



**MFA Investment Limited v Kinuthia & 2 others (Environment and Land  
Case E031 of 2023) [2026] KEELC 1513 (KLR) (16 March 2026) (Judgment)**

Neutral citation: [2026] KEELC 1513 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE E031 OF 2023**

**LL NAIKUNI, J  
MARCH 16, 2026**

**BETWEEN**

**MFA INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**JAMES NYOIKE KINUTHIA ..... 1<sup>ST</sup> DEFENDANT**

**ANN WAITHIRA GACHURA (SUED AS THE ADMINISTRATOR OF THE  
ESTATE OF THE LATE GODFREY MBUURI GACHURA) ..... 2<sup>ND</sup> DEFENDANT**

**KWALE LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgement of this Honourable Court pertains to a Civil Suit instituted by Mfa Investment Limited, the Plaintiff herein through an Amended Plaint filed before court on 29<sup>th</sup> February 2024. The suit was the against James Nyoike Kinuthia, Ann Waithira Gachura [Sued as the Administrator of the estate of the late Godfrey Mbuuri Gachura] and Kwale LAND REGISTRAR, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants herein.
2. Unfortunately, despite service of summons to enter appearance and the pleadings and all efforts made, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants never participated in this matter. It is only the 3<sup>rd</sup> Defendant who filed a Statement of Defence dated 29<sup>th</sup> January, 2024. Thus, it proceeded to defend the suit as against it. The Honourable Court proceeded to deal with the matter based on the pleadings by the two parties.

**II. Description of the parties**

3. The Plaintiff was described as a limited liability company incorporated within the Republic of Kenya. The 3<sup>rd</sup> Defendant was described as the principal officer in charge of land registry Kwale County.



### III. Court directions before the hearing

4. Consequently, on 20<sup>th</sup> November 2024, the Honourable Court fixed the hearing dated on 9<sup>th</sup> June 2025 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing by way of adducing “Viva Voce” evidence with the Plaintiffs’ witness PW - 1 testifying in Court on 9<sup>th</sup> June 2025 after which it closed the case and the 3<sup>rd</sup> Defendant called their witnesses on the same date and also closed their case.

### IV. The Plaintiffs case

5. The Plaintiff averred that he acquired the suit property Kwale/Diani/159 measuring 2.0Ha hereinafter referred to as the suit property on 27<sup>th</sup> November 1995 at a consideration. That the suit property was acquired from the Settlement Fund Trustee 1<sup>st</sup> allottee by the Lawrence Kang’ethe Ndungi aka Lawrence Kangethe Ndung’u.
6. The above was vide an agreement dated 5<sup>th</sup> July 1995 and the same was without any notice of defect in title or adverse claims. According to the Plaintiff prior to the said purchase he instructed his Counsel to conduct due diligence over the property and it was confirmed that the same was registered in the names of the first allottee from the settlement funds trustee. That after acquiring registration the Plaintiff took physical possession of the suit property, fenced the same off and employed a caretaker to guard the property.
7. The Plaintiff’s case was that later the caretaker was evicted and the fence destroyed during the “Kaya Bombo” clashes of 1997 during the general elections. That consequently the Plaintiff went back to Germany but his neighbours have always looked after the property. This was to ensure the same was not encroached upon. However, around July 2023, the Plaintiff averred that he was informed the property was being offered up for sale by the 2<sup>nd</sup> Defendant to unsuspecting members of the public.
8. The Plaintiff was prompted to conduct a search over the suit property through his advocate. That it was established that the property no longer existed and the same had been sub - divided into 18 portions with new numbers issued and registered as Land Reference Numbers Kwale/Diani SS/4227 to 4244. That all the subdivisions were registered in the 2<sup>nd</sup> Defendant’s names by the 3<sup>rd</sup> Defendant.
9. The Plaintiff stated that he was instructed by his advocate to register a restriction over the suit property and the sub - divisions to prevent further dealings thereon. That the 3<sup>rd</sup> Defendant demanded that he appears before the office with the original title to confirm its originality. That sometime on 26<sup>th</sup> October 2023 Mr. Manfred Wenzel a director of the Plaintiff travelled from Germany to Kenya to meet the land registrar but the 3<sup>rd</sup> Defendant was adamant about the transfer and subdivisions.
10. The Plaintiff stated that upon inspection of the green card to the suit property it was discovered that the same had been closed and further the original green card was missing. A forged green card had been replaced. The Plaintiff noted the forged green card had been opened on 15<sup>th</sup> November 1974 and a title deed was issued to Lawrence Kang’ethe Ndung’u on the said date and who later transferred the suit property to the 1<sup>st</sup> Defendant on 2<sup>nd</sup> October 2013 and later transferred to the 2<sup>nd</sup> Defendant on 12<sup>th</sup> February 2016.
11. The sub - divisions were closed on 30<sup>th</sup> October 2019. The Plaintiff maintained that the green card was a forgery and was procured by way of misrepresentation and collusion jointly between the Defendants for reasons listed under Paragraph 16 of the Plaint as follows:-



