

**IN THE COURT OF APPEAL  
AT MOMBASA**

**(CORAM: TUIYOTT, ACHODE & MUCHELULE, JJ.A.)**

**CIVIL APPEAL NO. E038 OF 2023**

**BETWEEN**

**SHEILA LOVERIDGE.....APPELLANT**

**AND**

**RICHARD KIMANI ..... 1<sup>ST</sup>  
RESPONDENT SWALEH MOHAMED MWAKURIWA .....  
2<sup>ND</sup> RESPONDENT HAMISI AYUBU MWAMJITA .....  
..... 3<sup>RD</sup> RESPONDENT  
HASHIM GOT SAT ..... 4<sup>TH</sup>  
RESPONDENT DR. KAWALJEET SINGH REKHI 5<sup>TH</sup>  
RESPONDENT  
THE HON. ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment and Orders of the  
Environment and Land Court of Kenya at Mombasa (**Naikuni,  
J.**) delivered on 20<sup>th</sup> January 2022  
in*

**ELC Cause No. 373 of  
2009)**

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**JUDGMENT OF THE COURT**

- [1] There is a tale of two certificates of title in respect to land known and described as Kwale/Galu/Kinondo/676 (**the suit property**) measuring nought decimal nine (0.9) hectares, not uncommon in Kenya.
- [2] Richard Kimani (**the 1<sup>st</sup> respondent or Kimani**) holds one of the certificates issued on 8<sup>th</sup> December 1978. The other is held by Sheila Loveridge (**the appellant or Sheila**). In

proceedings first commenced at the High Court in Mombasa,  
Kimani

contended that he bought the suit property from one Mr. Karagani in 1974 for Kshs. 5,000/-. During the finalization of the land adjudication process in regard to the area, a list of allottees was prepared by the Department of Land Adjudication and his name included and appears in the records at Nairobi. He was later to be issued with a certificate of title to the land.

- [3] Sometime in 2008 he learnt that a person had occupied the parcel of land and had carried out developments. He came to learn that the person was Sheila. On inquiry, he learnt that Swaleh Mohamed Mwakuriwa (2<sup>nd</sup> respondent) and Hamisi Ayubu Mwamjika (3<sup>rd</sup> respondent) had sold the suit property to Dr. Kawaljeet Singh Rekhi (the 5<sup>th</sup> respondent) through an agreement dated 7<sup>th</sup> May 2004 who in turn sold it to Sheila.
- [4] Kimani placed Hashim Got Sat (the 4<sup>th</sup> respondent) at the heart of the controversy. The 4<sup>th</sup> respondent was a Land Registrar at the Lands Office at Kwale in the period 2002 to 2005. He was accused of fraudulently, wrongfully and illegally issuing a green card and subsequently a certificate of lease/title to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents when he knew or ought to have known that they were not the registered owners of the property.
- [5] In pleadings filed at the High Court, Kimani set out

particulars of fraud allegedly committed by the appellant, the  
2<sup>nd</sup>

respondent, the 3<sup>rd</sup> respondent, the 4<sup>th</sup> respondent, and the 5<sup>th</sup> respondent, amongst them, that they conspired to deprive him of the suit property. To the suit, he joined the Attorney General (the 6<sup>th</sup> respondent), who was sued in a representative capacity for and on behalf of the Government of Kenya, Ministry of Lands and Settlement.

[6] In the proceedings, Kimani also recalled that on his complaint, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were arrested, detained and arraigned in Kwale Law Courts before the Senior Magistrate's Courts and charged with four (4) counts; the offence of making a document without authority contrary to section 357(a) of the Penal Code (Cap 63), Forgery contrary to section 349 of the Penal Code, Conspiracy to defraud contrary to section 317 of the Penal Code and obtaining registration by false pretences contrary to section 320 of the Penal Code, in Criminal Case No. 772 of 2008.

[7] Kimani sought special damages of Kshs.150,800 as advocates fees for watching brief in the criminal proceedings and General Damages. He also pleaded for an order directing the 6<sup>th</sup> respondent to rectify the records by cancelling the land certificate issued to Sheila. Kimani also sought costs of the suit and interest on the damages at court rates.

[8] The 2<sup>nd</sup> and 3<sup>rd</sup> respondents took a common stance in defence of the claim. They averred that they were born in Kwale and occupied the suit property as the original and first occupants. At the time of adjudication, they gave their names for registration as the owners of the suit property and they had since sold the land to a third party. They contended that it was not possible for Kimani to own the land without them transferring it to him.

[9] As for the 4<sup>th</sup> respondent, he denied allegations of fraud or any wrongdoing. He contended that he carried out his work professionally and without any favouritism. In his evidence before the trial court, he explained that Galu Kinondo was a registration section within the meaning of that phrase under the Land Adjudication Act. According to the records, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were the owners of the suit property.

[10] The 5<sup>th</sup> respondent is a doctor who is resident at Diani. His case was that he bought the suit property in the year 2004 from the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, and before doing so, he confirmed that; the land was not occupied by any person or squatters; the land was properly registered in the name of the sellers and a search to that effect issued; and there was no restriction or caution against the property.

[11] Sheila bought the suit property from the 5<sup>th</sup> respondent for a consideration of 70,000.00 Euros. She took possession and commenced construction of a house on or about April 2005. She asserted that she has been in constant possession of the property.

[12] On or about April 2008, while in the United Kingdom, she and her husband were informed by their guard that certain persons had come to their home and claimed that the land on which their home stood belonged to them. That was the beginning of her woes, now the dispute before us.

[13] The evidence of all witnesses who testified at trial was taken by Yano, J. who was then transferred to Mombasa before he prepared a decision. The judgment that is impugned was prepared and delivered by Hon. Naikuni, J, a matter which itself has raised a storm.

[14] We do not intend to rehash the evidence of the witnesses who testified for reasons that will be apparent shortly.

[15] In the impugned judgment, the learned Judge identified four substantive issues: whether the plaintiff was the absolute and legally registered proprietor of the suit property; whether the court had jurisdiction to deal with a claim and matters emanating, in connection with or relating to the land

adjudication process under the Land Adjudication Act; whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents acquired the suit property illegally, irregularly and wrongfully; and whether the 4<sup>th</sup> respondent being a civil servant was liable to any claim or demands by reason of anything done in good faith or executed or omitted to be done in his official capacity.

[16] The Judge found that title held by Kimani was the first registration, took precedence, and was not successfully challenged by the defendant. Regarding matters touching on the Land Adjudication Act, the court could only deal on matters arising or related therefrom in judicial review or as constitutional petition. A further finding was that the 4<sup>th</sup> respondent was protected by section 36 of the Registration of Documents Act from liability to any claim or relief against him.

[17] In the end, the court entered judgment in favour of Kimani in the following terms:

**a) THAT the Plaintiff is granted judgment to his favour and against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly and severally for:-**

- i) General damages;**
- ii) Special damages for a sum of Kenya Shillings One Fifty Thousand Eight Hundred (Kshs. 150,800/=).**

**b) THAT by invoking the provisions of Section 80 (1) and (2) of the Land Registration Act, of 2012, the 6<sup>th</sup> Defendant is and hereby ordered and/or**

**directed, within the next thirty (30) days from this date hereof, to:-**

- i. Cancel the lands certificate for all that parcel of land known as “Land Reference KWALE/GALU KINONDO/676” issued to the 4<sup>th</sup> Defendant and the transaction be declared null and void ab initio.**
  - ii. Rectify the lands records and register all that parcel of land known as “Land Reference KWALE/GALU KINONDO/676” in the names of Mr. Richard Kimani, the Plaintiff herein.**
- c) THAT under the laid down Provisions of Section 152E of the Land (Amended) Act, 2016, the 4<sup>th</sup> Defendant is directed and/or ordered to legally vacate the suit land by removing all her fixed fixtures, assets and/or property thereof within the next Ninety (90) days from this date hereof without failure.**
- d) THAT by virtual (sic) and dint of the provisions of Section 36 of the Registration of Documents Act Cap. 285, the 3<sup>rd</sup> Defendant, Mr Hashim Got Sat, the Kwale Land Registrar be and is hereby found not liable to any claim or relief sought against him and therefore he is henceforth exonerated and discharged from any liability arising from and pertaining to this instant suit.**
- e) THAT the County Commander of Police, Kwale and the Officer In Charge of the Police Station, Diani are hereby directed to ensure full adherence and compliance of this orders.**
- f) THAT Costs of the suit to be awarded to the Plaintiff to be borne by the 1<sup>st</sup>,2<sup>nd</sup>,4<sup>th</sup> and**

