

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. E030 OF 2023

WYCLIFFE TEMBO MWANGOMBE 1ST PLAINTIFF
NGUMBAO KENGA IHA 2ND PLAINTIFF
JOSEPH KARISA FONDO 3RD PLAINTIFF
ESTHER KACHE MWAYELE 4TH PLAINTIFF
GEOFFREY KAMAU NGOIYA 5TH PLAINTIFF
BAMBANI KILIO C.B.O 6TH PLAINTIFF

VERSUS

REA VIPINGO PLANTATIONS LTD 1ST DEFENDANT
**VIPINGO DEVELOPMENT PLC formerly
VIPINGO DEVELOPMENT LTD 2ND DEFENDANT**
CENTUM DEVELOPMENT PLC 3RD DEFENDANT
MOMBASA CEMENT LTD 4TH DEFENDANT

AND

THE LAND REGISTRAR MOMBASA 2ND INTERESTED PARTY
THE ATTORNEY GENERAL 3RD INTERESTED PARTY

(As consolidated with Malindi Constitutional Petition No. E014 of 2023 - VIPINGO DEVELOPMENT PLC -VERSUS- WYCLIFFE TEMBO MWANGOMBE, NGUMBAO KENGA IHA, JOSEPH KARISA FONDO, ESTHER KACHE MWAYELE & 2

OTHERS & REA VIPINGO PLANTATIONS LTD (INTERESTED PARTY) & 2 OTHERS)

JUDGMENT

Background

1. This suit was consolidated with Malindi ELC Constitutional Petition No. E014 of 2023 following directions issued in the said Petition on 31st May 2023.
2. By a Plaint dated 6th April 2023, the six (6) Plaintiffs pray for orders listed as follows:
 - i. **A permanent injunctive order restraining the Defendants by themselves, their servants, agents and/or any other person claiming under them from conducting a survey, subdividing, fencing, evicting, planting sisal, constructing a perimeter wall alienating and/or (carrying out) any other illegal activities and dispossessing the Plaintiffs from their legally acquired parcel of Land Reference Number 663/IV/MN, CR No. 79015, Original Numbers 120/1, 117/1, 118, 119/2 located at South of Takaungu-Kilifi along Malindi road or in any other way interfering with the Plaintiffs/Applicants quiet possession including fencing of the plots standing in the property and that Kilifi County Commissioner and the Kilifi South- Sub County Police Commander,**

O.C.S Kijipwa Police Station to enforce the orders herein;

- ii. A declaration that the Plaintiffs are the rightful and/or legal owners of the suit property;**
- iii. An order directing that the purported certificates of title of ownership owned and/or in the name of the Defendants if any be and is hereby revoked; and**
- iv. Costs of the suit be awarded to the Plaintiffs.**

3. The Plaintiffs aver that at all material times relevant to this suit they have been living on all that parcel of land for several years since their ancestors and that they have constructed semi-permanent houses and perform small scale farming thereon.

4. The Plaintiffs further aver that they have been enjoying quiet possession and now the Defendants are threatening to demolish and evict them from their houses and have started planting sisal and constructing a perimeter wall. The Plaintiffs maintain that the actions of the Defendants are illegal as they are trespassing on the Plaintiffs' land and the Plaintiffs are now at the verge of losing their rightfully owned property. In

addition, the Plaintiffs aver that the interests of the Defendant over the suit properties have been extinguished under the Limitation of Actions Act.

5. Vipingo Development PLC (the 2nd Defendant/Petitioner) is opposed to the grant of the orders sought in the Plaint. In its Statement of Defence and Counterclaim dated 14th June 2023, the 2nd Defendant avers that the Plaintiff's suit is fatally inept, incompetent and ambiguous and that the same does not sufficiently disclose any viable cause of action or material particulars and should therefore be struck out.
6. The 2nd Defendant denies that the Plaintiffs have been living on the suitland as they allege and maintain that it is the registered proprietor and lawful occupant of all the suit properties herein. In addition, the 2nd Defendant denies having violated the Plaintiff's peaceful enjoyment of the suit properties by attempting or threatening to demolish their houses built on the suit properties. It is further the 2nd Defendant's position that the Plaintiffs' contention that its titles have been extinguished under the Limitation of Actions Act is factually and legally misconceived.

7. By way of its counterclaim, the 2nd Defendant prays for judgment against the Plaintiffs as follows:

- i. The Plaintiffs suit be dismissed with costs;**
- ii. A declaration be made that the only valid titles of the suit properties are those held by the 2nd Defendant being:-
LR Nos. MN/IV/120/1 and MN/IV/117/1 (C.R 7314)
L.R No. 1835/IV/MN - C.R 75006
L.R No. 1835/IV/MN - C.R 75005**
- iii. A declaration that the title document issued to the Plaintiffs on 13th December 2022 referred to as Land Reference Number MN/IV/663 - C.R 79015 is null and void as it was issued unlawfully and in breach of the 2nd Defendant's constitutional right to property;**
- iv. The Plaintiffs be ordered to surrender to the Mombasa Land Registrar the Title document, referred to as Land Reference Number MN/IV/663- C.R 79015 for cancellation forthwith;**
- v. The Land Registrar Mombasa be directed to cancel, expunge and nullify all records relating to the Plaintiffs title document referred to as Land Reference Number MN/IV/663- C.R 79015, if he has**

not already done so, whether or not the Plaintiffs surrender the same for cancellation;

vi. The Plaintiffs be restrained by a permanent order of injunction, whether by themselves or any person acting under their direction or authority, from entering upon, interfering with, procuring titles to or in any way infringing upon or interfering with the 2nd Defendant's proprietary rights to any part of its land in any part of Kilifi County; and

vii. The costs of the Counterclaim be awarded to the 2nd Defendant.

8. By the Consolidated Petition dated 20th April 2023, the 2nd Defendant had essentially sought for similar orders against the Plaintiffs herein. The 2nd Defendant's claim against the Plaintiffs was on the basis that its ownership of the suit properties was threatened by the Plaintiffs who according to the 2nd Defendant had not only conspired to illegally procure a duplicate title for L.R. No. MN/IV/663 - C.R. 79015 but had also been inciting members of the public to invade its land with a view of forcibly taking possession thereof in breach of the 2nd

Defendant's constitutional right to own property under Article 40 of the Constitution.

9. It was the 2nd Defendant's case that they have enjoyed quiet possession and use of the suit properties since acquiring the same until January 2023 when it emerged that a duplicate title had been issued to the Plaintiffs comprising of the suit properties. The 2nd Defendant asserted that they have actively utilized the suit properties by growing sisal and have also lawfully charged the same to various financial facilities and hence the properties had at no point in time been open for alienation to the Plaintiffs.
10. I have carefully perused and considered the Pleadings filed herein, the testimony of the 2nd Defendant's witness as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties herein.
11. The dispute herein is the culmination of two cases filed simultaneously by the two sides of the dispute in April 2023. By a Plaint dated 6th April 2023, the five (5) Plaintiffs herein

together with a Community Based Organization instituted this suit against some five (5) Defendants urging the court to grant them an order of injunction from conducting a survey, subdividing, fencing or evicting them from a parcel of land they described as Land Reference No. 663/IV/MN, CR. No. 79015 (Original Numbers 120/1; 117/1; 118 and 119/2) located South of Takaungu along Malindi Road in Kilifi County.

12. In addition, the Plaintiffs urged the court to stop the Defendants from planting sisal, constructing a perimeter wall or carrying on any other activities on the said parcel of land. They asked the court to declare that they were the rightful and/or legal owners of the said property and to direct that the certificates of title in the name of the Defendants be revoked.
13. The basis of those prayers was the Plaintiffs' contention that they had lived on the parcel of land and had always known it as their home since the time of their ancestors. The Plaintiffs accused the Defendants of proceeding to the said parcel of land and threatening to demolish and evict the Plaintiffs therefrom on account that the Defendants were the lawful owners thereof.

14. On 20th April 2023, some fourteen (14) days after the first suit was filed, the 2nd Defendant instituted Malindi ELC Constitutional Petition No. E014 of 2023 against the 1st to 5th Plaintiffs as the Respondents seeking a declaration that the only valid titles of the suit properties were those held by the 2nd Defendant/Petitioner, the same being the following:

- i. LR Nos. MN/IV/120/1 and MN/IV/117/1(C.R 7314);**
- ii. L.R No. 1835/IV/MN - C.R 75006; and**
- iii. L.R No. 1835/IV/MN - C.R 75005.**

15. In addition, the 2nd Defendant sought for a declaration that the title document issued to the Plaintiffs/Respondents on 13th December 2022 and referred to as L.R. No. MN/IV/663 CR-79015 is null and void as it was issued in breach of the 2nd Defendant's Constitutional right to property. Accordingly, the 2nd Defendant urged the court to direct the Plaintiffs to surrender the said title documents to the Mombasa Land Registrar (the 2nd Interested Party in the Petition) for cancellation and in default, the Land Registrar be directed to cancel the same in any event.

16. Finally, the 2nd Defendant sought for a permanent order of injunction restraining the Plaintiffs whether by themselves or any persons acting under their direction from entering upon, interfering with, procuring titles to or in any way whatsoever infringing upon or interfering with the 2nd Defendant's constitutional rights over the suit properties.
17. It was the 2nd Defendant's case that they had acquired the said properties by way of purchase from Rea Vipingo Plantations Limited (the 1st Interested Party in the Petition) and that since then they had enjoyed quiet possession and use of the said properties until some time in January 2023 when it emerged that there was a duplicate title issued to the Plaintiffs comprising of the suit properties. The 2nd Defendant asserted that they have actively utilized the suit land over a period of time by growing sisal and that they had charged the same to various financial institutions and hence the land had not been open for alienation to the Plaintiffs.
18. When the Constitutional Petition came up for hearing at Malindi on 31st May 2023, the Honourable Justice E. Makori directed that the same be consolidated with this suit being Mombasa

ELC E030 of 2023 as the lead file. In its Statement of Defence and Counterclaim dated 14th June 2023, the 2nd Defendant restated its claim against the Plaintiffs as outlined in the Petition.

19. On 26th March 2025 when the suit came up for hearing, the Plaintiffs did not show up in court and the Plaintiffs' claim was dismissed for want of prosecution.

20. In support of their case, the Defendants called one witness. Kenneth Gitonga Mbae (DW1) is the Managing Director of Centum Real Estate Ltd which he told the court owns the 2nd Defendant Company. Adopting his witness statement dated 13th June 2013, DW1 told the court that the 2nd Defendant's counterclaim was premised on the fact that at all material times, the 2nd Defendant has been and still is, the lawfully registered owner of the three parcels of land in contention which he named as

- i. C.R. 9823 LR. No. MN/IV/118 (now LR. No. 1835/IV/MN - CR 75006);**
- ii. C.R. 8732 LR. No. MN/IV/119 (now LR. No. 1834/IV/MN - CR 75005); and**
- iii. C.R. 7314 LR. No. MN/IV/120/1 and MN/IV/117/1**

21. DW1 testified that the 2nd Defendant purchased the three properties from Rea Vipingo Plantations Ltd (the 1st Defendant) through one Sale Agreement dated 27th March 2015. He produced the Agreement plus the transfer documents as evidence of the sale and transfer of the suit properties from the name of the vendor to the 2nd Defendant.
22. DW1 told the court that since the time of purchase the 2nd Defendant had continuously enjoyed quiet possession and use of the suit properties until January 2023 when it emerged that a duplicate title had been issued to the Plaintiffs for the same parcels of land. He told the court that upon learning of the same, the 2nd Defendant immediately protested against the issuance of the duplicate title to the Land Registrar and further took the precautionary step of registering a restriction on the duplicate title that had been issued to the Plaintiffs.
23. DW1 testified that pursuant to the 2nd Defendant's complaint, the Land Registrar conducted an investigation into the matter and reviewed the titles to the suit properties as well as the history and acquisition process relating to the same. He

produced a letter dated 26th January 2023 from the Land Registrar Mombasa addressed to the Land Administration Officer in the Ministry of Land informing them that after conducting due diligence, the Land Registrar had established that the lease issued to the Plaintiffs was erroneous as the land it related to was not available for alienation at the material time.

24. As it turned out, the Plaintiffs did not rebut the evidence adduced by the 2nd Defendant that the titles it held were the only valid titles for the suit properties and that the 2nd Defendant was the rightful and lawful proprietor thereof. In this respect, Section 116 of the Evidence Act Cap 80 of the Laws of Kenya provides thus:

“116. When the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

25. Accordingly, the Plaintiffs were duty bound to prove before the Court the legality of their title over the suit properties. For

them to do so, the Plaintiffs were required to lead evidence to the root of the title they described as MN/IV/663 – CR 79015 without a break in the chain. The titles issued to them on 15th September 2020 and 13th December 2022 were clearly fraudulent and erroneous as confirmed by the Land Registrar in his letter aforesaid dated 26th January 2023.

26. It was clear from the evidence adduced by the 2nd Defendant that the suit properties had been registered in the name of the 1st Defendant for many years before the same were transferred to the 2nd Defendant pursuant to the Sale Agreement dated 27th March 2015. It was also apparent from the Plaintiffs' pleadings that they were aware that the properties had always been in the name of the 1st Defendant. That must have informed the Plaintiffs' assertion at paragraph 9 of the Plaint that the Defendants' title and interest in the suit properties had been extinguished under the Limitation of Actions Act. They did not however lead any evidence in support of that assertion. In my view, if the Defendants had no proper title to the suit properties, there would be no title or interests to be extinguished under the Act.

27. In the premises I am satisfied on a balance of probabilities that the 2nd Defendant has proved that the titles held by itself are the only valid titles for the suit properties and that the 2nd Defendant is the lawful proprietor thereof. Accordingly, I find merit in the 2nd Defendant's counterclaim dated 14th June 2023 and hereby enter judgment in favour of the 2nd Defendant as against the Plaintiffs as follows:

(a) A declaration is hereby made that the only valid titles of the suit properties are those held by the 2nd Defendant the same being:-

- i. LR. No. MN/IV/120/1 and MN/IV/117/1 (CR 7314);**
- ii. LR. No. 1835/IV/MN - CR 75006; and**
- iii. LR. No. 1835/IV/MN - CR 75005**

(b) A declaration is hereby issued that the title documents issued to the Plaintiffs on 13th December 2022, referred to as Land Reference Number MN/IV/663 - CR 79015 and any sub-divisions resulting or emanating therefrom are null and void.

(c) The Plaintiffs are hereby ordered to surrender to the Mombasa Land Registrar the title document

referred to as Land Reference Number MN/IV/663 - CR 79015 and any subdivisions resulting or emanating therefrom for cancellation forthwith.

(d) The Land Registrar Mombasa is hereby directed to cancel, expunge and nullify all records relating to the Plaintiffs' title document referred to as Land Reference Number MN/IV/663 - CR 79015 and any sub-divisions resulting or emanating therefrom.

(e) The Plaintiffs, whether by themselves or any person acting under their direction or authority, are hereby restrained by a permanent order of injunction from entering upon, interfering with, procuring titles to or in any way infringing upon or interfering with the 2nd Defendants proprietary rights to any part of the suit properties.

(f) The Plaintiffs shall bear the costs of their dismissed suit as well as the costs of the counterclaim.

28. It is so ordered.

Judgment dated, signed and delivered in open court and virtually at Mombasa this 16th day of October, 2025

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**J.O. OLOLA
JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Makworo and Mr. Egunza Advocates for the Plaintiffs
- c) Mr. Kahura Advocate for the 1st Defendant
- d) Mr. Makora holding brief for Musangi Advocate for the 2nd Defendant
- e) Mr. Onyony Advocate for the 4th Defendant
- f) Mr. Kimei Advocate for the 2nd and 3rd Interested Parties

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