



Yunis (Suing as a trustee for and on behalf of Suhail Shahid) & 3 others v Rengwa (Sued personally and as Executors of Estate Swalehe Mohamed) & 4 others (Environment & Land Case 167 of 2021 & 4 (CM) of 2019 (Consolidated)) [2025] KEELC 29 (KLR) (16 January 2025) (Judgment)

Neutral citation: [2025] KEELC 29 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 167 OF 2021 & 4 (CM) OF 2019 (CONSOLIDATED)
AE DENA, J
JANUARY 16, 2025

BETWEEN

MOHAMED YUNIS (SUING AS A TRUSTEE FOR AND ON BEHALF OF SUHAIL SHAHID) 1ST PLAINTIFF
SUHAIL SHAHID 2ND PLAINTIFF

AND

ABDALLA SWALEHE RENGWA (SUED PERSONALLY AND AS EXECUTORS OF ESTATE SWALEHE MOHAMED) 1ST DEFENDANT
HASSAN SWALEHE RENGWA (SUED PERSONALLY AND AS EXECUTORS OF ESTATE SWALEHE MOHAMED) 2ND DEFENDANT
BLUSHING BEACH LIMITED 3RD DEFENDANT
CHIEF LAND REGISTRAR KWALE 4TH DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 4 (CM) OF 2019

BETWEEN

RUTH WANGUI DEYA 1ST PLAINTIFF
PHILEMON BERNARD ODHIAMBO WASHINDU 2ND PLAINTIFF

AND

ABDALLA SWALEHE RENGWA 1ST DEFENDANT
HASSAN SWALEHE RENGWA 2ND DEFENDANT



BLUSHING BEACH LIMITED 3RD DEFENDANT
LAND REGISTRAR KWALE 4TH DEFENDANT
HON ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

Background

1. This judgement involves two suits Case No. 167 of 2021 which was first filed in Mombasa in the year 2019 before it was transferred to Kwale following the posting of a resident ELC judge and CMCC ELC No. 4 of 2019 filed in the Chief Magistrates court at Kwale (lower court matter). The suits were consolidated as the subject of both proceedings is property Kwale/Msambweni 'A'/2909 (hereinafter referred to as the suit property) and to ensure all issues are heard and determined before one court to avoid conflicting decisions
2. Upon lengthy engagements with counsels the suits were heard concurrently though consolidated to retain the identity of the Plaintiffs in both suits. It is also noteworthy that the 1st Plaintiff died during the pendency of these proceedings and the suit proceeded with the 2nd Plaintiff. The Plaintiff in CMCC ELC No. 4 of 2019 was to step in appropriately for cross examination based on his claim. I must note none of the suits is superior to the other. The 1st and 2nd Defendants are also referred to as the Rengwa's and the Plaintiffs in the lower court suit as the Deyas but recognising Philemon as the 2nd Plaintiff.
3. In case Number 167 of 2021 the Plaintiffs plead they are the rightful owners of the suit property. That the 1st Plaintiff purchased the land in the year 1978 from the previous owner Swalehe Mohamed and title registered in his favor in trust for his son the 2nd Plaintiff. That in the year 2016 while undertaking due diligence, the land records could not be traced. They discovered in July 2018 that the suit property was registered in the name of the 3rd Defendant Blushing Beach Limited as proprietor. That upon investigations they found that the Land Registrar undertook a rectification of the register and reverted the register back into the name of Swalehe Mohamed who had died in the year 1988. The 1st and 2nd Defendants then filed a succession matter and became registered proprietors of the suit property through transmission. That they then transferred the suit property to Blushing Beach Limited. It is the Plaintiffs case that all these transactions were fraudulent.
4. The Plaintiffs seek the following summarised orders; -
 - a. Rectification of the register under Section 79 (2) and (3) of the [Land Registration Act](#) No. 3 of 2012 was null and void;
 - b. Plaintiffs are the lawful owners of the property known as Kwale/Msambweni "A"/2909;
 - c. Suit Property known as Kwale/Msambweni "A"/2909 be vested wholly and unconditionally to the Plaintiffs;
 - d. Illegal entries and Certificate of Title held by the 3rd Defendant be cancelled;
 - e. Plaintiffs be awarded mesne profits, costs, and interest.
 - f. Any other or further relief deemed just and fair grant by this honourable court.



1st And 2nd Defendants Defence

5. The 1st and 2nd Defendants in case Number 167 of 2021 opposed the suit by way of a joint Statement of Defence dated 8th May 2019. It is averred that at all times they were the registered owners of the suit property and until 2/8/2018 when the same was legally transferred and registered in the sole proprietorship of the 3rd Defendant. The particulars of fraud set out in paragraph 10 of the plaint were denied. The Defendants reiterated the entries in the official green card of the suit property and state that the Plaintiffs are strangers to the Defendants. That the Defendants have never engaged the Plaintiffs in any transaction with regards to the suit property. That the title deed produced by the Plaintiffs was not authentic for failure to bear signature of the Land Registrar and stamp number. That the suit is time barred. The 1st and 2nd Defendants pray that the suit be dismissed with costs and interest.

3rd Defendants Defence & Counterclaim

6. The 3rd Defendant responded by way Written Statement of Defence and Counterclaim of the 3rd Defendant stamped 4/04/2019 dated 2/4/19. It is averred that the 1st and 2nd Defendants were the registered proprietors of the suit property until 2nd May 2018 when the same was legally transferred and registered to Blushing Beach Ltd as proprietor. That it conducted due diligence and at no time did the documents referred to by the Plaintiff appear in the Land register. The entries in the register are enumerated under paragraph 5 of the Defence. That no particulars of fraud have been raised against the 3rd Defendant. That the 3rd Defendant followed due process in its registration as proprietor. That the suit is time barred.
7. The 3rd Defendant raised a counterclaim claiming damages against the Plaintiffs in case Number 167 of 2021 for fraudulent misrepresentation, for misrepresenting that the suit property was transferred to the Plaintiff before the land was adjudicated. That the Plaintiff deceitfully and fragrantly purported they had possession despite providing their residence as London. That they procured a fake certificate and falsified Swalehe Mohamed signatures onto the transfer documents. Particulars of fraud are listed under paragraph 15 of the Defence and Counterclaim.
8. The 3rd Defendant Prays that;-
 1. This Honourable court do find and declare that;-
 - a. The land parcel Number Kwale/Msambweni 'A'/2909 measuring 1.10 hectares belongs to the 3rd Defendant
 - b. The purported transfer documents and agreement of sale of land parcel Number Kwale/Msambweni 'A'/2909 measuring 1.10 hectares are in all the circumstances of this case null void and unenforceable against the Defendant
 2. A permanent injunction do issue restraining the 1st and 2nd Respondents by themselves, their agents and or servants from trespassing onto the suit parcel Number Kwale/Msambweni 'A'/2909 measuring 1.10 hectares
 3. That general damages be awarded to the 3rd Defendant for the Plaintiffs and 4th Defendants fraudulent misrepresentation
 4. That the Plaintiffs suit against the 3rd Defendant be dismissed with costs to the 3rd defendant for such a period of time and at such rate as the court may determine.



5. That the 3rd Defendant be awarded the costs of the counterclaim together with interest thereon at such rate and for such period as this court may deem fit to order
6. That any such other or further relief as this Honorable court may deem appropriate to issue.

Plaintiffs Claim In Kwale Cm Elc Case No. 4 Of 2019

9. On the other hand the Plaintiffs claim in the lower court suit CM ELC case number 4 of 2019 dated 25/01/2019 seeks the following reliefs:-
 1. A declaratory order that the suit property, LR No. Kwale/Msambweni "A"/2909 measuring 1.10 hectares belongs to the Plaintiffs and they be registered as absolute proprietors of the said property.
 2. An order compelling the 4th Defendant to cancel entry Number 6 and 7 of the Green card and revoke the transfer and the Title Deed issued to the 3rd Defendant and restore the status quo as at 29th December 2016.
 3. An order compelling the 1st and 2nd Defendants to immediately execute transfer instruments in respect to the right, title and interest in suit property in favour of the Plaintiffs and in default, the court's Executive Officer to execute all the necessary transfer documents in place of the said defendants.
 4. A permanent injunction restraining the 1st, 2nd and 3rd Defendants by themselves, their agents and/or servants from trespassing onto the suit parcel of land.
 5. General damages for breach of contract.
 6. The costs of the suit and interest.
 7. Any other or further relief deemed just and fair grant by this honourable court.
10. The 1st and 2nd Plaintiffs case is that they are bonafide purchasers for valuable consideration of the suit property from the 1st and 2nd Defendants vide a duly executed sale agreement dated 3/08/2017. That after due diligence at the land registry and relying on official register proceeded to pay Kshs.1.9 million to the vendors. That the said vendors submitted as part of the completion document a fake title deed serial No.1709000 for the suit property purporting it to be a genuine title. That this move was well calculated to defraud the Plaintiffs. The particulars of fraud are set out in paragraph 10 of the Plaint. It is pleaded that the 1st and 2nd Defendants have since been charged in criminal case No.737 of 2018. That the 1st and 2nd Defendants have declined to produce the original title deed for purposes of transfer to the Plaintiff necessitating the proceedings.
11. In ELC CM 4 of 2019 the 3rd Defendant filed Written Defence and Counter claim of the 3rd Defendant dated 8th March 2019 and filed on 11/3/2019. However, the court came across a letter dated 24/5/2019 addressed to Executive Officer Chief Magistrates court kwale law courts seeking to expunge the said defence and counterclaim and to be recorded as withdrawn replacing it with 'written statement defence and counterclaim dated 10/5/2019 and filed on 14th May 2019. I perused through the entire file but did not come across the alleged replacement pleading. I had no court record endorsing the request. But all in all, this counterclaim was not prosecuted during the hearing.



Evidence Of The Parties

12. The suit was heard on 23/02/23, 22/05/2023, 14.02.2024, 15/02/2024, 23/04/2024 and 24/04/2024. During the hearing the Plaintiff in the original suit were represented by Ms. Opondo from the firm of Gikera Vadgama, the Defendants by Mr. Idambo but later the 3rd Defendant appeared in person and on behalf of the 1st and 2nd Defendant through Ms. Jennifer Shamalla, Mr. Kulecho from the firm of Lloyds Partners represented the Plaintiff in the lower court suit. Mr Penda Senior State Counsel represented the Land Registrar and the Attorney General. The 1st Plaintiff passed away during the proceedings, leaving the 2nd Plaintiff the deceased son to carry on with the case.
13. PW1 was Brian Julian Dsouza who testified on behalf of the 2nd Plaintiff and produced a Special Power of Attorney dated 1/6/22 in this regard (PEX1). He told the court that he works for Sureya Investment and for the Directors Suhail Mohamed. That he had known the 2nd Plaintiff since the year 2014 who is also the son of Mohamed Yunis. PW1 adopted his witness statement dated 12/9/22 as part of his evidence in chief. He produced the documents in the Plaintiffs list of documents dated 5/10/22 as part of his evidence. It was his evidence that the Plaintiff have been in possession of the suit property since the 1980. That the land belongs to the plaintiff because they hold the original land certificate (PEX2). That the Plaintiff negotiated for purchase of the suit property during the years 1978 to 1980 and signed a sale agreement dated 29/12/78 (PEX3). Parties to the sale agreement were Mohamed Yunus Suhail and Swalehe Mohamed. That the purchase price of Kshs. 80,000/- was acknowledged (PEX 4A and B). That Mr. Yunus then appointed Mr. S.K. Ngelech to attend Land Control Board to obtain consent (PEX5A and B). The consent was issued at a meeting of the Board held on 25/07/1979 pursuant to an application dated 7/7/1979 (PEX6). That transfer was executed in 1980, duly paid for (PEX 9&10) and registered on 28/2/1980 (PEX7) and Land certificate issued.
14. PW1 added that they then took possession. That they visited the suit property on several occasions. That in the year 2016 they did a search (PEX8) and were informed the records were misplaced. That on follow up they used to be sent back to await tracing of the green card. That it was until the year 2018 that a new green card came up but without the names of Mr. Suhail Shahid but instead the 1st 2nd and 3rd Defendants (PEX 11). That they formally wrote to the Land Registrar (PEX12) and successfully lodged a restriction and which no longer exists. That they were informed successors of Swalehe Mohamed were registered through transmission pursuant to proceedings at the Kadhis Court (PEX 14). The witness stated he did not know how Blushing Beach (entry No. 6 of the green card) acquired the suit property in 2/5/2018. It was his evidence that after transmission (PEX 15 application to register the property by transmission) the property was transferred from Hassan Swalehe Rengwa & Abdalla Swalehe Rengwa to the 3rd Defendant. That according to the green card the 1st and 2nd Defendants were registered on 29/12/16 though in the year 2016 the green card was missing.
15. PW1 testified that according to him there must have been collusion between the 1st 2nd 3rd and 4th Defendant for the reason that they followed up on the green card but they were usually informed by the 4th defendant they were still tracing the same. That the green card appeared in 2018 without entries reflecting the Plaintiffs registration. That they were shocked as things appeared to be happening behind the scenes while they waited for the tracing of the green card. The plaintiffs then filed the present suit. PW1 reiterated that Suhail Shahid was still the owner of the suit property, that they still hold the original certificate which has never been surrendered. The witness produced the 2nd Plaintiff passport as PEX17. PW1 urged the court to return the suit property to the rightful owner and the other entries be removed from the green card.



16. On cross examination by Mr. Idambo PW1 stated while he has known the Plaintiffs since the year 2014, he did not know whether they were born in Kenya and when they started living in the UK. He conceded the 2nd Plaintiffs name did not appear in the Sale agreement. He agreed letter 'A' was missing in the description of the property as appearing in the sale agreement and his witness statement. That ID Number of Swalehe Mohamed (vendor) as contained in the sale agreement and the purchase price acknowledgment did not tally. That all the acknowledgment notes produced were not witnessed except 8B. That the initials/signature on acknowledgement 8A and 8B were different in spelling. That at 8A Swalehe Mohamed does not appear as the person receiving the money. Further that the ID numbers of the deceased Mohamed Yunis as captured in the transfer do not tally. That the particulars of the ID card number are not filled in on certification by N. M. Doshi. The Swalehes ID Number as stated in acknowledgement 7A does not tally with the ID number in the transfer. That while the transferee is identified in the transfer by Driving licence the number of the same is not provided. On being referred to paragraph 6 of his witness statement, the certificate of title and page 3 of the sale agreement PW1 conceded the plot numbers are inconsistent. Further that the date of the issue of the certificate of title and the date the register was opened are different. That the name of the registrar issuing the certificate is not indicated.
17. PW1 conceded that the sale agreement has no names of witnesses. That while entry number 1 of the green card is dated 2/7/79, the sale agreement was executed on 29/12/78 a year prior to the registration. That the property was not registered in 1978 but he could not explain the variance.
18. On further cross examination by Mr. Penda PW1 testified that he did not participate in the transactions. That he was not a witness thereof. That he did not have deep knowledge in conveyancing transactions. That his several visits to the suit property meant possession despite absence of structures. He conceded he had only produced one search dated 7/6/2018 in proof of their follow up on the records. That while he had pleaded fraud and which he was aware it's a criminal offence he did not have an OB report.
19. Upon cross examination by Mr. Kulecho PW1 testified that he had been appointed by Power of Attorney in the year 2022 though the transactions took place in the years 1978 and 1980. He conceded that his evidence was based on issues he had been told by the plaintiffs. That during the 22 months before the green card surfaced, they never took any steps to reconstruct the register. The witness gave a description of the location of the suit property and while he stated he visited the suit property with a surveyor he did not produce a current ground status report. That though N.M Doshi advocates features in the transfer document he had not contacted him to appear and confirm that he witnessed the transfer. That he did not know the whereabouts of Mr. Ngelech who obtained the LCB consent.
20. PW1 clarified in re-examination that both plaintiffs were born in Kenya as evidenced in the death certificate. They both lived in Nairobi and immigrated in 1982 as shown in the passport. That Suhail Shahid name is not in the sale agreement because he was then a minor and his father was acting on his behalf. That the absence of 'A' in the property description in the sale agreement could have been an oversight though in acknowledgement 4A, LCB consent, transfer, land certificate, payment receipts, the property is described as 'A 2909'. He identified acknowledgement notes 4a,4b,4c and 4d bore thumbprints and signatures indicating Swalehe received the money. That the full purchase price is acknowledged as having been received. That the Registrars signature was missing in the encumbrance page because there were no encumbrances. On the execution of the sale agreement before issue of green card the witness stated parties can agree to execute the same before title issues. That they did not reconstruct the file because the registrar kept on assuring them the records were there except that he needed to find time to locate them. That due to passage of time they could not find him to attend and



testify. Describing the location of the suit property PW1 further stated he was very familiar with the Msambweni and Funzi area as he did a lot of fishing there.

21. With the above evidence the Plaintiffs case was marked as closed.

1st And 2nd Defendants Evidence

22. DW1 was Hassan Swalehe Rengwe the 2nd Defendant who testified on his own behalf and of his brother the 1st Defendant. DW1 witness adopted the statement dated 12/10/22 as his evidence in chief and produced in evidence the documents contained in the list of documents dated 13/10/22 (PEX1-4). DW1 testified that after the death of their father they sat down as family to chart ways of raising money for treatment for their brother who was diabetic. They commenced succession proceedings at the Kadhi's court Kwale where they obtained an order which they presented before the Land Registry Kwale and were issued with title. They decided to sell the land to Jennifer whom they knew through Mr. Manda (sic Amanda) an agent to assist in the above treatment. The two viewed the property, liked it and which is the only land they had sold.
23. On being cross examined by Ms. Opondo the witness stated they filed the succession proceedings in the year 2016 and conceded he did not include their sister Mwanakombo. That though his father had two pieces of land, the suit property and plot 1720 the later was not included in the succession proceedings because it was not for sell. That he was also not aware of the legal requirement to include it. That they conducted a search before they approached the Kadhis court though he was not sure if a copy was before this court. That they have never been summoned by the Land Registrar on amendment of the green card. They were never told the green card had issues. That under Muslim law they did not require confirmation of grant. That the only document he presented to the registrar was the Kadhis order dated 28/12/2016. That he paid for stamp duty whose receipt was before court, paid rates for the clearance certificate and signed a transfer to himself. That he never supplied a PIN but furnished a copy of his ID card and attached his photo. He admitted knowing the 3rd Defendant and signing a sale agreement with the 3rd Defendant for a consideration of Kshs.8,000,000/-. That he acknowledged receipt of the purchase price through Aminga Advocate, though he was not his witness in this case. Though Mr. Aminga obtained LCB consent a copy was not filed in court. That at the time of the sale the 1st Defendant was not married. DW1 stated he was married then and his wife consented to the transaction though he was not sure if the consent was in court. That he supplied the 3rd Defendant with a copy of his ID.
24. That upon lodging his documents at the registry DW1 was issued with the title the following day. He admitted trying to sell the suit property to Ruth Wangui Deya the 1st Plaintiff in the CM ELC 4 of 2019 suit though he did not know her physically. That he received money from her through the chief. The witness denied manufacturing the documents to deny Yunis the property. DW1 testified he was 10 years old in 1978 and did not know if his father could have sold the land but that at 10 years, he knew his father's dealings. The witness denied he had lied to the court.
25. Cross examined by Mr.Penda DW1 stated he was sure his father did not sell the land. That he knew the location of the land since he was a child, they cultivated thereon until the demise of their father. They would clear the bush at the beach and plant maize. That no one claimed or entered the land before his father's death. That the same photos were in the transfer annexed thereto. That during the proceedings before the Kadhis court they presented a witness by the name Zara who confirmed the 1st and 2nd Defendants as the deceased sons. The witness reiterated that he went to the land's office presented documents knowing that the land belonged to their father.



26. Cross examined by Mr. Kulecho DW1 told the court he knew Hassan Mazuri through chief Mwanyare (deceased). The witness confirmed that he was charged for taking money from Deya and forgery of title. That he used to receive the money in instalments from Deya. That they signed an agreement knowing the price was Kshs.19 million. That his nephew and niece objected about the sale to the chief but later agreed to the sale. Presently the two were over 30 years old.
27. The witness clarified in re-examination that he went to the Kadhis court because it was the Islamic court and was aware they had to succeed the property. That the deceased never sold the suit property to Yunis. That since he was born no one has come to remove them from the property. That his niece and nephew objected to the sale to Deya because the offer of Kshs. 19 million changed to Kshs. 1.9 million. That the criminal proceedings were ongoing and scheduled on 20/2/24. That he had not yet given evidence in the said proceedings. That they were assisted at the Land registry in Kwale by an agent who did the entire process. The witness stated that he was aware he could not sell land without a KRA PIN.
28. DW2 was Jennifer Mary Shamalla an advocate of this court who stated a director and owner of the 3rd Defendant. DW2 adopted the witness statement dated 4/4/2018 sworn on behalf of the 3rd Defendant. The witness produced as part of her evidence the documents in the list of documents dated 2/4/2019. The witness informed the court she had always dreamt of owning a beach property in Kwale county. She visited Msambweni in the year 2017 and together with a friend identified some property on the way to Funzi. The friend traced the owners who offered her 2 acres and three quatrates at Kshs. 8 million. That she met the vendors at their home in Msambweni and they were selling to raise money for their brothers medical fees. She undertook an official search to confirm their ownership and entered into a sale agreement. That she took possession and placed beacons as the process was ongoing. That she later was informed of a restriction placed against the title by Yunis and a letter from Lloyds and Partners. She became curious about the owners Suhail and a minor who lived in the UK. She got confirmation from the notary who had notarised the documents. The witness stated she was the true owner of the land and great injustice had been meted upon her.
29. On cross examination by Ms. Opondo, the witness stated she has practiced law for over 30 years. She could not remember if she had filed the 3rd Defendants certificate of incorporation. She had not filed authority to plead on behalf of the 3rd Defendant, that she undertook due diligence and conducted search before purchasing the property though she had not filed a copy in court. That she paid the consideration by cheque. The payment was not disputed and therefore proof was not required. DW2 conceded as part of her counterclaim she did not produce any proof of the payment of the estimated sum of Kshs. 8 million. That she was sure the 1st and 2nd Defendant's lawyer had presented all the relevant documents namely transfer, rates clearance certificate since he handled everything. That while the property was valued at Kshs. 8 million and having paid stamp duty she had no evidence of the same. That she was not aware of the requirement for spousal consent. Describing the property, the witness stated she purchased 3 and a quarter Ha out of the 1.10HA. that she only did a survey of the portion she wanted to buy. She did not find it necessary to have a beacon certificate at the time she was buying. Though she sent Amanda to go and find out about the restriction she was not her witness in the proceedings. She has done nothing on the property since purchase because of the ongoing court proceedings. That the response from the Notary public she approached to confirm if the Plaintiffs had appeared before him/her was not filed in court. British documents can be admitted in Kenya without notarisation. According to the witness the documents were notarised. She was not aware the Plaintiff had a title. DW2 reiterated that the 1st and 2nd defendants did not lie to her.
30. There was no cross examination on the part of Mr. Penda for this witness.



31. Upon being cross examined by Mr. Kulecho DW2 clarified she remembered receiving a letter from Vadgama and partners about the restriction and not through the Land Registrar. That the funds for the purchase price came from her and not the 3rd Defendant company. She did not purchase the entire parcel but a portion.
32. The witness indicated in re-examination that she followed up on the notary public because she wanted to know the Plaintiff citizenship. That companies are registered at the company registry which is accessible to everyone. That the Plaintiffs title is a fraud. She has never known the Plaintiffs. l
33. With the above the 3rd Defendants case was marked as closed.
34. PW1 in the lower court case ELC 4 of 2019 matter was Otieno Oganga Maurice a surveyor working with Kwale Sugar. The witness testified that he knew the Plaintiffs and the 1st and 2nd Defendant. He adopted his witness statement dated 23/9/22 as his evidence in chief and produced the documents in the Plaintiffs list dated 25/01/2019. That Maurice Deya informed him he wanted to purchase land with the assistance of an agent Hassan Mazuri. Maurice asked him to assist with due diligence on the suit property. That he conducted a search at the Kwale land registry visited the property and gave the feedback to him. That Maurice later informed him they had negotiated for the purchase and requested PW1 to facilitate the execution of the transfer by the sellers and receive the purchase price from him for payment to the sellers. That on 2/8/2017 he received the sale agreement from Maurice, passed it to the seller through the agent Mazuri to have it signed. That on 3/8/2017 the sellers Abdalla Rengwa and Hassan Swaleh Rengwa came to his office accompanied by Mazuri. The sellers acknowledged they had agreed to sale and he gave them 10% of the purchase price of Kshs. 1,902,670 being Kshs. 190,267/ =. That he paid the balance in three equal instalments of Kshs. 570,801/- on 5/9/17, 30/9/17 and 25/11/17. The amounts were paid in cash and acknowledged on a payment slip witnessed by Mazuri and countersigned by PW1. After the last instalment the sellers handed over the completion documents namely transfer form, original title, KRA PIN, Copies of ID, Photos, LCB consent and KRA certificates. They did not submit spousal consent but promised to furnish within the same day. That this took long and he was informed that Abdalla's spouse was in Tanzania attending to Abdalla in hospital. That he informed Lloyds who advised him to proceed with processing the transfer at the land registry. That upon submission the registry withheld the documents on the basis that the title was fake. That he reported the issue to the Diani police on the advise of Lloyd & Partners and the defendant charged.
35. That the documents retained by the registrar were never released back to him. He reiterated the purchase price was Kshs. 1,902,670 as advised by Lloyds and as reflected in the sale agreement, acknowledgement notes and the criminal proceedings and not Kshs.19 million as stated by the DW1. On the 3rd Defendants claim on a portion of the land the witness testified that this ought to have been undertaken through a subdivision with the relevant mutations followed by closure of the green card. That the transfer to the 3rd Defendant reflected the entire land was transferred.
36. Cross examined by Mr. Idambo the witness indicated that he visited the suit property on instructions by the Deya's. Describing the location of the property the witness stated it was close to the beach bush and no settlements nearby. The search showed the owners as Abdalla and Swalehe. He was not present during the negotiations for the purchase price and he went by what was contained in the agreement. That he did not know the price of an acre of a beach plot. He identified Hassan as being present in court. That he used the copy of the title sent to him by Deya to obtain the search and which he assumed was obtained from the sellers. He was not aware that the land registrar informed the police that he PW1 had presented the documents and he was never seen thereafter. That the transaction did not materialise because of the complaints by one of the Defendants sons. The chief had no authority to



- stop a transaction. The witness denied that it took him 1 year to report the issue to the police. He was not aware of any communication between the Plaintiff and the Defendant to refund the purchase price. He was not aware of the status of the criminal proceedings.
37. Cross examined by Mr. Penda the witness testified that he was informed about the objection on the transaction towards the end by Mazuri. He knew Mazuri through introduction by Deya. On the spousal consent he was not aware of the estrangement of one of the wives. On being shown Abdallas statement with the police he conceded it did not disclose the purchase price. He never got audience with the registrar about the fake title. That he did not undertake a historical search. The ownership was not in dispute.
38. Cross examined by Ms. Opondo PW1 told the court he was in court as a witness and not a surveyor. That he did not conduct a historical search of the suit property. That he relied on the certificate of official search. That todate the Rengwas have never presented the spousal consent. That he was told the title was fake by one of the clerks at the lands registry who he could not remember as they were many clerks. That he did meet the registrar who did not hand him anything as he was in hurry. He was advised to report the matter at Diani which was now a criminal issue. That according to him where there is no spouse the vendor would have to swear an affidavit in this regard. On being referred to a statement recorded by Mr Abraham Njoroge the witness stated that he presented title serial No. 170900 at the registry and confirmed that this was the same number of the title presented by the 4th Defendant. On being shown the signatures on the 3 titles produced before court the witness stated they seemed similar. That he was given the title he presented at the Land registry by Hassan Mazuri in the presence of the vendors. That the defendants never informed him they were not willing to continue with the transaction or that they were discontented with the purchase price. They have never followed up with him whether he registered the transfer. He never saw any beacons on the property.
39. On re-examination the witness clarified all the titles bore the same serial number which was indicative of the fact that they all originated from the registry. That the green card is what gives the history of the property and in the instant case Mohamed Yunis name was not in the green card. That he presented the documents at Kwale registry in Dec 2019 and recorded a statement at Diani on 29/12//17(sic 19) which was not over a year.
40. PW2 was Ruth Wangui Deya. She adopted her witness statement dated 29/01/19. The witness stated he executed a sale agreement dated 3/8/17 with the 1st and 2nd defendants over the suit property. The sale price was agreed at Kshs1,902,679. They made a deposit and 3 equal instalments which were acknowledged by the vendors. The vendors frustrated the transaction by issuing a fake title to the witnesses agent Maurice Otieno. The transfer was never effected PW2 asked the court to allow the reliefs as prayed.
41. On cross examination by Ms. Shamalla PW2 testified that she visited the suit property in early 2017 and it was a beach front property in Msambweni. That the initial deposit was paid in two instalments through her lawyers. That at all times she communicated with Lloyds & Company Nairobi via email though she never went to their office in Nairobi. That when they were ready for possession, they realised the title was fake.
42. Cross examined by Ms. Opondo the witness confirmed they undertook a search through Maurice Otieno before purchasing the suit property. The search confirmed the vendors as the owners. She did not meet the vendors before signing the sale agreement. She signed the agreement in Kwale. The witness conceded she did not make inquiries on how the vendors acquired the property. That Maurice attended LCB on her behalf thought she had no written authority in this regard. That she was not aware of the meeting with the chief. The witness realised the title was fake when Maurice lodged the transfer



- documents. The transfer did not go through as the registry advised it was fake. The witness was not aware that the land belonged to Yunis and Shahid as the name did not feature in the search. She could not confirm if the vendors were the owners in view of the fake title purported to be the original. She believed they were out to defraud.
43. Cross examined by Mr. Penda the witness recalled that Hassan one of the brokers was charged in criminal proceedings with regard to the suit property but she was not aware of the outcome. It is the Land Registry that informed her the title was fake. Trusting the search, she proceeded to pay the purchase price. She believed the Rengwa's sold the property to someone else and must refund her the purchase price.
 44. The witness indicated in re-examination that the firm of Lloyd & partners have acted for her in other transactions including the present one. That she has interacted with Mr. Kulecho. That she testified in the criminal proceedings before the Chief Magistrate at Kwale court. That it is Maurice who notified her of the fake title which was at the time of transfer. It is Maurice who conducted the search.
 45. PW3 was Maurice Onyango Deya spouse to Ruth Deya. He adopted his witness statement dated 24/10/22. The witness testified that he was the one coordinating the communication between Lloyd, Maurice Otieno and the agent Hassan. That when Hassan located the land and they were ready to buy the chief informed him the price was too low yet the chief was not a party to the transaction. That the vendor never communicated to him about this.
 46. Upon cross examination by Ms. Shamala indicated though based in Seattle USA he came and saw the suit property at a beach in Msambweni. The nearest land mark was an Italian restaurant about 900 meters away. That he did not do market survey on the price though he was informed beaches at Mombasa sold for Kshs.5 million. That as a husband he was aware of what Ruth transferred to the firm of Lloyds. On the issue of the purchase price being low, they took the issue through Lloyds. That there was no intention to defraud the vendors since the purchase price was paid through Lloyds.
 47. Upon cross examination by Ms. Opondo the witness stated the 2nd Plaintiff Philemon Bernard Washiundu was a friend who bought the property jointly with Ruth. PW3 confirmed Ruth executed the agreement for Kshs.1.9 million and money was wired through Lloyds though he had not supplied evidence of the latter. The communication from the chief was verbal. The witness could not recall meeting the vendors. They relied on the search as meeting a vendor is not enough due to impersonation. That there is a risk in every transaction thus the search. That according to him the transfer did not proceed for the reason that there was no spousal consent, fake documentation and low purchase price though he could not state which was the title said to be fake. The title used for the search undertaken by Maurice was obtained from the vendors though he could not state if it was the original title.
 48. Cross examined by Mr. Penda the witness indicated that it was his wife Ruth and the 2nd Plaintiff who bought the suit property. On being shown the transfer produced by Ruth Deya the witness confirmed the photos of the transferees. The witness conceded he resembled Philemon. The witness could not confirm if the transfer was signed. He told the court Lloyds, Maurice and Mazuri served as his agents. The Chiefs meeting took place in December 2017 before the land was transferred. He was not able to comment on the Maurice statement that he went to the land's registry immediately after the meeting with the chief. On being read the charges in the criminal proceedings all he could state was that the proceedings were ongoing though he was not a witness. That he was told the Land Registrar declined the title for being fake though he could become the bad person.
 49. On re-examination the witness stated that he had not received any communication from the vendors rescinding the agreement. That he had never seen a sale agreement in respect of the 3rd defendant nor



her evidence of payment. The meeting with the chief happened in Dec 2017 and Maurice visit to the land registry happened at the time.

50. With the above evidence the Plaintiffs case in ELC CM 4 of 2019 was marked as closed.
51. DW3 was Steve Mokaya the Land Registrar Kwale. He enumerated the entries in the register with regard Kwale/Msambweni A/2909. That on 2/7/79 the land was registered to Swalehe Mohamed and land certificate issued; 29/12/16 the property was vested to Abdala Swalehe Rengwa and Hassan Rengwa as administrators and beneficiaries and title issued; 7/13/2019; 4/5/2018 transfer to Blushing Beach Ltd; 7/6/18 a restriction was placed by the Land Registrar under section 76; 13/2/2019 a court order under CM case 4 of 2019 restraining the Plaintiffs and defendants from trespassing into the land until determination of the suit; 22/2/19 the restriction was lifted; 10/3/20 court order under ELC Mombasa 38 of 2019 ordering status quo; 10/9/20 court order under ELC Mombasa 38 of 2019 stopping the 3rd Defendant from selling, leasing, charging over the property. The witness produced the documents in the list of documents dated 4/01/21 being Certified copy of green card, Land Adjudication Record, surrendered land certificate dated 18/9/79 and title deed surrendered on 29/9/2015 DW3 Exh 1-4.
52. The witness told the court he was aware of the allegations fraud which he learnt from the court order. He was not aware of the criminal proceedings unless the same were commenced before he reported to work at Kwale.
53. Cross examined by Ms. Opondo enumerating his duties as Land Registrar including being a custodian of all land documents at the registry the witness listed the type of documents that would ordinarily be contained in a parcel file. Referring to Section 7(1)(b) he stated they hardly keep cadastral maps as required. That the documents produced were what he was requested to furnish. On the entry dated 2/7/79 in favor of Swalehe Mohamed the witness stated it was supported with the surrendered title issued on 18/0/79. He however stated the parcel file did not contain the ID and KRA PIN for Swalehe Mohamed. That while the green card was opened under the provisions of section 79(2)(3) of the RLA probably on the basis of fraud there was no notification to the proprietor of intention to rectify. There was also no application from the proprietor requesting for change.
54. With regard to the registration by transmission the witness stated he did not have the confirmed grant from the court however the RL 19 and RL7 showed the court confirmed the grant. He was not sure if the grant was authenticated. On being referred to section 61(1) of the [Land Registration Act](#) on transmission by death the witness confirmed that you cannot register RL7 without the grant. On being shown receipt dated 28/7/16 (PEX 8) the witness noted there was a payment for a search though he could not confirm if a search certificate was issued. That as at that date the register had no entry for 28/7/2016 since the transmission had not been registered by then. That the restriction registered on 7/6/2018 showed it was placed suo motto and not by any of the parties though the letter dated 22/5/2018 from Vadgama had already been received by this date. He confirmed that the letter raised concerns about fraudulent transfer of property. Referring to Section 78 which is on removal of restriction the witness noted the restriction was removed on 22/2/2019 though he could not confirm if notice was issued in relation thereto. That in his understanding the same was removed by the Land Registrar suo motto and notice was not required.
55. On being asked to comment on Swalehe Mohamed signature as contained in the land adjudication record and the sale agreement the witness declined to speculate. On reopening of the register, the witness indicated there was no letter of indemnity as required under section 81 of the [Land Registration Act](#). The witness stated it was not possible for Swalehe to have sold the suit property to Yunis before



he was registered since he cannot sell that which he does not have. However, it was possible for him to have sold the land while holding the adjudication record.

56. Upon cross examination by Mr. Kulecho and being referred to the statement by Abraham Ngugi Njoroge in the criminal case, DW3 confirmed he was land registrar then. He indicated that if you receive fake documents, you confiscate the title but if there is no entry you cannot do anything. That the sale agreement is not required during transfer. That the registrar registers transfer based on the documents presented, that in 2018 it is possible the registrar was not aware there was fraud or fake transfer (sic title). The witness confirmed that if the fake title was confiscated it must have been kept in the parcel file.
57. On the search produced by the Deya's he stated that the same is per status and if there was nothing on the record about fraud then the same could have been issued provided the applicant filled a form and attached copy of title and KRA PIN. That it was not extraordinary that the transfer from the Rengwa's to the 3rd Defendants was effected on the same date of lodging though this was not common. The witness outlined the documents that are required for a transfer and confirmed that all were presented during this transfer. He stated for a company the certificate of incorporation and CR form was also required and which was not presented though he could not confirm if the transfer was to an existent company. That the transfer and valuation confirm that the same covered the entire land. Had Blushing bought a portion there would have been a subdivision.
58. Cross examined by Ms. Shamalla the Land registrar stated a KRA PIN cannot issue to a non existing entity. That he was not aware of requirement for presidential ascent for ownership of beach properties by foreigners or the litigation by LSK on the subject.
59. On re-examination the witness clarified that there was no letter from the DCI on the criminal proceedings in the file not even on the outcome thereof. Where a proprietor initiates reconstruction there is no requirement for notice. That he was not an expert on handwriting except his own handwriting. On registration of the transfer the service charter provides for service between 1-7 days. That in accordance to the green card in the parcel file Abdalla and Swalehe vide the Kadhis succession documents had capacity and power to transact on the property.
60. With the above the case against the Chief Land Registrar Kwale was marked as closed.

Submissions

61. Submissions on behalf of the Plaintiff in Case No. 167 of 2021 are dated 13th June 2024 and 29/7/24. The 1st 2nd 3rd Defendants submissions are dated 28/5/24, the 4th Defendant 22nd July 2024 and the Plaintiffs in CM ELC 4 of 2019 are dated 1st July 2024.

Plaintiff Submissions In Case No. 167 of 2021

62. Rehashing the facts , the evidence given the following issues were identified for determination;
 - a. Whether the Plaintiff is the lawful registered proprietor of the property known as Kwale/ Msambweni "A"/2909 (the Suit Property).
 - b. Whether the rectification of the register under Section 79 (2) & (3) of the [Land Registration Act](#) No. 3 of 2012 was procedural.
 - c. Whether the transfer of the Suit Property by transmission to the 1st and 2nd Defendant was fraudulent, illegal, null and void and should be revoked.
 - d. Whether the 1st and 2nd Defendants transferred a good title to the 3rd Defendant.



- e. Whether the 3rd Defendant is a bona fide purchaser for value without notice of fraud.
 - f. Whether the 2nd Plaintiff is entitled to the reliefs sought.
 - g. Whether the 3rd Defendant is entitled to the reliefs sought in the Counterclaim.
 - h. Whether the Plaintiffs in Kwale ELC Case No. 4 of 2019 are entitled to the Suit Property.
63. It was submitted on behalf of the 2nd Plaintiff that Article 40 of the Constitution of Kenya, 2010 guarantees the right of every person to own and acquire property in Kenya and prohibits the state from depriving a person of their property unless there is just and prompt compensation.
64. Referring to the provisions of Section 27 of the Registered Land Act (repealed), Section 24(a) of Land Registration Act No. 3 of 2012, and Section 26 (1) of the Land Registration Act it is submitted that the 2nd Plaintiff is the absolute proprietor of the Suit Property because he holds a genuine title to the property, having purchased the property from the initial owner, Swalehe Mohamed. The title is to be taken by all courts as prima facie evidence that he is the absolute and indefeasible owner of the Suit Property and that his title shall not be subject to challenge except on the ground of fraud or misrepresentation to which he should be proved to be a party. That the Plaintiff has produced sufficient documentary evidence demonstrating the history of the Suit Property from the time of adjudication being sale agreement, payment acknowledgments, consent from the Land Control Board, transfer documents, registration applications, payment receipts, and the Land Certificate issued in the Deceased's and 2nd Plaintiff's names.
65. That the 2nd Plaintiff asserts that the Defendants have failed to present any evidence to challenge the validity of the above title, particularly on grounds of fraud or misrepresentation. The Plaintiff argues that apart from discrepancies in the identification numbers attributed to Swalehe Mohamed on the sale agreement, transfer documents, and acknowledgment notes, the same do not invalidate the transaction, as all documents were signed, indicating Swalehe Mohamed's sale of the property to the deceased. The court is urged to hold that 2nd Plaintiff is the registered owner of the Suit Property to the exclusion of the 3rd Defendant.
66. The 2nd Plaintiff asserts that both he and the deceased were the first registered owners of the Suit Property. To unlawfully dispossess the 2nd Plaintiff of his legally acquired property, the Defendants initiated the process by altering the land register and creating an entry in the register in the name of Swalehe Mohamed. That the only instances under which the 4th Defendant can rectify a land register are those provided under Section 79 of the Land Registration Act. In this regard reference was made to the case *Misoy v Jerotich & another* (Environment & Land Case 40 of 2021) [2022] KEELC 13339 (KLR) (29 September 2022) (Judgment). That the 4th Defendant failed to offer any explanation of the circumstances or reasons for reopening the land register.
67. That the requirements of Regulation 93 of the Land Registration (General) Regulations 2014, on notice to any person with an interest in the property and hearing before rectification of a register were not complied with by the 4th Defendant yet as early as 2016, the 2nd Plaintiff had visited the 4th Defendant's offices to ascertain the status of the Suit Property and paid for a search. The court was referred to the case of *Republic v Bishop Patrick Ligawa Nyagudi & 4 others; Ex-parte: Archbishop Naphtaly Yongo Okuon & 3 others* [2021] eKLR, on meanings of errors and mistakes, as well as the necessity for a hearing before rectification.
68. Citing Section 33(5) of the Act on powers of the Registrar to reconstruct any lost or destroyed land register and the steps to be taken before such reconstruction, demonstrating lack of compliance thereof



- the 2nd Plaintiff submitted that the unclear circumstances and secrecy under which the land register was reconstructed indicated the original register was destroyed to create a new one with entries under Swalehe Mohamed's name, potentially to defraud the 2nd Plaintiff of the Suit Property. The court was referred to *Republic v County Land Registrar, Makueni Lands Registry Ex-Parte Philes Mwikali Kioko & 2 others* [2021] eKLR and *re Francis Waiganjo Kimanga & another* [2017] eKLR.
69. Enumerating the process of registering a property by transmission under section 61 of the [Land Registration Act](#) 2012, Section 50 of the [Land Act](#) No. 6 of 2012 and Regulation 55 and 56 of the Land Registration (General) Regulations 2014 and vis a vis the evidence adduced, it was submitted that by relying on the Kadhis order which by its nature was neither a grant nor a confirmed grant to register the 1st and 2nd Defendants, the 4th Defendant contravened the provisions of Rule 55 of the Land Registration (General) Regulations Rules 2014 which allows transmission only after confirmation of the grant.
70. The 2nd Plaintiff asserts that the 1st and 2nd Defendant did not have a good title to transfer to the 3rd Defendant, as their title was acquired illegally and fraudulently. That even though the 1st and 2nd Defendants hinge their claim on the registration by transmission, the process under which the said registration was effected was shrouded with mystery, for the reasons that the 1st and 2nd Defendant failed to produce documents to prove that Swalehe Mohamed was registered as the owner of the property, documents to show they applied for reconstruction of the register, minutes of hearings chaired by the 4th Defendant to discuss the rectification of the register pursuant to Section 79 of the [Land Registration Act](#), failed to point out the mistakes, errors or omissions that necessitated the rectification of the register, proof of undertaking to indemnify the 4th Defendant in case a claim was made against the government, an agreement for the sale of the Suit Property between them and the 3rd Defendant, acknowledgment of purchase price, proof of spousal consent permitting the transaction, proof of subdivision of the property, Land rent and rates clearance certificates and proof of payment of Capital Gains Tax for the income received from the sale of the Suit Property pursuant to the [Income Tax Act](#).
71. Referring to the definitions of bonafide purchaser, fraud as given in Black's Law Dictionary, 8th and 7th edition respectively, it is submitted that the registration of the Suit Property in the name of the 3rd Defendant was procured by fraud. That the burden of proof was upon the 3rd Defendant to demonstrate to the court that it is a bona fide purchaser for value without notice. It is submitted that the Defendants perpetrated the fraud that occasioned the 3rd Defendant's registration of the Suit Property in its name through falsification of documents, therefore the 3rd Defendant cannot rely on the doctrine of bona fide purchaser for value without notice to lay claim on the Suit Property. The case of *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR which referred to the Ugandan Case of *Katende Vs Haridar & Company Ltd* (2008) 2EA 173 was relied upon to buttress the requirements for one to rely on the defence of innocent purchaser.
72. Further that the 3rd Defendant did not conduct due diligence to ascertain the history of the Suit Property; failed to produce the agreement for sale with the 1st and 2nd Defendants; and did not furnish evidence of payment for the purported purchase price, evidence of subdivision of three-quarters of the Suit Property allegedly purchased by the 3rd Defendant as well as the completion documents used in facilitating the registration of the Suit Property in its name. The Court of Appeal decision in *Samuel Kamere v Lands Registrar, Kajiado* [2015] eKLR is relied upon.
73. That even if the 3rd Defendant was not an accomplice in the fraud, since the 1st and 2nd Defendants did not have a good title to pass then the 3rd Defendant's title cannot stand under the provisions of Section 26(1)(b) of [Land Registration Act](#). The court was further referred to the cases of *Suleiman Rahemtulla Omar & another v Musa Hersi Fahiyeh & 5 others* (2014) eKLR Court of Appeal, Samuel



Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware Limited & another (2018)eKLR, Lawrence Mukiri Mungai v Attorney General & 6 others (2019) eKLR and Dina Management Limited v County Government of Mombasa & 5 others (2023) eKLR - the Supreme Court of Kenya.

74. That in view of the foregoing the court was invited to invoke its powers under section 80 of the [Land Registration Act](#) and cancel any titles acquired through fraud.
75. On mesne profits it is submitted that the fact that the 3rd Defendant had the title to the Suit Property registered in its name is sufficient proof that it denied the 2nd Plaintiff his right to his property without any lawful or justifiable cause, which is sufficient proof that it was a trespasser. Reliance is placed on the case of Kenya Anti-Corruption Commission v Mwaura & another (2023) eKLR where it was held that, liability to pay mesne profits goes with actual possession of the land and the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits. The court is invited to note the deprivation of use of the suit property was for 8 years and use the test in this authority.
76. On costs reliance is placed on Section 27 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya which provides that costs unless for good reason shall follow the event and the decision in Delilah Kerubo Otiso v Ramesh Chander Ndingra (2018) eKLR. The court is urged to grant costs of the suit to the Plaintiffs as the successful party.
77. On the counterclaim it is submitted that the 3rd Defendant is not deserving of the orders sought having failed to prove its claim, including its existence and urges the court to dismiss the counterclaim with costs.
78. On whether the Plaintiffs in Kwale ELC Case No. 4 of 2019 are entitled to the Suit Property, it is submitted that the 1st and 2nd Defendants acquired the title to the Suit Property illegally, consequently, they did not have a good title to pass it to the Plaintiffs in Kwale ELC Case No. 4 of 2019.
79. The 2nd Plaintiff submits he has proved his case and urges the Honourable Court to allow the suit as prayed.

The Plaintiffs Submissions in CMCC ELC No. 4 of 2019

80. The Plaintiff's submissions highlighted the undisputed facts from the pleadings, and the testimonies of the 3 Plaintiff witnesses which it is stated was corroborated by the testimony of Hassan Swalehe Rengwa the 1st Defendant. The contested facts were also enumerated. On the purchase price the court was urged to disregard the 2nd Defendant testimony that the Area Chief & Hassan Mazuri (a broker) represented to him that the Plaintiffs will pay him a purchase price of Kes. 20,000,000/-, which was allegedly negotiated to Kshs. 19,000,000/-. There was no document produced to validate this issue as required under Sections 107 and 109 of the [Evidence Act](#). DW1 did not file a statement from either the area chief or Hassan Mazuri. That Maurice Deya (PW 3), confirmed the 1st and 2nd Defendant has never issued a notice of rescission in view of Clause 9.1 of the Sale Agreement dated 3.08.2017. That it was confirmed by PW 3 (Maurice Deya) that the area chief was not part of the transaction; neither did the two certificates of official searches obtained from the Land Registry (Plaintiffs Exhibits No. 4) indicate that he was the owner of the suit property.
81. That Jennifer Shamalla Advocate, who testified on behalf of the 3rd Defendant, and acted for both the 1st, 2nd & 3rd Defendants in these proceedings did not produce any written, signed and attested Sale Agreement to demonstrate that there was a land transaction between the 3rd Defendant and the 1st and 2nd Defendant in respect to the Suit Property. In the absence of a valid written agreement, no legal rights are conferred to the 3rd Defendant in respect to the suit property. Consequently the 3rd cannot be said to be an innocent purchaser for value.



82. It is submitted that while Jennifer Shamalla only purchased a portion of the suit property for Kes. 8,000,000/- both Mr. Mokaya - the County Land Registrar, and Maurice Otieno (PW 1) testified that the transfer instruments filed by the 3rd Defendant dated 16.04.2018 and the valuation for stamp duty form dated 30.04.2018 were for the entire parcel of the suit property. That the the transfer process offended Section 42 of the Land Registration Act, 2012 which requires a subdivision. That in view of this, the court should not look far for evidence of fraud, collusion, misrepresentation, unprocedural & illegality on the part of the 1st, 2nd, 3rd and 4th Defendants.
83. That both the 1st, 2nd and 3rd Defendants did not file proof/evidence of payment/ receipt of the alleged purchase price of Kes. 8,000,000/- and the 3rd Defendant therefore cannot be said to be a purchaser for value without notice in the absence of proof of payment & a valid written, signed & attested sale agreement.
84. Referring to the provisions of Section 85(3) of the Companies Act, 2015 and Section 44 (5) (a) of the Land Registration Act No. 3 of 2012 as to requirement for Certificate of Incorporation or Certificate of Official Search (CR 12) in proof that the 3rd Defendant is a registered entity in Kenya and which were mandatory documents that should accompany registration instruments it was submitted that this was enough evidence that the 1st, 2nd, 3rd & 4th Defendants colluded to transfer the suit parcel of land to an entity that had not been duly incorporated. Further reference was made to the provisions of Section 26(1) (a) & (b) of the Land Registration Act, 2012 and the holding in Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR it was submitted that the title held by the 3rd Defendant is ripe for challenge on account of fraud or misrepresentation, illegal & unprocedural acquisition, and through a corrupt scheme.
85. On the 1st, 2nd, 3rd Defendant's submissions the court is urged to reject the submissions by the 1st, 2nd and 3rd Defendants since there is no suit filed by the said parties in any court within the Republic of Kenya, including the consolidated suit where they are seeking any reliefs against the Plaintiffs. That Paragraphs 15 c, e, f, g, h should be expunged on account of resjudicata the same having been determined in Blushing Beach Limited v Ruth Wangui Deya & another; Abdalla Swalehe Rengwa & 3 others (Interested Parties) (ELCA No. 17 of 2019) eKLR, by Justice Yano on 2.12.2019.
86. In response to Paragraphs 15 k, l, m, n, o, p, q, r seeking to impugne the sale agreement dated 3rd August 2017 for interalia being virtual , it was submitted that the 2nd Defendant confirmed that they indeed executed the said sale Agreement and received the sum of Kes. 1,902,670/- towards payments of the purchase price, that the said sum was paid in 4 instalments by Maurice Otieno on behalf of the Plaintiffs, and was duly acknowledged (Plaintiffs Exhibit No. 2) as further corroborated by the testimony of PW 1, PW 2 & PW 3. The court is invited to find that the Sale Agreement dated 3rd August 2017 is valid, written, executed and attested and the same complies with Sections 38(1) of the Land Act, 2012 and 3(3) of the Law of Contract Act, Cap 23 of the Laws of Kenya.
87. The court is urged to grant the Plaintiffs in CMCC EIC No. 4 of 2019 the reliefs as sought in the Plaint.

1st, 2nd & 3rd Defendants Submissions

88. The 1st 2nd and 3rd Defendants identified the following issues for determination; -
- a. Who are the 1st and 2nd Plaintiffs and the veracity of bundle of documents received in this the honorable court by the 1st and 2nd Plaintiffs.



- b. whether the 1st, 2nd and 3rd Defendants, followed due process when acquiring the property in the khadhis courts in the transmission of the property after the death of their father Mohammed Swahele to the 2 & 3rd defendant;
 - c. whether the 4th and 5th Defendants have come to court with clean hands;
 - d. whether 3rd Defendant is the bonafide owner of the property;
 - e. what orders is the court entitled to make in the circumstances.
89. It is submitted that Mohammed Yunis at the time, date and place of his birth 18th July 1933, as per the aforementioned death certificate states that the 1st Plaintiff was born in Kenya. However, at the time of the 1st Plaintiff's birth, Kenya was not yet a Republic but was a British colony/ protectorate known as The East African Protectorate and its subjects automatically became citizens of the United Kingdom & Colonies before Independence, on December 12th 1963. No evidence has been provided of the 1st Plaintiff's nationality. The submissions highlight notable anomalies in the documents presented by the Plaintiff and the issue of fraud and which are listed in the submissions. The court has considered the same.
90. It is submitted that the 1st and 2nd Defendants are the duly recognized heirs and executors of the estate of Swalehe Mohammed the deceased and that Jennifer Shamalla is a Kenyan Citizen and is the sole shareholder and Director of a Company named Blushing Beach situated in Kwale County, within the Republic of Kenya. That Jennifer Shamalla purchased a property known as LR. KWALE/ MSAMBWENI 'A'/2909 measuring 1.10 ha. and was issued with a title deed on the 2nd of May 2018 by the Land Registrar at Kwale in the absolute proprietorship in the name of Blushing Beach Limited. The 1st 2nd and 3rd Defendants give a brief summary of the evidence presented before court and in conclusion state that the power of attorney relied upon by the plaintiffs is a forgery.
91. On the legal status of ownership of beach properties by foreigners, it is submitted that ownership of land by foreigners in the country before the passing of the Amendment Act. This means that non-citizens can own property in Kenya and enjoy all legal rights and protections that Kenyan citizens enjoy, subject to the Constitutional restriction that non-citizens can only own leasehold land for a term of not more than 99 years and the statutory restriction in the *Land Control Act* which bars non-citizens from owning or dealing in agricultural land. That the title of Blushing Beach is an absolute a free hold ownership in perpetuity. It is in the public domain that the citizenship of the 3rd Defendant, Jennifer Shamalla is not in doubt and it is in the public domain that Jennifer Shamalla served as a Member of the 12th Parliament.
92. It is submitted that the 1st 2nd and 3rd Defendants 6th & 7th Defendants proved their case on a balance of probability. That the purchase of land in question LR KWALE/MSAMBWENI 'A'/2909 measuring 1.10 ha. from the 1st and 2nd by the 3rd Defendant was done in accordance with the law and the same was supported by the 1st, 2nd and 3rd 6th Defendants and prayed
1. To bring into this court proceedings in the Chief Magistrates Court Criminal Case no 737/2018 Republic- vs- Hassan Swaleh Rangwe and Abdalla Swale Rangwe for making a document without authority contrary to section under Section 39 of the Penal Code. The Complainants being the 4th & 5th Defendants in this suit. proceedings against the 1st & 2nd Defendant and quash the criminal proceedings.
 2. To act Suo Moto to make a determination on the same and that the Court do direct the Directorate of Criminal Investigations(DCIO) INTERPOL Kenya to liase with Scotland Yard



and The Federal Bureau of Investigations (FBI), to investigate this matter further on suspects , criminal cartels, within and outside the borders of the Republic of Kenya in relation to this suit.

2nd Plaintiff's Supplementary Submissions

93. The 2nd Plaintiff reiterated his submissions dated 13 June 2024 and in response to the Defendants submissions addressed Whether the Plaintiffs are Kenyan Citizens, Whether the 2nd Plaintiff's documents are valid, Whether the 2nd Plaintiff's Witness was a competent witness and Whether the Plaintiffs committed forgeries as follows; -
94. The 2nd Plaintiff contends that his nationality, as well as that of the 1st Plaintiff, was not an issue in dispute because it was never pleaded. Therefore, the court should not consider or advance a case that the Defendants have not pleaded. To buttress the above, the 2nd Plaintiff relies on the case of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR where it was held that a party cannot submit on an issue that was never pleaded unless an amendment to the pleadings was made.
95. The 2nd Plaintiff asserts that PW1 was a competent witness because he testified on facts within his knowledge as the manager of the 2nd Plaintiff's properties within the Republic. His testimony was supported by documentary evidence. This evidence demonstrated that the 1st Plaintiff lawfully acquired the property from Swalehe Mohamed.
96. On validity of the Plaintiff's documents it was contended that the sale agreement was entered into on 29 December 1979, and the Law Society Conditions for Sale at the time were incorporated into the agreement. At that time, the Law Society Conditions of Sale were based on the 1972 edition. The 2nd Plaintiff asserts that the purpose of incorporating these conditions was to provide a default position where the sale agreement was silent or failed to address specific issues. The sale agreement was properly executed by both Swalehe Mohamed (the vendor) and Mohamed Yunis (the 1st Plaintiff, now deceased). That the Defendants did not present any forensic handwriting expert to contest the authenticity of Swalehe Mohamed's signature on the sale agreement. The 2nd Plaintiff urged the Honourable Court to find that the omission of the edition does not invalidate the sale agreement and that the sale agreement was duly executed by Swalehe Mohamed.
97. On the form of Land Certificate, it was submitted that the same was issued on 28 February 1980, when the applicable law for the disposition of the suit property was the Registered [Land Act](#), Cap 300 (repealed). The 4th Defendant did not dispute the Plaintiff's title or point out any distinctive features that would attribute illegality to its issuance. Furthermore, the 1st, 2nd, and 3rd Defendants did not provide any forensic document examiner to challenge the authenticity of the Certificate of Title presented to the court. The Plaintiff therefore urged the court to find that the Certificate of Title Deed was duly issued by the 4th Defendant.
98. On the Power of Attorney, regarding the Verifying Affidavit, it is submitted at the time of donating the Power of Attorney, the suit was already active, having been filed during the lifetime of the 1st Plaintiff, who signed the Verifying Affidavit on 19 December 2018. As the Plaintiff was not amended, no additional Verifying Affidavit was required. The court is urged to find that PW1 ably represented the 2nd Plaintiff in the case. That the 2nd Plaintiff having authorised PW1 to commence, prosecute, defend, testify, and sign documents on his behalf in any court in Kenya, the Power of Attorney was not restricted to the suit property and could be registered in the Principal Registry in Nairobi.
99. It is submitted that the Power of Attorney, having been registered in the Principal Registry in Nairobi, complies with the [Registration of Documents Act](#) and properly authorized PW1 to testify on his behalf.



100. The 2nd Plaintiff asserts that the 1st, 2nd and 3rd Defendants' allegations of fraud are not substantiated. Although they claim to have reported the matter to the police, they did not produce any forensic report of any adverse findings against the Plaintiffs in court or call expert witnesses to confirm the alleged forgeries. The Plaintiff contends that the 1st, 2nd, 3rd, and 4th Defendants engaged in a scheme to defraud him by failing to follow due process before the 4th Defendant rectified the register and proceeded to register the 1st and 2nd Defendants as proprietors of the suit property by transmission.
101. The Plaintiff urges the court to find that the 1st, 2nd, 3rd and 4th Defendants colluded and fraudulently reconstructed the register, leading to the registration of the 3rd Defendant as the proprietor of the suit property thereby defrauding the 2nd Plaintiff of his property.

Analysis And Determination

102. The Court in these proceedings is faced with two parties claiming ownership of the suit property herein by purchase. On one hand the 2nd Plaintiff in ELC 167 of 2021 claims that his deceased father the 1st Plaintiff purchased the suit property from the initial owner Swalehe Mohamed. On the other hand, the 1st and 2nd Defendants also referred to as the Rengwas and who are the alleged beneficiaries of the said Swalehe Mohamed claim ownership following transmission through an order of transmission obtained from the Kadhis Court Kwale. Pursuant to the said transmission they sold the suit property to the 3rd Defendant Blushing Beach Ltd who now claims the suit property as registered proprietors. The Plaintiffs in CMCC ELC No. 4 of 2019 also allege to have purchased the suit property from the Rengwas though the transfer was never registered for reason that will become apparent later in this judgement.
103. My appreciation of this dispute is that the main contest is firstly between Suhail Shahid & Mohamed Yunis and the Rengwas. I say so because should it turn out that the deceased legally sold the suit property to Suhail Shahid, then the Rengwas would have had no business or capacity registering the suit to themselves by transmission for the reason that there would have been nothing to transmit. Consequently it would turn out they sold hot air to both the 3rd Defendant if at all and as well as to the 1st and 2nd Plaintiff in CMCC ELC No. 4 of 2019.
104. With the foregoing in mind and having considered the pleadings, the evidence led by the witnesses and the supporting documents produced as well as the submissions of the parties, the court agrees with the issues as identified by the Plaintiff in case number 167 of 2021 and adopts the same. I see no need to reinvent the wheel.
 1. Whether the Plaintiff is the lawful registered proprietor of the property known as Kwale/ Msambweni "A"/2909 (the Suit Property).
 2. Whether the rectification of the register under Section 79 (2) & (3) of the [Land Registration Act](#) No. 3 of 2012 was procedural.
 3. Whether the transfer of the Suit Property by transmission to the 1st and 2nd Defendant was fraudulent, illegal, null and void and should be revoked.
 4. Whether the 1st and 2nd Defendants transferred a good title to the 3rd Defendant.
 5. Whether the 3rd Defendant is a bona fide purchaser for value without notice of fraud.
 6. Whether the 3rd Defendant is entitled to the reliefs sought in the Counterclaim.
 7. Whether the 2nd Plaintiff is entitled to the reliefs sought.



8. Whether the Plaintiffs in Kwale ELC Case No. 4 of 2019 are entitled to the Suit Property.
9. Costs.

Whether the Plaintiff is the lawful registered proprietor of the property known as Kwale/ Msambweni “A”/2909 (the Suit Property).

105. According to the Plaintiff in ELC 167 of 2021, the 1st Plaintiff (deceased) agreed with Swalehe Mohamed on the sale of the suit property at a consideration of Kenya Shillings Eighty Thousand (Kshs. 80,000.00) sometime in December 1978. Pursuant to this they executed a transfer culminating into the registration of the suit property in the names of the 1st and 2nd Plaintiff as joint proprietors on 28 February 1980 and a Land Certificate issued. However, it is the 1st and 2nd Defendants defence that they were the registered owners of the suit property before they sold the same to the 3rd Defendant herein. In a nutshell they dispute the transfer of the land to Suhail Shahid and Mohamed Yunis. That upon the death of their father the land was transmitted to them as beneficiaries.
106. From the documents produced by the Plaintiff in ELC 167 of 2021, the suit property was first registered under the regime of the Registered Land Act Cap 300 (repealed). Section 27 (a) of the same is to the effect that 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.
107. Sections 26 of the Land Registration Act and which applies by dint of section 107 of the Land Registration Act 2012 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.”
108. It is submitted on behalf of the Plaintiffs in ELC 167 of 2021 that their title is indefeasible. But we have already seen from the above provisions of the law that the same may be challenged on grounds of fraud, misrepresentation to which the proprietor is part and for irregularities. The court must therefore investigate the root of the title issued to Suhail Shahid & Mohamed Yunis since it is being called into question by the Rengwas including the 3rd Defendant. Impeachment of title has been subject of numerous judicial decisions.
109. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR, stated that where the registered proprietor’s title root 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. Also see Daudi Kiptugen Vs. Commissioner of Lands & 4 Others (2015) eKLR.

110. I have already observed hereinbefore that the main contest is between Suhail Shahid and Mohamed Yunis represented by the 2nd Plaintiff herein vis a vis the Rengwas. Pursuant to the provisions of Section 107 of the *Evidence Act* the burden of proof lay on the Plaintiffs in ELC 167 of 2021 to prove they acquired the registration lawfully. The Court of Appeal in Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Anor [2005] 1 EA 334 emphasized that in every legal proceeding, the parties are required to adhere to rules on evidentiary standards and burdens of proof.
111. PW1 Brian Julian D'Souza testified as the Attorney and agent of the 2nd Plaintiff. He produced in this regard a Specific Power of Attorney dated 1/06/2022. PW1 told the court that the suit property was initially unregistered land and was owned by Swalehe Mohamed. This fact is not disputed by any of the parties. It is also corroborated by the Adjudication record dated May 1977 produced as part of the 4th Defendants bundle of documents. In any case the 1st and 2nd Defendants claim as beneficiaries of the Swalehe Mohamed. Moreover, DW3 Steve Mokaya the Land Registrar confirmed that on 2/7/79 the land was registered to Swalehe Mohamed and land certificate issued. Clearly therefore Swalehe Mohamed had capacity to transfer the suit property. But did he transfer the same to Suhail Shahid and Mohamed Yunis is the big question?
112. It is trite that any arrangement for the sale of land must be in writing. This is the requirement of Section 3 of the *Law of Contract Act*. In this regard PW1 produced in court a copy of a sale agreement under the Law Society Conditions of sale. The purchase price is given as Kshs. 80,000/-. In proof of the consideration having been received a bundle of acknowledgment notes were produced by PW1 where Swalehe Mohamed is shown to acknowledge receipt of a number of payments in instalments towards the purchase price for Beach Plot No. 'A' 2909. Other documents produced by PW1 were a Letter of Consent issued pursuant to a meeting of the Land Control Board of 25th July 1979 in respect of the sale to Suhail Shahid. It was PW1 evidence that in this respect Suhail appointed S.K. Ngetich to represent him during the Land Control Board sitting. A letter in this regard addressed to Chairman of the LCB was produced dated 30th June 1979. PW1 produced in evidence a Transfer of Land registered on 28th February 1980 and a Land Certificate dated 28th February 1980.
113. During cross examination there was an attempt by the Defendants to discredit the documents supplied by PW1. These were alleged differences in the signatures of Mohamed Swalehe in the acknowledgement and the transfers. While indeed this court noted the different ways in which Swalehe appended his signatures at different times, the 1st and 2nd Defendant did not present any evidence to the court to show the real signature of their father Mohamed Swalehe or the marks he ordinarily used to execute documents. They also did not subject the documents presented to forensic evaluation of the signatures to buttress their case. As a court I had nothing against which to evaluate and come to a finding that the signatures were not those of Swalehe Mohamed (deceased) and or that the documents were forgeries.
114. DW1 testified in cross examination that around the time of the sale or in 1978 he was 10 years old and conceded he did not know if his father could have sold the land but changed this narrative on further cross examination by Mr.Penda insisting he knew his fathers dealings and was sure he did not sell the land. My problem as a court is that DW1 did not call any evidence to corroborate his evidence that his father never sold the land. Infact in proof he ought to have produced the search which he indicated to the court during cross examination by Ms. Opondo they undertook before they went to the Kadhis court. PW1 did not present the results of this search as part of his evidence in court knowing very



well he was challenging the title to Mohamed Yunis. Had the search shown the deceased to be still the owner then it would be clear that the deceased never sold the land.

115. For purposes of registration of the transfer PW1 presented proof there was Sale Agreement date 29 December 1978, that consideration changed hands through Acknowledgement of payment, Land Control Board Consent, Transfer of Land, payment of registration fees of Kshs. 1,778.00 at the Kwale Land Registry, and resultant Land Certificate. Based on these documents I had no evidence that they were forgeries. On a balance of probabilities, they would suffice. The court will also demonstrate later in this judgement why the 1st 2nd and 3rd Defendants have no basis to impeach the 2nd Plaintiff title.
116. Based on the foregoing I will not hesitate to make a finding that indeed the Deceased sold the suit property to the 1st Plaintiff (now deceased) and the ensuing registration was lawful.
117. But having made the above finding it is important to interrogate how the 1st and 2nd Defendants ended up being registered owners of the suit property? It is clear from the proceedings that they became registered owners by transmission as beneficiaries of the deceased. It is important to look into the status of the parcel register in relation to the said deceased before the said transmission. This will become clear in the discussion of the next issue.

Whether the rectification of the register under Section 79 (2) & (3) of the Land Registration Act No. 3 of 2012 was procedural.

118. The Plaintiff case is that the register of the suit property was rectified by the 4th Defendant without undertaking due process and registered in the name of Swalehe Mohamed the deceased posthumous. It further alleged that the defendants colluded and fraudulently expunged the green card containing the proprietary rights of the Plaintiffs.
119. The law on rectification of the land register by the land registrar is embodied in Section 79 of the Land Registration Act 2012 which stipulates as follows; -

79. Rectification by Registrar

- (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, mistakes 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;
 - (c) if 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;
 - (d) for purposes of updating the register; or
 - (e) for purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.
- (2) No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) without the proprietor's consent unless—
 - (a) the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or
 - (b) it would for any other reason be unjust for the alteration not to be made.



Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.

- (3) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.
 - (3A) A person aggrieved by the decision of the Registrar under this section may apply to the Court for any necessary orders.
 - (4) The Cabinet Secretary may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under this section and without prejudice to the generality of the foregoing, the regulations may provide for—
 - (a) the process of investigation including notification of affected parties;
 - (b) hearing of the matters raised; and
 - (c) the criteria to be followed in coming up with the decision.
120. The Cabinet Secretary pursuant to section 79(4) above published the Land Registration General Regulations [*Legal Notice 278 of 2017*](#) and which I find necessary to reproduce the corresponding regulation as follows; -

Part XIV – CORRECTIONS, RECTIFICATIONS AND INDEMNITY

91. Corrections of an error on the register
 92. Notice of rectification of register
 - (1) The Registrar shall issue a notice to rectify the register under section 79(1)(c) of the Act, in Form LRA 90 set out in the Sixth Schedule to all persons interested in the rectification of the register.(2)The Registrar shall issue a notice of intention to rectify the register under 79(2) of the Act, in Form LRA 91 set out in the Sixth Schedule.
 - (3)An order by a Registrar issued under section 79 of the Act shall be in Form LRA 92 set out in the Sixth Schedule.
 93. Conduct of hearing for rectification of the register
 - (1) The conduct of hearings under section 79(4) of the Act by the Registrar shall be in accordance with the Fifth Schedule.(2)The Registrar shall cause summons to issue in Form LRA 93 to any person who may be required to attend the hearing.
121. The provisions of the law foregoing mandate the land registrar to rectify the register but at the same time stipulate the specific instances under which a register may be rectified by the land registrar and the procedures to be followed. These are correcting errors, mistakes, and omissions and such rectification should not materially affect the proprietary interests of a party. Incase of the later then it is a requirement that the registrar should first issue notice to a party who would be affected by the rectification.
122. The provisions were well enumerated by the court in *Republic v Bishop Patrick Ligawa Nyagudi & 4 others; Ex-parte: Archbishop Naphtaly Yongo Okuon & 3 others* [2021] eKLR cited by the Plaintiffs in the following dictum

“Let us then have a closer look at the powers granted vide Section 79 (1). It will be seen that Section 79 (1) gives the Land Registrar power to rectify the register or instrument



presented for registration, but it is for fairly limited and procedural matters, that do not go to address or settle any controversy over the proprietorship of the land. Section 79 (1) (a) is in fact categorical that the Land Registrar can correct errors, mistakes, or omissions, not materially affecting the interests of any proprietor. Section 79 (1) (a) would certainly cover some small slips and obvious errors, say, the value of consideration where a figure can be seen to be obviously missing (for example the missing zero in KShs. 1,000,00/= instead of KShs. 1,000,000/= yet the amount in words is Kenya Shillings One Million). The correction of errors, mistakes or omissions can also be made with consent of the parties under Section 79 (1) (b), and these would still have to be minor and not going to title, nor have a bearing on proprietorship. Section 79 (1) (c) covers corrections on acreage where there has been a resurvey where it is apparent that the dimensions shown in the register are incorrect, and even to exercise this power, notice has to be given to the parties affected so that they can comment on this rectification. Section 79 (1) (d) covers rectification for purposes of updating the register, and there is not really much here, because it is simply a clerical entry for keeping the register up to date. Section 79 (1) (e) covers rectifications of names, addresses and other particulars of the proprietor on the written application of the proprietor. It could be that the proprietor has changed the name due to marriage or through a deed poll and he/she wants the register to reflect this change of name. Again, no issue on proprietorship arises. Subsection (2) of Section 79 makes provision for the exercise of the Land Registrar's powers pursuant to sub-section (1) without the consent of the proprietor, and this would cover issues related to fraud, lack of proper care, due to error or mistake of the proprietor, and even then, a 90 days notice has to be given."

123. Guided by the above provisions of the law and precedent I will now interrogate the rectification purported to have been undertaken in this case. I will first draw from the Statement of Defence of the 4th Defendant chief Land Registrar Kwale dated 4th January 2020. The said statement only denies the illegalities set out in respect of the rectification.
124. From the law above, the registrar has power to rectify the register or any instrument presented for registration. However, it is clear that such rectification should not materially affect the interests of any proprietor. To me anything materially affecting a proprietors interest would include change of proprietor/ownership or removal and substitution thereof. The Land registrar Kwale testified on behalf of the 4th Defendant as DW3. DW3 stated he could not tell when the register was rectified. On reading section 79(2) the witness told the court he had not come across any notice of intention to rectify the register to the proprietor as required of the registrar to issue. That there was no application from the proprietor indicating they needed to make a change. The witness could not confirm whether the same was issued or not. All these raises an eyebrow. Indeed in my view if such notice was issued or if there was application both would form part of the record in the parcel file and DW3 confirms he did not come across them. The witness did not point out the mistakes, errors or omissions that necessitated the rectification of the register.
125. The green card on its face has the endorsement 'CARD OPENED UNDER SECTION 79 (2) AND 3 OF THE L.R.A NO.3 OF 2012.DW3 on cross examination by Ms. Opondo confirmed the said register '...was opened under section 79(2)(3) of RLA this was opened after the Land registrar rectified the register probably because of fraud.'
126. DW3 thoughts above were that the register may have been rectified because of fraud. The provisions of section 79(2)(3) gives the Land Registrar the discretion to rectify or direct rectification of a register besides the instances given under subsection (1). This would apply where a proprietor has obtained the registration fraudulently and secondly upon proof of change of name or address of any



proprietor of any proprietor. DW3 could not confirm when the rectification was done. But for me from the testimonies and proceedings rectification can only have happened at the time of registering the transmission. The only persons who would have an interest is the person who wanted to register a transmission. I say so because there is no record of complaints of any fraud against the Plaintiffs in suit number 167 of 2021 made to the Land Registrar emanating from the beneficiaries herein before the rectification of the register. Assuming fraud was the reason for the rectification, was there any evidence of fraud at that time? If fraud was the reason for rectification, then the registrar ought to have tabled a conclusive report of an investigation agency concluding involvement of fraud as contained in the parcel. In this case the report should have specifically attributed the registration to the Plaintiffs in suit 167 of 2021. DW3 did not and only hazarded a guess that fraud could have been the reason. You don't prove fraud by hazarding a guess. There was nothing convincing before me that the rectification was done because there was fraud on the part of the Plaintiffs. In my view it was done to facilitate the 1st and 2nd Defendants as earlier pointed they are the ones who would have an interest in the same.

127. But I must speak on the provisions of sections 79(3) aforesaid, where the Land Registrar also has discretion to rectify or order rectification of a register upon proof of change of name or address of any proprietor. In any case the registrar's discretion must be exercised judiciously and in this regard the law requires a written application by the proprietor to record the change of name. DW3 had no supporting documents or any explanation in this regard.
128. Additionally, what seems to have occurred in the circumstances of this case was replacement of a green card in other words reconstruction. DW3 admitted that the green card was not the original. Therefore, if the register is not the original this would be in instances where the green card is lost or destroyed. Reconstruction whose procedure as given under the provisions of section 33 of the [Land Registration Act 2012](#) is different from rectification under section 79. PW1 testimony is that they went to the land registry where they were informed the parcel file/green card could not be traced to give a search but they never applied for reconstruction. The 1st and 2nd Defendant had no evidence that they applied for this. DW3 had no evidence that anyone applied for reconstruction. The reconstruction was then suo motto however it was undertaken by application of the wrong provisions of the law instead of the elaborate stipulations under the provisions of section 33 herein. No notices were sent of the intention to reconstruct, no hearings took place all confirmed by the oral testimonies of the parties. The court was not informed of any inquiries or evidence of the same made by the Land Registrar pursuant to section 83 of the said Act. Having conceded the register is not the original, DW3 stated ordinarily there would be an indemnity but there was no such indemnity from the applicant in the parcel file as required under section 81 of the RLA.
129. I'm emboldened and agree with the undernoted dictum of the court in the case of Republic v County Land Registrar, Makueni Lands Registry Ex-Parte Philes Mwikali Kioko & 2 others [2021] eKLR cited by Counsel for the 2nd Plaintiff where the court held that: -

“It is common ground that it is Section 33(5) of the Act which is relevant in the application before me. My understanding of the above Section is that it deals with the powers of the Registrar to reconstruct any lost or destroyed land register. The Registrar is required to make enquires as to the loss or destruction of the land register sought to be reconstructed. And after being satisfied of the loss or destruction, the Registrar issues a notice of Sixty (60) days in the Gazette and in any local newspapers of nationwide circulation before reconstructing the lost or destroyed land register...As was correctly submitted by the counsel for the Ex parte Applicants, the Registrar and not the Applicants is the custodian of the land registers sought to be reconstructed.”



130. I think based on the above evidence it is clear the rectification to return the land to the deceased was unprocedural. It did not stand the test of the requirements under section 79 of the Land Registration Act hereinabove. The court respectfully agrees with the Plaintiffs submission that the action of rectification of the register in favor of the 1st and 2nd Defendant were in breach of substantive procedural rules which breach went to the root of substantive procedure laid down by the Land Registration Act. Indeed it also affected materially the proprietorship of the plaintiff contrary to Article 40 of the constitution. It is therefore the finding of this court that the rectification of the register was unprocedural and unlawful.

Whether the transfer of the Suit Property by transmission to the 1st and 2nd Defendant was fraudulent, illegal, null and void and should be revoked.

131. The 1st and 2nd Defendant presented as part of their evidence a copy of an order issued on 28/12/2016 in Succession Cause No. 462 of 2016, In the matter of the Estate of Swalehe Mohamed and the Petitioner Abdalla Swalehe (PW1). The order is to the effect that the suit property Kwale/Msambweni 'A'/2909 constitutes the Estate of the Deceased. The order proceeds to vest the same to Abdalla Swalehe Rengwa and Hassan Swalehe Rengwa. It further directs the District Land Registrar Kwale to effect transmission of the estate to heirs accordingly. DW3 corroborated that the 1st and 2nd Defendants were registered as proprietors of the property through transmission. The resultant title issued on 29th December 2016 was also produced as part of their evidence before court.

132. For me firstly the order for transmission would be of no legal consequence for the reason that having found that the rectification of the register was unprocedural. Nothing comes out of an illegality - see the Court of Appeal dictum in Athi Highway Developers Vs. West End Butchery & 6 Others (2015) while adopting the position taken by Lord Denning in Macfoy Vs. United Africa Limited (1961) ALL FR 1169. Consequently, no entry that is anchored on that rectification or the replaced green card can be legally sustained. On this ground alone the registration of the 1st and 2nd Defendants as proprietors would be rendered a nullity.

133. I must also add that as early as 28/7/2016 a request for a search by the Plaintiffs had been made as supported by receipt 4431673 dated 28/7/2016 for Kshs.500 paid for official search (PEX8) but according to PW1 the green card could not be traced. I asked myself the following rhetorical questions, whether it is a coincident that the green card was found just in time two months later for the registration of the transmission. What did the registrar use for reconstruction if the same was missing? Who presented the Registrar with the documentation to assist in the reconstruction if DW1 denied any knowledge of the rectification though he presented documents to the land registry and they had someone assisting them to do the documentation. DW1 did not disclose the particulars/identities of these people neither did he call them as his witnesses. But it is clear he authorised them to assist them. Even assuming the beneficiaries father held title why didn't the beneficiaries apply for reconstruction to enable the registration of the transmission. To me this raises eyebrows and only points out to games being played at the registry which means fraud.

134. Secondly, I have already mentioned earlier that by the time the orders for transmission were being issued the sale had already occurred and title in the name of the Plaintiffs issued. The sale to the plaintiff and their registration upon transfer predated the succession proceedings at the Kadhis Court. The suit property was therefore not part of the estate of the deceased as at the time of the succession proceedings that ordered transmission.



135. Having arrived at the foregoing conclusion I do not find it necessary to address the issue of the absence of a grant. It would be a mere academic exercise. I will now proceed to review the 3rd Defendants case as stated in its Defence and Counterclaim.

Whether the 1st and 2nd Defendants transferred a good title to the 3rd Defendant.

136. The 3rd Defendant is a Limited liability Company thus a legal person being capable of suing and being sued in its own name. Its case is that it purchased the suit property from the 1st and 2nd Defendants. The 3rd Defendant raised a counterclaim seeking to be declared the owner of the suit property and relied on the defence of a bonafide purchaser for value without notice of defect or claim. It is trite that a counterclaim is a case in its own right distinct from the Plaintiffs suit – see Kenya Commercial Bank Limited Vs James Karanja (1981) KLR 209. It was incumbent upon the 3rd Defendant to prosecute and prove its claim to the required standard of a balance of probabilities. Further its title being challenged by the Plaintiffs in ELC 167 of 2021, the 3rd Defendant was also required to establish the root of its title.
137. The 3rd Defendant gave its evidence through DW2 Jennifer Mary Shamalla an advocate of this court, who informed the court she was the sole Director of the 3rd Defendant and adopted the witness statement dated 4/4/2018. Her evidence was that she entered into a sale agreement, purchased three quattres (that is to say a portion) of the suit property at a consideration of Kshs. 8 million. She took possession by placing beacons as the sale process was ongoing. To buttress the 3rd Defendants claim DW2 produced in evidence documents in the List of Documents dated 2nd April 2019. These are namely copies of transfer documents dated 16th April 2018, title deed issued on 2/05/2018 to Blushing Beach Limited, Certified Copy of Green Card issued on 22/02/2019 and pleadings in response to CMCC ELC No. 4 of 2019 where the 3rd Defendant is also sued as the 3rd Defendant.
138. From the above there was not produced a sale agreement. The 1st and 2nd Defendants who admitted selling the property to the 3rd Defendant did not produce the same either. Section 3(3) of the [Law of Contract Act](#), Cap 23 of the Laws of Kenya states that contracts for the sale of land must be in writing. In any event there was no contention that the agreement was oral. As it is there was no evidence to demonstrate or cement that there was a land transaction between the 3rd Defendant and the 1st and 2nd Defendant in respect to the Suit Property.
139. But of utmost importance is proof that the consideration changed hands. DW2 evidence in cross examination by Ms. Opondo was that she paid the consideration by cheque and that since the payment was not disputed by the Defendants proof was not required. On further cross examination by Mr. Kulecho DW2 reiterated that the funds for the purchase price came from her and not the 3rd Defendant company. DW2 did not lead any evidence to demonstrate how and to whom the consideration of Kshs. 8 million was paid by herself. DW1 and who testified they sold the land to Ms. Shamalla only stated in cross examination by Ms. Opondo that he acknowledged receipt of the payment through his advocate Mr. Aminga. No evidence of this acknowledgement was placed before court. He admitted that the said Mr. Aminga was not his witness in the case. Indeed, I had nothing placed before the court to show the movement of the Kshs. 8 million from the 3rd Defendant or DW2 account into the 1st and 2nd Defendant's account or their lawyer's account. The witness however conceded on cross examination by Ms. Opondo that she had not produced proof of payment of the sum of Kshs.8 million pleaded in the counterclaim. DW2 believed the 1st and 2nd defendants lawyer who handled the conveyancing had done everything and had all the documentation. But assuming this was the case I failed to comprehend why it was difficult for DW2 to obtain the documentation from the said lawyers or have him as a witness to corroborate this evidence. In any event if the payment was made by DW2 why could she not obtain the requisite proof of payment.



140. There are other gaps that emerged culminating into the registration of the 3rd Defendant as proprietor on the 2nd May 2018. During DW2 evidence in chief the witness told the court that she bought a portion of the suit property which was surveyed appropriately. However witness could not produce a beacon certificate in this regard. On further cross examination by Mr. Kulecho DW2 reiterated she did not purchase the entire parcel but a portion. My review revealed even the transfer instrument filed by the 3rd Defendant dated 16.04.2018 was for the entire suit property. The witness could not explain why the title dated 2nd May 2018 indicated the entire suit land measuring 1.10Ha was transferred to the 3rd Defendant and not a portion. No evidence of subdivision was tendered as confirmed by DW3. The Court respectfully agrees with the submission that if at all, there was a transaction for a portion of the suit property between the 1st, 2nd and 3rd Defendants, but title deed issued to the 3rd Defendants for the entire property, then the transfer process offended Section 42 of the [Land Registration Act](#), 2012 which requires that a subdivision is required for such a transfer. This is further corroborated by the Land Registrar DW3 who conceded in cross examination that looking at the green card, the property sold to the 3rd Defendant was for the whole land and if the former bought a portion then he would have expected a subdivision. Further DW3 testified during cross examination by Mr. Kulecho that upon perusal of the parcel file he had carried with him to court there was no record of Certificate of incorporation in respect of Blushing Beach Ltd and CR 12 thereto which were documents which ought to have been available to register the transfer where a company is involved. These are identification documents. This position is buttressed by the provisions of section 44 (5) (a) which provides as follows; -

- (5) The transferee shall in addition to executing the instrument, attach the following—
- (a) a copy of an identity card or passport; and
 - (b) a copy of a Personal Identification Number certificate; (c) passport size photographs;
 - (d) where applicable, a marriage certificate; or
 - (e) such other identification documents as the Cabinet Secretary may prescribe.

141. Additionally, I have already stated nothing comes out of an illegality. As long as the 1st and 2nd Defendant's registration as proprietors was unprocedural and illegal nothing can come out of it. The 1st and 2nd Defendants had no capacity to pass good title to the 3rd Defendant.

142. I think the foregoing clearly demonstrates the acquisition of the suit property by the 3rd Defendant cannot be said to have been lawful, regular and procedural. But the 3rd Defendants pleads that it is a bonafide purchaser for value without notice? Will this defence suffice amidst all the above.

Whether the 3rd Defendant is a bona fide purchaser for value without notice of fraud.

143. It was DW2 evidence that at purchase she was not aware of the existence of the Plaintiffs title. That she had always dreamt of owning a beach plot. What does the plea of innocent purchaser entail? The Court of Appeal in the case of Samuel Kamere Vs Land Registrar (Kajiado Civil Appeal No.28 of 2005 (2015) eKLR held that in order to be considered a bonafide purchaser for value, one must prove they acquired a valid legal title and carried out the necessary due diligence.

144. In SC Petition 8 (E010) of 2021 Dina Management Limited Vs County Government of Mombasa & 5 Others the Supreme Court of Kenya pronounced thus; -

- (111) 111] Article 40 of [the Constitution](#) entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property



that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.

145. In *Suleiman Rahemtulla Omar & another v Musa Hersi Fahiyeh & 5 others* (2014) eKLR the Court of Appeal defined the duties bestowed upon a person claiming bona fide purchaser's interest. It held that:

“It is our view that counsel for both parties failed to carry out sufficient due diligence before committing their clients to the transaction. It is true that practically speaking counsel for the purchaser carries the heavier burden when it comes to carrying out due diligence. This is so because it is his client who stands to lose if he commits his funds to purchase a property that later turns out to be problematic. This does not however, absolve the vendor's counsel from the responsibility of confirming that his client has a good title to the property he seeks to dispose of and also that the property has a clear Title.”

146. Applying the foregoing to the circumstances of this case, I have already enumerated hereinbefore why the transmission and the registration of the property in the 1st and 2nd Defendants names cannot be validated by this court. Clearly the 1st and 2nd Defendants having acquired the title illegally and unprocedurally cannot transfer a good title to the 3rd Defendant counter claimer. I have also shown the unexplained gaps on the part of the 3rd Defendants process in acquiring the suit property from the 1st and 2nd Defendant. The 3rd Defendant therefore could not demonstrate to the court that it acquired a valid legal title.

147. Moreover, on the requirement to undertake due diligence DW2 insisted that she undertook a search before the purchase, this search was never produced in evidence. Her agent on the ground one Amanda Powell was not called as witness to corroborate what further due diligence she undertook. It is now established that a purchaser must go beyond the search at the land Registry. The Court of Appeal in the case of *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others* [2020] eKLR while commenting on due diligence stated thus:-

‘We are reminded of the warning in a passage in *Arthi Highway Developers Limited*, Civil Appeal No.246 of 2013, often quoted, where this Court stated that;

“It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the *Land Registration Act*, 2012 will have a positive impact for land investors in future.’

148. Moreover, if there was no sale agreement and no evidence of purchase price having been paid, can there be deemed to have been a scenario where an innocent purchaser purchased? The answer is a resounding no. There was no evidence that a purchase occurred. Black's Law Dictionary, 8th Edition at page 1271 describes a purchaser for value as ‘A Purchaser who pays consideration for the property bought’.

149. Based on the foregoing I find no basis to make a finding availing the defence of innocent purchasers interest to the 3rd Defendant.

150. What then would be the consequence of the above finding? It is submitted on behalf of the 3rd Defendant that its title is indefeasible by dint of the provisions of section 26 of the *Land Registration Act* 2012. This court is urged to protect the 3rd Defendant as the absolute & indefeasible owner. In the



case of *Miroro v Nyarumi & 5 others* (Environment & Land Case 23 of 2019) [2023] KEELC 21533 (KLR) (15 November 2023) (Judgment) - Justice Munyao commenting on the common law principle of *nemo dat quod non habet* (no one can give what they do not have), as articulated by the Court of Appeal in the case of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others*, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 [2015] eKLR. Stated thus; -

‘The above was a classical application of the *nemo dat* rule to a land transaction. If the registered proprietor of the title in question is declared not to have acquired a good title, then he can have no good title to pass downstream. His title is not laundered by the fact that he has transferred it to someone else and the purchaser or transferee receives such title with the same stain of illegality; the title remains null and void *ab initio*.’

151. Coming back to the provisions of section 26 Justice Munyao persuasively stated as follows;-

30. It is the same scenario here. The plaintiff is a purchaser, but she purchased a tainted title. The doctrine of ‘innocent purchaser for value without notice’ cannot assist her. The title was null and void *ab initio* and it remains null and void *ab initio* even while it is in her hands. This position of the law is indeed given affirmation by Section 26 of the [Land Registration Act, 2012](#), which provides as follows :-

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) 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. (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

31. From the above it will be observed that title can be nullified under Section 26 (1) (b) where it has been acquired illegally, unprocedurally or through a corrupt scheme and in such instance, the holder of the title does not need to be a participant in the issues that vitiate the title. This principle was affirmed in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna*, Eldoret ELC No. 609B of 2012 (2013) eKLR, cited by Mr. Ogado. In our case, I am not in doubt, and I have narrated quite extensively, that the title of Tom Nyagami was a fraudulent title, and being so, it follows that the title of the plaintiff is an illegal title or was procured unprocedurally. It is liable to cancellation.

152. This court concurs and resonates with the above dictum and likewise I have no option but to impeach the 3rd Defendants title. It cannot be saved on the basis of indefeasibility of title neither can it be saved on the basis of the doctrine of innocent purchaser for value without notice of fraud or defect.

Whether the 3rd Defendant is entitled to the reliefs sought in the Counterclaim.

153. The foregoing largely speaks to the question whether the 3rd Defendant is entitled to the reliefs sought in the Counterclaim. Moreover the 3rd Defendant did also not prove its case to the required standard. I will not belabour the point. The counterclaim lodged must consequently fail.



154. Having dealt with issues in Case NO. 167 of 2021 I must now deal with the Plaintiffs claim in the lower court suit being CM ELC No. 4 of 2019.

Whether the Plaintiffs in Kwale ELC Case No. 4 of 2019 are entitled to the orders sought.

155. The 1st and 2nd Plaintiff's case is that they purchased the suit property from the 1st and 2nd Defendants by way of sale agreement dated 3.08.2017 at an agreed purchase price of Kshs.1,902,670/- which was paid in 4 instalments and acknowledged. The Plaintiffs presented 4 witnesses to corroborate their claim. The Plaintiffs contend that the 1st and 2nd Defendants executed a transfer instrument dated 22/12/2017 in favour of the Plaintiffs (Plaintiffs Exhibit 3). However, they submitted a fake title serial No. 1709000 to the Plaintiffs agent, Maurice Otieno. The issue was reported to the DCI, Msambweni, for investigations and the 1st and 2nd Defendant were subsequently charged at Kwale Court in CR No. 737 of 2018 for related criminal charges of making a document without authority, obtaining money by false pretence and uttering a false document. The Plaintiffs produced a copy of the charge sheet and accompanying witness statements Exhibit No. 6). DW1 admitted in cross examination by Ms. Opondo that he was indeed charged in court.
156. The Plaintiffs also produced in support of their claim as per the List of documents dated 29/01/2019, copies of Sale Agreement dated 3/08/2017, payment acknowledgement sheet dated 3/8/2017, 5/8/2017, 30/9/2017 and 25/11/2017; Copies of Transfer Forms dated 22/12/2017, two Searches dated 19/07/2017 and 20/11/2017, Land Control Board Consent dated 22/11/2017 and Certified Green card issued on 3/12/2018.
157. My review of the sale agreement confirms it was between Abdalla Swalehe Rengwa, Hassan Swalehe Rengwa and Ruth Wangui Deya and Philemon Benard Odhiambo Washindu executed by the parties before Lyna Moraa Moranga Advocate on 22nd December 2022. Mr. Rengwa upon cross examination by Mr. Kulecho admitted he signed the agreement. DW1 admitted during cross examination by Ms. Opondo to trying to sell the suit property to Ruth Wangui Deya the 1st Plaintiff and testified that he received the money from her through the chief. Clearly there was no denial that the money paid was never received by the Rengwas. My perusal of the acknowledgement of the money shows that money was received and this was facilitated by PW1 on behalf of the Plaintiffs.
158. Based on this evidence it is my finding that the Plaintiffs have proved on balance of probability that there was a sale agreement executed between them and the 1st and 2nd Defendants and that indeed the alleged purchase price was paid. But is this enough for purposes of the Plaintiffs claim in CM ELC No. 4 of 2019.
159. The court has noted the Plaintiffs invitation to make a finding that the Sale Agreement dated 3rd August 2017 is valid having complied with the provisions of Sections 38(1) of the Land Act, 2012 and 3(3) of the Law of Contract Act, Cap 23 of the Laws of Kenya and allow the Plaintiffs claim. This in my view cannot be considered in isolation. It must be looked at wholistically within the circumstance of the matters before this court. It will become clear shortly why this invitation is not sustainable.
160. The court has gone through the evidence of the four witnesses called in support of the Plaintiffs claim and it is clear that the transfer was never registered one of the main reasons advanced according to PW1 is that the title presented for cancellation for the transfer was fake.
161. Was the title presented for cancellation upon transfer fake? The 1st and 2nd Defendants in their Defence dated 8th May 2019 stood by the entries contained in the official green card culminating into the transfer to the 3rd Defendant M/s Blushing Beach Ltd. These entries are already captured as per the evidence of the Land Registrar (Mr. Mokaya herein who gave evidence as DW3). PW1 Otieno Maurice Oganga



who assisted the Plaintiffs with the above transaction testified in examination in chief that he received the completion documents from the sellers which included an original title. That he was advised at the land office that the title was fake. He confirmed on cross examination by Mr. Idambo that the copy he used for due diligence was the same and which he assumed Maurice Deya obtained from the vendors through Mr. Mazuri. He conceded that he was not an expert to tell if a title was fake or not. On cross examination by Ms Opondo and being shown the statement of Ibrahim Ngugi to the DCI dated 29/12/17 the witness agreed that the title he presented bore the serial number 1709000 and confirmed that the same serial number was reflected in the title issued to the 1st and 2nd Defendants on 29/12/2016. PW1 clarified in re-examination that the said serial number is provided in his witness statement. This title was also produced by the 4th Defendant Land Registrar who confirmed the same serial number and which upon my perusal I note bore the said serial number.

162. I think if there was any title that was produced it must be the same one obtained pursuant to the orders of transmission and the same one shown to the 3rd Defendant M/s Blushing. It is clear to me that the Deyas did not knowingly present a fake title to the Land Registry based on the circumstances of the case. The Land Registrar on cross examination by Ms. Shamalla confirms that his colleague Mr. Njoroge indicated in his statement that there was a fake title presented. Who would be interested in having a fake title for this specific transfer? It can only be the vendors who clearly stated in evidence through DW1 that they expected a higher purchase price though they had already pocketed the Kshs.1.9 million. I will however not belabor this point. In any case I have already made findings that the title registered by dint of the transmission was irregular and void. The 1st and 2nd Defendant did not have capacity to transfer the land. For this reason alone this court cannot make a finding that there was a valid sale pursuant to an irregular title.
163. The orders sought by the Plaintiffs as I see them are basically seeking specific performance of the sale agreement. These orders cannot issue in view of the findings of this court hereinabove, nothing comes out of an illegality. In any event it is trite that the jurisdiction of specific performance is based on the existence of a valid enforceable contract as held in the case of Gilbert Kimani Nyumu Vs Gideon Kipkoech (2019)eKLR. In the present case there is no valid sale agreement.
164. For me having reviewed the Plaintiffs claim in CMCC ELC No. 4 of 2019 their recourse would be against the 1st and 2nd Defendants for a refund of the alleged purchase price of Kshs. 1.9 million which has been proved to have been acknowledged and received by the 1st and 2nd Defendants both orally and by documentary proof. PW2 in CMCC ELC No. 4 of 2019 on cross examination by Mr. Penda testified that she believed the Rengwa's sold the property to someone else and must refund her the purchase price.
165. But having made the findings herein I note that the Plaintiffs have not pleaded refund of the purchase price. However, the moneys were acknowledged in writing as received and admitted in oral testimony as received. PW2 Ruth Wangui Deya confirmed during cross examination by Mr. Penda they have not been paid back this money. For me the solution should be equity's intervention to provide relief against unconscionable conduct. Equity is also law. It would be unconscionable to let the 1st and 2nd Defendants benefit from proceeds which they received and also admitted they did sell the land to the 3rd Defendant. I had no evidence of any communication on their part offering to refund the purchase price. I'm aware during these proceedings the court was informed of intended negotiations but there was nothing before me on the outcome thereof if any. I think it would be a miscarriage of justice to deny the plaintiff a refund of their money for want of pleading for a refund.
166. In coming up with the above the court is guided by the following dictum of the Court of appeal in Civil Appeal 51 of 2015 Eldoret Willy Kimutai Kitilit Vs. Michael Kibet (2018) KECA 573 KLR.



(24) There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the *Land Control Act*. By Article 10(2) (b) of *the Constitution* of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of *the Constitution*. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to *the Constitution*, the *Land Control Act* should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with *the Constitution*.

(25) The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black's Law Dictionary, Ninth Edition will suffice for our purpose:

- “1.
2. The body of principles constituting what is fair and right.
3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ---
4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called “Law” in the narrower sense) when the two conflict”

167. In the case of *Nancy Makokha Baraza vs Judicial Service Commission & 9 Others* [2012] eKLR the Court expressed itself inter alia as follows:

“The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises.”

168. It is therefore my finding that the Plaintiffs in CMCC ELC No. 4 of 2019 are not entitled to the suit property but a refund of the monies paid having proved on a balance of probabilities that the same was received by the 1st and 2nd Defendants.

169. It behoves this court to review the Plaintiffs claim in CMCC ELC No. 4 of 2019 against the 3rd Defendant M/S Blushing Beach Limited and whether it has been proved. The Plaintiffs case against the 3rd Defendant from the Plaint dated 29/01/2019 is stated in paragraph 10 thereof. My review of the said paragraph shows that the particulars of fraud enumerated are attributed to the 1st and 2nd Defendants though at 10(c) the 3rd Defendant is said to have together with the 1st and 2nd Defendant forged the Land Control Board consent or concealed that the board had already earlier issued consent for the suit property to be transferred in favour of the Plaintiffs. I think this additional argument cannot hold and was an afterthought. I say so because a perusal of the 1st Plaintiff Witness statement dated 29th January 2019 and which she adopted as her evidence in chief has nothing attributing wrong doing on the part of the 3rd Defendant. A look at the supporting affidavit of Ruth Wangui Deya sworn on 29/01/2019 there is no finger pointed at the 3rd Defendant. Infact from paragraph 8 and 11 thereof issues arising on the Land Control Board are clearly attributed to the 1st and 2nd Defendants. Further Maurice Deyas witness statement filed on 25/10/22 and which he adopted as part of his evidence does not point to any wrongdoing on the part of the 3rd Defendant (see paragraph 8).



170. Further I noted Mr. Kulechos submission on behalf of the Plaintiff that the failure to disclose the details of the 3rd Defendant in terms of certificate of incorporation and CR 12 was an attempt to conceal the directorship of the 1st and 2nd Defendants in the said company. I think as long as these documents were never presented before court the court cannot speculate.
180. The upshot of the above is that the suit filed against the 3rd Defendant in CMCC ELC No. 4 of 2019 has no merit. It is however noteworthy that the court has already made a finding in respect the 3rd Defendants title.
181. From the discussions above it emerges that the 1st and 2nd Defendants title registered by dint of the transmission must be impeached largely on the basis of having been obtained unprocedurally. Likewise, the 3rd Defendants title must also be impeached having been intearlia obtained unprocedurally. As earlier stated, this is pursuant to the provisions of section 26 1(b) of the [Land Registration Act](#). Consequently the 1st and 2nd Defendants as well the 3rd Defendants had no basis or interest warranting them to impeach the 2nd Plaintiffs title having failed to prove the legality of their titles. The Land Registrar cannot escape liability for the unprocedural actions and registration pursuant to its mandate and being the custodian of all the land documents.

Whether the 2nd Plaintiff is entitled to the reliefs sought.

182. The prayers sought by the 2nd Plaintiff have already been enumerated at the beginning of this judgement. I have already made a finding that the rectification of the register was unprocedural and unlawful. I have also impeached the 1st and 2nd Defendants title as well as the 3rd Defendants title. The court pursuant to Section 80 of the [Land Registration Act](#) is conferred with powers to order for rectification of a 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. By dint of the findings I would not hesitate to grant the prayers sought. However, I must address the prayer for mesne profits.
183. The 2nd Plaintiff craves for an order for the 1st 2nd and 3rd Defendant to pay Mesne profits to be assessed by this Honourable court. I have considered the elaborate submissions on this head by the 2nd Plaintiff. None of the parties had taken actual possession of the land. The 2nd Plaintiff did not table any proof of their future plans for the property. I have read the holding in Kenya Anti-Corruption Commission v Mwaura & another (2023) eKLR relied by the 2nd Plaintiff. Each case is decided upon its facts and merits and I don't think an order for mesne profits is warranted in the present circumstances. I decline the invitation to grant mesne profits.
184. This judgement would be incomplete if this court does not make a mention of the issue of the 3rd Defendants failure to produce the certificate of incorporation to prove its registration status and a company resolution authorizing DW2 to sign documents and testify on the case on its behalf. While this issue was raised by Ms. Opondo in the Plaintiffs submissions, the same was raised only as it related to failure to produce some of the registration documents and to buttress their absence as a basis for the 3rd Defendants participation in fraud. There was no issue raised as to its implications to the 3rd Defendants defence in this suit. For this reason, I will let the matter rest.
185. Based on the various findings of the court as analysed hereinbefore the suits herein are disposed in the following terms; -

ELC Case Number 167 of 2021



186. It is the courts finding that the 2nd Plaintiff has proved its case on a balance of probabilities against the Defendants jointly and severally. Accordingly, judgement is hereby entered against the Defendants jointly and severally and the following orders hereby issue; -
- i. A declaration that the alleged rectification of the register under section 79(2) & 3 of the Land Registration Act No. 3 of 2012 was a nullity ab initio, devoid of procedure, illegal, unlawful and breach of Article 40 of the Constitution.
 - ii. A declaration that the Plaintiffs are the lawful owners of the suit property known as Kwale/Msambweni 'A'/2909
 - iii. An order vesting wholly and unconditionally the suit property known as Kwale/Msambweni 'A'/2909 to the Plaintiffs.
 - iv. An order directing the Land Registrar Kwale to cancel the illegal entries vesting the suit property with the estate of the deceased Swalehe Mohamed, the 1st, 2nd and 3rd Defendant, and Certificate of Title held by the 3rd Defendant and reinstate the 1st and 2nd Plaintiffs as the lawful, bonafide proprietors.
 - v. The orders in iv) above shall be effected within 60 days of the date of this judgement.
 - vi. There shall be no order for mesne profits.
 - vii. The 3rd Defendants counterclaim is hereby dismissed with no orders as to costs.
 - viii. The costs of the Plaintiffs suit shall be payable by the 1st and 2nd Defendants being the main originators of the issues surrounding the litigation.

CMCC ELC No. 4 of 2019

187. The court hereby enters judgement for the Plaintiffs against the 1st and 2nd Defendant in CMCC ELC No. 4 of 2019 for the refund of Kshs. 1.9 Million with interest at court rates from the date of this judgement.
- I. The refund above shall be paid within 60 days of the date of this judgement.
 - II. The suit against the 3rd Defendant is dismissed with no orders as to costs.
 - III. The costs of the suit plus interest thereof shall be payable by the 1st and 2nd Defendants.
188. Leave to appeal the judgement of the court by any of the parties is hereby granted if required.
- It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA CTS AND EMAIL HIS 16TH DAY OF JANUARY 2025.

HON. A.E DENA

JUDGE

16/1/2025

