



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: WARSAME, MUSINGA, & MURGOR, JJ.A.)**

**CIVIL APPEAL NO. 141 OF 2019**

**BETWEEN**

**SAID M. MABAVU.....1ST APPELLANT**

**ANNA W. DEREVA.....2ND APPELLANT**

**ABDALLA MWACHIBULO HEMA.....3RD APPELLANT**

**FATUMA S. NCHIZUMO.....4TH APPELLANT**

**OMAR MASHAKA.....5TH APPELLANT**

**MAHFUDH MOHAMED MWAMTUKU.....6TH APPELLANT**

**RAMA MATANO MWARINDA.....7TH APPELLANT**

**AND**

**BAHATI PROPERTIES LIMITED.....RESPONDENT**

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Mombasa (Omollo, J.) delivered on 27th June 2019)

*in*

***E. L. C. Case No. 31 of 2015.)***

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**JUDGMENT OF THE COURT**

1. The contest in this appeal between the appellants and the respondent is over a property that was previously registered as **Kwale/Diani Block 59**, but now known as **Kwale/Diani Beach Block/149** (the suit property). The appellants contend that they are the rightful owners of the suit property, by way of allotment by the then President of Kenya, **Daniel Arap Moi**, who directed the Commissioner of Lands to allocate it to them as it was vacant and undeveloped. The allotment was in the year 2001.

2. On the other hand, the respondent contends that it is the rightful registered proprietor of the leasehold interest in the suit property, though bearing the former registration number, **Kwale/Diani Beach**

**Block/59** (hereinafter No. 59), having bought it from **Prince Sadruddin Aga Khan**, who had a 99-year lease from the Government of Kenya from 1st January 1914, via a transfer of lease dated 18th September 1992 at a consideration of **Kshs.11,000,000**. At the time of the said acquisition the respondent was known as **Bahati Leisure Lodge Limited**.

3. The genesis of the dispute between the parties was a suit filed by the respondent in the Environment and Land Court (ELC) at Mombasa, **Mombasa ELC No. 31 of 2015** against the Attorney General who was sued on behalf of the Commissioner of Lands and/or the successor to the said office as well as the Land Registrar, Kwale, and the appellants herein.

4. The respondent averred that the purported allotment and subsequent issuance of title over the suit property to the appellants was illegal, fraudulent, and null and void and sought declaratory orders to that effect. The respondent also sought, among other reliefs, an order directing the Lands Registrar, Kwale, to rectify the registers for Kwale/Diani Beach Block/59 and Kwale/Diani/149 and issue it with a certificate of lease for the suit property.

5. In their joint statement of defence, the appellants denied the respondent's claim and contended that they were the rightful registered owners of the suit property; that prior to the first registration by the British Colonial Authorities in 1914 the suit land belonged to their forefather, one **Mwachimwindi Diya**, who was forcefully evicted from the land by the colonial government without any compensation; that in view of that historical injustice they petitioned the Government of Kenya for allotment of the suit property, which was done, and they were subsequently issued with a certificate of lease.

6. After a full trial before **Omollo, J.** the learned judge found in favour of the respondent and granted all the prayers as sought in the plaint. The court held, *inter alia*, that **Kwale/Diani Beach/Block 59** and **Kwale/Diani Beach Block/149** refer to one and the same parcel of land; that since the suit property had been leased to the respondent and there was in existence a valid lease when the appellant sought its allotment to them, under the provisions of the repealed **Government Lands Act**, the property was not available for allotment to the appellants.

7. Being aggrieved by the said judgment, the appellants preferred an appeal to this Court. In their memorandum of appeal, the appellants raised seven grounds of appeal. In summary they faulted the learned judge for: misapplying the provisions of the Government Lands Act to find that the suit property was not available for allotment to them; disregarding the provisions of the repealed Land Acquisition Act which placed a burden on any person aggrieved by any acquisition process to present his grievance to the government within six months, which the respondent did not do; and for failing to find that at the time the respondent acquired the suit property, the same had already been compulsorily acquired by the Government and therefore it did not exist and the respondent could not have acquired a valid title over the same in 1992.

8. This being a first appeal, its duty as set out in **Selle v Associated Motor Boat Company Ltd [1968] E.A. 123** is to consider the evidence, evaluate it and draw its own conclusions. In so doing, we must however bear in mind that we neither heard nor saw the witnesses and should therefore make due allowance for that. We shall proceed to consider the evidence adduced before the trial court, analyse it and draw our own conclusions.

9. The respondent called three witnesses. The first one, **Timamy Issa, PW1**, an advocate of the High Court, testified that on 13th March 2007, pursuant to the respondent's instructions, he wrote to the Commissioner of Lands and requested for extension of the lease for a further period of 50 years; that the Commissioner of Lands vide a letter dated 19th March 2007 directed the District Lands Officer to undertake a site inspection and submit a report, which he did, and indicated that he had no objection to the proposed renewal of the lease; that similarly the District Physical Planning Officer and the District Surveyor had no objection; consequently, vide a letter dated 23rd October 2007 the Commissioner of Lands gave his approval for the extension of the lease and requested the respondent to pay Kshs.222,690 as annual rent and Kshs.5,000 as approval fees, which sums the respondent paid.

10. PW1 further testified that by a letter dated 28th January 2008 the Commissioner of Lands sent to the District Land Registrar, Kwale, the new lease in triplicate in respect of **Kwale/Diani Beach Block/59** and surrender of the former lease. The new lease was registered on 31st January 2008 for a period of 50 years, commencing 1st October 2007. All this time, the respondent was not told of any cancellation of the title in respect of parcel No. 59 in favour of parcel No. 149, nor was the respondent informed of any competing interest over parcel No. 59.

11. The second witness, **Mohamed Mwinyi Mwadzecha, PW2**, who was an employee of Prince Sadruddin Aga Khan before the suit property was sold to the respondent, testified that he lived in a house on the suit property from 1974 to 2016; that in 1992 when the appellant acquired the suit property he was employed as a caretaker; that in 2016 he was attacked by a group of people who invaded the suit property on instructions of the appellants and he was forced to move out.

12. The third witness, **Sheba Mohamoud Mohamed, PW3**, was the company secretary of the respondent. He corroborated the evidence of PW1 regarding the renewal of the lease. He added that according to documents in the respondent's possession, in the 1970's when the suit property was still leased to Prince Sadruddin Aga Khan, a portion of the suit property was acquired by the Government for expansion of the Diani Beach Road but the title for parcel No. 59 remained, although a new one reflecting the size of the remainder ought to have been issued.

13. The office of the Attorney General called two witnesses. **Herbert Ndolo, DWI**, was the District Surveyor, Kwale. He testified that parcels Nos. 149 and 150 occupy the same area formerly occupied by parcel No. 59 (the parent one); that the first amendment to the map was made on 30th January 1975; that after the new parcel numbers were authenticated parcel No. 59 ceased to exist. He did not however state whether the then registered lessee was ever notified of the changes and required to surrender the certificate of lease for parcel No. 59.

14. **Dick James Safari, DW2**, was the Land Registrar, Kwale. He told the trial court that parcel No. 149 was a subdivision of parcel No. 59 and was by way of an allotment to the appellants; that after amendment of the Registry Index Map (R.I.M.) in 1975 the title for parcel No. 59 should not have continued to be in existence but there was no evidence that it was ever cancelled.

15. On the part of the appellants, only one of them testified, that is, **Said Mabavu wa Mabavu, DW3**. He said that the suit property was their ancestral land; that on 30th October 1999 they wrote to President Daniel Arap Moi and requested for its allotment to them, which request was granted; and a certificate of lease was issued to them in 2006.

16. From the pleadings, oral evidence and documents filed by the parties, the trial court held that in 1974, while parcel No. 59 was in the name of Prince Sadruddin Aga Khan, the Government excised and compulsorily acquired a part of it for construction of Diani Beach Road; the property was divided into two portions- parcel No. 149 and parcel No. 150; that the government acquired parcel No. 150 and used it for the expansion of Diani Beach Road but parcel No. 149 remained; that the original title for parcel No. 59 was not removed from the register and Prince Sadruddin Aga Khan continued to hold the lease in respect of the land and also remained in occupation until sometime in 1992 when he sold and transferred his leasehold interest to the respondent, but that same land was allotted to the appellants in 2001. For those reasons, the appellants were not lawfully entitled to the suit property.

17. When this appeal came up for hearing, **Mr. Aboubakar** appeared for the appellants and **Mr. McCourt** represented the respondent. Counsel relied on their written submissions, which they orally highlighted. The gravamen of the appellants' submissions was that parcel No. 59 was compulsorily acquired by the Government in 1975 and therefore in 1992 it was not available for sale by Prince Sadruddin Aga Khan to the respondent; that the land was rightfully given to them. We were urged to allow the appeal.

18. Mr. McCourt's reply was that there was only partial acquisition of the suit property where the Government acquired just a small portion of the land for expansion of a public road; the respondent

retained the bulk of the land as well as the certificate of lease. The process of compulsorily acquisition was not shown to have been undertaken with respect to the suit property and therefore the land could not have been allotted to the appellants as it had already been alienated.

19. In our view, there are only two substantive issues for determination in this appeal. The first one is whether the suit property was compulsorily acquired by the Government of Kenya in the year 1975; and the second one is whether the suit property was lawfully allotted to the appellants.

20. On the first issue, it was not disputed that in the year 1974/1975 the Government of Kenya acquired portions of parcels No. 59 and 60 for the expansion of Diani Beach Road. At that time, the suit property was in the name of Prince Sadruddin Aga Khan. An unchallenged joint survey report dated 30th January 2014 showed that: -

(a) Subdivision of parcels No. 59 and 60 are shown in the R.I.M. Sheet No. 201/3/7 of Diani Beach registration block as an entry dated 10th January 1975.

(b) The subdivision resulted into parcels Nos. 149 to 152 and the plan reference is shown as F.R No. 127/76.

(c) The R.I.M. shows that of the resultant sub-plots, parcels Nos.150 and 152 are the road reserve but Nos.149 and 151 are real plots.

(d) Parcels Nos. 151 to 152 were as a result of a road excision survey of parcel Nos. 59 and 60.

21. In 1974/75, the applicable law that guided the process of compulsory acquisition of land was the **Land Acquisition Act** (now repealed). **Section 3** thereof provided as follows: -

***“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”***

22. There was no evidence that the above procedure was followed at all by the Government in its acquisition of a part of parcel No. 59 from Prince Sadruddin Aga Khan. The State witnesses, if at all they intended to support the appellants’ position that the entire parcel No. 59 had been compulsorily acquired by the Government of Kenya, ought to have adduced evidence to that effect. All the relevant documents to support that contention like the Gazette Notice, correspondence and proof of compensation ought to have been in the State’s possession.

**Section 112** of the **Evidence Act** states:

***“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”***

23. Further, **section 20** of the repealed **Land Acquisition Act** speaks to the fate of title held by persons whose land has been compulsorily acquired by the Government. The section stipulates: -

***“20. (1) Where the documents evidencing title to the land acquired have not been previously delivered to him, the Commissioner shall in writing require the person having possession of the documents of title to deliver them to the Registrar, and thereupon that person shall forthwith deliver the documents to the Registrar.***

***(2) On receipt of the documents of title, the Registrar shall-***

***(a) where the whole of the land comprised in the documents has been acquired, cancel the documents;***

***(b) where only part of the land comprised in the documents has been acquired, record upon the documents that so much of the land has been acquired under this Act and thereafter return the documents to the person by whom they were delivered, and upon such receipts, or if the documents are not forthcoming, cause an entry to be made in the register recording the acquisition of the land under this Act.”***

It is apparent that the requirements of section 20 above were not complied with

24. The Land Registrar, Kwale, told the trial court that he did not know whether the title for parcel No. 59 was cancelled; that if its register had been closed, the certifications of search that the respondent obtained after the lease was renewed would not have been available; and further there was nothing to show that the title was ever surrendered.

25. It is therefore not clear how the Government acquired a portion of land parcels Nos. 59 and 60 for the construction or expansion of Diani Beach Road. If the entire land was compulsorily acquired as alleged by the appellants, the titles would have been surrendered for cancellation and there would also have been documents to support that. In the circumstances, we agree with the respondent that all the evidence adduced reveals that there was only partial acquisition of parcel No. 59, which reduced its size from 25 acres to 23.25, and it is the remaining portion that was given parcel No. 149. Ideally the title for parcel No. 59 ought to have been cancelled, but somehow it was not. Prince Sadruddin Aga Khan remained in actual possession of the land, until he sold and transferred his leasehold interest thereto to the respondent, albeit as parcel No. 59. By law, the Government of Kenya as the lessor must have consented to the transaction.

26. We now turn to consider whether the suit property was available for allotment to the appellants. The appellants testified that the allotment was in 2001. The legal regime that governed such allotment was the **Government Lands Act (GLA)** (now repealed). **Section 2** of the Act defined Government land as follows: -

***“Government land” means land for the time being vested in the Government by virtue of sections 204 and 205 of the Constitution (as contained in Schedule 2 to the Kenya Independence Order in Council, 1963), and sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act, 1964.”***

27. The trial court held that in 2001 the suit land was not available for allotment because it was not unalienated Government land, which **section 2** of the **GLA** defined as

***“Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.”***

28. The learned judge held that: -

***“70. It is not in dispute that in 2001 when the Letter of Allotment was issued to the 2nd – 6th Defendants, KWALE DIANI BEACH/BLOCK/59 was already leased out to a private person for a term of 99 years with effect from 1st January 1914 and a Certificate of Title duly issued. The lease was due to expire in 2013. That means that in 2001, the land was already allocated to a private person and was therefore not available for allocation or alienation to the 2nd – 6th Defendants. Put differently, there was no unalienated government land capable of being allotted to the 2nd – 6th Defendants.”***

29. We entirely agree. Neither the President of Kenya nor the Commissioner of Lands had power to allot the suit property to the appellants. The learned judge cannot be faulted at all for arriving at the conclusion she did.

We find this appeal bereft of merit and hereby dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 4<sup>th</sup> day of June, 2021.

**M. WARSAME**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

*Signed*

**DEPUTY REGISTRAR**