



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, (P), KARANJA & KANTAL, JJA)

CIVIL APPEAL NO. 14 OF 2016

Consolidated with

CIVIL APPEAL NO. 32 OF 2016

BETWEEN

ESTATE SONRISA LTD1ST APPELLANT

ALI KHAN ALI MUSES2ND APPELLANT

AND

SAMUEL KAMAU MACHARIA.....1ST RESPONDENT

LAND REGISTRAR, KWALE.....2ND RESPONDENT

FIDELITY COMMERCIAL BANK LTD.....3RD RESPONDENT

(Being an appeal against the Judgment and Decree of the Environment and Land Court in Mombasa (S. Mukunya, J.) dated 13th October, 2014 in Mombasa ELC No. 30 of 2014)

JUDGMENT OF THE COURT

The two appeals before us, Civil Appeal Nos. 14 and 32 of 2016 were consolidated and heard together. They arise from the decision of the Environment and Land Court (Mukunya, J) where the main issues were correctly framed by the learned Judge as follows;

“....firstly who is the legal owner of Land Parcel Kwale/Galu Kinondo/50 also referred to as land parcel Galu/Kinondo/50 and secondly, whether the owner of Kwale/Galu Kinondo/48 has encroached on plot no. 50 aforesaid”.

The dispute in Civil Appeal No. 14 of 2016 is essentially between Estate Sonrisa Limited, the 1st appellant and Samuel Kamau Macharia, the 1st respondent over the size of two adjacent beach plots, **Galu/Kinondo/50**, (the suit land) registered in the name of the 1st respondent and **Kwale/Kinondo/48**, belonging to the 1st appellant. It was contended that **Kwale/Kinondo/48** had encroached on the suit land.

In Civil Appeal No. 32 of 2016, the 1st respondent claimed that Ali Khan Ali Muses, the 2nd appellant, fraudulently obtained registration as a proprietor of the suit land while the former still held the original title to it.

The 1st respondent instituted an action against the appellants in the Environment and Land Court for an order of permanent mandatory injunction to restrain the appellants from encroaching, trespassing, developing, alienating, selling, transferring or in any other way interfering or dealing with the suit land; a declaration that he is the *bona fide* and legal owner of the suit land; an order to evict the appellants from the suit land; the cancellation of the title held by the 2nd appellant; an order directing the Land Registrar, Kwale to produce the parcel file and all records pertaining to the suit land and; finally, an order to the Land Registrar, Kwale to amend all entries made in register of the suit land to the detriment of the 1st respondent by reinstating him as the sole owner of the suit land.

In its defence, the 1st appellant maintained that, although **Kwale/Kinondo/48** borders the suit land, its boundary did not encroach on the suit land; and that the boundary wall between the two properties was erected along the correct beacons, a fact, it said was confirmed by the

District Surveyor, Kwale.

For his part, the 2nd appellant explained how in the month of April, 2007 he learnt of the sale of the suit land and instructed a firm of advocates, M/s Atkinson Cleasby & Satchu Advocates to act for him in the sale transaction while the firm of Oddiaga & Co Advocates acted for the seller; that a sale agreement was executed on 18th April, 2007, after which he paid a consideration of Kshs. 9,000,000.00 and the seller executed a transfer to him; that thereafter, he paid stamp duty, registration fee and the land was then registered in his name; that the title deed was finally issued to him after the previous one was surrendered by the seller.

The 1st respondent's testimony that he was the duly registered owner of the suit property, having purchased it in 1981 was supported by that of Mwaniki Gachoka, an advocate who had acted for him in a suit, Nairobi High Court Civil Case No. 528 of 1998, where Daima Bank Limited had sought to sell the suit land in exercise of its statutory power of sale when the former defaulted in the repayment of a loan facility amounting to Kshs. 7,000,000; and that the dispute was eventually settled and the charge discharged. He confirmed that he personally collected both the original title deed and the discharge from the bank and maintained that in the circumstances, the suit land has all along belonged to the 1st respondent.

Willis Sikasa, a professional land surveyor, who testified for the 1st respondent stated that, upon carrying out the survey on the two parcels with a view to establishing their sizes on the strength of the area indicated in the title deeds, he came to the conclusion that **Kwale/Galu/Kinondo 48** had encroached upon the suit land; that the size of **Kwale/Galu/Kinondo 48** ought to be 0.9 hectares as reflected on the title deed and not 1.9 hectares as it existed on the ground.

In response by way of oral evidence, the 1st appellant, through Ms E. Iwomna Strzelecka, its Director conceded that the suit land neighbours **Kwale/Galu Kinondo/48**; that there is a brick wall separating the two parcels; that in building the wall, the 1st appellant was guided by survey maps; that subsequently she submitted to NEMA the drawings for the construction of the wall which were approved; that she was also shown the existing beacons by a Mr Nyongesa, a Government surveyor before the construction of the wall commenced; and that, as such there was no encroachment on the suit land. Herbert Mboya Ndolo, also a Surveyor, was called by the 1st appellant. He testified that from his survey of **Kwale/Galu Kinondo/48**, he concluded that it was 1.9 hectares and not 0.9 hectares as reflected in the documents held and produced in respect of that parcel. It was admitted, however, that the survey was conducted in the absence of the owner of the suit land. The witness also told the court that all the plots in the area had discrepancies as regards the exact size.

The 2nd appellant's case was that he purchased the suit land from Joseph Mwangi Nderitu of ID Card NO. 6545273. They executed an agreement on 18th April, 2007 after agreeing on the purchase price of Kshs. 9,000,000. This was paid by two cheques of Kshs. 900,000 on 14th April, 2007 and Kshs. 8,100,000 on 18th April, 2007 to Stephen Oddiaga, the seller's advocate. After the stamp duty was paid, a transfer was registered in Kwale Lands office on 23rd May, 2007. According to the 2nd respondent, he conducted a search and was satisfied that the suit land was free of any encumbrance. He proceeded to charge it to Fidelity Bank Limited. On the property, he put up a structure whose value he gave as Kshs. 240,000,000. He told the court that in the year 2008, he had problems with one Chris Kirubi who claimed that he had encroached on his land, **Kwale/Galu Kinondo/47**; that Mombasa HCCC 205 of 2008 was filed in respect of that dispute, which suit was still pending at the time the case giving rise to this appeal was being heard.

For these reasons, the 2nd appellant argued that his title was unimpeachable. The Attorney General, representing the Land Registrar, Kwale, called Charles Kipkurui Ngetich, the District Land Registrar, Kwale, who is an advocate by profession whose evidence was to the effect that there were two transfers, with regard to the suit land for 28th February, 1975 from the original owner Bakari Mohammad to Peter Nganga Kamande and Wilson Burugu Gitau jointly. The second transfer involved one of the last two joint owners; from Peter Nganga Kamande to Samuel Kamau Macharia (the 1st respondent), in respect of which a stamp duty of 450 pounds was paid and an application for Land Control Consent granted by Kwale Land Control Board. He told the court that the suit land measured 1.7 hectares.

The Land Registrar also stated that there was a parallel title in the name of the 2nd appellant over the same suit land but this time described as **Kwale/Galu Kinondo/50** as opposed **Galu/Kinondo/50**, the suit land. The title in respect of the former was granted on 23rd May, 2007 by a Registrar called Mary Kaai. On account of the signature on the title, he suspected the title to be a forgery; that as Land Registrars, they were conversant and familiar with each other's signatures. His other suspicion on the title was the obsolete stationary on which the certificate of title was printed; that these were last used in 2002; that there was no transfer documents or application for the Land Control Board's consent or the consent itself; that there was no valuation requisition form; and finally, that the stamp duty receipt was not signed by Mary Kaai as was the requirement.

In conclusion, he explained away the existence of two titles to common and rampant cases of fraud in the land registry at Kwale by fraudsters who worked in collusion with Land Registrars and clerks; that during the cleanup of Land Registry in Kwale in the tenure of Mrs. Charity Ngilu, the Cabinet Secretary for Lands, 1,574 Green cards were found hidden in various places in the registry at Kwale alone; and that due to the fraud, there were instances where one parcel would have upto three different title deeds held by three different persons.

Regarding the claims by the 1st respondent that the 1st appellant's land had encroached on the suit land, the Land Registrar categorically stated that the 1st respondent was the legally registered owner of the suit land and that the search certificate and the white card for **Galu/Kinondo/48** confirm it to comprise 0.9 hectares which is also the same acreage in map sheet No. 9.

He summarized the history of its ownership and hierarchy of transactions as follows:

1. On 21st May, 1974 the land was allocated to Bakari Mohamed Mwatele;
2. On 28th February, 1975 Bakari Mohamed Mwatele sold the land to Peter Nganga Kamande and Wilson Burugu Gitau; and

3. On 20th May 1981 Peter Nganga Kamande sold to Samuel Kamau Macharia, the 1st respondent.

Pursuant to Court summons, he presented the parcel file of the suit land to the trial court. The contents of the file was in support of his evidence.

Answering the first of the two questions he had posed and which we have set out at the beginning of this judgment as to the ownership of the suit land, the learned Judge accepted the testimony of Land Registrar Kwale, Charles Kipkurui Ngetich to the effect that the title the 2nd appellant held was a forgery; that, as a result, the transfer from Joseph Mwangi Nderitu to the 2nd appellant could not be valid in the absence of the former's correct identity card number, P.I.N. number and photographs. According to the Judge, Joseph Mwangi Nderitu did not wish to expose his true identity because he knew he had committed a fraud; that that would explain why there was no Green card in the parcel file; that as a matter of fact, the Land Registrar explained that cases of fraud committed with the help of Land Registry staff who would systematically pluck out the green cards from the parcel file was widespread; and that in the same fashion, the green card of the suit land was plucked from the parcel file. The Judge believed that the green card in respect of the suit land was plucked out to facilitate a fraud; to conceal the chronological order of the entries in order to avoid trail of previous entries.

Ultimately, on the competing claims over the ownership of the suit land, the Judge concluded;

“There cannot be any question that the plaintiff was legitimately registered as the owner of Galu/Kinondo/50 after purchase from a previous owner Peter Nganga Kamande. His title has always been there. The Kwale District Land Registry could not at all issue another title to the 1st defendant for Galu/Kinondo/50 as no such land was available for registration without the consent, permission, authority and transfer by the plaintiff plus the consent from the relevant Land Control Board thereof.....

As far as the 1st defendant is concerned, I find that his title to Kwale/Galu Kinondo/50 is a fraud. A fraud he was either privy to or one he should have detected and avoided. I find that his purchase of the said land was not *bona fide*. He entered into an agreement for sale whose terms he never complied with. He had an advocate assisting him. He must have been well advised to follow the agreement. If he was not properly advised, then his advocate failed him. He cannot blame the plaintiff for his lack of diligence in the purchase of the suit land. He has no title to Kwale/Galu Kinondo/50. The land was not available when he allegedly bought it. It had a legitimate owner Samuel Kamau Macharia”.

On the claims of encroachment by Kwale/Galu/Kinondo/48 upon the suit land, the learned Judge expressed the view that;

“[22] The evidence that was adduced before me showed that land parcel Galu/Kinondo/50 comprises of 1.7 hectares. It was also proved to me by documents availed that Kwale/Galu/Kinondo 48 is 0.9 hectares. There was an attempt to say that Kwale/Galu/Kinondo/48 is 1.9 hectares according to Registry Index Map. No such evidence was availed to court at all. In fact, all documents produced showed the said land to be 0.9 hectares. I find as a fact that land parcel Kwale/Galu Kinondo/48 is 0.9 hectares. The beacons between land parcels Galu/Kinondo/50 and Kwale/Galu Kinondo/48 should be fixed by a surveyor as per the Land Act taking into account the area shown on the respective title deeds. ...The survey fees shall be paid by the owners of the said properties equally”.

Any party found to have encroached on the suit land was directed in the decree to vacate or face demolition within sixty days. Because the Judge found the Land Registrar who testified before him at the trial helpful, he exonerated the him (the 2nd respondent) from any blame.

Aggrieved by this determination, the two appellants now bring these consolidated appeals on the following condensed grounds:

(1) That the Judge erred in attaching undue weight on the parcel file for the suit land and made an adverse finding against the appellant based on it when it was neither in the list of documents of any of the parties nor supplied to them in advance to peruse; that only the Land Registrar and the Judge had the opportunity to peruse the parcel file; that the appellants were denied a chance to preview the parcel file and to cross-examine the Registrar on its contents;

(2) The Judge failed to evaluate the evidence presented to him and based his decision on extraneous matters; that instead of inquiring into the absence of a sale agreement between the 1st respondent and the person who allegedly sold the suit land to him, the learned Judge was consumed in discrediting the agreement between the 2nd appellant and Joseph Mwangi Nderitu, thereby erroneously shifting the burden of proof to the 2nd appellant; that it was curious that the 1st respondent could not point out who between Professor Munoru and Peter Ng'ang'a Kamande sold the suit land to him; and that Peter Ng'ang'a Kamande and Prof. Munoru were never called to testify and to confirm the amount paid as consideration for the suit property.

Still on this ground, the learned Judge was faulted for ignoring relevant documents and for erroneously holding that the 2nd appellant did not conduct due diligence, yet it was apparent from the evidence that;

(i) Joseph Mwangi Nderitu who sold the suit property to the 2nd appellant had a title deed issued as far back as August, 1996.

(ii) The 2nd appellant conducted a search on 16th April, 2007.

(iii) The 2nd appellant did two further searches on 23 July 2007 & 25th August 2008.

Further it was submitted that there was no analysis of the Registrar's misleading evidence to the effect that no consent of the Land Control

Board was sought and obtained, while in truth the consent was obtained. In addition, despite the admission by the Land Registrar that fraud could only have been committed with the help of his own officers, the Judge declined to make any adverse finding against the Registrar or his officers. Instead, the Judge ruled that the current Registrar had no interest in the matter and would have no reason to lie.

The 1st appellant, for its part, contended that the Judge failed to consider that there was an error on the 1st appellant's title with regard to the size of **Kwale/Galu/Kinondo/48**; that the Judge heavily relied on the wrong acreage contained in 1st appellant's certificate of title; that this error on the acreage was acknowledged by the Ministry of Lands in their letter dated 15th May, 2013 where the discrepancy was confirmed and the 1st appellant assured that the Ministry was in the process of rectifying it by reconciling the anomalies in the acreage on the ground and on title documents.

Despite the obvious discrepancy aforesaid, the 1st appellant faulted the Judge for proceeding to direct the 2nd respondent to fix the boundaries of the two properties **"taking into consideration the acreage shown in the respective titles"**.

According to the 1st appellant, this order was in excess of the Judge's jurisdiction, in that under **sections 21(2) and 21(4)** of the Registered Land Act, (repealed) and also under **section 18** of the Land Registration Act, 2012, read together, expressly vests exclusively in the Registrar of Lands the power to determine the actual position of disputed boundaries without being directed by any person on how to do it, as was confirmed in the case of **Lawrence Kairu Nyambura V. Symon Kabugi Kinyuru** (2015) eKLR. In short, it was submitted, by directing the Registrar to fix the boundaries in accordance with the acreage contained on the respective titles, the learned Judge assumed a jurisdiction reserved for the Registrar.

As a result of that misdirection, the learned Judge went further to make irregular orders, that, if encroachment is confirmed after the fixing of the boundaries, the encroaching party would have 60 days to demolish the encroaching structures, yet under the law, an aggrieved party following the fixing of a boundary by the Registrar has the remedy of referring the matter further to the court.

Responding to the appellants' submissions, the 1st respondent maintained that it was not denied, from the original title and survey plan that the acreage of title **No. Kwale/Galu Kinondo/48** is 0.90 hectares; that if indeed there was an error in the title, the 1st appellant failed to seek any remedy to correct or rectify the alleged error by way of counter-claim, neither did it present evidence during trial by way of re-survey map of title **No. Kwale/Galu Kinondo/48** to buttress its claim that the acreage reflected on the certificate of title, on the subsequent lease, green card, and on application and approval for change of user was different from the actual acreage on the ground; that even the charge documents to Fidelity Commercial Bank reflected 0.90 hectares; that the 1st appellant's application and plan for change of user described title **No. Kwale/Galu Kinondo/48** as being rectangular in shape and measuring 0.9 hectares.

The 1st respondent further submitted that in view of the remedies sought in the plaint under relief (g), where an order was sought directing the Land Registrar, Kwale to produce the parcel file and all records pertaining to the suit land, the Judge accordingly directed the Land Registrar to ascertain and fix the beacons in order to resolve the extent of the encroachment into 1st respondent's land.

The combined effect of the 2nd respondent's submissions is that the parcel file of the suit land was produced openly in court pursuant to summons following the 1st respondent's notice to produce; that sufficient time was extended to parties and indeed the Land Registrar was cross-examined on the documents contained in that file.

Regarding the 2nd appellant's claim to the suit land, the 2nd respondent submitted that he had failed to conduct due diligence on the suit land before committing himself to purchase it; that he failed to bring the purported vendor, Joseph Mwangi Nderitu to testify; that from the information obtained from the Registrar of Persons, the identity card number of the identification card which Joseph Ndeirtu Mwangi had used in the transaction belonged to someone else, Sabastian Onwonga Mogire; that this information was disclosed in open court and was neither challenged nor rebutted; that the transaction between the 2nd appellant and Joseph Mwangi Nderitu, including the transfer, the basis upon which the title was issued, was fraudulent.

On the size of **Kwale Galu/Kinondo/48** the 2nd respondent maintained that there was ample evidence that the property measured 0.9 hectares. It is that measurement that is contained in the 1st appellant's title and all other related documents.

On whether the Judge had jurisdiction to order for the fixing of boundary, it was contended that the matter was never canvassed before the Judge; that in any case, the Judge did not make any final decision regarding the boundary; that based on the evidence, especially on the status of the boundaries in the area, it was expedient and proper for the Judge to invite the affected parties and officials of Government, including the Surveyor to identify the beacons for both properties.

According to the provisions of **Rule 29(1)** of the Court of Appeal Rules, and from a long line of judicial decisions, we, as a first appellate court over the decision in question are expected, indeed enjoined to re-assess the entire evidence brought at the trial and make our own independent findings. If the finding of the trial court is supported by evidence and the law, then we cannot interfere with it. However, if the conclusion is erroneous, and is not supported by the evidence and the law, we are entitled to interfere with and reverse the determination. This is so because an appeal from the High Court to this Court is always by way of a retrial, hence we are not bound necessarily to follow the findings of the trial Judge. See **Peters -V- Sunday Post Ltd** (1958) EA 424, **Selle and Another V. Associated Motor Boat Co. Ltd & Others** (1968) EA 123 and **Mwangi V. Wambugu** (1984) KLR 453.

Bearing in mind these strictures, we turn our attention to the two questions posed and answered by the learned Judge; who is the legal owner of **Land Parcel Kwale/Galu Kinondo/50** or **Land Parcel Galu/Kinondo/50** and secondly, whether land parcel **Kwale/Galu Kinondo/48** has encroached on land parcel **Kwale/Galu Kinondo/50**.

The uncontested facts are that the 1st respondent was registered as the proprietor of the suit land and issued with the Land Certificate under

the Registered Land Act on 21st May, 1981. The only thing he did with the parcel after nearly 15 years on 6th February, 1996 was to charge it to Daima Bank Limited (in Liquidation) for a loan of Kshs. 7,000,000. After settling the loan, his efforts to register a discharge of charge was frustrated by the unavailability of the parcel file in respect of the suit land. On the suit land, he discovered that, not only was there encroachment by the 1st appellant but that the 2nd appellant had also occupied the entire parcel save for the portion encroached by the 1st appellant.

It is common factor too that the 2nd appellant had paid a man called Joseph Mwangi Nderitu on 18th April, 2007 for that very property. This was 26 years after the 1st respondent had acquired it.

In the plaint filed against the two appellants, the 1st respondent, in the main, prayed for a declaration that he is the lawful registered owner of the suit land and that the appellants had no colour of right to occupy any portion thereof. That being the 1st respondent's case, the burden was on him to prove it on a preponderance of the evidence.

Up to the point the suit land was being registered in 1st respondent's name there was distinctive history tracing the original ownership to 21st May, 1974 when it was allocated to Bakari Mohamed Mwatele, who on 28th February, 1975 sold it to Peter Nganga Kamande and Wilson Burugu Gitau. On 5th May, 1980 Wilson Burugu Gitau transferred his undivided share of the suit land by way of a gift to his co-owner, Peter Nganga Kamande absolutely. That explains why on 20th May, 1981 only Peter Nganga Kamande transferred, after selling, the suit land to the 1st respondent at a consideration. The transaction was witnessed by Prof. G.G.S. Munoru of Monoru and Njugi advocates. It is not correct, as claimed by the 2nd appellant that Prof. Munoru sold the suit land to the 1st respondent.

This history was presented on behalf of the 2nd respondent by the District Land Registrar, Kwale, Charles Kipkurui Ngetich, who further confirmed that all the transfers since 1975 to the one of 1981 to the 1st respondent were done procedurally and in accordance with the law; that in each instance the requisite land control board consent was obtained, stamp duty and purchase price paid.

At so me point in the course of his testimony, the Land Registrar was stood down upon application by counsel for the 2nd appellant to enable counsel obtain further instructions from the 2nd appellant. The court ordered the Land Registrar to avail the parcel file of the suit land on the resumed hearing date. The file was presented and all counsel cross-examined the Land Registrar on its contents. Again, it is incorrect, as alleged by the 2nd appellant that the Judge attached undue weight on the parcel file which was neither in the list of documents of any of the parties nor supplied to them in advance to peruse and preview its contents. In any case, the contents of the parcel file merely buttressed the earlier testimony of the Land Registrar. It is also not lost on us that the 1st respondent actually prayed in his plaint that;

“Land Registrar, Kwale to produce the parcel file and all records pertaining to the suit land”.

The production of the parcel file before the trial court, for these reasons, was not an ambush.

What can we say about the second title held by the 2nd appellant? We have already observed that the second title came on the scene nearly 26 years after the 1st respondent's title had been issued. According to the 2nd appellant and from the agreement for sale between him and Joseph Mwangi Nderitu, the former paid Kshs. 9,000,000 to the latter as consideration for the suit property. The title deed was then issued in favour of the 2nd appellant on 23rd April, 2007. From a copy of the title deed presented in evidence, it is claimed that before this transfer, the title deed had been issued to Joseph Mwangi Nderitu on 9th August, 1996. That transaction is reflected as the entry No. 10. We have not had the benefit of discerning the trail of transactions prior entry No. 10. The 2nd appellant produced copies of a transfer, letter of consent of the Land Control Board and search certificate as confirmation that he followed the due process. However, from his evidence, the Land Registrar contradicted that evidence contending that, although the 2nd appellant's title was registered, he believed the signature of the Registrar on it was forged.

He said;

“This title was signed on 23rd May, 2007 by one Mary Kaai. She used to be the Registrar in Kwale. I suspect the title to be a forgery. Signature of Mary Kaai is too long.....

The reason why Muses' (the 2nd appellant) is a forgery you look at the features; signature of Registrar and handwriting of Assistant Registrars.....I am not a handwriting expert but as a Registrar I am familiar to (sic) signatures of other Registrars.”

Subjecting this testimony along with the other relevant evidence to the standard of proof in a civil case, we are persuaded that the witness was able to distinguish the signatures of his colleagues from imitations of those signatures.

But that was not all. The witness further told the court below that the 2nd appellant's documents did not include essential documents like a transfer, application for Land Board Control consent, letter of consent and valuation requisition form. The coloured photographs of the parties to the sale, their PIN and identity card details were also not provided. Under **section 110** of the repealed Registered Land Act it was mandatory for a person executing an instrument of disposition of land, a lease or a charge to appear before the Registrar for the purpose of establishing or verification of his identity. For this reason Form R.L.1 in the Third Schedule to the Act required, not only the coloured photographs and PIN details of the transacting parties but also that the person attesting the signatures (that is, the Registrar) to authenticate the coloured passport size photographs, National ID Numbers and Tax PIN Numbers. It was in fact a term of the agreement for sale that the vendor would deliver these documents to the purchaser ten days after the execution of the agreement. From the evidence, they were not delivered.

But of significance, the witness was categorical that in the history of the suit land between 1974 to 1981 and beyond, Joseph Mwangi Nderitu did not feature at all in his records. On 9th August, 1996 when he was alleged to have been issued with a title deed, the suit land was already vested in the 1st appellant, who had charged it on 6th March, 1996 to Daima Bank Limited for a loan of Kshs. 7,000,000. This was noted in the encumbrance section of the register and land certificate reflected the transaction.

In other words, according to the records held in Kwale land registry, at no point did Joseph Mwangi Nderitu own the suit land. The documents presented by the 2nd appellant at the trial suggesting that Joseph Mwangi Nderitu had transferred the suit land to him were forgeries. Despite the fact that Joseph Mwangi Nderitu was the most critical link in unraveling the confusion arising from the existence of two titles over the same land, the 2nd appellant found it superfluous and categorically stated that he did not wish to call him as a witness, yet his case depended entirely on this Joseph Mwangi Nderitu.

Another significant aspect of this dispute was the identity of Joseph Mwangi Nderitu. It was the evidence of the 2nd appellant that Joseph Mwangi Nderitu provided his national identity card whose number was 6545273 at the stage of execution of the agreement. The Judge directed, upon considering the notice to produce filed by the 1st respondent, that;

“The notice to produce when issued means that the parties to whom they are issued have a choice to produce the documents. If they don’t produce them then the party asking for the same can produce copies of those documents without any objection...Parties herein can elect to produce the documents if they so wish. However, I give leave to any party herein to bring the particulars of the two vendors in this case, that is the vendor to the plaintiff of Galu/Kinondo/50 and the vendor to the 1st defendant, one Joseph Mwangi Nderitu identity 6545273 of P.O Box 3421 Nairobi”

Pursuant to the last highlighted part of this order, the 1st respondent presented a report from the Registrar of Persons which showed that identity card No. 6545273 belonged to Sebastian Onwonga Mogire and not Joseph Mwangi Nderitu. In overruling the objection by the 2nd appellant’s counsel regarding this revelation, the Judge stated that he had given opportunity to the parties to bring relevant information on the holder of identity card No. 6545273; that;

“This evidence is open to challenge by the other parties who have not given evidence. The door is not closed on them to say whether or not Joseph Mwangi Nderitu....is the holder of identity card No. 6545273. This information is crucial to this case”.

The 2nd appellant admitted that although he had been shown the report from the Registrar of Persons he had not taken steps to authenticate or controvert the information on the report. He also conceded that he **“did not do a search on the person who sold the land”** to him.

We observe, for our part, that the speed at which the transaction was concluded smacks of corruption and suspicion. The agreement for sale was executed on 18th April, 2007, the full purchase price and stamp duty paid on the same day, transfer signed and lodged the following day and on 23rd April, 2007, five days from the date of execution of the agreement, the title deed was issued!

We have to state here that there was evidence that fraud was a common phenomenon at the land registry at Kwale until the reforms introduced by the former Cabinet Secretary for Lands Mrs. Charity Ngilu. For instance, the 1st respondent recounted the difficulty he encountered in tracing the parcel file and other records in respect of the suit land to register the discharge of charge. Indeed, it was this difficulty that led to his discovery of the existence of a second title deed. The green card for the suit land had been plucked out and, in his testimony, the Land Registrar told the court that plucking out green cards from the parcel files was rife; and that at one point in the course of the aforementioned land registry reforms they came across 1574 green cards hidden in various places. He summarized the situation before these reforms as follows;

“In Kwale there was a lot of fraud. Fraudsters colluded with land registrars and clerks. They used to pluck out green cards...Galu Kinondu is leading for (sic) fraud in South Coast....There is massive fraud in Kwale. Some titles has (sic) over 3 titles”.

Based on the foregoing facts, the witness concluded saying that;

“I state that Mr. Macharia is the legal owner of this title. According to my records Mr. Macharia’s is the only correct title. The signature belongs to the regime of Hon. Kamoti who was the Registrar. I have familiarized myself with all the Registrars (sic)”.

Turning to the 2nd appellant’s title and after listing the documents that were missing from the 2nd appellant’s transaction, the witness said in conclusion that;

“These are the requirements upto now. Any documents missing among any of these documents is supposed to be rejected by the registry. If I was the Registrar, I would reject. There is no identity number, pin, and not conform with documents (sic)

I have no records to show Mr. Nderitu owned the property...From the records I have I’m only able to to pin point a genuine and false title”.

We conclude from these facts that the transaction involving the sale of the suit land to the 2nd appellant was one such fraudulent affair. We shall return shortly to consider the issue of fraud.

It is abundantly apparent at this point that there were two documents of title vesting the ownership of one property, the suit land, to two different people. Applying the law to the facts and circumstances of this dispute, we now turn to determine, who between the 2nd appellant and the 1st respondent is entitled to the suit land.

As we consider that question, we bear in mind that the two documents of title held by the 1st respondent and the 2nd appellant were issued respectively in 1981 and 2007 before the repeal in 2012 of the Registered Land Act by the Land Registration Act. By **section 27** of the former, the registration of the 1st respondent as the proprietor of the suit land on 20th May, 1981, way before the purported second registration of the 2nd appellant on 16th April, 2007, vested in the former the absolute ownership of that land and his rights over it could not be challenged except on the grounds specifically provided for in the aforesaid Act.

The 1st respondent holds a land certificate issued under the Registered Land Act, while the 2nd appellant holds a title deed, also said to be issued under that Act. Both documents are recognised under **section 32(1)** of the Act, which together with **section 31** are instructive. In the former, the Registrar can only issue a title deed or certificate of lease where none subsists. The title deed or certificate of lease has to be in the prescribed form showing all subsisting entries in the register affecting that land or lease.

“32(1)...

Provided that –

(i) only one title deed or certificate shall be issued in respect of each parcel of land or lease;

(ii)

(1) A title deed or certificate of lease shall be only *prima facie* evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register.”

The existence of a title deed *per se* only raises a rebuttable presumption of ownership of land. The existence of two documents of title in respect of one parcel of land is not only highly irregular and anomalous but is also forbidden by law.

The fact that the 1st respondent’s title was first in time, the burden was upon the 2nd appellant to demonstrate that before he committed himself, he was satisfied from the register that Joseph Mwangi Nderitu, who was in the process of selling the suit land to him had the capacity as “the registered proprietor” at the time to transact and therefore capable of passing interest in the land to him. It is basic that interests appearing in the register rank in priority according to the order in which the instruments which led to their registration were presented to the registry. See **section 42. (1) of the Registered Land Act. Section 31**, on the other hand is emphatic that the register is the first reference point for a party wishing to purchase a registrable interest from a vendor because it will mirror all currently active registrable interests that affect a particular parcel of land. It states that;

“31. Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition”.

The certificate of official search purportedly issued to the 2nd appellant to the effect that Joseph Mwangi Nderitu was the registered owner of the suit land on 16th April, 2007 is quite suspect in the face of the clear evidence by the Land Registrar, the custodian of the register in that registration district, to the effect that Joseph Mwangi Nderitu had no title that he could lawfully pass to the 2nd appellant. By the provisions of **section 143**, the court is permitted to order;

“143 (1).rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.” (Our Emphasis).

A similar provision was introduced in **section 26** of the Land Registration Act in substantially the same language, except that it adds that the person named as proprietor of the land in a deed or certificate will not be protected by the law if the deed or certificate was obtained through fraud or misrepresentation to which he is proved to be a party; or where the certificate or deed was **“acquired illegally, unprocedurally or through a corrupt scheme”**.

We cannot stress more than we have said that Joseph Mwangi Nderitu had no land or title to transfer to the 2nd appellant; that his (Joseph Mwangi Nderitu) registration, in the first place was obtained by fraud, while the 2nd appellant substantially contributed to the irregular and unlawful registration through his act, neglect or default. Had the 2nd appellant exercised due diligence, we are convinced he would have discovered that Joseph Mwangi Nderitu was a fraudster; that the particulars in the register did not relate to him; and that when he obtained the title deed the 1st respondent was still in possession of the original document of title. We are reminded of the warning in a passage in **Arthi Highway Developers Limited**, Civil Appeal No.246 of 2013, often quoted, where this Court stated that;

"It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a

foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the Land Registration Act, 2012 will have a positive impact for land investors in future.

We have said and it beats repeating that the gusto and dispatch with which the 2nd appellant went about this transaction points to an amalgam of adventurism, greed, and recklessness. For these reasons, all the grounds proffered in the 2nd appellant's appeal must fail.

The dispute between the 1st appellant and the 1st respondent was about the boundaries of their adjoining parcels, **Kwale/Galu Kinondo/48** and **Galu/Kinondo/50**. Basing his claim on the strength of the size indicated in the title deed the 1st respondent insisted that his **Galu/Kinondo/50** measured 1.7 and that the 1st appellant's **Kwale/Galu/Kinondo/48** was 0.9 hectares on the title deed but on the ground measured 1.9 hectares. He drew the inference that the latter had encroached upon the suit land by one hectare.

The 1st appellant, for its part argued that **Kwale/Galu Kinondo/48** was surveyed and after establishing that it measured 1.9 it built a brick wall separating it and that of the suit land; that it did this after being shown the beacons by a Government surveyor; that subsequently, a licensed surveyor also confirmed the acreage as 1.9 hectares and not 0.9 hectares; and that, as such there was no encroachment on the suit land. In the 1st appellant's view, there was an error on its documents of title with regard to the size of the property; and that the Government was in the process of rectifying it to reflect the correct acreage on the ground.

The learned Judge for his part, upon evaluation of the evidence found that the suit land comprised 1.7 hectares while **Galu/Kinondo/48** was 0.9 hectares; that the basis of the 1st appellant's claim that the latter was 1.9 hectares was not proved; and that the Registry Index Map was not produced in evidence. It was on the basis of the conviction that **Kwale/Galu Kinondo/48** had encroached on the suit land that the Judge ordered that the beacons between the suit land and **Kwale/Kinondo/48** be fixed by a surveyor in accordance with the Land Act, "**taking into account the area shown on the respective title deeds**". The 1st appellant having contested the accuracy of the acreage on the documents of title of **Kwale/Kinondo/48** argued that it was erroneous for the Judge to base the survey on the acreage reflected on the very title deed that had a mistake; and that by directing that the boundary be fixed in the manner directed, the Judge, according to the 1st appellant, had exceeded his jurisdiction and assumed the role exclusively reserved for the Land Registrar.

The 1st appellant's case is on two prongs; that the title deed issued to it in respect of the property reflects an incorrect acreage and that the correct acreage was established by a surveyor. On the latter point, it was stated by the 1st appellant's witness that upon acquiring **Kwale/Kinondo/48** a government surveyor, Nyongesa identified the boundary before the commencement of the construction of the perimeter wall. Although Nyongesa was not called to testify, Herbert Mboya Ndolo, another surveyor, told the trial court that he surveyed **Kwale/Kinondo/48** and found it to measure 1.9 hectares and not 0.9 contrary to the documents held by the 1st appellant.

In contrast to the foregoing the 1st respondent's witness, Wilson Sikasa, also a Surveyor, said that upon survey he established the size of the suit land to be 1.7 hectares while **Kwale/Galu Kinondo/48** was 0.9 hectares; and that the latter had encroached on the former by one hectare.

On the second point, the 1st appellant contended that by their own letters, the officials of Ministry of Lands had conceded that there was an error on the title deed to **Kwale/Galu Kinondo/48**; and that steps were being put in place to rectify the error.

It was common factor and an express admission that the title deed and all other documents relating to ownership of **Kwale/Galu Kinondo/48** are in complete agreement that it measures 0.9 hectares. Starting with the original title deed issued in favour of the 1st appellant on 11th February, 1991 and a subsequent certificate of lease of 24th April, 2012 are both explicit on the size as 0.9 hectares. The Planning Brief prepared for the 1st appellant by M.S Saleh, a physical planner for the purpose of proposed change of user similarly confirmed 0.9 hectares as the size. The certificate of official search dated 19th April, 2014 likewise was to the same effect.

Ms. Iwonna Strzelecka, the Director and witness of the 1st appellant confirmed that the valuation prepared for the purpose of obtaining a loan facility from Fidelity Commercial Bank Limited gave the size of her property as 0.9 hectares. Herbert Mboya Ndolo, the surveyor engaged by the 1st appellant conceded that the acreage indicated in Part Development Plan (PDP) of **Kwale/Galu Kinondo/48** was 0.9 hectares. This should suffice as an illustration of the common position that the aforementioned documents leave no doubt as to the size of **Kwale/Galu Kinondo/48**

In any case, as stated earlier, by **section 32 (2)** of the Registered Land Act a title deed is only *prima facie* evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register. The area shown in the title deed is indeed the same one extracted from the register, the details of which was contained in the certificate of official search.

Turning to the survey whose outcome contradicted the size established by the title deed, we first note that the 1st appellant and its surveyor admitted that none of those landowners whose parcels neighbour **Kwale/Galu Kinondo/48** was invited, given notice of or involved in the survey. This was, no doubt, against the letter and spirit of **Division 3** of the Registered Land Act (*Maps, Parcels and Boundaries*) that requires that any alteration of the boundary can only be done with the agreement of every person shown in the register to be affected by such alteration; that where it is intended to ascertain or fix a boundary, a notice has to be issued to the owners and occupiers of the land adjoining the boundary in question of the intention to ascertain and fix the boundaries. The alleged fixing of the boundary of **Kwale/Galu Kinondo/48**, done in violation of the law had no effect on the original boundary of the suit land.

In the same breath, and by the same provisions of the law, the letters written by the District Surveyor, Kwale to the Land Registrar, Kwale, purporting to change acreage of **Kwale/Galu Kinondo/48**, the suit land and a host of other parcels, were without effect. According to some of the letters, it is alleged that the District Surveyor visited **Kwale/Galu Kinondo/48** on 6th April, 2013; that it was in the course of that site visit that he confirmed that, contrary to records held by the Registrar, the area occupied by **Kwale/Galu Kinondo/48** was in fact 1.9 hectares and not 0.9 hectares; and that **Kwale/Galu Kinondo/48** did not encroach the suit land. There is no mention in the letters why it was

necessary to conduct the survey; who had complained? Ms. Iwomna Strzelecka, the Director and 1st appellant's witness appeared perplexed over this question and said in her testimony that;

“ I do not know whether there was a complaint on the acreage...I did not make any complaint on (sic) the land office about acreage. I was not aware of the problem”.

It is not apparent from the evidence whether the owners of the affected parcels of land were involved, but, at least, Ms Iwomna Strzelecka confirmed that the 1st respondent did not attend the exercise. Those letters were not copied to the other land owners.

It was, however, acknowledged by the District Surveyor, Kwale, that if there was any error on the boundary, as suggested in the letters in question, then it was only the surveyor who could rectify it. He was nonetheless emphatic that, from his records, the area occupied by **Kwale/Galu Kinondo/48** was 0.9 hectares, For our part, we observe that some of the letters were not signed and finally, but most significantly they were not produced. They were simply marked for identification (MFI). There was an order that they be produced by the makers. This did not happen, with the result that the contents of those letters have no bearing here.

Even the District Surveyor in his oral testimony confirmed that he was not in a position to authenticate the letters purporting to change acreage of the property; and that he did not have a report of his own.

We conclude this aspect and the last ground of appeal by agreeing, respectfully with the learned Judge that, strictly on the evidence on record **Kwale/Galu Kinondo/48** is 0.9 hectares. What appears to have aggrieved the 1st appellant most was the order that;

“the beacons between land parcels Galu/Kinondo/50 and Kwale/Galu Kinondo/48 should be fixed by a surveyor as per the Land Act taking into account the area shown on the respective title deeds. The survey fees shall be paid by the owners of the said properties equally..... Any party found to have encroached on the other parties' land shall have sixty days to demolish all structures that might have been erected therein and move and vacate therefrom.

Any public path between the said parcels no. 50 and 47 accessing the sea shall not be interfered with or blocked.” (Our emphasis).

We ourselves find nothing untoward with the first sentence of that order. The ascertainment and fixing of boundary in dispute involve three parties, the owners of the affected parcels, the surveyor and the Registrar. Reference to the Land Act must have been a mistake. It is the Land Registration Act that makes provisions relating to the determination of boundaries. Those provisions are found in **sections 16 to 19**. Specifically, for this dispute, the Registrar is empowered, after giving notice to all the affected parties, in this case, the 1st appellant and 1st respondent, indeed as well as any owner whose land adjoins the boundaries in question, and with the assistance of the surveyor, to ascertain and fix the disputed boundaries.

We do not think, as suggested by the 1st appellant, that the learned Judge exceeded his jurisdiction by directing that the beacons between the suit land and **Kwale/Galu Kinondo/48** be fixed by a surveyor **“as per the Land Act, taking into account the area shown on the respective title deeds”**. It must be emphasised that under the Land Registration Act, just like was the case with the repealed Act, the Registrar has wide powers, some *quasi* judicial. Though the learned Judge made reference to title deeds, we ourselves do not think he intended to limit the Registrar to consider only the contents of the title deeds. That is why there was the overarching ride **“as per the Land Act”** which we have explained was meant to be a reference to the Land Registration Act. Under that Act, the Registrar carries out his functions without any restrictions and may rely on any other relevant document and existing records in order to resolve any dispute between landowners. Because a title deed is only *prima facie* evidence of the matters shown therein, the Registrar's investigations, of necessity must encompass all entries in the register, rely on any other relevant document and existing records, conduct proceedings in accordance with **section 14(1)** and cause a survey to be carried out and determine the dispute. With respect, we reiterate that the learned Judge did not restrict the Registrar's discretion in the conduct of an inquiry into the dispute.

The only part of that order that we do not, with respect, agree with is where the Judge directed that **“any party found to have encroached on the other parties land shall have sixty days to demolish all structures that might have been erected therein and move and vacate therefrom”**. By that order, the Judge, as it were, jumped the gun because the Registrar had, first to conduct the proceedings to determine the extent of the parties' respective parcels, and cause to be defined by survey, the precise position of the boundaries in question. By **sections 79(3A), 80, 86 and 91(9)** of the Land Registration Act that decision may be challenged in court. To stress the point, we cite **section 86** which states that:

“If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court, and thereupon the Court shall give its opinion, which shall be binding upon the parties.”

It is only after determining the dispute can parties move to court to challenge it. In **Lawrence Kairu Nyambura V. Symon Kabugi Kinyuru** (2015) eKLR, the Court in allowing the appeal said;

“...the Judge exceeded his jurisdiction by directing the Land Registrar how to draw the boundaries and what acreage to allot to each plot. The order that the Court was enforcing required the Land Registrar to visit the suit parcels of land and determine the boundary dispute in accordance with the provisions of the law”.

The order for demolition was, in the result, premature.

Regarding the cost of survey, we find general consensus that there are discrepancies on the sizes of the plots in the area, which can only be attributed to the state of the register. The 1st appellant and the 1st respondent have not contributed to this situation and therefore should not have been asked to meet the cost of survey. We set aside that order and instead direct the Land Registrar, Kwale, together with the Government Surveyor, Kwale County to determine whether **Kwale/Galu Kinondo/48** has encroached upon the suit land.

From the reasons we have given, we find no merit in the consolidated appeals, except to the extent stated above. They are accordingly dismissed. Parties to bear their own costs of this appeal.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO, (P)

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR