



REPUBLIC OF KENYA



Kiruwa & another v Weindaba & 7 others (Environment & Land Case 14 of 2021) [2024] KEELC 3785 (KLR) (26 March 2024) (Judgment)

Neutral citation: [2024] KEELC 3785 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 14 OF 2021**

**AE DENA, J
MARCH 26, 2024**

BETWEEN

KOMBO KOPA KIRUWA 1ST PLAINTIFF

OMARI BAKARI KITAURO 2ND PLAINTIFF

AND

JAMES MUTELE WEINDABA 1ST DEFENDANT

SAHARE KISUPI MWICHAMBE 2ND DEFENDANT

WILLIE MAHUNGU NDABI 3RD DEFENDANT

DAVID WAGURA MATHAI 4TH DEFENDANT

LAND REGISTRAR, KWALE LAND REGISTRY 5TH DEFENDANT

NDOVU ROCK LIMITED 6TH DEFENDANT

LAND REGISTRAR, MOMBASA LAND REGISTRY 7TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 8TH DEFENDANT

JUDGMENT

1. According to the Plaintiffs, this suit is brought before court in their capacity as chairperson and vice chairperson of Block 5041 Committee hereinafter referred to as the committee and also as representatives of the residents of LR Kwale/Shimoni/5041 measuring 1000 Acres (suit property) It is averred the residents of Kichaka Mkwaju, Gunyu, Makonzoni, Panama and Baundi villages have been in occupation of the said property for many years preceding the pre-colonial period.
2. That in 2007 the then President (Hon. Mwai Kibaki) declared the suit property to be allocated for adjudication to settle squatters and the Ministry of Land complied culminating to the Ramisi Phase1.



That the Plaintiffs were issued letters of offer for allotment and made payments. They were allotted 5 Acres each and beacons placed pending issuance of titles by the 5th Defendant and which never saw the light of the day. The Plaintiffs however continued with occupation of the suit property with the legitimate expectation that the ownership would be eventually formalized.

- 3 That sometime in August 2018 the Plaintiffs found out from records at the Kwale Land Registry that the 5th Defendant had issued leases to the 1st to 4th Defendants. The said leases are registered for a term of 999 years from 1st July 1907 and were issued on 28th August 2018. The Plaintiffs state that the leases were issued without their consent and are thus fraudulent, illegal and void ab initio.
- 4 It is the Plaintiffs case that upon discovery of the issuance of the leases above, they petitioned the National Land Commission through the Kwale County government and which petition is still pending. That on 11th August 2021, the Plaintiffs did another search at the Mombasa lands registry and established that the leases had been transferred by the 7th Defendant to the 6th Defendant on 3rd March 2021 at a sum of Kshs 90,900,000/- meaning each party was paid Kshs 30,000,000/- for each lease held by each party. The said transfer is termed illegal and void ab initio. It is further averred that the adjacent parcels of land have been acquired by a company which plans to erect a cement factory. It is suspected that this company is associated with the 6th Defendant as its agents have in the recent past carried out public participation for an Environmental and Social Impact Assessment in a bid to set up the cement factory.
- 5 The Plaintiffs pray for judgement against the Defendants for;

- a. A declaration that the Plaintiffs are the lawful first registered proprietors of all that parcel of land known as LR Kwale/Shimoni/5041 by dint of having ancestral rights to the land.

SUBPARA b.

A declaration that the 5th Defendant lacked the statutory powers to issue certificates of lease to the 1st, 2nd, 3rd and 4th Defendants over all that parcel of land known as Kwale/Shimoni/5041 without consent and /or knowledge of the plaintiffs.

- c. An order compelling the 5th Defendant to revoke and cancel the certificates of lease issued by the 5th Defendant in the names of the 1st, 2nd, 3rd and 4th Defendants and restore title of all that parcels of land known as Kwale/Shimoni/5041 to the names of the Plaintiff.
- d. An order compelling the 5th Defendant to cancel all entries in the land register for LR Kwale/Shimoni/5041 made subsequent to the fraudulent and illegal issuance of the certificates of lease to the 1st, 2nd, 3rd and 4th Defendants.
- e. A declaration that the 7th Defendant lacked the statutory powers to transfer all that parcel of land known as LR Kwale/Shimoni/5041 from the 1st, 2nd, 3rd and 4th Defendants to the 6th Defendant without consent and/or knowledge of the Plaintiffs.
- f. An order compelling the 7th Defendant to revoke the transfers issued in the name of 6th Defendant and restore title of all that parcel known as LR Kwale/Shimoni/5041 to the names of the Plaintiffs.
- g. An order compelling the 7th Defendant to cancel all entries in the land register for LR Kwale/Shimoni/5041 made subsequent to the fraudulent and illegal issuance of the transfers to the 6th Defendant.
- h. A permanent injunction restraining the Defendants, whether by themselves, their servants, agents, employees and/anyone acting on their authority be restrained from interfering with



the Plaintiffs exclusive and quiet possession of the parcel of land known as LR Kwale/Shimoni/5041.

- i. A permanent injunction restraining the Defendants whether by themselves, their servants, agents, employees and/anyone acting on their authority be restrained from subdividing, leasing, selling, transferring, charging, further developing or dealing with the parcel of land known as LR Kwale/Shimoni/5041 in any manner whatsoever that is adverse to the Plaintiffs title to the land.
- j. Costs of this suit together with interest thereon at court rates.

Pleadings

1st Defendants Statement of Defence

- 6 The 1st Defendant responded to the suit vide Defence filed on 18/5/2022. The 1st Defendant denies the averments raised in the Plaint and states that some of the Plaintiffs never paid the prescribed fees within time being 90 days as alleged. That as such the alleged offers for allotment stood automatically cancelled as per the conditions outlined in the offer letters dated 16/6/2008. The 1st Defendant also states that no land adjudication process had commenced and no titles were issued. The Plaintiffs are put to strict proof of their assertions.
- 7 The 1st Defendant maintains that he was the lawful and bonafide registered owner of LR Kwale/Shimoni/5041/1[CR 71942] as lessee pursuant to the certificate of lease registered for the term of 999 years issued on 28th August 2018. That together with the 2nd to 4th Defendant they lawfully acquired the property and the requisite procedures for such acquisition were followed. He denies knowledge of any petition filed before the National Land Commission and states that the same is active then this suit offends the doctrine of les pendes and sub judice. The 1st Defendant prays that the suit against him be dismissed with costs.

2nd Defendants Statement of Defence

- 8 The 2nd Defendant filed statement of Defence on 13/7/22 and denies the Plaintiffs allegation that they are residents of the suit property and representatives thereof. It is denied the Plaintiffs were given any land by the then President. It is denied that the President ever issued any letters of allotment over the suit property. The 2nd Defendant states he is the beneficial owner and the lawful proprietor of LR No 5041/2 which parcel is delineated on the land survey plan no 455214 and registered under CR 71943 in the land registry at Nairobi. That a title was issued in his favour on 28th August 2018. That the Plaintiffs are not in actual possession of the suit property as alleged as no evidence has been tendered by them in support of this allegation. The 2nd Defendant prays that the Plaintiffs suit is dismissed with costs.

3rd and 4th Defendants Statement of Defence

- 9 The 3rd and 4th Defendants jointly filed their Defence on 25/04/22. They aver that the 3rd Defendant together with the 1st, 2nd and 4th Defendants are the owners of the suit property having been issued with a letter of allotment dated 15/5/1998 by the Kenyan Government. The 3rd and 4th Defendants state that they held the suit property jointly until 2017 when the same was subdivided into three portions being 5041/1, 5041/2 and 5041/3. That further sub division of the property was done and the 3rd and 4th Defendants received a certificate of title in their joint names for LR No 5041/3. That at the time of allotment of the suit property to them, there were no squatters on the suit property. That it is in the year 2019 that local politicians incited people from the neighbouring area to occupy the property.



- 10 The 3rd and 4th Defendants aver that they followed the laid down procedures in acquiring the suit property. This include the letter of allotment, subdivision and having the certificate of titles in their names. They deny being aware of any pending dispute before the National Land Commission. The allegation that the Plaintiffs are the registered owners of the suit property is denied and the Plaintiffs are put to strict proof of the same.
- 11 The 3rd and 4th Defendants have filed a counterclaim to the Plaintiffs suit and pray as follows;
1. The Plaintiffs' suit be dismissed with costs together with interest at courts rate.
 2. Judgement be entered for the 3rd and 4th Defendants against Plaintiffs for; -
 - a. A declaration that the 3rd Defendant together with the 4th Defendant are the lawful registered proprietors of all that parcel of land known as LR No 5041/3.
 - b. A permanent injunction restraining the Plaintiffs, whether by themselves, their servants, agents, employees and/or anyone acting on their authority be restrained from interfering with the 3rd Defendants exclusive and quiet possession of the parcel of land known as LR No 5041/3.
 - c. A permanent injunction restraining the Plaintiffs, whether by themselves, their servants, agents, employees and/or anyone acting on their authority be restrained from subdividing, leasing, selling, transferring, charging, further developing or dealing with the parcel of land known as LR No 5041/3 in any manner whatsoever that is adverse to the 3rd and 4th Defendants title to the land.
 - d. The costs of this suit and of the counterclaim with interest thereon at court rates.

6th Defendants Statement of Defence

- 12 The 6th Defendants filed Defence on 16/5/2022 and state that on or about January 2021 it received offers from the 1st to 4th Defendants on purchase of the suit property as follows;
- i. Title No CR 71942 measuring 122.7 Ha being LR No 5041/1 registered in the names of James Mutele Weindaba on 28th August 2018.
 - ii. Title No CR 71943 measuring 122.7 Ha being LR No 5041/2 registered in the names of Sahare Kisubi Mwichambe on 28th August 2018.
 - iii. Title No CR 71943 measuring 122.7 Ha being LR No 5041/3 registered in the names of Willie Mahungu Ndabi and David Wagura Mathai on 28th August 2018.
- 13 That due diligence was conducted on the suit property and which included inspecting the survey records, conducting official search of the properties from the relevant registries, land reports, government gazette notices so as to establish the true ownership. The official searches indicated the 1st to 4th Defendants as the owners of the suit properties. That the 6th Defendant proceeded then to purchase the suit properties. That the sellers applied for Land Control Board and after execution of all the requisite documents, transfer of the properties was effected to the 6th Defendant. Titles were then issued to the 6th Defendant and so was access and possession.
- 14 The 6th Defendant states that no evidence has been produced to demonstrate the alleged fraudulent transfers of the land to the 1st to 4th Defendants and consequently to the 6th Defendant. Further that no proof has been tendered to demonstrate the occupation of the suit property by the plaintiffs as alleged.



The 6th Defendant states that it is a bonafide purchaser of the suit property and is at liberty to use the same at its interest. It is further averred that the Plaintiffs are trespassers on the suit property and should therefore be compelled to give vacant possession. The 6th Defendant prays that the suit against it be dismissed with costs.

5th, 7th and 8th Defendants Statement of Defence

15 The 5th, 7th and 8th Defendants responded to the suit on 3/6/2022. They state that if the certificate of leases were issued to the 1st to 4th Defendants then the same was done in accordance with the law and due procedure was followed. Reiterating the statutory duties of the 5th and 7th Defendants it is stated that their actions were in no way geared towards stealing or defrauding any of the suit properties and that the said allegations have not been substantiated against the 5th Defendant. It is further averred that if indeed the certificate of leases were issued the same was done procedurally and with regards to the rules laid and the basis thereof cannot be fraud. The 5th, 7th and 8th Defendants pray that the suit against them is dismissed with costs.

Evidence

16 PW1 is Kombo Kopa Kiruwa. He confirmed that he was one of the Plaintiffs and adopted his statement filed before court on 24/08/21. He produced the documents listed in the Plaintiff List of Documents dated 20th August 2021 PEX 1 -7.

17 It is the witness's testimony that filing of this suit was informed by the injustices that were happening on block 5041. That together with the rest of the Plaintiffs they have lived on the suit property for many years where they have graves belonging to their forefathers, houses, madrasas, churches, and trees that have been there a very long period of time. He referred to photographs indicating what is on the land belonging to them. It was his evidence that the Ramisi Sugar used to be on the land before its lease expired and the land reverted back to the government. He reiterated the averments in the Plaint as to President Kibaki's intervention culminating into issuance of offer letters dated 16/6/2008 as evidenced in page 34-75 of Plaintiffs' bundle. That a survey was undertaken but as they awaited the titles they realized the land had been given to other people. They therefore held protests and the county government of Kwale intervened to aid in stopping the grabbing. He also referred to their pending Petition at the National Land Commission.

18 The witness stated that their grievance was how the government could issue out the land when there were residents therein. That their investigation showed the ownership had been transferred and registered to the 6th Defendant (see page 138-140) instead of the residents.

19 On cross examination by Mr. Koech the witness testified that he was born in 1963 in block 5041. That both his parents and grandparents lived on the suit property. That he was elected as a leader of the people residing on the suit property in the year 2021 before the filing of this suit. It was a corporate decision to come to court. The witness stated they prevented the Defendants from undertaking construction on the land but conceded he did not have any ownership documents for 5041.

20 Upon Cross-examination by Mr. Kibet Counsel for 3rd and 4th Defendants, the witness indicated that not all the Plaintiffs had the allotment letters. He could not confirm that the shamba referred to in the letters was 5041 and conceded the said letters had no reference to parcel 5041. He admitted they did not apply to be given the land.

21 On Cross-examination by Mr. Ayisi the witness testified that the land is in Pongwe Kidimu Kikoneni. That the membership form produced before court was signed at the time when the parties were



going to the National Land Commission and stated the form did not have a column for a date. PW1 acknowledged the evidence at page 34 of the Plaintiffs documents as the letter of offer from the Lands Office which mentioned instructions on the offer. He stated he could not remember the year Ramisi closed but stated the land reverted to the residents upon this closure. He stated KISCOL still exists though he did not know the acreage owned by KISCOL. That he never applied for the land. Upon being shown the letters of offer he confirmed they were from the Lands office and not Kwale Municipality. He confirmed one of the letters was signed by Director Land Adjudication proposing to give from Ramisi Phase 1 plot 624. He conceded it did not have a corresponding payment receipt. On being shown page 44 and 46 being letters of offer in respect of Ali Mwaushanga and Hamisi Nasuu the witness conceded they did not have a corresponding receipt in the bundle. He confirmed that Ramisi Phase 1 is one plot. As per the Ministry of Land the owner is NDOVU the 6th Defendant. He confirmed he is the one who filed the petition before the NLC.

- 22 On cross-examination by Mr. Mwanje PW1 testified that he had no records of the minutes of the Committee sittings for which he is the Chairman. He agreed the authority filed before court did not bear the signatures of all the people he purported to represent. He conceded the list did not add up to the over 700 people he allegedly represented. He confirmed he did not have a copy of the president's decree. He testified that he did not get a letter of offer and never wrote to complain about it. That none of the Committee officials letters of offer were presented before court.
- 23 On cross-examination by Mr. Shimaka he maintained that he was in court on behalf of over 700 people. That the ones present before court were representatives of 6 different families. He conceded he met the families on 22/01/23 when they authorized him to represent them and which was after the filing of the suit. That he knew the suit property as 5041 Ramisi Phase 1 and which was the land they were claiming. Upon being shown paragraph 4 of his witness statement he conceded that while it stated the land was unregistered, by 2006 it had title documents. He claimed that the titles held by the Defendants were fraudulent though he did not have evidence including an OB in this regard. He again confirmed he did not receive a letter of offer in his name. He conceded only 24 letters of offer were filed in court and none were in respect of the 6 families earlier mentioned. He conceded he approached the NLC when the present suit was already in court. He denied knowledge of the 70 people referred to as mzizima offspring. (see para 9) He conceded he did not have allotment letter in respect of KISCOL.
- 24 PW1 confirmed he had no claim against the 2nd Defendant though the 6 families were claiming 30 ha from Sahare.
- 25 On re-examination he testified that he had brought all the titles in the name of Ndovu so that the court may appreciate they are not genuine/legal. This was because the Government of Kenya knew the land belonged to squatters. That the letters offer were in respect of 5041 because they were given as per occupation. That the documents purporting withdrawal of the suit were forged. The Plaintiffs case was closed at this juncture.
- 26 DW1 Sahara Kisupi ID NO. 4619149 adopted his statement dated 13/07/22 as his evidence in court. He stated that he was born in Mzizima Pongwe Kidimu location and that plot 5041 the suit property herein was known to him even before it became 5041 and since Arab occupation thereof. That he was born on the suit property and all deceased members of his family were buried on the suit property. That to his knowledge, 5041 is inhabited by Digos and comprised about 6 families namely Juma Alawi Mwakumamba, IEMA Alawi Mwakumamba, Tail Alawi Mwakumamba, Diwali Bakari, Mwamtata Masoud and Mariala Mwamtswa. The witness testified that the 1st Plaintiff lived in plot 5030 lease belonging to Abib Adee. Omar Bakari Kitauro his nephew was in 5041 but they moved together to 1082. That Kichaka Mkwaju is in 5030. That the 1st Plaintiff Kombo and family are from pemba msheweni in Tanzania. They came to Kenya running away from the Afro Shirazi conflicts.



- 27 The witness disagreed that the allotment letters are from plots 1080, 5031, 5056 and 5041 and that they were called Ramisi Phase I. That in 1977 Land Adjudication was announced and their homes were listed in 5041 which comprised three pieces and surveyed from the year 1987. There was subdivision in 1977 however registration came out in a separate title and the suit property remained as it was. The suit property was later given to Ramisi Sugar for purposes of logging wood for the factory.
- 28 That they waited for Ramisi to go under to follow up on this. That in 1994 they were given title after the follow up with Noah Katana Ngala, Ramisi had then gone under. That he sold the land to Ndovu Rock Company in consultation with his family since it was harsh (coral) difficult to farm. They sought for an investor to start a cement factory and that the 1st Plaintiff PW1 also worked in the factory as a supervisor. The witness listed the families from the Plaintiffs list whom he knew were not occupants of the suit property.
- 29 On cross-examination by Mr. Oluenjo DW1 testified that he was born in 1948 as per the ID Card. Those that live in 5041/3 are the squatters and are very few. The indigenous moved but treat their land as available. Upon cross examination by Mwanjeje he stated that his title was obtained in the right way. He followed due process from Nairobi to Uhuru na Kazi Building. Cross-Examined by Mr. Ayisi stated he was born in 1080 which later became 5041. On cross-examination by Mr. Mwanzia Counsel for the Plaintiffs DW1 stated that he had made an application for land, that he was given allotment letter in his name Sahara Kisupi. At the lands office the 1st document he was given was a title at Uhuru na Kazi. There was a letter of lease too and he was told to go to Uhuru na Kazi to pick his title which he did. (shown the letter of allotment) he recognized it as the letter he was given to take to Uhuru na Kazi around 2017. He testified that he held the land on behalf of several other people around 800.
- 30 DW1 clarified on re-examination that he sold the land together with the cemetery and he did not require approval of the 828 people. He stated that his title is 5041/2. That the suit property now belongs to the 6th Defendant.
- 31 DW2 Willie Mahungu Ndabi ID NO. 24693839 adopted his written statement dated 24/3/2022 in evidence. He further produced the list of documents dated 24/3/2022 filed on 25/04/2022 as his evidence DEX 1-3. Cross-examined by Mr. Mwanjeje the witness confirmed that he followed procedure. That before the lease they had agreed the parcels will be three A, B, C, 5041/1 for David 5041/2 Sahara and the 5041/3 for Wandaba. That there were no people on the land when they entered in 2017. That the 6th defendant was willing to let go of 15 acres for the invaders but while in the process of doing so they came to court.
- 32 On cross-examination by Mr. Ayisi DW2 testified that he held title jointly with David Matheri which they sold to the 6th Defendant. On Cross-Examination by Mr. Mwanzia, he testified that they applied for the lease from the government though he did not have the application before court. That he also had the PDP but didn't have it before the court. He confirmed that payment had been made to the Plaintiffs for Kshs 3 million and that the 6th Defendant was to excise 15 acres for them. On reexamination DW2 clarified that he had followed due process to obtain title.
- 33 The 1st Defendant did not call any witness. State Counsel did not call any evidence on behalf of the 5th, 7th and 8th Defendants. He observed that the documents he was to produce were the same that have been submitted by the other parties. Mr. Ayisi did not call any evidence on behalf of the 6th Defendant and opted to instead file submissions and the testimonies of the parties and the documents filed.



Submissions

34 The court issued directions on 27th January 2023, directing parties to file written submissions in respect to the main suit which they did. The same are summarized as follows:-

Plaintiff's Submissions

35 The Plaintiffs identified four issues for determination highlighted here below: -

Whether the Certificate of Lease issued to the 1st to 4th and the 6th Defendants was obtained legally, procedurally, and without mis-representation.

36 It is submitted that from the evidence on record it is not in dispute that the Plaintiffs have been residing on the suit property since pre-colonial period. That the same was confirmed by the 2nd Defendant who stated that in 1997 the residents agitated to be allocated the suit property but were mistakenly allocated a different property. That the 2nd Defendant led the residents in lodging their dispute before the Land Adjudication Tribunal whereby the residents were promised a first priority in allocation of the suit property upon the lapse of the lease in favour of Ramisi Sugar Company. The Plaintiffs state that they produced evidence of letters of allotment and payment receipts which were issued following a process to have the land issued to the residents who were in occupation of the suit property.

37 The Plaintiffs submit that there was no evidence by the 1st to 4th Defendants to demonstrate how they acquired the Certificate of Title to the suit property pursuant to the provisions of Section 26 of the *Land Registration Act*. That according to the provisions of the said section, a title is proof of ownership of land which can only be challenged upon demonstration of fraud and misrepresentation. Under Section 26 (1) (b), it needs to be demonstrated that the title has been acquired illegally, unprocedurally, or through a corrupt scheme. On the latter, it is not necessary that the title holder be guilty of any misfeasance; he may be an innocent party, but so long as the title is not procured legally, or procedurally, or through a corrupt scheme, the title is still impeachable. The fact of ownership and holding of a Title document by itself, is not enough. For clarity, the holder of the Title document, which is being challenged, is obliged to tender before the Court, evidence to show the process of how that Title was obtained. For clarity the owner of the Title must justify its validity. The Plaintiffs placed reliance on the holding in *Munyu Maina v. Hiram Gathiha Maina* [2013] eKLR, *Elizabeth Wanjiru Githinji and 29 Others v. Kenya Urban Roads Authority* [2019] eKLR and *Daudi Kiptugen v. Commissioner of Lands & 4 Others* [2015] eKLR.

38 The Plaintiffs challenge the root of the title held by the 1st to 4th Defendants and states that the 1st Defendant did not testify or produce any evidence in support of his defence and/or to support the root of his title. The 2nd Defendant informed the court that he was registered in the lease as a trustee of 828 residents. However, nothing was produced to demonstrate the identity of the 828 members and/or their consent to have the suit property sub-divided in favour of the 1st, 3rd and 4th Defendants and the subsequent sale to the 6th Defendants. That the 3rd Defendant produced a letter of allotment dated 15th May, 1998 issued in the joint names of the 1st to 4th Defendants. However, the 2nd Defendant testified that he only met the 1st, 3rd and 4th Defendants for the first time during the transaction in favour of the 6th Defendant. The 3rd Defendant confirmed that there was no certificate of lease issued in the joint names of the 1st to 4th Defendant following the letter of allotment dated 15th May, 1998. However, he indicated that the land was sub-divided and separate certificate of lease issued to the 1st, 2nd, 3rd and 4th Defendants. Nothing was produced to demonstrate compliance with the conditions indicated in the



letter of allotment dated 15th May, 1998, no survey plan was produced or the Part Development Plan (PDP) in support of the letter of allotment.

- 39 The Plaintiffs refer to the process of disposition of Government Land before promulgation of the 2010 Constitution and state that even at that time certain procedures and processes had to be followed. Those included the identification of land by the Local Government Council within which the land was situated to inter alia find out if the parcel of land set for alienation was indeed Government Land and secondly, if it was available for disposition. That the 1st to 4th Defendants did not produce the application for allocation, it is not clear which parcel of land had been applied for given the admission by the 3rd Defendant that he neither identified the same nor visited it prior to the allocation. The letter of allotment giving rise to the titles being held by the 1st to 4th Defendants cannot be sustained in law. The Plaintiffs state that the letters of allotment required that certain obligations be fulfilled within 30 days and the 2nd Defendant admitted to having not complied with the same hence making the allotment letter a nullity. Reference was made to the case of *Bubaki Investment Company Ltd –vs- National Land Commission & 2 Others* [2015] eKLR.
- 40 It is the Plaintiffs submission that the defendants having failed to adduce evidence to justify the legality of their certificate of lease(s) and the procedure adopted to acquire the same, the certificate of lease issued in favour of the 1st to 4th and the 6th Defendants were issued in total disregard to the requirement of the Government *Land Act* (Repealed).

Whether the 6th Defendant has demonstrated the defence of bonafide purchaser for value

- 41 It is submitted having raised defence of “bona fide purchaser without notice” to the claim by the Plaintiffs the burden of proof was on the 6th Defendant to prove on a balance of probabilities that it is the bonafide purchaser for value without notice as was relayed in *Mohamed v Duba & another (Civil Appeal 83 of 2019)* [2022] KECA 442 (KLR) (18 March 2022) (Judgment) where the court upheld the decision of the Ugandan case of *Katende v. Haridar & Company Limited* [2008] 2 E.A.173. The Plaintiffs state that the 6th Defendant has failed to demonstrate the elements qualifying him the defence of bonafide purchaser for value without notice. The plaintiffs relied on the High Court decisions in *Linus Nganga Kiongo & 3 Others v. Town Council of Kikuyu* [2012] eKLR and that in *Peter Ngigi Kuria & another (Suing as the legal representatives of the Estate of Joan Wambui Ngigi) v. Thomas Ondili Oduol & another* [2019] eKLR.

Whether the Plaintiffs are entitled to reliefs sought hereto?

- 42 The court is referred to the following provisions of *the constitution*; Article 2(5), Article 10, Article 40, Article 28, Article 63(1) and Article 259(1). The Plaintiffs submit that the question of historical land injustices is a serious issue to be determined within the context of promoting constitutional purposes, values and principles and advancing the rule of law, human rights, and fundamental freedoms in the Bill of Rights. The plaintiffs state that the National Land Commission is mandated to investigate historical land injustices and hence the necessity of filing the complaint before them as was done by the Plaintiffs. That notwithstanding the period for lodging complaints of historical land injustices having lapsed, a bill of Parliament to amend the Act in order to allow the Commission to continue admitting and processing historical land injustice is still pending as at the date of filing these submissions. It is submitted in the above circumstances that the Plaintiffs, despite having a claim based on clear and veritable historical land injustices, do not have an accessible, adequate and effective remedy except through this Honourable Court.



43 The Plaintiffs lastly submit that they have demonstrated a good case to warrant the court to issue an order cancelling the certificate of title being held by the 1st to 4th Defendants and issue a declaration that they are the lawful owners of the suit property and proceed to issue certificate of title to the Plaintiffs. They further seek for costs of the suit.

1st Defendant's Submissions

44 The 1st Defendant addressed the court on the following issues;

- i. Whether the Plaintiff's demonstrated their locus standi before the court.
- ii. Whether the Plaintiffs presented credible evidence and demonstrated a legitimate cause of action,
- iii. Whether the Plaintiffs proved that the parcel of land known as L.R. No. 5041 was allocated, adjudicated and registered fraudulently in favour of the 1st, 2nd, 3rd and 4th Defendants,
- iv. Whether the Plaintiff's properly invoked the jurisdiction of the court.

45 1st Defendant referred various authorities on the definition locus standi and guidelines upon which the court can make a finding on whether or not a person has locus standi to institute a suit namely Julian Adoyo Ongunga v Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015, Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, National Environmental Tribunal v Overlook Management Limited & 5 Others [2019] eKLR and Mumo Matemu ...Vs... Trusted Society of Human Rights Alliances & 5 Others [2014] eKLR.

46 On locus standi, the 1st Defendant states that together with the Plaintiff, the Plaintiffs filed, inter alia, a list of Names at pages 4 to 33 of the persons they allegedly represent. A close look at the list showed it is titled "Historical Land Injustice by the Residents of Pongwe-Kiconeni Ward in Kwale County on illegal and irregular allocation of lease on LR 5041". This is a similar title as the alleged Petition to the National Land Commission at page 76 of the Plaintiffs' bundle of documents. The court is further referred to the authority to institute suit filed by the Plaintiffs. The 1st Defendant submits that as far as the said authority and annexed list relate to different proceedings. That the Plaintiffs lack authority to represent any of the said individuals in this case herein, but themselves. Further that the Plaintiffs have to demonstrate to the court that they had the mandate, authenticity and capacity to represent the said more than 700 people that they allegedly represented. That PW1 did not even adduce evidence of having been appointed or elected as chair of the group. The 1st Defendant thus submits that the Plaintiffs have not demonstrated their locus standi before the court.

Did the Plaintiffs present credible evidence before the court and thereby demonstrate a credible cause of action?

47 On cause of action it is submitted that the sentiments by PW1 that the claim for the suit property is premised on the fact that it is their ancestral land is refuted and contested by the 1st Defendant. That by dint of the evidence of the 2nd Defendant, Sahare Kisupi Mwichambe, PW1 is not even a Digo to give any credence to the sentimental pontifications. The 2nd Defendant in his evidence stated that PW1 is in fact a Pemba called Kombo Haji wa Haji. Open source material available on the internet (link <<https://www.youtube.com/watch?v=zXeOM8qpj6I>> shows PW1 addressing the media sometime on 2nd January 2023 to express his happiness at being recognized as Kenyan Citizen. The court is invited to take Judicial Notice of this fact, given the contemporaneity of the open source material. That PW1 said on oath that he was a Digo, yet there he was thanking the head of state as a Mpemba. That the allegation that the president had decreed the suit property be allocated for adjudication to squatters



have not been proved by any evidence and hence the Plaintiffs have again failed to demonstrate a credible and a proper cause of action.

- 48 It is the 1st Defendant's submission that no evidence has been tendered to support the fraud allegations and as such they remain allegations with no proof. That the cases cited by the Plaintiffs are factually distinguishable with this case herein in view of the fact that the Plaintiffs have not substantiated any equal, superior or any legal interest to the property. That the 1st Plaintiff Kombo Kopa Kiruwa is not among the allottees in the documents presented by his very self and his clear unequivocal testimony upon cross-examination that he had never applied to be allocated any land anywhere in the Republic of Kenya.
- 49 On jurisdiction the 1st Defendant submission is that the Plaintiffs did not properly invoke the jurisdiction of this court as this is not an application to review the government's decision to grant title to the 1st, 2nd, 3rd, & 4th Defendants and subsequently register the transfer in favour of the 6th Defendant, which is not being impugned, and that the Plaintiffs have not proved any claim of legitimate interest in the property. The 1st Defendant addressed the issue of whether the decision not to lead viva voce evidence by the 1st Defendant should be considered against him. The court is asked to consider the fact that the Plaintiffs exhibited the title held by the 1st Defendant before transfer to the 6th Defendant. The Plaintiffs by their own evidence thereby proved the interest of the 1st Defendant which was by dint of the law transferable to the 6th Defendant or any other party. They did not present any equal or superior entitlement to the property. What they displayed in court was that the property had been allocated. Such displays need not be addressed by any other means other than the status of the register held by the 7th Defendant and the state. That there is merit and judicial economy in avoiding unnecessary duplicity in evidence noting that the suit is joint and several against the Defendants and there is common effort between the 1st, 2nd, 3rd and 4th Defendants to legitimately apply for, pay and acquire the properties. Any potential gaps would be filled by the evidence of the 2nd & 3rd Defendant. The court is urged to dismiss the suit with costs to the Defendants.

2nd Defendant's Submissions

- 50 It is submitted that the 2nd Defendant followed the legal process pertaining to allocation and registration of land and was evidently registered as the bonafide legal owner of the suit property. The 2nd Defendant states that Section 26 of the [Land Registration Act](#) provides that the certificate of title issued by the Registrar to be held as conclusive evidence of proprietorship except challenged on the grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- 51 That the Plaintiffs allege that the 2nd Defendant obtained the certificate of title fraudulently and illegally and thus invoked Section 26 (1)(b) of the [Land Registration Act](#). That they have been on the land since precolonial period. They however failed to provide corroborative evidence of the same and similarly failed to adduce evidence before this Court to illustrate that the title of the 2nd Defendant was obtained an illegal, unprocedural or through a corrupt scheme. It leaves no doubt that the 2nd Defendant legally acquired possession and registration of the disputed parcel of land. The court is urged to uphold the certificate issued to the 2nd Defendant as conclusive evidence of his ownership. It is prayed that the 2nd Defendants case be dismissed.



3rd And 4th Defendants' Submissions

- 52 The 3rd and 4th Defendants addressed the court on Whether the Plaintiffs were allocated the suit property, whether the 3rd and 4th Defendants hold a good title in respect of the suit property and who between the Plaintiffs and the 3rd and 4th Defendants is entitled to the reliefs sought?
- 53 It is submitted that it is law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her as per Section 107,108 and 109 of the *Evidence Act*. That in the instant case, the burden of proof lay on the Plaintiffs. They claim to be the rightful owners of the suit property. The Plaintiffs claim that they made payments to the allotment in 2007 but only realized in 2018 that Certificates of Title had been issued to the 1st, 2nd, 3rd and 4th Defendants. That it beats logic why it had to take that long to find that the suit property had instead been allocated to other people. That while their claim was as a result of an allotment letter allotted to BLOCK 5041 COMMITTEE the same was not produced in evidence to support the Plaintiff's case, creating a doubt that the Plaintiffs allegation of title was obtained in an irregular and unprocedural manner thus rendering it null and void for all purposes of the law. Reliance was placed in Joseph Wamalwa Murutu v Robert Maina [2021] ECLR which referred to Rukaya Ali Mohamed v David Gikonyo Nambachia & Another Kisumu HCCA.9/2004 and in Joseph Arap Ng'ok v Justice Moijo Ole Keiwua [1997] ECLR where the Court of Appeal stated thus:
- “It is trite law that such title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of the title document pursuant to the provisions of the Act under which the property is held”.
- 54 It is urged the Plaintiffs have admitted that they did not comply with the conditions set out on the letter of allotment to crystallize their interest on the suit property. Thus, their possession was obtained illegally, unprocedurally and unlawfully without following the due process thus null and void for all purposes required of it in law.
- 55 It is submitted that the 3rd and 4th Defendants produced a letter of allotment to support their case. Together with the 1st and 2nd Defendants, they are the owners of the parcel of land known as L.R Kwale/Shimoni 5041 measuring approximately 909.5 acres having been issued with a letter of allotment dated 15th May 1998 by the Kenya government.
- 56 It is submitted that the Plaintiffs despite alleging fraud have failed to produce any evidence in proof thereof. Without any evidence to contradict the evidence of the 3rd and 4th Defendants and taking into account the exhibits provided before his Court, this court should find and hold that the 3rd and 4th Defendants are the lawful owners of the suit parcels. Reliance on the necessity to plead and prove fraud is placed on Christopher Ndaru Kagina Vs Esther Mbandi Kagina & Another [2016] eCLR and on the decision of the Court of Appeal in Demutila Nanyama Pururmu v Salim Mohamed Salim [2021]] eCLR which made inference to the decision in Vijay Morjaria Vs Nansingh Madhusingh Darbar & Another [2000] ECLR.
- 57 The 3rd and 4th Defendants submit that the Plaintiffs having failed to make any case for cancellation of the 3rd and 4th Defendants' titles or for any of the reliefs sought, the Plaintiffs failed to prove their case on a balance of probabilities, and the 3rd and 4th Defendants having done so, deserve the orders sought in their statement of Defence and Counterclaim.



6th Defendants Submissions

- 58 Referring to the provisions Order 1 Rule 8 and Order 1 Rule 13 of the Civil Procedure Rules the 6th defendant submits that the alleged representative suit is incompetent. There was need for the suit to be advertised by Public Advertisement because of the huge number of persons on whose behalf it is instituted. The Plaintiff did not give proof of having notified the alleged residents of the suit property of this suit to make them aware of the suit, neither did the 1st and 2nd Plaintiffs prove that they advertised the suit as is mandatory set out in Order 1 Rule 8. The court is invited to dismiss the suit as was held in the case of Ruth Wamboi Muturi v Joseph Karisa Katsoma & 4 Others [2007] eKLR.
- 59 The 6th Defendant submits that it purchased the property from the 1st, 2nd, 3rd & 4th Defendants, who were the then registered owners of the properties known as L.R. Kwale/Shimoni 5041/1 (CR. 71942), L.R. Kwale/Shimoni 5041/2 (CR. 71943) and L.R. Kwale/Shimoni 5041/3 (CR. 71944), upon conducting due diligence including; conducting an official search at the Kwale Land's Registry, checking on the land against the relevant land reports like the Ndung'u Land Report and the various legal Notices on land. That the Plaintiffs on the other hand did not produce any proof they were registered owners of the suit property, despite alleging that the suit property belongs to them. The Plaintiff neither challenged the validity nor authenticity of the title held by the 6th Defendant. It is the 6th Defendant's submission, that it acquired a valid title to the properties and thus urge this Honorable Court to so find. The Plaintiffs have not demonstrated how the actions or inactions of the 6th Defendant constituted fraud.
- 60 The 6th Defendant invites the court to uphold its defence of a Bonafide Purchaser since the Plaintiffs are not claiming a legal right as against the suit property, but an equitable right. It is stated that the 6th defendant met the threshold set in *Katende v Haridar & Company Limited* [2008] 2 E.A.173, as he honestly intended to purchase the property, holds a certificate of title, had no knowledge of the fraud, purchased for valuable consideration from vendors who had apparent valid title had no notice of fraud and was not party to any fraud.
- 61 Reiterating the above it is further submitted that the evidence on record demonstrates that the current title holders were legal and legitimate owners. Consequently, the Plaintiffs are not entitled to the reliefs sought or any one of them as against the Defendants.
- 62 It is submitted on the totality of the evidence provided by the Plaintiffs vis-à-vis the Defence of the 6th Defendant and considering the said evidence as against the law, the Court ought to find that the Plaintiffs have not proven their case to the required standards as provided in law and dismiss the same with costs.

5th, 7th and 8th Defendants Submissions

- 63 State Counsel filed submissions on 22/5/24. It is submitted there was no evidence tendered by the Plaintiffs to suggest the certificate of lease was acquired through fraud, illegality, unprocedurally or through a corrupt scheme. That allegations of fraud were not specifically pleaded and strictly proved and *Kuria Karies & 2 Others v Sammy Magera* [2018] was cited in this regard. That this was applicable to allegations of misrepresentation and illegality pursuant to Order 2 Rule 4 of the Civil Procedure Rules. As to burden of proof it was submitted the onus fell on the Plaintiff as required under section 109 of the *Evidence Act*. That there was nothing to persuade the court the Plaintiffs were allocated the suit property. It was urged that the Plaintiffs were not entitled to the orders sought in the absence of evidence.



64 Judgment in this case was set to be delivered on 25/9/23. Before I go into my analysis and determination I find it necessary to explain the delay in delivery of this judgement. This case was heard on 20/9/22 but was adjourned to 7th and 9th December 2022 at the instance of Counsel for the 2nd Defendant (Mr. Shimaka caused adjournment to enable him cross examine PW1) On 7th December 2022 Mr. Mwanzia came on record for the Plaintiffs having taken over the case but informed the court he had not obtained the file from the previous lawyers and that he also wanted room to allow for negotiations. It is noteworthy from the proceedings of 19/09/22 negotiations for settlement were underway. The matter proceeded for further hearing on 26/01/23 and 27/01/23 when the hearing was finalized. The court issued directions on the filing of submissions with each side given 21 days. At the same time, I allowed the application for a site visit at the instance of Mr. Ayisi for counsels to appreciate the ground status. Most of the parties were not ready with their submissions and I extended the same for 21 days. Counsel for the 2nd defendant intimated there were emerging issues which required to be resolved between his client and the 6th Defendant which I directed should be resolved within the 21 days extension. On 23/05/23 the 2nd Defendant filed an application dated 22/5/23 under certificate or urgency seeking to stay the delivery of Judgement in this matter. I declined to certify the same as urgent for the reason that the court was giving Judgements dates in September/October 2023. However there being a pending interlocutory matter the court gave directions on disposal thereof and vacated the date for judgement. On 11/10/23 the court scheduled the matter for both the ruling and the judgement on 15/2/2024. Due to pressure of work the court was not able to meet the above schedule until the delivery date herein.

Analysis and Determination

65 I have considered the pleadings evidence and submissions. The following issues stand out for determination.

1. Is the Plaintiffs suit properly before court?
2. Whether the Plaintiffs have sufficiently proved an interest in LR. Kwale/Shimoni 5041.
3. Whether the titles issued to the 1st to 4th and 6th Defendants should be impeached.
4. Are the Plaintiffs entitled to the prayers sought in the Plaint?
5. Costs.

Is the Plaintiffs suit properly before court?

66 The Defendants have raised a number of preliminary issues as seen in foregoing submissions namely lack of locus, lis pendes, failure to comply with the provisions of Order 1 Rule 8 and Order 1 Rule 13 of the Civil Procedure Rules as to representative suits. However in my view this court should focus on justice and the merits of the case. I find support in *Raila Odinga & 3 Others v IEBC* [2013] eKLR where the Supreme Court made the following commentary in reference to Article 159 (1) of *the Constitution*; -

The court as an agency of the process of justice is called upon to appreciate all the relevance conscious and the requirements of a particular case and conscientiously determine the best course”

Further in *Banco Arabe Espanol v Bank of Uganda* [1999] 2 EA 22 by the Supreme Court of Uganda as was referred to in *Nuru Ruga Ali & another v Commodity House Limited & 3 others* [2021] eKLR held thus;

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not



necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered”.

- 67 The Plaintiffs have brought this suit on their own behalf and on behalf of Block 5041 Committee representing all the residents of LR/Kwale Shimoni 5041. It is their case that residents of Kichaka Mkwaju, Gunyu, Makonzoni, Panama and Baundi Villages who are from the Digo community have been in occupation of the suit property predating precolonial era and which has been their home to date. That pursuant to a presidential decree by the then President Hon. Mwai Kibaki the suit property was adjudicated for settlement of squatters and letters of allotment issued. However despite the said residents meeting the conditions thereof they were never issued with titles but continued occupying the suit property with the legitimate expectation that the ownership had been formalized. In August 2018 the Plaintiffs discovered that the land had been allocated to the 1st, 2nd, 3rd and 4th Defendants without their knowledge or consent and who were not natives. The said titles are termed as fraudulent, illegal and void ab initio.
- 68 The Plaintiffs also state that the 1st, 2nd, 3rd and 4th Defendants subsequently sold their interest to the 6th Defendant which transfer they also term as fraudulent, illegal and void *ab initio*. Fearing eviction by the 6th Defendants the Plaintiffs filed the present proceedings to be declared the lawful registered proprietors by dint of ancestral rights, cancellation of the titles and permanent injunction against the Defendants and their agents from dealing with the property in any manner adverse to their title to the land.

Whether the Plaintiffs have sufficiently proved an interest LR. Kwale/Shimoni 5041

- 69 The above issue arises from prayer ‘a’ of the Plaintiffs herein where the Plaintiffs crave to be declared the lawfully registered proprietors of all that piece of land known as LR. Kwale/Shimoni 5041 by dint of ancestral rights to the land. The Plaintiffs case is substantively anchored on the ancestral claims and the letters of allotment allegedly issued pursuant to a presidential decree. The other ground is that the titles issued to the Defendants were fraudulent and illegal thus void *ab initio* and which to me is dependent upon proof of the Plaintiffs interest in the suit property. Does the evidence on record support the ancestral land theory advanced by the Plaintiffs? Did the Letters of Allotment confer title to the ‘allottees’?
- 70 He who alleges must prove. Section 107(1) of the *Evidence Act*, places the burden of proof on the Plaintiff and stipulates that ‘whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.’ In Leonard Otieno Versus Airtel Kenya Limited [2018] eKLR Justice Mativo observed that a litigant bears the burden of proof in asserting his claim. The onus was on the Plaintiffs therefore to prove on a balance of probabilities that they acquired title or a beneficial interest to the suit property by dint of ancestry and the said letters of allotment.
- 71 PW1 adopted his witness statement dated 20/8/21 as part of his evidence in chief which reiterates the ancestral claims dating to precolonial period. PW1 testified that the land used to belong to Ramisi Sugar Company which collapsed in the year 1987. That in the year 2007 the then President allocated 15,000 acres for sugar cane production to Kwale International Sugar Company Ltd (KISCOL) in an effort to revive the sugar industry. That the suit property never formed part of the said 15,000 acres and is unregistered community land. On the ancestry PW1 alluded to the presence of graves belonging to their forefathers but presented no evidence to support this allegation. Also adduced in



- court is a Petition that was filed with the National Land Commission dated May 2021 and which PW1 confirmed in cross examination it is him who filed it.
- 72 The court came across history allegedly linking the suit property LR. Kwale/Shimoni 5041 to Ramisi Sugar Company who took over Miwani Sugar Company in 1927 and how the company used to pay residents of Mzizima for trees harvested for fuel power. PW1 also told the court during cross examination by Mr. Koech that he was young and was just told that Ramisi used to only come in to undertake the said logging. This to me is hearsay which was not supported with any evidence and lacks probative value. On cross examination by Mr. Ayisi the witness could not even remember the year Ramisi Sugar closed. PW1 indicated in cross examination by Mr. Koech that while he and his father lived on the suit property he was not sure if it was still referred to as parcel 5041. A bundle of photos were produced by the Plaintiff which upon review by this court could not suffice for proof of ancestry.
- 73 In any event the Plaintiffs at paragraph 4 of the Plaintiffs refer to ‘squatters/kins of Mzizima offspring’. Again at paragraph 6 it is stated the President allocated land to be issued to squatters. Additionally this displaces the ancestral claims. In my view the Plaintiffs are squatters and which is confirmed as stated in their pleadings and to which it is trite they are bound by. My finding that the Plaintiffs are squatters is given credence by the supporting affidavits all sworn on 3/6/21 (page 89 – 107) produced by the Plaintiffs as part of the attachments in the Petition filed with the NLC. My review of the same did not reveal much in terms on ancestry, in fact the oldest of the deponents is Joseph Wasonga Ogotu aged 72 years who states he has lived in the suit premises since 1997. James Tsungu Sheti is 63 years old and states he has lived in the suit premises since 1988 and whose original home as per his identity card annexed is Rabai and not any of the villages mentioned herein.
- 74 Even if this court were to consider the claim from a historical injustice perspective, the Plaintiffs did not provide any evidence that their ancestors were in historical occupation of the suit property. From the evidence adduced by the Plaintiffs nothing significant or any cogent evidence was placed before this court to demonstrate the connection of the suit land with their ancestors and or forefathers. See the Courts dictum in *Henry Wambega & 733 others v Attorney General & 9 others* [2020] eK.LR where the court dismissed the claim therein, for lack of proof.
- 75 I’m further emboldened and persuaded by the dictum of Justice Sila Munyao in Constitutional Petition No. 8 of 2019 which was formerly Mombasa High Court Constitutional Petition No. 65 of 2011 *Said Omar Mwitw & 5 Others* (Suing on their own behalf and on behalf of 610 residents of Mabatani, Nyumba Sita, Vidziani, Gonjora, Fahamuni, and Kigwede area – Msambweni – Kwale County) v *Kwale International Sugar & 8 Others* where the court stated thus; -
- ‘The other reason why the petitioners appear to suggest that they deserve the land is because historically the land was of their forefathers. That may be so, but the mere fact that land was previously settled by one’s forefathers, does not by itself give a right to a descendant to have title to that land. I have addressed such issue in my decision in the case of *Henry Wambega & 733 Others v The Hon. Attorney General & Others*, Mombasa ELC Constitutional Petition No. 2 of 2018 (2020) eKLR. This land ceased to be ancestral land for decades before it was leased out to the 1st Respondent. Any ancestral claim to it must have been extinguished by the chain of ownership in private hands. In other words this land was no longer ancestral land but private land that could be disposed of.’
- 76 A Certificate of Ownership under the Land Titles Ordinance 1908 produced by the Plaintiffs shows the various transactions that took place notably the transfer to Associated Sugar Company Limited. This also in my view serves to displace the ancestral claims as the land had been allocated since time immemorial.



- 77 In the absence of evidence of the Claimant's ancestry this court declines to make a finding that the Claimants have a beneficiary interest based on their ancestry. I reiterate my observations that they are squatters. This then becomes a matter of settlement and leads me to the letters of allotment produced by the Plaintiffs.
- 78 The other ground raised by the Plaintiffs to cement their claim over the suit property is the letters of allotment that have featured substantively during these proceedings. PW1 told the court that Ramisi Sugar Company occupied the land but left after their lease expired and the land reverted to the government. The witness informed the court that thereafter the then President Mwai Kibaki decided to have part of the land allocated to the residents. PW1 produced a bundle of letters of allotment together with some receipts (see page 34-75 of plaintiffs' bundle). The court counted 24 letters addressed to different recipients. PW1 confirmed in cross examination by Mr. Shimaka that only 24 letters of offer were filed in court. It is strange to me that a list of the residents is attached and which does not tally with the number of letters of offer. PW1 himself conceded in cross examination he was never issued with one himself and never applied for land.
- 79 All the letters are dated 16/6/2008 and are titled 'Settlement Plot – Letter of Offer. It offers 5.0 acres at Ramisi Phase 1 Settlement Scheme and requires that within 90 days of the date of the letter payment of 100% Outright purchase (Kshs.12,777.00) or 10% deposit thereof being (Kshs. 1,277.90) failure to which the offer shall be cancelled without further notice to the offerees. The letters are signed by Director of Land Adjudication and Settlement.
- 80 A number of issues arose during cross examination which I find necessary to put to rest at this early stage of my analysis of the said Letters of allotment. Firstly was the identity of the suit property. PW1 on cross examination by Mr. Kibet and being shown the letters of offer stated he could not confirm that the land referred therein was LR. Kwale/Shimoni 5041. He confirmed that letters of allotment made no reference to LR. Kwale/Shimoni 5041. From my perusal of the same I note this position is correct. I say so because the letters of offer simply refer to Ramisi Phase 1. No evidence was tendered to show that Ramisi Phase 1 and LR. Kwale/Shimoni 5041 referred to the same land. I have already observed PW1 could not confirm in cross examination if at the time he allegedly lived with his father the suit property was still referred to as parcel LR. Kwale/Shimoni 5041. On cross examination by Mr. Shimaka PW1 conceded the only documents he had before court are the letters of allotment that were issued for allocation. Let me state that there was no letter of allotment produced by the Plaintiffs showing that LR. Kwale/Shimoni 5041 was allocated to the residents herein either through individuals or even the Committee chaired by PW1. An attempt was made to link this to the title No CR 71943 LR No 5041/2 registered in the names of the 2nd Defendant Sahare Kisubi Mwichambe on 28th August 2018 but my review of the title does not show it is held in trust. Moreover, no efforts were made by the Plaintiffs to summon the author of the said letters of allotment or an officer of the Land Adjudication department to clear the air on the identity of the suit property as it relates to said letters of allotment.
- 81 Secondly there was no proof of the alleged presidential decree. On cross examination by Mr. Mwanjeje State Counsel, PW1 informed the court that in 2008/7 he was about 44 years and conceded he had not tendered any proof of the Presidential decree. I wondered that such a Presidential decree would not attract publicity and the attention of the media for production of any related publications in newspapers for submission in court by the Plaintiffs.
- 82 But the above observations notwithstanding and even assuming the Presidential decree was availed I think the real issue is the legal implications of the letters of allotment allegedly issued pursuant thereto. I have already given an analysis of the same save to add that not all the letters of allotment produced were accompanied by corresponding proof of payment. PW1 on cross examination by Mr. Ayisi admitted



the receipt for payments by Ali Mwaushanga and Hamisi Nasipu were not available in the Plaintiffs bundle. It is also not in dispute that the settlement was not concluded and which is confirmed by the Plaintiff pleadings. PW1 in cross examination by Mr. Kibet testified that the letters of offer herein show that the residents are the owners even if the residents did not have title. Throughout cross examination PW1 admitted he had no title showing them as the registered proprietors of the suit property. To me all this points to the fact that the letters of allotment were never perfected. Is PW1 right to state that the letters of allotment conferred title to the allottees?

83 The Court of Appeal in the case of Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR stated thus; -

a. '.....Mr. Otieno-Kajwang who appeared for the applicant argued that the approval by H.E. the President amounted to his client obtaining the title to the suit property. This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.

84 The Supreme Court of Kenya in the case of Torino Enterprises Ltd v Attorney General (Petition 5(E006) of 2022 [2023] KESC 79 (KLR) in determining the legal consequence of a letter of allotment on property rights held that a letter of allotment, in and by itself, did not confer a transferable title on the allottee. Further that the holder of an allotment letter was incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he became the registered proprietor of the land consequent upon the perfection of the allotment letter and that it did not matter that the allotment letter had not lapsed.

85 I have noted the Plaintiffs case pleading legitimate expectation, but this was raised casually more or less as a by the way. Counsel for the Plaintiff did not make any substantive arguments in this regard. I will thus let the issue rest.

86 Arising from the above and from the proceedings clearly the letters of allotment were never perfected and the claimants herein were never issued with titles. My hands are tied by precedent and it is my finding is that the Plaintiffs did not prove beneficial or legal interest in the suit property by dint of the ancestral rights, registration as absolute proprietors or by dint of the letters of allotment. It is also my further finding that they are squatters.

87 The Plaintiffs further case is that sometime in August 2018, they found that the Land Registrar Kwale (the 5th Defendant) issued three certificates of lease being LR Kwale/Shimoni 5041/1 (CR. 71942) to the 1st Defendant, LR Kwale/Shimoni 5041/2(CR. 71943) to the 2nd Defendant and LR Kwale/Shimoni 5041/3CR. 71944) to the 3rd and 4th Defendants. That these titles were issued without the knowledge, participation and or consent of the community leadership. Further that the said Defendants had no ethnic or ancestral linkage with the community. It is pleaded that issuance of the titles was fraudulent, illegal and void *ab initio*. Copies of the titles were produced by PW1 as part of the Plaintiffs bundle of evidence together with corresponding copies of application for postal search requisitioning the same. The Plaintiffs state in addition that the 5th Defendant lacked statutory powers to issue the certificates of titles.

88 Let me first state that having made a finding that the Plaintiffs did not prove that they had beneficial or legal interest in the suit property, their participation and or consent in the issuance of certificate of titles herein was not required. On the issue of the ethnicity I'm not aware of any legal criteria on ethnicity and the court was not led to any by the Plaintiffs or their counsel. The only instance I'm aware



of would be under land adjudication process where ownership would be recorded as per the persons found on the ground, but I had no proof before court of the said adjudication process.

89 I think this will be the appropriate moment to deal with the 3rd and 4th Defendants counterclaim. Their case is that together with the 1st, 2nd, 3rd and 4th Defendants, they are the lawful owners of the suit property which they followed all the due procedure to be allocated the land. According to their defence firstly they held the title jointly until the year 2017 when with the consent of the County Government of Kwale and Ministry of Land the same was subsequently subdivided into the three parcels herein. A Letter of allotment dated 15th May 1988 was produced in evidence by Willie Mahugu Ndabi who gave evidence on behalf the 3rd and 4th Defendant. The title is also produced as evidence. My understanding of the entire proceedings is that following the subdivision herein the holders of the three subdivisions sold their properties to the 6th Defendant. Indeed, on cross-examination by Mr. Ayisi DW2 Mr. Ndabi testifying on behalf of the 3rd and 4th Defendants stated that he held title jointly with Mr. David Matheri which they sold to the 6th Defendant. Would the 3rd and 4th Defendant have locus to raise a counterclaim for the same property? In my view the answer is in the negative. The Counterclaim cannot stand owing to this admission. They have no title. It is also not in dispute that the 1st and 2nd Defendants sold their specific portions to the 6th Defendant. I will let the matter rest at that. In any event I have already made a finding that the Plaintiffs have failed to prove their interest in the suit property.

90 My next task is to determine whether the 6th Defendant is the lawful owner of the suit property being the currently the registered owner of the suit property. It is the 6th Defendant's case that it is a bonafide purchaser for value without notice having purchased the properties from the 1st to 4th Defendants. It is clear that while dealing with this issue the court must first go to the root of the other titles that gave rise to the 6th Defendants title. The Plaintiffs have challenged the titles issued to the 1st to 4th Defendants and seek to impeach the same on the basis of fraud. It is their case that the defence of bonafide purchaser for value without notice can therefore not come to the aid of the 6th Defendant.

91 This court is aware of the import of section 26 of the [Land Registration Act](#) 2012. The same provides as follows;-

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party or;
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

92 Arising from the law above a title may be impeached on grounds of fraud or misrepresentation on the part of the holder of the same or where the same is acquired illegally, unprocedurally or through a corrupt scheme. It is now established that fraud must not only be specifically pleaded but must be particularized and the particulars proved at a slight higher threshold than that of a balance of probabilities. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR Tunoi J.A (as he then was) pronounced himself as follows: -

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is



also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

93 In the case of Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996]eKLR)where the Court expressed itself as follows: -

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.

In this case, to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.”

94 Also see the decision of the Court of Appeal in Demutila Nanyama Pururmu V Salim Mohamed Salim [2021] eKLR which made inference to the decision in Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR.

95 Guided by the above caselaw, it was incumbent upon the Plaintiffs to state the actions undertaken by the Defendants which are termed to be fraudulent as well as the illegalities. In other words the nature of fraud complained against and how the holders of the title contributed to the same and or their participation including what illegalities and how they occurred. I had a keen look at the Plaint dated 20/8/21. Paragraph 14 and 18 thereof allude to the fact that the issuance of the titles to the 1st 2nd, 3rd and 4th Defendants was fraudulent, illegal and void *ab initio*. That the transfer of the suit property from the 1st, 2nd, 3rd and 4th Defendants to the 6th Defendants was fraudulent, illegal and void *ab initio*. A look at the Plaint does not enumerate the specific actions amounting to fraud on the part of the 5th Defendant herein for the initial titles neither is there any enumeration of the actions constituting fraud on the subsequent transfer to the 6th Defendant. There is no basis or reference point upon which this court would be able to make a determination on whether the 5th Defendant issued the said titles fraudulently or even whether the defendants participated in fraud or even the illegalities.

96 PW1 on cross examination by Mr. Shimaka indicated that they knew of the titles in 2018 and that from their investigations they were fake/fraudulent and they were not recognized by the offices PW1 visited during the investigation being the Chief Shimoni one Bakari, County Commissioner Lunga Lunga, and Kwale County Council. On being shown paragraph 11 of his witness statement PW1 conceded he had not presented before court an investigation report showing that the titles were fake nor did he have an OB reporting the fraud to the police. As earlier pointed fraud has to be specifically proved and cannot be inferred.

97 For me based on the foregoing the Plaintiffs failed to properly plead and also failed to prove fraud to the required standard. As to misrepresentation the same goes in tandem with fraud and my observations above are applicable.

PARA 98 Having made the foregoing findings what is the court left with to do. The court has already found that the Plaintiffs did not prove to the required standard their interest in the suit property. Do they have a right to impeach the titles for which they have no legal interest? I have agonized over this issue and more so considering what is before me is a suit commenced by way of Plaint which is very restrictive unlike a Constitutional Petition where the orders may be expanded. This courts hands are tied. It is an adversarial system and the litigant must prove their claims to the latter. It is not enough to state that a defendant did not call evidence. I have already given my analysis on what informed my findings. The Plaintiffs have not established their interest on the suit property. They are squatters.



- 99 In the case of Nelson Kazungu Chai & 9 Others v Pwani University [2017] eKLR the court quoting from Black's Law Dictionary, 9th Edition defined a squatter as 'a person who settles on property without any legal claim or title'.
- 100 Section 134 of the Land Act 2012 provides for Settlement Programmes as follows; -
- (1) The National Government shall implement settlement programmes to provide access to land for shelter and livelihood.
 - (2) Settlement programmes shall, for the purposes of this Act, include, but not be limited to provision of access to land to squatters, persons displaced by natural causes, development projects, conservation, internal conflicts or other such causes that may lead to movement and displacement.
 - (3) The national government shall administer the settlement programmes in consultation with the Commission and the respective county governments.
101. Arising from the above, resettlement of squatters is solely the responsibility of the National Government through the Ministry of Land and Physical Planning in consultation with the National Land Commission and the County Government of Kwale. Let the Plaintiffs chat their next cause of action.
102. The upshot of the foregoing is that the Plaintiffs suit against the Defendants is hereby dismissed. In view of these orders I make no further orders as to costs.

It is so ordered

DELIVERED AND DATED THIS 26TH DAY OF MARCH 2024.

A.E DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mwanzia for the Plaintiffs

Mr. Kibet for the 1st Defendant

Mr. Shimaka for the 2nd Defendant

Mr. Otieno holding brief for Mr. Kibet and Orluenjo for the 3rd & 4th Defendant

Mr. Otieno Achola holding brief for Mr. Ayisi for the 6th Defendant

Mr. Mwandeje for the 5th, 7th and 8th Defendants

Mr. Daniel Disii – Court Assistant

