



**Dalton (Suing as the executrix of Estate of Elizabeth Chepkemboi Dalton (Deceased) v Koi  
(Environment & Land Case 78 of 2017) [2023] KEELC 847 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 847 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 78 OF 2017  
MAO ODENY, J  
FEBRUARY 16, 2023**

**BETWEEN**

**HELLEN CHELEL DALTON (SUING AS THE EXECUTRIX OF ESTATE OF  
ELIZABETH CHEPKEMBOI DALTON (DECEASED)) ..... PLAINTIFF**

**AND**

**ANDERSON KAZUNGU KOI ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 4<sup>th</sup> April 2017 the Plaintiff filed this suit against the Defendant seeking judgment against the Defendant for a declaration that the Defendant has no claim over the land parcel Gede/Mijomboni/905 and a permanent injunction against the Defendant over the suit property. In response, the Defendant filed an amended statement of defence and counterclaim dated 19<sup>th</sup> November 2018.
2. The Plaintiff's case was dismissed on 9<sup>th</sup> June 2022 for non-attendance and the court directed the Defendant to proceed with his counter-claim where he sought the following orders:
  - a. A declaratory order that sub-division of Gede/Mijomboni/156 yielding two plots 905 and 906 by the Plaintiff's late mother Elizabeth Chepkemboi Dalton was illegal, null or void ab-initio and the same be revoked and land restituted to the Defendant's deceased father Kazungu Koi.
  - b. General damages.
  - c. Costs.
3. The Defendant adopted his statement dated 28<sup>th</sup> July 2017 as evidence in chief and produced the list of documents as Dexh. 1-5 and another dated 19<sup>th</sup> November 2018 as Dexh. 6 and 7. The Defendant testified that his father passed on 26<sup>th</sup> March 1981 and when they went to the land registry, they were



- only issued with a copy of the title and green card. That there was no transfer, consent, valuation report or a sale agreement.
4. It was the Defendant's claim that his father Kazungu Koi, now deceased, was at all times the registered proprietor of land parcel Gede/Mijomboni/156 measuring approximately 4.8Ha. That until his demise, Kazungu Koi did not sell the said land to anyone and further that neither the Defendant nor his family were aware of any such transaction.
  5. PW1 in the counterclaim stated that after the demise of his father, the Plaintiff illegally and fraudulently obtained original title for Gede/Mijomboni/156 which she later subdivided into two portions, the suit property herein and Gede/Mijomboni/906. Further that the Plaintiff caused the suit property measuring 3.65 Ha to be registered in her name; and the said Gede/Mijomboni/906 measuring 1.215 Ha in favour of the defendant's father.
  6. Counsel identified three issues for determination as to whether the subdivision of Gede/Mijomboni/156 was lawful, whether the counterclaim is merited and who is to pay costs and damages.
  7. Counsel cited section 45(1) of the *Law of Succession Act*; section 5(1) and 53 of *TPA* 1882; section 103(a) and (c) and 44 of *LRA* 201 and relied on the case of *Karanja Guchu v Sabera Wanjiku Guchu & 3 others* [2018] eKLR and urged the court to grant the orders as prayed.
  8. Counsel submitted that the counterclaim is uncontroverted by any evidence therefore unopposed and urged the court to grant damages as the amalgamation of the suit land will require a substantive amount which the Defendant is entitled to having been dragged to court by the Plaintiff.

### **Analysis and Determination**

9. The issues for determination are as to whether Defendant is entitled to the orders sought in the counterclaim and who should pay costs.
10. This matter proceeded undefended as the Plaintiff's suit was dismissed for non-attendance as the Plaintiff's counsel was served with a hearing Notice and called on the day of the hearing but neither attended nor asked an advocate to hold his brief.
11. The Defendant's case is that the suit property was originally Gede/Mijomboni/156 and registered in his father's name Kazungu Koi who died on 26<sup>th</sup> March 1981 and that the family does not know the circumstances under which the land was subdivided and a portion registered in the Plaintiff's name in 1992.
12. The Defendant challenged how the Plaintiff acquired the title which was in the deceased person's name and subdivided the same. The Defendant also told the court that when he went to the land registry he found that the file had only a green card and original title for plot 906, and there was no copy of a transfer duly signed by parties, copy of mutation form, relevant documents associated with subdivision, KRA copies of parties and their national identity card copies, Consent by the Land Control Board, Spousal consent and a copy of sale agreement among others and submitted that the transaction was fraudulent.
13. The Plaintiff had an opportunity to explain the root of the title but squandered that chance. When a title is challenged then the title holder must establish the root of the title.
14. Section 26 of the *Land Registration Act*, 2012 provides as follows: -

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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

15. In the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No 239 of 2009, the Court of Appeal held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

16. From a perusal of a copy of the green card produced by the Defendant, it is evident that the suit property was subdivided from Gede/Mijomboni/156 on 13<sup>th</sup> November 1992. The same green card shows that the original title had been registered in the name of Kazungu Koi on 6<sup>th</sup> June 1975. A copy of Kazungu’s death certificate reveals that he died on 26<sup>th</sup> March 1981. How the Plaintiff managed to subdivide and transfer the suit property after the death of the said Kazungu Koi is suspect.
17. I find that the subdivision and transfer were unprocedural and tainted with illegality.
18. I have considered the pleadings, the evidence and the submissions by counsel and find that the Plaintiff is entitled to the orders in the counterclaim and grant general damages of Kshs 500, 000/- for the amalgamation of the suit property to the original size plus costs of the suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

**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.

