



Abdalla & another (Suing as the Legal Representatives of the Estate of Ali Abdalla Mwalunzi) v Mombasa Cement Ltd (Environment & Land Case 16 of 2018) [2024] KEELC 1087 (KLR) (1 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1087 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 16 OF 2018**

**MAO ODENY, J
MARCH 1, 2024**

BETWEEN

ASHA ALI ABDALLA 1ST PLAINTIFF

ABDALLA ALI ABDALLA 2ND PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ALI
ABDALLA MWALUNZI**

AND

MOMBASA CEMENT LTD DEFENDANT

JUDGMENT

1. By the plaint dated 22nd January 2018, the Plaintiffs herein sued the Defendants seeking the following orders;
 - a. A declaration that the plaintiffs are the legal owners of plot No. 706 Takaungu (formerly known as Plot No. 592).
 - b. A permanent injunction order directed against the defendant, their agents, their servants, workers or legal representatives from destroying, entering, trespassing, erecting structures, digging, excavating, quarrying or in any other manner dealing with the Plot No. 706 Takaungu on the detriment of the plaintiffs herein.(sic)
 - c. Any other or further relief that this honorable court may deem fit to grant.
 - d. Costs of this suit.



Plaintiffs' case

2. PW1 Asha Ali Abdalla adopted her Witness Statement dated 22nd January 2018 and testified that she instituted this suit as a legal representative of the estate of her late father Ali Abdalla Mwalunzi. It was her testimony that they were appointed as legal representatives of the deceased on 9th June 2017.
3. PW1 further stated that the deceased was the legal owner of the suit land Plot No.706 Takaungu Land Adjudication Section (Formerly Plot No. 592) which was allocated to him in 2002 and that they have been in occupation since time immemorial.
4. It was PW1's case that the deceased has developed the suit land and during adjudication, the deceased was confirmed as the legal owner and was issued with a letter of allotment.
5. PW1 produced documents in her list of documents as PEX 1 to 10, 12 and 13. PW1 stated that in 2016 she brought down part of the wall claiming that they were the owners of the suit land. It was PW1's evidence that they reported the matter to Kilifi Police station where the Defendant was asked to produce ownership documents which it never did.
6. Upon cross examination by Ms. Mango, PW1 told the court that Mombasa Cement are in occupation of the suit land and that she is not aware whether the Defendant leased the land from the Mazrui family. PW1 also confirmed that her late father sold the suit property to Munir Ahmed and that they had never been informed about the 2012 case.
7. On re-examination by Mr. Mutugi, PW1 stated that after the Defendant demolished their fence, they invited a valuer to go to the land and that they did not receive any letter cancelling the allocation. Further that they were not parties to the 2012 case that allegedly gave the suit property to the Mazrui family.
8. PW2 Abdala Ali Abdala adopted his Witness Statement dated 22nd January 2018 as part of his evidence and stated that the late Abdalla Mwalunzi was his father and was the owner of the suit land.
9. Upon cross-examination by Ms. Mango, PW2 told the court that they were claiming Kshs. 650,000/= from the Defendant but had not attached any receipts in support of the said amount. PW2 admitted that their late father had sold the land to Munir.
10. PW3 Edwin Otieno Oduor testified that he was a licensed surveyor who did a valuation of the suit property and produced a report dated 22nd September 2016 which he prepared upon receiving instructions from Abdalla Malunzi.
11. It was PW3's further evidence that he visited land parcel No. Kilifi/Takaungu/706 to determine the damage that had been done on the suit property and confirmed that the value of the damaged wall, barbed wire fence, concrete pillars and building was Kshs. 650,000/=.
12. Upon cross-examination he told the court that he was instructed by Abdala verbally around 19th September 2016 and admitted that he did not attach any title in his report because his instructions were limited to conducting a valuation hence a title was not required.
13. PW3 confirmed that he googled the location of the suit property and admitted that he did not attach the said google map. He also admitted that his report neither had acreage of the suit property nor any boundary markings.
14. PW3 admitted that the photographs in his report were neither dated nor had any description but all the relevant information was captured. That the demolition was done by a third party and that the wall was 100 meters in length and 4 meters in height.



Defence Case

15. DW1 Javeed Mohamed adopted his Witness Statement dated 14th May 2018 as part of his evidence and testified that he was the Operations Manager of the Defendant. DW1 corrected an error in his statement where it had been indicated as Plot No. 587 to read 706.
16. DW1 produced the documents on the list of documents dated 14th May 2018 and the supplementary list dated 3rd July 2020 as PEX No. 1 to 7 and stated that the Defendant did not destroy the Plaintiffs' fence.
17. It was DW1's case that no one was charged with malicious damage to property and that the OB did not bear a stamp or signature. He also testified that Plot No. 706 was allocated to the Kilifi County Council as a trading center and prayed that the Plaintiff's suit be dismissed with costs.
18. Upon cross examination by Mr. Mutugi, DW1 told the court that the Defendant had leased 1000 acres out of 2716 acres of Plot No. 409 from Mazrui Lands Trust. He further stated that he was not aware that Plot No. 706 had been allocated to Abdalla Ali Abdalla.
19. DW1 told the court that the letter dated 9th March 2010 from Kilifi Land Adjudication and Settlement Officer indicated that the plot was allocated to Abdalla Ali Mwalunzi but vide another letter dated 23rd August 2018 from the same Land Adjudication Kilifi stated that Takaungu Land Adjudication Section was later nullified.
20. DW1 confirmed that there was no suit filed against Abdalla Mwalunzi after he was allocated Plot No. 706 and that the ten acres were identified using the adjudication register. He stated that the Defendant did not complain to the Mazrui family because there was no one in occupation of the suit property.
21. Upon re-examination, DW1 told the court that he attached the Land Adjudication Register, which showed that Plot No. 706 belonged to Kilifi County Council and further that vide a letter dated 20th December 2017, the Chief Land Registrar confirmed that the adjudication was complete and that the land belonged to Mazrui family.

Plaintiffs' submissions

22. Counsel gave a brief background of the case, summary of the evidence and submitted that the Plaintiffs had proved that their deceased father Ali Abdalla Mwalunzi had been allocated the suit land. It was counsel's submissions that the Plaintiffs produced a letter of allotment that was not challenged by the Defendant and therefore the deceased had an inalienable right to the suit property.
23. Counsel relied on the cases of *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others* [2015], *Republic v City Council of Nairobi & 3 others* [2014] eKLR and submitted that the Plaintiffs tendered evidence to show that they have been in occupation of the suit property and that their claim predates the Defendant's right which arose on 30th March 2014 when it leased the suit property from Mazrui's Trust Land Trustees.
24. Counsel admitted that the court declared that the repeal of the Mazrui Trust Lands Act unconstitutional but nothing was placed before the court to show that the suit property was part of the Mazrui land.
25. It was counsel's submissions that no one from the Mazrui family was called to testify that the suit property formed part of their land and also no officer from the land registry was availed to confirm whether the suit property formed part of Mazrui land.



26. Counsel relied on the case of Attorney General vs Zinj Limited [2021] and submitted that the cancellation of adjudication or allotment had no effect on the ownership rights of land owners who were already on the land.

Defendant's Submissions

27. Counsel reiterated the evidence of the parties and identified the following issues for determination;
- a. Whether the plaintiffs are entitled to a declaration that they are legal owners of plot number 706 Takaungu.
 - b. Whether the plaintiffs are entitled to an injunction against the defendant.
 - c. Whether the plaintiffs are entitled to Kshs. 650,000/= as damages.
 - d. Who bears the costs of the suit.
28. On the first issue, counsel relied on Section 107 of the *Evidence Act* and submitted that it is trite law that whoever asserts the existence of a legal right or liability dependent on the existence of facts which he asserts and must prove that those facts exist which he stated that the Plaintiffs have not proved. Counsel submitted that the suit property was part of parcel No. 409 which belonged to the Mazrui Land Trust Board under the Mazrui Trust Act.
29. It was counsel's submissions that the Mazrui Trust Act was repealed and the land became trust land under the *Land Adjudication Act*. The Mazrui challenged the repeal of the Act in Mombasa Petition No. 185 of 1991 which declared the repeal unconstitutional.
30. Counsel submitted that as a result of the said judgement, the Adjudication Officer confirmed that the allocations of the said property were cancelled and relied on the case of Isaac Kaberia Etirikia vs Ntika Munoru and another HCCA No. 157 of 2001 as was cited in the case of Jacinta Gakui vs Elias Murungi [2018] eKLR and submitted that the Plaintiffs deceased father had sold the suit property to Munir Ahmed Kassam thereby transferring their interest.
31. Counsel also submitted that the Defendant produced evidence that the suit property was allocated to Kilifi Town Council which was also confirmed by the Chief's letter produced by the Plaintiffs, which indicated that the Kilifi Town Council owned the plot, but on the ground the deceased was in occupation.
32. Counsel relied on the case of Tobias Achola Osidi & 13 Others vs Cyprianus Otieno Ogalo & 6 Others [2013] eKLR as was cited in Stephen Kirimi M'rinturi vs Land Adjudication and Settlement Officer-Peter Kumbu Kimunya and another [2020] and submitted that the plaintiffs are not the owners of the suit property.
33. On the second and third issues, counsel reiterated that the Plaintiffs were not the owners of the suit property, relied on the case of Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006]eKLR and urged the court to dismiss the Plaintiffs' suit with costs.

