



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**HCCC NO. 101 OF 2011**

**MICHELE CALIENDO.....1<sup>ST</sup> PLAINTIFF**

**MAURIZIO CARLO.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**SUN REEF LIMITED.....1<sup>ST</sup> DEFENDANT**

**DI IVITA GIUSEPPE.....2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES MOMBASA.....3<sup>RD</sup> DEFENDANT**

**J U D G M E N**

**Introduction**

1. The Plaintiffs moved this court by way of a Plaint dated 27<sup>th</sup> July, 2013.
2. In the Plaint, the Plaintiffs averred that they are the bona fine owners of land known as plot number 29144 (original number 514/53); that the 1<sup>st</sup> Plaintiff left the country on 11<sup>th</sup> November 2007 and came back on 20<sup>th</sup> November 2009 while the 2<sup>nd</sup> Plaintiff left the country on 1<sup>st</sup> November 2007 and came back on 20<sup>th</sup> July 2011.
3. The Plaintiffs further averred that they developed the suit property with a residential house, servant quarters, swimming pool and a garden and furnished it with all the essentials commodities and facilities necessary for occupancy.
4. On 13<sup>th</sup> July 2009, the 1<sup>st</sup> Defendant, with an intention of defrauding the Plaintiffs prepared an instrument, namely, an indenture, purporting to transfer the suit property; that the suit property was transferred to the 1<sup>st</sup> Defendant on 15<sup>th</sup> July 2009 and that the Plaintiffs only discovered all these developments when they came back from Italy on 20<sup>th</sup> July 2011 and found strangers in their house who denied them access.
5. The Plaintiffs pray for a declaratory order that the registration and transfer of the suit premises in favour of the 1<sup>st</sup> Defendant is null and void and for an order of cancellation of the 1<sup>st</sup> Defendant's title.
6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were served with the Summons to Enter Appearance and Plaint by way of advertisement in the Nation Newspaper of 15<sup>th</sup> December 2011. The Defendants, including the Registrar of Titles did not enter appearance. The matter proceeded for formal proof on 30<sup>th</sup> July 2013.

## 2<sup>nd</sup> Plaintiff's evidence

7. The 2<sup>nd</sup> Plaintiff, PW1, informed the court that he stays in Milan, Italy where he works as an auditor. He further stated that before the year 2006, he acquired a plot in Kenya from two Italians being plot number 914.
8. PW1 stated that he paid 19000 Euros for the property and was issued with a title. He produced as exhibit number 1 the indenture dated 2<sup>nd</sup> March 2006.
9. It was PW1 evidence that he acquired the property with the 1<sup>st</sup> Plaintiff who is his friend whereafter they prepared the plan for the construction of a residential house. The plan was approved by the Municipal Council of Malindi which he produced as exhibit number 2. The witness also produced photographs showing the different phases of the construction of the house of the suit property as exhibit numbers 3 a-f.
10. PW1 testified that they build the house to completion and took possession after furnishing it. According to the witness, the furniture was sold to them by Kibiribiri furnitures. He produced as exhibit 6 the invoice from Kibiribiri and exhibit 7 being photographs of the said furniture.
11. PW1 finally stated that when he came back to the country, he found strangers in his house and yet he had never sold the house. He obtained a search which showed that the 1<sup>st</sup> Defendant was the registered owner of the suit property which he produced as exhibit number 7.
12. The Plaintiffs' advocate filed his written submissions on 3<sup>rd</sup> October 2013 and reiterated the evidence given by PW1. I have considered the said submissions.
13. The 1<sup>st</sup> Defendant, who is the purported registered owner of the suit property was served with the Summons to Enter Appearance and Plaint but never entered appearance.

## Analysis

14. The Plaintiffs' averments and evidence that they bought the suit property by way of an indenture dated 2<sup>nd</sup> March 2006 has not been rebutted. The indenture was registered at lands office on 20<sup>th</sup> March 2006 in file number LT 21 folio 652 file 4940, which is the same number indicated in the search that shows that the registered owner of the suit property is the 1<sup>st</sup> Defendant.
15. In view of the fact that the Plaintiffs have denied ever selling the suit property to the 1<sup>st</sup> Defendant, and in the absence of evidence to the contrary, I find and hold that the transfer of the suit property to the 1<sup>st</sup> Defendant was fraudulently done and the same is null and void.
16. In the circumstances, and for the reasons I have given above, I allow the Plaintiffs' plaint dated 27<sup>th</sup> July 2011 in the following terms:

**(a) A declaration be and is hereby issued that the registration and transfer of the suit premises in favour of the 1<sup>st</sup> Defendant is null and void and consequently the 1<sup>st</sup> Defendant's title be cancelled and the suit property be registered in the names of the Plaintiffs.**

**(b) A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant, its agents, legal representatives, servants, or any one claiming interest through it from entering, remaining and or dealing with the suit premises in any manner whatsoever.**

**(c) The 1<sup>st</sup> Defendant to pay to the Plaintiffs the costs of the suit.**

Dated and Delivered in Malindi this 18<sup>th</sup> day of October, 2013

**O. A. Angote**

**Judge**