



Goma & another (Suing in their capacity as the personal representative of the Estate of Samuel Kapombe Hare - Deceased) v Indus Limited & 2 others (Environment & Land Case 11 of 2022) [2024] KEELC 4106 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4106 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 11 OF 2022**

FM NJOROGE, J

MAY 9, 2024

BETWEEN

DAMA KATANA GOMA 1ST PLAINTIFF

ANTHONY UNDA CHONGO 2ND PLAINTIFF

**SUING IN THEIR CAPACITY AS THE PERSONAL REPRESENTATIVE OF
THE ESTATE OF SAMUEL KAPOMBE HARE - DECEASED**

AND

INDUS LIMITED 1ST DEFENDANT

DISTRICT LAND REGISTRAR KILIFI 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. On 25th April 2022, the Plaintiff moved this court by way of Originating Summons seeking the following orders: -
 1. That this honourable court do issue an order vesting the land parcel known as Plot No. Chembe/Kibabamshe/304 (hereinafter the suit property) in the names of the Plaintiffs herein;
 2. That this honourable court do issue an order revoking/cancelling the title deed of the 1st defendant and subsequently the district land registrar, Kilifi, be ordered to register the plaintiffs as proprietor of the suit property and issue them with a title deed in respect thereof;
 3. That costs be in the cause.
2. The Originating Summons is anchored on the supporting affidavit sworn on even date by Anthony Unda Chogo and the accompanying documents namely, a certified copy of grant of representation



and a copy of decision by the National Land Commission (NLC) marked as AUC-1 and AUC-2 respectively. It is the Plaintiffs' case that the suit property was allocated to one Samuel Kapombe Hare (now deceased) being the first occupant therein having lived thereon since the year 1970. That upon ground verification exercise and public hearings conducted by the NLC on 24th December 2014 and 4th -7th February 2016 respectively, the NLC declared that the suit property belongs to the deceased; that the 2nd Defendant could not however issue the Plaintiffs with a title in the absence of this court's orders.

3. The 2nd and 3rd Defendants opposed the summons. They filed grounds of opposition dated 31st May 2022 and a Replying Affidavit sworn on 9th November 2022 by J.M Rithaa, the Malindi-Magarini Land Adjudication and Settlement Officer. The grounds of opposition were tailored as follows: -
 1. The 2nd Defendant is not aware of any alleged decision by the NLC with regard to the suit property since it was neither a party to the alleged inquiry nor informed of any decision and/or directive if any;
 2. There is no evidence that the 2nd Defendant has unreasonably refused to comply with any lawful directions issued by the NLC and neither has the Plaintiff demonstrated that any Gazette Notice or a letter from the NLC was served to the 2nd Defendant;
 3. That the Plaintiff should follow the due process of enforcing the directive of the NLC and should not place the cart before the horse;
 4. This application is misconceived and lacks basis and an abuse of the court process.
4. In the replying affidavit however, the Land Adjudication Officer stated that the suit property falls under the Settlement Scheme program and was first allocated to Samuel Kapombe Harare (the deceased herein). He acknowledged that the NLC vide a gazette notice dated 17th July 2017 recommended that the title be regularized and the title issued to the 1st Defendant be revoked.
5. On its part, the 1st Defendant failed to respond to the summons. Notably, it moved the court on 26th June 2023 vide an application dated 22nd June 2023 for leave to file a response, however, that application was dismissed for non-compliance with court orders. Parties agreed to proceed by way of written submissions.
6. In their submissions dated 7th March 2023, the Plaintiffs reiterated the contents of their pleadings and the replying affidavit. I therefore need not reproduce the same herein under.
7. The submissions filed on 8th March 2023 by the Attorney General on behalf of the 2nd and 3rd Defendants were in support of the Plaintiffs' case. Guided by Section 101 (1) of the Evidence Act and Section 80 of the Land Registration Act, the learned State Counsel Ms Someren submitted that the Land Registrar advised the Plaintiffs to seek this court's intervention so as to implement the decision of the NLC evidenced by the gazette notice. To counsel, the said defendants as custodians of land documents had provided the accurate position of the suit property.
8. Having outlined and considered the summons, supporting affidavit, replying affidavit and annexures thereto, together with the submissions filed by both parties, only one issue for determination arises: - whether the Plaintiffs are entitled to the orders sought in the Originating Summons.

Analysis and Determination

9. It is averred that the Plaintiffs filed a complaint with the NLC which subsequently conducted ground verification exercise and held hearings regarding the suit property and made a determination thereto as per the gazette notice dated 17th July 2017 (annexed as AUC-2). The NLC recommended that the



title issued to the 1st Defendant be revoked and the same be regularized to the first allottee, Samuel Kapombe Hare.

10. Section 80 of the [Land Registration Act](#) cited to me by state counsel Ms. Someren is clear that the court may order rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
11. In this particular case this court is not being asked to determine whether or not fraud occurred. A substantive trial on the merits of that issue has therefore not occurred before this court. It is being sought that the court issues an order vesting the land parcel known as Plot No. Chembe/Kibabamshe/304 (hereinafter the suit property) in the names of the Plaintiffs herein on the strength of the outcome of the dispute placed in the hands of the NLC which had exercised its mandate under the law and the constitution.
12. I find it relevant at this juncture to consider the mandate of the NLC. The NLC is established under Article 67 of the [Constitution](#) and its mandate includes *inter alia* management of public land on behalf of the national and county governments, to investigate present or historical land injustices and recommend appropriate redress and to review all grants or dispositions of public land to establish their propriety or legality.
13. It is trite that even where a claim is undefended the burden is still upon the Plaintiffs to prove their case and it does not change, this was stated by the Court of Appeal in [Karugi & another v Kabiya and 3 others](#) 1983 (eKLR). It was therefore upon the Plaintiffs to demonstrate to this court that they are entitled to the orders sought. The Plaintiff annexed a copy of the gazette notice to demonstrate the final recommendation issued by the NLC regarding the suit property. However, it must be remembered that in actualizing their mandate, the NLC conducts hearings and other processes, which the defendant must be apprised of. In this case and with the material presented before this court, it is not certain how the hearings were conducted and/or whether the 1st Defendant was notified of the same. The Plaintiffs did not annex copies of proceedings before the NLC, it is therefore difficult to ascertain the reason as to why the 1st Defendant's title was listed for revocation.
14. However, it must be presumed, especially in the absence of a challenge by the defendants on that issue, that the National Land Commission conducted hearings before it and came to the conclusion that the title issued in the name of the 1st defendant must be cancelled and issued a Gazette Notice of that recommendation, for the preamble to the notice states as follows:

“The Constitution Of Kenya

National Land Commission

Determinatin Of Review Of Grants And Dispositions Of Public Land Respect Of The Folowing Grants And Orders

In Exercise of the powers conferred by Article 68 (c) of the [Constitution of Kenya](#) and Section 14 of the [National Land Commission Act](#), 2012, the Chairman of the National Land Commission informs the general public that the National Land Commission upon receipt of complaints from the National Government, County Governments and Members of the Public, undertook review of grants and dispositions (titles) of Public Land to establish their legality or otherwise. The Commission via Public Notices in the National Dailies invited all Interested Parties to appear before it to inspect documents and make written and oral representations and submissions. Consequently, the Commission has mad determinations in respect of the following grants/Titles and orders for revocation, regularization, upholding



of the titles where applicable as indicated or give further C orders. Where the orders calls for revocation, the Chief Land Registrar is thereby directed to revoke as per Section 14 (5) of the [National Land Commission Act](#) and attendant Laws.

Table 1- Kilifi County, Mombasa And Kwale Countries...”

15. In view of the foregoing this court has no basis to doubt that the parties involved in the dispute were all served and that the hearings took place before the National Lands Commission as indicated in the Gazette Notice. The procedure for review of grants and proceedings is set out in Section 14 of the [NLC Act](#) and Sub-section 5 thereon provides that: –

“Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.”

16. Therefore, where the Commission under Section 15 of the [NLC Act](#) finds that the title was acquired in an unlawful manner, the Commission shall not revoke title but shall direct the Registrar to revoke the title. This provision thus reserves the power to revoke title to the Registrar and not the Commission. Did the National Land Commission determine the dispute and revoke the title?

17. The National Land Commission gave its findings on the allocation of the land in a separate columns and stated as follows:

“First allotted to Samuel Kapombe. It was alleged that he sold to Indus Ltd. (*sic*) Which (*sic*) has a lease for 99 years since 1992. Indus purchased from Antonio Pitno. Kapombe says he did not sale (*sic*).”

18. Thereafter the National Land Commission also gave what it calls a determination in a separate columns and stated as follows:

“Regularize to first allottee Samuel Kapombe. Revoke title for (*sic*) Indus Ltd.”

19. When the above entries in the gazette notice are read together with the pre-amble it becomes clear that the National Land commission was conscious of its limited power and that it deferred to the Chief Land Registrar who had power to revoke the title in this case, and it did not purport to revoke the title to the suit land. It can not be said that the National Land Commission acted illegally. The provisions of Article 50 of the [Constitution](#) were met in that the due process expected of the NLC was carried out with regard to the suit land and the defendants were granted an opportunity to defend the title prior to recommendations made by the NLC for cancellation of their title. Further, the NLC merely made a recommendation within its powers after due process.

20. The outcome of the foregoing analysis is that the Originating Summons dated 25th April 2022 has merit and it is hereby granted in terms of prayers nos. 1 and 2 thereof and for the avoidance of doubt the orders I issue are as follows:

- a. An order is hereby issued vesting the land parcel known as Plot No. Chembe/Kibabamshe/304 in the names of the Plaintiffs herein;
- b. The title deed of the 1st defendant and all entries made in the register pursuant to and subsequent to its issuance are hereby cancelled;
- c. The Land Registrar, Kilifi, shall register the plaintiffs as proprietors of the suit property in their capacity as the personal representatives of the estate of Samuel Kapombe Hare-deceased and issue them with a title deed in respect thereof;



d. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 9TH DAY OF MAY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

