Kinyua & another (Legal Representatives of Geoffrey Kanu Kinyua - Deceased) v Commissioner of Lands & 11 others (Civil Appeal E027 of 2022) [2025] KECA 862 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 862 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E027 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

MARCH 7, 2025

BETWEEN

JAMES CHARLES KINYUA ..... 1ST APPELLANT

KENNETH PATRICK MINAE KINYUA ..... 2ND APPELLANT

LEGAL REPRESENTATIVES OF GEOFFREY KANU KINYUA - DECEASED

AND

COMMISSIONER OF LANDS ..... 1ST RESPONDENT

LAND REGISTRAR KILIFI ..... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

JAMES NJENGA ..... 4TH RESPONDENT

SAMMY MWAITA ..... 5TH RESPONDENT

TAIWA AGENCIES LIMITED ..... 6TH RESPONDENT

DINAH CHELAL ..... 7TH RESPONDENT

A. SHARIFF ..... 8TH RESPONDENT

C. W. NGATIA ..... 9TH RESPONDENT

PRINCIPAL REGISTRAR OF TITLES ..... 10TH RESPONDENT

REGISTRAR OF TITLES, MOMBASA ..... 11TH RESPONDENT

DIRECTOR OF SURVEYS ..... 12TH RESPONDENT

(An appeal from the entire Judgment of the Environment and Land Court at Malindi (J. O. Olola, J.) delivered on 29th January 2021 in ELC Case No. 117 OF 2011 (Formerly Nairobi HCC Case No. 710 Of 1997)

JUDGMENT

1. This appeal dating back to the 1970's is one of numerous land disputes pertaining to land adjudication in the coastal region that have continued to wind their way through the courts.

2. By a Plaint dated 24th March 1997 as amended on 25th November 2002, Geoffrey Kanu Kinyua (deceased) the father to the appellants, and whom we shall refer to as "the appellant", filed suit against the respondents jointly and severally for orders that:

    1. "A declaration that the area where the suit lands LR Kilifi/Chembe/Kibabamshe/362 and 420 are situated has at all material times before 1.6.1963 been private land under the sovereignty of the Sultan of Zanzibar and after 1.6.1993 been Trust Land before adjudication and registration under Registered *Land Act* Cap 300 in accordance with *LN 718 of 1963* Second Schedule Section 208 and *the Constitution* of Kenya *Act No. 5 of 1969* Second Schedule Section 114, 115 and 116 of (the) Laws of Kenya took place on 30/5/1978.

        a. A declaration Judgment that the Land Adjudication Officer's Court of exclusive jurisdiction under (the) *Land Adjudication Act* Cap 284 did on 28.5.1978 in determining the Objection or case filed in accordance with (the) *Land Adjudication Act* Cap 284 Section 26 rule that land in LR Kilifi/Chembe Kibabamshe, Kilifi Jimba, Kilifi Madeteni and Kilifi Mtondia Roka Section was at all material times from time immemorial to 31.5.1963 held under native title and sovereignty of the Sultan of Zanzibar and from 1.6.1963 it became Trust Land under the Kenya Order in Council 1963 *LN 245 of 1963* Sections 6, 193, 194 and 198 (now revoked) and from 12.12.1963 all those areas of Kilifi Coastline became Trust Land under Kenya Independence Order in Council 1963, *LN 718 of 1963* Sections 19, 203, and 208 and from 1969 the area became Trust land under the provisions of *the Constitution* of Kenya *Act No. 5 of 1969* Second Schedule Sections 114, 715 and 116 and the said land remained so until when they were adjudicated in accordance with the provisions of *the Constitution* of Kenya Section 116 under *Land Adjudication Act*, Cap 284 when the individual parcel after registration under the provisions of Registered *Land Act* Cap 300 became private land.

        b. A declaration Judgment that the claim in Commissioner of Lands Circular letter No. 113936/55 dated 28.5.1986 and in GN No. 2505 of 30.5.1986 that land in LR Kilifi/Chembe Kibabamshe, Kilifi/Jimba, Kilifi/Madeteni and any other area of former Kilifi District Coast area to be Government land such as Kilifi/Mtondia Roka where the Commissioner of Lands stopped adjudication process are unconstitutional illegal and res judicata the Judgment, ruling and orders of the Land Adjudication Officer's Court of Exclusive jurisdiction dated 28.2.1978 which determined by dismissing the DC Kilifi's objection of adjudication of then Kilifi Coastline on grounds that it was Government land by ruling that there was no Government land along the then Kilifi District Coastline as at 28th February 1978.

        c. A declaration Judgment that the area of the then Kilifi District known as Kilifi/Chembe Kibabamshe, Kilifi/Jimba, Kilifi/Madeteni and Kilifi/Mtondia Roka was before application of LN of 155 of 1970 Trust Land in accordance with *the Constitution* of Kenya Second Schedule Sections 114, 115 and 116 and also *LN 718 of 1963* Second Schedule Sections 203 and 208 and the said land is also land referred to by *the Constitution* of Kenya (Amendment) *Act 1964 No. 28 of 1964* Section 20

and it is land referred to by Section 8B of the Government *Land Act* (Cap) 280 and the application of (the) *Land Adjudication Act*, Cap 284 vide LN. 155 of 1970 was Constitutional and lawful and the titles registered under the Registered Land Cap 300 were and still are Constitutional and valid inspite of the purported illegal and unconstitutional cancellation on 22.12.1986.

2. A declaration that the purported cancellation of the Plaintiffs titles and subsequent purported transfer of the Plaintiff's titles Kibabamshe/362 and 420 to the Government of Kenya on 22/12/1986 was unconstitutional, illegal and null and void ab initio; permanent injunction to be issued directed to the Defendants, their servants and/or agents barring them from interfering with the Plaintiff's title LR No. Kilifi/Chembe Kibabamshe/361 and 420.

3. A declaration that all transactions in respect of the suit lands LR Kilifi/Chembe Kibabamshe/362 and 420 from 22/12/1986 was unconstitutional, illegal and null and void ab initio and the said transactions from 22.12.1986 conveyed no Constitutional land rights and by their cancellation the holders lose nothing; the Vendors and their privies are bound by Judgment against the Vendor.

4. An order directed to the Land Registrar Kilifi, the 2nd Defendant; Chief Land Registrar and Registrar of Titles Mombasa, their servants and/or agents to rectify the Land Register by cancelling all registrations from 22.12.1986 to date of Judgment and Orders and re- register the Plaintiffs as the sole proprietor of the suit lands LR Kilifi/Chembe/Kibabamshe/362 and 420 from the time they were registered under (the) Registered *Land Act* Cap 300 on 30.5.1978 throughout to the date of Judgment and thereafter in future unless lawfully transferred by the Plaintiff.

5. The Plaintiff to be paid full value of the suit lands plus interest at Commercial Bank overdraft rates of interest at 35% p.a from 22.12.1986, 28.5.1986 (sic) calculated on monthly rates and general and punitive or exemplary damages quantum to be determined by the Court from 22.12.1986, 28.5.1986 sic to the time of full payment.

6. Costs of this suit plus and interest (sic) at Commercial Bank overdraft rates of 35% p.a 25% (sic) from the date of filing this suit based on the value of Kshs 5,000,000/- per acre."

3. It was the appellant's case that he is registered as proprietor of the parcels of land known as Chembe/Kibabamshe/362 and 420 (the subject properties) having acquired them through the process of adjudication and issued with title deeds by the 2nd respondent, the Lands Registrar, Kilifi on 15th June 1978.

4. He claimed that, upon acquiring the two properties, the deceased embarked on developing them. On 11th March 1983, he charged the titles of the suit properties to Habib Bank A-G Zurich for a loan of Kshs 750,000.

5. However, on 30th May 1986, the 4th respondent, J.N. Njenga, the Commissioner vide a Gazette Notice No. 2505 purported to cancel all the titles within Chembe/Kibabamshe,Kilifi/Jimba,Kilifi/Madeteni, Kakuyuni/Madunguni and Kilifi/Matsangoni of Kilifi District where the two properties are situated and, further, that about 22nd December 1986, the 2nd respondent, acting under the instructions of the 4th respondent, purported to cancel the registration and, thereafter, to register the Government of Kenya as the proprietor.

6. He claimed that the area where the subject properties are situated has always been Trust land; that at no time whatsoever did they become Crown or Government land; and that he purchased the

subject properties from the native title holder after he was adjudicated the properties under the *Land Adjudication Act*. He further claimed that, on 28th February 1978, the Land Adjudication Officer's Court of Exclusive Jurisdiction had ruled that there was no Government Land in the area, and no appeal was preferred against that decision.

7. Consequently, he claimed that the purported cancellation of his titles without due process amounted to deprivation by the Government of his properties contrary to Section 75 of the repealed Constitution, and that he was entitled to compensation for none use of the land and also for costs of development projects which he was to carry out in 1986-87 until the date of Judgment.

8. It was his further claim that due to the respondents' unlawful actions, he had been denied the right of access and use of his properties; that, therefore, he was unable to develop them in accordance with his development plan for which he had procured a bank loan to service; and that his rights had been violated.

9. He stated that he settled the loan with Habib Bank A-G Zurich, and that the Bank gave him a duly executed discharge of charge dated 20th September 1990; that, when he presented the discharge at the Kilifi Lands Registry, he was informed by the Land Registrar that the Register for the subject properties was moved to Nairobi under the directions of the Chief Land Registrar; and that, therefore, the discharge could not be effected until the register was returned to Kilifi. Hence the suit leading to the instant appeal.

10. To prove the compensation claimed, PW2 Gitonga Akoha produced the valuation reports, in respect of the subject properties.

