



Mwaka & another v Malu & 2 others (Environment and Land Appeal E013 of 2022) [2023] KEELC 18724 (KLR) (5 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18724 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E013 OF 2022**

A NYUKURI, J

JULY 5, 2023

BETWEEN

SOPHIA NDINDA MWAKA 1ST APPELLANT

JAYNE FRANCES MWAKA 2ND APPELLANT

AND

PATRICK MASILA MALU 1ST RESPONDENT

**THE REGISTERED TRUSTEE OF TALA CATHOLIC CHURCH 2ND
RESPONDENT**

COUNTY GOVERNMENT OF MACHAKOS 3RD RESPONDENT

(Being an appeal from the judgment of Honourable D. Orimba, SPM on the 4th day of November 2020 in SPMCC No. 53 of 2014 (Kangundo))

JUDGMENT

Introduction

1. This appeal is against the judgment of the Senior Principal Magistrate in Kangundo SPMCC No. 53 of 2014 delivered on 4th November 2020.

Background

2. In that case, the Appellants herein who were the Plaintiffs sued the three Respondents herein by way of plaint alleging that the deceased purchased half of Parcel No. Matungulu/Sengani/1031 (suit property) from the 1st Respondent. They also stated that the suit property had been registered in the name of the 3rd Defendant but reserved for the 2nd Defendant and that the 2nd Defendant had sold the same to the 1st Defendant.



3. Therefore the Plaintiff sought against the Defendants jointly and severally for specific performance for the sale of land agreement dated 1st May 1985 or in the alternative, monetary compensation for current market price of half share of the suit property.
4. In their defence, the 1st and 2nd Defendants who are the 1st and 2nd Respondents herein respectively, denied the Plaintiff's claim. The 1st Defendant stated that as he was not the registered owner of the suit property, he could not have sold the same or passed good title to the Plaintiff. According to the 1st Defendant, correspondence between the parties could not oust the import of the agreement in issue or override the express provisions of the Law of Contract Act. The 1st and 2nd Defendants disputed the court's jurisdiction to determine this matter and argued that the same was time barred.
5. On their part, in defence, the 3rd Defendant confirmed that the suit property was registered in their name and reserved for the 2nd Defendant, but denied knowledge of all other averments of the Plaintiff.
6. The question of jurisdiction and time limitation was dealt with at the Preliminary Stage and dismissed. Therefore the suit proceeded for hearing by viva voce evidence.

Evidence

7. At the hearing, the Plaintiff presented three witnesses. The Plaintiff testified that he purchased half share of the suit property on 1st May 1985 from the 1st Defendant at a consideration of KShs. 11,000/-, which he paid. He stated that he informed the 2nd Defendant of the purchase and that they had no objection to the purchase as they informed him that they had sold the same to the 1st Defendant. According to the Plaintiff, the 1st Defendant was to obtain registration of the suit property and transfer it to the Plaintiff, which did not happen. He stated that the land was now valued at KShs. 2.5 Million. He sought for transfer of the land to him or compensation in the alternative. He produced a sale agreement, official search certificate, valuation report, and demand letter and response thereto. In cross-examination, he stated that he had no claim against the 2nd and 3rd Defendants and that the prayer for specific performance is against the 1st Defendant or that he pays compensation in the alternative.
8. PW2 was Michael Katwa. He testified that in 1981, he was Chairman of Tala Catholic Church. He stated that the suit property is private property reserved for Tala Catholic Church and the church owned the land. That in 1981, the church sold half share of the suit property to the 1st Defendant and that the 1st Defendant sold the same to the Plaintiff. He produced a letter from the Catholic Parish dated 10th October 2017, sale agreement of 2nd April 1981 and a sketch map for the suit property. In cross-examination, he stated that the church has not refused to transfer the land to the 1st Defendant.
9. PW3 Johnson Ngugi testified that he was the Assistant Chief Sengani Sub-Location in 1985 when he witnessed a sale of land agreement between the Plaintiff and the 1st Defendant. That marked the close of the Plaintiff's case. No witnesses were presented by the defence.
10. Upon hearing the matter, the trial court held that the suit property was public land at the time of purchase by the Plaintiff, and that the same was not available for sale. The court further held that the parties to the agreement dated 1st May 1985 failed to conduct due diligence and therefore the purported sale was illegal. Therefore the court proceeded to dismiss the Plaintiff's suit with costs to the Defendants.
11. It is the above decision that provoked this appeal. In the Memorandum of Appeal dated 28th April 2022, the Appellant whose claim was dismissed in the lower court, stated the following grounds in his appeal;



- a. The learned Magistrate erred in law and in fact by finding that Title No. Matungulu/Sengani/1031 was public property without any evidence placed before him by the 3rd Respondent.
 - b. The learned Magistrate erred in fact and in law by holding that Title No. Matungulu/Sengani/1031 was public property without any evidence whatsoever as to what public purpose it was reserved for.
 - c. The learned magistrate erred in law and in fact by failing to appreciate that the Appellant had acquired proprietary interest over Title No. Matungulu/Sengani/1031.
 - d. The learned magistrate erred in law and in fact by making a presumption that the 2nd Respondent was a public institution to which public property would be reserved in its favour.
 - e. The learned magistrate misapprehended and misapplied the provisions of Articles 62 and 67 of *the Constitution* as well as Section 15 of the *Land Act* No. 6 of 2012.
 - f. The learned magistrate erred in law and in fact by finding that the contract of sale between Appellants and the 1st Respondent was illegal hence incapable of enforcement.
12. Consequently, the Appellant sought the following orders;
- a. That the appeal herein be allowed and the judgment of the Honourable D. Orimba (SPM) delivered on the 4th day of November 2020 be set aside and/or vacated.
 - b. That it be determined that the Appellants proved their case before the trial court and the prayers in the plaint dated 11th day of April 2014 be granted.
 - c. That the Respondents do pay the costs of this Appeal and the proceedings in the lower court.
13. This appeal was disposed by way of written submissions. On record are the Appellants' submissions dated 13th October 2022, the 1st and 2nd Respondents' submissions dated 31st January 2023 and the 3rd Respondent's submission dated 17th January 2023.

Appellants' Submissions

14. Counsel for the Appellant submitted that the main issue in contention was whether the suit property was public land and the specific purpose it had been reserved for. Counsel contended that it was not disputed that the suit property was registered in the 3rd Respondent's name and reserved for the 2nd Respondent who sold it to the 1st Respondent. Counsel relied on the case of Paul Orwa Ogila v. St. Joseph Medical Training College [2011] eKLR, to argue that the 2nd Respondent was not a public body capable of having public land reserved for them as reservation can only be done for a public purpose and not in favour of a private entity.
15. Counsel contended that the 3rd Respondent having failed to adduce evidence on the history of the land, the specific purpose for reservation, and the circumstances of the reservation, the trial court erred in finding that that the suit property was public land. To buttress this point, reliance was further placed on the cases of Adan Abirahani Hassan & 2 Others v. Registrar of titles, Ministry of Lands & 2 Others [2013] eKLR and Edward Mugo v. Attorney General & 2 Others [2019].

1st and 2nd Respondents' Submissions

16. Counsel for the 1st and 2nd Respondents submitted that the appeal only sought for the court to consider the reason for reservation of the suit property if it was to be found to be public land. Counsel



submitted that all the parties agreed that the suit property was registered in the 3rd Respondent's name as demonstrated in the Appellant's testimony and a copy of the official search certificate.

17. Therefore counsel submitted that the suit property was public land which could only be available for allocation by dint of Section 7 (a) of the *Land Act* No. 6 of 2012. Counsel submitted that the Appellant's claim was anchored on a sale agreement and not on allocation and therefore there is no privity between the Appellant and the 3rd Respondent.
18. It was further submitted that as the 1st and 2nd Respondents were not the registered proprietors of the suit property, they had no capacity in transacting over the same, as the same was registered in the 3rd Respondent's name. Counsel relied on decisions in the cases of Omar Gorhan v Municipal Council of Malindi (Malindi High Court Civil Appeal No. 44 of 2017) and Tom Dola & 2 Others v. Chairman National Land Commission & 5 Others Kisumu Civil Appeal No. 17 of 2017, for the proposition that an innocent purchaser for value cannot obtain good title where the title is void ab initio having been obtained in violation of the law.
19. Counsel for the 1st and 2nd Respondents blamed the Appellant for purchasing the suit property without conducting due diligence.

Submissions by the 3rd Respondent

20. Counsel for the 3rd Respondent submitted that it was not in dispute that the suit property was registered in the 3rd Respondent's name. Counsel argued that the suit property was public land within the meaning of Article 62 of *the Constitution*. Counsel submitted further that from the Appellant's case, it was not clear how the said public land was sold to become private land. Counsel argued that it was only the National Land Commission that had the mandate to manage public land on behalf of the National and County Governments.
21. It was the 3rd Respondent's contention that the mere fact that the suit property was reserved for the 2nd Respondent, could not confer any rights on the 2nd Respondent to alienate it. That therefore the 3rd Respondent's consent ought to have been sought first before the impugned transaction and that no evidence was produced to prove such consent.
22. Reliance was placed on Article 40 (6) of *the Constitution* of Kenya 2010 to contend that protection of proprietary rights does not extend to property acquired unlawfully. Counsel argued that the Appellant failed to observe the "buyer beware" principle and referred the court to the case of Joan Namarome Nyongesa v. Eddah Nabayi Echalo [2022] eKLR for the proposition that a buyer who fails to get what he or she bargained for, cannot later complain.

