



Mazrui & 2 others v Sunrise Creek Limited & 3 others; Mazrui Lands Board of Trustees (Interested Party) (Environment & Land Case 257 of 2018) [2024] KEELC 7266 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7266 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 257 OF 2018
SM KIBUNJA, J
OCTOBER 30, 2024**

BETWEEN

**RASHID MOHAMED SALIM MAZRUI 1ST PLAINTIFF
MOHAMED SULEIMAN NASSOR 2ND PLAINTIFF
MOHAMED SULEIMAN MAZRUI 3RD PLAINTIFF**

AND

**SUNRISE CREEK LIMITED 1ST DEFENDANT
LANDS AND PHYSICAL PLANNING 2ND DEFENDANT
MOMBASA LANDS REGISTRAR 3RD DEFENDANT
THE HON ATTORNEY GENERAL 4TH DEFENDANT**

AND

MAZRUI LANDS BOARD OF TRUSTEES INTERESTED PARTY

JUDGMENT

1. The plaintiffs initiated this suit through the plaint dated October 29, 2018, seeking for the following prayers against the defendants:
 - i. “A Declaration that the transfer dated April 29, 2013 between Khaidum Nabhan Rashid and Sunrise Creek Limited, the 1st Defendant, in respect of all that piece of land situate in Takaungu Trading Centre in Kilifi District measuring 5.163 hectares or thereabouts, that is to say, Land Reference Number Group 1/93 which said piece of land with dimensions, abuttals and boundaries thereof is delineated on a plan annexed to the said Grant and more particularly



on Land Survey Plan Number 311013 deposited in the Survey Records Office at Nairobi, is illegal, unlawful, null and void.

- ii. An Order that the transfer dated 29th April 2013 between Khaidum Nabhan Rashid and Sunrise Creek Limited, the 1st Defendant be cancelled and/revoked.
 - iii. An Order directing the 3rd Defendant to cancel and/or strike off the name of the 1st Defendant from the register relating to the suit premises and substitute thereof with the name of the Interested Party.
 - iv. A permanent injunction restraining the 1st Defendant from making any claim on any or of all that piece of land situate in Takaungu Trading Centre in Kilifi District measuring 5.163 hectares or thereabouts that is to say Land Reference Number Group 1/93 which said piece of land with dimensions, abutments and boundaries thereof is delineated on a plan annexed to the said Grant and more particularly on Land Survey Plan Number 311013 deposited in the Survey Records Office at Nairobi.
 - v. An Order compelling the 1st Defendant to demolish and/or remove all structures erected on the suit premises and to return the premises to their condition prior to the unlawful acquisition, within 30 days of judgment.
 - vi. After compliance with order (v) hereinabove, an order of permanent injunction restraining the 1st Defendant, whether by itself, its servants, agents or otherwise from trespassing upon, visiting, entering, and/or continuing to construct or erect structures upon any part of all that piece of land situate in Takaungu Trading Centre in Kilifi District measuring 5.163 hectares or thereabouts that is to say Land Reference Number Group 1/93 which said piece of land with dimensions, abutments and boundaries thereof is delineated on a plan annexed to the said Grant and more particularly on Land Survey Plan Number 311013 deposited in the Survey Records Office at Nairobi.
 - vii. In the event the 1st Defendant fails to comply with order (v) hereinabove within the stipulated time, the plaintiffs be at liberty to demolish and remove, any and all structures constructed and erected at the instance of the 1st Defendant, and further, the plaintiffs be at liberty to recover the costs of demolition and removal from the 1st Defendant.
 - viii. General Damages for unlawful alienation and deprivation of the Plaintiffs of the ownership, possession and use of the suit premises.
 - ix. Costs of the suit.
 - x. Interest on the (viii) and (ix) above at court rate from the date of filing suit till payment in full.
 - xi. Any part and further order that the Honourable Court may deem just and fit to grant.”
2. The plaintiffs inter alia averred they are elected and recognized trustees of the Mazrui Community (Development and Welfare) Wakf Lands Trust, as well as representatives of the Mazrui and Shaqsi descendants of Sheikh Rashid bin Salim bin Khamis Mazrui, who are the legal and beneficial owners of a parcel of land known as Certificate of ownership No. 409 dated 6th April 2014 issued under Land Titles Act chapter 282 of Laws of Kenya, repealed, [the land now referred to as plot No. 4236, Kilifi, Folio No. LT 23 Folio No. 290, File 3352], hereafter referred to as Mazrui Land. The plaintiffs averred that the ownership of the Mazrui land is crystal clear under the repealed Mazrui Lands Trust Act, and the two court cases, being Mombasa High Court Civil Case No. 200 of 1981, Ahmed Abdalla & 5 Others versus Mazrui Lands Board of Trustees & Another and Ahmed Abdalla Mohamed and 3 Others



versus Attorney General (2012) eKLR, and no party can claim any part of the Mazrui Land or purport to acquire title to any portion thereof.

