



**Tomas & 2 others v Muigai & 2 others (Environment & Land Case
86 of 2021) [2023] KEELC 19832 (KLR) (18 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19832 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 86 OF 2021**

**AE DENA, J
SEPTEMBER 18, 2023**

BETWEEN

**SAID MWINYIKAI TOMAS 1ST PLAINTIFF
ALI HAMISI JAMALI 2ND PLAINTIFF
BIASHA MWALIMU GANYUMA 3RD PLAINTIFF**

AND

**JOHN NJOROGI MUIGAI 1ST DEFENDANT
CHRISTINE MUNGAI 2ND DEFENDANT
KWALE DISTRICT LANDS REGISTRAR 3RD DEFENDANT**

JUDGMENT

1. The plaintiffs vide amended plaint filed on 9/3/2020 averred they are the legal and beneficial owners of the land known as Kwale/Diani Beach Block/1456 (suit property) measuring 0.4460Ha situate within Diani Kwale County. That however on 11/07/2018 the 1st and 2nd defendants claiming ownership invaded the land, chased away the plaintiffs, erected a perimeter wall and have since then denied the plaintiffs access to the land. They pray for judgement jointly and severally against the defendants as follows:
 - a. A declaration that all that piece of land known as Kwale/Diani Beach Block/1456 measuring 0.446 Ha belongs to the plaintiffs
 - b. A permanent injunction restraining the defendants by themselves, their agents, employees, representatives or contractors, servants and/or other person acting and /or claiming through and/or under them from undertaking and/or continuing any developments, constructions and erecting any structure on land known as Kwale/Diani Beach Block /1456 measuring



0.4460 Ha and or occupying ,remaining in occupation and/or undertaking any annexation of the same by the 3rd defendant is null and void and without any legal effect whatsoever.

- c. Eviction order, evicting the defendants and/or agents, employees, representatives or contractors, servants and/or any other person acting and /or claiming through and/or them from the parcel of land known as Kwale/Diani Beach Block/1456 measuring 0.4460 Ha
- d. Demolishing order for demolishing the perimeter wall and/or any structure, developments and/or building on the parcel of land known as Kwale/Diani Beach Block/1456 measuring 0.4460 Ha
- e. Supervision by the Officer Commanding Diani Police Station to ensure compliance with orders (b), (c) and (d) above
- f. General damages for loss of use of the land
- g. Cost and interest at court's rates from the date of filing of this suit until payment in full
- h. Any other relevant relief that the Honourable Court may deem fit and just to grant

1st and 2nd Defendants' Defence

2. The 1st and 2nd defendants jointly filed an defence on 18th October 2018 which was amended and filed on 4th November 2020. The defendants denied the plaintiffs claim to the ownership of the land. The defendants claimed they were the legal and beneficial owners of Kwale/Diani Beach Block/1456 which is registered in the 2nd defendants name having acquired it on 17th February 2011. The defendants pray that the suit against them be dismissed with costs.

3rd Defendant Defence

3. The 3rd defendant was joined later with leave of the court after it became apparent to the plaintiffs that there were two titles on the suit property. In their defence filed on 8th December 2021 they denied all the averments in the Plaint and stated that the suit did not raise any triable issues against the 3rd defendant.

Evidence

4. The suit was heard on various dates between 10/2/2022, 18/5/2022 and 29/09/2022. A number of adjournments during the hearing were allowed at the instance of counsel for the 1st and 2nd defendants to procure the attendance of the Land Adjudication Settlement Officer Nairobi to produce the parcel file for plot No. Kwale Diani Beach/168. This did not bear any fruit.
5. PW1 – Said Mwinyikai Tomas the 2nd plaintiff testified on 10/2/2022 on behalf of the plaintiff. He adopted his comprehensive written statement filed on 14/01/2020 and produced the documents in the Plaintiffs comprehensive list of documents dated 10/01/20 which the court admitted as exhibits. His evidence was that the plaintiffs became owners following a successful petition in Kadhi's Court Kwale case No. 209 of 2017 following the death of their fathers Mwinyikai Bakari Kiriwacho who died in the year 2005 and Juma Said Kwambirwa who died on 20/5/2010 and who both lived in the suit property. He added that following the Kadhi's determination the plaintiffs were successfully registered as proprietors and issued with a title on 7/9/2017. That a search they undertook prior to this showed his father and uncle were the title holders. That another search conducted on 18/6/2018 showed the three Plaintiffs as owners.
6. PW1 further testified, while the defendants claimed ownership of the land they were duped because the plaintiffs did not participate did not participate in the transfer dated 10/2/2011 herein. That the



green card in the 3rd defendants list of documents reflected the history and current correct position of the suit property. On the defendants KRA stamp duty payment document he pointed that KRA just received duty they were bound to collect and which did not mean the defendants were the owners of the suit property.

