the case that Land Registrar told the court that plot No 424 did not exist and so they could not register a caution over it.
20. She further stated that the Commissioner of Lands had placed an embargo on the Chembe/Kibabamshe plots and was not aware that the settlement scheme had re-allocated the properties. On cross examination by Mr. Ojwang, she stated that she had initially sued the Cabinet Secretary Lands, the National Land Commission, the Chief Land Registrar and the Attorney General but they did not file a response to the petition.
21. Upon re-examination, she further testified that the suit property was irregularly subdivided as the map has never been updated at the survey office. That she was not aware that the land reverted back to the government and that there was a subsequent gazette notice dated 17<sup>th</sup> July 2017

### **1<sup>ST</sup> Defendant's Case**

22. DW1 Dr. Frank Kamunde Mwongera adopted his Witness Statement dated September 29, 2016 as part of his evidence and produced the documents dated 26<sup>th</sup> September 2016 as PEX 1 to 5. He also relied on his supporting affidavit to petition No 4 of 2019.
23. DW1 testified that he is the rightful owner of land parcel No Chembe/Kibabamshe/424 which he was transferred to him by the Settlement Fund Trustees which transfer was executed upon payment of Kshs. 6,840.
24. It was DW1's evidence that after the property was discharged by the Settlement Fund Trustee, he went to the Kilifi Land Registry and was given the title for land parcel No Chembe/Kibabamshe/720. That



when he inquired, he was informed that there had been a subdivision of land parcel No Chembe/Kibabamshe/424 that resulted in title No's 720 and 655.

25. He testified that the green card indicated that plot No 424 had been subdivided and an entry made on 6<sup>th</sup> April 2001 in his name. DW1 denied ever subdividing the suit property or knowing Cosmas Chongo who claimed to have bought the land for Kshs. 200,000/=. That he also did not know that La Marina Limited had bought the suit property from Cosmas Chongo.
26. DW1 further stated that he has been in occupation of the suit land since 1999 and urged the court to cancel the fraudulent subdivision and illegal entries. He told the court that he had seen the affidavit sworn by Stella Gatwiri the Land Registrar where she stated that the register of Chembe/Kibabamshe had been opened on 6<sup>th</sup> April 2001 and allocated to him. Stella Gatwiri also confirmed that Plot No 655 and 720 were as a result of the subdivision of plot No 424.
27. Upon cross-examination by Mr. Munga, DW1 told the court that he was allocated the suit property by the Settlement Fund Trustees and that there was no other person who was allotted the suit property and that he was issued with a title deed for land parcel No Chembe/Kibabamshe/424. He further told the court that the suit property was fraudulently subdivided without his consent and is yet to see the mutation forms.
28. On further cross-examination by Mr. Kimani, he stated that he had a letter of offer issued in 1996 on the basis of which he was claiming ownership of the suit property. That the land belonged to him since he was dealing with the Settlement Fund Trustee who transferred the land to him and was registered as such. He also stated that the survey map was last updated on 14<sup>th</sup> December 2018 and his title deed was issued on 6<sup>th</sup> April 2001. Upon re-examination, he told the court that the document at page 6 to 9 was signed by Dr. Nehemiah K. Ng'eno on 15<sup>th</sup> September 2008.
29. Counsel for the 2<sup>nd</sup> 3<sup>rd</sup> and the Interested Party informed the court that they were not calling any evidence and therefore the cases were closed.

### **Plaintiff's Submissions**

30. Counsel for the plaintiff identified the following issues for determination by the court:
  - a. Whether the plaintiff is entitled to declaration as the registered owner of the suit land being Chembe/Kibabamshe/424.
  - b. Whether the alleged parcellation and sub-division of Chembe/Kibabamshe/424 and resultant titles being Chembe/Kibabamshe/720 and 655 are illegal, unlawful null and void.
  - c. Whether the defendants have trespassed on the plaintiff's property being Chembe/Kibabamshe/424.
  - d. Whether the court should issue permanent injunction restraining the defendants.
  - e. Whether the court should issue eviction orders against the defendants.
  - f. Whether the plaintiff is entitled to mesne profits for occupation.
31. Counsel relied on the case of *Katende v Haridar & Company Limited* [2008] 2 EA 173, sections 24(a) and 26(1) of the *Land Registration Act* and submitted that the plaintiff acquired the suit property procedurally. It was counsel's submission that the plaintiff was a bona fide purchaser for value and that the Vendors passed a good title to her.



32. On the issue whether the Defendants are trespassers on the suit property, counsel relied on section 3(1) of the [Trespass Act](#) and urged the court to find that the defendants are trespassers.
33. Counsel relied on the cases of [Philip Ayaya Aluchio v Crispinus Ngayo](#) [2014] eKLR and [Park Towers Ltd vs John Mithamo Njika & 7 others](#) [2014]eKLR and submitted that the plaintiff is entitled to general damages for trespass by the Defendants. Counsel submitted that the plaintiff is entitled to an order of mesne profits for loss of use of the suit land and urged the court to award Kshs 10Million as a reasonable amount. Mr Kimani cited the case of [Willesden Investments Limited v Kenya Hotel Properties Limited](#) (Civil Suit 367 of 2000) [2006] KEHC 673 (KLR) (Civ)
34. Counsel further relied on the case of [Kenya Power & Lighting Co. Ltd vs Sherrif Molana Habib](#) [2018]eKLR and submitted that the plaintiff is entitled to an order of a permanent injunction and eviction orders against the defendants

### **1<sup>st</sup> Defendant's Submissions**

35. Counsel reiterated the evidence of the parties on record and submitted that the two cases were consolidated being Malindi ELC No 146 of 2016 and Malindi Constitutional Petition No 4 of 2019 on 5<sup>th</sup> July 2021.
36. Counsel submitted that the 1<sup>st</sup> defendant is the lawful proprietor of land parcel No Chembe/Kibabamshe/424 having been allocated by the Settlement Fund Trustees, paid the purchase price, got a discharge of charge and a title issued in his name. Counsel cited the case of [Republic vs The Chief Land Registrar and Yosabia Kerubo Manyura exparte Applicant](#) [2018] eKLR
37. Mr Masese relied on section 22(2) of the [Land Registration Act](#) on application for subdivision by a proprietor and submitted that at no time did the 1<sup>st</sup> Defendant apply or consent to the subdivision of the suit parcel of land therefore the said subdivision was unlawful.
38. Counsel also relied on the case of [Siriekesi Morris Wanjala v Bonface Bruno Wanjala](#) [2021] eKLR where a subdivision was done illegally without the consent of the proprietor and without following laid down procedures. The judge found that the same was done illegally and cancelled the title that arose out of the subdivision.
39. Counsel therefore urged the court to find that the subdivision and transfer of land parcel No Chembe/Kibabamshe/424 was fraudulent and illegal hence the petition should be allowed and the plaintiff's suit be dismissed with costs.

### **1<sup>st</sup> and 2<sup>nd</sup> respondents' Submissions**

40. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents identified the following issues for determination;
  - a. Whether the Land Registrar followed due process in transferring the suit property.
  - b. Whether the petitioner is entitled to the reliefs sought.
41. On the first issue, counsel relied on section 25 of the [Land Registration Act](#), sections 107, 108 and 109 of the [Evidence Act](#) and the case of [Willy Kipsongok Morogo v Albert K. Morogo](#) [2017] eKLR and submitted that La Marina Limited is the current title deed holder.
42. Counsel also submitted that even though fraud was alleged the same was not proved and relied on the case of [Kinyanjui Kamau v George Kamau](#) [2015] eKLR in support of his arguments.



43. On the second issue, counsel relied on article 23(3) of *the Constitution* of Kenya, the cases of *Anarita Karimi Njeru v Republic* [1979] 1KLR 154, *Beekay Supplies Limited & another vs Attorney General & another* [2017] eKLR and submitted that the petition lacks merit and should be dismissed with costs.

### **Analysis and Determination**

44. The issues that arise for determination are as follows;
- a. Who is the rightful owner of the suit land between the plaintiff and the 1<sup>st</sup> Defendant.
  - b. Was the subdivision of the suit property done procedurally and legally
  - c. Whether the plaintiff is entitled to general damages and mesne profits
  - d. Whether the plaintiff and the 1<sup>st</sup> defendant are entitled to the orders sought.
  - e. Who is to pay costs for the suits.
45. This is a consolidated suit being Malindi ELC No 146 of 2016 by the plaintiff Joyce Muthoni Waciuma and Malindi Constitutional Petition No 4 of 2019 by the Petitioner Dr. Frank Kamunde Mwangera
46. The plaintiff and the 1<sup>st</sup> Defendant testified on the acquisition and ownership of the suit land. It should be noted that the 2<sup>nd</sup> 3<sup>rd</sup> and the Interested Party did not tender any evidence hence there cases were closed.
47. PW1 gave evidence on how she purchased the suit land parcel No Chembe/Kibabamshe/424 from Thomas Anarati Nyikuri and David Maside Anarati Nyikuri for a consideration of Kshs 60,000/-. She stated that she was later issued with a title deed. By a letter dated 22<sup>nd</sup> October 1978 the vendors Thomas and David Nyikuri requested the Malindi Town Clerk to issue a consent to transfer with the reason that they were transferring the property through their own volition and natural love.
48. This dispute emanates from a double allocation and subdivision of the suit land parcel No Chembe/Kibabamshe/424 of which the plaintiff and the 1<sup>st</sup> Defendant lay claim to. The issue revolves around cancellation of the plaintiff's title pursuant to a gazette Notice No 2505 of 1986.
49. The Gazette Notice No 2505 issued under the Government Lands Act provided as follows;
- “A letter has been sent to the land owners within Chembe/Kibabamshe, Kilifi/Jimba, Kilifi/Madoteni, Kakuyuni/Madunguni and Kilifi/Masaingoni, all in Kilifi District, requesting them to respond to the said letter before 31<sup>st</sup> July 1986 and also requesting them to report to the District Land Officer, Kilifi District before 31<sup>st</sup> July, 1986.
- Those who might not have received the said letter are requested to contact the Commissioner of Lands, P.O Box 30089, Nairobi...”
50. It is not disputed that initially land parcel No Chembe/Kibabamshe/424 was registered in the name of the plaintiff. It is also not disputed that gazette notice No 2505 recalled and cancelled a number of titles that included land parcel No Chembe/Kibabamshe/424.
51. In the case of *Geoffrey Kanu Kinyua v Commissioner of Lands & 11 others*; [2021]eKLR the court held that:
- “Arising from the foregoing, it was apparent that the law is alive to the possibility that an error might occur during the process of registration even under the Torrens System of land



registration. Where such an error occurs, the Government as the Keeper of the Master Record is obliged to compensate the affected parties such as the plaintiff herein.

While they did not file any defence before me, it was clear from the impugned Gazette Notice and the 4<sup>th</sup> Defendant's letter dated 28<sup>th</sup> May 1986 that it was the Government's position that there was an error in the registration where its officers on the ground erroneously applied the *Land Adjudication Act* to Government Land. The Government sought to remedy this position by summoning the affected parties and rectifying their titles as appropriate."

52. The above case was in respect of the impugned gazette notice No 2505. It is trite that in a Torrens system like any other system errors are bound to occur in the process of registration. The court held that where such an error occurs, the Government as the Keeper of the Master Record is obliged to compensate the affected parties.

53. The National Land Commission vide a gazette Notice No 6862 dated 17<sup>th</sup> July 2017 titled "Determination of Review of Grants and Dispositions of Public Land in respect of the following Grants and orders. It stated as follows:

"In Exercise of the powers conferred by article 68 (c) (v) of *the Constitution* of Kenya and section 14 of the *National Land Commission Act*, 2012, the Chairman of the National Land Commission informs the general public that the National Land Commission upon receipt of complaints from the National Government, County Governments and members of the public, undertook review of grants and dispositions (titles) of public land to establish their legality or otherwise. The Commission via public notices in the national dailies invited all interested parties to appear before it to inspect documents and make written and oral representations and submissions. Consequently, the Commission has made determinations in respect of the following grants/Titles and orders for revocation, regularization, upholding of the titles where applicable as indicated or give further orders. Where the order calls for revocation, the Chief Land Registrar is thereby directed to revoke as per Section 14(5) of the *National Land Commission Act* and attendant laws".

54. The National Land Commission after the public hearings to determine the legality and propriety of the allocations and registrations concluded that the government erred by applying three registration regimes in an area thus resulting in various types of allocations and registration. It further stated that the tenure system that the Chembe Kibabamshe area falls is trust land and not government land and therefore the adjudication regime should be upheld.

55. This gazette Notice was in a bid to rectify the errors that had occurred in the process of registration in the mentioned areas in Kilifi which included Chembe/ Kibabamshe where the suit land is situate. The suit plot No 424 was amongst the plots that were listed for determination where the Land Commission stated that the suit land was first registered in the name of Thomas who sold to Joyce, that Dr. Frank Mwangera got an allotment from the Settlement Fund Trustee in 1999 and paid and was issued with a title for plot No 720 a resultant subdivision of plot No 424 and La Marina Limited given Plot No 655. The Commission further indicated that the matter was not cleared as it had a pending case in court.

56. The plaintiff produced Gazette Notice No 6862 of 17<sup>th</sup> July 2017 which gave the background of Kilifi chembe Kibabamshe section as follows;

"Chembe Kibabamshe was declared an adjudication section on 2<sup>nd</sup> Oct. 1974 and finalized on 26<sup>th</sup> May 1978 with a total of 440 parcels. Registration took place in 1978 and titles issued



under the Registered Land Act cap 300 (Repealed). However, the registration was nullified by the government triggering numerous Court suits, which continue up to date. Settlement programme was also applied in the same section in 1998, there was a presidential directive that land owners be allocated land owing to many complaints from the region. A total of 443 parcels were re-allocated to land owners covering an area of 1,107.5 ha.

The former Commissioner of Lands through a gazette notice in 1986 declared the areas as falling under government land and ordered cancellation of the registrations where land owners returned their titles in exchange of titles under Registration of Titles Act cap.”

57. The plaintiff stated that she did not comply with the requirements of the notice to surrender the title for cancellation in exchange of titles under the Registration of Titles Act. The notice was an intention to cancel the title.
58. The plaintiff did not move the court to challenge the cancellation or reinstatement of the title. The evidence on record, the property section of the green card filed by the 1<sup>st</sup> Defendant from the Land registry indicate that the title was cancelled. The green card further indicates that the property which was subdivided into 2 parcels plot No 720 registered in the name of Dr Frank Kamunde and Plot No 655 in the name of La Marina Limited.
59. The plaintiff produced a judgment in which she had filed a Petition No 14 of 2013 against the Cabinet Secretary for Lands Housing and Urban Development, National Land Commission, Chief Land Registrar, District Land Registrar, Kilifi County Land Office and the Attorney General. The 1<sup>st</sup> Defendant Dr. Frank Kamunde Mwongera was not a party to this suit. By a ruling dated 4<sup>th</sup> April 2014 the court stated that:

“ Although the Petitioner claims that the suit property seems to have been sub-divided into two portions and allocated to third parties, the Petitioner does not have details of the said sub-division and the allocation. The Petitioner has been unable to trace the records at the Kilifi District Lands Registry either in respect to her property or the sub-division thereof, thus this Application.”
60. The court further stated that it is not clear from the evidence placed before it what happened from 1978 when the Petitioner was granted a title to 2008 when she discovered that the suit land had been subdivided. The court therefore declined to issue a mandatory injunction as it was not a clear case for issuance of such an order. This Petition proceeded without the evidence of the respondents as they neither filed replying affidavits nor participated in the case.
61. The petitioner’s claim against the respondents was that she had a title deed to the suit land but was not able to transact as the respondents had failed or refused to avail the register to enable her transact.
62. The Petitioner in her evidence stated that when she tried to lodge a caution the Land Registrar told her that the same could not be lodged because the suit parcel of land does not exist. A caution can only be registered in a register of a particular parcel of land. This parcel having been subdivided, parcel of land No Chembe/ Kibabamshe /424 ceased to exist as resultant parcels No 655 and 720 were created. The Petitioner could therefore not blame the Land Registrar for not registering the caution while the land had been subdivided and the register to the suit land closed.
63. From the Gazette Notice No 6862 dated 17<sup>th</sup> July 2017 it is apparent that there was an error in the registration system which the government sought to rectify after many complaints were raised from the government, county governments and individuals. The same led to public hearings on the review



of grants and dispositions of which the parties affected including the plaintiff and the defendant participated.

64. In the case of *Geoffrey Kanu Kinyua v Commissioner of Lands & 11 others*; [2021]eKLR (supra) the court held that:

“As it turned out, the plaintiff disregarded the request and refused to surrender his title deeds. While he asserted that his titles were cancelled pursuant to the 4th Defendant’s letter and the impugned Gazette Notice, he conceded during cross- examination that the two merely gave the Government’s intention to cancel the titles but did not in themselves amount to any cancellation.”

65. I find that the plaintiff has failed to prove her case against the Defendants in respect of the allocation and registration of the suit land to the 1<sup>st</sup> Defendant who is the registered owner of portion land known as Plot No 720. The best the plaintiff could have done is claim for compensation from the government after reallocating land and confirming the errors in the registration systems. The plaintiff never sought for such orders therefore the court cannot grant what a claimant has neither pleaded nor asked for.

66. The plaintiff had also sought damages and mesne profits, section 2 of the *Civil Procedure Act* cap 21 Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession”

67. In the case of *Attorney General Vs Halal Meat Products Limited* [2016] eKLR the court held as follows:

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another.”

68. Mesne profits must be specifically pleaded and proved. In the case of *Monica Anyona Dongi v Richard Otieno Okumu* [2019] eKLR the court held that:

“Regarding the Appellant’s prayers for mesne profits, the same must have been specifically pleaded and proved to be granted. The Court of Appeal in Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR stated:

“This court in Peter Mwangi Mbuthia & another vs. Samow Edin Osman [2014] eKLR expressed that it is upon a party to place evidence before the court upon which an order of mesne profits could be made. It was stated:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded... That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”



“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

69. Having found that the plaintiff has failed to prove her case against the Defendants it follows that her claim for general damages also fails. Who was in unlawful occupation to pay the general damages claimed?
70. On the issue of whether the subdivision of the suit land was done procedurally, both the plaintiff and the 1<sup>st</sup> Defendant claim that they were not aware of the subdivision as they neither authorized nor consented to it.
71. With regard to the petition, the 1<sup>st</sup> Defendant alleges that he was allocated land parcel No Chembe/Kibabamshe/424 by the Settlement Fund Trustees, paid the purchase price, got a discharge of charge but when he went to collect his title deed he realized that land parcel No Chembe/Kibabamshe/424 had been subdivided into land parcel No's Chembe/Kibabamshe/720 and 655.
72. It was also the 1<sup>st</sup> Defendant's case that he was registered as the owner of land parcel No Chembe/Kibabamshe/720 instead of land parcel No Chembe/Kibabamshe/424. The 1<sup>st</sup> Defendant produced a copy of the title deed for land parcel No Chembe/Kibabamshe/720 which shows that he was registered as the owner on 6<sup>th</sup> April 2001.
73. He also produced a copy of the letter dated 3<sup>rd</sup> September 2015 that he had written to the Chairman National Land Commission claiming that he had been allocated land parcel No Chembe/Kibabamshe/424 on 30<sup>th</sup> June 1999 by the Department of Land Adjudication upon making an application.
74. It is on record that the 1<sup>st</sup> Defendant was allocated the suit plot by the Settlement Fund Trustees in 1999 after the government sought to rectify the errors in the registration section. The Gazette Notice No 6862 dated 17<sup>th</sup> July 2017 by the National Land Commission lists Dr. Frank Kamunde Mwongera, Joyce Muthoni and La Marina Limited and the claimants of plot No Chemebe/ Kibabamshe/424. The same could not be heard due to this case that was pending in court.
75. The 3<sup>rd</sup> Defendant La Marina Limited who was a beneficiary of the subdivision Plot No 655 opted not to defend the case. It seems that it had lost interest in the suit land. The 1<sup>st</sup> Defendant stated that he has been in occupation since 1999, the plaintiff as was held Petition No 14 of 2013 was not in occupation and did not know what was happening in the suit land from 1978 to 2008 when she realized that there was a subdivision of the plot.
76. Section 22(2) of the *Land Registration Act* provides that :

“Upon the application of a proprietor of a parcel for the division of that parcel into two or more parcels, and authentication of the cadastral map, the Registrar shall effect the division by closing the register relating to the parcel and opening new registers in respect of the new parcels resulting from the division, and recording in the new registers all subsisting entries appearing in the closed register:”
77. This section was not complied with during the subdivision of the suit land. The plaintiff and the 1<sup>st</sup> Defendant who claimed proprietorship of the suit land were neither made an application for



subdivision nor were consulted when the subdivision was done. They testified that they were shocked when they visited the land office to register a discharge of charge and a caution.

78. The subdivision therefore was done unprocedurally, illegally without the consent of the proprietor hence it is null and void. I find that the 1<sup>st</sup> Defendant is the rightful owner of the suit land having found that the subdivision was done unprocedrally hence null and void.

79. 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 to be cancelled or amended if it is satisfied that any registration was obtained, made or committed by fraud or mistake.

80. Section 80 (1) of the [Land Registration Act](#), 2021 provides as follows:

“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 committed by fraud or mistake.”

81. Having found that the plaintiff failed to prove her case against the Defendants, the plaintiff’s case is therefore dismissed with each party bearing their own costs. I therefore make the following specific orders:

- a) The plaintiff’s suit and cross petition is hereby dismissed with each party bearing their own costs.
- b) A declaration is hereby made that the reparcellation and sub-division of Title Number Malindi/Chembe Kibabamshe/424 into two (2) parcels Title Number Malindi/Chembe Kibabamshe/655 and Title Number Malindi/Chembe Kibabamshe/720 was unauthorized and in utter violation of the petitioner’s rights under Article 40 of [the Constitution](#).
- c) A declaration is hereby made that the registration of Title Number Malindi/Chembe Kibabamshe/655 in the name of the 3<sup>rd</sup> respondent was in contravention of the petitioner’s rights under Article 40 and 64 of [the Constitution](#).
- d) An order is hereby made directing the Kilifi Land Registrar to cancel the reparcellation and sub-division of Title Number Malindi/ Chembe Kibabamshe 424 into to (2) portions Title Number Malindi/Chembe Kibabamshe/655 and Title Number Malindi/Chembe Kibabamshe/720.
- e) An order is hereby issued for the cancellation of Certificate of Title Number Malindi/Chembe Kibabamshe/655 and all the entries registered in the name of the 3<sup>rd</sup> Respondent.
- f) An order is hereby issued compelling the Kilifi Land Registrar to cancel all the entries made in the register sanctioning the recarcellation/sub-division of Title Number Malindi/Chembe Kibabamshe/424.
- g) An order is hereby issued compelling the Kilifi Land Registrar to issue a certificate of title over title number Malindi/Chembe Kibabamshe/424 in favour of the petitioner.
- h) An order of injunction is hereby issued prohibiting the 1<sup>st</sup> and 3<sup>rd</sup> respondents from effecting any transfer, charge, mortgage, or in any manner dealing with Title Number Malindi/Chembe Kibabamshe/655.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 7<sup>TH</sup> 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.

