



Ahmed & another v County Government of Mombasa (Environment & Land Case 203 of 2021) [2023] KEELC 18323 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18323 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 203 OF 2021**

NA MATHEKA, J

JUNE 21, 2023

BETWEEN

KHALID HADI AHMED 1ST PLAINTIFF

SALMA MBARAK ABUD 2ND PLAINTIFF

AND

COUNTY GOVERNMENT OF MOMBASA DEFENDANT

JUDGMENT

1. It is averred that at all material times to this suit, the 1st and 2nd plaintiffs were the joint registered owners of all that parcel of land containing by measurement nought decimal nought three four two (0.0342) hectares or thereabouts known as Title Number Mombasa/Block XVI/1539. That the plaintiffs have been in actual occupation of the suit property wherein they have developed structures and developments after obtaining the relevant approvals and a building permit from the defendant. The plaintiffs aver that prior to the resulting suit property being Title Number Mombasa/Block XVI/1539, there existed two separate plots being Title Number Mombasa/Block XVI/1300 and Title Number Mombasa/Block XVI/1 301 which properties was jointly registered in their names and were next to each other separated by a 5 Meters road. That in year 2019, they made an application to the defendant herein and the Ministry of Lands and Physical Planning to have the two properties being plot number 1 300 and 1301 consolidated and realignment of the 5 Meter road which application was made through the proposed road re-alignment and Consolidation form PPA 1 and they paid a total of Kshs. 101,000/= when lodging the Application. The plaintiffs add that their proposal was approved by all relevant offices involved as a result of which the Scheme Plan and the Registry Index Map were duly amended to reflect the new plot number being Title Number Mombasa/Block XVI/1539. That they duly obtained the building approvals for all the structures and developments on the suit property vide a building permit issued on the March 30, 2001. Despite the plaintiffs complying with all the requisite procedures as enumerated hereinabove, the defendant have unlawfully and without



any justification whatsoever commenced and still are demolishing their structures and developments on the suit properties. That the actions of the defendant's officers to demolish the suit premises can only be deemed as discriminatory thuggery as there is no justifiable reasons to the plaintiffs and the same was being done unlawfully and unprocedurally taking into consideration that they duly issued the plaintiffs with a building permit for the structures. That the defendant's officers was hell bent to frustrate and sabotage the plaintiff's business where they conduct their daily business operations on the suit property leading to colossal loss of business and irreparable damage which actions should not be condoned by this Court. The plaintiffs have suffered and will continue to suffer irreparable damages if the defendant is not stopped from carrying on its unjust and malicious actions to demolish the suit premises. The plaintiffs pray for judgment against the defendant for orders;

1. A permanent injunction do issue to the defendant, its servants and/or agents from demolishing or in any way interfering whatsoever with the plaintiff's possession and enjoyment of Title Number Mombasa/Block XVI/1539 and that the plaintiffs followed the requisite procedure for consolidation and road re-alignment and a declaration that the defendant's action of demolishing the structures on the suit property is illegal and unlawful.
2. Costs of the suit.
2. The defendant states that the suit property has always been a road reserve as such, the alleged title was acquired fraudulently and is therefore illegal. Particulars of fraud in acquisition of the Title on the part of the plaintiffs are causing the creation of a Title in respect of a public utility namely a road reserve. Facilitating by monetary terms or otherwise, the registration of public land in the name of the 1st and 2nd plaintiffs. Converting public property into private property without following due process.
3. The defendant denies the allegation that Plots No. XVI/1300 and XVI/1301 were consolidated with the approval of the defendant giving rise to Plot No. XVI/1539 and if at all there was any amalgamation done allegedly by or on behalf of the defendant, the process was contrary to the Physical Planning and Land Use Act and all applicable laws was therefore not sanctioned by the defendant. The defendant clarifies that the alleged amalgamation and attendant procedures if at all undertaken by or on behalf of the defendant were based on the misrepresentation on the part of the plaintiffs who at all material times misled the defendant into believing that the original titles were legitimate. The defendant denies issuing a building permit for construction on the suit property and that all procedures were adhered to prior to construction or development of the suit property and puts the plaintiffs to strict proof. The defendant clarifies that the plaintiffs were dully notified of the demolition.
4. This court has considered the evidence and the submissions therein. The plaintiffs are the registered proprietors of Land Parcel Mombasa/Block XVI/1539 (PEX-1) following the consolidation of two adjoining parcels of land separated by a five-meter road. The said parcels were Mombasa/Block XVI/1300 (PEX-3) and Mombasa/Block XVI/1301 (PEX-4) which were separately but jointly registered in the names of the plaintiffs. The defendant rejected the plaintiffs' title to the suit property and maintained that the same has always been a road reserve and the said title was acquired fraudulently and is therefore illegal. The defendants further denied approving the consolidation of Land Parcels Mombasa/Block XVI/1300 and Mombasa/Block XVI/1301. The defendant claimed that the said approval was based on misrepresentation on the part of the plaintiffs and was contrary to the Physical Planning and Land Use Act.
5. The plaintiffs made an Application for the Proposed Road Realignment and Consolidation of Plots 1300 and 1301 to the County Government of Mombasa, The Department of Physical Planning and Housing (PEX-5). On June 6, 2019, the plaintiffs paid Kshs 101,000 to the County Government of Mombasa for the consolidation (PEX-6 & 7). On 27th June 2019, the County Director of Planning



Mr. Salim Khalil forwarded the application to the relevant offices for approval with reference number TP.21/CONS/28/2019 (PEX-8). The Regional Surveyor Mr. Abbas Walid wrote back on June 28, 2019 indicating that his office had no objection to the consolidation (PEX-9). While on July 15, 2019, the National Land Commission County Coordinator Mr. Edward recommended the proposed consolidation and road re-alignment on the ground that the two parcels had the same registered owners (the plaintiffs) and that no public land will be lost as a result (PEX-10). The County Physical Planning Officer, Mr. Manyala as well had no objection to the consolidation and road realignment save for the same being part of public land earmarked for repossession (PEX-11). On July 19, 2019 (PEX-12) The Director Physical Planning approved the plaintiffs' application for consolidation. While the office of the Chief Land Administrator Mombasa, approved the proposal on September 3, 2019 and set out conditions to the plaintiffs inter alia submitting building plans for approval. The consolidation was completed with the amendment of the RIM, which reflected Mombasa Block XVI/1539, pursuant to the letter from the Director of Surveys Mr. Macharia dated November 18, 2020.

6. Be that as it may, the defendant has pleaded and particularized the acts of fraud and has pleaded that the suit property is public land and ought to be used as a road reserve, DW1 exhibited a DEX-1, which was meant to demonstrate that the suit property was earmarked for demolition as the suit property is a road reserve. The plaintiffs have chronologically outlined to court how they applied for the consolidation of their two parcels of land, by making an application to the defendant but how do they close up a road reserve. This is clearly with collusion with the respective offices. In my view, the defendant's allegations of fraud and misrepresentation are verifiable by the evidence adduced. This is a road reserve and hence public land and in the public interest is not available for acquisition. The Court of Appeal in *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia* (2020) eKLR held that;

Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities. No evidence was tendered to this end by the appellants. They did not call any witness from the land office to verify their allegations. The officials at the land's registry are the custodians of land records and would have been in a better position to explain the concerns raised by the appellants."

7. I now turn to the next issue, of whether the plaintiff had obtained building approvals for all the structures and developments on the suit property, which they allege were illegally demolished by the defendant. The plaintiffs have averred that on March 30, 2001, they were granted building approvals for all the structures and developments on the suit property. I have perused (PEX-20) which is a copy of a building permit issued on March 30, 2001 by the former Municipal Council of Mombasa, to the 1st plaintiff to construct a boundary wall on Plot 1300. I have also perused PEX-13, which is a Notification for the approval of an application for development permission dated July 19, 2019 which was issued by the defendant's director of Physical Planning and housing. In the said notification, the plaintiffs were allowed consolidation and road alignment on conditions, which included submitting the building plans to the said office for approval. The notification was followed by the letter dated 3rd September 2019, from the Ministry of Lands and Physical Planning, which approved the consolidation and road realignment subject to submitting the building plans to the said office for approval. From the evidence on record the only permit that the plaintiffs had acquired was back in 2001 for the construction of a boundary wall as evidenced by PEX-20. The defendant has also confirmed by way of documentary evidence that a notice of demolition was issued to the plaintiffs dated June 11, 2012. The plaintiffs have not established to the court that they submitted building plans after their land parcels were consolidated, to the relevant authorities for approval. Therefore, any construction whether it is of



a boundary wall or building structure that was undertaken by the plaintiffs on the suit property after the consolidation was not approved. I find that the plaintiff unprocedurally acquired consolidation of Plots 1300 and 1301 into the current suit property as the five meters road is public land and it is not clear where it was realigned to. This court cannot therefore permanently restrain the defendant from demolishing the plaintiffs' structures built on the road reserve. The plaintiffs have not proved that they acquired approval for any other construction on the suit property other than a boundary wall back in 2001. For these reasons I find that the plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST JUNE 2023.

N.A. MATHEKA

JUDGE

