



Malindi Musketeers Limited v Attorney General & another (Environment and Land Case 50 of 2014) [2025] KEELC 6764 (KLR) (7 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6764 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE 50 OF 2014
FM NJOROGE, J
OCTOBER 7, 2025**

BETWEEN

MALINDI MUSKETEERS LIMITED PLAINTIFF

AND

THE HON. ATTORNEY GENERAL 1ST DEFENDANT

THE LAND REGISTRAR, KILIFI 2ND DEFENDANT

JUDGMENT

1. The On 12th October 2023 the plaintiff confirmed that he had withdrawn the suit against the 3rd and 4th defendants, leaving only the Attorney General and the Land Registrar Kilifi as defendants.
2. The present suit proceeded to hearing on the basis of the Further Amended Plaint dated 3rd May 2021 in which prayers against the remaining defendants are sought as follows:
 - a. The defendants or their successors in office to pay the plaintiff a refund of purchase price in respect of parcels of land plot numbers Chembe/Kibabamshe/420 being Kenya Shillings 3 million only being the market value of the said parcel of land;
 - b. The defendants or their successors in office to pay to the plaintiff compensation at current market value in respect of parcels of land plot number Chembe/Kibabamshe/420;
 - c. The defendants or their successors in office to pay to the plaintiff exemplary damages of Kenya shillings 150,000 being 5% of 3 million (Kshs 3,000,000/-);
 - d. The defendants or their successors in office to pay to the plaintiff cost of this suit;
 - e. The defendants or their successors in office to pay to the plaintiff interest on a, b, and c above at court rates;
 - f. Any such other order or father relief as this honorable Court may deem appropriate.



3. According to the further re-amended plaint, the plaintiff's case is that at all material times the plaintiff was and it still is the absolute registered and legal owner of the suit premises known as Chembe/Kibabamshe/420 (hereinafter also referred to as "the suit land" having purchased the same from Southern Sun Investments Limited for Kenya Shillings 3,000,000/-.
4. The parcel file for the suit land was opened in 1986. The original title held by Southern Sun Investments Limited and the transfer document were produced to the 2nd defendant for registration of the transfer. The transfer was duly registered at Kilifi District Land Registry and a title dated 7th November 2007 was issued to the plaintiff.
5. A search was carried out before and after purchase. There was no caution registered against the title at the time of purchase. The plaintiff hence claims he has indefeasible title to the property and has been in quiet possession thereof since purchase. The plaintiff has also been paying the outgoings, including County Government Land rates.
6. Based on the report on the Special Task Force On Kilifi Jimba and Chembe Kibabamshe dated June 2010, the government through the Commissioner of Lands vide letter of allotment referenced 54187 / XVI dated 26th August 2010 allocated the suit property to one Karisa Mole Mbitha for a time of 99 years from 1st September 2010. According to the plaintiff, the recommendations of that Report do not have the force of law, and the Environment and Land Court at Malindi has since issued declarations in its judgment dated 8th May 2015 in Malindi Petition Number 11 Of 2012 to the effect that:
 - a. 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 Honorable Gideon Mung'aro dated 20th August 2010 was in violation of the Articles 10, 27, 40 and 47 of *the Constitution* and Section 10(3)(3) and 143 of the Registered *Land Act* (repealed) hence unconstitutional and void ab initio.
 - b. An order of permanent injunction be and is hereby issued restraining the respondents by themselves servants, agents or whosoever authorized on their behalf from giving effect or implementing in any manner whatsoever the report of the Task Force of Kilifi Jimba and Chembe Kibabamshe dated June 2010 "
7. The plaint further states that on the 29th September 2010 the County Land Registrar Kilifi, now the 2nd defendant, without due regard to the due process issued a certificate of lease in favor of the suit property to Karisa Mole Mbitha the former 3rd defendant in the present suit; that the suit property, having been privately owned, was not government land and it was not available for allocation and its allocation was illegal and void ab initio; that an allotment of land cannot be made when the purported land is not in existence; that issuance of double documents of title to the suit property is tantamount to compulsory acquisition of land. In the same breath, the plaintiff avers that compulsory acquisition of land is strictly for land which is required for a public purpose; that the allocation to Karisa Mole Mbitha did not attach in rem to any land since there was none for allocation, the plaintiff already having been registered as owner; that Karisa Mole Mbitha as proprietor of the suit property gave power of attorney to Hon Gideon Maitha Mungaro who sold and transferred the suit land to Dava Limited; that as a result of the actions of the defendant, the plaintiff has been unable to occupy or enjoy its property since the year 2011 because Karisa Mole Mbitha and Dava Limited took possession of the same, and that it has incurred losses arising from failure to conduct its intended business on the premises.



