



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 30 OF 2017**

TIRUS KARUGA GITHAKA.....1<sup>ST</sup> PLAINTIFF

WINNIE MBUCU NDARU.....2<sup>ND</sup> PLAINTIFF

VERSUS

1. DAVID SHIMEKHA MWASHI.....1<sup>ST</sup> DEFENDANT

2. CHARLES THUKU MUTUURA.....2<sup>ND</sup> DEFENDANT

3. STEPHEN MWANGI KANGARA.....3<sup>RD</sup> DEFENDANT

4. THE LAND REGISTRAR, LAMU now known as

COUNTY LAND REGISTRAR/LAND

REGISTRAR, LAMU COUNTY.....4<sup>TH</sup> DEFENDANT

**JUDGMENT**

**Background**

1. By their Plaint dated 7<sup>th</sup> February 2017 as filed herein on 13<sup>th</sup> February 2017, Tirus Karuga Githaka and Winnie Mbuca Ndaru pray for Judgment against the four Defendants for: -

- a) *A declaration that the Plaintiffs(are) entitled to the exclusive and unimpeded right of possession and occupation of six acres (of) all that piece of land known as LR No. Lamu/Hindi Magogoni/518;*
- b) *A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> Defendants whether by themselves and/or their servants and/or agents or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly trespassers on the same;*
- c) *An order compelling the 4<sup>th</sup> Defendant to remove the entries relating to the sub divisions and reinstate the Green Card to the status quo ante the fraudulent sub-divisions;*
- d) *A Vesting Order vesting all the property in LR No. Lamu/Hindi Magogoni/518 be granted in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and (be) registered accordingly;*
- e) *A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> Defendants whether by themselves and/or their servants and/or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property;*
- f) *Vacant possession of the suit property;*
- g) *General damages for trespass;*

***h) Punitive damages;***

***i) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant;***

***j) Such other or further relief as the Honourable Court may deem appropriate.***

2. Those prayers arise from the Plaintiffs' contention that they did purchase six (6) acres of the suit property measuring 12 acres in total from David Shimekha Mwashu (the 1<sup>st</sup> Defendant) who is the registered proprietor thereof on 15<sup>th</sup> March 2010 at a consideration of Kshs 450,000/-.

3. The Plaintiffs aver that as they waited for the sub-division and a transfer of their portion of land from the 1<sup>st</sup> Defendant, they came to learn that the 1<sup>st</sup> Defendant had without their knowledge fraudulently sub-divided the land into three (3) plots namely Lamu/Hindi Magogoni/995, 996 and 997 which were then respectively transferred to Charles Thuku Mutuura (the 2<sup>nd</sup> Defendant), Stephen Mwangi Kangara (the 3<sup>rd</sup> Defendant) and the 1<sup>st</sup> Defendant himself.

4. By reasons of the sub-divisions and transfer, the Plaintiffs aver that they have suffered loss and damage and hence the orders sought herein.

5. But in his Statement of Defence dated 21<sup>st</sup> June 2017 as filed herein on 22<sup>nd</sup> June 2017, the 1<sup>st</sup> Defendant while conceding that the suit property was initially registered in his name avers that the same was sold, sub-divided and transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants each of whom now owns five acres of the initial 12-acre parcel of land.

6. The 1<sup>st</sup> Defendant asserts that while it is indeed true that he initially entered into a sale agreement with the 1<sup>st</sup> Plaintiff on 10<sup>th</sup> October 2009, the 1<sup>st</sup> Plaintiff only paid a deposit of Kshs 110,000/- and thereafter failed to pay the balance within the agreed three months. The 1<sup>st</sup> Defendant further avers that he was entitled under the terms of the Agreement to rescind the same where the 1<sup>st</sup> Plaintiff failed to pay the balance as stipulated.

