



**Ngome & 10 others v Ndetei & another (Environment & Land Case  
91 of 2021) [2024] KEELC 5449 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5449 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 91 OF 2021**

**AE DENA, J  
JULY 22, 2024**

**BETWEEN**

**STEPHEN MKALLA NGOME ..... 1<sup>ST</sup> PLAINTIFF  
DAVID MBAI MUGWA ..... 2<sup>ND</sup> PLAINTIFF  
JAMES NGYEMA NYOLO ..... 3<sup>RD</sup> PLAINTIFF  
FAITH MUMBI KALISA ..... 4<sup>TH</sup> PLAINTIFF  
KEN KIPRONO RING ..... 5<sup>TH</sup> PLAINTIFF  
STELLA KABIBI WALTER ..... 6<sup>TH</sup> PLAINTIFF  
PATRICK KARANJA WERU (AS ADMINISTRATOR OF THE ESTATE OF  
ESTHER WAMBUI GITAHU) ..... 7<sup>TH</sup> PLAINTIFF  
PAULINE MUTHEMBWA KOTI ..... 8<sup>TH</sup> PLAINTIFF  
WILLIAM MWANGI GATHUMA ..... 9<sup>TH</sup> PLAINTIFF  
MAZERA SAMUEL MWAKUBO ..... 10<sup>TH</sup> PLAINTIFF  
MARTINA MALUKI ..... 11<sup>TH</sup> PLAINTIFF**

**AND**

**AGNES MUTINDI NDETEI ..... 1<sup>ST</sup> DEFENDANT  
ATHMAN JUMA MATAMU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1 At the heart of the dispute before this court is land parcel Kwale/Diani Beach BLK/651 which was subdivided into several other parcels. According to the Plaintiffs, they have at all material times to the



suit been the duly registered owners of the subdivided properties having purchased the same from the 2<sup>nd</sup> Defendant herein at various times. The 1<sup>st</sup> Defendant on the other hand pleads that the suit property was before the alleged fraudulent subdivision registered in her names having acquired it from the Settlement Fund Trustee sometime in the year 1990. Surprisingly, it seems that a dispute with regards to ownership of the property was once litigated upon before the District Land Tribunal and a decision made which the court will address later in this judgement.

2 The subdivisions allegedly owned by the Plaintiffs are listed here below and will herein after be referred to as the suit properties, -

- 1 1<sup>st</sup> Plaintiff- Kwale/Diani Beach Block/1520
- 2 2<sup>nd</sup> Plaintiff-Kwale/Diani Beach Block/1450
- 3 3<sup>rd</sup> Plaintiff-Kwale Diani Beach Block/1703
- 4 4<sup>th</sup> Plaintiff- Kwale/Diani Beach Block/1806
- 5 5<sup>th</sup> Plaintiff-Kwale/Diani Beach Block/1403
- 6 6<sup>th</sup> Plaintiff- Kwale/Diani Beach Block/1807
- 7 7<sup>th</sup> Plaintiff-Kwale/Diani Beach Block/1804
- 8 8<sup>th</sup> Plaintiff-Kwale/Diani Beach Block/1616
- 9 9<sup>th</sup> Plaintiff-Kwale/Diani Beach Block/1524 and 1701
- 10 10<sup>th</sup> Plaintiff-Kwale/Diani Beach Block/1615
- 11 11<sup>th</sup> Plaintiff-Kwale/Diani Beach Block/1805

3 The Plaintiffs state that they took possession of the suit properties and commenced developments thereon after purchase. That sometime in February 2021 the 2<sup>nd</sup> Defendant informed the Plaintiffs that he had received several eviction notices on behalf of the 1<sup>st</sup> Defendant thus giving the Plaintiffs notice to vacate their properties or face eviction. The Plaintiffs maintain that the eviction notices dated 4/1/2021 have been issued in bad faith as they are the owners of the suit properties with no defects in their titles. Further that the 1<sup>st</sup> Defendant is not the registered owner of the suit properties.

4 It is stated that the 1<sup>st</sup> Defendant had previously vide JR Civil Application No 21 Of 2010 Republic Versus Kwale Land Disputes Tribunal & 2 Others Exparte Agnes Mutindi Ndetei filed suit against the Plaintiffs but the same was withdrawn on 13/10/2010. That any claim by the 1<sup>st</sup> Defendant is therefore res judicata. It is stated that the properties claimed by the 1<sup>st</sup> Defendant do not exist and the 1<sup>st</sup> Defendant is barred by limitation.

5 The Plaintiffs pray for judgement against the 1<sup>st</sup> Defendant, nullifying the eviction notices, permanent injunction stopping any evictions of the Plaintiffs and or in manner interfering with their quiet enjoyment of the properties. The prayers are discussed elsewhere in this judgement.

1. A declaration that the eviction notices dated 4/1/2021 are null and void ab initio and the same should be cancelled forthwith.
2. A permanent injunction prohibiting the 1<sup>st</sup> Defendant by herself, servants, agents and or assignees from carrying out the proposed evictions of the Plaintiffs from properties known as Kwale/Diani Beach Block/1520, Kwale/Diani Beach Block/1450, Kwale Diani Beach Block/1703 Kwale/Diani Beach Block/1806, Kwale/Diani Beach Block/1403, Kwale/Diani



Beach Block/1807 ,Kwale/Diani Beach Block/1804 ,Kwale/Diani Beach Block/1616 Kwale/Diani Beach Block/1524 &1701, Kwale/Diani Beach Block/1615 and Kwale/Diani Beach Block/1805.

3. A permanent injunction prohibiting the 1<sup>st</sup> Defendant by herself, agents, servants, employees or any other person from evicting, alienating, encroaching upon, disposing, trespassing or in any manner interfering with the Plaintiffs possession and quiet enjoyment of the suit properties known as Kwale/Diani Beach Block/1520, Kwale/Diani Beach Block/1450, Kwale Diani Beach Block/1703 Kwale/Diani Beach Block/1806, Kwale/Diani Beach Block/1403, Kwale/Diani Beach Block/1807 ,Kwale/Diani Beach Block/1804 ,Kwale/Diani Beach Block/1616 Kwale/Diani Beach Block/1524 &1701, Kwale/Diani Beach Block/1615 and Kwale/Diani Beach Block/1805.
4. A declaration that the 1<sup>st</sup> Defendant claim is res judicata.
5. A declaration that the 1<sup>st</sup> Defendants claim is barred by limitation.
6. Costs of the suit.

### **Defence**

- 6 The 1<sup>st</sup> Defendant's statement of Defence was filed before court on 31/5/2021. The 1<sup>st</sup> Defendant states that the suit properties owned by the Plaintiffs are as a result of an illegal subdivision from plot no Kwale/Diani Beach Block/651. That the said subdivisions have already been revoked and the titles cancelled. The 1<sup>st</sup> Defendant states that she is the rightful owner of the suit property having purchased the same from the government as was held under settlement under the Fund Trustee. That the same was pursuant to a registration on 25/1/1990 at a consideration of Kshs. 500/= . It is averred that after 10 years the 2<sup>nd</sup> Defendant fraudulently changed the title to his name while the 1<sup>st</sup> Defendant was out of the country. That the 2<sup>nd</sup> Defendant procured another title after an illegal subdivision.
- 7 The 1<sup>st</sup> Defendant states that upon the realization that the property was no longer in her names, she went to court where an order revoking the titles was issued and she was reinstated as the owner of the property. That upon her return to the country she found the Plaintiffs had trespassed on the land. That it was upon a visit at the land registry that she established the land had been registered in the name of the 2<sup>nd</sup> Defendant after adoption of a decision by the Land Disputes Tribunal. The 1<sup>st</sup> Defendant states that the Plaintiffs have no capacity to file the instant suit and it should be the 2<sup>nd</sup> Defendant making a claim against her. The 1<sup>st</sup> Defendant prays that the entire claim be dismissed with costs.
- 8 On 13/7/2022 counsel for the 2<sup>nd</sup> Defendant informed court that he entered appearance but had not complied with order 11. He sought for indulgence from fellow Counsels. Court allowed the 2<sup>nd</sup> Defendant to file his defence. I do not seem to be able to trace the same from the court record, however it is noted that the 2<sup>nd</sup> Defendant informed court that he was in support of the Plaintiffs case.

### **Evidence**

- 9 The case was heard on 1/2/23, 3/5/23 and 7/11/23 The Plaintiffs were represented by Ms. Umara and the 1<sup>st</sup> Defendant by Ms. Kimuli while 2<sup>nd</sup> Defendant by Mr. Omolo.
10. PW1 was James Ngyema Nyolo the 3<sup>rd</sup> Plaintiff. He indicated he had authority of his Co-Plaintiffs to swear the verifying affidavit sworn on 25/3/2021 (PEX1). He testified that the 1<sup>st</sup> Defendant was not known to him but he had sued her for issuing eviction notices against the Plaintiffs. The notice indicated that the Plaintiffs were to leave the suit premises within 90 days (PEX 2 is a bundle of eviction



notices). He told the court that all the Plaintiffs are in occupation of the suit property having purchased the same from the 2<sup>nd</sup> Defendant. The witness referred to the sale agreement dated 19/06/2009 (PEX 3) for 590,000/=, title deed processed at Kwale Registrar office, title issued on 17/12/2009 for Kwale/Diani Beach Block/1703 0.0750 Ha approximate and several copies of the Plaintiffs agreements which he produced as PEX 4. It is his testimony that developments have been made on the land after occupation by the Plaintiffs. He added that there was a Judicial Review case which was withdrawn on 13/10/2010 ("PEX 6). It was after the said withdrawal that the eviction notices were issued. The witness asked for grant of the orders sought in the plaint.

11. On cross-examination by Ms. Kimuli the witness testified that at the time of his purchase of the suit property, it was only the 2<sup>nd</sup> Defendant who was in occupation of the same. That he carried out due diligence before the said purchase. He testified that Kwale/Diani Beach/651 no longer exists as the same was subdivided giving rise to the suit properties. He further stated that he was not aware the Plaintiffs' titles had been cancelled. On cross-examination by Mr. Omollo who intimated to court that he was in support of the Plaintiffs' case, the witness testified that the Plaintiffs had never been served with an order cancelling their titles. That the judicial review proceedings had been withdrawn by the 1<sup>st</sup> Defendant.
12. PW2 was Patrick Karanja Weru the administrator of Esther Wambui Gitahi his deceased wife. He told the court that the deceased had bought the land from 2<sup>nd</sup> Defendant and was issued with a title to the property Kwale/Diani 1804 on 15/05/2012. That they then occupied the land and have been living on the same since then. He adopted his witness statement as well as the exhibits produced by PW1.
13. On cross-examination by Ms. Kimuli he testified that his late wife had paid Kshs. 650,000/= for purchase of the property though he could not locate proof of the payment before court. He was not aware that the title was cancelled. On Cross-examination by Mr. Omollo he stated that he was not aware of any orders issued cancelling the title to the suit properties.
14. PW3 Stephen Mkalla Ngome testified that the eviction notice asked them to vacate plot 651 Kwale Diani. That he occupies Kwale Diani Beach Block 1520 having purchased it on 5/01/2006 from 2<sup>nd</sup> Defendant who was then the registered proprietor at 250,000/=. He confirmed that all the Co-Plaintiffs had purchased their portions from the 2<sup>nd</sup> Defendant. That after withdrawal of the Judicial Review case no further documents were served upon the Plaintiffs save for the eviction notices. The witness adopted his witness statement of 24/3/2021 and the exhibits produced by PW1. He prayed that the eviction notice be declared illegal and be cancelled
15. On cross-examination by Ms. Kimuli PW3 indicated that the agreement for purchase of his property was not before court. That he was not aware his property was a subdivision. On cross-examination by Mr. Omollo the witness confirmed that he had been served with an eviction notice by the 1<sup>st</sup> Defendant. Upon re-examination he testified that his title had never been challenged in court and neither had he received notification over the alleged cancellation of the same.
16. The Plaintiffs case was marked as closed.
17. DW1 Agnes Mutindi Ndeti gave evidence on her behalf. She adopted her written statement dated 21/4/2022 and placed reliance on the same as evidence together with her list of documents produced as DEX 1-9 in the order listed in the list of documents dated 21/4/2022. It was her testimony that she acquired plot Kwale/Diani Beach/651 in June 1990 through the Settlement Fund Trustees. That the same was advertised in the dailies and that she applied and after 8 months received an email that she had been offered a plot.



18. The witness stated that she accepted the offer and proceeded to Kwale Land Office where she made all the payments that were required. That later she was issued with a title deed to the property and produced it before court as DEX 2. DW1 further testimony was that she thereafter travelled to USA from 1999-2008. Upon coming back, she visited the land and found there were buildings inside the land. That after conducting a search she found that her name had been deleted and replaced with Athuman Juma Matano. That she thereafter reported the matter to DCI Nairobi.
19. It is her testimony that she produced the title to her property and which led to the cancellation of the rest of the titles and reinstatement of her name as owner. The witness states that her title which she terms as original was never de-gazetted. The 1<sup>st</sup> Defendant stated that she never sold the property to the Plaintiffs and hence their titles should be cancelled.
20. Upon cross-examination by Ms. Umara the witness was referred to a verdict by the District Land Tribunal which she confirmed that she had not appealed against. The witness referred to Land Case No. 2 of 2000 whose judgement was delivered on 16/5/2012. She stated that the judgment was not part of her documents before court. The witness stated that she was aware of the Judicial Review matter and that the same had been withdrawn by her counsel on record by then.
21. In further cross examination she indicated the suit property was reinstated to her by submitting the ruling of the Kwale court to the registrar Kwale who wrote to the Director of Survey and Government of Kenya who considered the ruling and mutated. The witness did not have both the mutation and the DCI report since it was verbal. That the mutation was done on 6/08/2018 but she had no evidence that the Plaintiffs were informed of the same as to her they did not exist. She undertook the mutation because there were multilayered titles on her land. That Athman never appealed the Kwale court decision. On being shown the eviction notice DW1 stated it referred to Kwale/Diani Beach/BLK/651. That she was not aware the Plaintiffs occupied their own land registered in their names which they alleged they had legally purchased from the registered owner. DW1 confirmed she had not produced the advertisement publishing the land for settlement.
22. On Cross-Examination by Mr. Omollo the witness testified that in the year 1990 she was a member of parliament. On being shown her allotment letter dated 14/6/90 she testified it showed the offer as 477 originally which was later cancelled by the Director to 651. That the plot was in Diani Settlement Scheme though she did not know the difference between Diani Settlement Scheme and Diani Beach Block. She was not able to tell how property in a settlement scheme ended up being Diani Beach Block. She indicated that she was not aware that titles under settlement scheme are endorsed as such. She reiterated the contents of paragraph 6 and 7. That she has never filed any proceedings against the Plaintiffs neither had she obtained any court orders cancelling the Plaintiffs' titles.
23. On re-examination the witness testified that upon the offer and acceptance the registrar Kwale issued to her a title which was the one in court Kwale Diani Beach BLK/651. That the process of reverting the land to her was an internal administrative process.
24. The 2<sup>nd</sup> Defendants case was closed at this point after counsel for the 2<sup>nd</sup> defendant Mr. Omollo informed the court that the 2<sup>nd</sup> defendant was in support of the Plaintiff's case.
25. DW2 was Susan Mueni Land Registrar Kwale gave a brief history of Kwale/Diani Beach/651. It was her testimony that the plot was initially registered to SFT in 1990, transferred to DW1 Agnes Mutindi Ndeti on 19/12/90 who was the 1<sup>st</sup> allottee. That the current registered proprietor was Agnes Mutindi Ndeti. That the records at the land registry show that in the year 2000 there was an appeal by Athman Juma Matano (Athman) to the Tribunal (District Land Tribunal chaired by the DO). He challenged the allocation claiming that the land belongs to his father and that he Athman resided



thereon. The Tribunal determined that Athman Juma Matano be awarded the land and pursuant to this Agnes Ndetei's title was cancelled and title was issued to Athman on 20/11/2000. In 2003 there was subdivision in two portions Kwale/Diani Beach BLK/1403 and 1404 but these were subsequently cancelled and land reverted to Agnes on 5/3/2015. That only two subdivisions were created then.

26. On cross-Examination by Ms. Umara the land registrar testified that her records indicated the Tribunal award was adopted in court thus issuance of Athman's title. The witness averred that she was not aware whether there was an appeal or a case in court that was adopted. The witness further stated that she was not aware why Athman's title was cancelled and she did not have any court order directing Land Registrar to cancel Athman's title. She further did not have any correspondence informing Athman of the intention to cancel his title which cancellation was done in 2015. The witness testified that under the current regime the Land Registrar can cancel title if there is fraud unlike in the old regime.
27. On cross-examination by Mr. Omollo the witness confirmed cancellation of Athman's title led to cancellation of the subdivision. She was not sure how many subdivisions were cancelled. Upon re-examination she testified that in the year 2000 the 1<sup>st</sup> Defendant's title was cancelled there was no correspondence to the 1<sup>st</sup> Defendant about it. The 1<sup>st</sup> Defendant's case was marked as closed.

### Submissions

28. The Plaintiffs' submissions were filed on 25/1/2024. The following issues for determination were singled out; -
  1. Whether the court issued an award in Kwale Land Award Case No 2 of 2000
  2. Whether the 1<sup>st</sup> Defendant's claim is res judicata.
  3. Whether the 1<sup>st</sup> Defendant's claim is barred by limitation.
  4. Whether the Land Registrar Kwale has authority to cancel the Plaintiffs title.
  5. Whether the Plaintiffs were innocent purchasers.
  6. Whether the Plaintiffs are entitled to the reliefs sought.
29. On whether there was an award issued, it is submitted that the 2<sup>nd</sup> Defendant objected to the allotment of Kwale/Diani Beach Block/651 vide an objection filed at the then Msambweni Lands Dispute Tribunal in 2000. That after hearing of the same the land was awarded the 2<sup>nd</sup> Defendant and which order was adopted in Kwale Land Dispute Case No. 2 of 2000. The said decision has never been appealed against save for the filing of Mombasa JR No 21 of 2010 which application was withdrawn by consent on 13/10/2010. That the award by the tribunal therefore remains in place and valid to date.
30. On the doctrine of res judicata it is submitted that having filed the judicial review case before the court in Mombasa, the 1<sup>st</sup> Defendant cannot yet again seek for any orders from this court pursuant to the provisions of Section 7 of the *Civil Procedure Act*. It was further submitted that the 1<sup>st</sup> Defendant's claim is barred by limitation as 12 years have already lapsed since her rights allegedly accrued over the suit property. It is stated that the 1<sup>st</sup> Defendant's interest over the suit property was extinguished in the year 2000 when the property was registered in the names of the 2<sup>nd</sup> Defendant and further subdivided into the portions owned and occupied by the Plaintiffs.
31. The Plaintiffs submitted on being innocent purchasers for value of the suit properties as outlined in the plaint. They aver that at the time of purchase of the properties, there were no encumbrances on the same. Reliance is placed in the holding by the Ugandan court in *Katende V Haridas & Co Ltd* [2008] 2 EA on the doctrine of innocent purchaser for value. The Plaintiffs further rely on section 26[1] of



the Land Registration Act 2012. It is submitted that the land registrar has absolutely no authority to cancel entries in the register without an order of the court. The Plaintiffs urge that the reliefs sought in the plaint are allowed with costs of the suit.

- 32 The 1<sup>st</sup> Defendant identified the following issues for determination;
1. Whether Orders of a permanent injunction should be granted against the 1<sup>st</sup> Defendant.
  2. Whether the procedure bequeathing the 2<sup>nd</sup> Defendant with a title was legal.
  3. Whether the 1<sup>st</sup> Defendants claim is res-judicata.
  4. Whether the 1<sup>st</sup> Defendant claim is barred by limitation.
  5. Who bears the costs of the suit.
- 33 On whether the prayer for permanent injunction should issue by the court. It is submitted that the Plaintiffs have not fulfilled the requirements to be granted an injunction as set out in *Giella –Vs- Cassman Brown & Company Ltd* [1973] EA 358. That there is no prima facie case to warrant the allowing of the orders as the land in question had a clear registered owner as of 1990 as exhibited by the title issued in 1990, that the mother title of the suit property that has never been cancelled and subsists to date. There has been no clear procedure showing how the suit property changed hands leading to the title presented in the name of the 2<sup>nd</sup> Defendant and onwards to the Plaintiffs. It is submitted that the court in land dispute no. 2 of 2000 award issued orders on the 16/5/12 declaring the judgment entered on the 24/7/2000 in favour of the 2<sup>nd</sup> Defendant and all other consequential dealings in Kwale/ Diani Beach Bloch No. 651 be reviewed and declared null and void.
- 34 That there is no irreparable damage to be suffered by the Plaintiffs as they allege as any structures erected on stolen land is clearly a fruit of a poisonous tree. Further the value of the structures was quantifiable and compensation made to the Plaintiffs in monetary value by the 2<sup>nd</sup> Defendant who received the purchase price fraudulently. That the balance of probabilities tilts in favour of the 1<sup>st</sup> Defendant who is the rightful registered owner of the land via a valid title procured after the land was allotted to her by the government and the necessary payments were made with quiet possession of the land until the year 2020.
- 35 On whether the procedure bequeathing the 2<sup>nd</sup> Defendant with a title was legal, it was submitted that the 1<sup>st</sup> Defendant testified under oath that she was not served with the documents related to the Kwale Land Disputes Tribunal case which reeks of fraud by the 2<sup>nd</sup> Defendant. This omission occurred while the 1<sup>st</sup> Defendant was abroad in the United States. Such a failure to provide essential documents goes against the fundamental doctrine of fair administrative action and constitutes a direct infringement of the 1<sup>st</sup> Defendant's constitutional right to a fair hearing. The 1<sup>st</sup> Defendant contends that the tribunal's decision is null and void. Consequently, any title derived from such a decision is also null and void ab initio.
- 36 The court is referred to the evidence of DW 2, the Land Registrar, who testified that the subdivisions related to the property were cancelled. Furthermore, the only valid title recorded in the lands registry belongs to the 1<sup>st</sup> Defendant. That DW2 testimony directly contradicts the validity of the 2<sup>nd</sup> Defendant's title, further emphasizing the 1<sup>st</sup> Defendant's averments that the 2<sup>nd</sup> Defendant's title was fraudulently acquired. The 1<sup>st</sup> Defendant emphasizes that any sale agreements or transactions originating from the void title are likewise nullities ab initio. The court was urged to recognize the irregularities in the title transfer process and take appropriate measures to rectify this situation. It is submitted that the resident magistrate Hon. A.O. Aminga issued orders on the 16/5/12 declaring



the judgment entered on the 24/7/2000 (in favour of the 2<sup>nd</sup> Defendant) and all other consequential dealings Kwale/Diani Beach Block No. 651 be reviewed and declared null and void. The said orders were in favour of the 1<sup>st</sup> Defendant and as such she would in no way be seeking to quash the same.

37 On whether the 1<sup>st</sup> Defendant's claim is res-judicata it was submitted that JR NO. 21 of 2010 was marked as withdrawn on 13/10/2010 and the suit cannot be said to be res-judicata since the court did not express itself to finality on the issues therein.

38 On limitation it was submitted that the Plaintiffs' claim is based on fraud and the same cannot be overridden by limitation. That the record shows that the 2<sup>nd</sup> Defendant fraudulently entered into the suit property in the year 2000 and four years later fraudulently acquired a title deed for the suit property. The 1<sup>st</sup> Defendant seeks for costs of the suit and dismissal of the Plaintiffs claim.

39 The 2<sup>nd</sup> Defendants submissions are not on record did not file submissions. He supported the Plaintiffs case.

## Discussions And Determination

### Preliminary Issues

40 Before I delve into the substantive issues for determination it is imperative to settle some preliminary issues that emerge. The plea of res judicata that has been raised under paragraph 7 of the Plaint against the 1<sup>st</sup> Defendant's claim to the title upon which the eviction notices herein were issued. The Plaintiffs also plead bar by limitation.

41 The doctrine of res judicata has its genesis in the provisions of Section 7 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya which provides that: -

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

42 The above provision defines the principle of res-judicata to apply where the issues in the previous suit ought to have been "heard and finally decided."

Black's law Dictionary 10<sup>th</sup> Edition defines "res judicata" as

"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

It further defines the terms "heard and determined" as follows: -

"Of a case, having been presented to a Court that rendered Judgment".

The term "hearing" is defined in the same dictionary as follows: -

"A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying".



43 The Supreme Court in a decision rendered on 6<sup>th</sup> August, 2021 in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR comprehensively dealt with the threshold to be met for a plea doctrine of res judicata to succeed thus:-

(86) We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a. There is a former Judgment or order which was final;
- b. The Judgment or order was on merit;
- c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d. There must be between the first and the second action identical parties, subject matter and cause of action

44 In the case of Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97 the Court stated:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.

45 PW1 testimony was that there was a Judicial Review case which was withdrawn on 13/10/2010. The application was produced (“PEX 6) being JR Civil Application No. 21 of 2010 pitting the 1<sup>st</sup> Defendant Agnes Mutindi Ndetei against Athumani Juma Matamu , the Kwale Land Disputes Tribunal , Kwale Resident Magistrate Hon. L.N.Mbatia , the Kwale Land Registrar and Stephen Mkala Ngome, Irene Tatu , Kiara Otilie , Samuel Mazera Kubo among other Interested Parties. My review of the same showed the subject of the dispute was the property Kwale/Diani Beach Block 651. The application sought to quash the orders of the Msambweni Land Dispute Tribunal herein, orders issued by the Kwale Resident Magistrate including nullification of the subdivisions. Produced in court is an order recorded before Ibrahim J (as he then was) on 13/10/2010 and issued on 6/12/2010 where the Judicial Review application No. 21 of 2010 is withdrawn with costs to the Interested parties who largely form the Plaintiffs herein and the 1<sup>st</sup> Respondent Athumani Juma Matamu the 1<sup>st</sup> Defendant in the present proceedings.

46 Based on the above case law, I am of the view that a suit that was withdrawn is not synonymous with a suit that has been heard and determined. The doctrine of res judicata does not therefore apply in the instant circumstances, if anything, the instant suit has been brought before court by the Plaintiffs and not the 1<sup>st</sup> Defendant. It was imperative of the 1<sup>st</sup> Defendant puts in a defence to what has been raised



against her. In my view she would not have failed to do so pursuant to a claim she had filed and which the court has established was withdrawn before being heard and determined. I further respectfully agree with the 1<sup>st</sup> Defendant's submission that the prayers sought in the former suit and the Plaintiff herein are entirely different.

47 It is the finding of this court that the 1<sup>st</sup> Defendant's case is not res judicata.

48 Additionally paragraph 12 of the Plaintiff avers that the 1<sup>st</sup> Defendant's claim is barred by dint of section 7 of the *Limitation of Actions Act*. It is submitted that the eviction notices are issued 21 years later after the year 2000 where dispossession is alleged to have happened. For me I would base my findings on the aspect of fraud. The 1<sup>st</sup> Defendant pleads fraudulent acquisition of title by the 2<sup>nd</sup> Defendant including the subdivision thereof. I'm persuaded by the dictum of Okong'o J in *Lureti Obara Vs. Peter Koipeitai* (2014) eKLR cited by the 1<sup>st</sup> Defendant to the effect that under section 26(a) of the *Limitation of Actions Act* the period of limitation does not start running until the same is discovered or could have with reasonable diligence have been discovered. It is also on record that the 1<sup>st</sup> Defendant filed proceedings in the year 2010 and though withdrawn for me time must have stopped running for purposes of limitation.

49 It is this court's finding that the suit is not time barred.

### Issues for Determination

50 Having dealt with the preliminaries I will proceed to deal with the substantive issues. My understanding of this matter is that while the Plaintiffs are contesting the eviction notices herein, ownership of the suit properties is at the heart of the dispute before this court. The Plaintiffs contest the eviction notices herein on the basis that they are the registered owners of the properties and innocent purchasers for value without notice having bought the properties from the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant wants the Plaintiffs evicted claiming the alleged title to the 2<sup>nd</sup> Defendant was acquired fraudulently vide a decision of the Msambweni Land Disputes Tribunal which she impugnes for inter alia proceeding exparte. That since she is the legitimate registered proprietor of the land originally known as Kwale Diani Beach BLK/651 following allotment by the Government of Kenya the subdivisions cannot stand.

51 Arising from the above the following questions in my view if answered will address the dispute herein; -

- a. Who between the Plaintiffs and the 1<sup>st</sup> Defendant is the lawfully registered owner of the suit property [properties] herein?
- b. Whether the Plaintiffs are innocent purchasers for value without notice?
- c. If the answer to b) above is yes are the Plaintiffs entitled to the orders sought.
- d. Who should bear the costs of this suit.

The discussions on a) and b) are likely to overlap and to avoid repetition I will consider them concurrently.

52 Section 26 (i) of the *Land Registration Act* provides: -

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or



endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

53 The Plaintiffs' titles are being impugned. It is trite that they must defend their titles by explaining the root thereof as it is not enough to dangle a title. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR, stated that where the registered proprietor's title root is under challenge, it is not enough to dangle the instrument of title as proof of ownership.

54 Justice Sila Munyao in *Daudi Kiptugen Vs. Commissioner of Lands & 4 Others* (2015) eKLR aptly stated: -

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land”.

55 The Plaintiffs case is that the suit properties and which they currently occupy were purchased from the 2<sup>nd</sup> Defendant one Athman Juma Matamu and this was reiterated by PW1, PW2 on behalf of the rest of the Plaintiffs. The appropriate letters of authority were filed before court and are dated 24/03/21. The Plaintiffs produced several Sale Agreements dated on diverse dates where the vendor is Athman Juma Matamu the 2<sup>nd</sup> Defendant in the present suit, for the various subdivisions herein drawn by Japhet Chidzipha & Co. Advocates. The Plaintiffs have further attached copies of title deeds as proof of ownership of the respective suit properties in their occupation.

56 The 1<sup>st</sup> Defendant case is that the suit property is legally and rightfully hers having purchased the same at a consideration of kshs 500/= in the year 1990 from the Settlement Fund Trustee. That upon the said purchase the suit property which she refers to as Kwale/Diani Beach BLK/651, the 1<sup>st</sup> Defendant left the country and on coming back discovered that the suit property had been registered in the 2<sup>nd</sup> Defendants names and further subdivided giving rise to the parcels held by the Plaintiff.

57 The 1<sup>st</sup> Defendant questions the validity of the title held by the 2<sup>nd</sup> Defendant and states that the same was acquired by way of fraud. In her testimony before court, DW1 the 1<sup>st</sup> Defendant testified that after discovery of the fraud, she made a report to the DCI and after the necessary investigations, the Plaintiffs



- titles were cancelled and the land reverted back to her. That it is this fact that prompted the service of the eviction notices upon the Plaintiffs and which triggered the filing of the instant suit.
- 58 The 1<sup>st</sup> Defendant DW1 testified in her evidence in chief that she purchased the suit property from the Settlement Fund Trustee following an advertisement she saw in the local dailies sometime in the year 1990 whereupon she applied. While DW1 admitted in cross examination by Ms. Umara that she did not have a copy of the advertisement before court she stated she had her allotment letter. She produced in evidence a bundle of documents, title Deed dated 15/12/1990 for Kwale Diani Beach BLK/651 corresponding Certificate of Official Search confirming the said registration, Official Receipts dated 23/7/90 for Kshs. 525/- and Kshs.1490/- for land charge and survey fee respectively to the account of SFT for Plot No. 651 Diani Settlement Scheme, Letter dated 14/6/90 addressed to Agnes Mutindi being letter of offer from the Director of Land Adjudication office and Transfer of Land in Settlement Scheme for title No. Kwale/Diani/651 where the Settlement Fund Trustees transferred the same to Agnes Mutindi Ndetei for a consideration of Kshs. 500/=.
- 59 The court noted the offer originally was for 477 which was crossed out and replaced with 651 which the witness conceded to in cross examination by Mr. Omolo. However the witness clarified in re-examination that other than the letter of offer dated 14/6/90 she had other letters that reflected plot 651. Indeed this was confirmed by other correspondences produced as part the witness bundle between the Land /adjudication office and the 1<sup>st</sup> Defendant. I must also lay to rest an attempt during cross examination by Mr. Omolo aimed at showing the suit property my not be the same for absence of endorsement on the title that it was Diani Settlement scheme which DW1 could not explain. None of the parties took up the issue with DW2. In any case it was not an issue based on the pleadings.
- 60 The registration of the 1<sup>st</sup> Defendant as 1<sup>st</sup> allottee was also confirmed by Ms. Mueni the land Registrar who testified as DW2. DW2 narrated the history of the parcel from the Settlement Fund Trustee culminating to the registration of the 1<sup>st</sup> Defendant on 19/12/90 as the 1<sup>st</sup> Allottee. Based on the evidence placed before me which presented the audit trail I had no problem with this registration upto this point.
- 61 Back to the Plaintiffs titles. These are largely being impugned for their nexus with the 2<sup>nd</sup> Defendant title and who was their vendor for acquiring the same fraudulently by dint of the impugned Tribunal decision. First and foremost it is trite that fraud must be specifically pleaded, particularised and proved at a slightly higher standard than that of a balance of probabilities – see *Ratil Patel Vs. Lalji Makanji EA 1957* and *Vijay Morjaria Vs. Nansigh Darbar & Another (2000)*. No such particulars were given neither was any fraud proved on the part of the Plaintiffs having known or participated in the same.
- 62 The above notwithstanding let me now venture into the impugned Tribunal award which seems to be the main substance of the 1<sup>st</sup> Defendant’s case. The registrar testified in regard to the decision of the Msambweni Land Disputes Tribunal pursuant to which the 1<sup>st</sup> Defendants title was cancelled and a title issued to the 2<sup>nd</sup> Defendant on 20/11/2000. DW2 further testified on the ensuing subdivisions Kwale/Diani Beach Block 1403 and 1404 and their subsequent cancellation back to the 1<sup>st</sup> Defendant on 5/3/2015.
- 63 The cancellation of the 1<sup>st</sup> Defendant’s title was pursuant to the tribunal decision which unfortunately I did not have occasion to peruse as it was not tabled by the party impugning it. DW1 testified in cross examination that she had not produced it as part of her evidence in court. However, the court was able to gather some information about the same as contained in the 1<sup>st</sup> Defendant’s pleadings and the Judicial Review application. The judicial review application which DW1 had filed seeking to quash the decision of the tribunal and the order adopting it, was proved to have been withdrawn. It is not clear why the same was withdrawn. It therefore follows that the decision of the tribunal and its



subsequent adoption remains to date. DW1 in cross examination by Mr. Omollo indicated that she has never filed a case against the Plaintiffs neither did she obtain any orders cancelling their titles. It is submitted on behalf of the 1<sup>st</sup> Defendant that the resident magistrate Hon. A.O. Aminga issued orders on the 16/5/12 declaring the judgment entered on the 24/7/2000 null and void. Again this was never produced before court. This then brings me back to the process of reverting the title back to the 1<sup>st</sup> Defendant in 2015.

- 64 DW1 clarified in re-examination that the process of reverting the title Kwale/Diani Beach Block 651 started at the Kwale Land Registry and was an internal administrative process. I hear DW1 to be stating that she had no control of how the registry conducted its processes. But it was her testimony that after her return from the USA where she had been for the period 1999 - 2008 she visited the land found there were buildings therein and upon search her name had been deleted and replaced with that of the 2<sup>nd</sup> Defendant. She reported the matter to the DCI Nairobi who undertook their own investigations and found that there were other titles issued on top of her title. That she presented her documents at the Registry and her land was reinstated to her. She further stated she was referred to Nairobi Land Registry where a Mr. Macharia for Director of Survey wrote a letter reverting the land to her. That a mutation was done, a new deed plan given showing that Kwale/Diani Beach Block 651 was back together.
- 65 My observations about the above is that DW1 presented no court order cancelling the titles above or even the 2<sup>nd</sup> Defendant's title. According to Ms. Mueni the Land Registrar, an entry existed in favor of the 2<sup>nd</sup> Defendant as at 20/11/2000. DW1 conceded when referred to paragraph 4 of her witness statement in cross examination, that when she came to learn about the Tribunal decision she did not appeal the decision.
- 66 It is also noteworthy the Judicial review herein was withdrawn. The witness stated on cross examination by Ms. Umara that she was aware of the Judicial Review matter and that the same had been withdrawn by her counsel on record by then. The witness further referred to a Case Number 2 of 2012 filed in Kwale court where she alluded to judgement (by Hon Aminga) having been delivered on 6/5/2012 in her favor though she conceded she had not presented it in court. Did Ms. Mueni DW2 confirm in her testimony an entry reflecting this judgement? DW2 testified in cross examination by Ms. Umara that she did not know why Athman's title was cancelled and conceded that there was no court order directing the Land Registrar to cancel Athman's title. Clearly then had this judgement existed it would have reflected in the parcel file.
- 67 The Land Registry appears to have been informed by correspondence from the DCI whose investigation report DW1 conceded was not before court because everything she was told was verbal. Even the letter by Mr. Macharia reverting the title to her was never presented and had it been presented legally it cannot be the basis upon which title can be cancelled. Mutations reconsolidating the various titles were never presented as evidence in court. The Land Registrar indicated further that the provisions of section 75 of the *Land Registration Act* empowering the Land Registrar did not apply then. For me even if it applied there was no investigation report upon which the decision could be anchored. Moreover, it is now established that the Land Registrar can only cancel title pursuant to an order of the court. In this regard I'm guided by the decision in *Harrison Kiambuthi Wanjiru & another v District Land Registrar Nairobi & 3 others* [2022] eKLR the court citing court decisions including the Court of Appeal position on the issue stated thus;

“This Court agrees with the sentiments of the Court in *Kisumu Misc No. 80 of 2008 Republic V Kisumu District Lands Officer & another* [2010] eKLR where the Court held “it is clear that it is only the Court that can cancel or amend if where the Court is of the view



that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”. Similarly the Court of Appeal in Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR agreed with the trial Court that “The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.

- 68 Based on the foregoing these courts hands are tied and finds that the suit property Kwale/Diani Beach Block 651 was unprocedurally and illegally reverted to the 1<sup>st</sup> Defendant. Consequently, the registration in favor of the 2<sup>nd</sup> Defendant as at 20/11/2000 which was confirmed by DW2 and further as per the Land Tribunal Award as per the 1<sup>st</sup> Defendant’s pleadings and latter duly adopted by the court at Kwale as required and having not been set aside still stands. What does this portend for the Plaintiffs? This brings me to the Plaintiffs contention that they are innocent purchasers for value.
- 69 Who is an innocent purchaser for value? The court in the case of Lawrence Mukiri vs The Attorney General & 4 others (2013) eKLR defined a bona fide purchaser for value as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. That the purchaser must prove he holds a certificate of title, He purchased the property in good faith, He had no knowledge of the fraud, The Vendor had apparent valid title, He purchased without notice of any fraud and that he was not a party to any fraud. Indeed, this was drawn from the Uganda Court of Appeal in Katende v Haridas and Company Ltd. [2008] 2 E.A 173.
- 70 The Plaintiffs plead at paragraph 4-5 of the Plaint that they are innocent purchasers for value of the suit premises being the various subdivisions herein. I note that PW1, PW2, were all consistent that they undertook due diligence before purchase of their parcels and this is corroborated by the Land Registrar evidence that the 2<sup>nd</sup> Defendant was registered as proprietor of the mother parcel in November 2000. My review of the sale agreements produced by the Plaintiffs shows that none of them predated this entry. The titles were also presented in court and no evidence was presented through the Registrar that the same were cancelled except for the Registrars testimony that the same were cancelled by dint of the title having been reverted to the 1<sup>st</sup> Defendant in the year 2015. I have made a finding that the said registration of 2015 was unprocedural and illegal. As earlier stated I had no evidence before me that the Plaintiffs participated in any fraud or illegality.
- 71 Having made a finding above I would have no hesitation therefore making a finding that the Plaintiffs were innocent purchasers for value without notice.
- 72 Is the Plaintiff entitled to the orders sought in the Plaint? The orders sought by the Plaintiffs have been stated elsewhere in this judgement. Based on the entire analysis in this judgement and the findings I have made the court would have no hesitation to granting the orders sought by the Plaintiffs as they are merited. The only orders I would decline to issue is the invitation to for declaration that the 1<sup>st</sup> Defendant claim is res judicata and time barred for reasons already enumerated. It is also noteworthy that there were no orders sought against the 2<sup>nd</sup> Defendant.
- 73 In conclusion therefore I find that the Plaintiffs have proved their case against the 1<sup>st</sup> Defendant on a balance of probabilities. Accordingly, Judgement is entered for the Plaintiffs against the 1<sup>st</sup> Defendant as follows.
1. A declaration that the eviction notices dated 4/1/2021 are null and void ab initio and the same are hereby cancelled forthwith.



2. A permanent injunction prohibiting the 1<sup>st</sup> Defendant by herself, servants, agents and or assignees from carrying out the proposed evictions of the Plaintiffs from properties known as Kwale/Diani Beach Block/1520, Kwale/Diani Beach Block/1450, Kwale Diani Beach Block/1703 Kwale/Diani Beach Block/1806, Kwale/Diani Beach Block/1403, Kwale/Diani Beach Block/1807 ,Kwale/Diani Beach Block/1804 ,Kwale/Diani Beach Block/1616 Kwale/Diani Beach Block/1524 &1701, Kwale/Diani Beach Block/1615 and Kwale/Diani Beach Block/1805
3. A permanent injunction prohibiting the 1<sup>st</sup> Defendant by herself, agents, servants, employees or any other person from evicting, alienating, encroaching upon, disposing, trespassing or in any manner interfering with the Plaintiffs possession and quiet enjoyment of the suit properties known as Kwale/Diani Beach Block/1520, Kwale/Diani Beach Block/1450, Kwale Diani Beach Block/1703 Kwale/Diani Beach Block/1806, Kwale/Diani Beach Block/1403, Kwale/Diani Beach Block/1807 ,Kwale/Diani Beach Block/1804 ,Kwale/Diani Beach Block/1616 Kwale/Diani Beach Block/1524 &1701, Kwale/Diani Beach Block/1615 and Kwale/Diani Beach Block/1805.
4. In accordance to the provisions of section 27 of the Civil Procedure Act costs follow the event. Costs of this suit are awarded to the Plaintiff.

Orders accordingly.

**JUDGEMENT DATED SIGNED AND DELIVERED THIS 22<sup>ND</sup> DAY OF JULY 2024.**

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**A.E DENA**

**JUDGE**

Mrs. Umara for the Plaintiffs

Mr. Mangale Holding brief for Ms. Kimuli for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

Mr. Daniel Disii – Court Assistant

