



Bahati Properties Limited v Attorney General & 7 others (Environment & Land Case 31 of 2015) [2019] KEELC 5109 (KLR) (27 June 2019) (Judgment)

Bahati Properties Limited v Attorney General & 7 others [2019] eKLR

Neutral citation: [2019] KEELC 5109 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 31 OF 2015

AA OMOLLO, J

JUNE 27, 2019

BETWEEN

BAHATI PROPERTIES LIMITED PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

SAID M MABAVU 2ND DEFENDANT

ANNA W DEREVA 3RD DEFENDANT

ABDALLA MWACHIBULO HEMA 4TH DEFENDANT

FATUMA S NCHIZUMO 5TH DEFENDANT

OMAR MASHAKA 6TH DEFENDANT

MAHFUDH MOHAMED MWAMTUKU 7TH DEFENDANT

RAMA MATANO MWAURINDA 8TH DEFENDANT

JUDGMENT

1. Vide a Complaint dated 16th February 2015 and filed on 24th February 2015, the Plaintiff prayed for judgement to be entered in her favour as against the defendants in the following terms:
 - (a) A declaration that all that land known as Kwale/Diani beach block/59 occupies the same geographical position as Kwale/Diani beach block/149 and/or in the alternative, a declaration that the two title numbers Keale/Diani beach block 59 and Kwle/Diani beach block/149 refer to the same parcel of land;



- (b) A declaration that the plaintiff is the lawful proprietor of the leasehold interest in all that land known as Kwale/Diani beach block/149, formerly known as Kwale/Diani beach block/59 and/or title number CR. 11811 under Land Reference Number 5004/20;
- (c) A declaration that the opening of a register for Kwale/Diani beach block/149 by the Lands Registrar, Kwale while the register for the same parcel of land under the title number Kwale/Diani beach block/59 was still open was unlawful, illegal, null and/or a mistake of fact;
- (d) A declaration that the allotment of Kwale/Diani beach block/149 by the Commissioner of Lands to the defendants named herein was illegal, null and void and/or a mistake of fact;
- (e) A declaration that the certificate of title issued to the defendants herein for Kwale/Diani beach block/149 is unlawful, illegal, null and void;
- (f) A declaration that the 2nd to 6th defendants had no lawful right to grant a power of attorney authorizing the 7th to 8th defendants to deal with all that property known as Kwale/Diani beach block/149 and that the said power of attorney was illegal, null and void;
- (g) An order directing the defendants herein to surrender all and any certificates of lease and/or titles for Kwale/Diani beach block/149 in their possession as well the power of attorney dated 17th February, 2010 to the Lands Registry Kwale and an order directing the Land Registrar Kwale to cancel the defendants' titles and power of attorney forthwith upon surrender of the same;
- (h) An order directing the Lands Registrar Kwale to rectify the registers for Kwale/Diani beach block/59 and Kwale/Diani/149 by canceling all the entries made in the register for Kwale/Diani beach block/149 while the register for Kwale/Diani beach block/59 was still open and transferring the entries made in the register for Kwale/Diani beach block/59 with effect from 10th January, 1975 to the register for Kwale/Diani beach block/149;
- (i) An order directing the Lands Registrar Kwale to issue to the plaintiff a certificate of lease for Kwale/Diani beach block/149 forthwith upon surrender and cancellation of the plaintiff's certificate of lease for Kwale/Diani beach block/59 and for the Lands Registrar, Kwale to thereafter close the register for Kwale/Diani beach block/59;
- (j) An order directing the Commissioner of Lands and/or the lawful successor to his office to rectify the lease for Kwale/Diani beach block/59 by cancelling the same and re-issuing the plaintiff with a lease for Kwale/Diani beach block/149 upon the same terms as those contained in the lease for Kwale/Diani beach block/59;
- (k) A permanent injunction to permanently restrain each and every one of the defendants whether by themselves, their agents, servants, employees as well as any and all other persons claiming any interest or right in the suit property through them, or otherwise howsoever from entering onto or occupying or using or trespassing on to the suit property or any part thereof or from taking possession of or damaging, wasting, developing, selling, leasing, alienating, transferring, charging, mortgaging or in any way from dealing howsoever with the suit property or in any way from interfering with or depriving the plaintiffs of their quiet use, enjoyment or possession thereof;
- (l) Costs of an incidental to this suit; and
- (m) Any other relief that this Honourable Court may deem fit to award.



2. The 1st Defendant, the Hon. Attorney General, filed his Statement of Defence dated 14th April 2016 on 20th April 2016. The 1st Defendant generally denied the Plaintiff's claim as pleaded in the Plaint and put the Plaintiff to strict proof thereof.
3. Initially, judgment in default of appearance and defence against the 2nd to 8th Defendants had been entered on 17th March 2016. However, the 2nd – 7th Defendants filed an application dated 10th October 2016 in which they sought the setting aside of that judgment. The application was not opposed by the Plaintiff and was therefore allowed on 28th November 2016. The 2nd – 7th Defendants thereafter on 2nd December 2016 filed their Statement of Defence dated 1st December 2016.
4. The 2nd – 7th Defendants pleaded that they are the rightful and registered title owners of the property known as Kwale/Diani beach block/149 which they averred belonged to their late parent, Mwachimwindi Diya prior to its first registration by the British Colonial Authorities in 1914. That before their said parent's demise, he was forcefully evicted from the land by the Colonial Government without compensation.
5. The 2nd – 7th Defendants claimed that they presented their grievances to the then President of Kenya, His excellency Daniel Arap Moi who directed the Commissioner of Lands to allocate them the said piece of land as it was vacant and undeveloped.
6. The 2nd – 7th Defendants pleaded that the issues raised in this case are the same as those in a Petition before Justice Mureithi in which the dispute was whether Kwale/Diani beach block/149 registered in the name of the Defendants is the same as Kwale/Diani beach block/60 registered in the name of Dignified Holdings. The 2nd – 7th Defendants further pleaded that it was admitted in those proceedings that Kwale/Diani beach block/60 was subdivided in October 1974 after compulsory acquisition by the Government for excision of Diani Beach Road and new plot numbers issued being Kwale/Diani beach block/151 for the plot and 152 for the road reserve and thus Kwale/Diani beach block/60 ceased to exist in 1974. That the result is similar to Plots 59 and 149.
7. The Plaintiff withdrew the case against the 8th Defendant vide a Notice of Withdrawal of Suit dated 3rd August 2016 and filed on 4th August 2016. This was after the Plaintiff learnt that the 8th Defendant is deceased.

The Plaintiff's Evidence

8. The Plaintiff called a total of three witnesses.
9. PW 1- Timamy Issa testified on 21st November 2017. He adopted his witness statement filed on 21st November 2017. In his statement, PW1 stated that he is an Advocate of the High Court of Kenya and had been retained by the Plaintiff in such capacity and as such he was conversant with the facts pertaining to the Plaintiff's leasehold interest over Kwale/Diani beach block/59.
10. PW 1 stated that on 13th March 2007, on instructions of the Plaintiff, he wrote to the Commissioner of Lands and expressed the Plaintiff's wishes to extend the Lease for a further period of 50 years. That the Commissioner of Lands in a letter dated 19th March 2007 directed the District Lands Officer to undertake a site inspection and submit a report. That the District Lands Officer responded vide a letter dated 10th May 2007 stating that he has no objection to the proposed renewal. That in a letter dated 3rd August 2007, the District Physical Planning Officer stated that he had no objection to the Plaintiff's application for extension of the lease. Similarly, in a letter dated 3rd August 2007, the District Surveyor confirmed that there was nothing adverse that would prevent the extension of the lease. In the same



vein, the County Council of Kwale in a letter dated 3rd August 2007 indicated that it had no objection to the extension of the lease subject to payment of relevant rates and rent.

11. PW 1 stated that the Commissioner of Lands in a letter dated 23rd October 2007 gave approval for the extension of the lease and requested the Plaintiff to pay Kshs. 222,690.00 in annual rent and Kshs. 5,000.00 towards approval fees. That payment of Kshs. 222,690.00 was made vide banker's cheque number 022475 dated 25th October 2007 and of Kshs. 5,000.00 vide banker's cheque number 022476 dated 25th October 2007 and a receipt was issued for both payments. That a Clearance Certificate and a receipt for payment for the certificate both dated 19th June 2007 were issued in the name of the Plaintiff by the County Council of Kwale. That a receipt dated 13th March 2008 for Kshs. 202,200.00 was issued by the County Council of Kwale for payment of land rates for the year 2008. That an application for search for Kwale/Diani beach block/59 was made on 3rd August 2007 in support of the application for extension of the lease. That a Certificate of Official Search dated 3rd August 2007 which showed that on 8th August 1999 the Plaintiff became the proprietor and a Certificate of Lease was issued and that there were no inhibitions, cautions, restrictions or encumbrances registered against the property at the time the application for extension was made.
12. PW 1 also stated that a letter dated 28th January 2008 was sent by the Commissioner of Lands to the District Land Registrar through the office of the Chief Land Registrar, forwarding the lease in triplicate and surrender of lease in respect of the lease over Kwale/Diani beach block/59. That a new lease and Certificate of Lease were issued granting the Plaintiff a leasehold interest over Kwale/Diani beach block/59 registered on 31st January 2008 for a period of 50 years starting 1st October 2007. PW 1 states that on 31st January 2008, his office made an application for official search and a Certificate of Official Search dated 31st January 2008 was issued confirming the lease was registered in favour of the Plaintiff.
13. PW 1 concluded by stating that at no time in the 8 months of the application for extension did his office or the Plaintiff receive a notice of cancellation of title number Kwale/Diani beach block/59 in favour of title number Kwale/Diani beach block/149 nor were the applicants informed of any competing interests being registered over Kwale/Diani beach block/59.
14. On cross- examination by Mr. Magolo, learned counsel for the 2nd – 7th Defendants, PW 1 recalled having testified before the Chief Magistrate's court over the same issues. He however stated that he did not know the outcome of that case. PW 1 confirmed that he is the one who got the extension of the lease.
15. When referred to the Survey Report at page 120 of the Plaintiff's documents, PW 1 stated that subdivision was done in 1975 on Plot Numbers 59 and 60. That on subdivision, the original number ceases to exist. He went on to state that Plot Numbers 59 and 60 were subdivided on 10th January 1975. The witness stated that the resultant numbers given were 149, 150, 151 and 152 and this took place before he applied for renewal of the lease.
16. The witness stated that they had a valid title for Plot Numbers 59 and 60 and that the subject land is where Diani Beach Road exists. He indicated that he was aware that the sub-division was done to create the road and road reserves and that the Government would not acquire land without compensation. He stated that he did not know whether the suit property was acquired without compensation because he was not in the picture.
17. PW 1 stated that he had never held title for plot numbers 149 and 151 and that if any such title exists, the same is not genuine. The witness stated that he personally went to Kwale Lands office to conduct the searches but he found the green card missing. That the Land Registrar gave him a search even with the green card missing.



18. PW 1 stated that he had visited the suit property many times and the same is occupied illegally by the Defendants from 2016 and not earlier than 2015. The witness stated that the Plaintiff acquired the land because the title existed as confirmed by the government agencies. The witness denied that the land became government land after acquisition and was therefore available for alienation. The witness stated that the Defendants' titles are very illegal.
19. On cross examination by Mrs. Waswa State Counsel appearing for the 1st Defendant, PW1 stated that the lease the subject of the application for extension commenced on 1st January 1914 for 99 years. That the application for extension was made in 2007. The witness stated that although there is a road on the suit property, the Plaintiff is not seeking compensation.
20. He stated that the suit property was illegally invaded in June 2016. That he was not aware of the subdivision done in 1975. He reiterated that he visited Kwale Lands Office in 2007 while applying for extension of the leases.
21. On re-examination by the Plaintiff's counsel, Mr. McCourt, PW1 stated that on 10th January 1975 when the subdivision took place, the parcel was owned by the Aga Khan. That the transfer to the Plaintiff was in 1992 and the lease was due to expire in 2013. The witness stated that despite the subdivisions, titles were still given for Numbers 59 and 60.
22. When referred to page 121 of the Plaintiff's Bundle of Documents, the witness stated that title numbers 149 and 59 refers to the same piece of land and that there was never a compulsory acquisition. That the Plaintiff took occupation of the land in 1992 and was still in occupation in 2007. That the title for Plot Number 149 was issued on 4th October 2006 and that if the title was acquired, then it was acquired illegally the Plaintiff being in possession from 1992 to 2006, acquired the same by prescription.
23. PW 2, Mohamed Mwinyi Mwadzecha also testified on 21st November 2017. PW2 testified that he was attacked in August 2016 on a Thursday by about 50-60 people. That before he was attacked, around 10 am, four of his colleagues had spotted some people jumping over the gate accompanied by six uniformed and armed officers and two officers without uniforms. That the attackers later came at 2pm armed with pangas and rungas and surrounded the house where PW2 was in. That they broke the door and entered. They said that they had been sent by the 2nd and 6th Defendants. The person in charge of the group was called Yaya who told PW2 that they had been sent to kill him and that he was a policeman.
24. PW2 stated that he had lived in the house from 1974 to 2016 and that his employer changed in 1992. PW 2 stated that he reported the incident to the police vide OB NO 43/25/80/16. That he did not see the 2nd and 6th Defendants but Yaya said he was sent by them.
25. On cross-examination by Ms. Waswa for the 1st Defendant, PW2 stated that the police did not talk to him but only looked at the place and left. He stated that he entered the land in 1974 having been employed by the Aga Khan and later by Bahati. That Bahati would come and leave. He stated that he did not know whether anyone had been charged in connection with the attack.
26. On cross-examination by Mr. Magolo for the 2nd -7th Defendants, PW2 stated that he was born in Likoni where his family lives. That he had reported the attack incident in Diani police but he was not assisted. That he also went to Kwale but did not find the County Commissioner. PW2 stated that two policemen arrested him saying that the 2nd and 6th Defendants had sent them to do so on the basis that he had invaded their land. He stated that he had never seen the title deed but knew the plot numbers as 59 and 60.



27. PW3, Sheba Mohamoud Mohamed testified on 13th March 2018. He stated that he is an Advocate of the High Court of Kenya and the Company Secretary of the Plaintiff company. He testified that the Plaintiff purchased the plot No. Kwale/Diani/59 which initially had tittle number CR 11811 and L.R. 500420 and currently numbered as Kwale/Diani/beach/149. The Plaintiff bought the land from Prince Aga Khan who had also purchased it from T. Erica. P. Aga Khan was registered in 1968. That the land registrar wrote to the Aga Khan notifying them of the change of number.
28. PW3 testified that they applied for extension of the leases in 2007 and the leases were renewed for 50 years each. That they had been in constant possession of the property from 1992 when they purchased it until about two years ago when some people came and violently chased away their caretaker.
29. PW3 stated that in 2010, he received a call from Ethics and Anti-Corruption Commission (EACC) that some people were attempting to sell the neighboring plot. That they carried out investigations and found that sometimes in the 70s, the road in Diani would be expanded which then would affect the suit tittle. That the owners should have been given new titles. That the title for Aga Khan still bore the old number. That the old register was also maintained alongside a new register. That because of that anomaly, some people got new titles and were in the process of selling the suit plot. That some people were arrested and charged with fraud.
30. On cross-examination by Mrs. Waswa for the 1st Defendant, PW3 stated that he was employed by the Plaintiff in 2013 and that he was not present when the property was purchased. That he was relying on the documents held by the Plaintiff. The witness stated that the road was expanded in the early 70s, and that at the time of the expansion the land belonged to Aga Khan. That the Aga Khan raised queries on the expansion with the Ministry of Lands although the letter regarding the same was not among the Plaintiff's documents. That there was no complaints on the expansion of the road. The witness said that he didn't know whether the government compulsorily acquired the land used for the expansion of the road or not.
31. PW3 testified that people who had been charged with several offences including fraud were acquitted. That he did not know the names of those who were charged. The witness testified that at the time the Plaintiff applied for renewal of the lease in 2007, the road had already been expanded. That the land was originally 25 acres but was reduced by approximately 2 acres. That the Plaintiff didn't know that the road had affected its land on the ground.
32. On cross examination by Mr. Magolo for the 2nd – 7th Defendants, PW3 stated that he was aware of the change in the tittle numbers and that the Plaintiff held number 59 and never held number 149. The witness stated that the land for the road ought to have been compulsorily acquired and be compensated. That at the time the land for the road was acquired, the owner of the land was the Aga Khan. That somehow the Aga Khan did not surrender the tittle and sold the land to the Plaintiff in 1992.
33. PW admitted that when a portion of land is excised, the old tittle dies and a new one is issued. That there is no evidence that the Aga Khan attempted to get a new tittle. That the register for the plot No. 59 ought to have been closed. That he was aware of existence of the register for plot No. 149 and tittle issued. That a search showed that plot No. 59 is still in existence.
34. On re-examination by Mr. McCourt for the Plaintiff, PW3 stated that he was aware that both registers for plot Nos. 59 and 149 exist for the same parcel of land as per the survey report. That the survey report says the plot Nos. 151 and 152 were a result of a road excision. PW3 stated that in 2007 when the plaintiff's leases were renewed, the plaintiff did not know that the number had changed.



The Evidence for the 1st Defendant.

35. The 1st Defendants called two witnesses. DW1, Herbert Ndolo testified on 4th July 2018. He told the court that he is the District Surveyor Kwale and that he prepared the report dated 30/01/2014 following a request by the court in case number 37 of 2011 to determine the boundaries of Plot NO. 59, 60, 149-152 and establish how they relate to one another as well as to establish any encroachments and the existing developments within those plots.
36. DW1 stated that Plot No. 59 occupies where Plot No. 149-150 and Plot No. 60 was occupying same position as No. 151-152. That the first amendment to the map was made on 30/1/1975 by which date plot No. 59 and 60 existed. That from the map FR NO. 127/76, the survey was completed on 10/10/1974 and the survey was submitted to the Director of Survey for authentication in November 1974. That the new numbers were entered in the records on 10/1/1975. That once the new numbers were authenticated, Plot Nos. 59 and 60 ceased to exist. That the numbers currently in existence are Nos. 149 and 151 while Nos. 150 and 152 are the road.
37. DW1 stated that from a survey point of view, a title cannot exist without the number appearing in the R.I.M. That once a plot is subdivided, communication is channeled to the Commissioner of Lands who then directs the Chief Land Registrar to effect the amendments. That the original title should then be cancelled.
38. On cross-examination by Mr. McCourt for the Plaintiff, DW1 confirmed the Plot Nos. 59 and 60 became 149 and 151 and that there existed a road before the 1974 survey. That the road reserve did not exist before the 1974 so it had to be created. That the old numbers were exchanged from the R.I.M and the new numbers were issued and the Commissioner of Lands prepared new leases.
39. DW1 stated that the document at page 109 of the Plaintiff's documents (Lease for Kwale/Diani beach block/59) shows the acreage of 25 acres while his map shows Plot No. 149 as 9.408 ha (23.25 acres). That his survey report does not show the acreage. That the new title for No. 149 was issued in 2006. That the surveyors did not look at the lease but only surveyed the grounds. That the position on the ground does not change during subdivision. That as a surveyor, DW1 does not determine the ownership of plots.
40. On cross-examination by Mr. Magolo for the 2nd and 7th Defendants, DW1 stated that Plot No. 59 is equal to Plot No.149 and 150. That plot No. 149 is less than what was No. 59. That the excision was a government project by way of compulsory acquisition and compensation of the owner.
41. DW2, Dick James Safari testified on 4th July 2018. He stated that he is the Land Registrar, Kwale Land Registry. That parcel No. 149 is an allocation by the government through letters forwarded from Nairobi. That the lease was forwarded through a letter dated 25th August 2006 which DW2 produced in evidence. DW2 stated that he did not have records of parcel No. 59. That No. 149 was subdivision of No. 59. That after the amendment of RIM in 1975, title number 59 would not be in existence.
42. DW2 told court that the owners of plot No. 149 are four: the 2nd, 3rd, 4th and 5th Defendants. The witness stated that in rare circumstance would the old title remain in existence. This may be a result of an error on the part of the survey department.
43. On cross examination by Mr. McCourt for the Plaintiff, DW2 stated that plot No. 149 was allocated by the government. That after subdivision of plot 59, the green card should have been closed by the land registrar to enable the creation of new numbers. DW2 stated that he was not aware that the Aga Khan had title for the subject plot. That he did not know if title for plot No. 59 was cancelled. That if the register of No. 59 was closed, the certifications of search would not be obtainable.



44. The witness stated that for any subdivision to be done, a surrender of the title has to be done. The witness said that he did not have a document asking for a surrender of title of the suit plot. DW2 told court that a lease was given in 1992 for plot 59 and again extended on 31/1/2008. That the letter of allotment was for 8 people and the lease document has 5 people. That the certificate of lease was issued to 5 people. That there are times when all the names are not included in the certificate of lease. That the proprietors can agree on the names to be entered in the certificate of lease but there must be a document expressing such agreement.
45. On cross examination by Mr. Magolo, DW2 stated that the file for No. 149 was opened when he received the lease from the Commissioner of Lands. That he had not received a complaint from the three persons whose names are missing in the certificate of lease.

The Evidence of the 2nd – 7th Defendants.

46. The 2nd – 7th Defendants called one witness, SAid Mabavu Wa Mabavu, who testified on 17th September 2018 as DW3. He stated that he was born around 1957, lives in Ukunda and is a farmer. That Diani beach block/149 is their ancestral land where their forefathers lived. That according to the Digo culture, land is owned as per clan and that they were members of the clan that owned the suit land.
47. DW3 stated that the Commissioner of Lands issued them with a letter of allotment which was later registered at Kwale Lands Registry. That they lived on the land. That the people claiming the land tried to use the police to remove them from the land but they were not removed. That there are coconut trees on the land which were not planted recently. DW3 stated that their title was issued in 2006 and that the Plaintiff is claiming that their title is fake after 8 years.
48. On cross examination by Mr. McCourt for the Plaintiff, DW3 stated that the letter of allotment is dated 5th July 2001. That they did not pay for stand premium. That the letter of allotment had 8 names, while the certificate of lease has 5 names. That the choice to have 5 names was made by the clan. The witness admitted that they did not develop the land within 24 months as required by clause 4 of the lease.
49. DW3 stated that their letter to President Moi is dated 30/10/1999 and approval is dated 27/12/1999. The witness could not explain why it took long for the letter of allotment to be issued from date of approval by the President. That those who petitioned the President were 48 but the names on the lease are 5. That according to Wadigo, there was nothing wrong with that.
50. DW3 stated that they were compensated for the land acquired to build the Lunga Lunga Road. On cross examination by Mrs. Waswa, DW3 stated that he believed that the stand premium was paid. He stated that his ancestors lived on the land even before Kenya came into being. That he personally did not live on the land but his brother is among the clansmen living there. That there is a house on the land built in 1953 by the colonialists. DW3 stated that he was aware that the title had a different number.
51. On re-examination by Mr. Magolo, DW3 stated that Kshs. 350,000/- was paid before they were issued with the lease.
52. This is yet one of those cases where the relevant government offices have caused legal confusion by having and keeping alive two rival and parallel official records relating to the same property.
53. From the pleadings, the documents and the evidence presented in court, the following facts have patently become clear. The suit property known as Kwale Diani/Beach/block/59 originally Land Reference Number 5004/20 (C.R. 11811) was leased to Dora Hyder by the Crown of the Colony and Protectorate of Kenya for a term of 99 years with effect from 1st January 1914 and a Certificate of Title was duly issued. On 14th July 1960, Dora Ryder transferred the property to Hugh Peter James. On 23rd



- May 1963 Hugh Peter James transferred the property to Trudi Erica Ruyenaars Gauz. On 1st April 1968, Trudi Erica Ruyenaars Gauz transferred the property to Prince Sadruddin Aga Khan.
54. In 1971, the number of the suit property was changed from Land Reference Number 5004/20 (C.R. 11811) to Kwale Diani/beach/block/59 and a Certificate of Lease issued to Prince Sadruddin Aga Khan on 8th November 1976.
 55. Meanwhile, in 1974 while the suit property was in the name of Prince Sadruddin Aga Khan, the government excised and compulsorily acquired part of it for purposes of construction of Diani Beach Road. The property was divided into two portions to wit: parcel numbers Kwale Diani/beach Block149 and Kwale Diani/beach Block150. The government acquired Kwale Diani/beach Block150 used for the expansion of Diani Beach Road and Kwale Diani/beach Block149 remained.
 56. Despite the compulsory acquisition of part of the suit property by the government and despite its subdivision into the said two parcels, the original title number Kwale Diani/beach/block/59 was not surrendered and neither was the said title removed from the register. Instead, in 1992, Prince Sadruddin Aga Khan transferred the said property to the Plaintiff (then known as Bahati Leisurelodge Limited) for a consideration of Kshs. 11 million.
 57. Meanwhile, in 2001, Kwale Diani/beach Block149 was allocated to 8 persons including the 2nd – 6th Defendants herein vide a letter of allotment dated 5th July 2001 and a Certificate of Lease issued in favour of the 2nd – 6th Defendants on 4th October 2006.
 58. The Plaintiff now contends that the suit property belongs to it and that the Certificate of Title should never have been issued in favour of the 2nd – 6th Defendants. The 2nd – 7th Defendants on the other hand contend that the suit property is their ancestral land where they have lived even before independence of Kenya and thus the allocation of the same to them was legal.

Issues for the Court's Determination

59. In my view, the issues for the court's determination are as follows:
 - i. Whether Kwale/Diani Beach/block/59 and Kwale/Diani beach block/149 occupy the same position on the ground and refer to the same parcel of land;
 - ii. Whether the Plaintiff was in existence at the time the transfer was made from the name of Prince Sadrudin Aga Khan;
 - iii. Whether the Commissioner of Lands had any power or legal mandate to allot, alienate or allocate to the 2nd – 7th Defendants the property known as Kwale/Diani Beach/block/149;
 - iv. Whether Kwale/Diani Beach/block/59 and Kwale/Diani Beach/block/149 occupy the same position and refer to the same parcel of land:
60. The question of whether Kwale/Diani Beach/block/59 and Kwale/Diani beach block/149 refer to the same parcel of land was addressed by the evidence and witnesses from both sides. The joint Survey Report dated 30th January 2014 and prepared by B.C Mwanyungu and Herbert Ndolo was filed and relied upon by both sides. The Survey Report clearly shows that Kwale/Diani Beach/block/149 and Kwale/Diani Beach/block/150 were a result of subdivision of and occupy the same position on the ground as Kwale Diani Beach/block/59. Thus, Kwale/ Diani Beach/block/149 is part of Kwale Diani Beach/block/59 and is actually what remained after the government compulsorily acquired the other subdivision of the said property.



61. According to DW 1, Herbet Ndolo And Dw 2, Dick Safari upon the subdivision, title number Kwale Diani Beach/block/59 ceased to exist. That implies that the title should ordinarily have been removed from the register. DW2 testified that the failure to remove the said title from the register must have been an error on the part of the survey department. It is therefore clear that Kwale Diani Beach/block/59 and Kwale Diani Beach/block/149 occupy the same physical position on the ground and refer to the same property (save for the portion which the government acquired compulsorily).

Whether the Plaintiff existed as at the time of transfer:

62. The Plaintiff produced and contained in her list of documents at page 27-33 copies of transfer form and titles for plot Kwale/Diani beach block/59 issued in the name of BAhati Leisure Lodge Ltd. In page 34 of the plaintiff's bundle is a certificate of change of name serial no C.48177. This certificate shows change of name from Bahati Leisure Lodge Ltd To Bahati Properties Ltd which was effected on 13th August 1995.
63. After the change of name in 1995, the suit plot no 59 was registered in the name of the plaintiff as shown on the copies of title documents produced at page 35-38 of their bundle of documents on 8th July 1999. The Certificate of Change of name thus explains any lacuna on the existence of the plaintiff as at 1992 when they acquired interest over plot no 59.

Whether the Commissioner of Lands had any power or legal mandate to alienate Kwale/Diani Beach/block/149:

64. Having concluded that Kwale/Diani Beach/block/149 refer to the same property as Kwale/Diani Beach/block/59, the evidence presented by the Plaintiff and DW1 & 2 does confirm that Kwale Diani Beach/block/59 [originally known as Land Reference Number 5004/20 (C.R. 11811)] was private property having been allocated to Dora Hyder by the Crown of the Colony and Protectorate of Kenya for a term of 99 years with effect from 1st January 1914 and a Certificate of Title duly issued. This property was already private property even before Kenya attained its independence in 1963 and it is the same property was allotted to the 2nd – 6th Defendants by the Commissioner of Lands in 2001. The question that the court has to answer therefore is whether the property was available for allocation to the 2nd – 6th Defendants.
65. The applicable statute in 2001 was the Government Lands Act, Cap. 280 Laws of Kenya (GLA) which was the Act that regulated the leasing and other disposal of Government lands (see Preamble of the Act). Section 2 of the GLA defined Government land as follows:

“Government land” means land for the time being vested in the Government by virtue of sections 204 and 205 of *the Constitution* (as contained in Schedule 2 to the Kenya Independence Order in Council, 1963), and sections 21, 22, 25 and 26 of *the Constitution* of Kenya (Amendment) Act, 1964;

66. The 2nd – 7th Defendants contended that the suit property was allocated to them by the Commissioner of Lands on behalf of the President following their petition. Section 3 of the GLA which gave the President power to make grants or dispositions over government land provided as follows:

“The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—



- (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land” (emphasis added).

67. Section 2 of the GLA Defined “unalienated government land” as follows:

“Unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.

68. Thus, the GLA empowered the President to make grants and dispositions of interests or rights in Government land which is not leased to any other person at the material time. Once a property is leased to and a certificate of registration issued in favour of a private person, the property converts from unalienated government land to alienated government land which cannot be dealt with under the GLA. This position was enunciated by the Court of Appeal in the case of *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR in the following manner:

“The legal effect of the registrations made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated government land with the consequence that the suit land became private property and moved out of the ambit and confines of the GLA. This made the suit property unavailable for subsequent allotment and alienation by the Commissioner of Lands or the President of Kenya. The appellant’s title to the suit property was thus anchored on land that was not unalienated government land. We concur with the trial judge’s finding that “the suit land having been owned privately was not GLA land, and was not available for alienation. Its alienation was illegal and void ab initio”

69. The High Court in the case of *Gitwany Investment Limited v. Tajmal Limited & 3 Others* [2006] eKLR was confronted with a similar scenario where there are two different titles referring to the same property on the ground held as follows:

“40. Having concluded that L.R. No. 209/3088 is in fact the same on the ground with L.R. No. 209/12004 this court is then confronted with really the main issue in this matter. Both *Gitwany* and the 2nd and 3rd Defendants were issued with title documents by the Commissioner of Lands. *Gitwany*’s title for L.R. No. 209/12004 was issued on 24.7.1995 and it is signed by Wilson Gacanja as such Commissioner in the presence of the Registrar of Titles whose name is unclear. The one in the name of *Maxtowers and Njage* was signed by *Sammy Silas Komen Mwaita* as Commissioner for Lands on 12.2.2001 in the presence of *J.K. Wanjau*, Registrar of Titles. The land was then transferred and is presently held in the name of the 1st Defendant which transfer was registered against the title on 26.7.2001.

41. The position as at now is that both *Gitwany* and *Taj Mall* claim and in fact have title to the same piece of land. Which title should prevail? The one issued on 24.7.1995 or the one issued on 24.2.2001? I would agree with the submissions by counsel for the 1st Defendant that it is to S.23(1) of the Registration of Titles Act Cap. 281 that this court must turn to. That section reads as follows:-

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land



is the absolute and indefeasible owner thereof, subject to the encumbrances, easements restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

42. I have taken the pains in this judgment to set out exactly how each party obtained title. I have also read the submissions by all parties and sadly none has offered any evidence that Gitwany or the 1st Defendant in any way acted fraudulently or that any of them misrepresented any fact and which then led them to obtain fraudulent titles. In fact the entire mess in which those parties find themselves in is the creation of and a matter that must be put squarely at the doorstep of the Commissioner of Lands, the 3rd Party. All documents leading to the issuance of title are not prepared, kept nor issued by any other party other than that office, sometimes in conjunction with the Directorate of survey. Any change in L.R.No. or in acreage is a matter that is always in the hands of those offices and even if a private person in a professional capacity undertakes those tasks then those offices must always approve and thereafter take responsibility for those actions...
44. Having so stated, I must return to s.23(1) of the Registered *Land Act*. To do so I must now state that the law as regards two conflicting titles was set out in Dr. Joseph N.K. Ng’ok vs Justice Moiwo Ole Keiwua and 2 others C.A. No. 60/1997(un reported) where the Court of Appeal in an Application under Rule 5(2)(b) of the Court of Appeal Rules stated thus;-
- “... Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party...”
45. ...
46. My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs Commissioner of Lands*, C.A. No. 71/1997 (unreported):- is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in *Faraj Maharus vs J.B. Martin Glass Industries and 3 others* C.A. 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity. The Gitwany title fits this description and in fact upto the end of this case, the 3rd party has not sought to cancel it!
47. My answer above does not solve the puzzle however. What then happens to the second title issued apparently procedurally but subsequent to an earlier valid title? Again my view is that the answer lies in s.23(1) aforesaid. Whereas the first title cannot be challenged, the second one can be challenged because whereas



it exists and even if procedurally issued, or so it appears, it is not absolute nor indefeasible and is relegated to a level of legal disability and the remedy for a party holding it if aggrieved, lies elsewhere...

48. My final word in this regard is that the lawfully registered proprietor of title No. L.R. No. 209/2004 (formerly L.R. No. 209/3088) is Gitwany the Plaintiff, for reasons I have attempted to articulate above.”
70. It is not in dispute that in 2001 when the Letter of Allotment was issued to the 2nd – 6th Defendants, Kwale Diani Beach/block/59 was already leased out to a private person for a term of 99 years with effect from 1st January 1914 and a Certificate of Title duly issued. The lease was due to expire in 2013. That means that in 2001, the land was already allocated to a private person and was therefore not available for allocation or alienation to the 2nd – 6th Defendants. Put differently, there was no unalienated government land capable of being allotted to the 2nd – 6th Defendants. Brother.
71. The 2nd – 7th Defendants contended that the subject property is their ancestral land where they have lived even before independence. However, from the evidence tendered in court, I doubt whether that contention is true. Mr Said Mabavu, the 2nd Defendant who testified on behalf of the 2nd – 7th Defendants confirmed that he does not live on the subject land. That it is his brother who lives there. The alleged brother was not called to testify so as to confirm that he is indeed living on the suit land and for how long he has lived there. The averments by the 2nd -6th defendants that they were farming on the suit property was also not corroborated either by photographic evidence or expert report. The plaintiff however demonstrated possession by production of a lease document executed between them and Kencell Ltd.
72. Further, PW3 stated in his evidence that the sublessee has erected a communication mast and technical communication room on the suit property. The 2nd – 7th Defendants did not explain how Kencell came to construct their communication facility on the suit premises if they (defendants) were really in occupation of the same. The Plaintiff on the other hand, explained that the communication facility was erected on the suit property by Kencell with the Plaintiff’s consent pursuant to a Sub-Lease Agreement registered on 17th July 2000 which was exhibited in evidence.

Conclusion:

73. In conclusion, it is my view and I so hold that the Plaintiff² has proved her case on a balance required in law. Consequently, I enter judgement for the plaintiff as per the prayers (a) to (k) of her plaint. However, on costs, since the mess in this case was occasioned by the acts and or omissions of the concerned government officers responsible for the removal of the title for Kwale Diani Beach/block/59 from the register and ensuring that only one title existed for the suit property, I order each party to bear own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JUNE 2019.

A. OMOLLO

JUDGE.

