



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 60 OF 2013

MALINDI GINNERIES LIMITED.....PLAINTIFF

VERSUS

1. PRITPAL SINGH KALSI.....1ST DEFENDANT

2. ABDUL HASSAN SHABAN.....2ND DEFENDANT

3. KASSIM ALI SAWA.....3RD DEFENDANT

4. ALI MOHAMED ALL.....4TH DEFENDANT

5. DR. NUREN t/a STAR HOSPITAL, MALINDI.....5TH DEFENDANT

6. THE COMMISSIONER OF LANDS.....6TH DEFENDANT

7. THE MUNICIPAL COUNCIL OF MALINDI.....7TH DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaint dated and filed herein on 10th April 2013, Malindi Ginneries Ltd (the Plaintiff) prays for Judgment against the seven defendants jointly and severally for:-

a) A declaration that the grants and or titles issued to the 1st and 5th and or any other Defendant and registered over the suit premises known as Portion No. 10811 (Original Portion No. 1725/22) measuring 0.0745 Ha situated at Malindi Town within Malindi Municipality and Portion No. 10812 (Original No. 1725/23) measuring 0.0955 Ha situated at Malindi Town within Malindi Municipality were issued ultra vires the 6th and or the 7th Defendants statutory powers and are thus illegal, null and void ab initio;

b) An injunction to issue to permanently restrain the Defendants, their servants and or agents from either entering upon, occupying, constructing on or developing, selling, charging, mortgaging or in any other manner whatsoever dealing with the suit properties;

c) (Spent)

d) (Spent)

e) An order directing the Commissioner of Lands (the 6th Defendant) and the Registrar of Lands to rectify the register by cancelling of all the entries relating to the issuance of the grants and or titles complained of to each and everyone of the Defendants in respect of the suit properties to ensure the reinstatement of the Plaintiff as the sole legal and beneficial owner thereof;

f) An order directing the 5th Defendants to demolish all buildings, developments and any construction of any nature that is

present and or continuing on the suit premises;

g) Eviction of the Defendants, their servants or agents from the suit premises;

h) An order directing the Defendants or any one of them and all of them to deliver up vacant possession of the suit premises to the Plaintiff;

i) General damages

j) Cost and incidentals to this suit; and

k) Interest on (i) and (j) above at 40% p.a.

2. Those prayers arise from the Plaintiff's contention that at all times material, it was the registered, legal and beneficial owner of the two suit properties having purchased the same for good and valuable consideration on 28th February 1934. On unspecified dates between the years 2000 and 2002, the 6th and 7th Defendants acting in purported exercise of their powers issued and or caused to be issued to and registered an indenture in respect of all that portion of land No. 10811 to the 2nd Defendant. Similarly on unknown dates, the 6th and 7th issued another indenture in respect of Portion No. 10812 to the 5th Defendant.

3. The Plaintiff asserts that prior to the issuance of the Indentures, 2nd Defendant purported to have purchased Portion No. 10811 from the 1st Defendant while the 5th Defendant purported to be an allottee and or grantee and or purchaser in a transaction whose details are fraudulent and known to them. The 2nd Defendant then purported to transfer his legal interest in the suit premises to the 3rd Defendant who in turn purported to transfer the same to the 4th Defendant.

4. By reason of the foregoing the Plaintiff avers that it has suffered loss and damage and that despite demand made and notice of intention to sue in default, the Defendants have failed, refused and or neglected to make good the Plaintiff's claim and hence this suit.

5. But in his Statement of Defence to the Plaintiff's suit dated 7th June 2013 Ali Mohamed Ali (the 4th Defendant) denies that the Plaintiff was the registered, legal and beneficial owner of Land Portion No. 1725/23 Malindi Municipality. The 4th Defendant avers that he purchased the Portion No. 10811 (Original No. 1725/23) from the 3rd Defendant and at a fair consideration.

6. The 4th Defendant further avers that contrary to the Plaintiff's allegations, the 1st Defendant had a good, secure and proper title to convey to the 2nd Defendant who in turn conveyed it to the 3rd Defendant from whom the 4th Defendant acquired a proper and legal title to the property.

7. The 4th Defendant further avers that upon acquisition of the property on 8th October 2007, he applied and obtained the requisite consent to construct what is now known as "Elite Plaza", a landmark building in the City of Malindi. It is his case that the construction took about two years to complete and that the Plaintiff which has its offices only a stone throw away never queried the construction even once.

8. The 4th Defendant further accuses the Plaintiff of being indolent and lazy in failing to stop the construction or inform the 4th Defendant of its ownership. He avers that he is now the legally registered owner of Plot No. 10811 having acquired the same through a lawfully executed conveyance.

9. Similarly in his Statement of Defence dated 3rd May 2013 as amended on 14th October 2014, Dr. M.E.S. Nurein, sued herein as Dr. Nurein t/a Star Hospital Malindi (the 5th Defendant) avers that he is unaware that the Plaintiff is the registered proprietor of the suit properties as stated in the Plaintiff's Complaint. The 5th Defendant asserts that he entered into and has remained on Land Portion No. 10812 (Original No. 1725/23) Malindi effective 1989 and that he has had an open, continuous and uninterrupted possession of the said property for 24 years with the knowledge of the Plaintiff but without its authority or consent.

10. The 5th Defendant further asserts that he has acquired an easement over the said property for air, light, access and parking for his hospital known as Start Hospital Malindi erected on Plot No. 236 which borders Portion No. 10812 Malindi. The 5th Defendants further asserts that the easement acquired on the Plaintiff's parcel of land is absolute and indefeasible under the provisions of Section 32 of the Limitation of Actions Act.

11. The 5th Defendant further avers that the Plaintiff's title to Portion No. 10812 Malindi was extinguished in or about the year 2001 after the 5th Defendant completed 12 years thereon without its consent under Sections 17 of the Limitation of Actions Act. The suit as against the 5th Defendant is therefore incompetent and a gross abuse of the Court process as the same is time barred for all intents and purpose.

12. The 5th Defendant further states that he has simultaneously with the filing of his Statement of Defence herein filed an Originating Summons against the Plaintiff in respect of his acquisition of the property by way of adverse possession.

13. On its part, the Municipal Council of Malindi (the 7th Defendant) in its Statement of Defence dated and filed herein on 9th October 2014 denies that the Plaintiff was entitled to the suit properties and invites it to strict proof.

14. The 7th Defendant denies allocating or alienating the suit properties as alleged by the Plaintiff or at all. It further asserts that the Plaintiff

has not demonstrated to the Court any wrong doing in its part and avers that the suit as against itself is misconceived, nebulous and a non-starter. The 7th Defendant therefore urges this Court to dismiss and or strike out the suit as against itself.

15. The 1st, 2nd, 3rd and 6th Defendants did not enter appearance or file any pleadings herein while the suit as between the Plaintiff and the 4th Defendant was compromised by an order of consent adopted by this Court on 9th October 2014.

The Plaintiff's Case

16. At the trial herein, the Plaintiff called one witness in support of its case.

17. PW1- Charles Onyiego Bwogari is the Plaintiff's Property Manager. He told the Court that the Plaintiff is the registered owner of all those parcels of land known as Portion No. 10811 (Original No. 1725/22) measuring 0.0748 Ha and Portion No. 10812 (Original No. 1725/23) measuring approximately 0.0955 Ha.

18. PW1 told the Court that the Plaintiff had purchased a portion of land then known as Plot No. M7 Malindi on 23rd February 1934. Plot M7 was subsequently sub-divided into various portions including Land Portion No. 1725 measuring 10.80 acres. Again, Portion No. 1725 was sub-divided into various portions including Portion No. 1725/R from which the two suit properties were sub-divided.

19. PW1 told the Court that in the process of the sub-division of Portion No. 1725, the Plaintiff was required by the then Municipal Council of Malindi to surrender a portion of land as an open space and another as a car park. Both the open space and Car Park were to be held by the Council in trust for use by members of the public. That open space is what is now known as Portion No. 10811 while the Car Park is now known as No. 10812.

20. PW1 further testified that even though the two portions were surrendered as such, the Plaintiff continued to receive rate demands and to pay the demanded rates to the Municipal Council of Malindi. PW1 told the Court that the Plaintiff gave out the two parcels of land on condition that they would be held in trust for the people of Malindi and not for any other purpose. If the purpose was to change, the Plaintiff expected the Council to meet and pass a resolution to that effect and where they were no longer required, the same were to revert to the Plaintiff and not any other person.

21. PW1 told the Court that despite those expectations on their part, sometime in 2008, they noticed that there were developments on the two properties that were not in tandem with the purpose for which they were surrendered. Contrary to their agreement Portion No. 10811 had a storeyed building constructed thereon going by the name "Elite Plaza" while on Portion No. 10812 there was a Mortuary being operated by the 5th Defendant. Their claim as shown in regard to the said Portion No. 10811 was settled by a consent filed herein prior to the commencement of the trial.

22. Pw1 testified that upon learning of these developments, the Plaintiffs directors tasked him to investigate the circumstances under which the mortuary was constructed on the surrendered land.

23. In regard to Portion No. 10812, PW1 testified that he was unable to get anything from the Land Registry relating to how it came to be transferred to the 5th Defendant. It was therefore the Plaintiff's conclusion that the 5th Defendant had unlawfully and illegally constructed a mortuary on that Portion of land without authority.

24. PW1 told the Court that despite many letters written to the 7th Defendant, the Commissioner of Lands and Director of Surveys, all were reluctant to take any action against the 5th Defendant. PW1 concluded that the process of alienation and/or approval of construction on the suit properties is a fraud, based on forgeries and an outright illegality.

25. On cross-examination, PW1 conceded that the Plaintiff is based about some 100 metres from the 5th Defendant's hospital. He told the Court that it was true they first asked the 5th Defendant to cease operations on the suit property in 2008. They were unable to take action earlier as they had assumed the person doing construction on the land had been permitted to build a Car Park.

26. PW1 further conceded that he did not produce the documents of surrender in Court. He further told the Court they never told the 7th Defendant that they had surrendered the land when they went on demanding for payments of rates. PW1 further testified that it took them five years before coming to Court as they were trying to agree with the 5th Defendant who was a close friend of the Plaintiff's directors. He further admitted that he had no evidence of collusion between the 7th Defendant and the 5th Defendant.

The Defence Case

27. The Defence in turn called two witnesses in support of their case.

28. DW1-Dr. Mohammed El Hadi Nurein is the 5th Defendant and the Proprietor of Star Hospital, Malindi. He told the Court that he applied to the 7th Defendant Council to be allowed to construct a Public Car Park in 1989 on a parcel of land next to his hospital. The 7th Defendant approved the building of the Car Park on 15th November 1991 and he went on with the construction.

29. DW1 testified that at one end of the triangular parcel of land was a big trench that had been left by those who had been doing drainage. On 2nd March 1995, the 5th Defendant requested the Council to allow him to fill the trench and to build a mortuary on the spot. The Council gave him permission and granted him an Occupation Permit on 6th November 2000.

30. DW1 further told the Court that no one tried to stop him when he started the construction and it was only in the year 2008 when the Plaintiff started threatening him. He told the Court that he did everything above board, the building was done in broad daylight and that the Car Park is for everyone.

31. On cross-examination, DW1 told the Court that he did not have a separate title for his Mortuary as the land on which the Mortuary stands is part and parcel of the public Car Park. He told the Court that from a letter dated 4th July 1991 and sent to them by the 7th Defendant Council, he knew the land was a designated public Car Park. He conceded that he had not filed an approved building plan for the mortuary and that they charge fees for its use.

32. DW1 further told the Court that the Occupation Permit given to them by the Council was subject to his acquisition of the land from the Commissioner of Lands. He has never acquired the land in that respect. He told the Court that they pay taxes from the fees they receive for the Mortuary Services and told the Court they did not charge fees for the use of the Car Park.

33. DW2 Nicholas Rowland Musila is a Works Officer with the 7th Defendant. He told the Court he was conversant with the matter in dispute and produced a Deed Plan for the concerned portion of land. He told the Court the parcel of land in contention was supposed to be a public car park and that the same had not been formally surrendered by the Plaintiff.

34. DW2 further testified that the Council had not allocated the land to anyone else and that the Plaintiff was still the one paying rates for the same. He further told the Court that the Council had not approved the construction of the Mortuary and that from their records, they had only approved the construction of the hospital.

Analysis and Determination

35. I have perused and considered the pleadings filed herein by the Plaintiff, the 5th and 7th Defendants. I have similarly considered the oral testimonies of their witnesses, the evidence adduced during the trial and the written submissions and authorities placed before me by their respective Learned Advocates. The 1st, 2nd and 3rd Defendants neither entered appearance nor filed any response to the Plaintiff's claim. On the other hand, the 6th Defendant despite entering appearance and participating in the trial did not call any oral testimony at the trial.

36. The gist of the Plaintiff's case was that it was hitherto the registered proprietor of the two parcels of land known as Portion No. 10811 (Original No. 1725/22) measuring approximately 0.0745 Ha and Portion No. 10812 (Original No. 1725/23) measuring approximately 0.0955 Ha both situated at Malindi (the Suit Properties).

37. It was the Plaintiff's case that it had purchased a big parcel of land then known as Plot No. M7 way back on 28th February 1934. The said Plot No. M.7 was then sub-divided into many other parcels among them Portion No. 1725 measuring 10.80 acres. With the passage of time, Land Portion No. 1725 was similarly sub-divided and one of the resultant parcels was what became known as Portion No. 1725/R. The Plaintiff told the Court that vide Survey Plan No. FR 303/72, the said Portion No. 1725/R was then further sub-divided resulting into Portion No. 10811 and 10812 which are the subject matter of this dispute.

38. It was further the Plaintiff's case that during the sub-division of Portion No. 1725/R as aforesaid, the Plaintiff was required by the then Municipal Council of Malindi to surrender a Portion of land as an open space and another as a Car Park for use by the members of the public. The portion surrendered by the Plaintiff as an open space is what became known as Portion No. 10811 while the surrendered as a car park is what is now known as Portion No. 10812.

39. According to the Plaintiff, sometime in the year 2008 or thereabouts, it came to its notice that there were some developments on the suit properties. On Land Portion No. 10811, there had been developed a Commercial Storey building named "Elite Plaza" while on Portion No 10812, there was now standing a mortuary that was being operated by the 5th Defendant.

40. Upon investigation, the Plaintiff came to discover that Portion No. 10811 had at some point been registered in the name of the 1st Defendant herein on the purport that he had purchased the same from the Plaintiff. The 1st Defendant then transferred the same to the 2nd Defendant who passed it to the 3rd Defendant before it was ultimately registered in the name of the 4th Defendant. For Portion No. 10812 however, other than the fact that the Mortuary thereon was being operated by the 5th Defendant, the Plaintiff was unable to find any documentation showing how the 5th Defendant came to be in possession thereof.

41. According to the Plaintiff, having surrendered the suit properties for public purposes as a condition for the sub-division of Plot No. 1725/R, those properties must remain available for that purpose, otherwise if they were to revert to private use, they must revert to the Plaintiff and not the people currently operating the same.

42. In his Statement of Defence as amended on 14th October 2014, the 5th Defendant on his part asserts that he is the proprietor of Plot No. 236 Malindi wherein he has constructed a health facility known as the "Star Hospital". It is the 5th Defendant's case that Land Portion No. 10812 was and has been adjacent to his said Plot No. 236 Malindi and that it was just an open space which he thought could be utilised in serving his hospital.

43. According to the 5th Defendant, he had always used the suit premises for parking since 1989 and the Plaintiff's rights and interests thereon had since been extinguished under the doctrine of adverse possession and the suit herein was therefore time barred.

44. It was also the 5th Defendant's case that he had subsequently applied for and obtained the consent of the 7th Defendant to construct his car park and the mortuary thereon and that the Plaintiff's claim was coming too late in the day having failed to stop his use of the land and

the subsequent construction over the years.

45. On his part, the 7th Defendant agrees that the two properties were indeed to be surrendered by the Plaintiff to the 7th Defendant to hold in trust for the public. Plot No. 10811 was to be used as an open space while Plot No. 10812 was to be used as a Car Park. The 7th Defendant told the Court however that it was upon the Plaintiff to surrender the two properties but it had failed to conclude the surrender process. It was further the 7th Defendant's case that since the process of surrender was not concluded, the 7th Defendant could not allocate the property to anyone else. The 7th Defendant further denied colluding with any of the Defendants herein to help them to fraudulently acquire the suit properties.

46. The 5th Defendant as I understood it did not have any issue with the history of Land Portion No. 10812 Malindi as given by the Plaintiff. It was however his case that he has been using the suitland openly, exclusively and continuously since 1989 and that the Plaintiff was always aware and had knowledge of his use of the land for all that period prior to the institution of this suit in the year 2013.

47. Consequently it was the 5th Defendant's case that he had acquired the said parcel of land by way of adverse possession. The 5th Defendant further submitted that all that the Plaintiff was trying to do here was to recover its parcel of land and such claim was already statute barred by dint of Section 7 of the Limitation of Actions Act.

48. At Paragraph 4 of his Amended Statement of Defence, the 5th Defendant emphasized this lien of defence thus:-

“In further answer to Paragraph 12 of the Plaintiff the 5th Defendant states that it has acquired the right to the said property No. 10812(Original No. 1725/23) Malindi by way of adverse possession and has become entitled to be registered as the owner thereof and has filed, simultaneously with the filing of this Defence an Originating Summons against the Plaintiff in that regard.”

49. As it were, the particulars of the Originating Summons said to have been filed were not brought to the attention of this Court, if indeed it was filed, the subject matter thereof and the parties would in all aspects have been the same as those before me and there may have been no reason for separate trials thereof. At least no consolidation was made to my knowledge.

50. Section 7 of the Limitation of Actions Act provides that:-

“An action may not be brought by any person for the recovery of land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

51. Under Section 17 of the Act, if a person does not bring an action to recover land within the stipulated 12 years, his title to the land is extinguished. Sections 37 and 38 of the said Act further stipulate if the land is registered under one of the registration acts then the title is not extinguished, but held in trust is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered an order of this Court vesting the land in him.

52. Adverse possession must however be proved as a fact and cannot be assumed as a matter of law from mere exclusive possession, however long. As the Court of Appeal (Makhandia, Ouko and M'Inoti, JJA) stated in *Mtana Lewa –vs- Kahindi Ngala Mwamgandi (2015) eKLR:-*

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

53. In the matter before me, the 5th Defendant told this Court that he has been exclusively occupying the suit property and using it as a car park since the year 1989. That would be some 24 years before this suit was filed. There was however very little by way of documentary support for that proposition. Instead, it was clear to me that 1989 was the time the 5th Defendant first developed interest in the suit property having decided to build a hospital in his adjacent parcel of land. By a letter dated 20th April 1989, he wrote to the 7th Defendant's predecessor as follows:-

“Subject: Car Park

I apply to the Council to be allowed to develop a car park on the Portion 1725/R as a public car park.

The car park will also serve my proposed clinic on the adjacent portion (Portion 363/236) of the building plan of which I am submitting together with it.

If I am allowed to develop the car park at my own expense, I will then produce detailed drawing for approval by the Council construction of the same, shall be made with the direction of your Engineer.”

54. It was not clear if this initial letter was responded to. Two years later by another letter dated 4th July 1991, the 5th Defendant wrote to the

7th Defendant as follows:-

Re: Car Park on Plot No. 1725/R

Dear Sir,

I am applying for authority to develop the above Plot No. 1725/R which is earmarked as a public car park for this purpose.

The car park fronting my new clinic on Plot No. 363/236 which is nearly completion, the car park will still remain public car park and will also serve my clinic. If permitted I undertake to do this project on my own cost for the benefit of the people of Malindi."

55. By a letter dated 15th November 1991, the Council gave approval to the 5th Defendant "to construct a public Car Park for the general public use on Plot No. 1725/R earmarked for that purpose...". Following another application, the Council proceeded on 16th November 2000 to grant an Occupation Permit for the same parcel of land subject to the acquisition of the land by the 5th Defendant from the Commissioner of Lands.

56. From the said correspondence, while it was clear that the 5th Defendant was in the land as early as the year 2000, it was evident that he started using the land with the authority of the Municipal Council of Malindi whose authority it sought and obtained to build the Car Park. On the assumption that the suit property was public land, the 5th Defendant was required to formally acquire the same from the Commissioner of Lands. When he was cross-examined on his testimony before this Court, he told the Court that he did not apply for the land as per the conditions of the Occupation Permit.

57. Evidently as at the time the 5th Defendant started eyeing the property in 1989, the 7th Defendant which was the body in charge of the town planning had categorized the property as a car park. That categorization could not have happened in a vacuum. As the 7th Defendant's Works Officer (DW2) testified herein, the Plaintiff had before then started the process of surrendering the said piece of land to the 7th Defendant.

58. According to DW2, that process was not concluded as the Plaintiff had failed to move it forward. The Plaintiff on the other hand told this Court that the issue of the surrender was made a condition by the 7th Defendant to approve the sub-division of its Plot No. 1725/R. It was not contested that the Plaintiff agreed to the surrender, that the sub-division went on and that is how the suit property came to be.

59. During his cross-examination before this Court, DW2 conceded that all that was pending for the surrender to be complete was the issuance of a Deed Plan. As the Court of Appeal stated in *Mwinyi Hamisi Ali -vs- The Attorney General & Another (1997)eKLR*:-

"Registration of such surrender is evidence of surrender. But Section 44 (of the now repealed Registration of Titles Act, Cap 281) does not envisage a situation whereby lack of such registration would make null and void de facto surrenders. From the evidence before the Superior Court there can be no doubt that Captain Townsend and his three Co-owners had factually surrendered Plot No. 334 to the Government."

60. Arising from the foregoing and in light of the evidence before me, I was persuaded that there was indeed a de facto surrender of the suit property. The 7th Defendant gave its consent to the sub-division on condition that the Car Park would be surrendered. Right from the time of the sub-division, the Plaintiff had ceased the use of the suit plot and the 7th Defendant had, at least from 1991 been treating the land as a Car Park as per the conditions it had imposed on the Plaintiff.

61. Having become public land, the suit property was so held by the 7th Defendant on behalf of the people of Malindi and the larger Kilifi County. Accordingly and by dint of Section 41 of the Limitation of Actions Act, no claim of adverse possession can be advanced against the suit property. Indeed having acknowledged the public nature of the property in his letter of 4th July 1991, the 5th Defendant was estopped from turning around and now claiming that the land he applied for had not been so designated.

62. At any rate, from the material placed before me, the suit premises were part of Portion No. 1725 before the sub-division proposal that was submitted by the Plaintiff and was approved by the Commissioner of Lands on 6th October 1969. That sub-division gave rise to Land Portions Nos. 2026 to 2043, 1725/R and the suit property herein among others.

63. While the other parcels were registered in the name of the Plaintiff, it was clear that since 1970, the suit property was not in the name of the Plaintiff. The 7th Defendant has indeed in their List of Documents dated and filed herein on 3rd November 2014 annexed a Copy of the Survey Plan dated 10th June 1970 evidencing the sub-division carried out on the original Portion No. 1725/421.

64. That being the case, it follows again that a claim for adverse possession could not be maintained against the Plaintiff as from 1989 as such a claim can only be maintained against the registered owner of the concerned parcel of land. Indeed where a claim for adverse possession was to be maintained under Section 38 of the Limitation of Actions Act, the requirement is that the Claimant ought to exhibit a copy of the certificate of ownership indicating that the person against whom the claim is made is the registered proprietor of the subject property.

65. In the matter before me, the Defendants have not exhibited any title deed, an indenture of conveyance, a certificate of lease or any other document of title to demonstrate that the Plaintiff was the registered owner of the land as at the year 1989 or thereafter. Instead they rely on

the fact that at some point in time, the 7th Defendant demanded for payment of rates for the years 2004 to 2008 and the Plaintiff obliged and made the payments.

66. There was however no evidence that the Plaintiff had been paying the rates at any other time after the sub-divisions were done. The Plaintiff's Property Manager explained that they received a demand for the rates and paid it as the Council threatened to take legal action. The 7th Defendant's Works Officer (DW2) explained that they continued demanding the rates because the process was not concluded. He told the Court there would be no requirement for the Plaintiff to pay rates after the surrender.

67. I did not think that the mere payments of rates in such circumstances was ipso facto evidence that the Plaintiff was the registered proprietor of the suit property. As we have found out, the 7th Defendant had imposed a condition upon the Plaintiff that it would have to surrender the suit property in order to obtain approval for the sub-division of its Portion No. 1725 Malindi. The Plaintiff accepted the condition and went ahead to sub-divide its land leaving the suit property for the use intended by the 7th Defendant. The demand for payment of rates by the 7th Defendant was therefore erroneous and its payment could not in my view entitle the Plaintiff to re-take the suit property and use it for its own purposes.

68. From the correspondence between the 5th and 7th Defendants shown herein above this Court was not left in doubt that the suit property was meant for the public to use as a car park. The 5th Defendant has also confirmed that he put up a private mortuary on the suit plot and that he has put up a perimeter wall around the property.

69. As it were, Section 144(1) of the Local Government Act, Cap 265 of the Laws of Kenya (now repealed) provided for the manner in which a local authority could deal with land which it had acquired by way of purchase, lease, exchange or gift. Under that provision, notwithstanding that such land was not required for the purpose it was acquired, it was to be held and used for the purposes of any other functions of the local authority.

70. Indeed under Section 144(3) of the said Cap 265, such land could only be appropriated for any other purpose for which the local authority is authorized to acquire land with the approval of the Minister of Local Government. While Section 144(6) of the said Act allowed local authorities to sell any of its land and which was not required for the purpose for which it was acquired or was being used, such sale required the approval by way of a resolution of the full Council and the Minister as well.

71. In the matter before me, the 5th and 7th Defendants have neither stated nor shown that the land upon which the 5th Defendant's mortuary has been constructed was not required for public purpose or that indeed the Minister for Local Government gave approval for the appropriation of the land by the 5th Defendant. Indeed, no material was placed before this Court to show that the Council approved the allocation of Land Portion No. 10812 (Original No. 1725/23) which had been earmarked for a public car park to the 5th Defendant or at all, or that the land was actually allocated to him by the Council.

72. In his testimony before the Court, the 5th Defendant admitted that he had put up a perimeter wall around the suit property. While the 5th Defendant purported that his mortuary and the car park was available for public use, it was evident that he ran a private mortuary for which he charged fees for services rendered on the land and that he had privatized the use of the car park by building a perimeter wall around it and making it appear as if the same was solely for the use of his Star Hospital and Mortuary.

73. As it were, land which had been set aside for public purpose cannot be allocated to individuals by the 7th Defendant without following the law. As the 7th Defendant vehemently denied alienating the land to the 5th Defendant, one would have expected that it should lead the crusade demanding that the 5th Defendant vacates the land so that it goes back to the public use it was reserved for.

74. From their conduct and predisposition in these proceedings however, it would unfortunately appear that the 7th Defendant was no longer interested in maintaining the suit property for the purpose for which it was surrendered. At paragraph 4 and 5 of its Statement of Defence, the 7th Defendant denies that the suit property was surrendered to itself in the manner stated by the Plaintiff as a trustee to hold and use on behalf of and for the benefit of the public. Indeed it is apparent from the cross-examination they subjected the Plaintiff's Witness herein that their purpose in these proceedings was to demonstrate that the suit property had not been so surrendered.

75. From the 7th Defendants' own list of documents filed herein, it was evident that they have been aware of the complaint herein that the Plaintiff had built a private mortuary and fenced off the rest of the suit property over a long period of time. Following one such complaint by the Plaintiff, they wrote to the 5th Defendant on 3rd May 2011 as follows:-

“RE: Trespass on Land Portion No. 10812(Original No. 1725/23

This is to inform you that we have received a letter from Malindi Gineries Ltd dated 30th March 2011 complaining about trespass that you built a mortuary on the above mentioned land-plot No. 10812 Original No. 1725/23 without consent.

This is to ask you to furnish this Council with your ownership documents and any documents related to that portion.”

76. There was no evidence placed before me that the 5th Defendant had any ownership documents and/or that he furnished any. The inescapable conclusion was then that the Council had approved the building of the mortuary and the wall surrounding the suit property by the 5th Defendant without any evidence of his ownership thereof. Despite being aware of these violations, the Council took no action against the 5th Defendant.

77. In response to a letter dated 20th November 2012 in which the Council told him that they had established that he had done several amendments/or extensions to the approved development for his hospital and asked him to remove what was not approved, the 5th Defendant responded as follows on 7th December 2012:-

RE: Development on Plot No. 13279

Reference is made to your letter...dated 20th November 2012 regarding the above matter.

This is to inform you that I am going to submit the Amendment Plan Number A6/2000.

The boundary wall is solely for security purposes and to protect the hospital equipment, I therefore request the Liason Committee to allow me the boundary wall for the same purpose.

I will demolish part of it to comfort my neighbour. I assure you there will be no structure or claim for that portion in the future.”

78. By this proposal, it was evident to me that the 5th Defendant was seeking to be allowed by the 7th Defendant to regularize his claim on this parcel of land that had been surrendered by the Plaintiff for public use. There was no evidence that the 7th Defendant declined this proposal and it was clear that the Mortuary and the perimeter wall remained in place to date. Looking at the entire spectrum of the correspondence between the 5th Defendant and the 7th Defendant herein one cannot help but remember the phenomenon of yester years dubbed by exasperated Kenyans as “Land grabbing” where it was in vogue for some well connected greedy individuals to illegally convert public land into private property for their private use.

79. As Maraga J (as he then was) stated in ***Republic –vs- Minister for Transport & Communication & 5 Others Ex-Parte Waa Ship Garbage Collector & 15 Others (2006)1KLR 563:-***

“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 Constitutional challenge succeed either under the trust land provisions of the Constitution or under Section 1 and 1A of the 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 interests goes against the letter and spirit of Section 1 and 1A of the Constitution.”

80. In my view, the correspondence between the 5th and 7th Defendants and the resultant claim that the 5th Defendant had acquired the land by adverse possession and or that he had acquired an easement over the same were all aimed at gifting the suit property to the 5th Defendant. But even where it is obvious as in this case that the 7th Defendant was no longer interested in maintaining the suit property for the purpose for which it was surrendered, I think it would be unacceptable and indeed unlawful for the 7th Defendant to allocate and or alienate the same to a private individual.

81. Dealing with a near similar scenario where land had been compulsorily acquired under Section 75 of the repealed Constitution in ***Kepha Maobe & 365 Others –vs- Benson Mwangi & Another (2015) eKLR***, the Court of Appeal(Waki, Karanja & Ouko JJA) cited with approval the decision of Waki J in ***Niaz Mohamed –vs- Commissioner of Lands & 4 Others*** where the Learned Judge observed as follows:-

“There is no right of compulsory acquisition of land by the government for purposes other than those provided for in the Constitution of Kenya under Section 75.....

If it were not so, and taken to its logical conclusion, a loophole would be created for any government which does not mean well for its citizens, to compulsorily acquire whole Sections of a city or town or other developed property on the pretext of public good, compensate the owners of the property acquired with taxpayers’ money and then turn round and dish out those properties to favoured citizens of its choice or the enemies of the Estate. Parliament could not have intended such preposterous consequences. I am not persuaded by the argument that upon compulsory acquisition of land and the consequent vesting of that land in the government then the land falls to be used by the government in any manner it desires. There is plainly no such carte blanche intended in the provisions of the law cited above. The land must be used subsequent to the acquisition, for a lawful purpose and as I see it, the only purpose is the one which it was intended.

I am persuaded that the land in issue was acquired for a specific purpose which is consonant with the Constitution and the Land Acquisition Act, namely for the construction of a public road. It matters not that the entire portion acquired was not used for that purpose. Unutilized portions, in my view, would remain road reserves. And if it was the case that it was found unnecessary after all to have acquired the portion for the expressed purpose, does equity not require that the portions be surrendered back to the person from whom the land was compulsorily acquired? The law itself in Section 23 of the Land Acquisition Act appears to imply such equity although it relates to withdrawal of acquisition before possession is taken...”(Emphasis added.)

82. By parity of reasoning and as the 7th Defendant purports that the surrender to itself was uncompleted, it cannot alienate the land to a private individual. Equity requires that the portions be surrendered back to the person who surrendered the land in the first place and that is the Plaintiff herein.

83. In the premises, I am satisfied that the Plaintiff has proved its case on a balance of probabilities. Save that I was not satisfied that there

was any basis for the prayer No. (i) in regard to general damages for the Plaintiff, Judgment is hereby entered for the Plaintiff as prayed in Prayers Nos. 'a', 'b', 'e', 'f', 'g' and 'h' of the Plaint in so far as the same relate to the 5th Defendant.

84. The Plaintiff shall also have the Costs of this suit.

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

J.O. OLOLA

JUDGE