



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL CASE NO. 139 OF 2004

SWALEHE MOHAMED MWAKIRUWA PLAINTIFF

VERSUS

SAMUEL NJOROGE WARUHIU DEFENDANT

AND

SAMUEL NJOROGE WARUHIU PLAINTIFF IN THE COUNTERCLAIM

SWALEHE MOHAMED MWAKIRUWA 1ST DEF IN THE COUNTERCLAIM

DR. KAWALJEET SINGH REKHI 2ND DEFENDANT IN THE COUNTERCLAIM

LUCIANA PARAZZI 3RD DEFENDANT IN THE COUNTERCLAIM

J U D G E M E N T

1. This suit was commenced by Swalehe Mohammed Mwakiruwa vide a plaint dated 19/5/2004 and filed on 28/5/2004. Mr. Swalehe's claim was against Samuel Njoroge Waruhiu. He pleaded that during the adjudication in 1975, plot No. 674 was registered in his name and he expected to be issued with a title deed. The plaintiff contended that without his knowledge, the defendant together with other scrupulous land officers caused title No. Kwale/Galu Kinondo/674 to be transferred to him. That the defendant did this fraudulently without due process of the law.

2. The plaintiff pleaded in the alternative that the defendant had no right to acquire the suit title since he is not a local. The plaintiff went ahead to level fraud against the defendant and urged the Court to nullify the defendant's title and instead he be registered as the owner thereof. Reasons wherefore the plaintiff prayed for judgment against the defendant for;

a) An order compelling the Lands Registrar Kwale to cancel Title Deed for plot Number Kwale/Galu Kinondo/674 issued to the defendant Samuel Njoroge Waruhiu on 28th October 1978 and issue a fresh title to Swalehe Mohammed Mwakiruwa.

b) General Damages for fraud.

c) An injunction barring the defendant, his agents, servants, employees or any other person acting on his authority from dealing with the property by selling, transferring and or by whichever way until this matter is heard and determined.

d) Costs and interests of this suit.

3. The plaintiff thereafter moved the Court vide an application dated 12th July 2004 and filed on 19th July 2004 seeking orders;

(i) That the Land Registrar Kwale to cancel title deed Kwale/Galu Kinondo/674 issued to the defendant Samuel Njoroge Waruhiu and to issue a fresh title to the plaintiff.

(ii) Cost of the application be provided for.

4. From the record it appears this application was granted on 22nd July 2004 since an order was extracted and executed. The plaintiff got himself registered as the owner of the suit title on 11/8/2004 pursuant to this order and subsequently sold the land in September 2004 to Dr. Kawaljeet Singh. When the defendant got cue of this order, he moved the Court to set it aside and they entered into a consent with the

plaintiff on 17th October 2005 which consent was adopted by the Court on 19/10/2005. The consent was later set aside by the Court *suo moto* on 21/2/2006 setting the file open for hearing of this suit on its merits.

5. The defendant filed a statement of defence and Counter-claim on 5th February 2007. The defendant pleaded that he will rely on the consent executed between them on 17/10/2005. The defendant denied the allegations of fraud pleaded against him and added that this Court has no jurisdiction to nullify or cancel the defendant's title. The defendant further pleaded that the suit is misconceived, bad in law and is time barred under the Limitation of Actions Act.

6. In the counter-claim, the defendant who is hereinafter referred to as the plaintiff made a claim against Swalehe (hereinafter referred to as the 1st defendant) and two other parties he added to this suit as 2nd and 3rd defendants. He pleaded that the 1st defendant used an invalid order dated 22/7/2004 to register himself as owner of the suit land and later sold the suit land to the 2nd defendant.

7. That the 2nd defendant then around 15th July 2005 subdivided the suit parcel into two giving numbers Kwale/Galu Kinondo/1559 and 1560 and title deeds issued. On 29th September 2005, the 2nd defendant transferred the two parcels to the 3rd defendant without the consent of the Land Control Board. The plaintiff also pleaded that the 2nd defendant also acquired his title from the 1st defendant without consent of the Land Control Board nor was any consent obtained when he sub-divided the suit premises. The plaintiff prays that the 2nd and 3rd defendants have failed or neglected to surrender the subdivided titles to the Land Registrar for cancellation and re-instatement and to allow for rectification of the original title to be registered in the name of the plaintiff.

8. The plaintiff in the counter-claim prays that the 1st defendant's suit be dismissed and or struck out with costs and judgement entered against the 2nd and 3rd defendants for;

(a) Vacant possession;

(b) Damages for trespass;

(c) The Lands Registrar be directed to rectify the Land records relating to the main Title No. Kwale/Galu Kinondo/674 in respect of Part B – proprietorship section thereof by cancelling all entries therein with effect from the 11th August 2004 (inclusive) being entry numbers 5, 6, 7, 8, 9 and 10 and to reopen the said title in the Proprietorship Section in the name of the Plaintiff;

(d) The Lands Registrar be further directed to rectify the Land records relating to the sub-divided titles being Kwale/Galu Kinondo/1559 and Kwale/Galu Kinondo/1560 by cancelling all entries in the Part B – Proprietorship Sections of both titles and to close the said titles forthwith.

(e) Costs of and incidental to this suit;

(f) Any other or further relief this Honourable Court may deem fit to grant.

9. The 1st defendant in his defence to the counter-claim avers that the plaintiff neither has lawful nor any other right over plot No. Kwale/Galu Kinondo/674 since he acquired the plot forcefully and fraudulently. The 1st defendant pleaded that he filed suit against a person who was in occupation and obtained orders which are still in force to date and he put the plaintiff to prove he invalidity of the order. He added that this suit is *res judicata* and incompetent. He urged the Court to dismiss the suit as contained in the counter-claim.

10. The 2nd defendant filed his defence on 14th March 2007 denying the entire claim in the counter-claim and putting the plaintiff to strict proof. The 2nd defendant pleaded that he was an innocent purchaser for value from the 1st defendant who was then the registered owner. The 2nd defendant stated further that he was not aware of any illegality or irregularity of the 1st defendant's title. He admitted the jurisdiction of this Court. The 2nd defendant urged the Court to dismiss the suit against him with costs.

11. The 3rd defendant filed his defence to the counter-claim on 28th March 2007. He pleaded at paragraph 5 thus;

(a) On or about the 23rd day of September, 2005 the 2nd defendant to the counter-claim offered/agreed to sell to the 3rd defendant the properties known as Kwale/Galu Kinondo/1559 and Kwale/Galu Kinondo/1560.

(b) The 2nd defendant to counterclaim undertook to have the said properties transferred to the 3rd defendant after complying with all the legal requirements in the matter;

(c) The second defendant to counterclaim got the third defendant to sign certain papers for the transfer of the said properties to her and on or about the 29th day of September 2005 gave her two original title deeds relating to Kwale/Galu Kinondo/1559 and Kwale/Galu Kinondo/1560 and counterparts of the transfers thereof against the payment by the third defendant to the second defendant to counterclaim of the sum of Kshs.16,524,000 the purchase price thereof and the stamp duty charges and other charges;

(d) The third defendant is the current registered owner of the properties having purchased the same for valuable consideration;

(e) If at all there was any omission fraud or mistake relating to the issue of title deeds of the said properties to the third defendant, which is denied, the third defendant avers that she had no knowledge thereof nor had she caused such omission fraud or mistake or contributed to the same by her act, neglect or default and hence the records of the said properties showing the third defendant to counterclaim as the registered owner thereof cannot be rectified to affect the titles of the third defendant to the properties.

12. After the close of pleadings, parties called oral evidence except for the 1st defendant (Swalehe Mohammed Mwakiruwa) who gave no evidence. On 13th October 2015 when the matter was set for hearing, Swalehe opted to close his Case without tendering any evidence. The procedure he adopted was opposed by the plaintiff in the counter-claim and urged the Court to find that the 1st defendant's claim as per his plaint stood dismissed. In the alternative, the plaintiff urged the Court to issue summons to Swalehe under Order 16 were the Court not to find that the original claim stood dismissed.

13. Brian Waruhiu testified on behalf of the plaintiff Samuel Njoroge Waruhiu – deceased. He adopted a witness statement dated 18/4/2013 and filed in Court on 19/4/2013 together with additional list of documents 6/7/2017. Mr. Waruhiu stated that in respect to the claim by Swalehe, they did not know any advocate called Mr Kiondo neither did they instruct him to act for them in this matter. That in Criminal Case No. 865 of 2007; R Vs Stephen Oddiaga and Swalehe, they were found guilty in 3 of the 4 counts. That J. J. Kiondo advocate confirmed at page 3 of the criminal case judgment that he never acted for the plaintiff herein.

14. **PW1** added that the Deputy Registrar of the Court also confirmed that there was no High Court order issued on 22/7/2004. **PW1** further states that the 2nd and 3rd defendants were also involved in the fraud. **PW1** referred to the green card (**Pex 10**) which showed that his father purchased the suit property on 27/7/1979. It his Case that the fraud committed by the 1st defendant vitiated the sale to the 2nd defendant and later to the 3rd defendant. That the 3rd defendant's claim cannot stand because the entries of subdivision do not correspond with the actual registration of the land. He urged the Court to allow his claim.

15. In cross-examination by Mr. Omollo learned counsel for the 3rd defendant, **PW1** said his father's title was cancelled using a court order and they have challenged that order. **PW1** was uncertain if the offending order was set aside or if the application seeking to set it aside was withdrawn. **PW1** states that the fraudulent entry was the one dated 11/8/2004 because the Court order was fictitious. **PW1** was then referred to document No. 7 which was an order signed by the Deputy Registrar.

