



REPUBLIC OF KENYA



**Hashim & 19 others v Abubakar & 3 others (Environment & Land Petition
23 of 2019) [2022] KEELC 13579 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 23 OF 2019**

**JO OLOLA, J
OCTOBER 19, 2022**

BETWEEN

SHARRIF ALI AHMED BIN HASHIM 1ST PETITIONER
AHMED ALI MOHAMED HANI 2ND PETITIONER
OMAR MOHAMED ALI HANI 3RD PETITIONER
FARID FEISAL KASSIM 4TH PETITIONER
BADRU MOHAMED ALI HANI 5TH PETITIONER
AHMED ABUBAKAR OMAR 6TH PETITIONER
SAID BAKARI OMAR 7TH PETITIONER
ABUBAKAR MWANAHANI SIMBA 8TH PETITIONER
RUKIA AHMED 9TH PETITIONER
SWALEH MOHAMED SALIM 10TH PETITIONER
ALI OMAR KHASIM 11TH PETITIONER
ATHMAN BAKARI KHALIFU 12TH PETITIONER
ABDULKARIM MOHAMED ALI 13TH PETITIONER
SAADA BAKARI SHEIKH 14TH PETITIONER
ALI BAKARI LIONGO 15TH PETITIONER
SAID MAAMUNI SIMBA 16TH PETITIONER
YUSUF AHMED 17TH PETITIONER
OMAR BAKARI KHALAFU 18TH PETITIONER
SOUD BAKARI KHALAFU 19TH PETITIONER



NASMA BODO BLUME 20TH PETITIONER

AND

ALWI SHARIFF ABUBAKAR 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

DIRECTOR LAND ADJUDICATION AND SETTLEMENT .. 4TH RESPONDENT

JUDGMENT

1. By this Petition dated and filed herein on July 18, 2019, the twenty (20) Petitioners pray that:
 1. The Petitioners be declared the legal and absolute owners of Lamu/Block/V/139;
 2. The purported allotment to the 1st Respondent by the 2nd to 4th Respondents be declared illegal and it be revoked and or nullified forthwith;
 3. The title to Lamu/Block/V/139 issued in the name of Alwi Shariff Abubakar be cancelled;
 4. The title to Lamu/Block/V/139 be registered in the name of the Petitioners;
 5. The Deputy Registrar of this Honourable Court do sign the transfer documents on the 1st Respondent's behalf – in the event he refuses to do so;
 6. The acts of the 2nd to 4th Respondents be declared illegal, null and void;
 7. A permanent injunction be issued against the Plaintiff by himself, his agents and/or servants from trespassing or any other form of interference; and
 8. The Petitioners be awarded costs of the suit.
2. Those prayers arise from the Petitioners' contention that the land in question was initially Government land but was set apart for settlement of the Petitioners herein through the Settlement Fund Trustees. The Petitioners aver that they have lived on the land for a period of over 60 years and that they have planted hundreds of coconuts, cashew nuts, tamarind and mango trees thereon as part of their economic sustenance.
3. The Petitioners further aver that they have recently discovered that the 1st Respondent had fraudulently and falsely represented themselves to the 2nd and 4th Respondent using fictitious documents that he was the owner of the Lamu/Block /V/139. It is the Petitioners' case that as a result of the said fraudulent documentation and representations made by the 1st Respondent, the 2nd, 3rd and 4th Respondents jointly and severally caused a title to issue in his name on September 10, 2013 as the freehold owner of the suit land to the detriment of the petitioners who are the true owners thereof.
4. In his response to the Petition and Cross-Petition, Alwi Shariff Abubakar (the 1st Respondent) avers that he is the bona fide owner of the suit property having acquired the same procedurally from the Government. The 1st Respondent asserts that the petitioners herein are not the local inhabitants of the suit land and invites them to strict proof.



5. The 1st Respondent avers that the suit property was not the Petitioners' customary land and that the Government was free to allocate it to any interested person including the 1st Respondent herein. He denies being involved in any fraudulent dealings in the acquisition of the property.
6. By way of his Cross-Petition, the 1st Respondent prays for:
 - (a) A permanent injunction restraining the Petitioners by themselves, their agents, servants, representatives, assigns or any other person claiming under them from claiming ownership, selling, alienating, disposing of, transferring, wasting or from adversely dealing with all that parcel of land known as Lamu/Block V/139;
 - (b) A declaration that the 1st Respondent is the bona fide registered owner of all that parcel of land known as Lamu/Block V/139 and had the constitutional right under Article 40 of the Constitution of Kenya 2010 to enjoy the same freely and peacefully;
 - (c) Costs of the suit; and
 - (d) Any other or further order or relief that this Honourable Court may deem fit and just to grant.

The Petitioners' Case

7. The Petitioners herein called one witness who testified on their behalf at the trial.
8. PW1 – Omar Mohamed Ali Hani is the 3rd Petitioner and a resident of Lamu. He told the Court that the Petitioners have lived on Land parcel No Matondoni Lamu/Block V/139 since 1965. The Petitioners had planted Coconut, Tamarind and fruit trees on the land.
9. PW1 further told the Court that they followed up the matter with the Government to have them allocated the land. In 1994, 1997 and 1998, the Government had brought Surveyors to demarcate the land. The Surveyors placed beacons and prepared a list of land owners for purposes of preparing titles in their names. Thereafter the Petitioners waited for titles until 2014 when they realized that something was amiss. It is then they realized the 1st Respondent had been issued with a title for their land.
10. PW1 told the Court the suit property was originally Government land which was subsequently marked for settlement of squatters. Upon realization of what had happened, the Petitioners made several efforts to get assistance from various entities of Government but they failed to assist the Petitioners.
11. PW1 testified that the suit property was allocated to the 1st Respondent without consultation and information to the locals and that no notice was published by the 5th Defendant to notify any person with interest in the land. PW1 further testified that the 2nd and 4th Respondents demarcated the suit property and recorded it in the name of the 1st Respondent despite the fact that the 1st Respondent had no remote connection to the property.
12. On cross-examination, PW1 told the Court that he had been on the land since 1968 and that they had asked for the land verbally from the Governments through their political representatives. He further told the Court the National Land Commission had carried out an investigation on the land but they were yet to receive their Report.
13. PW1 further told the Court that he did not know the acreage of the land although it was a big parcel with about 22 residents living thereon.

The Defence Case

14. On their part, the Defence called a total of two witnesses at the trial.



15. DW1 – Alwi Shariff Abubakar is the 1st Respondent and a resident of Lamu. He told the Court he knew about 10 of the Petitioners. DW1 testified that his parcel of land is about 8.3 Ha and that the Petitioners were claiming the land to be their own.
16. DW1 told the Court the land was empty when he applied for the same. He went to the Land Control Board (LCB) and was asked to apply for the land formally. DW1 told the Court he complied with the LCB request and that he was eventually issued with title for the land on September 10, 2013.
17. DW1 testified that shortly after getting the titles, he was summoned to DCI offices in Lamu where he found some complainants but who were different from the Petitioners herein. DW1 told the Court the DCI officers confiscated all his original documents in relation to the land and refused to hand them back. He told the Court he was surprised the documents were now not at the Lands Office.
18. DW1 told the Court the title deed he was issued with was not with the KCB Bank as he had used the same as collateral to secure a loan. DW1 further told the Court the land remains empty to-date and that the Petitioners do not reside on the land.
19. On cross-examination DW1 told the Court he did not go to the Land Registrar office but sought the land from the Land Control Board. He told the Court the title was issued to him through his agent and that it had taken about 8 months from the time he applied to the date when the title was issued.
20. DW1 conceded that he had not indicated in his written statement filed in Court that he had lost his documents or that the DCI had confiscated them. He told the Court he had paid for Gazettment of the land and also paid rates and stamp duty but he did not have the receipts in Court. He further conceded there was no public notice inviting prospective bidders for the land.
21. DW2- Thomas Morara Nyang'au is the Deputy Chief Land Registrar Lamu County. He told the Court the parcel of land in dispute was previously Government land before it was allocated to the 1st Respondent. The 1st Respondent was issued with a title on September 10, 2013 after he paid all requisite charges.
22. DW2 further told the Court that from their records, the parcel of land had been charged to KCB Bank in the year 2014 to secure a loan totaling Kshs.5 million.
23. On cross-examination, DW2 testified that there were two ways of acquiring Government land. One was by getting a letter of allocation while the second process was by a public auction. DW2 told the Court he did not have his correspondence file and that he had no records to show that there was an auction of the land. He further conceded he had nothing to show the stand premium was paid.

Analysis and Determination

24. I have carefully perused and considered the pleadings herein, the testimonies of the witnesses and the evidence adduced at the trial.
25. The Petitioners herein lay claim to a parcel of land known as Lamu/Block V/139. From the material placed before me the said parcel of land measuring some 8.3 Ha was on September 10, 2013 registered in the name of the 1st Respondent herein. It is the Petitioners' case that the parcel of land was initially Government land that had been set apart for their settlement through the Settlement Fund Trustees (SFT).
26. The Petitioners assert that they have lived on the parcel of land for many generations spanning a period of over 60 years. It is their case that they have recently discovered that the 1st Respondent had fraudulently and falsely represented himself to the 2nd and 4th Respondents using fictitious documents



that he was the owner of the land as a result whereof he was issued with the Title Deed on September 10, 2013.

