Mikaal Limited & another v Attorney General & 2 others (Civil Appeal E020 of 2021) [2024] KECA 358 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 358 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E020 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MARCH 22, 2024

BETWEEN

MIKAAL LIMITED ..... 1ST APPELLANT

JOHN KARANJA ..... 2ND APPELLANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

COMMISSIONER OF LANDS ..... 2ND RESPONDENT

DANIEL RUNYA GAMBA ..... 3RD RESPONDENT

(Being an Appeal from the Judgment of the Environment and Land Court at Malindi (J. O. Olola, J.) dated and delivered on 24th October 2019inMalindi ELC Petition No.17 of 2015 (Formerly Mombasa High Court Petition Nos. 12, 13 and 14 of 2011)

JUDGMENT

1. The appeal before us arises from the judgment of the Environment and Land Court at Malindi (J. O. Olola, J.) delivered on 24th October 2019 at Malindi in ELC Case No. 17 of 2015. The case was a consolidation of the High Court Petition Nos. 12, 13 and 14 of 2011, which had been lodged in Mombasa. However, on 22nd October 2015, Anyara Emukule, J. transferred the consolidated petitions to the Environment and Land Court in Malindi for hearing.

2. High Court Petition No. 12 of 2011 was lodged by Mikaal Limited, the 1st appellant herein, vide a petition dated 8th March 2011 wherein the 1st appellant sought: an order compelling the 2nd respondent to compensate the 1st appellant its full value of Chembe/Kibabamche/376 at the rate of Kshs. 10 Million per acre or such other figure as the court shall determine to be the open market value of the suit property; that, in the alternative, a declaration that Plot Chembe/Kibabamche/376 belonged to the 1st appellant; an order compelling the 2nd respondent to remove the embargo together with caution

placed thereon in favour of the 3rd respondent, Daniel Runya Gamba, and for the 2nd respondent to avail Chembe/Kibabamche/376 for occupation by the 1st appellant in vacant possession and free from all encumbrances; and for interests on the main prayer at court rates until full and final settlement.

3. According to the 1st appellant, it acquired leasehold interest in Chembe/Kibabamche/376 measuring 1.0 Ha and valued at Kshs. 25 Million from the Government for a period of 99 years from 1st June 1992, and became the registered owner thereof; that, in 1990, the 2nd respondent placed a general embargo in respect of Chembe/Kibabamche registration areas comprised of, inter alia, Chembe/Kibabamche/376; that, as a result, the 1st appellant was unable to develop, enter upon and/or enjoy its right of ownership of the plot; that, when the embargo aforesaid was lifted in 2010, Chembe/Kibabamche/376 was not among the parcels of land whose embargo was lifted by the 2nd respondent; that no explanation was offered for the 2nd respondent's actions; that the 3rd respondent also placed a caution on Chembe/Kibabamche/376 without any legal basis; and that the 1st appellant lost the use of Chembe/Kibabamche/376, and was apprehensive that its right to own, enjoy and develop the parcel of land would continue being infringed unless the court intervened.

4. However, it was disclosed that, in Malindi High Court Misc. Civil Application No. 37 of 2012, the 1st respondent consented to the removal of an embargo in terms of a consent filed in court on 12th August 2013. It was however asserted by the 1st appellant that the respondents never had any power to register a general embargo over Chembe/Kibabamche/376 and that the caveat had no basis since the 3rd respondent was compensated on 15th December 1998.

5. High Court Petition No. 13 of 2011 was lodged by Michael John Karani, the 2nd appellant herein, vide the petition dated 8th March, 2011 wherein the 1st appellant sought orders that the 2nd respondent be ordered to fulfil its duties and register Plot No. 2016/II/MN in the name of the 2nd appellant, and release the title documents to the 2nd appellant free of encumbrance; that, in the alternative, and in the event that the 2nd respondent was not in a position to strictly comply with the above prayer, the respondents be directed to pay to the 2nd appellant Kshs. 250 Million or such other figure as the court determines to be the best open market value of the said property; and interests on the principal prayer at court rates until full and final settlement.

6. According to the 2nd appellant, the unsurveyed residential Plot No. 46 (now Plot No. 2016/II/MN) was and is government land that was allotted to the late Hon. Bobby Tuva who agreed to sell and transfer his interest thereon to him for a sum of Kshs. 1,500,000/= on 15th December 1998; that the said transfer was approved by the 2nd respondent; that later, when he made inquiries from the 2nd respondent, it became apparent that the 2nd respondent would not finalise the allocation formalities due to the fact that the Prisons Department had objected to the transfer; that it was only fair that the 2nd respondent releases his title or compensate him in the sum of Kshs. 50 Million which, according to him, was the value of the property, or in such figure as the court would determine to be the open market value of the suit property.

7. High Court Petition No. 14 of 2011 dated 17th March 2014 was lodged by both appellants. In it, the appellants sought declaration that the respondents' actions were unconstitutional; an Order that the respondents compensate the appellants for the loss of the land parcel no. Kilifi/Jimba/470 in the sum of Kshs. 59,000,000/=; interest on the second prayer at court rates until full and final settlement; and costs of the petition.

8. In that petition, it was the appellants' case that on payment of the stand premium of Kshs. 100,830/=, they were allotted Plot No. Kilifi/Jimba/470 on 17th April 1996; that, due to political or legal issues, the 2nd respondent placed restriction on some parcels of land in Kilifi/Jimba and Chembe/Kibebemche

Registration Sections as a result of which the 1st appellant's Certificate of Lease was not issued; that the appellants discovered that the suit property was unlawfully subdivided by the respondents and mutated to Plot No. Kilifi/Jimba/1089/1090/1091 and 1153, which were subsequently allocated to indigenous/locally based Mijikenda community members; that, as a result of the respondents' actions, the appellants were unable to peacefully occupy the suit property or obtain title documents; that the respondents did not have power to place general embargo over the suit property, subdivide or allocate the suit property without their consent.

9. In response to the petition no. 12 of 2011, the 1st and 2nd respondents, the Attorney General and the Commissioner of Lands, relied on the Grounds of Opposition dated 4th June 2012 and filed on 5th June 2012, and in which it was stated that:

    1. That the petition is frivolous, vexatious and an abuse of the Court process.
    2. The respondents' decision was proper and in order.
    3. That no constitutional rights have been demonstrated to (be) breached.
    4. That the respondents acted in accordance with the law and their decision was not unconstitutional.

10. At the trial, the appellants relied on their affidavits and called two witnesses in support of their case. PW1, Richard Kimani Kagwe, a director of the 1st appellant, referred the trial court to the affidavit sworn by the 2nd appellant on 8th March 2011 in support of the petition. He told the trial court that the suit property, which was valued at Kshs 25 Million in 2021 was registered in in the 1st appellant's name; that cautions were registered on the suit property by the 2nd and the 3rd respondents, and which were still in existence; that the 1st and 2nd respondents placed an embargo on their title without any explanation and, as a result, the appellants were unable to utilize the land; that the 3rd respondent, Daniel Ginya Gamba, registered a caution in his capacity as an interested party; and that the appellants paid a sum of Kshs 1,083,000/- as compensation to the 3rd respondent on 15th December 1998.

11. PW2, Josephine Wanjiru Osodo, a land valuer, told the court that she carried out a valuation of land parcel No. Chembe/Kibabamshe/376 on 20th February 2012, which measured 2.471 acres. In her opinion, the market value of the said land was Kshs 25 Million.

12. In response, the 3rd respondent filed his replying affidavit dated 14th February 2013 wherein he admitted that the 2nd respondent did put an embargo on all titles to the land in the area where land parcel no. Chembe/Kibabamche/376 was situated, and that the embargo was still in existence; and that the Special Task Force on Kilifi Jimba and Chembe Kibabamshe Scheme in Malindi District prepared a report dated 6th May 2010 which found that there was a dispute in respect of the suit land and recommended the embargo not to be lifted, and hence the advertisement in the Daily Nation of Thursday August 12, 2010.

13. According to the 3rd respondent, the suit land belonged to the family of one Hinzano who had allowed him to occupy it from 1985 to 1998 when Michael John Karanja, a Director of Mikaal Limited, went to him with a title deed for the suit land; that he had no choice but to vacate the suit land, but that he was compensated for the developments he had made on the land; that he did put a caution before he was compensated to protect his interest over the suit land as a licensee; that the appellants took possession of the suit land, put up a structure and installed a caretaker by the name of Lawrence Kazungu and, therefore, it was not true that the appellants had been unable to develop, enter and/or enjoy the right of ownership due to the embargo; that it was within his knowledge that the family of Hinzano had a letter

of allotment and/or documents as proof of ownership, hence the reason the task force recommended the embargo to remain in place; that, in his view, the family of Hinzano should have been made aware of the petition to enable their participation in the proceedings as the orders made therein would affect them.

14. In opposition to Petition No.13 of 2011, the 1st and 2nd respondents filed Grounds of Opposition dated 8th November 2011 on 9th November 2011 against the petition stating:

    i. That the nature of this case demands that the petitioner approaches the court by way of ordinary litigation i.e suit and by a Constitutional Petition;

    ii. That no constitutional issues arise on the face of the Petition as failure to issue title documents amounts to an ordinary claim and not a Constitutional;

    iii. That the annextures to the supporting affidavit are invalid and incapable of granting title to the petitioner or the alleged vendor;

    iv. That the identity of the land in question is nebulous, uncertain and incapable of being verified on the ground;

    v. That Shimo la Tewa prison has had its land fenced off and/or secured and there is no other evidence to show that the land claimed by the petitioner is within the prison's precincts;

    vi. That it is in the public interest that the land in question if it were verified to be in the area occupied by the prison should be allowed to remain in their hands and under the administration and use of the Prisons Department.

    vii. That the petitioner and the alleged vendor have never been in physical possession of the property;

    viii. That the Petition is frivolous, vexatious and otherwise an abuse of the Court process.

15. Further, Joseph Taura Bao, the Land Registrar, Kilifi, Malindi, Kaloleni, Ganze and Rabai areas filed his replying affidavit sworn on 15th August 2014 wherein he averred that Plot No. Kilifi/Jimba/470 was originally registered as Pekiwa Investments Company Limited; that the original suit property was known as Plot No. 148 Jimba, which was later subdivided to several plots one of which was Plot Kilifi/Jimba/470; that the embargo on the plot was lifted by the 2nd respondent vide the Gazette advertisement on 10th August, 2010; and that the resultant subdivision that emanated from the original parcel of land was embargo free.

16. In opposition to Petition No.14 of 2011, the 1st and 2nd respondents filed Grounds of Opposition dated 20th September 2012 on 23rd September 2012 stating:

    i. That the Petition did not comply with the special conditions specifically acceptances of the offer by paying within 30 days and therefore the offer lapsed.

    ii. That the petition is an abuse of the court process as the petitioner has not annexed any correspondences or any attempt to obtain the Certificate of Lease from the government officers concerned.

iii. That without prejudice to ground 1 and 2 herein the petitioner has further in paragraph 8 of his petition alleged that "it is now certain that the 2nd respondent will never issue certificate of lease" which purely speculative and therefore incapable of being ascertained;

iv. That this Court cannot compel the 2nd respondent to carry out statutory duties in a specific was as demanded by the petitioner in para 9 of the petition.

v. That the office of the 2nd respondent has been abolished and its successor is required by law to adhere to statute and this Court would be usurping those powers if it grants the orders sought.

vi. That prayer (a) of the petition pre-supposes that the certificate of lease is ready for collection without availing any evidence

vii. That it is upon the petitioners to show and prove that they have(any) right to the suit property to demand compensation.

17. The respondents did not call any witnesses at the hearing.

18. After hearing the witnesses for the appellants, the learned Judge found that, by a Letter of Allotment dated 19th June 1992 addressed to the 1st appellant, who was offered Plot No. Kilifi/Jimba/470 measuring 3.0 Ha subject to the formal written acceptance of certain conditions therein prescribed. Based on Multiple Hauliers East Africa Ltd vs. The Attorney General & 10 Others (2013) eKLR; and Isaac Gathungu Wanjohi & Another vs. Attorney General & 6 Others Petition 154 of 2011 [2012] eKLR, the learned Judge held that there is a right to private property, and that such property ought not to be taken arbitrarily or without due process; that, however, the right does not extend to property that has been unlawfully acquired; that, in this case, there was no evidence of the embargo or restriction allegedly placed by the respondents; that all that the appellants produced was an advertisement placed by the 2nd respondent in the Daily Nation of 12th August 2010 lifting the restriction in regard to certain parcels of land; and that the fact that the suit property was not listed among those cleared did not necessarily mean that there was an embargo and/or restriction placed thereon.

19. It was further found by the learned Judge that, since the appellants pleaded that the embargo and/or restriction was placed by the respondents on the Kilifi/Jimba and Chembe/Kibabamshe Registration sections in the early 1990s, the appellants must have been aware of the restriction when they received their Letter of Allotment dated 19th June 1992 or thereabout; that whereas the Letter of Allotment required the fulfilment of certain conditions thereon within 30 days from the date it was issued, the appellants did not make any payment until four years later on 17th April 1996; that other than the fact that a third party had filed a caution in regard to the suit property, there was nothing placed before the Court to demonstrate that the appellants had tried to utilize the premises and were stopped from doing so by the respondents; and that, although it was conceded at the trial that the appellants had settled the matter concerning the caution with the 3rd respondent after they paid him a sum of Kshs 1,083,000/-, it was not demonstrated that any attempt was made at the Land Registry to process the title deed.

20. The learned Judge went on to hold that, since the appellants remained in occupation of the land, there was no proof that they suffered any loss to warrant the grant of compensation in the sum of Kshs 59,000,000/- claimed or in any other sum.

21. In this regard, the learned Judge relied on Patrick Musimba vs. National Land Commission & 4 Others(2016) eKLR to the effect that Article 40(3) of *the Constitution* is not just intended to have the

owner of the land who is divested of his property to be compensated, or receive restitution for the loss of his property. It sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence so that, whereas the owner must be compensated, so too the public coffers must not be looted.

22. Consequently, the learned Judge found no merit in the petition, which he dismissed, but made no order as to the costs.

23. Dissatisfied with the said decision, the appellant moved to this Court seeking to overturn the decision on the grounds that the learned Judge erred: in finding that there was no evidence tendered to support the allegation that the embargo or restriction was placed by the 2nd respondent over the suit property and, yet, that was not an issue before him; in finding that there was non-compliance with the conditions in the Letter of Allotment with regard to the payment of the premium when that was not an issue before him; in not finding that the appellants tried to utilize the premises and were stopped from doing so by the respondents; in failing to find that the appellants suffered loss to warrant the grant of compensation by Court in the sum of Kshs. 59,000,000/=; in finding that the appellants obtained the suit property from the Government during an ongoing investigation on allocation of land in affected section; and in not finding that the appellants made attempts at the Land Registry to process the title deed.

24. According to the appellants, no determination was made in Petition Nos. 12 and 13, which had been consolidated, and the decision arrived at by the trial court was against the weight of evidence, law and justice. The appellants therefore urged this Court to set aside the impugned judgment and decree, and remit the matter to the trial court to be heard and determined by another Judge other than J.O Olola, J. They also sought costs of the appeal.

25. We heard this appeal on 11th October 2023 when learned counsel, Mr. Gikandi Ngibuini, appeared for the appellants while learned counsel, Ms. Lutta, appeared for the 1st and 2nd respondents. Though duly served, the advocate on record for the 3rd respondent did not appear at the hearing. Both counsel relied on their written submissions, which we need not reproduce here. Mr Gikandi emphasised that the gist of the appeal was that, although the judgement emanated from three consolidated appeals, the learned trial Judge did not consider all the petitions, but only considered one.

26. We have considered the record of the proceedings placed before us as well as the submissions made.

27. There is no doubt that the judgement appealed from arose from a consolidation of three appeals being High Court Petition Nos. 12, 13 and 14 of 2011, which had initially been lodged in Mombasa. As we indicated at the beginning of this judgement, on 22nd October 2015, Anyara Emukule, J., transferred the petitions to the Environment and Land Court in Malindi for hearing. The consolidated petitions were assigned a new number being ELC Case No. 17 of 2015.

28. However, in his judgement, the learned Judge expressed himself as hereunder:

> This Petition was initially filed at the High Court Mombasa as Petition No. 14 of 2011 on 9th March 2011. By an Amended Petition filed at the said registry on 18th March 2014, Michael John Karanja and Mikaal Ltd (the petitioners).

29. According to the learned Judge, the appellants prayed for:

    a. A declaration that the actions of the respondents as set out in the Petition are unconstitutional;

b. An order that the respondents compensate the appellants for the loss of the suit property in the sum of Kshs 59,000,000/-;

c. Interests on (b) at Court rates until the full and final settlement of (b); and

d. Costs of the Petition.

30. It is clear from the judgement that the only issues dealt with were those that were the subject of Petition NO. 14 of 2021. The learned Judge did not deal with the issues raised in the other two petitions. The legal effect of consolidation is that one composite decision is made, and that determination must deal with all the issues raised in the consolidated causes. Accordingly, the learned Judge was duty bound to identify all the issues in the consolidated petitions and deal with each one of them. Failure to do so would run afoul of Order 21 rule 4 of the Civil Procedure Rules, which provides that:

> Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

31. Rule 5 thereof provides that:

> In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue.

32. This Court in Agnes Nzali Muthoka vs. Insurance Company of East Africa [2001] 1 EA 143 held:

> "It is elementary that a judge has to hear parties, record down as fully as possible what they submit on, crystallise the issues, answer them as fully as possible and eventually hand down a decision."

33. Likewise, in Mohammed Eltaff & 3 others vs.

Dream Camp Kenya Limited [2005] eKLR agreed

that:

> " ...it is indeed a substantial objection to a judgment if it does not dispose of the questions that were presented by the parties for determination by the trial court or that the judgment has left certain issues unresolved."

34. It was also held by this Court (Kwach, JA) in Kukal Properties Development Ltd vs. Tafazzal H. Maloo & 3 others [1993] eKLR that:

> " Nineteen issues were framed for decision by the judge. In his judgment, the judge only dealt with 9 issues leaving 10 undecided. It was the submission of Mrs Dias, for the respondents, that the issues that the judge did not deal with explicitly he had covered by implication. With respect this is not borne out by a perusal of the judgment and in any event this would constitute a violation of the express provisions of order 20 rule 5 of the Civil Procedure Rules... Once issues were framed, the judge was obliged to decide each and every one of them and in failing to do so he committed a serious breach of procedure. This ground of appeal accordingly succeeds."

35. We have said enough to conclude that this appeal, which we find merited, succeeds. We find it neither necessary nor prudent to deal with the other grounds raised in the appeal.

36. We accordingly allow the appeal, set aside the judgement of the learned Judge, and hereby direct that the matter be remitted to the trial court for hearing de novo and determination of all the issues raised in the consolidated petitions before a Judge of the Environment and Land Court other than Olola, J.

37. Since none of the parties were to blame for the manner in which the judgement was reached, we make no order as to costs of this appeal.

38. Those shall be our orders.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL**

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR