



REPUBLIC OF KENYA



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**Thara Orchards Limited v Mwakamki & 5 others (Environment & Land  
Case 95 of 2021) [2022] KEELC 4904 (KLR) (18 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 4904 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 95 OF 2021**

**AE DENA, J**

**JULY 18, 2022**

**(FORMERLY MOMBASA ELC COURT NO. 190 OF 2018)**

**BETWEEN**

**THARA ORCHARDS LIMITED ..... PLAINTIFF**

**AND**

**SALIM ABDALLA MWAKAMKI ..... 1<sup>ST</sup> DEFENDANT**

**JUMA RASHID VYONI ..... 2<sup>ND</sup> DEFENDANT**

**GETRUDE MAPENZI THOMAS RINGA ..... 3<sup>RD</sup> DEFENDANT**

**THE DISTRICT SURVEYOR, KWALE ..... 4<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR, KWALE ..... 5<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**The Plaintiffs' Pleadings**

1. The plaintiff claims to be the registered proprietor of parcel no. Kwale/Diani/494 (the suit property). It is pleaded that the same was advertised by Coast Beach- Lands, Lands & Estate Agents on behalf of its then registered proprietor one Jane Githigia Gatimu. That the plaintiff then purchased the property at a consideration of Kenya Shillings Six hundred and Ninety-Two Thousand (Kshs. 690,000/=) including the costs of the transaction, registration and other fees. It is stated that the conveyancing transaction was procedurally and successfully completed after proper due diligence through the firm of Waruhiu & Gathuru Advocates whereupon title issued to the plaintiff on March 29, 1993. That in December, 1993 change of use of the suit property was allowed from agricultural to residential cum commercial and in the year 2003 the County Council of Kwale introduced rates which the plaintiff has duly been paying to date.



2. It is averred that since the plaintiff's registration aforesaid they took care of the suit property by visiting including replacing missing beacons. That sometime in 2020, on learning of a scheme by locals to invade the suit property she reported to the 5<sup>th</sup> defendant, Diani Police Station and lodged a caution against the title. However, the 1<sup>st</sup> and 2<sup>nd</sup> defendant invaded, and having presented themselves as owners of the suit property caused its sub-division into Kwale/Diani/S.S/3692 - 3699 and Kwale/Diani/S. S/3692 into their names on 7<sup>th</sup> December, 2017. That on 19<sup>th</sup> January, 2018 they transferred Kwale/Diani/S. S/3692 to the 3<sup>rd</sup> defendant. It is alleged that the original green card for Kwale/Diani/494 had been removed from the records. That the 5<sup>th</sup> defendant had purported to issue title deeds to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant in accordance with the registration referred to above.
3. It is the plaintiffs' case that the action by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant was unlawful, null and void and a gross abuse of the law on proprietorship for reasons which were enumerated in the plaint. That the 4<sup>th</sup> defendant in abuse of office, colluded with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant in purporting to change and/or cancel the existing mutations and introducing new mutations and subdividing and/or causing the parcel of land to be subdivided by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant. In respect of the 5<sup>th</sup> Defendant it is alleged that he acted in blatant disregard of the law and colluded with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in their unlawful acts as particularized in the plaint.
4. The plaintiff prays for judgment against the defendants jointly and severally for;
  - a. A finding that the plaintiff is the absolute and registered proprietor of the parcel of land namely title number Kwale/Diani/494 Settlement Scheme.
  - b. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant whether by themselves, personal representative, employees, servants or agents from sub dividing or further subdividing offering for sale, selling, transferring, leasing, letting, developing or in any other manner dealing with the suit title number Kwale/Diani/494 as subdivided into Kwale/Diani/S.S.3692, Kwale/Diani/S.S.3693, Kwale/Diani/S.S.3694, Kwale/Diani/S.S.3695, Kwale/Diani/S.S.3696, Kwale/Diani/S.S.3697, Kwale/Diani/S.S.3698, Kwale/Diani/S.S.3699, Kwale/Diani/S.S.3700.
  - c. An order restraining the 5<sup>th</sup> defendant from effecting changes on the register in relation to the property title number Kwale/Diani/494 as subdivided into Kwale/Diani/S.S.3692, Kwale/Diani/S.S.3693, Kwale/Diani/S.S. 3694, Kwale/Diani/S.S.3695, Kwale/Diani/S.S.3696, Kwale/Diani/S.S.3697, Kwale/Diani/S.S.3698, Kwale/Diani/S.S.3699, Kwale/Diani/S.S.3700.
  - d. Damages for fraud and collusion between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.
  - e. Damages for trespass be awarded to the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
  - f. Mesne profits against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
  - g. An order of eviction be issued against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant and any other person claiming proprietorship of the suit property or any of the subdivisions thereon whether through them or under them.
  - h. Cost of this suit and interest at court rates from the date of filing this suit until payment in full.



## **Defendants Case**

### **1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants Statement of Defence and Counterclaim**

5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a joint defence and counterclaim on March 28, 2019. To avoid confusion, I will still refer to them as defendants though for the purpose of the counterclaim it should be noted they are plaintiffs. They state that they have been in occupation of the suit property which they inherited from the grandfathers and hold title registered in 2006 in favor of the 1<sup>st</sup> and 2<sup>nd</sup> defendants by transmission in trust for the community. That the subdivisions were done legitimately with approval from the community and any title was validly issued.
6. They also filed a counterclaim on the basis of the above title seeking for judgment against the Plaintiff for; -
  1. An order barring the Plaintiff from further trespassing on the suit land
  2. Damages for trespass.
  3. Cost of the suit.

### **4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> Defendants Defence**

7. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants denied the allegations in the plaint and stated that if at all it proceeded to prepare, register or cause to be registered any subdivision on the suit property to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the same was done after fully satisfying itself that the information held by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants was accurate. That upon the application for caution by the plaintiff they proceeded to summon parties and placed a caution on the suit property until determination of the matter. They denied knowledge of collusion, conspiracy and fraud as averred by the plaintiff.

## **The Hearing**

8. The case was heard on February 1, 2022. The plaintiff was represented by Mr. Kariuki, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants by Mr. Gitonga and the 4<sup>th</sup> and 5<sup>th</sup> defendant by Mr. Mwanjeje State Counsel.

## **The Plaintiffs Evidence**

9. PW1 was Mrs. Jane Njeri Maina a director of the plaintiff, Thara Orchards Limited who in her evidence in chief reiterated the averments in her witness statement dated August 16, 2018. She produced as evidence copies of the following documents as listed in the plaintiffs list of documents dated August 16, 2018; -
  1. Copy of the title deed in the name of Jane Gathigia Gatimu issued on June 10, 1992. pg.1.
  2. Copy of the agreement for sale dated January 14, 1993. pg.1(a) -2.
  3. Copy of the receipt number 486 dated January 18, 1993. pg.3.
  4. Copy of the receipt number 569 dated March 3, 1993. pg.4.
  5. Copy of the receipt number 572 dated March 3, 1993. pg.5.
  6. Copy of the Land Control Board Consent number 111/93 dated March 9, 1993. pg.6.
  7. Copy of the transfer dated March 10, 1993. pg.7-8.



8. Copy of the receipt number 542003 dated March 29, 1993. pg.9.
9. Copy of the title deed on title number Kwale/Diani/494 dated March 29, 1993. pg.10-13.
10. Copy of a note by Coast Beach-Lands to Mrs Maina dated March 31, 1993. pg.14.
11. Copy of the application for change of user dated December 30, 1993. pg.15-16.
12. Copy of the land control board consent for change of user dated January 11, 1994. pg.17.
13. Copy of the rates demand dated June 27, 2003. pg.18-19.
14. Copy of the receipt for rates payment & clearance certificate for the period between 1999 and 2003 dated July 21, 2003. pg.20.
15. Copy of clearance certificate dated July 30, 2003. pg.21.
16. Copy of the acknowledgement dated November 25, 2004. pg.21 (a).
17. Copy of the receipt number 23249 dated November 8, 2004. pg.21 (b).
18. Copy of the receipt number 2659457 dated August 13, 2009. pg.21 (c).
19. Copy of demand for rates and interest for the period between 2005 and 2007 dated October 3, 2007. pg.22.
20. Copy of receipt for rates payment for the period between 2005 to 2007 dated October 3, 2007. pg.23.
21. Copy of demand for rates and interest for the period between 2008 and 2010 dated August 12, 2010. pg.24.
22. Copy of cheque number 787905 for kshs. 45,352 dated September 14, 2010. pg.25.
23. Copy of rates payment request (duly paid) dated October 1, 2010. pg.26.
24. Copy of rates payment request (duly paid) dated January 22, 2011. pg.27.
25. Copy of rates payment request (duly paid) dated February 16, 2012. pg.28.
26. Copy of rates payment request (duly paid) dated January 29, 2013. pg.29.
27. Copy of rates payment request (duly paid) dated April 9, 2014. pg.30.
28. Copy of rates payment request (duly paid) dated January 23, 2015. pg.31.
29. Copy of rates payment request (duly paid) dated January 15, 2016. pg.32.
30. Copy of rates payment request (duly paid) dated January 13, 2017. pg.33.
31. Copy of rates payment request (duly paid) dated January 10, 2018. pg.34.
32. Copy of the note dated March 16, 2005. pg.35.
33. Copy of the letter dated March 24, 2005. pg.36.
34. Copy of the note dated October 3, 2007. pg.37.
35. Copy of the letter dated August 16, 2010. pg.38.
36. Copy of the letter dated August 20, 2010. pg.39.



37. Copy of search on title number Kwale/Diani/494 dated August 12, 2010. pg.40.
38. Copy of caution on title number Kwale/Diani/494 dated August 25, 2010.pg.41-42.
39. Copy of search on title number Kwale/Diani/494 dated September 15, 2010. pg.43.
40. Copy of search on title number Kwale/Diani/494 dated May 4, 2011.pg.44.
41. Copy of mutation on title number Kwale/Diani/494 dated October 21, 2017. pg.45 to 48.
42. Copy of greencard on title number Kwale/Diani/S.S./3692 measuring approximately 0.1 Ha. registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively on or about December 7, 2017. pg.49.
43. Copy of greencard on title number Kwale/Diani/S.S./3693 measuring approximately 0.1 Ha registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively on or about December 7, 2017.pg.50. \*
44. Copy of greencard on title number Kwale/ Diani/S.S.3694 measuring approximately 0.1 Ha. registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively on or about December 7, 2017. pg.51.
45. Copy of greencard on title number Kwale/Diani/S.S./3695 measuring approximately 0.11-la. registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively on or about December 7, 2017. pg.52,
46. Copy of greencard on title number Kwale/Diani/S. S/3696 measuring approximately 0.1 Ha. registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively on or about December 7, 2017. pg.53.
47. Copy of greencard on title number Kwale/Diani/S. S/3697 measuring approximately 0.1 Ha. registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively on or about 7<sup>th</sup> December 2017. pg.54.
48. Copy of greencard on title number Kwale/Diani/S. S/3698 measuring approximately 0.2 Ha. registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively on or about December 7, 2017 and transferred to the 3<sup>rd</sup> defendant on or about January 19, 2018.pg.55.
49. Copy of greencard on title number Kwale/Diani/S. S/3699 measuring approximately 0.2 Ha. registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively on or about 7<sup>th</sup> December 2017. pg.56.
50. Copy of green card on title number Kwale/Diani/S. S/3700 measuring approximately 0.34 Ha. registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively on or about December 7, 2017. pg.57
51. Copy of the map showing the unlawful subdivisions.pg.58.
52. Copy of letter dated January 16, 2018. pg.59.
53. Copy of the letter dated January 29, 2018. pg.60.
54. Copy of the letter dated April 4, 2018. pg.61.
55. Copy of caution registered against title number Kwale/Diani/S.S./3692.pg.62-63.



