



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL CASE NO. 237 OF 2012**

**HELLEN NEKESA NIELSEN ..... 1<sup>ST</sup> PLAINTIFF**

**PAUL FRIEDRICK NIELSEN .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DOROTHY NELIMA WAFULA ..... 1<sup>ST</sup> DEFENDANT**

**the estate of JOHANNES FREDRICK WILHEM LOWE (DECEASED)..... 2<sup>ND</sup>  
DEFENDANT**

**JUDGEMENT**

[1]. The plaintiffs in this case filed this suit praying for the prayers set out in paragraph 20 of the plaint. Paragraph (a) and (b) of the Plaint prayed for a permanent injunction and a mandatory injunction against the 1<sup>st</sup> defendant respectively while paragraph 20 (c) prayed for an order directing the land Registrar Kwale to cancel the certificate of Lease dated 26<sup>th</sup> August 2008 and to reinstate the Certificate of lease as it was on 31<sup>st</sup> March 2003 in the names of the plaintiffs and the defendants.

And finally, an order for survey and demarcation of the suit property among other orders.

[2]. The 1<sup>st</sup> defendant entered appearance on 6<sup>th</sup> November 2012 and she then filed her defence on 23<sup>rd</sup> January 2013. In her defence, the 1<sup>st</sup> defendant stated that she had applied for letters of administration of the 2<sup>nd</sup> defendant as his wife. She denied all the allegations by the plaintiffs and states that the transfer of shares of the suit land was done on the 26<sup>th</sup> of August 2008 by the 2<sup>nd</sup> defendant himself and that the plaintiffs duly executed a transfer of shares before a Notary Public in Germany after which the transfer was presented and accepted for registration by the land Registrar and that the plaintiffs were using the demise of the 2<sup>nd</sup> defendant to attack the 1<sup>st</sup> respondent.

[3]. An application dated 25<sup>th</sup> October 2012 was filed praying for a temporary order of injunction to be granted against the 1<sup>st</sup> defendant herself, her agents and servants from dealing, selling, wasting, mortgaging or interfering with the suit land and a mandatory injunction directed at the 1<sup>st</sup> defendant from denying the plaintiffs access to the suit property Kwale Diani Beach Block/372.I dealt with that application vide a ruling dated 18/10/2013 where I ordered a status quo of the suit property and restrained the respondents therein from dealing, selling wasting mortgaging or in any other way interfering with the suit premises (safe for running the hotel and using the same as their own accommodation) pending the determination of the suit.

[4]. During the hearing of this case the plaintiff gave evidence and said that she had authority from her husband the second plaintiff to give evidence on his behalf. She told the Court that the defendant was her elder sister. That the second defendant was a longtime family friend of her husband and herself. That her husband and herself were staying at Kwale, Diani Beach No.372 owned by the 2<sup>nd</sup> defendant. She stated that she knew her husband in the year 2002. That in the year 2002 she introduced her sister the 1<sup>st</sup> plaintiff to the 2<sup>nd</sup> defendant and that they liked each other and started living as man and wife from the year 2002.

That she was also living in the same premises. She gave evidence that the second defendant offered a half share of the suit property and asked the plaintiffs to pay 20,000 Deutschemarks which the plaintiffs paid in 2003. She said that there were no receipt issued as the parties were good friends. She produced a letter P. Exhibit 1 in which the 2<sup>nd</sup> defendant was offering the property to them. The cost of the property was to be 50,000 Deutschemarks. She said that, that was the letter that commenced the transaction. She told the Court that the balance of 30,000 deutschemarks was to be paid instalments. The agreement was that the plaintiffs would own ½ share while the defendants owned the other half.

[5].The witness said that they went to Kwale Land Registry and signed the transfer documents and left for Germany. That on 26/5/2003 the 2<sup>nd</sup> defendant sent a certificate of lease showing that all the parties herein each had been registered as tenants in common in the property known as Kwale / Diani Beach Block 372. The letters forwarding the title and the title deed itself was produced in Court as plaintiff exhibit P3.

The plaintiff said that they continued to pay the 30,000 Deutschemarks until they finished. That the 2<sup>nd</sup> defendant wrote to the plaintiffs on 19/8/2008 confirming that the plaintiffs had paid 2,400 Euros into his account. She produced the bank slips and the letter from the 2<sup>nd</sup> plaintiff marked as exhibit 4 & 5.

[6].It was stated by the plaintiff that the 2<sup>nd</sup> defendant called her to say that the 1<sup>st</sup> defendant needed some money to pay the school fees for her children. She stated that this money was to be treated as part of the purchase price. The witness produced originals of the money sent to the defendants from 2007 to 2012. She said the amount sent show about 3000 US dollars. The Western union receipts were produced as Exhibit P7. The plaintiff said that between 2003-2012 that they were coming from Germany and living in their premises that they had purchased in Kwale in Diani Beach Block 372. She said that there were three cottages. The big cottage was for the defendant and the small one for the plaintiff. That, that plot comprised of half the entire plot. The plaintiff further said that when they were away, the 2<sup>nd</sup> defendant managed the plot for them and kept all the transactions in a big black book.

[7].That their relationship was very good. That before Mr. Lowe the 2<sup>nd</sup> defendant died in 2012 the 1<sup>st</sup> defendant sent to him 290 Euros through Western Union to help him.

That after he died the 1<sup>st</sup> plaintiff while in Germany got an SMS message from the 1<sup>st</sup> defendant warning her not to step on the premises. She said she forwarded the text to Diani police station. She stated that she came back to Kenya in September 2012 and went to the Kwale Land Registry and was shocked to see that their names were not there in the Register. That the land had been transferred to the 1<sup>st</sup> defendant and Mr. Lowe. She categorically denied that neither her nor her husband transferred the land to the defendants.

[8].The Green card showing that transaction was produced in Court as P. Exhibit 8 and the receipt for the same.

The plaintiff said that she tried to register a caution on the land through her advocates Anyanzwa & Company but failed to do and so, she filed this suit. She said also that she reported to Diani Police Station about the threatening texts. The plaintiff was cross examined at length by Mr. Magolo Learned Counsel for the defendants. She applied to call the Land Registrar Kwale to give evidence.

The plaintiff called her sister Emily Nakhumicha Wafula who adopted her written statement and basically supported the plaintiff's claim. Also called was her brother Evans Mosimbo Wafula who also adopted his statement and also supported the plaintiff's claim.

[9. Prior to the Land Registrar Kwale giving his evidence, the defendant Dorothy Nelima Wafula give evidence. The defendant said that the plaintiff is her elder sister and that Paul Nielsen was her brother in law and the plaintiff's husband. She said that the plaintiffs were friends of the defendants. She adopted her statement made on 24<sup>th</sup> September 2014.

In her statement, the 1<sup>st</sup> defendant stated that sometime in the year 2000 that her husband the 2<sup>nd</sup> defendant was in a relationship with a lady called Catherine Mary Wanjiru which ended badly. That the said lady had brought a matrimonial case for subdivision of their property.

[10].That her husband was stressed and an idea was conceived between her late husband and the 2<sup>nd</sup> defendant to transfer the suit property in the names of the plaintiff to hold it in trust as a gift for the defendants. That by then the plaintiffs were living with the defendants in the suit property. She stated that no agreement was made and no money consideration was made. She said that while the plaintiffs stayed with them she borrowed Ksh.10,000 Euros. That this money was to be paid in bit by bit. She said, that she visited Germany with her husband and gave the plaintiffs 3000 Euros in cash which the plaintiffs promised to pay back before 2006. She said in her statement that the plaintiffs were unable to repay the money. That they told the 1<sup>st</sup> defendant's husband that the 1<sup>st</sup> plaintiff had obtained a German Citizenship that they, plaintiffs had no time to come to Kenya and they agreed to sign transfer forms from the four names to the defendants. That this was done through the DC and the Land Registrar. She denied that the 1<sup>st</sup> plaintiff paid school fees for her children. She also denied that the plaintiff paid her husband's hospital bills. She generally denied that the plaintiffs were entitled to a portion of the suit land.

[11]. On cross examination by Mr. Orenge Learned Counsel for the plaintiffs, the question put on her was How was the land re transferred into your names? The 1<sup>st</sup> defendant answered My sister came in 2008 and we went together to the DC Msabweni and they signed and we brought the documents in Kwale Land Registry. The transfer was by their consent to re transfer. My documents got lost in the year 2012.

[12].She however admitted that her sister's passport was valid from the year 200-2012 and it had no stamps showing that the first plaintiff came to Kenya in the year 2008.

On 6/11/2014 by a consent of Mr. Magolo for the defendants and Mr. Orenge for the plaintiff the advocates agreed that the case file be transferred to Bungoma Law Courts (where the trial Judge had by then been transferred) for hearing of the remaining witnesses and the case was fixed for hearing on 25/11/2014 when witness summons would issue to the Land Registrar Kwale to attend Court in Bungoma his costs being paid by the plaintiffs.

[13].On 25/11/2014 Mr. Orenge and the Plaintiffs appeared in Bungoma court but the defendant and her Lawyer never appeared. I ordered that since the case was listed for two days the matter be revisited on 26<sup>th</sup> November 2014 at 9a.m for hearing.

On that day the defendant and his client never attended. Though the advocate for the plaintiff requested the Court to invoke order 12(2) (a) of the Civil procedure rules, 1 however gave the defendant one more chance. I fixed the case for hearing on 15/12/2004. I ordered a hearing notice to issue on the defendant and witness summons to issue on Land Registrar Kwale Mr. Ngetich.

[14].On 15/12/2014 Mr. Magolo who was served never attended his client never attended as well.

I made a long ruling on adjournment and ordered the case to proceed. Mr. Charles Kipkurui Ngetich the land Registrar Kwale who had come to Court in compliance to the Court summons gave evidence. He stated that under entry No.9 of the register the suit property was owned by Dorothy Nelima Wafula, Hellen Nielsen, Paul Fredrick Nielsen, and Johnson Fredrick Wilhelm Lowe. The ownership was

indicated as proprietors in equal shares i.e.  $\frac{1}{4}$  share each. He produced the instruments that triggered the transfer entry No.13 dated 26-8-2008 to the defendants. He said that there was no transfer documents which were supposed to be signed by the four owners.

[15].There was no application for consent to the land Officer Mombasa and consent of the relevant Land Control Board. He further stated that there was no valuation requisition report and no evidence of payment of stamp duty. He said that in the parcel file, there were no documents at all. The only thing inside the parcel file was the surrendered title. He said that if the title was lost there was a procedure to replace the lost title through obtaining a police abstract accompanied by the necessary affidavit by the owner of the land and by advertising in the Kenya Gazette whereupon a new title would be issued. He said that the procedure adopted to retransfer the ownership from all the parties herein to the defendants herein was irregular.

[16].After the land Registrar gave his evidence, Mr. Orange closed his case.

There being no further evidence offered by the defendant who were absent, I ordered the parties to file their submissions by 20-01-2015. Only the plaintiff filed his submissions.

The issue for determination in this case is whether the charge of ownership entered in the proprietorship section of Kwale/Diani Beach Block 372 from the names of Dorothy NelimaWafula, Hellen Nekesa Nielsen, Paul Friedrich Nielsen and Johannes Friedrich Wilhem Lowe as proprietors in common in equal shares ( $\frac{1}{4}$  each) to Dorothy Nelima Wafula and Johannes Friedrich Wilhem Lowe on 26-8-2008 was done in compliance with the law or was irregular.

[17].From the outset, it was not in dispute that the land in issue herein was Agricultural Land. That the same was registered under the now repealed Registered Land Act cap 300. Further that the same was therefore subject to land control.

It is not in dispute that the land was previously registered in the names of the four defendants. It is argued by the defendant in her evidence that the plaintiff's infact attended the Musabweni land Control Board before the District Commissioner in 2008 and subsequently re-transferred the land to the defendants. The land Control consent was then taken together with the transfer to the Kwale Land Registrar by the parties to re-transfer the land to the defendants.

[18]. This fact has been vehemently denied by the plaintiffs indeed when the 1st defendant was cross examined on this issue by Mr. Orange Leaned counsel for the plaintiffs, and was shown the 1st plaintiff's passport for the period year 2000 – 2012, she admitted that there was no indication that the 1st plaintiffs came to Kenya in the year 2008 when the change of title was made. there was a very big debate in court as to whether the plaintiffs bought the suit land from the plaintiffs or whether the land was registered in the names of the four parties to avoid a portion of land from being awarded to Catherine Mary Wanjiru the former wife of Fredrick Wilhelm Johannes Lowe the deceased husband of the defendant herein. In fact, the letter written by Mr. Lowe from Diani Beach on 22<sup>nd</sup> December 2002 on page 45 of the plaintiffs' revised list of documents confirms otherwise.

[19].Further, whether the alleged purchase price of Kshs. 50,000/= Deutsche Marks was paid by the plaintiffs through the mode they stated through all the documents they attached, or whether the said payments to the 1<sup>st</sup> defendant and her husband was repayment of monies advanced by the 1<sup>st</sup> defendants deceased husband in Kenya and Germany as alleged, (a fact which is contrary to the 2<sup>nd</sup> defendants statement on oath in his affidavit of income and property pursuant to the provisions of Matrimonial Causes Act and rules filed in Divorce Cause No. 32 of 2002 in the Petition filed by his former wife Catherine Mary Wanjiru where he said his income was Kshs.2500 a month and where he said in para 15 of the affidavit that his income is NOT enough to meet his needs) is really not what is in issue here. The defendant has a duty to prove that the registration of title in her own name and that of her husband was done according to the law and was not irregular.

[20].The land registrar of Kwale Land Registry Mr. Charles Kipkurui Ngetich told the court that there

was no transfer from the four owners to the two now registered owners. The transfer would have proved the execution of the transfer documents by the plaintiffs back to the 1<sup>st</sup> defendant and her husband. There was no application for land control consent and no consent itself. There was equally no payment of stamp duty or exemption thereof if it was a gift and no registration fees for such transfer. The defendant attempted to explain that these documents were lost in her house. If that is the case, there was no explanation why a copy of the land control consent could not be obtained from Msabweni Land Control Office or indeed a copy of the minutes thereof. In any case, this transfer to the defendants could not have been possible without the plaintiffs who were co-owners and who were in Germany and who never came to Kenya in 2008. The original parcel file of the suit land was produced by the Land Registrar. It had no transfer documents

[21] I find that the 2<sup>nd</sup> defendant was not able to show that the change of registration from the four owners to herself and her late husband was done according to the law and that it was not irregular. I find also that the proprietorship section of the title of Kwale/Diani Beach Block/372 was changed illegally on 26<sup>th</sup> August 2008 to read Dorothy Nelima Wafula and Johannes Fredrick Wilhelm.

I do order that entry No. 13 on the proprietorship Section of the said title be cancelled and the names of Dorothy Nelima Wafula and Johannes Fredrick Wilhem Lowe be cancelled and be replaced by original entry number 9 in the names of

1. Dorothy Nelima Wafula
2. Helen Nekesa Nielsen
3. Paul Friedrich Nielsen
4. Johannes Fredrick Wilhem Lowe as proprietors in common in equal shares(1/4 each)

[22].I further order that the suit property be surveyed and the plaintiffs shall get ½ share of the same, the costs of the survey be shared equally.

[23]. This being a family dispute in that Dorothy Nelima Wafula and Helen Nekesa Nielsen are sisters married to German Nationals, I order that each party bears its own costs.

**DATED and DELIVERED at BUNGOMA this 15<sup>th</sup> day of JUNE 2015.**

**S. MUKUNYA**

**JUDGE**