



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELCA No. E050 OF 2024**

**BENHARD MAXWELL OMAGWA.....**

**APPELLANT**

**-VERSUS-**

**BADRIYA ABDALLA.....1<sup>st</sup>**

**RESPONDENT**

**IDDAH ALI.....2<sup>nd</sup>**

**RESPONDENT**

***(An appeal against the Judgment of Hon. Olga K. Onalo, Senior Resident Magistrate, delivered at Malindi on 30th August 2024 in MCELC No. E079 of 2022 - Benhard Maxwel Omagwa - Versus - Badriya Abdalla & Iddah Ali)***

**JUDGMENT**

1. This is an appeal from the judgment of the learned Magistrate Olga Onalo (SRM), delivered on 30th August 2024, in which she dismissed the appellant's suit and awarded costs to the 1st respondent.

2. By a plaint dated 19<sup>th</sup> August 2022, the appellant had sought the following reliefs against the respondents:

***a) A permanent injunction restraining the defendant, either by himself, his servants, agents, employees, legal representatives, or any persons claiming an interest through her, from interfering in any way with the plaintiffs' claim, usage, construction, fencing, and/or enjoyment, and to give the plaintiff his portion as verbally agreed earlier by the late Amir Tayabali (the vendor), part of land plot No. 11082/6 measuring 50 ft by 100 ft at Kwa Chocha area within Malindi sub-county within Kilifi County in the Republic of Kenya.***

***b) A declaration that the plaintiff is the bona fide beneficiary/owner of the said part/portion of the suit land parcel number 11082/6, measuring 59 ft by 100 ft, at Kwa Chocha area within Malindi sub-county within Kilifi County in the Republic of Kenya, and an order directing the Kilifi Land Office to register the portion stated above in favor of the plaintiff.***

***c) Costs and interests of the suit.***

***d) Any other relief the Court deems fit to grant.***

3. The 1st and 2nd respondents denied the claim in their joint statement of defense dated 21st September 2022. However, the 2nd respondent did not later participate in the hearing of the suit.

4. After hearing the parties, the learned Magistrate dismissed the appellant's suit in its entirety and awarded the 1st respondent the costs of the suit. No costs were awarded to the 2nd respondent.
5. The appellant now appeals from the said judgment on the grounds of appeal set out in the Memorandum of Appeal dated 18th September 2024 as follows:
  - a) ***Appeal grounds Nos. 1, 4, 5, 6, 7, and 8 are that the learned Magistrate did not thoroughly assess the evidence presented and reached an incorrect conclusion.***
  - b) ***Grounds No. 2 and No. 3 assert that the learned Magistrate erred in both law and fact by awarding costs to the 1st respondent.***
6. The appeal was canvassed through written submissions. I acknowledge receipt of submissions from learned counsel for the appellant, Mr. Nyangau, and learned counsel for the respondent, Mr. Shujaa, with much appreciation, as the same went a long way in disposing of the issues raised in the appeal.
7. Arising from the materials presented before me, emanating from the record of appeal and the parties' submissions, I frame the following issues for the court's determination as to whether the learned trial Magistrate erred in both law and fact in reaching the conclusion she did by dismissing the appellant's suit and determining the issue of costs.

8. As this is a first appeal, I am mindful that, as delineated in the decision of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this court's obligation is to reevaluate the evidence, assess it accordingly, and derive its own findings of fact and law. This court will deviate from the findings of the trial court solely if they lacked basis in the evidence on record; if the trial court is demonstrated to have acted upon erroneous legal principles, as affirmed in **Jabane v Olenja [1968] KLR 661**; or if its discretion was exercised imprudently, as established in **Mbogo & Another versus Shah [1968] EA 93**.

9. This suit arose from a land dispute over a 50ft by 100ft parcel. The land was to be subdivided from plot title No. 11082/6. According to the record, the appellant purchased the land from the original owner, Amirali Tayabali, who died in 2014. The deceased left a widow, who is herein named as the 1st respondent in this appeal. The 2nd Respondent is said to have bought a piece of land from the owner. The deceased's widow only showed and allowed the 2nd respondent to occupy part of the plaintiff's piece of land measuring 50ft by 50ft, from the appellant's 50ft by 100ft piece of land he legally bought from the deceased's land, after sending her to Malindi Police Station, as the 2nd respondent informed the

plaintiff/appellant when he inquired why she was trespassing on his piece of land.

**10.** The appellant asserted that he purchased the land and made payments for the 50ft by 100ft plot in two installments: first for 50ft by 50ft, followed by another 50ft by 50ft. The significant transaction was executed during the deceased's lifetime, and the purchase funds were fully paid. Additionally, a portion of the remaining amount was paid to the deceased's widow.

**11.** The appellant asserts that the learned magistrate failed to recognize that the 1st respondent lacked the capacity to initiate legal proceedings or to defend the deceased's estate. The appellant took possession of the property and constructed his family residence on the 50-by-100-foot lot in 2014, and has maintained occupancy to the present day. The family recognizes the property as their home. No disturbance has occurred.

**12.** The appellant asserts that, from the year 2014, when the deceased passed away, to the present date of this litigation, there have been no issues whatsoever with the deceased's family. Regarding the Agreement of Sale, it was duly witnessed and documented by the firm of Richard Otara,

Advocate. Furthermore, upon completion of the second phase of payment, acknowledgment receipts were duly prepared and witnessed by Vincent Mogaka Advocates, and all such documents were subsequently presented to the court as evidence. The 2nd respondent did not produce any court agreement to substantiate her claim regarding the title deed.

**13.** The appellant contends that the 2nd respondent was unknown to them until 2022, when the 2nd respondent appeared and informed the appellant that she had purchased the deceased's plot. Because the deceased was deceased, the 2nd respondent approached the widow, who stated that she was unaware of the transaction. Based on that response, the 2nd respondent reported the matter to the DCI Malindi and recorded a statement. Subsequently, the 2nd respondent returned to the 1st respondent, who was frightened and instructed the 2nd respondent to go to the land and take or occupy any unoccupied portion. It was then that the 2nd respondent occupied the portion of land belonging to the appellant, measuring 50 feet by 50 feet, which was part of the 1st respondent's property. Due to the trespass committed by the 2nd respondent, the appellant initiated legal proceedings, resulting in a court order in favor of the 2nd respondent. This order has precipitated the current appeal.

**14.** The 1st respondent submits that the gravamen of grounds of appeal Nos. 1, 4, 5, 6, 7, and 8 in the appellant's Memorandum of Appeal is that the learned Magistrate did not properly evaluate the evidence adduced and reached the wrong decision. The 1st respondent submits that the learned Magistrate properly evaluated the evidence adduced by the parties and reached the correct decision. The appellant testified that he had bought the suit property, measuring 50 feet by 100 feet, from the late Amirali Tayabali on 30th December 2014. He testified that the suit property is a portion of Plot No. 11082/6, which is owned by the deceased.

**15.** The appellant testified that he initially purchased a 50-by-50-foot portion of land for Ksh. 210,000/- on 30th December 2014. The appellant produced a copy of the written agreement for the sale of the said portion of land as Exhibit No. 1. He also testified that he subsequently purchased from the deceased an additional 50-by-50-foot portion of land adjacent to the earlier portion and amalgamated the two portions into one, but that the agreement for the sale of this additional 50-by-50-foot portion was not reduced to writing.

**16.** The appellant testified that, after the deceased's passing, the 1st respondent assumed control of an

additional parcel of land measuring 50 feet by 50 feet and subsequently sold it to the second defendant. The 2nd defendant then constructed a perimeter wall around the said parcel, thereby obstructing access to the septic tank, chambers, and some trees.

**17.** In her testimony before the court, the 1st respondent denied having taken possession of the aforementioned parcel of land and denied having sold it to the 2nd respondent. According to the 1st respondent, the deceased was responsible for selling the said parcel of land to the 2nd respondent.

**18.** Based on the evidence presented, the appellant was unclear regarding the purchase price for this supplementary portion of land or the date on which an agreement with the deceased for the purchase of this additional land was entered into.

**19.** The 1st respondent submits that the appellant called two witnesses; however, they failed to present compelling evidence regarding the purchase of the additional land. The testimony of the appellant's first witness, PW2 Zablon Mayaka Ongaga, was entirely hearsay. This witness did not witness the appellant and the deceased entering into the second sale agreement. His testimony regarding the second agreement for the supplementary land was wholly hearsay.

**20.** The 1st respondent asserts that the appellant's third witness, PW3 Vincent Mogaka, did not observe the parties entering into the two sale agreements. His involvement in the entire transaction is limited to witnessing the execution of an acknowledgment note dated 10th March 2015 for the amount of KSh. 195,000/-, presented as the appellant's exhibit No.2, and issued two receipts, both dated 10th March 2015, to the appellant, which are presented as exhibit No.4. PW3, who received Ksh. 155,000/- from the appellant, purportedly for onward transmission to the deceased, failed to produce any evidence that he had forwarded the amount to the deceased.

