



Kamau & 2 others v Kenya Railways Corporation & 2 others (Environment & Land Case 83 of 2014 & 90 of 2011 (Consolidated)) [2025] KEELC 4869 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4869 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 83 OF 2014 & 90 OF 2011 (CONSOLIDATED)
YM ANGIMA, J
JUNE 26, 2025

BETWEEN

ERNEST MUNGAI KAMAU 1ST PLAINTIFF

GALEROC LIMITED 2ND PLAINTIFF

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

JIHAN FREIGHTERS LIMITED 2ND DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 90 OF 2011

BETWEEN

HARDWARE & GENERAL PLAINTIFF

AND

JIHAN FREIGHTERS 1ST DEFENDANT

KENYA RAILWAYS CORPORATION 2ND DEFENDANT

JUDGMENT

A. Introduction

1. This judgment is in respect of two suits which were filed by the disputing parties. The first is Mombasa HCCC No. 90 of 2011 Ernest Mungai Kamau and Another vs Kenya Railways Corporation and Jihan Freighters Ltd. The second is Mombasa HCCC No. 83 of 2014 – Hardware & General Stores Ltd vs Jihan Freighters Ltd and Kenya Railways Corporation. It would appear that both suits were ultimately



transferred to the ELC and assigned the current number- Mombasa ELC No. 83 of 2014 and later on consolidated for hearing.

B. Plaintiffs' claim in suit No. 90 of 2011

2. The material on record shows that vide a plaint dated 01.04.2011 the plaintiffs in that suit sued the defendants seeking the following reliefs;
 - a. A declaration that the plaintiffs are the lawful proprietors of L.R. No. Mombasa/Block/XIV/364 and 363.
 - b. An order of eviction directed at the defendants, their servants and/or agents to vacate from L.R. No. Mombasa/Block/XIV/364 and 363.
 - c. A permanent injunction restraining the defendants whether by themselves or their servants, agents, employees or in any other manner whatsoever from interfering with the plaintiff's ownership and control of L.R. No. Mombasa/Block/XIV/364 and 363.
 - d. Costs of the suit and interest.
 - e. Any other or further relief that this honourable court may deem fit and just to grant.
3. The plaintiffs pleaded that they were the registered owners of Title No. Mombasa Municipality Block XIV/363(parcel 363) and Title No. Mombasa Municipality Block XIV/364 (parcel 364) located in Mombasa Island and had been issued with the relevant certificates of lease on 31.12.2002.
4. The plaintiffs pleaded that sometime in 2005 they visited both parcels 363 and 364 (the suit properties) and found that the 2nd defendant Jihan Freighters (Jihan) was occupying them on the basis that it had leased the suit properties from the 1st defendant, Kenya Railways Corporation (KRC). It was the plaintiffs' case that upon making inquiry from KRC the latter wrongfully claimed ownership of the suit properties without any lawful justification. It was the plaintiffs' contention that if KRC had obtained any title documents over the suit properties then they were acquired illegally, fraudulently or on account of a mistake.

C. Defence to the suit

5. The material on record shows that KRC filed a defence and counterclaim dated 16.05.2011. By its defence it denied the plaintiffs' claim in its entirety and put them to strict proof thereof. In particular, it denied the plaintiffs' ownership of the suit properties and pleaded that it was the legitimate owner at all material times hence the reason it built structures on the land and leased them to Jihan.
6. It was contended that if the plaintiffs had obtained any title documents for the suit properties then this same must have been obtained through fraud and illegality. KRC enumerated several particulars of alleged fraud and illegality against the plaintiffs in the body of the defence. As a result, KRC pleaded that the plaintiffs' certificates of title over the suit properties were null and void and could not confer any proprietary rights over them.
7. By its counter-claim, KRC reiterated the contents of the defence and sought the following reliefs against the plaintiffs;
 - a. A declaration that the plaintiffs' purported title is illegal null and void and does not confer any proprietary interest on the plaintiffs.
 - b. A declaration that the plaintiffs holds the registered ownership in trust for the 1st defendant who is the beneficial owner.



