



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELC CIVIL SUIT NO. 339 OF 2010**

**OMAR ABDALLA KONDO.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**JOSEPHINE MWIKALI KIKENYE**

**REGISTRAR OF TITLE MOMBASA**

**ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS**

**JUDGEMENT**

1. The Plaintiff Mr Omar Abdalla Kondo filed this suit vide a plaint dated 22<sup>nd</sup> September 2010 against Josephine Mwikali Kikene, the Registrar of Titles Mombasa and the Attorney General seeking the following prayers ;

**(a) The transfer and the certificate of registration made in favour of the 1<sup>st</sup> defendant in respect of the suit premises being Plot No 3155 (original No 933/13) SECTION 111 MN be cancelled and/or nullified and/or revoked.**

**(b) That there be a finding and/or an order for the plaintiff to be registered as the owner of the suit premises being Plot No 3155 (original No 933/13) Section 111 MN in place of the 1<sup>st</sup> Defendant.**

**(c) Costs of this suit**

2. The suit was denied by the three defendants through their defences filed and on record. The 1<sup>st</sup> Defendant also filed a counter – claim, she prayed for ;

**i) An order to quash and nullify the fraudulent transfer dated 7<sup>th</sup> March 2008 and entered in to the lands register on 13.5.2008.**

**ii) An order compelling the Plaintiff to deposit the original certificate of title No C. R 30305 with the 2<sup>nd</sup> Defendant for purposes of nullification and/or rectification in favour of the 1<sup>st</sup> Defendant.**

**iii) An order of Permanent Injunction restraining the Plaintiff from leasing or disposing or in**

**anyway interfering with the 1<sup>st</sup> Defendant's quite possession of the suit property.**

**iv) Kshs 39090.74**

**v) Costs of and other incidentals to this suit.**

3. After the pleadings closed, the suit was set down for hearing. The Plaintiff's evidence was taken by Mukunya J. When the matter came up for directions, parties agreed to proceed from where this matter had reached. The plaintiff testified as a single witness. He told Court that on 4<sup>th</sup> October 2006 the 1<sup>st</sup> Defendant told him about a debt she owed and was being demanded and her house was to be sold on 8<sup>th</sup> October 2006 because of Kshs 375,000=. The Plaintiff said he gave Kshs 375000 to Titus Tommy Gichangi the creditor. They signed a declaration on 10.10.2006 between the 1<sup>st</sup> Defendant, Mr Gichangi and himself. He produced this decalaration as Pex 1.

4. On the same day, PW 1 continued that she gave Josephine Kshs 400000 which 1<sup>st</sup> Defendant was to pay with interest at Kshs 75000= per month for four months bringing the total to Kshs 700,000= inclusive of the interest. PW 1 stated that the refund was to be made by 28<sup>th</sup> February 2007. He produced this agreement as Pex 2. PW 1 continued that the money was not repaid and because the 1<sup>st</sup> Defendant still had problems, she gave her more loans.

5. PW 1 stated that they held a meeting on 24.11.2007 where the 1<sup>st</sup> Defendant agreed to sell him the house for Kshs 1,100,000. An agreement was drawn to this effect and executed. Then the property was transferred to the Plaintiff on 7.3.2008. He produced the transfer document as Pex 3 and title deed issued on 13.3.08 produced as Pex 4. The witness said he took over possession of the plot.

6. He continued that in November 2009 he was summoned to the CID over allegation of Forgery under inquiry No 2/2009. He produced the letter from the CID as Pex 5 and letter from A.G as Pex6. The witness said that he undertook a search on 15.6.2010 which showed the property was in his name. He produced the search as Pex 7. Later he received a letter from the advocates produced as Pex 8 informing him that the property had been re – transferred back to the 1st defendant. The second search done confirmed this. The Plaintiff avers that the monies he gave Josephine has not been paid. He asked the Court to give him the plot as in the agreement there was a clause indicating if the money is not paid, the house would be sold to him.

7. During cross examination by the 1st Defendant the Plaintiff said he had known the 1<sup>st</sup> Defendant for one year but did not know whether she is literate or not. He also admitted he had no evidence of other monies given out except for the 375000 and the 400000. That the title given on 4/10/2006 was given as a security. In the transfer document, consideration was given at Kshs One Million while the agreement says 1.1 Million. He admitted there was no ID Number nor PIN number of the 1<sup>st</sup> Defendant on the transfer form.

8. The Plaintiff conceded that he did not provide evidence of payment of stamp duty or that he has paid rent. When he realised the title deed was reversed, he went to his lawyer. He maintained the transfer to himself was legal and he still has the title document. He denied being paid all his monies and that he did not defraud the 1st Defendant.

9. On cross – examination by Mr Ngare the State Counsel, the Plaintiff said they went to the offices of David Ongera advocate. He conceded he had no receipt for payment of stamp duty or transfer or rates neither did he have rates clearance certificate from Kilifi County.

10. In re – examination, the witness stated that he went to collect rent as the owner of the house. That he made payments to the lands office and there was no issue of payment of rents or rates. Neither was he ever summoned by the Land Registrar. That the reason the agreement is at variance with the transfer is because of valuation. He paid David Ongera Kshs 35000 and he is the one who did the transfer process.

That the receipts for other payments got burnt. The Plaintiff closed his case at this point.

11. On the 18<sup>th</sup> May 2015, the 1<sup>st</sup> defendant opened her case. She testified as DW 1 and stated that she is a business woman. She knows the Plaintiff and that plot No 3155/MN/111 belongs to her. She bought the plot in 2002 and produced the transfer as Dex 1. She built rental houses on the land in 2003. DW 1 said that she first borrowed Kshs 400000 from the Plaintiff and later on borrowed a further Kshs 350000. The interest agreed was Kshs 75000. DW 1 continued that they had a written agreement for the 1<sup>st</sup> debt but she was not given a copy. This agreement was witnessed by Salim and Kaisi Kisany. DW 1 continued that she was to refund the money after six months and produced as Dex2 a document showing she paid back the money in two instalments.

12. The 1st Defendant stated that she asked for return of her title deed but the Plaintiff refused because he was still claiming interest of Kshs 75000= which she was unable to pay as her husband had died. Later her house started leaking and she asked Salim for help. Salim referred her back to the Plaintiff. She approached the Plaintiff and asked for Kshs 350000 which the Plaintiff gave her and this was also reduced into writing.

13. DW 1 stated that they agreed that the Plaintiff was to recover his money from rent on the houses on the suit premises over a period of one year. DW 1 avers that the money owing to the Plaintiff was Kshs 425000 while the annual rent was Kshs 492000=. DW 1 denied selling this plot to the Plaintiff and denied receiving a loan of Kshs 1,100,000. She also denied the contents of the sale agreement as no sale took place. But she was given a copy of this agreement produced as Dex 3.

14. The witness stated further that the Plaintiff began receiving rent from December 2007. After the lapse of one year, she asked for the title deed but the Plaintiff demanded more money. The Plaintiff threatened to sell the house through auction if the money was not paid in two weeks. The witness said she involved people to try and resolve this matter but the Plaintiff was adamant. She therefore reported the matter to the CID Central Police Station.

15. The 1<sup>st</sup> Defendant denied giving out her passport size photograph, ID or PIN and denied appearing before any advocate in the presence of the Plaintiff. When she met David Ogera in her advocates' office, the said David denied knowing her. She produced a letter from Law Society of Kenya as Dex 4 which confirmed that David Ogera had no practicing certificate and therefore the register was rectified and her name re-instated. The Plaintiff on realising this filed this suit. She said she refunded the money with excess of Kshs 68000 which she is claiming from the Plaintiff.

16. In cross – examination by Mr Kenga for the Plaintiff, the 1st Defendant stated that she did not know how to read and write but now she can read and write. That she knew how to sign by writing her name. She admitted the Plaintiff gave her 400000/= which she used to pay Mr Tommy Gichangi. She denied the signature and claimed she was to repay with monthly instalments of Kshs 75000=. She does not have the agreement showing the interest was to be Kshs 75000= On the second agreement, after it was written, she was told to sign. She admitted the signature on Dex 3 as hers. Further that her caretaker would receive rent and take to Omar (Plaintiff).

In re – examination, she said she was given Kshs 825000 by the Plaintiff. She paid 400000= first then paid the 375000 by rent collected over one year. It is her evidence that the Plaintiff never read to her the contents of the sale agreement.

17. DW 2 is Martin Wambua Mwanzia testified on 21.9.2015. Previously lived in Mtwapa as the caretaker of the 1st Defendant from August 2003. He talked of a loan of Kshs 350,000= between the Plaintiff and the 1st Defendant. The 1st Defendant instructed him to remit all rents collected from January 2008 to the Plaintiff. He said the monthly rents was Kshs 41000=. He was introduced to the Plaintiff but was not shown where he lives. DW 2 continued that he took rents to the Plaintiff until December 2008 and gave him a total of Kshs 492000=. In December he was instructed to stop remitting money to the Plaintiff because the money was fully repaid.

18. On cross – examination, DW 2 said he did not have a letter of appointment but his monthly salary was Kshs 8000. He also did not have any letter authorising him to remit rent to the Plaintiff. That he did not have any receipts because they were burnt in the house. He once sent Kshs 25000 to the Plaintiff's brother. That it is the Plaintiff who told him where to find him. He denied being bought to testify.

19. In re – examination, he stated that the receipts were issued in the tenants names. He had an OB report of the burnt house. He enquired why rent was paid to the Plaintiff so that his job was not put at risk. The 1<sup>st</sup> Defendant closed her case. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants chose not to call any evidence. Parties agreed to put in written submissions. It took the Plaintiff's advocate 2 ½ months to file their submissions. I have read all the submissions filed by all the parties.

20. From the pleadings and evidence presented before this Court, it is not in dispute that the Plaintiff lent the 1<sup>st</sup> defendant some money. The 1<sup>st</sup> defendant admits receiving Kshs 400000 which she used to pay off Mr Gichangi. She also admitted receiving a further sum of Kshs 350,000=. The issue in dispute is whether these monies were repaid or not. The second issue is if the refund was not made, what repercussions did it have on the 1<sup>st</sup> Defendant's title that had been used as security for the monies advanced.

21. There are two agreements that formed the basis of the relationship between the 1<sup>st</sup> Defendant and he Plaintiff. In Pex 1 the document is dated 8.9.2006, the 1<sup>st</sup> Defendant deposited her title deed as security for the money advanced. The title was to be collected on 8.10.2006 upon payment of the amount advanced. In default of payment, the holder was at liberty to sell the item and recover the loan and expenses incurred. The 1<sup>st</sup> defendant admits this money was paid on her behalf by the Plaintiff.

22. In return, the 1<sup>st</sup> defendant and the plaintiff prepared an agreement between them dated 4.10.2006. The 1<sup>st</sup> Defendant received Kshs 400000 and it indicated that the interest per month for the months of October, November, December 2006 and January 2007 was Kshs 75000= for each month giving a total of Kshs 700,000= that was to be refunded on 28.2.2007. This document was executed by Salim Hussen, the Plaintiff and the 1<sup>st</sup> Defendant.

23. The 1<sup>st</sup> Defendant also produced as Dex 2 an “agreement” with two dates of 4/4/07 and 14/5/07 showing that the Plaintiff was refunded his money. It is indicated as signed by both the Plaintiff and the 1<sup>st</sup> Defendant. Both parties produced the “sale agreement”. The Plaintiff produced it as Pex 2 while the 1<sup>st</sup> Defendant it was Dex 3. The 1<sup>st</sup> defendant is recorded to have sold the house after failing to repay the amount of money advanced to her by the purchaser (Plaintiff). In clause 3 of this agreement, the 1<sup>st</sup> defendant authorised the Plaintiff to start receiving rent from the suit premises as from end of December 2007.

24. The 1<sup>st</sup> Defendant in her evidence stated that this rent was to be collected for one year to help recover the sum of Kshs 425,000 which she admits owing to the Plaintiff. The Plaintiff on his part states that he was collecting the rent as owner of the house and not to repay himself as there was no such agreement. To support this fact that there was a sale agreement, the Plaintiff averred that the 1<sup>st</sup> Defendant signed the transfer in his favour.

25. This Court's duty is to establish whether a sale ever took place or not. The 1<sup>st</sup> Defendant admitted she was given a copy of the sale agreement to keep. She admitted signing it but not on the understanding that the contents thereof was about sale. The 1<sup>st</sup> defendant in paragraph 11 of her defence adopted the defence of *non est factum* (it is not my deed). In her evidence in Chief, the 1<sup>st</sup> defendant did not lay a basis for this line of defence.

26. Before transacting with the Plaintiff, the 1<sup>st</sup> Defendant had given her title as security for a loan advanced to her by Mr Tommy Gichangi. That declaration (Pex 1) was written in English and the 1<sup>st</sup> defendant knew the consequence of default to repay the money advanced. Further when the Plaintiff advanced to her the sum of Kshs 400,000 to pay off Mr Gichangi, she knew the loan attracted interest according to her of Kshs 75000=. She went back to the Plaintiff for a second loan again on the basis of the

title deed held for security. When she paid the Kshs 400,000, she did not demand for the title deed because she knew she still owed the Plaintiff the sum of Kshs 75000=.

27. The 1st Defendant however became unaware of what she was signing on 24th November when the sale agreement was drawn. She was given a copy of the sale agreement but which she did not endeavour to ask from her friends (Mr Salim her former Landlord included). Is the defence of *non est factum* available to her? She relied in the cases of **Stephen Ikiao vs M'Iaryu M'Thankari Mikiamba (2010) eKLR and Saunders vs Anglia Building Society**. In the latter case, the burden of proving *non est factum* is on the person disowning his signature and it includes proof that he or she took care.

28. The agreement in dispute was not drawn by an advocate. As at the time the agreement was drawn, the 1st defendant still owed the Plaintiff some money. The 1st Defendant admits authorising the Plaintiff to collect rent from December 2007 as per the agreement but only to recover his money. There is no evidence led to show that the Plaintiff misled the 1st Defendant into signing this agreement. It does not come out from the evidence of both parties whose initiative the idea of collecting rents emanated from. The 1st Defendant had also done previous dealings with this title with Mr Gichangi. The issue of her illiteracy did not arise. Having found that there is nothing shown as misleading done by the Plaintiff, I find the defence of *non est factum* unavailable to the 1st Defendant.

29. Further this defence is not available to the 1st defendant because the Plaintiff's exhibit 6 showed that the signature on the transfer form belonged to the 1st Defendant. The 1st Defendant herself has produced as Dex 1 copy of the transfer form between Shamji Ramji Manji and herself. The inference drawn by this Court is that she knew what a transfer form looked like and cannot therefore plead ignorance of not knowing what she was signing. No evidence was led that the pass port photograph was illegally obtained by the Plaintiff. This Court is convinced by the dealings between the parties that the 1st Defendant gave it to the Plaintiff and has only changed her mind.

30. The evidence of DW 2 as regards the remittance of the rents to the Plaintiff does not change the effect of contents of the sale agreement between the parties. DW 2's role was to collect rent and remit to the Plaintiff on instructions of the 1st Defendant. He was not a party to the initial agreements of the monies advanced or the subsequent "sale". He had no evidence of proof that he indeed collected Kshs 41,000 from the suit premises every month and remitted to the Plaintiff. He cannot know the reason why the plaintiff was receiving rent whether as owner of the house or otherwise. In my view his evidence does not add any value to the 1st defendant's defence of *non est factum*. It only confirms that the Plaintiff took possession of the plot.

31. Was the registration of the transfer in favour of the Plaintiff regular? The Plaintiff pleaded that there was a complaint made by the 1st Defendant that he had forged the transfer documents. Following this complaint, the CID opened an inquiry file No 2 of 2009. The inquiry was closed on advice from the A. G's office Mombasa on the basis that the complaint lacked merit.

32. In the letter dated 17th February 2010, the DCIO Urban Mombasa wrote to the the Plaintiff confirming that the investigations were complete and the State Counsel advised that the file be closed. In the letter dated 29th January 2010, the State Counsel said that the document examiner's report showed that the specimen signatures compared were matching the 1st Defendant's signature therefore the complaint that the 1st Defendant's that she did not sign the transfer was without merit. The burden of proving fraud as set out in the counter-claim shifted to the 1st Defendant.

33. The 2nd and 3rd Defendants did not adduce any evidence but submitted that the fact that the Plaintiff did not produce receipts for evidencing payments of Stamp Duty, rates clearance certificates and transfer left a lot to be desired. The Plaintiff admitted that he did not have those receipts. On re-examination, he stated that he paid David Ongera advocate Kshs 35000 and it is the said advocate who carried out the transfer process.

34. Although it is imperative for parties to show proof of payment of stamp Duty and transfer, I am not aware of any law that declares non-payment of such levies by itself renders that transfer process

fraudulent. The 2nd and 3rd defendants did not impute any fraudulent activity done by the Plaintiff when the document was presented for registration. There is nothing to show that the documents presented on behalf of the Plaintiff in regard to the transfer into his name were irregular. The investigations done by the C.I.D did not also reveal any fraudulent actions. Consequently I find the registration of the Plaintiff as owner of the suit property was in order.

35. The defendants have not given this Court any reason why the registration of the plaintiff was revoked. The 1<sup>st</sup> Defendant based her complaint that her signature was forged which the handwriting examiner found otherwise. Secondly that David Ongera did not have a practicing certificate which in itself does not invalidate a document and is not a ground for revoking a title. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant did not give any reason.

36. Under section 142 (1) of the Registered Land Act Cap 300 (*repealed*) (now section 79 of the Land Registration Act 2012) allows the Registrar to rectify the register in case of errors or omissions not materially affecting the interest of the any proprietor or with the consent of all persons interested or and 142 (1) (c) upon notice to all persons appearing by the to be interested affected of his intention so to rectify. In section 79(2) the Registrar is permitted to rectify the register where the document is obtained by fraud. Subsection 4 gives regulations when carrying out such rectification.

37. The Registrar herein did the opposite of what this section provides for. Secondly section 143 of Cap 300 (*repealed*) (section 83 Land Registration Act) allows cancellation by the order of the Court. The 1<sup>st</sup> Defendant did not obtain any order of the Court before asking the 2<sup>nd</sup> Defendant to cancel the plaintiff's title. The revocation was therefore unlawful. The result of the action of the 2<sup>nd</sup> Defendant is to allow two certificates titles to be out in respect of the suit property. One certificate is held by the Plaintiff and the latter certificate by the 1<sup>st</sup> Defendant. Plaintiff as owner of the suit property to be in order

38. Is the Plaintiff entitled to the orders sought ? The Plaintiff asked that the registration of the 1<sup>st</sup> Defendant be cancelled and or revoked. The re-transfer of the suit plot into the 1<sup>st</sup> Defendant's name was done on the basis that the Plaintiff had forged registration in to his name. As I have found in paragraphs 33 – 35, there was no such finding made against the plaintiff and therefore the action undertaken by the 2<sup>nd</sup> Defendant was irregular, null and void.

39. I am therefore satisfied that the Plaintiff proved his case on a balance of probabilities. I do allow the prayers as contained in his plaint. I do dismiss the 1<sup>st</sup> Defendant's counter-claim with costs to the Plaintiff. The 1<sup>st</sup> Defendant is directed to surrender the certificate of title in her possession to the Deputy Registrar of this Court within 21 days of the delivery of this judgement for it to be destroyed.

**Judgement dated and delivered at Mombasa this 5<sup>th</sup> day of May 2016**

**A. OMOLLO**

**JUDGE**