



**Nathoo v Musyoka & another (Environment and Land Case Civil Suit
161 of 2017) [2022] KEELC 3986 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3986 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 161 OF 2017**

M SILA, J

JULY 21, 2022

BETWEEN

KARIM NATHOO PLAINTIFF

AND

JOSEPHINE MARTHA MUSYOKA 1ST DEFENDANT

THE LAND REGISTRAR, KWALE 2ND DEFENDANT

JUDGMENT

A. Introduction and Pleadings

1. This suit was commenced through a plaint which was filed on 10 May 2017. The plaintiff has pleaded that he is the registered proprietor of the land parcel Kwale/Diani Beach Block/1060 (the suit land) having purchased it from Johnson Musyoka Mawia (deceased) through a sale agreement dated 10 March 1998 and was issued with a certificate of lease on 1 April 1998. The 1st defendant is wife to the deceased. The plaintiff's claim against her is that around October/November 2016, she entered the suit property and started demolishing one of three incomplete structures on the land. He did a search which showed that the property had somehow reverted back to the name of the deceased. He contends that the 1st defendant irregularly altered the ownership details. The 2nd defendant is the Land Registrar, Kwale. In the suit, the plaintiff seeks the following orders (slightly paraphrased for brevity) :-

- (a) A declaration that the plaintiff is the bona fide and rightful owner of Kwale/Diani Beach Block/1060.
- (b) An order directed to the Land Registrar, Kwale land registry, to rectify the register by cancellation of the entries relating to the issuance of fresh title and registered in favour of the late Johnson Musyoka Mawia and register the plaintiff as the rightful owner.



- (c) As against the 1st defendant an order of permanent injunction to restrain her from trespassing or dealing with the suit land.
 - (d) Damages for trespass.
 - (e) Costs of and incidental to this suit; and
 - (f) Any other relief the court may deem appropriate to award.
2. The 1st defendant entered appearance and filed a statement of defence. She pleaded that she got married to the deceased in the year 1985 and together they purchased the suit property in the year 1995 and started construction. She pleaded to be a stranger to the alleged sale of the property and issuance of title to the plaintiff. She averred that she is a beneficiary and administrator of the estate of the deceased and entitled to enjoy the property as she deems fit.
3. The 2nd defendant entered appearance through the State Law Office and a defence was filed. In it, it is pleaded that the 1st defendant is the legitimate registered proprietor of the suit property as per the land registry records. It is nevertheless pleaded that there was a transfer of the suit property to the plaintiff, as purchaser from the deceased, which is reflected in the uncertified copies of title and transfer documents within their records.

B. Evidence of the Parties

4. The plaintiff testified as the sole witness in support of his case. He testified that he purchased the land around the year 1999/2000 from the deceased at a consideration of Kshs 840,000/=. The deceased was introduced to him by a land agent. He produced a copy of the sale agreement. He also produced as exhibits an application for Land Control Board consent, a copy of the transfer, copy of search, and the certificate of lease. He testified that he paid rates and he had rates clearance certificate and rates payment receipts. He also had demands for payment of land rent, receipts for land rent payment, and a rent clearance certificate issued on 28 November 2006. He testified that upon purchasing the land, he would visit it about twice every year as he did not have funds to develop it. He assigned one Jeremy, a friend, to look over the property on his behalf. In 2016, he was called and informed of the interference on the land. He contacted Jeremy who informed him that the interference was from the 1st defendant. They later got in touch with the 1st defendant who wished to sell the property. He asserted that the register to the land has been tampered with.
5. He was cross-examined on the copy of the sale agreement as it did not have his signature. He testified that it was witnessed by Mr Karimbhai Advocate though the Advocate's signature was not in the copy produced. He did not have proof of payment of the purchase price nor evidence that the Land Control Board (LCB) application for consent was approved. He did not have the search that he did before he purchased the property. He testified that stamp duty was paid though he did not have the receipts. RE-examined, he testified that the transfer instrument is signed by both parties and is witnessed by Advocate Karimbhai. It showed that all money had been paid. He stated that he could not have gotten a transfer without an LCB consent.
6. With the above evidence, the plaintiff closed his case.
7. DW-1 was the 1st defendant. She testified that she currently lives in Mwala, Machakos. She stated that the suit land is in the name of her late husband. Her husband suffered an accident in the year 2015 and unfortunately died. She then filed for a grant of letters of administration which she produced. She stated that the property was still owned by her husband and she had the original title deed. After her



- husband died, she came to Diani, where the property is located, and she decided to clear the land as neighbours were complaining about its state.
8. Cross-examined by counsel for the 2nd defendant, she stated that her husband never informed him that he wished to sell the land.
 9. Cross-examined by counsel for the plaintiff, she stated that she still lived in Machakos when her husband was alive and she only used to visit the place. She acknowledged that she was not privy to her husband's dealings of buying and selling land as he would not tell her. She therefore wouldn't know whether her husband sold the land as he was the one who used to keep the documents. She was however not aware of any sale of the land by her husband. She testified that she was present when the land was sold to the deceased in the year 1996 and about Kshs 750,000/= was paid for it. She was not registered as co-owner though she stated that she contributed to its sale. After the demise of her husband, she came to check on the land. She trimmed the trees and removed some stones. She knew her husband's signature and she could identify it as the one in the copy of the sale agreement, in the application for LCB consent, and in the copy of transfer. She was however not aware of the sale. She has never paid rates for the property and never been issued with a demand for rates.
 10. With the above evidence, the 1st defendant closed her case.
 11. After she had testified, I directed parties to avail the original documents. The plaintiff did attend and he produced the original agreement for sale, the original LCB application for consent, the original transfer, and copy of what he said is the LCB consent. He also had a search dated 8 May 1998 and the original certificate of lease. He had a clearance certificate dated 9 May 2002 from the County Council of Kwale and a rates clearance certificate. He also availed various original receipts being payments for land rates and land rents.
 12. DW-2 was Siema Mwanguni, a Land Registrar based in Kwale land registry. She testified that their records show that a lease was originally issued to Leisure Lodges Limited on 3 October 1995. The property was then transferred to Diani Agricultural Research and Development Limited. On 20 December 1996, the land was transferred to the deceased. On 6 March 2017, a caution was registered by the plaintiff claiming to be the proprietor. She testified that she does not have any transfer to the plaintiff or anything to show that he is the registered proprietor. She nevertheless acknowledged that the Land Registrar's signature on the transfer instrument displayed by the plaintiff was one of a Mr. Musumia who has since retired. The transfer is not however in their file. The white card in their records indicates that the last entry on proprietorship is that in favour of the deceased. She testified that there was a digitisation exercise that was done in the year 2014 and it is possible that the continuation card was misfiled or that it fell off. She had no records supporting transfer to the plaintiff such as stamp duty receipts, transfer or consent to transfer, booking forms or Kenya Revenue Authority slips. She did not think that there is anything wrong that their office has done.
 13. Cross-examined by counsel for the plaintiff, she testified that the last entry in the white card is that of 20 December 1996. This filled up the card, meaning that the next entry needed to be filled in a second card. She acknowledged that the transfer instrument was known to her. She testified that it is possible that the continuation card is missing and this may have happened during digitisation in the year 2014. She testified that for a search to be issued, there must be a white card. She mentioned that with the appropriate documents the card can be reconstructed.
 14. With the above evidence, the 2nd defendant closed her case.



C. Submissions of Counsel.

15. I invited counsel to file submissions and I have taken note of the submissions filed. In his submissions, Mr. Obonyo, learned counsel for the plaintiff, referred to the documents presented by his client demonstrating that he purchased the property. He particularly referred me to the documents signed by the Land Registrar and referred me to Section 35 of the *Land Registration Act*, which assumes that unless the contrary is proved, a document purporting to be signed by the Land Registry shall be presumed so signed. He submitted that his client is entitled to the order for rectification of the register.
16. For the 1st defendant, Ms Nduku, learned counsel, submitted that there was no explanation as to why the instruments said to have been signed by the plaintiff bear different signatures from that in his national identity card. She also raised issue that the copies of the sale agreement showed that it was not signed by the plaintiff but the original did. She thought that the plaintiff proceeded to append the missing signature after first testifying. She also raised issue that the sale agreement was not witnessed contrary to section 3(3) of the *Law of Contract Act*. Counsel also raised eyebrows on how come the transfer was registered on 1 April 1998 and the certificate of lease and search issued on the same date. She submitted that no proof of payment of stamp duty was availed. She submitted that the evidence that the documents in favour of the plaintiff may have fallen off was speculative. She pointed out that in the defence the 2nd defendant had pleaded to having uncertified copies of title and transfer documents in the plaintiff's favour. She submitted that the plaintiff has failed to demonstrate that he legitimately acquired the suit property. She further submitted that the 1st defendant cannot be said to be guilty of trespass as she had in possession the title document in favour of her late husband.
17. I have not seen any submissions filed in respect of the 2nd defendant.

D. Analysis and Disposition.

18. I have considered all the above. I take the following view of the matter.
19. The plaintiff's case is squarely founded on the claim that he purchased the suit property from the deceased. He asserts that the transfer instrument was registered and he got title in his name. His problem is that the register still shows that the deceased is the proprietor of the suit property. The 1st defendant's position is that the land is properly registered in the name of the deceased and she is not aware of any sale of the suit property to the plaintiff. The Land Registrar has affirmed that the records she holds demonstrates that the deceased is the registered proprietor although there are documents of transfer in their file. She speculated that it was possible that the white card upon which the transfer was registered, fell off or got misplaced, while they were undertaking a digitisation exercise in the year 2014. Both plaintiff and 1st defendant displayed original certificates of lease in their hands and in their favour.
20. The sole issue that I need to determine is whether or not there was a sale of the property to the plaintiff. I will have to make this decision based on an assessment of the documents presented to me. Initially, the parties had relied on the copies of documents in their list of documents, but after assessment of the evidence, I directed that originals be availed. I now have the benefit of the original documents.
21. The first document relied upon by the plaintiff is the sale agreement. I have looked at it. It is dated 10 March 1998. The vendor is noted to be Johnson Musyoka Mawia and the purchaser is Karim Nathoo. The property being sold is Kwale/Diani Beach Block/1060 and the purchase price is Kshs 840,000/=. It is said that Kshs 84,000/= has been paid on the signing of the agreement and the balance is payable upon transfer. The document appears to be signed by both vendor and purchaser.



22. The applicable law in relation to contracts to land has always been section 3 (3) of the *Law of Contract Act*, cap 23, Laws of Kenya. The applicable section at the time was section 3 (3) of the *Law of Contract Act* as amended through Legal Notice No 21 of 1990. Subsection 3 and the subsequent subsections provided as follows:-

- (3) 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 founded-
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (iii) incorporates all the terms which the parties have expressly agreed in one document; 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.

(4) Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that sub-section affect the creation or operation of a resulting, implied or a constructive trust.

(5) The terms of a contract may be incorporated in a document either by being set out in it or by reference to some other document.

(6) For the purposes of subsection (3) -

"disposition" includes a transfer and a devise, bequest or appointment of property contained in a will;

"transfer" includes a mortgage, charge, lease, conveyance, assignment, assent, vesting declaration, vesting instrument disclaimer, release and every other assurance or property or any interest therein by any instrument other than a will or a codicil;

"party" includes any agent, auctioneer or advocate duly authorized in writing to act in the absence of the party who has given such authority;

"interest in land" means any estate in or charge over land, or any estate in or charge over the proceeds of sale of land;

"sign", in relation to a contract, includes making one's mark or writing one's name or initial all the instrument as an indication that one intends to bind himself to the contents of the instrument.

(7) The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection.

23. From the foregoing, it will be observed that the following were what would constitute a valid and enforceable contract over a disposition of an interest in land as at the year 1998.

- (i) The contract is in writing;
- (ii) The contract is signed by all parties thereto;



- (iii) The contract incorporates all the terms which the parties have agreed in one document;
- (iv) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party;

24. From section 3 (6) above, disposition would include a transfer of land.

25. So does the contract that the plaintiff wishes to rely on satisfy the above criteria? I am afraid that it does not. It is true that the sale agreement is in writing. It appears signed. However, the signatures of each party are not attested. From what I can see, the signature of the purchaser has completely no attestation on it. The signature, alleged to be of the vendor, has another signature next to it, but it is not possible to tell whether this is an attestation signature, for no name is indicated against it. I see from the sale agreement that the vendor's advocate is said to be KM Karimbhai Advocate, Mombasa. You would expect that it will therefore be him who would have attested the signature of the vendor. However, as I have mentioned, there is no indication of who has purportedly attested the signature of the vendor. If at all it is KM Karimbhai who attested it, then you would expect that as an advocate, he would place his stamp or name against his signature, but there is none. I have also looked at the transfer instrument. It is allegedly signed by the deceased and the plaintiff. The document is purportedly attested by KM Karimbhai Advocate for there is a stamp bearing that name. There is also a signature against it. However, if you compare the attesting signature in the transfer and that in the sale agreement (if we assume that what is against the vendor's signature in the sale agreement is an attesting signature by KM Karimbhai), the two signatures are radically different and bear no resemblance at all. That buttresses my finding that the person who purported to attest the sale agreement (if at all you can consider that an attestation) is not the same as the one who purported to attest the transfer. It follows therefore that it was imperative to determine who purported to attest the signature of the vendor in the sale agreement. It should be recalled that the 1st defendant denied that there was any sale of the suit property and the duty to demonstrate that there was actually a sale was upon the plaintiff. This duty entailed bringing evidence that the vendor actually sold the land and executed the sale agreement and transfer. Since the instruments needed to be attested, the evidence of the certification witness was imperative as required by sections 70 through section 72 of the Evidence Act, Cap 80, Laws of Kenya, which provide as follows :-

70. Proof of allegation that persons signed or wrote a document

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

71. Proof of execution of document required by law to be attested

If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.



72. Proof where no attesting witness found

Where evidence is required of a document which is required by law to be attested, and none of the attesting witnesses can be found, or where such witness is incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

26. The sale and transfer instruments needed to be attested pursuant to section 3 (3) of the *Law of Contract Act* as demonstrated above. Pursuant to section 71 of the *Evidence Act*, the documents needed to be proved by having the attesting witness prove its execution. No attesting witness was called by the plaintiff. The plaintiff did not claim that whoever attested the document could not be available so that the procedure in section 72 can be utilised, and in any event, there was no attempt whatsoever to make utility of section 72 of the *Evidence Act*. I do not think that the plaintiff can use the evidence of the 1st defendant, that the signatures resembled those of her husband, to his favour. The 1st defendant maintained that she is disputing the sale, meaning that the plaintiff needed to prove that there was an actual sale of the property to himself. I am afraid that the plaintiff failed to meet the test set out in section 3 (3) of the *Law of Contract Act* and sections 70, 71 and 72 of the *Evidence Act*.
27. Apart from the disputed issue of the signature and the attestation, there are other questions that cast a shadow on the alleged sale. In his oral evidence in court, the plaintiff stated that the sale was around the year 1999/2000. The alleged sale was actually in 1998. Again in his oral evidence, he was not clear on what the purchase price was. He said that the land was sold to him at between Kshs 800,000/= and Kshs 1 million. You would expect a person to have such information at his fingertips. The purported sale agreement actually shows the amount of Kshs 840,000/= as the selling price. This was a significant amount of money in the year 1998. You would certainly expect that there be proof of payment of the money. There was none demonstrated in this case. All the plaintiff did was to point at the sale agreement and say that it shows that the sum of Kshs 84,000/= is acknowledged and therefore it was paid. But given the doubts about the sale, one would have expected the plaintiff to also demonstrate that he paid the balance of the purchase price. He did not.
28. I have also had a close look at the application for Land Control Board Consent. It has no evidence of it having been submitted to the Land Control Board and bears no number. No proof of payment for it was ever produced. The copy of what is said to be the letter of consent, that was produced, and which bears the date 16 April 1998, is from the District Land Officer and not from the Land Control Board. You would expect the consent to come from the Land Control Board not the District Land Officer. That letter does not also allude to any meeting of the Land Control Board. All it states is that it is in reference to a letter dated 3 April 1998 from KM Karimbhai Advocate. I am thus not persuaded that any consent of the Land Control Board was ever given.
29. In addition, I have keenly perused the transfer instrument. The back of it states that it was registered on April 1, 1998, but there is actually no evidence of registration, for at the front of the transfer instrument, the date of registration is blank. There is also no presentation book number for that item is similarly blank. Even assuming that the date of registration is what is shown at the back of the document, which is 1 April 1998, that purported date of registration comes before the date of the purported consent to transfer, which is 16 April 1998, and also before the purported letter asking for consent (if ever there was one) which would be 3 April 1998. The certificate of lease of the plaintiff



reads 1 April 1998. Was consent to transfer being sought after the transfer has already been registered and certificate of lease issued? It just doesn't add up.

30. It should not escape our attention that the original title document was never surrendered for the purported transfer to be effected. That original title was still held by the deceased and it was produced in court by the 1st defendant. The title was issued under the regime of the Registered Land Act (repealed in 2012). Section 33 of the said statute provides as follows :-

33.

- (1) If a title deed or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the title deed or the certificate shows all subsisting entries in the register, a note of the registration shall be made on the title deed or the certificate.
- (2) If the disposition is a transfer, the certificate if produced shall be destroyed, and in that case a new certificate may be issued to the new proprietor.
- (3) If the disposition is a charge, the certificate shall be delivered to the chargee.

31. It will be observed from the above, that where a certificate of lease has been issued, then it should be produced on the registration of any dealing with the land unless the Registrar dispenses with its production. There is no evidence here of the Registrar having dispensed with its production. From section 33 (2), on a transfer, the previous certificate of title or certificate of lease was to be destroyed and a new certificate issued to the new proprietor. We still have the original certificate of lease in the name of the deceased. It follows that it was never surrendered to enable a transfer to the plaintiff. That buttresses the impression that the deceased never completed any sale of the land to the plaintiff.

32. I have also not seen any evidence of payment of stamp duty or any evidence of payment of registration fees for the transfer. Neither did the plaintiff produce any consent to transfer, given that this was a leasehold, and no rates nor land rent clearance certificates of the year 1998. These would be crucial documents required before a transfer was effected to him. What the plaintiff presented are rates payments and rent payments from the year 2002. If he somehow has these documents you would expect that he will also have the land rent and land rates clearance certificates that he used at the time of transfer in 1998 but he had none. That he was paying land rates and rents in his name does not help him much in the circumstances of this case. The mere fact that one is paying land rent and land rates by itself is not proof of ownership of land. Such may be used to build on evidence presented on ownership, but by themselves, they are not sufficient to prove ownership of the land.

33. At the end of the day, it is only the plaintiff and the deceased who know exactly what transpired between them. This court can only deal with the evidence as presented. I am afraid that from the evidence, the plaintiff has not, on a balance of probabilities, discharged the burden of proving that he actually had a valid sale agreement with the deceased, which sale agreement led to the transfer of the land to him, and that is how he has ended up having a certificate of title in his name. There are serious doubts, as I have demonstrated above, on the genuineness of the certificate of title of the plaintiff. Because of those doubts, I am not persuaded that there was an actual registration of the transfer to the plaintiff. I am thus not moved by the evidence of the Land Registrar, that the white card may have fallen off and that



is why the register does not reflect the plaintiff as proprietor. If at all there was a registration, and the plaintiff had lost all other documents, then at the very least, the presentation book should have been produced in evidence to demonstrate that there was actual registration of the transfer in favour of the plaintiff. It was not.

34. The only reasonable conclusion I can reach is that there was never any registration of transfer in the name of the plaintiff. It is more probable that it is because there was no actual registration of the transfer that the white card does not show the name of the plaintiff as proprietor and still bears the name of the deceased.
35. Without demonstrating a proper sale and a proper transfer, the plaintiff cannot be considered the rightful proprietor of the suit land. He has failed to demonstrate that his title has a genuine root. It is for the above reasons that I must dismiss the plaintiff's suit and it is hereby dismissed with costs. The register will remain reflecting the name of the deceased as proprietor. The original certificate of lease in the name of the plaintiff will be retained in the court record and will not be released so that it cannot be used to transact over the suit property.
36. Judgment accordingly.

DATED AND DELIVERED THIS 21 DAY OF JULY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

Delivered in the presence of:-

Mr Obonyo for the plaintiff

Ms. Nduku for the 1st defendant

Mrs. Waswa for the 2nd defendant

Court Assistant – Wilson Rabong'o

