



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.137 of 2011 (OS)

**IN THE MATTER OF: LAND TITLES NOS. NGOMENI/SQUATTERS SETTLEMENT
SCHEME/576 AND 577**

AND

**IN THE MATTER OF: LIMITATION OF ACTIONS ACT CHAPTER 22 OF THE LAWS OF
KENYA**

BETWEEN

MARIAM HEMED KALE (*suing as* ADMINISTRATIX OF THE ESTATE OF

HEMED KALE HEMED.....PLAINTIFF/APPLICANT

AND

1. THE HONOURABLE ATTORNEY GENERAL

2. REGISTRAR OF LANDS KILIFI

3. KING FISHER BOATS LIMITED

4. ROBIN ANGUS PAUL

5. ESTATE OF HERBET JAMES ANDREW PAULDEFENDANTS/RESPONDENTS

J U D G M E N T

Introduction:

1. This suit was commenced by way of an Originating Summons dated 30th August, 2011.
2. In her orders of 3rd December, 2013 in Malindi Succession Cause No. 11 of 2010, Meoli J gave the following directions:-

“The main issues to be determined in the revocation application are also raised in the

pleadings in HCCC No. 137 of 2011 [this suit], pending before the Environment and Land Court. It is more efficient and prudent that these issues be considered and determined simultaneously by one judge.”

3. It is on the basis of those directions that this suit was consolidated with Malindi Succession Cause No. 11 of 2011.

4. On 8th June, 2015, the Plaintiff herein filed another Originating Summons being Malindi ELC case no. 89 of 2015 (OS) seeking for orders that are similar to the ones in the current suit. On 9th July, 2015, the court directed all the three suits to proceed for hearing simultaneously.

The Pleadings:

5. In this suit, the Plaintiff commenced her action by way of Originating Summons dated 30th August, 2011, in which she is seeking for the following reliefs:-

(a) A declaration that the deceased, Hemed Kale Hemed was adjudicated as the lawful owner of land Titles No. Ngomeni/Squatter Settlement Scheme/577 and Kale Shabwana Mjahid, adjudicated as the owner of Ngomeni/Squatter Settlement Scheme 576, though the two plots belong to the deceased Hemed Kale Hemed.

(b) That the Honorable be pleased to issue order for cancellation of the Registration of Land Titles Ngomeni/Squatter Settlement Scheme/576 and 577 in the name of the 4th and the 5th Defendants/Respondents herein and order fresh registration of the said Titles Ngomeni/Squatter Settlement Scheme/576 and 577 in the name of the Plaintiff/Applicant herein as the Administratrix of the Estate of HEMED KALE HEMED.

(c) THAT the Honourable court be pleased to order the District Land Registrar Kilifi to register the Plaintiff/Applicant MARIAM HEMED KALE the Administratrix of the Estate of HEMED KALE HEMED as the rightful and/or lawful owner of land Title NGOMENI/SQUATTER SETTLEMENT SCHEME/576 and 577 in place of REUBEN ANGUS PAUL and HERBERT JAMES ANDREW PAUL.

(d) Costs of this suit be born by the Defendants/Respondents.

6. The Originating Summons is supported by the Affidavits of the Plaintiff sworn on 30th August, 2011 and 29th February, 2012.

7. The 4th Respondent, Robin Angus Paul, swore a Replying Affidavit and a Further Affidavit in response to the Originating Summons on his own behalf and on behalf of the 3rd and 5th Respondents.

8. I shall revert to the Affidavits in a short-while.

9. As I have already stated, the orders that the Plaintiff is seeking in Malindi ELC No. 89 of 2015 (OS) are similar to the orders that she is seeking in this suit, save that she is representing herself in that suit.

10. In Malindi Succession Cause No. 11 of 2010, the objectors, who are the 4th and 5th Defendants herein, sought for the annulment or revocation of the grant of letters of administration intestate to the Estate of Hemed Kale Hemed made on 17th August, 2010 and confirmed on 2nd March, 2011.

11. In the alternative, the objectors [the 4th and 5th Defendants herein] are seeking for an order that parcel of land known as Ngomeni Settlement Scheme 576 and 577 be expunged from the said grant on the ground that they are the registered proprietors of the two parcels of land.

12. On 30th September, 2015, the advocates on record agreed to proceed with the Originating Summons “as though the same had been commenced by way of a Plaint”. The matters proceeded by way of viva voce evidence.

The Plaintiffs case:

13. In her Supporting Affidavit and evidence in chief, the Plaintiff, PW1, informed the court that she is the administratrix of the Estate of the late Hemed Kale Hemed who died on 7th April, 2006; that the deceased is the lawful owner of parcel of land number Ngomeni Squatter Settlement Scheme/576 and 577 and that it was the deceased who was in occupation of the said parcels of land before he died.

14. It was the evidence of PW1 that during the adjudication process, plot number 576 was adjudicated in the name of Kale Shabwana Mjahid while plot number 577 was adjudicated in the name of her late father, Hemed Kale Hemed.

15. According to deposition of PW1, plot number 576 was adjudicated in the name of Kale Shebwana Mjahid with the consent of the late Mr. Hemed on the understanding that upon a refund of Kshs.34,000 advanced to the deceased by Mr. Kale Shebwana, the said portion would revert back to Mr. Hemed.

16. It is the Plaintiff's case that Mr. Kale Shebwana was paid the Kshs.34,000 after the death of Hemed; that upon payment of the said Kshs.34,000, plot number 576 reverted to the children of Mr. Hemed and that the late Mr. Hemed died before the Title Deeds could be issued.

17. According to the evidence of PW1, the 4th Defendant used to use the suit property as a storage yard for his boats and that he later on had the Title Deeds issued in his name.

18. According to PW1, when the 4th defendant fenced the suit properties, they reported the matter to the Chief who advised him to negotiate the issue with the children of Mr. Hemed.

19. When PW1 was shown the agreement that she purportedly entered into with the Defendants in respect to the suit property dated 6th June, 2007, she denied having signed it.

20. According to PW1, the family of the late Mr. Hemed has never authorised Mr Dilimua to act on behalf of the family.

21. PW1 denied that she was paid Kshs.10,000 by the Defendants. According to PW1, the purported agreement between his late father and Kingfisher Boat Limited is a forgery and that in any event, the agreement relates to a non existing plot being plot number 77.

22. PW1 informed the court that plot numbers 576 and 577 are agricultural pieces of land which requires the consent of the Land Control Board before they could be transferred; that the consent of the Board was never obtained and that her late father did not execute a transfer document in favour of the Defendants.

23. In cross-examination, PW1 informed the court that the late Mr. Hemed had seven children and that he used to live on the suit land before he died.

24. PW1 informed the court that she had never seen the agreements that were purportedly entered into between her late father and Kingfisher Boats Limited dated 26th May, 1999 and 21st August, 2005 and that the payment of Kshs.1,000,000 that was made by the defendants after the demise of her father was the storage charges for the defendant's machines.

25. When asked why she handed over her identity card, PW1 stated that her national identity card was stolen and that she was re-issued with another identity card on 23rd January, 2014.

26. Mohamed Hemed Kale, PW2, relied on his written statement dated 13th August, 2012.

27. PW2 informed the court that he was one of the children of the late Mr. Hemed; that his father owned and occupied plot numbers 576 and 577 and that him, together with his late father were employees of Kingfisher Boat Limited whose directors were the 3rd and 4th Defendants.
28. According to PW2, when his father died, the 3rd and 4th Defendants assisted them with funeral and burial arrangements and that as a family, they appointed their uncle, Dilimua Mohamed to pursue the issue of their father's gratuity with the Defendants' company.
29. It was the evidence of PW2 that the payment of Kshs.1,000,000 by the Defendants after the death of their father was gratuity and had nothing to do with the sale of the suit properties.
30. It was the evidence of PW2 that plot numbers 576 and 577 belonged to his late father and that their father never told them that he had sold the two plots.
31. PW2 denied knowledge of the agreement of 26th May, 1999 that was purportedly signed by his late father and the Transfer document of 21st January 2000.
32. PW2 denied having signed the Affidavit in the Defendants' bundle of documents and the agreement dated 6th June, 2007.
33. PW2 informed the court that by the time his father died, he had not been issued with letters of allotment for the two parcels although he was in the list of the people who had been allocated land in the scheme.
34. In cross-examination, PW2 stated that he is the one who gave to the 4th Defendant his father's identity card when he died. PW2 maintained that all the documents which showed that he had appended his signature were a forgery.
35. Kale Shebwana Mjahid, PW3, informed the court that he has married the deceased's niece; that he was very close to the deceased and that the deceased was employed by Kingfisher Boat Limited as a watchman.
36. According to PW3, the late Mr. Hemed used to guard the 4th and 5th Defendant's boats which used to be anchored on the shores of plot numbers 576 and 577 which belonged to Hemed.
37. PW3 informed the court that the late Mr. Hemed requested him to advance him Kshs.35,000 which he did; that the deceased then gave him plot number 576 which he cultivated and that during the adjudication process, he was allocated plot number 576.
38. PW3 stated that he was paid the money that was owed to him by the deceased by his children; that he never sold plot 576 to the Defendants and that plot number 576 reverted back to the children of the deceased after he was refunded Kshs.34,000.
39. When the DO summoned the family of Mr. Hemed, it was the evidence of PW3 that PW1 only agreed to settle the matter if the Defendants paid the family Kshs.150,000,000; that he met Mr. Angus (the 4th Defendant) for the first time when they visited the D.O and that he was not aware of the agreement of 19th August, 2005 and witnessed on 21st August, 2005 and the agreement of 6th June, 2007.
40. PW3 admitted having met Mr. Dilimua and agreed to give him his identity card so that he could be paid Kshs.34,000. It was the evidence of DW3 that Mr. Dilimua paid him Kshs.34,000 which was the amount that the late Hemed owed him.
41. PW3 informed the court that he agreed to return plot numbers 576 to the children of Hemed after he was paid the Kshs.34,000.

42. In cross-examination, PW3 stated that Hemed owned both plot numbers 576 and 577 before he agreed to have plot 576 registered in his name. According to PW3, he has agreed to have plot 576 revert to the children of Hemed.

43. PW3 denied having signed any agreement before the Chief and that he heard PW1 say that they had been paid Kshs.1,000,000 by the Angus for the funeral arrangements of their late father.

The Defendants' case:

44. Angus Paul, DW1, stated that he is the 4th defendant and the registered proprietor of plot number 577; that his late father is the registered proprietor of plot number 576 and that Hemed sold the two plots to them.

45. According to DW1, the late Hemed approached his late father and told him he wanted to sell his land. That is when they signed the agreement dated 26th May, 1999 before Muli advocate.

46. Other than his father, DW1 stated that he also signed the agreement as a Director of Kingfisher Boats Limited (the vendor) and that although the agreement of sale describes the plot as 77, the correct number should have been 577.

47. According to DW1, he was present when the late Hemed signed the agreement in Ms Muli's advocate office.

48. DW1 informed the court that in the year 2000, the late Hemed signed the Transfer document and that they met again with Hemed in the year 2005 when he informed him and his father that he wished to sell plot number 576 too. That is when they signed another agreement in the presence of the Chief, the village elder and the Chairman of the Land Allocation Committee.

49. DW1 stated that although the record showed that plot number 576 was in the name of Kale Shebwana, Hemed informed them that the land belonged to him; that Hemed had Kale Shebwana sign the agreement of 19th August, 2005 on 21st August, 2005 and that the author of the agreement forgot to substitute the name of Hemed with that of Kale Shebwana.

50. DW1 stated that although Swaleh Hemed and Mohamed Said witnessed PW2 sign the agreement of 21st August, 2005, the two have since passed on.

51. DW1 stated that the local Committee Chairman witnessed the signatures of the vendor and of Hemed that he agreed to change the nominal roll to substitute the name of Kale Shabwana.

52. DW1 informed the court that after purchasing the two plots, the nominal roll/register was changed to indicate that he was the owner of plot number 577 while his late father was indicated to be the owner of plot number 576 and that the letters of offer were issued to them after the death of Hemed.

53. DW1 admitted that when Hemed died, they owed him money for the suit properties which the children took upon his demise.

54. It was the evidence of DW1 that they used to pay Hemed the purchase price in installments and that he was not happy with his children, including the Plaintiff. DW1 stated that Hemed informed them that he was selling the land so as to take care of himself.

55. After the death of Hemed, DW1 stated that PW2 introduced them to Dilimua who was to represent the family; that Dilimua established that the balance of the purchase price was Kshs.175,000; that because they had known the family for many years, they agreed to pay the family Kshs.1,050,000 over and above the Kshs.175,000 which was to be divided amongst the seven children of Hemed and that an agreement to that effect was signed.

56. After paying the family the Kshs.1,050,000 and Kale Shebwana Kshs.82,000, it was the evidence of DW1 that he lived in peace until after four years when the family made a complain to the D.O.

57. In cross-examination, DW1 stated that the late Hemed was paid kshs.50,000 at the time of signing the agreement for plot 577 leaving a balance of Kshs.400,000; that the balance was paid to him in installments and that by the time he died, he had been paid the whole amount.

58. DW1 admitted that the subsequent agreement with Kale Shabwana did not specify the purchase price of the plot 576 and that although it was the company which bought the plots, it is the directors' names which were entered into the register.

59. Dilimua Mohamed Dilimua, DW2, informed the court that he was a cousin to the late Hemed; that when Hemed died, there was a dispute between his children in respect to the amount that was due and owing to him and that the suit properties initially belonged to Hemed's parents.

60. Accordingly, it was the evidence of DW2 that the family members gave him authority through an affidavit to negotiate with the 4th and 5th Defendants on the balance of the purchase price; that DW1 gave him three sets of agreements that were in his possession and that when he approached Kale Shebwana, he admitted having signed an agreement which was taken to him by Hemed at night.

61. When DW1 informed DW2 that he only owned Hemed Kshs.175,000 he informed the family members. However, DW1 agreed to make a payment of Kshs.1,050,000 in addition to the balance of Kshs.175,000 to be shared amongst the family members.

62. On the other hand, Kale Shebwana was paid Kshs.82,000 and he acknowledged the payment. That is when all the children of Hemed signed the agreement of 6th June, 2007.

63. In cross-examination, DW2 stated that the late Hemed never involved him in the sale of the suit properties; that no one, including himself, knew the purchase price of the two plots and that two agreements do not show the purchase price.

64. Ms Lucy Muli Kina, an advocate of this court, DW3, informed the court that the 4th Defendant's father was her client; that when the 4th Defendant's father went to him with Hemed, she prepared for them a sale agreement in respect to plot number 77 and that Hemed was to be paid Kshs.5,000 per month.

65. When Hemed later on informed her that he had been paid the entire purchase price of Kshs.450,000, she prepared an informal transfer dated 21st January, 2000 which he signed.

66. According to DW3, the purchaser was to be given the first option to buy the plot which was neighbouring plot 77. DW3 stated that plot 77 is what became to be known as plot 577.

67. The then Chairman of the Land Allocation Committee, DW4, informed the court that Hemed approached him and informed him that he had sold his land to Mr. Angus; that he requested his name to be deleted from the register and that when he was shown the two agreements signed by Hemed and Angus, the Committee effected the changes of the proprietorship of plot numbers 576 and 577.

68. The Chief of Gongoni Location, DW5, stated that the late Hemed went to his office and informed him that he wanted to sell his land to Mr. Angus. That is when he did the letters dated 18th July, 2005.

69. DW5 stated that indeed Hemed and Kale Shebwana sold their respective plots.

The Plaintiff's submission:

70. The Plaintiff's counsel submitted that from the evidence adduced in court, neither Hemed nor Kale

Shebwana sold plot numbers 577 and 576; that the sale agreement adduced by the Defendants are in respect to a totally different parcel of land and that the agreement produced as DEXB3 and DEXB4 do not show how much the plots were sold for.

71. Counsel submitted that the Defendants did not produce any document to show that the company which purported to purchase the two parcels of land authorised the registration of the suit properties in the names of its directors and that the 3rd Defendant was incapable of being registered as the proprietor of the suit property.

72. The Plaintiff's counsel further submitted that the consent of the Board was required before the suit property could be transferred to the 3rd Defendant; that the transaction that the parties entered into became null and void at the expiry of 6 months and that the Defendants misrepresented themselves to the registrar of lands to be the owners of the suit land.

The 3rd-5th Defendants' submissions:

73. The 3rd – 5th Defendants' advocate submitted that Meoli J was under an obligation to deliver her Ruling in Succession Cause No. 11 of 2010; that this court should deliver a Ruling first on his Application in Succession Cause No. 11 of 2010 before considering the present suit and that in any case, the grant in Succession Cause No. 11 of 2010 was issued in contravention of the law.

74. The Defendants' advocate submitted that Hemed had the right to dispose of his property; that the local committee approved the change from the deceased to the Defendants and that Kale Shebwana voluntarily signed the agreement dated 19th August, 2005 on 21st August, 2005.

75. Counsel submitted that the Plaintiff acknowledged the fact that her father sold the suit properties by accepting further payments.

76. Counsel submitted that the Plaintiff did not give the particulars of fraud in the Originating Summons; that having failed to amend the pleadings to include particulars of fraud, the suit should be dismissed.

77. The Defendants' counsel submitted that Section 6(1) of the Land Control Act only applied to registered land; that the Application of the Act is not automatic and that the consent of the Board was not necessary.

Analysis and findings:

78. As I stated at the beginning of this Judgment, Meoli J directed that this suit be heard and be determined simultaneously with Malindi Succession Cause No. 11 of 2010 in which the 4th and 5th Defendants' Application to revoke the grant that was issued to the Plaintiff can only succeed if the court finds that parcel of land known as Ngomeni Squatters Settlement Scheme/576 and 577 (the suit properties) were lawfully registered in the names of the 4th and 5th Defendants respectively.

79. Having not appealed against the directions that were given by Meoli J, the 3rd – 5th Defendants cannot now insist that a Ruling should be delivered in Malindi Succession Cause No. 11 of 2010 first, before a decision in this matter can be made.

80. Although this suit was commenced by way of an Originating Summons, the parties agreed to have the Originating Summons be treated as a Plaint. Conversely, the Replying Affidavit by the 3rd Defendant was to be treated as a Defence.

81. The Defendants in this matter have not objected in their pleadings and evidence the manner in which this suit was commenced, other than stating that the Originating Summons has not particularised the alleged fraud by the 3rd to 5th Defendants.

82. In her Affidavit in Support of the Originating Summons sworn on 30th August, 2011, the Plaintiff, at paragraphs 29(a)-(e) set out the particulars of fraud by the Defendants as follows:

“a. THAT the 3rd, 4th and 5th Defendants knowingly very well that they are not lawfully entitled to the suit property proceeded to secretly obtain the registration of titles Ngomeni/Squatters Settlement Scheme/576 and 577 respectively in their favour.

b. THAT the 3rd, 4th and 5th Defendants falsely misrepresented themselves to the land registry at the time of obtaining their registration as proprietors of the suit properties purporting to have purchased and paid full purchase price of the suit properties herein, knowing very well that there was no such sale.

c. THAT the Defendants knowingly misrepresented themselves to the land registry at Kilifi at the time of obtaining their registration as proprietors of the suit properties herein, while knowing very well that the deceased did not participate in any agreement of sale of the suit property and neither gave his consent to transfer the same to the Defendant and if such consent was obtained then there was the art of (sic).

d. THAT as a result of the said fraud the deceased proprietary interests in the said suit properties was transferred to the Defendants on the 21st January, 2000 without the knowledge of the deceased.

e. THAT as a result thereof the Estate of the deceased HEMED KALE HEMED suffered loss and damage”.

83. It is therefore not true, as submitted by the 3rd – 5th Defendants' counsel, that the suit should be dismissed on the ground that the particulars of fraud have not been given.

84. Having set out the particulars of fraud in the Affidavit, and having given evidence, the only issue for determination is whether indeed the 4th Defendant and the 5th Defendant had plot numbers 577 and 576 fraudulently registered in their respective names.

85. It is not in dispute that plot numbers 576 and 577 are within a settlement scheme, otherwise known as Ngomeni Settlement Squatters Scheme.

86. It is also not in dispute that during the ascertainment of the rights of the squatters, it was realised that it is the Plaintiff's late father, Hemed Kale Hemed who was a resident on both plots. However, the late Hemed agreed to have plot number 576 registered in the name of one of his relatives, Kale Shebwana Mjahid because he (Hemed) owed Kale Shebwana (PW3) some money. Plot number 577 on the other hand was registered in the name of Hemed.

87. The initial (original) list of the squatters in the scheme was produced by DW1 which showed Kale Shebwana (PW3) was allocated plot number 576 while plot number 577 was allocated to Hemed Kale Hemed.

88. The Plaintiff, together with her brother (PW2) and Kale Shebwana (PW3) have denied that Hemed sold to the 3rd, 4th and 5th Defendants the two plots.

89. On the other hand, the 4th Defendant (DW1), maintained that the late Hemed sold to a company associated with himself and the 5th defendant plot number 577 while Kale Shebwana, with the consent of Hemed, sold to the same company plot number 576.

90. It was the evidence of DW1 that Hemed entered into sale agreements dated 26th May, 1999, 19th August, 2005 and the informal transfer of 21st January, 2000 in respect of plot NO. 577 and that Hemed

also caused Kale Shebwana to sign the agreement of 19th August, 2005 which was in respect of Plot No. 576.

91. An analysis of the three agreements will be in order.

92. The advocate who prepared the agreement of 26th May, 1999, DW3, informed the court that the 4th Defendants' father (deceased) went to her office in the company of the Plaintiff's father (deceased) with a view of reducing the agreement they had for plot number 577 [77] into writing.

93. It was the evidence of DW3 that the Plaintiff's father and the 4th defendant's father signed the agreement of 26th May, 1999.

94. The agreement of 26th May, 1999 shows that it was made between the Plaintiff's father, Hemed and a company known as Kingfisher Boats Limited. The Directors of Kingfisher Boat Limited, according to DW1, were himself and his late father.

95. According to the agreement, the purchase price was Kshs.50,000 per acre, with Kshs.50,000 having been paid at the time of execution of the agreement.

96. In the schedule, the agreement described the property as Kilifi/Ngomoni/77 and it measures 9 acres.

97. The balance of the purchase price of Kshs.400,000 was to be paid in installments of Kshs.5,000 per month commencing the month of May, 1999.

98. Although the agreement described the property as "Land Reference Number Kilifi/Ngomoni 77, DW1 and DW3 informed the court that that was a typographical error. According to the advocate, the agreement was in respect of plot number 577 measuring 9 acres.

99. I will accept the explanation that the agreement of 26th May, 1999 was in respect of plot number 577 and not 77 because that was the property that had been allocated to the late Hemed in Ngomeni. There is no evidence before me that the late Hemed had another property known as plot 77. The description of the plot as 77 must have been an error because the only land that Hemed could have sold was plot number 577.

100. The advocate who drew the agreement, DW3, informed the court that the balance of the purchase price was not paid to Hemed through her office. However, it was her evidence that in the year 2000, the late Hemed went to her office and informed her that having been paid the entire purchase price, he wished to transfer plot number 577 to the purchaser. That is when she prepared an informal Transfer dated 21st January, 2000.

101. I have perused the informal Transfer which was purportedly signed by the late Hemed.

102. According to the said transfer, Hemed agreed to transfer plot number Kilifi/Ngomoni/77 [577] to Kingfisher Boat Limited "in consideration of Kshs.450,000 paid to me."

103. Although I have no reason to doubt the fact that the late Hemed signed the Agreement of 26th May, 1999, I doubt that he signed the transfer of 21st January, 2000 before Ms Muli advocate. I say so because no evidence was placed before me to show how the Purchaser paid to Mr. Hemed the balance of Kshs.400,000.

104. DW1 informed the court that he used to pay Mr. Hemed as and when he needed the money.

105. According to the evidence of DW1, it was him and his late father who took care of Mr. Hemed all along and that they used to anchor their boats on the shores abutting plot number 577.

106. It was the evidence of DW1 that Mr. Hemed had informed him that he was selling the land because his children had abandoned him.

107. Although DW1 produced a few payment vouchers to show that he paid Hemed the balance of the purchase price for plot 577, the said vouchers have all manner of signatures which cannot be attributed to one person.

108. Indeed, the vouchers were done between the year 2005 and 2006, by which time Hemed had supposedly signed the informal transfer in which he admitted that he had been paid the entire purchase price.

109. Some of the petty cash vouchers show that money was paid to "Hemed Kale" in April 2006, a few days before Hemed Kale Hemed died.

110. I have gone through the petty cash vouchers produced by DW1 and the amount in those vouchers is less than Kshs.100,000. Considering the terms of the agreement of 26th May, 1999, the purchaser was supposed to pay the balance of the purchase price in installments of Kshs.5,000 per month, meaning that the balance of the purchase was to be cleared after 7 years. How did the purchaser now clear the payments within 8 months? And how was the Kshs.400,000 paid to Hemed within those 8 months? The averment that the entire purchase price had been paid by 21st January, 2000 can only be a lie.

111. I am convinced that although the late Hemed had agreed to sell plot number 577 to Kingfisher Boat Limited, the Directors of the purchaser took advantage of his infirmity, poverty, illiteracy and the lack of support by his children to defraud him of the land by not paying him the full purchase price.

112. In any event, the agreement of 26th May, 1999 and the informal transfer of 21st January, 2000 were entered into between the late Hemed and a limited liability company known as Kingfisher Boats Limited.

113. Although DW1 produced evidence to show that the list of the squatters was amended to reflect his name and that of his father after the company purchased those parcels of land, there is no evidence before me to suggest that the company resolved to have the suit properties registered in the names of its Directors.

114. The fact that the purchaser is indicated in the agreement of 26th January, 1999 and the informal transfer document of 21st January, 2000 to be Kingfisher Boats Limited while the letter of offer and the title documents shows the registered owners of the suit properties as Herbert James Andrew Angus and Robin Angus Paul respectively renders the transaction invalid.

115. After purporting to have purchased plot number 577 from Hemed, which sale I have held was a nullity, the Defendants went further to convince the late Hemed to sell to them plot number 576 which was abutting plot number 577.

116. To support the allegation that he purchased plot number 576 which had been allocated to Kale Shebwana, DW1 produced the agreement dated 19th August, 2005 that was entered into between Kingfisher Fishing Ltd, Mr. Hemed and Kale Shebwana Mjahidi.

117. Kale Shabwana (PW3) denied ever signing the agreement of 19th August, 2005 on 21st August, 2005.

118. Indeed, the chairman of the local land allocation Committee informed the court that when they read the agreement of 19th August, 2005, they realised that it had not provided for somewhere for Kale Shebwana to sign and advised Hemed to amend it.

119. The evidence that was presented to this court shows that neither the Defendants, the Chief of Gongoni location or the Chairman of the allocation Committee saw Kale Shebwana sign the agreement of

19th August, 2005.

120. Kale Shebwana (PW3), informed the court that he had agreed with the late Hemed that once he is paid the Kshs.34,000 that he owed him, he was to relinquish the plot to him or to his children.

121. Indeed, PW3 admitted that after the death of Hemed, Dilimua paid him what Hemed owed him and that he wished plot number 576 to be transferred to the children of Hemed.

122. Other than the fact that there is no evidence to show that Kale Shebwana signed the agreement of 19th August, 2005, the agreement does not show the purchase price for plot number 576. Was the purchaser getting plot number 576 for free?

123. The failure to indicate the purchase price in the agreement of 19th August, 2005 and signed on 21st August, 2005 shows the fraud that the purchaser was perpetrating with a view of owning the two plots which initially belonged to Hemed.

124. I have read the agreement of 19th August, 2005 and it states that Hemed has been paid the entire purchase price for Plot 576. The questions that beg answers are these: How much was the plot?, when and how was the purchase price paid and why is it that DW1 admitted in evidence that he owed Hemed Kshs.175,000 when he died?

125. It would appear that the “purchaser” realised the shortcoming of the agreements for plot numbers 576 and 577 after the death of Mr. Hemed in April 2006 because, instead of insisting of enforcing the said agreements, he entered into some other agreements with the children of the deceased and agreed to pay them Kshs.1,050,000 “over and above what he had already paid”, and the balance of Kshs.175,000 that he owed Hemed.

126. Of course, being in need of money after the demise of their father, they took the money. However, the children of Hemed had no legal capacity to take any money from the purchaser in respect of the suit properties considering the letters of administration had not been issued. In any case, the fact that the children of the deceased, through Dilimua Mohamed Dilimua, DW2, took the money does not validate the agreements that the purchaser entered into with Hemed.

127. In my view, the agreements that DW1 relied on were entered into with ulterior motives and were unconscionable considering that no consideration was paid for the two parcels of land to Hemed or Kale Shebwana.

128. That, coupled with the fact that it was not Herbert James Andrew Paul and Robin Angus Paul who bought the suit properties renders the Title Deeds for parcels of land reference number Ngomeni Settlement Scheme 576 and 577 respectively invalid, null and void.

129. The two parcels of land should revert to the legal administratrix of the Estate of the late Hemed Kale Hemed for distribution.

130. It is for those reasons that I allow the Plaintiff's Originating Summons dated 30th August, 2011 and dismiss the 3rd Defendant's/Objector's Notice of Motion dated 17th August, 2011 in Malindi Succession cause No. 11 of 2010 as follows:-

(a) An order be and is hereby issued cancelling the registration of parcel of land numbers Ngomeni Squatter Settlement Scheme/576 and 577 by deleting the names of the 4th and 5th Defendants.

(b) The District Land Registrar, Kilifi, be and is hereby ordered to rectify the register by deleting the names of the 4th and 5th Defendants and issue fresh Title Deeds in respect of parcels of land known as Ngomeni Squatters Settlement Scheme/576 and 577 to Mariam

Hemed Kale as administratrix of the Estate of Hemed Kale Hemed for distribution.

(c) The 4th and 5th Defendants to pay the costs of this suit and Malindi Succession Cause No. 11 of 2010.

Dated, signed and delivered in Malindi this 22nd day of **July**, 2016.

O. A. Angote

Judge