

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCA NO E001 OF 2024

CLIFTON BAY LIMITED
APPELLANT

VERSUS

1. DAMA NGUWA CHIVATSI (AS THE
ADMINISTRATOR OF THE ESTATE OF JEFWA KALAMA LEWA (DECEASED)
RESPONDENT

2. LAND REGISTRAR KILIFI.....
RESPONDENT

3. THE HON. ATTORNEY GENERAL
RESPONDENT

(Being An Appeal From The Judgment And Decree Of Hon James Ongondo, SPM Delivered On 6th March 2024 In CMELC Case No 154 Of 2021 -Dama Ngowa Chivatsi (Suing As Administrator Of Estate Of The Late Jefwa Kalama Lewa) Vs Clifton Bay Ltd, Land Registrar Kilifi And The Hon Attorney General.)

JUDGMENT

1. The following are the grounds of appeal contained in the Memorandum Of Appeal in this case dated **2nd April 2024**. It is claimed by the appellant that the Learned Trial Magistrate erred in law and in fact:

- a. **By failing to consider and find that the first respondent’s suit was statutorily time barred;**
- b. **By failing to consider that the appellant was not required to file a resolution authorizing its witness to testify;**
- c. **By imputing fraud on the appellant in failing to consider the Transfer of Land instrument executed by the 1st respondent and his co-owner was sufficient evidence of the sale of the property to Sleet Properties Limited and also by failing to consider the cheque and Cash payments which constituted sufficient evidence that the 1st respondent along with his co-owner received payment from Sleet Properties Limited for the transfer of the suit property to Sleet Properties Limited;**
- d. **By failing to find that the evidence on record showed that their appellant duly purchased the suit property from Sleet Properties Limited;**

- e. **By finding that the 1st respondent was entitled to 4 acres of the suit property without fully considering the evidence submitted by the appellant which demonstrated that the 1st respondent and his co-owner had executed the transfer of land for the entire suit property and not a portion, in favor of Sleet Properties Limited;**
 - f. **By failing to consider that the 1st respondent had already received payment from Sleet Properties Limited for the suit property and therefore implying that directing the issuance of title to him would result in unjust enrichment which is unfair to the appellant;**
 - g. **By finding that the appellant was a foreign company yet the character of the appellant was not in question and had not been pleaded by the 1st respondent;**
 - h. **By failing to consider the testimony of the appellant's witness Daniel Thoya that the copies of the titles, one in the 1st respondent name, and the other in Sleet Properties Ltd.'s name had been destroyed in a fire which explanation should have been considered by the court and not held against the appellant;**
 - i. **By failing to consider the appellant's submissions which strongly supported the appellant's case and were backed by legal principles and precedents;**
 - j. **By delivering a judgment that was contrary to the weight of evidence and law.**
2. It is therefore proposed that the appeal herein be allowed and the judgment of the Hon James Ongondo, Senior Principal Magistrate delivered on 6th March 2024 be set aside and the 1st respondent's suit in the trial court be dismissed and the costs of this appeal and those of the appellant in the trial Court below be borne by the 1st respondent.
3. The background to the present appeal is that **Malindi ELC Chief Magistrate's Court Civil Suit Number 154 Of 2021** was filed in which in the further amended plaint, filed on 8th July 2022, the 1st respondent herein sued the appellant herein plus the Land Registrar, Kilifi and The Attorney General the present 2nd and 3rd respondents. His

claim was that he was the real co-owner of approximately **4** acres hived off the suit land known as Kilifi/Madeteni/423, a beachfront property measuring **3.2** hectares, together with Julius Ngala Karisa, now deceased. He and his co-owner Julius, having fulfilled all the allocation conditions, obtained a discharge from the Settlement Office and presented it at the Land Registry Kilifi, for issuance of the first title jointly, but the land register indicated that the title deed had already been issued to strangers hence the suit. The 1st respondent made a report of the issue to the police.

4. According to the plaint, Julius took care of issues concerning discharge of the property and the 1st appellant could not remember giving him power to transfer his 4 acres without his permission. However, the 1st respondent is aware that Julius had sold approximately **4** acres of his own share of the land to someone going by the name *Daniel* from Kaloleni, and Daniel later sold it to another party. The plaintiff never received any money from any sale; that it was later discovered that the entire plot Kilifi/Madeteni/423 had been fraudulently transferred to Sarova Whitesands Hotel and Clifton Bay Limited who had never resided on the suit property. The 1st respondent claimed that the suit property of 4 acres had belonged to him for many generations he had been occupied the same without any interruption. The 1st respondent was not involved in the application for a Land Control Board consent to

transfer. The 1st respondent prayed for the following orders in his plaint:

- a. **A permanent injunction restraining the appellant or its agents from in any manner whatsoever interfering with the suit property measuring approximately 4 acres hived off from Kilifi/Madeteni/423;**
 - b. **An order directing the appellant forthwith hand over vacant possession of the suit property being approximately 4 acres hived from Kilifi/Madeteni/423 to the respondent or an eviction order do issue against the appellant;**
 - c. **The land register for Kilifi/Madeteni/423 be amended to reflect the name Jefwa Kalama Lewa as the registered owner and a title deed be issued for his 4 acres of the suit property;**
 - d. **That the previous title deed issued to the appellant be revoked without its production;**
 - e. **An order to the Land Registrar Kilifi without gazette ment to proceed and issue a title document for the 4 acres hived from parcel number Kilifi/Madeteni/423 in the name of Jefwa Kalama Lewa;**
 - f. **An order directing the Officer Commanding Malindi Police Station to supervise the eviction;**
 - g. **Costs and interest of the suit;**
 - h. **Any other relief that the court may deem fit and just.**
5. The appellant filed an Amended Statement Of Defense dated 18th August 2022 in which it is stated as follows: that it is the registered proprietor of the suit property, having legally acquired the same from Sleet Properties Limited for Kenya shillings 13,000,000/=; that Sleet Properties Limited executed a transform which was registered on 10th September 2007 and the appellant was subsequently issued with a title deed of the same date; that the appellant took possession of the suit property immediately upon completion of the transfer and registration of title deed in its name and employed a caretaker to

manage the property on its behalf. It constructed a perimeter wall around the suit property and has enjoyed quiet peaceful and interrupted possession for over 12 years. In 2009 the appellant applied for change of user from agricultural to multi-dwelling and hotels and the same was approved by the then Commissioner of Lands on 21st December 2009. The appellant surrendered the title deed to the government and was issued with a certificate of lease dated 11th March 2011 for term of 99 years commencing 1st January 2011. The appellant avers that there was never any contract between it and Julius; that the suit is defective for want of compliance with the provisions of **Order 40(1) CPR**. The appellant raised the defence of Limitation on the basis that it having been in occupation of the suit land for a period in excess of 12 years, the suit is time barred.

6. The 2nd and 3rd respondents filed a defence dated 18th October 2022 in which they stated as follows: that parcel number 423 was jointly allocated Jefwa Kalama and Julius Ngara Karisa on 27th March 1997 and an outright purchase payment was made of Kenya shillings **16,750/=** and a receipt issued in the names of Jefwa Kalama and Julius Ngala Karisa, and a certificate of outright purchase was issued on 16th May 2006 in favor of the two allottees. Thereafter, a Discharge of Charge and Transfer Documents were released in favor of both Jefwa Kalama and Julius Ngala Karisa on 25th October 2006. The transfer was signed by the allottees and witnessed by the District Land Adjudication Officer

Kilifi on the 14th November 2006 and presented to the land registry for issuance of title deed; that however, records at the lands office show that the first green card was opened on 31st July 1981, supported by an adjudication record created on the 12th September 1980. The property was registered to Damaris Njeri Gachoka on 31st July 1981 and a land certificate issued on 8th February 1982. These records were cancelled in 1986 by the then Commissioner of Lands due to irregularities in allocation.

7. The second set of records was created pursuant to receipt of lease dated 7th March 2011 from the office of the Commissioner of Lands, Nairobi. This culminated in the issuance of a certificate of lease to Clifton Bay Limited on 11th March 2011 for a term of 99 years for a peppercorn from 1st January 2011.
8. The third set of records was created pursuant one to a Discharge of Charge from the Settlement Fund Trustees dated 25th October 2006 and registered in Kilifi Lands Office on the 14th November 2006, allocating the property to Jefwa Kalama and Julius Ngala Karisa.
9. The 2nd and 3rd respondents denied fraud and stated that if at all titles were issue to the appellant issued in the proper and lawful manner and in accordance with the documents lodged for registration. It was also pleaded that no notice of intention to sue under Section 13A of the Government Proceedings Act has been received. Hearing took place between 8th February 2023 and 3rd October 2023 and on the latter date

parties were ordered to file submissions, and the judgment was delivered on 6th March 2024, allowing the 1st respondent's claim hence the present appeal.

10. The issues arising from the present appeal for determination are as follows:

- a. **Whether the trial Court erred in law and in fact in failing to find the suit was statutory time barred;**
- b. **Whether the trial Court erred in law in finding that the appellant was not required to file a resolution authorizing its witness to testify;**
- c. **Whether the trial magistrate erred in law and in fact in finding that there was fraud;**
- d. **Whether the trial magistrate's judgment was contrary to the weight of evidence rendered;**
- e. **Who should meet the costs?**

11. On whether the trial Court erred in law and in fact in failing to find the suit was statutory time barred, the learned trial magistrate held that time began running from the time the fraud was discovered. He held that fraud was discovered in the year **2020**. He stated that the 1st respondent is protected by **Section 26 LRA** since his claim was grounded on fraud.

12. In **paragraph 9A** the appellant had premised his objection on Limitation on the fact that it had been in occupation of the suit land for a period in excess of 12 years. However, the 1st respondent's case is that he and his co-allottee were issued with the letter of offer in **1997**, that they made the required payments in **2006**; that they obtained a discharge of charge in August **2020**; that when the 1st respondent

attempted to register the discharge of charge at the Land Registry at Kilifi he discovered that the land title for the suit land had been issued to strangers. That is when he was issued with some advice by the Land Registrar that he ought to file suit to challenge the title deed. That is then pleading of 1st respondent. This court can only go by the pleadings of the parties. That pleading states that the plaintiff's cause of action lies in fraud.

13. **Section 4** of the **Limitation of Actions Act** provides as follows:

"4. Actions of contract and tort and certain other actions

(1)

(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date."

14. The provisions of **Section 26(c)** of the Limitations of Actions Act are as follows:

"26. Extension of limitation period in case of fraud or mistake

Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake,

The period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it..."

15. A claim based on fraud must be brought within **3** years from the date of the occurrence of the cause of action, or if the cause of action was concealed, from the date the claimant discovers the fraud, or could with reasonable diligence have discovered it. In the present case the 1st respondent's case was simply that he discovered the fraud when he went to present the discharge to the registration in **2020** and he filed suit in **2021**, one year after, and the issue of extension under **Section 26** does not even arise. I therefore find that the trial magistrate was correct in finding that the 1st respondent's claim was not time barred.

16. As to whether the trial Court erred in law in finding that the appellant was not required to file a resolution authorizing its witness to testify, it is evident that the trial magistrate gave the evidence of the appellant's witness a short shrift. He merely stated as follows in the only sentence that discussed the issue in his judgment:

“Further, the defendant’s testimony was null and void as the witness did not produce resolution (sic) enabling her to testify before court.”

17. In **Dardanelli & 6 others v Tilito & 3 others [2025] KEELC 392 (KLR)** the court observed as follows:

“20. The case of Bugerere (supra) dealt with the issue of filing of a suit by a company which is in itself a matter of great consequence. The present case relates to the defence of a suit filed against a company, in which an application has been made and a supporting affidavit attached thereto. It is that supporting affidavit that is under challenge for the reason of the deponent’s apparent want of authority from the company to swear it.

21. I must state that Exhibit “PT-1” in the applicant’s supporting affidavit shows that the deponent is a director of the 2nd defendant; so does Exhibit “ELD 10” submitted before this court by the plaintiffs themselves. I therefore find that there is no controversy as to whether or not the deponent is a director of the 2nd defendant. By extrapolation, if as held in Arthi (supra) that a board resolution is not a requisite for an advocate to file suit on a company’s behalf and a director can instruct him to undertake that task, there is no good ground upon which this court can hold that a director has no mandate to authorize an advocate to perform a lesser task of swearing an affidavit in support of an application such as the present unless the contrary is shown.

22. No evidence has been presented by the plaintiffs to the effect that there is any objection from the rest of the directors or shareholders to the swearing of the affidavit.

23. For the foregoing reasons, this court hereby dismisses allegation that the 2nd defendant has not granted authority granted to the 1st defendant to swear the affidavit dated May 23, 2024.”

18. In short, in the **Dardanelli** case (supra), the court declined to uphold an objection based on want of a resolution to swear an affidavit. Affidavit evidence is just like oral evidence given on oath, but the difference is only that it is in writing and the oath is administered by a Commissioner for Oaths duly authorized for the purpose. Applying the court’s reasoning and acceptance of the affidavit evidence in the **Dardanelli** case (supra) to the oral evidence of the appellant’s witness in this case, I am of the view that a resolution was not necessary for the witness to competently give evidence on behalf of the appellant. The trial magistrate was therefore in error in finding that the evidence of the appellant’s witness was null and void for want of a resolution from the appellant purporting to give her authority to testify.

19. Regarding whether the trial magistrate erred in law and in fact in finding that there was fraud, it is correct that the learned trial magistrate found that there was. He found that if there was no title issued in the names of the two allottees of the suit property and that there was no possibility that they could have transferred title to the current owners.
20. It is the evidence of the parties that should be allowed to speak for itself. A case rises and falls solely by means of the evidence adduced by the parties. It is the case that statements made by a party in a pleading which at the end of the hearing have no evidence to support them have not been proved. So what was the evidence of the 1st respondent in this case?
21. The 1st respondent's narrative of events begins with the allotment of land to him and his co-allottee, then progresses to the payment of the dues required, followed by the execution of a discharge in the allottees' favour by the Settlement Fund Trustees which could not be registered at the land registry simply because other persons had already been registered as owners. The question that naturally arises is how those people who preceded the allottees achieved their registration when the discharge had not been issued in order to disencumber the land from dues owed to the SFT. The appellant has insisted in the suit and now in the present appeal that it was the 1st respondent and his deceased co-owner who sold the entire land. The

appellant denied selling his portion of 4 acres though he testified that his co-allottee had sold a portion of his entitlement to a man called Daniel who came from Kaloleni. Its registered title being under challenge, it was upon the appellant to demonstrate to the court that it was legally obtained. The evidence of DW1 which the trial magistrate did not take stock of was to the effect that the appellant purchased the suit land from one Daniel Katana in 2007. Daniel had informed them that he purchased the suit from the 1st respondent. On cross-examination, she stated that the land was sold to her company by Sleet Properties Ltd led by the said Daniel. Further cross-examination, revealed Sleet Properties Ltd to be a mere estate agent who were not in occupation of the property. DW1 did not have any copy of title issued in the name of Sleet properties ltd. The witness for the appellant could not explain why Sleet Properties Ltd was paying Kshs **150,000/-** to Jefwa Kalama Lewa. The witness told the court that there never existed any contract between the appellant and the 1st respondent and his co-owner of the suit land.

22. The evidence of Daniel Thoya Kalama was that he is the director of Sleet Properties Ltd and that upon learning that the appellant wanted an extra property next to a property it had purchased in the vicinity of the suit land, he established that the suit land was owned by Jefwa Kalama Lewa and Julius Karisa Ngala; Jefwa then introduced Daniel to Karisa and they agreed to sell the property to his company

Sleet Properties Ltd. During the acquisition, process the SFT discharged the property and transferred the same to the two co-owners who then executed transfer in favour of Sleet Properties Ltd which Daniel presented for registration thereby yielding title in Sleet's name. He then transferred the suit land to the appellant in 2007.

23. It is instructive that Jefwa Kalama Lewa lodged the suit in the lower court while he was still alive but died in 2022 and his widow took over the prosecution of the suit.

24. Among the documents produced by the appellant's witness was a transfer from Sleet Properties Ltd to the appellant, a transfer of the land from SFT to Jefwa and Julius (undated and unregistered), a copy of a discharge of charge, (dated 20/10/2006 (with the year 2006 seemingly having some visible alterations) and unregistered), a transfer from the Jefwa and Julius to Sleet Properties Ltd, (apparently registered on 4/9/2007) a cheque dated 11/10/2007 for the sum of Kshs 150,000/- written by Daniel Thoya Katana in favour of Jefwa Kalama Lewa, an acknowledgement of Kshs 20,000/paid to Jefwa from Daniel Katana Thoya dated 6/5/2009, labelled as part payment for the purchase of the suit land; and a bank statement of Daniel showing the cheque for Kshs 150,000/- was cashed on an unclear date in October 2007.

25. It is noteworthy that no copy of title or search certificate was produced to demonstrate that the land was indeed ever transferred to the Sleet Properties Ltd.
26. According to the evidence of the 2nd and 3rd respondents however, the suit land was offered to Jefwa and Julius and the discharge of charge was processed on 25/10/2006. The land registry lacked any documents that could support the transfer from the two allottees to the appellant. The transfer produced by the witness for the 2nd and 3rd respondents is in the name of Jefwa and Julius and appears to have been registered on 14th November 2006 at the Kilifi Land Registry. The same case applies to the discharge of charge.
27. What is sorely lacking from among the documents of the 2nd and 3rd respondents is a transfer of between Jefwa and Julius on the one hand and Sleet Properties Ltd on the other. The only transfer showing such a transaction was produced by the appellant's witness, shows that it was apparently registered on 4/9/2007. However, it is quite curious for the appellant to have that kind of document *purporting registration* while the 2nd and 3rd respondents do not have a replica at all in their registry; consequently, it is no surprise that it is not certified as a true copy by the Land Registrar. The consideration thereon is reflected as Kshs 1,200,000/= while the appellant states that it purchased the suit land from Sleet Properties Ltd for Kshs 13,000,000/- vide a transfer registered 10/9/2007, merely **4** days from the date

appearing on the transfer between Sleet Properties Ltd and Jefwa and Julius. Similarly, the copy of transfer is not certified by the Land Registrar and it can not be vouched for as having been lodged at the Kilifi Land registry.

28. It is not lost on this court that a crucial part of the title registration process in Kenya is the lodging of the transfers in the land registry. In this court's view, it is trite that the 2nd and 3rd respondents having disowned the transfers, only evidence that could extricate the challenged title was proof that the said transfers were presented at the Kilifi land Registry and booked for registration, otherwise their authenticity would remain unproved.

29. Though the two copies of transfer apparently bear daybook numbers on their face, no copy of the Presentation Book was exhibited in court as conclusive proof to show that both transfers were ever lodged at the Kilifi land registry. In the absence of the certification that they emanate from the land registry and also the absence of a copy of the Presentation Book, the appellant's claim that the suit land was first transferred to Sleet Properties Ltd, and subsequently to it, is too shaky to be believed in the face of the strong challenge to the appellant's title mounted by the 1st respondent.

30. In this court's view, there was no sufficient evidence to support the manner in which the appellant's freehold title dated **10/9/2007** found itself at the land registry.

31. In any event, there is good reason to believe that if indeed the transfers were lodged and the titles in the names of the appellant and Daniel were lodged and issued at the land registry respectively at around the same time, there is no good reason why none of the appellant's witnesses produced certified copies of the transfer both in favour of Sleet Properties Ltd and the appellant.

32. It is not that an undue burden is being foisted upon the appellant to prove that those transfers that led to the issuance of its title were ever lodged at the land registry. It is an unavoidable part of the process for such transfers to be lodged in all registrations. Where they have not been lodged, no title can issue. Already the title in favour of Sleet Properties Ltd is missing. So the question would be how the land became transferred from the 1st respondent *et al* to the appellant if title was not first issued in the name of Sleet Properties Ltd. In **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] KECA 706, (KLR)**, the court stated as follows:

“Quality of title refers to inviolability and marketability of title. A marketable title is a title that is free from any defects or clouds that a reasonable buyer would find objectionable.”

33. The detestable clouds alluded to in **Elizabeth Wambui Githinji** (*supra*) usually emanate from the manner of acquisition of title. The process of acquisition of title is as vital as the product when it comes to

production of titles and this as seen in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** where it was stated as follows:

“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 need not be noted on the register.”

34. The gist of the plaintiff’s claim in **Malindi Musketeers Limited v Attorney General & another [2025] KEELC 6764 (KLR)** was that the government, being the guarantor of the sanctity and indefeasibility of title, should pay him compensation in the form of loss for breach of that guarantee through administrative irregularities that resulted in double allocation of a plot in one of the notorious areas affected by the now discredited 1986 title recall exercise by the government, Chembe/Kibabamshe. The plaintiff stated that he legitimately acquired title to the suit land but has been deprived of the use and enjoyment of the property for a decade due to the defendants’ irregular issuance of a parallel title to a third party over the same land in the year 2010. Regarding presentation book entries, the court stated as follows in that case:

“54. According to the said Presentation Book extract, no transfer was ever lodged or registered with the Kilifi Land Registry in favor of Tanga Trolleys Services on 25th October 1999 as claimed by the plaintiff. Looking at the same exhibit the extract in respect of presentations of February 2000 show that on 17th February 2,000, only documents in respect of 4 transactions were lodged the Kilifi Land Registry. These were in respect of

Kilifi/Mtondia/866 (a transfer) Kilifi/Mtondia/880 (a transfer) Kilifi/Mtondia/867 (a transfer) and Gede/Mijomboni/484 (a transfer).

55. Clearly no transfer executed between Tanga Trolleys Services and Southern Sun Investments Limited for any land parcel whatsoever was ever lodged in the Kilifi Land Registry on 17th February 2000. I have stated that the plaintiff has not produced any Presentation Book in respect of the date 7th November 2007, on which it purports that its transfer was registered in the Kilifi Land Registry. That is a very serious omission on the part of the plaintiff which makes it doubtful that the transfer produced as P. Exh 1 on page 3 of the bundle was ever presented for registration at the Kilifi Land Registry.

56. There is also no credible entry in the presentation book showing that the government of Kenya transferred the suit land to Tanga Trolleys Services on 21st October 1999, that Tanga Trolleys Services transferred the suit land to Southern Sun Investments Limited on 17th February 2000, and that in turn Southern Sun Investments Limited transferred the suit land to Malindi Musketeers Limited on 7th November 2007. Without that evidence, the plaintiff has nothing to show this court that he had acquired valid title to the suit land.”

35. In view of the foregoing, the root of title of Sleet Properties Ltd has not been established as valid, hence the validity of the appellant’s title is not ascertainable. Where his title is impugned, a litigant who insists on presenting as proof of ownership the same title which just somehow popped up at the land registry, without impeccable evidence of how it was ever processed from the beginning to the end, has not established that his title is valid and the same applies to the appellant’s title in this case. Proof that the appellant’s title emerged in the land registry without any registration antecedents is sufficient proof of fraud.

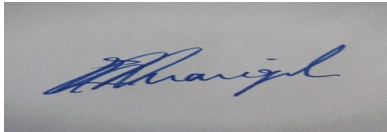
36. The conclusion of the above discourse is that the learned trial magistrate did not err in finding that there was fraud in the

procurement of title in the appellant's name. This also conclusively answers the fourth issue for determination, as to whether the trial magistrate's judgment was contrary to the weight of evidence rendered, in the negative.

37. The outcome is that the present appeal lacks merit and the same is hereby dismissed with costs.

It is so ordered.

Dated, signed and delivered at Malindi on this 10th day of February 2026.

A rectangular box containing a handwritten signature in blue ink. The signature is cursive and appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE,
JUDGE, ELC, MALINDI.**