



**Macharia v Saidi (Being sued as the legal representative of Issa Mjawiri Jabiri) & 2 others
(Environment & Land Case 109 of 2021) [2025] KEELC 1093 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1093 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 109 OF 2021**

AE DENA, J

MARCH 7, 2025

BETWEEN

GEORGE STEPHEN NJOROGE MACHARIA PLAINTIFF

AND

**HAMADI OMAR SAIDI (BEING SUED AS THE LEGAL REPRESENTATIVE OF
ISSA MJAWIRI JABIRI) 1ST DEFENDANT**

STANLEY NDIINGURI WANJIKU 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

1. As a way of background this suit was instituted vide a plaint dated 6th June 2017 which was later amended on 4/10/2021. The subject of the suit is parcel No. Kwale/Diani Settlement Scheme 397 (suit property). The Plaintiff pleaded that in 1978 through the Settlement Fund Trustee he was offered Plot No. 397 situated in Diani Settlement Scheme Kwale. He accepted the offer and upon payment of the requisite charges was issued with certificate of outright purchase pending the issuance of title. However, in March 2015 the Plaintiff while pursuing the title discovered that the title deed of the suit property was on 17th December 2002 issued to the 1st Defendant and subsequently transferred to the 2nd Defendant.
2. It is the Plaintiffs case that the title deed issued to the 1st Defendant was null and void as it had allegedly been processed fraudulently and that no good title passed to the 2nd defendant. The Plaintiff maintains that to date he is the lawful allottee and beneficiary of the suit property. That because of the fraudulent transactions he has been deprived of the lawful ownership of the property.
3. The Plaintiff prays for the following orders;-



- A. A declaration that the title issued to the 1st Defendant in respect of parcel of land Kwale/Diani Settlement Scheme/397 is null and void on account of fraud and thus the 1st Defendant cannot pass a good title to the 2nd defendant regarding the parcel of land
- B. That the 3rd Defendant do cancel or expunge from its records the title now held by the 2nd Defendant
- C. That the 3rd Defendant do transfer the said parcel of land to the Plaintiff forthwith.
- D. Any other relief the court may deem fit to grant
- E. Costs of the suit

The 1st Defendant's Statement Of Defence And Counterclaim

- 4. The 1st Defendant responded to the suit by way of defence and counterclaim filed before court on 7/6/2023. It is important to note that the 1st Defendant is deceased. On 29/5/23 the pleadings were amended by consent of the parties by substituting the 1st Defendant as per the grant ad litem issued to Hamadi Omar Saidi. The 1st defendant pleads that he has enjoyed quiet and uninterrupted possession of the suit property from the year 1970s when the suit property was still virgin land to the year 2009 when the 1st Defendant transferred the property to the 2nd Defendant for valuable consideration. That the 1st Defendant was allocated the suit property by the District Land Adjudication and Settlement Fund executing a transfer in his favour in the year 2002. The 1st Defendant in the counterclaim states that the re allocation of the suit property to the plaintiff by the 3rd defendant through the SFT was fraudulent and null and void ab initio.
- 5. The 1st Defendant prays for dismissal of the Plaintiffs suit with costs and for judgement against the Plaintiff for; -
 - a. A declaration that the 1st Defendant was the registered and legal owner of all that parcel of land known as LR No Kwale/Diani Settlement Scheme/397 from the year 2002 to the year 2009
 - b. A declaration that the re allocation of LR No Kwale/Diani Settlement Scheme/397 to the plaintiff is unlawful and fraudulent
 - c. In the alternative, a declaration that the 1st defendant acquired the parcel of land known as LR No Kwale/Diani Settlement Scheme/397 through adverse possession
 - d. Costs of the suit

The 2nd Defendant's Statement Of Defence And Counterclaim

- 6. The 2nd Defendant responded to the suit vide a defence and counterclaim dated 14/11/2022 filed before court on 15/11/2022. The 2nd Defendant avers that in the year 2015 the 1st Defendant was the absolute and indefeasible owner of the suit property as a title had been issued to him after a successful allocation. That the property was transferred to the 2nd Defendant on 19/11/2009 and he has been in occupation of the same to date. The 2nd Defendant denies any allegations of fraud and puts the Plaintiff to strict proof of the same. The 2nd Defendant has further raised a counterclaim and stated that having purchased the suit property bonafide for value without notice from the 1st Defendant, immediately took possession of the suit property, the Plaintiff does not have any proprietary rights and interests over the suit property.
- 7. The 2nd Defendant thus prays for dismissal of the Plaintiff's suit with costs and orders for; -



- a. A permanent injunction be issued against the Plaintiff restraining him and/or his servants/agents/employees from erecting, being upon, utilizing or in any other way interfering with the land parcel no LR No Kwale/Diani Settlement Scheme/397
 - b. A declaration against the Plaintiff that the 2nd Defendant is a bonafide purchaser for value without notice of the suit property and as such is the legal and rightful owner of all that parcel of land known as LR No Kwale/Diani Settlement Scheme/397
 - c. Costs of the suit and counterclaim
 - d. Any other or further orders as this honourable court may deem fit to grant
8. All the counterclaims were responded to appropriately by the Plaintiff and the 3rd Defendants.

The 3rd Defendants Statement Of Defence

9. The 3rd Defendant states that the mandatory notice of intention to sue the government and its agencies prior to the institution of the suit herein was not served upon the 3rd Defendant and the Attorney General hence the suit is fatally and incurably defective. The 3rd Defendant states that no reasonable cause of action has been raised against it and that the reliefs sought against the 3rd Defendant are neither available nor merited. The 3rd Defendant also filed a Notice of Claim against Co-defendants dated 27/06/2023 under the provisions of Order 1 Rule 24 of the Civil Procedure Rules. The 3rd Defendant prays that the Plaintiffs suit against it be dismissed with costs.

Hearing

10. The case was heard on 5/12/23, 6/12/23, 12/3/24 and 3/4/24. During the hearing the Plaintiff was represented by Mr. Othim from the firm of Mutisya & Company Advocates, the 1st Defendant by Ms. Machuki from the firm of Machuki & Associates Advocates and the 2nd Defendant by Ms. Kihika of CN. Kinyanjui & Company Advocates. Mr. Kemei State Counsel represented the 3rd Defendant.
11. The Plaintiff George Stephen Njorogetestified as PW1 adopted his witness statement dated 30/01/23 as part of his evidence and relied on the amended plaint dated 4/10/2021. The witness produced the documents in the Plaintiffs list of documents dated 5/6/2017 PEX '1-11.' It was his evidence that he visited the land office, and on perusal of the green card noted there was no discharge of charge. That the Transfer of Land in Settlement Scheme (PEX5) didn't bear the terms and condition in the schedule. That he also visited the Land Adjudication Office where he found that the land was still under his name. The witness insisted the land belonged to him as evidenced in the documents he had produced.
12. Cross examined by Ms. Machuki PW1 stated he got the letter of offer from Kwale land office after applying for it. He came with friends to see the land following rumours that there was land being offered to the public. He visited the land and it had old fruit trees largely mangoes planted by previous owner. He did a temporary fence with ordinary trees. There were no neighbours. He left the land for about three years and came back to see it around 1993/4 when he found buildings were coming up and plots had been fenced. The last time he harvested fruits including coconut was 4 years ago.
13. The witness conceded if the conditions in the letter of offer were not fulfilled the offer would be withdrawn. That he had a certificate of acceptance which had no date but bore a stamp dated 21/3/2016. He confirmed the letter of commitment from village elder dated 29/12/2016 had no addressee, was unsigned. He did not have a complaint prior to 2015 as there was no change in the property. Though he found someone constructing a house on the property he could not remember which year it was. He has never met the 1st defendant.



14. Cross examined by Ms. Kihika PW1 testified that he got to know about the land around 1979-80. He gave money to friends to follow up for him and after payment he was given the letter of offer. He admitted the receipt No. AK 242502 (PEX3) lacked a heading and a stamp. On being referred to paragraph 5 of the amended plaint the witness noted he was allocated the land but he had not produced the letter of allotment. That though he pleads at paragraph 7 he was pursuing transfer in 2015 he had not produced a transfer in his name. He intended to build in Diani but he never found time. That he could not remember who showed him the suit property, but the plot had already been marked by the Government into 5 acre plots. He did not have surveyor on the day he went to the land. That he marked the plot with trees but did not commence cultivation immediately. He left people to live thereon and continue with their activities though he did not document any agreements with them.
15. PW1 confirmed the offer letter was issued in 1978, certificate of outright purchase in 1997. He conceded the green card did not bear his name. He testified the borehole in the property was a donation which neighbours suggested be done in his land. On PEX6 which is a letter dated 13/3/2015 the witness stated though he received the letter he never followed up to ensure transfer was executed in his name as directed in the letter. On PEX 11 being the letter dated 20/12/2016 from Mohamed Hussein the witness agreed the author does not specify when he was appointed, how long and the period he had served as village elder of Colorado area. On whether there was any of his neighbours in court he stated he could not see any and reiterated he was under no obligation to know his neighbours. That he has never been called to any court where Issa Mjawiri has been charged for fraud.
16. On being shown the Statutory declaration produced by the 3rd Defendant (page 19) he agreed the date was incomplete in terms of the year. On his statement that he paid Kshs.500,000/- on 17/12/2014 he stated he signed this by mistake but admitted Mutisya & Co. have been his lawyers. He admitted the same errors are reflected in the Statutory declaration. Reading out the conditions in the letter of offer the witness conceded he was to remain in the plot at all times and not another person and that in the event of breach the offer is to be withdrawn. That there is no condition for notice for the withdrawal. He confirmed the certificate of acceptance bore no date and was incomplete in terms of approval and the officer checking. He stated he was seeing the document for the 1st time in court .
17. Cross examined by Mr. Kemei the witness confirmed that before he was allocated the suit property it was government land and had not been adjudicated. That his letter of offer issued in 1978 has never been cancelled or withdrawn to date. Though he understood the requirement for discharge he was not sure if he presented the discharge. That there was no appeal to his allocation. On being shown PEX6 being letter dated 13/3/2015 he confirmed it is written by Robert Nyakeruma who is a government officer. That entry 1 of 10/3/92 of PEX4 being green card opened in 1992 shows it was in favor of SFT but is cancelled. That the green card has no Part C. There is no discharge of charge from SFT. He had no green card showing the witness as proprietor and had not presented to court a title deed in this regard. That the title has not been transferred to him neither has it been transferred to any other person.
18. PW1 clarified in re-examination that he lived in many places including Kwale. At the point of buying the land there were mango trees but no permanent structures. When you acquire property, you don't need to know neighbours. That he left some boys in the community to take care of the property and who only put up temporary mud structures. He has never breached any of the conditions in the letter of offer. That he did a letter of acceptance and there is no requirement for SFT to further accept the acceptance. On the transfer (PEX5) it was his testimony he has never transferred the property to anyone else. That he was not the author of PEX 6,7 and 8. That the letter dated 20/12/2016 bears a stamp and he had to get a letter of confirmation that the village elder knew him and the people in the area when the ownership dispute arose. Before filing of the dispute in court there were no structures however



presently there are structures. He reiterated the plaintiffs list of documents as filed. He used a map to get to the suit property. The green card was complete with part A,B and C.

19. With the above the Plaintiffs case was closed.
20. DW1 was Rashid Omar Mwaramwendu who adopted his witness statement dated 27/01/2023 as his evidence in chief. He produced from the 2nd Defendant bundle of documents title for plot 420 (DW1 EX 1), Letters dated 9/2/1978, Certificate of Acceptance dated 9/2/78 (DW1 EX 2A&B). He told the court that his plot 420 neighbours the suit property which belongs to the 1st Defendant. He was sure of this because they used to compete when cultivating alongside and planted coconut trees, mango, cashew nuts, citrus and others like pineapples. On being referred to the photos in the 2nd Defendants bundle the witness testified he knew the well therein and it belonged to the 2nd Defendant and which he DW1 had supervised its construction at the request of the 2nd Defendant. That he had known the 2nd Defendant for about 10 years and before he purchased the suit property from the 1st Defendant. That he had also sold the 2nd defendant 1 acre from his title (D1EX 1). In photo 1 the witness identified a house built by the 2nd Defendant though he could not remember the year of construction. That 2nd Defendant did a fence which the witness identified in the photos. The witness told the court he had lived in his shamba for 60 years and he has never left and has been a nyumba kumi elder for over 10 years.
21. The witness added that he saw the plaintiff in court and has never seen him in the area and he has never seen him harvest anything. That it is Mjawiri who planted the fruit trees and was the only one who used to harvest and sell. Thereafter the 2nd defendant bought the land and was harvesting. He confirmed he knows Mohamed Musa the village chairman as indicated in the letter dated 30/12/2016. He pointed that Musa does not know the history of the land. That Mjawiri had built a 4 bedroomed house on the property which existed for 21 years where all his children were born.
22. Ms. Kihika did not cross examine the witness.
23. Cross examined by Mr. Kemei the witness stated plots border as per maps though he did not produce any map or survey report in this regard. He agreed together with the 1st Defendant they sought for the land from the government. He did not file the chiefs notice about the land distribution/adjudication. He did not see an adjudication list at the chiefs office nor did he present one in court. He agreed that it is the Land officers who have authority to give land documents and not the chief. The witness stated he is not the one who took the photographs submitted in evidence.
24. Cross examined by Mr. Othim for the Plaintiff on letter dated 24/9/2015 (item 13 of 3rd defendants bundle) the witness confirmed he knows the author Mohamed Hussein Musa as village chairman Colorado village. He noted it was stamped Mwamuwa village. Though he was present when Mjawiri applied for the land he could not remember the date or year. The witness confirmed he had not presented Mjawiris application or his own to show they had applied for the land. He had not presented any document allocating land to Mjawiri. While he admitted there were other neighbours before his land he did not know the owner of plot 398 and 319. He could not remember the year the 2nd Defendant came into the suit property nor when he received the instructions to look for labour for the well or when he fenced the land with the trees. The witness admitted he was not the one who took the photos and had seen them for the 1st time during the hearing. On being shown photo 2 he stated the 2nd Defendant has not put a wall fence. He was not aware that he was stopped from constructing a wall fence. He reiterated the well was inside the land and not outside. That there's a three bedroomed house made of blocks in the suit property though he could not remember when it was built. He admitted he had not brought to court a photo showing the fence and that his statement does not state the number of years he had known the 2nd Defendant.



25. Upon re-examination DW1 clarified that the chief read to them about government plans to give out land. Mjawiri never gave the witness his title but was present during the barazas. The witness stated he was given his letter of offer by the chief at Diani. He has always known Mjawiri's plot by looking at it. The land was given as per occupation/cultivation. That he only knows his plot numbers and not others. The numbers were given by the surveyors. The 2nd Defendant bought the land after he had bought the 1 acre from DW1. The well was dug 8 years after. The witness never saw a wall fence. He has known the 2nd Defendant for about 20 years. That while he was surrounded by neighbours the witness and Mjawiri were immediate neighbours.
26. DW2 was Hamadi Omar Said. He adopted his witness statement dated 31/5/2023 as his evidence in chief and produced the documents listed in the 1st Defendants list of documents dated 31/5/2023 D2EX 1-21. He informed the court that the 1st Defendant (deceased) was his uncle, that is his father's brother. According to the witness statement the witness was born in 1976, his parents died soon thereafter and he was adopted by Issa Mjawiri who brought him up like his son. Before the deceased moved into the suit property it was a forest. He cleared it over time and planted coconuts, oranges, mangoes and lime trees. The deceased then built a home and moved his family into the land. At the age of 25 years together with the deceased son moved to Kilifi where they earned a living from fishing. They identified a market for the fruit and the deceased started supplying the same to Kilifi from the suit property. The deceased's health became frail after he dislocated his leg compounded by age. He decided to sell the land and move to Kilifi where he had purchased a house. DW2 travelled together with the deceased to Kwale for the sale transaction to the 2nd Defendant. After the purchase DW2 assisted the deceased to demolish the home in the suit property, handed possession to the 2nd Defendant, and relocated to Kilifi. That he was aware the 2nd Defendant carried out developments erected a fence all around the property, drilled a borehole. The plaintiff never presented himself to demand the land yet the deceased had lived thereon for 40 years before selling to the 2nd Defendant. The deceased was never summoned by any office over the suit property in his entire life. That due to passage of time the deceased's age mates as well as the chief who oversaw the allocation and demarcation were also deceased. The deceased left him with the documents including the allotment letter and transfer from SFT.
27. Ms. Machuki did not cross examine the witness on the basis that she supported the 1st Defendant's case.
28. Upon cross examination by Mr. Kemei and on being referred to the letter dated 17/02/2023 (1st defendants list item 4) he admitted his name is not among those listed as survivors of the 1st Defendant. That in succession the deceased children are usually prioritised in recognition. He had not presented to court a birth certificate to show the relationship between him and the deceased. On the letter dated 4/5/2015 (item 8 of 1st Defendants bundle) the witness stated he was not sure when and how Mjawiri got the plot. On the letter dated 30/10/2014 in the same bundle DW2 testified he has never heard of the name Salim Mwachirimira. On the Transfer of Land In Settlement Scheme to Issa Mjawiri (item 10 of 1st Defendants bundle) he could not explain why year '19' at the date for certification is crossed out and 2002 inserted. He conceded he had no evidence of payment for the plot. That other than the green card he had no other document showing how the land moved from SFT to Mjawiri. He admitted part C of the green card was missing but reiterated that is what he got and brought to court. On being shown the title in the name of Mjawiri (item 12 of same bundle) he confirmed the date to be 17th December 2002 though there is the year 19....which was blank. The witness denied that his documents did not tally in dates. The witness added that he sold the land which was 5 acres together with Mjawiri to the 2nd defendant at Kshs.1,500,000/=
29. Upon cross examination by Mr. Othim the witness confirmed he obtained the Limited grant from Kilifi though he was aware the Kwale court also has magistrates. The witness reiterated he did not



- know anything about Mjawiris application for the land, when he was offered the land, whether he accepted the offer and made payments and conceded he did not have the documents in his list. The chiefs letter dated 17/02/2023 made no reference to property. That it indicated the deceased residence as Kaya village and not Colorado or Mwamuwa villages. He testified that he did not know about the suit property number or the well. Though he produced a sale agreement he could not remember its date.
30. On re-examination DW2 clarified he was not present when Mjawiri was allocated the land but was present when he sold it. That DW2 was 30/40 years old then. When he was 9 year old he lived with Mjawiri in the suit property. That he did not know who made the green card and title deed for Mjawiri. That the receipt at item 10 of his bundle was for transfer stamp duty and was just but one of the payments. The chiefs letter refers to Kaya village because the deceased had left Colorado village.
 31. DW3 was Mwanajuma Mjawiri Issathe deceased daughter. The witness adopted her witness statement dated 31/5/2023 as her evidence in chief which largely echoed the content of DW2 witness statement.
 32. Cross examined by Mr. Kemei the witness told the court she did not a birth certificate. She was born in Mwabungo but could not remember her year of birth. That she lived in her fathers land but did not know its number or title. She was illiterate. Though the deceased sold the land she could not remember the buyers name. She had already been married then and left the land. Referred to paragraph 7 of her witness statement DW3 could not remember the year DW2 and her brother left for Kilifi as she was very young. She only came to know of the buyer recently when these proceedings arose. That her father told her he was given the land by the government it was a forest. The witness had no problem with DW2 helping her as a brother.
 33. Cross examined by Mr. Othim she confirmed her witness statement. She could not tell the year her father got the land. Other than seeing the 2nd Defendant in court she has never met him before. She could not remember the year her father sold the land to the 2nd Defendant. The witness testified she never went to chief to obtain the letter. That she has gone back to the land only once and did not know what transpired there in 2015 or 2009.
 34. Ms Kihika did not cross examine the witness.
 35. DW3 clarified that she grew up in the shamba. She just found herself there. She left when she was about 18 years, they used to harvest the fruits and thereafter it took years before the deceased sold the land. She could not tell who harvested the fruits after she left. The buyers name was Stanley.
 36. The 1st Defendants case was closed at this juncture.
 37. DW4 was Stanley Ndinguri Wanjikuthe 2nd Defendant adopted witness statement dated 27/01/23 as his evidence and produced the documents in the lists dated 27/1/23 and 29/5/23 and 5/12/23 DW4 EX 1-24; 24-26 and 27-29. The witness added that during the application for Land Control Board consent the deceased was still alive. That he appeared before the Board in Msambweni before a committee of about 10 members. There was no objection to the consent. That the deceased prepared the consent documentation and therefore he could not explain why the application is not dated. That the Land Registrar has not filed any letter to the LCB indicating any anomaly. That the sale agreement date is post the consent as it had been agreed that since the witness had travelled all the way from Nairobi and deceased from Kilifi the documents be signed to avoid travel inconvenience. He paid 95 percent deposit of Kshs1,425,000/- by bankers cheque, facilitated the deceased stay in Ukunda to enable completion of the transaction and title issued accordingly on 19/11/2009. On the green card produced as PEX4 the witness stated the 1st entry was registered as SFT and there was no entry between 30/3/1992 and 17/12/2002. That Entry No. 3 to the deceased was endorsed with the registrar'



signature. That he did not see any impediment to the title issued. He denied that the borehole/well was constructed by an NGO and reiterated it was commissioned by him and supervised by Rashid Omar who was an immediate neighbour. The witness told the court he constructed a two bedroomed stone house for the caretaker. The photos demonstrate a planned plantations of coconut, mango, cashewnut, oranges. That he built a perimeter wall and a gate and there is no way the Plaintiff could have entered to harvest fruits. The trees were many and harvesting could only be done with lorries. Referring to the ground status report dated 16/01/2015 in the 3rd defendants bundle DW4 conceded he first built a temporary structure made of iron sheets and there were labourers. He was not aware of the visit. He confirmed he owned another plot in the neighbourhood immediately next to the suit property. He could not explain why the transfer to Mjawiri was undated and left this to the authors thereof.

38. The witness took the court through all the documents he had produced for replacement of title in 2017. That there being no objection the Registrar issued title. On the summons dated 21/7/2015 the witness noted that the deceased was still alive yet it was not addressed to him neither was it copied to him. He was seeing it for the first time. That DW3 only knew DW4 by name because he DW4 only dealt with the father and DW2. The witness told the court he was not aware of any criminal charges against himself nor the deceased when he was alive.
39. Cross examined by Mr. Othim the witness stated he knew DW3 the daughter of the deceased and had interacted with her at Kwale after he had finished purchase of the land. The witness was not aware that the 1st Defendant did not follow procedure in getting his title and that there was no charge or discharge. On being shown the deceased title and its reference No. ending with numbers '02' the witness was not aware this denoted the title may have been issued in the year 2002. That either of the agreement or consent could come first depending with the parties agreed arrangements. He insisted all the documents in respect to the LCB consent were executed. On the fence in the photos produced in 2nd Defendants bundle the witness stated he put up the same in 2009. He denied the structures in photo 7 and 5 were built in 2020 after the filing of this suit. That the well was done around 20/11/2009 and took time as it was dug manually. He disagreed that it was done before he had purchased the land. That he saw letter dated 21/7/2015 for the first time in court.
40. Cross examined by Ms. Machuki DW4 testified that DW2 was introduced to him by the deceased. That he did all the due diligence including with neighbours and the 1st Defendant was the lawful owner. That PEX6 dated 13/3/2015 is copied to the Plaintiff and is not copied to the 2nd Defendant nor the deceased despite these names featuring therein. The witness had already purchased the property by 13/3/2015. That the same applied to the letter dated 19/8/2015. The witness was not aware of any dispute on the property as the deceased never informed him of any. Even during due diligence nothing arose about any dispute. That the deceased had surrendered all completion documents.
41. Cross examined by Mr. Kemei the witness noted that as per the records the deceased got the land from SFT and got a discharge from SFT as confirmed through the search. The witness was not aware about discharge of charge. That having presented a consent meant the LCB sat though his application was not signed. That the Board does not share minutes. He denied that it was impracticable to finalise all the transactions in one day. The witness did not believe that there were no documents at the land office supporting entry no. 3 of the green card he had presented. He conceded he did not file a receipt for the application for consent.
42. DW4 clarified in re-examination that it was the deceased who obtained the LCB consent. At the time of purchase the land did not belong to SFT. That the entry No. 3 above was for title which is issued by the Registrar whose signature has been appended. There is no endorsement against 'CTC' that the signatures in the register are forgeries. That EX. No. 4 was produced by the Plaintiff and he is the one



- who ought to have included any encumbrance. He could not answer about forgery attributed to the deceased before 2002 because the witness not yet purchased the property. That the same applied to the forgeries referred to in letter dated 13/03/2015. There was no document from SFT indicating the Discharge and charge were missing or were not there. The witness stated they were not given the LCB minutes and the registrar did not produce them to show that I did not attend the LCB. On the letter dated 14/3/99 (page 4 3rd defendants bundle) the documents required for cancellation are not listed. On the photos the witness stated 5 acres was a big parcel which cannot be captured by one photo the same were taken at different angles. That the ground status report does not make reference to fraud but to unclear circumstances. That the deceased has not complained that he was not paid the purchase price.
43. With the above the 2nd Defendants case was closed.
44. DW5 was Steve Mokaya Land Registrar Kwale. The witness testified that the suit property 1st registration was to the SFT on 10/3/92. It was then issued to Issa Mjawiri on 17/12/2002 and title issued the same day. On 19/11/2009 Mjawiri transferred the same to Stanley Ndiguri for Kshs. 1 million and title issued the same day. That the title was re- issued vide Gazette Notice No. 2256 on 19/01/2018 to Stanley Ndiguri. The witness also explained the rest of the entries being the various court orders issued in the matter notably the order cancelling entries 4,5 and 6 which were in favor of the 2nd Defendant and restoring the land to the Plaintiff and a subsequent order reverting the proprietorship back to the 2nd defendant . The witness stated that other than entry No. 2 in favor of Mjawiri he did not have any records in respect of the other owners, no discharge of charge. The witness produced the documents in the 3rd defendants list dated 27/6/2023 as DW5EX 1-18.
45. On cross examination by Mr. Othim the witness testified that he had no document to show that SFT allocated land but entry 1 showing they were original owners of the suit property. He had no documents to support transition from the deceased to Stanley. That where SFT is the 1st owner they must issue a discharge. This was not available. That Issa ought to have been discharged. The witness stood by all the documents he had produced and stated that he joined the Land registry at Kwale in the year 2013 and he was not part of the transactions and therefore not culpable of any criminal actions.
46. Cross examined by Ms. Machuki he confirmed that his register bore a transfer to Issa but he had not seen any transfer to the Plaintiff or corresponding letter of offer. That DW5EX 1,2,3 were obtained through letter dated 13/3/2015 from the Director of Land Adjudication addressed to the Chief Land Registrar and copied to the Plaintiff. The said letter clearly showed there is a dispute and the parties to the same are disclosed. He noted the letter is not copied to Issa (deceased). On dispute resolution the witness testified that if the land was under land adjudication the complaint would be dealt by the department and the parties involved. On the letters dated 14/3/99, 17/3/15 which related to cancellation of title the witness stated the cancellations were not effected since the letters were not addressed to the Land Registrar.
47. The witness pointed that the caution filed by the plaintiff was never registered. On DW5EX 20 letter dated 12/5/17 from DCI Ukunda the witness stated it was clear that the author relied on the letter 13/3/2015 from the land registrar to reach the conclusion. The witness declined to comment on DW5EXH 21 an area list being a document from the ministry's sister department. While he agreed that Issas title had been referred to as fraudulent the Land registry had not received any complaint in this regard.
48. On cross examination by Ms. Kihika, Mr. Mokaya told the court that he has worked in several land registries and when you report to a station you work with the existing parcel file. Correspondences are never booked unlike charges and transfers. That the caution is not certified meaning it may not have originated from the land registry. That letter dated 13/3/2015 does not bear the land registry's



received stamp, there was also no corresponding request from the chief land registrar requesting the land registrar Kwale for a status report of the parcel which is what he would ordinarily do. On plaintiff EX 7 letter dated 2/4/2015 the witness confirmed he never received the original thereof and which applied to letter dated 19/8/2015 PEXH8. If it had been received then the originals would be in his possession. That his office rely's heavily on SFT documents to do registration. On being shown entry No. 2 in favor of Mjawiri the witness indicated it must have been based on the transfer from SFT and it was properly executed and was in its original state. There was no communication from SFT denying the signature in the transfer to support impeachment of the document. That the entry was fully booked and title issued. That the entry No.2 is supported by the particulars in the transfer.

49. On the entry No. 4 in favor of the 2nd Defendant the witness testified that he did not have its supporting documents and did not make inquire on it. On the green card produced by the Plaintiff DW5 observed that while it contained 10 entries they did not include a restriction placed by any party. Referring to PEXH8 the witness told the court the discretion to expunge or cancel a record is on the land registrar and not the Chief Land Registrar. That the present title was under settlement and targets the indigenous people as the 1st priority. The list of allottees is usually kept by the Ministry of lands & Physical Planning. That while the letter dated 24/6/2015 is from the Ministry of Lands he did not have a stamped copy which it ought to have. He did not have the original of EXH 16 the letter from DCI requesting for documents yet it is addressed to District Land Registrar. There was no forwarding letter in response to the same and does not particularise the documents being requested.
50. On being shown the area list (page 21) DW5 could not identify plot 397. Highlighting the process for reissue of title the witness stated that had all the documents 7,8 and 10 been in the parcel file the registrar would not have made the entry for re-issue. He would have summoned the other parties. The witness confirmed he had not seen any discharge in respect of the plaintiff and which is issued after one has paid to the SFT since the amount is treated as a loan. In the event of non-payment, the SFT would report. The discharge is one of the key documents the Registrar uses and is received in its original. For entry no. 2 to have occurred a discharge is mandatory. There was no document from DCI stating that the said entry was made without a discharge. On the letter dated 14/3/99 the witness observed it ought to have been signed by an officer from SFT and not the office of the Registrar of titles as stamped which is a different office. That since the year 2002 nothing has been impeached and the 2nd Defendant remains the owner. That the court order cancelling entries 4,5 & 6 did not touch entry No.2 and therefore Mjawiris title stood not impeached.
51. On re-examination the witness confirmed that the connection between their office and the land adjudication office is the discharge of charge and certificate of outright purchase. In the absence of a discharge one can obtain exemption from discharge. No discharge is required under outright purchase. Settlement is one of the core mandate of Land adjudication department. Disputes arising from area list are handled by the Land Adjudication officer.
52. With the above the 3rd defendants' case was marked as closed.

Submissions

53. The Plaintiffs Submissions are dated 15th April 2024, 2nd Defendant 20th May 2024 and the 3rd Defendants 22nd May 2024. The 1st Defendants submissions were not on record though I note on 5/6/24 the court granted counsel an extension of time to file the same. The court went out its way to inquire from ELC Kwale and it was confirmed the same were not in the CTS. I must however note that the 2nd Defendant supports the case of the 1st Defendant.



Analysis And Determination

54. From my analysis of the pleadings, documentary and oral evidence, and the submissions filed by parties the issues for determination are as follows:-
1. Whether the Plaintiff is the first lawful allottee of the suit property.
 2. Whether the 1st Defendant title should be impeached
 3. Did the 1st Defendant pass a good title to the 2nd Defendant
 4. Whether the Plaintiff has proved fraud on the part of the Defendants
 5. What orders should issue in the circumstances of this case
 6. Who should bear the costs of the main suit and counterclaims
55. The Plaintiffs claim according the amended plaint dated 4th October 2021 is that he was offered the suit property in 1978 by the Settlement Fund Trustee (SFT) which he accepted, paid the required charges upon which he was issued with a certificate of outright purchase pending the issuance of title. The issuance of title never saw the light of the day as he discovered in the year 2015 that a title was issued to the deceased 1st Defendant (whom I will refer to as Mjawiri) in the year 2002. The Plaintiff insists he is the lawful 1st allottee of the suit property as the title issued to Mjawiri was obtained fraudulently. That the said title having been fraudulent it is null and void and is impeachable.
56. It is trite that the burden of proof was on the Plaintiff to prove the existence of the facts he alleges to exist in accordance to the provisions of Section 107 of the Evidence Act Chapter 80 of the laws of Kenya. The standard of proof is on a balance of probabilities. In the case of Stephen Wasike Wakhu & Ano. Vs. Security Express LTD (2006) eKLR the court commenting on the provisions of section 107 posited that a party seeking justice must place before the court all material evidence and facts which if considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available.
57. Further the Plaintiffs alleged title being under challenge it was incumbent upon PW1 to show the root of its title and its legality. I will draw guidance from the Court of Appeal in Munyu Maina v Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR, stated that where the registered proprietor's title root is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.
58. It is pertinent to outline the mandate and objectives of the Settlement Fund Trustees. Under Kenyan law, the "settlement process" under the Settlement Fund Trustees involves the purchase of land by this government entity, which then subdivides and resells the land to individuals, typically as part of a settlement scheme, with the aim of providing land access to landless communities; this process includes land identification, surveying, allocation of plots, and issuance of title deeds to the new settlers, all managed by the Settlement Fund Trustees as per the (Agriculture Act chapter 318 now repealed).
59. In *Bandi v Dzomo & 76 others* (Civil Appeal 16 of 2020) [2022] KECA 584 (KLR) Neutral citation: [2022] KECA 584 (KLR), the court of appeal explained thus;
- “ Before the enactment of the Land Act, No. 12 of 2012, there was in existence the Agriculture Act, and at section 167 it established a body corporate known as a Settlement Fund Trustees;



Section 168 established the Agricultural Settlement Fund which is vested in the Settlement Fund Trustees. The Settlement Fund Trustees, using the fund, were empowered to purchase any land for resale. It means that settlement schemes could be created either by purchase of private land or by utilizing public land (unalienated Government land).’

60. Section 167(2) of the Agriculture Act Cap 318 (now repealed) provides;-

“The Settlement Fund Trustees shall, by that name, be a body corporate having perpetual succession and a common seal, and may in its corporate name sue and be sued, and, for and in connection with the purposes of this Part, may purchase, hold, manage and dispose of movable and immovable property, and may enter into such contracts as it may deem necessary or expedient.”

61. From the entire proceedings there is no dispute that the initial 1st registered owner of the suit property was the SFT. DW5 the Land Registrar Kwale confirmed in his evidence in chief that the suit property first registration was to the SFT on 10/3/92. None of the parties are of the contrary view and which is reflected in all the submissions filed before court (see paragraph 17 of the 2nd Defendants submissions and 24, 31 of 3rd Defendants submissions). This is not an issue in dispute.
62. I agree with the Plaintiffs submission that the law recognizes several processes of lawfully acquiring and owning land in Kenya as stipulated under section 7 of the Land Act 2012. It could be through Succession, transmissions, Settlement programmes such as settlement schemes, Land Adjudication process schemes, Communal ownership, Transfer, Compulsory acquisition and Adverse Possession.
63. It is however noteworthy that the underlining consideration is the legality of such acquisition as already seen in *Munyu Maina v Hiram Gathiha Maina* (supra). This is in view of the alleged double allocation and or allotment.
64. Was the Plaintiff the lawful first allottee of the suit property? I will also seek to answer the question whether such allocation crystallised if at all and this will become clearer in this judgement. The Plaintiff produced as part of his evidence in proof Letter of offer and acceptance dated 14/2/1978; Certificate of outright purchase dated 1997, Receipt No. AK 242502 for Kshs 500. It is the Plaintiffs evidence that having paid all the requisite charges and only awaiting issuance of title deed he cannot be short changed. Other documents produced relevant to this issue were letter dated 13/3/2015 by the Land adjudication and settlement department addressed to the Chief Land Registrar, Letter dated 19/08/2015 from Ministry of Lands, Housing and Urban Development addressed to the District Land Registrar, Letter dated 2/04/2015 addressed to District Land Registrar from Ministry of Lands, housing and Urban Development, Letter from National Police Service dated 25/1/2016 addressed to the District Land Registrar and letter of Commitment from the village elder Colorado area in Kwale.
65. My understanding of any process where there is an offer, the party receiving the offer must have expressed interest in the subject of offer. In this case the suit property. Cross examined by Ms. Machuki PW1 stated he got the letter of offer from Kwale land office after applying for it. This application was not produced in evidence. This is confirmed by PW1 on cross-examination by Ms. Kihika where he does not refer to this application but states that he gave money to friends to follow up for him and after payment he was given the letter of offer. This is also a contradiction of PW1 earlier evidence that he applied for the land.
66. The above notwithstanding, the letter of offer is dated 14th February 1978 and it is addressed to George Stephen Macharia ID No. 0987598/63 in respect of Plot No. 397 Diani. Being a letter of offer it must be accepted. Indeed also produced was Certificate of Acceptance see (PEX1). Quite a number of issues



arose during cross examination on this exhibit and it behoves the court to interrogate them because this is the evidence the court is called upon to rely on.

67. Firstly, is on the fulfilment of the conditions in the letter of offer. The conditions are listed as a) – (g). PW1 agreed in cross examination that if the conditions in the letter of offer were not fulfilled the offer would be withdrawn. Indeed the offer stipulates thus ‘In the event of breach of any of the above conditions, the offer contained herein shall be withdrawn.’ The court notes that during the entire proceedings there was no communication of this withdrawal by the SFT who issued the offer. PW1 agreed that the said letter does not refer to any such notice to be issued, in other words there was no requirement for notice for the withdrawal by the SFT. The offer is clearly couched in mandatory obligatory terms and gives no room for discretion to not withdraw the offer. I think what is of importance is whether there existed breach of any of the conditions given in the letter of offer. PW1 reiterated in his testimony that he never breached any of the terms in the offer. Meaning then he must have fulfilled all of them. But is PW1 right?
68. Condition a) is to the effect that in future the offeree will pay to the SFT such sum of money as he may be called upon to do so. PW1 admitted the receipt No. AK 242502 (PEX3) lacked a heading and a stamp. My review of this document indeed confirms the absence of these features. This diminishes the credibility of the document considering that PW1 evidence was that he gave money to friends to pay for him and he cannot therefore authoritatively have vouched for the document. My other concern is the date of the offer vis a vis the Certificate of outright purchase and the date of the receipt (PEX3). There is no explanation by PW1 for the issue of certificate of outright purchase in 1997, 19 years or so after the offer. It is important to note that a certificate of outright purchase is given when the land is not on loan from the SFT indeed this is confirmed by DW5 when he clarified in re-examination that no discharge is required in this regard. The receipt produced bears a date of 22/11/89 which in my view logically would be in tandem with the certificate of outright purchase. These disparities further diminished the veracity of the documents produced.
69. While I’m still on the authenticity of documents produced I had already observed that an offer must be accepted and as part of the letter of offer herein was produced the Certificate of acceptance. PW1 on being shown this exhibit confirmed the same had no date but bore a stamp dated 21/3/2016. My review of the certificate of acceptance confirms it is not dated below the signature of the person accepting the offer. The same bears a stamp of having been received on 21/3/2016 and the question I posed to myself is shouldn’t the date of this document closely correspond with the letter of offer? It is also not clear why the offeree did not date it at the point of signing it.
70. Conditions b) to e) all relate to possession and actual use/ activities on the suit property. Scanning the Amended Plaintiff the pleading makes no reference to possession of the suit property by the Plaintiff but only deprivation of lawful ownership. It is trite that a party is bound by its pleadings see *Galaxy Paints company Ltd Vs Falcon Guards Ltd (2000)E.A 885* and *Raila Amolo Odinga & Another VS Independent Electoral Boundaries Commission & 2 Others (2017) eKLR*. Be that as it may possession is included as a condition in the offer letter and ought to have been complied with. Cross examined PW1 told the court that he intended to build in Diani but he never found time. That he marked the plot with trees but did not commence cultivation immediately. Further that he had made arrangements with some people to live in the suit property and continue with their activities therein. PW1 did not produce any documentation in proof of these arrangements. Though the witness clarified in re-examination these were some boys in the community he left to take care of the property this is not a plausible excuse for not having formal arrangements with them. Infact I noted that in further cross examination PW1 affirmed that he visited the land and it had old fruit trees largely mangoes planted by previous owner. I had no evidence placed before this court in proof of the fact that PW1 ever took



possession of the suit property in a manner required in the letter of offer. He had no physical control at all.

71. Based on the foregoing analysis the court was left with no doubt in its mind that the documents produced by the Plaintiff in proof that he was the bonafide 1st allottee are tainted and could not be relied upon by the court as such proof. Further the conditions in the letter of offer having not been met there was no beneficiary or legal interest that passed to the Plaintiff as the contract between PW1 and SFT did not crystalize. In this regard the court is guided by the the court of appeal decision in Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR where the court had this to say; -

“.....Mr. Otieno-Kajwang who appeared for the applicant argued that the approval by H.E. the President amounted to his client obtaining the title to the suit property. This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held. (emphasis is mine).

72. The Plaintiff further contends in the amended plaint that the transfer to the 1st Defendant was fraudulent as particularised in paragraph 8 of the said pleading. These are that the 1st Defendant was not an allottee of the suit property, that the Plaintiff having paid all the requisite fees and only awaiting issuance of title deed cannot be shortchanged, that the transfer document in favor of the 1st Defendant cannot have been signed by the trustees in 1992 because the land was not available as it had been allocated to the Plaintiff. That the title to the 1st defendant is null and void.
73. It is trite that the standard of proof for fraud is a slightly higher than that of normal standard of a balance of probability See Ratil Patel Vs Lalji Makanji EA 1957 and Vijay Morjaria Vs Nansigh Darbar & Another (2000) eKLR. Further that fraud has to be specifically particularised and proved.
74. From the particulars outlined in the pleadings I must note there were no specific grounds touching on the 3rd Defendant as rightly observed by state counsel (see paragraph 54 of 3rd defendants submissions). In any event a party is bound by its pleading. The Plaintiff ought to have met the threshold as to outlining the grounds and particulars of fraud against the each of the defendants.
75. The Plaintiff produced in evidence a number of documents mostly correspondence to prove that there was fraud. These are letters dated 13/3/2015 by the Land adjudication and settlement department addressed to the Chief Land Registrar, Letter dated 19/08/2015 from Ministry of Lands, housing and Urban Development addressed to the District Land Registrar, Letter dated 2/04/2015 addressed to District Land Registrar from Ministry of Lands, Housing and Urban Development and Letter from National Police Service dated 25/1/2016 addressed to the District Land Registrar. My task is to review these documents to determine if they meet the threshold of proof that the transfers to the 1st and 2nd Defendants were fraudulent.
76. It is important to note that the above letters revolve around the year 2015 and this coincides with the period March 2015 which PW1 informed the court he attended the Ministry of Lands to pursue the issue of his transfer upon which he discovered the suit property had been transferred to the deceased. The letter dated 13/3/2015 (PEX6) is addressed to the Chief Land Registrar Ardhi house by Robert Nyakeruma for Director of land adjudication and Settlement. It refers to a complaint by the plaintiff dated 3/3/2015. Mr. Nyakeruma states

“It has come to my attention that on 17th December 2002, one Issa Mjawiri Jabiri ID. No. 6730302 obtained a title deed using a forged Transfer document which did not originate



from our office (see annex III). A copy of the green card (see annex IV) shows the plot was transferred to Stanley Ndinguri Wanjiku on 19th November 2009 using the fraudulent title’.

The letter asks the recipient to note that the plot still belongs to SFT as per entry No. 1 of the green card. The chief land registrar is then given an option to recall or expunge the title from his records to allow the department to transact and execute the transfer documents in the Plaintiffs favor’

77. The above letter appears to have been forwarded to the District Land Registrar Kwale by a letter dated 2/4/2015 (PEX7) by Mr. F.I Lubulellah for Chief Land Registrar. The District land registrar is requested to take note of the last paragraph of the letter and act as requested. A reminder dated 19/08/2015 (PEX8) is sent instructing the District Land Registrar to recall or expunge the fraudulently obtained title of Issa Mjawiri Jabiri.
78. Are the above correspondence proof of fraud? Indeed the courts have pronounced that fraud is a serious matter and thus the threshold of proof set out in the case law cited above. PEX 10 is a letter dated 25th January 2016 from the Directorate of Criminal Investigations addressed to the District Land Registrar Kwale on investigations that were being conducted in respect of the suit property ‘on obtaining registration by false pretence’. The letter requests for specific copies of documents to enable completion of the investigations. I did not see any investigation report pursuant to which the conclusion that the title was fraudulent was reached. Infact it would appear that a conclusion had already been reached that the transfer was fraudulent as the letters dated 2/4/2015 and 19/8/2015 both predated the letter by the DCI. Moreover no officer was called from the Land Adjudication and settlement to authenticate this information and specifically that the transfer/documents did not originate from their offices. The Settlement Fund Trustee which is a body corporate was not made a party to these proceedings and who would have been able to demystify everything being incharge of the settlement process.
79. Additionally PW1 cross examined on the letter dated 13/3/2015 testified that though he received the letter he never followed up to ensure transfer was executed in his name as directed in the letter. In any event he did not produce such transfer before court. This is confirmed by DW5 that his register bore a transfer to the deceased but he had not seen any transfer to the Plaintiff. PW1 confirmed he has never been called to any court where Issa Mjawiri has been charged for fraud. I resonate with the submission by the 3rd Defendant that the responsibility of the allocations are purely on the SFT.
80. A letter dated 12/05/2017 was also produced touching on the investigations (DW5EX 20) from DCI Ukunda. This letter purports that pursuant to a complaint by the Plaintiff investigations were conducted. The letter gives the chronology of events and refers to the letters dated 13/3/2015 and 19/8/2015 and concludes that in view of the evidence gathered ‘Issa Mjawiri is a stranger on parcel of land as per the records held in the land registry Nairobi’. My review of this letter does not disclose any investigations carried out except the same documents earlier stated in the analysis hereinbefore. Infact my observations are confirmed by Mr. Mokaya who testified that this specific letter was clear that the author relied on the letter 13/3/2015 from the land registrar to reach the conclusion. I also note that letter only terms the deceased as a stranger and not a fraudster. This court reiterates in the absence of an investigation report the evidence produced is not conclusive proof of fraud.
81. From the particulars of fraud highlighted above and in view of my analysis and having impeached the documents in respect of payment and the letter of allotment and acceptance I will not belabor the point for they did not qualify as proof of the plaintiffs claim. The implication of this finding therefore is that the particulars given are rendered otiose as they have no basis upon which they can stand.



82. Based on the foregoing it is this courts finding that the Plaintiff has not proved fraud as particularised to the required standard of proof.
83. The court must now deal with the 1st Defendants case who was later substituted with DW2. In his response to the suit, the party filed Statement of Defence and counterclaim dated 31/05/2023. The 1st Defendants case is that he is the registered proprietor of the suit property. That he has enjoyed quiet and uninterrupted possession of the suit from the year 1970 when the suit property was virgin land. He was allocated the same as a native of the Digo Community, paid the requisite fees and title issued on 17/12/2002. That he openly carried out developments including his matrimonial home and planted mango trees, nuts, oranges and lime. That in the year 2009 he transferred the property to the 2nd defendant for valuable consideration. The 1st Defendant also denied the transfer to him was fraudulent. It is averred that the Plaintiff has never been in occupation. He also raises the defence of adverse possession.
84. In view of the counterclaim the 1st Defendant was also required to prove his interest in the suit property. DW2 produced the documents contained in the List of Documents dated 31st May 2023. I will focus on item 10 of the said list being a copy of the transfer in favor of Issa Mjawiri Jabiri from the Settlement Fund Trustee, item 11 being a copy of a green card for the suit property and item 12 a title Deed to the suit property registered in the name of Issa Mjawiri.
85. The 1st Defendant pleads that he is the absolute and indefeasible owner of the suit property. I have seen the title dated 17/12/2002 in favor of Issa Mjawiri Jabir. The suit property is registered under the Registered Land Act chapter 300 of the Laws of Kenya (now repealed). Section 27 (a) of the same is to the effect that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
86. Sections 26 of the Land Registration Act and which applies by dint of section 107 of the Land Registration Act 2012 provides that: -
- “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.”
87. From the above legal provisions, a title may be impeached on grounds of fraud where the registered owner is proved to be a party. I have already made a finding that the Plaintiff has failed to discharge the legal burden of proof as to fraud and the reasons have been given in my analysis herein before. The 1st Defendants title cannot therefore be impeached on the grounds of fraud the same having not been proved as pleaded. Cross examined on the entry No. 2 in the green card produced being registration in favor of the deceased DW5 was sure it was based on the transfer from SFT since the land registrars office relies heavily on documents from the SFT for such registration. According to the witness it was properly executed and was in its original state. DW5 also stated there was no communication from SFT denying the signature in the transfer to support impeachment of the document. That the entry was



fully booked and title issued. That the entry No.2 is supported by the particulars in the transfer. The court respectfully agrees with these observations. I have also explained why the absence of the SFT or any of their witness poses a challenge. While DW5 agreed that the deceased title had been referred to as fraudulent the Land registry they had not received any complaint in this regard.

88. But let me also approach the matter from the possession perspective as pleaded by the 1st Defendant. I will later come to the issue of the defence of adverse possession raised. The Court of appeal was faced with almost similar circumstances where the issue of possession by the locals featured prominently. I note DW5 observed during his testimony in cross examination the prioritization of locals. But I must emphasise possession is possession looked at its plain meaning. In the case of *Bandi v Dzomo & 76 others* (Civil Appeal 16 of 2020) [2022] KECA 584 (KLR) Neutral citation: [2022] KECA 584 (KLR). This court drew some relevant guidance therefrom in the following holding of the Court of Appeal;-

29. We reiterate what this Court stated in *Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, that:

“It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in *Ghana of Wuta-Ofei -v-Danquah* [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.”

30. In addition section 116 of the Evidence Act states that: “When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

89. Firstly, I will refer to my earlier analysis where I have made a finding that I had no evidence placed before this court in proof of the fact that PW1 ever took possession of the suit property in a manner required in the letter of offer. He had no physical control at all. This finding resonates with the above holding of the Court of Appeal. The 1st Defendant called three witnesses to prove possession. DW1 gave evidence that he was a neighbour to the deceased and how together with the deceased they set out to clear the land which was unoccupied and started farming therein. They planted coconut trees, mango, cashew nuts, citrus and others like pineapples. PW1 clearly stated in his oral testimony that he found people in the farm whom he left to carry out their activities. PW1 testified he visited the land and it had old fruit trees largely mangoes planted by previous owner.

90. DW1 is a witness that I had no difficulty in believing from his knowledge of the history of the area which the Plaintiff did not have a clue. I also had no problem believing he knew the deceased very well as a friend and neighbour. I say so because I note his age given as 73 years old in his witness statement which he adopted as his evidence in chief. I noted from the deceased death certificate (see 1st Defendants bundle (7) Issa died on 31/10/2019 at the age of 77 years. The difference in age is very minimal which also lends credence to DW1 assertion the two grew up together and cultivated together. DW4 the 2nd Defendant confirmed DW1 was an immediate neighbour. Further there was no evidence to prove that DW2 was not an adopted son of the deceased and that DW3 was not the deceased daughter and that they never lived in the suit property. Infact DW3 had no problem with DW2 helping her as a brother.



91. Guided by the case law cited above I would have no hesitation making a finding favorable to the 1st Defendant as the party who was able to prove they were in possession of the suit property before they transferred the same to the 2nd Defendant.
92. Would the court be inclined to find the 1st Defendant is entitled to the suit property by way of adverse possession of as pleaded?
93. Adverse possession is grounded in sections 7, 13, and 38 of the Limitation of Actions Act, (Cap 22). The court in *Ongwen & another v Keya & another* (Environment & Land Case E027 of 2021) [2023] KEELC 279 (KLR) posited
29. This right to be adverse to land does not automatically accrue unless the person in whom this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. See the findings of the Court in *Malindi App No. 56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR where it held;
30. Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.
94. It is imperative to note that the land must be registered in the name of a third party under any of the recognized legal regimes. The rationale for this is that it is upon the date of the registration that time starts to run. In the present case no title was ever issued in the name of the Plaintiff and this is clearly pleaded that when the Plaintiff went to pursue his transfer he discovered that title had been issued to the deceased Issa Mjawiri. I have noted the 2nd Defendants submissions on this aspect alluding to the five basic conditions to be met to perfect the title of the adverse party. Counsel failed to address the registered legal owner, there was none for purposes of the Plaintiff. In my view the defence of adverse possession is misplaced. I will not overemphasise the point.
95. The court has also noted the submission that the suit is barred by limitation having been commenced 15 years after the title deed was issued to the deceased. For me I would not easily render the plaintiff's suit as time barred. I say so because the Plaintiff clearly pleads that he discovered fraud in the year 2015. It is now established that in such circumstances time will only start running from the date the fraud was discovered – see the holding of *S.Okongo J in Justus Tureti Obara Vs Koipetai* (2014)eKLR. This holding is also in tandem with the provisions of Section 26 of the Limitation of Actions Act reads;-
- “Where in the case of an action for which a period of limitation is prescribed, either-
- (a) The action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or
- (b) The right of action is concealed by the fraud of any such person as aforesaid; or



- (c) The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

96. This court therefore declines the invitation to declare the plaintiff's suit as statute barred.

Did the 1st Defendant pass a good title to the 2nd Defendant

97. I must now address the 2nd Defendants case. The 2nd Defendant filed a defence and Counterclaim dated 14/11/2022 and prays for inter alia a declaration against the Plaintiff that the 2nd Defendant is the bonafide purchaser for value without notice of the suit property and as such is the legal owner of the suit property. The Plaintiff contends that the 2nd Defendants title is null and void since the 1st Defendant never passed a good title to the 2nd Defendant.
98. Clearly arising from the above and the entire proceedings the 2nd Defendants title is dependant on a positive finding of the validity of the 1st Defendants title as rightly observed in the 3rd Defendants submissions. I have already found no basis upon which to impeach the title issued to the 1st Defendant. What remains is to interrogate how the 2nd Defendant came up to be the registered proprietor guided by the court of appeal holding in *Munyu Maina v Hiram Gathiha Maina* (supra).
99. The 2nd Defendant gave evidence as DW4. His evidence is that he purchased the suit property from the deceased. It was his evidence that the suit property had matured trees comprising mangoes, cashew nut as well as coconut trees. This evidence was corroborated by DW1, DW2, and the ground status seems to allude to this vegetation. Even PW1 conceded to what was in the suit property in terms the nature of trees presents as seen hereinbefore.
100. DW4 produced in evidence a number of documents including Certificate of official search dated 17/11/2009, copy of sale agreement dated 18/11/2009, LCB consent and application, transfer form dated 18/11/2009, Banker's cheque, Valuation requisition for stamp duty dated 18/11/2009, Stamp duty Declaration and pay in slip and the actual KCB payment slip, copy of title deed registered in his name. from the proceedings a lot of effort was put in cross examination to discredit these exhibits. DW4 was able to clarify most of the issues raised and those he could not he left to the makers which was the honest and reasonable thing to do. Asked about the speed at which the transaction was effected the explanation given was that both parties had travelled from Kilifi and Nairobi and had agreed to ensure finalisation within the time they were there and which also coincided with the LCB sitting.
101. The court also took its time to review the documents presented by DW4 and did not find any reasons to impeach them. DW5 did not state they were forgeries and no forensic report was presented by the Plaintiff to support the allegations. Even in terms of replacement of the lost title DW5 was able to give a plausible explanation in my view to the effect that had all the documents 7,8 and 10 been in the parcel file the registrar would not have made the entry for re-issue. He would have summoned the other parties. But even then, I asked myself who would have been summoned when no title had issued to the Plaintiff in the first place. For me the 2nd Defendant based on the material placed before court, the 2nd Defendant was able on balance of probabilities to explain the root of his title.
102. Based on the above and having found no basis for impeaching the 1st Defendants title and no fraud having been proved against the defendants, this court finds no basis upon which to impeach the 2nd Defendants title.



What orders should issue in the circumstances of this case

103. Having made the various findings herein the next task is to revisit the prayers sought in these proceedings and consider what orders should issue in the circumstances of this case and for the ends of justice to be met.
104. In respect of the findings against the Plaintiff having not proved his case to the required standard it follows therefore that the orders sought in the amended plaint cannot issue.
105. The prayers sought by the 1st Defendant have already been highlighted elsewhere in this judgement. Based on the findings of the court upholding the title issued to the deceased I would find no hesitation to declare the deceased to have been the lawful registered and legal owner of the suit property from the year 2002 to the year 2009. As to costs it is trite that costs follow the event and the 1st Defendant is entitled to costs having successfully defended its title.
106. With regard to the 2nd Defendant the court having upheld the 1st Defendants title and having found no basis to impeach the 2nd Defendants title I see no hinderance to issuing the orders of permanent injunction the case having been heard and the proprietary rights of the parties having been determined. I find persuasion in the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR where the held inter alia as follows:
- “...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.
107. I note that the 3rd defendant filed a Notice of Claim against co- defendants. However, in view of the findings hereinabove the claim cannot be upheld.
108. Before I get into the conclusion and disposition, I must explain the delay in the delivery of this judgement. This judgement has been rescheduled 4 times. Before the year 2024 ended the court was on transfer to Siaya law courts and had to finalise partly heard cases before reporting to the new station in January 2025. The court also prioritised the preparation of rulings in active files to avoid inconveniencing litigants and advocates by carrying active files to the new station. The court also had to handle rulings emanating from the new station. I wish to extend my sincere gratitude for the indulgence accorded by counsel in this matter.

Conclusion And Final Disposition

109. The upshot of the entire foregoing analysis is that this court finds that the Plaintiff has failed to prove his claim against the Defendants to the required standard. The court further finds that the 1st and 2nd Defendants proved their claim against the Plaintiff to the required standard to warrant the upholding of their titles.
110. The court therefore enters judgement for the 1st and 2nd Defendants being the Plaintiffs in their respective counterclaims against the Plaintiff being the Defendant in the said counterclaims in the following terms
1. The Plaintiffs suit against the 1st , 2nd and 3rd Defendants is dismissed with costs.



2. A declaration hereby issues that the 1st Defendant was the registered and legal owner of all that parcel of land known as LR No Kwale/Diani Settlement Scheme/397 from the year 2002 to the year 2009.
3. A declaration hereby issues against the Plaintiff that the 2nd Defendant is the legal and rightful owner of all that parcel of land known as LR No Kwale/Diani Settlement Scheme/397.
4. The District Land Registrar Kwale shall ensure compliance and registration of the 2nd Defendant Stanley Ndinguri Wanjiku in terms of order (3) above.
5. A permanent injunction be issued against the Plaintiff restraining him and/or his servants/ agents/employees from erecting, being upon, utilizing or in any other way interfering with the land parcel LR No Kwale/Diani Settlement Scheme/397.
6. Costs are the discretion of the court. This court has already awarded costs to the Defendants in the Plaintiffs suit and it is my view that the said costs should suffice in the circumstances.

It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA CTS . THIS 7TH DAY OF MARCH 2025.

.....

HON. A.E DENA

JUDGE

7/03/2025

