



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)**

**CIVIL APPEAL NO. 128 OF 2018**

**BETWEEN**

**SWALEH MOHAMED WAZIRI.....1<sup>ST</sup> APPELLANT**

**NASRA HASSAN MOHAMED.....2<sup>ND</sup> APPELLANT**

**AHMED ABDULHASIM KASIM.....3<sup>RD</sup> APPELLANT**

**JAMILA YUSUF MOHAMED.....4<sup>TH</sup> APPELLANT**

**AND**

**1. HOUD MOHMOUD ATHMAN**

**2. ATTORNEY GENERAL.....RESPONDENTS**

***(Being an appeal from a judgment and decree of the Environment and Land Court at Mombasa (O.A. Angote, J.) dated 12<sup>th</sup> July 2018 and delivered on 19<sup>th</sup> July, 2018 by Olola, J.***

**in**

**ELC No. 62 OF 2012)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This appeal concerns the allocation of unsurveyed parcel 'C' on Manda Island which upon survey became Parcel No. Lamu Manda Island/93 (the subject land) to **Houd Mohmoud Athman, the 1<sup>st</sup> respondent**, and subsequently re-surveyed to create Parcel No. Manda Island/ 88 registered in the names of **Rishad Hamid Ahmed** and **Abdulbasit Swaleh Mohdin** (the 1<sup>st</sup> titleholders), and Parcel Nos. 176 to 185 registered in the names of **Swaleh Mohamed Waziri, Nasra Hassan Mohamed, Ahmed Abdulhasim Kasim, and Jamila Yusuf Mohamed, and Matano Ahmed, Ndovu Masoud Mohamed**, (the 2<sup>nd</sup> titleholders.)

By a letter of allotment dated 20<sup>th</sup> August 1997, the Commissioner of Lands, the 2<sup>nd</sup> respondent in the lower court, allocated the subject land to the 1<sup>st</sup> respondent. Following payment of the requisite survey and other fees, on 7<sup>th</sup> September 2007 he sought to obtain a certificate of lease for the subject land.

The 1<sup>st</sup> respondent claimed that he thereafter learnt that a Parcel No. Manda Island/58 had overlapped onto the subject land, prompting the Commissioner of Lands to cancel it; that later, Parcel No. Manda Island/88 was also carved out of the subject land. The 1<sup>st</sup> respondent objected to its excision, as it was based on forged survey documents, as according to Field Reports and data, F/R 466/87 the survey document to which Manda Island/ 88 related, belonged to a survey in the Nairobi area; that despite the objections, the Commissioner of Lands had failed to cancel Plot No. Manda Island/88 and had proceeded to allocate it to the 1<sup>st</sup> titleholders.

Further, that the Commissioner of Lands had also resurveyed the remainder of the subject land and subdivided it into 12 plots, those being parcel Nos. Lamu/Manda Island/176 to 185 which were then issued to the 2<sup>nd</sup> titleholders. He claimed that unless the titleholders were

restrained from taking possession of the subject land, he (the 1<sup>st</sup> respondent) would be deprived of the subject land and his rights to the property, violated.

Consequently, the 1<sup>st</sup> respondent therefore sought the following orders;

- i. a declaration that he is the legal and beneficial owner of the subject land;*
- ii. a declaration that the survey and subsequent creation of parcels Nos. Lamu/Manda Island/ 88 and Lamu /Manda Island/176 to 185 are illegal null and void;*
- iii. an injunction do hereby issues restraining the Commissioner of Lands from further interfering with the suit land; and*
- iv. General damages*

In reply, **the 1<sup>st</sup> appellant, Swaleh Mohamed Waziri** on behalf the titleholders deponed that they are the registered proprietors of the leasehold interests for a term of 99 years of Plot Nos. Lamu/Manda Island/ 176, 177, 183, 184, 185 and 259 all of which were originally demarcated through FR No. 466/83 representing the survey plan of the original plots numbers 68 and 69, which was duly approved by the Ministry of Lands; that the parcel number 93 did not exist in 1997 since the alleged allotment letter dated 20<sup>th</sup> August 1997, and the receipt dated 7<sup>th</sup> September 2007 did not refer to the subject land, that further, as at 20<sup>th</sup> December, 2007 the subject land did not exist. It was averred that Survey plan FR 466/83 where Parcel number 93 was indicated was a forgery; and that after the creation of Parcel number 88, on the 19<sup>th</sup> March, 2012 the Registry Index Map (RIM) was further amended to include FR No. 504/166 representing Plot Nos. 176 to 185.

It was also deponed that the petition denied the titleholders of their right to natural justice as required by **Article 22 (3) and (d) of the Constitution** and the right to a fair hearing as enshrined in **Article 50** as the appellants were denied their rights to interrogate the 1<sup>st</sup> respondent's allegations and cross-examine the witnesses.

In a replying affidavit sworn on 22<sup>nd</sup> September 2014, on behalf of the Attorney General, **Silas Kiogora Mburugu, (DW 1)** a lands officer formally with the defunct Commissioner of Lands office, and attached to the National Land Commission deponed that the subject land was allocated to the 1<sup>st</sup> respondent on 20<sup>th</sup> August, 1997; that the offer was accepted by way of payment vide receipt No. G 055525 of 7<sup>th</sup> September 2007. Upon payment a requisition was made to the Director of Surveys to forward Registry Index Map (RIM) to facilitate preparation of the lease certificate.

It was deponed that when the Director of Survey checked the records the RIM could not be forwarded because of an overlap onto the subject land existed following the creation of Parcel Nos. 58 and 88; that further investigations disclosed that i) the survey for Parcel No. 58 was based on a false letter of indent which necessitated its cancellation from the Director of Surveys' records, and ii) the survey FR No. 466/87 for Parcel No. 88 was found to concern land in Nairobi area; that other surveys of parcel Nos. Lamu/Manda Island 176 to 185 and 56 to 60, were also overlapping the subject land.

Mr. Mburugu further averred that on 24<sup>th</sup> March 2014 the National Land Commission published a notice in the Nation Newspaper for the titleholders to appear before the Commission but they failed to appear.

The record shows that in the course of the proceedings, on 23<sup>rd</sup> October 2014, the learned judge ordered that the matter would "...proceed for hearing by way of viva voce evidence and affidavit..." . During the hearing, the 1<sup>st</sup> respondent testified, and the appellants called two witnesses, Silas Kiogora Mburugu and **Julius Abado (DW 2)**, a certified land surveyor. None of the titleholders testified.

After considering the pleadings and hearing the parties' evidence and the submissions, the learned judge granted the orders the 1<sup>st</sup> respondent had sought for reasons that the court found that the appellants' titles were baseless due to the obscure process by which they were acquired; that since the 1<sup>st</sup> respondent produced a letter of allotment, an approved Development Plan and evidence of payment, he was the rightful legal owner of the subject land.

The appellants were aggrieved by the decision of the court and filed an appeal in this Court on the grounds that;

- 1. The learned judge erred in law and in fact from the evidence adduced in the court that the 1<sup>st</sup> respondent had proved his case on a balance of probability.*
- 2. The learned trial judge grossly erred in fact and in law by improperly and wrongfully analyzing the facts and evidence tendered before the court thereby arriving at an unreasonable and illogical judgment in law.*
- 3. The learned judge erred in fact and law by basing his findings on facts and matters which were not supported by tangible evidence or of any legal efficacy at all.*
- 4. The learned judge failed in appreciating that the burden of proof was lay solely on the 1<sup>st</sup> respondent.*
- 5. The learned judge failed to appreciate that affidavit evidence is fool proof and that viva voce evidence was not sine qua non.*
- 6. The learned judge grossly failed to address the fact that land matters are very sensitive and should be adjudicated upon*

*individually and according to their peculiar circumstances and should not just be callously wished away.*

7. *The learned judge erred in fact in holding that circumstances of acquisitions of proprietorship by the appellants were unclear.*

8. *The learned judge erred in law setting too high a standard of proof in a constitutional petition.*

9. *The learned judge misdirected himself by failing to adequately analyze all evidence and issues raised in a detailed and comprehensive manner.*

10. *The judgment occasioned a miscarriage of justice which is manifest on the record.*

11. *The learned judge failed in upholding the salient principles of fairness, legitimate expectation and wednesburys's reasonableness.*

Learned counsel for the appellants, **Mr. Mayaka** relied on the written submissions which he briefly highlighted. Counsel contended that there was no evidence which supported the 1<sup>st</sup> respondent's claims to the subject land; that the 1<sup>st</sup> respondent had admitted that the subject land lawfully belonged to the appellants, and that the search document the appellants produced was sufficient proof of their ownership of the subject land; It was further submitted that since the 1<sup>st</sup> respondent had omitted to summon the Registrar of Lands to produce the original Lands records, and the authors of the documents were not called to testify he had not discharged the burden of proving that the subject land belonged to him. On the contrary counsel contended, the appellants had satisfactorily proved that they were the lawful proprietors of the subject land.

