



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO. 110 OF 2013**  
**(FORMALLY MOMBASA HCCC NO. 4 OF 2010)**

**CARMINE CRIMALDI.....PLAINTIFF**

**=VERSUS=**

**VILLAGE ON RIVERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**LORENZI MODESTO.....2<sup>ND</sup> DEFENDANT**

**LORENZI MAURO.....3<sup>RD</sup> DEFENDANT**

**VILLAGIO SUI FIUMI LTD.....4<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

**Introduction:**

1. The Plaintiff in this matter was filed on 11<sup>th</sup> January 2010 in the Mombasa Registry. In the Plaintiff, the Plaintiff (now deceased) has averred that him, together with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are directors of the 1<sup>st</sup> Defendant. It is the Plaintiff's averment that he holds 690 shares; that the 2<sup>nd</sup> Defendant holds 300 shares and the 3<sup>rd</sup> Defendant holds 10 shares.
2. According to the Plaintiff, the 1<sup>st</sup> Defendant has always been the registered proprietor of all that property known as L.R. No. 10814, Malindi (the suit property) having acquired the same from Mauro Saio pursuant to a sale agreement for the sum of Kshs.12,740,000 paid by the 1<sup>st</sup> Defendant. However, it has been averred, the 1<sup>st</sup> Defendant, with the initiation and facilitation of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, unprocedurally transferred the suit property to the 4<sup>th</sup> Defendant.
3. The Plaintiff has averred in the Plaintiff that between March and May 2008, the 2<sup>nd</sup> Defendant while using police tried to intimidate him into transferring his shares to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants; that when he refused to sign off his shares, the police confiscated from him all the original documents and arraigned him in court; that his arrest and arraignment in court was orchestrated to facilitate the transfer of the suit property to the 4<sup>th</sup> Defendant and that the sale of the suit property to the 4<sup>th</sup>

- Defendant is clouded with illegalities and should be declared a nullity.
4. The Plaintiff is seeking for a declaration that the transfer of the suit property to the 4<sup>th</sup> Defendant was registered fraudulently and for cancellation of the transfer of the suit property to the 4<sup>th</sup> Defendant and rectification of the register to show that the 1<sup>st</sup> Defendant is the bona fide registered owner of the suit property.
  5. The Defendants filed a joint defence and denied the allegations raised in the Plaintiff.

**The Plaintiff's case:**

6. The Plaintiff, PW1, informed the court that he has sued the Defendants because the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, who are Directors of the 4<sup>th</sup> Defendant's company, transferred the suit property from the 1<sup>st</sup> Defendant to the 4<sup>th</sup> Defendant without his consent.
7. It was the evidence of PW1 that he has shares totaling 690 in the 1<sup>st</sup> Defendant's company. Initially, he had 400 shares while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had 300 shares each. It was his evidence that he paid Euros 96,000 for the shares whereafter they incorporated the 1<sup>st</sup> Defendant in 2007 which acquired the suit property and erected dwellings on it.
8. According to PW1, the 1<sup>st</sup> Defendant acquired the suit property from Dr. Mauro Saio at a consideration of 240,000 Euros and his contribution was 96,000 Euros.
9. It was the evidence of PW1 that in the year 2008, CID officers from Mombasa went to his house, confiscated all the documents in respect to the suit property and thereafter confined him in the police cells. Although he was charged for falsifying documents, the court in Mombasa Criminal Case Number 1764 of 2008 acquitted him.
10. According to the Plaintiff, he had known the 3<sup>rd</sup> Defendant for over 20 years, and because of personal problems with the Italian consulate in Kenya he transferred his initial shares totaling 400 in the 1<sup>st</sup> Defendant to the 3<sup>rd</sup> Defendant.
11. It was the evidence of PW1 that his problems with the Italian consulate started when he dismissed the employees who were working for him at Barbar Bar and Restaurant. One of the dismissed employees was the consulate's wife.
12. PW1 stated that the understanding he had with the 3<sup>rd</sup> Defendant was that the shares he had transferred to him in the 1<sup>st</sup> Defendant's company were to revert to him after he had cleared his problems with the Italian consulate and his wife. It was his evidence that indeed, the suit between himself and the Italian consulate's wife was decided in his favour.
13. After resolving the dispute he had with the consulate, it was the evidence of PW1 that he became a shareholder in the 1<sup>st</sup> Defendant's company with a shareholding of 690 shares. It was his evidence that in the year 2007, he sold Barbar bar and Restaurant and gave the 2<sup>nd</sup> Defendant 25,000 Euros which enabled him to acquire 290 shares from him, which he added to his initial shares of 400.
14. According to PW1, the 1<sup>st</sup> Defendant acquired the suit property from Dr. Mauro Saio. After paying the purchase price and taxes, it turned out that he could not register the property because the president's consent was required to register any transfer in respect to a property at the beach front.
15. Because of that hitch, the title was never transferred in favour of the 1<sup>st</sup> Defendant although the transfer documents had been prepared by the law firm of AF Gross Advocates in Nairobi and duly signed.
16. However, it was the evidence of PW1 that in the year 2009, the suit property was transferred to the 4<sup>th</sup> Defendant, a company that is not associated with him at all.
17. It was the evidence of PW1 that the Transfer document that was used to transfer the suit property to the 4<sup>th</sup> Defendant is the same document that had been prepared in respect to the Transfer of the suit property from Dr. Mauro Saio to the 1<sup>st</sup> Defendant in the year 2007.
18. PW1 stated that he was not aware of the transfer of the suit property to the 4<sup>th</sup> Defendant; that there was no Board Meeting approving the said transfer and that the transfer was done during the pendency of the criminal case in Mombasa.
19. It was the evidence of PW1 that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants knew about his contribution in the

- shareholding of the 1<sup>st</sup> Defendant and that the CID officers took away all his original documents.
20. PW1 informed the court that the only receipt in his possession is the one showing that he sold Barbar and Restaurant for 25,000 Euros, which money was deposited on the 2<sup>nd</sup> Defendant's account.
  21. The Plaintiff's prayers are that he should have his shareholding of 69% in the 1<sup>st</sup> Defendant's company back to him and part of the suit property.
  22. In cross-examination, PW1 stated that the 1<sup>st</sup> Defendant was registered in the year 2007. PW1 could not remember the law firm that incorporated the company.
  23. It was his evidence that he was in the company of the 2<sup>nd</sup> Defendant when they went to register it at the Company's registry, Nairobi. By that time, the 3<sup>rd</sup> Defendant was in Italy.
  24. PW1 admitted that he transferred his 400 shares in the 1<sup>st</sup> Defendant in August 2007 and that no contract was entered into in respect to the said transfer of the shares. However, he signed the transfer documents which were filed at the company registry.
  25. PW1 also admitted that after transferring his shares, he resigned as a director in the 1<sup>st</sup> Defendant's company.
  26. PW1 stated that the 25,000 Euros he paid was for him to acquire 290 shares in the 1<sup>st</sup> Defendant's company to add to his initial shares of 400, bringing his shareholding to 690.
  27. It was his evidence in cross-examination that after paying the 25,000 Euros, the 290 shares in the 1<sup>st</sup> Defendant were transferred to him and that the only evidence he had for that transfer was a receipt for 25,000 Euros which he paid to the 3<sup>rd</sup> Defendant.
  28. According to PW1, the 25,000 Euros was paid to the 2<sup>nd</sup> Defendant who is the 3<sup>rd</sup> Defendant's father. It was the evidence of PW1 that the said 25,000 Euros was transferred to the 2<sup>nd</sup> Defendant's account directly by Mr. Federiko, the man who had purchased Barbar Bar and Restaurant from him.
  29. PW1 stated that he did not sign any contract or transfer document in respect to the 290 shares. However, it was his evidence that the 3<sup>rd</sup> Defendant signed the transfer of 690 shares in the 1<sup>st</sup> Defendant's company to him.
  30. On further cross-examination, PW1 stated that the transfer of the 690 shares to himself was prepared by one John Kamau in Nairobi and that he produced a copy of the transfer document in the criminal case.
  31. It was the evidence of PW1 that he was alone when he went to see John Kamau to prepare the transfer of 690 shares in his favour because the 3<sup>rd</sup> Defendant had already signed it in Malindi and that John Kamau had prepared the documents earlier on and sent it to Malindi for signature of the 3<sup>rd</sup> Defendant. This, according to PW1, was done towards the end of the year 2007.
  32. PW1's evidence is that there were two transfer documents in respect of the 690 shares, one for 400 shares and the other one for 290 shares and that the 3<sup>rd</sup> Defendant signed the transfer document for 400 shares because he was buying and 290 shares because he was selling.
  33. It was the evidence of PW1 that he was present when the 2<sup>nd</sup> Defendant signed the transfer document for the 400 shares and for 690 shares respectively; that the said transfer documents were witnessed by an advocate in Nairobi after they were signed in Nairobi and that it was true that the document examiner had stated in the criminal case that the signature on the transfer document in respect of the 290 shares was not the 3<sup>rd</sup> Defendant's.
  34. It was the evidence of PW1 that the cost of the suit property was 240,000 Euros although the figure that was indicated in the transfer document is Kshs.12,740,000.
  35. It was the evidence of PW1 that the purchase price was paid by the 3<sup>rd</sup> Defendant because he was in Italy at that time to the firm of AF Gross; that he paid 96,000 Euros for the land and that the 25,000 Euros was for his additional shares. It was the evidence of PW1 that he paid 96,000 Euros in cash to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants while in Italy either in March or April 2007. He was then required to pay Kshs.5.6 Million which he did before he was allocated 400 shares in the 1<sup>st</sup> Defendant's company.

#### **The Defendants' case:**

36. The 3<sup>rd</sup> Defendant, DW1, informed the court that the Plaintiff was his father's (2<sup>nd</sup> Defendant's) client in Italy.
37. It was the evidence of DW1 that on the advice of his father, the 2<sup>nd</sup> Defendant, he paid for the suit land which his father, the 2<sup>nd</sup> Defendant, had identified in Malindi.
38. The evidence of DW1 was that at that time, the Plaintiff did not have money. However the Plaintiff agreed to make a contribution towards the purchase of the property upon selling of his bar known as Barbar.
39. DW1 informed the court that the purchase price for the suit property was 240,000 Euros which he paid to Mr. Saio in two installments by way of bank transfers in Italy. It was his evidence that he made two bank transfers of 100,000 Euros each while his father, the 2<sup>nd</sup> Defendant, paid the balance of 40,000 Euros. It was the evidence of DW1 that he produced the original documents in respect of the said payment in the criminal case in Mombasa.
40. When the 1<sup>st</sup> Defendant was incorporated, it was the evidence of DW1 that he had 300 shares, while the 2<sup>nd</sup> Defendant and the Plaintiff had 300 and 400 shares respectively. However, the shareholding changed to 700 shares to himself and 300 shares to the 2<sup>nd</sup> Defendant when the Plaintiff transferred his 400 shares to him.
41. It was the evidence of DW1 that the Plaintiff transferred 400 shares to him because he owed him and the 2<sup>nd</sup> Defendant money which he could not repay and not in trust as alleged.
42. It was his evidence that when they acquired the suit property, the Plaintiff did not have any money but had instead promised to give them his bar; that the said bar had many debts which his father, the 2<sup>nd</sup> Defendant, tried to assist the Plaintiff sell but they were unable.
43. DW1 denied that he ever transferred his shares of 290 in the 1<sup>st</sup> Defendant in favour of the Plaintiff. DW1 stated that he came to Kenya on 10<sup>th</sup> August 2007 and travelled back to Italy on 18<sup>th</sup> August 2007 and that he was not in Kenya towards the end of the year 2007 as alleged by the Plaintiff.
44. In cross-examination, DW1 stated that he is the one who paid for the entire suit property; that he never trusted the Plaintiff unlike the 2<sup>nd</sup> Defendant and that he never agreed that the Plaintiff should be allocated 40% shareholding in the 1<sup>st</sup> Defendant's company.
45. The 3<sup>rd</sup> Defendant stated in his evidence that he was in Kenya when the 400 shares were transferred to him by the Plaintiff although he did not remember seeing the Plaintiff sign the transfer documents in respect to the shares.
46. It was the evidence of DW1 that when his father, the 2<sup>nd</sup> Defendant, went to Nairobi, he discovered that the Plaintiff had only allocated to him (DW1) 10% of the shares in the 1<sup>st</sup> Defendant's company and that that is why the Plaintiff was charged in court.
47. In re-examination, the 3<sup>rd</sup> Defendant denied ever receiving money from the Plaintiff.
48. The executive officer from Mombasa Law Courts, DW2, produced in evidence the file in Criminal case No.1764 of 2008, R Vs Carmine Crimaldi. The executive officer informed the court that the court file did not have the exhibits that were produced during the trial. DW 2 could not explain what happened to the exhibits.

### **Submissions:**

49. The Plaintiff's advocate submitted that the Plaintiff and the Defendants incorporated the 1<sup>st</sup> defendant's company to acquire the ownership of plot number 10814 Malindi. However, it was submitted, the 4<sup>th</sup> Defendant was later on incorporated and it is now the registered proprietor of the suit property.
50. Counsel submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants defrauded the Plaintiff of the ownership of the suit property by forming the 4<sup>th</sup> Defendant's company; that at all material times, the Plaintiff's share in the 1<sup>st</sup> Defendant's company was 40% and that what is in contention is the acquisition of 29% extra shares by the payment of 25,000 Euros directly from a third party to the 2<sup>nd</sup> Defendant.
51. Counsel submitted that the Transfer document in respect to the suit property having been signed by the transferor transferring the suit property to the 1<sup>st</sup> Defendant, and stamp duty having been

- paid, the interest in the suit property passed to the 1<sup>st</sup> Defendant, notwithstanding the non-registration of the transfer document.
52. Counsel submitted that the second transfer of the suit property to the 4<sup>th</sup> Defendant was unlawful because the vendor had already transferred his rights in the property to the 1<sup>st</sup> Defendant by way of a transfer dated 18<sup>th</sup> June 2007 and that the second transfer was done with the sole intention of defrauding the Plaintiff of his share in the property.
53. Counsel submitted that the Plaintiff paid the initial sum of 96,000 Euros and that the balance of the purchase price was to be paid by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants; that the parties operated on trust and that the Plaintiff paid for his shares through AF Gross advocates.
54. The Plaintiff's counsel submitted that in late 2007 and early 2008, the Plaintiff transferred his four hundred shares to the 3<sup>rd</sup> Defendant to hold them in trust for him and that he later on increased his shares to 69% after acquiring 29% from the 3<sup>rd</sup> Defendant.
55. The Defendants' counsel submitted that the Plaintiff has not proved that the 3<sup>rd</sup> Defendant re-transferred 400 shares or 290 shares to him and that the allegations by the Plaintiff of such transfer is false because the 3<sup>rd</sup> Defendant left the country in August 2007 and returned in May 2008.
56. The Defendant's counsel submitted that the Plaintiff did not offer any evidence of the payments of 96,000 Euros; that Innocenti Federico was not called to testify on the issue of the payment of 25,000 Euros to the 3<sup>rd</sup> Defendant and that the Plaintiff has not produced any evidence of his contribution towards the purchase of the suit property.
57. The Defendant's counsel submitted that no evidence was laid to confirm that an instrument of transfer of either 400 shares or 290 shares in the 1<sup>st</sup> Defendant from the 3<sup>rd</sup> Defendant to the Plaintiff had been executed by the 3<sup>rd</sup> Defendant; that there was no resolution that was produced to show that the 400 shares transferred by the Plaintiff to the 3<sup>rd</sup> Defendant was to be held by the 3<sup>rd</sup> Defendant in trust and that the first transfer of the suit property dated 18<sup>th</sup> June, 2007 was not attested as required by the law.
58. The Defendant's counsel submitted that the Plaintiff had failed to discharge his burden of proof pursuant to the provisions of section 107 (1) and 116 of the Evidence Act.

### **Analysis and findings:**

59. The only issue for determination at least from the pleadings, is:-

#### **Whether the 1<sup>st</sup> Defendant has any interest in the suit property.**

60. It is not in dispute that the Plaintiff, the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants agreed amongst themselves to purchase the suit property with a view of developing apartments. Before then, the Plaintiff and the 2<sup>nd</sup> Defendant, both Italian nationals, had been friends for many years. The 3<sup>rd</sup> Defendant is the son of the 2<sup>nd</sup> Defendant and at all material times was based in Italy. It is the Plaintiff and the 2<sup>nd</sup> Defendant who were living in Kenya doing business.
61. The Plaintiff, and the 2<sup>nd</sup> Defendant identified a parcel of land Reference number 10814 Malindi owned by a Dr. Mauro Saio.
62. After identifying the suit property, the parties incorporated the 1<sup>st</sup> Defendant's company on 9<sup>th</sup> February 2007. According to the Memorandum and Articles of Association annexed on the Defendants' bundle of documents, the shareholding in the 1<sup>st</sup> Defendant's company was as follows; the Plaintiff, 400 shares, the 2<sup>nd</sup> Defendant, 300 shares and the 3<sup>rd</sup> Defendant, 300 shares.
63. It was the evidence of the Plaintiff that on 18<sup>th</sup> June 2007, the Transfer in respect of the suit property was signed between Mauro Saio and the 1<sup>st</sup> Defendant. According to the copy of the Transfer document annexed on the Plaintiff's bundle of documents, the suit property was sold to the 1<sup>st</sup> Defendant for Kshs.12,740,000. The purchase price was acknowledged by the vendor.
64. However, it was the evidence of PW1 that the actual purchase price of the suit property was 240,000 Euros and not Kshs. 12,740,000 and that his contribution was Euros 96,000 which he paid

- to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' in cash.
65. It was the evidence of PW1 that after incorporation of the 1<sup>st</sup> Defendant, he started having problems with the Italian consulate in Kenya. It was his evidence that the Italian consulate's wife had been working for him and he dismissed her alongside other employees. The said employees sued the Plaintiff and he had to be bailed out by the 2<sup>nd</sup> Defendant who paid for him Kshs.1,000,000 as cash bail.
  66. It was during this period of tribulations that the Plaintiff decided to transfer all his 400 shares in the 1<sup>st</sup> Defendant's company in favour of the 3<sup>rd</sup> Defendant. According to the Plaintiff, the 3<sup>rd</sup> Defendant was supposed to hold the said shares for him in trust until after he had sorted out his problems with the Italian consulate.
  67. It was the evidence of the Plaintiff that the transfer of the 400 shares in favour of the 3<sup>rd</sup> Defendant was done in August 2007 when both the Plaintiff and the 3<sup>rd</sup> Defendant signed the transfer document. The transfer document of respect to the 400 shares signed by the Plaintiff and the 3<sup>rd</sup> Defendant was produced in Mombasa Criminal Case Number 1764 of 2008 in which the Plaintiff had been charged with several counts of forgery and altering documents. However, the said transfer document, together with the rest of the documents that were produced in the criminal court disappeared. Unfortunately none of the parties had the copies of the documents that had been produced as exhibits in the criminal case.
  68. There is therefore no documentary evidence before this court on the issue of the transfer by the Plaintiff to the 3<sup>rd</sup> Defendant of 400 shares in the 1<sup>st</sup> Defendant's company, or the re-transfer of the said share, to the Plaintiff, if at all.
  69. According to the evidence of the 3<sup>rd</sup> Defendant, in this case and in the criminal case, he gave to the Plaintiff the duly signed transfer documents in respect to the 400 shares for the purpose of lodging them with the company registry.
  70. Whether that document was ever lodged in the company registry or not is not clear to this court. However, the Plaintiff has admitted that he indeed transferred all his 400 shares to the 3<sup>rd</sup> Defendant sometimes in August 2007 because of the problems he was having with the consulate. It was his evidence that the said 400 shares were re-transferred to him and he purchased a further 290 shares from the 3<sup>rd</sup> Defendant.
  71. After the transfer of the said 400 shares by the Plaintiff to the 3<sup>rd</sup> Defendant, it was the evidence of the 3<sup>rd</sup> Defendant that when his father went to the company registry, he found that the changes that had been effected showed that he had only 10% shares, while the Plaintiff and the 2<sup>nd</sup> Defendant had 69% and 30% shares respectively in the company. The issue of the changes of the shareholding in the 1<sup>st</sup> Defendant's company was reported by the 3<sup>rd</sup> Defendant to the police and the Plaintiff was charged for forgery and obtaining company shares by false pretenses in Mombasa Criminal Case Number 1764 of 2008.
  72. The evidence of the Plaintiff was that sometimes towards the end of the year 2007 or beginning of 2008, the 3<sup>rd</sup> Defendant re-transferred to him his initial shares of 40% and also transferred to him 29% of his shares after he paid to the 2<sup>nd</sup> Defendant 25,000 Euros. This therefore increased his shareholding to 69% and reduced the 3<sup>rd</sup> Defendant's shareholding to a mere 10%.
  73. As I have stated above, none of the parties produced their respective share certificates or the transfer documents to enable this court determine the shareholding in the 1<sup>st</sup> Defendant's company.
  74. Indeed, each party has relied on letters from the Registrar of companies showing different shareholding in the 1<sup>st</sup> Defendant at different points in time. One of the letters dated 10<sup>th</sup> April, 2008 and produced by the Plaintiff shows that the Plaintiff had 69% shares in the 1<sup>st</sup> Defendant's company while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had 30% and 10% respectively.
  75. On the other hand, the Defendants produced a letter dated 24<sup>th</sup> January, 2014 showing the shareholding in the 1<sup>st</sup> Defendant's company be to 70% in favour of the 3<sup>rd</sup> Defendant and 30% in favour of the 2<sup>nd</sup> Defendant. None of the parties produced the transfer documents to support the changes of the shareholding in the 1<sup>st</sup> Defendant's company. In fact, none of the parties bothered to summon the Registrar of Companies to come and testify on the true shareholding position of the

1<sup>st</sup> Defendant.

76. I cannot therefore with finality determine the issue of the shareholding in the 1<sup>st</sup> Defendant's company in the circumstances. The issue of the shareholding in the 1<sup>st</sup> Defendant's company should be determined in a suit different from this one.
77. The question that I am supposed to determine is whether the 1<sup>st</sup> Defendant has been defrauded of the suit property.
78. The Plaintiff informed this court and the criminal court that the purchase price of the land that the 1<sup>st</sup> Defendant intended to buy was Kshs. 23,500,000 (240,000 Euros). However, after the purchase of the plot, the transfer could not be registered because the consent of the President was required.
79. The Plaintiff, at page 92 of the proceedings in criminal case number 1764 of 2008 informed the trial court that it is Lorenzi Mauro, the 3<sup>rd</sup> Defendant, who paid the purchase price in three installments of 40,000, 100,000 and 100,000 Euros.
80. Although the Plaintiff informed this court that he paid to the 3<sup>rd</sup> Defendant 96,000 Euros in cash while in Italy which translates to 40% of 240,000 Euros, no evidence was placed before me to show that the Plaintiff paid to either the 2<sup>nd</sup> or 3<sup>rd</sup> Defendants the said 96,000 Euros. Of course, if the said payment was in cash, no evidence could be availed.
81. However, the question that arises is why the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants agreed to have the Plaintiff acquire 400 shares in the 1<sup>st</sup> Defendant's company as at the time of incorporating the company. I pose that question because the sole intention for incorporating the 1<sup>st</sup> Defendant was to purchase the suit property and develop it.
82. If in deed the Plaintiff never paid the said 96,000 Euros or at all towards the purchase of the suit property, then the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants should not have agreed to allocate to the Plaintiff the 400 shares in the 1<sup>st</sup> Defendant when the company was incorporated on 9<sup>th</sup> February, 2007.
83. The evidence before this court shows that the 1<sup>st</sup> Defendant, represented by the Plaintiff and the 2<sup>nd</sup> Defendant purchased the suit property on 18<sup>th</sup> June, 2007, a few months after incorporation of the 1<sup>st</sup> Defendant. The actual purchase price, according to the evidence of PW 1 and DW 1, was slightly less than Kshs. 24,000,000, although the transfer document dated 18<sup>th</sup> June, 2007 shows that the 1<sup>st</sup> Defendant purchased the suit property from Mauro Saio for Kshs 12,740,000, receipt whereof Mauro Saio acknowledged. The non-declaration of over Kshs. 12,000,000 by the Directors of the 1<sup>st</sup> Defendant must have been to evade the payment of the requisite stamp duty which in itself is a serious criminal offence.
84. It was the evidence of PW 1 that after the 1<sup>st</sup> Defendant paid for the suit property, the transfer was never registered because they were not able to get the presidential consent which was required before a beach plot could be transferred.
85. DW 1 and the 2<sup>nd</sup> Defendant have not disputed that indeed the 1<sup>st</sup> Defendant entered into a contract with the vendor in respect to the suit property on 18<sup>th</sup> June, 2007, by which time the Plaintiff was still holding a shareholding of 40% in the 1<sup>st</sup> Defendant's company. In fact, it is the Plaintiff and the 2<sup>nd</sup> Defendant who signed the Transfer document as Directors of the 1<sup>st</sup> Defendant. The vendor acknowledged receipt of the full purchase price and all that remained was for the Transfer document to be registered, which never happened.
86. It is not clear to this court how the vendor sold the same property he had sold to the 1<sup>st</sup> Defendant on 18<sup>th</sup> June, 2007 to the 4<sup>th</sup> Defendant on 30<sup>th</sup> March, 2009 for the same amount.
87. I was told that the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants are the only directors in the 4<sup>th</sup> Defendant's company. The evidence of the Plaintiff was that the suit property was fraudulently registered in the name of the 4<sup>th</sup> Defendant so as to defeat his interests in the property despite having contributed to its purchase.
88. Although the Transfer document dated 18<sup>th</sup> June, 2007 between the 1<sup>st</sup> Defendant and Mauro Saio was not registered, it is still a contract capable of enforcement (see section 32 (2) of the repealed Registration of Titles Act). There is no evidence before me that the contract of 18<sup>th</sup> June, 2007 was ever repudiated, and if it was, whether the 1<sup>st</sup> Defendant, being a juristic person, received a

- refund of the purchase price.
89. Considering that the Plaintiff had a share of 40% in the 1<sup>st</sup> Defendant's company as at 18<sup>th</sup> June, 2007, he had an equivalent stake in the suit property as at the time the Transfer document dated 18<sup>th</sup> June, 2007 was signed by the 1<sup>st</sup> Defendant and Mauro Saio.
90. In the absence of evidence that the contract of 18<sup>th</sup> June, 2007 was repudiated, the sale of the suit property to the 4<sup>th</sup> Defendant on 30<sup>th</sup> March, 2009 is illegal, null and void.
91. A seller who has been paid in full the purchase price cannot purport to sell the same property to a different person before repudiating the first contract and refunding the purchase price. That did not happen in this case and the only conclusion I can arrive at is that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, for reasons known to themselves, wanted to exclude the Plaintiff from laying a claim over the suit property.
92. The only document that the Plaintiff produced to show his contribution either towards the purchase of the suit property or the shares in the 1<sup>st</sup> Defendant's company is a statement from Credito Bergamasco Bank showing that 25,000 Euros was paid to the 2<sup>nd</sup> Defendant.
93. According to the Plaintiff, this amount was paid directly by Decil Innocenti Federico who had purchased his bar directly to the 2<sup>nd</sup> Defendant. The transaction in respect to the transfer of 25,000 Euros to the 2<sup>nd</sup> Defendant was done on 5<sup>th</sup> September 2007. This was after the 1<sup>st</sup> Defendant had purchased the suit property and before the controversy of who owned what shares in the 1<sup>st</sup> Defendant had begun. The 2<sup>nd</sup> Defendant never testified with a view of explaining why the 25,000 Euros was deposited in his account by the person who had purchased the Plaintiff's bar.
94. As I have already stated above, it is not in the province of this court to make a determination of the current shareholding of the 1<sup>st</sup> Defendant. Indeed, the question as to who owns how many shares in the 1<sup>st</sup> Defendant's company is not an issue arising from the Plaintiff and the Defence.
95. All I am required to determine is whether the 1<sup>st</sup> Defendant did purchase the suit property on 18<sup>th</sup> June, 2007, and if so, whether the Plaintiff had any interest in the 1<sup>st</sup> Defendant as at that time.
96. I have already found and held in the preceding paragraphs that it is the 1<sup>st</sup> Defendant which is entitled to the suit property vide the Transfer document dated 18<sup>th</sup> June, 2007 and not the 4<sup>th</sup> Defendant. I have also found and held that as at that time, the Plaintiff's interest in the suit property was equivalent to the shares he was holding in the 1<sup>st</sup> Defendant's company which was 40%.
97. For those reasons, I allow the Plaintiff's Plaintiff dated 8<sup>th</sup> May, 2010 in the following terms:
- a. **A declaration be and is hereby issued that the transfer of the property known as Land Reference No. 10814, Malindi Municipality to the 4<sup>th</sup> Defendant was registered fraudulently.**
  - b. **The transfer of Land Reference No. 10814, Malindi to the 4<sup>th</sup> Defendant be and is hereby cancelled and the Registrar of Titles is hereby directed to rectify the certificate of title to show the 1<sup>st</sup> Defendant as the bona fide registered owner of the property.**
  - c. **A permanent injunction is hereby issued restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants from selling, alienating, developing or any manner whatsoever from dealing with Land Reference No. 10814, Malindi.**
  - d. **The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to pay to the Plaintiff the costs of the suit.**

98. Dated and delivered in Malindi this 7<sup>th</sup> day of November, 2014

**O. A. Angote**

**Judge**

