



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 26 OF 2014**

1. ALNOOR ABDULMALIK KANJI
2. GULSHAN ABDULMALIK KANJI (AS ADMINISTRATOR OF THE  
ESTATE OF ABDULMALIK ALIBHAI KANJI..... PETITIONERS

- VERSUS -

1. THE CHIEF LAND REGISTRAR
2. THE LAND REGISTRAR, KWALE DISTRICT LAND REGISTRY

(NOW KNOWN AS COUNTY LAND REGISTRAR OR LAND REGISTRAR,  
MOMBASA COUNTY

3. THE COUNTY GOVERNMENT OF KWALE

(PREVIOUSLY KNOWN AS AND OPERATING UNDER THE

LOCAL GOVERNMENT ACT AS THE COUNTY COUNCIL OF KWALE.....  
RESPONDENTS

**JUDGMENT**

**BACKGROUND**

1. The 1<sup>st</sup> petitioner and Abdulmalik Alibhai Kanji (deceased), being son and father respectively, were registered absolute proprietors of all that land known as Kwale/Galu Kinondo/681 (the suit property). The said land had been transferred to them by SADIQ SUMAR GHALIA at a consideration of Kshs.1Million sometime in 1992. A title deed for the land was issued to them on 22<sup>nd</sup> January 1992 under the Registered Land Act.
2. After the death of Abdulmalik Alibhai Kanji, 2<sup>nd</sup> petitioner (mother of the 1<sup>st</sup> petitioner and widow of the deceased) applied for and was issued with a confirmation of grant over the estate of the deceased on 12<sup>th</sup> November 2012.
3. The petitioners applied to the 2<sup>nd</sup> respondent for the 2<sup>nd</sup> petitioner to be registered as proprietor by transmission, and thereafter by personal representative to the person entitled on intestacy.

The application was however rejected on the basis that the property belonged to SADIQ GHALIA and a prohibition had been registered against the title on 14<sup>th</sup> September 2006 following an order of the High Court at Mombasa in Civil Case No. 561 of 2006 issued on 7<sup>th</sup> September 2006. The petitioners conducted a search at the High Court Registry and found that no such order was issued, and no such case existed. The respondents could not also avail to the petitioners a copy of the said court order. It later also emerged that the outstanding rates charge was in the name of Sadiq Ghalia.

## **THE PETITION**

4. The petitioners feeling aggrieved filed this petition dated 30<sup>th</sup> April 2014 on 9<sup>th</sup> May 2014. The petition was supported by the affidavit of Alnoor Abdulmalik Kanji sworn on 30<sup>th</sup> April 2014. The Petition sought orders for:
  - a. *A declaration that the petitioners' fundamental rights to the protection of their property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing have been breached.*
  - b. *A declaration that the wrongful removal of the 1<sup>st</sup> petitioner and the deceased, Abdulmalik A. Kanji's name from the proprietorship section of the register relating to the suit property is invalid in law and of no consequence whatsoever and that it does not confer any rights whatsoever, whether proprietary or otherwise, on SADIQ GHALIA.*
  - c. *A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents acted inconsistently with and in breach of their powers, duties and obligations under the provisions of Articles 10, 35, 47 and 50 of the constitution.*
  - d. *An order directing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to amend their records in respect of the suit property to reflect the 1<sup>st</sup> petitioner and Abdulmalik A. Kanji held and continue to hold the suit property as stated in the original title deed issued to them on 22<sup>nd</sup> January 1992.*
  - e. *An order directing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to forthwith and unconditionally avail to your petitioners all the requisite information concerning how the alleged change of proprietorship and registration of the alleged order relating to Mombasa High Court Civil Case No.561 of 2006 was effected.*
  - f. *Consequently, an order prohibiting the respondents whether by themselves or through their agents, servants or employees from interfering with your petitioners' proprietary rights of the suit property.*
  - g. *Costs*
  - h. *Any other and such relief as may be just.*
5. The 2<sup>nd</sup> respondent - Land Registrar, Kwale County - Mr. Charles K. Ngetich swore an affidavit in response on 25<sup>th</sup> November 2014. He confirmed that according to the suit property's parcel file, it had been transferred to Sadiq Ghalia on 14<sup>th</sup> October 1987, who transferred it to the 1<sup>st</sup> petitioner and his deceased's father on 22<sup>nd</sup> January 1992. Mr. Ngetich also stated that he found the purported court order to be suspect since the said order was not in the parcel file and he had been unable to trace the same at the Mombasa Court Registry.
6. The Director of Legal Services, Mr. Kevin Dzumo swore an affidavit on 1<sup>st</sup> December 2014 on behalf of the 3<sup>rd</sup> respondent. He deposed that the petitioners had no claim against the 3<sup>rd</sup> respondent, and as such the petition as against it should be dismissed with costs. The 3<sup>rd</sup> respondent maintained that the registered rateable owner was SADIQ GHALIA and not the petitioners, and that the 2<sup>nd</sup> respondent did not present the Memorandum of Registration of Title (MRT) in respect of the transfer to the petitioners. He affirmed also that their records reflected that the rates had been cleared for the property, under the name of Sadiq Ghalia.
7. Counsel for the parties made oral submissions before the court on 1<sup>st</sup> December 2014, and judgment was reserved for 19<sup>th</sup> December 2014.

## **DETERMINATION**

8. As the claim is admitted and not defended, the court would allow the same. However, in the absence of proof as to how the changes to the registration of title were done, the court is unable to grant the orders sought for declaration that the petitioners rights under Articles 10, 35, 47 and 50 have been breached since it has not been established that the respondents acted in breach of duty.
9. The affidavit of Charles Ngetich confirms that the respondents do not themselves have information concerning how the alleged change or registration of court order in Mombasa High Court Civil Case No.561 of 2006 was effected. In so far as the 3<sup>rd</sup> respondent is concerned, it has distanced itself from any wrong-doing, claiming that it acts on information provided by the 2<sup>nd</sup> respondent.
10. As the respondent parties to the suit have readily conceded the anomaly which led the applicant to seek judicial relief, the court considers this factor amounting to an admission or no-contest may properly be taken as a ground for not penalizing any of the respondents with costs of the suit.

## **ORDERS**

11. Accordingly, for the reasons set out above, the court enters judgment for the petitioner in terms of prayers (a), (b), (d), (f) and (g) of the Petition dated 30<sup>th</sup> April 2014. Each party will bear its own costs of the proceedings.

**Dated signed and delivered on the 19<sup>th</sup> December 2014.**

**EDWARD M. MURIITHI**

## **JUDGE**

In the presence of: -

Mr. Waithera for Mr. Khagram for the Petitioners

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Miss Egesa for Mr. Kibara for the 3<sup>rd</sup> Respondent

Mr. Murimi - Court Assistant



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