



REPUBLIC OF KENYA



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Royal Tulia Estates Limited v County Land Registrar- Kilifi & 6 others (Environment & Land Case 5 of 2014) [2022] KEELC 4772 (KLR) (7 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4772 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 5 OF 2014
MAO ODENY, J
SEPTEMBER 7, 2022

BETWEEN

ROYAL TULIA ESTATES LIMITED PLAINTIFF

AND

COUNTY LAND REGISTRAR- KILIFI 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

REUBEN KIRAGA 4TH DEFENDANT

DAVIDSON MATANO 5TH DEFENDANT

KATANA BAWA MWALUNGO 6TH DEFENDANT

DUNCAN CHARO 7TH DEFENDANT

JUDGMENT

1. By a plaint dated November 26, 2013 and amended June 16, 2014 the plaintiff herein sued the defendants jointly and severally seeking the following reliefs: -
 - a. Cancellation of the Title documents in Plot Nos. 363 and 364 situate in Chembe/Kibabamshe, Kilifi issued to Reuben Kiraga and Davidson Matano respectively.
 - b. A declaration that the Plaintiff is the registered owner of Plot Nos. 363 and 364 situate in Chembe/Kibabamshe, Kilifi.
 - c. A Permanent Injunction do issue restraining the Defendants from interfering with the Plaintiff's use, ownership and utility of Chembe/Kibabamshe/363 and 364.
 - d. Compensation for Loss of User in the sum of Kshs. 193, 818, 240.00.



- e. Interest on d) above at such rate and for such period of time as this Honourable Court may deem fit to grant.
- f. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
- g. Any such other or further relief as this Honourable Court may deem appropriate.

Plaintiff's Case

2. PW 1 Mr Benaglia Claudio adopted his witness statement and testified that he is a shareholder and director of the plaintiff company. He stated that the plaintiff is the absolute registered proprietor of the suit land and a *bona fide* purchaser for value.
3. It was his evidence that he took possession of the parcels of land known as Plot Nos. 363, 364 situate in Chembe/ Kibabamshe, Kilifi on March 20, 2009 and further that he complied with all the conveyancing protocols and purchased plot No. Chembe/ kibabamshe/ 363 from Daniel Ricci at a consideration of Kenya Shillings Four Million Five Hundred Thousand measuring approximately 1.2 Ha. He also told the court that the transfer was duly effected at the Kilifi District Land Registry and a Title deed dated the 20th day of March, 2009 was issued to him.
4. PW1 also testified that he purchased Chembe/ Kibabamshe/364 from the said Daniel Ricci in September, 2008 at a consideration of Kenya Shillings Four Million Five Hundred Thousand measuring approximately 1.69 Ha wherein a transfer was duly registered and a Title Deed dated March 20, 2009 issued to him. It was his testimony that as a result of the action by the 1st Defendant, he has suffered great loss and damage.
5. PW1 produced the list of documents as Pex No 1 to 36 in support of his case and stated that the plaintiff has suffered loss as a result of the 1st defendant's action of issuing title documents to the 4th & 5th defendants.
6. On cross examination by Ms Lutta counsel for the 1st and 3rd defendants, PW1 stated that he had not received a letter from the government indicating that they had an interest in the suit property. He also stated that he took possession of the suit property and built a gazebo and a small house for the watchman.
7. PW1 further that he paid money to Mr. Daniel Ricci but did not pay money to the 6th Defendant. It was his testimony that one Athuman Juma a Land Registrar was charged with a criminal offence but he did not remember how the case went.
8. On cross examination by Mr Shujaa PW1 stated that he entered into an agreement dated March 17, 2009 with Daniel Ricci, carried out a search in 2008 before he bought the land but did not obtain any search in 2009. PW1 also stated that he claims for damages because it has been unable to fully utilize the suit properties as was intended.
9. On cross examination by Mr Saussi, PW1 told the court that he is the Director of the Plaintiff company but he had not filed any authority to show that he was authorized to sue on its behalf. Making reference to Page 3 of the Further List of Documents, he stated that the Board Resolution dated July 16, 2013 was to recover losses and compensation from the Government and did not refer to the Defendants. He confirmed that his agreement with Mr Daniel Ricci was dated March 17, 2009.



10. On reexamination, he told the court that Daniel Ricci was the owner of the land and that he had the authority to represent the plaintiff in this suit. He also confirmed that he had the original titles for the two plots.

