



REPUBLIC OF KENYA



**Haji v Attorney General & 4 others; Athman & another (Interested Parties)  
(Petition 29 of 2022) [2024] KEELC 457 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 457 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
PETITION 29 OF 2022  
EK MAKORI, J  
JANUARY 31, 2024**

**BETWEEN**

**ABDULAHI FARA HAJI ..... PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, LAMU ..... 2<sup>ND</sup> RESPONDENT**

**AMINA ATHMAN ..... 3<sup>RD</sup> RESPONDENT**

**ABDULMAJID MAHMOUD ..... 4<sup>TH</sup> RESPONDENT**

**MOHAMED AHMED ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**HOUD MAHMOUD ATHMAN ..... INTERESTED PARTY**

**GOODISON FIFTY-THREE LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. The petition dated 24<sup>th</sup> November 2022 seeks the following remedies:
  - a. A declaration that the certificates of lease held by the 3<sup>rd</sup> to 5<sup>th</sup> respondents are simply pieces of paper and cannot confer any interest in land.
  - b. A permanent injunction restraining the respondents from trespassing, intimidating, harassing, and in any other way from further interfering with parcel No Lamu/Manda Island/259.
  - c. A permanent injunction restraining the respondents from interfering with the land's registration record of the suit property.



2. The 3<sup>rd</sup> to 5<sup>th</sup> respondents have taken out a cross-petition seeking to challenge the title held by the 2<sup>nd</sup> interested party/ the 5<sup>th</sup> respondent in this manner:
  - a. A declaration stating that the Title held by; (1) Amina Athman, (2) Abdulmajid Mahmoud, (3) Mohamed Kassim Ahmed and (4) Andrew Mwangi Kimani, is legal and valid in law.
  - b. A declaration that the Title and Certificate of Lease obtained by Abdulahi Fara Haji was fraudulently obtained and as such void in law.
  - c. A declaration that the transfer of Land Title No Lamu/Manda Island/ 259 from Abdulahi Fara Haji to Goodison Fifty-Three Limited was based on fraud and illegalities and as such is void.
  - d. An order directing the Land Registrar Lamu to rectify the Land Title No Lamu/Manda Island/259 by cancelling the Title held by the 5<sup>th</sup> Respondent.
  - e. Aggravated damages for fraud.
  - f. Costs.
3. The petition is supported by the affidavit sworn by Abdulahi Fara Haji. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit sworn by Tom Morara Nyangáu on 10<sup>th</sup> March 2023 in response to the petition. The 3<sup>rd</sup> to 5<sup>th</sup> respondents opposed the petition through a response and cross-petition dated 9<sup>th</sup> March 2023. The cross-petition is supported by the affidavit sworn by Ali Haidar Ali on 9<sup>th</sup> March 2023. Even though the 1<sup>st</sup> interested party was served with the petition, he did not file a response. The 2<sup>nd</sup> interested party filed a replying affidavit sworn by Famau Ahmed Famau on 12<sup>th</sup> May 2023.
4. The petitioner testified that by a letter dated 20<sup>th</sup> August 1997 and issued by the 2<sup>nd</sup> respondent, the 1<sup>st</sup> interested party was allocated unsurveyed Agricultural Plot No (c) at Manda Island, the parcel was later surveyed and named Parcel No 93, Manda. The 1<sup>st</sup> interested party paid the prescribed fees and the survey was done and survey plans prepared, however before the grant was issued some other allocations were created on top of this survey resulting in an overlap that created other plots which were identified as:
  - a. Lamu/Manda Island/88
  - b. Lamu/Manda Island/176-185
  - c. Lamu/Manda Island/256-260
5. The 1<sup>st</sup> interested party successfully challenged the creation of the new allocations in Malindi ELC Petition No 62 of 2012; Houd Mahmoud Athman v The Attorney General & others whereby the court made a declaration that the survey and subsequent creation of the allocations was illegal, null and void.
6. The said decision was the subject of the Court of Appeal Civil Appeal No 128 of 2018; Swaleh Mohamed Waziri & 3 others v Houd Mohmoud Athman & another which was dismissed by the Superior Court.
7. According to the petitioner, The National Land Commission also held deliberations over the other allocations stated herein above and through several letters including a letter dated 18<sup>th</sup> August 2014 recommended that the certificate of titles issued for Lamu/Manda Island/88, Lamu/Manda Island/176-185 and Lamu/Manda Island/256-260 be revoked and the interest in those parcels reverted to the 1<sup>st</sup> interested party.



8. The petitioner stated that after the said titles were quashed, the petitioner was then transferred/ allocated parcel No Lamu/Manda Island/259 and a certificate of lease issued on 25<sup>th</sup> May 2021 with the knowledge and consent of the 1<sup>st</sup> interested party.
9. The petitioner has since sold and transferred the suit property to the 2<sup>nd</sup> Interested party for consideration of Kshs 5,000,000/=. However, even though the petitioner granted physical possession of the suit property to the 2<sup>nd</sup> interested party, the quiet and peaceful enjoyment of the suit property which the petitioner transferred to the 2<sup>nd</sup> interested party has been hindered by the 3<sup>rd</sup> to 5<sup>th</sup> respondents through their continuous acts of trespass.
10. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit sworn by Tom Morara Nyangáu on 10<sup>th</sup> March 2023 in response and opposition to the petition. He deposed that he was the Land Registrar Lamu County, he stated that lease documents for Title No Lamu Manda Island/259 was forwarded to the office of the Land Registrar vide letter dated 20<sup>th</sup> May 2021. The lease documents were in favour of the petitioner herein executed by that proprietor and registered on 25<sup>th</sup> May 2021 and a certificate of the lease was issued on 11<sup>th</sup> August 2021. Transfer documents were lodged at the Land Registry and the same was formalized in favour of Goodison Nine Limited – The 2<sup>nd</sup> interested party/5<sup>th</sup> respondent herein at a consideration of Kshs 5,000,000/=and a certificate of lease issued on the same date.
11. On the 9<sup>th</sup> of March 2022 a caution was registered in favour of Amina Athuman, Abdulmajid, Abdulmajid Mahmoud, Mohammed Kssim Amhed, and Andrew Mwangi Kimani claiming beneficiary interest. Photocopies of the Lease documents purportedly issued on 17<sup>th</sup> July 2013 and the certificate of lease issued on the same date to the said parties were forwarded to his office on 28<sup>th</sup> November 2022. His office requested that the Director of Land Administration guide on the position of their records and advise on the sets of leases that were procedurally prepared by their office for purposes of registration and eventually issuance of a certificate of lease for the said parcel. The Director of Land Administration responded vide letter dated 16<sup>th</sup> December 2022. An alternative Dispute Resolution Mechanism meeting could not yield fruits. Meanwhile, the Director of Criminal Investigations set in and is currently investigating the matter.
12. Through the cross-petition, the 3<sup>rd</sup> to 5<sup>th</sup> respondents challenged how their title was cancelled. They allege that the suit property has never had any overlap or encroachment onto Lamu/Manda Island/93. Further, they stated that no court order or decree was extracted in Malindi ELC Petition No 62 of 2012; Houd Mahmoud Athman v The Attorney General & others for purposes of execution.
13. The 3<sup>rd</sup> to 5<sup>th</sup> respondents stated that the Land Registrar Lamu Mr. Tom Morara Nyangáu manufactured a Kenya Gazette Notice dated 10<sup>th</sup> August 2018 which set out the cancellation of Land Title No Lamu/Manda Island/259 as the said Gazette Notice was fraudulent.
14. The 2<sup>nd</sup> interested party averred, that through the replying affidavit filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the lease documents for Lamu/Manda Island/259 were forwarded to the office of the Land Registrar vide a letter dated 20<sup>th</sup> May 2021. The lease documents were in favour of Abdulahi Fara Haji (the petitioner herein) and the same were duly executed by the proprietor and were registered on 25<sup>th</sup> May 2021 and a Certificate of Lease was issued. On 11<sup>th</sup> August 2021 transfer documents were lodged at the Land Registry and the same was formalized in favour of Goodison Nine Limited at a consideration of Kshs 5,000,000/- and a Certificate of Lease issued on the same date.
15. On 9<sup>th</sup> March 2022 a caution was registered in favour of Amina Athuman, Abdulmajid Mohammed Kassim Ahmed, and Andrew Mwangi Kimani claiming beneficiary interest. The purchase was above board legal and regular hence the title held by it is indefeasible as against the whole world.



16. The petitioner submitted that Section 26 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;
- b. where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme”

17. The petitioner stated that the Land Registrar confirmed that the suit property was duly registered in favour of the petitioner and then transferred to Goodison Nine Limited at a consideration of Kshs 5,000,000/- and a Certificate of Lease issued, it follows that the title being flashed by the cross-petitioners are simply pieces of paper and cannot confer any interest in land. The cross-petitioner did not specifically plead or prove fraud to entitle the Court to invoke the exceptions set out under Section 26 of the [Land Registration Act](#). As such, the petition is well-merited and should be allowed as prayed.

18. The petitioner asserted that the cross-petition is supported by the affidavit of Ali Haidar Ali who is holding an unregistered power of attorney issued by Amina Athman, contrary to Section 9 of the [Registration of Documents Act](#) Cap 285 which provides that every document the registration whereof is compulsory shall be registered within two months after its execution, and if executed outside Kenya it shall be registered within two months after arrival in Kenya. There is further no evidence that this provision was complied with. The petitioner emphasized that this was a fatal omission which renders the petition defective ab initio.

19. On *res judicata* the petitioner stated that the 3<sup>rd</sup> to 5<sup>th</sup> respondents in the petition seek to challenge the title being held by the 2<sup>nd</sup> interested party and the 5<sup>th</sup> respondent. Through a judgment delivered in Malindi ELC Petition No 62 of 2012; Houd Mahmoud Athman v The Attorney General & others, the court found that parcel No 259, among other parcels, was obtained unlawfully. The Court declared that the titles that were issued to the 3<sup>rd</sup> – 10<sup>th</sup> respondents had no basis or foundation in law at all. In the absence of evidence to show the process followed before the titles were issued to the 3<sup>rd</sup> to 10<sup>th</sup> respondents. The issue was confirmed on appeal to the Court of Appeal in Civil Appeal No 128 of 2018; Swaleh Mohamed Waziri & 3 others v Houd Mohmoud Athman & another. That if they were not parties in that suit and any issue arising thereafter, then they should move the Court appropriately for redress. The petitioner cited the case in [John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) [2015] eKLR, to support the view that that case had fully and finally settled the issue of ownership which cannot be revisited here.

20. The question as to whether a decree was properly extracted and whether or not the cross-petitioners were represented in Malindi ELC Petition No 62 of 2012; Houd Mahmoud Athman v The Attorney General & others can only be raised in the said suit and not a subsequent suit.

21. The petitioner contended that the letter dated 24<sup>th</sup> April 2012 by Juliko Geospatial Consultants confirmed that the Letter of Allotment Ref: No 79586/IV dated 25<sup>th</sup> June 1998 was in the names of Doris Nyamvula Lenga, (Musa Hussein, Tima Hussein, Aboud Athman, Avukame Haruni, Maimuna Abdalla, Tima Swaleh & Ali Mohamed), Laila Abdalla, (Amina Athman, Abdulmajid Mahmoud,



- Mohamed K. Ahmed & Andrew Mwangi Kimani) & Abdulwahid Mohamed, Harith Aboud, Omar Abdillahi, Mselem Salim Said M. Swaleh & Yahya Ahmed Shee). There is therefore doubt as to the authenticity of the letter of allotment produced because there appears to be an issue with the names in the alleged letter of allotment.
22. The petitioner proceeded to add that the cross-petitioners admitted that the terms of the letter of allotment dated 25<sup>th</sup> June 1998 required them to fulfill certain obligations within 30 days (this is expressly stated in the letter of allotment). Mr. Ali Haidar conceded in cross-examination that he did not accept and comply with the conditions set in the letter of allotment within 30 days. If anything, no evidence was produced in court to demonstrate that the conditions set in the letter of allotment were strictly complied with. Having failed to demonstrate compliance with the conditions set out in the letter of allotment, the letter of allotment lapsed and was a nullity as held in the case of [\*Bubaki Investment Company Ltd v National Land Commission & 2 others\*](#) [2015] eKLR.
  23. The petitioner argued that because it has a title it is presumed that everything leading to the acquisition of that title was regularly done under the doctrine of “Omnia praesumuntur rite esse acta” – (all acts are presumed to have been done rightly and regularly) as held in [\*Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others\*](#) [2020] eKLR.
  24. The petitioner asserted that fraud was not proved by the cross petitioner the burden of proof which is higher than the normal balance of probabilities was not achieved as stated in the case of [\*Urmila w/o Mahendra Shah v Barclay Bank International Ltd & another\*](#) [1979] eKLR. Fraud was not pleaded nor proved. The petitioner avowed that it is only when the National Land Commission which ought to have investigated this matter and made its report and/or recommendations and the petitioner is found guilty of fraud in a Court of law, could the cross-petitioners have pleaded the same.
  25. The 3<sup>rd</sup> to 5<sup>th</sup> respondents submitted that Land Title No Lamu/Manda Island/259 was never part of what was discussed in Malindi ELC Petition No 62 of 2012; Houd Mahmoud Athman v The Attorney General & others. The land was all along the property of the respondents who held a genuine lease over it regularly and legally acquired after meeting all the conditions provided in the law. The Gazette Notice that set to illegitimate the title was fraudulently acquired and orchestrated by one Tom Morara Nyangau the 2<sup>nd</sup> respondent in the cross-petition when he was Land Registrar in Lamu County. If all that happened, there would have been fresh allocations by the Government. The procedure of allocation of Government land is as held in the case of [\*Cordison International \(K\) Ltd v Chairman National Land Commission & 44 others\*](#) [2019] eKLR. It is the 3<sup>rd</sup> to 5<sup>th</sup> respondents' view that no proper allocation was done by the National Land Commission. The petitioner did not plead any payment made to the Government besides, he is a resident of Mombasa who does not know even the location of the suit land.
  26. The 3<sup>rd</sup> to 5<sup>th</sup> respondents submitted that there was an allotment done in their favour dated 25<sup>th</sup> June 1998, all necessary fees were paid, a survey was done and the certificate of the lease was issued on 17<sup>th</sup> July 2013. The Green Card produced in this matter did not show any cancellations. The 3<sup>rd</sup> to 5<sup>th</sup> respondent then asserted that the title in their possession is valid in law. The case in [\*R v City Council of Nairobi & 3 others\*](#) [2014] eKLR is quoted to support that view.
  27. In the cross-petition, the 3<sup>rd</sup> through 5<sup>th</sup> respondents asserted that the title held by the 2<sup>nd</sup> interested party/5<sup>th</sup> respondent was not obtained through a formal known legal process. It was not possible to determine the true ownership of the suit property via due diligence, which if carried out correctly would have revealed that the 3<sup>rd</sup> through 5<sup>th</sup> respondents were the legitimate owners. According to the decision in [\*Dina Management Ltd v County Government of Mombasa & 5 others\*](#) (petition 8 of



- 2021) [2023] KESC 30 4KLR, the Supreme Court established the requirements that must be met to determine whether a party is a *bona fide* purchaser for value without notice.
28. Quoting the pronouncement in *Alice Chemutai Too v Nickson Kipkirui Korir & 2 others* 2015 eKLR, the 3<sup>rd</sup> to 5<sup>th</sup> respondents stated that Section 26(1)(a)(b) of the *Land Registration Act* provides exceptional circumstances under which absolute ownership can be challenged on the grounds of fraud or misrepresentation to which a person is party to or where the certificate of title is acquired illegally, unprocedurally or through corrupt scheme.
  29. The 3<sup>rd</sup> through 5<sup>th</sup> respondents argued that since they lost use and custody of the suit property, they should be granted damages having demonstrated their true ownership of the suit property. According to them, mesne profits would be appropriate in this situation. *Attorney General v Halal Meat Products Ltd.* [2016] eKLR and *Nakuru Industries Ltd. v S. S. Mehta & Sons* [2016] eKLR were referenced in this regard to bolster that claim.
  30. The 2<sup>nd</sup> interested party/ 5<sup>th</sup> respondent in the cross-petition submitted and adopted the same stance as the petitioner on the issue of the Power of Attorney which it said was not registered reiterating that it was fatal to the cross-petitioners' case.
  31. The petitioner and itself have not been proven to have committed fraud during the acquisition and sale of the suit land. This claim is supported by the edicts in two cases: *Gladys Wanjiru Ngacha v Theresa Chepsaat & 4 others* [2013] eKLR and *Laban Omuhaka Otumbula v Truphosa Okutoyi* [2019] eKLR Kakamega High Court Civil Appeal No 49 of 2014, [2019] eKLR. These cases addressed the necessity of pleading and specifically proving fraud when it is raised, as well as the standard of proof in each case which is higher than the balance of probabilities in civil matters.
  32. Concerning the question of a bona fide purchaser, the 2<sup>nd</sup> interested party and the 5<sup>th</sup> respondent argued that they had done all necessary research before purchasing the land in question and that they had done so sincerely and honestly, without knowledge of any third parties' potential rights in the title. This Court was referred to take into consideration additional authorities in this realm, which included *Arthi Highway Developers Limited v West End Butchery Limited and six others.* [2015] eKLR, *Dr. Joseph Arap Ngok v Justice Moiwo Ole Keiuwa & 5 others* Civil Appl. No NAI 60 of 1997, and *Katende v Haridar & Company Limited* [2008] 2 EA 173.
  33. The 2<sup>nd</sup> interested party further submitted that by dint of Section 80 of the *Land Registration Act* and the verdict in *Joseph Gitari v Muthui Chomba & 7 others* [2018] eKLR, no rectification of title could be done unless the bearer of the title is proven to have known of the fraud, mistake, or omission.
  34. Upon reviewing the evidence presented by the parties involved in this case as well as their arguments to me, the following questions are up for this court to decide:
    - i. Whether the petitioner has proved his claim as pleaded in the petition.
    - ii. Whether the cross-petitioners have proved their case as pleaded in the cross-petition.
    - iii. Whether the petition and the cross-petition are res-judicata?
    - iv. Whether there was fraud in the acquisition of the suit property by the 5<sup>th</sup> respondent in the cross-petition.
    - v. Whether the 5<sup>th</sup> respondent in the cross-petition is a bona fide purchaser for value without notice.
    - vi. Whether this court can grant the prayers sought in both the petition and cross-petition.



- vii. Who should bear the costs of these proceedings?
35. This petition and cross-petition, as far as I can see, are orbiting around Land Title No Lamu/Manda Island/259. I have carefully examined the facts and submissions that have been presented before me to determine whether the petitioner has shown his claim as pleaded in the petition. The 2<sup>nd</sup> interested party and 5<sup>th</sup> respondent in the cross-petition currently have this title; they purport to have acquired it through purchase for consideration in a market overt, while the 3<sup>rd</sup> through 5<sup>th</sup> respondents/cross-petitioners purport to have received it through allotment from the Kenyan government after fulfilling the conditions set in the offer.
36. The argument is that the suit property was initially the subject of litigation in Malindi ELC Petition No 62 of 2012; Houd Mahmoud Athman v The Attorney General & others; this was followed by an appeal in the Court of Appeal in Civil Appeal No 128 of 2018; Swaleh Mohamed Waziri & 3 others v Houd Mohmoud Athman & another. This Court (Angote J.) declared the registration of the 3<sup>rd</sup> through 5<sup>th</sup> respondents null and void, and the Court of Appeal upheld his decision after an appeal preferred against the decision. The 3<sup>rd</sup> through 5<sup>th</sup> respondents argued that neither the petition nor the litigation that ensued involved them as participants in the nullification of that title.
37. The petitioner used correspondence from the National Land Commission (NLC) to demonstrate that the relevant title had been revoked. A letter dated August 18, 2014, was presented. The National Land Commission informed the State Law Office of the following through the aforementioned letter:

“ ELC Suit No 62 Of 2012: Houd Mahmoud Athman v The Attorney General & another

The Above Matter Refers.

Land parcel No Lamu/Manda Island/93 was allocated to Houd Mahmoud Athman of P.O Box 74 Lamu as unsurveyed agricultural plot No C Manda Island vide letter of allotment ref: 31999/IX of 20<sup>th</sup> August 1997 (copy attached and marked SK 1).

The said offer was accepted by way of payment vide receipt No G.055525 of 7<sup>th</sup> September 2007 (copy attached and marked SK 2).

Upon payment, a requisition was made to Director of Surveys to forward Registry Index Map (RIM) to facilitate lease preparation.

Director of Surveys on checking their records, they were unable to forward RIM because there was an overlap in survey which had initially resulted to parcel No 58 and 88.

On further investigation it was found that: -

Survey for parcel No 58 was based on a fake authority (forged letter of indent) and it was erased from Director of Surveys records (see SK 3 A and B). Survey for parcel No 88 was found to be contained in FR No 466/87 for land in Nairobi area (see SK 4 paragraph 7).

It later emerged that other surveys were also done on the attention of the same piece of land for parcel No Lamu/Manda Island/176-185 and 256-260, overlapping further parcel No Lamu/Manda Island/93.

When this new development was brought to the attention of the National Land Commission, the District Land Registrar Lamu was directed to place a restriction on the said parcels of land to forestall further dealings with the titles until further investigations were carried out by the National Land Commission (See SK 5).



On 24<sup>th</sup> March 2014, the National Land Commission published a notice in the National newspaper for the owners of parcel No Lamu/Manda Island/176-185 and 256 to 260 to appear before the Commission in accordance to Section 14(1) of the [National Land Commission Act](#) (see SK 6)

The parties served by the above-referred publication never appeared in the Commission on the specified date and the Commission is now only left with the option of cancelling the said title. Please enter defence on behalf of the National Land Commission who took over the office of the Commissioner of Lands...”

38. Ideally, this Court – the ELC would not be dealing with fraudulent transactions, double allocations, or obtaining titles through dishonest means if the Torrens System was correctly operating in this Country and everything was presumed to be in the status as submitted by Mr. Mwanzia for the petitioner, holding all factors “*Omnia praesumuntur rite esse acta*” – (all acts are presumed to have been done rightly and regularly). The ELC will close its doors, and we will not grow weary, but rather we will sprout wings, ready to soar to heaven as inspired by Isaiah 40.31:

“But those who hope in the Lord will renew their strength. They will soar on wings like eagles; they will run and not grow weary, they will walk and not be faint”

39. The Torrens title system works based on title registration, which confers the high indefeasibility of registered ownership. The approach eliminates the requirement to demonstrate a chain of titles, which involves tracking titles through a sequence of documents backward in time. For example, to buy land, one would simply be required to visit the Land Registry, search for the most current registered owner, make the purchase, have the land register transferred and registered in one's favour, and then embark on using it as necessary. But the reality is our registration system does not reflect what is obtained on the ground, which is why this system isn't functioning well for us. There are instances when the registration of interests' sequencing is off-mark. Double registrations, fraudulent acquisitions, corrupt, and underhand deals, etc. have led to so many lawsuits - around what is now commonly referred to as 'due diligence and tracing the root of the title' - the daily bread for the ELC. Decisions like [Wainaina v Kiguru & another](#) (Environment & Land Case E023 of 2021) [2022] KEELC 3261 (KLR) (28 July 2022) (Judgment) have been coined:

“It is trite that when a person's title is called into question, the said proprietor has to show the root of his ownership. In the case of *Hebert L Martin & 2 others v Margaret J Kamar & 5 others* [2016] the Court held:

“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.”

22. Further In the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No 239 of 2009, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal, and free from any encumbrances including any and all interests which would not be noted in the register.”

40. Malindi ELC Petition No 62 of 2012; Houd Mahmoud Athman v The Attorney General & others; involved the following parties: Houd Mahmoud Athman, who was the petitioner; The Attorney General, Commissioner of Lands; Rishad Hamid Ahmed; Abdulbasit Swaleh Mohdin; Swaleh Mohamed Waziri; Nasra Hassan Mohamed; Ahmed Abdulsim Kassim; Matano Ahmed; Ndovu Masoud Mohamed; and Jamila Yusuf Mohamed, listed as the 1<sup>st</sup> through 10<sup>th</sup> respondents, respectively. Amina Athman, Mohamed Ahmed, Abdulmajid Mahmoud, and the petitioner in this case, Abdulahi Fara Haji, were never parties to those proceedings. In the current proceedings, none of the parties contest this fact.
41. This Court, Angote J., made the following findings after hearing the petition through *viva voce* evidence:
- “The 3<sup>rd</sup>-10<sup>th</sup> Respondents did not testify in this matter. Indeed, the Respondents did not produce the letter of allotment to show that they were allocated the suit land. Although produced in evidence was a report casting aspersion on the survey report that generated plot number 93, DW2 did not produce any evidence to show that the survey plan that gave rise to plot number 93 did not emanate from the survey of Kenya.
42. The titles that were issued to the 3<sup>rd</sup>-10<sup>th</sup> Respondents have no basis at all. In the absence of evidence to show the process that was followed before the titles were issued to the 3<sup>rd</sup>-10<sup>th</sup> Respondents, I find that the same were not obtained lawfully.
43. Considering that the Petitioner produced in evidence a letter of allotment together with an approved Part Development Plan, it is the Petitioner who is entitled to land known as Lamu/Manda Island/93. The purported titles that the 3<sup>rd</sup>-10<sup>th</sup> Respondents obtained for parcels of land known as Lamu/Manda Island/88 and Lamu/Manda Island/176 to 185 were fraudulently acquired and cannot be protected by the Constitution.”
44. The evidence presented before this Court (Angote J.) served as the foundation for its conclusions. Title No Lamu/Manda Island/259 is reportedly one of the titles possessed by the 1<sup>st</sup> through 10<sup>th</sup> respondents. The parties to this petition did not provide this Court with the decree resulting from the aforementioned judgment, nor did they explain its execution. This was a pertinent matter, in my opinion, and ought to have been brought before this Court for consideration regarding whether any of the parties involved could invoke the *res judicata* doctrine, as established by the Supreme Court in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport*



We reaffirm our position as in the Muiri Coffee case that the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of *res judicata* prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively. To further bolster our position we borrow from the decision from India in *Karam Chand another v Union of India and others* on 24 April 2014 where it was restated the principles upon which the doctrine of *res judicata* is founded as follows:

29. ....it is clear that the rule of *res judicata* is mandatory in its application and should be invoked in the interest of public policy and finality. The matter which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of *res judicata* is the combined result of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:

- (1) nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.
- (2) interest republicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and
- (3) *res judicata* pro veritate occipitur: a judicial decision must be accepted as correct.....The doctrine of *res judicata* is conceived not only in the larger public interest which requires that all litigation must sooner than later come to an end but is also founded on equity, justice, and good conscience.”

45. That decision serves as the right guidance for me. As I stated, no decree was presented to this court, and Title No Lamu/Manda Island/259 was not mentioned as forming part of this court’s decision in the former petition. In the interest of fairness, I had to request the court’s original record to determine if the current property under suit belonged to any of the 1<sup>st</sup> through 10<sup>th</sup> respondents, whose claims the judge had ruled to be invalid. According to the official record, on November 30, 2016, a man named Swaleh Mohammed Waziri testified on behalf of the other respondents in that petition, stating that the title was one of those parcels they legally possessed after being granted by the state. An examination of the proprietorship section, as annexed in the said affidavit shows that the property was in the names of Amina Athman, Abdulmajid Mahmoud, Mohamed Ahmed, and Andrew Kimani Mwangi, who were never parties in that petition. Since they were not parties to the petition, the said Swaleh Mohammed Waziri had no authority from the 3<sup>rd</sup> to 5<sup>th</sup> respondents to represent them. At least I did not see any authority. It means, therefore, that whereas their title was held to have been invalid and illegally obtained, they were never heard.

46. The petitioner in this case, Abdulahi Fara Haji, has now entered the fray. He has made a lengthy deposition and asserted that he was granted the same parcel with the approval of Houd Mohammed Athman, who was the principal litigant in Malindi ELC Petition No 62 of 2012; Houd Mahmoud



- Athman v The Attorney General & others. The aforementioned Houd did not participate in these proceedings. I'm not so sure if it was intentional or for any other reason or design that he refrained from participating in this petition. His testimony could have been crucial to my mind, in demonstrating if the judgment and decree in the petition were carried out in his favour and whether he transferred his ownership stake to Abdulahi Fara Haji who later sold the same to the 2<sup>nd</sup> interested party or he surrendered his interest to the Government of Kenya for reallocation. It is a serious convolution here! This is where the chain breaks in the history of land parcel No Lamu/Manda Island/259.
47. Goodison Nine Limited, the 2<sup>nd</sup> interested party was paid Kshs 5,000,000 for the said land, and, who asserts full possession of the same to date, was given a Certificate of Lease on the same day, thereby establishing its interest in the suit property. The Land Registrar, the Survey Department, and the National Land Commission - named multiple times during the proceedings - as well as the 3<sup>rd</sup> through 5<sup>th</sup> respondents and the 2<sup>nd</sup> interested party are the parties who should have been combatants in this petition to demonstrate how the two parties' titles were acquired. How Abdulahi Fara Haji is still interested in this petition is beyond me. He is not the registered owner. His interests ceased upon sale and transfer. This means we still have the two titles in the market, one held by the 2<sup>nd</sup> to the 5<sup>th</sup> respondents, and that now held by the 2<sup>nd</sup> interested party. A court of law is supposed to make an inquiry or investigate who among the two title holders has the 'real title.' That journey has been held by this court to be the discovery of the root of the title. See *Wainaina v Kiguru & another* (Environment & Land Case E023 of 2021) [2022] KEELC 3261 (KLR) (28 July 2022) (Judgment) (*supra*).
48. That then brings me back to the issue of *res judicata*. As stated I have carefully perused the entire record of this Court (Angote J.). Each of the parties has a different interpretation of what the holding of the judge was. I have shown the pain I undertook to check what the judge held in that matter. The petitioner stated that parcel No Lamu/Manda Island/259 was under discussion with the 3<sup>rd</sup> and 5<sup>th</sup> respondents saying it was not, they were never parties to the suit. To my mind, the file is still within our Registry, parties are at liberty to bring whatever issues they have in that file. I expected the orders of the judge should have been implemented, instead, we are having another new petition (reincarnated) for this Court to interpret what the judge found. The main question then back to the Torrens System does the register mirror the holding of this Court in Malindi ELC Petition No 62 of 2012; Houd Mahmoud Athman v The Attorney General & others? Mr. Tom Nyangau the Register of Land Lamu was of little assistance to this Court he did not refer to this Court what his office had done to implement the decision of this Court in the former petition. Instead, he seemed to shrug his arms, he was also in a quandary like me. He has two sets of leases, but the Director of Land Administration has not advised him what he should do. The matter has been compounded by the DCI who has come in to investigate. All this mess could have been avoided if our Land Registries had genuine, verifiable, and timely entries in the register reflecting and mirroring dealings in land held on our behalf. I therefore miss the chronological history of the land title Lamu/Manda Island/259.
49. In dealing with the issue of *res judicata* when dealing with Constitutional petitions the Supreme Court in the *John Florence Maritime Services Limited & another* (*supra*) had this to say:
- “If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of the *Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of *res judicata*, they only need to invoke some constitutional provision or other.



83. However, though the doctrine of *res judicata* lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the Danyluk Case from Canada the court cited the dissenting opinion of Jackson JA, in *Iron v Saskatchewan (Minister of the Environment & Public Safety)*, 1993 CanLII 6744 (SK CA), [1993] 6 WWR 1 (Sask C A), at p 21 where he stated:

“The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.”

84. Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of *res judicata*. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.

85. In the alternative a litigant must demonstrate special circumstances warranting the court to make an exception.

50. As stated in this judgment, the cross-petitioners and respondents ranging from the third to the fifth were never involved in the first petition. They can choose to revisit that petition and show that, as they were never heard, the judgment and decree do not apply to them. As an alternative, they have filed a cross-petition, which I will evaluate based on its merits to spare them any hardship that might result from the application of the *res judicata* doctrine.

51. According to the cross-petitioners, the disputed land was obtained by allocation. They claim to have complied with all offer requirements and paid the necessary fees following the demands made in the allotment letter. Their argument was refuted, nonetheless, because Ali Haider Ali's Power of Attorney was unregistered and the requirements for payment were never met on time.

52. The Power of Attorney held by Ali Haider Ali was not registered it offended the provisions of Section 9 of the [Registration of Documents Act](#) Cap 285 which provides that every document the registration whereof is compulsory shall be registered within two months after its execution, and if executed outside Kenya it shall be registered within two months after its arrival in Kenya. There is no evidence that this provision was complied with. Section 4 of the [Registration of Documents Act](#) Provides that:

“All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:’

53. Whereas this requirement appears not to have been fulfilled, the said Ali Haider Ali had authority conferred to him executed by the other respondents to plead in this matter on their behalf see Nambuye



J. (as she then was) in *Stephen Lolo Tathi & others v Mahabm Musa Kioko Ziwani Mosque & School Association* [2003] eKLR, where faced with a similar issue she held:

“I have considered the arguments from both sides on the advisability of the document listed as No 1 in the list of documents filed by the plaintiff and considered the same in the light of the provisions of the law relied upon by both counsels order 1 rule 12(1) stipulates that where there are more than one plaintiff any one or more than may be authorized by any other of them to appeal plead or act for such other in any proceeding. Order 1 rule 12(2) stipulates that the authority shall be in writing signed by the party giving it and shall be filed in the case. Through to the power of Attorney, I find that the same is not signed by the persons giving it on the first page before the Commissioner of oaths. The endorsed on a separate page and there is no indication that the separate page is a continuation of the first page. It is therefore not properly drawn.

Secondly, it is correct that a power of Attorney in order to be effective it has to be registered. In accordance with section 4 of the *Registration of Instruments Act* cap 285 Laws of Kenya and so it cannot pass the test of being called a power of Attorney in the ready legal sense. In the premises, the objection is upheld against the first document in the plaintiff's lists of documents that does not go to affect the proceedings adversely so far. The court's observation is that instead of filing a power of Attorney the plaintiff's lawyer should put in an authority to Act and attach the list with their signatures as attached to the purported power of Attorney. After replacing the purported power of Attorney with an authority to Act ...”

54. The next issue then will be whether the 3<sup>rd</sup> to 5<sup>th</sup> respondents/ cross petitioners fulfilled the conditions placed on the offer. It could seem there was a delay in the payment of fees prescribed in the offer Mr. Ali Haidar conceded in cross-examination that he did not accept and comply with the conditions set in the letter of allotment within 30 days. Nonetheless, he said the payment was made. The pertinent question would be how the 3<sup>rd</sup> to 5<sup>th</sup> respondents obtain the certificate of lease in their names if they did not fulfill the requirements of the offer. This question will be answered in the final findings of this Court.
55. There is the next question of the bona fide purchaser for value without notice. I agree with the submissions by the 2<sup>nd</sup> interested party/ 5<sup>th</sup> respondent in this petition. That as held in several authorities, on bona fide purchaser for value without notice, including the now leading decision of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment):

“The *Black's Law Dictionary* 9<sup>th</sup> Edition defines a bona fide purchaser as:

“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.”

91. The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a bona fide purchaser for value as follows:

“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:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005* [2015] eKLR stated as follows:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

93. As held by the Court of Appeal in *Munyu Maina v Hiram Gathiba Maina Civil Appeal No 239 of 2009* [2013] eKLR, where the registered proprietor’s root title 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.”

56. The manner the petitioner herein had the land transmitted to him has not been explained whether after the judgment in Malindi ELC Petition No 62 of 2012; Houd Mahmoud Athman v The Attorney General & others, the same was executed in favour of one Houd Mahmoud Athman who in turn transferred it to the petitioner herein or whether the said Houd Mahmed Athman surrendered it to the state for reallocation. Whether the alleged quashing of the title by the NLC was done on its own motion, or through a Court order. And if NLC acted did it publish the final findings and make it known to the whole world in the Kenya Gazzete? Are we dealing with a new allocation altogether? This piece of evidence was hard to come by in this petition because of the history or the root of land Title No Lamu/Manda Island/259 was erased and a new title emerged in the year 2021 in the name of the petitioner herein. The process he undertook to acquire the title which he later transferred to the 2<sup>nd</sup> interested party /5<sup>th</sup> respondent has not been explained through evidence. The sequence of alienation of Government Land is elaborately stated in the *Dina Management Limited Case (supra)*:

“The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR as follows:

“...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands



or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd v Attorney General*, Mombasa HCCC No 276 of 2013 where Njagi J held as follows:

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

105. This process is restated in *African Line Transport Co Ltd v Attorney General*, Mombasa, HCCC No 276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.

57. The petitioner herein as I said earlier having sold the land to the 2<sup>nd</sup> interested party/5<sup>th</sup> responded and having failed to show how he acquired the title whether from Mr. Houd or whether it was a fresh reallocation had no business propagating this petition, it sounded like he was prosecuting the claim for the 2<sup>nd</sup> interested party/5<sup>th</sup> respondent.
58. On the other hand, the 3<sup>rd</sup> to 5<sup>th</sup> respondents/cross petitioners given the findings in petition No Malindi Environment and Land Court Case No 62 of 2012 and lack of all necessary entries and the holistic history of Title No Lamu/Manda Island/259, the fraud assigned to the 2<sup>nd</sup> interested party cannot stand. And therefore, I could not find for any of the petitioners either in the main petition or the cross-petition. Perhaps a rematch between the 3<sup>rd</sup> to the 5<sup>th</sup> respondents/cross petitioners and the 2<sup>nd</sup> interested party/ 5<sup>th</sup> respondent may be necessary to trace the root of the title. I could not succeed here.
59. In a nutshell, both the petition and the cross-petition are denied, and each party will be responsible for paying its own costs. The explanation for this is that none of the parties provided the real evidence that was required to help this Court make a comprehensive and conclusive judgment on the Constitutional issues posed. In Kiswahili, we say "kufichiana kadi," meaning that each side kept the other guessing about when the other side unleash the crucial or "wild card", leading to the distortion of both the petition and cross-petition.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**



**E. K. MAKORI**

**JUDGE**

In the presence of:

Mr. Mwanzia for the petitioner.

Mr. Munga for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

Mr. Kibunja for the 3<sup>rd</sup> to 5<sup>th</sup> Respondent

Mr. Osoro for the 2<sup>nd</sup> interested party

Court Clerk: Happy

