



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

PETITION NO. 114 OF 2015

IN THE MATTER OF: ARTICLE 27, 40 & 47 OF THE CONSTITUTION OF KENYA AND

(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMES OF THE INDIVIDUAL) HIGH COURT PRACTISE AND PROCEDURE RULES 2006.

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLE 27, 40 & 47 OF THE CONSTITUTION REGARDING THE RIGHT TO PROPERTY, RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION AND RIGHT TO FAIR AND ADMINISTRATIVE ACTION ALL RELATING TO MWEMBELEGEZA SETTLEMENT SCHEME PLOT NOS. 1048, 1050, 1051, 1057, 984, 986, 987, 989, 1247, 1248, 1249, 1250, 1286, 1290, 1287, 1289, 1288, 977

BETWEEN

- 1. CHARLES RAMA AMOS**
- 2. AMINA CHARI MUGANGA**
- 3. SAUMU ADAM RAMADHANI**
- 4. HADIJA ATHMAN BEMBUCHE**
- 5. MWANAJUMA SWALEH KOMBO**
- 6. KATEMBO BAKARI**
- 7. MWANARUSI BAKARI**
- 8. JUMANNE BAKARI KOMBO**
- 9. SIDI CHARO KOMBE**
- 10. LAZIMA CHARO KOMBE**
- 11. NYADZUWA MWAPONDA KIBARAWA**
- 12. SAFARI CHARO KOMBE**
- 13. BAHATI SWALEH MWATENDO**
- 14. MUSA SHANGA MWAIPUNGU**
- 15. JUMAA SHANGA MWAIPUNGU**
- 16. YUSUF SHANGA MWAIPUNGU**
- 17. KHAMIS SHANGA MWAIPUNGU**

18. FATUMA ATHMAN.....PETITIONERS

AND

JOSEPHINE SESE MULATYA.....1ST RESPONDENT

BENJAMIN MULATYA.....2ND RESPONDENT

MUTHOKA MULATYA.....3RD RESPONDENT

PETER MULATYA.....4TH RESPONDENT

DENISE MULATYA.....5TH RESPONDENT

MOSES MULATYA.....6TH RESPONDENT

PAUL MULATYA.....7TH RESPONDENT

DAVINDER KANA.....8TH RESPONDENT

ARVINDER PAC SINGH.....9TH RESPONDENT

DISTRICT ADJUDICATION OFFICER, MOMBASA.....10TH RESPONDENT

COMMISSIONER OF LANDS.....11TH RESPONDENT

ATTORNEY GENERAL.....12TH RESPONDENT

REGISTRAR OF TITLES COAST PROVINCE.....13TH RESPONDENT

J U D G E M E N T

1. This petition dated 2/8/2012 was brought by the 18 petitioners seeking reliefs against the 1st – 13th Respondents. The petitioners gave the description of the Respondents in paragraphs 1 – 9 of the petition. They plead that in 1997 after various request to the government, they were allocated plots within Mwembelegeza Settlement Scheme according to the sizes they were already in occupation of. That the 1st respondent who was introduced to them by Kadzo Mboga agreed to purchase the plots allocated to the Petitioners at Kshs.170,000 per plot. Consequently, they entered into a sale agreement and were paid 10% of the price while waiting for their letters of allotment. That the sale agreement was reduced into writing.

2. Subsequently in around March 1999, the Lands Adjudication Officers went to the Scheme and gave the squatters their letters of allotment but the Petitioners letters were missing. When they followed up, they were informed that they could not be given their letters because they had sold their plots to the 1st respondent. That they were shocked because they were waiting to complete the transaction. Later in 2007, Prof Kivutha Kibwana the then Minister for lands visited the Scheme to hear their complaints. Pursuant to that visit, the Minister placed a general embargo on the whole Mwembelegeza Settlement Scheme and directed the Settlement Scheme Committee to follow up the Petitioners' issues.