- a. That the suit property was created after the creation of the Diani Settlement Scheme which was approved and the Registry Index Map opened on 4<sup>th</sup> February 1992 by the director of survey and not on 15<sup>th</sup> November 1974 as it appears on the forged green card
  - b. That as a result of the foregoing there could not have been a green card at the land registry and a title deed could not have been issued to Lawrence Kang'ethe Ndung'u on 11<sup>th</sup> November 1974 before the RIM was formally registered and the title deeds subsequently issued
  - c. The forged green card indicates that the suit property is located on map sheet 1 whereas the suit property is on the Registered Map Sheet 2.
  - d. The forged green card indicates that the size of the suit property is 2.1 Hectares whereas the actual size of the suit property from the RIM and Adjudication office [where the suit property emanated from] indicates that the size of the suit property is 2.0Ha
  - e. The forged green card was opened without the due process of notice to the public so that the Plaintiff could object to its issuance and as a cover up of the illegal entries therein and in gross abuse of the powers by the 3<sup>rd</sup> Defendant since the import was to materially affect the proprietorship and not minor alterations.
12. It was stated that in furtherance to the fraudulent activities the 3<sup>rd</sup> Defendant had issued titles to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and approved the sub division of the suit property in total disregard of the fraud. That the 1<sup>st</sup> Defendant never acquired a good title as the same was acquired through fraud and misrepresentation of facts and collusion and could therefore not transfer a good title to the 2<sup>nd</sup> Defendant.
13. The particulars of fraud, forgery and misrepresentation by the Defendants as listed under Paragraph 19 of the Plaintiff
- a. Interfering and destroying the green card and the parcel file for the suit property in the names of the Plaintiff
  - b. Forging green card for Kwale/Diani/159.
  - c. Forging a title deed for Kwale/Diani/159 in the names of Lawrence Kang'ethe Ndung'u.
  - d. Forging transfer forms and signature of Lawrence Kang'ethe Ndung'u.
  - e. Forging application forms for land control board consent.
  - f. Uttering forged title deeds and transfer forms.
  - g. Issuing title deeds to the Defendants.
  - h. Approving illegal subdivisions of the suit property.
  - i. Illegally sub - dividing the suit property and issuing new title deeds for the sub – divisions.
  - j. Amending the Registry Index Map.
  - k. Conspiracy to defraud the Plaintiff.
  - l. Making fraudulent claims of ownership on the suit property.
14. The Plaintiff prayed for Judgement to be entered against the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants jointly & Severally for:-



- a. Orders directed to the 3<sup>rd</sup> Defendant to cancel the green cards/land registers for all those parcels of land registered as Kwale/Diani SS/4227 to 4244 registered in the names of the 2<sup>nd</sup> Defendant.
  - b. Orders directed to the 3<sup>rd</sup> Defendant to cancel the green cards/land registers for all those parcels of land registered as Kwale/Diani/159 registered in the names of the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendants.
  - c. Orders directing the 3<sup>rd</sup> Defendant to reinstate the green card/land registers in the names of the Plaintiff
  - d. Order directing the relevant survey office to consolidate all the sub - divisions of the suit property registered as Kwale/Diani SS/4227 to 4244 and amend the registry index map (RIM) and reinstate the original property number registered as Kwale/Diani/159
  - e. Permanent orders of injunction to issue against the 2<sup>nd</sup> Defendant restraining him, his servants, agents, employees and or any person acting on his behalf from trespassing or in any way dealing with all that parcel of land formerly registered as Kwale/Diani/159 and the sub - divisions thereof registered as Kwale/Diani SS/4227 to 4244.
  - f. Orders of demolition of any structures that may be erected on all that parcel of land formerly registered as Kwale/Diani/159 and the sub - divisions thereof registered as Kwale/Diani SS/4227 to 4244
  - g. Orders of eviction to issue against the 2<sup>nd</sup> Defendant on all that parcel of land formerly registered as Kwale/Diani/159 and the sub - divisions thereof registered as Kwale/Diani SS/4227 to 4244
  - h. Costs and interests of the suit
15. The Plaintiff called his witness on 9<sup>th</sup> June 2025 and who testified as follows;

**A. Examination in Chief of PW- 1 by Mr. Mungai Advocate**

16. PW - 1 testified under oath in English language. She identified herself as DENISE NATHALIE DURR. She was a citizen of Kenya holding a national identity card bearing all the particulars as shown to court. She was testifying on behalf of company. That the director of the company one MR. Manfred Wenzel had donated to her through the Specific Power of Attorney dated 31<sup>st</sup> October, 2023, to testify on behalf of the company. The witness referred to the List of documents dated 11<sup>th</sup> December, 2023 which contained 13 documents – Plaintiff's Exhibit No. 1 to 13 produced in that order accordingly. Further, the specific Power of Attorney dated 31<sup>st</sup> October, 2023 from the List of Documents dated 9<sup>th</sup> June, 2025 – Plaintiff Exhibit No. 11.
17. The witness was referred to the 3<sup>rd</sup> Defendant's list of documents dated 19<sup>th</sup> July, 2024. The witness stated that the same were not original – i.e., the cards for LR. No. 159 and the entries no. 1 to 4 not signed – measures 2.1 HA. She referred to the List of Documents by the Plaintiff's page 24 – by the Plaintiff's its 2.03 HA. Page 28 of the Plaintiff's list indicated the acreage as – 2.03 HA. The two sizes on the title and Green card were not corresponding. On her side they should be corresponding page 25 – the title was opened on 15<sup>th</sup> November, 1974. The scheme was opened in the year 1992 February that hence the green card was forgery as it was opened before the scheme had already been opened. It was not possible.



18. The witness Referred to page 23 – Plaintiff Ex 3 i.e., the transfer and the sub-division were done illegally. That the Plaintiff is still in possession of the title deed. That the Plaintiff is an incorporated company by limited guarantee – certificate of incorporation no. C. 67943. At Page 44 – there is a list of directors and the resolution Plaintiff Ex No. 13 dated 13<sup>th</sup> July, 2023; to file the case. The Plaintiff referred to Plaintiff Exhibit No. 1 – It's the Sale Agreement of 159/Kwale/Diani dated 5<sup>th</sup> July, 1995, for consideration and payment of stamp duty. The Plaintiff referred to Exhibit no. 4 dated 27<sup>th</sup> November, 1995 meaning 2.0 HA – opened on 10<sup>th</sup> March, 1992. (pages 19 and 20)
19. That the title deed No. 24 were issued on 2<sup>nd</sup> October, 2023 to James Nyoike Kinuthia – 1<sup>st</sup> Defendant and to Godfrey Mhuri Gachira – 2<sup>nd</sup> Defendant issued on 12<sup>th</sup> February, 2016. There was no gazettelement and hence it was not procedural. In my view the way the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired the land was unprocedural.
20. PW - 1 further stated that the failure to defend the case was a clear case to this effect that they were admitting that the process was unprocedural. Lastly the witness stated that an application had been made to amend the plaint and substitute the 2<sup>nd</sup> defendant who had passed on as per the limited grant produced as Plaintiff Ex 15 – The application for leave of the Amended Plaint was allowed on 24<sup>th</sup> June, 2024. It was the Plaintiff who was in occupation of the suit property. The Plaintiff prayed that the Green Cards to the suit land be cancelled and the sub - division put on record as it was there originally.

#### **B. Cross - Examination of the PW – 1 by Ms. Mwanaszumba Advocate.**

21. PW - 1 confirmed that the Green Card by the 3<sup>rd</sup> Defendant is not the original Green Card and so is the one produced by the Plaintiff. That both of them were not original. There was no re-examination. The Plaintiff closed its case through its counsel Mr. Mungai.

#### **V. The Defendants case**

##### **The Statement of Defence by the 3<sup>rd</sup> Defendants.**

22. The 3<sup>rd</sup> Defendant filed his defence dated 29<sup>th</sup> January, 2024 through the office of the Attorney General on 2<sup>nd</sup> February 2024. The said party denied the averments raised in the Amended Plaint save for the descriptive nature of the parties. The Plaintiff was put to strict proof of the alleged legitimate ownership of the suit property Kwale/Diani/159.
23. The 3<sup>rd</sup> Defendant denied averments under Paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of the Amended Plaint on the legitimate purchase and occupation of the suit property as pleaded.
24. The 3<sup>rd</sup> Defendant denied the averments and particulars of fraudulent transfers listed in the Amended Plaint.
25. The 3<sup>rd</sup> Defendant further stated that the suit had been overtaken by events and is guilty of laches hence untenable in law. Reliance was placed on the Limitation of Action Act. Further that the suit was time barred whether filed as a tortious claim for fraudulent transfer or as a contract of purchase or as a suit to recover land.
26. That no leave of court had been obtained before filing of the suit out of time. It was stated that the court also lacked the jurisdiction to determine the suit considering the time of limitation goes to the core of the suit.
27. The 3<sup>rd</sup> Defendant stated in its defence that the Plaintiff had failed to exhaust the internal dispute resolution processes available under the provision of Sections 79[2] and 80 of the [Land Registration](#)



Act, no. 3 of 2012 and that a preliminary objection would be raised on this point. That the notice of intention to sue was not served and hence the suit was fatally defective.

28. The court was urged to dismiss the suit with costs.
29. On 9<sup>th</sup> June 2025, the 3<sup>rd</sup> defendants case proceeded for hearing with DW-1 testifying as follows; -

#### **A. Examination in Chief of DW – 1 Ms. Mwanaszumba Advocate**

30. DW-1 was sworn and testified in English language. The witness identified herself as Susan Mueni – Land Registrar Kwale PF No. 2015000474. She had been in Kwale from the year 2022. The witness informed court that on 19<sup>th</sup> July, 2024 she recorded a witness statement and wished to adopt it as evidence in chief. The witness further referred to 5 documents filed on 19<sup>th</sup> July, 2024 as 3<sup>rd</sup> Defendant Exhibit Numbers 1 to 5 and produced there.
31. DW - 1 stated that the suit property was Kwale/Diani SS/159 – measuring 2.1 HA (5.7 acres). That what they had was a re-constructed file meaning the original file was never there or was missing. DW - 1 stated that she was not able to tell how the original file went missing. That from the file, the suit property was first reported to Lawrence Kanyatta Ndinga on 15<sup>th</sup> November, 1974 and was issued with a title deed. On 2<sup>nd</sup> October, 2023, the Land was transferred to James Nyoike Kinuthia; On 12<sup>th</sup> February, 2016 – Mr. Kinuthia transferred it to Godfrey Mbuuni Gachira. On 30<sup>th</sup> October, 2023, Mr. Gachira sub-divided the Land to Parcel No. 4227 to 4244. That Parcel No. 4227 – 4244 on 17<sup>th</sup> January, 2024 was encumbered things cautions by Plaintiffs claiming ownership to the mother title.
32. The witness stated that they did not have any evidence to show that Lawrence Kanyatta Ndung’u was allocated the suit property by the settlement scheme i.e., to show that he was allocated the land. From the 3<sup>rd</sup> Defendants list of documents, they had a Letter of Consent dated 27<sup>th</sup> November, 2016 from James Nyoike Kimathi to Godfrey Mburu Gacharia. There was a transfer of Land dated 12<sup>th</sup> February, 2016 in the names of Godfrey Mbuuri Gachimu – i.e., the title deed.

#### **B. Cross-Examination of DW - 1 by Mr. Mungai Advocate**

33. DW - I testified that there was no record from the Land Adjudication Record of the suit property being Land from settlement scheme. The Land Registrar stated that her file was a reconstructed file. Referred to the Plaintiff bundle page 41 she confirmed there is an Adjudication section scheme for parcel no. 159. It was Diani Settlement scheme dated 16<sup>th</sup> November, 2023 for Lawrence Kangethe. She had not seen any green card for this scheme and stated she could confirm from other records – referring to show record here opened in 1991 – 1992. That this meant that all the registered registers were in the year 1990 to 1992 and not earlier; i.e., 1974.
34. DW - 1 stated that from the Green Card – it showed the title measures 2.1 HA but the one by the Plaintiff was 2.3 HA. For the 2<sup>nd</sup> Defendant it showed 2.01 – title shows 2.03 HA. That the same must have been a typographical error and hence it should not have been sub-divided. The Green Card shows the Green Card was opened by the Land Registrar under the Provision of Section 79 (1) and (2) of Land Registration Act of 2022.
35. DW-1 stated that these provision of the law talk of the alteration of the Register by the Land Registrar based on omission; mistake or fraud but not one that charges the proprietorship of the land. That there is no publication of the notice in the Kenya Gazette. She stated that mandatory procedures were not followed. That the card was never issued procedurally; as a result, or that the entries in the name of 1<sup>st</sup> and 2<sup>nd</sup> Defendants i.e., sub-division were never valid.



### **C. Re - Examination of DW - 1 by Ms. Mwanaszumba Advocate.**

36. Referred to the provision of Section 79 (1) and (2) of the LRA No. 3 of 2025; at the time of the Gazettement the person who applied for reconstruction never presented the documents from the settlement scheme.
37. The 3<sup>rd</sup> Defendant's case was closed by counsel for the 3<sup>rd</sup> Defendant Miss Mwanaszumba.

### **VI. Submissions**

38. On 9<sup>th</sup> June 2025 after the Plaintiffs and Defendants marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on.
39. Subsequently, all parties herein complied with the said directions and the submissions are summarised as here below. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 25<sup>th</sup> September 2025. Eventually, the Judgement was delivered on 6<sup>th</sup> February 2026 accordingly.

