



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 224 OF 2014**

LAMU BREEZE INVESTMENT.....1<sup>ST</sup> PLAINTIFF

EQUATORIAL COMMERCIAL BANK LTD.....2<sup>ND</sup> PLAINTIFF

VERSUS

CHARLES MALAKWEN.....1<sup>ST</sup> DEFENDANT

LUKAS CHIMERA KENGA.....2<sup>ND</sup> DEFENDANT

DIM PROPERTIES LIMITED.....3<sup>RD</sup> DEFENDANT

THE SENIOR REGISTRAR OF TITLES.....4<sup>TH</sup> DEFENDANT

COUNTY GOVERNMENT OF KILIFI.....5<sup>TH</sup> DEFENDANT

THE HON. ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT

**JUDGEMENT**

**BACKGROUND**

1. This suit was initially filed at Mombasa on 30<sup>th</sup> April, 2013 as ELC No. 78 of 2013. By a Complaint dated 29<sup>th</sup> April, 2013 amended on 29<sup>th</sup> July, 2013 and filed at the said Registry, Messrs. Lamu breeze Investments Ltd and Equatorial Commercial Bank Ltd (the Plaintiffs) pray for judgement against the 6 Defendants herein jointly and severally for: -

- i) a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants registration as proprietors of Plot No. 10159 North of Kilifi township vide title CR 44095 was obtained through fraud, is illegal, null and void;
- ii) a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' purported title CR No. 44095 is bad, defective, null and void and was incapable of conferring any lawful interest to the 3<sup>rd</sup> Defendant;
- iii) a declaration that the consolidation of Plot Nos. 10159 and 10160 and the certificate of consolidation issued therein is null and void;
- iv) an order directing the Senior Registrar of Titles Mombasa to rectify the land register by deleting and/or cancelling the registration of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as proprietors of the Plot No. LR 10159 Kilifi;
- v) an order of cancellation of the Title LR No. 28462 Kilifi held by the 3<sup>rd</sup> Defendant;
- vi) a declaration that certificate of Title No. CR 8245 is a valid Title Deed with encumbrance entry No. 5 as a charge in favour of Bullion Bank Ltd;
- vii) a mandatory order directing the 4<sup>th</sup> and 5<sup>th</sup> Defendants to restore the beacons of Plot CR No. 18245 as they were in 1994;

**viii) a mandatory order directing the 3<sup>rd</sup> Defendant by itself, its servants and or agents to demolish the perimeter wall (sic) around Plot LR 28462 and remove all the debris thereof from Plot LR 10159 Kilifi;**

**ix) costs of the suit; and**

**x) any such other or further relief as this Honourable court may deem appropriate.**

2. The Plaintiffs prayers arise from their assertion that at all times material to this suit, the 1<sup>st</sup> Plaintiff was the registered proprietor as a lessee from the Government of the said LR No. 10159 measuring 1.036 Ha following a transfer dated 6<sup>th</sup> September, 1994. Vide a charge dated the same day, the 1<sup>st</sup> Plaintiff charged the suit property to Bullion Bank Ltd which later on by change of name became the 2<sup>nd</sup> Plaintiff herein. The 2<sup>nd</sup> Plaintiff still has in its possession the original certificate of title handed over to it to secure advances paid to the 1<sup>st</sup> Plaintiff.

3. The 1<sup>st</sup> Plaintiff asserts that sometime on or about January, 2012, it discovered that a perimeter wall had been erected round the property by unknown people. After hiring a private surveyor to investigate the matter, they discovered that some beacons marking the suit property had been interfered with and that the suit property had been consolidated with LR No. 10160 and a new Plot No. L.R. 28462 created after the consolidation.

4. Upon further investigations the Plaintiffs established that on or about 28<sup>th</sup> June, 2007, one Charles Malakwen and Lukas Chimera Kenga (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants) had illegally and fraudulently caused themselves to be registered as the proprietors of the said property. On 19<sup>th</sup> August, 2008, they had gone further and transferred the property to Ms Dim Properties Ltd (the 3<sup>rd</sup> Defendant). It is the Plaintiffs case that the registration and certificate of title issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the eventual transfer to the 3<sup>rd</sup> Defendant was bad in law for being tainted with fraud and illegality.

5. The Plaintiffs accuse the Senior Registrar of Titles (the 4<sup>th</sup> Defendant) the officials of the County Government of Kilifi (the 5<sup>th</sup> Defendant) and the Honourable the Attorney General (the 6<sup>th</sup> Defendant) or their agents of acting with mala fides and lack of candour in effecting the registration of the Plaintiffs, issuing them with a certificate of title and consolidating the suit property with another.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered Appearance jointly with the 3<sup>rd</sup> Defendant but filed a separate Defence and Counterclaim excluding the 3<sup>rd</sup> Defendant. On its part the 3<sup>rd</sup> Defendant filed a Statement of Defence separately on 8<sup>th</sup> July, 2013 in which it avers that the property referred to by the Plaintiffs as LR No. 10159 is non-existent and unregistered. Accordingly, the 3<sup>rd</sup> Defendant avers that the Plaintiffs have no cause of action as against it and the suit should be struck out with costs.

7. The 3<sup>rd</sup> Defendant generally denies all the allegations contained in the Plaint and avers that: -

**a) the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were registered as joint proprietors of the said LR No. 10159 Kilifi;**

**b) by an Agreement dated 29<sup>th</sup> July, 2008 between itself and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the 3<sup>rd</sup> Defendant purchased the said property;**

**c) by a transfer dated 18<sup>th</sup> August, 2008, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants transferred the property to the 3<sup>rd</sup> Defendant who was subsequently registered as the proprietor thereof on 19<sup>th</sup> August, 2008;**

**d) the property was in the year 2010 consolidated with LR No. 10160 which also belonged to the 3<sup>rd</sup> Defendant resulting into a consolidated parcel No. 28462 registered in the name of the 3<sup>rd</sup> Defendant.**

8. The 3<sup>rd</sup> Defendant therefore avers that in the premise, the 1<sup>st</sup> Plaintiff cannot have any right, title or interest over LR No. 10159, a non-existent Plot and that hence the Plaintiffs are not entitled to any of the reliefs sought.

9. On their part, the 4<sup>th</sup> and 6<sup>th</sup> Defendants filed a joint Statement of Defence dated 11<sup>th</sup> October, 2013 on 1<sup>st</sup> November, 2013. The two generally deny any claims of fraud and/or illegality attributed to them in the Amended Plaint and invite the Plaintiffs to a strict proof thereof.

10. The 5<sup>th</sup> Defendant on its part filed a Statement of Defence on 27<sup>th</sup> May, 2013 in which it generally denies the Plaintiffs' allegations. It is their case that there is no reasonable or proper cause of action against them and urge the court to strike out the suit in so far as it relates to the County Government of Kilifi.

11. Following a preliminary point of objection taken by the 4<sup>th</sup> and 6<sup>th</sup> Defendants in regard to the Registry in which the matter was filed, the Honourable Mukunya J. on 18<sup>th</sup> September, 2014 directed that the suit be transferred to Malindi for hearing and disposal. The trial thereafter commenced before my brother Angote J.

#### **THE PLAINTIFFS' CASE**

12. At the trial herein, the Plaintiffs called 3 witnesses in support of their case.

13. PW1 – Bhupinder Singh Dogra adopted his witness statement filed herein on 30<sup>th</sup> April, 2013. In the said statement he avers that the 1<sup>st</sup>

Plaintiff is the registered proprietor of LR No. 10159 Kilifi. The 1<sup>st</sup> Plaintiff purchased the property from one Justus Kalewa Ndoti for KShs.1,700,000/-.

14. PW1 further states that in the year 1994, the 1<sup>st</sup> Plaintiff charged the suit property to Bullion Bank Ltd before its name changed to Equatorial Commercial Bank Ltd (the 2<sup>nd</sup> Plaintiff). Sometime in the year 2008, PW1 learnt from some property agents in Mombasa that a parallel title deed over the same property was in circulation. The 1<sup>st</sup> Plaintiff then wrote a letter to the Commissioner of Lands seeking to find out the correct position.

15. Sometime in the year 2012, PW1 was informed that their property had been fenced off. PW1 proceeded to Kilifi where he confirmed that indeed someone had put up a wall around the property. The wall however appeared to have enclosed a much bigger area than the suit property. Accordingly the 1<sup>st</sup> Plaintiff enlisted the services of a Surveyor to investigate and confirm what had happened.

16. The surveyor confirmed that the wall was erected following a consolidation of the suit property with another parcel of land. The new number for the consolidated parcel was LR No. 28462. From the Surveyor's Report, PW1 established that on 28<sup>th</sup> June, 2007, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants caused themselves to be registered as the proprietors of the consolidated property. On 19<sup>th</sup> August, 2008, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants transferred the property to the 3<sup>rd</sup> Defendant.

