



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 43 OF 2005

DR. SARAH JELANGAT SIELE.....PLAINTIFF

=VERSUS=

1. THE ATTORNEY GENERAL.....DEFENDANT

2. REMO LENZI.....DEFENDANT

3. SEVEN ISLANDS WATAMU LIMITED.....DEFENDANT

J U D G M E N T

Introduction:

1. This suit was commenced by way of a Complaint dated 3rd May, 2005. The Complaint was amended with the leave of the court in the year 2008.
2. In the amended Complaint, the Plaintiff averred that she is the proprietor of plot number 103, Watamu by virtue of a grant number CR 20405 issued to her under the Registration of Titles Act; that she later learnt that the Chief Land Registrar had directed the Kilifi District Land Registrar to issue a title deed for plot number Kilifi/Jimba/1125 to the 3rd Defendant and that the Title Deed that was issued to the 3rd Defendant subsumes and otherwise extinguishes the Plaintiff's title number 103, Watamu.
3. The Plaintiff has further averred in her Complaint that the Title Deed in respect of parcel of land number Kilifi/Jimba/1125 was issued by the Chief Land Registrar and obtained by the 3rd Defendant unlawfully and fraudulently.
4. It is the Plaintiff's case that the Commissioner of Lands had no authority to cause the issuance of a Title Deed for Kilifi/Jimba/1125 because the land was not available for allocation; that the Title Deed for Kilifi/Jimba/1125 is invalid, null and void and that it is the Plaintiff who has a valid title for plot number 103 Watamu.
5. The Plaintiff has prayed in the Complaint for the rectification of the Title Deed for Kilifi/Jimba/1125 by cancellation and in the alternative for compensation in monetary terms of the suit property.
6. In his Defence, the 1st Defendant averred that the suit property falls within an area previously registered through the adjudication process; that parcel of land known as Kilifi/Jimba/1125 was transferred by the Settlement Fund Trustees to Swaleh Athman, Abdinasir A. Mohammed and A. A. Nasir who transferred the land to a third party who ultimately sold it to the 3rd Defendant and that the issuance of the Title Deed to the 3rd Defendant was not unlawful.
7. On the other hand, the 2nd and 3rd Defendants averred in their Defence that Kilifi/Jimba/1125

does not subsume or extinguish L.R. No.103 Watamu; that parcel of land number Kilifi/Jimba/1125 is an area previously declared as an adjudication section but which was affected by the 1986 embargo and that parcel of land number Kilifi/Jimba/1125 was subsequently allocated to the squatters by the SFT.

The Plaintiff's case:

8. The evidence of the Plaintiff, PW1, was taken by Omondi J on 9th December 2010.
9. PW1 informed the court that she has land in Watamu which has been subsumed by a piece of land allegedly owned by the 2nd Defendant.
10. It was the evidence of PW1 that she applied for the subject land before 2nd July, 1990 and was issued with a title document on 2nd August, 1990. The Plaintiff produced in evidence the Grant for L.R. No. 103 Watamu that was issued to her together with the official searches for the land.
11. PW1 stated that she used the land that was allocated to her for picnics with her family and had planned to build a cottage on the land to use it during holidays.
12. According to PW1, she used the title document for plot number 103 to obtain a loan from Trans-National Bank and the property was duly charged by the Bank. After repaying the loan, it was her evidence that plot number 103 was discharged.
13. It was the evidence of PW1 that in the year 2005, she was surprised to see a stone wall covering around 16 acres of land coming up. The said wall encompassed her plot, amongst others.
14. The evidence of PW1 was that when she inquired from the Chief of the area about the new developments, she was informed that the area on which plot number 103 fell had been "redrawn" for a settlement scheme and the land in question had been allocated to a Mr. Swaleh, Mr. Abbas and another person who then sold the land to the 3rd Defendant.
15. PW1 informed the court that later on, she learnt from the District Commissioner that the 3rd Defendant was in possession of a Title Deed for a parcel of land known as Kilifi/Jimba/1125, which title had subsumed her title for plot no. 103 Watamu.
16. The evidence of PW1 was that the Title Deed for Kilifi/Jimba/1125 that was issued to the 3rd Defendant was issued in the year 2005, way after she had been issued with a grant for plot number 103 Watamu.
17. PW1 stated that she subsequently went with the surveyor on site to establish the boundaries and beacons of plot number 103 Watamu, which he did. After the establishment of the beacons, it was the evidence of PW1 that it was realised that indeed parcel of land number Kilifi/Jimba/1125 had subsumed plot number 103 Watamu.
18. While at the site, it was the evidence of PW1 that Mr. Abbas confronted her together with the surveyor and informed them that the land belonged to him and went ahead to threaten her.
19. PW1 produced in evidence the Ruling in HCCC Misc. No. 29 of 2002 in which the Court stated that parcel of land number Kilifi/Jimba/1125 was not reflected in the records of the Commissioner of Lands.
20. It was the evidence of PW1 that the problems of double allocation in Kilifi/Jimba were dealt with by a task force whose report was published in the Daily Nation of 12th August 2010; that plot number 103 was listed as one of the plots that was not affected by the embargo and that the Title Deed for Kilifi/Jimba/1125 should be cancelled by the court.
21. In cross-examination, PW1 stated that she has sought in the alternative in the amended Plaintiff for compensation of her land.
22. It was the evidence of PW1 that she paid Kshs.190,000 for the land and that the Chief Land Registrar had by a letter dated 7th March, 2002 stated that Kilifi Jimba/1125 had been allocated to squatters by the SFT.
23. PW2, a licenced surveyor, informed the court that he accompanied the Deputy Registrar of this Court to the site.
24. It was the evidence of PW2 that after visiting the site, he prepared a report in relation to plot number 103 Watamu viz-a-viz parcel of land known as Kilifi/Jimba/1125.
25. PW2 informed the court that while on the ground, he found the beacons for plot number 103 Watamu had been uprooted; that he only managed to find two beacons neighbouring plot 102 were still intact and that plot number 103 is identified in survey plan number FR 133/46. PW1

