



Solian Investment Limited v KSC International Limited in Receivership (Formerly known as Kundan Singh Construction Limited) & 5 others (Environment & Land Case 22 of 2016) [2022] KEELC 13548 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13548 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 22 OF 2016
JO OLOLA, J
OCTOBER 19, 2022**

BETWEEN

SOLIAN INVESTMENT LIMITED PLAINTIFF

AND

**KSC INTERNATIONAL LIMITED IN RECEIVERSHIP (FORMERLY KNOWN AS KUNDAN SINGH CONSTRUCTION LIMITED) 1ST DEFENDANT
CHIEF LAND REGISTRAR 2ND DEFENDANT
REGISTRAR OF LANDS KILIFI 3RD DEFENDANT
REGISTRAR OF TITLES 4TH DEFENDANT
DISTRICT SURVEYOR KILIFI 5TH DEFENDANT
ATTORNEY GENERAL 6TH DEFENDANT**

JUDGMENT

Background

1. By their plaint dated February 11, 2016 as amended on March 15, 2016 and further amended on September 5, 2016, Solian Investments Limited (hereinafter “the plaintiff”) prays for judgment against the defendants for:
 - (a) A declaration that the 5th defendant illegally amended and/or created the registry index map for Mtondia/Roka registration section in so far as the said registry index map failed to take into account the existence and boundaries of title No 15351, CR 22091 North of Kilifi Creek in accordance with survey records in the custody of the Director of Surveys;



- (b) A declaration that the 2nd and/or 3rd defendants and/or their officers working for them or under their direction and control, acted illegally and unlawfully when they issued a freehold title for Mtondia/Roka/11 as part of a Squatter Settlement Program when in fact part of Mtondia/Roka/11 had already been alienated to the plaintiff as a leasehold title, this being No 15351, CR 22091 North of Kilifi Creek;
- (c) A declaration that the creation of title No Mtondia/Roka/11 was unlawful and was a nullity in so far as the boundaries of the same encompassed title No 15351, CR 22091 North of Kilifi Creek;
- (d) A declaration that the 1st defendant acquired no lawful title/right/interest to title No Mtondia/Roka/11 in so far as the same encompassed title No 15351, CR 22091 North of Kilifi Creek;
- (e) Alternatively, a declaration that the 1st defendant acquired no lawful title, right/interest to title No Mtondia/Roka/11 at all for lack of a land control board consent for the transactions involving the transfer of title No Mtondia/Roka/11 from the original allottees to Magomeni Properties Limited and/or from Magomeni Properties Limited to the 1st defendant;
- (f) A declaration that the 1st defendant's construction on title No Mtondia/Roka/11 is unlawful and illegal in so far as the said construction is within the boundaries of title No 15351, CR 22091 North of Kilifi Creek and/or in so far as such construction is being undertaken without a change of user being obtained, that such construction amounts to an unlawful interference with the plaintiff's lawful rights to title No 15351 CR 22091 North of Kilifi Creek and that the 1st defendant has no right to enter, occupy, carry out construction activities or development thereon and/or to remain on title No 15351, CR 22091 North of Kilifi Creek;
- (g) A permanent injunction restraining the 1st defendant by itself or through its officers, servants and/or employees howsoever from entering upon title No 15351, CR 22091 North of Kilifi Creek and to continue to remain and/or to continue to trespass thereon and from carrying out or continue to carry out any construction or development thereon and from in any way whatsoever from disposing of, alienating, selling, transferring, leasing and/or charging, wasting or in any other manner whatsoever from having any dealings with all that parcel of land known as plot No 15351, Kilifi Creek North and CR 22091 being the plaintiff's land;
- (h) A mandatory injunction directing the 1st defendant, its officers, servants, agents and/or employees to vacate title No 15351, CR 22091 North of Kilifi Creek, to demolish all developments put up thereon and to hand over vacant possession thereof to the plaintiff and to allow the plaintiff, its officers, servants, employees and/or agents free and unrestricted access onto the plaintiff's land;
- (i) An order directing the 2nd, 3rd and/or 4th defendants to rectify their land registry records in respect of title No Mtondia/Roka/11 reducing the acreage thereon by 4 hectares and further directing the 1st defendant, (its) servants, employees, agents and all and any persons claiming through or under it to surrender the original title document in respect to title No Mtondia/Roka/11 to the Kilifi district land registry for purposes of cancellation and issuance of a title document duly rectified as ordered and decreed herein;
- (j) An order directing the 5th defendant to rectify and/or cause to be rectified the registry index map for Mtondia/Roka registration Section in respect to title No Mtondia/Roka reducing the acreage thereon by 4 hectares and to delineate and/or set out the boundaries of title No 15351,



CR 22091 North of Kilifi Creek in line with the contents of the Survey of Kenya Plan F/R 216/137 and deed plan No 159375 deposited at the survey office at Nairobi;

- (k) An order for vacant possession and eviction of the 1st defendant from title No 15351, CR 22091 North of Kilifi Creek;
 - (l) Damages against the 1st defendant for trespass;
 - (m) Costs of and incidental to this suit; and
 - (n) Such other or further relief or order which this honourable court may deem fit to grant.
2. Those many prayers arise from the plaintiff's contention that at all times material, the plaintiff was and is still the registered proprietor of title No 15351, CR 22091 North of Kilifi Creek comprising 4.0 Ha whose certificate of title was issued by the 4th defendant on January 15, 1992.
 3. The plaintiff avers that in or about September 2015, it instructed its surveyors to carry out a survey over the suit land when it was discovered that the 1st defendant had unlawfully entered into the said parcel of land without the consent or knowledge of the plaintiff and by then the 1st defendant had already constructed a wall along the boundary of the suit land thereby preventing the plaintiff from gaining access therein.
 4. The plaintiff further avers that on or about May 17, 2016, it discovered through exhibits attached to an affidavit sworn on May 12, 2016 by one of the 1st defendant's joint receivers manager and filed herein that on April 12, 2011, the 1st defendant was issued with a certificate of title by the 3rd defendant in respect to the 1st defendant's purported freehold interest in the parcel of land known as Mtondia/Roka/11 comprising some 14.2 Ha or thereabouts.
 5. The plaintiff avers that it has since established from the exhibits and the survey records in its possession that its parcel of land measuring 4 Ha. falls within the boundaries of the 1st defendant's 14.2 Ha land and that the same was created through a purported allotment of land through a settlement scheme. It is the plaintiff's case that the 1st defendant's parcel of land was unlawfully created and hence the prayers herein.
 6. KSC International Limited in receivership formerly known as Kundan Singh Construction Limited (hereinafter the 1st defendant) is opposed to the orders sought by the plaintiff. In its statement of defence dated May 24, 2016 as amended and filed herein on September 3, 2018, the 1st defendant avers that it is the registered owner of the parcel of land known as Mtondia/Roka/11 and asserts that it is a stranger to any parcel of land known as title No 15351, CR 22091 North of Kilifi Creek measuring 4 Ha.
 7. In addition the 1st defendant denies that it has erected a wall along the boundary of the plaintiff's property adding that the only wall it has built is around its own property. The 1st defendant avers that as indicated by the plaintiff, the 1st defendant duly purchased the suit property from Magomeni Properties Limited for good value without notice of any defect thereon. It is the 1st defendant's case that the suit premises were legally and lawfully allotted to one Garama Chai Jefwa, Samros Kalu Nguya, Amos Kithi Kombe and Omar Ahmed Shariff on February 4, 2002 before it was later transferred by the original owners to the said Magomeni Properties Limited on January 31, 2001.
 8. The 1st defendant further avers that if indeed the alleged leasehold interest created in favour of the plaintiff did exist, the same became extinguished by the plaintiff's failure to develop the same as provided under condition No 2 of the title thereto requiring certain developments to be made within certain stipulated periods.



9. The 1st defendant asserts that contrary to the plaintiff's assertions, it did obtain land control board consent for the transfer and acquired a change of user over the suit premises before it commenced the development thereon. Accordingly the 1st defendant denies that its construction on the suit premises is illegal and/or unlawful and invites the plaintiff to strict proof.
10. The Chief Land Registrar, the registrar of lands Kilifi, the registrar of titles, the district surveyor Kilifi as well as the Attorney General sued herein as the 2nd, 3rd, 4th, 5th and 6th defendants respectively are similarly opposed to the grant of the orders sought in the plaint. In their joint statement of defence dated and filed herein on December 2, 2016, the 2nd to 6th defendants state that the parcel of land described by the plaintiff was not available for alienation to the plaintiff as alleged or at all as the same comprised a settlement scheme carved out of government land well before 1992 when the plaintiff's title was allegedly issued.
11. The 2nd to 6th defendants further aver that the suit property was allocated through the settlement fund trustees to squatters who were ordinarily resident on the land and who complied with the terms of allocation and met the conditions provided therein. It is the defendants' case that if title No 15351, CR 22091 exists, the same was acquired illegally and is therefore null and void and incapable of conferring any proprietary rights to the plaintiff.

The Plaintiff's Case

12. In support of its case the plaintiff company called two witnesses at the trial.
13. PW1 – Azim Lalji nurani is a director of the plaintiff company. He told the court that the plaintiff is the registered owner of title No 15351 being CR No 22091 North of Kilifi Creek in Kilifi county comprising some 4 Ha. PW1 told the court the plaintiff was issued with a certificate of title for the said parcel of land by the registrar of titles (the 4th defendant) on January 15, 1992 and remains in possession of the same to-date.
14. PW1 testified that sometime in September 2015, he instructed one Dennis Malembeka of Mashariki Geosurveys Limited to carry out a survey of the property. The surveyor however informed PW1 that he was unable to carry out an official survey of the property as he was unable to gain any access onto the same as it was surrounded by a wall and none of the beacons could be found. The surveyor further informed PW1 that there was construction going on inside the said property and that he was denied access therein by guards manning the gate. The surveyor wrote to the plaintiff regarding his findings in a letter dated September 10, 2015.
15. PW1 testified that the surveyor later prepared a report dated June 21, 2016. A perusal of the report revealed that on or about May 9, 1990, parcel No 11 Mtondia/Roka was allegedly opened with the Government of Kenya as the registered owner. Some 12 years later on February 4, 2002, the said plot was allotted to four individuals. PW1 told the court the parcel known as Mtondia/Roka/11 was found by the survey to have completely overlapped the plaintiff's parcel of land.
16. PW1 further testified that from a perusal of the defendant's documents the said parcel number Mtondia/Roka/11 was transferred by the four original allottees to an entity known as Magomeni Properties Limited before it was transferred to the 1st defendant's name in the year 2011. PW1 told the court the 1st defendant's title was illegally issued in total disregard of the plaintiff's already existing title.
17. On cross-examination, PW1 told the court the plaintiff's title is a leasehold and that they were required to pay Kshs 150,000/- as consideration for the lease. PW1 conceded that he had nothing in court to



show that the plaintiff paid the said consideration. He further told the court they had been paying the annual ground rent since 1992 although he had no evidence of such payments.

18. PW1 further testified that condition No 2 on the terms of the lease required them to furnish building plans for approval and to complete the planned developments within 24 months of the issuance of the lease. PW1 conceded they had not brought any evidence that they submitted any such plans and/or completed any development on the land.
19. PW1 told the court the plaintiff's title was issued in 1992 but they only came to learn about the 1st defendant's construction on the land in the year 2015 as they were not residing on or occupying the land.
20. PW1 told the court he became a director of the plaintiff company on February 24, 1992 and that one of the other directors was called Yegon. He told the court he did not think the said Yegon hailed from Mtondia and admitted that he (PW1) is not a resident of Mtondia.
21. On further cross-examination, PW1 told the court he was unaware if the plaintiff had applied for the grant as he had joined the company after the same was issued. He conceded that it was true they had not complied with all the conditions under the grant. He told the court they did not carry out any development on the land from the time the grant was issued until 2015 when they found the 1st defendant had built a wall around the land.
22. PW2 – Dennis Malembeka is a land surveyor and holder of a Bachelor of Science Degree in Land Surveying. He told the court he has been in practice for 25 years and that he was instructed by the plaintiff to inspect one of their plots in Kilifi.
23. PW2 testified that following those instructions, he prepared a preliminary report dated September 10, 2015 in respect of LR No 15352 Kilifi/Roka. His instructions were to take a due diligence survey of the property and find out if there were any encroachments thereon. PW2 told the court they were however unable to do the survey as the place had a boundary wall and construction works were going on therein.
24. PW2 further testified that he again visited the property later on, a few days before he prepared his final report dated June 21, 2016. PW2 told the court that from his investigations, he learnt that the suit property was initially government land and that it was not possible that it was a settlement scheme. PW2 told the court that if the land was a settlement scheme, the adjudication process would have to be followed and that a letter of allotment would not apply to an adjudication scheme.
25. PW2 testified that from his observations, the parcel Mtondia/Roka/11 had completely engulfed the plaintiff's parcel of land.
26. On cross-examination, PW2 told the court he was a registered surveyor but not a licensed one. He told the court he was trained to carry out surveys and that the law does not bar him from carrying out the work that he did herein. He conceded he did not have any correspondence to show how he confirmed that the land had been surveyed as he had not written to the director of survey.

The Defence Case

27. The 1st, 3rd, 4th and 5th defendants each called one witness who testified in support of their respective cases at the trial.
28. DW1 – Okpar Singh Ubhi is the Managing Director of the 1st defendant. He told the court the 1st defendant is the registered owner of the parcel of land known as Mtondia/Roka/11 measuring 14.20 Ha and situated in Kilifi county. The 1st defendant acquired the suit property from Magomeni



- Properties Limited in the year 2011 after conducting due diligence and confirming that Magomeni Properties Limited were the proprietors thereof.
29. DW1 told the court the records the 1st defendant obtained from the Kilifi district land registry indicated that the original allottees of the property were some four individuals namely Garama Chai Jefwa, Jamros Kalu Nguya, Amos Omar Kithi Kombe and Omar Ahmed Shariff who were residents of Mtondia Roka Settlement Scheme. The said individuals sold the land to Magomeni Properties Limited.
 30. DW1 testified that the 1st defendant subsequently acquired the property from Magomeni Properties Limited as a purchaser for value without notice of any competing interest and that it did obtain all the requisite approvals including land control board consent before the property was transferred to its name.
 31. On cross-examination, DW1 told the court the 1st defendant was unaware that the plaintiff had another title until the time this case was filed. As far as they knew, the original title herein was issued in 1990 in the name of the government and DW1 did not believe there could be any other title.
 32. On further cross-examination, DW1 conceded that he had no evidence of the existence of Mtondia Roka Settlement Scheme. He told the court their parcel of land existed as per the documents and dismissed the notion that the green card produced by themselves was not genuine. DW1 told the court they have seven (7) other parcels of land in the same area and that they were all genuine.
 33. Shown the letter of allotment dated July 6, 1990, DW1 conceded that it referred to an unsurveyed plot No 11 Mtondia/Roka. He told the court he was unaware if the four (4) allottees named in the letter of allotment were squatters and/or whether they had paid the stand premium and rent which was shown as Kshs 837,100/-. DW1 also conceded that the letter of allotment produced in court did not have the second page.
 34. DW2 – Stella Gatwiri Kinyua is the land registration officer Kilifi. She told the court that as per their records, the title to the property known as Mtondia/Rika/11 was issued to Garama Chai Jefwa, Jamros Kalu Nguya, Amos Kithi Kombe and Omar Ahmed Shariff on February 4, 2002. The property was then afterwards transferred to Magomeni Properties Limited for Kshs 10,000,000/- on January 31, 2011 and then later transferred to Kundan Singh Construction Limited on April 12, 2011. The property was subsequently charged to Bank of Baroda to secure the sum of Kshs 120,000,000/-.
 35. On cross-examination, DW2 told the court she was not at the Kilifi Lands Registry prior to the year 2015 and that she came to know of the registration of the 4 original owners of the land by looking at the records at their office. DW2 told the court she was unaware if there were any previous titles issued in respect of the land and that the register was opened in 1990 with government of Kenya as the proprietor of the land.
 36. Shown the letter of allotment produced by herself, DW2 conceded that it did not have the second page. She further conceded that a letter of allotment does not apply to a scheme and that it should have been a letter of offer instead. DW2 testified that she was unaware of the reasons why the green card produced in court for the property was not signed. She told the court the copy she had in the office records was signed by the land registrar.
 37. DW3 – Samuel Kariuki Mwangi is the registrar of titles Mombasa. He told the court the title in their records for plot No 15351 shows it was registered as a new grant from the government of Kenya and was assigned title No CR 22091. The registered owner is the plaintiff herein and was issued with a title on January 15, 1992. There had been no transactions on the title ever since it was issued.



38. On cross-examination, DW3 conceded that the only documents in their record were a letter dated January 13, 1992 and the title. He conceded that the title shows a consideration of Kshs 150,000/- was to be paid as the stand premium. That premium was payable during the allocation process and evidence of such payment would be with the commissioner of lands or the National Land Commission today.
39. DW4 – Athman Chiro Ngoka is a land survey assistant at the Ministry of Lands, survey office in Kilifi. DW4 told the court that from the records held in their office, there existed no survey documents in respect of plot No Mtondia/Roka/11. As per the preliminary index diagram for Mtondia Roka Section, plot No 11 is government land and there has been no creation or amendment of the registry index map with respect to the suit property in favour of any person. The 5th defendant did not therefore prepare and/or amend any registry index map in respect of the suit property.
40. On cross-examination, DW4 confirmed that the registry index map for Mtondia Roka Section was prepared in September, 1988 and that there was no other map for the area.

Analysis and Determination

41. I have carefully perused and considered the pleadings herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the learned advocates representing the parties herein. The Bank of Baroda enjoined herein as an interested party did not call any witnesses.
42. The plaintiff herein instituted this suit seeking a number of declaratory orders in respect of a parcel of land described as title No 15351, CR 22091 measuring 4.0 Ha and situated North of Kilifi Creek within Kilifi county. It is the plaintiff's case that it acquired the property and was issued with a grant thereto by the registrar of titles (the 4th defendant herein) on January 15, 1992.
43. The plaintiff told the court that sometime in September 2015, they instructed a surveyor to carry out a due diligence survey of the property and to find out if there were any encroachments thereon. It was then that the plaintiff came to discover that the 1st defendant herein had, devoid of its consent and authority, entered upon the property and constructed a perimeter wall thereon.
44. It was the plaintiff's case that shortly thereafter, they came to learn that the basis for the 1st defendant's entry upon the property was the 1st defendant's claim to a parcel of land said to be measuring some 14.2 Ha and known as title No Mtondia/Roka/11. The plaintiff told the court that the said parcel of land was unlawfully created by the defendants on the basis of an irregular creation and/or amendment of the registry index map for the area.
45. The plaintiff asserts that the newly created parcel of land completely engulfs and subsumes its 4.0 Ha title No 15351, CR 22091 North of Kilifi Creek and that the 1st defendant has acquired no lawful title or interest thereon as the same is a nullity in law.
46. In its defence, the 1st defendant avers that it was an innocent purchaser for value without notice of any defects on the title to the said title No Mtondia/Roka/11. The 1st defendant told the court that prior to purchasing the said parcel of land from Messrs Magomeni Properties Limited, it conducted a search at the Kilifi Lands Registry and established that as at January 31, 2011, the said land was registered in the name of the vendor.
47. The 1st defendant further told the court that before it purchased the property, it had established through due diligence that prior to the acquisition of the property by the said Magomeni Properties Limited, the same had been registered in the names of four (4) original allottees who had subsequently been issued with a certificate of title in their joint names on February 4, 2001. It was the 1st defendant's



- case that since its purchase of the land as aforesaid it had complied with all statutory requirements including procuring the land control board consent and that it had been in an open and notorious occupation of the land wherein it has since carried out various developments.
48. The 1st defendant's position was supported by the 2nd to 6th defendants who took the position that the plaintiff's title was the one that was irregularly obtained as the area where the same is situated comprised a settlement scheme carved out by the government prior to the year 1992 when the plaintiff is said to have acquired its title.
 49. The 2nd to 6th defendants told the court that the said land parcel Mtondia/Roka/11 was allocated through the settlement fund trustees to four individuals who were residents of the area and who had complied with the terms and conditions set by the fund.
 50. In support of their position, the plaintiff company produced as exhibit 1 a certificate of title issued to the plaintiff on January 15, 1992 as grant number CR 22091/1. The plaintiff's director Azim Lalji Nurani (PW1) was however unclear as to how the plaintiff acquired the grant. On his cross-examination herein, PW1 told the court he joined the plaintiff after the grant was issued and he was therefore unaware if the plaintiff had applied for the same. While PW1 told the court there was another director of the company by the name Yegon, the said director did not give evidence herein and the issue as to how the grant came to be issued in the plaintiff's name was never clarified.
 51. As it were, given the plaintiff's position that the land was government land before it was issued with a leasehold interest thereon, it was clear that its alienation could only be through the process of public auctions as prescribed under sections 12 to 17 of the *Government Lands Act* (now repealed). The plaintiff neither provided any evidence of the auctions, its participation thereon and/or how the land came to be created. Even more significant, the plaintiff did not produce before the court any letter of allotment from the commissioner of lands *vide* which the land was allocated to itself.
 52. While the grant produced by the plaintiff required payment of Kshs 150,000/- as consideration by way of a stand premium to be paid on or before the execution thereof, the plaintiff had no evidence of any such payment. And while special condition No 2 attached to the grant required that the grantee shall submit to the relevant local authority building plans within six calendar months and to erect an approved building within 24 months on the property, it was apparent that the plaintiff neither took possession nor developed the land from 1992 when it holds it was issued with the grant until 2015 when it sent a surveyor to the land to establish its position and to find out if there were encroachments thereon.
 53. Again while the plaintiff insisted that the 5th defendant herein had unlawfully created the said Mtondia/Roka/11 in favour of the 1st defendant through an unlawful amendment of the relevant Registry Index Map (RIM), it was clear from the testimony of the Kilifi Land Survey Assistant (DW4) that the RIM in use was prepared for the area in 1988 and that it was still in existence and use.
 54. On the other hand the 1st defendant's parcel of land was confirmed both by the Kilifi Land Registration Officer (DW2) and the Registrar of Titles Mombasa (DW3) in their testimonies in court. In her testimony before the court, DW2 highlighted the fact that title No Mtondia/Roka/11 was in existence as at May 9, 1990 and was subsequently transferred to the initial allottees on February 4, 2002 when a title was issued to them.
 55. From the material placed before me I was not persuaded that it had been demonstrated that the 2nd to 6th defendants had on the one hand colluded with the 1st defendant to process the title Mtondia/Roka/11 as aforesaid. The upshot is that the plaintiff has failed to prove that the 1st defendant's title was acquired unlawfully. Consequently the plaintiff's suit is dismissed with costs.



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:

No appearance for the Plaintiffs

No appearance for the Defendants

Court assistant - Kendi

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J. O. OLOLA

JUDGE