27. On his part the 1st Defendant denies any wrong doing and asserts that he is the bona fide proprietor of the said parcel of land having lawfully and procedurally acquired the same from the Government of the Republic of Kenya. The 1st Defendant further asserts that the Petitioners are not local inhabitants and that they have never resided in the suit property. It is his case that the Government was free to allocate its land to any interested person in the manner it allocated the land to himself.
28. By way of his cross-Petition, the 1st Respondent urges the Court to declare him as the bona fide registered owner of the suit property and to issue a permanent injunction restraining the Petitioners from dealing in any manner with the suit property.
29. As it were, there was no dispute that the subject parcel of land was hitherto Government land. The process of allocation of such land is provided under Section 12 (1) of the Land Act No 6 of 2012 as follows:

“ 12. Allocation of public land

- (1) Whenever the National or County Government is satisfied that it may be necessary to allocate the whole or part of the specific public land, the Cabinet Secretary or the County Executive Committee member responsible for matters relating to land shall submit a request to the (National Land) Commission for the necessary action by way of –
 - (a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;
 - (b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;
 - (c) public notice of tenders as it may prescribe;
 - (d) public drawing of lots as may be prescribed;
 - (e) public request for proposals as may be prescribed; or
 - (f) public exchange of equal value as may be prescribed.
30. In the matter before me, it was unclear if those processes as prescribed had been followed in allocating the parcel of land to the 1st Respondent. According to the 1st Respondent, he had approached the Lamu Land Control Board (LCB) to be allocated the land in question. The Board then asked him to make a formal application and upon compliance with the request, he was allocated the land and was subsequently issued with a Title Deed therefor on September 10, 2013.
31. It was however unclear to this Court where the Lamu Land Control Board got the powers to allocate public land to a private individual. The 1st Defendant did not make it easier either for the Court to interrogate the process by which he acquired the said title. Other than the Title Deed which he produced in evidence, the 1st Defendant could not produce the application he purports to have made to the Board nor any receipts for any payments made as he maintained that the same had been confiscated from him by the Directorate of Criminal Investigations in Lamu. It was even unclear when if at all such application was made.



32. As was noted by the Court in *Mako Abdi Dolai v Ali Duare & 2 Others (2019) eKLR*, prior to the 2010 Constitution and the 2012 amendments to the body of Land Laws in Kenya, disposition of Government land was governed by the Government Lands Act (now repealed). Under the repealed Act, power to dispose of public land was vested in two entities, namely the President and the Commissioner of Lands as per Sections 3 and 9 respectively of the said Act.
33. A perusal of the process of disposition of Government land even in that past dispensation reveals that certain procedures and processes had to be followed. Those processes included the identification of the land by the Local Government Council within which the land was situated to inter alia find out if the parcels of land set for alienation was indeed Government land and second, if it was available for disposition.
34. That does not appear to have happened in the matter before me and that is how the 1st Respondent ended up being allocated land that was already in private hands. While the 1st Respondent insisted in his testimony before the Court that the Petitioners were not on the land, a visit to the locus in quo in Matondoni in Lamu by this Court on July 2, 2021 revealed the complete opposite. The Court not only found the Petitioners homesteads on the land but it was also clear that they had been settled on the land for a considerable period of time. There were not only permanent houses on the land, there were also old dug-out wells and large plantations of Mango trees to which the 1st Respondent laid no claim.
35. Even with the subtle help of the Land Registrar Lamu (DW2) who went out of his way to try to justify the allocation of the land to the 1st Respondent it was clear from the site visit that the 1st Respondent despite holding title to the land could not state with precision the boundaries of the 8.3 Ha. parcel of land.
36. Arising from the foregoing, I was indeed persuaded that the 1st Respondent's title deed to the suit property had been obtained irregularly and/or through misrepresentation of material facts as to the state of affairs on the ground. Given the questions surrounding the validity of his title, it was incumbent upon the 1st Respondent to provide a basis and a proper explanation as to how he had obtained the title and it was not sufficient for him merely to wave the title deed before the Court and to insist he obtained the same regularly.
37. It follows that I did not find any basis for the 1st Respondent's Cross-Petition. Given that the parcel of land in question was undisputably Government land, I did not also find any basis to award the same to the Petitioners as they are equally expected to follow the procedures set down for acquisition of such land. Accordingly, I make the following orders:
 - (i) The purported allotment of land parcel No Lamu/Block V/139 to the 1st Respondent is hereby declared illegal and the same is hereby revoked and nullified forthwith.
 - (ii) The Title Deed for the said Lamu/Block V/139 issued in the name of the 1st Respondent is hereby revoked and cancelled.
 - (iii) The Petitioners shall have the costs of this Petition and the Cross-Petition.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 19TH DAY OF OCTOBER, 2022.

In the presence of:

Mr Anyegah Ondieki for the Petitioners

No appearance for the 1st Respondent



No appearance for the Attorney General for 2nd to 4th Respondents

Court assistant - Kendi

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J O OLOLA

JUDGE