**5<sup>th</sup> Defendants.**

**g) THAT interest on (a), (b), (d) & (f) above at court rates.**

[18] Aggrieved by the decision and orders, Sheila is before us in this appeal which twelve (12) grounds. In preamble, we consider the complaint by Sheila that Naikuni, J. disregarded the directions of Yano, J. when he wrote the impugned judgement and that alone is sufficient for us to set it aside. This is how Sheila cast that grievance in ground 11;

***“The learned Judge erred when he decided to write the Judgment himself (instead of Hon. Justice Charles Yano who had heard all the witnesses and had directed that the file be sent to him to write the Judgment). In writing the Judgment, the learned Judge failed to caution himself that he did not have the benefit of listening to any of the witnesses and observing their demeanour in such a lengthy, complicated and highly contested matter.”***

[19] At plenary hearing of the appeal, this ground was extensively argued by both learned counsel Mr. Hamisi for Sheila and learned counsel Mr. Nyachoti representing the Kimani.

[20] Sheila argued that the Judge, Hon. L.L. Naikuni, erred when he decided to write and deliver the judgment himself despite not having heard a single witness testify. It was submitted that in doing so he went against the directions of Hon. Justice Yano. Further, in deciding to write the judgment, Naikuni, J. did not

consult the parties beforehand and surprised them with this information after pronouncing the judgment.

**[21]** It was contended that Naikuni, J. failed to caution himself that he had not had the opportunity to see and hear the witnesses, a crucial aspect in a long, highly contested, and sensitive trial. The appellant cited the Supreme Court's guidance in **Khalid &**

**16 Others vs. Attorney General & 2 Others**  
**(Application**

**32 of 2019) [2020] KESC 30 (KLR)**, which affirmed that the judicial officer who hears a case is the one preferred to decide on it, to avoid prejudice. This error, Shiela contended, meant that the appellate court cannot make the usual allowance for the trial court's findings of fact, as the trial judge had no first- hand interaction with the witnesses either. The failure to exercise this caution, it was argued, led the Judge to improperly appreciate the testimonies which ultimately affected his overall assessment of the evidence.

**[22]** On his part, Kimani defended the procedure where one judge heard the case, and another wrote the judgment. He argued this was a normal practice provided for under Order 18 Rule 8 of the Civil Procedure Rules. He noted that Sheila had not objected to the learned Judge writing the judgment when the

matter was mentioned on 6<sup>th</sup> October 2020 and other subsequent dates

thereafter for directions on the filing of written submissions. In addition, Sheila had not demonstrated any prejudice she suffered by Naikuni, J. writing the judgment. Cited in support is the decision in **Mandavia vs. Rattan Singh [1968] E.A. 146.**

[23] Kimani contended that land disputes rely more heavily on documentary evidence than on the demeanour of witnesses, which has little significance and does not carry much weight in matters that largely rely on documentary evidence to prove the dispute. In the end, it was asserted that Sheila was only raising the matter because the decision did not favour her.

[24] Yano, J. took the evidence of all the witnesses, but owing to a transfer to another station, could not complete the matter while at Mombasa. On 26<sup>th</sup> July 2021, the learned judge made the following orders:

***“The plaintiff to file and serve his written submissions within 21 days and the defendant to file theirs within 21 days of service by the Plaintiff. Mention on 6.10.2021 to confirm filing of submissions and thereafter the file will be forwarded to the court for writing of judgment which will be on notice.”***

[25] The law contemplates that on occasion a judge or judicial officer who has heard witnesses could be moved to another station before completing the trial and in Order 18 Rule 8 of

the Civil Procedure Rules provides;

**8. Power to deal with evidence taken before another judge [Order 18, rule 8]**

**(1) Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.**

**(2) The provisions of subrule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 18 of the Act.**

[26] The directions were clear. The judge (Yano, J.) would be writing the judgment. The judge had heard and watched all the witnesses as they testified. No less than seven (7) in total. He would have observed and assessed their demeanour. He would have engaged with the exhibits as they were produced. No doubt the judge, more than any other judge, would have had a 'good feel' of the matter. The eventual decision of the court was expected to benefit from this first-hand interaction with the matter, and the good judge must have had that in mind when he reserved the writing of the judgment to himself, notwithstanding that he had moved out of the station. The transfer of the learned Judge would not have prevented him from concluding the

trial, as all the witnesses had been heard

and all that remained was the filing of submissions and none of the parties objected to the directions.

[27] There was however a turn of events on 14<sup>th</sup> December 2021 when Naikuni, J. stated:

***“The matter slated for delivery of judgment. In the course of writing it, I noticed the submission for the 1<sup>st</sup> and 2<sup>nd</sup> defendant were missing from the file.”***

[28] Although Naikuni, J. had not set aside the directions and order of Yano, J., this was an indication that he (Naikuni, J.) would be writing the judgment. Counsel Mr. Hamisi, appearing for Sheila, was present in court and did not raise any objection.

[29] Mr. Hamisi was present in court again on 20<sup>th</sup> January 2022, representing Sheila when Naikuni, J. delivered the judgment. The reaction of counsel was:

***“I fully appreciate the judge for a very lengthy and well thought out judgment. The court has taken trouble to write it being an old case.”***

[30] Can it be said that by the conduct of her counsel on those two appearances, Sheila acquiesced to Naikuni J. writing the judgment as posited by learned counsel Mr. Nyachoti for Kimani?

[31] There was an express order that Yano, J. who had heard all witnesses would be writing the judgment. The order was not

set aside by Naikuni J. and it is not clear from the record whether

this was brought to his attention at all. While counsel for Sheila did not protest when Naikuni, J indicated that he was in the process of preparing the judgment, we think that in the circumstances of this case in which there was an express order that the Judge who had heard all the witnesses, many lengthy, would be writing the Judgment, there needed to be an equally unequivocal order varying or setting aside the order. Had a compelling reason arisen why judgment could not be written by Yano J as ordered, then the incoming Judge would have, in the very least, sought the views of counsel for the parties as to the way forward. This was not done.

[32] Further, nothing much should turn on the complimentary remark by counsel for Sheila to the incoming judge for preparing a *“very lengthy and well thought judgment”*. The courtesy extended to the Judge cannot be taken as an acceptance by the party that the Naikuni, J. was properly seized of the matter when the order of 26<sup>th</sup> July 2021 had not been set aside. While no aspersion should be cast upon Naikuni, J. for taking over this matter at such late stage, we have come to the conclusion that justice may have been better served had the Judge who heard all the witnesses and who was still available to prepare the judgment concluded it. We also bear in mind that if we are

to consider the substantive matters raised in this appeal on the basis of the impugned judgment, then we would be doing so, suffering the same handicap of the judge who wrote the judgment, as he did not see and hear the witnesses testify firsthand.

[33] Given our view, we refrain from considering the other grounds of the appeal and conclude that the judgment of 20<sup>th</sup> January 2022 is for setting aside. In the memorandum of appeal, Sheila had sought, amongst others, an order that the matter be heard afresh by a different Judge. We have anxiously reflected on the ultimate orders to make. Given the age of the dispute, it might seem the more reasonable and just order that the matter be remitted to Yano, J. to simply prepare the judgment. Yet it is not lost on us that the learned judge last dealt with the matter on 21<sup>st</sup> July 2021, more than four years ago. The passage of time may have affected the Judge's recollection of the demeanour of the witnesses and the dynamics of the trial and matter. The conclusion of the dispute at trial may now not benefit from the Judge in the manner in which it could have had he prepared the judgment in 2021 or so soon thereafter when the trial was fresh in his mind. For this reason, we accede to the prayer by Sheila that the matter be heard afresh. In doing so, we have taken into

account that none of the parties argued that they would not be in a position to mount a retrial even in the face of the prayer sought by Sheila.

[34] In the end, we allow the appeal to the extent that we do hereby set aside the judgment and orders made on 20<sup>th</sup> January 2022, in Mombasa ELC case No 373 of 2009. The matter shall be remitted to the Environment and Land Court for hearing afresh before any judge other than Yano, J., and Naikuni, J. The matter shall immediately, in any event not later than 14 days from the date of this order, be placed before the Presiding Judge of that Court for directions on priority and expedited hearing. Since no party can be blamed for this unfortunate set of circumstances, each shall bear their own costs.

**Dated and delivered at Mombasa this 11<sup>th</sup> day of December 2025.**

**F. TUIYOTT**

.....  
**JUDGE OF APPEAL**

**L. ACHODE**

.....  
**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....  
**JUDGE OF APPEAL**

*I certify that this is*

*a True copy of the  
original*

*Signed*  
**DEPUTY REGISTRAR**