



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 95 OF 2015**

**ALI MOHAMED KIJUVI.....1<sup>ST</sup> PETITIONER**

**THE ESTATE OF HAMADI ALI KIJUVI AKA AHMED**

**BIN ALI (DECEASED) THRU ITS ADMINISTRATOR**

**ALI MOHAMED KIJUVI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE REGISTRAR OF TITLE MOMBASA**

**DIRECTOR OF SURVEYORS**

**THE ATTORNEY GENERAL..... RESPONDENTS**

**AND**

**JOSEPHINE NAISENYA MBATIA.....1<sup>ST</sup> INTERESTED PARTY**

**THE ESTATE OF KALUME MUHALE AKA KALUMS**

**MUHALE KWANGURO (DECEASED)**

**THRU ITS JOINT ADMINSTRATORS BAHATI**

**SAGA & MOHAMED A. MUHALE.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. The Petition was filed on 28<sup>th</sup> November, 2012. The Petitioners seek the following orders:

1. A declaration that the mode and manner of the creation and registration of the certificate of title referred to as LR. NO.MN/III/540, LR NO. MN/III/541 and LR. NO.MN/III/542 by the 1<sup>st</sup> respondent is a breach of the Petitioner's fundamental rights and freedoms as enshrined under the constitution.
2. A declaration that the registration of title nos. LR. NO. MN/III/540, LR NO. MN/III/541 and LR NO. MN/III/542 by the 1<sup>st</sup> respondent in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Interested party were and are irregular and as such an order be made to nullify the same.
3. A declaration that the entry numbers 7,8 and 9 registered as cr. Nos.4121/7-9 dated 25<sup>th</sup> June 2002 on the certificate of Title dated 11<sup>th</sup> September 1923 made by the 1<sup>st</sup> Respondent on the register of LR NO. MN/III/167 be declared irregular with an order be made to nullify the same with the reinstatement of and opening of the register for LR. NO. MN/III/167 by the 1<sup>st</sup> respondent.

4. A declaration that the 2<sup>nd</sup> Respondent do cancel the Deed Plans dated 27<sup>th</sup> October 1975 numbered 97958 to 97960 all dated 27<sup>th</sup> October 1975.

5. A declaration that the Petitioners their agents servants licensees have a right to enjoy a quiet and peaceful occupation of the parcel of land once referred to as LR NO. MN/III/167 pending the execution of the ruling dated 17<sup>th</sup> February 1994 of the Kadhi's Court at Malindi Civil Case No.47 of 1993.

6. A conservatory order by issuing such order, directions and writs as may be necessary to safe guard and prevent the abuse and violation of the Petitioner's fundamental rights and freedoms, reputation, prestige and legitimate expectation over the property by the 1<sup>st</sup> Respondent and the Interested Parties.

7. Damages.

8. The costs of this Petition be provided for.

2. The Petition is premised on the averments in the Petition and the affidavit in verification of the petition sworn by Ali Mohamed Kijuvu the 1<sup>st</sup> Petitioner herein on 28<sup>th</sup> November 2012 together with the annexures attached thereto. The Petitioners' case in a nutshell is that the 1<sup>st</sup> Petitioner is a son to the late Hamadi Ali Kijuvu (deceased) and as such a beneficiary of the 2<sup>nd</sup> Petitioner and by virtue of Letters of Administration issued on 8<sup>th</sup> September 2008 in Mombasa HC P & A Cause No. 185 of 2008 the Administrator of the 2<sup>nd</sup> Petitioner. At the time of filing the Petition, the Petitioner averred that he was 58 years old and stated that he is aware of the family history with respect to the parcel of land referred to as LR NO. MN/III/167 located in Mtwapa area in Kilifi County.

3. The Petitioners stated that the 1<sup>st</sup> Respondent did issue a Certificate of Ownership dated 11<sup>th</sup> September 1923 over the said parcel of LAND LR. NO.MN/III/165 CR NO.4121/1 to Ahmed Bin Said who is the 1<sup>st</sup> Petitioner's paternal great grandfather. That by virtue of the summary certificate issued in Administrative Cause No.13 of 1943 (Kilifi) the Public Trustee was vested as the agent to Ahmed Bin Said. That by virtue of a Transfer dated 6<sup>th</sup> May 1968 recorded by the 1<sup>st</sup> Respondent the parcel of land which measures 15 acres and delineated on the plan No. 18978 issued by the 2<sup>nd</sup> respondent referred to as LR. NO. MN/III/167 was transferred to and allocated distinctive shares which they occupied with their families as follows:

a. Maryam Bint Ahmed – 21/96<sup>th</sup> share

b. Aisha Bint Ahmed - 21/96<sup>th</sup> share

c. Fatima Bint Suleiman - 21/96<sup>th</sup> share

d. Mwana Bint Khamis - 12/96<sup>th</sup> share

e. Ali Bin Mohamed - 7/96<sup>th</sup> share

f. Juma Bin Mohamed - 7/96<sup>th</sup> share

g. Nassor Bin Mohamed - 7/96<sup>th</sup> share

4. It is stated that vide a letter dated 26<sup>th</sup> April, 1972 the Petitioners cousin one Mr. S. M. Nzula instructed J. S. Vaughan Esq of M/s Cuthill Vaughan & Patterson to proceed and conduct a survey on LR. NO.MN/III/167 for the purposes of creating 3 distinct plots of 42/96<sup>th</sup>, 21/96<sup>th</sup> and 33/96<sup>th</sup> shares. That the intended subdivision of LR NO.MN/III/167 did eventually produce 3 Deed plans all dated 27<sup>th</sup> October, 1975 with the numbers 97958, 97959 and 97960. That upon a family meeting being held and the action of Mr. S. M. Nzuma being made public to the greater family there occurred a family dispute that rejected the proposal of the property being divided into 3 as per the Deed plans of Hime and Zimmerline and the issue was laid to rest as the family members all being of the Muslim faith agreed to seek guidance from the Kadhi.

5. The Petitioner stated that with the passage of time and with their descendants taking no concrete steps to resolve the situations the Petitioners herein did move the Kadhi's court in Malindi being Civil Case No.47 of 1993 **Ali Mohamed Kijuvu & Another –v- Fatima Binti Suleiman**. That the Honourable Kadhi ordered the land department on 17<sup>th</sup> February 1994 that the said parcel of land LR. NO. MN/III/167 should be divided among the beneficiaries as follows:

a. Omar Yusuf – 1.66 acres

b. Ahmed Ali – 7.75 acres

c. Fatima Suleiman – 2.77 acres

d. Mejumaa Nassor – 1.11 acres

e. Mkasi Binti Ali – 0.83 acres

f. Zuhura Binti Ali – 0.83 acres

That in line with the order from the Kadhi's court, the Petitioners commenced the process of having the said parcel of land surveyed for subdivision.

6. The Petitioners averred that it was upon taking further steps to have the survey plan implemented that they learnt that the 1<sup>st</sup> Respondent had proceeded to issue 3 new certificate of Titles to the 2<sup>nd</sup> Interested Party with the NUMBER MN/III/540, 541 and 542. That upon further investigation, the Petitioners learnt that the 1<sup>st</sup> Respondent's actions in favour of the 2<sup>nd</sup> Interested party were as a result of a forged transfer dated 27<sup>th</sup> August 1998 which was executed by persons who had passed away long before the alleged date of execution and the advocate who allegedly witnessed the same one Mr. Peter M. Omwenga Advocate also disowned it. That the matter was reported to the police who arrested and charged the 2<sup>nd</sup> Interested party in Criminal Case Number 1867 of 2002 **Republic –v- Kalume Muhale Kwanguro** who passed on in Shimo la Tewa Prison on 22/7/2004 during the pendency of that case, and that Bahati M. Saga and Mohamed A. Muhale applied for Letters of Administration and were jointly appointed on 3<sup>rd</sup> August 2004. The Petitioners aver that they have occupied the land for a number of years and have a valid claim of ownership over the land. That the 1<sup>st</sup> Respondent was duty bound to ensure that the Petitioners were afforded a hearing before the issuance of titles having had an interest in the property as a result of their occupation. It is the Petitioners contention that the titles acquired by the 2<sup>nd</sup> Interested Party were fraudulently obtained and as such the Interested Parties cannot make a claim for compensation as they participated in the fraudulent act.

7. The Petitioners filed their submissions on 18<sup>th</sup> July 2017 through their advocates on record, M/s Khaminwa & Khaminwa Advocates and which were highlighted by Mr. Gathuku, learned counsel who held brief for Dr. Khaminwa. Counsel for the Petitioners submitted that the creation and acquisition of parcels LR NOS. MN/III/540-541 is not a definite proof of a valid legal title and that Article 68 (c) (v) of the constitution implies that this court has a duty to investigate the validity of the title, arguing that the Article does by extension show that not all titles of ownership acquired before the coming into force of the constitution were acquired in a legitimate and legal manner and hence the manner of the acquisition can be challenged leading to the cancellation of such title documents. The petitioners counsel submitted that this court has a duty to investigate the manner the Interested Parties obtained title over the properties while they are strangers to the petitioners in that they are not related to them by kindred or consanguinity nor have the petitioners received any form of consideration from them to enable them obtain any legal right of the property. It was the petitioners submission that the interested parties obtained title to the property fraudulently and cannot claim to be bona fide purchasers. Counsel for the petitioners submitted that the interested parties have not met the threshold of a bona fide doctrine which include that one holds a certificate of title, he purchased the property in good faith; he had no knowledge of the fraud; the vendors had apparent valid title; he had purchased without notice of any fraud; and was not a party to any fraud. The petitioners' counsel submitted that Article 40 (6) of the constitution removes protection of title to property that is found to have been unlawfully acquired and together with the provision of Section 26 (1) (a) and (b) of the Land Registration Act places a responsibility to purchasers of titled property to ascertain the status of a property beyond carrying out an official search. Relying on the case of **Keroche Industries Ltd –v- Kenya Revenue Authority & 5 Others (02007) eKLR**, counsel submitted that whereas the 1<sup>st</sup> Respondent has discretion to register the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, it is trite law that where a statute gives a statutory or public body discretion, that discretion ought to be properly exercised. The Petitioners counsel also relied on the case of **Republic –v- Minister for Home Affairs and Others ex-parte Leonard Sitamze (2008) eKLR** and submitted that the court is empowered to interfere with the exercise of discretion; where there is an abuse of discretion; where the decision-maker exercises discretion for an improper purpose; where the decision-maker is in breach of the duty to act fairly; where the decision –maker acts in a manner to frustrate the purpose of the Act donating the power; where the decisions-maker has failed to exercise statutory discretion reasonably; where the decision maker fetters the discretion given; and, where the decisions maker fails to exercise discretion. They also cited **Keroche Industries –v- Kenya Revenue Authority & 5 Others (supra)** while citing **Reg-v- Secretary of state for the Environment for Ex parte Notting Hamshire Country Council (1986) AC**; **Reg –v- Inland Revenue Commssioners Ex Parte National Federation of Self Employed and Small Business Ltd (1982)AC 617**.

8. The Petitioners counsel further submitted that the provisions of Section 26(1)(b) of the Land Registration Act have been met and that the title of the interested parties should be cancelled as the same was obtained illegally, unprocedurally or through a corrupt scheme. They argued that the import of Section 26(1) (b) is to remove protection from an innocent purchaser or innocent title holder and means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. Counsel for the petitioner submitted that there is no legal basis for the approach adopted by the 1<sup>st</sup> Respondent in this case of what they called “see no evil, hear no evil and say no evil” in terms of verification of documents presented to him, adding that he should have insisted on evidence that the law has been followed when accepting documents presented to him. It was the petitioners' submission that the certificates of title issued to the respondents should be cancelled forthwith and the registration of the petitioners as proprietors of the suit land.

9. Mr. Makuto, learned counsel for the respondents submitted that if it true that there was an order issued by the Kadhi's court, the same was never registered against the title. That means that the order was never brought to the attention of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and they cannot be faulted for not acting on a court order which was not served on them. Mr. Makuto further submitted fraud must not only be pleaded, but must be specifically proved. He pointed out that whereas the Petitioner made an averment that the late Kalume Muhale Kwanguro was charged, it was clear that the deceased died while in custody and before determination of the criminal case. He submitted that what that means is that the allegation of fraud has to be proved before this court, and that the onus rests on the petitioners. That the petitioners must discharge the burden of proof of specifically proving the alleged fraud. Referring to annexures '2' and specifically entry no.4 in the supporting affidavit, Mr. Makuto noted that it is clear that the Public Trustee held the documents as an administrator of the estate of the deceased, Maryan Bint Ahmed, and subsequently a transfer dated 18/9/1965 was registered. Counsel noted that the Public Trustee is not a party to this suit, yet he was an important party for the court to determine the dispute at hand. Mr. Makuto submitted that there are competing interests of rights of ownership of land which required adduction of oral evidence for the court to determine with certainty the competing interests. That this would be a proper case for the court to direct the parties to file a civil suit so that evidence can be adduced and a determination reached on merit. He submitted that no blame can be made against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, adding that if there was fraud, then the 1<sup>st</sup> and 2<sup>nd</sup> respondents were victims of that fraud.

10. The interested party's filed a replying affidavit sworn by Mohamed A Muhale, the 2<sup>nd</sup> Interested Party on 21<sup>st</sup> November 2013, in which he has deposed inter alia, that his grandfather, father, uncle, grandmother and grandson all lived and died and were buried on plot no. 540. That the petitioners invaded the portions of LR NO. 540, 541 and 542 in 1996 and started selling portions of it after excavating remains of the bodies of the people who were buried thereon and threw them into the sea. It is the Interested Parties case that the petitioners have no claim whatsoever in the land and cannot claim a better title to it than them, adding that the constitution also protects their rights.

11. Mr. Akanga, learned counsels for the interested parties filed written submissions on 18<sup>th</sup> May 2018 which he also highlighted during the hearing. He submitted that the issues herein have been there since 1943. That the Petitioners and interested parties are grandchildren and wondered why the petitioners waited for over 90 years before instituting these recovery proceedings couched as constitutional claim. He further submitted that it was not until 1993 that the Public Trustee released the property to the father to the interested party and therefore the Public Trustee should have been enjoined in these proceedings. Mr. Akanga's submission is that the Petitioners are guilty of laches. Counsel further submitted that the issues herein are competing private rights to property by the petitioners and the interested parties, and that there are no constitutional issues disclosed, other than to enforce those rights. His submission is that the Petitioners should have filed a suit for the parties to be heard substantively and not a petition of this nature. That the petitioners have alleged fraud against the deceased and they remain mere allegations. That a substantive suit ought to be filed for the court to make a determination noting that the court cannot make a factual finding in this petition. Mr. Akanga submitted that the 1<sup>st</sup> Interested Party came in by way of purchase and the property passed from the deceased by transmission. Regarding the succession matters that were before the Kadhi's Court in 1943 and 1993 counsel submitted that Kadhi's court deal with property which is not in dispute and that the 2<sup>nd</sup> interested party were not parties and could not even be invited as the causes dealt with persons of the deceased. Mr. Akanga relied on the case of **Sceneries Limited –v- National Land Commision (2017) eKLR and Judy Watiri Wambugu –v- Chief Land Registrar & 7 Others (2014) eKLR**.

12. Having analyzed the pleadings and the submissions made, I pose the following questions for determination:

**i. Whether the mode and manner of the creation and registration of the certificate of titles of the suit properties by the 1<sup>st</sup> respondent violated the fundamental rights and freedoms of the petitioners.**

**ii. Whether the registration of the suit properties by the 1<sup>st</sup> respondent in favour of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties were irregular.**

**iii. Whether the petitioners are entitled to the reliefs sought.**

13. The Petitioners contented that the 1<sup>st</sup> respondent did issue a certificate of ownership dated 11/9/1923 over land LR NO. MN/III/167 CR. NO.4121/1 to one Ahmed Bid Said who is a great grandfather of the petitioners. That by virtue of the summary certificate issued in Administrative Cause No.13 of 1943 (Kilifi) the public Trustee was vested as the agent of the said Ahmed Bin Said. They averred that by virtue of a transfer dated 6<sup>th</sup> May 1968 recorded by the 1<sup>st</sup> Respondent the said parcel of land measuring 15 acres was transferred and allocated distinctive shares to the Petitioners relatives who occupied the land with their families. That there was subdivision of the land into three parcels but which led to a family dispute and no steps were taken until the Petitioners moved the Kadhi's court at Malindi in case No.47 of 1993 and the Kadhi's court ordered that parcel LR NO.MN/III/167 be divided among the beneficiaries. This however could not be implemented because the land had already been transferred to the 2<sup>nd</sup> interested party as LR. NO/MN/540, 541 and 542. Although the 2<sup>nd</sup> Interested Party was arrested and charged in criminal case no.1867 of 2002, he passed on on 22<sup>nd</sup> July 2004 before the case was concluded. The petitioners contend that they have occupied the land for a number of years and have a valid claim of ownership over it. The petitioners' case is that the Interested Parties acquired titles to the suit property fraudulently.

14. From the evidence on record, it is apparent that there was an entry for summary certificate dated 18<sup>th</sup> September, 1969 of Maryam Bint Ahmed deceased to the Agent of the public Trustee as the Administrator and a transfer of even date. Later transfers dated 27<sup>th</sup> August 1998 to Kalume Muhale Kwanguro of some portion following sub-division and who later transferred through purchase the portions to the late Lee Mbatia who is husband to the 1<sup>st</sup> interested party and who had the two portions LR NOS. MN/III/541 and 542 transferred to her by transmission in trust for the estate of the deceased in 2011.

15. The Petitioners argument is that the titles to the Interested Parties were obtained illegally, unprocedurally or through a corrupt scheme. The petitioners want the interested parties titles cancelled and the properties registered in the petitioners' names. It is trite law that fraud must not only be pleaded but the same must be specifically proved. Both the petitioners and the interested parties claim ownership of the suit properties. In my view, the constitution protects the rights of both parties. For the court to determine whether or not the titles held by the interested parties are fraudulently obtained hence should be cancelled, sufficient evidence must be adduced. In my considered view, this can only be done through a substantive suit where private rights will be determined between the parties. I do not think the issues of ownership can be resolved conclusively through this petition. Whereas the petitioners have alleged that their constitutional rights have been infringed, in my view the petitioners have not convinced the court how their constitutional rights have been violated. Furthermore, the petitioners have failed to join the public Trustee as party as it is clear that the properties were at one stage registered in his name. The joinder of the Public Trustee would have at least explained what transpired that led to the registration of the deceased as proprietors of the suit property. In this regard I agree with the Respondents submission that in this case, there are competing interests of right of ownership of the suit land which require adduction of oral evidence for the court to determine with certainty those competing interests. I would therefore direct the parties to file a civil suit to agitate their respective rights and for evidence to be adduced to enable the court reach a just determination on merits.

16. It is also a well established principle that a petitioner who seeks redress under the constitution must state his claim with precisions by reference to the provisions of the constitution that have been violated and the manner of the alleged violation. In the case of **Annarita Karimi Njeru –v- Attorney General (1970)KLR 154** it was held:

**“We would however again stress that a person is seeking redress from the High Court on a matter which includes a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with**

**reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.**

**17.** In my view, the allegations in the petition herein are too general and the petition has not passed the test established in the above cited case. The petitioners have not included the public Trustee who was a crucial party to this case. The petitioners have also made general allegations of fraud but have failed to prove the same.

**18.** In the result, I find that the petition lack merit and the same is dismissed. Considering the circumstances of this case, I order that each party bear their costs.

**DATED, SIGNED and DELIVERED at MOMBASA this 5<sup>th</sup> day of November 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Gitahi holding brief Dr. Khamimwa for Petitioner

No appearance AG for Respondents

No appearance Interested Parties.

Yumna Court Assistant

**C.K. YANO**

**JUDGE**