



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
ENVIRONMENT AND LAND COURT
CIVIL SUIT NO. 30 OF 2014

SAMUEL KAMAU MACHARIA PLAINTIFF

VERSUS

ALI KHAN ALI MUSES 1ST DEFENDANT

ESTATE SONRISA LTD 2ND DEFENDANT

LAND REGISTRAR, KWALE (SUED THROUGH

THE HON ATTORNEY GENERAL..... 3RD DEFENDANT

JUDGEMENT

[1] The plaintiff Mr. Samuel Kamau Macharia filed a suit and stated that at all material times he was and is still the registered owner of land parcel Galu/Kinondo/50 vide a land certificate issued on 21st May 1981. He states that he charged the suit land to Daima Bank (now in liquidation) and thereafter he cleared the charge with Deposit Protection Fund and was issued with a discharge of charge for registration at the Kwale District Land Registry where he was frustrated as he was told that the parcel file and other records in respect of the suit property were missing. He avers that he proceeded to the site and found that the first and second defendant had encroached upon the said land. The plaintiff avers that he has now established that the 1st defendant was issued with a title deed by the 3rd defendant for the same suit property on 23rd April 2007 and further that the encroachment by the 1st defendant was done with the knowledge and participation of the 3rd defendant. He alleged a fraud on the part of the defendants jointly and severally. He averred that the conduct of the defendants as a violation of his constitutional rights. he set out the particulars of fraud in his plaint against the defendants. He therefore prayed for an order of permanent/ mandatory injunction restraining the 1st and 2nd defendants from encroaching, trespassing, developing, alienating, selling, transferring or in any other way whatsoever by themselves their agents, servants from claiming through them or interfering or dealing with Title No. Galu/Kinondo/50. He further sought for a declaration that he is the bona fide and legal owner of the suit land and a declaration that any encroachment by 1st and 2nd defendants is illegal null and void and that the 1st and 2nd defendants should be evicted from his said land and any titles held by them be cancelled and that the Land Registrar be ordered to produce and avail the parcel file and records of the suit land and that the Land Registrar do amend and change all entries made on the suit land to the detriment of the plaintiff and do reinstate the plaintiff as the sole owner of title no. Galu/Konondo/50.

[2] The first defendant filed a defence on 6th March, 2014 and stated that he resides in Likoni. That in

the month of April 2007 he learnt that a beach plot Galu/Kinondo/50 was up for sale. He instructed M/s Atkinson Cleasby & Satchu advocates to act for him while the firm of Oddiaga & Co acted for the seller and a sale agreement was entered into on 18th April 2007. He states that he paid a consideration thereof of Kshs. 9,000,00.00 and the seller executed a transfer to him on 23rd April 2007. That he paid stamp duty registration fee and the land was registered into his name. On 23rd April, 2007 he was issued with a title after the surrender of the previous title by the previous owner. He claimed he is the owner thereof and has not entered the land illegally.

[3] The second defendant filed its defence on 26th April 2014. It averred that the first defendant has been the registered proprietor of Kwale/Galu Kinondo/50. It stated that it is the registered proprietor of Kwale/Kinondo/48. It denied that it has trespassed on the plaintiffs property, but admitted that its land is adjacent to the land parcel Kwale/Galu Kinondo/50.

[4] The third defendant appeared through the Attorney General and filed a general defence denying liability.

[5] The plaintiff Mr Samuel Kamau Macharia gave evidence in court that the suit property belonged to him. He stated that he was shown the land and he inspected the same before he bought it. He produced the original title document. He explained to court how he used the land to borrow money from Daima Bank. How Daima Bank went into liquidation and the balance of the money he had not paid was demanded by the Deposit Protection Fund. He explained how he was sued by the fund and how he engaged lawyers to defend him and how a consent was entered into and he cleared the debt. This culminated into a Discharge of charge. He explained how he instructed his lawyer Mr. Mwaniki Gachoka to register the discharge of charge at Kwale District Land Registry and how the discharge could not be registered as the parcel file in the Kwale District Land Registry aforesaid could not be found. That necessitated him and his counsel aforesaid to go to Kwale and when he went to the suit land he could not clearly identify his land as most of it was built up. He stated that he used a surveyor to identify the property. He found out the person who had encroached his land. He stated that he had not sold his land to anyone. He stated that the first defendant had a similar title to his. He said that from the records availed to him there was an agreement between the first defendant and a Mr Nderitu. The 1st defendant (according to the agreement) paid Kshs. 9 million and the land was transferred to the 1st defendant in four days. The plaintiff' stated that, between the time the land was registered in his name and the time the land was registered in the name of the 2nd defendant there was a difference of 27 years. He averred that he had not seen any title in the name of the said Joseph Francis Mwangi Nderitu. He said that he noticed that the title with the first defendant was 1.7 hectares. He further said that when he went to pick beacons with the Surveyor, he noticed that there were incomplete buildings all sitting on his land. He told the court that he had not allowed the first defendant to build on his land. The plaintiff' noticed that the 1st defendant has charged the land to Fidelity Bank for Kshs. 50 million. Mr. Macharia averred that no land can have two titles under the repealed Cap 300 and stated that the second one should be a fake. He said that he had issued the Attorney General with a notice to produce all the original registration documents and he stated that he had not been provided with the same. He said that the suit land is subject to land control consent of the relevant Land Control Board.

On being cross-examined by Mr. Maosa the plaintiff stated that he bought the land from Professor Munoru. That he did not have a copy of the sale agreement. That he was surprised to find out that the first respondent had charged the land while the original charge was subsisting. He said that he had sued for Galu/Kinondo/50 not Kwale/Galu Kinondo /50. In reply to questions by M/s Oluoch, the plaintiff said that Plot Kwale/Galu/Kinondo 48 has encroached into his plot. He admitted that the issue between himself and the second defendant was a boundary dispute. Mr. Macharia told the State Counsel that his land is 1.7 hectares and that the land of the 2nd defendant is 0.9 hectares.

[6] The plaintiff's first witness was Mr Mwaniki Gachoka an advocate of the High Court of Kenya who stated that he had acted for the plaintiff since 1991. He explained how he was engaged by the plaintiff to act for him in *Nairobi High Court Civil Case No. 528 of 1998*. That the plaintiff was sued by Daima Bank. He explained the nature of the matter and how land parcel Galu/Kinondo/50 was used as security. Further that the plaintiff lost the case in the High Court and the subsequent appeal was only successful in

as far as the penalty on interests was concerned but maintained the claim on principal amount of about 30 million. Counsel explained how the Kshs. 30 million was paid after the negotiations for waivers with the Deposit Protection Fund. He explained how eventually a discharge of charge was granted to him and how he attempted to register the same at Kwale District Land Registry on 7th November, 2013 but was unsuccessful. He therefore made a decision to ask the Kwale Land Registry to release his documents the discharge of charge and the original title since the Registry was unable to register the same. He stated that the land is still charged to Daima Bank.

[7] The second plaintiffs witness was one Mr. Wilson Skasa - a Surveyor who said he went to the same land and his instructions by the 2nd defendant were to establish the suit and size of the suit plot. He said he established the plot and gave the plot sizes to his instructing client. He said the plot is 1.7 hectares and Kwale/Galu Kinondo/48 is 0.9 hectares. He said he established the boundaries of the two parcels 48 and 50. He found out that parcel 48 had encroached on parcel 50 by one hectare. He also said that there was an unfinished building on Plot No. 50. He stated that plots no. 48, 50 and 47 all total to 5.0 hectares.

On cross-examination by Ms Oluoch he said he placed the beacons along the road, that he did not have to go inside the plots to find the beacons. He said he used the Registry Index Map as a guide. He said that the title itself carries more weight in regard to acreage.

[8] The 1st defendant Mr Ali Khan Muses restated the story in his defence aforesaid and explained how he saw an advertisement on the roadside for a beach plot. He went to check it out and he liked it. He explained to the court how he contacted the owner on telephone. He explained how the owner said he was from upcountry and how he came and they met at Castle Hotel in Mombasa. He explained that the vendor came accompanied by another person, he explained how they went to his lawyer Mr Satchu. He explained further that Mr Satchu advocate asked for the buyers identity cards. He asked him whether he had a lawyer and he said no. He gave him his business card and asked him to get in touch with him once he appointed a lawyer. The 1st defendant stated that the vendor got a lawyer Mr Stephen Oddiaga advocate. The 1st defendant said that Mr Satchu and Mr Oddiaga got together and an agreement was prepared. The seller was one Joseph Mwangi Nderitu ID NO. 6545273 of P.O. Box 3421 Nairobi. The agreement was dated 18th April, 2007. The purchase price was Kshs. 9 million. The money was paid to Stephen Oddiaga. The 1st defendant said he paid the money in two cheques of Kshs.900.000.00 dated 14th April 2007 and another cheque of Kshs. 8,100,000.00 dated 18th April 2007 and that he gave Mr. Satchu Kshs 182,000 for stamp duty and other fees. A transfer was prepared dated 19th April 2007 and registered in Kwale on 23rd May 2007. He stated that the stamp duty was paid.

The 1st defendant said that when this property was sold to him he did a search of the same in Kwale Land Registry. That this property after transfer to him was charged to Fidelity Bank. He said that there was a structure on the land whose value is Kshs. 240 million. He told the court that in the year 2008 he had problems with one Chris Kirubi who had said that the 1st defendant had encroached on his land and that the said Mr. Kirubi the owner of Kwale/Galu Kinondo/47 had filed Mombasa HCCC 205 of 2008 which case is still pending in the ELC Court Mombasa. The 1st defendant reiterated that he has a genuine title and is the owner of the suit property. He said the land was transferred to him after the Land Control Board gave its consent dated 4th April 2007. The 1st defendant said that his original title is with Fidelity Bank. He adopted his statement and his supplementary statements. At this point Mr. Orenge for the plaintiff protested that he had served notice to produce on the 1st defendant to produce certified copies of the Green card of Kwale/Galu Kinondo/50 and the original of the sale agreement between Joseph Mwangi Nderitu and the 1st defendant. He also said that he had given a notice to produce to the 2nd defendant also to produce a certified copy of the Green Card of Kwale Galu/Kinondo/48 and the change of user from Agricultural to Commercial use. Further that he had served a notice to produce on the Attorney General for Green cards and parcel file of Galu/Kinondo/50 and Kwale/Galu/Kinondo/48 and the parcel files in respect to the said two parcels of land.

[9] Ms Namahya State Counsel explained that she personally went to Kwale District Land Registry and that there were no Green Cards for the above parcels of land but she got a Green Card for plot no. 48 and she gave the advocate for the plaintiff a copy. Mr. Maosa Counsel for the 2nd defendant argued that the notices came so late in the day. He argued that the plaintiff wanted to shift the burden of proof. He said

that his client was not able to produce the documents.

[10] Ms Oluoch said that her client had complied with Order 11. She argued that the plaintiff should not insist on production of those documents since he has closed his case. She called that request a delaying tactic. The court made a ruling on the point. I rejected the prayer but did rule that any party herein was given leave to bring the particulars of the two vendors in this case to wit vendor to the plaintiff for Galu/Kinondo/50 and vendor to the 1st defendant one Joseph Mwangi Nderitu ID No. 6545273 of P.O.Box 3421 Nairobi before 2nd September 2013. The witness Mr Ali Khan Muses was stood down.

When the matter resumed for hearing on 2nd September 2014, the 1st defendant was said to be unwell with a bed rest. Ms Namahya State Counsel applied to have the evidence of the Land Registrar Mr Charles Kipkurui Ngetich heard. The witness was said to be alone in the station and was hard to get. I allowed him to give evidence. Before Mr Ngetich took the witness box, Mr Orange told the court that he had filed a report pursuant to the court order of 6th August 2014. He said that he had the particulars of one Joseph Mwangi Nderitu holder of ID No. 6545273 and the vendor of land parcel Kwale/Galu Kinondo/50. He requested that the report be made part of the court record.

Mr Maosa, was not opposed to the report but he said it should be made by a competent witness. He also stated that the plaintiffs only produced records of the vendor to the 1st defendant and did not produce the particulars of their own vendor. Ms Oluoch associated herself with the sentiments of Mr Maosa while Ms Namahya said that the information on particulars of person is online as long as you knew their identity card particulars. She saw nothing wrong with the production of the report. I ruled that since I had given all the parties a chance to avail the particulars of one Joseph Mwangi Nderitu the holder of the ID Card No. 6545273 on the agreement for sale dated 18th April 2007 of land parcel Kwale/Galu Kinondo/50 sold to the 1st defendant, and only the plaintiff had obtained those particulars and served all the other parties, The evidence was open to challenge by all other parties who had not given evidence as to whether or not the said identity card number belonged to the said Joseph Mwangi Nderitu. I stated that that information was crucial to this case. I ordered that the value of the evidence given in that regard shall be considered with other evidence that has been adduced and further evidence that may be adduced in this case.

[11] Mr. Charles Kipkurui Ngetich gave evidence and said that he is the Land Registrar in Kwale. He said he is a lawyer and an officer of the Court. He produced two transfers. The first was on 28th February, 1975 from the owner Bakari Mohammad of C/o Chiefs Office Diani Location. P.O. Ukunda to Peter Nganga Kamande and Wilson Burugu Gitau all of P.O. Box 95059 Mombasa. This second transfer was by one Peter Nganga Kamande ID No. 3339622/66 of P.O. Box 59635 Nairobi to Samuel Kamau Macharia of P.O. box 74309 for Kshs. 450,000. A stamp duty of 450 pounds paid and an application for Land Control Consent granted by Kwale Land Control Board of P.O. box 1 Kwale. The witness certified the documents as true copies of the original. He told the court that the area is shown as 1.7 hectares. He stated that he could see a charge on the title.

The Land Registrar said he could see another transfer in the name of Ali Khan Muses of P.O.Box 8691 Mombasa for Kwale/Galu Kinondo/50 acreage comprising 1.7 hectares and a map sheet no 9. The title was granted on 23rd May 2007 by a Registrar called Mary Kaai. The Land Registrar suspected that the title is a forgery. He justified his assertion by saying that as Land Registrars they are supposed and indeed are very conversant with each others signature. He said that the signature of Mary Kaai was too long - longer than normal. That the title given in 2007 was printed in old stationery that was supposed to be in use in the year 2002. He said that they do not use old stock and old stationery has time limits. That there was no transfer documents. No application for Land Control Consent. There was no Land Board consent and no valuation requisition form and finally that the stamp duty receipt was not signed by Mary Kaai the Land Registrar as was the requirement. The witness said that the land title heading on the two title deeds were in order. He explained that Galu/Kinondo/50 (Macharia) and Kwale/Galu Kinondo/50 (Muses) referred to the same piece of land. He explained that in the old titles the name Kwale was left out. The witnesses said that in Kwale, there used to be alot of fraud. The fraudsters corroborated with Land Registrars and clerks. They used to pluck out Green cards. The Land Registrar explained that during the cleanup of Land Registry in Kwale by the Cabinet Secretary for Land Mrs. Charity Ngilu they

found 1574 Green cards hidden in various places. The Land Registrar categorically stated that the plaintiff is the legal owner of the suit land. He finally stated that the search certificate for Galu/Kinondo/48, the white card shows it to comprise of 0.9 hectares which is also the same acreage in map sheet no 9.

[12] On Cross-examination Mr. Ngetich reiterated that in 2007 there was only one Land Registrar. The Registrar signed the title deed and also signed the receipt for stamp duty. He stated that they have specimen signatures for all Land Registrars. The witness said that there was no document showing any requisition by Mr Ali Khan Muses the 1st defendant. The Land Registrar said that for a Green card to be lost, a member of staff must be used.

On cross examination by Mr. Maosa for the 1st defendant, the witness said that he had the parcel file as ordered by the Court summons and plaint. He said that it has the history. He said it was possible to get the parcel file after the re-organization of the land Registry by Cabinet Secretary. He told the court that the parcel file should contain, transfer, valuation requisite Land Control Consent, any other payments searches etc and charge documents for the property. He reiterated to Mr. Maosa that the 1st defendant's title document was a forgery. He however said he does not know why only one person applied for transfer of title to Mr. Macharia when two (2) of them were registered.

On further Cross-examination by Ms Namahya State Counsel, he said there was no ownership of the property by Mr Nderitu. He stated that the hierarchy of transactions on the parcel file was as follows,

1. On 21st May the land was allocated to Bakari Mohamed Mwatele
2. On 28th February 1975 he sold the land to Peter Nganga Kamande and Wilson Burugu Gitau
3. On 20th May 1981 Peter Nganga Kamande sold to Samuel Kamau Macharia

He emphasised that there is a massive fraud in Kwale and that some properties have over 3 separate titles held by different persons. He finally stated that in the year 2005, the land office required every person filing any registration documents to provide;

1. passport size colour photographs
2. Personal Identification Numbers of the parties selling or buying or making any transaction
3. copies of identity cards and
4. Personal Identification Numbers of the advocates submitting the documents. He said that those are the requirements upto now. He averred that a document that does not have any of these documents is supposed to be rejected by the Land Registry.

[13] Ms E Iwomna Strzelecka gave evidence that she is a Director of Estate Sonrisa Ltd the owner of the neighbouring piece of land parcel no Kwale/Galu Kinondo/48. She produced a certificate of search and gave the history of how the land was acquired and how the change of user from Agricultural to Commercial was done. She said that her company plot is adjacent to LR Kwale/Galu/Kinondo/50. She told the court of her company's developments on plot no. 48. She stated that there is a brick wall separating plot no. 48 and 50. She stated that when her company built the wall it used survey maps and had the drawings approved by NEMA. She said she was showed the beacons by a Mr Nyongesa a government surveyor before she started constructing the wall. She denied having encroached on the plaintiff's land. She said that the acreage of her company's land is 0.9 hectares. She admitted that when she surveyed the company's land parcel no. 48 the owner of plot no. 50 was not present. She said that she did not know whether there is a footpath between plot no 50 and 48. She stated that her propriety charged to Fidelity Bank and the area shown for the land is 0.9 hectares for valuation purposes. One Herbert Mboya Ndolo a Surveyor was called by the 2nd defendant. He testified on how he surveyed plot no 48. He attempted to say that plot no 48 was 1.9 hectares and not 0.9 as per the documents held and produced.

On cross-examination by Mr. Orenge for the plaintiff he stated that he could not verify the correctness of the documents since he was not at the Kwale Survey Registry when they were written. He admitted that under the Registered Land Act Cap 300 then in force, there was a requirement to inform all the neighbours when such a survey exercise was to be conducted and that it could not be done in the absence of the neighbours. The witness admitted that all the plots in the area have a discrepancy and for anyone to know the exact size of his plot a full survey of all the plots has to be done. Ms Olouch at this juncture closed the case for the 2nd defendant.

[14] Mr Maosa recalled the 1st defendant who was stood down for purposes of producing verification particulars of the vendor to the plaintiff and vendor to the defendant of the suit land. He said he was aware of the particulars supplied to him of his vendor Joseph Mwangi Nderitu and the affidavit filed therein. He however stated that the plaintiff did not produce the particulars of Professor Munoru of the University of Nairobi. He further said that he was aware that the entire parcel file had been handed to court to peruse and safe keeping till finalization of the suit. He produced a bundle of supplementary documents. He denied that he did anything fraudulent. He said that his vendor Mr. Nderitu had a title, he signed the sale agreement and his picture and identify card is on the agreement. He said that his title is genuine and that he had undertaken developments worth Kshs. 240 million on the suit land.

On Cross-examination he admitted that he had not seen any transfer documents from Joseph Mwangi Nderitu to himself from the documents with the Land Registrar. He said the identity card given on the agreement between himself and Joseph Nderitu Mwangi was no. 6545273. When the witness was challenged with the fact that the identification report from the Registrar of Persons showed the identity card no. 6545273 to belong to Sebastian Onwonga Mogire he only said he saw the documents a few days ago and that he had made no effort to authenticate the documents and that Mr. Nderitu did not leave any document. He stated that when he went to the advocate Mr Satchu the vendor and himself agreed on the price. Mr. Nderitu gave his title deed and then his identity card and that Mr. Satchu gave him his business card and asked him to look for a lawyer which he did. He got Mr Stephen Oddiaga. He said the agreement was done by Mr Satchu. He agreed that Kwale/Galu/Kinondo/50 and Galu/Kinondo/50 refer one and the same thing. He said he was not calling Mr Joseph Mwangi Nderitu, Mr Satchu and Mr Oddiaga.

[15] These are the competing interests in this case. The question for determination is firstly who is the legal owner of Land Parcel Kwale/Galu Kinondo/50 also referred to as land parcel Galu/Kinondo/50 and secondly, whether the owner of Kwale/Galu Kinondo/48 has encroached on plot no. 50 aforesaid.

[16] I decided to peruse the parcel file, recently found hidden in the Kwale District Land Registry. The file revealed the following details.

- 1. Adjudication Record No. A654750 for Kwale/Galu Kinondo/50 comprising of 1.7 hectares, Diani location P.O. Ukunda dated 21st February, 1974 in the name of Bakari Mohamed Mwatete duly thumb printed. There were white and yellow copies of the same.**
- 2. Transfer of land for Kwale/Galu Kinondo/50 from Bakari Mohamadi c/o Chiefs Office Diani to Peter Nganga Kamande and Wilson Burugu Gitau for a consideration of Kshs. 14,500/- dated 28th February, 1975.**
- 3. Application for Land Control Consent from Bakari Mohamadi ID/29231/MSA to Peter Nganga Kamande and Wilson Burugu Gitau dated 28th February, 1975.**
- 4. Correction of name of Bakari Mohamed Mwatate to Bakari Mohamadi dated 28th February, 1975 and registered on 13th March 1975.**
- 5. Letter of consent dated 28th February 1975 to transfer from Bakari Mohamed to Peter Nganga Kamande and Wilson Burugu Gitau for Kshs. 14,000.**
- 6. Application for Land Control Consent to charge Galu/Kinondo/50 to Kenya Commercial**

Bank by Peter Nganga Kamande and Burugu Gitau dated 14th October 1975.

7. Consent to charge Galu/Kinondo/50 to KCB securing Ksh. 30,000/- by Peter Nganga Kamande and Wilson Burugu Gitau dated 14th October 1975.

8. Letter of Official Search showing Galu/Kinondo/50 as charged to Kenya Commercial Bank dated 14th November 1975.

9. Charge for Galu/Kinondo/50 duly registered dated 14th October 1975.

10. Letter of consent dated 23rd February 1979 to charge Galu/Kinondo/3,57 for Kshs. 100,000/- to National Bank of Kenya by Peter Nganga Kamande.

11. Charge to National Bank of Kenya against Galu/Kinondo/3,57,50 for Kshs. 710,000 by Peter Nganga Kamande and Wilson Burugu Gitau for Kshs. 710,000 dated 11th May 1979.

12. Letter of Consent dated 23rd February 1979 to charge Galu/Kinondo/50 to National Bank of Kenya by Peter Nganga Kamande and Wilson Burugu Gitau for Kshs 710.000.

13. Consent to transfer by way of Gift of Galu/Kinondo/50,392 from Peter Nganga Kamande and Wilson Burugu Gitau to Peter Nganga Kamande absolutely dated 5th May 1980.

14. Reference sheet for Galu/Kinondo/392 registered on 20th February 1976.

15. Application for Land Control Consent for Galu/Kinondo/3, 57 by Peter Nganga Kamande.

16. Application for charge for Galu/Kinondo/50 showing payment thereof of Kshs 25/-.

17. Discharge of Charge for Galu/Kinondo/50 from Kenya Commercial Bank dated 11th May 1979.

18. Receipt for Kshs. 75 dated 17th October 1979 for inspection fees of Galu/Kinondo/50,56 and 677.

19. Transfer of undivided share of Galu/Kinondo/50 from Wilson Burugu Gitau ID No. 5476232/68 to Peter Nganga Kamande ID No.3339622/66 dated 20th May 1981 registered as entry No. B five (5).

20. Transfer of Land Parcel Galu/Kinondo/50 from Peter Nganga Kamande ID No. 3339622/66 of P.O.Box 59635 Nairobi in consideration of shillings four hundred and fifty thousand (Kshs. 450,000/-) to Samuel Kamau Macharia ID. No. 3491980/66 of P.O.Box 74309, Nairobi dated 20th May 1981 witnessed by G.G.S. Munoru of Monoru and Njugi advocates P.O. Box 47159 Nairobi registered on 21st May 1981 as entry no B 6 (six).

21. Discharge of charge by National Bank of Kenya for Galu/Kinondo/50 for charge securing Kshs. 710,000/- dated 20th May 1981.

22. Letter of consent dated 14th May 1981 for sale of Galu/Kinondo/50 from Peter Nganga Kamande to Samuel Kamau Macharia for Kshs. 450,000/-.

23. Charge of Galu/Kinondo/50 by Samuel Kamau Macharia to Daima Bank Limited for Kenya shilling Seven Million (Kshs. 7000000/-) dated 6th February 1996. The Charge was drawn by Kilonzo & Company Advocates, Corner House, 6th Floor, P.O.Box 59839, Nairobi.

24. Receipt No. D334463 dated 5th March 1996 for Kshs. 150 issued by land office to Kilonzo

& Co Advocates for Official Search.

25. Receipt for Kshs.250/- issued to Kilonzo & Co dated 5th March 1996 fro Registration by charge of Galu/Kinondo/50.

26. Application for Land Control consent for sale of Kwale/Galu/Kinondo/50 dated 14th May 1981.

27. Photocopies of cheques for Ksh. 8,100.000.00 dated 18th April 2007 from Ali Khan Muses the 1st defendant paying Oddiaga & Co Advocates and a cheque for Kshs 182,000/- dated 18th April 2007 to Atkison,Clesby & Satchu by the 1st plaintiff and cheque for Kshs 900,000 to Stephen Oddiaga & Co dated 14th April 2007 by the 1st plaintiff.

28. Receipt No. 819034 for approval of building for Ksh. 5000/-.

29. A receipt No. 7578446 for Kshs. 20000/- for building plans for plot no. Kwale/Galu/Kinondo/50.

30. Letter by Mahihu & Co advocates for restriction on Kwale/Galu Kinondo/47 and 50.

31. Letter dated 30th November 2013 by Amolo & Gachoka Advocates.

[17] The agreement for sale dated 18th April 2007 between Joseph Mwangi Nderitu of P.O.Box 3421 Nairobi ID Card No. 6545273 and Ali Khan Muses of P.O. Box 82691 Mombasa ID Card No. 4242975/22 reveal the following;

1. Land Parcel Kwale/Galu Kinondo/50 comprising of 1.71 hectares was to be sold to one Ali Khan Muses for Kshs. 9 million.
2. Kshs. 900,000 was to be paid to the vendors advocate as a deposit pending completion of the transaction by registration of the transfer in favour of the purchaser.
3. The balance of Kshs. 8.1 million shall be paid upon completion and shall be held by the vendors advocate as per clause 5 (a) therein.
4. The completion of the agreement was the 10th day after 18th April 2007 and the following documents shall be delivered by the vendor to the purchaser.

(i) Conveyance duly engrossed and completed in triplicate.

(ii) Premises in vacant possession.

(iii) Receipts for all rates paid up to 2007.

(iv) Clearance certificate in respect of rates paid valid for 30 days after completion.

(v) Copy of vendors PIN certificate

(vi) 3 passport size photographs of the vendor

(vii) Duty valuation form by KRA

(viii) Certified copy of both sides of vendors, ID duly certified by vendors advocate.

(ix) All the above documents called the completion documents were to be exchanged against payment of balance of the purchase price. All these documents were to be held pending completion

of the registration and authority to release from the purchasers advocates.

5. Among other terms, the advocates for the vendors were Stephen Oddiaga & Co advocates and the advocates for the purchasers were Atkinson Cleasby and Satchu.

6. The agreement was drawn by Atkinson Cleasby & Satchu advocates, Ralli House, 1st Floor, P.O.Box 90121 Mombasa. The signature of the vendor is witnessed by Stephen Oddiaga Advocate. The said agreement is signed by all the parties on 18th April 2007. (all emphasis mine).

This agreement raises many issues and has many unanswered questions.

Firstly, if the cheque for nine hundred thousand (Ksh.900,000.00) was a deposit as per the agreement clause 5(a) why was the cheque dated 14th April 2007 before the agreement was made?

Secondly, clause 5 (b) of the agreement dated 18th April 2007 required the balance of the purchase price Kshs. 8.1. million to be paid upon completion and the same be held by the vendors advocate after completion in 10 days from the date of the agreement. Why then was this cheque for 8.1. million paid to Oddiaga & Co the vendors advocates on the same day of the agreement without waiting for completion as stipulated by the agreement?

Thirdly, why was the entire purchase price paid on the day of the agreement, before the rates were proved to be paid, before a copy of the PIN certificate, KRA Stamp duty valuation form and a certified copy of the vendors identity card certified by his advocate was presented as per the requirements of the agreement? Why did the transfer documents annexed to the agreement for sale have no copy of the purchasers and the vendors identity card, no personal identification numbers of both vendor and purchaser and photographs of the vendor yet these were a requirement in the agreement both parties entered into on 18th April 2007 and which agreement was witnesses by their advocates? Why were the documents left out? Was this a case of profession negligence by their advocates or a design by the vendor and purchaser to leave them out? Why was Mr Oddiaga advocate who was given all the cheques on 18th April 2007 not called as a witness to shed light on these issues? Equally why was the firm of Atkinson Cleasby & Satchu not called as witness in regard to the agreement and why the money was not deposited in their account for the purchaser as required by the Law Societies conditions for sale which conditions the parties agreement for sale had adopted in paragraph 7 (iii)?

[18] The Land Registrar Kwale Mr. Ngetich in his evidence said that in every transaction of sale and transfer under RLA, the purchasers and vendors identity cards, their personal identification numbers (P.I.N) certificate and their passport size photographs and the P.I.N of their lawyers are a requirement. He said that this has been the practice on all Land Registries since 1995. Further that any document presented without those documents must be rejected. It would appear the vendor and purchaser were well aware of that requirement and that is why the agreement for sale stipulated that these documents were a must for completion of the agreement. If that was the case, and it must be the case, how was this agreement completed without those documents? How was the transfer registered in the Land Registry without those documents? It is no wonder that the said transfer is not on the parcel file of Kwale/Galu Kinondo/50 at all.

Another interesting feature of this sale to the 2nd defendant is that the Agreement for Sale indicates the identity card of the vendor Joseph Mwangi Nderitu as 6545273. This number on the agreement for sale is handwritten. The purchasers identity card is typed. The same raised eyebrows. Everything seemed to hinge on it according to the plaintiff. During the hearing I did allow the plaintiff and the defendant to bring evidence on the identity of their vendors and that of the adversary parties vendors. When the hearing resumed the plaintiff had made inquiries. He brought an identification report from the Registry of Persons. A report printed at the Registry of Persons on Thursday August 7 2014 at 14 hrs 10.27. It showed the identity card on the sale agreement to belong to **SABASITIANO ONWONGA MOGIRE** of Mokogonwa Village Mwamogesa Division, Nyaribari Masaba Kisii. He was born in 1962. All his tribal

particulars, photographs and signature are therein. The 1st defendant tried to object to that document, but I ruled I will give him a chance to disapprove it when he gave his evidence. Since these particulars are easily available at the Registry of Persons on the touch of a button. When he gave his evidence he was unable to challenge the identification report of the number on the agreement of sale. It is therefore a fact that identity card 06545273 does not belong to Joseph Mwangi Nderitu. It belongs to Sebastiano Onwonga Mogire of Kisii who never sold anything to the 1st defendant herein. The Land Registrar Kwale Mr. Charles Kipkurui Ngetich said he suspected the title with the 1st plaintiff is a forgery. He gave his reasons that on perusing the signature of a previous Land Registrar one Mary Kaai, he said that he knows her signature and the signature on the copy of the title of the 1st defendant differs. The one on the title deed being too long. He also said the title was printed on 2002 stationery while it was issued in 2007 a fact he said was irregular. He further said there was no transfer document in the land registry to transfer the suit property to the 1st defendant and no application for Land Control Consent and the consent itself transferring the suit land to the 1st defendant. Further, there was no valuation requisition form. He therefore concluded that the title was a forgery. He said that after the closure of the Land Registries and a search of all the offices therein under a purge by the Hon. Cabinet Secretary Mrs Charity Ngilu they recovered 1574 Green cards and parcel files hidden in various places in the Registry.

During the hearing of this case the State Counsel Miss Namahya went to Kwale Land Registry after the said Minister's purge and this parcel file previously alleged to be missing was found. It was presented to court by the Land Registrar Mr. Ngetich aforesaid. He was gracious enough to allow the court to keep it, peruse it and to release it to him after judgment. This court is thankful to him. He is a new Land Registrar who came recently to Kwale Land Registry and he has really, no interest in hiding anything in this case.

[19] I therefore, have come to the conclusion that, if the 2nd plaintiff filed any transfer, it would have been on the parcel file with its requisite consent and receipts for various registration payments since there was no one interested in plucking documents of the 1st defendant since the plaintiff herein was unaware of those transactions. Further that, the 1st defendant failed to do so because he did not have the vendors identify card number, vendors P.I.N. number and vendors real photographs and/ or, the vendor feared giving the said documents to avoid detection. I further find that the vendor who had an advocate failed to have these documents produced because he knew he was committing a fraud. Infact, when I perused the parcels file of Galu/Kinondo/50 there was no Green card. The Land Registrar explained to the court that there has been many fraudsters of land in Kwale Land Registry and that the first thing they did was to pluck out the Green card from the parcel file. He says the fraudsters worked in cahoots with some Land Registrars and Land Registry clerks. This must be true. Otherwise, the Government could not have closed the Kwale and Mombasa Land Registries to trace the lost files without a reasonable cause. In the words of the Land Registrar himself, he said they recovered 1514 Green Cards hidden in various places in the Kwale Land Registry. I believe him when he said the Green Card was plucked out from the parcel file of Galu/Kinondo/50.

The Green card could not have been plucked out for any other reason but to facilitate a fraud. This was to conceal the chronological order of the entries on the same and to avoid detection of previous entries.

[20] I find that, if the first defendant Mr. Ali Khan Muses and his lawyers Atkinson Cleasby & Satchu and the vendor one Joseph Mwangi Nderitu and his lawyer Stephen Oddiaga followed the terms of the agreement for sale dated 18th April 2007 to the letter, and if the "completion documents" were availed as per agreement they would have received a photostat copy of the identity card of the vendor, his Personal Identification number and his real photographs among other documents mentioned in the agreement as "completion documents". The real Joseph Mwangi Nderitu would have been revealed and this fraud would have been avoided. Mr Ali Khan Muses the first defendant herein would not have lost his 9 million purchase price and he would not have put such extensive buildings in the plaintiffs land. He would have known that the said Joseph Mwangi Nderitu was a fraudster. He should have deposited the entire purchase with his lawyers who would have ensured his interests were protected. He did not do so. He paid deposit to the advocate for the vendor before the agreement was made and the balance he paid to the advocate of the vendor on the day of the agreement contrary to the stipulations of Law Societies conditions for sale adopted by his own agreement with the vendor.

[21] I have traced the history of this land Galu/Kinondo/50 in detail from its inception and allocation to Bakari Mohamed Mwatete to his transfer to Peter Nganga Kamande and Wilson Burugu Gitau and transfer of ½ share of the same from Wilson Burugu Gitau to Peter Nganga Kamande on 20th May 1981 and transfer of Peter Nganga Kamande to Samuel Kamau Macharia on 20th May 1981 both entries being shown as entry five (5) and (6) six in the land registry. All these owners except Bakari Muhamed Mwatete borrowed money from various Commercial Banks using the Title Galu/Kinondo/50. All the charges, consents of Land Control Boards and discharges of charge and consents for various transfer to each one of them are in the parcel file.

The Plaintiff while giving evidence had said he bought the land from G.G.S Munoru but on my perusal of the documents I note that G.G.S Munoru was indeed his advocate who witnessed the transfer by Peter Nganga Kamande to himself on 21st May 1981. It would not be uncommon for a man of that age (74 years) to forget what transpired 33 years ago particularly when he did not have the documents of transfer that are in the Land Registry parcel file which had been hidden. The plaintiffs charge of the suit land to Daima Bank dated 6th February 1996 drawn by Kilonzo & Company advocates of Corner House, 6th floor P.O. Box 59839 Nairobi is still on the parcel file. Indeed, it was the discharge of that charge that made him aware that his land had been trespassed upon by the 1st and 2nd defendants. The discharge of charge drawn by Gachoka & Co Advocates could not be registered as the parcel file was missing in the Kwale Land Registry. The plaintiff still has the original title deed. It had been held by Daima Bank and was released to him after he paid the Kshs. 14 million required by Deposit Protection Fund of the Central Bank for Daima Bank in liquidation. There cannot be any question that the plaintiff was legitimately registered as the owner of Galu/Kinondo/50 after purchase from a previous owner Peter Nganga Kamande. His title has always been there. The Kwale District Land Registry could not at all issue another title to the 1st defendant for Galu/Kinondo/50 as no such land was available for registration without the consent permission authority and transfer by the plaintiff plus the consent from the relevant Land Control Board thereof.

[22] The evidence that was adduced before me showed that land parcel Galu/Kinondo/50 comprises of 1.7 hectares. It was also proved to me by documents availed that Galu/Kinondo 48 is 0.9 hectares. There was an attempt to say that Kwale/Galu/Kinondo/48 is 1.9 hectares according to Registry Index Map. No such evidence was availed to court at all. In fact, all documents produced showed the said land to be 0.9 hectares. I find as a fact that land parcel Kwale/Galu Kinondo/48 is 0.9 hectares. The beacons between land parcels Galu/Kinondo/50 and Kwale/Galu Kinondo/48 should be fixed by a surveyor as per the Land Act taking into account the area shown on the respective title deeds. The survey fees shall be paid by the owners of the said properties equally. Any party found to have encroached on the other parties land shall have sixty days to demolish all structures that might have been erected therein and move and vacate therefrom. If the party encroaching fails to move and vacate, the party whose land is encroached shall be at liberty after the said sixty (60) days to demolish such encroaching structures with the help of the Court Bailiff who will be assisted by the nearest police officers and nearest administration police officers. The cost of such demolishment shall be borne by the party that has so encroached. Any public path between the said parcels no. 50 and 47 accessing the sea shall not be interfered with or blocked.

[23] Although the Land Registrar Kwale and his staff appear to have had a hand in this fraud the court was not lead with clear evidence as to the blame on the Land Registrar and/or his clerks. In any case, there has been full participation and cooperation of the current Land Registrar Kwale. I make no findings in regard to the 3rd defendant in this fraud.

[24] As far as the 1st defendant is concerned, I find that his title to Kwale/Galu Kinondo/50 is a fraud. A fraud he was either privy to or one he should have detected and avoided. I find that his purchase of the said land was not bona fide. He entered into an agreement for sale whose terms he never complied with. He had an advocate assisting him. He must have been well advised to follow the agreement. If he was not properly advised, then his advocate failed him. He cannot blame the plaintiff for his lack of diligence in the purchase of the suit land. He has no title to Kwale/Galu Kinondo/50. The land was not available when he allegedly bought it. It had a legitimate owner Samuel Kamau Macharia. The first defendant had no dealings with Samuel Kamau Macharia at all. He shall move and vacate out of the said land within 30 days from this judgment. He shall remove all his structures and remove all debris therefrom within that

period. If he fails to do so, the plaintiff shall after that period move in with the help of the Court Bailiff and with the assistance of police and administration police of the nearest police stations and demolish all structures therein. The cost of such demolition shall be borne by the first defendant, The Kwale Land Registrar shall reinstate the plaintiff as the registered owner of Galu/Kinondo/50 and delete the names of the 1st defendant from the same.

[24] The plaintiff shall have the costs of this suit in as far as it relates to the 1st defendant. The costs between the plaintiff and second defendant shall abide with the boundary determination by the surveyor as to who have encroached on whose land and after such determination is filed in court and adopted by this court.

Finally the parcel file of Kwale/Galu Kinondo/50 shall be taken back for safe custody to Kwale Land Registry by the Executive Officer of this Court. These are the orders of the Court.

Dated and delivered in open court this 13th day of October, 2014.

S. MUKUNYA

JUDGE

13.10.2014

In the presence of:

Mr. Orenge advocate for the plaintiff'

Mr. Maosa advocate for the 1st defendant

Ms. Oluoch for the 2nd defendant

Ms. Namahya for the 3rd defendant