



Said v Abdulsheikh & 2 others (Civil Suit 347 of 2017)
 [2022] KEELC 3178 (KLR) (7 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3178 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 347 OF 2017

M SILA, J

JUNE 7, 2022

BETWEEN

SWALEH OMAR SAID PLAINTIFF

AND

KHALID SALIM ABDULSHEIKH 1ST DEFENDANT

FIRST COMMUNITY BANK LIMITED 2ND DEFENDANT

LAND REGISTRAR, MOMBASA 3RD DEFENDANT

(Plaintiff filing suit in the year 2017 claiming that 1st defendant, who was his agent, stole his title documents around the year 2010 and transferred the suit properties to himself and later charged them to the 2nd defendant; plaintiff seeking orders to have the properties revert back to him; 1st defendant disputing the allegations of the plaintiff and stating that he purchased the suit properties for value and that he paid for the same using financing from the 2nd defendant; 1st defendant further stating that upon purchase of one property he proceeded to demolish the house therein and erected a two storey building in the year 2010; 1st defendant adducing evidence of two sale agreements, transfers, building plans, and bank statements to prove the above; 2nd defendant also availing evidence that it loaned the 1st defendant money to purchase the two properties and the purchase price was paid into the account of the plaintiff held by the 2nd defendant; court assessing the evidence and finding on a balance of probabilities that indeed the plaintiff sold the properties to the 1st defendant; plaintiff's suit dismissed; 1st defendant having a counterclaim for vacant possession which is allowed)

JUDGMENT

A. Introduction and Pleadings

1. This suit was commenced by way of a plaint which was filed on 26 September 2017. The plaint was subsequently amended on 26 February 2019. It is the pleading of the plaintiff that he is the rightful



proprietor of the land parcels Mombasa Block XXIX/76 and Mombasa/Block XVII/136 (hereinafter referred to as 'the suit properties' or separately as Plot No. 76 and Plot No. 136). He pleaded that on 5 April 2017, agents of the 2nd defendant (First Community Bank Limited) came to his house with auctioneers and informed him that they wished to sell the suit properties as there was a default on a loan that they had issued. The plaintiff pleads that he then rushed to his cupboard where he kept his documents but did not find his title deeds. He then proceeded to the land registry to do a search, which showed that the titles were now in the name of the 1st defendant (Khalid Salim Abdulsheikh). The information showed that the two plots were respectively transferred to the 1st defendant on 15 September 2010 and 14 July 2011 and charged to the 2nd defendant on the same dates of transfer. The plaintiff avers that the 1st defendant was his rent collection agent and had access to his documents which included the title deeds, PIN Certificate and passport photographs, which were in his cupboard. He contends that the 1st defendant fraudulently transferred the properties to himself and charged them to the 2nd defendant. He pleaded that he lives in one of the properties whereas the other is let out to tenants. In the suit, he seeks the following orders :-

- a. An order of permanent injunction restraining the defendants by themselves, agents, assignees and any person working under their instructions from collecting rent, transferring, selling by public auction or private treaty and/or having any dealings with plot No. Mombasa/Block XXIX/76 and plot No. Mombasa/Block XVII/136.
 - b. A declaration that transfer dated June 29, 2011 for title No. Mombasa/Block XXIX/76 and transfer dated July 14, 2010 for title No. Mombasa/Block XVII/136 be declared fraudulent and the same be cancelled.
 - c. That the 3rd defendant be ordered to cancel title No. Mombasa Block XXIX/76 and title No. Mombasa/Block XVII/36 in the name of Khalid Salim Abdulsheikh and issue the new titles in the name of Swaleh Omar Said.
 - d. General damages.
 - e. Costs of the suit.
2. The 1st defendant filed defence and counterclaim. He pleaded that he purchased the suit properties from the plaintiff sometime in the year 2010. He pleaded that in respect of the Plot No. 76 (formerly plot No. 317), he knocked down the structure and rebuilt the same with the necessary approvals, and he put in place tenants. In respect of the Plot No. 136, he pleaded that upon purchase, the plaintiff, who was his long time friend, requested for time to move out of the premises but repeatedly requested for extended indulgence until surprisingly commencing this suit. He pleaded that the properties were purchased through financing by the 2nd defendant, of which the plaintiff was aware and was present at the time of valuation of the premises, and was also aware of the demolition and rebuilding in the Plot No.76. He pleaded that at no time has the plaintiff taken up any issue over the altered status of the property. He averred that the allegation by the plaintiff that his titles were stolen is unfounded and an outright lie. He averred that there was nothing unusual in the transfer and charging of the title on the same day as this was a financed sale and the transfer and charge are registered simultaneously. He pleaded that the transfer of the properties to him were above board and the plaintiff freely appended his signature on the transfer documents and also supplied his passport size photographs, national identity card and PIN number. He further pleaded that the purchase price was paid into the plaintiff's account with the 2nd defendant. In his counterclaim he asked for an order of vacant possession for the Plot No. 136 together with mesne profits from the date of registration till the date of judgment. He also asked for a declaration that he is the rightful owner of the suit properties.



3. The 2nd defendant filed defence where she pleaded that she was a stranger to the allegations of the plaintiff. She pleaded that the suit properties were offered as security by the 1st defendant and were charged after due diligence showed that the properties were owned by the 1st defendant.
4. The 3rd defendant (Land Registrar, Mombasa) did not file defence and learned State Counsel appearing stated that the 3rd defendant will abide by any order of the court.
5. Alongside the plaint, the plaintiff filed an application for injunction. That application was heard by my predecessor, Omollo J, and orders issued on 28 September 2018, allowing the plaintiff to continue staying in the Plot No. 136 and collect rent but with an undertaking to reimburse the 1st defendant in the event that his suit does not succeed. An undertaking was duly filed on 17 October 2018.

B. Evidence of the Parties

6. PW-1 was the plaintiff. He was 65 years old at the time he gave evidence. He testified that he knew the 1st defendant as he was his agent. He therefore had free access to his house. He stated that he (1st defendant) would come to the house and he would send him on various errands. He testified that he came to know that there was an issue with his properties when auctioneers came to view them. He checked for his documents but did not find them. He proceeded to do a search and he found that the properties have been transferred to the 1st defendant. He stated that they never had any sale agreement and never signed any transfer instrument. He stated that he never discussed the sale of the properties with the 1st defendant. He denied having appeared before an advocate with intent to transact over the suit properties and never received any money as purchase price. He stated that the defendant (1st defendant) placed tenants on the properties.
7. Cross-examined, he reiterated that the 1st defendant was his agent; somebody that he would send around to tenants, pay water bills, land rates and land rents. He had no specific task and he could send him for any errands. He acted as his agent and he would be paid. He was questioned on his particular names and he stated that he is Swaleh Omar Said as noted in his identity card. He affirmed that he had a passport but he stated that the same got lost together with his title deeds. He testified that he purchased the suit properties when already developed. The Plot No. 76 had a Swahili house which was a one bedroomed bungalow. He stated that he pulled it down and erected a storey building. He would send the 1st defendant to pursue planning permission. He stated that the plans were also in the briefcase that was stolen. The Plot No. 136 also had a Swahili house which he also pulled down and made a storey building. He had the building plans for the Plot No. 136 but not for the Plot No. 76 which he explained were also stolen alongside the other documents as they were in the briefcase. He elaborated that the plans he produced were in the cupboard. He denied that the reason he had no building plans for the Plot No. 76 was because it was the 1st defendant who developed it. He was cross-examined at length on the transfer instruments. He acknowledged that they bore his passport photograph and the identity card (ID) number indicated was also his. He however denied that the signature in the transfer form was his. He also denied signing the sale agreements for both Plot No. 76 and Plot No. 136. He denied receiving any money as purchase price. He denied having a bank account with First Community Bank (2nd defendant) and stated that he was not aware of monies deposited into this account. The bank statements were put to him. They show the name Saleh Umeir Said and he denied bearing such a name. He denied that this was the name in his passport and denied having opened this account with his passport. He insisted that the 1st defendant stole his documents which he claimed were removed from his suitcase. He never made a report to the police.
8. Cross-examined by counsel for the 2nd defendant, he acknowledged that he made no report of the loss of his documents nor passport to the police. He had no document to show that the 1st defendant was



- his agent. He stated that he had given the 1st defendant the responsibility of collecting rent. He lived with his wife and son but he did not give this responsibility to any of his family members.
9. Cross-examined by counsel for the 3rd defendant, he reiterated that he had assigned the 1st defendant the duty of collecting rent. He explained that that the 1st defendant started being his agent in early 2017 and that he would bring for him the rent. He however stopped remitting it when he informed the tenants that he now owned the premises. He had no tenancy agreements nor rent receipts. He stated that they were in his briefcase thus were also stolen. He could not recall his passport number nor Kenya Revenue Authority (KRA) PIN number. He denied being a forgetful man though he had to check his identity card to confirm his ID number.
 10. Re-examined, he testified that he had an old account with First Community Bank which he closed about 5 or 6 years back. He acknowledged that the passport displayed by the 2nd defendant in her documents was his. It bears the names Saleh Umeir Said. He however denied receiving any money from the bank.
 11. PW-2 was Zainab Swaleh Ahmed, the wife of the plaintiff. They have been married for 30 years and have 4 children. The family lives together. She testified that the suit properties belong to her husband and that they developed them about 20 years back. She testified that the 1st defendant was her husband's agent and that he would enter the house, sometimes in her presence and sometimes when she was not present. He had free access. She stated that the 1st defendant was both a friend and agent of her husband and used to collect and bring rent. She stated that if the plaintiff wished to sell the suit properties he would have informed her as they would have nowhere to stay. She would not have acceded to such sale.
 12. Cross-examined by counsel for the 1st defendant she acknowledged that they made no report of the alleged loss to the police. She stated that the plaintiff put his documents in a briefcase in the cupboard. Cross-examined by counsel for the 2nd defendant, she stated that their house is of 3 bedrooms. The documents were in their bedroom. The cupboard would not be locked so as to allow children ingress to pick their clothes. It is the same place that the documents were kept. She acknowledged that the titles were in the name of her husband and if there was a sale he was the one to transact. Cross-examined by counsel for the 3rd defendant, she stated that she did not know of her husband's accounts. She could not tell if money was actually paid to any of her husband's accounts.
 13. PW-3 was Justin Samuel Kaburu. He is a retired Magistrate now practising as an advocate in Mombasa. He has been in practice for the last 17 years. Before that, he worked as a Magistrate for 20 years. Apart from being an advocate, he is also a Commissioner of Oaths and Notary Public. His evidence was in respect of the Plot No. 76, for the transfer instrument regarding this plot was allegedly attested by him. The said transfer instrument is dated 18 August 2010. Mr. Kaburu had a witness statement which he adopted as his evidence. In it he stated that he never attested to the transfer instrument dated 18 August 2010 and the advocate stamp appearing therein was not his. He stated that he has never seen the plaintiff or the 1st defendant and neither did they execute their signatures before him. He stated that he is a total stranger to the transfer. In court, he testified that though it may not be possible to remember everyone who has been to his office, he could confirm that the plaintiff and 1st defendant never appeared before him. He explained that a transfer instrument carries with it a heavy responsibility and the persons signing need to be known to him or identified by their identity cards. He pointed out that the transfer instrument in issue implies that the persons were known to him yet he doesn't know them at all. He stated that he inquired from his staff whether the alleged stamp on the instrument was from his office and they told him that it was not. He stated that his office stamp is much larger. He also denied that the signature against the stamp was his. He testified that he usually does not attest transfer documents without doing the full conveyance unless requested by an advocate. He stated that even the



transfer instrument itself has a lot of errors, and according to him, it shows that it was not done by a professional. He pointed out that the photograph of the vendor is placed on the part of the purchaser and is blank on the person who introduced them. He stated that he would have indicated whether the person is identified by his identity card or whether it was a person known to him but this part was blank. He stated that the instrument is a forgery.

14. Cross-examined by counsel for the 1st defendant, he reiterated that the signature and stamp on the transfer were not his. It was put to him that a document examiner engaged by the 1st defendant has verified the signature to be his but he maintained that it was not his signature. He however confirmed that a letter used by the document examiner to lift his known signature did bear his signature. Cross-examined by counsel for the 2nd defendant, he repeated that the signature in the transfer instrument is not his. He did not make any report to the police on the document as nothing of his was offended. He stated that after discussing with his staff he established that the stamp therein is not from his office. He did not however carry what he considered his rightful stamp. Cross-examined by counsel for the 3rd defendant, he stated that he first came to know of the transfer instrument when it was brought to his attention by Criminal Investigation Department (CID) officers sometime in the year 2019. He could see that the signature resembles his own but denied that it was his. He did not write to the Land Registrar to inform him of the forgery as the matter was with the CID. He stated that he inquired from his office administrator, one Faith Waweru, about the stamp. He stated that she is the one in charge of stamps. He had no affidavit from her. His other staff is one Mr. Murungi. He also did not have any affidavit from him. Re-examined, he stated that from his experience as a Magistrate, 8 specimen signatures are to be taken by a document examiner and in his view the examiner's report was very shallow. He stated that he had a clerk called Eric who he sacked and who later committed suicide. He was informed from his office that it may be that it was Eric who forged his signature. He claimed that he had forged his signature from the bank and stole his money.
15. With the above evidence, the plaintiff closed his case.
16. DW- 1 was the 1st defendant. He stated that he is a businessman engaged in the timber business. He buys and sells timber. He also had a witness statement which he adopted as his evidence in chief. In it, he denied stealing the plaintiff's documents. He stated that the truth of the matter is that he purchased the suit properties from the plaintiff for valuable consideration. For the Plot No. 76, he stated that he paid Kshs. 3.5 million. At the time of signing the agreement, he paid Kshs. 1,000,000/= and the balance was paid through the plaintiff's account at First Community Bank. For the Plot No. 136, he stated that he bought it for Kshs. 4 million and that he first paid a deposit of Kshs. 1,000,000/= on signing the agreement and the balance of Kshs. 3,000,000/= was also paid into the plaintiff's account at First Community Bank. All the agreements were done through his lawyer, Munyao Kenzi. He stated that he demolished the Swahili house on plot No. 76 and developed a storey building in the year 2010 after the building plans were approved. He stated that the plaintiff signed the transfer documents and also supplied his passport size photographs, PIN and ID card plus the original title deed for purposes of transfer. He denied that auctioneers were sent to the plaintiff's property as he has been paying his debt to the bank. He pointed out that the plaintiff has not exhibited any notice from auctioneers. In his oral evidence in court, he added that he came to know the plaintiff about 7-8 years before they did the sale agreement. They first met at the local café's at Bondeni. They agreed that he could buy the two properties. They started with the Plot No. 76 which was bought at Kshs. 3,500,000/=. He stated that the sale agreement was prepared by Mr. Kenzi Munyao Advocate. He paid Kshs. 1,000,000/= of which receipt was confirmed. The balance of Kshs. 2,500,000/= was financed (by the 2nd defendant). He stated that this money was paid into his account as a loan. He then transferred this money from his account directly into the plaintiff's account with the same bank. He referred to the entries in the bank statement of 4 October 2010 indicating transfer of the funds. He testified that he proceeded to



- demolish the house on the Plot and built a two storey structure. He added that the plaintiff was present and had no issue as he had sold the plot.
17. Regarding the Plot No. 136, he testified that they started discussion on it in the year 2011 after completion of the first sale. They settled at Kshs. 4 million as the purchase price. They again entered into a sale agreement before advocate Kenzi Munyao. The down payment of Kshs. 1,000,000/= was confirmed and he again took a loan to pay the balance of Kshs. 3,000,000/=. His application was approved and he again transferred Kshs. 3,000,000/= into the plaintiff's account. This was on 19 July 2011. A transfer was effected and he referred to the transfer dated 18 August 2010. He stated that the advocate who attested the transfer was the bank's advocate, one Mr. Murshid, and that he alongside the plaintiff signed the instrument. He could not explain how Mr. Kaburu came into the picture as they signed the documents before Mr. Murshid. He denied stealing any documents from the plaintiff and stated that he has only been to the plaintiff's house twice; the first time was when he was shown round the house by the seller and his wife, and the second time was when he took a valuer to value it. He testified that on the Plot No. 76, he has had tenants since the year 2010 until the order of injunction was issued. He stated that he had a tenant on the ground floor and the two other floors each paying Kshs. 10,000/=.
 18. Cross-examined by counsel for the 2nd defendant, he acknowledged having received a letter of offer for his loan and that he took the original title deed to the bank. Cross-examined by counsel for the 3rd defendant, he testified that he has never been charged with any offence of forgery and never been called to assist in any investigations. Cross-examined by counsel for the plaintiff, he stated that the Plot No. 76 was sold at Kshs. 3.5 million. He could see the agreement stating that Kshs. 1,000,000/= is paid and the balance was Kshs. 3,000,000/=. He acknowledged the discrepancy though he pointed out that the purchase price was clearly spelled out. He stated that he paid the balance of Kshs. 2,500,000/= into the plaintiff's account on 4 October 2010. On that same day, an amount of Kshs. 450,000/= was transferred back to him. He explained that the plaintiff had taken this money from him before the loan was approved and he was now refunding the money. This Kshs. 450,000/= was paid into an account held by Kongowea Kengeleni Group which the 1st defendant stated he is chairman. Another Kshs. 1,800,000/= was again transferred back to him on the same day. This money was paid directly into the 1st defendant's account. He explained that he had also earlier given the plaintiff this money around the month of May 2010. Nothing was recorded on this transaction. On the second sale, he testified that on 19 July 2011, the sum of Kshs. 3,000,000/= (being the balance of the purchase price) was paid into the plaintiff's account.
 19. He was cross-examined on the building plans which showed the Plot No. 317 but he explained that this is the new number for the Plot No. 76. He stated that he has never been before Mr. Kaburu for the transfer but only appeared before Mr. Murshid. He did not know how Mr. Murshid related with Mr. Kaburu. He also never went before Mr. Mwachungu advocate (full name, Mtana R. Mwachungu Advocate), who appears as the attesting witness in the transfer of the Plot No. 136. He only dealt with Mr. Murshid.
 20. DW-2 was Geoffrey Chania, a Superintendent of Police working with the Directorate of Criminal Investigations (DCI), Forensic Documents Examination Section, in Nairobi. He testified that he is a trained document examiner having been trained at the Documents Examination Laboratory at the DCI, the National Ribat University in Sudan, and the Regional Forensic Laboratories also in Sudan. He stated that he has had further training in Gujarat Forensic University in India and Security Laboratories in Melbourne, Australia. His work entails the examination of disputed documents; and analysis of handwritings, signatures, stamps and seals, impressions, prints and counterfeit currency. He has been in the field for the last 13 years. He testified that a request was made to their office



- by the 1st defendant for a forensic analysis of various documents. The documents forwarded were the two transfer instruments, a letter dated 17 July 2012 from J.S Kaburu Advocates containing a known signature of Mr. Kaburu; and a Memorandum of Appearance from M/s Mwahunga Mtana & Company Advocates containing the known signature of Mr. Mwahunga Mtana. He examined the known signature of Mr. Kaburu with the contested signature in the transfer instrument and formed the opinion that they were signed by the same person, i.e that it was Mr. Kaburu who signed both of them. He came to the same opinion regarding the signature of Mr. Mwahunga. He used his skill assisted by a magnification machine.
21. Cross-examined by counsel for the plaintiff, he testified that what his office received was a request for examination and even his travel expenses are provided by the DCI. He did not know the parties and his results were independent.
 22. With the above evidence, the 1st defendant closed his case.
 23. DW-3 was Mohamed Aden Mohamed, a witness called by the 2nd defendant. He is the Recoveries Manager with the 2nd defendant. He had a witness statement which he adopted as his evidence in chief. In it, he stated that the 1st defendant applied for a loan of Kshs. 3 million to purchase the Plot No. 136. A letter of offer was given to him on 10 June 2011. He stated that the 1st defendant offered the suit properties as security for the loan. The properties were subsequently charged. He stated that there was default and the 1st defendant requested for a restructuring of the loan on 24 March 2014 and committed his entire rental income towards repayment of the loan facility. This was acceded to through a letter dated 25 June 2014 and the loan was restructured. In court, he added that the 1st defendant is one of their customers at their Mombasa Branch and the bank advanced two facilities to him. He also testified that the plaintiff opened an account with the bank. He referred to the introduction letter and the account opening form said to be signed by the plaintiff. He explained that the plaintiff had these documents together with his passport, a passport size photograph, PIN, and a Kenya Power & Lighting Electricity Bill, which he stated a customer must avail before an account is opened in his name. He testified that the plaintiff delivered these documents and that he opened a savings account. It was into this account held in the name of the plaintiff that the money loaned to the 1st defendant was transferred.
 24. Cross-examined, by counsel for the 3rd defendant, he testified that the advocate for the bank was Murshid A. Mohamed under the law firm of M/s Murshid A. Mohamed Advocate. He affirmed that the first loan was of Kshs. 3 million and it was transferred into the plaintiff's account. The suit properties were charged. He stated that the first loan is cleared but the second loan has arrears of Kshs. 44,280/=. Cross-examined by counsel for the 1st defendant, he testified that the passport of the plaintiff had the names Swaleh Umeir Said and the electricity bill presented had the name Swaleh Omar. He testified that they refer to the same person and a savings account was opened in his name. The sum of Kshs. 2,500,000/= was paid into his account on 4 October 2010 through Kongowea/Kengeleni Group (account of Khalid, the 1st defendant). On 19 July 2011, a sum of Kshs. 3,000,000/= was again transferred into the plaintiff's account from Mr. Khalid. This amount was withdrawn on the same day by the account owner. He testified that the account is now dormant as this was the last transaction. He asserted that the plaintiff opened the account with his bank and he is the one who forwarded the account opening documents.
 25. Cross-examined by counsel for the plaintiff, he testified that the plaintiff opened his account on 4 October 2010. He was introduced by the 1st defendant. The amount withdrawn on 4 October 2010 was over the counter. He testified that the charge over the plot No. 76 is dated 14 September 2010 and it showed the 1st defendant as owner through transfer was effected the following day, 15 September 2010. The charge to Plot No. 136 is dated 29 June 2011 with the owner shown as the 1st defendant



though registration was done on 14 July 2011. He affirmed that the sum of Kshs. 2,500,000/= was paid into the plaintiff's account on 4 October 2010. He did not know why the sums of Kshs. 1,800,000/= and Kshs. 450,000/= were wired back to the 1st defendant's account.

26. Re-examined, he added that on 4 October 2010 there was an over the counter withdrawal of Kshs. 200,000/= by the plaintiff from his account. He explained that they were financing the 1st defendant to purchase the properties.
27. With the above evidence, the 2nd defendant closed her case.
28. The 3rd defendant did not call any witness.

C. Submissions of Counsel

29. I invited counsel to file submissions which they did. In his submissions, counsel for the plaintiff, M/s J.K Mwarandu & Company, inter alia questioned the sale agreements presented by the 1st defendant. He submitted that the agreement could not have been drawn by Munyao Kenzi Advocate, inter alia because the agreement is undated and is said to be drawn and filed by (rather than drawn by) Munyao Kenzi Advocates. He thought that the 1st defendant used the name of Munyao Kenzi Advocate because he is deceased. He submitted that the said deceased advocate had clerks and a secretary but they were not called as witnesses. He submitted that the said firm is "Advocate" and not "Advocates". He also questioned the purchase price and the discrepancy of Kshs. 3,000,000/= and Kshs. 3,500,000/=. He submitted that the plaintiff produced no cheque or bank statement to prove that he withdrew the sum of Kshs. 1,000,000/= claimed to have been paid as deposit. He submitted further that the transfer of the properties was fraudulent as they were not executed by Mr. Kaburu Advocate nor Mr. Mwachunga Advocate. He pointed to the evidence of the 1st defendant where he stated that he never signed the transfer documents before the two advocates. He also referred me to the evidence of Mr. Kaburu who denied attesting the transfer to one plot. He submitted that his client is entitled to the orders sought. He referred me to the decisions in the case of *Adrian Gilbert Muteshi v William Samoei Ruto & 4 others* [2013] eKLR; *Koinange & 13 others v Koinange* [1986] eKLR 23, and *Omullo v Small Enterprises Finance Company Limited & another* [2005] 1 KLR 668.
30. For the 1st defendant, Mr. Okanga, learned counsel, rehashed the evidence and referred me to the standard of proof in cases of fraud. He submitted that the plaintiff never pleaded any particulars of fraud against the 1st and 2nd defendants and thus any allegations of fraud remain unpleaded and unproven. He referred me to the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another*, Civil Appeal No. 106 of 2000. He submitted that the acquisition of the land by the 1st defendant was in full compliance with Section 38 of the *Land Act*, 2012 in that there was a contract in writing and he submitted that his client is entitled to proprietorship of the land. On the allegation that the transfers were not attested, he referred to the evidence of the document examiner. He submitted that his client's acquisition of the suit properties was above board.
31. For the 2nd defendant, counsel M/s Mulanya & Maondo, submitted that the 1st defendant was first granted a loan facility of Kshs. 2,500,000/= secured by a charge over the Plot No. 76, and later, a second facility for Kshs. 3,000,000/= secured by a charge over the Plot No. 136, which the 1st defendant was purchasing. The loan was later restructured in 2014 pursuant to the request by the 1st defendant. Although counsel submitted on whether there are legal charges over the suit properties duly registered in favour of the 2nd defendant, I do not think that this arose, and neither is it contested that the suit properties are charged. Counsel submitted that the burden of proof was on the plaintiff and referred me to the case of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR on the same. Counsel referred to Order 2 Rule 2 on the requirement to plead particulars of fraud and the decision



in the case of *Kuria Kiarie & 2 thers v Sammy Magera*, Nairobi Civil Appeal No. 326 of 2017, where it was held that fraud must be specifically pleaded. He submitted that the plaintiff failed to specifically plead the fraud complained of. He further submitted that no evidence of fraud was tendered before court. He submitted that the document examiner affirmed that the transfers were duly attested and also pointed out that the plaintiff never made any report to the police. He submitted that this is a classical case of a party who after receiving and utilizing the consideration now reneges on the sale.

32. No submissions were filed on behalf of the 3rd defendant.

D. Analysis and Disposition

33. The case of the plaintiff is that he never sold the suit properties and that the 1st defendant stole his documents and illegally transferred the titles to himself. This is refuted by the 1st defendant who contends that the plaintiff sold the suit properties to him and he purchased the same after obtaining financing from the 2nd defendant. I need to decide, which of the two conflicting versions, is more probable, on a balance of probabilities, based on the evidence that has been tendered.
34. Before I go into this, I think I need to dispense with one of the threshold issues that the defendants have raised, that is, that the plaintiff has not pleaded any particulars of fraud and thus his suit is incompetent. It is true that there are no particulars of fraud pleaded, but to me, it is sufficient that the plaintiff has pleaded that the 1st defendant stole his documents and transferred them to himself without the plaintiff having done so. That is really the basis of the plaintiff's case and it is sufficient pleading to found a cause of action against the defendants. I therefore do not consider it fatal that in the particular circumstances of this case, no precise particulars of fraud have been pleaded. I now go into the question of which of the two versions is more probable than the other.
35. It is of course the plaintiff's evidence that he never sold the suit properties to the plaintiff and that he never received any purchase price. He refutes the sale agreements and the transfer documents produced by the defendants and also contends that he never had an account with the 2nd defendant where part of the purchase price was deposited. The defendants on the other hand rely on the two sale agreements, one for each plot in issue, the transfer instruments, and the accounts in the name of the plaintiff held by the 2nd defendant bank.
36. In his pleadings and evidence, the 1st defendant averred that the plaintiff first offered the Plot No. 76 for sale and they agreed at the price of Kshs. 3,500,000/=. He averred that he paid a deposit of Kshs. 1 million and the balance of Kshs. 2,500,000/= was financed by the 2nd defendant and paid directly into the account of the plaintiff. I have seen the sale agreement relied upon by the 1st defendant regarding sale of the PlotNo. 76. That sale agreement is actually undated though it bears the year 2010. It proclaims that a sum of Kshs. 1 million has been paid and the balance of Kshs. 3 million will be paid on approval of a loan application. The plaintiff has tried to poke holes into this agreement inter alia because of the discrepancy in the purchase price, which is shown to be Kshs. 3.5 million, but if you total the deposit and the balance indicated, you get Kshs. 4 million. I will not nit-pick on this point, because my assessment of the agreement is that it was home made and only taken to the advocate for attestation. I am persuaded that the sale price is Kshs. 3,500,000/= despite the poor arithmetic. That agreement provides that the balance (which should be Kshs. 2,500,000/=) would be financed. There is evidence of financing from the 2nd defendant who dispatched to the 1st defendant a loan of Kshs. 2,500,000/=. I can see that this loan was dispatched to the 1st defendant through a group that he appears to belong to, known as Kongowea Kengeleni Group, for it is indicated as a borrowing for the group but to the account of the 1st defendant. The charge instrument also shows that the borrowing was on behalf of the Group. This money was disbursed to the Kongowea Kengeleni Group account then transferred



- to an account in the name of Saleh Umeir held in the same bank. This disbursement was made on 4 October 2010 and there is evidence of this disbursement from the bank statements that were produced. The plaintiff of course denies being aware of such transfer of funds into any account that he holds, an allegation that I will assess shortly.
37. The 1st defendant further stated that he then had the second agreement with the plaintiff. This agreement is dated 20 January 2011 and is for the sale of the Plot No. 136. The purchase price is indicated as Kshs. 4,000,000/= with Kshs. 1,000,000/= said to have been paid leaving a balance of Kshs. 3,000,000/=. It is the case of the 1st defendant that he also obtained financing for this balance of Kshs. 3,000,000/= from the 2nd defendant and that this money was then paid into the account of the plaintiff. There was produced a letter of offer dated 10 June 2011 for financing to the 1st defendant for the amount of Kshs. 3,000,000/= which letter of offer indicates that the purpose is for the purchase of the Plot No. 136 from the plaintiff. There is evidence of disbursement of Kshs. 3,000,000/= into the bank account of the 1st defendant, which monies were disbursed on 19 July 2011, and subsequently transferred into what was said to be the plaintiff's account on the same day. Prior to that, a valuation of the property was done and a valuation report dated 27 April 2011 was prepared by Dominion Valuers on instructions of the 2nd defendant bank, and a charge created over the property.
38. I have assessed the submissions of counsel for the plaintiff over the sale agreements but they are misplaced. If counsel wished to impugn the sale agreements, he ought to have led evidence about the manner in which Mr. Munyao Kenzi practiced, not proceed to say so at the submissions stage.
39. It was further the 1st defendant's evidence that upon purchase of the Plot No. 76, he proceeded to pull down the single storey Swahili house that was there and he erected a two storey building which he let out to tenants. This is important evidence as I will demonstrate shortly.
40. The plaintiff refutes all the above but I do not believe him. Why do I say so? It is the case of the plaintiff that he had employed the 1st defendant as his agent to do for him all kinds of errands. It is his case that because of this engagement, the 1st defendant had free access to his house and he therefore stole the title documents. Now, if at all the title documents were stolen from the plaintiff, this must have occurred around the year 2010, or before. However, when he was under cross-examination, the plaintiff stated that the plaintiff started being his agent in the year 2017. How then could he have had access to the plaintiff's house in the year 2010 as alleged? Clearly, if he only started being his agent in the year 2017, he could not have had the sort of access that the plaintiff alleges in the year 2010 or before.
41. I also find it incredulous that the plaintiff did not have occasion to find that he has lost his passport and his title documents for 7 years, if indeed his documents got lost in the year 2010 as he claims. The plaintiff does not say that he has so many other properties so that it would have been difficult to see that he is missing two title deeds. In fact, his case is that the two properties are the only properties that he has. One would expect that he would occasionally check if his title documents and passport are still where they were. I find it difficult to believe that he never had occasion to simply check on his title documents and passport for all those years.
42. The plaintiff claims that he discovered the loss of his title deeds when auctioneers came to the property with intention to auction the same on 5 April 2017 before he filed this suit in September 2017. I have no evidence of any auctioneer having visited the property in April 2017. You would expect something such as a notification of sale or a valuation report but there is nothing. I also find it odd that the plaintiff would discover that he has lost title deeds and that property has been transferred, but proceed to do nothing until 5 months had lapsed. The search documents which he availed are dated 5 April 2017. Now, if he had, by 5 April 2017 known of the illegal transfer, why would he wait for 5 months before taking any sort of action? He never reported to the police that his title deeds are lost and that there is



a stranger now registered as proprietor of his properties. He even did not place any restriction against the titles of the suit properties. I would imagine that one would be utterly shocked upon unearthing such discovery and you would expect swift action to follow. There was none taken in this instance, and no explanation offered as to why it took 5 months for the plaintiff to take any action.

43. The plaintiff also did not avail any evidence that he was the one collecting rent between the years 2010 and the year 2017 when he purportedly found out that the properties have been irregularly transferred. He also did not avail any evidence that he was paying rates for the properties between these years. You would expect the plaintiff to avail these records or avail any of his tenants as a witness that he was still collecting rent, to demonstrate the belief that he still recognized himself as the registered owner of the suit properties.
44. It will be recalled that the 1st defendant in his evidence stated that upon purchase of the Plot No. 76, he proceeded to knock down the Swahili house and developed a two storey building. You would imagine that if it was indeed the plaintiff who had done this development, he would take this allegation of the 1st defendant very seriously, and proceed to avail evidence that he was indeed the one who renovated the premises. He could for example have produced the building plans or availed as a witness the foreman who made the development. His explanation was that the building plans got lost together with the other documents, but this does not add up. He could not have lost his title documents together with the building plans, for the renovation of the building was done after the transfer of the property to the 1st defendant. The two documents could not therefore have been lost together. Moreover, if at all he prepared building plans, he needed to have copies of his title documents, and if indeed he is the one who drew the building plans, then he would have discovered that the title documents are not there when he was preparing the plans. In addition, given the importance of this evidence, if at all the building plans that he had got lost, he could have obtained copies from the offices of the County Government of Mombasa for they do maintain the records. Merely to brush this aside on the allegation that the building plans got lost is not enough. When cross-examined on when he renovated the building, the plaintiff stated that he could not remember. On the other hand, the 1st defendant did avail building plans which he stated were for the same plot. This bit of evidence makes one come to the conclusion that it is more probable that it is the 1st defendant who renovated the Plot No. 76 and not the plaintiff. Now, the plaintiff could not have allowed another person to come and renovate his premises if at all he was the owner thereof. This buttresses the position that the property must have been sold to the 1st defendant.
45. Apart from the above, there are bits of evidence that make one conclude that the plaintiff is not a truthful person. First, during examination in chief, he categorically denied bearing the names Saleh Umeir Said. This in fact was what he said :- “I am not Saleh Umeir Said. It is not true that this is the name in my passport.” It however turns out that he actually has a passport in these very same names that he denied bearing. He in fact acknowledged this when he was re-examined. Secondly, although he categorically denied having an account with the 2nd defendant, this changed during re-examination, when he suddenly remembered that he had an old account which he now stated he closed 5-6 years back. The plaintiff’s case is partly founded on the allegation that he had no account with the 2nd defendant. It now turns out that there is actually an account bearing his name and opened using his passport. And I am persuaded that this account was indeed opened by the plaintiff despite his denial. DW-3 elaborated how one opens an account and the documents that one needs to avail. All the required documents were provided. There is even a specimen signature of the plaintiff that was verified by the person who opened the account. If indeed this account was falsely opened as alleged by the plaintiff, I would expect him to take this very very seriously. At the very least, one would expect a report to the police so that investigations can be conducted on how a bank is holding a false account in his name.



Not even a complaint to the bank has been made. The inaction by the plaintiff can only lead one to the conclusion that he actually opened this account and the account was opened for purposes of receiving the purchase price. There is evidence of withdrawal of money from this account, much of which was done over the counter. DW-3 explained that for one to be able to withdraw money over the counter, one needs to identify himself. Although there can be instances of impersonation, where money may be lost over the counter, I do not have any evidence to suggest that this was the case in this instance. As I have mentioned, no report or complaint over this account or the transactions made therein has ever been made by the plaintiff, which is utterly unusual and out of the norm.

46. Although the plaintiff denied signing the sale agreements, the transfer instruments, and the bank documents, he never brought any evidence that the signatures therein are not his signatures. He could easily have done this by getting a document examiner to do a forensic examination but he never took this path. There is nothing to suggest that the signatures in those documents are not his.
47. I disbelieve the evidence of the plaintiff. The evidence of PW-2 is not useful at all. PW-2 had no specifics and merely regurgitated what her husband said. Her evidence was only aimed at self-preservation and was an attempt at helping her husband advance his theory.
48. From the foregoing, I draw the conclusion that indeed, the plaintiff had a sale agreement with the 1st defendant for the sale of the suit properties to him. The contract was fully performed, with the purchase price being paid to the plaintiff, partly through the account that he held with the 2nd defendant. It is on the basis of this sale transaction that the properties were transferred to the 1st defendant and charged to the 2nd defendant. That is the only reasonable conclusion that one can draw upon an assessment of the evidence presented. I do not believe the plaintiff in his allegations that the 1st defendant stole his title documents as I have elaborated above. There is absolutely no evidence that supports the theory that the 1st defendant was the plaintiff's agent and that he stole the title deeds from the plaintiff's briefcase.
49. I am aware that the plaintiff raised a lot of heat regarding the transfer instruments and even called PW-3 to deny having executed the same. On whether or not PW-3 executed the transfer document, I opt to believe the evidence of the document examiner that he actually did. I am of opinion that the disputed and known signatures of PW-3 were properly compared. PW-3 also claimed that the stamp on the document was not his office stamp, but he never brought his office stamp, so that it can be demonstrated that the instrument did not bear his actual office stamp. I also find it odd that he would need to consult with his staff on what the proper stamp of his own office is. One would expect an advocate to out rightly identify what is his stamp without the need of consulting his secretary or clerk.
50. However, it is not necessary to delve too deeply into the evidence of PW-3 regarding the transfer instrument, for the 1st defendant himself, in his evidence, did state that he never appeared before the two persons who are said to have attested the transfers. This, by itself, is a clear demonstration of the honesty of the 1st defendant. He was categorical (despite this being evidence that could be used against him) that the advocate they appeared before was Mr. Murshid who had been engaged by the bank. I do not know how Mr. Murshid dealt with the transfer documents, but given the evidence of the 1st defendant, it does appear that the same were not dealt with in accordance with what the law requires. That would be an irregularity which can lead to the cancellation of the transfers. But I do not find it necessary, in the circumstances of this case, to take that drastic action. I have already found that the suit properties were properly sold by the plaintiff. I have also found that the plaintiff was fully paid for the sale. The transfer instruments were not fraudulently drawn or executed but were probably dealt with carelessly. The 1st defendant placed the instruments before his advocate for him to deal with as any person transacting would. There is therefore no purpose to be served by ordering the cancellation



of the 1st defendant's title because of the irregularity in the transfer instruments, for I cannot make the order that the properties do revert back to the proprietorship of the plaintiff. I proceed to waive the irregularity in the transfer instruments and declare the 1st defendant as the owner of the properties Mombasa/Block XXIX/76 and Mombasa/Block XVII/136.

51. The plaintiff sold his interest in the two properties and no longer has any rights over the same. I find the plaintiff to be a person motivated by greed. He is simply trying to find a way of circumventing the sale that he fully participated in. I am afraid that he has presented a cock and bull story that this court is not persuaded to believe. He is clutching at straws. He cannot have his cake and eat it too.
52. The long and short of the above is that I find no merit in the plaintiff's case and it is hereby dismissed with costs. The plaintiff will pay costs of the main suit to all the three defendants.
53. Let me now turn to the counterclaim of the 1st defendant. He has pleaded that the plaintiff has failed to give vacant possession of the Plot No. 136 despite selling the property to him. He also asked for mesne profits from the date of registration till the date of judgment. I see no reason to deny the 1st defendant the order for vacant possession. He deserves this order since he is the proprietor of this property. I order the plaintiff to give vacant possession within 30 days of this judgment and in default the 1st defendant is at liberty to evict him in accordance with the law.
54. On mesne profits, unfortunately for the 1st defendant, he never led evidence of what mesne profits he has lost. He never gave any amount and I am unable to pluck a figure from the air. Mesne profits need to be specifically pleaded and proved for they are in the nature of special damages and I am afraid that this was not done in this case. I will not make any award for mesne profits.
55. However, the 1st defendant is entitled to rents that accrued to the plaintiff from the time this court made the orders of injunction. The plaintiff did give an undertaking to avail these sums of money in the event that he lost the suit. He has lost the suit and he needs to make good his undertaking. If he does not do so within 30 days of this judgment, the 1st defendant is at liberty to apply for accounts, and upon the same being ascertained, will be at liberty to execute for the same if they are not paid.
56. For the avoidance of any doubt, from the date of this judgment, the plaintiff has no right to continue collecting rent from any of the suit properties and it is the 1st defendant who is entitled to collect the same.
57. I allow the counterclaim to the above extent. The 1st defendant will also have costs of the counterclaim as against the plaintiff.
58. Judgment accordingly.

DATED AND DELIVERED THIS 7TH DAY OF JUNE 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT MOMBASA

