

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KWALE**

**ELC LAND CASE NO E025 OF 2025**

**CAROL**

**MAXTED.....PLAINTIFF**

**- VERSUS -**

**ALEX NGOMBO KITHI.....**

**DEFENDANT**

**JUDGEMENT**

**I. Preliminaries**

1. The Judgement of this Honourable Court pertains to the Civil suit instituted by *Carol Maxted*, Plaintiff vide a Plaint dated 9<sup>th</sup> December 2024. It was against *Alex Ngombo Kithi*, the Defendant herein.
2. It is instructive to note that the Summons to Enter Appearance dated 18<sup>th</sup> December, 2020 and pleadings were properly served in accordance with the contents of a four (4) Paragraphed Affidavit of Service dated 20<sup>th</sup> June 2025 sworn by George Mungai Kamau, an Advocate of the

High Court of Kenya having the conduct of this matter on behalf of the Plaintiff.

3. Despite of this, there was no Defence filed as required under the provision of Orders 5 and 7 of the Civil Procedure Rules, 2010. Thus, it follows that the suit was unopposed. But being a land matter and its sensitivities, it has become a pronounced policy by the Environment & Land Courts that in such given circumstances, no Judgement in default would be entered against the Defendant ( s ) therein. Instead, the Courts have been guided by the provision of Order 10 Rules 4, 5, 6, 7 9 and 10 of the Civil Procedure Rules, 2010 and Sections 107,108 and 109 the Evidence Act, Cap. 80 to proceed on by way of formal proof. That is what took in this case.

## **II. Description of the Parties**

4. The Plaintiff describes herself as a female adult residing in Diani within Kwale County and the beneficial owner of all that parcel of land registered as KWALE/DIANI BEACH BLOCK/1497 (Hereinafter referred to as The Suit Land"). The Defendant is described as a male adult working for gain in Ukunda within Kwale County.

## **III. The case by the Plaintiff**

5. It is the Plaintiff's case that she acquired land parcel no KWALE/DIANI BEACH BLOCK/1497 the suit property herein and caused it to be registered in the joint names of her son Daniel Thomas Ford and the Defendant herein who is Kenyan on or about 17<sup>th</sup> August 2007. That she had been advised that registration of freehold property cannot be made in the name of her son only since he was a foreigner.
6. The Plaintiff stated that as a result of the advice she got on not owning land as a foreigner, she nominated the Defendant to be registered as a joint owner on her behalf and to hold the same in trust until she acquired citizenship or rather converted the land from freehold to leasehold. According to the Plaintiff, she was fully involved in the acquisition of the suit property and payment of the same was made by one Amy Watkin her grandmother as a gift to the Plaintiff. That as a result the defendant was holding the property in trust of the Plaintiff and the Plaintiff had an overriding interest on the suit property though the same was not registered on the land register.
7. That the Plaintiff was in actual possession of the original title and actual physical possession of the suit property to

the exclusion of the Defendant and has extensively developed the same without the Defendants input.

8. At paragraph 9 of the Plaintiff, the Plaintiff informed court that the court had declared that the Defendant held the suit property as her trustee in the Civil Case “**ELC No. 112 of 2021**” vide a Judgement delivered on 22<sup>nd</sup> July, 2024 where the Defendant had sued the Plaintiff herein seeking injunctive orders but the subject matter in the former suit was different from the suit herein.

9. The Plaintiff stated that the trustee/beneficiary relationship between the parties herein had irreversibly broken down and it could not be redeemed. Thus, she wished to terminate the trustee relationship with the Defendant and have his name expunged from the title deed and the land register since the purpose for which he was registered was a joint owner and his trustee had ceased to exist.

10. At Paragraph 13 of the Plaintiff, the Plaintiff stated that after expunging the Defendants name from the and register the court can order the title deed to the suit property to be converted to lease hold interest for 99years

in the sole name of Daniel Thomas Ford and that a Certificate of Lease be issued in his name.

**11.** The Plaintiff prayed for Judgement to be entered against the Defendant for:-

**a) An order directing the Land Registrar Kwale Land Registry to rectify the land register for all that parcel of land registered as KWALE/DIANI BEACH BLOCK/1497 and cancel/expunge the names of ALEX NGOMBO KITHI**

**b) An order directing the Land Registrar, Kwale Land registry to issue DANIEL THOMAS FORD with a Certificate of lease and or certificate of title in his name alone for a term of 99 years**

**c) An order directing the land registrar kwale land registry to cancel the old land register with freehold interest and open a new register for KWALE/DIANI BEACH BLOCK/1497 for the leasehold interest**

**d) Costs of the suit**

**e) Any other relief this court deems fit to grant**

#### **IV. The hearing of the Plaintiff's case**

12. As already indicated above, the case by the Plaintiff proceeded as an undefended as **Formal Proof** under the provision of Order 10 Rules 4, 5, 6, 7, 9 and 10 of the Civil Procedure Rules, 2010. From the proceedings of 25<sup>th</sup> June

2025 before court, it was indicated that the Defendant was properly served.

13. Indeed, there was an affidavit of service on record confirming service having been effected upon the Defendant on 3<sup>rd</sup> April 2025. In the given circumstances, it was only the Plaintiff who testified as PW - 1.

**V. Examination In Chief of PW - 1 by Mr. Mungai Kamau Advocate.**

14. The witness testified on oath and in the English language. She identified herself as CAROL ANDRIA MAXTED a British citizen. She adopted her witness statement filed before court and the list of documents dated 9<sup>th</sup> December 2024 as Plaintiff Exhibit Numbers 1 to 3 as her testimony in support of her case.

15. PW - 1 stated that Daniel Thomas Ford was her son. That her mother had given her money to purchase property in Kenya as a gift. She stated that after her mother passed on, she decided to transfer the property to her son. She stated that she had bought the property from Annika Mwandaro at a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/-) but was not issued with a Certificate of Title Deed. This was because she was a foreigner and the

property could thus not have been registered in her names.

16. That she was then advised by the Defendant to have the property jointly registered in his name and her son's name. The registration proceeded. She then developed the suit property by putting up a house and a swimming pool. That she had trusted the Defendant to take care of the property but the two fell out and have not been in contact over the past ten years.

17. The Plaintiff testified that prior to filing the instant suit she had tried to resolve the issue out of court but her efforts were unsuccessful. She urged the Honourable Court to allow the prayers sought in the Plaint. The Plaintiffs case was marked as closed.

## **VI. Submissions**

18. On 7<sup>th</sup> October 2025 while the Plaintiff was before court, Plaintiff's Counsel was directed to have the suit disposed of by way of written submissions. Subsequently, the Plaintiff complied and the Judgement date was reserved and delivered on 22<sup>nd</sup> April 2026 accordingly.

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

**19.** The Plaintiff through the Law firm of Messrs. Mungai Kamau & Co Advocates filed written submissions dated 12<sup>th</sup> November 2025. Mr. Mungai Advocate commenced his submissions by stating that this was a Formal Proof case taking that despite of the proper service upon the Defendant with all the Summons to Enter Appearance and pleadings he declined to file any defence whatsoever as required by law whatsoever. The Plaintiff gave a brief history of the dispute before court as was already summarised in the pleadings and the testimony by PW - 1. In the analysis part of the submissions, the Learned Counsel pointed out that the Plaintiff had fully discharged the burden of proof on a balance of probability in compliance with the provisions of Section 107 of the Evidence Act, Cap. 80.

**20.** In their submissions, the Learned Counsel relied on a few issues to be considered by Court in its determination. Firstly, on whether the Defendants name should be expunged from the Land Register and title deed. The Learned Counsel averred that the Plaintiff had established and proved the Defendant was registered as owner in her trust. According to her testimony in Court,

she stated that the relationship of trustee/beneficiary was extinguished after the previous suit and it was no longer tenable for the Defendant to continue representing her interest as beneficiary hence the request to have the Defendant execute the transfer documents which he has refused to date.

**21.** The Learned Counsel submitted that the Defendant had breached the trust relationship with the trustee. He held that the provision of Section 28 of the Land Registration Act, No. 3 of 2016 provides for the Overriding Interests even though not noted on the register to include among other trusts. It was submitted that the suit property ought to be registered as a leasehold and not a freehold property.

**22.** Thus, that the court should take judicial notice that all properties registered under the registration regime of Diani Beach Block were all leaseholds and not freehold properties. That in the instant case the title document was issued as a freehold as opposed to a leasehold which this court had power to remedy the error by issuing the orders sought.

**23.** Lastly, the Learned Counsel submitted that the orders sought herein were within the jurisdiction of this court directing the Land Registrar to issue a Certificate of Lease for a term of 99 years to the co registered owner of the suit property. It was within the powers and jurisdiction of the court. Reference was made to the provisions of Section 80 of the Land Registration Act, No. 3 of 2012. To buttress on this point, he referred Court to the case of:- **“Republic - Versus - National Land Commission & Another Exparte Krystalline Salt Limited [2015] eKLR”** which this Court (Hon. LL. Naikuni J) held that urban land held on leasehold tenure and irregular freehold titles could be corrected through administrative or judicial action.

**24.** In the long run, the Learned Counsel urged the Honourable Court to allow the Suit and the prayers sought thereof by the Plaintiff herein.

## **VII. Analysis & Determination**

25. I have keenly assessed the filed pleadings filed by the Plaintiff herein, the written submissions, the authorities cited, the relevant provisions of the Constitution of Kenya, 2010 and the statutes thereof.

26. For the Honourable Court to reach an informed, Equitable and fair decision, it has condensed the subject matter into the following three (3) salient issues for its determination. These are namely: -

- a) Whether the suit instituted by the Plaintiff against the Defendant has any merit whatsoever?**
- b) Whether the Plaintiff is entitled to the orders sought?**
- c) Who bears the costs of suit?**

**ISSUE No. a). Whether the suit instituted by the Plaintiff against the Defendant has any merit whatsoever?**

27. Under this Sub - title, the Honourable Court will endeavour to assess whether the Plaintiff has been able to establish her case based on all the required legal standards. It is instructive to note that although the suit was undefended, the Plaintiffs had a duty to formally prove their case on a balance of probabilities as it is required by law. Particularly, on this front, the Court is guided by "**the doctrine of the Burden of Proof**". The said doctrine was founded under the provision of Sections 107, 108 and 109 of the Evidence Act, Cap. 80 of the Laws of Kenya whereby it the Plaintiff to prove its case. They provide as follows: -

**“Section 107; Burden of proof. (1); Whoever desires any court to give Judgement as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exists. (2); When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**Section (108); Incidence of burden. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

**Section (109); proof of particular fact. The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence. Unless it is provided by any law that the proof of fact shall lie on any particular person.”**

28. Having stated the above legal pronouncements, I now wish to make reference to the dictum in the case of ***“Charter House Bank Limited (Under Statutory Management - Versus - Frank N. Kamau [2016] eKLR”***, the Court of Appeal when discussing the burden of proof upon the Plaintiff in a situation where the Defendant failed to adduce evidence stated that:

***“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff’s case is not controverted or is proved on a balance of***

***probability by reason of the Defendant's failure to call evidence, the court must be satisfied that the Plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the Defendant.... The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the Plaintiff is not entitled to Judgement merely because the Defendant has not testified".***

29. Also in the case of:- ***"Kirugi and Another - Versus - Kabiya & 3 others (1987) KLR 347"*** the Court of Appeal held that: -  
***"The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof". Likewise, failure by the Defendant to contest the case does not absolve a Plaintiff of the duty to prove the case to the required standard."***

30. Similarly, in the case of: ***"Gichinga Kibutha - Versus - Caroline Nduku (2018) eKLR"*** the Court held that: -  
***"It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest."***

31. Critically speaking, I have intensively interrogated the Plaintiff's list of documents which accompanied the Plaintiff and whose contents were produced before court by PW - 1 in her testimony. They included:-

- a. Copy of bank transfer from Barclays bank dated 9<sup>th</sup> August 2007.
- b. Copy of a Certificate of Title Deed dated 17<sup>th</sup> August 2007.
- c. Copy of Judgement dated 22<sup>nd</sup> July, 2024.

**32.** From the above documents, it is confirmed that the Plaintiff received funds from her mother Amy Watkin and which were used for the purchase of the suit property herein. This was evidenced by a copy of the bank transfer from Barclays bank dated 9<sup>th</sup> August 2007. It is also confirmed that the suit property was purchased and registered in the names of the Defendant and the Plaintiff's son Daniel Thomas Ford jointly as per the title deed availed before court. The court further notes that this was not the only property purchased by the Plaintiff and Defendant herein, the contents of the judgement delivered on 22<sup>nd</sup> July, 2024 in the civil Case - "**ELC No 112 of 2021**" confirm that the Defendant herein had initially

sued the Plaintiff seeking for injunctive orders over a different parcel and which suit was dismissed by the court. The court in its Judgement made a finding that a trust had been created between the parties herein and the Defendant was infact holding the suit property in trust for the Plaintiff herein.

**33.** Having established the source of funds for purchase of the property, the history leading to the purchase and the fact that the property is registered in the names of the Defendant and the Plaintiff's son, I am convinced that the Plaintiff has made a case that is merited by identifying her stake in the suit property and the case ought to be determined by this Honourable court.

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

34. Under this sub - title, the Honourable Court will discuss whether the orders sought may be granted based on the evidence tendered. The Plaintiff seeks that the land register is rectified to cancel the name of the Defendant as proprietor of the suit property and to have the name of her son Daniel Thomas Ford maintained on the title as sole registered owner but under a leasehold tenure.

35. From the history as outlined above herein, the Plaintiff has successfully outlined the root of the registration of the suit property and produced the relevant documentation that enabled the current registration of her son Daniel Thomas Ford and the Defendant as the joint proprietors of the parcel. The Defendant did not defend his case despite being granted the chance to do so. His contribution towards acquisition of the property has not been established and as it stands, there exists an implied trust between him and the Plaintiff herein.

