



Jeremiah Creek Limited v Ndung'u & another; Imwati (Interested Party) (Environment and Land Case 103 of 2021) [2025] KEELC 5979 (KLR) (4 August 2025) (Judgment)

Neutral citation: [2025] KEELC 5979 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE 103 OF 2021**

**AE DENA, J
AUGUST 4, 2025**

BETWEEN

JEREMIAH CREEK LIMITED PLAINTIFF

AND

TABITHA NDUNG'U 1ST DEFENDANT

THE COUNTY/DISTRICT LAND REGISTRER KWALE 2ND DEFENDANT

AND

ANDREW THIAINE IMWATI INTERESTED PARTY

JUDGMENT

Background

1. This suit was commenced by way of plaint dated 22nd February 2017 and is in respect of land parcel Kwale/Diani Complex/1069 hereinafter referred to as the suit property. It is the Plaintiff's case that it has at all times been the registered owner of the suit property. The Defendant is sued in her own capacity and as the widow personal representative of the estate of Charles Kamau. That the suit property was invaded by the Defendant's husband (deceased) who had been permitted to supervise construction on the land. It is contended that the Defendant took advantage of her husband's invasion and moved into the suit land and that attempts to have her vacate the same through notices to vacate have borne no fruit.
2. It is the Plaintiff's case that both the Defendant and her late husband were intent on defrauding the Plaintiff and one Maureen Millet off the suit land as she was elderly and also a foreigner. The Plaintiff thus prays inter alia for an order of eviction against the Defendant.
3. In response, the Defendant filed a defence and later applied for joinder of the Interested Party as the initial registered owner from whom the suit property was allegedly bought and the Land Registrar



- as necessary parties. The orders were granted. The Defendant denies the Plaintiff's claims as stated in its pleadings. It is averred that the transfer of the suit land to the Plaintiff was procured fraudulently through collusion with the Land Registrar Kwale. It is her case that the suit land belongs to a company by the name Escafeld Holdings Limited where her late husband Charles Kamau was the sole director.
4. It is further alleged that the land was bought from the Interested Party herein Andrew Thianie Imwati and that the Interested Party had no capacity to sell the suit land to another party. The Defendant filed a counterclaim seeking for a declaration that the transfer of the suit land to the Plaintiff was fraudulent.
 5. The 2nd Defendant did not file any pleadings and or Defence in the matter apart from filing a bundle of documents and participating in the proceedings. The interested party gave evidence in support of the Plaintiff's case.

The Plaintiff's Evidence

6. PW1 was David Needham and gave evidence on behalf of the Plaintiff. During the hearing he adopted his witness statement dated 6/01/2017.
7. PW1 told the court he is majority shareholder of the Plaintiff who is the owner of the suit property. The same was bought by Mauren Millet the Plaintiff's mother who came to Kenya in the year 2005. That she wanted to build her retirement home. She identified a property belonging to Mr. Imwati who introduced her to Lucy Mbatia. She paid the said Lucy Mbatia to register Escafeld Holding Ltd and handle transfer procedures for the land from Andrew. The witness informed the court the transfer was never completed since after about 8 months his mother realised money for the development of the land was missing. That upon inquiry from Charles who was caretaker and managing the building site for her, she decided he wanted to end the relationship. That she paid Kshs.1 Million for the land through an agreement for sale dated March 2006.
8. That Millet later realised the shareholding document for Escafeld Ltd did not reflect her as majority shareholder. PW1 came to know that the shareholding was to be 65/35 and suspected there was some collusion. That between the period 2006 and 2011 he was trying to trace documentation for the transaction. PW1 then arranged for Mr. Imwanthi to sign a second agreement after showing him Millet's wishes. That Imwanthi understood the situation and that Lucy Mbatia was not acting in their interest.
9. On the sale agreement dated 23/03/2006 adduced by the 1st Defendant the witness testified that by that time Escafeld Ltd was not a legal entity and cannot have paid for the land. The said agreement was between Imwanthi and Millet. The witness urged the court to give possession to the Plaintiff as Charles wife has been in possession of the suit property since 2010. The witness produced as his evidence the documents in the bundles dated 22/2/2017, 20/4/2017 and 31/05/2022.
10. Cross examined by Mr. Tindika PW1 stated there was no document executed between Ms Millet and Charles appointing him as supervisor for the project. He admitted Jeremiah's Creek did not make payment to Imwathi. That the Power of Attorney (PA) donated to him by his mother is donated to him as David and not as Director. He confirmed there was an alteration in the PA from 2010 to 2011. He could not confirm if it was possible for a document to be notarised in UK the same day and registered in Kenya the same day. He conceded he had no document to prove Kshs. 1 million was paid to Imwathi but denied it was paid by Charles. On the sale agreement dated 12/3/2006 the witness conceded the same does not state the money was paid by Millet.
11. On further cross examination PW1 affirmed Charles asked for Miss Millet's passport photos but PW1 refused to submit the same and the transfer could not complete. On being shown the title dated



- 21/9/2004 in the name of Andrew PW1 told the court he was aware it was surrendered to Ms. Mbatia who refused to release it to him but he never took any action against her. PW1 further stated he did not present Mr. Imwathi's title at the Kwale registry when he went to register the transfer to Jeremiah's Creek. According to the witness he explained he did not have the original title and the lands registry understood his predicament. Asked to compare the transfer for plot 1069 (page 18 defendants further list) and the one at page 5 the witness observed the later has details of parties while the former was blank. He also noted that in the former the details for the Imwathi were missing.
12. On being shown the plaint PW1 conceded it did not specify any fraud against Charles. On the sale agreement dated 7/12/2011 between Andrew and Jeremiah's Creek he agreed neither him nor Jeremiah paid Andrew the Kshs. 1 million. He stated at this point the agreement with Escafeld had lapsed after 3 months. The witness confirmed the mother was 83 years and alive.
 13. The witness on being shown email correspondence between his mother and Charles denied he is the one who made the transaction to fail by poisoning the mother. On allegation of missing funds referred to in the emails PW1 confirmed he did not make a criminal complaint against Charles or filed suit to recover the same. That at some point during the construction Charles is seen using his own money. He confirmed that the main issue for stopping the transaction was the shareholding. That he did not follow the legal process for resolving the shares issue. While Lucy was holding the original title he did not initiate any legal process to compel surrender of the same. The witness asserted he had all the bank pay in slips except that they were not before court.
 14. PW1 clarified in re-examination that the PA gave him power to own the property through a company. That the same was prepared in Kenya by Ms. Mugambi and then sent for execution in UK. That the alteration was done by Ms. Mugambi. He confirmed LCB consent dated 23/3/2006 was given before the property was sold on 23/3/2006. That he did not incite Millet. That the sale agreement dated 23/3/2006 is signed at the bottom by Maureen, Imwathi except Charles. According to PW1 he executed the forms believing the officers at the registry would fill them since it was not his work to file them. He reiterated he did not transfer the land to the Plaintiff fraudulently. That he did not pursue criminal charges against Charles or Lucy because he opted for the present proceedings. That Maureen suffered a stroke and that is why she donated the PA to him.
 15. PW2 was Andrew Thiane Imwathi. Adopting his witness statement dated 22/7/2019. He told the court he sold the land to Maureen Millet who paid him the purchase price through a bank transfer. He stated he did not have a bank statement in proof as he closed the account around 2006. That he Charles as a land agent who introduced Maureen to him on a commission of Kshs.150,000/=. It was his testimony that he signed transfers twice to Escafeld and Jeremiah's Creek as he was made to under the former didn't materialise. He signed the transfer to the plaintiff on the strength of the PA. Moreover, Maureen who had sent PW1 had fully paid him for the purchase price. That Charles Kamau never paid him any money.
 16. Cross examined by Mr. Tindika PW2 testified that in 2006 he worked as a surveyor at the Ministry of Lands and was conversant with land transactions. He confirmed he sold the land to Escafeld Holdings Limited, received the purchase price through bank transfer from Millet though he did not have proof of receipt before court. That the purchasers advocate was Lucy Mbatia with whom he deposited his original title and which was never returned to him. He confirmed he signed the application for LCB as well as Millet and Charles signed who signed as directors. He confirmed the transfer was signed by Charles on behalf of Escafeld. He never received any money from Jeremiah's Creek for the sale of the suit property. On proof from the bank the witness testified he never asked for the same from the bank neither did his lawyer request him to ask for the same.



17. The witness further testified that having sold to Escafeld, received full purchase price and obtained LCB consent, he had no further interest in the suit property. That he did not sell the property twice he merely signed the documents on the basis of the PA at the request of PW1. He confirmed the PA emanated from Millet and not Escafeld. That while he was not aware Millet was a director his understanding was that they were going to form a company. He conceded the PA did not bear instructions to transfer the property to Jeremiahs Creek. It also did not indicate the land belonged to Millet.
18. According to the witness PW1 was the one who registered the transfer to Jeremiahs Creek though he did not have the original title. He affirmed neither David nor Jeremiahs Creek paid him any money. PW1 never went back to Lucy Mbatia to ask for the title at the time of signing the transfer to Jeremiahs Creek. He was aware that the title must be surrendered to the land registrar on transfer. He reiterated Charles was an agent whom he paid in cash but had no proof of the payment. PW1 confirmed he did not object to Charles signing the sale agreement, LCB application and transfer.
19. PW2 clarified in cross examination that he did not insert the figure of Kshs.500,000/- in the LCB application since he signed a blank document. That it was not his business to confirm if Escafeld was registered or not. That the LCB consent being signed before the agreement did not matter. He reiterated PW1 and Jeremiahs Creek never paid him any money.
20. With the above the Plaintiff's case was marked as closed.

1st Defendants Evidence

21. Tabitha Ndungu the 1st Defendant testified as DW1 the widow and administrator of Charles Kamau estate. Adopting her witness statements filed on 14/08/2019 and 9/10/2019 PW1 told the court she lives in the suit property having moved therein in 2010/2011 when Charles was still alive. That he died on 30/4/2016. That Charles was a Food & Beverage Manager at Diani Sea Lodge Hotel including a business supplying poultry products and food stuffs to hotels. Further that she witnessed the digging of a borehole, excavation of swimming pool, pit latrine, perimeter wall and the house on the suit property. Charles would send her to help with the fundis whenever he was away.
22. It was DW1 evidence that she met Ms. Millet upon introduction by Charles. She met PW1 two times in Diani at the offices of Lynette Oketch Advocate where PW1 was to meet with Charles. According to the witness the meeting did not end well since PW1 walked out of the same. DW1 confirmed instruction to her counsel on record to obtain information about the suit property. On being taken through the documents obtained she confirmed that the transfer in favor of Escafeld Ltd (page 5 of DW1 initial list) was filled with all details required, signed and attested by an advocate. Comparing the said transfer with the transfer on (page 18) DW1 pointed the details of transferor and transferee were missing including evidence of payment of stamp duty.
23. According to DW1 Jeremiahs Creek had no right to transfer the property into its name. That she knew Lucy Mbatia was doing the transaction for Escafeld, that the original title was surrendered to her and she never returned it to Jeremiahs creek or any other person. She sought the prayers in the Reamended Defence.
24. Cross examined by Dr. Khakula for the Plaintiff, the witness recognised that the grant issued on 24/3/2017 was limited. She confirmed that her signature and her husbands did not feature in the sale agreement dated 23/03/2006. Noting the purchase price was paid in two instalments the witness conceded it did not show who paid the same and did not have evidence to show Escafeld paid it as a company. That though she could not state the amount Charles paid she testified it could have been



75% or 50% of the purchase being Kshs.500,000/-. She had no proof of the payment. About the KRA stamp duty declaration she confirmed the PIN numbers given for both Lucy Mbatia and Escafeld were the same and it is the same number given for Imwati. She believed Escafeld did pay stamp duty the absence of PIN notwithstanding.

25. DW1 on being shown Escafeld shareholding testified that she had no evidence that Charles bought the 1500 shares attributed to him. She conceded that as at the time of sale agreement, LCB consent and transfer, Escafeld had not been incorporated. She stated she did not have a board resolution from Escafeld authorising DW1 to represent it. That though she lost documents sometime in 2005 there was nothing stopping her from obtaining the requisite documents from Equity and Commercial Bank of Africa (now NCBA) Banks where Charles operated bank accounts. DW1 confirmed she did not have her husband's letter of employment or evidence to show he supplied good to hotels.
26. Asked about Lucy Mbatia the witness confirmed she was handling the transaction and she never demanded the title from Lucy neither did she raise a complaint with LSK. Though Lucy handed over to Ms. Oketch the witness didn't instruct Ms. Oketch on the title. Referred to page 9 of her bundle DW1 among other emails, she noted it was correspondence from Charles asking for money (commission) from Maureen and including the unaccounted Kshs 1.3 million. She admitted she did not have records to show she would go to site to pay the workers.
27. The witness pointing a number of gaps reiterated in re-examination that all the documents used to transfer the property to Jeremiahs creek were fraudulent and the transfer to Jeremiahs Creek must be nullified by the court.

PW1 further evidence in response to Lucy Mbatia's witness Statement

28. The Plaintiff's case was re-opened as a matter of right following the admission of Ms. Lucy Mbatia as a witness in the case with leave of the court.
29. PW1 adopted his additional witness statement dated 22/5/2024 and produced documents in its attendant list of documents of even date. Referring to a CBA deposit pay in slip, PW1 testified that the money was being paid to Charles as architectural fees ahead of the purchase of the suit property. The witness also produced a number of bank pay in slips/telegraphic transfers in favor of Charles Kamau made in diverse months in the year 2006 towards the development of the suit property. The witness testified that he also used to follow on the title deed with Lucy Mbatia and after she left practice through Ms. Oketch of the same office but the issue was never resolved. PW1 also produced a bundle of email correspondence in this regard copied to Charles.
30. Upon cross examination by Mr. Tindika on paragraph 2 of his additional witness statement on the retainer of Ms. Mbatia by Millet PW1 conceded he had no evidence to show the instructions were issued neither was he present when Millet retained her. He confirmed that the property was to be bought from Imwati to Escafeld, Millet never took any action against Ms. Mbatia for allotting more shares to Charles contrary to instructions neither did Millet inquire on this. He agreed it was possible Ms. Mbatia refused to hand over the title in the absence of Charles because the purchase involved a company that had two directors and in the absence of authority to release the same to PW1.
31. On the new bundle adduced the witness reiterated that the purpose of the funds being for development of the property was disclosed in the email correspondence between Charles and Maureen though not in each specific quantity. PW1 conceded he did not have corresponding remittance advise for the application for funds transfer dated 3/01/2006. On Request for funds transfer at HALIFAX the witness relied on it in the absence of remittance/swift advise. He agreed there was also no remittance advise for the 529,803 of 5/07/2006 at CBA. On absence of bank accounts for Ms. Millet he stated



- while he asked for the same the bank could not avail them and for his own bank statements that he had closed his account at CBA long ago. On further cross examination on the emails PW1 conceded only 2 were copied to Lucy Mbatia and or Charles and that he was wrong to have told the court they were all copied as such.
32. PW1 confirmed he knew Charles before Millet. That while photos were requested from his mother she did not comply and the transaction could not progress. He reiterated his mother never raised any complaint against Ms. Mbatia for surrender of the title.
 33. PW1 reiterated in cross examination that he paid the money from CBA but the bank did not furnish him with remittance advise. Though he did not present original title at the lands office, the transfer was effected nevertheless. The Plaintiff case was closed.
 34. Ms. Lucy Mbatia testified as DW1 (sic it should be DW2 since DW1 was the 1st Defendant) an advocate of this court but working at the COMESA Court of Justice. Adopting her witness statement dated 17/6/2024 DW2 confirmed the original title to the suit property was deposited with her and passed it on to Mr. Tindika for the court to see. The title was produced in evidence with leave of the court. The witness confirmed it was still in the name of Andrew Thiane Imwati.
 35. Upon cross examination by Dr. Khakula on paragraph 2 of her witness statement DW2 conceded she did not know of the financial arrangements between Charles and Millet. That she wouldn't know the source of the funds. She did not dispute the registration date (16/08/2006) of Escafeld as seen in the CR 12. On being shown the sale agreement (23/3/2006) she prepared she confirmed it did not bear a company seal or stamp for the reason that Escafeld did not exist at the time. Noting the requirements for a valid contract, the witness stated Escafeld had capacity to enter into a contract then. That consideration was also paid by its directors Charles and Millet though she had no proof that they were directors. She reiterated stamp duty was paid as per the KRA pay in slip (page 7 of defendants list). She conceded that as at 23/3/2006 which was the date of transfer Escafeld was not in existence. That she was not aware who inserted the PIN numbers but confirmed the only correct one was for the agent/Advocate.
 36. The witness testified that Charles signed the transfer as a witness and not director. On payment as stated in paragraph 4 of the witness it was her evidence that Kshs.700,000/= was paid in cash on 23/3/2006 and the balance 10 days later and she did not ask how much each had contributed. She had no record to show the cash payment was made. She was not aware if Kamau received a commission from the sale transaction. She denied PW1 was her client and therefore stated she could not take his instructions. She acknowledged a limited company is a legal person. That Tabitha was not a director of Escafeld. The witness stated that Charles never demanded the title from her and even so she would not have released it to him in the absence of the other director. That her concern was for Millet because she needed to hear from her.
 37. On cross examination by Mr. Mwandeje DW2 reiterated her actions of preparing transfer before incorporation of Escafeld were accurate since Millet and Charles wanted to buy through Escafeld. She clarified in re-examination that she had instructions to incorporate the company and ultimately both Millet and Charles executed the relevant documents and the same was registered in 2006. That at the time of doing the transfer the company was in place. That Andrew PW2 was present and received the purchase price in cash. On the issue of commission, the witness clarified Charles came as a director. That she did not know him as an agent. That the only reasons the transfer never progressed is because new regulations required photos. She could not complete the transfer without Millet. That the shares were allotted on the instructions of Millet and Charles. That there has been no complaint from Maureen both on the shares and the land.



38. With the above the 1st Defendant's case was closed.
39. DW2 (sic DW3) was Susan Mweni Land Registrar Kwale and produced documents dated 24/2/2023. The witness read through the particulars of all the documents in the parcel file. The witness identified a number of missing requirements in the registration of from Andrew to Jeremiahs Creek.
40. Cross examined by Mr. Tindika the land registrar pointed out the same shortcomings gaps as stated in his evidence in chief. It was his testimony that based on the documents in the parcel file the same were incapable of passing an interest in land. He stated further that the transfer registered in the green card 8/12/2011 was not in the parcel file. He confirmed under the RLA the original title must be surrendered on registration of transfer yet the parcel only bore a copy thereof. On being shown the original produced by Ms. Mbatia he confirmed the same matched the copy but reiterated the original ought to have been surrendered for cancellation. That the said original is not cancelled and was valid. The witness noted that two original titles still existed the one produced by Mbatia in the name of Imwati and the one dated 8/12/2011 in the name of Jeremiahs Creek. Highlighting more gaps the witness testified it was not proper for the property to have been transferred to Jeremiahs creek.
41. In cross examination by Dr. Khakula the witness confirmed that as registrar she has come across instances of lost documents and reconstruction thereof. That it was not entirely odd for documents to get lost. He confirmed they have not received any complaint concerning fraud on the parcel. She admitted there are instances where transfer can be effected without surrender of the original such as vide court order or where title has been gazetted as lost. She reiterated she was not aware of any discretion conferred on the land registrar to register transfer without surrender of original title.
42. The witness indicated in re-examination that she had not come across any application for reconstruction in the parcel file. She stated stamp duty cannot have been paid in the absence of a valuation report. That the transfers in the parcel file were not properly executed. That it was not proper to sign a blank transfer.

Submissions

43. The parties filed and exchanged their final submissions. The Plaintiff's submissions are dated 19/11/2024, the 1st Defendant 14/02/2025. The 2nd Defendants submissions were not on record. I have considered the submissions on record and will refer to them in the resolution of the issues raised.

Issues for Determination

44. Having reviewed the plaint, the defence and counterclaim filed in response thereto, the facts, evidence adduced by the parties, the submissions on record and the law, the court identifies the following issues for determination; -
 1. Whether the Plaintiff is the lawful and or bonafide owner of Diani/Kwale Complex 1069.
 2. Whether the Estate of the late Charles Kamau has proprietary rights in the suit land Diani/Kwale Complex 1069.
 3. Whether the 1st Defendant's counterclaim should be allowed.
 4. What final orders should issue.



Analysis and Determination

Whether the Plaintiff is the lawful and or bonafide owner of the suit land.

45. The Plaintiff a limited liability company pleads it has at all material times the registered owner of the Plot No. Kwale/Diani Complex/1069 (suit property) and therefore entitled to its exclusive possession and occupation of the suit property. The Plaintiff seeks eviction of the 1st Defendant from the suit property who it is pleaded moved into the suit premises by taking advantage of her husband's authorization to supervise construction on the suit premises. That the 1st Defendant's husband who I will refer to as Charles had also been authorised to secure the suit land against vandals and intruders. It is further pleaded that the 1st Defendant has adamantly refused to vacate therefrom despite demands by the Plaintiff.
46. The 1st Defendant on the other hand denies that she is a trespasser. She pleads in her re-amended Defence and counterclaim dated 28th March 2022 that the transfer of the suit property to the Plaintiff was procured by fraud and or misrepresentation and was illegal, unlawful and wrongful. It is pleaded that the suit property was bought by Escafeld Holdings Limited from Andrew Thiaine Imwati wherein Charles was and still is Co- Director with Maureen Millet. That however the property has not been transferred to the said company for the reason that passport size photos for Maureen Millet were lacking and or had not been availed. The 1st Defendant therefore states that the property having been sold to Escafeld Holdings Limited, Andrew Thiaine Imwati had no capacity whatsoever to sell the suit property.
47. For purposes of this judgement the court will refer to David Needham as PW1, Charles Kamau the 1st Defendant's deceased husband as Charles, Andrew Thiaine Imwati as Imwati , Maureen Millet as Millet, Escafeld Holdings Limited as Escafeld and the 1st Defendant will be referred to as such or DW1.
48. He who alleges must prove. This is the import of Section 107(1)(2) of the Evidence Act, which provides as follows:
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
49. I find it necessary at this point to make more highlights on the issue of the burden of proof as expounded by the Court of Appeal in *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] KECA 290 (KLR) cited by the Plaintiff. The court stated thus
- ‘...This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading Text Book;- The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:
- “The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the



conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

16. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant. It was upon the appellant to prove that he did not affix his signature on the transfer of the suit premises in favour of the 1st Respondent.’
50. Arising from the foregoing rendition the Plaintiff therefore must prove his interest in the suit property to be able to dub the 1st Defendant a trespasser thereon. The 1st Defendant must also displace the allegations that she is a trespasser and more importantly establish her late husband’s interest in the suit property because she is claiming through his title/interest.
51. But at the core of the dispute is the acquisition of the suit property which appears to me to be pertinent in the determination of the root of the title in dispute. In this regard the court respectfully agrees with Dr. Khakula’s submission that acquisition of the suit property is the single most fundamental issue since this will ultimately determine whether the plaintiff has a proprietary interest over the suit property that has to be protected by the court or whether the 1st Defendants defence and counterclaim succeeds.
52. In the present proceedings PW1 David Needham testified as director on behalf the Plaintiff. A copy of Certificate of Incorporation Jeremiahs Creek Ltd CPR/2010/30392 was adduced in evidence issued on 3/9/2010. PW1 testified that his mother Millet is the one who bought the suit property from Mr. Imwati to build her retirement home. It is his evidence that the specific sale was through a sale agreement dated March 2006 at a consideration of Kshs.1 million.
53. My review of the facts and evidence adduced shows it is not in contestation that the suit property belonged to the Interested Party which indeed he disposed of by way of sale.
54. The court must first interrogate Millets interest in the suit property vis a vis the 1st Defendants claim as administrator of the estate of Charles. The initial sale agreement entered in 2006 becomes pertinent at this juncture. The Plaintiff did not produce this specific agreement. However, a sale agreement dated 23/03/2006 was produced by the 1st Defendant as listed in the Defendants’ Further List of Documents dated 12/09/2019. Obviously, it was in the 1st Defendant’s interest to produce it in proof of her allegation that the suit property was initially sold to Escafeld where Charles is director together with Maureen Millet.
55. My review of the sale agreement dated 23/03/2006 reveals it is for the sale of Plot No. Kwale/Diani Complex/1069 which is the suit property herein. The vendor is Andrew Thaine Imwati and Escafeld Holdings for the consideration of Kshs. 1,000,000/- payable in two instalments of Kshs. 700,000/- and Kshs.300,000/-. It is drawn by L.N. Mbatia & Company Advocates. Lucy Mbatia testified during the proceedings and confirmed drawing the agreement.



56. Mr. Imwati also testified and confirmed he took part in this agreement as the vendor. PW1 affirmed in re-examination that his mother Millet signed this agreement but pointed that Charles never signed this agreement. DW1 confirmed during cross examination by Dr. Khakula that the agreement did not bear Charles signature.
57. The court also looked at the said agreement and confirmed that it bore only two signatures that of the vendor and Millet as confirmed by PW1. Having confirmed that Charles did not execute the sale agreement the question that arises is what would be the implications legal or otherwise of the absence of this signature? Ordinarily it would mean he was not a party to the transaction and thus not the purchaser. But as observed the purchaser is given as Escafeld Holdings and not Maureen Millet.
58. I could not as a court escape an interrogation of the said purchaser Escafeld. The history of Escafeld was given by Ms. Lucy Mbatia. Ms Lucy Mbatia affirmed in re-examination that she had instructions to register a company since Millet and Charles wanted to buy the land through Escafeld. It is not in dispute that the company was later incorporated as Escafeld Holdings Ltd on 16/08/2006. The CR 12 was adduced in evidence confirming the registration. Ms. Lucy Mbatia confirmed that both Millet and Charles signed the relevant documents to facilitate the registration of the Company.
59. Additionally it is clear from the evidence that the proposal to register a limited company was a special purpose vehicle to enable Millet own property in Kenya as a foreigner and thus the inclusion of Charles.
60. The validity of the agreement has been questioned. It is urged by the Plaintiff that at the time of the said sale agreement Escafeld had not been incorporated and could not enter into a valid agreement. To buttress its position the Plaintiff referred the court to the case of Simona Rizzoti v Kenya Way Limited [2021] eKLR. Ms. Mbatia asserted she did not find anything wrong with her actions and for the reasons that she further noted Escafeld had been incorporated at the point of moving to lodge the transfer.
61. The Plaintiff adduced the company search in respect of Escafeld Holdings Limited vide the Plaintiff's further list of documents dated 31/5/2022. This search was issued on 10/6/2020 and showed that Escafeld was registered on 16/08/2006. This clearly means the initial sale agreement predated the incorporation of Escafeld.
62. I have read the decision in the Simona Rizoti (Supra) where R. Nyakundi J cited with approval binding authorities of the Court of Appeal thus;-

‘The Certificate of Incorporation produced in court shows that Kuumba Limited was incorporated on 26th June 2013. It is obvious that this is after the execution of the agreement dated 7th June 2013. I am therefore inclined to agree with the Plaintiff's assertion that it must be construed as a pre-incorporation agreement. As per the law, until a company has been incorporated, it cannot contract or do any act. In Civil Appeal 189 of 2016 Clement Muturi Kigano v Kibera Development Company Limited [2019] eKLR it was held:

“Until a company has been incorporated, it cannot contract or do any act. Nor once incorporated, can a company become liable for or entitled under contracts purporting to be made on its behalf prior to incorporation - for ratification is not possible when the ostensible principal did not exist. Any preliminary pre-incorporation arrangements will either have to be left to mere gentleman's agreements or the promoters will have to undertake personal liability. [emphasis supplied]



(See also *Kelner -v- Baxter* (1886) KR 2 C.P. 174; see also *Newborne -v- Sensolid* (Great Britain Limited [1954] 1 QB 45 C.A.)”

The position taken by the Court of Appeal above is not novel. It finds favour in the case of *Consolidated Chemicals Ltd vs. KEL Chemicals Ltd* Civil Appeal No 6 of 1981 where the Court of Appeal in that instance stated thus: -

“For a contract entered into by a company before incorporation to be legally binding upon it, there must be a company resolution clearly adopting such contract and such adoption must be provided for in the memorandum of the articles of association. Since the company did not ratify the pre-incorporation contract, there would have to be a new contract”

The position above has been coded into statute. Illusory in this vein is Section 44 of the *Companies Act*, 2015 which as regards pre-incorporation agreements provides that:

44.

(1) A contract that purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as a contract made with the person purporting to act for the company or as agent for it, and the person is personally liable on the contract accordingly.

63. My understanding of the above dictum including the provisions of section 44 of the *Companies Act* 2015, is that the agreement is void ab initio since Escafeld Holdings Limited was not in existence at the time. I also had no good explanation why Charles did not sign the sale agreement either. I do not see how the court could infuse life into the sale agreement. Moreover, it is trite that a court cannot rewrite a contract for the parties - *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR. It is therefore my finding that the agreement was void and there was no sale to Escafeld Holdings Limited.
64. Notwithstanding the foregoing this court is still faced with a suit property that has been sold and the vendor admits to selling. He even surrendered his title to L.N. Mbatia. I must therefore still determine whether the Plaintiff has an interest in the suit property through Millet. The issue of who paid for the purchase price then becomes pivotal in this dispute.
65. The Plaintiff's evidence through PW1 is that Millet paid the purchase price. Firstly, a look at the terms of the sale agreement is key. The purchase price is given as Kshs. 1 million payable in two tranches of Kshs. 700,000 and 300,000/-. A look at the sale agreement shows that it is largely silent on who pays the purchase price. DW1 confirmed this on cross examination. We have already seen that Escafeld at the signing of the agreement had not been incorporated and therefore it would not be expected to make payment anyway. What is clear from the agreement is that the first tranche of Kshs.700,000/- is acknowledged by the vendor at signing.
66. We are then left with the two Directors of Escafeld. PW1 testified that it is his mother Millet who paid the purchase price. Ms Lucy Mbatia testified she was not privy to the financial arrangements between Millet and Charles. That the two came together to her office. Her evidence is that the money was paid in cash though she did not produce any acknowledgement of receipt of the money by Imwati. The vendor testified he was paid by Millet. Indeed, Millet is the one who signed the agreement thus taking responsibility.
67. DW1 testimony in cross examination by Dr. Kakhula is that Charles must have paid about 50% of the purchase price though at first, she placed the percentage at 75%. DW1 admitted that she did not have



any evidence in this regard. Her testimony is basically that her deceased husband contributed as he then worked as a Food & Beverage Manager at Diani Sea Lodge Hotel including a business supplying poultry products and food stuffs to hotels. She did not present any documentary evidence in this regard.

68. DW1 explanation is that they lost documents during the post-election violence period. I had no OB of any report in this regard. Infact Charles had all the time to make this report. Why do I say so? The Plaintiff produced a demand notice dated 16/12/2011 issued to Charles by the Firm of Asige Keverenge & Anyanzwa to quit and vacate the land. Charles died in 2016 as will be seen shortly and had all the time to arm himself with his financial records attesting to his contributions in view of the looming dispute in ownership. DW1 admitted that nothing stopped her from going to her late husband's former bankers to request for the financial information/records.
69. DW1 pleads at para 12 of the Defence & Counterclaim that Charles started construction in March 2006 and managed to finalise the ground floor and moved in the suit property in January 2009. Later after getting married to Charles DW1 moved in. Did Charles pay for this construction? I had no evidence of any contributions to the project by Charles. During cross examination DW1 was shown correspondence exchanged between Charles and Millet and noted it was correspondence from Charles.
70. On the other hand a number of email correspondences and bank documents were produced by PW1 and which I reviewed. The court noted an email communication sent from Charles to Maureen dated 16/01/2007 in the Plaintiff's further list of documents dated 20/4/2017. It is to the email address maureenmillet@yahoo.co.uk. In the email Charles gives an account of budget for ongoing construction and how it was arrived at and the balances of money required including proposed budget for remaining work. The correspondence also shows Charles was receiving money. Clearly the correspondence shows that Charles is asking for money from Maureen a balance of Kshs. 1,190,845 and money for security purposes.
71. DW1 did not deny the email address used was not her husbands. In any event she had not even moved in with Charles at the time and though she stated she would be sent to pay the workers during construction she had no evidence in proof. Additionally, the dates of the emails for correspondence exchanged were when Charles was still alive. I say so because DW1 told the court Charles died on 30/4/2016. The grant of letters of administration adlitem issued on Succession Cause No. 81 of 2016 produced also confirms this date.
72. From the email of 23/01/2007 in the plaintiff's further list of documents dated 20/4/2017 from Charles to Maureen, the court gathered that Millet wanted to sell the property when Charles states

‘I’m also confused why you bother with this if you want to sell the property? Charles also proceeds to ask thus;-

‘Have you considered my Commission in the 5.5m price? I’ll do my best to get u that. What is your answer to my request for the Kshs 100,000? ‘

This communication got me wondering why one would ask for a commission for his own property. The only inference I could draw as a court is that it was not his property.

73. Based on the foregoing this court makes a finding that there was no proof of any contribution by Charles toward the purchase of the property and or even its construction. I’m persuaded by the holding in the case of Sandra Grimmet & Phillip Grimmet Vs Benedict Ndigirigi Gichuhi (2021) KEELC 3055. The evidence leads on balance of probabilities that Maureen Millet funded the purchase of the suit property and construction. This therefore effectively means that the Estate of Charles has no interest in the suit property.



74. Having made the foregoing finding I must now come back to PW1 interest in the suit property through the Plaintiff. PW1 evidence is that Millet donated to him a power of Attorney in respect to all matters concerning the suit property. The Power of Attorney dated 8/12/2011 was adduced in evidence. According to PW1 on the basis of the Power of Attorney the property was transferred to the Plaintiff. His evidence in chief is that he made arrangements for Imwati to sign another agreement with the Plaintiff. A copy of the Title Deed to plot Kwale/Diani Complex/1069 dated 8/12/2011 showing Jeremiahs Creek Limited as the absolute proprietor was presented before court. This evidence was corroborated by PW2 the vendor of the suit property. His evidence is that he acted on the basis of the Power of Attorney donated to PW1 having also sold the suit property to Millet.
75. It is asserted on behalf of the 1st Defendant that the suit property having been purchased by Escafeld, all requisite documents processed in its favour and the original Title surrendered to its Advocate, the Plaintiff could not have been registered as the proprietor of what had already been disposed off, and thus not the legal owner thereof. The court has already made a finding that there was no valid sale agreement.
76. Based on this court's finding in favor of Millet the court must revert to the Power of Attorney donated by Ms. Millet to her son PW1. The Power of attorney was registered on 8/12/2011. It is urged by the 1st Defendant that the power of attorney did not donate the power to PW1 to transfer the property to Jeremiahs Creek. The power of attorney provides as follows; -
- ‘To do everything and most specifically, to sign or execute on my behalf such documents to transfer to him my right and title to and in the property and to generally act on my behalf to convey my interests in the said property....and take all lawful ways and means..... transfer to him my right title and interest in the property and registering him as the owner of the property....to use all lawful means.’
77. The intentions of Maureen in respect to the property is that PW1 should own the property and be registered as the owner of the property. What is clear is that Milet wanted to transfer to PW1 her right, title and interest in the property. PW1 decided to use the Plaintiff and I do not see the reason for faulting him in doing this. It could be for the same reason they were told they are foreigners and cannot own land in Kenya as such. What is clear is that Millet has ceded her rights and her wishes must prevail. The plaintiff is a lawful owner. I had no evidence before me that the power of attorney was a forgery.
78. The registration of the suit property in the name of the plaintiff has been highly contested by the 1st defendant. The 1st Defendant averred and contended that if any transfer was effected to the Plaintiff by the Second Defendant, which was vehemently denied, the same was procured by fraud and/or fraudulent misrepresentation, and was thus illegal, unlawful and wrongful.
- Several issues emerged during the hearing and have been well elaborated in Mr. Tindikas analysis of the evidence led. Robust submissions were made and case law cited. Ostensibly the case of Samuel Kamere v Lands Registrar, Kajiado [2015] KECA 644 (KLR), where it was held that where a title is under challenge, in order to be considered a bonafide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.
79. This court is in agreement that where a title is challenged the holder must defend the root of his or her title. But this is not a position that comes automatically. The person challenging the title must establish and or demonstrate they have an interest in the title. The only exception that quickly comes



to my mind is if the same is being challenged on public interest. However, in the instant suit the claim involves ownership of a private property.

80. Consequently I must state that the 1st defendant having not proved her husband's interest in the suit property then she has no right to impeach the Plaintiff's title. On the other hand, could she in the alternative cling to the shareholding of Charles in Escafeld Holdings Limited?
81. The court has noted the submissions on the part of the Plaintiffs that Escafeld is a legal person capable of suing and being sued also echoed by the 1st Defendant. The Plaintiff submits Escafeld Holdings Ltd is not a party to this suit. This observation is made against the 1st Defendant's assertion that since the property was bought by Escafeld then it can only be registered in the name of Escafeld or alternatively in her name on behalf of her husband.
82. For me firstly the proposition to have the suit transferred to Escafeld Holdings Limited is not legally sustainable. DW1 cannot pray on behalf of Escafeld Holdings Limited. It is not a party to these proceedings and indeed legally only Escafeld can ask for this prayer in its own capacity.
83. Even as an administrator of the Estate of Charles the 1st Defendant cannot seek for these prayers in the manner, she has approached the court. In this regard I'm reminded of the rule in *Foss Vs. Harbottle* (1843) 67 ER 189, (1843)2 Hare 461 that whenever a wrong is committed against a company, it is for the company to bring proceedings against the wrong doer to remedy the wrong and not a shareholder or director.
84. It is trite that directors are distinct and separate legal persons from the company as enunciated in the case of *Salomon Versus Salomon & Co Ltd* [1986] UKHL [1987]AC 22 and *Macaura Versus Northern Assurance Co Ltd & Others* [1925] ALL ER 51. The principle established in these cases still holds good and in Kenya, courts have also not shied from applying this principle as has been demonstrated in *Civil Appeal No. 3 of 2003 Sultan Hasham Lalji & 2 Others Vs Ahmed Hasham Lalji & 4 Others* (2014) eKLR. Also see the Court of Appeal in *Victor Mabachi & Another V Nurtun Bates Limited* (2013) eKLR and *Arthi Highway Developers Limited v West End Butchery Limited, Solomon Mwinzi Mwau, John Mucheni Musa, Attorney General, Kenya Medical Association Cooperative Society Ltd, Yamin Construction Co Ltd & Gachoni Enterprises* [2015] KECA 816 (KLR) where the court also cited *Foss Vs Harbottle*.
85. The foregoing therefore speaks to the failure by the 1st Defendant to prove her interest in the suit property and including her capacity to plead on behalf of Escafeld Holdings Limited. The import of all this is that even the counterclaim must fail and there is no basis upon which the 1st Defendant can impeach the Plaintiff's title.
86. These courts hands are tied and cannot go further into the review of the legality of the registration of the suit property into the name of the Plaintiff. The title remains prima facie evidence of title. The court will thus also not delve into the Plaintiff's invitation to invoke the doctrines of equity.
87. Consequently this court finds that the Plaintiff has proved its case against the 1st Defendant on a balance of probabilities and is entitled to the prayers sought. The 1st Defendant's occupation of the suit property cannot be sustained under the circumstances she can only be deemed a trespasser.
88. The court therefore enters judgement for the Plaintiff against the 1st Defendant in the following terms; -
 - i. Eviction of the 1st Defendant from Plot No. Kwale/Diani Complex/1069 and vacant possession thereof within 120 days from the date of delivery of this judgement.



- ii. That the eviction above shall be peaceful, dignified and carried out in a humane manner should the 1st Defendant fail to vacate at the expiry of the 120 days above.
- iii. The Counterclaim is hereby dismissed.
- iv. In view of the fact that the 1st Defendant is widowed the court orders that each party shall bear its own costs.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 4TH OF AUGUST 2025.

HON. LADY JUSTICE A.E DENA

JUDGE

4.8.2025

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

Mr. Ogara Holding brief for Dr.Khakula for the Plaintiff

Mr. Tindika for the 1st Defendant

Ms. Saru for the 2nd Defendant

Asmaa Maftah – Court Assistant