11. The respondents did not adduce any evidence during hearing, but filed written submissions.

12. Upon considering the evidence, the trial Judge observed that, according to the Gazette Notice and the 4th respondent's letter dated 28th May 1986, it was the Government's position that there was an error in the registration where its officers on the ground erroneously applied the *Land Adjudication Act* to Government Land. The Government sought to remedy this position by summoning the affected parties and rectifying their titles as appropriate; and that the appellant disregarded the request and refused to surrender his title deeds. The court held that, in a situation where the appellant remains in occupation and possession of the subject properties, a claim for compensation cannot lie. On this basis, the trial court declined to grant the prayers sought and dismissed the suit.

13. Aggrieved, the appellant filed an appeal to this Court on grounds that: the learned Judge was in error in law and fact by failing to recognize the deceased as the owner of the subject properties despite his having proved beyond reasonable doubt that he was indeed the registered proprietor prior to the illegal Circular letter number 1139336/55 of 1986 and illegal Gazette Notice number 2505 of 30th May 1986; in failing to find that the 1st respondent, the Commissioner of Lands, had no lawful powers to revoke registration of the appellant as the proprietor of the subject properties; in failing to appreciate that, on 18th February 2003, the 4th respondent acting as the Attorney General and for the 1st , 2nd , 10th , 11th and 12th respondents on the one part and the appellant on the other part, signed and filed a consent dated 18th February 2003 where the respondents admitted liability of the illegalities of the Circular Letter No. 1139336/55 of 1986 and Gazette Notice No. 2505 of 30/5/1986; in failing to appreciate the legal effect of the consent was that:

> " i) The suit property was at all material times the private property of the appellant and the Claim by the Commissioner for Lands under the Commissioner's

Circular Letter No.113936/55 and Gazette Notice No. 2505 of 30/5/1986 were all unconstitutional, null and void ab initio.

ii. All entries made against the register without the consent of the appellant owner were a nullity and are set aside.

iii. Damages were payable to the appellant as to be assessed by the court in accordance with the formula set out in the said consent".

14. The learned Judge was further faulted for failing to appreciate that in February 2003, Ang'awa, J. ordered that all the suits whether finalized or otherwise be determined by a test suit, namely HCC (Nrb) No. 3106 of 1997 - Regina Ngahu: Others vs the Commissioner of Lands & 40 others, and that the Order to consolidate was made in this suit and the determinations in all other suits was binding on this suit; in failing to enforce the decree of 18th July 2009 issued in the binding test suit to the effect that:

"i) The area where the suit land is situated has at all times been trust lands before 31st July 1981.

ii. The application of the *Land Adjudication Act* CAP 284 Laws of Kenya was constitutional and lawful.

iii. The circular Letter No.113936/55 and all subsequent transactions in respect of the suit land since 22/12/1986 were unconstitutional, illegal, and void ab initio. Accordingly, that the purported cancellation of the titles of the 1st and 3rd plaintiff in that suit to Kilifi/Madeteni /604 and the subsequent transfer of the said title to the Government of Kenya on 22/11/1978 was also unconstitutional and unlawful.

iv. The Land Registrar Kilifi District the 2nd Defendant do rectify the land register by cancellation of all registrations on the suit land Kilifi/Matendeni/604 from 22nd November 1986 to the date of this decree and that the land registrar Kilifi District rectify the land register by registering the 1st and 2nd plaintiffs (in that suit) as the only proprietors of the suit property

v. The defendants jointly and severally do pay the 1% and 2 plaintiffs (in that suit) general damages in the sum of Kshs. 1,000,000 for loss of user".

vi. The defendants Do pay the 1st and 3rd plaintiffs costs to be taxed".

15. Furthermore, the learned Judge was faulted for failing to appreciate and recognize that the Decree and Judgment delivered by Ang'awa, J. in the test suit was adopted by other courts such as in HCC No. 3374 of 1994 (Nairobi)- Lali Swaleh Lali& 2 others -vs- Mathenge Wachire, Commissioner of Lands, Attorney General & others where damages were awarded on formal proof; in failing to find that the 1st respondents purported exercise of power was unlawful, null and void and could not extinguish the appellant's titles because: i) the subject properties being private property were protected under section 75 of the 1969 Constitution, and the Commissioner of Lands breached this provision by failing to follow the law in cancelling the appellant's registration or to otherwise compensate the appellant; ii) there was no statute or other law giving authority to the Commissioner of Lands, the 1st respondent the power to revoke registration of the proprietor; iii) that the Commissioner of Lands, the 1st respondent, admitted to lacking such authority or powers to cancel or revoke registration in a consent which was signed and filed. The Commissioner also conceded to the illegalities and unlawfulness of the Circular Letter No. 1139336/55 of 1986 and Gazette Notice No. 2505 of 30th May 1986 in the same consent

that has never been varied, set aside or appealed; iv)that the registration of the appellant on 30th May 1978 was a first registration which was expressly protected by section 143(1) of the Registered *Land Act* and could not be defeated even on grounds of fraud or mistake, but only by an order of the High Court and v) the purported revocation violated the rules of natural justice since the appellant was condemned unheard and lost ownership of his private property without compensation.

16. Finally, it was contended that the learned Judge failed to appreciate the question of whether the Commissioner had the power to revoke registration has been determined in several other matters involving the same gazette notice on the adjoining land to the effect that the Commissioner did not have such powers.

17. When the appeal came up for hearing on 17th October 2024 on a virtual platform, learned counsel Mr. Karina appeared for the appellant while learned counsel Ms. Lutta appeared for the 1st to 5th and 8th to 12th respondents. Prior to commencement of the hearing, Mr. Karina sought leave to withdraw the appeal against the 6th and 7th respondents. There being no objection from counsel for the respondents, leave to withdraw the appeal against the 6th and 7th respondents were duly granted.

18. In addition, Mr. Karina also informed the Court that he would only be canvassing the appeal in respect of the ground on compensation, and would be abandoning the grounds on the main claim for reinstatement of the titles to the subject properties.

19. Turning to their submissions, counsel for the appellant submitted that it was established beyond reasonable doubt that the appellant was indeed the registered proprietor of the subject properties prior to the Circular Letter No. 1139336/55 of 1986 and Gazette Notice No. 2505 of 30th May 1986, and that there was no evidence that the appellant knew, caused or substantially contributed to any omission, fraud or mistake such as to defeat his title under section 143(2) of the Registered *land Act*(repealed); that the acquisition of the subject properties by the 1st respondent was unlawful and in violation of the said section 75 of the 1969 Constitution because the 1st respondent failed to follow the law in cancelling the appellant's registration and also failed to pay the appellant compensation for the subject properties; that there was no statute or other law giving authority to the 1st respondent, the Commissioner, to revoke registration of a proprietor's title, and that the Gazette Notice did not cite any provision of law upon which the Commissioner could purport to rely upon to exercise the alleged powers, particularly since there are no provisions in any statutes donating such powers to the Commissioner for Lands.

20. Counsel submitted that the learned Judge failed to appreciate that, on 18th February 2003, the 4th respondent acting as the Attorney General and on behalf of the 1st , 2nd , 10th , 11th and 12th respondents on the one part, and the appellant on the other part, signed and filed a consent in the matter whereby the respondents admitted liability of the illegalities and unlawfulness of the Circular Letter No. 1139336/55 of 1986 and Gazette Notice No. 2505 of 30th May 1986, and that the same has not been set aside or varied.

21. Regarding the compensation payable to the appellant, counsel submitted that pursuant to the consent dated 18th April 2003 entered between Mr. Ritho and Mr. Rabala, state counsel for the Attorney General, the Government was liable to pay the appellant damages in terms of the agreed formula specified in the consent, that is, Kshs. 5,000,000 per acre; damages for loss of user at the rate of 15% per annum on the value of the land; exemplary damages at the rate of 5% of total damages and costs at the rate of 15%. Counsel argued that, since all the issues were determined by the consent, there was nothing further for the trial court to consider, other than to quantify the damages payable to the appellant in terms of the computation set out in the consent. Counsel contended that the trial judge disregarded the consent and instead wrongly delved into and determined the suit afresh; that, had the trial judge

considered the consent together with the valuation reports, inter alia, then judgment should have been entered in favour of the appellant for Kshs. 859,542,312.

22. For her part, learned counsel for the respondent, Ms. Lutta, informed the Court that she had filed written submissions. In her oral submissions, counsel stated that the consent was unenforceable since the person who signed on behalf of the Attorney General had refuted it. Counsel was not aware whether it had been set aside.

23. This being a first appeal this court has a duty to determine whether the learned Judge erred in making the conclusions that have resulted in the instant appeal. In the case of Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, this Court held:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

24. Based on the foregoing, we begin by observing that at the commencement of the hearing before this Court, the appellant informed us that he would abandon the main claim for reinstatement of the titles to the suit properties and instead seek compensation in terms of the consent dated 18th April 2003 made between Mr. Ritho, the appellant's counsel and Mr. Rabalo, the State counsel representing the Attorney General in the suit. This being the case, the issues that fall for consideration are: i) whether the titles to the subject properties were cancelled; and ii) whether the appellant was entitled to the compensation claimed.

25. As to whether the suit properties registered in the appellant's father's name were canceled, it was the appellant's case that he was the registered owner of the titles to the subject properties. As proof of ownership, he produced the titles registered in his name. In his evidence, the appellant claimed that he had bought the suit properties from one Nyau Wanje who had transferred the subject properties to him, but produced neither a sale agreement nor a transfer document evidencing the transfer.

26. The appellant's complaint was that, by the Circular Letter No. 1139336/55 of 1986 and Gazette Notice No. 2505 of 30th May 1986, he was informed that there were irregularities in the issuance of the titles as the *Land Adjudication Act* ought not to have been applied to the subject properties. He claimed that, by virtue of the gazette notices, his titles were cancelled and that, as a result, he claimed compensation.

27. It is not in dispute that, vide Gazette Notice No. 155 of 1970, the Minister for Lands and Settlement had applied the *Land Adjudication Act* to the concerned registration sections and, on this basis, the adjudication process with respect to Chembe/Kibabamshe commenced on 2nd October 1974 and concluded on 26th May 1978 with title deeds of 400 parcels of land issued to individuals under the then Registered *Land Act*. The parcels known as Chembe/Kibabamshe/362 and 420 are amongst the parcels that resulted from this process.

28. However, soon after issuance, by a letter dated 28th May 1986 from the then Commissioner of Lands, JR Njenga in reference to allocation of plots in Chembe/Kibabamshe,Kilifi/Jimba,Kilifi/Madetehi,

Kakuyuni/Madunguni and Kilifi/Matsangoni Adjudication Sections within the then Kilifi District addressed to the appellant among others. It reads:

> " It has come to light that between 1973 and 1983, a large number of people erroneously claimed land in the above mentioned areas. You are one of those people as you are occupying Plot(s) Number(s).....
>
> I wish to advise that your occupation of the said land/plot is improper and not in accordance with the law.
>
> Apparently the *Land Adjudication Act* (Cap 284) was erroneously applied to the Government Land. This Act only applies to Trust Lands. It could therefore not be used to facilitate your registration as the absolute proprietor of the said plot. It follows that in law your registration as the owner of the plot(s) in question was a nullity ab initio and consequently the title you hold in respect thereof is a defective title.
>
> This being the legal position, the Government has decided to cancel your Title. To this end, you are requested to report to the Land Registrar Kilifi who shall cancel your defective title and rectify the Register.
>
> I wish, however, to intimate to you that the Government is considering to allocate the piece of land you now occupy to you under the provisions of the Government Lands Act, Cap 280. It must however be understood that this shall be on an entirely without prejudice basis and the same shall be done at the full discretion of the Government. If you are in possession of more than one plot in the affected area you will be allocated with only one plot of your choice. The size of the plot to be allocated shall again be at full discretion of the Government.
>
> You are hereby requested to report to the Land Registrar Kilifi within sixty (60) days from the date hereof to facilitate an early finalization of this exercise. Note that if you do not report to the said Land Registrar within the time limit hereof, the Government shall assume that you are not interested in the plot(s) and the matter shall be submitted to the Attorney General who shall make necessary application in Court to have your title cancelled forthwith."

29. Two days later, the Commissioner caused to be published in the Kenya Gazette a Gazette Notice No. 2505 dated 30th May 1986 that stated:

> " Notice To Land Owners In Kilifi District
>
> A letter has been sent to the land owners within Chembe/Kibabamshe, Kilifi/Jimba, Kilifi/Madeteni, Kakuyuni, Madunguni and Kilifi/Matsangoni, all in Kilifi District, requesting them to respond to the said letter before 31st July 1986 and also requesting them to report to the District Land Officer, Kilifi District before 31st July, 1986.
>
> Those who might not have received the said letter are requested to contact the Commissioner of Lands, P.O. Box 30089 Nairobi (telephone No. 721780, Nairobi), as soon as possible."

30. A reading of the letters and the Gazette Notice makes it clear that no express cancellation the appellant's titles was issued. Rather, the appellant was given an opportunity to return his title, failure of which it was to be submitted to the Attorney General who was to file an application in Court seeking to have the titles cancelled.

31. In the instant case, the appellant admitted that he did not return his title to the Land Registrar. He stated that he remained in possession of both titles and, as a matter of fact, went on to used them to secure a loan facility. The titles to the two properties were charged to Habib Bank A-G Zurich for Kshs. 750,000 from 1983 up to 20th September 1990, when he was issued with a discharge of Charge by the Bank. The appellant further stated that, as at the time of his testimony in October 2018, 32 years after the impugned Gazette notice, he was still in possession of the subject properties.

32. The standard of proof in civil cases is the legal standard to which a party who has the burden of proof is required to prove his/her case. Lord Denning in the case of Miller vs Minister of Pensions [1942] 2 ALL ER 372 held that:

> " The ...(standard of proof).....is well settled. It must carry a reasonable degree of probability..... If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not."

33. This Court in the case of Mbuthia Macharia vs Annah Mutua & Another [2017] eKLR discussed the burden of proof and stated thus:

> (16) "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes an evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced."

34. The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14, describes it thus:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case....."

35. As a general principle, the evidential burden remains with the party that wishes the court to support their position in reaching a determination. This is the essence of section 107(i) of the *Evidence Act*, Furthermore, the responsibility of establishing any specific truth that a party wants the court to find exists is known as the evidential burden of proof of a fact or facts as set out in sections 109 and 112 of the same Act. In matters concerning land, it is trite law that the only institution mandated to cancel a title on the basis of fraud or illegality is a court of law. See Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another vs District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR.

36. As such, in the absence of evidence showing that the appellant surrendered the titles for cancellation when in fact he had benefitted from utilizing them as security for a loan facility, or showing that an order canceling the titles to the subject properties was issued by a court of law, we find, as did the learned judge, that the appellant utterly failed to prove that the Gazette notice cancelled his titles, and the trial Judge was right in so holding.

37. Turning to the next issue as to whether the appellant was entitled to compensation, the appellant argued that, the parties to the instant suit having filed a consent dated 18th February 2003, the learned judge misapprehended the terms of the consent. Counsel for the appellant submitted that, pursuant to the signed consent, the Commissioner conceded that he acted unconstitutionally when he canceled the appellant's title deeds and, on this basis, all issues were agreed upon; that, as a consequence, he was entitled to compensation computed in the manner spelt out by the consent and that, therefore, all that remained was for the court to quantify the damages.

38. An excerpt of the impugned consent dated 7th April 2003 reads at the penultimate paragraphs that:

> "IT IS THEREFORE HEREBY AGREED AND CONSENTED BY LITIGATION COUNSEL for all and on behalf of the Honourable Attorney General and on behalf of officers of the Government of Kenya who are Defendants in this suit and M/S S.K. Ritho and Company Advocates for and on behalf of the Plaintiffs as follows:
>
> 1. That all researches in land from 14th December 1895 to the day of signing this consent the area of the former Protectorate of Kenya was never Crown Land or Government Land and any claim by the Commissioner of Lands or any officer of the Ministry of Lands and Settlement who makes such claim the claim has no support of any Constitutional legal law in the form of Kenya Order in Council or any Provisions of Kenya Constitution and this has been confirmed by the Court in HCCC Miscellaneous Application No.185 of 1987, 730 of 1989 and HCCC No.2387 of 1987 and the research conducted by the Director of Survey has confirmed that between 1895 and present day there has never been Crown or Government Land within the former Protectorate of Kenya.
>
> 2. That the suit lands in this suit were at all material times before 31st May 1963 private land under the sovereignty of the Sultan of Zanzibar in accordance with the Agreement between the Sultan of Zanzibar and Great Britain Crown dated 14th December 1895, Kenya (annexation) Order in Council 1920, Kenya Native Areas Order in Council 1939 and from 1st June 1963 to present day the same area did become Trust Land under Kenya Order in Council 1963 L.N.245 of 1963 Second Schedule Section 193,198 and 199 Kenya (Independence) Order in Council 1963 L.N.718 of 1963 Second Schedule Section 208 and since then has been at all material times Trust Land.
>
> 3. That the claim by the Commissioner of Lands under the Commissioner of Land circular Letter No. 1139336/55 of 1986 and Gazette Notice No.2505 of 30th May 1986 were all unconstitutional and illegal claims and null and void ab initio and this legal status was confirmed by High Court in H.C.C.C Miscellaneous Application No. 185 of 1987 Nairobi, Miscellaneous Application No.730 of 1989 Nairobi and H.C.C.C No.2387 of 1987 Nairobi which have declared that the area of the former protectorate of Kenya has at all material times been Trust Land and the adjudication programmes were all carried out constitutionally and legally.
>
> 4. That the former Commissioner of Lands M/S James Raymond Njenga as he was then circular letter NO.113936/55 of 28th May 1986 and Kenya Official Gazette No.2505 of 30th May 1986 were declared in HCCC Miscellaneous Application No. 730 of 1989 unconstitutional, illegal and null and void ab initio and the Commissioner of Land is liable for damages caused by the unconstitutional, illegal and null and void ab-initio circular letter No.113936/55 of 28th May 1986 and Gazette Notice No.2505 of 1986. The compensation do be calculated based on accepted principles in Judgments, rulings and orders of the High Court and Civil Appeals and in accordance with Professional valuers principles of market values of the suit lands which as at the date for these consents is agreed and consented to be Kenya Shillings

Five Million (Kshs.5,000,000) per acre the actual payable compensation for non- use of the land to be average overdraft Commercial Banks rates of interest between 1987 and 2004 which is about fifteen percent 15% per annum calculated on annual rates the way commercial banks do calculate their interests and once they are calculated the calculation do be approved arithmetically only by the Deputy Registrar High Court after which without any further reference to the Court the necessary decree do be drawn based on the said arithmetical calculations plus interest of Bank overdraft rates from the date of these consents do be issued and it do be executed as such, without any further reference to court against all the Defendants jointly and severally.

5. That where there are development programmes the compensation payable do be based on the difference of cost of construction on 22nd December 1986 and 31st December 2004 plus loss of revenue from the development based on average interest at bank overdraft rates of 15% per annum of the market value of the land plus development value in 1986 calculated on annual rates from 22nd December 1986 the date the Plaintiffs titles were canceled by the Commissioner of Lands until when the total sum shall be paid in full. The arithmetic details based on professional valuers, architects and quantity surveyors estimates once arithmetically confirmed by the Deputy Registrar High Court to be correct, they do become the Court Decree without any further reference to the court.

6. That the Commissioner of Lands do be ordered to pay exemplary damages based on 5% of the total sum of damages agreed upon during the negotiations or quantified sum payable in accordance with the professional assessments as ordered by the Honourable Court do be paid to the Plaintiffs together with compensation referred to herein before within the shortest time possible and not later than six months from the date of service of the final decree and if full payment would not be made to the Plaintiffs then the Plaintiffs do apply for the orders of Mandamus to compel the Accounting Officer of the Ministry of Lands and Settlement, Commissioner of Lands and the other Defendants to pay the Decretal sum jointly and severally without any further delay and within a set out time table failing which execution process do be commenced against the Defendants jointly and severally.

7. That it is consented that the issues involved in this suit are very complicated and the relevant laws are also of not easy interpretation and for this reason it is agreed and consented that the costs awarded to the Plaintiff do be fifteen 15% percent of the total compensation payable to the Plaintiffs plus interest at the rate of fourteen 14% percent per annum calculated on annual rates the way commercial banks do calculate the overdraft interests bank loans from the date of filing this suit until when the total sum shall be paid in full.

8. That all proprietors purported to have been entered in the land registers of the suit land from 22nd December 1986 are all declared to be trespassers, the entries in the land registers do be declared to be unconstitutional and null and void ab initio, revoked from the time they were entered in the land registers and the Plaintiffs in this suit do be re-registered as the sole proprietors at all material

times from 22nd December 1986 to the date of the execution of these consents and preliminary decree which may have been drawn before the final decree.

9. That the Director of Surveys, Provincial Surveyor, District Surveyor, the Chief Land Registrar, District Land Registrar Kilifi and the Commissioner of Lands do revoke and cancel all land Registers, index, maps and plans and all land registers drawn and written on or there after the 22nd December 1986 and register in all official documents the names of the Plaintiffs or as directed by the Plaintiff's advocates.

10. That these consents and arithmetical certified correct amount by the Deputy Registrar together with any specific orders sought in the prayers of this suit do become together with the other said orders sought and also the orders granted through the interlocutory judgments part of decree to be finally drawn and executed against all the Defendants jointly and severally.

11. That the final decree does incorporate these consents and prayers in this suit as set out in the interlocutory Judgment and Preliminary decree."

39. It was the appellant's further contention that, in the case of Regina Ngahu & others vs the Commissioner of Lands & 40 others, HCCC 111 of 2011 (original Number HCC (Nrb) No, 3106 of 1997) a test suit, the trial Judge (Ang'awa, J.) ordered that all suits concerning the demarcation areas affected by the Gazette Notice in question be consolidated with the test suit, and that the orders arising therefrom would be final and binding on all suits.

40. What we understand counsel to be saying is that the trial court was bound by the consent and the Judgment in Regina Ngahu & others vs the Commissioner of Lands & 40 others, HCCC 111 of 2011 (original Number HCC (Nrb) No, 3106 of 1997) and that, therefore, ought to have proceeded directly to compute compensation in the manner thereby agreed and determined without going into the merits of the suit. As to whether this was indeed the manner in which the suit ought to have been determined requires that we further interrogate the record.

4.1 Beginning with the impugned consent and whether it was binding on the parties and the court in this case, it is worth noting at this point that we are uncertain as to the specific consent in question as the pleadings refer to a consent dated 18th February 2003, while the copy of the consent in the record is dated 7th April 2003. As we cannot discern the reason for this discrepancy, we will assume that nothing really turns on it.

42. It is trite that consent is only binding on parties and attains legal character once it is adopted as a judgment or order of the Court.

43. The Supreme Court in the case of Non- Governmental Organizations Coordination Board vs EG & 5 others (Petition (Application) 16 of 2019) [2023] KESC 102 (KLR) (Civ) was explicit that:

> "Adoption of a consent by a court was a process, in the course of which a court discharged the duty of evaluating the clarity of the consent placed before it by parties and giving directions on the manner of adoption. That circumvented the risk of an unlawful order and validated the mode of adoption and compliance. Thus, a consent by parties became an order of the court only when it had been formally adopted by the court. The consent had not been formally adopted by the court as an order and therefore served no useful purpose in the proceedings."

44. And in the case of Jane Nyambura Ndungu vs Beatrice Wangari Ndungu & 2 others [2021] eKLR it was observed that:

> We cannot say that the learned Judge erred in failing to adopt the said agreement as the same was not binding on the parties, it having not been adopted as a consent by the court."

45. Much as the appellant sought to place the impugned consent before the trial court so as to enable the terms specified to be applied to the circumstances of this particular case, we have been through the record and the proceedings to the minutest detail and nowhere has it been shown as to when or how the consent dated 7th April 2003 was adopted as an order of the court in this case. Therefore, contrary to the appellant's submissions that the terms of the consent ought to be applied as the basis for computing compensation, in the absence of an adopted consent, the consent as drawn did not translate into a court order that determined the suit. As a consequence, we find that the Judge was not bound to adhere to its terms.

46. A similar fate befalls the Judgment of Regina Ngahu & others vs the Commissioner of Lands & 40 others, HCCC 111 of 2011 (original Number HCC (Nrb) No, 3106 of 1997) (Angawa, J.) We say so because, according to the proceedings, when the matter came up for Mention before the trial Judge on 25th February 2013, counsel for the appellant, Mr. Obaga, applied to have the Judgment in HCCC No. 111 of 2011 (original Number HCC (Nrb) No, 3106 of 1997) adopted as one of the matters impacted by the test suit. In response, counsel for the respondent, Ms. Lutta, opposed the application and submitted that directions on proceeding were yet to be agreed, whereupon counsel requested that the matter proceed to hearing.

47. At the conclusion of the hearing, the trial Judge having observed that the judgment in of HCCC No. 111 of 2011 (original Number HCC (Nrb) No. 3106 of 1997) was not supplied to the court, he nevertheless went on to conclude that he was not satisfied that a test suit was applicable to all parties in all cases, given that each parties' case was based on different facts and circumstances. Needless to say, it becomes clear that at no point did the record of proceedings disclose that the Judgment in is HCCC No. 111 of 2011 (original Number HCC (Nrb) No. 3106 of 1997) was adopted in and determined the instant suit as a consequence. In the absence of an order of consolidation of this suit together with HCCC No. 111 of 2011 (original Number HCC (Nrb) No. 3106 of 1997), so as to render the conclusions reached in that case to be applicable to the instant case, the trial court was clearly not in any way bound by that decision. In point of fact, the proceedings show that the instant suit continued to full hearing and subsequent determination on the basis of its own set of facts and circumstances.

48. Our conclusion based on the record is that, since the consent of 7th April 2003 was not adopted as an order of the court, and the Judgment of the test case HCCC No. 111 of 2011 (original Number HCC (Nrb) No. 3106 of 1997) was not consolidated with this case, we find and hold that the suit remained undetermined, and that the trial Judge was mandated to proceed and determine it in the manner in which he did.

49. In view of the foregoing, was compensation was due to the appellant? In addressing this issue, the appellant contended that, during the proceedings in the trial court, the appellant was claiming Kshs. 5,000,000 per acre subject to professional valuation of the subject properties; exemplary damages at the rate of 15% of all the damages agreed; costs at the rate of 15% of total compensation plus interest at the rate of 14% from the date of filing the suit until payment in full.

50 In concluding that the appellant was not entitled to the compensation claimed, the learned judge held:

> I am unable to see the essence of the Plaintiff's demand to be computed at Kshs. 5,000,000/- per acre of the suit properties. For one to be entitled to compensation, a party must establish that a right to such a claim exists. In a situation where the Plaintiff remains in occupation and possession of the suit properties, I was not persuaded that a claim for compensation should lie"

51. As to whether the appellant was entitled to the compensation claimed, in the case of Rustom Cavasjee Cooper vs. Union of India 1970 AIR 564, 1970 SCR (3) 530, the Supreme Court of India addressed the issue of compensation thus:

> The owner whose property is compulsorily acquired is guaranteed the right to receive compensation and the amount of compensation must either be fixed by the law or be determined according to the principles and in the manner specified by the law. The law which does not ensure the guarantee will, except where the grievance only is that the compensation provide the law is inadequate, be declared void.

52 In its dictionary meaning "compensation" means anything given to make things equal in value: anything given as an equivalent, to make amends for loss or damage. In all States where the rule of law prevails, the right to compensation is guaranteed by *the Constitution* or regarded as inextricably involved in the right to property..." (emphasis ours)

53 In the case of Director of Buildings and Lands vs Shun Fung Wouworks Ltd [1995] AC 111, at 125 it was held that:

> "A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as "fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority."

54. The above cited authorities are clear that compensation can only be paid upon successful compulsory acquisition of land. In the instant suit, as already observed, the consent order having not been adopted as an order of the court, it did not determine the instant suit. As a consequence, the appellant's suit went on to full hearing. In his testimony, the appellant stated that he was in possession of the subject properties and had in fact obtained a loan facility and the titles used as security for the charge. By the time of determination of the suit, he was still in possession of the suit properties. Given the prevailing position, the appellant has not demonstrated in what manner the subject properties were compulsorily acquired, and, therefore, as was the learned Judge, we too are not persuaded that he was entitled to the compensation sought. And pursuant to our findings that the impugned consent and the Judgment were not applicable to the circumstances of this case, it follows that, there being no basis laid for computation of compensation in the terms specified, this claim accordingly fails.

55 In sum, the appeal has no merit and is hereby dismissed with costs to the respondents.

56. In sum, the appeal has no merit and is hereby dismissed with costs to the 1st - 5th and 8th to 12th respondents.

It is so ordered.

DATED AND DELIVERED IN MOMBASA THIS 7TH DAY OF MARCH, 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR