



REPUBLIC OF KENYA



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**King & 4 others v Mwatsumiro & 5 others (Civil Suit 367 of 2017)
[2022] KEELC 15042 (KLR) (9 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15042 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 367 OF 2017
M SILA, J
NOVEMBER 9, 2022**

BETWEEN

**CELESTINE ANN KING 1ST PLAINTIFF
CELESTINE ANNA VON MOLTKE 2ND PLAINTIFF
MICHAELA NINA CARMICHAEL 3RD PLAINTIFF
SUSAN GERALDINE KNOTT 4TH PLAINTIFF
ANTHONY BASIL MITTON 5TH PLAINTIFF**

AND

**SAID HASSAN MWATSUMIRO 1ST DEFENDANT
MSHENGGA VUYAA RUGA 2ND DEFENDANT
FATUMA O ZONGA 3RD DEFENDANT
OMAR H KITENGEELE 4TH DEFENDANT
MOHAMED HASSAN VYONI 5TH DEFENDANT
DISTRICT LAND REGISTRAR, KWALE COUNTY 6TH DEFENDANT**

JUDGMENT

(Plaintiffs holding title to the Plot Kwale/Diani Beach Block/76 which they inherited; part of this plot having been acquired by the Government for the creation of the Diani Beach road in the year 1971; the plot then being subdivided into the plots Kwale/Diani Beach Block/248 and 249, with the road being the Plot No. 249 and the original proprietor being expected to keep the title to Plot No. 248 being the remainder; however no title to the Plot No. 248 being issued to the proprietor who continued to retain the original title i.e Plot No. 76; subsequently in the year 2006, a fresh title



to Plot No. 248 being issued to the 1st – 5th defendants; plaintiffs filing suit to have this title of the 1st – 5th defendants cancelled and for orders to compel issuance of this title to them; 1st – 5th defendants claiming to have good title on the basis that they got an allotment letter to this Plot No. 248 and were later issued with title; court holding that the only person who ought to have been issued with title to the Plot No. 248 was the proprietor of the Plot No. 76, or her successors, as this was the remainder after part of it was acquired by the Government; title to the remainder could not issue to another person; title of the 1st – 5th defendants to the Plot No. 248 cancelled and orders made for title to issue to the plaintiffs)

A. INTRODUCTION AND PLEADINGS

1. This suit was commenced through a plaint which was filed on 12 October 2017. It is the case of the plaintiffs that they are the bona fide registered owners of the land parcel Kwale/Diani Beach Block/76 measuring 10.3 acres (also sometimes referred to herein simply as Plot No.76). It is pleaded that this land was initially part of a larger parcel of land, being LR No. 5004/38 comprising of 20.6 acres, originally owned by one Mrs. B. Lusso (now deceased). It is pleaded that in the year 1948 LR No. 5004/38 was purchased by Mrs. Nina Mitton (deceased) who subdivided it into two portions, each measuring 10.3 acres in the year 1955. In the early 1970s, there was conversion of titles to the regime of the Registered Land Act (cap 300) (repealed), and as a result, Mrs. Mitton was issued with a certificate of lease to the title Mombasa/M.S/Diani Beach Block/76 on 22 October 1971, for a term of 99 years from 22 July 1953. It is averred that in the year 1971 or thereabout, a portion of the plot No. 76 land was compulsorily acquired by the Government for the Diani Tourist Road and the Registry Index Map (RIM) was accordingly amended. The acquisition resulted into two new parcels being parcels No. 248 and 249 respectively, with the latter comprising of the land that was acquired for a road. In the year 2001, through succession proceedings, the plaintiffs acquired the property of Mrs. Mitton and were issued with a Certificate of Lease. In the year 2016, they approached the 6th defendant with a view to obtain title to the parcel No. 248 (the remainder after the road acquisition). They then discovered that another title had been issued for the same plot No. 248, to the 1st – 5th defendants on 4 October 2006. It is their position that this second title is fraudulent. In this suit, the plaintiffs seek the following orders :-
 - a. A declaration that the plaintiffs are the bona fide owners of all that land known as Plot No. 248 (being the remainder of the parcel of land to wit title no. Kwale/Diani Beach Block/76).
 - b. A declaration that the plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land to wit Plot No. 248 (being the remainder of the parcel of land to wit title No. Kwale/Diani Beach Block/76).
 - c. An order directing the 6th defendant to cancel the certificate of lease issued to the 1st – 5th defendants with respect to the plot Kwale/Diani Beach Block/248 on 4th October 2006.
 - d. An order directing the 6th defendant to issue the plaintiffs with a Certificate of Lease with respect to Plot No. 248.
 - e. A permanent injunction to restrain the defendants by themselves, their servants or agents or otherwise howsoever from selling, transferring, disposing off and/or interfering in any other manner whatsoever with the plaintiff's parcel of land known as Plot No. 248.
 - f. Costs of the suit.
 - g. Interest.



2. The 1st – 5th defendants filed a defence and counterclaim. They pleaded that they have no claim against the plot Kwale/Diani Beach Block/76. They pleaded to be the rightful registered proprietors of the Plot Kwale/Diani Beach Block/248. They stated that they were issued with their Certificate of title after following due process and payment of requisite dues, inter alia, applying for the lease, executing an allotment letter, and executing the lease document. In their counterclaim, they have asked for the following :-
 - a. That the plaintiffs' suit be dismissed with costs.
 - b. A declaration that the 1st – 5th defendants are indeed the bona fide owners of the Plot No. Kwale/Diani Beach Block/248 having legally obtained and in possession of a certificate of lease issued to them by the 6th defendant.
 - c. An eviction order be issued against the plaintiffs to vacate Plot No. Kwale/Diani Beach Block/248.
3. There was filed a reply to defence and defence to counterclaim with the plaintiffs more or less asserting their title to the land. They inter alia pleaded that the Plot Kwale/Diani Beach Block/248 (also herein sometimes referred to simply as Plot No. 248) was not available for allocation to the 1st – 5th defendants as the same belonged to them.
4. The 6th defendant, Land Registrar, Kwale, filed defence, where she inter alia pleaded that the register for Kwale/Diani Beach Block/76 measuring 10.3 acres, was opened on 21 October 1971. On the same date, a lease was registered in favour of Nina Mitton. On 22 January 1973, a caution was registered on behalf of the Government claiming 0.69 acres by compulsory acquisition. A new certificate of lease was issued on 10 November 2000, and on 2 August 2001 the property was transferred to the plaintiffs, and they were issued with a Certificate of lease. It is contended that the reliefs sought by the plaintiff are not available nor merited.

B. EVIDENCE OF THE PARTIES

5. PW-1 was Celestine Anne King, the 1st plaintiff. She explained that the 2nd and 3rd plaintiffs are her nieces, being daughters of her deceased sister, while the 4th plaintiff is her sister and the 5th plaintiff her brother. She testified that her mother (Mrs. Mitton) purchased the land in dispute, then identified by the title LR No. 5004/38, comprising of 20.3 acres. In 1955, it was subdivided into two equal portions of 10.3 acres each. One was sold and the other was retained. The one retained was registered as LR No. 9003. In the year 1971, the Government acquired 0.69 acres of it for the Diani Beach Road. Her mother was paid Kshs. 2,380.50/= for what was acquired. At the time of acquisition, the land was still described as LR No. 9003. This numbering later changed to Kwale/Diani Beach Block/76. Her mother died in the year 2000 and willed her property to her 3 children and two grandchildren who comprise the plaintiffs. They filed for administration and obtained a confirmed grant after which the property was transferred to them. They acquired the certificate of lease in their name on 2 August 2001. Regarding possession of the land, she testified that they have all along been in possession, as this was their family home. On it is a house that was developed in the year 1956 soon after the land was subdivided. She testified that they pay land rates and rents for the land. In the year 2015, they sought to apply for the title to Kwale/Diani Beach Block/248, the remainder after the acquisition of the road, the road having been titled as Kwale/Diani Beach Block/249 (hereinafter also sometimes simply referred to as Plot No. 249). It is then that they found that a title to Kwale/Diani Beach Block/248 had already been issued to the 1st – 5th defendants. She stated that this title of the defendants covers the exact land on the ground as Kwale/Diani Beach Block/76 after excision of the road. She had a letter from the Director of Surveys confirming that this Plot No. 248 is the remainder of Plot No. 76 after acquisition of the road. She



- pointed at the title issued to the 1st – 5th defendants and observed that it was issued on 4 October 2006. She testified that at that time they still held their title to Plot No. 76 and the Government could not therefore issue title to somebody else.
6. Cross-examined by Mr. Omiti, learned counsel for the 1st – 5th defendants, she reiterated that when LR No. 5004 was subdivided into two, it gave rise to the Plots LR No. 9002 and 9003. This LR No. 9003 is what became registered as Kwale/Diani Beach Block/76 and from it 0.69 acres was hived off for the road. They (plaintiffs) acquired the property through succession while still registered as Kwale/Diani Beach Block/76. They considered subdividing the land, and instructed a firm of surveyors, M/s Hime & Zimmerlin. The surveyor advised that the land is now Plot No.248, and no longer Plot No. 76, though the file to Plot No. 76 (in the land registry) had not been closed. It is from the surveyor that she came to know that the excised road was given the Plot No. 249, and the remainder, Plot No. 248. She has no claim over this Plot No. 249 as her mother was compensated for it. She expected the Lands Office to be aware that the Plot No. 76 is the same as Plot No. 248.
 7. Cross-examined by Mrs. Waswa, learned State Counsel on behalf of the 6th defendant, she testified that they had not applied for the new title No. 248 as they were not aware that there was a new number until Mr. Zimmerlin came to do the survey. They were advised to surrender their title to Plot No. 76 so as to get title to Plot No. 248.
 8. Re-examined, she stated that they wished to regularize their title but found that somebody else had already been issued with title to the Plot No. 248.
 9. PW-2 was Ephraim Maina Rwingo, a licenced land surveyor based in Mombasa. He has worked as a surveyor since the year 1989. He testified that he was instructed by the advocates of the plaintiffs to do a due diligence survey over the titles to Plots No. 76 and 248. He obtained the survey maps. He referred to various survey plans drawn when the road was acquired and the amended Registry Index Map (RIM). He also obtained a Gazette Notice of 16 January 1971 which was for the acquisition of the road. He prepared a report whereupon he concluded that the Plots No. 76 and 248 occupy the same position on the ground and thus refer to the same land. He testified that after the acquisition of the road, new Green Cards to Plots No. 248 and 249 were issued showing the Government as proprietor. One needed to surrender the old title (that is title to Plot No. 76) to get title for the new numbers after which a new lease would be prepared. He testified that the land could not be allocated afresh since it already belonged to someone. He affirmed that LR No. 9003 was the same as the Plot No. 76.
 10. Cross-examined by Mr. Omiti, he testified that he obtained the requisite maps and also visited the ground. He testified that FR No. 147/4 (the survey plan for the excision of the road) was approved and authenticated on 30 November 1981 and the Registry Index Map amended on 15 December 1981. The title LR No. 9003 was issued under the regime of the Registration of Titles Act (RTA). He stated that it was around the year 1969 that the RTA titles were converted into the regime of the Registered Land Act (RLA) and it is at that time that LR No. 9003 became Kwale/Diani Beach Block/76. After the survey plan FR 147/4, the Plot No. 76 was subdivided into Plots No. 248 and 249, and ceased to exist after the RIM was amended on 15 December 1981. Thus after 1981, Plot No. 76 ceased being on the map but not in the registry. He explained that a letter needed to be written by the Director of Surveys to the Commissioner of Lands, informing him that the old plot has ceased to exist and that new plots have been created, so that he can amend his records. He did not know whether such letter had been written. He did inspect the register at the Kwale Land Registry and it was confirmed that the Plots No. 248 and 249 exist. He explained that the Green Card register will reflect the Government as owner. He testified that Plot No. 76 shows that it measures 10.3 acres and that the Government excised from it 0.2733 Ha. What remained as Plot No. 248 was 3.895 Ha. He testified that the registry



still retained the old plot No. 76 as being in existence. He explained that once surrendered the owner will now get title to Plot No. 248 with acreage of 3.895 Ha.

11. Cross-examined by Mrs. Waswa, he testified that the Certificate of Lease to Plot No. 76 was before the compulsory acquisition. The certificate was registered on 22 October 1971, though the award for the acquisition was on 17 June 1971.
12. Re-examined, he reiterated that Plot No. 248 came about after part of it was acquired. He observed that the letter of allotment to the 1st – 5th defendants shows that what is being allotted is 4.1 Ha which does not reflect the change (in acreage) after the compulsory acquisition. He elaborated that the change of a title number does not mean that the property has reverted back. He explained that Green Cards refer to the Government as owner whereas the White Cards show the leasehold owner.
13. With the above evidence, the plaintiffs closed their case.
14. DW-1 was Siema Mwanguni, a Land Registrar in Kwale lands registry. She gave the history of the land in dispute. She testified that the land was originally LR No. 9003 registered on 7 December 1956 in name of Nina Mitton. There was acquisition of 0.69 acres. She stated that LR No. 9003 was closed as an RLA title was applied for. She had the Green Card to this title No. 76 opened on 21 October 1971 with 10.3 acres as the acreage. A leasehold title is registered on the encumbrance section of the Green Card being in favour of Nina Mitton for a term of 99 years from 22 July 1953. The White Card was opened on the same day, that is 21 October 1971, in name of Nina Mitton. There are some caveats in favour of Kenya Power & Lighting but which are not significant to our case. On 22 January 1973, a caution was registered on behalf of the Government, claiming compulsory acquisition of 0.69 acres. There was a reissue of the title (to Plot No.76) on 10 November 2000 and thereafter transfer to the personal representatives of Nina Mitton on 2 August 2001. She testified that upon subdivision, a letter should have come from the Chief Land Registrar surrendering the Lease. The surrender was to be prepared by the Director of Land Administration. Upon subdivision, the new number was to be communicated by the Director of Survey to the Director of Land Administration. The Director of Land Administration would then prepare a surrender of lease and forward to the Chief Land Registrar. The Chief Land Registrar would then forward it to the District registries. She stated that the lessee is usually copied in the letters. Once they receive the documents, the lessee is to come and surrender their title. He would bring the original title and they (the registry) would then register the surrender and register the new lease. In the old card, they would enter the words “surrender of lease in consideration of subdivision” and provide the new number. A fresh Green Card would be opened and they would note the lease in the encumbrance section. They will then open a new White Card where the lessor would be the Government and the lessee would be indicated. If a title is reserved for a road, the Green Card will show “road reserve” and they will not open a White Card (i.e, there will be no leasehold title issued on it). She testified that from where she sits, she cannot tell that there was a subdivision of Plot No. 76 as there was no entry in the White Card. They did not get correspondence that Plot No. 76 is subdivided and therefore they still have it retained in the name of the plaintiffs. She declared that no fraud has been perpetuated by the office of the Land Registrar. She did not know how title to the Plot No. 248 came about as they only register documents from their headquarters in Nairobi. She had no correspondence from the Chief Land Registrar relating to Plot No. 248 and the property still remains as Plot No. 76 in name of the plaintiffs.
15. Cross-examined by Mr. Omiti, she testified that the plaintiffs ought to have written a letter to the Director of Land Administration requesting for a new lease. She testified that in the Cards in her possession, there is no indication that Plot No. 76 was subdivided to give effect to Plot No. 248 and 249. Her cards only show that the Government acquired 0.69 acres. They therefore do not know of the existence of Plots No. 248 and 249. She however did not check in her registry if there are Cards to



- Plots No. 248 and 249. She could not tell what transpired as she had not checked the records of Plot No. 248 and 249.
16. Cross-examined by Mr. Njuguna, learned counsel for the plaintiffs, she conceded that it would have been relevant to come with the registers of Plots No. 248 and 249. She claimed not to know of the Plot No. 248 until the morning of the day that she gave evidence. She stated that what she has relating to Plot No. 76 shows the position prior to the subdivision. She stated that when a portion of land is surrendered, the remainder would belong to the existing owner and is not available for allocation.
 17. Re-examined, she reiterated that what her records show is that part of plot No. 76 was acquired but does not reflect the subdivision and that she has nothing in her records to substantiate existence of Plot No. 248 and 249.
 18. The 1st – 5th defendants called Mshenga Vuyaa Ruga, the 2nd defendant, as their first witness. He testified that around the years 1998/1999 their parents started following title to the land which they put down in writing. In the year 2001, they got an allotment letter and were asked to pay some fees. They did that and in the year 2006 they were issued with a leasehold title. He claimed that they pursued title to the land because they were informed that their forefathers used to live on it. He testified that when he was young, he used to go to the land with his grandfather where there was a shrine. He testified that they wrote a letter dated 30 October 1999 to the Commissioner of Lands and they were advised to take it to the Head of State. He claimed that they took the letter to the late President Moi at State House, Mombasa, on 27 December 1999. The President placed his signature on the letter. After many follow-ups, they were eventually issued with an allotment letter on 4 July 2001. On 4 October 2006, they were issued with a Certificate of Lease by the Land Registrar, Kwale. They went to take possession but found it difficult to enter as there is security at the gate. He had an official search confirming ownership to Plot No. 248 and a letter dated 4 October 2006 from the Commissioner of Lands forwarding the lease for registration. There was objection to production of these documents as they were not originals which objection I sustained and thus these documents were never produced as exhibits.
 19. Cross-examined by Mr. Njuguna, he conceded that the letter dated 30 December 1999 was not authored by him and neither was his name indicated on it as one of the persons requesting for the land. He never applied for the land. He acknowledged that the allotment letter required them to make payment. He claimed that they made payment but he had no receipt to prove this. He had nothing tangible to show that the land belonged to their forefathers and acknowledged that they attempted to move in after the year 2006. He claimed not to be aware that Plot No. 76 and Plot No. 248 are the same on the ground. Cross-examined by Mrs. Waswa, he testified that they did not conduct a search before applying to be allotted the land. No ground report was done when they applied for the land. He stated that they paid for the allotment through a banker's cheque but he did not have it. He alleged that they pay land rates but he did not have any receipt to prove this. Re-examined, he stated that he was nephew of one Rama Matano one of the persons indicated in the letter that applied for the land.
 20. The 4th defendant also testified. He had a witness statement which he adopted. In it, it is stated that on 30 October 1999, their family representative, one Said Bakari Ndege, wrote to the Commissioner of Lands to be allocated the land parcels, No. 149, 151, 294, 248 and 987 in Diani Beach Block, on the basis that it belonged to their forefathers. The Commissioner of Lands issued them with an allotment letter dated 4 July 2001. They were required to pay Kshs. 232, 300/=. They were subsequently issued with a lease and Certificate of Lease to the Plot No. 248. He stated that he did a search on 30 August 2017 and it showed them as owner of the property. He alleged that they have always been in possession. Cross-examined by Mr. Njuguna, he acknowledged that he is not among those who applied for the land and his name is not in the letter dated 30 October 1999. He could not authenticate that the President signed on this letter and acknowledged that the President could not allocate land belonging



to somebody else. He conceded that in their counterclaim they have asked for vacant possession because the plaintiffs are in possession of the land. He did not have any receipt for payment of the stand premium indicated in the allotment letter. He could not tell when such payment was made. He did not have any letter of acceptance of the allotment letter. They did not obtain a search before applying for the land. He conceded that he has nothing to show to demonstrate that the land belonged to their forefathers. He did not have the original title issued in their favour as he claimed that it is in possession of another family member. He was not aware of the Plot No. 76 though he was aware that the plaintiffs claim the same land which they have title to. On compulsory acquisition for the road, none of their forefathers was the one compensated. He expected that their title would issue less than the portion acquired for the road.

21. With the above evidence, the 1st- 5th defendants closed their case.

ANALYSIS AND FINAL DISPOSITION

22. I invited counsel to file written submissions and I have taken note of the submissions filed by Mr. Njuguna, learned counsel for the plaintiff, Mr. Omiti, learned counsel for the 1st – 5th defendants, and Mrs. Waswa, learned State Counsel for the 6th defendant. I hold the following view.
23. The plaintiffs have come to court holding title to Kwale/Diani Beach Block/76. It is their case that part of this land was acquired by the Government for the Diani Beach road. This road was given the title Kwale/Diani Beach Block/249. It is their case that the remainder became Kwale/Diani Beach Block/248. It is therefore their assertion that they are the ones entitled to be issued with title to Kwale/Diani Beach Block/248. They therefore seek that the title to Kwale/Diani Beach Block/248 issued in the names of the 1st – 5th defendants be cancelled. On the other hand, the 1st – 5th defendants contend that they have good title to this Plot No. 248. They claim that this land belonged to their forefathers and that they made an application to be allotted the land through a letter dated 30 October 1999. They say that they presented this letter to President Moi who countersigned it and said “mambo yenu nimemaliza.” They then followed up and they got an allotment letter. They claim that they made payment for the Stand Premium in the allotment letter and they were subsequently issued with a Lease and a Certificate of Lease.
24. In his submissions, Mr. Omiti, partly ventured to submit that the two titles No. 76 and No. 248 relate to different properties. That is a clear misadventure on his part and I cannot take that submissions seriously, for even the parties themselves agree that they are disputing over the same land.
25. From the evidence tendered, the history of the land is very clear to me. The land in dispute was hived of the title LR No. 5004/38. This plot, LR No. 5004/38 had been purchased by Mrs. Mitton in the year 1948. In the year 1955, she subdivided what she had purchased into two equal portions of 10.3 acres each. They were registered as Plot No. 9002 and 9003. The plot LR No. 9002 was sold and is not in issue. The other plot LR No. 9003 is what was retained by Mrs. Mitton. The plaintiffs availed as part of their exhibits, the title to LR No. 9003 in name of Nina Mitton. These were titles issued under the RTA regime. There was conversion of titles in the late 1960s and LR No. 9003 was converted and registered as Kwale/Diani Beach Block/76. The fact that LR No. 9003 was converted to Kwale/Diani Beach Block/76 was confirmed by the Land Registrar. The acreage for this title Kwale/Diani Beach Block/76 was the same as that indicated in the former RTA title, that is 10.3 acres. In the year 1971, the Government wished to acquire a portion of this land for the creation of the Diani Beach Road. This was not the only parcel that was affected by the acquisition. The plots that were to be acquired are in Gazette Notice No. 961 dated 8th April 1971. It will be seen in that notice, that 0.69 acres was being acquired from the plot LR No. 9003, in name of Nina Mitton. Now, upon acquisition, the land needed to be subdivided so that the remainder is separated from what was acquired for the road. This



resulted in the creation of the plot numbers Kwale/Diani Beach Block/248 and 249 out of the Plot No. 76. The road was the Plot No. 249 and the remainder to Nina Mitton was the Plot No. 248. This fact is confirmed by the letter from the Director of Surveys dated 12 April 2017. From the evidence of PW-2, the amendment of the Registry Index Map took some time as the amendment was done in the year 1981. That is when the subdivisions were now reflected in the maps. However, Mrs. Mitton continued to hold her old title to the Plot No. 76 which was taken over by the plaintiffs in the year 2001 upon the demise of Ms. Mitton. The plaintiffs to date have held this title. It is when they wished to subdivide their land that they realized that a title to the Plot No. 248 has already been issued to the 1st – 5th defendants hence this suit.

26. To me the issue is obvious. Upon the Plot No. 76 being subdivided into the Plots No. 248 and 249, title needed to be granted to Mrs. Mitton for the Plot No. 248. It appears that it was not, for reasons that I may not fully comprehend, though some explanations were provided by both PW-2 and the Land Registrar. Maybe the elaborate process of providing a new lease in her name was never done by the Director of Land Administration, but this did not take away her entitlement to this Plot No. 248. That remained to be her plot because it was the residue after the Government acquired what it needed for the road. If the Government was to issue a lease for this Plot No. 248, it could only be issued in the name of Mrs. Mitton, or her successors, and nobody else. If the Government wished to issue this title to somebody else, then the Government needed to first acquire it compulsorily. It could not, at a whim, take away the proprietary rights of Mrs. Mitton over this land and give it to somebody else.
27. It however appears that a purported title was issued to the 1st – 5th defendants without taking into account that the Government had already allotted this land to Mrs. Mitton and her successors. Ms. Mitton's leasehold title still subsisted, for it was for a period of 99 years from 1953, and the Government could not now issue another grant to another person. I have no hesitation in holding that the purported leasehold title issued to the 1st – 5th defendants for the Plot Kwale/Diani Beach Block/248 is a fraud and an affront to the proprietary rights of the plaintiffs. Even the manner in which this title was issued is very questionable. The 1st – 5th defendants claim that they were issued with an allotment letter which they paid for. There is no evidence of any payment for the allotment. The title issued also reads the whole 10.3 acres yet we all know that if title is to issue to Plot No. 248 then it will be 10.3 acres less 0.69 acres that was acquired. How this lease was issued is a mystery even to the Land Registrar who came to testify. Although the Land Registrar claimed not to be aware of the fact that Plot No. 76 was subdivided, she deliberately failed to address herself to the genesis of the Plot No. 248. Her excuse was that she had not looked at the records for Plot No. 248. It is an excuse that I am unable to buy because she must have been aware that the dispute herein is that title to Plot No. 248, which was a subdivision of Plot No. 76, was issued to the wrong person. I wonder how she thought fit to give evidence on Plot No. 76 but close her eyes to the Plot No. 248. But I need not dwell too much on how the title to the Plot No. 248 was issued to the 1st – 5th defendants for the process of issue of this title to the 1st – 5th defendants is actually immaterial. What is important, is that there was no other person that was entitled to be issued to a lease to the Plot No. 248, other than Mrs. Mitton, or her successors who happen to be the plaintiffs herein. This was the remainder after part of her land was acquired and it cannot be that title to the remainder would be given to someone else.
28. It is apparent to me that the 1st – 5th defendants wished to take advantage of the loophole that Mrs. Mitton was yet to be issued with a fresh lease to the Plot No. 248 and manipulated the system to get themselves registered as proprietors of this plot. The title to the 1st – 5th defendants could not issue in absence of fraud. A title that is fraudulently acquired is prone to cancellation as provided for in section 26 (1) of the *Land Registration Act* which provides as follows :-

26. Certificate of title to be held as conclusive evidence of proprietorship.



- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

29. It will be seen from the above, that title is impeachable if acquired through fraud or misrepresentation to which the title holder is proved to be a party, or where the title is acquired illegally, unprocedurally, or through a corrupt scheme. I am not persuaded as to the innocence of the 1st – 5th defendants. I am not in doubt that they schemed to grab the title of the plaintiffs. They claimed that they wrote a letter to be allotted that land and that the President endorsed their letter. They never brought the original of that letter. How they got title when their names were not even in the said letter demonstrates the fraudulent scheme. They claimed to have subsequently gotten an allotment letter which they paid for. This court was never shown the original of that allotment letter despite the 1st – 5th defendants seeking adjournment in order to avail it. They also claimed that they paid the money in the allotment letter, yet not a single receipt was produced. In any event, if I am to believe their letter of 30 October 1999, it follows that they were aware that this land is already titled to somebody else, for they did provide the actual plot number in that letter. They were also aware that the land is occupied by the plaintiffs. In my opinion, the 1st – 5th defendants were full participants in the fraudulent scheme and their title is impeachable pursuant to section 26 (1) (a) of the *Land Registration Act*. Even if they were innocent, their title is still impeachable pursuant to section 26 (1) (b) of the Act, for it was issued illegally and unprocedurally, given that the only person who was entitled to the Plot No. 248 was Nina Mitton and/or her successors. The result is that there is no substance in the contention of the 1st – 5th defendants that they are the rightful proprietors of the Plot No. 248. Their counterclaim must be dismissed and it is hereby dismissed. It flows from the foregoing that the title of the 1st – 5th defendants is a title which is not legally issued and must be cancelled. It is hereby cancelled.
30. I am persuaded that the plaintiffs have made out a case that they are the ones who are entitled to be proprietors of the Plot No. 248. I hereby order the Director of Land Administration, the Director of Surveys, and the Chief Land Registrar to follow all required procedures to see to it that title is prepared and delivered to the plaintiffs for the parcel Kwale/Diani Beach Block/248.
31. The only issue left is costs. I have no hesitation to order the 1st – 5th defendants to shoulder the costs of both suit and counterclaim. I also do not think that the 6th defendant was as innocent as portrayed. She never came to court to demonstrate how her office came to issue title to the Plot No. 248 to the 1st – 5th defendants. Indeed, in her evidence she acknowledged that she did not come with the records of the said parcel. In those circumstances, the 6th defendant cannot escape culpability. The costs of the plaintiffs' suit will thus be shouldered jointly and/or severally by the 1st – 6th defendants. The 1st – 5th defendants will however solely bear the costs of the counterclaim to the plaintiffs.
32. Judgment accordingly.

DATED AND DELIVERED THIS 9TH DAY OF NOVEMBER 2022



JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
MOMBASA

Delivered in presence of :-

Mr. Njuguna, instructed by M/s Njuguna, Kahari & Kiai Advocates, for the plaintiffs.

Ms. Marube holding brief for Mr. Omiti, instructed by M/s Ngeri, Omiti & Bush Advocates, for the 1st – 5th defendants.

No appearance for the Attorney General for the 6th defendant.

Court Assistant – Wilson Rabong'o.

