



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 20 OF 2009

IN THE MATTER OF: SECTION 84(1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTIONS OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS
70 AND 75 OF CONSTITUTION OF KENYA**

BETWEEN

MALINDI ESTATE LIMITED.....PETITIONER

VERSUS

- 1. THE ATTORNEY GENERAL**
- 2. THE COMMISSIONER OF LANDS**
- 3. THE PRINCIPAL REGISTRAR OF TITLES**
- 4. MUNICIPAL COUNCIL OF MALINDI**
- 5. TWALIB OMAR NAJI**

MANSUR NAJI SAID

ABDALLA NAJI SAID

MOHAMED SALIM BADAMANA

(Sued as Administrators of The Estate of OMAR NAJI SAID (Deceased))

- 6. FATIMA MOHAMED NUREIN..... RESPONDENTS**

JUDGMENT

BACKGROUND

1. By their Petition dated and filed herein on 14th December 2009, Malindi Estates Ltd (the Petitioners) prays for Judgment to be entered against the six(6) Respondents for:-

a) A declaration that Plot No. 10493 Malindi is part of Portion No. 1935 (Original 524/28) Malindi and is the property of the Petitioner and that the acts of the Respondents of creating leasehold interest, lease, Grant thereto was unconstitutional, null and void ab initio and nullities in law;

b) An order of cancellation of the Lease, Grant No. CR 29893 and the Certificate of Title thereto for Plot No. 10493 Malindi;

c) A permanent injunction restraining the Respondent from interfering with the Petitioner's title, use(and) possession of Plot No. 10493 Malindi;

d) General damages

e) Vacant possession, eviction, removal/demolition of the structures on Plot No. 10493 Malindi;

f) Any other form of redress that the Court may deem just to grant; and

g) Costs of the suit.

2. The Petitioner avers that by virtue of an Indenture dated 30th December 1968 and registered on 2nd January 1968 between itself and Coast Projects Ltd it was registered as the proprietor of all that parcel of land known as Portion No. 1935 (Original No. 542/28) containing by measurement 200.9 acres situated within the Malindi Municipality (the Suit Property).

3. The Petitioner further avers that it thereafter caused the property to be sub-divided, surveyed and laid out as a residential, commercial and industrial building estate comprising of 868 plots together with certain roads of access, road reserves and open public spaces for inter alia, educational, religious and recreational purposes. The access roads, road reserves and open spaces have neither been surrendered to the Malindi Municipality Council nor to the Government and remain the exclusive property of the Petitioner.

4. It is the Petitioner's case that without its authority and/or consent and on the application of the 4th and 5th Respondents, the 2nd and 3rd Respondents have since illegally sub-divided part of its land along Ganda Road and illegally created Plot No. 10493 (Grant No. 29893) measuring 0.0451 Ha which it then allotted to one Omar Haji Said (now deceased represented herein by the 5th Respondent) in the year 2006.

5. The Petitioner further asserts that the Administrators of the Estate of the said Omar Naji Said (deceased) have unlawfully and illegally transferred the said Plot No. 10493 to the 6th Respondent who in turn has commenced constructions thereon despite the Petitioner's protests.

6. The Petitioner avers that by reason of the matters aforesaid, the Respondents have violated its right to property as guaranteed under Sections 70 and 75 of the repealed Constitution. It further asserts that the Respondents are in violation of Section 75 of the said Constitution as they have purported to compulsorily acquire its property without due compliance with the law.

7. In a Replying Affidavit sworn by its then Town Clerk Ahmed M Hemed and filed herein on 4th November 2010, the Municipal Council of Malindi (the 4th Respondent) states that it is aware that the parcel of land which is the subject matter of this Petition is situated within the Municipality of Malindi.

8. The 4th Respondent however asserts that it was not involved in the alleged transfer of the said title from the Petitioner to the 5th Respondent and hence the Petitioner has no sustainable claim against itself. The 4th Respondent further avers that the 4th Respondent has no power to allocate land in the manner stated by the Petitioner.

9. The 4th Respondent further avers that on learning that the Commissioner of Lands (the 2nd Respondent) had issued the impugned Grant, it did resolve in Resolution No. 50/95 to request the 2nd Respondent to nullify the allocation. The 4th Respondent did indeed by a letter dated 11th November 1999 communicate its position to the Petitioner's Advocates and there is therefore absolutely no reason it has been enjoined in these proceedings.