7. In cross examination by Mrs. Ngure PW1 that he started visiting Kwale Land Registry in the year 2017 and he never got any indication there was someone claiming the suit property.
8. In further cross examination by Mr. Mwandeje, PW1 stated he was not aware of his parents selling the land to anyone after they had obtained the title.
9. With the above the plaintiff's case was closed.
10. DW1 - John Njoroge Mungai the first defendant and the 2nd defendants husband adopted his witness statements dated 17/10/2018 and 22/12/2021. He testified that he was a resident of Diani for close to 11 years and the suit property was located opposite his current residence. In support of their case the defendants produced the documents in the Defendants list of documents dated 17/10/2018 and 28/12/2022 and which the court admitted as exhibits. His testimony was that he bought the suit property in the year 2011 for Kshs. 1million from Beach Properties Ltd whose proprietors were Amos Hinja and Beatrice Wangui. That before purchase, he conducted a search at Kwale Lands office and obtained a Land Control Board Consent at Msambweni. Shortly after buying he constructed a wall and fundi structures.
11. His testimony was that plot no. 1456 was part of plot no. 168 which was originally 7 acres. It was then subdivided to get the plot no.1456. That in the year 2018 a staff at DTB Diani alerted him that someone intended to sell his land. That on inquiring from Amos Hinja he advised him to put up a fence as soon as he could. DW1 told the court he started the construction and the 1st plaintiff threatened him. He reported the matter to the police where Amos Hinja recorded a statement. The DCI asked him to go to Kwale and confirm ownership of the land. At Kwale he was asked to produce the original title and was denied the search.
12. DW1 stated he followed due process in acquiring the suit property and there were no shortcuts. That he never saw the plaintiffs until he started constructing. According to him the title held by the plaintiffs was a forgery. He told the court he saw a green card at the land's office. That on comparing the two titles he noted that the serial number in the plaintiff's title is wrong.
13. Upon cross examination by Mr. Mathare DW1 stated he undertook a search prior to purchase though he could not produce a copy. On being shown the defendants copy of title he agreed it was from plot 168 but conceded the subdivision was never captured but reflected in the plaintiff title for plot 1456. He agreed that the search dated 18/6/2017 showed the plaintiffs as the proprietors. He insisted he bought the land from Beach property's proprietors Amos and Betty who he could not confirm if they were his witnesses in the case.
14. Under cross examination by Mr. Mwandeje, He conceded the alert from DTB was not captured in his statement to the DCI. That he had no written complaint about the registry refusal to assist him conduct a search. He confirmed the content of his report to the DCI but pointed the DCI wrote it for him. On being referred to paragraph 2 thereof he conceded he informed the DCI he was not the owner of the property as he wanted to confuse them because he feared them and there were a lot of assassinations.
15. Ms. Siema Nkweli Mwaguni, Land Registrar stationed at the Kwale Land Office, testified on behalf of the 3rd defendant and produced the documents in the 3rd Defendants List of documents dated



- 26/11/2021 as “EXH 1-5”. She informed the court the suit parcel Kwale/Diani Beach Block 1456 was a subdivision of Kwale Diani Beach /168. That the 1st owner registered on 31/1/2005 was Mwinyikai Bakari Chiriwacho and Juma Said Kwambirwa. That on 7/9/2017 pursuant to an order of transmission in Kwale Kadhis’ Succession No. 2009/17, title was issued in the name of Said Mwinyikai Thomas, Biasha Mwalimu and Juma Hamisi Jamal (entry No. 3 & 4 in Green Card). That there was no other entry in the said green card other than the Plaintiffs. That the history showed Mwinyikai Bakari Chiriwacho and Juma Said Kwambirwa became the registered owners on 25/10/2004. There was no title document in the parcel file for the mother title.
16. Under cross examination by Mr. Mathare on being asked to compare the title produced by the 1st & 2nd defendants against the one by the plaintiffs, the registrar indicated that on the 2nd page of the 2nd defendants title there was no endorsement indicating it was a sub-division of Kwale 168 which ordinarily would be endorsed below ‘the registry map sheet’. That while entry No. 4 and 5 were in favor of Christine Mungai and title issued respectively the said entries did not appear in the green card. That the acreage in the Plaintiffs’ title matched with the green card and on page 2 below the words ‘registry map sheet’ the sub-division is reflected. That the green card content tally with plaintiffs’ title.
 17. In cross examination by Ms. Ngure the Land Registrar clarified the she did not have the parcel file for plot 168. She stated she had worked at the lands registry Kwale for 3 months and confirmed she was not the signatory of the Green Card. That the opening edition for the Plaintiff’s title meant the date when the mutation was lodged. As for the other title the opening edition date is 31/01/2005. She observed that in the title deed of September, 2017 the opening edition is 31/4/2005 yet it was a 2017 title, the other title is a 2005 and matches the edition. She stated that the opening date of the green card should not change until there is a subdivision or consolidation.
 18. The Registrar further stated the land registry uses the serial numbers for tracking and not the government printers’ numbers. That endorsement of the subdivision entry below the registry map sheet has been the practice because it tracks and shows the history. She conceded that the present was not a unique case as double titles have been issued in the past.
 19. On reexamination the Land Registrar reiterated she had compared the two titles and according to her the titles to the plaintiffs reflected the contents in the green card. Based on the variances seen she confirmed the property is registered in the plaintiffs’ names. That there were no records in respect of the defendants. That though at times there are instances of duplication of green cards, in the present case they had checked and there were no duplicate green cards. There are no documents of transfer in respect of the defendants.
 20. On 22/9/22 Mr. Simiyu Assistant Director Land Administration based at the Ministry of Lands Ardh House headquarters responded to summons issued by the court to produce the file for plot no. 168. He informed the court he was not able to get the file because he was not supplied with sufficient documentation to guide him in locating the file. Ms. Ngure promised to retrieve the letters of allotment and receipts from the defendant and forward the same by email. The court obliged and adjourned the case to 16/11/22 when Ms. Ngure informed the court the file could not be traced at the Nairobi office and closed the 1st & 2nd defendants case.

Submissions

Plaintiffs’ Submissions

21. In their submissions the plaintiffs identified the issues for determination as Whether the plaintiffs have proved their case on a balance of probabilities and if they are entitled to the prayers sought. On the



- first issue it was submitted that the plaintiff's evidence as to their ownership of the suit property was corroborated by the 3rd defendant. That from the documentary evidence adduced the plaintiffs' title deed is indefeasible pursuant to the provisions of Section 24(a) of the Land Registration Act having been obtained by transmission. That, the 1st & 2nd defendants failed to prove how they came to acquire the suit property having failed to produce a sale agreement in the transaction and proof of payment.
22. That it was not enough for the defendants to dangle title, a registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal as was held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina*, Civil Appeal number 239 of 2009. Citing Section 29 of the Registration of Land Act it was urged that the 1st & 2nd defendants had a duty to know who the registered owner of the land was yet they did not show any relationship with the plaintiffs leading to their alleged registration as proprietors on 17th February, 2011 and who denied selling the land to them. That the defendants did not produce a certificate of official search to confirm ownership of the suit property before and after purchasing the property. That therefore they acquired the suit property fraudulently by forging the transfer, application for consent of the Land Control Board and registering themselves as owners. The court was invited to cancel the 2nd defendants title by dint of section 26 (1)(a)(b) of the Land Registration Act. Reliance was placed on the cases of *Kibiro Wagoro Mukumu – v Francis Nduati Macharia & Another* [2018] eKLR, *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR and *Alberta Mae Gacci v Attorney General & 4 others* [2006] eKLR.
23. As to whether the Plaintiffs are entitled to the prayers sought, referring to Section 107 of the Evidence Act, rehashing the evidence led in terms of the ownership history as contained in the green card, the subdivision into 1496 and the title issued to the plaintiffs vide transmission on 4th August 2017 it was submitted the plaintiffs had proved their claim that the property was family property which had duly passed to them.
24. In the absence of any evidence to confirm that the title held by the 2nd defendant was a clean and proper one, the court was invited to order that the Register be rectified to only show the plaintiffs as the holders of indefeasible title to the suit property.

1st and 2nd Defendants Submissions

25. The defendants submitted on Whether the 1st and 2nd defendants are the true legal owners of the land; Whether the 3rd defendant established to the satisfaction of the Court the root of the title and Whether the Plaintiffs are entitled to the reliefs sought. On whether the 1st and 2nd defendants are the true legal owners of the land it was submitted that the 2nd defendant's title has a good foundation having been legally and procedurally acquired. Outlining the presence and validity of the supporting documents that led to the registration of the 2nd defendant as proprietor it was submitted that the plaintiff's claim ought to fail as the suit property was lawfully acquired and registered on 17th February 2011 under the name of the 2nd defendant.
26. As to whether the 3rd defendant established to the satisfaction of the Court the root of the title it was submitted the green card presented by the 3rd defendants is not enough to establish the root of the title document to cause the plaintiff's title to prevail over the 2nd defendants title. There were no tangible documents presented by the registrar which normally form the original parcel file to support the entries made in the green card as envisaged under the Section 6(1) of the Registered Land Act (now repealed).
27. It was contended that incidences of double titles were a common phenomenon with Land Registries in Kenya. The fact that the Kwale Land registry failed to produce entries and documents contained in the original parcel file to the suit property to support their case was a red flag and which confirms



possible tampering of documents existing in the parcel file that would have informed the court the true position. The Registrars statement confirming the situation at the Kwale land registry in the case of Estate of Sonrisa & Another v Samuel Kamau Macharia & 2 Others 2020 eKLR was cited in this regard. To further buttress the relevance of the Original Parcel file the court was referred to the case of Kenya Railways Corporation v Safrosh Limited & 3 Others [2013] eKLR.

28. Relying on the provisions of Section 107 (1) and 108 of the Evidence Act as well as the holding in James Mwangi Kamau v Weston Investment Limited [2021] e KLR it was submitted that the Plaintiffs had failed to discharge the burden of proof of demonstrating why their 'title' should prevail over the 2nd defendant's title. It was further submitted that the 2nd defendant's title dated 17th February 2011 being the first in time should take priority and be recognized and protected as the true title. Reliance was placed in Kamau James Njendu v Serah Wanjiru & Another 2018 eKLR, Wreck Motors Enterprises v The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997 and Gitwany Investment Ltd v Tajmal Ltd & 3 Others [2006] eKLR.
29. It was finally submitted that the suit property was acquired legally and procedurally in 2011 by the 2nd defendant whose title should be protected under article 40 of the Constitution as well as provided under Section 26 of the Land Registration Act.

Analysis and Determination

30. I have considered the pleadings filed by the parties, evidence and the submissions and I find the main issue commending determination is whether the plaintiffs have proved their case to the required standard as to entitle them to the prayers they are seeking. The Plaintiffs who are relatives claim they are the legal owners of Kwale/Diani Beach Block/1456 (the suit property). It is their evidence through PW1 that the suit property which initially belonged to their fathers was a subdivision of Kwale/Diani Beach Block/168 which was jointly registered in the names of Mwinyikai Bakari Chiriwacho & Juma Saidi Kwambiriwa who are all deceased. That the plaintiffs subsequently successfully petitioned the Kadhi at Kwale and the land was transferred to them by transmission.
31. According to the pleadings the Plaintiffs claim the defendants invaded the suit property sometime in July 2018 claiming ownership and began erecting a perimeter wall. Indeed, the 1st and 2nd Defendants case is that the 2nd Defendant who is the wife to the 1st Defendant is the lawful registered owner of the suit property having been allegedly duly transferred on 17/2/2011 following purchase from the proprietors of Beach Properties Limited Amos Hinja Kariu and Beatrice Wangui.
32. The court is therefore faced with two litigants each claiming ownership of the suit property holding titles one by succession and the other by purchase. Indeed, legally under the provisions of Section 32 of the Registered Land Act (repealed) only one title or certificate could issue. I will proceed to review the plaintiff's case as the party who has moved this court to have their title upheld as against that of the 2nd defendant. It was incumbent upon the plaintiffs to prove their allegations of ownership as required by the provisions of sections 107 and 108 of the Evidence Act Cap 80 of the Laws of Kenya.
33. The plaintiff produced in support of the claim of ownership by transmission a copy of title deed issued on 7/9/17, copy of Kadhi 's court order, application to be registered as proprietor by transmission and Transfer by Personal Representative to Person Entitled Under A Will or on Intestacy all dated 4/8/2017. Upon review of the title deed issued on 7/9/17 I noted it was in respect of Kwale/Diani Beach Block/1456 and the plaintiffs Saidi Mwinyikai Tomas, Biasha Mwalimu Ganyuma and Ali Hamisi Jamili are registered as absolute proprietors on 7/9/17. It now established that where the title is challenged, it is not enough to dangle the title. The holder of the title must go beyond it and establish its root and I agree with the Court of Appeal on this position as stated in the Munyu Maina



v Hiram Gathitha Maina (supra). Justice Sila Munyao added as follows in the case of Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR; --

‘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’

34. The plaintiff traced the root of the title to Plot Kwale/Diani Beach Block/168 whose title was produced by PW1 as an exhibit. Upon scrutiny of the mother title, I noted that the same was issued on 25/10/2004 to Mwinyikai Bakari Chiriwacho and Juma Saidi Kwambirwa as absolute proprietors. Kwale/Diani Beach Block/1456 as a subdivision. There was also produced by PW1 a copy of the title Kwale/Diani Beach Block/1456 and which the court noted was issued on 31st January 2005 to the said Mwinyikai Bakari Chiriwacho and Juma Said Kwambirwa. It was not disputed by the 1st and 2nd defendants that the plaintiffs did not come from this lineage or that the said Mwinyikai Bakari Chiriwacho and Juma Saidi Kwambirwa were not their fathers. What was disputed is whether indeed they were the bonafide owners of the subdivision. Infact I must observe that from the entire proceedings none of the parties denied that plot Kwale/Diani Beach Block/1456 was a subdivision of plot no. 168.
35. As has played out there are no records at the land office for the parcel file in respect of the mother title no. 168 as confirmed by the Land Registrar during the hearing. It was again confirmed by Ms. Ngure that the file could not be traced by the Land Adjudication Office Nairobi to clarify on the issue of subdivision. The plaintiff produced this mother title which was never categorically denied by the Registrar not to be a document emanating from the records at the land’s office. On the other hand, the 1st defendant did not produce any evidence to prove that this title was fraudulent.
36. DW1 did not adduce any evidence to demonstrate that the title held by the plaintiffs was impeachable and liable to be defeated on grounds of fraud, illegality and unprocedural transfer process. No evidence was led to show that the Plaintiffs failed to adhere to due process in acquisition of the suit property. The defendant approached the DCI for investigations and never followed up on the investigations to conclusion to ensure there was a report to buttress their position that plaintiffs’ titles were forged. It is not enough to just state the absence of records was indicative of tampering. I’m aware that it now settled the standard of proof for fraud is slightly higher than that of normal standard of a balance of probability See Ratil Patel Vs Lalji Makanji EA 1957 and Vijay Morjaria v Nansigh Darbar & Another [2000] eKLR.
37. I will then shift focus to the property in issue which is the suit property in respect of which both parties produced their own title. The one to the plaintiff reveals it was issued on 31st January 2005 to Mwinyikai Bakari Chiriwacho and Juma Said Kwambirwa. It is true the title does not contain any endorsement on its face to show that it is a subdivision of the said plot 168. The Land Registrar conceded this was a material detail though she could not explain this anomaly she was emphatic the green card reflected it was a subdivision. However, she also stated in cross examination that from the



year 2008-2009 the practice has been to include such endorsement. She did not therefore confirm that by the year 2005 this was a mandatory requirement. It is noteworthy the 2nd defendant's title too did not have the endorsement showing it was a subdivision. In fact this is confirmed by DW1 during cross examination when on being shown the defendant's copy of title he conceded the subdivision was never captured.

38. In support of the claim of ownership by transmission following the death of Mwinyikai Bakari Chiriwacho and Juma Said Kwambirwa the plaintiffs produced a copy of title deed issued on 7/9/17. This title I noted was for Kwale/Diani Beach Block/1456 and the plaintiffs Saidi Mwinyikai Tomas, Biasha Mwalimu Ganyuma and Ali Hamisi Jamili are registered as absolute proprietors on 7/9/17. The title was issued on the same day. (entry 4 and 5.), This specific title has an endorsement that it is a subdivision of plot No. 168. The plaintiffs further produced a copy of the Kadhis court order, Application to be registered as proprietor by transmission and Transfer by Personal Representative to Person Entitled Under A Will or on Intestacy dated 4/8/2017. The Kadhis Order was issued on 4/8/2017 and it is to the effect that Kwale/Diani Beach Block/1456 constitute the estate of Mwinyikai Bakari Chiriwacho and Juma Said Kwambirwa. The parcel is then vested in the plaintiffs herein on their own behalf and the family.
39. The Application to be registered as proprietor by transmission showed the plaintiffs herein applying on 4/8/2017 as personal representatives of Mwinyikai Bakari Chiriwacho and Juma Said Kwambirwa to be registered by transmission as proprietors in place of the said deceased persons. It is executed before the Kadhi Kwale County. The Transfer by Personal Representative to Person Entitled Under A Will or on Intestacy shows the plaintiffs as personal representatives of the deceased transferring to themselves the interest of the deceased in the suit property as proprietors in common in undivided shares. It is witnessed and certified by the Kadhi Kwale County.
40. I then proceeded to look at the legal requirements for transfer of land by transmission. Section 119 of the Registered Land Act (now repealed) provides as follows; -

119. (1) If a sole proprietor or a proprietor in common dies, his personal representative, on application to the Registrar in the prescribed form and on production to him of the grant, shall be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after his name of the words "as executor of the will of deceased" or "as administrator of the estate of deceased", as the case may be. (2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission - (a) any transfer by the personal representative; (b) any surrender of a lease or discharge of a charge by the personal representative. (3) In this section, "grant" means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee.
41. The above provisions are replicated in section 61 of the Land Registration Act. My review of the documentation presented by the plaintiffs shows that the transfer by transmission followed the legal process. Again, no evidence was placed before this court by the 1st and 2nd defendant to show that the documentation from the Kadhis court were forgeries. The documents produced by the Plaintiffs found corroboration in the testimony of Ms. Siema Mwanguni on behalf of the 3rd Defendants'. In cross examination by Mr. Mathare and upon review of the titles she pointed that the green card contents tallied with the plaintiff's title.
42. In reexamination she reiterated her position that having compared the two titles in respect of plot No. Kwale Diani 1456 her opinion was that the title to the plaintiff reflects the contents in the green card. She stated that 'in my view and the variances seen I confirm the property is registered in the plaintiff



name. The Registrar was able to point out though there were instances where there are duplicate green cards, there were no duplicate green cards in the present case. While she admitted during cross examination that she is not the registrar who signed the titles and that she had worked for only three months, in my view this should not be a reason to cloud her testimony. Infact in my view having not been there at the time she would have no reason to cover up for any previous registrar. I find no reason to disregard the conclusion made by the Land Registrar that the title is registered in the plaintiff's name.

43. But the defendants deny that the plaintiffs have any interest in the suit property and claim that they are the legal and beneficial owners of the suit property which it is their case they obtained legally and procedurally on 17/02/2011 in the name of the 2nd defendant. DW1 produced before court a copy of Transfer of Land which upon my perusal I noted that Beach Properties Limited by a transfer lodged on 17/2/11, transferred Kwale/Diani Beach Block/1456 for Kshs. 1,000,000/= to Christine Mungai the 2nd defendant. The same is signed on behalf of the said Beach Properties Ltd by Amos Hinja Kariu and the said Beatrice.
44. Also produced was a copy of title deed issued on 17/2/2011 for Kwale/Diani Beach Block/1456 showing Christine Mungai the 2nd defendant as absolute registered proprietor, Copy of Stamp Duty Declaration for the said transfer of Kwale/Diani Beach Block/1456 to the 2nd defendant by Beach Properties Ltd. DW1 testified that he followed due process in acquiring the suit property and there were no shortcuts. It behooved the court to interrogate the process the defendants followed to acquire the land and the documents in support to be satisfied of the same. I was not satisfied for the following reasons.
45. The defendants did not produce a pre-transfer search undertaken as part of their due diligence, showing that indeed Beach Properties Ltd were the registered owners of the property and had capacity to pass title. DW1's case is that he did a search before he purchased the suit property which he confirmed during cross examination by Mr. Mathare he could not produce a copy. There was no satisfactory explanation as to why he could not produce the same considering that he was able to produce the other 2011 documents in support of the transaction. DW1 was only able to account for the search he alleged in his evidence in chief to have been denied by the land registry in 2018. Pressed further by Mr. Mathare he told the court he had his search which was however stolen ostensibly by either the DCI or the registry officials which I found difficult to believe in the absence of any evidence of a complaint in this regard which he admitted during cross examination by Mr. Mwanjeje he did not have.
46. DW1 further relied on the history of the land as recorded by one of the Directors of Beach Properties. The said director Amos Hunja Kariu recorded a statement with the DCI Diani Police station on 1st July 2018 which DW1 produced as part of his evidence in court. To me he was the most apt person who would have shed light on the sale of the property and specifically its origin from plot 168. He states in the statement that he was introduced to the land by a land broker called Hamisi in 2005 who told them that Kwale Diani Beach Block 168 was owned by a European, the lease expired and one Mzee Kani went to court and got the plot measuring 21 acres.
47. At the outset this is hearsay from a broker and I wouldn't place reliance on it in the absence of documentation. Amos was not called to give evidence and PW1 could not confirm during cross examination if he was lined up as one of his witness. But of importance was Beatrice Wangui who is said to have sold the plot together with Amos. She too was a pertinent witness yet no explanation is given why she could not be called to testify even if she had left the company.
48. During cross examination DW1 could also not explain from whom Amos purchased the property but was clear from his witness statement he did not buy from the Plaintiffs forefathers. Moreover, if DW1



had lived in the neighborhood of the suit property for 11 years weren't there neighbors who may also have bought from the said Beatrice Wangui as mentioned in Amos statement.

49. DW1 also recorded a statement at Diani Police station on 3rd July 2018 which he produced as part of his evidence. He states therein that he was approached by Amos Hunja Kariuki a director of Beach Properties Ltd who wanted to sell plot Kwale/Diani Beach Block/1456. That upon consultation with his wife the 2nd defendant and after undertaking a search went ahead and bought it from the said Amos. DW1 does not at all mention Beatrice Wangui in this statement. Additionally, DW1 was cross examined at length by Mr. Mwanjeje on this statement and he could not stand the test of cross examination to the point he almost disowned his statement by stating that it was the DCI who wrote it for him.
50. But most importantly and curiously is the absence of an agreement for sale between the 1st and 2nd defendants and Beach Properties Ltd in respect of the suit property. And this is where I began to wonder further about the 'silent' absence of the said Beatrice Wangui in these entire proceedings. Clearly there was something amiss.
51. Based on the foregoing it is the finding of this court that the plaintiffs have on a balance of probability demonstrated that they are the legal owners of the suit property.
52. Are the plaintiff therefore entitled to the orders sought? From the evidence on record it is this court's finding that the plaintiffs have been able to prove their case on a balance of probabilities and are therefore entitled to the orders sought. The orders craved by the Plaintiffs have already been outlined elsewhere in this judgement. It is this court's view however that the award of general damages would not be appropriate in this matter as the plaintiffs have not demonstrated the extent of general damages they suffered. I also see no need for the involvement of the police in execution of court orders this being the preserve of the court bailiff.
53. In conclusion, I hereby enter judgment for the Plaintiffs against the 1st and 2nd Defendants jointly and severally as follows;
 - a. I declare that the piece of land known as Kwale/Diani Beach Block/1456 measuring 0.446 Ha belongs to the plaintiffs.
 - b. A permanent injunction is issued restraining the defendants by themselves. their agents, employees, representatives or contractors, servants and/or other person acting and /or claiming through and/or under them from undertaking and/or continuing any developments, constructions and erecting any structure on land known as Kwale/Diani Beach Block /1456 measuring 0.4460 Ha and or occupying the same.
 - c. An eviction order is hereby issued evicting the defendants and/or agents, employees, representatives or contractors, servants and/or any other person acting and /or claiming through and/or them from the parcel of land known as Kwale/Diani Beach Block/1456 measuring 0.4460 Ha, within ninety [90] days from the date hereof.
 - d. The Defendants are hereby given the option of demolishing their structures within the said 90 days failure to which demolishing orders will automatically issue against them upon expiry, for demolition of the perimeter wall and/or any structure, developments and/or building on the parcel of land known as Kwale/Diani Beach Block/1456 measuring 0.4460 Ha by the Plaintiff.
 - e. The plaintiffs shall have the costs of this suit.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 18TH DAY OF SEPTEMBER, 2023



A.E. DENA

JUDGE

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

Mr. Mathare for the Plaintiffs

Ms. Ngure for the 1st and 2nd defendants

Mr. Mwanjeje for the 3rd defendant.

Mr. D. Disii Court Assistant.

