



**Dopp Investments Limited v Kenya Railways Corporation & 2 others; Kahia Transporters Limited & 5 others (Interested Parties) (Environment & Land Case 39 of 2019) [2024] KEELC 13907 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13907 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 39 OF 2019  
NA MATHEKA, J  
DECEMBER 19, 2024**

**BETWEEN**

**DOPP INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**KAHIA TRANSPORTERS LIMITED ..... INTERESTED PARTY**

**TRADE LEAD LIMITED ..... INTERESTED PARTY**

**KACHUNGO EDWARD BEKWEKWE ..... INTERESTED PARTY**

**CHARLES MULOLE SHANGA ..... INTERESTED PARTY**

**HAMISI TSUMA MWERO ..... INTERESTED PARTY**

**REDALUMBOVU MGAIDI ..... INTERESTED PARTY**

**JUDGMENT**

1. The suit was instituted vide a plaint dated 7<sup>th</sup> March 2019 and filed on 8<sup>th</sup> March 2019. The plaintiff's case is that the 2<sup>nd</sup> defendant inquired into the acquisition and ownership of Plot No. MN/VI/1040/2 and on the strength of its determination dated 12<sup>th</sup> February 2016 made an award on 11<sup>th</sup> October 2017 of Kshs 667,903,887/=. The plaintiff contended that there has been a series of fictitious litigation against their title over the years but they have never materialized to anything substantial, they include Mombasa Constitutional Petition No. 18 of 2016, Mombasa ELC No. 258 of 2016, Mombasa



Criminal Case No. 1213 of 2017, Kiambu Civil Suit No. 424 of 2017, and Mombasa Judicial Review Misc Application No. 56 of 2017. The plaintiff prayed for judgement against the defendants jointly and severally for:

- a. An order do and is hereby issued that the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant forthwith pay the plaintiff the sum of Kenya shillings six hundred and sixty seven million nine hundred and three thousand eight hundred and eighty seven only (Kshs 667,903,887).
  - b. Interest on (a) above at court rates until in full.
  - c. Costs and interest thereon of the suit.
2. The 1<sup>st</sup> defendant filed a statement of defence on 27<sup>th</sup> March 2019 and a counterclaim on 6<sup>th</sup> July 2022. It was the 1<sup>st</sup> defendant's case that the plaintiff's case has fundamental contradictions and inconsistencies and as such it would be impossible to make a meaningful response to it. Further, the 1<sup>st</sup> defendant argued that given the various litigations against the title of the plaintiff, it was prudent management of public funds to withhold payment to the plaintiff. The 1<sup>st</sup> defendant contended that the said funds, which the plaintiff lay claim to, were dispatched to the 2<sup>nd</sup> defendant and as such should be able to explain the use of the funds disbursed. In defence of the 1<sup>st</sup> and 2<sup>nd</sup> interested party counterclaim, the 1<sup>st</sup> defendant contended that they acquired a portion of LR No. MN/VI/1040/2 and not LR No. 31537. The 1<sup>st</sup> defendant claimed that the plaintiff's suit does not disclose any reasonable cause of action and as such the suit should be dismissed with costs.
  3. The 2<sup>nd</sup> defendant filed their amended statement of defence on 16<sup>th</sup> May 2022 and contended that Plot No. LR 1040/2 was one of the suit properties acquired for the construction of SGR. Following the compulsory acquisition process, they upheld the plaintiff as the owner of the suit property and issued a gazette notice Vol. CXIX No. 167 Notice No. 11043 dated 10<sup>th</sup> November 2017. The 2<sup>nd</sup> defendant averred that due to the large number of properties that were compulsory acquisition, there was a lot of information being relayed to the government press. It was claimed that inadvertently errors occurred during the publication of the gazette notices and that some documents erroneously read MN/VI/1040/2 instead of LR 1040/2 Kwale with regards to the suit property. The 2<sup>nd</sup> defendant affirmed that the suit property that was partially acquired for the SGR Phase 1 was LR 1040/2 located in Kwale county registered in favour of the plaintiff.
  4. Concerning LR 31537, the 2<sup>nd</sup> defendant claimed that it was fraudulently acquired and registered in 2017 long after the compulsory acquisition and gazettement in 2015. That LR 31537 erroneously overlaps LR 1040/2 and even the private surveyor who surveyed it has since requested the Director of survey for its cancellation for it to be expunged from records as it erroneously overlaps on the plaintiff's suit property causing a duplication of title. The 2<sup>nd</sup> defendant maintained that Plot No. MN/VI/1040 was a subdivision of Plot No. 247/VI/MN that the government acquired on 26<sup>th</sup> July 1975 for Moi International Airport. The 2<sup>nd</sup> defendant sought to explain that LR 1040/2 is located in Bonje Kwale county and Plot MN/VI/1040 in Port Ritz Mombasa and are not related to each other at all.
  5. Vide an application 9<sup>th</sup> June 2023, the 1<sup>st</sup> interested party sought and was granted orders on 15<sup>th</sup> June 2023 to enjoin the 3<sup>rd</sup> defendant into the suit, however, the plaintiff confirmed they have no claim against the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant filed a witness statement where the historical analysis of the suit property was given; and concluded that LR No. 31537 was irregularly allocated as the plaintiff owned it and was not available for alienation to another party.
  6. On 11<sup>th</sup> November 2019, the parties herein reached a consent that was adopted as an order of the court, by consent the interested parties joined the suit by filing their respective pleadings. The 1<sup>st</sup> and



2<sup>nd</sup> interested parties filed a statement of defence on 11<sup>th</sup> December 2019, amended it on 27<sup>th</sup> January 2021, averred that they are the registered owners of Plots No. LR 31537 which is in the same location as the plaintiff's alleged Plot No. VI/MN/1040/2. They advanced a counterclaim against the plaintiffs where they maintained they were the registered owners of Plot No. LR 31537 and that the plaintiff's Plot No. MN/VI/1042/2 had encroached and overlapped into it. It was their case that the SGR had passed through Plot No. LR 31537 however the 1<sup>st</sup> and 2<sup>nd</sup> defendants have illegally and unlawfully made a compensation award to the plaintiff. The interested parties urged the court to compel the 1<sup>st</sup> and 2<sup>nd</sup> defendants to cancel the proposed compensation award to the plaintiff and make the payment to themselves instead, and prayed for the plaintiff's suit to be dismissed with costs and for the counterclaim to be allowed as follows:

- a. The assessment for compensation dated 11<sup>th</sup> October 2017 done in favour of the 3<sup>rd</sup> defendant in the counterclaim be cancelled forthwith.
  - b. An order do and hereby issue that the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the counterclaim forthwith do pay the plaintiff in the counter claim the amount that had been assessed on 11<sup>th</sup> October 2017 as compensation for their Plot No. LR 31537 which has been affected by the Standard Gauge Railway Line.
  - c. Interest on the above and costs of the suit.
7. The 3<sup>rd</sup> to 6<sup>th</sup> interested parties claimed that Plot No. MN/VI/1040/2 is part of their ancestral community land and the acquisition by the plaintiff is unlawful and illegal and urged the court to dismiss the suit with costs.
8. The plaintiff responded to the 1<sup>st</sup> to 6<sup>th</sup> interested parties' statement of defence on 21<sup>st</sup> December 2021. The plaintiff emphasized that it was the bonafide registered proprietor of the suit property, a fact that was acknowledged by the defendants hence the compensation award. The plaintiff claimed that the Ministry of Lands is investigating Plot No. 5153/VI/MN, 5141/VI/MN and 5154/VI/MN and further claimed that the interested party's suit was an afterthought aimed at denying the plaintiff the award. Further, the plaintiff maintained that the Survey of Kenya surveyed Plots No. 5141/VI/MN, 5153/VI/MN and 5154/VI/MN as new grants and issued deed plans number 393141 and 407082, which were declared as Plots No. MN/VI/909 and MN/VI/910. The plaintiff averred that the interested parties three surveyed Plots No. 5141/VI/MN, 5153/VI/MN and 5154/VI/MN were erroneously surveyed and granted as they fall within and overlap Plots No. MN/VI/909 and MN/VI/910 which titles are freehold. It is the plaintiff's case that the said plots do not exist and even if they do they do not border the suit property and as such, the plaintiff's title is owned by the plaintiff.

### **Proceedings before the court**

9. PW1 was Hashid Patel, the director of the plaintiff, and he produced his statement and the plaintiff's list of documents. He stated that in 2015, the suit property was acquired for SGR and the plaintiff was involved in the acquisition process. The process culminated with an award of Kshs 667 million from the 2<sup>nd</sup> defendant but they have never received any payment. He claimed that LR No. 31357 overlaps on the suit property, and has been confirmed by the director of surveyor to be irregular. On cross-examination, he confirmed that the plaintiff attended two inquiries, one on review of the grant and squatters issue and both were determined in the plaintiff's favour. He clarified that the award was made on MN/VI/1040/2 and not MN/1040/2 or LR No. 31357 as they were not gazetted for compensation. He sought to clarify that though his title was LR1040/2 the award did not have the plot number since there was a typing mistake. He maintained that the SGR passed through the suit property and that the error on the award was occasioned by the NLC and not the plaintiff.



10. PW2 was Wilson Kibichi, working with the Ministry of Land as Head of Survey records office. He confirmed LR No. 31357 had overlapped on LR No. 1040/2 and that MN/VI/1040/2 and LR No. 1040/2 were in different localities. He claimed that 1040/2 was surveyed in 1932, while LR No. 31357 was surveyed in 2017 and ought not to have been registered. He also clarified that there exists no plot like MN/VI/1040/2.
11. PW3 was Erastus Chege Mwangi, a licensed surveyor. He stated that he was contracted by the plaintiff to confirm LR 1040/2 and MN/VI/1040/2. He discovered that they were two different parcels in different locations. LR 1040/2 was in Kwale while MN/VI/1040/2 was in Mombasa and had been extinguished. He further stated that LR 31357 overlapped with LR 1040/2 which was illegal. He sought to clarify that MN/VI/1040/2 has a road to the airport while LR 1040/2 has SGR and other developments. He insisted that the suit property exists on the ground and that there cannot be two titles for the same property as it amounts to double allocation. With that the plaintiff closed their case.
12. DW1 was Duncan Mwangi, he produced his statement and stated that the 1<sup>st</sup> defendant identified the suit property, which was at the boundary between Kwale and Mombasa County. He stated he acquired LR MN/VI/1040/2 and other plots that were acquired from the compensation schedule from NLC. With that the 1<sup>st</sup> defendant closed their case.
13. DW2 was Abigail Mbagaya a former chair of NLC, where she chaired the committee for the review of grants and dispositions. She claimed that they received a complaint from Mombasa County on LR 1042/1, which led to a notice being put on the Kenya Gazette for an inquiry. The same was heard, and they ruled in favour of the plaintiff and the director of valuation issued the award. She maintained that there was a typographical error in the description of the plaintiff's suit property, which was rectified.  
  
DW3 was Sospeter Odour Ohanyo, a surveyor at NLC, he also confirmed that LR 1040/2 and LR MN/VI/1040/2 are far apart and have different acreage. He confirmed that LR 1040/2 has SGR in Kwale while MN/1040/2 is a road near the airport. He also confirmed that LR 31357 was surveyed in 2017 long after LR 1040/2 was surveyed in 1932, and that it was manned with irregularities like a missing PDP. During cross-examination, he clarified that the interested parties participated in the hearing of the acquisition and review of grants between 3<sup>rd</sup> and 6<sup>th</sup> August 2015, and by then LR 31357 did not exist until 2017. He claimed that he relied on the survey plan done in 1932 and deed plan for 1040/2 and confirmed that LR 31357 was irregular and an encroachment. He further claimed that the acquisition plan was for LR 1040/2 and that LR 31357 was not captured since it did not exist. He confirmed that the award letter had an error and another letter corrected it. DW3 further stated that he got the original survey plan done in 1932 and the deed plan for 1040/2 and found that LR 31357 was irregular, it did not even have an access road. He maintained that the survey of 1040/2 was already there when LR 31357 was done.
14. DW4 was Maulo Kiphour Kahamai is the Chief Valuer at NLC. He claimed that on 24<sup>th</sup> May 2015, LR 1040/2 was in existence, however, LR 31357 was not in their acquisition plan. He confirmed that there was an error in the award that was made to the plaintiff, the error was discovered during review of grant in 2019 and the same was corrected by the second award that was issued on 31<sup>st</sup> March 2023 and accepted on 4<sup>th</sup> April 2023. He explained that the first award was for MN/VI/1040/2 as well as the acceptance, since there was no flaw in the process, they cancelled the award, which was surrendered to them and issued a fresh one. He confirmed that he visited the suit property, which was occupied by various families who were compensated for their structures. He admitted that they were aware of the case in court when they made the final award. With that the 2<sup>nd</sup> defendant closed its case.



15. DW5 was Ojwang Omolo Patroba is the Assistant Director at the Ministry of Lands. He gave a history of LR 1040/2 and claimed that it was registered to the plaintiff while claiming that LR 31357 was irregular. He maintained that the suit land was privately allocated and could not be allocated again by the commissioner of lands. He stated that LR 31357 overlaps the suit property and should be impeached for lacking a letter of allotment, PDP, acceptance or proof of payment of land rates. He stated that the land registrar is the custodian of all land records and that he has only seen the file for LR No. 1040/2. With that, the 3<sup>rd</sup> defendant's case was closed.
16. Osman Ahmed Kahia, took the stand on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. He claimed to have bought his plot after conducting due diligence and obtained the title in 2018. He claimed when the government purchased land for SGR, his land was not in the Gazette Notice. He went to the NLC but got no response, instead the award was given to MN/VI/1040/2. He claimed that the land has three deed plans of 1970, No. 31929 then No. 156221 which is the plaintiff's title. He claimed that LR 1040/2 was not in the Gazette notice since it no longer exists since it was closed in 1975. He claimed that when he searched in 2012 it showed that it was subdivided and the title closed, this was after he had a MOU with the seller. He also claimed to have inspected the land and had it surveyed and registered in 2017 and acquired title in 2018. He maintained that the seller was born in 1978 and allotment happened in 1984. He further claimed that before purchasing, the seller owed him money so he gave him the plot instead. On further cross-examination, he maintained that his plot was LR 31357 which was surveyed in 2017 and the first title issued the same year and later transfer was conducted in 2021. He clarified that he bought the land in 2012 from Ali Osman Abdi, for Kshs 37 million but paid only 10% since Osman owned him Kshs 19.5 million for transport and his purchase price was a set-off. He further claimed that Osman showed him the allotment letter, the letter of offer as well as the PDP. He admitted that he does not remember how much he paid for stamp duty or even when they went to the lands control board neither does he have land rent receipts or clearance. On reexamination, he maintained that his land is LR 31537, having transferred it on 11<sup>th</sup> November 2021. He contended that the first award referred to MN/VI/1040/2 while the second award referred to LR/1040/2. He claimed that NLC did not revoke the first award that MN/VI/1040/2 does not exist and that the court cannot approve an award of a nonexistent land. With that the 1<sup>st</sup> and 2<sup>nd</sup> interested parties closed their case.
17. Hamisi Tsuma Mwero, the 5<sup>th</sup> interested party produced a statement and list of documents. He claimed that the suit property was trust land, which has never been adjudicated. He stated that he had never seen the plaintiff and that he had made no developments on the suit property. He maintained that the NLC has never compensated them for the acquisition. He maintained that the natives do not have title documents as they are waiting for the suit land to be adjudicated. He contended that about 200 people are living on the suit land with the SGR passing in the middle and urged the court to order their compensation. He admitted that he had no documents to prove ownership and insisted that his forefathers were buried on the suit land. With that, the 3<sup>rd</sup> to 6<sup>th</sup> interested parties closed their case.

### **Analysis and determination**

18. The court has considered the pleadings, evidence presented before it, submissions made as well as the authorities relied upon by the parties. The issues for determination are:
  - a. What is the legal position of LR 1040/2 and LR 31537.
  - b. Who is entitled to be compensated by the 1<sup>st</sup> and 2<sup>nd</sup> defendant?
19. Looking at the detailed history of LR No. 1040/2, it has been demonstrated by the 3<sup>rd</sup> defendant, who is the custodian of land records that LR No. 1040/2 was initially surveyed on 15<sup>th</sup> August 1932 as per



FR No. 39/59. The first registered proprietor was Mohamed Afzal Khan who held the suit land for a term of 99 years from 1<sup>st</sup> October 1908. On 2<sup>nd</sup> August 1957 Mohamed Afzal Khan transferred LR 1040/2 to Aniceto Dias and Charles Dias who held as tenants in common in equal share. On 15<sup>th</sup> July 1963, Aniceto Dias and Charles Dias transferred the suit land to Ramji Jethabhai Limited, who in turn transferred to Peter Muigai Jomo Kenyatta on 17<sup>th</sup> July 1970. After the demise of Peter Muigai Jomo Kenyatta, his estate's administrators (John Kamau Muigai and Dr Richard Kamau Muigai) executed an indenture of conveyance in favour of Mukinye Enterprise Limited on 15<sup>th</sup> April 1991. Mukinye Enterprise Limited sought to extend the lease since they were left with an unexpired term of 16 years, which was approved by the Commissioner of Lands for a 45-year unexpired term on 3<sup>rd</sup> June 1991. Later on, 7<sup>th</sup> June 1991 Mukinye Enterprise Limited executed an indenture of conveyance in favour of Dopp Investment Limited, stamp duty was paid on the same day and it was registered in the Lands Registry Mombasa on the very same day. On 20<sup>th</sup> August 1991, Dopp Investment Limited was registered as the proprietor of LR No. 1040/2, holding a Grant No. CR 21749 on Land Survey Plan No. 156221 for a term of 45 years from 1<sup>st</sup> June 1991.

20. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties' case was presented by Osman Ahmed Kahia the director of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. It was their case that they bought LR 31357 from Ali Osman Abdi pursuant to a Memorandum of Understanding dated 25<sup>th</sup> June 2012 and an agreement of sale dated 1<sup>st</sup> March 2018. In the Memorandum of Understanding, Ali Osman Abdi claimed to be the owner of the unsurveyed industrial plot at Mombasa Miritini measuring 50.01ha for a term of 99 years from 1<sup>st</sup> January 1994 and sold the same for Kshs 37,000,000/= to Kahia Transporters Limited. Osman Kahia instructed Edward Kiguru a private surveyor to undertake a new grant survey, with a letter of allotment dated 30<sup>th</sup> May 1994 and PDP No. 12.3.CT.7.94 as supporting documents. Edward Kiguru, as per his letter dated 22<sup>nd</sup> January 2022, to the DCI; claimed that he surveyed the land which was approved by the Director of Survey and the plot was issued with a New Grant No. LR 31537. After the plot was issued with an LR number, Ali Osman Abdi entered into an agreement of sale with Kahia Transporters Limited on 1<sup>st</sup> March 2018. In the agreement of sale, it was noted that the vendor acknowledged having received 10% of the purchase price upon signing the memorandum of understanding dated 25<sup>th</sup> June 2012 and was confirming receipt of 60% of the balance as the final settlement. Ali Osman Abdi executed a transfer on 2<sup>nd</sup> November 2020 in favour of Kahia Transporters Limited and the same was registered on 11<sup>th</sup> November 2021. The 1<sup>st</sup> interested party maintained it is the registered proprietor of LR No. 31537 as seen from the Certificate of Postal Search dated 23<sup>rd</sup> May 2023.
21. Osman Ahmed Kahia claimed he bought an unsurveyed plot from Ali Osman Abdi who was an allottee. The court has perused a letter dated 22<sup>nd</sup> January 2022 by Edward Kiguru to the DCI, where the private surveyor who surveyed the plot claimed he was issued with a Letter of allotment Ref No. 90751/XI dated 30<sup>th</sup> May 1994. The plaintiff has produced this allotment letter which corresponds with the reference number that Edward Kiguru claimed to have used to survey the plot. The Letter of allotment Ref No. 90751/XI was issued on 30<sup>th</sup> May 1994 to one Osman Ahmed Kahia for an unsurveyed site for farming measuring 21ha for a term of 99 years from 1<sup>st</sup> January 1994. Further to that, the plaintiff has produced the 1<sup>st</sup> interested party's CR 12 dated 8th February 2021 which indicated that Osman Ahmed Kahia is a director at Kahia Transporters Limited. Notwithstanding this inconsistency, the 1<sup>st</sup> interested party has produced a certificate of title LR 31537 CR No. 70900 that was issued to Ali Osman Abdi measuring 50.01ha on 29<sup>th</sup> December 2017 and later transferred to Kahia Transporters on 11<sup>th</sup> November 2021.
22. The 1<sup>st</sup> interested party has not demonstrated how Ali Osman Abdi, his predecessor in title acquired title to LR 31537. The question that is in the mind of this court is how, Osman Ahmed Kahia, a



director of the 1<sup>st</sup> interested party, has the letter of allotment that was issued on 30<sup>th</sup> May 1994 in his name, while claiming to have purchased the same plot in 2012 from Ali Osman Abdi. The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR held that;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

23. It is the view of this court that it is fraudulent for the 1<sup>st</sup> interested party’s director Osman Ahmed Kahia, to have a letter of allotment that was issued on 30<sup>th</sup> May 1994 bear his name while claiming to purchase the very same plot from Ali Osman Abdi in 2012. It is evident that the Letter of Allotment Ref No. 90751/XI is a forgery as it bears the name and postal address of Osman Ahmed Kahia, who is a director of the 1<sup>st</sup> interested party. Also, the letter of allotment refers to an unsurveyed site for farming on Mombasa Mainland North measuring 21ha with an annual rent of Kshs 44,100 while the memorandum of understanding which the 1<sup>st</sup> interested party claims to have entered into with Ali Osman Abdi referred to an unsurveyed industrial plot situated at Mombasa Miritini measuring 50.01ha for an annual rent of Kshs 128,200.
24. Be that as it may, by the time the letter of allotment, lease document and certificate of title were issued to the 1<sup>st</sup> interested party the land had already been alienated and was not available for allocation.
25. In the Court of Appeal case of *Benja Properties Limited vs Syedna Mohammed Burhannudin Sahed & 4 others* (2015) eKLR the court held as follows;

“The legal effect of the registrations made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated government land with the consequence that the suit land became private property and moved out of the ambit and confines of the GLA. This made the suit property unavailable for subsequent allotment and alienation by the Commissioner of Lands or the President of Kenya. The appellant’s title to the suit property was thus anchored on land that was not unalienated government land. We concur with the trial judge’s finding that “the suit land having been owned privately was not GLA land, and was not available for alienation. Its alienation was illegal and void ab initio”

26. Similarly, in the case of *Bahati Properties Limited vs Attorney General & 7 others* (2019) eKLR the court held that;

“It is not in dispute that in 2001 when the Letter of Allotment was issued to the 2<sup>nd</sup> – 6<sup>th</sup> Defendants, Kwale Diani Beach/Block/59 was already leased out to a private person for a term of 99 years with effect from 1<sup>st</sup> January 1914 and a Certificate of Title duly issued. The lease was due to expire in 2013. That means that in 2001, the land was already allocated to a private person and was therefore not available for allocation or alienation to the 2<sup>nd</sup> – 6<sup>th</sup> Defendants. Put differently, there was no unalienated government land capable of being allotted to the 2<sup>nd</sup> – 6<sup>th</sup> Defendants. Brother.”

27. It is evident to the court which party has proved the root of its title. The plaintiff has led evidence, that has been supported by the defendants of how he acquired ownership of the suit property. It is clear



to the court that the plaintiff purchased the suit land from Mukinye Enterprise Limited on 7<sup>th</sup> June 1991 for Kshs 1,000,000/= and paid stamp duty of Kshs 40,000/= then became registered owner on 20<sup>th</sup> August 1991. The 1<sup>st</sup> interested party, on the other hand, his evidence is tainted with fraud and irregularity that go to the root of his title. For a start, the 1<sup>st</sup> interested party could not explain why the letter of allotment dated 30<sup>th</sup> May 1994 bears the name of its director while claiming to have bought the land. Further to that, the interested party neither called the one who sold him the plot nor the surveyor who surveyed the land to adduce evidence in support of his case. There is no valuation report adduced to support the claim for Kshs 1 billion as compensation as pleaded in the counterclaim. During cross-examination, he was at pains to explain why he did not produce the letter of allotment or the PDP in support of his claim over the suit land. The court has no reason to believe the evidence adduced by the 1<sup>st</sup> interested party as to how it acquired the certificate of title.

28. The plaintiff acquired title to the suit land on 20<sup>th</sup> August 1991, the 1<sup>st</sup> interested party's letter of allotment (which the court has found to be a fraud) is dated 30<sup>th</sup> May 1994. It is clear to the court that the plaintiff is the first in time and his title ought to prevail. This position was also supported by one W. Kibichii from the office of the Director of Surveys on 20<sup>th</sup> December 2021 as he responded to Agimba Advocates concerns as far as LR 1040/2 and LR 31537. In the said letter, he stated "Having compared the two (2) survey that is LR No.1040/2 and LR No. 31537, it is clear that it was an encroachment on the earlier survey (LR No. 1040/2) and therefore based on the findings, LR No. 31537 should not have been approved in regards of LR No. 1040/2 which was existing by then." The court has also perused google earth images and an illustrative topo cadastral plan of the two plots and it is clear that LR No. 31537 overlaps LR No. 1040/2. To put it more clearly, LR No. 31537 overlaps into the suit property, creating a title duplication. The court in Joseph Kiprotich Bor vs Tabutany Chepkoech Chebusit (2021) eKLR held that;

"I find that the Respondent's title was the first in time and as equity teaches in its maxim that; "when two equities are equal, the first in time prevails", then the Respondent's title deed was the first in time and should prevail the evidence called by the Respondent having been cognate and not displaced by the Appellant. No evidence was called to confirm how the 2nd title deed came into being and whether the title deed held by the Appellant was genuine or not. In fact of interest to note is that the Appellant's title had been registered after the death of the original proprietor of the suit land and without any probate proceedings conducted.

Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation, that was for a new title to be issued the older title has to be surrendered to the lands office for cancellation. No evidence was tendered by the Respondent that she had surrendered her title, which had been issued earlier than the Appellant's title, for cancellation.

Balancing the two competing titles, it is my view that the Respondent holds good title to the suit property. The title of the Appellant in my view, and in the absence of evidence to rebut the same, could only have been obtained either by the fraud, or by the mistake of the Land Registry, or both."

29. The 3<sup>rd</sup> to 6<sup>th</sup> interested parties claimed that the suit land was trust land that had never been adjudicated and that the natives in occupation were waiting for it to be adjudicated to get title documents. He maintained that they have lived on the suit land for years they have buried their forefathers there, and that the plaintiff has made no developments on the land and they should be compensated hat the 2<sup>nd</sup> defendant should compensate the interested parties and their families. The 5<sup>th</sup> interested party,



however, admitted that he had no documents to prove ownership, and indeed they adduced no evidence to support their claim that the suit land was trust land or that it was never adjudicated upon. Further to that suit land is vast, 610 acres and the interested parties have not demonstrated to court through a survey report that they occupy the part that was acquired by the 1<sup>st</sup> and 2<sup>nd</sup> defendants for SGR. There is no evidence of their occupation on the suit property and the court is also aware that they had advanced a claim for adverse possession but later withdrew it.

30. On 27<sup>th</sup> March 2015 vide The Kenya Gazette Vol. CXVII No. 32 Gazette Notice No. 1991 the 2<sup>nd</sup> defendant issued an Inquiry Notice under Section 162 (2) of the *Land Act* to hear claims to compensation for interested parties in LR No. 1040/2 among other land parcels that were to be compulsory acquired for the Mombasa-Nairobi SGR Line Project. During the acquisition process, the 2<sup>nd</sup> defendant received complaints from the County Government of Mombasa on the legality of the grants issued on LR No. 1040/2 on the basis that it was illegally acquired. The 2<sup>nd</sup> defendant issued a public notice on the local dailies to all interested parties including the complaint, the plaintiff and squatters. After reviewing the grants, the 2<sup>nd</sup> defendant made a determination on 12<sup>th</sup> February 2016 and concluded that the plaintiff is the registered owner of MN/VI/1040/2. Following that determination, on 11<sup>th</sup> October 2017 the 2<sup>nd</sup> defendant awarded the plaintiff Kshs 667,903,887 for the compulsory acquisition of 13.3480 ha on Plot No. MN/VI/1040/2. Before the award was made, the 2<sup>nd</sup> defendant's CEO wrote an internal memo to its chairman on 26<sup>th</sup> February 2017 requesting further investigations into LR No. 1040/2 before compensation; on the basis that MN/1040 no longer exists since it was acquired by the Government in 1974 and hence MN/VI/1040/2 cannot be a result of a subdivision from a parcel that does not exist. After the award was made, yet another internal memo was done by the 2<sup>nd</sup> defendant's CEO to its chairman recalling the award issued to the plaintiff for MN/VI/1040/2 until this case is determined by the court. On 2<sup>nd</sup> November 2017, the 2<sup>nd</sup> defendant through its Director of Valuation and Taxation recalled the compensation award given to the plaintiff for MN/VI/1040/2.
31. The plaintiff has placed evidence before this court that demonstrates that MN/VI/1040 was surveyed in 1994 as per Survey Plan F/R No. 50/37 and measures 0.22ha which was originally part of MN/VI/247 located in Port Ritz area of Mombasa County. The said plot has been resurveyed twice in 1995 altering the shape and acreage of the original parcel as seen from F/R No. 290/181 and F/R No. 294/145. The Director of Survey in his letter dated 20<sup>th</sup> December 2021 confirmed to the plaintiff's counsel that MN/VI/1040/2 does not exist since there was no subdivision of MN/VI/1040 for it to be created. The director of survey also confirmed to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties counsel on 4<sup>th</sup> July 2022 that MN/VI/1040/2 does not exist. In the letter, it was said "In respect of survey records regarding parcel of land number LR No. MN/VI/1040/2, the Director of Surveys has no survey record in support of such parcel of land in the form of cadastral plan or cadastral map"
32. The plaintiff, through Kolmans Geomatic Consultants produced a survey report dated 19<sup>th</sup> November 2021. The report sought to give a contrast of LR No. 1040/2 and MN/VI/1040, the former being created in 1932 within Kwale County and measures 610 acres while the latter was created in 1944 within Mombasa County and measures 0.56 acres. The report emphasized that the two plots were not related to each other, sharing no boundary and were located in different geographical locations with a distance of 8 km between them. It was further reported that MN/VI/1040 once existed but does not anymore since it was resurveyed and acquired by the government. The court has studied the Google Earth map showing the position compassion of LR No. 1040/2 and LR No. MN/VI/1040 and it is clear that the plots are miles apart and are not related to each other in any way. This position supports the one taken by the director of survey that MN/VI/1040/2 could not be said to have existed since there was no MN/VI/1040 in the first place.



33. The 1<sup>st</sup> defendant, in its letter to the 2<sup>nd</sup> defendant dated 22<sup>nd</sup> February 2023 admitted an error was made in the award where the suit land was referred to as MN/VI/1040/2 as opposed to LR No. 1040/2 and advised for an amendment. A fresh award was made on 31<sup>st</sup> March 2023 to the plaintiff and was accepted on 4<sup>th</sup> April 2023 by the plaintiff. The plaintiff and the defendants have urged the court to find that the reference to the suit property as MN/VI/1040/2 as opposed to LR No. 1040/2 was a typographical mistake made out of human error that was admitted to and corrected. The plaintiff argued that MN/VI/1040/2 does not exist and that all other details in the said award were correct, it was therefore for the court to allow the award as amended.
34. I find that with the wrong plot number, the plaintiff was not able to get their award. *The Constitution* is clear in Article 159 (2)(d) that the courts are to be guided by the principle that justice shall be admitted with undue regard to procedural technicalities. For the plaintiff to access justice, it is fair and proper for the court to allow the amended award, for the reason that they have proved to this court on a balance of probabilities that they are the registered owners of the suit property; and as such is entitled to an award of compensation following the compulsory acquisition of a portion of his suit property. What is crucial is, what was the 2<sup>nd</sup> defendant's intention when issuing the award. It is clear to the court that the 2<sup>nd</sup> defendant's true intention was to award the plaintiff for the compulsory acquisition of the suit land and that the interested parties have not demonstrated otherwise. Even court's makes room for the correction of errors in Section 99 of the *Civil Procedure Act* on the slip rule states that;
- “Clerical or arithmetical mistakes on judgments, decree or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or the application of any of the parties.”
35. The court in *Nedermar Technology BV Limited vs Kenya Anti - Corruption Commission & another* (2009) eKLR held that;
- “The primary purpose of the provision is akin to rectification, namely to allow the court to correct a formal order which by accident or error does not reflect the actual decision of the judge. It also authorizes the Court to make an order which it failed to make as a result of the accidental omission and counsel did not at the time ask for it. This would not constitute a variation or a new decision. In my view the rule ought to apply to all situations which when drawn to the Court's attention immediately enlists remarks from the Court such as “Ghosh it should not have happened” and situations where the Court upon detecting the error would be obligated to move on its own motion. In this case, had I noticed the error before any of the counsel did, I would certainly have promptly caused the Court to move on its own motion. There is no way the correction of the last sentence would result in a new decision on costs. It is still the same decision. I never intended to penalize a successful party by way of denying it of costs.”
36. The court has also seen the two internal memos dated 26<sup>th</sup> February 2017 and 17<sup>th</sup> October 2017 respectively sent by the 2<sup>nd</sup> defendant's CEO, to its chairperson and director of valuation and taxation. It is clear to the court that the 2<sup>nd</sup> defendant at the time of reviewing grants for determination, that was before issuance of the award, was aware that MV/VI/1040/2 did not exist, and went ahead to recall the award pending the determination of this suit for saving public funds. It only meant that the award to MN/VI/1040/2 was a mere typographical error and did not go to the root of the award.



37. In the end I find that the has plaintiff established its case on a balance of probabilities and that the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> interested parties' counterclaims are devoid of merit and are dismissed with costs. Consequently, the court orders as follows;

1. An order is hereby issued that the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant forthwith pay the plaintiff the sum of Kenya shillings six hundred and sixty seven million nine hundred and three thousand eight hundred and eighty seven only (Kshs 667,903,887/-).
2. Interest on (1) above at court rates until payment in full.
3. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties to jointly and severally pay the costs of the plaintiff, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19<sup>TH</sup> DAY OF DECEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

