



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 30 OF 2011**

**SOFT WHITE BEACH LIMITED.....PLAINTIFF**

**VERSUS**

**1. JOSEPH KASHURU MUMBO.....1<sup>ST</sup> DEFENDANT**

**2. MASUMBUKO YERRY KOMBE.....2<sup>ND</sup> DEFENDANT**

**3. THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**4. THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**5. THE DISTRICT LAND REGISTRAR KILIFI.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By a Plaint dated 13<sup>th</sup> April 2011 and filed herein on 14<sup>th</sup> April 2011, Soft White Beach Ltd (the Plaintiff) prays for Judgment against the five (5) Defendants jointly and severally for:-

- a. A declaration that the Title Deed for Plot Title No. Chembe/Kibabamshe/393 is illegal, null and void;**
- b. A declaration that the Title Deeds for Plot No. Chembe/Kibabamshe/651 and 652 are valid;**
- c. A declaration that the Plaintiff is the indefeasible and absolute proprietor of Plot No. Chembe/Kibabamshe/651 and 652;**
- d. A permanent injunction restraining the Defendants by themselves, their servants and/or agents from selling, transferring, assigning and/or in any manner whatsoever dealing with Plot No. Chembe/Kibabamshe/393;**
- e. Costs of the suit.**

2. The above prayers arise from the Plaintiff's position that it purchased the suit properties being Plot Nos. 651 and 652 from La Marina Ltd in the year 2006. Prior to the said purchase, the Plaintiff avers that it had done due diligence and established that prior to 1998 the suit properties were known as Plot No. 393 and were registered in the name of the Government.

3. The Plaintiff further asserts that between 1998 and 2001, the said Plot No. 393 was sub-divided into two, thereby yielding the suit properties- Plot No. 651 (0.5 Ha) and Plot No. 652 (2.2. Ha). While the Plaintiff holds title for the two suit properties, Joseph Kashuru Mumbo and Masumbuko Yeri Kombe (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively) also hold a Title Deed for the Original Plot No. 393.

4. It is the Plaintiff's case that the registration of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the proprietors of the said Plot No. 393 was illegally and fraudulently facilitated by the Chief Land Registrar and the Land Registrar Kilifi (the 4<sup>th</sup> and 5<sup>th</sup> Defendants) and hence the orders sought herein.

5. But in their Statement of Defence and Counterclaim dated 12<sup>th</sup> May 2011 as filed herein on 13<sup>th</sup> May 2011, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

deny that they procured any registration illegally or fraudulently as stated by the Plaintiff. They assert that the Title Deed for Plot No. Chembe/Kibabamshe/393 is valid and that no sub-divisions have ever been done as per the records held at the offices of the 4<sup>th</sup> and 5<sup>th</sup> Defendants.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants further aver that the said Plot Nos. Chembe/Kibabamshe/651 and 652 do not exist and urge the Court by way of their Counterclaim to find that the title deed for Plot No. 393 is valid and that the 2<sup>nd</sup> Defendant is the bona fide and/or lawful owner thereof.

7. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant pray for an order of permanent injunction restraining the Plaintiff, its agents or servants from invading and/or trespassing or in any manner interfering with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' quiet possession of the said Plot No. 393 Chembe/Kibabamshe.

8. While the Honourable the Attorney General (the 3<sup>rd</sup> Defendant) was allowed to participate in these proceedings representing himself as well as the 4<sup>th</sup> and 5<sup>th</sup> Defendants from as early as the year 2014, I was unable to find the basis of their participation as I could not trace any Memorandum of Appearance filed by the Attorney General. From the record, they sought leave on 1<sup>st</sup> July 2014 to file a Statement of Defence and were granted 21 days to do so. I did not however find any evidence of compliance with that order.

### **THE PLAINTIFF'S CASE**

9. The Plaintiff called a total of three (3) witnesses at the trial herein which partially commenced before the Honourable Justice Angote.

10. PW1-Rufus Karima Kalama was the District Land Registrar Kilifi in 2006 but had since been transferred to Kajiado North. He testified that sometime in the year 2000, a Mutation Form was prepared and presented for the sub-division of Plot No. 393. The mutation gave rise to Plot Nos. 649, 650, 651 and 732.

11. PW1 told the Court that once a Mutation is presented, it closes down the original title and new numbers are issued. Accordingly, upon the preparation of the mutation, Plot No. 393 ceased to exist. Plot Nos. 651 and 652 were then registered in the name of Lamarina Ltd. PW1 told the Court that from their records the said Plot No. 651 was subsequently transferred to the Plaintiff's name upon valuation and payment of stamp duty. Plot No. 652 was similarly transferred to the Plaintiff at the same time on 21<sup>st</sup> December 2006.

12. During cross-examination, PW1 told the Court that Plot Nos. 651 and 652 were created as a result of the sub-division of Plot No. 393. Before the titles were issued for the two plots in the year 2001, Plot No. 393 had been closed in the year 2000 by the mutation of the District Surveyor. Prior to the sub-division, Plot No. 393 was in the name of the Government before it was transferred to the Settlement Fund Trustees (SFT).

13. PW1 further testified that before the issuance of a title deed, the mutation has to be registered. He conceded that the mutation in this case was never registered and that it was unclear how the sub-division was done as the mutation ought to have been registered before the title for the sub-division could issue.

14. On cross-examination, PW1 told the Court that he was not aware that at the time of the sub-division, Plot No. 393 had been allocated to anyone. He however conceded upon being shown the Defendant's documents that Plot No. 651 had already been created on 30<sup>th</sup> June 1999 and allocated to one Lucas Kadenge. He also agreed that the documents showed that Plot No. 652 had been created on 28<sup>th</sup> July 1999 and that there was a Letter of Offer dated 30<sup>th</sup> June 1999 in the name of one Japhet Charo Chome.

15. PW1 further told the Court that it is the Settlement Fund Trustees which should have initiated the process of mutation and then issued titles to the original allottees.

16. PW2-Philip Munge Ndolo is a Director of La Marina Ltd. He told the Court that he is familiar with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants having interacted with them severally.

17. PW2 testified that sometime in 1998, their company was approached by some residents of Chembe/Kibabamshe Settlement Scheme who informed them that they had some properties for sale. They negotiated the price and finalized the purchase for Plot Nos. 651 and 652. Prior to the purchase however, the Company did due diligence and confirmed that prior to 2001, there was an original Plot No. 393 registered under the name of the Government of Kenya.

18. PW2 further told the Court that between 1998 and 2001, the said Plot No. 393 was sub-divided into several portions. As at the time their company purchased Plot Nos. 651 and 652, Plot No. 393 had already been closed and the necessary documents were lodged with the 5<sup>th</sup> Defendant herein. In the year 2006, La Marina Ltd sold Plot Nos. 651 and 652 to the Plaintiff herein.

19. PW2 further testified that they had been forced to file several suits surrounding the subject properties because the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have been claiming that they own Plot No. 393 which had ceased to exist. PW2 told the Court that as a result of the Defendants claims he had together with his co-directors Vittorio Veneziani and Harrison W. Musumia been charged in ***Kilifi SRM's Criminal Case Nos 370 and 373 of 2009*** but the charges were later withdrawn on the realization that there was no evidence to support the charges.

20. PW2 further told the Court that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants also filed ***High Court Miscellaneous Civil Application No. 18 of 2009*** trying to compel the 4<sup>th</sup> and 5<sup>th</sup> Defendants to register an illegal transfer. However after La Marina Ltd contested the case, it was dismissed for being premature.

21. During cross-examination, PW2 told the Court that they acquired the two properties from Lucas Kadenge and Japhet Charo Chome respectively. He told the Court that he had a Letter of Offer that was issued to the allottees from the Settlement Fund Trustees. He however processed the two titles directly to their company name as the two individuals had no money.

22. PW3- Zipporah Nyaguthi Gitonga is a Director of the Plaintiff Company. She told the Court that she was appointed as such director on 17<sup>th</sup> October 2018 following the retirement of two directors. PW3 adopted the Statements of PW1 and PW2 and confirmed that the Plaintiff purchased the two suit properties from La Marina Ltd for value as confirmed by PW2.

23. During Cross-examination, PW3 conceded that she did not know PW2 and that she was not a director when the suit properties were acquired. She however told the Court that she had gone through PW2's Statement and that it represented the position of the Plaintiff company.

#### **THE DEFENCE CASE**

24. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants called one witness at the trial in support of their case. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants did not however call any oral testimony at the trial.

25. DW1- Masumbuko Yerry Kombe is the 2<sup>nd</sup> Defendant herein. He told the Court that he is the legitimate owner of the subject parcel of land known as Chembe/Kibabamshe/393 and that he was issued with a title deed therefor by the 5<sup>th</sup> Defendant on 10<sup>th</sup> August 2012.

26. DW1 testified that he acquired the parcel of land by way of purchase from Joseph Kashuru Mumbo (the 1<sup>st</sup> Defendant) for Kshs 10,000,000/-. He told the Court that prior to the purchase, he did due diligence on the property and came to the conclusion that it was a clean, free and an unencumbered piece of land.

27. DW1 further told the Court that in the process of acquiring the land, he obtained first hand information from the 1<sup>st</sup> Defendant of his legal and legitimate ownership of the property as he was the beneficiary of an allocation from the Government as registered on 19<sup>th</sup> January 2003.

28. DW1 testified that the 1<sup>st</sup> Defendant was issued with a Letter of Offer for the parcel of land dated 30<sup>th</sup> June 1999 and that he accepted the offer by duly paying the sum of Kshs 19,987/- to the Settlement Fund Trustees. Thereafter the 1<sup>st</sup> Defendant was issued with a Title Deed for the entire parcel of land on 19<sup>th</sup> January 2003 before later on transferring the same to DW1 on 1<sup>st</sup> December 2008.

29. DW1 told the Court that since acquiring the land he has taken possession and developed the same and continues to pay the rates due therefrom to the local authorities. He told the Court that the sub-division alleged to have been done on the land never happened as he retains the title of the parcel which was never closed or amended.

30. During cross-examination, DW1 maintained that he had purchased the land from the 1<sup>st</sup> Defendant even though he had not produced a Copy of the Sale Agreement and a Copy of the Transfer.

31. DW1 admitted that he was the complainant in *Kilifi Criminal Case Nos. 370 and 373 of 2009*. He told the Court that he paid the Purchase price for the suit property even though he had no evidence of the payments in Court. He told the Court that he was not aware of any complaint on the part of the 1<sup>st</sup> Defendant to the effect that he had not been paid.

32. DW1 further testified that he was not aware that his title had been cancelled by the Government.

#### **ANALYSIS AND DETERMINATION**

33. I have perused and considered the pleadings as filed by the parties herein. I have examined the oral testimonies of the witnesses and gone through the evidence adduced at the trial. I have also considered the written submissions and authorities placed before me by the Learned Advocates-Mr. Muniyithya for the Plaintiff and Mr. Kokebe for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

34. The Plaintiff, a limited liability company instituted this suit on 14<sup>th</sup> April 2011 seeking certain declaratory orders in relation to the parcels of land known as Chembe/Kibabamshe/393, 651 and 652. It is the Plaintiff's position that the parcel numbers 651 and 652 whose titles are in its name and possession are a product of the sub-division of Parcel No. 393 and that after the sub-division, the said parcel No. 393 ceased to exist.

35. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold that parcel No. 393 is in existence and that the 1<sup>st</sup> Defendant was a legitimate beneficiary of an allocation of the parcel No. 393 from the Government of Kenya and that he thus held a good title therefor which title he has since regularly and procedurally transferred to the 2<sup>nd</sup> Defendant.

36. Both the Plaintiff as well as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants assert that the title deeds held by the rival sides for the parcels Nos. 651 and 652 on the one side and Parcel No. 393 on the other were issued by the 4<sup>th</sup> and 5<sup>th</sup> Defendants. As it turned out, the said 4<sup>th</sup> and 5<sup>th</sup> Defendants did not however file any pleadings and/or adduce any evidence of their own at the trial.

37. In the absence of an official position from the 4<sup>th</sup> and 5<sup>th</sup> Defendants, this Court could only but glean what may have happened in their offices from the evidence of PW1- Rufus Karima Kalama. PW1 was the District Land Registrar Kilifi between December 2004 and April

2007. That was around the time the Parcel Nos. 651 and 652 were transferred to the Plaintiff's name. As at the time he testified at the trial herein PW1 had been transferred and was serving as the District Land Registrar, Kajiado North.

38. By an Affidavit he swore on 30<sup>th</sup> September 2011 filed by the Plaintiff herein on 2<sup>nd</sup> July 2014, PW1 avers that he was conversant with the facts of this case. He then goes ahead to give the history of the suitland stating that the original adjudication title was issued to one Bernard Chiuri Murage on 22<sup>nd</sup> September 1978.

39. PW1 further deposes that Murage's title was canceled by the Government on the basis of glaring irregularities in the process of adjudication vide Gazette Notice No. 2505 of 30<sup>th</sup> May 1986. By the said notice, the holders of title deeds in the relevant adjudication Section were given 60 days to surrender their title upon expiry of which the same were presumed to have been cancelled.

40. It would appear that after the presumed cancellation, the Government once again decided to re-allocate the land. Testifying at the trial herein some two (2) months after his Affidavit was filed in these proceedings, PW1 told the Court that sometime in the year 2000, a Mutation was prepared and presented for the sub-division of Plot No. 393. That mutation gave rise to Plot Nos. 649, 650, 651, 652 and 732.

41. It was PW1's evidence that once a Mutation is presented, it closes down the original title and new numbers are then issued. Accordingly, upon the preparation of the Mutation in regard to Parcel No. 393, the same ceased to exist. PW1 told the Court that from the records at their office, following that sub-division, Parcel No. 651 was allocated and transferred to one Lucas Kadenge on 17<sup>th</sup> April 2001 while Parcel No. 652 was allocated and transferred to one Japhet Charo Chome on 11<sup>th</sup> April 2001.

42. Arising from the foregoing, PW1 concluded that the title deed issued in the name of the 1<sup>st</sup> Defendant herein on 19<sup>th</sup> January 2003 for Parcel No. 393 was fraudulently obtained. He told the Court that indeed their Department had carried out investigations which came to a similar conclusion and that by a letter dated 4<sup>th</sup> April 2004, the 4<sup>th</sup> Defendant herein had recalled the 1<sup>st</sup> Defendant's title for cancellation.

43. As it turned out however, PW1's testimony did not satisfactorily explain how Parcel No. 393 ceased to exist and how the sub-division Parcel Nos. 651 and 652 came into being. During his cross-examination, PW1 conceded that before the issuance of a title deed, the mutation has to be registered. As it turned out, the Mutation creating Parcel Nos. 651 and 652 was never registered as required.

44. Similarly PW1 conceded that if his version of the events was to be believed the Parcel Nos. 651 and 652 came into existence in June 1999 before the Mutation and sub-division thereof. This was so because from the documents produced herein, the two parcels had allegedly been allocated to Lucas Kadenge and Japhet Charo Chome on 30<sup>th</sup> June 1999. According to PW1 it was these two gentlemen who had transferred the two parcels to La Marina Ltd in April 2001.

45. I have taken a keen look at the Mutation Forms which allegedly created the sub-division of Parcel No. 393. The same were neither signed by the Land Registrar nor, as conceded by PW1, registered. The Registered Index Map (RIM) was equally never amended to reflect the sub-division. On being cross-examined on this confused and irregular state of affairs, PW1 who issued the titles for Parcels Nos. 651 and 652 in the name of the Plaintiff testified as follows:-

**“The owner must sign the mutation form. According to your document, the mutation is not signed by the owner but it is signed by the surveyor. The mutation form is not dated. It is not signed and registered by the District Surveyor. Once it is registered, it was supposed to be sent to the Surveyor for amendment of the RIM. The effect of non-registration is that no title can issue....”**

46. Having come to that conclusion himself, one wonders what may have motivated PW1 to proceed to process the titles. As it were, Parcel No. 393 was Government land in the year 2000 under the administration of the Settlement Fund Trustees (SFT). Accordingly, it was only the Settlement Fund Trustees that could have initiated the process of mutation and thereafter issue titles to the original allottees of the two parcels of land. They did not.

47. From the record, the Settlement Fund Trustees issued the 1<sup>st</sup> Defendant herein with a Letter of Offer dated 30<sup>th</sup> June 1999. He accepted the offer and paid a sum of Kshs 19,987/- to the Settlement Fund Trustees as required by the conditions of offer. The 2<sup>nd</sup> Defendant produced documents herein evidencing payments of the Settlement Fund Trustees loan by the 1<sup>st</sup> Defendant including a Discharge of Charge and Transfer duly executed by the Settlement Fund Trustees in the name of the 1<sup>st</sup> Defendant.

48. Arising from the foregoing, I am persuaded that the Parcel No. Chembe/Kibabamshe/393 remains as it were and that the purported mutation and sub-divisions creating Parcels Nos. Chembe/Kibabamshe/651 and 652 were unprocedural, illegal and fraudulent.

49. I am equally persuaded that the 1<sup>st</sup> Defendant procedurally and legitimately acquired title for the said Parcel No. 393 and that the 2<sup>nd</sup> Defendant is a bona fide purchaser thereof for value.

50. In the premises, I did not find any merit in the Plaintiff's case. The same is accordingly dismissed. On the contrary, I was satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had proved their Counterclaim to the required standard and I hereby enter Judgment for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as against the Plaintiff in terms thereof.

51. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall have the costs of both the dismissed suit as well as that of the Counterclaim.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 13<sup>TH</sup> DAY OF MAY, 2020.**

**J.O. OLOLA**

**JUDGE**