



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTIONAL PETITION NO. 12 OF 2016

**IN THE MATTER OF: ARTICLES 20(1), 23(3) 40, 47, 232,
258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

IN THE MATTER OF: PLOTS NUMBERS 18, 35 AND 67

KAWALA “B” ADJUDICATION SECTION aka TITLE

NUMBERS MARIAKANI/KAWALA “B”/18, 35 AND 67

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS ENSHRINED IN THE BILL OF RIGHTS AND IN
PARTICULAR THE RIGHT TO ACQUIRE, POSSESS AND OWN PROPERTY**

BETWEEN

1. ANTHONY MTEKE MUCACHI

2. RICHARD KALUNDI MDACHI.....PETITIONERS

AND

1. ABDALLA NGOKA MBUDZYA

2. MANGALE DZOMBO NGOKA

3. TIMOTHY KOMBE NZAI

4. MODERN COAST EXPRESS LIMITED

5. THE DISTRICT LAND REGISTRAR, KILIFI

6. THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER, KILIFI

7. THE CABINET SECRETARY, MINISTRY OF LANDS & SETTLEMENT

8. DIRECTOR, LAND ADJUDICATION AND SETTLEMENT

9. CHIEF LAND REGISTRAR

10. THE ATTORNEY GENERAL.....RESPONDENTS

RULING

1. By an Amended Notice of Motion application dated 9th November 2016 and filed herein on 17th November 2016 pursuant to Articles 22 and 23 of the Constitution of Kenya(Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013, the two Petitioners seek the following:-

1. Spent

2. That this Court be pleased to issue a conservatory order restraining the Respondents by themselves, their employees, servants, agents, nominees, assigns or anyone claiming from or through them from entering into, planting, cultivating, sub-dividing, pledging, entering into, remaining in or in any other manner interfering with the Plaintiff's ownership and quiet possession and enjoyment of all those pieces or parcels of land known as Plot Nos 18, 35, 67 and Kawala B Adjudication Section, aka Title Numbers Mariakani/Kawala "B"/18, 35 and 67 pending the inter-partes hearing of this application and further pending the hearing and determination of the Petition herein;

3. That this Honourable Court be pleased to issue an order of inhibition, against the Respondents by themselves, their employees, servants, agents, nominees, assigns or anyone claiming from or through them, inhibiting the registration of any dealing with the suit properties herein, to wit, all those pieces or parcels of land known as Plot Nos. 18, 35, 67 and 312 Kawala "B" Adjudication Section, Title Nos Mariakani/Kawala "B"/18, 35 and 67, pending the inter-partes hearing and further pending the hearing and determination of this suit or further orders of this Court.

2. The Motion is supported by an Affidavit sworn by Anthony Mteke Mudachi and is premised inter alia, on the grounds that:-

a) The Petitioners are among several grandsons of the late Mohamed Mwakulu who initially owned about 640 acres of land in Mariakani but which has since been reduced to a mere 55 acres due to fraudulent acquisitions, encroachment and illegal sales of portions thereof;

b) Some of the land was wrongfully sold by family members to one Nazir M. Amjee but he failed to remit the entire purchase price of Kshs 50,000/=

c) The said Nazir M Amjee thereafter unlawfully and wrongfully purported to sell the said piece of land measuring six acres to one Khetshi Kantilal;

d) The said transactions were done in collusion with the Area Chief;

e) During the process of Land Adjudication in Kawala "B" the entire Mwakulu family was only allocated 39 acres which was adjudicated as Plot No. 10. Other portions of the family land measuring 17 acres were demarcated as Plot Nos. 18, 26, 35, 67 and 312 and were allocated to none family members;

f) The 1st Petitioner challenged the allocations before the Land Committee but his objections were dismissed upon hearing.

g) Being dissatisfied with the decisions of the Committee, the 1st Petitioner appealed to the Minister for Lands, Housing & Urban Development and was on or about 4th November 2013 summoned to appear before the District Commissioner Kaloleni. The Appeal proceeded but was

equally dismissed;

h) The said District Commissioner had no powers to preside over the Appeal since the Provincial Administration had ceased to exist upon the coming into force of the Constitution of Kenya, 2010;

i) Upon obtaining the Appeal proceedings, the 1st Petitioner discovered that the District Commissioner had backdated the proceedings to June 2013 whereas the Appeal had been heard on 30th October 2013; and

j) As a result of the foregoing, the Petitioners' right and title to the suit properties had been fraudulently, illegally, unlawfully and wrongfully interfered with by the Respondents in breach of their Constitutional right to property.

3. In response to the Petition and the Motion, the 1st and 2nd Respondents have taken out a Notice of Preliminary Objection dated 13th December 2016 in which they object to the application and the suit on the grounds:-

1) That the Application and the entire suit is frivolous, vexatious and an abuse of the Court process;

2) That the application grossly offends Section 9(3) of the Law Reform Act, and Order 53 Rules 2 of the Civil Procedure Rules and leave for the main motion(sic) ought not to have been granted in the first place;

3) That the suit is an abuse of the Court Process and brought in bad faith and also in a bid to frustrate our client(sic); and

4) That the suit should therefore be dismissed with costs.

4. Timothy Kombe Nzai, the 3rd Respondent on his part swore a Replying Affidavit filed herein on 27th March 2017 in which he challenges the authority of the Petitioners to bring this application and the Petition. It is the 3rd Respondent's case that the Petitioners have no grant of Letters of Administration or other legal authority to act on behalf of the estate of their father Mohamed Mwakulu who passed away in 1942.

5. It is further the 3rd Respondent's case that neither the Petitioners nor their father Mohamed Mwakulu(deceased) had any proprietary interest in the suit properties, in particular, Mariakani/Kawala 'B'/35 and 67 to which he is the registered proprietor.

6. The 3rd Defendants avers that the registration of the suit properties in his name followed an adjudication process that was carried out under the provisions of the Land Adjudication Act, Cap 284 of the Laws of Kenya and he now has a good and indefeasible title having been issued with Title Deeds after the Appeal process was completed on 8th December 2015.

7. The 3rd Defendant further denies that he sold the suit properties to the 4th Respondent and avers that he indeed instituted Malindi ELC Case No. 87 of 2016 against Vantage Road Transporters Ltd (4th Respondent) for forcibly entering into the suit properties. The said case is still pending determination.

8. On behalf of the 5th to 10th Respondents, the Honourable the Attorney General filed Grounds of Opposition on 9th August 2016 stating as follows:-

1. That due process was followed in the adjudication process which is the subject matter of the proceedings herein and transactions with regard to the suit premises were not conducted in

breach of the Constitution or any other law;

2. That the Respondents deny that the Petitioners' proprietary rights under the Constitution have been violated by the respondents herein;

3. That the Petitioners have not met the basic threshold for grant of the prayers sought in the Petition and Notice of Motion; and

4. That the Respondents deny that the Appeal under the Land Adjudication Act alluded to in paragraph 30 of the Petition was heard and determined without jurisdiction.

9. I have considered the issues herein and the respective submissions of the parties to this dispute. I have equally considered the law and the authorities as were placed before me by Learned Counsels acting for the parties herein.

10. It is apparent that despite the lengthy and detailed affidavits filed herein, the Petitioners main protest is the fact that when they appealed to the Minister for Lands Housing & Urban Development against the decision of the Land Adjudication Committee, he was summoned to appear before the District Commissioner, Kaloleni who heard his Appeal and proceeded to dismiss the same. It is his position that the District Commissioner had no powers to preside over the Appeal since the Provincial Administration had ceased to exist upon the coming into force of the Constitution of Kenya, 2010.

11. Further and in addition to the foregoing, they are aggrieved that, according to them, the said District Commissioner backdated the proceedings to June 2013 whereas the Appeal had been heard on 30th October 2013. As a result of the foregoing issues, the Petitioners aver that their right and title to the suit properties have been fraudulently, illegally, unlawfully and wrongfully interfered with by the Respondents in breach of their Constitutional rights to property.

12. From the material placed before me, it is apparent that the Kilifi Land Adjudication and Settlement Officer(the 6th Respondent) was charged with the duty of ascertainment and recording of rights and interests in parcels of land in an Adjudication Section known as Kawala 'B' in Mariakani within Kilifi County.

13. The 6th Respondent proceeded in this regard to prepare the register reflecting the individual interests as established on the ground by the demarcation officers pursuant to Sections 5(1) of the Land Adjudication Act, Cap 284 of the Laws of Kenya. That Section inter alia requires the Land Adjudication Officer to notify persons claiming an interest in land within an adjudication Section to make his claim to the recording officer, either in writing or in person. Any such person making a claim is required to point out to the demarcation officer or to demarcate or assist in the demarcation of the boundaries of the land in which he claims to be interested or to clear any such boundaries or any other line in the manner and before a date fixed by the demarcation officer.

14. It is evident that pursuant to his mandate as aforesaid, the 6th Respondent ascertained and recorded interest for Plot Nos 18, 35, 67 and 312 Kawala 'B' Adjudication Section and accordingly prepared a register. Being dissatisfied with the findings, the Petitioners initiated proceedings before the Land Committee as by law required. From annexures AMM-5, AMM7 and AMM 11 of the Petitioner's Supporting Affidavits, it is evident that the Appeals were filed against the outcomes for the aforesaid parcels of land.

15. In the said proceedings, the Petitioners alleged that the 5th to 10th Respondents colluded to give part of their land to strangers who were not part of their family. It is however evident that in their appeal to the Minister for Plots Nos 35 and 67(Annexure AMM 11), the 1st Petitioner conceded that the parcels of land were sold by his brother to one Nazir Amjee. Annexures AMM 1, AMM 2 and AMM 3 are indeed copies of the Sale Agreements regarding various Sections of the suit properties. The Petitioners do not deny that these portions were sold by family members or persons known to them. It is however their

claim that the transactions were not completed as the buyers never paid the full purchase price reflected in the Agreements.

16. It is therefore apparent that by this Petition, the Petitioners seek to undo inter alia, the transactions that were entered into prior to the adjudication process by various family members and/or their relatives. According to the petitioners, prior to the said process, the Mwakulu family owned approximately 640 acres in Mariakani. No evidence was however adduced to back the said claim and it is unclear if the Mwakulu family ascertained made any demarcations of that magnitude prior to the adjudication process for purposes of being ascertained by the Adjudication Officer.

17. In my view, prior to the adjudication process, no ownership interests had been ascertained or recorded. It was therefore incumbent upon all individuals claiming an interest in land to present their cases and interests to the demarcation officer for purposes of preparation of the register. In the event family members had sold portions of land to other bona fide purchasers whose interest were eventually captured in the register, the purchasers and the concerned Government Officers cannot be accused of collusion to deprive the family of their land when all along the family members were aware of and were in possession of documents evidencing the transactions. The Petitioners themselves identify their brothers Michael Mudachi and Shikuku Mwakulu as having sold portions of the land.

18. In any event, I note that the Applicants herein have brought this Petition on behalf of the estate of their grandfather Mohamed Mwakulu who is said to have owned the original 640 acres. The late Mohamed Mwakulu is said to have passed away in 1942 at the age of 70 years. As it were, the Applicants have not demonstrated to this Court that they have the requisite authority to bring these proceedings for and on behalf of the estate and/or their wider family. As it were, the Petitioners have not shown either that they have been appointed executors under any will left by their grandfather or that they are appointed as administrators of his estate.

19. In this regard, I am in agreement with the observations of Musyoka J *In the matter of the Estate of Veronica Njoki Wakagoto(2013) eKLR* where the Learned Judge stated that:

“.....the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles the estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

20. In my view therefore while the Petitioners may have been actuated by a genuine desire to preserve the estate of their deceased grandfather, they ought to have obtained the necessary authority before filing this Petition. Dealing with a similar matter in *Rajesh Pranjiran Chudasama –vs- Sailesh Pranjioran Chaldasama(2014)eKLR*, the Court of Appeal sitting at Mombasa states thus:-

“As far as he was concerned, he moved to Court by virtue of being a beneficiary for purposes of preserving the deceased estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession.”

21. As it were the Applicant have brought these proceedings in their personal capacities. They are not possessed of the requisite locus standi to do so. Consequently, both the Petition and the application are incompetent, bad in law and totally misconceived.

22. Both the Petition and the Application are accordingly struck out with costs to the Respondents.

Dated, signed and delivered at Malindi this 25th day of May, 2018.

J.O. OLOLA

JUDGE