



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
HIGH COURT CIVIL SUIT NO. 1618 OF 1995

MUSA HERSI FAHIYE.....1ST PLAINTIFF
MOHAMED OMAR.....2ND PLAINTIFF
REPUBLIC OF SOMALIA.....3RD PLAINTIFF

VERSUS

SULEIMAN RAHEMTULLA OMAR.....1ST DEFENDANT
ZARINA SULEIMAN OMAR.....2ND DEFENDANT
ATTORNEY GENERAL.....3RD DEFENDANT
REGISTRAR OF TITLES.....4TH DEFENDANT
COMMISSIONER OF LANDS.....5TH DEFENDANT

JUDGMENT

At the centre of this dispute is a property known as LR. No.1870/III/50 (hereinafter called the suit property) measuring about 2¹/₂ acres and located in Spring Valley, Nairobi, Kenya. This property is said to have been purchased by the Somali Government in 1972 and registered on 12th April, 1973 in the name of Government of Somali Democratic Republic.

It is the plaintiffs' case that upon registration, the said property became sovereign and belonging to the people and Government of Somalia. Under the doctrine of Committee of Nations, all privileges accorded to properties belonging to foreign nations extended to this particular property and the Kenya Government had the duty to protect the diplomats and property of foreign governments.

Sometimes in the year 1991, there was a collapse of the Government of Somalia and all diplomats of Somali government sought refuge in countries they had been accredited. That accreditation and protection was to be extended to the properties of the foreign government and in this particular case, the Somali Government, until a new government came into place regardless however long it took.

As at the time the Somali Government collapsed, its Embassy was located at International House in the

Central Business District of Nairobi. After the said collapse, the officials then present in the Republic of Kenya, relocated to the suit property and continued to carry out minimal official duties to assist Somali citizens then resident in Kenya. This property was the Ambassador's residence.

Sometime in 1994, Amhed Sheikh Mohamud, a former Ambassador, is said to have sold the Ambassador's residence by an agreement dated 8th August, 1994 between the Embassy of the Republic of Somalia and the 1st and 2nd defendants herein Suleiman Rahemtulla Omar and Zarina Suleiman Omar. The purchase price was said to be Kshs.15,000,000/- (Fifteen million). The plaintiffs in this suit set out to prove that the purported sale was not only unlawful and irregular under the Kenyan Law, but also breached International Conventions, Law and Practice as is required under the Committee of Nations and should be declared null and void.

The following grounds were advanced:-

1. There was at that time no government in place in Somalia and there could not be a sale between the government and any other person.
2. Even though the stated Government of Kenya position was that it did not recognize Somali Government, it had an obligation to protect its property under International Law until another government came into place.
3. In the circumstances, the Kenya Government should not have facilitated or consented to this sale. The defendants knew or ought to have known there was no Government in Somalia to sell any property. It was a matter of common knowledge.
4. No consideration passed between the parties. The purchaser did not pay any money to the Government of Somalia and strict proof would be called for. The plaintiffs also set out to establish that the Government of Kenya and the 1st and 2nd defendants knew the title to the suit property was lost and that proper procedure was not followed where title is lost.
5. The sale was fraudulent.

The plaint herein was first filed on 24th May, 1995, amended on 16th July, 2008 and further amended on 18th November, 2009. The defence was also amended resting with amended defence dated 20th August, 2008 and filed on 10th September, 2008. There is a reply to the amended defence dated 19th October, 2008 and filed on 22nd October, 2008. It would appear from the record that there was no amended defence to the further amended plaint which was filed on 18th November, 2009.

At the institution of this suit, only the 1st and 2nd plaintiffs moved the court. However, in the course of time the Republic of Somalia was joined as the 3rd Plaintiff. Equally, at the institution thereof only the 1st and 2nd defendants were cited but subsequently, the 3rd, 4th and 5th defendants were joined as parties.

It is important to set the descriptions of parties herein because one of the issues that has to be determined is the capacity (to sue) of the plaintiffs herein. The 1st plaintiff Musa Hersi Fahiyee is said to be a Somali national then residing in Nairobi and at all material times was the first counsellor in the Embassy of the Somali Democratic Republic in Kenya having been accredited in that capacity in 1989. The 2nd plaintiff Mohamed Omar, is also a Somali National then residing in Nairobi and at all material times was an attaché in the Embassy of the Somali Democratic Republic in Kenya having been so accredited in 1979. The 3rd plaintiff is a foreign sovereign duly recognized by the Republic of Kenya, and was at all material times prior to the institution of this suit, the registered owner of all that piece or parcel of land known as LR. No.1870/III/50 which it purchased in 1972 to serve as the official residence of its Ambassador to Kenya.

The 1st and 2nd defendants are said to have been the purchasers of the suit property by an agreement dated

8th August, 1994. The 3rd defendant is the Principal Legal Advisor of the government of the Republic of Kenya and is being sued on behalf of Registrar of Titles and Commissioner of Lands. The 4th defendant is the Principal Registrar of Titles recognized under the law to issue titles and record the same in the register. The 5th defendant is the officer empowered under the law to be in control of the land, Land Surveys, Land Registration and Recorder of Titles Departments in the Republic of Kenya.

In the detailed further amended plaint filed on 18th November, 2009 the plaintiffs have set out what they believe is their cause of action against the defendants. They reiterate the summary which I have already set out herein above and the particulars of fraud attributed to the 1st and 2nd defendants to the effect that;

(a) The 1st and 2nd defendants knew that the property herein belonged to and was registered in the name of a foreign government and proprietary interest and rights therein vested in a foreign state.

(b) The 1st and 2nd defendants knew that the sovereign state was Somalia.

(c) The 1st and 2nd defendants knew Somalia was engulfed and embroiled in civil war and that at all material times there was no effective government or effective authority in Somalia.

(d) The 1st and 2nd defendants knew that at all material times the Ex-Ambassador Amhed Sheikh Mohamud who they dealt with, and entered the purported agreements with, was not a representative of any government or authority in Somalia.

(e) The 1st and 2nd defendants knew at all material times the said Ambassador lacked the legal capacity, authority, and or power to enter into any contractual relationship as an Ambassador or diplomatic agent of so-called Democratic Republic of Somalia.

(f) The 1st and 2nd defendants knew that at all material times that the Democratic Republic of Somalia was no longer in existence empirically or recognized by the Community of Nations including the Government of Kenya.

(g) The 1st and 2nd defendants knew that in the aforesaid circumstances set out in the plaint, the said property of the Somali State could not legally or lawfully be sold or disposed off. Notwithstanding their knowledge as set out in (a) to (g) above, the 1st and 2nd defendants willingly proceeded to deal with the said Ex-Ambassador and the transaction relating to the suit property.

(h) The defendants knew or ought to have known that under the 1965 Vienna Convention on Diplomatic Immunity, and the Privileges and Immunities Act, Cap 179 of Laws of Kenya, it was a requirement that before any immovable property of a foreign state which had, has or which has previously had diplomatic relations with the Kenya Government, the Government of Kenya through the relevant Ministry (in this case the Ministry of Foreign Affairs and International Co-operation), has to be notified and its consent and approval sought as a matter of law and or protocol yet, the 1st and 2nd defendants knowingly and willingly proceeded, with the said transaction without notifying the Government of Kenya or obtaining its consent or approval.

The 1st and 2nd defendants are also faulted for knowing that, the consideration or price at which the Ambassador purportedly sold the property to them, was so low as to place any reasonable and innocent buyer on the inquiry yet they proceeded with the transaction. They should have known that, that consideration was so low that, the same amounted to evidence of fraud yet they knowingly and willingly proceeded with the transaction. It is also alleged that the 1st and 2nd defendants paid the said purported price or consideration to the said Amhed Sheikh Mohamud in his individual capacity knowing they were paying him for his personal gain and enrichment, and not on behalf of his purported Principal the Government of the Democratic Republic of Somalia.

As a result of all the foregoing matters, it is the plaintiffs case that, the Somali State and or the Nation of Somalia and the Somali people have suffered immense loss and damage and that the 1st and 2nd plaintiffs as Somali nationals, and the last sitting accredited Diplomatic agents, have suffered loss, damage and diplomatic embarrassment.

It is further pleaded in the further amended plaint that the 1st and 2nd defendants entered the suit property on 25th January, 1995 and took possession thereof which entry was unlawful, illegal and amounted to trespass. The entry into the suit property by the 1st and 2nd defendants also led to destruction of movable properties and assets belonging to the Embassy of Somalia and as a result, the 1st and 2nd plaintiffs suffered loss and damage.

It is also stated in the plaint that after the Ex-Ambassador Mr. Ahmed Sheikh Mohamud had executed the transfer of the suit property, he received the sale proceeds or portion thereof and disappeared. It is their case that he may have fled from Kenya with his bounty from the said transaction to avoid facing the consequences of his acts and the full force of the law. The 1st and 2nd plaintiffs formally notified the Government of Kenya of the foregoing matters with the relevant authorities in the government including the Ministry of Foreign Affairs and International Cooperation and also the Kenya Police but no action has been taken or response received.

The 1st and 2nd plaintiffs have instituted these proceedings on their own respective behalf and also in a representative capacity on behalf of Somali State and Nation and the people of Somalia and on behalf posterity.

There are several orders sought out in the said further amended plaint, the salient of which are:

(a) There be a declaration that the sale and transfer of all that property known as LR. No.1870/III/50 situated in Spring Valley within Nairobi to the 1st and 2nd defendants was illegal, unlawful and a nullity *ab initio*.

(b)Further to or in the alternative to (a) above a declaration that the aforesaid sale and transfer of all that property known as LR.No.1870/III/50 situate in Spring Valley within the Nairobi area to the 1st and 2nd defendants was fraudulent.

(c)A declaration that the ownership of all proprietary interest and rights in all that property known as LR.No. 1870/III/50 situate in Spring Valley in the Nairobi area vests in the sovereign State or Nation of Somalia represented by the Government of the Republic of Somalia.

(d)An order for the delivery up of the title documents to LR. No. 1870/III/50 to the 3rd plaintiff.

(e)An order for rectification of the title to LR. No.1870/III/50 to revert its ownership to the Government of the Republic of Somalia.

e.(i) an order directing the 3rd , 4th 5th defendants to jointly and severally execute orders (d) and (e) above.

There are other alternative orders set out in the prayers and also an order of a permanent injunction to restrain the 1st and 2nd defendants by themselves, their agents and or servants or any party claiming under them or their titles or names or otherwise from entering upon, remaining or dealing with the suit premises in any other manner whatsoever. There is also a prayer that the 1st and 2nd defendants be compelled to give an account of all the immovable properties, assets and goods belonging to the Embassy of Somalia which were removed from the suit property. The other prayers are limited to damages for wrongful eviction, detinue, trespass, loss and destruction of any goods not accounted for, exemplary damages, costs and interest.

At the instance of the plaintiffs after the plaint was first filed, an application by way of Chamber Summons for injunction orders was prosecuted and a ruling delivered by Ole Keiwa J. (*as he then was*) on 27th March, 1996. The said ruling granted orders in favour of the plaintiffs restraining the 1st and 2nd defendants Suleiman Rahemtulla Omar and Zarina Suleiman Omar from selling, charging, disposing or parting with possession of or in any other manner, dealing with the suit property or titles thereto so as to diminish the value thereof until further orders of this court. The two defendants were also restrained from demolishing any buildings or erections, carrying out any structural changes or erections or carrying out any renovation works or reconstruction of any buildings on the said property until further orders of this court.

Years later, the 1st and 2nd defendants moved the court by way of an application for security for costs based on the apprehension that, if the suit were to be dismissed, the plaintiffs would be incapable of paying the costs incurred in this litigation. In a ruling delivered on 11th March, 2008 Osiemo J. made an order that the plaintiffs do deposit a sum of Ksh.3,000,000/= as security for costs. The plaintiffs complied therewith.

In the amended defence of the 1st and 2nd defendants filed in court on 10th September, 2008 the two defendants denied the allegations raised against them by the plaintiffs and stated that they came to know of the existence of the said property from an Estate Agency by the name Jorim Enterprises, and subsequently a meeting was arranged between them and the Ambassador Ahmed Sheikh Mohamud.

The thrust of the defence of the 1st and 2nd defendants is that, they bought the property from a party who had capacity to deal with it in the normal course of dealings and that, the Sale Agreement was entered into between the parties which was executed and properly performed. The Somali Republic received consideration in accordance with the said agreement. The 1st and 2nd defendants were also set to prove that all procedures relating to purchase of property in Kenya, and applicable to this transaction, were duly followed. The 1st and 2nd defendants received a good, valid and indefeasible title in the circumstances. This is not a claim for purchase price and no claim has been made for the same and against the Kenya Government that would affect any claim against the defendants and finally, the 1st and 2nd plaintiffs lack the capacity to bring this suit as claimed.

The Ambassador of the 3rd plaintiff one Amhed Sheikh Mohamud also represented himself to the two defendants, which representation was acted upon, that he was duly accredited Ambassador of the Republic of Somalia. Consequently, the 1st and 2nd defendants made an inquiry through their then advocate Mr. K.S. Brahmbhatt as to whether the Ambassador had authority to sell the said property. This inquiry was made to the vendor's advocates Messrs. Kibunja and Mwitwi Advocates. Upon that inquiry, the vendor's advocates did confirm that their client and the requisite authority to transfer the suit property to the 1st and 2nd defendants. Thereupon the two defendants obtained a financial facility from Prime Capital and Credit Limited to be able to discharge their contractual obligation. Their advocate then released the purchase price to the advocates of the Embassy of the 3rd plaintiff and a conveyance was made in favour of the two defendants.

The conveyance having been made, the suit property thereafter passed to the two defendants who became the registered owners having been issued with the title thereto by the Commissioner of Lands on 25th June, 1995. The said Commissioner of Lands is said to have confirmed by a letter dated 28th August, 1995 that the conveyance had been sanctioned by the 3rd plaintiff by a letter dated 19th May, 1990 and was therefore duly recognized.

Upon acquiring the title to the suit property, the 1st and 2nd defendants sought and did utilize lawful means to obtain vacant possession. It is also the defence of the 1st and 2nd defendants that the subject conveyance was commercial and they did not hold any diplomatic nor sovereign status to bring themselves within the 1965 Vienna Convention on Diplomatic Immunity and Privileges and The Privileges and Immunities Act Cap 179 Laws of Kenya as alleged, and denied any allegations of fraud set

out in the plaint.

In the said amended defence, the plaintiffs' capacity to sue has been denied. It is the 1st and 2nd defendants defence that the plaintiffs are not entitled to bring this action in any representative capacity or at all. They therefore have no reasonable cause of action against the two defendants. It is also their case that, the Commissioner of Lands was requested by the Attorney General to confirm the title to the suit property which he did, and that decision has not been challenged by the plaintiffs. They have raised a counterclaim to the effect that, the 3rd plaintiff cannot maintain a suit against them, as they were innocent purchasers who have acquired good title over the suit property for valuable consideration, and therefore seek a declaration that they are the lawful owners of the suit property and entitled to possession without any interference from the plaintiffs and or persons claiming by or under them.

The plaintiffs called two witnesses in support of their pleadings. PW1 is Mr. Mohammed Osman Aden, who is a Diplomat in the Somali Embassy in Nairobi as a counsellor and Deputy Head of Mission. The 2nd witness PW2 is Mr. Ali Amhed Jama, the current Minister for Foreign Affairs in the Transitional Federal Government of Somali Republic.

On the other hand, the defence called two witnesses; the 1st being Mr. Stephen Kinyanjui Kibunja an Advocate of the High Court of Kenya who acted for the Somali Democratic Republic, represented by the Somali Embassy in this transaction. The 2nd witness is the 1st defendant herein, Mr. Suleiman Rahemtulla Omar. I shall address the evidence of these witnesses later in this judgment.

The genesis of the transaction that gave raise to this dispute is a letter dated 4th August, 1994 by Mr. K.S. Brahmhatt Advocate to Messrs. Kibunja & Mwiti Advocates the contents of which I deem necessary to set out in full. The letter reads;

“4th August, 1994

M/s. Kibunja & Mwiti Advocates

Cianda House

Koinange Street

NAIROBI

Dear Sir,

RE: LR. NO.1870/III/50 LOWER KABETE ROAD, NAIROBI

I am acting on behalf of Mr. and Mrs. Suleman R. Omar who are negotiating to purchase the above mentioned property.

As the property belongs to Somali Embassy, and I am told that you are an advocate acting on behalf of this Embassy. Will you please confirm whether the present Ambassador has authority from the Somalia Government to sell this property.

On receipt of your reply, I will be able to advise my clients accordingly.

Yours faithfully,

Signed

K.S. BRAHMBATT

Copy to:

Mr. & Mrs. S.R. Omar.”

On the following day, that is, 5th August, 1994 M/s. Kibunja and Mwiti advocates replied to the said letter in the following terms;

“5th August, 1994

**K.S. Brahmatt Esq
Jubilee Insurance Exchange
4th Floor, Room No.405 (A)
NAIROBI**

Dear Sir,

RE: LR. NO.1870/III/50 LOWER KABETE ROAD

Your letter of 4th August, ult. Refers

The ambassador assures us that he has authority to sell the property and since he is the duly accredited ambassador of the Republic of Somalia and his letters of accreditation have not been withdrawn then he has capacity to enter into an Agreement of Sale. He transacts all matters on behalf of the Republic of Somalia and he is in possession of the seal.

We are therefore satisfied he can sign the Agreement and the Transfer accordingly

**Yours faithfully,
KIBUNJA & MWITI**

Signed

STEPHEN K. KIBUNJA

The said authority to sell the suit property is premised on a letter dated 19th May, 1990 said to have been written by one Saadha Mohamed Gulleid holding a title of “Co-ordinator of Foreign Affairs”. That letter is addressed to the Ambassador, Democratic Republic of Somalia, Nairobi. Although it was in Somali language, a translation thereof has been annexed but there is an anomaly on the dates. Whereas the one in Somali language is dated 19th May, 1990, the translation in English is dated 19th May, 1994. That notwithstanding, the said letter reads as follows;

“DEMOCRATIC REPUBLIC OF SOMALIA

MINISTRY OF FOREIGN AFFAIRS

19th May, 1994

**To: Ambassador
Democratic Republic of Somaliya
P.O Box 30769
NAIROBI**

I am, pleased to inform you that the Government of Democratic Republic of Somaliya, has hereby given you the authority to sale the house/property of our Ambassador residence in Nairobi/Kenya No.LR./1870/III/50, Lower Kabete Road, Westlands.

The sale of the above property, will enable to assist you and the Embassy staff to offset all the financial commitments you incurred.

I hope that you take the necessary action.

Yours faithfully,

**SAADHA MOHAMMED GULLEID
CO-ORDINATOR OF FOREIGN AFFAIRS.”**

Upon the said confirmation, an agreement for sale dated 8th August, 1994 was drawn between the Embassy of the Republic of Somalia as Vendor and Suleiman Rahemtulla Omar and Zarina Suleiman Omar or their nominees as purchasers.

This was followed by an indenture dated 16th August, 1994 between the Government of the Somali Democratic Republic represented by H.E. Amhed Sheikh Mohamud as the vendor, and Suleiman Rahemtulla Omar and Zarina Suleiman Omar as purchasers. That indenture facilitated the registration of the suit property in favour of the purchasers.

There is on record a letter dated 19th August, 1994 addressed to the Principal Registrar of Titles Nairobi by H.E. Amhed Sheikh Mohamud, Ambassador of Somalia which sought issuance of a certified copy of the title deed in respect of the suit property which had been misplaced.

The said letter suggests, and this has not been controverted, that as at the time the agreement was signed on 8th August, 1994, there was no document of title that had been exchanged between the parties. One would have thought that is the most central document in a transaction of this nature. Whatever the case, the property was subsequently transferred to the 1st and 2nd defendants.

In the list of documents produced by the plaintiffs, the plaintiffs protested in writing to the Ministry of Foreign Affairs of the Republic of Kenya the sale of the said suit property on 14th September, 1994. They also gave notice to the public, all banks and financial institutions in respect of the said controversy. Further, they made an appeal to the President of the Republic of Kenya in respect of the said sale, and pleaded that the President do intervene to salvage and or save the property of Somalia in that hour of need.

As the controversy created by the sale of the suit property continued, the Government of Kenya came into the picture and following some consultation, it emerged that the purchase or sale of properties by foreign missions in Kenya is well regulated. There is an affidavit included in the plaintiffs list of documents sworn by Mr. Julius Kiplagat Kandie, who was then the Head of Legal Division in the Ministry of Foreign Affairs and International Co-operation sworn on 28th November, 1995. In his affidavit Mr. Kandie stated as follows;

- 1. That the Ministry of Foreign Affairs and International Co-operation requires all Foreign Missions to inform the Ministry of any intended purchase or sale of property in Kenya.**
- 2. That the said requirements are published in a booklet circulated to all Missions, a copy of the booklet is attached hereto and marked MFA. 1.**
- 3. That the Somali Embassy did not inform the Ministry of sale of the property.**
- 4. That the facts deponed herein are true to the best of my knowledge.**

The attached booklet bears the title *“A Guide to Diplomatic Privileges and Immunities in Kenya”*.

Paragraph 31 is headed **Purchase (and Sale) of Land and Real Properties**. 31(b) reads as follows **“When a foreign government intends to sell real property which it already owns in Kenya, the representative mission should inform the Ministry of Foreign Affairs and International Co-operation. Where a foreign government owns real property and wishes to alter its use, the Ministry**

of Foreign Affairs and International Co-operation should be informed before the change is made”.

There is also on record an affidavit sworn Abdullahi Haji Abdirahman on 9th June, 1995 relating to this particular property. Part of this affidavit reads as follows;

“2. I am a member of the committee of former officials of the Republic of Somalia who are closely following the developments of the above suit filed by the First Counsellor and Attaché respectively of the Somali Embassy here in Nairobi. Annexed hereto and marked “AHA 1” is a copy of an appeal to the President of Kenya written by the aforesaid committee of former officials of the Somali Republic.

3. I am the immediate former Permanent Secretary in the Ministry of Foreign Affairs of the Somali Republic up to January 1991 when the Government of the late Mohamed Siad Barre was overthrown.

4. That as regards the annexure referred to as “SRO 1” in the replying affidavit of the defendant, Suleiman Rahemtulla filed herein I wish to state as follows;

(a) The letter marked “SRO 1” is a forgery in so far as the same did not emanate from the office of the Minister of Foreign Affairs.

(b) To the best of my knowledge, as the last Permanent Secretary in the Ministry of Foreign Affairs, the person named SAADHA MOHAMMED GULLEID was not known to me as any Head of Department in the Ministry of Foreign Affairs and she has never appeared in the list of Ministry of Foreign Affairs staff. Also the position of “CO-ORDINATOR OF FOREIGN RELATIONS” did not exist in the Ministry of Foreign Affairs or in any other Ministry of Somali Government.

(c)The authority to sell government property in Somalia must be discussed and approved by a Council of Ministers which would then authorize the Minister of Foreign Affairs to write an authorization such as the one purported to be given by the said SAADHA MOHAMMED GULLEID

(d)Such a letter must also have the official seal of the Government of Somalia and official stamp of the Ministry of Foreign Affairs.

(e)It must have the Presidential decree countersigned by the Minister of Finance before such an authorization can be dispatched from the Foreign office.

(f) The Ex-Ambassador Amhed Sheikh Mohamud was in any event recalled by the Government of Somalia in August 1990 and was replaced by AMBASSADOR JAMA DIRIR GULLEID as Ambassador to Kenya.

(g)The Somali Embassy in Nairobi had no financial problems to warrant the sale of the Ambassador’s house.

(h) The certification of documents from the foreign office is done by the Head of the Department of Protocol and Consular Affairs in the Ministry and not an Ambassador of a host country as claimed in the said letter.

(i) The translation into English of the letter referred to as “SRO 1” in the Defendants’ affidavit filed herein is not accurate and is meant to suit the Defendant’s case.”

There is also another affidavit filed herein by Abdirizak Osman Hassan sworn on 9th June, 1995, part of which reads as follows;

2. That I am the immediate Former Assistant Minister of Ministry of Foreign Affairs of Somali Government, having been appointed as such in 1989, which position I held until the fall of the

government in January, 1991.

3. That prior to my appointment as Assistant Minister of Foreign Affairs, I was the Chairman of the National Agency for International Co-operation under the Ministry of Foreign Affairs from 1985 to 1989. I was also the Dean of the Faculty of Industrial Chemistry in the University of Mogadishu from 1976 to 1985.

4. That as regards the annexure referred to as “SRO 1” in the Replying Affidavit of the defendant Suleiman Rahemtulla, filed herein, I wish to state as follows:-

(a) In my capacity as the immediate former Assistant Minister of Foreign Affairs of Somalia, I am not aware of existence of any position called “Co-ordinator of Foreign Affairs” in the Ministry of Foreign Affairs nor of the person called “SAADHA MOHAMMED GULLEID” as a person employed in the Ministry of Foreign Affairs of Somalia as the head of any department.

(b) The letter marked “SRO I” annexed to the defendant’s affidavit is a forgery and did not emanate from the Ministry of Foreign Affairs of Somalia.

(c) Such a letter would have been written by the Minister of Foreign Affairs himself or the Permanent Secretary.

(d) The authority to sell the property of Somali Government is first given to the Council of Ministers who would then give the necessary powers to the Minister to authorize one to sell the property.

(e) Any copy of a letter emanating from the Somali Foreign Affairs Ministry and addressed to any party outside the country would be certified by the Director General of the Department of Protocol and Consular Affairs and not any other person.

(f) The original copy of the letter and its maker should be produced to prove their authenticity.

5. That the Ex-Ambassador, Amhed Sheikh Mohamud, had no authority as he had been recalled as Ambassador to Kenya in August 1990 and was replaced by Ambassador Jama Dirir Guleid.

6. That the Somali Embassy in Nairobi, to the best of my knowledge, had no financial problems to warrant the Somali Government then to authorize its Ambassador to Kenya to sell his house.

7. That apart from the said Ex-Ambassador, all the other staff of Somali Embassy in Kenya were opposed to the sale of the house as they had realised that the Ambassador was fraudulently and without any authority purporting to dispose off the state property. Annexed hereto and marked “AOH 1” is a copy of a letter written by the said Somali Embassy staff complaining of the Ex-Ambassador’s fraudulent and illegal act.

8. That the letter annexed to the defendant’s replying affidavit and marked “SR)1” is a hopeless and desperate attempt by the Defendant to give validity and the cloth of authority to the Ex-Ambassador’s illegal and fraudulent act purporting to sell the property of the Somali State here in Kenya.”

PW2 in these proceedings Mr. Ali Mohamed Jama, the Foreign Affairs Minister, gave evidence in respect of the procedures applicable when property belonging to the 3rd plaintiff, that is, the Somali Republic is being sold. I should observe here that both Mr. Ali Mohamed Jama and Mohamed Osman PW1 were not residing in Kenya when the suit property was allegedly sold. According to PW2, the procedure to sell the property is as follows;

“If the government wants to sell any property the procedure is rigorous. It is not easy to dispose off any property owned by the government abroad. The Ministry has to propose to the Presidency. In this case the Ministry of Foreign Affairs. The Ministry of Finance would be informed. Assessment

team would be sent to the country – Ministry of Finance, Presidency or Prime Minister’s Office. The team would usually report back. If a decision is reached then the request would be submitted to the Council of Ministers for approval. If the Council decides to sell the property, then the President would issue a letter to the relevant Ministry. Proceeds would then go to the treasury – Ministry of Finance”.

It is also the evidence of this witness that in January 1991 the Somali Government collapsed. By then, Amhed Sheikh was not the Ambassador in Kenya. He ceased to be an Ambassador because he was recalled sometime in the middle of the previous year. He however did not return. This witness also said that he did not know Saadha Mohamed Gulleid who allegedly signed the Letter of Authority to sell the suit property. There was not a position known as “Co-ordinator of Foreign Affairs”. This witness was then the Director of Personnel and he knew everybody holding senior positions in the Government.

There is evidence on record by the plaintiffs that at some stage, several Kenyan government officers raided the suit property and caused the arrest of all the people who were residing therein. Those people were then charged with several offences ranging from being in possession of firearms and being present in Kenya illegally. As some of them were previous diplomats in the government that had collapsed, diplomatic immunity was pleaded. However, a certificate from the Kenyan Ministry of Foreign affairs and International Co-operation was issued to clarify that the said people did not enjoy the protection of diplomacy in Kenya. That certificate read as follows;

“REPUBLIC OF KENYA

**IN THE MATTER OF THE PRIVILEGES AND IMMUNITIES ACT
CHAPTER 179 LAWS OF KENYA**

**AND THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS
AND**

IN THE MATTER OF THE FORMER SOMALI EMBASSY AND DIPLOMATS

CERTIFICATE

PURSUANT to the Provisions of Section 18 of the PRIVILEGES and IMMUNITIES ACT CHAPTER 179 LAWS OF KENYA, I HON. STEPHEN KALONZO MUSYOKA, MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL CO-OPERATION OF THE REPUBLIC OF KENYA do certify that:-

- 1. Somalia became incapable of entering into diplomatic relations with the Republic of Kenya and of establishing or maintaining a diplomatic mission in Kenya when its civil authority collapsed on 26th January, 1991 with the ouster of the former president, the late Siad Barre.**
- 2. The Republic of Kenya has no diplomatic relations with Somalia and does not recognize the existence of the Somali Embassy and its former Diplomats in Kenya in terms of the Vienna Convention following the collapse of the Government or Civil authority in Somalia in January 1991.**
- 3. Mohammed Omar Aden, Muse Fahiye Hersi, Zeynab Ali Osman or any former Somali Diplomats accredited to the Republic of Kenya by the Government of Somalia do not enjoy any diplomatic immunity under the PRIVILEGES AND IMMUNITIES ACT CAP 179 laws of KENYA and the VIENNA CONVENTION ON DIPLOMATIC RELATIONS.**

Dated at NAIROBI this 21st day of February 1995.

**Hon. S.K. MUSYOKA
MINISTER**

Signed

MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL CO-OPERATION.”

The ultimate decision in this matter will rest on the issue of whether or not the Ex-Ambassador of the Republic of Somalia Amhed Sheikh Mohamud had the capacity and authority to commit the Republic of Somalia in this transaction. There is the related issue of whether or not he represented any existing state to be able to commit it in the disposition of the suit property. What would follow is whether or not there was valid contract between the Republic of Somalia as owners of the suit property and the 1st and 2nd defendants considering the allegations raised by both parties in this case.

For reasons that are not clear neither the plaintiffs nor the 1st and 2nd defendants deemed it necessary to join Mr. Ahmed Sheikh Mohamud as a party in these proceedings. This however, has no adverse consequences to the final decision of this court.

The combined evidence of PW1 Mr. Mohammed Osman and PW2 Ali Ahmed Jama is that, there being no government known in law, the Ex-Ambassador had no authority whatsoever to commit the Republic of Somalia and in any case, even if he had that authority, some internal procedures were not followed and therefore the contract that he purported to sign did not have the blessings of any existing authority.

On the other hand, the 1st and 2nd defendants did not conduct due diligence or inquiry and that, had this been done, it would have been evident that there was no government or recognized government agency that could act on behalf of the State of Somalia for purposes of the sale of the suit property. The defence case as advanced by Mr. Stephen Kibunja Advocate and Mr. Suleiman Rahemtulla Omar is that, proper instructions were received on behalf of the Somali Government in this transaction and that a proper contract and conveyance were executed by the parties and, the executing party in the name of the Ambassador, had proper authority to do so.

Consideration had passed and therefore the 1st and 2nd defendants hold a proper title in that regard. It is also the defence case that it was not necessary for the 1st and 2nd defendants to make any inquiry in the Ministry of Foreign Affairs to confirm the status of the property, as that requirement only refers to the selling authority, in this case, the Ambassador. It was enough for the 1st defendant to say that property was identified for him, he signed an agreement with the Ambassador, he paid for the property and that it belongs to him. He told the court that he did not know there was a problem in Somalia and that the Government had been overthrown. He did not bother to find out.

Mr. K.S. Brahmatt the advocate who acted for the 1st and 2nd defendants in this transaction is said to have retired and moved to Canada. He was therefore not available to give evidence in this case.

DW1 Mr. Stephen Kinyanjui Kibunja Advocate, played a central role in this transaction. He received instructions from the Ex-Ambassador. He was persuaded the Ambassador had authority to sell the suit property. He was shown the original letter giving that authority. He did not receive any protest from the Kenya Government or any member of the Somali government. He told the court it was not his duty to make a search as that was the duty of the purchasers.

About the omission to inform the Ministry of Foreign Affairs and International Co-operation, Mr. Kibunja said the guideline does not say it should be followed where a lawyer is acting. It was also his position that there has always been a government of Somalia.

Of the purchase price, he told the court that his client had already received a sum of Kshs.6,155,000/- (directly). He was emphatic that the transaction was done professionally and he has not been subjected to any proceedings questioning his conduct in execution of his duties.

Both learned counsel for the plaintiffs and the 1st and 2nd defendants filed submissions in this case and cited several authorities. I have taken some time to read the same and in the event that I do not refer to any specific cases, this should not be viewed as wanting in substance. The 1st plaintiff passed on in the course of these proceedings on 6th January, 2010 and the Death Certificate was presented to the court.

The 2nd plaintiff is said to have relocated to Canada and did not participate in these proceedings. The record shows that the 3rd plaintiff, that is, the Republic of Somalia was joined in these proceedings on 3rd July, 2008. In October, 2009 the 3rd, 4th and 5th defendants were also joined. Although the issue of the *locus standi* of the 1st and 2nd plaintiffs has not been seriously contested in the proceedings after the injunction order was granted by Ole Keiwa J (*as he then was*), I have deemed it necessary to reaffirm their position in this case by citing the ruling of the learned judge when he granted the interim orders to preserve the property herein. The learned judge said as follows of the two plaintiffs ***“The applicants have shown to have an interest in the matter to entitle them to come to court to complain. They are not compelled by any personal interest as such but a personal duty to themselves and to the rest of their countrymen. In the absence of any helping hand by the Government of Kenya, the plaintiffs are the best people to complain to court to stop any dealings with the suit land until investigation by the court are complete at the hearing of the suit. The plaintiffs have made a prima facie case with a probability of success.”*** Thus, the capacity of the 1st and 2nd plaintiffs was settled. In any case, The Republic of Somalia is now a party in these proceedings as the 3rd plaintiff.

Any contract for the disposition of land under the Kenya Law must be in writing and signed by both parties. The signatures of both parties must be witnessed. In the instant case, there is an agreement for sale dated 8th August, 1994 but there is no evidence whatsoever that this agreement was preceded by any Letter of Offer.

However, there is no issue that has been made out of this. The completion date of that agreement was 31st August, 1994. It is clear from the material before me however, that payment was not completed until 30th January, 1995 about five months from the completion date set in the agreement. That in itself was breach of the said agreement and no explanation has been offered by either party although Mr. Kibunja told the court the parties agreed on the extensions. The bottom line however is that, on 30th January 1995 the learned advocate for the vendor confirmed to the advocate for the purchasers that, the latter had been released from his professional undertaking.

But the foregoing is not the central issue in this matter. The central issue is whether or not the Ambassador Amhed Sheikh Mohamud had the capacity, authority and power to execute the said contract. There is evidence that the property belonged to the State of Somalia. To that extent, that property was sovereign. The State of Somalia is a legal international person; but since a State cannot act in that capacity, it only acts or transacts any business through legally recognized government officials. In a case of an existing State and if all things were to be said to be equal, in this particular case, the Ambassador would be authorized and or have capacity to do so. The existence of a State is based on a particular criteria. A classic definition of a State is that contained in article 1 of the Inter-American Convention on the Rights and Duties of States, also known as Montevideo Convention of 1933, which provides that a State as a person of International Law should possess the following qualifications;

- (a) Permanent population
- (b) Defined territory
- (c) Government
- (d) Capacity to enter into relations with other states

PW1 and PW2 have testified that the Civil Government of the State of Somalia collapsed in January, 1991 and it was not until the year 2005 that another Interim Civil Government was formed that could be

able to fit the description of a State as recognized in International Law. During that particular time it is the plaintiffs' case that no transactions could be effected in the absence of any authority flowing from the State. It is worth noting that, the 3rd Plaintiff was joined in these proceedings in the year 2008, that is, after the coming into being the Interim government of Republic of Somalia in the year 2005.

It is also the plaintiffs' case that in the absence of any Civil Government from January 1991 to the year 2005, no one had the authority to commit the State of Somalia and therefore the Ambassador who purported to execute the Sale Agreement in respect of the suit property herein did not possess such authority.

The learned counsel for the plaintiffs have cited an English case of ***Republic of Somalia – vs – Woodhouse Drake Carey SA and another (1993) ALL ER. 371***. It is important to set out the brief facts of this case. Just before the fall of the late President Siad Barre regime in 1991 some rice belonging to the Republic of Somalia was shipped to Mogadishu. On arrival at the port the Captain of the vessel refused to dock as the Government had been overthrown and there was a civil war. The vessel owners filed an application by way of Originating Summons seeking the sale of the cargo of rice and that the proceeds be deposited in court and that the bills of lading be placed at the disposal of the court. These orders were granted. Subsequently, a firm of solicitors purportedly acting for the Republic of Somalia and one calling himself the Prime Minister of Somalia applied for the release of the funds which had been deposited in court to them for onward transmission to their client. The immediate Somalia Ambassador to the United Nations Organizations in Geneva, one Madame Fatuma Isak Bihi made an application to be joined as a party, and also opposed any payment of the deposit held by the court to the solicitors on the ground that, there was no government in Somalia capable of instructing the firm of Solicitors or to whom the deposit could be released. Madame Bihi was a long standing diplomatic representative who had been appointed by the Government of President Barre. The court held as follows;

“1) Since Madame Bihi had no personal interest in the money in court and had no *locus standi* to represent the Government of Somalia before the court, as she has received no accreditation or authority from any current government in that country and in fact claimed that there was currently no government in Somalia, and since she had no diplomatic status in the United Kingdom and no recognition in the British Government as representative of the Republic of Somalia, her application to be joined as a party to the proceedings would be refused.

2) Where the issue before the court was whether money in court was the property of a foreign state should be paid to a firm of solicitors whose authority to act on behalf of that state was in question, the court had to be satisfied that the solicitors on the record had properly constituted authority to receive money and that the government instructing them was in fact the government of the foreign state and if the court was for any reason satisfied that the solicitor did not have requisite authority it would, on its own motion if necessary, require the solicitors to obtain that authority and ensure that in the meantime the money remained under the control of the court.

3) The factors to be taken into account in deciding whether a government existed as a government of a State were;

(i) Whether it was the constitutional government of the state.

(ii) The degree, nature and stability of administrative control, if any, which it exercised over the territory of the state.

(iii) Whether the British Government had any dealings with that Government, and if so, the nature of those dealings and

(iv) In marginal cases the extent of international recognition that it had as the government of that state.

On the evidence before it the court was not satisfied that the interim government had any

constitutional authority or stable administrative control over the territory of Somalia or that it was recognized by the British Government. Furthermore, the argument that the Djibouti Conference or the recognition by foreign states and international bodies did not assist the interim government which was a regime of one faction seeking to achieve a position of de jure government displaying a former government without having effective administrative control over all the people of that country. It followed that the application on behalf of the interim government for paying out of the money would be refused.”

The above case is not binding on this court but persuasive enough to apply in this case. The judgment is dated 13th March, 1992. It relates to the Republic of Somalia. It refers to events that took place after the collapse of the late President Barre. It examined the factors to be taken into account in deciding whether a government existed as a government of a State

The evidence of PW1 and PW2 showed that the Ambassador said to have executed the Sale Agreement had been recalled in August 1990 and replaced by another Ambassador by the name Jama Amhed Dirir. It is now on record, that the government of the Republic of Somalia collapsed in January, 1991 and by then the Ambassador who had been recalled had not returned to Somalia neither had his successor taken office in Nairobi. The recall of the said Ambassador stripped him of the power, authority or competence to continue acting on behalf of the State of Somalia.

This position would be even more compromised after the fall of the Government in 1991 aforesaid. There was no government leave alone a constitutional one. It matters not that he retained the seal of the Embassy that he used to execute the said transfer. As at that time, he was devoid of any authority and therefore, the sale on behalf of the Republic of Somalia was executed by an unauthorized person, who could not pass a valid title or any title to any one at all.

The 1st and 2nd defendants have relied heavily on a document in the form of a letter dated 15th May, 1990 said to be the authority given to the Ambassador to dispose of this property. A close look at the said letter which is in Somali language reveals that, it was written on 19th May, 1990. The translation into English is however, dated 19th May 1994. This raises some suspicion in that, it may have been intended or tailored to fit in the transaction that took place in respect of this property. Whatever the case, there is now evidence on record by PW2 that no such a person or title existed in the establishment of the Government that had fallen.

Additionally, there are two affidavits on record which I have cited herein above by Abdullahi Haji Abdirahman and Abdirizak Osman Hassan confirming that such a person never existed. To that extent. Also the Kenya Government itself required that a transaction of this nature be notified to the Ministry of Foreign Affairs, this was not done. The Ex-Ambassador was aware of this requirement. Mr. Kandie whose affidavit I set out earlier said the booklet containing that procedure is circulated to all missions. And so, applying the principles set out in the case of **Republic of Somalia – vs – Woodhouse Drake Carey SA and another (1993) ALL ER. 371 (Supra)**, I am persuaded that the Ambassador who purported to execute the transfer document, that is, Amhed Sheikh Mohamud had no authority or diplomatic recognition to commit the Republic of Somalia in the selling of this property. There was no Government in authority and there is no way one can commit the powers or authority of an institution that is non-existent. There was no constitutional government and therefore he could not have acted for any other institution. There was no form of International recognition and therefore under International Law there was no such government that existed.

I am fortified in so holding by the Certificate which was signed by the then Minister for Foreign Affairs and International Cooperation Hon. S.K. Musyoka on 21st February, 1995. Although this certificate was issued several months after the said transaction, it is relevant in as much as it referred to the status of the Republic of Somalia, its relations with Kenya and the personnel previously accredited to this country. The said certificate was specific and unambiguous that, Somalia became incapable of entering into diplomatic relations with Republic of Kenya when its civil authority collapsed on 26th January, 1991. The Kenya Government therefore, did not recognize the existence of Somali Embassy and its former diplomats in

Kenya in terms of the Vienna Convention following the collapse of the Government or civil authority in Somalia in January 1991.

It would be noted that the certificate was issued in relation to Criminal Case No.458 of 1995 against the two plaintiffs herein Mohammed Omar Aden, Muse Hersi Fahiye and others. As I observed earlier these accused persons had claimed diplomatic immunity under the Privileges and Immunities Act Cap 179 Laws of Kenya and the Vienna Convention on Diplomatic Relations. The Hon. Minister (*as he then was*) may not have known that this transaction was in dispute amongst the former diplomats of the Republic of Somalia. It has now turned out that this certificate is the saving grace not only for the plaintiffs, but also the Republic of Somalia. I say so because, the operating date of that certificate is January 1991 and although it has mentioned specific names therein, it extended to “any former Somali diplomats accredited to the Republic of Kenya” and therefore, the Ex-Ambassador who allegedly executed the transfer documents in this transaction cannot be excluded from that certificate.

It is logical therefore to conclude that, in 1994 when the Ex-Ambassador executed the transfer documents, the Kenya Government had no diplomatic relations with Somalia. It did not recognize the existence of the Somali Embassy and its former diplomats and that, no diplomatic immunity could be extended to that Ambassador.

The execution and sealing of the said documents was therefore void for lack of authority, power and competence. The question that now begs attention is whether or not a contract executed by a person without authority, as in this case, has any force of law to transfer a property as in this case. A non-existent government cannot offer for sale any property. The person who executed the sale did not have any authority to do so because, such authority must of necessity flow from the state. It follows therefore, that that execution renders the contract void, unlawful and therefore of no legal effect.

The foregoing casts Mr.Kibunja’s evidence in negative light. He should not have taken the instructions he received from the Ex-Ambassador at face value. Elementary background check would have informed him, the instructing party had no authority to execute any documents relating to the suit property. A call or visit to the Ministry of Foreign Affairs and International Co-operation would have been sufficient in that regard.

Being a Kenyan Mr. Kibunja cannot be said to be ignorant of the situation in neighbouring Somalia. It is surprising therefore to hear him say there has always been a Government in Somalia. His testimony was defensive and of little help to the court. The events in Somalia and the attendant circumstances dislodge his position in this transaction.

The 1st and 2nd defendants may as well argue that they are purchasers for value without notice. Their advocate wrote to the vendor’s advocates who confirmed that the Ambassador had the authority to sell the property. Two things beg questions. Why did not the 1st and 2nd defendant demand to see the title documents? Additionally, this being foreign property and the document they executed said as much, why did they not consult the Ministry of Foreign Affairs to clear the air as to the legal entity first, of the Ambassador, and, secondly, of the said property? As it has turned out, the Embassy was supposed to inform the Ministry of Foreign Affairs about this sale.

The 1st and 2nd defendants say it was not their business to do so. Yes, that may be true. But due diligence would have demanded that they confirmed such a position because of the money they were putting into this transaction. Had they consulted the Ministry of Foreign Affairs they would have been informed that, although the names of the Ambassador and the two plaintiffs appeared in the directory of Diplomatic Corps and International Organizations of March, 1991 at pages 136 and 137, their names are conspicuously missing in the subsequent directories of July 1992 and May 1993. In fact, the name of the Democratic Republic of Somalia is omitted in the two latter directories.

The 1st defendant Suleiman Rahemtula Omar told the court that he did not know there was trouble in Somalia. The fall of the Government of Somalia in 1991 was reported worldwide in both the print and electronic media.

The civil war that followed had the immediate effect of displacement of civilians who fled the strife to neighbouring countries including Kenya. Their presence was not confined to camps but several towns in Kenya.

I do not believe the defendant did not know about the fall of the Somalia government. His denial dents his credibility and by extension the veracity of his evidence.

There is evidence that 1st and 2nd plaintiffs and some of Somali nationals were residing in the suit property prior to 28th January, 1995 when they were forcibly evicted and charged with criminal offences. The 1st and 2nd defendants have denied any role in the said eviction. Whatever the case, what has transpired is that contrary to the provisions of the Sale Agreement the property was not sold in vacant possession.

Assuming that this court may be wrong in declaring the contract void and unlawful *ab initio*, was there completion in this transaction? The evidence shows that it took the 1st and 2nd defendants well over five months to pay the balance of the purchase price. They were clearly in breach of that agreement. However, the advocate for the vendors released the advocate for the purchasers from his professional undertaking on 30th January, 1995. Even if I were to find that consideration passed, I would still hold that the mere passing of consideration does not validate a contract that in the first place was void *ab initio*.

Having found as I have, that no valid contract existed between the parties, I have pondered over the issue of fraud that has been pleaded and addressed by both counsel. I deem it necessary to say very little in respect of that issue. From the time an inquiry was made by the advocates for the 1st and 2nd defendants about this transaction to the time the agreement was executed, the speed at which the parties moved raised some concern.

The Ex-Ambassador knew he had no authority to execute any documents because his appointing authority was non-existent. Nevertheless, he went ahead and purported to sell the suit property to the 1st and 2nd defendants. That was fraudulent. As at the time he was executing the Agreement for Sale, he did not have the original title to the property. This is shown by his letter dated 19th August, 1994 addressed to the Principal Registrar of Titles requesting to be issued with a certified copy of the title deed to the suit property which had been misplaced. He must also have been aware of the requirements that he should inform the Ministry of Foreign Affairs and International Cooperation about this transaction. That he did not is also a pointer to the fact that he intended to keep this matter secret and fraud can be imputed from that conduct. He also received a substantial sum of money from the 1st and 2nd defendants without any acknowledgement. By playing along with the said Ambassador, the 1st and 2nd defendants were drawn into the scheme and therefore participated in the said fraud. Although they were represented by a lawyer, they paid part of the purchase price directly to the Ambassador for which they did not obtain any acknowledgment. Though not directly pleaded, constructive fraud is existent. There is a letter dated 28th August, 1995 addressed to the Attorney General by the Commissioner of Lands in respect of the suit property apparently after the Attorney General had raised some inquiry in respect of the transaction.

The Commissioner of Lands relied heavily on the letter dated 19th May, 1990 which allegedly authorized the Ambassador to sell the suit property. It was the position of the Commissioner of Lands that the Registrar followed the correct procedures in registering the title and that the Registrar is not required by registration statutes to go behind the documents and ask unrelated questions. It is upon the lawyers handling such a transaction to satisfy themselves the transaction is beyond suspicion. The Registrar was satisfied that the title was clear and the document was fit for registration to confer the title to the purchaser.

I have already observed herein above that the letter relied upon by the Commissioner of Lands has been said to be a forgery. That in itself casts doubts as to the validity of the said registration. That enhances the finding that the whole transaction was shrouded in fraud.

I am aware of the provisions of Sections 23 and 24 of the Registration of Titles Act. I am also alive to the

authorities that have been cited by both counsel in respect of the issue of indefeasibility of a title. I am however, persuaded by the authorities that provide that that position is not absolute and where, like in this case, the whole transaction is void, then that section cannot be invoked such that a party is compelled to resort to a claim for damages as a remedy.

And so, having considered the evidence on record and the positions taken by the parties herein, I am persuaded that the plaintiffs have proved their case against the 1st and 2nd defendants on a balance of probability to warrant the granting of the main orders of this suit, that is to say that, the transfer of the property known as LR.No.1870/III/50 situated in Spring Valley within Nairobi Area to the 1st and 2nd defendants was illegal, unlawful and null and void *ab initio*. I have also found that the said transaction was fraudulent. I have also found that the plaintiffs have proved that the ownership and all proprietary interests and rights in that property known as LR. No.1870/III/50 situated in Spring Valley Nairobi Area vests in the sovereign State of Somalia represented by the Government of the Republic of Somalia.

Accordingly, there shall be a permanent injunction against the 1st and 2nd defendants in terms of prayer (h) of the Further Amended Plaintiff.

In view of the foregoing, the 1st and 2nd defendants counterclaim is hereby dismissed. The sum of Ksh. 3,000,000/= paid by the plaintiffs as security for costs shall be released to the plaintiffs.

Under the Geneva Convention the Government of Kenya had the duty and mandate to protect not only the Diplomats but also the property of the Republic of Somalia. This it did not do. However, in the pleadings before me the plaintiffs only registered their blame but sought no orders against the Government of Kenya. I therefore make no orders against the Government of Kenya.

The 3rd, 4th and 5th defendants were enjoined in these proceedings to effectuate the orders that may be granted by the court in favour of the plaintiffs herein. Having found as I have, that the title should vest in the 3rd plaintiff herein, it is now directed that the 3rd, 4th and 5th defendants shall facilitate restoration of the said title in the name of the 3rd plaintiff in these proceedings, The Somali Republic.

The 1st and 2nd defendants may have believed that they were paying for the suit property which indeed was subsequently registered in their names. The only money which has been accounted for is a sum of Kshs. 10,350,000/=. There is however, an acknowledgment by way of a letter dated 30th January, 1995 that the total purchase price was paid. I consider it fair and just that they should not lose the money that they paid, though with some degree of carelessness on their part, in this transaction. The money paid was received in the name of the Embassy and whether or not it ended up in the account of the Republic of Somalia, its name was pledged by one of their own.

I order that the 1st and 2nd defendants are entitled to a refund of all monies paid by them to the said Ex-Ambassador plus a sum of Kshs.600,000/- paid to the Collector of stamp duty, to be paid by the Republic of Somalia, together with interest at court rates. The circumstances of this case dictate that each party shall pay their own costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 7th day of December, 2010.

A. MBOGHOLI MSAGHA
JUDGE