



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO.61 OF 2015**

**RIZIKI ABDALLA FENESI (suing as legal representative of the of estate of**

**ABDALLA SALIM FENESI (deceased).....PLAINTIFF**

**.-VS-**

**THE SUB-COUNTY COMM. MSAMBWENI SUB-COUNTY.....1<sup>ST</sup> DEFENDANT**

**ATHMAN MWAKAMORE BUNDO.....2<sup>ND</sup> DEFENDANT**

**VERONICA NGENDO MUTEMI.....3<sup>RD</sup> DEFENDANT**

**THOMAS KILONZO MUTEMI.....4<sup>TH</sup> DEFENDANT**

**THE DIRECTOR OF SETTLEMENT.....5<sup>TH</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....6<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....7<sup>TH</sup> DEFENDANT**

**COUNTY LAND REGISTRAR KWALE.....8<sup>TH</sup> DEFENDANT**

**THE CHAIRMAN DIANI LOCAL LAND COMMITTEE.....9<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....10<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff, Riziki Abdalla Fenesi, suing as the legal representative of the estate of Abdalla Salim Fenesi (deceased) instituted this suit by way of a Plaint filed on 6<sup>th</sup> April 2015. The Plaintiff is seeking for judgment against the Defendants jointly and severally for an order for rectification of the register by revoking all the fraudulent registration acts of the Defendants and reinstatement of the deceased as a sole proprietor of **LAND REGISTRATION NO. KWALE/DIANI SETTLEMENT SCHEME/196.**

2. The Plaintiff's case is that at all material times relevant to this suit, the deceased was the original local indigenous farmer of all that piece of land known **AS KWALE/DIANI SETTLEMENT SCHEME/196** which he had gathered, cleared the bush, developed and farmed before Diani Settlement Scheme was pronounced by the government for local indigenous farmers. That when Diani Settlement was created, the then Kwale District Commissioner (now falling under the Sub County Commissioner, Msambweni) was mandated to chair the Diani Local Lands Committee mandated to settle local indigenous farmers among them the deceased within Diani Settlement Scheme. The Plaintiff states that under the 1<sup>st</sup> Defendant's Chairmanship each village within Diani Settlement Scheme was permitted to select a village chairman, and the Plaintiff's village known as Ikwakwani appointed Ramadhan Mohamed (deceased) assisted by Mohamed Ali Gude (also deceased) as chairman and assistant chairman respectively.

3. It is the Plaintiff's case that the Chairman with the assistance of local elders identified local indigenous farmers on the ground who included the deceased and listed and forwarded their names to the 1<sup>st</sup> Defendant. According to the Plaintiff, Athuman Mwakamere Bundo, the 2<sup>nd</sup> Defendant herein, has never been a local indigenous farmer within Ikwakwani village but for unknown reasons was issued with a letter of offer/allotment in respect of the suit property in place of the deceased. The 2<sup>nd</sup> Defendant subsequently sold the suit property to Veronica Ngendo Kariuki, the 3<sup>rd</sup> Defendant herein who after conversion of the property from freehold to leasehold was registered as the lessee. That the 3<sup>rd</sup> Defendant sub-divided the land into plot **NOS.KWALE/DIANI/855, 856, 857, 858, and 859** and sold plot No.859 to Thomas Kilonzo Mutemi, the 4<sup>th</sup> Defendant, and retained the other plots in her name.

4. The Plaintiff avers that the Defendants colluded and fraudulently removed, deleted and/or destroyed the lawful area list comprising the local indigenous farmers among them the deceased and in place of the deceased settled and issued title ownership documents, to strangers such as the 1<sup>st</sup> Defendant. The Plaintiff avers that this violated the Constitutional rights of the deceased under Articles 47, 73, 75 and 232 of the Constitution.

5. The Plaintiff avers that although the record shows there are alleged sub-divisions, the same is only a disguise as the land on the ground has never been sub-divided and the Defendants in question have never accessed nor developed it. It is the Plaintiff's contention that it is the beneficiaries of the deceased who are in actual possession of the suit property without any interference from the Defendants. He adds that they farm the suit land and continuously harvest mangoes and coconut fruits from trees planted by the deceased many years ago. The Plaintiff avers that the deceased never sold the land to any of the Defendants and therefore urged the Court to grant the reliefs sought in the plaint.

6. The Honourable Attorney General filed a joint defence on 27<sup>th</sup> June 2016 for the 1<sup>st</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, & 10<sup>th</sup> Defendants in which they deny the Plaintiff's claim. In particular, they aver that they are not privy to the particulars of paragraphs 12, 13, 14, 15, and 16 and are not aware of the contents of paragraphs 17, 18, 19 and 20 of the plaint. They have denied the particulars of fraud enumerated in the plaint and further deny violation of any constitutional rights of the deceased. The 1<sup>st</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants state that no notice as required by law was served upon them and aver that the reliefs sought by the Plaintiff are neither available nor merited, and urged the Court to dismiss the Plaintiff's suit with costs.

7. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants were served with summons to enter appearance but failed to do so and upon request by the Plaintiff, interlocutory judgment was entered against them in default of appearance on 10<sup>th</sup> May 2017. They therefore did not participate in these proceedings.

8. PW1 Riziki Abdalla Fenesi adopted the contents of his witness statement filed together with the plaint and in which he repeats the contents of the Plaint. He produced the bundle of documents filed on 6<sup>th</sup> April 2015 as exhibits. The documents are the Green Card for **LAND PARCEL NO. KWALE/DIANI SETTLEMENT SCHEME/196** and Receipt No.3820634 (P.exhibit 1(a) and (b)); Green Card for sub-divisions of parcel **No.Kwale/Diani Settlement Scheme/196 To 855, 856, 857, 858 And 859** (P.exhibit 2); Grant dated 2<sup>nd</sup> March 2015, (P.exhibit 3); letter dated 4/11/13 from Chairman National Land Commission to District Land Registrar, Kwale (P.exhibit 4); letter dated 27/1/15 (P.exhibit 5 (a)) and receipt NO.534791 (P.exhibit 5 (b)); chief's letter dated 27/1/15 (P.exhibit 6) and certificate of death (p.exhibit).

9. The Plaintiff called two witnesses. Ramadhan Swaleh Mwatapha (PW2) told the Court that his village is known as Ikwakwani in Msambweni Sub-county, Diani Location, Kwale County and during demarcation Ramadhan Mohamed (deceased) was the Chairperson assisted by Mohamed Ali Gude (deceased) and participated among local indigenous elders in identifying local indigenous farmers. He stated that in their village, there was no one known by the name Athumani Mwakomere Bundo who was allocated **LAND REFERENCE NO. KWALE/DIANI SETTLEMENT SCHEME/196**. He further stated that only those who

were living on the land were allocated the land and included the deceased Abdalla Salim Fenesi. PW2 stated that the 2<sup>nd</sup> Defendant hailed from Tiwi and was not on the land. According to him, the 2<sup>nd</sup> Defendant obtained the suit land fraudulently. He added that he did not know if the land has been sub-divided. On being cross-examined by Ms. Kiti Counsel appearing for the Defendants represented by the Honourable Attorney General, PW2 stated that his land is away from the suit land and that the Plaintiff's father lived on the suit land since the 1970's.

10. Rehema Said Mwangore, PW3 also stated that she resides in Ikwakwani village, Diani Location, Mswambweni sub-county, Kwale County. She stated that she owns plots **NO.KWALE/DIANI SETTLEMENT SCHEME/198** which is near that claimed by the Plaintiff. She reiterated that during demarcation, the land was only allocated to those who were living on the land and included the late Abdalla Salim Fenesi (deceased). On being cross-examined, she stated that the adjudication committee invited them to their office to be given numbers for their respective plots.

11. At the close of the Plaintiff's case, the Honourable Attorney General did not call any witness and therefore closed their case. Both the Plaintiff and the attorney general filed written submissions.

12. In his submissions filed on 26<sup>th</sup> February 2018, the Plaintiff's Counsel reiterated the Plaintiff's case as stated in the Plaintiff and gave a summary of the evidence given. He also relied on some decided cases. It was their submission that the Plaintiff had proved her case on a balance of probabilities.

13. In their submissions the Attorney General submitted *inter alia* the Plaintiff is claiming ownership by being in possession of the land, but did not follow up with the land office in order to get a title to the land. They submitted that the Plaintiffs have not brought any evidence before the Court to prove that the 1<sup>st</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> Defendants committed any fraud and or colluded with the other Defendants to deprive the property of the Plaintiff in that they did not produce an alternative list which shows the deceased was fraudulently omitted, thus the Defendants cannot be made liable for the allegations of fraud.

14. The Court has considered the pleadings and the evidence on record. The issues arising for determination are:

**i. Whether the Plaintiff has proved the allegations of fraud against the Defendants**

**ii. Whether the Plaintiff is entitled to the prayers sought.**

15. From the documents produced, **LAND PARCEL NO. KWALE/DIANI SETTLEMENT SCHEME/196** was in the name of Settlement Fund Trustee as at 10<sup>th</sup> March 1992. The green card, which was produced by the Plaintiff as P.Exhibit 1 shows that the suit property was registered in the name of Veronica Ngendo Kariuki, the 3<sup>rd</sup> Defendant on 3<sup>rd</sup> September 1992 and a title deed issued on the same date. There was a change of user from freehold to leasehold and the property was surrendered to the government on 13<sup>th</sup> April 1993 which in turn granted a 99 years lease to the 3<sup>rd</sup> Defendant from 5<sup>th</sup> February 1993 before the land was subdivided into several plots. The Green card produced as P.exhibit 2 shows the registered proprietor of **PLOT NO.196** as at 18<sup>th</sup> June 1996 is the Government of Kenya.

16. The Plaintiff's case is that during the demarcation of Diani Settlement Scheme, the late Abdalla Salim Fenesi (deceased) was allocated **PLOT NO.196**. I note however that from the search produced as P.exhibit 5 (a), the District Land Adjudication and Settlement Officer, Kwale Msambweni confirms that at the time of demarcation, **Plot No.196** was recorded in the name of Athumani Mwakamole Bundo, the 2<sup>nd</sup> Defendant herein. There is no document showing that the suit plot was ever recorded in the name of the deceased, except the letter by the National Land Commission which was only written on 4<sup>th</sup> November 2013.

17. There is no doubt that the Suit Property herein was initially allocated to the 2<sup>nd</sup> Defendant before he transferred it to the 3<sup>rd</sup> Defendant who also sold a portion to the 4<sup>th</sup> Defendant. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants as the registered proprietors of the suit property are deemed to be the absolute and indefeasible owners of the suit property. Section 26(1) of the Land Registration Act provides that:

*“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 Court 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 grounds 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.”

18. Therefore on the face of it, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the absolute and indefeasible proprietors of the suit property. However, there are exceptions or instances when the said title can be challenged as provided by **section 26 1(1) & (b)**.

19. The Plaintiff alleged that during demarcation the land was originally given to the late Abdalla Salim Fenesi (deceased) as an indigenous local farmer. The Plaintiff alleged that the name of the deceased was fraudulently deleted and the land was given to the 2<sup>nd</sup> Defendant who in turn sold to the 3<sup>rd</sup> Defendant through fraud and connivance of the Defendants. He urged the Court to order for the rectification of the register by revoking all the fraudulent registration/acts of the Defendants and reinstate the name of deceased as the sole proprietor of land parcel no. **KWALE/DIANI SETTLEMENT SCHEME/196**.

20. The onus of proof was on the Plaintiff as provided by Section 107 (1) of the Evidence Act which provides:

*“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 these facts exist.”*

The Plaintiff has based his claim on the issues of fraud. The issue now for determination is whether the Plaintiff has proved his case and therefore entitled to the prayers sought in the Plaint. Since the Plaintiff has based his claim on allegations of fraud, he had the duty to prove the same on the laid down standard. In the case of **Railal Gordhanbhai Patel –v- Lalji Makenji (1957) EA 315**, the Court held that:

*“Allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond any reasonable doubts, it ought to be more than a balance of probabilities.”*

Therefore the Plaintiff herein had a duty to strictly prove each and every allegation of fraud that he has particularized in the plaint.

21. In his evidence, the Plaintiff has stated that the late Abdalla Salim Fenesi (deceased) was originally allocated the land. However, the Plaintiff did not produce any evidence showing that the suit property was ever in the name of the deceased. The documents produced by the Plaintiff clearly show that **PLOT NO.196** was recorded in the name of Athumani Mwakamole Bundo, the 2<sup>nd</sup> Defendant before they were eventually registered in the name of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The Plaintiff did not show the Court at what stage the property changed from the deceased to the 2<sup>nd</sup> Defendant before they were transferred to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. Although the Plaintiff alleges that the deceased was allocated the land in the 1970s the question that begs answers is why the deceased never took any action from the 1970s until his demise in 2001. There is also no explanation why the Plaintiff never took action from 2001 until 2015 when he filed this suit. There being no explanation for failure to take action in all those years, I find that the Plaintiff’s belated action was an afterthought. The Court finds that the Plaintiff is not entitled to the prayers sought in the plaint. The Plaintiff has stated that they are in occupation of the suit land and have been so for many years. That may be so but that alone is no reason to challenge the Defendant’s title in the manner sought. The Court cannot impeach the Defendants title as sought through these proceedings.

22. Having carefully considered the available evidence, the Court finds that the Plaintiff has failed to prove his case on a balance of probabilities. Consequently, the Plaintiff’s case is dismissed with costs to the 1<sup>st</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants.

It so ordered.

**Dated, signed and delivered at Mombasa this 31<sup>st</sup> day of May 2018.**

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**C. YANO**

**JUDGE**



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