



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC. CASE NO. 65 OF 2012

JOHN GITAU MUNGAI.....PLAINTIFF

VERSUS

STEPHEN THUKU KABEBE.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, LAMU.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

THE LAMU LAND CONTROL BOARD.....4TH DEFENDANT

JUDGMENT

1. This suit was commenced by way of a Plaint dated 7th May, 2012. The Plaint was further Re-amended on 23rd May, 2014. In the Re-amended Plaint, the Plaintiff averred that at all material times, the Plaintiff was the lawful, legal and absolute proprietor of land known as Lamu/Hindi Magogoni/198 measuring approximately 5.4 Ha (*the suit property*).
2. According to the Plaintiff, the suit property was offered to him by the Settlement Fund Trustees (SFT) vide a Letter of Offer dated 15th April, 1999; that he was issued with a Title Deed to the property on 28th August, 2006 and that he received the Discharge of Charge by the Settlement Fund Trustees together with the Transfer of Land which have never been lodged for registration.
3. The Plaintiff has averred that the suit property falls within an agricultural area; that he has since discovered that the Lamu Land Control Board issued a consent for the sale of the land on 25th August, 2010 and that the said consent was issued unlawfully because he never appeared before the Board.
4. According to the Plaintiff, he discovered that the suit property was transferred to the 1st Defendant on 27th March, 2012; that he does not know the 1st Defendant; that he has never entered into an Agreement of Sale with the 1st Defendant and that the purported transfer and the consent of the Board were obtained fraudulently, illegally and unlawfully.
5. The Plaintiff listed the particulars of fraud and illegality as against the 1st Defendant to include: Fraudulently purporting to transfer the suit property to himself when he knew that there was no application to the Land Control Board executed by the Plaintiff; fraudulently transferring the suit property to himself when he knew the Plaintiff had not executed any transfer and colluding with the 2nd Defendant so as to fraudulently register a Discharge of Charge from the Settlement Fund Trustees (SFT).
6. The Plaintiff averred that the only amount that the 1st Defendant paid for the suit property was Kshs. 410,000 which he had demanded back; that he still holds the original Discharge of Charge and Transfer of Land forms from the Settlement Fund Trustees (SFT) and that the copy of the Discharge of Charge that the 1st Defendant used to register the suit land in his favour was fraudulent, illegal and unlawful.
7. The Plaintiff has prayed for a declaration that the alleged consent of the Board was fraudulent and illegal; that the alleged registration of the Discharge of Charge of the Settlement Fund Trustees and the registration of the 1st Defendant as the proprietor of the suit property was fraudulent and illegal and that entry number 2 on the encumbrances Section and numbers 6 and 7 of the proprietorship section of the register of the suit property should be cancelled.
8. In the Further Amended Defence and Counter-claim, the 1st Defendant pleaded that he genuinely purchased the suit property from the Plaintiff; that the Plaintiff signed the Sale Agreement in respect to the suit land together with the Application for the consent of the Board; that Kshs. 1,770,000 was paid to the Plaintiff and his wife; that Kshs. 103,855 was paid to SFT for the discharge of the suit property, and that he made an over payment in respect of the suit land by Kshs. 51,355.

9. According to the 1st Defendant, he had all the requisite documents relating to the suit property, including a certified copy of the Discharge of charge, which he obtained from the Ministry of Lands and that he deposited the purchase price of Kshs. 410,000 in the Plaintiff's bank, then Kshs. 400,000 and Kshs. 960,000.

10. In the Counter-claim, the 1st Defendant averred that the Plaintiff signed the transfer form which he now alleges to be invalid for having been allegedly witnessed by an unqualified person and that if the court finds that the transaction was invalid, the 1st Defendant should be ordered to refund all the monies received by the Plaintiff and his wife with interest at commercial bank interest's rates.

The Plaintiff's case:

11. The Plaintiff, PW1, relied on the statements that were filed in court. According to the Plaintiff, he is the lawful owner of land known as Lamu/Hindi Magogoni/198 (*the suit property*); that he was offered the said land by the Settlement Fund Trustees (SFT) and that he made the requisite payments to the Settlement Fund Trustees (SFT) whereafter he was issued with a Title Deed on 28th August, 2006.

12. It was the evidence of PW1 that he received the Discharge of Charge from the Settlement Fund Trustees (SFT) on 20th March, 2012 together with the Transfer of Land from the Settlement Fund Trustees (SFT) and that the said documents have never been lodged for registration to date by himself, or at all.

13. PW1 informed the court that when he went to lodge the said Discharge of Charge and the Transfer documents, he was informed that the land had been transferred to the 1st Defendant on 27th March, 2012; that he does not know the 1st Defendant and that he has never met him. PW1 denied having ever met the 1st Defendant, or obtained a consent of the Land Control Board for the transfer of the suit property in favour of the 1st Defendant.

14. In his Further Statement, PW1 stated that he never signed the Agreement of Sale in respect to the suit property neither did he meet a Mr. Gathorongo nor Samuel Muchoki Mbugua on 18th June, 2010 or at all. According to PW1, all the documents he signed were blank without details and that the details on the said documents appear to have been added much later.

15. PW1 denied having attended the Land Control Board Meeting of 25th August, 2010; that he never appeared before a Mr. M.M. Kahindi Advocate to sign the Transfer of Land on 28th June, 2011 and that in any event, there is no advocate going by the name M.M. Kahindi.

16. PW1 stated that he had given his wife Esther Wamucii Gitau, the Power of Attorney to sell the suit property; that his wife informed him that she met the 1st Defendant and negotiated to have the suit property sold to him at a consideration of Kshs. 140,000 per acre totaling Kshs. 1,890,000 and that the 1st Defendant insisted to be given the original documents.

17. PW1 informed the court that his wife informed him that the only amount that the 1st Defendant paid towards the purchase price on 24th June, 2010 was Kshs. 410,000. PW1 denied ever receiving Kshs. 560,000 and Kshs. 400,000 on 18th June, 2010 at Mahrus Hotel in Lamu. It was the evidence of PW1 that the only money that the 1st Defendant is entitled to is Kshs. 410,000 which was refundable upon the 1st Defendant returning the documents.

18. According to PW1, he is still in possession of the original Discharge of Charge which he picked from the Lamu Settlement Office on 19th December, 2011; that the 1st Defendant demanded for the original Title Deed, his P.I.N and Passport photograph and that after he was given the said documents, he gave his wife a blank Transfer document together with an Agreement for him to sign. PW1 stated that he signed the documents that the 1st Defendant gave to his wife and gave his wife the original documents to take to the 1st Defendant and that it is his wife who met the 1st Defendant.

19. PW1 denied having obtained any money from the 1st Defendant in form of cash; that the only money the 1st Defendant paid him was the Kshs. 410,000 and Kshs. 450,000 which he deposited on his account.

20. PW1 informed the court that the only time he appeared before the Land Control Board was when he wanted to sell the land to a Mr. Njiiri. However, the said sale aborted when his family members objected to the sell; that he never appeared before an advocate to sign the Transfer and that the Agreement that he signed is the one that was brought to the house by his wife.

21. PW1 stated that he signed the blank documents in trust; that the 1st Defendant never paid him the full purchase price of Kshs. 1,890,000 or Kshs. 1,770,000. PW1 denied that his wife received Kshs. 560,000 in cash. It was his evidence that he handed over to his wife the original Title Deed, the copy of the national identity card, the P.I.N and passport photographs and that he never signed the Application for the consent of the Land Control Board. However, upon being shown the signature on the Application form, PW1 admitted that he is the one who signed it.

22. PW2 informed the court that the Plaintiff is her husband; that they both live in Mpeketoni, Lamu County and that the suit land belongs to her husband, the Plaintiff. According to PW2, the attempt by the Plaintiff to sell the suit property to Mr. Njiiri did not go through after the family objected and that the Plaintiff then gave her a Power of Attorney to sell the suit property.

23. PW1 stated that she was introduced to the 1st Defendant by Mr. Albert and that after meeting with the 1st Defendant, she agreed to sell to him the suit property at Kshs. 140,000 per acre; that the entire land is 13.5 acres and that the 1st Defendant gave her blank forms to take them to the Plaintiff for signing, which she did.

24. Upon the said documents being signed, PW2 stated that she gave to the 1st Defendant the signed documents together with the original Title Deed; that he gave out her husband's telephone number and that she never received any money in cash from the 1st Defendant. PW2 denied ever meeting the 1st Defendant in the company of the Plaintiff at Maharusi Hotel in Lamu and that the 1st Defendant never met the Plaintiff during the entire transaction.

25. PW2 denied that her husband received Kshs. 1,770,000 on the day the Agreement was signed and that the only money that was paid was the money that was deposited on her husband's account.

26. PW2 denied ever attending the Board meeting; that it is only when the Plaintiff went to pick the Discharge of Charge that he discovered the suit property had been transferred to the 1st Defendant and that the Plaintiff is still in possession of the Discharge of Charge together with the signed Transfer by the Settlement Fund Trustees (SFT).

27. It was the evidence of PW2 that although she handed to the 1st Defendant the original Title Deed, the P.I.N, the copy of the Plaintiff's national identity card and his passport photographs, she never received cash of Kshs. 560,000 and 400,000 as alleged. According to PW2, the only amount that the 1st Defendant paid was Kshs. 410,000 and 450,000 which he deposited in the Plaintiff's bank account.

The Defence case:

28. DW1, informed the court that he has known the 1st Defendant, who is a Pastor at the Nairobi Light House Church, where he is a member, for many years; that he met the Plaintiff's wife (PW2) in early June, 2010 while working in Lamu as a Procurement Officer at the Kenya Rural Roads Authority and that the Plaintiff's wife was introduced to him as a former Councilor in Lamu.

29. It was the evidence of DW1 that him, together with the 1st Defendant, were looking for land to buy; that the Plaintiff's wife informed him that her, together with her husband, were selling the suit property and that they agreed to purchase the suit land at Kshs. 1,822,500.

30. According to the evidence of DW1, the Plaintiff's wife surrendered to the 1st Defendant the original completion documents whereupon the 1st Defendant gave her Kshs. 560,000 in cash; that the documents the Plaintiff's wife surrendered to the 1st Defendant were the original Title Deed, the Letter of Offer from Settlement Fund Trustees (SFT), receipts from the Lands Adjudication Office, the Plaintiff's identity card and his P.I.N number. According to DW1, the Kshs. 560,000 was exchanged with the said original documents at Sunsell Hotel in Lamu town. It was the evidence of DW1 that PW2 received the Kshs. 560,000 in his presence.

31. DW1 stated that a week after receiving Kshs. 560,000, PW2 requested for more money to take care of the Plaintiff who was sick; that they agreed to pay her an additional sum of Kshs. 400,000 in cash and that it is him who took the Kshs. 400,000 from the 1st Defendant and handed it over to the Plaintiff's wife (PW2); DW1 stated that he also paid to PW2 Kshs. 34,000 via Mpesa to enable her buy medicine for her ailing husband and that on 13th June, 2011, the 1st Defendant settled a debt of Kshs. 103,855 which the Plaintiff owed the Settlement Fund Trustees (SFT).

32. According to DW1, the balance of the purchase price they owed the Plaintiff was Kshs. 52,000; that the 1st Defendant gave PW2 some documents to take to the Plaintiff to sign and that he was not present when the 1st Defendant gave to PW2 documents to take to the Plaintiff to sign but that he was present when the Plaintiff's wife gave to the 1st Defendant the signed documents. However, it was the evidence of DW1 that he never saw the Plaintiff's husband hand to the 1st Defendant the signed Agreement.

33. DW2 informed the court that he runs the business of a Cyber Cafe in Lamu Island in a building where Mahrus Hotel is situated; that he has known the Plaintiff and his wife since childhood and that he also knows the 1st Defendant who is his Pastor.

34. According to DW2, on 18th June, 2010, the 1st Defendant called him and informed him that he was going to his Cyber Cafe with a couple for the purpose of signing a Sale Agreement which they had earlier prepared; that the Plaintiff and his wife later joined the 1st Defendant at the balcony of the Hotel and that him, together with one Samuel Muchoki joined the Plaintiff, his wife, and the 1st Defendant at the balcony.

35. It was the evidence of DW2 that he was a witness of the 1st Defendant in the signing of the Agreement and that he witnessed all the four people sign the Agreement. DW2 stated that he also witnessed the parties to the land transaction sign the Application forms for the consent of the Board; that he heard the Plaintiff and his wife informing the 1st Defendant to deposit Kshs. 410,000 in the Plaintiff's account to make up a sum of Kshs. 1,770,000.

36. DW2 stated that while at the balcony of the hotel, he witnessed the 1st Defendant pay the Plaintiff and his wife Kshs. 400,000 in cash and that the Plaintiff gave to the 1st Defendant his bank account on the same day. According to DW2, the Agreement which he prepared in his Cyber Cafe and witnessed the signing is the one dated 18th June, 2010.

37. In cross-examination, DW2 stated that before he prepared the Agreement of 18th June, 2010, he had done many Agreements for the 1st Defendant; that he was given instructions to prepare the Agreement; that by the time the Plaintiff and the wife joined them, he had done the Agreement except for the personal details of the sellers and that he witnessed Kshs. 400,000 being paid to the Gitau's in cash.

38. DW2 stated that the payment of Kshs. 400,000 was to be part of the Kshs. 1,770,000 indicated in the Agreement; that it was the 1st Defendant who informed him that the total purchase price was Kshs. 1,822,500 and that Kshs. 410,000 was to be deposited in the Plaintiff's bank account.

39. According to DW3, in the year 2010, the Plaintiff's wife, PW2, asked her to assist her to look for a buyer for the suit land which is opposite her parcel of land number 183 where she resides. It was the evidence of DW3 that later, PW2 informed her that she had managed to sell the land to the 1st Defendant; that after two years, PW2 informed her that she was selling the suit land and that when she inquired from the 1st Defendant, the 1st Defendant was shocked because he had already purchased the land and that the Land Control Board had already given its consent. According to DW3, the 1st Defendant informed her that the only thing they were waiting for was the registration of the Discharge of Charge which had been sent from Nairobi.

40. DW4 informed the court that he knows both the Plaintiff and the 1st Defendant; that on 26th June, 2010, he went to Lamu Island to meet the 1st Defendant in respect to the sale of a different parcel of land; that when he got to Mahrus Hotel, he met the 1st Defendant who was in the company of the Plaintiff's wife together with DW3 and that the Plaintiff who was all along downstairs, joined them for the purpose of signing a Sale Agreement.

41. DW4 stated that while at the hotel, the Plaintiff was paid Kshs. 400,000 in cash which he was told was part payment of the purchase price of Kshs. 1,822,500 and that it was then agreed that the 1st Defendant should deposit another sum of Kshs. 410,000 in the Plaintiff's account thus leaving a balance of Kshs. 52,500 which was to be paid later. DW4 stated that on the same day, the parties signed the Application form for the Land Control Board consent.

42. The 1st Defendant, DW5, stated that he is a resident of Lamu where he serves as a Pastor and Missionary with Nairobi Light House Church and that he met the Plaintiff for the first time on 18th June, 2010. However, according to DW5, he had met the Plaintiff's wife previously.

43. It was the evidence of DW5 that he met the Plaintiff's wife through DW1; that him, together with DW1, were looking for land to buy and that after talking to the Plaintiff's wife and the Plaintiff on phone, they agreed on Kshs. 1,822,500 as the purchase price.

44. It was the evidence of DW5 that when the Plaintiff's wife (PW2) gave him the original Title Deed, a copy of the Letter of Offer and three receipts together with the Plaintiff's copy of the national identity card and P.I.N Certificate, he paid the Plaintiff's wife Kshs. 560,00 in cash. It was the evidence of DW5 that a week later, the Plaintiff's wife asked for more money and that DW1 gave her a further sum of Kshs. 400,000 in cash.

45. DW5 stated that he agreed with the Plaintiff's wife that they meet on 18th June, 2010 at Mahrus Hotel; that he met the Plaintiff and his wife and that after the Plaintiff went through the Agreement, he signed it in the presence of his wife (PW2), DW2 and DW4. According to DW5, on the same day, he gave to the Plaintiff Kshs. 400,000 in cash and agreed to deposit Kshs. 410,000 in his bank account, which he deposited on 24th June, 2010.

46. DW5 stated that the Plaintiff signed the Transfer form on 28th June, 2010; that on 13th June, 2011, he went to the Settlement Office to find out if the Discharge of Charge had been forwarded by the Settlement Fund Trustees (SFT) and that on 14th June, 2011, he paid Kshs. 103,855 to the Settlement Fund Trustees (SFT) to have the land discharged.

47. DW5 stated that he later on learnt that the Plaintiff had instructed brokers to get someone to buy the suit land; that he had a certified copy of the discharge registered on 26th March, 2012 and that the suit land was eventually transferred in his name on 27th March, 2012.

48. DW5 informed the court that the total amount that he paid to the Plaintiff was Kshs. 1,770,000 as per the Agreement and that they had agreed to pay the balance of Kshs. 52,500 upon registration of the title in his favour. According to DW5, later on, the Plaintiff's wife called him and told him that they intended to sell the suit land to another buyer for a higher amount and that he agreed to pay a further sum of Kshs. 450,000 which he deposited on the Plaintiff's account.

49. In addition, and because he wanted the land to be transferred in his name, DW5 stated that he paid Kshs. 103,885 to Settlement Fund Trustees (SFT); that the payment of this amount, together with Kshs. 450,000 was over and above the agreed purchase price and that it is the Plaintiff who took him to an advocate by the name M.M. Kahindi to sign the Transfer document.

50. In cross-examination, DW5 stated that the Plaintiff and his wife attended the Land Control Board and that the consent of the Board was given before he obtained the Discharge of Charge from the Settlement Fund Trustees (SFT).

51. The Registrar of Lands, DW6 informed the court that he registered the suit property in favour of the 1st Defendant after receiving a duly signed Transfer and the consent of the Land Control Board. It was the evidence of DW6 that he also received a certified copy of the Discharge of Charge which was sufficient for him to transfer the land to the 1st Defendant.