10. In a Replying Affidavit sworn and filed herein on 5th February 2010 by Prof. Abdullah Naji Said on behalf of the Estate of Omar Naji Said (the 5th Respondent), he avers that by dint of Section 24 (1) of the Registration of Titles Act, the Petitioner has no cause of action against the 5th Respondent and that the cause of action did not survive the death of the said Omar Naji Said.

11. The 5th Respondents further avers that the deceased did not leave behind any information on how the Grant was issued in his favour and asserts that it is unfair for the Petitioner to expect answers from Administrators of the estate. While conceding that they indeed sold the land to the 6th Respondent, the Administrators contend that there was nothing registered against the title and that they did so in lawful exercise of their mandate.

12. The 5th Respondents further assert that the Petitioner's claim is time-barred as the contested title was first registered on 9th May 1997, more than 12 years before this Petition was filed. The Petitioner despite having protested the creation of the title did not take any action to stop the alleged trespass, excision and or unlawful conduct of the 2nd, 3rd and 5th Respondents until now and is therefore guilty of serious and culpable indolence which resulted in the entrenchment of other rights including those of the 6th Respondent.

13. Similarly, Fatima Mohamed Nurein (the 6th Respondent) has through a Replying Affidavit sworn on her behalf by her Attorney Dr. Mohamed Elhadi Sheikh Nurein and filed herein on 3rd February 2010 denied that the Petitioner is entitled to the orders sought.

14. The 6th Respondent avers that she did purchase the suit premises from the 5th Respondents and was registered as proprietor thereof on 4th August 2006 upon payment of the consideration sought by the 5th Respondents. The 6th Respondent further asserts that from a Copy of the survey plan for the property, it is apparent that the same was approved by the Government on 17th May 1996.

15. The 6th Respondent avers that when she purchased the premises, she did so innocently, openly and without notice of any defects in the 5th Respondent's title and the Petitioner did not indicate any defect either by way of a Caveat or other restriction registered on the title. The 6th Respondent accordingly asserts that she was a bona fide purchaser for value without notice and her title is indefeasible under the provisions of Section 23 of the Registration of Titles Act.

16. The 6th Respondent further asserts that the Petitioner's claim is time-barred as the same is brought more than 12 years after the title was first registered on 9th May 1997. She accuses the Petitioner of being guilty of serious and culpable indolence in taking any action to stop the alleged trespass to its property and avers that due to such delay her rights as such purchaser have since been entrenched.

17. The 6th Respondent further accuses the Petitioner of abusing the Court process to file a Constitutional Petition while there were more effective methods open and available to the Petitioner to agitate its rights. She asserts that she has no power in law, neither is she capable of safeguarding, protecting or securing the Constitutional rights of the Petitioner that are claimed to have been infringed and urges the Court to reject the Petition with costs.

18. On 28th July 2014 directions were given that this matter proceeds by way of viva voce evidence. The parties agreed that the Affidavits filed be taken to be the Witness Statements and that the annexed documents be treated as exhibits. On the same day, leave was granted to parties to file further affidavits and documents that they may have wished to rely on within 14 days. From a perusal of the record, only the Petitioner, the 5th and 6th Respondents filed any affidavits herein. The 1st, 2nd, 3rd and 4th Respondents did not respond to the Petition.

The Petitioner's Case

19. The Petitioner called two witnesses in support of their case.

20. PW1-Dinkar Meghji Chahya is a director of the Petitioner. He told the Court that his father Meghji Velji Chahya who was present in Court when he testified is a Co-director in the company but was now 86 years old having a problem with his health and hearing. His father is the one who had sworn the affidavit together with the annexures when they first filed the Petition in 2009. He adopted the averments made by his father in the affidavits.

21. PW1 told the Court that their company's 209 acres of land was sub-divided into 869 portions in 1978. From the sub-division, the road reserve on Ganda Road was supposed to be 30 metres heading to Tsavo Road. The Respondents had created plots on a road reserve narrowing it to 15 metres. PW1 told the Court that his father had bought the land from Coast Products Ltd way back in 1967 and that everything within the Estate was the private property of the Petitioner.

22. On cross-examination, PW1 told the Court that they did not know who was allocating the plots on the road reserves, He however conceded that a letter dated 11th November 1999 by the Municipal Council of Malindi (the 4th Respondent) stated that the Council was not involved in the allocation of the Plots and urged that the same be cancelled.

