



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE 185 OF 1991
IN THE MATTER OF MAZRUI LANDS TRUST (REPEAL) ACT
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA

BETWEEN

**AHMED ABDALLA MOHAMED
KHALFAN ABDALLAH
SALIM AL AMIN
MBARUK ABDALLA SULEIMAN**

(Suing in their own behalf and on behalf of the Mazrui and Shaks followers of Salim Bin Khamis)

The Mazrui's) APPLICANTS

V E R S U S

THE HONOURABLE THE ATTORNEY GENERAL RESPONDENT

JUDGEMENT

1. In this Constitutional Petition the Court is asked to determine the Amended Originating Motion dated 28th October 2011. In it the Applicants seek the following six (6) declarations-

(1) A declaration that the Applicants right to property as guaranteed in Article 40 of the Constitution of Kenya and as previously guaranteed in Section 75 of the former Constitution of Kenya, was, and is being violated by the Mazrui Lands Trust (Repeal) Act (1989).

(2) A declaration that the Mazrui Lands Trust (Repeal) Act 1989 is unconstitutional, null, void and of no legal effect.

(3) There be a declaration that all that piece of land situated to the South of Kilifi Creek in the Kilifi District containing by measurement 2716 acres or thereabouts, and as comprised in Certificate of Ownership number 409 dated 6th April 1914 issued under the Land Titles Act (Cap 282) of the Laws of Kenya and declared to be a Wakf to the Mazrui's and their successors for ever was always vested in the

Mazrui Lands Trust Board not thereby as the lawful proprietors thereof, but as trustees for the Mazrui who are the lawful owners within the meaning contained in the said Act, and to the exclusion of all other persons.

(4) There be a declaration that all other lands vested in the said Board as Trustees for the Mazrui, by the Mazrui Lands Trust Act (Cap 289) of the Laws of Kenya (now repealed) were also vested in the Mazrui, as lawful proprietors thereof, and to the exclusion of all other persons.

(5) There be a declaration in addition to or in the alternative to 3 and 4 above that, should any of the Mazrui lands aforesaid be lawfully and properly acquired by the Government of Kenya for the benefit of persons other than the Mazrui, then prompt, just and full compensation should first be paid to the Mazrui in accordance with the provisions of Section 75(i) (c) of the said former Constitution, and Article 40 of the new Constitution.

(6) There be a declaration that in so far as the said Mazrui Lands are concerned the Minister concerned or his servants or agents has no power to determine the question of the ownership of such land as the proprietors of the said lands are known to have title thereto under a specific Act of Parliament and other laws and are legally capable of alienating and/or disposing of such land in conformity with the provisions of the law.

2. The Applicants relied on three affidavits (sworn on 12th November 1991, 10th May 1994 and 28th October 2011) to support their application. And as required of them in proceedings of this nature the Applicants, with specificity, set out the manner in which they allege the Respondent violated or infringed on their rights. These shall be fully discussed in the course of this decision.

3. The Hon. The Attorney General, the Respondent did not lead any affidavit or oral evidence and choose to oppose the application by way of Grounds of Opposition dated 7th February, 2012. Mr. Eredi appearing for the Attorney General amplified and clarified those grounds in written and oral arguments presented to court.

The Facts

4. The facts to the dispute are disclosed in the three affidavits sworn for and on behalf of the Applicants. These facts were not challenged by evidence to the contrary.

5. The Applicants bring this suit on behalf of the Mazrui and Shaks followers of Salim Bin Khamis. Under Section 2 of The Mazrui Lands Trust Act, whose repeal triggered these proceedings, the followers are jointly referred to as “***The Mazrui.***”

6. By virtue of a Certificate of Title No. 409 of 4th April 1914, the Mazrui Lands Trust Board were registered as proprietors of land containing 9,100 acres or thereabouts comprised in that Certificate of Ownership issued by the Recorder of Titles and registered under The Land Titles Act (Cap 280) (*Now repealed*).

7. Upon the enactment of The Mazrui Lands Trust Act (Cap 289) the land comprised in Title No. 409 containing by measurement 3,172 acres (after the deduction of certain portions) was vested in the Board vide Section 5 thereof. For convenience I shall hereafter refer to this land as the “***Takaungu land***”.

8. Apart from the Takaungu land the Mazrui owned other land. That land also vested in the Board by the Repealed Statute.

9. For a long time all was well, at least from the point of view of the Applicants, until the enactment of The Mazrui Lands Trust (Repeal) Act (hereinafter called “***The 1989 Statute***”). The 1989 Statute repealed the Mazrui Lands Trust Act and deemed all lands vested in the Mazrui Lands Board of Trustees to be Trust land. The 1989 Statute further provided that the rights and interests of persons on the said land would be ascertained in accordance with the provisions of The Land Adjudication Act (Chapter 284 Laws

of Kenya).

10. Following this the Government through the District Land Adjudication and Settlement Officer, Kilifi declared Mazrui Lands at Takaungu to be an adjudication section within the meaning of Section 5 of the Land Adjudication Act.

11. The Applicants are aggrieved by both the repeal of The Mazrui Lands Trust Act and the declaration that Mazrui Lands is subject to the Land Adjudication Act.

The Determination by Court

12. Emerging from the arguments by Counsel the Court sees the following as issues for its determination-

i. Were the Applicants the lawful proprietors of the Mazrui land prior to the 1989 Statute?

ii. Did the 1989 Statute take away that ownership?

iii. Was, and is, the taking in conformity with the former Constitution and/or The Constitution 2010?

iv. Is the 1989 Statute unconstitutional?

13. The Applicants argue that the 1989 Statute offends the provisions of the former Constitution and the Constitution 2010. The violation complained of would have first happened on 1st December 1989, the commencement date of the 1989 Statute. It was on this day that the Mazrui Lands Trust Act was repealed. Although the provision of Article 40 of The Constitution does not have an anticlockwise application, the violation complained continues in the sense that the 1989 Statute is still in force. The violation, if any, astrides the two Constitutional dispensations.

14. Section 5 of the Mazrui Lands Trust Act reads-

“All lands held by or on behalf of the Mazrui at the commencement of this Act, which lands are described in the Schedule and more particularly delineated on a set of plans entitled “Mazrui land, mainland north”, which plans have been deposited in the Survey Records Office, Survey of Kenya, Nairobi, are declared to be vested in the Board for such estate and interest and subject to such leases, mortgages, charges or other encumbrances, trusts, rights of way, easements, conditions and restrictions as existed immediately before the commencement of this Act.”

There are two highlights to this provision that relates to the questions posed by this petition. First it is unequivocal that the Lands described in the schedule to the Act were held by or on behalf of the Mazrui. Second it vested this land in the Mazrui Lands Board of Trustees. The Board was to hold all the land as Trustees in Trust for the Mazrui (Section 6(1)). And as though to clarify that the land was indeed owned by the Mazrui, Sections 6(2) and 6(3) provide as follows-

“6(2) The Board may convey, mortgage, assign or demise any of the land for the benefit of the tribe on such terms and conditions as they may think fit, and shall distribute any profits which may arise out of the land among the members of the tribe in such manner as may seem to them just.

(3) The Board may at the request of the majority of the tribe subdivide any land vested in them and grant any such land so subdivided to such member or members of the tribe as they may think just.”

15. In respect to the Takaungu property, the land was registered in favour of The Mazrui under The Land Titles Act (Now repealed) and a Certificate of Ownership No. 409 issued on 1st April 1914 and that ownership reinforced by The Mazrui Lands Trust Act.

16. It is little wonder that Muli J (*as he then was*) affirmed the Mazrui Tribe as the owner of the Takaungu property in Mbsa HCC

230 of 1981 Ahmed Abdalla Mazrui & 5 Others –Vs- Mazrui Lands Board of Trustee & Another in the following words-

“The vesting of the Mazrui land including that which was contained in the original Wakf in the Board of Trustees diverted from the whole world any interest that anyone may have had or may have thought he had.”

17. The inescapable conclusion I must reach is that prior to the repeal of The Mazrui Lands Trust Act, all land in the schedule to the Act (including The Takaungu Land) vested in the Mazrui Tribe as the exclusive and lawful proprietors.

18. The 1989 Statute which commenced on 1st December 1989 provided as follows in Section (2)-

“2(1) The Mazrui Lands Trust Act is repealed. (2) All lands which at the commencement of this Act are vested in the Mazrui Lands Board of Trustees (hereinafter called “the Board”) established under the Mazrui Lands Trust Act (now repealed) shall be deemed to be Trust land and the rights and interests of persons on the land shall be ascertained and registered in accordance with the provisions of the Land Adjudication Act.”

19. The effect of that provision was to repeal the entire Mazrui Lands

Trust Act and to deem all lands vested in the Board of Trustees to be Trust Land. Secondly it provided that the rights and interests of persons on the land would be ascertained and registered in accordance with the provisions of Land Adjudication Act. The Trust Land means the Trust Land under Section 114(1) of the Former Constitution. The Applicants were of the view that this was a drastic move as it took away their land. The Respondent does not think so. It is the Respondent’s position that at all times the land which vested in Mazrui Lands Board of Trustees was part of The Trust Land as defined by Section 114(1) of The Former Constitution. The Respondent premises his argument on the underlined portion of Section 114(1)(a) produced below-

“1. Subject to this Chapter, the following descriptions of land are Trust land-

(a) land which is in the Special Areas (meaning the areas of land the boundaries of which were specified in the First Schedule to the Trust Land Act as in force on 31st May, 1963), and which was on 31st May, 1963 vested in the Trust Land Board by virtue of any law or registered in the name of the Trust Land Board.” (emphasis mine)

Does a close examination of this provision bear out the Respondents position?

20. The land described in Section 114(1) (a) of The former Constitution is clear enough. It is the land specified in the first schedule to the Trust Land Act as in force on 31st May 1963 and which vested on the same day in the Trust Land Board. The Court has familiarized itself with the schedule to the Trust Land Act and has confirmed that the Mazrui land is not part of that land. AT any rate it would have been needless to enact the 1989 Statute to include Mazrui Land as Trust Land if it was already Trust Land by virtue of Section 114 of The former Constitution. The argument by the Respondent is as strained as it is untenable.

21. This Court agrees with the Applicants that Section 2(2) of The 1989 Statute had the effect of taking away the Mazrui land from the Mazrui and The Mazrui Lands Board of Trustees and purported to place it among other Trust Lands under Section 114 of The former Constitution. This undoubtedly was the intention of the 1989 Statute as it also provided that the land was to be subject to The Land Adjudication Act.

22. What the Statute attempted to do was to amend Section 114 of The Former Constitution of Kenya by adding a new category of Trust Land. This was a void attempt!

23. The more serious crisis caused by the 1989 Statute, from the Applicants' stand point, is that it deprived or took away their property in a manner that breached the provisions of Section 75(1) of The former Constitution and Article 40(3) of The Constitution 2010.

24. By deeming Mazrui's private land to be Trust Land, the Act approved or authorized the compulsory acquisition of that land without satisfying or providing a mechanism for satisfying the Constitutional essentials anchored in Section 75(1) of The Former Constitution and Article 40(3) of The Constitution 2010 in respect to compulsory takings. Section 75(1) reads-

“No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied-

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.”

While Section 40(3) states-

“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”

25. The 1989 Statute did not itself provide for the prompt payment of full compensation of the acquired property nor did it refer the question of prompt payment of full compensation to the provisions of Land Acquisition Act (Cap 295 now repealed). The Land Acquisition Act being the legislative arrangement at that time for the compulsory acquisition of Land for public benefit. The Court is told by the Applicants and it is not contested, that they did not and have not received any compensation at all. To that extent the Statute has enabled or facilitated the breach of Article 75(1)(c) of The Former Constitution and Article 40(3)(b) of The Constitution 2010.

26. I now turn to consider the Respondent's argument that the suitland was in fact not set apart and the Mazrui have lost nothing. The argument leans on the following part of Section 2(2) of The 1989 Statute-

“... and the rights and interests of persons on the land shall be ascertained and registered in accordance with the Land Adjudication Act.”

The difficulty with accepting this argument is that, for one, all Mazrui land had been ascertained to belong to the Mazrui. Section 6 of The Mazrui Lands Trust Act is of singular importance in this regard and should again be reproduced:

“6(1) The Board shall hold all land as trustees in trust for the Mazrui.

(2) The Board may convey, mortgage, assign or demise any of the land for the benefit of the tribe on such terms and conditions as they may think fit, and shall distribute any profits which may arise out of the land among the members of the tribe in such manner as may seem to them just.

(3) The Board may at the request of the majority of the tribe subdivide any land vested in them and grant any such land so subdivided to such member or members of the tribe as they may think just.”

Section 6(1) spells out that the Board holds all land as trustees in trust for the Mazrui. And a plain reading of Section 6(3) is that should the land be divided then only members of the Mazrui Tribe are eligible to be granted such land.

27. Secondly the Respondent says that other people other than Mazrui are on the land. If this were true then the 1989 Statute makes them eligible for ascertainment and registration. This no doubt is an attack on the Mazrui’s exclusive claim over their land.

28. The Respondent was of the view that the Court ought to take into account the historical background to the ownership of the land. The Court has studied the Hansard on the debate leading to the enactment of the 1989 Statute. Moving the Motion on 2nd November, 1989 Mr. Mbela, The Minister for Lands and Housing and Physical Planning said in part-

“Mr. Speaker, Sir, the land is for the exclusive use of the Mazrui tribe or family and the Shak’s followers of Salim Bin Khamis, who have all the legal rights of ownership over it. This is not a healthy situation as it contradicts the prevailing official policies in that it discriminate against the citizens of this country. The indigenous people who reside on this land are now treated as squatters and have no legal right over its use or exploitation.”

29. The stated intention of the repeal was to put right a historical wrong. The Court is urged to lean towards the presumption of Constitutionality of the 1989 Statute as its intention is laudable. For this Mr. Eredi referred this Court to the Decision in ***Rose Moraa & Another –Vs- AG*** [2006]eKLR in which the Court embraced the following passage from the Decision of the Supreme Court of India in ***HAMDARDDAWAKHANA –Vs- UNION OF INDIA*** AIR 1960 554-

“In examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment.”

30. This Court accepts that proposition but the presumption would not extend to uphold legislation that infringes on what the Kenyan people have deemed for themselves, through Constitutional Guarantees, as a fundamental right. In the Article “Rethinking the Presumption of Constitutionality”, F. Andrew Hessick had this to say-

“Altering judicial deference in this way would not lead to a complete change in Judicial Review as we know it. For example, the Judiciary would not necessarily be required to allow the legislature to circumvent the heightened constitutional protections that Courts have created for fundamental rights and to prevent discrimination against suspect or quash suspect classes. Those heightened protections as a result of the Court’s conclusion that the current presumption of Constitutionality should not extend to laws infringing on those rights, and the same reasons may Counsel against extending judicial deference to legislative interpretation of the Constitution with respect to those rights.” (my

emphasis) (www.nd.edu.)

I have held that the enactment of the 1989 Statute lead to a Constitutional Violation of the Applicants fundamental right to property. It is a violation that this Court will not uphold.

31. There is then the argument that many people have acquired land within the Mazrui land and this decision is likely to affect them adversely. As noted at the beginning of this decision the Respondent never filed any affidavit. Without evidence, this Court cannot tell of the nature and interest of these people. This decision however is about the Constitutionality of The 1989 Statute. Any person who has acquired land pursuant to that Statute must necessarily be affected. The decision, however, does not foreclose any lawful acquisition made independent of the 1989 Statute.

32. For the reasons stated, I reach the decision that Section 2 of The 1989 Statute is unconstitutional, null and void. But what would be left of that Statute? This short Act has only three Sections which are reproduced below-

“1. This Act may be cited as the Mazrui Lands Trust (Repeal) Act, 1989.

2. (1) The Mazrui Lands Trust Act is repealed.

(2) All lands which at the commencement of this Act are vested in the Mazrui Lands Board of Trustees (hereinafter called “the Board”) established under the Mazrui Lands Trust Act (now repealed) shall be deemed to be Trust land and the rights and interests of persons on the land shall be ascertained and registered in accordance with the provisions of the Land Adjudication Act.

(3) No suit, prosecution or legal proceedings whether civil or criminal shall be instituted against the Board or any member thereof concerning any alienation in good faith of land vested in the Board under the repealed Act.”

It is therefore apparent that Section 2 is the only speaking part. Once it goes then nothing substantive is left of the Statute. The entire Statute must give way.

33. Ultimately the Court issues the following orders-

(1) A declaration that the Applicants right to property as guaranteed in Article 40 of the Constitution of Kenya and as previously guaranteed in Section 75 of the former Constitution of Kenya, was, and is being violated by the Mazrui Lands Trust (Repeal) Act (1989).

(2) A declaration that the Mazrui Lands Trust (Repeal) Act 1989 is unconstitutional, null, void and of no legal effect.

(3) A declaration that all that piece of land situated to the South of Kilifi Creek in the Kilifi District containing by measurement 2716 acres or thereabouts, and as comprised in Certificate of Ownership number 409 dated 6th April 1914 issued under the Land Titles Act (Cap 282) of the Laws of Kenya and declared to be a Wakf to the Mazrui’s and their successors for ever was always vested in the Mazrui Lands Trust Board not thereby as the lawful proprietors thereof, but as trustees for the Mazrui who are the lawful owners within the meaning contained in the said Act, and to the exclusion of all other persons.

(4) A declaration that all other lands vested in the said Board as Trustees for the Mazrui, by the Mazrui Lands Trust Act (Cap 289) of the Laws of Kenya (now repealed) were also vested in the Mazrui, as lawful proprietors thereof, and to the exclusion of all other persons.

(5) Should any of the Mazrui lands aforesaid be lawfully and properly acquired by the Government of Kenya for the benefit of persons other than the Mazrui, then prompt, just and full compensation should first be paid to the Mazrui in accordance with the provisions of Section 75(i) (c) of the said

former Constitution, and Article 40 of the new Constitution.

(6) A declaration that in so far as the said Mazrui Lands are concerned the Minister concerned or his servants or agents has no power to determine the question of the ownership of such land as the proprietors of the said lands are known to have title thereto under a specific Act of Parliament and other laws and are legally capable of alienating and/or disposing of such land in conformity with the provisions of the law.

(7) Each party shall bear its own costs.

Dated and delivered at Mombasa this 19th day of July, 2012.

F. TUIYOTT

JUDGE

Dated and delivered in open court in the presence of:-

Kimani for the Applicant

Lutta for Eredi for the Respondents

Court clerk - Moriasi

F. TUIYOTT

JUDGE

19.7.2012