



**Kenya Broadcasting Corporation v County Government of Mombasa & another (Environment and Land Case Civil Suit 323 of 2010) [2022] KEELC 3988 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3988 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE CIVIL SUIT 323 OF 2010**

**M SILA, J**

**JULY 7, 2022**

**BETWEEN**

**KENYA BROADCASTING CORPORATION ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> DEFENDANT**

**OLDBAY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

(Plaintiff filing suit seeking nullification of two titles held by the defendants on the basis that they were illegally created over the land of the plaintiff; evidence showing that plaintiff has had title, and still holds title, to the larger original land; the two titles of the defendant allegedly created after a subdivision of the plaintiff's land into nine plots; no evidence of the plaintiff having applied for any subdivision of her land; the two titles were therefore illegally created and are null and void; court proceeding to cancel the two titles of the defendants).

1. This suit was commenced through a plaint which was filed on September 13, 2010. The plaintiff avers to be the owner of the Plot No 1476 (Original No 464/60)/I/MN measuring 22.85 acres issued under certificate of title No 13088/1 and delineated in survey plan No 81176 (the suit land). The title is said to be held under a 99 year old lease from the year 1962 and on it is registered a caveat dated 15 May 1964 lodged by one Sultan Ali Kurji on behalf of Television Network (K) Limited and which caveat has never been removed. It is pleaded that in the year 2010, the plaintiff got to know that part of this property had purportedly been sold by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant in the year 2007. What was sold is identified as Plots No MN/I/10771 and MN/I/10772 and it is the plaintiff's case that these plots were illegally carved out of the suit land. In this case, the plaintiff seeks the following orders :-
  - (a) A declaration that the plaintiff is the owner and entitled to sole possession of Plot No 1476 (Original No 464/60)/I/MN.



- (b) A declaration that the 2<sup>nd</sup> defendant was wrongfully and unlawfully through fraud registered as the owner of plot numbers MN/I/10771 and MN/I/10772 which is part of Plot No 1476 (Original No 464/60)/I/MN and that the transfer to the 1<sup>st</sup> defendant is therefore null and void.
  - (c) A permanent injunction to prevent the defendants, their servants and/or agents from interfering with the plaintiff's quiet possession of Plot No 1476 (Original No 464/60) / I/ MN or carrying out any dumping or any transaction on plot numbers MN/I/10771 and MN/ I/10772.
  - (d) An order for rectification of the register directing the Registrar of Titles Mombasa to cancel the titles in respect of plot numbers MN/I/10771 and MN/I/10772.
  - (e) The OCS Nyali Police Station to enforce the order in (c) above.
  - (f) Costs of this suit together with interest thereon at court rates from the date of judgment until payment in full.
2. The 1<sup>st</sup> defendant entered appearance and filed defence. Her defence was that the Plot No 1476 (Original No 464/401) was subdivided and the titles MN/I/10771 and MN/I/10772 issued to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant subsequently purchased the two plots from the 2<sup>nd</sup> defendant at a consideration of Kshs 18,000,000/= in the year 2007. She denied any fraud on her part and denied altering any records to obtain the plots.
  3. The 2<sup>nd</sup> defendant also entered appearance and filed defence. She denied that the plaintiff has been the proprietor of the Plot No 1476 (Original No 464/401) measuring 22.85 acres or that the said plot exists as described by the plaintiff. She pleaded that the plots were alienated and demarcated by the Government and the Commissioner of Lands issued titles to third parties in the year 1997. She pleaded that she purchased the two plots Nos MN/I/10771 and 10772 from the third parties and the title was conveyed to her. The plots were subsequently sold and transferred to the 1<sup>st</sup> defendant in the year 2007. She intimated that she would institute third party proceedings against the parties who sold the land to her and also pleaded that the suit is in breach of Sections 4 and 7 of the Limitation of Actions Act.
  4. PW-1 was Velma Kwanga, a Legal Officer with the plaintiff. She had a witness statement which she adopted as her evidence in chief. In it, she averred that that the plaintiff has been the owner of the Plot No 1476 (Original No 464/60)/I/MN measuring 22.85 acres in the survey plan No 81176. It is a leasehold title for 99 years from 1962. She stated that the plaintiff is the owner of the suit land; that there was a caveat lodged on May 15, 1964 by Sultan Ali Kurji on behalf of Television Network (K) Limited; that the original certificate got lost and on September 3, 2002, a provisional certificate was issued after a Gazette Notice No 2547 of April 26, 2002, was published; that in the year 2003, the 1<sup>st</sup> defendant entered the land and started dumping garbage on part of the property; that they protested this dumping through the letter dated August 25, 2003; that the 1<sup>st</sup> defendant wrote the letter dated September 1, 2003 promising to stop the dumping; that despite this assurance, the dumping continued, which led to the plaintiff protesting again through the letter dated September 30, 2003; that the 1<sup>st</sup> defendant wrote a letter dated February 13, 2004 requesting the plaintiff to allow her to use a portion of it as a dump site and attached a sketch of the portion which is the disputed portion herein; that this request was declined; that in July 2010, the plaintiff commenced fencing of the property and was stopped by officers of the 1<sup>st</sup> defendant on the basis that they needed to require approval from the 1<sup>st</sup> defendant; that the 1<sup>st</sup> defendant applied for approval which was not granted; that upon making further inquiry why the plaintiff was being prevented from fencing, the 1<sup>st</sup> defendant claimed that it owned part of the property that the plaintiff intended to fence off. It is stated that the plaintiff sought more details