23. PW1 further told the Court that he was aware the 5th Respondent had been issued with a title on 27th March 1997 and that the same parcel of land had been sold by the 5th Respondent to the 6th Respondent. He conceded that he had nothing to show that the 6th Respondent was not a bona fide purchaser for value. He did not know if Omar Naji Said who was allocated the land had been notified of the anomalies in the title before his death.

24. PW2-Prof. Josephat Kazungu Ziro Mwatelah is a Licensed Surveyor. He told the Court that in March 2017, he was given the task by the Petitioner to establish the proposed road reserve along Tsavo Road, Malindi. He testified that using available data and the approved Part Development Plan (PDP), he was able to re-establish the original road reserve.

25. PW2 told the Court that he observed that temporary business structures had been constructed along the reserve. There was also one permanent building and some mabati structures. Portion No. 10493 was among the plots falling within the 30 metre road reserve. It was his conclusion that the new plan under Folio Reference 261/43 which created Portion Nos. 10487 to 10494 had not been approved as per the regulations and should be nullified.

26. On cross-examination, PW2 conceded that his task was to establish the road reserve and not to find out if the PDP had been properly created or which Government entity had approved the same. PW2 further told the Court that ordinarily, a title would not be issued unless there is approval of the Deed Plan.

27. PW2 conceded that the 6th Respondent had a title in her name and that a Deed Plan was also in place. He told the Court that it was not part of his assignment to check the authenticity of the records held by the Director of Surveys and testified that all a member of the public needed to do to confirm authenticity of documents was to go to the Lands Registry.

The Respondents' Case

28. The 1st, 2nd, 3rd and 4th Respondents neither filed any documents nor called any oral testimony at the trial. However the 5th and 6th Respondents called one witness each in support of their respective cases.

29. DW1-Mansoor Naji Said is one of the Administrators of the Estate of Omar Naji. He told the Court that Omar was his brother and that he died on 10th December 2003. They had responded to the Petition through the Replying Affidavit sworn by his brother Prof. Abdallah Naji Said and filed herein on 5th February 2010.

30. DW1 testified that LR No. 10493 belonged to the deceased who left behind ten children. As an Administrator, he never benefited from the property as his role merely entailed administration and sharing out the same to the beneficiaries. DW1 told the Court that he was not aware how his deceased brother acquired the property.

31. On cross-examination he told the Court that according to the Deed Plan, the land had been surveyed on 2nd July 1996. He conceded that the property was later sold to the 6th Respondent and that he signed the document transferring the same to the 6th Respondent. He testified that he was unaware the Plot was to be surrendered as a road reserve and/or that the title thereto was revoked.

32. DW2-Dr. Mohamed El Hadi Sheikh Nurrein is the father of the 6th Respondent and the holder of a Power of Attorney donated by herself and registered on 12th January 2010.

33. DW2 testified that Plot No. 10493 belongs to the 6th Respondent. The same was bought by the 6th Respondent's husband from the 5th Respondents and was registered in the 6th Respondent's name on 4th August 2006. The seller of the land had died by the time this matter was brought to Court.

Analysis and Determination

34. I have perused and considered the pleadings filed herein by the parties, the oral testimonies of the witnesses and the evidence adduced in the course of the trial. I have equally perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

35. The Petitioner avers that it is the proprietor of all that parcel of land measuring 200.9 acres and Portion No. 1935 (Original No. 542/28) Malindi. It is the Petitioner's case that it acquired the suit property way back in 1968 and that some ten years later, it went into great expense and trouble to sub-divide the property into some 868 plots. In its sub-division scheme, the Petition asserts that it reserved open spaces for access roads, recreation, education and religious purposes.

36. The Petitioner further asserts that in compliance with the law, it did leave out a 30 metre wide strip of its land that borders Ganda Road in Malindi town as a road reserve. To the Petitioner's shock and consternation however, it came to notice that some constructions had been made on the road reserve. Upon investigations, the Petitioner came to learn that the 2nd, 3rd and 4th Respondents had unlawfully created titles thereon for the benefit of the 5th Respondent who in turn sold the same to the 6th Respondent.

37. The Petitioner avers that at the time the said titles were created, the suit property was private property and incapable of and unavailable for alienation by the Respondents in the manner they purported to do. The Petitioner therefor contends that the title created in the name of the 5th Respondent was therefore null and void and could not as a result pass any title to the 6th Respondent.

38. The Honourable the Attorney General, the Commissioner of Lands and the Principal Registrar of Titles sued herein respectively as the 1st, 2nd and 3rd Respondent did not file any pleadings herein even though the 1st Respondent actively participated in the proceedings herein.

39. On its part, the Municipal Council of Malindi (the 4th Respondent) disowned the process of creation of the title and the subsequent allocation and transfer to the 5th Respondent. In a Replying Affidavit sworn by its then Town Clerk Ahmed M. Hemed, the Council attributed the creation and transfer of the title to the 2nd Respondent. It was further the Council's position that when it learnt about the issuance of the Grant to the 5th Respondent, it had by a Resolution requested the 2nd Respondent to nullify the allocation.

40. As it were, the impugned title was allocated to one Omar Naji Said who passed away on 10th December 2003, some six (6) years before this suit would be filed. The Administrators of his estate, sued herein as the 5th Respondent do not deny that he was allocated the said Plot No. 10493 Malindi. They however assert that the deceased did not leave behind any information on how the Grant was issued in his favour and contend that it is unfair for the Petitioner to expect answers on how the Grant came to be issued from them.

41. The 5th Respondent administrators concede that they sold the suitland to the 6th Respondent. They aver that in doing so, they were only doing their work of distributing and sharing the deceased's estate among his ten children and beneficiaries and that there was indeed no caveat or any other restriction registered against the title that could have prevented them from disposing of the same.

42. It is the 5th Respondent's case that the Petitioner's claim is in any case time-barred as the contested title was first registered in the late Omar Naji's name on 9th May 1997 more than 12 years before this Petition was filed. They accuse the Petitioner of being guilty of serious and culpable indolence which resulted in the entrenchment of other rights including those of the 6th Respondent over the suit property.

43. The 6th Respondent-Fatima Mohamed Nurein agrees that she indeed purchased the suitland and was registered as the proprietor thereof on 4th August 2006. Through her father and donee of a power attorney Dr. Mohamed Elhadi Sheikh Nurein (DW2), she told the Court that when she did purchase the premises, she did so innocently, openly and without notice of any defects in the 5th Respondent's title.

44. The 6th Respondent asserts that she was a bona fide purchaser for value without notice as the Petitioner had neither indicated any defect on the title neither by way of a caveat or other restriction registered thereon. She equally accused the Petitioner of being guilty of serious and culpable indolence in bringing the present action and asserts that due to the delay on the Petitioner's part her rights over the suit property have since been entrenched and the Petitioner should seek recourse elsewhere for the alleged violations of its rights.

45. It is the Petitioner's case that the creation of the sub-division, the title thereof and the grant of the 99 year lease is illegal, unlawful,

unconstitutional, null and void *ab initio*. The Petitioner told this Court that by creating and allocating the suitland in the manner they did, the Respondents have violated its right to the protection of the law and the guarantee that it shall not be deprived of the same without compensation as was provided under Sections 70(a) and 70(c) and 75 of the repealed Constitution.

46. The Petitioner further contends that Section 84(1) of the retired Constitution by implication provided this Court with jurisdiction to enforce fundamental rights and freedoms of an individual and that accordingly it is entitled to redress for the said violations.

47. The 5th and 6th Respondents submitted first and foremost that this Petition did not meet the precise test of a Constitutional Petition and that at any rate it was filed after an inordinate delay of more than ten years after the suit property was allocated and registered in the name of Omar Naji in 1997.

48. The 6th Respondent in particular argued that the Petition did not seek to nullify the acquisition of the suitland by the Government but only seeks nullification of the Grant issued to the 5th Respondent who subsequently transferred the same to the 6th Respondent. It was therefore the Respondent's argument that even if this Court were to allow the Petition, the effect thereof would only be to revert the suitland to the Government and not the Petitioner.

49. For starters, I did not find much support for the contention that the Petition as filed is imprecise and/or that the same does not seek the nullification of the acquisition of the land by the Government. It was clear to me from a reading of Prayer 'a' of the Petition that the Petitioner is seeking to have the creation of leasehold interest by the 1st, 2nd and 3rd Respondents nullified and for a declaration that the suit plot No. 10493 remains part and parcel of the Petitioner's land as comprised in the original Portion No. 1935 Malindi.

50. On the question of delay, a close look at past jurisprudence reveals that Courts are reluctant to shut out a litigant on account of limitation of time in cases of violation of fundamental rights unless there are obvious reasons to do so. In considering such delays, others before me have taken judicial notice of the immense difficulties which prevailed during the period of the alleged violations making it nearly impossible for aggrieved persons to litigate some claims against the Government.

51. In the matter before me, it was evident from the correspondence availed herein that the Petitioner had initially protested the creation of the lease and its subsequent allocation in 1997 but did not do anything much until the year 2009 when this Petition was filed. Taking into account the prevailing circumstances at the time, I was not persuaded that the delay in bringing this Petition was unreasonable and or inordinate.

52. As it were Chapter 5 of the repealed Constitution guaranteed fundamental rights and freedoms of the individual. Chapter 4 of the Constitution of Kenya 2010 has since introduced an expanded Bill of Rights and expanded not only the democratic space but also guaranteed the right to approach the Court citing violation of fundamental rights and breach of the Constitution.

53. Article 259 of the Constitution now enjoins Courts in interpreting the Constitution to promote the purposes, values and principles of the Constitution, advance the Rule of Law and human rights and fundamental freedoms in the Bill of Rights, permit development of the law and contribute to good governance.

54. Section 75 of the retired Constitution provided on the aspect of protection from deprivation of property as follows:-

“(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:-

a) The taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of property so as to promote the public benefit ; and

b) The necessity therefor is such as to afford reasonable jurisdiction for the causing of hardship that may result to any person having an interest in or right over the property; and

c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

55. The above provisions which are analogous to the provisions of Article 40 of the Constitution of Kenya 2010 clearly provided for the manner in which private property could be lawfully appropriated. The Petitioner herein has accused the Government through the 1st, 2nd and 3rd Respondents of unlawfully expropriating its land and proceeding to allocate the same to the 5th Respondent whose estate then passed the same to the 6th Respondent.

56. As it were, none of the Respondents contested the fact that the Petitioner was the proprietor of Land Portion No. 1935 (Original No. 542/28) Malindi. The 1st, 2nd and 3rd Respondents did not deny that they sub-divided the Petitioner's property along Ganda Road and created Plot No. 10493 measuring 0.0451 Ha which the 2nd Respondent then allocated to the 5th Respondent on 9th May 1997.

57. In Paragraph 4 of the Replying Affidavit of Prof. Abdalla Naji Said, the 5th Respondent indeed acknowledges the Petitioner's title and ownership prior to the allocation thereof. The 6th Respondent on the other hand contended that she was an innocent purchaser from the 5th Defendant for value without notice of any defect on the 5th Respondent's title.

58. While that may have been so, it was clear that the 1st, 2nd and 3rd Respondents had purported to compulsorily acquire the Petitioner's property without compensation as provided in law. That property had been designed by the proprietor thereof as a road reserve. Rather than

acquire the same for a public purpose such as town planning as envisaged in both the retired and the current Constitution, this alienation was patently irregular and illegal. The 2nd Respondent allocated the same in yet unclear circumstances to the 5th Respondent.

59. Indeed it was evident that the 2nd Respondent proceeded so even against the advise of the Malindi Municipal Council (the 4th Respondent) whose responsibility it was to ensure the proper planning of Malindi town within which the suitland is situated. Despite the Council's letter dated 11th November 1999 cautioning against the irregularity, the 2nd Respondent on 2nd August 2006 made an entry on the Title acknowledging the 5th Respondent as the registered owner thereof. Interestingly, barely some two (2) days later another entry was made on 4th August 2006 acknowledging the transfer of the property to the 6th Respondent.

60. In the circumstances herein, I am persuaded that the Petitioner demonstrated to the required standard that it was unlawfully deprived of its land. It was however clear to me that the 4th Respondent Council had no role in the creation and allocation of the subject land. I did not also find a basis for an award of damages.

61. Accordingly I hereby make the following orders:-

i. Judgment is hereby entered against the 1st, 2nd, 3rd, 5th and 6th Respondents as prayed in the Petition save for Prayer 'd' on General Damages.

ii. The Petition is struck out as against the 4th Respondent with no order as to costs.

iii. The 1st, 2nd, 3rd, 5th and 6th Respondents shall bear the costs of the Petition.

iv. Orders accordingly.

Dated, signed and delivered at Malindi this 27th day of May, 2020.

J.O. OLOLA

JUDGE