



REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA ATMALINDI

CIVIL SUIT NO. 46 OF 2010

SAMUEL CHARO KITSAO & 34

OTHERS.....PLAINTIFF

VERSUS

MOMBASA

CEMENTLIMITEDDEF

ENDANT

CONSOLIDATED WITH E.L.C. CASE NO. 23 OF 2011

CHARO KILIFI PILAU & 10

OTHERS.....PLAINTIFFS

VERSUS

MOMBASA

CEMENTLIMITED.....DEFENDANT

JUDGMENT

1. By a Plaint dated May 12, 2010, the plaintiffs in ELC No. 46 of 2010 seek the following reliefs:

a) A permanent injunction to restrain the defendant, by itself, its servants, agents, and/or nominees, from entering upon the plaintiffs' parcels of land, fencing the said land, cutting down the plaintiffs' trees, or preventing the Plaintiffs from accessing their land and conducting their activities thereon. It also restrains the defendant from coercing or compelling the plaintiffs to sell their land to the defendant and from dealing with the plaintiffs' land in any manner.

b) Mandatory injunction compelling the defendant, along with its servants, agents, and nominees, to remove its fence erected around the plaintiffs' parcels of land.

c) Costs

2. The defendant denied the claim in its defense dated June 10, 2010.

3. In paragraph 8 of the defense, the defendant claimed that it had purchased the parcels of land belonging to the 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 15th, 16th, 18th, 19th, 21st, 23rd, 24th, 26th, 30th, 34th, and 35th plaintiffs but denied having interfered with the suit properties owned by the 1st, 2nd, 4th, 14th, 17th, 22nd, 25th, and 27th, 28th, 29th, 31st, 32nd, and 33rd plaintiffs

4. The plaintiffs in ELC No. 23 of 2011, through an amended plaint dated October 31, 2012, seek the following reliefs:

a) Permanent injunction restraining the defendant, its servants, and agents from trespassing onto the plaintiffs' parcels of land, constructing roads across those parcels, erecting fences around them, or otherwise dealing with the parcels in any manner.

b) A Mandatory injunction compelling the defendant, its servants, and or agents to pull down the fence erected around the plaintiffs' parcels of land.

c) Costs of the suit and interests thereon at Court rates.

5. The defendant denied the claim in its March 4, 2011, statement of defense.

6. After a full hearing of the matter, the court directed that the issues raised be addressed through written submissions. I acknowledge receipt of submissions from learned counsel for the plaintiffs, Mr. Shujaa, and Ms. Mango for the defendants, with much appreciation, as the same went a long way in resolving the issues raised in this matter.

7. The key legal issues in this case that I identify for the court's resolution, based on the materials, evidence, and submissions

before me, are: who owns the subject properties, whether the reliefs sought by the plaintiffs are achievable, and who should bear the litigation costs.

8. The suit properties are detailed in paragraph 3 of the plaint dated May 12, 2010, in ELC No. 46 of 2010, and in paragraph 3 of the amended plaint dated October 31, 2011, in ELC No. 23 of 2011.
9. At the hearing, the plaintiffs presented their written witness statements filed on July 25, 2014, as part of their main testimony. The plaintiffs assert their long-term residence on the suit properties, claiming they have lived there since time immemorial. They further state that, in 1991, the properties were allocated to them after the completion of the adjudication process. PW1 submitted in evidence a copy of the adjudication registers and a notice of completion of the adjudication, marked as exhibits No.1 and No.2, respectively.
10. The adjudication register indicates that the 1st to 34th plaintiffs in ELC No. 46 of 2010 were allocated the following properties: Plot Nos. 31, 355, 361, 363, 362, 368, 379, 377, 380, 381, 382, 389, 437, 433, 436, 441, 482, 260, 416, 416, 408,410, 539, 605, 694, 603, 488, 484, 480, 481, 447, 449,

450, 784, 587, and 586.

11. Further, the adjudication register shows that the 1st to 4th plaintiffs in ELC No. 23 of 2011 were allocated the following properties: Plot Nos. 519, 499, 412, 507, 457, 511, 568, 706, 222, and 504.
12. PW 12 testified that her late husband bought Plot No. 552 from the original owner, Kazungu Kenga Karisa, on August 24, 1999. PW 12 also provided a copy of the sale agreement as Exhibit No. 6.
13. The plaintiffs testified that the defendant owns a cement factory near the suit properties and that, sometime in October 2009, the defendant trespassed onto the suit properties through its servants and agents, cut down the plaintiffs' trees, and began excavating limestone from the properties without their consent.
14. The plaintiffs further testified that the defendant also fenced off the suit properties, preventing the plaintiffs from accessing them. The defendant carried out all these activities in an attempt to coerce or compel the plaintiffs to sell the suit properties to the defendant at a price determined by the defendant.

15. The plaintiffs submitted photographs of the suit properties as Exhibit No.3, which show the destruction caused by the defendant to the suit properties.
16. PW12 testified that after acquiring Plot No.552, they took possession and built a permanent residential house with five rooms at a cost of Khs. 300,000. They stated that sometime in September 2010, the defendant entered the plot, demolished the house, and constructed a road across the property without her consent. PW12 produced photographs showing the destruction of the house, bundled and marked C in the plaintiffs' supplementary list of documents dated July 25, 2014.
17. The plaintiffs contend that the evidence shows the defendants' activities on the suit properties have prevented the plaintiffs from using those properties. The evidence also demonstrates the damage inflicted by the defendants on the properties in question.
18. PW1 submitted photographs as evidence, contained in a bundle marked A, A1, and A2, listed in the plaintiffs' supplementary document list dated July 25, 2014, in suit No. 46 of 2010. These photographs show the extent of excavation

on the suit properties.

19. The plaintiffs argue that the excavation will not only alter the condition and nature of the suit properties but also leave them exposed and hollow after the limestone deposits are exhausted. This process will render the suit properties completely unsuitable for the purposes for which the plaintiffs intend to use them.
20. The plaintiffs testified that the defendants use the road built across the suit properties to transport limestone excavated from the properties to the defendant's cement factory.
21. They argue that they have presented evidence showing that the damage to the suit properties is irreparable and cannot be adequately compensated with monetary damages.
22. They also state that there are several agreements with third parties who never owned the suit properties. For example, the sale agreement dated February 3, 2010, for Plot No. 441, owned by the 16th plaintiff, shows that it was sold to the defendant by Mrima Kinyaka Deche.
23. Similarly, the sale agreement dated May 14, 2010, for Plot No. 382, owned by the 11th plaintiff, indicates that it was sold

to the defendant by Charo Karisa Ngwaru.

24. The agreement dated December 4, 2009, for Plot No. 368, owned by the 10th plaintiff, shows that it was sold to the defendant by Alfred Mwanguza Kaloki.

25. Another agreement, dated January 14, 2010, for Plot No. 437, owned by the 9th plaintiff, shows that it was sold to the defendant by Josephine Mere Charo.

26. The sale agreement dated February 26, 2010, for Plot No. 380, owned by the 15th plaintiff, shows that Evans Katana Kalume sold the plot.

27. Additionally, the agreement dated January 11, 2010, for Plot No. 379 owned by the 7th plaintiff indicates it was sold to the defendant by Charo Karisa Ngwaru.

28. The agreement dated February 15, 2010, for Plot No. 377 owned by the 6th plaintiff shows it was sold to the defendant by Sidi Masha Katana.

29. There are also sale agreements for the suit properties in suit No. 23 of 2011. For example, the sale agreement dated March 26, 2010, for Plot No. 568 owned by the 8th plaintiff shows that the plot was sold to the defendant by Samuel

Charo Kahindi.

30. The agreement dated November 30, 2009, for Plot No. 552 owned by the 12th plaintiff shows that Mwenda Kenga Karisa sold the plot.

31. The sale agreement dated April 20, 2010, for Plot Nos. Plots 432 and 488, owned by the 4th plaintiff, show that Evans Katana Kalume sold both plots.

32. There is also the sale agreement for Plot No. 499 owned by the 3rd plaintiff, which indicates that Kazungu Wanje Nyale sold the plot.

33. In contrast, the sale agreement dated April 20, 2010, for Plot No. 222 owned by the 10th plaintiff's husband, Sylvester Daniel Runya, was sold to the defendant by Kadzo Pande Hamisi.

34. The plaintiffs produced copies of these agreements in a bundle as Exhibit No. 4.

35. The plaintiff argues that the defendant also produced, in evidence, a land procurement analysis report in its supplementary list of documents, dated July 28, 2017, which shows the land allegedly purchased by the defendants. The

individuals listed as vendors in the report are the same as those described as vendors in the sale agreements. The report, therefore, supports the plaintiffs' testimony that they did not sell the disputed properties. The plaintiffs testified that in all these agreements, the defendant was informed by the former area chief of Takaungu location that the plaintiffs had passed away and that the vendors were their next of kin or personal representatives.

36. The defendant, through its director, Hasmukh Patel, also swore an affidavit dated July 22, 2010, filed on July 23, 2010, in land case No. 46 of 2010, in which he stated that the defendant had been misled to believe that the plaintiffs had passed away and that the vendors of the disputed properties were the personal representatives of the plaintiffs' estate.

37. The plaintiffs argue that the third parties, being non-owners of the properties in question, had no saleable interests in the properties, and therefore, the sale agreements were invalid.

38. Consequently, the plaintiffs argue that the defendant had no legitimate right to enter the properties, cut trees, begin limestone excavation, or construct a road across the properties.

39. DW1, the defendant's Operations Manager, testified and adopted his witness statement dated July 2014 and the supporting affidavit filed on February 14, 2019, as his primary evidence. He stated that the defendant entered into a Sale Agreement and purchased parcels of land from some of the plaintiffs who had been awarded them after the repeal of the Mazrui Lands Trust Act. (Paragraph 7 of the Defence in 46/2010 and 3, 4, 6 in 23/2011). He also said that the defendants had no interest in or interference with the parcels mentioned in Paragraph 10 of the defense in 46/2010.

40. That the defendant later became aware that the Mazrui had previously filed a suit, HCCC NO. 185 of 1991, concerning the Mazrui Land Trust, between the Mazrui and the Attorney General, in which they challenged the repeal of the Mazrui Lands Trust Act.

41. In 2012, the Honorable Judge Tuiyot, as he was then known, ruled that the repeal of the Mazrui Lands Trust Act was unconstitutional, resulting in the land reverting to the Mazrui (Paragraph 17 of the Supporting Affidavit of Javeed, filed on February 14, 2019).

42. The evidence presented by the defendants indicated that,

after the court's judgment, they entered into a Lease Agreement with the Mazrui for 1,000 acres (Paragraph 9 of the Supporting Affidavit), which included the parcels currently in dispute and claimed by the plaintiffs.

43. The defendant also stated that the court's judgment in HCCC No.185/1991, which reverted the land to the Mazrui, was never appealed and remains entirely in effect. The defendant denied demolishing any houses or cutting down trees belonging to the plaintiffs and requested that the suit be dismissed with costs.

44. Mr. Shujaa, representing the plaintiffs, argues that since the lease granted to the defendant pertains to a different portion of Plot No. 4236-Kilifi and not the area where the suit properties are located, the defendant does not have a superior right of possession over the suit properties claimed by the plaintiffs. The defendant did not present any evidence to prove that the Mazrui Lands Trust Board had any dispute with the plaintiffs regarding their possession and use of the suit properties. The plaintiffs' claim does not challenge the proprietary rights of the Mazrui Lands Trust Board in Plot No. 4236-Kilifi.

45. The claim is limited to the prayers made against the defendant. The plaintiffs, therefore, argue that the defendant has not proven any right, legitimate or otherwise, to the suit properties.

46. For these reasons, Mr. Shujaa asserts that their evidence has substantiated their case against the defendant, and they formally request judgment as prayed for by the plaintiffs.

47. Ms. Mango, on the other hand, asserts that it is a well-established legal principle that any individual claiming a legal right or liability based on specific facts must prove the existence of those facts (Section 107 of the Evidence Act).

48. She stated that the plaintiffs claimed to be the beneficial owners of the parcels in question and relied on an adjudication register along with a notice indicating the completion of the adjudication process as recorded in the register. The plaintiff further confirmed that the parcels previously formed part of the Mazrui Land Trust, which was vested in the Mazrui Land Board Trustees.

49. Following the repeal of the Mazrui Lands Trust Act, the plaintiffs confirmed that the land became Trust Land, and the parcels were adjudicated to the respective parties, as

documented in the register.

50. Conversely, the defendant argued that the Mazrui challenged the repeal of the Act. In a judgment issued in Mombasa HCCC No. 185 of 1991, the repeal was deemed unconstitutional, resulting in the land reverting to the Mazrui. The plaintiffs did not contest the effect of this judgment, nor did they file an appeal against it. She stated that the plaintiff confirmed that the parcels previously fell within the Mazrui Land Trust, which was vested in the Mazrui Land Board Trustees.

51. She stated that the plaintiffs further confirmed that after the repeal of the Mazrui Lands Trust Act, the land became Trust Land, and the parcels were allocated to each of them as recorded in the register. The defendant, in turn, argued that Mazrui challenged the repeal of the Act. In a judgment in Mombasa HCCC No. 185 of 1991, the repeal was declared unconstitutional, leading to the land reverting to Mazrui. The plaintiffs did not contest the effect of the judgment, nor has it been appealed.

52. She stated that Section 26 of the Land Registration Act provides:

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

53. In her view, the plaintiffs did not present any title to the parcels they claimed to own beneficially. With the repeal of the Mazrui Lands Trust Act being declared unconstitutional, the land in question reverted back to the Mazrui.

54. Thus, it is argued that the plaintiffs have not demonstrated their beneficial or legal interest in the disputed parcels.

55. She concluded that the injunctive orders claimed by the plaintiffs are not achievable, as the test outlined in *Giella v*

Cassman Brown & Co. Ltd. [1973] EA 358 and reaffirmed in Mrao Ltd. v First American Bank of Kenya Ltd. and 2 others [2003] EKLK has not been satisfied by the plaintiffs.

56. The process of acquiring land in Kenya involves various methods outlined in the Land Act (see section 7 of the Land Act), including allocation, land adjudication, compulsory acquisition by the government for public use, prescription (adverse possession), settlement programs, transmission, transfer by sale or gift, and long-term leases over twenty-one years originating from private land.

57. It was the plaintiffs' responsibility to prove that they obtained their respective parcels of land through the methods I outlined above. However, they failed to do so. Instead, they argued that they either purchased their parcels from the land's occupants who had already been adjudicated or that, after the repeal of the Mazrui Lands Trust Act, the land was lawfully awarded to them during that adjudication process.

58. During the hearing, it was admitted that the adjudication process could not be finished due to the pending Mombasa case challenging the repeal of the Mazrui Lands Trust Act.

59. The matter was later concluded, and the High Court declared the repeal of the Mazrui Act unconstitutional, resulting in the land reverting to the Mazrui. This decision is reported as Ahmed Abdalla Mohamed & 3 Others v Attorney General [2012] KEHC 5471 (KLR). This is what Tuiyot J (as he then was) held:

“Ultimately, the Court issues the following orders-

(1) A declaration that the Applicants right to property as guaranteed in Article 40 of the Constitution of Kenya and as previously guaranteed in Section 75 of the former Constitution of Kenya, was, and is being violated by the Mazrui Lands Trust (Repeal) Act (1989).

(2) A declaration that the Mazrui Lands Trust (Repeal) Act 1989 is unconstitutional, null, void and of no legal effect.

(3) A declaration that all that piece of land situated to the South of Kilifi Creek in the Kilifi District containing by measurement 2716 acres or thereabouts, and as comprised in Certificate of Ownership number 409 dated 6th April 1914 issued under the Land Titles Act (Cap 282) of the Laws of Kenya and declared to be a Wakf to the Mazrui’s and

their successors for ever was always vested in the Mazrui Lands Trust Board not thereby as the lawful proprietors thereof, but as trustees for the Mazrui who are the lawful owners within the meaning contained in the said Act, and to the exclusion of all other persons.

(4) A declaration that all other lands vested in the said Board as Trustees for the Mazrui, by the Mazrui Lands Trust Act (Cap 289) of the Laws of Kenya (now repealed) were also vested in the Mazrui, as lawful proprietors thereof, and to the exclusion of all other persons.

(5) Should any of the Mazrui lands aforesaid be lawfully and properly acquired by the Government of Kenya for the benefit of persons other than the Mazrui, then prompt, just and full compensation should first be paid to the Mazrui in accordance with the provisions of Section 75(i) (c) of the said former Constitution, and Article 40 of the new Constitution.

(6) A declaration that in so far as the said Mazrui Lands are concerned the Minister concerned or his servants or agents has no power to determine the question of the ownership of such land as the proprietors of the said lands are known to have title thereto under a specific Act of Parliament and other

laws and are legally capable of alienating and/or disposing of such land in conformity with the provisions of the law.

(7) Each party shall bear its own costs.”

60. It seems to me that the adjudication process during the Mombasa case's pendency left the plaintiffs' ownership of the suit properties unresolved - the process could not be finalized. The Superior Court's decision halted the adjudication in the Takaungu area, where the Mazrui Trust Land was located. It prevented the plaintiffs from obtaining land titles under the now-revived Mazrui Lands Trust Act by court order. This situation, resulting from the repeal of the Mazrui Lands Trust Act and the ongoing Mombasa case, clearly impacted the land rights of those previously recognized and validated as owners - including the current plaintiffs.

61. The scenario faced by the plaintiffs in this case is not alone; I see this reflected in Abdalla & another (Suing as the Legal Representatives of the Estate of Ali Abdalla Mwalunzi) v Mombasa Cement Ltd [2024] KEELC 1087 (KLR), where this court (Odeny J.) found that:

“The Plaintiff filed this suit together with an application for injunction which was heard and

dismissed vide a ruling dated 14th December 2018 on the ground that vide a dated 23rd August 2018 from the Land Adjudication and Settlement Officer Kilifi that the said Takaungu Adjudication Section was later nullified. The said letter reads at paragraph 2 as follows: -

“Takaungu Adjudication Section was declared as per Cap 284 Land Adjudication Act and later nullified through Civil Case No. 185 of 1991. This led to cancellation of allocation, which was being undertaken within Takaungu Adjudication Section. Hence, the property is now under the ownership of the Mazrui family.”

40. The Defendant produced the letter dated 23rd August 2018 written by Mary Muteti, the Land Adjudication and Settlement Officer, Kilifi North, Kilifi South, Ganze, Kaloleni, and Rabai Subcounties, which stated that the Takaungu Adjudication Section was nullified through Civil Case No. 185 of 1991.

41. It should be noted that this Judgment was never set aside or appealed against; therefore, it still stands, making the suit land property of the Mazrui family. The said ruling by Olola J in Asha Ali Abdalla & another v Mombasa Cement Limited [2018] eKLR, the court held that:

“The said letter appears to me to lend credence to

the Defendant's case that the land in issue initially belonged to the Mazrui family. The same was allocated to the Plaintiff upon the creation of the Takaungu Adjudication Section after the repeal of the Mazrui Lands Trust Act (Cap 286) by the Mazrui Lands Trust (Repeal) Act in 1989. From the material placed before me, it was evident that the repeal of the Act was challenged vide Mombasa High Court Constitutional Petition No. 185 of 1991. After the hearing of the said case, a Judgment was delivered on 19th July 2012, which declared the repeal unconstitutional. That decision thus reverted the land to its original owners, and the Takaungu Adjudication register was, by implication, nullified. The Plaintiffs did not deny that the land in question fell under the Mazrui Lands Trust Act. Neither did they contest the effect of the decision made in Mombasa Constitutional Petition No. 185 of 1991. As it were, the Defendants have demonstrated that they leased the portion of land in dispute from the Trustees of the Mazrui family, who are ipso facto, the owners of the land in dispute."

62. From the above, it seems that there are two conflicting land ownership regimes: one for the plaintiffs under an adjudication process resulting from the repeal of the Mazrui Lands Trust Act, and the other for the defendant, who claims

they leased the suit properties from the Mazrui and that the judgment mentioned above restored the land rights that had been taken away by the repeal of the Act but were reinstated by the High Court.

63. At the end of the day, the plaintiffs did not prove that their parcels of land fell within a Trust Land and were available for adjudication, as opposed to the Mazrui Lands Trust Act, within the scope of the land that reverted to the Mazrui by dint of Mombasa HCCC No. 185 of 1991. This court thus cannot resolve the conundrum created by the two conflicting regimes.

64. This conundrum is further complicated by the fact that the defendant already purchased some of the parcels claimed by some of the plaintiffs during the pendency of the Mombasa case.

65. In conclusion, this case highlights one of the harsh realities of extended delays in settling lawsuits, which can substantially alter the core of the original cause of action and the foundation of a suit.

66. The upshot is that the plaintiffs' suit(s) therefore fail with costs.

Dated, signed, and electronically delivered in

Malindi on 12th day of November, 2025.

E. K. MAKORI

JUDGE

In the presence of:

Mr. Shujaa for the Plaintiffs

Ms. Mango for the Defendant