



Kenya Ports Authority v Essam Properties Limited & 5 others (Environment & Land Case 497, 498 & 499 of 2001 (Consolidated)) [2023] KEELC 17848 (KLR) (30 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17848 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 497, 498 & 499 OF 2001 (CONSOLIDATED)**

**M SILA, J
MAY 30, 2023**

BETWEEN

KENYA PORTS AUTHORITY PLAINTIFF

AND

ESSAM PROPERTIES LIMITED 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

THE CHIEF LAND REGISTRAR 3RD DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 498 OF 2001**

BETWEEN

KENYA PORTS AUTHORITY PLAINTIFF

AND

KILIFI GARDENS LIMITED 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

THE CHIEF LAND REGISTRAR 3RD DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 499 OF 2001**

BETWEEN

KENYA PORTS AUTHORITY PLAINTIFF



AND

STONEWAVE LIMITED 1ST DEFENDANT
NATIONAL LAND COMMISSION 2ND DEFENDANT
NILE LIMITED 3RD DEFENDANT

JUDGMENT

A. Introduction And Pleadings

1. This is a consolidated judgment in respect of three suits being Mombasa ELC Civil Suit No. 497 of 2001, Mombasa ELC Civil Suit No. 498 of 2001, and Mombasa ELC Civil Suit No. 499 of 2001. The plaintiff in all the three suits is Kenya Ports Authority (KPA).
2. The first suit, registered as Mombasa ELC No. 497 of 2001, was commenced through a plaint filed on 5 October 2001, respectively against Essam Properties Limited, the Commissioner of Lands and the Chief Land Registrar. The suit concerns the land parcel Mombasa/Block XXVI/508 (sometimes herein referred to simply as plot No. 508). The plaint was amended several times, resting with the Further Re-amended Plaint filed on 4 February 2020, with the 2nd defendant now being the National Land Commission, upon the office of the Commissioner of Lands being declared defunct following *the Constitution* of 2010. The case of the plaintiff is that the Plot No. 508 was registered in the name of the General Manager, East African Railways and Harbours Corporation (the EA Railways and Harbours Corporation). It is pleaded that in the year 1978, the East African Harbours Corporation was disbanded, and through the *Kenya Ports Authority Act*, Cap 391, Laws of Kenya, Kenya Ports Authority (KPA) was established and became the successor in title to the said East African Harbours Corporation. It is averred that as successor in title, all undertakings of the East African Harbours Corporation, including the Plot No. 508, were transferred to KPA. It is pleaded that KPA took possession of the Plot and has remained in open exclusive possession, and has managed and operated the land as its own. It is pleaded that on a date unknown to the plaintiff, but about the years 1997/1998, the Commissioner of Lands, discreetly and without giving notice to the plaintiff, allocated the Plot No. 508 to Essam Properties Limited. It is pleaded that the Chief Land Registrar cancelled the entries in the register in respect of the Plot and caused the Government of Kenya to be registered as proprietor, and shortly thereafter, the 1st defendant. These acts are claimed to be illegal, for reason inter alia, that the Commissioner of Lands could not, without the express written authority of the plaintiff, or its surrender of title, purport to allocate the land to the 1st defendant, and further for reasons that :-
 - a. The plaintiff could only be divested of the land strictly under the terms of the Act and not otherwise;
 - b. Any rights the Government of Kenya sought to acquire by registering itself as the proprietor in 1999 had been extinguished by adverse possession and/or prescription;
 - c. All the parties concerned had the express notice of the plaintiff's interest in the property by virtue of the register and the plaintiff's physical possession of the property.
 - d. The property was never unalienated Government land nor was it ever surrendered back to the Government.
 - e. The 2nd and 3rd defendants had no authority or power to allocate the property for private use.



3. It is pleaded that the defendants committed acts of fraud and the following particulars are pleaded :-
- a. Application by the 1st defendant to be allocated the suit property whilst the plaintiff was in possession;
 - b. Cancellation of the name of the General Manager, the East African Harbours Corporation from the title;
 - c. The 2nd defendant acting as in (b) above without consulting or notifying the plaintiff of his intention to so act;
 - d. Discreet allocation of the suit property to the 1st defendant;
 - e. The 2nd and 3rd defendants discreetly deregistering the plaintiff as the proprietor of the suit property;
 - f. The defendants conniving and conspiring with each other and destroying and/or hiding the documents relating to the transactions touching on the suit property before July 1998;
 - g. Re-numbering the suit property other than the number previously held by the plaintiff's predecessor.
 - h. The plaintiff only realized the matters set out herein in or about late 1999.
4. It is claimed that the 1st defendant has demolished the plaintiff's premises erected on the plot No. 508, and as a result, the plaintiff has suffered loss and cannot be able to deal with the property freely so as to meet its obligations under the Act.

In the suit, the plaintiff seeks the following orders :-

- a. A permanent injunction to restrain the 1st defendant from the suit land and/or dealing with it.
 - b. A declaration that the cancellation of the General Manager, East Africa Railways and Harbours and the registration of the Government of Kenya as proprietor of the Plot No. 508 is null and void.
 - c. A declaration that the 2nd defendant and/or its predecessor and the 3rd defendant did not have power to allocate and lease the Plot No. 508 to the 1st defendant.
 - d. The entries made in the register in respect of the Plot No. 508 after 1997 be cancelled and consequently the plaintiff be registered as proprietor.
 - e. Costs and interest.
 - f. Any other relief the court may deem fit and just to grant.
5. The second suit, Mombasa ELC No. 498 of 2001, was commenced through a plaint, again filed on 5 October 2001, respectively against Kilifi Gardens Limited, the Commissioner of Lands, and the Chief Land Registrar. The plaint was also subsequently amended a couple of times resting with the Further Amended Plaint filed on 4 February 2020, with substitution of the Commissioner of Lands for the National Land Commission. The plaint is drafted in similar terms to that in the suit Mombasa ELC No. 497 of 2001, and seeks the same prayers, only that the land in issue is the Plot Mombasa/Block XXVI/928 (sometimes herein referred to simply as Plot No. 928) which is in the name of Kilifi Gardens Limited.



