Islam & 4 others v Magumba & 2 others (Civil Appeal E006 of 2023) [2024] KECA 1828 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1828 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E006 OF 2023

GWN MACHARIA, JA

DECEMBER 20, 2024

BETWEEN

ISLAM SAID ISLAM .... 1ST APPELLANT

MOHAMED SAID ISLAM .... 2ND APPELLANT

FATUMA SAID MASJERY .... 3RD APPELLANT

SWALEH SAID MASJERY .... 4TH APPELLANT

ARIF OMAR BAKOR .... 5TH APPELLANT

AND

MALIK MBASHE MAGUMBA .... 1ST RESPONDENT

NATIONAL LAND COMMISSION .... 2ND RESPONDENT

KENYA PORTS AUTHORITY .... 3RD RESPONDENT

(Being an appeal from the Judgement of the Environment and Land Court at Mombasa (Olola, J.) dated 22nd September 2022) in ELC Suit No. 73 of 2014)

JUDGMENT

1. In this appeal, Islam Said Islam, Mohamed Said Islam, Fatuma Said Masjery, Swaleh Said Masjery and Arif Omar Bakor (the appellants) are challenging the judgement of the Environment and Land Court (the ELC) (Olola, J.) at Mombasa delivered on 22nd September 2022 in favour of Malik Mbashe Magumba, Kenya Ports Authority and National Land Commission (the respondents).

2. The facts which gave rise to the dispute can be gleaned from the plaint dated 16th April 2014, which was later amended on 25th October 2015. The appellants alleged that they were the owners of unregistered parcels of land known as Nos. 263, 264, 265, 266 and 267 (the suit parcels), measuring a total of 45 acres

respectively and situate at Kililama B Lamu by virtue of customary land rights. It was contended that, in the year 2010, the Langoni Council of Elders sub-divided the suit parcels and numbered them for purposes of registration. The appellants stated that, upon subdivision, they demarcated their respective suit parcels. The appellants were aggrieved that, despite being the alleged owners of the suit parcels, in the year 2012, Malik Mbashe Magumba (the 1st respondent), caused their names to be removed from the list of owners of the suit parcels and replaced them with his own name.

3. Further, it was their averment that The Kenya Ports Authority (the 2nd respondent) embarked on construction of a road, the well-known LAPPSET Project, and that part of the land which was to be affected by the construction belonged to them. The contention of the appellants is that, since The National Land Commission (the 3rd respondent) compulsorily acquired the suit parcels, it was under the legal duty to compensate the bona fide owners of the affected parcels of land. The appellants pleaded that they stood to suffer substantial loss should the 2nd and 3rd respondents compensate the 1st respondent as an imposter at their (the appellants) expense, yet they are the true owners of the suit parcels.

4. Against the above factual background, the appellants asked the trial court to enter judgement against the respondents jointly and severally for: a declaration that they are the owners of the suit parcels of land; an injunction restraining the 1st respondent from occupying, trespassing into, or alienating, or in any other whatsoever manner dealing with the said parcels of land; and an injunction restraining the 2nd and 3rd respondents from occupying, trespassing into, or in any other manner whatsoever dealing with the said suit parcels of land.

5. In response, the 1st respondent filed a defence dated 19th September 2014. He denied that the appellants are the owners of the suit parcels by dint of customary rights, registration and/or transfer; and the existence of the suit parcels of land measuring 45 acres as a result of demarcation. He contended that the Langoni Council of Elders were not bestowed with any legal power or authority to demarcate any land and/or oversee any customary rights. He denied having knowledge of the existence of any list of land owners who were to be compensated upon compulsory land acquisition by the 3rd respondent, destroying the same and/or replacing the names of the appellants with his own.

6. The 1st respondent averred that he has been in occupation of the suit parcels of land, which he allegedly acquired by virtue of Banjuni customary rights; that the appellants are not in possession of the suit parcels of land, save for the 1st appellant to whom he sold an unregistered parcel of land, while the 2nd - 5th appellants were strangers to him with no rights whatsoever over the suit parcels; and that any compensation paid to him was done lawfully as he is in occupation of the suit parcels of land, which he rightfully owns.

7. In its amended defence dated 22nd December 2017, the 2nd respondent made no admission to the allegations raised by the appellants, save to state that the dispute is primarily between the appellants and the 1st respondent; and that the reason for the land acquisition was for a government funded project, and that any compensation for the acquisition would be done with the involvement of the 3rd respondent, and in accordance with *the Constitution*.

