



**Moorgate Investments Limited v Romsard Limited & 3 others;  
Chief Land Registrar & 3 others (Interested Parties) (Civil Case  
67 of 2016) [2025] KEELC 479 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 479 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL CASE 67 OF 2016  
EK MAKORI, J  
FEBRUARY 6, 2025**

**BETWEEN**

**MOORGATE INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**ROMSARD LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BENTER CAROLYNE OTIENO ..... 2<sup>ND</sup> DEFENDANT**

**IBRAHIM ABDI ATHMAN ..... 3<sup>RD</sup> DEFENDANT**

**MARGARET NYACHAE KAPTUIYA CHEBOIWO ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**THE CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**THE REGISTRAR OF COAST LAND TITLES ..... INTERESTED PARTY**

**THE REGISTRAR OF COMPANIES ..... INTERESTED PARTY**

**THE ATTORNEY GENERAL ..... INTERESTED PARTY**

**JUDGMENT**

1. The plaintiff has sued the defendants in this matter, seeking the following reliefs:
  - a. A declaration that the plaintiff is the lawfully registered proprietor of the leasehold interest in apartments E1, E2, E12, and E18, the staircase accessing apartments E12 and E18, the bank premises and terrace A erected on all that land known as plot No. 603 title No. LT.41 FOLIO 60/A FILE 11222.



- b. A declaration that the 3<sup>rd</sup> defendant is not and has never been a director or a shareholder of the plaintiff and that the transfer of sub-lease executed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants dated 16<sup>th</sup> October 2015 in respect to apartments E1, E2, E12, and E18 in favour of the 1<sup>st</sup> defendant was null and void and incapable of divesting the plaintiff of its lawful interest in the suit premises.
  - c. A declaration that the 4<sup>th</sup> defendant is not and has never been the company secretary of the plaintiff and all company secretarial documents prepared by her in that capacity are null and void and are of no legal effect.
  - d. A declaration that the registration of the sublease dated 16<sup>th</sup> October 2015, concerning apartments E1, E2, E12 and E18 erected on all that land known as plot No. Portion 603 Title No. LT. 41. Folio 60/A file 11222 was unlawful, null, and void and did not divest the plaintiff of its lawful interest therein.
  - e. An order that the 1<sup>st</sup> defendant does surrender, within fourteen [14] days from the date of judgment, the sub-lease dated 16<sup>th</sup> October 2015 concerning apartments E1, E2, E12, and E18 erected on all that land known as plot No. Portion 603 title No. LT.41 Folio 60/A file 11222 to the 2<sup>nd</sup> interested party for cancellation and reinstatement of the plaintiff as the registered owner of the said leasehold interest.
  - f. An order that the 2<sup>nd</sup> interested party rectifies the plot No register. Portion 603 title No. LT.41.Folio 60/A file 11222 by canceling all entries therein about the transfer of apartments E1, E2, E12, and E18 to the 1<sup>st</sup> defendant and reinstating the plaintiff as the registered leasehold proprietor of the said apartments, the staircase accessing apartments E12 and E18, the bank premises and the terrace erected on plot No. Portion 603 title No. LT.41 FOLIO 60/A file 11222.
  - g. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants, whether by themselves or through their servants, employees, agents, or through anyone deriving title through them or otherwise howsoever from entering, using, occupying, leasing, transferring, charging, selling, interfering with or in any manner whatsoever in dealing adversely with apartments E1, E2, E12 and E18 or any of the plaintiff's premises erected on or forming part of all that land known as plot No. Portion 603 title No. LT.41 folio 60/A file 11222.
  - h. A permanent injunction restraining the 4<sup>th</sup> defendant, whether by herself or through her servants, employees, agents, or through anyone deriving title through them or otherwise howsoever from having any dealings with the corporate secretarial matters of the plaintiff and from acting and or holding herself out as the company secretary or officer of the plaintiff and this order be served on the 1<sup>st</sup> interested party and the 1<sup>st</sup> interested party be directed to file the same in the company file CPR/2011/62586.
  - i. Costs incidental to the suit.
  - j. Any other or further relief this court may deem appropriate to award.
2. The 1<sup>st</sup> and 3<sup>rd</sup> defendants entered appearance, filed defences, and counter-claimed as follows:
- a. A declaration that the 1<sup>st</sup> defendant is the lawful and indefeasible sublease proprietor of all those premises described as E1, E2, E12, and E18, standing on Portion No. 603 Malindi since the 16<sup>th</sup> October 2015.
  - b. A declaration that the sale and registration of the premises known as E1, E2, E12, and E18 standing on Portion No. 603 Malindi, popularly known as Blue Marlin Resort, by the



plaintiff's directors, attorneys, agents, and or representatives on the 16<sup>th</sup> October 2015 was proper, lawful and regular.

- c. An order for the plaintiff to account for all the profits, rents, and/or income received since the 16<sup>th</sup> of October 2015 every month until the Court renders its judgment in this suit from the premises known as E1, E2, E12, and E18 on Portion No. 603 Malindi popularly known as Blue Marlin Resort.
  - d. An order that one Matteo Bottini, who has allegedly instructed the filing of this suit, furnish sufficient security for costs before determining this suit.
  - e. An order that the plaintiff by itself, servants, directors, shareholders, and/or agents do forthwith vacate and hand over possession of premises known as E1, E2, E12, and E18 on Portion No.603 Malindi to the 1<sup>st</sup> defendant.
  - f. General damages for trespass to premises known as E1, E2, E12, and E18 standing on Portion No. 603 Malindi and interest thereon at court rates from the 16<sup>th</sup> October 2015 to the time of the judgment of the court or giving of possession of the suit premises to the 1<sup>st</sup> defendant.
  - g. A permanent injunction restraining the plaintiff by itself, its directors, shareholders, agents, representatives, and/ or agents from in any other manner, howsoever and whatsoever, dealing with, interfering with, possession, occupying, and/ or living in any part of the premises known as E1, E2, E12 and E18 on Portion No.603 Malindi LT. 41 Folio 60/A file 11222.
  - h. Costs of this suit and interest thereon at court rates.
3. The 4<sup>th</sup> defendant did not enter an appearance nor mount a defense, and the interested parties did not participate in these proceedings.
  4. Based on the evidence and materials presented to the court, the issues this court must determine involve the validity and legality of the leasehold interest in apartments E1, E2, E12, and E18, the staircase serving apartments E12 and E18, the bank premises, and terrace A situated on the land identified as plot No. 603 title No. LT.41 FOLIO 60/A FILE 11222. This includes whether the acquisition of the suit premise by the 1<sup>st</sup> defendant from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants (sic Moorgate Investment Limited) occurred through fraud, misrepresentation, or unlawful or corrupt means. If the plaintiff's reliefs claimed in the plaint are sustainable, if the counter-claim by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants is viable, and who should be responsible for the costs of the lawsuit.
  5. Put it this way, the dominant feature in this matter is the root of the leasehold title held by the 1<sup>st</sup> defendant vis-à-vis that of the initial holder – the plaintiff. Who between the plaintiff and the 1<sup>st</sup> defendant should be the rightful owner of the suit property?
  6. It will be noted that this matter has been in our court system since 2016, with parties filing applications and counter applications, stalling the determination of the issues raised herein. Elsewhere in my ruling dated 31<sup>st</sup> May 2023, this court expressed dismay at how counsels handling the matter were dragging their feet towards finalizing it.
  7. Further, it will be noted that the apartments in contestation were closed with the parties' consent, adopted by this court on 5 September 2016 (Angote J.). Since then, neither party in this dispute has used the apartments economically—a state of affairs this court frowned on in the ruling dated 31<sup>st</sup> May 2023.



8. It will also be reckoned that there was a criminal matter, Malindi Criminal Case No. 733 of 2018, over the same subject matter, in which the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants were accused of fraudulently orchestrating the transfer of the suit properties from the plaintiff to the 1<sup>st</sup> defendant. The accused were acquitted under Section 210 of the *Criminal Procedure Code*. I will refer to the proceedings in the said matter where necessary.
9. At the close of both the plaintiff's and the defendant's cases, parties were directed to file written submissions. As the record shows, an extension was accorded to the parties to comply, and a judgment date was reserved. The plaintiff complied. The other parties did not.
10. Matteo Bottini, who testified as PW2, adopting his witness statements dated 17<sup>th</sup> March 2016 and 18<sup>th</sup> November 2016, said that acting on the resolution of the plaintiff company dated 17<sup>th</sup> March 2016, the plaintiff company owned some apartments standing on plot No. 608, being apartments No. E1, E2, E12 and E18. He had hired Nicholas Ruwa to manage the property, called him, and notified him that some people had gone to take over the said apartments, claiming purchase interest. They had demanded the keys to the said apartments. Benter Carolyne Otieno, her co-director (the 3<sup>rd</sup> Defendant), led the persons asking for the keys.
11. When the search was conducted at the Lands Registry, it was discovered the apartments had changed hands. The same was sold to the 1<sup>st</sup> defendant, Romsard Limited. The agreement had been signed by Benter Carolyne Atieno (2<sup>nd</sup> defendant) and one Ibrahim Abdi Athman (the 3<sup>rd</sup> defendant). He said this was a surprise because Benter was the known director of the plaintiff company. He said he had four shares in the company. The 2<sup>nd</sup> defendant had no shares.
12. He further testified that the company used to file returns. The Company Secretary was one Aboo of Mombasa Company. From 2015, Walter Kilonzo filed the returns; he testified as PW1. The company had two accounts at ECO Bank Malindi, one for Kenya Shillings and the other for Euros.
13. When criminal investigations were done, it was discovered that another account had been opened at Diamond Trust Kenya Limited. Before the sale was made, illegal company meetings and resolutions had been held, which altered the company's directorship, bringing in the 3<sup>rd</sup> defendant as a director using Powers of Attorney donated by Matteo's father, who testified as Bottini Giancarlo Ernesto PW4. He said he donated Powers of Attorney to the 3<sup>rd</sup> defendant dated 4<sup>th</sup> August 2016 and that the same had been revoked on 19<sup>th</sup> July 2016. That the Powers of Attorney never gave the 3<sup>rd</sup> defendant authority to alter the directorship of the plaintiff Company. I will revert to the same in analyzing the matter.
14. On whether he had resigned as director of the company, Matteo Bottini—PW2 testified that he had intended to do so and wanted Lydia Moraa to take over, but this never happened, as witnessed from the returns from the Registrar of Companies.
15. Regarding the Company Secretary's portfolio, he said that the company never appointed Margaret Kaptuiya Cheboiwo, who was then working with the National Land Commission, to that position.
16. He said that Tasmac Limited, of which he is a minority shareholder, has one director—Milton Services, whose address is 9<sup>th</sup> Floor, Ebene Tower, 52, Cybercity, Ebene, Republic of Mauritius. The 3<sup>rd</sup> defendant, holding a Power of Attorney donated by one of the shareholders of Tasmac Limited, could not purport to act as a director of Tasmac Limited. The 2<sup>nd</sup> defendant, too, is not a director of Tasmac Limited. No meeting of Tasmac Limited was called to alter the Company's directorship, and any other meetings or resolutions reached were illegal.



17. PW2 further stated that one Ruggero Sciomeri, who executed the transfer of the sub-lease, is a defendant in Malindi ELC Misc. Application No. of 2013 – In the Matter of Nassau Limited, in which Tasmac Limited had sued the said Ruggero Sciomeri amongst other persons, claiming that Tasmac Limited's 480 shares in Nassau Limited had been fraudulently disposed of. In that matter, Ruggero Sciomeri admits that Tasmac Limited is an offshore Company.
18. As to due diligence done by the 1<sup>st</sup> defendant, PW2 testified that the 1<sup>st</sup> defendant either negligently or by design ignored that the Powers of Attorney presented by the 3<sup>rd</sup> defendant did not make the 3<sup>rd</sup> defendant Director of Tasmac Limited nor Director of Moorgate Limited but only an attorney of a shareholder of Tasmac Limited. The purported meeting of the shareholders of the plaintiff did not set out the purported meeting and was never sent to the registered office of Tasmac Limited. The meeting of 2<sup>nd</sup> October 2015 was held without the attendance of one of the plaintiff's directors. The resolution of an extraordinary general meeting of the plaintiff did not pass a resolution to sell the plaintiff's apartments. No independent search was conducted at the Company Registry by the 1<sup>st</sup> defendant to verify that the persons executing the transfer of the sublease were, in fact, directors of the plaintiff. The CR 12 dated 27<sup>th</sup> October 2015 and purported Company Registry receipt number ought to have been verified by an official search done by the 1<sup>st</sup> defendant and or its advocates, not the one done by the vendor or vendor's Company Secretary. Ruggero Sciomeri who knew that Tasmac Limited was an offshore company ought to have exercised greater caution given Malindi ELC Misc. Civil Application No.5 of 2013.
19. PW2 further testified that from the Registrar of Companies, none of the company secretarial documents obtained by the 1<sup>st</sup> defendant was presented at the Registrar of Companies. The 3<sup>rd</sup> defendant and, Margaret Kaptuiya Cheboiwo, were not the Director and Company Secretary of the plaintiff company.
20. Walter Kilonzi testified as PW3, in addition to what PW2 said, that he was the plaintiff's Company Secretary as of 2015. His role included Company Secretarial and Accountancy work for the plaintiff. He handled all returns for the Company for the years 2015 and 2016. When shown the documents for annual returns of the plaintiff company done by Margaret Kaptuiya for 2012- 2015 and minutes of meetings held on 2<sup>nd</sup> October 2015, 15<sup>th</sup> October 2015, and CR dated 27<sup>th</sup> October 2015, he was shocked because, as of that period, he was the Company Secretary and not the said Margaret Kaptuiya. When he filed returns, the directors were Benter Carolyne Otieno and Bottini Matteo. After receiving the new documents, he did a search at the Registrar of Companies. The CR 12 confirmed the same. The purported letters to call company meetings were never sent to him. Those who attended the meetings were not the plaintiff's company directors, and the company's extraordinary meeting can only be attended by members and not directors. The minutes refer to a Board of Directors meeting, not an Extraordinary Board meeting of the company. The registered office of the plaintiff was Mombasa Block XXX/178 Nkrumah Road Mombasa and not Blue Merlin Hotel Malindi. The annual returns for 2013-2015 purportedly filed with the Registrar of Companies were not legitimate as the people mentioned were not legitimate officials of the plaintiff company. Ibrahim Abdi Athman - 3<sup>rd</sup> defendant was never appointed a director then; Tasmac Limited was a shareholder with 96 shares and not a director. The receipt shown, dated 15<sup>th</sup> October 2015, had an anomaly. It did not bear a serial number from the Company Registrar. It did not quote the plaintiff's CPR number. It quotes CPR2011/62586, which was not the plaintiff's company number. An anomaly also shows the Company's Secretary as Mombasa Company and Margaret Kaptuiya Cheboiwo. The form 203A shows the name Mary Kaptuiyo Cheboiwo, a different person. The purported changes never happened and never took place. A Power of Attorney issued to Ibrahim Abdi Athman showed Giancarlo Bottini



was a director of Tasmac Limited, which was untrue. Even if he was a director, the meeting was for the Board of Directors. He did not qualify to sit on the board.

21. In addition to the testimony by PW3 Walter Kilonzi, Oscar Otieno Owino from the Registrar of Companies in the AG office testified that he had a file for Moorgate Investments Limited, file No. CPR62/58/6, the company was incorporated on 7<sup>th</sup> December 2011. The initial directors and shareholders were Shalin Jilgan and Joyce Msarani Jomo. Shalin resigned from the Board of Directors on 13<sup>th</sup> December 2011. Then thereafter, Bottini Matteo and Benter Carolyne Otieno were appointed directors on 2<sup>nd</sup> December 2011. Bottini Matteo had one share, while Tasmac Limited had ninety-four shares. As of 2<sup>nd</sup> December 2011, Shalin Corn and Joyce Msarani transferred their shares. Ian Giancarlo Bottini has sixty shares, and Bottini Matteo has forty shares as directors and shareholders. Annual returns were filed by Walter Kilonzi, the Company Secretary, for 2012-2013. In 2015, they were filed by the same person, i.e., on 12<sup>th</sup> August 2015. From the annual returns, it is possible to see the directors as Bottini Matteo, Tasmac Limited, and Carolyne Benter Atieno. The same returns were also filed on 18<sup>th</sup> March 2016. At that time, Giancarlo had 60 shares, Matteo had 40, and Benter Otieno was a director. Also, in their file, they had correspondence from Anjarwalla and Khanna Advocates dated 20<sup>th</sup> June 2016 seeking to determine the record of the annual returns filed and the genuineness of the returns for 2012, 2013, 2014, and 2015. They also sought to know the notification of change of directors. In their office's response dated 1st July 2016, it was replied that the resolutions were never filed and the changes were not effected. The CR12 forms were also said to be forgery and not emanating from the Registrar's office. From the record, Ibrahim Abdi Athman was not the Director, and Margaret Kaptuiya was not the Company Secretary for the plaintiff's company. From the file, there was also a change of directorship from 15<sup>th</sup> December 2016, in which Benter Carolyne Atieno was removed as director, and there has never been a director known as Ibrahim Abdi Athman. Walter Kilonzi was the only Company Secretary throughout.
22. Lucy Wangari Mwangi, who testified as DW2, said that she is the director of the 1<sup>st</sup> defendant company and had the authority to represent the company. The company was incorporated on 2<sup>nd</sup> December 2015. Pursuant to the transfer of sublease dated 16<sup>th</sup> October 2016, the plaintiff, through its lawful directors, sold all those premises known as apartments E1, E2, E12, and E18 on portion number 603 Malindi, popularly known as Blue Merlin Resort for consideration of Kshs. 18,000,000/- (Eighteen Million) Only. As proof of the same, she produced copies of the transfer of the sublease of the suit dated 16<sup>th</sup> October 2015, copies of payment cheques, copies of consent dated 15<sup>th</sup> October 2015 of Nassau Limited to the plaintiff to transfer apartment E1, E2, E12, E18 to the 1<sup>st</sup> defendant. She stated that proper due diligence was done before the 1<sup>st</sup> defendant purchased the premises. The following documents were obtained from the Company's Registry and the 3<sup>rd</sup> defendant: a copy of the pin from the 3<sup>rd</sup> defendant, two copies of Power of Attorney, and a proxy, all dated 4<sup>th</sup> August 2015 by Giancarlo Bottini to the 3<sup>rd</sup> defendant in the matter of Tasmac Limited and Moorgate Investments Limited, application for registration of Power of Attorney in favour of the third defendant dated 7<sup>th</sup> August 2015, Tasmac letter by the 3<sup>rd</sup> defendant, dated 27<sup>th</sup> August 2015, calling on the plaintiff's directors to call a general meeting for the company. A copy of the postal registration receipt dated 3<sup>rd</sup> September 2015, forwarding the letter calling for the general meeting, a copy of Tasmac's letter to the Company Secretary of the plaintiff dated 8<sup>th</sup> September 2015, a copy of the plaintiff's letter dated 10<sup>th</sup> September 2015 calling for the general meeting for the plaintiff's directors, a copy of postal registration receipt, posting the letter dated 10<sup>th</sup> September 2015 to the directors of the plaintiff herein, extract of meeting of the board of directors of the plaintiff's company dated 2<sup>nd</sup> October 2015, resolution of the plaintiff to appoint the 3<sup>rd</sup> defendant and Margaret Kaptuiya as director and Company Secretary respectively, copy of notification form No. 203A for change of directors and shareholders of the plaintiff.



23. She testified that from the annexures, the 1<sup>st</sup> defendant conducted a comprehensive due diligence before agreeing to purchase the premises subject to these proceedings, whose consideration was wholly paid to the plaintiff in its bank account, held and operated at Malindi Diamond Trust Bank Limited. The 1<sup>st</sup> defendant, in the circumstances, purchased the suit premises above board and after complete investigations of the ownership of the company and confirming that, indeed, the correct directors of the plaintiff during negotiations to purchase the premises known as apartments E1, E2, E12, and E18, on portion No. 603 Blue Merlin Resort Malindi, from the plaintiff, can not be termed as having been fraudulent or having conspired with 1<sup>st</sup> and 2<sup>nd</sup> defendants to alienate the plaintiff of the foresaid suit premises. Matteo Bottini, as the director of the plaintiff company, despite being notified to attend the meeting of the company, declined to do so, and the meeting proceeded in his absence and passed resolutions, which were duly returned to the Registrar of Companies. Walter Zakayo Kilonzi was not the Company Secretary of the plaintiff's company, as shown in the copies of returns given to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant. The Company Secretary was Margaret Kaptuiya Choboiwo, and no returns of her replacement were tendered before the Court. The resolutions to file this suit are null and void as, firstly, they were done by the Company Secretary, not lawfully authorized by the plaintiff, and secondly, they were from a meeting lacking the necessary quorum of the directors as Giancarlo Bottini was not a director of the plaintiff and had appointed the 3<sup>rd</sup> defendant to represent Tasmac Limited and Moorgate Investments Limited, more so without the other directors. The restrictions placed by the plaintiff against the property of the 1<sup>st</sup> defendant apartments, E1, E2, E12, E18, were without a court order and, therefore, unlawful and unjustified. The plaintiff has no cause of action against the 1<sup>st</sup> defendant; if it has any cause, it will be against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. If any fraud was committed, which is denied – it was not committed by the 1<sup>st</sup> defendant.
24. She proceeded to assert that this suit contravenes the *Companies Act* and the Rules made thereunder, as it ought to have petitioned the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the matter of Moorgate Investments Limited. All the allegations in this suit were the subject of criminal proceedings in Malindi Criminal Case No.732 of 2018 - R v Ibrahim Abdi Athman, alias Ibrahim Matumbo, Ruggero Sciommeri, and herself, where all the accused were acquitted.
25. Mohammed Ashur—DW2 produced proceedings and a ruling of Criminal Case No. 732 of 2018, delivered on 1<sup>st</sup> September 2020. The accused were found to have no case to answer and were acquitted under Section 210 of the *Criminal Procedure Code*. The AG preferred an appeal in the High Court, and a Notice of Withdrawal dated 9<sup>th</sup> September 2022 was filed.
26. Daniel Nyaruri Ondieki, who testified as DW3 from the office of the Attorney General in the Urban Registry and described himself as a Record Officer, produced a list of documents filed on 26<sup>th</sup> November 2016; they were produced as exhibits No. 27,28 and 29. CR12 dated 27<sup>th</sup> October 2016, and two other CRs dated the same day. He said he downloaded the CRs, which Nicholas Oduor and Jemimah Mungai signed on behalf of the Registrar of Companies. As per the three CR12 produced, the directors of Moorgate Investments Limited were Benter Caroline Atieno, Kenyan, Bottini Matteo, and Tasmac Limited - majority shareholder, and one Ibrahim Abdi Athman, Kenyan.
27. Benter Carolyne Atieno - DW4 adopted her witness statement dated 11<sup>th</sup> March 2021 and said she is one of the directors of the plaintiff's company. The others were Ibrahim Abdi Athman and Giancarlo Bottini, director of Tasmac Limited, which had 96 percent of the shares of the plaintiff company. Giancarlo Bottini had given Abdi Athman power of attorney for Tasmac Limited and Moorgate Investments Limited as he traveled to Italy. She confirmed that transactions that transpired were done according to regulations. She says in the counterclaim that she seeks the apartments to be declared to



belong to the 1<sup>st</sup> defendant. The sale of apartments was done, and all involved parties were informed. Nothing was hidden, and she said she wasn't involved in any fraud.

28. Ibrahim Abdi Athman—DW4 adopted his witness statement dated 27<sup>th</sup> June 2016 and the list of attached documents. He said the attached documents absolve him of any claim for the sale of the apartments in question. He got Powers of Attorney from the owner; he had signed the same in his house. He was referred to the advocate to regularize the same. The advocate explained the meaning and tenor of the Powers of Attorney to all of them.

29. In *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal noted the following concerning circumstances where the root title is the subject of challenge:

“...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge 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 need not be noted on the register.”

30. This position was reiterated in *John Kiguru Karume v Kenya Institute of Administration & 4 others* [2017] eKLR, the court held:

“The concept of absolute and indefeasible ownership of land cannot be clothe with legal and constitutional protections if the interest was acquired through fraud, misrepresentation, illegality unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the Case of *Champaklal Ramji Shah & 3 Anors Vs AG & Anor*, HCCC No. 145 of 1997, it was held that the Court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.”

31. The 1<sup>st</sup> defendant contends that it regularly and lawfully acquired the sub-lease – which is under contention as an innocent purchaser for value without notice, and it did due diligence as explained by its director Lucy Mwangi – DWI and that any fraud or misrepresentation cannot be visited on it but rather the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. 1<sup>st</sup> defendant thus pleads that it falls within the purview of the decision in the Ugandan case of *Katende v Haridar & Company Ltd* [2008] 2 EA 173 where the court held:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and 7. he was not party to the fraud.”



32. The import of section 26(1)(b) of the *Land Registration Act* and Article 40(6) of *the Constitution* was explained by the court in *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR:
- “The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”
33. In this matter, tracing backward the root of the title held by the 1st defendant, who pleads to be innocent purchaser for value without notice, originates with a Powers of Attorney issued to the 3rd defendant by one Giarnicarlo Bottini, the father of Matteo Bottini. The Powers of Attorney ostensibly donated on the 4th of August 2015 mandated the 3rd defendant to act as an Attorney for him in matters involving the affairs of Tasmac Limited and Moorgate Investment Limited. The said Powers of Attorney did not authorize the 3<sup>rd</sup> defendant nor the 2<sup>nd</sup> defendant to sell the apartments that are the subject of the suit. That is why the defendants were charged in Malindi Criminal case No. 733 of 2018 for forgery, obtaining registration by false pretences, and theft – among other charges.
34. From the evidence adduced in this matter and Malindi Criminal case No. 733 of 2018 – all the activities and affairs conducted by the 3<sup>rd</sup> defendant using the said Powers of Attorney did not get the backing of the plaintiff nor follow the law. The Powers of Attorney presented by the 3<sup>rd</sup> defendant did not make the 3<sup>rd</sup> defendant a Director of Tasmac Limited nor the Director of Moorgate Limited but only an attorney of a shareholder of Tasmac Limited. The purported meeting of the shareholders of the plaintiff did not set out the agenda of the meeting and was never sent to the registered office of Tasmac Limited. The meeting of 2<sup>nd</sup> October 2015 was held without the attendance of one of the plaintiff's directors. The resolution of an extraordinary general meeting of the plaintiff did not pass a resolution to sell the plaintiff's apartments. No independent search was conducted at the Company Registry by the 1<sup>st</sup> defendant to verify that the persons executing the transfer of the sublease were, in fact, directors of the plaintiff. The CR 12 dated 27<sup>th</sup> October 2015 and purported Company Registry receipt number ought to have been verified by an official search done by the 1<sup>st</sup> defendant and or its advocates, not the one done by the vendor or vendor's Company Secretary. The receipt shown, dated 15<sup>th</sup> October 2015, had an anomaly. It did not bear a serial number from the Company Registrar. It did not quote the plaintiff's CPR number. It quotes CPR2011/62586, which was not the plaintiff's company number. Besides, Ruggero Sciomeri, who knew that Tasmac Limited was an offshore company, should have exercised greater caution given Malindi ELC Misc. Civil Application No.5 of 2013. A power of attorney issued to Ibrahim Abdi Athman showed Giancarlo Bottini was a director of Tasmac Limited, which was untrue. Even if he was a director, the meeting was for the Board of Directors. He did not qualify to sit on the board.
35. The Registrar of Companies testified in this matter and in the Criminal matter that none of the company secretarial documents obtained by the 1<sup>st</sup> defendant was presented at the Registrar of Companies, contrary to the testimony of one Daniel Nyaruri Ondieki – DW3 – the downloads he produced seem to have been a later development after investigations commenced upon inquiry by the



erstwhile advocate Anjarwalla & Khanna for the plaintiff in his letters dated 20<sup>th</sup> of June 2016 and 5<sup>th</sup> January 2015. The Registrar of Companies reply to the later letter of the law firm stated as follows:

“That the resolutions dated 2<sup>nd</sup> October, 2015 minutes and form 203A of the same date attached in your letter were never filed in the Company Registry and that the changes contained therein were never effected.

That the filing receipt purportedly issued by the Company Registry together with the CR 12 dated 27<sup>th</sup> October 2015 attached in your letter did not emanate from the office and the same is a forgery and should be treated as such.

That Ibrahim Abdi Athman has never been a director of this Company neither has Margaret Kaptuiya been a Secretary of the Company since the resolutions dated 2<sup>nd</sup> October 2015, minutes and form 203A were never lodged neither the changes contained therein registered in the Company Registry.

As per your request, we have attached copies of annual returns for the year 2013, 2014, 2015 and 2016 for your information.”

36. In reply to the former letter from Anjarwalla & Khanna, the Registrar of Companies wrote on 18<sup>th</sup> January 2017 as follows:

“As per our current records, we have no documents filed to alter the directorship/ shareholding of the Company, we are therefore not in a position to provide certified documents as requested in your letter.....

This position held until an application was received by us on 2<sup>nd</sup> of June, 2016 for the transfer of shares as follows:

1. Sixty (60) shares from Tasmac Limited to Giancarlo Bottini
2. Thirty (36) shares from Tasmac Limited to Bottini Matteo.

37. The significance of the foregoing is that Ibrahim Abdi Athman and Margaret Kaptuiya Cheboiwo were not the Director and Company Secretary of the plaintiff company at any point and that the Powers of Attorney donated to the 3<sup>rd</sup> defendants were used to perpetrate fraud.
38. Walter Kilonzi -PW3 handled all returns for the Company for the years 2015 and 2016, as confirmed by the Registrar of Companies. Margaret Kaptuiya sued as the fourth defendant. She never answered letters written to her, entered an appearance, or filed a defence. A negative inference can be drawn that she was not the Company Secretary. The record shows her name was being misspelled as Mary, aka Margaret Kaptuiya.
39. From the record, the purported letters to call company meetings were never sent to Matteo Bottini. Those who attended the meetings were not the plaintiff's company directors, and the company's extraordinary meeting can only be attended by members. The minutes refer to a Board of Directors meeting, not an Extraordinary Board meeting. Besides, the registered office of the plaintiff was Mombasa Block XXX/178 Nkrumah Road Mombasa and not Blue Merlin Hotel Malindi
40. Whereas the 1<sup>st</sup> defendant paid the purchase monies to the plaintiff company's bank account purportedly, it emerged from the proceedings here and in the criminal case that the plaintiff had two accounts at ECO Bank, one for Kenyan Shillings and the other for Euros. The account opened at Diamond Trust Limited by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was a dummy account – whose purpose was



to receive the purchase money in disguise that it was meant for the plaintiff. From the record in the criminal case, all funds deposited in that account were later to be withdrawn by the 3<sup>rd</sup> defendant personally purporting to act for the plaintiff. That is why theft charges were brought in the criminal matter. The 2<sup>nd</sup>, 3<sup>rd</sup>, and one Ruggero Sciommerri could not account for the plaintiff concerning the sale transaction, which as shown from the proceedings in the criminal case was withdrawn by 3<sup>rd</sup> defendant pretending to be the plaintiff.

41. The conclusion is that the 1st defendant's title originates from fraudulent and illegal processes; both the 1st and 2nd defendants and Ruggero Sciommerri were fully aware that the documents they allegedly used to sell the apartments to the 1st defendant were acquired through fraud and deception. To paraphrase the holding by Munyao J. in the Alice Chemutai Too Case (supra) - the significant implication of Section 26 (1) (b) as read with Article 40(6) of *the Constitution* is to eliminate the protection offered to an innocent purchaser or titleholder. This implies that the title of an innocent individual can be challenged if it was obtained illegally, improperly, or through a corrupt arrangement. The titleholder is not required to have played a role in these detrimental factors. In my opinion, Section 26 (1) (b) intends to safeguard genuine titleholders from being stripped of their rights due to subsequent transactions. The innocent purchaser falls back and sues for recovery of the purchase money from the perpetrators – in this case the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and one Ruggero Sciommerri.
42. The plaintiff's claim will succeed with costs as stated below, and the counter-claims by the defendants will be dismissed with costs. Thus:
  - a. A declaration be and is hereby issued that the plaintiff is the lawfully registered proprietor of the leasehold interest in apartments E1, E2, E12, and E18, the staircase accessing apartments E12 and E18, the bank premises and terrace A erected on all that land known as plot No. 603 title No. LT.41 FOLIO 60/A FILE 11222.
  - b. A declaration be and is hereby issued that the 3<sup>rd</sup> defendant is not and has never been a director or a shareholder of the plaintiff and that the transfer of sub-lease executed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants dated 16<sup>th</sup> October 2015 in respect to apartments E1, E2, E12, and E18 in favour of the 1<sup>st</sup> defendant was null and void and incapable of divesting the plaintiff of its lawful interest in the suit premises.
  - c. A declaration be and is hereby issued that the 4<sup>th</sup> defendant is not and has never been the company secretary of the plaintiff. All company secretarial documents she prepared in that capacity are null and void and of no legal effect.
  - d. A declaration be and is hereby issued that the registration of the sublease dated 16<sup>th</sup> October 2015, concerning apartments E1, E2, E12, and E18, erected on all that land known as plot No. Portion 603 Title No. LT. 41. Folio 60/A file 11222 was unlawful, null, and void and did not divest the plaintiff of its lawful interest therein.
  - e. An order be and is hereby issued that the 2<sup>nd</sup> interested party rectifies the register concerning plot No. Portion 603 title No. LT.41.Folio 60/A file 11222 by canceling all entries therein about the transfer of apartments E1, E2, E12, and E18 to the 1<sup>st</sup> defendant and reinstating the plaintiff as the registered leasehold proprietor of the said apartments, the staircase accessing apartments E12 and E18, the bank premises and the terrace erected on plot No. Portion 603 title No. LT.41 FOLIO 60/A file 11222.
  - f. A permanent injunction be and is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants, whether by themselves or through their servants, employees, agents, or through anyone deriving title through them or otherwise howsoever from entering, using, occupying, leasing,



transferring, charging, selling, interfering with or in any manner whatsoever in dealing adversely with apartments E1, E2, E12 and E18 or any of the plaintiff's premises erected on or forming part of all that land known as plot No. Portion 603 title No. LT.41 folio 60/A file 11222.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 6<sup>TH</sup> DAY OF FEBRUARY 2025.**

**E. K. MAKORI**

**JUDGE**

In the presence of:

Mr. Renee, for the Plaintiff

Ms. Oloo, for the 1<sup>st</sup> Defendant

Happy: Court Assistant

In the absence of:

Mr. Komora for the 3<sup>rd</sup> Defendant.

