



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 112 OF 2012

CHRISTOPHER IDDI MOTO.....1ST PLAINTIFF
EVANS IDDI KESI.....2ND PLAINTIFF
IDI CHARO IDI.....3RD PLAINTIFF
RASHID CHIWAI MALINGI.....4TH PLAINTIFF
BOTI MALINGI MOTO.....5TH PLAINTIFF
ALFRED ALI MALINGI..... 6TH PLAINTIFF
MOHAMED KESI IDI.....7TH PLAINTIFF
JASPA IDDI MOTO.....8TH PLAINTIFF
CHAI IDDI MOTO.....9TH PLAINTIFF
CHIRIBA CHAI IDI.....10TH PLAINTIFF
BENEDICT CHAI MALINGI.....11TH PLAINTIFF
CHARO IDI MOTO.....12TH PALINTIFF
DOMINICK CHAI IDDI.....13TH PLAINTIFF
GUNGU IDI MOTO.....14TH PALINTIFF
ANTHONY CHIRIBA KESI.....15TH PLAINTIFF
MILTON CHIWAI IDDI.....16TH PLAINTIFF

=VERSUS=

CHIRIBA NYAMBU BARU.....1ST DEFENDANT

J U D G M E N T

Introduction:

1. The Plaintiffs moved this court by way of a Plaint dated 21st June, 2012 and filed on 12th July 2012. The Plaint was amended on 13th July, 2012 to included Duma Investment Limited as the 2nd Defendant.
2. In the amended Plaint, the Plaintiffs have averred that at all material times, Mwapula/Magogoni /489 was owned by three families, namely GEJI MOTO, CHIRIBA NYAMBU and IDDI MOTO. However, in the year 2007, one Kalume Deri encroached on the suit property and the family sought redress from the Land Disputes Tribunal in Kilifi. The Tribunal went ahead and awarded to the said Kalume Deri the suit property.
3. The Plaintiffs have further averred that they appealed against the said decision to the Minister of Kilifi Adjudication area. The Appeal was made through the 1st Plaintiff who was acting on behalf of the family members.
4. It is the averments by the Plaintiffs in the Plaint that being the eldest family member, the 1st Defendant donated to the 1st Plaintiff a special Power of Attorney which powers were limited to preferring an appeal to the Minister; that the Minister found in favour of the family and directed that the suit property should be registered in the name of the 1st Defendant on behalf of the other family members.
5. However, it was alleged in the Plaint, the 1st Defendant, without the consent of the Plaintiffs, sold and transferred the suit property to the 2nd Defendant; that the 2nd Defendant has now taken possession of the suit property; that the suit property is the only land that they have known as their home and that the sale of the suit property to the 2nd Defendant was done fraudulently, irregularly and unlawfully.
6. The Plaintiffs have claimed in their Plaint for a permanent injunction restraining the Defendants from interfering with the suit property and for a mandatory injunction to compel the Defendants to vacate the suit property. The Plaintiffs have also claimed for a declaration that the suit property be deemed to be family land and be registered in the names of the family members owning equal shares.
7. The 1st Defendant filed his Defence on 19th September 2012 and averred that the suit property has never been owned by Geji Moto or Iddi Moto; that the suit property was solely owned by Chiriba Nyambu and that the 1st Defendant never appointed the 1st Plaintiff to be the spokesman of the family.
8. According to the 1st Defendant's Defence, the 1st Plaintiff misled the Tribunal during the Appeal to believe that the property belonged to the entire family and that the Plaintiffs have never resided in the suit property.
9. The 1st Defendant finally stated in his Defence that the Plaintiffs are his cousins' sons and that they have no right under the Mijikenda Customary law or under the Law of Succession to inherit land from his father.
10. The 2nd Defendant stated in its Defence that it is the lawful registered owner of the suit property; that the Plaintiffs are busy bodies who have no claim known in law over the suit property; that the 2nd Defendant has invested in the suit property to the tune of over Kshs. 90 million and that the Plaintiffs' Plaint does not disclose any reasonable cause of action against the 2nd Defendant.

The Plaintiff's case:

11. The 1st Plaintiff, Pw 1, informed the court that the suit property has always been owned by the families of Iddi Moto and Geji Moto. According to Pw 1, the suit property was initially registered

- in the name of Kalume Deri. However, the family of Iddi Moto, Geji Moto and Barua Nyambu instructed the 1st Defendant to file a suit so as to recover the land from Kalume Deri.
12. It was the evidence of Pw 1 that the 1st Defendant lost the case before the Tribunal in Kilifi and also on appeal. After the 1st Defendant lost the case, Iddi Moto and Geji Moto held a meeting and appointed Pw 1 to file a further appeal with the Minister. It was after the said meeting that Pw 1 was given a special power of attorney to file the appeal with the Minister which he did. The Power of Attorney was produced by Pw 1 as PEXB1. The summons of the Appeal to the Minister was produced as PEXB2.
 13. The Appeal to the Minister was heard by the then Kilifi District Commissioner, who, after hearing Pw 1 and Kalume Deri, amongst other witnesses, decided the matter in favour of the Appellant.
 14. It was the evidence of Pw 1 that the final decision of the Minister was that the suit property should be registered in favour of the 1st Defendant on behalf of the family. The proceedings and the award of the Minister was produced in evidence as PEXB3.
 15. It was the testimony of Pw 1 that after the award by the Minister, the family came to learn that the suit property had been sold by the 1st Defendant before consulting the other family members.
 16. Pw 1 admitted that before the suit was sold to the 2nd Defendant, him, together with his younger brother, Milton Chai, met the 2nd Defendant's representative at the Kilifi lands office. It is during the said meeting that Mr. Hassan Said, the 2nd Defendant's representative informed them that the 1st Defendant had sold the suit property to the 2nd Defendant. He showed them the Sale Agreement between the 1st Defendant and the 2nd Defendant. The 1st Defendant refused to meet Pw 1 when he inquired from him about the sale. According to Pw 1, the whole family should have met and authorised the sale of the suit property which was not the case.
 17. Pw 1 finalised his evidence in chief by stating that he used to stay on the suit property before he moved out. According to Pw 1, the 1st Defendant is his youngest uncle and he owns parcels of land number 487 and not the suit property.
 18. In cross-examination, Pw 1 could not remember when the family members discussed the issue of the 1st Defendant representing the family in respect to the suit property. Pw 1 admitted that he was not in that particular meeting. After reading the power of attorney, Pw 1 stated that the Power of Attorney did not state that he (Pw 1) was to represent the family in the Appeal before the Minister and that indeed it was the 1st Defendant who gave him the authority to represent him (1st Defendant) in the proceedings before the Minister's representative.
 19. According to Pw 1, his uncles, Iddi and Geji Moto did not have any other land except the suit property. On further cross-examination, Pw 1 stated that the two have other parcels of land being plot numbers 372 and 645.
 20. It was the evidence of Pw 1 that the 1st Defendant, being part of his clan known as "Mwachipa" was given a share of the larger land that belonged to the family. It was his testimony that the land that was allocated to the 1st Defendant is plot number 487 which has been registered in the name of Athman Barua Nyambu, his grandson. However, the suit property, together with plot number 373 and 645 belonged to the family of Iddi Moto and Geji Moto and not the clan.
 21. Pw 1 further stated that plot number 373 is registered in the name of Gabriel Chai, Barua Chai, Chibwago, Iddi Chai and Garama Chai Chibwago while plot number 370 is registered in the name of Konde Malindi Chai, Mkoke Malindi Chai and Said Iddi Nyambu who are all members of his clan.
 22. It was the further evidence of Pw 1 during cross-examination that every member of the clan was given land depending on how they were cultivating it and that his uncles Geji Moto and Iddi Moto were alive during the adjudication process.
 23. Pw 1 stated that it is Karisa Mitsanze who used to stay on the suit property with his family although Geji Moto and Iddi Moto are the ones who were cultivating the suit property.
 24. It was the evidence of Pw 1 that the suit property has always had a quarry since 1978 and that at one particular time, Geji Moto and Iddi Moto allowed a private company to harvest gravel from the suit property. However, Pw 1 admitted that he never saw the two being paid from the gravel that was excavated from the suit property.
 25. In re-examination, Pw 1 reinstated that the clan had many parcels of land and everybody had his

