



Mwabalahe & 5 others v Bamahriz & another (Environment and Land Case 102 of 2018) [2024] KEELC 13280 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13280 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 102 OF 2018
SM KIBUNJA, J
NOVEMBER 20, 2024**

BETWEEN

**SALIM SALIM MWABALAHE 1ST PLAINTIFF
JUMA HASSAN NONDO 2ND PLAINTIFF
YUSUF MAGUTI ODHIAMBO 3RD PLAINTIFF
ALI IDRIS 4TH PLAINTIFF
MWINYI ALI SAID 5TH PLAINTIFF
RAMA HAMISI 6TH PLAINTIFF**

AND

**ABDALLA BAMAHRIZ 1ST DEFENDANT
COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT**

RULING

1. The 1st defendant moved the court through the notice of motion dated April 9, 2024, seeking for striking out of the amended plaint dated and filed on June 28, 2019 for want of locus standi and viable cause of action by the plaintiffs, and costs. The application is based on the nine grounds on its face marked (i) to (ix) and supported by the affidavit of Abdalla Bamahriz, 1st defendant, sworn on the 9th April 2024, in which he inter alia deposed that the plaintiffs' prayer for a declaration that the alienation and allocation of plot No. MS/1592, suit property, by the 2nd defendant to him is null and void is totally misplaced and not anchored in any law; that he bought the suit property which is a part of a subdivision scheme resulting into parcels 1591, 1592 and 1594 carried out by Mombasa Council in 1971, from the previous owner who is not a party in this suit, after carrying out due diligence and obtaining the necessary consents; that he is the duly registered owner of the suit property and has paid the rates and



- rent; that there is no privity of contract or viable cause of action between the plaintiffs and himself, and the plaintiffs lack the locus standi to bring this suit; that the suit should be dismissed with costs.
2. The application is opposed by the plaintiffs through the replying affidavit sworn by Salim Salim Mwabalahe, 1st plaintiff, sworn on the May 15, 2024, in which he inter alia deposed that the suit land was public land and the 1st defendant has not shown that the due process was followed when it was allocated; that the plaintiffs are residents of Likoni area and have through their pleadings demonstrated that the suit property is used as a public arena for public functions including religious gatherings, sports, community events and political rallies, and its allocation to 1st defendant is therefore null and void and contrary to the public interests of the citizen in that area and Kenya in general; that the plaintiffs have the locus standi to institute and prosecute this suit under Article 22 & 25 of the Constitution of Kenya 2010, and the present application is a belated attempt to delay the suit filed in 2018; that the 1st defendant had not raised the issue of their locus standi in his statement of defence and has been attending court since 2018, and the application lacks in merit and should be dismissed with costs.
 3. The court issued directions on filing and exchanging submissions on the July 9, 2024, and the learned counsel for the plaintiffs filed theirs dated July 15, 2024. The record confirms that the 1st defendant had not filed submissions as of October 2, 2024 when today's ruling date was fixed. The court directed the learned counsel for the 1st defendant to file their submissions before close of business that day. At the time of preparing this ruling, I perused the CTS and the physical file and has not seen any submissions filed by the 1st defendant on their application dated April 9, 2024. The learned counsel for the 2nd defendant had told the court on the July 9, 2024 that they would not participate in the hearing of the instant application.
 4. The following are the issues for the determinations by the court:
 - a. Whether the plaintiffs have the locus standi to institute and prosecute this suit.
 - b. Whether the plaintiffs suit as filed discloses a reasonable cause of action against the 1st defendant.
 - c. Who pays the costs?
 5. The court has clearly considered the grounds on the notice of motion, affidavit evidence by the plaintiffs and 1st defendant, submissions by the plaintiffs' counsel, the pleadings filed and come to the following conclusions:
 - a. That from the plaintiffs' pleadings in the amended plaint dated June 28, 2019, the suit property was public land registered with the 2nd defendant as custodian for the general public, that has been leased to the 1st defendant. The 1st defendant averred in his statement of defence dated the 13th August 2019, that he bought the suit property from the previous owner, and is therefore the registered owner vide a lease from the County Government of Mombasa. The court has noted from the copy of the certificate of lease for the suit property attached to 1st defendant's replying affidavit sworn on the May 7, 2018 in response to an application dated the April 27, 2018, that register to the property was opened on the October 6, 2010. The same certificate of lease show the 1st defendant was registered as the owner of the leasehold interest on February 28, 2018 under entry number 11, and the Municipal Council of Mombasa, the predecessor to the 2nd defendant, is indicated as the lessor.
 - b. The plaintiffs' pleadings at paragraphs 6, and 7 of the plaint averred that the 2nd defendant has "illegally and unprocedurally alienated and allocated the suit land which is public land to the



1st defendant to the detriment of the plaintiffs and the general public at large.” That “the entire community within Likoni area stands to suffer irreparable loss if the construction activities of the 1st defendant already commenced on the suit property are not stopped by this honourable court.” The 1st defendant has at paragraph 6 of the statement of defence averred that “he is the registered owners of the suit property vide a lease from the County Government of Mombasa.” The foregoing averments by the parties and the contents of the certificate of lease over the suit property issued to the 1st defendant on the 28th February 2018, that the court referred to in (a) above, leads the court to find that the suit property was public property registered with the 2nd defendant obviously for public use. The plaintiffs have faulted the procedure through which the 2nd defendant alienated the said public land to private land that is now leased to the 1st defendant.

- c. The 1st defendant has averred that he bought the suit property from the previous registered owner, and that the plaintiffs do not have the locus standi to institute this suit. The plaintiffs have relied on Articles 22 & 25 of the Constitution that deals with enforcement of bill of rights and fundamental rights and freedoms that may not be limited respectively. That as the suit property has a history of being public land, and the plaintiffs are indeed questioning the process through which it was alienated by 2nd defendant to the 1st defendant, I find it is only fair and just that the suit be allowed to proceed to hearing and determined on merit in view of the provision of Article 40(6) and section 26(1) of the Land Registration Act No.3 of 2012. In case the plaintiffs fail to succeed, the 1st defendant may be compensated through an award of costs. It is therefore the finding of the court that the plaintiffs have the locus to file and prosecute this suit and indeed their suit has disclosed a reasonable cause of action against the 1st defendant.
- d. Under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the events unless where the court for good cause orders otherwise. In this instance, I do not find any cause to order otherwise and the plaintiffs are awarded costs.

6. In view of the above conclusions, the court finds and orders as follows:

- a. The 1st defendant’s notice of motion dated the 9th April 2024 is without merit and is hereby dismissed.
- b. The plaintiffs are awarded costs in the application.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 20TH DAY OF NOVEMBER 2024.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFFS : M/s Nyambune for Mokaya

DEFENDANTS : Mr. Mohamed for 1st Defendant

LEAKEY – Court Assistant.

S. M. Kibunja, J.