Analysis And Determination

34. The issues for determination are as to whether the Plaintiffs are the legal owners of Plot No. 706 Takaungu (formerly known as plot No. 592) and whether an order of permanent injunction should issue against the defendant.



35. It was the Plaintiffs' case that their deceased father was allocated the suit property in the year 2002 and have been in occupation since then.
36. It is not disputed that the late Ali Abdalla Mwalunzi was allocated the suit property vide adjudication. What is in dispute is whether the suit property formed part of the Mazrui land which allegedly reverted back to the Land Adjudication Board after the Mazrui Land Trust was repealed and back to the Mazrui family after the said repeal was declared unconstitutional Vide Mombasa Petition No. 185 of 1991 and leased to the Defendant.
37. The Plaintiffs produced two letters dated 16th August 2017 written by Anthony Mwang'ombe for the District Land Adjudication and Settlement Officer Kilifi which indicated that Plot No. 706 Takaungu Land Adjudication Section was recorded under Ali Abdallah Mwaluzi while the other one stated that plot No. 706 Takaungu Land Adjudication Sector was sold to Munir Nazir Ahmed Kassam vide the land sale agreement dated 22nd February 2014.
38. During the hearing, the Plaintiffs admitted that their late father had sold the suit property to Munir and since the suit property was sold by the deceased in 2014, his estate no longer had any interest in it.
39. The Plaintiff filed this suit together with an application for injunction which was heard and dismissed vide a ruling dated 14th December 2018 on the ground that vide a dated 23rd August 2018 from the Land Adjudication and Settlement Officer Kilifi that the said Takaungu Adjudication Section was later nullified. The said letter reads at paragraph 2 as follows:-

“Takaungu Adjudication Section was declared as per Cap 284 *Land Adjudication Act* and later nullified through Civil Case No. 185 of 1991. This led to cancellation of allocation, which was being undertaken within Takaungu Adjudication Section. Hence, the property is now under the ownership of the Mazrui family.

40. The Defendant produced the letter dated 23rd August 2018 written by Mary Muteti, the Land Adjudication and Settlement Officer, Kilifi North, Kilifi South, Ganze, Kaloleni and Rabai Subcounties which stated that the Takaungu Adjudication Section was nullified through Civil Case No. 185 of 1991.
41. It should be noted that this Judgment was never set aside or appealed against therefore, it still stands making the suit land property of the Mazrui family. The said ruling by Olola J in *Asha Ali Abdalla & another v Mombasa Cement Limited* [2018] eKLR the court held that:

“The said letter appears to me to lend credence to the Defendant's case that the land in issue initially belonged to the Mazrui family. The same was allocated to the Plaintiff upon the creation of the Takaungu Adjudication Section after the repeal of the Mazrui Lands Trust Act (Cap 286) by the Mazrui Lands Trust (Repeal) Act in 1989. From the material placed before me, it was evident that the repeal of the Act was challenged vide Mombasa High Court Constitutional Petition No. 185 of 1991. After the hearing of the said case, a Judgment was delivered on 19th July 2012 which declared the repeal unconstitutional. That decision thus reverted the land to its original owners and the Takaungu Adjudication register was by implication nullified.

The Plaintiffs did not deny that the land in question fell under the Mazrui Lands Trust Act. Neither did they contest the effect of the decision made in Mombasa Constitutional Petition No. 185 of 1991. As it were, the Defendants have demonstrated that they leased the portion



of land in dispute from the Trustees of the Mazrui family who are ipso facto, the owners of the land in dispute.”

42. Consequently, I find that the Plaintiffs have failed to prove their case on a balance of probabilities and the same can be dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF MARCH, 2024.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

