



**Mwagutta (Mwabendo Mwagutta (Suing as the Personal Representative of the Estate of Riziki Mwamwenda Chirima) v County Government of Kwale (Environment & Land Case 176 of 2021) [2024] KEELC 7358 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7358 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 176 OF 2021**

**AE DENA, J**

**OCTOBER 24, 2024**

**BETWEEN**

**MWABENDO MWAGUTTA ..... PLAINTIFF**

**MWABENDO MWAGUTTA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF RIZIKI MWAMWENDA CHIRIMA**

**AND**

**COUNTY GOVERNMENT OF KWALE ..... DEFENDANT**

**JUDGMENT**

1. Salim Mwabendo Mwagutta commenced this suit on 2<sup>nd</sup> March 2020 as the Personal Representative of his deceased wife Riziki Mwamwenda Chirima. The Plaintiff seeks the following reliefs; -
  - a. A declaration that the late Riziki Mwamwenda Chirima is the lawful and absolute owner of the Plot No. LR. No. 5007/118, CR. No.34206
  - b. An order of permanent injunction restraining the Defendant by itself, its servants and or agents from entering, remaining, trespassing, constructing and or dealing with Plot No. LR. No. 5007/118, CR. No.34206
  - c. Compensation and damage for trespass
  - d. Costs of this suit
  - e. Any other or further relief this Honourable Court may deem fit to grant
2. The Plaintiff avers he is the personal representative of the estate of the late Riziki Mwabendo Chirima (herein deceased) and who is the registered proprietor Plot No. LR. No. 5007/118, CR. No.34206 (herein the suit land). It is the Plaintiffs case that the Defendant entered the suit land, erected stalls and



built a road on a portion thereof without the consent of the deceased estate and compensation. That the estate has suffered and continues to suffer loss and damage.

3. The Plaintiff adopted his witness statement dated 3/2/2020 as his evidence in chief. He told the deceased never sold or leased the suit land. The Plaintiff produced a copy of the grant of letters of administration and the documents listed in the list of documents (PWExh 1-19) which included a copy of the title of the suit land. That the Defendant has built business stalls for letting on the suit property without the consent of the deceased or his consent on the contention that the suit property was government land which position he disagreed with. That the market and the suit property are separate and that the deceased was given the land lawfully. That PDP was approved by the Government and cannot be said to have been illegally issued. That the deceased did not obtain the suit property fraudulently but was issued with a letter of allotment and therefrom a lease for 99 years. That had the suit property been for public use then it ought to have been utilised for public purposes and not business premises. That it was also the deceased intention to build business plot thus her application for the suit premises.
4. The Plaintiff further told the court the deceased used to make annual payments of Kshs.4000 and collected her title in Nairobi. That they were never informed of the public participation session allegedly undertaken for development of the market. That the suit property does not feature in the Ndungu Report as having been issued irregularly. That it would be unfair to cancel the title the deceased applied for, issued and for which she had been paying for.
5. On cross examination the witness confirmed that the deceased paid Kshs. 27,110/= indicated in the letter of allotment vide receipt dated 30/4/96 though it was not a 1998 receipt. He was not aware of the requirement for limitation. On the name A.G. Kinyanjui appearing in the approved survey plan F/R No. 340/154 dated 16/7/98 PW1 clarified that he was a businessman and which was a mistake, that he only recognised the deceased. He conceded he did not produce a search to confirm ownership. On receipts produced by the Defendant he stated he was not aware that there were people paying space on the suit property. That there were no people on the ground until the new county government built the stalls. On re-examination the witness clarified that approved survey plan F/R No. 340/154 dated 16/7/98 refers to two plots.

### **Defendants Case**

6. The suit was defended by the County Government of Kwale vide a Statement of Defence and Defence to Counterclaim dated 17<sup>th</sup> October 2022. The Defendant Plaintiff in the counterclaim prays for the following orders
  - a. A declaration that the title issued to the Defendant in respect of all of all that property Known as Plot No. LR. No. 2007/118, CR. No.34206 is illegal, null and void.
  - b. A declaration that any entry in the Lands registry transferring all that property known as Plot No. LR. No. 2007/118, CR. No.34206 is irregular and fraudulent.
  - c. An order directing the National Land Commission and the Registrar of Lands, its servants, agents and or employees to ensure the rectification of the Register by cancellation of all entries relating to the issuance of the title complained of in respect of the suit property.
  - d. An order directing the National Land Commission and the Registrar of Lands, its servants, agents and or employees to ensure the rectification of the Register by cancellation of all entries relating to the issuance of the title complained of in respect of all that suit property known as Plot No. LR. No. 2007/118, CR. No.34206 and rectify the same in all manners required so



as to ensure the intended objective and result of the Plaintiffs reinstatement and registration as the soler owner of the suit property.

- e. An order directing the defendant to demolish all buildings developments and any construction and nature that is present and/or of continuing on the suit premises.
  - f. Eviction of the Defendant, their servants, agents, proxies and or employees from the suit property.
  - g. An order directing the Defendant to deliver vacant possession of the suit property to the Plaintiff.
  - h. General Damages
  - i. Costs of and incidental to this claim
  - j. Further and/or any other reliefs as this Honourable Court may deem fit and just to grant.
7. It is the Defendants case that the suit land is Government Land. That according to the Physical Development Plan the suit property is within a designated market area and Bus Park. The same initially contained temporary structures where local traders paid monthly stall rent to the County Government. That the land was not available for allocation and the allocation and registration to the deceased was of no legal effect. That the allocation was obtained through fraud and misrepresentation since the deceased applied for it knowing it was government land. That plots alienated from government land is only issued through allotment letters and not title deeds. That if someone has title which contravenes the Physical Development plan they should apply for rectification thereof. That the road was built by KENHA pursuant to Physical Development Plan prepared by KENHA. That before the market stall were constructed the Defendant conducted public participation in 2018/19.
8. The Defendants state that title issued to the Plaintiff was acquired illegally, fraudulently and therefore null and void. The particulars were given as failure to follow procedure, the land being public land was not available for alienation thus fraudulently disposing the public of Kwale and the future generations of Kwale County the use and enjoyment of the suit property among others.
9. Kevin Bongo the County Marketing Officer incharge of trade testified on behalf of the Defendant as DW1. He adopted his witness statement dated 17/10/22 and produced in evidence the documents listed in the Defendants list dated 17/10/22 (DEx 1-3). In addition to the averments in the Defence & Counterclaim the witness informed the court that the traders requested the department to construct from them permanent stalls to enable them operate in safe environment. That public participation was undertaken and the tender floated. That is, it only after the entry of the contractor that the Plaintiff emerged claiming the suit land. That no one had claimed the suit property for a period of over 10 years when the traders had been going about their business. Referring to the Plaintiff bundle the witness testified there was no official search to support the Plaintiffs claim of ownership or any evidence they acquired the property long time ago. That any documents produced by the Plaintiff should be disregarded.
10. On cross examination DW1 conceded the land is registered. That the Development Plan is not dated and bore no approval remarks. That the receipt to the traders show that the land belongs to the person being paid. That he believed there is a title in the name of the Government of Kenya he had not produced it as part of his bundle. He conceded the Plaintiff name was not in the public participation report and the Plaintiff did not participate. That he could not confirm the authenticity of the receipt for Kshs. 27,110 neither could he confirm the suit land was government land. He conceded he had not presented to court any proof confirming the documents were not authentic or that the land does



not belong to the Plaintiff. He confirmed the receipts produced showed the traders were on the suit property since 2015 which was not 10 years.

11. The witness indicated on re-examination that if there was a grant in 1996 then the letter of allotment ought to have predated the grant since the allotment must come first. One cannot re-allote. That he obtained the PDP from the Physical Planning department. Had the Plaintiff appeared during the public participation forum she would have been given an opportunity to address the forum. Though the amounts tallied in the receipts and the letter of allotment the dates did not. It was possible to obtain receipts fraudulently.

### **Submissions**

12. Parties filed and exchanged their final submissions. The Plaintiffs submissions are dated 15/3/24. The Defendants submissions are dated 4<sup>th</sup> April 2024. The court has considered the submissions.

### **Analysis and Determination**

13. I have considered the pleadings of the parties, the evidence led in court both documentary and oral as well as the submissions filed by the parties. The following issues commend determination
  1. Whether the registration of the Plaintiffs as proprietors of the suit property is regular.
  2. Whether the Plaintiff is entitled to the reliefs sought
  3. Whether the Defendants are entitled to the prayers in the counterclaim
  4. Who should bear the cost of the suit and the counterclaim?

### **Whether the registration of the Plaintiffs as proprietors of the suit properties is regular.**

14. In my analysis of this issue I will also seek to address the question whether the suit land was available for allocation which to me will also answer to the legality of the Plaintiff registration. The Plaintiff claims that the suit land was lawfully and procedurally registered in the name of his wife now deceased. That the Defendants have unlawfully taken over the same by building market stalls without his consent or that of his wife on the basis that the land was public land having been set aside for public use. By way of the counterclaim the Defendants want the Plaintiffs title cancelled and the land reverts to the Defendant.
15. Section 107 of the *Evidence Act* (Cap 80) on the issue of "Burden of proof" states: (1,) 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.
16. The Plaintiff produced in evidence copies of Limited Grant of Letters of Administration AD Litem issued on 18<sup>th</sup> February 2020 and Death Certificate to confirm that he was properly before the court. Also produced was a copy of a Grant CR. 34206 to Riziki Mwamwenda Chirima for a term of 99 years from 1<sup>st</sup> January 1996. The Plaintiff title is under challenge by the Defendants who claim it is null and void. It is now established that where a title is being challenged then it is no longer sufficient to dangle title. The owner must demonstrate how they acquired the land.



17. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR emphasized the duty of the holder of an impugned title thus:-

We state that when a registered proprietors' root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which need not be noted on the register”

18. Justice Sila Munyao in *Daudi Kiptugen Vs. Commissioner of Lands & 4 Others* (2015) eKLR and which was also referred to by both parties persuasively further elaborated the above; -

In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.’

19. Section 26 of the *Land Registration Act* provides that:-

26 (1) 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.

Further it is trite that under section 23 of the Registration of Titles Act cap 281 (repealed) a title is sacrosanct and indefeasible and can only be challenged on the ground of fraud and misrepresentation

20. In further support of his claim the Plaintiff produced a Letter of Allotment dated 22<sup>nd</sup> January 1998 to Riziki M. Chirima the deceased. It is trite that a letter of allotment is just but an offer and does not confer title. A letter of allotment will only confer title once the conditions therein are fulfilled by the offeree and crystalize into the issuance of a title. My review of the letter of offer revealed that the deceased had to accept the offer in writing and pay the requisite charges totalling Kshs. 27,110/= PW1 produced a receipt issued by the Department of Lands dated 30/4/1996 for the various charges



tabulated in the letter of allotment totalling the said Kshs. 27,110/=. PW1 did not produce as an exhibit the formal acceptance of the offer. Even assuming the offer was accepted I noted the payments predated the letter of offer when it should be vice versa. On cross examination PW1 conceded the charges in the letter of allotment were paid vide a receipt dated 30/4/96 which did not match the year 1998 when the letter of offer was issued. PW1 had no explanation to offer for the disparity in dates. Additionally, DW1 indicated on re-examination that if there was a grant in 1996 then the letter of allotment ought to have predated the grant since the allotment must come first. The court respectfully agrees with this observation.

21. The court also noted stamp duty assessment at the top right-hand corner of the documents is dated 1/11/2008. But it is also strange that the Plaintiff states in his witness statement of the deceased thus 'That after acquiring the plot in 2004 she applied for Development Permission from the Council of Kwale. Application for Development was approved.' So why not the year 1998 or even 1996 but instead the year 2004 is given. It is also not clear from the grant produced whether the same was duly signed and issued by the Commissioner of Land the page overleaf is missing. This worries me in the absence of a search to confirm such title exists. Indeed, PW1 conceded he did not produce a search to confirm ownership.
22. It is also stated development approval was granted. Additionally, I have seen the said application for Development Permission to the Clerk Kwale Town Council dated 8/11/2004. It bears on its face a stamp inscribed 'Recommended & Passed' 8/11/2004. This drew my attention to the process of approval and grant of the same.
23. The application was made by the deceased under the provisions of the Physical Planning [Act No. 6 of 1996](#) (now repealed). Sections 30 to 33 is on Development permissions, applications and approval. The application is made under section 31 while section 32 enumerates the steps an application is subjected to. Section 33 states that a development permission is given in the prescribed form in the 5<sup>th</sup> Schedule. Therefore, the endorsement of the said stamp and within the same day considering the process in section 32 was again a pointer of the irregularities in this lease. I would not use the document to buttress the Plaintiff case that the Council recognised the lease by approving the development permission.
24. It has been submitted by the Plaintiff that there was no evidence the title was fraudulently acquired. I must reiterate that the provisions of section 26 (1)(b) above do not require proof of fraud. What needs to be demonstrated under this limb is that the title was acquired illegally, unprocedurally or through a corrupt scheme. For me all the issues pointed above raised eyebrows and required a convincing explanation which was not given by PW1. Clearly something was not adding up. The court is left with no option but to conclude that the lease was acquired unprocedurally.
25. On the above ground alone the court would declare the grant null and void under the provisions of Section 26 (1)(b) of the [Land Registration Act](#), nothing comes out of an illegality.
26. But having stated the above I will address the question whether the land was available for alienation. The Defendants case is that as per the Physical Development Plan the suit land was within a designated market area for the benefit of the public.
27. The Plaintiff stated in his examination in chief that the area set apart for the market was a different one. He did not however present a different physical plan or any evidence to show the said different site designated for the market. I think it is evident from these proceedings that going back to the year 2006 the suit property was a market. It prompted the filing of HCC No. 65 of 2006 Riziki Mwamwenda Chirima Vs Kwale Town Council. From the orders produced by the Plaintiff a 14 days injunction was issued stopping the Council from constructing sheds or structures of any kind. To me clearly the use as market area did not start with the new County Government but with the previous regime.