Analysis and Determination

23. I have carefully considered the appeal, the submissions and the entire record. The issues for determination are whether the suit property was public land and whether the Appellant would be entitled to the prayer for specific performance or in the alternative damages as sought in his claim.
24. The duty of this court as a first appellate court is to re-analyze, re-evaluate and reconsider the evidence before the trial court and make its own independent conclusions bearing in mind that it had no advantage of seeing and hearing witnesses and therefore give due allowance for that. This position was



aptly captured in the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, as follows;

"This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court.....is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect....."

25. Having considered the evidence before the trial court, I note that it is not disputed that the suit property was on 16th August 1999 registered in the name of Masaku County Council and reserved to Tala Catholic Church as seen from the official search. The Appellant contends that the suit property which was owned by 2nd Respondent was sold to the 1st Respondent who subsequently sold it to him. According to the Appellants, reservation can only be for a public purpose and that the 2nd Respondent which is a church is a private entity incapable of having any public land reserved for its benefit.
26. In the appeal, the Appellant's fault the trial court's finding that the suit property was public land and maintains that the Appellant acquired proprietary interest in the suit property by virtue of the sale agreement of 1st May 1985. Further that therefore they are entitled to the orders sought in their plaint before the trial court.
27. What arose before the trial court as relates to the registration of the suit property was whether the suit property having been registered in the name of 3rd Respondent and having been reserved for the 2nd Respondent, was public land. And that is the question that this court will address together with other attendant issues thereto.
28. The transaction herein occurred on 1st May 1985. The search produced by the Appellant show that the suit property was registered in the name of Masaku County Council on 16th August 1991. The date of the reservation of the suit property in favour of the 2nd Respondent is not indicated but it can only be after 16th August 1991 and not before. On the other hand, PW2, a former chairman of the 2nd Respondent testified that the agreement between the 1st and 2nd Respondent was done on 2nd April 1981. That agreement is said to be at page 157 of the record of appeal although the same is illegible.
29. The Appellant has not produced any document to show who owned the suit property at the time he allegedly purchased it from the 1st Respondent on 1st May 1985 as the search certificate shows that the suit property was registered in the 3rd Respondents name on 16th August 1991. Therefore the question would then be, whose property was the Appellant purchasing? Although the 1st Respondent filed defence jointly with the 2nd Respondent, denying the Appellants claim and denying entering into agreement with the Appellant, no witness statement was filed by the 1st Respondent and no evidence was presented in court on his behalf and therefore the Appellant's evidence that it is the 1st Respondent who sold him the suit property was not rebutted. The Appellant produced a sale agreement together with several addenda bearing the signatures of the 1st Respondent. The 1st Respondent having not disputed those signatures by presenting evidence, it is clear and this court finds that indeed the agreement dated 1st May 1985 was entered into between the Appellant and the 1st Respondent who received the entire consideration of Kshs. 11,000/-.
30. However, as the Appellant did not produce any evidence to show that the 1st Respondent owned the suit property as at the time of sale being the year 1985, and that the later had capacity to sell the same to him, then, it is my finding that the Appellant failed to prove that he entered into an enforceable



agreement. It was incumbent upon the Appellant to conduct due diligence to confirm whether the suit property existed and who owned it before transacting on the same. He however failed to conduct due diligence in that regard.

31. As to whether the suit property is public land, it is clear from the search certificate produced by the Appellant that the suit property was registered in the name of the 3rd Defendant's predecessor on 16th August 1991 and reserved for Tala Catholic Church. As the suit property was registered in 1991, the applicable law is the repealed Constitution, and the Trust Lands Act Cap 288 Laws of Kenya (repealed).
32. Under Section 115 (1) of the repealed Constitution, all trust land vested in the County Council in whose area of jurisdiction the land was situated save if the same was body of water, minerals and mineral oils, which then vested in the Government of Kenya. Besides, Section 115 (2) of the repealed Constitution provided that County Councils held trust land vested in them for the benefit of persons ordinarily resident in that area. Section 117 (1) of the repealed Constitution provided for instances where trust land could be set apart or reserved, and provided as follows;

"Subject to this section, an Act of Parliament may empower a County Council to set apart an area of trust land vested in that County Council for use and occupation –

 - a. by a public body or authority for public purposes; or
 - b. for the purpose of the prospecting for or the extraction of minerals or mineral oils; or
 - c. by any person or persons for a purpose which in the opinion of that County Council is likely to benefit the persons ordinarily resident in that area or any other area of trust land vested in that County Council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof, and the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.

(2)

(3) where a County Council has set apart an are of land in pursuance of this section, it may, subject to any law, make grants or dispositions of any estate, interest or right in or over that land or any part of it to any person or authority for whose use and occupation it was set apart.
33. Section 118 of the repealed Constitution gave the President of Kenya power if satisfied that the use and occupation of an area of trust land is required for government purposes, in consultation with the relevant County Council, to give written notice to that County Council that the land is required to be set aside for use and occupation for purposes of the Government of Kenya, to a body corporate established for public purposes by an Act of Parliament, for purposes of a company registered on behalf of the Governemnt of Kenya and for purposes of prospecting for extraction of minerals or mineral oils. Under this section, the President may seek to set apart land that has already been set apart in pursuance of Section 117 of the repealed Constitution.
34. Essentially therefore, setting apart or reservation of trust land could be done not only in favour of a public body but also in favour of a private citizen or private entity where in the opinion of the County Council in question, the reservation was for a purpose which was likely to benefit the persons ordinarily resident in that area or any other area of the trust land. I therefore reject the Appellant's submissions



- that reservations could only be made in favour of a public body. If Tala Catholic Church use of the suit property was going to benefit the residents of the area in the vicinity of the suit property, then nothing would invalidate the reservation in favour of the said church.
35. The Appellant did not clarify his goal in contending that the suit property could not be reserved in favour of Tala Catholic Church a private entity, and at the same time anchor his claim on the agreement between Tala Catholic Church and Patrick Masila Malu. The Appellants insisted that the suit property was privately owed by the 2nd Respondent and that the same lawfully passed on to the 1st Respondent and eventually to the deceased. Therefore the issue that arises is whether property set apart or reserved can be lawfully disposed by the person in whose favour the setting apart was done.
 36. Having considered the provisions of the repealed Constitution, and more specifically Sections 117 and 118 thereof, it is clear that the purpose of setting apart is for public benefit or benefit of residents other than the entity in whose favour the reservation is made. Under Section 117 (3) of the repealed Constitution, pursuant to a reservation, the County Council could make a grant or disposition conferring rights and interest in the reserved land to the person or authority for whose use and occupation the land was set apart. Therefore the setting apart was for use and occupation for the benefit of the public or residents within the trust land vested in the relevant County Council. And it is my view that until and unless a grant or disposition was made in favour of the person or body for whose use and occupation the land was set apart, such person or body had no capacity to dispose, alienate, sell or in any manner transact in respect of the reserved land, as the same remained trust land, held by the County Council on behalf of the community within the County Council; and the entity in whose favour a reservation was made, only held the land on behalf of the County Council for public benefit and not for their own benefit.
 37. In that regard therefore, as there was no evidence of any grant or disposition made by Masaku County Council in favour of Tala Catholic Church granting interest or rights in the suit property to the said church, I find and hold that the said church had no legal right and capacity sell the suit property to the 1st Respondent and therefore the 1st Respondent could not pass any title to the Appellants as he had none. It is my view that a mere reservation or setting apart did not confer ownership rights on the body or person for whose use and occupation the land was reserved. The reservation was meant to allow the public and or residents within the County Council to benefit from the trust land and not for the benefit of the authority or the person in whose favour the reservation was made.
 38. Therefore even at the time of the 3rd Respondent's registration in 1991 and the subsequent reservation in favour of the 2nd Respondent, without subsequent grant or disposition made in favour of the 2nd Respondent by the 3rd Respondent, the suit property remained trust land and its ownership did not pass to the 2nd Respondent even after 1991. Therefore subsequent correspondence between the parties after 1991 did not legitimize or validate the incapacity of the 2nd Respondent to transact in the suit property.
 39. Having said that, I must point out that although the Appellants in this appeal and in their submissions faulted the legality of reserving the suit property in favour of the 2nd Respondent arguing that they were not a public body capable of having public land reserved in their favour, that contention or issue never arose from the pleadings before the trial court and neither was that an issue for determination before the trial court.
 40. Since the 2nd Respondent did not own the suit property as no disposition or grant had been made in their favour by the 3rd Respondent, they had no good title to pass to the Appellant and therefore the suit property although set apart for the 2nd Respondent, remained trust land and as at the time of filing suit in the lower court in 2014, the suit property was public land by virtue of the provisions of



Article 62 (2) of *the Constitution* 2010. Consequently, the 1st Respondent did not obtain good title from the 2nd Respondent, neither could the 1st Respondent, pass good title to the Appellants. In the premises, the agreement dated 1st May 1985 and subsequent acknowledgments by the 2nd Respondent are unenforceable as they are based on an illegality.

41. In the premises, I find no merit in this appeal and the same is hereby dismissed. As the 1st and 2nd Respondents are partly to blame for the circumstances the Appellant found himself in, I decline to make an award for costs in their favour. I award costs of the appeal to the 3rd Respondent and the same shall be borne by the Appellant.

42. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Mutunga for Appellants

Mr. Ondabu for 1st and 2nd Respondents

No appearance for 3rd Respondent

Josephine – Court Assistant