6. The third suit, registered as Mombasa ELC No. 499 of 2001, was also commenced through a plaint filed on 5 October 2001, respectively against Stonewave Limited, the Commissioner of Lands and the Chief Land Registrar. The plaint was equally amended, resting with the further amended plaint filed on 4 February 2020, with the National Land Commission substituted for the Commissioner of Lands, removal of the Chief Land Registrar as 3rd defendant and addition of Nile Limited as the 3rd defendant. The plaint is also drawn in similar fashion to the plaint in the other two suits, save that the property in issue is Mombasa/Block XLVII/112 (hereinafter sometimes simply referred to as Plot No. 112). It is averred that the property was illegally allotted to Stonewave Limited, on the same reasons pleaded in the other two suits, and that Stonewave Limited subsequently transferred her interest to Nile Limited. Nile Limited filed a counterclaim where she sought a declaration that Stonewave Limited was the only allottee of the Plot No. 112; that she transferred a good title to her; and a declaration that she is the rightful owner of the Plot No. 112.
7. Before the plaints were amended to incorporate the National Land Commission in place of the Commissioner of Lands, the Attorney General had filed defence on behalf of both the Commissioner of Lands and the Chief Land Registrar. It was denied that the suit properties were ever registered in name of the General Manager, East African Railways and Harbours Corporation on behalf of the said Corporation. It was denied that the properties were never unalienated Government Land or that the Commissioner of Lands had no power to allocate the same. It was pleaded that if the properties belonged to the Corporation, the Corporation never registered its claim over the suit properties under the provisions of the then East African Harbours Corporation Act, Cap 19, nor did the plaintiff raise or register its claim to the properties under Section 74 (4) of the *Kenya Ports Authority Act*. It was also averred that no notice was issued prior to filing suit in compliance with Section 136 (2) of the Government Lands Act, Cap 280 and the suits ought to be dismissed.

Evidence Of The Parties

i. Evidence of the plaintiff

8. PW-1 was George Opiyo, who works with KPA as an Estates and Rating Officer. He has worked with KPA since 1985. He explained that the three suit properties are in different localities and all of them had structures. He stated that the Plots No. 508 and 928 each had a maisonette, which were pulled down, and the plots are now vacant, while the Plot No. 112 was vacant but now has a structure in it. He was not sure what the old registration numbers were, but he thought that for the Plots No. 928 and 508, they were respectively 235/PT/XXVI and 251/PT/XXVI. He stated that the suit properties were not available for allocation as they were occupied by KPA staff. He also relied on his witness statement filed in two of the three cases and a witness statement of Hussein Mamo, filed in the suit No. 499 of 2001. Much of his statement mentions the land parcels Mombasa/Block XXVI/1000 and 1001 which are not for these three suits. For the Plots No. 928 and 508, it is only stated that they were fraudulently allocated.
9. Cross-examined, he did not have the list of properties handed over by East African Harbours and Railways Corporation. He could not refer to any document showing that the properties were owned by East African Railways and Harbours Corporation. He could not refer to any document showing that KPA were paying rates for the properties. They (KPA) concluded that the titles were fraudulent because there was no reference to KPA as previous owners. He could not tell who was currently occupying the plots No. 508 and 928, his evidence being that he was last on the plots 'a long time ago.' He mentioned that the other plot (meaning Plot No.112) was locked with no activity. On further cross-examination he acknowledged that he could not tell which plot from which. He was not sure whether the Plots No. 928 and 508 arose from subdivision of Plots 235/PT/XXVI (PT/235) or PT/251/XXVI (PT/251).



He never saw the title 235/PT/XXVI or PT/251/XXVI. He had no document relating to these titles PT/235 or PT/251. He had no evidence that the Plot No. 112 was ever registered in name of East African Railways and Harbours Corporation or KPA. He had no record on this plot. He stated that KPA did not have titles but the properties were reserved for KPA. He mentioned that there was a list of properties transferred to KPA by East African Railways and Harbours Corporation but he did not have this list.

10. PW-2 was Stephen Kyandih, a Principal Legal Officer with KPA. He joined KPA in the year 2002 as an Assistant Legal Officer and rose up the ranks. He has been an advocate of the High Court of Kenya for a period of 17 years. He testified on the three plots as follows :-
 - i. That the Plot Mombasa/XXVI/928 was hived off the original Plot No. 235/PT/XXVI.
 - (ii) That Plot Mombasa/XXVI/508 was part of an original Plot No. 251/PT/XXVI.
 - (iii) That Plot Mombasa/ XLVII/112 did not change its numbering.
11. He testified that the suit properties were initially owned by East African Railways and Harbours Administration in 1963. That pursuant to Legal Notice No. 440 of 12 July 1963, any land that was being used by East African Railways and Habours Corporation, or reserved for its use, was vested upon the General Manager, East African Railways and Harbours Administration (the General Manager). That following Legal Notice No. 3 of 13 May 1969, any property that was held by the General Manager came to be vested in the East African Railways and Harbours Corporation.
12. He elaborated that East African Railways and Harbours Corporation was based in Arusha, Tanzania and all the titles to the properties were held in Tanzania. He testified that the only documents they have to show that the properties were of East African Harbours Corporation are the Legal Notices.
13. He testified that Legal Notice No. 160 of 11 October 2001 vested these properties to KPA, which Legal Notice he stated is one of the Schedules in the *Kenya Ports Authority Act*. He stated that the second reason why KPA owns the properties is that at the time of the breakup of the East African Community in 1978, and establishment of KPA in the same year, KPA was in possession of these properties and continued to pay rates up to the year 1998, when it was discovered that the properties have been allotted to other people and the third parties took over possession. He testified that between 1978 and 1998, KPA was the entity in possession, and had undertaken the process of acquiring the land. He reiterated that any parcel of land used or reserved for use by East Africa Railways and Harbours Administration was vested in the General Manager and that such land was either unalienated Crown Land or vested in the Trust Land Board. He testified that following Legal Notice No. 3 of 13 May 1969, any property held by the General Manager was now vested in a new body which was the East African Railways Corporation. A subsequent vesting order was issued pursuant to Legal Notice No. 21 of 9 June 1969 and Legal Notice No. 160 of 2001. He elaborated that the only documents which will show East African Habours Corporation, and later KPA, as having interest in the suit properties, is the Legal Notices. He added that the second reason why KPA owns the properties is that at the time of the breakup of the former East African Community in 1978, and after establishment of KPA, KPA was in possession of the suit properties and continued to pay rates up to the year 1998.
14. He referred to various documents relating to rates payment, and payment in lieu of rates, made by KPA to the Municipal Council of Mombasa. He testified that they show payment for the Plot No. 112 and the plots 251/PT/XXVI and 235/PT/XXVI. He also referred to letters to the Commissioner of Lands, written by KPA, complaining of the allocation of their parcels of land and the replies received thereto. He particularly referred to letters from KPA dated 17 November 2001 and response received from the Commissioner of Lands dated 5 December 2001, where Commissioner said that the parcels were



- properly alienated by Government. There was also a letter dated 6 December 1999 from the Ministry of Transport and Communications, requesting the Auditor General to undertake an audit of the sale or transfer of KPA land and houses, which letter included the subject properties.
15. He further testified that the properties were included in the Ndungu Land Commission Report and pointed out at the Schedule to the report which contains the suit properties.
 16. Cross-examined, by learned state counsel, he testified that KPA did not consent to allocation of the suit properties. He testified that the leasehold title to Plot No. 508 was registered on 1 April 1998, yet in the same year, 1998, KPA were issued with a demand for payment of rates for the property for the years 1998, 1999 and 2000. He testified that this is the same for the property Plot No. 251/PT/XXVI, and he referred to a letter dated 29 January 1998 demanding for rates.
 17. Cross-examined by counsel for the beneficiary companies, PW-2 testified that KPA is currently not in possession, and they are not at present paying rates for the properties. He stated that no notice was given to KPA before allotment of the parcels of land to other people. He reiterated that the titles were held in Arusha but KPA was in use and possession of the land and paying rates. He stated that they were waiting for the Legal Notice to vest the property in KPA. He acknowledged that the Legal Notices of 1963 and 1969 do not specifically mention the suit properties. He referred to Section 74 (4) of the KPA Act as permitting KPA to continue using the land until the vesting order is made. He asserted that the Commissioner of Lands could not allot land reserved for use by KPA for this was a reservation for public use. He conceded that there was no document of title for the suit properties in name of East African Harbours Corporation or KPA. His evidence was that they were in the process of procuring the titles and were waiting for the vesting order which came in the year 2001. He reiterated that the title documents were held in Arusha and not in hands of KPA. He stated that there was title in the name of the General Manager East African Railways and Harbours Corporation. He acknowledged that he had not produced any title or search in that name. He stated that he tried to retrieve counterfoils of the titles from the Land Registry but was not able to get them. He thought that he was unable to get the documents because the Lands office was also part of the fraud.
 18. Re-examined, he testified that the Plots No. 508 and 928 are located in Kizingo, and had staff houses. The Plot No. 112 is in Moi Avenue, Mombasa, and was vacant property. He referred to searches dated 5 December 1997 for the Plot Mombasa/Block XLVII/113, and 114, which he said was adjacent to the suit Plot No. 112, and which search shows registration in name of General Manager, East African Railways and Harbours. He also acknowledged that payment of rates does not confer ownership.
 19. With the above evidence, the plaintiff closed her case.

(ii) Defence Evidence

- Nile Limited, Essam Limited, Kilifi Gardens Limited and Stonewave Limited called Mohamed Yawer Kalyan as their witness. He is the General Manager of all the four companies. He joined the companies in the year 2002 and was not there when the parcels of land were allotted. He produced letters of allotment, leases and certificates of lease, for the three suit properties. He testified that Plot No. 508 was originally allotted to Essam Properties Limited and it is still in that name. Plot No. 928 was allotted to Kilifi Gardens Limited who are still proprietors. On the Plot No. 112, he stated that it was originally allotted to Stonewave Limited who sold the land to Suntania Limited and Suntania subsequently sold the same to Nile Limited who are the current registered proprietors. He denied that the properties ever belonged to East African Harbours Corporation.
20. Cross-examined, he testified that he had no letter from the President authorizing the Commissioner of Lands to allocate these plots. He affirmed that the companies are commercial and not charitable. There was no advertisement for auction of the properties. The allotment letter for the Plot Mombasa/Block



