



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 245 OF 2004**

**KENYA PORTS AUTHORITY.....PLAINTIFF**

**VERSUS**

**1. G. WAYUMBA**

**2. F. OKOMBU PRACTICING AS GEOMETER SURVEYS LIMITED**

**3. COMMISSIONER OF LANDS**

**4. THE DISTRICT LANDS REGISTRAR, MOMBASA**

**5. WAYLAND LIMITED**

**6. ESSAM PROPERTIES LIMITED**

**7. KILIFI GARDENS LIMITED.....DEFENDANTS**

**JUDGEMENT**

1. The plaintiff has filed this suit against the defendants jointly and severally seeking:-

**i. A declaration that the excision of portion of the plaintiff's aforesaid original parcels of land are null and void.**

**ii. A declaration that the purported merging of the plaintiff's aforesaid original parcels of land are null and void.**

**iii. A declaration that the 3<sup>rd</sup> and 4th defendants acted unlawfully and ultravires in converting the plaintiffs title over plot number Mombasa/Block III/225 (Original Block XXIII/181).**

**Mombasa/Block XXIII/214-244**

**Mombasa/Block XXIII/180**

**Mombasa/Block XXVIR54R**

**Mombasa/Block XLVII/170 (Original block XLVII) and**

**Mombasa/Block XXXXVI/Adj.103 from freehold to leasehold and that the plaintiff still holds freehold titles to the aforesaid parcels of land.**

**iv. A declaration that the 3rd and 4th defendants acted unlawfully in leasing and/or registering the 5th defendant as lessee of Mombasa/Block XXVI/1001 whereas the same was a subdivision of original Mombasa/Block XXVI/263PT which entirely belonged to the plaintiff and whereas the same had been developed and was in occupation of the plaintiff.**

**v. A declaration that the lease and registration of the 7th defendant and 6th defendant as the lessee of the plaintiffs parcel of land Mombasa/Block XXVI/928 and XXVI/508 respectively are fraudulent and unlawful and contravenes the plaintiff's title**

**and interest thereto.**

**vi. An order to revoke all the excisions, mergers/subdivisions and leases aforesaid.**

**vii. A permanent injunction restraining 5th defendant, 7th defendant and 6th defendant from dealing with, constructing, developing, demolishing or in any other manner interfering with the plaintiff's structures, tenants and buildings on the plaintiff's plots number Mombasa Block XXVI/1001, MOMBASA Block XXVI/928 and Mombasa Block XXVI/508 respectively.**

**viii. An order of rectification of the land registers in respect of all the plaintiff's aforesaid parcels of land and/or leased to third parties.**

**ix. General damages**

**x. Costs of interests**

**xi. Such other or further reliefs this honourable court deems fit and just to grant.**

2. The 1st, 2nd, 3rd and 4th defendants who were duly served with copies of plaint and summons to enter appearance neglected to enter appearance and or file defence within the prescribed period. Interlocutory judgment was entered and the matter proceeded for formal proof.

3. The 5th, 6th and 7th defendants were served by way of advertisement in the Daily Nation newspaper of 8th June, 2016. They too neglected to enter appearance and/or file defence within the prescribed period.

4. The plaintiff called one witness George Opiyo the Estate and Rating Officer, adopted his witness statement filed in court on 10/6/2015 as part of his examination in chief. It is the plaintiff's case that between 1997 and 2002 the 1st and the 2nd defendants practicing as Geometer Surveys were asked to undertake ground survey, do due diligence and procure titles in the name of the plaintiff. The plaintiff being a predecessor of East African Railways and Harbours acquired the properties of the predecessor.

5. In Kizingo area the 1st and 2nd defendants subdivided the plaintiff's property and came up with two titles namely Mombasa/Block XXVI/1000 and Mombasa/Block XXVI/1001. That initially the parcel of land had five similar houses built and/or developed by the plaintiff for occupation by the plaintiff's staff for many years. During subdivision, Mombasa/Block XXVI/1000 remained with four houses or units while Mombasa/Block XXVI/1001 remained with one house or unit. Mombasa/Block XXVI/1000 was registered in the name of the plaintiff while Mombasa/Block XXVI/1001 was registered in the name of Wayland Limited.

6. The sub division and transfer of plot No 1001 to Wayland Limited was done fraudulently and without instructions given by the plaintiff and the same was illegal. The said transfer was perpetuated by the fraud of both the 1st and 2nd defendants together with the 3rd and 4th defendants. The plaintiff does not know the 5th defendant and prays that the title be cancelled.

7. It is further the plaintiff's case that Mombasa/Block XXVI/928 and Mombasa/Block/508 were inherited from the predecessor. The plaintiff paid rates for them. They were originally 235/PT/XXVI and 251/PT/XXVI. The said plot Mombasa/Block XXVI/508 was allocated to Essam properties Limited for a lease of 99 years with effect from 1/4/1998. The plot was not available for allocation to a third party as it belonged to the plaintiff. The plaintiff was not notified of the allocation to a third party Mombasa/Block XXVI/928 was not available for allocation well as it belonged to the plaintiff. The 3rd and 4th defendants are to blame for processing the titles.

8. In support of its case the plaintiff produced the following documents as exhibits;

a. Legal Notices No 19 dated 31st May 1969. Exhibit P1.

b. Legal Notice No 20 of 1969 Exhibit P2

c. Legal Notice No 21 dated 9th June Exhibit P3

d. Legal Notice No 22 dated 9th June 1999- Exhibit -P4

e. Certificate of lease on Mombasa/Block XXVI/1000 dated 15th March 1998 Exhibit P5

f. Certificate of official search on Mombasa/Block XXVI/1001 dated 27th December 1998 Exhibit P6.

g. Lease on Mombasa Island/Block XXVI/508 dated 28th July, 1998 exhibit P7.

h. Lease on Mombasa Island/Block XXVI/928 dated 28th July 1998 Exhibit P8.

i. Letter dated 8th April 1998 to Geometer Surveys Limited Exhibit P9

j. Letter dated 30th June 1998 from Geometer Surveys Limited Exhibit P10

- k. Brief on Mombasa/Block XXVI/263 (part) Kizingo from Senior Estate and Rating Officer of Kenya Port Authority Exhibit P11.
- l. Letter dated 2nd October 1997 to Geometer Surveys Limited Exhibit P12.
- m. Letter dated 26th August, 1997 to Kenya Ports Authority P13.
- n. Letter dated 3rd November 1997 to Geometer Surveys Limited Exhibit P14.
- o. Letter dated 28th August 1999 to the Commissioner of Lands Nairobi Exhibit P15
- p. Letter dated 19th August 1999 to the Managing Director Kenya Ports Authority Exhibit P 16.
- q. Schedule of properties and copy of their receipt for rates from the municipal council of Mombasa Exhibit P 17.
- r. Letter from Geometer Surveys Limited confirming receipts of the instructions Exhibit P18.
- s. Area map for plot numbers 508 and 928 Exhibit P19.
- t. Demand letter for rates for the current year for plot numbers (original PT 215 now Mombasa Block XXVI/928 Exhibit P20.

9. The plaintiff's case is uncontroverted. The issue for determination is whether the said plot numbers Mombasa/Block XXVI/1001, Mombasa/block XXVI/928 and Mombasa/Block XXVI/508 were available for allocation by the 3rd and 4th defendants to any third party namely the 5th, 6th and 7th defendants.

10. It is the plaintiff's case that the 1st and 2nd defendants trading as Geometer Surveys Limited received instructions from the plaintiff to survey the Mombasa/Block XXVI/263 PT in Kizingo area and process the title in the names of the plaintiff. That contrary to instructions the 1st and 2nd defendants sub divided the property into Mombasa/Block XXVI/1000 and Mombasa/Block XXVI/1001 Plot No 1001 was issued in the names of Wayland Limited, the 5th defendant. The said property has a residential house currently occupied by the plaintiff's staff. The illegal subdivision was done by the 1st and 2nd defendants while the illegal allocation and registration in the names of the 5th defendant was done by the 3rd and 4th defendants.

11. With respect to Mombasa/Block XXVI/508, a lease was issued to Essam Properties, the 6th defendant. The letter dated 19/8/1999 addressed to the managing director of the plaintiff was produced as Exhibit P7. The lease for Mombasa/Block XXVI/928 issued to Kilifi Gardens the 7th defendant dated 28/7/1998 was produced as exhibit P8.

12. From the foregoing it is clear that the leases to the said properties were issued to the 5th, 6th and 7th defendants while the plaintiff was already the owner. The land was already alienated for public use by the plaintiff. The same was not available for allocation for a third party.

13. I have gone through Sections 3(a) and (9) of the Government Land Act (repealed). I agree with the plaintiff's counsels submissions that once land is alienated it is not available for allocation to any third party specifically the 5th, 6th and 7th defendants.

14. The plaintiff has relied on the cases of;

**1. Henry Muthee Kathurima –vs-Commissioner of Lands & Another [2015] Eklr.**

**2. Nelson Kazungu Chai & others –vs-Pwani University College Malindi Civil Appeal No 78 of 2016.** I am guided by the above authorities.

15. I note that the said properties have the plaintiff's staff houses and the plaintiff has been paying rates. In the case of **Henry Muthee Kathurima –vs- Commissioner of Lands & another Meru Civil Appeal No 8 of 2014** the Court of appeal quoted the case of **Said Bin Seif vs Shariff Mohammed Shatry [1940] 19 (1) KLR 9** stated that:-

**“an action taken by the Commissioner of Lands without legal authority is a nullity, such an action however technically correct is a mere nullity and not only voidable but void with no effect without legitimate expectation estopped or otherwise”.**

16. Having stated earlier that the plaintiff's case is uncontroverted, I find that the plaintiff has proved its case against the defendants on a balance of probabilities.

17. I enter judgment in its favour as against the defendants jointly and severally as follows;

**i. A declaration be and is hereby issued that the excision portions of the plaintiff's original parcels of land Mombasa/Block XXVI/263 PT (New Mombasa/Block XXVI/1000 and 001) Mombasa/Block M/MN (New Mombasa/Block XXIII/181. (New XXIII/225) Mombasa/Block/471, Mombasa Block/1(New Block 1/492) and Mombasa/Block XXVI/247 PT New XXVI/556 are null and void.**

ii. A declaration be and is hereby issued that the purported merging of the plaintiffs aforesaid original parcels of land are null and void.

iii. A declaration be and is hereby issued that the 3rd and 4th defendants acted unlawfully and ultravires in converting the plaintiff's title over plot number Mombasa/Block XXIII/225(original Block XXIII/181) Mombasa/Block XXIII/214-244 (Original Block XXIII/180, Mombasa Block XXVI/R54R, Mombasa/Block XLVII/170 (original Block XLVII) and Mombasa/Block XXV/Adj. 103 from freehold to leasehold and that the plaintiff still holds freehold titles to the aforesaid parcels of land.

iv. A declaration be and is hereby issued that the 3rd and 4th defendants acted unlawfully in leasing and/or registering the 5th defendant as lessee of Mombasa/Block XXVI/1001 whereas the same was a sub division of original Mombasa Block XXVI/263 PT which entirely belonged to the plaintiff and whereas the same had been developed and was in occupation of the plaintiff.

v. A declaration be and is hereby issued that the lease and registration of the 7th defendant and 6th defendant as the lessees of the plaintiff's parcel of lands Mombasa/Block XXVI/928 and XXVI/508 respectively are fraudulent and unlawful and contravenes the plaintiffs title and interests thereto.

vi. An order is hereby issued directing the 4th defendant to revoke all the excisions, mergers, subdivisions and leases aforesaid.

vii. A permanent injunction do hereby issue, restraining the 5th, 6th and 7th defendants from dealing with, constructing, developing, demolishing or in any other manner interfering with the plaintiffs structures, tenants and buildings on the plaintiff's plot Mombasa/block XXIV/1001, Mombasa/Block XXVI/928 and Mombasa/Block XXVI/508 respectively.

viii. An order is hereby issued to the 4th defendant to do rectification of the parcels registers in respect of all the plaintiff's aforesaid parcels of land excised, merged sub divided, converted to leasehold and/or leased to those parties.

ix. As the court was not guided on what loss the plaintiff has suffered, I decline to award any damages.

x. Costs of the suit and interests.

It is so ordered.

Dated and signed in Nairobi on this...day of .....2018

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**L. KOMINGOI**

**JUDGE**

Dated and delivered at Mombasa on this 5<sup>th</sup> day of October 2018.

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**A. OMOLLO**

**JUDGE**