and it emerged that the 1<sup>st</sup> defendant had purported to purchase a portion of the plaintiff's property which is the same portion that the 1<sup>st</sup> defendant had sought permission from the plaintiff to use as a dumping ground. It was her opinion that the acquisition of the land is null and void and tainted with fraud. She testified in court that the plaintiff has never surrendered her property or a portion of it for re-allocation. She was referred to a PDP that created the suit properties and pointed out that it showed some plots A to H which were being carved out of the plaintiff's land.

5. PW-2 was Charles Ndeto, the then acting Managing Director of the plaintiff. He also had a witness statement which he adopted as his evidence. His evidence was more or less a replica of the evidence of PW-1.
6. The 2<sup>nd</sup> defendant called Abdalla Ali Taib as her witness. He is a director of the 2<sup>nd</sup> defendant. He also had a recorded statement which he relied on as his evidence. He averred that on June 6, 1997, the 2<sup>nd</sup> defendant purchased the two plots now MN/I/10771 and N/I/10772, from one Zadock Muyela and Dorcas Ogembo. The two held allotment letters to the two plots, which at that time were designated as Plots B and C in a deed plan dated February 21, 1997. On 23 July 1997, the 2<sup>nd</sup> defendant paid Kshs 388,150/= at the Lands office so as to obtain the title documents. On September 24, 1997, she also paid Kshs 129,650/= as land rates. He produced copies of the sale agreements vide which it purchased the two plots, the allotment letters, the PDP, and receipts for fees paid. The two plots were later sold to the 1<sup>st</sup> defendant and he produced copies of the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendant prepared in the year 2007. The 2<sup>nd</sup> defendant proceeded to pay the outstanding land rates for the two plots being Kshs 129,650/= and also paid the sum of Kshs 388,150/= for issuance of title. Cross-examined he testified that it is the 2<sup>nd</sup> defendant which paid the stand premium on the allotment letters issued to Zadock Muyela and Dorcas Ogembo. He acknowledged that the letters produced by the plaintiff show that the 1<sup>st</sup> defendant had requested for permission from the plaintiff to use the land as a dump site. At that time the Mayor of the 1<sup>st</sup> defendant was one Taib Ali Taib, who was his brother. He denied that the allotment letters were fraudulently acquired with the help of his brother and pointed out that his brother is not a shareholder or director of the 2<sup>nd</sup> defendant. The land was sold to the 2<sup>nd</sup> defendant after his brother had left office as Mayor. The selling price was Kshs 8,000,000/= and Kshs 10,000,000/= respectively for the two plots, in total, Kshs 18,000,000/=. Upon sale, the 2<sup>nd</sup> defendant no longer had interest in the properties. He was yet to see a title in the name of the 1<sup>st</sup> defendant.
7. The court summoned the Land Registrar Mombasa to produce the parcel files for the plots in issue. Ms Siema Mwanguni, the Land Registrar, Mombasa, attended to testify. Her evidence was that the suit property under title CR No. 13088 belongs to the plaintiff and it measures 22.85 acres. It is a leasehold for a term of 99 years from 1 July 1962. The other two plots, MN/I/10771 and 10772 are registered in the name of the Municipal Council of Mombasa after a transfer from the 2<sup>nd</sup> defendant. The two plots measure 0.4700 Ha. The grants for the two plots were issued on October 12, 2004. There was no indication that the suit property was ever subdivided to produce the two plots belonging to the defendants and neither was there any indication that the two subplots were created out of the suit property. She stated that title to the two plots of the defendants were initially issued in the name of the 2<sup>nd</sup> defendant as the first allottee.
8. After she had testified, Mr Saende, learned counsel for the plaintiff, applied to call the District Surveyor. This was not opposed, and Mr Teddy Mulusa, a land surveyor with the Regional Survey office Mombasa, testified. He stated that he visited the site and prepared a report which he produced in court. He testified that the two plots of the defendants arose from a subdivision of the plaintiff's title, which was done in the year 1998, through Survey Plan No 336/185. The two plots are thus within the plaintiff's title. He testified that the plaintiff's plot was subdivided into nine plots, being



the plots numbers 10769 to 10777 and the plots Nos 10771 and 10772 are among the nine sub-plots. He testified that subdivision would require the consent of the owner, the authority of the Municipal Council (now County Government) and the authority of the Lands Office. For this instance, he did not see any authority for the subdivision. From his experience, the original title deed is required to complete the subdivision process.

9. The 1st defendant did not call any witness.
10. I invited counsel to file their written submissions, and I have seen the submissions of Mr Saende, learned counsel for the plaintiff, and Mr Odipo, learned counsel for the 2<sup>nd</sup> defendant. Ms L N Momanyi, learned counsel appearing for the 1<sup>st</sup> defendant, did not file any submissions. I have read the submissions filed and I have taken them into account before arriving at my decision which follows hereunder. I will be brief in my delivery as the issues to me are crystal clear.
11. From the evidence presented, it is apparent that the plaintiff still remains registered as proprietor of the land parcel Mainland North, LR No 1476 (Original No 464/60) under the title No CR 13088. This land measures 22.85 acres and is well outlined in Deed Plan No 81176. There is no evidence that the plaintiff has ever applied for the subdivision of her land into subplots. In fact, the plaintiff still holds the original title as issued and the title still has a caveat in favour of Television Network (Kenya) Limited registered on May 20, 1964. The plaintiff's land could clearly not have been subdivided without the plaintiff applying for the subdivision and without this caveat being lifted. The Land Registrar who testified, affirmed that this title still exists in the Lands registry. A purported subdivision survey of this land was however done, though the survey plan FR No 336/185 in the year 1988, and that subdivision survey purported to subdivide the Plot No 1476 and create nine sub-plots numbered MN/I/10770, MN/I/10771, MN/I/10772, MN/I/10773, MN/I/10774, MN/I/10775, MN/I/10776, MN/I/10777, MN/I/10778 and MN/I/10779. The two plots in the name of the defendants, being the plots MN/I/10771 and MN/I/10772, fall within the above subdivisions. The survey was purportedly approved on March 27, 1998 and authenticated on June 3, 1998, and it is obvious, that it was following a PDP that had proposed to carve out the plaintiff's land and upon which allotment letters to plots identified as Plots A-H were issued. This land was already in the ownership of the plaintiff and it was only the plaintiff who could undertake the subdivision of its land. The Government or other persons had no right to subdivide the plaintiff's land and allocate parts of it to other persons. It was already land that was alienated to the plaintiff. It is clear that the purported subdivision of the plaintiff's 22.85 acres was illegal and null and void. It follows that any title that was issued thereunder is also null and void. The title issued to the 1<sup>st</sup> defendant is null and void and ought never to have been issued in the first place. It was a nullity *ab initio*.
12. In his submissions, Mr Odipo argued that the plaintiff has not moved to challenge the titles to the Plots No 1469/I/MN; 625/I/MN; 626/I/MN; 464/I/MN; and MN/I/464/R which neighbour the plaintiff's land. I don't see his point because these plots are where they were originally and are neither affected by the plaintiff's land nor the two titles held by the defendants. Counsel also claimed that no fraud has been proved against the defendants. Subdividing a person's land and issuing title to it without his consent is evidence enough of fraud, and indeed, among the particulars of fraud pleaded, were that the defendants subdivided and created titles from the plaintiff's property without the consent of the plaintiff. The 2<sup>nd</sup> defendant was the first beneficiary of the impugned titles and knew or ought to have known that the title it was receiving was being carved out of land belonging to the plaintiff. The title of the 1<sup>st</sup> and 2<sup>nd</sup> defendants cannot hold because it is within land for which the plaintiff also has title. You cannot have two titles to the same land and one must give way to the other. In this instance, it is clear beyond doubt that it is the title that was issued to the 2<sup>nd</sup> defendant, and which was transferred



to the predecessor of the 1<sup>st</sup> defendant, that must pave way, for it is a result of an illegal subdivision of the plaintiff's land.

13. The title is now in the hands of the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant cannot be said to be an innocent purchaser for value. It knew that this land was owned by the plaintiff. When the 1<sup>st</sup> defendant started using it to dump garbage, the plaintiff wrote to it a letter dated August 25, 2003 asking it to stop its activities on the land. The 1<sup>st</sup> defendant wrote back through its letter dated September 1, 2003 stating that it would take remedial measures. It appears as if no remedial measures were taken which prompted the plaintiff to write again on September 30, 2003. The 1<sup>st</sup> defendant responded by writing the letter dated February 13, 2004, wherein it asked the plaintiff to be allowed to use part of the land as a transfer point for collected garbage. That letter clearly refers to the suit land. Another letter asking to use the suit land as a dump site was written by the 1<sup>st</sup> defendant on February 23, 2004. The 1<sup>st</sup> defendant therefore knew that this land was owned by the plaintiff. I wonder how the 1<sup>st</sup> defendant, despite having that knowledge, proceeded to deal with the 2<sup>nd</sup> defendant without raising any query with the plaintiff. In those circumstances, the 1<sup>st</sup> defendant cannot purport to be an innocent purchaser for value. The 1<sup>st</sup> defendant did not even bother to attend court to defend the title that is now in her name which speaks volumes.
14. The matter in this suit is plain and obvious. The plaintiff still has her title which is intact. The 1<sup>st</sup> and 2<sup>nd</sup> defendants cannot purport to also hold a title to land which is within the plaintiff's title. The plaintiff's title came first and there is no evidence that the plaintiff has ever applied to subdivide it. It follows that the title issued to the 2<sup>nd</sup> defendant must be declared null and void and the transfer of it to the 1<sup>st</sup> defendant is also null and void. I must proceed to cancel the titles to the land parcels MN/I/10771 and MN/I/10772 and I do proceed to cancel them. I declare that the land upon which the two titles fall is land falling within the title No 3088 to MN/I/1476 which belongs to the plaintiff. The only entity that has the legal right to use and possess this land is the plaintiff. The defendants are therefore hereby barred by an order of permanent injunction from entering, being upon, utilising, or dealing with the ground upon which the Plots No MN/I/10771 and MN/I/10772 purport to fall, for that ground falls within the plaintiff's land parcel MN/I/1476, and it is only the plaintiff who has rights over it.
15. Within this suit, I have only dealt with the plots Nos MN/I/10771 and MN/I/10772. The evidence showed other subdivisions. It is upon the plaintiff to make a decision whether to pursue them or not, for they are not within the purview of this judgment.
16. The only issue left is costs. The plaintiff shall have costs against the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and/or severally.
17. Judgment accordingly.

**DATED AND DELIVERED THIS 7 DAY OF JULY 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