- c. An order for rectification of the Land Registrar to strike out the plaintiffs' name therefrom.
 - d. Costs of the suit and counterclaim.
8. The record shows that Jihan filed a defence dated 27.02.2012 denying liability for the plaintiffs' claim and putting them to strict proof of their claim. Jihan pleaded that at all material times it was a tenant of KRC on a portion of the suit property comprising about 0.2682 ha. It pleaded that it had no other claim over the suit property other than a lessee whose term had not expired.

D. Plaintiff's reply

9. By a reply to defence and defence to counter-claim dated 15.07.2011 the plaintiffs joined issue with the 1st defendant's defence. They denied all material allegations pleaded in the defence and put KRC to strict proof thereof. They denied the allegations and particulars of fraud and illegality pleaded against them and reiterated that they held valid titles over the suit properties.
10. By their defence to counter-claim, the plaintiffs simply denied all the contents of the counter-claim and reiterated the contents of their plaint.

E. Plaintiff's claim in suit No. 83 of 2014

11. By an undated plaint filed on 10.04.2014 the plaintiff sued Jihan seeking the following reliefs against it;
- a. A permanent injunction to restrain the defendant by itself, servants, agents and/or representatives from encroaching or trespassing or continuing to trespass or interfering in any other way whatsoever with the suit premises Mombasa/Block/XIV/364.
 - b. An order for vacant possession be issued against the defendant, its agents or representatives to vacate the suit property Mombasa/Block/XIV.
 - c. A mandatory injunction against the defendant by itself, agents, or servants to remove its containers, vehicles, items and/or any of its property lying at the plaintiff's property Mombasa/Block/XIV/364.
 - d. In the alternative an order directing the court bailiff to enforce prayers C above under the supervision of the area officer commanding the nearest police station.
 - e. General damages.
 - f. Costs and interest of the suit.
12. The plaintiff pleaded that it was the registered owner of parcel 364 which it bought on 02.12.2013 at a public auction conducted by Standard Chartered Bank (K) Ltd in exercise of its statutory power of sale as a chargee. It further pleaded that it had been unable to take possession and utilize the parcel because Jihan had trespassed on part of parcel 364 which it was using as a storage yard, garage and parking area without any lawful justification.
13. It was the plaintiff's case that as a result of the said actions on the part of Jihan it had suffered loss and damage for which Jihan was liable. It was further pleaded that despite issuance of a demand and notice of intention to sue Jihan had failed to vacate parcel 364 thereby rendering the suit necessary. It would appear that in the course of the proceedings KRC was considered as a defendant.



F. Jihan's defence to the suit

14. The record shows that Jihan filed a defence dated 20.05.2019 denying the plaintiff's claim in its entirety and putting it to strict proof thereof. Jihan pleaded that the suit properties were entirely owned by KRC and that it was merely a tenant which had leased part of the land from the legitimate owner.
15. It was denied that the plaintiff had suffered any loss of damage for which Jihan was liable. It was further pleaded that Jihan had no other claim or interest over the suit properties other than in its capacity as a lessee.

G. Trial of the consolidated suits

16. It would appear that ELC No. 83/2014 was treated as the lead file for purposes of the proceedings hence Hardware and General Stores Ltd tendered its evidence first and it called two witnesses before closing its case. The record shows that KRC called its principled land surveyor as its sole witness whereas Jihan did not tender any evidence at the trial. The plaintiffs in suit No. 90 of 2011 did not testify since their suit had been dismissed for want of prosecution way back in 2014.

H. Directions on submissions

17. Upon conclusion of the trial the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the plaintiff filed its written submissions dated 01.04.2024. There is, however, no indication of Jihan having filed any submissions by the time of preparation of the judgment.

I. Issues for determination

18. It would appear from the record that the parties did not file any statement of agreed issues for determination. As a result, the court shall frame the issues as stipulated under Order 15 Rule 2 of the Civil Procedure Rules. Under the said rule, the court may frame issues from any of the following;
 - a. The allegations contained in the pleadings or in answers to interrogatories.
 - b. The allegations contained in statements sworn by or behalf of the parties.
 - c. The contents of documents produced by the parties.
19. The court has perused the pleadings, evidence and documents on record. The court is of the opinion that the following are the main issues for determination herein;
 - a. Who is the legitimate owner of parcel 363.
 - b. Who is the legitimate owner of parcel 364.
 - c. Whether the plaintiff in suit No. 83 of 2014 has proved its claim against Jihan and KRC.
 - d. Whether KRC has proved its counter-claim in suit No.90 of 2011.
 - e. What records should be made for disposal of the consolidated suits.
 - f. Who shall bear costs of the suits.



J. Analysis and determination

Who is the legitimate owner of parcel 363

20. The material on record shows that the plaintiffs in suit No. 90 of 2011 Ernest Mungai Kamau and Geteroc Limited, claimed ownership of parcel 363 on the basis that they held a certificate of title issued on 31.12.2002. Even though the plaintiffs' suit was dismissed the counter-claim by KRC for the property remained intact.
21. The court has considered the evidence and survey records tendered by KRC on this issue. It was their case that parcel 363 was illegally and fraudulently carved out of their surveyed property as depicted in the Mombasa Central Railway station layout prepared in 1979. In particular, the relevant survey plan F/R No. 27/14 showed that the land reserved for the railway station was surveyed in 1926 and the survey plan duly authenticated and registered by the director of surveys.
22. When the plaintiff's surveyor, Edward M. Kiguru, was shown F/R No. 27/14 in suit No. 83/2014 he testified that it appeared to him that both parcels 363 and 364 fell outside the area surveyed for the Central Railway Station. However, when he was questioned by the court at the end of his cross-examination he conceded that both parcels appeared to fall inside the area surveyed as F/R No. 27/14. He also stated that he did not come across any approved Part Development Plan re-planning the area for a different purpose.
23. The court believes the evidence of DW1 who testified on behalf of KRC that the parcel 363 was excised from the area falling within the Mombasa Central Railway Station yard and that the area had been surveyed much earlier vide F/R No. 27/14. The court therefore considers the latter survey F/R No. 412/29 which created parcel 363 several decades later to be fraudulent.
24. The court is further of the view that since the land had already been set aside for a public purpose, duly surveyed and put in the actual possession of KRC, the Commissioner of Lands had no legal authority to allocate any part thereof and to issue a letter of allotment to Galeroc Limited since it was not unalienated government land within the meaning of Section 3 of the Government Lands Act (now repealed) which was in force at the material time. It would thus follow that the purported alienation of parcel 363 was illegal, irregular, null and void and did not confer any good title upon the allottee. It is thus the opinion of the court that KRC is still the legitimate owner of parcel 363.

Who is the legitimate owner of parcel 364

25. The court has considered the material and submissions on record. It is clear from the material on record that parcel 364 was excised out of the Mombasa Central Railway Station land in a similar manner as parcel 363. The same survey plan, that is, F/R No. 412/29 was used in the process. The court believes the evidence of KRC that parcel 364 was illegally and fraudulently created out of F/R No. 27/14 which was surveyed and authenticated in 1926. There was no evidence that F/R No. 27/14 was ever lawfully cancelled or that the land set aside for the railway station was re-planned in accordance with the applicable physical planning law. The surveyors who prepared F/R No. 412/29 simply did an overlapping survey for the purpose of alienating parcel 364 to a private person.
26. The court is similarly satisfied that the issuance of a letter of allotment to E.M.K ventures and certificate of lease to Ernest Mungai Kamau did not confer any valid title to either of them. The certificate of lease was null and void ab initio for the reasons given earlier in relation to parcel 363.
27. So, what is the effect of the registration of the charge and the subsequent sale by a chargee pursuant to the statutory power of sale? The plaintiff in suit No. 83 of 2014 submitted that it was a bona fide



purchaser for value without notice of any defect in the title hence it acquired a good title. The plaintiff relied upon the Court of Appeal decision in *Kinyanjui Kamau vs George Kamau Njoroge* (2015) eKLR in support of its submission.

28. The court is of the view that the legal consequences which follow an illegal and fraudulent allocation of public land by the Commissioner of Lands were settled by the Supreme Court of Kenya in SC Petition (E010) of 2021 – *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment);

“ 110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.

