



Ali v Mwaniki (Civil Appeal E187 of 2024) [2025] KEHC 6338 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E187 OF 2024
FN MUCHEMI, J
MAY 15, 2025**

BETWEEN

ABDULKADIR ALI APPELLANT

AND

ISAAC NJOROGE MWANIKI RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. D. Milimu (SRM) delivered on 8th July 2024 in Thika CMCC No. 984 of 2012)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Senior Resident Magistrate in CMCC No. 984 of 2012 whereby the trial court entered judgment in favour of the respondent in his capacity as an agent for a sum of Kshs. 2,300,000/- arising out sale of property land parcel number Thika Municipality Block 29/30.
2. Dissatisfied with the court’s decision, the appellant lodged this appeal citing 10 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact by failing to consider and render herself on the preliminary objection raised by the appellant in his Statement of Defence to the effect that he is not the personal representative of Ali Mohammed and that the substitution was done contrary to Section 82 of the *Law of Succession Act* and Order 24 of the Civil Procedure Rules.
 - b. The learned trial magistrate erred in law and in fact in holding that the appellant was the trustee of his late father.
 - c. The learned trial magistrate erred in law and in fact in failing to consider that the appellant at best could only have been an agent of his late father, thus could not be sued in his individual capacity as an agent of a disclosed principal.



- d. The learned trial magistrate erred in law and in facts in relying on the contradictory evidence by the Advocate John Muturi Njoroge and that a written agreement existed between the plaintiff and Ali Mohammed, which agreement was not produced in evidence before the court.
 - e. The learned trial magistrate erred in law and in fact in finding that the respondent was entitled to an agency fee of Kshs. 2,300,000/- being 5% of the purchase price , thus creating and rewriting a contract between parties.
3. Directions were issued that parties put in written submissions and the record shows that the appellant complied by filing his submissions on 17th March 2025. The respondent on the other hand had not filed his submissions by the time of writing this judgment.

The Appellant's Submissions

4. The appellant submits that he raised a preliminary objection in his Statement of Defence dated 4th October 2019 to the effect that the substitution of the initial defendant, Ali Mohammed with him was done contrary to Section 82 of the Law of Succession Act and Order 24 of the Civil Procedure Rules. The appellant argues that he is not the administrator of the estate of the late Ali Mohammed and thus he was wrongly substituted as only a personal representative has the capacity to represent a deceased person. The appellant further argues that the respondent in his application dated 9th November 2018 sought to substitute Ali Mohamed with him on the allegation that he is the administrator of the Estate of Ali Mohamed. The respondent annexed copies of the death certificate of Ali Mohamed and the appellant's identity card. There was no evidence in terms of grant of letters of administration intestate annexed to the said application to prove that he was the administrator of the estate. The appellant submits that he is not the administrator of the estate of Ali Mohamed as the Kadhi Court at Nairobi in Succession Cause No. E016 of 2021 In the Matter of the Estate of Ali Mohamed confirmed that the administrators of the said estate are Fatuma Hassan Awadh and Abdi Nasser Ali Mohamed who were issued with letters of administration on 16th February 2023.
5. The appellant submits that neither the respondent or himself pleaded that he is a trustee of his late father Ali Mohammed. Furthermore, the trial court disregarded the matter in which he was made a party to the proceedings and also contradicted itself by holding that he was sued because he was appointed as a trustee of his late father. The appellant argues that he was made a party to the lower court proceedings by substitution of his late father on allegation that he is the administrator. Relying on the cases of Stephen Ndolo Wambua vs Beatrice Mbula Mutilu & 2 others [2019] eKLR and Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR, the appellant submits that parties are bound by their pleadings and that any evidence that was contrary to the averments in the pleadings must be disregarded. The appellant submits that the trial court went beyond the issues raised by the parties in their pleadings and came up with its own issue and finding that he was a trustee.
6. The appellant submits that even though there was an agency relationship between the respondent and Ali Mohamed, the same cannot be enforced against him by virtue of privity of contract and in any case the agency was terminated upon the principal's death in 2017. The appellant argues that it is trite law that a principal's death terminates the agency immediately/by operation of law. Furthermore, an agent is not personally liable when acting for a disclosed principal. In light of the foregoing, the appellant argues that even assuming that he was the agent of his late father, he cannot be held liable for the acts and omissions of his late father arising from the agency relationship between his late father and the respondent since he would then have been an agent of a disclosed principal. Similarly, the appellant submits that he could not be held liable for an act or omission done in his capacity as an agent of Ali



- Mohamed, the disclosed principal. To support his contentions, the appellant relies on the case of Victor Mabachi & Another vs Nurtun Bates Limited [2013] KECA 204 (KLR).
7. The appellant submits that although John Muturi Njoroge, the advocate testified that he drew up a memorandum of agreement depicting the nature of the relationship between the defendant and the plaintiff, he did not produce the said document. Furthermore, the witness did not have any evidence to support that the allegations that the respondent would be paid a commission of 5% of the purchase price. The appellant further submits that although the advocate's testimony centred around him, there is nowhere in his witness statement he mentioned the appellant. Thus, the appellant submits that the evidence of John Muturi is of no probative value at all as he did not record any witness statement after the Amended Plaint dated 22nd November 2018. The appellant argues that the trial court further disregarded DW2's evidence that he was not a party to the agreement for sale, that the commission of 5% is not reflected in the agreement and that there is no other agreement and that he was not a party or an agent to the agreement. The appellant submits that the evidence of DW2 is contradictory. Further pursuant to Section 134(1) of the *Evidence Act*, the advocate John Muturi Njoroge having acted for the late Ali Mohamed in the alleged agreement for sale could not give evidence against him on account of advocate client privilege. To support his contentions, the appellant relies on the case of King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) & Another vs M/s Kaplan & Stratton Advocates [1993] KECA 57 (KLR).
 8. The appellant submits that it is not the business of the court to rewrite parties' contracts. The appellant argues that there was no evidence that the respondent was to be paid 5% commission by the late Ali Mohamed and DW2 did not produce any agreement in court nor did he give any explanation why he did not produce it. During cross examination, DW2 confirmed that he did not have the said agreement and that there was no other agreement other than the agreement of sale between the late Ali Mohamed and Tapasiya Bhavan Limited. The appellant argues that both he and the respondent are not party to the agreement. Furthermore, the agreement for sale dated 7th July 2010 does not provide for the respondent's claim for a commission of 5%. The appellant argues that in finding that the respondent was entitled to an agency fee of Kshs. 2,300,000/-, the trial court created a contract between the late Ali Mohamed and the respondent and by extension between him and the respondent thus disregarding the principle that a court cannot rewrite a contract between parties. To support his contentions, the appellant relies on the cases of National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd (2002) 2 EA, 503, (2011) eKLR and Agricultural Finance Corporation vs Lengetia Limited & Jack Mwangi [1985] KECA 58 (KLR).
 9. The appellant submits that the trial court did not evaluate the pleadings and evidence on record as it failed to note that paragraphs 7 and 8 of the Plaint dated 7th December 2012 and the Amended Plaint dated 22nd November 2018 are the same yet they refer to two different parties. Similarly the trial court failed to consider that there was no witness statement filed by the respondent and John Muturi Njoroge after he was made a party to the proceedings through substitution. The appellant further submits that the trial court in its judgment did not make any reference to the submissions filed by the parties' advocates and the entire judgment is bereft of any evidence that the court considered the submissions and the authorities relied upon, which authorities are binding upon the trial court.
 10. The appellant relies on Section 107 and 109 of the *Evidence Act* and the case of Kyalo Elly Joy vs Samuel Gitahi Kanyeri [2021] eKLR and submits that the respondent did not discharge both the legal and evidential burden as he did not adduce any evidence to show that he was entitled to a commission of 5%.
 11. Relying on Section 27 of the *Civil Procedure Act* and the case of Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2014] eKLR, the appellant submits that he ought to be awarded costs of the appeal and the lower court proceedings. The appellant further urges the court to release



the security deposited by him as a condition for stay of execution pending hearing and determination of the appeal.

Issue for determination

12. The main issue for determination is whether the appeal has merit.

The Law

13. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

14. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

15. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether appeal has merit.

16. The appellant argues that the trial court erred by allowing him to be sued as an administrator without any evidence to that effect being presented before the court.
17. The record shows that one Ali Mohamed, the deceased defendant in the suit in the trial court died on 15th November 2017. The law under Order 24 Rule 4 of the Civil Procedure Rules mandates that upon death of a defendant and where the cause of action survives, then the plaintiff should make an application to cause the legal representative of the deceased defendant to be made a party to the suit. Order 24 Rule 4(1), (2) & (3) provides:-

Where one of two or more defendants die and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole



surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.

18. The respondent filed an application on 9th November 2018 seeking substitute the appellant herein as the administrator of the estate of Ali Mohamed in place of Ali Mohamed. The trial court allowed the application on 12th November 2018 as the same was not objected. However, the suit proceeded undefended and judgment was delivered on 10th December 2018 but the same was set aside and the appellant allowed to defend the claim. From his Statement of Defence, the appellant maintained the issue of substitution and even filed a preliminary objection seeking to have the suit struck out as he argued that he is not an administrator or legal representative of the estate of Ali Mohamed and therefore the substitution was a nullity.

19. The definition of legal representative is provided for in Section 2 of the *Civil Procedure Act* as:-

Legal representative means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

20. It is trite law that the procedure of appointing such legal representative fell under the *Law of Succession Act*. Furthermore, when a question of whether or not a party is a legal representative to a deceased defendant's estate, the court has the power under the provisions of Order 24 Rule 5 of the Civil Procedure Rules to determine such question. Order 24 Rule 5 of the Civil Procedure Rules provides as follows:-

Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court.

21. As pointed out Order 24 Rule 4 of the Civil Procedure Rules is clear that the person to be made a party is "the legal representative" of the deceased's estate. Thus when the appellant raised the issue before the trial court, the court ought to have interrogated whether the respondent proved through letters of administration or grant that the appellant was the legal representative of the estate of the deceased. On perusal of the trial court judgment, the trial court held that the appellant denied being the administrator of the estate of the deceased claiming that it was his brother and sister who were administrators of the estate. However, the appellant failed to provide a grant in support of his assertions. The trial court erred in law as Order 24 Rule 4(1) of the Civil Procedure Rules is clear that upon the death of the defendant, the plaintiff ought to substitute the deceased with a legal representative of his estate. The onus of moving the court for substitution is on the party seeking to substitute a deceased and not the one likely to obtain letters of administration. Furthermore, the provision does not allow a person to be sued in his individual capacity. One can only be sued in his capacity as the legal representative of the deceased's estate. That notwithstanding, the appellant annexed a copy of Nairobi Kadhi's Court Succession Cause No. E016 of 2021 in the Matter of the Estate of Ali Mohamed which indicates that the administrators of the estate of the deceased are Fatuma Hassan Awadh and Abdi Nasser Ali Mohamed who had been issued with letters of administration intestate on 16th February 2023.



22. I have perused the judgment of the learned Magistrate. The finding was based on the evidence of the advocate one Moturi Njoroge. He said that he included the appellant in the agreement because the appellant is the one who obtained clearance and paid rates required for the transaction as the advocate testified before the court on behalf of his father. The advocate said the appellant was appointed as the trustee of his deceased father in the transactions. This was the main reason the advocate included the appellant's name in the agreement between the respondent and the deceased. Section 82 of the [Law of Succession Act](#) and Order 24 Rule 4 (1) of the Civil Procedure Rules are very clear as to substitution of a deceased person. The appellant testified that he was not the administrator of the estate of his late father. The administrators were known to the court in that their particulars had been presented before the court in evidence.
23. It is my finding that the court erred both in fact and in law in holding the appellant liable for the debt of a deceased person and completely exonerated liability on the legal persons in the estate of the deceased.
24. The appellant has satisfied this court that the magistrate acted contrary to the law in finding the appellant liable for the debt owed to the respondent.
25. I find that this appeal has merit and hereby set aside the judgment of the court below delivered on 8th July 2024. It is hereby substituted with a finding of dismissal of the said suit for lack of merit with costs to the appellant.
26. The appeal is allowed and the appellant is awarded the costs.
27. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 15TH DAY OF MAY 2025.

F. MUCHEMI

JUDGE