17. PW1 avers that the 1<sup>st</sup> Plaintiff was not consulted before the consolidation and that the same was fraudulent and illegal as the 1<sup>st</sup> Plaintiff was the registered proprietor of the property.

18. PW2 – Brian Otieno Asiu was the 2<sup>nd</sup> Plaintiff's Legal Officer. He adopted his statement as filed herein on 30<sup>th</sup> April, 2013. In the said statement, he asserts that it was within his knowledge that as at 1994, the 2<sup>nd</sup> Plaintiff's name was Bullion Bank Ltd. The name later changed to Southern Credit Banking Corporation Ltd before it again changed to become Equatorial Commercial Bank Ltd.

19. PW2 told the court that from their records, the 2<sup>nd</sup> Plaintiff registered a charge over LR No. 10159 in the year 1994. The 2<sup>nd</sup> Plaintiff thereafter retained the original title deed. However sometime in January, 2012, PW1 went to the 2<sup>nd</sup> plaintiff's offices and informed them that someone unknown to him had fenced off the property. They agreed to get a Surveyor to verify the position. The surveyor later reported that the property had been consolidated with another and that the new parcel was now registered in the name of the 3<sup>rd</sup> Defendant.

20. PW2 testified that the bank is still owed KShs.32,000,000/- by the 1<sup>st</sup> Plaintiff on account of the security of the title it continues to hold.

21. PW3 – Bartholomew Mwanyungu is a licensed Surveyor. He recalled that in the year 2012, he was approached by the 2<sup>nd</sup> Plaintiff and instructed to prepare a report in relation to the suit property. He visited the property and several other offices.

22. In his Report forwarded to the Bank on 23<sup>rd</sup> February, 2012, he found out that LR Nos. 10159 and 10160 had been consolidated to produce LR No. 28462.

### **THE DEFENCE CASE**

23. The Defence called 2 witnesses who testified in support of their respective positions.

24. DW1 – Lucas Chimera Kenga is the 2<sup>nd</sup> Defendant herein. He too relied on his witness statement filed herein on 16<sup>th</sup> September, 2014. He told the court that his father (now deceased) had been residing on the suit property since the 1970s. His father had during his lifetime began to pursue documents of title.

25. It was DW1's case that his father asked his friend the 1<sup>st</sup> Defendant to help pursue the title documents. His father passed away in 2006 and the title deed eventually came out in his name and that of the 1<sup>st</sup> Defendant on 15<sup>th</sup> July, 2008. He told the court that they subsequently sold the land to the 3<sup>rd</sup> Defendant for KShs.13,750,000/-.

26. DW2 – Ashok Doshi is one of the Directors of the 3<sup>rd</sup> Defendant. He adopted as his evidence-in-chief his statement dated 15<sup>th</sup> October, 2018 and filed in court on 16<sup>th</sup> October, 2018. In the said statement, he states that the 3<sup>rd</sup> Defendant is the registered proprietor of the suit property having acquired the same from the 1<sup>st</sup> and 2<sup>nd</sup> Defendant on 29<sup>th</sup> July, 2008.

27. DW2 further states that prior to acquiring the property, the 3<sup>rd</sup> Defendant was also the registered proprietor of the adjacent Plot known as LR No. 10160. Upon acquisition of the suit property they proceeded to consolidate the same into Plot No. 28462 as a result of which LR Nos. 10159 and 10160 ceased to exist. The 3<sup>rd</sup> Defendant has since undertaken substantial development on the consolidated property without any objection or hindrance from anyone else.

### **ANALYSIS AND DETERMINATION**

28. I have perused and considered the pleadings herein, the testimony of the witnesses and the evidence produced by the various parties. I have equally perused and considered the written submissions and authorities as filed by the Learned Advocates acting for the respective parties herein.

29. It was the Plaintiffs' case that the 1<sup>st</sup> Plaintiff purchased the suit property – LR No. 10159 Kilifi way back in the year 1991 from one Justus Kalewa Ndoto. In support of this position, the Plaintiffs produced as Pexh 1 an Agreement of Sale executed between the said Justus Kalewa Ndoto and Bhupinder Singh Dogra (PW1) on 18<sup>th</sup> January, 1991. According to the Plaintiffs, the vendor transferred the property to the 1<sup>st</sup> Plaintiff as the nominee of PW1.

30. The Plaintiffs further asserted that upon transfer of the property to the 1<sup>st</sup> Plaintiff as aforesaid, the 1<sup>st</sup> Plaintiff proceeded to charge it to the 2<sup>nd</sup> Plaintiff for a loan which remains outstanding to-date at Kshs.32,000,000/-. The original title deed used to secure the loan remains in the 2<sup>nd</sup> Plaintiff's custody and the Plaintiffs were therefore shocked in the year 2008 to learn that someone else had proceeded to erect a wall around the property on the basis that they were the registered proprietors thereof.

31. It was the Plaintiffs case that when they learnt of the encroachment, they instructed M's B.S. Mwanyungu Surveyors to carry out a verification exercise of the physical position of the suit property. The surveyor prepared a Report dated 23<sup>rd</sup> February, 2012 in which he stated that LR No. 10159 had been consolidated with LR No. 10160 to create a new title deed LR No. 28462.

32. Upon further enquiries the Plaintiffs came to learn that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein had caused themselves to be registered as the proprietors of LR No. 10159 which they then proceeded to sell and transfer to the 3<sup>rd</sup> Defendant who owned the adjacent parcel of land LR No. 10160 Kilifi. The 3<sup>rd</sup> Defendant had then proceeded to consolidate the two parcels and to erect a perimeter wall around the consolidated parcel.

33. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not deny selling the suit property to the 3<sup>rd</sup> Defendant. It is however their case that contrary to the Plaintiffs accusations they were duly registered as the proprietors of the said parcel of land and were issued with a title deed therefor on 15<sup>th</sup> July, 2008. Thereafter the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sold the land to the 3<sup>rd</sup> Defendant as they intended to pay outstanding rates and pending hospital bills for the 2<sup>nd</sup> Defendant's father who had passed away in 2006.

34. The 3<sup>rd</sup> Defendant supports the position taken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is their case that upon carrying out due diligence and establishing that the suit property was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, they proceeded to purchase the same and to have it consolidated with their own adjacent parcel of land – LR No. 10160. After the consolidation, the 3<sup>rd</sup> Defendant was issued with a new title being LR No. 28462 Kilifi. It was accordingly their case that the title sought by the Plaintiffs no longer exists and that the 3<sup>rd</sup> Defendant legitimately holds title to the consolidated parcel of land.

35. On their part, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants respectively deny any collusion or wrong-doing in the circumstances leading to the consolidation of the two parcels of land and the subsequent registration of the 3<sup>rd</sup> Defendant as the proprietor thereof. In particular the 5<sup>th</sup> Defendant asserts that it was not at fault in issuing the consolidation certificate as it duly followed the elaborate procedure as set out in the Physical Planning Act, Cap 286 of the Laws of Kenya.

36. I have taken a keen consideration of the oral testimonies of the witnesses as well as the documentation placed before me. According to the Plaintiffs, when they did purchase the suit property from Justus Kalewa Ndoto, the vendor was armed with an original Letter of Allotment dated 20<sup>th</sup> March, 1996. A copy of the Letter of Allotment was produced in evidence at the trial. It is backed with certain receipts for payments made for inter alia, the Certificate of Title on 12<sup>th</sup> June, 1987. The vendor was subsequently issued with Grant No. 18245 in his name on 23<sup>rd</sup> July, 1987.

37. From a perusal of the said documents, it was apparent that the subject property was surveyed and letters of allotment were issued in regard thereto in the year 1986. According to the Plaintiffs, the vendor was issued with a Deed Plan No. 72857 and a beacon certificate.

38. On the other hand, the 2<sup>nd</sup> Defendant told the court that his father and step-mother lived on the suit property since the 1970s as squatters. Both his father and step-mother are now deceased. It was however his case that prior to his death, his father had commenced the process of obtaining title for the property in which they lived. His father then approached his friend Charles Kipkemboi Malakwen, the 1<sup>st</sup> Defendant herein to help him obtain the title.

39. The 2<sup>nd</sup> Defendant went on to state that by the time the titles came out on 27<sup>th</sup> June, 2007, his father had passed away. A perusal of that title reveals that it came out in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant did not explain why the property which he claims to have belonged to his father was subsequently registered in the name of his father's friend and his own. Neither did he produce or refer to any Letter of Allotment either issued to his father or to himself and his co-defendant in whose name the title was issued.

40. As it were, the Grant issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was issued under the Registration of Titles Act, (now repealed). As I understood it, the process of acquisition of Government land under that Act envisaged a situation where one would apply for and be issued with a Letter of Allotment or offer. One would thereafter demonstrate his acceptance by paying the stand premium and abiding by other conditions set out under the offer.

41. Granted that the 2<sup>nd</sup> Defendant did not participate much in the processing of the title which, according to him his father had entrusted to the 1<sup>st</sup> Defendant, there was need to explain to the court the initial steps taken before the Grant was issued in their names. As it turned out, the 1<sup>st</sup> Defendant who was leading the 2<sup>nd</sup> Defendant in processing the title never testified in these proceedings.

42. In my mind, if the 2<sup>nd</sup> Defendant's father Kenga Mwajima had been allocated the suit property by the Government, nothing would have been easier than for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to state so and to produce copies of the documents in support.

43. During his cross-examination herein by Ms Umara, Learned Counsel for the Plaintiffs, the 2<sup>nd</sup> Defendant stated as follows: -

**“... I do not have any other documents other than the ones we filed. I have nothing to show how Malakwen (the 1<sup>st</sup> Defendant) got the title to the land.”**

44. In a matter such as this one where the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are being accused of fraudulently and illegally causing themselves to be registered as the proprietors of a parcel of land for which another title already existed, it was of paramount importance for the said defendants to clearly and succinctly demonstrate to the court how they came to be the beneficiaries of that parcel of land.

45. It is otherwise common knowledge that if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not have a proper title to the suit property, there was nothing capable of being transferred to the 3<sup>rd</sup> Defendant in terms of their interest or rights over the property. Indeed, I note that while the 3<sup>rd</sup> Defendant purports to have acquired the property as aforesaid from the two defendants, a copy of the title it purportedly acquired after the purchase was not produced before this court.

46. The Plaintiffs claim is that the registration of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the proprietors of the suit property was as a result of fraud perpetrated at the Lands Registry. Neither the 4<sup>th</sup> nor the 6<sup>th</sup> Defendants produced any evidence in this court to rebut those claims. As was stated in **West End Butchery Ltd –vs- Arthi Highway Developers Ltd & 6 Others (2012) eKLR**: -

**“The existence of two different titles with respect to the same property, and with all the necessary endorsements made thereon is in itself evidence of participation in a forgery by officials in the Ministry of Lands who are the custodians and issuers of the titles.... It is my view that the Government of Kenya has the full responsibility to ensure the accuracy of the register of titles and the authenticity of titles issued consequent to registrations made thereon, and this is the main basis for the provisions in the law for compensation in the event of fraud or errors committed in the process.”**

47. As it turned out, the Plaintiffs had as far back as August, 2008 alerted the 4<sup>th</sup> and 6<sup>th</sup> Defendants in writing about the possibility of some fraudulent dealings taking place in regard to the suit property. Nothing was however done to ensure the sanctity of the title to the suit property. Instead, they went ahead to register the consolidation of the suit property with LR No. 10160 belonging to the 3<sup>rd</sup> Defendant without any notice to and or consent of the 1<sup>st</sup> Plaintiff. That can only have been a scheme aimed at depriving the 1<sup>st</sup> Plaintiff of its property.

48. Even where the officials of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants did not collude in the registration and consolidation of the suit property with another in the name of the 3<sup>rd</sup> Defendant, it was evident to me that for one reason or the other, two titles had been registered in respect of LR No. 10159. One title was held by the Plaintiffs as Grant No. 18245 while the other held by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as Grant No. 44095.

49. The date shown for the endorsement of the Grant issued to the Defendants was 15<sup>th</sup> July, 2008 while that for the Plaintiffs was endorsed on 27<sup>th</sup> August, 1987. That necessarily means that the Grant issued to the Plaintiffs was the first in time to be registered and in the absence of any irregularity thereon, it must be allowed to prevail. As I understood it, the 1<sup>st</sup> Plaintiff's title was not cancelled by the titles issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. It remains in the custody of the 2<sup>nd</sup> Plaintiff Bank protected under the provisions of Section 23(4) of the Registration of Titles Act (repealed) which gave the owner of such property absolute and indefeasible title to his property.

50. As was stated in **Dr. Joseph Arap Ngok -vs- Justice Moiwo Ole Keiwua & 5 Others, Civil Application No. Nai 60 of 1997** (unreported): -

**“The title of 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. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”**

51. In the circumstances I am satisfied that the Plaintiffs have proved their case on a balance of probabilities. Judgement is accordingly entered for the Plaintiffs as against the defendants as prayed in the Plea.

52. The Plaintiffs shall also have the costs of this suit.

**DATED, SIGNED AND DELIVERED AT MLAINDI THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2019.**

**J.O. OLOLA**

**JUDGE**