



REPUBLIC OF KENYA



Alausii & another v Mussani & 8 others (Environment & Land Case 5 of 2021) [2024] KEELC 13402 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13402 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 5 OF 2021
FM NJOROGE, J
NOVEMBER 20, 2024**

BETWEEN

MOHAMED ALI ALAUSII 1ST PLAINTIFF

KHALID BADI SUEDI 2ND PLAINTIFF

AND

ABDI AZLI MOHAMED MUSSANI 1ST DEFENDANT

ROGERS KAIBUGA 2ND DEFENDANT

JACOB KIRINYA NAIRUTGI 3RD DEFENDANT

EMMANUEL KAZUNGU MASHA 4TH DEFENDANT

RENONS 5TH DEFENDANT

JAMES MOUKO 6TH DEFENDANT

JOGI MOTOR LIMITED 7TH DEFENDANT

JOSEPH WAMBUGU 8TH DEFENDANT

KESREC AGENCY LTD 9TH DEFENDANT

RULING

1. The application for determination is dated 25/1/2021 for the following orders: -
 1. Spent.
 2. Spent.
 3. That the defendants be restrained by themselves, their servants, employees, agents and/or assignees from carrying out all construction works, developing, transferring or in any manner



whatsoever disposing off all that property known as Land Reference Number 141 Malindi Title Number LT 21 Folio 817 File 306 pending the hearing and determination of the suit herein.

4. That the costs of this application be provided for.
2. The application which is supported by the affidavit sworn by Mohamed Ali Alausii, the 1st Plaintiff, on 25/1/2021, is based on the following grounds: -
 1. That the Plaintiffs are the registered owners of all that property known as Land Reference Number 141 Malindi, Title Number LT 21 Folio 817 File 306 (hereinafter “the suit property”);
 2. That the defendants have fraudulently and without any color of right fraudulently obtained titles in respect of various portions of the Plaintiffs’ aforesaid property without the Plaintiffs’ consent and approval;
 3. That the title documents held by the defendants are all illegal documents and do not confer any legal interests in the subject land;
 4. That the defendants have embarked on construction works and are keen on undertaking extensive developments on the plaintiffs’ aforesaid property.
3. The Plaintiffs’ case is that they inherited the suit property from their grandparents namely, Haji Ahmed Hajji Ibrahim, Time Binti Masoud and Halima Binti Masoud, who were all siblings to one Hussein Wa Masoudi Bin-Alidina, the apparent original owner of the suit property. The 1st Plaintiff added that by an agreement dated 6/9/2006, the Plaintiffs agreed to sell a portion of the suit property containing approximately 30 acres, to one Francis Wambugu Ngabi who failed to pay the agreed consideration. Resultantly, one Joseph Wambugu, a director of the 7th Defendant, offered to purchase the said 30 acres and an agreement between the plaintiffs and the 7th defendant was executed. Similarly, the 7th Defendant failed to pay the purchase price, forcing the Plaintiffs to decline a transfer to it. Thereafter, the said Joseph Wambugu informed them that they had transferred the portion to the 1st Defendant and at some point, the said Joseph Wambugu caused the arrest of the Plaintiffs during which arrest attempts were made to coerce the plaintiffs into executing transfer documents in favour of the 1st Defendant which they refused. Ultimately, the 1st Defendant was registered as the owner of the said portion and subdivision done in favour of the other Defendants. It is alleged that the transfer was without the plaintiff’s consent.
4. The Plaintiff further deposed that following the loss of the original title, they made an application for a provisional title, however, they are yet to obtain the same for the reason that the suit property’s file at the land’s registry cannot be found. He added that the National Land Commission has since established that the suit property belongs to the Plaintiffs and in a letter dated 4/7/2018 expressly recommended the District Land Registrar to rectify the title in favour of the Plaintiffs; that despite the above, the Defendants have since moved into the property carrying out extensive developments prejudicial to the Plaintiffs’ interests.

2nd Defendant’s Response.

5. The application is contested. The 2nd Defendant swore a replying affidavit on 25/1/2022 wherein he deposed that the suit is *sub judice* Malindi ELC 59 of 2017 Khalid Badi Swedi & 2 others v Arbi Ali Mohamed Mussani & 3 others; that the Plaintiffs have no known proprietary rights over the suit property, Plot No 141, which is in any event non-existent following sub-divisions. He explained



that the Plaintiffs were previous beneficiaries through intestacy, and upon the said subdivision, they distributed the new portions to Khalid Badi Swedi, Mohamed Ali Alausi, Halima Hussein Ahmed and Arbi Ali Mohamed Mussaini.

6. The 2nd Defendant added that the suit and application are barred by the doctrine of estoppel by virtue of memorandum of understanding dated 26/2/2014, between the Plaintiff and the 1st and 8th Defendant. He stated that he lawfully and procedurally purchased the sub-division plot 13761 from the 1st Defendant vide an agreement dated 26/2/2014 and that he has since further subdivided the said plot and sold the same to third parties. He asserted that the orders sought were untenable.

The 3rd Defendant's Response.

7. The 3rd Defendant filed a replying affidavit which he personally swore on 10/2/2022 adopting the contents of the 2nd Defendant's replying affidavit. He added that he is the registered owner of portions No 13757 – 13760 being products of sub-division of the original Plot No 141. He also filed a notice of preliminary objection to the suit and the motion stating that they are *sub judice* ELC 59 of 2017.

The 6th Defendant's response

8. The 6th Defendant also opposed the application. He swore a replying affidavit on 31/1/2022, stating that he purchased a total of 5 acres from the Plaintiffs and two other deceased persons identified as Halima Hussein and Hassan Serenge in the year 2007, and has since constructed his permanent home thereon. He explained that the 1st Defendant sub-divided the land and the 1st Plaintiff authorized that a portion 13763 be given to him (6th Defendant) together with some other 3.5 acres. Pursuant to this arrangement, they signed an indenture of transfer which they presented for registration; that the 1st Plaintiff managed to retrieve the indenture, forcing the 1st Defendant to prepare another indenture which the 1st Plaintiff has since refused to sign; that he agreed to retain the 3.5 acres when he learnt that the 1st Defendant had re-sold the other portion to a different person, yet the Plaintiff filed ELC No 59 of 2017 contesting his ownership; that during the pendency of that suit, the Plaintiffs filed a complaint against him to the Assistant County Commissioner, where they agreed to be bound by the findings of a joint surveyor; that the outcome of the survey revealed that the 6th Defendant occupied three and a quarter acre; the 6th Defendant urged the court to dismiss the application for being an abuse of the court process.

The 7th Defendant's response

9. The 7th Defendant also opposed the application. It filed a replying affidavit sworn by Joshua Rodrot, its director, on 5/3/2022, who stated that the suit and application were bad in law, misconceived and an abuse of the court process for failure to disclose any cause of action against the 7th Defendant; that the Plaintiffs sub-divided and transferred plot No 141 to other individuals including the 7th Defendant, who occupies portion No 13756, vide an indenture dated 9/10/2013.
10. Parties were directed to file written submissions. While Ms. Mwangi, counsel for the 3rd Defendant indicated that she shall rely on the replying affidavit on record, none of the other parties complied with those directions, or did like Ms Mwangi, not even the Plaintiff/applicant. Where no other mode of disposal of the application save by filing of submissions has been ordered by court, the application can not be deemed to have been prosecuted. This applied to the present application where the applicant has failed to file submissions. In the premises, I dismiss the application for want of compliance with this court's directions.



**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON
THIS 20TH DAY OF NOVEMBER, 2024.**

MWANGI NJOROGE

JUDGE, ELC, MALINDI

