

**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: GATEMBU, MURGOR & NYAMWEYA,

JJ.A.) CIVIL APPEAL NO. E039 OF 2023

BETWEEN

PHILOMENA MWIKALI MUANGI.....APPELLANT

AND

CONSTITUENCY DEVELOPMENT

FUND

COMMITTEE, NYALI CONSTITUENCY.....1ST RESPONDENT

THE LAND REGISTRAR, MOMBASA.....2ND RESPONDENT

*(Being an appeal from the Judgment of the Environment
and Land Court of Kenya at Mombasa (N.A. Matheka, J.)
dated 29th June 2022*

in

***ELC Case No. 319 of
2017)***

JUDGMENT OF THE COURT

1. The appellant, Philomena Mwikali Muangi, is dissatisfied with the judgment of the Environment and Land Court at Mombasa (**N. Matheka, J.**) delivered on 29th June 2022 dismissing her claim in Mombasa ELC Case No. 319 of 2017. In the suit she had sought to be declared the lawful proprietor of the property known as Title Number Mombasa/Mwembelegeza/1581; an order directing the 2nd respondent to remove the restriction restricting dealings in that property; a declaration that the construction carried

out on the property is unlawful; a permanent injunction restraining the respondent from constructing, developing,

trespassing, occupying or in any other manner dealing with the property; and an order compelling the respondents to demolish the improvements put up on the property. In the alternative, she sought an order for compensation for the value of the property as well as damages and costs.

2. The appellant's claim before the Environment and Land Court (ELC) was that she was allocated the property vide a letter of allotment dated 29th March 2001; that upon complying with all stipulated requirements in the allotment letter, she was issued with a Title Deed dated 24th October 2005 in respect of the property.
3. She averred that the property remained undeveloped until sometime in September 2017 when construction of a Chief's Office and a Police Post commenced; that she was never notified of the purported acquisition of the property by the respondents; that her demands to the respondents to stop the illegal construction on her property were ignored; and that the respondents had illegally and forcefully taken over possession of the property and denied her the use of it.
4. In their defence, the respondents pleaded mainly that the property "is indeed reserved and designated as a public utility plot not available for private ownership"; that the property "was set aside in the Mwembelegaza Settlement Scheme as a public utility plot meant for public purposes only" and the registration of the appellant as proprietor was irregular and illegal; that in any event the letter of offer

dated 29th March 2001 had express conditions that the appellant

did not fulfil; that for over 16 years the appellant did not occupy or carry out any development on the property indicating that she was well aware that it was public utility plot; that to grant the order sought by the appellant for demolition of the development would result in colossal loss and wastage of public resources.

5. During the trial, the appellant explained the process through which she acquired the property commencing with the allotment of the property to her vide a letter dated 29th March 2001; that she made the requisite payments and the property was discharged by the Settlement Fund Trustees (SFT) which then transferred the property to her and a Title Deed issued in her favour; that she was surprised to learn a restriction had been registered against the title restricting dealings with it on the basis that it “is public utility land”; and that the respondents had therefore trespassed and wrongfully began construction.
6. The defence called Sammy Mchombo, Land Adjudication and Settlement Officer, Mombasa within whose jurisdiction Mwembelegaza Settlement Scheme lay. He stated that the property “was originally allocated and left as an open space for public utility” and the list of allocation in the scheme forwarded to the Director of Land Adjudication and Settlement in 1998 reflected that position; that in the year 2007, the Land Adjudication and Settlement Officer wrote to the Land Registrar Mombasa to restrict dealings with the

property on account of “the rampant grabbing of public land...”.

7. Upon reviewing the oral and documentary evidence presented at the trial and relevant decided cases, the learned Judge of the ELC dismissed the appellant’s suit on the grounds that the suit property is public land not available for private allocation.
8. The appellant has challenged that judgment on grounds set out in her Memorandum of Appeal namely that the Judge wrongly decreed that the appellant fraudulently and illegally acquired the property when there was no proof; erred in failing to hold that the appellant followed due process in acquiring the property and was properly issued with a valid Title Deed; failed to appreciate that the appellant was not given a hearing before the property was taken away by the respondents; and erred in failing to sufficiently and correctly consider, evaluate and analyze the evidence and the submissions.
9. We heard the appeal on 9th July 2025. Learned counsel **Mr. Wachira** appeared for the appellant. Learned counsel **Mr. Kiprono** held brief for Mr. Kimei for the respondents. Mr. Wachira relied on his written submissions dated 22nd November 2024 as well as oral arguments. Mr. Kiprono relied entirely on the respondents’ written submissions dated 27th January 2025.

10. It was urged for the appellant that the property was allocated to her through the allotment letter in March 2003 and subsequently issued with a Title Deed on October 24, 2005, after paying all requisite fees and complying with acquisition procedures; that in recognition of sanctity of Title, Section 24(a) of the Land Registration Act provides that the registration of a person as a proprietor vests absolute ownership in them; that once an allotment letter is issued and conditions are met, the land is no longer available for reallocation unless the first allocation is validly and lawfully cancelled.
11. It was submitted that the appellant's constitutional rights under Article 40 of the Constitution were violated and that the State cannot deprive a person of property unless it is for a public purpose and involves prompt payment of full and just compensation; that although the respondents alleged the Title Deed was obtained fraudulently, no evidence of fraud whatsoever was tendered; that the registration of a restriction against the title was done in violation of due process as no notice was given to her and was thus condemned unheard as she was never given a chance to explain how she acquired the property before it was taken.
12. It was submitted that the actions by the respondents amount to a compulsory acquisition that ignored constitutional procedures under Article 40(3) leading to her loss of property valued at Ksh.4,000,000.00.

13. Counsel concluded by urging the Court to allow the appeal and order the respondents to compensate the appellant for the current value of the property and award her the costs of the legal proceedings.
14. Counsel for the respondents submitted that from the onset the property was set aside for use as a public utility (an open space) within the Mwembelegeza Squatter Settlement Scheme and was not available for allotment as private property; that the trial court correctly held that the acquisition of the property by the appellant was irregular; that the trial Judge's findings are well supported by the evidence including the final allocation/adjudication list for the settlement scheme which clearly identifies Plot 1581 as an open space for public utility; the 2016 survey report which confirms that the property conforms to the Registry Index Map, which outlines it as public land; that the appellant was not listed among the squatters who were the intended beneficiaries of the settlement scheme.
15. It was submitted further that the Appellant failed to perform due diligence to establish the "root of the title"; that had the appellant perused the Land Adjudication Office records, she would have discovered the land was not available for private allocation. Cited was the decision of the Supreme Court of Kenya in the case of **Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC30(KLR).**

16. It was submitted further on the strength of the decision of the Court in **Shah v Kenya National Highways Authority (Civil Appeal 20 of 2018)[2023]KECA 404 (KLR)** that a title is not protected if the land was set aside for public utility; that any alienation of such land for private use is considered illegal and void *ab initio* regardless of whether the current holder acted without express culpability.
17. On the alternative claim for damages, it was submitted that the appellant cannot claim a loss from property that was never available for private ownership; that one cannot claim damages arising from an action rooted in an illegality.
18. Counsel concluded by urging the Court to dismiss the appeal in its entirety and award costs to the respondents.
- 19.** We have considered the appeal and the submissions mindful of our duty on first appeal under Rule 31(1)(a) of the Court of Appeal Rules. On the role of the Court on a first appeal such as this, we echo the words of the Court in the case of **Odera t/a AJ Odera & Associates vs. Machira t/a Machira & Company Advocates (Civil Appeal 161 of 1999) [2013] KECA 208 (KLR)** that:
- “...our primary role as a first appellate court [is] to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”***
20. In stating so, the Court cited an earlier decision of the Court in **Kenya Ports Authority vs. Kuston (Kenya) Limited**

(2009) 2 EA 212 where it was held:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

21. Bearing that in mind, the main issue for our determination is whether the Judge erred in dismissing the appellant’s suit on the basis that she un-procedurally obtained title to public land that was not available for allotment as private land. Secondary to that is the question whether the appellant’s alternative claim for compensation is well founded.

22. In dismissing the appellant’s suit, the learned Judge held as follows:

“In a nutshell, I find that the [appellant] un-procedurally obtained title to the suit property as the same had been alienated as public land and is not available for conversion to private Land. I find the [appellant] has failed to prove a case on the balance of probabilities and a dismissed with costs.”

23. Is that finding supported by the evidence? As already indicated, the appellant (PW1) testified on her own behalf, while Sammy Mchombo (DW1), a Land Adjudication and Settlement Officer, Mombasa testified on behalf of the respondents.

24. The appellant demonstrated that the property was offered to her by the Ministry of Lands and Settlement through a letter of allotment dated 29th March 2001. In that letter, the

Director Land Adjudication and Settlement communicated
to

the appellant that her “application for a settlement plot has been successful” and that the District Settlement Plot Selection Committee offered her “plot No. 1581 of approximately 0.05 Ha at Mwembelegeza Settlement Scheme.” The appellant was then required to report to the District Land Adjudication and Settlement to be “shown the plot boundaries and be issued with a letter confirming this before documentation.” The offer was expressed to be valid for 90 days within which she was required to pay the 10% deposit for the plot and be documented failure to which would “lead to cancellation of offer without further notice.”

25. On 15th May 2001, the appellant was issued with a receipt for Kshs.378. SFT discharged the property by an instrument of Discharge of Charge dated 12th February 2002 and a Title Deed in favour of the appellant was issued on 24th October 2005.
26. In her witness statement dated 4th September 2017, the appellant stated that since 2001, the property remained undeveloped “until recently” when construction of a Chief’s Office and a Police Post commenced without her knowledge. She stated that she was never notified of the acquisition of the property.
27. She produced a certificate of official search dated 21st July 2017 which revealed that a Restriction was registered against the title prohibiting dealings with the property on basis that it “is public utility land.”

28. It was her testimony that her advocates letters dated 30th August 2017 and 31st August 2017 addressed the Land Registrar and the Adjudication/Settlement Office respectively seeking clarity whether the plot belongs to the appellant or is a public utility and whether due process was followed in allocation of the property did not elicit a response and thereafter they filed suit by way of a plaint dated 4th September 2017. She maintained that the respondents illegally and forcefully took possession of the property and prayed for judgment as prayed. She produced a valuation report in respect of the property by Musyoki & Associates dated 18th September 2018 placing the value of the vacant plot as Kshs.4,000,000.00.
29. Under cross examination, the appellant confirmed that the property is within Mwembelegeza Settlement Scheme and that she was offered the property within that scheme and paid for the title; that she also bought another plot within the same scheme, namely, Plot No. 956. She stated that she did not know that the suit property was a public utility plot.
30. On his part, Sammy Mchombo (DW1), the Land Adjudication and Settlement Officer testified that based on records in his office, the allocation list in respect of the settlement Scheme that was forwarded to the Director of Land Adjudication and Settlement in 1998, the property was “allocated and left as an open space for public utility.”; that in 2007, the Land Adjudication and Settlement Officer Mombasa wrote to the Land Registrar to restrict dealings

in the property, among

other plots within the scheme, due to what he described as “rampant grabbing of public land meant for public utility”.

31. Produced in support of the defence case was a letter dated 28th March 2007 addressed to the District Land Officer by the District Land Adjudication & Settlement Officer, one Felix Kiteto under the subject reference “Public Utility Plots - Mwembelegeza Settlement Scheme” listing all public utility plots reserved for schools, health centre, administration, public cemetery, etc in the scheme. In relation to Plot No. 1581, the utility was indicated as “open space”. Similarly, a District Surveyor report dated 22nd January 2016 addressed to the Fund Manager, Nyali Constituency Development Fund undertaken for purposes of re-establishing boundaries for parcels indicated that Plot No. 1581 as open space, and that the plot on the ground conformed to the Registry Index Map.
32. Under cross examination, the witness stated that the plots in the scheme were allocated in 1999 and that “1581 was public utility.”; that in 2001 it was allocated to the appellant and that she paid for plot 961, and not 1581 but it was documented as 1581; that she was not a member of the scheme in 1999.
33. Upon reviewing the evidence, the learned Judge was satisfied, as we are, that based on the documents and the testimony to which we have referred, that by the time the property was allocated to the appellant in March 2001, it had been earmarked as “open space”. We are therefore

fully in agreement with the learned Judge's finding:

“...that by the time the [appellant] was allocated the suit property in March 2001, the same was not available to private use as it had already been set aside for public utility.”

34. Having found that the property was not available for allocation in the first place since it had clearly been demarcated as open space, a public utility, the appellant had no protection under the doctrine of indefeasibility of title. In the case of ***Shah & Another vs. Kenya National Highways Authority (supra)***, the Court held as follows:

“1. As a general principle, an individual would not be inoculated from a declaration of defeasibility of title where it was demonstrated that a parcel of land was set aside for public utilities or public purposes and was subsequently irregularly allocated to an individual for private use or private ownership. The principle applied even where it was not demonstrated that the present holder of title expressly acted illegally and without the necessity to prove culpability on the part of the present holder.

2. The principle that an individual would not be inoculated from a declaration of defeasibility of title where it was demonstrated that a parcel of land was set aside for public utilities or public purposes and was subsequently irregularly allocated to an individual for private use or private ownership, was based on the public policy rationale for protecting lands set aside for public utilities and for public purposes and incentivized prospective land owners to perform their due diligence to determine the root title of the parcel of land they were purchasing. It applied with even more jurisprudential force where there were indicative signs that the property might have been set aside for public utilities.”

35. We respectfully agree. It accords with the holding by the Supreme Court in the case of ***Dina Management Limited v County Government of Mombasa & 5 others*** that:

“...the court could not, based on the indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It was not enough for a party to state that they had a lease or title to the property.”

36. That principle, in our view, is equally applicable in the circumstances of this case. For the same reasons, the question of compensation for the “loss” of irregularly allocated property would be inimical and does not arise.

37. The appeal fails and is dismissed with costs to the respondents.

Dated and delivered at Mombasa this 27th day of February 2026.

S. GATEMBU KAIRU, FCI Arb, C.Arb.

.....
JUDGE OF APPEAL

A.K. MURGOR

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed
DEPUTY REGISTRAR