### **A. The Written Submissions by the Plaintiffs**

40. The Plaintiff's submissions were dated 22<sup>nd</sup> July 2025 and were filed by the Law firm of Mungai Kamau & Co Advocates for the Plaintiffs. Mr. Mungai Kamau Advocate commenced his submissions by giving a brief preview of the facts leading to the dispute before court and identified three ( 3 ) issues for determination as follows. Firstly, on whether the Plaintiff is the legally registered owner of the suit property. The Learned Counsel submitted that the Plaintiff had testified that it acquired the suit property from Lawrence Kang'ethe Ndungi vide agreement for sale dated 5<sup>th</sup> July 1995. That the Plaintiff had also demonstrated that the said Lawrence Kang'ethe Ndungi was the 1<sup>st</sup> allottee of the subject property by the Government. The Plaintiff produced exhibits demonstrating payment of the purchase price and produced a title deed in its name confirming it was the registered owner, thus demonstrating it was acquired for valuable consideration, lawfully and procedurally.
41. Reference was made to the provisions of Section 26 of the *Land Registration Act* on the sanctity of title and circumstances when the same can be impeached. The Plaintiff's title deed has never been impeached or nullified by any Court of law.
42. Secondly, on whether the Plaintiff's title deed was acquired procedurally and legally. The court was referred to the provisions of Sections 107 & 109 of the *Evidence Act*, Cap. 80 on discharge of the burden of proof in civil cases. It was submitted that the Plaintiff upon enquiry at the registry discovered a forged green card which was opened on 15<sup>th</sup> November 1974 and a title deed was issued to Lawrence Kang'ethe Ndungu who later, on 2<sup>nd</sup> October 2013 transferred to the 1<sup>st</sup> Defendant. Thereafter, on 12<sup>th</sup> February 2016 it was transferred to the 2<sup>nd</sup> Defendant. On 30<sup>th</sup> October 2019, it was then closed on sub – division and new numbers registered as Kwale/Diani SS/4227 to 4244.
43. Upon inspection of the green card, it was discovered to have many discrepancies, which included:
  - i. The green card was opened before the Diani Settlement Scheme came into existence. i.e., it was opened on 15<sup>th</sup> November 1974.
  - ii. The entries on the green card are not being signed by the Land Registrar.
  - iii. The forged green card indicates that the suit property was located on Map sheet 1 instead of Map sheet 2.



- iv. The forged green card indicates the size of the suit property is 2.1 Ha, whereas the actual size according to the Registry Index Map and adjudication office is 2.0 Ha (This information is also available to the Defendants.
  - v. The opening of another green card did not follow the due process, which entails gazettelement in the Kenya Gazette.
44. The Learned Counsel relied on the dictum in the case of “Mutiria Karumbai Macaw – Versus - James Njagi Makembo & 3 others [2018] eKLR” where the court held that allegations of fraud must be proved through cogent evidence whose degree of proof must be higher than the ordinary proof of balance of probabilities required ordinarily. Also in the case of “Vijay Morjaria – Versus - Nansign Madhusingh Darbar & Another 2000 eKLR” where the Court held that the particulars alleged must be specifically stated on the face of the pleadings. Further in the case of “Stephen Murithi M’Ngaruthi – Versus - George Muthinja [ 2018 ] eKLR” Court emphasised Section 26 of the [Land Registration Act](#) and stated at Paragraph 13 of the Judgement as follows:-
- “The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation, which the owner of the property is proved to be a party. Such is the sanctity of the title holder under the Act.”
45. It was submitted that the Plaintiff’s evidence of fraud by the Defendants was specifically pleaded in the particulars of fraud, forgery and misrepresentation and proven during the hearing and the exhibits produced, especially exhibit No. 5, which was the green card for the suit property before subdivision. The Plaintiff’s evidence was further corroborated by the evidence of the 3<sup>rd</sup> Defendant through her oral evidence in court during her cross-examination.
46. The 3<sup>rd</sup> Defendant, through the evidence of the Land Registrar M/s. Susan Mueni, admitted during cross examination that the green card that was subdivided was a forgery, and it was opened without due process since there were no supporting documents in support of its opening. She further admitted that the said green card was not the original green card and that the suit property was not in existence on 15th November 1974, and that the Diani Settlement Scheme was registered in the 1990s. Section 33(5) of the [Land Registration Act](#) states:
- “The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.”
47. The Learned Counsel submitted that the above section is relevant in the application for the reconstruction of the land register. This Section deals with the powers of the Registrar to reconstruct any lost or destroyed land register. The Registrar is required to make enquiries as to the loss or destruction of the land register sought to be reconstructed. And after being satisfied of the loss or destruction, the Registrar issues a notice of Sixty (60) days in the Gazette and any local newspapers of nationwide circulation before reconstructing the lost or destroyed land register. Reference was also made on the provisions of Regulation 28 of the Land Registration (General) Regulations, 2017 which provides for the procedure for reconstruction of a lost land register.
48. Lastly, the Plaintiff submitted on whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired good titles it was stated that the doctrine of innocent purchaser cannot apply to the Defendants herein as was held by the Supreme Court in the case of: “Dina Management Limited – Versus - County Government of Mombasa & 5 Others” which stated that an unlawfully acquired title could not be protected by



the court for that reason the 1<sup>st</sup> and 2<sup>nd</sup> Defendants could not benefit from the doctrine of bona fide purchaser.

49. In conclusion, the Plaintiff submitted that it had proved its case in challenging the title deed in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, despite service did not file any defence challenging the averments by the Plaintiff. The court was urged to allow the plaint as prayed.

### **B. The Written Submissions by the 3<sup>rd</sup> Defendant**

50. On behalf of the 3<sup>rd</sup> Defendant, the submissions were filed before court by the office of the Attorney General dated 30<sup>th</sup> July 2025. Miss Mwanaszumbah Monica Senior State Counsel commenced by stating a summary of the evidence presented by DW - 1 and its import. Having already summarised the same above herein, the court would not reproduce the testimony once more.
51. The 3<sup>rd</sup> Defendant submitted that the missing original parcel file and green card for the suit property led to reconstruction and opening of a new green card. However, it was also the 3<sup>rd</sup> Defendant's evidence that the entries should have been endorsed as proof that they were generated by the Office of the 3<sup>rd</sup> Defendant and thus there being no endorsement, the Entries nos. 1-4 on the green card were not valid. The lack of reference to a gazette notice compounded the belief that the same may not have originated from the 3<sup>rd</sup> Defendant's Office.
52. It was submitted that the 1<sup>st</sup> Defendant did not enter appearance to defend his title in this case and the 3<sup>rd</sup> Defendant did not hold his brief. The 3<sup>rd</sup> Defendant was not involved in any fraudulent activity with regards to the suit property but conducted his duty as per the *Land Registration Act* and the Land Registration (General Amendment) Regulations 2023 and was thus indemnified from liability.
53. The Learned Counsel submitted that the entries for the 1<sup>st</sup> Defendant not having been endorsed against, the Plaintiff had not proved that the Land Registrar was involved in any fraudulent activities in relation to the suit property, if any.

### **VIII. Analysis and Determination**

54. I have keenly assessed the filed pleadings by all the Plaintiff and 3<sup>rd</sup> Defendant herein, the written submissions, cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
55. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three [3] salient issues for its determination. These are: -
- a. Whether the suit instituted by the Plaintiff herein through an amended Plaint dated 29<sup>th</sup> February 2024 has any merit or not whatsoever.
  - b. Whether the Plaintiff is entitled to the prayers sought.
  - c. Who bears the costs of the suit?

#### **ISSUE No. a). Whether the suit instituted by the Plaintiff herein through an Amended Plaint dated 29<sup>th</sup> February 2024 has any merit or not.**

56. In analysing the issues that arise under this sub heading, the court has identified the following significant issues for consideration
- a. Whether the suit property herein was under a Settlement Scheme and if so, during which period of time



- b. Whether the 3<sup>rd</sup> Defendant acted fraudulently in the subsequent transfers, subdivisions and registration of the suit property and
  - c. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were innocent purchasers for value
  - d. Whether as a result thereto the titles were null and void
  - e. The facts leading to the suit before court could only be compared to a classic novel tale on the intricacies surrounding land conveyancing in Kwale County and the country at large. The only difference would be that unlike classic novel tales that are fictional in nature, the instant proceedings are factual and give a deep insight into the state of land transactions in the recent times based on the numerous cases handled by this court.
57. In identifying the first issue, the court is informed by the allegations raised by the Plaintiff who stated that from the 3<sup>rd</sup> Defendant's evidence, the suit property was allocated to its first allottee the SFT and was later transferred to Lawrence Kang'ethe Ndung'u on 15<sup>th</sup> November 1974. According to the Plaintiff, the Diani Settlement Scheme did not even exist during that time. That the green card and records relied upon by the 3<sup>rd</sup> Defendant were therefore a forgery as the information they contained was not factual.
58. It is trite law that settlement schemes are governed by Sections 134 and 135 of the Land Act, No. 6 of 2012 this was discussed at length in the case of:- "Philemon L. Wambia – Versus - Gaitano Lusista Mukofu & Others [2019] KECA 157 [KLR]".
59. It is also trite law that the Settlement Fund Trustees under the repealed Agriculture Act [now repealed] was initially the body mandated to allocate land within a settlement scheme once the land was acquired for settlement purposes. Under Sections 134 and 135 of the Land Act, the identification and verification of the beneficiaries is provided for under Section 134 (4) of the Land Act, No. 6 of 2012. In the case of:- "Bandi – Versus - Nzomo & 76 Others (Civil Appeal No. 16 of 2001 [2022] KECA 584 [KLR] (24th June 2022)(Judgment)", the Court of Appeal stated that the operative law for a settlement scheme are Sections 134 and 135 of the Land Act No. 6 of 2012, which set out how National Land Commission creates settlement schemes, how and who is entitled to the land in these schemes, manner of setting up the authority responsible for identifying the beneficiaries and manner of acquiring land for the establishment of settlement programs.
60. At this point, the court will not be concerned with the entire process of allocation of land under a settlement scheme as it is not contested. Nonetheless, the Court has taken the trouble of highlighting the above provisions of statute and case law in a bid to re - affirm that the whole process of land allocation through the settlement schemes is in fact provided for in law. What is contested is the time period as to when the first allottee in relation to this suit was allocated the land. From the evidence adduced by the DW – 1, the Land Registrar, the register for the Diani Settlement Scheme only came into existence in the year 1991-1992 and not 1974 as alleged.
61. This information leads to the question as to when and how the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were able to obtain registration of the suit property through a green card that indicated the suit property had first been registered in the year 1974. As it is, it has been confirmed that the record as relied upon by the 3<sup>rd</sup> Defendant is not factual, the Diani Settlement Scheme was not in existence as at the year 1974. The evidence on record and which has not been disputed by DW - 1 is that the RIM giving rise to the settlement scheme was opened on 4<sup>th</sup> February 1992 and was not present before then. The green card indicating 15<sup>th</sup> November 1994 as the first registration of the suit property is thus a forgery.



62. As to whether the 3<sup>rd</sup> Defendant acted fraudulently in the subsequent transfers, subdivisions and registration of the suit property. Black's Law Dictionary, 9<sup>th</sup> Edition defines fraud as:-

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

63. In the case of:- “Arthi Highway Developers Limited – Versus - West End Butchery Limited & 6 others [2015] eKLR”, the Court held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford – Versus - Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune – Versus - Occident [1989] 1 Lloyd's Rep. 305, 308).

64. The Plaintiff has pleaded acts of fraud on the part of the Defendants. It is incumbent upon the court to determine whether the same has been proved by the Plaintiff to the required standard which is slightly higher than the balance of probabilities. In the case of “Koinange & 13 Others – Versus - Koinange [1968] KLR 23” the Court of Appeal held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities.

65. The titles held by the 2<sup>nd</sup> Defendant as a result of the subdivision of the suit property are under challenge by the Plaintiff. It is incumbent upon the Plaintiff to prove that indeed the said register, titles and green card which are as a result of the subdivision of the suit property are a forgery and that the 1<sup>st</sup> Defendants title was also procured fraudulently and which fraud was enabled though the 3<sup>rd</sup> Defendant's actions. The Plaintiff has maintained that to date, it holds the original title to the suit property and the court is keen on having the plaintiff to show the root of its title and its legality.

66. I will draw guidance from the Court of Appeal in the case of:- “Munyu Maina – Versus - Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR”, stated 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. From the entire proceedings there is no dispute that the initial 1<sup>st</sup> registered owner of the suit property was the SFT. What has been in dispute is when the suit property was allocated and transferred Lawrence Kang'ethe Ndung'u. As was discussed earlier, the register for the Diani Settlement Scheme was created in the years 1991-1992. The Plaintiffs evidence was that the suit property was transferred to Lawrence Kang'ethe Ndung'u and registered on 13<sup>th</sup> March 1992, this was as per the initial records availed by the Plaintiff through a green card.
68. However, there is still yet another green card that was produced by DW - 1 and which indicated that Lawrence Kang'ethe Ndung'u was allocated the land on 15<sup>th</sup> November 1974. Clearly, the allocation for the year 1974 is not factual because as at that time, the Diani Settlement Scheme register was not in existence as confirmed by the evidence by the DW - 1 the custodian of such records.
69. The Plaintiff also informed the court that the process through which the suit property was transferred to the 1<sup>st</sup> Defendant was fraudulent. This was for the simple fact that according to the evidence of DW - 1, the original file holding the records to the suit parcel was not traceable. That the same informs the decision to reconstruct the green card and thereafter transfer the suit property to the 1<sup>st</sup> Defendant on 2<sup>nd</sup> October 2013. The Plaintiff maintained that the process of reconstruction of the green card was not followed a fact that was confirmed by DW - 1 in her cross examination. The court will now interrogate the said process to establish the authenticity of the green card held by the 3<sup>rd</sup> Defendant.
70. To kick-off this discussion, the court will highlight the provisions of Section 79 of the LRA which governs rectification of land register by the Registrar. It provides, inter alia, that the Registrar may rectify the register or instrument presented for registration in formal matters and in the case of errors or mistakes and for purposes of updating the register. Sub-sections 2, 3A and 4 of the said Section read:
2. No alteration affecting the title of a proprietor may be made pursuant to sub-section (i) without the proprietor's consent unless;
- a) The proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or
- b. It would for any other reason be unjust for the alteration not to be made. provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.
- (3A) A person aggrieved by the decision of the Registrar under this section may apply to the court for any necessary orders.
- (4) The Cabinet Secretary may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under this Section and without prejudice to the generality of the foregoing, the regulations may provide for: -
- a) The process of investigation including notification of affected parties.
- b) Hearing of the matters raised; and
- c) The criteria to be followed in coming up with the decision
71. In addition, Rule 92 (2) and (3) of the Land Registration[General] Regulations published vide Legal Notice No 278 of 2017 and which commenced on 24<sup>th</sup> November 2017, stipulates that;
- a) The Registrar shall issue a notice of intention to rectify the register under 79(2) of the Act, in Form LRA 91 set out in the Sixth schedule.



- b) An order by a Registrar issued under section 79 of the Act shall be in Form LRA 92 set out in the Sixth Schedule.
72. These provisions clearly establish that the power of the Registrar to rectify the register is administrative and limited. The Registrar may correct typographical errors, misdescriptions, or non-material discrepancies. However, where the rectification would affect the ownership or title of a registered proprietor, such action cannot be taken administratively and requires the intervention of the Court under Section 80 of the Land Registration Act, No. 3 of 2012. Section 80(1) of the same Act provides that:
- “Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
73. The provision further limits rectification affecting a registered proprietor’s title unless it is shown that the proprietor had knowledge of or substantially contributed to the omission, fraud, or mistake. It therefore follows that the distinction between Sections 79 and 80 is crucial: Section 79 governs administrative corrections by the Registrar, while Section 80 vests the power to cancel or amend a title in the Court upon proof of fraud or mistake.
74. In the same breadth, the provision of Section 33 of the Land Act provides the procedure for replacement of lost or destroyed certificates of title and registers of land. It provides that, in case of loss or destruction of a certificate of title or certificate of lease, an application for replacement is to be made to the Land Registrar by the proprietor of the land or lease accompanied by evidence of such loss or destruction. If the Land Registrar is satisfied with the evidence of such loss or destruction, he shall issue a replacement thereof after expiry of 60 days of publication of the application in the Gazette and in any two local newspapers of nationwide circulation.
75. The term “rectification of register” is defined in Black’s Law Dictionary, 10<sup>th</sup> Edition, page 1467 as:-
- “a process by which a person whose name was wrongly entered in or omitted from the record can compel the recorder to correct the error.”
- This definition reinforces the legal principle that rectification may involve correcting clerical or administrative errors but does not extend to substantive alteration of ownership unless by judicial sanction.
76. The Land Registrar who is the 3<sup>rd</sup> Defendant herein did not follow the procedures that have been outlined in the above provisions of law. It was further not within the powers of the registrar to proceed with cancellation of the title held by the Plaintiff and proceeding to register the suit property in the name of the 1<sup>st</sup> Defendant and later enabling the transfer to the 2<sup>nd</sup> Defendant and lastly aiding in carrying out sub - divisions of the suit property.
77. In saying so, I am guided by an excerpt discussing a similar issue in the case of:- “Mwareri – Versus - Land Registrar (Naivasha) & 3 others (Environment and Land Judicial Review Case E3 of 2022) [2023] KEELC 20162 (KLR) (22 September 2023).
78. Also in the case of “Republic – Versus - Chief Land Registrar & another Ex - Parte Yosabia Kerubo Manyura [2018] eKLR”, it was held as follows:
- “It is evident from the provisions of section 79 that the land registrar’s powers of rectification are limited to rectifying errors, mistakes or omissions that do not materially affect the



interests of any proprietor. Cancellation of a title quite clearly would materially affect the interest of the registered proprietor. In my view, it is only the court that under section 80(1) of the *Land Registration Act*, 2012 that has the power to direct the cancellation of a registration. ....I therefore hold that the land registrar lacked the jurisdiction to cancel the Applicant's title and in doing so he acted ultra vires and his actions are amenable to an order of certiorari. Having held that the land registrar did not have jurisdiction to cancel the applicant's title it follows that no due process was followed in effecting the cancellation of the title as the land registrar could only cancel the title if he was ordered to do so by the court. The land registrar in the circumstances of the case only had jurisdiction to place a restriction against the land pending determination of the issue whether or not the Applicant was validly registered as the owner of the land by the court."

79. For the above reasons the court is satisfied that the aspect of fraud has been clearly demonstrated by the Plaintiff.

80. On whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are innocent purchasers for value. Black's law Dictionary 10<sup>th</sup> Edition defines a 'bona fide purchaser' as follows:-

'One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.'

81. Further, on this legal position, I seek reliance to a few cases including of:- "Arthi Highway Developers Limited (Supra)", where the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. Further in the Uganda Court of Appeal Case of "Katende – Versus - Haridar & Company Ltd (2008) 2 EA 173", the Court defined what amounts to a bona fide purchaser for value thus: -

"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine ... (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud."

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.'



82. While in the case of “Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura – Versus - Attorney General & 4 others (2017) eKLR”, the Court of Appeal held that a party cannot claim a bona fide purchaser for value where the vendor did not have a valid title.
83. In the instant case, I first wish to point out that the court was alarmed by the failure by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to participate in this suit despite proper service having been effected upon them. The nature of the prayers sought are adverse against their ownership interests and it would therefore be somehow incumbent of them to defend their interest on the suit property and particularly the 2<sup>nd</sup> Defendant. These actions have raised brows as to what might be the motive for this show of indifference and lean towards conduct evidence.
84. My conviction on this issue is affirmed by the dictum in the case of “Stanley Mombo Amuti – Versus - Kenya Anti-corruption Commission [2019] eKLR” where the court appeal had this to say:-
- “84. We note that the failure to call a particular witness or voluntarily to produce documents or objects in one’s possession is conduct evidence. (See J. Wigmore, Evidence § 265, at 87 (3d ed. 1940). In principle, failure by a party to call a material witnesses may be interpreted as an indication of knowledge that his opponent’s evidence is true, or at least that the tenor of the evidence withheld would be unfavorable to his cause. An inference will not be allowed if a party introduces evidence explaining the reasons for his conduct, and reason for failure to call a witness and if the evidence is truly unavailable or shown to be immaterial.<sup>85</sup> Comparatively, in *Bukenya and Others v Uganda* [1972] EA 549, it was stated that a court may infer that the evidence of uncalled witnesses would have tended to be adverse. In *Mann Holdings Pte Limited and another – Versus - Ung Yoke Hong* [2018] SGHC 69, the Singapore High Court drew adverse inference against a party who had failed to call crucial witnesses to testify at trial. In *Elgin Finedays Limited – Versus - Webb* 1947 AD 744, it is stated at 745: “... it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him ...”.
85. Now back to the issue as to whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were bonafide purchasers for value. The court recognises the need to discuss this issue so as to establish whether the titles held by them are legal. It is clear that the process through which the 1<sup>st</sup> Defendant acquired the suit property was marred with numerous irregularities, mistakes and illegalities. The Plaintiff has demonstrated that the process through which the subsequent transfer even to the 2<sup>nd</sup> Defendant was made was certainly not legal, proper nor right. It is trite that a title obtained illegally does not enjoy the protection of the law through grounds of indefeasibility.
86. I am in agreement with the dictum in the case of:- “Robert Mutiso Lelli – Versus - Kenya Medical Training College & 2 others [2021] eKLR”, where the Court of Appeal stated:
- “We have found that the allocation and issuance of titles to the subject plots to the Appellant was irregular and unlawful. And though Article 40 guarantees the right of every person to acquire property, Article 40 (6) qualifies this right to exclude “...any property that has been found to be unlawfully acquired.”



87. Similarly, the Supreme Court in the case of: “Dina Management Limited – Versus - County Government of Mombasa & 5 others [2023] KESC 30 (KLR)” had this to say:

“To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment...Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired.”

88. I will now embark on discussion of the last issue on whether the titles held by the Defendants are null and void. The 3<sup>rd</sup> Defendant through its witness DW - 1 did not offer any explanation as to how there was issuance of a new title to the 1<sup>st</sup> Defendant when another title was in existence and in possession of the Plaintiff. The provision of Section 31 of the Land Registration Act, No. 3 of 2012 Act provides that unless the Land Registrar dispenses with the production of a Certificate of Title or a Certificate of Lease, the same must be produced during the registration of any dealing with the land or lease to which it relates.

89. In the instant case, it is outright that the 3<sup>rd</sup> Defendant has not followed the procedure prescribed above, given that there is no evidence before me that an application for dispensation with the production of the certificate of title of the land herein had been made to the Land Registrar. Having not followed the proper procedure in obtaining registration in their names, the titles held by the 1<sup>st</sup> Defendant and then transferred to the 2<sup>nd</sup> Defendant are therefore null and void and cannot be protected by this Honourable Court.

**ISSUE No. b). Whether the Plaintiff is entitled to the prayers sought.**

90. Under this Sub – title, the Honourable Court will be examining whether the parties are entitled to the reliefs sought. The Plaintiff sought for several orders and which include cancellation of the green card giving rise to the title issued to both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The court has also been asked to issue orders consolidating the sub - divisions arising from the suit property back to the original parcel and for orders of permanent injunction and eviction of any person in occupation. It is clear from the proceedings the court is faced with two competing titles over the same suit property.

91. It was therefore upon each party had to defend their individual titles both having been under challenge. This is the position that has been taken by the courts when faced with multiplicity of titles on the same subject matter. The existence of the two parcels in their current state offends the provision of Section 30 (2) of the Land Registration Act, which provides that only one Certificate of Lease or title may be issued in respect of each parcel of land.

92. In the case of:- “Daudi Kiptugen – Versus - Commissioner of Lands & 4 Others (2015) eKLR” the court stated: -

‘In order to determine the question whether the lease held by the Plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The



acquisition of title cannot be construed only in the end result; the process of acquisition is material.’

93. In the case of “Hubert L Martin & 2 Others – Versus - Margaret J Kamar & 5 Others [2016] eKLR”:- the court stated thus: -

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

94. The burden of proof was on the Plaintiff to prove the existence of the facts she alleges to exist in accordance to the provisions of Sections 107, 108 and 109 of the Evidence Act Chapter 80 of the laws of Kenya to wit he who alleges must prove. The standard of proof is on a balance of probabilities. In the case of “Stephen Wasike Wakhu & Ano – Versus - Security Express Limited [2006] eKLR” the court commenting on the provisions of section 107 posited that a party seeking justice must place before the court all material evidence and facts which if considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available.

