



**Haji & another v Moorhead & another (Environment & Land Case
74 of 2019) [2025] KEELC 953 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 74 OF 2019
EK MAKORI, J
FEBRUARY 26, 2025**

BETWEEN

ABDULLAHI FARAH HAJI 1ST PLAINTIFF

FAMAU AHMED FAMAU 2ND PLAINTIFF

AND

GEORGE MOORHEAD 1ST DEFENDANT

KENYA WILDLIFE SERVICE 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 15th August 2019 Abdillahi Farah Haji and Famau Ahmed Famau have sued the 1st defendant George Moorhead for trespass in their alleged capacity as proprietors of LR No. 27898 Lamu and seek orders restraining the 1st defendant from any dealings with the suit property.
2. George Moorhead pleaded to be a non-suited party in the proceedings. The basis of his averment is that as director of Kiwayu Safari Village Limited, which company obtained a license from the Kenya Wildlife Service – the 2nd defendant to operate a tourist recreation site within Kiunga Marine National Reserve. The said tourist recreation facilities within the suit property aggrieved the plaintiffs to move the court to have the 1st defendant vacate the premises. The 1st defendant asserts that he is a separate entity from Kiwayu Safari Village Limited that is in occupation of the suit property on authority of Kenya Wildlife Service – the 2nd defendant and therefore improperly sued in these proceedings.
3. The 2nd defendant's amended statement of defence, dated 9th May 2023, was accompanied by a counterclaim. The 2nd defendant argues that the plaintiffs had no right to seek eviction of the 1st defendant or anyone else from the suit property because it is situated inside Kiwayu Island, which forms part of the greater Kiunga Marine National Reserve, under the management of the 2nd defendant. The 2nd defendant further contends that the land within Kiunga Marine National Reserve is a protected



area under Gazette Notice No. 291 dated 26th October 2019 as read with Boundary Plan No. 216/39 and thus not available for private ownership, and any claim by the plaintiffs is fraudulent.

4. Abdillahi Farah Haji - PW1 adopting his witness statement produced the title deed and a copy of Certificate of Postal Search dated 30th April 2019 as exhibits to prove ownership and indefeasibility of title.
5. George Moorhead - DW1 adopting his witness statement testified and stated that as director of Kiwayu Safari Village Limited they received a license from Kenya Wildlife Service and have been in the suit property since 1993. The 1st defendant does not lay a claim to the suit property but asserts that if indeed he is in the suit property, then it is on account of a license issued to his company by the 2nd defendant, who has statutory mandate over the suit property and surrounding land.
6. Mathias Mwavita - DW2, and Judith Adipo-DW3, Senior Warden Officer and Principal Land Management Officer respectively with the 2nd defendant, adopted their filed witness statements and produced a bundle of documents marked exhibits 1 to 10, respectively.
7. The 2nd defendant's case is that the plaintiffs' claim is fraudulent because the suit property is located in Kiwayu Island, part of the larger Kiunga Marine National Reserve, by dint of [Legal Notice No. 29 of 1979](#). They testified that the gazette notice is to be read together with the Boundary Plan No. 216/39, demonstrating that Kiwayu Island is within the area delineated as Kiunga Marine National Reserve under the management of Kenya Wildlife Service.
8. Parties were directed to canvass the issues raised herein via written submission. They complied.
9. From the materials, testimonies, exhibits and submissions by the parties, the issues that I frame for this court's determination are: whether the suit discloses any cause of action against the defendants? Are the plaintiffs entitled to the orders sought in the plaint against the defendants? Whether the counterclaim by the 2nd defendant is sustainable. Who is liable to pay the cost of the suit? This court has meticulously examined each aspect of the case to ensure a fair and just judgment.
10. Let me start from the preliminaries, Ms. Janmohamed (SC) learned counsel for the 1st defendant submits (and correctly so) that 1ST defendant confirmed during hearing that he is the Director of Kiwayu Safari Village Limited, a position that he has held since 1993, where he manages the company's properties. As the Managing Director, the 1st defendant confirmed that he has never dealt with the plaintiffs. He maintained that he was wrongly joined to the suit as a defendant and was a total stranger to the plaintiffs' claim filed against him in his personal capacity.
11. Senior Counsel rightly avers that the 1st defendant is a non-suited party to this claim, relying on the locus classicus case of *Salomon & Co Limited v Salomon* [1897] AC 22 HL which clearly defined the legal position of a company. The court has adhered to this legal principle in its judgment.

“A company is a different person altogether from the subscribers and directors..... That separate legal personality of a company can never be departed from except in instances where the statutes or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.”



12. Similarly, in the case of *Multi choice Kenya Limited v Mainkam Limited & Anor* [2013] eKLR it was held:

“To my mind, there is no doubt that ever since the famous case of *Salomon versus Salmon*, courts have applied the principles of corporate personality strictly, but exceptions to the principles have also been made where it is too flagrantly opposed to justice. Other instances include when a fraudulent and improper decision by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as an entity.”
13. She further asserts, which I also agree with, that the above position is echoed under Section 19 of the *Companies Act*, which provides that once a company is registered, it becomes a body corporate distinct from its members. The 1st defendant, a director at Kiwayu Safari Village Limited, denied possessing or occupying the suit property in his own capacity. The plaintiffs brought forth no evidence to enable this court to determine that this is a case where the corporate veil needs to be lifted for the 1st defendant to be held personally liable for acts of the company. This being the case, I would not find it difficult to agree with the submissions by counsel for the 1st defendant that the 1st defendant is nonsuited and is wrongly sued in his personal capacity here.
14. As correctly submitted by counsel for the 1st defendant – which position I also agree with. Order 1 A and B of the Civil Procedure Rules, places on the courts a responsibility to give effect to the overriding objectives which include; the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties. The efficient disposal of the court's business requires that the suit proceed against the correct defendant against whom any court orders can be enforced. In their submissions, the plaintiffs note that the alleged tort of trespass is by Kiwayu Safari Village Limited, a distinct entity from the 1st defendant. In a nutshell, the plaintiffs' claim against the 1st defendant should fail on this point alone.
15. Significantly on the merits of the suit by the plaintiffs, and as submitted by Mr. Okoko, learned counsel for the 2nd defendant – which I agree with - L.R No. 27898 Lamu, from the official postal search and the title document produced which the court has had a chance to look at, the same is registered in the names of Abdillahi Farah Hanji Ndor and Famau Ahmed Famua. This is an incongruity from the names cited in the face of the plaint before this court and failure to amend the pleadings and to explain the disparity in the caption of the names, it is clear that the plaintiffs and the persons appearing in the search and title documents are markedly different and thus the claim to ownership over the suit property falls on that instance too.
16. The plaintiffs testified that the suit property is not situate within Kiwayu Island, Kiunga Marine National Reserve. PW1 confirmed during cross-examination that he has been in physical possession of the property since 2013 and that he has people on the ground in Kiwayu. PW1 claimed that the property was sold to them by a squatter who used to reside on the suit property and that they executed a transfer before the chief. The said transfer was never produced in court as evidence.
17. The plaintiff failed to produce any documents explaining the history of acquisition of the property apart from the title and postal search certificate; thus, what was presented in court did not match the evidence tendered. This is exacerbated by the inconsistency of names in the pleadings and title document. At the same time, the lack of qualifying documentation on the acquisition of the suit property backwards in time signifies that the case and claim to title by the plaintiffs lack legal and factual basis.



18. As evidenced from the bundle of documents produced by the 2nd defendant, the land within Kiwayu Island is not available for private allocation since it has never been de-gazetted as part of the Kiunga Marine National Reserve.
19. The plaintiffs have failed to demonstrate to the court the historical nexus of acquisition of the property. A copy of a title deed that is not certified as a copy of the original, and seeks the imposition of authenticity from the court cannot stand. The jurisprudence that holds sway is that a party cannot just present to the court a title deed and claim indefeasibility and total ownership without the legitimate traceability of the title.
20. The Supreme Court of Kenya in the case *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) settled the principle that a title document is insufficient proof of ownership where the origin of that title has been challenged. The holder of the title must go beyond the title and demonstrate that the process of acquisition, from inception, was legal. Their Lordships stated:

“To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.....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.... Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above, the appellant could not benefit from the doctrine of bona fide purchaser.”
21. The position of the Supreme Court was informed after consideration of a thread of decisions emanating from the ELC, the Law Lords thus held:

“As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No 239 of 2009 [2013] eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”
22. The plaintiffs in this matter failed to dislodge the defendants’ claim that the suit property they claimed was unavailable for allocation since it falls within Kiwayu Island, within the Kiunga National Marine Reserve.
23. The 2nd defendant, through the counterclaim, has impugned the authenticity of the plaintiff’s title as fraudulent since it is purportedly issued despite a gazetted and protected area consisting of a marine ecosystem. The 2nd defendant argues that the plaintiff’s purported ownership is a threat to the environment and marine ecosystem and that it is a seizure that will destroy the environment for posterity.
24. Plaintiffs’ exhibit No. 7, a correspondence from the National Land Commission dated 26th September 2016, by Prof. Swazuri, the chair of the National Land Commission, confirming that any title deed



issued within Kiwayu Island was irregularly acquired in the gazetted Marine National Reserve and thus ripe for revocation.

25. As discussed above, the plaintiffs failed to adduce any evidence to support the root of their title, given the strong averments that the area is a protected Marine National Reserve. This failure is fatal to their case because the title they hold cannot be protected either by Article 40 of *the Constitution* nor Section 26(1) of the *Land Registration Act* – since they have not proved deprivation of property under Article 40 of *the Constitution*, and as persuasively held by my brother Munyao J., in *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR:

“The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

26. The plaintiffs failed to show how they acquired and were allocated public land within a marine reserve by virtue of *Legal Notice No. 29 of 1979*, under the protection of the 2nd defendant.
27. The upshot is that the plaintiffs’ suit is hereby dismissed with costs. The counterclaim by the 2nd defendant is sustained and upheld with costs.
28. It is so ordered.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 26TH DAY OF FEBRUARY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Mwanzia, for the Plaintiffs

Ms. M’mbaka for the 2nd Defendants

Happy: Court Assistant

In the Absence of:

Ms. Janmohamed (SC), for the 1st Defendant

