



**Timeless Properties Limited v The Mombasa Polytechnic University College & 2 others
(Civil Appeal E057 of 2020) [2025] KECA 1395 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1395 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E057 OF 2020
F TUIYOTT, KI LAIBUTA & GWN MACHARIA, JJA
JULY 31, 2025**

BETWEEN

TIMELESS PROPERTIES LIMITED APPELLANT

AND

THE MOMBASA POLYTECHNIC UNIVERSITY COLLEGE . 1ST RESPONDENT

THE CHIEF LAND REGISTRAR 2ND RESPONDENT

THE LAND REGISTRAR MOMBASA DISTRICT 3RD RESPONDENT

*(Being an appeal from the judgment and decree of the Environment and Land Court
at Mombasa (L. Naikuni, J.) delivered on 25th April 2022 in ELC No. 37 of 2011)*

JUDGMENT

1. Shorn of all other skirmishes, the real issue emerging from this dispute is who, if either of them, between Timeless Property Limited (Timeless or the appellant) and the Mombasa Polytechnic University College (Mombasa Polytechnic or the 1st respondent) is the lawful owner of some land created as a result of the recession of Indian Ocean and which abuts land known and described as Mombasa/Block X/180 (Plot 180) belonging to Mombasa Polytechnic.
2. In the proceedings from which this appeal arises, Mombasa Polytechnic had pleaded, in its amended reply to defence and defence to counter claim, that Mombasa/Block X/430 (Plot 430) currently registered in the name of Timeless was created after the “receding” of the sea level which portion forms part of sea front of its property, Plot 180. It specifically asserted:

“7(a) Where the tidal water recedes gradually and unperceptively from the land or land by alluvion or dereliction is added to the dry land or foreshore so that it becomes situate above the l[o]w water mark it belongs. If above the high water



mark to the owner of the dry land to which the land is added and if above the low water mark to the owner of the foreshore.”

3. Alluvion is defined in Black’s Law Dictionary 9th Edition as:

“1. Strictly, the flow or wash of water against a shore or riverbank. 2. An accumulation of soil, clay, or other material deposited by water; esp in land law, an addition of land caused by the buildup of deposits from running water, the added land then belonging to the owner of the property to which it is added.”

4. On the other hand, dereliction, in this context, is the gaining of land from water because of permanent recession of the sea below the usual water mark.

5. At the trial, Mombasa Polytechnic had pleaded that its land has a creek which fronts the sea line, and that it used to run Marine Engineering related academic courses from the early 1950s on the portion fronting the sea, and on which a ‘Boat House’, a building thereon still stands. Intending to revive teaching of the course in the building in 2009, it discovered an attempt to illegally acquire part of its parcel of land, namely Plot 180 fronting the sea (the Indian Ocean) where there is a creek.

6. It further discovered that that a title deed was purportedly issued, hiving off a portion of 1½ of its land and giving it to Timeless. This, it was averred, included the land reclaimed by it from the ocean after its recession. Mombasa Polytechnic was aggrieved that the portion was given to Timeless without notice to it.

7. Mombasa Polytechnic also asserted that Timeless, the Chief Land Registrar (the 2nd respondent) and The Land Registrar Mombasa District (3rd respondent) were guilty of fraud and illegality particularised as:

“19. The Plaintiffs are still in possession of the entire parcel of land.

Particulars of fraud and illegality of the defendants

- i. The Plaintiff reiterates contents of paragraphs 3 to 17 as being further particulars of fraud and illegality.
- ii. Curving out about 11/2 acres of Plot No. Mombasa Block X/180 inclusive of combining it with a portion of the reclined sea level and giving it to the 3rd Defendant without consent or authority or knowledge or Notice to the Plaintiff.
- iii. Proceeding to issue an illegal title/Lease for 99 years purporting to it be for Plot No. Mombasa Block X/430
- iv. Declining to rectify the register in perpetuation of the said fraud and illegalities as it does not pass any rights or title to the 3rd Defendant.
- v. Failing to follow the due process in creating Mombasa Block X/430



vi. Disregarding the Law with impunity.

8. Ultimately, Mombasa Polytechnic sought the intervention of the trial court with the following orders:

1. A Declaration that the creation of Mombasa Block ^{X/430} out of a portion of 11/2 acres of the Plaintiff's Plot No. Mombasa Block X/180 inclusive of the reclaimed ocean due to the receded sea level and the consequent issuance of 99 year lease to the 3rd Defendant for the same is fraudulent and illegal and null and void ab initio and the same ought to be cancelled forth with.
2. An Order for rectification by the Court of the register by directing the cancellation of Title Mombasa Block X/430 and the Register be accordingly amended to indicate Mombasa Block X/430 does not and or has ceased to exist and consequently the proper boundaries for parcel No. Mombasa Block X/180 be restored.”

9. The dispute at the trial, as it does now, turned out to be a contest between Mombasa Polytechnic and Timeless. At the trial, the 2nd and 3rd respondents did not file any defences nor called evidence. The defence and case for Timeless was presented, in part, in the Amended Statement of Defence and Counterclaim dated 24th April 2015.

10. It denied that Plot 430 was created from the land belonging to Mombasa Polytechnic. It averred that it was issued with a Certificate of Lease for this property by the Government of Kenya, having purchased it for value from its “predecessors” in July 2006. The interest purchased was a reversionary interest of a lease of 99 years from 1 July 1997 and the purchase price being Kshs.4,000,000.00.

11. Timeless complained that Mombasa Polytechnic trespassed onto Plot 430 and was carrying out illegal activities and construction on the land. On its part, Timeless sought various reliefs in the following terms:

- “(a) A declaration do issue that the Plaintiff has trespassed onto the Defendant's property L.R. Number Mombasa/Block X/430.
- b. An Order of vacant possession be and is hereby issued against the Plaintiff compelling it to give vacant possession of L.R. NUMBER Mombasa/Block X/430.
- c. An Order be and is hereby issued compelling the Plaintiff to pull down the buildings and or constructions, structures it has put up upon L.R. Number Mombasa/Block X/430 at its own cost.
- d. An Order of injunction be and is hereby issued restraining the Plaintiff by itself, its servants, agents or otherwise howsoever from tress-passing onto or putting up buildings, constructions, structures or carrying out any activities on L.R. NUMBER Mombasa/Block X/430.
- e. Alternatively, the Plaintiff be compelled to pay compensation to the Defendants as shall be properly determined.
- f. The Plaintiff to pay the costs of the suit.”

12. Three witnesses testified at the trial. Dr. Matata Kilungu, an administrator at the Mombasa Polytechnic, for the polytechnic. Mr. Lestony Muramba, a director of Timeless, for the defence. In



addition, the trial court made a site visit and directed that the Government Land Surveyor Mombasa do, inter alia, undertake a critical and detailed survey exercise of the controversial parcels by establishing all necessary cadastral and beacons in addition to conducting a detailed historical background of the parcels. Upon filing a report, Mr. Sammy Wambua Juma, the Regional Coast Surveyor, was cross-examined by counsel for the parties. The evidence presented, as is relevant to resolving the issues here, shall be discussed in due course.

13. In the impugned judgment, the trial Judge delineated the following issues for determination:
 - a. Whether due process of law, method and procedure for the acquisition and creation of the Certificate of Leases to all suit properties known as Land Reference numbers Mombasa X/Block/180 and 430 by both the Mombasa Polytechnic and Timeless Properties were followed accordingly.
 - b. Whether the Mombasa Polytechnic had committed any acts of trespass onto Timeless Properties' s land as alleged.
 - c. Whether the Parties were entitled to be granted the Permanent Injunction orders sought hereby.
 - d. Whether the findings by the Regional Coast Surveyor by its report dated 7th December, 2021 was valuable to the Court.
 - e. Who will bear the costs of this Suit?
14. In summary, the trial court made the following findings and held that, despite the allegations of fraud, none of the parties had been able to prove the allegation of fraud by filing a report by a Land Surveyor, an investigation agency or forensic document examiner, or a report from the Directorate of Criminal Investigation, being the established expert on demonstrating the allegation of fraud, was neither produced nor summoned. For that reason, the Court was left to invoke the provisions of Sections 112 and 173 (1) of the Evidence Act, Cap. 80 at least on the aspects of the Survey and root of title in respect of the two parcels of land in dispute in order to establish whether the Certificate of Leases held by Timeless and Mombasa Polytechnic were genuine, and the conclusive "prima facie" evidence that they are the legal and registered proprietors to the two parcels of land.
15. The trial court noted that it was Mombasa Polytechnic who had been in occupation of the entire suit land, which was conterminous with the Indian Ocean. The trial court invoked the provisions of Section 30 of the Registered Land Act (Cap.300) (repealed) regarding overriding interests; Section 32(1) of the Limitation of Actions Act (Cap. 22) on adverse possession; and Article 40(1), (2)(a), (2)(b), and (3) of the Constitution on the right to property. The trial Court considered that the conduct of Timeless violated these rights and principles.
16. Further, the trial Court observed that Timeless failed to produce empirical documentary evidence to support its claims that it was a bona fide purchaser for value without notice. The trial court further stated that the acquisition of land by sale is a "long and activity infested involving process" and not an event. Accordingly, the trial court did not have the benefit of being shown the empirical documentary evidence to support the said process. Timeless failed to produce copies of the said newspaper advertisement, sale agreement with terms and conditions stipulated therein entered between it and the then vendor, copies of the transfer forms, application and Letter of Clearance by the Commissioner of Lands, copies of Mutation Forms, Maps, receipts of statutory payments, such as stamp duty and registration fees in respect of the Certificate of Lease. The Court pointed out that, at the very least, Timeless would have summoned the Vendors, Crescent Properties Limited (Crescent), as their witness but failed to do so. All this put the sale of Plot 430 into "great questionable pedestal".



17. On the issue as to whether Mombasa Polytechnic has trespassed on the controversial property, the trial court observed that: there were two structures – the boat house and the nautical block constructed outside the said land; that it had no direct and proper access road; and that it was rather disturbing that, despite having bought the land for over twelve (12) years as claimed, Timeless had never taken possession of the land. The trial court concluded that Crescent did not have a good title to pass to Timeless. Secondly, it had no hesitation finding that Timeless did not fall under the category of an innocent bona fide purchaser for value without notice.
18. On the issue as to whether the parties were entitled to the reliefs sought, the trial court found that Mombasa Polytechnic was prima facie the registered owner of the Plot 180 measuring 27.5 ha. Therefore, the most appropriate and available relief was rectification of the Register pursuant to Section 80(1) and (2) of the *Land Registration Act*.
19. On the question as to whether the findings by the Regional Coast Surveyor through its report dated 7th December, 2021 was valuable, the learned trial Judge found that the report was bereft of credibility due to the fact that the Government Land Surveyor admitted that he never participated in the physical survey or visited the field personally. Instead, he sent his field assistants to the ground, and that they were the ones who brought him the data, which he used to carry out the analysis and prepare a report. Further, the surveyor admitted that he was not able to fully embark on the detailed literature and historical background of the two parcels of land bearing Numbers 180 and 430, which was critical to the dispute and which formed part of the clear terms of reference by the trial court.
20. Ultimately, the trial court found in favour of Mombasa Polytechnic in the following terms:
 - a) That a declaration that the Plaintiff is the lawful registered proprietor of the parcel of land No. Mombasa X/BLOCK 180 measuring 27.5 Ha.
 - b. That a permanent injunction be and is hereby issued restraining the 3rd Defendant, their agents, servants, employees or anybody purporting to act under him from entering, remaining constructing, trespassing, cultivating, occupying and/or in any manner whatsoever interfering with the Plaintiff's quiet occupation and utilization of the parcel land known as Land Reference No. Mombasa X/Block 180 measuring 27.5 Ha.
 - c. That an order of legal eviction from the suit land by the 1st, 2nd and 3rd Defendants be and is hereby granted within the next Ninety (90) days from this date hereof in accordance with the legal provisions of Section 151E of the *Land Act*, No. 6 of 2012. In default forceful eviction to ensue at the 1st, 2nd and 3rd Defendant's expenses.
 - d. That an order for the cancellation of all that Certificate of Title deed to that parcel of Land Known as Land Reference Numbers Mombasa/X/Block 430 measuring 2 1/2 acres and rectification of the land registries to revert back to the Plaintiff's original land being Land Reference numbers Mombasa X/Block/180 under Section 80 (1) and (2) of the *Land Registration Act* of 2012.
 - e. That the Counter Claim dated 24th April, 2015 and filed in Court on 30th April, 2015 be and is hereby dismissed with Costs.
 - f. That the County Commander of Police, County of Mombasa and the Officer in Charge of Police Station (OCS), Central Police Station, Mombasa to ensure that these orders are fully complied with without failure.



- g. That the Plaintiff is awarded the Costs of this suit to be borne by the 1st, 2nd, 3rd and 4th Defendants herein.”
21. The findings and outcome of that judgment aggrieved Timeless, which is before us in an appeal fashioned around the following grounds, which are also framed as issues:
- i. The learned judge failed to appreciate the evidence before him and shifted the evidentiary burden to the appellant to prove that its title was not obtained fraudulently.
 - ii. The learned judge erred in finding that the appellant obtained its title fraudulently and whether the failure to call its predecessor in title was tantamount to an admission of guilt.
 - iii. Whether the learned judge erred in finding that the appellant’s property Plot 430 was excised from Plot 180 and at the same time created as a result of the rescission of the ocean; whether the learned judge erred in finding that Plot 430 was excised from Plot 180 when Plot 430 was first in time; whether the learned judge failed to comprehend that the property belonging to Mombasa Polytechnic is a fixed boundary as opposed to unfixed boundary; and whether the learned judge rightly applied the doctrine of accretion.
 - iv. Whether the learned judge erred in unfairly awarding the Mombasa Polytechnic 2.5 acres beyond that which was allocated to it by the Government through its certificate of title; and whether the issue was pleaded in the suit filed by the 1st respondent.
 - v. Whether the learned judge erred in fact and in law in finding that the property Mombasa/ Block X/430 is landlocked.
 - vi. Whether the judgment of the superior court amounts to a miscarriage of justice.
22. Timeless relied on written submissions dated 9th May, 2023 while the 1st respondent relied on written submissions dated 3rd July, 2023.
23. On the evidentiary issues, Timeless submits that the trial court, in finding that the Timeless failed to produce empirical evidence to support its purchase of Plot 430, shifted and placed the burden of proof on Timeless against whom an allegation of fraud was fronted. It is contended that, Mombasa Polytechnic having levelled an accusation of fraud bore the burden of proving that indeed there was fraud on the part of Timeless so as to vitiate the title. This was never done and, therefore, Mombasa Polytechnic failed to discharge the burden of proof to the required standard.
24. On the issue of fraud, it is contended that the trial court misdirected itself gravely on the evidence before it and therefore reached an erroneous conclusion. It is urged that, in finding that there was fraud on the part of Timeless, the trial court cited the grounds at paragraph 42 of the Judgment as:
- a. Failure to call its predecessor in title as a witness;
 - b. Failure to produce its predecessor’s letter of allotment; and
 - c. Failure to follow due process in creating the appellant’s property.
25. It is also submitted that these grounds are not sufficient to meet the threshold of fraud. Relying on the decision in *Gichinga Kibutha vs. Caroline Nduku* ELCA no. 16 of 2007, it is urged that fraud is a serious accusation which, procedurally, must be pleaded and proved to a standard above a balance of probabilities, but not beyond reasonable doubt.



26. The appellant asserts that it was a bona fide purchaser for value and, during the trial, produced a copy of its title, copy of its predecessor's title and a letter from the predecessor's advocates requesting for copies of the sale agreement and transfer for its records. Further, Timeless relied on Section 28 of the Registered Lands Act to assert that its title was not liable for defeat, except as provided for in the Act. Timeless also relied on Section 143(2) which provides that the register shall not be rectified so as to affect the title of a proprietor who was in possession and acquired the land for valuable consideration, unless the proprietor has knowledge of omission, fraud or mistake.
27. It is submitted that the title in question was created from the recession of the Indian Ocean; that, looking at the survey plan prepared in 1929, the last plot abutting the ocean is Plot 180 which, at the time, was unallotted. It is argued for Timeless that, after recession of the sea, another survey was carried out in 1997, and that the new survey depicts Plot 430 abutting the Ocean, meaning that it was created from the recession of the Ocean; and, further, that it was not excised from the property of Mombasa Polytechnic. It is asserted that land created from the recession of the ocean belongs to the government, and is treated like any other government land that is subject to allocation to private individuals under the repealed Government *Land Act* (GLA).
28. Reference is made to Section 3 of the GLA which allowed the President to make grants or dispositions of any estates, interests or rights over unalienated government land. It is urged that, in alienating land for private use, a survey is conducted, which survey culminates into a survey plan; and that, in the present case, a survey plan was produced showing that the Director of Surveys created Plot 430 for allocation to a third party.
29. On the third issue of the excision, recession and accretion, it is submitted that title to Plot 430 was earlier in time, having been created on 17th November, 1997 and later transferred to Timeless on 20th July, 2006 while Mombasa Polytechnic's title was issued on 17th November, 2009 as appears from the copies produced in evidence.
30. It is further contended that, according to the survey plan, Mombasa Polytechnic has not lost even an inch of land to Timeless. This was confirmed by the site visit of 3rd December, 2018. It was further contended that the trial court misapplied the doctrine of accretion in finding that land created as a result of the recession of the Ocean belongs to Mombasa Polytechnic.
31. It was also submitted that the doctrine of accretion and recession do not operate in isolation but, rather, in consonance with the doctrine of age limitatus. The South African case of *The Body Corporate of Dolphin Cove vs Kwadukuza Municipality & Another* (2012) Zakzdhc 13 was cited. In this case, the Court held that an ager limitatus is land enclosed on all sides by artificial boundaries and demarcated by such while ager non limitatus is a plot bounded on one or more side by some natural feature, such as a river or the sea shore. The Court further held that, if the title deed and drawing alone can fix the extent and position of the land, then it is ager limitatus. However, if the natural boundaries determine the extent or position of the land, then the extent of the land could also increase or decrease by alluvion, avulsion or by virtue of having a 'fluid curvilinear boundary'.
32. Relying on the afore-cited authorities, it was argued that the land of Mombasa Polytechnic is a fixed boundary property as demarcated by the Survey Plan No. 29/27 as it demarcated on all sides within the beacons defined in the survey plan and that, therefore, changes caused to the outer edges of the water body do not affect it. The case of *Ignacio Grande, Et al vs Hon. Court of Appeal, Domingo Calalung and Esteban Calalung GR L-17652* by the Supreme Court of Philippines was cited to buttress this point. Here, the Court held that the owner of an adjoining land, once the sea recedes, must seek to have the maritima incrementa registered, failing which the land is open for allocation to any individual.



33. Timeless contends that, in the present case, Mombasa Polytechnic did not seek registration of the land created when the ocean receded. Under the Torres system, ownership is demonstrated by registration and, therefore, the trial court erred in finding that Plot 430 was excised from Plot 180.
34. On the fourth issue of unfair allotment, it is submitted that, by ordering cancellation of its title and rectification of the land register, the trial court awarded Mombasa Polytechnic property beyond the limits of its title. Further, this was never prayed for by Mombasa Polytechnic while this Court has rendered itself numerous on the dangers of courts granting orders not sought.
35. On the fifth issue of Plot 430 being landlocked, it is submitted that trial court made a grave error in finding that Plot 430 was landlocked. This was contrary to evidence showing that the plot is serviced by two access roads. The one on the right side is serviced by a 9-metre wide access road marked with beacons RD1 -RD5 (No. 428) and, on the left, a similar access road marked RN1 -RN2. Timeless contends that the surveyor contradicted himself because, in spite of the access roads being marked, at the end of the report, he concludes that the land is landlocked. It is submitted that, even if the land was landlocked, and which is vehemently denied, Section 140 of the *Land Act* also addresses how an owner of a landlocked land may apply for grant of reasonable access to that land.
36. On the next issue of the contested right to property, it is urged that the trial court, in cancelling its title and ordering the same to revert to Mombasa Polytechnic, the court unfairly deprived it of its property contrary to Article 40 of *the Constitution*. It is argued that, throughout the proceedings, Mombasa Polytechnic failed to prove that Timeless acquired its property fraudulently so as to invoke Section 80(1) and (2) of the *Land Registration Act*. In failing to prove fraud, Section 26 of the Land Registration Act should have protected its title. The trial court should have sustained its title, and that it is clear that Timeless was deprived of its property unlawfully.
37. On the seventh issue of the alleged miscarriage of justice, which may be related to the arguments made earlier, it is submitted that the trial court misapplied the burden of proof, thus resulting in the perverse decision that the alleged fraud was proved.
38. Mombasa Polytechnic delineated 5 issues, which it addressed in their submissions. On whether the mandatory legal process for allocation of unalienated government land was complied with on creation of Plot 430, it is submitted that it was granted a lease for 99 years from 1st July, 1943. By the time of filing suit, Mombasa Polytechnic had occupied the land with uninterrupted access to the ocean for 76 years and, therefore, its title was not created in 2009 but in 1943 and first in time before the title obtained by Timeless, which was registered in 1997.
39. It is contended that the appellant failed to establish that it was a bona fide purchaser for value and without notice for several reasons, including:
 - a. No sale agreement was exhibited to court as proof of purchase.
 - b. No evidence of payment of the Ksh.4 million by way of either receipts, bank statements, RTGS, transfer invoice or cash payment.
 - c. No executed or registered transfer document was produced.
 - d. No receipt for payment of statutory levies was produced such as registration fees, stamp duty, reserved rent.
 - e. No correspondence between the purchaser's advocates or vendor's advocates is exhibited.
 - f. No evidence of due diligence that was done.



40. Mombasa Polytechnic contends that Timeless dangled a Certificate of Lease and nothing else, and yet it is the very Certificate of Lease that is under challenge for being illegally, unlawfully, unprocedurally and irregularly acquired. It is argued that the matter involves illegal hiving off and creation of Plot 430 and, therefore, it is the prerequisites to allocation of unalienated government land that was under inquiry by the trial court. Nothing was placed before the court in defence of the claim of illegality of allocation of title to their predecessor.
41. It is urged that Plot 430 is 6 meters from the ocean and full of mangrove trees, and that the high tide reaches the suit property. With mangroves on the land, it is riparian land not available for alienation. Further, that Article 62(1) (l) of [the Constitution](#) defines public land as “all land between the high and low water mark”. Therefore, that parcel of land is reserved for government purposes and should not be alienated, except with special dispensation or license issued by the Cabinet Secretary responsible for matters relating to environment and land. The procedure is set out in the GLA and the [Survey Act](#).
42. It is also submitted that, due to the fact that Plot No. 430 is 6 metres from the Ocean and within the mangrove area, it was created contrary to the [Survey Act](#) and Regulations 110 of the Survey Regulations 1994. It is further urged that the creation of Plot No. 430 was an illegality for not observing the 60-metre reservation from the high-water mark, and for being within a mangrove infested area, which is reserved land; and, further, that the land is riparian reserve land.
43. It is argued that Timeless failed to provide evidence of the legality of the alienation of its parcel of land. It was pointed out that an application for allocation of land addressed to the Commissioner of Lands was not produced; that a Part Development Plan showing the property in relation to other parcels of land neighbouring it was not produced; and that the letter of allotment does not exist. Mombasa Polytechnic contends that the title of Plot 430 was fraught with extreme and fatal irregularities in its creation and was ripe for rectification by cancellation of the said title.
44. Mombasa Polytechnic cited the Supreme Court case of *Dina Management Ltd vs County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) where the Court held that, where the root of title has been successfully challenged, a party in possession cannot benefit from the doctrine of bona fide purchaser.
45. On the burden and standard of proof, Mombasa Polytechnic contends that it was able to prove to the requisite standard that its title was valid and ran from 1943. Further, that its title was never sub-divided and its land touched the sea and, therefore, it enjoyed the fore shore for 76 years. Accordingly, Timeless had a duty to rebut this evidence.
46. Conversely, it is argued that Timeless filed a Counterclaim and, therefore, had a duty to prove the claim that it was a bona fide purchaser for value. It is urged that Timeless failed to discharge this burden by proving that it purchased the land, and that its predecessor had a valid title to pass. It is submitted that the Certificate of Lease does not of itself prove anything without a valid and legal conveyance instrument; and that there was nothing to show that Timeless indeed legally and regularly acquired a legal title to the property known as Plot 430.
47. Mombasa Polytechnic urged that failure to comply with Article 62 and, by extension, the Government Lands Act, by disposing of public land in due process, was a breach of public trust. It is submitted that it was erroneous for Timeless to contend that none of the parties were able to prove fraud. It is urged that Mombasa Polytechnic’s suit was not hinged only on fraud, but also on illegality and failure to follow due process as pleaded at paragraphs 17 and 19 of the *Plaint*, and the particulars whereof are pleaded thereunder; and that the 1st respondent was able to demonstrate that due process was not followed in allocation of Plot 430. In conclusion, it is urged that title cannot be held as indefeasible



where it was obtained irregularly and contrary to the provisions of *the Constitution* and the relevant statute law.

48. This being a first appeal, the duty of this Court as set out in the decision of *Selle & another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, is to reconsider the evidence, re- evaluate it and draw our own conclusion of facts and law. Bearing in mind that, unlike the trial court, we did not see and hear the witnesses testify and, therefore, due allowance must be given for this.
49. Without making any firm finding as to whether Timeless was guilty of fraud in its acquisition of its property from the original owner (Crescent), the learned judge cast aspersions on the process mainly because the vendors were not called by Timeless to testify on the sale. With respect, this holding was wholly unnecessary and probably arose from a misapprehension by the learned judge of the nature and character of the controversy that he was called upon to resolve. The question was not about how Timeless acquired Plot 430 from its previous owner, but whether this property was lawfully carved out of property belonging to Mombasa Polytechnic, and the manner in which it was created and alienated.
50. An allegation of fraud is a serious allegation which must not only be specifically pleaded but proved with certainty on proof higher than a balance of probabilities, although not to the heightened threshold of beyond reasonable doubt (see *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR; and *Kinyanjui Kamau vs George Kamau* [2015] eKLR and *Kuria Kiarie & 2 others v Sammy Magera* [2018] KECA 467). Here, Mombasa Polytechnic did not seek to impeach the manner of acquisition by Timeless of Plot 430 from its previous owner. No such matter was pleaded and we hold, with respect, that the learned judge stepped outside the real issues before the court in casting aspersions on how Timeless acquired the suit property.
51. Thankfully, the decision by the trial court did not turn on that holding. The trial court found in favour of Mombasa Polytechnic as it held as follows:

“ 43. In this judgment it has been demonstrated that firstly, the vendor did not have a good title to pass on to the 3rd defendant. Secondly, I have no hesitation to conclude that the 3rd defendant did not fall under the category of innocent bona fide purchaser for value without notice.”

52. These findings were motivated by the view taken by the learned Judge that:

“ 52. Therefore, the finding of the report comes to support the claim advanced by the plaintiff to the effect that the creation of Mombasa Block X/430 was out of the portion of 1½ acres of the plaintiff's plot No. Mombasa Block X/180 inclusive of the reclaimed ocean due to the receded sea level and the consequent issuance of 99 years lease to the 3rd defendant for the same was fraudulent and illegal and null and void ab initio and the same ought to be cancelled forthwith.”

53. This brings us to the gist of the matter before the trial court and the instant appeal.

54. In paragraph 5 of its plaint, Mombasa Polytechnic asserts:

“ 5. Sometimes during the 1980's the plaintiff reclaimed from the sea a portion of land next to its parcel No. Mombasa Block X/180 as a result of the receding sea level. The plaintiffs land has a creek which fronts the sea line.”



55. In paragraph 8 and 9 it is averred:

“8. That on carrying out investigations it discovered that a Title Deed was purportedly issued taking away a portion of 1½ acres of its Land Mombasa Block X/180 and giving it to the 3rd Defendant.

9. This includes the land reclaimed by the plaintiff from the Indian Ocean due to the receding sea level.”

56. From this pleading, what is absolutely clear is that Mombasa Polytechnic lay a claim of ownership over the part of the land that abuts its property (Mombasa Block X/180), and which was created as a result of the recession of the Indian Ocean. Less clear, because of the somewhat inelegant language of paragraphs 8 and 9, was whether Mombasa Polytechnic asserted that Plot 430 registered in the name of Timeless was created wholly from the receded land, or whether its case was that a portion of it was from the receded land and a portion curved out from Plot 180 as it originally stood.

57. However, this confusion was removed when, in the amended reply to defence and defence to counterclaim, Mombasa Polytechnic pleaded:

“7. The said portion Mombasa/block X/430 was created after the rescinding of the sea level which portion forms part of sea front for plot Mombasa/Block X/180.”

Mombasa Polytechnic then directly invoked the concepts of alluvion and dereliction whose definition we have set out at the opening of this judgment.

58. Against this backdrop, we view the following as the main issues that arise for our determination;

- a. Does the land registered as Mombasa/Block X/430 stand on land created from the permanent recession of the seashore of Mombasa Block X/180?
- b. If so, to whom would the land created as a result of the said recession belong?
- c. Related to (b), was Mombasa/Block X/430 properly alienated to Crescent Property Development Limited (Crescent), who then transferred it to Timeless?

59. The first issue is quickly resolved because, in a close of ranks, both Mombasa Polytechnic and Timeless agree that Mombasa Block X/430 is land born from the recession of the sea.

60. So as to resolve the second issue, we make reference to the survey report filed on the directions of the trial court. Although it was criticised by the learned trial judge, we choose to be more forgiving of it because the substantial findings in the report are supported by documents produced by either Timeless or Mombasa Polytechnic, and are all but common ground. Pertinent to the dispute are the following findings in the report:

- i. Plot 180 was originally surveyed in the year 1929.
- ii. The total acreage of Plot 180 was 27.469 acres and combined two plots; Plot 27 measuring 0.669 acres and Plot 28 measuring 26.8 acres.
- iii. In 1954, a portion of land measuring 0.25650 was excised from Plot 180 through survey plan F/R 70/64. The excised portion was numbered No. 180/1 and later re-numbered as parcel No. 296 held under freehold tenure by Sheikh Salim Bin Mohamed.



- iv. Plot 430 was surveyed in the year 1997.
 - v. LR. No. 180/1 was re-numbered parcel No. 318, and it appears that Plot 318 was subdivided into Plots 428 and 429.
 - vi. Though not stated directly, on the survey plan, the access road to Plot 430 seems to be Plot 428.
 - vii. There are no records to show the status of registration of Plots 428, 429 and 318.
 - viii. The university compound is secured by a perimeter wall.
Most of the boundary beacons for Plot 180 fall on the perimeter wall and could not be placed. Beacons RD5, RD4, RD2, RD1 and 12 were placed. All these beacons also define the boundaries of Plot 428.
 - ix. Plot 430 was not accessible due to the perimeter wall established by the University. All the beacons defining the parcel were not placed except boundary beacon RD5, also defining the boundary for Plot 180.
61. To be deduced from this report and the maps accompanying it are the following:
- i. Plot 180 remains in its form after the excision of 0.25650 hectares and the excised portion numbered No. 296.
 - ii. Plot 430 was created outside the boundaries of Plot 180.
 - iii. Attempts to further excise land from Plot 180 so as to create Plot 428 as access to Plot 430 was never formalised or actualised.
 - iv. Plot 430 is landlocked.
 - v. The boundary beacons for Plot 180 fall along the perimeter wall which secures the university compound.
62. Another issue which we must clarify is that Plot 180 is a leasehold property with a term of 99 years from 1/7/1943, while Plot 430 is a leasehold property with a term of 99 years from 1/7/1997. Clearly, Plot 180 was created earlier than Plot 430, and the submission by counsel for Timeless on this aspect was misleading.
63. With those deductions and observations, the task of determining the main issue before us is much easier. Plot 430 belonging to Timeless property was never part of Plot 180 as it was created as a gain of land from the ocean water after the permanent recession of the sea below the usual water mark. The phenomena is christened dereliction and, it bears repeating, is the gaining of land from water because of permanent recession of the sea below the usual water mark.
64. One core assertion by Mombasa Polytechnic at trial was that it was the natural owner of this created land parcel as it abuts or adjoins its property (i.e. Plot 180). It is a legal proposition that land created through either dereliction or alluvion necessarily vests in the owner of the land that abuts the created land. The onus lay on Mombasa Polytechnic to prove this assertion. On our part, we do not perceive the matter to be that simple.
65. Cited by counsel for Mombasa Polytechnic albeit for making the argument that Plot 430 is within the area reserved for Government purposes, is regulation 110 of The Survey Regulations (*Legal Notice No. 168 of 1994*), which reads: “110. Coast foreshore reservation



1. Where unalienated Government land fronting on the area coast is being surveyed for alienation, a strip of land not less than 60 metres in width shall normally be reserved above high-water mark for Government purposes:

Provided that, if the interests of development require, the Cabinet Secretary may direct that the width of this reservation shall be less than 60 metres in special cases.
 2. High-water mark in all cases in these Regulations means the Mean High Water Mark of Spring Tides.”
66. There is no evidence that before the creation of the land by dereliction, Plot 180 did not honour this coast foreshore reservation. Second, emerging from the surveyor’s report and accompanying plans, the boundary of Plot 180 was fixed by beacons which lay on the perimeter wall erected by Mombasa Polytechnic. This included the boundary on the seaward. The Deed Plan produced by Mombasa Polytechnic in its list of documents dated 3rd March 2011 corroborates this latter conclusion. This would mean that the fixed beacons defined the extent of the land referred to as Plot 180 belonging to Mombasa Polytechnic. This would have an implication as to whether the land created from the recession of the sea should, as a matter of course, follow title to the land belonging to Mombasa Polytechnic.
67. Enter the concepts of *ager limitatus* and *ager non limitatus*. The concepts are recited by D. Pillay, J. in *The Body Corporate of Dolphin Cove* (*supra*) to be as follows:
- “ 18. Turning to the authorities, both sides relied on the same case law as to whether the property was *ager limitatus* or not. According to the authorities 20 an *ager limitatus* is a plot of land enclosed on all sides by artificial boundaries and demarcated by such. An *ager non limitatus* is a plot bounded on one or more sides by some natural feature such as a river or, as in this case, the seashore. Irrespective of the sort of boundaries it has, a plot defined by measurement is also *ager limitatus* or, if not one in the pure sense, then is regarded as such for all practical purposes. 21
 19. Simpson and Sweeny²² elaborate:

“*Ager Limitatus*” means, literally, “fixed field” and in Roman-Dutch law beacons land rectilinearly bounded is *ager limitatus* and, abutting a river or sea, there can be no extension of this land area to midstream nor is the owner entitled to alluvion. On the other hand land bounded curvilinearly by a river or the sea is normally “*ager non-limitatus*” which in Roman-Dutch law is entitled to alluvion and by a principle of English law adopted in South Africa there is a rebuttable presumption that the land so bounded in relation to a river extends to midstream. In respect of the above there is no doubt: not unless a piece of land has a boundary relating to a river or the sea and in addition there are certain features relating to the numerical data, inclusive of the area, that appear in the title deed or diagram. When these features are present it seems that the land is *ager limitatus* or fixed and it is not entitled to alluvion nor can the piece of land be extended to midstream even though it is curvilinearly bounded by water.”



68. We have further sought to understand the meaning of the words rectilinear and curvilinear using the Concise Oxford English Dictionary 12th edition, 2011. Rectilinear means ‘1. contained by, consisting of, or moving in a straight line or lines 2. Photography (of wide-angle lens) corrected so that straight lines in the subject appear straight in the image’
while curvilinear means “contained by or consisting of a curved line or lines;’
69. Applying these concepts to the matter at hand, it does not mean that, simply because land abuts a river or a sea, it is *ager non-limitatus*. What matters is whether the boundary of that land has been fixed by beacons, or whether the boundary is defined in relation to a natural feature (the sea or the land) and is not defined by measurement. If it is the former, where the land is rectilinearly bounded, then there can be no extension of the land beyond the beacons. However, the latter can benefit from alluvion or dereliction.
70. Should Plot 180 be *ager limitatus*, then there can be no extension as a consequence of dereliction. On the other hand, if it were *ager non limitatus*, then it is entitled to the land now designated as Plot 430 which was created by dereliction. On our re-evaluation of the evidence, Mombasa Polytechnic did not prove, as it was duty bound, that Plot 180 is *ager non-limitatus*. To the contrary, on the material on record, which includes a copy of the survey plan produced by Mombasa Polytechnic, Plot 180 is delineated by beacons to be found along the perimeter wall. Inexorably, Plot 180 is *ager limitatus*, and cannot automatically append the created land (Plot 430). The land created, and this we agree with counsel for Timeless, is the property of the Government of Kenya, which has a right to alienate it.
71. We also add that the trial court could not, as it attempted to do, invoke the doctrine of adverse possession in favour of Mombasa Polytechnic. It is old learning that this doctrine is not available against land owned by the Government (see *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] KECA 227 (KLR); and *M’Mikua v Muchiri & another* [2024] KECA 1882 (KLR))
72. The next issue is whether Plot 430 was lawfully alienated to Crescent. The process of how the title to Plot 430 had been created was specifically raised in the pleadings of Mombasa Polytechnic as follows:
“Failing to follow the due process in creating Mombasa Block X/430.”
73. Further pleaded in paragraph 10 of the amended reply to amended defence and defence to counterclaim is:
“In response to contests of paragraph 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 of the Amended Defence and Counter Claim the plaintiff states that Plot No. Mombasa/Block X/430 was fraudulently and illegally acquired out of the sea front of Plot No. Mombasa/Block X/180 without due process being followed.”
74. We must say that Timeless did not challenge the right of Mombasa Polytechnic to question the manner in which Plot 430 was alienated. The polytechnic would no doubt have *locus standi* to do so because, not in the least, there was an attempt to curve out a portion of its property so as to create an access road to Plot 430.
75. Mombasa Polytechnic having proved that Plot 430 was created through dereliction, and having raised the manner in which title to Plot 430 was created and alienated to a private entity, the onus of proof shifted to Timeless and the 2nd and 3rd respondents who would be the custodian of the records and information involving and pertaining to the alienation to prove that the root of title was lawful. This



burden is placed on the three by dint of section 112 of the Evidence Act, which provides that, in civil proceedings, when any fact is especially within the knowledge of any party, the burden is on the party to prove or disprove that fact (see the decision of this Court in *Munyu Maina v Hiram Gathiha Maina* [2013] KECA 94 (KLR)). It was also discussed by the Supreme Court in the case of *Munya v Kithinji & 2 others* (Petition 2B of 2014) [2014] KESC 38 (KLR) as follows:

“189. Section 112 of the Evidence Act, on which the learned Judges of Appeal placed reliance, is an exception to the general rule in Section 107 of the same Act. Section 112 was not meant to relieve a suitor of the obligation to discharge the burden of proof. The Supreme Court of India, in *Shanbhu Nath Mehra v. State of Ajmer* AIR 1956 SC 404, considered the import of Sections 106 and 101 of the Indian Evidence Act (which are in pari materia with Sections 112 and 107 of our Evidence Act), as follows:

‘Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof. ‘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.’...This lays down the general rule that in a criminal case, the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are ‘especially’ within the knowledge of the accused and which he could prove without difficulty or inconvenience.’

The Court further observed:

‘...the word ‘especially’ PARA indicates stress.. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.’”

76. At any rate, on this question of burden of proof, the defence and counterclaim set up by Timeless was partly that Plot 430 “was free from any encumbrances and that the title was good”. Surely, Timeless bore the burden of proving this assertion.

77. The need to go behind the title and to establish a good root of title where the same is challenged was emphasised in the case of *Dina Management* (supra) where the apex court held:

“108. As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of *Funzi Development Ltd & others v County Council of Kwale*, Mombasa Civil



Appeal No 252 of 2005 [2014] eKLR the Court of Appeal, which decision this court affirmed, stated that:

'... a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.'

109. We note that the suit property was subsequently converted and HE Daniel T Arap Moi registered as owner and obtained a freehold title. Further, the suit property herein is within the then Mombasa municipality. Contrary to the appellant's averment, section 10 of the GLA is applicable. Being a town plot, within the jurisdiction of the 1st respondent and its predecessor, it ought to have been an allocation for a lease for a term not exceeding 100 years.

110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant."

78. There was no evidence whatsoever of how Plot 430 was alienated to Crescent and there was no iota of proof that the alienation of the property complied with the provisions of the repealed Governments Lands Act. Taking a slightly different route from the trial court, and on the authority of Dina's case, we uphold the decision of the trial court that the title held by Timeless was successfully impeached. Timeless cannot benefit from the doctrine of bona fide purchaser.

79. As we conclude, we need to say this. While we have held that Plot 430 created out of dereliction belongs to the national government, which can alienate it in accordance with the law, whether the owner of land adjoining land created from such process should be given first priority of allocation on alienation, is a matter that was not fully argued before us and must await another day.

80. The upshot is that we hereby uphold the cancellation of the title to Mombasa Block X/430 in the name of Timeless. The property shall forthwith revert to the Government of Kenya which shall, if it so wishes, alienate it in compliance with *the Constitution* and the relevant statute law. Only to that extent does the appeal succeed. Each party to bear their own costs of the trial and of this appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JULY, 2025.

F. TUIYOTT

.....

JUDGE OF APPEAL

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

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA



.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