**21.** The 1st respondent submits that the appellant did not adduce cogent evidence showing that he had paid any money for the additional portion of land. What can be deduced from Exhibit No. 1 is that, on the date of execution of that agreement, the appellant paid the deceased the sum of Ksh. 30,000/-, leaving a balance of Ksh. 180,000/-. The appellant had testified that the deceased owed him car hire charges in the sum of KSh. 65,000/- and that it had been agreed that, due to the said debt, the appellant would add the deceased the sum of Ksh. 135,000/- towards payment of the purchase price. However, no

evidence was adduced regarding the debt or the sum of Ksh. 135,000/- was ever paid to the deceased.

**22.** The 1st respondent asserts that the written agreement for sale, dated 30th December 2014 and introduced at trial as plaintiffs' Exhibit No. 1, demonstrates that the appellant remitted Ksh. 30,000 to the deceased on the date of execution, leaving an unpaid balance of Ksh. 180,000. There is no evidence to suggest that the remaining Ksh. 180,000 was ever fully paid to the deceased. The acknowledgment notes, dated 10th March 2015 and presented at trial as plaintiffs' Exhibit No. 2, reflect a payment of Ksh. 195,000, of which Ksh. 75,000 is purportedly the amount paid for the initial parcel of land. If that averment is true, the question that arises is when the sum of Ksh. 105,000, being part of the purchase price for the first portion of land, was paid, given that in the agreement for sale (Exhibit No. 1), the balance due for the first portion of land was Ksh. 180,000/-.

**23.** 1st respondent submits that the acknowledgment note indicates that, as at 10th March 2015, the plaintiff still owed a balance of Ksh. 15,000/-. In his testimony, the appellant stated that he had paid the deceased Ksh. 5,000/- while the deceased was on his deathbed, and a further Ksh. 10,000/- to the 1st respondent after the deceased's burial, leaving a balance

of Ksh. 15,000/- unpaid as at the date of the hearing of the suit. No evidence was produced of the receipt of Ksh. 5000/- by the deceased or on the receipt of Ksh. 10,000/- by the 1st respondent. This statement also contradicts the acknowledgment note, which indicates that, as at 10th March 2015, the balance due was Ksh. 15,000/- only. The arithmetic does not add up, and the learned Magistrate noted this in her Judgment, holding that there was conflicting evidence regarding the payment of the purchase price.

**24.** After reviewing the record on appeal and considering the evidence adduced and the parties' submissions, I find that the learned Magistrate, after analyzing the evidence, held that the appellant had not fulfilled his obligation under the agreement and that, in respect of the balance amount owed, it was payable only to the estate, as such, no title could issue to the appellant.

**25.** In addition to the foregoing, no cogent evidence of the agreement regarding the car hire charges was adduced. Other than the allegation that the deceased owed him Ksh 65,000 in car hire charges, no evidence of the debt was produced.

**26.** I agree with the findings of the trial Magistrate and, as submitted by the 1st respondent, that Section

38(1) of the Land Act No. 6 of 2012, mirroring Section 3(3)(1) of the Law of Contract Act, Cap. 23, barred the appellant from instituting the suit in respect of the alleged additional portion of land measuring 50 feet by 50 feet. The section provides the following:

***“(1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—***

***(a) the contract upon which the suit is founded—***

***(i) is in writing;***

***(ii) is signed by all the parties thereto; and***

***(b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.”***

**27.** Considering the appellant's own testimony in court that the agreement concerning the purchase of the additional portion of land was not documented in writing, the appellant's lawsuit or claim regarding the additional land was legally inadmissible and untenable.

**28.** In her judgment, the learned Magistrate analyzed the evidence and found that there was no evidence of the purchase of the additional portion of land measuring 50 feet by 50 feet.

**29.** According to her analysis, the learned Magistrate found that the provisions of Section 3(3) of the Law of Contract Act, Cap. 23, and Section 38(1) of the Land Act No. 6 of 2012 barred the appellant from instituting the suit regarding the purchase of the additional portion of land measuring 50 feet by 50 feet, given the absence of a written agreement duly executed by the vendor and purchaser and attested by witnesses. See **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR.**

**30.** She found that (a position I concur with) the acknowledgment note dated 10th March 2015 failed to meet the criteria established by Section 3(3) of the Law of Contract Act and Section 38(1) of the Land Act. The learned Magistrate determined that, beyond the absence of signatures from both the vendor and the purchaser, the document did not reference the suit land in any manner.

**31.** Furthermore, the appellant did not present evidence showing that the 1st respondent had taken possession of the purported additional land parcel measuring 50 feet by 50 feet and subsequently sold it to the 2nd respondent, as alleged in the appellant's plaint.

**32.** Although the 1st respondent is the deceased's widow, she does not occupy the position of administrator or personal representative of the deceased's estate. Consequently, she lacked the authority to manage the aforementioned portion of land. The evidence presented suggests that the disputed land was not in her possession; rather, it was under the control of the 2nd respondent, who, according to the appellant's testimony, had constructed a perimeter wall around the land.

**33.** Besides, the claim that the appellant should receive the suit land is not supportable against the 1st respondent. This type of claim is only valid against the estate administrator of the deceased. As noted in paragraph 27 of the plaint, the deceased's family had not appointed an administrator for the estate when the suit was initiated.

**34.** In legal proceedings, the responsibilities of the 1st respondent extend beyond her role as the deceased's widow, concerning the agreement executed on 30th December 2014. Such responsibilities are the administrator's responsibility. The 1st respondent contended in paragraph 6 of her statement of defense that she was not the administrator of the deceased's estate. Any evidence presented by the appellant did not challenge

this assertion. Consequently, the lawsuit filed against the 1st respondent concerning the deceased's estate was, to that extent, legally incompetent and invalid.

**35.** Considering that this suit was not filed against the deceased's estate or the administrator, the request concerning prayer No. (b) The plaintiff's claim, which seeks an order directing the Kilifi Land Office to transfer the registration of the suit land, currently registered in the name of the deceased, to the appellant, is unfounded. The learned Magistrate was therefore correct in dismissing that claim.

**36.** Further to the foregoing, the appellant's pleading in paragraph 6 of the plaint was that the suit land, measuring 50 feet by 100 feet, had not been subdivided from Plot No.11082/6, which the appellants referred to as the mother plot. As such, the suit land has no separate Deed Plan of its own; it remains within the mother plot No.11082/6.

**37.** Consequently, issuing an order to the Land Registrar to transfer the entire mother Plot No. 11082/6 to the appellant in the absence of evidence from a land surveyor indicating that the said plot measures 50 feet by 100 feet or 50 feet by 50 feet is unjustifiable and would cause an injustice to the estate, especially considering the appellant's own testimony that

he had acquired only a portion or fraction of the mother Plot No. 11082/6 and not the entire plot.

**38.** The appellant's assertion that he possessed a parcel of land measuring 50 feet by 100 feet could not be substantiated, given his own admission during the proceedings that the 2nd respondent had constructed a perimeter wall that encroached on an additional area measuring 50 feet by 50 feet.

**39.** About costs, it is well-established law that the allocation of litigation costs rests within the discretionary authority of the trial court—section 27 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

**40.** The appellant has not demonstrated that the learned Magistrate erred in exercising her discretion in awarding costs, including failing to consider relevant factors or neglecting to provide adequate reasons for her decision to decline the award of costs.

**41.** The Civil Procedure Act provides that the costs of a lawsuit shall follow the outcome of the case. The appellant's suit was unsuccessful. The 1st respondent incurred expenses in her defense. She was summoned to the Court by the

appellant. The learned Magistrate's award of costs was therefore justified.

**42.** The judgment demonstrates that the learned Magistrate did not issue any decision in favor of the 2nd respondent. The absence of testimony from the 2nd respondent in court does not, in itself, automatically entitle the appellant to the reliefs sought in the plaint. The appellant remains responsible for establishing his claim against the 2nd respondent.

**43.** Sections 107, 108, and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya, impose an evidential burden on the appellant to substantiate his claims against the respondents. Specifically, the appellant must establish the existence of the 2nd sale agreement for an additional parcel of land measuring 50 feet by 50 feet, demonstrate payment of the full purchase price, and furnish evidence regarding the debt related to car hire charges. The appellant failed to discharge this burden.

**44.** Considering the aforementioned, I shall refrain from disturbing the esteemed Magistrate's findings; her decision was well-founded in both legal and factual aspects. The appeal is devoid of merit and is accordingly dismissed with costs.

**Dated, signed, and delivered virtually at Nyeri on this 28<sup>th</sup>  
day of January 2026.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

**Ms.Kemunto for the Appellant**

**Mr. Shujaa for the 1<sup>st</sup> Respondent**

**Kendi: Court Assistant**