



REPUBLIC OF KENYA



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**Ali v Raso & another (Environment & Land Case 83 of 2021)  
[2025] KEELC 2909 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2909 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 83 OF 2021**

**AE DENA, J**

**MARCH 27, 2025**

**BETWEEN**

**DEGAN ABDURAHMAN ALI ..... PLAINTIFF**

**AND**

**AMINA NKULOLA RASO ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR KWALE COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff herein commenced this suit by way of Plaint dated 22<sup>nd</sup> March 2021 which was amended by leave of the court on 23<sup>rd</sup> May 2023. It is her case that she bought the land parcel Kwale/Diani 183 measuring 2.1 Ha (suit property) from Khadija Mohamed Khamisi and immediately took possession by putting a temporary fence and employing a guard. The plaintiff obtained title in her name in the year 2002. That she had no problems with the suit property until 2010 when she was informed the green card was missing and efforts to trace it were futile. She then successfully applied for a new green card. In 2020 she was informed the 1<sup>st</sup> defendant had trespassed into the suit property with the intention of subdividing the same and selling. Upon inquiry with the 2<sup>nd</sup> respondent, it emerged her title had been allegedly cancelled by the registrar.
2. The plaintiff avers she discovered that the 2<sup>nd</sup> defendant had in fraudulent connivance with the 1<sup>st</sup> defendant replaced the plaintiffs name with the 1<sup>st</sup> defendants name as proprietor of the suit property. The particulars of fraud against the 1<sup>st</sup> and 2<sup>nd</sup> defendants are contained in paragraph 14B of the amended plaint. The plaintiff prays for judgement against the defendant for inter alia a declaration that her title issued on 7/05/2002 is a valid title.
3. The 1<sup>st</sup> defendant responded to the suit by way of defence and counterclaim dated 10/05/2021 which was subsequently amended on 1/07/2021. It is the 1<sup>st</sup> defendants' case that she is the legal registered owner of the suit property having acquired the same on 10/03/1992 and was in occupation of the



same. That in October 2019 she applied for a search as one of the documents required for development permit when she discovered a new entry No. 2 dated 7/05/2002 in the name of the plaintiff had been registered pursuant to gazette notice No. 6405. The 1<sup>st</sup> defendant states she has never sold the property and the plaintiff fraudulently obtained documents to the suit property. The particulars of fraud on the part of the plaintiff and 2<sup>nd</sup> defendant are listed in paragraph 22. That because of the said actions she has lost opportunity to develop the property.

4. The 1<sup>st</sup> defendant prays the plaintiffs suit is dismissed with costs and her counterclaim be allowed in the following terms; -
  - a. A declaration that the suit property belongs to the 1<sup>st</sup> defendant solely
  - b. Cancellation of the title deed and green card issued to Degan Abdulrahman Ali being title deed no. Kwale/Diani/183
  - c. The 2<sup>nd</sup> defendant to ensure records reflect the 1<sup>st</sup> defendant as the true owner of the property
  - d. General damages
  - e. Costs and interest of this suit
5. The plaintiff replied by filing Reply to defence and Defence to the counterclaim dated 6/07/2021 and denies all the allegations raised and reiterate that the plaintiff followed the correct procedure on the gazette and issuance of title.
6. The 2<sup>nd</sup> defendant responded vide a defence dated 22/06/2021 which was amended on 6/05/2022. It is denied that the plaintiff wrote to the 2<sup>nd</sup> respondent for postal search or any inquiries on the suit property. The particulars of negligence are specifically denied. The averments in the 1<sup>st</sup> defendants' counterclaim are also denied. That at all material times to this suit, the registration process was based on executed documents presented and without intention to defraud the 1<sup>st</sup> defendant. That all the irregularities are solely attributable to the plaintiff for fraudulent misrepresentation of facts. The 2<sup>nd</sup> defendant in addition filed a Notice of Claim Against Co-Defendant in the counterclaim, dated 5/06/2023

### **Hearing**

7. The case was heard on 30/10/23, 9/5/24 and 3/07/24. During hearing the plaintiff was represented by Mr. Agwara from the firm of Professor Albert Muma & Associates, the 1<sup>st</sup> defendant by Mr. Matheka of the firm of Wandai Matheka & Company Advocates and the 2<sup>nd</sup> defendant alternately by Mr. Penda and Ms Opio state counsels

### **Plaintiff Evidence**

8. The plaintiff testified on her behalf and called one witness. PW1 was Khadija Mohamed Khamisi. She adopted her affidavit sworn on 6/06/23 as her evidence in chief. The witness told the court she bought the land in 1989 and sold it to the plaintiff in the year 2002.
9. On cross examination by Mr. Matheka the witness stated she did not have a sale agreement between herself and the plaintiff. She bought the land from Jiwa. Though she a built a house and borehole on the suit property she never lived there.
10. Cross examined by Mr. Penda PW1 testified that when she bought the land from Jiwa she was sure it was his land. She never saw Jiwa again after the sale. He never gave her an ID.



