



**Bonea v Bonea (Environment and Land Appeal E054 of 2024)
[2025] KEELC 3787 (KLR) (7 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E054 OF 2024**

EK MAKORI, J

MAY 7, 2025

BETWEEN

OMAR BORIDE BONEA APPELLANT

AND

KHADIJA BORIDE BONEA RESPONDENT

(Being an appeal from the Judgment of the Hon. P.E. Nabwana (Senior Resident Magistrate Mpeketoni) dated and delivered on 16th September 2024)

JUDGMENT

1. In the Trial Court, the Appellant and the Respondent were engaged in a legal dispute over the ownership rights of property Plot No. 286 located in Witu, Lamu County. The Appellant asserted his claim to the property based on a transfer document dated October 17, 1997, which he contended was properly executed. Additionally, the Appellant mentioned that he had invested Kshs. 750,000/- in renovations on the property and had been collecting rent from the Kenya Wildlife Service (KWS) as the legitimate owner of the property in question.
2. The appeal was canvassed through written submissions. Based on the appeal record, the evidence provided, and the arguments from learned counsels, Mr. Oduol representing the Appellant and Mr. Omwancha representing the Respondents, the court will address the following issues: the legitimacy of the transfer instrument granting proprietary rights to the Appellant, the Appellant's entitlement to renovation funds amounting to Kshs. 750,000/-, and the determination of who will bear the costs of this appeal.



3. The appellate court is crucial at this juncture, tasked with re-evaluating the evidence and drawing its independent conclusions. In the significant case of *Okeno v Republic* [1972] EA 32 at 36, the East African Court of Appeal outlined the duties of the Court during an initial appeal as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] E. A. 424.”

4. The Respondent in the Lower Court contested the legitimacy of the transfer document, claiming she was illiterate and unaware of its signing. She also asserted that the Appellant had deceitfully utilized false ownership documents to receive rent from KWS. The Trial Court ruled in favor of the Respondent, declaring the transfer document invalid and determining that she had substantiated her claim based on the balance of probabilities. The Appellant challenges the Trial Court's conclusions, asserting that the evidence provided by the Respondent was inadequate to support her allegations and that the Trial Court incorrectly applied the legal standards related to the validity of transfer documents, documentary evidence, and the burden of proof.
5. Mr. Oduol, representing the Appellant, references the ruling in *Mbai & another (Both Suing as the Representatives of the Estate of the Late John Mbai Kavoi – Deceased) v Mbai & 2 others (Environment & Land Case 54 of 2021) [2024] KEELC 5531 (KLR) (25 July 2024) (Judgment)*, arguing that the Trial Court incorrectly determined that the transfer instrument dated 17th October 1997 was void. This conclusion contradicts the well-established principle that a properly executed transfer instrument is presumed valid unless proven otherwise. The Environment and Land Court emphasized that the responsibility to demonstrate invalidity rests with the party making the allegation. Although the Respondent claimed fraud, he did not meet the necessary burden of proof. The Court concluded that:

“Where a party alleges fraud, they must specifically plead the particulars thereof and strictly prove the same. Proof of fraud is on a standard slightly above proof in ordinary civil cases of the balance of probability but below the standard of proof in criminal cases of beyond reasonable doubt.”

6. Mr. Oduol asserted that the Appellant presented the original transfer document, demonstrating its adherence to the legal requirements for land transactions at that time. The Respondent did not provide sufficient evidence to counter this claim, resulting in the trial court's conclusion lacking evidential support. Furthermore, the Learned Magistrate overlooked the legal presumption of regularity associated with official documents. Courts are expected to affirm the legitimacy of such documents unless there is compelling evidence to suggest otherwise. The Trial Court's failure to apply this principle led to an erroneous decision. Additionally, the Learned Trial Magistrate's ruling to invalidate the transfer document did not acknowledge the legal principle that an executed transfer is presumed valid unless its invalidity is clearly established. The onus of proving the transfer's invalidity lay with the Respondent, who failed to meet this burden, leaving the trial court's determination



without evidential backing. An official document executed in accordance with the relevant land transaction laws establishes a prima facie case for ownership. The Appellant provided the original transfer document, properly executed and witnessed as per the then-applicable Registered Land Act (Cap 300) (now repealed). This evidence should have sufficed to validate the transfer unless compelling evidence to the contrary was presented. Lastly, the Respondent's assertion of illiteracy and misunderstanding of the transfer document lacked credible support, such as expert testimony or corroborative evidence. Allegations of illiteracy or misrepresentation must be substantiated by strong evidence; otherwise, the court is obligated to uphold the executed document.

7. Counsel further argued that the magistrate overlooked the doctrine of estoppel as outlined in Section 120 of the Evidence Act, which prevents a party from disputing facts they have previously acknowledged through their actions. The Respondent behaved in a manner that supported the transfer, including stopping rent collection from the property after the transfer date. This behavior confirmed the legitimacy of the transfer document, as established in *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR, where the Court of Appeal affirmed that parties are bound by their representations. It stated:

“The doctrine of estoppel serves as a legal principle that prohibits an individual from claiming something that contradicts what is suggested by their prior actions or statements.”

8. Additionally, counsel argues that the Trial Court neglected the principle of title sanctity as stated in Section 26(1) of the Land Registration Act, 2012, which safeguards a registered title holder from unfounded allegations of fraud or misrepresentation. Claims of fraud must be specifically detailed and proven to a standard exceeding a mere balance of probabilities. The Respondent did not establish fraud, making the Trial Court's annulment of the transfer document legally unsound. Moreover, the Trial Court failed to recognize the significant evidentiary value of the Appellant's original transfer document. The probative strength of original documents is considerable unless effectively contested with substantial opposing evidence. The Appellant's documentary proof was unchallenged; thus, the transfer document should have been recognized as valid. The Respondent's inability to counter the Appellant's evidence with credible proof of fraud or misrepresentation established a presumption of regularity in favor of the Appellant. Courts are required to assume the regularity of executed official documents unless compelling evidence to the contrary is presented.
9. The Appellant, therefore, submits that the Trial Court erred in its assessment of the evidence and the legal principles governing the validity of transfer instruments. The court's failure to apply settled legal principles not only undermined the Appellant's proprietary rights but also set a precedent contrary to established jurisprudence.
10. Mr. Oduol avers that the Trial Court erred in accepting the Respondent's claim that she was illiterate and unaware of executing the transfer instrument. The Respondent's evidence on this point was contradictory and insufficient to meet the evidentiary burden. Parties who execute documents are bound by their terms unless they unequivocally prove fraud, misrepresentation, or duress. The Respondent failed to establish any of these vitiating factors. Her allegations of illiteracy, unsupported by credible evidence, should not have been a basis for invalidating the transfer instrument.
11. Counsel avows that, moreover, individuals must exercise reasonable care when entering contractual arrangements. The Respondent used the Trial Court as a special purpose vehicle to limit the freedom to contract. The Respondent's failure to adduce evidence of fraud or misrepresentation further weakens her claim.



12. Counsel went further to state that the Trial Court erred in finding that the Appellant received rent from Kenya Wildlife Service (KWS) using “untruthful ownership documents.” The Appellant produced tenancy agreements and rent receipts to substantiate his ownership and entitlement to rent. This evidence was unchallenged. Since the Respondent did not provide any evidence to discredit the Appellant’s documents, the trial court’s finding on this issue was misplaced.
13. Regarding renovations, Mr. Oduol asserted that the Appellant contends the Trial Court made an error by concluding that he did not demonstrate renovations valued at Kshs. 750,000/-. Although the Appellant did not present receipts or invoices as supporting documentation, minutes indicated that the Respondent acknowledged the renovations totalling Kshs. 750,000/-, which she agreed to reimburse. This evidence was not contested during the trial and was adequate to establish that the Appellant indeed carried out renovations on the property, amounting to Kshs. 750,000/-.
14. Furthermore, the court neglected to consider the principle of restitution, which underscores the necessity of returning parties to their original state in cases of unjust enrichment. The Appellant’s expenses for renovations should have been recognized as an investment in the property, justifying restitution or acknowledgment of ownership rights. The court ruled in the case of Samuel Kamau Macharia v Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited [2003] eKLR that: When such events occur and the defendant unjustly benefits, restitution is the legal remedy, requiring the Defendant to return the enrichment received at the Plaintiff’s expense or its monetary equivalent. This is how the law addresses cases of involuntary benefit transfers resulting from impaired judgment or unmet transfer conditions.
15. Mr. Oduol contends that, additionally, the Learned Magistrate incorrectly determined that the Respondent had substantiated her case on a balance of probabilities. The Respondent’s evidence was inconsistent and did not sufficiently support her claim to the property. A party is required to prove its case on a balance of probabilities by providing credible and convincing evidence. The Respondent’s inability to satisfy this standard should have resulted in the dismissal of her claim.
16. The Appellant cites the minutes from a meeting included in the appeal record, in which the Respondent explicitly acknowledged the renovations and consented to reimburse the Appellant for the expenses incurred. These minutes serve as an admission of liability and are part of the documentary evidence available. Meeting minutes can act as binding agreements when they reflect a mutual understanding between the parties involved. When parties agree to specific terms and document that agreement, those terms become enforceable. In this instance, the Respondent’s agreement, as documented in the minutes, clearly indicates their responsibility to cover the renovation costs. The Trial Court neglected to consider the Respondent’s clear admission of liability made during the meeting. By overlooking this substantial evidence, the trial court compromised the principles of fair adjudication and the burden of proof. Once the documentary evidence was introduced and remained unchallenged, the burden shifted to the Respondent to refute the Appellant’s claims.
17. Mr. Omwancha, representing the Respondent, contended that the transfer documents underpinning the Appellants’ case were legally unenforceable as they were procured through fraudulent means and misrepresentation. The Appellant did not execute the transfer in the capacity of a transferee. Furthermore, the transfer was unregistered, thus failing to confer proprietary rights upon the Appellant.
18. The Appellant failed to present a sale agreement to substantiate the existence of a sale transaction between the parties, which contravenes the provisions of Section 3(3) of the *Law of Contract Act*.
19. The area chief, alleged to have affixed his signature on the transfer document, has denied this claim.



20. In conclusion, Mr. Omwancha asserts that in exercising its Appellate jurisdiction, this court is only permitted to interfere with the Trial Court's discretion under certain circumstances – if it is found to have been exercised injudiciously.
21. I have thoroughly evaluated the evidence and documents before the Learned Magistrate. The Respondent/Plaintiff was unequivocal in her testimony that the suit property was not transferred to the Appellant/Defendant. She asserted that she was misled into signing the purported transfer under the impression that the Appellant intended to utilize it to secure financing for renovations.
22. There is no document indicating the existence of a sale of land agreement between the parties. As the magistrate correctly noted, according to Section 3(3) of the Law of Contract Act, agreements about the sale of land must be documented in writing:

“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
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

23. The aforementioned provisions of the Law of Contract Act became effective in 2003. This section was interpreted as elucidated in the case of Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR, wherein the issue at hand revolved around an oral agreement for the sale of land entered into by the parties in the year 1964. The Court of Appeal rendered the following decision concerning the provisions of the Law of Contract Act:

“Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties, and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act came into effect on 1st June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:

- (3) No suit shall be brought upon a contract for 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;

Provided that such a 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 a 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.

25. We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in 1991. It is our view that Section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the Law of Contract Act applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the Law of Contract Act.”

24. Even if we were to assume the existence of an oral agreement for sale, it is important to note that no such agreement existed between the parties. The document at hand pertains to a transfer, which the Respondent refutes as having been obtained through misrepresentation. The Appellant failed to provide evidence before the Trial Court regarding the Respondent's sale of the contested property to the Appellant. Furthermore, the alleged transfer is grounded in misrepresentation, a finding affirmed by the Trial Court. The Trial Court correctly determined that, given the absence of a written sale agreement, this constituted a violation of established legal principles. In the case of *Silverbird Kenya Limited v Junction Ltd & 3 others* [2013] eKLR, the court articulated, inter alia:

“The plaintiff thus makes an admission that there was no agreement that was in writing yet the foundation of the suit is the said alleged oral agreement. The said agreement, having not been in writing, contravened Section 3 (3) of the Law of Contract Act and cannot be relied upon to sustain the present suit by the plaintiff. The contract is unenforceable as it related to a disposition of an interest in land and 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 Law of Contract Act. See the cases of *Rainald Schumacher v Aubrey Garth Monsey* 120081eKLR, *Laikipia Mifuqo Ranching Co. Ltd v Nanyuki Ranching Ltd* 120071eKLR and *John Michael Waniao v Alubala Abonayo Andambi* [2011] KLR where the courts declined to enforce contracts which fell foul of Section 3 (3) of the Law of Contract Act and proceeded to strike out the suits for noncompliance thereof.”

25. On the issue of renovation, the Trial Court was of the view that:

“The Defendant failed to provide proof of this on a balance of probabilities. He did not have any single receipt showing the extent of the renovations he undertook. He did not call as a witness any mason, carpenter, casual labourer, or other craftsmen to prove that he undertook repairs to the suit property. He did not even state the time frame when he undertook the repairs.



His claim that they agreed before the elders that he be paid Kshs. 750,000/- before departing from the house was, as stated in his own defence in paragraph 11, “repudiated”. The Defendant has had exclusive and unaccounted use of the suit property since the year 1997. This has not been quantified and may be way much more than the figure quoted. He leased the property to two (2) different entities. The court finds that this limb was not proven as is required by law.”

26. From the evidence and materials presented before the Learned Magistrate, I do not see anything untoward in his finding concerning the renovations. The Appellant had no authority to undertake the renovations and as elaborated, he was not paying rent and was instead receiving rent from two (2) entities. Further, nothing was produced to support the renovations. And as found by the Trial Magistrate, the purported agreement before the Elders was denied.

27. At the end, I find no merit in the appeal – I proceed to dismiss it with costs to the Respondents.

28. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 7TH DAY OF MAY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Oduol for the Appellant

Mr. Omwancha for the Respondent

Court Assistant: Happy

