



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 230 OF 2010**

**MARGARET SOMMER CHARO.....PLAINTIFF**

**-VERSUS-**

**ISAAC NJUGUNA NJOROGE.....DEFENDANT**

**JUDGEMENT**

1. Vide a plaint dated 7<sup>th</sup> July 2010 and filed in Court on 8<sup>th</sup> July 2010, the plaintiff sued the defendant. In the suit before Court, the plaintiff prayed for judgement against the defendant for:

**a. A declaration that each and every transaction purporting to divest the plaintiff and the other registered owner of Plot No. Subdivision No. 1538 (Original No. 651/11) Section III Mainland Nor and Plot No. Subdivision No. 1538 (Original No. 651/12) Section II Mainland North Mombasa and Magisa Guest House Bar & Restaurant is null and void.**

**b. A declaration that the plaintiff and the other registered owner namely Robert Charo Karisa are still the registered owners of the land known as Plot Subdivision No. 1538 (Original No. 651/11) Section III Mainland North and Plot No. Subdivision No. 1538 (Original No. 651/12) Section II Mainland North Mombasa.**

**c. An Order directing the Registrar of Titles, Mombasa to rectify the Land Titles register by the cancellation and/or amending the entire registration and/or entries against the suit properties that include the Defendant's name on the said Title No. Subdivision No. 1538 (Original No. 651/11) Section III Mainland North and Subdivision No. 1538 (Original No. 651/12) Section II Mainland North Mombasa.**

**d. A prohibitory injunction do issue against the Defendant whether directly or through his agents servants and/or employees and any person who are claiming or may claim through the Defendant from dealing, alienating or in any other manner whatsoever disposing of the suit properties known as Plot No. Subdivision No. 1538 (Original No. 651/11) Section III Mainland North and Plot No. Subdivision No. 1538 (Original No. 651/12) Section II Mainland North Mombasa.**

**e. A permanent injunction do issue restraining the Defendant, his agents and/or servants and/or assigns and any persons who are claiming or may claim through the Defendant from interfering with the Plaintiff's quiet possession, occupation enjoyment and/or ownership of the suit property known as Plot No. Subdivision No. 1538 (Original No. 651/11) Section III Mainland North and Plot No. Subdivision No. 1538 (Original No. 651/12) Section II Mainland**

**North Mombasa.**

**f. General damages.**

**g. Costs of the suit.**

2. The defendant contested the suit vide his defence and counter – claim dated 4<sup>th</sup> October 2010 and filed in Court on 5<sup>th</sup> October 2010 and amended on 15<sup>th</sup> April 2013. In his counter – claim, he prayed for judgement as follows:

**a. Division of the property held in common and preservation orders till full division.**

**b. An injunction restraining the plaintiff from evicting him or dealing with the property in dispute bb) Lorry Load of Timber, Panel Beating and Mechanical Engineering Tools, and personal effects.**

**c. Dismissal of the suit with costs of the suit and Counter – Claim.**

**d. Costs and interest.**

3. After all the interlocutory applications were dispensed with and parties filed their respective documents, and witnesses' statements, the matter was set down for trial. The plaintiff called a total of six (6) witnesses while the defendant relied on his sole evidence. Mr John Muinde force No 231371 testified as PW 1. He told Court that he is a superintendent of police and a forensic document examiner based at C.I.D headquarters Nairobi. He gave his educational and professional qualifications from various institutions. He continued that on 27<sup>th</sup> March 2013 through the office of forensic document examiner he received documents marked **A & B, B1, B2 & B3** being specimen signature of Suleiman Chombo. He also received exhibits **C1 – C5** being specimen handwriting of Alice Mureithi brought together with the exhibit memo form. The purpose was to ascertain the handwriting doing the comparisons.

4. PW 1 stated that after examining the documents, he formed an opinion that **B1 & B2** were made by the same person while exhibit **A** and **C1 – C5** were not made by the same person. He based his findings on the similarity & dissimilarity in terms of the spread of the ink, relative proportion of characters slope of the pen e.t.c. He also said that he took into consideration factors which can affect somebody's handwriting such as age, poor sight, sickness, intoxication e.t.c. He produced his report as Pex 1 & 2.

5. On cross – examination, PW 1 said he knew Antipas Nyanjwa but he did not know he carried out examination on the same document. That he only dealt with documents relating to Alice and Chombo. That what he examined was a transfer form but he did not have the exact document marked as **"A"** in Court.

6. PW 2 is Emanuel Kenga who is a retired police officer and forensic examiner of more than 25 years. He retired on 4<sup>th</sup> March 2015. He gave the background of his educational & professional qualifications. PW 2 testified that on 24<sup>th</sup> September 2010 the complainant took the following documents to his office:

**A1 – Transfer form**

**A2 – Transfer form (questioned signature)**

**A3 – Transfer form (questioned signature)**

**A4 – Transfer form (questioned signature)**

That the plaintiff also gave her signature. He also received document **B** which had the plaintiff's known signature.

7. PW 2 continued that he did the analysis by examining the questioned signatures with document **B**. He did not find any agreement of the signatures. He also examined the questioned signatures of the plaintiff with the plaintiff's known signature and he found no agreement. He prepared a report which he produced as Pex 4. In cross – examination, he stated that he did not testify in the criminal proceedings between the parties. That it is the plaintiff who made the request for the examination. PW 2 stated that he has never met Robert Charo. That he never received known signature of the defendant.

8. BENARD ONDUSO testified as PW 3. He is an executive assistant at Mombasa Law Courts. He produced the proceedings in CM Criminal case No 2128 of 2012 Republic vs Isaac Njuguna Njoroge as Pex 5. This case had not been concluded.

9. SULEIMAN MCHOMBO was PW 4. He does land documents and he said he knew the defendant. He said he did a transaction with him. He adopted his statement filed in Court on 8<sup>th</sup> October 2013. During cross – examination by Mr Akanga advocate for the defendant, PW 4 said that when he was transacting with the defendant over the two plots he did not know the plaintiff. That he was contacted by the investigating officer called Mr Charo. The witness said he knew Rajab Swaleh but he did not deal with him over these plots. He did not know what the Land Registrar, the handwriting expert and firm of Hassan Abdi Said in the criminal proceedings. In Re – examination, PW 4 stated he did not deal with Mr Renson the land registrar during the registration of the disputed plot.

10. No 58752 IP ELVIS CHARO was the plaintiff's fifth witness. He is attached to the regional directorate of Criminal Investigations heading the investigations docket. PW 5 stated that he was assigned to investigate this matter. He recorded statements of PW 4 and the Land Registrar. He produced the following documents as exhibits, transfer form for CR 2184 & 21815, copy of charge sheet, letter from the DPP to prosecute and documents prepared by Mr Kenga & Mr Antipas who are the hand writing experts

11. On cross – examination, PW 5 said he was the investigating officer in criminal case No 2182 of 2012 alongside P.C Okello & Mercy Mjomba. He was not aware criminal of cases No 1837 of 2010 & 396 of 2011. PW 5 said he did not come across Rajab Swaleh during his investigations. His work was to establish whether the plaintiff signed the documents. The criminal case was still pending. That he did not obtain the specimen signature of Mr Charo who was out of the country when the transfers were done. That it is the defendant who presented the documents to the lands office.

12. The plaintiff testified as PW 6. She adopted her statement dated 7<sup>th</sup> October 2014. She said she is married to Robert Charo and they bought the suit land with him. The property was jointly registered in their names. She produced a marriage certificate and sale agreement to confirm. Then they developed it with a 3 bed roomed house. PW 6 stated that by then she did not know the defendant. Later the defendant wanted to kill her and she reported the matter to the C.I.D. That Mr Mukan advocate wrote to Hassan Abdi advocate when PW 6 became aware the defendant had inserted his name in the title.

13. PW 6 said she has never met Hassan Abdi or signed any documents before him. The signature on document **C1** looks like hers but it's not hers. Neither did the defendant pay her Kshs 50,000= as is indicated in the document. She also said that she bought a house without land on 19<sup>th</sup> May 1998 and 26<sup>th</sup> February 2002 by which time he had not met the defendant. The purchase price was Kshs 600000 of which she has paid Kshs 400000 and the balance of Kshs 200000 to be paid once a title deed is availed. PW 6 continued that her care taker was Zacharia John. That she met the defendant when the renovations had already began and she is the one who provided the money for the renovations. She stated that she left some money here and some she sent by western union (at page 7 of her documents). The plaintiff testified that Mr Zacharia completed all the renovations. Pages 26 – 40 of her documents comprised of copies of documents she used to send money to the defendant for the works she was doing in the house which was upgrading the Swahili house.

14. It is PW 6's further evidence that the plots in mwembe legeza is jointly registered in her & defendant's name because she did not have a P.I.N number. She got her P.I.N in April 2010 and now wishes to have the defendant's name removed. She also bought vehicles. She asked the Court to return

all her properties.

15. The plaintiff was put to cross – examination and said she knew Philip Tanui & Philip Ole Kato. Their business relationship with Philip Tanui ended and she sent the defendant to collect her properties. That she met the defendant in 2002 but she is still married to Robert Charo. That the defendant was a supervisor and a friend although it is recorded in the Court in Kilifi that they had an intimate relationship. PW 6 admitted they lived together with the defendant but never released the title deeds to anyone. That at the time the fraud was committed the titles were in the house. She was not aware the land registrar said there was no transfer. That the renovations were done in 2005 and there was no salary agreement with the defendant. She just gave money. She admitted the defendant put the African wood on the bedrooms & windows and extended the existing perimeter wall. The defendant also added 4 rooms to the Swahili house but everything was done at her cost.

16. PW 6 said the fraud was done in 2003 but she discovered it later as she was living in Kenya & Switzerland. She denied filing this case because they had disagreed. In re – examination, PW 6 said she has not sued Philip because she has no complaints of him forging her documents or Mr Charo or any other person in Kenya except the defendant. That the defendant had access to the house while she was in Switzerland and the documents were in the house. She wants her house & guest house back but not the bar. This marked the close of the plaintiff's case.

17. The defendant testified on 29<sup>th</sup> August 2016. He said he lives in Mtwapa. He adopted his statement signed on 24<sup>th</sup> September 2013. He said that he met the plaintiff first as a client in the year 2000, while he was a tour operator. In 2002, they got into a relationship and later got married under the Kikuyu Customary Law in August 2003. The defendant continued that she lived in the disputed house on plot No 21814 & 21815 from July 2002 – 2010. He said that he renovated the house in the year 2005.

18. The defendant admitted that when they met, the suit house was already bought but was in a dilapidated state. He therefore renovated it from top – bottom and it was furnished with skeleton furniture. He also confirmed Zacharia John was the care taker of the garden. That he spent Kshs 2 Million in renovations and Kshs 800000 to purchase new furniture. That he was enjoined in July 2010 not to use this house and therefore he moved to Magisa guest house. That he never removed anything from the house on plot 21814/15 except on 14<sup>th</sup> December 2010 when he accessed the house with the help of the police to take inventory.

19. The defendant further stated that the title deeds have always been with the plaintiff. That in criminal proceedings in Kilifi case No 396 of 2011, the plaintiff said she had divorced Robert Charo in 2003. That he did not prepare the transfer forms but it was the plaintiff who did so and he only gave out his ID number. That he was charged with fraud and uttering false documents in criminal case No 2128 and that is when he learnt Chombo (PW 4) is the one who had undertaken the transaction at the lands. It is the defendant's case that the plaintiff's share is still intact.

20. In regard to the guest house, the defendant described Mama Moza as a distant relative of the owner of the plot. He was aware some money was paid and there is some outstanding balance. That the sale agreement cannot confer ownership and that the plot was sold without the owner's consent. That he has lived and worked on the plot for over 15 years. He said he also renovated the premises which had been condemned by the public health. That he is the one running & obtaining licences for the bar. He admitted the plaintiff sent her money but it was to clean her mess from her past relationship not to repair the guest house. The defendant denied John Zacharia was involved in the renovations.

21. The defendant confirmed that the Land Registrar said in the criminal proceedings that the transaction was done above board as Robert Charo transferred his share to the defendant. He said he did not sign the transfers and he did not know whether he was required to sign. The defendant said he is the one who bought Plot No Mwembelegeza 1067 and 1068 although he included the plaintiff's name. That she was holding the titles. He also said he gave the plaintiff Ksh 700,000 to sort out herself after selling his plot at Serena beach for 1.4 Million. That because of their relationship, he never got into any agreement with the plaintiff to develop the suit plots. That he signed for the monies he received. He urged the Court to

dismiss the plaintiff's suit, the cars be released to him and his share in the land as per the counter claim be allowed.

22. On cross – examination, on **C1** only Robert & the plaintiff signed the document and witnessed by Hassan Abdi. That Hassan has testified in the criminal case and said he never witnessed the document. He gave the plaintiff Kshs 100,000= in cash for consideration but there was no witness. That no agreement was signed because he was not buying the land. That it is not true he gave Chombo the documents as he has never dealt with him. The witness said he made a mistake in his statement stating he met the plaintiff in 2002. The defendant said he had properties but it was not consolidated with the plaintiff's. That the plaintiff paid the initial price for Mwembe legeza plots. That he did not have approval plans for the rebuildings/renovations. He said most of his documents are still locked in the suit premises. That in his advocates letter (page 89) he said they were living as girlfriend/boyfriend because he was not legally married. That refurbishing a house does not confer ownership. That the transaction for Mwembelegeza plots was done by Mulong advocate but he does not know where he went to. He had not produced documents to show he purchased the furniture. In re – examination, he said he presented receipts he could find. The defendant then made a request for site visit.

23. This Court on 21<sup>st</sup> April 2017 visited the two properties situated in Mtwapa named Magisa Guest house and the house on plot Nos CR 21814/15. The visit was made in the presence of the parties, their advocates and security officers. I found three vehicles parked at Magisa Guest house registration Nos KRP 953, KAG 191 C, KVK 560 all said to be in the defendant's name. The site has a Swahili type of house and a bar operated on the frontage. It is fenced. The iron sheets are corroded and the defendant explained it is because of Mombasa weather. On the second plot (21814 & 21815), the house was empty – nothing inside the house. The wall was decorated with galana stones which the defendant said works done by him. It is wall fenced with defendant saying he raised the height of the existing wall. The house is built in the middle of the two plots (21814 & 21815). The windows are wooden framed. The defendant stated that he replaced the loovers with the wooden frames. The plaintiff on her part does not dispute but said all this was done at her cost. The defendant's case was closed and matter fixed for mention for submissions.

24. The parties filed written submissions which consisted of a summary of the evidence on record. Since I have already given a summary of the evidence adduced in the preceding paragraphs, I will not repeat them here. From the pleadings, evidence adduced and submissions rendered, I raise the following questions as forming issues for my determination:

- (1) Whether the defendant being a foreigner is allowed to own free hold title.**
- (2) Whether the defendant acquired any interest in the suit property.**
- (3) Whether allegations of fraud leveled against the defendant have been proved.**
- (4) If No (3) is yes whether the plaintiff's suit succeeds with costs.**
- (5) If No (3) above is No whether the orders sought in the counter – claim ought to be granted.**

25. The defendant stated both in his evidence and submissions that the plaintiff not being a citizen of the Republic of Kenya is not allowed under the Land Control Act to own free hold land. No specific section of the law was quoted to support this averment. Before the constitution was amended in 2010, there was no provision in our laws barring foreigners from owning free hold title. All the suit properties were acquired before the year 2010. In the current constitution 2010 article 65 dealing with land holding by non citizens provides thus:

***“65(1) A person who is not a citizen may hold land on basis of lease hold tenure only and such lease however granted shall not exceed 99 years.***

***65(2) if a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a 99 year lease, the provision shall be regarded as conferring on the person ninety nine year lease and no more.”***

26. The effect of this provision is that even a free hold title is interpreted to be a ninety nine year lease. The gist of this law is that it is not a bar to non – citizens to own land in Kenya but only limit the duration. Without saying more, I find no basis why the defendant is challenging the plaintiff’s title on this limb and without substantiating his reasons for doing so.

27. The second issue is whether allegations of fraud have been proved. The plaintiff gave the particulars of fraud in paragraph 8 of the plaint as follows:

**a) Causing his name to be registered/and nor included as registered owner of the suit properties.**

**b) Purporting to engage in a sale transaction the registered owner of the suit properties.**

**c) Forging signature of the plaintiff and the other registered owner.**

**d) Presenting fake Transfers purporting to have been duly signed by the plaintiff and the other registered owner and allegedly witnessed by Hassan Abdi, Advocate.**

**e) Presenting fake Transfer documents to the Registrar of Titles, Mombasa purporting the same to have been prepared by the Advocate and witnessed by the said Advocate one HASSAN ABDI.**

28. To prove these allegations, she called PW 1, 2 & 4 whom I find their evidence of relevance. PW 1 John Muinde and PW 2 Emanuel Kenga are both handwriting experts. They carried out examination on the signatures on the transfer documents that was used to transfer Robert Charo’s share in the suit property to the defendant. In their evidence they both confirmed that the signatures did not agree with the known signatures of both the plaintiff and the said Charo. Their evidence corroborated the evidence of the plaintiff that she never signed the disputed documents. On his part the defendant said the signatures were similar to that in the marriage certificate but he is not an expert in handwriting examination and he never called any expert to contradict the evidence of PW 1 & PW 2. His averment therefore is unsupported and with no value.

29. Further PW 4 testified that he was given the documents by the defendant. That he is the one who presented the said documents to the lands office. PW 4 also said he had never met the plaintiff and Mr Charo. The defendant denied ever meeting this witness. However taking his evidence together with the evidence of PW 1 & 2, I do reach a finding that PW 4 was truthful that it is the defendant who gave him the documents. If the plaintiff did not sign the transfers and the title deeds were in the house shared between the plaintiff and the defendant (who was living there all the time), it is only plausible that one of them is the one who had the knowledge of the title details and presented them to PW 4. In the instance case, it is the defendant since PW 4 said he had never met the plaintiff nor Mr Charo.

30. Still on allegation of fraud, from the criminal proceedings produced in evidence, Mr Hassan Abdi gave evidence and stated that he never witnessed the documents. He also did not know any of the parties. The advocate had also written a letter produced in the bundle of the plaintiff’s documents stating that he was slighted for being accused to have participated in this transaction. This puts to doubt the authenticity of the transfer documents used to confer ownership on the defendant. This evidence contradicts the defendant’s statement that the Land Registrar said the transaction was above board. The defendant further said he never signed the transfer form. One then wonders, what was above board with all these contradictions? The allegations of fraud must be proved also almost on a balance beyond reasonable doubt. In the instant case, I am satisfied that the plaintiff has also proved fraud showing her signature was forged. The defendant having been linked to presentation the documents for registration

through PW 4 then one draws conclusion that he knew of the fraud and cannot be allowed to benefit from it. This calls into play the provisions of section **26 of the Land Registration Act** which provides when registration can be cancelled as the plaintiff has shown the defendant was a party to the fraud and of the registration was acquired through a corrupt scheme.

31. The third issue is whether the defendant acquired any interest in the properties. As already explained above, the registration of the defendant as co-owner was unlawfully and or irregularly done. Therefore such unlawful actions could not and cannot confer any proprietary interests. Further the evidence adduced shows that at the time the defendant met the plaintiff whether in 2000 or in 2002, the suit titles Nos. 21814 and 21815 had already been acquired and registered in the joint names of the plaintiff and Robert Charo. The plots was already developed with a 3 bed roomed house and habitable. There is also no dispute that the house was renovated/refurbished in the manner described by the defendant. The only issue raised by the defendant is whether the cost of the renovations was met by the plaintiff or himself.

32. The matter before Court was not to determine the cost of the renovations but whether undertaking those renovations would confer any interest upon the defendant. **Section 3 of the Law of Contract Act** provides that a disposition in land must be in writing, signed by both parties and witnessed. The defendant does agree that they had no written agreement. Further he did not put forth any evidence whether the share was given to him as gift. After all he said he did not even know how the property was registered in his name indicating no discussions was made between him and the plaintiff before the transfer was made in his favour. Further having met the plaintiff when this house/plot was already in existence, it cannot be said to constitute matrimonial home. Consequently in the absence of an agreement in writing to state a consideration was paid or evidence alluding that it was a gift in addition to the manner the transfer was undertaken I do hold that the defendant acquired no interest in this property. If he has any claims on the costs incurred during the renovations (which have been denied) then such can be recovered as a debt and not by way of getting a share in the land.

33. On the land hosting Magisa guest house, the same has not been registered in the name of either of the parties. The plaintiff on her part produced a sale agreement showing how she acquired the land. She told the Court that the purchase price is Kshs 600,000 out of which Kshs 400000 has been paid and the balance of Kshs 200,000= is to be paid after title deed is issued. At the time of buying the land, there was already a Swahili house with 8 rooms. The defendant does not dispute these facts. His contention is again on renovations carried out and at whose cost. The defendant also alleged that the person who sold the property called Mama Moza is a distant relative of the owner. Neither the alleged owner or Mama Moza has sued the plaintiff. At least no documents were presented to the Court to support such averement. The plaintiff has clearly stated that she has no interest in the bar which is comprised of temporary structures (as seen during the site visit). The defendant although claims he incurred the expenses for renovations which is denied but he has not contributed any payment towards the purchase price. I therefore reach the same conclusion as that of the plot No 21814 & 21815 that the plot belongs solely to the plaintiff her co-owner and she is therefore entitled to vacant possession. The defendant can only continue using the premises with her consent which has been withdrawn by virtue of the claim before this Court.

34. The last plot in dispute is the one in Mwembe legeza No 1067 & 1068. It is jointly registered in the name of the defendant and the plaintiff. Again the plaintiff laid a foundation on how the properties were acquired. That the same were registered in joint names because she was told she had no P.I.N certificate. After she acquired the P.I.N in 2010, she now wants the property to be wholly hers. The defendant on his part said he is the one who paid for the plot but included the plaintiff's name out of love. He said the sale agreement remained with his personal items at the house after their disagreement and therefore he could not access it. The defendant said that part of the proceeds of sale from his Serena beach plot was used to purchase this plot. He however did not produce a sale agreement for Serena beach plot which I believe if he wanted to, he would have traced a copy either from the advocate who prepared the sale agreement or calling the person he sold to as a witness.

35. However on the basis that the registration of this property into joint names was not shown to have been done under any irregular manner or coercion and given that it was acquired during the subsistence of

their relationship, I will take the position that the defendant is entitled to some shares by virtue of his name having been included. Further the plaintiff having acquired a property earlier even without a P.I.N must have known the process involved in acquisition of title deeds. In any event, obtaining a P.I.N document in Kenya does not require a long time. Therefore it is my finding that they are both entitled to the suit property in Mwembelegeza in equal shares.

36. Since Mwembelegeza suit plot consists of two plots, I order that the plaintiff shall retain plot No Mwembelegeza/1067 in her name while the defendant takes plot No 1068. Each of the parties to execute the transfer forms to re – transfer their shares to effect the division. In the event of any party refusing to sign any documents to give this order effect, the Deputy Registrar shall execute the necessary documents to ensure each of the parties receives titles in their names.

37. In regard to the motor vehicles, the same shall be shared in accordance to the vehicle bearing their names as per the log books. In the absence of the log books, the plaintiff to take all the vehicles bought prior to her meeting the defendant. The ones bought during the subsistence of their relationship to be shared equally. In conclusion it is my finding that each of the parties claim succeeded partially. I do grant the plaintiff the orders as per her plaint in terms of prayers (a) – (e). In respect of the counter – claim, the defendant only gets one plot Mwembelegeza/1068 and any motor vehicles as specified above. The rest of the prayers in the counter – claim is not proved and is hereby dismissed. The totality of my findings is that the defendant’s name should be removed from title No CR 21814 & CR 21815. He should also surrender vacant possession of the suit premises known Magisa Guest house to the plaintiff. The defendant is entitled to plot No Mwembelegeza/1068 and any motor vehicles as specified in the rest of his claim in the counter claim is dismissed. Having completely denied the plaintiff’s claim, it is my considered opinion that plaintiff be awarded cost which I hereby do.

**Dated, signed & delivered at Mombasa this 12<sup>th</sup> day of July, 2017**

**A. OMOLLO**

**JUDGE**