



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 189 of 2010

DUNCAN KABETHI WACHIRA..... PLAINTIFF

VERSUS

SALIM NASSORO MWADARANGUNYA.....1ST DEFENDANT

DAIMA NASSORO MBWATA.....2ND DEFENDANT

THE REGISTRAR OF LANDS.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

1. Duncan Kabethi Wachira is the plaintiff in this case. He has sued Salim Nassoro Mwarangunya, Daima Nassoro Mbwata, the Registrar of Lands, and the Attorney General (hereinafter referred to as the 1st, 2nd, 3rd and 4th defendants respectively). The plaintiff states that he purchased Kwale Galu/Kinondo/337 (hereinafter referred to as the suit property) from one Nasoro Salim, in the year 1976 for a sum of Kshs. 16,500/-. He was registered as the owner of the suit property and issued with a certificate of title. The plaintiff has now discovered that the suit property was transferred to the 1st and 2nd defendants on 21st February, 2007 pursuant to an order of the Kwale Resident Magistrate Court in Land case No. 22 of 2005.

2. Upon perusing the court file the plaintiff discovered that the court had adopted an award from the Kwale Land Disputes Tribunal issued pursuant to a dispute filed by the 1st and 2nd defendants against the plaintiff in the tribunal. The plaintiff contends that he was never served with any notice of the proceedings of the Land Tribunal, nor was he made aware of the adoption proceedings in the Kwale Resident Magistrate Court. The plaintiff contends that the purported transfer of the suit property to the defendants was the result of fraud and misrepresentation on the part of the 1st and 2nd defendants, and that the neither the Land Tribunal nor the Kwale court had jurisdiction to issue the purported orders.

3. The plaintiff therefore prays for judgment against the defendants jointly and severally as follows:

(a) An order of declaration to the effect that the purported transfer effected over KWALE GALU/KINONDO/337 pursuant to the transfer effected on 21st February 2007 is, illegal, null and void for want of service of notice of the proceedings before the tribunal and before the court, which proceedings were conducted against the cardinal principal of the right to be heard and that the proceedings are null and void.

(b) An order of declaration to the effect that the Kwale Land Disputes Tribunal had no jurisdiction to cancel a title deed and that the said proceedings and award are null and void.

(c) An order of declaration to the effect that the resident magistrate court did not have the jurisdiction to entertain the proceedings pursuant to the provisions of the Registered Land Act and that the proceedings therein are null and void.

(d) An order directed at the Registrar of Lands to cancel the land certificate issued on 21st February 2007 in favour of the 1st and 2nd defendants.

(e) A permanent injunction directed at the 1st and 2nd defendants whether by themselves, agents, servants or any of them whatsoever from trespassing onto, taking possession of, selling, transferring, lease, charging or in any manner whatsoever dealing in any manner whatsoever with all that property known as KWALE GALU/KINONDO/337.

(f) General and aggravated damages against the 1st and 2nd defendants.

(g) Costs of this suit and interests.

(h) Such further and other orders as this Honourable Court may deem fit to grant.

4. By an amended defence and counterclaim filed on 19th August, 2010, the 1st and 2nd defendants: denied that the plaintiff is the registered owner of the suit property, or that he purchased the same from Nasoro Salim; maintained that the proceedings before the tribunal and the Resident Magistrate's court at Kwale, were properly done and that the plaintiff chose not to participate out of his own choice; that the suit property is legally registered in the defendants' and all allegations of fraud are untrue; and that the plaintiff's suit should be dismissed.

5. The 1st and 2nd defendants as administrators of the late Nasoro Salim, their late father, who was the first registered owner of the suit property, lodged a counterclaim against the plaintiff contending: that the plaintiff used his position as the Provincial Police Officer and Police Commissioner to acquire the suit property illegally; that the plaintiff did not obtain consent from the Land Control Board, nor did he pay any purchase price for the suit property, nor was any transfer signed. The 1st and 2nd defendants thus seek judgment against the plaintiff on the counterclaim for:

(a) a declaration that there is a judgment already in court, and that this court cannot enter judgment in favour of the plaintiff as sought by him.

(b) an order declaring that the title deed held by the plaintiff is null and void.

(c) a declaration that the 1st and 2nd defendants are rightful owners of Plot No. Kwale Galu/Kinondo/337

(d) the Court to grant any other remedy it deems fit to grant in the circumstances.

6. The 3rd and 4th defendants did not enter any appearance or file any defence. In his evidence, the

plaintiff who is a retired Commissioner of Police, and currently a businessman, testified that he purchased the suit property in the year 1976 from one Mzee Nasoro Salim (hereinafter referred to as the seller). The agreed purchase price was Kshs.16,500/-. It was agreed that the plaintiff would commence payment once the process had gone through and the Land Control Board had given its consent. The seller on the other hand agreed to execute all the necessary documents to avoid going to the lands office several times. The Land Control Board gave its consent to the transaction on 24th March, 1976 and the seller executed the transfer. Thereafter the plaintiff made payment to the seller through several installments which were duly acknowledged. The plaintiff lodged the necessary documents with the Registrar of Lands, and a land certificate dated 26th March, 1976 was issued to him.

7. The plaintiff maintained that he has been in occupation of the suit property and has never sold or transferred it to any person. On 6th April, 2010 the plaintiff went to Kwale Lands office to confirm the status of his two properties i.e. Kwale Galu/Kinondo 357 and the suit property. He was shocked to discover that the suit property had been transferred to the 1st and 2nd defendants. Upon making further enquiries plaintiff learnt that the suit property had been transferred pursuant to an order from the Kwale Senior Resident Magistrate vide land case No. 22 of 2005. The plaintiff denied knowledge of the Kwale suit or the Kwale Land Disputes Tribunal proceedings, which were adopted by the Kwale Resident Magistrate court. Plaintiff denied ever having been served with any documents in regard to any of those matters. At the time the plaintiff learnt of the transfer of the suit property, the 1st and 2nd defendants were in the process of selling the suit property to other people. Plaintiff therefore obtained an interlocutory injunction to stop the sale.

8. The plaintiff denied the allegations that he obtained the suit property fraudulently, and asserted that the defendants were aware of the transactions between the plaintiff and the seller who was their father. The plaintiff denied ever having used his position as a Provincial Police Officer or Police Commissioner to acquire the suit property illegally. He maintained that he became the Police Commissioner about twenty years after he had purchased the suit property. He therefore urged the court to give judgment in his favour. Among the documents produced by the plaintiff, were duly signed acknowledgement of receipts for payment of installments in regard to the purchase price, consent from the Land Control Board for the transfer of the suit property, a duly registered transfer of land in the plaintiff's favour, and a certificate of title in plaintiff's name in regard to the suit property.

9. Under cross-examination, the plaintiff conceded that there was no agreement signed by the parties other than the acknowledgments for receipts of the installments for the purchase price. He explained that he made the first payment on 29th March, 1976. Plaintiff confirmed that the certificate of title was issued in his name on 26th March, 1976, although he had not made any payments by then. He conceded that all the documents which facilitated the transfer of the suit property to him, i.e. the consent from the Land Control Board, and the transfer document, were all obtained before he had made any payment.

10. The plaintiff asserted that he paid the agreed purchase price of Kshs.16,500/- and an additional sum of Kshs.4,000/-. The payments were made between August and March 1976 when he paid Kshs.14,020/- and on 28th July, 1979 when he paid Kshs.6,500/- through Salim Salim, a brother to the seller and Kshs.5,000/- to the seller. The plaintiff admitted that the seller and his son had come to the plaintiff's office looking for payment. He denied having threatened them with arrest and maintained that he paid them. He contended that the seller was in full control of the process of transfer of the land to him, and that it was a case of a willing buyer, willing seller. The plaintiff explained further that although the land certificate was issued in his name, the seller retained the title until after he had completed paying him the full amount.

11. The 2nd defendant was the only witness who testified for the defence. He stated that the suit property originally belonged to his father Nasoro Salim Ndarungunya who is now deceased. Upon the deceased's death, the 1st and 2nd defendants obtained a limited grant appointing them personal representatives of the deceased's estate, for the purposes of filing a suit. They filed a dispute in the Kwale Land Disputes Tribunal in connection with the suit property, and obtained an award in their favour. The award was adopted in the Kwale Resident Magistrate's court, and an order issued for the suit property to be

transferred to the defendants. The defendants were then issued with a land certificate.

12. The 2nd defendant conceded that the plaintiff had entered into an agreement with his deceased father for the suit property to be transferred to the plaintiff at a consideration of Kshs.16,500/-. However, the plaintiff only paid Kshs.6,000/-. The 2nd defendant stated that he accompanied his father several times to the plaintiff's office seeking payment, but the plaintiff chased them away. Since the plaintiff did not pay the balance of the purchase price, the defendants lodged a dispute in the Kwale Land Disputes Tribunal resulting in the award in their favour. He maintained that the plaintiff was served with hearing notices but did not oppose the tribunal proceedings or the adoption of the award at the Kwale Senior Resident Magistrate's court.

13. Following an agreement between the parties' counsel, written submissions were duly filed on behalf of the parties. For the plaintiff, it was submitted that there was contradiction in the defence case, as contrary to the defendants' pleadings that their father never sold the suit property, the defence witness admitted that there was an agreement of sale between their father and the plaintiff. It was pointed out that the proceedings of the tribunal which were relied upon by the defendants were defective as they were not signed by the Chairman. It was argued that the plaintiff's evidence that there was an agreement between him and the seller for sale of the suit property at a price of Ksh. 16,500/- was not disputed, and the plaintiff adduced appropriate evidence which established that he paid the seller a sum of Kshs.19,020/- which was over and above the agreed price.

14. Counsel submitted that the plaintiff had opted to file a new suit because he could not obtain leave to apply for an order of certiorari, as he only learnt of the transfer of the suit property after the statutory period of six months had expired. Nor could the plaintiff appeal against the tribunal award to the Provincial Appeals Committee as he was not served with the appropriate proceedings. It was maintained that the tribunal acted without jurisdiction, and therefore the award was a nullity and void *ab initio*. Reliance was placed on the case of **Omega Enterprises Kenya Limited vs. Kenya Tourist Development Corporation & 2 Others, [1988] eKLR** where Tunoi, JA. (as he then was), stated as follows:

“It follows therefore in my judgment that all proceedings before the learned judge which were based on the null and void order having been allegedly disobeyed are a complete nullity since with such a faulty foundation, the entire house of cards must collapse without much ado.”

15. It was therefore submitted that the order of the magistrate adopting the tribunal award and transferring the suit property to the 1st and 2nd defendants, was a nullity and of no legal consequences; that the court should exercise its unlimited jurisdiction and supervisory powers over subordinate courts, to intervene by declaring that the tribunal's action of purporting to cancel the plaintiff's title deed was an action which was void *ab initio*; that the adoption by the trial magistrate of that award, is of no consequence and the resultant transfer to the defendants flawed; that the court should issue an order directing the 3rd respondent to cancel the title deed issued to the 1st and 2nd defendants, and restore the plaintiff as the registered owner of the suit property.

16. The court was urged to dismiss the defendants' counterclaim as the judgment of the Kwale court which they rely upon is a nullity; that the counterclaim is incompetent as the limited grant only authorized the defendants to file suit on behalf of the estate, but the defendants have instead had the suit property registered in their own capacities, and are attempting to have the suit property transferred to third parties.

17. For the defendants it was submitted that the hand written document produced by the plaintiff was not a sale agreement but payment acknowledgements which were not even complete; that in one acknowledgement there is no signature confirming receipt of the money; that in another there is only an unidentified thumb print; while in yet another, the plaintiff himself has not signed; and thus the acknowledgments have no evidential value. It was maintained that the plaintiff was not an honest witness as he claimed to have bought the suit property at Kshs. 16,500/- while the alleged acknowledgment for payment amounted to Kshs. 20,520/-; that the application for Land Control Board consent produced by

the plaintiff was dated 16th March, 1976 while the consent was dated 24th March, 1976, and yet there was no evidence that the seller attended the Land Control Board; that the application for consent, the transfer and issuance of title deed were all admittedly done before the plaintiff paid any part of the purchase price, confirming that the seller was arm twisted by the plaintiff who took away his land without paying.

18. As regards the defendants' counterclaim, it was argued that although there was an intention to sell the suit property to the plaintiff, the plaintiff did not pay the full purchase price, no agreement was signed, nor was the Land Control Board consent obtained. In the context of that background, the defendants successfully filed a claim before the Kwale Land Tribunal. The tribunal award was adopted in Kwale Land Case No. 22 of 2005 and a decree issued, which resulted in the plaintiff's title being cancelled, and the defendants being issued with a title deed for the suit property. It was contended that the proceedings before the tribunal and the Kwale Magistrate's Court have not been challenged, appealed against, set aside nor declared a nullity, and therefore the defendants' title was intact, and this court has no jurisdiction to contradict the previous orders, nor can the plaintiff bring a fresh suit as the matter is *res judicata*.

19. It was submitted that the plaintiff could not purport to invoke the inherent jurisdiction of this court under Article 165(3) of the Constitution of Kenya because the Land Disputes Tribunal was a creature of the statute. The statute provided the tribunal with a constitutional basis and a mandate to carry out its work as well as a procedure to challenge the decisions of the tribunal. Relying on **Chatur Radio Services vs. Phonogram Limited Civil Appeal No. 50 of 1998**, it was argued that the plaintiff was simply trying to invoke the inherent jurisdiction of the court to improperly circumvent the statutory procedural provisions provided under the Land Disputes Tribunal Act No. 18 of 1990. The court was urged that to allow the plaintiff's suit would create a dangerous precedent where parties would result to filing suits in the High Court to change decisions of lower courts and tribunals.

20. Citing **Hadkinson vs. Hadkinson [1952] 2 All ER** it was submitted that a court order is a court order, whether null or valid, regular or irregular, and every person has an obligation to respect it unless and until the order is discharged. It was submitted that the plaintiff's arguments could only be used on appeal or on an application for judicial review and not in a new suit. The **Omega Enterprises Kenya Limited** case (Supra) was distinguished as an appeal challenging an existing order and not a fresh suit challenging an existing order. Finally it was submitted that the defendants had proved their counterclaim on a balance of probability and therefore the court should dismiss the plaintiff's suit and allow the defendants' counterclaim.

21. The parties did not file a list of agreed issues. Instead each party filed their own statement of issues which I do not find necessary to reproduce herein save to note that the plaintiff's claim and the defendants' counterclaim are basically intertwined and therefore, I shall consider them together. From the pleadings, evidence adduced, and submissions made by counsel, the following facts are not in dispute: that the seller Nasoro Salim also known as Nasoro Salim Ndarungunya was the original registered owner of the suit property; that the seller and the plaintiff entered into an oral agreement for the sale of the suit property to the plaintiff at a consideration of Kshs.16,500/-; that the plaintiff obtained consent of the Land Control Board for the transaction on 24th March, 1976, and on the same date the seller executed the transfer document; that a land certificate was issued in the name of the plaintiff on 26th March, 1976 before the plaintiff made any payment for the suit property. That subsequently the plaintiff made some payments for the suit property. That the seller died in 1992; that the defendants filed a dispute in the Kwale Land Disputes Tribunal in the year 2005 and obtained an award in their favour; that the award was adopted by the Kwale Senior Resident Magistrate's court and a decree issued; that the proceedings at the tribunal and the Kwale Senior Resident Magistrate's court proceeded ex-parte and resulted in a decree which was used to nullify the plaintiff's title and to have the 1st and 2nd defendants registered as the owners of the suit property.

22. The plaintiff's suit is essentially for declaratory orders, to which the defendants have objected as being a contradiction of a lawful judgment of the court and a matter which is *res judicata* in the light of the tribunal award and the decree by the Kwale Senior Resident magistrate's court. Therefore, the first issue that this court needs to deal with is whether the plaintiff's suit is competent, in the light of the award

of the Land Disputes Tribunal and the decree of the Kwale Senior Resident Magistrate's court which have not been set aside.

23. In Johana Nyokwoyo Buti vs. Walter Rasugu Omariba (suing through Beutah Onsomu Rasugu) & 2 Others, Civil Appeal 182 of 2006, the Court of Appeal upheld a decision of the High Court overruling a preliminary objection to a suit brought by the respondent in similar circumstances as the plaintiff herein, seeking a declaration that the adoption of the tribunal award by the Senior Resident Magistrate was unlawful and improper. The Court of Appeal addressed similar submissions as that made herein by defendants to the plaintiff's suit. The following extract from the judgment of the Court of Appeal provides answers to the objections raised by the defendants.

***“A declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are, and which has no coercive force – that is, it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the court to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter.*”**

***In the present case, the 1st respondent sought a declaration in essence that the decision of the tribunal was unlawful as it was made without jurisdiction. If such a declaration is granted, the result will be that the decision of the tribunal would be a nullity. The 1st respondent was not a party to the tribunal proceedings. The decision of the tribunal came to his notice long after the 30 days stipulated by Section 8(1) of the Land Disputes Tribunal Act for appealing to the Provincial Appeals Committee had elapsed, and, also long after the six months stipulated for seeking a judicial review remedy of order of certiorari had expired. It is true that the 1st respondent filed a judicial review application but it was dismissed on the ground that the application for leave was made outside the stipulated six months. Since the application for judicial review was not determined on the merits, the doctrine of res judicata does not apply.*”**

***Moreover, although the Resident Magistrate's court entered judgment in accordance with the decision of the tribunal such a judgment could be challenged in fresh proceedings if obtained by fraud or mistake etc. – see paragraph 1210 of Halsbury's Laws of England, 4th Edition – Re-Issue page 353). In Jonesco vs. Beard [1930] AC 293 the House of Lords held that the proper method of impeaching a complete judgment on the ground of fraud is by action which decision was followed in Kuwait Airways Corporation vs. Araqi Airways Co. & Another (No.2) [2001] 1 WLR 429. The decision of the Tribunal has of course been merged in the judgment of the magistrate's court.*”**

***It seems to us that the 1st respondent had no other remedy since the superior court had jurisdiction to entertain both a declaratory suit and an ordinary suit impeaching the judgment of the magistrate's court the preliminary objection was not maintainable. It is after the hearing of the suit that the superior court can determine whether or not to grant a declaration in the circumstances of the case”*”**

24. In this case, the plaintiff has explained that he did not attend the proceedings in the Kwale Land Disputes Tribunal, and the Kwale Senior Resident Magistrate's Court, as he was not served with any summons or hearing notice. The plaintiff has explained further that he could not pursue the remedy of a certiorari to quash the orders of the tribunal because he only came to learn about the orders after the six months statutory period provided under section 9(3) of the Law Reform Act, Cap 26 had lapsed. Under those circumstances, the plaintiff had the option of seeking redress by way of declaratory orders. In short the plaintiff's suit for declaratory orders is properly before the court.

25. The next question to be addressed is whether the award by the Kwale Land Disputes Tribunal and the consequent decree by the Kwale Senior Resident Magistrate's court were null and void. It is not disputed that the defendants are the administrators of the estate of the seller who was their father, and that the defendants had the suit property registered in their names pursuant to an order from the Kwale Resident Magistrate's Court. The question is whether the defendants were entitled to pursue the seller's right to the

suit property through the Kwale Land Disputes Tribunal and whether the Kwale Resident Magistrate's Court had jurisdiction to vest title of the suit property upon the defendants.

26. The defendants' complaint in the Kwale Land Disputes Tribunal related to the transfer of the suit property to the plaintiff without the plaintiff paying for the suit property. This was therefore a dispute relating to title to land. Indeed, the award issued by the Land Tribunal concluded as follows:

“Due to evidence given by the claimant, the Land Dispute Tribunal heard the dispute exparte, and came into a conclusion that the parcel plot No. Kwale/Galu Kinondo/337 belongs to the claimants. Therefore the title deed which is now in the name of Duncan Kabethi Wachira be revoked and a new title be issued with immediate effect with to the bona fide owners i.e. Salim Mwandarangunya and Daima Nassoro Mbwata.”

27. In adopting the award of the Tribunal, the Kwale Senior Resident Magistrate's Court issued an order in the following terms:

“This land case was heard before the Panel of Elders on 12th April, 2005, and before the Senior Resident Magistrate's D.M. Ochenja on 19th October, 2005, in the presence of the plaintiff, it is hereby ordered: -

(i) That the Land Dispute Tribunal [award] dated 12th April, 2005 is hereby adopted as judgment of the court.

(ii) That Land Registrar Kwale to revoke the title deed No. Kwale/Galu Kinondo/337.

(iii) That the title deed to be registered in the name of Salim Mwandarangunya and Daima Nassoro Mbwata.

(iv) That it is further ordered that Salim Mwandarangunya and Daima Nassoro Mbwata be issued with a title deed in connection with the piece of land No. Kwale/Galu Kinondo/337 as it belongs to them.

Penal Notice: Any party so served with this order refuses to comply, the same shall be cited for contempt of court.

Given under my hand and the seal of this Honourable court this 28th day of October, 2005

***D. N. Onchenja
Senior Resident Magistrate-Kwale”***

28. Therefore it is evident from the above, that both the Kwale Land Disputes Tribunal and the Kwale Senior Resident Magistrate's Court were dealing with the issue of ownership of the suit property. Under section 3(1) of the Land Disputes Tribunal Act, 1990 (now repealed), the jurisdiction of the Tribunal was limited to:

“cases of a civil nature involving a dispute as to –

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land.”

Thus, the Land Disputes Tribunal did not have powers to entertain the dispute between the defendants and the plaintiff, as the dispute related to ownership and title over the suit property and did not fall under section 3(1) of the Land Disputes Tribunal Act No. 18 of 1990. The orders issued by the Kwale Land

Dispute Tribunal and the consequent decree were null and void, as they were issued without jurisdiction.

29. Further, the defendants' mandate as per the limited letters of administration issued to them was to file suit on behalf of the estate of the seller. That mandate did not authorize the defendants to be registered exclusively as proprietors of the suit property. At best they could only be registered proprietors as administrators on behalf of the estate, pending the distribution of the estate which could only be undertaken after the issuance of the full grant and confirmation of the letters of administration. Neither the Kwale Land Disputes Tribunal nor the Kwale Senior Resident Magistrate had jurisdiction to order the registration of the suit property in the names of the defendants without following the proper succession rules. It is evident that the defendants fraudulently obtained the orders by presenting themselves as the persons who were entitled to the suit property. Thus the order was irregular and unlawful. In the circumstances, it would be appropriate to issue a declaration that the Kwale Land Disputes Tribunal and the Kwale Senior Resident Magistrate's court had no jurisdiction to entertain the dispute or to order the cancellation of the plaintiff's title; and therefore the purported transfer effected of Kwale/Galu Kinondo/337 and registration of the suit property into the defendants' names was illegal, null and void.

30. Section 143 of the Registered Land Act, Cap 300 provides that:

“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

In this case, it being evident that the defendants fraudulently and irregularly obtained the orders which resulted in their registration as proprietors of the suit property, an order for rectification of the register and cancellation of the defendants' title under section 143(1) of the Registered Land Act would be appropriate.

31. The result of the above conclusion is that the title to the suit property will revert back to the name of the plaintiff. This brings us to the issue of the propriety of the sale of the suit property to the plaintiff. I.e. whether the sale to the plaintiff was valid; whether the sale process was completed and the agreed purchase price paid; whether the registration of the plaintiff as the registered proprietor of the suit property was fraudulent.

32. While it is not disputed that the plaintiff and the seller entered into an agreement for sale of the suit property, it was clear that the suit property was transferred to the plaintiff before the plaintiff paid any money. Although it was conceded that the plaintiff paid some money after the land was transferred to him, it is evident that the plaintiff did not immediately pay the consideration as agreed. In his plaint dated 15th June, 2010 the plaintiff averred at paragraph 6 that he purchased the suit property from the seller in the year 1976 for a sum of Ksh. 16,500/- and a certificate of title was issued to him. This averment is reiterated in the plaintiff's affidavit sworn in support of his application for interlocutory orders on 15th June, 2010, wherein the plaintiff swore that he purchased the suit property in the year 1976 from the seller, for the sum of Kshs.16,500 /- and had the property transferred to his name on 26th March, 1976 and a title issued to that effect.

33. The impression given by the plaintiff is that he had completed the sale transaction by the date the title was issued to him. However, in his evidence before the court, the plaintiff stated under cross-examination that he paid the first installment in regard to the purchase price on 29th March, 1976 and that between March 1976 and August, 1976 he had paid Kshs.14,020/- before making a further payment of Kshs. 6,500/- on 28th July, 1979. Plaintiff claimed that the total payment he made towards the agreed consideration was Kshs.19,020/- which was more than the agreed consideration. A sum of Kshs. 1,500/-

was given to the seller's brother. The plaintiff's oral evidence regarding payments was disputed by the defendants who claimed that the plaintiff only paid Kshs.6,000/- and failed to pay the balance of the purchase price.

34. The documents relied upon by the plaintiff in support of his contention that he made payments, were copies of acknowledgement allegedly signed by the seller. According to the acknowledgments which were exhibited, a sum of Kshs. 3,600/- was paid on 8th April, 1976 to the seller, a sum of Kshs. 5,000/- was paid to the seller on 28th July, 1979 and Kshs.1,500/- to Salim Salim on the same date. There is also another acknowledgement entitled certificate on receipt of money sale/purchase of land Plot No. 337 Galu/Kinondo. The document indicates the price of the land as Kshs. 16,500/- in respect of which payments are reflected as having been made as follows:

1. 29th March, 1976 - Kshs. 3,600/-
2. 5th April, 1976 - Kshs. 2,400/-
3. 8th June, 1976 - Kshs. 220/-
4. 15th June, 1976 - Kshs.1,100/-
5. 18th August, 1976 - Kshs.1,100/-
6. 23rd August, 1976 - Kshs.2,000/-

35. The documents have impressions which look like thumbprints. However, the only thumbprint which has been identified is the one indicated as that of a witness, but again it is not clear who the witness is as two names are indicated against the thumbprint, i.e. Suleiman Hassan Setu and Salim Salim. So again it is not clear to whom the thumbprint belongs. It is also evident that this certificate is not consistent with the previous acknowledgments, as the payment of 8th April, 1976 has not been reflected. It is apparent to me that the alleged certificate of receipt of money is a document which appears to have been prepared long after the event, and cannot therefore be relied upon. The acknowledgments produced are also inconsistent with the plaintiff's evidence under cross-examination regarding payments made. Moreover, the plaintiff did concede that the seller and his son went to his office pursuing payment for the suit property. That is a clear indication that payment had not been made and that is why the seller had to go to the plaintiff's office.

36. The plaintiff was a senior civil servant who no doubt understood land transactions and the importance of having appropriate documents and witnesses to confirm any payments made. I find that the only reason why the plaintiff's evidence regarding payment made was inconsistent and contradictory, was because he had not made full payment of the purchase price. Thus, the contract entered into between the plaintiff and the seller was voidable at the instance of the seller.

37. Further, assuming for a moment that the plaintiff made payments as he alleges, then the plaintiff could not have bought the suit property in 1976 as alleged by him. This is because by his own admission, the plaintiff having claimed that it was agreed that he would make the payment after getting the title to the suit property, and having conceded paying the purchase price within a period of about four years after the suit property was transferred to him, failed to pay the balance of the purchase price within a reasonable time. Therefore, notwithstanding the registration of the plaintiff as the proprietor of the suit property, the contract between the plaintiff and the seller was vitiated by the plaintiff's to provide the agreed consideration, and the plaintiff was simply holding the suit property in trust for the seller. Indeed, the plaintiff's failure to pay the full purchase price even after the suit property was transferred to him lends credence to the defendants' contention that the plaintiff intimidated the seller to transfer the suit property to the plaintiff without full payment.

38. The suit property was transferred to the plaintiff in March, 1976. The seller died about sixteen years later in 1992, having not taken any action against the plaintiff either for recovery of the purchase price or nullification of the sale transaction. Section 4(1) (a) of the Limitation of Actions Act, provides inter alia that no action founded on contract may be brought after the end of six years from the date the cause of action arose. Section 7 of the Limitation of Actions Act, provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

In this case, the seller’s right of action under the contract was statute barred after six years as per section 4(1) (a), while his right to recover the suit property was statute barred after 12 years as per section 7 of the Limitation of Actions Act. Thus the defendants’ counterclaim brought on behalf of the seller’s estate as administrators of the estate is bad in law as it is statute barred. Needless to state that the seller having slept on his rights, the counterclaim being brought thirty four years after the cause of action arose, cannot succeed as the plaintiff ‘s right to the suit property is now unassailable.

39. The plaintiff being the registered proprietor of the suit property, he is entitled to a permanent injunction restraining the defendants from interfering with the suit property. As regards the prayer for general and aggravated damages against the 1st and 2nd defendants, the plaintiff had left the suit property lying fallow. His interest in the suit property was only reignited when he realized that the defendants had had the title to the suit property transferred to them. The plaintiff has therefore not established any loss suffered by him to justify the award of general or aggravated damages.

40. For all the afore-stated reasons, I give judgment in favour of the plaintiff as against the defendants on the main suit and grant orders as follows:

(i) A declaration that the Kwale Land Disputes Tribunal and the Kwale Senior Resident Magistrate’s court had no jurisdiction to entertain the dispute or to order the cancellation of the plaintiff’s title; and therefore the purported transfer effected of Kwale/Galu Kinondo/337 and registration of the suit property into the defendants’ names was illegal, null and void.

(ii) An order for rectification of the register and cancellation of the defendants’ title under section 143(1) of the Registered Land Act.

(iii) The defendants’ counterclaim is dismissed for being statute barred.

(iv) In the circumstances of this case, I do not find it appropriate to award any costs. Each party shall therefore meet their own costs for the main suit and the counterclaim.

SIGNED THIS 26TH DAY OF JUNE, 2012.

**H.M. OKWENGU
JUDGE**

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF JULY, 2012.

JUDGE

In the presence of:

.....***Counsel for the Plaintiff***

.....***Counsel for the 1st and 2nd Defendants***

.....***Counsel for the Attorney General***

.....***Court Clerk***