



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 63 OF 2011

DORICE ATIENO RAJORU & 145 OTHERS.....PLAINTIFFS

VERSUS

1. MJAHID SUO-CHAIRMAN HARAMBEE MAWENI Committee SELF HELP GROUP

2. REICHARD BAYA- TREASURER HARAMBEE MAWENI Committee SELF HELP GROUP

**3. MOIZ FAZLE ABBAS TAYABALI
RAJABALI.....DEFENDANTS**

J U D G M E N T

Introduction:

1. This suit was filed by 145 Plaintiffs. In the Plaint, the Plaintiffs have averred that they are the original squatters in plot number 546 Maweni before the same was purchased by Harambee Maweni Committee Self Help Group comprising of the Plaintiffs and the 1st and 2nd Defendants.
2. According to the Plaintiffs, the officials of the Self Help Group have colluded with the 3rd Defendant in disposing of plot number 372 which is a public utility within plot number 546 Maweni.
3. The Plaintiffs have averred in the Plaint that Plot number 546 was subdivided into 476 plots; that 228 plots were occupied while the rest were to be utilised for nursery schools, parking slots, social halls, a dispensary, a mosque, cul dusue and open spaces.
4. The Plaintiffs have averred that the 1st Defendant has allocated himself plot number 311 which is an open space; that the 2nd Defendant has allocated himself plot numbers 72 and 73 and that he has also colluded with the 3rd Defendant and sold to him plot number 372 which is a public utility plot.
5. According to the Plaintiffs, the 1st and 2nd Defendants have secretly and unlawfully sold many plots which are meant for public utility to their detriment.
6. In their Defence, the 1st and 2nd Defendants admitted that indeed plot 546 was purchased by Harambee Maweni Committee and subdivided it into 464 sub-plots; that some of the sub-plots were reserved for public utilities and surrendered to the Municipal Council of Malindi and that they have never sold the plots that were reserved for public utilities.

7. According to the 1st and 2nd Defendants, plot numbers 2, 408, 407, 372, 311, 72 and 73 are private plots and are not public utility plots as alleged.

8. On his part, the 3rd Defendant averred in his Defence that the Plaintiffs' suit does not disclose a cause of action as against him.

The Plaintiffs' case:

9. The 2nd Plaintiff, PW1, informed the court that through Maweni Harambee Committee, the squatters who were living on plot number 546 purchased it; that the 1st and 2nd Defendants were the officials of the Committee and that 209 plots were not occupied by squatters while 228 plots were occupied.

10. It was the evidence of PW1 that 4 plots were reserved for nursery schools, 25 plots for parking slots and other plots were reserved for open spaces.

11. PW1 further informed the court that plot number 419 was reserved for a social hall, plot number 408 was reserved for a mosque, plot number 373 was reserved for a cul desue and 2 plots were reserved for Asians.

12. PW1 stated that the Defendants have sold all the plots that had been reserved for public purposes and that the 3rd Defendant acquired plot number 372 which was meant for parking.

13. According to PW1, the 1st and 2nd Defendants were only supposed to sell the open spaces and compensate the squatters and also use the proceeds to process the title documents.

14. However, according to PW1, the said officials ended up selling the plots that were reserved for public utilities too.

15. In cross examination, PW1 stated that he owns plot numbers 546/122 and 124 which were allocated to him; that it was the surveyor who reserved the 209 open spaces in the sub-division scheme and that the open spaces were to be sold to outsiders to raise money.

16. According to the evidence of PW1, the sale of the open spaces to raise funds was agreed upon by the squatters in 1984. However, it was the evidence of PW1 that public utility plots were to be handed over to the squatters and not the Council.

17. PW1 informed the court that when the 3rd Defendant started putting up a building on plot number 372 which was reserved for parking, they demolished it.

18. PW1 admitted that although all the open spaces were sold, he could not tell the people who purchased them; that their officials went against the agreement by selling all the public utilities including roads to third parties and that he could not tell which of the ten (10) officials of the Committee sold the plots.

19. PW2 informed the court that he is one of the original squatters on plot number 546 Maweni.

20. According to PW2, the officials of Harambee Maweni Committee Self Help group were mandated to look for a surveyor and have the whole land subdivided; that the work of the surveyor was accepted by all the squatters and that their officials have been selling public utility plots and vacant plots to the detriment of the squatters.

21. It was the evidence of PW2 that although plot 372 was designated as a parking slot, the same was sold to the 3rd Defendant by the officials of the Committee.

22. According to PW2, the land was to be allocated to 225 squatters and that the open spaces were not supposed to be disposed off.

23. In cross examination, PW2 stated that he bought plot number 145 from the Committee; that he has no road of access to his plot and that plot 546 was subdivided in accordance with the subdivision scheme.
24. According to PW2, the officials of the Committee sold to the 3rd Defendant plot number 372; that although the spaces could be sold, the parking lots were not supposed to be sold and that is why they are opposed to the sale of 372.
25. PW3 informed the court that it is the squatters who bought plot 546 from the owner.
26. According to PW3, they have filed the suit because they do not agree with the manner in which the officials are selling the open spaces and the public utility plots.
27. PW3 informed the court that although plot number 372 was reserved for parking, it was sold to the 3rd Defendant.
28. It was the evidence of PW3 that 211 plots were to be sold to the outsiders to assist in the processing of Title Deeds for the squatters.
29. In cross examination, PW3 stated that she was allocated plot number 315 and that the subdivision scheme for the entire land was approved by the Council in 1998.
30. The Malindi land surveyor, PW4, informed the court that the survey plan for plot number 546 exists.
31. According to PW4, he used the proposed scheme plan to identify the plots for public utilities. PW4 produced a letter dated 25th May, 2012 which according to him identifies the public utilities within the scheme.
32. PW4 also produced the approved survey plan showing the subdivision of plot number 11696/3984 and 1169/92-228 for block 546.
33. According to PW4, the survey plan shows the plots that were to be surrendered to the government.
34. It was the evidence of PW4 that portion numbers 11696/1-8 as captured on FR No. 343/2 were to be surrendered, and so were portion numbers 11696/85-91 captured on F/R No. 343/3.
35. PW4 further stated that plots numbers 11696/229-231 captured on F/R No. 343/4 were also to be surrendered, making the total number of plots that were to be surrendered to be 17.

The Defence case:

36. The 1st Defendant, DW1, informed the court that he is the chairman of Harambee Maweni Committee while the 2nd Defendant, who was the secretary, died on 9th February, 2013; that the Committee was formed for the purpose of buying plot number 546 from the registered owner and that the extra plots were to be sold to raise money.
37. The evidence of DW1 was that the surveyor subdivided the land into 462 subplots as shown in the sub divisional scheme.
38. According to DW1, the plots which were designated as public utility plots were clearly marked as follows:-

1. Parking plots -5, 12, 17, 461, 462, 99, 77, 92, 126, 133, 140, 150, 153, 130, 79, 463, 316, 283, 288, 251, 228, 260, 171, 276, 275 and 211.
2. Nursery plots:- 1, 400, 208 & 458.

3. Open spaces:- 4, 101, 197 and 173

4. Bus stops:- 373 and

5. Social hall/ mosque plot 419

39. DW1 informed the court that after the approval of the scheme, the Committee surrendered the public utility plots to the Municipal Council of Malindi who were to use them for the purposes set out in the scheme.

40. According to DW1, the Council later on surrendered to the Committee some plots that it elected not to use for the suggested amenities and that the Defendants have not allocated to themselves any public utility plots or sold them as alleged.

41. According to DW1, when some of their members missed out on the plots, they requested the Council to surrender some of the plots that they had ear marked for public purposes to them.

42. DW1 stated that the 3rd Defendant bought plot number 372 from Mr. Hemed who had been allocated the land by the Council.

43. In cross examination, DW1 stated that he applied to the Council to allocate him some plots which it did; that the Council agreed to re-surrender the plots including plot 372 which was allocated to Rose Mutinda and that the plot stopped being public land.

44. DW2 informed the court that he is the 3rd Defendant and that he purchased plot number 372 from Mr. Hemed for Kshs.675,000 who had purchased it from Rose Mutinda.

45. According to DW2, the Municipal Council of Malindi approved the building plans and recognised him as the owner of plot No. 372.

Submissions:

46. The Plaintiff's advocate submitted that the Defendants admitted that they sold the plots which were reserved for parking spaces and that the sale of the said plots was illegal, null and void.

47. The 1st and 2nd Defendants' advocate submitted that the Plaintiffs have not adduced any evidence to show that his clients remained in possession of the surrendered public plots; that the Council surrendered some of the public utility plots to the Committee and that those plots were subsequently allocated.

48. The Defendants advocate submitted that the onus was on the Plaintiff to plead each of the public utility plot that was sold by the 1st and 2nd Defendants which they failed to do; that the Council was never sued despite having surrendered the plots to the Committee and that the provisions of the Land Registration Act are not applicable in this case.

Analysis and findings:-

49. It is not in dispute that the squatters who were residing on a parcel of land known as plot no. 546, Malindi formed a group known as "Harambe Maweni Committee" with the sole purpose of purchasing the plot from the registered proprietor.

50. After buying the said plot, the Committee engaged a surveyor who subdivided the parcel of land into 462 plots. The 462 plots were clearly indicated in the sub divisional scheme which was produced in this court.

51. According to the evidence of both the Plaintiffs and the 1st Defendant, 215 plots were occupied by the

squatters while 211 remained vacant.

52. Out of the 211 plots that remained vacant, some were sold to third parties to raise the money that was required to process the title documents while others were reserved for parking, a nursery school, a bus stop, a social hall, and open spaces.

53. The Plaintiffs have enumerated in the Plaint the plots that were reserved for parking, nursery schools, open spaces, a social hall, a dispensary and “Asian” totaling to 38 plots.

54. PW1 and PW2 informed the court that the officials of the Committee were only mandated to sell the vacant plots to third parties and not the plots meant for public utilities and open spaces.

55. According to paragraph 12 of the Plaint, the Plaintiffs averred that the 1st and 2nd Defendants overstepped their mandate whereby the 1st Defendant allocated himself plot number 311 which falls under an open space; the 2nd Defendant (deceased) allocated himself plot number 72 and 73 which was one of the vacant plots that were to be sold and that the 1st and 2nd Defendants colluded with the 3rd Defendant and sold him plot number 372 which is a public utility plot.

56. The Plaintiffs are seeking for an order for cancellation of all unlawful sales and allotments of public utilities and vacant plots within plot number 546 Maweni.

57. Although the Plaintiffs have prayed for the cancellation of the sale by the 1st and 2nd Defendants in respect to the vacant plots – that is plots that were not occupied by the squatters after the subdivision scheme was prepared, no basis has been given for such a prayer to issue.

58. I say so because PW1, PW2 and PW3 informed the court that as members of the Committee, they had authorised their officials to sell all the vacant plots for the purposes of raising money to process the Title Deeds.

59. Consequently, they cannot turn around and say that the sale of those plots was unlawful.

60. All they can ask, in my view, is for a proper account to be presented to the members of the Committee on the number of vacant plots that have been sold to third parties and how the money that has been raised from the sale has been utilised.

61. In any event, the Plaintiff did not adduce evidence to show the number of vacant plots that have been sold to third parties and the specific people who acquired those plots.

62. Without adducing evidence to show that indeed those plots have been sold to third parties or have been acquired by the 1st and 2nd Defendants, the court cannot make an order cancelling the purported sale.

63. It is not in dispute that some of the plots were reserved for public utilities and open spaces.

64. Indeed, the 1st Defendant produced in evidence a copy of the subdivision scheme showing that some plots were reserved for a nursery school, a dispensary, a mosque/church, a social hall, a parking, a bus stop and roads.

65. According to the evidence of DW1, the subdivision scheme for plot no. 546 was approved by the then Municipal Council of Malindi after the open spaces and plots for public utilities were surrendered to the Council.

66. Indeed, it is trite that plots for public utilities and open spaces are usually surrendered to either the Council, the County Government or the National Government. It is either the County Government or the National Government that is required to hold plots meant for public utilities on behalf of residents of the

place where such plots are situated.

67. In fact, in the normal course of things, a the Council, or the County Government, cannot approve a subdivision scheme exceeding a particular acreage unless and until the scheme provides for open spaces and plots for public utilities which are usually surrendered to the Council (or the County Government). That is what must have happened in this case.

68. The surveyor, PW4 stated that the survey plan that was prepared and approved by the Director of Surveys based on the sub-division scheme shows the plots that were surrendered to the then Municipal Council for public utilities.

69. PW4 produced in evidence survey plans number FR NO.343/2, 343/3 and 343/4. According to PW4, the plots which were surrendered to the Council by the Committee were portion numbers 11696/1-8, 11696/85-91 and 11696/229-231 totaling to 17 plots. The number of the plots surrendered for public purpose in those maps differs from the numbers stated in the Plaintiff.

70. When the survey was done, the plot numbers appearing on the subdivision scheme changed. It was the evidence of PW4 that he used the subdivision scheme to identify the plots that were surrendered to the Council after the survey was done. Those plots, according to the surveyors letters of 25th May, 2012, are plot nos 372, 419, 79, 133, 208, 458, 77, 171 and 441.

71. PW4 did not inform the court why, according to the survey plans, a total of 17 plots were reserved for public utilities while the letter of 25th May, 2012 shows nine (9) plots.

72. The evidence of DW1 was that after surrendering the open spaces and the plots meant for public utilities to the Council, the Council re-surrendered some of those plots to the Committee because the Council could not utilise all the plots for the purpose that they were reserved for, after which they allocated them.

73. DW1 produced in evidence a letter dated 4th January, 2008 authored by the Council in which the Town Clerk stated as follows:-

“This is to confirm that the Council has no objection provided the exercise is done transparently and that all the applicants who missed out in the first allocation benefit....The Council would also like to have a complete list of all the remaining public utility plots in your subdivision scheme.”

74. Where a private entity surrenders plots meant for public utilities to the County or National Government, the plots can only be used for the purpose that they have been reserved for. The Council cannot legally allocate such plots to a private entity.

75. However, in the event the Council or Government does not wish to utilise the property for public purposes, then it ought to re-surrender the plot to the person who surrendered it in the first place. The person may then use the land as he wishes.

76. The plots which were reserved for public purposes were surrendered to the Malindi Municipal Council by Harambee Maweni Committee. This was done vide the survey plans that were produced by the surveyor.

77. If, as shown in the letter by the then Municipal Council of Malindi, some of those plots were surrendered to the Committee, then the Committee was to add those plots to the “vacant plots” and sell them in accordance with the agreement that it had with its members.

78. Unfortunately, neither the Plaintiff nor the Defendants provided to this court evidence showing the precise plot numbers that were surrendered to the then Municipal Council of Malindi and the plots that were re-surrendered to the Committee.

79. Having alleged in the Plaint that the 1st and 2nd Defendants unlawfully sold plots meant for public utilities, the burden was on the Plaintiffs to prove that indeed those plots were never re-surrendered to the Committee and how the subsequent sale was unlawful. Indeed, it is not clear to this court the people who bought those plots, except for plot no. 372 owned by the 3rd Defendant.

80. The Plaintiffs' evidence was that plot number 372 was sold by the 1st and 2nd Defendants to the 3rd Defendant.

81. However, the 3rd Defendant informed this court that he bought the plot from a third party.

82. If indeed plot number 372 was one of the plots which had been re-surrendered by the Council because it did not need it for parking, then the Committee was entitled to sell it.

83. The Plaintiffs have not adduced evidence to prove the allegations that the 1st and 2nd Defendant allocated themselves plot numbers 311, 72 and 73 or colluded with the 3rd Defendant to unlawfully sell to him plot number 372.

84. In the absence of evidence to show that indeed the plots reserved for public purposes were unlawfully sold, and to whom, this court cannot issue a blanket order cancelling the alleged sales.

85. Before I pen off, I would like to state that the residents of plot number 546 Malindi ought to take stock of all the plots shown in the sub-division scheme and the survey plans with a view of ascertaining the owners of the said plots and for how much each of vacant plot was sold.

86. It is only after such a forensic audit has been done that the residents can call upon their officials to account for each and every plot that has been allocated in the scheme

87. It is for those reasons that I dismiss the Plaintiffs' Plaint dated 6th June, 2011 with costs.

Dated, signed and delivered in Malindi this **16th** day of **September**, 2016.

O. A. Angote

Judge