



**Shamsher Kenya Limited v Fayard Abdulrazak Sheikh, Commissioner of Lands, District Lands Registrar, Kilifi District, Attorney General, Mwenda Kadenge Jefwa, Stephen Kiramana Ilongi, National Land Commission & Estate of Benjamin Raphael Ndubai (Environment & Land Case 139 of 2011 & Civil Case 71 of 2008 (Consolidated)) [2020] KEELC 2410 (KLR) (27 May 2020) (Judgment)**

*Shamsher Kenya Limited v Fayard Abdulrazak Sheikh & 7 others [2020] eKLR*

Neutral citation: [2020] KEELC 2410 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ENVIRONMENT & LAND CASE 139 OF 2011 & CIVIL CASE 71 OF 2008 (CONSOLIDATED)**

**JO OLOLA, J**

**MAY 27, 2020**

**BETWEEN**

**SHAMSHER KENYA LIMITED ..... PLAINTIFF**

**AND**

**FAYARD ABDULRAZAK SHEIKH ..... 1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**DISTRICT LANDS REGISTRAR, KILIFI DISTRICT ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**MWENDA KADENGE JEFWA ..... 5<sup>TH</sup> DEFENDANT**

**STEPHEN KIRAMANA ILONGI ..... 6<sup>TH</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 7<sup>TH</sup> DEFENDANT**

**THE ESTATE OF BENJAMIN RAPHAEL NDUBAI ..... 8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. By a Plaint dated and filed herein on 6<sup>th</sup> September 2011 Shamser Kenya Ltd (the Plaintiff) sued Fayard Abdulrazak Sheikh (the 1<sup>st</sup> Defendant) seeking a declaration that it is the lawful proprietor of Plot No. Kilifi/Jimba/332. It also sought an order of injunction against the then sole defendant restraining him from interfering in any way with the property.



2. Subsequently however, by an Amended Plaint dated 1<sup>st</sup> August 2012 as filed herein on 3<sup>rd</sup> August 2012, the Plaintiff enjoined the Commissioner of Lands, the District Land Registrar, Kilifi District and the Honourable the Attorney General as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively and sought orders against all the Defendants jointly and severally as follows:-
  - a) A declaration that the 1<sup>st</sup> Defendant has no lawful and valid right, claim and/or interest in the suit property and that the constructions, developments and or activities undertaken or carried out by the 1<sup>st</sup> Defendant on the suit property are unlawful and in breach of the Plaintiff's proprietary interest, claim and or title in the suit property;
  - aa) A declaration that the allotment letter dated August 26, 2010 together with the lease thereof dated September 17, 2010 fraudulently granted, entered and registered by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein.....in favour of the 1<sup>st</sup> Defendant.....in respect of the Plaintiff's Plot Number Kilifi/Jimba/332 are unlawful, irregular, null and void;
  - ab) An order for the cancellation, revocation, nullification and/or rescission of the Letter of Allotment dated August 26, 2010 with the Lease thereof dated September 17, 2010 granted, entered and/or registered by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants...in favour of the 1<sup>st</sup> Defendant.. with respect to Plot No. Kilifi/Jimba/332;
  - b) An order for the 1<sup>st</sup> Defendant to forthwith, at (his) own costs and expenses remove, demolish and or clear any constructions and or developments unlawfully undertaken and or carried out on the suit property;
  - c) A permanent injunction restraining the 1<sup>st</sup> Defendant...from (in any manner dealing) with the suit property; and
  - d) Costs and interest.
3. These prayers arise from the Plaintiff's contention that at all times material to this suit, the Plaintiff had purchased the suit property from one Benjamin Raphael Ndubai and was the registered proprietor of the said Plot No. Kilifi/Jimba/332 measuring approximately 1.8 Ha and situated in Watamu, in Malindi District (the suit property). The Plaintiff avers that upon acquisition of the property sometimes in 1991, it designed a development or building plan therefor which plans were approved by the Municipal Council of Malindi and the National Environment Management Authority among other Government agencies and Departments.
4. The Plaintiff further avers that while it was processing the plans, the 2<sup>nd</sup> Defendant declared a general moratorium, caveat or restriction with regard to all dealings with land within the Kilifi/Jimba registration area and formed a Task Force to deal with the issues arising therefrom. The Plaintiff attended meetings of the Task Force but it is to-date yet to publish its report or findings or to revert back to the Plaintiff thereon.
5. Sometime in July 2011 when the Plaintiff's directors visited the suit property, they discovered that the 1<sup>st</sup> Defendant had entered and started developments and constructions thereon without its authority or permission. Subsequently, the Plaintiff discovered on or about 26<sup>th</sup> August 2010, that the 2<sup>nd</sup> Defendant had, in collusion with the 1<sup>st</sup> and 3<sup>rd</sup> Defendants herein issued a Letter of Allotment in respect of the suit property to the 1<sup>st</sup> Defendant pursuant to which it also issued a Certificate of Lease to the 1<sup>st</sup> Defendant.



6. The Plaintiff asserts that the issuance of the Letter of Allotment and Certificate of Lease were tainted with fraud and were done in breach, abuse and/or excess of the 2<sup>nd</sup> Defendant's statutory powers and duties and hence the prayers sought herein.
7. But in its Amended Defence and Counterclaim dated 29<sup>th</sup> August 2012 and filed herein on 31<sup>st</sup> August 2012, the 1<sup>st</sup> Defendant denies that the Plaintiff is the registered proprietor of the suit property . On the contrary, the 1<sup>st</sup> Defendant avers that he is the lawfully registered proprietor thereof having been so registered on 29<sup>th</sup> September 2010.
8. The 1<sup>st</sup> Defendant further avers that he acquired the title to the suit property lawfully and without any knowledge whatsoever of the Plaintiff's purported interest thereon. He asserts that he carried out all the necessary due diligence and found out that the suit property belonged to the Government of Kenya prior to its allocation. Accordingly, the 1<sup>st</sup> Defendant denies that he colluded with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as stated by the Plaintiff or at all.
9. By way of Counterclaim, the 1<sup>st</sup> Defendant avers that the Plaintiff's title is not genuine and that the same was obtained uprocedurally and by means of fraud. Accordingly the 1<sup>st</sup> Defendant prays for Judgment against the Plaintiff as follows:-
  - a. That the Plaintiff's suit as against him be dismissed with costs;
  - b. A declaration that the 1<sup>st</sup> Defendant is the lawful registered proprietor of Plot No. Kilifi/Jimba/332 and the Plaintiff has no valid/legal claim to it whatsoever;
  - c. An order for cancellation of the Plaintiff's Title Deed to Plot No. Kilifi/Jimba/332;
  - d. A permanent injunction restraining the Plaintiff ...(from in any manner dealing) with the suit property; and
  - e. Costs and interest.
10. Similarly in their joint Statement of Defence dated and filed herein on 18<sup>th</sup> March 2013, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants deny that the Plaintiff is the registered proprietor of the suit property and invite it to strict proof.
11. While admitting that the Government of Kenya did indeed declare a general moratorium over the Kilifi/Jimba registration section, the Defendants deny that they colluded with the 1<sup>st</sup> Defendant to perpetrate any fraud and/or that the registration of the 1<sup>st</sup> Defendant was in breach, abuse or in excess of the statutory powers of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
12. In the cause of these proceedings, it did emerge that vide an Originating Summons filed in Malindi HCCC No. 71 of 2008, one Mwenda Kadenge Jefwa had sued the Estate of Benjamin Raphael Ndubai, Stephen Kiramana Kongi and the Plaintiff herein seeking orders that he had acquired the suit property by adverse possession. The said Originating Summons was subsequently served upon the three Respondents named therein by way of substituted service. None of the Respondents responded and the suit proceeded by way of formal proof.
13. Subsequently and by a Judgment delivered therein on 11<sup>th</sup> November 2010, the Honourable Justice H.A Omondi determined that the Applicant in the Originating Summons had had uninterrupted adverse possession of the land and decreed that the said Mwenda Kadenge Jefwa be registered as the proprietor of the suit property herein.



14. However, following an application dated 4<sup>th</sup> April 2012 filed by the Plaintiff herein in the Originating Summons, the said Judgment was set aside on 7<sup>th</sup> June 2012 and the Plaintiff who was the 3<sup>rd</sup> Respondent therein was granted leave to file a response to the Originating Summons.
15. On 22<sup>nd</sup> July 2013 the said Originating Summons No. 71 of 2008; Mwenda Kadenge Jefwa –vs- Stephen Kiramana Kongi and Shamsheer (K) Ltd was consolidated with this suit. The order on consolidation did not however specify the order of appearance of the parties in the consolidated suit.
16. In his Originating Summons dated 17<sup>th</sup> September 2008, Mwenda Kadenge Jefwa (the Applicant) avers that he has been in exclusive continuous and quiet possession of the suit property since 1994 when the title was still held in the name of Benjamin Raphael Ndubai. He further avers that during that period which exceeds 12 years, he has carried out agricultural activities in the property growing and harvesting crops, trees and other plants as well as keeping cattle, sheep, goats and other domestic animals.
17. The Applicant further asserts that he has since erected and maintained residential structures which he uses together with his family on the suit property. He states that during his stay therein the Respondents have neither set foot on the property nor interfered with and/or obstructed his quiet possession, continued use and enjoyment of the property. It is thus his case that he has since acquired the property by virtue of adverse possession and that the Respondents' title thereto has been extinguished by operation of the law.

#### **The Plaintiff's Case**

18. At the trial herein, the Plaintiff called three witnesses in support of its case.
19. PW1-Nizar Samji is one of the directors of the Plaintiff company. He produced a Certificate of Incorporation showing the Plaintiff was incorporated on 27<sup>th</sup> October 1999. He also produced a resolution dated 6<sup>th</sup> August 2011 showing the Plaintiff's directors authorized the filing of this suit.
20. PW1 testified that they purchased the suit property vide a Sale Agreement dated 11<sup>th</sup> July 2002 from one Richard Ndubai, Leo Murithi and Lina Margaret Ndubai at a consideration of Kshs 800,000/-. Before the sale agreement, they had done an official search on 17<sup>th</sup> June 2002 which revealed that the property was in Mr. Ndubai's name. Similarly after the purchase, their Advocates did a search on 24<sup>th</sup> July 2002 and it did show that the property had been registered in the name of the Plaintiff.
21. PW1 further testified that after the property was transferred to their name, they started getting letters demanding payment of rent from the Ministry of Lands. The Plaintiffs have since been paying the rent with the latest being in 2014. They have similarly paid the land rates due to the Municipal Council of Malindi. PW1 further told the Court that they intended to put up a residential building cum hotel on the property and that they obtained all necessary approvals including one from the National Environmental Management Authority (NEMA) - obtained on 9<sup>th</sup> August 2008.
22. PW1 told the Court they were however unable to proceed after the Government declared an embargo on the 10-mile Coastal strip. According to that embargo which was advertised in the newspapers, no one was allowed to develop any land falling within the area. The Plaintiffs were however allowed to fix beacons on 5<sup>th</sup> June 2006. As at that time, the land was not accessible and the Area Chief told them he could not allow them in as the area had many snakes.
23. PW1 further told the Court that the land still belonged to them between 2006 and 2008 when they carried out a search. They were even able to use the title as collateral to acquire a loan from a Bank. That Bank still holds the original title to-date.



24. PW1 testified that they were unable to proceed with their project as someone put up a perimeter wall around the property. When they investigated, they came to learn it was the 1<sup>st</sup> Defendant herein. PW1 told the Court they then came to Court and obtained an injunction. The 1<sup>st</sup> Defendant however continued with construction on the property.
25. PW1 told the Court that they reported the matter to the Ministry of Lands and they were told the 1<sup>st</sup> Defendant's Letter of Allotment was not genuine as it could not be traced in their records. Later on on 29<sup>th</sup> October 2010, the 1<sup>st</sup> Defendant was issued with a Certificate of Lease. PW1 told the Court they had visited the land before they purchased it and there had been no squatter on the land.
26. On cross-examination, PW1 admitted that the Sale Agreement did not have their company seal. He also conceded that his signature was not on the agreement as it had been executed by other directors. He told the Court that Rahim Samji who signed the agreement was his son and a director of the Plaintiff. He told the Court he was not present when the agreement was signed.
27. PW1 denied doctoring the agreement. He conceded that he was aware of the private prosecution of the 1<sup>st</sup> Defendant but he told the Court he was unaware of the details thereof. PW1 was also unaware if the property was bought from a dead person and did not know that the property was transferred to them by someone who was already deceased. He however denied that they obtained the title fraudulently.
28. PW1 further testified that he was aware of the Government embargo in the area that stopped them from developing the land. He told the Court there were investigations which were carried out in respect of the land even during the pendency of this case. He was also aware of the notices issued by the National Land Commission. He told the Court he was not an indigenous person from Jimba and that he was equally unaware if the 1<sup>st</sup> Defendant originated from there.
29. PW2- Emmanuel Kenga is a Private Forensic Document Examiner. He testified that on 19<sup>th</sup> January 2015, he received some documents from the Plaintiff's Advocates for examination. These were a Letter of Allotment dated 26<sup>th</sup> August 2010, a Lease Document dated 29<sup>th</sup> September 2010 and a Replying Affidavit dated 19<sup>th</sup> February 2013.
30. PW2 told the Court that he was requested to examine the context of the signatures marked in the documents by comparing them to other signatures said to have been signed by the 1<sup>st</sup> Defendant. He testified that on examination, he was unable to find any agreement between the two signatures as both had different peculiar characteristics. After the examination he prepared a Report (Pexh 22) showing the differences.
31. On cross-examination, PW2 told the Court he was unaware that the Law firm that instructed him was prosecuting a Constitutional reference in regard to the case. He admitted that he is the one who cycled the documents during examination. He also told the Court that the best documents for examination were original copies but admitted that his comparison chart was a photocopy and not the original pencil marks.
32. PW2 further told the Court that he used a microscopy and magnifying glass to enlarge the documents and that he was able to identify erasures even though the documents were photocopies. It was his conclusion that the two signatures were made by different authors.
33. PW3- Rahim Samji is a director of the Plaintiff. He testified that the company purchased the suit property 2001. They did an official search on the property in 2002, 2006 and 2008 and the property rightfully belonged to the Plaintiff.



34. PW3 told the Court that sometime in 2011 upon visiting the land, he noticed that someone was building thereon. It turned out to be the 1<sup>st</sup> Defendant. The company then moved to Court for an injunction to stop the building of the wall. They also reported the matter to the Police and the DPP. In addition they wrote to the National Land Commission and the Ministry of Lands.
35. PW3 further told the Court that both the Ministry and the Commission responded to their Letters in May and August 2014 confirming that the property belonged to the Plaintiff. By its Letter dated 6<sup>th</sup> February 2014, the Commission summoned the parties and asked them to produce their original Letters of Allotment. The 1<sup>st</sup> Defendant did not produce any.

### **The Defence Case**

36. The 1<sup>st</sup> Defendant did not call any witness at the hearing herein. On their part, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants called one witness in support of their case.
37. DW1-Athman Otime Juma is the Land Registrar Kilifi. He testified that from the records held at their office, a 99 year lease was registered on 29<sup>th</sup> September 2010 in favour of the 1<sup>st</sup> Defendant. He produced a Copy of the Green Card and the White Card held in their office as evidence.
38. On cross-examination, he told the Court that the file he had was opened on 29<sup>th</sup> September 2010 and he was unaware if there were any records before then. He however conceded that from a Letter written by their office on 29<sup>th</sup> October 2014 (Pexh 27), the Plaintiff was the proper Lessee of the land.
39. DW1 told the Court that he was unaware that in 1991 an allotment letter was issued to Richard Ndubai. He was equally unaware that the said Defendant had transferred the property to the Plaintiff. He was further unaware of any records prior to 2009 which appeared to show that the said Ndubai was the proprietor of the land in 1986.

### **Analysis And Determination**

40. I have perused and considered the pleadings filed by the various parties herein, the oral testimonies of the witnesses and the evidence adduced at the trial. I have equally perused and considered the submissions and authorities placed before me by the Learned Counsels for the parties. The 1<sup>st</sup> Defendant and the Applicant in the Originating Summons did not testify at the trial nor did they call any evidence.
41. The Plaintiff instituted this suit in September 2011 seeking to be declared the lawful proprietor of all that parcel of land known as Kilifi/Jimba/332 measuring approximately 1.8 Ha and situated at Watamu in Malindi (the suit property). He also sought a declaration that the Letter of Allotment dated 26<sup>th</sup> August 2010 and the resultant Certificate of Lease issued to the 1<sup>st</sup> Defendant in respect of the suit property are unlawful, irregular, null and void.
42. The Plaintiff accordingly urged this Court to cancel the said Letter of Allotment and the Certificate of Lease issued to the 1<sup>st</sup> Defendant and to compel the 1<sup>st</sup> Defendant to forthwith remove, demolish and clear any constructions unlawfully undertaken so far on the suit property. The Plaintiff further urged this Court to issue an order of permanent injunction restraining the 1<sup>st</sup> Defendant from interfering with, disturbing, frustrating and or curtailing the Plaintiff's use of the said premises in any manner whatsoever.
43. It was the Plaintiff's case that long before the 1<sup>st</sup> Defendant came into the scene, it had by a Sale Agreement dated 11<sup>th</sup> July 2002 purchased the suit property from its original owner one Benjamin



- Richard Ndubai at a consideration of Kshs 800,000/-. The property was subsequently transferred and a Title Deed was issued in the Plaintiff's name on 16<sup>th</sup> July 2002.
44. The Plaintiff told the Court that they intended to put up a residential building cum hotel on the premises and that they had in fact prepared the necessary plans and received approval therefor but were unable to proceed with the same due to an embargo imposed by the Government on the Kilifi/Jimba Land Adjudication Section.
  45. Sometime in 2011 as the Plaintiff was still waiting for the embargo to be lifted, the Plaintiff noticed that someone was busy carrying out some construction on the land and had indeed put up a perimeter wall around the same. After conducting some investigations, the Plaintiff learnt that it was the 1<sup>st</sup> Defendant who was responsible for the said constructions.
  46. When they asked the 1<sup>st</sup> Defendant to stop the constructions, he refused insisting instead that he was the lawful owner of the suit property. After further investigations by the Plaintiff, they came to realise that the 1<sup>st</sup> Defendant was claiming the suit property on the basis of a Letter of Allotment apparently issued to him by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein. According to the Plaintiff, the said Letter of Allotment was in its own words "fake" and incapable of conferring any title upon the 1<sup>st</sup> Defendant. As the Defendants refused to cancel the letter and or stop the on-going construction on the suit property, the Plaintiff came to this Court for redress.
  47. In his pleadings filed before this Court, the 1<sup>st</sup> Defendant does not deny that he had commenced construction on the property. He however asserts that he was doing so as the lawfully registered proprietor of the suit property. While confirming that he was indeed allocated the property vide a Letter of Allotment dated 26<sup>th</sup> August 2010, the 1<sup>st</sup> Defendant asserts that contrary to the Plaintiff's contention, the suit property belonged to the Government of Kenya prior to the allocation to himself.
  48. The 1<sup>st</sup> Defendant accordingly denies that he colluded with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to have the suitland allocated to himself. By way of Counterclaim, he urges this Court to declare instead that he is the lawfully registered proprietor of the suit property and that the Plaintiff has no valid claim thereto. The 1<sup>st</sup> Defendant accordingly urges the Court to cancel the Plaintiff's Title Deed and to issue an order of permanent injunction restraining the Plaintiff by itself, its agents and/or servants from interfering and/or dealing in any way whatsoever with the property.
  49. By an Order issued herein on 22<sup>nd</sup> July 2013, this suit was consolidated with an Originating Summons filed in Malindi HCCC NO. 71 of 2008; Mwenda Kadenge Jefwa –vs- The Estate of Benjamin Raphael Ndubai, Stephen Kirimana Kongi and Shamsher (K) Ltd. In the said Originating Summons, the Applicant-Mwenda Kadenge Jefwa had sought orders declaring that he had been occupying the suit property since 1994 for an uninterrupted period of time and that he had since acquired the same under the doctrine of adverse possession.
  50. I have perused the record herein and it is apparent that ever since the order of the consolidation, neither the Applicant nor the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the Originating Summons have appeared in these proceedings. For all intents and purposes and as it was unclear to me if they had been made aware of the consolidation, the application in the said HCCC No. 71 of 2008 is hereby considered as abandoned.
  51. While he did not testify before me, the 1<sup>st</sup> Defendant filed pleadings herein including a Supporting Affidavit to his Chamber Summons dated 29<sup>th</sup> August 2012 in which he asked the Court to give directions on the notice to the Co-defendants issued by himself in which he sought to be indemnified by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. That affidavit summarizes the manner in which he acquired the suit property at paragraphs 3 to 9 thereof where he avers as follows:-



3. That on the 26<sup>th</sup> September 2010, I was allocated Plot Number Kilifi/Jimba 332 by the Government of Kenya. I was issued with an Allotment Letter dated 26<sup>th</sup> August 2010 in respect of Plot No. Kilifi Jimba Parcel No. 332 after making the requisite payments to the Department of Lands on the same day. Annexed hereto and marked “FAS 1” and “FAS 2” are copies of the Letter of Allotment and the Receipt for payments respectively.
  4. That I was issued with a Lease and Certificate of Lease on the 29<sup>th</sup> September 2010 after making all requisite payments. Annexed hereto and marked “FAS 3”, “FAS 4” and “FAS 5” are copies of the Lease, Certificate of Lease and the Certificates of Official Searches respectively.
  5. That I am the owner of a leasehold interest in the suit plot for a term of 99 years from 1.09.2010 as per the Certificate of Lease hereinabove which period has not yet expired.
  6. That the title was registered as a first registration and I am advised by my Advocate on record which advise I verily believe to be true, that my title is absolute and indefeasible.
  7. That I followed the due process in acquiring the suit plot and in acquiring the title documents thereto.
  8. That since allocation of the suit plot to me and after its registration in my name, I took immediate possession of the same and I have been in occupation of the plot.
  9. That sometime in August 2011, the Plaintiff served me with a demand letter to cease interfering with the suit plot without its permission and prior to that I was not aware of any alleged rights, title or interest held over the suit plot by any third party.”
52. It was however not clear to this Court how the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants could have proceeded to allocate the suit property in August 2010 as stated. When he testified herein, the plaintiff’s director Nizar Samji (PW1) produced in evidence Plaintiff’s Exhibit 7 and 8. The two are basically Certificates of Official Searches conducted at the 3<sup>rd</sup> Defendant’s registry at Kilifi on 17<sup>th</sup> June 2002 and 24<sup>th</sup> July 2002.
53. As it were the first Certificate (Exhibit 7) shows that the suit property was as early as 31<sup>st</sup> March 1992 already registered in the name of Benjamin Raphael Ndubai. The second Certificate (Exhibit 8) on the other hand shows that on 16<sup>th</sup> July 2002, the Plaintiff herein was registered as the proprietor of the land.
54. Questioned about the titles at the trial herein, Athman Otime Juma (DW1) who testified on behalf of the 3<sup>rd</sup> Defendant confirmed that the record he brought to Court did not contain all the documentation they had on suit parcel of land prior to the year 2010.
55. As it were, DW1 was certainly not a truthful witness. The Plaintiff as it turned out produced through PW1 a Letter dated 25<sup>th</sup> August 1991 showing that on that date, the suit property had been allocated to B.R. Ndubai of P.O. Box 73730 Nairobi. That would be the same Ndubai who, as confirmed by the first Certificate of Search conducted on 17<sup>th</sup> June 2002 (Pexh 7) was issued with a Certificate of Lease on 31<sup>st</sup> March 1992.
56. The Plaintiff also produced a Sale Agreement executed on 11<sup>th</sup> July 2002 (Pexh 5). By that Agreement, one Ricahrd Mwangela Ndubai, Leon Muriithi Ndubai and Margaret Ndubai are shown to have jointly sold the Suit property to the Plaintiff herein. While PW1 was taken to great task during cross-examination to explain how they had acquired the property from Raphael Ndubai who was already deceased at the time, a perusal of the Agreement clearly indicates that the three vendors sold the land as personal representatives of the estate of Benjamin Revel Ndubai also known as Benjamin Rafael Ndubai.



57. That position is indeed confirmed by a Grant of Letters of Administration Intestate of the said Benjamin Ndubai issued to the three vendors in the High Court of Kenya at Nairobi on 15<sup>th</sup> April 1999. The said Grant indicates that the registered proprietor of the land passed away on 6<sup>th</sup> January 1999.
58. Indeed while DW1 was busy misleading this Court about the ownership of the suit property, it was clear that when this dispute erupted, his own boss the Chief Land Registrar had conducted his own investigations and confirmed that the property belonged to the Plaintiff. By his letter dated 29<sup>th</sup> October 2014, the Chief Land Registrar writes to the Plaintiff at paragraph 2 thereof as follows:-
- “We have perused through all our records including those that show the history of ownership and find that Shamsher Kenya Ltd is the true and rightful owner of the said parcel of land.”
59. As it were, while the 1<sup>st</sup> Defendant purported that he had acquired the said title after making all the requisite payments, I was unable to find any evidence of payments made by himself as all the receipts attached indicated that it is one Gideon Mungaro who had paid a sum of Kshs 203,765/- for a number of plots including Plot No. 332 on 26<sup>th</sup> August 2010 the same date the 1<sup>st</sup> Defendant purports to have been allocated the land.
60. It is that same Gideon Mungaro who was referred to as the Lessee in the Letter forwarding the 20 Leases (Pexh 28) and the 1<sup>st</sup> Defendant having not testified herein did not explain how he came to be registered as the proprietor of the suit property.
61. In the premises, I am persuaded that the Plaintiff has proved its case to the required standard and that the 1<sup>st</sup> Defendant’s claim is without basis. Accordingly the 1<sup>st</sup> Defendant’s Counterclaim is dismissed and Judgment is hereby entered for the Plaintiff as prayed in the Plaint.
62. The Plaintiff shall have the costs of his suit as well as of the Defendant’s Counterclaim.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 27<sup>TH</sup> DAY OF MAY, 2020.**

**J.O. OLOLA**

**JUDGE**

