



**Said (Suing as Administrator of the Estate of Mohamed Said Ali Deceased) v Bwana
(Environment & Land Case 5 of 2020) [2021] KEMC 1 (KLR) (6 August 2021) (Judgment)**

Neutral citation: [2021] KEMC 1 (KLR)

**REPUBLIC OF KENYA
IN THE LAMU LAW COURTS
ENVIRONMENT & LAND CASE 5 OF 2020
AT SITATI, PM
AUGUST 6, 2021**

BETWEEN

**BWANAHERI MOHAMED SAID (SUING AS ADMINISTRATOR OF THE
ESTATE OF MOHAMED SAID ALI DECEASED) PLAINTIFF**

AND

MOHAMED BWANA DEFENDANT

JUDGMENT

1. This case was initially filed at the Mpeketoni Law Courts before the High Court ordered its transfer to Lamu law Courts vide an order of the Hon. Lady Justice Korir-Lagat.

In the Complaint instituting this suit dated 25th October, 2018, the Plaintiff prayed for the following reliefs:

- a. A permanent injunction restraining the Defendant by himself, his agents, servants, representatives or any other person claiming under him from interfering, wasting, damaging, selling, disposing of, alienating or from adversely dealing with LL That permanent residential house standing on Plot 644 situated at Tundani village in Lamu Island within Lamu County.
- b. A declaration that the sale agreement made and executed on 25th May, 2010 between the Defendant, the Plaintiff's deceased brother ALI Mohamed Said and the Plaintiff for the sale of all that permanent residential house standing on Plot No. 644 situated at Tundani village in Lamu Island within Lamu County is null and void.
- c. An order compelling the Defendant or any other person occupying the suit premises known as all that permanent residential house standing on Plot 644 situated at Tundani village in Lamu Island within Lamu County under the authority of the Defendant to give vacant possession and deliver the suit premises to the Plaintiff.



- d. An order compelling the Defendant to give accounts of the rent collected and expenditures for the accounting purposes to determine the losses and profits realized in the suit premises known as all that permanent residential house standing on Plot No. 644 situated at Tundani village within Lamu Island within Lamu County since the execution of the said agreement.
 - e. An order that the Plaintiff do refund to the Defendant the money paid by the Defendant in respect of the sale of the suit premises known as all that permanent residential house standing on Plot No. 644 situated at Tundani village in Lamu Island within Lamu County.
 - f. No order as to costs.
 - g. Any other or further relief that the Court shall deem fit and just to grant.
2. The Plaintiff was duly verified by an affidavit of similar date. Accompanying the Plaintiff were the following:
1. List of documents dated 25th October, 2018 containing 5 annexed documents Limited grant of letters of administration dated 9th October, 2018 Certificate of death dated 4th January, 2018 Chief's letter dated 11th June 2018 by Ali Jelle Farah Abrogation deed of 21st October, 2000. Sale agreement of 25th May, 2010. 5 photos of the present building.
 3. The firm of Omwancha & Company Advocates represented the Plaintiff in these proceedings. The plaintiff gave evidence on 30th November, 2011 and produced his 6 exhibits as contained in the bundle. He was duly cross-examined. In summary his case was that he wrongfully sold the house-without-land to the defendant because it belonged to the plaintiff's father. He asked for a revocation of the transaction and a refund to the Defendant of the transaction sums.
 4. The Defendant entered appearance and filed a Statement of Defence dated 21st June, 2019 praying for a dismissal of the suit with costs. A.A. Mazrui & Company Advocates represented the Defendant. The defendant testified on 27th May, 2021 when he affirmed that he purchased the property from the Plaintiff and his brother and paid the full consideration. He produced 5 exhibits as listed in the bundle of documents: Sale agreement of 25th MAAAY, 2010. Goodwill agreement dated 11th March, 2011 Mombasa Kadhi's order of 5th July, 2011 Lamu Kadhis' ruling dated 10th May, 2018. Photos of the building under construction Summary breakdown of costs incurred in the litigation

Issue for Determination : Validity of the Sale Transactions and Ownership of the Subject Property

5. The tested evidence in the court record shows that on 25th May, 2010 the Plaintiff and his brother offered to sell and entered into a written sale agreement with the Defendant for the sale of the house without the land. The purchaser accepted the offer resulting in a sale transaction that was duly witnessed and drawn up in the presence of a legal representative namely Mr. Khatib, Advocate of the High Court of Kenya.
6. The further tested evidence shows that after the execution of the said sale agreement, the Purchaser paid the full consideration for the purchase of the house without land. This was by way of Kenya Shillings 70, 000 being 10% towards the purchase of the said house and a subsequent cash clearance of the outstanding transaction balances of Kshs 700,000/=
7. The further tested evidence shows that on 11th March, 2011 the Plaintiff entered into an addendum fresh agreement with the Purchaser for the payment of what the parties called the "goodwill" of the house. This amount was paid in full in the presence of an advocate. The said advocate was the legal representative to the 2 sides.



8. The uncontested evidence shows that at the time of negotiating the price, the 2 brothers (sellers) were in actual physical possession of the house. they relinquished their possession to the Defendant upon the execution of the sale agreement and their joint receipt of the various payments made by the purchaser towards the completion of the sale.
9. The question to be decided is whether or not these transactions were valid or invalid. On the one hand, the Plaintiff avers that these transactions were invalid on the ground that the house without land belonged to his now deceased father and that he together with his brother had no authority to transact in the said house. in support of his assertion, the Plaintiff produced as P.Ex.1 a death certificate dated 4th January, 2018 showing that their father died on 29th May, 2010. The plaintiff asserts that this date of death was significant because it happened 4 days after they had recorded the sale agreement on 25th May, 2010 when the father was still alive.
10. The plaintiff contended that since the father was alive as of 25th May, 2010 it was the father who had the legal authority to transact by selling the said house without land. The plaintiff argued that the transaction was invalidated by the fact that the father who is now deceased did not sign anywhere to sell the house-without –land to the defendant.
11. In further support of his contention that he did not have the authority to sell the house-without-land to the Defendant, the Plaintiff produced a document titled “Abrogation Deed”. He contended that the deed recalled the ownership of the house-without-land to the father which he had initially gifted to the son. On this basis, the Plaintiff asked the court to permit him to refund the purchase monies to the Defendant on account of the arguments above.
12. The Defendant, on the other hand opposed the contentions by the Plaintiff. He affirmed that the transactions were above board and valid. He affirmed that he paid the purchase price in full after recording the sale agreement. He also affirmed that the goodwill of the house was paid in full. He added that he took physical possession of the house-without-land and collected rent from it.
13. He further contended that the owner of the land (the Mosque Trustees) consented not only to the change of ownership but also to the change of the structure from a bungalow to a storeyed building. He asked the court to reject the case by the Plaintiff and uphold his ownership of the property.
14. It is this contestation that the court is called upon to decide. In order to make a determination of the dispute, the court was guided by the established facts and the relevant law.

Determination

15. There was a late objection by the Defendant on the limitation of time that applied to this case. A cursory perusal of the pleadings shows that the action is founded on a contract dated 25th May, 2010 for the purchase of a house-without-land and this case was instituted well outside the 6 year window that is required for actions founded on contract. Section 4(1) of the *Limitation of Actions Act* cap 22 laws of Kenya provided that actions founded on contract may not be brought at the end of six years from the date on which the action accrued on the contract. The implication of such a limitation was that the suit became time-barred. In the court’s opinion, on this alone, the case would stand dismissed although this was essentially a technical objection because it could be cured by applying for extension of time by the High Court.
16. On substance, however, the success or failure of the Plaintiff’s contentions rested on the proof or lack of proof of the ownership of the house-without-land by the Plaintiff’s now deceased father. Therefore, the court, out of abundance of caution shall examine the substance of the case quite apart from finding



that the suit was time-barred as a successful technical objection in agreement with the Defendant's written submission of 6th July, 2021.

17. In the Kenyan coastal region, the concept of owning a house-without-land is a valid historical and legal concept to be found in the Mohameddan law. This concept was addressed and captured by the Honourable Mr. Justice in the case of Murtahar Ahamed Dahman & Another –v- Athuman Sudi (2013) eKLR Angote J. cited with approval in Juma Mzee Ali & 43 others v Al Mohamed Hatimy & another [2018] eKLR (Yano J.) had the following to say regarding the concept of a house without land:

“The land question within the coastal region is complex due to its peculiar historical and legal origins. The region is in a very unique position because of its geographical positioning and with it the peculiar historical ties unlike the other part of the country. It is common knowledge that were a person is the registered owner of a parcel of land, there is a conclusive presumption that he is also the owner of all buildings of whatever kind thereon. Indeed, the Registration of Titles Act Cap 281 has defined land to include thing embedded for the permanent beneficial enjoyment of that to which it is so attached. However, the Land Title Act Cap 282 which is applicable to the coastal region, and which has since been repealed, abrogated partly the Mohammedan Law.

Under the Mohammedan law and the Land Titles Act, Cap 282 a building erected by one person, even by a trespasser on the land of another does not become attached to the land but remains the property of the person who erected it. Such interests are, however, supposed to be noted in the certificate of title. It is therefore not uncommon in this region for the buildings of the type with which the present case is dealing with to be erected upon the land of another person in consideration of a monthly rent.

The concept of owning a house or coconut trees by a person who is not the owner of the land was and still being used by absentee landlords to either generate an income for themselves or to forestall the claim of adverse possession by people who would have stayed on such parcels of land for more than twelve years. This interesting concept of “owing a house or coconut trees without land” as recognized under the Land Titles Act, which was enacted in 1908, was followed up by the enactment of the Eviction of Tenants (Control) (Mombasa) Ordinance Cap 298 which came into effect on 31st December 1956 and lapsed on 31st December 1969. Section 2 of the Ordinance defined a “house” to mean any building or erection used as a piece of residence and constructed on land which is not owned by the owner of such building or erection.

Although the Ordinance lapsed in 1969, many people in the coastal region and especially within Mombasa Municipality still own houses without land. The owners of those houses pay a monthly rent to the owner of the land.

18. As can be gleaned from the above authority, the question of ownership of the house-without land was wholly a question of physical possession of the subject house.
19. By such arrangement, there would be no title deeds issued for the houses in question. The evidence of ownership of the house was two-fold:
1. Actual physical possession of the house-without-land.
 2. Recognition of the physical possession by the true owner of the ground upon which the house stood.



20. Applying the two-fold test to this case shows that when the Defendant was approached by the Plaintiffs, the persons who were in actual physical possession were the 2 brothers (sellers). The 2 brothers (sellers) were collecting rent. The 2 brothers (sellers) took the Defendant to the property and showed the Defendant the house-without-land and offered it to him for sale on 25th May, 2010. While under cross-examination, the Plaintiff admitted that the Sale Agreement did not state that the house-without-land belonged to their father. By that admission alone, the Plaintiff's assertions that his father owned the house fell face flat. Section 97 of the Evidence Act precluded the Plaintiff from seeking to include or to speak an oral term into a written contract of sale where the law required the contract to speak for itself. The section provides:-

97. Written contracts and grants

(1) When the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself or secondary evidence or its contents in cases in which secondary evidence is admissible under the provisions of this Act.

21. He accepted the offer and completed the transaction by taking physical possession from the 2 brothers after paying the necessary consideration totalling Kshs 700, 000 as purchase price and Kshs 200, 000 as goodwill (paid on 11th March, 2011 and 23/6/2011). All these events took place in open market and the Defendant had no notice of any defects as none existed. The court therefore rejects the written submission dated 31st May, 2021 by the Plaintiff that the principle of *Nemo dat quod non habet* favoured the Plaintiff – actually it favoured the Defendant because the 2 brothers openly represented themselves to the Defendant as being the owners and the contract never mentioned the father as an owner real or special.

22. Therefore, by the first test, the court finds that the owners of the building were the sellers who were the in active possession and they had full authority to transact in the property. The 2 brothers had full legal capacity to sell the house and there was no illegality on their part when they sold it. This has the effect of distinguishing the cited case of *Root Capital Incorporated –v- Tekangu Farmers Cooperative Society Ltd & Anor* (2016)eKLR because in the present scenario the transactions were lawful and validly conducted by persons who had capacity to contract.

23. On the second aspect of the test, the recognition of the physical possession by the owner of the ground showed that prior to 25th May, 2010 it was the 2 brothers who were collecting the rent. They were making some commission payment to the mosque as per the custom. When the sale took place, the 2 brothers introduced the new purchaser to the mosque trustees. In recognition of the new owner of the building, the mosque trustees who were the owners of the ground gave consent to the new purchaser to knock down the old bungalow building and construct a new storeyed building. This confirmed that not only had the owners of the ground recognized the previous owners (the 2 brothers) but had also taken cognizance of the successor owner of] the house-without-land (the Defendant).

24. In all this course of events, the deceased father to the brothers featured nowhere because in fact and in law he owned nothing. If the contrary position was true (which it was not), then under section 108 of the Evidence Act cap 80 the evidential burden lay on the Plaintiff to produce the trustees of the mosque in court to affirm the contrary because the success of the Plaintiff's assertions completely depended on a contrary assertion by the Trustees (a contrary assertion being that the Trustees had recognized the now deceased father as owner who was making commission payments as opposed to recognizing the 2 sons)



Section 108 of the *Evidence Act* provides:

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence is given on either side.

25. By failing to discharge this specific evidential burden, the court finds that the Plaintiff could not prove that their now deceased father was the owner to this extent.

26. As to the “Abrogation Deed” that the Plaintiff placed heavy reliance on, the court found that the said document had serious deficiencies in it to the detriment of the Plaintiff’s case. First, the document has a purported signature of the now deceased father yet neither the Plaintiff nor his now deceased brother witnessed their father appending his signature on the document.

27. Secondly, in order for the Plaintiff to have convinced any court of law that the “Abrogation Deed” was a genuine document, he ought to have first complied with the mandatory requirements of section 70 of the *Evidence Act* requiring the production of the report of a document examiner to prove the genuineness of the signature on the document. Section 70 makes the following provisions :-

70. Proof of allegation that persons signed or wrote a document

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.

28. The Plaintiff did not provide a document examiner’s report to confirm that indeed the Abrogation Deed had been signed by the now deceased father if at all he ever signed it. By that failure, the court rejects the “Abrogation Deed” as a suspicious document probably manufactured to obfuscate issues and twist the case into the Plaintiff’s favour. The effect of the rejection is that there is no evidence to show that the deceased father owned the property in question. The failure to comply with the provisions of section 70 of the *Evidence Act* was fatal to the Plaintiff’s contention that the “Abrogation Deed” was genuine.

29. Thirdly, the proof of the genuineness of the signature by the document examiner would have been followed up by a comparison by the court of the said signatures with other known signatures of the now deceased father as is stipulated by section 76 of the *Evidence Act* providing thus:

76. Comparison of signatures, seals, etc.

(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

30. Lastly, if it was true that the “Abrogation Deed” was a genuine document (which it was not as the court has just found), then the Plaintiff’s conduct of concealing the document suggested that there was mischief on his part. The purported Abrogation Deed was purportedly executed in the year 2000. When the Plaintiff was transacting over the house in 2010 he had in his possession the purported Abrogation Deed but opted to conceal it from the Defendant-Purchaser so as to gain an unfair advantage over the purchaser. In law, this mischief cannot not be allowed to stand because as an equitable relief, the permanent injunction sought demanded of the plaintiff to come to court with clean hands and not seek to benefit from his own wrongdoing.



31. At page 193 of *The Broom's Maxims of Law - A Selection of legal Maxims : Classified and Illustrated (1864)* by Herbert Broom there is a chapter on "Fundamental Legal Principles" discussing this legal maxim : *Nullus commodum capere potest de injuria sua propria* : No man shall take advantage of his own wrong.

"It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong, and this maxim which is based on elementary principles, is full recognised in Courts of law and equity, and indeed, admits of illustration from every branch of legal procedure. The reasonableness and necessity of the rule being manifest, we shall proceed at once to show its practical application by reference to decided cases; and in the first place, we may observe, that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law – *frustra legis auxilium quaerit qui in legem committit*

32. At page 195 the Maxim further provides that:-

"It is moreover a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned."

33. It would have been manifestly wrong and inequitable, if the "Abrogation Deed" had been existing as of 25th May, 2010 (which it was not) for the Plaintiff to have concealed it from the Defendant at the time that the parties were transacting whilst the purported owner (the now deceased father) was still alive. So much for the wrongfulness by the Plaintiff. Even on the strength of the Defendant's cited case of *Mistry Aman Singh –v- Kulubya (1984) KLR 580* it was held that no court ought to enforce any contract in favour of a person who had created the alleged illegality.
34. In conclusion on this issue, the court finds no material or evidence to prove that the house in question was owned by the Plaintiff's deceased father on the strength of the now impugned "Abrogation Deed". The Plaintiff and his now deceased brother validly sold the house to the Defendant for full consideration and on top of it for the full goodwill price. As evidence of the validity of the transaction, it is noteworthy that the Goodwill Agreement was entered into after the demise of the plaintiff's father. This was done with full knowledge that the father had died and had no say over the property just as he had been when he was alive. After taking possession of the old building, the purchaser acquired full rights to renovate or demolish it and construct a new building that could generate greater income and this is exactly what the Purchaser did in 2018 as a valid owner of the house-without-land.
35. Fourthly, the court must not act in vain. The actual house that was sold by the Plaintiff and his brother to the Defendant is no longer in existence. It was demolished by the Defendant as an owner who then put up a storeyed building on the same space. This was done with the consent of the owner of the ground upon which the former house stood. If the court was to order a reversal, this would be totally absurd and in vain.
36. The last nail in the coffin was the evidence from the Kadhi's Court in Mombasa in Succession Cause No. 129 of 2011 – the certified order was marked as "BMB 2" in the Defendant's bundle of documents. As per the order of the honourable Sheikh Kadhi Twalib B. Mohamed dated 4th July, 2011 the Kadhi's Court under Mohameddan law ordered the Plaintiff and his brother to effect a final transfer of the property to the Defendant who was purchaser for value in market overt who had no notice of any defect to the title. Afterwards, the son to the Plaintiff sought to recover this property but his claim in Lamu Succession Cause No. 5 of 2017 was dismissed on merit under Mohameddan law by the Honourable Kadhi Mshali H. Mshali vide the learned Kadhi's ruling on 10th May, 2018. The Plaintiff is estopped



from denying the validity of the respective court orders in the 2 Kadhis' Court in Lamu and Mombasa over which this Honourable Court lacks the jurisdiction to overturn.

37. As the Defendant correctly submitted in his written statement of 14th October, 2020, the Plaintiff has embarked on an extortion exercise using flimsy excuses against the Defendant. Such an innocent purchaser needs the protection of the law and the law has come to his rescue now.

38. The end result is as follows:

1. The Plaintiff's case is dismissed in its entirety as the plaintiff as it lacks substance and the plaintiff has failed to prove his case on a balance of probabilities.
2. The court vacates all interlocutory orders, injunctions and any restraining orders that had been issued against the Defendant in relation to the property in question. The Defendant has full liberty, possession and legal authority to proceed to deal with his property as he deems fit and just.
3. The court now issues a permanent injunction against the Plaintiff whether by himself, his agents, servants, assignees, representatives or any other person claiming under restraining him or them from interfering, wasting, damaging, selling, disposing of, alienating, trespassing or stepping on, and/or adversely dealing with all that house-without-land belonging to the Defendant that is situate on Plot no. 644 Tundani Lamu island.
4. The court awards the costs of litigation to the Defendant.

It is so ordered. Right of appeal is 30 days.

DATED, READ AND SIGNED AT LAMU THIS 6TH DAY OF AUGUST 2021

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HON. T. A. SITATI

PRINCIPAL MAGISTRATE

LAMU LAW COURTS

