



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 310 OF 2014**

**DIGNIFIED HOLDINGS LIMITED..... PLAINTIFF**

**= VERSUS =**

**1. ATTORNEY GENERAL**

**2. SAID B. NDEGE**

**3. RAIA A. MAKUNGU**

**4. OMARI ZONGA**

**5. SAID H. KABANG**

**6. HILMI M. AHMED**

**7. SAID MWINYIKAI TOMAS**

**8. ATHUMAN SAID RIMO**

**9. ALI JUMA NGONYO**

**10. YASMIN DUSHMAN SHABAN**

**11. DAVID K. KANDIE**

**12. SILAS KIPTUI KIPCHILAT**

**13. KENEDY BEGI ONKOBA .....DEFENDANTS**

**JUDGEMENT**

1. The plaintiff brought this claim against the 13 defendants jointly and separately over the suit property formerly known title No. CR.12859 under L.R No. 5004/14 and currently renumbered to Kwale/Diani Beach Block/151. The plaintiff pleaded that he was the lawfully registered owner of the suit property upon a transfer of lease dated 18<sup>th</sup> September 1992 pursuant to a purchase from Prince Sadrudin Aga Khan for a consideration of Kshs11,000,000 and the plaintiff was handed possession.

2. The plaintiff pleaded that it has always been in uninterrupted possession as it fenced off the property and put up developments therein as well as employed a Caretaker to look after the property. That it applied for extension of the lease in March 2007 and after following due processes it was granted a new lease on 31<sup>st</sup> January 2008 for a period of 50 years from 1<sup>st</sup> November 2007. The plaintiff further pleaded that in November 2010, it was contacted by the Ethics and Anti-Corruption Commission in regard to an investigation over fraudulent dealings involving a parcel of land Kwale/Diani Beach/151.

3. The plaintiff states that it later discovered and/or confirmed

*a) From the contents of a survey report dated 16<sup>th</sup> January, 2014 by B.C Mwanyungu, licensed surveyor and from a further joint survey report dated 30<sup>th</sup> January, 2014 by the said B. C. Mwanyungu and the District Surveyor, Kwale District, that said title number Kwale/Diani Beach Block/151 occupied the exact geographical location and/or position as Kwale/Diani Beach*

**Block/60.**

**b) From investigations carried out by the plaintiff at the Ministry of Lands, that Kwale/Diani Beach Block/151 was the new number for Kwale/Diani Beach Block/60 and that the said renumbering was occasioned by the creation and/or expansion of what is commonly known as Beach Road Diani which cuts across the suit property.**

**c) From affidavits exchanged in MOMBASA HIGH COURT CONSTITUTIONAL PETITION NO. 37 OF 2014, that a certificate of lease for Kwale/Diani Beach Block/151 had been purportedly issued to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants by the District Lands Registrar, Kwale on or about the 4<sup>th</sup> October, 2006.**

**d) Another certificate of lease for Kwale/Diani Beach Block/151 had been purportedly issued to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants by the District Lands Registrar, Kwale on or about 18<sup>th</sup> October, 2006.**

4. The plaintiff avers that the purported issuance of titles over Kwale/Diani Beach Block/151 by the Land Registrar and the allocation of the same by the Commissioner of Lands to the defendants was illegal, unlawful, fraudulent null and void. The plaintiff pleaded the particulars fraud to include but not limited to the following;

**a) On the part of the District Lands Registrar, Kwale, by issuing multiple certificates of lease to the 2<sup>nd</sup> to 13<sup>th</sup> defendants over the same parcel of land without any supporting instruments of lease and/or transfer and/or surrender and/or transmission and/or assignment and more so without cancelling the previous titles issued.**

**b) The District Lands Registrar, Kwale and/or the Commissioner of Lands, despite being actually and/or constructively aware of the plaintiff's and/or H.E prince Sadrudin Aga Khan's interest and/or title, did not inform the plaintiff and/or H.E. Prince Sadrudin Aga Khan of the change in the title number for the suit property from Kwale/Diani Beach Block/60 to Kwale/Diani Beach Block/151.**

**c) The District Lands Registrar, Kwale and/or the Commissioner of Lands did not call for the surrender of the plaintiff's and/or H. E. Prince Sadrudin Aga Khan's certificate of title for Kwale/Diani Beach Block/60 for purposes of cancellation and re-issuance of a new certificate of lease bearing the changed number Kwale/Diani Beach Block/151 as was required under the provisions of the Land Acquisition Act, Cap 295, Laws of Kenya (now repealed).**

**d) No entry was entered in the register for parcel number Kwale/Diani Beach Block/60 by the District Lands Registrar, Kwale and/or the Commissioner of Lands to show that part of the suit property had been acquired for purposes of creation of a road and that the title number had changed as was required under the provisions of the Land Acquisition Act, Cap 295, Laws of Kenya (now repealed).**

5. The plaintiff pleaded that in the alternative, the entries in the register for Kwale Diani Beach Block/60, the extension of the lease over Kwale/Diani Beach Block/60 and issuance of a certificate of lease to the plaintiff for Kwale/Diani Beach Block/60 was done under a mutual mistake of fact on the part of the previous proprietor of the leasehold interest, the Office of the President of the Republic of Kenya, the Commissioner of Lands, the District Surveyor, Kwale, the District Land Planning Officer, Kwale and the Lands Registrar, Kwale. It added that there was a mistake of fact on the part of the office of the president in exempting the transfer of L.R No. Kwale/Diani Beach Block/60 from the provisions of the Land Commission Act cap 302 without the knowledge that the land in respect to which an exemption had been sought and granted had been renumbered to Kwale/Diani Beach Block/151.

6. The plaintiff pleaded that it issued various notices of demand before filing this suit and unless the Court intervenes, the defendants will adversely deal with the suit property. Consequently, the plaintiff prays for judgment against the defendants for;

**a) A declaration that all that land known as Kwale/Diani Beach Block/60 occupies the same geographical position as Kwale/Diani Beach Block/151 and/or in the alternative, a declaration that the two title numbers Kwale/Diani Beach Block/60 and Kwale/Diani Beach Block/151 refer to the same parcel of land.**

**b) A declaration that the plaintiff is the lawful proprietor of the leasehold interest in all that land known as Kwale/Diani Beach Block/151, formerly known as Kwale/Diani Beach Block/60 and/or Title number CR. 12859 under Land Reference Number 5004/14.**

**c) A declaration that the opening of a register for Kwale/Diani Beach Block/151 by the Lands Registrar, Kwale while the register for the same parcel of land under title number Kwale/Diani Beach Block/60 was still open was unlawful, illegal, null and void and/or a mistake of fact.**

**d) A declaration that the allotment of Keale/Diani Beach Block/151 by the Commissioner of Lands to the defendants named herein was illegal, null and void and/or a mistake of fact.**

**e) A declaration that the certificates of title issued to the defendants herein for Kwale/Diani Beach Block/151 are unlawful, illegal, null and void.**

7. The defendants opposed the suit by filing their respective defences. The 7<sup>th</sup> – 10<sup>th</sup> defendants filed theirs on 31<sup>st</sup> March 2015. The 7<sup>th</sup> – 10<sup>th</sup> defendants pleaded that they had no knowledge of the matters pleaded in paragraphs 4 – 6; 9 – 18 and 21 and 24 of the plaint and they deny their contents. They stated that they are strangers to paragraph 14 of the plaint and they deny their contents. They stated that they are strangers to paragraph 14 of the plaint adding that L.R Kwale/Diani Beach/151 has always been theirs through ancestry since pre-colonial

times. That they have been pleading with post-independence governments for the return of their ancestral land. That through lobbying the 7<sup>th</sup> – 10<sup>th</sup> defendants and their families applied for allotment of Kwale/Diani Block/151 after which they obtained a title. It is their case that they acquired the suit title lawfully and their title is indefeasible under section 28 and 143(2) of the Registered Land Act (repealed).

8. The 7<sup>th</sup> – 10<sup>th</sup> defendants avers that the plaintiff has pleaded owning Diani Beach Block/60 thus it has no title which is at risk of being deprived. The 7<sup>th</sup> – 10<sup>th</sup> defendants also denied this Court has jurisdiction to review grants and dispositions of public land. The 7<sup>th</sup> – 10<sup>th</sup> defendants plead that the plaintiff's suit discloses no reasonable cause of action therefore should be dismissed with costs.

9. The 3<sup>rd</sup> – 6<sup>th</sup> defendants filed a statement of defence on 17<sup>th</sup> defendant 2015. In reference to paragraph 14 of the plaint, the 3<sup>rd</sup> – 6<sup>th</sup> defendants pleaded that they are the owners of L.R No. Diani Beach Block/151. That prior to 1914, the land belonged to their late parent Mwachi Mwindi Diya who was forcefully evicted by the British Colonial Government without compensation. That due to this historical injustice they petitioned the government and the president presenting their claims and grievances. That on consideration of their petition, the Commissioner of Lands was directed to allocate them the land which was vacant and undeveloped.

10. The 3<sup>rd</sup> – 6<sup>th</sup> defendants pleaded further that a survey was done on the suit land pursuant to a court order. According to the surveyors, as in the proceedings, jointly admitted in consensus that parcel known as Kwale/Diani Beach Block/60 was subdivided in October 1974 after compulsory acquisition by the Government for the excision of the Diani Beach Road and new plot numbers are now Kwale/Diani Beach Block/151 for the plot and 152 for the road serve up to today as displayed by the Registry Index Map No. 201/3/7 and Survey Plan F/R 127/76 the Block having been amended by mutation No. MN/1/3806 of January 1975 and further conclusively agreed that parcel Kwale/Diani Beach Block/60 ceased to exist since 1974. That this suit is full of ill motive and devoid of any merit thus should be dismissed with costs.

11. The 1<sup>st</sup> defendant filed her defence dated 14/4/2016 on 25<sup>th</sup> April 2016 denying the plaintiff's claim.

12. Hearing commenced on 3<sup>rd</sup> July 2018 with the evidence of Batholomew Mwanyungu who is a licensed surveyor. **PW1** said he was instructed to prepare a survey report in respect of the suit land. The report was prepared jointly with the district surveyor and it was in respect of parcel Nos 59 and 60. He found that there was a creation of Diani Beach road which road passed between plot 59 and 60. That any survey dealing with numbers under the Registered Land Act the numbers would change. Plot Nos 150 and 152 became the road reserve. Plot No. 151 was the balance of No. 60 after the sub-division. **PW1** produced the maps and their reports in evidence.

13. In cross-examination, **PW1** stated that the original report was produced in petition No. 37 of 2011. That the road was created in 1974. The parcel which came from No. 60 was 151 and 152 with No. 152 being the road reserve. That any person claiming plot 60 is claiming both the road reserve and plot 151. That the maps for the plots are public documents therefore available to anyone to access. **PW1** was not certain whether Diani Beach road was built after the government acquired the land. **PW1** further that plot 60 ceased to exist after the sub-division in 1974 although it would be reflected in the plan. In re-examination, **PW1** said the person who compiles the maps is a licensed surveyor and the records kept by the government. That the numbers change but the physical land remains the same. **PW1** stated that plot No. 60 and 151 occupies the same place on the ground.

14. ISSA ABDALLA TIMAMY gave evidence as **PW2**. He is an advocate of the High Court of Kenya. **PW2** said he was involved in the extension of the lease for Kwale/Diani Beach Block/60. That he wrote to the Commissioner of Lands on 13/3/2007 and received a response dated 19/3/2007 directing the land officer to visit site and file report. **PW2** continued that the District Land Officer wrote back that they had no objection to the extension of the lease. The District Surveyor and the District Physical Planner both wrote letters stating that they had no objection to the extension of the plaintiff's lease. **PW2** said they continued with the payments in November 2007 as advised by the Commissioner of Lands. He concluded that the suit title Diani beach/151 belongs to the plaintiff.

15. In cross-examination, **PW2** said he wrote the letter dated 13<sup>th</sup> March 2007 to the Commissioner of Lands in his capacity as an advocate for the plaintiff. That to his knowledge, he knew the plot existed. That they received correspondences from government agencies and if the Ministry misled them, their claim lies against the Ministry. He later confirmed plot No. 60 was not in existence. He denied when it was put to him that he was satirising the lacuna by applying for extension of the lease. **PW2** could not comment on whether the original owner refused to surrender the title during sub-division.

16. In further cross-examination by Makuto counsel for the Attorney General, **PW2** said he participated in the purchase of plot 60 as he was the company secretary of the plaintiff from 2002. That he has no relations with previous Company called Leisure Lodge Club Limited which later changed to Dignified Holdings in 1995. That he did a search before purchase but he did not produce a copy of that search. That he engaged the services of a professional surveyor in 1995 to verify that the land did exist but he could not remember the name of the surveyor. This plaintiff bought the land pursuant to acquisition of shares from Leisure Lodge Club but he could not tell when Leisure Lodge Club purchased the land. **PW2** said he was not aware there was a sub-division of plot 60 in 1974. That the original certificate of lease was issued in 1992 however the certificate of lease at page 27 was issued on 8<sup>th</sup> October 1976.

17. In re-examination, **PW2** was referred to gazette notice exempting plots 59 and 60 by the president. That he got confirmation from all government agencies that plot 60 existed. That an original owner does not lose the whole block where only a portion is acquired. That if the number changes, the relevant government agency ought to notify the owner.

18. Sheba Mohamud Mohamed testified as **PW3**. He is the company Secretary of the plaintiff. He adopted his witness statement made on 3/12//2014 as his evidence in chief. He stated that the plaintiff is still the proprietor of the leasehold interest in parcel No. Kwale/Diani Beach Block/60 currently numbered as Kwale/Diani Beach Block/151, having purchased it at a consideration of Kshs.11M from the previous owner who had a 99 year lease from 1/1/1914.

19. **PW3** continued that in March 2007, the plaintiff applied for extension of the lease which was scheduled to expire on 1/1/2013. **PW3**

stated that all the requisite comments were sought from the District Land officer, Mombasa; Physical Planning Officer Kwale, District Surveyor Kwale and Clerk to the Kwale County Council who all indicated no objection to the extension of the lease. That their application was approved and an extension of lease for a further period of 50 years issued on 31/1/2008. **PW3** said the plaintiff has been in constant uninterrupted possession of the suit property from date of purchase.

20. In November 2010 after being contacted by Ethics and Anti-Corruption Commission, the plaintiff discovered that multiple certificates of leases had been issued to various persons over the same property i.e. one set to the 2<sup>nd</sup> – 6<sup>th</sup> defendants on 4/10/2006 and another to the 7<sup>th</sup> – 9<sup>th</sup> defendants on 18/10/2006. **PW3** said the 2<sup>nd</sup> - 6<sup>th</sup> defendants were charged in Mombasa Anti-Corruption Case No. 5 of 2012 which Case was still on-going. **PW3** stated that the suit land was alienated while still in the plaintiff's possession which renders all titles issued to the 2<sup>nd</sup> – 13<sup>th</sup> defendants illegal.

21. In cross-examination, **PW3** admitted plaintiff is registered as owner of plot no. 60 which no longer exists. That the plaintiff does not have title documents for plot 151. That he knew plot 60 ceased to exist in 1974 when Diani Beach road was curved out. That the transfer in 1992 of a non-existent plot was like a con. **PW3** said he was aware the accused persons in case no. 5 of 2012 were acquitted. That in the criminal proceedings, Mrs Okungu who was the Commissioner of Lands then said probably the defendant's titles were genuine. That title 151 is smaller than plot 60. In re-examination by Mr. MC'Court, **PW3** said that the survey report stated that plot 151 refers to the same land as plot 60. That the road was excised in 1974-75 but they were issued with a title in the year 1992. The defendants' titles were issued sometime in the year 2006. The plaintiff also adopted the evidence of Cheza given in ELC No. 31 of 2015 as PW4. This was by consent of the parties.

22. The following is the evidence of **MOHAMED MWINYI MWADZECHA** in the previous suit testifying on 21<sup>st</sup> November 2017 as PW2. He stated that he was attacked in August 2016 on a Thursday by about 50-60 people. That before he was attacked, around 10 am, four of his colleagues had spotted some people jumping over the gate accompanied by six uniformed and armed officers and two officers without uniforms. That the attackers later came at 2pm armed with *pangas* and *rungus* and surrounded the house where PW2 was in. That they broke the door and entered. They said that they had been sent by the 2<sup>nd</sup> and 6<sup>th</sup> Defendants. The person in charge of the group was called Yaya who told PW2 that they had been sent to kill him and that he was a policeman. PW2 stated that he had lived in the house from 1974 to 2016 and that his employer changed in 1992. PW 2 stated that he reported the incident to the police vide **OB NO 43/25/80/16**. That he did not see the 2<sup>nd</sup> and 6<sup>th</sup> Defendants but Yaya said he was sent by them.

23. On cross-examination by **Ms. Waswa** for the 1<sup>st</sup> Defendant, PW2 stated that the police did not talk to him but only looked at the place and left. He stated that he entered the land in 1974 having been employed by the Aga Khan and later by Bahati. That Bahati would come and leave. He stated that he did not know whether anyone had been charged in connection with the attack.

24. On cross-examination by **Mr. Magolo** for the 2<sup>nd</sup> -7<sup>th</sup> Defendants, PW2 stated that he was born in Likoni where his family lives. That he had reported the attack incident in Diani police but he was not assisted. That he also went to Kwale but did not find the County Commissioner. PW2 stated that two policemen arrested him saying that the 2<sup>nd</sup> and 6<sup>th</sup> Defendants had sent them to do so on the basis that he had invaded their land. He stated that he had never seen the title deed but knew the plot numbers as 59 and 60.

25. The 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> defendants opened their case with the evidence of Ali Hassan Mwakilunda as **DW1**. He said that he is one of the proprietors of parcel No. Diani Beach Block/151. He adopted his witness statement filed on 14<sup>th</sup> June 2018. He added that the land belonged to their grandfathers who were forcefully evicted from it. That they petitioned the then President of the Republic of Kenya. **DW1** said the Commissioner of Lands visited the land before finally issuing them with a title deed. **DW1** continued that he was one of the people charged in Anti-Corruption Case No. 5 of 2012 but they were acquitted. He wants the plaintiff's suit dismissed with costs.

26. In cross-examination, the witness said he is one of the defendants and co-owners of L.R No. 151 although his name does not appear in the certificate of title. That his name appears in the letter of allotment and the lease document. **DW1** agreed that they did not win in the Petition filed before the High Court. **DW1** said he was claiming the land through his ancestry. He did not know when Obar Hazzar left the land. That in the year 2001, they were living on the suit land and farming it. That he learnt about the second title after the Court proceedings were filed. According to **DW1**, they have a legal/correct title. **DW1** said Athuman Said Rimo is not a member of their family.

27. In re-examination, **DW1** said he is not a defendant but he is a co-proprietor of the suit. That his name is in the allotment letter and they were told all the 8 names could not fit in the certificate of lease so they elected 5 people whose names were registered in trust for all of them. That the land was passed on to them through their grandparents. That they had appointed a committee chaired by Rama to help in the acquisition of their title. When Rama died, he was succeeded by Raia Mkungu (3<sup>rd</sup> defendant). That their title was found as genuine in the criminal proceedings.

28. Abdalla Awadh Abubakar testified as **DW2**. He is the in-charge of Criminal Registry Mombasa Law Courts. He produced the typed proceedings in Anti-Corruption Case No. 5 of 2012 as **Dex 2**. This marked the close of the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants Case. The Attorney General relied on the joint survey report as their evidence and closed their Case. The 7<sup>th</sup> – 13<sup>th</sup> defendants did not call any evidence.

29. The parties thereafter filed their respective submissions. The plaintiff filed its submissions on 14<sup>th</sup> January 2019 and supplementary submissions on 25<sup>th</sup> March 2019. It rehashed the facts contained in the pleadings and the evidence rendered. The plaintiff also raised several questions which it gave answers to in support of its Case. I shall adopt some of those questions in determining this matter and they are as follows;

a) *Whether the plaintiff is the lawful registered owner of Block/60 and or Block/151 and whether it is entitled to be registered as the proprietor of title No. 151.*

b) Whether the opening of the register for Block/151 conferring interests to the 2<sup>nd</sup> – 13<sup>th</sup> defendants was illegal, null and or a mistake of fact.

c) Who pays the costs of the suit?

30. I will refer to the 1<sup>st</sup> and 2<sup>nd</sup>, 4<sup>th</sup> – 6<sup>th</sup> defendants as the defendants in the course of this judgment. The plaintiff has pleaded that it owns Kwale/Diani Beach Block/60 through purchase and which parcel of land it contends was renumbered as Kwale/Diani Beach Block/151. As at the time of purchasing parcel No. 60 in the years 1992 the plaintiff was not aware the renumbering had been done. It became aware when the Ethics and Anti-Corruption visited their offices in the year 2010 to investigate the titles to this land which then brought into question whether the plaintiff is entitled to be registered as the owner of title No. 151.

31. In proving its case, the plaintiff presented a bundle of documents filed on 9<sup>th</sup> December 2014. At page 34 and 35 of the bundle is a copy of a transfer of lease for Block 60 dated 18<sup>th</sup> September 1992 from prince Sadrudin Aga Khan to Leisure Lodge Club Limited in consideration of the sum of Kshs.11,000,000. At page 37 is a copy of records showing Leisure Lodge Club Limited registered as the owner at entry number 4 and a certificate of lease issued. A copy of the certificate of lease to Leisure Lodge Club issued on 22/9/1992 was exhibited at page 38 – 39. Leisure Lodge Club limited later changed its name to Dignified Holdings Limited (now plaintiff) on 13<sup>th</sup> August 1995. It is by virtue of these documents that the plaintiff is claiming ownership of Block/60 later renumbered as Block/151 after the subdivision in 1974-1975.

32. The defendants submit that it is not possible that the plaintiff could have a valid title in Kwale/Diani Beach Block/60 which does not exist in the map and which number ceased to exist in 1974 pursuant to the compulsory acquisition by the government for construction of a public utility road. These defendants further argue that Prince Aga Khan was never issued with a certificate of lease for the resultant plot No. Kwale/Diani Beach Block/151.

33. From the evidence on record, it is not disputed that a road was curved out from parcel numbers Diani beach/Block/59 & 60. The road is in existence to date and is referred to as Diani beach road. A joint survey report conducted pursuant to a court order made in MSA High Court Petition No. 37 of 2011 was produced as an exhibit by consent of the parties herein. The joint survey report revealed that Block 60 was sub-divided in 1974/1975 to create the numbers Block 151 and 152. That Block 152 is what constitutes part of the Diani beach road and Block 151 was the number given to the remainder plot.

34. The dispute herein therefore revolves around **the question whether the remainder plot remained to the original owner Prince Aga Khan who later passed on the interest to the plaintiff or the whole land was acquired thus was available for allocation to the defendants.** The plaintiff in contesting the defendants' title argued that they have always been in possession of the suit property hence the same was not available for allocation. To support its possession, the plaintiff relied on the evidence of Madcheza (PW4) given in ELC No. 31 of 2015 who said that he was the caretaker for the plaintiff in parcel numbers 59 & 60. The plaintiff further relies on the correspondences from the government agencies which were exchanged during the process of the extension of the lease for Block/60 which letters are exhibited from pages 41 – 46 of their bundles.

35. At page 41 is a letter dated 13/3/2007 applying for extension of the lease drawn by **PW2**. In response, the District Land Officer, MSA; District Surveyor Kwale; and District Physical Planning Officer Kwale all stated they had no objection to the proposed extension of the lease over Block/60. In the plaint filed, the Attorney General is described as sued on behalf of the Commissioner of Lands (and or the Successor in title to the said office) as well as the Lands Registrar Kwale. The plaintiff pleaded what it described as particulars of irregularity and or illegality and or fraud on the part of the defendants which particulars refer to the actions of the District Lands Registrar Kwale and the Commissioner of Lands. The plaintiff thus put the burden upon itself to prove the existence of the irregularities and or illegalities and or fraud alleged.

36. The 1<sup>st</sup> defendant in her submission stated that since Block/60 ceased to exist in 1974, that the plaintiff was guilty of not doing due diligence while buying the land in 1992 for failure to check the record in the respective offices and on the ground to establish the measurements of the land they were buying. The 1<sup>st</sup> defendant submitted that there was no lease to be extended in the year 2007 as Block/60 had ceased to exist. According to the 1<sup>st</sup> defendant, the certificate of lease exhibited at page 38 was not obtained at her client's office. The 1<sup>st</sup> defendant relied on the evidence of the Land Registrar and the Surveyor given in ELC case No. 31 of 2015.

37. The plaintiff produced documents that were issued pre-1974 before the sub-division of Block/60. It also presented a certificate of lease issued to His Excellency Prince Aga Khan on 8<sup>th</sup> Day of October 1976 for Block/60 measuring 25 acres. The joint survey report dated 14<sup>th</sup> February 2014 (page 156 – 157 of plaintiff's bundle) indicate that sub-division of parcel No. 60 is shown on the RIM sheet No. 201/3/7 of Diani Beach registration block in an entry dated 10<sup>th</sup> January 1975 giving the resultant Nos as 151 and 152. The survey report stated that the total areas of plot Nos 149 – 152 on the survey plan is the same as the total area of plot numbers 59 and 60 depicted on the lease documents.

38. The survey report thus confirms that the sub-division of parcel No. 60 was completed on 10<sup>th</sup> January 1975 when the entry was made. Title No. 60 thus ceased to exist as at 10<sup>th</sup> January 1975. It is not clear on what basis a certificate of lease bearing the same number was again issued on 8/10/1976. Although **PW2** said that he did a search before the plaintiff made the purchase in 1992 but no search was annexed in the plaintiff's documents. The transfer document annexed is also not endorsed by the Land Registrar to indicate the date of registration in favour of the plaintiff.

39. The plaintiff shifted blame on the Land Registrar and or the Commissioner of Lands and the respective government agencies for misleading it that Plot 60 was still existing. The 1<sup>st</sup> defendant submitted that the plaintiff is guilty of not doing due diligence. However, the letters produced in evidence by the plaintiff were not challenged by the 1<sup>st</sup> defendant. Pw2 in re-exam stated that the remainder land belonged to the original owner and that the Lands office ought to have notified Prince Aga Khan of the resultant numbers.

40. Neither of the defendants particularly the 1<sup>st</sup> defendant presented to this court evidence that the entire parcel no 60 was acquired. Similarly, for the 2<sup>nd</sup>, 4<sup>th</sup>-6<sup>th</sup> defendants ought to have provided a ground report to support their averment that this land was available for allocation. They claim the land through ancestry but concede that their ancestors had been evicted during the colonial rule. Once the land was given a title to prince Agakhan, in my opinion it cancelled the defendants claim on ancestry. DW1 reliance on the evidence adduced in the criminal proceedings in Anti-corruption case no 5 of 2012 where the then Commissioner of Lands said that their title could be genuine is not sufficient. The question this court believes the defendants ought to have answered was whether whole land had been compulsorily acquired thus it was available to be allocated to them.

41. In the case of **Niaz Mohamed Jan Mohamed vs the Commissioner of lands & 4 others (1996)eKLR**, the court held that where land was acquired by the government but not put to use, the remainder land must revert to the person who owned it before the acquisition. The court held stated thus; *“I am persuaded that the land in issue was acquired for a specific purpose which is consonant with the Constitution and the Land Acquisition Act, namely for the construction of a public road. It matters that the entire portion acquired was not used for that purpose. Unutilized portions in my view would remain as road reserves. And if it was the case that it was found unnecessary after all to have acquired the portion for the expressed purpose, does equity not require that the portions be surrendered back to the person from whom the land was compulsorily acquired” The law itself in Section 23 of the Land Acquisition Act appears to imply such equity although it relates to withdrawal of acquisition before possession is taken.”*

42. In this case where evidence is lacking to show what was compulsorily acquired, I find there were illegalities committed by the Commissioner of Lands and/or the Land Registrar sued as the first defendant. First, for maintaining the parcel file for plot no 60 (issuing a certificate of lease for the same in 1976) yet there was already created new numbers 151 and 152. The same would not have been reflected in the R.I.M if the registrar did not register the numbers. The second illegality was to process a separate set of allotment documents to the defendants without evidence that the suit parcel was available for allocation. In the HCCC 1/96 BABU OMAR & OTHERS –Vs- EDWARD MWARANIA & ANOTHER (UR) it was found that, *“there is nothing in the statutes relating to local authorities to exclude the courts ordinary jurisdiction to restrain Ultra Vires act or nuisance or to prevent breaches of trust*

43. The issue of whether plot 151 and 60 refers to the same land is answered by the survey report and the finding of **Mureithi J. in Raia A. Mkungu and 3 others Vs Kenya Anti-Corruption Commission and Ano MSA HC Petition No. 37 of 2011** paragraph 21 thus;

***“The Court’s visit to the locus in quo established, as agreed between the two surveyors representing all the parties, that the parcel numbers Kwale/Diani Beach Block/60 and Kwale/Diani Beach Block/151 referred to the same parcel of land, the suit property herein, the latter being the number of the parcel given after subdivision to provide road access which became parcel No. 152.”***

44. The link missing which the plaintiff was mandated to prove was whether the original owner was entitled to the remainder parcel of the land which got renumbered as Kwale/Diani Beach Block/151. The plaintiff in my view proved the same through the evidence of PW3 & PW4 who said they were in possession. Further the application process in renewing the lease and the government agencies stating they had no objection meant the ownership of the Plaintiff was recognized. If the said officers did the letters without physical inspection of the land, then it is them and not the plaintiff to bear their negligence.

45. The plaintiff cited the Case of;

a) **Eunice Grace Njambi Kamau & Another Vs Attorney General and 5 others (2013) eKLR** where it was stated thus;

***“...as to whether the third parties’ interests can be defeated by the invocation of overriding interests within the meaning of Section 28(b) and 30 of the Registered Land Act (repealed) which provisions are mirrored under Sections 26 and 28 of the reference to overriding interests under the referenced provision of necessity must mean the government has an overriding interest and can compulsorily acquire any registered land at any time if it is required for a public purpose. Those interest need not be noted in the land register. I do not understand overriding interests within the context of the provisions and in regard to compulsory acquisitions to mean land that has already been acquired by the government except of course land that has been acquired and the process of acquisition has not been completed within the context of the provisions for compulsory acquisition of interests in land under the provisions of the Land Act No. 6 of 2012. Rights of compulsory acquisition are conferred by specific provisions of the law (the Constitution and now Sections 107 to 133 of the Land Act of 2012) and these provisions have to be complied with for the rights to crystallise.”***

b) **Virenda Ramji Gudka & 3 others Vs Attorney General (2014) eKLR** it was held that;

***“To acquire land compulsorily for a public purpose which it can do at any time and/or where it is in the process of compulsorily acquiring land but the process has not been completed. In those situations, the interest need not be noted in the land register. In all other situations the government has to comply with the law ... These provisions have to be complied with for the rights of acquisition to crystallise. I have already held that the defendant has not established there was compulsory acquisition of the suit property and therefore the question of overriding interest under Section 28(e) of the Land Registration Act would be inapplicable.”***

46. In this instance, the process of acquisition was already complete. No green card/copy of records for Diani Beach Block/151 was exhibited by either the plaintiffs and or the defendants to ascertain that the interest of the government was/not registered as provided for in the Land Acquisition Act.

47. In terms of possession claimed by the 2, 4-6<sup>th</sup> defendants and the plaintiff, the plaintiff relied on the evidence of PW4 given in case No. 31 of 2015. PW4’s evidence stated that he was caretaker for both parcel No. 59 renumbered Block 149 & Block/60 renumbered as 151. The

plaintiff also stated that it had fenced off the land. Contrasted with the evidence of **DW1** that they were using the land for farming. However, details on when the defendants began farming this land after the eviction of their great grandfathers was not particularized. There was no corroboration of DW1's evidence which makes this court to doubt that the 2<sup>nd</sup>, 4<sup>th</sup> -6<sup>th</sup> defendants were in possession of the suit title before it was allocated to them.

48. The 3<sup>rd</sup> and 7<sup>th</sup> - 13<sup>th</sup> defendants besides filing their statement of defence did not adduce any evidence to support the facts pleaded in their defences. In the Case of **R Vs Omar Zonga and 9 others**, the plaintiff said the Commissioner of lands said in her evidence that some of the titles could not have been signed by her. As between the 2<sup>nd</sup> 6<sup>th</sup> defendants & 7<sup>th</sup> - 13<sup>th</sup> defendants there is none who blamed the other. The court shall presume that the 7<sup>th</sup> - 13<sup>th</sup> the defendants who did not pursue the suit to the conclusion lost interest in the case. Consequently, the title issued to them be and is hereby cancelled.

49. The plaintiff also urged the Court to cancel the 2<sup>nd</sup>, 4<sup>th</sup> - 6<sup>th</sup> defendants title because it was unprocedurally acquired. Having weighed the evidence presented by both sides, I am persuaded to find that there was no proof that the whole parcel number 60 was acquired. Neither was there evidence that Prince Aga Khan was requested to surrender the title no 60 for cancellation thus creating the confusion of transactions being registered on it in 1992. Prince Aga Khan could not be disentitled of the remainder of the land when only a portion of the land was curved out for the road merely because he did not surrender the title he held.

50. In the circumstances, I safely conclude that there was no land that the 1<sup>st</sup> defendant could allocate to the 2<sup>nd</sup> -6<sup>th</sup> defendants in the year 2006 when they attempted to do so. That the allocation was therefore null & void and could not confer any rights on the 2<sup>nd</sup> -6<sup>th</sup> defendants. The result of the null & void action of the 1<sup>st</sup> Defendant issuing title to the 2<sup>nd</sup> -6<sup>th</sup> defendants is also null and void. Consequently, I find merit in the plaintiff's case and enter judgement for it against the defendants jointly and severally as follows;

**(a) A declaration be and is issued that all that land known as Kwale/Diani Beach Block/60 occupies the same geographical position as Kwale/Diani Beach Block/151 and/or in the alternative, a declaration that the two title numbers Kwale/Diani Beach Block/60 and Kwale/Diani Beach Block/151 refer to the same parcel of land.**

**(b) A declaration be and is hereby made that the plaintiff is the lawful proprietor of the leasehold interest in all that land known as Kwale/Diani Beach Block/151, formerly known as Kwale/Diani Beach Block/60 and/or Title number CR. 12859 under Land Reference Number 5004/14.**

**(c) A declaration is made by this court declaring that the opening of a register for Kwale/Diani Beach Block/151 by the Lands Registrar, Kwale while the register for the same parcel of land under title number Kwale/Diani Beach Block/60 was still open was unlawful, illegal, null and void and/or a mistake of fact.**

**(d) A declaration be and is hereby given that the allotment of Kwale/Diani Beach Block/151 by the Commissioner of Lands to the defendants named herein was illegal, null and void and/or a mistake of fact.**

**(e) A declaration be and is hereby issued that the certificates of title issued to the defendants herein for Kwale/Diani Beach Block/151 are unlawful, illegal, null and void and the two sets of title one issued to the 2<sup>nd</sup> -6<sup>th</sup> defendants and another to 7<sup>th</sup> - 13<sup>th</sup> defendants be and are hereby cancelled.**

**(f) Each party to meet their costs of the suit**

**Dated, signed and delivered at BUSIA this 12<sup>th</sup> day of May, 2020.**

**A. OMOLLO**

**JUDGE**

**Judgment delivered electronically through mail this 12<sup>th</sup> Day of May, 2020 due to Covid-19 pandemic.**

**A. OMOLLO**

**JUDGE**