-Doctrine of Accretion and Alluvion

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.218 OF 2014**

**IRENE MARY HAMPHRIES (suing in her own capacity and as executor and trustee of the Estate of her late husband ROY WYETH HUMPHRIES.....PLAINTIFF**

**=VERSUS=**

**1. TAHIR SHEIKH SAID (also known as TSS)**

**2. IBRAHIM MUKTAR ABASHEIKH**

**3. THE NATIONAL LAND COMMISSION**

**4. THE DIRECTOR OF SURVEYS NAIROBI**

**5. THE REGISTRAR OF LANDS MOMBASA**

**6. THE ATTORNEY GENERAL.....DEFENDANTS**

**R U L I N G**

1. What is before me is the Application by the Plaintiff dated 20th November 2014 in which the Plaintiff is seeking for the following orders:

(Orders Nos. a, b, c, e, g and h have been spent).

(a) **That pending the hearing and determination of this suit the Honourable Court be pleased to restrain the 1st Defendant, his servants and or agents from presenting the grant in his possession for Portion Number 1125 Malindi for registration by the 5th Defendant.**

**(b) That pending the hearing and determination of this suit the Honourable Court be pleased to restrain by order of injunction the respondents jointly and severally, their employees, servants or agents or any one of them from trespassing into or remaining upon, selling, mortgaging, transferring or in any**

**other way dealing with the Petitioners' land known as Portion Number 11200 Malindi.**

**(c) The penal notice to be inserted on any order or orders issued to be deemed to be in force and within the knowledge of any party served.**

**(d) Costs of and incidentals to this application.**

**The Plaintiff's case:**

2. The Plaintiff's Application is premised on the ground that at all material times, the Plaintiff was registered as the proprietor of land in fee simple of all that portion of land measuring approximately 3.01 acres and known portion number 620 (original number M17G).
3. It is the Plaintiff's case that the 1st Defendant on the other hand owns land known as portion number 617 which is also a subdivision of M17G.
4. It is the Plaintiff's deposition that when M17G was subdivided, the eastern boundary of the land extended to the Indian Ocean. However, in or about 1961 and following wide spread floods, there was wide spread siltation along the Malindi Bay as a consequence of which the sea in some sections of the Malindi Bay has continued to recede exposing land that originally formed part of the Indian Ocean sea bed.
5. According to the Plaintiff, the sea has receded by more than a kilometer in some places while in some areas, the sea has encroached on the land.
6. It is the Plaintiff's case that the 1st Defendant was able to apply for and acquired portion number 10801 which abuts his portion of land number 617 Malindi and that the 1st Defendant should rightly hold the title to that portion of land, save that the preparation of the deed plan thereto should have respected the common law rights of the owners of portion number 618 to access the sea.
7. The Plaintiff has deponed that she applied for and was issued with a title for a term of 99 years of the resultant land measuring 2.916 hectares known as portion number 11200; that she applied and was allocated the land merely to register the common law right of access to the sea and that the deed plan shows that the Plaintiff's portion of land abuts the Indian Ocean.
8. According to the Plaintiff, when she attempted to clear portion number 11200 in the year 2014, the 1st Defendant's agents stopped her from doing so; that on 15th November 2014, the 2nd Defendant visited portion number 11200 in the presence of the surveyor for the purpose of identifying a portion of land which the Plaintiff learnt to be portion number 11215 and that the Plaintiff's neighbours on portion number 785 (original number 621/1) informed the surveyor and the 2nd Defendant that the land in question is private land.
9. However, it is the Plaintiff's deposition that on 16th November 2014, the 1st Defendant's agents created a road of access along the riparian of numbers portion 618 and 617 connecting portion number 617 with portion number 620 and portion number 11200 thus splitting the portion into two.
10. It is the Plaintiff's deposition that the grant issued in respect of portion number 11215 is not registered and is not registrable because the grant purports to suggest that it completely subsumes the Plaintiff's portion of land number 11200 and interfere with the riparian right of portion numbers 618, 619, 620, 785, 786 and 622 Malindi.
11. According to the Plaintiff, the survey and the subsequent deed plan for portion number 11215 was prepared in violation of Regulations 91, 99 and 103 of the Survey Regulations.
12. It is the Plaintiff's deposition that the wall erected by the 1st Defendant around portion number 11215 is a vicious and dreadful eyesore interfering with the Plaintiff's unimpeded view of the sea.
13. According to the Plaintiff, by dint of Section 24, 25 and 26 of the Land Registration Act, the Plaintiff became the indefeasible owner of the subject piece of land and the said land ceased to be un alienated Government land.
14. The Plaintiff summarized her case by averring that the 3rd Defendant does not have the power to extinguish the riparian rights enjoyed by the Plaintiff and the properties abutting the Indian Ocean contiguous to the Plaintiff's land or at all.

15. Other than the Plaintiff's Affidavit, the Application is also supported by the Affidavit of Tukero Ole Kina, an advocate and a neighbour of the Plaintiff and the 1st Defendant.
16. In the said Affidavit, Mr. Tukero Ole Kina has deponed that him, together with his wife are the registered proprietors of portion number 785. I will not go into the details of that Affidavit considering that there is a distinct suit in relation to portion number 785 viz a viz portion number 11215.

**The 1st and 2nd Defendants' case:**

17. The 2nd Defendant's advocate filed Grounds of Opposition in which he averred that the 2nd Defendant, as an agent of the 1st Defendant and with no personal interest in the suit property, is wrongly impleaded.
18. In his Replying Affidavit, the 1st Defendant deponed that he is the registered owner of land known as plot number 11215 which is a Grant for a term of 99 years by the government; that plot number 11215 borders to the east his other plot known as portion number 10801, which is also a Grant and that portion number 10801 borders portion his other land known as number 617 which is a freehold title.
19. According to the 1st Defendant, his property being plot number 617, like all the other neighbouring plots, was affected by flooding and siltation causing the Indian Ocean to recede thereby creating land between the hitherto beach front properties and the new sea line.
20. The 1st Defendant deponed that as a law abiding citizen, he knew better than to pretend to have some rights over the chunk of land that emerged as a result of siltation; that having been advised that all land that is not private land belongs to the government, he applied to the Commissioner of Lands vide a letter dated 1st September 1993 to be allocated a portion of the newly created land towards the Indian Ocean and that his application was allowed.
21. It is the 1st Defendant's case that he was then allocated plot number 10801 whereafer he also applied for the land that was abutting plot number 10801.
22. It is the 1st Defendant's case that the Commissioner of Lands allocated to him the second portion of land known as plot number 11215 which he intends to build a hotel.
23. The 1st Defendant has deponed that Mr. E. M. J Kiguru conducted the survey for plot number 11215; that the surveyor forwarded to the Director of Surveys the documents and reports that he used to survey the land and that the Director of Surveys approved the said survey plan.
24. After the said survey plan was approved by the Director of Surveys,, the 1st Defendant has deponed that the surveyor prepared a Deed Plan for checking and signing in respect of plot number 11215 which was thereafter forwarded to the District Land Registrar for registration.
25. It is the 1st Defendant's case that since plot number 11215 was registered in the year 2009, he has been paying the requisite rates and rent, as demanded.
26. The 1st Defendant has deponed that the title for plot number 11200 purportedly issued to the Plaintiff is itself riddled with illegalities; that he has established that portion number 11200 is not located anywhere near plot numbers 620 or 11215 but somewhere close to Malindi Airport; that the Grant for plot number 11200 was purportedly issued on 20th July 2006 and yet Roy Hamphries passed away on 14th April, 1998 and that Deed Plan number 274095 apparently issued for plot number 11200 was already committed to the survey of plot number 11215.
27. On the issue of the land that was created after the sea receded, the 1st Defendant deponed that the Plaintiff never bought the sea front; that there is no right recognised in law as the right to a beach front; that all land that is not private land belongs to the government and that the offshore is and will also remain government land.
28. The 1st Defendant finally deponed that his rights to plot number 11215 can only be defeated if fraud or misrepresentation is proved.

**The Plaintiff's submissions:**

29. The Plaintiff's advocate submitted that although the 1st Defendant applied for accreted land and

got a title for portion number 10801, there is no application in respect of portion number 11215.

30. Counsel submitted that prima facie, the grant for portion number 11200 is not only earlier in time of survey and issue but was also registered first.
31. Counsel submitted that the survey that was undertaken by the 1st Defendant which yielded portion number 11215 is void; that if the surveyor who undertook the survey agreed to establish the position on the ground and cared to obtain the relevant maps of the area, he would have been able to capture basic facts showing that most of the portions in the map had already been sub-divided and original numbers retired; that there is no access between portion number 624 (now portion 978) and portion number 979 (original number 624/2) and that the accretion was not fixed as early as 1933 when the subdivision of M12 was done.
32. Counsel for the Plaintiff submitted that accretion or alluvion is presumed by law to belong to the owner of the dry land to which it is added.
33. Counsel submitted that the accreted land acquires the characteristics of the land which is added. In respect to portion number 620 Malindi which is freehold, it was submitted, the accreted land added to it is also freehold.
34. Counsel submitted that even if the suit property is government land, the process of acquisition of the land was unlawful because the process of allocation of such land must be in accordance with the law. Counsel submitted that the decision not to advertise the property in the Kenya gazette as required by Section 13 of the Government Lands Act was motivated by the desire to circumvent the law and any of the riparian land owners.
35. The Plaintiff's counsel submitted that the Plaintiff's right to property is constitutionally protected; that the Plaintiff in this case and like situated parties had a legitimate expectation that the government would allocate them the accretion; that the erection of the wall by the 1st Defendant has cut off those properties from accessing the sea and that the Transfer of Property A ct recognised that the accretion to the land would belong to the land owner.

**The 1st and 2nd Defendants' submissions:**

36. The 1st and 2nd Defendants' advocate submitted that the applicable law in the present matter is the law that was applicable to plot number 620, 1120 and 11215 as at the time the respective proprietors got an interest therein.
37. According to counsel, the rights and interests over plot No.620 were acquired on 24th April 1979, plot number 11200 on 26th June 2009 and plot number 11215 on 28th October 2009.
38. At the said dates, it was submitted, the applicable law was the Registration of Titles Act and the Government Lands Act (repealed).
39. Counsel submitted that by purporting to apply for and obtaining a lease for portion number 11200 on 26th June, 2009, the Plaintiff recognised the public nature of the accreted lands. Consequently, it was submitted, the Plaintiff is estopped by Section 121 of the Evidence Act from disputing the government's title over the accreted land.
40. The Defendant's counsel submitted that the facts as pleaded by the Plaintiff do not lead to any conclusion of the existence of accretion, avulsion or alluvion; that the Plaintiff has admitted in her Plaint that the land accreted was formed as a result of flooding in the year 1961 and that the statement is an admission that the process herein was not so slow and gradual as to be in practical sense imperceptible.
41. Counsel submitted that where the change is not gradual but sudden and can be related to a specific event, then the resulting land belongs to the government and not the owner of the adjoining private land.
42. The Defendants' counsel submitted that the right of accretion would be accepted if the ocean-ward boundary of plot 620 was described as ending to a point on the ocean shore which is not the case. Counsel submitted that a title under the Registration of Titles Act provides for fixed boundaries.
43. Even if plot number 620 was registered under the Land Titles Act, it was submitted, Section 22 of the said Act leaves no doubt that boundaries under the Act are also fixed.
44. On the issue of the titles allegedly issued to the Plaintiff and the 1st Defendant, counsel submitted that the Plaintiff cannot cast a duty on the 1st Defendant to produce evidence of compliance with Sections 9 to 15 of the Government Land Act (repealed) without herself showing if she complied

with the said Sections; that the Plaintiff has not responded to the allegation that plot No.1200 is actually not a beach front property but an inland property and that the Plaintiff has not established a prima facie case with chances of success.

45. Counsel submitted that in any event, the Plaintiff has not shown the irreparable injury that she is likely to suffer if the injunctive order is not granted.
46. The Defendants' advocate submitted that the Plaintiff's suit is time barred pursuant to Section 136 of the Government Lands Act (repealed).

**Analysis and findings:**

47. It is not in dispute that the Plaintiff is the registered owner of land known as portion number 620 Malindi on which she has developed a residential house.
48. It is also not in dispute that the 1st Defendant also has land known as portion number 617 which is in the neighbourhood of the Plaintiff's land.
49. According to the Plaintiff's depositions, when plot numbers 620 and 617 were first planned, the eastern boundary of the land extended to the Indian Ocean.
50. The Plaintiff has averred in her pleadings that following wide spread floods in or about 1961, there was wide spread siltation along the Malindi Bay as a consequence of which the sea in some sections of the Malindi Bay and the north past the Sabaki River has continued to recede exposing land that originally formed part of the Indian Ocean sea bed.
51. Presently, it was deponed by the Plaintiff, the sea has receded by more than a kilometer in some places.
52. Due to the recession of the sea, it is the Plaintiff's case that the 1st Defendant was able to apply for and acquired portion number 10801 which abuts his land being portion number 617 Malindi. On her part, she applied for and was issued with a grant for a term of 99 years of the resultant land abutting her portion of land number 620 which is portion number 11200 Malindi.
53. However, it is the Plaintiff's case that in September 2014, the 1st Defendant claimed that portion number 11200 had been allocated to him. On inquiry, she realised that the 1st Defendant was in possession of an unregistered grant in respect of portion number 11215 Malindi.
54. The Plaintiff's claim is two pronged: firstly, that accretion or alluvion is presumed by law to belong to the owner of the dry land to which it is added and being the owner of plot 620, she is entitled as of right to the accretion and alluvion appurtenant thereto and secondly, that she is the one who was allocated the suit property by the Government after the sea receded.
55. For the court to find out if the Plaintiff has established a prima facie case with chances of success or not, it will have to address the following issues:

