



**Colwall Investments Limited & another v Registered Trustees of Mombasa Golf Club & another  
(Environment & Land Case 181 of 2005) [2023] KEELC 263 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 263 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 181 OF 2005**

**NA MATHEKA, J  
JANUARY 24, 2023**

**BETWEEN**

**COLWALL INVESTMENTS LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**PATRIA PROPERTIES LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**REGISTERED TRUSTEES OF MOMBASA GOLF CLUB ..... 1<sup>ST</sup> DEFENDANT**

**MOMBASA GOLF CLUB LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff avers that at all material times they are the registered as the leasehold proprietor of all that property known as Plot No. Mombasa/Block XXVI/378. The Plaintiff avers that the former Trustees of the Mombasa Golf Club on or about 24<sup>th</sup> May, 2002, filed in this Court a Civil Suit No. 216 of 2002 praying for, inter alia, a declaration that the Property is part and parcel of Title No. Mombasa/Block XXVI/558 and therefore belongs to the Defendants. However, that suit was withdrawn by a consent order filed in this Court on 15<sup>th</sup> July, 2003.
2. The Plaintiff further avers that the Defendants, and the members of the Golf Club, their servants, agents and or employees without the consent of the Plaintiff have wrongfully encroached onto and have entered upon the Property by taking possession and using the same as part of its golf course thereby depriving the Plaintiff of the use of and enjoyment of the Property.
3. The plaintiff further avers that despite demands made to the Defendants to vacate the Property, the Defendants have ignored and or refused to do so and intend to continue in wrongful possession and or occupation of the Property unless restrained by this Court. The Plaintiff prays for the following orders;
  1. A declaration that the Plaintiff is the Registered Owner of the suit premises and entitled to possession;



2. Return of the encroached portion of the Plaintiff's Property being the suit premises with vacant possession;
  3. A permanent injunction restraining the Defendants and all members and visitors of the Golf Club, their servants and or agents from entering onto or from trespassing on or onto the Plaintiff's Plot No. Mombasa/Block XXVI/378
  4. Damages for its conversion and detention;
  5. Damages for trespass;
  6. Alternatively, mesne profits;
  7. Costs of and incidental to this suit;
  8. Interest on damages; and
  9. Any other or further relief this Court deems fit to grant.
4. The Defendants states the 'Mombasa Golf Club' was established far back in 1911 and has been in existence ever since. Prior to 1976 the said Golf Club was the registered owner of three parcels of land, to wit, MSA/ Block XXVI/ 175 (measuring 43.0 Acres or thereabouts; MSA/Block XXVI/ 160 (measuring 0.377 Acres or thereabouts) and MSA/Block XXVI/164 (measuring 0.786 Acres or thereabouts). MSA/XXVI/368 & MSA/XXVI/369. Between 1979 and 1998 Plot Nos. 365, 160 and 164 were consolidated to form Plot No. 558/XXVI/Mombasa Island. Further Plot No. MSA/XXVI/366 was further subdivided into Plot Nos. 376, 377 and 378/XXVI/Mombasa Island.
  5. The Defendants assert that the said Golf Club is the legal and rightful owner of the said Plot No. MSA/ Block XXVI/378; wherefore the alleged issue of trespass or encroachment thereon does not and cannot arise. The Defendants aver and maintain that the said Golf Club never ceded, to the 1<sup>st</sup> Plaintiff or any other third party, any of its said land after the said subdivision or consolidation. Further the Defendants aver and maintain that the said land belonging to it or any part thereof or at all was never alienated by the Government.
  6. The Defendants aver and maintain that if the said land was so alienated (which is denied) the prescribed procedure was not followed in accordance with the relevant provisions of the Government Lands Act or at all. In any event had the prescribed procedure relating to alienation been followed (which is denied) the said Golf Club would not have passed over the opportunity to contest any intended alienation of its rightful land. The Defendants prays that the suit herein be dismissed with costs.
  7. This court has considered the evidence and the submissions therein. Edward Maranye Kiguru, a licensed surveyor gave his testimony as PW1. He stated in 2002 he was contracted by the 1<sup>st</sup> Plaintiff to carry out a survey on the suit property and prepared a report dated 24<sup>th</sup> June 2002 (PEX-3). In the report he detailed the origin of the suit land as well as Plots 558, 364, 60, 164, 178 and 376. He deponed that the Plot 377 and Plot 378 the suit land were excised out of Plot 366 by the Government of Kenya. He then produced a letter of allotment dated 5<sup>th</sup> January 1987 (PEX-1) and stated that the Defendants were allocated Plot 558 which was a consolidation of Plots 60, 164, part of 175 and 376 and issued with a lease on 11<sup>th</sup> February 1993 (PEX-2). The said lease came with a RIM which showed that Plot 378 is not part of Plot 558. On cross examination, he confirmed that he does not have a report that showed where the beacons to Plot 378 are, neither does he have the official certificate of search that shows ownership of the suit land. He stated that the Government created a lease over Plot 378 was registered on 14<sup>th</sup> August 1997 in favor of Eldoret Bata Stores limited, however he confirmed that he did not attach the said lease between the Government of Kenya and Eldoret Bata Stores limited.



8. Ashok Labshanker Doshi, is a Director to both the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, he gave his testimony as PW2 in support of the Plaintiffs' case, he produced his statement dated 30<sup>th</sup> September 2012 and the Plaintiffs' bundle of documents dated 5<sup>th</sup> October 2012. PW2, testified that in 1998, the 1<sup>st</sup> Plaintiff purchased the suit property from Eldoret Bata Stores Limited, the initial registered owners of the suit property. On 10<sup>th</sup> March 2006, while this suit was still pending in court, the 1<sup>st</sup> Plaintiff transferred the suit property to the 2<sup>nd</sup> Plaintiff.
9. Eldoret Bata Stores Limited was the registered lessee of Mombasa/Block XXVI/378 from the Government of Kenya, as seen in the Certificate of Lease dated 14<sup>th</sup> August 1997 (PEX-4). Eldoret Bata Stores Limited sold the suit property for Kshs 5,000,000/= to Colwall Investment Limited as seen from the Transfer (PEX-5). Colwall Investment Limited got registered as owner of the suit property as seen from the Certificate of Lease dated 13<sup>th</sup> October 1998 (PEX6). Colwall Investments Limited transferred the suit property to Patria Properties Limited as seen from the Transfer dated 10<sup>th</sup> March 2006 (PEX-7). Patria Properties Limited were registered as owners of the suit property as seen from the Certificate of Lease dated 10<sup>th</sup> March 2006 (PEX-7).
10. On cross examination, PW2 stated that the 1<sup>st</sup> Plaintiff did not engage a lawyer when he bought the suit property from Eldoret Bata Stores Limited. He confirmed that he did not have a board resolution from either company i.e. the vendor Eldoret Bata Stores Limited or the purchaser the 1<sup>st</sup> Plaintiff authorizing the transaction. He admitted that he did not visit the suit property to conduct a site visit nor carried out a search at the lands office before purchasing the suit property. He stated the Director of Eldoret Bata Stores Limited simply showed him the location of the suit land on a map and proceeded with the transaction. He sought to explain that he did not see the need of viewing the suit land since he knew the area very well since he is a residence of Kizongo where the suit land is situated.
11. On further cross examination, he stated that the transfer from Eldoret Bata Stores Limited to Colwall Investments Limited was registered on 14<sup>th</sup> October 1998. He was, however at pains to explain why the certificate of lease was then registered on 13<sup>th</sup> October 1998, a day before the registration of the transfer. He stated that he had no explanation for the contradicting dates between the transfer and the certificate of lease. PW2 admitted that transfer (PEX-5) was neither dated nor did it show the person who had drawn it. PW2 had no justification as to why the transfer dated 10<sup>th</sup> March 2006 (PEX-6) was indicated as 'Transfer of Land as opposed to 'Transfer of Lease' as required by Cap 300 (repealed). PW2 maintained that the suit land is adjacent to land owned by the National Museums of Kenya, who have confirmed that they have no objection to any development on the suit land.
12. Mr. Gakuo Counsel for the Defendant requested for a site visit to the suit land, which the court conducted on 20<sup>th</sup> March 2019. At the suit land, Counsel for the Defendant further cross examined PW2. PW2, confirmed that was the first day he was entering the suit land and stated that he had only viewed it from the road as he was not allowed into the Golf Club. The court was also able to confirm that presence of historical monuments, which the witness confirmed they existed prior to him purchasing the suit land.
13. The court finds that the Defendants are the registered owners of Mombasa Island Block XXVI/558 measuring 13.52ha pursuant to a lease from the Government of Kenya registered on 15<sup>th</sup> March 1993 (PEX-2). The lease was registered under The Registered Land Act Cap 300 (repealed) for a term of 45 years from 1<sup>st</sup> January 1987 for the purpose of establishing a Golf Course and nonresidential club house. The Defendants were also allotted Plots Mombasa Island Block XXVI/ 60, 164, 175 and 376 amounting to 13.56ha by Government of Kenya vide a Letter of Allotment dated 5<sup>th</sup> January 1989 (PEX-1).



14. The question in the mind of the Court is at what point was Mombasa Block XXVI/378 created? Edward Kiguru, the Surveyor on cross examination confirmed that Mombasa Block XXVI/378 and 377 were excised by the Government of Kenya from Mombasa Block XXVI/366. Further he confirmed that though he was aware there was an existing lease between Eldoret Bata Stores Limited and the Government of Kenya, he had not annexed it in his report dated 24<sup>th</sup> June 2002. The court has perused the RIMs and survey plans annexed to PEX-1 and PEX-2 in order to determine if indeed Plot 378 was excised from Plot 366. The Survey plan dated 22<sup>nd</sup> August 1979 for Parcel No. (365-368, 369) point out that Plot 366 is adjacent to Plots 337 and 367. Plots (365-368, 369) were created out of Plot 175, as seen from the Mombasa Island Part Printed Block 26 Map. Further the court has perused Survey Plan dated 14<sup>th</sup> May 1981 for Parcel 376-379, which indicated that they were originally part of Plot 366 and 367. The Survey plan dated 6<sup>th</sup> June 1989 for Parcel No. 558 indicated that it was a combination of Plots 60, 164, 175 and 376. It is therefore clear that Plot 378 was created out of Plot 366 which was originally part of Plot 175. This Plot 175 is part of the plots that were consolidated vide the letter of allotment dated 5<sup>th</sup> January 1987 (PEX-1) to create Plot 558 which was allotted to the Mombasa Golf Club by the Government and a lease issued (PEX-2).
15. The court has also ascertained that Plot 378 the suit land, was created pursuant to the Survey plan dated 14<sup>th</sup> May 1981. That being the case, the court is not satisfied that the parcel file for Plot 378 was opened on 14<sup>th</sup> August 1997 and Eldoret Bata Stores Limited was registered as the first entry as seen from the Certificate of Lease dated 14<sup>th</sup> August 1997. The court is also aware of the fact that PW1 admitted to court that indeed Plot 378 was created from Plot 366, the only thing that PW1 did not disclose to court is that Plot 366 was created from Plot 175 which is part of Plot 588 belonging to the Defendants.
16. It is not clear how Eldoret Bata Stores Limited came to be the first registered owners of Plot 378 in 1997, when the suit land was surveyed back in 1981. Between 1981 and 1997, was there no title created over the suit land? Was Plot 378 still unalienated Government land that was available for allocation to the Eldoret Bata Stores Limited by the Commissioner of Lands on behalf of the president? The answers to both questions are in the negative, the suit land is Government land and it was not available for alienation to anyone including Eldoret Bata Stores Limited for their private use. Section 3 of the Government Land Act (Repealed), provided the President with powers to make grants or dispositions in or over un-alienated Government land. The President then delegated this powers to the Commissioner of Lands. However, these powers donated to the Commissioner only related to making grants for specific purposes only. Which was for, religious, charitable, and educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President.
17. The Commissioner of Lands leased out Plot 558 to the trustees of Mombasa Golf Club for the purpose of Golf Course, nonresidential club house, squash court, swimming pool the manager's house and for no other purpose (PEX-2). In my view, the lease was properly within the scope of Section 3 of the Government Land Act (Repealed). Therefore, the Commissioner of Lands could not reallocate Plot 378, which forms part of Plot 175, which constitute Plot 558 to Eldoret Bata Stores Limited. The Court of Appeal in *James Joram Nyaga & another v Attorney General & Another* (2019) eKLR held that,

The Learned Judges however found and held, and correctly so in our view, that only the President of Kenya and not the Commissioner of Lands had power to alienate unalienated Government land by dint of section 3 of Government Land Act and by a reading of section 7 of the same Act. To the extent that it was the Commissioner of Lands who masterminded the process of the allocation and processing of the title of the suit property



to the appellants, he acted without jurisdiction and whatever resulted was a nullity. The question of whether the Commissioner of Lands could legally alienate un-alienated public land has been considered in the past by the Supreme Court in an advisory opinion - *In the Matter of the National Land Commission* (2015) eKLR in which the Court remarked as follows,

“Section 3 of the Government Lands Act (GLA) conferred powers on the President to make grants of freehold or leasehold of un-alienated Government land. Section 7 prohibited the Commissioner of Lands from exercising the powers of the President under Section 3, subject to certain exceptions; though the President could (and did) delegate his powers to the Commissioner. Procedures were laid out, to guide the allocation of Government land; but those were not duly followed, subsequently.”

18. The Plaintiffs have not dispensed with the burden of proving to Court to its satisfaction, that the Commissioner of Lands had powers to allocate land to Eldoret Bata Stores Limited. It was not enough for the Plaintiffs to produce a certificate of lease in the name of Eldoret Bata Stores Limited, as proof that they were alienated the suit land by the Government of Kenya. They ought to have gone a step further and demonstrated to court the origin of the same title. The Court of Appeal in *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR stated that;

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. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

19. The Plaintiffs did not produce an official search certificate of Mombasa/Block XXVI/378. PW2 admitted on cross examination that he never conducted a site visit to the suit property before purchasing it, he simply relied on the map that was apparently shown to him by the Director of Eldoret Bata Stores Limited. The court finds that PW2 failed to lay a foundation on the authenticity of his title, and is therefore not a bonafide purchaser for value. PW2 cannot claim to be a person who honestly intended to purchase the suit property without being aware of the inconsistencies and discrepancies in the title of Eldoret Bata Stores Limited. The Court of Appeal in Kampala defined the bonafide purchaser doctrine in the case of *Katende v Haridas and Company Limited* (2008) 2 EA 173, it was held that;

A bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine he must prove the following: he holds a certificate of title, he purchased the property in good faith, he had no knowledge of the fraud, he purchased for valuable consideration, the vendors had apparent valid title, he purchased with no notice of any fraud and he was not party to any fraud.

A bonafide purchaser of a legal estate for value without notice has absolute, unqualified and answerable defence against the claims of any prior equitable owner.”

20. PW2 admitted that the 1<sup>st</sup> Plaintiff did not investigate whether his predecessor had a valid title to sell the land. PW2 also admitted that he never conducted an official search of the title at the lands office before the purchase. He confirmed that he never visited the suit property before purchasing it, he merely stated



that since he lives in Kizingo he knew the area well. If indeed PW2 was fully cognizant with Kizingo, it is expected that he knew the suit property was fenced as part of the Defendants' Golf Course. It was a further admission during the court's site visit inside the Defendant's Golf Course by PW2 that he had never stepped into the suit property until that day and could not even point out to court where the beacons were. This court finds that the Plaintiffs did not make sufficient inquiries about the ownership of the suit property and neither of them can be termed as bonafide purchasers. The Plaintiffs have failed to prove their case on the balance of probability and the court finds no merit in their Further Amended Plaint dated 7<sup>th</sup> March 2012 and it is dismissed with costs to the Defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF JANUARY 2023.**

**N.A. MATHEKA**

**JUDGE**

