



**Mlechwa & another (Suing as the legal representatives Samuel Mbogho Mshila) v Duwe (Environment and Land Appeal 21 of 2023)
[2024] KEELC 125 (KLR) (Environment and Land) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL 21 OF 2023**

NA MATHEKA, J

JANUARY 23, 2024

BETWEEN

ALLEN MWADALI MLECHWA 1ST APPELLANT

STANLEY BARISA MLEGHY 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES SAMUEL MBOGHO MSHILA

AND

GETRUDE SOKO DUWE RESPONDENT

JUDGMENT

1. The Appellants being aggrieved by the Judgement of Hon. G. Kithinji, Principal Magistrate sitting at Voi on 18th day of January, 2023 appeal on the whole Judgement on the following amongst other grounds;
 1. The Learned Magistrate erred in law and in fact, in failing to establish if the appellants were enjoined in the probate and Succession Cause filed by the Respondent with respect to the estate of the late Albert Duwe.
 2. The Learned Trial Magistrate erred in law and in fact, in failing to find that the said Albert Duwe was a Tanzanian national and hence incapable of inheriting or passing a good title to the respondent.
 3. The Learned Trial Magistrate erred in law and in fact, in disregarding customary laws pertaining to interstate succession among the Taita.



4. The Learned Trial Magistrate erred in law and in fact in failing to find that minutes of the elders pursuant to which the respondent was granted title to the suit property were not in the parcel file as part of the adjudication evidence and grant of title to the suit property to her was unfounded for the same reason.
5. The learned trial magistrate erred in law and in fact in disregarding the fact that the suit property was undivided and occupied in common by all the parties to the suit.
6. The Learned Trial Magistrate erred in law and fact in disregarding the number of years the appellants have lived on the suit property which is their ancestral land and proceeded to issue injunctive orders whose effect is the immediate displacement of the appellants and their entire extended family so as to render them homeless.
7. The Learned Trial Magistrate erred in law and fact in finding that land adjudication disputes had been closed by the land adjudication office while grievances lodged by the appellants therein had not been resolved.
8. The Learned Trial Magistrate erred in law in fact in disregarding criminal proceedings previously instituted between the parties which were unresolved prior to the filing of the trial suit, as well as probate and administration rights and obligations between the parties herein.
9. The Learned Trial Magistrate erred in law and fact in holding that the appellants/applicants failed to enjoin the land registrar and adjudication officers as parties to the suit subject of appeal.
10. That the Learned Trial Magistrate erred in law and in fact in making findings and inferences of fact on matters in which no submissions were filed by the respondents thus arriving at an erroneous judgement which is unsupported by pleadings and/or reasons for the judgment.
11. The Learned Trial Magistrate erred in law and in fact by not considering the Appellants' evidence thereby misdirecting himself as to who is the owner of the suit property.
12. The Learned Trial Magistrate erred in law and in fact by not considering the weight of the evidence tendered by the appellants and the submissions thereof.
13. The Learned Trial Magistrate erred in law and in fact by applying wrong principles of law in arriving at a judgement which is entirely erroneous.

2. The Appellants pray that;
 - a. That the Judgement of the Honourable court dated 18thJanuary, 2023 be set aside and the Respondent's counter claim be dismissed;
 - b. That this Honourable court be pleased to grant the appellants the reliefs sought in the plaint originating the suit the subject matter of this appeal;
 - c. That this Honourable court be pleased to make such other orders and grant such reliefs to the appellants as it deems fair and just to meet the ends of justice.
 - d. That the costs of the trial suit and this appeal be borne by the Respondent.
3. This court has considered the appeal. The appellants in their plaint dated 22nd March 2021 averred that at all material times, the Estate of Samuel Mbogho Mshila was the owner of Chawia/Wusi-Kaya/1295 which he inherited from his father in the 1930s, and was also buried therein upon his death on 27th July 2007. It was the appellants' case that the respondent's deceased husband Albert Duwe who was a Tanzanian national illegally settled on the suit property during the lifetime of their late father and a



dispute arose concerning the said occupation. Despite the dispute never being resolved, the respondent fraudulently and illegally caused the title of the suit property to be registered in her name thus depriving the appellants of their inheritance. The appellants prayed for judgment against the respondent for;

- a. An order declaring the Estate of the late Samuel Mbogho Mshila as the legal owner of the suit property being Chawia/Wusi-Kaya/1295.
- b. An order that the Taita Taveta County Land Registrar cancels the name of the defendant from Chawia/Wusi-Kaya/1295 and register the late Samuel Mbogho Mshila as the proprietor thereof.
- c. Costs of this suit and interests.
- d. Any other relief that this honourable court deems fit to grant.

4. The respondent mounted a defence and counterclaim against the appellants' claim and averred that she is the legal owner of the suit property having acquired it through transmission as the widow and administrator of the estate of Albert Duwe, the initial registered owner of the suit property. The respondent maintained that the suit property was not ancestral land belonging to anyone let alone the estate of Samuel Mbogho Mshila but community grazing land. It was the respondent's case that her late husband acquired the suit property after complying with the due process of land adjudication and registration was effected with no dispute filed during the said process. In her counterclaim, she urged the court to restrain the appellants from trespassing into the suit property and cultivating the same which was depriving her of loss of usage of about an acre of the suit property. She further urged the court to dismiss the appellants' case with costs.

5. The trial magistrate entered judgment in favour of the respondent on 18th January 2023 and found that the suit property went through the adjudication process and the first registered owner was Albert Duwe. The trial court concluded that though the appellants faulted the said process claiming it was manned with fraud, no proof of the same to the required standard was established. The court concluded that the respondent is the legal registered owner of the suit property and is entitled to peaceful, quiet and exclusive possession of the land and issued the injunction as prayed in the counterclaim. Dissatisfied with the said judgement, the appellants mounted an appeal against the said judgement which is now before this court for determination.

6. The respondent maintained that she inherited the suit property from her late husband Albert Duwe. She maintained that the suit property was community grazing land that was given to her late husband in her presence by village elders. She claimed that during the said ceremony, her late husband provided some local brew and a goat which was eaten by the elders. They proceeded to give him the suit property to build a homestead for his wife since she was from Wusi. The respondent reiterated that during the land adjudication and registration process that commenced in 1975, her husband was then picked and registered as the first proprietor of the suit property, the same was never challenged or objected to and later issued with a title deed.

7. The Adjudication Record for Adjudication Area Taita, Adjudication Section Wusi-Kaya dated 16th January 1976 (page 92 of the Record of Appeal) established that Parcel No. 1295 approximately 4.4ha was adjudicated to Albert Duwe Nosent; who was later issued with a title deed sometime in July 1982 as seen from the green card for Land Parcel Chawia/Wusi-Kaya/1295 (page 93 of the Record of Appeal). The Adjudication process also covered Mlegwa Mbogo who was adjudicated upon Parcel No. 697 on 7th April 1976 (page 58 of the Record of Appeal). From the Survey of Kenya Map of April 1980 (page 82 of the Record of Appeal), it can be seen that Parcel No. 1295 and Parcel No. 697 share a boundary, this boundary has been disputed by the late Samuel Mbogho Mshila and Albert Duwe. On 18th June



1986, the late Albert Duwe wrote to the Land Registrar Wundanyi complaining about his neighbor Mlegwa Mbogho for interfering with the suit property. On 11th August 1986, the Land Registrar Taita Taveta wrote to both parties informing them he would be paying them a visit to resolve the boundary dispute on the suit property.

8. The appellants have maintained that the respondent acquired title to the suit property fraudulently and that the suit property belongs to their late father. Their claim essentially challenges the adjudication process that led to the registration of the late Albert Duwe as the first registered proprietor of the suit property. The evidence adduced points to the fact that when the land adjudication process began in the adjudication section of Wusi-Kaya, Parcel No. 1295 was recorded in the name of Albert Duwe and Parcel No. 697 was recorded in the name of Mlegwa Mbogo. Mlegwa Mbogo started claiming the suit property after the process of adjudication was completed, there is no evidence whatsoever that he challenged the adjudication of the suit property to Albert Duwe during the process of adjudication. The evidence that was adduced was of a boundary dispute between the two which was being resolved by the then Land Registrar and not a dispute to the land adjudication process which the Land Committee would have resolved.

9. Section 26 (1) of the *Land Registration Act* states that a certificate of title can be challenged on the ground of fraud or misrepresentation to which the person is proved to be party to. Once fraud has been successfully proven, the court can base it as a ground for cancellation of a title. The Court of Appeal of Uganda held in *Katende vs Haridas and Company Limited* (2008) EA 173 that;

for a party to plead fraud in registration of land a party must first prove fraud was attributed to the transferee. It must be attributed either directly or by necessary implications that is, the transferee must be guilty of some fraudulent act or must have known such act by someone else and taken advantage of such act. Fraud can be participatory that is, the party participates in the fraudulent dealings. Fraud can also be imputed on a person, that is, when he or she was aware of the fraud and condoned it, or benefited from it or used it to deprive another person of his rights. All those people who actually participate in the fraudulent transactions and who had knowledge of it are privy and have notice of fraud.”

10. The appellants must have specifically pleaded fraud and proved it, since it is a question of evidence as stated in Section 109 of the *Evidence Act*. In *R. G Patel vs Lalji Makanji* (1957) EA 314 it was stated;

Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

11. The appellants did not adduce evidence that their late father Mlegwa Mbogo objected to the adjudication committee, complaining that Parcel No. 1295 was irregularly allocated to the late Albert Duwe, the respondent's husband. It is evident that the adjudication process began sometime in 1975 and the process of registration for Wusi/Kaya Adjudication Section was finalized sometime in 1982 when the title deed was issued and Parcel No. 1295 was registered in the name of Albert Duwe. The suit property remained registered in the name of Albert Duwe since 1982 until 2012 when the same was transferred to the respondent. During this time neither the appellants nor their late father placed a restriction against the title ownership of the suit property.

12. The respondent was consistent all through her evidence, that she was present in 1965 when her late husband was allocated a portion of the community grazing land by the village elders for marrying one of their own. The adjudication process began after her late husband had been allocated land by the village elders hence the suit property being recorded in his name and later registered as the first proprietor of



the suit property. The appellants' claim that their father settled on the disputed land in the 1930s has not been demonstrated, what has been established is that he was allocated Parcel 697 which is adjacent to the suit property. Albert Duwe remained unchallenged since his adjudication and registration as the proprietor of the suit property and as such there are no acts of fraud that have been proved were committed during the entire process. In *Mutsonga vs Nyati* (1984) KLR at page 426, it was held;

Allegations of fraud must strictly be proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities and it is a question of the Judge to answer"

13. The respondent is an elderly widow born in 1947 she was alive in the 1960s to have witnessed the suit property being adjudicated to her late husband Albert Duwe. She was granted a certificate of confirmation of a grant on 29th September 2011 to the estate of Albert Duwe, which enabled her to inherit Chawia/Wusi-Kaya/1295 and became the registered owner on 20th April 2012. The respondent's registration has been well established and as such she is entitled to quiet possession as the registered owner of the suit property. She has demonstrated that the appellants entered into the suit property and on 15th January 2021 she reported the same to Mwatate Police Station under OB No. 14/1/15/2021. The allegations by the appellants that they lived on the lower side of the suit land, while the respondent built on the upper side was not supported by any evidence.
14. It is the finding of this court that the particulars of fraud as enumerated in the appellants' plaint have not been proven to a degree of proof that ought to be higher than the ordinary proof of balance of probabilities required ordinarily. The process of adjudication and the subsequent registration of Albert Duwe as the initial registered proprietor has been well established and in the absence of the contrary, the respondent remains the registered owner of the suit property. Consequently, the Memorandum of Appeal dated 17th February 2023 is devoid of merit and the same is dismissed with costs to the respondent.
15. It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA EMAIL THIS 23RD DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