**(a) Whether the common law doctrines of accretion and alluvion are applicable in the instant matter, if at all.**

**(b) Whether the Plaintiff's title, prima facie, for plot number 11200, is valid.**

**(c) Whether the 1st Defendant's title for plot number 11215, prima facie, is valid.**

**(d) Whether this suit is time barred.**

56. Before I can address the above issues, I have to deal with the applicable law considering that the Land Titles Act, the Registration of Title Act and the Government Lands Act have since been repealed and replaced with the Lands Registration Act, 2011 and the Lands Act, 2012.
57. The Indenture in respect to land portion number 620 was registered in favour of the Plaintiff's late husband on 8th May, 1979 under the Land Titles Act and the grant for portion number 11200 was registered on 26th June, 2009 under the Registration of Titles Act. On the other hand, the 1st Defendant's grant for portion number 11215 was registered in his favour on 28th October, 2009 pursuant to the provisions of the Registration of Titles Act.
58. For the purposes of this suit, the applicable law in respect to the suit properties, which are plot

numbers,620 11200 and 11215 is the law that was applicable as at the time the Indenture and the grants were registered in favour of the 1st Defendant, that is the Land Titles Act and the Registration of Titles Act.

59. The above legal position finds grounding in the provisions of Section 23(3) (c) of the Interpretation and General Provisions Act which provides as follows:

> **"Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation, or liability acquired, accrued or incurred under a written law so repealed."**

60. In the case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 others (2012) e KLR**, the Supreme Court held as follows:

> **"As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relates only to matters of procedure or evidence or prima facie prospective, retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."**

61. Section 162(1) of the Land Act supports the above holding of the Supreme Court in relation to the applicability of land statutes to any dispute. The section provides as follows:-

> **"Unless the contrary is specifically provided in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."**

62. The applicable law in the instant case is the repealed RTA, GLA, LTA and the Constitution and not the Land Act and the Land Registration Act.
63. The common law doctrines of accretion and alluvion recognise the fact that where land is bounded by water, the forces of nature are likely to cause changes in the boundary between the land and the water.
64. Accretion has been defined as the gradual and imperceptible receding of the sea or inland water while Alluvion has been defined to mean the gradual and imperceptible deposit of matter on the foreshore **(see Halsbury Laws of England 3rd Ed. Vol 39 Paragraph 780).** Both lead to addition of the land on the foreshore.
65. Reliction is the opposite of Accretion. Reliction has been defined to mean the gradual and imperceptible encroachment of water onto land causing a reduction in the surface area of the foreshore. Accretion, reliction and alluvion are therefore identifiable expressions that principally denote the phenomenon of *matima incrementa.*
66. In his treatise on Real Property, Professor Powell states as follows:

> **"Where title to real property describes a boundary line as a body of water, the common law has developed several different doctrines that respond to the issues raised by the movable nature of those bodies of water. Accretion, dereliction, erosion and alluvion are ancient common law doctrines rooted in the Roman law of alluvion and the civil law doctrine of accession. As applied, these doctrines are as complex and muddy as the movements of the water. The term "accretion" denotes the process by which an area of land is increased by the gradual deposit of soil due to the action of a boundary river, stream, lake, pond, or tidal waters....." (see Powell on Real Property at 66-26).**

67. Under these common law doctrines, Professor Powell has explained in his book that where the change in the location of a body of water is caused by accretion, reliction or erosion, the boundary

line between the abutting landowner moved with the waterway. Thus, the littoral owner is given title to lands that are gradually added by accretion or reliction.

68. Some scholars have expressed doubts whether the doctrines of accretion, erosion, reliction and avulsion are actually rules of law.

69. In his book, Professor Tiffany explains as follows:-

> **"In the presence of such a doctrine, the fact that, in conveying the property to its present owner, the grantor expressly retained all future accretions, would be immaterial, as would the fact that the conveyance, in describing the land, made no reference to the body or stream of water, or to any incident or characteristics thereof. We do not find any case which explicitly decides that one can in conveying property bounding on water, retain any subsequent accretions thereto, but there are dicta to that effect. <u>The effectualness of intention in this regard is also indicated by judicial assertions that when the boundary is fixed by the deed at a specified line without reference to the water, the grantee cannot claim accretions beyond such line</u>...." (The Law of Real Property at 1075-76)."**

70. The doctrines of accretion and alluvion have been rationalized by courts in the commonwealth countries and commentators on various grounds, the most common rationalization being that since a riparian owner is subject to losing land by erosion, he should benefit from any additions to his land by the accretions thereto.

71. Professor Powell has stated in his book (Powell on Real Property) that the most persuasive and fundamental rationale for a doctrine that permits a boundary to follow the changing location of a body of water is the desirability of maintaining land as riparian that was riparian under earlier conditions, thus assuring the upland owners of access to the water along with other advantages of such contiguity. Professor Powell states as follows:

> **"One who purchases riparian land expects that the land will retain its riparian character even if the body of water moves. An essential attribute of a riparian or littoral parcel is its access to water, so when such a parcel was created and transferred the parties must have intended the transferee to retail that access."**

72. The elements attributable to the doctrine of accretion and alluvion were addressed by the court in the cases of **Southern Center of Theosophy Inc. Vs State of Scott Australia (1982) 1ALL ER 283** and **Clarke Vs Canada (Attorney General) [1930] SCR 137.**

73. In the **Southern Centre of Theosophy case (supra**) the Privy Council held as follows:

> **"This is a doctrine which gives recognition to the fact that where land is bounded by water, the force of nature is likely to cause changes in the boundary between the land and the water. Where these changes are gradual and imperceptible, the law considers the title to the land as applicable to the land as it may be so changed from time to time."**

74. In the **Clarke** case (supra), the Supreme Court of Canada had this to say:

> **"The terms "accretion" denotes the increase which land bordering on river or on the sea undergoes through the silting up of soil, sand or other substance or the permanent retiral of the waters. This increase must be formed by a process so slow and gradual as to be in practical sense imperceptible by which is meant that the addition cannot be observed in its actual progress from moment to moment or from hour to hour although after sometime it can be observed that there has been fresh addition to the shoreline."**

75. The authorities and legal commentaries I have quoted above shows that the doctrines of accretion

and alluvion apply to land bounded by water.

76. According to Professor Powell (supra), the common law doctrine of accretion applies where title to real property "describes a boundary line as a body of water."

77. In the case of **Monashee Enterprises Ltd Vs. British Colombia (Recreation and Conservation) 1981 434(BC CA), The Court of Appeal of British Colombia** held as follows:

> **"It is well stated that land gained by accretion accrues to the benefit of the riparian owner. It is equally well settled that to be a riparian owner, and thus to benefit from accretion, <u>one's property must</u> <u>run to the shoreline</u>. In this case, the riparian owner is the Crown as the owner of the one-chain strip. The land gained by accretion is added to and becomes part of the strip."**

78. In the case of **Municipality of Queens County Vs Arthur I Cooper, (1946) SCR 584**, the Supreme Court of Canada held as follows:

> **"Now that view of the effect of accretion of marks or measures cannot be said to have been followed; <u>but the fact that it was held by such an authority is the strongest evidence that accretion is wholly involved in boundary and is inapplicable where that boundary is not a water line. In cases then where the stream bed is parcelled out in ownership by fixed or line limits, the essential condition of accretion is lacking."</u>**

79. The question that arises then is whether the Plaintiff's parcel of land being portion number 620 which she acquired in 1979 had the ocean as a boundary line.

80. I have perused the Indenture that was registered on 8th May 1979 under the Land Titles Act in respect to plot number 620.

81. The Indenture has described the property that the Plaintiff's husband acquired as "registered in the Land Titles Registry at Mombasa in Volume L.T.VII Folio 356/1 the dimensions boundaries and abuttals of which are more particularly delineated on Deed Plan number 28868."

82. Although the said Deed Plan was not annexed on the Indenture, the Deed Plan number 28869 in respect to portion number 621 was exhibited. Plot numbers 621 and 620 lie on the same boundary line which is a straight boundary on the easterly side, whereafter it is indicated that there is the Indian Ocean.

83. The Deed Plan exhibited on the Indenture for plot number 621 shows the boundary for the three plots, on the easterly side, to be straight and fixed.

84. The boundaries for plot number 620 are shown on the plan by way of beacons pursuant to the provisions of Section 24 of the Survey Act.

85. In the case of the **Body Corporate of Dolphine Cove Vs Kwadukuza Municipality and Another (2012)ZAKZ DHC 13,** the Kwazulu Natal High Court discussed at length the law relating to a property that is *"ager limitatus"* and *"ager non limitatus"*. The court stated as follows:-

> **"Turning to the authorities, both sides relied on the same case law as to whether the property was *ager limitatus* or not. According to the authorities, an *ager limitatus* is a plot of land enclosed on all sides by artificial boundaries and demarcated by such. An *ager non limitatus* is a plot bounded on one or more side by some natural feature such as a river or, as in this case, the sea shore. Irrespective of the sort of boundaries it has, a plot defined by measurements is also ager limitatus or, if not one in this pure sense, then is regarded as such for all practical purposes."**

86. In the case of **Body Corporate of Dolphin (supra)**, the court quoted with approval **Simpson and Sweny, Land Surveyor and the Law 173** in which they wrote as follows:

> **"*Ager limitatus* means, literally, "fixed field" and in Roman-Dutch law beaconed land rectilinearly bounded is ager limitatus and, abutting a river or**

**sea, there can be no extension of this land area to midstream <u>nor is the owner entitled to alluvion".</u>**

87. This court had an opportunity to address the issue of fixed boundaries viz-a-viz land registered under the Registration of Titles Act in the case of **Abdalla Mohamed Salim & Another Vs Omar Mahmud Shallo & Another (2014) e KLR**. In that case, this court held as follows:

> **"Land Registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary survey principle. Such a survey has an accurate linear and regular measurements to aid the registration of a title of a report. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons."**

88. The Land Titles Act, under which plot number 620 was registered, and the Registration of Titles Act only allows the registration of plots that are "*ager limitatus*", that is, a plot of land enclosed on all sides by artificial boundaries and demarcated as such.
89. Section 22 of the Land Titles Act demands that land registered under the Act must have fixed boundaries.
90. Section 27 (1) of the Land Titles Act provides as follows:

> **"Every Certificate of Title shall set out a description of the immovable property therein referred to, the figure and references necessary to identify it on the plan or map of the area in which it is situated, and a correct statement of the right, title or interest of the person to whom it is issued."**

91. Section 27(4) of the same Act provides that there shall be attached to every certificate of ownership a plan of the land the subject of the certificate signed by the Recorder of Titles and the Director of Surveys.
92. Section 28 (1) on the other hand provides that the Certificate of Title issued under the Act shall not derogate the right of the Government <u>in or over the foreshore.</u>
93. Section 28(1) of the Land Titles Act excludes the holder of a certificate of title any rights over the foreshore and bestows the rights over the foreshore on the Government. Considering that the Land Titles Act only applied to the Coastal region, it would have recognized the common law doctrines of accretion and alluvion if that was the intention of Parliament. Instead, the Act specifically excluded those doctrines by stating that it is the Government which has rights over the foreshore.
94. If the law has conferred the rights of the foreshore, which is defined as the land between the high water mark and the low water mark, on the Government, how can it be said that land gained by *maritima incrementa* on the foreshore goes to the owner of the land adjoining the sea? That, in my view, is contradictory and unlawful.
95. The totality of the above provisions of the law shows that in Kenya, the law requires that all parcels of land registered under the Land Title Act and the Registration of Titles Act (repealed) are *ager limitatus* as opposed to *ager non limitatus.*
96. The Constitution at Article 62(1) (e) has defined public land to include all land between the high and low water marks, which is a reinstatement of the provisions of the Land Titles Act and the Government Lands Act.
97. Consequently, it follows that any land gained from the sea, either by alluvion, accretion or dereliction becomes un alienated Government land as defined by the Government Lands Act (repealed) and the Constitution.
98. In fact, the Constitution having granted the foreshore to the public, the issue of the Plaintiff having an exclusive right to the beach front under the current constitutional dispensation does not arise. The beach front belongs to the public at all times. Previously, the foreshore formed what was un alienated Government land.
99. If the Plaintiff's argument that the thousands of hectares of accreted land along the Kenyan coastal line is presumed by law to belong to the owners of the dry land abutting the ocean is taken to its logical conclusion, such an argument will not only be unconstitutional but also contra-

statute.

100. I say so because Article 60(1) of the Constitution provides that there must be equitable access to land, while Article 62(1) has defined public land to include the territorial sea and all land between the high and low water marks, notwithstanding the person abutting the said high water mark.

101. Even if it is to be argued that the Plaintiff's right to the accreted land crystallized before the promulgation of the Constitution, the argument will still be contra-statute because section 28 of the Land Titles Act (repealed) provided that a certificate of title shall not confer a right upon any person to or over the foreshore unless that right is expressly described in the certificate issued to the person. The Government Lands Act on the other hand defined "un alienated Government Land" to mean Government land which has not been leased to any person, or in respect of which the Commissioner has not issued any letter of allotment.

102. If the boundaries of a piece of land are bounded by specific measurements and beaconed rectilinearly, then in my view, and on the basis of the cases and the law that I have quoted above, the doctrine of accretion and alluvion do not apply to such land. I say so because when one acquires an interest in land, his interest is limited to the "four" corners as indicated in the Deed Plan, notwithstanding that the ocean is a few meters away. That is the position in respect to the Plaintiff's portion of land number 620 Malindi.

103. In any event, from the Plaintiff's own pleadings, the land which was gained by the sea was due to wide spread floods siltation in 1961 along the Malindi Bay as a consequence of which the sea has continued to expose land that originally formed part of the Indian Ocean seabed.

104. If that is the case, the Plaintiff cannot claim ownership of such land under the doctrines of accretion or alluvion because for the two doctrines to apply, the gain must be by little by little and by small and imperceptible degrees **(see Clarke Vs Cananda (Attorney General) 1930 SCR 137.)**

105. **William Blaston, Commentaries on the Law of England 262 (1765**) restated the above position as follows:

> **"And as the land gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma; or by dereliction, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining it.....But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King, for as the King is lord of the Sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry. So that the quantity of ground gained and the time during which it is gaining, are what make it either the Kings' or the subject property."**

106. In conclusion, I would like to say that the common law doctrine of accretion and alluvion, just like any other common law doctrine, must be considered in the context of the laws governing or which governed this country, including but not limited to the Constitution, the Land Titles Act (repealed), the Government Lands Act (repealed) and the United Nations Convention on the Law of the Sea.

107. Indeed, it is important for this court to remind itself of what Lord Denning said about the applicability of the common law in the case of **Nyali Ltd Vs Attorney General (1956) 1QB1**. This is what Denning L.J stated at page 16-17:

> **"It is a recognition that common law cannot be applied in a foreign land without considerable consideration qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but needs careful tending so with common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These offshoots must be cut away. In those far off land people**

**must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications. The task of making these qualifications is entrusted to the Judges of these lands. It is a great task which calls for all their wisdom."**

108. I have already stated that the Land Titles Act, under which portion number 620 Malindi was registered, did not intend the ocean to be the boundary line to any freehold land.
109. In the circumstances, I am not convinced, prima facie, that the doctrines of accretion and alluvion are applicable in the instant case because the boundaries in respect to plot number 620 are fixed by a Deed Plan at specified lines without reference to the water. The eastern boundary which was first fixed in 1929 vide deed plan number 28869 was fixed by a straight line and with identifiable beacons. The boundary was not ambulatory and therefore the sea water never moved with it.
110. The Plaintiff's Application for injunction is also premised on the fact that after the sea recededs, he applied and was issued with a grant by the government measuring 2.916 hectares.
111. According to the Plaintiff, the land that her late husband was allocated by the Government is known as portion number 11200 Malindi.
112. On the other hand, the 1st Defendant's claim is that he applied and was allocated portion number 11215 Malindi.
113. The Plaintiff annexed on her Affidavit the copy of the grant that was registered on 26th June 2009 in respect of land portion number 11200.
114. The copy of the grant issued to the 1st Defendant is in respect to a parcel of land known as portion number 11215. The initial copy of the grant issued to the 1st Defendant that the Plaintiff obtained from undisclosed sources did not show if it was ever registered. That explains why the Plaintiff has sought for an order prohibiting the 1st Defendant from presenting for registration the grant for portion no.11215.
115. The Plaintiff also annexed on her affidavit a copy of the survey plan that gave rise to the 1st Defendant's grant for portion no.11215. The only evidence that the Plaintiff has annexed on her affidavit to show that she was allocated plot number 11200 is a grant.
116. The 1st Defendant has deponed that after the siltation process, and being the owner of plot number 617, he applied to the government to be allocated the accreted land on 1st September 1993.
117. It is the deposition of the 1st Defendant that the Commissioner of Lands allocated him plot number 10801 and plot number 11215, which is to the South of plot number 10801.
118. The 1st Defendant has annexed on his Affidavit a grant in respect of portion number 11215 which was registered on 28th October 2009. The copy of the grant shows that the 1st Defendant charged and further charged portion number 11215 to Kenya Commercial Bank on 17th November 2009 and 8th September 2010 respectively.
119. The 1st Defendant has also annexed the letter by his surveyor dated 5th December 2000 in which the surveyor was forwarding his field notes, computations, the survey report and the survey plan in respect to portion number 11215 to the Director of Surveys.
120. The copies of the survey plan and the field notes have also been annexed.
121. An Indent dated 9th January 2007 signed by the Director of Surveys approving F/R No. 462/160, which is the survey plan for portion number 11215, has been annexed on the 1st Defendant's Replying Affidavit. The Indent is addressed to the 1st Defendant's surveyor, Mr. E M J Kiguru.
122. On 10th January, 2007, the 1st Defendant's surveyor submitted to the Director of Surveys a set of Deed Plan for Portion NO. 11215 which was then approved by the Director of Surveys.
123. On 31st January, 2007, the Commissioner of Lands forwarded to the District Land Registrar the grant for portion number 11215 for registration.
124. The 1st Defendant has annexed on his Affidavit a copy of the bankers cheques for Kshs.88,000 each and the pay-in-slips from the Kenya Revenue Authority for the said amount being the annual rent for plot number 11215. The payments of Kshs.88,000 are for the years 2015, 2014, 2013 and 2012. A rate clearance certificate for plot number 11215 dated 4th November 2014 has also been

annexed on the Affidavit.

125. According to the 1st Defendant's deposition, portion number 11200 is not located anywhere near plot number 620 or 11215 but close to Malindi Airport.

126. According to the 1st Defendant, Deed Plan 274095 which was apparently annexed on the grant for plot number 11200 was already committed to the survey of plot number 11215.

127. The Plaintiff in this matter did not respond to the allegation that plot number 11200 is located somewhere near the Malindi Airport. Indeed, a survey plan showing the location of plot 11200 which is in a different location from where plot nos. 620 and 11215 was exhibited by the 1st Defendant.

128. Other than the copy of the grant for plot number 11200 which the Plaintiff claims is in respect to the accreted land, the Plaintiff did not exhibit the survey plan that gave rise to the said plot. The Plaintiff never alluded in her affidavit to a survey having been conducted in respect to plot number11200 or when such a survey was conducted, if at all.

129. Considering that the 1st Defendant's claim is that plot number 1200 is not anywhere near plot number 11215 or 620, it was imperative for the Plaintiff to inform the court the surveyor who conducted the survey for plot number 11200 and to produce the approved survey plan for the said plot to enable the court to ascertain the location of the plot.

130. I say so because the Plaintiff's claim is that plot number 11215 has subsumed her plot number 11200. That allegation can only be substantiated by producing the survey plans for the two plots.

131. The 1st Defendant has produced the field notes, computations and the survey plan that were authenticated by the Director of Surveys pursuant to the provisions of Section 30 of the Survey Act. That section demands that all plans, field notes and computations relating to land shall be sent to the Director and shall become the property of the Government of Kenya.

132. Section 32 of the Survey Act on the other hand provides as follows:

> **"No land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director or of a Government Surveyor authorized in writing by the Director in that behalf, or by the affixing of the seal of the Survey of Kenya.".**

133. Portion number 11200 can only be deemed to have been surveyed by the production of the survey plan. A survey plan, prima facie, shows the location of a plot.

134. Indeed, a surveyor who has been instructed to survey a piece of land would only rely on the records deposited with the Director of Surveys to ascertain if the plot in question or the neighbouring plots have ever been surveyed.

135. How then can the surveyor who surveyed plot number 11215 in the year 2007 be accused of having surveyed a piece of land belonging to the Plaintiff if there are no records to show that indeed the Plaintiff had already been allocated and surveyed the same piece of land? And why would the Director of Surveys approve the 1st Defendant's survey for plot number 11215 if indeed the same plot had already been surveyed? Those questions can only be answered with the production of the survey plan for portion number 11200 which the Plaintiff has failed to do.

136. Although the 1st Defendant has exhibited receipts showing that he has been paying land rent and rates for portion number 11215, the Plaintiff did not produce any evidence to show that she has ever paid land rent or rates for plot number 11200.

137. Although the Plaintiff's counsel submitted that even if the suit property is government land, the process of acquisition of the land by the 1st Defendant was unlawful because the process of allocation of such land was not in accordance with the law, the Plaintiff has not shown that she followed the law in the acquisition of plot number 11200.

138. Indeed, there is no evidence by the Plaintiff to show that she applied to be allocated plot 11200 or even that it is in respect of the accreted land. It is the Plaintiff who should establish a prima facie case with chances of sucess, and not the 1st Defendant.

139. The issue of whether the plot number 11215 was ever advertised before the same was allocated to the 1st Defendant can only be addressed by the 3rd Defendant, the successor in office of the Commissioner of Lands. To the extent that the 3rd Defendant has not stated that the grant that was

issued to the 1st Defendant was unlawfully issued for want of advertisement, this court, prima facie, finds that the said title is valid having been surveyed and registered.

140. The totality of the above observations leads me to a conclusion that the Plaintiff has not established a prima facie case with chances of success in respect to the grant for portion number 11200 in so far as the claim that the said land was subsumed by portion number 11215 is concerned.

141. In any event, the first prayer in the Application cannot be issued because the grant in respect of portion number 11215 was registered on 28th October 2009 and charged to Kenya Commercial Bank Limited on 17th November 2009. This court cannot prohibit that which has already happened.

142. The second prayer cannot also issue because the 1st Defendant's claim is in respect of portion number 11215 and not portion number 11200 Malindi. Even if the order is issued, it will be in vain. The third and final prayer is depended on the first two prayers.

143. The last issue that I am supposed to address is whether this suit is time barred.

144. The issue of whether this suit is time barred pursuant to the provisions of Section 136 of the Government Lands Act can only be dealt with at the hearing of the suit.

145. I say so because it is the trial court which will determine, on the basis of the evidence before it, whether the cause of action herein arose from the time the Plaintiff discovered that the 1st Defendant was in possession of a grant for portion number 11215 or when the said grant was actually issued to the 1st Defendant.

146. For the foregoing reasons, I dismiss the Plaintiff's Application dated 20th November 2014, with costs.

**Dated and delivered in Malindi this 24th day of July 2015**.

**O. A. Angote**

**Judge**