



**Ethics & Anti Corruption Commission v Mwidani & 4 others (Environment & Land Case 203 of 2007) [2024] KEELC 6924 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6924 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 203 OF 2007  
SM KIBUNJA, J  
OCTOBER 23, 2024**

**BETWEEN**

**ETHICS & ANTI CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**AHMED MWIDANI ..... 1<sup>ST</sup> DEFENDANT**

**JUMA SWALEH ..... 2<sup>ND</sup> DEFENDANT**

**KIUN COMMUNICATION LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**VECTORCON PEST CONTROL & SUPPLIES LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**IMPERIAL BANK LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit through the plaint dated 20<sup>th</sup> August 2007 seeking for judgement against the defendants jointly and severally for:
  - a. Declaration that the lease dated 24<sup>th</sup> June 1997 and registered on 27<sup>th</sup> June 1997 in favour of 1<sup>st</sup> & 2<sup>nd</sup> defendants over Mombasa Island/Block X1/940, suit property, is illegal, null, and void ab initio.
  - b. Declaration that the transfer of the lease dated 3<sup>rd</sup> July 1997 and registered on 4<sup>th</sup> July 1997 over the suit property in favour of 3<sup>rd</sup> defendant is illegal, null, and void ab initio.
  - c. Declaration that the transfer of lease dated 7<sup>th</sup> April 2000 and registered on 10<sup>th</sup> April 2000 over the suit property in favour of 4<sup>th</sup> defendant is illegal, null, and void ab initio.
  - d. Declaration that the charge dated 26<sup>th</sup> June 2000 and registered on 6<sup>th</sup> July 2000 and further charge dated “16.12002” [sic] and registered on 11<sup>th</sup> February 2002 are illegal, null and void



ab initio and the 5<sup>th</sup> defendant cannot exercise any rights conferred under the aforesaid charge and or further charge.

- e. Order to Land Registrar Mombasa to rectify the register of the suit property and cancel the aforesaid entries.
  - f. The 4<sup>th</sup> defendant be ordered to give vacant possession of the suit property.
  - g. An order of permanent injunction be issued against the 4<sup>th</sup> defendant restraining it from trespassing, transferring, leasing, wasting and or in any manner whatsoever dealing with the suit property other than by way of a surrender to the Government of Kenya.
  - h. General damages against the 1<sup>st</sup> defendant.
  - i. Costs of and incidental to this suit.
  - j. Interest at court rates on (h) and (i) above.
2. The plaintiff avers inter alia that the suit property was excised from the access road registered as Mombasa Island/Block X1/535 that links Mutwafi and Ali Bin Salim roads, and abuts parcels Mombasa Island/Block X1/418, 419, 615, 388 to 392 on one side and Mombasa Island/Block X1/421, 438, 439, 396, 1044, 393 7 394 on the other side. That through the lease dated 24<sup>th</sup> June 1997 that was registered on 27<sup>th</sup> June 1997, the Municipal CAouncil of Mombasa, council, purported to let the suit property for commercial purposes, to the 1<sup>st</sup> & 2<sup>nd</sup> defendants for a term of 99 years from 1<sup>st</sup> November 1996 for a consideration of Kshs.19,700 as stand premium. That through the transfer of lease dated 3<sup>rd</sup> July 1997 and registered on 4<sup>th</sup> July 1997, the 1<sup>st</sup> & 2<sup>nd</sup> defendant purported to transfer the suit property to the 3<sup>rd</sup> defendant, for a consideration of Kshs.1.4 million. That through the transfer of lease dated 7<sup>th</sup> April 2000 and registered on 10<sup>th</sup> April 2000, the 3<sup>rd</sup> defendant purported to transfer the suit property to the 4<sup>th</sup> defendant for a consideration of Kshs.800,000. That by the charge dated 26<sup>th</sup> June 2000 and registered on 6<sup>th</sup> July 2000, the 4<sup>th</sup> defendant purported to charge the suit property and another parcel to 5<sup>th</sup> defendant to secure an indebtedness of Kshs.1.5 million. That by a further charge dated “16.12002” and registered on 11<sup>th</sup> February 2002, the 4<sup>th</sup> defendant purported to charge the said laid to 5<sup>th</sup> defendant for a further indebtedness of Kshs.2 million. That the suit property was not available for alienation by the council to the 1<sup>st</sup> & 2<sup>nd</sup> defendants or any other person as it was a portion of a road, and the issuance of the lease thereof was fraudulent, illegal, null and void ab initio. The plaintiff set out the particulars of fraud and illegality, misfeasance, loss and damage at paragraphs 9, 10, and 10(a) of the plaint respectively.
3. The 1<sup>st</sup> & 2<sup>nd</sup> defendants opposed the suit through their statement of defence dated 6<sup>th</sup> September 2007 inter alia averring that the suit property was an open space and not a road reserve as alleged. That they applied for and were allocated the property by the Town Clerk, who was the Chief Executive of Municipal Council of Mombasa. They denied the particulars of fraud, illegality and misfeasance stating that all the procedures were followed in the allocation.
4. The 3<sup>rd</sup> defendant filed their statement of defence dated the 21<sup>st</sup> September 2007, averring that the suit was misconceived, fatally defective and incompetent and the suit property is registered in the name of Municipal Council of Mombasa and the plaintiff has no power to initiate this suit. That the council’s title cannot be nullified, without making it a party in the suit. That it purchased the property from 1<sup>st</sup> & 2<sup>nd</sup> defendants for valuable consideration and resold it to the 4<sup>th</sup> defendant, and all the transactions were done in accordance of the law.



5. The plaintiff's suit is also opposed by the 4<sup>th</sup> defendant through its statement of defence dated 18<sup>th</sup> September 2007, among others stating that the suit property is leased to it and registered with Municipal Council of Mombasa, and the suit is a nullity as the Council is not a party in the suit. That the transaction between it and the 3<sup>rd</sup> defendant over the suit property and the charge to 5<sup>th</sup> defendant were properly done, and there was no entry on its register to show the land was a road as alleged. That it has put up a warehouse complex costing Kshs.6 million on the suit property.
6. The 5<sup>th</sup> defendant opposed the suit through the statement of defence dated the 11<sup>th</sup> September 2007, inter alia stating that it did due diligence before entering into the charge and further charge with the 4<sup>th</sup> defendant over the suit property securing Kshs.1.5 million and Kshs.2 million. That the Government of Kenya organs knew of the charge as stamp duty and other applicable registration fees were paid.
7. The hearing of the main suit started before me on the 30<sup>th</sup> October 2023, with the plaintiff calling Edward Kiguru, surveyor and Dedan Okwama, investigator, who testified as PW1 and PW2 respectively. In the subsequent hearing, the plaintiff availed Pius Nyange Maithya, valuer, Amani Ali Athman, Survey Assistant, and Phillip Osiero, Mombasa Engineer Roads, who testified as PW3 to PW5 respectively. PW1 told the court how he did the initial survey for the suit property on 6<sup>th</sup> February 1997 under FR 318/180 as parcel 940/X1/MI, and forwarded for registration to the Director of Survey, who rejected it and returned the same to him vide the letter dated 11<sup>th</sup> June 1997, for reasons that it was on a road reserve. He disclosed that he had used a scheme survey plan and not a PDP when doing the survey. In cross examination by the learned counsel for the 4<sup>th</sup> defendant, PW1 stated that he had been given instructions to survey the plot by an individual whose name he could not recall, and not an institution. He testified that he came to learn his survey was later used fraudulently to amend the RIM and register interest over the plot, but he did not lodge any complaints. He added that he had visited the property and noted it was on a road that was not active.
8. PW2 told the court how he carried out investigations on the transactions over the suit property, and established it was part of the road reserve. That as the land had not lawfully been degazetted for alienation, the plaintiff issued demand notices to the 1<sup>st</sup> to 4<sup>th</sup> defendants and then filed this suit. During cross examination by the learned counsel for 4<sup>th</sup> defendant, PW2 stated that the plaintiff had initiated investigations over the suit property after receiving a complaint from a private individual. That he did not see any approved minutes from the Municipal Council of Mombasa on the application for the suit property by the 1<sup>st</sup> & 2<sup>nd</sup> defendants. That the plaintiff did not find it necessary to sue the Council and the Land Registrar.
9. PW3 told the court how he valued parcel Mombasa/Bock X1/940 in September 2018, on instructions of the plaintiff, at Kshs.10 million, which value does not include the godown structure on it.
10. PW4, a Senior Lands Survey Assistant with Survey of Kenya, told the court that parcel 940/Mombasa Island/Block X1 was excised from a road reserve through a survey done by PW1 and submitted on 21<sup>st</sup> February 1997, to the Director of Survey. That the Director of Survey declined to approve the survey and returned it to PW1 through the letter dated 11<sup>th</sup> June 1997, requesting for the PDP to be availed as the plot had been carried out on a road reserve. He testified that according to the official records in their office, FR 318/180 that was used to register the said property is for LR. NO. 22805 which is situated west of Kilifi town, Kilifi County. During cross examination by the learned counsel for the 4<sup>th</sup> defendant, PW4 told the court that he got to know PW1's survey had been rejected after the checking the records following the plaintiff's complaints. He produced as exhibit FR.NO. 89/28 done in 1957 that is the original survey plan for the area where the suit property is situated, and pointed out that all approved survey works done on the plots on that area are reflected there.



11. PW5 testified that plot 940/Block X1/Mombasa was curved out of the road reserve, without due procedure being followed. Answering questions from counsel for the 4<sup>th</sup> defendant, PW5 told the court that the road from where the plot was curved is under the County Government of Mombasa, but previously was under the Ministry of Roads up to 2007. That the Commissioner of Lands could not allocate the plot on the road reserve as the road was already alienated to the Ministry in charge of Roads.
12. The 4<sup>th</sup> defendant called Halima Bayani Adan, Managing Director, who testified as DW1, and told the court how the 4<sup>th</sup> defendant bought the plot 940, suit property, through the agreement dated 15<sup>th</sup> February 2000 for Kshs.800,000 after doing due diligence. That the 4<sup>th</sup> defendant then applied for change of user to godown and offices which was approved. Their building drawings were done and approved by the Municipal Council of Mombasa, and they have been paying rates and ground rent to date. That the 4<sup>th</sup> defendant had bought the property as an innocent purchaser for value and without notice of any illegality, and there was no road through it. She informed the court that her late husband handled the transaction through which the 4<sup>th</sup> defendant charged the title with 5<sup>th</sup> defendant to secure funds for development. She prayed for the plaintiff's suit to be dismissed, with costs. During cross examination by the learned counsel for the plaintiff, DW1 agreed that she had availed payment receipts for only Kshs.440,000 of the plot's purchase price. She added that if the plot was a road reserve, the Council would not have allowed 4<sup>th</sup> defendant to pay rates for it. DW1 testified that she did not know that the suit property had been registered with a survey reference for a plot in Kilifi County. That the change of user application and construction on the plot was done by her late husband. That after receiving the demand notice from the plaintiff, the 4<sup>th</sup> defendant through her late husband, lodged an oral claim with the 3<sup>rd</sup> defendant. That the 4<sup>th</sup> defendant was still in possession of the suit property and have been paying rates.
13. The learned counsel for the plaintiff, 4<sup>th</sup> and 3<sup>rd</sup> defendants filed their submissions dated the 17<sup>th</sup> May 2024, 8<sup>th</sup> July 2024 and 14<sup>th</sup> October 2024 respectively, which the court has considered.
14. The issues for the determinations by the court are as follows:
  - a. Whether the suit property was excised from a road reserve, and if so, whether the creation of the said plot was lawfully done
  - b. Whether the allocation of the suit property was lawful and the title thereof protected in law.
  - c. Who pays the costs?
15. The court has carefully considered the parties' pleadings, oral and documentary evidence presented by PW1 to PW5 and DW1, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following findings:
  - a. I find it necessary to start by pointing out for posterity's sake, that the suit against the 5<sup>th</sup> defendant was withdrawn by the plaintiff through the notice of withdrawal dated the 7<sup>th</sup> August 2018.
  - b. That from the evidence tendered, the suit property was excised from Mombasa Island/Block X1/535, through the survey plan FR 318/180 of 6<sup>th</sup> February 1997 conducted by PW1, and forwarded to the Director of Survey. It is apparent that the Director of Survey rejected the survey for being on a road reserve vide letter dated 11<sup>th</sup> June 1997, to PW1 and sought for an PDP approved by the Commissioner of Lands. However, the same FR 318/180 that was rejected was used to amend the RIM to reflect M1/X1/940, the suit property, under entry No.



70, as confirmed by both PW1 and PW4 in their testimonies. The FR NO. 318/180 had not been approved as required by section 41 of the Survey Act which provides that:

“ 41.

- (1) A plan shall be deemed to be authenticated and identified for the purposes of sections 39 and 40 if-
  - a. It is authenticated, by the signature of the Director or of a Government surveyor authorized in writing by the Director in that behalf and by the signature of the authority by whom the notice is given, to be the land or area to which the notice refers; and
  - b. It is identified by a reference number.”
- c. That while the position of 4<sup>th</sup> defendant through DW1, is that there was nothing in the title documents relating to the suit property to show it was created from the road reserve, the evidence tendered by PW1, the surveyor who did the property’s first survey, PW2, the investigator, PW4, Survey Assistant from Survey of Kenya and PW5, the Engineer Roads, Mombasa, was that the suit property now in the name of 4<sup>th</sup> defendant, was indeed on the road reserve. PW1 and PW5 told the court they have been to the suit property and indeed, it was on a road reserve. That evidence has not been rebutted or challenged.
- d. That while DW1 may have told the truth when she stated that there was nothing on the suit property’s title documents to show it was on a road reserve, the testimony by PW1, PW2 and PW4 that it was registered using the survey plan FR NO.318/180, that was done by PW1 and rejected by the Director of Survey, and that the said survey plan was for LR. NO. 22805, which is situated west of Kilifi town, Kilifi County, then the court has no difficulty in finding that the property had been unlawfully, illegally and irregularly created, from a road reserve. A survey plan that has been rejected cannot be used to create and register a plot as that would contravene section 32 of the Survey Act that provides that:

“ No land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director of Survey or of a Government Surveyor authorized in writing by the Director in that behalf or by the affixing of the seal of the Survey of Kenya.”

Section 43 of the said Act further provides that;

“ 43

- (1) All plans authenticated under this Act, purporting to be signed by the Director, or by ttttta Government surveyor authorized by the Director in that behalf, or to be sealed with the seal of the Survey of Kenya, shall be presumed, until the contrary is proved, to have been signed by the Director, or by a Government surveyor



authorized as aforesaid, to have been sealed with the seal of Survey of Kenya, as the case may be.”

It is not disputed that the survey plan in question in this case was not authenticated and was therefore unlawfully relied upon to amend the suit property’s RIM.

- e. That having found that the suit property was excised from a road reserve, it becomes important to establish whether it was lawfully created and alienated. Section 182 of the Local Government Act Chapter 265 of the Laws of Kenya vested the power of general care and control of public streets upon the area Municipal authority, in trust for the public benefit. Section 185 of the said Act empowered the council, upon certain conditions including giving notice and addressing the arising objections, to close any street or road vested in it. That power does not extend to alienating the road reserve as can be seen in the case of *In Italian Engineering Works versus Glory Car Hire (1990) KLR 218*, where the court inter alia found that “The decision to close down a public street, or even change its user requires a resolution of the Council to which the power has been vested by legislation..... In the above circumstances it is clear that the decision to allocate the road reserve to the 1<sup>st</sup> defendant was ultra vires the powers of the 2<sup>nd</sup> defendant. the 2<sup>nd</sup> defendant purported to alienate the road reserve when it could not legally do so.” In this suit, the plaintiff presented some minutes of the Mombasa Municipal council showing on 7<sup>th</sup> September 1993, it had approved allocation of some plots to several people, including the 1<sup>st</sup> defendant. The minutes also indicated that the council had resolved that applications for allocations of plots on road reserves would be considered on merit on case by case basis. The plaintiff’s case is that no minutes were traced to show that the council had resolved to create the suit property on the road reserve, and allocate it to the 1<sup>st</sup> & 2<sup>nd</sup> defendants. The learned counsel for the plaintiff submitted that the minutes of the Council did amount to a lawful allocation of the suit property, and that the power to close the roads under section 185 of the said Act did not extend to authority to create and allocate plots on the road. In the case of *County Government of Meru & Others versus PCEA thro’ The Registered Trustee [2020] eKLR*, where the court held that:

“...minutes alone do not confer proprietary interests in the land. This is because minutes are an expression of intention to allocate land. The committee to actualize the intent to allocate is manifested in the issuance of letter of allotment from allotting authority. Demarcation of the parcel of land in question is then carried out through the process of survey. Thus the resolutions of the council in the minutes must be put in effect in order to give rise to a bundle of rights in the land capable of being protected..... from the foregoing analysis, it is clear that none of the parties acquired rights over the suit land through the aforementioned minutes....the council simply expressed an intention to give the respondent the suit land vide their minutes.”

- f. That even taking for a moment that the council had regularly moved and passed a resolution to consider allocation of plots excised from road reserves through its minute of 7<sup>th</sup> September 1993, that does not appear to have been actualized as no gazette notice on closure of the road in question was availed to the court by any of the parties. According to PW2, no such gazette notice was traced during the investigations, and that the only gazette notice obtained was that of 11<sup>th</sup> March 1994, where the Town Clerk gave notice that the council intended to close certain roads within Mombasa municipality, and invited objections. There is however no evidence



whether any objections were raised, and or how they were resolved. In any case, the said notice did not mention the specific road reserve where the suit property is situated.

- g. The statutory power given to the council to close a road must be exercised in good faith for the public good, and as it remained alienated government road, it was not available for allocation to private entities/persons in view of section 85 of the Government *Land Act*, and section 8 of the Public Road and Access Act chapter 399 of Laws of Kenya. It follows therefore that the Clerk and Mayor of the Council did not have the power to create the suit property over the road reserve, register or allocate it to the 1<sup>st</sup> & 2<sup>nd</sup> defendants, as under section 3 of the Government *Land Act*, only the President and or Commissioner of Lands, under delegated authority, could allocate un-alienated government land. In the case of Kenya Highway Authority versus Shalien Masood Mughal & 5 Others [2017] eKLR, the court was emphatic that public land and resources are held in trust for the needs of the society. Indeed, the constitutional protection of rights to property under Article 40 of *the Constitution*, 2010 does not extend to any property that has been found to have been unlawfully acquired.
- h. The 1<sup>st</sup> to 3<sup>rd</sup> defendants did not tender evidence in support of their averment in their statements of defence. The contents of their statements of defence remains mere allegations as no evidence was tendered in support thereof. However, the learned counsel for 3<sup>rd</sup> defendant filed submissions among others submitting that the plaintiff has failed to prove that the 3<sup>rd</sup> defendant obtained and passed on a bad title to the suit property. That the plaintiff has been in a quest to prove a case against the 1<sup>st</sup> & 2<sup>nd</sup> defendants, while trying to pull the other defendants as active participants in any alleged fraud.
- i. The 4<sup>th</sup> defendant's case was that it was an innocent purchaser for value without notice. The learned counsel for the 4<sup>th</sup> defendant inter alia submitted that the registration and or transfer of the suit property to the defendants was for valuable consideration, above board, devoid of any irregularity or illegality, and they should not be deprived of their right to the property as sought by the plaintiff. The plaintiff's case and submissions is that the alienation of the suit property that was evidently excised on the road reserve, was illegal, fraudulent, irregular, null and void an initio, and incapable of conferring any good interest or title on the defendants. I find the plaintiff has tendered evidence to the standard required that proves the creation of the suit property was done on an already alienated land, a road reserve. The survey done on it by PW1 was rejected by the Director of Survey as confirmed by PW1 and PW4, but strangely, the said survey plan with a reference of a plot in Kilifi County, was later used to register the suit property, that was allocated to the 1<sup>st</sup> & 2<sup>nd</sup> defendants. It follows therefore, that the 1<sup>st</sup> & 2<sup>nd</sup> defendants did not acquire a good title to the suit property, and the transfer of the same to the 3<sup>rd</sup> defendant and thereafter to the 4<sup>th</sup> defendant did not confer upon them good title that can be protected under Article 40 of *the Constitution*.
- j. It follows that the title to the suit property obtained by the defendants at allocation, registration and transfers has been successfully impugned, and the court has the power to order its cancellation or revocation. The decisions in the following cases is relevant; Chemney Investment Limited versus Attorney General & 2 Others [2018] eKLR, and Funzi Island Development Limited & 2 Others versus County Council of Kwale & 2 Others [2014] eKLR.
- k. The provision of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya direct that costs follow the events unless where ordered otherwise for good reasons. In this case, I do not find good cause to deviate from that edict and the plaintiff shall have costs.



16. The above conclusions leads the court to find that the plaintiff has proved it claim against the defendants. The court therefore enters judgement for the plaintiff against the defendants jointly and severally as follows:

- a. A declaration is issued that the lease dated 24<sup>th</sup> June 1997 and registered on 27<sup>th</sup> June 1997 in favour of 1<sup>st</sup> & 2<sup>nd</sup> defendants over Mombasa Island/Block X1/940, suit property, is illegal, null, and void ab initio.
- b. A declaration is issued that the transfer of the lease dated 3<sup>rd</sup> July 1997 and registered on 4<sup>th</sup> July 1997 over the suit property in favour of 3<sup>rd</sup> defendant is illegal, null, and void ab initio.
- c. A declaration is issued that the transfer of lease dated 7<sup>th</sup> April 2000 and registered on 10<sup>th</sup> April 2000 over the suit property in favour of 4<sup>th</sup> defendant is illegal, null, and void ab initio.
- d. A declaration is issued that the charge and further charge registered on 6<sup>th</sup> July 2000 and 11<sup>th</sup> February 2002 respectively, over the suit property are illegal, null and void ab initio.
- e. An order is hereby issued directing the Land Registrar Mombasa to rectify and cancel the aforesaid entries from the register of the suit property.
- f. The 4<sup>th</sup> defendant is hereby directed to give vacant possession of the suit property within the next ninety [90] days.
- g. An order of permanent injunction is hereby issued restraining the 4<sup>th</sup> defendant from trespassing, transferring, leasing, wasting and or in any manner whatsoever dealing with the suit property, other than by way of a surrender to the Government of Kenya, after the expiry of ninety days from today.
- h. Costs to the plaintiff.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 23<sup>RD</sup> DAY OF OCTOBER 2024.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

In the Presence of:

Plaintiff : M/s Songole

Defendants : M/s Awino for Noor for 3<sup>rd</sup> Defendant and M/s Takah for 4<sup>th</sup> Defendant.

Leakey – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