8. The plaintiff avers that if there was any omission fraud or mistake relating to the issue of title deed to the suit property to it, which is denied, the plaintiff has no knowledge thereof, and nor did it cause such omission fraud or mistake or contributed to the same by its act, neglect or default, and hence the records of the said property showing the plaintiff as the registered owner thereof of the suit property cannot be rectified to affect the title of the plaintiff.
9. It was also averred that there is no other suit pending in any other Court but there have been proceedings in court in respect of the same parties in HCCC No 182 of 2011 OS which matter was struck out on the technicality by the ELC on 28th February 2014.

Defence

10. Richard Ngari, Litigation Counsel filed defence on 15th April 2014 on behalf of the 1st and the 2nd defendants praying that the suit be dismissed with costs. The defence was amended later on 8th June 2021 in response to the further re-amended plaint. In the amended defense, the 1st and 2nd defendants denied the claims in the plaint and averred that it discloses no cause of action against them. They denied the particulars of fraud therein. The amended defence stated the land in question was lawfully and in compliance with the procedures issued to Karisa Mole Mbitha and any other allocation or transfer was improper and incapable of conferring good title. It is pleaded that the plaintiff's alleged title was not lawfully acquired and is therefore null and void and incapable of conferring any proprietary rights to the plaintiff. The defendants denied receipt of any Statutory Notice in accordance with the mandatory provisions of Section 13A of the *Government Proceedings Act*.

Evidence

11. PW1 gave evidence on 29th May 2024, adopted his witness statement dated 9th February 2023 as his evidence-in-chief, and produced documents in a list dated 6th January 2014. He stated that he was representing the plaintiff company; that since 2010 the plot details had disappeared at the Lands Office, only to later reappear in the name of Karisa Mole Mbitha. He prayed for compensation.
12. Upon cross-examination by Mr Munga, he said that they purchased the plot in 2007. from one Franco Esposito who owned it through his company called Southern Sun Investments Limited. The transacting parties had a joint lawyer, Muli ole Kina. It was a freehold title. Land Control Board consent was obtained. Stamp duty was paid. Everything was done through the lawyer. Title was issued on 7th November 2007. One day, somebody told the PW1 in October 2010 that someone was building a wall on the land. That person happened to be Karisa Mole Mbitha, the former 3rd defendant herein. Karisa Mole Mbitha had been issued a title without the plaintiff's knowledge. The plaintiff complained to the police. It looked like a criminal case to the plaintiff. The Land Registrar Kilifi was arrested and arraigned in court but was later acquitted.
13. Under cross-examination by Mr Ouma, PW1 changed his evidence and stated that the Land Registrar, one Athman, was charged but the case against him was withdrawn and he was not acquitted.
14. PW2 Jacob Mageni Oduor, a forensic examiner based at Integrity Center, Nairobi, testified on the same day. He prepared the forensic document examination report dated 10th August 2012 while stationed at the DCI Headquarters Forensic Laboratory. He produced the report as Pexh14. His findings were that Elizabeth Thoya, the then Land Registrar Kilifi was the one who signed the originals of those documents which were under examination. The plaintiff case was closed on 25th February 2025 when the plaintiff ran out of witnesses and after few adjournments which had been sought in order to seek those witnesses, which efforts yielded no results.



15. DW1 Mohamed Billow testified on 11th March 2025. He produced the defendant's documents in the list dated 15th June 2021 as P. Exh. 1 - 10. According to him the property was registered in the name of Karisa Mole Mbitha on 29th September 2010 pursuant to a lease. A power of attorney was registered in favour of Hon. Gideon Mungaro on 27th September 2011. A transfer was registered on 28th October 2011 for Kenya shillings 35,000,000/- in favour of Dava Limited. Copies of the transfer documents to Dava Limited as well as the surrendered Certificate of Title in Karisa Mole Mbitha's name, the original Power of Attorney to Hon. Gideon Mungaro are all available in the parcel file. The white card had been missing and it was reconstructed by the Gazette Notice Number 9347 of 11th September 2021. The present registered proprietor, according to the present records, is Dava Limited. According to him, no document can be legal if it is not reflected in the Presentation Book. He stated that in the Presentation Book on 21st October 1999 they were only 2 documents that were presented for registration at the Kilifi Land Registry. The next document was registered on 25th October 1999. There were only 4 documents presented for registration on 17th February 2000. They were all transfers to other persons, and in respect of other parcels of land, and none of the plaintiff's documents are reflected on the Presentation Book.
16. On cross-examination by Mr Munga, he could not confirm that the title deed at page 5 of the plaintiff's bundle filed on 21st November 2023 bears the Land Registrar Thoya's signature. He could not find the seal of the Land Registry on the same document. He averred that it is not his registry that issued the purported title to Southern Sun Investments Limited.
17. He also stated that the title to Southern Sun Investments Limited is not supported by any documents in the parcel file while Karisa Mole Mbitha's is. He denied that the registry ever issued a double title in respect of Plot Number 420. The registered owner now is Dava Limited. At the end of his cross-examination the defendants' case was marked as closed.
18. Parties were ordered to file submissions. The defendant filed submissions dated 24th April 2025. The plaintiff filed submissions on 27th May 2025. I have considered the said submissions in preparation of this judgment.

Plaintiff's Submissions

19. The Plaintiff identified three issues for determination.
20. On the first issue, whether it acquired lawful title and has been deprived of its use through administrative irregularities, the Plaintiff submitted that its title was lawfully acquired through a duly registered transfer and issuance of a title deed. It relied on Section 26(1) of the *Land Registration Act* which provides that a certificate of title issued by the Registrar is prima facie evidence of ownership and indefeasible except on proof of fraud or misrepresentation to which the proprietor is a party, or where the title was acquired illegally, unprocedurally or through a corrupt scheme.
21. The Plaintiff cited *Joseph Njuguna Kabugua v Peter Njuguna Giiko & Another* [2021] eKLR, *Mwero v Osman & 11 Others* (ELC 42 of 2021) [2024] KEELC 6081, and *Sigma Developments Limited v Registrar of Titles, Mombasa & 5 Others* (ELC 79 of 2016) [2024] KEELC 1457 to emphasise that the law is highly protective of registered titles. It further cited *Elijah Makeri Nyang'wara v Stephen Njuguna & Another* [2013] eKLR where the Court held that Section 26(1)(b) is intended to protect the true title holder from deprivation by subsequent irregular transactions. The Plaintiff argued that no evidence had been produced to prove fraud, misrepresentation or illegality in its acquisition, and further maintained that the requirement for Land Control Board consent was inapplicable as the suit land, being situated in Malindi town, was not agricultural land within the meaning of the *Land Control Act*.



22. On the second issue, whether the allocation to Karisa Mole Mbitha and the subsequent transfer to Dava Limited was irregular and illegal, the Plaintiff submitted that once land has been lawfully vested in a private proprietor, the State cannot subsequently allocate the same parcel to another party. It relied on the English authority of *Belfast Corporation v O.D. Cars Ltd* [1960] AC 490, where the House of Lords held that a public authority cannot grant rights over property that is already privately owned.
23. The Plaintiff pointed out that the impugned allocation was founded on the Report of the Special Task Force on Kilifi Jimba and Chembe Kibabamshe, which was later declared unconstitutional in Malindi Petition No. 11 of 2012, *Denman Properties Limited & 4 Others v Attorney General & 5 Others* [2024] KEELC 14142 (KLR). It was therefore its position that the Certificate of Lease issued to Karisa Mole Mbitha was void ab initio, and incapable of supporting a subsequent transfer to Dava Limited. The maxim *nemo dat quod non habet* was invoked, the Plaintiff arguing that since Karisa Mole did not hold a valid title, he could not confer one on Dava Limited.
24. In support, the Plaintiff relied on *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, which held that in cases of competing titles, the Court must trace the root of each and uphold the one traceable to proper procedure, and on *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, where the Court of Appeal held that a proprietor whose root of title is challenged must prove the legality of its acquisition. The Plaintiff submitted that its title predates the impugned lease by about three years, has a clear chain of ownership from Southern Sun Investments Limited, and had been confirmed as authentic by the Forensic Document Examination Report produced in evidence.
25. On the third issue, whether it is entitled to the reliefs sought, the Plaintiff submitted that having been deprived of its property and prevented from undertaking development plans, it is entitled to restitution and compensation. It relied on the principle of restitution, arguing that it is entitled to a refund of the purchase price of Kshs. 3,000,000/=, together with compensation for the current market value of the land, damages for loss of use, and costs. It cited *Kenya Hotel Properties Ltd v Willesden Investments Ltd* [2009] eKLR and *Kariuki v Kariithi & 2 Others (ELC 865 & 342 of 2017 (Consolidated))* [2024] KEELC 13722 for the proposition that unlawful interference with property rights warrants an award of damages.
26. On exemplary damages, the Plaintiff submitted that the Defendants' conduct in issuing a duplicate title over already registered land, and failing to rectify the anomaly even after a court declaration, fell within the category of oppressive and unconstitutional governmental action contemplated in *Rookes v Barnard* [1964] AC 1129. The Plaintiff also cited *Anns v Merton London Borough Council* [1978] AC 728 to argue that public authorities are liable in negligence where they perform statutory duties so negligently as to cause foreseeable harm.
27. In conclusion, the Plaintiff maintained that it had proved ownership of the suit property, demonstrated the illegality of the subsequent allocation, and established its entitlement to monetary compensation. It therefore prayed for refund of the purchase price, compensation at current market value, exemplary damages, interest and costs, as sought in its Further Amended Pleint.

Defendants' Submissions

28. The Defendants contended that the Plaintiff did not acquire lawful and legitimate rights over the suit property. Mr. Munga submitted that although the Plaintiff alleges to have purchased the property from Southern Sun Investments Limited in 2007 and to have been issued with a title deed, there is no supporting record in the presentation book or the Land Registry to validate that transfer.



29. Counsel argued that the Plaintiff failed to demonstrate compliance with mandatory legal requirements, including obtaining consent from the Land Control Board and paying stamp duty. In their view, this omission rendered the alleged transfer irregular and incapable of passing good title. Reliance was placed on *Nyangoka & 2 Others v Kabwori & Another* (Environment and Land Appeal 013 of 2023) [2024] KEELC 4599 (KLR) where the Court held that failure to comply with statutory requirements such as payment of stamp duty and presentation of transfer documents renders a transaction fraudulent.
30. The Defendants further submitted that the certified copy of the presentation book produced in evidence demonstrates that no transfers were presented for registration on the dates when Southern Sun Investments Limited was allegedly registered as proprietor. They maintained that the current registered proprietor is Dava Limited, which lawfully acquired the suit property from Karisa Mole Mbitha. DW1 testified that Karisa Mole was issued with a certificate of lease by the Government as lessor, and that the subsequent transfer to Dava Limited was supported by an application to the Land Control Board, consent duly issued, payment of consideration, and proper registration.
31. On the competing titles, counsel cited *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, where the Court held that when faced with two titles over the same land, the valid one is that which conforms with procedure and can trace a clear root of ownership. They also relied on the Court of Appeal decision in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, which held that when a registered proprietor's root of title is challenged, it is insufficient to merely produce the title deed; one must prove that the acquisition was legal, formal, and procedurally sound.
32. It was submitted that the Plaintiff failed to discharge this burden and that its title, having been acquired without compliance with statutory requirements, falls within the exceptions under Section 26(1)(b) of the *Land Registration Act*. Reliance was placed on *Elijah Makeri Nyang'wara v Stephen Njuguna & Another* [2013] eKLR, where the Court held that even an innocent purchaser's title is impeachable if it was obtained illegally, unprocedurally, or through a corrupt scheme.
33. On the reliefs sought, the counsel argued that the Plaintiff had not proved entitlement to compensation or exemplary damages. He submitted that exemplary damages are only awardable in limited categories, namely: oppressive or unconstitutional action by government servants; cases where the defendant's conduct is calculated for profit exceeding compensation; or where expressly authorized by statute. Reliance was placed on *Godfrey Julius Ndumba Mbogori & Another v Nairobi City County* [2018] eKLR and *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] KECA 782 (KLR) which reiterated the principles set out in *Rookes v Barnard* [1964] AC 1129.
34. Counsel submitted that none of the Defendants' conduct fell within these categories. On the claim for Kshs. 3,000,000/=, Mr. Munga pointed out that no evidence was led to prove payment of this sum to the Defendants, since PW1 admitted that the consideration was paid to Southern Sun Investments Limited, a party no longer in the proceedings. In his view, the Plaintiff's case was not supported by tangible evidence of probative value. He relied on *Lt. Col. Peter Ngari Kaguma & Others v Attorney General*, Constitutional Application No. 128 of 2006, as cited in *Christian Juma Wabwire v Attorney General* [2019] eKLR, and *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, for the proposition that a party alleging damages must prove them through cogent documentary evidence such as receipts or bank records, and that courts cannot rely on speculation.
35. In conclusion, Counsel submitted that the Plaintiff had failed to prove acquisition of a valid title, or entitlement to damages and compensation, and urged that the suit be dismissed with costs.



Analysis And Determination

36. In *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] KECA 706, (KLR) the court held as follows:

“118. The appellants’ titles are RLA titles; this is the Torrens system of land registration. In *Breskvar vs. Wall* (1971) 126 CLR it was stated the Torrens system is not a system of registration of title but a system of title by registration. It is a system which places emphasis on the accuracy of the land register and the register must mirror all currently active registrable interests affecting a particular parcel of land. Under the Torrens system, the Government as the keeper of the master record of all land and its respective owners, guarantee indefeasibility of all rights and interests shown in the land register against the entire world; and in case of loss arising from an error in registration, the person affected is guaranteed Government compensation. It is in this context that the appellants seek an alternative prayer in their memorandum of appeal that the respondents make prompt payment in full of just compensation to pursuant to the provisions of Article 40 of *the Constitution*.

119. The statutory presumption of indefeasibility and conclusiveness of title under the Torrens system is rebuttable by proof of fraud or misrepresentation in which the buyer is involved. The object of the Torrens system was summarized in the Privy Council decision in *Gibbs vs. Messer* 1891 AC 28 or 248 (Privy Council) as follows:

“The main object of the Act and the legislative scheme for the attainment of that object are equally plain. The object is to save a person dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title.”

120. Under the Torrens system, the title of the registered proprietor is cleared of any errors, mistakes or hidden defects, the process of registration acting, if you like, as a publicly funded hospital that remedies the injuries embedded within that title - a purge of past omissions or incorrect additions occurring by fiat of registration.”

37. The restatement of the law by Odek J in the above case was not made in the majority judgment in that appellate case but it remains the correct position in law.

38. The gist of the plaintiff’s claim in the present case is that the government, being the guarantor of the sanctity and indefeasibility of title, should pay him compensation in the form of loss for breach of that guarantee through administrative irregularities that resulted in double allocation of Plot Number Chembe/Kibabamshe/420. The plaintiff states that he legitimately acquired title to the suit land but



has been deprived of the use and enjoyment of the property for a decade due to the defendants' irregular issuance of a parallel title to a third party over the same land in the year 2010.

39. The plaintiff's claim is anchored on the following facts:
- a. He purchased land for the consideration of Kenya shillings 3 million which was paid;
 - b. After the purchase the transfer was due to registered at the Kilifi Land registry;
 - c. Following the registration of the transfer a title deed was issued in his name dated 7th November 2007;
 - d. He had quiet possession of the land between 2007 and 2010;
 - e. He contracted a company to design apartment and a restaurant complex on the property;
 - f. A Special Task Force on the Kilifi Jimba and Chembe Kibabamshe authored a report dated June 2010 showing that a lease had been issued to the former 3rd defendant over the same property on 29th September 2010.
 - g. The said leasehold property was subsequently transferred to Dava Limited the former 4th defendant herein on 28th October 2011
 - h. Despite a judicial pronouncement to the effect that the Task Force on Kilifi Jimba and Chembe Kibabamshe Report would not yield any constitutionally recognized title and the quashing of the same, the 3rd party lease over the said property has not been canceled and the plaintiff remains deprived of its property rights.
40. In support of its case, the plaintiff produced a host of documents including Transfer of Land form, executed by Southern Sun Investment Limited, Title Deed issued thereafter, Certificates of Official Search for the said property, payment of land rent and rates to the Malindi County Government, and a forensic examination report purportedly showing that the transfer was indeed registered by the Kilifi Land Registrar at the Kilifi Land Registry. He also produced a Charge Sheet and Proceedings in Criminal Case No 102 of 2023- Republic Versus Athman Otime Juma. The plaintiff relied on the evidence of 2 witnesses who included its director Daniel Ricci and the Forensic Examiner.
41. The defendants on their part deny that the transfer was ever registered at the Land Registry. They produced an extract of the Presentation Book to show that on the day it is claimed the transfer was registered, no such transaction was ever undertaken at the Land Registry. The defendant's case is that the plaintiff's purported title is invalid and the lease issued to Karisa Mola Mbitha is valid. They acknowledge that the lease has been transferred by Karisa Mola Mbitha to Dava Limited.
42. The issues that arise for determination in the present suit are as follows
- a. Did the plaintiff acquire lawful title to Plot Number Chembe/Kibabamshe/420 and has he been deprived of its use by way of the defendant mistakes and/or neglect?
 - b. Who should be the costs of this suit?
43. Regarding the first issue, it is the duty of this court to examine whether the plaintiff actually got registered Title to the suit land.
44. It was upon the plaintiff to bring evidence to demonstrate that he had his title registered. What the plaintiff produced in court as evidence of registration of its title were copies of the Title, Searches, and the Transfer from Southern Sun Investment Limited.



45. The court has examined the plaintiff's trial bundle. It commences with a Transfer between the plaintiff and Southern Sun Investments Limited whose directors are Franco Esposito and Elly JC Esposito Barnes. The transfer is that page 3 to 4 of the bundle. It is closely followed by the Title Deed purportedly issued on 7th November 2007 in the name of the plaintiff at page 5. The title is closely followed by a Certificate of Official Search dated 11th June 2008 showing that Malindi Musketeers Limited was registered as owner of the suit land on 7th November 2011 and title deed issued on the same date. Another copy of an official search at page 7 of the bundle dated 8th September 2008 provides the same information. At page 18 of the bundle of documents is a report titled "Report On Irregular Acquisition of Some Plots of Chembe Kibambamshe and Kilifi Jimba Settlement Schemes". However, that report appears incomplete in that it does not have many pages and neither is the suit land mentioned in the pages that appear.
46. At page 27 of the bundle is the Forensic Document Examination Report. At page 28 of the bundle that Forensic Document Examination Report purports to indicate that the signatures on the title deed held by the plaintiff, the green card, the certificates of official search and the transfer to the plaintiff were indeed made by one Elizabeth Thabu Thoya, the then Land Registrar, Kilifi. There is no Sale Agreement in that bundle. However, at page 128 of the plaintiff's bundle is a Charge Sheet showing one Athman Otime Juma, Land Registrar was on 8th February 2013 charged in Kilifi Criminal Case Number 102 Of 2013 with the offense of arbitrarily issuing a certificate of lease for the suit land to Karisa Mola Mbitha while knowing that there existed another title for the same land issued to Malindi Musketeers Limited on 7th November 2007.
47. At page 129 of the plaintiff's bundle is a copy of a Ruling in which the case against the said Athman Otime Juma was withdrawn before Y. M. Shikanda, SRM on 12 March 2015 on the basis that after the prosecution went through their file, they discovered that some of their witnesses ought to have been arraigned in court. There is no indication that Elizabeth Thoya was ever charged with any wrongdoing concerning the issuance of title to the plaintiff. There is also no evidence whatsoever that Athman Otime Juma was ever rearrested and charged afresh after the Kilifi Criminal Case Number 102 of 2007 was withdrawn.
48. Consequently, there's no evidence whatsoever that any of those two Registrars did register the plaintiff's documents at the Kilifi Land Registry.
49. The evidence of DW1 was that the Presentation Book for the date on which the plaintiff's transfer is said to have been presented for registration has no record of such presentation. His evidence is that no document purporting to have undergone registration can be legal or valid if it is not reflected in the Presentation Book.
50. The plaintiff did not produce evidence of Presentation Book entries to show he ever presented the Transfer to the Kilifi Land Registry. Its transfer which PW1 produced as P. Exh 1 shows that it was presented at the land registry on 7th November 2007 under P.B. (Presentation Book) No. 08 of 07 and that it was registered on the same day by one E.N. Thoya. The only evidence that this court can resort to in this case in establishing whether such a transfer was indeed presented at the Land Registry is the copy of the Presentation Book produced by DW1 the land registrar DExh.10 listed in the list dated 5th February 2024.
51. At Page 37 of the plaintiff's bundle is a copy of a Green Card which the plaintiff relies on to demonstrate that Southern Sun Investments Limited transferred the title to the suit land to Malindi Musketeers Limited. That Green Card shows that Southern Sun Investments Limited had obtained title on 17th February 2000 from Tanga Trolleys Services for the consideration of KSh 1,200,000. Tanga



- Trolleys Services on its part had obtained title in its name on 21st October 1999. The Green Card had been opened in the name of the Government of the Republic of Kenya on 22nd December 1986.
52. As I stated herein before, the plaintiff never produced a copy of the Presentation Book for the date on which title to the suit land is said to have been transferred to it. That fateful date is 7th November 2007. But what is more concerning is that the Green Card produced by the plaintiff shows that Southern Sun Investments Limited got its title on 17th February 2000. That transfer should ordinary be reflected in the Presentation Book for that day.
 53. Looking at D.Exh. 10 that is, the Presentation Book produced by the defendants, only 2 transactions had their documents presented for registrations and none of them was a Transfer. Both of them were instruments of Charge one in respect of Kilifi/Vishakani/353 and the other one in respect of Kilifi/Ngalani/445, presented in that order as items number 26 and 27 in the list for the month of October 2000.
 54. According to the said Presentation Book extract, no transfer was ever lodged or registered with the Kilifi Land Registry in favor of Tanga Trolleys Services on 25th October 1999 as claimed by the plaintiff. Looking at the same exhibit the extract in respect of presentations of February 2000 show that on 17th February 2,000, only documents in respect of 4 transactions were lodged the Kilifi Land Registry. These were in respect of Kilifi/Mtondia/866 (a transfer) Kilifi/Mtondia/880 (a transfer) Kilifi/Mtondia/867 (a transfer) and Gede/Mijomboni/484 (a transfer).
 55. Clearly no transfer executed between Tanga Trolleys Services and Southern Sun Investments Limited for any land parcel whatsoever was ever lodged in the Kilifi Land Registry on 17th February 2000. I have stated that the plaintiff has not produced any Presentation Book in respect of the date 7th November 2007, on which it purports that its transfer was registered in the Kilifi Land Registry. That is a very serious omission on the part of the plaintiff which makes it doubtful that the transfer produced as P. Exh 1 on page 3 of the bundle was ever presented for registration at the Kilifi Land Registry.
 56. There is also no credible entry in the presentation book showing that the government of Kenya transferred the suit land to Tanga Trolleys Services on 21st October 1999, that Tanga Trolleys Services transferred the suit land to Southern Sun Investments Limited on 17th February 2000, and that in turn Southern Sun Investments Limited transferred the suit land to Malindi Musketeers Limited on 7th November 2007. Without that evidence, the plaintiff has nothing to show this court that he had acquired valid title to the suit land.
 57. This court has no reason to disbelieve the evidence of the defendants when they stated that the transactions transferring the suit land to Tanga Trolleys Services, Southern Sun Investments Limited and Malindi Musketeers Limited in succession were not reflected in the various Presentation Books held at the Kilifi Land Registry.
 58. In the amended defence dated 8th June 2021, the defendants had challenged the plaintiff's title as illegal and thus called upon the plaintiff to prove the validity of its title. They expressed regret that the plaintiff's title was not lawfully acquired. Consequently, they denied that the document the plaintiff held was capable of confirming any proprietary rights upon the plaintiff.
 59. It was stated long ago in the case of *Munyu Maina Versus Maina Gathiha* [2013] eKLR that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership; that it is this very instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired it and show that



the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.

60. In Elizabeth Wambui Githinji (supra) Odek JA observed as follows:

“The determination of the dispute in this appeal lies in the answer to the following straight forward questions: if a person sells you land that is a public road, can you acquire private proprietary interest and title thereto? What if he/she sells you land that is a road reserve? What if you have no knowledge or means of knowing the land is reserved as a public road? In any of these scenarios, does the vendor have any land or proprietary interest to sell? In considering the answers to these questions, it should be borne in mind that it is entitlement to property that gives rise to title to property; it is not title that gives rise to entitlement to property. In any of the above scenarios, the vendor must have entitlement to the land before he/she can pass any title or proprietary interest to a bona fide purchaser for value without notice.”

61. Therefore, the evidential burden of proof was upon the plaintiff establish that is title was properly issued by the government before any other step could be taken of verifying whether there was a subsequent double allocation to any other person or not. In doing that, nothing would have been as easy as getting those Presentation Book entries vide which the transfers to the plaintiff's predecessors were registered at the Kilifi Land Registry as well as the Presentation Book vide which the plaintiff itself was registered as proprietor.
62. The plaintiff has not controverted the defendant's evidence in the form of a certified copy of the Presentation Books for the various dates on which the transfers that led to the issues of title in its name. The defendant's evidence thus stands strong. As the plaintiff did not bring that evidence, the presumption of this court is that it does not have it.
63. Further, as the defendant presented evidence showing that the transfers forming part of the plaintiff's evidence were not registered at registry on the date when they are purported to have been registered this court ineluctable conclusion is that no such transfers whatsoever were presented for registration or registered at the land registry. The only persons who can know how those documents were ever dealt with are the directors of Tanga Trolleys Services, Southern Sun Investments Limited and Malindi Musketeers Limited.
64. It must be stated that with the current state of the devolved governments where it has not been demonstrated that they are directly connected electronically to the Land Registry in order to verify ownership of any particular plot of land in real time, suggesting that the rates payments receipts or rent payments receipts issued by the County Governments should be evidence of ownership of land ought to be rejected. These documents can be used only for persuasion in other peripheral issues such as expenditure on the plot, but they are worthless as far as proof of legal ownership is concerned. For proof of ownership, it is the contents of the register at the Lands Office and the Presentation Book that matter.
65. One more observation by this court is that the requirement for Land Control Board consent is set out under Section 6(1) of the *Land Control Act*, which provides that certain controlled transactions, including sales, transfers, leases, and charges of agricultural land, are void unless the consent of the Land Control Board is obtained. The key question, therefore, is whether the suit property constituted agricultural land for purposes of the Act. In the present case, no evidence was led by the Defendants to demonstrate that the suit property was agricultural land to which the Act applied. That notwithstanding, PW1 testified that the Plaintiff obtained the said consent and paid stamp duty for the



transfer. This assertion, however, was not substantiated by the production of the actual consent form or payment receipts. On this score, the Defendants were correct that critical documents to establish compliance were lacking. In the circumstances, the Plaintiff's root of title remains questionable, and it cannot be said with certainty that the Defendants were guilty of double issuance of title.

66. In this case, the plaintiff failed to prove registration of his title at the very elementary level. The superfluity of engaging in a lengthy attempt to proceed to the next step of establishing whether there was a double allocation occasioned by the issuance of a lease to Karisa Mola Mbitha is self-evident as the plaintiff possesses no title over which any other title could have been superimposed in order for this case to be construed as a double allocation. Any title not so properly registered by way of lodgment of transfers at the Land Registry is illegally obtained. Though Article 40 (3) of *the Constitution* stipulates that the State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, Article 40 (6) states that:

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

67. While the Special Task Force Report may have been declared unconstitutional, the critical issue remains whether the Plaintiff has established that his title was indeed registered. If it was not, it is not fair to allow it to compete for validity with any registered title. The conclusion of this court is that the plaintiff's title deed can not be said to be without defects, and serious ones too.

68. The plaintiff's withdrawal of suit against the 3rd and 4th defendant meant that the trial of the case against them could not go on, but that was not all. The plaintiff seriously narrowed down his range of maneuver by failing to join Southern Sun Investments Limited, Tanga Trolleys Services, the persons who allegedly took its money as consideration, and focused solely on compensation by the government which move is very improper in the circumstances of this case.

69. In Elizabeth Wambui Githinji (*supra*), the court stated as follows:

“Quality of title refers to inviolability and marketability of title. A marketable title is a title that is free from any defects or clouds that a reasonable buyer would find objectionable.”

70. The very *nemo dat quod non habet* rule that the plaintiff extolled in its submissions against the defendants and third parties has now been reversed by circumstances to become the weapon of its unintended suicide.

71. Without establishing a valid registered title and a compensable wrong attributable to the Defendants, the claim for damages against the government cannot succeed. Restitution cannot also issue against the Government for sums paid to a private vendor who is not before Court. Also, there is no room to presume compulsory acquisition where the government never officially commenced any compulsory acquisition process in accordance with the law and has also not involved itself in any manner with possession or utilization of the suit land. Deeming that there was any such acquisition may set a bad precedent where government will be blamed for all manner of misconduct in the land sector by miscreants.

72. In brief, this court states that there was no compulsory acquisition by any stretch of imagination and there could not have been any double allocation as the plaintiff's documents are of dubious origin. Compensation and awards of damages are only deserved by persons whose titles though regularly registered become muddled up in a genuine double allocation or where there was intended compulsory acquisition that put the land into government's possession. Therefore, the plaintiff in the present case deserves to be awarded no compensation or exemplary damages whatsoever against the defendants.



73. The outcome of the foregoing is that the plaintiff's suit lacks merit and it is hereby dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 7TH DAY OF OCTOBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

