



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**CIVIL SUIT NO. 30 OF 2006**

**PROF. SAMSON KAGENGO ONGERI .....PLAINTIFF**

**VERSUS**

**GREENBAYS HOLDINGS .....1<sup>ST</sup> DEFENDANT**

**EDWARD MZEE KAREZI..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES .....3<sup>RD</sup> DEFENDANT**

**CONSOLIDATED WITH HCCC NO. 54 OF 2005**

**GREENBAYS HOLDINGS LIMITED .....PLAINTIFF**

**VERSUS**

**TOWN COUNCIL OF KILIFI .....DEFENDANT**

**JUDGMENT**

The suit HCC No. 30 of 2006 was filed by Professor Samson Kagengo Ongeri (plaintiff) against Greenbays Holdings Ltd, Edward Mzee Karezi t/a Kazrad Agencies and the Registrar of Titles (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants) in which he sought for

- (a) Declaration that he is the lawful owner of the leasehold interest in plot LR No. 5054/1185, Kilifi.
- (b) A declaration that the registration of interest in the suit property in the 2<sup>nd</sup> defendant is null and void *ab initio*
- (c) Rectification of the register relating to the suit property by the Registrar of titles so as to show that

plaintiff is the registered proprietor of the leasehold interest therein.

(d) A permanent injunction to restrain the 1<sup>st</sup> defendant, its agents, servants or any other person whomsoever, from using the suit property in any manner whatsoever.

(e) In the alternative, damages against the defendants for unlawfully dealing with the suit property, such damage being the value of the suit property

(f) In the further alternative, damages being value of the suit property against the 2<sup>nd</sup> defendant. The plaintiff's case is that he is the legal owner of land known as LR No. 5054/1185 situated in Kilifi and measuring 0.8247ha. This is a leasehold for a term of 99 years which commenced on 1<sup>st</sup> April 1991 as per the Grant No. CR 26606 which was duly registered.

Currently, the suit property is charged to Middle East Bank, which charge has not been discharged. It was his case that since 18<sup>th</sup> November 1994, he became the registered leasehold proprietor of that parcel of land.

On or about 1<sup>st</sup> April 1996, the suit property was inexplicably and unlawfully registered in the name of Kazrad Agencies which is termed a non legal entity. Such registration was wrong and the title given to the said firm had no genesis at the Department of Lands in Nairobi.

On 24<sup>th</sup> May 2004, while the property was still registered in the plaintiff's name, the 2<sup>nd</sup> defendant purported to sell it to the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant obtained a transfer to itself, of the suit property. Plaintiff blames the 3<sup>rd</sup> defendant (i.e the Registrar of Titles) whom he says ought not to have registered the 2<sup>nd</sup> defendant as the proprietor of the leasehold interest in the said property and such registration was unlawfully and irregularly effected. It is the plaintiff's case that the registration in the name Kazrad Agencies and the subsequent transfer by it to the 1<sup>st</sup> defendant were both tainted with illegality, so Kazrad Agencies could not have given any title to the 1<sup>st</sup> defendant.

It therefore follows that the 1<sup>st</sup> defendant has wrongfully taken possession of the suit property by erecting walls, gates and digging a well. It is the plaintiff's contention that neither the 2<sup>nd</sup> defendant, nor the 1<sup>st</sup> defendant have a title superior to that of the plaintiff. It is at this point that HCCC No. 54 of 2005 comes in, because it is in reference to the self same property and because parties in that suit also claim ownership of the same property. But perhaps before introducing the issues in no. 54, let me set out the defence raised by Greenbays Holdings which is that on 15<sup>th</sup> January 2003, the Commissioner of Lands issued to Kazrad Agencies a Grant No. CR 37529 for 99 years from 1<sup>st</sup> April 1996 at an annual rent of kshs. 26,000 in respect of LR No. 5054/1185 measuring 0.8257 ha. That Grant was registered at the Mombasa Lands Registry on 4<sup>th</sup> May 2004. Then a sale agreement was made between Edward Mzee Karezi t/a Kazrad Agencies and one Lai Martino Giuseppe, where Edward Mzee Karezi t/a Kazrad Agencies agreed to sell to Lai the property at a price of kshs. 2,800,000 and a transfer dated 21<sup>st</sup> June 2004 and registered at the Land Registry Mombasa, as CR 37529/2 on 28<sup>th</sup> June 2004. The effect then was that Karezi transferred all his rights title and interest, absolutely to the Greenbays Holdings which was Lai's nominee pursuant to the registration of the Greenbays as the owner of the property, it entered into possession of the same by clearing the bushes, constructing a boundary wall, erecting four gates, digging up a well and planting 2000 trees and flowers at an approximate cost of kshs. 2,000,000/-.

Greenbays objects to the prayer sought by Professor Ongeru, and prays that, in the event that Prof. Ongeru's prayers are granted then Edward Mzee Karezi t/a Kazrad agencies and the Registrar of Titles, should be ordered to fully and completely indemnify the said Greenbays against all loss and damage suffered by it in consequence thereof and all costs and expenses incurred by it on an advocate and client basis.

In HCCC 54 of 2005, Greenbays Holdings Ltd has sued Town Council of Kilifi seeking for injunction

orders to issue against the Town Council of Kilifi by itself, its servants and agents from demolishing the gate and the lower wall erected by Greenbays on the said plot, and allowing free entry to the public thereunto. Pursuant to the position taken by Greenbays that it is the registered proprietor of the suit property, its case is that Director of Physical Planning in the Ministry of Lands and Housing, published a NOTICE in The Standard newspaper of 10<sup>th</sup> May 2005 at page 14 to the effect that preparations of the Part Development Plans named therein had been completed – one of the plans (NRB 134/2005/01) included the suit plot.

The said notice required any interested person who wished to object, to make representation in connection with or objection to the said plans to send such representation or objection in writing to the Director of Physical Planning Department or the respective District Physical Planning offices within sixty (60) days of the publication of that notice.

The plaintiff intends to object to the relevant Part Development Plan on the grounds that it is the registered owner and occupier of the said plot and the Director of Physical Planning cannot therefore propose the same for a public beach without the Commissioner of Lands compulsorily acquiring the same.

Although at the time, the period given in the notice had not expired, the Town Council of Kilifi had already required Greenbays to remove the gate, the lower wall erected, and allow the free entry to the public into the plot, and threatened that unless it did so within 7 days from 18<sup>th</sup> May 2005, the defendant would demolish the said gate and wall and Greenbays would be billed for the costs of demolition.

This is why Greenbays Holdings was seeking orders for injunction.

The Town Council of Kilifi filed a defence stating that Greenbays has no lawful registration of title conferred to it and the Title it holds was fraudulently and illegally obtained.

The particulars of fraud are listed as:

- a) Obtaining the alleged title without following the rightful acquisition procedures, this being a public property.
- b) Failing to seek approval from the Defendant, local authority, who hold the land in trust for the public
- c) Acquiring the land without the approval of the Director of Physical Planning.
- d) Disregarding the concerns and interests of the public in acquiring the title, and as such entering into possession and subsequent activity by Greenbays was unlawful and invalid.

The Town council is aware of the notice and maintain that the Director of Physical planning was entitled to issue such notice since the acquisition and registration and the subsequent development of the suit property was illegal then Greenbays is not entitled to the prayers sought.

The Council filed a counterclaim seeking that this court declares;

- (a) The suit against it is untenable and should be dismissed with costs.
- (b) The purported Grant and/or title issued in respect of plot no. 5054/1185 Kilifi to be null and void
- (c) The Town council of Kilifi be allowed to utilize the parcel of land being plot no. 5054/1185 for public use.

In all this, the Registrar of Titles filed a statement of defence denying ever issuing Edward Mzee Karezi with any title to the land in question or to Greenbays. The Registrar avers that the documents of Title

which Edward Mzee used to transfer the land to Greenbays Holdings were false documents made by Edward Mzee with an intention to deceive and defraud Greenbays. The Council is opposed to indemnifying Greenbays for any losses it might incur.

The Town Council denies that Edward Mzee and Greenbays were the registered owners and valid transferees respectively and any transaction they may have been involved in is termed as filled with fraud and misrepresentation. The particulars of fraud and misrepresentation on the part of Edward are pleaded as:

(a) Knowingly and with intent to deceive and defraud, the said Edward made or caused to be made on his behalf, a false document, purporting it to be a genuine grant to the premises.

(b) Having made or caused that false grant to be made on his behalf, the said Edward t/a Kazrad Agencies, purported it to have been issued to him by the Registrar of Titles.

(c) Having caused a registration of a false grant in his favour, Edward purported it to be, and knowingly, and with intent to defraud, transferred the said false grant to Greenbays.

(d) Knowingly and with intention to defraud, Edward Karezi obtained from Greenbays', funds, purporting them to be the purchase price for the suit premises which he knew he did not have any genuine or valid title.

(e) Knowingly and with intent to default, Edward Karezi then executed transfer over the false grant to Greenbays Holdings Ltd.

The Registrar also blames Greenbays for failing to ensure that the documents presented to it by Edward were genuine and is liable in negligence for its own acts of omission in that;

(a) It failed to ascertain the authenticity of the purported first grant borne by the said Edward t/a Kazrad Agencies.

(b) It proceeded to enter into a sale transaction in respect of the said land on the basis of the false grant.

(c) It purported to pay out sums to the 2<sup>nd</sup> defendant pursuant to the transaction involving the said false grant.

(d) Having reason to believe that the said grant purporting to be a first grant was false, it failed to liaise with the Third Party to investigate the veracity of the said document.

In fact the Registrar of Titles view is that these proceedings if not brought in collusion between Prof. Ongeru, Greenbays and Edward, then the best way forward is to have Greenbays claims indemnified by Edward in respect of all loss and damage suffered in consequence thereof.

At the hearing of this suit, Mr. Shah and Miss Onyinkwa appeared for Prof. Ongeru, Mr. Kilonzo appeared for Greenbays Holdings, Mr. Njoroge appeared for the Registrar of Titles and Miss Mango appeared for the Town council of Kilifi.

PW1 (Prof. Samson Kegengo Ongeru) is the Minister for Education in the Government of Kenya. He testified that during the year 1990, he saw a plot in Kilifi Creek which interested him, so he applied to the President of the Republic of Kenya for allocation. His application was approved by His Excellency the President Daniel Arap Moi and as a result, he was issued with a letter of allotment which has been produced as exhibit 2. A survey was done, he paid for it as per receipt (ex.3). He was then issued with a Title Deed, and on 30<sup>th</sup> November 1994, he charged the Title to Middle East Bank, this was followed by another charge, which exists to-date.

In the course of time, he got to learn from a Good Samaritan, that something fishy was going on within

his registered property and he instructed his lawyer M/s Onyinkwa to do a search on the property. The search confirmed that he was the rightful owner of the property.

However his advocate gave him information that there was an advocate by name K. NANJI who had in his possession a document indicating the land belonged to other persons. MR. NANJI flew to Nairobi with the persons who had purportedly bought the property and they met in Prof. Onger's office in the presence of his advocate. The result of the meeting was that Mr. Nanji realized there had been an error, resulting in double registration of the title, so someone else had been registered as a leasehold proprietor of the plot i.e GREENBAYS HOLDINGS LTD.

Mr. Nanji indicated to the professor, that his client wished to discuss the issue of double allocation with a view to resolving it. It became apparent to PW1, that a title had been issued to KAZRAD AGENCIES being TITLE NO. CR 37529 for LR NO. 5054/1185 – this title was issued on 15<sup>th</sup> January 2003 and registered on 4<sup>th</sup> May 2004.

The records showed that on 28<sup>th</sup> June 2004, there was a transfer to GREENBAYS HOLDINGS LTD, and it was PW1's testimony that he never sold his land to anyone as the same was in any event mortgaged to a bank for a loan. PW1 had no idea how the second title came into existence, and only learnt from Nanji Kishore (advocate) about its existence.

Mr. Nanji offered PW1, that they settle the matter so that his clients could get the property, and made a proposal to pay PW1 between Kshs. 9-10 million, saying he would consult his clients, then get back to PW1. However he never returned.

In support of his right to the property, PW1, referred this court to a land rent notice issued to him as the holder of the plot and a rent certificate dating back to 16<sup>th</sup> July 1996. A valuation carried out by MILLIGAN AND CO. LTD. on 18<sup>th</sup> April 1995 placed the value of the property then, at kshs. 6,00,000/- (six million).

PW1 never received a notice from the Director of Physical Planning to surrender the land, and the only suggestion he saw was a call up in the newspapers that since he was the owner of the plot, he should pay – having been listed as a Rate Defaulter. A letter was written to the Director of Physical Planning by PW1's advocate, which stated that the plot was not part of a public beach because it was registered to him as a residential plot and in any case no proceedings have been instituted against him to take away the land. His prayer is that the 2<sup>nd</sup> title issued to GREENBAYS HOLDINGS LTD be cancelled and he be declared the legal owner of the plot.

On cross-examination by Mr. Kilonzo, PW1 stated that he applied for allocation of the plot, and got an approval from His Excellency the President, on the same day. The approval was by way of endorsement on the same letter, and there was no other letter signed by the President approving the allocation. He was not aware that the plot had been planned for before he got a surveyor to carry out the survey. He says he has not developed the land because there was interference on it, his intention having been to develop it by getting a mortgage. He further stated that he had got consent from the Commissioner of Lands to mortgage the property, although he has no document to confirm that. His testimony on cross-examination is that before the controversy arose, he had been paying the land rates to Kilifi Town council but he stopped paying any land rates to await a determination as to the rightful owner. As far as he is concerned, by listing him as one of the rate defaulters, then the Town Council of Kilifi was in effect acknowledging that he was the rightful owner of the property.

On cross-examination by Mr. Njoroge, PW1 stated that his advocate pursued several correspondences with the Ministry of Lands and a letter dated 24<sup>th</sup> January 2005 signed by Mr. Mbogori on behalf of the Commissioner of Lands showed that the Title issued to Kazrad Agencies was a fraudulent one. Pw1 does not know whether the Registrar of Titles was party to the fraudulent registration.

Although PW1 acknowledges that he did receive a letter written by the Director of Physical Planning dated 25<sup>th</sup> May 2005 questioning his right to the property, he says there is nothing to resolve about his status, as his ownership to the land was never questioned. He pointed out that although the two titles

herein bear different Grant Numbers, the plot is the same one – PW1's title was signed by the Commissioner of Lands WILSON GACHANJA, while GREENBAYS title was signed by his predecessor S. MWAITA. It is his contention that the correspondence from the Commissioner of Lands reinforces his suspicions that the 2<sup>nd</sup> title was fraudulently obtained.

On cross-examination by Miss Mango, PW1 states that after applying to be allocated with 4 hectares of land, the Town Council of Kilifi told him that only 2.5 hectares was available. He however admits that Kilifi County Council (which I suppose is the same as Town Council of Kilifi) requested for a Part Development Plan from him, claiming that the plot was actually a public beach, but his position is that what was allocated to him was a CREEK not a BEACH. Although he has no development plan to prove that.

**MWENDA KINYINGA MBOGORI (PW2)** worked for Ministry of Lands for a period of 17 years as a Land Officer under the Commissioner of Lands. It was his evidence that he had the authority of the Commissioner of Lands to enter into correspondences and he did sign the letter dated 14<sup>th</sup> January 2005 addressed to Edward Mzee Karezi which stated that allocation of the property to him, was suspect and asked Karezi for an allocation letter. Karezi never showed him a letter of allocation. P W2 was also suspicious and sent letters to Attorney General's Chambers dated 30<sup>th</sup> September 2005 by Mbogori A. K. on behalf of Commissioner of Lands informing the AG that the plot was allocated and registered in the name of PROF. S. K. ONGERI, but he had discovered another document issued and registered in favour of another party. The letter stated that the title did not emanate from the Lands office and that it was a fraud. PW2 observed in the letter, that the first title i.e CR 26606 was registered and free from any encumbrances. Another letter dated 7<sup>th</sup> January 2005 by one Onyino Mukobe indicated that the property was registered and should be treated as private property and as far as PW2 knows, the Director of Physical Planning did not take any steps to acquire the land. He maintained that the Title issued to Edward Karezi did not originate from their office as it did not even have an allotment letter or a file in Nairobi, saying that if it was a genuine title it would be having a file in Nairobi. He also referred to another letter dated 3<sup>rd</sup> June 2005 addressed to the Town Clerk for the County council of Kilifi, indicating that the plot was registered in the name of S. K. Ongeru and He had obtained consent to charge the property in 1996.

He also produced the letter of allotment issued to PW1, which he says has with it, the original plan, and confirms, it emanated from Lands office Nairobi, and shows the location of the suit property. Another feature which caused PW2 to doubt the credibility of the title issued to Kazrad was that a title can be issued to a person in law, but for a trading name one must mention the name of the person who is trading to who the title is registered, yet here the title was issued to a trade name, not a limited company.

On cross-examination PW2 confirmed that he worked for Ministry of Lands from 5<sup>th</sup> January 1989 – 3<sup>rd</sup> July 2006 when he was sacked and the action was related to the issue which is before this court.

He confirmed that he is the one who wrote to the Town Clerk of Malindi to say that the second title was fraudulent. He confirmed that the plot in question was considered a beach property so the consent to transfer would be from the President, communicated through the Commissioner of Lands and there were no records to confirm that Kazrad was given consent to transfer the property and he repeatedly stated that the registration of Kazrad Agencies as title holder in the Mombasa registry was fraudulent.

Another reason why he casts doubt on the credibility of Kazrad's documents of title is that even the Deed plan was never seen by the Director of Survey and it was not sealed. He however conceded that even the Deed plan held by Prof. Ongeru was not sealed. PW2 seemed to absolve the Registrar of Titles from blame by his answers when cross-examined by Mr. Njoroge where he stated that Kazrad's documents did not originate from the Land office and that during his tenure as a Lands Officer, he encountered fake titles and people who have been conned using fake documents and the existing situation here fits into such scenario. It was his opinion that this case should not have been brought against the Registrar of Titles or the Lands Registrar as they may not have realized that there were two titles in existence.

His evidence on cross-examination by Miss Mango was that Kazrad did not have proper title to pass to Greenbays. It is not lost to this court that the Director of Physical Planning Mr. R. K. Mbwagwa had under his statutory powers provided under the Physical Planning Act cap 288, circulated a Notice in the Standard Newspaper of 9<sup>th</sup> May 2005 at page 34 to the effect that part Development Plans had been completed and any objections were to be raised within sixty days. The Part Development plan included the suit property i.e LR NO. 5054/1185 upon realizing this PW1's advocate wrote to the Director of Physical Planning, a letter dated 17<sup>th</sup> May 2005, seeking clarification.

