



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT MALINDI

CIVIL SUIT NO. 2 OF 2007

CONSOLIDATED WITH

CIVIL SUIT NO. 9 OF 2012

THE ESTATE OF MOHAMED ISHAQ

MOHAMED AMIN

MOHAMED YUNIS

KIBOKONI PROPERTIES LTD.....PLAINTIFFS

VERSUS

PASSAGLIA GIUSEPPE

GIORDANO ALLIEVI

GABRIELLA TOSCANO

DANIELLA OLMO D'ALESSANDRO.....DEFENDANTS

AND

GIORDANO ALLIEVI

GABRIELLA TOSCANO.....PLAINTIFFS

VERSUS

KIBOKONI PROPERTIES LTD.....DEFENDANT

JUDGMENT

PLEADINGS

HCC 2 of 2007

The Plaintiff

1. In the Further Amended Plaintiff filed on 16th October, 2010, the 4th plaintiff Kibokoni Properties Ltd and alleged newly registered owner of the plot No. Chembe/Kibabamshe/404 (hereinafter the suit property) joined the three original plaintiffs, namely the Estate of Mohamed Ishaq Mohamed Amin and Mohamed Yunis (Mohameds) against the three original defendants, namely Passaglia Giuseppe (1st defendant), Giordano Allievi (2nd defendant) Gabriella Toscano (3rd defendant) and introduced a new party Daniella Olmo D' Allesandro (4th defendant) replacing the original 4th defendant, Robert Kaingu Maitha (now deceased).

2. The Further Amended Plaintiff avers that the Mohameds were the original owners of the suit property which was transferred to 4th plaintiff on 7th September, 2010 and who desires to have vacant possession thereof. Asserting that the plaintiffs have no claim against the 1st defendant, the plaintiffs aver that the 2nd to 4th defendants who occupy villas erected by the 1st defendant on the suit property are trespassers in illegal occupation thereof since inception. That their continued occupation has deprived the plaintiffs of their use and enjoyment of the suit property.

3. The Further Amended Plaintiff seeks the following prayers:

a. A declaration that the 1st, 2nd and 3rd plaintiffs were at all times the Lawful owners of Title No. Chembe/Kibabamshe/404 which has lawfully been transferred to the 4th plaintiff and the defendants are trespassers thereon.

b. An Order directed at each of the 2nd, 3rd and 4th defendants to cease all acts of trespass upon and on Title No. Chembe/Kibabamshe/404 to and vacate forthwith vacate and render to the plaintiff's vacant possession of the title No. Chembe/Kibabamshe/404 and in default an Order eviction to issue to be executed by this Honourable Court's Bailiff and/or an official Court Broker.

c. Damages for trespass and Mesne Profits from the date of illegal occupation of the suit property until the date of vacation or eviction together with interest thereon.

d. Costs of this suit and interest thereon and those of (c) above at court rates" (sic)

The plaintiff's were represented by Mr. K'opere.

The Defence Statements

4. The 2nd and 3rd defendants filed an amended defence through the firm of A. B. Patel & Patel Advocates, and were represented by Ms. Gudka. They denied the plaintiffs' claim to the suit property and the averment that they were trespassers, asserting instead that they are in occupation of one villa with its compound, pursuant to payments made to the 1st defendant who held himself out as the developer of the said property. They further aver that they acquired an interest in respect of the villa and portion of land they occupied by virtue of purchase of shares from the company called SICA Ltd. which had in turn acquired a beneficial interest pursuant to its agreement with two holders of letters of allotment in respect of the said property namely, Adam Kazungu Nzamba and Hafsa S. Mohamed. That they have since December 1997 been in open, continuous, quiet and peaceful possession thereof.

5. The 2nd and 3rd defendants disputed the alleged transfer of the suit property to the plaintiffs in particular that the 4th plaintiff has acquired title to the suit property and aver that if indeed it has, it did so with full knowledge of their occupation and therefore the purchase is subject to their overriding interest in the property, and the said plaintiffs are not entitled to the orders they seek. They deny that they have

prevented the plaintiffs from taking effective possession of or utilizing the suit property, and further, any knowledge that their continued occupation of the villa was illegal from inception or the existence of any High Court suit touching on the suit property.

6. The 2nd and 3rd defendants plead a co-defendant's claim against the 1st defendant to the effect that, in the event that an order for vacant possession is issued against them, they will seek damages and indemnity against the 1st defendant who allegedly received the consideration for the purchase of their portion of the suit property (via purchase of shares in SICA Ltd) as an agent of SICA Ltd., and as one holding himself out as the developer of villas on the said property.

7. The 4th defendant through Michira Messah & Co. Advocates filed a defence on 31st February, 2011. The 4th defendant disputes the plaintiffs' title, asserting that she derived her title from SICA Ltd. who at the time of the purchase agreement had been in possession of the suit property for 12 years. She avers that she has since been in occupation, developed the property and that the 4th plaintiff's claim is statute barred. The 4th defendant accuses the 4th plaintiff of securing title to the property through fraud.

8. The 4th defendant further denies involvement in any of the previous suits touching on the suit property and asserts that the parties having maliciously and mischievously excluded her from the suits are estopped from asserting their claim against the 4th defendant who describes herself as the rightful owner of her portion and villa. The 4th defendant avers that the plaintiffs are not entitled to the orders sought. On 28th November, 2011 the 4th defendant filed a notice of claim against the 1st defendant. The details thereof are a replica of the claim pleaded by the 2nd and 3rd defendants in their defence against the 1st defendant.

9. In his defence to the claim by the 2nd and 3rd defendants filed through Machuka & Co. Advocates on 25th February, 2011 the 1st defendant denied liability pointing out that the plaintiffs had by the Further Amended Plaint withdrawn their claim against him. He asserts that at all material times the said defendants were aware of the various disputes over the suit property, and further, that they filed a civil suit (HCC 103/2000 in Mombasa) against the former 4th defendant who was eventually the decree holder in HCC 53/06 (OS).

10. That the 2nd and 3rd defendant have no document of title to the villa they occupy and are trespassers with no right of claim. The 1st defendant denied receipt of any money from the 2nd and 3rd defendants. In regard to their alleged purchase of a villa or holding himself out as the developer thereof, he claims to have lost colossal sums of money upon erecting the villas, due to the actions of one Alessandro Ghidoni and "other fraudsters posing as owners of the suit properties", including one Said Adam Kazungu now charged over fraudulent criminal transactions, from which no interest in land can be derived.

11. Asserting that he completed the erection of the villas in 2000 the 1st defendant denies the 2nd and 3rd defendant's claim of possession thereof since 1997, but avers that their occupation of their villa has no legal basis being victims of fraudsters, and should vacate the suit property. That the claim for indemnity or damages by the 2nd and 3rd defendant against him cannot hold there being no legally binding agreement between the 1st defendant and the claimant defendants and no consideration having been paid to him directly or indirectly in respect of the alleged sale of land, villas or shares in SICA Ltd. He avers that the 2nd and 3rd defendant's claim should be dismissed and the said defendants ordered to vacate the suit property in favor of the new registered owner, the 4th plaintiff. There is no record of a defence filed in respect of the co-defendant's claim by the 4th defendant against the 1st defendant.

Summary Judgment Application

12. Earlier on 28th January, 2011 the plaintiffs had moved the court for summary judgment in terms of prayer (b) (for an order for vacant possession or in default eviction against the 2nd, 3rd and 4th defendants). The said application was primarily brought under Order 36 Rule 1, 5, and 6 of the Civil

Procedure Rules, but was dismissed on 15th June, 2011 by which date the 2nd – 4th defendants had filed their respective defences.

HCC 9 OF 2012

The Plaintiff

13. About six months after the dismissal of the motion, and while the suit was pending the 4th plaintiff in HCC 2 of 2007 through K'opere & Co. Advocates sent a demand letter to the 2nd to 4th defendants (dated 17th January, 2012) demanding rent arrears accrued, allegedly amounting to Kshs. 960,000/- in respect of the suit property, which demand was accompanied by a threat to levy distress in default of payment. This action prompted the 2nd and 3rd defendants in HCC 2 of 2007 to file a suit, namely HCC 9 of 2012, on 31st January, 2012 and a contemporaneous application later amended, seeking an injunction against the 4th plaintiff.

14. The plaintiff filed in HCC 9/2012 repeats most if not all of the averments contained in the defences filed in HCC 2/07 against the 4th plaintiff. Citing the said pending suit, the 2nd and 3rd defendants asserted they were not tenants of Kibokoni Properties Ltd. (defendant in HCC 9/12 and 4th plaintiff in HCC 2/07) and the threat to levy distress was therefore without basis and unlawful. The plaintiffs (in HCC 9/2012) sought a permanent injunction to restrain the defendant (4th plaintiff in HCCC 9/2012) accordingly, from levying distress or evicting the plaintiffs.

Defence Statement

15. On 27th February, 2012 Kibokoni Properties Ltd. filed a defence reiterating the existence of the pending suit between the parties (HCC 2/07) and asserting that the plaintiffs in the new suit had no claim to ownership of the suit property or indeed against the defendant, having filed for indemnity against the 1st defendant in HCC 2/07. The defendant took issue with the plaintiffs' action of filing a new suit terming it an abuse of the court process, and further asserting its title to the suit property, right to vacant possession mesne profits or rent against the plaintiffs as trespassers thereon, and dismissal of the suit. On 11th May, 2012 the court granted an injunction in favor of the plaintiffs but also directed that the two suits be consolidated.

Order of Reference to Parties

16. For consistency and in order to avoid confusion and repetition, the 1st, 2nd and 3rd plaintiffs in HCC 2 of 2007 will be henceforth be referred to as such while the 4th plaintiff will be referred to as Kibokoni for purposes of both HCC 2 of 2007 and HCC 9 of 2012. Equally the 1st defendant in HCC 2/07 will be referred to as the 1st defendant throughout this judgment, while the 2nd and 3rd defendants in HCC 2/07 and plaintiffs in HCC 9/12 will be referred to as Giordano and Gabriella. The 4th defendant in HCC 2/07 will be referred to as the 4th defendant

The Evidence

Evidence on behalf of the 1st, 2nd, 3rd Plaintiffs and Kibokoni

17. On behalf of the 1st – 3rd plaintiffs and Kibokoni, three witnesses testified. These were Moses Kibunja Kibui (PW1), a director of Kibokoni Ltd., Mohamed Amin (the 2nd plaintiff as PW2) and Passaglia Giuseppe (1st Defendant as PW3).

18. The Plaintiffs' evidence is basically a chronology of events relating to a series of ownership disputes over the suit property. Briefly, it is that in the year 1980 the 1st – 3rd plaintiffs bought the suit property

from one Alphonse Masika Nyukuri and obtained what they described as a leasehold, which was allegedly surrendered to the government in May, 1986 following many complaints regarding adjudication/allotments within Chembe/Kibabamshe, Kilifi/Jimba, Kilifi/Madeteni, Kakuyuni/Madunguni and Kilifi/Matsangoni all located in then Kilifi District (see Gazette Notice no. 2505 of 30th May, 1986.) The 1st-3rd plaintiffs claim that following the subsequent verification exercise they were issued with a lease and certificate of lease on 26th August, 1997 over the same suit property, measuring 4.4Ha, for a term of 99 years commencing 1st November, 1992.

19. Meanwhile one Robert Kaingu Maitha (Maitha) also had allegedly on 13th August, 1993 been issued with a title deed for the same property on the basis of which he entered into a sale agreement with the 1st defendant. Despite having allegedly confirmed Maitha's title through a search in the Kilifi land registry, the 1st defendant was unable to transfer the suit property in his favor as the land registrar Kilifi subsequently rejected Maitha's title. He discovered in 1997 that apart from Maitha, there was Adam Kazungu Nzamba and Hafsa S. Mohamed, the latter a daughter of one Baadawy (former Member of Parliament Malindi), who jointly held a letter of allotment in respect of the suit property. The 1st defendant again entered into an agreement with these persons before Lucy Muli (DW3) advocate for the purchase of the property.

20. The 1st defendant had by then already started development of the three villas on the property, one of which was completed and occupied since the year 2000 by the 2nd and 3rd defendants, who, had been introduced to him by his friend and business partner Allesandro Ghidoni. About the same time Maitha attempted to restrict the 2nd and 3rd defendants' access to the suit property prompting them to file a suit in Mombasa being HCC No. 103/00, wherein an injunction was issued against Maitha to restrain him inter alia, from interfering with the suit property until the determination of the suit. This was just one of the myriad suits filed in respect of the property. In the Mombasa suit the 2nd and 3rd defendants claimed to derive title from shares purchased in SICA Ltd. associated with Ghidoni and his wife.

21. It was alleged that SICA Ltd. had purchased the suit property on 31st January, 1999 from Adam Kazungu Nzamba and Hafsa Mohamed. The agreement of sale was signed before Lucy Muli advocate (it later emerged however, that the alleged vendor had died in 1998). In 2004 Said Adam Kazungu the son of Adam Kazungu Nzamba entered the scene and approached the 1st defendant with a surrender of lease and Power of Attorney (POA) allegedly executed in his favor by the 1st to 3rd plaintiffs. When the matter was brought to the attention of the 1st – 3rd plaintiffs they denied the documents and reported to police. The said plaintiffs sued the 1st defendant in Malindi HCC 40 of 2006 Estate of Mohamed Ishaq & 2 others vs Passaglia Giuseppe for trespass on the suit property while Maitha lodged a claim in adverse possession in Malindi HCCC No. 53 of 2006 (OS) Robert Kaingu Maitha vs Mohamed Amin & 2 others.

22. For his part the 1st defendant commenced a suit No. HCC 5 of 2005 against the Land Registrar, the Attorney General, and the 1st – 3rd plaintiffs and other claimants in a bid to secure his title in the suit property. Malindi HCC No. 2 of 2007 was also filed by the 1st, 2nd and 3rd plaintiffs against the present defendants. It would seem from the evidence of Mohamed Amin (2nd plaintiff) that by 2008 the 1st to 3rd plaintiffs were exhausted with litigation and commenced negotiations with Maitha, 1st defendant and one Walter Cigni, allegedly in a bid to resolve the festering disputes over the property. These negotiations culminated in the following:

a. A sale agreement executed between Walter Cigni and the 1st to 3rd Plaintiffs for the sale of the property to Cigni at Kshs. 10million.

b. A consent dated 8th December, 2008 between Maitha and the 1st – 3rd plaintiffs in HCC 53 of 2006 (OS). By this consent the 1st - 3rd plaintiffs conceded Maitha's claim in adverse possession in respect of the suit property and the said plaintiffs relinquished their title thereto. Cigni was a director with PW1 in Kibokoni which had been incorporated on 27th October, 2008, seemingly as a

vehicle for the transfer of the suit property. The 1st defendant joined Kibokoni first as an alternate director to Cigni but in 2009 became a full director and shareholder in the company.

23. The suit property was eventually transferred to Maitha. Maitha in turn executed an irrevocable power of attorney and transfer in favor of Kibokoni the alleged assignee of Cigni. The suit property was transferred to Kibokoni on 7th September, 2010. Maitha received Kshs. 3m as consideration. It is the plaintiff's case that by the said date of transfer all outstanding suits had been settled, save for HCC 2 of 2007 and Mombasa HCC 103 of 2000 partly because Maitha died only a few months after the transfer.

24. Although one of the special terms of the special sale agreement was the withdrawal of HCC 2 of 2007 by the vendors before transfer of the property, that did not happen. Instead Kibokoni the newly registered owner of the suit property was to be later enjoined in this case as the 4th plaintiff on application by the vendors and, seeking inter alia an order for vacant possession and mesne profits against Giordano, Gabriella and the 4th defendant about whom PW1 testified that they have no registrable interest in the property. The 1st – 3rd plaintiffs have no claim against the defendants. Kibokoni, having embraced the 1st defendant as a director and shareholder all but withdrew their case against him.

25. The 1st defendant denied having received any payment from Giordano, Gabriella and the 4th defendants regarding the sale of the suit property, save for a sum of Shs. 200,000/- for the construction of a perimeter wall and servants quarters on behalf of Giordano and Gabriella. He stated that they balked at his proposal to join with him in order to pursue the 1st – 3rd plaintiffs to salvage the property, upon making the adverse discoveries regarding the titles.

26. Through PW1, Kibokoni asserted that there has been no challenge raised in connection with their title since September, 2010 and that they have fenced off the property with the intention of constructing a hotel. Based on their registration as new owners, Kibokoni sought to demand rent from Giordano and Gabriella in 2012, which led to the filing of HCC 9 of 2012 by the said Defendants, who have remained in occupation to date. As far as Kibokoni is concerned, Giordano, Gabriella and 4th defendant are trespassers who ought to give vacant possession. The 1st defendant agreed, asserting that the said defendants' agreement with SICA Ltd. did not involve him as he had nothing to do with the said company as an agent or at all. He took the position that he is not liable to indemnify the said defendants and that Ghidoni (who remains at large) should compensate them.

Evidence on behalf of Giordano, Gabriella and the 4th defendant

27. Giordano and Gabriella testified as follows. They are a retired Italian couple who after visiting Kenya in 1994 decided to buy a holiday home. They first settled for Karibuni Villas at Mamburi. However, in 1995 a friend by the name Flavio introduced them to Allesandro Ghidoni, the latter who, was said to be in the process of developing some villas on the suit property. They liked the villas under construction and settled on one described variously as Villa No. 2. A preliminary agreement was entered into with Ghidoni, on 29th May, 1997 in Italy.

28. Soon after the couple was introduced to the 1st defendant who was managing the construction project while Ghidoni, his partner, marketed the villas. Early in 1999 their villa was almost complete and Ghidoni requested that they enter into a second agreement to facilitate completion and transfer of title. Hence on 11th March, 1999 the couple entered into an agreement for the transfer of 30 shares in SICA Ltd. equivalent to one villa. The same was executed before Lucy Muli Advocate (DW3). They had paid all monies due under the initial contract through bank transfers to the 1st defendant and to Ghidoni, but by September, 1999 they became aware that there was another claimant to the suit property.

29. Nevertheless they posted their worker Edward Mumbo as a caretaker in their villa and were generally in possession. About two months later they were summoned by CID over a complaint raised by Maitha whom they didn't know and who claimed to own the suit property. Matters escalated when Maitha barricaded the property denying them access thereto. The couple moved to court early in the year 2000

(MSA HCC 103/00) and obtained orders, inter alia restraining Maitha from interfering with their property. The orders were never discharged and the case has not been finalized.

30. The couple moved into the property early in 2000 and have lived there since, warding off many busy bodies, but with no interference from Maitha or 1st defendant. Upon learning that the 1st to 3rd plaintiffs were the owners of the suit property they attempted to salvage their situation by making offers to buy the property, but these did not materialize and eventually Kibokoni was registered as the new owners thereof. Giordano and Gabriella deny that they are trespassers on the land or tenants of Kibokoni. They deny the claim for rents and mesne profits by Kibokoni and assert that they have fully paid for their villa and compound.

31. The 4th defendant was represented at the trial by her husband and donee to her POA one Allesandro D' Allesandro (DW4) who testified that in 1999 he accompanied the 4th defendant to the suit property where he saw the house under construction and was aware of payments made to Ghidoni and an agreement with SICA Ltd. in that regard. He said the house was a shell and uninhabitable. That he too later paid some money to Said Adam Kazungu which transaction was the subject of the proceedings brought against the said payee in Malindi Criminal Case No. 1446/05. He stated that the 4th defendant did not have the funds to complete the house and that Ghidoni abandoned the development.

32. DW5 was the Assistant Land Registrar, Kilifi who produced records in respect of the suit property confirming present ownership details and a brief history of the title.

ANALYSIS OF THE EVIDENCE

Common Ground

33. Having considered all the evidence on record and submissions made by the parties, it is possible to state the undisputed issues. It is common ground that the suit property has been the subject of many ownership disputes some of which ended up in court. At various times different parties claimed ownership and purported to hold titles to the property apparently issued by the relevant lands office. There is no dispute that sometimes in 1997 the 1st, 2nd and 3rd plaintiffs emerged with one such document, being a lease, issued in their favor in respect of the suit property. By the said date the 1st defendant had moved into the property and commenced construction of three villas pursuant to an alleged sale agreement between himself and Maitha in March 1995.

34. Maitha herself held a purported freehold title to the land issued in 1993. One of the villas on the suit property having been completed in, or around the year 2000 was occupied by Giordano and Gabriella who have since remained in occupation, save for a brief spell early in 2000, when Maitha attempted to exclude them and was restrained by an injunction issued by the court in Msa HCC 103/2000 filed against him by Giordano and Gabriella. The 4th defendant's villa was never completed but she had taken possession as evidenced by the demands made against her by the plaintiffs. The two villas sit on a small portion of the entire suit property which measures 4.4 Ha.

35. The above suit was followed by HCC 15 of 2005 which was brought by the 1st defendant against the 1st – 3rd plaintiffs herein, the Attorney General, Said Adam Kazungu (another claimant) inter alia. The suit sought orders and damages in respect of loss incurred in respect of the suit property pursuant to the sale agreement with Maitha. Citing the various misdeeds of government officers through multiple issuance of concurrent title deeds over the same property, the 1st defendant sought indemnity from the government and an order of injunction against the defendants therein from trespassing onto the suit property. For their part, the 1st, 2nd and 3rd plaintiffs herein filed a suit No. Malindi HCC 40/2006 against the 1st defendant, Giordano and Gabriella for trespassing on the suit property.

36. Maitha too, filed a suit being an Originating Summons No. 53 of 2006 (OS) seeking the following orders:

“1. THAT the plaintiff herein, ROBERT KAINGU MAITHA be registered as the proprietor of the lease over all that parcel of land known as Title Number Chembe/Kibabamshe/404 (herein after the “property”) in place of the defendants, MOHAMED AMIN, MOHAMED YUNIS and THE ESTATE OF MOHAMED ISHAQ for reasons that the plaintiff has become entitled to the said land by Adverse possession;

And

2. THAT the Order referred to in paragraph one (1) herein above be registered against the lease issued by the Government of Kenya in respect of the said property in terms of the Limitation of Actions Act (Cap 22).”

37. In 2007 the 1st to 3rd plaintiffs brought HCC 2/07 against the 1st defendant, Giordano and Gabriella and Maitha. It would seem that HCC 40/06 and 15/06 have been determined through striking out while Msa HCC 103/00 is still outstanding. With regard to HCC No. 53(OS)/06 a consent was recorded through which judgment was entered for the plaintiff as prayed. A decree in Maitha’s favor issued on 22nd January, 2009. Before this however, a sale agreement dated 15th September, 2008 had been entered into between the 1st to 3rd plaintiffs for the sale of the suit property to one Walter Cigni for a sum of shs. 10,000,000/.

38. Some of the special conditions in the said agreement included an undertaking by the three Mohameds (1st – 3rd plaintiffs) to withdraw inter alia suit No. HCC 2 of 2007. As well, the purchaser undertook to have HCCC 53(OS) of 2006 withdrawn and to “liase” (sic) with the 1st defendant, Giordano and Gabriella among others “with a view to facilitate and obtain for itself or its nominee vacant possession of the said property”.

39. On 22nd April, 2009 Maitha executed a special irrevocable Power of Attorney (POA) and Transfer of Lease in favor of Kibokoni for the consideration of shs. 3,000,000/-. On 7th September, 2010 a transfer was effected in favor of Kibokoni and a certificate of lease issued. Suit No. HCC 103/00 remained outstanding, so too HCC 2/07. With regard to the latter, the vendors sustained it and in fact made an application to enjoin Kibokoni as the 4th plaintiff, and to substitute the 4th defendant for Maitha who had died four months after signing the POA and Transfer Document. In January 2012 Kibokoni through their advocates wrote to Giordano, Gabriella and the 4th defendant demanding payment of rent for the occupied premises. They threatened to levy distress in default. This prompted the said defendants to file the suit HCC 9/2012 to restrain Kibokoni from levying distress or evicting them.

Disputed Issues

40. Broadly speaking there are four broad issues to be determined:

1. Whether the 1st to 3rd plaintiffs were at all times the lawful owners of the suit property
2. Whether the 1st – 3rd plaintiffs or Maitha lawfully or fraudulently transferred their lease to Kibokoni.
3. Whether Giordano, Gabriella, and 4th defendant have occupied the suit premises lawfully by virtue of an overriding interest arising inter alia from a sale agreement with SICA Ltd. and upon which they are entitled to claim indemnity from the 1st defendant
4. Whether Giordano, Gabriella and the 4th defendants are trespassers liable for eviction and damages, mesne profits, and rents for their continued occupation of the suit property.

1st Issue

Whether the 1st to 3rd plaintiffs were at all times the lawful owners of the suit property

41. There can be no dispute that in 1997 the 1st – 3rd plaintiffs were the beneficiaries of a lease issued in their favor over the suit property. It is also true, as emerges from the contested history of the suit property that there were a plethora of claimants to the said property before and after that date, some who held titles that on the face of it were never cancelled. According to PW2 this land was acquired by the Mohameds through purchase from one Alphonse Masika Nyukuri in 1980 and subsequent to the verification of lease in 1986, the said plaintiffs were issued with a new lease. PW2 was unable to tender any documentary evidence of the alleged purchase or even the original lease issued by the lands office.

42. The controversy surrounding the ownership of this land parcel is aptly captured in the plaint filed by the 1st defendant in HCC 15/05. At least three titles - to Karisa Chengo (1994), Maitha (1993), the Mohameds (1997), and letters of allotment to Adam Kazungu Nzamba and Hafsa Mohamed (1997) were issued for the same property. The latter 3 dealings were confirmed by witnesses in this case. It appears that after numerous tussles the 1st – 3rd plaintiffs were issued with a lease in 1997. It is difficult in light of the contention and without the benefit of all relevant material, to state conclusively that the said persons were always the lawful owners of the suit property, rather that they were issued with a lease in 1997.

43. This however, did not end the bitter fight. Mainly because Maitha persisted in his claim while Said Adam Kazungu the son of Adam Kazungu Nzamba (who died in 1998) joined the fray. In a very real sense the present litigation is between Kibokoni who claim title derived from the 1st to 3rd plaintiffs and Maitha and those whose alleged interests are derived from the interest which can be traced back to Adam Kazungu Nzamba and the 1st defendant. Hence it is a continuation of the old war as to who is the true owner of the suit property. Sadly, the land registrar (DW5) in his evidence seemed to have very scanty details of this history and also failed to tender before the court the full record of transactions touching on the suit property.

44. I am prepared to hold, in light of the established history and the fact that the 1st to 3rd plaintiffs ceded their title to the earliest alleged title holder Maitha, that Maitha thus became the lawful owner of the suit property. The court therefore recognizes Maitha as the lawful owner of the suit property from the year 2009.

2nd Issue

Whether the 1st – 3rd plaintiffs or Maitha lawfully or fraudulently transferred their lease to Kibokoni.

45. The 1st to 3rd plaintiffs ceded their title to the suit land in 2009 to Maitha. They did not transfer the property to Kibokoni so the question whether the transfer was lawful or not cannot arise in regard to them. The fact of the matter is that although the 1st to 3rd plaintiffs entered into an agreement with one Walter Cigni over the purchase of the suit property in 2008, the transfer in 2009 and POA in Kibokoni's favor was by Maitha. According to PW1 this was the method the parties chose to resolve the many suits outstanding in the material period.

46. As to whether the transfer from Maitha to Kibokoni was lawful four aspects stand out:

1. The injunction against Maitha in HCC 103/00. The suit had not abated when Maitha signed the transfer, nor had the injunction been discharged.
2. The transfer form did not take the prescribed format, as admitted by DW5.
3. By virtue of special condition No (ii) in the agreement between Kibokoni and Mohameds, suit No. HCC 2/07 should have been withdrawn prior to transfer being effected. It may be argued that

only the 1st to 3rd plaintiffs and one Walter Cigni were privy to that agreement. However PW1 asserted that the said Cigni appointed Kibokoni as his nominee for purposes of the transfer. Kibokoni was therefore bound by all the terms of the agreement as much as the 1st to 3rd plaintiffs were. To my mind therefore it was an abuse of the process of the court for the 1st to 3rd plaintiffs not only to maintain their suit (HCC 2/07) but also to enjoin Kibokoni as 4th plaintiff, essentially transferring the suit to them, contrary to the express terms of the agreement. Under the said special terms (ii) withdrawal of the suit HCC 2/07 was a condition precedent to the registration of the transfer.

4. Equally, Kibokoni was bound by special clause (vii) to liaise with 1st defendant, Giordano, Gabriella and others, which term I understand to mean resolving outstanding issues with them, and in my view necessarily excludes the maintenance of this cause (HCC 2/07) against the said defendants. The 1st defendant was absorbed into Kibokoni as a director while others defendants were left out and subjected to further litigation.

47. It is evident that all but the second aspects described above touch upon the court process and border on abuse of the same as all the parties involved were admittedly aware of the factual details, if not involved in the outstanding suit in HCC 103/00 and HCC 2/07. As regards the second aspect, it is a matter of form although DW5 said in his evidence that the transfer should have been denied. One wonders why the parties could not comply with due procedure after working out a complicated resolution process.

48. What is the total effect of these acts of commission and omission on the actual transfer? In my considered view it is that the same was most irregularly effected, although not necessarily unlawful or fraudulent. However, there will be consequences flowing from the said gross irregularity. As Mrs. Gudka for Giordano and Gabriella has observed, it is difficult to understand why the 1st to 3rd plaintiffs, Maitha and Kibokoni and admittedly the 1st defendant elected such a convoluted method of transferring the suit property to Kibokoni. Were they engaging in a game of smoke and mirrors? Was Cigni a proxy of the 1st defendant intended to create a buffer between him and his possible detractors or such claimants as Giordano, Gabriella and 4th defendant? The answers are not clear at this stage. What is clear however, is this: Kibokoni has been registered as the company holding a lease over the suit property since 7th September, 2010 and I so find.

3rd and 4th Issues

3. Whether Giordano, Gabriella, and 4th defendant have occupied the suit premises lawfully by virtue of an overriding interest arising inter alia from a sale agreement with SICA Ltd. and upon which they are entitled to claim indemnity from the 1st defendant

4. Whether Giordano, Gabriella and the 4th defendants are trespassers liable for eviction and damages, mesne profits, and rents for their continued occupation of the suit property.

49. Whether or not the registration of transfer occurred after Maitha's death does not alter the fact that he had already executed an irrevocable POA and transfer of lease in favor of Kibokoni four months before his death. And before that, Maitha had already transacted with the 1st defendant over the suit property through a sale agreement in 1995 by virtue of which the 1st defendant built the three villas on the suit property. The 1st defendant has consistently stood on this agreement (or at least Maitha's title) which was the basis of his suit HCC 15/05, and his defence in HCC 2/07 dated 16th April, 2007. No doubt this gave him added leverage in negotiating with the 1st to 3rd plaintiffs, and his admission into Kibokoni. Kibokoni "liaised" with him therefore, in terms of the sale agreement with the Mohameds.

50. I am convinced that the 1st defendant and Kibokoni, the late entrant to the suit, were duty bound to carry Giordano, Gabriella and the 4th defendant along. Why do I say this? The pleadings of the 1st

defendant in HCC 15/05 tell it all. The 1st defendant had already sold the two villas, by his own averments and was not in possession. By his conduct: he allowed Giordano and Gabriella to take possession, put up a wall and servants quarter next to the villa they occupied, built the wall and the servant quarters for them, and received payment for the work prior to 1999. He had continued to build the villas even after learning in 1997 that the land was claimed by other parties. He completed the villa occupied by Giordano and Gabriella 2 years later and allowed them to move in. After 2000 he has not made any claim for payment against them even though they have been on the property. Most significantly he did not list Giordano, Gabriella or the 4th defendant among the trespassers in HCC 15/05 or enjoin himself in MSA HCC 103/00 to resist their suit. His first claim against them for trespass was made when he became part of Kibokoni and its witness in HCC 2/07.

51. The 'Preliminary' sale agreement between Gabriella, Giordano and Ghidoni entered into on 29th May, 1997 may not amount to a legally enforceable sale agreement in respect of land. But it does indicate the parties' intentions. The agreement states that Allesandro Ghidoni who signed on behalf of the vendor of the villa did so as a "legal representative" of the vendor, described as Flagstaff Investments Ltd. This is the same company which was contracted by Gabriella and Giordano to put up the servants quarters and perimeter wall at a cost of Shs. 300,000/-. The 1st defendant signed the said construction agreement on behalf of Flagstaff Investments Ltd while Giordano signed as a purchaser.

52. It is the evidence of Gabriella that after the preliminary agreement she and her husband constantly visited the villa to follow up on the construction and that they consulted regularly with 1st defendant who had been introduced to them as the person responsible for the project. It defies reason that the 1st defendant allowed strangers to put up and even helped them put up structures on 'his property' and to take possession thereof including the villa. The 1st defendant has denied evidence adduced in the form of transfer orders dated 28th April, 1998, 3rd August 1998, 17th August, 1998 and a handwritten note indicating his name and details and those of two payees namely, Wilma Passaglia (his sister) and De Boni Danilo whom he nominated to receive bank transfers of cash from Giordano and Gabriella.

53. Giordano said he personally effected the transfers and asserted that he could not have dreamed up the details of the payees. My view is that the 1st defendant's conduct in allowing the couple and indeed the 4th defendant to take full possession (whether constructive or not) of the villas is consistent with receipt of payment. Most probably in furtherance of the intended sale. Gabriella testified that by the date of the 2nd agreement with Ghidoni, the agreed purchase price was all but paid and the final instalment (indicated in the agreement with SICA Ltd. dated 11th March, 1999 as Ksh. 1,000,000/-) is all that remained unpaid and was settled on that date. The 4th defendant also similarly signed an agreement with SICA Ltd. But her villa was never completed.

54. It is true that the two agreements with SICA Ltd. did not involve the 1st defendant and that they were not completed. But they were also agreements based on a rotten root in the sense that SICA Ltd., in which Ghidoni and his wife were allegedly directors, themselves claimed to derive title from one Adam Kazungu Nzamba (already deceased by the time of the alleged agreement). His son Said Adam Kazungu had in an earlier agreement with SICA Ltd. made before Lucy Muli Advocate, apparently purported to transact in the name of his deceased father, whose title for all intents and purposes was under dispute in 1997, as he held only a letter of allotment with Hafsa Mohamed.

55. Thus both the 'preliminary' agreement with Ghidoni as representative of Flagstaff and secondly as director of SICA were not completed, or effective to pass proprietary rights to the alleged purchasers. After the year 2000 Giordano, Gabriella and 4th defendant held on to the villas, without any hindrance and in the case of the latter, the villa being a virtual shell according to DW4 and admissions by the plaintiffs. The order in HCC 103/00 further sanctioned the occupation by Giordano and Gabriella. The 1st defendant did not take action against them but persisted in upholding Maitha's title and his agreement with him and held onto the property until conclusion of the consents resulting in transfer of the suit property to Kibokoni where he now sits as director.

56. In these circumstances it would be stretching it to assert, as submitted by Mrs. Gudka that Gabriella, Giordano and 4th defendant acquired an overriding interest as envisaged by Section 30 (g) of the Registered Land Act or by virtue of the sale agreement with SICA Ltd. It is enough to say the occupation was sanctioned by the court and was subject to the outcome of the suit. The agreements with Ghidoni (as Flagstaff and SICA) cannot give rise to an overriding interest proper as the ownership of the property by SICA Ltd. or 1st defendant in that period is doubtful. My considered view is that Gabriella, Giordano and 4th defendant entered on the suit premises on the basis of the two flawed agreements, with the permission of the 1st defendant who had received payments, and subsequently remained thereon by virtue of the court order. They did not therefore qualify as trespassers. They came on board due to the representation by word and conduct of the 1st defendant and his partner, now fugitive, Ghidoni both putative owners of the property then.

57. That Ghidoni did not pay up for his shares in Flagstaff cannot take away the fact that the defendant couple acted on the perceived relationship between the 1st defendant and the said Ghidoni and paid large sums of money not only to Ghidoni (for Flagstaff) but also to the 1st defendant. As noted earlier no defence was filed in respect of the co-defendants claim filed by the 4th defendant against the 1st defendant.

58. The recognition of the presence of the 1st defendant, Giordano and Gabriella on the suit property under special clause vii) and the obligation undertaken by Cigni to “liase” (*sic*) with them “to facilitate and obtain ...vacant possession” reinforces their claim to have entered and remained on the land lawfully. So too special condition ii) by which the 1st to 3rd plaintiffs bound themselves to withdraw the trespass case HCC 2/07 against the said defendants. Indeed for that reason alone neither the 1st to 3rd plaintiffs nor 1st defendant and Kibokoni can be heard to seek to enforce their claim against the said defendants as trespassers.

59. My finding is that given the proven events and history of this matter neither Giordano and his wife nor the 4th defendant can be held liable for trespass, or for payment of rents (as they were not tenants), damages or mesne profits. To my mind they are victims of an intricate legal battle over the suit property, and possibly fraud evidently orchestrated through collusion with officials in the Kilifi lands registry.

60. Kibokoni having had due notice of facts surrounding the suit land including the litigation past and present must bear the inconvenient consequences flowing from their late engagement in the matter. That is what the doctrine of *lis pendens* portends for Kibokoni in these suits. **Mulla on the Transfer of Property Act 1882 9th Edn.** states at page 367

“3) ... the doctrine of *lis pendens* ...imposes a prohibition on transfer or otherwise dealing of any property during the pendency of a suit...the principle on which the doctrine rests is explained in the leading case of *Bellamy and Sabine (1857) DeG & J586* where Turner, L. J. said, “It is I think, a doctrine common to the courts both of law and equity, and rests, as I apprehend upon this forciation – that it would be plainly impossible that any action would be brought to successful termination, if alienations pendent lite were permitted to prevail – the plaintiff would be liable in every case, to be defeated by defendant alienating before the judgment or decree, and would be driven to commence his proceeding, *de novo*, subject again to be defeated by the same course of proceeding.”

61. This doctrine is captured in Section 52 of the Transfer of Property Act. The Court of Appeal restated the doctrine in the case of **Festus Ogada v Hans Mollin C.A. No. 100/2007 (unreported)** as follows:

“The doctrine of *lis pendens* is meant to maintain the status quo over the property which is the subject matter of the suit until after the final determination of the suit or until the suit is in any manner terminated.”

62. Kibokoni may be the registered proprietor of the entire suit property but for having elected to effect

the transfer without first withdrawing suit no. HCC 2/2007, their registration is subject to the indemnity claim by Giordano, Gabriella and the 4th defendant as will be adjudicated. Equally, as a party to the transfer the 1st defendant cannot hide behind Kibokoni to defeat the claims made against him by Giordano, Gabriella and 4th defendant. More so because Kibokoni opted to adopt the 1st defendant as a director holding shares. The 1st defendant cannot wish away the victims of his and Ghidoni's conduct. So that even though the agreements with Ghidoni failed and passed no title and no overriding interest in the strict sense of the word, to the alleged purchasers (Giordano, Gabriella and 4th defendant), they are entitled to restitution from the 1st defendant, Ghidoni's admitted business partner and one who derived a benefit from the purchasers.

63. Faced with an almost similar situation in the case of **Chrisantus Omariba & 3 others vs Ting'a Trading Co. Ltd & 3 Others [2010]e KLR**, Musinga J (as he then was) stated that it was inequitable for one party to draw an unfair benefit at the expense of another and that the aim of equity is to do justice between the parties. The learned judge then cited the English authority **Fibrosa Spolka Akcyjana vs Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 page 62** as follows:

“It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or tort, and are now recognized to fall within a third category of common law which has been called quasi-contract or restitution.”

64. The doctrine was also applied in **Madhu Paper Int. Ltd & Another v Kenya Commercial Bank and 2 others [2003] KLR 31**. The court in that case relied on the decision in **Chase International Investment Corp. & Another v Laxman Keshra & Others [1976 - 1980]1 KLR 891** as to the elements giving rise to the principle of unjust enrichment being:

1. enrichment by receipt of a benefit
2. enrichment at the expense of the giver of the benefit and
3. that it would be unjust to allow such recipient to retain the benefit in the circumstances.”

Madan JA (as he then was) stated:

“If the circumstances are such as to raise equity in favor of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed.”

65. While I do agree with Mr. K'opere's submission that the authority cited by Mrs. Gudka – **Kanyi v Muthiora [1984] KLR 712** – does not apply squarely to the facts of this case regarding the creation of an overriding interest under Section 30(g) of the Registered Land Act, I would say that the idea of some trust (resulting or constructive trust) arising therefrom is not altogether misplaced. The Court of Appeal held in the case of **Arumba v Mbega & Another (1988) KLR 121** that a trust (resulting or constructive) in proportion to the expenditure incurred by the appellant, was created where such person incurs such expenditure in building and improvements on another person's land with the tacit or direct agreement of the owner but without the intention of giving a gift or loan to the owner. In the case of **Hussey v Palmer (1972) 3 ALLER 744** Lord Denning held that a constructive trust is one imposed by law whenever justice and good conscience demand it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

66. The 1st defendant stood in the position of a putative rather than legal owner of the suit property in the material period. He allowed Giordano, Gabriella and 4th defendant thereon upon receiving a benefit which cost them and also allowed them to expend monies in improvements on the property. He has now acquired a confirmation of his claim to title through shares in Kibokoni. He cannot be heard to say that

the two villas were built by him exclusively. It is instructive in this respect that the amended Plaintiff which was replaced by the Further Amended Plaintiff had sought in prayer (a) an order against the 1st defendant, Giordano and Gabriella to demolish and remove all “the structures” on the suit land. That prayer was deleted in the Further Amended Plaintiff.

67. Instead, an averment was made in a new paragraph (4A) that the 1st defendant built the -

“Villas standing in the suit property” and that “the 2nd to 4th defendants moved therein when there was a serious dispute over ownership of the suit property and therefore the occupation was illegal from inception a fact which is well within 2nd to 4th defendant’s knowledge...”

(The 1st defendant also held on to the suit property despite the raging disputes). Clearly, these amendments were precipitated by the fact that the 1st defendant had made a “deal” with the 1st to 3rd plaintiffs and Maitha and also become a director holding shares in Kibokoni. The aim of the amendments and tenor of the 1st defendant’s evidence at the trial was to secure the villas for himself and ultimately Kibokoni, while at the same time jettisoning his former co-defendants therefrom. It is not true as he stated that the said co-defendants showed no interest in pursuing the negotiations with the Mohameds *et al*. There are enough letters in the said defendants’ bundles to demonstrate that their lawyer did try but made no headway.

Conclusion

68. My conclusion is that even though the evidence may not support a constructive trust and/or occupation in circumstances as would amount to an overriding interest as was the case in **Muthiora v Kanyi**, nevertheless, any benefit that the 1st defendant has obtained for himself in Kibokoni by way of shares is subject to a constructive trust in favor of Giordano, Gabriella and 4th defendant. From these persons, he received a benefit, namely money enabling him to put up the villas. There being no evidence that the 1st defendant has made any payments to Kibokoni for the acquisition of his shares beyond the apparent surrender of “his villas”, in all likelihood, the villas have given him added advantage with Kibokoni even as he complains that he too lost a lot of money. Now as a shareholder in Kibokoni he stands in a position to recoup his losses. In all fairness it cannot lie in his mouth to say to Giordano, Gabriella and 4th defendant to walk away empty handed.

69. In my view this is a proper case for the invocation of the doctrine of unjust enrichment and a finding that an equity capable of identification and satisfaction in favor of Giordano, Gabriella and 4th defendant has arisen against the 1st defendant. Until and unless the 1st defendant makes good their loss, equity demands that neither Kibokoni nor the 1st defendant can also demand vacant possession and assert a right to evict the would-be purchasers as trespassers. Any other course would amount to allowing the 1st defendant, shielding himself behind Kibokoni to keep a benefit obtained at the expense of Giordano, Gabriella and the 4th defendant. That in my considered view would be a travesty of justice.

Final Orders

70. What orders for disposition of the suits ought to be made?

This is a difficult matter in light of all the foregoing findings. Certainly, on the basis of my findings on the considered issues, I cannot grant the declaration sought in prayer (aa) in HCC 2 of 2007 which appears to me to have been deliberately drafted as an omnibus prayer. The history of this case and evidence before me does not give the court sufficient assurance to issue such a wide ranging declaration. Secondly, the plaintiffs mentioned in the said order have relinquished their interest in the property, while Kibokoni (through Cigni) and the said plaintiffs agreed on 15th September, 2008 to withdraw the suit HCC 2/07. Prayer (a) as drawn is rejected. Equally I do not grant prayer (b) and (c) in the Further amended Plaintiff as drawn. With regard to HCC 9/12 prayer (a) will be granted while prayer (b) is

rejected.

71. In order to bring this long drawn dispute to a just end, at least as far as the parties before me in the two cases are concerned, I do order as follows:

1. The 1st defendant to make restitution to Giordano, Gabriella and the 4th defendant, either on terms to be agreed upon between the said parties, OR, alternatively by payment on the basis of a valuation of the two villas and their respective compounds, which are the subject of the suits, by a properly qualified and mutually agreed expert valuer.
2. Pending compliance with Order 1 above, Giordano, Gabriella and the 4th defendant will remain in quiet possession of their respective villas, but will yield vacant possession to Kibokoni or the 1st defendant, as the case may be, within 45 days of full payment to them of sums agreed or quantified by the expert valuer.
3. Pending compliance with Order 1 and 2 above, the status quo in respect of the suit property will be maintained and no activities may be commenced thereon, or any dealings or transactions entered into by the 1st defendant or Kibokoni, or their agents or assignees.
4. Each party will bear own costs in HCC 2/07 and HCC 9/12

Delivered and signed at Malindi this 25th day of **July, 2014** in the presence of: Miss Marubu holding brief for Mr. K'opere for 1st -3rd plaintiffs and Kibokoni and holding brief for Mr. Matini for 1st defendant. Mrs. Gudka for Giordano and Gabriella. Mr. Lughanje for the 4th defendant.

Court clerk – Samwel

C. W. Meoli

JUDGE