3. They further averred that sometime in March 2018, they learnt the 1st defendant was claiming ownership of a part of the Mazrui land, and upon conducting a search on the property, they found that the 1st defendant had been registered as lessee for 99 years of plot number group 1/93 measuring 5.163 ha, hereafter referred to as the suit property. Upon further investigation, they discovered that the Commissioner of Lands had purported to alienate the suit property through Grant No. CN 58951 dated 15th January 2013, in favour of one Khaidum Nabhan Rashid for a term of 99 years, commencing on 1st December 2012. That the suit property had been carved from the Mazrui Land, and subsequently transferred by the said Khaidum Nabhan Rashid through a transfer dated 20th April 2013 to the 1st defendant, pursuant to a sale agreement dated 16th April 2012. They noted the grant dated 15th January 2013 indicated the Government of Kenya was the lessor of the suit property. The plaintiffs averred that neither themselves, nor the interested party were involved in the disposition of the suit property. That the alienation of the suit property by the 2nd defendant and registration by the 3rd defendant was unlawful and the 1st defendant does not possess a good title. They added that the actions by the defendants over the suit property has grossly violated the plaintiffs' interests over the Mazrui land and occasioned them loss and damages.
4. The 1st defendant opposed the plaintiffs' claim through its statement of defence dated the 13th February 2019. It inter alia denied all the plaintiffs' claims, and averred that through its agents/officers, they were approached by the Khaidum Nabhan Rashid, who presented himself as the beneficiary of the Mazrui land and registered owner of the suit property that he intended to sell; that the 1st defendant conducted due diligence by obtaining a search and checking historical records under custody of the 3rd defendant, Khaidum Nabhan Rashid and Kilifi Town Council. It obtained a letter dated 20th August 1980, to the Chairman of the Mazrui Lands Board of Trustees regarding transfer of a designated portion of land to the descendants of Sheikh Rashid Bin Salim Mazrui, and another dated 6th December 1980 by the then Recorder of Titles, Ms M.W Thairu, confirming that a Mr. Usama Nabhan Rashid was allocated 40 acres of land out of the Mazrui Land, and that the registration was ongoing and the said Usama would be issued with a Certificate of Title. The 1st defendant also got various documents relating to consent given by 3rd defendant to Khaidum Nabhan Rashid to subdivide, excise, pay rates and obtain all that is required to effect transfer to the 1st defendant. It further averred that vide an agreement for sale dated 12th October 2009 and amended on 16th April 2012 with Khaidum Nabhan Rashid as vendor the 1st defendant purchased the suit property for Kshs.32,000,000. In the recitals of the agreements, it was confirmed that Khaidum Nabhan Rashid, the vendor, was the beneficial owner of subdivision 690 (Original 409) Takaungu Kilifi District measuring 16 acres and that approval for subdivision and deed plan are part of the completion documents. The 1st defendant having obtained confirmation of ownership and subdivision, the it issued various undertakings and settled the entire purchase amount of Kshs.32,000,000, and after execution and transfer became the registered owner of the suit property. That it took possession by engaging a caretaker and making arrangement to fence it. That sometime in July 2018, the said caretaker informed it of a signage erected on the suit property stating that "trespassers will be prosecuted" and had two telephone numbers contacts written on them. Upon calling those numbers, the 1st defendant learnt that two companies, Transpares Kenya Limited and Mombasa Cement Limited, claimed ownership of the said land, and accused 1st defendant of illegally utilising the suit property. Thereafter, the plaintiffs' advocates wrote to the 1st defendant demanding immediate vacant possession and proceeded to completely fence the suit property. The 1st defendant maintains that there was no encumbrance against the title of the suit property at the time of subdivision and transfer, and sought for the suit to be dismissed with costs.



5. The 2nd, 3rd, and 4th defendants opposed the plaintiffs' suit through its statement of defence dated 10th April 2019, inter alia averring that the records held by the 3rd defendant show the parcel of land known as portion 4236 Kilifi registered as LT.23. Folio 3352 measuring approximately 2716 acres is registered as Mazrui Land Trust; that parcel known as Group 1/93 measuring 5.163 hectares, was registered as CR. 58951, in the name of Khaidum Nabhan Rashid on 4th February 2013, pursuant to new Grant executed by the Commissioner of land on behalf of the President of the Republic of Kenya on 5th January 2013, and on the 2nd May 2013, it was transferred to Sunrise Creek Limited for a consideration of Kshs.28,000,000; that only office of Director of Surveys, can prove or establish whether the suit property was curved from the Mazrui land. That from the information received from the office of Director of Surveys, they show that parcel 4236, Mazrui Land, is contained on survey plan F/R 7/154 as part of Mazrui reserve No.1 while the suit property is contained on survey plan F/R 502/153; that the relationship between the two parcels is that the suit property was alienated from parcel 4236/R, which is a remnant of parcel 4236. The 2nd to 4th defendants sought for the plaintiffs' suit to be dismissed.
6. Khaidum Nabhan Rashid, third party, opposed the plaintiffs' suit through its statement of defence and third-party notice dated the 15th July 2019, inter alia averring that the suit is subjudice to a pre-existing suit being Mombasa ELC 204 of 2014, involving the same parties, including the 1st & 2nd plaintiffs and Khaidum Nabhan Rashid as the 10th defendant; that the suit should therefore be struck out, and the plaintiffs are without locus standi to file the suit, as they did not have authority or approval from the Mazrui Land Board of Trustees as per the requirement of clause 5,14 of the Trust Deed dated 7th February 2006. That through an agreement of April 2013, the Mazrui and Shaqsy Community apportioned one fourth (1/4) of the Sayyid bin Twahir bin Sayyid Abubakar Wakf land comprised in certificate of tile No. 409 to Sheikh Rashid bin Salim bin Khamis Mazrui for his exclusive possession and thereafter for the provision of his descendants/beneficiaries. That the late Usama Nabhan Rashid, as heir to the late Sheikh Rashid bin Salim bin Khamis, pursued a request, through the District Commissioner Kilifi, to the Mazrui Lands Board Trustees to obtain a formal transfer of the said land in favour of the beneficiaries of Rashid bin Salim bin Khamis Mazrui. That the recorder of titles vide letter dated 6th December 1980 certified that the said Usama had been allocated 40 acres out of the Mazrui land, and registration was to follow, and this was confirmed in Objection Cause No. 90/91-92 before the Takaungu Adjudication officer. That vide the affidavit of 23rd April 1993, the said Usama deposed that he had transferred 24 acres out of the 40 acres to several people including Dr. N. L. Acharya, Johar Manswab, Simon Mutua Kalendu, portions measuring 2acres, 2acres, and 5acres respectively. That the purchasers of the 24 acres have developed their portions and are parties in Mombasa ELC No. 204 of 2014. That the 16 acres remaining from the 40 acres belong to Khaidum Nabhan, as he pursued their formal registration after the death of Usama. That Khaidum obtained the requisite approvals from the Town Council of Kilifi; the survey was approved by Director of Survey; Deed plan No. 311013 registered as LR No. Group 1/93, and Grant No. CR 59951 for 99 years from 1st December 2012. That the said Khaidum entered into a sale agreement with the 1st defendant on 16th April 2012, and transferred the suit property to the 1st defendant on the 2nd May 2013, procedurally after obtaining the rates clearance certificate from Town Council of Kilifi, and consent from District Land Officer Kilifi for Commissioner of Lands. The third party further averred that the decision in Ahmed Abdalla Mohamed and 3 others vs Attorney General (2012) eKLR Tuiyott J, did not forbid lawful acquisition made independent of the Mazrui Lands Trust (Repeal) Act 1989, and the acquisition of the suit property was not contrary to the said judgment.



7. In the 2nd Third Party notice dated 15th July 2019, against the 2nd & 3rd defendants, the third party sought for:
- a. A Declaration that on account of the entries made by the second third party with regard to issuance of a Grant Title No. CR. 58951, that any claim arising from the use of the said Certificate of Title by the Third Party to the 1st Defendant in this suit, shall be fully indemnified by the 2nd Third party. In that event, the 2nd Third Party be ordered to refund the 1st defendant herein the sum of Kshs. 32,000,000 plus interest at court rates from the date of payment of the purchase price to the third party, being 20th March 2012, until payment in full as more particularly pleaded in paragraph 6 and 7 in this 2nd Third Party Notice.
 - b. Costs of the suit against the 2nd Third Party.
 - c. Any other relief this Honourable court may deem fit.”
- In averments akin to those in the defence, the third party averred that should the plaintiffs’ suit ever succeeds, warranting the 1st defendant to demand the return of the purchase price it paid from the third party, such payments together with costs and accrued interest be paid by the 2nd & 3rd defendants, as they are obligated by Articles 10 and 47 of *the Constitution* read with section 81 of the *Land Registration Act* to take full responsibility for any losses that may arise from any registration effected by the said offices; that the two offices are the custodians of all land registration documents in the Country and are in law obliged to indemnify the third party.
8. The interested party filed a response dated 9th September 2019 to the third party’s defence and denied all the allegations raised thereon, and averred that no party can claim any part of the Mazrui Land, and that Khadija Khaidum Nabhan has not taken out letters of administration, and therefore lacks locus standi.
9. The plaintiffs also filed a response dated 10th September 2019 denying the Defence of the Third party in toto and reiterated the issues of locus standi of the said Khadija. They averred that the parties and subject matter in Mombasa Case 204 of 2014 were different and this suit was therefore not subjudice. They defended their locus standi by stating that they do not need authority from the Mazrui Land Board of Trustees and that they are empowered by Article 22 of *the Constitution* of Kenya to file and prosecute this suit.
10. During the hearing, the plaintiff called Rashid Mohamed Salim Mazrui, the 1st plaintiff, who testified as PW1. He adopted the contents of his statement dated 29th October 2018 and produced the documents in the list of documents of even date, and that of 24th October 2022. He testified inter alia that the Mazrui Land ought not to be sold or subdivided under the repealed Mazrui *Land Act*, in view of the two Ahmed Abdalla [supra] court cases. He reiterated that he was never involved in the sale and transfer of the suit property, and termed some of the documents at pages 12 to 14 relied on by the third party are forgeries. That he discovered the suit property had been sold when he saw ongoing construction in 2018. On cross-examination, he agreed that the trustees have discretion to lease the Mazrui land. That when they conducted the search on the Mazrui land, they found the title was intact. That the title held by the 1st defendant was therefore a fake. He acknowledged Usama and Sheikh Rashid bin Salim were members of the Mazrui family, but added they were not trustees. He insisted that there was no need to plead fraud in the suit in view of the decisions in the two Ahmed Abdalla cases [supra]. That he was



not aware that Usama Rashid owned a portion of the Mazrui Land, that he sold parts of and gave a portion to the third party who then sold to the 1st defendant. That the import of the judgments in the two Ahmed Abdalla cases, is that the late Usama Rashid and his heirs had no legal rights to the Mazrui Land, and had no capacity to sell portions thereof to any party. That the Mazrui land cannot be sold, or subdivided, or transferred, and any title issued over that land would be illegal. PW1 insisted that the Mazrui Land is registered with a Wakf and cannot be sold or transferred, and the original title for 409 was never surrendered to enable subdivision and registration of new titles.

11. The 2nd to 4th defendants called Waridi Abas, of the Regional Survey office, Mombasa, and Sheila Nasambo Soita, Land Registrar Mombasa who testified as DW1 and DW2 respectively. It was the testimony of DW1 inter alia, that the suit property was carved out of parcel 4236, Mazrui land, and approved under F/R 502/153 procedurally; that parcel 4236 was carved by F/R 7/154; that the suit property was subdivided from the Mazrui Land, that due process was followed and that the suit property had been allocated just before the survey to place beacons. He produced the surveyor's report dated 1st April 2019 as well as the documents in the 2nd to 4th defendants' list of documents dated 10th April 2019, as exhibits. In cross-examination, DW1 stated that the suit property is a valid parcel and that the Director of Surveys confirmed the allotment letter was genuine. That the documents 8 to 11 in the third party's list of documents filed on 16th July 2019, relate to the suit property and are valid. That the suit property is within the boundaries of parcel 4236, which is valid land. DW2 reiterated that the suit property was issued pursuant to a new grant executed by the Commissioner of Lands on 5th January 2013, that was on 2nd May 2013, transferred to the 1st Defendant. She told the court that she could not tell how the suit property was allocated as that was the preserve of the Director of Land Administration. That it was the Director of Physical Planning and Director of Survey that could tell whether the suit property was carved from the Mazrui land. On cross examination she stated that the Mazrui Land was registered under the repealed Land Titles Act while the suit property was registered under the repealed Registration of Titles Act. She was not sure whether all the procedures were followed in the registration of the suit property as the office was missing some documents, like the transfer form to 1st defendant and there was no correspondence file, that should have been opened on registration. She ascertained that if the suit property was hived out of the Mazrui Land, then the registration system of the parcels should have remained the same. That the consent judgment in case 185 of 1991 was not filed in her records. She was categorical that according to her records, the suit property is not within the Mazrui Land. DW2 further stated that a deed plan normally shows the mother title, and that the grant for the suit parcel did not show it was subdivided from Mazrui Land, but a new grant from the Commissioner of Lands. In re-examination, DW2 stated that despite not having the correspondence file, they would not have made the various entry No. 1 for Khaidum and No. 2 for 1st defendant in the Grant No. 58951, without the supporting documents. That the Grant must have been forwarded by the Commissioner of lands to her office together with supporting documents for registration and opening of the correspondence file. That from the records held in the office, the suit property is registered with 1st defendant and parcel 4236 as Mazrui land. That her office does not have any evidence that the Mazrui Land had been converted to a different registration regime from Land Titles Act.
12. The 1st defendant called Stanley Kebathi, a director of the 1st defendant, who testified as DW3. He adopted his statement dated 17th September 2021 and filed on 19th July 2022, as his evidence in chief and produced the documents in list of documents dated 17th September 2021 as exhibits. He reiterated that 1st defendant had conducted due diligence with the help of lawyers and other professionals, before buying the suit property from Khaidum Nabham Rashid. In cross-examination, DW3 stated that they got a letter of consent from the chairman of the Mazrui Land Board Committee, paid the purchase price of Kshs.32 million and stamp duty. He told the court that he did not know the suit property was carved out of the Mazrui land at the time of purchase, and was also, not aware of the two Ahmed



Abdalla court decisions [supra]. That he had seen a decision by the interested party allowing 40 acres to be carved out of the Mazrui Land to the third party.

13. Khadija Khaidum Nabhan, the third party, testified as DW4 and relied on her statement filed on 16th July 2019, and produced the documents in the list of documents of even date. She testified that in 1913, the Mazrui community agreed to give a quarter of the land under Wakf to her grandfather Sheikh Rashid. That Usama, his grandson, is the one who followed up on the land, through the office of the District Commissioner, and was allocated 40 acres as evidenced by the letter authored by Mrs. M.W Thairu, the then recorder of titles, on 6th December 1980. She further testified that objection proceedings were conducted and she produced the proceedings. That the said Usama Rashid had already sold off 24 acres out of the 40 acres by the time he passed away, and that his brother, the late Khaidum Rashid, who is her father, followed up on the 16 acres and was registered as owner. DW 4 stated that after obtaining approval from Kilifi Town Council, Khaidum Rashid had the land surveyed and was issued with an excision certificate, and thereafter obtained a deed plan for the 16 acres, which he registered and a Grant CR 58951 was issued. She further testified that the late Khaidum sold 16 acres to the 1st defendant. Before then, the deceased had paid all the rates and obtained a land rates clearance certificate. DW4 testified that all the procedures were followed in the transaction over the suit property, and if the court should find in favour of the plaintiffs, then the Government should be the one to compensate the 1st defendant. She told the court that the 1st defendant was an innocent purchaser for value, and that the land was neither charged to any bank nor was there any court order stopping its sale. The consent dated 4th April 2013 is what enabled the third party to sell the suit property to the 1st defendant who paid purchase price of Kshs.32,000,000 and stamp duty. She admitted that there was a first sale agreement in 2009 between themselves and the 1st defendant, but the late Khaidum did not have a Grant at that time. Further that the suit property was Wakf land of the Mazrui as at 2019. The objection proceedings did not involve the plaintiffs and that the affidavit sworn by Usama Rashid at page 26 of the third party's list of documents is not equivalent to a title. DW4 stated that the decision in Mombasa HCC NO. 230 of 1981 was not registered at the Land Registry, and if it had been registered, the late Kahidum Nabhan would not have been issued with title to be able to sell to the 1st defendant. The sale agreement at page 41 shows that the late Khaidum was selling freehold title to the 1st defendant. That the suit property transferred to the 1st defendant was 12.76 acres as the rest of the land was taken up beach percentage and access road, and that is why the valuation was reduced from Kshs.32,000,000 to Kshs.28,000,000.
14. The learned counsel for the plaintiffs, 2nd to 4th defendants, third party, 1st defendant and interested party filed their submissions dated 10th June 2024, 9th September 2024, 19th August 2024, 25th July 2024 and 1st July 2024 respectively, which the court has considered.
15. The issues for determination by the court are as follows:
 - a. Whether the plaintiffs had locus standi to file and prosecute this case.
 - b. Whether this suit was subjudice.
 - c. Whether the suit property was hived out from the Mazrui Land, and if so whether the acquisition of the title to the suit property by the late Khaidum Nabhan Rashid was regularly, and procedurally obtained.
 - d. Whether the sale and transfer of the suit property to the 1st defendant by the late Khaidum Nabhan Rashid was lawful and/or procedurally done.
 - e. Whether 1st defendant was a bona fide purchaser for value without notice.



- f. Whether the third party is entitled to indemnity from the 2nd and 3rd defendants, for the value of refund of purchase price paid by 1st defendant, should the suit property be found to have been irregularly transferred.
- g. Who bears the costs?
16. The court carefully considered the pleadings, the oral and documentary evidence tendered, written submissions by the learned counsel for the plaintiffs, 1st defendant, 2nd to 4th defendants and third party, superior courts decisions cited thereon, and come to the following determinations:
- a. It clearly came out during the proceedings that the legal standing of the plaintiffs was being challenged for lacking authority to sue on behalf of the Mazrui Land Board of Trustees. Though the defendants and third party had through their pleadings indicated they would be raising objections on the plaintiffs' locus, that appear to have been abandoned as can be seen in their submissions. However, the court has noted that under clause 9.2 of the Trust deed dated 7th February 2006, it provides Trustees with the power to sue and defend suits under the Trust/Wakf called Mazrui Community Development and Welfare Wakf Lands Trust. Although, the plaintiffs' claim that their names are in the preamble of the deed, the only name noted by the court is that of 2nd plaintiff. However, it is further noted that by the resolution of Board of Trustees dated 23rd June 2022 the 1st and 2nd plaintiffs were authorised. In the decision relied on by the plaintiffs *Spire Bank Limited vs Land Registrar & 2 Others* (2019) eKLR the Court of Appeal held that it is the burden of the party alleging that one is without authority to tender proof, and it would be sufficient for the authorised person to state he/she was duly authorised. The second objection to the plaintiffs' suit was on the ground of subjudice in view of the previously filed Mombasa ELC No. 204 of 2014. From the related documents availed to the court, that suit was filed by Mazrui Lands Board of Trustees as plaintiff against 11 defendants, among them being Haidhum Nabhan. The suit is no more as it was terminated vide the notice of withdrawal of suit dated the 4th November 2022, and filed on the 7th November 2022. That from the parties' submissions, the objections to the plaintiffs' capacity and suit being subjudice were abandoned, and the court do not need to say more.
- b. On the issue of whether the suit property was carved out of the Mazrui Land, the plaintiffs had the burden of proof under section 107 of the [Evidence Act](#) Chapter 80 of Laws of Kenya. Their position is that LR Group 1/93 measuring 5.163 hectares was carved out of certificate of ownership No. 409 dated 6th April 2014, issued under Land Title Act chapter 282 of Laws of Kenya, now referred to as Plot No. 4236, Kilifi Folio No. LT 23 Folio No. 290 File 3352. I have gone through the evidence tendered by the plaintiffs through PW1 and though I have not seen any documentary evidence to show the nexus between Plot No. 4236, and Certificate of Ownership No. 409, I have noted none of the parties has contested that the suit property came out of the Mazrui land. The testimony by DW1 and DW2, including the survey report dated 1st April 2019, and produced as exhibit shows that the Mazrui Land was originally Certificate of Ownership Number 409 dated 6th April 2014 issued under the Land Titles Act, but is now referred to as plot number 4236 Kilifi, and that the suit property was carved out of the parcel 4236, and was approved under F/R 502/153. A map showing the Mazrui reserve was produced as exhibit, to show the position of the suit property as "A". A plan for F/R 7/154 and which was marked as D shows that the suit property is partly in 4236/R, and partly parcel 4236. The court has observed that the parcels of land have been delineated into groups. DW1, the surveyor testified that 4236/R is a remainder of parcel 4236, and that the suit property was created before beacons were placed. She agreed that the suit property should not have overlapped with



the other parcel 4236. It was her evidence that the due procedure was lawfully followed in creating the suit property, though she could not confirm the validity of parcel Group 1, which cannot be seen on the map. It appears to the court that the suit property is the only parcel in the category of Group 1. The court is satisfied that the evidence of DW1 confirms that the suit property was hived from parcel 4236/R, which is the remainder of the Mazrui Land. The evidence of DW1 and DW2 taken together with the position taken by the plaintiffs, third party and the 1st defendant leaves no doubt that the suit property indeed was excised from the Mazrui land.

- c. There is no acreage given to the court to show that the parcel 4236 was created as a result of the 40 acres given to the late Usama Nabhan Rashid vide the letter dated 6th December 1980 by the then Recorder of Titles, Mrs. M.W Thairu. However, the evidence tendered by DW1 show that the suit property was excised from parcel 4236, and the portion that remained become parcel 4236R. DW2 told the court that the suit property was registered under the Registration of Titles Act Chapter 281 of the Laws of Kenya, while the Mazrui Land it is said to have originated from, was registered under the repealed Land Titles Act. No evidence of any formal conversion of the registration regime having been undertaken from Land Titles Act to Registration of Titles Act was presented to the court by the 2nd to 4th defendants and the third party. DW2 further testified that in her opinion there is no relationship between the suit property and the Mazrui Land. She further cast doubt onto the procedures followed as she said some documents, including the correspondence file were missing or not available in the office, but hastened to add that her office would not have processed the title for the suit property without all the requisite documents having been presented.
- d. The plaintiffs' position, which I agree with, is that the Commissioner of Lands could only have lawfully issued grant No. 58951 over the suit property, if the land was un-alienated government land. In the circumstances of this suit, two probable positions arise; first that the said Grant over the suit property was previously government land under section 2 of the repealed Government Lands Act or secondly, if the land was not government land, then Commissioner of lands acted ultra vires in alienating land which was already privately owned by the Mazrui Land Board of Trustees. The second position is the most probable one, as the evidence tendered, even by the 2nd to 4th defendants, through DW1 and DW2, has not suggested that the suit property was previously un-alienated government/public land. Civil matters are decided on a balance of probabilities, and in light of the totality of the evidence adduced by DW2 on the missing documents, and corresponding file for the suit property, as well as the evidence by DW1, the office of the Commissioner of Lands was in complicity with Khaidum Nabhan Rashid in issuing the latter a Grant on land that was previously private land, that was subdivided to create the suit property and remainder given a new parcel number of 4236/R. Parcel 4236 was never a government land before and even after it was subdivided. The court therefore finds that parcel 4236/R, being a remainder of parcel 4236 was before and after the Mazrui Land Trust (Repeal) Act 1989, was declared unconstitutional in Mombasa HCCC No. 185 of 1991; Ahmed Abdalla & Others versus The Attorney General, still part of the Mazrui Land.
- e. The Orders issued in Ahmed Abdalla & Others versus AG [2012] KEHC 5471 (KLR) specifically stated that "all land situated to the South of Kilifi Creek in the Kilifi District containing by measurement 2716 acres or thereabouts, and as comprised in Certificate of Ownership number 409 dated 6th April 1914 issued under the Land Titles Act (Cap 282) of the Laws of Kenya and declared to be a Wakf to the Mazrui's and their successors for ever was always vested in the Mazrui Lands Trust Board not thereby as the lawful proprietors thereof,



but as trustees for the Mazrui who are the lawful owners within the meaning contained in the said Act, and to the exclusion of all other persons” and “that all other lands vested in the said Board as Trustees for the Mazrui, by the Mazrui Lands Trust Act (Cap 289) of the Laws of Kenya (now repealed) were also vested in the Mazrui, as lawful proprietors thereof, and to the exclusion of all other persons.” The court also held that “should Mazrui lands aforesaid be lawfully and properly acquired by the Government of Kenya for the benefit of persons other than the Mazrui, then prompt, just and full compensation should first be paid to the Mazrui in accordance with the provisions of Section 75(i) (c) of the said former Constitution, and Article 40 of the new Constitution” The suit property by admission of all the parties, was sold and purchased in the belief that it came out of the 40 acres that had been promised to Usama Rashid under the void Rashid Wakf. Usama Rashid, was one of the defendants in Mombasa HCCC No. 230 of 1981; Ahmed Abdalla & 5 Others versus Mazrui Lands Board Trustees & Usama Nabhan Rashid. In that case the court among others held that the said Usama did not have any interest in the 40 acres of Mazrui land and that the decision by the board to award the said land to him was null and void. The court issued an injunction barring Usama from dealing in the null and void title.

- f. From the evidence tendered, Khaidum Rashid, represented in this suit by his daughter, DW4, was a brother to Usama Nabhan Rashid. Though Usama Nabhan Rashid appear not to have actualized the excision and registration of the 40 acres from the Mazrui land after the decision of the court in the above case, upon his death, his brother Khaidum Nabhan Rashid, and father to DW4, embarked on the journey to have the land registered, culminating inter alia to the sale of the suit property to the 1st defendant. Even though the decision of the court declaring Usama’s claim over the 40 acres of the Mazrui land null and void appear not to have been registered against the title of the Mazrui land to ward off other potential claims arising therefrom, Khaidum Nabhan Rashid, the third party, appear to have known about the court’s decision even at the time the suit property was being transferred to the 1st defendant. The excision of the suit property from the Mazrui land and its registration, and related processes by Khaidum Nabhan Rashid over it, including the subsequent disposition to the 1st defendant, was evidently irregular, and therefore null and void.
- g. While in all probability the 1st defendant does not appear to have known of any irregularity in the acquisition of the suit property’s title at the time it entered into the sale agreements of 2009 and 2012 with the said Khaidum Nabhan Rashid, the fact that vendor knew of the court decision that nullified Usama Nabhan Rashid claim to the 40 acres of Mazrui land, and yet proceeded not only to excise it, but also offer the same for sale and transfer to the 1st defendant, leads the court to come to the finding that as the said Khaidum never acquired good title, he was incapable of passing a good title to the 1st defendant.
- h. The first defendant issued a third party notice against Khaidum Rashid for refund of the purchase price it paid to him in case the court was to fault the transaction. The third party is represented in the suit by Khaidija Khaidum Nabhan, who testified as DW4, as administrator of the estate of Khaidum Nabhan Rashid, deceased, pursuant to the court order of 31st March 2021 on her application dated 24th March 2021. In view of the foregoing findings that the third party’s title to the suit property was irregularly obtained, then the estate is obligated to refund the purchase price received under the sale agreements to the 1st defendant with interest.
- i. The third party took out 2nd third party notice dated 15th July 2019, against the 2nd and 3rd defendants for indemnity in case the third party is ordered to return the purchase price received from the 1st defendant. As submitted by counsel for the third party, the third party notices are



anchored on Order 1 Rule 24 of the Civil Procedure Rules, which allows a defendant in a suit to without leave issue such a notice against another person who is already a party to the suit and to whom he seeks contribution or indemnity. Though the 2nd to 4th defendants filed their statement of defence dated 10th April 2019 to the plaintiffs' claim, no response/defence was filed by, or for the 2nd and 3rd defendants to the third party's 2nd third party notice, though it was served on 23rd August 2019. The third party counsel has moved the court through their submissions to take the 2nd third party notice by his client as unopposed. The learned counsel has cited the decision in the case of *Timsales Limited versus Harun Thuo Ndungu* [2010] eKLR, where the court held;

“...that where a party fails to produce certain evidence, a presumption arises that the evidence, if produced, would be unfavourable to that party; this presumption is not confined to oral testimony that can also apply to evidence of a tape recording that is withheld.”

The learned counsel for the 2nd to 4th defendants, who is also representing the 2nd and 3rd defendants in the 2nd third party notice, submitted that the third party is not entitled to indemnity as the 2nd third party only came to interact with the transactions relating to the suit property, at the tail end. That the 2nd defendant relied on the documents the third party had presented to issue the title document he then used to enter into a sale agreement, and transfer the suit property to the 1st defendant. The learned counsel cited decision in the Supreme Court Pet. 8(E010) of 2021; *Dina Management Limited versus County Government of Mombasa & Others* where the court stated that;

“Indeed the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to the *Bawazir & Co. (1993) Ltd*, who in turn could pass to the appellant.”

The learned counsel pointed out that the *Khaidum Nabhan Rashid* knew all along that the title he was pursuing over the suit property was part of the 40 acres out of *Mazrui* land allegedly allocated to the late *Usama Nabhan Rashid*, that had been declared null and void by the court in the previous court decision.

- j. The third party had inter alia stated that after the sale of the 24 acres out of the 40 acres, the 16 acres that remained belonged to *Khaidum Nabhan*, who pursued registration after the death of his brother *Usama*. That *Khaidum* obtained the requisite approvals from the Town Council of *Kilifi*, survey by the licensed surveyor approved by Director of Surveys, Deed plan No. 311013 registered as LR No. Group 1/93, and Grant No. CR 59951 for 99 years from 1st December 2012. Those are the documents that were used in the registration of the title that was finally transferred to the 1st defendant pursuant to the agreement of sale. While that may be so, there is no explanation tendered by the 2nd defendant how the conversion of the regime under which the suit property was registered and the allocation of the land excised from *Mazrui* private land was registered as if it had originated from government land in favour of the third party by the Commissioner of Land. The third party may have made some misrepresentations to the Ministry officers concerned, but those in the office of Director of survey, and the Commissioner of Lands must have been heavily involved with *Khaidum* in the scheme, or were out-rightly inefficient if they proceeded to allocate and process the title



over the suit land that was on private land, as if it was government land to the third party without raising red flags like those DW2 was pointing during her testimony. It was through their actions or inactions that the third party obtained the title over the suit property that made the 1st defendant enter into the sale agreement with him, and pay the purchase price of Kshs.28 million. The 1st defendant was not to blame as it followed all the due process as evidenced by the documents provided in court.

- k. The 3rd defendant may also not be to blame as the office is the final consumer of all documents from different departments such as the physical planner, the Commissioner of Lands, the County Government, Director of Survey et al, by registering the details of ownership of land upon confirming all the documents are in order. In the case of *Gitwany Investment Limited - v- Tajmal Limited & 2 others*, (2006) eKLR, the court expressed itself as follows:

“Having concluded that LR No. 209/3088 is in fact the same on the ground with LR No. 209/12004, this court is then confronted with really the main issue in this matter. Both Gitwany and the 2nd and 3rd Defendants were issued with title documents by the Commissioner of Lands. Gitwany’s title for L.R. NO. 209/12004 was issued on 24.7.1995 and it is signed by Wilson Gachanja as such Commissioner in the presence of the Registrar of Titles whose name is unclear. The one in the name of Maxtowers and Njage was signed by Sammy Silas Komen Mwaita as Commissioner of Lands on 12.2.2001 in the presence of J.K. Wanjau, Registrar of Titles. The land was then transferred and is presently held in the name of the 1st defendant which transfer was registered against the title on 26.7.2001.

The position as at now is that both Gitwany and Taj Mall claim and in fact have title to the same piece of land. Which title should prevail? The one issued on 24.7.1995 or the one issued on 24.2.2001? I would agree with the submissions by counsel for the 1st Defendant that it is to S.23 (1) of the Registration of Titles Act that this court must turn to. That section reads as follows: -

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

I have taken the pains in this judgment to set out exactly how each party obtained title. I have also read the submissions by all parties and sadly none has offered any evidence that Gitwany or the 1st Defendant in any way acted fraudulently or that any of them misrepresented any fact and which then led them to obtain fraudulent titles. In fact the entire mess in which those parties find themselves in is the creation of and a matter that must be put squarely at the doorstep of the Commissioner of Lands, the 3rd Party. All documents leading to the issuance of title are not prepared, kept nor issued by any other party other than that office, sometimes in conjunction with the Directorate of Survey. Any change in L.R. No. or in acreage is a matter that is always in the hands of those officers and even



if a private person in a professional capacity undertakes those tasks then those offices must always approve and thereafter take responsibility for those actions.....”

DW2 testified that she could not tell how the suit property could have been allocated to Khaidum Nabhan Rashid, as land allocation was not done through her office. The 2nd defendant should have deemed it fit to summon an officer from the National Land Commission, who took over all the functions of the defunct Commissioner of Lands, to testify as a witness and probably shed light on the issues surrounding the allocation of the suit land, which was part of the Mazrui land to the third party. The Office of the Commissioner of lands should be held accountable, just like the estate of the later Khaidum, the third party and both should refund the purchase price paid by the 1st defendant under their sale agreements. The refund of the purchase price paid by the 1st defendant to Khaidum Nabhan Rashid should be the responsibility of both the 1st and 2nd third parties jointly and severally, as it was their complicity in creating the suit property on Mazrui land that was the genesis of the scam.

- l. General damages were discussed in *Dominic Arony Amolo Vs Attorney General H.C Misc. Application No.494/2003*, where the court held that monetary compensation must be reasonable and fair, and taking into account all the circumstances of each case. In this circumstance the plaintiffs have been in occupation of the suit property since sometime in July 2018. They have not shown that the 1st defendant or any other defendant was the one in occupation of the suit property, and there would be no justice to grant general damages in this suit.
- m. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs abide the outcome of a suit unless where otherwise ordered for good cause. Though the plaintiffs and the third party have succeeded in their respective claims, I am of the considered view that justice in the suit will better be served by an order that each party bears their own costs.
1. From the foregoing, the court finds the plaintiffs have substantially proved their case on a balance of probabilities. The 1st defendant has shown that it is entitled to a refund of the purchase price paid under the sale agreement with the 1st third party, and the latter has shown she is entitled to some indemnity from the 2nd third party. The court therefore enters judgement and orders as follows:
 - a. That prayers (i) to (vii) in the plaint dated October 29, 2018 are allowed in favour of the plaintiffs.
 - b. That the 1st Third party and 2nd Third Party to jointly and severally refund the 1st defendant the purchase price of Kshs.28 million paid under the sale agreement, with interest at court’s rates from date of payment until payment in full.
 - c. Each party to bear their own costs in the suit and third party notices.Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 30TH DAY OF OCTOBER 2024.



S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFFS : Mr. Ochieng holding brief for Onyony

DEFENDANTS : Mr Gakunga for Owino for 1st Defendant

INTERESTED PARTY : Mr. Ochieng

THIRD PARTIES : M/s Murage for 1st Third Party.

LEAKEY – Court Assistant

S. M. KIBUNJA, J.

ELC MOMBASA.