4th 5th 6th and 7th Defendants' case

11. The 4th defendant did not participate in the case. The 5th Defendant filed his Statement of Defence dated the 11th day of October, 2014 but neither gave evidence nor called any witness.
12. DW1, Katana Bawa the 6th defendant adopted his statement and stated that Plot No. 363 belongs to his father who was given the land by the Settlement scheme. He also stated that his late father had a case in Mombasa but that he was not a party in the Mombasa case.
13. On cross examination by Mr Binyenya, counsel for the Plaintiff, DW1 stated that his father, Bawa Mwalungo died in 2013 but they have not filed a Succession cause in respect of his Estate and that he did not know Mr. Daniel Ricci. Upon being shown the plaintiff's Certificate of search, he confirmed the suit plot indicates that it belongs to Daniel Ricci. It was his testimony that his father did not sell the land and that he was equally never paid any money for the sale of the land.
14. On cross examination by Mr Shujaa, counsel for the 5th Defendant, DW1 stated that his father was not given a title deed; and that they do not stay on the suit land. He also stated that he did not know that the 5th Defendant Duncan Charo stays on plot No.364.
15. On cross examination by Mr Mkalla, counsel for the 1st, 2nd and 3rd Defendants, DW1 stated that the Court order that gave his father land was issued in 2007 and that he did not know Mr. Fredrick Kazungu Diwani and Mr. Daniel Ricci. He further stated that they stayed on the suit land before the year 2000.
16. On re-examination by Mr Sausi, DW1 stated that his father was not a squatter and that he did not know the Plaintiff. He also confirmed that they are not in occupation of the suit land but have houses and coconuts therein.
17. DW2 Duncan Charo the 7th defendant adopted his statement and testified that his father acquired the land in 1987. That when he was 30 he started following up the issue of Title deed as Daniel Ricci was claiming the suit land. He told the court that they have a case in Mombasa JR No. 2 of 2007 where the court ordered that he be given Plot No. 364 but they were stopped by a court order in the present case. That he has not sold the land to anyone and that he had not been issued with a title deed.
18. On cross examination by Mr Binyenya, counsel for the Plaintiff, DW2 stated that he was given a letter of allotment which was with his lawyer but did not produce it. DW1 agreed that from his witness statement he stated that he knew Mr. Daniel Ricci who had agreed to buy the suit land.
19. DW3 the 1st defendant the Land Registrar Kilifi County adopted her statement dated 26th November, 2021 whereby she stated that there are no original records for the said parcel of land and what is available are the green cards and other correspondences. It was her testimony that the original documents were forwarded to the DCI as per the letter dated 26th September, 2014. That from the copies of the green card the property was adjudicated in the name of Samuel Kanongo Ritho in 1978 and a title deed issued with first edition green card which title together with all other titles were cancelled by the Chief Land Registrar in 1986 for irregular allocation.
20. DW3 further told the court that on 25th October 2000 the property was allocated to Fredrick Kazungu Diwani through the Settlement Fund Trustee and a title deed issued. She also stated that a transfer



to Daniel Ricci was effected on 8th January, 2002 a title deed issued and thereafter the property was transferred to Royal Tulia Estate on 20th March, 2009 and title deed issued.

21. It was her testimony that on 29th September, 2010 a fresh Certificate of lease was issued under the name of Davidson Matano & Reuben Kirago pursuant to a lease received from Ardhi house in respect of Chembe/ Kibambamshe/ 363 and Chembe/ Kibambamshe/364. DW3 also stated that on 25th October 2000 the property was allocated to Msoloni Villas Limited through the Settlement Fund Trustee and a title deed issued.
22. DW3 told the court that the double allocation of the plots 363 and 364 was the reasons why the records in respect of the suit parcels were forwarded to the DCI Malindi for investigation. It was her testimony that there are vesting orders in Mombasa JR case no. 1,2 & 3 of 2007 that property be registered to Bawa Mwalungo & Duncun Charo respectively.
23. On cross examination by Mr. Shujaa, counsel for the 5th Defendant, she confirmed that the original records for the suit properties were taken to the DCI in 2014 and that she based her evidence on the copies in the parcel files.
24. On cross examination by Mr. Sausi, Counsel for the 6th and 7th Defendants, it was her testimony that she had transfers from Mr. Daniel Ricci to the Plaintiff and that the order dated the December 14, 2007 was not complied with.
25. Upon cross examination by Mr. Binyenya, counsel for the Plaintiff, she told the court that a green card gives the exact details of a property and that there are two titles in respect of the said properties which is not regular. Further that there was order for revocation or cancellation of title.
26. In reference to the orders dated December 14, 2007 and December 21, 2007 DW3 stated that neither Daniel Ricci nor Royal Tulia Ltd were parties to the case. She also confirmed that there were no ownership documents in respect of Bawa Mwalungo and Charo Duncan. It was her testimony that there is a copy of an agreement between Duncan Charo and Daniel Ricci who is the proprietor dated July 28, 2009 which was entered after the orders issued in the JR case in 2007.
27. It was also her testimony that she had an agreement between Bawa Mwalungo in respect of Plot No. 363 with Daniel Ricci. She confirmed that it was a leasehold for a term of 99 years and the Certificate of lease was issued to Davidson Matano.

Plaintiff's Submissions

28. Counsel filed submissions and listed the following issues for determination;
 - a. Who issues title documents and were the Plaintiff's title documents issued by the Government of Kenya?
 - b. Whether or not the Plaintiff is the absolute and indefeasible owner of the suit properties?
 - c. Whether or not the Government has recalled, and/revoked the Plaintiff's title documents or instituted proceedings to have the same cancelled?
 - d. What are the consequences of double allocation of title and title procured irregularly by fraud or corruption?
 - e. Whether or not the 6th and 7th Defendants complied with letters of allotment or offer issued to them?



