



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 606 of 2001

BROMINE INVESTMENTS LTD.....PLAINTIFF
VERSUS
1. KALUME KARISA MBITHA
2. NANCY KHANJILA KALUME.....DEFENDANTS

Coram:
Mwera J.
Mogaka for Plaintiff
Oddiaga for Defendants
Furaha Court Clerk

JUDGMENT

Before embarking on drafting the judgment herein it appears pertinent to comment that this is an old case which was commenced by way of plaint dated and filed in court on 4th December, 2001 and the first proceeding followed the next day. There were several firms of advocates either for this or the other side and various interlocutory proceedings. At some stage the defendants opted to act in person. In the file is KLF CR. Case file No. 1371/2000 and also Constitution Petition No. 57/2011 which appears to be on-going. It is not clear why these two files were attached to the present one but probably that will emerge with time. This file has passed through several judges' hands including the undersigned, before getting to this stage. Pleadings filed will be reverted to presently, but suffice it to observe that with all the foregoing, in the event a document or page fell off or cannot be easily traced on the file, all that this court can do at this stage is its best in order to conclude the trial.

Having remarked as above, the pleadings this court has found on record that form the basis of the trial may be noted as follows:

1. The Plaint dated 4th December, 2001 filed by M/S Mogaka, Omwenga & Company advocates.
2. The Defence and Counter-Claim filed on 9th January, 2002 by M/S S. M. Madzayo & Company Advocates.
3. The Reply to Defence and Defence to Counter-claim by the plaintiff dated 15th January, 2002.
4. The Amended Defence and Counter-Claim dated 5th May, 2005.

Apparently sets of issues probably were not filed but that will be dealt with after reviewing the evidence and the submissions.

In the plaint it was pleaded that at all material times the plaintiff company was the owner of and entitled

to possession and occupation of a certain plot of land known as KILIFI/MTONDIA/61 (plot No. 61) measuring 14 acres. That sometime in 1993 the defendants trespassed over that land. A complaint was laid before the police who proceeded to prefer KLF SRM C.R.C. No. 1371/2000 (above). That the defendants were cultivating, erecting structures and mining coral bricks on the suit land, plot No. 61 – all which caused the plaintiff loss of user of the land and damage. So it sought an injunction directed to the defendants to restrain their acts over plot No. 61. It was pleaded that the defendants further be directed to pull down their structures and remove the debris.

The defendants filed a defence and a counter-claim. They denied the plaintiff's claims as to ownership of the subject plot and instead averred that the 1st defendant was in fact the lawful owner of plot No. 61 (old plot No. 445D) in Mtondia Settlement Scheme. That he purchased in 1990 from one Charo Randu Nzai – the allottee of the suit plot by the Settlement Fund Trustees (SFT). That after the purchase the defendants proceeded to occupy plot No. 61 and develop the same – lawfully, continuously and uninterrupted. That, they so occupied the plot until 2000 when the plaintiff came along with its claim. It was further pleaded that the plaintiff purportedly bought plot No. 61/D TEZO/ROKA Settlement Scheme from on Zakaria Orwa – a totally different property. It was alleged that subsequently the plaintiff employed fraudulent and mischievous methods to obtain registration over and transfer to itself plot No. 61 (subject here) and caused KLF SRM CR. Case 1371/00 to be preferred against the defendants.

In their counter-claim the defendants claimed that by fraud and error the plaintiff company got registered over plot No. 61 (in suit) instead of plot No. 61D Tezo/Roka Settlement Scheme. Accordingly, this court should issue an order for the relevant land register to be rectified to enable the defendants to enjoy occupation of their plot as *bona fide* purchasers. They prayed for a declaration that they were the lawful owners of plot No. 61 Mtondia Settlement Scheme (old plot No. 445D), an injunction to bar the plaintiff from interfering with the defendants quiet enjoyment of the subject plot and an order to rectify the register accordingly.

In the reply to the defence and defence to the counter-claim, the plaintiff joined issue with the defendants reiterating its own claim and denying that by the defendants. It added that the defendants do strictly prove their claim in the counter-claim or the same be thrown out for being defective and bad in law.

This pleading was followed on 6th May, 2005 with an amended defence and counter-claim filed by the same M/S S. M. Madzayo & Company Advocates with focus on the counter-claim. In this, the defendants set out particulars of fraud against the plaintiff company. They alleged that it purported that a genuine transfer of lease in respect of Plot No. 61 had been effected in favour of Zakaria Orwa Ogoye; misrepresented that plot 61/D Tezo-Roka was the same as plot No. 61 Mtondia – and claiming interest in the latter; used a wrong form R21 instead of R22 as per the Registered Land Act; and also used a partly hand-written transfer of lease form.

The trial opened before the undersigned on 7th April, 2005 with James Oburu (PW1) an executive officer at Kilifi court producing KLF CR. Case 1371/2000 file, in which the defendants were charged with trespass. They were acquitted on 10th July, 2001 with the learned trial magistrate remarking that:

“Though the accused are acquitted of the offence, they should be made to understand that the acquittal does not make them the owners of the land as there is no doubt that the land is properly registered in the name of Bromine Investments.”

The charge had been stated to be over plot No. 61/TEZO ROKA/MTONDIA (Exhibit P1).

Bharat Ruparelia (PW2), the director with the plaintiff company, entered the witness box and stated that they acquired the suit land from one Zakaria Orwa for Shs. 1 million and proceeded to obtain a certificate of lease (Exhibit P2). The plot was without any development and PW2 was shown the beacons. Due documents were obtained ending in registration in favour of the plaintiff company. PW2 also displayed a copy of application for consent (Exhibit P3) since plot No. 61 was agricultural land. The witness called the locality – Tezo/Roka/Mtondia. A transfer of lease was also produced (Exhibit P4). That in 1998/99 PW2 found a house built on the plot by somebody. A complaint was lodged with the police. A

prosecution followed and PW2 testified against Mr. & Mrs. Kalume (the defendants) who were later convicted. So the plaintiff had come to court to obtain orders so that the plaintiff company could have its land back, get paid compensation and have the house on the plot demolished. That PW2 had paid all the rates in respect of the suit plot (Exhibit P5A, B). He denied the allegation in the counter-claim that his company used wrong documents to buy the plot. He asserted that it bought that plot from a known person, Zakaria Orwa, through Zambirawalla Agencies in 1991/92. The sale was by agreement signed on behalf of Orwa, a former DC (Kilifi) who had retired to Kisumu, by his son Ken Oburu who transacted for him things at Kilifi.

On cross-examination, PW2 said that he made payments by cheque in the name of Zakaria Orwa Ogoye in July, 1993 after title was issued on 21st February, 1992, after making an advance payment.

PW2 said that the land was at Kilifi. He had heard of Tezo Roka Scheme but Orwa had the land at Mtondia – not Tezo Roka. The witness' partner Abdallah Hussein Gulam was shown the plot by Orwa. It was an empty place when that partner showed the witness the plot. There was a land control board meeting but PW2 could not recall who was present from the seller's (Orwa) side. He did not attend it. He was sick at that time and his partner did most of the things, keeping PW2 informed. The witness appeared to be of the view that Orwa later died and Ken Oburu got a power of attorney. The witness was then shown search certificates, one dated 24th June, 2005 for KILIFI/MTONDIA – application by the plaintiff – 14 acres, and another dated 24th June, 2005 i.e. KILIFI/MTONDIA/61 – 12.7 acres absolutely owned by SFT. The court was told that PW2's said partner, since deceased, had carried out a search before purchase at Mtondia – not Tezo-Roka. The witness said that he paid for the land but his partner followed up with registration and transfer of lease (Exhibit P4). When PW2 visited the plot in about 2000 he found the defendants having built a house there and were farming. They told him that the plot was their property. Its boundaries had not been marked. PW2 was shown a lease document dated 24th August, 1974 in the name of Zakaria Orwa, title No. 61/D TEZO ROKA SETTLEMENT SCHEME. He maintained that their transaction related to Mtondia Settlement Scheme. He did not know that there was another scheme called Tezo Roka, or that the two were separate.

On re-examination the court heard that the negotiations to buy plot No. 61 took place in 1991 and PW2's partner had to pay Shs. 200,000/= soon after the agreement. The balance was paid in 1993 after the plaintiff's sister company helped out. PW2 visited the plot, boundaries were marked and his partner showed the witness a copy of lease (DMFI-3) to Orwa. He visited the plot between 1991 and 1998 and then on the 2000 visit he noticed building on the land, occupied by the 2nd defendant. That was reported to the police. There was no further hearing and the plaintiff closed its case on 6th May, 2009. The defence opened on 16th September, 2010 before Ibrahim J, as he then was.

Kalume Karisa Mbitha (1st defendant, DW1), a retired army officer told the court that he had lived on his land at Mtondia – plot No. KILIFI/MTONDIA/61 since 1990. The plot is in a settlement scheme. The 1st defendant bought the land from Charo Randu Nzai for Shs. 90,000/=. That the seller Nzai had documents from SFT dated 22nd July, 1982 (Exhibit D5). Mbitha knew his neighbours Kalama and Maisha. When he was waiting for his title the plaintiff company's agent arrived to claim the land. Nzai died in 2006. DW1 referred to a sale agreement dated 12th January, 1990 (Exhibit D1) over plot No. 61. He paid Shs. 25,000/= (Exhibit D2) and then Shs. 35,000/= on 3rd February, 1994 (Exhibit D3). A further payment was made on 30th September, 1996 (Exhibit D4) – all payments were witnessed. The 1st defendant's wife was living on the land. When the plaintiff's agents laid claim over the suit land, that was followed by a complaint to the police and criminal charges of trespass were laid at Kilifi court. The 2nd defendant was on 17th May, 2000 arrested and charged with an offence of “*detainer*” of which “*they*” were acquitted. DW1 said that it took time to obtain a title to the said plot and at some point he was posted to Yugoslavia. The defendant appeared to say that the plot once belonged to SFT “*before the records were proper*”. Then he marked for identification a list of numbers for Mtondia Scheme (DMF1 6). On a visit to the lands office, the 1st defendant learned that the land in issue had not been adjudicated. It was still under SFT awaiting discharge. That the lands officers would come to testify. DW1 had seen the plaintiff's title – a lease hold referring to Tezo/Roka Scheme – a different scheme in Kilifi. That is where the

plaintiff's property was – not at Mtondia where the defendants' plot No. 61 was. The 1st defendant knew Zakaria Orwa, once a District Commissioner at Kilifi. He had not come to testify. Neither did his attorney/agent. The court heard that titles at Mtondia were freehold – not leases. He asked the court to dismiss the suit and allow the counter-claim.

In cross-examination, the 1st defendant answered that Orwa was a District Commissioner at Kilifi between 1973-1975. He left and later died on 30th July, 1999. The defendant was told that the land in issue was sold through the power of an attorney. He could not trace the name of Randu at the SFT offices and his agreement did not state how many acres he was buying. Referring to the plaintiff's title (Exhibit P2) it referred to KILIFI/MTONDIA/61 on which the defendant lived – 14 acres in area. That the certificate of lease issued on 21st February, 1992 was with effect from 1st January, 1974. This defendant saw this as a fraud, which he REPORTED. Charo Randu Nzai who sold him the land died before he obtained a title. The 1st defendant maintained that the plaintiff land was in Tezo/Roka – measuring 12.7 acres. He did not have a title to the plot he bought and the seller (Nzai) did not have one either. The land was agricultural; the 1st defendant did not obtain a land control board consent for the transaction. That one Mary Kai, land registrar Kilifi had testified that the subject land was registered in the name of the plaintiff company, Bromine with no change in the records. It was not disclosed in which proceedings Mary Kai testified..

On re-examination it was stated that the plaintiff bought the land from Orwa; he had a title which was transferred to the plaintiff. The hearing was adjourned on 13th September, 2011 by Okwengu J, as she then was. Then there followed proceedings between 13th October, 2011, mainly by way of mention (all not typed) until 29th February, 2012 when DW2 Johnston Balo appeared in the resumed hearing before Kasango J – a settlement officer from Kilifi District, department of land and adjudication. When DW2 was about to produce records relating to Mtondia Settlement Scheme, and particularly about plot No. 61, the learned judge noted that some of those records had not been supplied to the plaintiff's counsel. The defence was directed to do the needful.

On the 23rd April, 2012 Mr. Mogaka for the plaintiff drew Justice Kasango's attention to the Constitution Petition No. 57/2011 filed by the 1st defendant, apparently seeking orders to compel the District Adjudication Officer (Kilifi) to issue the petitioner with another title to the same plot No. 61. Noting that the undersigned had substantially heard the present cause Kasango J directed that the petition be placed before me, recently reposted to Mombasa High Court for directions. So on 29th June, 2012 the undersigned directed the hearing to resume as counsel sorted out their various positions in the constitutional petition (No. 57/2011). Accordingly, hearing the defence case resumed on 25th September, 2012 with Lawrence Karung'e Ndung'u as witness number 2 (DW2).

DW2, a settlement officer from Kilifi for the past six years, told the court that he was conversant with Mtondia Settlement Scheme, outside Kilifi town. It was established in 1978, meant to settle landless people on sub-divisions thereat. Each plot had to have a file opened. DW2 had the original file for the suit plot No. 61 and he tendered a bundle of documents (Exhibit D6) containing all the relevant papers. The court heard that titles at Mtondia were freehold. List of beneficiaries was drawn up with Charo Randu Nzai being allotted plot No. 61 (Exhibit D6 – 28, 29). Referring to Exhibit D6-27 DW2 told the court that plot No. 61 was marked against one Nur Shire Nur. The witness did not have another list of plots and allottees. That on allotment the beneficiary ought to pay 10% value of the plot and occupy/stay on it. In the event of failure to comply with those two conditions DW2's office moves to allot the plot to another beneficiary. And that is what happened with Charo Nzai. He defaulted and that is how Nur Shire Nur became the new allottee. The receipt (Exhibit D6-20) showed that Charo Randu Nzai paid a legal fee on 22nd July, 1982 to SFT (Exhibit D6-21). The sale agreement between Charo Randu and Kalume Karisa (1st defendant) dated 12th January, 1990 was produced then further sale agreements followed between the same parties over the same plot No. 61 – on 12th January, 1990, 3rd February, 1994, 30th April, 1996 (Exhibit D6-22, 23, 26). As to the process of allotment of SFT land, after one pays the legal fee, one executes a charge and continues to repay the loan. On completion, the charge is discharged. The discharge and the transfer are forwarded to the land registrar to issue the title. That process was not completed in

the case of Charo Nzai regarding plot No. 61, Mtondia. So the plot remained in the name of SFT. DW2's records did not have allotment or discharge of Zakaria Orwa Ogoye regarding plot No. 61 either. And the plot was not retained by the Government for some public use.

On 9th November, 2001 a letter was written from the Ministry of Lands Headquarters (Nairobi) to DW2's Kilifi Office. The director required an official search of plot 61, adding that it was not clear how Zakaria Orwa came into the transaction of that plot. DW2 had no document that a lease was issued to Nur Shire Nur over this plot No. 61. All that because it required the process of making full repayment, getting a discharge of charge so as to enable DW2's headquarters to issue a lease.

It was heard in cross-examination that Nur Shire Nur was at one point allotted plot No. 61 and a charge and all relevant documents were given to him (Exhibit D6 – 192 to 201). And referring to what the record contained of transactions before DW2 joined the Ministry, focus shifted to a letter dated 15th April, 1993 (Exhibit D6-175). That by it the Director of Settlement asked the Kilifi office to make some clarification about three plots including plot No. 61. The Kilifi office responded on 10th May, 1993 (Exhibit D8-178), that plot No. 58 was documented for Wali Essak Jiwa but it was occupied by Nur Shire whose name appeared in what was called nominal roll against plot No. 61. And that this plot No. 61 had been documented to Nur Shire but Zakaria Orwa was in occupation, holding a certificate of lease. As for plot No. 63 in the nominal roll, it showed the names of Moses Mkorwa and Zakaria Orwa. In occupation was Kalume Kidhongo. None of them had documents. Rather confusing, this piece of story. However, DW2 went on to refer to a letter dated 25th January, 1993 from their Kilifi office (Exhibit D6-181) to the effect that while Orwa's name appeared in the nominal roll against plot No. 63, he was in occupation of plot 61, having a certificate of lease issued before SFT took over the scheme. The witness went on to testify that if plot No. 61 had been given to Zakaria Orwa before SFT took over the scheme SFT could not be in charge of that plot of which the Commissioner of Lands had already issued a title to Orwa. Then going to a letter of 9th November, 2001 from the Ministry of Lands Headquarters to the Kilifi office (Exhibit D6-174), there was doubt as to how Zakaria Orwa came into Mtondia Scheme. But then the clarification followed on 4th December, 2001 (Exhibit D6-176) [Note: while DW2 was referring to a bundle of Exhibit D6 and referring to document 176, the court bundle has the letter at document 172. Such variation could occur in other references in the different bundles of Exhibit D6, it can be opined]. DW2 said that the Kilifi office informed their headquarters that plot No. 61 was originally allotted to Zakaria Orwa by the Commissioner of Lands before the area became a settlement scheme in 1978. So the Kilifi office could not have power or control over plot No. 61. Then Orwa sold the plot to Bromine Investments. That Bromine did not take possession/occupation immediately. That Kalume Karisa bought the land from Charo Ruwa and proceeded to build a house on it – having no documents.

Moving to the letter from the land registrar's office at Kilifi to DW2's land adjudication and settlement office, the former communicated that a document of discharge and transfer of plot No. KILIFI/MTONDIA/61 IN FAVOUR OF Nur Shire Nur could not be processed because the plot was already registered in the name of Zakaria Orwa. The witness proceeded to refer to several errors of allottees (Exhibit D6-27) ending with the transfer of lease to Bromine Investments Limited on 17th February, 1992 (Exhibit D6-98) from Zakaria Orwa on the strength of a consent of transfer dated 28th November, 1991 (Exhibit D6-99). DW2 could not see/trace such a land control board consent regarding the deal between Charo Randu and Kalume (1st defendant).

In re-examination the court heard that there was no lease for plot No. 61. If it was not under the charge of their office, the record there could not contain such correspondences. Referring to payment receipts (Exhibit D6-96,97) issued to Zakaria Orwa from DW2's office, DW2 remarked that such receipts could not be issued if plot No. 61 was not under that office. Further, that the process of charge to discharge to Zakaria Orwa was never completed and to DW2 plot No. 61 was owned by Nur Shire Nur. In such cases any registration and transfer could be invalid. The court notes that DW2's testimony in re-examination ought to be seen in the light of his cross-examination when he gave evidence that plot No. 61 was granted to Zakaria Orwa long before Mtondia became a settlement scheme in 1978 and thus the plot fell outside the charge/control of the land and settlement office after establishing a settlement scheme. The witness had also alluded to errors appearing against plot numbers 58, 61, 63 in the nominal rolls involving

Zakaria Orwa, Nur Shire Nur and others which the Kilifi office tried to rectify/clarify with their headquarters.

Next was Antony Tune Karani (DW3), an assistant land registrar (Kilifi) for three years. He brought a bundle of documents (Exhibit D7) and proceeded to refer to those relating to plot No. 61. He told the court that on 11th September, 1974 the plot was shown to be the property of the Government of Kenya. On 25th February, 1981 the owner was SFT (Exhibit D7-1). On 11th September, 1974 lease thereof was granted to Zakaria Orwa who transferred the same to Bromine Investments Limited on 21st February, 1992. Bromine then charged it on 2nd August, 2002 for Shs. 10 million (Exhibit D7-2, 3). This was contained in what is generally called the “*green card*”. The witness then moved to the second register of plot No. 61 (Exhibit D7-5). This had one entry only dated 8th September, 1980 with SFT as the plot owner. Then in the exhibit there was this letter from CID (Exhibit D7-12) that plot No. 61 was under investigation.

DW3 then returned to the first register and said that the property was said to have been given to Zakaria Orwa on 11th September, 1974 by a government lease. But he could not trace a copy of the lease in the register, as it should be, at all. There was no copy of documents leading to the transfer either except for the entries on the “*green*” card. Plot 61 had two files at DW3’s office. He told the court that when allotment is granted by SFT a copy of a charge is filed. That was not the case here. That if the land begins off as a freehold, it has a register/file to that effect. In the event a lease is granted over it later, a second register is opened. Considering the two registers in his hands, DW3 was of the view that the land had been leased to the plaintiff company (Bromine). The second register was opened when Mtondia became a settlement scheme. To DW3, following that the lease should have been surrendered to the government so that a process followed to make plot No. 61 a freehold under SFT who could then issue a title. The witness then concluded that the transfer from Zakaria Orwa to Bromine must have been supported by a transfer of lease and a land control board consent.

In cross-examination DW3 stated that the land registrar keeps the original transfer of lease with the lease. And in the case of Zakaria Orwa there must have been a lease document. The witness could not explain why these documents were not in their records. The witness repeated that on 17th September, 1974 the Government granted a lease to Zakaria Orwa. It was/is valid. It could not be extinguished. The rights that accrued to Orwa were then transferred to Bromine. That from the date of the lease to Orwa, 11th September, 1974 the land was not available to any other person. There was no court order to nullify the title of plot No. 61 to Zakaria Orwa or Bromine Investments Limited. That closed the trial and both sides submitted.

The plaintiff company went over the pleadings herein, the oral and documentary evidence from both sides and particularly adopted the defence evidence (Lawrence Ndung’u DW2, Anthony Karani DW3) that the records they presented to court (borne in Exhibit D6, 7) were clear that plot No. 61 Mtondia was given to Zakaria Orwa, by way of a Government lease before the area became a settlement scheme. It did not fall under the settlement office (after 1978) and so the lease Orwa transferred to the plaintiff was not invalid in any way. That a land control board consent was exhibited before court together with the transfer. Submission addressed the other parts of evidence e.g. the confusion that transpired when Orwa’s name appeared e.g. against plot No. 63 but remained firm that all along Orwa was given plot No. 61, Mtondia which he later transferred to Bromine. That the defendants’ allegation in the counter-claim that the plaintiff company employed mischief and fraud to be registered over the subject plot was not proved while the plaintiff had proved its claim.

On their part the defendants similarly went over the pleadings and the evidence – oral and documentary. The court was urged to find that a copy of the lease transferred to the plaintiff had not been produced here. Further, that Ken Oburu alleged to have been the agent of Zakaria Orwa in the sale transaction did not testify in these proceedings. The court was told that plot No. 61 was still a plot in Mtondia Settlement Scheme. SFT at no time sanctioned issuance of title to this plot because the charge over it had never been discharged. Thus Charo Randu Nzai was the first allottee of plot No. 61 which he later sold to the defendants. And that at some stage the 1st defendant commenced proceedings to compel

the Director of Adjudication to rectify the records by having him registered over the suit property. That the plaintiff has not opposed these proceedings. If the court may remark on these proceedings, it looks like the defendants are referring to the Constitutional Petition No. 57/2011. It is still pending and it was not brought to the attention of the court whether the plaintiff is a party in it or was served with it. But be that as it may.

The defendants added that even as late as 1992 Orwa paid fees to SFT meaning that plot No. 61 was under the control of that office. The two registers at the land office (Kilifi) regarding the subject plot were referred to in the sense that on 11th September, 1974 plot No. 61 could not be owned by the Government of Kenya and also Zakaria Orwa at one and the same time. Without stating clearly why the plaintiff's claim of ownership should be dismissed while that of the defendants is sustained, the rest of the submission tended towards demonstrating that plot No. 61 Mtondia was and is still under SFT. That Orwa's lease title was cancelled when Mtondia became a settlement scheme. Now the decision.

Having regard to all the above, this court is of the mind that the issue to decide is:

- (i) whether plot No. 61 Mtondia once belonged to Zakaria Orwa who then transferred his lease to Bromine Investments Limited or
- (ii) whether Charo Nzai was allotted plot No. 61 which he validly sold to the defendants.

A composite answer is in order. From the evidence of PW2 (a director of the plaintiff company) and that of Lawrence Ndung'u (DW2), a settlement and adjudication officer (Kilifi) and Anthony Karani (DW3), a land registrar (Kilifi) and the various letters and land documents placed before this court, Plot No. 61 Mtondia was given by way of a government lease to Zakaria Orwa on 11th September, 1974 and that is in the green card. Later in 1978 the area was declared a settlement scheme under SFT. SFT could deal with other plots of land in the area but not plot No. 61. It had since been alienated and so fell out of the control, procedures and processes followed by SFT when giving land to the allottees i.e. listing the allottees, giving them plots, insisting on payment of deposits and taking occupation. Then issuing charges which are discharged after full payment, followed by issuing freehold titles. Plot No. 61 was long out of this. In 1974 it had been alienated to Orwa by a Government lease.

Charo Nzai was allotted plot No. 61; he defaulted on a thing or two and according to DW2, the plot was given out afresh to Nur Shire Nur. Then there followed a mixture of errors, omissions, mislisting of people and plots in the scheme. This elicited letters back and forth between the settlement office at Kilifi and the clarifications sought from the headquarters at Nairobi. Corrections were attempted or given and yet more queries followed as late as 2001. All appeared chaotic. In the meantime Charo Nzai, who had defaulted had been replaced by Nur Shire was selling the plot to the 1st defendant. It is not clear how at this point the settlement office had not come to realize that plot 61 was long ago alienated to Zakaria Orwa in 1974, before the settlement scheme in 1978 so as to appear to allot it to Charo (see Exhibit D6-172, 181, 182). Anyway, Kalume Karisa (1st defendant) proceeded to pay Charo; he moved and built on the plot. Charo never had a title to the plot. He had defaulted and Nur Shire had been allocated the plot. Kalume Karisa was therefore buying nothing from Charo. Charo had no documents of title and Karisa was not taking over plot No. 61 in order to pay off the charge and so ask SFT to process for him a title. This is agricultural land. Karisa did not even get a land control board consent to sanction his deal with Charo. It is thus no surprise that even as at the time the plaintiff's agent (PW2) found him on the land trespassing, he had no title. In the circumstances, Karisa could not even get a title to the plot.

More or else at the time Karisa was "*buying*" the plot, the plaintiff company had bought the lease rights from Orwa and had title in its name having presented valid transfer and consent documents. The record held in the office of the land registrar showed clearly how the lease to Orwa was entered in the register; he transferred it to the plaintiff. The plaintiff charged the property for Shs. 10 million

The court was told that Orwa's lease was not produced here. But the records, at the lands office had all the required information. And that Ken Oburu, Orwa's agent did not testify here. The court did not discern what more he could add to the case. And that the plaintiff company played fraud and mischief, there was

not even an attempt to prove this. Or that Orwa paid some money to SFT in 1992 regarding plot No. 61 Mtondia. That could have been out of ignorance or error. Plot No. 61 was alienated to him in 1974 by the Commissioner of Lands. It could not and did not form part of Mtondia Settlement Scheme declared in 1978.

So all in all the plaintiff's suit succeeds with costs and the defendants' counter-claim is dismissed with costs. The defendants have no right to remain on the suit premises or using the same. They should consider pulling down the structures they erected there and remove the debris themselves or the plaintiff does so at their expense after the next forty five (45) days. The court was not addressed in terms of damages and so does not award any. Judgment accordingly.

Dated/Delivered on 11th December, 2012.

J. W. MWERA
JUDGE