11. PW1 clarified in re-examination that she signed the affidavit at her house in Diani. She reiterated Jiwa was the owner of the land she bought and was a good man.
12. The plaintiff Degan Abdurahman Ali testified as PW2 and adopted her witness statement dated 22/3/2021. The plaintiffs' evidence in chief largely reiterated the averments in the plaint which I will not rehash. PW2 told the court she bought the land to build her retirement home. That on purchase she surveyed the property. There was a shack for PW1 watchman and borehole. She would pay rates and sometimes back fess for the same.
13. That during the purchase she received notice of valuation which valued the property at Kshs 382,000. That in 2011 she brought in a surveyor for subdivision of the land for purposes of rental houses but the green card was missing. The registrar advised her on the process of opening a new green card which she effected and a new green card was issued. She employed a caretaker by the name Rashid who stayed upto the year 2008 and thereafter deployed Richard Kariuki an agent. That in 2020 she tried to do a search but was informed there was no file and her inquiry through Balala Advocates was not responded to. Upon visiting the land she found a construction thereon which necessitated the present suit. That she also did a search at Settlement Fund Trustee (SFT) Nairobi. The witness testified that she sued the 1<sup>st</sup> defendant because her title was fake.
14. PW2 produced her original title, Rates Clearance certificates and receipts, Gazette Notice dated 10/6/2011, Valuation for rates, Land Adjudication search dated 4/1/2011, letter dated 7/12/2020 and the new green card . Mr. Agwara acceded to the rest of the documents to be produced by the Director Land adjudication and settlement.
15. On cross examination by Mr. Matheka PW2 testified that though she reported the matter to the police she had not filed the statement she made in court. The witness affirmed she was not a Kenyan Citizen. She had no transfer between her and PW1. She had no evidence of payment of stamp duty. On being shown her green card she affirmed the SFT entry dated 10/3/92 predated the entry in her favor by 10 years. On being shown reference to the property as Diani SS PW2 testified that according to her the property Kwale Diani SS and Kwale/Diani 183 were one and the same.
16. Cross examined by Ms Opio the witness testified that her title has never been cancelled. The witness noted the gazette notice she produced did not tally in terms of the period of notice. She reiterated that the 1<sup>st</sup> defendant must have perpetrated the fraud.
17. The witness clarified in cross examination that upon sale she came to Diani, visited the chiefs office who gave them documents which she presented at SFT accompanied by PW1 and her husband. There was no title at the time of buying the land and hers was the first registration.
18. PW3 was John Mwangi Karanja Assistant Director Land Adjudication & Settlement based at Kwale. The witness confirmed he had a letter (1979) of consent between Abdalla Hassan Mwasaniti transferring the land to Joseph Matiri Mbaya; Transfer from Abdalla Hassan Mwasaniti to Naushad Hessein M. Jiwa together with attendant application for LCB consent and the consent for the year 1987; Transfer from Naushad to Khadija Mohamed Hamisi dated 1989. The documents were produced as PEX9. He confirmed Khadija was issued with certificate of outright purchase.
19. PW3 highlighted the entire process of settlement and the mandatory documents one must have to be registered as owner and proprietor. That at registration the current owner is the one reflected. That the records in their file only show one transfer by the settlement fund.



20. On cross examination by Mr. Matheka PW3 testified he only had certified copies of the documents from the Directors office in Nairobi where the originals were kept. That he had not brought documents from the county adjudication office as the same were not available. On being shown letter of offer dated 8/2/1978 and certificate of acceptance dated 8/2/78 both in favor of Amina Nkulola Raso he confirmed that the same are documents ordinarily used for registration. That he did not have transfer from PW1 to the plaintiff. He did not have letter of offer and certificate of acceptance to the plaintiff. That the transfer from Khadija to Degan if genuine ought to be franked. He confirmed that Kwale/ Diani 183 and Kwale/Diani/183 SS are the same parcel and the Gazette notice meant the same property. The SS was just a reference.
21. Cross examined by Ms. Opio the witness could not explain what transpired in the transfer between Abdalla Mwasaniti and Joseph Matiri Mbaya but based on the documents presented PW3 confirm it extinguished Abdalla Mwasanitas interest.
22. On re-examination the witness confirmed that he did not have transfer from Mbaya to any other person. The witness confirmed the land registrar only keeps transfer and discharge in originals. The rest of the documents are received in copies. That the land registrars bundle of documents confirm Amina Raso as the registered owner. The witness pointed that he has no records showing SFT transferred the property to Amina Raso and the offer and acceptance were not in his records. As at 1989 the parcel was in the name of Khadija. He reiterated that there can only be one offer the one to Abdalla Mazikwa.
23. The Plaintiffs case was closed at this juncture.

### **1st Defendants evidence**

24. DW1 was Khadija Bakari Haraka the 1<sup>st</sup> defendants daughter. The witness told the court her mother was very sick with paralysis in her legs and in her view her mental state was unstable. That she had a Power of Attorney (PA) to represent her. It was her testimony that she did not know the plaintiff and only got to know about her at the county offices where the witness and her mother had gone to apply for a development permission when they were told the land belonged to the plaintiff. DW1 denied that they had fraudulently confiscated the plaintiffs title. That the two titles are 10 years apart. She confirmed that the transfer from SFT and certificate of acceptance produced by the 2<sup>nd</sup> defendant bore her mothers thumbprint. She told the court the land is in Diani near Alexander school and that her mother informed her she had given birth to her on the suit property in 1975. Currently the land has two houses leased to two tenants.
25. DW1 produced the Power of Attorney (DW1EX 1), the application for development approval (DW1EX 3). The title Deed showing Amina Nkulola Raso was marked for identification. That she has never reported the plaintiff to the police as she never disturbed them nor did she know where to find her because she is a foreigner. DW1 urged the court to consider the prayers sought by the 1<sup>st</sup> defendant.
26. Cross examined by Mr. Agwara the witness confirmed the content in her witness statement dated 10/5/2021 which she executed. She admitted that the PIN reflected in the PA were the same for both her mother and herself. She did not know her mothers ID No. off head. While she was aware she was coming to court she forgot the title as she changed bags. She admitted her mother's ID Number as given in her mother's title was different from the one given in the PA. Upon being referred to the letter of offer in favor of her mother and certificate of acceptance DW1 testified she had never seen the originals or certified copies and did not know their source. DW1 stated the only document she saw was her mothers title which she also didn't know the source as she was young. The witness confirmed she did not have an adjudication search in her mothers name.



27. Cross examined by Ms Opio the witness stated she came to learn from her mother that she was given the land by the government. Her mother would always come to Kwale to follow up on the land and had shown her the title.
28. On re-examination the witness clarified that the PA was registered and both her mothers and DW1 signatures were attested by Jack Matheka (counsel on record for 1<sup>st</sup> defendant). That all she knew the document was for her to use to help her mother on the land issue herein. That the difference in the mothers ID number as in the PA and title was just the missing last digit (1) .
29. The matter was adjourned to 3/7/2024 for the production of the 1<sup>st</sup> defendants title. The same was produced as DEX2.
30. Cross examined by Mr. Agwara on the title above the witness confirmed that the ID numbers differed with only one digit and that it was her mother who collected the said title at the land registry after she was summoned to collect the same. There was no cross examination by the 2<sup>nd</sup> defendant.
31. The 1<sup>st</sup> defendants case was closed with the above evidence.

### **The 2<sup>nd</sup> defendants case**

32. DW2 was Steve Mokaya County land registrar Kwale. He informed the court that the records in the parcel file had three registers which did not tally as they had different information and were opened on different dates. The 1<sup>st</sup> register was dated 10/3/1992 under SFT, entry No. 2 is transfer to Amina Nkulola Raso ID 219552 and title issued the same day. The entry was supported by transfer of land in a settlement scheme registered on 10/3//1992 a document always issued from Nairobi. That the 2<sup>nd</sup> register was opened on 3/10/1992 under SFT as entry No1 with entry 2 therein dated 10/9/1992 where the land was transferred to Mebakari Hamisi Mwapesa who was issued with title on the same day. The witness told the court this entry is crossed out meaning it was cancelled. The 3<sup>rd</sup> register was opened on 10/3/1992 starting with entry No.4 dated 7/05/2002 in favor of Degan Abdurahaman Ali and title issued the same day. The card was opened vide Gazette Notice 6405 of 10/6/2011.
33. DW2 produced Transfer of land in settlement scheme registered on 10/3/1992, Letter of offer and Certificate of Acceptance Amina Nkulola Raso dated 8/2/78; Title Deed dated 10/3/1992 in the name of Amina Nkulola Raso and green card with entry No. 2 Amina Nkulola Raso
34. Upon cross examination by Mr. Matheka DW2 confirmed the 2<sup>nd</sup> entry was 6 months after the issue of Aminas title. That there was no problem with the register opened vide gazette starting at entry 4 since this means there were other entry's and therefore entry 1-3 could still be valid. That since the register for Mebakari was cancelled no one can deal with it. He confirmed that Amina is recognised as the owner as there was no other transfer by SFT in the record except this one. On reviewing the said transfer DW1 confirmed it is embossed by franking meaning stamp duty was paid and the document accepted for registration. The witness noted the ID No on the title is the same one reflected in the register and that it is the land registry that enters the said data. He stated that typographical errors do occur and can be corrected when the owner requests.
35. Cross examined by Mr Agwara DW2 confirmed it was not normal for a parcel to have three registers. The witness testified the only transfer supported by the records is the plaintiffs. He conceded in respect of the transfer to Amina that it did not make sense the transfer was executed by SFT on 3/9/1992, presented at the land registry on 22/9/92 and registered on 10/3/1992. He agreed the franking for stamp duty predates the date of presentation for registration since ordinarily franking should come first. That it is not common practice to present transfer for franking before it is signed by the transferor



that is the SFT. The transfer could only be available after 3/9/1992. On being shown the original of the plaintiff title DW2 evidence was that it tallied with the entries in the register and the same was authentic.

36. On re-examination DW2 clarified that from the record the register which is first in time is in respect of Amina Kulola which was by SFT. The only document available from land adjudication was the transfer to Amina Kulola.
37. The court asked the witness to state to the court why he termed Degans title to be authentic. The witness observed it bore all the relevant features. On the 1<sup>st</sup> defendants title while the witness did not want to comment he finally stated he was not sure of the authenticity of the document.
38. The 2<sup>nd</sup> Defendants case was marked as closed at this juncture.

### **Submissions**

39. Parties filed and exchanged submissions. The plaintiffs' submissions are dated 19/09/2024, the 1<sup>st</sup> defendants 24/9/2024 and the 2<sup>nd</sup> defendants 3<sup>rd</sup> October 2024. The court has considered the submissions.

### **Analysis And Determination**

40. After a careful consideration of the pleadings, the testimonies, documentary evidence, submissions and case law relied upon to support the positions of the parties the following issues fall for determination;-
  1. Who between the Plaintiff and the 1<sup>st</sup> Defendant is the lawful registered owner of the suit property?
  2. Are the reliefs sought available.
  3. Who should bear the costs of the suit and counterclaim
41. It is clear from the proceedings the court is faced with two competing titles over the same suit property. Each party had to defend their individual titles both having been under challenge. This is the position that has been taken by the courts when faced with multiplicity of titles on the same subject matter.
42. In *Daudi Kiptugen v. Commissioner of Lands & 4 Others* (2015) eKLR the court stated; -

‘In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result; the process of acquisition is material.’
43. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR, held, where the registered proprietor's root of title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.



44. In the case of *Hubert L Martin & 2 Others v Margaret J Kamar & 5 Others* [2016] eKLR 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.”

45. The burden of proof was on the Plaintiff to prove the existence of the facts she alleges to exist in accordance to the provisions of Section 107 of the *Evidence Act* Chapter 80 of the laws of Kenya. The standard of proof is on a balance of probabilities. In the case of *Stephen Wasike Wakhu & Ano v Security Express LTD* [2006] eKLR the court commenting on the provisions of section 107 posited that a party seeking justice must place before the court all material evidence and facts which if considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available.

46. The plaintiff claims proprietorship by dint of purchase from one Khadija Mohamed Khamis a long term friend of her mother, simply put a family friend. On the other hand, the 1<sup>st</sup> defendant claims ownership by dint of allocation by the government. Both parties impute fraud against each other and which I will discuss latter in this judgement.

47. Khadija testified as PW1. She confirmed she knew the plaintiff through the plaintiff's mother who was a family friend. She also confirmed that she sold the suit property to the plaintiff. Khadija testified that she bought the land from Mr. Jiwa. This is therefore where the root of the plaintiff's title begins. PW1 adopted the statutory declaration sworn on 6/06/2023 as her evidence in chief. At paragraph 4 she declares and depones that she acquired the property from Jiwa and was issued with a certificate of outright purchase by the Settlement Fund Trustee on 12/05/1989.

48. PW3 Assistant Director Land Adjudication and settlement produced letter of consent between Abdalla Hassan Mwazikwa Mwasaniti (herein Abdalla) transferring the land to Joseph Matiri Mbaya in 1979; Transfer from Abdalla Hassan Mwasaniti to Naushad Hussein M. Jiwa together with attendant application for LCB consent and the consent for the year 1987; Transfer from Naushad to Khadija Mohamed Hamisi dated 1989. He also confirmed Khadija was issued with certificate of outright purchase.

49. Based on the above it emerges that Abdalla Mwasaniti may have transferred the property twice, firstly to Joseph Matiri Mbaya in 1979 and to Jiwa in 1987. It is important to settle this issue as it would taint the validity of the transfer to Jiwa and which transfer was the root of Khadija's title which she allegedly sold to the plaintiff herein. Infact cross examined by Ms Opio PW3 indicated the said transfer to Mbaya extinguished Abdalla Mwasaniti's interest. If that were the case then it is only Mbaya who could have transferred a valid interest to Jiwa. PW3 told the court his records did not bear the said transfer between Abdalla and Mbaya. That the only transfer registered is the one from Abdalla to Jiwa. I have reviewed all the documents presented in the plaintiff's supplementary list of documents with



- regard to the alleged transfer from Abdalla to Mbaya. In my view had this transaction sailed through then there would be a title in the name of Mbaya at the lands office. DW2 did not produce any green card for Mr. Mbaya.
50. Based on the foregoing there being no green card in the name of Joses Matiri Mbaya that matter is hereby put to rest. The court will only deal with the green cards referred to by DW2 as these are deemed as prima facie evidence of title.
51. I will now focus on the transaction between Jiwa and Khadija. This was supported by PW3 as observed under paragraph 48 of this judgement. The court perused these documents culminating into issuance of Certificate of outright purchase dated 12/5/1989 to Khadija Mohamed Khamisi by the SFT. They all seemed to flow in terms of dates content including statutory compliance. I did not see anything that could raise eyebrows. A Land Adjudication search dated 4/1/2011 produced by the Plaintiff confirmed that Khadija was the allottee. Upto this point I had no problem with this history.
52. Thereafter according to both the plaintiff and Khadija the suit property was sold to Degan the plaintiff for a consideration of Kshs.1.5 million in the year 2002. It is PW2 evidence she followed up on title and she was issued with the same as the first registered proprietor on 7/05/2002. The title was produced as part of the plaintiffs documents and the original was shown to the court. She thereafter paid rates for the suit property at times in arrears and documentary evidence was furnished to the court.
53. But there is still a problem to be surmounted by the plaintiff. It is important to note that DW2 informed the court there were three registers the particulars are highlighted in paragraph 32 herein. Arising from this testimony clearly there is a problem. I say so because the suit property is registered under the legal regime of the Registered Land Act Chapter 300 of the laws of Kenya (now repealed). Section 32 thereof and which applies by dint of section 107 of the Land Registration Act is to the effect that only one title can issue in respect of a suit property.
54. Section 27 of the Registered Land Act provides that subject to this Act:-
- a. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
55. The above provisions are reproduced in Section 24(a) of Land Registration Act, which applies by dint of section 107 of the Land Registration Act 2012 and reads
- “Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
56. The provisions of Section 26 (1) of the Land Registration Act are also pertinent which I will discuss latter in this judgement.
57. The court has noted that the title presented in court by Degan was confirmed to be authentic by DW2 during cross examination and that it tallied with the entry’s in the register. PW2 confirmed she even took possession by deploying a caretaker at first and an agent thereafter even though she was away. She clearly remembered the particulars of these two. She also produced evidence of payment of rates for the suit property. DW1 indicated in cross examination that they used to pay rates for the suit property but she confirmed she had not filed any proof in court.
58. The 1<sup>st</sup> defendant equally claims ownership. Hers is the 1<sup>st</sup> green card referred by DW2. However, DW2 could not confirm the authenticity of the 1<sup>st</sup> defendants title. This is very pertinent in view of the fact



that the 2<sup>nd</sup> defendant is the custodian of all land documents. Ms. Opio chose not to cross examine DW1 on the original title. But what did the 1<sup>st</sup> defendant have to say about her title?

59. DW1 was the daughter of the 1<sup>st</sup> defendant who gave evidence pursuant to a Power of Attorney donated by the 1<sup>st</sup> defendant her mother. The witness was not able to defend her mothers title from a point of knowledge. In cross examination she testified that she had never seen the originals of the documents in support of her mothers title except the title which indicated she did not know the source as she said she was young when it was obtained. The court has noted Mr. Mathekas submission that the burden of proof never shifted in this regard to the 1<sup>st</sup> defendant. I respectfully disagree with counsel as both parties were under a duty to defend their titles and more so where the 1<sup>st</sup> defendant raised a counterclaim to be declared the rightful owner as well.

60. The court in *Munyu Maina v Hiram Gathiha Maina* (supra) had this to state; -

“Under Section 112 of the *Evidence Act*, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the respondent acquired title to the suit property is a fact within the personal knowledge of the respondent and it was incumbent upon the respondent to dislodge the notion that their deceased father was beneficial owner of the suit property and to explain how he appellant came to be in possession of a portion of the....”

61. In *Stanley Mombo Amuti v Kenya Anti corruption Commission* [2019] eKLR cited by the plaintiff the court appeal had this to say;-

“84. We note that the failure to call a particular witness or voluntarily to produce documents or objects in one’s possession is conduct evidence. (See J. Wigmore, *Evidence* § 265, at 87 (3d ed. 1940). In principle, failure by a party to call a material witnesses may be interpreted as an indication of knowledge that his opponent’s evidence is true, or at least that the tenor of the evidence withheld would be unfavorable to his cause. An inference will not be allowed if a party introduces evidence explaining the reasons for his conduct, and reason for failure to call a witness and if the evidence is truly unavailable or shown to be immaterial.

85. Comparatively, in *Bukenya and Others v Uganda* [1972] EA 549, it was stated that a court may infer that the evidence of uncalled witnesses would have tended to be adverse.

In *Mann Holdings Pte Ltd and another v Ung Yoke Hong* [2018] SGHC 69, the Singapore High Court drew adverse inference against a party who had failed to call crucial witnesses to testify at trial. In *Elgin Finedays Ltd v Webb* 1947 AD 744, it is stated at 745:

“... it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him ...”.

62. Applying the above caselaw I found it quite disturbing that no evidence was availed before court to confirm the reason why the 1<sup>st</sup> defendant could not attend court to defend her title. While it was stated the 1<sup>st</sup> defendant was unwell no medical reports were presented. DW1 made her own diagnosis that she found her mother not to be mentally stable. To me I got the impression that the witness did not want the 1<sup>st</sup> defendant to appear before court at all. In the process the court missed out on evidence of this very crucial witness who may have had clear answers to the history and how she got her title.

63. The court also observed some contradictions in DW1 testimony. She admitted to using one PIN (her PIN) as the PIN for both her mother and herself and she had no explanation for this except that it was



because her mother could not walk. To me there was no nexus between providing her PIN number as her mothers PIN and her mother's inability to walk. When she clearly knew she was coming to give evidence in court she did not carry her mothers title stating that she changed bags. However on 3/7/2024 when the witness produced the same in court she stated she collected it from her mother that morning forgetting that she had told the court she had changed bags. On the day 3/7/2024 when her mother was expected in court after counsel had sought an adjournment to either have Amina or DW1 produce the original, title she stated her mothers blood pressure was high without any medical proof that her readings were taken and they were high.

64. DW1 further stated her mother told her she was born on the suit property and later she stated they lived in their shamba at Maguto where she DW1 stated she was born. She confirmed that the land in Maguto was different from the suit property.
65. Be that as it may, the land registrar was cross examined at length on the documents in relation to the 1<sup>st</sup> defendant's title. DW2 observed that it did not make sense the transfer was executed by SFT on 3/9/1992, presented at the land registry on 22/9/92 and registered on 10/3/1992. He agreed the franking for stamp duty predates the date of presentation for registration since ordinarily franking should come first. That it is not common practice to present transfer for franking before it is signed by the transferor that is the SFT. That the transfer could only be available after 3/9/1992. The court reviewed the Transfer of Land in favor of the 1<sup>st</sup> defendant produced by DW2. I observed it was presented for registration on 22/9/92 and given a booking reference. However it indicates the date of registration as 10/3/1992, this clearly is a contradiction for practically the transfer cannot have been registered before the date it was even presented for registration.
66. Moreover during the hearing the 1<sup>st</sup> defendants original title was shown to the DW2. The witness observed that this title had an amendment on the date the register was opened. The said title was shown to the court I recorded my observation thus

‘ court sees the 10/3/92 the digit 2 seems to have been erased where the 3 is replaced with 2.’

67. To me the erasing of the digit 3 and replacing with 2 was calculated to tally with entry no.2 of the register. While it is noteworthy that DW2 confirmed during cross examination by Mr. Matheka that errors could be rectified were the title holder to request, the correction undertaken was clearly not the expected mode of correction. Additionally a look at the copy of the title deed in the name of the 1<sup>st</sup> defendant produced by DW2 and Part A thereof shows the register was opened on 10/3/1993 but entry No. 2 in Part B of the same register shows title was issued on 10/3/1992 which raises doubts. Clearly this is unprocedural and no wonder the land registrar could not confirm the authenticity of the 1<sup>st</sup> defendant title.
68. But of importance to me in addition to the above is if the land was already allocated to Abdalla Ali Mwazikwa Mwasanite as confirmed by the documents produced it was clearly not available for allocation to anyone else as 1<sup>st</sup> allottee in 1992 or transferred to the 1<sup>st</sup> defendant by the same Settlement Fund Trustee. The suit property was clearly not available for allocation to the 1<sup>st</sup> defendant. It could only be transferred where there was a transfer between the 1<sup>st</sup> defendant and the previous allottee. Moreover, it had already been issued to Khadija in 1989.
69. The court has noted the submission on behalf of the 1<sup>st</sup> defendant that the plaintiff cannot hold free hold land as a foreigner and therefore the title is void. The plaintiff did not deny that she was an American citizen. My understanding of the constitutional provisions cited is that the titles automatically became leasehold interests for a period of 99 years. *The Constitution* does not bar foreigners from owning land in Kenya. On provisions for Notice in the Kenya Gazette for replacing a



lost green card my view of the matter is that the plaintiff still held her original title. It is the green card at the land registry that was lost and not her original title and which was confirmed to be authentic by DW2.

70. It has been submitted on behalf of the 1<sup>st</sup> defendant that the plaintiff did not prove fraud to the required standard against the 1<sup>st</sup> defendant. I have perused through the particulars of irregularities and fraud by the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendants as pleaded. The fact that DW2 could not confirm the authenticity of the 1<sup>st</sup> defendants title raises eyebrows. What else can this be other than fraud on the part of the 1<sup>st</sup> defendant. This alone was sufficient. Additionally the transfer to the 1<sup>st</sup> defendant was marred with irregularities in terms of the dates, its franking, registration as already highlighted.
71. I think I have said enough to demonstrate why the court cannot uphold the 1<sup>st</sup> defendants title as being lawfully acquired. I have also said enough to show that the plaintiffs root is the only one that has sufficiently been explained and largely supported by documents produced.
72. It is the finding of this court that the Plaintiff is the lawful registered proprietor of the suit property.
73. I must address the notice of claim against Co-defendant dated 5/7/2023 filed by the 2<sup>nd</sup> defendant in the counterclaim against the plaintiff. In view of the above finding the claim cannot be sustained.
74. Having made the above finding I must address the reliefs sought by the Plaintiff. The plaintiff craves the following orders;-
  - a. A declaration that the plaintiffs title deed issued for the property known as Kwale/Diani 183 issued on the 7<sup>th</sup> May 2002 is valid
  - b. A declaration that the title deed was issued to the 1<sup>st</sup> defendant for the property known as Kwale/Diani 183 is null and void
  - c. An order directing the 2<sup>nd</sup> defendant to cancel the entries made on the register of the suit property in favor of the 1<sup>st</sup> defendant including the title deed held by the 2<sup>nd</sup> defendant and rectify the record by entering the plaintiff as the lawful proprietor and owner of the property known as Kwale/Diani 183
  - d. An order directing the 2<sup>nd</sup> defendant to remove the name of the 1<sup>st</sup> defendant from the suit property register and replace it with the name of the plaintiff
  - e. A permanent injunction to be issued restraining the 1<sup>st</sup> defendant by herself agents, servants, employees or otherwise howsoever from entering occupying erecting structures subdividing selling transferring alienating or in any way dealing with or interfering with the proprietary rights interests and possession enjoyed by the plaintiff over all that property known as Kwale/ Diani 183
  - f. Damages for trespass
  - g. Vacant possession of the suit property from the 1<sup>st</sup> defendant
  - h. Costs of the suit
75. I will start with prayers b), c) and d) which touch on the rectification of the register. I have already cited the provisions of section 32 of the repealed Registered *land Act*. Only one title can be registered on one piece of land.



76. Section 26 (1) of the [Land Registration Act](#) provides that: -

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

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

77. Applying the above provisions, the title of the 1<sup>st</sup> defendant can be impeached under the above two exceptions, that is on grounds of fraud to which the person is proved to be a party. I have already made a finding of fraud against the 1<sup>st</sup> defendant. The title may also be impeached on the grounds of irregularities. The irregularities with the 1<sup>st</sup> defendant's title have already been highlighted and it does not matter who occasioned them. See the persuasive dictum of Justice Sila Munyao in *Alice Chemutai Too v. Nickson Kipkurui Korir & 2 Others* [2015] eKLR. The 1<sup>st</sup> defendant title should be impeached.

78. The provisions of section 80 of the [Land Registration Act](#) are also pertinent with regard to the reliefs sought. The same are on Rectification by order of Court and stipulate; -

80. (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 who is in possession and had acquired the land, lease or charge for valuable consideration, 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.

79. The court having found in favour of the plaintiff then the register must be corrected to reflect the correct position and all irregular entries removed.

80. On the prayers for permanent injunction against the 1<sup>st</sup> defendant, it is trite that this would be the right stage at which to grant prayers for permanent injunction. A permanent injunction defines the rights of the parties after the suit is heard on merit. Having made a finding that the plaintiff is the rightful owner of the suit property it is imperative that the 1<sup>st</sup> defendant is permanently restrained from claiming any right or doing any act over the property that would go against the plaintiff's right. It is this court's finding that this prayer is merited.

81. In respect of the prayer for damages for trespass, this court was not led to any proposals or basis upon which the court would award this relief. I decline to entertain this prayer.

82. The upshot of the foregoing is that this court makes a finding that the plaintiff has proved her claim to the required standard of proof against the 1<sup>st</sup> defendant. The court enters judgement for the plaintiff against the 1<sup>st</sup> defendant in the following terms



- a. A declaration that the plaintiffs title deed issued for the property known as Kwale/Diani 183 issued on the 7<sup>th</sup> May 2002 is valid
- b. A declaration that the title deed issued to the 1<sup>st</sup> defendant for the property known as Kwale/Diani 183 is null and void
- c. An order directing the 2<sup>nd</sup> defendant to cancel the entries made on the register of the suit property in favor of the 1<sup>st</sup> defendant including the title deed held by the 1<sup>st</sup> defendant and rectify the record by entering the plaintiff as the lawful proprietor and owner of the property known as Kwale/Diani 183
- d. An order directing the 2<sup>nd</sup> defendant to remove the name of the 1<sup>st</sup> defendant on the suit property register and replace it with the name of the plaintiff
- e. A permanent injunction to be issued restraining the 1<sup>st</sup> defendant by herself agents, servants, employees or otherwise howsoever from interfering with the proprietary rights interests and possession enjoyed by the plaintiff over all that property known as Kwale/Diani 183
- f. Vacant possession of the suit property from the 1<sup>st</sup> defendant to the plaintiff.
- g. The 1<sup>st</sup> defendants counterclaim is dismissed with no orders as to costs.
- h. The orders in c, d and f shall be implemented within 60 days of this judgement.
- i. The plaintiffs original title held by the court shall be released to the plaintiff after the period in h) above.
- j. While the costs ordinarily follow the event the court in its discretion and in the circumstances of the case makes an order that each party shall bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA CTS.**

**THIS 27<sup>TH</sup> DAY OF MARCH 2025.**

.....

**HON. A.E DENA**

**JUDGE**

**27/3/2025**

