



REPUBLIC OF KENYA



**Islam & 4 others v Magumba & 2 others (Environment & Land Case
73 of 2014) [2022] KEELC 4804 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4804 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 73 OF 2014
JO OLOLA, J
SEPTEMBER 22, 2022**

BETWEEN

**ISLAM SAID ISLAM 1ST PLAINTIFF
MOHAMMED SAID ISLAM 2ND PLAINTIFF
FATUMA SAID MASJERY 3RD PLAINTIFF
SWALEH SAID MASJERY 4TH PLAINTIFF
ARIF SAID BAKOR 5TH PLAINTIFF**

AND

**MALIK MBASHEE MAGUMBA 1ST DEFENDANT
KENYA PORTS AUTHORITY 2ND DEFENDANT
NATIONAL LANDS COMMISSION 3RD DEFENDANT**

JUDGMENT

BACKGROUND

1. By a Plaint dated April 16, 2014 as amended on October 28, 2015, the five (5) Plaintiffs pray that Judgment be entered against the three (3) Defendants severally for:
 - (a) A declaration that the Plaintiffs are the owners of parcels of land Nos 263, 264, 265, 266 and 267;
 - (b) An injunction order restraining the 1st Defendant from occupying, trespassing into or alienating or in any other (way) whatsoever dealing with the said parcels of land Nos 263, 264, 265, 266 and 267;



- (c) An (order of) injunction restraining the 2nd and 3rd Defendants from occupying, trespassing into, or alienating or in any other (way) whatsoever dealing in the said parcels of land Nos 263, 264, 265, 266 and 267;
- (d) Costs and interest.
2. Those prayers arise from the Plaintiff's contention that they are the owners of the said unregistered parcels of land situated in Kililana B Lamu measuring a total of 45 acres by virtue of customary land rights. Sometime in the year 2010, the Langoni Council of Elders having charge of the customary rights sub-divided the land among members of the County and numbered the same for purposes of registration.
3. The Plaintiffs accuse the 1st Defendant of proceeding with the help of unscrupulous individuals to have their names removed from the list of owners sometime in the year 2012 and to replace the same with his own name.
4. Malik Mbashee Magumba (the 1st Defendant) is opposed to the grant of the orders sought. In his Statement of Defence dated September 19, 2014 as filed herein on October 30, 2014 the 1st Defendant denies that the Plaintiffs are the owners of the said parcels of land by virtue of any customary or other rights. It is further his case that there are no plots of land in the area known as or demarcated as Nos 263, 264, 265, 266 and 267 respectively measuring 45 acres as stated by the Plaintiffs.
5. The 1st Defendant further avers that he is not aware of any list of land owners nor did he replace the Plaintiff's name with his own. He avers that he has always been in possession of his parcel of land having acquired the same under Banjuni customary rights.
6. The Kenya Ports Authority (the 2nd Defendant) is equally opposed to the grant of the orders sought. In its Amended Statement of Defendant dated December 22, 2017 and filed herein on January 12, 2018, the 2nd Defendant asserts that it is a stranger to the claims of ownership of the suit properties by the Plaintiffs. The 2nd Defendant further avers that it is unaware that the Langoni Council of Elders sub-divided the land and numbered the same as stated by the Plaintiffs for purposes of registration.
7. The 2nd Defendant contends that the reason for the land acquisition is a Government funded project and that any compensation will be done according to the provisions of the Constitution and with the involvement of the National Land Commission (the 3rd Defendant herein).

The Plaintiffs' Case

8. The Plaintiffs called three (3) witnesses who testified in support of their case at the trial.
9. PW1 – Islam Said Islam is the 1st Plaintiff and a resident of Mlangoni in Lamu. PW1 told the Court that the other Plaintiffs are his brothers. He testified that the 1st Defendant entered their parcel of land in Kililana, Mokowe and has refused to vacate therefrom. The land which was previously bushland in 2008 – 2009 was given to him and his brothers by the Government
10. PW1 testified that a list of the beneficiaries of the land was kept by one Sharif Salim Kiambaa and that there were about 200 beneficiaries in the list. The 1st Defendant was not on the list and only came to the land when he saw a road passing by PW1's portion of land. PW1 told the Court his land had been taken by Lapsset and he was to be paid Kshs 14 Million.
11. PW1 told the Court that he and his Co-Plaintiffs were not paid because the 1st Defendant invaded their land and took it over. The 1st Defendant was paid Kshs 25 Million for the land. PW1 told the Court his portion of land was designated as Plot No 263 and the other plots followed chronologically.



12. On cross-examination, PW1 testified that there was a council of elders chaired by the said Sharif Kiambaa which was giving the residents land. PW1 told the Court he was given 10 acres while the 5th Plaintiff was given 5 acres. He told the Court the list of those to be given the land was prepared by the Chairman and not the 2nd or 3rd Defendants. He conceded he did not have the list prepared by the 3rd Defendant.
13. PW1 stated he was unaware that his name and that of his brothers were not in the Report prepared by the Ministry of Lands for compensation. He told the Court they were from the Bakori family and that he was unaware their name was not on the list of those who were to be compensated by Kenya Ports Authority.
14. PW2 – Salim Sharrif Omar aka Sharrif Kabar is a businessman in Lamu. He told the Court that in 2013 he was a member of the Lamu LAPPSET Steering Committee and the Chair of the Lands Division of the Committee. PW2 told the Court that the land belonged to the Government. And that their job was to settle disputes between squatters who were on the land.
15. PW2 further told the Court that in the year 2008, they had come up with a list of those who were to be allocated the land and that the Plaintiffs were in the list at Nos 263, 264, 265, 266 and 267. The said list was prepared before the issue of Lappset came about. The 1st Defendant was also on the list.
16. PW2 told the Court the Plaintiffs names appeared on the list as the Bakori family and that the list that came from the National Land Commission (the 3rd Defendant) protesting the validity of their list but received no response from them.
17. PW2 further testified that when LAPPSET came in, the land was being taken over by the Government and they wanted compensation to be done as per the 2008 list. That did not happen and the 1st Defendant was compensated for land belonging to the Plaintiffs.
18. On cross-examination PW2 conceded that the 1st Defendant's name was on their list and that his land was 6.097 acres by measurement. He told the Court he had heard that the 1st Defendant was paid although he had no evidence to show how much he had been paid. PW2 further told the Court he had himself been compensated for his land.
19. PW3 – Mohamed Kombo Abshir is a farmer and Village Headman in Kililani B in Lamu. He told the Court he knows about the parcels of land in the area and that PW2 was their Chairman. PW3 testified that the 1st Defendant had no land in the area and that save for the 5th Plaintiff who had been given 5 acres all the other Plaintiffs had each 10 acres of land.
20. PW3 further told the Court the 1st Defendants parcel of land was only 2 acres and that it was far away from the area. He told the Court the 1st Defendant encroached on the Plaintiff's land and that he later heard that he had been compensated although he did not know how much money he was paid.
21. On cross-examination, PW3 conceded that he had nothing to show that as a Village Headman, he was authorized to allocate land. He further told the Court the 1st Defendant had a small plot far away from the Plaintiff's. PW3 further told the Court he was never paid any compensation as his parcel of land was not taken for the project. He told the Court he heard that the 1st Defendant was compensated although he did not know the amount the 1st Defendant was paid.

The Defence Case

22. On their part the three (3) Defendants called two (2) witnesses who testified in support of their case.



23. DW1 – Malik Mbashee Magumba is the 1st Defendant and a farmer in Lamu. He told the Court he was the owner of Plot No 59 in Kililana. He was given the said parcel of land by the village elders. DW1 further told the Court he had not been paid any compensation for the land by the 2nd Defendant.
24. DW1 further told the Court he had no power to change the particulars of the properties for which compensation was sought. He further told the Court he had sold a portion of his land to the 1st Plaintiff. On being shown a list of the properties prepared by the 3rd Defendant, DW1 conceded there were three names listed for Plot No 59. The names were the Bakori family, the Abuluma family and DW's name.
25. On cross-examination, DW1 told the Court his parcel of land was 3.95 acres and that everyone had been required to stand on their parcels during the survey that was done by the Ministry of Lands.
26. On further cross-examination, DW1 conceded he had been paid the sum of Kshs 22,500,000/- but the payment was for plot No 56 which also belonged to him. He told the Court his parcel of land was subdivided into two and that he was compensated for the portion that had no dispute.
27. DW2 – Peter Rusenge Oremo is an Engineer formerly working with the 2nd Defendant as its Lamu Port Project Manager. He told the Court he was the Lamu Port Manager from 2008 to 2019 when he retired.
28. DW2 told the Court that he represented the 2nd Defendant during the Lamu Port acquisition process. DW2 further told the Court that the Port is situated in an area known as Kililana which was Government land but was occupied by squatters. The 2nd Defendant carried out a feasibility study in 2010 and identified the area required and those that were to be affected.
29. DW2 testified that the 1st Defendant was the owner of land parcel No 56 as per the survey that they had carried out. Before compensation was made the 3rd Defendant published a list of all the Project Affected Persons and later on the Parent Ministry of Transport wrote to the 2nd Defendant asking them to release the money for compensation to the 3rd Defendant. In that respect, the 2nd Defendant released the sum of Kshs 1.5 Billion.
30. On cross-examination DW2 told the Court the listing of land parcels numbers 263 to 267 was not done by the 2nd Defendant and that the Government had listed the parcels of land as they were. He denied that the 2nd Defendant colluded in any way with the 1st Defendant to change the particulars of the owners.

Analysis and Determination

31. I have carefully perused and considered the pleadings as filed by the parties herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates representing the parties herein. The 1st and 2nd Plaintiffs passed away before the trial and their suits were deemed to have abated as they were not substituted. The National Land Commission added herein as the 3rd Defendant *vide* the Amended Plaintiff of October 28, 2015 neither entered appearance nor did they participate in the hearing hereof.
32. By their suit as filed herein, the Plaintiffs urge the Court to make a declaration that they are the owners of Parcels of land described as Nos 263, 264, 265, 266 and 267 situated in Kililana 'B' area of Lamu. In addition, the Plaintiffs pray for injunctive orders restraining the Defendants from occupying, trespassing into, dealing with or alienating the said properties. In particulars, the Plaintiffs urge the



