



REPUBLIC OF KENYA



Flying School Holdings Limited v Chief Land Registrar & 2 others (Environment & Land Case E004 of 2023) [2024] KEELC 7139 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7139 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E004 OF 2023**

AE DENA, J

OCTOBER 24, 2024

BETWEEN

FLYING SCHOOL HOLDINGS LIMITED PLAINTIFF

AND

THE CHIEF LAND REGISTRAR 1ST DEFENDANT

COUNTY LAND REGISTRAR 2ND DEFENDANT

PUNCHKULLA ENTERPRISES LIMITED 3RD DEFENDANT

JUDGMENT

1. The Plaintiff's case is that it is the absolute proprietor of the property known as Kwale/Diani Beach/1429 (herein suit property). That the property shares a boundary with Diani airport runway and which the Plaintiff states it intends to develop and construct an aircraft hangar. That after carrying out due diligence, the Plaintiff established that there exists another parcel of land bearing the same land registration number but in the name of Punchkulla Enterprises the 3rd defendant. However, after doing a search at the companies' registry it was confirmed that the said company does not exist.
2. The Plaintiff further states that after carrying out further due diligence through a licensed surveyor, a report was prepared and the details of the same are outlined under paragraph 9 as follows; -
 1. Parcel No Kwale/Diani Beach/1429 was a sub division of parcels No 656 measuring 0.0870Ha belonging to Flying School Holdings Limited
 2. Parcel No Kwale/Diani Beach/1429 being a subdivision of parcel No 1417 measuring 0.2294Ha leased by the government of Kenya to Punchkulla Enterprises Limited a lease dated 6/7/2004
 3. It was established that the boundary beacons for Plaintiff's land were in situ being beacons DX34, MR8, MR9, MR10, MR18



4. It was discovered that the 3rd defendant's land does not exist on any survey plan held with the director survey headquarters.
3. That the surveyor in the process of carrying out the above excise discovered an unapproved plan marked folio 434 and registered as No 157[F/R 434/157] whose details show parcel No 1417 was subdivided to create the 3rd defendant's parcel. That parcel 1417 was identified as the property called Swahili beach resort and which is unrelated to the 3rd defendant. That the registered survey plan for the plaintiff's parcel on the ground is proper and accurate and identified the plaintiff's land with its actual dimensions. It is further stated that the plaintiff's property is not public utility property and that there is an apparent error and mistake in the records of double registration and illegal duplication and miscomputation of size and it was therefore proper for the court to issue orders of rectification. The plaintiff prays for judgement against the defendants as hereunder; -
 1. A declaration that the Plaintiff is the registered proprietor of Kwale/Diani Beach/1429 measuring 0/1086 HA and not 0.0870 HA. The 3rd Defendant's title/parcel bearing the same title number Kwale/Diani Beach/1429 is an illegality due to duplication and double registration. The 3rd Defendant's title be accordingly cancelled by rectification of the register so as not to affect the Plaintiff's rights and interest in the suit land.
 2. An order of rectification by the court
 - a. By directing the cancellation of the 3rd Defendant's title as being illegal and the register be accordingly amended to indicate that the title number 1429 is registered in the Plaintiffs Flying School Holding Limited name
 - b. To indicate the correct area for the Plaintiffs, land No Kwale/Diani Beach/1429 to be 0.1086Ha and not 0.0870Ha as currently reflected on the register. The register and the title documents and all the requisite records be duly amended.
 3. A permanent injunction be issued restraining any dealings on the suit property by way of sale, transfer, alienation or in any other way interfering with the Plaintiffs/Applicants rights and interest in the suit property Kwale/Diani Beach/1429 by the Defendants/Respondents or their agents, servants or any other person whomsoever and whatsoever.
 4. Cost of this suit
4. In buttressing their claim against the Defendants, the Plaintiff filed the following documents as part of its evidence before court; -
 1. Title no Kwale/Diani Beach/1429
 2. Consent of Land Control Board
 3. Stamp duty payments
 4. Transfer of Kwale/Diani Beach/1429
 5. Search of title Kwale/Diani Beach/1429 measuring 0.870HA
 6. Search of title Kwale/Diani Beach/1429 measuring 0.2294 HA
 7. Gismap surveyors and consultancy survey report
5. The 1st and 2nd Defendant's statement of defence was filed before court on 28/5/2024. The 2nd Defendant admits that there exist two titles of Kwale/Diani/1429. That one title is registered in the



Plaintiff's name while the 2nd title is registered in the names of the 3rd Defendant. It is averred that once this court makes a finding in favour of either party then they are obligated to comply with the orders of the court. The 1st and 2nd Defendant's also state that the plaintiff failed to serve a notice of intention to sue upon the Attorney General and the suit is thus fatally and incurably defective. The Defendant's pray that the suit against them be dismissed with costs.

6. The 1st and 2nd Defendants filed the following list of documents in support of their case; -
 1. Certified copy of green card Kwale/Diani Beach/1429
 2. Copy of green card for 1429 in favour of Punchkulla Enterprises Ltd
 3. Copy of transfer dated 7th October 2004 from Athuman Mabavu & Amina Rama to Jamja Swalehe
 4. Copy of transfer dated 14th June 2013 from Jamja Swalehe to Flying School Holdings.
7. This case was heard on 28/5/2024.
8. PW1 Judy Ririani Muthoni testified on behalf of the Plaintiff. She told the court that she runs business in the flying industry and the Flying School Holding is one of the businesses. The witness referred to her statement of 20/7/2023 which adopted as her evidence and further produced the Plaintiffs list of documents listed in this judgement hereinabove as PEx 1-7. PW1 indicated that the Plaintiff company was interested in developing the suit property and conducted a search of the same. It was discovered that there are two titles in existence with the same parcel number.
9. it was her evidence that they engaged M/s Gismap Surveyors & Consultancy Limited to pursue the matter and it was discovered that the other parcel belonged to Swahili Beach Limited by way of lease. That efforts to contact the 3rd Defendant at the Registrar of Companies were futile as the same had not been registered. That there was also an error on the acreage of the Plaintiffs title given as 0.0807 when it should be 0.1086Ha. The witness sought for orders for rectification of the acreage and the prayers as sought in the plaint together with costs.
10. On cross examination the witness testified that the acreage for her land was supposed to be 0.1086 and not 0.0870Ha. That it was necessary to make the rectification before developing the property. On re-examination the witness stated that they were in occupation of the land and confirmed that there were no records of the 3rd Defendant at the company's registry.
11. With the above evidence the plaintiffs case was marked as closed
12. DW1 was Susan Mueni the Land Registrar Kwale. The witness produced the documents in the 1st and 2nd Defendants list of documents dated 14/11/2023 as DExh 1-4. The witness outlined the history of the suit property based on the green card for the same [Kwale/Diani Beach/1429] as follows; That the register for the suit property had been opened in the year 2004 in the name of Amina Rama & Athuman Bwanaheri as joint proprietors. The land was a subdivision of 656. In 2004/2005 the land was transferred to Janja Swalehe and Ali Matano as joint proprietors and was later in 2013 transferred to the Flying School Holdings Limited.
13. DW1 further testified that there was also a white card registered in the name of the 3rd Defendant over the suit property subdivided from Plot 1417 in 2004. That the acreage in the plot registered in the 3rd Defendants name is 0.2294Ha whereas the one for the Plaintiff is 0.0870Ha. The Land Registrar testified that the former suit is larger as compared to the acreage for the plaintiff. That the Plaintiff visited the lands office and was advised to look for the 3rd Defendant who it emerged was untraceable. DW1 indicated stated she was not in a position to tell how the white card came into being though



the 3rd Defendant owned a series of parcels from 1425-143. In the witness's opinion both subdivisions were on two different map sheets and it was her conclusion that the two parcels were different from each other. That there could have been a mistake on numbering resulting with duplication of parcel numbers.

14. On cross examination by Mr. Opolu Counsel for the Plaintiff, the witness testified that the plaintiffs land has a mutation under the mother title 656. That as per the mutation the acreage given correct based on where the beacons had been placed. On being referred to the survey map she testified that the report indicated the exact position on the ground and the same was occupied by the Swahili Beach. That the discrepancies on the acreage were noticeable as per the survey report. That they could not trace the 3rd Defendants green card in the land registry. However, 1417 belonged to the 3rd Defendant. That plot 157 was where Swahili Beach was and that in order to trace the 3rd Defendants parcel on the ground, she would to have check the relevant records.
15. The Land Registrar further stated in her cross examination that the cards for parcels 1417 and 1418 were cancelled on 23/8/2005. That different parcels of land cannot have the same number neither can 1429 have two different registered owners. That one parcel of land cannot bear a freehold and leasehold at the same time. She stated that from their records there was the need to separate parcels 1429 and 155 & 157 as it seemed the two gave rise to 1429 though 155 was still intact. The witness further stated that the green card for the 3rd defendant for 1429 was opened on 6/7/2004 as a 1st registration. That further records over the parcel were with other departments as it was a lease. DW1 confirmed that what was before court was a case of duplication. The witness agreed that there was need for rectification. That before land is registered in the names of a company it is a must for the certificate of incorporation to be produced, the same was however not there and the 3rd Defendant could not be traced. That at this juncture section 75 would come into play as the registration would be fraudulent. That based on the fact that the 3rd Defendant could not be traced, the witness stated she had no objection to the prayer for cancellation of 1429.
16. On re-examination the witness clarified that parcels 1417 and 1418 were not originals as they emanated from 1222. That registration of a freehold depended on a mutation while that of a lease depended on land adjudication.
17. With the above evidence the 1st and 2nd Defendants case was closed.

Submissions

18. The parties filed and exchanged written submissions in summary of their respective cases.

Plaintiffs Submissions

19. The Plaintiff's submissions were dated and addressed one issue, Whether the court can rectify the register for Kwale/Diani Beach/1429 by cancellation and amendment of the 3rd Defendant title under the same number with the Plaintiff's title. It is submitted that the DW1 augmented the Plaintiff's claim as being correct. That it was demonstrated through evidence by the Plaintiff that there exists double registration of the suit property due to duplication of the Parcel Number 1429 which was confirmed by DW1. Referring to Section 30 of the [Land Registration Act](#) it is submitted that the registrar may issue to a proprietor of land whose name appears in the register a certificate of lease or title as required by the proprietor showing all subsisting entries in the register affecting the land and lease. That once a title or lease has been issued over a particular parcel of land, the same parcel number cannot be issued to another person. The court was also referred to the provisions of Section 80 of the [Land Registration Act](#) on rectification of title by an order of the court. That as has been made evident through the evidence



before court, the double registration was by and large a mistake in accordance with the evidence of DW1 and which ought to be rectified by grant of the orders sought. The court is urged to allow the plaintiffs suit as prayed.

1st and 2nd Defendants Submissions

20. The 1st and 2nd Defendant's submissions are dated 12/7/2024. The Defendants refer to the rights of a registered owner of land as envisaged under sections 24,25 and 26 of the [Land Registration Act](#). That as per the holding in Hubert L Martin & 2 others versus Margaret J Kamar & 5 Others [2016] eKLR, a proprietor of land has to show the root of his ownership of land. That evidence adduced by PW1 demonstrated how the Plaintiff acquired the suit property and the subsequent transfers from the previous owners. That the evidence is further corroborated by the documents produced by the Land Registrar as per the list of documents.
21. The Defendants further submit that it is not in dispute that there exists a white card registered in the name of the 3rd Defendant and which bears the same Plot Number Kwale/Diani Beach/ 1429 subdivided from plot no 1417 in 2004. That the Plaintiff's Plot was however subdivided from parcel number 656. The 2nd Defendant submits that it was its conclusion that the two parcels are different from each other and there was a mistake in numbering during sub division as the subdivisions are different and on different map sheets. That from the 2nd defendants witness it can be deduced that this is a case of duplicity and the 3rd defendant has not been traced so as to establish whether there was duplication or the suit property was the same.
22. It is submitted that the court is vested with the powers to do rectification of the titles as was rendered in Kiplagat Arap Biator V Esther Tala Cheyegon [2016] eKLR and in Mary Ruguru Njoroge V Hon Attorney General. In conclusion the court is urged to make appropriate orders considering that fact that the plaintiff has proved its case on a scale of probability that it holds a good title.

Determination

23. Having considered the pleadings, evidence and submissions, I will seek to answer as part of this judgement whether the Plaintiff has proved its case to warrant the grant of the reliefs sought in this suit.
24. A certificate of title is prima facie held to be evidence of ownership of the stated land. This is provided for in Section 26(1) of the [Land Registration Act](#) which provides; -

The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”
25. However, the said ownership can be challenged as provided by 1(a) & (b) above.
26. It is noteworthy the dispute subject of this judgement, both the plaintiff and the 3rd defendant hold similar titles in number to their suit properties being Kwale/Diani Beach/1429. Under section 32 of the Registered [Land Act](#) (repealed) and which applies by dint of section 107 of the [Land Registration Act](#)



there can only be one title in respect of a suit property. Also see Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura Vs Attorney General & 4 others (2013) eKLR

27. With the above in mind the Court shall proceed to determine which of the two titles is valid. The court agrees with the dictum in the case of Hubert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others [2016] eKLR, cited by the 1st and 2nd defendants herein where the Court stated thus; -

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

28. Guided by the above dictum, the burden of proof pursuant to the provisions of section 107 of the Evidence Act Chapter 80 of the laws of Kenya lay on the Plaintiff to prove that it is the bonafide owner of the suit property and how it acquired the same. This to me is not so much for purposes of its impeachment. Further that there is a duplication.
29. It is the Plaintiffs case that this is an issue of duplication of numbers and which should be remedied by the court. To buttress this position the Plaintiff has relied on a survey report pursuant to an exercise conducted by Gismap Surveyors & Consultancy Limited produced as PExh7. I have perused the report. According to the report the suit property belonging to the plaintiff is a subdivision of parcel 656 and measures 0.0870Ha. On the other hand, the 3rd Defendant’s property though holding the same number as the Plaintiff’s parcel is a subdivision of parcel number 1417 measuring 0.2294 Ha and it is infact a leasehold as opposed to the plaintiff’s freehold.
30. Surprisingly, as per the map sheets relied upon by the plaintiff and which were also reviewed by DW1, the 3rd Defendants property is non-existent on the map. The Plaintiff’s property was however recognisable on the map sheet and the surveyor was able to visit and take measurements of the same as per the beacons placed thereon. From this exercise, it was further found out that the property actually measured 0.1086 Ha as opposed to the 0.0870 Ha indicated in the title deed.
31. I have all the documents as placed before court and am in agreement with the Plaintiff that there is indeed duplication of Kwale/Diani Beach/1429. There is no doubt that the plaintiff is the registered proprietor of parcel No. Kwale/Diani Beach/1429 measuring 0.0870Ha. The plaintiff in addition to the title in its name produced in evidence documents that enabled its registration as the proprietor of the parcel. Application for Consent of Land Control Board, Stamp duty payments, Transfer of Kwale/Diani Beach/1429 from Jinja Swalehe Mwangang’anzi & Ali Matano Mwafrika to the Plaintiff and search of title Kwale/Diani Beach/1429 measuring 0.870HA. In my view the plaintiff has successfully outlined how she acquired the title herein and which history has been supported by the records in the parcel file as presented by DW1 culminating into its registration.
32. The Land Registration Act under Section 79 allows the Registrar to rectify the register or any instrument presented for registration in certain cases. Section 79 (1) provides thus: -



- 79(1) The registrar may rectify the register or any instrument presented for registration in the following cases; -
- (a) In formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
 - (b) In any case and at any time with the consent of all affected parties; or
 - (c) Upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.
33. Section 80 further allows the Court to direct the Registrar to rectify the Register by directing that any registration be cancelled or amended if the court is satisfied that the registration was obtained, made or omitted by fraud or mistake. The same provides as follows; -
- Section 80 of the *Land Registration Act*,
- (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
34. While I will not attribute fraud to what caused the duplication, I think the duplication happened in error. DW1 testified in cross examination that in her opinion both subdivisions were on two different map sheets and it was her conclusion that the two parcels were different from each other. That there could have been a mistake on numbering resulting with duplication of parcel numbers. The 2nd Defendant reiterates in its submissions that it was its conclusion that the two parcels are different from each other and there was a mistake in numbering during sub division as the subdivisions are different and on different map sheets.
35. The 1st and 2nd Defendants through the evidence of DW1 are not opposed to rectification of the title to indicate the correct acreage and cancellation of the 3rd Defendants title so as to effect the rectification sought by the plaintiff. Under normal circumstances, the 3rd Defendant is to be informed of the said rectification, however going by the pleadings and the testimony of both the plaintiff and the defendants, the 3rd defendant is not traceable. If anything this court issued orders to have the said party served by substituted service which order was complied with as per the affidavit of service sworn by the Plaintiffs' counsel and filed before court on 23/8/2023.
36. It is my considered view that in the interest of justice the orders sought ought to be granted. The 3rd Defendant will suffer no prejudice as it has been established that its parcel is distinct from that of the plaintiff. I further note that the plaintiff intimated to court that records of the 3rd Defendant is not traceable at the office of the Registrar of companies. This information raises alarm as to how the property allegedly belonging to the 3rd defendant was registered without the certificate of incorporation. DW1 in her testimony also confirmed that the 3rd Defendant could not be traced. In her conclusion, she did not object to the possibility of fraudulent dealings over the said parcel. 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”.

37. 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”.

38. Having carefully considered the evidence before court, this court hereby enters judgement for the Plaintiff against the Defendants as prayed for in the plaint. The Plaintiff will have the costs of this suit.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 24TH DAY OF OCTOBER 2024

A E DENA

JUDGE

Mr. Maithya Holding Brief for Mr. Opulu for the Plaintiff

Ms. Kiti for the 1st and 2nd Defendant

No appearance for the 3rd Defendant

Asmaa Maftah-Court Assistant