In response, R. K. Mbwagwa wrote a letter dated 25<sup>th</sup> May 2005 stating clearly that the "THE PLOT IS THE ONLY PUBLIC BEACH IN KILIFI TOWNSHIP and arising out of the findings of the report of the Commission of inquiry into the illegal/irregular allocation of public land, it is this ministry's objective to repossess and restore public utility land.

A letter written by Mbogori M. K.(for Commissioner of Lands) and dated 30<sup>th</sup> June 2005 confirmed to the Director of Physical Planning that the plot LR 5054/1185 was allocated as planned vide the Director's Part Development plan Ref. No. 134/KLF/2/91 and approved by the Commissioner of Lands on 21<sup>st</sup> February 1991.

THIS PLOT forms the area planned on Part Development Plan No. NRB 134/2005/01 on the proposed public beach and advertised vide the standard newspaper of 9<sup>th</sup> May 2005"

There followed a letter dated 30<sup>th</sup> September 2005 by Mbogori M. K. for the commissioner of Lands in which he stated in part;

***"This plot was initially allocated as unsurveyed plot in favour of Hon. Prof. S. K. Ongeri, This allocation was done AFTER the plot was planned for and part Development Plan approved on 21<sup>st</sup> February 1991."***

The 1<sup>st</sup> defendant called as its witness, Kishore Nanji (DW1) the advocate who was involved in the transaction between Greenbays Holdings and Kazrad Agencies. His evidence is that sometime in May 2004, he got instructions to handle a matter on behalf of LAI MARTINO GIUSEPPE of Kilifi. Lai had gone to his office with the seller of plot no. 5054/1185, saying he had agreed to buy the plot. He brought a Grant in respect of the property which was in favour of KAZRAD AGENCIES registered on 4<sup>th</sup> May 2004 and registered in Mombasa having been issued on 15<sup>th</sup> January 2003. Lai was accompanied by one MR. KAREZI and LUGHANJE Advocate (who was acting for Kazrad).

Mr. Nanji caused a search to be carried out and received a certificate of postal search dated 12<sup>th</sup> may 2004 ( D.Ex.3) which confirmed that the property was owned by KAZRAD AGENCIES and had no encumbrances.

He then prepared a sale agreement in respect of the property, having been given particulars of the sale price, what had been paid and mode of payments. The sale agreement was executed on 24<sup>th</sup> may 2004 in the presence of advocate Lughanje, Edward Mzee Karezi and Mr. Lai Guiseppe – the same is produced as D. Ex5.

Mr. Lai had brought the deposit in cash and paid the sum of kshs 220,000/- to Edward Mzee Karezi, and Mr. Nanji issued the latter with a receipt. This payment was witnessed by Mr. Lughanej advocate. The receipt noted that Lai had made an earlier payment of Khs. 150,000/-.

Further payments were made of kshs. 220,000/- Kshs. 300,000/- and receipts issued as D.Exh. 8 and 9 Mr. Nanji then obtained the Land Rent Clearance Certificate, Town council Rates Clearance Certificate and consent to transfer, from the Commissioner of Lands.

Mr. Nanji then prepared a transfer in favour of the nominee of Mr. Lai i.e GREENBAYS HOLDINGS LTD and caused Stamp Duty to be paid. The transfer was executed on 21<sup>st</sup> June 2002 and witnessed by Mr. Lughanje. Mr. Nanji paid kshs. 56,010/- for Stamp duty then presented the documents for registration

at the Lands office, Mombasa.

Once registration took place he was given the original Grant which was registered on 28<sup>th</sup> June 2004 – a copy is produced as D. Ex 17.

He then paid the balance price of kshs. 1,930,000/- to Mr. Karezi by cheques whose photocopies are produced as D.Ex.18.

He was aware of orders issued by Kilifi County Council to Greenbays to demolish a wall it had erected and infact he acted in HCC 54 of 2005 where he applied for and obtained an order for injunction in favour of Greenbays against the County Council's conduct. The County Council claimed the land was a public utility and should never have been registered in favour of Greenbays.

However Mr. Nanji contests this saying the plot's Title showed that it was a residential/business plot.

At the end of March 2005 while Mr. Nanji was in England, Prof. Ongeru called his office saying he was the owner of the suit property. Mr. Nanji got in touch with Prof. Ongeru and that is how he got to learn about the other Title so DW1 spoke to his client (LAI) who suggested a meeting with Prof. Ongeru to discuss the matter.

They met, explained ways of resolving the matter. Lai offered to pay Kshs. 6.5million on condition that he called the Kilifi County Council and sort out the issue about the public utility. However the issue concerning the public utility could not be resolved. When Greenbays sued the County Council, PW2 called DW1 to tell him that the title he had handed was fraudulent, so DW1 advised his client to report the matter to police. DW1 also recorded a statement which he presented to police. He maintains that his client was not part of any fraud, and as the advocate who handled the conveyancing, he carried out the normal steps in survey and confirmed ownership of his mind, the Grant presented by Mr. Lai and Karezi, was genuine.

He explains that since he was dealing with advocate Lughanje he had no reason to suspect fraud.

On cross-examination by Mr. Shah he confirms that Kazrad's copy of the Deed did not have a seal, nor did he ask Edward Karezi for a letter of allotment because the title appeared so clear.

He acknowledges that Prof. Ongeru had an earlier Title –which is why he even met him to try and resolve the issue of what appeared to be a double allocation. He also acknowledged an odd feature in the title, which he had not noted, that defendant's title was issued in 2003 and rent backdated to 1996.

On cross-examination by Mr. Njoroge, Mr. Nanji stated that he did not think it odd that the title was issued to a firm and he maintains that Kazrad had a good title to pass to Greenbays.

Martino Giuseppe Lai testified as DW2. He told this court how on 24<sup>th</sup> May 2004, a friend of his by name ALBERTO LANZARI gave him a map of a plot in Kilifi (actually a Deed Plan) he had been offered to buy. Alberto requested DW2 to follow up on the issue as he was going back to Europe DW2 then carried out a search and did all the preliminaries required before one buys a plot. He went to Mr. Nanji advocate, who did the search and a week later, told him that everything was ok and the purchase could proceed. Mr. Nanji then prepared the sale agreement and both DW2 and MR. KAREZI who was acting for KAZRAD AGENCIES signed the agreement. DW2 paid kshs. 420,000/- as advance payment which money had been sent to his bank from Mr. Lanzari who was then in Italy. Mr. Karezi signed the payment advance (D.Ex 7) and DW2 then marked the relevant document to Mr. Lanzari.

It was his evidence that Mr. Nanji had shown him the search certificate (D.Ex.3) which showed that the land belonged to KAZRAD AGENCIES so he had no doubt as to who owned the land.

DW2 had no interest in the land and was simply a facilitator for his friend Lanzari who later showed him a Title Deed issued in favour of GREENBAYS HOLDINGS LTD in respect of the suit property.

As soon as Lanzari got the plot, he begun development activities and that is when Kilifi County Council ordered a stop and Dw2 got to learn that Professor Ongeru was also claiming ownership of the same

property as was Kilifi County Council. He confirmed attending the meeting with Professor Ongeru, in an attempt to resolve the issue and on a second visit to Professor Ongeru's office he accompanied Lanzari and Mr. Nanji to see whether it was possible to find a friendly solution as both had Title. The attempts yielded nothing because there was the claim by Kilifi County Council that the land was public land.

According to Dw 2 the land is a creek about 30 metres above the sea level and is not a beach. According to him, a beach is off the shore and has sand on it – further that there were residential houses in the area. ALBERTO LAZARI (Dw 3) confirmed assigning Dw 2 the task he has just described. He is an Italian citizen who lives in Kenya 6 months, then goes to live in Italy for 6 months. He and his wife are directors of Greenbays Holdings Limited. After all the payments and relevant steps had been made in the transaction, he collected the certificate of Grant DEX 17 from Mr. Kishore Nanji's office. It was his evidence that when he was buying the plot, he visited the site and saw it physically- he was then accompanied by an officer from the Kilifi County Council named EZEKIEL. He explains that he went with the said Ezekiel accompanied by a surveyor who placed beacons on the plot and it's the same Ezekiel who gave him approval to build the wall. Mr Lazari paid to have the water connected and also for approval to put up the wall fence. By the time he was learning about Professor Ongeru's Title to the land, Lanzari had made a garden, constructed the wall and installed a 50,000 litres water tank. After meetings with Professor Ongeru, the later proposed that Lanzari buys the plot from him for about 5-6m but he declined because as far as he was concerned, he (LANZARI) was the genuine owner. It was his testimony that he was not the maker of the documents which eventually gave Title to the land and says he did not use fraudulent documents to register the land. His position is that Professor Ongeru does not have a superior Title to his. He has sued Kilifi County Council saying there is no way it can claim the plot is a public utility/land yet there are other houses built next to it. His evidence is that when he presented his Development Plan for approval to Kilifi County Council, he was asked for "something small" so as to get the consent, and that is when they begun saying it was public utility.

To demonstrate the bad faith by Kilifi County Council, he says the council recently approved construction of three other houses in 2010, one Hamid constructed a house in the same area – he is ex-chairman of Kilifi Town Council. He confirms that the then DC Chelimo Cheboi did write to him a letter dated 17/2/2004 saying the plot was a public utility and he should stop developing it – the letter is produced as D. exhibit 32. There was also a letter dated 22/12/04 from the Town Council of Kilifi signed by K. O. Akaranga (the Town Clerk), stopping Greenbays from developing the land and ordering a removal of all the structures on the land. In short Dw 3 begun receiving letters on a weekly basis from the Kilifi County Council warning him to stop developing the land, and that is why he instituted the case against the council, so that he can carry on with construction.

His parting shot is that, if that is a public utility, then it should apply to all the people in the area and not just him. He also relied in receipts for payment of rates to Kilifi County Council and demands for payment of rates for the council to support his contention that if the plot was a public utility then the council should never have demanded for and received payments for rates in its respect. He terms the council's activities as harassment and prays that they be stopped from interfering with this quiet enjoyment of the property. He also urges this court not to cancel his Title saying if someone has a Title and has not made use of nor been in possession of the land for many years, then he bought the land and developed it, then he has demonstrated a better interest saying Professor Ongeru did not spend anything on the land. Further that in Kenya, one must develop land allocated to them within two years or lose it, so on that score, Professor Ongeru's claim should be rejected. He also prays that if the court finds that the Plot belongs to Professor Ongeru, then he should be compensated for the expenses he incurred, and this should borne by the Registrar of Lands Kilifi and Commissioner of Lands. He caps it all by issuing a thinly veiled threat;-

***“I have a children's home in Kilifi, and if the Government of Kenya does not assist me, then I will have to close it down and go back to Italy.....this claim that the land is public land is discriminatory, as the other neighbouring plots are not suffering the same fate.....”***

As a matter of fact, he has threatened to file suit in the International Court, if he is not paid compensation. He also concedes that from the development plan, the recreational area falls within the

area where the suit property is situated, but he wonders how it is that so many other people have built on the area without much fuss by the Council. On cross-examination by Miss Onyinkwa, Dw3 stated that one Kamuti who used to work for Kilifi County Council is the one who had given him information about the property saying there was a free parcel of land. He had met Kamuti at the Council where he had gone to pay rates for his other house in Bofa. He pointed to one EZEKIEL, who was seated in court (who turns out to be employed by Kilifi County Council as a BUILDING INSPECTOR) as the man who accompanied him to the plot, showed him the beacons and approved the construction of the perimeter wall. He (Dw 3) also confirmed on cross-examination that the beacons have now been removed because there is a road which passes through the plot. He is convinced that the person who alerted Professor Ongeru about his (Dw 3) activities on the plot was HAMID whom he has several times referred to as the Good Samaritan.

Dw 3 then blames MBOGORI for the mess, saying:-

***“He is the one who made a mess with all the Title Deeds because of money. I did not offer Mbogori money although I was asked to give money at Kilifi but I refused”***

**EZEKIEL WASHE NGWAITE (Dw 4)** confirmed that he works for Kilifi County Council in the Department of Works and Town Planning (the department deals with planning, cleanliness, environment and control of building`s. His evidence is that the suit property belongs to the Council. He points out that the procedure for acquiring a plot belonging to the Council involves one making an application, then a meeting is held and minute of the meeting are sent to the Commissioner of Lands. He never saw application relating to the suit plot nor had the said plot been advertised as being available for allocation. So he urges this court to cancel the Titles issued to Professor Ongeru and to Greenbays. He also pointed out that, this plot was mentioned in the NDUNGU report as a public utility plot and showed the court a Part Development Plan for the whole of Kilifi showing areas in Kilifi and the public utilities. The suit plot falls under the head **“PUBLIC PURPOSES”**. He confirms writing a letter dated 16/12/04, to GreenBays, stopping them from constructing the perimeter wall, because Greenbays had not been allocated that plot.

It was also his evidence that Greenbays never sent a written application seeking approval for constructing the wall. He explained that the receipt issued to the director of Greenbays (DEX4) by the Council, was NOT an approval, it was simply paying for an application for approval – after that approval would be in writing – and the receipt is not a permit but only evidence of payment. He also explained that the plot is different from the others in that area, in terms of zoning – it is in a different zone and does not fall within the zone at Residential. He further informed this court that the place was set apart for public utility and the public does not have to be using it, because it is up to the Council to develop it, since the Council had not developed it, members of the public would go there for different activities to date.

On cross-examination Miss Onyinkwa Dw 4 explained that if one pays fees for approval and fails to get approval, then the fees is refunded although in the present instance, that has not been done because the matter is in court. On cross-examination by Mr Kilonzo, Dw 4 pointed out that the PDP which was revised in 1980 showed that the plot belongs to Kilifi Town Council and that whenever the Government is allocating land within the county, it consults with the council, but that was not the case here. He explains that payments made by Greenbays for rates were received by the Council in respect of the plot, because Dw 2 simply went to the cashier with the Title and paid rates, without passing through the Physical Planner who knew the status of each plot. He denied approving Greenbays construction of the perimeter wall wondering how he could have done so, then write to them to stop construction. His evidence is that initially the land measured 8 acres, then it was subdivided and Professor Ongeru and Greenbays grabbed the land which is under the Town Council of Kilifi. Further that any rates are refundable if erroneously collected.

**CYRUS KIOGORA MBURUGU (Dw 5)** the Chief Lands Administration Officer at the Ministry of Lands Office Nairobi told this court that when Professor Ongeru applied for the land in 1991, they investigated and confirmed that the land was available for allocation and instructed the Director of Planning to prepare a PDP – Professor Ongeru was then allocate 2.5acres and he paid Stamp Duty. After

accepting the offer, the Director of Survey was directed to have the land surveyed, then documentation was done and eventually Professor Ongeru collected his document of Title on 25<sup>th</sup> November 1994. His office was surprised by the claim that the same plot was allocated to Greenbays Holdings and says the Title held by Greenbays was not prepared by the office, so the Registrar at Mombasa was instructed to place a restriction on the land while the Ministry tried to establish how Greenbays document of title got registered in Mombasa Lands Registry. DW5 explained to this court that the Lands Office became suspicious about the Title issued to Kazrad Agencies because they never prepare titles with the names of Agencies because an Agency is not a Title owner. According to this witness, they prepared the title in favour of Prof. Ongeru because from their records there was nothing to show that the suit property was a public utility and they did not need the consent of Kilifi County Council before allocating the land as that is government land. As far as he is concerned, the records are clear that Prof. Ongeru is the registered owner of the land. In an odd twist this defence witness has contradicted what all the other witnesses from the County council and witnesses for the defence have stated. He dismisses the claim that the land was public land, saying Kilifi county Council cannot claim the same, and that land held under Registration of Titles are leasehold whose Titles are supposed to be prepared by the Commissioner of Lands and forwarded to the Registry for registration. He explained on cross-examination by Mr. Kilonzo that if one wants to buy government land (i.e alienated government land under the Registration of Lands Act) the steps are;

- (1) Carry out an official search in the registry and if satisfied that title is genuine
- (2) Clear land rent and rates, and obtain a clearance certificate.
- (3) Obtain consent to transfer
- (4) Place all the above information along with the transfer document.
- (5) Present – document for assessment to pay Stamp Duty
- (6) Present for registration.

He also confirmed that at the search stage, it is not necessary for the interested party to inquire as to how the land was acquired. So that if Greenbays followed the above dated six steps, then there was no fault on their part.

However all efforts at the Lands Registry to trace records showing how Kazrad acquired the land yielded nothing – no file could be traced. DW2 pointed out two defects on Kazrad's Title;

- (1) Land rent had appreciated to Kshs. 26,000 and Stamp Duty was kshs. 130,000/- yet the other title had rent of kshs. 12,000/- and Stamp Duty of Kshs. 60,000/- and the witness stated;

***“There is no way that within two years the property would have appreciated so much to double, and it appeared valuation was done using previous figures issued to Prof. Ongeru .....*”**

At the end of his answer on cross-examination by Mr. Kilonzo, DW5 then states;

***“Public utilities are allocated by my department in conjunction with the local authority and that was never done by Kilifi County Council i.e they never involved a department.”***

This witness appeared totally unaware of many issues, although he confirmed that allotment is done in conjunction with department of Director of surveys, and that the survey is supposed to be done by the Director of Survey alongside the plan by the Director of Physical Planning, and that indeed a Deed Plan was prepared, approved and submitted to the Director of survey.

He was not aware of the PDP issued by the District Planning Officer, Kilifi and says that although the Director of Physical Planning had copied to his department a letter dated 2<sup>nd</sup> May 2005 stating that the

plot in question was a public beach. It was his contention that it seemed as though the Director had not done his investigations to realize that there was a plan done in 1995 and that the land was considered to be private land, having ceased being public land.

For purposes of clarity, in these proceedings the plaintiff is also referred to as Prof. Ongeru or PW1, whilst Greenbays Holdings Ltd is also referred to as Greenbays, Kazrad Agencies is referred to as Kazrad, and Town Council of Kilifi is interchangeably referred to by witnesses as Kilifi County Council, County Council of Kilifi and The Council.

The parcel in question being plot LR No. 5054/1185 located in Kilifi District and measuring 0.8247Ha is claimed by Prof. Ongeru and Greenbays (both holding Title) and Town Council of Kilifi (who say it is a utility intended for use by the public) and the issue for determination is which among the three legitimately owns the suit property. Alongside this are of course the recognition that;

- (1) No one parcel of land can have two titles issued to two different entities.
- (2) The court has also to determine which one of the parties herein has an improper title.
- (3) Was the issuance of two Titles a fundamental error at the lands office or was there an element of fraud involved

Although at the start of the proceedings Mr. A. B. Shah appeared as lead counsel alongside Miss Onyinkwa for the plaintiff (Prof. Ongeru) he seems to have stopped attending the court sessions after the testimony of the 2<sup>nd</sup> witness.

All counsel in this matter filed written submissions as directed by the court.

Miss Onyinkwa submitted that the evidence clearly showed the procedure Prof. Ongeru followed in acquiring the property, and which demonstrates that he is the legitimate holder of the title and that undoubtedly Prof. Ongeru his title to the suit land with Greenbays activities on the suit plot. She maintains that the correct position is that there was no rightful acquisition procedure followed by Greenbays and there was fraud in that regard.

It is Miss Onyinkwa's argument that even if the council claims ownership of the suit property, then the Constitution provides several safeguards relating to acquisition by the Government over privately owned property unless;

- (1) The taking of possession or acquisition is necessary in the context of defence, public safety, public order, public morality, public health, town and county planning or the development or utilization of the property so as to prove to the public benefit and
- (2) The necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in a legitimate proprietor's right over property and
- (3) Provision is made by law applicable to that taking of possession or acquisition for the prompt payment of final compensation. As far as this property goes, Miss Onyinkwa's contention is that Prof. Ongeru is the legitimate owner and if the Council wishes to acquire the same, then he must be compensated.

To fortify this position, Miss Onyinkwa urges the court to consider the evidence of CYRUS KIOGORA MBURUGU (DW5) who told this court that the lands Office only recognizes Prof. Ongeru as the registered owner of the land, and that there are no documents to show that Greenbays legally acquired the land, and if such documents exist, then they are fraudulent and that there is nothing to show that the suit property is a public utility and Kilifi County Council has nothing to do with the suit property.

As for Kazrad's claims to have legitimately transferred the property to Greenbays, Miss Onyinkwa submits that there being no letter of allotment issued to Kazrad in respect of the suit property or any other

records to show how Kazrad legally acquired the land, then it had no legitimate rights to confer on Greenbays and little wonder that Kazrad although sued in the matter has never entered appearance nor filed defence – meaning Edward Mzee Karezi is hiding something and knows that he obviously took Greenbays for a ride and the reason is only one – Kazrad’s title was fraudulent.

Miss Onyinkwa also urged the court to note that although Kazrad’s title was issued on 15<sup>th</sup> January 2003 the business name KAZRAD AGENCIES was only registered on 16<sup>th</sup> May 2004, meaning Title was issued even before the purported holder came into existence.

Miss Onyinkwa pointed out that this is not one of those situations where a genuine proprietor lawfully passes a title to a purchaser – here Kazrad had no legal title to pass on to Greenbays. Furthermore Prof. Onger’s title was first in time, and had not been cancelled, so he had not been deprived of the land, so as to give Kazrad any other rights over the land. This then means that even if one were to assume that 1<sup>st</sup> defendant was an innocent purchaser for value, it still acquired no valid title because Prof. Onger’s title still existed. To fortify this position, Miss Onyinkwa points to the evidence of Kishore Nanji (DW1) the advocate who was involved in the transaction who admitted in court, that Prof. Onger had a superior title. Further Greenbays’ attempt to resolve the issue amicably with Prof. Onger and even offering to make some payment were actions taken because Greenbays realized the futility of its title which was fraudulent.

The crux of the title initially held by Kazrad as pointed out by Miss Onyinkwa is that it is shown as issued by the President of the Republic of Kenya and registered on 4<sup>th</sup> May 2004, it is a fact that His Excellency the President Mwai Kibaki has never authorized issuance of such titles after he became the Third President of our republic.

As regards the claim by the Town Council of Kilifi that the land is public land, Miss Onyinkwa argues that the same is on a creek and not a beach, and is for residential purposes. While recognizing that Greenbays may have innocently trespassed on the suit property while acting in good faith, section 23(1) of the Registration of Titles Act (Cap 281) is clear that:

***“The certificate of title issued by the Registration to a purchaser of land, upon a transfer or transmission by the proprietor thereof, shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land, is the absolute and indefeasible owner thereof...and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”***

Miss Onyinkwa suggests that since Greenbays does not plead fraud against Kazrad Agencies, (who had no title to pass for valued), then Greenbays is indeed a trespasser and the court ought to make a finding in the plaintiff’s favour.

Mr. Kilonzo on behalf of the 1<sup>st</sup> defendant (i.e Greenbays) submits that the evidence of plaintiff, PW2 Mwendwa Mbogori and Cyrus Mburugu who were both employees of the Ministry of Lands, were categorical that the land was not public land (although DW4 Ezekiel Washe Ngwaite) from the Town Council testified that the suit property was in fact public land, Mr. Kilonzo termed his as unreliable as the Part Development Plans were never gazette to show that the same was a public utility before that plot was alienated for allocation. His position is that Kilifi County Council has failed to prove that the suit plot was public land.

As regards right of ownership between plaintiff and Greenbays, Mr. Kilonzo concedes that Prof. Onger has a better title than Greenbays because his title was the first in time to the defendant’s and there can be legally no two titles over the same piece of land. In an odd twist now it seems that Greenbays does not wish to contest the validity of Prof. Onger’s Title and Mr. Kilonzo submits;

***“The plaintiff in this matter is protected under section 23 of the Registration of Titles Act with regard to his title”***

He now concedes reliefs (a), (b), (c) and (d) sought by plaintiff i.e that plaintiff be declared the lawful owner of the suit property and that the registration of 2<sup>nd</sup> defendant (i.e Kazrad) is void *ab initio* and the register should be rectified to show that plaintiff is the registered proprietor and so an injunction do issue to restrain Greenbays, its agents, servants and other person whatsoever from using the suit property in any manner.

Mr. Kilonzo however urges this court to find that there was no fraud on the part of Greenbays as all due diligence was taken towards acquiring the property from Kazrad, and he was not a party to any impropriety which the defendant Kazrad or Edward Mzee Karezi may have perpetrated. In fact Mr. Kilonzo seeks to suggest that since Mr. Silas Komen Mwaita, (former Commissioner of Lands), Mr. Muhunyi (Registrar of Titles), Mr. Jackson Wanjau (a Senior Registrar of Titles) were not called to testify on behalf of the Registrar of Titles, then this omission can only be construed to mean that it's because they were all involved in colluding with Edward Mzee Karezi to obtain the dubious Title and so the Registrar of Titles (and by extension the Commissioner of Lands) were guilty of fraud in processing and registering parallel Titles of the suit property. Because of this fraudulent collusion, Mr. Kilonzo argues that the Registrar of Titles and the Commissioner of lands, along with Edward Mzee Karezi t/a Kazrad Agencies were liable to Greenbays for the loss and damages incurred. Mr. Kilonzo urges this court to be guided by the decision in **GITWANY INVESTMENT LTD V TAJMAL LTD AND 4 OTHERS** to direct that 2<sup>nd</sup> and 3<sup>rd</sup> defendants, and the Third party be ordered to indemnify Greenbays for their loss and to be guided by the decision in **MANCHESTER OUTFITTERS SUITING DIVISION LTD. AND ANOR. V STANDARD CHARTERED FINANCIAL SERVICES LTD & ANOR. (2002) 2KLR PG 590** when considering the principles to be followed in awarding damages.

He urges this court to order 2<sup>nd</sup> and 3<sup>rd</sup> defendants plus the Third Party to bear the costs of this case, having caused the plaintiffs and 1<sup>st</sup> defendant (Greenbays) all the troubles which were encountered during the trial of this matter, as well as the Kilifi Town Council for laying a baseless claim against Greenbays.

The third defendant's and Third party's counsel, Mr. Njoroge submits that the non appearance of 2<sup>nd</sup> defendant plus non entry of defence means that the claims against him should succeed and judgment be entered against him.

It is admitted that the documents which led to the registration of Prof. Ongeru as the owner of the property originated from Nairobi land's office. Mr. Njoroge has dwelt largely on the legality of the Title issued to Kazrad repeating what both Miss Onyinkwa and Mr. Kilonzo have argued on that score.

It is Mr. Njoroge's argument that no fraud was established on the part of the Commissioner of Lands or the Registrar of Titles. Mr. Njoroge points out that from the outset, no notice of intention to sue was issued by the plaintiff and 1<sup>st</sup> defendant before the commencement of the suit and the third party proceedings as is required under section 13A of the Government Proceedings Act and Mr. Njoroge refers to the decision in **HUDSON LAISE WALIMBWA V AG** and also **NGUGI V AG.**

It is further submitted that the Commissioner of Lands and the Registrar of Titles should not be condemned to pay any indemnity to Greenbay for losses and costs of acquisition of the suit property transferred to it by virtue of Edward Mzee Karezi's utterances of false documents and in fact Edward Karezi should bear the claimed liability, because to order otherwise would be condoning and cushioning Edward Mzee for his ill gotten fairs.

He pokes holes at the decision of **GITWANY INVESTMENTS** cited by 1<sup>st</sup> defendant, saying the same does not aid the 1<sup>st</sup> defendant's case since the situation here is clearly distinguishable in that the 3<sup>rd</sup> defendant and Third Party defended themselves against the allegations made by 1<sup>st</sup> defendant and the evidence of non existence of any records of any grant speaks volumes.

Further that the 1<sup>st</sup> defendant being a limited liability company, could only initiate these proceedings with the authority of the company, yet no such authority has been produced here and so the action by 1<sup>st</sup> defendant is null and void. He asked court to consider the separate existence of a company as was set out

in the famous case of **SALMON V SALMON & CO. (1897) AC 22** and also **BUGERERE COFFEE ESTATES LTD V SEBADUKA (1970) EA 147.**

The submissions by Miss Mango, on behalf of Town Council of Kilifi are that from the onset, it must be noted that no prayer is sought by the plaintiff, against Kilifi Town Council. She too points out that Greenbays has not been able to demonstrate its legitimate ownership over the suit property based on the same arguments that Miss Onyinkwa, Mr. Kilonzo and Mr. Njoroge advanced. Since Kezrad had no capacity to pass a title to Greenbays, then it cannot now be said that plaintiff is entitled to the orders it seeks as against Kilifi Town Council. Further, that, the 1<sup>st</sup> defendant, by conceding that plaintiff is entitled to prayers (a) – (d), then confirms the assertion by the Town Council that the said Title was fraudulently obtained it should be declared null and void. Further that by virtue of 1<sup>st</sup> defendant's admissions to those prayers, then the 1<sup>st</sup> defendant's claims against Kilifi Town council were baseless and the Council should not be penalized for costs - as a matter of fact, she submits that the 1<sup>st</sup> defendant ought to be condemned to bear costs because of filing a baseless claims. Further, since the plaintiff did not make any claim against the Town Council of Kilifi, nor did the Town council make any claims against the plaintiff, then it follows that each party should bear its own costs.

In response to the submissions by the 3<sup>rd</sup> defendant and Third Party and the Kilifi Town council, Miss Onyinkwa elected not to file any replies. Mr. Kilonzo however filed reply in which he pointed out that since the suits were consolidated, the court was requested in the agreed issues to make a finding on the status of the suit land, whether it is public or private land. A finding by the court that the suit is private land, would be tantamount to 1<sup>st</sup> defendant's suit succeeding and thus entitling the 1<sup>st</sup> defendant to costs against the Council.

As for fraud by the 3<sup>rd</sup> defendant and Third Party, Mr. Kilonzo submits that in the spirit of the **GITWANY CASE** then the two points were limited in fraud by the following acts;

(a) The grant in favour of 2<sup>nd</sup> defendant Edward Mzee Karezi was drawn by Jackson K. Wanjau a Senior Registrar of Titles at the offices of the Registrar of Titles and Commissioner of Lands and the existence of that official in compliment of the lands defendant was admitted.

(b) The grant in favour of the 2<sup>nd</sup> defendant Edward Mzee Karezi, was signed by Sammy Silas Komen Mwaita (the then Commissioner of Lands).

(c) The grant to the 2<sup>nd</sup> defendant was signed in the presence of a Mr. Muhuyi, a Registrar of titles, in the employment of 3<sup>rd</sup> defendant and third party.

(d) The participation of the three officers in granting the suit plot to Edward Mzee Karezi has not been cleared and so 1<sup>st</sup> defendant is entitled to a complete or partial indemnity from the 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendant and third party.

As regards issuance of notice of intention to sue, Mr. Kilonzo's submission is that the law does not allow 1<sup>st</sup> defendant to issue notice since 1<sup>st</sup> defendant had already given the 3<sup>rd</sup> defendant requisite notice for indemnity and contribution and 1<sup>st</sup> defendant could only be expected to issue notice if it had filed a counterclaim against them. Mr. Kilonzo urges the court to be guided by the case of **CHALICHA FACS LTD V ODHIAMBO AND 9 OTHERS (1987) KLR 182,** in making a finding that the issuance of notice has never been contested before and should not derail determination of this matter and should be viewed as a technical procedure which the section 159(1) (d), Constitution frowns upon as a requirement which is technical and thus hampers quick disposal of matters and delays administration of justice.

As between Prof. Ogeri and Greenbays Holdings, there is a mutual agreement as submitted to by Greenbays Holdings Ltd., the claim has already been conceded to in terms of prayer a – d.

This is because

- (1) There is no evidence/genesis showing how Edward Mzee Karezi was allocated the suit property – no such record existed in Lands office.
- (2) His agency/firm was registered after the title had been issued – meaning title was issued to a nonexistent being.
- (3) The 2<sup>nd</sup> defendant (Kazrad's) Title came after Prof. Ongeri's Title had been issued.
- (4) Edward Mzee Karezi offered t/a Kazrad Agencies, offered no evidence regarding how he came to acquire the Title – he neither entered appearance nor filed defence.

All the observations made by the counsel on this matter as regards Kazrad's Title are valid, so that even if it was a question of double registration, Kazrad's would still be defeated by virtue of the fact that Prof. Ongeri's was first in time. I think it is upon this realization that Greenbays woke up to futility of insisting on legal ownership of the property because *ab initio* Kazrad had no legal title to pass on to Greenbays as the land was already alienated.

Section 23(1) of the Registrar of Titles Act reads;

***“The certificate of title issued by the Registrar to a purchase of land, upon a transfer or transmission by the proprietor shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof,...and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”***

I make a finding that 2<sup>nd</sup> defendant had no valid title to pass to 1<sup>st</sup> defendant. However unlike the **Gitwany case** where all fingers pointed at the Commissioner of Lands, here, the role of Edward Mzee Karezi is also questioned. Just how did he get to have the title in his agency's name, when Prof. Ongeri already had title? Did he collude with the then Commissioner of Lands, (Sammy Mwaita) and Muhuyi (the then Registrar of Titles to fraudulently get registered?)

Is there proof that the signatures purported to belong to Sammy Mwaita and Muhuyi are actually theirs? Did 2<sup>nd</sup> defendant have his own mischievous ways of foregoing those two signatures? What about the fact that even after a search was carried out at the Mombasa Lands Registry, 2<sup>nd</sup> defendant was shown as the registered owner of the property? Was this manipulation by employees of the Ministry of Lands, the Registrar of Titles and/or the Commissioner of Lands.

The absence of 2<sup>nd</sup> defendant's participation in this matter raises suspicions a note higher as to his bona fides – it is apparent he is avoiding open confrontation regarding his actions in this matter – without the genesis of how Edward Karezi got allocation, then the question of mala fides must be extensively examined as against the Commissioner of Lands and the Registrar of Titles and the curious aspect linking the Registrar of Titles and the Commissioner of Lands was the search which showed Kazrad's ownership, otherwise there were no other records in the Lands office to give Kazrad's claim legitimacy and this finding is in line with the evidence of DW2 and DW5 (Mbogori and Mburugu) the whole process leading to the registration of Kazrad as a title holder and eventually issuing Greenbays with a Title, could not have been done by Edward Mzee Karezi single handedly. There is not a single explanation offered by either the Registrar of Titles or Commissioner of Lands as to how the Lands Registry in Mombasa ended up with a register which showed that Kazrad Agencies held title to the land, and the only logical inference that can be drawn, is that this happened through the collusion of the 3<sup>rd</sup> defendant, Third party and/or their servants/agents within the Lands Office.

The search carried out and signed by the Registrar of Titles showed that the suit property was registered in the name of 2<sup>nd</sup> defendant. That search showed that the plot had no encumbrances. The 2<sup>nd</sup> defendant's grant was shown as drawn by Jackson K. Wanjau (Senior Registrar of Titles) and the copy of Grant issued to 2<sup>nd</sup> defendant was witnessed by Sammy Mwaita (then Commissioner of Lands on 25<sup>th</sup> January

2003 in the presence of Mr. Muhuyi (a Registrar of Titles). These persons are informed to have held those positions at the time, and Wanjau and Muhuyi remain in office, yet it was not deemed necessary to call them as witnesses to explain how their signatures ended up on the parallel document or even to confirm or deny that those were not their signatures. From that omission then, I draw an inference that they were fully aware of Kazrad's mischief and participated in facilitating it. Indeed the Registrar of Titles gave Kazrad consent to transfer the title to Greenbays after payment of land rent (as supported by Exhibit 12) and also issued the land rent clearance certificate (ex.10).

From the foregoing, I make a finding that Commissioner of Lands and the Registrar of Titles contributed to this sorry state but for recovery of the money Greenbays paid towards purchase of the plot, that can only be recovered from Edward Mzee Karezi. However for the costs developments undertaken including planting fauna and flora, constructing the wall and its subsequent demolition, that must be borne by 3<sup>rd</sup> defendant and Third Party. In an attempt to see what expenses the 1<sup>st</sup> defendant has incurred I have read through the valuation report by Maina Chege & Co. dated 13<sup>th</sup> May 2005 (D.Ex.2) but the report shows valuation of the plot without improvements and no services had been connected to the plot, so I am not able to apply an informed figure as regards what the 3<sup>rd</sup> defendant and Third Party ought to pay in terms of special damages. This does not however preclude the 1<sup>st</sup> defendant from an award of general damages – the object of such an award being to compensate 1<sup>st</sup> defendant for what the officials from the Lands Office misrepresented to him through collusion with the 2<sup>nd</sup> defendant. However in this present instance, the case cited by Mr. Kilonzo of **Cursens v AG (1999) 1 EA, at page 40** - a decision by the Supreme Court of Uganda sitting in Mengo is not useful as it dealt with a totally different situation relating to physical bodily injuries suffered by an individual.

As I have stated, the valuation report makes it impossible for me to assess or know the exact monetary implication of the activities 1<sup>st</sup> defendant had so far undertaken and my assessment of general damages is simply guided by the notice from the Town Council which confirms that a wall had been constructed by Greenbays and bearing in mind that the 1<sup>st</sup> defendant will still be entitled to recover what he paid from Edward Mzee then an award of kshs. 200,000 (two hundred thousands only) as general damages is awarded and be borne by the Registrar of Titles and Commissioner of Lands in favour of the 1<sup>st</sup> defendant (Greenbays Holdings Ltd.)

In fact in this present case, there is no suggestion that the 2<sup>nd</sup> title was issued by mistake, the Lands office maintains the position that it was never issued from there at all. Prof. Ongeri's title was first in time and therefore took priority and Greenbay's Title is hereby cancelled.

However, I hold the view that Greenbays presence on the land, though amounting to trespass (as it is in occupation of land not legally belonging to it and with no legal authority), yet one must view the circumstances on the ground. Having believed that Kazrad had passed to it a good title, and having found the suit property vacant, with just bush and trees, Greenbays proceeded to plant flora and fauna and secure the property by constructing a perimeter wall. This was in good faith – to borrow from the observation by my brother Lenaola J in the **Gitwany Case** while referring to the text by Cheshire and Burn's Modern Law of Real Property 15<sup>th</sup> Edition (1994) page 26.

***“All Titles to land are ultimately based upon possession in the sense that the title of the man siesed prevails against all who can show no better right to seisin. Seisin is a root of title, and it may be said without exaggeration that so far as land is concerned, there is an England, no law of ownership but only a law of possession.*”**

Greenbays entered into occupation and possession believing itself to be owner, in the honest belief that it had a right to occupy and make use of the suit property.

So yes the 1<sup>st</sup> defendant is a trespasser, but beyond that I am hesitant to condemn it to bear any damages for trespass.

Matters would have ended here, except that Kilifi County Council (also referred to as Town Council of Kilifi) say the property is actually intended for public use and had been so set apart in their development plan. How does this affect the sanctity of Title which had been obtained by Prof. Ongeru. It is admitted that in his quest to own the property, Prof. Ongeru complied with all the procedures expected. My only observation in what was otherwise great diligence by the Professor is that he never sought to establish the status of that property before seeking for allocation. His own evidence is that he saw the property, liked it and applied to His Excellency the President, for allocation. There is no way in which I can declare the plaintiff the bona fide owner of the suit property on account of the concession made by 1<sup>st</sup> defendant, without examining the claims made by Town Council of Kilifi, albeit against Greenbays. It is my duty to make a determination here as to whether the suit property is public land, or private land – because it is only in so doing that the question of Prof. Ongeru's ownership will be laid to rest.

A thread of argument that seems to be in favour of the property being private property is this;

- (a) That all other lands in that area are residential and in fact have houses constructed or being constructed on them, so there can be no rationale for picking only on the suit property and declaring it to be a public utility.
- (b) That by listing Prof. Ongeru as a rate defaulter, the Council by that notice acknowledged that the plot was a private one, as public plots are never asked to pay rates and if that was a public utility, then there was no reason to list it as one where rates had not been paid
- (c) Mbogori (PW2) and Mburugu (DW5) both stated in their evidence that the property was not public land and that Prof. Ongeru was properly entitled to the same.

This argument is contested by Town Council of Kilifi on the strength of:

- a) The Development Plan from Kilifi County council dated 28<sup>th</sup> October 1981 which showed the area was a public utility.
- b) The evidence of DW4 (Ezekiel Ngwaite) an employee of Kilifi Town Council Works and Town Planning Development who maintains that the plot belongs to the Council which has set apart the area to be used by the public and that there are procedures to be followed for one to acquire a plot owned by the Council – which is that a meeting is held after such an application is made, then minutes of the meeting are sent to the Commissioner of Lands.

In the present instance, there was no such application or meeting nor had the plot been advertised as being available for allocation.

In a situation which greatly resembles sibling rivalry, the Ministry of Lands official vouch for Prof. Ongeru, that he is the legal holder of that title and the plot is not a public land. Yet Mburugu admits that in instances of land being allocated by the “younger sibling” (i.e local government and for that matter the county council), the latter would work in conjunction with the Ministry. If Prof. Ongeru applied for the allocation in 1990, without checking on the status of the plot which by 1981 was a public utility, then shouldn't the Land Registrar have contacted the council to confirm from its records the status of the property which was within the county. Did this “working in conjunction only apply to the county council when allocating land, and never to the lands department?” I would expect that the standards would cut across the board, and “in conjunction” or the findings “in consultation” would mean that both sides would inform each other of dealings in land which falls under their jurisdiction.

The Part Development Plan for the whole of Kilifi shows all the areas in Kilifi, including public utilities and the plot in question falls under the heading “Public Purposes” Ezekiel (Dw4) also explained that the plot in issue is different from the others in the area in terms of zoning, saying it is in a different zone, and so is not residential. This was not rebutted by any other evidence from the plaintiff or the Registrar of Titles or Commissioner of Lands.

I am very skeptical about Mbogori's credibility.

(a) He admits that the reason why he lost his job, had everything to do with this plot – he was however very careful not to reveal what allegations were leveled against him in relation to this property.

(b) Despite insisting that this property was private property, it was none other than Mbogori himself who wrote the letter dated 30<sup>th</sup> September 2005 to the Chief Litigation Counsel at the Attorney General’s Chambers in reference to the self same plot, when he stated in part:

***“This plot was initially allocated as unsurveyed plot in favour of Hon. Prof. S. K. Ongeri. This allocation was done after the plot was planned for and Part Development Plan approved on 21<sup>st</sup> February 1991...”***

Surely that tells it all. The original status of the property was known even to the Commissioner of Lands for whom Mbogori wrote on his behalf. If the Commissioner of Lands then decided to ignore that status and pretend to convert the property from public to private by the stroke of nothing other than a pen so as to favour Prof. Ongeri then the blame can only lie with the Commissioner of Lands Office.

Mbogori’s double talk is clearly disclosed by what he states in his correspondences while dealing with the status of this plot whereas to the Attorney General’s counsel he had stated that the plot was a public land prior to allocation to Prof. Ongeri, in a letter to the Director of Physical Planning in which he stated this:

***“The subject plot ...was allocated as planned vide your Part Development Plan reference No. 134/KLF/2/91 forwarded by you on 21<sup>st</sup> January 1991 and approved by the Commissioner of Lands on 21<sup>st</sup> February 1991. This plot forms the area on the Part Development Plan no. NRB 134/2005/01 on the proposed public beach...as it is at present, the plot is private land and the issue of ownership should be addressed to extinguish all interest before it can be converted for public use”***

Mbogori was fully alive to the status of the plot and cannot now claim that all along the plot was private property.

From the correspondences sent by R. K. Mbogori, Director of Physical Planning, the Plot is intended to be used by the public whether as a beach or creek – the intention is that it should be for recreational purposes by the public.

But there remains one question –

If Kilifi County Council was all along aware that the same was public land then why did it demand for rates from Prof. Ongeri – the paradox is not made any better by the fact that at the same time that the council was listing Prof. Ongeri as a rate defaulter, it was issuing notices to Greenbays not to carry on with construction of the wall. Was it mixed up as to the identity of the plot (only recognizing it on the ground, hence the zeal with which to pursue Greenbays?) I think this might be the explanation I can glean from the set of circumstances. Also from DW4 answer on cross-examination by Miss Onyinkwa, that all the open spaces in the Town council do not have title because there are some procedures to be followed by the Physical Planner to get title – which falls in place with the evidence of Prof. Ongeri, Lai and Alberto, that the place was an open space with bushes and trees.

Indeed the same manner that Greenbays paid rates although the Council contested its title is applicable to the situation which Prof. Ongeri finds himself in. As a matter of fact DW4 explained that Greenbays was issued with receipts upon payment for rates because the person paying went straight to the cashier and made payment without passing through the Physical Planner who knew the status of each plot. It is therefore possible that had Prof. Ongeri pursued the issue of rates by going before the Physical Planner before paying, the status of his plot would have been detected.

With regard to Cyrus Mburugu (DW5) evidence, he appears very dismissive of the Kilifi Town Council, in fact his demeanour in court oozed “superiority complex” almost suggesting the Town Council of Kilifis is made up of dim wits whom he wouldn’t bother to contact or pay regard to when dishing out titles. While he was very forthright about Kazrad and its questionable title, he became very protective

about Prof. Ongeru title, to a fault – in fact I got the impression that he was a witness for the plaintiff camouflaged as a defence witness. His evidence was

***“From our records, there was nothing to show that the land was public utility and that is why it was given to the allottee as residential. We did not require consent of Kilifi County Council before allocating land because that is Government Land.”***

It's almost as though the local authority is not part of Government – and pray what happened to the much touted consultation he had so eagerly harped about in the earlier part of his evidence in chief. Perhaps if he had taken the time to consult Kilifi County Council the PDP prepared in the eighties. Had he done this then his statement on cross-examination by Mr. Kilonzo that:

***“Public utilities are allocated by my department in conjunction with the local authority...”*** would have had some credibility.

DW5 told this court that there cannot be two PDP (Part Development Plans) in respect of one property. Surely how can DW5 say the Director of Physical Planning had not done his investigations to realize there was a plan done in 1995 – when there was an earlier plan done in 1980? - I think it is DW5 who did not do any investigations and was out rightly dismissive of every move the Council made to try and explain the status of the suit property.

Another aspect that causes me to doubt Mburugu's credibility is that despite insisting that the suit property was private land, he has not a single document from the entire Lands Department to rebut the PDP which the Town Council relies on and which dates back to years before Prof. Ongeru applied for the plot. His explanation falls flat on its face on account of Mbogori's letter to the State Counsel where he confirmed that prior to the property being allocated to Prof. Ongeru it was public land. Either the officials at Lands Office are mixed up and are not abreast with what had been going on regarding land in Kilifi OR they are out to deliberately protect Prof. Ongeru OR at worst, they are simply inefficient. I have some difficulty in believing that Prof. Ongeru was totally unaware that the land was just lying idle, which is why, for someone of his caliber, I would have expected greater diligence from him so as to establish the status of the land before applying for it and I am persuaded there was misrepresentation by the Professor and the Lands officials that i.e the Registrar of Titles and the Commissioner of Lands, to His Excellency The President, that the land was available for allocation yet it was already set apart in 1980 as public utility land.

This was not a question of genuine mistake, but deliberate official misrepresentation by manipulating and/or ignoring available existing information at the Town Council of Kilifi so that the property could be allocated. I think then that the sanctity of Prof. Ongeru's title is subject to challenge, on grounds of misrepresentation.

Due to these observations, it would be misplaced for this court to then declare Prof. Ongeru as the absolute legal owner of the suit property. My position in this is fortified by correspondence which suggests a panic – mode to seal some loopholes. On 7<sup>th</sup> January 2005, a letter was addressed ***“To whom it may concern”*** regarding R No. 5054/1185 Kilifi District purportedly signed by ONYINO MUKOBE on behalf of the Commissioner of Lands it stated:

***“Kindly note that the above plot was REGULARLY allocated minutes of which are confidential. The user of the plot was residential as set aside by the Physical Planning office. The property does NOT fall under public utility land.”***

Oddly enough on 20<sup>th</sup> January 2005, another letter signed by Onyino Mukobe for Commissioner of Lands referred to the same plot, addressed the District Land Officer, Kilifi. The Registrar of Titles Mombasa and The Town Clerk (Kilifi Municipal Council) in the following terms;

***“I refer to the above plot and letter reference 43487 of 7<sup>th</sup> January 2005 regarding the same and purportedly written and signed by me. I hereby refute that the said letter was authorized and signed by***

***me. I have no knowledge of the letter nor its contents.***

I am therefore justified in doubting the claim that this was not public land, the spirited attempts at all costs to try and make it appear as always having been Residential or Private land is doubtful – the balance of probabilities that it was in fact public land is only strengthened by those odd chains of attempts.”

Who is entitled to compensation and by who?

The 1<sup>st</sup> defendant (Greenbays) entered into the land because of mischief by the 2<sup>nd</sup> defendant. If the Registrar of titles and the Commissioner of Lands had a hand, then this has not been demonstrated. The missing genesis of 2<sup>nd</sup> defendant’s Title, the dubious registration of a firm name or title holder, all point to a dubious involvement and manipulation by the 2<sup>nd</sup> defendant.

My view is that of course 1<sup>st</sup> defendant must vacate the premises, and remove the wall constructed there. Since 1<sup>st</sup> defendant seemed only eager to recover his losses from the 3<sup>rd</sup> defendant and 3<sup>rd</sup> party, but not the 2<sup>nd</sup> defendant who definitely misled Greenbays, then the most I can order as against 2<sup>nd</sup> defendant is 1<sup>st</sup> defendant’s cost as well as plaintiff’s costs.

With record to recovery any other losses or damages – my view is that Greenbays would have to file an appropriate suit against Edward Mzee Karezi who in my view, has been demonstrated as the party who caused 1<sup>st</sup> defendant all the inconvenience. As regards Prof. Ongeru – I will borrow the words of my brother Hon. Justice Isaac Lenaola in the **Gitwany case** and paraphrase the position as I see it in these terms:-

The actions of the Commissioner of Lands together with the Registrar of Titles led the Professor to believe that the suit property was vacant and available for allocation. The Registrar of Titles proceeded to issue title to the Professor, who from his conduct I doubt intended to develop the land – he seemed to have got the land to use it as a collateral in obtaining bank loans and perhaps for speculation purposes – to eventually dispose of it after making maximum use of its collateral value.

There is nothing presented on record to suggest that the loans (which the Professor has taken twice) were intended for developing the property, and it is safe to conclude that he has had the benefit of “owning” the land, at almost minimal cost which only involved payment for processing of the paper work, but not for the value of the land. If the plaintiff had incurred expenses in terms of development, then I would have held 3<sup>rd</sup> defendant and 3<sup>rd</sup> Party liable to compensate him, but here my view is that he has benefited from the land, and it being public land, then to order for him to be compensated, would be awarding an already questioned allocation. However in terms of costs of this suit, I have no hesitation in ordering that actions emanating from the office of the Registrar of Titles and Commissioner of Lands, is what led the Professor into even ending up filing suit and they must therefore bear the costs of the plaintiff’s suit as well as 1/3 costs of the 1<sup>st</sup> defendant’s suit.

This is not a situation contemplated by the Land Acquisition Act (Cap 295) for compulsory acquisition – because ab initio, the land was public land, so the procedure applicable for compulsory acquisition of land does not apply here. This matter cannot be fully concluded without drawing from what the Constitution of Kenya States with regard to ownership of property. The right to own property is protected under Article 40 of the Constitution.

However section Article 40 (3) (a) and (b) of the Constitution recognizes what is known as the doctrine of public interest in relation to illegal alienation of public land.

The Constitution now classifies land into definite description i.e Public Land, Private Land and Community Land. Under Article 62 Public Land includes inter alia 62(1) (a) –

***“land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date”***

I have already noted in the earlier part of this judgment that as at the date when the land was allocated to Prof. Ongeri, Mbogori (who seemed to have the Commissioner of Lands nod to sign correspondences on his behalf) did inform the Counsel at the Attorney General's Chambers by a letter, that the land had been public land.

62(2) then follows with this;

***“Public land shall vest and be held by a county government in trust for the people resident in the county...”***

Before the 2010 Constitution, the county governments were actually the local government which comprised of the municipal councils and town councils – so the Town Council of Kilifi was properly placed to protect the property on behalf of the public.

My finding therefore is that this property was public land.

The decision in **Mureithi and 2 others v AG and 4 others Misc. Civil Application No. 158 of 2005** examined the doctrine of public trust and public interest vis a vis alienation of public land for public purposes, and the conflict between public and private interest and took into account the provisions under the Constitution with regard to registration, and right of full compensation. So far the evidence offered by Prof. Ongeri does not fit into what is contemplated in the above mentioned decision.

Finally is the issue regarding notice of intention to institute proceeding not having been served.

Section 13(A) (1) of the Government Proceedings Act provides as follows;

***“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings”***

It is on this account that Mr. Njoroge submits that the notice was required so as to inform the Government of the alleged fraud by its agents/servants.

While it is correct that this is a provision which parties are expected to comply with, I think the purpose of such notice was intended to simply enable the Government (which has so many departments, Ministries and servants) to be able to get the right information and prepare adequately its defence. From what has transpired, the fact that indeed a defence was filed in respect of 3<sup>rd</sup> defendant and 3<sup>rd</sup> party, and a witness from the Lands Office was even called to testify, confirms that the non service of that notice did not cause any prejudice to the government. What's more, this was an omission which if prejudicial to the conduct of the proceedings, should have been raised as a preliminary point at the start of the proceedings and not wait to be pulled out at the end, like something out of a magicians hat.

Secondly, I think the issue falls within Article 159(1) (d) of the Constitution of Kenya refers to as procedural technicalities which only go to delay and hamper delivery of justice - it has not been demonstrated to this court, what prejudice the 3<sup>rd</sup> defendant and 3<sup>rd</sup> party suffered by non compliance of the provision.

Thirdly section 13A (3) provides as follows;

***“The provisions of this section shall not apply to such part of any proceedings a relates to a claim for relief in respect of which the court may, by virtue of proviso (1) to section 16, make an order declaratory of the right of parties in lieu of injunction”***

Among the prayers sought were

- (a) A declaration that Prof. Ongeru is the lawful owner of the suit property.
- (b) A declaration that the registration of interest in the suit property in respect of 2<sup>nd</sup> defendant is null and void.
- (c) A permanent injunction to restrain the 1<sup>st</sup> defendant

In view of these prayers then I think the issuance of that notice does not even arise, because in view of the injunction against the 1<sup>st</sup> defendant a declaration as to ownership would suffice. That limb by Mr. Njoroge therefore has not even have a small toe upon which to stand.

My findings then are as follows;

(1) I declare that (a) the registration of interest in the suit property in the 2<sup>nd</sup> defendant is null and void *ab initio*

(b) The registration and Grant issued to the 1<sup>st</sup> defendant (Greenbays Holdings Ltd) is null and void

2. I decline to issue orders restraining Town Council of Kilifi from ordering for and/or demolishing the perimeter wall constructed on the suit property.

3. Prof. Ongeru is not the rightful owner of the property, the same being Public Land, so that title must be revoked and cancelled. To this end then, I direct the Registrar of Titles to immediately revoke and cancel the said Title issued to Prof. Ongeru.

4. I declare that Plot No. LR 5054/1185 Kilifi is Public Land.

5. General damages Kshs. 200,000/- (two hundred thousand) is award to 2<sup>nd</sup> defendant to be borne by 3<sup>rd</sup> defendant and 3<sup>rd</sup> party at 50:50)

6(a) The costs of this suit in respect of the plaintiff and the 1<sup>st</sup> defendant (Greenbays) shall be borne by Edward Mzee Karezi t/a Kazrad Agencies (2<sup>nd</sup> defendant) and the Registrar of Titles (3<sup>rd</sup> defendant) and the Commissioner of Lands (3<sup>rd</sup> Party) at a ratio of 1/3 each.

(b) the costs in respect of Town council of Kilifi's defence and counterclaim shall be borne by 1<sup>st</sup> defendant (Greenbays) at 25%

(c) Interest on No. 5 above at court rates from date of filing suit until payment in full.

Delivered and dated this 10<sup>th</sup> day of May 2011 at Malindi.

**H. A. Omondi**  
**JUDGE**