- portion.
26. Pw 2, Barua Nyambu, stated that Pw 1 was his nephew (his cousin' son) while the 1st Defendant was his younger brother. Pw 2, relying on the family tree that was produced in court stated that his grandfather was called BARUA MTUNE.
 27. According to Pw 2, and the family tree that is on record, his grandfather, BARUA MTUNE, had four sons, that is BOTI BARUA, MOTO BARAU, CHAI BARUA AND NYAMBU BARUA.
 28. BOTI BAURA had only two sons, that is, IDDI MOTO ((also known as Msami Boti Barua) and GEJI MOTO.
 29. MOTO BARUA had three sons, that is, CHIRIBA KAZURI, CHIBWAGO MOTO and LOMA MOTO.
 30. CHAI BARAU had only one son, that is, MRAMBA CHAI.
 31. NYAMBU BARUA, who is the father of the 1st Defendant and Pw 2 had five sons, that is, CHARO NYAMBU (Pw 2), the 1st Defendant, MAYANGA NYAMBU and MONYESO NYAMBU.
 32. Pw 2, who is the 1st Defendant's elder, brother stated that the suit property belonged to his two cousins, IDDI MOTO and GEJI MOTO. It was his evidence that the land has two old boreholes and that the 1st Defendant never involved him during the sale of the suit property.
 33. According Pw 2, the 1st Defendant used to work with the Land Board and that is why he was appointed to represent the family at the Tribunal where he lost the case. That is when they involved Pw 1, being the son of Iddi Moto, to represent the family when the appeal was lodged with the Minister. It was the evidence of Pw 2 that the suit property belonged to the family.
 34. In cross-examination, Pw 2 stated that his grandfather, BARUA MTUNE, had a lot of land and he gave each of his four boys there share. It was his evidence that each of the sons of Barua Mtune stayed with their respective families on their land.
 35. Pw 2 confirmed that his father, NYAMBU BARUA, having inherited his portion of land allocated to his sons, including the 1st Defendant their respective portions of land. Pw 2, who, according to his national identity card, was born in 1921, stated that his father allocated him his portion of land, so was the 1st Defendant. His uncles, Iddi Moto and Geji Moto, were also allocated their respective pieces of lands, and so were their children.
 36. It was the evidence of Pw 2 in cross-examination that plot number 489, the suit property, was allocated to his father NYAMBU BARUA and belongs to that particular family. However, Pw 2 stated that in the statement that was filed in court, he had stated that the suit property was allocated to his cousins Geji Moto and Iddi Moto.
 37. It was the evidence of Pw 2 that the suit property belonged to the Nyambu Barua's family and that they should have involved Pw 1 during the sale of the property because he had represented the Nyambu Barua's family during the appeal at the District Commissioners office. Pw 2 stated that the land that he was allocated by his father was intact, so is the land that was allocated to his other brothers.
 38. In further cross-examination, Pw 2 stated that the murrum that was used to construct Kilifi bridge on the Mombasa Malindi highway was harvested from the suit property and that it Pande Mkauma and Geji Moto who were paid kshs. 40,000 for the said murrum; that it was the family which decided that Pw 1 takes over the case from the 1st Defendant and that by the time Pw 1 took over the case, Geji and Iddi Moto had died.
 39. Pw 2 finally testified that it is Karisa Mitsanze who used to stay on the suit property having been invited on the land by Iddi Moto.
 40. In re-examination, Pw 2, reinstated that the suit property belongs to Iddi Moto and Geji Moto and that the suit property was never used by the family.
 41. The other witness, Pw 3, was Antony Chiriba Kesi, who, according to the family tree that was filed in court by consent, is the great grandson of MOTO BARUA. MOTO BARUA was one of the sons of Barua Mtune. Pw 3 is also the 15th plaintiff.
 42. It was the evidence of Pw 3 that he was present when the dispute between his family and Kalume Deri over the suit property stated and that the family agreed that the 1st Defendant should represent the family in recovering the suit property from Kalume Deri. According to Pw 3, the 1st Defendant was appointed because he was a good spokesman.

43. After the 1st Defendant lost the dispute three times, the family appointed Pw 1 and instructed him to file an appeal with the Minister, which appeal was decided in favour of the family. It was the evidence of Pw 3 that the title deed was eventually issued although Hassan, a representative of the 2nd Defendant, was involved in the procurement of the said title.
44. It was the evidence of Pw 3 that he was in the company of the family members who went to see the Chief to complain about the selling of the suit property by the 1st Defendant without involving the whole family.
45. In cross-examination, Pw 3 stated that each member of the family was given his land. However, Pw 3 maintained that the suit property belonged to the family and that the same was to be registered in the name of the 1st Defendant on behalf of the family.

The 1st Defendant's case:

46. The 1st Defendant, Dw 1, stated that the suit property was registered in 1993 after the adjudication process was completed. Later on, the title deed was issued to Kalume Deri Ngumbao instead of him. It was because of the issuance of the title to Kalume Deri that Dw 1 sued him at the Tribunal in Kilifi.
47. According to DW 1, the dispute at the Tribunal (the Land Committee) was never heard and he had no faith in the said "Tribunal". He therefore decided to file another dispute with "the Board" which decided in favour of Kalume Deri. The decision of the Land Board was produced as 1 DXB1. At the Board, he represented himself as the claimant and owner of the suit property.
48. 1Dw 1 stated that he filed another dispute at the lands office and took the officials from the Ministry of Lands to the suit. However, his objection was again dismissed on the ground that he had no house on the suit property notwithstanding the fact that he showed the said officials the grave of his great grandfather.
49. After losing the dispute, 1 Dw 1 stated that he discussed the issue with Pw 1, who is his cousin's son and paid him so that he could pursue the dispute on his behalf. He gave the 1st Plaintiff, Pw 1, the power of attorney which Pw 1 used to file an appeal with the Minister. The District Commissioner delivered the Minister's decision in his favour. That decision was produced as 1DEXB 3 while the special power of attorney was produced as 1DEXB 3 b.
50. It was the evidence of I Dw 1 that Pw 1, who is the 1st Plaintiff, has his own land which is plot number 372. The said land abuts the suit property.
51. It was the evidence of 1DW 1 that plot number 372 is registered in the name of Geji Moto, who is the uncle of Pw 1. The 1st Defendant produced the search for plot number 372 as IDXB 5. 1 DW 1 also produced the official search for plot number 376 as IDEXB 6 showing that the plot is registered in the names of Msami Boti Barua (also known as Iddi Moto) and Geji Moto.
52. Another search for plot number 356 in the name of Msami Boti Barua a.k.a Iddi Moto was produced as 1DEX 7 while the search for plot number 487 in the name of Athman Barua Nyambu was produced as 1DEXB 8.
53. 1DW 1 listed the children of Barua Mtune, his grandfather, and stated that the fourth child of Barua Mtune, Nyambu Barua, was his father.
54. According to 1Dw 1, he has five brothers. His eldest brother, Charo Nyambu was allocated plot number 317 and another piece of land. His other brother, Barua Nyambu Barua (Pw 2) was also allocated his land by their father although he could not recall the plot number. His other brother, Mayanga Nyambu was allocated plot number 487 although the same is registered in the name of Athuman Mayanga Nyambu, who is his biological son. His other brother, Monyasi Nyambu, had his land too while his plot (1DW) is plot number 489 (the suit property).
55. It was the evidence of I DW 1 that every member of the Barua Mtune family was given his land during the adjudication process and that the suit property does not belong to the family. According to 1DW 1, his cousins, Iddi Moto and Geji Moto, were alive when the dispute over the parcel of land between himself and Kalume Deri commenced and they never claimed that the land belonged to them.
56. It was the evidence of 1DW 1 that when the dispute was finally decided in his favour, he was issued with the title deed and eventually sold the suit property to the 2nd Defendant. 1DW 1 produced the Land Control Board consent for the transfer of the suit property as 1 DEXB 11.

57. According to 1DW 1, it was him, together with his neighbour Mkaume who were paid kshs. 40,000/= when the company which was constructing Kilifi Bridge harvested murram from the suit property and from Mkaume's land and that the Plaintiffs have never stayed or cultivated on the suit property.
58. 1DW 1 informed the court that his family had no objection for him to sell the suit property.
59. In cross-examination, 1DW 1 stated that the suit property measures 40 acres; that plot number 487 is in the name of Athman Barua who is the son of his younger brother. According to the witness, although plot number 378 is registered in his name, the same belongs to his brother (Pw 2) and that there is no dispute between the two of them over that plot.
60. 1DW 1 denied that Iddi Moto and Geji Moto are part of his family members because they do not share a father. According to 1 DW 1, he went to the Land Control Board to obtain the consent of the Board with his brother Mayanga Nyambu and his nephew Anderson Charo Nyambu.
61. 1Dw 1 denied that the family agreed to appoint Pw 1 to pursue the appeal on behalf of the family and that he paid Pw 1 Kshs 10,000 to file the appeal on his behalf because he has gone to school.
62. The 2nd witness for the 1st Defendant was Nyiro Mpande. 1 DW 2 stated that he is a village elder and he knew the Plaintiffs. It was his evidence that the 1st Defendant was his neighbour and that it is the 1st Defendant who has always used the suit property.
63. 1DW 2 stated that in 1988, Dhemji Limited harvested murram on his plot number 202 and on the suit property. They paid him together with the 1st Defendant kshs. 40,000 which they shared equally.
64. According to 1DW 2, Majimbo Karisa, who is his in-law, is the one who used to stay on the suit property with the permission of the 1st Defendant. It was his evidence that he has never seen Iddi Moto or Geji Moto or their families on the suit and that during adjudication, there was a dispute between Kalume Deri and the 1st Defendant.
65. When the dispute commenced, it was the evidence of 1DW 2 that Iddi and Geji Moto were still alive and they never claimed the land. It was his evidence that the children of Iddi and Geji Moto have their land which is far from the suit property.
66. In cross-examination, 1DW2 stated that it was his father who shared with the 1st Defendant the money that was paid by Dhamji Limited for the murram.

The 2nd Defendant's case:

67. The 2nd Defendant was represented by Phillip Cemerucci, 2DW 1, who stated that he was the 2nd Defendant's director.
68. 2Dw 1 denied that the 2nd Defendant bought the suit property while knowing that the same was illegally conveyed.
69. It was the evidence of 2DW 1 that before purchasing the property, the company did due diligence by visiting the office of the Chief and was told that the legitimate owner of the property was the 1st Defendant. The 2nd Defendant confirmed the number of the plot and conducted an official search to confirm the position.
70. The 2nd Defendant subsequently entered into an agreement with the 1st Defendant on 2nd April, 2012. After obtaining the title in favour of the 2nd Defendant, the company cleared the area which was bushy and brought on site machinery for crushing aggregate (kokoto). It was the evidence of 2DW 1 that the 2nd Defendant has invested in the land approximately 1 million Euros and employed 41 people.
71. In cross-examination, 2 DW 1 stated that he was not aware that one of the 2nd Defendant's directors, Mr. Hassan Said, was aware of the disputes over the suit property. The witness stated further that he did not have the resolution by the company for the purchase of the suit property.
72. It was the evidence of 2 DW 1 that Hassan Said is a shareholder and director in the 2nd Defendant's company; that Hassan is the only Director who is a Kenyan citizen and that the company relied on the advice of its lawyers in the transaction.