36. Under the provision of Section 79 of The Land Registration Act, No. 3 of 2012 allows the Land Registrar to rectify the register or any instrument presented for registration in certain cases. Section 79 (1) provides thus: -

**79(1) The registrar may rectify the register or any instrument presented for registration in the following cases; -**

**(a) In formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;**

**(b) In any case and at any time with the consent of all affected parties; or**

**(c) Upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.**

37. While the provision of Section 80 of the afore stated Act, further allows the Court to direct the Registrar to rectify the Register by directing that any registration be cancelled or amended if the court is satisfied that the registration was obtained, made or omitted by fraud or mistake. It provides as follows:-

**Section 80 of the Land Registration Act,**

**(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, 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.**

38. Bearing the above provisions of statute in mind and the analysed evidence above, this court opines that a case

has been made for rectification of the register as sought by the Plaintiff. However, it is noted that the Plaintiff has further sought for conversion of the suit property from freehold to leasehold tenure given that the other registered owner is a foreigner. I have not come across any evidence confirming that the nationality of the Plaintiff and her son has since changed to Kenyan citizenship or better still being desirous to be considered as a **“Dual Citizenship”**.

39. The process of conversion of land from freehold to leasehold tenure is provided for under the provision of Article 65 of the Constitution of Kenya, 2010. It is further governed by Land Regulations 2017 [Legal Notice No 280 of 2017] which provided for the conversion period to last for 5 years. This means that the process lapsed in the year 2022 and is no longer within its pro active period.

40. However, it is noted that under the provisions of Article 65[2] of the Constitution of Kenya, 2010 land automatically becomes a lease hold once it is held by a foreigner. It will be incumbent upon the Plaintiff to follow the process of registration of the same before the Land Registrar can now complete the process. The Land

Regulations 2017 provided for when the government was tasked with conversion of the foreigners owned freehold lands through the National Land Commission within 5 years in fulfilment of Article 65. However, it is clear that the time limit provided for in the land regulations 2017 is already spent. In this instance the process is instigated by an individual foreigner whose registration was still under freehold tenure. The process will include informing the National Land Commission for issuance and publication of the notice for the intention of the conversion in the Kenyan gazette and in two newspapers of widespread circulation. Re - Survey of the land once more, surrender of the title to the National Land Commission in exchange for a leasehold title, issuance of a title by the National Land Commission and who will forward it to the Chief Land Registrar for regularisation of the records and reflection of the same in their records.

**ISSUE No. c). Who will bear the costs of the suit?**

41. It is well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of the legal action or proceeding in any litigation. The Black Law Dictionary

defines cost to mean: - ***“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”***. The proviso of Section 27 ( 1 ) of the Civil Procedure Act, Cap. 21 provides that costs follow the event. It as follows:-

**“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”**

42. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book **“Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition, 2005 at 95”** notes that the words ‘the event’ means the result of all the proceedings

incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

43. In the instant case, the Plaintiff herein has successfully managed to establish her case. Thus, she is entitled to the costs of the suit.

#### VIII. **Conclusion & Disposition**

44. Ultimately, upon causing intensive analysis of the framed issues herein, the Honourable Court based on the principles of Preponderance of Probabilities and the balance of convenience, holds that the Plaintiff has been able to prove her case. For avoidance of doubt therefore, the Court proceeds to grant the following orders: -

**a) THAT Judgement entered in favour of the Plaintiff in accordance with the prayers sought from the filed Plaint dated 9<sup>th</sup> December, 2024 in its entirety.**

**b) THAT an order directing the Land Registrar Kwale Land Registry pursuant to the provision of Section 79 ( 1 ) & ( 2 ) of the Land Registration Act, No. 3 of the 2012 to**

rectify the land register for all that parcel of land registered as KWALE/DIANI BEACH BLOCK/1497 and cancel/expunge the names of ALEX NGOMBO KITHI and replaced with those of DANIEL THOMAS FORD hence forth.

- c) THAT a copy of this Judgement to be served upon the National Land Commission to facilitate conversion of the suit property from freehold to leasehold in the next 120 working days.
- d) THAT the costs of the suit to be awarded to the Plaintiff to be borne by the Defendant herein.

**IT IS ORDERED ACCORDINGLY.**

**JUDGEMENT DELIVERED THROUGH THE MICRO - SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS.....22<sup>ND</sup> ..... DAY OF .....APRIL .....2026**

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

**AT**

**KWALE.**

**Ruling delivered in the presence of: -**

- a) M/s. Asmaa Maftah, the Court Assistant.
- b) Mr. Mungai Kamau Advocate for the Plaintiff.
- c) No appearance for the Defendants.