Counsel argued that no explanation was provided for cancellations of the titleholders' survey plans and related titles, and that the learned judge considered only the 1<sup>st</sup> respondent's documents, and disregarded those belonging to the appellants'. It was asserted that it was not proved that the titles were fraudulently issued by the Land's Registry, and therefore the trial court should have ordered the surrender of all the title documents, and for the conduct of the exercise afresh to ensure that all parties were allocated their rightful parcels. Finally, counsel faulted the trial judge for failing to analyse the evidence in order to arrive at the correct decision.

On his part, **Mr. Omollo**, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file, written submissions, but submitting orally. It was stated that the 1<sup>st</sup> respondent received a conditional letter of allotment, and paid the specified stand premiums albeit after 10 years, by which time, the subject land was allocated to other parties, who had since extracted their certificates of title; that the 1<sup>st</sup> respondent's petition, did not meet the threshold of a constitutional petition, and faulted the trial court for cancelling the appellants' titles for the reason that they had failed to produce original letters of allotment.

For his part, **Mr. Muoko**, learned counsel for the 1<sup>st</sup> respondent supported the judgment of the trial court. Counsel stated that the learned judge rightly found that a contract existed between the 1<sup>st</sup> respondent and the Commissioner of Land particularly as nothing showed that the letter of allotment was cancelled, and therefore, the 1<sup>st</sup> respondent was entitled to make a payment and obtain a title to the subject land.

We have considered the appeal, the record and the parties' submissions. This is a first appeal, and as stated in **Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212;**

***“On a first appeal from the High Court, the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence.”***

Having in mind these guidelines, the issues that can be discerned from the grounds of appeal are, whether the learned judge rightly concluded that the 1<sup>st</sup> respondent had the right to own the subject land, and if so whether his rights were violated. To address this issue we will determine whether the 1<sup>st</sup> respondent proved his case on a balance of probabilities, and whether the learned judge properly analysed the evidence, and in so doing arrived at the correct conclusion that the 1<sup>st</sup> respondent was the legal and beneficial owner of the subject property.

The learned judge observed that, *“...the right to acquire and own land is not limited to people who have title documents. Indeed all that is required is for one to show that he acquired the land lawfully”*, and having satisfied himself that the 1<sup>st</sup> respondent had discharged the burden of proving that he acquired the subject land lawfully, the learned judge had this to say;

***“...the Petitioner produced in evidence a letter of allotment together with an approved Part Development Plan, it is the petitioner who is entitled to land known as Lamu/Manda Island/93. The purported titles that the 3<sup>rd</sup> – 10<sup>th</sup> Respondents obtained for parcels of land known as Lamu/Manda Island/88 and Lamu Manda Island/ 176 to 185 were fraudulently acquired and cannot be protected by the Constitution.”***

**Article 40 (3)** of the Constitution stipulates in part that, the State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description. Additionally **Article 40 (6)** states that,

***“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. ”***

In the above regard, the sentiments expressed by this Court in the case of **Munyu Maina vs Hiram Gathiha Maina [2013] eKLR**, are of

pertinence;

***“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”***

So, did the 1<sup>st</sup> respondent discharge the burden of proof by demonstrating that he was rightfully entitled to the subject land, and as a consequence, the appellants’ titles were unlawful? In terms of the above, **section 107** of the **Evidence Act** provides that he or she who asserts must prove that the facts alleged exist. And according to **section 109** of the same Act the burden of proof lay with the 1<sup>st</sup> respondent to establish his right to the subject land.

The 1<sup>st</sup> respondent’s case is that vide a letter of allocation dated 20<sup>th</sup> August, 1997 he was allocated an un-surveyed agricultural plot No. ‘C’ Manda Island which was later surveyed and became the subject land. On 7<sup>th</sup> September 2007 he paid the stand premiums and other fees. It is his contention that thereafter, various surveys were carried out on the subject land, some of which were cancelled. The surveys nevertheless culminated in two sets of subdivisions, that is, Parcel No. Manda Island/ 88 and Parcel Nos. Manda Island/176 to 185 where, certificates of lease of the subdivided portions were subsequently issued to the titleholders. The 1<sup>st</sup> respondent’s complained that despite having been allocated the subject land and making the requisite payments, he was deprived of ownership, as he was not issued with a title document.

The gist of the appellants’ argument on the other hand is that, they acquired valid titles since the survey plan and land parcels to which their plots related were different, from that of the subject land. As evidence they attached copies of certificates of lease, receipts showing payment for the lease certificates, attestation charges, inter alia to the 1<sup>st</sup> appellant replying affidavit.

In the case of ***M’Ikiara M’Rinkanya and Another vs Gilbert Kabeere M’Mbijiwe [1982 – 1988] 1 KAR 196*** this Court succinctly held that;

***“Where a similar situation as in this case arose, there was a double allocation to a plot issued by the Council of the area. The court had noted that the said first allotted letter to the original plaintiff had never been cancelled. That the council had no power to allocate the same property again without following the laid down procedure of re-allocating the property.”***

Recently, this position was followed by this Court in the case ***of Kenya Ihenya Company Limited & another vs Njeri Kiribi [2019] eKLR*** where it was again stated;

***“... it was clear that the 1<sup>st</sup> appellant had allotted the suit land to both the respondent and the 2<sup>nd</sup> appellant hence the learned Judge’s conclusion that there was a double allocation. That being the case, since the respondent was first in time, as the evidence is clear that she completed making payments in the year 1983 whilst the 2<sup>nd</sup> appellant claimed to have purchased the same on 24<sup>th</sup> June, 1997, she was the bonafide proprietor.”***

In other words, an allottee having been allotted land by the Commissioner of Lands and duly paid all the stand premiums and other related charges, is considered to have acquired rights over such land, which thereafter rendered it unavailable for allocation to other persons or entities.

The evidence that was before the trial judge, both in the affidavits and the *viva voce* evidence, was that the Commissioner of Lands allocated the subject land to the 1<sup>st</sup> respondent on 20<sup>th</sup> August 1997. He paid for it on 7<sup>th</sup> September 2007, albeit much later in time. This notwithstanding, there is nothing to show that prior to the payment that the allotment was at anytime cancelled. But thereafter, instead of a certificate of lease being issued in his name, the subject land was re-surveyed, subdivided and the certificates of lease issued in the names of the titleholders.

The respondents’ who did not appear in court or testify had annexed copies of their title documents to the replying affidavit of the 1<sup>st</sup> appellant. Distinctly missing from their documents were letters of allotment, and receipts evidencing payments of stand premium charges and related fees. It is clear that, instead of title to the subject land being issued to the 1<sup>st</sup> respondent, who had paid the required sums, and was therefore the bonafide allottee, titles were issued to the titleholders, who had neither been allocated the subject land by the Commissioner of Lands, and nor had they paid any stand premiums in respect of the subject land.

Essentially, a crucial step in the land allotment process was omitted in the titleholders’ case leading to the conclusion that the titles they acquired were not legally established, while the 1<sup>st</sup> respondent who, by virtue of his having paid the stand premiums and survey fees and subsequently acquired rights to own the land, was deprived of ownership the subject land, which was a violation of his rights. This is why, the learned judge stated;

***“The titles that were issued to the 3<sup>rd</sup> to 10 respondents have no basis at all. In the absence of evidence to show the process that was followed before the titles were issued to the 3<sup>rd</sup> to 10<sup>th</sup> respondents, I find that the same were not obtained lawfully.”***

We agree. As was the learned judge, we too are satisfied that on a balance of probability the 1<sup>st</sup> respondent discharged the burden of proving that he was the beneficial owner of the subject land, and the learned judge was right to grant the orders sought.

We also find that the learned judge properly evaluated the evidence and arrived at the correct decision, and as such, we have no reason to interfere with that decision. Consequently, the appeal is dismissed with costs to the 1<sup>st</sup> respondent.

*It is so ordered.*

*Dated and delivered at Nairobi this 24<sup>th</sup> day of April, 2020.*

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

***Signed***

**DEPUTY REGISTRAR**