

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ELC NO E94 OF 2021

ZAINULABIDIN YUSUFALI DAR
(Suing as Personal Representative the administratrix of the
estate of the late Yusufali Adamali Dar)
.....1ST PLAINTIFF

BURNAHUDDIN SADIQALI GULAMHUSSEIN (Suing as
Personal Representative the administratrix of the estate of the
late Sadiqali GulamHussein.....2ND
PLAINTIFF

MUSTAFA YUSUFALI ABDULHUSEIN.....3RD
PLAINTIFF

VERSUS

**YUSUFALI MOHAMED SIKONDO.....1ST
DEFENDANT**

**BAKARI ABDALLA YUWA.....2ND
DEFENDANT**

**TWALIB A. RUGUNDA.....3RD
DEFENDANT**

**LAND REGISTRAR KWALE4TH
DEFENDANT**

JUDGEMENT

1. The plaintiffs filed this suit vide a plaint dated 10/07/2014
and aver they are at all material times the bonafide

registered owners of the parcel of land described as Kwale/Msambweni 'A'/1666 which they purchased from one Hassan Mgala sometime in 1979. However, in 2014 its ownership was fraudulently and irregularly changed with new proprietors the 1st and 2nd defendants.

2. The plaintiffs seek the following orders; -

- A. A declaration that the plaintiffs are the bonafide and rightful owners of Kwale/Msambweni 'A'/1666.
- B. An order directed to the Land Registrar Kwale Land Registry to rectify the register by cancellation of the entries relating to the issuance of fresh title and registered on 10/04/2014 in favour of the 1st defendant and 2nd defendant over the parcel of land described as Kwale/Msambweni 'A'/1666 and registering the plaintiffs as the rightful proprietors
- C. As against the 1st, 2nd and 3rd defendants, an order for a permanent injunction to restrain them, their agents, servants, employees and or assigns from trespassing upon, transferring, leasing, wasting and/or dealing in any manner whatsoever with the parcel of land described as Kwale/Msambweni 'A'/1666, other than by way of a surrender to the plaintiffs.
- D. As against the 4th defendant, general damages
- E. General damages for trespass
- F. Costs of and incidental to this suit
- G. Interest at court rates on (F) and (G) above

3. The 1st , 2nd and 3rd defendants responded to the suit by a joint statement of defence dated 23/08/2017 which has been amended several times culminating to Amended Joint Statement of Defence dated 1/02/2021 filed on 4/2/2021. They denied the allegations in the plaint and aver that their title was obtained through a court process and properly executed by the Lands Registry. That Hassan Mgala could never sell what he never possessed or had. That the suit was incurably defective.
4. The 4th defendant responded through Defence dated 2/05/2019 filed on 8/05/2019 through the office of Attorney General. They denied the allegations in the plaint and the particulars of fraud, loss and damage raised therein.

EVIDENCE OF THE PARTIES

5. The matter was heard viva voce on 27/01/2022, 28/3/22, 31/01/2023, 7/11/2024 and 5/12/2024. PW1 was **Zainulabidin Yusufali Dar** the 1st plaintiff herein. He adopted his witness statement dated 1/7/2014 and produced the documents in the list of documents dated 10/7/2014. The witness statement largely echoes the averments contained in the plaint.
6. Cross examined by Mr Sausi counsel on record for the 1st 2nd and 3rd defendants PW1 stated he had not produced the sale agreement between Mgala and the buyers, transfer thereto including Mgala's title. He also didn't know how the purchase price was paid. He confirmed he did not participate in the purchase of the suit property.

To him the LCB consent produced by the plaintiff was not a forgery but admitted it was unsigned by Mgala and undated. He asserted he has been enjoying quiet possession of the suit property with a caretaker by the name Zuma Mwarabu but had no salary records. He last visited the property in December 2021.

7. Referring to the 2nd paragraph on page 2 of his witness statement he confirmed Zumas father was the caretaker in the year 2013 though he could not remember his name.
8. The witness confirmed the title was lost in 1996 but he had not produced the requisite application for its replacement. While they reported the loss to the police he confirmed he had not presented the OB in support or police abstract. He affirmed they did not advertise the loss. While he noted the green cards were missing at the land registry, he had no communication from the land registry in this regard. He stated the registrar used to run away from them but they did not file a formal complaint about this. He could not remember the registrar's name. That they took action by placing a restriction against the title though he had no copy of the same. He confirmed they did not complain about the opening of a new green card. That the plaintiff did not move to set aside the court order that led to the issue of a new title and were not aware if the order was still in place. While they complained to the EACC he had not produced the formal

communication and was not sure of the outcome of investigations.

