



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 15 OF 2010

NGOMENI SWIMMERS LIMITED.....PLAINTIFF

VERSUS

- 1. ZEDI AHMED SAID**
- 2. THE HON. ATTORNEY GENERAL**
- 3. THE LAND REGISTRAR KILIFI**
- 4. THE CHIEF LAND REGISTRAR**
- 5. THE DIRECTOR OF SURVEYS**
- 6. THE DIRECTOR OF LAND ADJUDICATION AND SETTEMENT**
- 7. THE REGISTRAR OF TITLES MOMBASA**
- 8. TABU TUVA KHONDE**
- 9. KAHINDI KAINGU GONDA.....DEFENDANTS**

AND

ST. PATRICK'S HILL SCHOOL LIMITED.....INTERESTED PARTY

JUDGMENT

BACKGROUND

1. This suit was initially instituted by the Plaintiff against the 1st Defendant via a Complaint dated and filed herein on 22nd February 2010. That Complaint has over the time been amended on 28th July 2010, 19th November 2014 and on 2nd March 2015, during which time eight more Defendants were enjoined to the suit. Pursuant to a consent order executed on 15th September 2014 this suit was consolidated with *Malindi HCCC No. 31 of 2006* and *HCCC No. 87 of 2009* which had also been filed by the respective parties herein against each other.

2. By their Further Amended Complaint dated and filed herein on 2nd March 2015, Ngomeni Swimmers Ltd (the Plaintiff) pray for Judgment to be entered against the nine Defendants as follows: -

a) A permanent injunction do issue to restrain the 1st Defendant, his servants, agents, workmen and by any other persons whomever (sic) from entering into and/or remaining upon or encroaching into any of the Plaintiff's properties comprised in Grant Nos. 33295 and 33298 respectively that is to say all (those) piece(s) of land known as LR No. 24845 and LR No. 24846 respectively and from in any manner otherwise interfering with the Plaintiff's quiet possession, use and enjoyment (thereof).

b) An order directed at the 3rd and 4th Defendants to come and effect the cancellation of the 1st Defendant's title Ngomeni Squatter Settlement Scheme/1361.

b (i) An order directed at the 3rd and 4th Defendants to cause and effect a cancellation of all titles overlapping on the Plaintiff's parcels of land being Plot No. 20119 Mamburi; Plot No. 20130 Mamburi; Plot No. 24845 Mamburi and Plot No. 24846 Mamburi.

b(ii) A declaration that the Plaintiff is the lawful owner and proprietor of a leasehold interest in Plot No. 20119 Mamburi; Plot No. 20130 Mamburi; Plot No. 24845 Mamburi and Plot No. 24846 Mamburi being Grant Nos. CR 21651; CR 33295; CR 332298 and CR 33297 respectively.

b (iii) A declaration that the title deeds issued to the 1st, 8th and 9th Defendants by the 3rd and 4th Defendants are irregular, unlawful, null and void.

b (iv) A permanent injunction do issue restraining the 8th and 9th Defendants, their servants, agents or otherwise howsoever from entering into and/or remaining upon or encroaching into any of the Plaintiff's property comprised in Grant Nos. CR 26151, CR 33295, CR 332298 and CR 33297 respectively and from in any manner otherwise interfering with the Plaintiff's quiet possession, use and enjoyment of the properties above stated.

b (v) A declaration that the actions of the 3rd and 4th Defendants in issuing and registering title deeds on land that was already registered and certificates of leases issued in the names of the Plaintiff were irregular, unlawful, null and void.

B (vi) An order directed at the 3rd and 4th Defendants to cancel the title deeds belonging to the 1st, 8th and 9th Defendants issued under the Registered Land Act, Cap 300 (repealed).

b (vii) A declaration that all the title deeds under the Ngomeni Squatter Settlement Scheme overlapping on the Plaintiff's parcels of land are invalid, null and void.

B (viii) A declaration that the actions of the 6th Defendant in creating a Squatter Settlement Scheme on land that had already been adjudicated upon was irregular, invalid, unlawful, null and void.

b (ix) A declaration that the actions of the 5th Defendant in creating Registry Index Maps on a section without ascertaining the position on the ground is irregular, unlawful, invalid, null and void.

b (x) An order for vacant possession of the suit properties.

b (ix) An order for compensation for the Plaintiff's loss of use as against the Defendants for the remainder of the lease period.

b (xii) General damages for loss of use with interest.

b (xiii) An order for compensation in favour of the Plaintiff by the Defendants at the prevailing market rates.

b (xiv) Damages for trespass and interest thereon.

b (xv) In the alternative and without prejudice to the prayers aforesaid, damages for loss of use and compensation for the current market value of the properties and improvements standing thereon.

c) Costs of this suit and interest thereon at Court rates.

C(i) Any other or further orders this Honourable Court may deem just to grant.

3. Those prayers arise from the Plaintiff's contention that at all times material, it was the registered proprietor of the Leasehold interest comprised in the said Grant Nos. CR 26151, 33295, 33298 and 33297 whose leases commenced effective 1st July 1994, 1st December 1994, 1st August 1995 and 1st October 1994 respectively.

4. The Plaintiff asserts that since its registration as aforesaid, it has been in quiet possession of the properties until the year 2010 when it was informed that the 1st Defendant as well as other residents of the area had been issued with title deeds under a different regime but to the same parcels of land already registered in its name. The Plaintiff further came to learn that sometimes in the year 2010, the 6th Defendant had commenced an adjudication exercise in the area despite the existence of its leases, culminating with the issuance of certificates of title by the 3rd and 4th Defendants under the Registered Land Act.

5. It is the Plaintiff's case that the correct procedure for cancelling or recalling titles as laid down by the law was not followed by the 3rd, 4th and 7th Defendants. The Plaintiff has hence been unable to occupy, develop or even utilize the suit properties due to the resistance and hostility they are facing from the local residents who were issued with the overlapping titles as a result whereof the Plaintiff has suffered loss and damage.

6. Zedi Ahmed Said (the 1st Defendant) is however opposed to the grant of the orders sought. In his Further Amended Defence and Counterclaim dated 19th May 2015 and filed herein on 20th May 2015, the 1st Defendant denies that the Plaintiff is registered as proprietor of

the leasehold interest in the suit properties.

7. The 1st Defendant further denies that the Plaintiff has been in quiet possession of the suit properties until the year 2010 as alleged or at all and invites the Plaintiff to strict proof. On the contrary, the 1st Defendant avers that the suit property is their ancestral land and that they commenced the process of acquiring title thereto long before the Plaintiff obtained its registration.

8. The 1st Defendant further avers that there was a suit in Court involving the whole of Ngomeni Squatter Settlement Scheme and that the same was decided in favour of the Government. It is the 1st Defendant's case that he is the registered proprietor of Ngomeni Squatter Settlement Scheme/1361 measuring approximately 9.48 Ha having been so registered on 27th July 2007 and hence the Plaintiff is not entitled to the orders sought herein.

9. By way of his Counterclaim, the 1st Defendant accuses the Plaintiff of encroaching upon his said parcel of land on or about 6th March 2010 and proceeding thereafter without any colour of right to fell and cut various coconut trees thereon. Accordingly, the 1st Defendant urges this Court to dismiss the Plaintiff's suit with costs and to instead enter Judgment in his favour for:

a) A declaration that the 1st Defendant is the rightful and legal proprietor of Plot No. 1361 Ngomeni Squatter Settlement Scheme.

b) Damages of trespass and interest thereon at Court rates.

c) A permanent injunction against the Plaintiff by itself, servants, agents, employees and/or directors from encroaching, trespassing, damaging, wasting and/or in any other manner howsoever and whatsoever from interfering with the Defendant's ownership, occupation, possession and/or enjoyment of proprietorship rights in Plot No. 1362 No. 1361 Ngomeni Squatter Settlement Scheme.

d) Costs of the Counterclaim and interest thereon at Court rates.

10. Similarly, the Honourable the Attorney General, the Land Registrar Kilifi, the Chief Land Registrar, the Director of Surveys, the Director of Land Adjudication and Settlement and the Registrar of Titles Mombasa (the 2nd, 3rd, 4th, 5th, 6th and 7th Defendants respectively) are opposed to the suit. In their joint Statement of Defence dated 10th June 2013 but filed herein on 20th June 2015, they deny that the Plaintiff is the registered proprietor of the leasehold interest in the suit property.

11. The 2nd to 7th Defendants further deny that they illegally engaged in an adjudication process and hence illegally issued titles to the suitland as stated by the Plaintiff and invite the Plaintiff to strict proof. They assert that the suit as filed does not disclose any cause of action against themselves and urge the Court to dismiss the same with costs.

12. Tabu Tuva Khonde and Kahindi Kaingu Gonda (the 8th and 9th Defendants) are also opposed to the Plaintiff's claim. In their joint Statement of Defence and Counterclaim as amended on 17th March 2015 and filed herein on 20th March 2015, they equally deny that the Plaintiff is the registered proprietor of the leasehold interest in the suit properties. They also deny that the Plaintiff was in possession of the same until the year 2010 as stated in the Plaintiff's claim.

13. The 8th and 9th Defendants assert that due process and due diligence was followed and undertaken by the Kenyan Government whereby notices were issued in newspapers calling upon those holding adverse titles to present them to the Government for redress prior to the adjudication process that was conducted in the area. It was only thereafter that the area was mapped and surveyed before titles were issued to all those residing within the Ngomeni Squatter Settlement Scheme under the Registered Land Act, Cap 300.

14. The 8th and 9th Defendants further assert that their parcel Nos. 787 and 894 within the Settlement Scheme have never overlapped any of the Plaintiff's alleged parcels of land and any overlap existing in any report is purely manufactured by the Plaintiff to suit his interest and convenience in this matter.

15. By way of their Counterclaim, the 8th and 9th Defendants pray that the Plaintiff's suit be dismissed and that Judgment be issued in their favour as follows: -

1A. That the Honourable Court be pleased to issue a permanent injunction against the Plaintiff, restraining itself, its agents, employees, workmen, servants and/or any other third parties from trespassing and/or laying claim to and/or dealing in any way whatsoever with land parcel numbers Ngomeni Squatter Settlement Scheme/787 and Ngomeni Squatter Settlement Scheme/894.

1B. That the Honourable Court be pleased to issue a permanent injunction against the Plaintiff restraining itself, its agents, employees, workmen, servants and/or any other 3rd parties from trespassing and/or laying claim to and/or dealing in any way whatsoever with all parcels of land within Ngomeni Settlement Scheme registered under the old Registered Land Act, Cap 300 Laws of Kenya.

2. That the Honourable Court be pleased to cancel, delete and/or declare as null and void the registration of the Plaintiff's parcel of land numbers 20130, 24845 and 23846 comprised in Grant Nos. 33295 and 33298.

3. That the Plaintiffs be condemned to pay the costs of this suit.

4. That the Honourable Court be pleased to grant any other order as it may deem fit in the circumstances.

16. By a Notice of Motion application dated 24th February 2015, St. Patrick's Hill School Ltd applied to be enjoined as an Interested Party in the proceedings. That application was allowed by the Honourable Liz Gicheha, Deputy Registrar of this Court on 17th March 2015. Subsequently, on 30th March 2015, the Interested Party filed a Defence and Counterclaim wherein it denies that the Plaintiff is the registered proprietor of the leasehold interest comprised in the cited Grants.

17. The Interested Party avers that on the contrary, it is the bonafide proprietor of Ngomeni/Squatters Settlement Scheme/892 measuring 5.38 Ha with an indefeasible title having been issued with the same on 26th May 2011 after purchasing it from one Katana Charo Suleiman. The Interested Party further avers that contrary to the Plaintiff's position, no certificates of lease were issued in 1994 over the suit properties as the adjudication process had not been concluded due to some litigations upon the Ngomeni Area.

18. Further and in addition to the foregoing, the Interested Party asserts on a without prejudice basis that the leases purportedly issued between 1994- 1995 to the purported registered owners were irregularly, unlawfully and fraudulently obtained as the adjudication process had been halted due to the suit filed by Coastal Aquaculture Ltd which had laid a claim on the Ngomeni Peninsular.

19. The Interested Party further denies that the Plaintiff was registered as a Sub-Lessee of the suit properties and that it had been in quiet possession thereof. It avers that prior to purchasing the said property in 2011, it conducted an official search which indicated that the registered owner was the said Katana Charo Suleiman.

20. It is further the Interested Party's case that this suit is res judicata as the Plaintiff herein had originally filed HCC No. 18 of 2013 (OS) praying for similar reliefs but which suit was dismissed with costs to the Defendants and the Interested Party.

21. By way of its Counterclaim the Interested Party prays for dismissal of the Plaintiff's suit with costs and for Judgment to be entered for itself as against the Plaintiff for: -

i) A declaration that the Interested Party is the bona fide owner of Plot LR No. Ngomeni/Squatters Settlement Scheme /982.

ii) A declaration that the Interested Party is entitled to exclusive and unimpeded right of possession and occupation of all that Ngomeni/Squatter Settlement Scheme/892.

iii) A permanent injunction restraining the Plaintiff whether by (itself) or (its) servants or agents or otherwise from interfering, remaining on, selling, alienating, charging, leasing and/or dealing with LR No. Ngomeni/Squatters Settlement Scheme/892.

iv) And/or in the alternative the current value of the LR No. Ngomeni/Squatters Settlement Scheme/892 which amount shall be determined at the hearing of this suit.

v) Costs of this suit and the Counterclaim.

vi) Interest on (iii), (iv) and (v) above at commercial rates.

The Plaintiff's case

22. At the trial herein, the Plaintiff called one witness who testified in support of its case.

23. PW1- Mario Muzzio is a Director and Shareholder of the Plaintiff. He told the Court he was a Partner of one Daniel Ricci who had given him a Power of Attorney dated 11th July 2011 to prosecute this case. PW1 told the Court the Plaintiff Company was incorporated on 8th June 1994 and that it owns various parcels of land some of them Title Nos. 20119, 20130, 24845 and 24846.

24. PW1 testified that they acquired three of the parcels being Nos. 20130, 24845 and 24846 in 2005. The other one being No. 20119 was acquired in 1994. At the time of acquisition, the properties were bushy and inaccessible. The Plaintiff then prepared access roads, removed sand dunes and replaced the same with garden soil. Thereafter they connected the properties to electric power.

25. PW1 testified that no one interfered with the developments they were making on the suitlands. However, at some point in time when the Plaintiff was about to put up a building, the 1st Defendant entered into Plot No. 20130 and 24845 and started constructing some structures thereon. The Plaintiff reported the matter to the Police and also wrote a demand letter on 10th February 2010 asking the 1st Defendant to stop.

26. PW1 told the Court the 1st Defendant did not stop his activities on the land. Instead, he showed the Plaintiff's directors a title for Plot 1361. When the Plaintiffs enquired from the Land Registrar about the new title, the Land Registrar responded that the title was erroneously issued.

27. On cross-examination, PW1 conceded that the titles he had produced were Government leases. He further conceded that he had not produced any allotment letters or their application for allocation. He told the Court he did not know when Ngomeni Settlement Scheme was created but agreed it could have been in 1996. PW1 further admitted that his Plaintiff as Further Amended on 2nd March 2015 did not include the 1st Defendants Plot No. 1361 as one of those overlapping his own.

28. PW1 told the Court he was aware the 1st Defendant has a freehold title for Plot No. 1361. He further told the Court the Government gave him a lease even though the others had been given freehold titles. He had not challenged the manner in which the Scheme was set up. He however insisted the Government could not put up a scheme on private land.

29. PW1 testified that he had not seen the public notice issued by the Commissioner of Lands in regard to the Scheme and so he did not respond to the same. He further told the Court he was aware the land was previously referred to as Coast Aquaculture. He did not however know if the said Coast Aquaculture was also claiming the land.

30. On further cross-examination, PW1 told the Court he could not recall the names of the people from whom they bought the parcels of land. He could not recall if the company carried out a search before they purchased the properties. He did not have any documents of transfer as some of the documents were destroyed by a fire at his house.

31. PW1 conceded that he was one of the Directors of Kenlands which had transferred one of the Plots to the Plaintiff. Being such a director he told the Court it was possible no money may have exchanged hands. The Sale Agreement was probably burnt in the fire that broke out in his house.

32. PW1 testified that he is a Kenyan citizen by naturalization and that they founded the Plaintiff in 1994. He conceded that they may have bought land from Sea Wall Ltd but told the Court he did not know those behind the company.

The Defence Case.

33. On their part, the Defendants called a total of six (6) witnesses who testified on their behalf at the trial.

34. DW1- Zedi Ahmed Said is a resident of Mamburi and the 1st Defendant herein. He testified that he inherited the then unregistered parcel of land from his father who had been farming the land since time immemorial. It was only in the early 1990s that their family was informed that the land would be surveyed and registered. The Scheme was later established. In 1994, the land was adjudicated and his Plot became Parcel No. 1361 Ngomeni Settlement Scheme.

35. DW1 testified that as they waited for their title deed, they got information from the Adjudication Committee that an organization called Coast Aqua Culture Ltd had some interest in the land. The issuance of the titles got delayed after the said organization filed a case against the Commissioner of Lands. They later lost the case and filed another before the Comesa Court of Justice. Titles were only issued to the squatters upon conclusion of the cases.

36. DW1 further told the Court that a few titles were issued to the area residents in 2007 by then President Mwai Kibaki who assured the squatters that they will get their titles. However, on or about 3rd January 2008, DW1 saw Mario Muzzo commencing construction of a wall on the neighbouring plots. That wall later extended to DW1's plot where his coconut trees were uprooted and destroyed.

37. DW1 told the Court that he then caused a demand letter to be written by his Advocates to the said Mario Muzzo demanding a stoppage of the encroachment. Instead in 2010, Mario Muzzo filed a case against DW1 and continued with the destruction of coconut trees through the construction. He urged the Court to declare the land to be his own and to grant an order for compensation.

38. In cross- examination, DW1 testified that the land belonged to him before the Scheme was set up even though he had no documents. He further told the Court the Plaintiff started going into the land in 2008. He further told the Court the Plaintiff had built a road on the land using force. He had never seen the Plaintiff's title although DW1 knew they were issued in the year 2000. DW1's title was issued in 2007.

39. DW1 further told the Court he had lived on the land since the 1980s and that land adjudication was not done until 1994. He insisted the Plaintiffs had no land in the area and that they had filed a case as Coastal Aqua Culture Ltd and had lost the case.

40. DW2- Purity Wanjiru Mwangi is an Assistant Director of Lands based at the 6th Defendant's office. She testified that from the records held at their offices Plot No. 787 belonged to the 8th Defendant. It had not been discharged and not title had been issued therefor.

41. DW2 further told the Court that Plot No. 892 was allocated to Katana Charo and that it was discharged and the proprietor was issued with a title. Plot No. 894 on the other hand belongs to the 9th Defendant and is yet to be discharged. Plot No. 1361 was allocated to the 1st Defendant, it was discharged in 2012 and has a title.

42. On cross- examination, DW2 told the Court that Ngomeni was a Squatter Settlement Scheme and not an adjudication area. It was declared a Scheme in 1994. Their department would put a Charge when the demarcation was done to enable them recover the costs for the demarcation. In respect of Plot No. 1361, the proprietor had paid and obtained a discharge.

43. DW2 further testified that once a Settlement Scheme is surveyed, people are given Letters of Offer which have conditions among them to pay a certain amount of money. Once that money is paid one gets a discharge. The process of allocation does not take away the ownership of the land.

44. DW3- Stellah Gatwiri Kinyua is the Land Registrar Kilifi. She told the Court that from their records, Plot No. 1361 was allocated to the 1st Defendant and a title issued to him on 27th July 2007. Plot No. 894 was allocated to the 9th Defendant and title issued on the same day. It is however still charged to the Settlement Fund Trustees(SFT). Plot No. 787 was allocated to the 8th Defendant who was also issued with title on 27th July 2007. It remains charged to the Settlement Funds Trustees.

45. DW3 further testified that Plot No. 892 was allocated to Katana Charo Suleiman. It was discharged on 13th October 2009 and was thereafter sold to St Patrick's Hill School (the Interested Party herein).

46. DW4- Grace Tabu Tuva Khonde is a farmer and the 8th Defendant herein. DW4 told the Court that the Plaintiff has all along laid a claim to a wide area within Ngomeni Settlement Scheme under titles purportedly issued under the Registration of Titles Act while the area had been adjudicated and titles were issued under the Registered Land Act.

47. DW4 testified that adjudication of the land within Ngomeni area started way back in the late 1980s but was held in abeyance due to a claim by Coastal Aquaculture Ltd that it had acquired the entire Ngomeni Peninsular in the same manner now being claimed by the Plaintiff. She told the Court that all titles claimed by the Plaintiff were issued after the land had been adjudicated in 1994.

48. On cross- examination, DW4 told the Court she had been on the land ever since she got married in 1974. She testified that land adjudication was done in the area in 1994 and that the 1st Defendant has been their neighbor ever since. She told the Court she owns Plot No. 787 having been allocated by the Government. It is about 10.0 acres in size.

49. DW5- Kahindi Kaingu Gonda is a farmer and the 9th Defendant herein. He told the Court he is the proprietor of Plot No. 894 Ngomeni Settlement Scheme and that he has lived there for some 45 years. He reiterated the position taken by DW4 and told the Court he had a title deed for his parcel of land measuring eight acres.

50. On cross- examination, he told the Court he was aware it is Daniel Ricci who had sued him in Court. He told the Court the said Daniel has no land in their area.

51. DW6- Ruffas Karima Kalama is the Principal Land Registrar at the Ministry of Lands. He told the Court he works under the Chief Land Registrar (the 4th Defendant) and that on 13th November 2019, he wrote to the District Land Registrar Kilifi in regard to a complaint about Ngomeni Settlement Scheme. In that letter, he told the Registrar that the titles issued under the Settlement Scheme were the genuine titles recognized by the Government.

52. DW6 told the Court there were other titles issued under the Registration of Titles Act (RTA) which were said to be overlapping with those issued under the Registered Land Act (RLA). The Commissioner of Lands had issued notices informing anyone who held titles under the Registration of Titles Act to return the same and make their claim within 21 days. Those who never appeared had their titles nullified as the Government was auditing the titles.

The Interested Party's Case

53. The Interested Party herein called a single witness in support of their case.

54. IPW1- Ellah Kagwitha Kang'ethe is a business lady and the Executive Director of the Interested Party. She told the Court that sometimes on 9th April 2011, the Interested Party entered into a Sale Agreement for the purchase of LR No. Ngomeni Squatters Settlement Scheme/892 measuring 5.38 Ha from the then registered owner Katana Charo Suleiman at a consideration of Kshs 20,000,000/-.

55. IPW1 testified that prior to the execution of the Agreement, she conducted an official search and confirmed that the said Katana Charo Suleiman was the registered proprietor of the land. On 21st April 2011, both parties proceeded to obtain the relevant consent and the land was transferred and registered in the Interested Party's name on 26th May 2011.

56. IPW1 further testified that on 8th February 2013, the Plaintiff filed **HCCC No. 18 of 2013** seeking inter alia a declaration that the registration and issuance of title deeds in respect of Plot No. Ngomeni Squatter Settlement Scheme 1882, 892, 811, 986, 1025, 987, 988, 787, 1887, 1888 and 1373 which overlapped its properties was erroneous, illegal and unlawful. That suit was dismissed with costs to the Respondents and the Interested Party herein on 20th December 2013.

57. IPW1 told the Court that the Plaintiff had since failed to pay their costs causing them to institute **Winding Up Cause No. 1 of 2014** against them. Sometimes in March 2015, the Interested Party was shocked to learn that the Plaintiff had filed in the matter herein a copy of a map purporting to be evidence that there is an overlap of titles in the area where the Interested Party's School land is situated. For that reason, the Interested Party filed an application to be enjoined as an Interested Party herein and counterclaiming to be declared as the bona fide owner of its parcel of land.

Analysis and Determination

58. I have perused and considered the pleadings filed by all the parties herein, the testimonies of the witnesses and the evidence adduced at the trial. I have equally perused and considered the detailed rival submissions placed before me by the Learned Counsels appearing for the respective parties herein.

59. The Plaintiff Company urges this Court to restrain the 1st, 8th and 9th Defendants from entering into or remaining upon its properties comprised in Grant Nos. 33295, 35297 and 332298. They also urge the Court to direct the 3rd and 4th Defendants to cancel the 1st Defendant's title No. 1361 Ngomeni Squatters Settlement Scheme and any other titles overlapping on the Plaintiff's parcels of land otherwise known as LR No. 20119, 20130, 24845 and 24846 Mambui.

60. The Plaintiff equally wants this Court to declare that it is the lawful owner of the listed properties and that the title deeds issued to the

1st, 8th and 9th Defendants or any other title overlapping its own are irregular, unlawful, null and void. They also pray for an order of vacant possession and for compensation for loss of use of its land and/or for the current value of the suit properties.

61. In support of those prayers, the Plaintiff told the Court that sometimes in 2005, its directors Daniel Ricci and Mario Nuzzo owned the properties known as LR No. 20130 (CR No. 33295) on a leasehold interest for 99 years in the name of their other company known as Kenland Enterprises Ltd. Later on, 21st December 2005, the said property was transferred by the said two directors to the Plaintiff herein.

62. It was further the Plaintiff's case that its directors also happened to be the directors of a third company known as Ibacho Investment Company Ltd. In the same year 2005, the said Ibacho Investment Company Ltd purchased LR No. 24845 (CR No. 33298) from Messrs Seaowl Holdings Ltd. That property was on 16th December 2005 transferred by Ibacho to the Plaintiff.

63. Testifying through its director Mario Nuzzo (PW1) the Plaintiff told the Court that they then started developing the properties which were surrounded by bushes and submerged in sand, with no access roads. The Plaintiff company expended a great deal of money to construct access roads, put up murrum and install garden soil and electricity to the properties. Sometimes in 2010 however, the 1st Defendant herein trespassed onto the properties and commenced the building of shanties thereon.

64. The Plaintiff reported the trespass to the Police and engaged the services of a lawyer who on 10th February 2010 dispatched a demand letter through the area Chief to the 1st Defendant. The Plaintiff told the Court that the 1st Defendant did not however cease from the illegal trespass.

65. According to the Plaintiff, it then came to learn that the 1st Defendant and other residents of the Ngomeni area had been issued with title deeds under a different regime but over the same parcels of land that were already in its name. It was then that the Plaintiff came to learn that sometimes in the year 2010, the Director Land Adjudication and Settlement (the 6th Defendant) had commenced an adjudication exercise in the area despite the existence of the leases a situation which led to the issuance of certificates of titles by the 3rd and 4th Defendants to the concerned individuals.

66. The Plaintiff told the Court that as a result of the issuance of the new titles, it has not been able to occupy, develop or even utilize the suit properties due to the resistance and hostility they are facing from the local residents. It is their case that the correct procedure for cancelling and/or recalling titles as laid down by the law was not followed and that they have as a result suffered loss and damage.

67. The 1st, 8th and 9th Defendants however denied the Plaintiff's claim. It was their case instead that they had been using their respective parcels of land from time immemorial and that following land adjudication in the area in 1994, they were subsequently registered as the proprietors of the portions they occupied after the Government declared the area a Settlement Scheme. That was the same position taken by the Interested Party whose position was that it had purchased Plot No. 892 from the originally registered proprietor thereof for value without notice of the Plaintiff's interest therein.

68. As I understood it, the Plaintiff's suit is premised on the grounds that it is the absolute proprietor of LR Nos. 20119, 20130, 24845 and 24846 and that it was an innocent purchaser thereof for value without notice. The Plaintiff told the Court that upon acquisition of the suit properties, it had taken possession thereof and expended huge sums of money in the development thereof.

69. The Plaintiff is aggrieved that despite the developments and the existence of its lease over the suit premises, the Government as represented herein by the 2nd Defendant declared the Ngomeni Area a Settlement Scheme, adjudicated the land and proceeded to issue various parties, including the 1st, 8th and 9th Defendants as well as the predecessor in title to the Interested Party with various titles which titles encroach and overlap upon the Plaintiff's parcels of land.

70. From the material placed before me, it was evident that the Government established the Ngomeni Settlement Scheme sometime in the year 1994 for the purpose of settling landless people who had been squatting on the land. That process of adjudication came to be concluded around the year 2007 when the Government started issuing the squatters with title deeds. There however emerged some complaints that some of the titles issued to the Squatters under the Registered Land Act (Cap 300, now repealed) had overlapped with other leasehold titles previously issued to private individuals under the Registration of Titles Act.

71. Testifying before this Court on the circumstances leading to the creation and establishment of the Ngomeni Settlement Scheme, the Principal Land Registrar Ruffas Karima Kalama (DW6) told the Court that when the complaints came about, the Government decided to audit the existing titles by calling upon any one with such claims to present the same for consideration.

72. One such public notice published in the Daily Nation Newspaper of Monday 24th January 2011 by the then Commissioner of Lands Zablon Mabea reads in part as follows: -

PUBLIC NOTICE

NGOMENI SETTLEMENT SCHEME IN MAGARINI DISTRICT, KILIFI COUNTY

The Government is in the process of finalizing issuance of Titles to the beneficiaries of land in Ngomeni Settlement Scheme in Magarini District of Kilifi County.

It has however been reported that there are other people claiming to have titles or letters of allotment to parcels of land within the above scheme and specifically the area described as hereunder, that is: -

.....

Under the circumstances, NOTICE is hereby issued to all persons claiming to have Letters of Allotment or Titles within the above Settlement Scheme to make their claim within (Twenty-One)21 days from the date of this Notice. Any such claim accompanied by documentary evidence, should be presented to the District Land Officer Kilifi or Chief Land Registrar Nairobi.”

Failure to do so with(in) the given time, any Allotment and Grant within Ngomeni Settlement Scheme above described shall be deemed to have been forfeited and the parcel of land reverted to the Government.”

73. The Plaintiff’s sole witness told the Court that they did not see the advert even though they later became aware of the same. While that notice came a year after the Plaintiff had instituted this suit against the 1st Defendant herein, it was apparent that no action was taken to comply therewith as sought by the Government whose agencies were later enjoined in the suit as the 2nd to 7th Defendants.

74. That being the case, it was first and foremost clear to me that the 1st, 8th and 9th Defendants as well as the Interested Party herein derived their claim to the disputed parcels of land from the establishment of the Ngomeni Settlement Scheme by the Government of the Republic of Kenya.

75. Secondly and consequent to the above, it was clear to me that it was incumbent upon the Plaintiff then to demonstrate that it had an existing right to the land upon which the Scheme or portions thereof had been established and that by so establishing the Scheme, the said rights had been infringed upon by the 2nd to 7th Defendants.

76. According to the Plaintiff, they had purchased the suit properties from Messrs Kenlands Enterprises Ltd and Ibacho Investment Company Ltd. As it turned out, the two directors of the Plaintiff herein- Mario Nuzzo (PW1) and Daniel Ricci are also the directors of the two companies said to have transferred the suit properties to the Plaintiff.

77. In support of their case, the Plaintiff produced provisional certificates of title after telling the Court that they had lost the original documents following a fire that gutted PW1’s residential house at Kijiwetanga in October 2009.

78. Given that the root of their titles were under challenge in this suit, one would have expected the Plaintiff to provide the genesis of the said title deeds and to demonstrate how its sister companies acquired the land in contention. As the Court of Appeal stated in ***Munyu Maina –vs- Hiriam Gathiha Maina (2013) eKLR***: -

“.....When a registered proprietor’s root of title is under a challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

79. The provisional certificates produced by the Plaintiff herein are self-evident that the suitlands fell under the Government Lands Act (Cap 280) and the Registration of Titles Act (Cap 281). The steps to be followed in allocation of Government land were laid down in ***Abdi Mohamed Kahiya –vs- Fatuma Haji Kasim (2019) eKLR*** as follows: -

- 1. An application is made to the County Council under which the subject plot is situated.***
- 2. The application then goes through an allocation committee who carry out their independent investigation as to the availability of the property by preparing a ground report which reveals whether there are occupants occupying the property or not.***
- 3. The Physical Planner also prepares a Part Development Plan to ascertain the position on the ground especially on whether the plot is occupied or not. After the PDP is published, the Director of Physical Planning submits the same to the Minister for approval.***
- 4. If the Committee is certain about the availability, it then recommends and sends a recommendation to the Full Council Meeting where the same is either adopted or rejected.***
- 5. Should the full Council adopt the recommendations, then minutes are forwarded to the Commissioner of Lands for the purposes of issuing a letter of allotment in accordance with the PDP.***
- 6. The Applicant is then to make an acceptance of the offer by making payments and fulfilling the conditions set out in the letter of offer.***

80. At the trial herein, it was however clear that PW1 as the Plaintiff’s sole witness could not give a proper recollection as to how their sister companies had acquired the properties. Nothing was mentioned about the price at which they acquired the same or any fees paid for allotment. There were no Sale Agreements or evidence of any direct allocation of the properties to the sister companies. And there was no evidence of any purchase price paid or any fees paid for the transfer to their names.

81. That being the case, it was not possible to vouch for the legality of the Plaintiff’s titles. As Angote J observed in ***Peter Kamau Njau –vs- Emmanuel Charo Tinga (Malindi ELC Case No. 156 of 2014)***: -

“.....the mere production of a title deed without any evidence from the District Land Registry to show the existence of the title is a dangerous path that cannot afford this Court the opportunity to conclusively state that the Plaintiff acquired the suit property lawfully. Where the fact of registration of an individual as a proprietor of a parcel of land is challenged, the proprietor of such land can only prove that fact by producing a certified copy of the extract of the register or an official search. Even after the production of such documents, the registered proprietor has to show that the land was registered in his name lawfully.”

82. In the matter before me, nothing was placed before the Court to demonstrate how the Plaintiff's sister companies acquired the titles which they then purported to transfer to the Plaintiff. At any rate, while the Plaintiff gives a detailed list of alleged overlaps to its parcels of land at paragraph 9 (vii) of its Plaint as further amended on 2nd March 2015, no survey Report was produced in Court and no surveyor was called as a witness to shed light on the alleged overlap and/or the extent thereof.

83. While it is indeed a truism that this Court has a duty to uphold the Constitution of Kenya as submitted by the Plaintiffs herein, this Court can only protect such rights that are recognized and demonstrated to exist. There was no such demonstration in the matter before me.

84. Accordingly, and without more, the Plaintiff's suit must fail. I dismiss the same with costs.

Dated, signed and delivered at Malindi this 19th day of February, 2021.

J.O. OLOLA

JUDGE