



**Bay v Mulanda (Environment & Land Case 81 of 2019)  
[2022] KEELC 12675 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12675 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 81 OF 2019  
MAO ODENY, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**HANNINGTON KESI BAYA ..... PLAINTIFF**

**AND**

**KAZUNGU KARISA MULANDA ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated October 2, 2018 the plaintiff herein sued the defendant seeking the following orders:
  1. An order declaring the plaintiff as the rightful owner of plot number Gede/Mijomboni/359
  2. An order compelling the defendant to transfer the suit property by signing the transfer documents in the names of the plaintiff
  3. Costs of the suit.

**Plaintiff's Case**

2. PW1 adopted his witness statement and stated that he bought the suit property from the defendant on December 5, 1974 for a sum of kshs 1,600/- whereupon he has built houses and has been residing on the suit property.
3. PW1 also stated that in 1978 he filed a suit against the defendant in Mombasa vide Civil Suit No 116 of 1978 where a decree was issued directing the defendant to execute transfer documents in favor of the plaintiff which the defendant has declined to do to date.
4. It was PW1's testimony that the defendant filed Civil Suit No CMCC 117 of 2019 Kazungu Karisa Mulanda v Hantony Baya Mwaro in respect of plot number Gede/ Majimboni/ 354 which he has no knowledge of but was served with papers.



5. PW1 also produced an agreement dated December 5, 1974 for sale of plot no 359 Mjomboni section between him and the defendant. He further produced an acknowledgment dated September 14, 1975 for the sale of cashew nut trees to the plaintiff and that he no longer had any claim on the suit land.
6. On cross examination by counsel for the defendant PW1 stated that he had previously filed a case at Mombasa which was decided in his favor and a decree issued that the suit property be transferred in his name.
7. PW1 also stated that at the time he bought the suit property from the defendant, the agreement was drafted by the agricultural officer and was signed by all parties including the defendant.
8. PW2- Johnson Mtana stated that on December 5, 1974 the plaintiff and the defendant went to the agricultural office where they entered into an agreement for sale of the suit land.
9. He testified that they wrote an agreement to which both the plaintiff and defendant signed and was witnessed by three other people. Further that the plaintiff occupied suit land from 1974 to date.
10. On cross examination by Ms Achieng, he stated that the plaintiff was not working at the agricultural office and that he was the one who drafted the agreement in the presence of both the plaintiff and the defendant and witnessed both of them sign.
11. PW1 urged the court to grant the orders as prayed and stated that it was not true that he had leased the land from the defendant.

#### **Defendant's Case**

12. DW1 adopted his statement and stated that sometime in 1974 he leased 80 cashew nut trees at kshs 20 per tree totaling to kshs 1,600 which agreement was reduced in writing.
13. DW1 further testified that in 1976 he saved up enough money and attempted to pay the plaintiff kshs 1,600/- who declined and insisted that the DW1 had sold him the property. Further that the plaintiff threatened to evict his mother from the suit property.
14. It was DW1's evidence that in 2019 he realized that the plaintiff was erecting permanent structures on the suit property which necessitated that filing of ELC No 117 of 2019 which is still pending for hearing and determination.
15. On cross examination by the plaintiff he stated that he received kshs 1,600/- from the plaintiff which was payment for lease of the suit property but he did not sell the suit property to the plaintiff.
16. DW2- Katana Mweri adopted his witness statement and testified that he is the defendant's neighbor and that the land belongs to the defendant.
17. On cross examination by the plaintiff he stated that he was aware that the plaintiff leased the suit property but did not purchase the same. He also stated that it is true that there was a land dispute before.
18. DW3- Kadzo Kazungu also adopted her written statement dated February 18, 2022 as her evidence and on cross examination by the plaintiff she stated that she was not aware of any agreement between the plaintiff and her father (the defendant)



### **Plaintiff's Submissions**

19. The plaintiff reiterated the evidence on record and stated that he had proved his case by the production of the sale agreement dated December 5, 1974 and payment of the consideration of kshs 1600/- as the owner of the suit land.
20. It was the plaintiff's further submission that he has been in occupation of the suit property since then. That the defendant filed Land Case No 117 of 2019 in the lower court Malindi against him in plot number 354 Gede/Mijomboni.
21. He submitted that the defendant has neither been in physical control of the suit premises nor possession of the same thus he is not entitled to claim the suit property. Further that the alleged lease by the defendant was not produced in court as evidence. He urged the court to grant the orders as prayed.

### **Defendant's Submission**

22. Counsel for the defendant submitted that the purported sale agreement is in contravention of section 3 (3) of the Law Of Contracts Act thus cannot be enforced.
23. Counsel reiterated the evidence of the parties and submitted that the plaintiff did not pay for stamp duty hence the agreement is unenforceable and further that the defendant did not sell the land to the plaintiff. Counsel urged the court to dismiss the plaintiff's case with costs.

### **Analysis And Determination**

24. The issues for determination are as to whether the plaintiff is the rightful owner of the suit land and whether he is entitled to the reliefs sought.
25. The plaintiff produced a sale agreement showing that he bought the suit land from the defendant and paid the consideration of ksh 1600/- which was acknowledged by the defendant.
26. The defendant however stated that the money was for sale of cashew nut trees which he did not substantiate. There is also an acknowledgement by the defendant dated September 14, 1975 indicating that he had sold had sold cashew nuts on the suit land voluntarily for kshs 70/- and he did not have any claim on the suit land from then onwards.
27. The defendant claimed that he had leased the suit property to the plaintiff but there was no such evidence of lease. Further what would be the explanation for the plaintiff being on the suit land since 1974 uninterrupted and being allowed to build permanent structures.
28. This shows that the plaintiff had a stake as an owner of the suit land. If the defendant's version that he had leased the land to the plaintiff, why did he not ask for his land back after the lease had expired if any, and if the is so what were the terms of the lease agreement, for what period, what were the conditions of the lease and termination thereof. This evidence was not forthcoming.
29. I find that the plaintiff has proved his case on a balance of probability and enter judgment as prayed in the plaint with costs.
30. The defendant to sign the transfer documents within 30 days failure to which the deputy registrar to sign on his behalf.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF SEPTEMBER, 2022.**

**M.A. ODENY**



## **JUDGE**

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

