



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**

**ELC CIVIL APPEAL NO. 12 OF 2013**

*(Being appeal from the Judgment delivered on 9<sup>th</sup> October 2013*

*by Hon. A. M. Obura-Senior Principal Magistrate*

*in Kilifi in SRMCC No.189 of 2009.*

**MORRIS NGUNDO.....APPELLANT**

**=VERSUS=**

**1. LUCY JOAN NYAKI**

**2. TUA BENYAMBO NYAKI** (*suing thr' their capacity as administratrix  
and administrator of the estate of*

**GILBERT MBONI NYAKI (DECEASED).....RESPONDENTS**

**J U D G M E N T**

**Introduction:**

1. This is an appeal from the Judgment of Hon. A. M. Mbura in Kilifi Principal Magistrate's Court Civil Case No. 189 of 2009. In the Judgment, the Appellant was ordered to deposit the Title Deed in respect to parcel number Kilifi/Mtwapa/124 to court for onward transmission to the Ministry of Lands. The Appellant was also restrained from interfering with the Respondents' possession of the suit property.

2. In his grounds of appeal, the Appellant averred that the learned Magistrate erred by allowing the Defence and Counter-claim which was time barred; that the Defence and Counter-claim had abated by operations of the law; that the Magistrate erred by allowing the Respondents leave to file an application for substitution and that the Magistrate erred by allowing documents brought by way of a letter from the Respondents' advocate.

3. The other grounds raised in the Memorandum of Appeal are that the Magistrate erred by allowing unstamped documents and photocopies on record.

4. The parties agreed to dispose of the Appeal by way of written submissions.

**The Appellant's submissions:**

5. The Appellant's advocate submitted that before the trial suit was heard and determined, the Defendant in the initial suit died.
6. Counsel submitted that in accordance with Order 24 Rule 4(3) of the Civil Procedure Rules, where within one year no Application is made, the suit abates as against the deceased Defendant. Counsel submitted that the abatement of the suit in the lower court rendered the court functus officio.
7. Counsel submitted that the learned Magistrate allowed documents on record by way of a letter, which documents had not been supplied to the Appellant's counsel or the court in advance; that the Magistrate allowed in evidence copies of documents contrary to the provisions of the Evidence Act and that the Magistrate allowed documents that had not been stamped.
8. Counsel submitted that the final order of the lower court amounted to an order which could not be implemented; that the award that was made is beyond the jurisdiction of the Court and that the Appellants' ownership and legal title to the suit property still remains.
9. It was submitted that the Appellant, being the registered owner of the suit property, is the absolute and indefeasible owner; that the Respondents did not allege fraud as against the Appellant and that the Transfer having been witnessed by the District Settlement Officer contravened Section 45(1)(a)(b) and (2) of the Land Registration Act.

**The Respondents' submissions:**

10. The Respondents' counsel submitted that the Appellant sold to the deceased the suit property for sufficient consideration; that the agreement was endorsed in the presence of independent witnesses and that the Appellant admitted in evidence receipt of the entire consideration besides signing a receipt to that effect.
11. The Respondents' counsel submitted that the Appellant admitted having signed the agreement; that both the Appellant and the deceased obtained the consent of the Board and that the Appellant executed the Transfer document voluntarily transferring the suit property to the deceased.
12. Counsel submitted that ever since the property was sold to the deceased way back in the year 1983, the Applicant has never laid any claim in respect thereof until the filing of the suit in the year 2009, a claim which only arose after the erroneous issuance of the Title Deed in favour of the Appellant.
13. The Respondents' counsel finally submitted that the Constitution takes away the immunity and or alleged indefeasibility of title where it is established by the court that the same was unlawfully acquired.
14. On the issue of whether the suit had abated, the Respondents' counsel submitted that the Magistrate exercised her discretion to revive the suit and the Appellant has not shown that the discretion was exercised unjudiciously.
15. The Respondents' counsel submitted that the Appellant did not raise the issue of Limitation during trial; that in any event the deceased took possession of the suit property way back in 1983; that it is the Appellant's claim which is time barred and that the Appellant did not object to the production of documents at trial.

**Analysis and findings:**

16. The Appellant's appeal is grounded on the following condensed grounds: that the Defendant's Defence and Counter-claim was time barred by virtue of the Limitation of Actions Act; that the Defence and Counter-claim had abated by the time of trial due to the death of the Defendant on 1<sup>st</sup> December 2010; that there was no order for enlargement of time and that the trial court should not have allowed the

production of copies of documents in evidence and documents that had not been stamped.

17. The other grounds that the Appeal is premised on is that the Defendant did not plead and prove fraud and that the orders that were given by the court were not capable of enforcement.

