



**REPUBLIC OF KENYA**

**High Court at Malindi**

**Civil Case 141 of 2010**

**PHILIP MUTISO MAKAU .....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL on behalf of**

**1. MINISTRY OF LANDS & SETTLEMENT**

**2. THE CHIEF LAND REGISTRAR**

**3. THE DISTRICT LAND REGISTRAR, KILIFI .....1ST DEFENDANT**

**4. WINNIE JUMWA MUFULO .....2ND DEFENDANT**

**5. BAKARI ABDALLA KABATHE .....3RD DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit against the defendants seeking various orders against the defendants including declarations, inhibitions and eviction. He avers that he purchased two plots namely CHEMBE/KIBABAMSHE/430 and 431 from Mohamed Salim and Katana Kalama, respectively, in the year 1980 and was issued with titles in the same year. He subsequently discovered that the said properties had been fraudulently registered in the names of the 2nd and 3rd defendants.

2. Only the 1st defendant filed a defence denying the plaintiff's claim. In respect of the 2nd and 3rd defendants an interlocutory judgment was entered by the Deputy Registrar on 26th January, 2011. This judgment is erroneous in light of the provisions of the old civil procedure rules that made no provision for entry of a default judgment in respect of a claim such as laid in this case against the said defendant. That judgment is set aside *ex debito justitiae*.

3. During the trial, only the plaintiff adduced evidence. He relied on a set of documents including two sale agreements Exh. 1 and 2 and titles issued in his name under the Registered land Act, in 1980. He claimed that the original titles held by the vendors were surrendered to the Land Registry.

4. During cross-examination, the plaintiff admitted that he did not sign the alleged sale agreements and further that he did not conduct a search to confirm the vendors' titles before purchase. He maintained however that the subsequent transfers to the 2nd and 3rd defendants were fraudulent because green cards in his favor and in respect of the property were missing.

5. I have considered the pleadings on record, the plaintiff's evidence and the submissions of counsel Mr. Kenzi. Regarding the alleged fraudulent transfer, it has been proved that the plaintiff did not

consent to the transfer of the suit property to the 2nd and 3rd defendants in the year 2001. However, in the circumstances of this case the plaintiff needed to establish that the persons from whom he allegedly purchased the property held title to the land. Beyond his verbal assertions, there is no firm proof that they were. The plaintiff did not conduct a search before the alleged sale and the green cards are not before the court. Neither did the plaintiff produce any search in respect of the period when he was allegedly registered as the owner of the property (between 1980 and 2001).

6. There is also evidence of an embargo over the suit property as at 26th November, 2010 when this matter was first placed before my predecessor Omondi J. on a certificate of urgency. The plaintiff also acknowledges this fact in his evidence but he asserted that no such embargo was in place at the time of purchase. The question that must be answered is whether the plaintiff has established fraud against the defendants. Against the 2nd and 3rd defendants no evidence at all was tendered. As against the first defendant the evidence is of such a sketchy nature that the court can only find fraud by making surmises. The legal circumstances in which the transfers to the 2nd and 3rd defendant were made are unclear. Ditto the circumstances in which the plaintiff obtained title.

7. The submissions of the plaintiff contain correct statements of law. But the nature of the plaintiff's evidence is such that the said legal principles cannot be applied to his case. Cancellation and rectification of titles is only available where mis representation or fraud is proved against the registered proprietor of the suit property in this case the 2nd and 3rd defendants. In the case of **Wareham t/a A. F. Wareham & 2 others vs Kenya Post Office Bank (2004)2 KLR 91** the Court of Appeal held inter alia that in our adversarial system cases are tried and determined on the basis of pleadings, issues of fact and law framed and the burden is on the plaintiff to prove on a balance of probabilities, the existence or non-existence of facts in issue or facts relevant to the issue.

8. Applying that test to this case, I am not persuaded that the plaintiff has discharged the burden of proof in this case and I will dismiss it. Each party will bear its own costs as the defendants participation in the trial was minimal.

Delivered and signed this **21st** day of **December, 2012** in the presence of Mr. Kenzi for the plaintiff, Ms. Kiti for 1st Defendant.

**C. W. Meoli**  
**JUDGE**

MR. MATATA – We ask for certified copies of proceedings.

**C. W. Meoli**  
**JUDGE**

COURT – Proceedings will be supplied.

**C. W. Meoli**  
**JUDGE**