REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO 295 OF 1976

(KNELLER, J

JOSEPH KARISA MUTSONGA…….....PLAINTIFF

AND

JOHNSON NYATI…….....DEFENDANT

JUDGMENT

Joseph Karisa Mutsonga, the plaintiff by his amended plaint filed on May 15 1977, asked this court to give him judgment against Johnson Nyati the defendant for a declaration that the defendant holds Nyalani 39 in trust for the plaintiff an order that the defendant accepts Shs2,100 from the plaintiff and transfers that parcel to the plaintiff or, instead, he pays the plaintiff Shs.32,000 for it.

The defendant, by an amended written statement of defence (drawn and filed by an advocate) filed in this suit on March 29 979 asks for the plaintiff's claims to be dismissed with costs.

The plaintiff in his amended plaint averred that in 1964 he borrowed from the defendant Shsl2,100 and let the defendant have this land as security for the loan but when it was registered the defendant had himself secretly and fraudulently made the absolute proprietor of it. When this was discovered the defendant promised to have the matter put right if and when the plaintiff repaid him the loan which he had refused to do though the money had been tendered to him. The value of the land was 3hs32,000 in mid 1977.

But the defendant claimed the plaintiff and his father received that Shs.2,1000 in exchange for the land and the money was not lent to them and the land was not taken as a security for it, The registration was not done secretly or fraudulently but openly an lawfully. From that date in 1964 until March 29 1984 the defendant had been in possession and cultivating "this land and the plaintiff was not entitled to its absolute ownership or value. It was not worth Shs32,000 in late March 1979 or anything like it. If it were held that the plaintiff had any right to own that land then his right was extinguished by its being registered for the first time in the name of the defendant.

There was also a pleading by the defendant that the plaint was bad in law and disclosed no cause of action against **the** defendant.

So the issues between the parties were -

1. was the plaint bad in law because it did not disclose any cause of action?

2. who owned this land before it was registered?

5. was it sold to the defendant?

4. what was its value at the end of May 19?6?

5. what was the effect of this first registration?

6. did the defendant have it registered in his name fraudulently?

7. limitation?

8 estoppel?

Evidence was recorded from William Mwenyesi a recording officer of the land adjudication depart men the plaintiff who is now an assistant hospital secretary in the office of the Provincial Medical Officers Mombasa and two of his brothers called Munga Mtsonga and Tsuma Ntsonga. The defendant, an accounts clerk.with the Kenya Bus Mombasa Co. testified and so did his uncle Mwangalo Jilanly a small scale farmer who lives near the land around which this dispute rages.

These are WaWa-Jibana gentlemen from Nyalani sub-location Jibana location aloleni division in the Kilifi district. The Wa-Jibana are one of the nine tribes together called Mjikenda, The Mtsongas belong to the Mbari ya Vumbi and the defendant and his family to the Mbari ya Mwarumba. They are settled around Maandani school in that sub-location.

Up until the time the land adjudication process reached their area their belief was that the land was given to their clans by God and a member of a clan could not sell any of it because that would presumably be an ungrateful thing to do and none of it was owned by an individual for it was all clan land. Nevertheless the elders decided which portions should be cultivated by which members of the clan and those portions were known as the land of those individuals as a matter of identification and normally passed from father to son, A sale of Mjikenda land could only take place when the chief had called a meeting and those at it having beard the family and the neighbours agree also consented to such a transaction. This was possible but improbable. So was a secret sale. After registration it was no longer clan land and the registered owners have been able to sell their parcels without the approval of the clan.

What happened then before registration when someone in the area wanted to raise a loan or obtain some capital? The plaintiff and his witnesses said that with the consent of the clan and the family (and neighbours?) a man could pledge his land to the man who advanced the loan or capital who then temporarily occupied it and farmed it and if the loan or capital advance was repaid then the land was surrendered back to its owner. If the borrower decided not to repay the loan the lender kept the land. There was no time limit according to their customs for the repayment of the loan or advance and no interest was charged on the loan.

The defendant demurred and said there was no such transaction known to these clans. A man could however, use the unused portion land for a year at a time for Shs.100 (now it is of someone shs.150) a year and/with permission for another year at the same and so on. The payment was never returned and the land never passed to the one who was allowed to use it.

The parties agreed that whatever it was - a mortgage or a lease - it was called ‘rahani’ and different from a sale. Any land the subject of rahabi remained the property of the owner and so the occupier could not build on it or plant what the witnesses called permanent freest by which they meant mangoes, coconuts, cashew nuts, and all the occupier could do was plant vegetables or maize and harvest them.

Sometime in May 1964 Bahati Mtsonga the father of the plaintiff had to help his son pay dowry for a girl he wished to marry so having no spare cash he approached Samuel Katito Minawato the father of the defendant for a loan who in turn having no savings asked the defendant who was then working as a clerk in Mombasa with the Kenya Bus Company for help and he passed over Shs.2,100 (in all) to his father who handed it to the plaintiff's father. The defendant was then permitted to occupy the suit land and **use** it

for his own profit.

The Mtsongas say the cash was offered and taken -as a loan and the defendant's uncle says it was an outright sale, and the defendant declares that is what his father told him it was.

The Mtsongas allege their mango and palms and orange trees and cashew nut trees are still on it and they collected the fruit and tapped the palm wine while all the defendant did and does is to plant and reap maize there. The defendant and his uncle Maintain however that the defendant planted up to 60 coconut trees and only 7 remain of which 2 bear nuts because the Mtsongas surge across the land and up-root anything the plants.

The Mtsongas suggest the acreage of this land is about 8 or 9 acres but comparing it with other land he has the defendant believes the surveyor made a mistake about this because it is smaller than his other plots and he puts its size at about 4 acres at the most.

William Mwenyesi the recording officer who arrived in that area on May 19 1971 believed the land these parties are bickering about would have been sold in the open market for about Shs.2,900 and in mid1977 about Shs.40,000 if there had been an for open market such sales.

On June 15 1971 he met Tsuma Mtsonga the brother of the plaintiff and Samuel Katite Minawato the father of the defendants who traveled round the plot showing him where its boundaries were. He marked it out on a sketch plan Exhibit 3 for the demarcation officer to put in his rough book.. At the time he asked the representatives of these families who owned it and the defendant's father explained that the defendant had the right to cultivate it until the Mtsongas repaid the money the defendant ,lent them in 1964 which amounted to Shs.2,100 and there would be another Shs.500 to cover the improvements the defendant had made to the holding. Tsuma Mtsonga it seems confirmed this. Both sides agreed that the names of the plaintiff and the defendant should be recorded on the plan and in the rough book. William Mwenyesi put all this on his sketch plan Exhibit on June 151971 in this form

"Land under lease for Shs.2,100 by Johnson

Nyati 1964. He is to use land until money

will be refunded by Joseph Mtsonga who

will be registered later.

He has also put it again at the bottom of this plan Exhibit 3thus -

"Plot No 39, it has been stated before me and

others that the land is entirely "(sic)" on

lease before 1971. His father said that his

son will be registered until money is

refunded. This money will be refunded by

Joseph Mtsonga.."

Realizing Tsuma Mtsonga and Samuel Minawato were committing the plaintiff and defendant respectively to all sorts of arrangements in their absence he arranged a meeting with them but neither appeared.

Before leaving the sketch plan Exhibit 57 for other matters it is pertinent to note that on it are marked

the parcels of and their numbers for;-

Tsuma Mtsonga - 150

Joseph Mtsonga - 15

Stephen Mtsonga - 155

Maandani School - 54

and there are notes about Stephen Mtsonga's 155 which suggest he will be the owner of it when he has refunded money and beside that in 57 for with the name Marklin Mbui are the words 'soldfor Shs^tOOO"^ but whether that means Marklin Mbui sold parcel 37 for Shs.3000 or Stephen Mtsonga did was not the subject of any examination and is unclear. I will return to this sketch plan Exhibit in due course.

William Mwenyesi could not understand why only the name of the defendant was registered as the owner of parcel 39. He was transferred to another area after one and a half years, which, would be about the end of May 1973 and did not see the rest of the adjudication and registration process for this area concluded. On May 19 1977 he sent a letter exhibit J4 to the advocate for to the advocate for the plaintiff setting out what he could remember of his meeting with Tsuma Mtsonga and Samuel Minawato. During his time in that area he saw on this parcel the defendant's maize and the Mtsonga's oranges, mangoes and cashew nuts.

The defendant on the other hand explained that his father asked him to buy this land from the Mtsongas and his father knew where and what sort of land this is fertile land according to the defendant so he drew his savings which were Shs.400 and handed it to his father to pay Samuel Katite Minawato.

Later, according to the defendant, the plaintiff approached him - this was in May 1965 and asked him to help the Mtsongas pay a fine and in return the Mtsongas would sell him some more land for Shs.700 (which was all he could raise). The Mtsongas did not transfer any more land to him and when he nagged them for it the plaintiff told him he had paid a low price, Shs.1,400, for the other 8 acres in the first place so by tacit agreement no more was sad about that Shs.700 and it became part of the price for the original 8 acres. Also, no more was said about the other plot. This may tie in with the reference to Shs15,000 made by William Mwenyesi in his sketch plan Exhibit in the plot next to that of Stephen Mtsonga.

The defendant points out that there was no dispute about his ownership of the land before Bahati Mtsonga died and this was because he knew he had sold this land to the defendant. So did the plaintiff. Then after 10 years had elapsed the plaintiff had raised this bogus claim.

The Mtsonga explained the delay in this manner. When the adjudicating officers were in this area in 1977 Tsuma Mtsongc. was sent to the plaintiff at Malindi where he was a clerk in the hospital because the Mtsongas realised they had better recover their land before it was registered by paying back the Shs.2,100 they had borrowed from the defendant but at that time the plaintiff was earning about Shs.300 a month and did not have that sum. He had amassed it by some date in 1974 and so they tendered it then to the defendant who refused to accept it.

The defendant does not know what went on in the Mtsonga family about this and denied he was offered that SUB or any other by the plaintiff or any of them for the return of the land they sold him.

The plaintiff's next step in this was to file a plaint on October 22 19?4 in the Court of the District Magistrate, Kaloleni which was the foundation of his Civil Suit 297 of 1974 /Exhibit 1 in which the plaintiff asked that court to order the defendant to accept back his money and give the plaintiff back his shamba which he mortgaged to him. This is how the summons clerk interpreted what the plaintiff told him was his claim. On November 14 the same year the defendant filed his defence and it must now be set out in full -

"On 4/5/64 the father of Mr Joseph K Mtsonga came

to our home. He approached my father about some money.

His son had taken a girl as his wife but he had no money to

pay as dowry.My father advised me to give him the money and

I dido I have been using this piece of land for the past ten years

now. When the Lands Act came into force, I expected Mr. Joseph

K Mtscnga to come forward and get it registered in his name.

To my surprise he kept quiet and I had to get it registered in my

name. Now that the process had not been completed I asked

him to wait for a little while and the then we shall sort it out

through proper channels."

This action in the court of the District Magistrate at Kaloleni never came to anything unfortunately because on January 9 1975 Mr, Macharia Muhunia Mombasa advocate, wrote to the magistrate telling him that he had been briefed by the plaintiff to file a notice in his court wholly discontinuing the suit against the defendant under Order XXIV rule 1 of the Civil Procedure Rules.

The defendant believes this was because the plaintiff decided he did not want the land after all and he thinks he saw some letter about this from Mr Macharia Muhuni but it cannot be traced. Mr Macharia Muhuni denies it was written and says the discontinuance was because the District Magistrate Kaloleni was told by the Land Adjudication Officer in January 1975 the Jibana area was a land adjudication area. This may be borne out by a letter KDC/CC/297/74 of January 27 1975 from the District Magistrate to the Registrar of the High Court in Nairobi asking him to refund some fees to the plaintiff in the suit in that court because 'the case was withdrawn as 'his' court had no jurisdiction to try it.

After the close of the pleadings in this court there is an entry by the late Mr Justice Sheridan^ the resident Judge in Mombasa on May 23 1977 when the suit was due to proceed to trial but Mr Macharia Muhuni told him a settlement had been reached between him and Mr Kupalia for the plaintiff and defendant respectively but as Mr Kupilia was absent the matter should be stood over generally for a consent judgment to be filed. This never happened.

A bundle of ten photocopies of letters on the settlement were put in by consent at the beginning of the hearing of this suit.They are almost all from Mr. Macharia Muhuni to Mr, Kupalia and suggest that it was Mr Kupalia who asked for the hearing to be taken out of the list for settlement to be filed but thereafter he failed to approval and failed to sign the one draw it for Mr Macharia Muhuni left at his house for his approval. There was also no acknowledgement of a cheque 082876 drawn by Macharia Muhuni & C on its account at the Kenya Commercial Bank Malindi made out to Mr Kupalin though Mr Macharia Muhuni claims Mr Kupalia banked it. In his letter to Mr Macharia Muhuni makes it plain that it is in repayment of the loan the defendant made to theplaintiff against the security of the plaintiff's ‘shamba’

In January 1978 Mr. Macharia Muhuni wrote to Mr Kupaliato tell him that the plaintiff had told him that Mr Kupalia had agreed on behalf of the defendant to settle the action on terms that the defendant would submit to judgment and pay the plaintiff shs.1,182 for disbursements. And this elicited no reply from Mr Kupalia;, The defendant claims that he asked Mry Kupalia about this cheque for Shs/2,000 from Macharia Muhuni & Co. and Mr Kupaliatold him it had been for some office furniture Mr Kupalia sold to Macharia Muhuni & Co.,

The plaintiff alleged that the defendant told him out side this court (when the action was stood over generally to have a consent judgment drawn approved and filed) that Mr Kupalia had paid him this Shs2,000.

Mr. Kupalia was instructed by the defendant on December 26 1974 to act for him in the Kaloleni Magistrate's court according to a letter of that date from Mr Kupalia to the magistrate which is in the magistrate's file. On that date and the next he sent details of when he would be available to conduct the case for the defendant. This was overtaken by the plaintiff discounting the suit in that court on January 9 1975.

Mr. Kupalia was also instructed by the defendant in this suit in this court and entered appearance for him and filed his defence on July 6 1976.

He did not appear for the defendant when the suit was re-listed before Sheridan on May 25 1978 which is when the defendant said he bought the land for Shs2,100 and did not lend the plaintiff this sum. He told the court he wished to find another advocate. Atkinson Clleasby and Scratch filed a notice of change of advocates on June 23 1978 for the defendant and Mr. Jayantilal Shah of that firm took over his defence. He applied on October 11 1982 for an order that his firm should cease to act for the defendant because it could get no further instructions in the suit from the defendant which the defendant said he had no alternative but all right if the firm did not wish t6 represent him. He would have to accept and it was/to engage another advocate so Bhandariy J made that order on October 28 1982.

The defendant was given about 11/2 . months notice of the resumption of this hearing but arrived without an advocate. He said he had asked Mr Kupalia to represent him and he had expected him to attend but he had not done so. He was given an hour to find him but that proved fruitless and/ in the end.' the defendant agreed he would continue without an advocate and the court helped him as much as possible (as the record reveals).

The plaintiff claims this land back from the defendant he says because he was the Mtsonga that tendered the sum his father borrowed and his father having died before this litigation began it was agreed he should sue for the registration of the parcel in his name.

So much for an outline of the evidence in this suit and its history. When it came to credibility, impression and demeanour would not be the proper basis for any finding. Other matters must be taken into account.

The parties are of equal status and I think respectability and age and so forth. Each has land elsewhere and probably enough. Each suffered from the fact that the negotiations for the transaction touching this land were conducted in the main between their fathers who died before the hearing began. There was a witness of the walk along the boundaries of the plot of Tsuma and the defendant’s father was accompanied by Muhemba Chiko who was not called but from what was defendant said I gathered he was probably dead before he could be summoned.

When it comes to the question of whether the transaction was a sale of land by the Mtsongas to the defendant the defendant's defence in the court of the District Magistrate reveals he did not look upon it then as a sale. He tried to explain that away later by saying that it was not drawn by an advocate and he did not have one then. This will not **do** because as a clerk in the Kenya Bus Company, as he then was, he knows that if the land had been sold to him the plaintiff could 'come forward and get it registered in his name and there is no reason in law or in equity why he should ask him to wait for a little while until the process of registration was completed so they could sort it out through proper channels. That written statement of defence repays a re-reading from tine to time when the evidence in the case is being considered.

Then there is the evidence of William Mwenyesi the recording officer and his sketch plan which despite some obscurities in it and the reference to the land being leased by the plaintiff to the defendant supports the version of the plaintiff and his brothers and is against the suggestion that this land was sold

to the defendant. I ignore the negotiations between the advocates and the suggestion before Mr Justice Sheridan that the action had been settled because without having Mr Kupalia before the court I cannot divine where the truth of all that lies.

On all the evidence in the case,' however, I conclude that the truth of the matters in issue between the parties was in the version put forward by the plaintiff and not that of the defendant.

The answer to that issue has been given on the evidence in the trial. It is always perplexing, however, when there is acute conflict on matters of customary law in the testimony of people steeped in it. A little re-assurance is vouchsafed by certain passages in a monograph with the striking title Palms Wine and witnesses. Public Spirit and Private Gain in an African Farming community by David Parking 1968 pp 53/54 in which he deals with the land transaction of the Wa-Giriama.

There is outright purchase or permanent alienation of palms and the land on which they stand. Unlimited mortgages refer to Pledged land and or palms which may be redeemed at any time on repayment of the original loan made by the mortgagee. Limited mortgages of pledged land and or palms must be redeemed by the mortgagor within an agreed number of years or else the mortgagee acquires permanent total rights to it or them.

The loan must be repaid in full, according to the Wa-Giriama, continues Dr Parking regardless of how much money the creditor may have made using the palms and the land over the years. A mortgagee may not plant palms on the land pledged to him which is frustrating when the mortgagee, is an unlimited one and thus the limited mortgage has come into use more and more for there is a reasonable likelihood that the mortgagor will fail to redeem in time and then the transaction turns out to have been a cheap buy. Land and palms were originally taken as pledges for cash to help friends or neighbours or relatives in trouble but recently they are taken to expand the creditor's holdings.

It must now be said that all that relates to the Wa-Giriama and the author is not a lawyer and so it cannot be an authority. Nevertheless, the Wa-Giriama live next door to the Wa-Jibana and are also Mjikenda and it is comforting to know that my finding that this transaction was, on the evidence, not a sale or lease but or limited mortgage/An unlimited mortgage is not a transaction unknown in, at any rate» a contiguous area and among the same sort of people.

I now turn to the task of setting out the law and evidence some of the other issues raised and to anawering them.

The first was whether or not the plaint was bad in law because it disclosed no cause of action? The answer is "no" for it disclosed a cause of action. And yearly so.

The second was who owned this land before it was registered? I find on the evidence that the plaintiff proved that, according to customary law his father, Bahati Mtsonga, did.

The third was whether or not Bahati Mtsonga sold it to the defendant? Here again, with the evidence of the written defence of the defendant in the suit in the magistrate's court at Kaloleni to the same sort of claim and the evidence and plan of the recorder Mwenyesi I declare that the plaintiff proved that on the balance of probabilities it was not sold to the defendant by any Mtsonga.

The fourth issue is related to the plaintiff's alternative prayer for the value of the parcel if he cannot have it back again. What was the value of the land in May 1976 Taking it to be 8 acres and accepting the evidence of the recorder and plaintiff again I answer this issue by saying it was shown to be probably about shs.32,000.

The defendant relies, however, on the fact that he was registered as its first proprietor and so the fifth issue was what effect did that have on the right of the plaintiff to this parcel? The defendant as the registered proprietor has a title free from all interests and claims whatsoever but subject to any lease, charge and encumbrance shewn in the register together with such overriding interested that exist and are

not required to be noted in the register sections 28 and 30 of the **Registered Land Act** (Cap.300). Eights arising under customary law are not among the interests listed in section 50 of the Act as overriding interests. Bennet, J. in Obiero v. Opiyp. (1972) EA 227, 228 (K) pointed this out and added

> "Had the legislature intended that the rights of a registered proprietor were to besubject to the rights of any person under customery law, nothing could have easier than for it to say so"

and 12 years later it still has not done so. This **was** followed in Esiroyo v. Esiroyo, (1973) EA 388 (K) which was approved of bylaw and Potter, JJ.A. (Madan, J.A. dubitante) in Kiama v, Mathanya Civil Appeal 42 of 19?8. Registered land, however, by section 165 of the Act is subject to the "common law of England as modified by equity" which brings in the equitable doctrines of implied, constructive and resulting trusts.

Justice and good conscience here require the defendant not to exclude the plaintiff from the parcel but to allow him to have it back for his use and occupation when he has repaid the loan to the defendant. The evidence, and again especially that of the defendant's written defence in the Kaloleni court and the recorder's version of what the parties representatives told him about the ownership of it underline the fact that a constructive trust arose in favour of Bahati Mtsonga when this land of Bahati Mtsonga was registered in the name of the defendant, see Lord Denning, M.R. in Hussey v. Palmer, (1972) 1 WLR 1286, 1289, 1290 (CA).

But section l45 of the Act forbids any rectification of the register at all if it concerns a first registration and it will be recalled the defendant's registration was a first one.

To rectify, however, is to correct or define something which is erroneous or doubtful. Rectification is often used for making an alteration correcting an entry in a register and that, in my judgment, is its meaning in section 143 of the Act. It is not defined in the Act itself.

Jessel M R in Pulbroook v Richmond Consolidated Mining Co (1878), 6l0, 6l5 (CA) explained the consequence of a court order for the rectification of the register of a company in this way -

> "The name of Mr. Cuthbert has been struck out of the register and the
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> register rectified. The effect of that is exactly the same as if it had never
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> been put in. That is the 1 meaning of 'rectified'. You strike it out by way
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> of rectification, and the Court has declared that it ought never to have been
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> entered at all. They had struck it out from the very beginning."

This is different from making another entry recording a lawful transfer by a court order after a first registration. The first registration is not struck out. The register is not rectified at all.

So Lindley L J in Re National Bank of Wales (1897) 66 L J Ch 222 (CA) at pp 226, 227 made this clear for rectifying the register under section 35 of the then Companies Act 1862 by saying –

> "Altering the register so as to make it comfortable with a lawful transfer is not the same thing as to rectify the register under section 35. That section only comes into operation when the company improperly puts on the register a name which ought not to be on it, or improperly refuses to put on the register a name that ought to be on it."

There are dangers, of course, in applying case law on one statute to another but the principle in those two authorities is appropriate for the Act and the circumstances of this case.

The first registration of the defendant as the proprietor was not doubtful. The word as trustee' should

have been entered but they cannot be put in now. There is no need to do so after all these years. The defendants name need not be struck out. All that will happen is that another line will be added to the register somewhere under the first registration making the register conformable with the transfer of these acres to the plaintiff as ordered by this Court. Nothing in the Act forbids this.

The next issue is whether or not the defendant lad the parcel registered in his name fraudulently? Charges of fraud should not be lightly made or considered. .Mason v Clarker (1955) AC 778, 794: Bradford Building Society v Borders (1941) 2 All ER 205. They must be strickly proved and although the/ standard of proof may not be so heavy as to require beyond reasonable doubt^ something more than a mere balance of probabilities is required. Hatilal Gordonbhai Pat el v Lal.ji Mahan. (1957) EA 314 (CAT). In fact a high degree of probability is required. Hornial v Neuberger Products Limited (1957) 1 QB 247m 258. It is very much a question for the trial judge to answer. Gross v Lewis Hillman I9707 Ch 445 (CA) See generally Clerk & Lindsell on Torts. 15th ed/, (-1982) page845, para 17-20.

Whether there is an evidence to support an allegation of fraud is a question of fact. Ludgate v Love (l88l). 44 LT 694 (CA). Halsbary's Laws of England Vol 26 Third Ed/, (1959) page 845, para1572.

Again it would not be right to answer this issue on the impression any witness or party made or his demeanour alone. It would have to be tested against documentary evidence and their conduct before and after the event and the probability of the account given by them. Satilal Gordonbhai Pat el v Laljj Mahan.ji (ibid)

The documentary evidence and the conduct of the parties and their representatives before the registration and the impression I had of those who testified including the defendant led me to believe the defendant did not have this registration done fraudulently. There was no evidence of how it came to be made. He would not know the registration made him absolute proprietor of the parcel when he should have been marked in it as the trustee for Bahati Mtsonga. The plaintiff failed to show the high degree of probability of fraud that he had to do. It was, however, on the evidence a registration that was probably made by mistake and now is the time to put it right.

Limitation? This was not pleaded by the defendant's advocate. The defendant admits the Mtsongas were constantly disrupting his right to plant what are called permanent trees which is only consistent with ownership.

Estoppel? This was not pleaded. It could be argued that after all these years of use of this parcel by the defendant how can the plaintiff succeed in having the ownership restored to him? Whether or not this was pleaded the evidence about the customary law is that the land which is ortgaged, so to speak, or leased never become' the land of the lender. The defendant, **Mr/** Kupalia and Mr2 Jyaantilal Shah maintain in this action Bhati Mtsonga sold the parcel to the defendant and I have found the plaintiff proved this was not so. It would take the Mtsongas and the plaintiff years to collect these sums of Shs,/l,100 and Shs,/5,QOO as the evidence reveals. It is a transaction based on custom and in my view not repugnant to justice or morality.

The plaintiff is entitled to the judgment he sought. This court declares the defendant is the trustee of this parcel for the plaintiff. He is ordered to transfer it back to the plaintiff 5 months from the date of repayment or tender of the loan of Shs.2,100 to him by the plaintiff. (The plaintiff or Mr, Macharia Muhuni will have to persuade Mr Kupalia to return the Shs2,000 or sue him for it if either is entitled to it. I was not asked to make a finding on whether or not that cheque had been cashed or whether or not Mr J Kupalia paid that sum or any other to the defendant) The three months delay in the transfer is to enable the defendant to harvest his maize or vegetables.

He is ordered to join with the plaintiff in having the transfer registered and if he fails or refuses to do so the Deputy Registrar of the court on application is authorised tosign and seal the necessary documents for doing so. The defendant must pay the costs of this litigation and interest at court rates is to run on them from three months after they have been agreed or taxed. This delay will give him time to collect and pay them.

Orders accordingly.

Delivered, signed and dated this 12th day of September 1984 in Mombasa.

A.A. KNELLEK

JUDGE