



**Shee v Kamau & 2 others (Environment & Land Case 49 of 2021)  
[2024] KEELC 6173 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6173 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 49 OF 2021**

**AE DENA, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**SALIMU MWALIMU SHEE ..... PLAINTIFF**

**AND**

**MACHARIA KAMAU ..... 1<sup>ST</sup> DEFENDANT**

**MARTIN MOGWANJA ..... 2<sup>ND</sup> DEFENDANT**

**PAULINE MOGWANJA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**The Plaintiff**

1. The Plaintiff herein vide the complaint filed before court on 31/7/2017 seeks for judgement against the defendants jointly and severally for;
  - a. Permanent injunction restraining the Defendants by themselves, their agents, servants, workers, employees and/or any other person acting on their behalf in respect of Kwale/Galu Kinondo/720.
  - b. Alternatively, the Plaintiff prays for mandatory order against the defendants to demolish the structures on plot no Kwale/Galu Kinondo/720 and to remove the debris
  - c. Any other and/or further orders this honourable court may deem just and fit to grant
  - d. Costs of this suit
2. It is the Plaintiff's case that he is the absolute registered owner of all that piece and/or parcel of land known as plot Number Kwale/Galu Kinondo/720. That the Defendants have without his consent or any colour of right invaded the said parcel and erected structures thereon. The Plaintiff states that he



now seeks for the prayers outlined in the plaint as the demand and notice of intention to sue against the Defendants have borne no fruit.

### **Defence**

3. The Defendants Statement of Defence was filed before court on 13/11/2020. The averments raised in the plaint have all been denied. The defendants state that they hold the original title deed to the suit property Kwale/Galu Kinondo/720 which is registered in the names of Macharia Kamau (half share), Martin Mogwanja and Pauline Njoki Mogwanja (half share). That the said proprietors took possession of the suit property sometime in February 2001 and proceeded to build cottages thereon and which are their source of income. It is averred that the Plaintiff is a vexatious litigant who has participated in several litigations one being Mombasa CMCC 14 of 2012 which was dismissed for want of prosecution in November 2016. Further that Misc. Appl No 131 of 1991 is not a valid case filed within the court registry at Mombasa. The Defendants pray that the Plaintiff's suit is dismissed with costs.
4. The Plaintiffs further replied to the Defendants statement of Defence on 18/2/21 stating that it is not known how Gilbert Kibe acquired the title to Kwale/Galu Kinondo/720 from an adjudicated area when he was not a local and sold it to the Defendants. That the title must have been obtained irregularly or fraudulently. That Misc. Application No. 131 of 1991 was a valid matter

### **Hearing**

4. The suit was heard on 23/2/22 and 16/5/22. During the hearing the Plaintiff was represented by Mr. Atiang holding brief for Mr. Kinyanjui and the Defendant by Mr. Gitahi.
5. PW1 was Salim Mwalimu Shee adopted his statement dated 31/07/2017. It was his testimony that the suit property belonged to him, having been given the same by his mother Halima Amir Boi. That the land belonged to Halima's father Amir Ali Boi who is the Plaintiff's grandfather. The Plaintiff testified that his grandfather had inherited the parcel from his father and who is the Plaintiffs great grandfather.
6. The Plaintiff stated that he used to visit the suit property as a relative and that Amir used to harvest coconut planted thereon. Further that Amir Ali Boi obtained 7 titles from land registrar in his names, he referred to consolidated bundle dated 26/11/2021 documents number 8 marked "PEX I" being the bundle of the 7 title deeds registered on 12/3/1992. That they were seven titles because the people who took the land were seven and had subdivided the land. Amir Ali sued the seven individuals where Justice Wambilyanga in an order dated 14<sup>th</sup> November 1991 "PEX2" found that the shamba be given to Amir Ali Boi.
7. It was his evidence that the order was presented to the lands office but the staff at the office were not willing to assist in implementation of the same. He stated that the land was eventually inherited by his mother as per the Grant of probate to Halima item 2 in the comprehensive bundle "PEX 3" and who obliged and gave him parcels 720 and 723. That the transfer was done pursuant to the proceedings at the Kadhi's Court as per the grant "PEX 4" item number 3 of the bundle. However, there was a house built on plot 720 and he could not access it. PW1 testified that he did follow up on the ownership of the house on the disputed parcel through letters addressed to the lands registry, see document 4 and 5 in the bundle letter dated 11/11/2013 "PEX 5" "PEX 6" Ref Land Number 7/9/2004 volume XII/2021.
7. The witness stated that Amir Ali Boi died 1997 as per the death certificate "PEX 7", leaving behind a will "PEX 8" dated 1 1/10/1996. That despite having the ownership documents (title) for the suit parcel, he cannot use the same given the occupation of the Defendant thereon and which has necessitated the filing of this suit for demolition of the same. The witness produced the copies of green cards "PEX 9"



8. On cross examination by Counsel Mr. Gitahi for the Defendant, the witness stated that the will was written by Amir Ali Boi. He admitted that the contents of the same did not specify the property alluded to and had been attested to by a thumb print and no other signature. When referred to the will, he admitted that the same did not have any seal of the court, the order by the Kadhis court had no court signature or the seal with court of arms. That the green card was obtained from the lands office and who are the custodians of such documents. The witness conceded that the order issued in case 131 of 1991 where Amir Boi had allegedly sued the people subdivided the land only had two defendants namely Director of Adjudication and District Land Registrar. He admitted he does not have title for parcel 723. That he did not obtain LCB consent. He maintained that the land had been given to him by his mother Halima as per the grant from the Kadhis court.
9. On re-examination the witness testified that the will was never objected to and/ or disputed. That his mother was present when the will was made at the hospital.
10. PW2 was Halima Amina Boi, adopted her witness statement dated 17<sup>th</sup> February 2022 as part of her evidence. She testified that the Plaintiff was her son, that the suit property belonged to her father and she had inherited everything from him. That her father had instructed her to give part of the land to the Plaintiff which she did. The witness could not recall the properties registration numbers. On cross examination the witness testified that her father had at some point gone to court to claim ownership of the suit property and had been awarded the same. She further confirmed that they had gone to the Kadhis Court over succession of the estate of her father and which enabled her to get the properties. PW2 however on being shown the Kadhis order conceded it did not bear a signature.
11. With the above the Plaintiffs case was marked as closed.
12. DW1 was Peter Migie Karingu an Advocate engaged in private Land practice with specialty in commercial and conveyancing. He informed the court that he has been acting for Mr. Muchama and Martin Mugwanja and his wife Pauline the Defendants in the purchase of the property. He adopted his witness statement sworn on 23/10/2020 as part of his evidence in chief. The witness further adopted the Defendants list of documents filed on 13/11/2020 as "EX 1-12" and the supplementary list of documents filed on 10/12/2021 as EXH 13". It was his testimony that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had gone to his office with the intention of purchasing land in Kwale. The clients informed him they met the vendor and agreed on purchase price and that the vendor lawyer would get in touch with the witness for the transaction. The vendor advocates wrote to him a letter dated 15/2/2002 confirming what the parties had agreed that they had the title and that it was clean free from encumbrances though the letter was not in the bundle. The witness attempted to refer to the letter but Mr. Atiang objected to the same and being prejudicial. I sustained the objection.
13. DW1 testified that the parties entered into a sale agreement which he prepared. After execution of the sale agreement the LCB form and transfer were signed by the purchasers. The vendor also signed the LCB consent as per the supplementary list of documents dated 29/12/2021. The purchasers proceeded to sign transfer, paid stamp duty. The transaction was registered and title deed was issued (see PMK4). That the defendants also got an official search certificate dated 20/2/2001 (PMK 5).
14. According to the witness, he learnt after 2 years that there were other parties interested in the land who placed restrictions on the land. That there was also ongoing litigation on the land in which Mwalimu Shee the Plaintiff in those proceedings is the same Plaintiff herein. That the suit instituted by the Plaintiff and which the Defendants enjoined as interested parties was dismissed. The witness stated that he had been granted the Power of Attorney to act on behalf of the Defendants. From his knowledge the Defendants took possession of the suit property immediately and built residential accommodation for themselves. As a consequence of this proceedings their plans to subdivide the property and build



more cottages have not been possible because of the injunction. The witness asked the court to dismiss the suit and for the Defendants be allowed to use the land.

15. On cross examination the witness testified that by virtue of the power of Attorney he was competent to sign the agreement on behalf of Macharia Kamau. The power of Attorney was of a general nature it allowed him to buy and sell. He stated that he had never met the vendor not engaged with him. That all the documentation by the vendor was handled by his lawyers. The witness further stated that at the time of the transaction passport size photos were not a requirement. He stated that he did not present before court the records for payment but he had them in his possession. That he had not conducted a search prior to the purchase as he relied on the word of the vendor's advocate that the title was clean. He stated that from the records, the vendor Kibe was given the title in the year 1977. That after they found out about the restriction, they realized that the same had been placed by the 1<sup>st</sup> entry in the green card.

That Macharia was not in the country when he donated the PA though he was in Kenya at the time of signing. He was never presented with Mr. Kibes ID card as he was not acting for him. He never met the vendor/Kibe. DW1 admitted the Plaintiff herein was not a party in suit 30 of 2017 and conceded that the orders removing the restriction was by consent of the parties.

16. Upon re – examination DW1 clarified that he was given the Power of Attorney as his clients were not in the country. The authority was in regard to this specific suit today. That the documentation shown to them with regard to the suit property showed that the title was clean. He had no reason to doubt the same as it had been confirmed by his colleague.
17. With the above evidence the defence case was marked as closed

### **Submissions**

18. Parties filed and exchanged written submissions in support of their cases.

### **Plaintiffs Submissions**

19. The Plaintiffs submissions were filed before court on 18/7/2022. The Plaintiff enumerated the following issues for determination; -
1. Whether parcel no Kwale/Galu Kinondo/720 was excised from parcel number Galu/Kinondo/677
  2. Whether The process of acquisition of the property by Amir Ali Boi was legitimate under the law
  3. Whether the said Joseph Gilbert Kibe obtained a good title capable of being transferred to the defendants
  4. Whether there is a good case for rectification of the records of the said title by this honourable court
  5. Whether the plaintiff has satisfied the court on a balance of probabilities and preponderance of evidence for the reliefs sought.
20. On the 1<sup>st</sup> and 2<sup>nd</sup> issues for determination, it is submitted that both the Plaintiffs witnesses testified and produced a letter from the District Adjudication Officer which confirmed that the suit property was registered in the names of Amir Ali Boi. That the Plaintiff's witnesses further produced the title deed to the suit property as proof of the same having been excised from Galu/Kinondo/677. The Plaintiff



submits that the process was legitimate as evidenced by the green card produced by the 1<sup>st</sup> Defendant which confirmed the land was registered in the names of the Plaintiff's grandfather in the first place.

21. On the 3<sup>rd</sup> and 4<sup>th</sup> issues for determination it is submitted that from the material placed before court and the testimony of Peter Karingu, it was clear that Joseph Gilbert Kibe did not have a good title. That the defence witness testified that no due diligence was carried out before purchase of the suit property by the defendants. The court is made aware of the fact that the vendor Joseph Kibe was never called as a witness despite his evidence having been critical. That from the green cards presented before court, no evidence has been adduced as to how the suit property was transferred from Amir Ali Boi to Joseph Kibe and subsequently to the Defendants. That from this it can be deduced that the title held by Joseph Gilbert Kibe was fraudulent and illegal.
22. On the 5<sup>th</sup> issue for determination the Plaintiff submits that the Plaintiff has satisfied the court on a balance of probability and preponderance of evidence and therefore the suit be allowed and he be declared the legitimate owner of the suit property.

### **Defendants Submissions**

23. The Defendants have highlighted two issues for the courts determination namely; -
  - a. Whether the Plaintiff has proved his claim to the required standard.
  - b. Whether the Defendants have proved their ownership of the subject matter property
24. On the 1<sup>st</sup> issue for determination it is submitted that it was confirmed that the Plaintiff never obtained the Land Control Board consent when registering the alleged transfer of land into his name. That the Plaintiff was further unable to explain how he obtained his certificate of title in the absence of the consent which is a mandatory legal requirement. Further, that PW2 confirmed she had not seen her fathers will and that he had only made oral wishes while at home contrary to what the plaintiff's testimony who alleged that the grandfather made the will in his hospital bed.
25. It is submitted that under the Evidence Act Section 107 it is provided that he who alleges must prove. That the Plaintiff has failed to demonstrate how the suit property was transmitted to his name. That the root of the Plaintiff's title has not been adequately proved.
26. On the 2<sup>nd</sup> issue for determination it is submitted that the defendants have discharged their burden of proving that the certificate of title held by themselves was acquired procedurally and in accordance with the law. That the Defendants produced before court a list of documents in evidence of how they acquired the suit property. Further that due diligence was carried out before the land was purchased. The court is invited to consider the holding in *Harilala Velji Shah & Another V Matiri Mburu & Chepkemboi Advocates* [2017] eKLR where it was held that where an official search has been conducted and in the absence of fraud, an Advocate is entitled to proceed with the transaction. That the Plaintiff and Defendant cannot both give a proper account on the entries in the green card as they are not the custodians of the said document. That however from the evidence on record, Joseph Gilbert Kibe was issued with a new title deed on 10/9/1998 as evidenced by Entry 13 on the green card. That the Defendants have given a full account of how they obtained ownership and the same should be considered by the court. The Defendants pray that the Plaintiff's suit be dismissed with costs.

### **Plaintiffs Further Submissions**

27. The Plaintiff filed further submissions on 18/9/2023. Reiterating the Plaintiff's earlier submissions the following additional issues emerged; -



- a. Whether the Plaintiff is the bonafide registered proprietor of the parcel of land to wit Kwale/Galu Kinondo/720
  - b. Whether the Defendants are bonafide registered proprietors of the parcel of land to wit Kwale/Galu Kinondo/720
  - c. Whether the Plaintiff has met the threshold for the grant of a mandatory injunction
  - d. Who shall bear the costs of this suit
28. On the 1<sup>st</sup> issue for determination the plaintiff submits that he has demonstrated on a balance of probabilities that he is the bonafide registered owner of the suit property. The rest of the issues were not discussed from the copy of submissions on record.
29. Before I get into the analysis and determination in this case I must mention that there was an attempt to set aside the proceedings and amend the Plaint herein vide Notice of Motion dated 27/1/23. This was way after both parties had closed their cases and the matter was awaiting judgement. I declined the invitation and dismissed the application vide my ruling dated 4/7/23. The applicant then filed another application dated 24/7/24 for stay of proceedings pending appeal on the ruling delivered by the court. In my ruling delivered on 8/5/2024 I declined to stay the proceedings. I then fixed the suit for judgement for 5/07/24. As at the time of writing this judgement, this court has not been served with any orders by the Court of Appeal staying these proceedings.

### **Analysis And Determination**

30. I have considered the pleadings, the evidence of the parties and the final submissions filed. The following issues commend determination
1. Whether the Plaintiff has met the threshold for the grant of a mandatory injunction
  2. Who between the Plaintiff and the Defendants is the bonafide registered proprietor of the parcel of land Kwale/Galu Kinondo/720
  3. Who shall bear the costs of this suit

### **Whether the Plaintiff has met the threshold for the grant of a mandatory injunction**

31. It is trite that an order of permanent injunction fully determines the right of the parties before the Court and is thus a decree of the court. In essence, a permanent injunction is meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This position was annunciated in the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR where it was persuasively held inter alia as follows:

‘...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...’



32. Applying the above to the facts of this case there must exist an interest or a right held by the party claiming the orders, which right is the one to be protected by the court. The Plaintiff is therefore expected to walk through the journey of proving his interest in the suit property and how it has been violated. Indeed, the evidential burden is cast upon any party to prove any particular fact which he desires the court to believe in its existence. Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya), provides:

107. (1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Section 109 is to the effect that; -

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 112 provides that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

33. According to the Plaintiff he is the absolute registered owner of Kwale/Galu Kinondo/720, a portion from Kwale/Galu Kinondo/677. That parcel Kwale/Galu Kinondo/677 was first owned by his late maternal grandfather Amir Ali Boi. That Plaintiffs mother inherited the land from Amir Ali Boi and thereafter gave it to the Plaintiff. This evidence was corroborated by PW2 who testified that the suit property belonged to her father and that the same was later subdivided forming 7 parcels. From the Plaintiffs witness statement which he adopted as part of his evidence Kwale/Galu Kinondo/677 was subject to Miscellaneous Civil Application No.131 of 1991 Amir Ali Boi Vs. Director Land Adjudication and District Land Registrar which was decided in Amir Boi's favor.

34. In support of the above PW1 produced as part his documentary evidence a letter dated 11/11/2013 from District Land Adjudication and Settlement Officer Kwale/Msambweni indicating the Adjudication record for Plot No Kwale/Galu Kinondo/677. This letter shows that the said parcel was adjudicated in the name of Amir Ali Boi, Salim Baraka Mwachala and Omar Mohammed. That this was the verdict of the minister of lands made on 25/7/1976 with regards to land under the adjudication section. This was supported by the Green card produced by the PW1 opened on 16/8/76. The Plaintiff further led the court in evidence indicating that the verdict of the minister was confirmed by the District Land Registrar Kwale as per the letter dated 2/9/2010 and which confirmed that the Plaintiff's grandfather be registered as the owner of the parcel Kwale/Galu Kinondo/677. Indeed, PW2 testified that Salim Bakari and Omar Mohamed had fraudulently laid a claim on the parcel.

35. The 2<sup>nd</sup> entry on the green card was that of Joseph Gilbert Kibe made on 19/8/77. The 3<sup>rd</sup> entry is made on 29/10/86 a caution dated 17/10/86 by Amir Ali Boi claiming ownership interest. According to both PW1 and PW2 this necessitated the filing of Mombasa Misc. Civil Appl 131 of 1991. A copy of the court order in these proceedings was also produced as part of the Plaintiffs bundle. From my perusal of the said court order the Hon Justice Wambilyanga issued orders of mandamus directing the Director of Lands Adjudication and the District Land Registrar Kwale District to remove from their registers the persons named as the proprietors of original Land Parcel No Galu/Kinondo/677 subdivided into plots No. 718-724 and register in the name of Amir Ali Boi.

36. The Plaintiff states that after the said registration was effected his grandfather died. That before his death, Amir Ali Boi left a will where he bequeathed his daughter PW2 the suit property. That it was with the agreement that the same was to be later transmitted to the Plaintiff herein. PW2 stated in her oral testimony that the deceased reiterated many times before he died that PW1 should be given a



portion of the land. The handwritten will was produced as part of the Plaintiffs bundle of documents. From the evidence on record, PW2 was vide Mombasa Succession Cause No 90 of 1999 made the administrator of the estate of her late father Amir Ali Boi (see item 2 of the Plaintiffs comprehensive bundle). That the suit property was later transmitted to the Plaintiff and the other sub divided portions to his mother PW2 vide the Kadhis Court in Mombasa in Succession Cause No 18 of 2009 (see page 3 of the same bundle).

37. The above is the history of how the Plaintiff came to be the registered owner of the suit property. I have noted the Defendants effort in cross examination to impugn the ruling of Wambilyanga J but to me the same is an order of the court and remains valid as long as it was not set aside. Further about the will for me as long as the administration of the estate was granted to Halima the only surviving child of the deceased, she had all rights to give a portion to his son. PW2 stated in evidence that if her son gets the land she too gets the land for they are one. PW1 clarified in re-examination that the will was never objected to and/ or disputed. In any event the will passed through probate in the High Court succession proceedings and without objection. I would not fault it for the right place for it to be faulted is before the said court. Up to this point I did not have any reason to impugn the process deployed by the Plaintiff.
38. It trite that upon the completion of the succession process the provisions of the Land Act, No. 6 of 2012 come into play. See Beatrice Wangui Kamau alias Beatrice Wangui Kagunda vs. John Kariuki Kamau & Another [2016] eKLR, and I hold a similar view. The Plaintiff maintains that he is the lawful proprietor of the suit property having been registered as the same vide the title deed issued on 28/11/2011 which he produced before court. Section 26 of the Land Registration Act provides as follows; -
- 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.
39. Arising from the above provisions, title can be impeached on grounds of fraud, or misrepresentation, to which the title holder is a party, or where such title was obtained illegally, unprocedurally or through a corrupt scheme. This position has aptly been explained in several judicial authorities. I am guided by the case of Dr. Joseph Arap Ngok Vs Justice Moijo Ole Keiwua & 5 Others where the Court stated thus; -

section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.



40. The above position has been reiterated in a number of decided cases see Joseph Komen Somek Vs Patrick Kennedy Suter Suter Eldoret ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR and Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 Others (2015) eKLR.
41. The above brings me to the reason why the Plaintiff is in court against the Defendants who seem to rival his title and for which reason he has never been able to enjoy the same. The Plaintiff's ownership of the suit property is disputed by the Defendants. According to the Defendants, the suit property was purchased from one Joseph Gilbert Kibe who as per the copy of green card produced as evidence before court, was registered as the owner of the suit property on 19/8/1977. I noted that this is the 2<sup>nd</sup> entry in the said green card and a land certificate was issued to him on the same date.
42. DW1 told the court he was the lawyer who handled the conveyancing on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is his testimony that the two negotiated with the said vendor and agreed on the purchase price after which they instructed him and donated a Power of Attorney to handle the conveyancing. That he undertook the same following due process culminating into registration of the Defendants as proprietors in the manner reflected in the register.
43. In proof of the above DW1 produced and relied on copies of A General power of Attorney (PMK 1), Letters of authority (PMK2), Land sale agreement over the suit property (PMK3), Title deed in the names of the Defendants (PM4), Certificate of search (PMK5), Official search indicating the entries made on the green card (PMK6), Pleadings in CMCC No 14 of 2012, Court order enjoining DW1 in the suit (PMK8), Order dismissing CMCC No 14 of 2012 (PMK7a-e), Originating summons in ELC No 30 of 2017, Order settling ELC No 30 of 2017 and Green card for parcel Kwale/Galu Kinondo/720. All annexed to DW1 witness statement which he adopted.
44. I must note that the root of the Defendants title should be Gilbert Kibe whose title appears to have been issued in 1977. However, on 19/11/1991, the late Amir Ali Boi was reinstated as the owner of the suit property by dint of the mandamus orders issued by the court on 14/11/1991 in Misc. Civil Appl No 131 of 1991. I have already stated elsewhere in this judgement that this remains a valid court order as long as there was no evidence of its having been set aside. As far as this court is concerned the registration of Gilbert Kibe was defeated by dint of the order by Wambilyanga J which order is reflected in the Green card as entry No. 5. In fact, PMK 12 which is a green card clearly shows the entries 1,2,3 duly cancelled out pursuant to these orders including that of Gilbert Kibe.
45. Moreover from documents presented by the Defendants there is no history given or proof adduced as to how the suit property was transferred from Amir Ali Boi to Joseph Gilbert Kibe. This crucial link was not explained to the court. If anything, the said Joseph Gilbert Kibe was never called as a witness before court and his whereabouts have not been explained. DW1 produced a search applied on 20/2/2001 which is a day after the transfer to the Defendants stating there were no encumbrances. For me what would have sufficed is a search predating the transfer. None was produced. DW1 conceded in cross examination that he had not carried out due diligence over the suit property before its purchase as he believed the same was clean from what he had been informed by the vendor's advocate. The defendants have on their part failed to explain before this court the root of the title issued to them.
46. In addition, while DW1 stated that he had proof of the payments of the purchase price which I noted from the sale agreement he was to pay the balance from his firm, he did not produce the evidence in court. I had no doubt from the evidence presented that the title held by the Defendants was obtained irregularly. The court is not expected to sanitize the process through which the Defendants were registered as the proprietors of the suit property. Clearly the title ought not to have issued and I find



no reason to uphold the Defendants title as invited. I'm persuaded by the dictum of Onyancha J in *Alberta Mae Gacci – vs – Attorney General & 4 Others* (2006) eKLR persuasively stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”

46. I note that the Defendants have stated that the Plaintiff failed to present the consent indicating how he managed to transfer the suit property to himself. On this, it is clear that the suit property was previously registered in the names of the deceased Amir Ali Boi. It was after his death as per the copy of death certificate attached, that the property was transmitted to his daughter and grandson PW2 and PW1 respectively. There was no other way to convey the property of a deceased person other than by transmission through the filing and completion of a succession cause. The issue of obtaining the consent from LCB does not clearly come into play in this scenario.
47. Is the Plaintiff therefore entitled to the orders sought in his pleadings? The orders sought have already been outlined elsewhere in this judgement. I will not belabour the point for the reason that the upshot of the foregoing discussion clearly shows there is a right that has been infringed and which calls for protection by way of an order of mandatory injunction.
48. But what should happen to the title issued in the names of the Defendants in the year 2001. Section 32 (1)(i) of the Registered Land Act (repealed) and which applies by dint of section 107 of the Land Registration Act is to the effect that only one title deed or certificate shall be issued in respect of each parcel of land or lease. Undoubtedly there cannot be two titles over the same suit property. I have agonized over this for the reason that the Plaintiff has not sought for an order for cancellation of title, yet a party is bound by his pleadings. The Plaintiff has asked for any other and/or further orders this honourable court may deem just and fit to grant. Section 13 (7) of the Environment and Land Court empowers the court in exercise of its jurisdiction under the Act to make any order and grant any relief as the court deems fit and just. Further the court is empowered under Section 80 (1) of the Land Registration Act, 2012 to order the rectification of the register by directing that any entry be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. Equity also suffers no wrong without a remedy.
49. I'm further emboldened by the following pronouncement of The Supreme Court in *Dina Management Limited Vs County Government of Mombasa & 5 Others* (2023) KESC 30 (KLR) where the court stated thus; -
50. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to property. In the case of *Funzi Development Ltd & Others Vs. County Council of Kwale*, Msa Civil Appeal No. 252 of 2005 (2014) eKLR the Court Appeal which decision this court affirmed stated that; -

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



51. Invoking foregoing therefore I'm inclined to order the rectification of the register in the manner that I will shortly outline.
52. The upshot of my analysis and discussions herein is that it is the courts finding that the Plaintiff has proved his case against the Defendants to the required standard and I enter judgement for the Plaintiff against the Defendants in the following terms; -
  1. Permanent injunction restraining the Defendants by themselves, their agents, servants, workers, employees and/or any other person acting on their behalf in respect of plot Number Kwale/Galu Kinondo/720.
  2. In view of 1) above an order of mandatory injunction hereby issues against the defendants to demolish the structures on plot Number Kwale/Galu Kinondo/720 within 90 days of the date of this judgement failure to which the plaintiff shall be at liberty to undertake the demolishing at the cost of the Defendants.
  3. The Land Registrar Kwale to expunge all documents indicating that Kwale/Galu Kinondo/720 was transferred to Macharia Kamau, Martin Mogwanja & Pauline Mogwanja and Reconstruct all the records to reflect the Plaintiff as the legal registered owner of Kwale/Galu Kinondo/720.
  4. The costs of the suit are awarded to the Plaintiff.

Orders accordingly.

**JUDGEMENT DATED SIGNED AND DELIVERED THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2024**

**A E DENA**

**JUDGE**

Ms. Ng'ang'a Holding brief for Mr. Oloo for the Plaintiffs

Mr. Gitahi Holding Brief for Ms. Waihenya for Defendants

Denis Mwakina – Court Assistant

