



Gwaya ((Suing as the Personal Representative of the Estate Of Mwinyi Rama Gwaya)) v Kivuti & another (Environment & Land Case 27 of 2021) [2024] KEELC 4153 (KLR) (7 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 27 OF 2021**

AE DENA, J

MAY 7, 2024

[FORMERLY MSA ELC 430 OF 2010]

BETWEEN

**SAIDI RAMADHANI GWAYA PLAINTIFF
(SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
MWINYI RAMA GWAYA)**

AND

**LENNY MAXWEL KIVUTI 1ST DEFENDANT
MOFFAT KINGI 2ND DEFENDANT**

JUDGMENT

1. 1 The Plaintiff via amended Plaint dated 14th October 2021 prayed for judgement against the Defendants jointly and severally for; -
 - i. A declaration that the Plaintiff is the absolute owner of the property known as Plot No Kwale/Diani Settlement Scheme/317 and is entitled to quiet, peaceable and uninterrupted possession of the same.
 - ii. A permanent Injunction restraining the 1st and 2nd Defendants, by themselves or their employees, servants, agents and or through persons claiming through them from entering into, erecting or building any structures on the properties, selling, transferring and or disposing off or in any way whatsoever interfering with the Plaintiffs ownership and possession of plot No Kwale/Diani/317.
 - iii. An order to issue directing the District Land Registrar, Kwale, to cancel any registration/title in respect to Plot No Kwale/Diani Settlement Scheme /317 in the name of the 1st defendant.



- iv. General damages.
 - v. Costs of this suit.
 - vi. Any other further relief this honourable court deems fit to grant.
2. It is important to note that during the pendency of the proceedings the Plaintiff died on 30/05/22 having already testified. He was later substituted with Said Ramadhan Gwaya as his personal representative pursuant to Letters of Administration Ad Litem issued on 7/10/22 and leave of the court on 8/12/22. The above prayers were accordingly amended to reflect the substitution of the Plaintiff with the words 'deceased' instead of Plaintiff. The court will however still refer to the deceased Plaintiff as Plaintiff but at the same time recognising the substitution.
 3. The Plaintiff pleaded that he is the registered proprietor of land parcel No Kwale/Diani/317 measuring 2.1Ha (hereinafter referred to as the suit property). The Plaintiff states that his occupation of the suit property has been since it was adjudicated having passed through his grandfather Hamisi Gwaya Mwachimako and later to the Plaintiff's father Ramadhan Hamisi Gwaya. That sometime in October 2010, the 2nd Defendant District Commissioner in Kwale summoned the Plaintiff to his office in Kwale and asked him to vacate the suit property. That since then the 2nd Defendant has been using the provincial administration to harass and intimidate the Plaintiff.
 4. It is the Plaintiff's case that he was later asked by the 2nd Defendant to have the suit property subdivided into two portions one to be given to the 1st Defendant and the remainder to be retained by the Plaintiff which he refused. The Plaintiff is apprehensive that the 2nd Defendant using the provincial administration will have the property subdivided and hence this suit.
 5. The Defendants filed their statement of defence before court jointly through the firm of Gikandi & Co Advocates. The Defendants deny that the suit property belongs to the Plaintiff and put him to strict proof. The 1st Defendant states that the suit property was first registered on 9/7/1992 in his name and the said registration was a first registration. It is further stated that the title held by the Plaintiff is fraudulent and the same was recalled by the Land Registrar Kwale on 22/10/2010 but has to date not been availed. The court is asked to dismiss the suit.

Hearing

6. During the hearing the Plaintiff was represented by learned Counsel Mr. Burugu and the 1st Defendant by Mr. Ngibuini.

Plaintiff's Evidence

7. PW1 Mwyni Rama Gwaya relied on the witness statement filed before court on 8/03/2011 as his evidence in chief. He further adopted the documents in the list dated 7th February 2011 hereinbefore listed as "PWEX 1-3" letter dated 29/10/2014, the supplementary list of documents dated 28th February and letter dated 6/5/2021 marked as "PWEX 4 and 5". Also extract of the green card for the suit property certified on 3/3/2022 "PWEX 6".
8. On cross examination PW1 confirmed that his father was Ramadhan Hamisi and his grandfather Hamisi Mwachimako. That his father was left out of the allotment list because of fraud on the part of Walter Mwachoki which he discovered around 2006. The witness indicated that his name was put on the list after being called to line up and stand against the land they owned for survey, which they did, though he conceded that he did not have documentary proof. When referred to the documents relied upon by the Defendants as filed before court, he stated that he did not believe the same.



9. The Plaintiff confirmed that his title is dated 4th December 2006 that he was charged in E66/81 together with Ephraim Guyo for fraud though he stated he was wrongly charged. He stated that the land had graves but he did not have pictures in proof because he is not a tourist.
10. On re-examination the witness clarified that adjudication was done in 1978. Walter Mwachoki was the adjudication officer at Kwale and the 1st Defendant a surveyor. That the two conspired to remove the Plaintiff's father name from the list. He maintained that the 1st Defendant has never used the land and was presently not in use of the same.
11. PW2 Siema Mwanguni Land Registrar currently stationed at Kwale testified that from the record at the lands office, the property was registered in the name of Mwinyi Rama Gwayu. The witness produced a certified copy of the green card (PEXH6) and a letter of 29/10/2014 from the Chief Land Registrar indicating that the land belongs to Mwinyi Rama Gwaya the Plaintiff. The witness further referred to a letter dated 31/05/2012 from the Coordinator Complaint and resolution committee within the Ministry of lands concluding that Kwale Diani 317 belongs to Mwinyi Rama Gwaya. (PWEX 7). The Land Registrar stated that from their records, the 1st Defendant did not appear anywhere as the owner of the suit property. On Cross-Examination the witness stated that she was not aware the Plaintiff had been charged with breaking into the Land Registry and stealing the green card. The witness referred to PWEX 6 green card but testified if the 1st Defendant was the owner then this entry would not be in the green card. That she had no Gazette Notice for opening a provisional card. The green card indicated it was opened on 10/3/92 and the title to Plaintiff was issued on 4/12/2006. In her view there must have been an original title held by the Plaintiff for the document to have been opened and title procured.
12. The witness added that a proper green card would have reflected the Settlement Fund Trustee as at 10/03/92 which was not the case in the present parcel. According to PW2 the letters dated 29/10/2014 and 31/05/2012 by the adjudication committee will suffice since they conclude that the Plaintiff was the registered owner.
13. The witness stated that there were two green cards present in the name of the 1st Defendant. It was confirmed that the land registry has two original green cards in Defendant's name and the other in the Plaintiff's name which was not legally possible.
14. On re-examination the witness clarified that the records held by the adjudication office are an area list identifying the people to be allocated the land. Once area list is prepared with approval from Nairobi the same is forwarded to Kwale to prepare and issue titles and sometimes titles are issued from Nairobi. The area list and the documents from Land adjudication are the primary documents used to issue title. That only the Plaintiff features as the proprietor in the lands registry records. That they had never received a complaint from the 1st Defendant that his green card had been manipulated.
15. With the above the Plaintiff's case was closed.

Defence Case

16. DW 1 Lenny Maxwell Kivuti adopted two witness statements dated 29/9/2016 and 29/11/2021 as part of his evidence. He further produced the documents in the list of documents dated 11th March 2022 as his evidence. His evidence was that the land was allocated to Mwachofi who transferred it to the 1st Defendant. That he got certificate of outright purchase in the early 1990's and with the certificate, he got the 1st title dated December, 1992. He stated that he had visited the suit property severally with his family while on holiday in Diani and had fenced off the same. He stated that the documents produced by the Plaintiff as proof of ownership of the land were all forged. The court was urged to dismiss the Plaintiff's case.



17. During cross-examination DW1 stated that he bought the land from Mr. Mwachofi. Further that when he discovered the green card was lost at the lands office he made a report of the same with the police. On re-examination he clarified that the physical status of the property is that there is undisturbed bush and there is been no occupation. That he was never involved with any investigations over the land.
18. DW2 was CPL John Mumasi 73716 a police officer stationed at Coast DCI Headquarters but formerly worked at Kwale DCI Headquarters. He told the court that he dealt with investigations over the suit property. That at one point they were looking for one Ephraim Wanyoike Ngonyo for the offence of obtaining money by false pretences and upon his arrest they recovered several documents originals and copies. The documents included green card for Kwale/Diani settlement scheme/317 which had 3 entries (1) SFT (2). Lenny Maxwell Kivuti (3) was on issue of title on 19/7/92. That he recorded the statement of the 1st Defendant who informed him that indeed the green card had been lost.
19. On cross examination he confirmed that he recovered a green card from Ephraim.
20. DW3 John Mwangi Karanja the Land Adjudication and Settlement Officer Kwale County testified that in 1989, 26/7/89 there is a certificate of outright purchase of 1st allottee of Diani SS 317. Its certificate of outright purchase is to Walter Mwachofi. He later filed he transferred the property to Lenny Maxwell Kivuti for Ksh. 150,000/=. The transfer is signed by both Walter, Lenny and one Ogolla A.O. The witness referred to two official receipts 20/11/90 receipt number AP 694808. He produced this documents as evidence in court. On cross-examination he stated that both the land registrar and the adjudication officer through their offices were custodians of land documents. On re-examination he stated that the certificates of outright purchase have not been objected to by the office of the land registrar.
21. With the above the defence case was marked as closed.

Submissions

22. The Plaintiff's submissions were filed before court on 14/11/2023 and the 1st Defendants on 7/12/23. Parties were also given an opportunity to orally highlight their submissions on 24/01/24 which I have also considered.

Plaintiff's Submission

23. It is submitted that based on the evidence before court, the Plaintiff has proven his case on a balance of probabilities and therefore judgement should be entered in his favour as prayed. It is submitted that the Plaintiff's grandfather's name was removed from the list of beneficiaries of the Diani Settlement Scheme after he was allocated the land in 1977. That it is Mr. Mwachoki Walter who removed the said name. That after complaints to the relevant offices amends were made and in the year 2006 the deceased Plaintiff was registered as the proprietor of the land. The Plaintiff submits that under the Registered [Land Act](#) which is now repealed but was the applicable law then, the Plaintiff's title is indefeasible by virtue of the Plaintiff being the original proprietor of the suit property. It is stated that the letter by the Chief Land Registrar dated 29/10/2014 indicated that the Plaintiff is the true and rightful owner of the suit property. That this letter demonstrates a prima facie case. A similar letter was also done on 6/5/2021 by the Director Land Administration.
24. The Plaintiff submits that Walter Mwachoki the Land Adjudication Officer in- charge of the adjudication was not supposed to allocate himself land which was termed a conflict of interest and abuse of power. The Plaintiff states that the documents relied upon by the 1st Defendant are tainted



by fraud and cannot confer to him any ownership of the suit property. The Plaintiff maintains that he has been in occupation of the suit property to date.

25. On the allegation of fraud on the part of the Plaintiff as raised by the 1st Defendant, it is submitted that pursuant to the provisions of order 2 rule 10, no fraud has been particularised by the 1st Defendant. The threshold for proof of fraud according to the *Evidence Act* has therefore not been met and the court should disregard the said allegations. The court is asked to allow the suit as prayed and to condemn the Defendants to costs.

Defendants' Submissions

26. The 1st Defendant's submissions were filed before court on 7/12/2023. It is submitted that the Plaintiff has failed to give any evidence to prove that his great grandfather was ever allotted the land by the Settlement Fund Trustee. That no certificate of outright purchase has been produced before the court. It is submitted that the failure by the Plaintiff to produce evidence of the process he alleges was followed by his great grandfather to get the land is unfavourable to his interests. Reference is made to the holding in *Timsales Limited V Harun Thuo Ndung'u* [2010] eKLR where the court held that in the event a party fails to produce evidence a presumption arises that the evidence if produced would be unfavourable to them.
27. The 1st Defendant submits that he has established and proved how he acquired the suit property and that he holds a valid title deed issued in the year 1992. That a title deed is prima facie evidence of ownership unless it is challenged. That no valid evidence has been produced challenging the said title. That in addition to the title, the 1st Defendant had produced transfer documents that bear details of the transaction of the purchase of the suit land, official search indicating that he is the owner and a certificate of outright purchase. That he paid stamp duty and conveyancing fees over the property and official receipts were issued over the same and which he had produced. It is stated that the 1st Defendant's evidence is cogent and has not been disputed.
28. The 1st Defendant further submits that the title deed produced by the Plaintiff was allegedly issued to his late father in the year 2006. No document was produced to corroborate the assertion that the land was allocated the Plaintiff's great grandfather by the Settlement Fund Trustee. The Defendant states that through his documents he has been able to demonstrate how he ended up being the proprietor of the land property including the history of its ownership from the Settlement Fund Trustee.
29. In interrogating the documents produced by the Plaintiff, the 1st Defendant submits that with regards to the letters alluding to the investigation carried out by the department of Adjudication and Settlement, the letter shows that the first registered owner of the suit property is the Settlement Fund Trustee registered on 10/3/1992. That the registration being a first registration cannot be extinguished save for fraud and which aspect has not been proved by the Plaintiff. That while the Plaintiff accuses one Walter Mwachoki of fraud he to date never sued him. It is also stated that the 1st Defendant was never informed of or involved in the said investigations.
30. On physical occupation it is stated that the Plaintiff is not in occupation of the suit property while the 1st Defendant in his testimony stated that he had fenced off the property and was in occupation of the same. The court is urged to dismiss the Plaintiffs suit with costs.

Analysis and Determination

31. Having analyzed the parties' pleadings, evidence and the submissions of the parties, this court is of the view the main issue that arises for determination is whether the Plaintiff has proved his case to the required standard to warrant the reliefs sought.



32. At the centre of this dispute is the suit property Plot No Kwale/Diani/317 which the Plaintiff claims ownership by dint of registration since its adjudication in favour of his paternal grandfather and thereafter the Plaintiff's father. On the other hand the 1st Defendant claims to be the registered owner of the same suit property by dint of purchase from a Mr. Mwachoki who was initially allotted the suit property by the Settlement Fund Trustee.
33. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR, advanced 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.
34. In *Daudi Kiptugen Vs. Commissioner of Lands & 4 Others* (2015) eKLR Justice Sila Munyao persuasively stated thus in advancing the above position

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”

35. In the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, Munyao J. further stated as follows;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current”

36. Guided by the above positions and the law I will proceed to scrutinize the Plaintiff's evidence as to the acquisition of his interest in the suit property and whether he holds a good title. The burden of proof lay on the Plaintiff to prove the root of his title and how he ended up being registered as proprietor



thereof and therefore displace the 1st Defendant's claim. Section 107 of the *Evidence Act* Chapter 80 of the Laws of Kenya provides;

“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.”

37. In *Stephen Wasike Wakhu & Another (2006) eKLR* the court aptly stated that a party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available.
38. PW1 the Plaintiff (now deceased) informed the court that the origin of his title is traced back to land adjudication exercise which he clarified in reexamination was undertaken sometime in 1978. According to his witness statement which he adopted it was PW1 evidence that his paternal grandfather Hamisi Gwaya Mwachimako was a beneficiary of the Diani Settlement Scheme established in 1977 where he was granted the suit property. That prior to the establishment of the scheme his forefathers were in possession of the land for over 50 years. I hear the witness as saying the suit property is ancestral land and which he confirmed and or clarified in reexamination. However while PW1 testified graves existed on the land he conceded he did not have photos for the same and the reason he did not have photos was because he was not a tourist to take photos. In my view nothing was placed before me establishing the connection linking the Plaintiffs grandfather to the suit property.
39. Moreover it is expected that the beneficiary list would be presented but which the witness preempted by stating his grandfather's name was omitted leaving the court with nothing to confirm his grandfather's name was in the list of beneficiaries. Additionally, PW1 told the court during cross examination that in 1978 they were called during survey to stand against their plot and his name was indeed captured. That he was a young boy. This in his own admission was not corroborated by documentary proof and while the witness stated the Chairman was still available (sic alive) he did not record a statement. To me this was a very critical witness yet the Plaintiff squandered the opportunity to have him corroborate his evidence.
40. PW1 further testified in cross examination that he presented a small card that was given during adjudication which was used to register the name in the green card on 4/12/2006. For me even assuming the card bore his father's plot number, the same was never presented before court. From the proceedings the witness was very unstable on this item during cross examination shifting goal posts. I noted from cross examination that PW1 would always hide under the fact that he was a young boy when some of the processes were happening. For me this is a court of facts supported by evidence and not conjecture. The list from which his grandfather's name was allegedly removed was never produced yet it is the substratum of the Plaintiff's case.
41. PW1 produced in support of his case a letter dated 29th October 2014 addressed to him (Mwinyi Rama Gwaya) where the Chief Land Registrar (G.S. Birundu) states they had perused all their records including those that show the history of the ownership of land Kwale/Diani/317 and found that the Plaintiff is the true and rightful owner of the said land.
42. During cross examination PW2 Siema Mwaguni Land Registrar on being shown the letter 29th October 2014 and the last paragraph therein where reference is made to Department of Land Adjudication & Settlement investigations having demonstrated a prima facie evidence of the Plaintiff being the rightful owner. She conceded that she did not have any investigation report by the adjudication office supporting that statement. My reading of this letter revealed that while it purported that the position that Mwinyi Rama Gwaya is the true owner of the land is compounded by the Department of Land Adjudication & Settlement, through its investigations, no investigation report is



enclosed or has been produced to support the alleged findings. Consequently, the contents of the letter could not be confirmed especially on the history of the land having been allocated during adjudication to the Plaintiffs grandfather or even the Plaintiff's father.

43. PW1 also produced a letter dated 6th May 2021 from Kihenjo Mwaura Director Land Adjudication Officer addressed to him Mwinyi Rama Gwaya. This letter refers to the above letter dated 29th October 2014 and confirms that the plot is registered in the name of Mwinyi Rama Gwaya. I have already pointed on my misgivings about the content of the said letter.
44. The letter dated 31/05/2012 is by the Complaints Resolution Committee. PW2 conceded in cross examination she did not have the letter of complaint referred to in the letter. Infact for me while the Plaintiff states his father made complaints to various government agencies there was no documentary proof of the same. The court also spent time on this letter. Indeed it states the land title Kwale/Diani/317 had been subject of investigation by the Public Complaint and Resolution Committee (PCRC) since November 2011 following the Plaintiffs complaint. The report concluded verbatim as follows;-
- “Since investigations could not prove or ascertain multiple titles holding or manipulation of records as alleged by the complainant, it was preliminarily concluded that land title no. Kwale/Diani/317 belongs to Mwinyi Rama Gwaya. The case was closed and Mwinyi Rama Gwaya was informed accordingly.”
45. My observations of the above is that this report was not a conclusive report but preliminary. Again the findings stated in the letter are not supported by the report of the investigations of the Committee. This again did not lend credence to the content of the said letter or report as a basis for the registration of the Plaintiff as proprietor. For me this created a doubt in my mind on the letters probative value.
46. Indeed PW1 produced as his evidence the Title deed in respect of Kwale/Diani/317 in the name of Mwinyi Rama Gwaya issued on 4/12/2006. This entry was No. 2 in the green card produced by the Plaintiff which PW2 also had in the parcel file. Firstly the Plaintiff admitted in cross examination that he did not know how his name came to be in the green card. The Land registrar did not help things either. PW2 attempted to support the entry No. 2 as having been made by the land registrar on the basis of the letters dated 29th October 2014 and 31/05/2012 which I already demonstrated my reservations on the same. It is also important to note letters dated 29th October 2014 and 31/05/2012 cannot logically support entries made in the year 2006. They ought to have predated the registration. If the green card was opened in March 1992 I did not see the logic in the Land Registrar justifying the same using a letter dated 29/10/2014.
47. The court also reviewed the green card produced by the Plaintiff showing entry No. 2 of 4/12/06 in favour of the Plaintiff and No.3 in respect of the issuance title deed thereto. PW2 conceded that she could not confirm that the said entry No. 2 is premised on any valid documents for she had no documents in her records produced by the Plaintiff as a basis upon which the Land Registrar opened the green card in favor of the Plaintiff. This contradicted PW2 evidence in cross examination that there must have been an original title for the Plaintiff to have been registered as proprietor and that the area list is one of the primary documents used in registration when it was never produced.
48. Moreover PW2 went further to state in cross examination that a proper green card would have the 1st entry as the Settlement Fund Trustee as owner as at 10/03/92 when the card was opened. That this is what would have shown the origin. This to me did not support the Plaintiff's case either.
49. It is further alleged by the Plaintiff that the omitting of the names from the list was fraudulently perpetrated by Mr. Mwachoki who was the Land adjudicator. It is now established that fraud must



be specifically pleaded, particularized and proved at a slightly higher standard than of balance of probabilities. See *Ratil Patel Vs Lalji Makanji EA 1957* and *Vijay Morjaria Vs Nansigh Darbar & Another (2000) eKLR*. Firstly, let me state that the particular actions done by Mr. Mwachoki were not outlined. There was no evidence given in this court to prove Mr. Mwachoki held the said office. In any event the Plaintiff having failed to prove that his grandfather's name or even that of his father was in the beneficiaries or area list then he cannot plead that the same was removed. The Plaintiff ought to have proved the name existed in the said list in the first place.

50. I think based on the foregoing I have said enough to demonstrate that the Plaintiff failed to prove the origin/root of his title and that there was due process that led to him being registered as the proprietor of the suit property plot No Kwale/Diani/317 and I find as such.
51. On the other hand the 1st Defendant case is that he is the lawfully registered proprietor of plot No Kwale/Diani/317. DW1 who is the 1st Defendant enumerated in his evidence in chief how he obtained ownership of the suit property from the initial allottee culminating into his registration as the 1st proprietor in December 1992.
52. Let me start by saying that it is trite that legally there cannot exist two separate titles on the same land, only one title or certificate could issue. Section 32 of the Registered *Land Act* (repealed) and which applies by dint of section 107 of the *Land Registration Act* provides as follows; -
 32. (1) The Registrar shall, if requested by a proprietor of land or a lease where no title deed or certificate of lease has been issued, issue to him a title deed or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease:

Provided that - (i) only one title deed or certificate shall be issued in respect of each parcel of land or lease;
53. PW2 in her testimony confirmed that it is not legally possible to have two titles on the same suit property. It was also incumbent upon the 1st Defendant to prove on balance of probability that he was the legally registered proprietor and why his title should be sustained as against the title issued to the Plaintiff.
54. DW1 produced in support of this claim documents listed in list of documents filed before court on 11/3/2022. These were Certificate of outright purchase in favour of Mr. Walter Mwachoki dated 26th July 1989. Instruments of transfer from Walter Mwakudu Mwachoki to Lenny Maxwell Kivuti for Plot No Kwale/Diani Settlement Scheme/317 dated 15/11/1990, official government receipts No AP694427 and AP694808 dated 20th November 1990, Certificate of outright purchase in favour of Mr. Lenny Maxwell Kivuti dated 16th November 1990, Title deed for Plot No Kwale/Diani Settlement Scheme /317 issued to Lenny Maxwell Kivuti ID No 0297597/63 dated 9th July 1992, Green card for Plot No Kwale/Diani Settlement Scheme /317 opened on 10th March 1992 (Dex 1-9).
55. My understanding of DW1 evidence is that he bought the property from Mwachoki and had all the supporting documents culminating to his registration. According to the witness he would be lying if he purported to know anything about the adjudication process. That while PW2 produced letter indicating there were investigations that established the Plaintiff ownership he was never part of the investigations.
56. My task was to review the documents produced by the 1st Defendant above and establish if he procedurally acquired his title. The original Green card for Plot No Kwale/Diani Settlement Scheme /317 opened on 10th March 1992 was produced in court. CPL John Mumosi informed the



court this green card was found in possession of one Ephraim Wanyoike Nguyo whom he had arrested at Kombani in respect of another matter. He confirmed recording a statement from the 1st Defendant as well as preparing the charge sheet which were part of the 1st Defendant's bundle. I note that the witness indicated in cross examination that while he knew the custodian of land documents was the land registry he did not surrender the green card back to the registry he was to do the same after the proceedings. I think this evidence is supported by the evidence of PW2 that the green card was not in the parcel file. PW2 in fact further stated that while it was not legally possible to have two titles over the same property but the other probable way was to remove one card to create a different view of the property. PW2 on being shown this specific green card during cross examination she stated that looking at it she did not see anything on its face that would make her think it was not an original document of the lands office.

57. Based on the above therefore I had no hesitation in forming the view that the said green card belonged to the lands office. Having made this finding I will proceed to the entries in the said card. My observations are that this green card establishes the history in that it shows the original owner as the Settlement Fund Trustee, this is supported by certificate of outright purchase from the Settlement Fund Trustee dated 26/7/1989 to Walter M. Mwachoki, the attendant transfer and receipts issued for conveyancing which were shown to the court in originals culminating into the title issued on 9/7/92 to the 1st Defendant. All the entries were corroborated by the original green card that was recovered by the Police. The court further noted the evidence of DW3 John Mwangi Karanja from Land Adjudication Kwale. He came to court with the official Government of Kenya folio for Kwale Diani/317 and confirmed the existence of the foregoing documents and his evidence was that he had nothing in his file stating that Rama Gwaya ever held the property and which was very fundamental to this case. To me there is no way Rama Gwaya would just surface from nowhere without an audit trail and which is the case here. The witness clarified in re-examination that the certificates of outright purchase were never questioned by the Land Registrar. For me on matters of adjudication or even land settlement this would be the best repository of documentation in proof of initial allocation.
58. Based on the foregoing it is apparent that the 1st Defendant has shown the origin of his title and the processes undertaken supported by the relevant documentation culminating into his registration as proprietor. The court makes a finding that 1st Defendant has proved on balance of probabilities the root of his title and that he procedurally acquired ownership thereof.
59. I must also pronounce myself on the issue of the existence of two titles on the same property. This issue has largely already been discussed in my analysis and therefore the legally acquired and valid title is the title issued in the year 1992 in the name of the 1st Defendant. This court is also emboldened in the provisions of section 32 of the Registered *Land Act* (repealed) and which applies by dint of section 107 of the *Land Registration Act*. It is trite that there can only be one title in respect of a suit property. As at the year 1992 the 1st Defendant was already the absolute proprietor of the suit property. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura Vs Attorney General & 4 others* (2017) eKLR the court stated

As at the date of the trial, the appellant was still holding a valid Title Deed to the suit property, which title was issued to him in 1992. The 2nd respondent was allegedly issued with a Title Deed for the same property in 1996. A property cannot have two valid title deeds. Even assuming that the second title had been issued by mistake, the first in time prevails; see *GITWANY INVESTMENT LIMITED V TAJMAL LIMITED & 3 OTHERS* [2006] eKLR. 31. ...



60. The upshot of the foregoing is that I find that the Plaintiff (now deceased) has failed to prove to the required standard that he is the lawfully registered proprietor of the property known as Plot No Kwale/ Diani/ 317 and therefore is not entitled to the reliefs sought.
61. What then are the orders that will best serve justice in this case? It is noteworthy that the 1st Defendant did not raise a counterclaim in these proceedings. This court did grant leave to the Defendant to amend their defence on 29/9/21 and extended the same on 24/11/21. The defence was never amended. Mr. Ngibuini for the 1st Defendant during highlighting of submissions invited the court to apply the provisions of Section 1A and 3A and article 159 of *the Constitution* to make a clear confirmation that the property belongs to the 1st Defendant. Mr. Burugu learned counsel for the Plaintiffs view was of the arguments that the court cannot issue orders which are not supported by pleadings as there was no counterclaim. The court was urged not to descend into the arena.
62. This court has dismissed the Plaintiff's claim and has proceeded to make a clear finding that the 1st Defendant has sufficiently demonstrated the root of his title and that he procedurally acquired the same. These findings were made after both parties presented their cases before the court. Having dismissed the Plaintiffs case it goes without say that the 1st Defendant's title is upheld. It is only fair and just that the land parcel file and the land register reflects this position. It behoves the court to bring finality to litigation and not create confusion or even create room for new litigation on the same subject matter. I say so because the Land Registrar would be at a loss on what do with the suit property. This court is guided by Section 1A, 1B and 3A of the *Civil Procedure Act* which obligates it to facilitate the just and expeditious resolution of disputes and to make orders that may be necessary for the ends of justice and to prevent abuse of the process. In *Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA* held inter alia that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. Every case is decided on its own facts and I think having regard to the aforesaid provisions of the *Civil Procedure Act*, it is in the interest of justice that an order be issued declaring the 1st Defendant as the registered owner of the suit property.
63. The upshot of the foregoing is that this court issues the following final orders; -
- i. The Plaintiff has failed to establish his claim on a balance of probabilities against the defendants and his claim therefore is dismissed.
 - ii. A declaration is hereby issued declaring that the 1st Defendant is the genuine owner and/or legal proprietor of the suit property Kwale/Diani/317.
 - iii. The Original Green Card herein opened on 10th March 1992 held by the DCI Kwale Headquarters be surrendered to the Land Registry Kwale in exchange for a certified copy thereof.
 - iv. Each Party to bear their own costs.

Orders accordingly

JUDGEMENT DATED SIGNED AND DELIVERED THIS 7TH DAY OF MAY 2024.

.....

A.E DENA

JUDGE

In the presence of: -



Mr. Burugu for the Plaintiff

Ms. Gwahalla holding brief for Mr. Gikandi for the Defendant

Mr. Daniel Disii – Court Assistant

