



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.70 OF 2017

NATHAN WALIAULA MUNOKO.....PLAINTIFF

VERSUS

1. THE HONOURABLE ATTORNEY GENERAL

**(Sued on behalf of the Cabinet Secretary Ministry
of Lands, Housing and Urban Development)**

2. JOSEPH TUVA KONDE

3. VISTA PROPERTIES LIMITED

4. DENMAN PROPERTIES LIMITED.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Plaint dated 31st January 2017, Nathan Waliaula Munoko(the Plaintiff) prays for Judgment against the four (4) Defendants herein for:-

a) A declaration that he is the absolute registered proprietor of the suit premises known as Kilifi/Jimba/334 and he is entitled to quiet possession without any reference (to) anyone else claiming or acting through the Defendants and for an order of vacant possession and eviction of the Defendants;

b) A declaration that the allocation from the 1st Defendant to the 2nd Defendant was null and void ab initio and ineffectual to confer any right, interest or title upon the 2nd Defendant in the first instance thereby rendering the subsequent transfers null and void;

c) An order for rectification of the land register by cancellation of the entry made in favour of the Defendants so as to restore the suit property to the Plaintiff as the proprietor of the land;

d) An order for permanent injunction against the Defendants by themselves, their agents, servants or assigns restraining them from leasing, transferring, charging, entering upon, developing, or in any other manner howsoever from dealing with Kilifi/Jimba/334;

e) General damages for fraud;

f) Costs of and incidental to the suit;

g) Mesne profits;

h) Interest on (d) (e) and (f) at Court rates and

i) Any other relief that the Court may deem fit and just to grant.

2. These prayers arise from the Plaintiff's contention that at all times material to this suit, he was the registered owner of the said parcel of land known as Kilifi/Jimba/334 measuring 1.5 Ha and situated within Kilifi County (the suit property). The Plaintiff avers that he acquired the suit property following a land adjudication exercise conducted in the area and was subsequently issued with a title deed thereto on 25th July 1979.

3. It is further the Plaintiff's case that sometime in the year 1992, the Ministry of Lands requested him to surrender his free hold title in compliance with a Gazette Notice No. 2205 of 1987 for the purposes of being issued with a leasehold title for 99 years. Upon surrender of the title, the Plaintiff was consequently issued with a Letter of Allotment in respect of the suit property effective 1st March 1992.

4. The Plaintiff avers that sometime in the year 2000, the 1st Defendant herein irregularly and fraudulently allocated the suit property to the 2nd Defendant despite the knowledge that the Plaintiff was the registered owner thereof. Despite demand made and notice of intention to sue, the Defendants have failed to admit liability and to rectify and/or restore the title to the Plaintiff's name and hence this suit.

5. But in a Statement of Defence dated 1st September 2017 and filed herein on 29th September 2017, the Honourable the Attorney General, sued herein on behalf of the Cabinet Secretary, Ministry of Lands, Housing and Urban Development (the 1st Defendant) denies that the Plaintiff was the registered proprietor of the suit property as alleged or at all and puts the Plaintiff to strict proof of the allegations.

6. In addition, the 1st Defendant denies the particulars of fraud and illegality pleaded by the Plaintiff and states that any dealings on the suit property if any including any transfer thereof were done in compliance with the law.

7. Joseph Tuva and Vista Properties Ltd sued herein as the 2nd and 3rd Defendants neither entered appearance nor filed a Defence in these proceedings.

8. On its part, Denman Properties Ltd (the 4th Defendant) denies that the Plaintiff was the registered proprietor of the suit property. In a Statement of Defence dated 10th October 2017, the 4th Defendant avers that it purchased the suit property on or about 27th September 2006 from the 3rd Defendant herein at a consideration of Kshs 7,125,000.00 after complying with all the conveyancing protocols. The 4th Defendant further avers that the transfer was duly registered at the Kilifi District Land Registry and it was issued with a title deed on the same day in its name.

9. The 4th Defendant avers that when it bought the property, there was no caveat or caution and it was a bona fide purchaser for value consideration without notice. The 4th Defendant further avers that it carried out a search over the suit property prior to and after purchasing the same. It is its case that since it purchased the property, it has been in physical, quiet and uninterrupted enjoyment and possession thereof and it has been meeting all the requisite outgoings such as land rents and rates thereof.

10. In the alternative, the 4th Defendant avers and affirms that the parcel file for the suit property was opened on 22nd December 1986 and that it has a good and indefeasible title thereto. The 4th Defendant avers that if there was any omission, fraud or mistake relating to the issuance of the title deed, the 4th Defendant had no knowledge thereof, was not responsible in any way therefor and hence the records at the relevant registry cannot be rectified to affect its title.

11. It is further the 4th Defendant's case that this Court has since issued declarations in its Judgment delivered on 8th May 2015 in **Malindi Petition No. 11 of 2012; Denman Properties Ltd & 4 Others –vs- The Hon. Attorney General & 6 Others** declaring that the issuance of Certificates of Leases based on the Report of the Task Force on Kilifi Jimba and Chembe Kibabamshe dated June 2010 and the letter by the Hon. Gideon Mung'aro dated 20th August 2010 was in violation of the Constitution, null and void.

12. The 4th Defendant further asserts that the said Judgment equally declared that the 4th Defendant herein is the legal proprietor of a number of parcels of land including the suit property herein. The 4th Defendant therefor asserts that the Plaintiff is not entitled to any of the reliefs sought in the Plaint and urges this Court to dismiss the same with costs.

The Plaintiff's Case

13. At the trial herein, the Plaintiff (PW1) testified as the sole witness in support of his case. Relying on his Statement filed herein dated 31st January 2017, PW1 told the Court that he was allocated the suit property by the Commissioner of Lands and upon payment of the necessary fees therefor, was issued with a Land Certificate on 25th July 1979.

14. PW1 told the Court that he then took possession of the property until sometime in 1992 when he was requested to surrender the freehold title he held to be replaced with a 99 year leasehold title. Sometimes in the year 2000 however, the Settlement Funds Trustees (SFT) purported to allocate the property to the 2nd Defendant who then proceeded in 2006 to transfer the same to the 3rd Defendant. In the same year, the 3rd Defendant transferred the property to the 4th Defendant.

15. PW1 testified that he had been in possession of the land since 1979 and that the same was not a Settlement Scheme for the SFT to allocate in the manner that they did. PW1 told the Court the land was never vested in the SFT and the allocation and subsequent transfers had no basis and infringed his rights to property as protected under Article 40 of the Constitution.

16. On cross-examination, PW1 told the Court that he bought the land from one Kahindi Charo Kiponda who had been allocated the land

through an adjudication process. Some years later he received a letter from the Commissioner of Lands indicating that the land had been erroneously allocated to himself. PW1 testified however that he only realised in 2008 that the land had been registered again in the name of a different person.

17. PW1 admitted that he surrendered his title to the Government in 1992. He however told the Court that he was unaware of **Malindi Petition No. 11 of 2012** which declared that the property belonged to the 4th Defendant. He was equally unaware of a report prepared by a Task Force which was appointed to deal with problems of land in the Kilifi Chembe/Kibabamshe area which was the subject of that Court case.

18. PW1 conceded that he was not born in Kilifi County. He further told the Court that he was aware land adjudication was meant to allocate land to the locals. In this respect, he told the Court that he had bought the suit property from a local person.

The Defence Case

19. In support of their respective cases, the 1st and 4th Defendant each called one witness.

20. DW1-Stella Kinyua Gatwiri is the Land Registrar at the Kilifi District Land Registry. She told the Court that as per their records, there was a transfer of the suit property from the Government to Joseph Tuva Konde (the 2nd Defendant) on 28th February 2000. The land was later transferred and a title deed was issued to Vista Properties Ltd (the 3rd Defendant) on 13th September 2006. Two weeks later on 27th September 2006, the property was transferred to Messrs Denman Properties Ltd (the 4th Defendant herein).

21. DW1 further testified that there is an entry registered on the file of orders issued on 13th May 2015 in **Malindi ELC Petition No. 11 of 2012** directing the reconstruction of the records regarding the said property. They also had copies of the reconstructed Green Card and a misplaced one for the same property. DW1 however told the Court that she was not aware if the suit property was declared a Settlement Scheme. On the contrary, she told the Court the property was in an adjudication section.

22. On cross-examination, DW1 re-affirmed that the property was not in a Settlement Scheme. She told the Court that the first embargo on Kilifi/Jimba was lifted in 1982 but another one was placed in 1986. The National Land Commission however cleared the properties in February 2019.

23. DW1 testified that while the 2nd Defendant was allocated the land, it was not available for allocation through the SFT. She conceded the land was the subject of double allocation and hence the embargo that was placed on it. She further told the Court that it appeared that by the time the land was allocated to the 2nd Defendant, it was not available for alienation.

24. DW2- Sofia Abdullahi Chacha is a shareholder and director of the 4th Defendant company. Relying on her statement filed herein dated 7th May 2018, DW2 testified that the 4th Defendant is the registered proprietor of the suit property having purchased the same on 27th September 2006 from the 3rd Defendant at a consideration of Kshs 7,125,000/-.

25. DW2 told the Court they bought the property in good faith having confirmed that it was registered in the 3rd Defendant's name and that there was no caveat or caution registered thereon. She told the Court the 4th Defendant was not under any obligation in law to inquire or ascertain the circumstances in or the consideration for which the 3rd Defendant came to be registered as the proprietor thereof.

26. DW2 further testified that since purchasing the same, the 4th Defendant has been in physical, quiet and uninterrupted enjoyment and possession of the suit property without any interference from any quarter and that they have been meeting all outgoings such as land rates and rent due to the authorities. Their ownership of the property was further confirmed by a Judgment delivered on 8th May 2015 by the Honourable Justice Angote in **Malindi Petition No. 11 of 2012; Denman Properties Ltd & 4 Others –vs- The Honourable Attorney General & 6 Others**.

Analysis and Determination

27. I have perused and considered the pleadings as filed herein by the Plaintiffs and the Defendants, the oral testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities as placed before me by the Learned Advocates appearing for the respective parties herein. The 2nd and 3rd Defendants however neither entered an appearance nor did they participate in these proceedings in any way.

28. The Plaintiff –Nathan Waliaula Munoko- has urged this Court to make a declaration that he is the absolute registered proprietor of all that parcel of land known as Kilifi/Jimba/334 measuring approximately 1.5 Ha and situated at Kilifi within Kilifi County (the suit property).

29. The Plaintiff further urges this Court to declare that the allocation of the suit property to the 2nd Defendant by the 1st Defendant was ineffectual to confer any right, interest or title upon the 2nd Defendant in the first instance and that the subsequent transfers to the 3rd and 4th Defendants were null and void. Accordingly he craves further for an order rectifying the register by cancelling the entry in favour of the Defendants and an order of injunction restraining the Defendants from dealing with the suit property.

30. It is the Plaintiff's case that following a land adjudication exercise conducted in the Kilifi Jimba adjudication section in 1979 one Kahindi Charo Ponda was allocated the suit property. By a Sale Agreement executed between himself and the said Kahindi Charo Ponda, the Plaintiff purchased the said parcel of land at a consideration of Kshs 5,000/-.

31. The Plaintiffs told the Court that subsequent to the said purchase, he was issued with a title deed for the property registered directly in his name on 25th July 1979. The Plaintiff testified that he thereafter took possession of the land and used it for a couple of years. However, by a Gazette Notice and a letter addressed to him issued by the Government in the year 1986, he was asked to surrender the said title on account that the Land Adjudication Act (Cap 284) had erroneously been applied to Government land and that his title was as a result defective. The letter further intimated that the Government would consider re-allocating the suit property to him under a different registration system.

32. As it turned out, the Plaintiff had some time in 1980 used the suit property as collateral for a loan from Messrs Habib Bank A.G Zurich and was unable to surrender it as required. By a letter dated 17th July 1986, the Plaintiff communicated this position to the District Land Registrar Kilifi and requested that the defective title deed be cancelled and that a proper one be issued to him under the Government Lands Act Cap 280 of the Laws of Kenya.

33. That however did not happen until the property was discharged by the Bank upon which by a letter dated 6th February 1992, the title was forwarded to the Commissioner of Lands. Upon surrender of the title, the Plaintiff told the Court he was issued with two letters of allotment-one dated 17th February 1992 and the other dated 27th February 1992. The letter of allotment dated 27th February 1992 was however not among the exhibits produced by the Plaintiff herein.

34. It was the Plaintiff's case that he continued following up with the Government for the issuance of the new title. Sometime in 2008 however, it came to his notice that a new title deed had been prepared and issued to the 4th Defendant herein. Despite complaints made to the concerned Government Departments including one to the National Land Commission, nothing had been done to re-issue him with a title deed and or to cancel the one issued to the Defendant.

35. As it turned out, the Government's position as articulated by the Land Registrar Kilifi –Stella Kinyua Gatwiri (DW1, is that the parcel file for the suit property was registered on 22nd December 1986. On 28th January 2000, it was allocated to Joseph Tuva Konde (the 2nd Defendant) and a title deed was issued to him in that regard. The records further reflected that on 13th September 2006, the 2nd Defendant transferred the property to Vista Properties Ltd (the 3rd Defendant) who in turn transferred the same after two weeks on 27th September 2006 to Denman Properties Ltd (the 4th Defendant).

36. That position was supported by the testimony of the 4th Defendant whose director Sofia Abdullahi Chacha (DW2) confirmed that they purchased the suit property from the 2nd Defendant on 27th September 2006 at a consideration of Kshs 7,125,000/-. According to DW2, the 4th Defendant company bought the property in good faith and as bona fide purchasers having conducted a search at the relevant registry and having confirmed the proprietorship of the 3rd Defendant.

37. DW2 told the Court that since purchasing the same, the 4th Defendant has been in physical, quiet and uninterrupted possession thereof without any interference from any quarter and that they have been meeting all outgoings such as land rates and rent due to the relevant authorities.

38. It was also the 4th Defendant's case that the suit property had been the subject of proceedings in **Malindi ELC Petition No. 11 of 2012; Denman Properties Ltd & 4 Others –vs- The Honourable Attorney General and 6 Others** and that in a Judgment delivered on 8th May 2015, this Court had declared them the rightful owners of the suit property.

39. From the material placed before me, there was no doubt that the parcel of land known as Kilifi/Jimba/334 was initially registered in the name of the Plaintiff herein. In support of his case, the Plaintiff produced before me a Land Certificate for the said parcel of land issued in his name on 25th July 1979. It was equally evident from the receipts issued in his name that on the same 25th July 1979 he had paid to the Kilifi Land Registry a sum of Kshs 70/- for the process of adjudication and the Land Certificate and that on 7th August 1979, he paid a further Kshs 10/- as survey fees.

40. There was also evidence that immediately upon acquisition of the title, the Plaintiff used it as collateral to secure a loan and that he had intentions of selling the same to a third party. In this respect in his letter dated 12th September 1980, addressed to the Manager, Habib Bank A.G Zurich, Nairobi, the Plaintiff instructed the Bank as follows:-

“With reference to the loan of Kshs 60,000/- availed to me from your Bank against the loan documents belonging to my property title number Kilifi/Jimba/334 I request you hand over these documents to M/s Charter Radio Service against their payment of Kshs 100,000.00/- to my following accounts with your Bank in the following manner:-

i. Kshs 60,000.000/- to be deposited in my loan account number 5017 with you.

ii. Kshs 40,000.00 to be deposited in my current account number 470 with you.

Please note that I have sold the above property to M/s Charter Radio Service against Kshs 100,000.00/- and all the formalities for the transfer of the title deed, etc will be carried out by me with M/s Charter Radio Service directly.”

41. It was not clear whether the Bank carried out the Plaintiff's instructions. What was clear was that the sale and transfer never took place due to other Government restrictions in place at the time. This can be discerned from a letter dated 24th September 1981 authored by Ms Khanna & Company Advocates who were apparently retained to conduct the sale transaction. In the said letter addressed to the Provincial Commissioner of the then Coast Province and copied to the Plaintiff herein, the Advocates state as follows:-

“Re: Kilifi/Jimba/334

The above property is being sold by Mr. Nathan Munoko to Mr. Madatali Shaburuli Charter.

We are informed by the Kilifi Land Registrar (that) this plot being along the beach Presidential consent is required before the said plot can be transferred and such application must be channeled through the Commissioner of Lands. We are informed that there are forms to be submitted which are obtainable from you. We shall be glad if you will kindly let us have the requisite forms to enable us to fill in the same and submit through the normal channel for obtaining the Presidential consent.

We look forward to receiving the forms at an early date.”

42. Again, it was apparent that the Presidential consent was never given and that a couple of years down the line, the Plaintiff remained the registered proprietor of the suit property. Subsequently and by a Gazette Notice published vide the Kenya Gazette Notice No. 2505 of June 1986, the Commissioner of Lands gave notice to all land owners within among other areas the Kilifi/Jimba Land Adjudication Section to respond to a letter sent to them in regard to their ownership thereof before the end of July 1986. The Gazette Notice further requested the addressed land owners who had not received the letter to report to the District Land Officer, Kilifi District before 31st July 1986 while those who had received the letter were to contact the Commissioner of Lands as soon as possible.

43. As one of the landowners, the Plaintiff received a letter dated 8th July 1987 from the Commissioner of Lands stating as follows:-

“Allocation of Plots inKilifi Jimba, Kilifi District

It has come to light that between 1973 and 1983, a large number of people erroneously claimed land in the above mentioned areas. You are one of those people as you are occupying Plot No. Kilifi/Jimba/334.

I wish to advise that your occupation of the said land/plot is improper and not in accordance with the law.

Apparently the Land Adjudication Act (Cap 284) was erroneously applied to Government Land. This Act only applies to Trust Lands. It could therefore not be used to facilitate your registration as the absolute owner of the said plot. It follows that in law, your registration as the owner of the plot(s) in question was a nullity ab initio and consequently the title you hold in respect thereof is defective title.

This being the legal position, the Government has decided to cancel your title. To this end, you are requested to report to the Land Registrar Kilifi who shall cancel your defective title and rectify the register.

I wish, however, to intimate to you that the Government is considering to allocate the piece of land you now occupy to you under the Government Land Act.”

44. As it turned out, as at the time the Plaintiff received this letter, the title was still being held by the Bank. Accordingly on 17th July 1986, the Plaintiff wrote to the District Land Registrar Kilifi as follows:-

“Re: Land Title Kilifi/Jimba/334 Nathan Waliaula Munoko

Please refer to Commissioner of Lands Letter No....of 8th July 1986 on the subject of Land Titles in Kilifi/Jimba which are said to be defective.

My title deed Kilifi/Jimba/334 is now held by a Bank as security for a loan and I cannot therefore forward it.

I would however, like to request that this defective title deed be cancelled and another one (be) issued under the Government Land Act Cap 280.”

45. No other title was however issued to the Plaintiff and the matter remained in obedience until sometime in 1992 when the title was released by the Bank and was forwarded to the Commissioner of Lands vide a Letter dated 6th February 1992 authored by one Musikari Kombo whom the Plaintiff informed this Court was his son-in-law.

46. The Plaintiff told the Court that he was thereafter on 17th February 1992 issued with another Letter of Allotment for the very piece of land. From a series of correspondence he produced herein, he has since been pursuing the issuance of a new title deed in lieu of the “defective” one that he returned to the Government for cancellation.

47. Unknown to the Plaintiff and as confirmed by the evidence of the Land Registrar Kilifi (DW1), even as he was being issued with a new letter of offer for the suit property, the Government had through the 1st Defendant opened a new Register for the property way back in 1986.

48. As the Plaintiff engaged the 1st Defendant in a series of correspondence, the suit property was quietly registered in the name of one Joseph Tuva Konde (the 2nd Defendant) in the year 2000. The 2nd Defendant transferred the property to the 3rd Defendant on 13th September 2006 and a fortnight later, the 4th Defendant herein would acquire the same from the 3rd Defendant. Indeed so quiet was the transaction that

the Plaintiff told the Court he only learnt of it in the year 2008.

49. From the material placed before me, there was no evidence whatsoever that prior to the creation of the new Register in 1986 and the registration of the 2nd Defendant of the suit property in the year 2000, the Plaintiff had been given a chance to explain how he acquired the said title and an explanation given to him why the same was defective and, as a result, needed to be allocated to someone else.

50. Dealing with a similar situation in *Joseph Manga Mugwe –vs- Attorney General & 8 Others (2018) eKLR*, the Honourable Justice Angote delivered himself as follows:

“Considering the Plaintiff had surrendered the title for parcel Number 391 on the government’s misrepresentation that he will be issued with a fresh title document, and in view of the fact that the government went ahead to issue him with a letter of allotment for the same land, the Plaintiff was either entitled to the land or compensation for the land.”

51. I am in agreement with my Learned Brother that in circumstances such as this where the Plaintiff had acquired title, taken possession of the land, used the same and only surrendered it on the purport that he would be issued with a proper title, there was a legitimate expectation from the Plaintiff, more so after being issued with a Letter of Allotment that the land still belonged to him and that he would be issued with a title thereto.

52. Upon registration of the Plaintiff as the registered owner of the land on 25th July 1979, the Plaintiff acquired all rights and interests thereon as by law provided. The position of such a holder of a title deed issued in respect of a parcel of land is given at Section 26(1) of the Land Registration Act as follows:-

“The Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party, or

b) Where the Certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme.

53. Thus as it were, the law is extremely protective of title and provides only two instances for the challenge thereof. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. Re-affirming this position in *Dr. Joseph Arap Ngok –vs- Justice Moijo Ole Keiwua & 5 Others, Civil Application No. Nai 60 of 1997 (unreported)*, the Court of Appeal observed that:-

“The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

54. In the matter before me, nothing was placed before me to demonstrate how the parcel of land which had been registered in the Plaintiff’s name in 1979 came to be vested on the Settlement Fund Trustees in the year 1986. The subsequent allocation of the land to the 2nd Defendant in the year 2000 and all subsequent transfers were therefore without basis.

55. At any rate, the Plaintiff’s title being the first in time should prevail. As the Honourable Lenaola J (as he then was) stated in the similar case of *Gitway Investment Ltd –vs- Tajmall Ltd & 3 Others (2006) eKLR*:-

“My understanding is therefore that the title given to Gitway in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors –vs- Commissioner of Lands C.A. No. 71/1997 (unreported) is the” grant(that) takes priority. The land is alienated already.”.....

Like equity keeps teaching us, the first in time prevails so that in the event such as this one where by mistake that is admitted the Commissioner of Lands issues two titles in respect of the same parcel of land then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity.”

56. In the instance suit, it was clear to me that there had been no cancellation of the Plaintiff’s title before the new one was issued to the 2nd Defendant. As Angote J observed in the Joseph Manga Mugwe Case (Supra):-

“It cannot be said, by any stretch of imagination, that the Plaintiff was holding an invalid title without due process being followed. I say so because once the government issues to a person a title document, then such a title can only be cancelled after the person has been heard and in accordance with the provisions of the law. That did not happen in respect of Plot Number 391. Consequently I find the government’s action of cancelling the Plaintiff’s Land Certificate vide gazette notice Number 2505 of 30th May 1986 to be illegal, null and void.”

57. In the same vein and having found that the 1st Defendant irregularly and unprocedurally registered the suit land in the name of the 2nd Defendant, the same and the consequent transfer cannot stand.

58. While it was contended by the 4th Defendant that the suit property was in *Malindi ELC Petition No. 11 of 2012* determined to belong to the 4th Defendant, it is clear to me that the Plaintiff herein was not a party to those proceedings. The facts regarding the existence of the Plaintiff's title was not brought before that Court and the arising decision was therefore arrived at per incuriam.

59. In the result, I am satisfied that the Plaintiff has proved its case on a balance of probabilities. Save that I did not find any basis for the award of general damages and mesne profits, Judgment is accordingly hereby entered for the Plaintiff as prayed in the Plaint.

Dated, signed and delivered at Malindi this 10th day of July, 2020.

J.O. OLOLA

JUDGE