



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 20 OF 2017

IN THE MATTER OF: ARTICLES 22, 23(3) & 258 OF THE CONSTITUTION OF KENYA (2010)

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES
2(5) & (6), 10, 22, 40(3), 42, 47, 62 & 70 OF THE CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF: THE IMPLEMENTATION OF THE AFRICAN (BANJUL)
CHARTER ON HUMAN AND PEOPLE'S RIGHTS ARTICLES 2, 3, 7, 13, 14 & 24**

AND

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION
ACT (NO. 4 OF 2015), SECTIONS 4, 5, 6 & III THEREOF;**

AND

IN THE MATTER OF: THE CIVIL PROCEDURE RULES (2010), ORDER 53

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT, NO. 5 OF 2012

BETWEEN

HAMID ABDALLA MBARAK.....PETITIONER

AND

THE REGISTRAR OF TITLES.....1ST RESPONDENT

RENE SCHILLER.....2ND RESPONDENT

COUNTY GOVERNMENT OF KILIFI.....3RD RESPONDENT

THE NATIONAL LAND COMMISSION.....4TH RESPONDENT

WILL W. M. OMIDO.....1ST INTERESTED PARTY

JUDGMENT

1. By this Petition dated and filed herein on 9th October 2017, Hamid Abdalla Mbarak (the Petitioner), prays for orders listed as follows:-

i) That the property known as Kilifi Township Block IV/149, all its sub-divisions including Kilifi Township Block IV/177/PDP made by the Physical Planner vide Plan No. NRB/134/2005/1 is public property;

ii) A declaration that the registration of (the) property known as Kilifi Township Block IV/177 in favour of the 2nd Respondent is null and void and that the said 2nd Respondent has no right to or interest whether proprietary or beneficial in the said property;

iii) A declaration that the alienation of the property known as Kilifi Township Block IV/177 by the 1st Respondent to the 3rd Respondent(for) private use was a violation of the Petitioner's rights of equal access to public property as recognized by the Physical Planner under PDP No. 134/2005/01;

iv) A declaration that the sub-division or excision of the property known as Kilifi Township Block IV/149 into sub plots for purposes of allocation to third parties is illegal null and void;

v) An order permanently restraining the 2nd Respondent from occupying, utilizing, constructing, entering, pouring construction materials or in any other manner interfering with all that property known as Kilifi Township Block IV/177;

vi) An order of judicial review in the nature of certiorari to bring into this Court for purposes of quashing the decision of the 1st Respondent in alienating property known as Kilifi/Township Block IV/149 and Kilifi Township Block IV/177 to third parties or the 2nd Respondents;

vii) An order of judicial review in the form of mandamus compelling the 1st Respondent to cancel the grant known as Kilifi Township Block IV/177 in favour of the 2nd Respondent;

viii) An order compelling the 2nd Respondent to remove from the suit property known as Kilifi/Township Block IV/177 all construction material, backfill the dug trenches and rehabilitate the property to (its) state prior to his illegal occupation;

ix) Costs of the Petition; and

x) Any other such conservatory or preservation orders that may be necessary and fit to grant as to serve the interests of the residents of Kilifi County and its environs over all that property known as Kilifi Township Block IV/177 and the original Kilifi Township Block IV/149

2. These prayers by the Petitioner arise from his contention that the property known as Kilifi Township Block IV/149 was a public property initially measuring 5½ acres before it was irregularly sub-divided and smaller sub-plots, including Kilifi Township Block IV/177 were carved out and illegally sold to third parties. Prior to that the Petitioner avers that the land was a public utility property used for public creation by the residents of Kilifi County and its environs.

3. The Petitioner avers that sometimes in the year 2008, through an illegal and irregular scheme, the 1st Respondent purported to issue a grant and did register the same in favour of the 2nd Respondent. It is the Petitioner's case that having so obtained the property, the 2nd Respondent in September 2017 moved therein, started excavating the boundaries thereof and poured construction materials in readiness to start a construction on the land.

4. The Petitioner further avers that his attempts and those of other residents to stop the construction have failed and the 2nd Respondent has now fenced off the land and there is construction going on therein under heavy private security. As a result, the Petitioner and other residents of Kilifi County are hence apprehensive that they stand to lose the only recreational facility they had and hence the institution of this Petition and the orders sought herein.

5. The initial Petition was instituted against four (4) Respondents listed therein by the Petitioner respectively as the Registrar of Titles, Rene Schiller, the County Government of Kilifi and the National Land Commission. Subsequently however and by a Notice of Motion application dated 27th July 2008 and filed herein on 30th July 2018 one Will W. M. Omido and Janet A. Omido sought to be enjoined in the Petition as the 5th and 6th Interested Parties.

6. In a Supporting Affidavit sworn on behalf of the two who are husband and wife by the said Will W.M Omido, the Interested Parties aver that they are the registered owners of the suit premises having purchased the same from the 2nd Respondent on 1st December 2016. The Parties further asserted that they have expended numerous resources and materials to have a perimeter wall erected on the premises and that the 3rd Respondent County Government had already approved the construction of a perimeter wall on the property.

7. The Interested Parties further accused the Petitioner of failing to disclose to the Court that in ***Malindi HCCC No 11 of 2011***, the Court had determined and declared that the suit premises belonged to the 2nd Respondent.

8. Having considered the said application to be enjoined and there being no objection thereto, the Motion dated 27th July 2018 was on 1st October 2018 allowed. While the Honourable Attorney General filed a Memorandum of Appearance for the Registrar of Titles (the 1st Respondent), no response was made to the Petition. The 2nd, 3rd and 4th Respondents neither entered appearance nor filed a response to the Petition.
9. The Petition accordingly proceeded as between the Petitioner and the 5th and 6th Interested Parties. By a consent of these parties on 11th March 2019, directions were given that the Petition would proceed by way of affidavit evidence and written submissions as filed by the Parties.
10. I have considered the Petition and the response thereto by the 5th and 6th Interested Parties. I have equally studied the Written Submissions and authorities placed before me by the Learned Advocates for the parties.
11. The Petitioner Hamid Abdalla Mbarak is a resident of Kilifi County and according to him, he brings this Petition on his own behalf and on behalf of the affected residents of the County. In his Petition filed herein on 9th October 2017, he sued the Registrar of Titles Kilifi (the 1st Respondent), one Rene Schiller (the 2nd Respondent), the County Government of Kilifi (the 3rd Respondent) and the National Land Commission (as the 4th Respondent).
12. The Petitioner avers that he has lived and worked in Kilifi Township as a businessman for the last forty (40) years. He told the Court that during most of this time, the parcel of land known as Kilifi Township Block IV/149 was a public utility beach plot that was used by the area residents for recreational purposes.
13. The Petitioner told the Court that sometime in the year 2008, the property which was initially measuring about 5 ½ acres was irregularly sub-divided and small sub-plots curved out and illegally sold to various individuals. Among the plots curved out according to the Petitioner was one re-named parcel No. Kilifi Township Block IV/177 which was issued and registered in the name of Rene Schiller, the 2nd Respondent herein.
14. The Petitioner contends that the grant was issued and registered in the name of the 2nd Respondent through an illegal and irregular scheme. The Petitioner further told the Court that despite the illegal and unlawful alienation, the 2nd Respondent moved into the property in September 2017 and started putting up a boundary wall and other developments under heavy private security.
15. As a result, the Petitioner as a resident of the County is now apprehensive that he and other residents stand to lose the only recreational facility they have been using and he urges this Court to protect his Constitutional rights over the property and to make the 1st, 3rd and 4th Respondents give answers in regard to the 2nd Respondent's acquisition of the property.
16. As it turned out, none of the four named Respondents filed any response to the Petition. The 5th and 6th Interested Parties however got wind of the Petition and by their application dated 27th July 2018, they sought to be enjoined as parties herein on account that they were the registered proprietors of the property now known as Kilifi Township Block IV/177. The said application was allowed on 1st October 2018.
17. In their Replying Affidavit to the Petition filed herein on 31st January 2019, the 5th and 6th Interested Parties who are a husband and wife respectively aver that they purchased the suit premises from the 2nd Respondent by a Sale Agreement dated 1st December 2016 at a consideration of Kshs 30,000,000/-. It is their case that prior to the said agreement they had exercised due diligence by conducting an official search at the Kilifi Land Registry which search did not reveal any encumbrances on the title.
18. The Interested Parties further assert that in the course of the purchase, they were made aware by the 2nd Respondent of a Court case involving the suit premises being *Malindi ELC Case No. 11 of 2011; Rene Schiller –vs- Charles Wabuko & 2 Others*. The Interested Parties further told the Court that they were made aware of the Judgment in the said case which declared that the 2nd Respondent was the bona fide registered proprietor of the suit property.
19. The Interested Parties also assert that they perused a copy of the Report of the Commission of Inquiry into the illegal/irregular allocation of public land (commonly known as Ndungu Land Report) and there was no mention of the suit premises. Upon satisfying themselves, they proceeded to have the property transferred to their name. It is their case that they purchased the property for value without notice and that they were not aware of any encumbrances placed on the property.
20. In support of his position that the suitland was public property meant for recreation by members of the public, the Petitioner relies on *Gazette Notice No. Vol. CVIII-No. 53* dated 29th July 2005 as well as a decision made by the Honourable Lady Justice H.A. Omondi in *Malindi HCCC N. 30 of 2006; Professor Samson Kegengo Ongeru –vs- Green Bay Holdings Ltd & 2 Others* as consolidated with *Malindi HCCC No. 54 of 2005; Green Bay Holdings Ltd –vs- the Town Council of Kilifi*.
21. Responding to the Petitioner in regard to those issues however, the Interested Parties asserted that this Court had no jurisdiction to entertain the matter as the same was res judicata in light of the determination of the Court in *ELC No. 11 of 2011; Rene Schiller –vs- Charles Wabuko & 2 Others*. In the said suit, the 2nd Respondent in this Petition was declared the rightful owner of Kilifi Township Block IV/177 and it was the position of the Interested Parties that this Court cannot sit on appeal of a decision made by a Court of concurrent jurisdiction.
22. The Interested Parties further asserted that they had done due diligence and there was no encumbrances to the title prior to the transfer into their name. They accused the Petitioner of engaging in a witch hunt against the 2nd Respondent as the Part Development Plan (PDP) for

the area shows that there were many parcels of land and the Petitioner had not brought any suit against the other owners of the adjacent parcels.

23. As it were, the doctrine of res judicata is set out at Section 7 of the Civil Procedure Act as follows:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they, or any of them can claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

24. A clear reading of the above provisions reveals that in order for a matter to be regarded as res judicata, there must be (a) an earlier decision over the dispute or matter in issue, (b) there must be a final determination on the merits; and (c) the parties involved must be the same.

25. Arising from the foregoing, it is only in order that a party asserting that a matter is res judicata should present for scrutiny before the Court both the pleadings and the decision in the previous suit. Accompanying the assertion that the High Court declared the 2nd Respondent as the bona fide registered owner of the suit premises, the Interested Parties have annexed an extract of the decree issued on 20th December 2013. Neither the pleadings nor the Judgment leading to the decree have been annexed.

26. Luckily, the Judgment leading to the decree was attached to an affidavit sworn by the Petitioner in support of his application for conservatory orders dated 9th October 2017.

27. From a perusal of the Judgment the 2nd Respondent herein instituted the said suit on 28th February 2011 against one Charles Wabuko, the Commissioner of Lands and the Attorney General claiming the following:-

a) A declaration that the Plaintiff herein is the bona fide registered proprietor of the Leasehold interest in the property known as Kilifi Township Block IV/177 as stated in paragraph 14 (of the Plaintiff);

b) In the alternative special damages of the sum of Kshs 7,234,475/- as stated in paragraph 15 hereinabove, and;

c) General damages for breach of contract and breach of the general guarantee as to entries at the Kilifi District Land Registry as to the correct registered proprietary details with respect to the property known as Kilifi Township Block IV/177 as at 29th October 2008;

d) Costs of and incidental to this suit;

e) Interest on the above (b) at the rate of 18% per annum from 10/10/2008 until payment in full; and

f) Any other or further relief this Honourable Court may deem just and fit to grant.

28. A further reading of that Judgment reveals that the 1st Defendant in those proceedings the said Charles Wabuko is the one who sold and transferred the suit property for a consideration of Kshs 7,000,000/-. It is further clear that the 2nd Respondent filed the said suit because when he applied for an official search after the sale, the Lands Office declined to issue him with a Search because as they told him the suit property was under investigations.

29. As it turned out the 1st Defendant did not contest the suit even as he pleaded that he was unaware of the allegations raised in the suit and reiterated that his documents of title had not been revoked. The 2nd and 3rd Defendants on the other hand generally denied the averments by the 2nd Respondent and did not call any witnesses at the trial.

30. In a brief analysis of the facts before him, the Learned Judge stated as follows at paragraphs 11 to 14 of his Judgment:-

“11. This is a unique case in the sense that there is no issue before me for determination. The Plaintiff is in possession of a Certificate of Lease in respect to land known as Kilifi Township Block IV/177 which he purchased from the 1st Defendant.

12. The 1st Defendant is not claiming the land. Indeed, the 1st Defendant's case is that he transferred the suit property to the Plaintiff and he does not have a claim over it.

13. The 2nd and 3rd Defendants averred in their Joint Defence that they are strangers to the issues raised in the Plaintiff.

14. In view of what has been placed before me, and in the absence of any evidence of any wrongdoing by the Plaintiff and the Defendants, I shall allow the Plaintiff in the following terms:-

a) A declaration be and is hereby issued that the Plaintiff is the bona fide registered proprietor of the leasehold interest in the property known as Kilifi Township Block IV/177.

b) Each Party shall bear their own costs.”

31. From that decision of my Leaned Brother, it was evident that the parties did not raise any issues in dispute. No evidence was indeed tendered by any of the parties despite the Plaintiff's own averment that the property was under investigation.

32. As it turned out, there were indeed investigations on-going at the time and by a letter dated 2nd March 2013, some nine months before the Judgment the Chief Land Registrar would address himself to the District Land Registrar Kilifi as follows:

“RE: Kilifi/Township/Block IV/177

Thank you for your Letter Ref.....of 23rd July 2012 addressed to this Office.

Please note that the attached forwarding letter and lease in favour of Charles Wabuko are forgeries and did not originate from the Commissioner of Lands. The same should be expunged from your records and owners advised accordingly.

On the issue of whether or not the parcel of land was public utility, investigations are underway and you will be advised as soon as possible.”

33. From the material placed before me, this Court was unable to ascertain if the District Land Registrar advised the parties in the said **ELC Case No. 11 of 2011** about the contents of this letter. What was clear to me was that the finding had not been communicated to the Court as at the time the impugned Judgment was delivered on 20th December 2013.

34. In this respect, I am in concurrence with the submissions of Mr. Adhoch Learned Counsel for the Petitioners that the parties in the said matter were guilty of material non-disclosure and that the resulting decision was made, as they say, per incuriam. In **Jasbir Rai & Others – vs- Rai Plywoods (2013) eKLR**, the Supreme Court observed as follows:-

“For the special role of precedent in the certainty of the law as it plays out in daily transactions, any departure is to be guided by rules well recognised. It is a general rule that the Court is not bound to follow its previous decision where such decision was an obiter dictum (side-remark), or was given per incuriam (through inattention to vital, applicable instruments or authority). A statement obiter dictum is one made on an issue that did not strictly and ordinary, call for a decision and so it was not vital to the outcome set out in the final decision of the case. And a decision per incuriam is mistaken, as it is not founded on the law and governing pillars of law.”

35. As a result, I was not persuaded in any way that the jurisdiction of this Court was in any way precluded by the decision in **Malindi ELC Case No. 11 of 2011**. At any rate, it was plain to me that the parties in this matter and the rights they seek to vindicate in the present proceedings are at complete variance with those that were sought by the 2nd Respondent in the previous proceedings.

36. In the peculiar circumstances before me, the Registrar of Titles (the 1st Respondent) who could have shed more light on the legality of the title that was issued to the 2nd Respondent chose not to participate in these proceedings even after entering appearance. I did not however hear the Interested Parties contest the fact that by **Gazette Notice No. 53 Vol. CVIII** dated 29th July 2005, the suit property had clearly been marked out for use as a public beach.

37. Nor did the Interested Parties contest the Petitioner's contention that by an earlier Judgment delivered by the Honourable Justice H.A. Omondi on 10th May 2011, in **Malindi HCCC No. 30 of 2006; Professor Samson Kegengo Ongeri –vs- Green Bay Holdings Ltd & 2 Others (as consolidated with Malindi HCCC No. 54 of 2005)**, the Learned Judge had determined as a matter of fact that the registration of Titles carved out from the original parcel No. Kilifi Township Block IV/149 were null and void.

38. A perusal of the Judgment in the said matter reveals that the Plaintiff in the said case had like the Interested Parties before me purchased a Portion of land that was hived off the very parcel of land from which the suit property herein was sub-divided. The Learned Judge after hearing the parties properly determined that Kilifi Township Block IV/149 was public property and refused to uphold the leasehold interests purportedly created thereon.

39. In the matter before me, it is acknowledged that the Respondent who sold and transferred the land to the Interested Parties acquired the said title from Charles Wabuko who was the 1st Defendant in **Malindi ELC Case No. 11 of 2011**. This Court has been shown documents, including a letter from the Chief Land Registrar that clearly show that the documents used by the said Charles Wabuko were found to be forgeries.

40. While the Interested Parties have dwelt on the sanctity of their title asserting the indefeasibility thereof, I think it would be a scandal of monumental proportions if this Court was to turn a blind eye to these glaring irregularities. Article 40 of the Constitution while guaranteeing protection to property rights provides at Clause 6 thereof that those rights do not extend to any property that has been found to have been unlawfully acquired.

41. At any rate, I did not think that the Interested Parties herein are, if innocent as they claim, without recourse in law against those who sold to them the Title No. Kilifi Township Block IV/177. While they claim to have made massive investments on the property which now stand to go to waste, their individual rights must be weighed against the rights of the general public, and in particular, the residents of Kilifi County who like the Petitioner herein stand to be deprived of the use and access of the public beach for recreational purposes.

42. And while the Interested Parties may indeed have been bonafide purchasers for value as they claim, I was not persuaded that they had been sufficiently diligent prior to the purchase thereof. If they were, they would have interrogated the 2nd Respondent on the reason he found it necessary to 'cleanse' himself with the suit he filed in **Malindi ELC Case No. 11 of 2011**.

43. If they read the Court's Judgment, they would have noted that the major reason the suit was filed was because there were investigations that were said to be going on over the propriety of the title. Their Replying Affidavit is silent on whether they ever tried to find out if indeed there were investigations and if so, the result thereof. If they made any inquiries, they would have known that prior to the conclusion of the case, the Chief Land Registrar had written his letter dated 22nd March 2013 to the Kilifi District Land Registrar informing him that the documents that were relied on to purportedly pass title to themselves were founded on forgeries.

44. Land grabbing and irregular acquisition of public resources by private individuals has long been a thorny issue in our Country and more so along the few remaining public beaches in this region. As Maraga J (as he then was) stated in **Republic –vs- Minister of Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others (2006) 1KLR:-**

“Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed.....It is quite evident that should a Constitution challenge succeed either under the trust land provisions of the Constitution or under Section 1 and 1A of the (repealed) Constitution or under the doctrine of public trust, a title would have to be nullified because the Constitution is the Supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of the Section 1 and 1A of the Constitution.”

45. In the premises herein, I am satisfied that Kilifi Town ship Block IV/177 was a designated public utility property and it was therefore not upon the 1st Respondent to convert the same into private property without adhering to the law. I am accordingly persuaded that the Petition before me is merited and I allow the same as prayed.

46. While this Court commends the Petitioner for his public spiritedness in bringing this Petition, each party shall in the circumstances herein bear their own costs.

Dated, signed and delivered at Malindi this 17th day of June, 2020.

J.O. OLOLA

JUDGE