



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA COUNTY

COURT NAME: MOMBASA LAW COURT

CASE NUMBER: ELCPET/16/2021

CITATION: COMMISSION FOR HUMAN RIGHTS & JUSTICE AND ANOTHER VS IBRAHIM
MWANJE ZAI AND ANOTHER

JUDGMENT

'1. The petitioners commenced this proceeding on its own behalf and that of the general public in respect of land known as Mombasa/Mwembelegeza/1473/R, suit property, through the amended petition dated 21st February 2025. They have invoked Articles 1, 2, 3(1), 10, 21, 22, 23, 48, 50, 60, 62, 62, 165, 232, and 258, of the Constitution of Kenya. They averred that they got to know on 25th January 2021 that the 3rd respondent filed a suit against the 2nd, 4th and 6th respondents seeking to be registered as the owner of the Mombasa/Mwembelegeza/1473/R, suit property. That upon the petitioners perusing the pleadings in that suit, they found out that the suit property had been reserved for public purpose, and the procedure for alienating public land to private land had not been followed. The petitioners therefore stated that the suit property was illegally alienated by the 1st respondent with assistance and connivance with the 4th, 5th, 6th, 7th and 8th respondent. That after illegally acquiring the said land, the 1st respondent sold it to the 2nd respondent, who subdivided it before selling it to the 3rd and 4th respondents. The petitioners stated that all transactions relating to the suit property were done through the 5th respondent, who represented both the 3rd and 4th respondents, and received deposit of Kshs.5,000,000 from the 3rd respondent, before reselling the property to the 4th respondent. That the disputes created in the transactions ended up in court and with connivance of the two advocates for the parties, a consent was entered, recorded, extracted and forwarded to the 5th respondent for registration. That the same advocates repeated a similar process after reselling the property. That the said transactions were fraudulent, illegal and the petitioner seeks the following reliefs:

- a. A declaration that the entire process of alienation of the public land to wit the suit parcel of land comprising Title Number Mombasa Mwembelegeza/1473/R (now subdivide and registered as Mombasa Mwembelegeza/1691 and 1692) was irregular, illegal and illegitimate and without sanction of law and cannot vest an indefeasible proprietary interest and title in favors of the 1st, 2nd, 3rd and the 4th Respondent and all disposition made in favor are null and void abintio.
- b. A declaration that parcel of land comprising Title Number Mombasa/Mwembelegeza/1473/R (now subdivided and registered as Mombasa/Mwembelegeza/1691 and 1692) land and all the subdivision and new subsequent title are illegal and that entries created in the land registry are null and void.
- c. An order directing the Mombasa Land Registrar to rectify the register by cancellation of the



entries made in respect to the parcel of comprising of title number Mombasa/Mwembelegeza/147/R (now subdivided and registered as Mombasa Mwembelegeza 1691 and 1692) be and hereby cancel and the national and commission register it in the registry of public land.

d. An order of permanent injunction restraining the Respondent by themselves, their servants, agents, employees and deny other persons acting on their behalf and/or instruction or authority from selling, transferring, disposing, occupying, developing and/or dealing with the suit parcel of land comprising of title number Mombasa/Mwembelegeza/1473/R (now subdivided and registered as Mombasa/Mwembelegeza/1691 and 1692) in any manner whatsoever.”

2. The 1st, and 2nd respondents filed a reply to the petition dated 26th August 2024, denying the allegations against them. They stated that the suit premises was allocated to them lawfully, legally and procedurally, and disputed that the suit property was public land.

3. The 3rd respondent filed a replying affidavit sworn by Samuel Otieno Nyanya on 25th June 2025 inter alia denying having violated any procedure in acquiring the suit property; that the 3rd respondent had conducted due diligence by obtaining an official search dated 25th June 2020, as well as paying hoarding fees and rates owed to the County Government by the 2nd respondent; that the 8th respondent approved hoarding on the suit property vide their letter dated 30th July 2020, and the 3rd respondent was therefore, a bonafide purchaser for value without notice; that the 3rd respondent was not involved in the original allocation of the suit property, and no evidence has been produced by the petitioners to prove the 3rd respondent’s participation in violating of the provisions of the listed Articles of the Constitution, or in any fraud or collusion; that the judgment in MCELC E005 of 2021, Discount Group of Companies versus John Joel Ria, the court determined the 3rd respondent as the legitimate owner of the suit property and no appeal has been preferred; that this petition is a collateral attack on the said judgment.

4. Shahed Shamsu Deen Kashmiri, filed a replying affidavit he swore on 20th March 2025, in respect of the 4th respondent denying all the allegations in the petition against his father, younger brother and himself and deposed inter alia that they were searching for land at Mwembelegeza when a land agent linked them up with the 2nd respondent who was selling the suit property; that they engaged Omar Said advocate who conducted an official search which confirmed that the suit property was indeed registered to the 2nd respondent and was not encumbered; that they did further due diligence, including visiting the suit property together with a surveyor and established the boundaries and noted that it was vacant; that they negotiated and agreed at a purchase price and entered into a sale agreement dated 24th September 2020; that the agreement was only for a portion of the suit property, and after a subdivision was carried out, their parcel became number 1691; that they carried out an official search and confirmed that the parcel belonged to the 2nd respondent, paid stamp duty on 9th November 2020 and on 11th November 2020 made an application for transfer which resulted in their registration as owners of parcel “1473”; that they had the rate payer’s record changed on the 8th respondent, and paid all dues to the County and National governments; that while this petition was pending, the 3rd respondent filed the MCELC E005 OF 2021 against the 2nd and 10th respondents, Shamusdeen Kashmiri Zauddin, Sajjad Kashmiri and himself and judgment was delivered on 24th February 2025, which inter alia held that their title for 1691 was cancelled; that as their title has been cancelled, they are no longer the registered owners; that they will not pursue an appeal but rather will pursue a claim for restitution against the 2nd respondent, and hence this suit against them for plot 1691 has dissipated.

5. The Attorney General for the 6th, 7th, 10th, and 12th respondents filed three sets of replying affidavits of Benjo Daniel Kibet, Land Adjudication and Settlement Officer, Peter Orero Nyangura, Assistant Manager Facilities and Property Management at Postal Corporation of Kenya, and Joseph Muthui, Inspector of Police, sworn on 24th October 2023, 5th November 2023 and 26th June 2025 respectively. Benjo Daniel Kibet inter alia deposed that Mombasa/Mwembelegeza/1473, the suit property was according to the Allocation list/Accountability list in their office reserved as public utility for Post Office. He attached a copy of the accountability/allocation list and the letter dated 28th February 2007 on the public plots in the scheme as evidence. He also confirmed that there are



no records of the suit property having been allocated for private use. That neither has any acceptance of such an offer been received nor payment of Settlement Fund Trustees charges made, and no discharge of charge had been issued. Peter Orero Nyangura deposed inter alia that the Postal Corporation had not sold the suit property to anybody. On his part IP Joseph Muthui inter alia deposed that he was the investigating officer in the alleged fraudulent and unlawful registration of titles to Mombasa/Mwembelegeza/1473, a public land, belonging to Postal Corporation of Kenya; that one Isaack Yasin Mohamed had lodged a complaint claiming to be the owner of Mombasa/Mwembelegeza/1626 & 1627, which neighbours the suit property, against Mrs. Mugo, the owner of Railway Annex Club; that Isaack Yasin Mohamed had alleged that Mrs Mugo had unlawfully erected a structure on the suit property as well as Mr. Yasin's properties, on the basis of a letter from the Sub-County Commissioner granting her all the three properties; that in the process of investigations, he found out that Mr. Yasin had filed ELC 162 of 2015 and won the case resulting in Mrs. Mugo being evicted; that after Mrs Mugo was evicted, the 1st and 2nd respondent who were relatives connived to acquire the suit property by suing each other over a sale transaction in ELC No. 302 of 2017, and filed a consent in favour of 2nd respondent; that no sale had taken place between the 1st and 2nd respondent and the whole claim was a fabrication aimed at obtaining court orders and decree to compel the Land Registrar to issue title to 2nd respondent; that upon confirming from Benjo Kibet Daniel, the County Land Adjudication and Settlement Officer, Mombasa that the suit property was a public utility plot that had not been transferred to any private person, he recommended to the Office of Director Public Prosecution, (ODPP), that the 1st and 2nd respondents be charged; that he then discovered that the 2nd respondent had upon illegally acquiring the title deeds over the suit property offered to sell the property to 3rd and 4th respondents leading to the filing of MCELC No. E005 of 2021, that was decided in favour of the 3rd respondent, though they had through the Attorney General notified the court of this petition.

6. The court has perused the record and has not traced any reply to the petition filed by or on behalf of the 5th, 8th and 11th respondents.

7. Following the court's directions on 27th May 2025, on filing and exchanging submissions, only the learned counsel for the 3rd respondent filed their submissions dated the 25th June 2025. The 1st and 2nd respondents had filed their submissions earlier dated the 27th August 2024, while the Attorney General for the 6th, 7th, 10th, and 12th respondents had also filed their submissions dated 19th November 2024. On the 9th July 2025, the learned counsel for the petitioners informed the court that they would rely on their earlier submissions dated 26th July 2024. The court has considered all the submissions. No submissions were filed by or on behalf of the 5th, 8th, and 11th submissions.

8. The following are the issues for determinations by the court:

- a. Whether the suit property was public property, and if so whether its alienation was lawful and legal.
- b. Whether the petitioners are entitled to the reliefs sought.
- c. Who bears the costs?

9. The court meticulously considered the grounds/facts on the petition, the affidavit evidence presented, submissions by counsel, superior courts decisions cited thereon and come to the following determinations:

a. The threshold for a constitutional petition was discussed in the famous case of Anarita Karimi Njeru versus Republic (1979) eKLR where the court held as follows:

" we would however again stress that if a person is seeking redress from the High Court on a matter which involves reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

The Court of Appeal in the case of Mumo Matemo versus Trusted Society of Human Rights Alliance and 5 Others (2013) eKLR emphasized this position and held that:

"it is our finding that the petition before the High Court was not pleaded with precision as required of constitutional petitions. Having reviewed the Petition and the Supporting Affidavit, we have



concluded that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and anti- Corruption Act, 2011, accordingly the petition did not meet the standards enunciated in the Anarita Karimi Njeru case.”

The petitioner has cited a plethora of the Articles in the Constitution, which they allege to have been violated by the various respondents. The petition brings to the fore questions of whether the registration of the suit property as private property, while it had been reserved as a public property, was in violation of the cited constitutional provisions. That the 3rd respondent is the only party that claimed that the petitioners have failed in demonstrating how it violated the said provisions of the Constitution. The court has looked at the said Articles of the Constitution and the facts relied upon by the petitioners and is satisfied that the petition meets the threshold.

b. On whether or not the suit property was public land, the petitioners have through the supporting affidavit sworn by Julius Ogogoh, executive director, on 21st February 2025 deposed how they discovered the suit property was public land, having been initially reserved for public utility. There is no evidence presented to show that the suit property had been converted from public land to private land in accordance with the laid out legal procedures. The petitioners have received support from the 6th, 7th, 10th, and 12th respondents, as can be seen through their replying affidavits sworn by Benjo Daniel Kibet, Land Adjudication and Settlement Officer, Peter Orero Nyangura, Assistant Manager Facilities and Property Management at Postal Corporation of Kenya, and Joseph Muthui, Inspector of Police, sworn on 24th October 2023, 5th November 2023 and 26th June 2025 respectively, that the suit property was indeed reserved as a public property and no documents exists to show it had been converted into private property.

c. The 4th respondent who had bought parcel No. 1691 that had reportedly been subdivided from the suit property, has indicated under their deposition that they no longer claim title to the that property in view of their title being cancelled in MCELC E005 of 2021, Discount Group of Companies versus Joel John Ria & 4 Others, vide the court’s judgment delivered on 24th February 2025. From the copy of the said judgement that is annexed to the replying affidavit of 4th respondent, it is clear the plaintiff, who is the 3rd respondent herein, had sought for the following orders among others; mandatory injunction order restraining defendants over dealing with Mombasa/Mwembelegeza/1691 & 1692; mandatory order declaring plaintiff as owner of Mombasa/Mwembelegeza/1473, currently registered as Mombasa/Mwembelegeza/1691 & 1692; order directing Land Registrar, Mombasa, to cancel entries registered in favour of Shamusdeen Kashmiri Zauddin, 3rd defendant; order directing the Executive Officer to execute documents to transfer Mombasa/Mwembelegeza/1473 registered as Mombasa/Mwembelegeza/1691 & 1692 to plaintiff; and order directing the Land Registrar, 2nd defendant, to register the order.

d. The lower court made a finding for the plaintiff and ordered as follows inter alia;

i. That plaintiff deposit balance of purchase price in court.

ii. That upon deposit of the balance being made, a declaration be issued that plaintiff had acquired proprietary rights over a portion measuring 0.1302 Ha to be excised from Mombasa/Mwembelegeza/1473, that is currently registered as Mombasa/Mwembelegeza/1691 & 1692.

iii. That title issued to 5th defendant [Sajjad Kashmiri, t/a Kashmiri Investments], is cancelled.

iv. 1st defendant to cause the subdivision at his own costs of Mombasa/Mwembelegeza/1473 currently registered as Mombasa/Mwembelegeza/1691 & 1692 for a portion measuring 0.1302 Ha to be excised and transferred to the plaintiff.

v. Order for Executive Officer to execute the documents to give effect to the above order should 1st defendant fail to do so.

vi. Mandatory order restraining the defendants from dealings on Mombasa/Mwembelegeza/1473, currently registered as Mombasa/Mwembelegeza/1691 & 1692.

vii. Land Registrar to construct records including the green card of the parcel of land registered in favour of the plaintiff.

viii. Plaintiff awarded costs against 1st defendant.



ix. The counterclaims by 1st 2nd & 4th defendants against the plaintiff dismissed with costs. The 3rd respondent herein, in whose favour the orders in the lower court suit were issued, has deposed that no appeal has been filed. The 4th respondent herein, who was the 5th defendant in that matter has deposed that they do not intend to file any appeal as they have opted to seek reimbursement of their purchase price from their vendor, the 2nd respondent, who was the 1st defendant in the lower court suit. The 4th respondent deposed at paragraph 8 of their replying affidavit inter alia that the 3rd respondent had filed the lower court suit while this petition was pending in court. That deposition has not been rebutted or challenged by any of the parties herein. It is quite clear therefore, that the lower court suit was filed, heard and judgement delivered while this petition was pending before this court, contrary to the sub judice provision in section 6 of the Civil Procedure Act chapter 21 of Laws of Kenya.

e. This court, being a superior court has supervisory jurisdiction under Article 165(6) of the Constitution, over the lower court in which MCELC E005 of 2021, Discount Group of Companies versus Joel John Ria & 4 Others, was filed, heard and determined. Should this court come to the determination that Mombasa/Mwembelegeza/1473 or the subdivisions thereof, being 1691 & 1692, are public lands reserved for public utility purpose, then the judgment in MCELC E005 of 2021, Discount Group of Companies versus Joel John Ria & 4 Others, will amount to nothing but a nullity.

f. The court, being a court of record, is alive to the fact the letter by Mr. Benjo Kibet was discussed in ELCPET E003 of 2023 on 26th March 2025, where the court inter alia directed as follows:

“The court on its own motion directs the DCI, with the assistance of the National Director of Land Adjudication and Settlement Office, to investigate establish the number and identity of the public utility plots that were set aside in Mwembelegeza Settlement Scheme, the legality of the letter dated 28th February 2007 by the County Land Adjudication and Settlement Officer, in view of the statement and evidence of Benjo Kibet Daniel, the County Land Adjudication and Settlement Officer, Mombasa, in this petition denouncing the contents of the aforementioned letter, which differed with his earlier evidence in the Mombasa ELCLPET No. E008 of 2023, that was decided on 12th March 2025, and initiate legal action if evidence of any criminal activities is detected in the alienation of any of those public utility plots.”

The court is not aware of how far the investigations ordered have gone with regard to that petition. The fact that the instant petition is over one of the other plots reserved for public use under the same letter in respect of Mwembelegeza Settlement Scheme, requires the investigations ordered to be fast tracked and completed without further delay to at least identify and secure the public plots in that scheme.

g. Though the 1st and 2nd respondents, from whom the 3rd and 4th respondents traced their respective claims over the suit property, claimed in their reply to the petition that they had acquired title to the suit property lawfully, legally, procedurally and that there is no evidence to show it was public utility land, the documentary evidence tendered by the petitioners, 6th, 7th, 10th, and 12th respondents show it was indeed a public utility plot, and had never been converted to private property through a sale or re-allocation. This leaves the 1st and 2nd respondents claim of a lawful, legal and procedural acquisition of the property, and that of the 3rd respondent of being a bona fide purchaser for value without notice, in a precarious position and without basis. The 3rd respondent’s claim seems to hang on the judgement delivered in its favour on 24th March 2025 in MCELC E005 of 2021, Discount Group of Companies versus Joel John Ria & 4 Others, which was evidently sub judice this petition as it was filed, heard and determined during its pendency. In the Supreme Court of Kenya case of Dina Management Limited versus County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) the court held as follows about the defence of bona fide purchaser for value:

“93. As held by the Court of Appeal in Munyu Maina versus Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the



legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

The court agrees with the petitioners’, 6th, 7th, 10th, & 11th respondents’ position that the suits filed by or between the 1st to 4th respondents, including MCELC E005 of 2021, Discount Group of Companies versus Joel John Ria & 4 Others, were all aimed at sanitizing their illegal, unlawful and unprocedural conversion of public land to private land through the fraudulent transactions they orchestrated through the 5th respondent. They used the court processes to obtain orders that they used to effect transfers from one to the other and reconstruction of green the card over the suit property. However, as the suit property was not available for alienation or being transferred and or subdivided, the 1st to 4th respondents never acquired good title as the plot remained public property. The claim by the 3rd respondent that the judgment in MCELC E005 of 2021 Discount Group of Companies versus John Joel Ria & 4 Others, had determined them as the legitimate owner of the suit property, and that as no appeal has been preferred, and therefore this petition is a collateral attack on the judgment, is not correct, as through this petition, a determination has been made that the suit property and the subdivisions thereof remain public land. It follows therefore that any alienation, transfers and or subdivisions of the suit property thereof were illegal, unlawful, unprocedural, null and void ab initio.

h. The parties have in their pleadings referred to other suits relating to the suit property including ELCC No. 302 of 2017, ELCC No. 209 of 2020, Case No. 162 of 2015 and MCELC No. E005 of 2021. I have perused the records on the CTS and noted ELCC No. 302 of 2017, Joel John Ria versus Ibrahim Mwanje was over ownership of Mombasa/Mwembelegeza/1473. It was filed on 21st August 2017 and during the mention of 2nd October 2017, a consent was entered and the case was closed. No documents on the case have been uploaded from which to confirm the nature of the claim, but the physical record has a plaint. The details given on Case No. 162 of 2015 did not help much in tracing the record as it does not disclose the court it may have been filed. However, I traced ELCC No. 162 of 2015, Rose Emma Mulela versus Fort Properties Limited, which is apparently between different parties and subject matter, being Plot No. 8604 (Original No. 1872/328), is also different to those in this suit. In MCELC No. E005 of 2021, the parties are Discount Group of Companies versus Joel John Ria & 2 Others and judgement was delivered on 24th February 2025 in favour of the plaintiff. The matter has a pending ruling on stay of execution application. I also saw ELCC No. 209 of 2020, Isaack Yasin Mohamed versus Joel John Ria and noted it was dismissed by this court on 10th March 2023.

i. Under Section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where otherwise ordered for good cause. Though the petitioners herein pursued this petition as a public interest litigation for the public good, and they are successful, the 1st to 5th respondents being the architects of the fraudulent transactions over the suit property that prompted the filing of this petition, will pay the petitioners’ costs.

10. From the foregoing conclusions, the court finds the petitioners have proved their claim against the 1st to 5th respondents to the standard required, and orders as follows:

a. A declaration is hereby issued that the entire process of alienation of land comprising Title Number Mombasa Mwembelegeza/1473/R, and or the subdivisions Mombasa Mwembelegeza/1691 and 1692 thereof was irregular, illegal and without the sanction of law and cannot vest an indefeasible proprietary interest and title in favour of the 1st, 2nd, 3rd, and 4th Respondents, and therefore all dispositions made in their favour are null and void ab initio.

b. A declaration is hereby issued that parcel of land comprising Title Number Mombasa/Mwembelegeza/1473/R, and there subdivisions Mombasa/Mwembelegeza/1691 and 1692, and or any other subsequent subdivision and title are illegal, and all entries created and entered on their documents at the land registry are null and void.

c. An order is hereby issued directing the Mombasa Land Registrar to rectify the register by cancellation of the entries made in respect to the parcel of comprising of title number Mombasa/Mwembelegeza/147/R, and subdivisions Mombasa/ Mwembelegeza/1691 and 1692, and



the said land be reverted back to the National Land Commission and registered as public land.
d. An order of permanent injunction is hereby issued restraining the 1st to 5th Respondents by themselves, their servants, agents, employees and deny other persons acting on their behalf and/or instruction or authority from selling, transferring, disposing, occupying, developing and/or dealing with the suit parcel of land comprising of title number Mombasa/Mwembelegeza/1473/R and subdivisions Mombasa/Mwembelegeza/1691 and 1692, in any manner whatsoever.
e. The 1st to 5th respondents to pay the petitioners costs.
Orders accordingly.

SIGNED BY: HON. JUSTICE STEPHEN KIBUNJA



THE JUDICIARY OF KENYA.
MOMBASA ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT
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