18. The Appellant commenced the suit in the lower court by way of a Plaint dated 14<sup>th</sup> May, 2009. In the Plaint, the Appellant sought for an order for eviction against the Defendant from the suit premises.

19. In the Plaint, the Defendant was Gilbert Mboni Nyaki, who was later on substituted by the current Respondents upon his death.

20. In the Amended Defence and counter claim that was filed on 26<sup>th</sup> November 2012, the Respondents herein, averred that they are the administratrix and administrator respectively of the Defendant who died on 1<sup>st</sup> December 2010.

21. It is the Appellant's case that by the time of the substitution, the suit, including the Counter-claim had abated.

22. The record shows that the evidence of the Appellant, PW1, was taken on 22<sup>nd</sup> October 2009. On 7<sup>th</sup> March, 2011, the Court was informed that the then Defendant had died.

23. The Appellant's advocate then filed an Application dated 29<sup>th</sup> December 2011 in which he sought for Judgment because the Defendant was dead.

24. In her Ruling dated 8<sup>th</sup> February 2012, the Magistrate found as a fact that the Defendant died on 1<sup>st</sup> December 2010. The Magistrate further found as a fact that one year had lapsed since the death of the Defendant. After quoting the provisions of Article 159(2)(d) of the Constitution the learned Magistrate held as follows:

**“Considering this reasoning, I find that it is only fair and just to grant the Defendant's legal representative an opportunity to come on board so that the suit and counter-claim are determined on merits.....It is in the interest of justice that this suit shall not abate.....I further order that the Defendant's legal representatives regularises their position by complying with Order 24 Rules 4(1)and (2) within the next 21 days failing which the suit against the Defendant and counter-claim shall abate.”**

25. By way of an Application dated 27<sup>th</sup> February 2012, the Defendant's legal representatives sought to be enjoined in the suit in place of the deceased Defendant having obtained the Grant of Letters of Administration Intestate.

26. In opposing the Application, the Appellant's advocate submitted that the Application was in respect to a non-existent suit because of the lapse of one year from the time of the death of the Defendant.

27. In her Ruling, the Magistrate found in favour of the Respondents herein. In the same Ruling, the Magistrate held, and rightfully so, that the Appellant should have filed an appeal challenging her earlier orders in which she allowed the deceased legal representative to be enjoined in the suit although the suit had abated.

28. The Appellant did not file an appeal against the two Rulings of the lower court. Having not filed an appeal challenging the decision of the Magistrate allowing the Defendants' legal representatives to be enjoined in the suit after the lapse of one year, he cannot raise the same issue after the delivery of Judgment.

29. The two Rulings by the learned Magistrate were made on 8<sup>th</sup> December 2012 and 15<sup>th</sup> August 2012. The Memorandum of Appeal (s) should have been filed within 30 days challenging those Rulings from

the date they were made. That did not happen.

30. On that ground, I will not consider whether the learned Magistrate was right or wrong in allowing the deceased's legal representative to be enjoined in the suit after the suit had abated. The Appeal before me is in respect of the Judgment of 9<sup>th</sup> October 2013 and not the mentioned two Rulings.

31. The next issue that I am supposed to deal with is the admissibility of the documents that were relied on by the Respondents in the lower court.

32. DW1 testified on 24<sup>th</sup> April 2013. On that day, DW1 produced a copy of certificate of confirmation as defence exhibit 2 (DEXB2) and the copy of the Death Certificate as DEXB3.

33. When DW1 attempted to produce in evidence the agreement of sale, the Appellant's counsel objected on the ground that the same was not stamped pursuant to Section 19(1) of the Stamp Duty Act. The learned Magistrate overruled the Appellant's advocate objection in the following words:

**“The document is stamped at the land and settlement office. The parties participated in the adjudication at the said office. It is a document authored long time ago in 1983.”**

34. The Appellant advocate also objected to the production of the Application for the Consent of the Board, the Consent of the Board and the Transfer documents.

35. The record shows that those objections were all rejected by the trial court.

36. Where a document is produced in evidence without any objection from the opposite party, the same is considered as having been admitted by the opposite party.

37. The learned Magistrate overruled the Appellant's advocate's objection on the production of the Sale Agreement of 21<sup>st</sup> March 1983 on the grounds that it was not stamped as required by the Stamp Duty Act.

38. I have perused the agreement that was produced in court as DEXB4. The said agreement is in its original form and shows that the deceased purchased the suit property for Kshs.135,000 from the Appellant. The agreement has not been stamped as required by the Stamp Duty Act.

39. The non payment of stamp duty pursuant to the provisions of the Stamp Duty Act does not in itself lend the document inadmissible. There is a long chain of authorities by the Court of Appeal and the High Court in which it has been held that stamp duty can be paid on a document at any time even after the said document has been produced in evidence.

40. Having produced the Sale Agreement in evidence, it was the duty of the Respondents to make payments of the requisite stamp duty, which they have not done. However, the fact that the Respondents have not made payment of the stamp duty in respect of the agreement does not dis-entitle the trial court from considering the contents of the agreement with a view of understanding the agreement that the Appellant had entered into with the deceased *inter se*.

41. The trial court was therefore entitled to consider the agreement in view of the fact that the Appellant admitted in cross-examination that he signed the agreement. The issue of payment of stamp duty on the agreement can still be pursued by the relevant authorities.

42. The carbon copy of the Application for the Consent of the Land Control Board has the original signatures of the Appellant and the deceased. The said carbon copy was therefore procedurally produced considering that the original always remains with the Board.

43. The Appellant did not produce evidence from a document examiner to disprove the fact that he signed the Application for consent of the Board. In the circumstances the learned Magistrate was right to conclude that the Appellant signed the Application for the Consent of the Board that was produced as

DEXB6.

44. The Settlement Land Officer, DW2 produced in evidence the entire file in respect of the suit property. In the file, there was a copy of the Consent of the Board which was issued on 30<sup>th</sup> May 1988 in respect of the transfer of the suit property from the Appellant to the deceased.

45. The original file from the Land Adjudication and Settlement Office also has a carbon copy of the Transfer with the original signatures of the Appellant and the deceased in respect of the suit property.

46. The said Transfer was witnessed by the Settlement Officer. In the same Transfer document, the Estate Manager of SFT signed a certificate of consent transferring the balance of the loan that was due to SFT to the deceased. The Transfer document, having been witnessed by a public officer pursuant to the provisions of Section 110 of the Registered Land Act, repealed, is a valid document.

47. According to the evidence of the Settlement Officer, by the time the parties herein signed the Sale Agreement and the Transfer, the Title Deed had not been issued.

48. The transfer of the Appellant's interests in the suit property to the deceased is further confirmed by the District Settlement Officer, Kilifi, in his letter dated 26<sup>th</sup> April 1983 and addressed to the Secretary, Land Control Board. In that letter, the officer requested to be furnished with the consent of the Board, which consent was given on 30<sup>th</sup> May, 1983.

49. It was the evidence of the said officer that when the Title Deed was eventually issued, it was erroneously issued to the Appellant who had already passed his interests in the suit property to the deceased. It is for that reason that on 21<sup>st</sup> July 2008, the District Land Registrar informed the Appellant that having transferred the entire land to the deceased, someone erroneously forwarded his name to the Settlement Office and that he should not have collected the Title Deed.

50. The Appellant admitted in evidence that he received Kshs.135,000 from the deceased and he acknowledged the receipt in writing.

51. According to the evidence of the Appellant, he gave to the deceased the suit property as security in 1983.

52. However, no evidence was placed before the trial court to show that the Ksh.135,000 the Appellant received from the deceased was in respect of a loan. There was also no evidence that was placed before the trial court to explain why the Appellant will handover possession of the land to the deceased immediately after the signing of the agreement in 1983 together with the letter of allotment if the suit property was just to be used as security, and only claimed for the land when the Title Deed was issued to him and a Restriction registered.

53. Having considered and evaluated the evidence on record, I am in agreement with the holding of the Magistrate that in view of the fact that the Appellant was a councillor, he was aware of the fact that he was selling the suit property to the deceased in 1983. His intention, as correctly held by the learned Magistrate, was to transfer his interests in the suit property to the deceased.

54. I am also in agreement with the holding of the learned Magistrate that the Respondents proved on a balance of probability that the consent of the Land Control Board was obtained before the suit property was transferred to the deceased. Consequently, I concur with the learned Magistrate's finding that the Appellant was not entitled to the orders that he had sought in the Plaintiff.

55. In view of the fact that the Title Deed in respect of the suit property was issued to the Appellant by mistake, the same should be expunged from the register and a valid Title Deed issued in favour of the deceased.

56. According to the provisions of Section 80(1) of the Land Registration Act, the court may order for the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

57. The evidence that was placed before the trial court shows that the Title Deed in respect to the suit property was obtained by mistake, the Appellant having sold and transferred the same to the deceased. Consequently, the order by the learned Magistrate that the Appellant should deposit in court the Title Deed for onward transmission to the Ministry of Lands for further action could only have meant one thing, that the title was to be forwarded to the Ministry of Lands for cancellation pursuant to the provisions of Section 80(1) of the Land Registration Act.

58. For those reasons, I dismiss the Appellant's Appeal with costs and uphold the Judgment of Hon. A. N. Obura of 9<sup>th</sup> October 2013.

Dated and delivered in Malindi this **15<sup>th</sup>** day of **May**, 2015.

**O. A. Angote**

**Judge**