



**Muangi v National Government Constituency Development Fund
Committee - Nyali Constituency & 2 others (Environment & Land Case
319 of 2017) [2022] KEELC 2235 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2235 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 319 OF 2017**

NA MATHEKA, J

JUNE 29, 2022

BETWEEN

PHILOMENA MWIKALI MUANGI PLAINTIFF

AND

**NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND
COMMITTEE - NYALI CONSTITUENCY 1ST DEFENDANT**

LAURAMANI INVESTMENTS LTD 2ND DEFENDANT

LAND REGISTRAR, MOMBASA 3RD DEFENDANT

JUDGMENT

1. The Plaintiff avers that she is the registered owner of Plot Title No. Mombasa/Mwembelegeza/I58I. The Plaintiff avers that vide a letter dated March 29, 2001 she was allotted the suit property by the then Ministry of Lands and Settlement. The Plaintiff further avers that she paid all the necessary duties and charges and a Title Deed was subsequently issued. The Plaintiff avers that the suit property has since 2001 remained undeveloped until recently when the 2nd Defendant commenced construction of a Chief's Office and a Police Post on instruction of the 1st Defendant. The Plaintiff states that at no point was she notified of the acquisition of the suit property by either the 1st Defendant, the government or any other public entity. The Plaintiff alleges that on July 21, 2017, the 3rd Respondent issued an official search on the suit property that revealed that the Plaintiff is the registered owner but dealings with the suit property was restricted allegedly because the suit property is a public utility. The Plaintiff further states the official search revealed that the restriction was placed on the suit property based on a letter referenced DUASO/M/208/VOL 111/154. The 3rd Defendant has since declined to avail a copy of that letter to the Plaintiff despite written demand. The Plaintiff avers that since the Title Deed to the suit property was issued in 2005, she has not received any demands, assertions or claims from members of the public or government officials that the suit property is a public utility as alleged. The Plaintiff



states that she was not notified by either the 1st or 2nd Defendant that they intended to construct on her property. The Plaintiff avers that before the commencement of the construction the 1st and 2nd Defendant knew or ought to have known that the Plaintiff is the registered owner of the suit property. The Plaintiff states that if the 1st Defendant wishes to acquire the suit property there is a procedure laid out in law for such acquisition. The Plaintiff avers that the construction of public offices on the suit property is unlawful and illegal as the suit property still belongs to the Plaintiff. The Plaintiff avers that her Title Deed has not been cancelled. The Plaintiff avers that she has written to the 1st and 2nd Defendant asking them to stop the illegal construction but they have refused/ignored the request thus rendering the filing of this suit necessary. The Plaintiff avers that the 1st and 2nd Defendant have illegally and forcefully taken over possession of the suit property and denied her the use of the suit property. The Plaintiff further state that she will suffer loss and damages as a result of the illegal possession of the suit property by the 1st and 2nd Defendant. The Plaintiff prays;

1. For a declaration that the Plaintiff is the lawful proprietor of the property comprised in Title No. Mombasa/Mwembelegeza/1581 as currently registered.
 2. For an order directing the 3rd Defendant to remove the restriction restricting dealings in Title No. Mombasa/Mwembelegeza/1581 belonging to the Plaintiff.
 3. For a declaration that the construction carried out by the 2nd Defendant on Title No. Mombasa/Mwembelegeza/1581 is unlawful.
 4. A permanent injunction restraining the 1st and 2nd Defendants or any of them either by their servants, agents or employees from constructing, developing, trespassing, occupying or in any other manner dealing with plot Title No. Mombasa/Mwembelegeza/1581.
 5. An order compelling the 1st and 2nd Defendants to demolish the improvements they have put on plot Title No. Mombasa/Mwembelegeza/1581 and carry away the debris and building materials at their cost.
 6. In the alternative and without prejudice to any of the above prayers, the 1st Defendant be compelled to compensate the Plaintiff the undeveloped value of the suit Properly as at the time of determination of the suit.
 7. Damages and interest against both the 1st and 2nd Defendants.
 8. Costs of and incidental to this suit.
2. PW1 the plaintiff testified that she acquired the suit property legally. That she was allocated the property, paid for it and was issued with a title legally. That the 1st defendant acquired the suit property without any notification and did not compensate her. She seeks compensation in as an alternative in her prayers.
3. DW1, Sammy Mchombo, testified that he is the Land Adjudication and Settlement Officer, Mombasa. That Mombasa/ Mwembelegeza Settlement Scheme falls under his jurisdiction. That their records show that according to the allocation list forwarded to the Director of Land adjudication and Settlement in the year 1998, Mombasa/Mwembelegeza/1581 was originally allocated and left as an open space for public utility. That the final list forwarded to the Director of Land Adjudication and Settlement in 1998 did not capture any changes in allocation in parcel Mombasa/Mwembelegeza/1581 DEX 4. That in The Year 2007, the Then Mombasa Land Adjudication And Settlement Officer wrote to the Land Registrar Mombasa to restrict dealings in plot Mombasa/ Mwembelegeza/1581 amongst other plots within the scheme due to the rampant grabbing of public land or land meant for public utility within the County. That in further support of the fact that Mombasa/



Mwembelegeza/1581 was set apart as a public utility plot, a cursory glance of the Letter referenced DLASO/MSA/208VOLIII/154 DEx1 requesting for the placement of the caveats on various parcels within the Mombasa/Mwembelegeza Settlement Scheme also yields two other plots; 1466 and 1477 identified as a Nursery School and a Primary School respectively which are also listed in the letter referenced SF/LND/7 Vol.VI/19 to the Director of Land Adjudication and Settlement encompassing the final allocations DEx4.

4. This court has carefully considered the evidence and submissions therein. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:

"Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

Section 26 (1) of the [Land Registration Act](#) states as follows:

"The Certificate of Title issued by the Registrar upon registration ... 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... 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."
5. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
6. This court in considering this matter referred to the case of [Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another](#) [2013] eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the [Land Registration Act](#) rendered himself as follows:-

"-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme."

7. PW1 testified that she is the registered owner of Plot Title No. Mombasa/Mwembelegeza/I58I. The Plaintiff avers that vide a letter dated 29th March 2001 she was allotted the suit property by the then Ministry of Lands and Settlement. The Plaintiff further avers that she paid all the necessary duties and charges PEx 3 and a Title Deed was subsequently issued PEx1. The Plaintiff avers that the suit property has since 2001 remained undeveloped until recently that the 2nd Defendant commenced construction of a Chief's Office and a Police Post on instruction of the 1st Defendant. I have perused the documents adduced as evidence in great detail. The Plaintiff vide a letter dated March 29, 2001



was allotted the suit property, Plot Title No. Mombasa/Mwembelegeza/I58I by the then Ministry of Lands and Settlement. The Plaintiff paid all the necessary duties and charges PEx 3 and a Title Deed was subsequently issued PEx1 in 2005. The Defendants have produced a final list forwarded to the Director of Land Adjudication and Settlement in 1998 it did not capture any changes in allocation in parcel Mombasa/Mwembelegeza/ 1581 DEx 4 in a letter dated April 21, 1999. The same was captured as open space for public use. In the Year 2007, the then Mombasa Land Adjudication And Settlement Officer wrote to the Land Registrar Mombasa to restrict dealings in plot Mombasa/ Mwembelegeza/1581 amongst other plots within the scheme due to the rampant grabbing of public land or land meant for public utility within the County. I find that by the time the plaintiff was allocated the suit property in March 2001, the same was not available for private use as it had already been set aside for public utility.

8. On the issue of compulsory acquisition and compensation, the Court in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR stated that:

"It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the *Land Registration Act*, 2012 will have a positive impact for land investors in future."

9. In the case of *Republic v Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 others* Mombasa HCMCA No. 617 of 2003 [2006]1 KLR (E&L) 563 the court stated that;

"Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of *the Constitution* or under section 1 and 1A of *the Constitution* or under the doctrine of public trust a title would have to be nullified because *the Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of *the Constitution*."

10. In the case of *Mureithi & 2 others (For Mbari Ya Murathimi Clan) v Attorney General & 5 others* Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443 the court held that;

"Should the Land Acquisition Act give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests? How for instance are the Courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the Courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of *the Constitution*. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins.".....In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of *the Constitution* captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in "a democratic society." This phrase also appears



in most of the fundamental rights and freedoms provisions in chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency...A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of s 1 and s 1A of the Constitution in my view...The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to public land, forests, wetlands, riparian rights, riverbeds and “kayas” just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land.”

11. In the case of *Chemei Investments Limited v The Attorney General & Others* Nairobi Petition No 94 of 2005 the court stated that;

"The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra) where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

12. In a nutshell, I find that the plaintiff un-procedurally obtained title to the suit property as the same had been alienated as public land and is not available for conversion to private land. I find the plaintiff has failed to prove her case on a balance of probabilities and I dismiss it with costs.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF JUNE 2022.

N.A. MATHEKA

JUDGE

