



Murage (Suing as the Administrator of the Estate of Bernard Chiori) v Land Registrar, Kilifi County & another; KCB Bank Kenya Limited (Interested Party) (Environment and Land Case E046 of 2022) [2025] KEELC 6488 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6488 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE E046 OF 2022
FM NJOROGE, J
SEPTEMBER 30, 2025

BETWEEN

JOSEPH NICHOLAS MURAGE APPLICANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF BERNARD CHIORI

AND

LAND REGISTRAR, KILIFI COUNTY 1ST RESPONDENT
MASUMBUKO YERRY KOMBE 2ND RESPONDENT

AND

KCB BANK KENYA LIMITED INTERESTED PARTY

JUDGMENT

1. The plaintiff is suing as the administrator of the estate of Bernard Chiuri Murage (deceased). He filed a plaint dated 3/8/2022. The orders sought were tailored as follows: -
 - a. That the honorable Court be pleased to issue an order restraining the 1st defendant herein from cancelling the plaintiff's title issued on 22nd September 1978, amending, rectifying, and or otherwise interfering with the current Land Register and records pertaining to Land Reference Number Chembe/Kibambamshe/393;
 - b. That this honourable Court be pleased to order that the 1st defendant to attend court and produce the Land Register (Green Card) for Land Reference Number Chembe/Kibambamshe/393;
 - c. The honorable court be pleased to order the County Land Registrar Kilifi to register the Certificate of Confirmation of Grant issued in High Court at Nairobi Succession Cause



Number 438 Of 1988 upon the plaintiff submitting an application and paying the requisite fees;

- d. The honorable Court be pleased to issue a permanent injunction restraining the 2nd defendant his servants, agents and or employees and or anyone else claiming rights authority and or ownership under him from selling marketing/advertising for sale disturbing, trespassing, alienating, claiming, ownership and or interfering with a plaintiff quiet possession, peaceful enjoyment and or ownership of the path of front known and registered as Land Reference Number Chembe/Kibambamshe/393 or any part thereof.
 - e. That the 2nd defendant surrender any document(s) of title over Land Reference Number Chembe/Kibambamshe/393 in his possession to the Land Registrar Kilifi for emergency cancellation within 7 days of this order failure to which the said documents shall be deemed cancelled and invalid by the order of this court;
 - f. That an order do issue confirming that the only valid title to Land Reference Number Chembe/Kibambamshe/393 is the one issued to Bernard Chiori Murage on 22nd September 1978 and further order that any other registration to the contrary that may exist be cancelled;
 - g. The honorable Court be pleased to grant any other order and or relief that it may deem fit to grant;
 - h. That costs of the suit be borne by the defendants.
2. The plaintiffs claim is that the late Bernard Chiuri Murage is the registered proprietor of Chembe/Kibambamshe/393 (hereinafter also referred to as “the suit property”). Vide a certificate of confirmation of grant in Nairobi High Court Succession Cause Number 438 Of 1988 the suit property was transmitted to the plaintiff and he remains in possession thereof to date. The property is also charged KCB Bank Limited, the interested party herein vide and instrument of charge registered at the Kilifi District Land Registry on 8th March 1982.
 3. The plaintiff has attempted to register the transmission pursuant to Nairobi High Court Succession Cause Number 438 Of 1988 at the land registry on two occasions but the 1st defendant has declined to accept the forms, alleging that there existed a civil suit over the property.
 4. The plaintiff avers that there is no valid ground advanced by the 1st defendant for his failure, neglect or refusal to register the plaintiff’s interest pursuant to the succession proceedings.
 5. The plaintiff conducted further investigations and found that Malindi ELC Number 30 Of 2011 had been filed by third parties and neither the plaintiff nor the chargor Bank were joined as parties to that suit. The plaintiff discloses that he tried to arrest the judgment in that suit and to secure his joinder in the suit but was unable to do so before the judgment was issued in favour of the second defendant declaring him a bona fide purchaser of the property.
 6. However, when the matter went to the Court of Appeal upon finding that the plaintiff was in possession and had a title to the suit property, the Court of Appeal granted injunctive orders against the defendants in that case, which orders collapsed on 29th July 2022 when it was struck out the plaintiff’s appeal, stating that his is a fresh cause of action as he did not participate in the proceedings before the High Court, which finding has necessitated the present suit.
 7. On 1st August 2022 the second defendant attempted to have the 1st defendant ratify records over the property on purporting that he was enforcing a decree from the High Court emanating from a



declaratory judgment and on 2nd August 2022, he attempted to forcefully enter the suit property and evict the plaintiff by way of goons.

8. The plaintiff maintains that no coercive order was issued by the High Court to the Land Registrar Kilifi in the declaratory judgment pursuant to Section 80 of the [Land Registration Act](#), but that it only declared that the 2nd defendant was a bona fide purchaser; that even perchance that judgment was enforceable, the same cannot be executed against the plaintiff or the interested party who have valid and registered interests in the suit land but who were not parties to the suit Malindi ELC Number 30 Of 2011.
9. The plaintiff also avers that the 1st defendant's refusal to accept and register the Certificate of Confirmation of Grant issued in Nairobi High Court Succession Cause Number 438 Of 1988 is illegal and contrary to the [Land Act](#) and the [Land Registration Act](#). He also avers that the attempt to procure an amendment of the land records and the cancellation of the plaintiff's title over the suit land using a declaratory judgment and decree is contrary to the mandatory requirements of Section 80 for the [Land Registration Act](#).

Defence of The Interested Party

10. The Interested Party filed a defense dated 11th October 2022. It is stated that it granted the deceased financial accommodation in the sum of Kenya Shillings 500,000 which loan was secured by the deceased's interest in the suit land. The loan attracted an agreed interest rate of 14% per annum calculated on a daily balances and debited monthly by way of compound interest. The interested party released the loan funds to the deceased after registration of the charge and the borrower then paid back the loan facility in full; there is no outstanding loan sum due. The interested party also executed a Discharge of Charge in the prescribed form in respect of the suit land and that it has no further interest in the suit and hence no cause of action lies against it in the present suit. However, the interested party was struck out of this suit vide an order of this court issued on 7th December 2022.

The 1st Defendant's Statement of Defence

11. The 1st defendant filed his Statement of Defence dated 21st March 2023. He stated that the present suit does not disclose any reasonable cause of action as against him; that he is not privy to the allegations of the plaintiff's claim to ownership of the suit land. He denied the particulars of irregularity alleged against him. He avers that no notice of intention to sue was served on him pursuant to Section 13 of the [Government Proceedings Act](#). He prays that the plaintiff's suit be dismissed with costs.

2nd Defendant's Statement of Defence and Counterclaim.

12. The above mentioned pleading was filed on 16th June 2023. In the defence, the 2nd defendant denied the contents of the plaint. He avers that the plaintiff failed to demonstrate that the deceased was the legal or lawful and registered proprietor of the suit land who received a Letter of Allotment and, after fulfilling set conditions, received and held good title.
13. The second defendant averred that the issue of ownership and/or title to the suit land has been dealt with in Malindi ELC Number 30 Of 2011 consolidated with HCCC Number 22 Of 2011; that the plaintiff's remedy lies in seeking compensation from the government; that the defendant is a bona fide purchaser for value without notice having acquired good title from Joseph Kashuru Mumbo as declared in Malindi ELC Number 30 Of 2011; that his title is valid as it is reflected in all land records; that he has all right to enforce the decree arising from a judgment of the court. He denies allegations of



illegality irregularity and fraud. He denies jurisdiction of this court at paragraph 17 and immediately thereafter in paragraph 18 admits it.

14. The 2nd defendant counterclaims against the plaintiff in the main suit for a declaration that he has the right title to the suit land which he alleges was obtained regularly and lawfully. He sets out the facts as follows: In June 1999, Mr Joseph Kashuru was issued with a letter of offer by the Ministry of Lands with respect to Plot Number 393 measuring 10 acres at Chembe Kibabamshe Settlement Scheme in Kilifi County which he did accept as per the conditions of offer; he then purchased the land from the Settlement Fund Trustees for the total sum of Kenya Shillings 19 987/- and was issued with a receipt for payment and thereafter title issued to him on 19th January 2003. Consequently, the 2nd defendant purchased the suit property from Mr Kashuru and the transfer for that transaction was registered on 28th January 2009; title then issued to the 2nd defendant on 12th November 2010; that he has already taken possession of the property and developed it and has been settling land rates due thereon with the Municipal Council of Malindi. The 2nd defendant avers that the property title was unencumbered during acquisition and remains in that state to date, with him being reflected as the proprietor. He denies that the property has ever been subdivided or that the plaintiff's confirmation of grant is registrable against the title. He prays for a permanent injunction restraining the plaintiff from interfering with the suit land.

Plaintiff's Reply to Defence and Defence to Counterclaim.

15. This pleading was filed on 23rd June 2023. It denied the contents of the defence of the 2nd defendant and reiterated the matters contained in the plaint. The plaintiff stated that the 2nd defendant has attempted to register an unenforceable declaratory judgment against the suit title while holding and uttering two fraudulent documents of title dated 12th November 2010 and 10th August 2012. He states that there has never been any suit filed by the plaintiff as against the two defendants herein and that he was not a party to Malindi High Court ELC Number 30 Or 2011. He relies on the defence filed by the 1st defendant at paragraph 3 as confirming the true position on ownership of the suit land as per the land records. He asserted that in Malindi COA APPL E10 of 2020 the Court of Appeal settled the matter of possession and issued orders preserving the suit land and the plaintiff's quiet possession thereof, and that he is still in occupation. He avers that he pays for the utilities connected to the suit land. He avers that the deceased never sold the land to anyone including the 2nd defendant. He terms the counterclaim as incurably defective and statutorily time barred under Section 12 of the *Limitation of Actions Act*, the limitation period having allegedly lapsed on 28th January 2021, that is, 12 years from 28th January 2009. He faulted the second defendant for failing to join him in Malindi ELC Number 30 Of 2011 and Malindi Miscellaneous Application E10 of 2020. He maintained that as at June 1999, the suit land was still registered in the deceased's name and was not as available for allotment by the government of Kenya to any party; that in any event Joseph Kashuru Mumbo the person who purported to have sold the 2nd defendant the suit land having attended and participated in the National Land Commission's hearings in Kilifi on 14th September 2015, was well aware that it belonged to the plaintiff's father. He reiterated that the second defendant's title to the suit property is a forgery and the defence of innocent purchaser for value is not available to him. He relies on the doctrine of *nemo dat quod non habet* in respect of the alleged purchase of the land by the second defendant. He maintains that the title to the suit land is still freehold, that the land is undeveloped and under the care of a caretaker though he occasionally utilizes the land.



Evidence of The Parties

16. The plaintiff testified on 26th October 2023. He adopted his witness statement dated 16th March 2023 as his evidence-in-chief in the case and produced 18 documents in evidence as per the lists that he had filed. His evidence as contained in the witness statement corresponded to the matters set out in the plaint and reply to defence and defence to counterclaim. He stated that after judgment was delivered in Malindi ELC Number 30 Of 2011, he appealed to the Court of Appeal which dismissed the appeal and indicated that his claim was a fresh cause of action since he did not participate in Malindi ELC Number 30 of 2011. He accused the 2nd defendant of being in possession of 2 forged titles issued on different dates regarding the suit property. He asserted that there was no gazette for loss of title that could have entitled the 2nd defendant to be in possession of the later title. He maintained that his is the only title supported by the records maintained by the first defendant.
17. He showed the court the original title deed in respect of the suit land. He maintained that he is still in occupation of the suit property. The utilities connected to the property are subscribed for in his name. Among the documents he produced were Certificates of Official Search showing that the original title for the suit land issued on 22nd September 1978.
18. Upon cross-examination by Mr Ojwang for the 1st defendant, he stated that he freely obtained the searches from the Land Registry. He testified that the Land Registrar declined to register his certificate of confirmation of Grant against the suit title despite the plaintiff having written a letter to his office.
19. The plaintiff was not cross-examined by counsel for the 2nd respondent who was present, nor was he re-examined, and his case was marked as closed on the same day.

Evidence of The 1st Defendant

20. DW1 Muhammad Billow Ibrahim testified on 30th January 2025. His evidence is that he is the officer in charge of the Kilifi Land Office; that the suit land was allocated to the deceased on 30th May 1978 and a land certificate issued on 27th September 1978. Before the land was allocated to the deceased, it had been earlier on allocated to Kalume Hinzano which allocation was cancelled and the deceased was registered. Kalume Hinzano appealed to the Minister. The Minister decided the dispute on 12th May 1978 in favor of the deceased and the latter was then issued with a land certificate. He then charged the same to Kenya Commercial Bank for Kenya Shillings 200,000/- on 10th October 1978. A Deed of Variation of Charge was registered on 15th May 1980. The land was discharged by the Chargee on 3rd September 1981. No discharge was registered on the title. A Ministerial Task Force recommended cancellation of titles in sections named Chembe Kibabamshe, Jimba Madeteni, Kakuyuni and Matsangoni Sections in 1986. Title holders were required to return titles to the government within 60 days. The government handed over those Sections to the Settlement Fund Trustees and another green card was opened on 22nd December 1986 reflecting the Government of Kenya as the first entry. A transfer was registered in favor of Joseph Kashuru Mumbo on 10th March 2004 on the new record. However, the Chief Land Registrar registered a restriction against the title issued to Kashuru on the basis that registration thereof was fraudulent. A copy of a letter from the Chief Land Registrar to that effect was produced from the land records. It was noted on the green card in red ink that the title to Joseph Kashuru Mumbo should be recalled and cancelled. Despite that directive, a transfer was registered conveying the said land to Masumbuko Yeri Kombe on 12th November 2010 and a title deed issued to him on the same date. Yet another title deed issued to him on 10th August 2012. There is no explanation for the issuance of the second title over the same parcel of land to the same person, the 2nd defendant. There is no indication of loss of title in the land registry records. There was no gazette notice preceding the issuance of that



second title. However, the original Green Card was reconstructed on 30th March 2023 pending the determination of the claim by Masumbuko Yeri Kombe. The present records show that there is a title in the name of the deceased and another in the name of Masumbuko Yeri Kombe. A letter revoking the title to Kashuru is still among the records of the Land Registry. As seen before, that letter from the Chief Land Registrar had declared Kashuru's title to be a fraud. It requested for its cancellation. In DW1's view, entry number 6 could not have been effected legally on the green card in view of entry number 4. Entry number 5 and entry number 3 on the green card have not been signed against.

21. Upon cross-examination by Mr Kokebe for the 2nd defendant, he confirmed there are 2 green cards, that there was a Minister Task Force, that Gazette Notice 2505 issued, cancelling earlier titles in Chembe Kibabamshe among other areas; that title for the suit property was affected by that notice. He confirmed that the Land Registrar was the 5th defendant in ELC Number 30 Of 2011. The decree in that case was however not registered against the suit title, but a copy thereof is among the land office records. He maintained that the Land Registrar can only register documents which have been booked for registration. According to him, no gazette notice issued revoking gazette notice number 2505 of 30th May 1986. He admitted that the second defendant's name still appears on the green card.
22. Upon cross-examination by Mr Juma, DW1 stated that he was aware that Gazette Notice Number 2505 of 1986 was declared unconstitutional by the High Court. He maintained that according to the records, the deceased never transferred the land to anyone. Neither was the land ever subdivided. Among the records in the land Registry there was no land transfer form evidencing transfer to the 2nd defendant. The property would require a discharge of charge for any transfer in the 2nd defendant's favour to be registered against it but there was none.
23. DW1 stated that Objection Number 50 was determined in favor of the deceased Bernard Chiori Murage; further pointed out that the gazette notice nullified titles in respect of the whole Sections named and not just the suit property; that it was later declared unconstitutional; that entry number 8 on the green card does not have any gazette notice to support it. He stated that the reason why the confirmed grant could not be registered was that there was a case pending before Court. No discharge of charge was ever registered against the title in the deceased's name; it was presented but rejected.
24. Upon re-examination by Mr Ojwang, the Land Registrar stated that there is no forwarding letter for the judgment in ELC Number 30 Of 2011. Registration on a green card begins with booking a document; that usually when SFT transfers a portion of land to an allottee; there is a transfer to that allottee and a discharge of charge, the latter which is issued when the money owing to the SFT is fully paid. In respect of transactions between SFT and Joseph Kashuru Mumbo, the transfer from the SFT was available, but no discharge of charge could be found; that once the transfer is registered the discharge is usually registered on the Encumbrance Section, but there is no such entry in the Encumbrance Section with regard to the suit property.

Evidence of The 2nd Defendant.

25. The 2nd defendant called no evidence in his case, and it was marked as closed by the court.

Submissions of The Parties.

26. Submissions of the parties were filed, and they were subsequently highlighted on 13th March 2025

Submissions of The Plaintiff.

27. The plaintiff's counsel identified the following as the issues for determination:



- a. Whether the title to Chembe/Kibabamshe/393 issued to the deceased on 22nd September 1978 is valid;
 - b. Whether the plaintiff is the beneficial owner of Land Reference Number Chembe/Kibabamshe/393;
 - c. Whether there can be two sets of records over the same parcel of land;
 - d. Whether the 2nd defendant's Defence and Counterclaim are admissible and or can be considered if the absence of witness statements testimony under oath, documentary evidence and a verifying affidavit.
28. Mr Juma for the plaintiff emphasized that the plaintiff is still the registered owner. He referred to paragraphs 32 to 47 of the Submissions and stated that Gazette Notice No 2505 of 1986 was declared unconstitutional and nullified by Rawal J. as she then was in High Court Miscellaneous Number 730 Of 1989 Nairobi; he also submitted that in the case of Marian Mweni Musembi Versus the Commissioner of Lands and 6 Others [2015] KEELC 245 [KLR], Attorney General entered into a consent admitting that a Gazette Notice 2505 of 1986 was unconstitutional. He relied also on the case of Helena Kithinji V The Attorney General 2002 eKLR and Joseph Manga Mugwe V The Attorney General & 8 Others 2018 eKLR in support of the proposition that no suit was ever filed or any order ever issued by court cancelling titles of Kilifi landowners.
29. He also relied on the case of Mbugua & Another (Suing as Administrator of The Estate of Simon James Mbugua) V The Attorney General & 2 Others ELC Petition No 2 of 2021 [2022] KEELC 3063 KLR in which Justice Naikuni made a similar decision, holding that the government in causing the cancellation of the petitioner's title deed without obtaining a court order was ultra vires illegal and wrongful. He maintained that the plaintiff is still in possession of the suit premises and that he has water bills receipts to prove that he pays for the utilities. He cited the Court of Appeal in CA Miscellaneous E10 of 2010 as having been satisfied that the plaintiff was in possession and in that case, the second defendant was a party; Further, in that case, the Court of Appeal recommended that the plaintiff possessed a fresh cause of action.
30. He also pointed out that this court (Odeny J) also issued an injunction against the 2nd defendant in the year 2023. He laid much emphasis on the production of the original title issued to the deceased. He maintained that the declaratory judgment had no executable rights. He referred to the case of Katiba Institute V President of the Republic of Kenya & Others Judicial Service Commission & 3 Others (Interested Parties) [2020] eKLR and Johana Nyokwonyo Buti V Walter Rasugu Omariba & 2 Others 2011 eKLR in support of that proposition.
31. He also pointed out that the 2nd defendant did not call any evidence or produce any document. He stated that the National Land Commission is reflected in the Hansard as having been informed that the land is registered in the deceased's name, hence the 2nd defendant could not claim to have obtained title in 2010; which is the reason why the Land Registrar's records do not have among them any transfer forms or documents executed in his favour.
32. It was submitted by Mr Ojwang for the 1st defendant that DW1 being the custodian of the land documents in Kilifi, produced the original documents in the parcel file and showed them to the court; that he desires this to be considered a double allocation; that title was first issued in the name of the deceased Bernard Chiori Murage but later canceled by a gazette notice and title later issued to Joseph Kashuru Mumbo who transferred it to the 2nd defendant. However, by the time of transfer to the 2nd defendant, Joseph Kashuru Mumbo's title had been canceled by the Chief Land Registrar for being



fraudulent; consequently, there was nothing to transfer to the 2nd defendant. In his submission on behalf of the 1st defendant, Mr Ojwang expressed support for the plaintiff's case. He cited the case of Ernest Kibiwott Kipkosgey V David Bett & Another [2019] KEELC 3219 (KLR) and stated that possession is emphasized as an overriding interest in Section 30 of the *Land Act*. He faulted the title to the 2nd defendant as being tainted by lack of a Discharge of Charge. He cited the case of Munyu Maina v Hiram Gathiha Maina 2013 KECA 94 (KLR) for the proposition that when a title is under challenge dangling the very same title is not enough and one must prove how it came to be registered in his name. He maintains that compensation of the 2nd defendant can only come from Joseph Kashuru Mumbo.

33. In his submissions Mr Kokebe for the 2nd defendant maintained that that 2nd defendant's right to the suit land had been recognized by Olola J and Angote J previously in ELC Number 30 Of 2011. He maintained that title had already passed to Mr Masumbuko, the 2nd defendant, and that the only thing that the Land Registry was waiting for was the determination in ELC Number 30 Of 2011. He maintained that the Land Registrar could act suo motu, but that he never did. he submitted that the 2nd defendant's remedy was issued in the previous case, that is ELC Number 30 Of 2011. He also maintained that in HCCC Number 730 Of 1989 the court found a remedy, being compensation or restoration. He maintained that the 2nd defendant did due diligence while purchasing the suit land and that the declaration in ELC Case Number 30 Of 2011 still stands.

Analysis and Determination

34. The issues arising in the present dispute can be distilled as follows:
- a. Whether the 2nd defendant's defence and counterclaim are admissible and/or can be considered in the absence of witness statements testimony under oath documentary evidence testimony and a verifying affidavit;
 - b. Which of the two titles held by the plaintiff and the second defendant respectively is valid;
 - c. What orders should issue?
35. The issues are addressed as herein below.
- Whether the 2nd defendant's defence and counterclaim are admissible and/or can be considered in the absence of witness statements testimony under oath, documentary evidence and a verifying affidavit;
36. Regarding the first issue this notes that only the plaintiff and the 1st defendant adduced evidence of the trial. Both were of the opinion that it is the plaintiff's title that is valid. The 2nd defendant filed Defence and Counterclaim but he adduced no evidence despite having been given an opportunity to do so. His counsel filed written submissions as seen above.
37. It is trite that factual statements in a defence must be proved by way of evidence. Where a defendant files are defence and does not adduce evidence to support the statements in that defence then the statements, no matter how strong, cannot be a substitute for evidence and can not be deemed as proved.
38. In the present case therefore this court has only the evidence of the plaintiff and the 1st defendant to consider in making a determination. Nevertheless, the plaintiff must be called upon to prove his case even where the defendant does not call any evidence to support the statements in the defence. Proof is by way of not just evidence but sufficient evidence. That evidence would have to be of the amount and type that can make the court believe that the litigant has proved his case on a balance of probabilities. He would have needed to do so if there had been no attempt to file a defence - see the cases of Wycliffe Lubanga Kefa v Dennis Ochola & another [2020] eKLR and Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR.



Which of the two titles held by the plaintiff and the second defendant respectively is valid.

39. The plaintiff's case is that he is the Administrator of the estate of his father, Bernard Chiori Murage, deceased. His father was allocated the land and title issued to him in the year 1978; the original title to that land was produced in court as evidence. It was beyond challenge by the respondents that the title indeed issued to the deceased in the 1970s long before the 1st defendant acquired his two titles over the same piece of land. There is evidence that the land was charged to KCB Bank Limited and instrument of charge was registered at the Kilifi Land Registry on 8th March 1982. From the evidence produced by the Land Registrar DW1, which included records held at the Kilifi Lands Registry, the deceased is still the registered owner of the suit land.
40. The plaintiff obtained a Grant of representation in his name to the estate of his late father. He attempted to register a Discharge of Charge as well as the Confirmation of Grant in vain. On each occasion, he was informed that there was litigation pending regarding the suit property. That litigation turned out to be Malindi ELC Number 30 Of 2011. The plaintiff made attempts to join himself to that suit but also in vain. Judgment was issued in that case declaring the 2nd defendant to be the bona fide purchaser of the property. A declaratory decree issued. The same was not registered at the Land Registry. When the plaintiff lodged an appeal at the Court of Appeal that Court determined that his was a fresh cause of action as he had not participated in the proceedings in Malindi ELC Number 30 Of 2011.
41. As stated hereinbefore, the 1st defendant supported the plaintiff's case. Through the evidence of the Land Registrar Kilifi County, crucial documents were produced before the court. The Land Registrar produced an Adjudication Record in the name of Bernard Chiori Murage, deceased. He also produced a Green Card in the deceased's name opened on 30th July 1978. Gazette Notice number 4926 of 17th July 2020 for the reconstruction of a new green card for the suit land parcel was also produced by the same witness. Pursuant to the Gazette Notice, the green card was reconstructed but a restriction was recorded as entry number 3 thereon on the basis that there was some pending litigation between Soft White Beach Limited and Masumbuko Yeri Kombe.
42. Vide a letter dated 4th May 2004 (produced as D. Exh 8) the Chief Land Registrar declared that the issuance of the title to Joseph Kashuru Mumbo was an outright fraud and he ordered that the said title be recalled for cancellation before any other action was taken.
43. The Land Registrar also produced Variation of Charge dated 12th May 1980, said to be supplemental to a charge dated 9th October 1978 made between the deceased and National Bank of Kenya Limited, as well as a Discharge of Charge issued by the National Bank of Kenya Ltd, duly executed and attested by Ms Waruhiu and Muite Advocates, with a date of registration thereof indicated as 19th October 1981. The Variation of Charge was booked vide Presentation Book Number 18 of 15th May 1980. The stamp on face thereof shows that it was received in the registry on the same date at 11:44 hours. The Discharge of Charge has an endorsement on its face showing it was received in the Land Registry on 19th October 1981 at 9:58 hours vide Presentation Book Number 7 of 19th October 1981. The foregoing documents are very crucial evidence because they are reflected as entries number 3 and 4 respectively in the encumbrances section in the copy of green card produced as 1 D. Exh. 2.
44. The defence filed by the KCB Bank Kenya Limited, who was earlier on the Interested Party herein, confirmed that the deceased was the registered proprietor who had charged the suit property as security for a loan facility; that the loan facility had been repaid in full and that the interested party had already executed a discharge presented to it by the plaintiff in acknowledgment of repayment of the loan. The Interested Party's evidence is very strong indicator that the deceased was issued with title in the



late 1970s. Ordinarily, chargees conduct due diligence by making searches on titles before issuing any loans on the security of those title deeds. There is good ground for this court to believe that National Bank of Kenya Limited conducted such due diligence exercise before the Charge and the Variation of Charge were registered against the title then held by the deceased. The very presence of entries on the Encumbrances Section of the copy of Green Card produced by the Land Registrar which confirm the charge and discharge of charge is evidence that such charge was indeed registered against the title held by the deceased.

45. A copy of the Adjudication Record dated 30th August 1977 for the suit land (1 Dexh.1) shows that it was originally allocated to Kalume Hinzano, which allocation was cancelled and replaced with an allocation to the deceased pursuant to the deceased's objection which was successful.
46. On the other hand, the 2nd defendant's title derives from a transfer purportedly executed in his favor by one Joseph Kashuru Mumbo. One notable fact is that by the time of Mumbo's purported execution of transfer of the suit land in favour of the 2nd defendant, the Chief Land Registrar had already written the letter dated 4th May 2004 directing the recall and cancellation of Mumbo's title on the basis that it was fraudulently acquired. No letter countermanning the instructions of the Chief Land Registrar's letter dated 4th May 2004 was presented in evidence by the 2nd defendant. Consequently, the instructions of the letter of 4th May 2004 still stand to date. A finding of that nature by the Chief Land Registrar is crucial. It is a finding that must have been made after due investigations and even at the very present moment, it is supported by the crowd of documents mentioned herein above regarding the illegality of registration of Joseph Kashuru Mumbo as the purported owner of the suit land as herein below and of the propriety of the registration of Bernard Chiori Murage.
47. One of the observations this court makes here is that the registration effected on 9th January 2003 in favour of the 2nd defendant was effected after a decision of the High Court in HC Miscellaneous Application Number 730 Of 1989 Helena Kithinji Versus The Attorney General in which K. H. Rawal J. (as she then was) declared the decision of the Commissioner Of Lands canceling the titles in Kilifi Madeteni vide Circular Number 113936/55 to be illegal and unconstitutional, noting that no evidence have been placed before the court to prove that the titles were null and void ab initio. In the Helena case Rawal J stated as follows:

“In all respects the actions of the Commissioner of Lands in cancelling the titles of the appellant without hearing the applicant is illegal, invalid and unconstitutional and has to be set aside by this court. The applicant has been wrongfully deprived of her proprietary rights in the two parcels of land by the Commissioner of Lands and I shall have no hesitation to declare so. I also declare that she has been deprived of the proprietorship of the land registered in her name in pursuance of the circular which is unconstitutional and in flagrant violation of the rules of natural justice. I therefore declare that she is still the registered owner of title numbers Kilifi/Madeteni/410 and Kilifi/Madeteni/414.”
48. The second vital observation is that as per the evidence of DW1, he was able to locate the transfer from SFT to Joseph Kashuru Mumbo in the records but he was not able to find SFT's discharge of Charge in favour of Joseph Kashuru. According to him registration of a discharge normally follows a transfer to an allottee by the SFT. Since there is no such entry of registration of a Discharge in the Encumbrance Section, it therefore remains a mystery as to how title was transferred from Mumbo to Masumbuko. This court finds that the transfer was irregular.
49. Thirdly, Gazette Notice Number 2505 of 1986 was declared unconstitutional in Mbugua & Another (Suing as Administrator of The Estate of Simon James Mbugua) Versus The Attorney General



Petition Number 2 of 2021 (2022) KEELC 3063 (KLR). The government had through Gazette Notice Number 2505 of 30th May 1986 as well as letters to title holders within Kilifi Jimba, Chembe Kibabamshe, Kilifi Madeteni and Kilifi Matsangoni that the earlier adjudication of lands in those Sections under the Land Adjudication Act Cap 284 was erroneous since it was government land, and cancelled the titles issued over land parcels in those areas.

50. In the Mbugua case (supra), Naikuni J stated as follows:

“... it is quite clear the deceased was the absolute and legal owner of all that suit land with indefeasible title right and interest vested on it. Therefore, for the government to have taken it away on the pretext that it was their land which was allocated by mistake under the Land Adjudication Act and that they would be re-allocating it to him was erroneous, illegal, wrongful.... The procedure for the cancellation of title deed Section 79 of the Land Registration Act is for rectification of the register with the consent of the proprietor and not cancellation. Cancellation cannot be through publication of a notice in the Kenya gazette. That was illegal improper and wrongful. Cancellation can only be through a court order under Section 80 of the LRA. That did not happen at all ”

51. The suit land herein falls within the Chembe Kibabamshe Section which was affected by the same Gazette Notice that was nullified in the Mbugua case (supra). Therefore, though the 2nd defendant's name still appears on the Green Card it remains there irregularly owing to the three observations as immediately herein above.

52. In ELC Number 97 of 2007 Joseph Manga Mugwe Versus the Honourable Attorney General & 8 Others in which case the title also fell under Chembe Kibabamshe and had been cancelled under Gazette Notice 2505 Of 1986, Angote J, in a judgment delivered on his behalf by Olola J, his successor in this court station, found for the plaintiff, stating as follows:

“Considering the plaintiff had surrendered the title for parcel of land 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. That is what the repealed Constitution provided for.”

53. In the Joseph Manga Mugwe case, Angote J. also stated as follows:

“The next issue that I should determine is the appropriate remedy that the court should issue. Considering that a new register was opened on 22nd December 1986 where after the suit land was transferred to the Settlement Fund Trustees on 11th April 2011 before the register was closed on the same day after subdivision of the land, the subsequent owners of subdivision numbers 6376 3038 and 723 cannot be faulted for having acquired the land.”

54. In Marion Mweni Musembi And Another Versus The Commissioner Of Lands And Six Others Malindi ELC Civil Case Number 102 Of 2008, a consent was filed by the Attorney General. Angote J, addressing the consent stated as follows:

“All that I can state in this particular matter is that a paragraph three of the consent of 18th February 2005 the State agreed with the decisions of the High Court that the cancellation of the plaintiff's title deeds in respect to the suit properties in 1986 was unconstitutional null and void ab initio...



The State also agreed at paragraph 4 of the consent of 18th February 2005 to compensate the people whose titles were revoked in 1986 by the Commissioner of Lands in accordance with the professional valuers' principles of market value. The State was also supposed to compensate the plaintiffs for non-use of the land."

55. In the same case, Angote J also proceeded to observe that where an individual whose title has been unlawfully revoked or cancelled, he is entitled to either get his land back or to be compensated monetarily. He stated as far as follows:

"Section 144 of the Registered Land Act (repealed) and Section 81 of the Land Registration Act complements Article 40 of the Constitution. According to those sections any person suffering damages by reason of any rectification of the register or an error in the register is entitled to indemnity unless it is shown that the person has caused or substantially contributed to the damage by fraud or negligence."

56. In Marion Mweni Musembi & Another Versus Commissioner of Lands and 6 Others Malindi ELC Civil Case Number 102 Of 2008, it was found that the defendants did not adduce evidence to rebut the 1st plaintiff's evidence that she was the registered proprietor of the suit properties in 1978 before her titles were revoked or cancelled by the 1st defendant therein in 1986, and they did not demonstrate that she had acquired the title to the suit land unlawfully or fraudulently. The court granted the plaintiff's claim and ordered payment of compensation for the market value of the land as well as exemplary damages.
57. This court also draws from the case of Dina Management Limited Versus County Government of Mombasa - Supreme Court Petition Number 8 (E010) Of 2024 which stated that the appellant's title was not protected under Article 40 of the Constitution. The court in that case found that the title or lease was an end product of a process if the process that was followed prior to the issuance of the title did not comply with a law, then such a title could not be held indefeasible. The court also held that the first allocation having been irregularly obtained, the former President had no valid legal interest which he could pass on who purported to pass it on to their appellant.
58. It must be deduced from the approach taken by Dina Management Limited and Gathiha that it is not sufficient for a litigant to merely point out, as the 2nd defendant did in this case, that his title is reflected in the entries of issuance of title appearing in the official land records held by the Land Registrar; it is now sufficiently clear that a title can still be declared invalid even when so appearing. This is a deduction closely related to the holding of the Court Of Appeal in the Munyu Maina case (supra).
59. The upshot of the foregoing analysis is that the title issued to the deceased is the valid title to the land and the title held by Masumbuko Yeri Kombe, the 2nd defendant herein, is invalid.
60. In holding as above, this court is conscious of the flaunting of the judgment of the court in Malindi ELC Number 30 Of 2011 as having declared him as a bona fide purchaser for value. However, this court must state here and now that the said judgment was purely between the parties in that case and the plaintiff herein was not among them. When two strangers lacking in legal title are fighting for a house and one is proclaimed the owner, the declaration is confined to only the facts of that particular case. When the real owner of the house appears and lays his provable claim for the same and presents evidence in proof, the court can not afford to uphold any of the stranger's claim if it is weaker than that of the real owner. That is what has happened in this case. The judgment in the case Malindi ELC Number 30 Of 2011 only proclaimed the 2nd defendant as bona fide purchaser (and not holder of title) from Kahuru Mumbo only relative to all other claimants in that case and not the present plaintiff who



was not joined therein as a defendant. As per the *nema dat quod non habet* rule, Kashuru Mumbo had no legal title that he could transfer to anyone leave alone the 2nd defendant. That judgment is therefore confined to the transaction between the two and can not deter this court from pronouncing the plaintiff the owner of the suit land.

What Orders Should Issue

61. In the light of the fact that the title in the deceased's name has been found to be valid, and that all evidence adduced shows that the plaintiff, the administrator to the deceased's estate is in occupation thereof, this court has no difficulty in finding that all the prayers in the plaint dated 3/8/2022 are merited save prayer 2 which is denied for having been overtaken by events, and prayer 8 which I must appropriately modify.
62. In the end I enter judgment for the plaintiff against the defendants and I issue the following orders:
 - a. An order is hereby issued restraining the 1st defendant herein from cancelling the plaintiff's title issued on 22nd September 1978, amending, rectifying and or otherwise interfering with the current Land Register and records pertaining to Land Reference Number Chembe/Kibambamshe/393 save in accordance with the orders of the court in this case;
 - b. The County Land Registrar Kilifi shall register the Certificate of Confirmation of Grant issued in High Court at Nairobi Succession Cause Number 438 Of 1988 upon the plaintiff submitting an application to that effect and paying the requisite fees;
 - c. An order of permanent injunction restraining the 2nd defendant Masumbuko Yerry Kombe, his servants, agents, and/or employees and/or anyone else claiming right, authority and/or ownership under him from in any manner whatsoever from interfering with the plaintiff's quiet possession, peaceful enjoyment, and or ownership of the parcel of land known and registered as Land Reference Number Chembe/Kibambamshe/393 or any part thereof;
 - d. The 2nd defendant, Masumbuko Yerry Kombe, shall surrender any documents of title over Land Reference Number Chembe/Kibambamshe/393 in his possession to the Land Registrar for immediate cancellation within 7 days of this order failure to which the said documents shall be deemed cancelled and invalid;
 - e. That that the only valid title to Land Reference Number Chembe/Kibambamshe/393 is the one issued to Bernard Chiuri Murage on 22nd September 1978 and any other registration to the contrary that may exist shall be cancelled;
 - f. The costs of the present suit shall be borne by the 2nd defendants alone.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 30TH DAY OF SEPTEMBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

