



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.219 OF 2014

1. TUKERO OLE KINA.....PLAINTIFF

2. LUCY MWELU MULI.....PLAINTIFF

=VERSUS=

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

2. IBRAHIM MUKTAR ABASHEIKHDEFENDANT

3. THE NATIONAL LAND COMMISSIONDEFENDANT

4. THE DIRECTOR OF SURVEYS NAIROBIDEFENDANT

5. THE REGISTRAR OF LANDS MOMBASADEFENDANT

6. THE ATTORNEY GENERAL.....DEFENDANT

R U L I N G

1. What is before me is the Application by the Plaintiffs dated 24th November 2014. In the Application, the Plaintiffs are seeking for the following orders:

(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 11215 Malindi for registration by the 5th Defendant.

(b) That pending the hearing and determination of this suit the Honourable Court be pleased to restrain y 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 petioners' land known as portion number 785 Malindi and the accretion or alluvion appurtenant thereto.

(c) Costs of and incidental to this application be provided.

The Plaintiffs'/Applicants' case:

2. The Plaintiffs' case is that they are the registered proprietors of plot number 785 (original Number 621/1) on which they have developed a residential house. The Plaintiffs' neighbour to the left is the owner of portion number 785 (original number M17G/5).
3. According to the Plaintiffs, the Deed Plan annexed to an Indenture dated 8th March 1957 shows that the Plaintiffs' portion of land abuts the Indian Ocean; that the 1st Defendant is the proprietor of portion number 617 Malindi which is also a sub-division of MI7G and that all the other subdivisions have a right access and a well existing therein.
4. It is the Plaintiffs' case that when the suit property was originally planned and subsequently subdivided, the eastern boundary of the land extended to the Indian Ocean.
5. According to the Plaintiffs, in or about 1961, and following wide spread floods, there was widespread siltation along the Malindi Bay as a consequence of which the sea in some sections of Malindi Bay has continued to recede exposing land that originally formed part of the Indian Ocean sea bed.
6. The Plaintiffs' case is that the alluvion ensured to their predecessors in title and when they purchased the suit property, they became the owners of the said right. According to the Plaintiffs, such a right does not require registration and is indefeasible as a covenant between the Plaintiffs, the Government of Kenya and any past and present owner of the said portions of land.
7. It is the Plaintiffs' deposition that on 17th November 2014, the 1st Defendant encroached on and annexed the alluvion deposited as part of portion number 785 Malindi and completely blocked the Plaintiffs right of access to the Indian Ocean.
8. The Plaintiffs averred that the grant issued in respect of portion number 11215 is not registered, is not registrable and that the Deed Plan issued is unlawful because: the grant purports to suggest that the government owns portion number 11215 which would, if surveyed, subsume portion number 11200 and interfere with the riparian right of portion numbers 618, 619, 785, 785, 786 and 622 Malindi; that the survey of 23rd January 2007 was not actually done on the ground; that the survey ignored the duo principle of equity and justice in the allocation of the accretion to the 1st Defendant and that the survey and deed plan violates regulations 91, 99 and 103 of the Survey Regulations.
9. It is the Plaintiffs' contention that the wall erected by the 1st Defendant is a vicious and dreadful eyesore interfering with the Plaintiffs' unimpeded view of the sea and that the 3rd Defendant wrongfully and unlawfully assumed lordship over the riparian land for portion 785 Malindi and issued a grant thereof to the 1st Defendant.
10. The Plaintiffs deponed that the accretion fronting portion number 785 is private land and therefore out of the jurisdiction of the 1st Defendant; that such land is not available to the government for alienation without the consent of the Plaintiffs and that the land comprised in the alluvion is and has never been un alienated government land.
11. It is the Plaintiffs' case that the subject portion of land has to be subjected to Part VIII of the Land Act and that even assuming that the land has been compulsorily acquired, the acquisition was not for a public purpose.

The 1st Defendant's case:

12. The 1st Defendant deponed that he is the registered proprietor of plot number 11215 which is a Grant for a term of 99 years; that plot number 11215 borders to the East with his other property known as plot number 1080, also being a Grant from the Government.
13. The 1st Defendant conceded that there was widespread flooding which led to widespread siltation

along the Malindi Bay causing the Indian Ocean to recede thereby creating land between the hitherto beach front properties and the new sea line.

14. It is the 1st Defendant's case that his property being portion number 617 was equally affected by the flooding and siltation; that having been advised that all land that is not private land belongs to the government, and that the government having the power to allocate the said land, he applied to the Commissioner of Lands and was allocated a portion of the newly created land towards the Indian Ocean coast.

15. Having been allocated the created land, it is the 1st Defendant's deposition that his surveyor updated him of the survey work; that the Director of Surveys approved the survey report submitted to him by the surveyor for plot number 11215 and requested his surveyor to submit the Deed Plans for approval.

16. The 1st Defendant's case is that after the Deed Plan was prepared by his surveyor and forwarded to the Director for approval, the Commissioner of Lands vide his letter dated 31st January 2007 forwarded the Grant for plot number 11215 to the District Registrar for registration and that the Grant was registered by the Registrar of Titles on 28th October 2009 under the Registration of Titles Act (repealed).

17. According to the 1st Defendant, the Plaintiffs' claim that they are entitled to the ocean front is misguided since the surveyor has proposed an access road of 20M; that the road was created after the surveyor consulted the Malindi Development Plans; that plot number 785 is separated from the ocean front by the said 20M road and that the Plaintiffs' entitlement is the direct access to the 20 M road.

18. The 1st Defendant's case is that the Plaintiffs never bought the sea front; that all land that is not private land belongs to the government and that the offshore is and will always remain government land which no private individual can have exclusive possession of as the Plaintiffs seem to believe.

19. The 1st Defendant deponed that the Indenture of conveyance is very clear on the boundaries of portion number 785 and that pursuant to Survey Regulations, a 60 meter reservation must be made between the boundary of plot 785 and the High Water Mark.

20. The 1st Defendant further deponed that he procedurally applied for permission of the County Government of Kilifi to construct a boundary wall around his property which was approved and that the Constitution, the Land Act and the National Land Commission Act cannot apply retrospectively.

21. According to the 1st Defendant, his rights to plot number 11215 can only be defeated if fraud or misrepresentation to which he is a party is alleged and proved and that he is a holder of a Grant that is regular on the face of it.

The Plaintiffs' advocate's submissions:

22. The Plaintiffs' 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.

23. 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 even as early as 1933 when the subdivision of M12 was done.

24. Counsel for the Plaintiffs submitted that accretion or alluvion is presumed by law to belong to the owner of the dry land to which it is added.

25. Counsel submitted that the accreted land acquires the characteristics of the land which is added. In respect to portion number 785 Malindi, which is freehold, it was submitted, the accreted land added to it is also freehold.

26. 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.

27. The Plaintiffs' counsel submitted that the Plaintiffs' right to property is constitutionally protected; that the Plaintiffs 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 Act recognised that the accretion to the land would belong to the land owner.

The 1st and 2nd Defendants' advocates submissions:

28. The 1st and 2nd Defendants' advocate submitted that the applicable law in the present matter is the law that was applicable to plot numbers 785 and 11215 as at the time the respective proprietors got an interest therein.

29. According to counsel, the rights and interests over plot No.785 were acquired and plot number 11215 were acquired when the applicable law was the Registration of Titles Act and the Government Lands Act (repealed) and not the Land Act and the Land Registration Act, 2011.

30. The Defendants' counsel submitted that the facts as pleaded by the Plaintiffs do not lead to any conclusion of the existence of accretion, avulsion or alluvion; that the Plaintiffs have admitted in their Complaint 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.

31. Counsel submitted that where the change in the receding of the sea 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.

32. The Defendants' counsel submitted that the right of accretion would be accepted if the ocean-ward boundary of plot 785 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.

33. Even if plot number 785 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.

34. Counsel submitted that in any event, the Plaintiffs have not shown the irreparable injury that they likely to suffer if the injunctive order is not granted.

35. The Defendants' advocate submitted that the Plaintiffs' suit is time barred pursuant to Section 136 of the Government Lands Act (repealed).

Analysis and findings:

36. It is not in dispute that the Plaintiffs are the registered proprietors of land known as portion number 785 Malindi on which they have developed a residential house.

37. 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 Plaintiffs' land.

38. According to the Plaintiffs' depositions, when plot numbers 785 and 617 were first planned, the eastern boundary of the land extended to the Indian Ocean.

39. The Plaintiffs have averred in their 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.

40. Presently, it was deposed by the Plaintiffs, the sea has receded by more than a kilometer in some places.

41. Due to the recession of the sea, it is the Plaintiffs' case that the 1st Defendant was able to apply for and acquired portion number 10801 which abuts his land being portion number 617 Malindi.

42. However, it is the Plaintiffs' case that in September 2014, the 1st Defendant claimed that portion number 11215 had been allocated to him. On inquiry, they realised that the 1st Defendant was in possession of an unregistered grant in respect of portion number 11215 Malindi.

43. The Plaintiffs' claim is that accretion or alluvion is presumed by law to belong to the owner of the dry land to which it is added and that being the owners of plot number 785, they are entitled as of right to the accretion and alluvion appurtenant thereto. In any event, it has been urged, due process was never followed when the 1st Defendant was issued with a Grant for portion number 11215.

44. For the court to find out if the Plaintiffs have 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 1st Defendant's title for plot 11215, prima facie, is valid.

c. Whether this suit is time barred.

45. 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.

46. The Indenture in respect to land portion number 785 was registered in favour of the Plaintiffs on 22nd April, 2013 having purchased the said property from Francis Sandford Cook. On the other hand, the 1st Defendant's grant for portion number 11215 was registered in his favour on 28th October, 2009.

47. For the purposes of this suit, the applicable law in respect to the suit property, which is plot number 11215, is the law that was applicable as at the time the grant was registered in favour of 1st Defendant, that is the Registration of Titles Act. Considering that the Deed Plan which the Plaintiffs are relying on in respect of portion number 785 was prepared and registered under the Land Titles Act on 8th March, 1957, it follows that the law applicable to portion number 785 is the Land Titles Act.

48. 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.”

49. 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.”

50. 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.”

51. 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.

52. 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.

53. Accretion has been defined to mean 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 land on the foreshore.

54. 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. Alluvion, accretion and reliction are therefore identifiable expressions that principally denote the phenomenon of *matima incrementa*.

55. 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)

56. 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.

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

58. 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. 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....” (The Law of Real Property at 1075-76).”

59. The common law 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 or reliction, he should benefit from any additions to his land by the accretions thereto.

60. 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 retain that access.”

61. The elements attributable to the doctrines 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**.

62. 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.”

63. 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 retreat 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.”

64. The authorities and legal commentaries I have quoted above shows that the doctrines of accretion, alluvion or reliction apply to land bounded by water.

65. 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.”

66. 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, one's property must run to the shoreline. 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.”

67. 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; 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.”

68. The question that arises then is whether the Plaintiffs’ parcel of land being portion number 785 (original number 621/1) which was first surveyed and a deed plan number 28869 issued on 7th November, 1929 had the Indian ocean as a boundary line.

69. I have perused Deed Plan number 65430 that arose after the subdivision of plot number 621 which gave rise to plot numbers 785 and 621/1 and approved by the Director of Surveys on 8th March, 1957 and registered under the Land Titles Act in the same year.

70. That is the same Deed Plan that was used in the Indenture dated 3rd April, 2013 in which the suit property was transferred to the Plaintiffs. The said Deed Plan has described the property the Plaintiffs acquired.

71. The Deed Plan depicts a straight boundary with two beacons on the easterly side, whereafter it is indicated that there is the Indian Ocean. The boundaries for plot number 785 are shown on the plan by way of beacons pursuant to the provisions of Section 24 of the Survey Act. That is the same position that obtains in the Survey plan number 77/128 which subdivided portion number 621/1 to create plot numbers 785 and 786 in 1957.

72. 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.”

73. 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 the said authours wrote as follows:

“Ager Limitatus means, literally, “fixed field” and in Roman-Dutch law beacons land rectilinearly bounded is *ager limitatus* and, abutting a river or sea, there can be no extension of this land area to midstream nor is the owner entitled to alluvion”.

74. 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.”

75. The Land Titles Act, under which plot number 785 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.

76. Section 22 of the Land Titles Act demands that land registered under the Act must have fixed boundaries.

77. 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.”

78. 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.

79. 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 in or over the foreshore.

80. 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.

81. 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.

82. 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*.

83. 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 Land Act.

84. 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.

85. In fact, the Constitution having granted the foreshore to the public, the issue of the Plaintiffs 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 and is subject use and allocation pursuant to the provisions of the Constitution and the Land Act. Previously, the foreshore formed what was un alienated Government land and could only be dealt with in accordance with the Government Lands Act.

86. If the Plaintiffs’ argument that the thousands of hectares of accreted land along the Kenyan coastal line is presumed by law to belong to the owner 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.

87. 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 persons abutting the said high water mark.

88. Even if it is to be argued that the Plaintiffs' right to the accreted land crystallised 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.

89. If the boundaries of a piece of land are bounded by specific measurements and beacons 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 indicated in the Deed Plan, notwithstanding that the ocean is a few meters away. That's the position, prima facie, in respect to the portion number 785 Malindi.

90. In any event, from the Plaintiffs' 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.

91. If that is the case, the Plaintiffs 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 Canada (Attorney General) 1930 SCR 137.) 15.

92. 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."

93. 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 this country, including but not limited to the Constitution, the Land Titles Act, the Government Act Lands and the United Nations Convention on the Law of the Sea.

94. 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.”

95. I have already stated that the Land Titles Act, under which portion number 785 Malindi was registered, did not intend the ocean to be the boundary line to any freehold land.

96. In the circumstances, I am not convinced, prima facie, that the doctrine of accretion and alluvion are applicable in the instant case because the boundaries in respect to plot number 785 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 as submitted by the Plaintiffs.

97. The Plaintiffs' advocate submitted that due process was never followed when the 1st Defendant was issued with a grant for portion number 11215.

98. 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.

99. 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.

100. 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.

101. The 1st Defendant has also annexed on his Affidavit 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.

102. The copies of the survey plan and the field notes have also been annexed.

103. An Indent dated 9th January 2007 signed by the Director of Surveys approving F/R No. 462/160 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.

104. On 10th January, 2007, the 1st Defendant's surveyor submitted to the Director of Surveys a set of Deed Plans for Portion NO. 11215 which were approved by the Director of Surveys.

105. On 31st January, 2007, the Commissioner of Lands forwarded to the District Land Registrar the Grant for portion number 11215 for registration.

106. 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.

107. The issue of the Government having not advertised the plot pursuant to section 13 of the Government Lands Act before it allocated the same too the Defendant can only be answered by the 3rd Defendant, the predecessor of the office of the Commissioner of Lands and not the Defendant.

108. Considering that the 3rd Defendant has not deponed that the grant issued to the 1st Defendant was

unlawfully allocated for want of advertisement, I hold that that is an issue which, prima facie, cannot invalidate the grant for portion of land number 11215.

109. In any event, prayer number (d) cannot issue 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.

110. Prayer (f) and (e) cannot also issue because the 1st Defendant's claim is in respect to portion number 11215 and not portion number 785. The court cannot issue orders in vain.

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

112. 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.

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

114. For the foregoing reasons, I dismiss the Plaintiffs' Application dated 20th November 2014, with costs.

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

O. A. Angote

Judge