- Court to bar the 2nd Defendant from compensating the 1st Defendant for its acquisition of the said parcels of land.
33. From the material placed before me, this suit was triggered by the implementation of a Government flagship project under the umbrella of Lamu Port – South Sudan – Ethiopia – Transport Corridor commonly referred to in short as the LAPSSET Project. It was not in dispute that for purposes of construction of the Lamu Port, the National Government set out to acquire various parcels of land in the area through the National Land Commission (the 3rd Defendant) for use by the Kenya Ports Authority (the 2nd Defendant).
 34. According to the Plaintiffs the said Plot Nos. 263 to 267 said to be measuring a total of 45 acres were part and parcel of the properties acquired by the 3rd Defendant on behalf of the 2nd Defendant for the construction of the Lapsset Corridor Project. The Plaintiffs assert that they had acquired the said properties through customary law after the Langoni Council of Elders sub-divided the same and apportioned it to the area residents.
 35. The Plaintiffs told the Court that upon sub-division of the land by the Council of Elders in the year 2010, the Council prepared a list of the beneficiaries of the land for purposes of registration. It is their case that subsequently in 2012, the 1st Defendant herein – Malik Mbashee Magumba in collusion with other people caused their names to be removed from the list and instead inserted his own name in order to benefit from the expected compensations.
 36. On his part, the 1st Defendant denies that he has caused himself to be registered as the owner of the said parcel Nos 263 to 267. On the contrary, he avers that he is the owner of a Parcel of land known as Plot No 59 measuring some 3.95 acres. He states that he has lived on the said parcel of land since 2005 when he acquired the same from the village elders.
 37. While admitting that the 3rd Defendant acquired some land at the Kililana ‘B’ area for the Lapsset Corridor Project, the 2nd Defendant on its part insists that all Project Affected Persons on the acquired land were duly compensated through the 3rd Defendant. The 2nd Defendant avers that the land was acquired after several surveys had been done to establish ownership and a list of the affected persons was prepared and published in the Daily Nation Newspaper of December 10, 2014.
 38. In support of their case, the Plaintiffs called three witnesses. PW1 – Islam Said Islam (now deceased) told the Court that the 1st Defendant entered their land in Kililana and that he had refused to vacate therefrom. He told the Court that the 1st Defendant was later paid Kshs.25 Million for the parcel of land. On his part, PW2 – Salim Sharrif Omar told the Court he was part of the Lapsset Corridor Project Steering Committee and that he was the one who wrote a list of persons who had property in the affected area. PW2 told the Court the 1st Defendant’s name was also on the list but that his parcel was 2 acres and separated from the Plaintiffs by a footpath. He testified that he was aware that the 1st Defendant had been paid by the 3rd Defendant for the parcel of land that was acquired.
 39. As it turned out, the properties in dispute were unadjudicated and unregistered parcels of land on which the Plaintiffs and the 1st Defendant previously occupied and/or utilized as squatters. While the Plaintiffs insisted that their parcels of land described as Nos 263, 264, 265, 266 and 267 measuring 45 acres were taken from them, there was no evidence whatsoever placed before this Court to demonstrate the existence of the said parcels of land.
 40. Despite the Plaintiffs contention that they had an original list of owners of the said Plot Nos 263 to 267, neither the said list nor a survey report was produced in Court to prove the existence of the said plots and/or to demonstrate that the said parcels of land are the same ones comprised in Plot No 59



which the 1st Defendant insists is his own. Indeed while the Plaintiffs told the Court that their parcels of land were 45 acres in total, the 1st Defendant asserted that his parcel of land No 59 aforesaid only measures 3.95 acres in size.

41. In support of their case, the 2nd Defendant relied on the testimony of their former Manager at the Lamu Port Engineer Peter Usenge Oremo (DW2) who told the Court he had represented the 2nd Defendant in the process of the land acquisition. From DW2's testimony it was apparent that the Government carried out a survey of the area and identified persons who were to be affected by the Project. The names of those people were published in the Daily Nation Newspaper of December 10, 2014.
42. DW 2 was clear in his testimony and the documents produced herein as evidence that the survey done by the Government did not list the Plot Nos 263 to 267 which the Plaintiffs claim herein. Those parcels of land are equally not mentioned anywhere in the list of Project Affected Persons that was produced by the 2nd Defendant and it was apparent no compensation had been made or scheduled for the said parcels of land if indeed they exist.
43. Having failed to show any nexus between the Plot Nos 263 to 267 on the one hand and the Plot No 59 claimed by the 1st Defendant, it follows that this Court cannot issue the orders sought by the Plaintiff against him as the 1st Defendant cannot be restrained from occupying parcels of land whose existence are unproven.
44. As it were the Plaintiffs claim over the property was based on a list allegedly authored by the Langoni Council of Elders. That list as produced in Court is not signed by any person nor does it appear on any official letterhead. While the Plaintiff told the Court the 1st Defendant's name was not on the list, their own witness, PW2, contradicted that position and told the Court the 1st Defendant's name was on the list. At the same time the letters produced by the Plaintiffs written to and received from various Government agencies make no reference to any plot numbers 263 to 267 and the same were of no use to their case.
45. The upshot is that I did not find any merit in the Plaintiffs' claim herein. This suit is accordingly dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 22ND SEPTEMBER, 2022.

In the presence of:

Mr. Magolo for the Plaintiff

No appearance for the Defendants

Court assistant - Kendi

.....

J. O. OLOLA

JUDGE