- produced in evidence the said survey plan.
26. The evidence of PW2 was that although parcel of land known as Kilifi/Jimba/1125 is supposed to be on sheet number 12 of the Kilifi/Jimba registration section, the same is not on the sheet; that sheet number 12 recognises FR No.133/46 and that the beacon numbers of FR No. 133/46 are the same as the beacon numbers on sheet number 12.
 27. PW2 informed the court that the planned area on sheet number 12 is the same area that is covered by FR 133/46 and that parcel of land number Kilifi/Jimba 1125 is not indicated on any of the two plans.
 28. According to PW1, he found that the area purportedly represented as parcel of land number Kilifi/Jimba/1125 is where plot number 103 is situated. PW2 produced in evidence sheet number 12 together with his report.
 29. In cross-examination, PW2 stated that although plot number 103 was allocated to the Plaintiff by the Government, he did not see the letter of offer; that he never dealt with the allocation of plot number 103 when he was the District Surveyor in Mombasa and that when Kilifi/Jimba Settlement Scheme was established, he was still working in Mombasa as the District Surveyor.
 30. According to the evidence of PW2, by the time the Kilifi/Jimba Settlement Scheme was established, FR No.133/46 was already in existence.
 31. PW2 stated that when he did a search on plot number Kilifi/Jimba/1125, he found that a mutation had been done; that the mutation was not based on any existing number and that the mutation must have been originated by the District Surveyor.
 32. PW2 informed the court that Settlement Schemes were created to deal with the squatters who had settled on government land and that the area under inquiry was covered under that programme. However, PW2 was categorical that the area in dispute was not government land because the land had already been allocated to individuals, including the Plaintiff.

The Defendants' case:

33. The 3rd Defendant's director, DW1, informed the court that he does not know the Plaintiff. It was the evidence of DW1 that he is a director in the 3rd Defendant's company while the other director, the 2nd Defendant, is his father.
34. DW1 stated that him, together with his father, purchased parcel of land known as Kilifi/Jimba/1125 from Mr. Abbas Ali for 220,000 Euros (approximately Kshs.25,000,000) and executed an agreement for sale.
35. According to DW1, he paid Mr. Abbas an additional amount of Kshs.3,200,000 and executed a second agreement for the said amount; that he paid a further sum of Kshs.2,500,000 to Mr. Swaleh who was claiming that a portion of plot number 1125 belonged to him and that in total, he paid Kshs.32,000,000 for parcel of land number Kilifi/Jimba/1125.
36. After the purchase of Plot number Kilifi/Jimba/1125, DW1 informed the court that they decided to have the land transferred to the 3rd Defendant; that a Transfer document was duly executed and registered and that the official search shows that the land was eventually registered in favour of the 3rd Defendant.
37. According to the evidence of DW1, he saw a letter dated 21st July, 2003 which was authored by the Chief Land Registrar confirming that Mr. Swaleh had been allocated parcel of land number Kilifi/Jimba/1125 by the SFT.
38. It was the evidence of DW1 that their advocate, Mr. Ole Kina, did due diligence on their behalf in respect of the suit property before they proceeded to purchase it.
39. In cross-examination, DW1 stated that both himself and his father are Italian citizens and that there is no Kenyan holding shares in the 3rd Defendant's company.
40. According to DW1, it is the directors of the 3rd Defendant who signed the sale agreement of 15th August, 2003 and that the company was not mentioned anywhere; that by the time the second agreement was entered into between Swaleh and the company, the land had already been transferred to the company and that he signed the second agreement on behalf of the company.
41. Although the Transfer shows the consideration of the land to have been Kshs.8,000,000, DW1 stated that he paid to Mr. Abbas Kshs.25,000,000; that the Transfer document was prepared by Mr. Abbas and that it is the advocate who paid the requisite stamp duty.

42. It was the evidence of DW1 that he bought the plot thrice because everybody went asking for money from him; that it is his advocate who handled all the transactions and that he saw the original Title Deed for plot number Kilifi/Jimba/1125 before he signed the sale agreements.
43. According to DW1, when he visited the land with Mr. Abbas, he found the land had squatters, animals, trees and coral reefs. It was his evidence that he paid off the squatters who left the land.
44. Mr. Abbas Lali Ahmed, DW2, informed the court that he has lived in Watamu for more than 40 years.
45. According to DW2, Mr. Swaleh had a house, coconut trees and animals on plot number Kilifi/Jimba/1125 and that he was allocated plot number Kilifi/Jimba/1125 by the Government.
46. It was the evidence of DW2 that Swaleh showed him the documents that he had been given by the government, including a Title Deed for Kilifi/Jimba/1125 and that is why he decided to buy the land from him.
47. DW2 stated that an advocate prepared an agreement of sale between himself and Mr. Swaleh which was duly executed whereafter plot number 1125 was transferred to him. According to DW2, he paid Mr. Swaleh Kshs.6,000,000 for plot number Kilifi/Jimba/1125.
48. DW2 stated that he paid off the squatters who were on the land then sold the land to Mr. Roberto Lenzi and Remo Lenzi, the 3rd Defendant's Directors.
49. DW2 admitted that he was paid 220,000 Euros for the land and that he was paid an additional amount of Kshs.3,200,000 to pay off the squatters.
50. Although he was initially a director in the 3rd Defendant's company, together with a Mr. Mjahim Jahid, it was the evidence of DW2 that they resigned as directors from the company. They transferred their shares in the company to the 2nd Defendant and his son, DW1.
51. DW2 denied knowledge of the existence of plot number 103 inside plot number 1125. DW2 stated that no one has ever raised a claim over plot number 1125 and that the land had squatters who were living thereon.
52. In cross-examination, DW2 stated that he was not aware that the consent of the Board was required before the land could be transferred to him; that he obtained the consent of the Board when he transferred the land to the 3rd Defendant and that it is his advocate who has a copy of the consent of the Board.
53. After the Transfer, DW2 stated that he did another agreement with the 3rd Defendant in the year 2007. It was his evidence that he demanded for more money, thus the agreement.
54. DW2 finally informed the court that he is the one who sold to the 2nd and 3rd Defendants the plot known as Kilifi/Jimba/1125 and that he co-owned the plot with Mr. Jamil before they sold it.
55. The 2nd and 3rd Defendants' conveyancing advocate, DW3, informed the court that he is the one who drew the agreement between Mr. Abbas and Remo Lenzi and Roberto Lenzi in respect of plot no. 1125; that the agreement provided for the registration of the land in the name of the purchasers or their nominee and that the 3rd Defendant was the purchasers' nominee.
56. According to DW3, the suit property is in Watamu and that when he conducted a search, he found that the land was registered in the name of Mr. Abbas (DW2).
57. DW3 informed the court that when he made further inquiries, he found out that DW2 had purchased the land from Mr. Swaleh and others who were allocated the land by the SFT.
58. DW3 informed the court that the suit property is an adjudication section and that the rights of Swaleh and others were ascertained by the SFT.
59. DW3 stated that it was not possible for him to have found out about the existence of plot 103 because of the different registration systems; that Kilifi/Jimba is a product of an adjudication which was done by the SFT and that the local committee identified the people who were on the land whereafter the SFT issued them with the letters of offer.
60. It was the evidence of DW3 that the Title Deed for parcel of land number 1125 shows that the land is within a Registry Index Map Sheet No. 12; that the land cannot therefore be government land and that the land in question is Trust land pursuant to the provisions of the 1956 Native Lands Act.
61. Because the suit property falls within Trust land, DW3 stated that the Government could not have allocated the same to the Plaintiff.
62. According to DW3, plot number Kilifi/Jimba/1125 is within Watamu town which was under Malindi Municipality and consequently the Land Control Act was not applicable.

63. It was the evidence of DW3 that the land within the then Malindi Municipality was not controlled for the purpose of the Land Control Act and that the consent of the Board was not required.
64. DW3 stated that when he was dealing with the transaction, he did not come across evidence showing that plot number 1125 was a sub-division and that he never came across a mutation which gave rise to plot number 1125.
65. It was the evidence of DW3 that the title document held by the Plaintiff presupposes that a part development plan (PDP) was done in respect of the suit property and a letter of allotment issued whose conditions must have been complied with first before the issuance of the Grant to the Plaintiff.

The Plaintiff's submissions:

66. The Plaintiff's advocate filed detailed submissions in which he rehashed the evidence that was given by the witnesses, which I have already summarised above.
67. The Plaintiff's advocate submitted that if the court finds that no adjudication process and allocation was made in respect to parcel of land number Kilifi/Jimba/1125, then there would be nothing that the 3rd Defendant would have bought from DW2 who is said to have purchased the land from the original allottees.
68. According to the Plaintiff's counsel, the 1st Defendant and the 2nd Defendant (sic) refused to testify; that the process of adjudication is an extremely detailed process that cannot be proved without documents and that there is no evidence that the process under the Land Adjudication Act was ever followed.
69. Counsel submitted that if the area was an adjudication section, nothing would have been easier than for the Defendants to produce a certified copy of the Adjudication process which was finalised in favour of Swaleh or the SFT.
70. The Plaintiff's counsel submitted that even if there was proof that the land was adjudicated and then transmitted to SFT, there was no evidence that SFT dealt with the land and therefore no land was transmitted or was capable of being transmitted to the 3rd Defendant.
71. According to the Plaintiff's advocate, DW2 had no valid title in the subject property to pass to the 3rd Defendant; that the transaction between DW2 and DW1 was a controlled transaction and that the consent of the Board was required in the circumstances.
72. Counsel submitted that the creation of Kilifi/Jimba/1125 was illegal; that the court cannot sit and allow illegal transactions to pass as it watches and that if there is no other reason for invalidating the Title Deed for Kilifi/Jimba/1125, then the same should be nullified on the basis that the Plaintiff's plot number 103 came first.
73. The Plaintiff's counsel submitted that FR No. 133/46 shows that the Interested Party- the Registered Trustees of Postal Corporation of Kenya Staff Pension Scheme- are the owners of plot numbers 96 and 110 which DW2 admitted that he left out while selling plot Kilifi/Jimba/1125 and that the plots for "Posta" cannot be left out while the Plaintiff's plot number 103 is subsumed by plot number Kilifi/Jimba/1125.
74. Counsel submitted that the 2nd and 3rd Defendants were not innocent purchasers for value; that the two actively participated in a process they knew was fraudulent and that the Transfer shows that the land was valued for Kshs. 8 million and yet DW1 claims that he paid Kshs.32 Million for the plot.
75. Counsel submitted that the intention of the Defendants was to mislead the lands office and the tax-man so as to evade tax.

The 2nd and 3rd Defendants' submissions.

76. The 2nd and 3rd Defendants' advocate submitted that the core of the Plaintiff's case is that plot number Kilifi/Jimba/1125 was unlawfully and fraudulently created by the District Land Registrar, Kilifi; that the Plaintiff's plot number 103 has been subsumed by the 3rd Defendant's plot Kilifi/Jimba/1125 and that the Plaintiff has admitted in her amended Plaintiff that both titles for plot number 103 and Kilifi/Jimba/1125 were created by the Government of Kenya.

77. Counsel submitted that the Plaintiff has not pleaded the particulars of fraud which she alleged were committed by the 2nd and 3rd Defendants.
78. The Defendants' advocate submitted that the testimony by the witnesses established that there was a settlement scheme in Kilifi Jimba area which was set up by the Government.
79. According to the Defendant's advocate, the 2nd and 3rd Defendants bought the suit property for consideration after conducting due diligence through their advocate, DW3.
80. The Defendants' counsel submitted that the Kilifi/Jimba area fell within land that was set apart pursuant to the provisions of Section 9 of the Native Land Trust Ordinance; that the suit land falls within the various units of native land and that the Settlement Trust Fund replaced the Trust Board and the Local Board which were created under the Ordinance.
81. According to counsel, the Grant for plot number 103 was issued under the Government Lands Ordinance and that there was no government land within Kilifi Jimba area.
82. The Defendants' advocate submitted that no evidence was adduced by the Plaintiff to show that the Defendants had knowledge of the Plaintiff's claim over plot number 103 and that the 3rd Defendant's title over plot number Kilifi/Jimba/1125 is indefeasible.
83. Counsel submitted that it is the 1st Defendant who should be blamed for the double allocation of the land in Kilifi Jimba.
84. The Defendants' counsel submitted that the sale of plot number Kilifi/Jimba/1125 was reduced into writing; that the Plaintiff is a stranger to the contract between DW1 and DW2 and that there was no evidence to show that plot number Kilifi/Jimba/1125 was in controlled area for the purpose of obtaining the consent of the Board.
85. The Defendants' counsel finally submitted that it is the 3rd Defendant who has at all times been in possession of the plot and that even if this court was to order for the rectification of the title, the rectification can only go to the extent of allowing plot number 103 and not the cancellation of the title for plot number 1125 which is bigger.

Reply to the Defendants' submissions:

86. In response to the 2nd and 3rd Defendants' submissions, the Plaintiff's advocate submitted that this is not an ordinary civil matter; that the issues of fraud and illegality that the Plaintiff complains of were put forward in evidence and that the parties knew that they were supposed to deal with the issue of the legality of the titles.
87. Counsel submitted that it matters not that the 3rd Defendant has developed the plot; that there was no evidence that title number Kilifi/Jimba/1125 was created by the Government and that the Defendants did not call the Chief Land Registrar to testify.
88. The Plaintiff's counsel submitted at length as to why plot number Kilifi/Jimba/1125 is not Trust Land.
89. According to the Plaintiff's counsel, it is not true that any land that is at the Coast is part of the Coast Land Unit and therefore Native (Trust) Land; that the schedule in the Ordinance shows instances where certain lands were excluded from the ordinance and that no evidence was called to show that the land in question was Trust land.
90. The Plaintiff's counsel submitted that the issue of double allocation does not arise because plot number Kilifi/Jimba/1125 does not exist and that Map sheet number 12 does not have plot number Kilifi/Jimba/1125.

Analysis and findings:

91. I have anxiously agonized and considered the facts and the law in this matter.
92. Initially, the Plaintiff sued the Commissioner of Lands, the Chief Land Registrar, Remo Lenzi and Seven Islands Watamu Limited as the 1st, 2nd, 3rd and 4th Defendants respectively.
93. However, in the Amended Plaintiff, the Plaintiff deleted the names of the Commissioner of Lands and the Chief Land Registrar and substituted the two with the Attorney General as the 1st Defendant. The current Defendants are therefore the Attorney General, Remo Lenzi and Seven Island Watamu Limited whom I shall refer to as the 1st, 2nd and 3rd Defendants respectively.
94. In the amended Plaintiff, the Plaintiff pleaded that she is the proprietor of plot no.103 Watamu.

95. In the said Plaintiff, the Plaintiff averred that she later on learnt that the Chief Land Registrar had directed the Kilifi District Land Registrar to issue a Title Deed for parcel of land number Kilifi/Jimba/1125 to the 3rd Defendant which subsumed and otherwise extinguished her plot being L. R. number 103 Watamu.

96. The Plaintiff further averred that the Title Deed that was issued to the 3rd Defendant for Kilifi/Jimba/1125 was issued unlawfully and fraudulently because:

(a) The parcel of land was already a government block that had been surveyed in 1984;

(b) Her acquisition of the land was first in time and therefore another title document could not be issued to the 3rd Defendant and;

(c) There was an embargo over land in the Kilifi/Jimba block which had not been lifted and therefore the transactions leading to the issuance of the title deed in respect of Kilifi/Jimba/1125 was illegal.

97. The Plaintiff is seeking for three substantive reliefs, firstly, a declaration that she has a valid title to plot number 103 Watamu, secondly, a declaration that plot number 103 Watamu was not available for alienation by the State after 2nd August, 1990 and lastly, for a permanent injunction to issue restraining the 2nd and 3rd Defendants from trespassing or dealing with land known as Kilifi/Jimba/1125 as to prejudice her rights over plot number 103 Watamu.

98. In the alternative, the Plaintiff has prayed for compensation in monetary terms and general damages.

99. In their Defence, the 2nd and 3rd Defendants maintained that the 3rd Defendant is a bona fide purchaser for value of parcel of land number Kilifi/Jimba/1125.

100. The 2nd and 3rd Defendants' Defence denied that plot number 1125 subsumes plot number 103 Watamu. According to the Defence plot number 1125 was initially allocated to squatters who eventually sold it to them.

101. Although the 1st Defendant filed a Defence in which it was averred that parcel of land number Kilifi/Jimba/1125 was transferred by SFT to Swaleh Athman who then sold it to Mr. Abbas who in turn sold it to the 3rd Defendant, the 1st Defendant did not call witnesses.

102. The Plaintiff, PW1, informed the court that she applied and was allocated by the Government plot number 103.

103. According to the Grant that was produced in evidence by PW1, the Plaintiff was registered as the proprietor of plot no. 103 on 2nd August, 1990.

104. The Grant that was issued to PW1 by the government is a leasehold of 99 years and measures 0.4134Ha. The Deed Plan that is attached on the Grant is dated 24th July, 1990.

105. PW1 also produced in evidence a Certificate of Postal Search showing that indeed she was the registered proprietor of plot number 103 Watamu.

106. According to her, while she was walking along the Watamu beaches, she noticed that someone was putting up a perimeter wall encompassing plot number 103, and on inquiry, she discovered that the 3rd Defendant was in possession of a Title Deed for Kilifi/Jimba/1125.

107. On further inquiry, PW1 was informed by the area Chief that the area in which plot no. 103 falls had been re-drawn for a settlement scheme and the same was allocated to the squatters.

108. The only land surveyor that was called in this matter by the Plaintiff, PW2, filed a report in which he stated that plot number 103 is contained on survey plan F/R No. 133/46.

109. PW2 informed the court that when he visited the site, he found that indeed plot number 103 was inside the fenced plot which was plot number Kilifi/Jimba/1125 measuring 6.2 Ha.

110. However, according to PW2, plot number Kilifi/Jimba/1125 was not reflected on the Registry Index Map sheet number 12. Sheet number 12, together with FR No. 133/46 were produced in evidence by PW2.

111. According to PW2, the beacons on FR No.133/46 which created plot number 103 amongst others has the same beacon numbers as those ones on sheet number 12.

112. The evidence of PW2 was that the identity of those beacons shows that by the time the

- registration section indicated in sheet number 12 was approved, F/R No. 133/46 had already been approved and registered by the Directors of Surveys.
- 113.PW2 informed the court that he found in the District Surveyor's office copies of mutation forms showing that plot number 1125 was a sub-division. However, he was unable to know the number that gave rise to plot number 1125. PW2 did not produce the copies of the Mutation forms in evidence.
- 114.I have perused the survey plan number F/R 133/46 that gave rise to plot number 103 which was purportedly allocated to the Plaintiff.
- 115.Indeed, as stated by PW2, the said survey plan (F/R No. 133/46) was prepared in 1976, meaning that plot number 103, amongst the other plots indicated in FR No. 133/46 (they are more than 60 plots) were surveyed in 1976 and allocated numbers pursuant to the provisions of the Registration of Titles Act. However, the same land was brought under the regime of the RLA (repealed) when Registry Index Map (sheet) No.12 was prepared in June 1976 by a Director of Survey.
- 116.PW2 informed the court that he was the Coast Provincial Surveyor between 1996 -2003 having worked as the District Surveyor in Mombasa between 1989 – 1995.
- 117.When PW2 was asked if he knew when plot number 103 was allocated to the Plaintiff before she was issued with a Grant, he stated that he did not know. It was the evidence of PW2 that he had never seen the letter of allotment for plot no. 103.
- 118.It was the evidence of PW2 that while working as the District Surveyor in Mombasa in 1990, he never dealt with plot number 103.
- 119.PW2 stated that he was in Mombasa when Jimba Settlement Scheme was established; that by that time, F/R 133/46 was already existing and that in any event, plot number Kilifi/Jimba/1125 is not reflected on sheet number 12.
- 120.The evidence of PW2 shows that indeed the government established a settlement scheme known as Kilifi Jimba to settle the squatters who were already squatting on government land. This evidence was collaborated by the evidence of PW1 who stated that the Chief of the area had informed her that the area had been re-drawn and allocated to squatters.
- 121.PW1 produced in evidence PEXB6 which is the Replying Affidavit of Remo Lenzi together with the annexures.
- 122.One of the annexures attached on PEXB6 is the letter dated 7th March, 2002 authored by the then Chief Land Registrar and addressed to Mr. Swaleh Athman & Others. In the letter, the Chief Land Registrar stated as follows:-

“ While it is true that the subject plot falls within an area previously registered through the adjudication process, the same was affected by the 1986 embargo and subsequently allocated among other through the Settlement Fund Trustees (SFT). In this context and unless otherwise stated the Settlement Fund Trustees allocation remains valid. You may therefore wish to proceed with your planned developments on the plot”.

- 123.In another letter dated 21st July 2003 and annexed on PEXB6, the Kilifi District Land Registrar informed the Principal Litigation counsel as follows:

“According to the records held in this office parcel no. Kilifi/Jimba/1125 was allocated by Settlement Fund Trustees to the 5th, 6th and 7th Respondent and the allocation remains valid hence the Title Deed issued to them.....”

- 124.Although the Plaintiff's counsel objected to the production of the above letters by DW1, which objection I sustained, the said documents were produced by the Plaintiff herself as Plaintiff Exhibit number 6. Consequently, the letters are part and parcel of the evidence before the court notwithstanding that the makers of the documents were not called to testify.
- 125.Although DW3, an advocate of this court, stated that Kilifi/Jimba was Trust land and that that is why the SFT adjudicated the rights of the locals and issued them with Title Deeds, he did not produce any evidence to show that indeed Kilifi/Jimba Registration Section, represented in sheet No.12, was Trust land.
- 126.In any event, if Kilifi/Jimba Registration Section was indeed Trust land as defined by Section 114 of the repealed Constitution, then the SFT would not have established it as a settlement

- scheme because Trust land can only be dealt with as provided for by the Land Adjudication Act and the Trust Land Act.
127. The preamble to the Land Adjudication Act states that it is “an Act of Parliament to provide for the ascertainment and recording of rights and interests in **Trust land**, and for purposes connected therewith and purposes incidental thereto.”
128. The Act provides the mechanisms that have to be put in place in ascertaining the rights and interests of the people who are entitled to Trust land up to the point that the people who are entitled to the land are issued with Title Deeds. The SFT is not involved at all in the ascertainment of rights and interests in Trust land.
129. The only bodies/persons that can deal with the ascertainment of rights and interests in Trust land under the Act are: the Land Adjudication Officer, the Land Adjudication Committee, the Land Arbitration Board and the Minister.
130. There is a distinction between land adjudication, which is a process that is governed by the Land Adjudication Act, and Settlement, which is the function that was bestowed upon the SFT by Sections 167 and 168 of the Agriculture Act, Cap 318.
131. In fact, it is because of the above distinction that the Department of Land Adjudication and Settlement in the Ministry of Lands has two Divisions, namely, the land Adjudication Division and the Settlement Division.
132. The Land Adjudication Division deals with the ascertainment of land rights and interests of individuals on customary/trust lands and the administration of Group Ranches while the Settlement Division deals with the settlement of the landless and regularization of squatters on government land.
133. From the evidence of PW2, (the surveyor), Kilifi/Jimba fell into the later category, that is land set aside by the government for Settling Squatters.
134. Consequently, the issue of the provisions of the Land Adjudication Act having not been complied with when the Title Deed for parcel land number Kilifi/Jimba/1125 was issued to the initial allottee does not arise.
135. Land for settlement used to be acquired by the SFT from either private proprietors or the Government. Indeed, a Fund known as Agricultural Settlement Fund was established for the purpose of purchasing land from individuals with a view of settling the landless. That is how the former “White Highlands” in the former Rift Valley Province were purchased and settlement schemes established.
136. After acquiring the land, either from the Government or by purchase, the SFT would survey the land, identify beneficiaries or squatters and then allocate them the land.
137. After allocating the land, the SFT would either charge the land and only issue a Title Deed to the identified individuals upon discharge or it would issue Title Deeds to the allottees without charging it, in what was known as “a direct purchase”.
138. All land that was allocated to individuals by the SFT used to be registered under the RLA and not RTA, even where the land that had been acquired was initially Government land.
139. The evidence by DW1 was that the 3rd Defendant, through its directors, purchased parcel of land number Kilifi/Jimba/1125 from Mr. Abbas, DW2.
140. DW2 on the other hand informed the court that he purchased the said land from Mr. Swaleh A. Athum and two others. The evidence of DW2 was that Mr. Swaleh, Mr. Abdinasir and Mr. Nasir were identified as squatters and were allocated plot Kilifi/Jimba/1125 by the SFT.
141. The Transfer document between Mr. Abbas and Mr. Swaleh & others was produced in evidence.
142. Although the Defendants did not produce the Green card to show whether indeed plot number Kilifi/Jimba/1125 was initially registered in the name of the SFT before it was transferred to Swaleh and others, I have no reasons to believe otherwise. Indeed, that is what the Chief Land Registrar stated in his letter dated 7th March, 2002 that was produced as PEXB6.
143. The Plaintiff, through her advocate, submitted that in any event, the Title Deed that was issued to the 3rd Defendant cannot stand, firstly, because the land was not available for allocation and secondly, because the consent of the Land Control Board was never obtained.
144. The Plaintiff's advocate further submitted that in any event, the agreement that was entered into between Mr. Abbas, Mr. Roberto Lenzi and Mr. Remo Lenzi did not refer to the 3rd Defendant at all.
145. The issue as to whether the consent of the Board was ever obtained by the parties before plot

number Kilifi/Jimba/1125 was transferred to the 3rd Defendant was never raised in the Plaintiff's Plaintiff.

146.Indeed, according to the Plaintiff, the Plaintiff's complaint was that the 3rd Defendant's Title Deed is null and void because the land had already been allocated to her having being surveyed in 1984 and that there was an embargo as at the time the Title Deed for plot number 1125 was issued to the 3rd Defendant.

147.In the case of **Global Vehicles Kenya Limited Vs Lenana Road Motors, Mombasa Civil Appeal No. 7 of 2015**, the Court of Appeal stated in detail the central role of pleadings. The Court held as follows:

“Before we consider the issues raised in this appeal, it bears repeating the central role of pleadings in dispute resolution in our jurisdiction. Pleadings serve several fundamental purposes. Firstly, they define the nature and contours of the dispute that the parties have submitted to the court for resolution. Secondly, it is through pleadings that the fair hearing that is promised by Article 50(1) of the Constitution is actualized. That provision guarantees every person who has a dispute that can be resolved by the application of the law, the right to have it decided in a fair and public hearing by a court or independent and impartial tribunal or body. That right to a fair hearing comes alive in pleadings, which makes known to each party the exact case it has to prove or rebut.

Thirdly, pleadings contribute immensely to speedy resolution of dispute and cost-efficient delivery of justice. Because pleadings ensure that the dispute is focused and precisely defined, they not only eliminate ambushes and surprises, but also wastage of time and unnecessary expenses involved in calling witnesses to prove or disprove matters that are not in dispute before the court. It can therefore be argued that pleadings contribute immensely to the realization of the cardinal constitutional principle that justice shall not be delayed.

Lastly, pleadings help in keeping the judge, literally, on a short leash because as a neutral umpire, the judge determines only the issues the parties have placed before the court. Without pleadings, the judge may be tempted to determine issues of interest to him or her, which are outside the contemplation of the parties, or to even determine matters that are not in dispute at all.

It is for the above reasons that it has been emphasized time and again that except where an issue has been sufficiently raised, succinctly made an issue at the trial, and left to the trial court to decide, parties are bound by their pleadings and that the court should not by its own volition introduce issues to the dispute which do not arise from the pleadings.”

148.In the above case, the Court of Appeal quoted with approval the holding of **Jessel M. R** in the case of **Thorp Vs Holdsworth (1876) 3 Ch. D 637 at 639** who stated as follows:-

“ The whole object of pleadings is to bring the parties to an issue and the meaning of the rules....was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regard to the amount of testimony required on either side at the hearing.”

149.The Court of Appeal further reiterated the issue of parties being bound by their pleadings in the case of **David Sironga Ole Tukai Vs Francis Arap Muge & Others, CA NO. 76 of 2014** where it held as follows:

“It is well established in our jurisdiction that the court will not grant a remedy, which

has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

150. In the Plaintiff, the Plaintiff admitted that the 3rd Defendant was issued with a Title Deed for parcel of land number Kilifi/Jimba/1125 by the Kilifi District Land Registrar. The Plaintiff has sought for the cancellation of the said title not because the Board never gave its consent, or the agreement was in respect of different parties, but because the land had already been allocated to her.
151. The Plaintiff's advocate introduced the issue of the consent of the Board while cross-examining DW1, DW2 and DW3 without amending the Plaintiff. Indeed, PW1 never raised that issue when she was testifying. That, as was held by the Court of Appeal in the above case, is not proper.
152. The Defendants, while preparing their cases, did not prepare to deal with that aspect because it was not pleaded in the Plaintiff.
153. In any event, it is the Plaintiff who was bound to prove that indeed parcel of land number Kilifi/Jimba/1125 is “agricultural land” as defined by the Land Control Act, notwithstanding the fact that the agreement of 15th August 2003 alluded to the fact that parties were to obtain the consent of the Board.
154. This is more so considering that DW3 stated that while conveying the parcel of land number 1125 to the 3rd Defendant, he discovered that the land was within a municipality and the consent of the Board was not required.
155. Although the 3rd Defendant was not a party to the agreement of 15th August, 2003, the agreement provided for the purchasers to appoint a nominee for the purpose of registering the Title Deed. That is how the Title Deed was issued in the 3rd Defendant's name.
156. It therefore follows that the Plaintiff would not have succeeded to have the Title Deed that was issued to the 3rd Defendant nullified on those two limbs even if she had pleaded them in her Plaintiff.
157. The above argument also applies to the question that was raised in cross-examination by the Plaintiff's advocate as to whether or not the requisite stamp duty was paid by the Defendants. That issue was not pleaded in the Plaintiff.
158. The last and most pertinent issue that I will deal with is whether parcel of land known as Kilifi/Jimba/1125 was available for allocation in view of the Grant for plot number 103 that had been issued to the Plaintiff.
159. I have already stated that survey plan FR No. 133/46 was brought under the regime of the Registered Land Act when sheet number 12 was prepared in June, 1976, three years after the survey. I say so because the Registered Map Sheet No. 12 for “Kilifi Jimba Registration Section which was produced by PW2 was prepared in June, pursuant to the provisions of the RLA.
160. Although the entire land represented in FR No. 133/46 was surveyed in 1976, it is not clear to me when the numerous plots (sub-divisions), including plot 103, appearing on FR No. 133/46 were made.
161. The Grant for L.R. NO. 103 that was issued to the Plaintiff was registered by the Registrar of Titles in Mombasa on 2nd August, 1990 while the Deed plan for the said plot was issued on 24th July, 1990.

162. Notwithstanding the fact that the survey for the entire government block was surveyed in 1976, thus F/R No. 133/46, the Plaintiff's interests in plot number 103 only crystallised on 2nd August, 1990 when a grant was issued to her.
163. However, by the time the Plaintiff was issued with the Grant for plot 103 in 1990, the land was already governed by the Registered Land Act (repealed) when the Registry Index Map (sheet) No. 12 was prepared in June 1979, which, as stated by PW2, incorporated the entire block represented in F/R No. 133/46.
164. Registry Map Sheet No. 12, 4th edition clearly shows that the clearly shows that the “ Kilifi/Jimba Registration Section” incorporated F/R No. 133/146, which, according to the sheet, was prepared in June 1979 and was “retraced” in November 2011.
165. It therefore follows that the Government, by 1979, had set aside the land represented in survey plan number F/R 133/46 as a settlement scheme to be managed by SFT, and the only title documents that could be issued were only in respect to the people who were to be identified by the SFT either as squatters on the land or landless.
166. Furthermore, having placed FR 133/46 under the Registered Land Act, the Government could not purport to sub-divide the land and issue grants under the Registration of Titles Act in 1990 or at all before cancelling Sheet No. 12 that was prepared pursuant to the provisions of Section 18(1) and (3) of the RLA.
167. The Plaintiff could not have therefore legally acquired a Grant in respect of plot number 103 in 1990 in view of the fact that the land had already been set aside by the Government for a settlement scheme known as Kilifi/Jimba Settlement Scheme and the Title Deeds that were to be issued could only have been issued pursuant to the provisions of the RLA (repealed).
168. I say so because plot number 103 was created on 24th July, 1990 by way of Deed Plan number 147796 and not in 1976 as the Plaintiff would want this court to believe.
169. The above conclusion is buttressed by the fact that the Plaintiff did not produce a copy of the letter of allotment that was issued to her, which is a formal offer that the government always makes when it is allocating its land, to enable this court ascertain if indeed the allocation of plot no. 103 was done before June 1979 when Sheet Number 12 was prepared.
170. The failure by the Plaintiff to produce the letter of offer and evidence showing the stand premium that she paid to the government clearly shows that by 1990, the Government could not have offered plot number 103 to the Plaintiff because the land was already under the Jimba Registration Section, as indicated in Registry Map Sheet No. 12.
171. Even if I am wrong in my conclusion above, Section 39(1)(c) of the Registered Land Act seems to suggest that where land is brought under the Act, it does not matter that the same land had already been registered under the Registration of Titles Act, more so where an innocent purchaser for value is concerned. The said section states as follows:

“39(1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned-

(c) To search any register kept under the Land Registration (Special Areas) Act, the Government Lands Act, the Land Title Act or the Registration of Titles Act.”

172. The RLA (repealed) therefore protects a person dealing or proposing to deal for valuable consideration with land which has been registered under the Act, notwithstanding an existing title issued under a different registration tenure system. Of course, that can only hold if the registration of the impugned title under the RLA was done in a lawful manner. The indefeasibility of the title deed held by the 3rd Defendant is further buttressed by the fact that the Plaintiff never took possession of plot number 103 after the same was purportedly allocated to her in 1990. There is therefore no way the 3rd Defendant would have known about the grant that was issued in 1990 to the Plaintiff.
173. Although PW2 attempted to impugn the Title Deed for parcel of land number Kilifi/Jimba1125 on the ground that it is not reflected on sheet number 12, it follows that due to the nature of the boundaries under the RLA, which are usually general boundaries and not fixed boundaries,

- allocation of land is usually done first and the Registered Index Map is amended later to reflect the allocations, especially in a settlement scheme.
174. What is important during the allocation process is the creation of a map for every registration district or section and the opening of a register. That is what happened in this matter when sheet number 12 for the Jimba Registration Section was prepared in 1979. Parcel of land number 1125 need not be in the R.I.M for it to be valid. But again, whether plot 1125 is on the R.I.M or not was not one of the issues that was pleaded in the Plaintiff.
175. The evidence before me shows that Swaleh and others were allocated the suit property within the Jimba Registration Section by the SFT. The Title Deed for parcel of land number Kilifi/Jimba/1125 shows that it falls within that section, otherwise known as Registry Map Sheet 12 which was produced by PW2. The Jimba Registration Section was established in June, 1979, way before the Plaintiff was issued with a grant for plot No.103, which in my view should not have been issued in the first place.
176. The Plaintiff did not pursue the prayer for compensation for plot number 103 when she testified. I shall therefore not address that issue.
177. It is for the above reasons that I find and hold that the Plaintiff has not established a case on a balance of probabilities.
178. In the circumstances, I dismiss the Plaintiff's Plaintiff which was subsequently amended with costs to the Defendants.

Dated, signed and delivered in Malindi this 13th day of May, 2016.

O. A. Angote

Judge