3. That in 2011, the embargo was lifted on some plots which plots included those fraudulently acquired by the 1st respondent. When the Petitioners visited the Adjudication office, they discovered the plots bore the names of the 1st – 9th Respondents. According to the Petitioners the names in the adjudication register should never change unless there is a successful objection proceedings against a person whose name is in the register. The Petitioners' Case is that the actions of the Respondents contravened Article 27, 40 and 47 of the Constitution.

4. The Petitioners pray that the Court do issue a declaration that the Petitioners are the owners of their plots as follows;

| S. No. | NAMES | PLOT NUMBER |
|---------------|------------------------|-------------------------------------|
| 1. | Charles Rama Amos | Mwembelegeza/Settlement Scheme/1048 |
| 2. | Amina Chari Muganga | Mwembelegeza/Settlement Scheme/1050 |
| 3. | Saumu Adam Ramadhani | Mwembelegeza/Settlement Scheme/1057 |
| 4. | Hadija Athman Bembuche | Mwembelegeza/Settlement Scheme/1051 |

| | | |
|-----|----------------------------|-------------------------------------|
| 5. | Mwanajuma Swaleh Kombo | Mwembelegeza/Settlement Scheme/984 |
| 6. | Katembo Bakari | Mwembelegeza/Settlement Scheme/986 |
| 7. | Mwanarusi Bakari | Mwembelegeza/Settlement Scheme/987 |
| 8. | Jumanne Bakari Kombo | Mwembelegeza/Settlement Scheme/989 |
| 9. | Sidi Charo Kombe | Mwembelegeza/Settlement Scheme/1247 |
| 10. | Lazima Charo Kombe | Mwembelegeza/Settlement Scheme/1248 |
| 11. | Nyadzuwa Mwaponda Kibarawa | Mwembelegeza/Settlement Scheme/1249 |
| 12. | Safari Charo Kombe | Mwembelegeza/Settlement Scheme/1250 |
| 13. | Bahati swaleh Mwatendo | Mwembelegeza/Settlement Scheme/1286 |
| 14. | Musa Shanga Mwaipungu | Mwembelegeza/Settlement Scheme/1290 |
| 15. | Jumaa Shanga Mwaipungu | Mwembelegeza/Settlement Scheme/1287 |
| 16. | Yusuf Shanga Mwaipungu | Mwembelegeza/Settlement Scheme/1289 |
| 17. | Khamis Shanga Mwaipungu | Mwembelegeza/Settlement Scheme/1288 |
| 18. | Fatuma Athman | Mwembelegeza/Settlement Scheme/977 |

5. The petition prays for judgement that;

a) That the court makes a declaration that the plots of land as set out in paragraph 28 of the petition or paragraph 4 hereinabove that had been allotted to the 1st to 9th Respondents and their kin belongs to the Petitioners.

b) An order that any allotment and/or registration of the Petitioners plots that was done in the names of the 1st to 9th Respondents and their kin as follows;

- 1. Josephine Sese Mulatya plot Numbers Mwembeleges/ Settlement Scheme 1290, 1289, 1288, 1286, 1987, 986, 984**
- 2. Benjamin Mulatya plot number Mwembelegeza/ Settlement Scheme 1248, 977, 1051**
- 3. Muthoka Mulatya plot number Mwembelegeza/ Settlement Scheme 1249**
- 4. Peter Mulatya plot number Mwembelegeza/ Settlement Scheme 989**
- 5. Denise Mulatya plot number Mwembelegeza/ Settlement Scheme 1247**
- 6. Moses Mulatya plot number Mwembelegeza/ Settlement Scheme 287**
- 7. Paul Mulatya plot number Mwembelegeza/ Settlement Scheme 1250**
- 8. Aridner Pac Pincsh and Davinder Kana plot number Mwembelegeza/ Settlement Scheme 1050**
- 9. Be expunged from the records and be replaced by the Petitioners' names.**

c) A declaration that Mwembelegeza/ Settlement Scheme plots that were registered in the 1st to 9th Respondents and their kins names belong to the Petitioners.

6. Upon being served by way of substituted service, the Respondents filed their respective responses in opposition to the reliefs sought in the petition. The 1st, 3rd – 7th Respondents filed their appearance on 24/8/2012. The 8th & 9th Respondents also filed a replying affidavit sworn by Arvinder Pal Singh on 26/5/2015. He deposed that they jointly own plot No. Mwembelegeza/1049 and 1050 with the 8th respondent and he annexed copies of transfers and titles to support. He further deposed that he had no notice of claim by the Petitioners as they are innocent purchases for value. Mr. Pal stated that having been allocated and subsequently selling their interest in the land, he could not see how the

Petitioners can claim that their constitutional rights have been violated. That the 8th & 9th Respondents are also protected by the Constitution.

7. Hearing of the Petition commenced on 7th March 2016 with the evidence of Charles Rama Amos owner of plot as 1028 as **PW1**. **PW1** adopted the facts stated in his affidavits sworn on 2/8/2012 and 25/12/2013. He narrated that the lands office took their names in 1997. Later the 1st respondent visited the place and expressed interest to purchase their plots. That the 1st respondent offered to pay a deposit of Kshs.8,500 since the Petitioners did not have details of their plots. **PW1** continued that they were again paid Kshs.8,500/= leaving a balance of Kshs.153,000 which was to be paid after they got their titles.

8. **PW1** continued that they signed an agreement but they have never signed a transfer. That when the letters of allotment were out, they were given none being told they had sold their plots. According to **PW1**, the 1st respondent changed their agreement. **PW1** states that he has sued the 10 – 13th Respondents because they changed their names before they were paid the balance. **PW1** said he wrote the letter dated 12/9/2007 to the minister. He also produced the searches for the suit plots (at pages 5 – 42 of their documents). **PW1** concluded that they are ready to refund the deposit they received as the 1st Respondent did not meet part of her bargain.

9. In cross-examination, **PW1** said he does not live on the suit plot. **PW1** denied that all of them received Kshs.17,000. He did not produce the agreement signed between him and the 1st respondent. **PW1** denied the signature on the document marked as “**IRMF1 1**” but admitted the ID No. 4597253/67 indicated on the said document is his. According to **PW1**, he signed an agreement at the advocates office for Kshs.17,000 which was 10%. That he received Kshs.8,500 with the advocate retaining Kshs.500 as transfer fee. That Kadzo got her plot back. That they were told they could not get their titles because they had sold their plots. His complaint was that the balance was never paid. **PW1** knew the 8th and 9th Respondents bought their land from the Mulatya’s. That those who did not sell their plots got their titles.

10. AMINA CHARI MUIGANGA testified as **PW2**. She said she was assigned plot No. 1050 but letters of allotment were not issued then. **PW2** said the 1st respondent came and said she wanted to purchase their plots. She was given a deposit of Kshs.17,000 leaving a balance of Kshs.153,000. That the balance was to be paid when they signed the transfers which balance she has never been paid.

11. **PW2** further stated that the land is now in the name of the 1st respondent. That they lodged a complaint vide the letter of **PW1**. **PW2** said she is the one who signed the document annexed to the 1st respondent’s Replying Affidavit. The complaint was that she had never signed a transfer yet the suit plot is registered in the names of the 8th and 9th Respondents.

12. In cross-examination, **PW2** said she had not produced any document to show she was allotted this plot. She agreed the thumb print sign on the document was done before an advocate and it is her way of signing. She confirmed selling the plot for Kshs.17,000 which amount was paid to her. She had no document to show that the purchase price was Kshs.170,000. **PW2** is also not living on the suit plot.

13. In further cross-examination by counsel for 8th and 9th respondents, **PW2** said that when she sold the land, she had not received any document of ownership. She could not remember the year she sold the plot to the 1st respondent. **PW2** said she cannot now accept payment of Kshs.153,000 because the value of the land has shot up. She could not tell when she discovered the land was registered to the 1st respondent. That she did nothing to stop the 1st respondent from selling the land to the 8th and 9th Respondents. In re-examination, **PW2** said each person was given a number which was recorded in the village committee book. That when she signed the agreement, she knew she received a deposit leaving a balance of Kshs.153,000.