- XLVII/112 was signed by one S.M Kagwi for the Commissioner of Lands, but he did not have any letter giving him authority to so sign on behalf of the Commissioner of Lands. The allotment letter to Plot No. 112 described the land being allotted as Plot XII/112- Mombasa Island. It was not being allotted as an unsurveyed land. He did not know when it was surveyed. The Lease to this Plot indicates that it is signed by Wilson Gacanja, the Commissioner of Lands, by Order of The President. He did not have the Order by the President. This Plot No. 112 has a warehouse which they built.
21. On the Plot Mombasa/Block XXVI/928, the letter of allotment is dated 3 March 1998, signed by S.M Kagwi for the Commissioner of Lands. He did not know when the acceptance for the allotment letter was made, nor when payments were made for the land. He did not know when survey was done. The allotment letter showed the plot being allotted as Block XXVI/928 meaning that it had already been surveyed. The Lease to this plot is dated 17 July 1998 and is signed by Wilson Gacanja. He stated that there was no house on the plot when it was allotted. The allotment letter shows that it was allotted to develop one dwelling house. He stated that it is being used as a yard for parking their trucks and is not developed.
 22. On the Plot Mombasa/Block XXVI/508, the letter of allotment is dated 31 March 1998 and signed by S.M Kagwi for Commissioner of Lands. The reference for the plot being allotted is XXVI/508 meaning that it had been surveyed. He also had no payment receipt for acceptance. The lease issued is dated 17 July 1998 signed by Wilson Gacanja. He stated that this land is also used as a yard though allotment was for residential purposes.
 23. The Plan numbers indicated in the allotment letters of Plot Numbers 508 and 928 was the same, i.e Plan No. 12.2.CT.141. The plan was not attached to the allotment letters produced.
 24. He testified that when he came to the companies in the year 2002, the plots were all plain and vacant. They built a warehouse on the plot No. 112 but the other two plots are still undeveloped. He explained that the three companies are sister companies dealing with commodities and the owners are cousins. The Lease for the Plot No. 112 shows the purposes of allotment as “shops, offices, flats, excluding the sale of petrol and motor-oil.” He testified that they have been paying rates though he did not have the rates and rents payment receipts. He stated that the Plot No. 112 was purchased at Kshs. 14 million from Suntania Limited. He was not aware that there were KPA houses on the Plots no. 508 and 928.
 25. DW-2 was Samwel Kariuki Mwangi, the Principal Land Registrar, Mombasa. He produced the records for the three properties. He testified that in the year 1998, the allocating authority was the Commissioner of Lands through the authority of the President.
 26. For the Plot Mombasa/Block XLVII/112, he testified that the original allottee was Stonewave Limited, who transferred the land to Suntania Limited on 23 January 2003. There was a second transfer to Nile Limited on 4 March 2004. There was an issue about an entry dated 27 March 1995 but he clarified that this must have been by error and that the record therein must be for another title.
 27. For Plot Mombasa/Block XXVI/928, allotted to Kilifi Gardens Limited, on 23 January 2003, there was transfer to Suntania Limited. The signatures of transferor and transferee are the same meaning that the two companies shared directors. There was a subsequent transfer to Abbasali Merali Dewji on 4 March 2004. The plot was however transferred back to Kilifi Gardens on 20 May 2006.
 28. For the Plot Mombasa/Block XXVI/508, the original allottee was Essam Properties Limited. There is transfer to Suntania Limited registered on 23 January 2003 with signatures of transferor and transferee being the same. This is reflected in Presentation No. 40 of the same date. He had a copy of Certificate of Lease in name of Suntania Limited which he produced as an exhibit. There was transfer to Essam Properties on 25 May 2006.



29. Cross-examined, by counsel for the companies, he testified that he has not seen any titles in the name of KPA or East African Railways and Harbours for the suit properties. He testified that the valuation roll is generated by the Municipal Council.
30. Cross-examined by counsel for the plaintiff, he testified that the Municipal Council used to source for information on ownership from the Lands office but he had not seen any communication between the two on the issue of who owns the suit properties.
31. With the above evidence, the defendants closed their respective cases.
32. I invited counsel to file written submissions which I have taken into consideration. I hold the view that follows :

C. Analysis and Disposition

33. Before I go too far, there is contention in the submissions of counsel for the plaintiff, that the suit is not defended by the 2nd and 3rd defendants. That cannot be true. I had pointed out in my introduction that before the plaint was amended, the Attorney General had entered appearance and filed defence, on behalf of the Commissioner of Lands and the Chief Lands Registrar. The Office of Commissioner of Lands was succeeded by the National Land Commission (NLC) after the 2010 Constitution but the office of the Chief Lands Registrar remains. Unless otherwise shown, the NLC must be deemed as the successor of the Commissioner of Lands, and that also goes for the pleadings herein. The other issue that I feel the need to clarify early is the submission by State Counsel, on behalf of the Attorney General, regarding some entries in the title to the parcel Mombasa/Block XLVII/112. It was submitted that there are entries showing that the register was opened in the year 1995 yet the allotment letter is of the year 1997. The Land Registrar, in his evidence, clarified that this must be entries for a different register and I understood that clarification. It is not correct therefore to contend that the card was opened in the year 1995. The final preliminary point that I feel the need to address regards the submissions of counsel for the plaintiff, that Mr. Mohamed Kalyan who testified on behalf of the companies, had no authority from the three companies to testify on their behalf. I see no substance here. Mr. Mohamed stated that he is the General Manager of the three companies and that he was authorized to testify on behalf of the three entities. There was even a Board resolution filed on 25 September 2020 indicating that Mohamed Kalyan has been authorized to execute all court documents and affidavits. There is therefore no substance in the argument that he was not duly authorized.
34. With the above preliminary issues out of the way, I proceed to address the substance of the case.
35. In these three cases, the plaintiff seeks to nullify the titles of the three companies who are registered as proprietors. It is the position of the plaintiff that the three companies, or their successors, ought not to have been allotted the suit properties as they were properties belonging to her. It is indeed the plaintiff's pleading that the suit properties were registered in the name of the General Manager, East African Railways and Harbours Corporation, for and on behalf of the East African Railways and Harbours Corporation. It is also her pleading that in 1978, the East African Harbours Corporation was disbanded and KPA was established through the *Kenya Ports Authority Act*. It is the plaintiff's case that the properties of the East African Harbours Corporation vested in KPA and this includes the suit properties. It is the contention of the plaintiff that she was all along in possession and that the allocation of the properties was illegal.
36. . I have gone through the evidence and documents presented by the plaintiff. At the outset, I need to state that the plaintiff never produced any document of title for the suit properties in name of the General Manager, East African Railways and Habours Corporation, or in name of East African



Harbours Corporation, or in her name i.e Kenya Ports Authority. I have however seen in the exhibit bundle of the plaintiffs, official searches dated 5 December 1997, for the plots Mombasa/Block XLVII/113,114,117,118, which are in name of 'General Manager, East African Railways and Harbour.' You would expect that if the plaintiff was able to avail searches in name of the General Manager, for other properties, then it would also have a similar document for the suit properties but she does not have. The explanation given by PW-2 was that the documents of title were kept in Arusha. I did not hear PW-2 state that he or any officer of the plaintiff has written to the Tanzanian Government to be availed of the documents of title but the same were not given. I also did not hear PW-2 state that he or any other officer on behalf of the plaintiff went to Arusha to look for the documents of title but they could not get the same. You would expect that if the plaintiff was very very serious in following up documents of title from Arusha, then they would have done much more. What I heard PW-2 say is that he went to the Lands Registry Mombasa, but was unable to get any document relating to the suit properties and he thought that it was by a fraudulent scheme, involving officers of the Lands Registry, that the documents of title could not be traced. I think KPA could have done better in trying to trace some semblance of title documents.

37. Without the document of title, what the plaintiff relies upon to assert ownership of the suit properties are legal notices, some letters, the Ndungu Land Commission Report, the claim that she was all along in possession, and evidence of payment of rates. I will go through these systematically :-

a. The Legal Notices

38. On the legal notices, the plaintiff has provided the following in the exhibit bundle:-

1. LN No. 440 OF 12 July 1963. The Kenya (Vesting of Land) Regulations, 1963 (LN 245 of 1963).

It provides where relevant as follows :-

(2) The land described in the First Schedule to these Regulations is hereby vested in the General Manager of the EA Railways and Harbours Administration.

First Schedule

"All land which, immediately before the 1st June 1963, either was unalienated Crown land or was vested in the Trust Land Board, and which was then in use, or reserved for use, by the East African Railways and Harbours Administration for –

- (a) premises used for the administration and control of the services provided by the Administration;
- (b) railway lines (including marshalling yards and sidings);
- (c) railway stations;
- (d) workshops and training schools;
- (e) the operation of ports and harbours including the berths, wharves, piers, jetties and other installations comprised therein;
- (f) the navigation of vessels, and aids thereto, in respect of any port or harbour;



2. LN No. 19 of 13 May 1969 made under the EA Harbours Corporation Act, 1967. It provides :

- (a) that the fixed assets of the General Manager of the East African Railways and Harbours Administration (LN 15 of 1969) which are recorded as Harbours assets in the Classification of Assets of the East African Railways and Harbours Administration as at 31st May 1969 and for which provision for depreciation and amortization is made in the estimates (1st June, 1969 to 31st December, 1969) approved by the Board of Directors shall be transferred to and vest in the East African Harbours Corporation on the appointed day and the corresponding loan liabilities of the General Manager of the East African Railways and Harbours Administration as reduced by sinking fund provisions accumulated up to the appointed day shall be deemed to have become liabilities of the East African Harbours Corporation on the appointed day subject to the certification by the Auditor-General of the accounts of the East African Railways and Harbours Administration for the period 1st January, 1969 to 31st May, 1969 and such accounts shall be divided in all respects to show such Harbours and Railways assets and liabilities separately; and
- (b) all other Harbour assets and liabilities of the General Manager of the East African Railways and Harbours Administration as at 31st May, 1969 shall be transferred to and vest in the East African Harbours Corporation on the appointed in accordance with the arrangements agreed between Board of Directors of the East African Railways Corporation and the Board of Directors of the East African Harbours Corporation at the joint meeting held on 28th November, 1968 as recorded in Minutes 66/68 and 67/68 and subject to the certification by the Auditor-General of the accounts of the East African Railways and Harbours Administration for the period 1st January, 1969 to 31st May 1969 and such accounts shall be divided in all respects to show such Harbours and Railways assets and liabilities separately.

Z.H.K. BIGIRWENKWYA

Secretary-General

EAST AFRICAN COMMUNITY

Dated 31st May 1969

3. LN No. 20 of 13 May 1969.

This legal notice is clearly not applicable as it deals with assets assigned to the Railway Corporation. It states as follows :-

The fixed assets of the General Manager recorded as Railway assets, in the Classification of Assets of the EA Railways and Harbours Administration as at 31st May 1969, and for which provision for depreciation and amortization made in the estimates (1st June, 1969 to 31 December 1969) approved by the Board of Directors,



shall be transferred to and vest in the EA Railways Corporation on the appointed day (refer to LN 16 of 1969). So this relates to assets of Railways.

4. LN No. 21 of 9 June 1969 and LN No. 22 of same day.

This is also not applicable and has no relation with the issues herein. It deals with distribution of staff who worked in East African Railways and Harbours Corporation, put to service either in Railways or Harbours.
5. LN No. 160 of 11 October 2011.
39. . This legal notice is made pursuant to Section 74 (4) of the KPA, Act, wherein the Minister declared that the property of the EA Harbours Corporation or any liabilities, become the property, liabilities and contracts of Kenya Ports Authority.
40. I am not adept at the history of harbours and railways, and not much background on this was given by the plaintiff. However, the little that I can gather from the Legal Notices suggests that at independence in 1963, there was the operation of railways and harbours by the East African Railways and Harbours Corporation. Around about the year 1969, it was deemed fit to separate the operations of harbours and railways, and two entities, the East African Railways Corporation, and the East African Harbours Corporation, were created under the auspices of the old East African Community which was formed in 1967. With the creation of the two Corporations, there had to be division of assets, stores and personnel between the Harbours and the Railways Corporations, and a sub-committee for this purpose was formed which is the 'Sub-Committee of The Joint Board of Directors of both the EA Railways Corporation and the EA Habours Corporation on the Division of Assets of the EARH between the two Corporations.' Several meetings were held, including the meetings of 24 October 1968, and 4 November 1968. It was agreed that the division would proceed based upon the division of functions, so that what was functionally for the railway went to the East African Railways Corporation, and likewise for harbours, which went to the East African Harbours Corporation. On division of housing at Mombasa, Dar es Salaam and Tanga (minute 4), the Committee agreed that housing at Mombasa, Dar es Salaam and Tanga, should be divided between the two Corporations 'by class of quarter in proportion to the number of posts in the existing establishment of the EARH transferred to each Corporation and eligible for each class of quarter.'
41. These legal notices do not actually tell us the particular assets that were vested in the General Manager East African Railways and Harbours Corporation, or the way that they were distributed to the Railways and the Harbours Corporations. There must however be some inventory somewhere including the inventory of land. This was however not presented to court.
42. The old East African Community was disbanded in 1978, and with this disbandment, each country had to operate its own railway and/or harbours independently. Through two statutes, that is the [Kenya Railways Corporation Act](#), Cap 397, Laws of Kenya, and the [Kenya Ports Authority Act](#), Cap 391, Laws of Kenya, the Kenya Railways Corporation and the Kenya Ports Authority, were formed. The functions and assets of the East African Railways Corporation were taken by the Kenya Railways Corporation and the functions and assets of the East African Harbours Corporation were taken over by the Kenya Ports Authority. Indeed if you look at the preamble to the [Kenya Ports Authority Act](#), it provides that it is 'an Act of Parliament to provide for the establishment of an Authority to be known as the Kenya Ports Authority, for the transfer to the Authority of the undertakings, within Kenya, of the East African Harbours Corporation, for the functions of the Authority and for purposes connected therewith.'



43. Unfortunately, as I have mentioned, no inventory of what was distributed to the Kenya Ports Authority, from the East African Harbours Corporation, was given to this court. It follows that all we can discern from the Legal Notices is that indeed there were some assets held in name of the General Manager, East African Railways and Harbours Corporation, and which were subsequently distributed between the East African Harbours and East African Railways Corporations. We cannot however tell, from the Legal Notices alone, that indeed the suit properties were among the properties in the inventory handed over to Kenya Ports Authority. The Legal Notices cannot therefore determine that the suit properties were the properties of East African Harbours Corporation and that they were indeed handed over to the Kenya Ports Authority. If the plaintiff had provided the inventory of land handed over, that would have assisted immensely, but there was none, and I need to now proceed to the other evidence presented.

b. The Ndungu Commission Report

44. The plaintiff relied on the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, 2004, popularly referred to as the Ndungu Commission Report, in support of her case. She did demonstrate that the suit properties were mentioned in the Ndungu Commission Report as having been improperly alienated. I have seen the extract of the report presented, and it is true that the suit properties were acknowledged in the report, as among the properties irregularly allocated to individuals. I have seen the plot Mombasa/Block XLVII/112 which is noted as having been reserved for KPA for commercial use and that it was allocated to Stone Wave Limited. The recommendation of the Commission is for this title to be revoked. The plot Mombasa/Block XXVI/ 508 is noted as reserved for KPA, for staff housing, and was allocated to Essam Property Limited. The recommendation is to have this title revoked. The plot Mombasa/Block XXVI/928 is also observed as reserved for KPA staff housing and allocation was made to Kilifi Gardens Limited and similarly the recommendation is for this title to be revoked.
45. I do not think that the mere fact that a particular parcel of land is mentioned in the Ndungu Report means that it has been proved to the required standard that it was irregularly allocated. The Ndungu Commission was not a court of law but a commission of inquiry. Within a suit, a party can demonstrate that the findings of the Ndungu Commission Report were erroneous, and can prove that the allocation of land to him/her was proper. Thus, the Ndungu Commission Report by itself, may not be conclusive, but can be used to add to the wealth of evidence that a party is at liberty to produce, in order to prove her case. I will consider the report and analyse it together with the other evidence that has been presented by the plaintiff.

c. Claim of KPA being in Possession

46. The case of KPA is also hinged on the contention that prior to title being issued in name of the private companies, KPA was in possession of the suit properties. I am afraid that I have no proof of the claim that the plaintiff was in possession.
47. It was the evidence of PW-1, that the properties No. 508 and 928 had maisonettes which were occupied by KPA staff. You would expect that PW-1, as an Estates officer, would present a record of their occupancy, i.e, which staff, his/her staff number, and some documentary evidence that such persons were permitted to occupy the claimed houses because they are staff of KPA. PW-1 had no such document and neither did PW-2. There was no housing inventory presented, and no letter assigning any member of staff, occupancy of any of the suit properties. If there was no such record, nothing barred the plaintiff from calling as a witness any one of their staff, or former staff, to affirm that they occupied the suit properties and that there were houses in them, which they were in possession of, as



staff of KPA. There are some letters claiming that the suit properties were occupied, but these letters are claims in themselves, which need proof, and there was no proof to back up the allegation in the letters.

48. In fact, I found the evidence of PW-1 pretty hopeless. You would have expected that as an Estates Officer, PW-1 would have facts and figures at the tip of his finger. He could barely tell the plots apart and had not even visited them so as to know their current status. I need not belabor the fact that he had absolutely no records of these properties. I thought he was extremely casual and quite pathetic as a witness. Let me not go further. The long and short of it is that the plaintiff has failed to prove that they were in occupation of any of the suit properties prior to them being allotted to the companies.

d. Letters

49. The other evidence presented is exchange of letters between KPA and the Commissioner of Lands and the Permanent Secretary Ministry of Transport and Housing. I have gone through the letters. As I have mentioned, letters written by KPA claiming ownership of the properties has very little probative value. There was however particular attention to the letter dated 5 December 2001 from the Commissioner of Lands, to the Managing Director of KPA. That letter provides as follows :-

RE : KPA Land Matters

Thank you for your letter Ref. No. MLS/4/8/830 of 17th November, 2001 on the above subject.

As much as I appreciate the sentiments expressed therein, it is good to observe that this matter has featured prominently in Public Investment Committee (P.I.C) in the past.

However, the truth of the matter is that the said properties were properly alienated by the Government. The allottees have since procured titles and transacted to third parties.

To reverse this situation is very difficult notwithstanding the fact that these lands were vested in your Corporation following the disbanding of East African Railways and Harbours.

It is therefore my sincere advice that legal action against the allottees is like one arm biting the other. It may suffice to seek an amicable solution as suggested in your letter.

S.K Mwaita

Commissioner of Lands.

50. The letter that was referred to, i.e that of 17 November 2001, had been written by the Managing Director, KPA, to the Commissioner of Lands, complaining of various KPA plots having been allocated to individuals. Among the plots were the suit properties herein. It will be observed that in his reply, the Commissioner of Lands stated that as far as he was concerned, the properties were properly alienated by the Government, though he appears to have acknowledged that the lands were vested in the Corporation.
51. . I wouldn't give too much weight to this letter either way, as this was merely the opinion of the Commissioner of Lands. He could be right and he could also be wrong in his opinion. What matters is not so much the opinion of the Commissioner of Lands, but the evidence presented, as to whether or not the properties belonged to KPA, and if so, whether they were properly alienated.
52. I do not therefore think that this case can be decided based on the letters written by KPA or by the Commissioner for Lands.



e. Payment of rates

53. KPA contends that she paid rates for the suit plots to the Municipal Council of Mombasa and that this demonstrates that the properties were alienated to her. There is evidence of what the Municipal Council acknowledged to be owned by KPA and for which they asked KPA to pay rates, based on a draft valuation roll of 1991. I have seen that the Municipal Council of Mombasa did accept payment in lieu of rates for various plots including the Plots No. 111 -118/XLVII. It will be recalled that one of the plots in dispute is the plot No. 112/XLVII. These plots feature in the rates payments of 1991, 1999, 2000. This Plot No. 112 is identified in the Valuation Roll as No. T14. I have no problem with finding that there is adequate proof of payment of rates for this Plot Mombasa/Block XLVII/112 prior to it being allotted to the plaintiffs.
54. What about the plots Mombasa/Block XXVI/508 and Mombasa/Block XXVI/928? It will be recalled that PW-2 testified that an original Plot No. 251/PT/XXVI was subdivided to produce Plot No. 508 and that the original Plot 235/PT/XXVI was subdivided to produce the Plot No. 928. I am extremely doubtful of that proposition. First, there is absolutely no evidence presented that the Plots No. 508 and 928 arose from subdivisions, and if so, from subdivisions of the mentioned Plots 251/PT/XXVI and 235/PT/XXVI. I asked PW-2 if he has any evidence that the Plots No. 508 and 928 were carved out of the Plots 251/PT/XXVI and 235/PT/XXVI and he conceded that he has none. If at all the Plots were as a result of subdivision, there would have been nothing easier than to call a surveyor to demonstrate the claimed subdivisions, and provide a link between the Plots No. 508 and 928, and 251/PT/XXVI and 235/PT/XXVI. This was not done. In fact, my analysis of the Valuation Roll and other evidence provided leads me to a different conclusion as I will explain below.
55. When you look at the Valuation Roll, (for example page 51 of the plaintiff's bundle) you will actually find the Plot 508/XXVI under Roll No. M58. It was valued at Kshs. 627,000/= for rates purposes and rates of Kshs. 12, 540/= was being paid. You will also find the Plot 251/PT/XXVI valued at Kshs. 621,000/= and rates of Kshs. 12,420/= being paid under Roll No. 83. Clearly, these are two different plots described differently, under two different rolls, and valued differently for rating purposes. It cannot be that Plot No. 508 is a subdivision of Plot 251/PT/XXVI, and if it is, then no evidence has been provided.
56. Similarly there is nothing to suggest that Plot No. 928 is a subdivision of 235/PT/XXVI. I have also not seen any evidence of payment of rates for Plot No. 928 at all. I have seen payment for Plot No. 235/PT/XXVI but without there being any link displayed that the Plot No. 928 was a result of its subdivision (or that Plot No. 928 is the same as 235/PT/XXVI) then one cannot conclude that payment of rates for the Plot 235/PT/XXVI was payment of rates for Plot Mombasa/Block XXVI/928. I also note that in the letter dated 22 December 2000, from KPA to the Commissioner of Lands, Plot No. 928 is allegedly paid for rates under Roll L106, which is different from what PW-2 stated. Nonetheless I have perused the roll to find this Roll No. L106 and it refers to a Plot No. R.54R/XXV and not Plot No. 928.
57. My analysis of the rates therefore do show payment for rates for the Plots Mombasa/Block XLVII/112 and Mombasa/Block XXVI/508 but none for Plot Mombasa/Block XXVI/928.

Evaluation of the totality of the Evidence __/**

58. So does the above evidence (a) – (e) above, prove that KPA owned the suit properties and that they were illegally alienated? I will discuss this going plot by plot.



i. Plot Mombasa/XXVI/928

59. The only tangible evidence that KPA has provided to demonstrate ownership of the parcel No. 928 is the Ndungu Land Report. KPA did not prove any previous possession and/or occupation of this plot prior to the land being allotted to the current proprietor. KPA did not bring any evidence that there was ever a KPA house on this property. KPA have not brought any evidence that any of their staff ever resided on this plot at any one time. If ever there was a house on this plot, none of their witnesses have given any description of that house, or when it was built. If such house was ever there and was demolished, no evidence was brought when it was pulled down. Their witnesses in fact did not seem to know much about this plot, and even stating its location was a problem. I have discussed this before. In addition, KPA have not brought any evidence that they used to pay rates for this property. The correspondences that were produced have little evidential value.
60. My conclusion on plot No. 928 is that KPA have failed to demonstrate, on a balance of probabilities, that this land was ever at any one point owned by her. I am not persuaded that KPA have any locus to complain about this plot and the suit in respect of this Plot, which is the suit Mombasa ELC No. 498 of 2001, fails and is dismissed with costs to the defendants.

(ii) Plots Mombasa/XLVII/112 and Mombasa/XXVI/508

61. On these two plots, the most critical evidence that KPA provided was that the Corporation used to pay rates for these two plots. In addition, I note that the parcel No. 112 is sandwiched between the series No.111-118 for which there is evidence, through the searches produced, that KPA owned them, at least the plots No. 113-118.
62. In his submissions, Mr. Kihiko, learned counsel for the private companies and current leasehold owners of the suit properties, submitted that payment of rents and rates does not prove ownership and referred me to the case of Abdi Mohamed Kahiya vs Fatuma Haji Kasim, Garissa ELC No. 37 of 2017 (2019) eKLR. I have read the decision. The facts of the case were that the plaintiff sought an order of eviction against the defendant in respect of a property identified as Plot No. A1 Low Density Mandera. No defence was filed and the matter proceeded ex parte. The evidence presented by the plaintiff was that he was paying rents and rates for the property and he produced receipts thereof. The court found that the land in question was Government Land previously governed by the Government *Land Act*. The court was of opinion that the documents showing payment of rents and rates and a letter that the plaintiff produced addressed to ‘who it may concern’, were not legal documents recognized in law as conferring a right of ownership over property. The court observed that the plaintiff did not produce a letter of allotment and his acceptance to confer upon him the right over the suit property. The plaintiff’s case was thus dismissed.
63. I am not bound by the reasoning in that case. I think that depending on the special circumstances of each case, payment of rents and rates, may actually be proof of ownership of property, or at least, can be taken as part of the evidence presented to prove ownership or demonstrate rights over land. I wouldn’t consider payment of rents and rates to be entirely worthless in proving rights over land.
64. In our case, I am of the opinion that since the properties attracted payment of rates, then it means that they were alienated. If the properties had not been alienated, then they would constitute unalienated Government land for which rents and rates could not be charged for there would not have been generated a parcel number. I do not think that KPA, being a public institution, would pay rates for properties that are not alienated to her. The Municipal Council of Mombasa recognized that these plots Mombasa/Block XLVII/112 and Mombasa/Block XXVI/ 508 were alienated to KPA, and that is why they received, for a quite a long time, and even after they had purportedly been alienated to the



private companies, payment of rates by KPA. I don't think that it can be argued that KPA went out of its way to improperly pay rates, so that in future, they can use that for purposes of fraudulently acquiring the parcels of land. The fact that KPA paid for rates, coupled with the mention of these properties in the Ndungu Commission report, lends credence to the assertion by KPA that these properties had been alienated to her and could not therefore be alienated to a private individual.

65. In their defence, the companies contended that the two properties were legally allotted to them. I have looked at their evidence. For the plot No. 112, the green card shows that it was opened on 6 October 1997 and on the same day the lease to Stonewave Limited was registered. I am not persuaded that there was never a green card in respect of this plot before 1997. As I have pointed out earlier, this plot forms part of a series of plots from No. 111 – 118 and there is evidence of the plots No. 113-118 being registered in name of the General Manager, EA Harbours and Railways. I doubt that the plot No. 112 remained unalienated until 1997. The evidence also shows that the plot had earlier been surveyed, because the allotment letter to Stonewave Limited, dated 25 August 1997, bears the plot number in full, which is a demonstration that the plot had already been surveyed. I am not therefore persuaded that this was unalienated Government land that could be allocated to a private individual. It had already been assigned to KPA for public use. There is no evidence that KPA were consulted before the allotment, and in fact, the evidence shows that upon KPA getting wind of this allocation, they wrote a series of letters in protest. I am thus not persuaded that allotment of the Plot Mombasa/Block XLVII/112 to Stonewave Limited was legal. It follows that Stonewave Limited did not get a good title to the land and having no good title, Stonewave Limited could not transfer any title so as to enable Nile Limited, the current registered proprietor, hold a good title. I am persuaded to proceed and cancel the title of Nile Limited to the land parcel Mombasa/Block XLVII/112 and order that the register be rectified so that Kenya Ports Authority are registered as proprietors of this parcel of land. I do not find merit in the counterclaim of Nile Limited and it is hereby dismissed with costs.
66. It is the same for the Mombasa/Block XXVI/508. I have mentioned that there is proof of payment of land rates by KPA and I hold the view that this land was already alienated to KPA for public use and the Commissioner of Lands could thus not proceed to issue an allotment letter to an individual. I find the issue of an allotment and lease to Essam Properties Limited was irregular and the title of Essam Properties Limited is thus liable for cancellation. I proceed to order the cancellation of the title of Essam Properties Limited and order the rectification of the register so that this land parcel Mombasa/Block XXVI/508 is registered in name of Kenya Ports Authority.
67. Given that I have held in favour of KPA for the plots Mombasa/Block XLVII/112 and Mombasa/Block XXVI/508, it follows that Nile Limited and Essam Properties Limited no longer have any rights of possession of these two properties. I order them to give vacant possession within the next 30 days and if they do not do so, they be forcibly evicted. Upon lapse of this 30 days, window, the two entities and/or their servants/agents are hereby permanently restrained from the properties. I award costs of the suits Mombasa ELC No. 497 of 2001 and Mombasa ELC No. 499 of 2001 to KPA jointly and/or severally against the defendants. I already mentioned that the plaintiff's suit Mombasa ELC No. 498 of 2001 has failed and is dismissed with costs.

68. Judgment accordingly.

DATED AND DELIVERED THIS 30 DAY OF MAY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT.

In presence of: -



****Mr. Sanjeev Khagram and Mr. Dan Ondego for plaintiff**

Mr. Emmanuel Makuto for the Attorney General and holding brief for Mr. Mbutia for the National Land Commission.

Mr. Daniel Kihiko for the 1st defendants in the suits No. 497/2001 and 498/2001 and for the 1st and 4th defendants in the suit No. 499/2001.

Court Assistant – Wilson Rabong’o

