



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL PETITION NO.50 OF 2012

DR. PETER WAINAINA KAMAU..... PETITIONER

VERSUS

THE DISTRICT LAND REGISTRAR KWALE.....1ST RESPONDENT

THE DIRECTOR OF SURVEYS.....2ND RESPONDENT

DR. KAWALJEET SINGH REKHI.....3RD RESPONDENT

JUDGEMENT

Historical Background:

[1]. On 15/11/74 at Kwale District Land Registry, a register was opened for land parcel Kwale/Galu/Kinondo/46, comprising of 1.7 hectares. This was in the Registry map sheet No.9. It was in the names of Delfino Juma Mwatha and Stephen Mulu Karingi as tenants in common in equal shares. This was entry No.1 in the proprietorship section of that Green card of that title. On 21/2/75 a land Certificate for that land was issued, as entry No.2 in the proprietorship section aforesaid. Entered as entry No.3 is a transaction of sale for Kshs.700/= in the name of Stephen Mulu Karingi of P.O. Box 30414 Nairobi and Delfino Juma Mwatha is cancelled as a proprietor. Entry No.4 dated 25/11/77 a sale is in the name of Dr. Peter Wainaina Kamau of P.O. Box 44231. The same was for Kshs.50,000/-. On the said day 25/11/77 a land Certificate was issued. Entry No.6 is a reservation of rights under section 70 of the Registered land Act. Entered as entry No.7 on 3/10/05 is the name of Ramathan Mohamed Tsolozzi of P.O. Box 94 Ukunda. On the same date a title deed was issued to Mr. Tsolozzi. On 6/12/2005 the property was registered in the name of Kawaljeet Singh Rekhi of P.O. Box 5074 Diani and a title deed issued on the same day. On 28/6/06 the title of Kwale/Galu/Kinondo/46 was closed on subdivision and new numbers were issued as Kwale/Galu/ Kinondo/1632 and 1633. New green cards were opened on 28/6/2006 for Kwale/Galu/Kinondo 1632 comprising of 0.85 hectares and Kwale/Galu/Kinondo 1633 comprising of 0.85 hectares all in the names of the 3rd respondent. On 11/5/2012 a Court order was registered on the two parcels of land preventing any dealings or any transaction and/or development on the said land (s) in any manner. These prohibitory orders were issued pursuant to an order in the *High Court Mombasa Miscellaneous Civil Application No. 227 of 2006*.

The history of the Case:

[2]. Hamisi Mwalimu Mwabwagizo and Ramadhani Mohammed Tsolozzi filed land dispute No.12 of 2005 at Msambweni Land Disputes Tribunal in respect of land parcel Kwale/Galu/Kinondo/46 against Stephen Mumu Kasingi and Dr. Peter Wainaina Kamau the petitioner herein. A ruling was made by the

aforesaid tribunal revoking petitioner's title to the said land and purported to give the said land to the claimant in the land dispute. The said tribunal's award was on 27th September 2005 adopted by the Mombasa Senior Magistrate's Court in Land Award No.6 of 2005 as the judgement of the Court.

[3]. The petitioner herein in Civil application No.227 of 2006 filed judicial proceedings. By a ruling dated 9th February 2007, the tribunal's award aforesaid and the Mombasa Senior Resident Magistrate's Court adoption of the same were quashed and set aside for the reason that the tribunal acted unlawfully and without jurisdiction. In the meantime, vendors of Kwale/Galu/Kinondo /46 to the 3rd respondent herein namely Hamisi Mwalimu Mwabwagizo and Ramadhan Mohammed Tsolozzi took part in that Judicial review. Through their lawyers Obara & Obara advocates. It is argued by the Petitioner that when the Judicial review was going on, land parcel no Kwale/Galu/Kinondo /46 was subdivided into Kwale /Galu/Kinondo/ 1632 and 1633. This fact was not brought to the attention of the Court in the Judicial review application aforesaid. That thereafter prohibitory orders were issued by the High Court prohibiting dealings with parcels No. Kwale/Galu/Kinondo/1632 and 1633, the resultant parcels from subdivision of Kwale/Galu/Kinondo/46. The subdivision had been done by the 3rd respondent herein who claims to have purchased the same from the claimant in land dispute No.12 of 2005 (at Msambweni Land Disputes Tribunal) one Ramadhan Mohammed Tsolozzi. To facilitate a second set of new Green Cards in the new parcels Kwale/Galu/Kinondo/1632 and 1633, (the first ones had been issued after subdivision on 28.6.2006)it is alleged that the 3rd respondent herein in cahoots with land Registrar Kwale caused a parallel register for subdivision of Kwale/Galu/Kinondo/1632 and 1633 to be opened unlawfully with a view to defeat the petitioner's rights in Kwale/Galu/Kinondo/46.

The dispute:

[4]. The petitioner herein avers that the Mombasa High Court in Miscellaneous Civil application No.227 of 2006 vide its decision delivered on 9th February 2007 quashed the land disputes tribunal decision of 7th February 2005 and the confirmation thereof by the Senior Resident Magistrate Mombasa and it reinstated title in Kwale/Galu/Kinondo/46. That the said orders were filed in the land Registry Kwale as an inhibition to title Kwale/Galu/Kinondo/46 and against the green card of the same against which these order were made. The petitioner argues that these orders have not been varied or set aside. It is argued by the petitioner that the 1st respondent mischievously published a gazette notice No.2139 on 4/3/2011 purporting that the Green Cards of Kwale/Galu Kinondo/1632 and 1633 were lost and were untraceable and hence the need of opening new Green Cards which were unlawfully opened. The petitioner argue that the opening of these green cards whose original registers were intact was in violation of valid Court orders and were in breach of the law, unconstitutional and hence a nullity. The petitioner further avers that the actions of the 1st and 3rd respondents were illegal and were with a sole purpose of defeating the petitioner's Constitutional rights to private property in respect of the suit land. He states that the respondent's actions violated his rights as guaranteed by Articles 10 and 40 of the Constitution. The petitioner wants a declaration that the 3rd respondent's interest in Kwale/Galu Kinondo/1632 and 1633 is void invalid and a nullity pursuant to order made in the Mombasa High Court miscellaneous Civil application No.227/2006.

[5]. The 3rd respondent on the other hand argues that by the time the Court made its order on 9/2/2007 in HCCC Misc. Civil application No.227 of 2006, one Ramadhan Mohammed Tsolozzi was the then registered as proprietor pursuant to a valid Court order which had not been set aside, varied reviewed on rescinded and it matters not that the decision of Msambweni land disputes tribunal and the Senior Resident Magistrate's order confirming it as an order of the court were set aside. That as long as there was no order forbidding such transaction at the time of purchase and transfer from Ramadhan Mohammed Tsolozzi to the 3rd respondent, he obtained good title. The 3rd respondent argues that the petitioner's argument that the 3rd respondent's interest in the subject property and the resultant subdivision is void invalid and a nullity cannot stand. The 3rd respondent claimed that he did not take part in any fraud in regard to the sale and eventual transfer of the suit lands. The respondent argued that his acquisition of interests in the subject property Kwale/Galu/Kinondo /46 was legal and free from any encumbrances. He averred that there was no collusion or fraud on his part in acquiring interest in the suits subject to this petition and none was proved to the court under the law.

He argues that by the time Mombasa High Court Miscellaneous Civil application No.227 of 2006 was filed on 20th March 2006 to quash the Land Disputes Tribunals decision, that gave Mohammed Tsozoi the land, he had already been registered as the owner on 6th of December 2005. He avers that he was served with the order on 24th April 2006 and that he was not a party to the Judicial Review proceedings. He claims that no orders were sought and granted capable of interfering, infringing or violating his interest in the subject property in any way.

The Evidence:

[6]. Dr. Peter Wainaina Kamau the petitioner herein gave evidence and told the court that he was 80 years old. He told the court that in Msambweni Land Disputes Tribunal no. 12 of 2005, Hamisi Mwalimu Mwabwagizo and Ramadhan Mohammed Tsozoi vs. Stephen Muhu Karingi and Dr. Peter Wainaina Kamau he was named as the defendant. That he was not served at all with any pleadings or any hearing notice of that case. That he was completely unaware of that case. That he was not served with land award no. 6 of 2005.

He informed the court that he challenged that decision in court vide Mombasa High court Miscellaneous civil application No. 227 of 2006, Republic vs. Msambweni Land Disputes Tribunal and Senior Resident Magistrate Mombasa exparte Dr. Peter Wainaina Kamau aforesaid.

He said that he served Hamisi Mwalimu Mwabwagizo and Ramadhan Mohammed Tsozoi who participated in the case and were represented by Obara and Obara advocates. He told the court that the ruling in that case was delivered on 9th February 2007 and in his favour. He stated that the ruling by the court has not been challenged by anyone and Kwale/Galu/Kinondo /46 remains his. He stated that he had brought this petition to be declared the owner. He averred that he has been on the land since the title was issued to him on 25th May 1977. That he has been in possession of the property since then to date.

[7]. On cross examination By Mr. Magolo learned counsel for the 3rd respondent, he stated that he practices medicine at Upper Hill Medical Centre. That he has been a doctor since March 1962. He said that he filed this petition in 2012 after a friend of his based at Ukunda went to the survey of Kenya office to purchase a map and was able to identify the petitioner's plot which had been subdivided into two and his friend inquired from him whether had subdivided his land. He said that he had been told by his caretaker one Gabriel that people had come into his property and destroyed his chain link. He said he went to Kwale lands office and he saw that his name on land parcel Kwale/Galu/Kinondo/46 had been cancelled and substituted with names of others. He said that his lawyer Mr. Urshwin Khanna found out that his name had been substituted with another name following a court order. The petitioner said that as soon as he learnt that, he commenced legal proceedings in March 2006. He said that the land was transferred to Dr. Rekhi the 3rd respondent on 6.12.2006. He averred that his title Kwale/Galu/Kinondo /46 was closed on 28.6.2006 and new titles in the names of Kwale/Galu/Kinondo /1632 and 1633 were opened. He averred that by that date his application on miscellaneous application 227 of 2006 had not been heard. That it's pleadings had been served on the 3rd respondent on 24th April 2006 but a ruling on his application was not delivered until 9.2.07. He told the court that the order in miscellaneous application was registered at Kwale land registry and that whomever he sent to register the court order did not know that Kwale/Galu/Kinondo /46 did not exist. Dr. Kamau averred that the green cards showed that his title was closed on 28.6.06. However, a search certificate dated 25.5.07 from the same registry showed him as the registered proprietor, further that another search dated 30.11.12 still showed him as the registered proprietor. He therefore argued that if all these documents came from Kwale District land registry, then there was a fraudulent activity in that lands office. He argued that the said fraudulent activity was not for his benefit and that he was not a party to such fraud.

[8]. Mr. Charles Kipkurui Ngetich, District Land Registrar Kwale gave evidence in court after a consent was recorded by the parties that he produces the parcel file of Kwale/Galu/Kinondo /46, Kwale/Galu/Kimondo/1632, and Kwale/Galu/Kinondo /1633, plus all relevant documents in his possession in regard to those properties. He stated that the previous land registrar never disclosed that the land parcel Kwale/Galu/ Kinondo/46 was not in existence since a subdivision was done by the 3rd respondent on 28.6.06. That the Land Registrar registered a court order from the said Mombasa

miscellaneous civil application no. 226 of 2006 on a title that did not exist. Mr. Kirui stated that his predecessor, the Kwale Land Registrar should have rejected the court order and said he was unable to register the order giving the reason that the title did not exist. He said that as at today the subdivisions are in the names of the 3rd respondent.

[9]. In cross examination by Mr. Mogaka learned counsel for the petitioner Mr. Ngetich stated as follows; That plot no. 46 was registered in the names of Delfino Juma Mwathe and Stephen Mulu Karingi on 15.12.1974. The next owner became Stephen Mulu Karingi alone on 20.8.1977. The fourth entry, the plot was sold to Dr. Peter Wainaina Kamau on 25.11.1977 for Kshs. 50,000/=. He borrowed a loan for Kshs. 200,000/= from Barclays Bank on 19.12.1977 and the loan was discharged on 7.6.1984. Then he charged the same to Continental Bank Ltd. On 7.6.1984 and it was discharged on 8.6.1992. Entry No. 7 is a court order in Senior Resident Magistrate's court in land case no. 6 of 2005 arising out of land Disputes Tribunal Msambweni 12/2005. He further gave evidence and said that Ramadhan went to Senior Resident Magistrate's court Mombasa for adoption of a vesting order. The land disputes order revoked the registration of Dr. Kamau and Stephen Muriu Karingi as owners of Kwale/Galu/Kinondo/46. He stated that the order by the Land Disputes Tribunal was wrong because Mr. Karingi ceased to be an owner in 1983. He said that land registrars have powers to make corrections if fraud is brought to their attention. He said he was aware of the order in Mombasa High Court Misc. no. 227 of 2006.

[10]. Dr. K.S. Rekhi the 3rd respondent told the court that he has been doctor since 1990. He said that he is the registered owner of Kwale/Galu/Kinondo/46. He said the plot was divided into 1632 and 1633. He said he purchased it from Ramadhan Mohammed Tsolozzi in December 2005. He said he had a search in the name of Mohammed Tsolozzi and a search dated 17.10.2005. He produced a copy of the title dated 3.10.2005 and a search dated 17.10.2005. He said that his lawyer was Mr. Magolo. He produced an agreement for sale and correspondences for sale between his lawyers and Stephen Odiaga and Co. advocates. He said that this was his land and he became the owner in 2005. He produced the certificate of title and a search certificate as def. exhibit number 5 and 6. He said that he later subdivided the property after getting compliance certificate from the physical planning department on 16.3.2006. He produced the certificate of compliance as D. Exh. 7. He said that the subdivision were completed on 28.6.2006. He said that he was issued with two title deeds Kwale/Galu/Kinondo /1632 and 1633. He stated that there were restriction on parcel (s) no. 1632 and 1633. He said the restrictions were imposed on 5.4.2007 pursuant to a court order. He said that those restrictions were removed by the Land Registrar Kwale after his advocate Mr. Magolo complained to the Land Registrar that he has put the restriction on the wrong titles. He produced letters by his lawyers dated 2.5.2007 and 21.3.2011. He stated that there was a consent between Mr. Magolo advocate and the Land Registrar Kwale, that the restrictions be removed. He further said that the Land Registrar could not get the green cards for 1632 and 1633 and that the Land Registrar needed to advertise in the Kenya Gazette of the loss of the cards to enable him to create new ones. That he asked Mr. Magolo to submit the two titles. He produced the Kenya Gazette dated 4th March 2011 produced as exh. 12. He said he was issued with two titles for the same pieces of land on 22.3.11. He produced the copies of the titles for 1632 and 1633 dated 28.6.2006 showing a note from the land registrar that the originals were surrendered as def. exh. 13 and 14. He produced the new titles of the same parcels their green cards which were produced as exh. 15, 16, 17 and 18. He also produced green cards for Kwale/Galu/Kinondo /46 as Def.exh. 21 showing that the title was closed on subdivision. He said that he knew Dr. Peter Wainaina Kamau. That he saw him in court. That he knows the said Dr. Peter Wainaina Kamau claims Kwale/Galu/Kinondo/46. He however said that Mohammed Tsolozzi was the registered owner when he purchased the property. He said that there was no case between himself and Dr. Peter Wainaina Kamau. He admitted however, that he was on 24.4. 2006, served with a notice of motion in Mombasa High Court Miscellaneous Civil Application no. 227 of 2006 between Republic as applicant versus Land Disputes Tribunal Msambweni 1st respondent, Senior Resident Magistrate Mombasa, 2nd respondent ex parte Dr. Peter Kamau. That there was no order from the court to cancel his titles and he was not named therein as a party. That when he was served he had commenced the process of subdivision of Kwale/Galu/Kinondo /46 and that he had committed no fraud.

[11]. On cross examination by Mr. Mogaka learned counsel for the applicant, the 3rd respondent conceded that when he was served with the miscellaneous application aforesaid, the title for

Kwale/Galu/Kinondo /46 was not closed. He further admitted that he was aware that there was a dispute about Kwale/Galu/Kinondo /46. He said he knew that the title of the same in the name of Ramadhan Mohammed TsoLozi was cancelled out but said that he did not know the reason why. He admitted that he had not lost or misplaced or damaged his titles for Kwale/Galu/Kinondo /1632 and 1633. He said that he returned his titles and was re- issued with the same numbers. He stated that when he returned his titles there were restrictions, but, when the new green cards were opened and the new titles issued with the same numbers there were no restrictions on the green cards. He said he was re-issued with land certificates on 21.3.11. That he was not advised not to proceed to Kwale/Galu/Kinondo /46 a piece of land, which had a dispute in court. He said that all along he was represented by counsel. That despite service with pleadings seeking to annul the ownership of Kwale/Galu/Kinondo /46 against the person who had sold it to him, one Ramadhan Mohammed TsoLozi, he went ahead to subdivide the same and extinguished the title.

[12]. On cross examination by Mr. Ngare, State Counsel for the 1st and 2nd respondents he said that it is the land registrar who informed him that he needed to get new titles since the green cards were lost. He stated that his titles did not have an error. He did not pay anything for the new titles to the Government Printer or Lands Office Kwale. He said that he did not know which registrar gazetted the loss of the green cards for Kwale/Galu/Kinondo /1632 and 1633.

Analysis:

[13]. That being the evidence in this case what are the issues herein?

To my mind the issues herein fall in four broad categories.

1. *Did the Msambweni land disputes tribunal have any jurisdiction to determine title to land? If it did not have such jurisdiction, did its order confirmed by the Senior Resident magistrate at Mombasa confer any title to Mohammed TsoLozi who later "sold" the land to 3rd respondent herein?*
2. *Was the 3rd respondent herein aware of the pleadings in Mombasa High court Miscellaneous Civil Application no. 227 of 2006 challenging Ramadhan Mohammed TsoLozi ownership of title in Kwale/Galu/Kinondo /46 which he had bought?*
3. *Should the Land Registrar have rejected the registration of the court order that was directed by the court (in Mombasa High Court Miscellaneous Application no. 227 of 2006) to Kwale/Galu/Kinondo /46 that had ceased to exist? Was the Land Registrar right in registering it against Kwale/Galu/Kinondo /1632 and 1633? Was it incumbent upon the Land Registrar to inform the petitioner herein or his advocate of the removal of the restriction?*
4. *Who initiated the process of issuance of new titles? Who paid the fees for advertisement and registration fees? Were the green cards lost or otherwise incapable of being obtained?*
5. *What orders should be made in this petition?*

Issue No. 1

Did the Msambweni land disputes tribunal have any jurisdiction to determine title to land? Did the confirmation of their order by the Senior Principal magistrate Mombasa confer any title to Mohamed TsoLozi? On 27th September 2005?

[14]. The land in dispute herein was registered in the name of Dr. Peter Wainaina Kamau. It was registered land under cap 300 laws of Kenya (now repealed). That title was interfered with by the Msambweni Land Disputes Tribunal. The tribunal was operating under the Land Disputes Tribunal Act

18 of 1990. The tribunal acting under that act cancelled the title to land of the applicant herein. Courts in this country have held time and time again that Land Disputes Tribunal acting under Act 18 of 1990 have no jurisdiction to cancel title to land.

In the case of Owners of motor vessel "Lillian's vs. Caltex Oil Kenya Ltd. [1989] KLR page 14 and 15, the court of appeal said,

... if the jurisdiction of an inferior court or tribunal (including an arbitrator depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction... where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

The Msambweni Lands Disputes Tribunal therefore conferred nothing to Hamisi Mwalimu Mwabwagizo and Ramadhan Mohammed Tsolozzi because it lacked jurisdiction to determine title to land ab initio. There was therefore nothing that Senior Resident Magistrate Mombasa could confirm as order of the court.

In Desai Vs. Sama [1967] EA 351 it was held, by the court of appeal,

(quoting words and phrases legally defined – Vol 3:1 – N page 113). That no court can confer jurisdiction upon itself. That if a court assumes jurisdiction and proceeds to hear and determine a matter not within its jurisdiction, the proceedings and determinations are a nullity.

[15]. In my view therefore, the period between 7th June 2005 when the Msambweni Land Disputes Tribunal rendered its decision to cancel land parcel Kwale/Galu/Kinondo /46 to 27th September 2005 when the award was confirmed as the order of the court on 27th September 2005 up to 23rd March 2006 when Mombasa high court miscellaneous civil application no. 227 of 2006 was filed by the applicant herein up to the time when the application was decided by the court in March 2007, the ownership of Kwale/Galu/Kinondo /46 had not *de jure* changed. I say so because the action of the Msambweni land disputes tribunal was a nullity and void. On the issue of nullity Lord Denning said,

In Macfoy Vs. United Africa Co. Ltd [1961] 3 all E.R page 1172,

"If an act is void then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so. And every preceding which is found on it is also bad and incurably bad. You cannot put something on nothing and expect it to be there. It will collapse."

Further in Asman Maloba Wepukhulu & another vs. Francis Wakhwabubi Biketi (unreported) civil appeal no. 157 of 2001 the court of appeal held that title to land of land parcel No. Bokoli/Kituni/169 was unlawfully interfered with by bodies which lacked jurisdiction and that all orders made by them were illegal.

[16]. It is no wonder therefore, that in High Court Mombasa in Misc. Civil Application no. 227 of 2006 the Msambweni land disputes tribunals decision dated 7th June 2005 and the decision of the Senior Resident Magistrate Mombasa to confirm the same were quashed by the High court on 9.2.07.

The answer therefore to this issue is that Msambweni land disputes tribunal had no jurisdiction to determine title to Kwale/Galu Kinondo/46. The confirmation of their order by the Senior Resident Magistrate Mombasa was a nullity and the proceedings in the tribunal conferred no title to Mr. Ramadhan Mohammed Tsolozzi.

Issue No. 2

Was the 3rd respondent herein aware of the pleadings in Mombasa Miscellaneous civil application no. 227 of 2006 challenging the title in Kwale/Galu/ Kinondo/46?

[17]. The 3rd respondent in his own admission was aware of the miscellaneous application no. 227 of 2006. In his own submissions filed in court he admits he was served with the pleadings of the same on 24th April 2006. He informed the court under oath that when he received the said proceedings he was in the process of subdividing land parcel Kwale/Galu/Kinondo /46 which was now in his name.

Indeed, an affidavit of service by a process server of the court one Alfred Kingi sworn on 11.7.2006 confirms that the 3rd respondent was served .

The affidavit supporting the application in Mombasa High Court Miscellaneous Civil Application no. 227 of 2006 was sworn by Mr. Ushwin Khanna Advocate. In that affidavit para 3, 4 and 5 stated as follows;

[3]. – *That the exparte applicant is the lawful owner of all that piece and parcel of land known as plot number Kwale/Galu/Kinondo/46 (the property)*”).

[4] – *That the interested parties namely Hamisi Mwalimu Mwabwagizo and Ramadhan Mohamed Tsolozzi, fraudulently acquired title to the property by instituting proceedings before the land disputes tribunal at Msambweni, land disputes case no. 12 of 2005 without the knowledge of the exparte applicant, that lead to the cancellation of the lawful title deed held by the exparte applicant as the first registered owner of the property.*

[5] – *That the decision and/or order of the tribunal aforesaid was subsequently affirmed and adopted by the Senior Resident Magistrate, Mombasa in land award case no. 6 of 2005. A true copy of the order annexed hereto and is marked as exhibit “UKI”.*

[6] – *That on 9th December, 2005 my firm, Ajarwalla & Khanna, advocates were instructed by the ex-parte applicant herein to represent him in these proceedings.*

[18]. When the 3rd respondent was served with the application aforesaid, he must surely have known that his land Kwale/Galu/Kinondo /46 had a dispute in court. That the dispute was between the previous owner the applicant herein and the one who sold the land to him one Ramadhan Mohammed Tsolozzi. That the allegation was that of fraudulently acquiring title by instituting proceedings on Land Disputes Tribunal at Msambweni vide Tribunal case no. 12 of 2005 without the knowledge of the applicant herein. Mr. Tsolozzi took part in those proceedings and was represented by a firm of advocates Obara & Obara. The 3rd respondent who was all through represented by counsel never thought it wise to join those proceedings. This is inspite of the fact that the title that was in dispute was now in his name. The 3rd respondent was by then in the process of subdividing Kwale/Galu/Kinondo /46. The title was still existing. The 3rd respondent having taken 2 months and four days after service of the pleadings in Mombasa High court Misc. appeal no. 227 of 2006 proceeded to subdivide Kwale/Galu/Kinondo/46 into Kwale/Galu/Kinondo/1632 and Kwale/Galu/Kinondo/1633. He thereby extinguished the subject matter of Mombasa High court Civil Misc. Application no. 227 of 2006 namely, land parcel Kwale/Galu/Kinondo /46.

All this time the 3rd respondent had the benefit of counsel. It is therefore obvious that the 3rd respondent was aware of the pleadings, the import and purport of Mombasa High Court Misc. Civ. Application No. 227 of 2006 before he subdivided Kwale/Galu/Kinondo /46. He knew that the title he possessed was under interrogation and was challenged by the applicant herein.

Issue no. 3

Should the Land Registrar have rejected the registration of the court order that was directed by the court (in Mombasa High Court Miscellaneous Application no. 227 of 2006) to Kwale/Galu/Kinondo /46 that had ceased to exist? Was the Land Registrar right in registering it against Kwale/Galu/Kinondo /1632 and 1633? Was it incumbent

upon the Land Registrar to inform the petitioner herein or his advocate of the removal of the restriction?

[19]. The court order prohibiting any dealings with land parcel Kwale/Galu/Kinondo/46 pursuant to Mombasa High Court Misc. Appl. No. 227 of 2006 was registered in the lands office on 5.4.2007. By this time land parcel Kwale/Galu/Kinondo/46 had ceased to exist and new titles issued as Kwale/Galu/Kinondo/1632 and 1633. The land registrar instead of rejecting the order with an explanation that parcel no 46 does not exist, proceeded to register the restriction on completely different parcels which were not subject to the Mombasa High Court Misc. Appl. No. 227 of 2006. These were the resultant parcels of Kwale/Galu Kinondo/46 parcels no. 1632 and 1633. When Mr. Charles Kipkurui Ngetich the new Land Registrar Kwale gave evidence, he said that the land registrar should have rejected the court order and cited the reason that the title to which the order was directed did not exist. There was absolutely no reason in my view, for the land registrar to register the court orders on Kwale/Galu/Kinondo/1632 and 1633.

[20]. New titles for parcels no. 1632 and 1633 were issued 28th June 2006. Their owner the 3rd respondent took them and went his way. He in fact produced copies of titles in court as D. exh. 13 and 14. As against those titles a restriction was made in the register pursuant to a court order of 29.3.2007. The 3rd respondent told the court that the restriction was removed by the Land Registrar when his lawyer Mr. Jared Magolo complained that the land registrar had put a restriction on the wrong titles. He referred the court to his lawyer's letters of 2.5.07 and 21.3.2011. He said that as a result, there was a consent between Mr. Magolo and the Land Registrar that the restriction should be lifted. It was duly lifted and vacated. It would be noted that the inhibition had been put by the petitioner. Why did the Land Registrar not give a notice to the petitioner or to his counsel of the removal of the inhibition as was required by the Registered Land Act Section 138?

Section 138 of the Registered Land Act (now repealed) provided as follows,

138 (1). The Registrar may at any time, upon application by any person interested or of his own motion, and after giving the parties affected thereby an opportunity of being heard, order the removal or variation of a restriction

(2). Upon the application of any proprietor affected by a restriction, and upon notice thereof to the Registrar, the court may order a restriction to be removed or varied, or make such other order as it thinks fit, and may make an order as to costs.

There was no application to remove the inhibition by the petitioner at all. If the Land Registrar removed the inhibition on his own motion, it was incumbent upon him to give the petitioner an opportunity of being heard. There was equally no order from any court. The 3rd respondent said that the land registrar could not get the green cards for 1632 and 1633 and that he needed to advertise of their loss in the Kenya gazette to enable him to open new registers. That he asked Mr. Magolo to submit the title deeds.

The Registrar should have rejected the court order and cited the reason that the land upon which it was directed did not exist. He had a legal duty to inform the petitioner herein of his intention to remove the inhibition as per Section 138 of the Registered Land Act. Registering the inhibition on parcels Kwale/Galu/Kinondo/1632 and 1633 on his motion was against the law and a fraud since those parcels had no court case. His removal of the inhibition on the new titles was a fraud since there was no order of the court or notice to the petitioner or his advocate.

Issue no. 4

Who initiated and paid for advertisement and registration fees in Kenya Gazette no. 2139 and registration fees at Kwale land registry and for what reason? Were the green cards lost or otherwise incapable of being obtained? For what reason was that done?

[21]. The 3rd respondent had his titles Kwale/Galu/Kinondo/1632 and 1633. He had successfully partitioned Kwale/Galu/Kinondo/46. He had a copy of the green card of the original parcel 46 and searches for the titles he obtained after subdivision on 28.6.2006. He was sitting pretty in 2011. From his evidence, it was the Land Registrar who said the green cards for Kwale/Galu/Kinondo/46, 1632 and 1633 were lost. That the Land Registrar needed to advertise in the Kenya gazette for green cards for 1632 and 1633. That therefore, the 3rd respondent had to return his titles for such advertisement. Why could the Land Registrar not re-construct his records from the documents the 3rd respondent had? Infact, all those green cards were produced in court by the 3rd respondent as defence exhibits 10,11,15, 16, 19, 20 and 21. Why was the Land Registrar moving himself on those green cards? The Kenya Gazette notice no. 2139 of 4.3.211 is interesting and informative as to the relationship between the Land Registrar and the 3rd respondent in regard to the alleged lost green cards. The same read as follows;

WHEREAS Dr. Kwaljeet Sing Rekhi, is registered as proprietor in absolute ownership interest of that piece of land situate in the district of Kwale, registered under title no. Kwale/Galu/Kinondo/1632 and 1633, and whereas sufficient evidence has been adduced to show that the green cards issued thereof have been lost and efforts to trace them in the office have failed, notice is given that after the expiration of fourteen days (14) from the date hereof, I shall open new registers provided that no objection has been received within that period.

This advertisement implies that it is the 3rd respondent who furnished evidence that green cards are lost and that the 3rd respondent's effort to trace them in his office have failed. If this is not the case then, who moved the Land Registrar when there was no complaint and when the 3rd respondent was not aware that any documents were lost?

[22]. It is worth of note that the 3rd respondent told the court that he did not move the land registrar that he did not pay any money to the lands office for advertising with the Government Printer and the issuance of new titles. Payment of fees was a mandatory requirement under Section 156 of the Registered Land Act Cap 300 section 156 (1) stated

156. (1) The prescribed fees shall be payable in respect of title deeds, certificates of lease, searches, survey plans, printed forms and all other matters connected with registration, and the registrar may refuse registration until the fees are paid.

(2). ...

(3). ...

He produced to court copies of the titles for Kwale/Galu/Kinondo/1632 and 1633 that he surrendered to the land registrar as defence exhibit 13 and 14. The green cards for those titles had 3 entries. The last entry being an inhibition registered on 11.5.12. The green cards were produced as D. Exh. 19 and 20. However, when the new titles for the said parcels Kwale/Galu/Kinondo/1632 and 1633 were re-issued after the advertisement on 21.3.2011, they were exactly the same in every detail. See D.exh. 13 and 14 but the green cards showed that there were only two entries in the proprietorship section. The first, showing the registered proprietor as Dr. Kwaljeet Sing Rekhi and the 2nd entry being that the title was issued on 22.3.2011. The Inhibition that were put pursuant to Mombasa High Court Misc. Civ. Appl. No. 227 of 2006 were removed without any reference to the applicant herein or his advocates. Why did the Land Registrar not comply with the mandatory provisions of Section 138 of the Registered Land Act? The sole purpose of the Land Registrar of saying that the green cards were lost and for asking the 3rd respondent to submit his titles for 1632 and 1633, and the reason for not asking the 3rd respondent to pay any advertisement fees to the Government Printer and registration fees at the Kwale Registry and for issuing new titles that were exactly the same in every detail with the titles he had recalled was then revealed.

[23]. The purpose was to erase the record in the original green card of Kwale/Galu/ Kinondo/46. As a matter of fact, it is quite clear why the 3rd respondent wanted to subdivide Kwale/Galu/Kinondo/46 and ignored the *Miscellaneous case 227 of 2007* aforeseaid. This was to enable the Land Registrar to do the

following,

1. To enable the land Registrar to use the new subdivisions to wit, Kwale/Galu Kinondo/1632 and 1633 to allege that the green cards are lost and to enable him to advertise in the Kenya gazette without the applicant herein (the real owner of Kwale/Galu Kinondo/46) detecting that a process of change of ownership had occurred in his land. The new titles would ring no bells to him even when advertised in the Kenya gazette.

2. To remove all records and entries in the register of Kwale/Galu/Kinondo/46 and its resultant subdivisions and to issue second string titles for parcels Kwale/Galu/Kinondo/1632 and 1633 without any inhibitions.

It is for this reason that even when the 3rd respondent was served with pleadings of Mombasa High Court Misc. Civil Appl. No. 222 of 2007 challenging his predecessors in title in Kwale/Galu/Kinondo/46, he chose to ignore, and proceeded to extinguish the subject matter of that suit. Any reasonable person, who had also the benefit of advice from counsel, and acting in good faith, would have rushed to court and applied to be made a party to that suit to protect his interest.

[24]. The 3rd respondent in his defence raised the issue that he was a bona fide purchaser for value without notice. That he was registered as owner of Kwale/Galu/Kinondo/46 well before Mombasa High Court Misc. Civ. Appl. No. 227 of 2006 was filed on 20th March 2006. This was before the final orders were granted in that case, on 7th February 2007 quashing the Mwambweni Land Disputes Tribunal's award.

That he was registered as owner of the same on 6th December 2005. That there were no inhibitions or restrictions in the Lands office Kwale or anywhere else. That his title is incapable of being challenged.

This argument could have been valid but for two major reasons mitigating against the respondents claim;

(a). That Ramadhan Mohammed Tsolozzi the person who sold the land to the 3rd respondent could pass no title to him since the tribunal which awarded the land to Mr. Tsolozzi had no jurisdiction. The tribunal's orders were void ab – initio. Mr. Tsolozzi had therefore no title to pass to the 3rd respondent.

(b). Even if (a) was not the position, the 3rd respondent cannot be said not to have known the existence of Mombasa High Court Misc. Civ. Appl. No. 227 of 2006. The said judicial review application was challenging the title he held that is Kwale/Galu/Kinondo/46. He was served with the proceedings on 24.4.2006. The title was still existing. The previous ownership of that property by Ramadhan Mohammed Tsolozzi who sold it to him was in dispute. His title was therefore in danger. The case was going on. He had every opportunity to join that case. That is why he was served! He had the services of an advocate. What did he do? He ignored the case. He proceeded to subdivide the land and had the subject matter of that Mombasa High Court Misc. Civ. Appl. No. 227 of 2006 extinguished when the case was pending. Two months and 4 days later on 28.6.2006 he was issued with land titles Kwale/Galu/Kinondo/1632 and 1633. The titles were later blocked with an inhibition from the court. Thereafter, those titles were recalled by the Land Registrar on the allegation that the green cards were lost and he was re-issued with a fresh set of titles with exactly the same detail, with the exception that, their respective green cards had no inhibition that had been imposed by the court.

[25]. I have no doubt in my mind that the inhibitions were removed for the 3rd respondent's benefit. Consequently, I hold that the 3rd respondent was part and parcel of that plan to remove the inhibition. A party who extinguishes the subject matter of a suit registered in his name after being served with pleadings challenging ownership of the title he holds cannot come to court and plead that he was bona

fide. If there was any *bonafides* on the part of the 3rd respondent he should not have subdivided Kwale/Galu/Kinondo46 two months and four days after service. I reject his contention and find it without any merit at all.

The green cards were never lost. All of them were in the possession of the 3rd respondent. He produced them in this case. The allegation by the Land Registrar Kwale that they were lost is a red herring. If it was the Land Registrar who told the 3rd respondent that the green cards were lost as alleged, there was nothing easier than the 3rd respondent herein, telling the said Land Registrar that he had certified copies of the same. He never did that. He was part of the whole plan. The Registrar's rectification of the register to create new green cards was not within his power under Section 142 of the Registered Land Act. His intention was to remove the restrictions by attempting to issue new title deeds.

I have no doubt in my mind that the 3rd respondent acted in cahoots with the District Land Registrar Kwale to defeat the cause of justice in regard to the applicants interest in Kwale/Galu/Kinondo/46 and also to defeat his constitutional rights under Article 40 of the Constitution of Kenya.

Issue no. 5

What orders should be made under the circumstances?

The orders:

[26]. I agree with the applicant that his constitutional rights were breached under the bill of rights as provided by Section 75 and 77 of the old constitution. His constitutional rights under the Articles 35 (2), 40 and 47 were breached by the actions of the 1st and 3rd respondents. This petition succeeds as prayed in paragraph a – h as prayed with costs and interest to the petitioner.

I find no blame on the part of the 2nd respondent and the petitions against the 2nd respondent is dismissed with no order as to costs.

I wish to thank the learned counsels in this case Mr. Mogaka, Mr. Magolo, Mr. Ngare State Counsel and Miss Ngige, for their insight diligence hard work and courtesy to the court.

DATED and SIGNED at BUNGOMA this 18th day of September 2015.

S. MUKUNYA

JUDGE

DELIVERED in MOMBASA this 7th day of October 2015 .

by Hon. Justice

A. Omollo.

JUDGE.