



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 120 OF 2011

FRANCIS MUNYAO MULINGE

ZIPORAH MUKONYO KIMEU

FREDRICK MUTUA MULINGE.....PLAINTIFFS

-VERSUS-

GLADYS MPONDA & 5 OTHERS.....DEFENDANTS

JUDGEMENT

1. Vide an amended plaint dated 12th October 2012, the three plaintiffs brought this suit against the Six defendants claiming the following loss as particularised in paragraph 15 of the plaint. They asked the Court to enter judgement on the following terms:

(a) A declaration that the Title No. Kilifi/Mtwapa/ 536 is null and void

(b) A mandatory injunction compelling the 1st Defendant to demolish and pull down the fence erected on the suit properties and to give vacant possession of the suit properties.

(c) In the alternative damages for unlawful allotment of plot Nos. 615, 616, 617, 618, 619, 627, 628, 630, 611, 622, 614, 621, 607, 608, 609 and 610 Section IV/MN to the plaintiffs.

(d) General damages for trespass of Land

(e) Costs of this suit and other incidentals thereto.

2. The 1st defendant opposed the suit by filing her defence and counter – claim later amended and filed on 25th January 2013. The 1st defendant pleaded that she is occupying plot No Kilifi/Mtwapa/536 belonging to her late father David Mitchel and not the suit premises being claimed by the plaintiffs. She counter – claimed for an *order of permanent injunction restraining the plaintiffs from interfering with her quiet possession. She also urged the Court to dismiss the plaintiffs' suit with costs.*

3. The 2nd – 6th defendants did file a defence dated 11th July 2013 denying the claim *in toto*. In their defence, they also pleaded that the suit is incurably defective for failure to serve the Attorney General with *notice of intention to sue* prior to the filing of the claim. The 2nd -6th defendants thus urged the court to dismiss the plaintiffs claim with costs to them.

4. The 1st plaintiff testified as **PW 1** and gave her evidence on 19.2.2014 before my late brother Mukunya J. He began by producing the *notice to sue the government* served on the A.G. as *Pex 6*. That there are 16 pieces of land in his claim. **PW 1** referred to the title filed by the 1st defendant and noted that the same was registered in the name of David Mitchell four months before he died. That the document from the Mtwapa Settlement Scheme submitted to the Registrar on 6th May 1992 was done after the title was already out. **PW 1** continued that before he purchased his parcels, he confirmed they were vacant. His first letter of allotment is dated 8th December 1995. That by a letter dated 19th December addressed to the Commissioner of Lands requesting for drawing of PDP, the Kilifi Office wrote back a letter confirming the area is vacant. These documents were produced as a bundle of title deeds & allotment letters as *Pex 1 (a) – (f)*. **PW 1** stated further that plot No 628 has no title but has a letter of allotment dated 19.1.1996. That he sold plot Nos 168, 627, 622 & 614.

5. The first plaintiff further told the Court that he was told about the plots by his friend and he applied for the same in 1995. Their

application for the 12 acres was received on 11th January 1996 which letter said they were approving uncommitted government land which letter is produced as *Pex 2*. Mr Munyao Mulinge stated further that he paid for the plots and had original receipts for 4 of the plots. Others they did not pay up because they found another person claiming them. The receipts are produced as a bundle as *Pex 3*. The map sheet approved by director of survey produced also as *Pex 4*.

6. **PW1** continued that the 1st defendant came and fenced off the plots and started building structures for chicken. He learnt of the 1st defendant's actions in 2010. He asked her to leave but she refused hence the filing of this suit. The witness stated that he took a loan using the title of plot No 607 as security which loan he is still paying. He asked to be given an order of eviction plus costs of the suit. The witness also referred to the mutation for Kilifi/Mtwapa/453 marked as MFI 5 which mutation according to him created plot No 536. He blamed the 2nd – 6th defendants for backdating the issuance of title No 536 to rule out his plots.

7. The witness on cross examination by Mr Wafula advocate for 1st defendant stated that the plots were allocated to him, his wife and his brother. That the application for a plot was received on 11.1.1996 and the purpose for the plots indicated as residential. On 21.6.1996, the application was forwarded to the Commissioner of Lands & Permanent Secretary who then issued a letter of allotment on 24.6.1996. The witness could not explain why some of the letters of allotment were issued on 19.1.1996 before final approvals obtained. **PW1** said he was not aware plot No 242 was allocated to David Mitchel. The witness was then shown documentation of how plot 242 was acquired by the advocate.

8. That the plaintiffs' titles were under Mombasa titles registry while the Mtwapa Settlement Scheme titles issued under the RLA was registered in Kilifi lands registry. The 1st plaintiff said he did not acquire his plot under Mtwapa Settlement Scheme. That if it is true 242 became 536 then the suit plots were not available for allocation. None of the people he sold to the plots are on the land. He confirmed some of the allotments were not paid for.

9. In cross – examination by Ms Luta State counsel appearing for the 2nd – 6th defendants the witness said he sold some plots in 2005. He said that he paid for some of the plots in March 1997. That when Kuguru did the survey, he was on the plot but he did not see any beacon. In 2010, he found a hen pen and a workers' house. That where plot No 536 is the same place he was given. That the Land Registrar has signed the mutation form for plot 453. There is no issue of ownership on the mutation and it is not written on it that it is for backdating of a title. That when he sold the land, the same was empty.

10. In re – examination, he said he saw the mutation forms and title deeds. He paid in 1997 after he got the allotments. That when he was given the letters of allotment, he did not know how they were made. His mutation No 23701 are referred to in the map. The documents the lawyer showed him were for No 242 and 452. He does not know all the plots. That if he did not pay for the plots, the person to complain is the government.

11. CLYDE UMACA SILAS testified as **PW 2**. He is a surveyor working with the Ministry of Lands based in Kilifi. **PW 2** said that they keep mutation at district levels. That the mutation dated 31.7.2000 for plot 453 registered in Kilifi had an alteration on the acreage without being counter – signed. That he looked for a copy of the same at Kilifi Lands registry but did not find one. **PW 2's** designation is the deputy District Surveyor. He stated further that mutations are prepared in triplicate; 1st copy left at Kilifi, 2nd copy sent to Mombasa Provincial Survey headquarters and last copy to the Registrar's office. The copy certified by the provincial office Mombasa had the applicant's name reading Hariet Kadzo Mitchel.

12. **PW 2** in cross – examination said he has seen the allocation of land in Mabweni, Mritini & Vipingo. That allocation of land under the settlement scheme is done by the Director of land administration. He knew nothing about the establishment of a settlement scheme. He knew plot 536 is under the scheme. **PW 2** said he did not establish how David Mitchel obtained the suit land. That page 2 of the mutation meant boundaries were to be picked as they existed on the ground and that it was not a subdivision. That the person who picked the boundaries is his senior based in Nairobi. That plot 242 & 536 are on the same spot on the ground as per the sketch but they have different shapes. That Majengo village is on plot No 453 and it is sitting on the same position in the mutation form. That surveyors also make mistakes and it is possible to have a plot on the ground and not be included on the map.

13. In further cross – examination by Ms Luta for 2nd -6th defendants, **PW 2** said most of the evidence he gave was based on what he was shown here. That by the time of issuance of the certificate of outright purchase in 1988, the scheme was not surveyed. In re – examination, **PW 2** said he did not have the plan for Mtwapa Settlement Scheme. That the title for plot 536 was issued on 9.4.1992 while the letter asking for picking of the boundaries is dated 28.4.1992. That Majengo village is measuring 15.29 hectares and that it was part of the settlement scheme.

14. The 2nd plaintiff testified as **PW 3**. She said they acquired their plots in 1995 after application was made to the Commissioner of Lands. She produced a copy of title for plot No 608 as *Pex 8*, plot 610 – *Pex 9*, 615 – *Pex 10*. She had a letter of allotment for plot No 613 – *Pex 11* and deed plan dated 11th September 1997 produced as *Pex 12*. Letter of allotment for plot No 620 dated 5.8.1996 *Pex 13* & deed plan as *Pex 14*, letter of allotment for plot no 609 dated 19.1.1996 – *Pex 15* & deed plan – *Pex 16*. She also produced receipts made in respect of the said plots in March 1997 as *Pex 17 (a), (b) & (c)*. That she visited the land in 2010 and found somebody had fenced the plots and prevented them from accessing the same.

15. She learnt the 1st defendant was the trespasser claiming to have a title for the same. She also learnt that plot No 536 was hived off plot No 453 on 31.7.2000 but the title deed claimed to have been issued on 9.4.1992. **PW 3** said she has suffered losses as the costs of building has gone up. She blamed the 2nd – 6th defendants for issuing an invalid title. She prayed for an order of vacant possession & costs of the suit.

16. In cross – examination, **PW 3** said she did not know how she was given a letter of allotment before approval. That as per the conditions in allotment, the payment for the offer was to be done within 30 days. That according to the letter dated 28.4.92, the attached sketch showed

where plot 536 was. That she never received a letter of offer from the Director of Settlement Fund Trustees. She said plot 453 is not hers. In re – examination she said the letter of 8.8.1978 from SFT addressed to plot 452 and the plot offered is No 242. That plot No 536 was hived from plot No 453. She could not confirm that plot No 536 sits on her plot. That she visited her plots many times.

17. The 3rd plaintiff testified as **PW 4** on 10th October 2016. He said his plot is No 611 in Mtwapa/Majengo. That while at work, in 1995 he heard the government was allocating land in the suit area. He made an application in January 1996 and got an allotment on 5.8.1996. His advocate misplaced the original. That the land was surveyed and a deed plan dated 11.7.1997 prepared. The deed plan produced as *Pex 18*. He has not received title for his plot. He later heard the 1st defendant was claiming the land. **PW 4** like his co – plaintiffs is also asking for vacant possession.

18. In cross – examination, he said there was no notice of vacant government land. He only knew about his plot. That he went to survey office in Kilifi and confirmed it was uncommitted government. That he filled the form as provided which had a map at Kilifi. That he wanted this case finalised before making payment. According to the 1st defendant's documents, plot No 242 had been given to David Mitchel. That the area given is approximately 12 acres. That when he made the application, the land was not fenced nor occupied by anyone. He did not know whether the land was unavailable for allocation. He wants the house demolished. That if the 1st defendant paid for the plot No 242, then the same was unavailable for allocation to anyone else.

19. In further cross – examination by the state counsel, he said he visited the suit plot several times but he never took measurements. That the boundaries were on the government map. It is his brother who submitted the application. In re – examination, **PW 4** said when he applied, the land was said to be government land not settlement scheme. That the papers shown to him by 1st defendant refers to Mtwapa Settlement Scheme. His plot is not in the scheme. This marked the close of the plaintiffs' case.

20. The defendants opened their case on 28.1.2017. The 1st defendant testified as **DW 1**. She said the suit land belongs to her late father David Mitchel. That the late Mitchel got the land on 22.9.1969 from the Mtwapa Settlement Scheme. She said that he had an agreement with Mtwapa Settlement Scheme and paid for it in 1975 in respect of plot No 242. She produced as *Dex 1*. She produced offer letter from Mtwapa Settlement Scheme for plot No 452 as *Dex 2*. That plot No 452 was the number for the whole scheme. That pursuant to the offer letter, the plot 242 was subsequently charged to the SFT on 28.10.1978. **DW 1** produced the charge document as *Dex 3* and evidence of loan repayment as *Dex 4*. **DW 1** continued that the SFT issued them with certificate of outright purchase on 23.2.1988 as *Dex 5* and discharge of charge dated 19.8.1991 as *Dex 6*. That the suit plot neighbours Majengo village which is occupied by squatters. She also produced a letter from the survey office which picked the measurements of the plot on the ground as *MFID 7*.

21. The 1st defendant continued that plot 242 is reflected on the RIM for Mtwapa as 536 and her family occupies it. That the title was issued to David Mitchel on 9.4.1992 and it is measuring 5.81 ha. Copy of the title produced as *Dex 9*. She also produced a schedule from the scheme which had the change of numbers that included plot 242 changed to plot 536 as *Dex 10* and D.O's letter over the same as *MFID11*. The witness produced correspondences over the omission of plot 242 on the survey map as *Dex 12 & 13*. She denied the plaintiffs' claim stating that the history of their land began in 1969. That they are using the land for farming as well as running a school and they have built a house for the caretaker. She asked the Court to dismiss the plaintiffs' case with costs.

22. In cross – examination, **DW 1** stated that the letter complaining of omission in the Majengo village map is dated 4.2.2000. That they have not had any boundary dispute. The neighbouring plot would be 243. That the letter dated 23.2.1999 refers to boundary dispute between plot Nos 536, 537 & 539. On the map the neighbouring plots are 452, 417, 2305 & 2306. That she did not know what should have come first between the schedule dated 16.5.1992 and the title dated 9.4.1992. That in the year 2000, the letter was referring to the error. That she got on to the land in 2010 but has always known about the plot. In re – examination, **DW 1** stated that the old number for plot 417 is 243. That their plot was only missing from the map sheet but it existed on the ground.

23. Harriet Mitchel Mponda testified as **DW 2**. She is the mother of the 1st defendant. That she worked with KPA until 1989. That after getting the land in 1969, they were using it for farming and rearing animals and built a house on it in 1970. That currently it is being used by her children. **DW 2** stated the land was not available to be given to the plaintiffs in 1996 since she was using it. That they paid the loan in instalments till payment in full. She urged the Court to dismiss the plaintiffs' claim.

24. In cross – examination, **DW 2** stated that they were living in Bombolulu at the time of allocation. That the children are not living on the land but they are using it. That she does remember the surveyor came and demarcated the land but could not recall the dates.

25. FELIX MWAWASI KITETO who is the Chief Land Adjudication & Settlement officer testified as **DW 3**. He said he had with him records for plot 242. That Mtwapa Settlement Scheme was established in 1977 with about 600 plots created within the scheme. He had a roll of the 605 allottees with plot No 242 shown in the name of David Mitchel. That by the time of allocation, the plots should have fixed boundaries. That the loan to SFT was fully paid & a certificate of outright purchase given to the allottee. That he was to be given freehold title after the survey. **DW 3** was aware plot 242 was missing in the map from the copies of correspondences he had. That the new number of 536 was given by the survey department. He also gave the example of plot numbers 229 which changed to 404; 239 to 414; 241 to 416. That he acted on the complaint lodged by **DW 2** as per the letters produced. That as the SFT, they have not given the 1st defendant another plot other than where he is. He produced the letter dated 28.4.1992 as *Dex 16*. He was also not aware that someone was claiming plot 242. That all plots within Mtwapa SFT fall within Kilifi Lands registry. **DW 3** produced copies of his records as *Dex 17*. **DW 3** continued that the sketch map (*Dex 8*) shows plot 242 was sitting on the same position as plot 536.

26. In cross – examination, **DW 3** stated he is the agent of SFT on the ground. That he has never physically visited the suit plot. He did not know the other plot numbers in dispute or their location on the ground. A map is usually prepared by the survey then brought to the committee to allocate. That the Land Registrar issues titles as per numbers given to him so 1st defendant's title ought to read 242. As per the correspondence, the plot picked was No. 536. That the correction was done around April 1992. That the amendment for 536 on the RIM was done on 6th November 2000. That Majengo village is not part of the Mtwapa Settlement Scheme. In re – examination **DW 3** stated that from their roll, plot Nos 229 – 605 were changed from old to new numbers by the survey department. That marked the close of the 1st

defendants' case.

27. Joseph Taura Bao testified as **DW 4**. He is the Land Registrar based in Kilifi. He had documents in respect of plot No 242 on the ground and final area list produced as *Dex 21* together with discharge of charge – *Dex22*. His work was to register documents as presented.

28. In cross – examination, **DW 4** said the discharge of charge presented for registration was for plot 242 and the date of transfer is 8.4.1992. That the change in number was on account of the letter dated 28.4.1992. In cross examination by Wafula appearing for 1st defendant, **DW 4** said the land was allocated by the settlement department and the sketch map was drawn by the survey department. That the letter dated 28.4.1992 said plot 242 was omitted from the map. This also marked the close of 2nd – 6th defendants' case.

29. Parties then filed written submissions within the agreed timelines. The plaintiffs have raised the issue of locus of the 1st defendant in this suit. It is noteworthy that they are the ones who sued her. Having been sued as a trespasser the law allows her to marshal any type of defence to her claim. Therefore the fact that she is not an administrator to the estate of David Mitchel who is the registered owner of the title no. 536 cannot be used to nullify her defence. The 1st defendant also testified that she is using the suit property together with her brothers and sisters namely; Grace Mponda, Victoria Ngava, John Mponda, Steven Mponda and Rose Mponda

30. The 1st defendant's mother who testified as DW 2 also corroborated the 1st defendant's evidence when she said the land is currently being used by her children. If the plaintiffs are of the view that the 1st defendant lacks locus standi to bring the claim on behalf of David Mitchel then they ought to have sued the administrator of the estate of the late David Mitchel. Otherwise their prayer for a declaration that the title No Kilifi/Mtwapa/536 is null and void would fail for contravening the rules of natural justice which requires that a person shall not be condemned unheard. In the circumstances I find the submissions on the lack of locus standi of the 1st defendant cannot hold.

31. From the evidence adduced, it appears that it is not in dispute that the plaintiffs' plots occupy the same position on the ground as the 1st defendant's title. The substance of this dispute thus- who owns the parcel of land in question? The plaintiffs lay claim over the same by virtue of having been allocated by the government. To demonstrate their entitlements, they produced the following documents:

- i) *Application form received on 11.1.1996 and approved by the Minister on 25.6.96 for plot measuring 0.4 ha.*
- ii) *Letter of allotment to Francis Mulinge dated 19.1.1996 for unsurveyed plot No. 9 – Majengo Trading Centre, Kilifi for area measuring 0.3 ha on attached plan given as No 31380/111.*
- iii) *Letter of allotment for unsurveyed plot No K - - Majengo dated 5.8.1996 measuring 0.3349 ha dated 5.8.1996.*
- iv) *Letter of Allotment dated 5.8.1996 for unsurveyed plot "E" Majengo measuring 0.4 ha.*
- v) *Letter of Allotment dated 5.8.1996 for plot "1" measuring 0.4 ha.*
- vi) *Letter of Allotment dated 5.8.1996 for plot "C" measuring 0.4 ha*
- vii) *Letter of Allotment dated 5.8.1996 for plot "F" measuring 0.4 ha.*
- viii) *Letter of Allotment dated 19.1.1996 for plot No 4 Majengo Trading Centre Kilifi measuring 0.3 ha.*
- ix) *Letter of Allotment dated 5.8.1996 for plot A measuring 0.4 ha.*
- x) *Receipts for payments made in respect of plots numbers "G"; "D"; 4, 2; 12; 1.*
- xi) *Certificate of title for plot No. MN/IV/607 issued on 27.3.1998.*
- xii) *Title No MN/IV/608 issued on 5th September 1997.*
- xiii) *Title for MN/IV/616 issued on 27.10.2000.*
- xiv) *Title No MN/IV/610 issued on 16th September 1997.*
- xv) *Title for MN/IV/615*

32. Was the land uncommitted and available for allocation to the plaintiffs? From the letters of allotment produced, all the plots are referred to as un-surveyed plots. The plaintiffs testified that the plots were subsequently surveyed and they were issued with titles for some of the plots. That being the registered owners and or holders of letters of allotment of the suit parcels, the 1st defendant is trespassing on their said plots and that she has used the 2nd – 6th defendants to backdate records which defendants then issued her/David Mitchel with a title deed reading Kilifi/Mtwapa/536 and which action is illegal and fraudulent.

33. The 1st defendant on her part contends the suit land was not available for allocation and proceeded in her attempt to establish this fact by presenting to Court the following documents in her bundle inter alia;

1. An agreement dated 5.8.1975
2. Letter of offer dated 8.8.1978
3. Charge dated 28.10.1978
4. Receipt dated 4.12.1986
5. Certificate of outright Purchase dated 23.2.1988
6. Discharge of charge dated 29.7.1991
7. Map (sketch plan)
8. Copy of Title deed for Kilifi/Mtwapa/536
9. Copy of schedule of Numbers
10. Letters dated 28.4.1992 and 29.4.1992
11. Certified copy of final area list
12. Letter from adjudication & settlement office dated 4.2.2000
13. Official search for plot 536 dated 19.6.2014

34. I have compared the two sets of documents provided by the plaintiffs and the 1st defendant. It is proved that the 1st defendant's documents as relate to plot No 242 was regularly issued by the Mtwapa Settlement Fund Trustees. The only question would be if the change of plot No 242 to 536 was in order and if supported by any evidence. In the discharge of charge form dated 29th July 1991 plot 242 is crossed and No 536 put with writings "see Ref KFI/ACS/49/VOL.1/125 of 28.4.1992". The crossing is made pursuant to a letter addressed to the District Settlement Officer Kilifi by a Mr M. A Mwambingu for District Surveyor – Kilifi and the same is copied to the Land Registrar Kilifi. The letter stated that the plot 242 bordered plot No 240, 241, 243, MN/IV/86 and the Majengo village. The letter also enclosed a sketch map of the location of the plot 242.

35. From the evidence of DW 4 Joseph Taura Bao, he confirmed that he had from his records this letter as well as the sketch plan (Dex 20) and also the area list from Mtwapa Settlement Scheme (Dex 21). The plaintiffs took issue with the change of numbers done pursuant to the letter of 28.4.1992 on the basis that it was after the title had been issued on 9.4.1992. Secondly that David Mitchel having been allocated plot no 242, title deed should have been issued bearing the number 242 not 536 as in this case. However going by the evidence of DW 3 Felix Mwawasi Kiteto and documents produced, several of the initial numbers given to the allottees were subsequently changed as seen in the document referred to as Mtwapa Settlement Scheme Nominal Roll.

36. It is the evidence of the defendants that Mtwapa Settlement Scheme plots were created from title No 452 which neighboured Majengo village recorded as plot No 453. The plaintiffs did not demonstrate to the court the location of plot no 242 on the ground to contradict the documentation by the defendants that plot no 536 occupied the same position as plot no 242. PW2 in his evidence conceded that the mutation drawn in the year 2000 referred to picking of boundaries and not subdivisions. The defendants witnesses have shown the Court that the suit plots {since plot 242 or 536 sits on the same place as plaintiffs' plots} was already committed prior to 1996 when the plaintiffs were allocated the plots, it follows that the suit land was not available for allocation as per the provisions of section 3 of the Government Lands Act (*repealed*). Further with the many paper trails by different government departments for the 1st defendant's title Kilifi/Mtwapa/536 issued on 9.4.1992, the allegation that the same was backdated is hollow and not supported by any evidence.

37. In regard to the particulars of fraud and conspiracy pleaded in paragraph 15 of the amended plaint, none of the documents produced and or referred are in the name of the 1st defendant. The 1st defendant as described in the plaint is not the registered owner of plot no 242 and/or 536. In my opinion, the particulars of fraud were not proved against any of the defendants as set out in paragraph 15 (v) on the basis of the evidence led on how the title changed from plot No 242 to plot No 536.

38. Therefore I conclude that the plaintiffs' **prayer (a) in the plaint** lacks merit because of the evidence adduced showing the plots were not available for allocation. Further and in the alternative is that the David Mitchel's title being the 1st in time and fraud having not been proved to vitiate it, it takes priority over the plaintiffs' claim. Secondly, the **prayer (c)** does also failure in view of conditions stated at page 2 of the letters of allotment that the government "**shall not accept liability in case of prior commitment or otherwise**". The claim of loss as particularised under paragraph 15 of the plaint automatically collapses. So does **prayer (b)** on grant of mandatory injunction/vacant possession. The result is the plaintiffs' suit is dismissed with costs to the defendants.

39. Whether or not I enter judgment for the 1st defendant as prayed in the counter-claim, her use & occupation of plot 536 remain undisturbed. Therefore for completeness of record, I do issue an order of permanent injunction restraining the plaintiffs from interfering with the 1st defendant's quiet possession, use and/or occupation of plot No Kilifi/Mtwapa/536.

Dated, signed & delivered at Mombasa this 24th October 2018

A. OMOLLO

JUDGE