14. MESHAK MWAKI MOSO testified as **PW3**. He adopted the facts contained in his affidavit dated 2/8/2012. **PW3** stated that they were given plots measuring 50 by 100ft because they were living on government land. **PW3** was selected as the Committee Secretary to work with officers from the lands office. That they worked with the surveyors/adjudication officers and had the land measured and put into plots of 50 x 100. **PW3** stated that the names of the people living on the plots were recorded as shown in annexure **MMM3** in his affidavit.

15. **PW3** continued that the names were forwarded to Ministry of Lands, Nairobi to await issuance of allotment letters. The letters were ready in March of 1999 and a meeting was called to inform the squatters/Petitioners. When the names were called, the Petitioners’ names were missing and the reason given that they had sold their plots. They lodged a complaint with lands office, Mombasa when they discovered their plots were registered in the 1st – 9th Respondents names. **PW3** avers that there was forgery during the process of transfer from the original allottees to the present owners.

16. **PW3** was not a petitioner. That the register he produced is undated and it does not say who had sold their plots. **PW3** said he is not the one who prepared the document marked as **MMM2**. That before the embargo, transfers were possible to be done. **PW3** was also not party to the sale agreement between the petitioner and the 1st respondent. According to him, the forgery occurred when names were sent to Nairobi. **PW3** did not know if the Petitioners had sold their plots as the Petitioners told him they were in the process of selling after they were short-changed.

17. Mwana Harusi Bakari who is the 7th Petitioner testified as **PW4**. He is a small scale businessman. He adopted his statement dated 3/11/2016 as his evidence in chief. He confirmed the activities of 1997 as regards the plot allocation. **PW4** said he was given plot No. 987. That in 1998, the 1st respondent had said she wanted to purchase the plot. That they agreed on a purchase price of Kshs.170,000 and the 1st respondent paid a deposit of 10%.

18. **PW4** continued that he never received the balance of Kshs.153,000 neither did he sign the transfer form when they received information in 1999 that the allotment letters were ready. They went to the lands office but did not receive their letters on account of having sold. **PW4** urged that the name of the 1st respondent be removed and he be registered instead as owner of plot 987. He also prayed for costs of the suit.

19. In cross-examination, **PW4** confirmed entering into a contract to sell with the 1st respondent. He did not have anything to show that the 1st respondent conned them. That had the balance been paid, he would not have filed this Case. In further cross-examination, **PW4** said the agreement to sell was made in 1998 and this suit was filed in the year 2012. That he learnt of the 1st respondent's name being in the allotment in the year 1998. That the balance was to be paid after issuance of the allotment letter. That the agreement was signed by the 8th petitioner.

20. **FATUMA ATHMAN** who is the 18th petitioner testified as **PW5**. His evidence was similar to that of **PW1 – PW4**. His plot was No. 977 which is registered in the name of the 2nd respondent. Similarly, **PW6** **Lazima Charo Kombe** gave similar evidence as his co-petitioners except he said he had never sold his plot. His Case is that he wants his plot back. This marked the close of the Petitioners' Case.

21. The 2nd and 3rd Respondents died during the pendency of this suit and the Petitioners opted to withdraw the suit against them. By consent of counsels on record for the parties, the 1st respondent was allowed to adopt her replying affidavit as her evidence without being called for cross-examination. With that, the 1st respondent closed her case and that of the Case of the 1st, 4th – 7th Respondents. The 8th and 9th Respondents also adopted the replying affidavit sworn by **Arvinder Pac** as their evidence and they closed their Case.

22. Parties filed detailed submissions which I have read and considered. From the pleadings and the evidence rendered, the issues I raise for determination are as follows;

(a) *Whether this petition raises any constitutional violations or it is an ordinary suit/claim.*

(b) *Whether or not there is fraud/forgery proved against the Respondents.*

(c) *Whether or not the Petitioners suit is time barred.*

(d) *What orders ought to be granted in this Case?*

23. The Petitioners pleaded that their rights under Article 27, 40 and 47 of the Constitution were violated. The said Articles provides thus;

“27 (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

40 (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –

(a) of any description and

(b) in any part of Kenya

47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

24. The burden of proof rested on the petitioners to discharge that the rights stated had been violated. On the right to equality and freedom from discrimination under article 27 and the right to fair administrative action under article 47, the Petitioners did not lead evidence of such violations. The evidence adduced by the Petitioners does show that they were allocated plots in Mwembelegeza Settlement Scheme just like the other squatters. They opted to sell their plots and when they raised a complaint with the minister, an embargo was put on the Scheme. The Petitioners did not tell this Court what they did before the embargo was lifted to protect their rights. Secondly, they did not lead any evidence which office failed to give them a hearing.

25. In their submissions, the Petitioners stated that the 10th, 11th and 13th Respondents action to issue title deeds to the 1 – 7th Respondents yet it was the Petitioners names that were at all material times appearing in the adjudication register amounts to an act of discriminating the Petitioners for the benefit of the 1st – 7th Respondents. That it is a violation of the Petitioners' fundamental freedom from discrimination as enshrined in article 27 of the Constitution of Kenya. In my view, the acts of the 10th, 11th and 13th Respondents would only amount to discrimination if the Petitioners had not been allocated plots. From the pleadings and evidence adduced, the actions complained of would constitute illegalities if and when proved that the Petitioners did not sell their plots to the 1st respondent. The same scenario applies to the violation complained of under Article 40. Consequently, my answer to the first issue is that the claim herein was an ordinary suit couched as constitutional petition.

26. The second question is whether there is fraud proved against the Respondents. **PW1, PW2 PW4 and PW5** all admitted to entering into a sale transaction with the 1st respondent over their respective plots. They all confirm receiving a sum of Kshs.17000 which they stated constituted 10% deposit. The fraud alleged is that the transfer was effected to the 1st – 7th Respondents before they were paid their balances outstanding at Kshs.153000 each.

27. It is trite law that allegations of fraud must be specifically pleaded and proved. The standard of proof of fraud is also set higher than that in Civil Cases. This was stated in the Case of *Vijaj Morjaria Vs Nansingh Madhusingh Darbar & Ano (2000) eKLR* thus;

***“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.*”**

In this case, fraud cannot be imputed on the part of the Respondent by mere fact that the record in relation to the subject property was missing at the Lands Registry. To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding. In the present appeal, there is no such evidence, and the courts below rightly came to the conclusion that the appellant had not made out a case for the grant of the orders he sought.”

28. In this instance, the Petitioners ought to have demonstrated and or proved that indeed the purchase price was Kshs.170000 and not Kshs.17000 as pleaded by the 1st respondent. None of them had a copy of an agreement setting the purchase price at the said Kshs.170000. PW2 confirmed during cross examination that she sold her plot for Kshs.17000 which she was paid in full. She also admitted the signatures appearing on the documents annexed to the 1st Respondents’ affidavit. PW1, PW4, PW5 all admitted signing an agreement to their respective plots to the 1st Respondent before an advocate.

29. PW3 who was not a petitioner but was called as a witness told the Court that he was not aware the Petitioners had sold their plots. He was only informed after the Petitioners said the 1st respondent had short changed them. PW3 also admitted that the transfers could be effected on the register before the embargo. A few of such transfers were pointed out to him. For instance, in the document called ‘MMM2,’ there were entries showing transfers effected to 3rd parties. There was no evidence of the mode of transfers adopted before the issuance of the allotments. Therefore, it is unclear whether there was a requirement for a transfer form to be executed in favour of the 1st respondent.

30. The Petitioners generally stated that the whole process was forged. Yet PW3 said the village committee is the one who entered names in the Register and that the adjudication office also had a clerk. It is the Committee who forwarded the names to Nairobi. This line of evidence does not prove any actions of fraud on the part of the 1st – 7th Respondents. Secondly the particulars of what was alleged to have been altered was also not stated. Therefore, making it difficult for this court to pick the fraud if any against the 10th – 13th Respondents.

31. The Petitioners cited several Case law in their submissions for this Court to find in their favour because the 10th – 13th Respondents failed to provide any evidence that there was objection proceedings taken out by the 1st – 7th Respondents against them. That a party failing to lead evidence of a fact in issue means the Petitioners Case was unchallenged. First, the claim against the 2nd and 3rd Respondents was voluntarily withdrawn thus leaving titles of the 1st, 4th – 9th Respondents as the only ones being challenged. Secondly, the issue of objection proceedings was not pleaded and did not arise for determination. The question before the Court was whether or not the Petitioners were paid the entire purchase price agreed between them and the 1st respondent. They had to prove this as against the 1st respondent. The 1st respondent adopted her replying affidavit as her evidence with consent of the Petitioners. For this reason, I find the cases of *Linus Ng’ang’a Kongo & 3 Others Vs Town Council of Kikuyu (2012) eKLR*, *Motex Knitwear Limited Vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Lesiit J citing the case of Autar Singh Bahra and Another Vs Raju Govindi, HCCC No. 548 of 1998*, *Trust Bank Limited Vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 OF 2001*, *Timsales Limited Vs Harun Thuo Ndungu (2010) Eklr which cited Nguku Vs Republic (1985) KLR 412 and William Cheruiyot Kandie Vs Republic (1997) eKLR* are unsupportive of the Petitioners claim.

32. The third question is whether or not the Petitioners claim is time barred. Under the Limitation of actions Act, a claim under contract cannot be brought after the expiry of 6 years while claim founded on tort (fraud) cannot be brought after three (3) years from the date when the right accrued. Under Section 7, a claim to recover land cannot be brought after the expiry of 12 years.

33. The Petitioners’ evidence was that they discovered their names were missing when the other squatters were given the letters of allotment in March, 1999. They stated that none of them are living on their respective suit plots. The impugned agreement was entered into between 1997 – 1998. According to the Petitioners, the balance of Kshs.153000 was due and payable on issuance of the letters of allotment. Consequently, time started running as against the 1st respondent in March 1999. The Petitioners did not take any steps to demand their balance from the time when they discovered their letters of allotment were missing until in 2007 when they wrote to Prof. Kivutha Kibwana, the then Minister for Lands. This was after the expiry of 6 years.

34. Further, even after writing of the letter dated 12/9/2007, the petitioners did not file a suit for recovery of their land. The Petitioners instead sat back until August 2012 to bring this claim by which time the 12 years had expired and they did not apply for extension of time before bringing this petition. To worsen their case, they are alleging fraud which is a tort. For claims under tort, it must be commenced before the expiry of 3 years when the right accrued. In this case, the right accrued in March 1999 when they discovered their letters were missing thus time to bring a complaint under the tort of fraud ended in March 2002. The Petitioners must have commenced this suit as a petition to try and escape the limitation of time bar which is glaring.

35. Since I have found that there were no constitutional violations demonstrated as this was an ordinary claim of breach of terms of a contract of sale, it is my finding from the analysis given in *paragraphs 32 – 34* above that the claim herein is time barred. The issue of limitation was put forth to PW2 during cross-examination by Miss Luta State Counsel appearing for the 10th – 13th Respondents. Therefore, the court cannot ignore it.

36. What orders ought to issue? Taking the issues raised by the parties and analysed by the Court, I come to the conclusion that the Petitioners have not proved their case against any of the Respondents. Accordingly, the petition is dismissed for want of merit with costs to

the 1st, 4th – 9th Respondents.

Dated, signed and delivered at BUSIA this 12th day of May, 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically through mail this 12th Day of May, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE