



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE 354 OF 1993**

**RAJAB KATEKE MUTUNGA.....1<sup>ST</sup> PLAINTIFF**  
**ABDILLAHI HAMISI DAHAB .....2<sup>ND</sup> PLAINTIFF**  
**ANDREW OCHIENG .....3<sup>RD</sup> PLAINTIFF**  
**DAVID MBUGUA KINYANJUI .....4<sup>TH</sup> PLAINTIFF**  
**HASTINGS THUKU .....5<sup>TH</sup> PLAINTIFF**  
**SAID AWADH.....6<sup>TH</sup> PLAINTIFF**  
**JAMES ONYANGO KHANDA .....7<sup>TH</sup> PLAINTIFF**  
**RAPHAEL GONDI .....8<sup>TH</sup> PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF MOMBASA.....1<sup>ST</sup> DEFENDANT**  
**PRABULA SHAH .....2<sup>ND</sup> DEFENDANT**  
**JITENDRA KANABA .....3<sup>RD</sup> DEFENDANT**  
**MR. SUTHIR.....4<sup>TH</sup> DEFENDANT**  
**OMICRON INVESTMENT LTD. ....5<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

In the amended amended plaint dated 27<sup>th</sup> October 2005 Rajab Kiteke Mutunga, Abdilahi Hamisi Dahab, Andrew Ochieng', David Mbugua Kinyanjui, Hastings Thuku, James Onyango Khanda and Raphael Gondy being the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> plaintiffs herein, sued the Municipal council of Mombasa, Prebhula Shah, Jitendra M. Kanaba, Mr. Suthir and Omicron Investments Ltd, being the 1<sup>st</sup>,

2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants herein. In the aforesaid plaint the plaintiffs prayed for judgment as follows:

**(a) Full compensation fro their buildings erected on Plot**

**No.740/V/MN Mikindani Mombasa plus interest per paragraph 7**

**– Kshs.968,000/-.**

**(ai) Alternative plot to be provided by the 1<sup>st</sup> Defendant.**

**(b) Injunction restraining the defendants from demolishing or**

**destroying the plaintiffs and their tenants and defendants until**

**proper assessment for compensation has been made.**

**(c) Costs of this suit plus interests.**

**(d) Exemplary damages.**

The 1<sup>st</sup> Defendant filed a defence to resist the plaintiffs' suit while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants too filed a defence but with a counter-claim. In the counter-claim the 2<sup>nd</sup> and 3<sup>rd</sup> defendants asked for the following orders:

**(i) Vacant possession of Plot No.740/V/MN Mikindani.**

**(ii) Costs of this suit.**

**(iii) Interest thereon at Court rates.**

When the suit came up for substantive hearing, four witnesses turned up to testify in support of the plaintiffs case. The first to take the witness box is Abdillahi Hamisi (P.W.1), the 2<sup>nd</sup> plaintiff herein. He told this court that he inherited a house without land standing on Plot no. 740/V/M.N. from his late mother, Zuhura Binti Abdalla. He said he succeeded her vide Mombasa Kadhi Succession Case No . 126 of 2004. P.W.1 said he leased those premises to tenants but he did not personally reside on the suit land. He produced in evidence a copy of Kadhi's order showing he was the legal representative of the Estate of Zuhura Binti Abdalla, deceased. The land in which the premises stood was owned by Ali Bin Gadim now deceased. P.W.1 produced a copy of a lease agreement between Ali Bin Gadim and Zuhura Binti Abdalla. In that agreement executed on 1<sup>st</sup> October 1972 Zuhura Binti Abdalla was allowed to put up structures on part of Plot No. 240/V/M.N. and was to pay a monthly land rent of Kshs.25 per month. P.W.1 said he later learnt that the Municipal Council of Mombasa (1<sup>st</sup> Defendant) repossessed the land and thereafter allocated Prabhula Shah, Jitendra Kanaba and Mr. Suthir (2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants) who in turn sold the same to Omicron Investments Ltd (5<sup>th</sup> Defendant). P.W.1 said the 2<sup>nd</sup>- 4<sup>th</sup> Defendants bought the leasehold without compensating him for the investments he had put on the suit land. He said his structures were valued at Kshs.180,000/- as of 12<sup>th</sup> August 1989 yet he was only paid Kshs.25,000/-. He said he refused to vacate the suit premises because he felt the compensation was not sufficient. He produced a valuation report prepared by the firm of Musyoki & Associates to prove that his property was valued at Kshs.180,000/-. Samuel Musyoki (P.W.3) testified in court to back the valuation report prepared by his firm known as Musyoki & Associates. P.W.1 said said that his main interest in these proceedings is for compensation for the balance of the value of his house which was demolished by the 5<sup>th</sup> Defendant. P.W.1 admitted in cross-examination that he had been given three (3) months' notice to vacate the suit premises. The notice was in line with the terms of the lease agreement between Ali Gadim and Zuhura Binti Abdalla. He also admitted that the Municipal Council of Mombasa (1<sup>st</sup> Defendant) was

not party to the lease agreement. P.W.1 stated that he has sued the Municipal council of Mombasa because it failed to give him priority to purchase the property. P.W.1 was unable to prove that he paid Ali Gadim the land rent regularly. He also confirmed that the tenancy between Ali Gadim and Zuhura Binti Abdalla was a month tenancy. P.W. 1 further admitted that the lease agreement obliged the Zuhura Binti Abdalla to sue Ali Gadim where there was a breach by Gadim. On the other hand Ali Gadim was at liberty to terminate the tenancy where Zuhura Binti Abdalla was in breach.

Hastings Thuku (P.W.3) the 5<sup>th</sup> plaintiff herein told this court that he lived in Mombasa between 1972 and 1989 before moving to settle at Kibwezi. He said he put up a house on plot No. 740/V/M.N between 1971 and 1972. He said he used to pay monthly land rent to the landlord and in the process he came to know the other plaintiffs. P.W.3 said his house valued at Kshs.122,000/- was demolished upon being paid Kshs.30,000/- as compensation. He claimed he had a lease agreement with Ali Gadim which is similar to that of Zuhura Binti Abdalla. P.W.3 was unable to produce such an agreement nor any documentary evidence showing how his house was valued. He said he was surprised to learn that the Municipal council of Mombasa (1<sup>st</sup> Defendant) had sold the parcel of land. His main complaint against the 1<sup>st</sup> Defendant is that it approved building plans to be put up on the suit premises. P.W.3 said he was not sure whether or not the Municipal council repossessed the plot. P.W.3 abandoned the prayer for an allocation of an alternative plot. He restricted his claim to the balance of the value of his house. P.W.3 conceded that he had no lease agreement with Omicron Investments Ltd (5<sup>th</sup> Defendant). He also admitted that he did not sue Ali Gadim.

David Mbugua Kinyanjui (P.w.4), the 4<sup>th</sup> plaintiff herein told this court that he was a tenant in plot No. 740/V/M.N. He said he put up a house valued at Kshs.92,000/- He said he was forced to accept a payment of Kshs.13,000/- as compensation before the area District officer. He has now come to court to claim the balance of the value of the house. He produced a lease agreement he entered with Ali Gadim on 1<sup>st</sup> October 1973. He said the land was eventually sold to some Asians. P.w.4 said the Municipal Council approved building plans for those Asians to put up structure on the suit land. He said he was only given Kshs.13,000/- as compensation for his house. He admitted on cross-examination that he was actually paid Kshs.25,000/-. He claimed he was coerced by the area District officer to receive the amount yet his house is valued at Kshs.92,000/- He claimed his house was demolished without being given notice as required.

Martin Odhiambo Otunga (D.W.1) was the only witness called by the Defence. D.W.1 said he worked with the municipal Council of Mombasa as a Principal Valuer hence he is conversant with the dispute over plot No. 740/V/MN. He said the plot was acquired by the government in 1975 vide gazette notices no. 1586 and 1587 for purposes of putting up housing units. He said plot no. 517/V/MN was subdivided giving rise to plot no. 740/V/MN. D.W.1 produced the plot card showing the Government acquired the land from the original lessees namely Ali Bin Mohammed Gadim and Abdulkarim M. Gadim. This witness also produced in evidence as an exhibit the letter dated 3<sup>rd</sup> June 1975 showing that the Government would compensate those affected by the acquisition. It is for this reason that D.W.1 said that the plaintiffs should pursue the Commissioner of Lands and not the Municipal council of Mombasa. D.W.1 further produced a copy of a letter dated 17<sup>th</sup> June 1981 indicating that the Municipal was taking over all buildings and structures standing on the suit premises on the assumption that the owners have been compensated. On cross-examination by Dr. Khaminwa the plaintiffs' counsel, D.W.1 said that plot no. 740/V/M.N. was vested in the municipal Council of Mombasa to establish a housing project. D.W.1 was unable to state what terms the Government acquired the plot D.W.1 said the land was later allocated to Seif Kajembe who then sold the same to some Asians. Those Asians in turn sold the property to Omicron Investments Ltd.

At the close of the evidence, learned counsels with the approval of this court agreed to file and rely on written submissions. I have considered the submissions filed by the firm of Khaminwa & Khaminwa Advocates for plaintiffs plus those of the firm of Apollo Muinde & Associates for the 1<sup>st</sup> Defendant and those of the firm of Asige Keverenge & Anyanzwa Advocates for the 5<sup>th</sup> Defendant. To begin with, this court from the outset must state that only three plaintiffs testified in support of the plaintiff's case. Those

who appeared are Abdillahi Hamisi Dahab (2<sup>nd</sup> Plaintiff), David Mbugua Kinyanjui (4<sup>th</sup> Plaintiff) and Hastings Thuku (5<sup>th</sup> Plaintiff). There was no evidence tendered by Rajab Kiteke Mutunga (1<sup>st</sup> Plaintiff), Andrew Ochieng (3<sup>rd</sup> Plaintiff) James Onyango Khanda (6<sup>th</sup> Plaintiff) and Raphael Gandhi (7<sup>th</sup> Plaintiff). I dismiss their suits for lack of evidence.

Let me now address my mind to the cases of those who participated during the hearing of this suit. The plaintiffs plus the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their separate issues. The plaintiffs filed the following issues:

- (i) When did the plaintiffs acquire interests in the plots in dispute?**
- (ii) What was/is the nature of the plaintiff's interest in the plots and if so when?**
- (iii) Did the 1<sup>st</sup> defendant acquire interests in the said plots and if so when?**
- (iv) If the 1<sup>st</sup> Defendant acquired interest was it or was it no subject to the prior interest of the plaintiffs?**
- (v) Did the 1<sup>st</sup> defendant have any interests to grant to 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in these plots?**
- (vi) Was alleged valuation for compensation full, just and fair in the circumstances. What is fair compensation?**
- (vii) Since 1989 has the plaintiff been able to collect rents from their premises and if not has the defendants prevented them and cause.**
- (viii) What Orders can be made in the circumstances?**

On the other hand the 2<sup>nd</sup> & 3<sup>rd</sup> defendants filed the following:

- (i) Was the 1<sup>st</sup> Defendant at all material times to this suit the owner of plots the subject matter of this suit?**
- (ii) If so, did the plaintiffs at any time during the material time acquire any right of ownership of the said plots from the suit defendant.**
- (iii) If not in what capacity did the plaintiffs stay in the above plots.**
- (iv) Did the 1<sup>st</sup> Defendant have any interest to grant the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in these plots?**
- (v) Whether the plaintiff agreed, subject to compensation, to vacate these plots to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and whether on receipt of the said compensation the plaintiffs are now stopped from re-claiming these plots or more money.**
- (vi) Are the plaintiffs entitled to any rents after the receipt of the said compensation?**

In my view the issues raised by both sides are intertwined. I will deal with them together. The first issue which is common to all parties is whether or not the plaintiffs were in occupation of Plot No. 740/V/M.N. If the answer is in the affirmative whether they are entitled to the remedies sought as against the defendants. The evidence tendered clearly show that Abdillahi Hamisi Dahab (2<sup>nd</sup> Plaintiff) and David Mbugua Kinyanjui (4<sup>th</sup> Plaintiff) were in occupation of the suit premises pursuant to a lease agreement executed in 1972 and 1973 respectively. The 2<sup>nd</sup> plaintiff is said to have inherited the lease to occupy Plot No. 740/V/M.N. from the estate of Zuhura Binti Abdalla, deceased. The lease between

Zuhura Binti Abdalla and Ali Gadim was executed on 1<sup>st</sup> October 1972. On the other hand, David Mbugua Kinyanjui, 4<sup>th</sup> plaintiff has shown that he executed a lease agreement with Ali Gadim on 1<sup>st</sup> October 1973. The duo appear to have paid land rent as tenants without land. The duo put up houses on the suit land. Those houses were later demolished by the 5<sup>th</sup> defendant after the 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs were paid through the District Officer's Office, Changamwe compensation which the plaintiffs found to be inadequate. The 2<sup>nd</sup> plaintiff is said to have received a sum of Kshs.25,000/- yet he was supposed to have been paid Kshs.180,000/- which is the true value of his house. The 4<sup>th</sup> plaintiff said he was paid Kshs.25,000/- too yet his structures were valued at Kshs.92,000/-. The duo are now demanding to be paid the balance of the value of their properties. The 1<sup>st</sup> Defendant tendered the evidence of Martin Odhiambo Otunga (D.W.1) who produced documents showing that the suit property was acquired by the Government which in turn vested the same on the Municipal Council of Mombasa (1<sup>st</sup> Defendant) to put up housing units. It also emerged from the evidence of D.W.1 that the 1<sup>st</sup> Defendant allocated the plot to one Suleiman Kajembe who in turn sold the same to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The trio is said to have sold the property to Omicron Investments Ltd, the 5<sup>th</sup> Defendant. Upon purchasing the property, the 5<sup>th</sup> defendant issued quit notices through the District Officer Changamwe. The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs each claimed they were coerced by the District Officer to collect the payments and ordered to vacate the suit premises. The trio said they resisted but they were evicted and their houses demolished. They now want to be fully compensated. I have already stated that the 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs were in occupation of Plot No. 740/V/M.N. On the basis of leases executed with Ali Gadim. There is no clear evidence as how the Government acquired the aforesaid plot. The Government could have acquired it by purchase or by voluntary surrender and or by compulsory acquisition. What remains as a fact is that by the time of acquisition, the 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs had occupational rights on the basis of an existing lease agreement. The plaintiffs have admitted that they were not given three months notice to quit as prescribed in the lease. Such a notice was to have been served by the original owner. In default the plaintiffs had a right to sue. However in this case the plaintiffs admit that they did not sue Ali Gadim nor his legal representatives. They have decided to sue parties who are not party to the leases. The law is well settled that a contract cannot confer or impose liabilities on any persons other than the parties to it and consequently no one may seek to enforce on contract to which he is not a party. The plaintiffs have attempted to link the 1<sup>st</sup> defendant to this suit on the basis that it approved building plans. That in my view will not assist because the 1<sup>st</sup> Defendant was simply performing its statutory duty within its territorial jurisdiction.

I have already found that the Government acquired the land in dispute. It is possible the Government took over the liabilities of the original owners. If that was the true position, then the Government was bound to compensate the plaintiffs. Unfortunately the plaintiffs did not sue the Commissioner of Lands. The 1<sup>st</sup> defendant in my view was a mere trustee, the suit property having been vested to it by the Central Government. The plaintiffs should have sued the Commissioner of Lands. There is clear evidence that the government through the District Officer, Changamwe, attempted to compensate the plaintiffs. The plaintiffs received the amount but found it to be inadequate compensation. In short the plaintiffs are of the view that the amount paid was not commensurate with the value attached to the property. It is manifestly clear that the right party to sue for compensation was the Government through the Commissioner of Lands.

The 5<sup>th</sup> plaintiff's evidence, in my view did not meet the threshold of proof in civil cases. He miserably failed to produce a lease agreement that show the relationship between him and Ali Gadim. He also failed to produce evidence of the loss he suffered. I find his case to be wholly unfounded.

In the end and for the above reasons, I dismiss the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs as against all the defendants. The trio failed to establish any reasonable cause of action against the defendants. In sum the suit is dismissed with costs to the defendants.

**Dated and delivered at Mombasa this 28<sup>th</sup> day of May 2009.**

**J. K. SERGON**

**J U D G E**

In open court in the presence of Mwakireti for 5<sup>th</sup> Defendant

Miss Kanaga h/b Dr. Khaminwa for Gathuku h/b Ngigi for 1<sup>st</sup> Defendant.