111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”

29. Once the initial allocation and alienation is found to be null and void then all subsequent actions and transactions cannot possibly be valid. Moreover, it is doubtful if the plaintiff did any meaningful due diligence before purchase of parcel 364. A director of the plaintiff who testified as PW2 stated during cross-examination that prior to the purchase a site visit revealed that Jihan was in possession. When asked by the court whether he inquired from Jihan the basis of their occupation and whose tenant they were, he answered in the negative. The court is thus of the view that the creation of the charge and the subsequent sale of parcel 364 could not validate what was already a nullity. In the event, the court finds that parcel 364 still rightfully belongs to KRC.

Whether the plaintiff in suit No. 83 of 2014 has proved its claim against Jihan and KRC

30. The court has found that the KRC is the legitimate owner of parcel 364 and that its purported alienation to a private entity was illegal, null and void. The court has also found that all subsequent transactions including the charge were a nullity. It would, therefore, follow that the plaintiff has no good title to parcel 364 hence it is not entitled to the reliefs sought in the suit or any one of them.

Whether KRC has proved its counter-claim in suit No. 90 of 2011

31. As indicated before, the court is satisfied on the basis of the material on record that parcel 363 and parcel 364 legitimately belong to KRC. There is adequate material on record to show that all the assets of the defunct East African Railways Corporation were vested in the Kenya Railways Corporation through vesting orders which were duly gazetted for general information of the public. The court is thus of the opinion that KRC is entitled to the prayers sought in relation to the suit properties.



What orders should be made for disposal of the consolidated suits

32. In view of the court's findings on the issues for determination, the court is of the opinion that the plaintiff's suit for recovery of parcel 364 in suit No. 83 of 2014 ought to fail. The court is of the opinion that the counter-claim by KRC in suit No. 90 of 2011 should be allowed including the order for rectification of the land register to have KRC registered as the proprietor of suit properties. For completeness of the judgment, the court is inclined to issue orders for cancellation of the title held by Hardware and General Stores Ltd and to have the land register rectified so that KRC is registered as proprietor of the suit properties.

Who shall bear costs of the application

33. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court is of the view that since the parties in suit No. 83 of 2014 were not to blame for the situation they found themselves in the appropriate order to make is for each party to bear its own costs. However, in respect of suit No. 90 of 2011 the plaintiffs therein played a role in the fraudulent and irregular acquisition of public property. They shall bear costs of the suit and counter-claim by KRC.

K. Conclusion and disposal orders

34. The upshot of the foregoing is that the court finds and holds that plaintiff in suit No. 83 of 2013 has failed to prove its case against the defendants whereas the KRC has proved its counter-claim in suit No. 90 of 2011. As a result, the court makes the following orders, for disposal of the consolidated suits;
- a. The plaintiff's suit in Civil Suit No. 83 of 2014 is hereby dismissed.
 - b. Each party to that suit shall bear its own costs.
 - c. The counter-claim by KRC in Civil Suit No. 90 of 2011 is hereby allowed in the following terms;
 - i. A declaration is hereby made that the title held by the 2nd plaintiff, Galeroc Limited over Mombasa Municipality Block XIV/363 is null and void and the same is hereby cancelled.
 - ii. The Land Registrar Mombasa shall accordingly rectify the register by removing the name of Galeroc Limited as proprietor and registering Kenya Railways Corporation in its place
 - iii. The plaintiffs shall pay the defendants costs of the suit and the KRC costs of the counter-claim as well.
 - d. The plaintiff's title for Mombasa Municipality Block XIV/364 in the name of Hardware and General Stores Ltd is hereby cancelled.
 - e. The Land Register shall rectify the register by removing the name of Hardware of General Stores Ltd as proprietor and replace it with Kenya Railways Corporation.

It is so ordered.



JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 26TH DAY OF JUNE, 2025.

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Y. M. ANGIMA

JUDGE

In the presence

Gillian – Court Assistant

Ms. Okata for the plaintiff in 83/2014

Mr. Muya holding brief for Ms. Julu for 1st defendant

Mr. Kongere holding brief for Mr. Karina for 2nd defendant