Submissions:

52. The Plaintiff's advocate submitted that key negotiations in respect to the transaction between the Plaintiff and the 1st Defendant were between the 1st Defendant and the Plaintiff's wife; that it is curious that the Plaintiff's wife did not witness the signing of the Agreement of 18th June, 2010; that the said Agreement alleges that the sum of Kshs. 1,770,000 had been paid on or before the execution of the Agreement and that the alleged payments made in cash contradicted the contents of the Agreement.

53. Counsel submitted that looking at the Sale Agreement, it is obvious that the last page was added to the first three pages; that the last page of the Agreement is one of the blank pages that the 1st Defendant had handed over to the Plaintiff's wife to give to the Plaintiff for signing and that the Agreement of 18th June, 2010 was not signed on the said date.

54. Counsel submitted that the signing of the Agreement did not comply with the provisions of Section 3(3) of the Law of Contract Act; that there is no evidence that the 1st Defendant paid the entire amount of the purchase price and that the alleged cash payments of Kshs. 560,000 and 400,000 twice is not supported by any evidence.

55. The Plaintiff's counsel submitted that the Land Control Board could not have given a consent to transfer the suit land because the land had an encumbrance by the Settlement Fund Trustees (SFT); that a Discharge of Charge had not been issued as at the time the Land Control Board gave its consent and that this court should inquire in the manner in which the consent of the Land Control Board was given.

56. Counsel submitted that the Plaintiff denied having appeared before an advocate by the name M.M. Kahindi; that an advocate by the name M.M. Kahindi does not exist; that the Transfer of land between the Plaintiff and the 1st Defendant was not executed in terms of Section 110 of the Registered Land Act and that the said document was subject to the mandatory requirements of Sections 34 and 35 of the Advocates Act.

57. Counsel submitted that the Plaintiff is still in possession of the original Discharge of Charge and that the copy of the Discharge of Charge that was in the custody of the 1st Defendant was not a registrable document. Counsel relied on numerous authorities which I have considered.

58. The 1st Defendant's advocate submitted that the Plaintiff has not denied that the signature appearing on the Sale Agreement is his; that the Plaintiff was conversant with the contents of the Sale Agreement and that the Plaintiff knew that he was selling the suit property.

59. The 1st Defendant's advocate submitted that in the Plaintiff, the Plaintiff admitted having received Kshs. 410,000 only; that during the hearing, the Plaintiff admitted having received a total of Kshs. 810,000 from the Plaintiff; that there is no law outlawing undocumented cash payments and that witnesses stated how Kshs. 1,360,000 was paid to the Plaintiff in cash.

60. The 1st Defendant's counsel submitted that while attendance before the Land Control Board is not a requirement in law, the non-attendance by the Plaintiff could have been deliberate considering the past demeanour of the Plaintiff; that the non-attendance by the Plaintiff to the Board is a scheme that the Plaintiff and his wife have employed to fraudulently get money from people as happened to one Peter Njiiri; that the Minutes produced by the Plaintiff shows that in certain instances, the Board would issue the consent without the attendance of parties and that the requirement for attendance is at the discretion of the Board.

61. The 1st Defendant's counsel submitted that the Plaintiff admitted to having signed the Transfer document; that there is no proof that M.M. Kahindi is not an advocate; that the Transfer was drawn by a qualified person and that the Plaintiff has not denied that the certified copy of the Discharge is a genuine document.

Analysis and Findings

62. It is not in dispute that at all material times, the Plaintiff was the registered proprietor of land known as Lamu/Hindi Magogoni/198 measuring approximately 5.4 Ha. According to the documents produced in evidence, the said land was offered to the Plaintiff by the Settlement Fund Trustees (SFT) vide a Letter of Offer dated 15th April, 1999. Although the Settlement Fund Trustees (SFT) transferred the land to the Plaintiff on 28th August, 2006, the abstract shows that the Settlement Fund Trustees (SFT) charged the land on the same day.

63. The Plaintiff informed the court that he gave to his wife a Power of Attorney to sell the suit property; that his wife (PW2) met the 1st Defendant and agreed on the purchase price of Kshs. 1,822,500 and that the 1st Defendant insisted on having all the original documents before he could pay the purchase price. According to the Plaintiff, his wife gave him some blank forms to sign, which forms he signed and returned to the 1st Defendant together with the original completion documents.

64. The evidence of the Plaintiff was that the only money that he received from the 1st Defendant was Kshs. 810,000 which was deposited in his bank account by the 1st Defendant. The Plaintiff denied having received any other amount in cash. According to the Plaintiff, he released the original Title Deed, the Letter of Offer, his P.I.N and the receipts from the Settlement Fund Trustees (SFT) to the 1st Defendant before he was paid the purchase price in good faith.

65. The Plaintiff denied having signed the Transfer form before an advocate known as M.M. Kahindi or at all. The Plaintiff also denied having signed the Agreement dated 18th June, 2010 at Mahrus Hotel as alleged by the 1st Defendant and his witnesses.

66. The 1st Defendant's case was that he bought the suit land from the Plaintiff who was ailing; that based on the Power of Attorney that the Plaintiff's wife had, he paid to the said wife Kshs. 560,000 in cash on the day he received the original completion documents from her and that the same money was given to her in the presence of his friend, DW1. The 1st Defendant (DW5) stated that he later on instructed his friend Albert (DW1) to pay to the Plaintiff's wife a further sum of Kshs. 400,000 in cash, which he gave her. These assertions were denied by the Plaintiff and his wife (PW2).

67. The other occasion that the 1st Defendant purportedly paid the Plaintiff, who was in the company of his wife, cash of Kshs. 400,000 was on 18th June, 2010, which was the same day that the Sale Agreement of 18th June, 2010 was signed. According to the 1st Defendant, this amount of Kshs. 400,000 was paid to the Plaintiff in the presence of his wife (PW2), DW2, and DW4, and that he agreed to make a deposit of Kshs. 410,000 in the Plaintiff's bank account.

68. The 1st Defendant's case is that as at the time of signing the Agreement of 18th October, 2010, he had made a total payment of Kshs. 1,770,000, which the Plaintiff acknowledged by signing the Agreement. The said payment of Kshs. 1,770,000 was inclusive of Kshs.

410,000 that he was to deposit on the Plaintiff's bank account.

69. The total payments, according to the 1st Defendant, to the Plaintiff, were made as follows: Kshs. 560,000 in cash; Kshs. 400,000 in cash; Kshs. 400,000 in cash; Kshs.410,00 in the bank account and Kshs. 450,000 in the bank account.

70. In addition, it was the evidence of the 1st Defendant that he made a payment of Kshs. 103,855 to the Settlement Fund Trustees (SFT) to off-set the money that was owing to Settlement Fund Trustees (SFT).

71. Other than the Kshs. 103,855 that the 1st Defendant paid to the Settlement Fund Trustees (SFT), the total amount that the 1st Defendant claims to have made was Kshs. 2,220,000. I shall come to the issue of the purchase price in a short while. In the meantime, I will address the issue of the validity of the Agreement of 18th June, 2010.

72. The Agreement dated 18th June, 2010 shows that the Plaintiff sold to the 1st Defendant the suit property at a price of Kshs. 1,822,500. The Agreement provided that prior to or upon execution of the Agreement, Kshs. 1,770,000 in cash has been paid to the Vendor, "*who shall hold as stakeholder pending successful transfer of the property in favour of the Purchaser.*"

73. The signing of the Agreement of 18th June, 2010 shows that the same was witnessed by Daniel M. Gathoronjo (DW2) and Samuel Muchoki (DW4). Although the Plaintiff has not denied that the signature appearing on the last page of the Agreement is his, he stated that the last page annexed on the Agreement must have been one of the blank documents that was handed to him by wife (PW2) to sign.

74. The Plaintiff in this matter is a literate man. Indeed, the Plaintiff used to work with the Kenya Power and Lighting before he retired. That being so, the Plaintiff cannot claim that he was only handed a blank page to sign. In fact, a perusal of the forth page of the Agreement, which is computer generated, with the certificate on it, could not have been blank as at the time the signature of the Plaintiff was embossed on it. The names of the Purchaser and the Vendor, and the two Certificates must have been printed first before the Plaintiff, the Vendor and the two witnesses signed the document.

75. Having signed the Agreement, and the signatures of the Plaintiff and the 1st Defendant having been witnessed by two people, it is my finding that the terms in the said Agreement are binding as against the Plaintiff *inter se*. The Plaintiff cannot acknowledge the signature appearing on the last page of the Agreement and at the same time run away from the contends thereof. Indeed, it would have been different if the Plaintiff's claim was that some of the pages on the Agreement were altered. However, he cannot state that he never signed the Agreement as he has purported to do.

76. As was held in the case of *Securicor Courier (K) Limited vs. Benson David Onyango & Another (2008) eKLR*, when a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not. The Plaintiff having signed the Agreement of 18th June, 2010, it is immaterial whether he read it or not.

77. Indeed, this court was convinced by the evidence and demeanour of DW2 and DW4 who informed the court that they were at the balcony of Mahrus Hotel when the Plaintiff, who was unwell, signed the Agreement. It was only after signing the said Agreement that his wife was given Kshs. 400,000 in cash.

78. Having held that the Agreement dated 18th June, 2010 between the Plaintiff and the 1st Defendant is valid, it follows that as at the time of signing the Agreement of 18th June, 2010, the Plaintiff acknowledged receipt of Kshs. 1,770,000 from the Plaintiff. This amount includes the Kshs. 560,000 and Kshs. 400,00 that the Plaintiff's wife was paid in cash and the Kshs. 410,000 that the 1st Defendant promised to deposit on his account, which he did on 24th October, 2010.

79. The next issue I will deal with is the validity of the Transfer of the suit property from the Plaintiff to the 1st Defendant. The copy of the extract of the register shows that the title in respect of the suit land was transferred to the 1st Defendant on 27th March, 2012. According to the Plaintiff, the Transfer form that was used to effect the said transfer, although signed by him, was not attested by a qualified person.

80. The Plaintiff denied having appeared before an advocate by the name M.M. Kahindi. According to the Plaintiff, the Transfer form that the 1st Defendant lodged for registration was one of the blank documents that he was given to sign by his wife; and that he never met the 1st Defendant or the said advocate. Having admitted that he signed the Transfer document, the only issue for determination is whether the said Transfer was valid for the purpose of lodging it for registration.

81. Section 110 (1) (3) of the Registered Land Act (*repealed*) which is applicable in this case states as follows:

"1. Subject to subsection (3), a person executing an instrument shall appear before the Registrar or such public officer or other person as is prescribed and, unless he is known to the Registrar or the public officer or other person, shall be accompanied by a credible witness for the purpose of establishing his identity.

2. The Registrar or public officer or other person shall satisfy himself as to the identity of the person appearing before him and ascertain whether he freely and voluntarily executed the instrument, and shall complete thereon a certificate to that effect.

3. The Registrar may dispense with verification under this section-

a. If he considers that it cannot be obtained or can be obtained only with difficulty and he is otherwise satisfied that the document has been properly executed; or

b. In cases in which to his knowledge the document has been properly executed, and shall record on the document his reasons for dispensing with the appearance of the parties.”

82. According to the Fourth Schedule (*Rule 7*) of the Act, the prescribed officers include “*an advocate*”. The Plaintiff produced in evidence an extract from the *Law Society Advocate Search Engine* which showed that the only advocate with the names having the initials M.M. and Kahindi was one Kinuthia Mogusu Milka Moraa Kahindi.

83. The said Mrs. M.M. Kinuthia of Kinuthia Kahindi & Advocates, based in Nairobi did a letter dated 10th July, 2012 and denied having ever met the Plaintiff. The said advocate also denied having attested the Transfer document on 28th June, 2011.

84. The Plaintiff having shown by way of documentary evidence that an advocate by the name of M.M. Kahindi does not exist, the evidentiary evidence to show that indeed such an advocate existed shifted to the 1st Defendant. The 1st Defendant having not shown by way of documentary evidence that such an advocate existed, it is my finding that the person who purportedly attested the Transfer form transferring the suit land to the 1st Defendant was not an advocate.

85. That being the case, it is the finding of this court that the Transfer document purportedly signed by the parties on 28th June, 2011 and registered on 27th March, 2012 is not a valid document. Indeed, the said Transfer document is contrary to the provisions of Sections 34 and 35 of the Advocates Act which provide as follows:

“(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument-

a. Relating to the conveyancing of property; or

b. For, or in relation to, the formation of any limited liability company, whether private or public; or

c. For, or in relation to, an agreement of partnership or the dissolution thereof; or

d. For the purpose of filing or opposing a grant of probate or letters of administration; or

e. For which a fee is prescribed by any order made by the Chief Justice under Section 44; or

f. Relating to any other legal proceedings;

Nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument;

Provided that this subsection shall not apply to –

a. Any public officer drawing or preparing documents or instruments in the course of his duty; or

b. Any person employed by an advocate and acting within the scope of that employment; or

c. Any person employed merely to engross any document or instrument.

(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

(3) Any person who contravenes subsection (1) shall be guilty of an offence.

(4) This section shall not apply to –

a. a will or other testamentary instrument; or

b. a transfer of stock or shares containing no trust or limitation thereof.”

86. In the case of *National Bank of Kenya Limited vs. Anaj Warehousing Limited (2015) eKLR*, Petition No. 36 of 2014, the Supreme Court held as follows:

“The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1) (a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of Advocates,

shall be void for all purposes.”

87. The Transfer form, having been attested by a person who was not an advocate, is null and void. The same could not be used to transfer the Plaintiff's interest in the suit land to the 1st Defendant or at all.

88. The transfer of the suit land to the 1st Defendant was also illegal because the original Discharge of Charge by the Settlement Fund Trustees (SFT), which was in the custody of the Plaintiff, was not presented for registration. Indeed, the admission by the 1st Defendant that he used a certified copy of the Discharge of Charge to discharge the suit land and then effect the registration connotes a fraudulent act on the part of the 1st Defendant.

89. I say so because it is only the original Discharge of Charge that is known in law to be a registrable instrument, and not a copy of the same. If the 1st Defendant was unable to get the original Discharge of Charge, which possession is in the possession of the Plaintiff, he should have filed a suit for an order of specific performance and not engage in an illegality.

90. Indeed, considering that the suit land was still charged to the Settlement Fund Trustees (SFT) as at 25th August, 2010 when the Land Control Board purported to grant the consent to transfer the suit land from the Plaintiff to the 1st Defendant, I find that the said consent is a nullity.

91. I say so because the Land Control Board is supposed to be satisfied that the land that a party intends to sell is available for sale before it can issue a consent. Such land cannot be said to be available for sale when it is encumbered. For that reason, whether the Plaintiff attended the Board meetings before the said consent was issued or not is neither here nor there.

92. Having found that the transfer of the suit land to the 1st Defendant is a nullity, I shall consider if the 1st Defendant is entitled to a refund, and if so, how much? The Plaintiff admitted in evidence that the 1st Defendant deposited on his account Kshs. 410,000 and Kshs. 450,000 respectively. However, he denied having received Kshs. 1,360,000 in cash.

93. The issue of whether the Plaintiff and his wife received Kshs. 1,360,000 in cash has been admitted in the Sale Agreement of 18th June, 2010. Indeed, it is the amount of Kshs. 410,000 which was deposited on the Plaintiff's account on 24th June, 2010 that makes the amount of Kshs. 1,770,000 captured in the Agreement.

94. Although the Agreement stipulated that the balance of the purchase price was Kshs. 52,500, the 1st Defendant informed the court that he deposited on the Plaintiff's account a further sum of Kshs. 450,000 when the Plaintiff and his wife demanded for more money, and if not, threatened to sell the suit land to a third party. This amount was admitted by the Plaintiff. Therefore, in addition to the Kshs. 1,770,000 captured in the Agreement, the Plaintiff received a further sum of Kshs. 450,000, making the total amount that was paid to the Plaintiff to be Kshs. 2,220,000.

95. The 1st Defendant produced receipts in evidence to show that he paid Kshs. 103,855 to the Settlement Fund Trustees (SFT) being the debt that was due and owing. This amount was payable by the Plaintiff and not the 1st Defendant. In the circumstances, the amount of Kshs. 103,855 and Kshs. 2,220,000 that the 1st Defendant paid to the Plaintiff and his wife is refundable. Indeed, it will be unjust for the Plaintiff to keep the land and the money that was either paid to him or the Settlement Fund Trustees (SFT).

96. For the reasons I have given above, I find that the Plaintiff has partially proved his case on a balance of probabilities. The 1st Defendant has also partially proved his Counter-claim to the extent that the monies he paid in respect to the transaction, as summarized above, is refundable. This court therefore makes the following final orders:

a. A permanent injunction is hereby issued restraining the 1st Defendant by himself, his agents, assigns and/or employees or anyone claiming in or through him or otherwise howsoever from selling or purporting to sell or offering to sell, disposing off, charging, mortgaging, sub-dividing, pledging, entering into, remaining in or in any other manner interfering with the Plaintiff's ownership and quiet possession and enjoyment of the property known Title Number Lamu/Hindi Magogoni/198 together with an order of inhibition inhibiting the registration of any dealing in favour of the 1st Defendant or any person claiming the said property in and/or through him.

b. A declaration be and is hereby issued that the alleged and purported registration of Discharge of Charge of the Settlement Fund Trustees on the 23rd March, 2012 and registration of the 1st Defendant as the proprietor of the suit property were fraudulent, illegal, unlawful and wrongful and that further that entry number 2 on the encumbrances section and numbers 6 and 7 of the proprietorship section of the register (green card) of the suit be cancelled, removed and/or revoked and that the Plaintiff be reregistered and/or reinstated as the absolute proprietor of the suit property and a fresh Title Deed be issued to him.

c. The Plaintiff to refund to the 1st Defendant Kshs. 2,323,855.

d. The Plaintiff to pay interest on the above amount at court rates from the date of filing this suit until payment in full.

e. Each party to bear his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE