



**SEIF SALIM MWAKIRUMI..... PLAINTIFF/RESPONDENT**

**V E R S U S**

**KINONDO AMANI LTD .....DEFENDANT/APPLICANT**

**RULING**

1) The Plaintiffs fight for that land known as Kwale/Galu Kinondo/40 (the suitland) has had a long and convoluted history, culminating now in these proceedings. The plaint filed on 17<sup>th</sup> December 2008 seeks, in the main, a declaration that the transfer and registration of the suitland into the name of the Defendant is null and void.

2) The Plaintiffs cause of action is anchored on paragraph 5 of the plaint which reads, in part, as follows:-

***“That Plaintiff avers that prior to the transfer to the Defendant there existed a prohibition by Court on the title date 16<sup>th</sup> March 2006 and another one dated 13<sup>th</sup> June 2006 which prohibition had not been lifted and the Plaintiff believes that the transfer to the Defendant was procured fraudulently and the subsequent title should be cancelled and revoked and the register should be rectified to reflect the position before the transfer.”***

3) It is this cause of action that this Court, through the Chamber Summons of 12<sup>th</sup> October 2009 and filed on 14<sup>th</sup> October 2009, is asked to strike out for failing to disclose any reasonable cause of action, being scandalous, frivolous, vexatious and an abuse of the process of Court. The application was expressed as brought generally under the provisions of Order VI Rule 13(1) of The Previous Edition of the Civil Procedure Rules and this allowed the Defendant to lead some affidavit evidence.

4) The contention of the Defendant is that it is a bonafide purchaser for value without notice having purchased this land from Formation House Ltd. That any grievance by the Plaintiff can only be directed at the previous registered owner and not the Defendant. At any rate, it is also argued, the question of ownership of the suitland was determined by the High Court in **Mbsa Miscellaneous Civil Application No. 438 of 2006 Republic –Vs- The Land Registrar Kwale & Another – Exparte Formation House Ltd** (hereinafter application No. 438 of 2006).

5) On the part of the Plaintiff he maintains that he holds title to the suitland and that the Defendant could not have lawfully obtained registration of it as there were two prohibitory orders registered on the title to the suitland.

6) To unravel the current dispute between the parties some background information is necessary. As far as I can gather from the evidence presented to Court the Plaintiff herein brought a claim in Msambweni Land Disputes Tribunal case No. 20/2005 against Rosemary Njoki Nyanjui, Central Investment Ltd and Formation House Ltd. At that time the suitland was registered in the name of Formation House Ltd.

7) Following deliberations, the Tribunal on 16<sup>th</sup> September 2005 reached this decision;

***“In view of the above therefore, this tribunal orders the revocation and nullification of the Title Deed held by Formation House Limited and a new Title Deed to be issued to the original owner of this land Kwale/Galu Kinondo/40 – SEIF SALIMU MWAKILIMU who is the bonafide owner.”***

8) That award was adopted as an order of Court on 5<sup>th</sup> October 2005 in Kwale land Case No. 16 of 2005 and soon thereafter the Plaintiff was registered as owner of the suitland in place of Formation House Limited.

9) Prior to the delivery of the decision by the Tribunal, Formation House Ltd had taken out an application in **Mbsa HCC NO. 744 of 2005 Republic –Vs- The Msambweni Land Disputes Tribunal** Exparte **Formation House Ltd** (hereinafter application No. 744 of 2005) in which it sought leave to bring Judicial Review proceedings, inter alia, to prohibit the Tribunal from determining the Plaintiffs claim in Case No. 20 of 2005. On 5<sup>th</sup> September 2005 the High Court granted an order of stay of the delivery of the award. Whether the Tribunal was in disregard of this Court order when it delivered its decision on 16<sup>th</sup> September 2005 is unclear.

10) What is more clear is that following the changes made in the Register of the suitland, Formation House Ltd returned to Court in Application No. 744 of 2005 and on 14<sup>th</sup> March 2006 obtained an injunction expressed as follows-

***“(2) THAT temporary prohibitory injunction do issue restraining the Interested Party Seif Salim Mwakarim from selling, leasing, disposing, entering upon or otherwise or interfering with the suit property known as Kwale/Galu Kinondo/40 for a period of 14 days.***

***(3) THAT the order of injunction be registered against the title to the suit piece of land.***

***(4) THAT the Chamber Summons dated 14<sup>th</sup> March 2006 be served upon the Respondent before the interpartes hearing on 27<sup>th</sup> March 2006.”***

11) That order was entered in the register of the suitland on 16<sup>th</sup> March 2006 as an order ***“prohibiting all transactions until Civil Suit No. 744 of 2005 in the High Court Mombasa is determined.”*** This Court is told that those proceedings are yet to be determined.

12) Enter the next act in this drama. So as to deal with the Tribunal award that was consequently adopted as an order of Court, Formation House Ltd look out Judicial Review proceedings in Application No. 438 of 2006. The Plaintiff was not a party therein and in a Ruling dated 28<sup>th</sup> February 2007 Maraga, J (as he then was) found that the Tribunal had acted without jurisdiction and granted the order of certiorari quashing the changes made in the Register to the suitland in favour of the Plaintiff herein. It would seem that this paved the way for the Defendant herein to transact with Formation House Ltd in respect of the suit land. Formation House Ltd sold and transferred the suitland to the Defendant.

13) I have given this background so that the dispute herein can be placed into proper perspective. This Court is aware that this may very well be the Plaintiffs final curtain call in this drama. If he were to be shut out then it would be a serious blow to his quest for ownership of the suitland. On the other hand, if the Plaintiff’s claim was to be completely frivolous then it would be unfair to saddle the Defendant with any further litigation.

14) One of the issues taken up by the Plaintiff is that the Defendant obtained title inspite of the prohibitory orders entered in the register. They were two prohibitory orders entered on 16<sup>th</sup> March 2006 and on 13<sup>th</sup> June 2006 in suit **Nos 744 of 2005** and **438 of 2006** respectively. **HCC 438 of 2006** was determined in favour of Formation House Ltd and so the order of prohibition in that respect would have been spent. What about that in No. 744 of 2005? Whilst I would agree that the prohibitory order was obtained by Formation House Ltd, the manner in which it was registered was to the effect that it banned all transactions until the cause was determined. If then, as the Court is told, that Cause has not been

determined then how would the changes be effected on the register? This, from the Defendants standpoint, may not be serious issue in view of the following words of Maraga, J in the ruling of Misc. 438 of 2006-

***“That decision is null and void as it was made without jurisdiction and in defiance of an order staying all proceedings relating to that title which had been given in HC Misc. Application No. 744 of 2005 which had been served upon that Tribunal.”***

So it is possible that Misc. 744 of 2005 will be determined against the Plaintiff. But for purposes of fidelity to the law I would hold that it is a fair question for the Court to consider and determine how the changes in the Register making Formation House Ltd the registered owner passed over an existing prohibitory order.

15) That said, the Court agrees with the Defendant that the Plaintiff’s cause cannot be sustained without involving the first registered owner and perhaps subsequent registered owners that preceded the Defendant. This is because the Plaintiff’s allegation is that the mischief started when the land was unlawfully registered in favour of Rosemary Njoki Nyanjui.

But this non-joinder is curable by an amendment to pleadings to enjoin the necessary party/ies. It would be too harsh for the Court to strike out the cause of action for only this reason. In addition the Plaintiffs allegation that the Defendant had full knowledge of the contest in respect to the ownership of the suitland and the existence of the prohibitory order will have to be tested by way of evidence against the Defendants position that it is a bonafide purchaser for value without notice.

16) This Court is also of the view that the decision of Maraga, J (as he then was) in Misc. 438 of 2006 did not have the effect of determining the issue of ownership of the suitland with finality. The Court held, without going into the substance, that the Tribunal did not have jurisdiction to deal with the dispute between the parties. That dispute is now before a proper forum, parties should be given a chance to ventilate their positions and a decision made on merit.

17) The upshot is that the application dated 12<sup>th</sup> October 2009 and filed on 14<sup>th</sup> October 2009 is hereby dismissed without costs.

18) This is an old dispute and should not be allowed to linger on much longer. For this reason I do hereby order that parties attend to all pre-trial motions within 45 days hereof and set down the suit for hearing.

***Dated and delivered at Mombasa this 29<sup>th</sup> day of August, 2012.***

**F. TUIYOTT**

**JUDGE**

**Dated and delivered in open court in the presence of:-**

**Njuguna for the Plaintiff**

**Abdalla for the Defendant**

**Court clerk - Moriasi**

**F. TUIYOTT**

**JUDGE**