



Mwaja & 5 others v National Land Commission & another (Environment & Land Case 100 of 2021) [2023] KEELC 16458 (KLR) (27 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16458 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 100 OF 2021
AE DENA, J
MARCH 27, 2023
FORMALLY MSA ELC NO. 9 OF 2018**

BETWEEN

**DAIMA NASSORO MWAJA 1ST PLAINTIFF
YUSUF ALI MWAHAMBWE 2ND PLAINTIFF
ABDALLA MWAKUTULA 3RD PLAINTIFF
NASORO SALIMU MPWATA 4TH PLAINTIFF
OMARI MOHAMED NGUNI 5TH PLAINTIFF
MOHAMED ATHUMANI MWABAZI 6TH PLAINTIFF**

AND

**NATIONAL LAND COMMISSION 1ST DEFENDANT
THE CHIEF LAND REGISTRAR 2ND DEFENDANT**

JUDGMENT

Introduction

1. By a plaint dated 22nd January 2018 the Plaintiffs seek for judgment against the Defendants jointly and severally for: -
 - a. An order and/or declaration that the Plaintiffs herein are the legal/beneficial/registered owners of the property known as LR. NO. KWALE/GALU KINONDO/670.
 - b. An order that the Honourable Court do adopt the determination by the 1st Defendant issued on 30th October, 2017 to the effect that all the titles held by Mr. Ebrahim Ali Awale and Dhanjal Properties Limited should be revoked and the land reverted to the Plaintiffs



- c. That an order that the Honourable Court do direct the Chief Land Registrar to issue a title deed for the 2.4 Hectares to the Plaintiffs as reflected in the Adjudication records.
- d. Costs of this suit and interest at Court rate,

Pleadings

2. The Plaintiffs aver in the plaint that LR. NO. Kwale/Galu Kinondo/670 (herein referred to as suit property) was registered on 15/11/1974 after payment of the requisite charges to Yusuf Ali Mwahambwe, Abdalla Mwakutala Nasoro, Salimu Mpwata, Omari Mohamed Nguni and Mohamed Athuman Mwabazi as owners in common of 1/5 undivided share. That the said entry was however crossed out by pen but no explanation for the same was made on the register.
3. It is averred that the property was then registered in the names of Ebrahim Ali Awale and Dhanjal Properties Limited without the Plaintiffs knowledge and authority. That the Plaintiffs lodged a complaint with the National Land Commission and upon being heard on the same, a determination dated 30/10/2017 was made in favor of the Plaintiffs. It is averred that the 1st Defendant directed that all the titles held by the said Ebrahim Ali Awale and Dhanjal Properties Limited be revoked and the suit property be reverted to the Plaintiffs by the 2nd Defendant as reflected in the adjudication register.
4. The 1st Respondent, National Land Commission did not respond to the suit though served.
5. The Chief Land Registrar entered Appearance through state counsel in the office of the Attorney General and filed grounds of opposition. The main ground raised was that 2nd Defendant did not participate in the proceedings of the 1st Defendant the subject of the determination delivered on 30th October, 2017. That the proceedings were the basis of the suit and the 2nd defendant ought not have been joined.
6. The suit was heard on 14/11/2022 *ex parte*. Mrs Waswa for the 2nd Defendant had informed the court on 23/9/22, 21/02/22 that in view of their main ground of opposition cited above, they would not participate in these proceedings. However, she stated that the 2nd Defendant was going to comply with any orders of the court pursuant to these proceedings.

Evidence

7. At the hearing Ms. Kyalo representing the Plaintiffs made an oral application to amend the name of the 1st Plaintiff by replacing 'Mwaja' with 'Mbwata' to read Daima Nassoro Mbwata, which leave I granted.
8. The 1st Plaintiff Daima Nassoro Mbwata testified on behalf of the Plaintiffs. She adopted her witness statement dated 22/01/2018 as her evidence in chief. She reiterated the averments in the plaint and in addition that the 2nd Defendant had failed to comply with the orders of the 1st Defendant. The Plaintiff produced a letter of authority to act on behalf of the Plaintiffs dated 22/01/2017 and a copy of the determination dated 30/11/2017 which were adopted as exhibits.
9. In addition, PW1 testified that during the hearing of the complaint before the 1st Defendant she was advised to file her claim in court because the land was her right. She prayed to the court to consider the recommendation of the 1st Defendant and grant her the right to the suit property.
10. With the above the Plaintiffs case was closed.



Submissions

11. At the request of Ms. Kyalo I made directions that the Plaintiff file submissions within days. On the date the matter was fixed for mention to confirm filing of the submissions Ms. Kyalo informed the court that the submissions were ready save that the office was experiencing problems with their printer and undertook to file the same by close of business that day. Counsel requested for a date for judgement and the court obliged. The submissions are not on record.

Analysis And Determination

12. I have considered the pleadings filed by the Plaintiff and the evidence adduced before court. The issue for determination is whether the Plaintiffs have a valid claim over the suit property and whether they are entitled to the reliefs sought.
13. The suit is largely undefended. However, it is trite that the burden of proof still lay on the Plaintiff to prove their case on a balance of probabilities. In the case of Susan Mumbi Versus Kefala Grebedhin; (Nairobi HCC NO. 332 OF 1993) Justice J. V. Juma had this to say; -

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”

14. The Court of Appeal in Mumbi M’Nabea vs David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in this jurisdiction stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

.....The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

15. The Plaintiff claim was that they are the legal owners of the suit property by dint of the same having been adjudicated to the family in 1974. That it was registered in the name of the 2nd 3rd 4th 5th and 6th Plaintiffs as owners in common each entitled to 1/5 undivided share. The Plaintiffs therefore had a duty to tender evidence before this court to prove the claim. The only documentary proof presented before court was the determination of the 1st Defendant dated 30th October 2017 Ref. Nlc/Chairman/Vol.XX/475 -Determination Of The Dispute In Respect Of Lr. No. Kwale/Galu Kinondo/670. The question that I posed to myself was whether the contents of the determination and which I read, would suffice for purposes of proving the Plaintiffs legal or even beneficial ownership of the property. My answer was in the negative. Why do I say so?



16. The first relief sought in the plaint was a declaration that the Plaintiffs are the legal/beneficial/registered owners of the property known as Lr. No. Kwale/Galu Kinondo/670, the suit property. It was expected that the beneficial ownership would be demonstrated through the history of the property from the time of adjudication. The adjudication search was never presented before this court. The purported green card allegedly showing the Plaintiffs registration and which is pleaded was not produced before this court though it appears to have been produced in the proceedings before the Commission. The nexus between the 1st Plaintiff and the rest of the plaintiffs in regard to the suit property is not detailed. To me it seemed that the court was expected to rely fully on the determination without its own benefit of reviewing the documentary evidence that was allegedly presented to the Commission.
17. In my view it behooved this court to review the documentation and test their veracity against the oral testimony and make its own determination. It was incumbent upon the Plaintiff to produce the documentary proof which they did not. In this regard I'm persuaded by the dictum of Onguto, J in the case of *Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others* [2015] eKLR where the court expressed itself thus; -

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property’
18. Guided by the above and this courts observations a foregoing with the material produced before this court I'm unable to declare the Plaintiffs as the legal/beneficial/registered owners of the property.
19. This court was also invited to adopt the determination by the 1st Defendant issued on 30th October, 2017 to the effect that all the titles held by Mr. Ebrahim Ali Awale and Dhanjal Properties Limited should be revoked and the land reverted to the Plaintiffs. In proof the Plaintiffs produced as part of their evidence a copy of the said determination by the 1st Defendant. PW1 informed the court that she indeed appeared before the 1st Defendant where she was also advised to present her claim to court. The first question that arose in my mind was whether a court faced with such a prayer to adopt a determination should merely oblige since a determination had already been made or the court must also apply itself on the determination and make its own judgement on whether the same would suffice. This is more considering that the determination is not under judicial review of the court. I reached the conclusion that this court is not a mere conveyor belt and should apply itself to adopt or not to adopt and I proceeded accordingly.
20. From the determination the 1st Defendant undertook the proceedings in respect of the 1st Plaintiff complaint on behalf of her family pursuant to powers conferred upon it by Article 68(c)(v) of *the Constitution* of Kenya 2010 and Section 14(4) (5) (6) (7) and (8) of the *National Land Commission Act* 2012 (herein the Act).
21. Article 67[2][e] of *the Constitution* set out the functions of the 1st Respondent which include initiation of investigations on its own initiative or upon complaint into present or historical land injustices and recommend appropriate redress. Article 68 (c) (v) of *the Constitution* provides for Parliament to enact among others legislation that will enable the review of all grants or dispositions of public land to establish their proprietary or legality. Consequently, The *National Land Commission Act* 2012 was enacted. At the outset therefore the mandate of the 1st Defendant as given in *the Constitution* is limited



to public land. By the time the complaint was filed before the 1st Defendant the suit property had already been alienated to the Ebrahim Ali Awale and Dhanjal Properties Limited as pleaded by the Plaintiff and as stated by the 1st Defendant in the award who I assume had the benefit of seeing the green card. There is no evidence mentioned in the award to show that the land was public land or was ever converted into such and neither is such evidence before this court.

22. The question of jurisdiction of the National Land Commission has been the subject of numerous judicial decisions. In the case of Mwangi Stephen Murithi Vs National Land Commission & 3 Others (2018) eKLR W. A. Okwany J on jurisdiction of the National Land Commission stated as follows:-

Jurisdiction of the National Land Commission.

17. The functions of the National Land Commission are provided for under Article 67 (2) (e) of *the Constitution* which stipulates that; these powers include: (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

Article 68 (c) (v) provides that Parliament shall enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality.

Article 61 (2) of *the constitution* classifies land in Kenya as public, community or private. Article 62 of *the Constitution* defines public land thus: -

“62. Public land is—

- (1)
- (a)) land which at the effective date was un-alienated government land as defined by an Act of Parliament in force at the effective date;
 - (b) (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
 - (c) land transferred to the State by way of sale, reversion or surrender;
 - (d) land in respect of which no individual or community ownership can be established by any legal process;
 - (e) land in respect of which no heir can be identified by any legal process;
 - (f) all minerals and mineral oils as defined by law;
 - (g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
 - (h) all roads and thoroughfares provided for by an Act of Parliament;



- (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
- (j) the territorial sea, the exclusive economic zone and the sea bed;
- (k) the continental shelf;
- (l) all land between the high and low water marks;
- (m) any land not classified as private or community land under this Constitution; and
- (n) any other land declared to be public land by an Act of Parliament—
 - (i) in force at the effective date; or
 - (ii) enacted after the effective date.”

18. Article 64 of *the Constitution* defines private land in the following terms: -

“64. Private land consists of —

- (a) registered land held by any person under any freehold tenure;
- (b) land held by any person under leasehold tenure; and any other land declared private land under an Act of Parliament.”

Section 14 of the *National Land Commission Act* provides: -

- (1) Subject to Article 68(c)(v) of *the Constitution*, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

19. Guided by the provisions of Articles 67, 68 (c) (v) of *the Constitution* and Section 14 of the Act, I find that that the 1st Respondent has jurisdiction to review all grants or dispositions of public land. The critical point however, is that the jurisdiction in this context extends only to public land as outlined above, or land that was previously public but was subsequently converted to private land. (emphasis is mine)

23. The court in the above case further dealt with the issue whether the National Land Commission has jurisdiction to revoke titles to land even where it finds, after an inquiry, that such title was irregularly or illegally acquired. The learned judge stated thus; -

34. It is the Petitioner’s contention that *the Constitution* of Kenya 2010 did not vest the 1st Respondent with power to revoke titles, grants or dispositions of land.



As I have already noted in this judgment, Article 67 (2) (e) of *the constitution* provides that the functions of the National Land Commission include “to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.”

Article 68 (c) (v) of *the Constitution* empowers Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety. The legislation anticipated in this context is the *National Land Commission Act* No. 5 of 2012. The Act provides at Section 14 for the review of grants and dispositions, pursuant to Article 68 (c) (v) of *the Constitution*. The said section outlines the procedure for the review of grants and disposition of public land to establish their propriety and legality. Where the Commission under Section 15 of the Act finds that the title was acquired in an unlawful manner, the Commission shall direct the Registrar to revoke the title.

35. I find that there is no provision empowering the Commission to revoke titles even where it is established that the same were unlawfully or irregularly acquired. The power to revoke title is vested in the Registrar and not the Commission which can only recommend. In this regard I fully associate myself with the sentiments of Odunga, J in the case of *Robert Mutiso Lelli and Cabin Crew Investments Ltd v National Land Commission & 3 others* [2017] eKLR. (emphasis is mine).

In any case, the provisions of Article 67 (2) of *the Constitution* cited above is clear and overrides the provisions of section 14 (4) of the act which provides that “after hearing the parties in accordance with subsection (3), the Commission shall make a determination.” *The Constitution* is the Supreme Law of the Land as is indeed espoused under Article 2 (4).

To the extent that the 1st Respondent rendered a determination as opposed to a recommendation, I find that the decision is tainted with illegality.

24. I’m completely persuaded by the above exposition and which I find applicable to the circumstances of the instant case. The suit property was private land and not public as observed earlier in this judgement. The Commission indeed made a determination and not a recommendation and went ahead to direct the Chief Land Registrar to issue the 2.4 Hectares to the Complainants. I refuse to sanitise the determination by adopting it in the present suit as invited by the Plaintiffs, it was given without jurisdiction and outside the law.
25. The upshot of the discussions of this court and findings is that that the Plaintiffs have failed to prove their case on a balance of probabilities and are also not entitled to the orders sought in this suit. The suit is hereby dismissed with no orders as to costs.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 27TH DAY OF MARCH, 2023

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Kyalo for the Plaintiff

No appearance for the 1st Defendants.



Mr. Mwakina -Court Assistant.