16. He maintained that since the sale agreement between Swalehe and Dr. Rekhi (1st and 2nd defendants) was drawn 2 days after registration of the order was an indication of complicity. **PW1** was not aware there was an L.C.B consent to transfer in favour of the 2nd defendant was obtained. That the criminal proceedings against Mr. Oddiaga and his client was instituted after the transfer to the 3rd defendant. **PW1** maintained that the 3rd defendant's title is vitiated by the fraud of the 1st and 2nd defendants. In re-examination, **PW1** said he did not think the 3rd defendant was involved in the fraud cancelling his father's title but he ought to have taken due diligence. This marked the close of the plaintiff's Case.

17. The 3rd defendant gave evidence on 18/6/2018 as **DW1**. She lives in Diani Beach. **DW1** adopted her witness statement dated 15/2/2014 as her evidence in chief together with the list of documents dated 15/2/2014 as her exhibits in support of her Case. **DW1** added that she was not aware the 2nd defendant had obtained his title fraudulently. **DW1** stated further that she verified the documents before purchasing the land. That she was shown a title, search, Land Control Board consent and transfer. She also filed a notice against co-defendant to be paid back her money in case the Court cancels the suit title.

18. In cross-examination, **DW1** said he was looking for a place where her family could live in Diani. That the 2nd defendant knew she was looking for land to buy so he offered to sell his. That she had known Dr. Rekhi for over 10 years so she trusted him. The witness said she gave Dr. Rekhi a banker's cheque for stamp duty and she assumed he paid for the stamp duty. That because she trusted Dr. Rekhi, she never checked the green card. That the receipt (**Doc 12**) for plot 1559 is dated 29/10/2005 but the title was issued on 29/9/2005.

19. Paul Wambua who is a valuer testified as **DW2** as a witness of the 3rd defendant. He said that he is a full member of Institute of Surveyors of Kenya although he did not carry his professional certificates to Court. **DW2** said he was asked by the 3rd defendant to do a valuation on the suit land. That they inspected the properties and prepared a valuation report dated 15/1/2015 which he produced as an exhibit.

20. In cross-examination, **DW2** said he did not know when the properties were purchased or how much it was purchased for. He did not have in Court his practising certificate for the year 2015. That the property was vacant when he did the valuation. That page 4 of his report describes the status of the property at the time of valuation.

21. The 2nd defendant testified as **DW3** on 23/10/2018. He adopted his witness statement dated 14/7/2014 as his evidence in chief together with the bundle of documents in his list dated 11/7/2014 as exhibits in support of his Case. **DW3** stated that the 1st defendant offered to sell him L.R No. Kwale/Galu Kinondo/674 and they agreed at a price of Kshs.6,750,000. That the agreement was reduced into writing when a deposit of Kshs.250,000 was paid on 13/8/2004.

22. **DW3** said he carried out a search after signing the agreement which search confirmed the land was clean. They applied for Land Control Board consent which was given on 15/9/2004. After consent was given, the price was increased to Kshs.8,000,000 and another agreement was drawn by Oddiaga and Co. Advocates. That he completed payment and on 1/10/2004 the land was registered in his name. **DW3** continued that after acquiring the property, he sub-divided it into two with the aim of selling one portion and developing one.

23. It is **DW3's** further evidence that he obtained Land Control Board consent to sub-divide on 8/6/2005. But after sub-division, he was approached by the 3rd defendant to purchase both plots. **DW3** obtained consent to transfer on 14/9/2005 and on 23/9/2005 they signed a sale

agreement. The stamp duty was paid on 29/10/2005 and the transfers registered in favour of the 3rd defendant. That he was paid the full purchase price after the titles were issued in the name of the 3rd defendant. **DW3** said he was an innocent purchaser for value. He denied the claims made against him. **DW3** added that the appeal filed against the orders of Maraga J (as he then was) vide civil appeal No. 2'9 of 2006 was marked as abated on 17/4/2003 due to the death of the appellant. That he did what was required in law to do in acquiring the suit parcel.

24. In cross-examination, **DW3** said receipts for payment of stamp duty are at page 24 and on one receipt there was a mistake as payments were all made on 29/9/2005. That both receipts bear same serial No. i.e. 740071. That he did not know Swalehe before the land was sold to him. That the 1st defendant was taken to his office by someone he knew. **DW3** said it was not the first time he was buying land. That application for Land Control Board was made on 10/9/2005 and issued on 15/9/2004. **DW3** confirmed he knew the 3rd defendant before the transaction and that she paid him the entire purchase price. That he had found himself a victim of land fraud before and lost his investment. This marked the close of the 2nd defendant's Case.

25. Thereafter parties filed written submissions which were highlighted on 17/7/2019. Miss Minyiri learned counsel for the plaintiff in the counter-claim submitted that prior to cancellation of her client's title, he had a valid title issued in 1979. The order used to cancel the defence title was fake as confirmed by the court on October 2005. It is not in dispute that the plaintiff and his advocate were charged in a Criminal case and found them guilty of fraud. There was no evidence of appeal filed against the conviction. She urged the Court to disregard the evidence sneaked by the plaintiff through their submissions. Without a valid court order, the plaintiff had no capacity to transfer the suit property to the 2nd defendant. That the 2nd defendant is not a bonafide purchase without notice because there was collusion between him and the plaintiff. That the 3rd defendant was negligent in the transaction. The 3rd defendant's title is not absolute under section 143 of Registered Land Act (repealed) as it is not in dispute that the 3rd defendant is not in possession. She contributed in the illegality by being negligent in the transaction. Miss Minyiri urged the Court to allow her client's claim and award Kshs.15 million as damages for trespass.

26. Mr. Kabita counsel appearing for the 2nd defendant submitted that the suit property was the original plaintiff's ancestral home. He sought cancellation when he realised the same was registered in the name of the defendant. There was an application dated 11/10/2005 which sought to set aside the impugned order which application was later withdrawn. That the defendant appealed but no result of that appeal was given. He therefore submits that the order of 22nd July 2004 is still valid. That a Court order remains in force unless set aside. That defendant also averred there was no Land Control Board consent obtained yet Land Control Board consent was produced as **Dex 3 – 7** of our exhibits. There was also no pleading of fraud and none was proved against the 2nd defendant. Mr Kabita put reliance on the Case at page 23 and 35 of his submissions. Later the 2nd defendant sold the suit property to 3rd defendant and at clause 5 provided for indemnity before the transfer. Consequently, no indemnity accrues to the 3rd defendant after the transfer.

27. He continued that the 3rd defendant admits purchasing the suit property at Kshs.16 million yet she now claims Kshs.90 million which he submits is a gross-exaggeration. That the applicable law on co-indemnity is Section 144 of Registered Land Act and not Order 1 of the Civil Procedure Rules. The 2nd defendant was guided by Case of Kenya Commercial Bank (page 71) and Kenya Pharmaceutical (page 95) of the submissions. He urges the Court to invoke Section 27 and 28 of the Registered Land Act (Page 53 and 64 of submissions) and on the provisions of Section 143 of Registered Land Act on rectification of title. Counsel added that the appeal from the Criminal conviction was delivered in January 2019 and the conviction was set aside. He urged the Court to dismiss the defendants claim and 3rd defendant's claim against the 2nd defendant with costs.

28. Mr. Omollo learned counsel appearing for the 3rd defendant submitted on the order of 22/7/2004 which cancelled the defendant's title. That the defendant made attempts to set aside that order but for reasons known to him, he withdrew that application. In the case of **Woburn Estate Ltd vs Margaret Bashforth (2016)eKLR** held that a party who knows the existence of an order whether null or void, regular or irregular, he must obey it unless the application to discharge it is made and is granted. That the same observation was also made in the Case of **Refrigeration Utensils ltd Vs GulaChand Popattal Shah & Ano Civ application no 39 of 1990**. That the Orders of 22/7/2004 are still in force to date. The Court cannot revisit to set aside the said order and to support this position he cited the case of **William Koros Vs Kiptoo Komen & 4 others (2015)eKLR**. That the defendant cannot raise the question of ownership in the counter-claim when the same was already determined by the order cancelling his title.

29. On the allegation of negligence or due diligence on part of the 3rd defendant; what would this 3rd defendant found out when the green card showed defendant's title was cancelled and registered into plaintiff's name before transfer to 2nd defendant. There is no difference she would have discovered. Section 39 of Registered Land Act (repealed) provides that the 3rd defendant was not to inquire under what circumstance the 1st and 2nd defendants in counter-claim were registered. That the Torrens system provides that the government guaranteed in the records they keep. There was also no fraud pleaded against the 3rd defendant. Allegations of fraud by inference are not enough since the standard of proof is high.

30. In the Case of **Lawrence Muchiri Vs Attorney General & 4 others** sets what a bonafide purchaser needs to prove. Mr Omollo submitted that his client has met all these requirements. That the Case of **Kibiro Wagoro Makumi vs Francis Nduati Macharia & Ano (2018)eKLR** cited by the defendant was in relation to Registration of Titles of Act thus not applicable to this Case. The Case of **Arthi Highway Developers Ltd vs West End Burchery Ltd (2015)** was considered in the **Denis Noel Mukhulo & Ano vs Elizabeth Murungari Njoroge & Ano (2018)eKLR** cited in their Supplementary List of authorities. That they had served a notice of indemnity against the 2nd defendant. The measure of damages should not just be refund of the purchaser price but loss as provided by the valuer. He urged the Court to dismiss the counter-claim with costs. In the event the court allows the counter-claim, he urged that they be awarded the indemnity against the 2nd defendant.

31. I have analysed the pleadings filed, evidence adduced and submissions rendered. The dispute rotates around the questions of;

(i) *Whether the plaintiff/1st defendant acquired the suit land L.R No. Kwale/Galu Kinondo/674 lawfully or otherwise.*

(ii) Whether or not the 1st defendant had a valid title to pass to the 2nd defendant and subsequently the 2nd defendant passing it on to the 3rd defendant.

(iii) If the plaintiff (in counter-claim) is entitled to general damages in the sum of Kshs.15 million as pleaded.

(iv) What amount of compensation is payable to the 3rd defendant in the event her title is cancelled?

32. The plaintiff/1st defendant opted not to adduce any evidence to support his claim as contained in the plaint dated 19th May 2004 brought against the original defendant (now plaintiff in the counter-claim). The proceedings in this file began on 12th October 2005. It is therefore unclear of how the order of 22/7/2004 constantly referred to in this suit was obtained.

33. Be that as it is, I will make reference to copy of the extracted order which is in the Court file and was also produced by the parties herein. The order was made in this file pursuant to a notice of motion application dated 12th July 2004 filed by the 1st defendant. The impugned order read thus;

“Upon reading the notice of motion application dated 12th July 2004 together with the supporting affidavit of Swalehe Mohammed Mwakuriwa the plaintiff it is hereby ordered;

1. That the Lands Registrar Kwale/Galu Kinondo/674 issued to the defendant Samuel Njoroge Waruhiu and to issue fresh title to Swalehe Mohammed Mwakuriwa.

2. That each party to bear its own costs.”

34. The 1st defendant used this order and acquired the registration of the suit property in his name on 11/8/2004 as shown in the green card (page 13 of 2nd defendant's documents). The plaintiff has challenged the title of the 1st defendant pleading that he was never served with summons to enter appearance before the order was obtained. Secondly, that the order was invalid. The defendants have submitted that the order of 22nd July 2004 is valid as it was never set aside.

35. On 12/10/2005 the plaintiff (in the counter-claim) filed a chamber summons application seeking orders *inter alia* that the orders issued on 22/7/2004 be set aside. From the record, Mr. Khanna appearing for the plaintiff asked the trial judge to summon Mr. Oddiaga advocate then appearing for the original plaintiff to come explain how the order was obtained. Mr. Oddiaga appeared before Maraga J (as he then was) and explained that the plaintiff and the defendant went to his office and told him they were ready to file a consent in the matter. That he did not know the defendant. Mr. Oddiaga stated that the parties gave him a consent which he filed on 22nd July 2004. That after filing of the consent, the order was issued. He said he is not the one who collected the order.

36. The Judge noted that a copy of that consent was not on record. Secondly that the orders of 22/7/2004 were obtained in the absence of any proceedings. Neither was there any defence filed by Mr. Kiondo advocates who was said to be appearing for the defendant (now plaintiff in counter-claim). The Judge directed the application dated 11/10/2005 fixed for hearing on 19/10/2005. On 10/2/2006 a consent was entered between the defendant/applicant and the plaintiff/respondent allowing the chamber summons application. The gist of the consent was that it set aside the order of 22/7/2004 and struck out the plaint dated 19/5/2004 which order was adopted by the Court on the same day.

37. The consent of 10/2/2006 was subsequently set aside by the Court on 21/2/2006 after the Land Registrar appeared before him because the judge noted that since the land had changed hands; the consent would condemn those parties (herein sued as the 2nd and 3rd defendants) unheard. This meant the application dated 11/10/2005 was to be prosecuted afresh on 16th March 2006. The plaintiff appealed against this ruling which the 2nd defendant submitted that the appeal against that ruling abated because the appellant died before it had been prosecuted. The application dated 11/10/2005 was later withdrawn through a notice of withdrawal dated 11/4/2006 and filed on 12th April 2004.

38. It is on account of the withdrawal of the said application that the defendants in the counter-claim adopted a defence that the order of 22/7/2004 has never been set aside hence the 1st defendant's title has not been vitiated. In my opinion, I note it is a misconception for the defendants to argue that the order of 22/7/2004 has not been set aside and remains valid when part of the Cause of action as pleaded in the counter-claim questions the validity of the impugned order. In paragraph 12 & 13 of the counter-claim, it is pleaded thus;

“12. On the 24th May 2004 the 1st defendant filed this suit and obtained an invalid court order dated 22nd July 2004 directing the Lands Registrar, Kwale to cancel title Kwale/Galu Kinondo/674 and to issue a fresh Title Deed to SWALEHE MOHAMMED MWAKURIWA and which was subsequently served on the Lands Registrar at Kwale who registered the said Court Order on the 11th August 2004 against the plaintiff's title and cancelled the same purportedly in accordance with the same invalid court order and issued the said title to the 1st defendant.

Paragraph 13,

13. The Lands Registrar at Kwale upon registering the said invalid Court order on the 11th August 2004 also on the same date registered the 1st defendant as the proprietor of Kwale/Galu Kinondo/674 and also issued a Title Deed to the 1st defendant on the same day.”

39. Since the impugned order was made pursuant to an interlocutory application brought in this file, it was open for any party to raise issues

regarding its validity otherwise during the main trial. The mere fact that the application seeking to set it aside was withdrawn in my opinion cannot be used as blanket cover to defeat the interests of parties affected by it who had not been heard and where the suit was still pending determination. The appeal that abated was against the order which set aside the consent allowing the application of 11/10/2005 and had nothing to do with the validity or otherwise of the impugned order. The question for me to determine is whether the plaintiff in the counter-claim has satisfied this court that indeed the order of 22/7/2004 was invalidly obtained.

40. As already narrated in the proceedings on how the order of 22/7/2004 was obtained, it was alleged to be pursuant to a consent between the plaintiff and the defendant in the original suit. That consent apparently was not on record. The same was also not adopted as an order of the Court (the Judge noted there were no proceedings adopting it). The consent signed between the two parties was not produced in evidence and the 1st defendant having not defended the counter-claim leaves implies the facts as set out the plaintiff (in counter-claim) are not controverted. One of the important facts not challenged is plaintiff's evidence that he was never served with STEA so he could not have signed any consent between him and the 1st defendant.

41. Further PW1 said that both Mr. Oddiaga and Mr. Swalehe were charged in Criminal Case No. 865 of 2007 and they were convicted on 3 of the 4 counts. The charge sheet had the following charges;

- (i) *Conspiring to defraud contrary to Section 317 of the Penal Code.*
- (ii) *Making a false document contrary to Section 347(a) of the Penal Code.*
- (iii) *Obtaining by false pretences contrary to Section 313 of the Penal Code.*

“That Stephen Oddiaga and Swalehe Mohammed Mwakuriwa on 22/7/2004 at Mombasa Law Courts jointly with others not before Court with intent to defraud obtained a court order by fraudulent means from Priscilla Ndua Ngigi, the deputy registrar of the High Court.”

(iv) *Uttering a false document i.e. that the accused persons jointly with others not before Court knowingly and fraudulently uttered a court order in respect of Civil Suit No. 139 of 2004 to Hashiro Got Sat, the Land Registrar purporting it to be a genuine Court order.”*

42. The complainant in the said Criminal Case was Samuel Njoroge Waruhiu who is the claimant in the counter-claim. By him taking up the issue of the order through the investigating authorities of the justice system meant he was challenging the order. It is not in dispute that the accused persons were found guilty and convicted. If the impugned order was found to have been falsely uttered, it matters not that an application for its setting aside was withdrawn. It is not submitted that the appeal setting aside the conviction of Mr Oddiaga & the 1st defendant stated that the order was valid. Nyamweya J in her determination only stated that it was not proved beyond reasonable doubt that the appellants had uttered the impugned order. Consequently, it was incumbent upon the defendants in this suit to prove that the order was validly obtained a task the failed to discharge. Hence my answer to the first question is that the 1st defendant did acquire title to the suit land using an order unlawfully obtained.

43. The 1st defendant submitted that under Order 7 Rule 13 of the Civil Procedure Rules there is no corresponding provision whereby a judgment for the plaintiff's case leave a residual counter-claim to be determined at a later date as purported to happen herein. Order 7 Rule 13 provides thus;

“If, in any case in which the defendant sets up a counter-claim the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.”

44. From the record, what was determined was an application dated 12th July 2004. That application was not brought under the provisions of seeking summary judgement. Similarly, there is nothing recorded that the application compromised the entire suit. The 1st defendant was therefore wrong to presume that his suit was wholly determined without an order/decreed issued/extracted to that effect. This contradicts his own argument that a counter-claim cannot stand alone when he quotes the provisions of Order 7 Rule 3 thus

“A defendant in a suit may set-off, or set-up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counter-claim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counter-claim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defend to avail himself thereof.”

45. The 1st defendant did not raise any objection that there was no suit to be prosecuted. Parties are entitled to defend themselves both on points of facts and law. The plaintiff did not participate in the suit during the process alleged to have determined the 1st defendant's suit. Asking the Court to find that the counter-claim could not stand without having raised it in his pleadings and or evidence goes against the principle of natural justice. Having opted to keep quiet, it is inferred that the 1st defendant did not oppose the claim brought in the counter-claim. The finding in the Case of *William Koross Vs Hezekia Kiptoo Komen and 4 others (2015) eKLR* was not explained how it invalidated the counter-claim as that Case only stated that only one judgment is to be pronounced on the original claim of the plaintiff and the counter-claim of the defendant. The plaintiff did not provide the evidence of any judgment/decreed made in regard to his claim.

46. The 1st defendant also submitted that the counter-claim was res judicata. Again this was a matter not raised in the pleadings. The 1st

defendant wants to prosecute several issues through submissions yet no evidence led to support this limb of his submissions. The 1st defendant annexed a copy of the judgment rendered on appeal against their conviction. On the same breath, he submits that the criminal charges had no basis in this Case. The plaintiff in the counter-claim used the criminal charges/proceedings to demonstrate the fraud or deceit. He asked the court to refer to the evidence of Mr Kiondo given in the criminal trial to support his case that he never instructed Kiondo advocate to act for him neither did he consent to the order of 22/7/2004. It was part of the plaintiff's evidence in proving that the order used to cancel his title was irregularly obtained. Therefore, I find nothing wrong in the mode the plaintiff adopted.

47. The answer to the second question on whether the 1st defendant had a valid title to pass to the 2nd defendant is resounding **NO**. The 2nd defendant said that he is an innocent purchaser for value. For this defence to be available to the 2nd defendant, he had to demonstrate as was held in the Case of *Samuel Kamere Vs L.R. Kajiado Nairobi Civil Appeal No. 28 of 2005* that;

- (i) *He had acquired a valid and legal title.*
- (ii) *He had carried the necessary due diligence.*
- (iii) *He paid valuable consideration.*

The 2nd defendant in his evidence stated that he did a search after drawing the 1st agreement and paying a deposit. The copy of the hand written agreement dated 13/8/2004 was produced as **Doc No. 2**. DW3 did not annex a copy of the search he carried out if at all.

48. The 2nd defendant said that he did not know Swalehe before and that he was introduced to him by someone. He did not give the name of that someone neither was he/she called as a witness. The 2nd defendant did not say how close they were with the introducer to make him enter into a sale transaction with a stranger before doing a search on the title. Further, the 2nd defendant's evidence is that he did not inquire into the title because he said that after receiving the Land Control Board consent on 15/9/2004, they called Mr. Oddiaga to now make a formal agreement. He failed to do due diligence and the payment of money only does not qualify him as an innocent purchaser for value. It is apparent that him buying this land on the 3rd day of registration of the 1st defendant portrays him as a participant in the illegality readily waiting to pounce on the opportunity. By the manner the sale was conducted, someone can easily conclude that he was aware of the actions of the 1st defendant in the counter-claim.

49. The 2nd defendant also stated that not being a party to the original suit, the counter-claim did not establish any cause of action against him. He added that no fraud was pleaded and none was proved. He cited several Case laws where it was held that fraud must be specifically pleaded and distinctly proved – see *Kinyanjui Kamau Vs George Kamau Njoroge (2015) eKLR*. That the counter-claim made no allegations of fraud. The Court has noted these observations of the 2nd defendant. The record of these proceedings as earlier stated show a consent that was entered into between the original parties (plaintiff and defendant). That consent was set aside by the Court *suo moto* after hearing the Land Registrar, Kwale informing the then trial Judge that the original plaintiff had transferred the land to the 2nd defendant and subsequently the 3rd defendant.

50. It was common sense and in accordance with the rules of natural justice that the subsequent title holders be joined in the suit in order to have the dispute determined once and for all. Secondly the plaintiff herein questioned the mode of how the 2nd defendant acquired his title. If that was not done, it would serve no purpose to seek an order for re-instatement of the suit title to the name of this plaintiff (in counter-claim). It is my considered opinion and I so hold that the plaintiff had a Cause of action against all the defendants in the counter-claim by virtue of the final orders issued affecting them and by virtue of him stating that the 1st defendant had no good title to pass to them.

51. The holding in the Case of *Joseph Kamamu Musa & others Vs Ireri & Co. Ltd & 3 others (2018) eKLR* that;

“The Judge found, correctly so in our view, that far from being complicit in any wrongdoing, the said third party purchasers, named as Interested Parties before her, in actual fact had sale agreements after due diligence and were properly registered as proprietors without being in any way encumbered. The titles held evidencing their interest were statutorily protected and were absolute under Sections 27 and 28 of the RLA” does not favour the 2nd defendant because in his case, he did not prove that he undertook due diligence before purchasing the suit property.

52. It is further my holding that the 2nd defendant is misapplying the

provisions of Section 39 (1) of the Registered Land Act when he states that it limits the extent required of a purchaser in terms of finding out the history of the property as the said section is not to be read in isolation. Similarly, Section 143 of the Registered Land Act offers no relief to a party who is not in possession and who did not conduct a search and or exercise due diligence before purchasing the property.

53. From the foregoing, it is my considered opinion and I hold that the plaintiff in the counter-claim has proved his Case to the standards required in law. Accordingly, I find that he is entitled to the reliefs in prayers (a), (c) – (d) of the counter-claim. Prayer (b) is declined for reasons stated in next paragraph.

54. Is the plaintiff entitled to payment of general damages? The plaintiff did not in his evidence state what he intended to put the land to use for that the actions of the defendants stopped him from fulfilling. Secondly when he gets back his land which is still in vacant possession as per the report of the valuer, the market value has increased. I find no loss suffered to justify for awarding general damages.

55. The last question is whether or not there is any compensation payable by the 2nd defendant to the 3rd defendant. It is not disputed that

the purchase price exchanged between the 2nd defendant and the 3rd defendant was Kshs.16,524,000. The 3rd defendant is however seeking payment of Kshs.90,000,000 from the 2nd defendant which she submitted was the market value of the suit property. The 3rd defendant relied on the report of Paul Wambua who testified as DW2 and produced the report dated 15/1/2015. It is the 3rd defendant's Case that the valuation report was never challenged.

56. The 2nd defendant however submits that the 3rd defendant's remedy if any is covered under Section 144(a) of Registered Land Act which states that the government is the indemnifying authority. That reliance on a subsidiary legislation in this Case Order 1 rule 24 cannot override the provisions of a statute (Registered Land Act). On this proposition, the 2nd defendant relied on the Case of *KCB Ltd Vs Kenya Planters Co-operative Union (2010) eKLR* where it was held,

“Thus our call is not limited to being broadminded about justice and fairness but we have a statutory duty to discharge and in the cause of exercising that duty should there be conflict between any of the Civil Procedure Rules and the Rules of this court the statute or the O₂ principal, the later must prevail”.

57. The 2nd defendant further made reference to clause 5 of the special conditions to their contract of sale executed between the two parties which stated thus,

“The vendor undertakes to indemnify the purchaser for claims regarding ownership arising thereafter upon the signing but before the transfer.”

58. It is 2nd defendant's submission that the 3rd defendant having admitted in evidence that she was negligent as she did not peruse the green card before the transaction no indemnity is payable to her. Lastly the 2nd defendant submitted that without prejudice, the 3rd defendant only suffered a loss of Kshs.16,200,000. That it would be unfair to condemn the 2nd defendant to pay Kshs.90,000,000 when he has also suffered loss.

59. I have taken into consideration the submissions rendered by the 2nd and 3rd defendants in regard to the claim for indemnity. As I have held in paragraph 48 herein above that the titles held by the 3rd defendants are to be cancelled, the question is who (between the 2nd Defendant or the Government) and how much compensation is payable to her? The 2nd defendant invoked the provisions of Section 144(a) of the Registered Land Act stating that it is the government that should pay the indemnity if any. The government was not joined by either of the defendants as a party to these proceedings. If the 2nd defendant wished to shift the indemnity blame to the government, nothing stopped him from joining it. He cannot therefore invoke the provisions of Section 144(a) now as the same would amount to condemning the government without affording them a hearing.

60. The 2nd defendant also submitted that clause 5 of the special conditions of their sale agreement does not allow a claim for indemnity where the transfer was already made. This clause would be invoked if the transaction between defendants was not nullified. The effect of cancellation of the title held by the 1st defendant implies there was no good title that passed to the 2nd defendant and which could possible pass to the 3rd defendant. Consequently, the 3rd defendant is entitled to a refund of monies paid to the 2nd defendant on account of the transfer her title having been nullified. The value payable in my opinion is the value at the time of their transaction plus interests at court rates from date of this judgment until payment is made in full.

61. I adopt this mode because as rightly submitted by the 2nd defendant the 3rd defendant failed in carrying out due diligence before purchasing the land. Secondly, there was no evidence led that the 2nd defendant put the money into an income generating activity that would necessitate him being condemned to refund the amount paid to him at Kshs.90,000,000 as submitted.

62. In conclusion, I make the following orders;

(a) The claim by the plaintiff in the original suit (Swalehe Mohamed Mwakiruwa) is hereby dismissed for not being proved.

(b) Judgment be and is hereby entered in favour of the plaintiff in the counter-claim in terms of prayer (a), (c) – (d) therein.

(c) The 2nd defendant to pay the 3rd defendant a sum of Kshs.16,524,000 being refund of monies paid during the sale transaction between them. The refund to be made within 60 days from the date of delivery of the judgment in default execution to issue. The sum awarded attracts interest at court rates from the date of this judgement until payment is made in full.

(d) Costs of the counter-claim is awarded to the plaintiff to be paid by Swalehe Mohammed Mwakiruwa (plaintiff/1st defendant).

Dated, signed and delivered at BUSIA this 12th day of May, 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically through mail this 12th Day of May, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE