



REPUBLIC OF KENYA



Mayungu Real Estates Limited v Dawagi Investments Limited & 4 others (Environment & Land Case 20 of 2021) [2022] KEELC 2799 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2799 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 20 OF 2021**

**JO OLOLA, J
JUNE 30, 2022**

BETWEEN

MAYUNGU REAL ESTATES LIMITED PLAINTIFF

AND

DAWAGI INVESTMENTS LIMITED 1ST DEFENDANT

DIRECTOR, LAND ADJUDICATION AND SETTLEMENT ... 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

CHIEF LAND REGISTRATION OFFICER, KILIFI 5TH DEFENDANT

RULING

1. By the Notice of Motion dated 22nd March, 2021 as filed herein on 24th March 2021, Mayungu Real Estates Limited (the Plaintiff) prays for orders that:
 4. This Honourable Court be pleased to issue an order of inhibition against registration of any dealings on Title Nos. Chembe/Kibabamshe/366 as issued by the 5th Defendant to the 1st Defendant on the 10th day of March, 2015 pending the hearing and determination of this suit.
 5. Further to prayers 4 above the 1st Defendant, its servants and/or agents be restrained by interim injunction from transferring, occupying, alienating, disposing, charging or engaging on any development whatsoever or in any way dealing with Title No. Chembe/Kibabamshe/366 pending the hearing and determination of this suit;
 6. The costs of this application be provided for.
2. The application which is supported by an affidavit sworn by the Plaintiff Company's Director Mehboob Hasham Ahmed is premised on the grounds, inter alia, that:-



- (i) The Plaintiff is the registered proprietor of a freehold interest in Title No. 366 situate in Chembe/Kibabamshe (“the suit property”);
 - (ii) On or about the 20th day of January, 1999 the Settlement Fund Trustees transferred to the Plaintiff the suit property at a consideration of Kshs.2,000/-. The suit property measures 2.6 Ha. and a Title Deed was issued to the Plaintiff on the same 20th day of January, 1999.
 - (iii) The Parcel File for the suit property was opened on 22nd December, 1986 and the Plaintiff has a good and indefeasible title to the suit property.
 - (iv) Ever since the Plaintiff was registered as proprietor of the property as aforesaid, it has been in quiet occupation and possession of the same without any interference from the Defendants herein or any other person and has been meeting all the requisite outgoings such as land rates and rent;
 - (v) On 10th March 2015, the Chief Land Registration Officer, Kilifi (the 5th Defendant herein) without due regard to due process, did cancel and expunge the Plaintiff’s title from their records;
 - (vi) The Plaintiff was never informed and/or given actual notice of any intention to revoke its title to the suit property and the Defendants have since made no communication to the Plaintiff in respect thereto.
 - (vii) On 10th March 2015, without due regard to due process, the 5th Defendant issued a Title Deed in respect of the suit property to the Settlement Fund Trustees;
 - (viii) The suit property having been owned privately was not Government land and was not available for allocation. Its purported allocation by the 2nd Defendant to the Settlement Fund Trustees was illegal and void ab initio;
 - (ix) The action by the Government of issuing title to the Settlement Fund Trustees and the 1st Defendant is not only illegal and against the law, it amounts to compulsory acquisition of the land;
 - (x) The Settlement Fund Trustees had no legal or proprietary rights in the suit property to pass to the 1st Defendant;
 - (xi) The purported issuance of the Title Deed in favour of the suit property violates Article 47(1) of *the Constitution* as no reason was given to the Plaintiff for the revocation of its titles; and
 - (xii) The Plaintiff is apprehensive that unless this Honourable Court grants an order of inhibition, there is the likelihood that the suit property will be interfered with and/or alienated by the Defendants.
3. Upon being served with the application and the suit herein, the 1st Defendant – Dawagi Investments Limited filed a Notice of Preliminary Objection dated 28th May, 2021 objecting to the suit on the grounds that:
- 1. The Plaintiff’s suit (not being a derivative action) has been instituted and is being prosecuted by a sole minority shareholder of the Plaintiff Company.
 - 2. The Plaintiff’s suit offends the provisions of Section 80(2) of the *Land Registration Act* No. 3 of 2012 Laws of Kenya;



3. The Plaintiff's suit is time barred under the provisions of Rule 30 of the National Land Commission (Historical Land Injustices Rules, 2016) Act;
 4. The Plaintiff's suit offends Article 67(2)(e) of *the Constitution* of Kenya as read in pari pasu with Section 5 of the National Land Commissions Act No. 5 of 2012;
 5. The Plaintiff is guilty of laches. Equity does not aid the indolent.
4. In addition to the objection, the 1st Defendant has also filed herein on 31st May, 2021 a Replying Affidavit refuting the averments made by the Plaintiff. In the said Replying Affidavit sworn on its behalf by its Managing Director Anthony Safari Kitsao, the 1st Defendant avers that the prayers sought in the Plaint cannot be maintained as against itself as they have the occupation, possession and ownership of the suit property.
 5. The 1st Defendant avers that it did purchase the suit property from one Changawa Mranzi Mulila for valuable consideration after conducting due diligence which established that the vendor had been issued with a letter of offer for the land by the Land Adjudication and Settlement Department on 18th August 2008. The vendor thereafter transferred his interest on the land by an Affidavit sworn on 30th June, 2014.
 6. The 1st Defendant asserts that it paid the loan outstanding for the land being Kshs.26,279/- and that on 28th September, 2014 the said Changawa Mranzi requested for a Discharge of Charge for the property. The same was discharged by the Settlement Fund Trustees and was transferred into the 1st Defendants name on 21st January, 2015.
 7. The 1st Defendant asserts that the Plaintiff was neither successful in convincing the National Land Commission in 2015 that its acquisition of the suit property was procedural/lawful nor did it convince the Commission to review the 4th Defendant's decision of revoking the Plaintiff's title.
 8. The 1st Defendant further avers that the determinations by the National Land Commission in 2017 and 2019 conveyed through Legal Notices, regarding the suit property, disqualify the Plaintiff's claim herein and the proceedings herein are an attempt to circumvent the law as the Plaintiff failed to appeal the decision of the Commission as required under the Law.
 9. The 1st Defendant avers that the title held by the Plaintiff is one of those secured as a result of historical land injustices and that the contention that the Plaintiff as a Company was issued with a letter of offer directly in a Settlement Scheme is untrue.
 10. The 1st Defendant further avers that in September 2015, the National Land Commission invited parties interested in the suit property to public hearings conducted at the Red Cross Social Hall in Malindi. The invitation followed a ground verification exercise undertaken by the Commission in 2014 of all properties in Chembe/Kibabamshe adjudication area.
 11. The 1st Defendant avers that the Plaintiff was not present during the ground verification exercise but it later attended the proceedings at the Red Cross Social Hall in Malindi where it was represented by an Advocate. Having heard all the parties and by a decision communicated to the Chief Land Registrar and the parties on 8th February 2017, the Commission determined that the Plaintiff's title was illegal/irregular thereby vindicating the decision taken earlier by the 2nd and 4th Defendants.
 12. The 1st Defendant avers that the decision of the National Land Commission was published in the Kenya Gazette vide Legal Notice No. 1157 on 8th February, 2019 and that the Plaintiff did not contest



or appeal the decision in any way within the timelines stipulated under the [National Land Commission Act](#).

13. I have carefully perused and considered the Plaintiff's application and the 1st Defendant's Preliminary Objection and responses thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates acting for the Plaintiff and the 1st Defendant. While the Honourable the Attorney General did enter appearance for the 2nd to 5th Defendants, the said parties neither filed a response to the Motion nor did they take part in the proceedings.
14. From the material placed before me, the two main issues that arise for determination are:
 - (a) Whether or not the suit ought to be struck out as per the 1st Defendant's Preliminary Objection dated and filed herein on 28th May, 2021;
 - (b) If the answer to the above is in the negative, whether the Plaintiff has satisfied the conditions for the grant of an interlocutory inhibition and/or injunction as sought in Prayer Nos. 4 and 5 of the Plaintiff's application.
15. As Law J. A stated in the often – cited case of *Mukisa Biscuit Manufacturing Company Limited -vs- West End Distributors Limited* (1969) EA 696:

“... a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit ...”
16. The five grounds enumerated in the 1st Defendant's Preliminary Objection can in my view be reduced to three major grounds. One is whether the suit as filed is invalid for want of authority under seal from the Plaintiff Company while the other is whether the suit offends Section 80(2) of the [Land Registration Act](#) No. 3 of 2012. The third issue is whether the suit offends Article 67(2)(e) of [the Constitution](#) as read with Section 5 of the [National Land Commission Act](#) No. 5 of 2012.
17. On their first point of objection, the 1st Defendant contends that the Board Resolution exhibited as annexure 'MHA 1' in the Supporting Affidavit of the Plaintiff's Director Mehboob Hasham Ahmed is invalid to institute this suit. According to the 1st Defendant, the majority shareholders of the Plaintiff Company are off-shore companies and those off-shore Companies are in turn owned by phantom members holding bearer shares.
18. The 1st Defendant submits that given that the names of the owner of the bearer share is never recorded anywhere, those shares enable unparalleled confidentiality and anonymity for the owner. According to the 1st Defendant, the Plaintiff company's shareholding structure affords lawsuit protection to its shareholders such that if the veil of incorporation were to have to be lifted, the Plaintiff's majority shareholders would simply burn their bearer shares and run if they do not wish to be legally culpable for the actions of the Plaintiff's Company.
19. The basis of those submissions by the 1st Defendant was however not clear to me. A perusal of the lengthy Statement of Defence dated and filed herein on 31st May, 2021 does not reveal any reference to the Plaintiff's shareholding structure. At Paragraphs 3 and 4 of the Replying Affidavit, filed herein on 31st May 2021, the 1st Defendant's Managing Director Anthony Safari Kitsao avers as follows:

“ 3. That the 1st Defendant's Advocates now refer me to paragraph 1 annexure MHA1 of the Plaintiff's Affidavit (Mehboob Hasham Ahamed) being the purported Board Resolution of



the Plaintiff Company after a meeting of the Plaintiff company and observe that the same is executed by just one minority director of the Plaintiff Company.

4. That I also observe that the majority shareholders are off-shore companies which are themselves subsidiaries of almost 70 other companies who in turn hold highly liquid bearer shares. (Attached hereto and marked “ASK-2” is information secured from the Consortium of Investigative Journalists (ICIJ) in an investigation widely known as “The Panama Papers”)

20. It was clear to me from a perusal of the above Paragraph as well as the said annexure “ASK-2” that the information provided therein would certainly require to be ascertained and/or substantiated by the 1st Defendant and that the same would therefore not form the basis of a Preliminary Objection. As Newbold P. cautioned in the same Mukisa Biscuits Manufacturing Company Limited case (Supra);

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

21. At any rate, it was clear to me that there was no hard and fast rule requiring the filing of any resolution by the Plaintiff prior to the commencement of the suit. Dealing with a similar contestation in *Arthi Highway Developers Limited -vs- West End Butchery Limited and 6 Others* (2015) eKLR, the Court of Appeal observed as follows:

“ 44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this Country for a long time; *Bugerere Coffee Growers Limited -vs- Sebaduka & Another* (1970) 1 EA 147. The Court in that case held:-

“ When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Director’s meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an Advocate has brought legal proceedings without authority of the purported Applicant, the applicant becomes personally liable to the Defendants for the costs of the action.”

45. To their credit the appellants have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme Court. The authority is *Tatu Naiga & Emporium -vs- Virjee Brothers Limited* Civil Appeal No. 8 of 2000.

The Uganda a Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of *United Assurance Company Limited -vs- Attorney General*: SCCA No. 1 of 1998. The latter case restated the law as follows:-

“ ... it was now settled, as the law, that, it does not require a Board of Directors, or even the general meeting of members, to sit and resolve to instruct counsel to file proceedings on behalf and in the names of the company. Any director, who



is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that company.”

The decision has since been applied in Kenyan courts, for example, in *Fubeco China Frushum -vs- Naiposha Company Limited & 11 Others* (2014) eKLR .”

22. In the matter before me, the said Mehboob Hasham Ahmed describing himself as a member and Director of the Plaintiff Company has sworn both the Verifying Affidavit to the Plaintiff as well as the Supporting Affidavit to the Plaintiff’s Motion and there was nothing placed before me to demonstrate that he had no such authority to act on behalf of the Plaintiff. It follows therefore that the first limb of the 1st Defendant’s Preliminary Objection must fail.
23. On the second ground, the 1st Defendant asserts that the suit as filed by the Plaintiff offends the provisions of Section 80(2) of the [Land Registration Act](#). The said provision provides thus:

“80(2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
24. From the pleadings herein, it is clear that the cause of action relates to the cancellation and removal of records relating to the Plaintiff’s title to the suit land. The Plaintiff contends that the same was done without due process and/or any notification to itself and urges the Court to determine that the said actions were irregular, illegal and amounted to a violation of its rights under Article 47(1) of [the Constitution](#).
25. Given the rival arguments herein, I was again not satisfied that this was a proper ground that could lead to the disposal of the suit. As it were, the jurisdiction to rectify a land register and cancel registered title was reserved for this Court to be exercised under Section 143 of the now repealed Registered Land Act(Cap. 300). This section has since been reproduced under Section 80 of the [Land Registration Act, 2012](#).
26. However while under the repealed Act the Court could not rectify a register even where fraud or mistake had been proved if it was a first registration, it no longer matters under the new dispensation whether or not the Court is dealing with a first registration. That being the case, one could not as at this stage conclude that the suit as filed offends Section 80(2) of the [Land Registration Act, 2012](#) as both parties contend to have been issued at one point or the other with title for the same suit property. It follows therefore that the objection based on that ground is without basis.
27. The third ground of objection by the 1st Defendant is that the Plaintiff’s suit offends the provisions of Article 67(2) of [the Constitution](#) as read together with Section 5 of the [National Land Commission Act](#) and Rule 30 of the National Land Commission (Historical Land Injustices) Rules, 2016. According to the 1st Defendant, the subject matter of these proceedings had also been the subject matter in proceedings held before the National Land Commission. It is the 1st Defendant’s position that the Commission made a determination in its favour and that the Plaintiff having failed to appeal and/or cause the said decision to be reviewed, they cannot be allowed to re-open the proceedings by filing the present suit before the Court.
28. As it were, the Plaintiff has not made the National Land Commission a Party in the suit herein. The Plaintiff’s main problem appears to be with the Chief Land Registrar (the 4th Defendant) who is said



to have by a letter dated 5th March, 2015 caused the Chief Land Registration Officer Kilifi (the 5th Defendant) to cancel and expunge the Plaintiff's title from their records without due process and/or any regard to the law.

29. However, while the 39 Paragraph Plaintiff makes no mention of the National Land Commission, it was apparent that some proceedings in regard to the suit land took place before the Commission. That fact is indeed acknowledged by the Plaintiff at Paragraph 13 of the Supplementary Affidavit sworn by its Director Mehboob Hasham Ahmed and filed herein on 31st May, 2021 wherein the deponent avers as follows:

9. That in reply to Paragraphs, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66 of the said (Replying) Affidavit, I am advised by our Advocates on record, Binyenya Thurania & Company Advocates, which advise I verily believe to be true that:

- (a) I reiterate the contents of Paragraphs 5, 6, 7, 8, 10, 11 and 12 of this Affidavit.
- (b) As at the 23rd day of November 2017, the Applicant was unaware of the fact that the 5th Respondent had on the 10th day of March 2015, without due regard to the due process cancelled and expunged the Applicant's records.
- (c) As can be seen in the letter dated the 23rd November, 2017 by Balala & Abeid Advocates for the Applicant, the Applicant duly informed the 5th Respondent not to act on the National Land Commission's Gazette Notice dated the 17th day of July, 2017.
- (d) The mode of service adopted by the National Land Commission did not meet the threshold of the principles of Natural Justice and under Articles 47 and 50 of the Constitution of Kenya, 2010.
- (e) The Applicant was neither furnished with the details of the complaint before the National Land Commission nor granted access to the critical documents before the National Land Commission.
- (f) Under the Fourth Schedule of the National Land Commission Act, which schedule is established pursuant to Section 19 of the National Land Commission Act it is stipulated in mandatory terms that the business and affairs of the National Land Commission shall be conducted in accordance with the Fourth Schedule.
- (g) That there is absolutely no evidence that hearings took place before the determinations on the suit property was (sic) made by the National Land Commission. This is so because no minutes or proceedings of the National Land Commission in respect of the suit property have been availed to the parties or to this Honourable Court to show how the determinations were made.
- (h) In the absence of any minutes leading to the National Land Commission's determination on the suit property, it is our conclusion that no hearing took place.
- (i) The National Land Commission was under a duty to accord the Applicant an opportunity to be heard which opportunity unfortunately the National Land Commission did not extend to the Applicant before it made an adverse determination on the ownership of the suit property. It follows therefore that the determination by the National Land Commission on the suit property is null and void ab initio.

30. From the material placed before me, the determination which the Plaintiff deems as null and void was communicated to the 4th Defendant vide a letter dated 8th February, 2017. The said letter was copied to



both the Plaintiff and the 1st Defendant. Subsequently vide legal Notice No. 6866 contained in volume CXIX – No. 97, the Commission published its findings and determination in the Kenya Gazette of 17th July, 2017. By the said determination, the Commission determined that the Plaintiff's titles was illegal/irregular.

31. It was also evident that the Plaintiff was not only aware of the determination but also the Gazettment thereof. That much is also clear from a letter dated 23rd November, 2017 written by the Plaintiff's then Advocates Balala & Abed in which they addressed the 5th Defendant herein as follows:

“Re: Plot No. 366/Chembe/Kibabamshe

Our Client: Mayungu Real Estates Limited

We refer to the above matter in which we act for the registered owner of the above mentioned property, Mayungu Real Estates Limited.

We are informed by our client that the National Land Commission vide a Gazette Notice dated 17th July, 2017 purported to revoke the above mentioned Title. The power to revoke title under *the Constitution* and the Land Act 2012 is vested on the High Court only.

Be that as it may, the National Land Commission failed to take into account the jurisdictional submissions made on behalf of the registered owner and the fact that under Section 14(7) of the *National Land Commission Act*, the Commission cannot purport to revoke title against an innocent bona fide purchaser for value who had no notice of defect in the title. It is to be noted that the National Land Commission mandate is only to review grants and dispositions of public land, which does not include a power to review private land or disputes between two parties with competing interests.

Accordingly we request you to not act on the aforesaid Gazette Notice as we shall be moving to the High Court for appropriate Judicial review orders of certiorari and prohibition.

Take Noticethat if you proceed to revoke the title as directed by the National Land Commission, we shall hold you personally liable, responsible and to account for all losses that our client may suffer as a result thereof.”

32. As it turned out, no such application for Judicial Review was ever filed by the Plaintiff and the determination as Gazetted by the Commission remains in place. Instead, the Plaintiff instituted this suit some four (4) years later seeking inter alia a declaration that it is the registered proprietor of the land, an order for the rectification of the register to reflect its name as the owner of the suit property as well as an order of vacant possession to issue as against the 1st Defendant.

33. The National Land Commission is established under Article 67 of *the Constitution*. The said Article clothes the Commission with power

to amongst other functions, initiate investigations on its own initiative or on a complaint, into present or historical land injustices and to recommend appropriate redress. In the exercise of its functions under Section 14 of the *National Land Commission Act* No. 6 of 2012, the Commission exercises quasi – judicial powers. In this respect, Rule 30 of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017 provide thus:

“ Any person aggrieved by the decision of the Commission may, within fourteen days, of the Commission's decision, appeal to the Court.”



34. In the matter before me, no such appeal was filed within the stipulated time or at all. Instead, the Plaintiff waited some four years before filing a fresh suit against the 1st Defendant who was a party to the proceedings before the Commission and other Government Departments it accused of impropriety.
35. The objective of creating the Commission was to assist in interrogating all acquisitions of hitherto Government land with the aim of either restoring the same back to the Government or identifying the rightful owner who may have been denied title due to some past injustices. In conducting the hearings in which the Plaintiff participated, the Commission was acting in furtherance of its Constitutional mandate and its decisions can only be challenged in the manner provided in law.
36. Otherwise, as was stated in *Diana Kethi Kilonzo-vs-Independent Electoral and Boundaries Commission and 2 Others* (2014) eKLR:
“... *the Constitution* allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by *the Constitution* so long as they comply with *the Constitution* and National Legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing *the Constitution*, found it fit that the powers of decision – making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The Courts should not cross-over to areas which Kenyans specifically reserved for other authorities.”
37. In the matter herein, the Plaintiff was fully aware of the decision made by the National Land Commission pursuant to its Constitutional mandate. By the suit herein, it seeks to side-step the said decision by concealing the fact that the Commission had several years down the line pronounced itself on the ownership of the suit property and opting instead to sue other Government agencies on the purport that they had earlier on made the same decision as that of the Commission while they lacked the mandate so to do.
38. By making a finding that the Plaintiff's title was irregular, the Commission had in fact vindicated the position earlier on taken by the 2nd, 4th and 5th Defendants and the question of whether or not the said Defendants had acted without due process is now moot and academic. The decision by the Commission which is lawfully mandated to interrogate the validity of such titles is the latest in time and it remains valid and unchallenged.
39. That being the case I am persuaded that the suit herein and the Motion dated 22nd March, 2021 were filed in abuse of the Court process. The Plaintiff having run out of time to challenge the decision by the Commission within the stipulated time has resorted to this suit in an attempt to subvert the procedure laid down in law.
40. The upshot is that I find merit in the third limb of the 1st Defendant's Preliminary Objection. This suit as filed offends the provisions of Article 67(2) of *the Constitution* as read with Rule 30 of the National Land Commission (Review of Grants and Disposition of Public Land) Regulations, 2017. Both the suit and the Motion are accordingly struck out with costs to the 1st Defendant.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 30TH JUNE, 2022.

In the presence of:

Mr. Binyenya for the Plaintiff



No appearance for the Defendants

Court assistant - Kendi

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J. O. OLOLA

JUDGE