- f. Whether the orders in Mombasa High Court JRELC Misc. Application No. 2 of 2007 and Mombasa High Court JRELC Misc. Application No. 3 of 2007 can be executed?
- g. What reliefs if at all are available to the Plaintiff?
- h. Who should bear the cost of this suit?
29. On the first issue on who issues title documents and whether the plaintiff's documents were issued by the Government of Kenya, counsel submitted that the plaintiff is an innocent purchaser for value who bought the suit properties from Mr. Daniel Ricci, each at a consideration of Kenya Shillings Four Million Five Hundred Thousand (Kshs. 4, 500, 000.00) in good faith. Counsel further submitted that the title documents were issued under the *Registered Lands Act* (RLA), Cap 300 of the Laws of Kenya (now repealed) which regime of law still applies by virtue of the transitional provisions in Section 107 of the *Land Registration Act* of 2012 and Section 162 of the *Land Act*, 2012
30. On the second issue whether or not the plaintiff is the absolute and indefeasible owner of the suit properties, counsel relied on Section 27 *RLA* (repealed) Repealed Act which provides that registration of a person as proprietor of land vested in that person absolute ownership of that land together with all rights and privileges appurtenant thereto and that Section 28 of the said Repealed Act provided that the rights of a proprietor acquired on first registration, subsequent registration for valuable consideration or by an order of the Court could not be defeated except as provided for under the said Repealed Act.
31. Mr Binyenya submitted that the Plaintiff was under no obligation in law to go behind the titles of the suit properties and to enquire how the previous registered owner, Mr. Daniel Ricci, was registered as proprietor thereof and relied on the case of *David Peterson Kiengo & 2 others v Kariuki Thuo* [2012] eKLR.
32. Counsel also submitted that under the Repealed Act the title of a bona fide purchaser for value and without notice of fraud could not be impeached and cited the case of *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR.
33. Mr Binyenya also submitted that the 5th, 6th and 7th Defendants failed to prove any allegation of illegality, omission and/or mistake by the plaintiff as they never led any evidence in support of their allegations. Further that a person who presents their case for determination before a court of law must present evidence in support of that case based on Section 2 of the *Evidence Act* and cited the cases of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* (2015) eKLR and *County Government of Homa Bay v Oasis Group International & Ga Insurance Limited* (2017) eKLR.
34. Counsel submitted that whereas the 5th, 6th and 7th Defendants have argued and asserted that the Plaintiff's title documents to the suit properties were illegally and unlawfully procured and therefore cannot deserve the protection under the law, the Plaintiff has demonstrated how it acquired the suit properties and none of the Defendants have shown any fraud, mistake or misrepresentative on the part of the Plaintiff. Similarly, counsel stated that under the Repealed Act, a title document was conclusive proof of ownership and that the owner thereof was entitled to exercise and enjoy all the incidents that ownership confers and cited the case of *Eunice Grace Njambi & Another v Attorney General & 5 others* (2013) eKLR.
35. On the issue as to whether or not the government has recalled, and / revoked the Plaintiff's title documents or instituted proceedings to have the same cancelled, counsel submitted that the Repealed Act had a self-contained code providing both procedural and substantive law and that the Government did not have jurisdiction to revoke and/or cancel the Plaintiff's title. That Section 143(1) of the Repealed Act stated that a court could order rectification by directing that any registration be cancelled



- or amended where it was satisfied that any registration had been obtained, made or omitted by fraud or mistake.
36. Counsel relied on the case of *Republic v Kisumu District Lands Officer and another* [2010] eKLR and submitted that the validity of the said certificates of title can only be challenged upon the application of due process. That the plaintiff holds a valid title to the suit parcels of land.
 37. Mr Binyenya further submitted that to this date, neither the 3rd Defendant nor the 2nd Defendant the National Land Commission have commenced any proceedings in a Court of Law against the Plaintiff or invoked the process established under Section 14 of the *National Land Commission Act, 2012* against the Plaintiff. Further that whereas the Plaintiff filed this suit seeking to enforce its' right to own property, none of the Defendants filed a counterclaim over the Plaintiff's title to the suit properties.
 38. On the issue on the consequences of double allocation of title, counsel submitted that it was illegal and contrary to the provisions of Section 32 (1) of the said Repealed for there to be two different title documents in respect of the same parcel of land issued to different people. Counsel also submitted that the issuance of title to another person was illegal and amounted to compulsory acquisition of land.
 39. Counsel relied on Section 9 of the *Government Lands Act* (Repealed), and stated that the 1st Defendant's purported action to allocate non-existent lands to the 4th and 5th Defendants on the 29th day of September, 2010 was done in contravention of the prescribed manner. Further that the Commissioner of Lands under Section 3 did not have powers to alienate government land.
 40. Similarly Mr. Binyenya submitted that this suit involves double allocation and that it is well settled that the first title in time took priority as was held in the case of *Gitwany Investment Limited v Tajmal Limited and 3 others* [2006] eKLR hence the Certificates of Lease issued to the 4th and 5th Defendants and any other party for that matter are null and void ab initio.
 41. On the issue as to whether the 6th and 7th defendants complied with the letters of offer issued to them, counsel stated that the defendants neither mentioned the letter of allotment/offer in their joint amended defence and witness statements. Further that they did not produce any document in their evidence
 42. Counsel submitted that a letter of allotment or offer is usually valid for a specific period of time which must be complied with and that a letter of allotment or offer is not proof of title as it is only a step in the process of allocation of land and relied on the cases of *Wreck Motor Enterprises v Commissioner of Lands & 3 others* [Supra] eKLR and *Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua & 4 others* [1997] eKLR.
 43. Consequently, it was counsel's contention that in the absence of letters of allotment or offer and duly executed lease agreement documents between the 6th and 7th Defendants and the then Commissioner of Lands their claim on the suit properties contravenes the mandatory provisions of Section 3(3) of the *Law of Contract Act*, Cap 23 of the Laws of Kenya and ought to be struck out with costs to the Plaintiff and cited the case of *Leo Investment Ltd v Estuarine Estate Ltd* [2017] eKLR.
 44. On the issue as to whether the orders in Mombasa High Court JRELC Misc. Application No. 2 of 2007 and Mombasa High JRELC Misc. Application No. 3 of 2007 can be executed, counsel submitted that the 6th and 7th Defendants Mombasa cases but did not lead any evidence during their testimony in court.
 45. It was counsel's contention that the question to be determined involves ownership of land, and the rights, to occupy land namely occupation, and disposition there would be need to allow *viva voce* evidence and cross examination of the witnesses which is not available in Judicial Review proceedings



as Judicial Review proceedings is not a forum where a dispute on ownership of land can be adjudicated and determined.

46. Counsel also stated that the Plaintiff, the Settlement Fund Trustees, Fredrick Kazungu Diwani and Daniel Ricci were not parties to the consent order dated 21st December 2007 in Mombasa High Court JRELC Misc. Application No. 2 of 2007 which stated as follows:

"It is hereby ordered:-

1. That Judicial Review Orders of *Certiorari* do issue to remove into this Honourable Court and be quashed, the orders made by the Respondents on the 25th September 2007 not to register the Applicant as the Absolute proprietor of Plot No. Chembe/Kibabamshe/363 as contained on the Respondents' remarks made on the face of the letter dated September 25, 2007.
2. That Judicial Review Orders of *Mandamus* directed against the Respondents compelling the Respondents by themselves, their servants, agents and/or employees to process and register the Transfer and Discharge of Charge and issue a Certificate of Title in favour of the Exparte Applicant to Plot No. Chembe/Kibabamshe/363.
3. That there be no order as to costs."

47. Counsel relied on Section 4 (4) of the *Limitation of Actions Act* which governs execution of judgments and cited the case of *Koinange Investments and Development Company Limited v Ian Kabiu Ngethe & 3 others* [2015] eKLR* and submitted that Bawa Mwalungo had until 1 December 22, 2019 to execute his order which was never done hence time barred. Counsel therefore urged the court to allow the plaintiff's case as prayed with costs.

1st and 3rd Defendants' Submissions.

48. Counsel identified three issues for determination as follows:
- a. Whether the plaintiff can claim ownership rights over the parcel of land,
 - b. Whether the plaintiff's claim for compulsory acquisition and for compensation is justified
 - c. Whether the plaintiff is entitled to the reliefs sought.
49. On the issue as to whether the Plaintiff can claim ownership rights over the parcel of land, counsel submitted that it is a well-established principle that any allegations of fraud and/or illegality in the acquisition of title must be strictly proven and relied on the case of *R. G. Patel vs Lalji Makanji (1957) E.A* cited in the case of *Gladys Wanjiru Ngacha vs Theresa Chepsaat & 4 Others* (2013) eKLR where the court held that allegations of fraud must be strictly pleaded and proved.
50. Ms Lutta also submitted that the Plaintiff has not produced any evidence to demonstrate that the certificate of lease issued to the defendants were issued mala fides and that in the absence of original records, either parties could claim indefeasible title hence the plaintiff must prove that its title was acquired formally, legally and free from any encumbrances.
51. Counsel emphasized that the root of a title is very important and relied on the cases of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No. 239 of 2009 and *Sammy Mwangangi & 10 others vs Commissioner of Lands & 3 others* (2018) eKLR.



52. Ms Lutta further submitted that there are vesting orders in Judicial Review, ELC Mombasa, Miscellaneous Application No. 1 & 2 in which orders are in respect of Chembe/ Kibabamshe/363 and 364 to be registered in the names of Bawa Mwalungo and Duncan Charo.
53. On whether the plaintiff's claim for compensation is justified, Counsel submitted that the particulars of damage and loss as claimed by the Plaintiff are misplaced and relied on the case of *Geoffrey Kanu Kinyua v Commissioner of Lands & 11 others* (2021) eKLR where the court held that for a claim for compensation to issue, the claimant must first establish that a right to such a claim exists and that right must be established and demonstrated to exist and the court must be shown how the right has been contravened or breached to warrant the compensation claimed.
54. It was counsel's submission that the Plaintiff has not demonstrated with proof of the means and/or finances for carrying out the intended giant project worth Kshs. 193, 818,240.00 and relied on the case of *Jackson Mwabili v Peterson Mateli* (2020) eKLR and that the conditions precedent for compulsory acquisition as set out under Article 40 (3) of the *Constitution* were never met. Further that for a claim of compensation to issue, such claim as quantified must be substantiated with logical and arithmetical precision and cited the case of *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* (2017) eKLR. Counsel therefore urged the court to dismiss the suit.

5th Defendants Submissions

55. Counsel filed submissions and stated that it is not disputed that there exist two documents of title in respect of Parcel No. Chembe/ Kibabamshe/ 364 and that there is the certificate of lease registered in the name of the 5th defendant produced by the plaintiff. Further that the 5th defendant is registered as a lessee of the suit property as per the certificate of official search produced by the plaintiff as exhibit No. 22.
56. Mr Shujaa identified two issues for determination namely who is the lawful registered owner of title No. Chembe/ Kibabamshe /364 and whether the plaintiff has suffered loss of user of the suit property.
57. On the issue as to who is the lawful registered owner of the suit land, counsel relied on Section 26 (1) of the *Land Registration Act* and submitted that the plaintiff has the onus of proving that it acquired the title lawfully and procedurally.
58. Mr Shujaa submitted that DW1, the Land Registrar, produced a copy of the certificate of official search dated March 23, 2011 showing that the 5th defendant was registered as lessee of the suit property on September 29, 2010 but did not produce any evidence showing the registration of the plaintiff as owner of the suit property. On cross examination the witness testified that she did not have the parcel file for the suit property in her registry it had been taken by the Directorate of Criminal Investigations for purposes of investigations and has not been returned to date.
59. Counsel further submitted that the plaintiff did not adduce any evidence to show that it planned to erect a tourist village where it would earn an income of Kshs. 193,818,240/- Similarly, that no evidence has been adduced showing that the 5th defendant dispossessed the plaintiff of the suit property or prevented the plaintiff from using the suit property in any manner.
60. Counsel also stated that parties are bound by their pleadings and referred the court paragraph 16 of the amend plaint where the plaintiff pleaded that it took possession of the suit property after purchasing it, therefore if the plaintiff was in possession then the issue of loss of user cannot arise unless evidence is led showing that it was prevented from using the suit property by the 5th defendant.



61. Mr Shujaa therefore urged the court to dismiss the plaintiff's case with costs as there is no certificate of official search or green card that confirms the plaintiff's registration as the owner of the property.

6th and 7th Defendants' submissions

62. Counsel gave a brief background to the case and submitted that the plaintiff is a foreign company with two directors who are foreigners and that the nature of the title which this foreign Plaintiff is claiming to be holding legally is a freehold under Cap 300 (repealed)

63. Counsel relied on Article 65 of the Constitution of Kenya, under land holding by non-citizens and submitted that it provides that a person who is not a citizen may hold land on a leasehold tenure only and any such lease however granted shall not exceed ninety- nine years. Mr Saussi further relied on sub-Articles 3 (a) which states a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens but the CR12 which is item No. 2 of the Plaintiff's list of documents confirms that the two shareholders/director are Italian nationals and that is the reason PW1 has stated on his witness statement that he is a resident of Malindi deliberately leaving out his passport numbers as well as his national status.

64. Mr Saussi also submitted that the Plaintiff has not annexed any document on its List of Documents, to show the manner in which he paid Kshs. 9,000,000.00 to the Vendor, Daniel Ricci. Further that the Plaintiff has confirmed in its amended Plaint at paragraph 39 that it had filed Malindi HCCC No. 29 of 2011 i.e. Royal Tulia Estates Limited vs. Davidson Matano & 3 Others which case was dismissed for want of authority vide a ruling delivered on May 11, 2012.

65. According to Mr, Saussi the plaintiff annexed a Sale Agreement dated July 30, 2009 between Daniel Ricci and Bawa Mwalungo Wanje and the property that was being sold was Chembe/Kibabamshe 363 but at paragraph 7 of the said agreement states "*that the agreed amount ex-gratia as compensation is Kenya Shillings One Million (Kshs.1,000,000.00)*" and the question is what was the compensation for. Further that the sale agreement stated at paragraph 8, that "*the proprietor shall pay to the squatters Kshs.150,000.00 only upon signing of this agreement (receipt whereof is hereby acknowledged by the squatters.)*"

66. Counsel further stated that the Plaintiff never called the said Daniel Ricci as a witness to clear the air on how he sold the two parcels of land to the Plaintiff. That the order granted on December 14, 2007 which orders were very specific directing the Land Registrar at Kilifi Registry to register Chembe/Kibabamshe/363 in the name of the *ex parte* applicant i.e. Bawa Mwalungo while property No. 364 was to be registered in the name of the 7th Defendant. The two orders from Mombasa High Court with inherent powers as well as jurisdiction were issued on December 21, 2007 and December 14, 2007 respectively and both orders had penal notices.

67. Mr Saussi submitted that the Plaintiff obtained its irregular title deed for Chembe/Kibabamshe/363 and Chembe/Kibabamshe/364 both on 20th March 2009 when the two High Court orders were already in force and operational and relied on the case of *Bellenny -vs- Sabine* (1857) 1 Dej 566 of 584 when Turner L.J where the court held that where a litigation is pending between the Plaintiff and the Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be biding not only on the litigating parties but also on those who derive title under them by alienating pending the suit whether such alienees had or had no notice of proceedings. Counsel therefore submitted that in view of the two High Court Orders its crystal clear that there were no properties to be sold and acquired by the foreign Plaintiff by 2009 and that to date the two High Court orders i.e. JRELC Misc Application No. 2 of 2007 and JRELC No. 3 of 2007



whose orders were issued on December 21, 2007 and December 14, 2007 are still in operation and in force as no they have either been set aside nor appealed against.

68. It was counsel's submission that the plaintiff did not produce a Sale Agreement between it and the Vendor Daniel Ricci, Title Deeds in the names of Daniel Ricci, Mode of payment of Kshs.9,000,000.00 to Daniel Ricci, copies of cheques, RTGS, Bank transfer, cash payment, KRA and Bank receipt confirming payment of stamp duty, executed minutes under seal, board resolutions under seal sanctioning the purchase of Chembe/Kibabamshe/363 and 364 by the two directors in the presence of the Plaintiff's secretary, hence failed to prove its case against the defendants..
69. Counsel also submitted that the Land Registrar was unable to confirm the existence of a transfer or copy of title from Daniel Ricci to the Plaintiff and further that she did not have the original documents of the suit parcels of land as they had been taken by DCI for investigations in 2014 and to date they do not know the outcome.
70. Mr Saussi submitted that the 6th Defendant's stated in his testimony that he was sued wrongly by the Plaintiff since Chembe/Kibabamshe/363 was allotted to his father who is now deceased. The 6th Defendant's further confirmed that his names are Katana Bawa and not Bawa Mwalungo who is his father and an ex-parte applicant in JRELC Misc Application No. 2 of 2007 in whose Order was issued on December 21, 2007 directing that Chembe/Kibabamshe/363 to be registered under the *ex-parte* applicant's names Bawa Mwalungo (deceased).
71. Counsel submitted that the 6th Defendant should never have been a party in these proceedings before this Honourable Court and urged the court to dismiss the suit and expunge his name from the court record.
72. Mr Saussi relied on the 7th Defendant, list of documents and more specifically letters dated July 9, 2014, August 11, 2008, January 15, 2008 all are from the Ministry of Lands directing that the Registrar of Titles at Kilifi District Lands Office do comply with the Court Order and register Chembe/Kibabamshe/364 in the name of the 7th Defendant with a view to avoid contempt.
73. Further that from the list of documents by the 1st, 2nd and 3rd Defendants there are no copies of transfer from the 6th and 7th Defendants' to Daniel Ricci, no copies of title in the names of Daniel Ricci for Chembe/Kibabamshe/363 and 364, no copies of sale agreement between Daniel Ricci and the Plaintiff but there is a title in the name of the Plaintiff and counsel urged the court to dismiss the plaintiff's case with costs.

Analysis and Determination

74. The background of this case is that the plaintiff a company known as Royal Tulia Estates Limited claims to be an absolute owner of parcel Nos Chembe/Kibabamshe/363 and 364 having bought them from one Daniel Ricci at a consideration of Kshs 4,500,000/ each which amount it paid in full.
75. The 1st 3rd 5th 6th and 7th defendants filed defences and denied the plaintiff's claim but the 4th defendant neither filed a defence nor participated in the case. The 5th defendant also neither gave any evidence nor called any witness.

The issues for determination are as follows:

- a. Whether the issuance of certificate of leases to the 4th and 5th defendants pursuant to a report by the Task Force on Kilifi Jimba and Chembe/Kibabamshe dated June 2010 were valid.
- b. Whether the plaintiff is the absolute and indefeasible owner of the suit parcels of land.



- c. Whether the orders in Mombasa High Court JRELC Misc . Application No 2 of 2007 and Mombasa High Court JRELC No. 3 of 2007 can be executed.
 - d. Whether the plaintiff is entitled to compensation for loss of user in the sum of Kshs. 198,818.240/ together with costs.
76. On the first issue on whether the issuance of certificate of leases to the 4th and 5th defendants pursuant to a report by the Task Force on Kilifi Jimba and Chembe/Kibabamshe dated June 2010 were valid, it should be noted that there have been many cases in respect of the validity of the report on the task force together with the letter by the Hon. Gideon Mung'aro dated August 20, 2010. The court will more specifically rely on Malindi Petition No. 11 of 2012, which was heard and in a Judgment delivered on May 8, 2015 by Angote J as follows: -
- a. A declaration be and is hereby issued that the issuance of Certificate of Leases based on the Report of the Task Force on Kilifi/Jimba and Chembe Kibabamshe dated June 2020 and the letter by the Hon, Gideon Mung'aro dated 20th August 2010 was in violation of Articles 3, 10, 27, 40 and 47 of the Constitution and Sections 10, 33 and 143 of the Registered Lands Act, Cap 300 of the Laws of Kenya (Repealed) hence unconstitutional, null and void ab initio.
 - b. A declaration be and is hereby issued that the 1st Petitioner (read the 3rd Defendant) is the legal proprietor of Parcels of Land Known as Kilifi/Jimba/ 342, 335, 340, 341, 427, 338, 353, 333, 334, 311, 331, 337, 317, 336, 345, 328, 343 and 344;
 - c. A declaration be and is hereby issued that the 2nd Petitioner is the legal proprietor of the Parcel of Land known as Kilifi/Jimba/312;
 - d. A declaration be and is hereby issued that the 3rd Petitioner is the legal proprietor for Parcels of Lands known as Kilifi/Jimba/323;
 - e. A declaration be and is hereby issued that the 4th Petitioner is the legal proprietor of Parcels of Land known as Chembe/Kibabamshe/396, 637, 638, 401, 423, 425, 428, 394 and 379;
 - f. An order of certiorari be and is hereby issued to bring to this Honourable Court for purposes of being quashed, Leases and Certificates of Lease that were issued in respect of the above suit properties.
 - g. An order of permanent injunction be and is hereby issued to prohibit the Respondents by themselves, servants, agents or whosoever authorized on their behalf from giving effect or implementing in any manner whatsoever the Report of the Task Force on Kilifi/Jimba and Chembe Kibabamshe dated June 2010 or in any other manner interfering with the Petitioners possession and ownership of their respective suit properties;
 - h. An order of *mandamus* be and is hereby issued compelling the 4th Respondent to restore the register in respect of the above mentioned parcels of land and issue to the Petitioners with Certificate of Search on payment of the requisite fees.
77. The above judgment quashed or declared that the issuance of Certificate of Leases based on the Report of the Task Force on Kilifi/Jimba and Chembe Kibabamshe dated June 2010 and the letter by the Hon, Gideon Mung'aro dated August 20, 2010 unconstitutional hence any leases including the ones that were issued to the 4th and 5th defendants who did not defend the case against them were null and void.
78. This judgement was neither reviewed nor appealed against hence it is still binding. The court also prohibited the respondents giving effect to the implementation in any manner the Report of the Task



force on Kilifi/ Jimba and Chembe/ Kibabamshe dated June 2010. It should be noted that this report created a lot of chaos in these two registration areas with many double allocation cases. The Land Registrar also told the court that the original files in respect to the suit parcels of land were forwarded to the DCI for investigation when they realized that there were irregularities.

79. I find that the leases issued to the 4th and 5th defendants pursuant to the Task Force report dated June 2010 were irregular, null and void as it is only the court that can cancel or amend titles where the court is of the view that the registration was obtained, made through fraud or mistake as was held in the case of *Republic v Kisumu District Lands Officer and another* [2010] eKLR.
80. On the second issue as to whether the plaintiff is the rightful owner of the suit land, the plaintiff told the court that after complying with all the conveyancing protocols, he purchased Chembe/ Kibabamshe/ 363 from Daniel Ricci at a consideration of Kenya Shillings Four Million Five Hundred Thousand measuring approximately 1.2 Ha. It was his evidence that the suit land was duly transferred at the Kilifi District Land Registry and a Title deed dated the March 20, 2009 issued to him.
81. Similarly, the plaintiff testified that he purchased Chembe/ Kibabamshe/364 from the said Daniel Ricci in September, 2008 at a consideration of Kenya Shillings Four Million Five Hundred Thousand measuring approximately 1.69 Ha. That the transfer was duly registered and a Title Deed dated the March 20, 2009 issued to him.
82. The plaintiff produced 36 documents in support of its case which included, a certificate of incorporation, official search, sale agreements with Daniel Ricci, transfer dated March 17, 2009 from Daniel Ricci to Tulia Estates Ltd. Stamp duty assessment and pay in slip title deed issue to Tulia Estates Ltd, Green Cards for both plots, Rates payments receipts and others.
83. The plaintiff's evidence was not rebutted by the 4th and 5th defendants who were the beneficiaries of the Task Force report, it is noteworthy that the 4th defendant neither entered appearance nor filed a defence. If he was interested in the title, then he should have vehemently defended it and filed a defence and counterclaim. This was not the case. Likewise, to the 5th defendant who never appeared in court to testify to defend his title. It is his lawyer who filed submissions on his behalf.
84. What is the effect of a defence filed but no evidence is adduced by a defendant? In the case of Edward Muriga (through *Stanley Muriga -vs- Nathaniel R Schutts* Civil Appeal No. 23 of 1997, the court held that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed as the allegations in the Defence do not amount to evidence. Similarly, in the case of *Motex Knitwear Limited -vs- Gopites Knitwear Mills Limited* [2009] eKLR, the court held that

"although the Defendant denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st Plaintiff stand unchallenged but also that the claims made by the defendant in his defence and counterclaim unsubstantiated."
85. The 5th Defendant's counsel's submission were not anchored on any evidence adduced before the court by his client hence they amounted to unsubstantiated statements. The counsel further submitted that the case should be dismissed, the question is after the dismissal of the plaintiff's case what happens to the titles that the plaintiff holds and likewise what happens to the titles that the defendant holds which titles were declared to be null and void. It follows that the plaintiff's evidence has not been controverted by the alternative title holders which I have found to be null and void as per the declaration that they were issued pursuant to the report of the Task Force dated June 2010.



86. The 6th and 7th gave evidence whereby the 6th defendant stated that he had been wrongly sued and urged the court to expunge his name from the proceedings. It was his evidence that the father is deceased and that land had been allocated to him. The 7th defendant relied on the JR cases No 20 and 3 of 2007 whereby the court had ordered that his father be registered as an owner of plot No 364 but the same was not implemented.

87. The 6th and 7th defendants also claimed that their fathers had been issued with allotment letters but they did not tell the court whether they had complied with the conditions stipulated in the allotment letters. A letter of allotment is not proof of title as it is only a step in the process of allocation of land as was held in the Court of Appeal case of Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR.

"Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held."

88. The orders were issued on 21st December 2007 and 14th December 2007 respectively but the defendants have not explained to the court why they did not execute them. It is also on record that vide an agreement dated the 30th d July, 2009, Mr. Daniel Ricci paid Bawa Mwalungo Wanje the sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00) as *ex gratia* compensation for his claim of ownership in Title No. Chembe/Kibabamshe/363. Bawa Mwalungo Wanje vide an Addendum dated the 28th August, 2009 confirmed having been fully paid by Mr. Daniel Ricci, that he had no claim against Mr. Daniel Ricci and that he shall indemnify Daniel Ricci against any claims raised upon Bawa Mwalungo Wanje's defect in title.

89. It is further on record that vide an Agreement dated the 28th July, 2009 Mr. Daniel Ricci paid the 7th Defendant the sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00) as *ex gratia* compensation for his claim of ownership in Title No. Chembe/Kibabamshe/364. This might be the probable reason why the defendants did not pursue the execution of the court order earnestly within the stipulated time.

90. This leads me to the issue as to whether the defendants can execute the orders after 12 years, Section 4 (4) of the Limitation of Actions Act provides as hereunder:

"An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

91. Further in the case of case of M'Ikiara M'Rinkanya & Another V Gilbert Kabeere M'Mbijiwe [2007] eKLR the Court of Appeal stated that:

...From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years' limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of Lougher v Donovan, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration



of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4 (4) of the Act would be inconsistent with the law of adverse possession.”

92. From the above case it is clear that the defendants slept on their right to execute the order hence it is time barred and cannot be heard to raise it at this late juncture.
93. The evidence of DW3 was to the effect that there are no original records for the said parcel of land and what is available are the green cards and other correspondences. That from the copies of the green card the property was adjudicated in the name of Samuel Kanongo Ritho in 1978 and a transfer to Daniel Ricci was effected on 8th January, 2002 and a title deed issued. Thereafter the property was transferred to Royal Tulia Estates on 20th March, 2009 and title deed issued. On September 29, 2010 a fresh Certificate of lease was issued under the name of Davidson Matano & Reuben Kirago the 4th and 5th Defendants pursuant to a lease received from Ardhi house in respect of Chembe/ Kibabamshe/ 363 and Chembe/ Kibabamshe/364.
94. The Land Registrar also confirmed in her testimony that Athman Otime Juma, the then holder of the 1st Defendants office was on the October 17, 2013 charged with the offence of abuse of office in Malindi Criminal Case No. 644 of 2013 which particulars of the offence were that the said Athman Otime Juma arbitrarily issued Certificate of Lease for Title Number Chembe/Kibabamshe/364 in the names of Davidson Matano while knowing there existed another title for Title Number Chembe/ Kibabamshe/364 in the names of Royal Tulia Estates Limited issued on the March 20, 2009. The court was not told of the outcome of the case but DW3 stated that the original files are still with the DCI under investigations.
95. There is no proof that the suit parcels of land were revoked or cancelled and further that there has been no tangible evidence that they were acquired fraudulently. This is a case of double allocation but the latter leases issued pursuant to the task Force Report were found to be null and void. The plaintiff's title ranks in priority to the leases that were issued to the 4th and 5th defendants.
96. I therefore come to the conclusion that the Plaintiff is the absolute and indefeasible owner of the suit property hence entitled to enjoy the rights of an absolute owner of the property as provided by Section 24 and 25 of the [Land Registration Act](#).
97. On the last issue as to whether the plaintiff is entitled to compensation by the 1st and 3rd Defendants in the sum of Kshs. 193,818,240.00 being the projected loss of user and alleged compulsory acquisition of the suit premises, counsel for the plaintiff submitted that the takeover of the plaintiff's parcels of land amounted to compulsory acquisition. There was no evidence of the allegation of compulsory acquisition and there are elaborate procedures laid down on how compulsory acquisition is done. Land that is compulsorily acquired by the government is for public use and not to be allocated to individuals.
98. The Plaintiff claimed loss of user but did not lead any evidence to prove the means and/or finances for carrying out the alleged grandiose project with an income of over Kshs 193 Million. The plaintiff in his pleadings and evidence in chief stated that he took possession immediately upon purchase, put up a gazebo, a toilet and a watchman's house, there was no order stopping him from carrying out any developments as he was in possession. There was further no evidence that he had been deterred from carrying out the proposed development by the defendants. The plaintiff did not produce any approved plans or projection of how much it would make when the construction is complete. I find that this limb of the plaintiff's claim has not been proved and is therefore declined.
99. I have considered the pleadings, the submissions by counsel and the relevant authorities and make the following specific final orders:



- a. An order is hereby issued for the cancellation of the Title documents in Plot Nos. 363 and 364 situate in Chembe/Kibabamshe, Kilifi issued to Reuben Kiraga and Davidson Matano respectively.
- b. A declaration is hereby issued that the Plaintiff is the registered owner of Plot Nos. 363 and 364 situate in Chembe/Kibabamshe, Kilifi.
- c. A Permanent Injunction is hereby issued restraining the Defendants from interfering with the Plaintiff's use, ownership and utility of Chembe/Kibabamshe/363 and 364.
- d. The plaintiff is entitled to costs of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF SEPTEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

