



Mwakitele alias Swabrina & 10 others v Karama & 2 others (Environment & Land Case 77 of 2018) [2023] KEELC 261 (KLR) (24 January 2023) (Judgment)

Neutral citation: [2023] KEELC 261 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 77 OF 2018
NA MATHEKA, J
JANUARY 24, 2023**

BETWEEN

**ROSE WAKESHO MWAKITELE ALIAS SWABRINA 1ST PLAINTIFF
MASHAKA MOHAMED MKUZI 2ND PLAINTIFF
KENDRICK MZAE KISAKA 3RD PLAINTIFF
KAYANGO MOHAMED 4TH PLAINTIFF
BENEDICT MWACHOFI MKAWANYIKA 5TH PLAINTIFF
MKANYI DZOMBO 6TH PLAINTIFF
MUSTAFA KABILIA ATHERU 7TH PLAINTIFF
JUMA MOHAMED 8TH PLAINTIFF
YUSUF ALI MOHAMED 9TH PLAINTIFF
ABDULRAHMAN KIMANI KABILIA 10TH PLAINTIFF
MATANO KALUME 11TH PLAINTIFF**

AND

**YUSUF KARAMA 1ST DEFENDANT
KASEMENI INVESTMENT COMPANY LTD 2ND DEFENDANT
NATIONAL LAND COMMISSION 3RD DEFENDANT**

JUDGMENT

1. At all material times to this suit, the plaintiffs aver that they are the allottees of parcels of land within Maganda Settlement Scheme in Miritini area within Mombasa county. The plaintiffs aver and state,



that they have their houses both permanent and semi-permanent within Maganda Settlement Scheme. The plaintiffs aver that the 1st and 2nd defendant have a parcel of land bordering the Maganda Settlement Scheme homestead which parcel of land is occupied and in use and in occupation of the 1st and 2nd defendants. The plaintiffs state that, the 1st and 2nd defendants are now claiming huge portions of Maganda Settlement Scheme and have through force and intimidation by the authorities and the administration police on the March 31, 2018 vigorously attempted to start construction of a perimeter wall in the area occupied by the plaintiffs who have allotment letters by the government of Kenya. The plaintiffs' claim against the defendants is a mandatory injunction restraining the 1st and 2nd defendant from building a perimeter wall and/or demolishing the plaintiffs' premises as threatened. The plaintiffs pray for;

1. A mandatory injunction directed to the defendants, their agents, employees and/or servants from building a perimeter wall and/or demolishing the plaintiffs houses within Maganda Settlement Scheme.
 2. A declaration that the plaintiffs are the owners of the disputed parcel of land being the portions allocated to them by the national government of Kenya, within Maganda Squatter Settlement Scheme.
 3. Costs and interest of the suit.
2. The 1st and 2nd defendants state that they own a parcel of land known as Mombasa/MN/VI/3804 but the same is not bordering Maganda Settlement Scheme homesteads. The 1st and 2nd defendant deny claiming a huge portion of Maganda Settlement Scheme and further deny having used force and intimidation to start construction of a perimeter wall.
3. In their counterclaim the 1st and 2nd defendants aver that they are owners of a parcel of land known as Mombasa/MN/VI/3804. The 1st and 2nd defendants further aver that, the aforesaid Mombasa/MN/VI/3804 is not within Maganda Settlement Scheme and the title was issued way back in the year 1994 before the establishment of Maganda Settlement Scheme. The 1st and 2nd defendants aver that, the numbers on the allotment letters exhibited by the plaintiffs herein are within the Maganda Settlement Scheme. The 1st and 2nd defendants aver that, the plaintiffs are without any colour of right occupying and claiming the 1st and 2nd defendant's parcel of land being Mombasa/MN/VI/3804. The 1st and 2nd defendants claim against the plaintiff are for eviction and payment of damages for trespass. The defendants pray for the following orders;
1. The plaintiffs suit be dismissed.
 2. This honourable court be pleased to order the eviction of the plaintiffs from the 1st and the 2nd defendants parcel of land known as Mombasa/MN/VI/3804.
 3. Damages against the plaintiffs for trespass on Mombasa/MN/VI/3804.
 4. Costs of the suit.
 5. Any other relief this honourable court deem fit to grant.
4. This court has considered the evidence and the submissions therein. It is the plaintiffs' case that they are allottees of parcels of land within Maganda Squatter Settlement Scheme, in Miritini within Mombasa. The plaintiffs have attached a number of allotment letters issued by department of lands in Maganda Squatter Settlement Scheme; Rose W. Mwakitele and Yusuf M. Ali (1st and 9th plaintiffs) were allocated plot No 148, Kayango Saha Mkuzi was allocated plot No 153, Benedict Mwachofi Mkawanyika (5th plaintiff) was allocated plot No 156, Mkanyi Tsuma Dzombo (6th plaintiff) was allocated plot No



147, Mstafa Betero Kabilia was allocated plot No 176, Abdulrahman Kimani Kailia (10th plaintiff) was allocated plot No 246, Matano Kalume (11th plaintiff) was allocated plot No 1465, and Jamal Mkubwa Kabilia Atheru was allocated plot No 244.

5. The plaintiffs averred that the 1st and 2nd defendants' whose land parcel No MN/VI/3804 borders the settlement scheme, are now claiming a huge portion of the scheme. The plaintiff further averred that through intimidation and force, the 1st and 2nd defendants have attempted to start construction of a perimeter wall in an area occupied by the plaintiffs who have allotment letters from the government of Kenya. The plaintiffs are now seeking a mandatory injunction to restrain the 1st and 2nd defendants from building a perimeter wall or demolishing the plaintiffs premises within Maganda Settlement Scheme and that the plaintiffs be declared the owners of the disputed parcel of land being the portions allocated to them by the Government of Kenya within Maganda Squatter Settlement Scheme.
6. The 1st and 2nd defendants confirmed being the registered owners of land parcel MN/VI/3804, and also denied sharing a boundary with Maganda Squatter Settlement Scheme. The defendants mounted a counterclaim against the plaintiffs and averred that their suit land is not within Maganda Settlement Scheme, as the same was registered before the scheme was established. The defendants contended that the plaintiffs are in illegal occupation of their suit land and urged court to evict them for trespassing into their land and for damages for the damage caused.
7. On May 28, 2018, the court ordered that there be a site visit to determine whether plot No 3804 has encroached on Maganda Squatter Settlement Scheme. On December 17, 2018, the coast regional surveyor Mr P.R.J Wanyama prepared a report after conducting a site visit. He reported that MN/VI/3804 together with other neighboring plots MN/VI/3851, MN/VI/3869 and MN/VI/3682 were surveyed and allocated by the then defunct office of the commissioner of lands. The rest of the land, excluding these 3 parcels of land were surveyed as Maganda Squatter Settlement Scheme and a registry index map prepared. It was further reported that there was a change of user on MV/VI/3804 and a new number was issued MN/VI/4697 which was then subdivided into 36 subplots and new numbers issued ranging from MN/VI/4698-4733 were issued. The external beacons of the former MN/VI/3804 were searched and fell at the corners of a parameter wall erected all round. The houses of the plaintiffs and other 9 people fall within the original MN/VI/3804 and within the new parcel numbers. The report concluded that the plaintiffs' house do not fall within Maganda Settlement Scheme but rather fall within parcel MN/VI/3804 which has since been subdivided.
8. DW1 was Abdallah Mwanza, he produced a title deed for land parcel LR No Mombasa/MN/VI/3804 (Dex-1). The title was issued pursuant to the *Government Lands Act* (repealed) by the then commissioner of lands Wilson Gachanja on August 23, 1994 to Kalume Randu to hold for 99 years from the April 1, 1994. The suit land was then transferred to Kasemeni Investment Company Limited, the 2nd defendant on July 29, 1996.
9. The survey report dated December 17, 2018 that was prepared by the coast regional surveyor Mr P.R.J Wanyama, on the order of the court revealed that, MN/VI/3804 together with other neighboring plots MN/VI/3851, MN/VI/3869 and MN/VI/3682 were surveyed and allocated to private developers by the then defunct office of the commissioner of lands. From the map of Maganda Squatter Settlement Scheme (Dex-4) it can be seen that MN/VI/3804 is right in the middle of the settlement scheme. Upon the perusal of the survey plan folio No 472 register No 47, which is attached to the survey report dated December 17, 2018, it can be seen that there has been a change of user on MV/VI/3804 and a new number was issued MN/VI/4697. From MN/VI/4697 there were several subdivisions and the creation of 36 subplots with new numbers being issued ranging from MN/VI/4698-4733. It was further reported and illustrated in the survey report that the houses of the plaintiffs and



other 9 people fall within the original MN/VI/3804 and within the new parcel numbers as follows, MN/VI/4715, MN/VI/4728, MN/VI/4730, MN/VI/4712, MN/VI/4731, MN/VI/4711, MN/VI/4732, MN/VI/4710, MN/VI/4733, MN/VI/4700, MN/VI/4706, MN/VI/4713, and MN/VI/4714. The report concluded by clarifying that the plaintiffs' houses do not fall within Maganda Settlement Scheme but rather fall within parcel MN/VI/3804 which has since been subdivided.

10. From the evidence on record, it is clear to court that MN/VI/3804 was until, it was granted to David Kalume Randu on April 1, 1994, unalienated government land. Section 2 of the [Government Land Act](#), cap 286 Laws of Kenya (now repealed), defined un-alienated land as:

“Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.”

11. 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.
12. Though the suit land was un-alienated and available for allocation, the commissioner of lands had no authority to alienate the suit property to David Kalume Randu. Section 3 of the [Government Land Act](#) (repealed) vested the powers to alienate un-alienated government land in the President, and the powers that were delegated to the commissioner of lands were limited to undertakings to do with education, charity work, sports and other purposes as set out in the Act. Upon perusal of the 2nd defendant's memorandum and articles of association (Dex-3) it is can be seen that the company is in the business of making profit and none of the exceptions set out in the Act would apply in this case.
13. 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 un-alienated 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. The Government treated public land as its “private property”, and the public-interest element in administration and allocation of public land was negated. The Commissioner of Lands was making allocations of land by



direct grant, routinely exceeding his authority. (Such excesses of power are well documented in the Ndungu Report).

14. It follows that the onus was on the appellants to satisfy court that the commissioner of lands had requisite powers to grant the suit property to them. The appellants were indeed required to do more in proving that the legal and right procedure was followed in alienating the suit property to them.”
15. The plaintiffs have produced allotment letters issued by department of lands in Maganda Squatter Settlement Scheme (Pex-1), which from the map of Maganda Squatter Settlement Scheme, these allotted plots appear to be outside MN/VI/3804. However, the government survey report dated December 17, 2018, stated that the plaintiffs and 9 others were physically occupying MN/VI/3804. This position was supported by PW1 who stated that the Government of Kenya informed the squatters that they ought to remain where they were in occupation and that allotment and registration would be done according to their physical occupation.
16. The 1st and 2nd defendant in their counterclaim dated April 25, 2018 averred that they are the registered owners of MN/VI/3804 and were issued with title in 1994 before the establishment of the Maganda Squatters Settlement Scheme. The defendants insisted that the suit land is not within the settlement scheme and urged court to evict the plaintiffs from the suit land. However, other than the certificate of lease, the defendants did not produce any other evidence to demonstrate to court that the procedure laid down for alienation of the suit land, which was un-alienated government land, by the commissioner of lands was followed. The defendants have not tendered any evidence from the director of surveys to show the surveying that was carried out before the suit land was carved off from the rest of the government land and was allocated a land reference number. As previously stated, the commissioner of lands had no authority to alienate the suit land to the 1st and 2nd defendant as he purported to do, it was preserved for the president. Therefore, the commissioner of lands could not have made any grant under the *Government Lands Act*, nor could he pass any registerable title under the *Registration of Titles Act*.
17. The government survey report dated December 17, 2018 did not clarify whether the titles to plots MN/VI/3804 and the other neighboring plots MN/VI/3851, MN/VI/3869 and MN/VI/3682 that had been earlier were surveyed and allocated to private developers by the then defunct office of the commissioner of lands had been recalled for annulment following the creation of Maganda Settlement Scheme. There is a survey report dated August 31, 2018 that was produced by Edward Kiguru, the land surveyor as instructed by the plaintiffs (Pex-2). It was reported that at the creation of Maganda Settlement Scheme, the government intended to cancel the plots that had been previously surveyed and registered. The report further indicated that the government required the grantees to surrender those titles for cancellation. This was supported by a certificate of postal search dated March 28, 2018 which indicated that MN/VI/MN was surrendered on December 17, 2009 to the government.
18. From the evidence on record, it is clear that though the plaintiffs hold allotment letters to plots within the Maganda Squatter Settlement Scheme and they obtained the same for being physically on the ground. They are in physical possession and occupation of MN/VI/3804. The national land commission and the department of survey therefore needs to make fresh allocations of allotment letters depending on where the squatters are in order to avoid double allocation, where one allottee has an allotment letter for one plot but is in actual possession of another plot. I find that Mombasa/MN/VI/3804 falls within Maganda Settlement Scheme. The said suit property was illegally alienated and a title issued to the defendants and the same is null and void. Accordingly, this court finds that the plaintiffs have proved on the balance of probabilities, while the 1st and 2nd defendants’ counterclaim dated April 25, 2018 lacks merit and is dismissed with costs. I therefore make the following orders;



1. A mandatory injunction is directed to the defendants, their agents, employees and/or servants from building a perimeter wall and/or demolishing the plaintiffs' houses within Maganda Settlement Scheme.
2. A declaration that the plaintiffs are the owners of the disputed parcel of land being the portions allocated to them by the National Government of Kenya, within Maganda Squatter Settlement Scheme.
3. Costs of this suit to the plaintiffs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JANUARY 2023.

N.A. MATHEKA

JUDGE

