



**Nyesi v Munyoki (Environment & Land Case 328 of 2017)  
[2022] KEELC 2384 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2384 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 328 OF 2017**

**NA MATHEKA, J**

**JUNE 30, 2022**

**BETWEEN**

**KADOGO ATHUMANI NYESI ..... PLAINTIFF**

**AND**

**TITUS MUNYOKI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff avers that she was the registered owner of the undivided portion of Plot No.289 measuring 45 feet by 80 feet situated within Likoni Corner Mbaya in Mombasa County. The Plaintiff avers that the Defendant without any colour of right invaded the Plaintiff's parcel of land on the 27<sup>th</sup> August, 2017 and commenced construction thereon without the Plaintiff's express consent and or authority. The Plaintiff avers that the actions of the Defendant is detrimental to the Plaintiff's ownership of the undivided portion of Plot No.289 measuring 45 feet by 80 feet situated within Likoni Corner Mbaya. The Plaintiff's claim against the Defendant is for injunctive orders directed to the Defendant from further construction and or trespass upon the Plaintiff's parcel of land situated within Likoni Corner Mbaya. The Plaintiff further claim against the Defendant is a Declaration by the Honourable Court that she is the bonafide owner of the undivided portion of Plot No.289 measuring 45 feet by 80 feet situated within Likoni Corner Mbaya in Mombasa County and vacant possession of the suit land. The Plaintiff prays for the following orders;
  1. A mandatory Injunction issued to the Defendant from further developing, constructing, trespassing, alienating and or dealing with the undivided portion of Plot No.289 measuring 45 feet by 80 feet pending the hearing and determination of this suit.
  2. A Declaration by the Honourable Court that the Plaintiff is the owner of the undivided portion of Plot No.289 measuring 45 feet by 80 feet situated within Likoni Corner Mbaya in Mombasa County.



3. Vacant possession.
4. Costs and interest
2. The Defendant to the contrary avers that he purchased a parcel of land measuring 72ft by 35ft from parcel of land No. 289 Likoni Kona Mbaya from the maternal aunts of the Plaintiff who are the rightful owners of the subject suit property. The Defendant avers that Plot No.289 Likoni Kona Mbaya is family land owned by the Plaintiff's mother and other siblings and each sibling has been given a share of the family land. That the Plaintiff has her own share and she has built on it. The Defendant avers that he completed purchase of the suit property in November 2016 and has done substantial development thereon by constructing a residential house which is near completion. The Defendant avers that the suit herein is an afterthought since the Plaintiff all along knew he had purchased the parcel of land for the last one year and has substantial development therein. The Defendant avers that there has been arbitration by the elders over the issue and the Plaintiff's claim has been found baseless. The Defendant avers that he has not trespassed over the Plaintiff's land or at all and he is not wasting the same since he purchased the parcel of land and he is constructing his residential house. The Defendant prays that the plaintiff's suit be dismissed with costs.
3. This court has considered the evidence and submissions therein. PW1 testified that she bought the suit property from her mother at a purchase price of Kshs. 30,000/-. That the suit property Plot No. 289 was family land belonging to her mother and her sisters which has no title deed. The sale agreement was not in writing. That she has put up a 12 bedroomed house nearby and the Defendant has constructed on the suit property. PW2 the Plaintiff's brother testified that the Defendant has taken the Plaintiff's plot which she bought in 1997 but did not put up anything on it.
4. The Plaintiff's instant suit is founded on an alleged oral agreement entered into in 1997 that was not in writing as required under Section 3 (3) of the Law of Contract Act, Cap 23 Laws of Kenya. Section 3(3) of the Law of Contract Act provides that;  
No suit shall be brought upon a contract for the disposition of an interest in land unless:-
  - (a) The contract upon which the suit is found-
    - (i) Is in writing
    - (ii) Is signed by all the parties thereto; and
  - (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party."
5. This provision came into force in June 2002 and amended and replaced the previous Section 3 of the Law of Contract Act which had provided that;  
"No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof is in writing and is signed by the party to be charged or by some person authorized by him to sign it."
6. Provided that such suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract:-
  - (i) Has in part performance of the contract taken possession of the property or any part thereof; or



- (ii) Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”
7. The Court of Appeal in the cases of *Morgan vs. Stubenitsky* (1973) KLR 188 and *Wagichiego vs. Gerald* (1988) KLR 406 held that in the absence of an agreement in writing duly signed by the party to be charged in accordance with the previous Section 3(3) of the *Law of Contract Act*, there was no enforceable contract between the parties. The High Court decision in *Rainald Schumacher vs. Aubrey Garth Monsely* (2008) eKLR, *Patrick Tarzan Matu & another vs. Nassim Sharrif Nassir Abdulla & 2 others* (2009) eKLR, *Laikipia Mifugo Ranching Co. Ltd vs. Nanyuki Ranching Ltd* (2007) eKLR and *John Michael Wanjao vs. Alubala Abonayo Andambi* (2011) have dealt with Section 3(3) of the *Law of Contract Act* as amended and have all been consistent that a party seeking to enforce a contract relating to disposition contract relating to a disposition of an interest in land such a contract has to have been in writing and signed by the parties to it and witnessed as required under Section 3(3) of the Contract Act.
8. The Plaintiff never took possession but instead the Defendant testified that in 2016 he bought the said suit plot from Binti Ali Masud and Maeli Sudi Suleiman measuring 72 feet by 35 feet at a purchase price of Kshs. 240,000/- he took possession and has constructed a permanent house. He produced the sale agreements, construction receipts and photographs as DEx 1 to 4. DW3, Binti Ali Masud and DW2, Maeli Sudi Suleiman confirmed that they sold the suit plot to the Defendant and he had paid in full. DW 4 the Plaintiff's cousin, DW5 the Plaintiff's brother, DW6 a witness to the sale agreement all testified confirming that the Defendant was a bonafide purchaser. From the foregoing I find that the Plaintiff's sale agreement was not in writing and she never took possession of the same. In the absence of an agreement in writing duly signed by the parties in accordance with the previous Section 3(3) of the *Law of Contract Act*, there was no enforceable contract between the parties. I find that the Plaintiff has failed to establish her case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH JUNE 2022.**

**N.A. MATHEKA**

**JUDGE**

