

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCC NO. 41 OF 2005

KENYA PORTS AUTHORITY
PLAINTIFF

VERSUS

TAHIR SHEIKH SAID GRAIN MILLERS LTD 1ST
DEFENDANT

NATIONAL LAND COMMISSION 2ND
DEFENDANT

THE CHIEF LAND REGISTRAR 3RD
DEFENDANT

RED SPARROW LIMITED 4TH
DEFENDANT

AND

ELCC NO. 42 OF 2005

KENYA PORTS AUTHORITY
PLAINTIFF

VERSUS

SANTUNIA LIMITED 1ST
DEFENDANT

NATIONAL LAND COMMISSION 2ND
DEFENDANT

THE CHIEF LAND REGISTRAR 3RD
DEFENDANT

RED SPARROW 4TH
DEFENDANT

AND

ELCC NO. ELCC NO. 43 OF 2005

KENYA PORTS AUTHORITY
PLAINTIFF

VERSUS

FREIGHT CONSTRUCTORS SERVICES LIMITED 1ST
DEFENDANT

NATIONAL LAND COMMISSION 2ND
DEFENDANT

THE CHIEF LAND REGISTRAR 3RD
DEFENDANT

RED SPARROW LIMITED 4TH
DEFENDANT

JUDGEMENT

A. ELCC NO. 41 OF 2005:

1. Through the further amended plaint dated 28th February 2020, the plaintiff sued the defendants asserting ownership of Mombasa/Block XLV11/118, suit property, as the successor to the General Manager, East African Railways and Harbours Corporation, that was between 1997 to 1999 unlawfully, wrongfully and fraudulently allocated by the 2nd and 3rd defendants to Sydney Mwanjia, who then transferred it to the 1st defendant, and subsequently to the 4th defendant, without its consent. The plaintiff set out the particulars of fraud at paragraph 19 of the plaint, and prayed for:

- a. *“Permanent injunction restraining the 1st to 4th defendants either through themselves, their servants or otherwise howsoever from charging, leasing, transferring or in any way whatsoever and howsoever from charging, leasing, transferring or in any way whatsoever and howsoever dealing with the property known as Mombasa/Block XLV11/118.*
- b. *A declaration that the cancellation of the General Manager, East African Railways and Harbours and the registration of the Government of Kenya as proprietor in the land register relating to parcel number Mombasa/Block XLV11/118 is null and void.*
- c. *A declaration that the 2nd and 3rd defendants did not have powers to lease and allocate the property known as Mombasa/Block XVL11/118 to the 1st and the 4th defendant and/or any other person.*
- d. *The entries made in the register in respect of land parcel No. Mombasa/Block XVL11/118 after 1997 be cancelled and consequently the plaintiff be registered as the proprietor thereof.*
- e. *Costs of the suit and interest thereon.*

f. Such other and further reliefs as this Honourable court may deem just and fit to grant.”

2. The 4TH defendant opposed the plaintiff's claim through their statement of defence and counterclaim dated the 24th September 2020, inter alia denying that the suit property was registered in the name of the General Manager, East African Railways and Harbours Corporation, or that the plaintiff had any proprietary interest over the same; that it was issued with the certificate of lease through a valid transfer as purchaser for value without notice of any defect in title; that the allocation of the said land to the 1st defendant and subsequent transfer to the 4th defendant was not illegal, unlawful and void as the Commissioner of Lands could not allocate the suit property to 1st defendant without plaintiff's express written authority or it having surrendered the same. The 4th defendant therefore seeks for the following in the counterclaim:

a. “A declaration that Sidney Mwanya is the initial and only allottee of Mombasa/Block XLV11/118 from the Government of Kenya as the only authority then capable of making such allocation.

b. A declaration that Sidney Mwanyia transferred good title of property known as Mombasa/Block XLV11/118 to the 1st defendant, who in turn transferred a good title to Suntania Limited, who subsequently transferred the same to the 4th defendant.

c. A declaration that the 4th defendant is the registered owner of the property known as Mombasa/Block XLV11/118 as lessee from the Government of Kenya having acquired the same from Santunia Limited pursuant to a legitimate transfer registered in its favour by the 3rd defendant.

d. Any other relief which this Honourable court may deem just and expedient to award the 4th defendant in the circumstances of this case.”

3. The 3rd defendant opposed the suit through their statement of defence dated 21st October 2024, inter alia averring that according to the survey plan FR 107/96, land parcels Mombasa/Block XLV11/111 to 118 were created after consolidation and subdivision of land parcels Mombasa/Block XLV11/11 & 12, 85 to 99, which were registered with the General Manager East Africa Railways and Harbour

Corporation; that the 3rd defendant denied acting illegally or fraudulently and disputed denying the plaintiff its property rights or causing it to suffer any loss or damages.

B. ELCC NO. 42 OF 2005:

4. Vide the further amended plaint dated the 28th February 2020, the plaintiff asserted Mombasa/Block XLV11/114, suit property, was at all material times registered in the name of General Manager, East African Railways and Harbours Corporation on behalf of East African Harbours Corporation; that upon the disbandment of the East African Harbours Corporation in 1978, the ownership of the said property passed on to the plaintiff by being its successor in title; that in or about 1997, 1998 and or 2002, the 2nd defendant allocated the suit property to 1st defendant, which in turn transferred it to 4th defendant; that the said allocation and transfer were illegal, unlawful and void as it had not given a written consent or surrendered its interest. The plaintiff set out the particulars of illegalities and fraud at paragraphs 16 and 19 of the plaint respectively, and sought for the following prayers:

- a. *“Permanent injunction restraining the 1st to 4th defendants either through themselves, their servants or otherwise howsoever from charging, leasing, transferring or in any way whatsoever and howsoever from charging, leasing, transferring or in any way whatsoever and howsoever dealing with the property known as Mombasa/Block XLV11/114.*
- b. *A declaration that the cancellation of the General Manager, East African Railways and Harbours and the registration of the Government of Kenya as proprietor in the land register relating to parcel number Mombasa/Block XLV11/114 is null and void.*
- c. *A declaration that the 2nd defendant did not have powers to allocate and lease the property known as Mombasa/Block XVL11/114 to the 1st defendant and subsequently to the interested party[sic], [4th defendant].*
- d. *The entries made in the register in respect of land parcel No. Mombasa/Block XVL11/114 after 1997 be cancelled and consequently the plaintiff be registered as the proprietor thereof.*

e. Costs of the suit and interest thereon.

f. Such other and further reliefs as this Honourable court may deem just and fit to grant.”

5. The 1st & 4th defendants opposed the plaintiff's claim through their undated and unsigned statement of defence and counterclaim filed on 25th September 2020 under receipt number 1160325 dated 25th September 2020, averring inter alia that the plaintiff was not the registered owner of the suit property, and has never held any proprietary interests over it; that the 4th defendant bought the suit property from a third party as purchaser for value without notice of any defect in title; that the Commissioner of Lands allocated the suit property to Ramanda Limited lawfully and legally; that the plaintiff has never been in possession of the suit property and the 4th defendant has therefore acquired proprietorship of the property through adverse possession. The 1st & 4th defendants sought for the following in their counterclaim:

a. “A declaration that Ramand Limited is the initial and only allottee of Mombasa/Block XLV11/114 from the Government of Kenya as the only authority then capable of making such allocation.

b. A declaration that 1st defendant transferred good title of property known as Mombasa/Block XLV11/114 to the 4th defendant, who in turn transferred a good title to Suntania Limited, who subsequently transferred the same to the 4th defendant.

c. A declaration that the 4th defendant is the registered owner of the property known as Mombasa/Block XLV11/114 as lessee from the Government of Kenya having acquired the same from 1st defendant pursuant to a legitimate transfer registered in its favour by the 3rd defendant.

d. Any other relief which this Honourable court may deem just and expedient to award the 4th defendant in the circumstances of this case.”

6. The 3rd defendant also opposed the plaintiff's claim through their statement of defence dated 27th October 2024, averring inter alia that according to the survey plan FR 107/96, land parcels Mombasa/Block XLV11/111 to 118 were created after consolidation and subdivision of land parcels Mombasa/Block XLV11/11 & 12, 85 to 99, which were registered with the General Manager East Africa Railways and Harbour

Corporation; that the 3rd defendant denied allocating the suit property to Santunia Limited and or any other person, and acting illegally or fraudulently and disputed denying the plaintiff its property rights or causing it to suffer any loss or damages.

C. ELCC NO. 43 OF 2005:

7. The plaintiff lodged their claim against the defendants through the further amended plaint dated 28th February 2020 averring inter alia that Mombasa/Block XLV11/115 & 116, suit properties, was at all material times registered in the name of General Manager, East African Railways and Harbours Corporation on behalf of East African Harbours Corporation; that upon the disbandment of the East African Harbours Corporation in 1978, the ownership of the said property passed on to the plaintiff by being its successor in title; that in or about 1997, the 2nd & 3rd defendants allocated the suit properties to 1st defendant, which in turn transferred it to 4th defendant; that the said allocation and transfer were illegal, unlawful and void as it had not given a written consent or surrendered its interest. The plaintiff set out the particulars of

illegalities and fraud at paragraphs 16 and 19 of the plaint respectively, and sought for the following prayers:

- a. *“Permanent injunction restraining the 1st to 4th defendants either through themselves, their servants or otherwise howsoever from charging, leasing, transferring or in any way whatsoever and howsoever from charging, leasing, transferring or in any way whatsoever and howsoever dealing with the property known as Mombasa/Block XLV11/115 & 116.*
- b. *A declaration that the cancellation of the General Manager, East African Railways and Harbours and the registration of the Government of Kenya as proprietor in the land register relating to parcel number Mombasa/Block XLV11/115 & 116 are null and void.*
- c. *A declaration that the 2nd & 3rd defendants did not have powers to allocate and lease the property known as Mombasa/Block XVL11/115 & 116 to the 1st defendant and/or to the interested party or any other person/entity.*
- d. *The entries made in the register in respect of land parcel No. Mombasa/Block XVL11/115 & 116 after 1997*

be cancelled and consequently the plaintiff be registered as the proprietor thereof.

e. Costs of the suit and interest thereon.

f. Such other and further reliefs as this Honourable court may deem just and fit to grant.”

8. The 4th defendant opposed the plaintiff's suit through the statement of defence and counterclaim dated the 24th September 2020, inter alia averring that the plaintiff was not the registered owner of the suit property, and has never held any proprietary interests over it; that the 4th defendant bought the suit property from Suntania Limited as purchaser for value without notice of any defect in title; that the plaintiff has never been in possession of the suit property and the 4th defendant has therefore acquired proprietorship of the property through adverse possession. The 4th defendant sought for the following in their counterclaim:

a. “A declaration that the 1st defendant is the initial and only allottee of Mombasa/Block XLV11/115 & 116 from the Government of Kenya as the only authority then capable of making such allocation.

- b. A declaration that 1st defendant transferred good title of property known as Mombasa/Block XLV11/115 & 116 to Suntania Limited who subsequently transferred the same to the 4th defendant, having acquired the same from Santunia Limited pursuant to a legitimate transfer registered in its favour by the 3rd defendant.*
- c. A declaration that the 4th defendant is the registered owner of the property known as Mombasa/Block XLV11/115 & 116 as lessee from the Government of Kenya.*
- d. Any other relief which this Honourable court may deem just and expedient to award the 4th defendant in the circumstances of this case.”*

9. The plaintiff filed a reply to the 4th defendant's defence and defence to the counterclaim dated the 28th January 2021, inter alia averring that the Commissioner of Lands had no authority to confer any proprietary interest upon the 4th defendant or any other party, and any title document purporting to do so was a nullity and void ab initio; that Suntania Limited had no proprietary interest in the suit property that was capable of being lawfully transferred to the

4th defendant; that the alleged possession of the property by the 4th defendant does not confer upon it any proprietary interest as the title was a nullity and void ab initio; that the suit property having been reserved for a specific purposes was incapable of being allocated and any subsequent transfer to the 4th defendant was a nullity and void; that the purported allotment of the suit property to the 1st defendant was illegal, void and a nullity ab initio and incapable of conferring any proprietary interest to anyone including Suntania Limited and the 4th defendant, and therefore the 4th defendant was not a bona fide purchaser for value without notice of defect in the title.

10. The 2nd & 3rd defendants filed the statement of defence dated the 21st May 2019 denying the plaintiff's claim and inter alia averring that all the initial allotments of the suit properties and subsequent registrations was done in accordance with the law and in good faith based on the records presented to the Commissioner of Lands and Mombasa Land Registry; that the records at the Mombasa County Land Registrar office confirms Mombasa/Block

XLV11/115 & 116 are owned by Red Sparrow on a 99 year lease basis.

11. By consent of counsel for the parties of 13th March 2025, the above listed three suits were consolidated for the purposes of hearing and it was agreed the proceedings take place in ELC No. 41 of 2005.
12. The plaintiff called Stephen Kyandih, principal legal officer with the plaintiff, John Charles Kyalo Mwangi, principal assets management officer with the plaintiff, and Ephantus Waweru Mugendi, asset Management Officer with plaintiff, who testified as PW1 to PW3 respectively. It is the plaintiff's case that all the suit properties herein were created through consolidation and subdivision of its properties, being Mombasa/Block XLV11/11 & 12, 85 to 99, without its consent or surrender, that were registered in the name of General Manager, East African Railways and Harbours Corporation for East Africa Harbours Corporation, that was later disbanded through an Act of Parliament and to which the plaintiff is the successor in title. That the various suit properties were illegally and unlawfully allotted to the named allottees, and

subsequently transferred and are currently in the name of Red Sparrow Limited, the 4th defendant in the three suits.

13. In their defence, the 1st & 4th defendants called Mohamed Ngaraini, general manager with Red Sparrow Limited, Suntania Limited & Fleight contractors, who testified as DW1. It is their case that that the 4th defendant bought the suit properties that are close to the port facilities from Suntania Limited, which had purchased the same from the original allottees, after doing due diligence, and is therefore the lawful registered owner.

14. The 3rd defendant called Sheila Soita, Land Registrar Mombasa, who testified as DW2. She produced certified true copies of green and white cards for Mombasa/Block XLV11/111 to 113, 115 to 118, owned by East African Railways. She also produced copies of parcels Mombasa/Block XLV11/11 & 12, 85 to 99. It is her case that Mombasa/Block XLV11/114 to 116 & 118, which are the suit properties herein and now registered with the 4th defendant, came from the consolidation and subdivision of the original parcels, Mombasa/Block XLV11/11 & 12, 85 to 99, that were owned by the General Manager, East African Railways and

Harbours. That however, the original documents in her possession for Mombasa/Block XLV11/11 & 12, 85 to 99, do not show that they have ever been consolidated and subdivided. She observed that the documents in the 1st defendant's list includes a lease for Mombasa/Block XLV111/118. She also told the court the 1st and 4th defendants lists of documents did not contain evidence of payments of stamp duty, consents to transfer, transfer documents do not have company seals and are not attested by an advocate, and no CR 12 is attached thereof.

15. The learned counsel for the plaintiff, 1st & 4th defendants and the 3rd defendant filed their submissions dated the 30th October 2025, 11th November 2025 and 21st November 2025 respectively, which the court has considered.

16. From the pleadings, evidence and submissions tendered, the following issues arises for the court's determinations:

- a. Whether the Mombasa/Block XLV11/114 to 116 & 118, suit properties, now registered with the 4th defendant, are independent of Mombasa/Block XLV11/11 & 12, 85*

to 99 registered with East African Railways and Harbours Corporation, the predecessor to the plaintiff.

b. Whether the suit properties were available for alienation to the allottees.

c. Whether the allottees acquired good title that could be passed on to any subsequent party, including the 4th defendant, on transfer.

d. Whether the 4th defendant is a bona fide purchaser of the suit properties for value without notice of any defect on the titles.

e. What reliefs, if any to grant in the main suits and or counterclaims.

f. Who pays the costs?

17. The court has carefully considered the parties' pleadings, documentary and oral evidence, submissions by the learned counsel, superior court decisions cited thereon, and come to the following determinations:

a. From the pleadings and documentary and oral testimonies given by the parties herein Mombasa/Block XLV11/11 & 12, 55 to 99 are registered in the name of the plaintiff's predecessor, and still existed as such on

16th October 2025 when DW2, the Land Registrar, Mombasa testified in court. The suit properties in the three suits herein are Mombasa/Block XLV11/114 to 116 & 118, which according to PW1 to PW3 and DW2 were reportedly created after the unlawful consolidation and subdivision of Mombasa/Block XLV11/11 & 12, 55 to 99. Even though the 1st & 4th defendants disputed through their statements of defence and counterclaim that the plaintiff had a legal interest over the suit properties, the evidence tendered by PW1 to PW3 and DW2, to the effect that the suit properties were created on the land, to which the plaintiff had legal interests as the successor in title of the registered proprietor, remains unchallenged. The 1st & 4th defendants did not present any evidence to contradict that by the plaintiff and 3rd defendant that the suit properties emanated from land already alienated and registered in the name of the plaintiff's predecessor. In his testimony, DW1 was categorical that the suit properties were purchased for the 4th defendant through their advocates and he could not personally tell how the vendors had obtained title to

the said properties, and he was not involved in their acquisitions. He also admitted that he had only seen the certificates of leases of the suit properties but had not seen the leases of the suit properties, and could not confirm whether they were registered with the Land Registry by their advocates. He also could not explain the correct registration dates between 4th March 2004 and 8th March 2004.

b. Indeed, the evidence of DW2 was very damning for the 1st to 4th defendants, in that though parcels Mombasa/Block XLV11/114 to 116 & 118, suit properties, were reportedly excised after consolidation and subdivision of Mombasa/Block XLV11/11 & 12, 55 to 99, the titles of the latter parcels remained intact at the Lands Registry, without anything evidence of consolidation and subdivision, or the titles being closed, as would ordinarily happen after subdivision. This leads the court to conclude that the suit properties emanated from public land that was already alienated for use of the plaintiff as the successor in title of the registered proprietor. The evidence presented by the plaintiff

confirmed that it had been paying rates for the suit properties at least up to the year 2006. The fact of payment of rates was found to be proof of ownership in the case of Kenya Ports Authority versus Essam Properties & Others Mombasa ELCC No. 497 of 2001 (consolidated with ELCC No. 498 & 499 of 2001), and the registration in respect of Mombasa/Block XLV11/11 & 12, 55 to 99, being unchallenged, it is therefore undoubted that the plaintiff had legal interest over the suit properties.

- c. The plaintiff has clearly indicated that it had not surrendered its title to the suit properties or consented to their being allocated to third parties. It follows therefore that the action of the Commissioner of Lands and or its successor, the 2nd defendant, had no legal authority to allocate the parcels to the third parties who later on transferred the same and the titles ending with the 4th defendant. The actions by the Commissioner of Lands (2nd defendant) to cancel the entries in the registers of the suit properties and entering the Government of Kenya as the lessor before proceeding to

allot the said properties to the listed third parties was unlawful, illegal and fraudulent, and the allocation could not confer good title to those third parties. It follows that the third parties, not having acquired good titles, could not pass on any good title by transfer, and the 4th defendant's title to the suit properties stands impugned under *Article 40(6)* of the Constitution, *section 26(1)* of the Land Registration Act chapter 300 of Laws of Kenya, and the Supreme Court of Kenya decision in the case of Dina Management Limited versus County Government of Mombasa & 5 Others [2023] KESC 26 (KLR).

d. In the case of Munyu Maina versus Hiram Gathiha Maina [2013] eKLR, the Court of Appeal held that when the instrument of title is under challenge;

"...the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from encumbrances..."

And, in the case of Waterfront Holdings Limited versus Kandie & 2 Others KECA 1233 (KLR), the Court of Appeal inter alia held that:

“It is now law that the mere fact of issuance of title deeds does not confer the status of indefeasibility of title. Courts of this country have therefore held that they would not hesitate to nullify titles held by those who stare at the court and wave a title of a grabbed land by merely and pleading loudly the principle of indefeasibility of title deed. In cases where the very process of acquisition of land in question is under challenge, it is not enough to simply rely on the title....”

The 4th defendant herein must have known its claim of title or ownership over the suit properties was under challenge through these three suits, and as shown by the decisions in the two Court of Appeal decisions above, it had the responsibility to defend the source and legality of its title to weather off the plaintiff’s onslaught and or succeed in its counterclaims. See also the case of Kenya Ports Authority versus Africa Inland Church Kenya (Registered Trustees) & 12 Others [2024] KECA 1431 (KLR) (11 October 2024) (Judgement), where the court held that:

“Once an issue arises regarding the procedural propriety of the acquisition of a title, the presumption of indefeasibility of title is open to scrutiny.”

- e. Going by the testimony presented by DW1, who was the only witness called by the 1st & 4th defendants, they do not appear to have taken this legal responsibility seriously. DW1 told the court during cross-examination that other than knowing that the 4th defendant bought the suit properties through their advocates, he could not personally tell how the vendors had obtained titles to the said properties, and he was not involved in their acquisitions. He also could not give details of the due diligence done and was not aware whether certificates of search for the properties before and after acquisition were applied for. It was telling that he admitted that he had not seen the leases of the suit properties, and could not confirm whether they were registered with the Land Registry by their advocates, and that what he had seen were certificates of leases. This, among other details that he could not talk on concerning the registration of

the 4th defendant as proprietor of the suit properties, taken together with the evidence of DW2 on the defects or incompleteness of the 4th defendant's transfer documents, in respect of the suit properties, leads the court to the inevitable conclusion that the transactions leading to the 4th defendant's registration and acquisitions of title to the suit properties were irregular, unlawful, unprocedural, fraudulent, null and void ab initio. No wonder DW1 could not tell whether there was any resolution by the 4th defendant Board of Directors authorising him to testify on its behalf. No such resolution was presented to the court authorising the filing of the counterclaims herein. See the case of Directline Assurance Company Limited versus Tomson Ondimu [2019] eKLR, which cited with approval the reasoning in the case of Affordable Homes Africa Limited versus Ian Henderson & 2 Others HCCC No. 524 of 2004.

f. Having found merit in the plaintiff's claim over the suit properties, against all the defendants except the Chief Land Registrar, 3rd defendant, who has shown it only registered the documents presented for registration and

was not involved in the alienation and allocation of the suit properties. Accordingly, the 4th defendant's title over the suit properties have been successfully impugned and its counterclaim in the three suit fails.

g. Under *section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the events except where for good reasons, the court orders otherwise. That as the plaintiff has succeeded in its claim over ownership of the suit properties, and the 4th defendant has failed in its counterclaim, the court finds no reasonable cause not to follow the provided legal edict on costs.

18. Flowing from the foregoing on the main suits and counterclaims, the court finds and orders as follows.

a. That the 4th defendant has failed to prove its claims in the counterclaims in Mombasa ELCC Nos. 41 to 43 of 2005 to the standard required by the law, and they are therefore dismissed with costs.

b. The plaintiff has successfully proved its claims against the 1st, 2nd and 4th defendants, on a balance of probabilities over the suit properties but has failed to

prove any claim against the 3rd defendant. The court orders as follows:

- i. Judgement is therefore entered for the plaintiff against the 1st, 2nd and 4th defendants in terms of prayers (a) to (e) in the Mombasa ELCC Nos. 41 to 43 of 2005.*
- ii. The plaintiff's case against the Chief Land Registrar, 3rd defendant in the three suits, is dismissed with no order as to costs.*

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF DECEMBER 2025.

S. M.
Kibunja, J.
ELC
MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF : Mr Ondego

DEFENDANTS : Mr Kihiko for 1st to 4th Defendants.

Mr Kemei for Penda for 3rd Defendant.

KALEKYE-COURT ASSISTANT.

S. M.

Kibunja, J.

ELC

MOMBASA.

Original