



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Takaungu Investment Limited v Khamis & 2 others (Environment & Land
Case 19 of 2022) [2025] KEELC 980 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 980 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 19 OF 2022
EK MAKORI, J
FEBRUARY 26, 2025**

BETWEEN

TAKAUNGU INVESTMENT LIMITED PLAINTIFF

AND

FAROUK HAMID KHAMIS 1ST DEFENDANT

THE LAND REGISTRAR LAMU 2ND DEFENDANT

DIRECTOR OF SURVEYS 3RD DEFENDANT

JUDGMENT

1. The plaintiff, in the amended plaint dated 6th November 2023, brought before this court a case centered on the following key legal issues:
 - a. An order directing the land Registrar, Lamu County, to cancel and/or extinguish the 1st defendant's title No. Lamu/Manda Island/232.
 - b. A declaration that upon issuance of title No. Manda/Island/47 and Manda/Island/48 to the plaintiff, the suit property was unavailable for re-allocation and registration to the 1st defendant or any other party.
 - c. A declaration that the title No. Lamu/Manda/Manda/232 to the 1st defendant was issued unlawfully, unprocedurally through a corrupt scheme, and therefore, null and void.
 - d. An order directing the 3rd defendant to expunge all records relating to file No. Lamu/Manda island/232 and undertake a re-survey of parcel No. Manda/Island/47 and Manda /Island/48 to reinstate its RIM.
 - e. An order directing the County Government, Lamu, to expunge all the records from the rating roll concerning title No. Lamu/Manda/Island/232.



- f. A permanent injunction restraining the defendants, their agents and/or servants, or any other person acting under their authority from carrying out developments, trespassing upon, fencing, selling, and/or in any other way dealing in respect to the suit property to the plaintiff's detriment.
 - g. Costs of this suit.
 - h. Any other relief that the court may deem fit.
2. The plaintiff's case is that at all material times, it was the registered owner and proprietor of all parcels of land No. Manda/Island/47 and Manda/Island/48. The plaintiff, having duly purchased it for value from Omar Ahmed Mohamed-deceased and his elder son Mohamed Omar Ahmed, respectively, in 2004, has been the rightful owner for nearly two decades. The sale agreement was made between the plaintiff and Omar Ahmed Mohamed before his death on 3rd November 2004, while the transfer of lease was made between the plaintiff and beneficiaries on his behalf on 13th September 2005, who were the rightful beneficiaries and owners by transmission duly executed on 26th May 2005 and registered on 23rd September 2005 vide Lamu Succession No. 7 of 2005—further, the sale agreement concerning parcel No. Manda/Island/48 and the attendant transfer were executed between the plaintiff and Mohamed Omar Ahmed on 13th September 2005. It was stated that the parcel title No. Manda/Island/47 and Manda/Island/48 and Lamu/Manda Island 232 refer to the same parcel of land, the suit property herein, commonly known as Simba Rungwe Island, situated in Shella, Lamu County. It was averred that the suit property was registered in the plaintiff's name in 2005, title No. Manda/Island/47 and Manda/Island/48 while the suit property was registered in the 1st defendant's name as title No. Lamu/Manda Island/232 in 2011. The suit properties, having been registered and issued in 2005, were unavailable for re-allocation and issuance to the 1st defendant or anyone. At the time of execution of the plaintiff's sale agreements and transfers, parcel title No. Lamu/Manda Island 232 had not been registered and did not exist. It was additionally stated that after acquiring ownership, the plaintiff actively and effectively occupied the suit property, developed it, and enjoyed quiet, exclusive possession for more than 17 years without any interference or objection. The plaintiff further averred the unlawful allocation, amalgamation, and registration of parcel title No. Lamu/Manda Island/232 and the irregular ownership to the 1st defendant was not only a calculated mistake but a fraudulent and unlawful ploy to dispossess the plaintiff's rightful interest and ownership of the suit property, an injustice that the plaintiff seeks to rectify through legal means. The particulars of fraud were set out under paragraph 15 of the plaint.
3. Despite being served, the 1st defendant did not enter an appearance or file any documents, effectively choosing not to participate in these proceedings. On the other hand, the 2nd and 3rd defendants filed an amended statement of defense dated 19th February 2024, denying the plaintiff's claim. They maintain that the registration and/or entries over the suit property were in good faith and within the law and that the records concerning the suit property are accurate.
4. Ann Sohie Trzebinski Lemarti, aka Anna – PW1, adopted her witness statement dated 8th March 2022 and produced PEX 1-24 documents as per the list of documents of even date and PEX 25-26 as per the additional list of documents dated 6th November 2023. She added that Manda/Island/ 47 and 48 are owned by Takaungu Investments Limited, which acquired the same in 2005. She stated that when she searched, she found that the parcels had been amalgamated to Lamu/Manda Island/232 in the name of Farouk Hamid Khamis. Upon realizing this, she went to the DCI to find out how the amalgamation had happened. She placed caution on the suit land. On cross-examination, she stated that parcels No. 47 and 48 were purchased separately, though simultaneously.



5. Mohamed Omar—PW2 adopted his witness statement dated 8th March 2022 as his evidence in chief. He stated that Manda 47 and 48 belonged to him and his late father, who sold them to Takaungu Investments Co. Ltd. He said that Farouk Hamid Khamis – the 1st defendant- was unknown to him. Abdulrahman Omar—PW3 – sibling to PW2, adopted his witness statement dated 8th March 2022 as his evidence in chief. He gave a similar testimony to that of PW2 in terms of how the sale of the suit properties was done.
6. Seso Manyarkiy, DW1the, the Land Registrar - Lamu County, produced DEX 1-7 documents as per the list of documents. He testified that Manda/Island 47 was registered on 29th July 2004 to Omar Mohamed and was later transferred to Mohamed Omar Ahmed, Bakari Omar Ahmed, Abdalla Omar Ahmed, and Hanifwa Omar through succession in 2007 by the Public Trustee. On 23rd December 2005, the parcel was transferred to Takaungu Investment Ltd, and a lease certificate was issued. He stated that parcel No. 48 was registered on 29th July 2004 to Mohamed Omar Mohamed, and on 23rd December 2005, it was transferred to Takaungu Investments Ltd.
7. He told the court that in the Registry Index Map for Manda registration section, there was a duplication of numbers where parcel Numbers 47 and 48 were duplicated with another registered parcel. That Manda Island 48 was registered on 10th February 2010 to Hadija Sheuk and was transferred on 16th June 2010 to Michael Bovio Austin. Parcel No. 47 was duplicated but was registered with the Registrar of Titles in the Mombasa Lands Office; therefore, he cannot tell the ownership details. As much as the parcels were duplicated, they refer to the same parcels on the ground and the Registry Index Map. He added that parcel No. 232 was registered on 15th February 2011 to Farouk Hamid Khamis, and the lease certificate was issued on the same day. A caution was registered on 27th September 2021 by Anna Sophie.
8. On cross-examination, he confirmed that parcels 47 and 48 were transferred to Takaungu Investment Ltd. Parcels 47 and 48 equal Lamu/Manda Island 232 and are in the exact geographical location. No. 232 was registered on 15th February 2011; by then, the land had already been allocated to a private individual and could not be reallocated to another person.
9. Samuel Githu, a surveyor working with Lamu County, told the court that he prepared a ground verification report on the distinction between parcels No. 47 and 48 and 232 Manda Island. He stated that the need was to identify the geographical location, particularly in the interest of Takaungu Investment. They visited Simba Rongwe, where they established that parcels No. 47 and 48 are in different positions but on the same island. Further, parcel No. 232 varied in shape and size, and there was confusion that parcels 47 and 48 were amalgamated into 232 and the exact geographical location.
10. Parties were directed to file written submissions. They complied.
11. The issues that fall for the determination of this court arising from the evidence tendered and the submissions by parties are whether parcel No. Lamu/Manda Island/47 and Lamu/Manda Island/48 are in the exact geographical location as parcel number Lamu/Manda Island/232, and which of the titles is valid given the issue of overlap raised by the plaintiff in this suit? Whether the plaintiff is entitled to the reliefs sought and who should bear the costs of the suit.
12. Mr. Nyanje learned counsel for the plaintiff submitted that during the hearing, it was DW2 and DW3's evidence that titles No. Lamu/Manda Island/232 and titles No. Manda/Island/47 and Manda/Island/48 were registered against the same parcel of land, the suit property herein. The County Surveyor's report equally established this position. To him, this broaches the issue of which of these titles is valid.



13. On the same issue, Mr. Munga learned state counsel for the 2nd and 3rd defendants had the same view that the three parcels overlapped.
14. This brings us to the issue of which of the titles between the plaintiff and the 1st defendant which is more authentic than the other, entails tracing the root of each party's titles. Mr. Nyanje submitted that a similar question arose in the case *Hubert Martin & 2 others v Margaret J. Kamar & 5 others* [2016] eKLR; the Court had this to say:

“A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain.”
15. See also *Munyu Maina v Hiram Gathiha Maina* [2013], where the court stated that:

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
16. Counsel for the plaintiff is of the view that in its investigation, this court will establish that the plaintiff is the registered owner of the suit property as it gained proprietary interest upon purchase from PW2 and PW2's late father vide sale agreements and transfers dated 3rd November 2004 and 13th September 2005 respectively and transfer executed as appropriate
17. Counsel further contended that the legality and chain of the plaintiff's ownership have been demonstrated and the same not broken from the original owners as shown by the exhibits produced from the title the parcels were allocated and how the same changed hands to the plaintiff.
18. Thus, Counsel for the plaintiff asserts that acquiring the plaintiff's titles and those of the original owners was lawful, procedural, and devoid of fraud, misrepresentation, and/or corruption.
19. Further counsel asserted that the evidence adduced in court by all the witnesses was not controverted. Both parcels that give rise to the suit property were registered to the plaintiff in 2004 and 2005, respectively. Certificates of lease for both parcels dated 23rd September 2005 were issued to the plaintiff, and the suit property was duly registered with the plaintiff on 23rd September 2005. The Certificate of Lease proved the same, which resulted in a transfer of the suit property from PW2 and his late father to the plaintiff. The said process of transfer has equally not been challenged.
20. Counsel argued that It was DW2's testimony that upon issuance of title No. Manda/Island/47 and Manda/Island/48, the suit property was not available for reallocation to any other person. See *Kasarani Mall Ltd v Daniel Otieno Miganga & others* 2017 eKLR where the Court held:

“having found that the plaintiff herein is the registered owner of the suit property, then that is conclusive evidence that the plaintiff is the absolute and indefeasible owner of the suit property as provided by section 26(1) of the [Land Registration Act](#).”
21. Counsel for the plaintiff submitted that the legality and the regularity of title held by the plaintiff were not controverted; hence, the court should find for the plaintiff. According to the records, the 1st



- defendant was registered as a proprietor under title No. Lamu/Manda Island/232 on 15th February 2011. No documentary evidence was produced to show how the 1st defendant acquired the suit property. No chain of ownership to demonstrate the legal procedure used to allocate the 1st defendant title No. Lamu/Manda Island/232, primarily where the plaintiff's titles already existed. The only document available is the title issued to the 1st defendant. The 1st defendant did not follow all processes and procedures to validate his title. He has failed to prove how he acquired the title; hence, the root of the title he holds is shaky and does not achieve the threshold as required by law.
22. Counsel for the plaintiff opines that in the maxim of equity, where there are two equal equities, the first in time prevails. From the records, the 1st defendant was registered as a proprietor under title No. Lamu/Manda Island/232 on 15th February 2011. The plaintiff's titles were registered under title No. Manda/Island/47 and Manda/Island/48 on 23rd September 2005. By dint of that maxim, the plaintiff's title was registered first. It prevails over the second title and is, therefore, absolute and indefeasible. The land had already been alienated and, hence, not capable of further alienation or allocation.
23. Counsel for the plaintiff cited The Court of Appeal case of Benja Properties Ltd v Syedna Mohamed Barhannidin & 4 others [2015] eKLR, citing with approval the High Court case Gitwany Investment Ltd v Tajmal Limited and & 2 others (2006) eKLR, where the court stated that:
- “My understanding is therefore that the title given to Gitwany in the first Instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal Wreck Motors Enterprises v Commissioner of Lands, C. A 17/1997 (unreported) “– is the grant that takes priority” The land is alienated already. This decision was again upheld in the case of J.B Martin Glass and 3 Others C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because, without cancellation of the 1st title, it retains sanctity.”
24. Counsel for the 2nd and 3rd defendants agreed with the plaintiff's submissions by stating that, according to the evidence by DW1 and DW2, the three parcels of land are located in the same area, Rongwe Island, and that the ground verification report, prima facie, shows the location the plots and that duplication was exhibited. The 1st defendant did not approach the court to controvert the evidence tendered by the plaintiff.
25. The Court, considering the parties' submissions, has no difficult finding that the plaintiff holds a lawful and regular title on the suit property and that the title held by the 1st defendant, having been issued later, could not have been procedurally allocated because the land in question had already been alienated and not available for reallocation.
26. On whether title No. Lamu/Manda Island/232 was fraudulently obtained. The plaintiff asserts that the inference that can be drawn, given the failure of the 1st defendant to appear and defend, is that the title was procured unprocedurally, through fraud, or corrupt schemes.
27. The 2nd and 3rd defendants opine that the plaintiff has partially proved its case to the required standard that they acquired the suit property from persons lawfully allocated through allotment letters. The 1st defendant, who is alleged to be the registered owner of Lamu/Manda Island/232, failed to appear and produce any letter of allotment and receipts demonstrating proof of allotment. In addition, the ground verification report supports the plaintiff's argument that the three parcels of land are in the