9. Asked about the restriction he testified the registrar refused to register the same though he did not know why. On being referred to paragraph 2 of the affidavit sworn by Karimbhai Advocate on 3/09/2013 PW1 testified that his understanding was that Karimbhai lost the original title.
10. The witness indicated in re-examination that he did not participate in the sale but the deceased. That a Gazette Notice was issued on the loss of title.
11. PW2 was **Karimbhai Kurban Hussein** an advocate of this court. He adopted his witness statement dated 25/03/2022 and produced the documents in the plaintiffs supplementary list of documents. The witness testified he had represented the plaintiffs in the purchase of the suit property which belonged to Mgala. That the 1st original title got lost and he was the one who applied for replacement which was issued in July 1996. Advertisement was through Kenya Gazette dated 22/3/1996. The witness showed the original of the re-issued title to the court. PW2 told the court the plaintiffs later discovered someone was trying to sell the suit property and placed a Caveat in the Daily Nation of 4/10/2013. He also conducted a search and found the green card was missing and opened a new one.

12. On cross examination the witness confirmed he acted for the purchaser and the vendor in the entire conveyance of the suit property. According to him there was no sale agreement since it was a straight purchase agreement where the buyer was paying in full. He confirmed he had the land certificate dated 23/7/1979. He could not identify who among his clients lost the title and the circumstances under which the same got lost. He told the court he did not know how the consideration of Kshs.350,000/= was paid.

1.3 PW2 stated the land registry informed him verbally about the missing green card. He confirmed he was the one who applied for reconstruction. He had no OB showing he reported the missing title to the police. That he was not aware of any court orders touching on the title. The witness reiterated in re-examination that he was the advocate for the transaction and followed due process to obtain the new title after the initial one was lost.

14. With the above the plaintiff's case was marked as closed.

1st 2nd and 3rd defendants Evidence

15. DW1 was **Yusuf Mohamed** the son of Mwanajuma Buwa (deceased). He adopted the Re-amended witness statement filed on 4/03/2021 as his evidence in chief. He produced the documents in the list of documents dated 2/2/2021 (DEX 1-10). He testified that the land belonged to his mother. That his grandfather (Mohamed Dosa), his

mother's sister was buried in the suit property. He told the court he was born in the suit property and lived therein all his life. That no one had come to the property to claim the land. He has never seen the plaintiffs on the ground.

16. Cross examined the witness indicated he had not undertaken a recent search of the suit property. He confirmed that the plaintiffs were not parties in Kwale case No. 12 of 2010. That it is only his family that lives in the land. They have not occupied the entire land but 1 acre of the total 7.2 Ha while the rest is under farming.
17. DW2 was **Bakari Abdalla Yuwa** a fish monger. He adopted his witness statement dated 21/12/2022 as his evidence in chief. He testified that his involvement was because of the Power of Attorney donated to him by Mwanajuma and Twalib his uncles children to deal with the land. Mwanajuma was in Tanzania and Twalib was paralysed. According to DW2 Mwanajumas father Saidi Ali Buwa was the one who was registered during adjudication having inherited the land from his father Dosa Buwa. That those who have lived on the land since 1971 included Dosa, Said Buwa, DW2, Twalib Ragunda and all the grandchildren. That no one has come to evict them from the suit property.
18. He reiterated the verdict of the Land Disputes Tribunal nullifying the subdivisions undertaken by Sadiq Ghalia, its adoption by the Magistrates court Kwale and subsequent

proceedings in the High Court Mombasa. The witness added that Mgala lent Kshs.100,000/= to Mwanajumas father and had arrangements similar to a mortgage where Mgala would harvest coconuts therefrom to recoup his money. That they never saw him again. They did not know how he sold the suit property and he must have obtained the title fraudulently. He then subdivided the land which prompted his being summoned by the Land Tribunal but never attended. To him Mgala's actions were unjust for he sold the property without the knowledge of its real owners.

19. Cross examined by Ms. Nanjala the witness conceded he did not take part in the proceedings at the tribunal. That he was not present when Mgala returned the money but clarified in re-examination that he was present when the money was lent to him. He was not involved in the title process. He reiterated the photos he produced for the suit property and he recognised the features based on his long stay in the land.
20. The 1st 2nd and 3rd defendants case was closed at this juncture.
21. DW3 was **Susan Mueni** land registrar Kwale. She confirmed the suit property was an adjudication parcel. She informed the court that the parcel has two green cards both endorsed as forgeries meaning they are not

authentic. She asserted while both bear the same information the same were not from the land registry. She stated there was no other green card they can call authentic. She informed the court that the titles in the parcel files were copies which were attached to an application for search, the caution and registration for the court order. There were not original titles in the parcel file as is required under RLA.

22. DW3 pointed that the copy of title in the name of Issa Mwangauli did not originate from the lands office as confirmed by her colleague Mr. Jembe who is alleged to have signed it. She reiterated that the only documents she would own are those found in their originals namely the Special Power of Attorney and the Court documents. She indicated in the absence of a green card she was not in a position to confirm the ownership.
23. The witness testified that the prayers for rectification can only be effected by the order of the court upon determination of who the real owner is. DW3 produced documents in the parcel file DW3 1- 38 as per the 4th defendants paginated bundle dated 7/11/2023.
24. The witness was cross examined by Mr. Sausi. DW3 asserted the title in the name of Mwanajuma Ali Buwa and Twalib was not signed by Mr. Jembe and found its way in the parcel file as an annexure for a search application.

She could not confirm if the court order of 6/9/2011 which was in its original was complied with stating that only the registrar who was present then would be in a position to clarify the matter.

25. DW3 agreed that the dated 1/4/2014 was post the court order issued in 2011 but denied if the same was issued pursuant to the court order since there was no corresponding original green card wherein it ought to have been registered. She conceded that a title existed and that is why the power of attorney was registered against it on 9/4/2014.
26. DW3 affirmed the parcel file did not have a title in the name of the plaintiffs, Hassan Mgala nor the attendant transfer and no gazette notice on loss of title. There was no complaint on the loss or disappearance of the original green card. She asserted the plaintiffs green card (page 12) is forged.
27. Cross examined by Mr. Angira Holding brief for Mr. Owiny, DW3 indicated that the green cards she stated were forged were only kept for purposes of reference on any issue that may arise. She reiterated she could not confirm the proprietorship of the suit property. She agreed that the plaintiffs were not parties to the suit subject of the court orders. The parcel did not have any complaint from the plaintiffs.

28. DW3 clarified in re-examination that her list was the entirety of the parcel file kept at the registry. She had interacted with Mr. Jembes signature over a thousand times and reiterated the signature in the title was not Mr. Jembes signature. She pointed that she is not the one who marked the green cards with the word 'forgery'. The files were inherited as such and where there is such endorsement it is treated as the position.
29. The 4th defendants case was marked as closed.

SUBMISSIONS

- 30.. The court issued directions on filing of final submissions.

Plaintiffs Submissions

- 31 The plaintiffs submissions are dated 23/05/2025 filed by the firm of E.K. Owinyi & Company Advocates. Rehashing the evidence led during the hearing including the exhibits it is submitted as follows;-
32. That the Plaintiff has enjoyed peaceful, uninterrupted possession and occupation of the suit property since 1979, spanning over four decades. During this time, no competing claims, boundary disputes, or adverse entries were recorded against his interest in the land. This long period of uncontested occupation gives rise to a presumption of ownership and further solidifies the legitimacy of the Plaintiff's title. That having satisfied the burden of proof as required the burden shifted to the

defendants to rebut it and which they failed to. Reliance is placed on the Court of Appeal decision in **Wambugu v Njuguna [1983] KLR 172.**

33. Rehashing the law on fraud and illegality it is submitted the 1st and 2nd Defendants acquired interest in the suit land illegally and fraudulently. That the named Saddiq Ghalia did not have a valid interest to transfer to the 1st and 2nd Defendants as per the Latin principle of *maxim nemo dat quod habet*. It is urged the 1st and 2nd defendants instituted proceedings for cancellation of title of Kwale/Msambweni "A"/1666 with malicious and fraudulent intentions claiming it belonged to a different party. This resulted in the abuse of court process and caused the court orders to be issued for cancellation of title and acquiring ownership of suit property fraudulently. That consequently the court must rectify the irregularities by cancellation of the title.
34. To buttress the above the court is referred to the provisions of Section 26 of the Land Registration Act, Act No.3 of 2012; the case of **Zacharia Wambugu Gathimu & another v John Ndungu Maina [2019] eKLR; Esther Ndegi Njiru & Another -vsLeonard Gatei [2014] Eklr** and **Isaac Gathungu Wanjohi & another v Attorney General & 6 others [2012] eKLR** to the effect that rights under Article 40 (6) are not available to any property that has been found to have been procured

unlawfully notwithstanding when the fraud was committed and by whoever.

35. It is submitted that Section 79 and 80 of the Land Registration Act empower the court to direct rectification where fraud or error is proved.
36. It is contended that the 1st and 2nd Defendants are relying on orders from Kwale PMC Land Case No. 12 of 2010 - a case where the Plaintiff was not a party. Any orders obtained without due process and used to alter the register amount to an abuse of court process as held in the case of Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd [2009] eKLR on abuse of court process.
37. It is the Plaintiffs' submission that the 4th Defendant, the Land Registrar, Kwale, played a central role in enabling the fraudulent acquisition and transfer of the suit property. That the admission by the 4th Defendant that "two green cards existed" and that the registry was unable to confirm the identity of the actual proprietor demonstrates dereliction of duty. It exposes glaring irregularities in the land registration process and gives credence to the Plaintiff's claim of fraud.
38. It is urged that the Land Registrar has a statutory obligation under Section 6(1) of the Land Registration Act to ensure the integrity of land registration processes. That

any registration arising from irregular or unlawful processes is void ab initio, and the Registrar must rectify such errors to uphold the sanctity of the land register as was held in **Republic v Registrar of Land & another Ex-Parte Mbage Njuguna Ng'ang'a & another [2014] eKLR.** and **Republic v Land Registrar, Kilifi & another Ex-Parte Daniel Ricci [2017] eKLR,**

39. The Plaintiffs urge this Court to find that the 4th Defendant abdicated their legal duty, failed to protect the sanctity of land records, and enabled an illegal and unprocedural transfer to take place.
40. It is submitted that the Plaintiffs have proved their case beyond reasonable proof to warrant the grant of the prayers sought in the Plaint herein.

The 1st 2nd and 3rd defendants

41. The above defendants' submissions are dated 19/12/2024 filed by the firm of Ochoki and Ochoki Associates. The defendants robustly evaluated the evidence led in court both orally and the documentation produced and I will pick key summaries that speak to this evaluation.
42. It is submitted that the Plaintiffs were absolutely unable to connect their documents with the record produced in Court by "DW3" and indeed failed flat to cross-examine

the “DW3” on her documents if any were missing from the file of the 4th Defendant.

43. That the Plaintiffs further failed to defend the existence of their documents and more particularly on documents supplied by Hassani Mgala e.g. produce a copy of the title in the name of Hassani Mgala, receipt of payment made to Hassani Mgala by the Plaintiffs of Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000/=).

4..4 It is contended in respect of the plaintiffs documents in the list filed on 11th July, 2014 and the Supplementary list of documents dated 25th March 2022, not a single document either in a form of copy or otherwise was filed and produced by the 4th Defendant who is the sole custodian of the documents regarding Kwale/Msambweni A/1666 measuring 7.2 Ha.

45. Further, the unsupported narrative that the Plaintiffs bought Kwale/Msambweni A/1666 from Hassani Mgala is brought to rest vide the 4th Defendant’s two green cards found at pages 12 and 13 of the 4th Defendant’s list of documents since the two green cards are cancelled with an indication that all the entries appearing on them were as a result of forgeries which action of cancellation leaves the Plaintiffs standing on a very soft sea sand and in between the wide scheme of forged documents by one, Mr. Hassani Mgala, which he used to defraud the Plaintiffs

in as much as they do not have any document in their names at Kwale lands office. The Plaintiffs must have acted lackadaisically in what they call as a purchase of Kwale/Msambweni A/1666.

46. It is contended that the Plaintiffs are before Court with very unclean hands to sanitize their forged documents. That the 4th Defendant having confirmed by documentary evidence that, the entry of Hassani Mgala on both green cards (page 12 and 13) on the 2nd September, 1979 are forgeries and the fact that the Plaintiffs are in Court stating that they bought Kwale/Msambweni A/1666 from Hassani Mgala, then nothing is easier for this Honourable Court to find that both Hassani Mgala and the Plaintiffs are in Court relying on proven forged documents to defraud the 1st and 3rd Defendants.
47. It is asserted that the Plaintiffs in spite of having known and being aware that the Defendants had moved to Msambweni Tribunal, Magistrate's Court at Kwale and Mombasa High Court and obtained Orders, never took any steps to be enjoined as interested parties in the said proceedings and or even set aside the orders.
48. It is posited that the 1st and 3rd Defendant equipped with the three Orders served the 4th Defendant and in compliance with the said Orders, the 4th Defendant issued a title deed dated the 1st April, 2014 in the names of the

1st and 3rd Defendants. That in a very careless manner, the 4th Defendant copied and filed the first page of the Defendant's title deed vide page (1) of the 4th Defendant's list of documents. That a look at the Defendant's list of documents dated 2nd February, 2021 and further list of documents dated 23rd May, 2024, the Defendant's title deed has all the pages in which the 2nd page of the title deed shows that the names of the Defendants were entered on 1st April, 2014 as (1) and (2) and title deed issued on 1st April, 2014 and on entry number 3, it shows that on 9th April, 2014, the Power of Attorney which "DW3" confirmed that its original was endorsed and registered against the title of the 1st and 3rd Defendants.

49. Counsel urged that it is not in dispute that the 4th Defendant complied with the Mombasa High Court Order. The Defendant's List of Documents item number 3 is a copy of the green card which was issued to the Defendants by the 4th Defendant after several cautions were filed by the Defendants at the 4th Defendant's office vide page 3, 11, 29, 30 and 31.
50. That a thorough perusal of the 4th Defendant's list of documents reveals the signatures of registrar C.K Ngetich appears on all the aforementioned documents and in particular on page 15 is a copy of the 1st and 3rd Defendants' part of the title deed which shows entry

number 1 entered on 1st April, 2014 which has names of Mwanajuma Ali Buwa, Twalib A. Rugunda and title deed issued on 1st April, 2014 and where entry number 3 shows that on 9th April, 2014 the power of Attorney to the 2nd Defendant Bakari Abdalla Yuwa was entered and there is no doubt that the 1st and 3rd Defendants were issued with a title pursuant to the Court Order and on that title, the 4th Defendant registered the Power of Attorney on the 2nd Defendant which Power of Attorney donated by the 1st and 3rd Defendants and the reasons for the donation were given during the testimony of "DW2". That page 17 of the 4th Defendant's list of documents to the extreme left, shows the initials as MHESCI and under it the name Yuwa, which is the last name of the 2nd defendant

51. The defendants refer to the provisions of Section 24 (a) (b) of the land registration Act 2012 on the effect of registration of a person as the proprietor of land? That pursuant to the High Court Order, the Court Ordered the 4th Defendant to register Kwale/Msambweni A/1666 in favour of the 1st and 2nd Defendants as the absolute owners and that was done vide title deed issued on 1st April, 2014 and the green card in the 1st and 3rd Defendant's list of documents where entry number 3 shows a vesting Order dated 6th September, 2011 that a title should be issued to the 1st and 3rd Defendants. That the entries and notifications were done by the 4th Defendant and to be specific by C.K Ngetich of number

212 on the 13th November 2014 but unfortunately, “DW3” did not have the original copy of the green card which was opened on 2nd July, 1979 to produce in Court.

52. The Defendants join issues with the 4th Defendant and urge this court to dismiss the Plaintiffs’ suit with costs to the Defendants for being unmerited, filed for the sake of it, casually prosecuted, filed by relying on manufactured, fake and forged documents and further causing forged entries at the 4th Defendant’s office.

ANALYSIS AND DETERMINATION

53. I have carefully considered the pleadings, examined the evidence together with the submissions of the rival parties and analyzed the law applicable. For me the main issue for determination is whether the Plaintiffs have proved their case to warrant the orders sought.
54. The plaintiffs claim to be the bonafide legal owners of the suit property which they purchased in the year 1979 from Hassan Mgala and were issued with a title. Their title got lost and a new one was issued in 1996 after following due process. They enjoyed quiet possession. Upon carrying out a search in 2014 they discovered a new title deed was issued in the names of Mwanajuma Ali Buwa and Twalib A. Rugunda pursuant to a court order to which they were not parties to the proceedings. It is also their case that the suit property has never been on sale and therefore any

changes made to the proprietorship were made through fraud involving the defendants.

55. The 1st 2nd 3rd defendants deny the allegations of fraud levelled against them. It is their case that they are the bonafide owners of the suit property following the said court order which cannot be termed fraudulent. The court order was issued by a court of competent jurisdiction. They claim the plaintiffs title is the one that was obtained fraudulently.
56. The main contest therefore is firstly between the two main parties being the plaintiffs and the 1st 2nd 3rd defendants. The plaintiffs have approached court and desire to be declared the bonafide and rightful owners of the suit property Kwale/Mambweni 'A'/1666 for the reason that their ownership was changed in the year 2014 when another title was issued in the names of Mwanajuma and Twalib who claim to be lawful registered owners. This court can only uphold one title because there cannot exist two titles in respect of the same parcel of land- see section 32 of the Registered Land Act (repealed).
57. The plaintiffs challenge the title issued in 2014 on the basis of fraud and illegality by the defendants. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the

existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

58. The court notes that the suit property is registered under the Registered Land Act Chapter 300 of the Laws of Kenya (now repealed).

59. Section 27 of the Registered Land Act provides that subject to this Act: -

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;

60. The above provisions are reproduced in Section 24(a) of Land Registration Act, 2012 which provides as follows: -

“Subject to this Act, 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.”

61. Section 26 (1) of the Land Registration Act provides that: -

“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.”**

62. Prima facie the court must treat the people named in the title produced as indefeasible owners. It is also evident from the above provisions that while title is supposed to be taken as prima facie evidence of ownership, the same can be challenged and impeached on the basis of the above grounds.
63. To be able to impeach the 1st and 2nd defendants title the plaintiffs must first prove their interest in the suit property as per their averments that they are the lawful registered owners of the suit property.
65. To prove their ownership the plaintiffs produced in evidence before court a copy of title to Kwale/Msambweni "A"/1666 issued by the Kwale Land Registry on 8th July 1996. The root of the plaintiffs title has been challenged by the existence of another title which the plaintiffs plead

was issued in the year 2014 in the names of Mwanajuma and Twalib who claim to be the lawful registered owners.

66. Consequently, it is not enough to dangle a title as proof of ownership. In this regard the Court of Appeal in **Munyu Maina Vs. 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.
67. In **Daudi Kiptugen Vs. Commissioner of Lands & 4 Others (2015) eKLR; -- Munyao J**, persuasively underscored thus

'.....The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary

for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name'

68. In addition to the title issued on 8th July 1996, the plaintiffs presented in evidence Letter of consent from the District Commissioner Kwale to Hassan Mgala following sale of the suit property to the plaintiffs, Application for consent of Land Control Board dated 24th September 1979, Gazette Notice Number 1656 on the issuance of a new land title deed dated 22nd March 1996 and contained in the Kenya Gazette of 22nd March 1996, Clearance Certificate dated 11th February 2009 from the County Council of Kwale in the name of Yusufali Adamali, Copy of Receipt dated 11/02/2009 for Kshs.260,495/- and a Copy of Certificate of official search dated 21/02/2012.
69. I will start with the purchase of the suit property by the plaintiffs from one Hassan Mgala. In a purchase a formal sale agreement is expected to have been entered. I say so because firstly it is pleaded at paragraph 9 of the Plaint the land was purchased and this was reiterated by PW1 and PW2. Infact PW2 evidence is that he was the lawyer who acted for the plaintiffs in the transaction. Secondly it is the requirement of the law that such agreement would be in writing.
70. Section 3(3) of Law of Contract Act provides that, No suit shall be brought upon a contract for disposition of land unless, the contract which the suit is founded upon is in writing, signed by all parties thereto and the signature of

each party has been attested by witnesses who is present when the contract was signed.

71. Was there an agreement between the plaintiffs and Hassan Mgala for the purchase of the suit property? PW1 conceded in cross examination that he had no sale agreement to prove the purchase. What did PW2 have to state about this? He also confirmed there was no sale agreement. He justified the absence by stating that it was a straight purchase where the entire amount was being paid.
72. Assuming the above is the case, the question that would naturally arise is whether there is evidence of the purchase price having been paid. PW1 told the court he did not know how the said Mgala was paid the purchase price. PW2 evidence in cross examination was that he did not know how the consideration was paid. I found this strange and a contradiction for the reason that the witness vouches to the fact the full purchase price was being paid in full making a sale agreement unnecessary and at the same time not know how the same was paid. This was not convincing to the court at all and raised a red flag. Maybe the presence or existence of a note acknowledging receipt of the money by the said vendor would have been more convincing.
73. According to paragraph 4 of the witness statement of PW2 which he adopted as evidence in chief, the witness informs the court that the application for Consent of the

Land Control Board was signed by both the parties that is the vendor and purchasers. The court notes that indeed this is correct however this cannot be a cure to the absence of proof of a sale agreement and payment of purchase price.

74. Would a successful application for consent of the Land Control Board mitigate the above. I have already noted a Letter of consent from the District Commissioner Kwale to Hassan Mgala and the Application for consent of Land Control Board dated 24th September 1979 (note it is the letter of consent that refers to Hassan Mgala application as dated 24/9/1979.) were produced as part of the process. For me this is just but a requirement of the law for a controlled transaction under the provisions of section 6 of the Land Control Act. It is a compliance issue and cannot take the place of a sale agreement and or even proof of payment of the purchase price.
75. Moreover if it was a requirement that such evidence be attached to the application for consent then it would have been availed as part of the said exhibit. This just goes to confirm they did not exist as already admitted.
76. But let me speak to the instrument of transfer which conveys the suit property from the seller in this case Hassan Mgala to the purchasers' plaintiffs. PW2 testified from his adopted witness statement that the transfer dated 15/12/1979 was acknowledged by the said seller

and for the agreed consideration of Kshs.350,000/-. A copy of this transfer was produced as part of the plaintiffs supplementary list of documents and my review confirm it was signed as alleged. Would this then dispense with the production of a sale agreement and proof of consideration? My answer would be in the negative. I find support and agree with the following decisions; -

77. In the case of **Lucy Wangui Mwaura Vs Linet Achieng Amala 2019 KLR** the court citing various authorities had this to say;-

‘12. In a similar situation where no sale agreement was executed by the parties, the Environment and Land Court in Daudi Ledama Morintant -vs- Mary Christine Kiarie & 2 Others (2017) e KLR, citing the case Patrick Tarzan Matu & Another -vs- Nassim Shariff Abdulla & 2 Others (2009) e KLR, Azangalala J (as he then was) rendered, inter alia that “--- The applicant in this case has satisfied me that there is no agreement between her and the plaintiffs in terms of the provisions of Section 3(3) of the Law of Contract Act which the plaintiffs can enforce against her --- the claims are made pursuant to an agreement that is contra statute or at the very least does not comply with the law. So, the very foundation of their claim is untenable.”

13. Mutungi J in the David Ledama Morintant case (Supra) further rendered that provisions of Section 3(3) Law of

Contract Act are couched in mandatory terms and that failure to comply thereto renders a suit defective and it must fail.

15. It is trite that for a transfer of land to be valid, it must be preceded by a sale agreement and a transfer document executed by the parties and by the Land Registrar, and upon which assessment of stamp duty and registration fees are made and duly paid. Failure would automatically be evidence that the transfer and registration was obtained illegally and unprocedurally. These are the necessary documents that perfect a sale transaction if in the first place there exists a valid sale agreement that complies with provisions of Section 3(3) of the Law of Contract Act.'

78. Having noted the circumstances under which a title may be impeached or defeated I must now deal with the particulars of fraud and illegality.
79. It is now established that a claim of fraud must be specifically pleaded with particulars of how the fraud was perpetrated. In addition, the allegations of fraud must be strictly proved.
80. The Court of Appeal in **Kuria Kiarie & 2 Others v Sammy Magera [2018] eKLR** stated thus:

"It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo _vs Ndolo (2008) 1 KLR (G & F) 742 wherein the

Court stated that: "... We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases. "...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

81. The particulars of fraud and illegality have been listed under paragraph 18 of the plaint and the specific party to whom each is attributed to.
82. I will highlight the particulars listed in 18 a - e. It is averred that the defendants instructed advocates to institute proceedings for cancellation of title of Kwale/Msambweni 'A'/1666 with malicious and fraudulent intentions. They claimed it belonged to a different party while knowing the same to be completely false. They caused to be issued court orders in Kwale Principal Magistrates Court Land Case No.12 of 2010 to cancel title to the suit property. That in abuse of court process and contempt of court caused to be issued orders in Mombasa High Court Miscellenous Cause

No. 20 of 2011 to vest absolute ownership of title to the suit property. That in total affront to truth and justice and morality caused the court orders to be issued directing the Land Registrar Kwale to effect changes to the register in their favor.

83. All the above actions are alleged to have been committed by the 1st 2nd 3rd defendants despite them having knowledge that the suit property did not legally belong to either of them.
84. PW1 produced a copy of Order issued in Mombasa High Court Miscellenous Cause No. 90 of 2011, A vesting Order dated 6/9/2011 in Favor of Twalib A. Rugunda the Plaintiff in Principal Magistrates Court At Kwale Land Case No. 12/2010. This Order was also produced by DW3 who testified for the 4th Defendant. The 1st 2nd 3rd defendants also produced this document as part of their evidence (see item 20 of the Supplementary list of documents dated 25/11/2022).
85. It was therefore not in dispute that such an order was issued by the court at the instance of Twalib Rugunda named as the 2nd defendant who it is confirmed by DW2 testimony is a relative to the other two defendants.
86. The order by the Principal Magistrates Court at Kwale Land Case No. 12/2010 was also adduced in evidence by DW3 dated 14/5/2010. It reveals the Principal Magistrate is adopting the decision of the elders who heard a land dispute between Twalib Akida Rugunda and Saddiq Ghalia.

Among the orders of the elders is that several subdivisions were to be reverted to one title No. Kwale/Msambweni 'A'/1666 in favor of among others Mwanajuma Ali Buwa and Twalib Akida Rugunda.

87. Based on the foregoing there was no doubt in my mind that the said proceedings existed based on the documentation presented. Moreover, DW3 confirmed in cross examination that the Order of 2011 was in its original. It was also important for the court to satisfy itself that there was action taken pursuant to the above proceedings. The plaintiff produced a Certificate of official search dated 21/05/2014 showing Mwanajuma Ali Buwa and Twalib Akida Rugunda as the registered proprietors.
88. DW3 testified in cross examination that she could not confirm if the copy of the title dated 1/4/2014 showing the two as proprietors was issued pursuant to the court orders. The court however notes that DW3 conceded that a title must have existed for the power of attorney to have been registered (see the same certificate of official search). Moreover DW3 did not indicate to the court that the signature of Mr. C.K.Ngetich in the green card entry on 1/4/2014 showing that the title was issued pursuant to the court order was a forgery yet she was very categorical about Mr. Jembes signature. Infact the court respectfully agrees with the submission made on behalf of the 1st 2nd 3rd defendants that "DW3" did confirm in her cross-examination that the names and/or entries of the 1st and

3rd Defendants were not the names and entries cancelled on the green cards found on pages 12 and 13 of the 4th Defendant's list of documents.

89. I had no hesitation to believe that the above was confirmation the above title was issued by the land registry pursuant to the court orders.
90. The next step was for this court to determine if the court orders were obtained fraudulently as alleged. The burden of proof was upon the plaintiff to prove this fact. But I had to tread with caution at the very thought of interrogating the court orders. I thus posed and asked myself whether this would be the right forum to interrogate this issue. It is submitted on behalf of the 1st 2nd and 3rd defendants that the court orders were duly issued and the Land Registrar simply implemented the same and cannot be said to have participated in the fraud. They too submitted in evidence the proceedings dated 16/03/2010 of the Panel of elders in Dispute No. 13/2009, the Order dated 14/05/2010 by the Principal Magistrate Kwale and the vesting order dated 6/11/2011.
91. I have noted the defendants submission that the plaintiffs ought to have set aside the orders relating to the Tribunal Proceedings. This is a pertinent issue to interrogate. I have no evidence before this court tendered by the plaintiffs showing that the orders of the High Court have been set aside or reviewed in any manner. The plaintiffs plead that they made a discovery in 2014 that their alleged

proprietorship was changed in 2014 pursuant to a court order. They have not demonstrated any steps they took to set aside these orders but instead filed these proceedings. This court is faced with orders that were issued by a court of concurrent jurisdiction being the High Court Mombasa by Justice Maureen Odero. I had no basis upon which to doubt that the orders were not issued.

92. Further the Defendants produced a letter dated 25/11/2013 Ref. KWL/A/19/78 addressed to the 1st and 2nd defendants stating that there was Misc. Civil Appeal No. 76 of 2010 Mombasa High Court on the suit property. The fate of this appeal is also not known as the court was not led as to its status.
93. Can this court therefore seat to interrogate the circumstances under which the court orders were issued? The answer is an emphatic no. I agree with the defendants submission that the first port of call would have been for the plaintiffs to have sought the setting aside of the orders issued by the High Court. The orders remain valid orders of the court until they are set aside. Everything that has been raised by the plaintiffs against the said orders would have been properly ventilated there. I do not see the capacity under which this court would render itself on this issue being a court of concurrent jurisdiction to adjudicate the plaintiffs claim in the manner in which it is brought as a fresh suit.

94. In the case of **Kambi & 3 others v Chome & 9 others (Environment & Land Case 54 of 2019) [2023] KEELC 494 (KLR)** this court had this to say

40. The Award of the Land Disputes Tribunal which was upheld by the Provincial Land Appeal's Committee and adopted as a Judgment of the Court has not been set aside. It is still subsisting therefore it follows that it is a valid order until it is set aside.

41. The Plaintiffs' argument was that the Tribunal did not have the jurisdiction to hear and determine the matter hence the award was null and void. These are the issues that were supposed to be determined in the Appeal which the Plaintiff filed in the High Court but abandoned. That was the right process and forum to impeach the award on the ground that the Tribunal lacked the requisite jurisdiction.

42. In the case of *Munga Mbodi Mwenda v Muguza Jangwata Jindwa & another* [2014] eKLR Angote J held that: - " I hold the view that in instances where the Land Disputes Tribunal had already delivered its award, and the award was duly adopted by the subordinate court, such an award remains valid even where an appeal was pending before the Appeals Committee. Upon the repeal of the Act, all the appeals which were pending before the Appeals Committee should be transferred to the Environment and Land Court and dealt with in that court in its appellate jurisdiction. In situations where fresh matters are filed in

this court, if a party shows that the same issues had been dealt with and decided by the Land Disputes Tribunal and the subordinate court, then this court can only deal with those issues as an appellate court and not otherwise.

43. It is on record that an award was adopted as an order of the court and that there is an appeal that was filed challenging the award in the High Court and therefore this court cannot deal with afresh matter which is not an appeal.'

95. This court is persuaded and finds useful guidance in the above dictum to the extent that this is not the forum to adjudicate whether the court orders were obtained fraudulently and illegally as there is still existing an order issued by a court of equal status.
96. As against the 4th defendant having considered the totality of the evidence adduced, I see no reason to find them culpable. The registry simply acted in accordance to a court order presented to them,
97. Is the plaintiff entitled to the orders sought? The orders sought by the plaintiff have been outlined at the beginning of this judgement. Based on the foregoing analysis I think I have said enough to show that the Plaintiffs are not entitled to the orders sought.
98. The upshot of the foregoing is that the plaintiffs have failed to prove their case on a balance of probabilities. The

suit must fail and it is dismissed with costs to the defendants.

Orders accordingly.

Judgement dated signed and delivered this **2nd** day of
February 2026

HON. LADY JUSTICE A.E DENA

JUDGE

02.02.2026

Mr. Mola for the Plaintiffs

Mr Sausi for Defendants

No appearance for the 4th Defendant

Daniel Disii – Court Assistant