95. The provision of 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.”

96. Applying the above provisions to the instant case, I hold that the title of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants can be impeached under the above two exceptions. Specifically, that is on grounds of fraud to which the person is proved to be a party. I have already made a finding of fraud against the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Further, the title may also be impeached on the grounds of irregularities. The irregularities with the 2<sup>nd</sup> Defendants title have already been highlighted and it does not matter who occasioned them. See the persuasive dictum of Angote J in the case of:- “Wakaimba – Versus - Registrar & 3 others (Environment & Land Case 617 of 2011) [2025] KEELC 1058 (KLR) (6 March 2025) (Judgment)”

97. In the case of “Chemey Investments Limited – Versus - Attorney General & 2 Others, CA No. 349 of 2012, the Court of Appeal held that sanctity of title to land registered under the repealed Act was



guaranteed and could not be defeated except on the specific grounds set out therein. Where, however, title to property was obtained fraudulently or illegally in violation of the provisions of the Act, except a first registration the same was not sacrosanct, did not enjoy any protection, and the Court had power to order rectification of the register.

98. The provisions of Section 80 of the *Land Registration Act* are also pertinent with regard to the reliefs sought. These are on Rectification by order of Court and stipulate; -80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
99. The court having found in favour of the Plaintiff, it follows that then the land register must be corrected to reflect the correct position and all irregular entries removed. On this I am guided by the holding in the case of:- “Mistry Amar Singh – Versus - Serwano Wofunira Kulobya [1963] EA 408”, it was held that whenever an act of illegality is brought to the attention of the Court, then the Court will not allow anybody to benefit from such an illegality.

Further in the case of: “Elijah Makeri Nyangw’ra – Versus - Stephen Mungai Njuguna & Another (2013) eKLR” where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of the provision of Section 26(1) (a) and (b) of the *Land Registration Act*, No. 3 of 2012

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

100. On the prayers for permanent injunction against the Defendants, it is trite that this would be the right stage at which to grant prayers for permanent injunction. A permanent injunction defines the rights of the parties after the suit is heard on merit. Having made a finding that the Plaintiff is the rightful owner of the suit property it is imperative that the 2<sup>nd</sup> Defendant is permanently restrained from claiming any right or doing any act over the property that would go against the Plaintiffs right. It is this court’s finding that this prayer is merited. See the decision in the case of:- “Kenya Power & Lighting Co. Limited – Versus - Sheriff Molana Habib [2018] KEHC 5027 (KLR)”.
101. Regarding the prayer for eviction, it is trite that the right to absolute and exclusive possession of property by the title owner cannot be realized if there is any interference with such rights. In this regard, it is imperative to observe that an eviction order would go a long way in ensuring that the title owner enjoys the exclusivity in possession and occupation of the designated property. In short, the Plaintiff is entitled to an order of eviction.

#### **ISSUE NO. c). Who bears the costs of the suit**

102. It is trite law that the issue of costs is at the discretion of the Court. Costs mean the award a party is granted at the conclusion of the legal proceedings or action in any litigation. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 provides that costs follow the events. By events it means the result of outcome of the said legal action or proceedings.



103. In this case, the Plaintiff's case has succeeded in proving its case. Thus, he is entitled to costs to be borne by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants jointly and severally

### C. Conclusion & Disposition

104. The upshot of all this, having caused an indepth analysis to the framed issues herein, the Honourable Court based on the principles of Preponderance of probability and balance of Convenience, finds that the Plaintiff has successfully established its case. For avoidance of doubt, the Honourable Court specifically proceeds to make the following orders:-

- a). That Judgement be and is hereby entered in favour of the Plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants jointly and severally in the following terms:-
  - i. Orders are hereby issued directed to the 3<sup>rd</sup> Defendant [the Land Registrar, Kwale County] to cancel the green cards/land registers for all those parcels of land registered as Kwale/Diani SS/4227 to 4244 registered in the names of the 2<sup>nd</sup> Defendant.
  - ii. Orders are hereby issued directed to the 3<sup>rd</sup> Defendant [the Land Registrar, Kwale County] to cancel the green cards/land registers for all those parcels of land registered as Kwale/Diani/159 registered in the names of the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendants.
  - iii. Orders directing the 3<sup>rd</sup> Defendant to reinstate the green card/land registers in the names of the Plaintiff
  - iv. Order directing the Kwale County survey office to consolidate all the subdivisions of the suit property registered as Kwale/Diani SS/4227 to 4244 and amend the registry index map and reinstate the original property number registered as Kwale/Diani/159
  - v. Permanent orders of injunction are hereby issued against the 2<sup>nd</sup> Defendant restraining him, his servants, agents, employees and or any person acting on his behalf from trespassing or in any way dealing with all that parcel of land formerly registered as Kwale/Diani/159 and the subdivisions thereof registered as Kwale/Diani SS/4227 to 4244.
- b). That pursuant to the provision of Section 152A, B, & E of the Land Act, No. 6 of 2012, the 2<sup>nd</sup> Defendant be and is hereby directed to vacate the suit parcel known as Kwale/Diani/159 and the sub - divisions thereof registered as Kwale/Diani SS/4227 to 4244 from today and to further demolish any illegal structures thereon. Failure to adhere with these statutory conditions, legal eviction process and demolition of the unlawful structures to issue.
- c). That Costs and interests of the suit to be awarded to the Plaintiff from being borne by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants herein jointly and Severally.

It Is Ordered Accordingly.

**JUDGEMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS,  
SIGNED AND DATED AT Kwale THIS.....16<sup>TH</sup> ..... DAY OF .....FEBRUARY.....2026**

.....

**HON. MR. JUSTICE L.L NAIKUNI,  
ENVIRONMENT & LAND COURT  
AT**



**KWALE.**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. Mr. Mungai Kamau Advocate for the Plaintiff.
- c. M/s. Ondieki Advocate holding brief for M/s. Kiti Advocate for the 3<sup>rd</sup> Defendant.
- d. No appearance for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants.

