



Mwanzia v Ngaluma (The Administrator of the Estate of Shadrack Ngaluma) (Environment & Land Case 2 of 2023) [2024] KEELC 7417 (KLR) (Environment and Land) (8 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7417 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 2 OF 2023
EK WABWOTO, J
NOVEMBER 8, 2024
(FORMERLY MOMBASA ELC CASE NO. 228 OF 2007)**

BETWEEN

ALI MWANZIA PLAINTIFF

AND

JEREMIAH MWARABU NGALUMA DEFENDANT

THE ADMINISTRATOR OF THE ESTATE OF SHADRACK NGALUMA

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 21st September 2007 which was later amended on 10th February 2022 seeking the following reliefs:-
 - a. A declaration that the plaintiff is the owner and entitled to possession of the land now registered as Kimorigho/Mboghoni/469.
 - b. An order be made directing the Defendant to transfer all that plot known as Kimorigho/Mboghoni/469 to the plaintiff, Ali Mwanzia, and in default the Deputy Registrar of the Honorable Court be directed to execute all such necessary instruments as would convey Plot No. Kimorigho/Mboghoni/469 to Ali Mwanzia.
 - c. An order to restrain the defendant from interfering with the plaintiff's piece of land comprised in Title No. Kimorigho/Mboghoni/469 which was irregularly issued.
 - d. Costs of and incidental to this suit.
 - e. Any other or further relief that this Court may deem fit and just to grant.



2. The suit was contested by the Defendants who filed a statement of defence dated 9th November 2022 denying the averments made in the plaint and sought for dismissal of the suit.

The Plaintiff's case

3. It was the Plaintiff's case that he was at all material times the owner of all that piece of land now known as Kimorigho/Mboghoni/468 together with all that piece of land now erroneously registered in the name of the defendant and known as Kimorigho/Mboghoni/469. It was averred that the land comprised in titles No. Kimorigho/Mboghoni/469 and Kimorigho/Mboghoni/468 belongs and has always belonged to him.
4. It was averred that on or about 25th August 2006 Shadrack Ngaluma obtained a title deed for a portion of the said piece of land and the same is now wrongfully registered in the name of Shadrack Ngaluma as Title No. Kimorigho/Mboghoni/469. As a result of the said irregularly acquired title deed, the said Shadrack Ngaluma severally trespassed onto the Plaintiff's land and harvested the Plaintiff's bananas and other crops despite the existence of a lawful court order on 14th July 2005.
5. It was pleaded that the registration of Shadrack Ngaluma as the proprietor of Kimorigho/Mboghoni/469 was fraudulent and the said fraud was confirmed in a survey report prepared by the County Government of Taita Taveta on 6th March, 2019.
6. It was further pleaded that even prior to the closure of the Kimorigho/Mboghoni adjudication process, the Plaintiff lodged a complaint with the Wundanyi District Land Adjudication and Settlement Office as witnessed by letters dated 26th February 2024 and 7th July 2006. In the process, the said Shadrack Ngaluma also claimed that Plot No. Kimorigho/Mboghoni/468 should have been registered in his name and not the name of the Plaintiff. This resulted in Mboghoni Adjudication Arbitration Board Case No. MBN/ARB/B/60/88 which claim the said Shadrack Ngaluma later withdrew.
7. It was also pleaded that the Plaintiff applied for a consent to institute court proceedings with regard to the issuance of the said plot No. Kimorigho/Mboghoni/469 to Shadrack Ngaluma vide a letter dated 19th July 2006 and by a letter dated 28th September 2006, the District Land Adjudication and Settlement Office indicated that such a consent was not necessary as by that date a certificate of finality of the said adjudication process had already been issued.
8. It was averred that the Defendant and his family have never lived on the suit property neither do they have any relatives nearby while the Plaintiff family has from time immemorial lived on the said property 468 and 469 since it belonged to the Plaintiff and the family. It was also averred that the Plaintiff is holding the title deed for the said portion 469 as a trustee of the Plaintiff.
9. During the hearing of the suit, only the Plaintiff Ali Mwanzia testified as PW1 and the sole witness in the matter. He relied on his witness statement dated 7th November, 2018 and bundle of documents dated 17th January 2024 in his evidence in chief which demonstrated the Plaintiff's interest, right of ownership, possession and stake in the property. He added that he seeks the court's assistance to recover his land Kimorigho/Mboghoni/469 and urged the court to grant the relief sought.

The Defendant's case

10. The Defendant filed a Statement of Defence dated 9th November, 2022. It was pleaded that Shadrack Ngaluma obtained title to the suit property legally and that the Plaintiff had trespassed on the Defendant's father's property and was also ordered by the Taveta Court Civil Suit Number 48 of 1995 Shadrack Ngaluma =Versus= Ali Mwanzia to pay the Defendant's father Kshs. 65,000/= as compensation for trespass and damages for the destruction of the Defendant's crops.



11. The Defendant averred that the dispute herein lies before the Adjudication and Settlement Committee of the Mbogholi Adjudication Section.
12. The Defendant denied the contents of the plaint and averred that the plaint does not attribute the alleged fraudulent registration of the suit property in the name of the Defendant's father to him nor to anybody whatsoever. The survey conducted on 5th March 2019 was conducted only in the presence of the Plaintiff and not any other party present, the survey was conducted on a different date and not the date as was communicated by the notice from the Land Registrar – Taita Taveta District and therefore the Plaintiff was the only person who participated in the process. There is no map sheet attached to the survey report as alleged to confirm the alleged findings.
13. It was also averred that throughout the adjudication process and before final allotment, the Plaintiff had ample time to lodge his grievance (it at all any) before the committee of the Kimorigho/Mbogholi Adjudication Section as constituted at that time as per the *Land Consolidation Act*. It was further averred that the Plaintiff neither lodged any objection to the Committee after the Record of Existing Rights had been published as per section 17, neither against the publishing of the Adjudication register as per Section 26 of the act and any decision taken thereafter by the Adjudication Officer regarding the entitlement of the suit property was final. It was also averred that the fact that title to the suit property was issued sometimes in 2006 and the Plaintiff neither objected to the issuance until the Plaintiff's filed the present suit on the 19th November, 2021. The Defendant averred that the Plaintiff's claim to the suit property has since been extinguished by the lapse of 12 years after the first registration.
14. The Defendant pleaded for dismissal of the Plaintiff's suit with costs.
15. Save for filling the Statement of Defence, the Defendant did not tender any evidence neither did he participate during the hearing and this court closed his case in view of his absence and the parties were directed to file written submissions.

Submissions

16. The Plaintiff filed written submissions dated 16th October 2024. No written submissions were filed by the Defendant. The Plaintiff submitted on the following issues:-
 - a. Should a declaration issue that the Plaintiff is the owner and entitled to possession of the land now registered as Kimorigho/Mbogholi/469.
 - b. Should an order be made directing the Defendant to transfer all that plot known as Kimorigho/Mbogholi/469 to the Plaintiff, Ali Mwanzia and in default the Deputy Registrar of the Honourable Court be directed to execute all such necessary instruments as would be directed to execute all such necessary instruments as would convey Plot No. Kimorigho/Mbogholi/469 to Ali Mwanzia.
 - c. Should an order to restrain the Defendant from interfering with the Plaintiff's piece of land comprised in Title No. Kimorigho/Mbogholi/469.
 - d. Is the Plaintiff entitled to the costs of and incidental to the suit.
17. It was submitted that from the evidence on the record, it was clear that the Plaintiff was the owner of the parcel of land prior to the adjudication exercise wherein the Defendant misrepresented himself as the owner in the absence of the Plaintiff who was working in Nairobi. Had there be no such representation, the parcel of land would have been registered in the name of the Plaintiff.



18. it was argued that from the evidence on record, it is clear that the registration in the Defendant's name actually happened after the parcel had been cancelled from the adjudication register at a time when the ownership dispute was before the relevant adjudication officials. It was submitted that the Plaintiff had proved ownership and right of possession.
19. It was contended that the Defendant was well aware that the land belonged to the Plaintiff but he knowingly and wilfully misrepresented himself as the owner with the intention of acquiring the property to the detriment of the Plaintiff. According to the Plaintiff, this wilful misrepresentation amounts to fraud and the adjudication officers acted on the misrepresentation and pursuant to P Exhibit 5, the parcel of land was cancelled from the adjudication Register. The case of Kimani =Versus= Njeri & 3 Others (Environment and Land Case No. 10 of 2022) (2023) KEELC 17771 (KLR) (8 June 2023)(Judgment) was cited in support.
20. The court was urged to grant the prayers sought.

Analysis and Determination

21. The court has considered the pleadings, evidence and written submissions filed and the following are the issues that arise for determination:-
 - i. Who is the legitimate and bonafide owner of Kimorigho/Mboghoi/469.
 - ii. Whether the Plaintiff is entitled to the reliefs sought.
22. The court shall now proceed to determine the said issues sequentially.

Issue No. (i)

Who he legitimate and bonafide owner of the suit property?

23. Article 40 of *the Constitution* of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows;

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
 - (b) in any part of Kenya.

24. The dispute before this court is that both the Plaintiff and Defendant have laid claim to the suit property herein. Where a court is faced with two competing interests over the same suit property, it must look into the root of ownership of the said property. This approach was well appreciated in the case of Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR. Equally in the case of Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which



claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

25. Equally it is not automatic that simply accepting titles as conclusive, incontestable and indefeasible or the concomitant argument that in the face of two or more competing titles, the first in time automatically prevails. It is not enough to wave an instrument of title or rest easy on the former rock of chronological primacy. What must now be established by he who would prevail is the solidity of the root of title. No flowery foliage, absent a sturdy and settled root speaking to a regular and legal process preceding the product that is the title, will avail the holder. That much is now the law pronounced in a lengthening line of authorities such as *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR and *Funzi Development Ltd & Others vs Country Council Of Kwale* [2014] eKLR, and by the Supreme Court in its authoritative and all-binding decision of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] eKLR.
26. As earlier stated and without appearing to be repetitive, a court when faced with two competing interests over the same land has to make an investigation so that it can be discovered who is the bonafide and lawful owner. This investigation must start at the root of the title and follow all processes and procedures that brought forth the interests of each party to the land. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one case solely on the title document that they hold. The Court of Appeal in the case of *Jacob Wekesa Bokoko Balongo vs. Kincho Olokio Adeya & another* [2020] eKLR held as follows on the importance of deciphering the historical acquisition of title:
- “The historical background to the acquisition of the title is as good as the title itself. How else, for example, can a person seeking to impugn or impeach the title on the grounds of fraud, misrepresentation or it having been obtained unprocedurally or through corrupt means do so without placing the title in its historical context? On the ground of indefeasibility of title, it was urged that the trial judge erred in failing to find that the appellant’s title to the suit land was indefeasible... In the persuasive case of *Fahiye & 2 others – v- Omar & 4 others* [201] 2KLR, 224, it was held that indefeasibility of title is not absolute particularly where the whole transaction was void. In *Milankumar Shah and 2 Others vs. City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05))*, it was correctly pointed out that: “The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of *Champaklal Ramji Shah & 3 Anors –v- AG & Anor, HCCC No. 145 of 1997*, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.”
27. The apex court also shed light on the relevance of a historical background analysis insofar as acquisition of title is concerned restating that the ownership of land whose title was not acquired regularly is not



protected under Article 40 of the Constitution on the protection of right to property. It held as follows in *Dina Management Limited vs. County Government of Mombasa & 5 others* (supra):

“Where the registered proprietor’s root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

28. Section 26 of the Land Registration Act, Act No. 3 of 2012, provides that a title which was acquired by way of fraud or misrepresentation, where a person is proved to be a party can be attacked. So too a title which was acquired illegally, procedurally or through a corrupt scheme. The said Section is drawn as follows: -

- “26. 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—
- (1)
 - (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.”

29. In the instant case, the Plaintiff adduced evidence to the effect that the suit property belonged to his late father Mzee Simon Lashigoni before the adjudication and settlement exercise in the area in or about 1980. During the demarcation in 1985 the Plaintiff was working in Nairobi when his brother Kadolo Lekwenina informed him that demarcation was ongoing in Taveta. P Exhibit 1 is in evidence that indeed a notice for the establishment of Mboghoni Adjudication Section was given in September, 1985. The Plaintiff travelled back only to find that the piece of land had already been demarcated and subdivided into two pieces known as Kimorigho/Mboghoni/468 and Kimorigho/Mboghoni/469. The parcel known as Kimorigho/Mboghoni/469 was erroneously allocated and registered to Mr. Shadrack Ngaluma after misrepresentation to the adjudication officers. Upon inquiry, the Plaintiff went to the land’s offices in Taveta to make a report and complaint on the said misrepresentation. He was advised to lodge a complaint to the Appeals Board. He lodged a complaint with the Appeals Board to cancel the allocation to Mr. Shadrack Ngaluma who coincidentally had also lodged a similar complaint for cancellation of the Plaintiff’s name in respect of parcel no. Kimorigho/Mboghoni/468. P Exhibit 2 (page 4 of the list of documents) is evidence that the Plaintiff, through his father who was alive by then, lodged a land dispute with the District Land Adjudication Officer, Taita/Taveta District. Mr. Shadrack Ngaluma’s appeal was subsequently withdrawn. P Exhibit 3 (page 7 of the list of documents) is a certified true copy of proceedings of 13th September, 1990 before the Taita-Taveta Land Arbitration Board Case No. MBN/ARB/B/60/88 in which the Defendant withdrew his appeal from the Arbitration Board. The Plaintiff’s appeal was also not heard but the Plaintiff went back to



his farming activities on parcel No. Kimorigho/Mboghoni/468. P Exhibit 4 (page 26 in the list of documents) is a certified true copy of proceedings and judgment in Taveta District Magistrate's Civil Suit No. 48 of 1995. In the judgment the court did not determine ownership of the property finding that "whether after the appeal is heard and the defendant succeeds or not still the plaintiff has to be paid compensation for the crops he had planted whether legal or illegal." P Exhibit 5 (page 29 in the list of documents) is a certified true copy of a letter dated 20th January, 2000 from the Taita-Taveta District Adjudication and Settlement Office to the Taita-Taveta District Adjudication Objections Tribunal in which a number of objections including the Plaintiff's Objection No. 469 were allowed and the parcel numbers "(P/Nos.) cancelled from the Adjudication Register (A/R)". P Exhibit 7 and P Exhibit 8 (pages 33 and 34 in the list of documents) are a letter dated 26th February, 2004 and a translation thereof from Kiswahili to English from Mndighiri Mkamate Family to the Taita-Taveta District Adjudication and Settlement Officer in evidence of efforts to settle the land dispute. P Exhibit 9 (page 36 in the list of documents) is a copy of orders granted on 13th July, 2005 in above mentioned Mombasa High Court Civil Appeal No. 106 of 2001 staying execution of the Magistrate's Court's judgment and ordering for status quo. P Exhibit 10, P Exhibit 11 and P Exhibit 12 (pages 38, 39 and 41 are a letter dated 7th July, 2006 from Mndighiri Mkamate Family to the Taita-Taveta District Adjudication and Settlement Officer, a translation thereof and a letter dated 19th July, 2006 from the Mndighiri Mkamate Family to the Taita-Taveta District Land Adjudication & Settlement Officer respectively, in evidence of the dispute in respect of the allocation of parcel No. Kimorigho/Mboghoni/469. On 25th August, 2006 the Plaintiff obtained a title deed. The Title Deed dated and given on 25th August, 2006 in respect of Title No. Kimorigho/Mboghoni/468 in the Plaintiff's name is produced as P Exhibit 13 (page 42 in the list of documents). By a letter dated 28th September, 2006 produced as P Exhibit 14 (page 44 in the list of documents) the District Land Adjudication/Settlement Officer gave the Plaintiff's clan a consent to institute civil proceedings. For the purposes of filing this suit, the Plaintiff carried out an official search of the disputed property. A copy of the certificate of official search dated 2nd November, 2006 is produced as P Exhibit 15 (page 45 in the list of documents). It shows that the Defendant was issued with a title deed dated 25th August, 2006 while the dispute was still pending before the adjudication officers. Later in 2013, while this suit was in court, the Plaintiff visited the parcel of land and found the Defendant and his family were farming on the land and they used force to deny the Plaintiff access thereto. The Plaintiff was assaulted. He made a report to the police and the Defendant was charged in Criminal Case No. 252 of 2013 in Taveta Principal Magistrate's Court. He was found guilty and fined Kes. 25,000/= . The Judgment in Taveta Principal Magistrate's Court Criminal Case No. 252 of 2013 is produced as P Exhibit 16 (page 50 in the list of documents). The Plaintiff caused a notice of intention to sue the Attorney General dated 5th April 2007 produced as P Exhibit 17 (page 50 in the list of documents) on grounds that the District Land Registrar, Taita Taveta has irregularly issued title deed No. Kimorigho/Mboghoni/469 when there was a dispute still to be decided. As exhibited by P Exhibit 18 (page 51 in the list of documents) there were proceedings and a judgment in Taveta Senior Resident Magistrate's Criminal Case No. 47 of 2009 wherein the Defendant was charged with creating a disturbance and theft of farm produce following a complaint by the Plaintiff. The court acquitted the Defendant by reason of the fact that there is a land dispute between the Plaintiff and the Defendant and so the court was not satisfied, beyond any reasonable doubt, as required in criminal trials that the offenses had been proved. The Plaintiff also lodged a complaint through the Deputy County Commissioner, Taveta upon which the Assistant County Commissioner was ordered to ensure peaceful co-existence. On 27th February, 2018 the Plaintiff visited his parcel No. Kimorigho/Mboghoni/468 only to find that the Defendant had earmarked the Plaintiff's banana plantation claiming it to be his and threatened the Plaintiff. The Plaintiff reported the incident through OB No. 17/27/18. The Plaintiff produced a survey report dated 6th March, 2019 as P Exhibit 16 (page 115 in the list of documents) whose findings show that there are anomalies between what is on the



ground and what appears on the map sheet. He has also produced a copy of the Mboghoni Registration Section Map (Diagram No. 7) as P Exhibit 17 (page 116 in the list of documents). And finally, in the Plaintiff's further list of documents, the Plaintiff produced a current official search dated 30th August, 2024 which shows that land parcel No. Kimorigho/Mboghoni/469 is still registered in the name of the Defendant. The search is produced as P Exhibit 18.

30. From the analysis of the evidence adduced herein, it is clear that Mboghoni Adjudication Section was established sometimes in September 1985. It was also evident that during the adjudication process land parcel No. Kimorigho/Mboghoni/468 and No. Kimorigho/Mboghoni/469 was registered in the name of the Plaintiff and land Parcel No. Kimorigho/Mboghoni/469 was registered in the name of the Defendant. From the evidence that was tendered, upon registration of the suit property the Plaintiff filed a complaint and objection in the form of appeal with the Taita-Taveta District Adjudication Objections Tribunal. The Plaintiff's objection was allowed and from the Adjudication Register (A/R) the parcel No. Kimorigho/Mboghoni/469 was cancelled.
31. The Plaintiff produced a letter dated 28th September 2006 from the District Land Adjudication Officer which stipulated as follows:-

“Refer to your letter dated 19th July 2006 requesting for a consent to institute civil proceedings under Section 30(1) of the *Land Adjudication Act* Cap. 284 of Laws of Kenya. Please note that under the provision of Section 27(2) of the said Act, the Director of Land Adjudication signed and issued a certificate of finality on the 4th August 2006. You do not need consent to institute civil proceedings since Mboghoni is registered section, now under Cap 300, Registered *Land Act*.”

32. Hence therefore, the requirement for the consent to institute this suit from the Land Adjudication Officer was not necessary.
33. Section 109 of the *Evidence Act* provides as follows:-

“The burden of proof as to any particular fact is on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”

34. The Defendant did not controvert the testimony of PW1. From the analysis and weight of the evidence on record, the Plaintiff was able to demonstrate a good root of title to the suit property and in the circumstances, it is the finding of this court that the Plaintiff is the legitimate and bonafide owner of the Land Parcel No. Kimorigho/Mboghoni/469.

Issue No. (ii)

Whether the Plaintiff is entitled to the reliefs sought?

35. The Plaintiff is seeking several reliefs as pleaded in his amended plaint dated 10th February 2022. The court has already held that the Plaintiff was able to prove the root of title and also show that he is the bonafide and legitimate owner of the suit property.
36. The case of Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR the Court held that

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person



is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

37. Section 80(1) of the *Land Registration Act* comes into play. It provides: -

“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 omitted by fraud or mistake.”

38. Being guided by the aforementioned decision and provision of the law, this court is satisfied that the certificate of title held by the defendant was procured irregularly and as such it is impeachable and ought to be cancelled. The court equally finds that the other prayers are for granting.

39. In respect to costs the Court is granted discretion under Section 27 of the *Civil Procedure Act* to award costs. Evidently, costs usually follow the events unless special circumstances present themselves. The Plaintiff, herein has succeeded in making his case and getting orders as outlined above. The Plaintiff being the successful litigant is entitled to costs of this suit to be borne by the Defendant herein.

Final orders

40. In the end, it is the finding of this Court that the Plaintiff has successfully proved his case to the required standard and the Court enters judgment in favour of the Plaintiff as against the Defendant in the following terms;

1. A declaration is hereby issued that the Plaintiff is the lawful owner and entitled to possession of land parcel known as Kimorigho/Mboghoni/469.
2. An order is hereby issued cancelling the registration of Shadrack Mwarabu Ngaluma as the registered proprietor of land parcel known as Kimorigo/Mboghoni/469.
3. An order be and is hereby issued directing the defendant to transfer all that parcel known as Kimorigho/Mboghoni/469 to the Plaintiff, Ali Mwanzia within 45 days from the date of service of the Decree and in default, the Deputy Registrar of this court shall execute all the necessary instruments as would convey Plot No. Kimorigho/Mboghori/469 to Ali Mwanzia.



4. An order be and is hereby issued restraining the defendant from interfering with the suit property Kimorigho/Mboggori/469.
5. Costs of the suit are awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 8TH NOVEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Kabebe for the Plaintiff.

N/A for the Defendant.

Court Assistants: Mary Ngoira and Norah Chao.