exact location. However, the allegations of fraud and/or corrupt schemes against the 2nd and 3rd defendants have not been proven to meet the standard required in law. In this regard, the decision in *Kimanthi Kilonzo v Susan Wangari Kiiru and another* [2019] eKLR is cited where the court stated as follows:

“It is common ground that fraud is serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. Section 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence...it was the duty of the Plaintiff to lead evidence and produce such documents for the Court to prove fraud on the part of the 1st Defendant. No such evidence or documents were produced before the Court to enable the Court deduce fraud and/or forgery. The Plaintiff must demonstrate that there is fraud and secondly that the 1st Defendant is a party to such fraud. It is trite law that the burden of proof lies on the person who alleges fraud.”

28. I agree with the submissions by the 2nd and 3rd defendants on the issue of fraud, which has a higher standard of proof. However, I will add that whereas such fraud may not have been proved, no evidence was adduced that the issuance of the 2nd title – No. Manda/Island/232 to the 1st defendant in 2011 did not result in a reallocation and an overlap on already allocated and alienated land to the plaintiff in 2005 – title No. Manda/Island/47 & 48. It did. This was unprocedural and unlawful and against the known public land allocation procedure. We are dealing with the root of the title here. The verification report by DW2 captures the irregularity and illegality as follows:

“From the map, it was established that the actual ground we visited is mapped and registered as a single parcel 232.

There is a duplication of Nos. 47 and 48 since the same numbers exist elsewhere on the map, but their actual position is far from the area of interest.

The duplicated parcels had no relations since they varied in area, shape, and position.

Parcel No. 232, registered under FAROUK HAMID KHAMIS P/P NO.003925, is the ACTUAL parcel in dispute, where the complainer also holds title registered as numbers 47 & 48.”

29. That duplication then must be rectified.
30. Based on the totality of the evidence adduced by the parties in this matter, the plaintiff's claim will succeed, and I will grant the following final orders:
- a. A declaration be and is hereby issued that upon issuance of title No. Manda/Island/47 and Manda/Island/48 to the plaintiff, the suit property was unavailable for re-allocation and registration to the 1st defendant or any other party.
 - b. An order be and is hereby issued directing the Land Registrar, Lamu County, to cancel and/or extinguish the 1st defendant's title No. Lamu/Manda Island/232 to remove any overlap with Manda/Island/47 & 48.
 - c. A declaration is hereby issued stating that title No. Lamu/Manda/232 was issued to the 1st defendant unprocedurally. The same represents an overlap unto title No. Manda/Island/47 & 48



- d. An order be and is hereby issued directing the 3rd defendant to expunge all records relating to file No. Lamu/Manda island/232 and undertake a re-survey of parcel No. Manda/Island/47 and Manda /Island/48 to reinstate their RIM and remove the overlap.
- e. A permanent injunction restraining the defendants, their agents and/or servants, or any other person acting under their authority from carrying out developments, trespassing upon, fencing, selling, and/or in any other way dealing in respect to the suit property to the plaintiff's detriment.
- f. Costs of this suit to the plaintiff.

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

E. K. MAKORI

Judge

In the presence of:

Mr. Nyanje, for the Plaintiff

Ms. Ekiru, for the 2nd and 3rd Defendants

Happy: Court Assistant