56. Copy of caution registered against title number Kwale/ Diani/S.S./3693.pg.64-65.
  57. Copy of caution registered against title number Kwale/Diani/S.S./3694.pg.66-67.
  58. Copy of caution registered against title number Kwale/ Diani/S.S./3695.pg.68-69.
  59. Copy of caution registered against title number Kwale/ Diani/S.S./3696.pg.70-71.
  60. Copy of caution registered against title number Kwale/ Diani/S.S./3697.pg.72-73.
  61. Copy of caution registered against title number Kwale/ Diani/S.S./3698.pg.74-75.
  62. Copy of caution registered against the title number Kwale/ Diani/ S.S.3698. pg.76-77
  63. Copy of caution registered against the title number Kwale/Diani/S.S.3699 pg. 78-79
  64. Copy of the letter dated June 14, 2018pg 80-81.
  65. Copy of the letter dated July 17, 2018pg. 82.
10. She further stated that the parties were summoned to the office of the registrar Kwale with regard to the caution herein, the defendants attended the meeting but did not come with their documents relating to the alleged ownership of the suit property. That she availed the plaintiff's documents. She reiterated the prayers as pleaded in the plaint.
  11. On cross examination by Mr.Gitonga she informed this court that she believed that since she was represented by a lawyer, she believed the law firm undertook a search before she purchased the suit property. She told this court that both parties were present during the signing of the original sale agreement which was before court and conceded that it did not bear the vendors signature neither was it witnessed. She told the court that the vendor was not her witness before this court. That it was not possible she duped her. She confirmed she never took any photos at the suit property when she first bought it. That she admitted she only undertook a search in the year 2011 which she relied on but did not get to see the green card. She told the court that during a recent visit to the suit property there were makuti structures with around 3 people in occupation, mango trees and a coconut tree which looked big but which was not there at purchase.
  12. On cross examination by Mr. Mwandeje PW1 stated though the plaintiffs certificate of incorporation existed she had not produced it in court, that she did not have the OB number for the report she made at the police. She admitted the registrar was the custodian of all land documents but was emphatic that they were wrong to state that the suit property belonged to the defendants. PW1 confirmed she was aware that the land used to be a settlement scheme but she did not require a discharge from the settlement fund trustees since there existed a title. That she trusted her lawyers to ensure the sale agreement was signed, during that time there was a lot of trust. She clarified in reexamination that the Attorney General had not disputed her title.

With the above the plaintiff closed its case.

### **The Evidence of the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> Defendants**

13. DW1 was Salim Abdalla Mwakamki the 1<sup>st</sup> defendant 42 years old, a business man living in Ukunda Maweni. His affidavit sworn on October 18, 2018 was converted to a witness statement which was adopted as part of the evidence in chief. He stated that he inherited the suit property together with the 2<sup>nd</sup> defendant and had lived thereon for over 30 years. That they live as family and planted maize, grains and cereals and had mango trees and coconut trees. That before the title was issued in their names the land belonged to their fathers Abdalla Hamisi Mwangandaro and Rashid Vyoni (deceased)who held it



on behalf of the family. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendant also held the land as trustees after they had presented the issue to the Kadhis court. He told the court that he was aware that the land was a settlement scheme and their fathers had approached the Board. That they did not know the vendor neither did their fathers inform them about any sale. Further he had never seen anyone clearing the land and that they only used to leave the land during elnino rains and thereafter the house would be repaired. He emphasized they held a valid title, reiterated the counterclaim and the prayers therein.

14. As part of the evidence in support of their case the defendant produced several documents which are listed elsewhere in this judgement.
15. On cross examination by Mr. Mwanje PW1 told this court that at the lands registry they were not informed that the land belonged to a third party. All he needed to produce is title which he stated he had. On cross examination by Mr. Kariuki. PW1 confirmed the land was subdivided with the consent of the rest of the family though he had no proof of the said consent. He conceded the title did not show they were trustees. That Abdalla Hamisi Mwangandaro his father and Rashid Hamisi Abdalla his father's brother were the second owners of the land, the first having been Mwangandaro and Rashid Vyoni and conceded that he had omitted this history in his pleadings. He admitted that in land adjudication a letter of allotment must issue which he clarified in reexamination that the transfer of land in settlement scheme dated April 6, 1994 which indicated a payment of Kshs. 8000 sufficed for this purpose. He conceded they used a backdated consent letter which he clarified in reexamination was not prepared by him. He further stated that his brother used to pay rates in the year 2015 and the documents were with his brother. He denied that they ran away from the land because of the plaintiff's title and reiterated it was because of the elnino and returned as soon as rains subsided. That had the plaintiff's title been genuine it would have reflected in the green card.
16. The defendant did not call the rest of the witnesses noting that they would have given the same evidence since they were part of the trustees. As regards the 3<sup>rd</sup> defendant's counsel was not able to procure the attendance despite having been given an adjournment to do so.

With the above the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants closed their case.

#### **Evidence of the 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> Defendants**

17. Ms Siema Mwanguni Land Registrar stationed at Kwale gave evidence and produced Copy of Title Deed of Kwale/Diani S.S/494., Copy of the letter from the Department of Land Adjudication and Settlement dated 5<sup>th</sup> December, 2017, Copy of Mutation Form dated October 21, 2017, Copy of the letter of District Surveyor dated December 11, 2017. Copy of Succession Cause No. 219 of 2015, Copy of application to be registered as proprietor by Transmission dated July 23, 2017 and Copy of Transfer by Personal Representative to person entitled under will dated July 23, 2017. She informed the court that there was no indication in the records whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants attended the hearing on the cautions.
18. Upon cross examination by Mr. Gitonga she confirmed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were registered owners of the parcel, that the subdivisions resulted into the plots mentioned in the pleadings and that plot 3698 was within the mutations.
19. On cross examination by Mr. Kariuki she confirmed the green card was missing and despite effort they could not be traced. That she was not able to verify the authenticity of the plaintiff's title. On the searches produced by the plaintiff she stated they reasonably resembled what is issued at the lands office. She confirmed there were no existing records on plot 494 before the subdivision neither was the green card available to show the history. She confirmed it was possible to use the reference in the land adjudication office letter dated December 5, 2017 to trace the documents. There would be no evidence



of payment as the transaction by the defendants was not a transfer but a transmission. In reexamination she confirmed possibility of having two titles on one parcel however only one title existed at the registry in the name of the 1<sup>st</sup> and 2<sup>nd</sup> defendant issued on the basis of the Kadhis order.

With the above Mr. Mwandeje closed the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants' case.

20. An application was made for a site visit by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants which the court declined since the main issue was on ownership vis some vis the two titles which in the courts view could not be resolved by the intended visit. Moreover, it was the duty of the parties to place evidence before the court in proof of their claims.

### **Submissions of the Parties**

21. The parties filed and exchanged submissions which are summarized as follows; -

### **Plaintiffs Submissions**

22. The plaintiff filed submissions on April 25, 2022. Counsel submitted that plot title no. Kwale/Diani/494 and Kwale Diani/S.S/494 referred to the same plot, the suit property. That the plaintiff had good title having conformed with procedure and processes. Reliance was placed on the case of *Hubert L. Martin & 2 others vs. Margaret J. Kamar & 5 others* (2016) eKLR.; Court of Appeal in *Munyu Maina vs. Hiram Gathiba Maina* Civil Appeal No. 239 of 2009. Citing the provisions of Section 26 of the *Land Registration Act* on indefeasibility of title it was urged that the land having been acquired lawfully it was not available for allocation as equity upholds the first title in time as was held in *Gitwany Investment Limited vs. Tajmal Limited & 3 others* (2006) eKLR. That the 5<sup>th</sup> defendant acted contrary to the terms of the order by registering the 1<sup>st</sup> and 2<sup>nd</sup> defendants for the entire land instead of the half share and also to the exclusion of the other beneficiaries.
23. It was the plaintiffs' case that the defendants failed to prove that Abdalla Hamisi Mwangandaro and Rashid Hamisi lawfully held the land for them to be capable of transmission to the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the subsequent subdivision. That the defendants were just driven by hostility to the ownership of land buy non-locals. Counsel pointed that the title Kwale/Diani/S.S/3698 issued to the 3<sup>rd</sup> defendant was invalid since it was based on the 1<sup>st</sup> and 2<sup>nd</sup> defendants bad title. This court was urged to award Kshs. 2 million damages for trespass and mesnes profits in favor of the plaintiff and relied on *Justus Munyao Kyungu vs Robin Stuart McDonald*. Other claims were for damages for fraud and collusion.
24. On the defendant's counterclaim counsel submitted that since the 2<sup>nd</sup> and 3<sup>rd</sup> defendant did not testify in support of the counterclaim while the 1<sup>st</sup> defendant did not prove his case against the plaintiff, the orders sought in the counterclaim cannot be granted. This court was urged to find in favor of the plaintiff including costs.

### **The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Submissions**

25. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed submission on May 16, 2022. Counsel for the defendant submitted that the suit land was community land. That having been a community land and therefore settlement scheme it was not possible for the plaintiff to have obtained title in 1993 without a transfer and consideration paid to the Settlement Fund Trustee. Citing the provisions of Order 2 Rule 10(1) of the *Civil Procedure Rules* 2010 it was submitted that the particulars of fraud had not been specifically pleaded and proved on slightly higher threshold. Also relied upon was the case of *Gudka vs. Dhodia* Civil Appeal No. 21 of 1980 and *Ratil Patel vs. Laalji Makanji* EA (1957). That the blame for the double allotment lay squarely on the Settlement Fund Trustee to ensure proper allotment of the land



26. Counsel further submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were bonafide owners of the suit property by dint of article 40 of the Constitution 2010 and section 24-26 of the Land Registration Act 2012. That the plaintiff's sale agreement was not properly executed and no proof of payment of the consideration was tendered. Reliance was placed upon Samuel Kamere vs. Land Registrar Kajiado, Nairobi Court of Appeal No. 28 of 2005. That the history of the plaintiff's title could not be authenticated in the absence of records on the same. That the registrar had confirmed clear presence of records confirming the defendants as owners. Counsel urged that the plaintiff had come to court with tainted hands to cover her fraudulent transaction.

#### **The 4<sup>th</sup> and 5<sup>th</sup> Defendants Submissions**

27. The submissions were filed on May 12, 2022 who reiterated the 1<sup>st</sup> and 2<sup>nd</sup> defendants had a constitutional right to own property. That their title was indefeasible. Counsel reiterated that the burden of proof lay on the plaintiff to prove that they had indeed purchased the land from Jane Gathigia yet the vendor had not executed the sale agreement neither had it been witnessed by the plaintiffs' lawyer who was also not tendered as a witness. That it was not enough for the plaintiff to dangle a title especially when it was being questioned, the acquisition had to be proved to be legal, formal and free from any encumbrance. They relied on Munyu Maina vs. Hiram Gathiba Maina (*supra*).

#### **Analysis and Determination**

28. Having considered the pleadings, evidence and submissions filed by Counsels for the parties I have deduced the issues for determination by the court to be as follows; -

1. Whether the property in dispute is one and the same.
2. Whether the plaintiff was a bonafide purchaser of the suit property from Jane Gathigia
3. Whether the transmission to the 1<sup>st</sup> and 2<sup>nd</sup> defendants was lawful.
4. Which party or parties is the lawful proprietor of the suit property
5. What relief commends the suit and the counterclaim
6. Which party shall bear the costs of the suit and the counterclaim.

#### **1) Whether the property in dispute is one and the same.**

29. The plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendant claim they are bonafide registered owners of the suit property herein and produced copies of their titles. It therefore becomes necessary to ascertain if the parties refer to one and the same property, the suit property. The plaintiff adduced as part of her evidence copy of title No. Kwale/Diani/ 494 dated June 10, 1992, measuring approximately 1.6 hectares in the name of Jane Gathigia Gatimu, the vendor. The 1<sup>st</sup> and 2<sup>nd</sup> defendant produced a copy of title No. Kwale /Diani S.S/494, dated 23<sup>rd</sup> July 2015 in the names of Salim Abdalla Mwakamili and Juma Rashid Vyoni, measuring approximately 1.9 hectares. The register for both parcels was opened on March 10, 1992 under the Kwale Diani adjudication section under registry Map Sheet. No.1. The only point of departure is the acreage by about 0.3 acres. I have no doubt therefore both titles referred to one and the same property which is the property under contest.



## 2) Whether the plaintiff was a bonafide purchaser of the suit property from Jane Gathigia

30. The plaintiff told the court that she purchased the suit property from one Jane Gathigia (Vendor) at a consideration of Kshs. 680, 000 after it was advertised by the vendors agents. That the purchase price was agreed upon in the presence of the vendor and her agents and her lawyers Waruhiu & Gathuru Advocate. That her lawyers ensured that the requisite procedure was followed in the transaction. She tendered as her evidence copies of several documents as her evidence on the history of the purchase and the conveyance into her name which were produced as PExh 1-12 as listed earlier in this judgement. I therefore embarked on analysis of the documents to determine the legality of the process. My observations were that vendors title No. Kwale/Diani/ 494 is the only entry (No. 2) in the proprietorship section. The Sale price in the Land Control Board Application and Transfer dated March 10, 1993 reveals the purchase price as Kshs. 300,000 contrary to the sale agreement figure of Kshs. 680,000 executed by the plaintiff. The sale agreement does not disclose the particulars of the vendor neither is it signed by them. It is not witnessed. While it may have been assumed that the plaintiff signed on a blank copy to be finalized by the advocates this was not the case. PW1 on cross examination by Mr. Gitonga told this court that both parties were present during the signing of the original sale agreement which was the copy before the court. In addition, the sale agreement is not executed by the plaintiff in the usual manner for a limited company. With regards to the transfer the vendors address in the title document and the transfer are different and again execution by the plaintiff is not certified/attested by their lawyer. The receipts No. 486, 569, 572 totaled Kshs 692,000 from M/ S Waruhiu & Gathuru Advocates on account of the plaintiff for the purchase of 'Diani Settlement' including stamp duty. However, no corresponding evidence was tendered to prove that the funds were transmitted to the vendor. The title deed was then issued to the plaintiff on March 29, 1993. The advocate who undertook the conveyance transaction, the vendor and the agents were not called as witnesses to buttress the plaintiffs claims.
31. Having looked at the steps taken allegedly by the plaintiff's lawyer it is clear the said lawyers did not conduct due diligence of the property at the land registry before the sale was sealed. Indeed, upon cross examination PW1 stated that she believed that since she was represented by a lawyer the law firm undertook a search before the plaintiff purchased the suit property. That during that time there was trust. Infact she emphasized during cross examination that there was no way the vendor could have duped her. It is apparent that the plaintiff first search was undertaken in the year 2011. This is very fundamental and I think this is where the rain started beating the plaintiff. According to her testimony she visited the suit property and was shown the beacons and she was satisfied. This in conveyance practice is not enough.
32. Clearly based on the evidence produced by the plaintiff there are many gaps in this conveyance which without an explanation dampens its veracity. It cannot stand the legal test and legality. I therefore find that the plaintiff has failed on a balance of probability to prove that she purchased the suit property as alleged. She must have been taken for a ride.

## 3) Whether the transmission to the 1<sup>st</sup> and 2<sup>nd</sup> defendants was lawful?

33. The 1<sup>st</sup> and 2<sup>nd</sup> defendants who are also plaintiffs in the counterclaim, claim their entitlement of the suit property was by virtue of their customary rights and that they inherited the land from their grandfathers. They too like the plaintiff narrated a history of how the suit property belonged in the family culminating into its transmission to the 1<sup>st</sup> and 2<sup>nd</sup> defendant being registered as trustees. In support of their case they produced as evidence Title deed for Kwale/Diani/S.S/494, Consent from the Land Board for Kwale/Diani S.S 494, Title Deed for Kwale/Diani/S.S. 3698, Transfer for



Kwale/Diani/S.S 3698 dated January 19, 2018, Consents from the Land Board for Kwale/Diani/S.S 3698, Letter of Consent dated 27<sup>th</sup> December, 2017 , Transfer dated April 6, 1994, Mutation and Map dated October 21, 2017, Official search for Kwale/Diani/S.S. 3698, Letter from the Land Adjudication officer dated 5<sup>th</sup> September, 2017, Discharge of charge for parcel No. Kwale/Diani/Settlement Scheme/494 and Green Card. DW2 Ms Siema Mwanguni Land Registrar produced 7 of the said documents as contained in the records at the lands file.

34. From my understanding the 1<sup>st</sup> and 2<sup>nd</sup> defendants base their claim on customary law rights since the suit property belonged to them by inheritance from their father's lineage. This is the reason after their parents died they approached the Kadhi's Court and caused it to be registered in their names as trustees on behalf of the rest of the family. DW1 gave the history starting with the process of land adjudication and exhibited a letter dated September 5, 2017 from the District Land Adjudication Officer confirming that at the time of demarcation the names Abdalla Hamisi Mwangandaro and Juma Rashid Vyoni existed on the accountability list for plot No. 494. The 1<sup>st</sup> defendant informed this court that the former was the 1<sup>st</sup> defendant father and the later his father's brother. This document was not controverted by the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendant. For me this document demonstrates a link of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the suit property. From the history given which goes back to adjudication in my view any inquiry into their possession or actual occupation of the land, would have revealed that such possession was permitted by customary law and practice. It has been urged that the 1<sup>st</sup> and 2<sup>nd</sup> defendant had not demonstrated their occupation of the land. The plaintiff neither adduced any photographs to controvert the defendants evidence that they were in occupation of the suit property she did not take photographs thereof. Even if occupation was being contested it is not a requirement for a customary trust to prove the same. What is clear from the evidence adduced by the 1<sup>st</sup> defendant is that the land was before registration customary family land. In this analysis I'm well guided by the Supreme Court enunciation and principles on customary trust and customary law claims in *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR.
34. Based on the foregoing and the evidence of the Land Registrar confirming the 1<sup>st</sup> and 2<sup>nd</sup> defendants as the registered proprietors of plot no. Kwale/Diani/S.S/494 this court finds that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have on a balance of probabilities established that they are absolute proprietors thereof as trustees. This therefore determines the question as to which party or parties was the lawful proprietor of the suit property. It is the 1<sup>st</sup> and 2<sup>nd</sup> defendants as trustees.
35. Further in view of the above finding and the evidence of the Land Registrar confirming that plot No.Kwale/Diani/S.S/ 3698 arose from the mutation in plot no. Kwale/Diani/S.S/494, this court makes a finding that the said plot was properly carved out including the rest of the subdivisions herein.
36. Based on the finding that the plaintiff was not the bonafide purchaser of title No. Kwale/Diani/ 494 and that the transmission of plot no. Kwale/Diani/S.S/494 was lawful, this court finds no wrong doing on the part of the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants.
37. In the end I find that the plaintiff has failed to prove its case on a balance of probabilities and I dismiss her suit. I find that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have proved their counterclaim on a balance of probabilities and I allow it on the following terms; -
- i. A declaration is hereby issued that Salim Abdala Mwakamki and Juma Rashid Vyoni the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the lawful owners of the parcel of land known as Kwale/Diani/S.S/494 as trustees.



- ii. That a permanent order of injunction is hereby issued against the plaintiff by its servants, agents, assigns and or representatives and or servants from trespassing on the parcel of land known as Kwale/Diani/S.S/494.
- iii. The plaintiff shall bear the costs of the suit and counterclaim.

**DELIVERED AND DATED AT KWALE THIS 18<sup>TH</sup> DAY OF JULY, 2022**

**A.E. DENA**

**JUDGE**

**Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:**

Mr. Kariuki for the Plaintiff

Mr Gitonga for 1<sup>st</sup> 2<sup>nd</sup> & 3<sup>rd</sup> Defendant.

No appearance Mr. Mwanjeje for the 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> Defendant

Mr. Denis Mwakina- Court Assistant. parcel of land known as