The Defendant is merely continuing what had been started by its predecessor. Evidence has also been produced of receipts of payments by the market users since 2015. While it is submitted on behalf of the Plaintiff that these receipts do not indicate the plot for which the payments were being made, the Plaintiff has pleaded at paragraph 8 (e) of the Plaintiff that the Defendant continues to collect revenue from stalls it has illegally constructed on the Plaintiff's land. The Plaintiff is bound by his pleadings.

28. Having made a finding that the grant herein was acquired irregularly I find no motivation to allow the Plaintiff's claim. Nothing comes out of an illegality See *Macfoy Vs. United Africa Limited* (1961) ALL FR 1169. Additionally, I cannot sanctify a title issued irregularly. The same must fail. The court is emboldened in this regard by the decision in SC Petition 8 (E010) of 2021 *Dina Management Limited Vs County Government of Mombasa & 5 Others* where the Supreme Court of Kenya pronounced thus; -

111. Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the Constitution.’

108. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to property. In the case of *Funzi Development Ltd & Others Vs. County Council of Kwale, Msa Civil Appeal No. 252 of 2005 (2014) eKLR* the Court Appeal which decision this court affirmed stated that; -

... A registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.’ Emphasis is mine.

### **Whether the Defendants are entitled to the prayers in the counterclaim**

29. A counterclaim has been raised by the Defendant. Based on the foregoing findings the counterclaim must prevail to the extent that the suit property shall revert and be used for the public purpose for which it was dedicated to and has continued to be in use. In this regard I find support in the case of *Adan Abdirahani Hassan and 2 Others Vs The Registrar of Titles and Others Nairobi Petition No.7 of 2012 (2013) Eklr* where the court stated; -

19. Section 75 of the repealed Constitution recognised the doctrine of public trust which applies to land set aside for public purpose. Such parcels of land are held by the Government in trust for the public and any purported allocation to individuals or legal persons cannot be said to fall under the purview of the protected property pursuant to the provisions of Section 75 of the repealed Constitution. It is true that under section 23 of the Registration of Titles Act cap 281, a title is sacrosanct and indefeasible and can only be challenged on the ground of fraud and misrepresentation. However, any alienation of land contrary to the provisions of section 75 of the repealed Constitution or the provisions of the Government Land Act or any other Act of parliament would be null and void ab initio.

20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that the Constitution



protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by the Constitution, he must show that he has followed the due process in acquiring that which he wants to be protected.

30. The court pursuant to Section 80 of the Land Registration Act is conferred with powers to order for rectification of a register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained irregularly. See *Falcon Global Logistics Co. Limited v Management Committee of Eldama Ravine Boarding Primary School* [2018] eKLR.
31. The Court of Appeal in Mombasa Appeal No. 98 of 2016 *Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties)* [2018] eKLR agreed with the trial Court that

The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.

32. The upshot of the foregoing is that the Plaintiff has failed to prove their case on a balance of probabilities and their case is dismissed. The court enters judgement for the Plaintiff in the counterclaim against the Defendant as follows; -
  - a. A declaration that the title issued to the Defendant in respect of all that property Known as Plot No. LR. No. 2007/118, CR. No.34206 is illegal, null and void.
  - b. A declaration that any entry in the Lands registry transferring all that property known as Plot No. LR. No. 2007/118, CR. No.34206 is irregular.
  - c. An order directing the National Land Commission and the Registrar of Lands, its servants, agents and or employees to ensure the rectification of the Register by cancellation of all entries relating to the issuance of the title property known as Plot No. LR. No. 2007/118, CR. No.34206
  - d. An order directing the National Land Commission and the Registrar of Lands, to rectify the Register by cancellation of all entries relating to the issuance of the title complained of in respect of all that suit property known as Plot No. LR. No. 2007/118, CR. No.34206 and rectify the same in all manner required so as to ensure the intended objective and result of the Plaintiffs reinstatement and registration as the sole owner of the suit property.
  - e. An order directing the Defendant to deliver vacant possession of the suit property to the Plaintiff within 90 days of this judgement.
  - f. Each party to bear its own costs on both the main suit and counterclaim

Orders accordingly.

**JUDGEMENT DATED SIGNED AND DELIVERED THIS 24<sup>TH</sup> DAY OF OCTOBER 2024.**

**A E DENA**

**JUDGE**

Ms. Okumu for the Plaintiff

Ms. Kinuva for the Defendants

Asmaa Maftah-Court Assistant

**HON. LADY JUSTICE A.E DENA**

