



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 49 OF 2022

ALI SULEIMAN ALI

SWALEH ABEID AWADH (*Suing in their capacity as the
representatives of the family of*

HEMED BIN JUMA ALIAS MOHAMED BIN JUMA

(deceased).....

PLAINTIFFS

-VERSUS-

MUHIA DANIEL KIMEU.....**1ST**

DEFENDANT

LUCAS CHIMERA KENGA.....**2ND**

DEFENDANT

FRANCIS KIPKOGEI KENBOI.....3RD

DEFENDANT

CHRISTOPHER TUITOEK KIPLAGAT.....4TH

DEFENDANT

LAND REGISTRAR MOMBASA.....5TH

DEFENDANT

JUDGMENT

- 1.** This matter pertains to a parcel of land identified as L.R. No. MN/IV/71/1, the ownership, allocation, and registration of which have been vigorously disputed by both the plaintiffs and the defendants in the plaint, the respective defenses, and counterclaim.
- 2.** The core issue of the dispute pertains to whether the allocation and subsequent registration of a lease in favor of the 1st-4th Defendants in 2018 were conducted in accordance with applicable legal requirements. The Plaintiff asserts that the land was never legitimately available for allocation, as it was reserved for the Wakf of Hemed Bin Juma; that the registration process involved procedural irregularities; and that the alleged lease violated

constitutional and statutory provisions related to land tenure, allocation, and registration.

- 3.** The 1st-4th Defendants claim legal ownership of the property, supported by allotment records, registration, and a 2018 title certificate. They dispute the Plaintiff's claim and have filed a counterclaim for trespass, requesting appropriate remedies.
- 4.** The 5th Defendant, the Land Registrar, argues that no cause of action exists against him, as he was acting within his official duties as the custodian of the land register.
- 5.** The Plaintiffs called one witness, PWI Ali Suleiman Ali, who adopted his written statements and the filed documents.
- 6.** The Defense called two witnesses. DW1 Daniel Kimeu, representing the other co-defendants, also adopted the filed written statements and documents. DW2 Soita Sheila, the Land Registrar, produced the record held by the Mombasa Land Registry concerning the suit property.
- 7.** After the parties' respective cases were closed, I received written submissions from learned counsel for the plaintiff, Mr. Mgupu; from learned counsel for the 1st to 4th Defendants, Mr. Kirwa; and from learned State counsel for the 5th

Defendant, Mr. Munga. I appreciate their submissions, as they went a long way toward resolving the issues raised in this matter.

- 8.** Based on the evidence, materials, and submissions before me, I frame the following issues for the determination of this court, namely, whether the Plaintiffs had capacity to bring this suit; the legality of the 2018 lease; the effect of the Wakf dedication; the validity of the 1st to 4th Defendants' title; the merits of the Plaintiffs' claim and the counterclaim; whether any relief is available to the parties in light of the evidence and the law; and the issue of costs.
- 9.** Regarding *locus standi*, the 1st to 4th Defendants argue that paragraph 4 of the plaint states that the Plaintiffs are the direct descendants of Hemed Bin Juma, who died around 1945. Ali Suleiman Omar is a great-grandson of Hemed Bin Juma, and Swaleh Abeid was married to Hemed Bin Juma's granddaughter. Based on this, the 1st to 4th Defendants contend that Ali Suleiman Ali has changed to Ali Suleiman Omar and is a great-grandson of Hemed Bin Juma. Consequently, his claim, if any, is rooted in inheritance as a beneficiary of Hemed Bin Juma's estate. It is important to

note that the Plaintiff Ali Suleiman Ali, or Ali Suleiman Omar, has not obtained a grant of letters of administration before filing this suit. See **Trouistik Union International & Another v Jane Mbeyu & Another (1993) eKLR.**

10. The 1st to 4th Defendants further state that it is abundantly clear that the Plaintiffs have not obtained any letters of administration in respect of the estate of Hemed Bin Juma alias Mohammed Bin Juma (Deceased), nor have they presented any letters of administration appointing them as administrators of the estate of Hemed Bin Juma alias Mohammed Bin Juma (Deceased).

11. 1st to 4th Defendants further contend that in **Taura 3 others v Taura (Environment and Land Case No 148 of 2017 (2025) KEELC 148(KLR) (27th January, 2025)**, the Court stated:

“It is clear that the life of a suit is granted to it upon filing of a plaint by a competent person has been restated in many Court decisions. The suit cannot lie unless it is filed by a person with Locus Standi. The 1st Plaintiff commenced this suit alone. It was null ab initio.”

12. 1st to 4th Defendants assert that the Plaintiffs' attempts to cure this anomaly presented documents, including Plaintiff Exhibits 1 - Copies of consents dated 5 November 2017 - that purported to allow the Plaintiffs to represent the family of Hemed Bin Juma. It is submitted that these documents cannot substitute for section 82(a) of the Law of Succession Act and are of no probative value. They constitute a clear admission that no Grant of Letters of Administration exists. They represent nothing more than a clumsy, homemade gambit by the Plaintiffs to mislead this Court. 1st to 4th Defendants conclude that this transparent charade cannot serve as a foundation for any claim and must be rejected rather than allowed to slip past the Court's vigilant scrutiny.

13. On the other hand, the Plaintiffs aver that the provisions of Part VII of the Law of Succession Act, under which Section 82 falls, apply only to a Muslim estate where they are not inconsistent with Muslim law. It is the Plaintiffs' opinion that the determination of the estate of any Muslim is first subject to the Kadhis Court under the provisions of the Kadhis Court Act, which applies Article 170(5) of the Constitution of Kenya.

The provisions of Article 170(5) on the powers of the Kadhis Court are moot.

14. Plaintiffs assert that PW1 produced PEXH.10 as one of the documents to be relied upon as evidence in the matter. Exhibit 10 is a copy of an Order dated 14 March 2019 in **Succession Cause Number 320 of 2018: In the Matter of the Estate of Mohamed Bin Juma**, also known as Ahmed Bin Juma. In the Order, the Kadhi is tasked with determining who the heirs of the late Hemed Bin Juma are, whether the property comprising the deceased's estate should be distributed to the heirs, and in what shares. The Kadhi goes on to list all of the heirs of the deceased person as presented by the Petitioners in that matter, confirms them as the true heirs, and further determines that the deceased's property, which is the suit property herein, is to be distributed amongst the heirs in the manner provided in that Order. It is safe to state that the production of PEXH.10 was not contested. Having obtained the said orders, the Plaintiffs herein obtained consents from all the heirs who were granted proprietary rights over the estate and thereafter filed the present suit. The 2nd Plaintiff, Said Abeid, was

named in the Order as a beneficiary by virtue of his wife's death and obtained a 16/64 share in the property. The 1st Plaintiff was a great-grandchild of the said Hemed Bin Juma, and his share is equally provided in the Order. The Plaintiffs chose to pursue the path provided for under the Kadhis Court Act to determine the estate of Hemed Bin Juma, and the same does not provide for the administration of the deceased's estate.

15. Therefore, the Plaintiffs submit that, having obtained orders from the Kadhis Court granting them proprietary rights over the estate of the deceased, the Plaintiffs had the locus to institute the present case and had only to seek the consent of the other heirs (which they did) to pursue their claim over the suit property.

16. Plaintiffs assert that although the High Court in Kenya, sitting on appeal from decisions of the Kadhi's Court, has interpreted whether Part VII applies to a Muslim estate differently, they are convinced that its applicability is merely directory and not mandatory. See **Maimuna Kenvi Suleiman v Amina Ibrahim, Civil Suit No. 36 of 1999**, a 2016 decision where Hon. A. I. Hussein had this to say:

"Sincerely speaking, Islamic law of succession did not recognize the concept of administration of estate of the deceased Muslims. It merely laid down machinery for the distribution of the estate of the deceased among the legatees and the heirs..."

The concept of administration of estate was introduced in Kenya for the first time by the British rulers. In modern Kenya, the administration of the deceased Muslim is governed by Law of Succession Act, Cap.160, where they are not inconsistent with those of Muslim Laws.

It should be noted that the substantive law that is applicable to the estate of a deceased Muslim is Muslim law as provided by Sec 2(3) of the Act.

17. Further, in the **re-estate of Mohamed Kismali (2017 eKLR)**, Kadhi Abdulhalim H. Athman had this to say:

"The applicable law in succession of estates of deceased Muslims is therefore Islamic law. Under Islamic law, letters of administration is not a requirement for purpose of instituting inheritance proceedings. This is because the general rule in Islamic law of succession is that estates do not stay in abeyance, it automatically vests in the heirs [unlike in common law, not the personal representative of the

deceased]. M. M. Khan, in his 'Islamic Law of Inheritance', at p.22 states:

“Administration, as understood by modern law, was unknown to Islamic jurisprudence. In Islam there is mere distribution of property of the deceased, by the state if not by the heirs themselves. Unlike other modern systems to dispose of the estate of a deceased Muslim, neither there is a need of executor or / and administrator nor probate or / and letters of administration. In the absence of an executor appointed by the will of the deceased, heirs of a Muslim have a right and capacity to dispose of the estate of the propositus according to law. In case they fail or refuse to do so, the Qazi (magistrate) may appoint an executor.”

18. Plaintiffs further submit that in **Rashid Zahran v Azan Zahran & 4 Others, Civil Appeal No. 55 of 1999**, Mohamed Ibrahim J. (as he then was) stated:

“What is the effect of this provision? It is my view that this provision can only apply where the same shall not oust the application of Islamic law and principles in connection with the administration of the estate of a deceased Muslim. It is in effect directory and not

mandatory as where there is any inconsistency or doubt as far as Muslim law is concerned then Muslim law shall prevail. Any requirement that one must obtain letters of administration to the estate of a deceased Muslim before management or distribution thereof would be inconsistent with Muslim law.”

19. The Plaintiffs maintain that the above cases are clearly distinguishable from **Zulekha Salim Bantushi & another v Shehuna Mohammed Modhihiri; Ahmed Modhihiri Mohamed (Interested Party) [2019] KEHC 11944 (KLR)**, where a party therein objected to the sale of a property by way of consent of all heirs, where, in the first place, the suit was instituted by letters of administration. The court stated that the mere fact that the parties had first sought letters of administration intestate and thereafter filed a Petition before the Kadhi for administration of the estate, defeated their claim that Part VII was not applicable.

20. Plaintiffs are of the view that in the present scenario, the Plaintiffs have completed the determination of the estate of the deceased, and as the Chief Kadhi Abdulhalim Athman (as he then was) rightly put it, that:

"estates of a deceased Muslim do not stay in abeyance, but automatically vest in their heirs unlike common law where they vest in personal representatives of the deceased" (See re-estate of Mohamed Kismali 2017 eKLR supra).

21. The plaintiffs assert that, currently, there is no appellate court decision that this court is obliged to follow, and that it retains the authority to determine this question on its own findings based on the specific facts of this case.

22. I have carefully considered the two warring positions regarding whether Part VII of the Succession Act applies here. In **Zulekha Salim Bantushi & another v Shehuna Mohammed Modhihiri; Ahmed Modhihiri Mohamed (Interested Party) [2019] KEHC 11944 (KLR)**, the Court held that:

"In various jurisdictions that apply the sharia, some of which are dominantly Muslim such as Pakistan, Egypt, Syria, including India where sharia law is applicable to Muslims, statutes have been enacted to guide in the administration of estates of deceased Muslims, and where Like in Kenya the substantive Law applicable in the devolution of the estate of a deceased Muslim remains the Sharia law.

28. In my view the prepositions cited above in favour of Part VII of the Act was indeed the aim of the drafters of Section 2(3) of the Act. Clearly the intention of the Act is not to oust the application of the Islamic law on distribution but to complement the same in the administration of the estate to avoid disorder and greed by unscrupulous heirs to the detriment of others after all borrowing the words of Fyzee (supra) the cake is not always round and divided proportionately and carefully for one heir to pick his portion and satisfactorily and happily walk away. This is not always the case in the world and certainly not in Kenya today.

29. I will align myself with those who find the application useful and harmless and will therefore not hesitate to find and hold that the requirement of part VII of the Act and in particular Section 45 is not inconsistent with the Sharia and fault the decision of the Kadhi in holding so. The provisions are complementary and most useful in facilitating transmission of legacies in line with provisions of other laws applicable to all Kenyans in the said exercise. The provisions also ensure orderliness and proper administration is put in place.”

23. In Succession Cause Number 320 of 2018, Principal Kadhi Hon. Juma Ali Abdalla determined the heirs of the late

Mohamed Bin Juma and how the estate, including the suit property, should be distributed among them. The Kadhi confirmed the heirs listed by the Petitioners, and the production of PEXH.10 was uncontested. After obtaining orders, the Plaintiffs secured consent from all heirs with proprietary rights and filed this suit.

24. Therefore, the Plaintiffs, having obtained orders from the Kadhis Court granting them proprietary rights over the deceased's estate, had the *locus* to institute the present case and had only to seek the consent of the other heirs (which they did) to pursue their claim to the suit property. I do not see any conflict with Part VII of the Succession Act, and therefore, I apply the Sharia law as submitted by the Plaintiffs, namely, that:

"estates of a deceased Muslim do not stay in abeyance, but automatically vest in their heirs, unlike common law, where they vest in the personal representatives of the deceased" (See re-estate of Mohamed Kismali 2017 eKLR (supra)."

25. Having established the Plaintiffs' standing to initiate this proceeding, I now address the primary issue, namely, the two conflicting interests. On the one hand, the Plaintiffs

allege that the 1st to 4th defendants unlawfully acquired the subject property, even though rights in the property had already legally vested as a private Wakf in Mohammed Bin Juma for the benefit of his heirs and their descendants in perpetuity. Conversely, the 1st to 4th defendants contend that the property was lawfully allocated to them after they followed a rigorous allocation process. This analysis will resolve both the claims outlined in the plaint and the counterclaim.

26. The Plaintiffs' case is grounded in several fundamental facts. Initially, records from the Mombasa Lands Registry, dating back to 1924, demonstrate that the subject property, L.R. No. MN/IV/71/1, was designated as a private Wakf by Mohammed Bin Juma for the benefit of his heirs and their descendants in perpetuity.

27. PWI produced PEXH 3, a report by the National Assembly Departmental Committee on Lands pursuant to Public Petition Number 49 of 2020. The report is dated 10 August 2021. Its authenticity was never challenged by the 1st to 4th Defendants. The report was tabled in Parliament after a thorough investigation into who the rightful owners of the

suit property were, following the residents' request to be settled on the suit property.

28. The report, having obtained documents and evidence from government institutions mandated to carry out land administration, registration, and related duties, found that the suit land was preserved as a wakf in perpetuity for the children of Hemed bin Juma.

29. In furtherance of that investigation by the Departmental Committee on Lands, the Director of Land and Administration at the Ministry of Lands and Physical Planning, by letter dated 20 April 2021, expressed concern about the registration of the 1st to 4th Defendants.

30. In a letter dated July 28, 2021, the Senior Registrar of Titles in Mombasa, responsible for maintaining the property register, informed the Clerk of the National Assembly that the lease for the 1st to 4th Defendants was submitted for registration on March 6, 2018, and registered on March 19, 2018. The registration card stated the property was reserved as a Wakf for Mohamed Bin Juma's heirs and descendants forever. The land was not available for allocation or alienation unless the Wakf interest was extinguished through

a lawful process that established heirs and proprietary interests and removed encumbrances.

31. The Director of Land Administration further indicated that although a lease in favor of the 1st-4th Defendants was processed and registered under C.R. 71107, the correspondence file (C.F. No. 183166) could not be located. Additionally, survey details were absent from the Ministry's survey office, and the registration was conducted despite records indicating that the land had been dedicated as a Wakf. Consequently, the Director recommended summoning the allottees pursuant to Section 79(2) of the Land Registration Act to verify the authenticity of the lease and its supporting document

32. The Plaintiff cites the Land Registrar's testimony, which confirms that the Defendants conducted no search or inquiry before the allocation. The land was unavailable for allocation, and a 999-year lease was granted despite the ninety-nine-year limit in the 2010 Constitution and the Land Act. Based on this, the Plaintiff argues that the allocation, lease, and registration were unlawful, unconstitutional, and void from the start.

33. The 1st to 4th Defendants claim they have a valid lease and a 2018-registered title. The 1st Defendant testified that they were allocated L.R. NO. MN/IV/71/1-South of Takaungu by the Kenyan Government on January 5, 1995. They paid Kshs 2,915,500, underwent a survey, received a deed plan, and then a lease and a Certificate of Title.

34. They assert that, in summary, the Plaintiffs have not produced any Certificate of Title, Certificate of Ownership, or a registered claim under the Land Titles Ordinance, 1908, which governed land adjudication in the coastal region. They rely on an alleged sale from Mzee Mbuto Mumbo to Mohamed Bin Juma and on a resulting registration card, but have failed to demonstrate that Mbuto held any lawful title or that a claim was ever lodged or adjudicated.

35. The 1st-4th Defendants produced exhibits “1-25” of their trial bundle, which show the steps taken in the allocation process to the issuance of the Title, documenting the ownership process.

36. They claimed that, unlike the Plaintiffs, they already have a valid, registered Certificate of Title. This means the Plaintiff

must do more than just claim a right to acquire one to nullify an existing title.

37. The 1st to 4th Defendants say the Plaintiffs claim ownership of the suit premises based on a registration card showing the land was wakf to Mohammed Bin Juma's heirs. However, no registration card or wakf was presented as evidence, and no date or entry confirms when the property was registered. The land is claimed to have been reserved as a wakf. No claim number or documents show whether the claim was registered.

38. They further contend that the Plaintiffs have not shown the basis of their ownership claim to this property. Their account of how the property passed from one Mzee Mbuto Mumbo to Mohammed Bin Juma stops midway, as no sale agreement was produced, and no witness testified to the sale. As such, no clear direction regarding ownership can be discerned, particularly whether Mzee Mbuto had demonstrable proprietary rights to effect a sale.

39. The 1st to 4th Defendants claim the alleged wakf by Mohamed Bin Juma was not validly created and argue that it was not registered and is legally non-existent. A wakf must

be made with lawful ownership, and the Plaintiffs have not proven that Mohamed Bin Juma possessed such ownership. Islamic law states: *“La wakfa illa mimma yumliku,”* meaning no wakf over what one does not own.

40. Additionally, Kenyan law requires wakf property to be registered, but the Plaintiffs failed to show compliance. There’s no evidence of gazettelement, trustee appointment, or registration. Therefore, the alleged wakf is not legally recognized, and claims based on it are invalid.

41. 1st to 4th Defendants further assert that, the Plaintiffs failed to satisfy the Land Tenure System requirements applicable at the time of registration, the steps toward ownership of the land in question, as observed in **Federation of Women Lawyers & 4 Others v AG & 2 others (2016) eKLR**, See also **Mbetsa Sadi Munga & others v Peter Kahi (2019)eKLR and others, Charles Malenya & 22 others v Registrar of Titles Nairobi & Another [2012] KEHC 511 (KLR)** and **Torino Enterprises Limited v Attorney General [2023] KESC 79 (KLR)**.

42. They further assert that, pursuant to Section 26 of the Land Registration Act, the certificate of title is conclusive

evidence of ownership unless fraud or illegality is demonstrated. They maintain that they acquired the property lawfully and, through a counterclaim, allege trespass by the Plaintiff and seek appropriate remedies. Accordingly, the 1st to 4th Defendants hold the only valid proprietary interest in the suit property, while the Plaintiffs' claim is unsupported by law, documentation, or registration. Their reliance on a historical perspective on occupation and unregistered claims cannot override the 1st to 4th Defendants' title document.

43. As held in **Mohamed v Board of Management, Pentrose Community School & another [2023] KEELC 16510 (KLR)**, the law affords strong title protection, with grounds for impeachment being acquisition through fraud or misrepresentation and a corrupt scheme. Titles held by the 1st to 4th Defendants are presumed valid unless proven to have been obtained by fraud, misrepresentation, or illegal means. See also **Kamoye v Tipango & 2 others [2024] KEELC 4227 (KLR)**

44. The 1st to 4th Defendants assert that they have taken steps to establish their property interests, including a postal

search, contesting squatters' objections with the National Land Commission, appointing professionals for boundary demarcation, paying land rates, and engaging with the County Government to file a caveat against land invasions supported by politicians. These actions create legal and equitable interests that must be protected from unjust enrichment, as affirmed in **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**.

45. They argue that **Dina Management Limited v County Government of Mombasa [2019] eKLR** emphasizes that courts may look beyond registration only if there is credible evidence of illegality or fraud. Since no such evidence exists here, the registered title is fully protected by law. Unsettling a good-faith registered title would be unfair and against public policy. As no evidence of fraud has been presented, the allegations are unfounded.

46. In addition, the current proceedings are founded on tort and are barred by statute pursuant to Section 4(2) of the Limitation of Actions Act, Cap. 22, Laws of Kenya, rendering it unsustainable. Section 4(2) of the Limitation of Actions Act, Cap. 22 stipulates that recovery of land cannot be initiated

after twelve years. It is uncontroverted that the Plaintiffs' claim is based on a purported registration of the suit land as a wakf in 1924; they initiated proceedings before the court in 2022, constituting a significant delay of 98 years.

47. The 5th Defendant, the Land Registrar, in his defense, affirms that no misconduct or illegal activity has been attributed to him and that he has merely performed his statutory duties as custodian of the land register. Consequently, he contends that no cause of action exists against him personally.

48. Regarding the limitation issue raised by the 1st to 4th defendants, who assert that the Plaintiffs' claim is time-barred, the record shows that the government has been diligently investigating the subject property, including proceedings in Parliament, with particular attention to the issuance of a 2018 lease to the 1st to 4th defendants. This lease is central to this case, and the history of ownership of the suit property is also under review. The counterclaim filed by the 1st to 4th defendants is grounded in their 2018 lease; consequently, the question of limitation shall not arise.

49. After a thorough review of the evidence, it is clear that this land was officially designated a private Wakf by Mohammed Bin Juma in 1924, as recorded in the Mombasa Lands Registry. The Senior Land Registrar and the Director of Land Administration confirmed that the registration document explicitly stated the land was reserved indefinitely for Mohammed Bin Juma's heirs. They also explained that the land could be allocated or alienated only after the correct procedures were followed to secure the Wakf's proprietary rights, free from any encumbrances. Additionally, had the 1st to 4th Defendants exercised proper due diligence, they would have discovered that this land was not available for allocation. The Land Registrar further noted that the registration card on the record proved ownership of the parcel and its dedication to the private Wakf, and she indicated that the land in question was therefore not available for allocation to anyone else.

50.

51. In letter DEX-25, the Land Administration Director noted that although a 2018 lease for the 1st to 4th Defendants was processed and registered under C.R. 71107, the correspondence file (C.F. No. 183166) was missing. The

Ministry's survey records lacked detail and indicated that the land was dedicated as a Wakf to Mohammed Bin Juma's heirs. The Director advised summoning the registered owners under Section 79(2) of the Land Registration Act, 2012, to verify the lease documents.

52. The Senior Land Registrar confirmed that while the registration card showed evidence of dedication as a Wakf, no valid title was issued to the 1st to 4th Defendants. Since the land was part of a private Wakf, it could not be allocated or alienated without first lawfully extinguishing the Wakf interest by identifying the legitimate heirs of Mohammed Bin Juma, acquiring rights from them, and removing all encumbrances. None of these steps occurred before the 2018 lease was processed and registered.

53. I agree with Mr. Munga on behalf of the 5th defendant that, under Islamic endowment principles recognized in Kenyan law, land dedicated as a Wakf is inalienable except through lawful processes. The Court in **Khalifa Abdalla Khamis v Mohamed Abdalla Khamis [2021] KEHC 7388 (KLR)** affirmed that such land retains its Wakf status indefinitely:

“The definition is propounded in various judicial decisions. Thus, in Haji Salleh Bin Haji Ismael & another v Haji Abdullahi Bin Haji, Mohammed Saleh & Others (1935) 1MLJ 26, Whitley J stated that

“The ownership of the thing immobilized is transferred to God, which means that such object ceases, for man, to be subject to the right of the private property, and that it henceforth belongs neither to the founder nor to the beneficiary.”

The import of the courts statement in the Haji Saleh case is the corpus of irrevocability and perpetuity. These two concepts adequately clarify the frontiers of the regime of a Waqf. Turning to perpetuity, its associated with the binding nature which automatically follows such a declaration. Secondly it cannot be constrained by time and temporariness. Thirdly, the subject matter of the Waqf remains so forever in perpetuity.”

54. Once dedicated, wakf property ceases to be private property capable of free alienation and instead becomes subject to trust-like obligations enforceable against successors. The authority affirms that dedicating L.R. No. MN/IV/71/1, as a private Wakf in 1924, imposed legal restrictions on its disposition.

55. Article 40(6) of the Constitution excludes protection for unlawfully obtained property. It requires transparent land transactions, and under section 80, courts can correct the register when fraud or mistake is proven, by canceling or amending registrations.

56. This is the bedrock of the decision cited by the parties in **Munyu Maina v. Hiram Gathiha Maina, Civil Appeal 239 of 2009**, in which the Court of Appeal stated:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge, and 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 any encumbrances, including any and all interests which would not be noted in the register.”

57. The alleged 999-year lease, registered in 2018 for land already designated as a private Wakf, is unlawful because the land could not be legitimately leased unless the Wakf interest was lawfully annulled, which never occurred. There was no correspondence file or survey records, and the lessees were to be summoned under Section 79(2) of the

Land Registration Act, indicating procedural irregularities. Registering a 999-year lease after 2010 also violated the constitutional ninety-nine-year limit and Section 13(1) of the Land Act, making the lease unlawfully issued to the 1st to 4th defendants.

58. Due to the property's Wakf status and cited violations, the 2018 lease under L.R. No. MN/IV/71/1 is invalid, granting no valid interest to the 1st to 4th Defendants.

59. The evidence presented shows that the suit property was historically a private Wakf for Mohammed Bin Juma's heirs. No lawful steps were taken to end or acquire that interest. Moreover, the 2018 lease was processed and registered despite missing records, no searches, and a violation of the ninety-nine-year leasehold limit. The acquisition of the lease in 2018 went contrary to the **Dina Management Ltd Case** (supra):

“The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR as follows:

“...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and

approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013, where Njagi J held as follows:

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP)

can only be prepared in respect to Government land that has not been alienated or surveyed...”

105. This process is restated in African Line Transport Co Ltd v Attorney General, Mombasa, HCCC No 276 of 2003 [2007] eKLR, where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.”

60. As previously noted, issuing a lease to the 1st to 4th Defendants in 2018 was unlawful. The land intended for allocation was unavailable because the conditions set out in the 1995 allotment letter had not been met. Additionally, the premium, due 30 days after issuance of the allotment letter, was paid much later, in 2016. No surveying was conducted until 2016, over two decades later. Furthermore, the Land Registry does not have a complete record of the allocation process.

61. Our Superior Courts hold that if a title's basis involves illegality, procedural error, or a constitutional breach, it is

invalid and can be canceled under Section 80 of the Land Registration Act. Formal registration cannot remedy illegality or legitimize violations of the law.

62. No cause of action was established against the 5th Defendant, the Land Registrar, who acted within his statutory mandate as custodian of the land register and against whom no wrongful acts have been pleaded or proved.

63. The 1st-4th Defendants' counterclaim for trespass must fail because it relies on a title that has been undermined by constitutional and statutory noncompliance.

64. This case demonstrates that justice, constitutional fidelity, and the rule of law favor the Plaintiffs, supporting the orders for declaration, injunction, rectification, cancellation of the unlawful lease, title to the 1st to 4th Defendants, and costs, as well as the dismissal of the Counterclaim with costs, because the squatters mentioned in these proceedings were never joined, among other reasons for dismissal.

65. Consequently, this will constitute the final orders from this court:

a) A declaration is hereby issued that the Wakf of the heirs of Mohamed Bin Juma is the bona fide lawful owner and reserves exclusive claim to the suit property known as L.R. No. MN/IV/71/1.

- b)** *A declaration is hereby issued that the 5th Defendant lacked statutory authority to issue the lease to the 1st to 4th Defendants over the suit property without the written consent and knowledge of the heirs of Mohamed Bin Juma.*
- c)** *An order is hereby issued compelling the 5th Defendant to cancel and revoke the lease issued to the 1st to 4th Defendants and, in its place, to register the suit property in favor of the Wakf of the heirs of Mohammed Bin Juma.*
- d)** *A permanent injunction is hereby issued, restraining the Defendants from subdividing, leasing, selling, transferring, charging, developing, and/or otherwise dealing with the suit property known as L.R. No. MN/IV/71/1.*
- e)** *Costs to the Plaintiffs to be borne by the 1st through 4th Defendants.*
- f)** *The counterclaim of the 1st to 4th defendants is hereby dismissed with costs.*

**Dated, signed, and delivered electronically in Malindi on
December 10, 2025.**

E. K. MAKORI

JUDGE

In the presence of:

Mr. Mgupu for the Plaintiffs

Mr. Kirwa for the 1st to 4th Defendants.

Happy: Court Assistant

In the absence of: