



Gitau & 2 others v Attorney General & 13 others (Environment and Land Case 57 of 2021) [2025] KEELC 7605 (KLR) (3 November 2025) (Judgment)

Neutral citation: [2025] KEELC 7605 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE 57 OF 2021**

AE DENA, J

NOVEMBER 3, 2025

BETWEEN

**JOSEPH MWANIKI GITAU 1ST PLAINTIFF
MILKA NJERI GITAU (BOTH Suing AS THE ADMINISTRATORS OF THE
ESTATE OF THE OF THE LATE SAMSON MWAURA GITAU) ... 2ND PLAINTIFF
BRIGITTE KARL GITAU 3RD PLAINTIFF**

AND

**THE ATTORNEY GENERAL 1ST DEFENDANT
THE LANDS REGISTRAR OF KWALE 2ND DEFENDANT
SAID H BEDZENGA Sued AS THE KADHI OF KWALE 3RD DEFENDANT
THE ESTATE OF THE LATE JUMA A KIMETSE
MWACHIMAKO 4TH DEFENDANT
HAMISI T CHIMETSE 5TH DEFENDANT
SAID RAMADHAN GUAYA 6TH DEFENDANT
FATUMA SAID KIMETSE 7TH DEFENDANT
MWANALIMA SAID NIMUGUPU 8TH DEFENDANT
FATUMA RAMA MWAPAZIA 9TH DEFENDANT
ASHA SAID KIMETSE 10TH DEFENDANT
LIPI SAID CHIMETSE 11TH DEFENDANT
REHEMA JUMA KIMETSE 12TH DEFENDANT
JOHN ERIC MUSYOKA ANNAN 13TH DEFENDANT**



JUDGMENT

1. The plaintiffs' suit was commenced by way of plaint filed on 14/01/2016 and subsequently amended culminating into Further Amended Plaint dated 26/07/2023.
2. The plaintiff brought the suit representing the Estate of his brother Samson Mwaura Gitau (herein Samson) and Brigitte Karl the widow of his brother who it is averred were the owners and or allottees of Kwale Diani Settlement Scheme 217 by virtue of a Certificate of Outright Purchase from the Settlement Fund Trustees (SFT). Milkah Gitau is the mother of Samson deceased who later died in 2023 during the pendency of these proceedings.
3. The plaintiffs claim they were issued with a certificate of outright purchase and transfer for registration dated 5/01/2004 upon complying with the terms and conditions. However unknown to the plaintiffs one Hamisi Juma Chimetse (Chimetse) and the 5th defendant had fraudulently acquired a title over the land. That the said Chimetse died and the 7th defendant petitioned the Kadhis court at Kwale and was again fraudulent registered together with the 5th defendant as the owners by transmission. That the 10th and 11th defendants in cahoots with the 2nd defendant and the 5th and 9th defendants fraudulently caused the land to be subdivided into 5 portions and obtained the same at a gross undervalue.
4. The plaintiffs seek the following orders against the defendants jointly and severally seeking for; -
 1. A declaration that the registration of the suit property known as Kwale Diani Settlement Scheme 217 in the names of the late Juma Kimetse Mwachimako and Fifth Defendants and the subsequent transfer to the 5th 6th 8th, 9th 10th and 11th defendants was and is null and void
 2. An order directing the 5th 6th 8th, 9th 10th and 11th defendants to deliver the title improperly issued to them for cancellation by the court
 3. An order directing the 2nd Defendant to cancel the titles issued to the 5th 6th 8th, 9th 10th and 11th defendants in respect of Kwale Diani Settlement Scheme 217 and or subsequent subdivisions known as Kwale Diani Settlement SS 3046, Kwale Diani Settlement Scheme SS 3047, Kwale Diani Settlement Scheme SS 3048, Kwale Diani Settlement Scheme SS 3049 and Kwale Diani Settlement Scheme SS 3050.
 4. In the alternative, an order directing that the original title of the property known as Kwale Diani Settlement Scheme SS 217 does vest in the rightful owners, the plaintiffs herein and that the green card be restored by dispensing with the order for advertisement.
 5. In the further alternative, the plaintiffs claim against the defendants the prevailing market value of land at the time of trial, subject to valuation
 6. Mesne profits from 28th June 2002 on a sum found to be due until payment in full
 7. Cost of this suit and interest thereon
 8. General damages for trespass and eviction of the 5th defendant
5. The 2nd defendant filed defence dated 18/03/2021 through the office of the Attorney General who is also sued as the 1st defendant in this suit, denying the allegations that he unlawfully removed a restriction that had been lodged against the title of Hamisi and Juma Chimetse as there was never such



a restriction. That the only register that was available for Kwale Diani Settlement Scheme SS 217 was the one dated 28/6/2002 and the subdivisions were above board. That he acted in good faith within the provisions of section 8(5) of the Miscellaneous Land Amendment Act 2017. That an order emanating from the Kadhis court overrides any restriction, caution or encumbrances if at all they existed.

6. The 4,6,7,8, and 9th defendants filed a joint statement of defence which was further amended on 22/03/2024 through the firm of Sigey A. Bett & Company advocates and denied the allegations raised against them some of which they stated they were unaware of and were total strangers to them. They put the plaintiffs to strict proof.
7. The Attorney General through State Counsel also filed a joint statement of defence for the 1st 2nd and 3rd defendants dated 28/2/2021 denying the allegations raised in the plaint.
8. The 5th Defendant was initially represented by the firm of Kamoti & Co. Advocates. I have not come across a defence, the court however notes that Sigey A. Bett & Company Advocates amended its defence by including the 5th defendant as one of the parties they were acting for. No opposition was raised in this regard. Moreover the 5th Defendants case cannot be severed from the 4,6,7,8, and 9th defendants being parties claiming under the same title of the 5th defendant. This issue was never brought up during the proceedings except at the point of final submissions.

Hearing And Evidence Of The Parties

9. The suit was heard on various dates.

Plaintiffs Case

10. PW1 was Joseph Mwaniki Gitau the 1st plaintiff. He adopted his witness statement dated 14/01/2016. He presented the documents in the list of documents dated 13/01/2016, 25/04/2016 (as a bundle), Supplementary List dated 8/4/2019. However, the forensic document examiners report 14/7/2022 was marked for identification following objections raised by the defence.
11. On being cross examined by Mr. Kithi Counsel for the 10th and 11th defendants, he told the court that the first title to Samson Mwaura Gitau and Brigitte was issued on 9/01/2013 on the basis of the new green card. That did not have a title at the time of requesting for replacement of green card and he could not tell which documents were used by the land registrar to reconstruct the green card. He further testified that he got the title because the title issued to Chimetse was not recognised by the lands office who wanted it back for correction. He pointed while the transfer adduced by the plaintiff was not registered title had passed vide the certificate of outright purchase issued in 1986.
12. Cross examined by Mr Sigei on the Minutes of the land Settlement Committee he noted the same indicated D.Mwangi is the District Agriculture Officer. He admitted he did not have a sale agreement. He agreed the titles to the 5,6,7,8,9 defendants was precipitated by an order of the Kadhi court. He never came across the name Kuzi during his due diligence. It never occurred to them that the land belongs to the Digo and *the Constitution* allows Kikuyus to own land anywhere. He agreed that the succession was done 17 years after Samsons death.
13. The witness was also cross examined by Mr. Waga. He admitted that due diligence is done before purchase and for him the Minutes of the plot allocation committee gave the origin of the title to the plaintiff. He testified that he could not tell if it was illegitimate for D. Mwangi to allocate himself land. He pointed the discharge of charge was presented but because of lack of title it was not registered. He denied the 2013 title was 'suspected forgery'. He could not remember who took the pictures produced



- by the plaintiff (Pex 3). That they were posted and he could not edit them. He confirmed he did not go for review of the Kadhis orders but it was being challenged under the present case.
14. Upon re-examination PW1 clarified that the land was allocated to D. Mwangi by a panel and not by an individual. That the evidence of fraud is in the plaintiffs replying affidavit dated 24/4/2016.
 15. PW2 was Stephen Waweru Gitau a property agent and brother to the deceased (Samson). He adopted his witness statement dated 11/04/2023. He told the court the plot 217 was purchased from Daniel Mwangi by Samson and Bridgette. It was intended to put up cottages, a store house was built and foundations of swimming pool, a well but things stopped when Samson died.
 16. According to PW2 all file entries were intact until 1995 but by September 2000 the green card had been removed. That in 2004 the discharge of charge was issued. In 2014 it was discovered new titles were issued with 16 subdivisions and Samsons green card replaced. On inquiry all the land registrars told them they had stayed for too long. He told the court he has been the one looking after the property since 1987 following the demise of Samson and no one showed up on the property until 2023.
 17. Cross examined by Mr. Waga PW2 asserted that the absence of 'SS' in their title should not be a big issue as the property is the same. He confirmed that he did not play any role when Samson bought the property. He first visited the property in 1986 and was overseeing the construction of 2 houses, store, swimming pool and a well. That on the day of the site visit there was no trace of these developments. He confirmed he lacked a search conducted in 1995. While he agreed there was an existing title by the year 2002 he asserted it had no documents to support its issuance. He insisted Ngetich and Kahindi ignored Samsons documentation instead of checking with SFT who were the original owners. That he positively identified the suit property and its beacons during the site visit.
 18. Cross examined by the 10th defendant PW2 averred his brother had shown him where his land begins at the fenced area where there was a baobab tree according to the history of the property. He was aware that a title cannot be cancelled except by order of the court.
 19. The witness cross examined by Mr. Sigei confirmed PW2 testified the green card (page 7 of AGs bundle) had no entry for Daniel Mwangi. He testified the structures he had referred to had been demolished but he wasn't sure there was a police report. On the certificate of Acceptance he conceded by the time Samson bought the property in 1986 Chimetse had accepted the offer in 1978. He confirmed Chimetse's family committed no wrong in approaching the Kadhis court but it was the Kadhi who was wrong.
 20. PW2 clarified in re-examination the structure commenced by Samson were vandalized over time. That during the site visit the plaintiff asked PW2 to show the beacons because PW2 was present when the same were placed.
 21. PW3 was Purity Wanjiru Mwangi Deputy director office of Land Adjudication & Settlement. She adopted her witness statement dated 6/4/2023. The witness outlined the history of the Diani Settlement Scheme noting it was for settlement of squatters. Beneficiaries also included public utilities, Squatters found on the ground including Tanzanians who were actually Kenyans who came back after the breakdown of East Africa Community. Other applicants also applied.
 22. PW3 could not confirm if D. Mwangi District Agricultural Officer referred to in the Minutes dated 17/7/1977 was the same person being referred to by the plaintiffs. She could not confirm if there was a grievance raised by the 4-9th defendants leading to amendments as there was no such record with regard to the present case. That the true documents are the ones held by the HQs and which is what she had brought to court.



23. PW3 testified that plot no. 217 was allocated to D.Mwangi based on Minutes of 17/5/1977, Certificate of outright purchase issued on 19/3/1994. That consent & transfer were dealt with after the LCB application to transfer to Samson and Bridgit and who were issued with Discharge and transfer on 15/01/2004. That issue of certificate of outright purchase is an indication of full payment.
24. Cross examined by Mr. Waga the witness indicated that after 1st allocation there was room for handling grievances but she had no record indicating there were grievances. That had there been a grievance the discharge of charge would have been withheld. The witness disowned the letter of offer dated 7/2/78, Certificate of acceptance, plot survey, certificate of outright purchase and transfer dated 21/11/07 stating they did not originate from Hqs-(see 5th defendants bundle).
25. Cross examined by the 10th defendant the witness testified that if at all D.Mwangi was the District Agricultural Officer he would not qualify as owner. She pointed resettlement does not displace owners and that the ex-Tanzanians came in as landless. That the discharge of charge issued in 2004 was signed by one Mwaniki Gitau in the absence of a notification of the death of Samson which she conceded was wrong.
26. On cross examination by Mr. Sigei the witness pointed the transfer(pg69) was not registered neither was it signed by the land -registrar. On being referred to the letter dated letter 7/2/1978 she denied RDG Wachira was their Director. She testified there was no letter of offer in the parcel file to the plaintiffs but insisted the offer to the defendants had discrepancies such as lack of folio number, different font from that used in their office.
27. The witness clarified in reexamination that she could not tell the author of the letter dated 10/7/2000 as its last page 2 is missing. That RDG Wachira was Estate Manager and the only person authorized to sign letters of offer was the director of adjudication. Documents from the HQs were authentic and final because of the seal.
28. The plaintiff therefore closed its case.
29. DW1 was Susan Mueni Land Registrar Kwale. Her evidence was that based on their records the correct owner of Kwale/Diani/217 is John Musyoka Annan & Geraldine Mumbua Musyoka after the parcel was subdivided into three portions and subsequently into 5 portions in 2014. The 1st title was registered to the Settlement Fund Trustee in 1992. That in 2002 the 1st allottee Hamisi J. Chimatse and Juma Chimatse Mwachimaka were jointly given the land by Settlement Fund Trustees. The witness indicated there was a green card showing that the SFT issued the Land to Simon Mwaura Gitau and Bridgete Karl as joint proprietors in 2013 and title. However the same bear remarks on its face “suspected forgery”.
30. Cross examined by Mr. Tindi DW1 confirmed the parcel has two titles– issued in 2002 and 2013. That the letter dated 30/8/2007 by Kwale Land Registrar R.K Kalama stated the 2002 title was null and void. The witness supported the position since a parcel cannot have two titles. She confirmed there is no gazette notice in the file to support the opening of the green card (page 7 of the plaintiff bundle). The position taken by R.K Kalama was legally incorrect as he should have advised the parties to approach the court. There was no letter asking the registrar to place the restriction. There was no letter also asking for the removal of the restriction. That Samson and Bridgette were joint owners and upon death of one, their interest in the land goes to the surviving proprietor and succession would not be required.
31. On further cross examination by the 10th defendant the witness indicated that there is no record showing the 2002 title was cancelled neither is there an application for its cancellation. She expressed concern that another title issued in 2013 when the record shows the 2002 title was still in force. She told the court the title which is first in time should take precedence.



32. DW1 affirmed the registered owners were the 10th and 11th defendants and the only valid mutation were those that were carried out in 2014 giving rise to plots 3046 – 3050 and which effectively extinguished title number 217. The witness confirmed in reexamination that the parcel file did not contain mutations that gave rise to plots 2561-2576 (entry 6).
33. Asked by the Court whether the gazette notice of 2012 was available in the parcel file the witness answered in the negative.
34. DW2 was Joseph Mulwa Kaindi Land registrar who worked in Kwale between 1997 to 2004. He adopted his witness statement dated 18/3/2022 as his evidence in chief. The witness told the court that where a title is from SFT the allottee(owner) must request for the transfer from SFT. The SFT then issues a transfer from itself to the “owner” since the land is initially registered under the SFT. A settlement officer was required to accompany the ‘owner’ to the registry to present the documents. They should present the transfer which is then assessed for stamp duty and registration of title deed and then make payments. DW2 added that at the time he left Kwale in 2002 the only any green card was in respect of plot 217.
35. Cross examined by Mr. Tindi the witness pointed the investigations referred to in the letter dated 30/8/2007 were not procedural since Mr. Kalama is not a settlement officer. He affirmed the discharge of charge and transfer were availed to him for registration to have happened and was not aware that records at SFT show that plot 217 was registered in the names of Daniel Mwangi. That during his tenure there were no queries on plot 217 unless the same arose after. He observed that the letter dated 22/08/2005 was a summons and not cancellation of title.
36. Cross examined by Mr. Sigei the witness denied he engaged in fraud. That since he left Kwale he has never been summoned by police relating to the land. He asserted that Kalamas advise was wrong and any challenge should have been resolved by the court. That a restriction must have correspondence giving reasons for the restriction and which he has not seen. He pointed that legally a parcel cannot have 2 titles. However the 1st title is always the lawful title.
37. On further cross examination by the 10th defendant the witness testified that he issued the title in 2002 to Juma and Hamisi and neither the SFT or his superiors have questioned the same.
38. DW3 was Charles Kipkurui Ngetich, Deputy Chief Land Registrar. According to him the right procedure for subdivision was followed and he was the one who closed the register of parcel 217 as required. The witness explained the procedure for subdivision entailing prior search, ground work by practicing surveyor, submission of sketches of the ground to the District Surveyor who approved the mutation form which was accompanied by consent from the LCB. The deputy surveyor then forwarded the mutation to provincial survey in Mombasa for amendment of the map. It was returned to the District Surveyor who then issued numbers Kwale/Diani S.S 3046 – 3050.
39. DW3 added that there was a surrender of road to Government of Kenya 0.011 of an Hectare. The District surveyor forwarded the mutation to the witness as land registrar and he proceeded to cancel the mother title Kwale/Diani 217. DW3 then opened 5 registers (Green cards) and issued titles in respect of the said registers. He affirmed that he is the one who crossed the title (item 1) in the Attorney General’s bundle) and there was no order stopping him.
40. As to the Kadhis orders the witness asserted his actions were based on the Kadhis order in Succession cause 211 of 2012. He confirmed cancelling the title dated 9/01/2013 since it was a forgery. According to the witness the new registers were registered by Mr. Marwanga without any explanation and back up documentation. That there cannot be two registers. He upon investigations discovered there was a



genuine register dating back to 2002 in the name of the deceased (i.e. Hamisi J Chimatse Mwachimako and Hamisi J. Chimatse. Thus the 2013 title wasn't a good title.

41. He asserted that section 79 (2) of the [Land Registration Act](#) empowers a land registrar to cancel title in event of mistake or fraud to avoid further damage. He observed that the transfer (see plaintiff list item 1) was not embossed for stamp duty. Embossment was only done in Nairobi and Mombasa while other registries used franking. It was not dated neither signed by the land registrar. It was an incomplete instrument. He stated the documents were brought in by Vincent Mogaka advocate who is the person he dealt with and therefore he cannot have dealt with Chimatse and Mwachimako fraudulently.
42. Cross examined by Mr. Tindi the witness asserted Mr. Mogaka brought R.L 19. He confirmed he used to see the plaintiff at the registry. He denied PW1 beseeched him to place the purported restriction. He reiterated he was not aware of any letter written by PW1 complaining about him. On the letter dated 11/12/2015 (see plaintiff supplementary list item 70) he asserted he never received it and was never copied to Kwale. That the only title he canceled is the one dated 28/6/2002. A court order overrides a restriction
43. Cross examined further he stated it is procedural for LCB to deal with correction of name. That he never played a role in an affidavit of Hamisi Juma Kuzi on change of name. He conceded item 65 which was for correction of name was in the prescribed form and was a valid document. He noted while the 1st page of the mutation did not bear Chimatse's name because he was deceased the Kadhi was permitted by law to adopt and represent the deceased under sections 170 (5), of the Kadhis Court Act and section 48 of cap 160. The Kadhi signed the papers on behalf of the deceased. He maintained there was no complaint and the order of the card would supercede the complaint. He asserted the Kadhis order is the one that made him complete the subdivision transaction.
44. Cross examined by Mr. Sigei the witness reiterated the Kadhis order would override any restriction, caution or caveat. That he did not frustrate anyone but was complying with a court order. According to the witness he did not breach any trust, abuse his office and neither did he act dishonestly but acted within the confines of section 63 of the [Land Registration Act](#) 2012. On the letter of offer dated 7/2/1978 he confirmed the signatory D. G. Wachira Estate Manager had authority to sign the same on behalf of SFT being the standard practice in the 70s and 80s.
45. On the letter of offer dated 24/07/1985 also signed by DG Wachira the witness confirmed it is the offer that generated title 438. That both offers were authentic. On the minutes of the meeting held on 17/5/1977 the witness stated that based on his experience as land registrar a committee member was not supposed to benefit but only settled squatters 80% of whom must be locals and 20% non locals. He recalled a case where Justice Makhandia ordered nullification of titles of public officers who had allocated themselves land in a settlement scheme and ordered fresh allocation to the real members.
46. Cross examined by the 10th defendant on the breaches of the 3rd defendant the witness reiterated he acted under lawful court orders. That the Agriculture Act ceases to apply upon registration of titles. He stated that the 10th and 11th defendants had nothing to do with the subdivisions since subdivision is done by the registered owner. The subdivision was a direct consequence of the Kadhis order. Recapping the process of subdivision the witness affirmed the subdivision herein was above board. There was nothing wrong with the transfers for the sale of the subdivisions. That as custodian of documents on behalf of the Chief land registrar he never saw any court order to cancel title 217. The plaintiff title issued in 2013 just cropped up with no basis and should only have been issued upon cancellation of the 2002 title otherwise it would be a case of double registration.



47. DW3 clarified in reexamination that he only marked the title 'suspected forgery' to differentiate it for internal consumption as he did not know it would end up in court. The 1-3rd defendants case was closed.
48. DW4 was Saidi Mabavu Wa Mabavu the Chairman ofMkakwani Committee Natural Resource Organization a Community Based Organization. He presented a petition presented by the CBO to the National Land Commission seeking nullification of the Diani Settlement Scheme as 80% of the same was allocated to outsiders. He stated that the NLC had not responded to the petition. That Chimetses land was one of the affected parcels. He prayed that the land be returned to Chimetses family.
49. Cross examined by Mr. Tindi the witness stated that his parents land was in the scheme. That the petition encompassed all the plots. He disagreed with the fact that the land was being given out to non digos when the same was never idle but being used for cultivation. That he was not complaining about the Tanzanians. They had only agreed to allocation for 25 kikuyus who were under the late president Jomo Kenyatta. His position was that those who have purchased land in the scheme may remain subject to discussions on compensation for those who were treated unjustly. He conceded that he discovered Mzee Chimetse had a title in the scheme after his death following succession proceedings.
50. The witness added that he was aware of High Court proceedings where the court refused to nullify the scheme. He admitted you cannot approach the court and the NLC concurrently. That they had no issue with the 10 & 11th defendants title but the plaintiffs title since Saidi Chimetse was already in occupation of the land.
51. Cross examined by Mr. Waga the witness stated that by the time of the meeting held on 17/5/1977 Chimetse was already farming on the land. That the letter dated 10/7/2000 confirms Chimetses family was following up on the parcel. He identified the name Juma Kimatso Mwachiri as Chimetses son in the plot occupation list filed as an annexure in the petition.
52. Cross examined by the 10th defendant DW3 testified that the aim of the petition to NLC was to have the historical injustices addressed and nullification of titles that were not obtained justly. Locals have land but the titles are not registered under them. The witness outlined the various portfolios he has served in since 1977 fighting for the land rights of locals. That while the ex Tanzanians were 25 foreigners were more numbering 177 -200 said to have been allocated the parcels by secret ballot. That Nyarangi the DC together with the committee allocated the land to government officials such as D. Mwangi who sold the parcel to the plaintiff. That the plot survey was carried out following a complaint from him and the report was prepared by the GOK. That in addition to NLC he had also made complaints to other senior government officials.
53. DW4 clarified in reexamination that most of the ex Tanzanians in the Minutes were imposed as only one was genuine.
54. DW5 was Stephen Muthuu Mukono a surveyor since 2019. He confirmed he was present during the site visit conducted on 21/7/2023 on behalf of the 10th defendant. That his role was to identify the position of plot 217 which he did by using the Govt official map of the scheme and GPRS. That the plaintiff together with his assistant did not identify the correct position of the parcel 217. He produced a report DW5 ex 2.
55. On cross examination by Mr. Tindi DW5 asserted he is an approved assistant though at the time of the report he had a preliminary practice certificate as the main certificate was not ready. He was working under an authorized surveyor and has authority to prepare a report as an approved assistant. Based on map for the settlement scheme the witness stated plot 217 has defined boundaries.



56. Cross examined by Mr. Waga the witness testified that during the site visit the plaintiff showed 3 beacons and beacons for a neighboring property which was not part of plot 217. In the neighboring plot the plaintiff showed a portion as part of their plot. None of the parties used a map during the visit to identify the beacons. That it was clear the plaintiff did not know the plot 217.
57. On cross examination by the 10th defendant DW5 stated that during the site visit the plaintiff pointed there were structures but there were no remnants of structures but only a well. That he saw the portion that was ring fenced with poles and cement. The same appeared as if there was an excavation and the plaintiff claimed this was a portion of his land. He heard Mr. Kuzi denying that the portion was part of plot 217. The witness affirmed that the area said to have been fenced by the 10th defendant was not part of plot 217. That the well was just a hole in the ground. That the defendants version was the correct orientation of the land.
58. DW6 was Saidi Ramadhan. He adopted his witness statement dated 28/3/2023. He stated that the 5th Defendants father his fathers brother. The witness informed the court he had come to give evidence on behalf of the family. The documents he sought to produce in list dated 26/9/2019 except the Kadhis order were marked for identification to enable production by the relevant Government departments. He produced the documents 1-10 and 14 -17 as part of his evidence.
59. DW6 informed the court that plot 217 belonged to Saidi Matano Chimetse even before the SFT came in. That upon Chimetse's death they had to undertake succession at the Kadhis court and presented the same to the lands office where they were asked to surrender the original title in exchange for new ones. They later sold to the 10th and 11th defendant.
60. In cross examination by Mr Tindi the witness stated there were 5 sale agreements and Mzee Hamisis heirs were the vendors. He did not have details of the purchase price. He could not remember how the amount his father gave for payment of the titles in 2002. The title they presented before the Kadhi was the one to Juma Saidi Chimetse. The witness indicated he was not happy about the land being issued to non locals since the same were issued where locals still owned the land. He emphasized plot 438 was subdivided and sold and was different from 217. He could not tell how plot 438 became the 5th defendants plot but it belonged to the witnesses brother. He had no problems with the list containing the plot 200 series. He pointed in series 199-235, plot 217 was allocated to Daniel Mwangi and Samson Mwaura Gitau.
61. Cross examined by Mr. Waga the witness indicated that he was born in the suit property and Saidi Matano was allocated the land because they lived therein. He was not aware if there were any disputes on plot 438 which the 5th defendant subdivided and sold. On the letters of offer dated 24/7/1985 and 1/2/1978 he noted they were both signed by PDG Wachira and it would be difficult to state which was genuine or not. That under the certificate of urgency dated 13/01/2016 filed by the plaintiff it is stated that D.Mwangi was issued plot 217 and according to the report he was District Agriculture Officer. Under the series 199-235 the name is given in full as Daniel Mwangi thus the same and one person. That from his understanding of settlement scheme procedures a District Agricultural Officer should not have been allocated land or allocate himself land.
62. Cross examined by the 10th defendant DW3 indicated he was the eldest in the family after the 5th defendant and upon the demise of the later he took up the role of family spokesperson. That the plaintiff showed plot 438 as the beginning of his land however the 5th defendant clarified on site that it was his land which he had sold and it wasn't part of plot 217 and which the witness agreed with. That there was no other title before the 2002 title. He used to attend the succession proceedings before the Kadhis court and did not know the 10th and 11th defendants. His aunties were never compelled to



- sell neither have they denied selling to the 10th and 11th defendants. The sell was willing buyer willing seller and there was no fraud.
63. DW7 was Ibrahim Abdallah Makanzu Assistant Chief Diani Location between 2001 – 2006; Snr Chief in 2014. The witness adopted his witness statement dated 14/2/2022 DW7 testified as chief he knew the Chimetses, where they lived and their relatives. He confirmed he wrote a letter for them for purposes of succession pertaining their fathers land which he did after seeing the official search and list of all beneficiaries.
64. On cross examination by Mr. Tindi the witness indicated that the Chimetses moved to the neighboring land after they sold the land. That the land they sold is not occupied. The letter he wrote for the family was not before court. The title that was brought before him was in the name of Juma Saidi Mwachimako and Hamisi Juma Kuzi his son. The two came as trustees as indicated in the title. It was not in the name of the deceased (Said Matano Chimatse).
65. Cross examined by Mr. Waga the witness indicated that under Islamic law some among the beneficiaries are selected as trustees and would hold the title on behalf of the others. That for the entire time he served he knew the land as belonging to the Chimetses.
66. Cross examined by the 10th defendant the witness stated he knew the Chimetses before he became chief. That the Kadhi would not handle any succession without a letter from the chief confirming the beneficiaries. All the Chimetses who came to him were Muslims. He knew all his constituents having worked in the area for 15 years. All he has stated was from his own knowledge and the land belonged to the Chimetse family which he clarified as Kwale/Diani SS/217. The 4th – 9th defendants case was closed.
67. DW8 was John Musyoka Annan the 10th defendant an advocate of the High Court of Kenya. Outlining his career path and service the witness stated he became aware of the plot 217 in 2014 when on holiday. He was planning on settling down in Diani Ukunda after retirement. He was shown plot 217 and introduced to Juma Kuzi who indicated he was the head of the Chimetse family following demise of their father. Kuzi informed him that the land devolved to him and 4 of his fathers sisters. That together they visited the land adjudication office where it was confirmed the land belonged to the said family. Upon due diligence at the land registry it was confirmed the land belonged to the said family following the Kadhis orders and had been split into 5 portions 3046- 3050 registered on 25/11/2014 in the names of individual beneficiaries and Kuzi being the only male had a larger portion. There was no caveat or caution.
68. The witness added that the land he was shown was vacant though there were signs of previous activities since there were coconut trees, fruit trees. Satisfied with ownership the 10th and 11th defendants proceeded to buy. The vendors appointed Abdulrahman Aminga as their advocate who drafted an agreement dated 11/9/2015. After payment the plaintiff informed him he should not purchase the land as it belonged to the plaintiff. He informed him he had already purchased the land and on inquiry of the purchase price the witness gave him a random figure. That he then went to Diani where Kuzi assured him the land belonged to them. At Kwale the Registrar Mr. Ngetich assured him he wouldn't have accepted their documents if there was a problem. He later learnt of the present suit filed at Mombasa and he and the 11th defendant were joined. Referring to the allegations of fraud pleaded against him the witness asserted that he did not know the Chimetses at the time they were obtaining their titles. He only met them in 2015 their titles having been issued in 2014.
69. Responding to the allegations of undervaluation the witness added that they agreed on a purchase price on a willing buyer willing seller basis. The witness informed the court the plaintiff had complained against him to LSK for contravening the law by ignoring a caveat lodged against the property. He had



- also served them at their residence in Nairobi despite having counsel on record. The plaintiff accused the witness of invading the property by fencing but upon site visit the land he showed had never been part of plot 217 as confirmed by its owner (Kuzi) who was present. That at the same time PW1 failed to show the developments he had alluded had been done on the suit property. That PW1 relied on his brother (PW2) who also relied on another person and together they could not show their boundaries.
70. The witness added that the 4th – 9th defendants have never denied that they sold the property to him and the 11th defendant neither had they indicated they were coerced into selling or undervalued the property. That Gitau's claim was Kshs.50,000 which was a drop in the ocean compared to what the witness had already paid. He pointed the plaintiff's case was dismissed twice for want of prosecution and while the 10th and 11th defendant for 8 years have obeyed the court order to keep off the property. That the sale between him and the Chimetses was above board. Adopting the witness statement dated 27/6/2019 the witness urged the court to find in its favor. He relied on the documents produced by the 4-9th defendants and the land Registrar.
 71. Following application dated 26th September 2024 the documents in the supplementary list dated 26th September 2024 were produced as DW8 Exh. 1-8.
 72. On cross examination by Mr. Tindi the witness indicated he paid Kshs. 15 million for the property. The witness stated the sale agreements were 4 each constituting Kshs. 4,812,500/- making the purchase price of 19,250,000/-. The witness affirmed he has not cleared the balances of the purchase prices though he held the titles with authority of the vendors. That he conducted a search dated July 2015 as part of his due diligence which confirmed ownership. On the letter dated 30/8/2007 addressed to Kamoti Advocates declaring the title null and void, the witness asserted the same cannot have been in his knowledge as he came into the picture 8 years later.
 73. On the restriction DW7 denied the allegations that he was assisted by Mr. Ngetich Land Registrar to remove the restriction when the later indeed testified he removed the restriction based on the Kadhis order. The removal was to facilitate the family to share the land as per the Kadhis order issued on 31/3/2014 while the 10th defendant sale agreement came in 2015.
 74. DW7 (sic 8) admitted that Hamisi Juma Chimetses witness statement dated 19/12/2017 did not mention sale agreement, payment of consideration and LCB consent. That to him Hamisi Juma Kuzi was also Hamisi T. Chimetse. On the application for funds transfer dated 28/08/2025 to Hamisi Juma Kuzi the witness asserted the same was acknowledgement since it was bank to bank though he did not have an acknowledgement of the same by Mr. Kuzi. On clause 3.1 of the sale agreement (31/07/2015) with Mr Kuzi the witness confirmed he did pay Kshs 825,000. There was no need to amend the agreement and Mr. Kuzi had no issues with it. He had no proof of the stamp duty payment before court and denied that the transaction was void for absence of stamp duty.
 75. Referring to the transfers of plots 3047,3048, 3049 and 3050 the witness affirmed that the figure of Kshs. 19,250,000 is a mathematical error and the total purchase price ought to be Kshs. 22 million.
 76. He added the payments to Mr. Aminga were for the three lady vendors. That only 1.9 million was to be paid as deposit at the signing of the agreement. The agreement was not being followed strictly but depended with availability of money at any time. He asserted there was no denial by the defendants that they were not paid. It was agreed between the parties to the sale that the balance would not be paid until completion of this case
 77. The witness confirmed the transfer for plot 3046 had not been signed by the 11th defendant, lacked dates for the certification and the title in respect thereof predated the transfer which bore the date 29/9/2015. He had no explanation for the disparity on the later as he was not the maker. He conceded



the transfer for 3047 was thumb printed but lacked certificate of illiteracy. He admitted to lack of dates and witnessing by Mr. Aminga, no signature of person certifying but insisted these were mere copies and what was submitted at the registry must have been duly completed. The witness stated he had not paid rates as the same were frozen by the court order and he had so far not received any demand note from the county in this regard. In respect of demand dated 5/4/23 the witness stated he was not aware of it and in any case plot 217 ceased to exist since 2016.

78. The witness denied informing PW1 that the purchase price was 2,500,000/- but added he gave him a figure at the top of his head because he didn't know who he was and what he wanted. He was not aware Mr. Musembi had been arrested though he knew him as the person who identified the land to him and introduced him to the Chimetses. He denied Mr. Mwaniki ever showed him his title and documents. On undervaluation the witness asserted PW1 was not a party to the sale agreements and there is no dispute there was a sale agreement. He noted that while the 1st and 2nd plaintiffs were not muslims, the title that was presented to the Kadhi belonged to the muslim family. He insisted there was no evidence the letter recalling the title reached the addressees. The plaintiffs did not take action to enforce the said letters.
79. Cross examined by Mr. Waga DW7 asserted that no one had challenged the fact that the Chimetses lived on the land since independence. That no one challenged Kaindi when he testified he received all documents required to open a parcel register. That Mr. Ngetich had confirmed a letter could not cancel a title and therefore he only marked the Gitaus title 'suspected forgery'. That Mr. Kahindi, Ngetich and Susan all registrars gave Chimetses transfer a clean bill of health meaning all the documents had been signed and paid for. That a transfer cannot be registered if stamp duty has not been paid. The 4-9th defendants had no issue with the transfer that led to the registration. The mutations were in tandem with the Kadhis orders for 5 shares and corresponding 5 titles. Following the subdivisions there was no basis for the county to demand rates on a nonexistent plot. The reason for the unexecuted transfers was because there were many copies. That originals remain with the registry and were available in the AGs bundle before court.
80. With regard to the PW1 evidence that the 2013 title was based on a Gazette Notice the witness reiterated there was no title in the names of the plaintiffs before 2013. The only title being the one issued in 2002 which had not been cancelled making the process for the 2013 title irregular. The witness saw Kahindi for the first time before court and he could not therefore have colluded with him. The witness never met Bedzenga the Kadhi and could not have colluded with him. The 10th and 11th defendants' case was marked as closed.

Submissions Of The Parties

81. After all the foregoing proceedings I issued directions on the filing of final submissions which were complied with.

Plaintiffs' Written Submissions

82. The Plaintiffs, through the firm of Martin Tindi & Company Advocates, filed written submissions dated 28th November 2024 and 6th February 2025 in support of their claim seeking the cancellation and revocation of the title to Kwale/Diani Settlement Scheme/217, which they allege was unlawfully and fraudulently issued to the 4th and 5th Defendants.
83. It was submitted that the Plaintiffs were the lawful allottees of the suit property, having purchased it from Daniel Mwangi, the original beneficiary under the Diani Settlement Scheme, a government resettlement programme established from land formerly owned by Ramisi Sugar Company (L.R.



- No. 5020). The Plaintiffs averred that their acquisition followed the prescribed procedure under the Land Adjudication and Settlement Department, including payment of conveyance fees, issuance of a certificate of outright purchase, and registration of a discharge of charge on 26th October 2004, confirming full ownership.
84. The Plaintiffs submitted that upon presenting the discharge of charge for registration, they discovered that the same parcel had been irregularly and fraudulently registered in the names of Juma Kimetse Mwachimeko and Hamisi Juma Kuzi (the 4th and 5th Defendants). They promptly lodged multiple complaints with the Kwale Land Registry and the Director of Land and Settlement, including letters dated 22nd August 2005 and 30th August 2007, and a report prompted by the Attorney General's letter of 10th July 2009, all confirming that the registration of the Defendants was irregular and unlawful.
85. It is asserted that acting on the direction of the Lands Office, the Plaintiffs advertised the loss of the original green card for Diani Settlement Scheme/217 through a Kenya Gazette Notice, after which a new register was issued clearly marked "pursuant to Gazette Notice dated...". The Plaintiffs contended that this newly issued green card represented the authentic and lawful government record, consistent with their legitimate ownership.
86. Counsel further submitted that the Attorney General, in earlier proceedings under O.S. No. 58 of 2009, had unequivocally supported the Plaintiffs' claim, acknowledging that the title should rightfully have been issued to the plaintiff, but later changed position in the present matter without any justifiable reason.
87. The Plaintiffs maintained that the 2nd Defendant, Mr. Charles Ng'etich, then Land Registrar, Kwale, acted illegally and maliciously by cancelling a valid register and marking it as "suspected forgery" without affording the Plaintiffs a hearing. It was argued that he ignored his predecessors' findings (including those of Mr. Kalama and Mr. Hashim G.S.) that had confirmed the Plaintiffs' ownership and, instead, facilitated the fraudulent subdivision and transfer of the property to the 10th and 11th Defendants.
88. It was the Plaintiffs' submission that the 2nd Defendant's conduct contravened the Land Registration Act, particularly Sections 7, 38, 44 and 45, and violated the principles of fair administrative action under Article 47 of the Constitution. His unilateral cancellation of the register without notice, hearing, or inquiry amounted to malfeasance, abuse of office, and breach of public trust.
89. The Plaintiffs asserted that the 4th and 5th Defendants, in collusion with the Land Registrar, procured the impugned title fraudulently, without valid documents or consideration. The 5th Defendant never filed a substantive defence or rebuttal, thereby leaving the allegations of fraud, misrepresentation, and breach of trust uncontroverted.
90. The Plaintiffs further urged that the 10th and 11th Defendants, acting in conspiracy with the 2nd Defendant and the 5th to 9th Defendants, fraudulently subdivided Kwale/Diani Settlement Scheme/217 into Kwale/Diani/3046 – 3050, which they purportedly purchased at a gross undervalue through forged and improperly executed conveyancing instruments.
91. It was submitted that the impugned sale and transfer documents contained glaring anomalies, including undated and unsigned transfer forms, absence of attestation by advocates, inconsistent consideration amounts, unregistered instruments, and titles issued before the purported registration dates. Further, no evidence of stamp duty payment or valuation assessment was produced, rendering the entire process void ab initio.



92. Counsel emphasized that the 10th and 11th Defendants failed to conduct genuine due diligence, relying only on a defective search for parcel Kwale/Diani/3046, while neglecting to verify the root of the vendors' title or the authenticity of the register. It was thus argued that they were not bona fide purchasers for value, but complicit beneficiaries in an orchestrated fraudulent scheme.
93. The Plaintiffs relied heavily on the testimony of PW3, Purity Wanjiru Mwangi, Deputy Director of Land Adjudication and Settlement, who confirmed that the only title recognized by the Ministry of Lands was that held by the Plaintiffs and that all processes followed by Daniel Mwangi and the Plaintiffs were lawful and complete. Her evidence remained unshaken and corroborated by documentary exhibits.
94. The Plaintiffs challenged the reliance placed by the Defendants on Kadhi's Court Petition No. 211 of 2012, which was purportedly used to validate the transfer of the suit property to the Chimetse family. Citing Article 170(5) of *the Constitution*, Section 5 of the Kadhi's Court Act, and Section 48(2) of the *Law of Succession Act*, counsel submitted that the Kadhi's Court lacked jurisdiction, as the Plaintiffs are non-Muslims and did not voluntarily submit to its jurisdiction. Any orders emanating therefrom were therefore null and void.
95. It was contended that the Land Registrar's reliance on the said Kadhi's Court decision to effect the transfer was illegal, and all resultant entries in the land register were invalid and incapable of conferring any interest.
96. That on the issue of possession, the Plaintiffs produced evidence showing active occupation and development of the suit land, including constructed foundations and a swimming pool excavation, which were confirmed during the court-ordered site visit, thereby discrediting the Defendants' claims of continuous occupation.
97. The Plaintiffs argued that the subdivision and transfers were designed to defeat their proprietary rights, pointing to the shared legal representation of the 10th and 11th Defendants by Mr. Sigey, and the involvement of Mr. Ng'etich, as further indicators of collusion and conflict of interest.
98. They urged the Court to draw an adverse inference from the 2nd Defendant's failure to produce the complete record, including correspondence, payment receipts, and the full gazette documentation, asserting that this omission was deliberate and intended to conceal evidence favourable to the Plaintiffs.
99. On damages, counsel submitted that the Plaintiffs had been unlawfully deprived of possession and use of their property for over twenty-two (22) years, warranting substantial compensation. Citing *Caroget Investments Ltd v Star Holdings & 4 Others* [2019] eKLR and *Shah & Another v Juma & 2 Others* [2022] eKLR, they proposed general damages for trespass of KShs. 20,000,000 against the 4th and 5th Defendants, and KShs. 15,000,000 against the 10th and 11th Defendants, together with costs and interest.
100. The Plaintiffs further maintained that no valid consideration was paid by the 10th and 11th Defendants. The alleged payment slips and sale agreements were internally inconsistent and unsupported by any banking or advocate-client records, confirming that no lawful sale occurred.
101. Counsel submitted that the Plaintiffs' title was indefeasible under Section 26(1) of the *Land Registration Act*, there being no proof of fraud, illegality, or misrepresentation on their part. They relied on Article 40 of *the Constitution*, guaranteeing protection of property rights, and urged the Court to recognize their lawful ownership.



102. In conclusion, the Plaintiffs contended that they had proved their case on a balance of probabilities. They urged the Court to find that the registration and subsequent transfers of Kwale/Diani Settlement Scheme/217 were fraudulent, illegal, and unconstitutional, and that the 2013 green card issued to them remains the authentic and valid record.

103. Accordingly, they prayed for judgment in their favour as prayed in their plaint.

1st, 2nd and 3rd Defendants' Submissions

104. The 1st, 2nd and 3rd Defendants, through the State Law Office, filed written submissions dated 20th January 2025 by Mr. Paul Waga, a Senior State Counsel, opposing the Plaintiffs' claim and asserting that the suit property known as Kwale/Diani Settlement Scheme/217 lawfully belongs to the 10th and 11th Defendants, who purchased it from the 4th to 9th Defendants. The latter derived their title from Saidi Matano Chimetse, the original allottee under the Diani Settlement Scheme of 1977.

105. Counsel identified seven issues for determination, namely: Whether Daniel Mwangi legally obtained the allocation of the suit property; Whether the Plaintiffs acquired a valid title or can be considered innocent purchasers for value; Whether the Plaintiffs have locus standi; Whether the title of the 4th to 9th Defendants is irregular Whether the 2013 title held by the Plaintiffs is regular; Whether the 10th and 11th Defendants possess a proper title; and Whether any fraud, illegality, misrepresentation, or corruption was committed by the 1st 2nd and 3rd Defendants.

106. It was submitted that Daniel Mwangi, the then District Agricultural Officer and member of the Diani Plot Allocation Committee, abused his office by allocating the suit property to himself in 1977, contrary to public policy and Section 46 of the *Anti-Corruption and Economic Crimes Act*. The minutes of 17th May 1977 indicated that only squatters, ex-Tanzanian returnees, and public institutions qualified for allocation. Mwangi's self-allocation was therefore illegal and void ab initio. Reliance was placed on John Simiyu Khaemba v Republic [2020] eKLR, which condemns self-benefiting allocations by public officers.

107. It was contended that since Daniel Mwangi had no lawful title, he could not transfer any valid interest to Samson Mwaura Gitau and Brigitte Karl. The transfer documents were irregular, unregistered, and bore inconsistent names, referring to both Samson and Simon Gitau, hence void. The maxim *nemo dat quod non habet*—one cannot give what one does not have—was invoked.

108. The 1st, 2nd and 3rd Defendants argued that the Plaintiffs cannot be regarded as innocent purchasers for value because they failed to verify ownership or investigate the authenticity of Mwangi's title. The decision in *Dina Management Limited v County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) was cited, where the Supreme Court held that rights under Article 40 of *the Constitution* do not extend to property unlawfully acquired.

109. On locus standi, counsel submitted that the 1st Plaintiff lacked authority to institute the suit on behalf of the estate of Samson Gitau, as Brigitte Karl, the surviving joint owner, neither authorized the suit nor acted as administrator. By the doctrine of survivorship, the property vested wholly in the surviving spouse, and could not form part of the deceased's estate.

110. The 1st, 2nd and 3rd Defendants maintained that the 4th to 9th Defendants were the legitimate beneficiaries of the Diani Settlement Scheme, having occupied the land since before independence. Their registration in 2002 under title Kwale/Diani/217 followed due process, supported by a letter of offer, certificate of acceptance, and discharge of charge, all verified by the then Land Registrar



Joseph Mutua Kaindi. The Chimetse family’s ancestral occupation was regularized through succession proceedings before the Kadhi’s Court.

111. It was contended that the Plaintiffs’ 2013 title was fraudulent and irregular, having been issued while the valid 2002 title remained active and uncanceled. Both the current and former Land Registrars testified that the 2013 green card was a forgery, since two concurrent titles cannot exist over the same parcel. The impugned title was therefore properly annotated as “Suspected Forgery,” and no evidence was presented to refute that finding.
112. Counsel emphasized that during the court-ordered site visit, the Plaintiffs were unable to identify the exact boundaries of the alleged property, whereas the Defendants precisely pointed out the beacons, a fact confirmed by DW5 Stephen Muthuu Mukono, a licensed surveyor.
113. It was further submitted that the 10th and 11th Defendants lawfully purchased the land after conducting due diligence—carrying out official searches, obtaining Land Control Board consent, and paying all statutory levies. They are therefore bona fide purchasers for value without notice, protected under Section 26(1) of the [Land Registration Act](#), their titles being indefeasible in the absence of proven fraud.
114. On the allegations of fraud, corruption, and collusion by the 1st, 2nd and 3rd Defendants, counsel submitted that no credible evidence was adduced. The Land Registrars acted lawfully and professionally within their statutory mandate in preserving the integrity of the register. The alleged cancellation of the Plaintiffs’ forged title was therefore proper. The authorities of *R.G. Patel v Lalji Makanji* (1957) EA 314 and *Ali Mohamed Kijuvu v Registrar of Titles, Mombasa* [2019] eKLR were cited for the principle that fraud must be specifically pleaded and strictly proved.
115. Counsel urged the Court to note that the Plaintiffs’ title was anchored on an illegal allocation, whereas the 4th to 9th Defendants hold legitimate titles emanating from lawful settlement processes and verified succession. The 10th and 11th Defendants stand protected as innocent purchasers whose acquisition was procedurally sound and untainted by any illegality.
116. In conclusion, it was submitted that the Plaintiffs failed to prove their case on a balance of probabilities as required under Section 107 of the [Evidence Act](#). The allocation to Daniel Mwangi was void from inception, the 2002 title remains valid, and the 2013 title is a forgery. The Court was therefore urged to dismiss the Plaintiffs’ suit with costs, and to affirm the 2002 title held by the 4th to 9th Defendants and the subsequent transfers to the 10th and 11th Defendants as lawful and binding.

4TH, 5TH, 6TH, 7TH, 8TH And 9TH Defendants’ Submissions

117. The 4th, 5th, 6th, 7th, 8th and 9th Defendants, through the firm of Sigey Arap Bett & Company Advocates, submitted that the Plaintiffs instituted the present suit seeking cancellation of the title Kwale/Diani/217 and reissuance in the name of the administrator of the Estate of Bridgette-Karl Gitau. It was noted that a similar suit had been dismissed twice for want of prosecution in 2009 and 2016 before being re-filed in 2021.
118. Counsel outlined several issues for determination, key among them being the validity of the title Kwale/Diani/217, the effect of the Kadhi’s Court succession proceedings, the conduct of the Land Registrar, and whether the 10th and 11th Defendants were bona fide purchasers for value.
119. It was submitted that the 4th to 9th Defendants were legitimate beneficiaries of the Diani Settlement Scheme (1977) established to resettle squatters and landless persons. They are members of the Digo community and heirs of Juma Chimetse Mwachimako, who had peacefully occupied the land since independence, thus establishing customary trust and inheritance rights. Reliance was placed on Isack



- M’Inanga Kiebia v Isaaya Theuri M’Lintari and Samwel v Priscilla Wambui (HCC 1400) to support the preservation of family land rights under customary law.
120. The Defendants further contended that the title Kwale/Diani/217, issued in 2002, was the legitimate and original title, and that the title produced by the Plaintiffs in 2013 was a forgery, as confirmed by the Land Registrar (DW3). The green card for the 2013 title was flagged as fraudulent and inconsistent with government records.
 121. It was argued that the Plaintiffs could not derive a legitimate title from the actions of Mr. Daniel Mwangi, a former District Agricultural Officer and member of the land allocation committee, who improperly allocated land to himself in abuse of office, contrary to Section 46 of the [*Anti-Corruption and Economic Crimes Act*](#).
 122. On the Kadhi’s Court succession proceedings, counsel submitted that the 4th to 9th Defendants, being Muslims, lawfully obtained succession rights through Petition No. 211 of 2012. Reference was made to Article 170(5) of [*the Constitution*](#) and Section 5 of the Kadhi’s Court Act, asserting that the Kadhi’s Court properly exercised jurisdiction over the estate of Said Matano Chimetse Mwachimako.
 123. Counsel submitted that the Land Registrar, Kwale, acted professionally and lawfully throughout the registration process and did not aid or abet any fraudulent dealings. It was contended that the Plaintiffs’ accusations of corruption and malfeasance against the Land Registrar were unsubstantiated.
 124. It was further argued that the 10th and 11th Defendants were bona fide purchasers for value without notice, having purchased the parcels Kwale/Diani/3046–3050 from the 5th to 9th Defendants after conducting due diligence, including official searches and verification of title. Reliance was placed on *Weston Gitonga & 10 Others v Peter Rugu Gikanga & Another and Katende v Haridar & Co. Ltd* [2008] 2 EA 173 on the doctrine of bona fide purchasers.
 125. Counsel maintained that the sale agreements were valid and compliant with Section 3(3) of the [*Law of Contract Act*](#), and that under Section 26(1) of the [*Land Registration Act*](#), the Defendants’ titles were indefeasible, having not been acquired fraudulently or through any corrupt scheme.
 126. It was submitted that the cancellation of the forged title Kwale/Diani S.S/217 by the Land Registrar was lawful, supported by the principle in *R.G. Patel v Lalji Makanji* (1957) EA 314, that fraud must be strictly proved.
 127. The Defendants urged the court to find that the Plaintiffs had not established ownership or any legitimate claim over the property. Counsel relied on *David Peterson Kiengo & 2 Others v Kariuki Thuo* [2012] eKLR, submitting that the 10th and 11th Defendants were innocent victims of fraud and were entitled to quiet possession of their lawfully acquired land.
 128. In conclusion, the Defendants prayed that the Plaintiffs’ case be dismissed with costs, asserting that it was misconceived, unsubstantiated, and aimed at unjustly depriving the rightful beneficiaries and purchasers of their property rights.

10TH AND 11TH Defendants’ Submissions

129. The 10th and 11th Defendants submit that their only connection to these proceedings arises from their purchase, in July 2015, of the parcels of land known as KWALE/DIANI/3046–3050, situated within the Diani Settlement Scheme. It is contended that they were bona fide purchasers for value without notice, having lawfully bought the said parcels from the then registered proprietors, who later became the 5th to 9th Defendants in the present matter.



130. Counsel submits that the purchase process was procedurally regular and duly documented. The Defendants inspected the property, conducted official searches at the Kwale Land Registry, which confirmed the vendors as the legitimate proprietors, and subsequently executed two separate sale agreements drawn and witnessed by the firm of Ramadhan Aminga Advocates. The vendors handed over duly executed titles and transfer instruments to the purchasers' advocate, Sigey Arap Bett & Co. Advocates, for registration.
131. It is stated that the purchasers were granted vacant possession prior to full payment of the purchase price, as the 10th Defendant was to travel abroad for medical treatment. The 5th to 9th Defendants' ownership of the land stemmed from the original title KWALE/DIANI/217, adjudicated in the Kwale Kadhi's Court succession proceedings following the demise of one Said Mwachimako, which subdivision gave rise to the five current titles—3046 to 3050.
132. The Defendants assert that allegations by the Plaintiffs of fraudulent transfer, disobedience of court orders, or collusion were unsubstantiated and unproven. It was noted that during cross-examination of the Land Registrars (DW1 and DW3), the Plaintiffs failed to discredit the authenticity of the titles held by the 10th and 11th Defendants. The Land Registrars confirmed the genuineness of the titles and indicated there was no evidence of corruption or irregularity in their registration.
133. The 10th and 11th Defendants emphasize that the vendors themselves testified and repeatedly confirmed in court that they lawfully sold the suit properties to the 10th and 11th Defendants and had no complaint or dispute concerning the said transaction.
134. Counsel notes that the title relied upon by the Plaintiffs was allegedly issued in 2013, yet an earlier title existed since 2002 and had never been cancelled. This anomaly led the Land Registrar to mark the 2013 title as "Suspected Forgery." The Registrar explained that it was legally impossible to have two valid titles over the same parcel absent lawful cancellation of the earlier one.
135. It is submitted that a site visit directed by the court revealed that the area the Plaintiffs alleged had been invaded was not part of the suit properties (LR 217 or LR 3046–3050) but rather parcel KWALE/DIANI/438, belonging to Hamisi Kuzi, who produced proof of ownership both at the site and in court. The Plaintiffs were unable to accurately identify or demonstrate possession of the alleged property or any developments thereon.
136. Counsel relies on the evidence of DW4, Mr. Mabavu wa Mabavu, who testified that within Diani Settlement Scheme, most of the land was physically occupied by indigenous Digo families while titles were in names of strangers. It is submitted that this testimony, together with that of the area Chief (DW7, Mr. Said Makanzu), confirmed that the Chimetse family and other Digo families had long been in occupation prior to any alleged allocation to the Plaintiffs.
137. The Defendants maintain that ownership is proved by the production of genuine title duly issued by lawful authorities. The 10th and 11th Defendants produced their original titles in court, which were verified as authentic by DW2 and DW3—both qualified Land Registrars. The titles remained unchallenged at the close of trial.
138. It is further submitted that the Plaintiffs' claim—premised on alleged absence of sale agreements or Land Control Board consent—was unsupported by evidence. The burden lay on the Plaintiffs to disprove the Defendants' titles, which they failed to do. The 10th and 11th Defendants, on the other hand, demonstrated proper due diligence, including searches, site inspections, and confirmation of vacant possession prior to purchase.



139. Counsel highlights that the survey and expert evidence of DW5, Mr. Stephen Mukono, confirmed the location and dimensions of the parcels and that the Plaintiffs were unable to identify or point out any of the developments they claimed existed on the land.
140. It is finally submitted that the 1st Plaintiff's admission—that the property could not form part of the estate of Samson Mwaura Gitau (deceased) as it was jointly owned with his widow—undermined the Plaintiffs' claim. Under the principle of joint tenancy, upon the demise of one spouse, the surviving partner assumes full ownership, excluding succession proceedings.
141. Counsel concludes that the Plaintiffs have failed to prove their case on a balance of probabilities, having neither established fraud nor demonstrated valid ownership. It is therefore prayed that the Plaintiffs' suit be dismissed with costs to the 10th and 11th Defendants.

Analysis And Determination

142. I have examined and considered the pleadings, the evidence of the parties both documentary and oral, the parties' respective submissions together with the issues they identified. I have also considered the relevant legal frameworks and the prevailing jurisprudence on the issues falling for determination. In my view, the following issues commend determination; -
1. Whether or not the 4th and 5th defendants hold a legitimate Title to the suit property.
 2. Whether or not the Plaintiffs claim to the suit property is legitimate.
 3. Whether the 10th and 11th Defendants possess proper titles
 4. Whether or not the Plaintiff is entitled to the prayers sought for in the Amended plaint.
 5. Who should bear the costs of the suit?

Whether or not the 4th and 5th defendant held a legitimate Title to the suit property.

143. The plaintiffs case simply put is that his brother Samson and his wife Bridgette both now deceased bought the parcel Kwale Diani Settlement Scheme 217 from one Daniel Mwangi sometime in September 1986 for a consideration of Kshs.50,000/-. They expected that title would be issued in the names of Samson and Bridgette after they complied with all the processes but this was never to be. Instead when the plaintiff went to present the discharge of charge they discovered title was fraudulently issued to the 4th and 5th Defendants who later caused the parcel to be subdivided and sold to the 10th and 11th Defendant.
144. It is trite that the burden of proof was on the Plaintiff to prove the existence of the facts he alleges to exist in accordance to the provisions of Section 107 of the Evidence Act Chapter 80 of the laws of Kenya. The standard of proof is on a balance of probabilities. In the case of *Stephen Wasike Wakhu & Ano.v Security Express LTD (2006) eKLR* the court commenting on the provisions of section 107 posited that a party seeking justice must place before the court all material evidence and facts which if considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available.
145. The plaintiffs case as pleaded is that the investigations conducted by subsequent land registrars clearly asserted that the titles issued to Hamisi J Chimetse and Juma Chimetse Mwachimako were fraudulently acquired and ought to be cancelled. PW1 produced in evidence a letter dated 30/08/2007 by District Land Registrar Kwale (R.K.Kalama) addressed to M/s Kamoti & Company Advocates.



146. The letter by R.K. Kalama states that upon investigation by both the land office and the office of the SFT being the allocating authority a number of findings were made firstly that the records at SFT show that at no time were Hamisi J Chimetse and Juma Chimetse Mwachimako noted as the legal owners of Kwale/Diani/217. The letter by R.K. Kalama states that upon investigation by both the land office and the office of the SFT being the allocating authority a number of findings were made firstly that the records at SFT show that at no time were Hamisi J Chimetse and Juma Chimetse Mwachimako were noted as the legal owners of Kwale/Diani/217. Secondly that the records indicated the same was registered in the name of Mr. Daniel Mwangi who paid for it and issued with a certificate of outright purchase.

The letter further states that; -The letter dated further states that; -

“While registration of this nature from the SFT to the latter is done vide a Discharge of Charge and Transfer from SFT, Hamisi J Chimetse and Juma Chimetse Mwachimako registration fall short thus rendering the title deed a nullity.

Unless the same is proved by production of the above stated documents i.e Discharge of Charge and Transfer of land from Settlement Fund Trustees to Hamisi J Chimetse and Juma Chimetse Mwachimako the title deed they hold is null and void.”

147. It is not in dispute that a green card was opened on 10/3/1992. This green card was produced by the plaintiff (see page 90 of the plaintiffs bundle initial bundle) as well as DW1 the Land Registrar Kwale. The green card shows the 2nd entry dated 28/6/2002 is to Hamisi J. Chimetse and Juma Chimetse.
148. In the case of Mbuthia Macharia v Annah Mutua Ndwiga & Commissioner of Lands [2017] KECA 290 (KLR) the court unpacked the concept of the legal burden of proof as follows;

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.”

149. At this point the burden of proof shifted to the Chimetses herein to disprove the above allegations. It is their title that is under challenge. The Court of Appeal in Munyu Mainav Hiram Gathiha Maina civil Appeal No. 239 of 2009 reiterated that where the registered proprietor’s title root is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.
150. The Chimetses case is that the property was ancestral land as occupied by their patriarchs who were indigenous locals even before the area was declared a Settlement scheme. It is their case that Hamisi J. Chimetse and Juma Chimetse were the true owners of the land. They produced the title issued to these two individuals.
151. Also adduced in court is a letter dated 10th July 2000 (see 4,6,7,8 and 9th defendants list of supplementary documents dated filed 25725/7/2023). This letter is from The District Commissioner Kwale. It is addressed to The Director Land Adjudication & Settlement Nairobi. It reads; -

Re: Diani Settlement Scheme



The above quoted scheme was allocated to squatters in 1977, and letters of offer issued thereafter. However, some squatters have not been traced since. During the allocation some local residents were also not considered due to limitation to the number of plots. The long absence of the original allottees has made it possible for those not allocated to move into the vacant plots and develop them. The long absence of the original allottees has made it possible for those not allocated to move into the vacant plots and develop them. The magnitude of development for the last 23 years is enormous. During its meeting the Committee recommended to allocate the plots to those squatters who have developed them as hereunder; -

152. The letter then lists the plot numbers affected and the Allottee. Plot 217 is listed against Juma S. Chimetse.
153. The court also notes that the letter was endorsed for action to (1) ADS by DLAS on 18/1/01 with remarks 'Plse arrange to Process the same.' (2) RO with the following remarks; -

“Pls confirm whether the previous(sic) had paid any money and documented. If not then this list is in order, if documented then repossess(sic). Mechanisms have to be put in place before this list is processed. Signed by ADS 22/1/2001.”
154. The main content of the letter reveals that the people who are proposed to be allocated in place of the original allottees moved into the plots and developed them owing to the long absence of the original allottees. This therefore means plot 217 had an initial allottee before Juma S. Chimetse entered it and purportedly developed it. PW2 indeed testified that the officers at the land registry told him he stayed for too long where he reiterated land does not rot. I pondered whether this is the long absence referred to in the letter aforesaid dated 10/07/2000.
155. But the above notwithstanding the comments made by the ADS on 22/1/2001 commend interrogation. While I may not tell what RO means it could as well mean Recording Officer. His instructions were that repossession mechanism have to be put in place before the list is processed. These instructions envisaged a process of repossession would take place. The court was not told that such a process took place and in any event I had no evidence adduced by the defendants that the list was processed pursuant to such process. This therefore puts to doubt whether the envisaged process of repossession was undertaken to replace the initial allottee of plot 217 with Juma S. Chimetse.
156. I must further point out that the letter dated 10/07/2000 seemed incomplete as it did not show who authored it and bore no signature. PW3 clarified in reexamination that she could not tell the author of the letter dated 10/7/2000 as its last page 2 is missing.
157. Moreover, PW3 could not confirm if there was a grievance raised by the 4-9th defendants leading to amendments of the record as there was no such record with regard to the present case. DW4 alluded to a myriad of interventions deployed to revert the land to the locals culminating to a petition to the NLC which he produced as part of the defendants evidence in court. But to me the same is a separate process. It is not the process envisaged under the SFT framework.
158. Moreover, the matter before court is for an individual claim. It is not the establishment and implementation of the Diani Settlement Scheme that is under litigation before me.
159. DW4 conceded in cross examination that he discovered Mzee Chimetse had a title in the scheme after his death yet he consistently asserted that plot 217 was one of the plots referred to in the petition. The petition was submitted in the year 2021 and the alleged Chimetse's title was issued in 2002.



160. Saidi Ramadhan DW6 gave evidence on behalf of the Chimetse family. Contained in the list of documents dated 26/06/2019 was a Letter of offer dated 7/2/1978, Certificate of outright purchase and transfer dated 21/11/07. These documents were disowned by PW3 as having not emanated from the Headquarters. My only problem with these documents is that I have no corresponding Minutes about this allocation of 1978 and attendant list as was done under the 1977 list. Infact what is shown is a plot allocation survey which I note is an interview conducted in the year 2006. What the court has is the Minutes of the plot allocation committee meeting held in 1977. These Minutes connect the plot 217 to Daniel Mwangi and not Chimetse. Moreover, if the transfer is dated 21/11/2007 how come the title was issued in the year 2002 predating this documentation. Clearly something is not adding up.
161. Further the record bears a letter of offer dated 24th July 1985 addressed to Hamisi Juma by the SFT Nairobi. Overleaf is a Certificate of Acceptance. I note that this letter has no bearing to the plot 217. Indeed, Saidi Ramadhani agreed it related to plot 438 and had no bearing to plot 217.
162. Consequently, the only other link which alleged to have connected Chimetse to plot 217 could have been the letter dated 10/07/2000 and which letter I have impugned hereinbefore, there was no other documentary evidence that linked Hamisi J Chimetse and Juma Chimetse Mwachimako to plot 217 based on the settlement process herein. The list as contained in the Minutes of 1977 show plot 217 as having been allocated to D. Mwangi.
163. Moreover, Saidi Ramadhani could not tell this court in cross examination how much his father paid for the 2002 title.
164. The plaintiff further states at paragraph 25 of the amended plaint that a restriction he had placed on the suit property was ignored by Charles Kipkurui Ngetich then Land Registrar who proceeded to issue titles to the 5th -11th defendants. That the 2nd defendant circumvented this restriction. From the green card produced by the plaintiff a restriction under section 126 of the RLA was registered as entry No 4 on 24/6/03. Noting the date of the restriction all I can state is that it cannot have applied retrospectively for purposes of the title dated 28/6/2002.
165. I think I have said enough to demonstrate that the 4th and 5th Defendants do not hold a legitimate title to the suit property.
166. The court having arrived at the above conclusion will later in this judgement discuss the import of the above finding on the rest of the titles issued.

Whether or not the Plaintiffs claim to the suit property is legitimate.

167. The plaintiffs produced in evidence a number of documents in the lists dated 13/01/2016, 25/04/2016 (as a bundle) and Supplementary List dated 8/4/2019. The plaintiffs title allegedly originates from one Daniel Mwangi from whom they claim it was purchased by the deceased and his wife. PW3 who testified in support of the Plaintiffs case informed the court that the plot 217 was allocated to D. Mwangi by the Settlement Plot Committee during the first allocation sitting of 17/5/1977. These Minutes were produced by PW1 at MIN.4/77 -EX-TANZANIAN LANDLESS GROUP is of relevance. D.Mwangi is listed as allottee number 127 for plot 217.
168. A transfer of Land dated 16/09/1986 was produced executed by Daniel Mwangi before Nagin K. Patel advocate in Mombasa transferring plot 217 to the Samson and Brigitte. A Certificate of outright Purchase dated 1/10/1986 from the SFT certifying that Samson and Brigitte are the allottees of plot 217 Diani Settlement Scheme was adduced in evidence. My review of the same also reveals it is not registered. PW1 clarified in reexamination that there were no titles at this point and which I agree. This is corroborated by the green card which shows the 1st edition was opened in 1992 and therefore there



was no parcel register under which they could be registered. I think I would not be wrong to state all these documents were to facilitate the registration of the title when the parcel registers were first opened in favor of SFT.

169. PW1 produced a discharge of charge for Kwale/Diani/217 dated 5/01/2004. Ordinarily this is issued after the certificate of outright purchase to discharge the entry 1 in the green card which is always in favor of SFT. The letter dated 30/08/2007 confirms that the Discharge of Charge and Transfer of Land from Settlement Fund Trustees are mandatory documents for purposes of registration of the allottee.
170. PW3 Purity Wanjiru Mwangi the Deputy director office of Land Adjudication & Settlement which is the office charged with the mandate of settlement testified in court. She confirmed she had the parcel file and that it is the documents held by the headquarters that are the correct ones and not any other. The plaintiffs case is fully supported by the department of the Land Adjudication & Settlement notably letter dated 19/1/2015 from their HQs confirming the plot 217 was discharged in favor of Samson and Brigitte; 19/11/2015 a follow up to the letter of 19/1/2015 reiterating the content; 28/07/2005 to the District Land Registrar Kwale, this letter specifically confirms that a discharge of charge and transfer were prepared in the names of Samson Mwaura Gitau and Brigitte Karl and forwarded to the District Land Adjudication & Settlement Office on 15/01/2004 to facilitate the preparation of title.
171. I had no evidence that was placed before me indicating all these correspondences did not emanate from the Land Adjudication Settlement office. It was also not enough for DW2 to state that the investigations carried out by Mr. Kalama were wrong because he was not a Settlement Officer. The letter clearly states the investigations entailed both the Kwale registry as well as SFT Nairobi. DW4 who registered the 2002 title could only reiterate that he must have been supplied with supporting documents. If the documents supplied were the ones I have already discussed then they could not pass for the anomalies noted.
172. Based on all the foregoing the plaintiff demonstrated the root of their title linking it to the Settlement process undertaken by the SFT from allocation to Daniel Mwangi, Purchase and Transfer by Mwangi to Samson & Brigitte all through to the issuance of the Discharge and Certificate of outright purchase. The court has no doubt in its mind that it was more probable than not that all these transactions happened as against the claims by Chimetses. Proof is on a balance of probabilities.
173. Let me address the title issued to the deceased couple. The property in dispute is registered under the Registered *Land Act* Cap 300 (now repealed). This is clear from the title issued to Hamisi J Chimetse and Juma Kimetse Mwachimako dated 28th June 2002 and the title issued in 2013 under Samson Gitau and Bridgette.
174. What is the import in law of such registration? This is aptly explained by Justice Sila Munyao in the case of Rosemary Wanjiru Njiraini v Officer In Charge of Station, Molo Police Station & another [2017] eKLR as follows; -

“ 17. It has been the law, and it still is the law, that the Certificate of Title issued to a person is prima facie evidence, that the said person holds title to the land noted therein. In the pre-2012 land regime, this was provided for in Section 28 of the Registered *Land Act* and Section 23 of the Registration of Titles Act which were drawn as follows: -

RLA Subject to this Act -

S.27.

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership



of that land together with all rights and privileges belonging or appurtenant thereto;

- b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

RTA S.23 (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.

18. The current law is in Section 26 of the *Land Registration Act*, 2012, which provides as follows :-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

175. Simply put therefore the law explicitly states that a registered title cannot be nullified unless there is proof of fraud or misrepresentation involving the registered proprietor or evidence that the title was acquired illegally, unprocedurally or through a corrupt scheme.

176. Based on my analysis hereinbefore I have already demonstrated that the 4, 5, 6,7,8,9 defendants have not successfully defended their title. Therefore, there would be no basis upon which they can impeach the plaintiffs title. Moreover, there was no counterclaim.



177. And assuming the court were to be found wrong with respect to the above I must address the concerns raised about the title No. 0193402 dated 9/1/2013. PW1 produced in evidence the title issued on 9/01/2013 and the attendant green card which was a replacement green card. The same shows SFT as the 1st registered owner followed by entry No.2 of 3/1/2013 supporting this title. Another green card showed entry No.2 was the entry made in favor of the Chimetse and Mwachimako. The contestation throughout the proceedings was that the green card for the title dated 9/01/2013 was opened without supporting documents by Mr. Marwanga, this is what DW3 stated in evidence.
178. Indeed the court has noted a number of gaps in the way the plaintiff title was issued by officers at the land registrars office and specifically as a reconstructed green card contrary to the procedure envisaged under Section 33 of the Land Registration Act Cap 300 provides. Not all the supporting documents were presented since PW1 only adduced in evidence a document titled 'Loss of Green Card' signed by Joseph S. Koskei. It is indicated as Notice under section 35 of Cap 300 touching on the Kwale/Diani SS/217 (page 96 of the plaintiff initial bundle). He also produced a Copy of Gazette Notice No. 4398 dated 5/04/2012 pursuant to section 16 of Registered Land Act cap 300.
179. The plaintiff has always been desirous since the year 2009 when he filed the Originating Summons No. 58 of 2009 to have the title dated 28/06/2002 declared null and void and be cancelled and thereafter title be issued in the names of the plaintiffs. What the plaintiff ought to have done was to have the existing title issued in the year 2002 to Hamisi J Chimetse and Juma Kimetse Mwachimako to be cancelled by a competent court first instead of having the title issued by replacement on the basis that the previous title was not recognized. All the registrars who testified agreed that there cannot exist two titles and only the court had powers to cancel a registered title. This is the established legal position and I need not belabor the point.
180. But having made the above observations I must emphasize, the court cannot lose sight of the main reason why the parties have found themselves before court. The gist of the dispute lies in who was the first original allottee. I have already discussed this point and found in favor of the plaintiffs. The issue of the title therefore would follow the first allottee and those he transferred to and were recorded and or documented. This is the estate of the deceased brother and wife. It is not the deceased who decided to take the path the administrator took and it is my considered view that the estate must not be penalized for this. This is what equity would do.
181. The Constitution of Kenya 2010 has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others,
182. In the case of *Shah & 7 Others v Mombasa Bricks & Tiles Ltd Limited & 5 Others* (Petition 18 (E20) of 2022) (2023) KESC 106 KLR; *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* [2023] KESC 106 (KLR), the Supreme Court of Kenya pronounced itself thus;-
- “74. Vide Section 3(1) of the Judicature Act, Cap 8 Laws of Kenya, the doctrines of equity are applicable in Kenya and form part of our laws. It states that common law, doctrines of equity and statutes of general application shall apply in so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”
183. Additionally, the provisions of section 26 (1) of the Land Registration Act were meant for the protection of the real owner of the land. In this case it is the deceased Samson and Brigitte. For me therefore there is every reason to impeach the title issued to the Chimetses and revert the land to the



true owners of the property which would also require rectification of the register by cancellation of the Title dated 9/1/2013 and making a new entry No.2 after the SFT in favor of the deceased and his wife. Section 80 of the [Land Registration Act](#) has clothed the court with power to rectify the register and provides that: -

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

184. The other issue is that Daniel Mwangi was a public servant and was not an ex Tanzanian and could not benefit from the scheme. It is urged that this title is irregular and cannot benefit from the protection under article 40 of [the Constitution](#). It is noteworthy that reference is made to D.Mwangi and Daniel Mwangi. Is this the same person as Daniel Mwangi referred to in the list? My answer is in the affirmative based on the correspondence emanating from the Ministry of Lands Land Adjudication & Settlement Department specifically letter dated 30/8/2007 by District Land Registrar Kwale (R.K.Kalama) addressed to M/s Kamoti & Company Advocates, Letter dated 1/01/2007 addressed to Deputy Solicitor General signed by T.M.Nyangau Director of Land Adjudication & Settlement and Letter dated 19/11/2015 to DLASO Kwale from Department of Land Adjudication and Settlement office Nairobi. Based on these correspondence the court is satisfied that D. Mwangi and Daniel Mwangi were one and the same person.
185. I think the said Mwangi had a right to own land and be allocated land in the scheme like any other person. For me this cannot be an issue in the present proceedings as it is only the Settlement Fund Trustee who could answer to the reasons why they allocated the land to this specific individual. The Settlement Fund Trustee is not a party to these proceedings. PW3 confirms she had no records of any dispute resolution on this specific parcel. I have already pronounced myself on the issue of the Petition filed at the NLC.

Whether the 10th and 11th Defendants possess valid titles

186. The 10th and 11th Defendant case is that they are bonafide purchasers for value without notice of any defect of title having purchased the same from the beneficiaries of the estate of Chimetse. The 10th defendant giving evidence on his own behalf and that of the 11th defendant who is his wife detailed how he purchased the suit property after carrying out due diligence and following due process upto to the point of the various subdivisions pursuant to the order issued by the Kadhi Court.
187. I think the position as to the title of a party claiming to be a bonafide purchaser has now been clarified in the case of Dina Management Limited v County Government of Mombasa & 5 Others [2023] KESC 30 (KLR) cited by state counsel , where the Supreme Court held that rights under Article 40 of [the Constitution](#) do not extend to property unlawfully acquired. But more specifically the Apex court had this to say:-
- (111) Article 40 of [the Constitution](#) entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of [the Constitution](#).’
188. It has been urged that plot 217 was extinguished by the time the 10th and 11th defendants purchased the properties from the beneficiaries having been closed on subdivision. But I think the main point of



focus here should be the root of the properties these defendants bought. I have impugned the root of their titles being the title issued in the year 2002 to Chimetse and Mwachimako.

189. The 10th and 11th defendants titles cannot be upheld as being valid as guided by the case of Dina Management Supra. Moreover, as long as the titles held by the Chimetses were not valid, they had no good title to pass. subsequently to the 10th and 11th defendants.
190. It is noteworthy that the 10th and 11th defendants did not in any event raise a counterclaim against the plaintiffs nor a claim against co - defendants.
191. I'm inclined to discuss the site visit (report dated 27/7/2023) that was undertaken with approval of the court to ascertain the ground status following allegation of fencing of the portion of the suit property during the pendency of the proceedings. allegedly by the 10th defendant. Reference was made during the hearing pointing to the fact that the plaintiffs were unable to identify the beacons to their plot. For me this is neither here nor there. I say so because the area map for the scheme against which titles were issued must be available against which the beacons can be verified.

Whether the Plaintiff is entitled to the orders sought

192. The plaintiff craves a declaration that the registration of the suit property known as Kwale Diani Settlement Scheme 217 in the names of the late Juma Kimetse Mwachimako and Fifth Defendants and the subsequent transfer to the 5th 6th 7th 8th, 9th 10th and 11th defendants was and is null and void. My analysis foregoing has already spoken to this prayer. The court has found that the title issued in the year 2002 in favor of Hamisi J. Chimetse and Juma Kimetse Mwachimako was not legally valid. I have already discussed the import of this being those other titles drawing their root to these titles must collapse. I have already discussed the import of this being that it other titles drawing their root to these titles must collapse. I therefore see no reason to decline the prayers touching on the cancellations of the titles including the subdivisions.
193. However, the alternative prayers for the value of the suit property is declined. This is for the reason that I have already granted the substantive prayers.
194. The court further declines the prayer for Mesne Profit which is a special damage claim. Special damages must be particularised and specifically proved. This was not done. General damages for trespass is discretionary and I decline to burden any party in this regard. The lead perpetrator seems to have been Mr. Kuzi from the Chimetses who died during the pendency of these proceedings and his soul deserves to rest in peace.
195. The upshot of the foregoing is that this court finds that the plaintiff has proved the claim against the Defendants jointly and severally on a balance of probabilities and enters judgement accordingly in the following terms; -
 1. A declaration that the registration of the suit property known as Kwale Diani Settlement Scheme 217 in the names of the late Juma Kimetse Mwachimako and Fifth Defendants and the subsequent transfer to the 5th 6th 7th 8th, 9th, 10th and 11th defendants was and is null and void
 2. An order directing the 5th 6th 7th 8th, 9th 10th and 11th defendants to deliver the titles improperly issued to them for cancellation by the court.
 3. An order directing the 2nd Defendant to cancel the titles issued to the 5th 6th 7th 8th, 9th 10th and 11th defendants in respect of Kwale Diani Settlement Scheme 217 and or subsequent subdivisions known as Kwale Diani Settlement SS 3046, Kwale Diani Settlement Scheme SS



3047, Kwale Diani Settlement Scheme SS 3048, Kwale Diani Settlement Scheme SS 3049 and Kwale Diani Settlement Scheme SS 3050.

4. An order directing that the original title of the property known as Kwale Diani Settlement Scheme SS 217 does vest in the rightful owners, Samson Mwaura Gitau and Brigitte Karl and that the green card be restored by dispensing with the order for advertisement.
5. Vacant possession of the suit property known as Kwale Diani Settlement Scheme 217.
6. All the above orders shall be complied with within 90 days of this judgement.
7. There shall be no orders as to costs for the reasons already explained.

196. Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 3RD DAY OF NOVEMBER 2025.

JUSTICE A.E. DENA

JUDGE

3/11/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Tindi for the Plaintiffs

Mr. Sigei for the 4,5,6,7,8th & 9 Defendants

Mr. Musyoka Annan for the 10th and 11th defendants

MS Asmaa Muftaa Court Assistant.

