



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.38 OF 2015**

**(Formerly Nairobi ELC 1567 of 2014)**

**1. ROSE KASIKU WATIA**

**2. DICKSON KYALO WATIA.....PLAINTIFFS**

**=VERSUS=**

**1. EDWARD WATIA NZILU**

**2. JAMES TEKO LOPOYETUM**

**3. THE NATIONAL LAND COMMISSION**

**4. THE ATTORNEY GENERAL (on behalf of the Government of Kenya & Ministry of Land & Settlement.....DEFENDANTS**

**RULING**

1. What is before me is the Application by the Plaintiffs dated 18<sup>th</sup> December 2014 seeking for the following orders:

(a) **THAT** this honourable court do issue temporary orders restraining, stopping, barring and/or prohibiting the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents from making any payments and/or compensation to the 2<sup>nd</sup> Defendant and/or anybody acting through him in respect of land title Lamu/Hindi/Magogani/682 for land acquired by Lamu Port and Lamu-Southern Sudan Ethiopia Transport corridor (LAPSSET) pending the hearing and determination of this suit.

(b) That the 2<sup>nd</sup> Defendant/Respondent be restrained from selling, transferring and/or dealing in anyway with the suit premises pending the hearing of this suit.

(c) That the 2<sup>nd</sup> Defendant/Respondent be restrained from trespassing, interfering and/or dealing in anyway with the suit premises pending the hearing of this suit.

**(d) That costs of this suit be provided for.**

2. The Plaintiffs' Application is premised on the grounds that they have been in possession and occupation of the suit premises as their family land; that they have learnt that the suit property was fraudulently registered in favour of the 2<sup>nd</sup> Defendant and that the suit property was acquired by the Government for the LAPSET Project and is due for compensation.
3. According to the Plaintiffs, they are the ones who are living on the suit property and that they have never seen the 2<sup>nd</sup> Defendant.
4. In his affidavit, the 2<sup>nd</sup> Defendant deponed that he was lawfully registered as the owner of land known as Lamu/Hindi/Magogoni 682 having obtained it for value from the 1<sup>st</sup> Defendant; that the 1<sup>st</sup> Defendant applied for and obtained the consent of the Board on 25<sup>th</sup> June, 2009 and that the transfer of the suit property was effected on 30<sup>th</sup> June 2009.
5. In her Further Affidavit, the 1<sup>st</sup> Plaintiff deponed that although the land was given to her, all the documents were registered in the name of the 1<sup>st</sup> Defendant being the head of the family.

**Analysis and findings:**

6. The 1<sup>st</sup> Plaintiff is the mother of the 2<sup>nd</sup> Plaintiff.
7. According to the 1<sup>st</sup> Plaintiff's deposition, the suit property was allocated to her although the letter of offer was issued in the name of her husband, the 1<sup>st</sup> Defendant.
8. The documents exhibited by the Plaintiffs shows that indeed a letter of offer dated 15<sup>th</sup> April 1999 was issued to the 1<sup>st</sup> Defendant.
9. Before the Title Deed could be issued, the 1<sup>st</sup> Defendant sold the land to the Plaintiff by way of a transfer dated 30<sup>th</sup> June 2009.
10. The said Transfer was registered on 29<sup>th</sup> July 2009 after the land control board gave its consent on 25<sup>th</sup> June 2009.
11. The Title Deed in respect to the suit property was then issued to the Plaintiff on 29<sup>th</sup> July 2009 under the Registered Land Act, Cap 300.
12. The applicable law in respect to the suit property is the law that was applicable as at the time the title deed was registered in favour of Plaintiff, that is the Registered Land Act.
13. This legal position finds grounding in the provisions of Section 23(3) (c) of the Interpretation and General Provisions Act which provides as follows:

**“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation, or liability acquired, accrued or incurred under a written law so repealed.”**

14. In the case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 others (2012) e KLR**, the Supreme Court held as follows:

**“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relates only to matters of procedure or evidence or prima facie prospective, retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”**

15. Section 162(1) of the Land Act supports the above holding of the court in relation to the applicable land statutes to any dispute. The section provides as follows:-

**“Unless the contrary is specifically provided in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be**

**governed by the law applicable to it immediately prior to the commencement of this Act.”**

16. The only applicable law in the instant case is the repealed RLA. The repealed RLA, unlike the Land Act, did not require spousal consent before a spouse could transfer a parcel of land.
17. Consequently, the Plaintiffs in this matter have not shown, prima facie, that they can challenge the act of the 1<sup>st</sup> Defendant in selling the suit property to the 2<sup>nd</sup> Defendant in the year 2009.
18. To the extent that the 1<sup>st</sup> Defendant has not alleged that the suit property was fraudulently transferred to the 2<sup>nd</sup> Defendant, I find and hold that the Plaintiffs have not established a prima facie case with chances of success.
19. I say so because pursuant to the provisions of Section 143 (1) of the Registered Land Act (repealed), the court can only rectify the register directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.
20. In the instant case, it is only the 1<sup>st</sup> Defendant who can raise such a complaint as against the Plaintiff, which he has not.
21. For those reasons, I dismiss the Plaintiffs' Application dated 18<sup>th</sup> December 2014 with costs.

Dated and delivered in Malindi this **24<sup>th</sup>** day of **July** 2015.

**O. A. Angote**

**Judge**