Submissions:

73. The Plaintiff's advocate filed her submission on 14th February, 2014. Counsel submitted that the Plaintiffs had proved that the suit property was in the Plaintiffs' family possession for years on end; that the land has a dam known as "Ziwa ya Iddi" which name refers to Iddi Moto, the 1st Plaintiff's biological father and that the suit property was owned by Geji Moto, Iddi Moto and the 1st Defendant.
74. The Plaintiff's counsel submitted that the Minister Appeal's decision was to the effect that the suit property should be registered in the name of the 1st Defendant on behalf of the other family members. This, according to counsel, created a trust envisaged under section 28 of the Land Registration Act, 2012. Counsel relied on the cases of **MUKANGU VS MBUI (2004) 2 K.L.R. 256** and **JASONGITIMU WANGARA VS MARTIN MUNENE WANGARA & OTHERS (2013) e KLR** to buttress her arguments.
75. The Plaintiffs' counsel, despite having produced in evidence the power of attorney, submitted that the same should not be considered by the court because it is an unregistered document.
76. It was the submission by the Plaintiff's counsel that although the decision by the Minister's representative was made on 27th March, 2012, the 1st Defendant proceeded to sell the suit property a few months down the line to the 2nd Defendant while fully aware that the Plaintiffs had an interest in the suit property; that the title deed was registered on 3rd May, 2012 but was issued to the owner on 2nd May 2012 and that the 1st Defendant fraudulently sold the suit property.
77. Counsel submitted that the Bahari Land Control Board had no jurisdiction to grant to the 1st Defendant consent to transfer the suit property to the 2nd Defendant in view of the provisions of section 9 (1) of the Land Control Act. Consequently, it was submitted, the transfer of the land from the 1st Defendant to the 2nd Defendant was *null and void*.
78. The 1st Defendant's advocate submitted that the position taken by the Plaintiffs in this matter ignores the history of the dispute; that the mandate of Pw 1 during the hearing of the appeal was restricted to the power of attorney that was given to him by the 1st Defendant and that he cannot run away from the said power of attorney having produced it in evidence and relied on it.
79. On the issue of the validity of the consent that was issued by the Land Control Board to transfer the suit property, counsel submitted that the issue was not raised in the pleadings and that the Board is not a party in the current proceedings.
80. The 2nd Defendant's advocate filed his submissions on 13th March, 2014 in which he submitted that the Plaintiffs can only succeed against the 2nd Defendant if they show that the title held by the 2nd Defendant was obtained on the basis of misrepresentation and or fraud which the 2nd Defendant was part of.
81. The 2nd Defendant's counsel further submitted that in law, an allegation of fraud must, first, be specifically alleged and thereafter proved as provided for under order 2 Rule 4 of the Civil Procedure Rules.

Analysis and findings:

82. The issues that arise from the pleadings and evidence in this matter are as follows:

- a. **Is land known as Mwapula/Magogoni/489 (the suit property) family land?**
- b. **If the answer to (a) above is in the affirmative, which family.**
- c. **Was the 1st Defendant registered as the proprietor of the suit property in trust?**
- d. **Was the suit property lawfully transferred to the 2nd Defendant?**

83. According to the Plaintiff and the evidence adduced by the Plaintiffs, the suit property belongs to three families, namely Geji Moto, Chiriba Nyambu (the 1st Defendant) and Iddi Moto.

84. The family tree that was filed in this court by the consent of the parties shows that Geji Moto and Iddi Moto, now deceased, were brothers. Chiriba Nyambu, the 1st Defendant, is their cousin.

85. According to the evidence that was adduced in this court, seven Plaintiffs, including Pw 1, are the children of Iddi Moto while three Plaintiffs are the children of Geji Moto. Three other Plaintiffs are the sons of Kesi Kibwago, who is a son of Chibwago Moto, one of the cousins of

- Iddi, Geji and the 1st Defendant.
86. None of the children of the 1st Defendant or his four brothers, including Pw 2, are Plaintiff's in this case.
 87. It would therefore be true to state that it is the Children of Iddi Moto and Geji Moto, together with the grandchildren of Chibwago Moto, a cousin of Iddi Moto, Geji Moto and the 1st Defendant, who are claiming that their uncle, the 1st Defendant, has deprived them of the suit property, which, according to them, they are entitled to.
 88. According to the evidence of Pw 1, his uncle, the 1st Defendant, was mandated to pursue the suit property with the relevant bodies after it was realised that the property had been unlawfully registered in the name of one Kalume Deri after adjudication.
 89. According to the evidence that was presented to this court, the adjudication process in respect to the area where the suit property is situated was finalised in 1993 or thereabouts after which many complaints arose.
 90. Before the enactment of the Land Act, 2012, the law that governed the ascertainment of land rights and interests of individuals on customary land or Trust land, as in this case, was the repealed Land Adjudication Act, Cap 284.
 91. The procedures for the ascertainment of the land rights of individuals under that Act were elaborate. The process of adjudication pursuant to the provisions of the Act commenced with the request of the residents of an area that they wished their land to be adjudicated.
 92. Once the Director of Land Adjudication and Settlement communicated to the Land Adjudication Officer of an area to commence the adjudication process, the Land Adjudication Officer would request the Director of Surveys to provide him with the relevant photo enlargements, satellite imageries or maps whereafter the Land Adjudication Officer would appoint a Demarcation Officer and other support staff to work in the area.
 93. The Land Adjudication Officer was mandated under the Act to appoint the Land Adjudication Committee and an Arbitration Board. These two bodies are the ones who were mandated to hear complaints from land owners during and after the demarcation process.
 94. It was the function of the Demarcation Officer, with his staff, to accompany the land owners who were supposed to point out their boundaries. The Demarcation Officer would then mark the boundaries in the enlarged aerial photographs and prepare the Demarcation book.
 95. The Act provided that if any land owner was aggrieved by the survey and demarcation exercise, he was supposed to file the dispute with the Land Adjudication Committee (the Committee) and the Arbitration Board (the Board). It is only after such disputes have been resolved that the Demarcation Officer would prepare the Adjudication Record which was supposed to be signed by the land owners and then forwarded to the Land Adjudication Officer.
 96. The Land Adjudication Officer was required to inform the residents of the area of the completion of the adjudication register and receive any objections in that respect in writing. Where there were no objections, the adjudication register would be forwarded to the Director of Surveys for the preparation of the Registered Index Map which would be returned to the Director of Land Adjudication and Settlement for the final checking of the register. The final adjudication register would then be forwarded to the Chief Land Registrar for issuance of title deeds.
 97. The Act provided the manner in which disputes were supposed to be resolved before the final register could be forwarded to the Chief Land Registrar for issuance of title deeds.
 98. A land owner who was aggrieved by the demarcation and survey of his land was supposed to file his case with the Land Committee. The Land Committee would deliberate on the case and if a party is dissatisfied with its decision, he would appeal to the Arbitration Board within 14 days.
 99. The Arbitration Board, whose members used to be appointed by the Lands Adjudication Officer, would hear the appeal from the Committee and make a decision, which decision was supposed to be implemented by the Demarcation Officer.
 100. The Act further provided that upon receipt of the Demarcation Book, the Land Adjudication Officer was supposed to receive objections from any person aggrieved by the decision of the Arbitration Board or by the register as compiled by the Demarcation Officer. The decision of the Land Adjudication Officer was appealable to the Minister of Lands whose decision was final. The Minister for Lands delegated those functions to the respective District Commissioners by way of gazette notices.
 101. I have reproduced above the vigorous process of land adjudication so as to put the Plaintiffs'

case into context.

102. It was the evidence of Pw 1 and 1 Dw 1 that before the title deed was issued to the 1st Defendant, it was discovered that Kalume Deri had been allocated the suit property during the adjudication process. Pw 1 informed the court that he filed an appeal with the Minister after the 1st Defendant lost the dispute three times, a fact admitted by the 1st Defendant.
103. This evidence shows that the process of adjudication of the suit property complied with the requirements of the Land Adjudication Act. The 1st Defendant must have been dissatisfied by the decision of the demarcation officer in allocating Kalume Deri what he considered to be his land and filed a dispute with the Land Committee, the Arbitration Board and the Land Adjudication Officer. The dispute, in all those three instances, was decided in favour of Kalume Deri.
104. The 1st Defendant produced as DEXB 1 the proceedings of the Land Board case number 23/93/94. In that case, the Plaintiff was Chiriba Nyambu Barua (the 1st Defendant) while the Defendant was Kalume Deri Mumbo.
105. In those proceedings, the 1st Defendant stated that the land in question was “clan land.” The 1st Defendant further stated that it was him who has always utilized the land by planting trees. He stated that **“the Defendant (Kalume Deri) had stolen his number.”**
106. In those proceedings, Pande Mkauma informed the board that indeed the land belonged to the Defendant herein. This position was reinstated by the 2nd witness while testifying before the Board.
107. The Board proceeded to concur with the decision of the Land Committee and awarded Kalume Deri the land. D EXB 2 is an objection that the 1st Defendant filed before the Land Adjudication Officer after losing at the Board. The families of Geji Moto and Iddi Moto were never mentioned in those proceedings.
108. In the objection, the 1st Defendant stated as follows:

“During demarcation period, I registered the disputed parcel of land to myself but later I discovered that the disputed land was registered to Kalume. I inherited the disputed parcel of land from my father and that I am utilizing it up to date.....”

109. After hearing the two parties and their witnesses, the Land Adjudication Officer dismissed the objection. Again, there was no mention in those proceedings that parcel of land number 489 belonged to the families of Geji Moto and Iddi Moto. Indeed, the 1st Defendant was clear in those proceedings that he inherited the suit property from his father, Nyambu Barua and not from his grandfather Barua Mtune or from his cousins Iddi and Geji Moto.
110. It was the evidence of Pw 1, Pw 2 and Pw 3 that after the 1st Defendant lost the dispute in respect to the suit property thrice, the family appointed Pw 1 to lodge an appeal with the Minister as provided for under the law.
111. Pw 1 produced in evidence the power of attorney which was marked as P EXB1. According to the evidence of Pw 1, it is the power of attorney that he was given by the 1st Defendant that enabled him to pursue the appeal. I have perused P EXB1 which was signed by the 1st Defendant. The special power of attorney states as follows:

“I Chiriba Nyambu Barua..... do hereby ordain, nominate and appoint Christopher Iddi Moto to be my attorney and or representative in my plot known as MWAPULA/MAGONGONI/489 which powers shall mean dealing in, preferring an Appeal to the Minister arising from the decision of the land adjudication officer number 8, in which I was aggrieved, registering and or transferring the said plot into my names for doubts.....”

112. Pw 1 stated that he read and understood the said power of attorney before he preferred the Appeal. Indeed, 1 DW 1 stated that he appointed Pw 1 to represent him because Pw 1 was schooled.
113. It is clear from the wording of the power of attorney that it is not the family which gave the 1st Plaintiff authority to prefer an appeal to the Minister. In fact, the 1st Defendant had to clarify in

- the said power of attorney that it is him who was aggrieved with the decision of the Land Adjudication Officer and that the said land should be registered in his name.
114. It is therefore not true that the 1st Plaintiff filed the appeal to the Minister on the basis that the suit property also belonged to his father, Iddi Moto, notwithstanding the fact that while prosecuting the appeal, the 1st Plaintiff stated that the land in dispute belonged to the family of Geji Moto, Chiriba Nyambu and Iddi Moto.
115. The powers that were donated to him to prosecute the appeal were clear, he was to prosecute the appeal on behalf of the 1st Defendant and not the family.
116. The Plaintiffs' counsel submitted that this court should disregard the power of attorney because it was not registered. That is an interesting argument considering that it is Pw 1 who produced the power of attorney as P EXB 1 and relied on it in his testimony. Indeed, at paragraph 6 of the amended Plaintiff the Plaintiff averred as follows:

“The Plaintiffs aver that by virtue of being the eldest family, the 1st Defendant donated a special power of attorney to the 1st Plaintiff to be his attorney and or representative in all that property known as MWAPULA/MAGOGONI/489 which powers were limited to procuring an appeal as afore.”

117. It is trite law that parties are bound by their pleadings. The Plaintiffs cannot therefore run away from the said power of attorney considering that it was specifically mentioned in the Plaintiff and the same was produced in evidence by the Plaintiff.
118. In his decision, the District Commissioner, who was the Minister's representative, found that parcel number 489 should be registered in the names of Chiriba Nyambu Barua, the 1st Defendant on behalf of other family members.
119. Although Pw 1 initially stated that his father, Iddi Moto and his uncle, Geji Moto did not own any other land, he later changed and stated that they owned some other parcels of land after he was shown search certificates.
120. The search certificates that were produced in evidence by the 1st Defendant shows that Geji Moto was the registered owner of Mwapula/Magogoni/371 while Msami Boti Barua alias Iddi Moto was the registered owner of plot number 656. The two also owned jointly plot number 376. The said searches show that all the title deeds were issued to Iddi Moto and Geji Moto around the year 2011.
121. It was the evidence of Pw 1 that parcel of land number 487 was the one that was allocated to the 1st Defendant and not the suit property. The search for that property shows that the same is registered in the name of Athumani Mayanga, the son of Mayanga Nyambu, who is the 1st Defendant's brother, and not the 1st Defendant.
122. Pw 2, the eldest brother of the 1st Defendant contradicted himself by stating at one point that the suit property belonged to Iddi Moto and Geji Moto and then, in cross-examination, stated that the suit property belonged to their father Nyambu Barua. His evidence, just like that of Pw 1 is not credible at all.
123. The process of adjudication of customary land, as I have already stated entails the identification of boundaries of land owners. The evidence that was tendered in this court showed that the late Iddi Moto and Geji Moto were alive when the process was undertaken and completed around the year 1993.
124. According to the evidence of Pw 2, who according to his national Identity card was born in 1922, his grandfather, Barua Mtune allocated his big piece of land to all his four sons. It is therefore obvious that during the adjudication process, each of the families of Barua Mtune knew the extent of the land that had been allocated to their fathers or grandfathers. Indeed, that explains why the title deeds for the other parcels of land were issued in the names of Iddi Moto and Geji Moto who are the 1st Defendant's cousin.
125. It is therefore inconceivable that it is the sons of Geji Moto and Iddi Moto who would complain that the suit property belonged to their fathers when their fathers never filed any dispute during the demarcation process. It was the 1st Defendant who filed disputes before the Lands Committee, the Arbitration Board and the Lands Adjudication Officer, not as against his cousins,

- but one Kalume Deri. That, in my view, is conclusive proof that Iddi Moto and Geji Moto knew that they had no interest in the suit property.
126. The first time that Pw 1 came into the picture, was when he was allowed by the 1st Defendant to pursue the appeal on his behalf. Pw 1 took advantage of that opportunity to state that indeed the suit property belonged to the three families. However, no evidence was put before the court to show that that was the position.
127. Although it is true, as submitted by the Plaintiffs' counsel, that section 26 of the Land Registration Act and the repealed Registered Land Act recognised the fact that land could be registered in the name of an individual in trust for family members, a basis must be laid for the court to make such a finding, which is not the case here.
128. I say so because the Plaintiffs did not lead any evidence to show why their fathers, Geji Moto and Iddi, could not have had the title registered in their joint names or the property to be subdivided and registered in their respective names during the adjudication process considering that the two were adults with more than 14 children between themselves, or why they never complained when they realised that the suit property had been registered in the name of Kalume Deri.
129. Although the District Commission, on behalf of the Minister, found and held that the suit property should be registered in the name of the 1st Defendant on behalf of other family members, and while it is true that the concept of holding land in trust for family members is recognised in law, it is far-fetched and improbable that the family members that the District Commissioner had in mind included the 1st Defendant's cousins.
130. No evidence was tendered by the Plaintiff to show that under the Giriama customary law, one can hold land in trust for his cousins. In the absence of such evidence, the only conclusion I can arrive at in this case is that the 1st Defendant was required to hold the suit property in trust of his immediate family members, and in this case his children and probably his brothers.
131. However, Pw 2, who is the 1st Defendant's elder brother, stated that their father distributed the land that was given to him by their grandfather equitably and he was not interested with the suit property. The issue of the 1st Defendant's brother claiming the suit property does not therefore arise.
132. For the above reasons, I hold the view that the suit property belonged to the 1st Defendant and his children as at the time he transferred it to the 2nd Defendant. None of the Plaintiffs is a child of the 1st Defendant, or his brother and therefore the Plaintiffs' claim that the 1st Defendant held the suit property in trust for them does not arise. Indeed, none of the Plaintiffs proved that he is in possession of the suit property.
133. The Plaintiff's advocate stated in her submissions that the sale of the suit property to the 2nd Defendant by the 1st Defendant was null and void *ab initio* because by the time the consent to transfer the property was given by the Land Control Board, the 2nd Defendant was a foreign company. According to counsel, section 9 of the Land Control Act provides that the Board cannot give consent to transfer land to a person who is not a citizen of Kenya or a private company all of whose members are not citizens of Kenya.
134. The Plaintiff's counsel submitted that the 2nd Defendant's director admitted in his testimony that the 2nd Defendant had 3 shareholders, 2 of whom were foreigners and or non-citizens.
135. This assertion by the Plaintiff's counsel is not supported by her pleadings or evidence. The particulars of fraud as against the 2nd Defendant is at paragraph 15A of the Amended Plaintiff. The Plaintiffs pleaded in that paragraph as follows:

“The Plaintiffs further aver that the 2nd Defendant bought the said property knowing that the same was illegally and or fraudulently conveyed.”

136. The Plaintiffs case as against the 2nd Defendant was that the suit property belonged to their family and that the 1st Defendant did not have the family's consent to transfer it to the 2nd Defendant. There was no allegation in the Plaintiff, or when the Plaintiffs tendered their evidence that the Board should not have given its consent because the 2nd Defendant's company was not

wholly owned by Kenyans.

137. In the case of **Vijay Morjaria Vs Nansing Madhusingh Darbar & Others, Civil Appeal No. 106 of 2000**, the Court of Appeal held as follows:

“Fraudulent conduct must be distinctly alleged and proved. It is not allowable to leave fraud to be inferred from the facts.”

138. The above holding of the Court of Appeal is in tandem with the provisions of Order 2 Rule 10 which provides that every pleading shall contain particulars of misrepresentation, fraud, breach of trust, willful default or undue influence.

139. In the absence of the allegation that the 2nd Defendant is a foreign company not capable of purchasing agricultural land pursuant to the provisions of section 9 of the Land Control Act, and not proving that fact, I am unable to find that that was the position as at the time the Board gave the 1st Defendant consent to transfer the suit property to the 2nd Defendant. That issue should have been raised in the Plaint to enable the 2nd Defendant and the concerned Land Control Board to respond appropriately.

140. For the reasons I have given above I find and hold that Plaintiffs have not proved their case on a balance of probabilities. I therefore dismiss the Plaintiffs amended Plaint with costs to the Defendants.

Dated and Delivered in Malindi this **6th** day of **June**, 2014

O. A. Angote

Judge