8. The 2nd respondent further stated that the dispute between the appellants and the 1st respondent ought not to stand in the way of a Government project which involved the governments of Kenya, Ethiopia and South Sudan; and that the monies due to the rightful owners can be deposited in court by the 3rd respondent pending determination of the dispute. It urged that the appellants' suit against it be dismissed as it disclosed no reasonable cause of action.

9. The 3rd respondent did not participate in the proceedings.

10. The 1st appellant took to the stand on behalf of all appellants and testified as PW1. He stated that he was the owner of the suit portion No. 263 and that the co- appellants are his brothers. He testified that the whole portion of the suit land measures 45 acres; that it was adjudicated by the Government; that each of them was allocated a number; that the list of the adjudicated parcels and to whom they belonged was with one Sharrif Salim Kambaa, one of the elders; and that the 1st respondent was not on the list, but that he only came to occupy the suit parcels when he saw that the Government Project (LAPPSET) was passing through his portion of land. PW1 refuted the claim that he and his co- appellants were paid any money in compensation. It was his evidence that he heard that the 1st respondent had been paid some Ksh.25 million in compensation; and that, for that reason, he (the 1st respondent) should be removed from his land and be ordered to refund the compensation paid to him.

11. PW2, Salim Sharrif aka Sharrif Kabar Omar, testified that he was the Chairman of the Lands Division of the Lamu LAPPSET Steering Committee. He stated that his task was to settle disputes between the squatters who were on the suit land; and that he had a parcel of land therein. He testified that, in the year 2008, the Committee came up with a list of those who should be allocated land in the Kilalani area. He produced the original list prepared on 27th December 2008. It was his testimony that the appellants were from the Bakoori family, but that the 1st respondent was not part of that family. He disagreed with the list of the 2nd respondent, which bore different names, and stood by the assertion that compensation ought to have been undertaken in accordance with the 2008 list.

12. PW3, Mohamed Kombo Abshir, testified that he had been the village headman for the past 25 years at Kililama B; that the 1st - 4th appellants each had 10 acres of land while the 5th appellant had 5 acres in the same area; that the 1st respondent did not have a portion of land in the suit land; that the 1st respondent's land was only 2 acres, but that it was located far away; and that he was aware that people were compensated for their respective parcels.

13. We have noted that the trial court record is not complete. In particular, the defence case proceedings are not on the record. Consequently, we are unable to re-evaluate the evidence of the defence witnesses' as they testified. We shall therefore refer to the summary of their evidence from the trial court's judgement.

14. The 1st respondent testified as DW1. He stated that he was the owner of Plot No. 59 in Kililama area; that he was given the said land by village elders, but that he has not been paid any compensation by the 2nd respondent. In cross- examination, he conceded that he was paid Kshs. 22,500,000/= which was for Plot No. 56 which still belonged to him. DW1 defended himself against the accusation that he changed the particulars of the properties for which compensation was sought, adding that he had no powers to do so. He conceded that the names listed for Plot No. 59 consisted of the names of the Bakori family, Abuluma family and his own name.

15. On behalf of the 2nd respondent, Engineer Peter Rusenge Oremo testified as DW2. It was his testimony that he worked with the 2nd respondent at its Lamu Port as the Project Manager. He stated that he represented the 2nd respondent during the Lamu Port acquisition process; and that the Port is situated in a Government owned land, an area known as Kililama, but that it was occupied by squatters.

16. DW2 went on to state that, in the year 2010, a feasibility study was carried out and persons who were to be affected by the Project were identified; that, pursuant to that survey, the 1st respondent was indicated as the owner of land parcel No. 56. He contended that, before compensation was done, the 3rd respondent caused a list of all persons to be affected by the Project to be published; that, later on, the 2nd respondent released a sum of Ksh. 1.5 Billion for compensation purposes. He denied that the

2nd respondent colluded with the 1st respondent to change the particulars of the owners of the parcels of land who were subject to compensation.

17. Upon consideration of the pleadings, oral testimonies and the written submissions, the trial court concluded that the appellants' suit lacked merit and dismissed it with costs.

18. In arriving at that decision, the trial court (Olola, J.) rightly held that the suit was triggered by the implementation of a Government flagship project under the umbrella of Lamu- Port South Sudan-Ethiopia-Transport Corridor commonly known as the LAPSSET Project. It was also observed that it was not disputed that, for the purpose of construction of the Lamu Port, the National Government acquired various parcels of land in the area through the 3rd respondent for use by the 2nd respondent.

19. On the alleged ownership of the suit parcels by the appellants, the court stated that no evidence was placed before it in the form of an original list of owners, nor a survey report to demonstrate the existence of the said suit parcels; that neither was evidence placed before it to demonstrate that the suit parcels were the ones which compromised Plot No. 59 belonging to the 1st respondent; and that, having failed to show the nexus between the suit parcels with Plot No. 59, the learned Judge held that the court could not issue the orders sought by the appellants against the 1st respondent.

20. On the list produced, which was allegedly authored by the Langoni Council of Elders, it was held that the said list was not signed by any person, and that it did not appear on an official letterhead; and that furthermore, the letters produced by the appellants written to, and received by various Government agencies, made no reference to any of the suit parcels.

21. For the foregoing reasons, the appellants' suit was dismissed with costs.

22. Aggrieved by the judgement of the ELC, the appellants lodged this appeal. In a memorandum of appeal dated 13th February 2023, they raised 4 grounds of appeal, namely that:

> " a) The learned Judge erred in fact and in law in finding that the appellants' names were not included in the names of people published in the Daily Nation Newspaper of 10th December 2014;
>
> b. The learned Judge erred in fact and in law in finding that the appellants were not entitled to any compensation by the 2nd respondent;
>
> c. The learned Judge erred in fact and in law in wrongly evaluating the evidence on record hence coming to a wrong determination; and
>
> d. The learned Judge erred in fact and in law in ordering the appellant to pay costs of the suit."

23. The appellants pray that this appeal be allowed with costs; and that the 2nd respondent be ordered to compensate them.

24. At the hearing of this appeal, learned counsel, Ms. Matoke holding brief for Mr. Magolo, appeared for the appellants, learned counsel Mr. Achoka appeared for the 1st respondent, while learned counsel Mr. Amakobe holding brief for Mr. Stephen Kyandih appeared for the 2nd respondent.

25. Ms. Matoke highlighted the appellants' submissions dated 8th September 2023. She pointed out the aspects of the evidence which she believed the trial court ignored. The first question for determination that we were urged to consider is whether the appellants had a legitimate claim over the suit parcels. She submitted that the suit parcels were unregistered, and that it is the Langoni Council of Elders

who were in charge of allocating and subdividing it to its members. Reference was made to the authority in Nairobi Milimani ELC Case No. 694 of 2012 Caroline Awinja Ochieng & Another vs. Jane Anne Mbithe Gitau & 2 Others (2015) eKLR for the proposition that, in situations where there is an unregistered land, the court should look into the historical acquisition of the parcels of land to determine the ownership.

26 On whether the appellants were entitled to compensation, counsel referred us to page 150 of the Record of Appeal and urged us to find that Plot No. 59 was listed therein, and that it belongs to the Bakoori family of which the appellants are members; and that the 1st respondent is a stranger to the appellants. Counsel drew our attention to the fact that the compensation payment that was set aside to be made to the appellants has been withheld.

27. On behalf of the 1st respondent, Mr. Achoka submitted that in the trial court, the appellants were claiming parcel numbers 263, 264, 265, 266 and 267; that the appellants have never amended their pleadings to include Plot No. 59; that Plot No. 59 is being introduced in this appeal, while it was not a subject of contention before the trial court; that Langoni Council of Elders have no mandate to create a parcel of land; that his client was entitled to Plot number 56 but not 59; and that the only way to prove that Plot number 59 existed was through a survey which has never taken place.

28. Mr. Amakobe for the 2nd respondent fully relied on his written submissions dated 14th June 2024 and a bundle of authorities of even date. He did not wish to highlight them, save to state that the appellants' case did not disclose any reasonable cause of action against the 2nd respondent.

29. As this is a first appeal, we have to discharge our duty by re- appraising ourselves with, and re-evaluating, the evidence adduced before the trial court and draw our own independent conclusions. In so doing, we must bear in mind that we did see or hear the witnesses testify and we must give due regard for that. Our mandate is drawn from rule 31 (1) of this Court's Rules. This mandate was further enunciated in the renown rule in Selle vs. Associated Motor Boat Co. (1968) EA 123, thus:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

30. This Court has pronounced itself on its duty while sitting as a first appellate court in an avalanche of cases such as in the case of Mohamed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja (1986) KECA 21 (KLR) as follows:

> " More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. See Ephantus Mwangi Vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni Vs. Kenya Bus Services (1982-88) 1 KAR 870."

31 Having carefully considered the background of this dispute, the pleadings and submissions of the respective parties and the law, we have deduced that the prominent issues which fall for determination are: whether the appellants were the legitimate owners of the suit parcels; whether they were entitled to compensation in respect of the suit parcels of land; and whether they led evidence in that respect.

32. On behalf of the appellants, the 1st appellant testified that they were entitled to, and were allocated, the suit parcels of land, namely Nos. 263, 264, 265, 266 and 267 by virtue of customary laws. In particular, he contended that the Langoni Council of Elders allocated the land to them, and that they demarcated their own portions. Further, he affirmed that they are from the Bakoori family. The 1st respondent's claim over the suit parcels is that they were allocated to him by the village elders. He stated that he sold a portion of it to the 1st appellant, and that the 2nd - 5th appellants are strangers to the suit parcel.

33. While submitting on behalf of the 1st respondent, Mr. Achoka was at first emphatic that Plot No. 59 from which the suit parcels metamorphosed, does not exist, and that it is a new issue which has been introduced in this appeal. However, upon further questioning by this Court, counsel conceded that indeed the 1st respondent was compensated in the sum of Kshs.22,500,000 or thereabouts for Plot No. 56, and that, during identification of the plots, the 1st respondent stood on Plot No. 59 as the one belonging to him.

34. Furthermore, the 1st respondent, in his own testimony and pleadings, acknowledged that he allegedly sold to the 1st appellant a portion of the suit parcels. This, therefore, brings us to the unrefuted conclusion that indeed there may have existed the said suit parcels which the appellants lay claim to, and a further possibility that the suit parcels are the erstwhile Plot No. 59.

35. We cannot fail to mention that the conduct of the 1st respondent with respect to his account of how he owns the suit parcels is wanting; he comes out as a double speak mouth. For example, from his cross examination, the trial court judgement bespeaks as follows:

> " On being shown a list of the properties prepared by the 3rd defendant, DW1 conceded there were three names listed for Plot No. 59. The names were Bakoori family, the Abuluma family and DW1's name."

36. Further to the foregoing, there is a Survey Report prepared by the Director of Surveys from the Ministry of Land, Housing & Urban Development dated September 2014. The report outlined the findings of the survey of land parcels within Lamu Port Administration Headquarters and part of the LAPPSET Transport Corridor. In the report, there was confirmation that a total of 58 parcels of land were surveyed and a list thereof was drawn. At the last paragraph of page 3 of the report, it was acknowledged that:

> " there were no ownership documents provided by the persons claiming ownership as proof of title to land parcels occupied. It is therefore required that an audit and vetting of land ownership documents be done with a view of establishing ownership. This is informed and based on the fact that some of the individuals had indicated and produced documents claiming ownership but are not the occupants on the ground."

37. At paragraph 39 of his judgement, the learned Judge rightly held that the properties in dispute which the appellants and the 1st respondent previously occupied and/or utilised as squatters were

unadjudicated and unregistered. On the claim which the appellants lay on the suit parcels, the learned Judge had this to say:

> "While the plaintiffs insisted that their parcels of land described as Nos. 263, 264, 265, 266 and 267 measuring 45 acres were taken from them, there was no evidence whatsoever placed before this court to demonstrate the existence of the said parcels of land. Despite the plaintiffs' contention that they had an original list of owners of the said Plot Nos. 263 to 267, neither the said list nor a survey report was produced to court to prove the existence of the said plots and/or to demonstrate that the said parcels of land were the same ones comprised in Plot No. 59 which the 1st defendant insists is his own. Having failed to show any nexus between the Plot Nos. 263 to 267 on the one had and the Plot No. 59 claimed by the 1st defendant, it follows that this court cannot issue the orders sought by the plaintiffs against him as the 1st defendant cannot be restrained from occupying parcels of land whose existence are unproven."

38. In our respectful view, the above finding did not intently and keenly consider the oral and documentary evidence adduced in the trial court. First, it was not proper to conclude that the appellants were claiming non-existent parcels of land while the survey report acknowledged that the whole suit parcel was in fact unsurveyed. It is the 3rd respondent who eventually surveyed the land. Hence, the conclusion that the suit property was not surveyed was not sound.

39 Secondly, the learned Judge also failed to note that, upon cross examination of the 1st respondent, he admitted that Plot No. 59 contained the names of the Bakoori and Abuluma families and his own name. We have confirmed this from the list which was drawn up by the 3rd respondent that the disputed parcels are listed at serial No. 51 and is contained at page 150 of the record of appeal. It is upon this supposedly unadjudicated and/or unsurveyed suit land that the 1st respondent was able to identify his own parcel of land as Plot No. 56 for which he was compensated by payment of Kshs.22,500,000.

40. Thirdly, we observe that the learned Judge failed to take judicial notice that the suit land was initially unoccupied, and that the squatters thereon were allocated their portions by the Langoni Council of Elders. No doubt then, the evidence of the Langoni Council of Elders was vital. On his part, the 1st respondent himself admitted that his own parcel of land was allocated to him by the village elders. Mr. Achoka confirmed that, during the identification of the plot owners, the 1st respondent, just like all other owners, stood on his plot. The 1st respondent also averred in his defence that he sold a portion of the disputed suit parcels to the 1st appellant.

 The question which then arises is: what exactly was the 1st respondent selling to the 1st appellant if indeed the suit parcels were non-existent as he wants this Court to believe, or as pronounced by the trial court? The pontificated arguments by the 1st respondent that the suit parcels are in fact not in existence, cannot stand. We see it this way: there was a ploy to conceal the factual truth from the trial court by the 1st respondent so as to be unjustly compensated for the suit parcels at the appellants' expense.

41. During the hearing of this appeal, learned counsel for the appellants and the 1st respondent, Ms. Matoke and Mr. Achoka respectively, seemed to give different explanations on the true status of the suit parcels which, regrettably, did not assist us to be able to establish the truth in order to reach our own independent conclusion. Each counsel had their own opinion as to where exactly Plot No. 59 was, and to whom it belonged. In fact, towards the tail end of the proceedings, Ms. Matoke now changed tune and told us that the suit parcels were in fact a resultant of Plot No. 59, but not that the suit parcels were consolidated to constitute Plot No. 59. This made the scenario even murkier.

42. The proceedings before the trial and this Court can only be termed in the French phrase as "comme ci comme ça" which means 'it can be either way' or 'I guess so.' or rather 'it is neither here nor there.' Proceedings before the court cannot be indifferent. Our view is that the judgment of the ELC did not address the core questions or issues involved in the dispute to effectually and completely adjudicate the dispute before it. As a fact-finding court, the trial court abdicated its duty to interrogate the evidence before it. It laboured into the incorrect assumption and conclusion that there was no evidence which could have supported the appellants' case.

43. We are not satisfied that the hearing before the trial court was properly conducted so as to reach a just conclusion. Rule 33 (1) of the Court of Appeal Rules, 2022 gives this Court general powers as far as its jurisdiction permits:

    a. To confirm, reverse or vary the decision of the superior court;

    b. To remit the proceedings to the superior court with such directions as may be appropriate; or

    c. To order a new trial.

44. At the risk of there being a perception that we have abdicated our duty to re-evaluate the evidence before us to reach our own independent findings, from our foregoing analysis, we are of the view that there were fundamental issues which the trial court ought to have looked into keenly, and which it did not. Taking of primary evidence can only be a function of the trial court. This Court in In RE: SS (Baby) (2019) KECA 399 (KLR) held that it would be usurpation of jurisdiction to exercise the powers that the trial court did not exercise.

45. Against the fundamental and well-established principle of finality once issues of fact have been judicially investigated and pronounced upon, the power of this Court in remittal of matters for rehearing should be done so sparingly and only in special or exceptional circumstances. In this instance, we reiterate that the fundamental issues and evidence which ought to have guided the trial court were not properly looked into. We think that there are many gaps in the case as presented that require to be sealed through taking of evidence afresh. Although we may not dictate which witness(es) a party should call, we think that this judgment has eliminated the gaps that exist on record which parties need to seal.

46. As we come to the end of our findings, it is regrettable that the 3rd respondent chose not to participate in the proceedings before the trial court, notwithstanding that it was the bearer of the factual truths which would have guided the trial court in the outcome of its survey report. The 3rd respondent's functions as outlined under section 5(2) (e) and (f) of the *National Land Commission Act* are, inter alia, to:

    e. manage and administer all unregistered trust land and unregistered community land on behalf of the county government; and

    f. develop and encourage alternative dispute resolution mechanisms in land dispute handling and management.

47. The whole of the suit parcel having been unregistered but later surveyed by the 3rd respondent, it was bestowed with the hallowed responsibility of guiding the trial court on what its findings were in its survey report. On the disputed parcels of land which it has withheld its payments as indicated in the entry No. 51 on the list, the 3rd respondent ought to have at least told the court the steps it took to discharge its duty pursuant to section 5(2) (f) of the *National Land Commission Act*.

48. The long and short of our findings is that this matter is best suited to be remitted to the ELC for hearing de novo before any Judge other than (Olola, J.). The hearing should be on priority basis. We further

direct that this judgement be served upon the 3rd respondent by the appellant's counsel. Each party shall bear its own costs in this appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR