



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC PETITION NO. 13 OF 2016

IN THE MATTER OF

A COMPLAINT LODGED BY ASILI JUANO DIDO & OTHERS

TO THE NATIONAL LAND COMMISSION FOR.....THE REVIEW OF GRANT OF LR. NO. 29207

AND

IN THE MATTER OF

THE INVESTIGATIONS AND INQUIRIES BY THE NATIONAL LAND COMMISSION ON

THE GRANT ISSUED TO STIMA INVESTMENT CO-OPERATIVE SOCIETY LIMITED

AND

IN THE MATTER OF

ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 40 47, 60 61,64, 67 AND 253 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

SECTION 23 OF THE REGISTRATION OF TITLES ACT, CAP 281 LAWS OF KENYA (NOW REPEALED) AND SECTIONS 26 AND 107 OF THE LANDS REGISTRATION ACT, 2012

AND

IN THE MATTER OF

SECTIONS 5, 6 & 14 OF NATIONAL LAND COMMISSION ACT, 2012

BETWEEN

STIMA INVESTMENT CO-OPERATIVE SOCIETY LIMITED.....PETITIONER

VERSUS

ASILI JUANO DIDO (*Sued on her own behalf & on behalf of 17 Others*).....1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

COUNTY GOVERNMENT OF LAMU3RD RESPONDENT

JUDGMENT

BACKGROUND

1. By their Petition dated 27th July 2016, Stima Investment Co-operative Society Limited (*the Petitioner*) prays for the following orders:
 - (i) *A declaration that the Petitioner is the bona fide proprietor of the suit property to wit L.R No. 29207 with an indefeasible title against the 1st Respondents and the whole world;*
 - (ii) *An order of injunction be issued restraining the 1st Respondent from claiming title to, transferring, alienating, disposing off, entering into, remaining on, interfering, wasting and/or dealing in any manner whatsoever with the suit property L.R No. 29207;*
 - (iii) *An order of prohibition be issued restraining the 2nd Respondent from investigating, inquiring, hearing and/or determining the complaint lodged by the 1st Respondent and/or any other complaint relating to parcel LR No. 29207;*
 - (iv) *An order of certiorari be issued to bring to this Court and quash any decision and/or findings of the 2nd and 3rd Respondents on the complaint lodged by the 1st Respondent over the suit property L.R No. 29207; and*
 - (v) *The costs of this Petition be borne by the Respondents in any event.*
2. Those prayers arise from the Petitioners' contention that it is the registered proprietor of the parcel of land known as L.R No. 29207 situated North of Lamu measuring approximately 27.26 Ha. having lawfully and legally purchased the same from one Ahmed Mohamed Omar.
3. The Petitioner avers that by a letter dated 8th April 2016, the National Land Commission (*the 2nd Respondent*) wrote to the Petitioner informing it that Asili Juano Dido who is sued in the Petition on her own behalf and on behalf of 17 other listed persons (*the 1st Respondent*) had raised a complaint alleging invasion of their land by strange people. By the said letter, the 2nd Respondent asserted that the land is located in an area where the local residents claim ancestral rights.
4. The Petitioner asserts that the 2nd Respondent has no jurisdiction or powers in respect of private property and cannot purport to conduct any investigations of whatever nature in respect of such property. Accordingly, the Petitioner avers that the 2nd Respondent acted ultra vires and contrary to **Article 67 of the Constitution** and **Sections 5 and 6 of the National Land Commission Act, 2012**.
5. The Petitioner is further aggrieved that by a letter dated 12th April 2016, the County Government of Lamu (*the 3rd Respondent*) wrote to the Petitioner declining to give it permission to develop the suit land on the basis that there were claimants on the same parcel of land and that it had received complaints from a group of people claiming ownership thereof.
6. The Petitioner is apprehensive that there is an imminent danger of the 1st Respondent and the 17 other listed persons interfering with, degrading, wasting and/or destroying the suit property. The Petitioner asserts that the complaint lodged by the 1st Respondent and the subsequent inquiries and investigations by the 2nd Respondent as well as the decision of the 3rd Respondent have violated its rights to quiet uninterrupted possession and enjoyment of the suit property and its right to fair administrative action as enshrined in **Article 47 of the Constitution**.
7. As it turned out, some two months before the Petition was filed, some 66 claimants including the 1st Respondent and the 17 people listed in the Petition had by a Plaint dated and filed on 12th May, 2016 instituted Malindi ELC case No. 110 of 2016 against the Petitioner and some 6 other Defendants being Ahmed Mohamed Omar (*1st Defendant*), Stima Investment Co-operative Society (*the 2nd Defendant*), National Land Commission (*the 3rd Defendant*), the Chief Land Registrar (*the 4th Defendant*), the Registrar of Titles (*the 5th Defendant*) and the Honourable the Attorney General (*the 6th Defendant*).
8. The 66 claimants in the said Malindi ELC case No. 110 of 2016 pray for the following:
 - (a) *A declaration that all that parcel of land situated at Hindi Magogoni, Lamu, Lamu County purportedly known as L.R No. 29207 and purportedly registered as Grant No. 60203 does not belong either to the 1st or 2nd Defendants but that the Plaintiffs' ancestral rights and interest are genuine;*
 - (b) *An order to issue compelling the 3rd and 4th Defendants to cancel the registration of the title known as Grant No. CR 60203 L.R. No. 29207;*
 - (c) *A permanent injunction restraining the 1st and 2nd Defendants either by themselves, their servants, agents and employees from evicting the Plaintiffs, or from fencing, trespassing into, interfering with or constructing any structure or fence that may prevent any of the Plaintiffs to access any part of the suit land as occupied and possessed by them;*
 - (d) *Costs of this suit; and*

(e) Any other relief.

9. The prayers by the 66 Plaintiffs are premised on their contention that at all times material, they are entitled to possession of the said parcel of land having lived therein and with each one of them occupying about 4 to 5 acres. The Plaintiffs aver that they have built their homes and developed the land which is their ancestral and community land.

10. The Plaintiffs accuse the 1st and 2nd Defendants of attempting to erect fences and other structures on the land and assert that those acts amount to trespass and interference with their rights to quiet enjoyment and possession of the suit land.

11. The two suits were consolidated while another related matter being Malindi ELC 109 of 2016; Ahmed Mohamed Omar -vs- Mwanamkuu Bahani Mbawahaji & 17 Others was struck out on 18th January, 2019.

THE PETITIONER'S CASE

12. The Petitioner called one witness in support of its case at the trial.

13. PW1 – Viola Odhiambo is the Petitioner's Legal Officer. She told the Court that the Petitioner acquired the suit property from Ahmed Mohamed Omar vide a Sale Agreement dated 10th July 2015 after undertaking due diligence and being satisfied of the ownership thereof.

14. PW1 testified that upon completion of payment of the purchase price, the property was transferred into the Petitioner's name. PW1 told the Court the Petitioner is in the business of investments and that they purchased the land to sell to their members. She testified that prior to the purchase, nobody else had claimed to be the owner of the land but when they moved in to sub-divide the same, the Respondents started claiming the land.

15. PW1 testified that the 2nd Respondent accommodated complaints from the 1st Respondent yet this was private land. The 2nd Respondent wrote a letter to the Petitioner on 8th April 2016 at a time when they were seeking approvals to develop the property. The approvals were denied with directions that the Petitioner first sorts out the issue with those claiming the land.

16. On cross-examination, PW1 told the Court she joined the Petitioner in 2018 and that the Petitioner had paid a sum of Kshs.107 million to Ahmed Mohamed Omar as the purchase price. She further told the Court she visited the site on 2nd October, 2018 and was able to access the land.

17. PW1 further testified that she was aware the seller had gone to Court in Lamu PM Misc. Application No. 4 of 2016 seeking to have access to his land. By the time the seller went to Court in Lamu on 2nd October 2016, the suit property had been sold to the Petitioner. PW1 told the Court the seller had gone to Court seeking security to enter the land.

18. PW1 told the Court she was unaware that the Respondents were on the land prior to the sale and or that the land had any structures, water tanks and towers. Due to the complaints, they have never taken possession of the land. They have also not developed the land because the 3rd Respondent declined to give them approval.

THE RESPONDENTS' CASE

19. On their part the Respondents called a total of two witnesses at the trial.

20. DW1 – Asili Juano Dido is one of Respondents and a resident of Mokowe in Lamu. She told the Court she was the 44th Plaintiff in ELC Case No. 110 of 2016 and sought to rely on Affidavits filed in both cases.

21. DW1 testified that they are the ones presently occupying the land and that Mohamed Omar who is registered as the owner lives in Lamu Island. DW1 told the Court she was 65 years old and that they had lived on the land ever since she was born. DW1 told the Court there are many graves on the land where their relatives including her own grandfather were buried.

22. DW1 testified that while she had seen a title deed in the name of Ahmed Mohamed Omar, they had never seen any surveyor on the land. She was however told that some people had come when she was away in hospital claiming they had been sent by the Government. Other people however stopped them from surveying the land.

23. DW1 further testified that Ahmed's title is fraudulent as he does not live on the land and they only knew him during this case. Nobody knows how he got the title and the area has no titles. DW1 told the Court they were not destroying the land but were using it for cultivation of crops for their consumption. The Government has also dug a borehole for them on the land for their use.

24. On cross-examination, DW1 testified that they went to see the Governor Lamu County when they saw people coming to the land.

25. DW1 testified that she did not know the size of the land and that it was big. Personally, she utilizes about 6 acres. She told the Court each of her 65co-respondents had 6 acres of land. DW1 further told the Court they had verbally asked the Government to give them the land. They have however not been issued with titles.

26. DW2 – Omar Kombo is also a resident of Mokowe. He told the Court he was born in 1968 and that he had always lived on the land.

His father died and was buried on the land. They plant Maize, Sim Sim, Mangoes and Cashew nuts on the land.

27. DW2 testified that the Government built them a water pan on the land in the year 1987 and that other than themselves, there were many people living on the land. None of them knew how title to the land was issued. They only saw some people come with policemen and then they started placing beacons on the land.

28. On cross-examination, DW2 told the Court he had never surveyed his portion of the land but he thinks it is 15 acres. He had since sold some 10 acres of his land although he had nothing to show that the land belongs to himself.

29. DW2 conceded that he was not one of the Claimants in ELC 110 of 2016 and that their representative DW1 had not included his name in the Letter of Authority.

ANALYSIS AND DETERMINATION

30. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

31. The Petitioner herein prays for a declaration that he is the bona fide proprietor of the suit property, to wit L.R No. 29207, Lamu with an indefeasible title against the 1st Respondent and the whole world. It also prays for an order of injunction to be issued restraining the 1st Respondents from claiming title to, transferring, alienating, disposing off, entering into, remaining on, interfering, wasting and/or dealing in any manner whatsoever with the suit property.

32. In addition, the Petitioner prays for an order of prohibition to issue restraining the 2nd Respondent from investigating, inquiring, hearing and/or determining the complaint lodged by the 1st Respondent and/or any other complaint relating to the suit property as well as an order of *certiorari* quashing the decision or findings of both the 2nd and 3rd Respondent in regard to the complaint lodged over the suit property by the 1st Respondent.

33. While the Petition had only named Asili Juano Dido (DW1) and some 17 other listed persons as the 1st Respondent, it did emerge that a group of some 66 claimants including those described as the 1st Respondents had also instituted Malindi ELC Case No. 110 of 2016 against the Petitioner and 5 other parties over the same subject parcel of land.

34. In the said ELC Case No. 110 of 2016 which was consolidated with the Petition, the 66 claimants who for these purposes I shall refer to collectively as the 1st Respondents pray for the following orders:

(a) A declaration that all that parcel of land situated at Hindi Magogoni Chandavee area a.k.a Mashundwani, Lamu, Lamu County purportedly known as L.R No. 29207 and purportedly registered as Grant No. 60203 does not belong either to the 1st or 2nd Defendant but that the Plaintiffs' ancestral rights and interests are genuine;

(b) An order to issue compelling the 3rd and 4th Defendants to cancel the registration of the title known as Grant No. CR 60203 LR No. 29207; and

(c) A permanent injunction restraining the 1st and 2nd Defendants either by themselves, their servants, agents and employees from evicting the Plaintiffs, or from fencing, trespassing into, interfering with or constructing any structure or fence that may prevent any of the Plaintiffs to access any part of the suit land as occupied and possessed by them.

35. As it turned out, the National Land Commission named as the 2nd Respondent did not file any response to the Petition. The County Government of Lamu (*the 3rd Respondent*) replied to the Petition vide a Replying Affidavit sworn by its Chief Officer, Department of Lands, Infrastructure, National Resources and Water filed herein on 6th September, 2016 but like the 2nd Respondent failed to call any witnesses at the trial.

36. Similarly, Ahmed Mohamed Omar, sued as the 1st Defendant in Malindi ELC 110 of 2016, the National Land Commission (*the 3rd Defendant*), the Chief Land Registrar (*the 4th Defendant*) as well as the Attorney General (*the 6th Defendant*) neither entered appearance nor filed any response to the claim by the 1st Respondents. These proceedings were therefore basically between the Petitioner and the 66 Claimants grouped together as the 1st Respondents.

37. As it were, there was no dispute that the Petitioner, an investment company registered under the Co-operative Societies Act, is presently the registered proprietor of the parcel of land described as L.R No. 29207 situated North of Lamu at Hindi Magogoni area. It had purchased the parcel of land measuring approximately 27.26 Ha from Ahmed Mohamed Omar (*the 1st Defendant* in ELC 110 of 2016) at a consideration of Kshs.107 Million.

38. In support of that position, the Petitioner produced a copy of a Sale Agreement executed between itself and the said Ahmed Mohamed Omar on 10th July, 2015. The title was subsequently transferred from the vendors name to that of the Petitioner on 18th December, 2015.

39. Testifying at the trial through its Legal Officer Viola Odhiambo, the Petitioner told the Court they had purchased the property for purposes of carrying out investment activities and sub-division to their members. They were however unable to utilize the land after the 1st Respondents invaded the same and wrote various complaints to the 2nd and 3rd Respondents who responded by initiating an inquiry into the

origins of their title and by denying them permission to develop the land.

40. The 1st Respondents do not deny initiating the said complaints. In a Replying Affidavit sworn on their behalf by their representative Asili Juano Dido and filed herein on 22nd February 2017, their representative avers at the relevant Paragraphs 5, 7, 8 and 11 thereof as follows:

5. That I, the 17 persons named and many others own, work and reside on portions of land that are now encompassed in the land registered as LR No. 29207. There are other families who reside in the same area and contiguous portions of land that were wrongly surveyed by the Petitioners or their predecessor in title for the purpose of alienation in complete disregard of our rights, title, interest and every conceivable rule of decency.

7. Further to the above, the survey of the land and the subsequent issue of title to the Petitioner's predecessor in title did not take into account the nature of the land, its category and ownership and/or management prior to its alienation and in the end, a void title was issued and purportedly transferred to the Petitioner. It is the 1st Respondents contention that the said portion of land and all the land contiguous to it were trust land held by the Lamu County Council and its successors in title for the benefit of the 1st Respondent and equally situated persons not named in these pleadings. These other parties are named in ELC 110 of 2016; Tamu Somobwana Bakari & 65 Others. The Petitioner is Defendant No. 2 in the said case.

8. Further to the above, the survey and acquisition of the land in question was corruptly done, precipitate a void title *ab initio* and it did not precipitate any valid title capable of being transferred to the Petitioner or at all. The Petitioner is an active participant and certainly not a victim of the greed and machinations of officers in the survey and settlement departments of the Government of Kenya. The latter conspired to unlawfully enrich themselves at the expense of the 1st Respondent and equally situated persons in the process of the survey while the Petitioner never bothered to visit the land to view its status prior to purchasing it. The petitioner is not a bona fide purchaser for value without notice; and

11. That it is correct that I made the complaint referred to in paragraph 6, 7 and 8 of the Petition. The complaint is valid in law. My advocate on record advises me that from the National Land Policy, the Constitution of Kenya and various Acts governing the ownership and management of land in Kenya, I am entitled to invite the 2nd Respondent to investigate the validity of any title. This is a Constitutional right I have derived from the knowledge by the people of Kenya of our unique circumstances of the rich and powerful disintitling the poor like the Respondents and likely situated persons of their land. The people of Kenya therefore enabled the 2nd Respondent to investigate any title. Investigating a title is not synonymous to managing or administering the land.

41. As it were, I did not think that the 1st Respondents could be faulted for referring whatever dispute they had with the Petitioner to the 2nd Respondent. Neither could the 2nd Respondent be faulted for receiving the complaint and making an inquiry thereon. The 2nd Respondent is duty bound to receive such complaints and to investigate them under **Article 67(2)(e) of the Constitution** and **Section 5(1)(e) of the National Land Commission Act**. Those provisions clearly give the 2nd Respondent powers to initiate investigations on its own initiative or on a complaint, into present or historical injustices and to recommend appropriate redress.

42. Under **Article 68(c) of the Constitution**, the Commission was also vested with the mandate, on its own motion or upon a complaint by the National or a County Government, a community or an individual, to review all grants and dispositions of public land to establish their propriety or legality.

43. In the matter before me, it is not disputed that the title exhibited by the Petitioner is a Grant. There is sufficient evidence that the land in question was once public land and that the same was granted to Ahmed Mohamed Omar by the then President before the same was transferred to the Petitioner. That being the case the 2nd Respondent was properly clothed with the mandate to investigate how the land was converted from public to private use.

44. Be that as it may, it was clear to me that the claim by the 1st Respondents that the suit property was their ancestral or community or trust land held by the 3rd Respondent for their benefit was nothing but a figment of their own imagination. **Article 63 of the Constitution of Kenya, 2010** states that all community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Under

Sub-Article (2) of Article 63 of the Constitution such land is defined as follows:

“(2) Community land consists of-

- (a) Land lawfully registered in the name of group representatives under the provisions of any law;
- (b) Land lawfully transferred to a specific community by any process of law;
- (c) Any other land declared to be community land by an Act of Parliament; and
- (d) Land that is –
 - (i) Lawfully held, managed or used by specific communities as community forest, grazing areas or shrines;
 - (ii) Ancestral land and land traditionally occupied by hunter gatherer communities; or

(iii) Lawfully held as trust land by the County Government, but not including any public land held in trust by the County Government under Article 62(2).”

45. The custodian of such unregistered community land is the County Government as set out under **Article 63(3) of the Constitution**. It was interesting to note that while the 1st Respondents were asserting that the land in question is held in trust for themselves by the 3rd Respondent, the 3rd Respondent had no such illusions. In its Replying Affidavit filed herein as aforesaid on 6th September, 2016, the 3rd Respondent makes it clear it had no claim to the land and that its surveyor had no objection to the proposal by the Petitioner to develop the same and for change of user subject to the issue of the ownership thereof being sorted out as between the Petitioner and the 1st Respondents.

46. Other than making sweeping statements that they had lived on the land for many years and that they had buried their relatives thereon, the 1st Respondents had nothing to show that they owned and or were entitled to the land. While they plead that they each owned 4 or 5 acres of the suit property, it did emerge during cross-examination that none of them had ever surveyed the purported portions and their representatives were unsure of the measurements of the land they claim.

47. While the 1st Respondents accused the Petitioner and its predecessor in title of obtaining registration of the suit property fraudulently and through corruption and collusion with Government

Officers, there was no such evidence of fraud or corruption as it did emerge that the land had been so registered as early as 1998 even though the title was issued much later.

48. Where one holds a title such as the one in possession of the Petitioner, **Section 26 of the Land Registration Act, Act No. 3 of 2012** provides as follows:

“26 (1). The certificate of title issued by the Registrar upon registration or to a purchaser of land upon 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 –

(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.”

49. Thus having acquired such a title it is presumed to be valid and it was therefore incumbent upon the parties disputing the same to demonstrate that it was acquired illegally or without complying with due process. The 1st Respondents have not done that and there was therefore no basis upon which this Court could hold that the suit property does not belong to the Petitioner.

50. Having been so registered as the proprietor of the land, **Section 24 of the Land Registration Act, Act No. 3 of 2012** provides as follows:

“24. Subject to this Act –

(a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

51. Accordingly, having been so registered as the proprietor of the land, the Petitioner did acquire proprietary rights and privileges thereon as against all other parties. While the 3rd Respondent denied in its response to the Petition that it had declined to grant the Petitioner permission to develop the land, it was clear from their letter dated 12th April, 2016 that they had declined to give approval to the Petitioner’s request on the purported ground that they had found Claimants on the land and that they had received a complaint from a group of people claiming ownership of the same parcel of land.

52. That was clearly an attempt to legitimise the claim by the 1st Respondents who as we have seen have no basis for their claim on the land. As it turned out, the 3rd Respondent failed to call any evidence to justify their position in blocking the Petitioner from developing the land and it was apparent that their decision was arbitrary and without any justification whatsoever.

53. In the premises, it was clear that there was merit in the Petition and that the Petitioners have proved their case to the required standard against the 1st Respondents as well as the 3rd Respondent.

54. Accordingly I hereby make orders as follows:

(i) A declaration is hereby made that the Petitioner is the bona fide proprietor of the suit property to wit L.R No. 29207 situated in Hindi, Lamu with an indefeasible title against the 1st Respondent and the whole world;

(ii) A permanent order of injunction is hereby issued restraining the 1st Respondents from claiming title to, transferring, alienating, disposing off, entering into, remaining on, interfering, wasting and/or dealing in any manner whatsoever with the suit property L.R No. 29207;

(iii) An order of certiorari is hereby issued bringing to this Court and quashing the decisions of the 3rd Respondent as contained in their letter dated 12th April, 2016 on the complaint lodged by the 1st Respondents over the suit property L.R No. 29207; and

(iv) The costs of this Petition shall be borne jointly and severally by the 1st Respondents and the 3rd Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 17TH DAY OF MARCH, 2022.

IN THE PRESENCE OF:

NO APPEARANCE FOR THE PETITIONER

MR. OLE KIRIA FOR THE RESPONDENTS

COURT ASSISTANT – KENDI

.....

J. O. OLOLA

JUDGE