IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MWILU & MURGOR, JJ.A.

CIVIL APPEAL NO. 245 OF 2011

BETWEEN

SULEIMAN RAHEMTULLA OMAR…….....1ST APPELLANT

ZARINA SULEIMAN OMAR…….....2ND APPELLANT

AND

MUSA HERSI FAHIYE……..….....…….1ST RESPONDENT

MUHAMMED OMAR…….…….....….2ND RESPONDENT

REPUBLIC OF SOMALIA……..……3RD RESPONDENT

ATTORNEY GENERAL…….4TH RESPONDENT

REGISTRAR OF TITLES…….5TH RESPONDENT

COMMISSIONER OF LANDS…….……6TH RESPONDENT

(An Appeal from the Judgment and Decree of High Court of Kenya at Nairobi (Mbogholi Msagha, J.) delivered on 7th December 2010

in

HCCC NO. 1618 OF 1995)

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JUDGMENT OF THE COURT

The Government of the Somali Democratic Republic purchased a parcel of land known as Land Reference Number 1870/111/50 (original Number 1870/111/6/1) measuring 2.26) acres in Nairobi from Herbans Singh and Kamal Prakash Amrit on 12th day of April, 1973 and an indenture to that effect was registered at the Lands office in Nairobi under the Government Lands Act (repealed).

The said property was used as the official residence of the ambassador of the Government of the Republic

of Somalia to the Republic of Kenya. The Somali embassy offices were then located at the International Life House along Mama Ngina Street within the Nairobi Central Business District (CBD).

On 26th January 1991, the Government of Siad Barre which had ruled Somalia since 1969 was overthrown, and the Democratic Republic of Somalia ceased to exist as hitherto known and accepted in the international community. There was no Government in Somalia that was capable of transacting with any other state or Government and the situation remained fluid until the early 2000s when the Transnational National Government (TNG) and later the Transnational Federal Government (TFG) was formed. The first permanent central Government in Somalia following the end of the TFG's interim mandate as we know it today was formed in 2012.

One can therefore, safely say that there was no effective Government in Somalia for more than two decades after 1991. For these two decades, Somalia was what in international law is referred to as a failed state. A failed state - or "*Etats sans government*" has no functional Government organ or body which can commit the state in an effective and legally binding way. It lacks capacity to transact in any way with other international bodies or States and has no capacity whatsoever to enter into a binding agreement.

A failed State is therefore, the converse of State in intentional law which the 1933 Montevideo convention on the rights and duties of states defines as:

"a person of international law who should posses;

a. ***a permanent population***
b. ***a defined territory***
c. ***a Government***
d. ***Capacity to enter into relations with other states."***

We have found it necessary to give this short narrative because in our view, this appeal as does the suit it arises from reposes on whether Mohammed Ali Nur, who prior to 1991 was the duly accredited Somali ambassador to Kenya had legal capacity to enter into any binding contract or agreement on behalf the Republic of Somalia after the collapse of the legitimate Government of Somalia. We shall revert to that issue later.

From the pleadings and evidence adduced before the High Court, Mohammed Ali Nur who was the duly accredited ambassador of the Republic of Somalia to Kenya during the subsistence of the Siad Barre Government decided to dispose of the official ambassador's residence in Nairobi. He appears to have instructed an estate agent going by the name Jokim enterprises to look for buyers.

In the meantime, the appellants herein had been looking for a suitable residence and had instructed several estate agents to alert them if such a residence was placed in the market for sale. The said Jokim enterprises estate agents who were looking for a buyer for the Somali ambassador's house contacted the appellants and informed them about the house. According to the 1stappellant, (Suleman Rahemtulla Omar), he expressed an interest in the house. He went and viewed it and liked it. He negotiated the price with the agent and they agreed on a purchase price of fifteen million Kenya Shillings (Ksh. 15,000,000.000).

He was also given the name of the lawyer acting for the Somali Ambassador. He gave all these details to his lawyer, Mr. Brahmbhatt and left him to contact Mr. Stephen Kibunja, the seller's lawyer. According to Mr. Kibunja, who testified before the High Court as DW1, he personally knew the Ambassador as he had acted for him in other similar matters before. He nonetheless confirmed that the other transactions were in respect of immovable properties. He told the court that he received the letter dated 4th August 1984 from Mr. Brahmbhatt enquiring as to whether the said Ambassador had the requisite authority from his government to sell the property in question.

In response to the said letter, Mr. Kibunja wrote the letter dated 5th August 1994, which he said he did with the full authority of the Ambassador and confirmed that the Ambassador had full authority to sell the said property. It was Mr. Kibunja's testimony that the Ambassador gave him the contentious letter dated 19th May 1990 written in Somali language, but also translated into English language. We say contentious because its authenticity was questioned.

It was the respondents' case that the author of the said letter was unknown or non-existent and that the same was a forgery. This was deposed to by one Abdullahi Haji Abdirahman who was the immediate former permanent secretary in the Ministry of Foreign Affairs of the Somali Republic up to January 1991 when the Siad Barre Government was overthrown. Due to the importance of this document to this matter, we find it necessary to reproduce it (the translation) verbatim in this judgment.

To: Ambassador

Democratic Republic of Somalia

P O Box 30769

NAIROBI

I am pleased to inform you that the Government of Democratic Republic of Somaliya, has hereby given you the authority to sale (sic) the house/property of our Ambassador residence in Nairobi/Kenya, No/ LR/1870/111/50, Lower Kabete Road, Westlands.

The sale of the above cited property will enable to assist you and the Embassy staff to offset all the financial commitments you incurred.

I hope that you take the necessary action.

Yours faithfully,

SAADHA MOHAMMED GULLEID

CO-ORDINATOR OF FOREIGN AFFAIRS

The evidence to the effect that the said letter was a forgery remained unrebutted by the appellants. Be that as it may however, It is clear that the said letter was written on 19th May, 1990 when the legitimate Somali Government was still in place.

In our view, the timing of the sale of the property in question raised two pertinent issues.

Firstly, why was the letter not acted on immediately as the purpose of the sale sounded urgent?

Secondly, even if we were to assume that the same was genuinely written in May 1990 when the Government was still in place, could it still be valid after the fall of the said Government?

Mr. Kibunja does not seem to have given these issues much thought, yet in his evidence, he stated that he relied on the said document as the source of the Ambassador's authority to transact. We shall revert to these issues later.

Relying on the said document and the ex-Ambassador's word, Mr. Kibunja prepared the sale agreement which was then duly executed by the ex- Ambassador as the seller, and the respondents herein as purchasers. He signed as a witness. The former ambassador signed the same and affixed the seal of the Somali Embassy. Ten percent of the sale price i.e Kshs 1.5 million was deposited with Mr. Kibunja as stakeholder to await completion of the transaction. It was Mr Kibunja's evidence however, that a sum

of Kshs 6,155,000/= was paid direct to his client without his knowledge or involvement. The balance of Kshs 8,845,000/= was nonetheless paid vide a banker's cheque dated 30th January 1995 which was payable to the "Embassy of the Democratic Republic of Somalia".

The transaction was completed and vacant possession given to the appellants herein. The transfer was duly registered at the Land Registry vide an indenture dated 16th August 1994. The registration was later done under the Registration of Titles Act and the lease was renewed for a period of 50 years.

Although in his evidence the first respondent claimed that vacant possession was delivered to him peacefully, it is instructive that evidence was adduced before the High Court to the effect that the former staff of the Somali Embassy had to be forcefully evicted from the premises. Some were arrested and taken to court. Among those arrested and charged in court were the 1st and 2nd respondents. They were arrested for refusing to vacate the premises in question. It was in the course of the criminal trial that several documents were requested for and availed to court which documents were later produced in evidence in the course of the civil suit before the High Court. These documents were meant to confirm the subsistence or otherwise of the diplomatic status of the Somali nationals who had been living in the house in question before its sale to the appellants. We shall refer to the contents of the said documents later.

There was also an appeal to the Government of Kenya through the Ministry of Foreign Affairs and International Cooperation with a copy to the President of the Republic of Kenya for the return of the said property to the people of Somalia. The said appeal which is dated 14th September 1994 was made by a group of persons describing themselves as "Somali Diplomats" based in Nairobi. Apparently, the said appeal was made before the appellants were given vacant possession and before the balance of the purchase price was paid i.e on 30th January 1995.

It was in fact almost nine months before the certificate of lease was issued to the appellants under the Registration of Titles Act. In the said appeal, the seven "Somali Diplomats" made a passionate appeal to the Government of Kenya to stop the sale of the Somali Embassy residence which they said was fraudulent, illegal and void and which was being done secretly.

Similar appeals were made directly to the President, and a notice was given to the "Kenya Public, all Banks, Financial Institutions and the International Community in Kenya" to desist from dealing with the property in question.

All these pleas appear to have borne no fruit and so the 1st and 2ndrespondents herein filed Civil Suit No. 1698 of 1995 against the appellants before the High Court seeking a raft of orders. The pleadings were subsequently amended to include the Republic of Somalia as the third plaintiff and the Attorney General, Registrar of Titles and Commissioner of Lands as 3rd, 4th and 5th defendants respectively.

After a full trial in which several documents were produced as exhibits, in a judgment rendered on 7th December 2010, Mbogholi Msagha J. entered judgment in favour of the plaintiffs and dismissed the defendants defence and counterclaim. In his judgment, the learned Judge made a finding that the sale agreement was void *ab initio* for lack of capacity on the part of the ex-ambassador to sign and seal the agreement in question. The learned Judge found as a fact that in 1994 the Government of Kenya had no diplomatic relations with Somalia and it did not therefore, recognise the existence of the Somali Embassy and its former diplomats. He therefore concluded that:

> ***"the execution and sealing of the said documents was therefore void for lack of authority, power and competence."***

The learned Judge also found that the appellants were not innocent purchasers for value without notice arguing that from the circumstances of the case, constructive fraud could be inferred against them.

He also found that the seller had acted fraudulently, and the entire transaction was tainted with fraud. In the circumstances the appellants could not invoke the provisions of **Sections 23** and **24** of the

Registration of Titles Act (repealed) to claim inviolability or indefeasibility of Title. The learned Judge restored the ownership of the property to the 3rd respondent and directed the 4th, 5th, and 6th respondents to ensure that the same was duly registered in the 3rdrespondent's name.

The learned Judge also made a finding to the effect that there was evidence that a sum of Ksh 10,350,000/= had been accounted for. He therefore made an order that since the money was received in the name of the Embassy, whether the same ended up in 3rdrespondent's account, or not, the 3rd respondent should refund the same to the appellants together with the Kshs 600,000/= paid as stamp duty, with interest at court rates. The learned Judge ordered each party to bear its own costs.

Being aggrieved by the said judgment, the appellants filed this appeal through the firm of Majanja, Luseno & Company Advocates on 25th November, 2011. They have proffered sixteen grounds of appeal and entreat this court to set aside the impugned judgment; and consequently dismiss the plaintiffs' suit in the High Court with costs and to allow the defendants counterclaim in the High Court, they also pray for the costs of this appeal.

At the request of learned counsel for the parties, Mr. Mohamed Nyaoga and Mr. Athuok respectively, the court, on 25th November 2013 directed that the appeal proceeds by way of written submissions but with counsel being given limited time to highlight their submissions if need be. In compliance with the said directions, the appellants' submissions were filed on 4th December 2013 while the 1st, 2nd and 3rdrespondents' submissions were filed on 11th December 2013. The 4th, 5th and 6th respondents did not file any submissions and have not participated in this appeal.

This is not surprising given the fact that they had been enjoined as parties in the High Court for purposes of effectuating orders of transferring the property to the 3rd respondent if such orders were made. The said orders were made and they effectuated the transfer as ordered by the court and their role ended at that point.

The gist of the grounds of appeal is that the learned Judge erred in finding that the sale agreement was null and void for lack of authority/capacity on the part of the former Ambassador; that the learned Judge erred in finding that the appellants and their counsel had not done due diligence before entering into the agreement; that the laid down procedure when selling consulate property was not followed; that the learned Judge erred in considering the contents of the certificate issued by the Minister for Foreign Affairs and International Cooperation dated 21stFebruary, 1995 on status of the Republic of Somalia; that the learned Judge erred in finding that fraud had been proved on the part of the former Ambassador, and constructive fraud on the part of the appellants while constructive fraud had not been pleaded; and finally that the learned Judge had erred in disregarding the provisions of **Sections 23** and **24** of the **Registration of Titles Act.**

The learned Judge was also faulted for dismissing the appellants' counterclaim. Having summarised the evidence adduced before the trial court as above, it is now our duty to re-evaluate and re-analyze the same as required of us by **Rule 29** of this Courts Rules and arrive at our own independent decision based on the said evidence, the law, the grounds of appeal paraphrased above and the able submissions of counsel. See also **Selle vs Associated motor Boat Company (1968) E.A123.**

In doing so however, we should bear in mind that, unlike the trial Judge we do not have the advantage of having seen the witnesses as they testified in order to assess their demeanor and we must therefore give some allowance for that. We acknowledge that the written submissions of all counsel for both sides were very succinct, very well articulated and to the point. The highlighting in court was similarly done. We applaud them for a job well done.

We have considered the entire evidence before the High Court as contained in the record of appeal before us along with the grounds of appeal and the said submissions. We shall compact the issues for determination as clustered by counsel and deal with each of them separately. These issues will be discussed under the following subheadings:-

i. The Ex-ambassador's legal capacity/authority to enter into a binding contract.

ii. Exercise of due diligence.
iii. Adherence to internal procedures.
iv. Was there Breach of contract?
v. Fraud on the part of the Ex-ambassador.
vi. Fraud on the part of the appellants. Was fraud proved to the required standard?

vii. Applicability of Sections 23 and 24 of the Registration of Titles Act.
viii. Was the non-joinder of parties fatal?
ix. Fate of the Counterclaim.

LEGAL CAPACITY

On this issue, it is the respondents' contention that the sale agreement entered into by the appellants and former Ambassador of the Republic of Somalia was null and void *ab initio.* This was so according to the respondents because the former Ambassador had long ceased being an Ambassador after being recalled and hence had no capacity to transact on behalf of the Republic of Somalia; and secondly, because the Government of Somalia itself had ceased to exist as such and there was therefore, no state of the Republic of Somalia which the former ambassador could purport to represent in the sale agreement.

On their part, the appellants maintain that the former Ambassador (Mr. Ahmed) had the requisite power and authority to enter into the said transaction. They appear to have relied heavily on the representation and also the testimony of Mr. Stephen Kibunja Advocate, before the trial court to the effect that he had represented Mr. Ahmed before and that he was well known to him as the ambassador of the Somali Republic to Kenya.

What was Mr. Kibunja's evidence on that issue?

According to him, he had dealt with Mr. Ahmed before and represented him in instances where the ambassador had disposed of movable properties before in the name of the Republic of Somalia. He told the court that he was the advocate for the Somalia Republic in 1994. He believed that the former Ambassador whom he said he knew personally had the requisite authority to transact on behalf of the Somali Republic. He said that he was the person who wrote to the appellants and confirmed to them that Mr. Ahmed had authority and capacity to enter into the agreement of sale. His further testimony was that he consulted a directory which is published by the Ministry of Foreign Affairs giving names of all Ambassadors accredited to Kenya which contained the name of Ahmed Sheikh Mohamud as the Somali Ambassador. No such directory was however, exhibited before the trial court for reference by the court.

According to Mr. Kibunja, he also placed heavy reliance on the document dated 19th May 1990 which was written in Somali language, which was nonetheless dismissed by the respondents as a forgery. As noted earlier on, the said letter was written before the fall of the Somali Government, but was not acted on until four (4) years later. Even if we were to assume that the said letter was genuine, could the same continue being valid after the originator had ceased to exist?

Could this letter confer authority to the Ambassador to sell the property in question in 1994 when it was clearly meant to address an urgent situation in 1990? We shall revisit this issue under the head of fraud.

It is our view however, that the said letter was not sufficient to confer authority on the Ambassador to convey a property of a Government which had long ceased to exist. Mr. Kibunja in an attempt to validate or legitimize his action stated that "*there was always a Government in Somalia*".

With respect to Mr. Kibunja, being the lawyer that he was he would have been expected to have known that the legitimate Government of the Republic of Somalia ceased to exist about three years before he purported to represent it in the sale transaction. The former Ambassador could not therefore, have been transacting on behalf of a fallen Government. If indeed there was no state known as the Republic of

Somalia that existed in 1994 which had capacity to enter into treaties with other nations under international law, a state that had no Government, how would anybody purport to be representing such a state for purposes of disposing of its asset?

No Government would ask its ambassador to sell its property in a foreign country without notifying the host country, which is charged with protecting such property. That, in our view falls in the realm of the obvious. Further the Somali Government could not have been asking a duly accredited ambassador and staff to sell the property to pay its debtors without giving them the option as to where they would be expected to operate from. So, even the content of the said letter was sufficient to raise alarm bells in the head of any reasonable person as to its authenticity.

The procedure to be followed when disposing of property such as the suit property herein was clearly set out in the booklet annexed to the affidavit sworn by one Julius Kandie, then head of the Legal division in the Ministry of Foreign Affairs and International Cooperation.

Paragraph 31(b) of the said booklet provides as follows:-

"When a foreign government intends to sell real property it already owns in Kenya, the representative missions should inform the Ministry of Foreign Affairs and International Cooperation."

The process is also succinctly explained in the affidavit of Abdullahi Haji Abdirahman, who used to work in the Ministry of Foreign Affairs in the Somali Government before the fall of the Siad Barre Government. He deposed that a letter of authority to sell such property would only have been written by the Minister of Foreign Affairs himself or the Permanent Secretary. He further deposed that such a letter would be preceded by a meeting of the Council of Ministers who would deliberate on the matter and decide on whether the property should be sold or not. If the property was to be sold, then the council would give the necessary powers to the minister concerned to authorise the sale. Such a decision would also be communicated to the host country. The witness dismissed the letter in question as a forgery, and one that was written by a person not known in the said Government.

To sum up on the issue of the Ambassador's authority to sell the property, we refer to the English case of **Republic of Somalia vs Woodhouse Drake Carry SA and Another [1993] ALL ER 371** which is very relevant to the matter before us. The brief circumstances of that case were that just before the tumbling of the Siad Barre Government in 1991, a consignment of rice belonging to the Somali Government had been shipped to Mogadishu. On arrival at the port, the captain of the vessel refused to dock as the Government had been overthrown and there was civil war. The vessel owners filed an application seeking orders to sell the consignment and for the proceeds to be deposited in Court. The orders were granted and the rice was sold and money deposited in court.

Subsequently, an application was made on behalf of "The Republic of Somalia" and the self-professed Prime Minister of Somalia for the release of the said funds. The immediate past Somalia Ambassador to the United Nations Organization in Geneva, Madame Fatuma Isak Bihi applied to be joined as a party to the proceeding. She also opposed any payment of the funds in question to the applicants, on the basis that there was no Government in Somalia capable of instructing the firm of solicitors who had filed the suit, and consequently no Government to release the funds to.

The court held, inter alia:

> ***"(1) That Madame Bihi had no locus standi to represent the Government of Somalia before the court as she had not received accredition or authority from any current Government in that country;***

2. ***Where the issue before the court was whether money in court was the property of a foreign state should be paid to a firm of solicitors whose authority to act on behalf of the state was in question, the court had to be satisfied that the solicitors on the record had properly constituted authority to receive money and that the government instructing them was in fact the***

government of the foreign state and if the court was for any reason satisfied that the solicitors did not have the requisite authority, it would, on its own motion if necessary, require the solicitors to obtain that authority and ensure that in the meantime the money remained under the control of the court;

3. ***The factors to be taken into account in deciding whether government existed as a government of a state were;***

a. ***Whether it was a constitutional government of the state;***

b. ***The degree, nature and stability of administrative control, if any, which it exercised over the state;***

c. ***In marginal cases, the extent of international recognition that it had as a government of that state."***

On the evidence before it, the Court was not satisfied that the interim government had any constitutional authority or stable administrative control over the territory of Somalia or that it was recognised by the British Government.

According to the English courts therefore, even as early as 1992, the International Community did not acknowledge, or recognise whatever group that had taken over the government from Siad Barre as a legitimate Government of the Republic of Somalia. In other words, as we stated earlier on in this judgment, as at 1992 and as at the time the suit property herein was sold, Somalia was a failed state.

It had no Government that was recognizable in international law; it had no government capable of accrediting any ambassadors or other diplomats including those who were serving the Siad Barre's Government before its fall in 1991. To that extent therefore, whether the former ambassador had been recalled in 1990 or not is non-material. By 1994 when he decided to dispose of the official Somali Ambassador's Residence in Nairobi, he was not an Ambassador and had no diplomatic status whatsoever. There was simply no government in place to confer to him that status.

This position was indeed confirmed by the then Kenyan Minister of Foreign Affairs and International Cooperation Hon. S. K. Musyoka who issued a certificate in the following terms on 21st February 1995:-

"Pursuant to the provisions of Section 18 of the privileges and immunities Act Chapter 179 Laws of Kenya, I Hon. Stephen Kalonzo Musyoka, Minister of Foreign Affairs and International Co-operation of the Republic of Kenya do certify that:-

1. *Somalia became incapable of entering into diplomatic relations with the Republic of Kenya and of establishing or maintaining a diplomatic mission in Kenya when its civil authority collapsed on 26th January, 1991 with the ouster of the former president, the late Siad Barre.*

2. *The Republic of Kenya has no diplomatic relations with Somalia and does not recognise the existence of the Somali Embassy and its former Diplomats in Kenya in terms of the Vienna Conventions following the collapse of the Government or civil authority in Somalia in January 1991.*

3. *Mohammed Omar Aden, Muse Fahiye Hersi, Zeynab Ali Osman or any former Somali Diplomats accredited to the Republic of Kenya by the Government of Somalia do not enjoy any diplomatic immunity under the privileges and immunities act Cap 179 laws of Kenya and the Vienna Convention on diplomatic relations.*

Dated at Nairobi this 21st day of February 1995

Hon. S. K. Musyoka

MINISTER"

A similar communication from the then Kenyan Ambassador/Permanent Representative to the United Nations – Ambassador Francis Muthaura dated 8th February 1995 addressed the same issue i.e the status of Somali diplomats in the international arena this time in the United Nations. We find it necessary to reproduce the contents of this very important communication.

"RE: SOMALIA REPRESENTATION

I wish to refer to our conversation in connection with treatment of Somalia and its representation in the United Nations, and confirm that in the view of the Secretary General, Somalia is a Country without a Government or authority exercising effective control. Consequently, he does not recognize any diplomatic representation or accept any accreditation.

The credentials committee has nevertheless extended a courtesy based purely on grace to a Somali lady (who was a former accredited diplomat) which permits her to monitor informally issues relating to Somalia.

She neither represents any one of the de facto authorities in Somalia nor can she claim any diplomatic title or privilege. In our opinion, this same principle should apply in other situations where persons may purport to exercise diplomatic functions.

*(*Emphasis supplied)

Francis K. Muthaura

AMBASSADOR

PERMANENT REPRESENTATIVE"

The last sentence (underlined) is of particular relevance to this case. It clearly means that even those Somali diplomats who were duly accredited by the previous government were stripped of all privileges and diplomatic status which go with accreditation after the overthrow of a government. The former Somali Ambassador to Kenya was not an exception. It is also worth noting that the Somali chair at the United Nations General Assembly remained vacant from 1991 when Siad Barre's Government collapsed up to year 2000 with the coming into power of the Transnational National Government (TNG).

We believe we have said enough on this issue. Simply put, the former Somali Ambassador to Kenya had no capacity whatsoever to enter into any contract of whatever nature on behalf of any *de Jure* or *de facto* Government of the Republic of Somalia.

Any contract entered into by parties without legal capacity is null and void *ab-initio*. It goes without saying therefore, that the sale agreement entered into by the appellants on the one hand and Ambassador Ahmed Sheikh Mohamud on the other was null and void for all intents and purposes. We agree with the learned Judge of the High Court in his finding to the effect that:

> ***"there was no government leave alone a constitutional one. It matters not that he retained the seal of the Embassy that he used to execute the said transfer. As at that time, he was devoid of any authority and therefore, the sale on behalf of The Republic of Somalia was executed by an unauthorized person who could not pass a valid title or any title to any one at all."***

EXERCISE OF DUE DILIGENCE

On this issue, it is our view that counsel for both parties failed to carry out sufficient due diligence before committing their clients to the transaction. It is true that practically speaking counsel for the purchaser

carries the heavier burden when it comes to carrying out due diligence. This is so because it is his client who stands to lose if he commits his funds to purchase a property that later turns out to be problematic. This does not however, absolve the vendor's counsel from the responsibility of confirming that his client has a good title to the property he seeks to dispose of and also that the property has a clear Title.

In this case, all Mr. Kibunja did was to conclude that the former ambassador had authority to sell the suit property by looking at a document whose author he did not even authenticate. He also claimed that he checked the directory and confirmed that the ambassador's name was still the one appearing as the duly accredited ambassador of the Somali Republic to Kenya.

What Mr. Kibunja nonetheless could not plausibly explain to the court is how he did not know that as at that time, there was no state known as the Democratic Republic of Somalia. His statement that there was '*always a government'* in Somalia was fallacious to say the least since he must have been aware, like any other Kenyan of reasonable intelligence and exposure that the Somali Government had collapsed in 1991.

It is clear to us that Mr. Kibunja took his client's instructions at face value and did not bother to do any serious background check to confirm if indeed he had capacity to dispose of the property. He also ought to have confirmed with the Ministry of foreign affairs what procedure needed to be followed before such a property could be sold. We are also curious that in his testimony in court, he said that the appellants were given vacant possession of the property while the evidence on record revealed otherwise. The other former employees of the Somali Embassy who were living in the house had to be forcefully evicted and there were even criminal proceedings filed in court against them. All this was done before the last installment of the purchase price was paid and Mr. Kibunja could not therefore plead ignorance.

On the other hand, as stated earlier Mr. Brahmbhatt, counsel acting for the purchaser had a heavier responsibility to his client when it came to conducting due diligence. All he did was to write the letter dated 4th August 1994 to Mr. Kibunja seeking confirmation on whether the former Ambassador had authority to sell the said property. Mr. Kibunja responded the very following day and confirmed the information sought.

Four days later, i.e on 8th August 1994, the parties entered into the said sale agreement and ten days later the indenture in favour of the purchasers was registered at the land registry. This was notwithstanding the fact that the balance of Kshs. 8,845,000/= was paid at the end of January 1995. There is no evidence that Mr. Brahmbhatt did any other due diligence whatsoever. He did not even attempt to confirm from the ministry of Foreign Affairs what needed to be done before a property which belonged to a foreign state could be sold. He did not even seek confirmation from the said ministry as to whether the former Ambassador had the requisite authority to transact on behalf of a Government which was no longer in existence.

It is our observation that the said counsel failed the diligence test and this is what landed his clients in the quagmire they now find themselves in.

INTERNAL PROCEDURES

There is consensus that these were not followed at all. There was even no attempt by either party to find out from the relevant ministry whether such procedures existed. Both learned counsel ought to have known that the Government of Kenya, as the host country was charged with the responsibility of protecting the property in question and should not have sanctioned the sale without roping in the ministry of Foreign affairs. Had this been done, then the existence of the internal procedures would have been brought to the fore and all necessary requirements would have been explained. Compliance with the said procedures may not have culminated in the appellants expanding their property portfolio, but it would have spared them the possible loss of their hard earned money.

BREACH OF CONTRACT

Having found that the contract was null and void *ab-initio*, it will not be necessary for us to make any finding on whether there was any breach of contract or not – as a null and void contract is incapable of being breached. This brings us to the all important issue of fraud.

FRAUD

The question is whether there was fraud involved in the entire transaction on either the part of the purchasers or the vendor or both.

The learned Judge of the High Court found, and rightly so in our view, that the document dated 19th May 1990 was indeed a forgery. We have discussed this issue earlier on in this judgment and concurred with the trial court that indeed the document was a forgery. Further that, there is no doubt in our minds that the former Ambassador must have been conversant with the procedures to be followed if immovable property belonging to the Embassy was to be sold. He decided to ignore the said procedure not out of ignorance but because he knew he was not authorised to sell the property and that in fact the sale was not for the benefit of the Embassy but solely for himself. There was evidence that he received more than six million shillings in cash. It is also not clear who cashed the bankers cheque for the balance of the purchase price given the fact that the Embassy was not operational; yet there was correspondence from Prime Bank vide the letter dated 1st December 2009 confirming that the cheque was paid. It would not be farfetched to conclude that the entire purchase price ended up in the Ex-Ambassador's pocket. Fraud on his part is not disputed at all. The only question is whether the purchasers could have been said to have been complicit to the fraud.

The learned Judge of the High Court made the following finding in respect of that issue:-

> ***"He (Ex-ambassador) also received a substantial sum of money from the 1st and 2nd defendants without any acknowledgment. By playing along with the said Ambassador, the 1st and 2nd defendants were drawn into the scheme and therefore, participated in the said fraud. Although, they were represented by a lawyer, they paid part of the purchase price directly to the Ambassador for which they did not obtain any acknowledgment. Though not directly pleaded, constructive fraud is existent."***

This finding has been faulted by the appellants who assert that constructive fraud was never pleaded and since parties are bound by their pleadings, it was a misdirection on the part of the learned Judge to make the said finding. Learned counsel for the appellant relied on this Court's decision in **Chumo Arap Songok vs David Kibiego Rotich (2006) Eklr** where it was held:-

> ***"The law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings."***

We nonetheless note that the latter part of the same quote states :-

> ***"Unless a matter has been canvassed before it by the parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties."***

It is our view that the issue of the appellants' conduct in the entire process was a live one. Though not directly pleaded, evidence was adduced to the effect that the appellants even paid a substantial amount of the sale price in cash behind their advocate's back. There was no receipt issued for the same or any other form of acknowledgment. The lack of proper due diligence on their part; among other things clearly shows that the transaction was not done above board and the appellants were part and parcel of the whole scam.

In our considered view, the learned Judge was within the law to make the said finding. We do note however, that his finding did not affect the decision in any way. This is so because basically, the transaction was null and void *ab-initio* and the issue of fraud was as is in this appeal secondary. It is

instructive also that even with that finding, the learned Judge went ahead and ordered that the appellants could be refunded their money by the 3rd respondent. The constructive fraud was therefore not held against them.

We need not say more on this issue.

APPLICATION OF SECTIONS 23 AND 24 OF THE REGISTRATION OF TITLES ACT

On this issue, we find that the cited provisions only protect a bona fide purchaser for value without notice and who is not privy to the fraud. In any event, having found that the sale itself was fraudulent and that the seller had no title to pass to the vendors, then all subsequent transactions including the registration of the indenture and the transfer of the property from the Government Lands Act (GLA) to the Registration of Titles Act (RTA) were all null and void. The issue of indefeasibility of Title does not therefore arise.

On the issue of non-joinder of the Ex-ambassador, we agree that since it was the Ex-ambassador who was the originator of the fraud that courses through the entire transaction he ought to have been joined as a party in the suit before the High Court.There was evidence however, that immediately after receiving the money, the Ex-ambassador disappeared without a trace. It would not therefore have been possible to serve him with the proceedings. We note also that his non-joinder was not meant to cover up for him or exonerate him from the acts of fraud in question. This case can therefore be distinguished from the case of **Central Kenya Limited vs Trust Bank Kenya Limited & Other (1996) Nairobi Civil Appeal No. 215 of 1996** (unreported) which was cited by the appellants in their submissions. In this case, the fraud by the Ex-ambassador was blatant on its face and it was not possible that he could have made any meaningful rebuttal. We also note that the only claim the appellants would have had against him was that of compensation by way for damages. His presence could not have validated the transaction. We therefore agree with the learned Judge of the High Court that the said non-joinder was not fatal to the respondents' case.

On the counterclaim, having found as we have that the appellants were not bona fide purchasers for value without notice, the order sought in the counterclaim cannot be granted. We agree with the learned Judge of the High Court that the counterclaim was for dismissal.

In conclusion therefore, having considered all the material before us, we are satisfied that the learned Judge of the High Court cannot be faulted. We have no basis for interfering with his judgment which we find sound and properly predicated on the law and facts before him. We find this appeal devoid of merit and dismiss it with an order that each party bears its own costs.

Dated and delivered at Nairobi this 6th day of June, 2014.

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

…….

JUDGE OF APPEAL

A. K. MURGOR

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR