



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 1 OF 2010**

**ATIQ MOHAMED MOHAMED NAAMAN (Suing as the duly appointed agent for and on behalf  
of ABUBAKAR MOHAMED)..... APPELLANT**

**V E R S U S**

**HEMED SALIM .....**  
**..... RESPONDENT**

*(An appeal from the Judgment of Hon. L. Mutende (SPM) delivered on 8<sup>th</sup> December, 2009 in CMCC  
No. 3685 of 2005)*

**JUDGMENT**

1. Appellant **ATIQ MOHAMED MOHAMED NAAMAN** suing as the duly appointed agent of **ABUBAKAR ABDALLA MOHAMED** filed a case before Mombasa Chief Magistrates court being **Civil Case No. 3685 of 2005** against the Respondent **HEMED SALIM** seeking his eviction from property **Mbsa/Block XXXIV/42** and for mesne profit of Kshs. 12,000/- per month from February 2005 until vacant possession is surrendered. In that case he pleaded that he bought the property on or about the year 2000 from the beneficiaries of the estate of **SHARIFFA ALI BIN ABUBAKER** (Deceased). That the Respondent was one of those beneficiaries. That the Respondent unlawfully entered the property and the house thereof and hence Appellant's claim for vacant possession.
2. After hearing the case the Learned trial Magistrate dismissed the claim of the Appellant and this appeal is against that dismissal.
3. The role and duty of this Court as the first Appellate Court has been the subject of many decisions such as follows-

**“JAMES ODERA T/A A. J. ODERA & ASSOCIATES v JOHN PATRICK MACHIRA  
T/A MACHIRA & CO. ADVOCATES [2013]eKLR the Court stated-**

**‘This being a first appeal, we are reminded of our primary role as a first Appellate Court  
namely; to re-evaluate, re-assess and reanalyze the extracts on the record and then  
determine whether the conclusions reached by the learned trial Judge are to stand or not  
and give reasons either way. See the case of KENYA PORTS AUTHORITY –Vs-  
KUSTON (KENYA) LIMITED (2009) 2EA 212 wherein the Court of Appeal held inter alia  
that:-**

**“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”**

**In exercising that jurisdiction the Appellant ought to bear the caution discussed in the case PETERS –Vs- THE SUNDAY POST LIMITED (1958)E.A 424 viz-**

**“... whilst an Appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the Appellate Court will not hesitate so to decide ....”**

4. Appellant gave evidence to the effect that the beneficiaries, who included the Respondent entered into an agreement for sale of the property which copy of agreement he produced before Court. That agreement was dated 27<sup>th</sup> July 2000. Parties agreed that the purchase price of Kshs. 1,200,000/- would be paid by Kshs. 200,000/- on signing the agreement and the balance was payable on execution of the transfer. The following were the terms and conditions of that Agreement-

**“OTHER TERMS AND CONDITIONS**

1. **Vendors to immediately take steps to obtain the Deceased Grant.**
  2. **If the Grant is not obtained within three years from the date of this Agreement this Agreement will be deemed cancelled and the Vendors jointly and severally undertake to refund the deposit hereby paid to the purchaser.**
  3. **Law Society conditions for Sale (1989) Edition will apply hereto except where otherwise stated.**
  4. **All income and outgoings pertaining to the property will be apportioned as at the date of completion of transfer. Until then the Vendors will continue to receive the income and pay outgoings as heretofore.**
  5. **Vendors to bear the legal costs of obtaining the Grant of Letters of Administration and any other costs incidental thereto. Purchaser will bear the costs of transfer including stamp duty registration charges etc.**
  6. **K. M. Karimbhai Advocate will represent both the Vendors and the Purchaser.**
5. A grant was issued and confirmed as per those conditions on 7<sup>th</sup> October 2002. Before that confirmation the beneficiaries asked and were given Kshs. 300,000/- as part payment of the purchase price. The balance of the purchase price that remained was Kshs. 700,000/-. Thereafter the property was transferred to the Appellant; the Title was exhibited in evidence.
  6. Appellant testified that the beneficiaries were paid Kshs. 700,000/- the balance of the purchase price. But that despite the transfer of the property to the Appellant and the payment of the purchase price Appellant testified he had not obtained vacant possession. Appellant stated that the Administrator of the estate had informed him that the Respondent had refused to vacate the property. That such refusal had no basis and particularly it is Appellant’s claim that the Respondent had failed to pay rent of Kshs. 12,000/- per month. That the Respondent broke and

entered the house after the keys to the house had been given to the Appellant.

7. The second witness for the Appellant was the Administrator, namely Abdul Suji Salim. He confirmed that the Deceased owned the property. He stated that he was appointed administrator. That the beneficiaries sold the property to the Appellant and that even the Respondent was a signatory to the agreement for sale. That the property was transferred to the Appellant after the grant was confirmed and after the balance of the purchase price was paid.
8. In his defence Respondent confirmed he was a party to the agreement for sale of the property with Appellant. However after stating so in chief Respondent stated-

**“One of the beneficiaries was to obtain letters of administration. It was Abdul Sufi Salim (PW2). It is after obtaining of the Grant that we have (sic) to enter into a sale agreement. The Grant of representation was obtained in October, 2002.”**

He then proceeded to identify that grant exhibited in evidence. He stated that the Appellant had not to date paid the balance of the purchase price. He then stated-

**“It is not true that I have refused to vacate a house which is (sic) for another.”**

9. The second witness for Respondent, Mariam Salim Ali, a sister of the Respondent and the Administrator of the Estate confirmed that-

**“Our brother [Abdul Sufi Salim] is the one who had authority to become the Administrator ... I do not know if my brother is paid the money .... Hemed stays in the house because we did not know if the money was paid.”**

10. After receiving that evidence the learned trial Magistrate, as stated before dismissed Appellant's case. In so doing in her considered judgment the trial Magistrate stated-

**“By an agreement dated 27<sup>th</sup> July 2000 between the heirs of the estate of Sharrifa Abubakar and Abubakar Abdalla Mohammed, they sold off the property – Msa/Block XXXVI/42. At the time of the said sale of the property, no letter of administration had been obtained. The persons who purported to dispose off the property therefore had no capacity to enter into any sale agreement with any person on behalf of the Estate of the deceased, Sharrifa Ali Bin Abubakar. The makers of the agreement which is indeed null and void did appreciate the fact that they were bound by the law of succession that is why one of the term of the said agreement stipulated that the outstanding balance of one (1) million could only be paid after the grant of letters of administration had been obtained and confirmed.**

**Section 45(1) of the Land Succession Act alluded to by Counsel for the defence is very clear. No person can dispose of the property of the Deceased unless otherwise authorized by the Act. According to the Land Succession Act, immovable property cannot be sold before confirmation of the grant. The grant of letters of administration intestate in the matter was confirmed on 30<sup>th</sup> October 2002. There was however no authority for the beneficiaries mandating the administration of the estate to dispose of the property. This being the case the Plaintiff has failed to establish his case on a balance of probabilities. The case is hence dismissed with costs to the defendant.”**

11. Although Appellant raised 6 grounds of appeal I am of the view those grounds can be considered together. Those grounds of appeal are-

- **The Learned Magistrate erred in law and fact in dismissing the Plaintiff's case on unpleaded issues and grounds.**

- **The Learned Magistrate erred in law and facts in failing to give reasons in the judgment.**
- **The Learned Magistrate erred in law and fact in making the case for the defence.**
- **The Learned Magistrate erred in law and fact in failing to interpret a properly entered and written contract.**
- **The Learned Magistrate erred in law and fact in failing to arbitrate on the matter presented by the Plaintiff and waded into irrelevant matters.**
- **The Learned Magistrate erred in law and fact in dismissing the Plaintiff's case.**

### **ANALYSIS**

12. In my considered view those grounds call the Court to determine two issues; that is-

- i. **Was the Appellant's case defeated by provisions of Section 45(1) of the Law of Succession Act Cap 160;**
- ii. **If not, did the Appellant prove his case at trial.**

### **ISSUES NO. (i)**

13. Section 45(1) and (2) is in the following terms-

**“45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

**(2) Any person who contravenes the provisions of this Section shall-**

**(a) be guilty of an offence and liable to a fine not exceeding ten**

**thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**

**(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”**

14. I have considered the submissions of the Learned Counsel for Respondent Mr. Khatib in support of the dismissal of the case on the ground that there was contravention of Section 45 of Cap 160. He submitted that the trial Court was correct to have refused to enforce an illegal agreement of sale because the vendors had no capacity to enter into that agreement.

15. In order to understand Section 45 it is necessary to dissect it. The title of that Section, in the Act, is **“protection”**. The margin note states: **“No intermeddling.”** It is clear from the title and margin notes that the intention of Parliament was to protect the property of a Deceased person before Grant is issued. The Section protects that by penalizing any act of possessing or disposal of Deceased's property before a Grant is issued; and making the person who possesses or disposes that property answerable to the Executor or Administrator. I do not see that Section enabling a Court to dismiss a case. In my view the trial Court fell into grave error in dismissing the Appellant's case on that ground. This is because the trial Court had before it the Appellant's title to the property. The subject property was in the name of the Appellant. A case in point is **SIMON NJAGE NJOKA –Vs- SIMON GATIMU KANYI [2007]eKLR** where Justice M.S.A.

Makhandia (as he then was) stated-

**“In this case, the Learned Magistrate was confronted with a fairly straight forward case. The case was for eviction of the Appellant from land parcel number Baragwi/Kariru/1932 on account of him being a trespasser. Her task was not to investigate the title. It was not the business of the trial Court to investigate how the title was acquired. Yes the Respondent might have pleaded in his defence that the Appellant had acquired the land illegally. However the particulars of the illegality were not given in the defence. Order VI rule 4 of the Civil Procedure Rules specifically provide for matters which must be specifically pleaded. It is worded as follows ....”**

16. Similarly in this case Respondent did not plead that the Appellant’s case was defeated by lack of administration and consequently Section 45 of Cap 160 was breached. The Respondent and the trial Court were bound by the pleadings presented before Court. The Court of Appeal in the case-

**“Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014]eKLR** cited the following cases to show that principle of Law Lord Denning in JONES –Vs- NATIONAL COAL BOARD [1957]2 QB 55 that-

**“In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”**

**ADETOUN OLADEJI (NIG) LTD –Vs- NIGERIA BREWERIES PLC S.C. 91/2002, jdge of Nigeria Supreme Court Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows-**

**“... It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”**

17. The first issue identified is found in favour of the Appellant.

#### **ISSUE NO. (ii)**

18. The title of the property is in the name of the Appellant. The title was registered under the Registered Land Act Cap 300 (now repealed). Under Section 27 of that Act the interest of a registered owner of land is asserted as follows-

**“27. Subject to this Act-**

- a. **The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**
- b. **The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”**

That Section provided that a registered proprietor of property had absolute ownership together with all rights of such ownership. Such right must and do include possession; which is what the Appellant sought by his case in Magistrate’s Court. The decisions of the Courts have supported

those provisions of that Section such as the case **THOMAS ONSERIO ONGUBO –Vs- LABAN MASINJIK [2006]eKLR** as follows-

**“In the instant case, the Defendant is resisting the Plaintiff’s claim based on what he states was a promise given to him that he would be allocated the suit land.**

**His defence was that the Plaintiff purchased the said parcel of land and got himself registered under dubious circumstances. Although the Defendant has said that the Plaintiff was fraudulently registered as the owner of the suit land, no such averment of fraud was made in his defence neither was the said alleged fraud particularized as required by law. What I have before me is a registered owner whose title has not been challenged and who wants to secure possession from an illegal occupant of his land.”**

19. What is outlined in the above case is precisely what Appellant seeks and has sought since he became the registered owner of the property. There is no basis brought before Court by the Respondent which can resist Appellant’s claim.
20. Appellant apart from seeking vacant possession also sought mesne profit. He however did not prove this. That claim is in the nature of special damages and which he was required to specifically prove. He did not. He did bring to the Court a rent assessment perhaps based on the rental income obtained in the neighbouring property. Having failed to do so that claim fails.

### **CONCLUSION**

21. In the end the Appellant’s appeals succeeds. The judgment of the Magistrate’s Court in **Mbsa CMCC No. 3685 of 2005** is hereby set aside and is substituted with the following orders-
- a. **Appellant shall obtain immediate possession of the house on property MOMBASA/BLOCK XXXIV/42. In default of the Respondent surrendering that possession leave is hereby granted for his eviction.**
  - b. **The Appellant is granted costs of the Mombasa CMCC No. 3685 of 2005 and the costs of this appeal.**

**DATED and DELIVERED at MOMBASA this 5<sup>TH</sup> day of MARCH, 2015.**

**MARY KASANGO**

**JUDGE**