



REPUBLIC OF KENYA



Katana v Karisa Chongo Mleka aka Karisa Mleko Chengo & 6 others (Environment & Land Case E005 of 2023) [2024] KEELC 6345 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6345 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E005 OF 2023
FM NJOROGE, J
SEPTEMBER 30, 2024**

BETWEEN

FREDRICK MWAMBIRE KATANA PLAINTIFF

AND

**KARISA CHONGO MLEKA AKA KARISA MLEKO CHENGO 1ST
DEFENDANT**

MWANAKOMBO KHAMIS RAMTU 2ND DEFENDANT

SHARON ATIENO 3RD DEFENDANT

MARIAM KHAMIS MOHAMED 4TH DEFENDANT

KHADIJA KHAMIS MOHAMED 5TH DEFENDANT

ELIAS WAMBUGU MUTHUI 6TH DEFENDANT

JACQUILINE WAMBUI MWANGI 7TH DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 20th July 2023 seeking the following orders:
 1. A declaration that the parcels of land plot No. Kilifi/Mbaraka Chembe/1110, 1111, 1188, 1189 and 1190 registered in the names of the 2nd, 3rd, 4th, 5th, 6th and 7th Defendants were fraudulently acquired;
 2. A mandatory injunction do hereby issue cancelling all subdivisions, (Plot No. Kilifi/Mbaraka Chembe/1110, 1111, 1188, 1189 and 1190) emanating from Plot No. Kilifi/Mbaraka Chembe/379;



3. A mandatory injunction do hereby issue compelling the Kilifi County Land Registrar to register and issue Fredrick Mwambire Katana, the plaintiff herein, with the original title deed to Plot no. Kilifi/Mbaraka Chembe/379;
 4. A permanent injunction restraining the defendants, their agents, personal representatives and/or any other person acting under their instructions from entering, remaining and/or interfering with the Plaintiff's occupation of plot no. Kilifi/Mbaraka Chembe/379;
 5. profits;
 6. Costs of this suit.
2. The Plaintiff's case is that he purchased six acres of all that parcel of land known as Kilifi/Mbaraka Chembe/58 from Lewa Chongo Mleka and Lwembe Chongo (both deceased) vide a sale agreement dated 10th September 1986; that he took possession of the suit property upon purchase and he has been in possession up to date. He averred that upon the death of Lewa Chongo Mleka and Lwembe Chongo Mleka, he instituted a succession cause with the help of the Public Trustee who caused the plot No. Kilifi/Mbaraka Chembe/ 58 to be subdivided into two for purposes of hiving of the six acres sold to the plaintiff thus produce the suit property herein and Kilifi/Mbaraka Chembe/378. It was averred that the plaintiff instituted suit ELC No. 192 of 2014 (OS) seeking to be declared the lawful proprietor and vide the judgment of 21st March 2023 he was pronounced as such, and the said judgment has not been appealed or reviewed. He further averred that upon embarking to register the decree issued by aforementioned determination, the plaintiff found that the suit property had been subdivided into various smaller portions being plot nos. Kilifi/Mbaraka Chembe/ 1110,1111,1188,1189 and 1190 registered in the names of the 2nd, 3rd, 4th, 5th, 6th and 7th defendants respectively to which title deeds were fraudulently issued between 19th April 2021 and 6th January 2022 during the pendency of ELC No. 192 of 2014 (OS).
3. Despite being duly served, the defendants did not enter appearance or file any document and the matter proceeded undefended with only the plaintiff testifying.
 4. PW1, Fredrick Mwambire Katana, the plaintiff, adopted his witness statement dated 20th July 2023 and produced as P. Exh 1-8 documents as set out in the list of documents of even date. He urged the court that the suit property now subdivided into 5 portions be reinstated and the subtitles cancelled. He added that the land has trees that he used to harvest coconuts, mangoes, lemons etc. of about Kshs. 100,000 per year in value and sought compensation from the year 2021.

Disposition

5. The Plaintiff filed submissions upon the close of his case. I have considered the plaint, the evidence, the submissions and the authorities referred to. The issue for determination is whether the plaintiff has proved ownership of the suit property and whether the subsequent subdivisions should be cancelled. It is the plaintiff's burden to prove that he is the owner of the suit property.
6. Section 107(i) of the Evidence Act provides that: -

“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.”
7. In *Serraco Limited V Attorney General* [2016] eKLR the court stated as follows:

“The import of the above provision is that in civil cases it is the obligation of a party like the respondent in this case, who has personal knowledge of the circumstances of the case,



namely what became of the appellant's gunny bags, to give evidence on his own behalf and to submit to cross-examination. His failure to do so goes to strongly discredit the truth or credibility of his case."

8. The plaintiff's case is that he bought the land vide the sale agreement dated 10th September 1986 from Lewa Chongo Mleka and Lwembe Chongo Mleka both now deceased; that consequently he pursued the succession through the Public Trustee which led to ELC No. 192 of 2014. The suit property was then bestowed to the plaintiff through the judgment by the Hon. Lady Justice Odeny on 21st March 2023. I have perused the said judgment and noted that the court dealt with the issue of ownership and vested the same in the plaintiff. The said judgment has not been appealed against or set aside.

9. As regards cancellation of the titles of the five portions arising from the suit property I first have to determine whether the same were fraudulently acquired.

10. Further Black's Law Dictionary Ninth Edition at Page 731 defines 'fraud' as: -

"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment"

11. It is trite that the registration of a person and the certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property subject only to certain terms under which such title maybe impeached under certain circumstances which are set out in Section 26(1) of the Land Registration Act (LRA). Section 26 (1) of the LRA provides as hereunder:

"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.

12. The plaintiff is not registered as proprietor of Kilifi Mbaraka Chembe/379 at the moment. That parcel of land has been subdivided. The titles in respect of the five portions of land emanating from the subdivision of suit property are said to have been issued on diverse dates between 19th April 2021 and 6th January 2022. Evidence shows that the issuance of those titles occurred during the pendency of ELC No. 192 of 2014 (OS); judgment in that case was delivered on 21/3/2023. By that judgment and decree, the plaintiff herein was declared to have acquired parcel number Kilifi Mbaraka Chembe/379 for himself. Therefore, upon the determination of the suit, the suit property vested in the plaintiff. It is not clear then how the said subdivisions were done in favour of the 2nd- 7th Defendant. Despite service upon them the defendants never attended to this suit to demonstrate the process that was used to transfer the suit property to them. The suit is thus unopposed. In the absence of proof of a valid process of acquisition, I find that the said subdivisions were fraudulently acquired and thus the titles in respect of the same are null and void and are for cancellation. I therefore enter judgment in favour of the plaintiff and I grant him prayers nos A, B, C, D, and F thereof. I decline to grant mesne profits as the plaintiff never provided proof of the claim under that head.



13. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 30TH DAY OF
SEPTEMBER 2024.**

MWANGI NJOROGE

JUDGE, ELC MALINDI