7. The 1<sup>st</sup> Defendant avers that subsequent to the Plaintiff's failure to clear the balance he did in November 2010 enter into another Sale Agreement with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants wherein he sold to each of them five acres of the suit property. The 1<sup>st</sup> Defendant asserts that as at the time of the second sale, the 1<sup>st</sup> Plaintiff had paid in instalments the sum of Kshs 300,000/- towards the purchase price. He avers that he refunded the said sum to the 1<sup>st</sup> Plaintiff together with a further sum of Kshs 19,000/- which the Plaintiff demanded as interest on 1<sup>st</sup> February 2012.

8. The 1<sup>st</sup> Defendant further avers that the 1<sup>st</sup> Plaintiff refused to bank the Cheque of Kshs 319,000/- and instead pressed criminal charges against himself at the Lamu Law Courts. The Criminal Court then ruled that the 1<sup>st</sup> Defendant should refund the sum of Kshs 450,000/- to the 1<sup>st</sup> Plaintiff, an order which the 1<sup>st</sup> Defendant complied with.

9. The 1<sup>st</sup> Defendant denies executing any Sale Agreement with the Plaintiffs on 15<sup>th</sup> March 2016 as alleged or at all. He further avers that he does not know and has never met or transacted with the 2<sup>nd</sup> Plaintiff and urges the Court to dismiss the suit in its entirety.

10. Similarly, in their Joint Statement of Defence dated 2<sup>nd</sup> May 2017 as filed herein on 11<sup>th</sup> May 2017, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants deny that the Plaintiffs are entitled to the orders sought herein. They assert that there was no basis upon which Plaintiffs sought consent to transfer the land as they had not purchased the same and no sub-division has been carried out in their favour. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants further assert that the Plaintiffs have not come to Court with clean hands as they seek vesting orders for a parcel of land measuring 12 acres when they concede they only purchased six acres of land.

11. The District Land Registrar Lamu (the 4<sup>th</sup> Defendant) is equally opposed to the suit. In his Statement of Defence dated 29<sup>th</sup> September 2017 as filed herein by the Honourable the Attorney General on 3<sup>rd</sup> October 2017, the 4<sup>th</sup> Defendant denies the Plaintiffs' claim and asserts that the parcel of land known as Lamu/Hindi Magogoni/ 518 was registered in the names of the 1<sup>st</sup> Defendant from the year 2006 to 2011.

12. The 4<sup>th</sup> Defendant further denies that the impugned sub-divisions were fraudulent as alleged or at all and invite the Plaintiff to strict proof.

### **The Plaintiffs' Case**

13. At the trial herein the Plaintiffs called one witness who testified in support of their case.

14. PW1- Tirus Githaka is the 1<sup>st</sup> Plaintiff herein and a Medical Micrologist resident in Nairobi. He told the Court that he purchased six acres of land from the 1<sup>st</sup> Defendant through a Sale Agreement dated 15<sup>th</sup> March 2010. He further told the Court he was paying Kshs 75,000/- per acre with the total purchase price being Kshs 450,000/-. His wife who is the 2<sup>nd</sup> Plaintiff herein also executed the Agreement.

15. PW1 testified that he met the 1<sup>st</sup> Defendant in the year 2004 through a mutual friend by the name Michael Chege. On 4<sup>th</sup> September 2009, he paid Kshs 10,000/- to the 1<sup>st</sup> Defendant as commitment fee. On 2<sup>nd</sup> October 2009, he sent a cheque of Kshs 100,000/- through

Chege to the 1<sup>st</sup> Defendant. On 14<sup>th</sup> October 2009, PW1 gave the 1<sup>st</sup> Defendant a sum of Kshs 40,000/- in cash, while on 15<sup>th</sup> March 2010, he sent another cheque of Kshs 150,000/- with the Sale Agreement to the 1<sup>st</sup> Defendant.

16. PW1 further told the Court that on 1<sup>st</sup> October 2010, he paid the 1<sup>st</sup> Defendant Kshs 150,000/- in cash while on 15<sup>th</sup> April 2011, he paid him Kshs 16,100/- through mpesa for the sub-division of the land. He told the Court that by 1<sup>st</sup> October 2010, he had paid the purchase price in full. He then went to the 1<sup>st</sup> Defendant to have him transfer the land.

17. PW1 testified that it is at that time they discovered that the 1<sup>st</sup> Defendant had not discharged the title deed for the land from the Ministry of Lands. They went to the Land Control Board but they declined to transfer the land in the absence of a Discharge of Charge. PW1 told the Court he followed up the matter from Nairobi making the necessary payments and on 1<sup>st</sup> August 2011, the Discharge of Charge was prepared and was sent directly to the 1<sup>st</sup> Defendant.

18. PW1 told the Court that after the issuance of the Discharge he called the 1<sup>st</sup> Defendant and they agreed to go for the Land Board Consent in December 2011. Later the 1<sup>st</sup> Defendant changed the date to January 2012. Later on, the 1<sup>st</sup> Defendant changed and told PW1 that his children had objected to the transfer.

19. PW1 told the Court he then did a search and realized the land had been sub-divided into three portions. The first portion of five acres was transferred to the 2<sup>nd</sup> Defendant while another portion also measuring five acres was transferred to the 3<sup>rd</sup> Defendant. The third portion measuring two acres remained in the 1<sup>st</sup> Defendant's name.

20. PW1 testified that when he confronted the 1<sup>st</sup> Defendant with that information, the 1<sup>st</sup> Defendant confessed that he had sold the land. They then agreed that the 1<sup>st</sup> Defendant would give him his two acres portion but the Plaintiff later switched off his phone forcing PW1 to register a caution on the piece of land which was now Plot No. 997.

21. PW1 further testified that he then reported the matter to Mokowe Police Station after which the 1<sup>st</sup> Defendant was charged with the offence of obtaining money by false pretense. The Court then directed the 1<sup>st</sup> Defendant to refund PW1's money but he has never done so.

22. PW1 testified that after he sued the 1<sup>st</sup> Defendant herein, the 1<sup>st</sup> Defendant deposited Kshs 450,000/- into his Sacco account which account PW1 holds with a third party.

23. On cross examination, PW1 testified that he first made payment to the 1<sup>st</sup> Defendant in 2009 with the last instalment being on 1<sup>st</sup> October 2010. The parties executed the Agreement on 15<sup>th</sup> March 2010. PW1 told the Court that initially they were to conclude payment of the purchase price within three months.

24. PW1 conceded that Clause 9 of the Agreement allowed the Vendor to refund him and that the sum of Kshs 450,000/- was paid into an account which they jointly have with one John Mugambi, a member of his sacco at Equity Bank. The money remains in that account as PW1 has never touched it.

25. On further cross-examination, PW1 conceded that Parcel No. 518 Lamu Hindi Magogoni no longer exists as it was sub-divided in November or December 2011. By then he had not registered a caution on the land. The caution was placed on the sub-division being Plot No. 997 which remains in the name of the 1<sup>st</sup> Defendant.

### **The Defence Case**

26. On their part the Defendant called a total of two witnesses who testified in support of their cases.

27. DW1- David Shimekha Mwashu is the 1<sup>st</sup> Defendant and a farmer resident in Hindi, Lamu. He testified that he met the Plaintiff when he was selling his land. They then wrote a hand-written agreement which DW1 signed. He told the Court he did not however know the 2<sup>nd</sup> Plaintiff shown in the typed agreement as he had never signed any other agreement. He further told the Court he had never met the Advocate said to have drawn the agreement.

28. DW1 testified that the Plaintiff had carried away a copy of the agreement he had signed and that he did not remain with a copy. When they went to Lamu, they were told they must first get a discharge of the charge on the land. At that point in time DW1 told the Court that he had given receipts which he had used to pay for the land to the 1<sup>st</sup> Plaintiff to go and sort out the discharge.

29. DW1 further testified that at some point in time, his child fell ill and when he asked the 1<sup>st</sup> Plaintiff for some money, the 1<sup>st</sup> Plaintiff told him to sell the land and refund him his money. DW1 then proceeded to sell the land by another agreement dated 9<sup>th</sup> November 2010. After doing calculations, he gave the 1<sup>st</sup> Plaintiff a cheque of Kshs 319,000/- but the 1<sup>st</sup> Plaintiff refused to accept the same.

30. DW1 told the Court that the 1<sup>st</sup> Plaintiff then went to Court in Lamu where he was ordered to pay him Kshs 450,000/-. DW1 paid the money into the 1<sup>st</sup> Plaintiff's Account.

31. On cross- examination, DW1 told the Court that the signatures in the agreement produced by the Plaintiff (Pexh 1) resembled his signature but he did not sign the agreement. While admitting that he knows one Henry Katumanga, he denied that the said Henry had executed the agreement as his witness. DW1 told the Court that the Plaintiff first paid him Kshs 110,000/- and then Kshs 150,000/-. He

denied that the Plaintiff paid for the discharge.

32. DW1 further told the Court he had sold the land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant at Kshs 400,000/- per acre. Each one of them thus paid him Kshs 2 Million for the five acres sold to them. DW1 told the Court he sold the land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants because the 1<sup>st</sup> Plaintiff was unable to complete the transactions.

33. DW2- Stephen Mwangi Kangara is the 3<sup>rd</sup> Defendant and an Insurance Broker based in Nairobi. He told the Court that sometime in 2009, a friend by the name Florence told them about the land being sold in Lamu. They travelled to Lamu and were introduced to the 1<sup>st</sup> Defendant who showed them the land and his title to the same.

34. DW2 testified that they then conducted a search on the land on 28<sup>th</sup> August 2010 and confirmed that the land was in the name of the 1<sup>st</sup> Defendant. By then the land had not been discharged by the Settlement Fund Trustees (SFT). After a discussion on the issue, they went to an Advocate in Mpeketoni and did an agreement to buy five acres at a cost of Kshs 2 Million on 9<sup>th</sup> November 2010.

35. DW2 told the Court he paid Kshs 1.9 Million leaving a balance of Kshs 100,000. They then took a surveyor to the land and it was sub-divided into three portions being Plot Nos 995, 996 and 997. The 1<sup>st</sup> Defendant then went to the SFT and cleared the loan. The title was then discharged. Portion No. 995 is now in the 2<sup>nd</sup> Defendant's name while Portion No. 996 is in DW2's name.

36. DW2 further told the Court that Portion No. 997 was also to go to the 2<sup>nd</sup> Defendant but they were unable to transfer the same after they found a caution registered thereon. The caution was placed after they had done the initial sub-divisions.

37. In cross- examination, DW2 conceded that the 1<sup>st</sup> Defendant had told them about the Plaintiff and asked them to write a Bankers Cheque for Kshs 450,000/- to be returned to the Plaintiff. He however denied that it was the Plaintiffs who paid for the Discharge of Charge.

38. DW3- Tom Morara Nyang'au is the County Land Registrar, Lamu. He told the Court that from their records, the parcel of land known as Lamu/Hindi Magogoni/518 was first registered in the 1<sup>st</sup> Defendant's name on 28<sup>th</sup> August 2006. The Registry received a discharge of Charge dated 9<sup>th</sup> August 2011 and it was registered on 25<sup>th</sup> August 2011. That property was sub-divided on 22<sup>nd</sup> November 2011 into three portions namely Lamu/Hindi Magogoni/995, 996 and 997.

39. DW3 further told the Court that thereafter, Parcel No. 995 was transferred to the 2<sup>nd</sup> Defendant while No 996 went to the 3<sup>rd</sup> Defendant. There is a power of attorney registered in the name of the 1<sup>st</sup> Plaintiff on 8<sup>th</sup> May 2012.

40. In cross- examination, DW3 told the Court the discharge was paid for by the 1<sup>st</sup> Defendant. He conceded that for any transaction in regard to the original Parcel No. 518, one had to get a consent from the Land Control Board. He told the Court their records show that the sub-divisions had been approved.

#### **Analysis and Determination.**

41. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses and the evidence adduced at the trial. I have equally perused and considered the rival submissions and authorities as placed before me by the Learned Advocates for the respective parties.

42. The two Plaintiffs have urged this Court to declare that they are entitled to the exclusive and unimpeded right of possession and occupation of six acres comprised in all that parcel of land known as LR No. Lamu/Hindi Magononi/518 measuring some 12 acres or thereabouts. They also crave an order declaring the occupation of the said property by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants wrongful and for the 4<sup>th</sup> Defendant to be compelled to remove the entries relating to the sub-division of the said property. In addition, the Plaintiffs want the said property vested upon themselves and an order of injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from remaining in or continuing with their occupation thereof.

43. Those prayers arise from the Plaintiff's contention that by an agreement in writing dated 15<sup>th</sup> March 2010, they did purchase six acres of the said Parcel No. Lamu/Hindi Magogoni/518 from the 1<sup>st</sup> Defendant at a consideration of Kshs 450,000/-. The Plaintiff told the Court that despite complying with the terms of the Agreement and paying the purchase price as agreed, the 1<sup>st</sup> Defendant reneged on the same and fraudulently proceeded to sell and transfer some ten acres from the said property to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein.

44. The 1<sup>st</sup> Defendant does not deny selling the said ten acres to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He however denies that the sale was fraudulent and asserts that he did sell the land only after the 1<sup>st</sup> Plaintiff failed to pay the purchase price as agreed. It is further his case that he only sold one acre of land to the Plaintiff and he has since refunded the Plaintiffs all the deposits paid and that they are therefore not entitled to any of the orders sought as aforementioned.

45. In support of their case, the Plaintiffs rely on a Sale Agreement dated 15<sup>th</sup> March 2010. The Agreement which has been disowned by the 1<sup>st</sup> Defendant provides at Clause 6 and 9 thereof as follows: -

#### **"6. Completion Date**

***Subject to Clause 4 above, the date of completion shall be within Ninety (90) days from the date of execution of this Agreement***

or such other earlier date as the parties may agree.

## **9. Failure to Complete**

***9.1 If the Purchaser fails to comply with any of the conditions hereof or of the conditions subject to which this sale is made including the condition relating to the completion of the sale the Vendor may give to the Purchasers at least Twenty one (21) days' notice in writing confirming the Vendor's readiness to complete the sale in all respects and specifying the default and requiring the purchasers to remedy the same before the expiration of such notice and if the Purchasers shall fail to comply with such notice the Vendor's remedy shall be to rescind their Agreement, refund any monies paid by the Purchasers( without interest) and thereafter be at liberty to resell the property.***

***9.2.....”***

46. According to the 1<sup>st</sup> Defendant, he had only sold one acre of land to the 1<sup>st</sup> Plaintiff and he vehemently denies executing the Sale Agreement dated 15<sup>th</sup> March 2010 exhibited by the Plaintiffs and avers that he only signed a hand written agreement with the Plaintiffs. It was however noteworthy that while the 1<sup>st</sup> Defendant has produced herein copies of the Sale Agreement executed between himself and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, he has not exhibited a copy of the hand-written Sale Agreement purportedly executed with the Plaintiffs.

47. Questioned about the whereabouts of the handwritten agreement at the trial herein, the 1<sup>st</sup> Defendant insisted that the 1<sup>st</sup> Plaintiffs took all the copies that they had executed and that he was hence left with no duplicate or other copy. It was however interesting to note that the 1<sup>st</sup> Defendant conceded that one Henry Katumanga shown to have witnessed his signature on the Agreement was his friend. For some reason, the 1<sup>st</sup> Defendant did not consider it necessary to call his friend to come and clarify to the Court how he had come to witness the Sale Agreement.

48. Be that as it may, it is apparent that when the Plaintiffs failed to get the land from the 1<sup>st</sup> Defendant, they reported the matter to Mokowe Police Station. Consequently, on or about 24<sup>th</sup> February 2012, the 1<sup>st</sup> Defendant was charged at the Lamu Law Courts with the offence of obtaining money by false pretense contrary to Section 313 of the Penal Code. The particulars of the offence as contained in the Charge Sheet produced before the Court read as follows: -

***“David Shimekha Mwash- On diverse dates between March 2010 and June 2011 at Hindi Trading Centre in Lamu West District within Lamu County with intent to defraud obtained from Mr. Tirus Karuga Githaka Kshs 450,000/- by falsely pretending to sell six acres of Land Number LR Lamu/Hindi Magogoni/518.”***

49. While none of the parties availed the Court proceedings in the Criminal Case as evidence herein, it is apparent at some point in time the 1<sup>st</sup> Defendant pleaded guilty to the charges and was ordered to refund the said sum of Kshs 450,000/- to the Plaintiffs. That much is evident from a reading of the Further Affidavit sworn by the Plaintiff in support of their application for mandatory injunction dated 7<sup>th</sup> February 2017. At paragraph 4 of the Affidavit filed herein on 2<sup>nd</sup> October 2017, the 1<sup>st</sup> Plaintiff avers as follows: -

***4. That after the 1<sup>st</sup> Defendant was charged in Court where he pleaded guilty and was ordered to refund the money. The 1<sup>st</sup> Defendant deposited a cheque of Kshs 450,000/- into a Joint Chama account of which I am one of the signatories. I had not given him any details or instructions on this. I am unable to withdraw the money since it is a Chama account which is only used for lending purposes only. I hereby attach a Copy of the Bank Statement dated 11<sup>th</sup> July 2017 marked and produced as Exhibit “TKG- 13.”***

50. I have looked at the said annexure TKG- 13. It is a Statement of Account No. 0240 104 129668 held in the names of the 1<sup>st</sup> Plaintiff and one John Mugambi with Equity Bank. The Statement shows that on 24<sup>th</sup> March 2017 a sum of Kshs 450,000/- was indeed deposited into the said account under the Particulars' "Mr. Shimekha's Refunds to Karuga."

51. Having chosen to file a criminal complaint against the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Defendant having been ordered by the Court to refund the sum of Kshs 450,000/-, I did not think it was open for the Plaintiffs to pursue the 1<sup>st</sup> Defendant to give them back the land more so after the 1<sup>st</sup> Defendant, as conceded, refunded the sum of money paid in compliance with the Court Order.

52. Obviously, what the Court was saying in the Criminal Case was that the Plaintiffs were only entitled to a refund of the money they had paid to the Vendor and no more. By virtue of that decision, any contract that existed between the parties was in my view frustrated by the order made by the Court and unless that order were challenged on appeal or by way of review, the Plaintiffs cannot be heard seeking to be awarded the suit property in addition to the refund they had received.

53. The Plaintiffs have to-date not challenged the Court Order requiring the 1<sup>st</sup> Defendant to refund them the sum of Kshs 450,000/-. They admit that the said amount of money was subsequently deposited by the 1<sup>st</sup> Defendant into an account jointly owned by 1<sup>st</sup> Plaintiff who was the sole complainant in the criminal case, with a third party. The 1<sup>st</sup> Plaintiff is in control of the refunded sum and he did not tell this Court that he has failed to withdraw the money for any reason nor has he attempted to refund the same to the 1<sup>st</sup> Defendant.

54. In any event from the material placed before me, it was evident that as at the time Land Parcel No. Lamu/Hindi Magogoni/ 518 was sub-divided on 28<sup>th</sup> August 2011, the said property remained in the name of the 1<sup>st</sup> Defendant. The 4<sup>th</sup> Defendant produced a certified copy of the mutation form indicating that the property was sub—divided into three portions being Lamu/Hindi Magogoni/995, 996 and 997 before Portion No. 995 was transferred to the 2<sup>nd</sup> Defendant and Portion No. 996 went to the 3<sup>rd</sup> Defendant.

55. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are now the registered proprietors of their respective portions and while the Plaintiffs alleged fraud in their registration as such, no such fraud was either particularized or proven.

56. In the premises, it was clear to me that the Plaintiffs' case was neither supported by the facts nor the law. It must fail. Accordingly, I dismiss the same.

57. Each party shall in the circumstances bear their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF APRIL, 2021.**

**J.O. OLOLA**

**JUDGE**