



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 109 OF 2012

MAALIM MOHAMED DIMA.....PLAINTIFF

VERSUS

KADHI ATHMAN ABUBAKAR.....1ST DEFENDANT

SAMOW MOHAMED.....2ND DEFENDANT

J U D G M E N T

Introduction:

1. This court was moved by the Plaintiff by way of a Plaint dated 14th June 2012 and filed on 10th July 2012.
2. In the Plaint, the Plaintiff has averred that he is the actual, real and or beneficial owner of plot number 6997/III/MN originally known as plot number 539/III/MN which he acquired in 1994 (the suit property).
3. The Plaintiff has pleaded that he came into possession of the suit property first as a tenant where he used to pay ground rent to one Mrs. Kobana Salim before the plot was given to him; that there was a dispute between him and the 2nd Defendant which ended up in court and that while the said case was pending, the 1st Defendant fraudulently processed a title document in his own name.
4. The Plaintiff has particularised the alleged fraud by the 1st Defendant. According to the Plaintiff, the 1st Defendant obtained the title document in respect to the suit property by fraudulently forcing one Rehema Shee Ali to sign documents which she did not understand and which turned out to be documents transferring the land to himself.
5. The Plaintiff is claiming for the cancellation of the title for land reference number 6997/III/MN and registered as CR53079 in the names of the 1st Defendant and have the same re-issued in his names.
6. On his part, the 1st Defendant averred that plot number 6997 (originally number 539/128) of Section III MN originally belonged to Rehema Shee Ali who transferred it to him at a consideration of Kshs.200,000; that he was thereafter issued with a certificate of title and that he is a bona fide purchaser for value without notice and his right of ownership is indefeasible.
7. The 1st Defendant further averred that neither Rehema Shee Ali nor himself were parties to Kilifi SRMCC Number 6 of 2004 or Malindi HCA No 4 of 2000 and that indeed the Plaintiff's advocate on record confirmed in writing that Rehema Shee Ali was at liberty to transfer the suit property notwithstanding the existence of the two cases.
8. In the Counter claim, the 1st Defendant has prayed for an order that the Plaintiff should vacate the

- suit property and remove the temporary structure thereon.
9. In his Defence, the 2nd Defendant deponed that he is the owner of a permanent residential house on the suit property which he built in the year 1991 after entering into a tenancy agreement with one Kobana Salim Hamisi.
 10. The 2nd Defendant has denied in his Defence that the Plaintiff came into possession of the suit property as a tenant and that he used to pay ground rent for the land and that the Plaintiff's claim contradicts his claim in Kilifi SRM Misc. Civil Application number 6 of 2004.
 11. It is the 2nd Defendant's averment that the Plaintiff's claim raises the same matters of law and fact as those raised in Kilifi SRM Misc. Application Number 6 of 2004 and the matter is therefore *res judicata*.

The Plaintiff's case

12. The Plaintiff, PW1, informed the court that the 1st Defendant is his neighbour in Mtwapa, Kilifi County. It was the evidence of PW1 that his house and the 1st Defendant's house are on one plot.
13. According to PW1, he went to Mtwapa in 1981 as a teacher of Madrasa and was given the plot by the owner, Mrs. Kobana Salim, because of his work as a teacher of madrasa in Mtwapa. It was his evidence that he started staying in a house which is on the suit land from 1991 until 1994 when he left.
14. After five to six years, it was the evidence of PW1, that he went back to Mtwapa and found that the 2nd Defendant had requested Ms Kobana Salim to allow him to stay in the house while the Plaintiff was away.
15. Although the 2nd Defendant was asked to vacate the house so that the Plaintiff could continue occupying it, he refused. The Plaintiff produced a letter from the Chief asking the 2nd Defendant to leave the house he was occupying within seven (7) days as PEXB1.
16. When the 2nd Defendant refused to leave the house that the Plaintiff felt he was entitled to, it was his evidence that he filed a suit in Kilifi being SRMCC number 6 of 2004. However, his case was dismissed by the lower court and he filed an appeal in the High Court.
17. While the appeal in the High Court was pending, it was the evidence of PW1 that he was informed that the land had been transferred to the 1st Defendant who was now in possession of the certificate of title.
18. It was the evidence of PW1 that the 1st Defendant is not entitled to the suit property because the family of Mrs. Kobana Salim did not sell to him the said land.
19. PW1 refuted the claim that Rehema Shee Ali ever gave or sold to the 1st Defendant the suit property.
20. Although the 1st Defendant was given a portion of the suit land by Rehema Shee, it was the evidence of PW1 that it was only in respect to where the 1st Defendant had built a house and not the entire plot. PW1 informed the court that the 1st Defendant combined his plot and the Plaintiff's plot and acquired a title to it; that he only knew about the existence of the title document when he received a letter from the 1st Defendant's advocate and that it is Rehema's mother who allocated to him the plot he is claiming.
21. Although PW1 had agreed with Ms Kobana to be paying her Kshs.100 every month for using the plot, it was the evidence of Pw 1 that she later on allowed him to live on the plot without paying any rent because he was a madrasa teacher in the area.
22. PW1 produced in evidence the tenancy agreement that he entered into with Ms Kobana.
23. PW1 also produced as PEXB 3 a copy of the letter that he sent to the Ministry of Lands complaining about the issuance of the title document in respect to the suit property to the 1st Defendant.
24. It was the evidence of PW1 that the Kobana family has been protesting about the issuance of the title to the 1st Defendant. It was his testimony that the land he is claiming measures 20 M by 10 M while the land the 1st Defendant was occupying and which he is entailed to measures 10 M by 15 M. According to PW1, he has sued the 2nd Defendant because he has refused to vacate his portion of land.

25. In cross-examination, PW1 stated that the land he is claiming was sold to him in 1994 having paid Kshs.8,000 for it. It was his evidence that he only bought the land but not the house having been given the house by Ms Kobana.
26. PW1 denied that he gave his advocate instructions to write the letter dated 13th September 2010. It was the evidence of PW1 that he does not know if the drawings of the house that he was given were approved by the Kilifi County Council and that the 1st Defendant misled Rehema Shee to get the whole piece of land.
27. PW1 admitted that in the Kilifi case, he told the court that he was given the house in 1985. It was his evidence that he was given the land in 1994 although he had been given the house much earlier by Ms Kobana.
28. PW1 informed the court that the 2nd Defendant has been staying in the house since 1991.
29. Rehema Shee Ali, PW2, informed the court that she knew the Plaintiff. It was her evidence that she is aware that the Plaintiff used to stay in a small house on her late mother's plot. PW2 informed the court that it is only her late mother who knew the circumstances that led to the Plaintiff's stay in the house.
30. PW2 informed the court that the 1st Defendant is her former husband and that he bought a portion of the suit property for Kshs.200,000 from her and her other two siblings.
31. According to PW2, the small house that was occupied by the 2nd Defendant was built by her mother and not the 2nd Defendant; that it is the Plaintiff who used to stay in the small house that was built by her late mother and that she did not know who between the Plaintiff and the 2nd Defendant was recognised by her late mother as the bona fide occupier of the house.
32. Although she sold to the 1st Defendant the portion of land that his house was standing on, and not the whole portion, it was the evidence of PW2 that she signed the agreement of sale while sick and as the administrator of the estate of her late mother.
33. PW2 denied any knowledge of an agreement between her late mother and the Plaintiff or the 2nd Defendant.
34. In cross-examination, PW2 stated that she sold to the 1st Defendant the house he was living in and the piece of land where the house stood and that when she signed the agreement, it was with the permission of her siblings, Shamsha and Zulfa.
35. PW2 admitted that she also signed the transfer document using her thumb print after which she was paid Kshs.200,000 which she shared with her sisters.
36. It was the evidence of PW2 that she allowed the surveyor to survey the portion of land that had the 1st Defendant's house.
37. PW2 denied having sold the small house to the 2nd Defendant. It was her evidence that she did not know on whose authority the 2nd Defendant was occupying the small house.
38. According to PW2, she has also never sold the small house or land to the Plaintiff. It was her evidence that neither her nor her sisters were aware of the sale of the small house by their late mother to the Plaintiff and that the land and house does not belong to the Plaintiff.
39. It was the evidence of PW2 that she only sold an empty plot to the 1st Defendant whereafter he built his house. PW2 stated that she never saw the land she was selling to the 1st Defendant to ascertain its size and that the land she sold to the 1st Defendant is different from where the house that the 2nd Defendant is occupying stands on.
40. PW3, Abdulla Mengi Mohammed, informed the court that he was a grandson of the late Ms Kobana and that he is the one who manages her property.
41. It was the evidence of PW3 that he has known the Plaintiff for a long time as his madrasa teacher and that he used to occupy the house being occupied by the 2nd Defendant.
42. It was the evidence of PW3 that the house being occupied by the 2nd Defendant was built by a Mr. Hemed, with her late grandmother's permission, for the purpose of a football club. Later on, the Plaintiff was allowed to stay in the house.
43. According to PW3, there was a vacant plot in front of the house. An agreement was later on prepared allowing the Plaintiff to purchase both the house he was occupying and the vacant plot. It was his evidence that he prepared the agreement which was signed by her late grandmother, Ms Kobana. The agreement was produced as PEXB3

44. It was the evidence of PW3 that when the Plaintiff left, the 2nd Defendant's wife requested his late grandmother to allow them stay in the house temporarily. However the 2nd Defendant later on refused to vacate the house.
45. PW3 stated that he was surprised when he was told that the 1st Defendant had been issued with a title document for the whole plot.
46. It was the evidence of PW3 that the vacant plot on which the 1st Defendant built his house had already been sold to the Plaintiff by her grandmother and that the plot was part of plot number 539 Section III/MN.
47. It was the evidence of PW3 that it is the Plaintiff who is entitled to the house occupied by the 2nd Defendant together with the land on which the said house stands.
48. In cross-examination, PW3 stated that he is not one of the people entitled to inherit Ms Kobana's estate. PW3 admitted that PW2 is the administrator of the Estate of Ms Kobana and that none of the Kobana's siblings have gone to court to dispute the dealings in the Estate of Ms Kobana.
49. Although the agreement between Ms Kobana and the Plaintiff is purported to have been witnessed on 18th April 2013, it was the evidence of PW3 that Ms Kobana died in the year 2005; that he was the one who prepared the agreement in 1994 and that the house that the Plaintiff was staying in does not have an approval from the Municipal Council of Kilifi.
50. The 1st Defendant, 1DW1, informed the court that plot number 6997, which is the suit property, is registered in his name. Initially the plot belonged to Ms Kobana Salim Khamisi.
51. It was the evidence of 1DW1 that before Ms Kobana died, he went to see her in the company of the 2nd Defendant. He then informed Ms Kobana that he was interested in purchasing the entire plot and he paid her Kshs.15,000/-. However, Ms Kobana thereafter died. Before her death, it was the evidence of 1DW1 that Ms Kobana informed Ms Rehema of his interest in the plot.
52. According to the evidence of 1DW1, Rehema Shee transferred to him the entire plot for Kshs.200,000. The transfer document was produced as 1DEXB1.
53. 1DW1 informed the court that the Plaintiff's advocate wrote to Ms Rehema a letter dated 13th September 2010 informing her that the suit which was pending in the lower court in Kilifi had nothing to do with her. The letter was produced as 1DEXB 2.
54. According to 1DW1, the 2nd Defendant has constructed a house between his house and the house that Ms Kobana had allowed the 2nd Defendant to occupy.
55. In cross-examination, 1DW1 stated that Rehema sold to him the suit property after the succession cause had been finalised and that the suit property was one of the plots that was created from plot number 539.
56. It was the evidence of 1DW1 that he started building his house in 1999 after she gave to Ms Kobana some money. It was his evidence that the agreement for sale of land between him and Rehema was prepared by the surveyor; that neither him nor Rehema know how to read and that before signing, the agreement was read to Rehema by her son Salim.
57. In cross-examination, 1DW1 stated that when he bought the suit property, there was a house which was occupied by the 2nd Defendant. It was his evidence that the seller informed him that the 2nd Defendant had been allowed to stay in the house temporarily and that he was not paying any rent.
58. It was the evidence of 1DW1 that it is Rehema who authorised the survey of the suit property.
59. The surveyor, 1DW2, informed the court that plot number MN/III/539/R is owned by several interested parties. Rehema Shee Ali is one of the shareholder's in the said property.
60. It was the evidence of the surveyor that he was instructed by the 1st Defendant to survey the suit property which he did.
61. According to 1DW2, the Deed Plan number in respect to the suit property is 326723 dated 28th June 2011 and the plot number is 6997/III/MN. This plot was exercised from land known as plot 539. The deed plan was produced as 1DEXB7.
62. It was the evidence of 1DW2 that at the time of the survey, he saw a mud walled house on the suit property.
63. In cross-examination, it was the evidence of 1DW2 that the survey was done in accordance with the agreement that had been entered into between the 1st Defendant and Rehema although the sale agreement did not show the measurements of the land being sold.

64. Before he commenced the survey work, 1DW2 stated that he passed through Rehema's house and she confirmed that she had indeed sold to the 1st Defendant the suit property although Rehema was not present during the actual survey work.
65. The 2nd Defendant, 2DW1, informed the court that he has been staying on the suit property since 1991 with the permission of Ms Kobana.
66. It was his evidence that he purchased a piece of land measuring 30 by 33 feet and that he paid Ms Kobana Kshs.30,000 for the plot. The purported agreement between the 2nd Defendant and Ms Kobana was produced as 2DEXB 1.
67. It was the evidence of 2DW1 that he extended the size of the land he had purchased and made a further payment of Kshs.15,000. He produced the receipt that he says was given to him by Ms Kobana as 2DEXB2.
68. According to 2DW1, the Plaintiff sued him in the Kilifi court seeking for vacant possession of the house that he was staying in. The pleadings in the Kilifi court were produced as 2DEXB 3 and the judgment in the matter was produced as 2DEXB 4. The Record of Appeal in respect to the same matter was produced as 2DEXB 5.
69. It was the evidence of 2DW 1 that the 1st Defendant was given a piece of land next to his house where he constructed his house in the year 2000.
70. According to 2DW1, the house that the Plaintiff was staying in was demolished after he moved out and that he is the one who built the house that he is staying in.
71. In cross-examination, 2DW1 stated that the agreement for the purchase of land from Ms Kobana was entered into with Ms Kobana's son known as Keli and that the agreement was not signed by Ms Kobana. It was his evidence that Ms Kobana allowed her son to sign the agreement on her behalf because she did not know how to read and write.
72. It was his evidence that although he built the house on the suit property in 1991, he did not have the duly approved building plans from the council. 2DW1 denied that he entered the house that used to be occupied by the Plaintiff.
73. 2DW1 stated that although he purchased the land from Ms Kobana, nobody witnessed the signing of the agreement between him and Ms Kobana's son and that he was given additional land after paying Kshs.15,000 in addition to the Kshs.30,000 that he had already paid.

The Plaintiff's submissions:

74. The Plaintiff's counsel submitted that his client produced an agreement between himself and Mrs. Kobana for a portion measuring 20 Meters by 10 Meters and that he paid Kshs.8,00 0 for it.
75. It was submitted that after the purchase of the property, the Plaintiff lived in the house on the land until he moved out temporarily when the 2nd Defendant sought for accommodation from Ms Kobana.
76. The Plaintiff's advocate submitted that the 2nd Defendant did not enter into any agreement with Ms Kobana and cannot therefore claim for the land.
77. According to counsel, the agreement that was entered into between the 1st Defendant and Rehema Shee Ali was invalid because by the year 2008, no succession had been done over the estate of Kobana Salim Khamisi; that Rehema's signature was not witnessed and that in any event the agreement did not have the measurement of the plot that was being sold to the 1st Defendant.
78. The Plaintiff's counsel submitted that the suit is not res judicata because pursuant to the provisions of the Registration of Titles Act, the lower court did not have jurisdiction to deal with the matter.

The 1st Defendant's submissions:

79. The 1st Defendant's counsel submitted that the lower court determined the question as to who between the Plaintiff and the 2nd Defendant is the owner of the house on the suit property, and that is the 2nd Defendant.
80. Counsel submitted that the 2nd Defendant has not filed any claim in these proceedings; that the 2nd Defendant admitted that he did not get approvals for the construction of his structure on the suit property and that even if he signed a tenancy agreement with Ms Kobana, he is in breach of the

same.

81. Counsel submitted that the 1st Defendant is the owner of the suit property having purchased it for Kshs.200,000; that even if the house being claimed by the Plaintiff and the 2nd defendant belongs to the said parties, then they would be entitled to compensation of the value of the said house.

The 2nd Defendant's submissions:

82. The 2nd Defendant's counsel submitted that the Plaintiff and the 1st Defendant had failed to prove their respective cases; that the Plaintiff was a mere licensee of Kobana Salim and that once the Plaintiff quit his job as the Islamic teacher, his licence to occupy the house lapsed.

83. Counsel submitted that the 2nd Defendant was granted a lease and that he paid for the extension of the house on the suit property; that in the lower court, the Plaintiff was claiming for a house without land and that the Plaintiff's case was dismissed by the lower court.

84. Counsel submitted that the suit property does not belong to the 1st Defendant because the plot still belongs to the Estate of Kobana Salim; that the registered owner never took steps to evict the 2nd defendant since 1991 and that by the time the 1st Defendant was purchasing the land, the 2nd Defendant had dispossessed the registered owner of his portion of land for a continuous period of over 12 years.

85. Counsel submitted that Rehema Shee only sold to the 1st Defendant the portion of land on which his house stands and not the whole land.

Analysis and findings:

86. It is not disputed that plot number 6997/III/MN (the suit property) once belonged to the late Kobana Salim Khamisi, the mother of Rehema Shee Ali, PW2.

87. It is also not in dispute that at some particular point, the Plaintiff was allowed by the late Ms. Kobana Salim Khamisi to occupy a house which was standing on a portion of the suit property before he left. By that time, the suit property was part of the larger portion of plot number 539/III/MN.

88. The evidence by the Plaintiff is that he was allowed to stay in the said house by the late Ms Kobana because of his work as a madrasa teacher. It was his evidence that he eventually purchased the house and the land from Ms. Kobana in 1994.

89. According to PW1, he stopped staying in the house temporarily for a period of between 5 to 6 years and when he went back, he found the 2nd Defendant was occupying the same house.

90. The Plaintiff then sued the 2nd Defendant in the lower court seeking for vacant possession. The suit in the lower court was dismissed and the Plaintiff appealed against the said judgment.

91. While the suit was pending in the lower court, it was the evidence of the Plaintiff that he discovered that the 1st Defendant had purportedly purchased the suit property from PW2 and a certificate of title issued to him. The Plaintiff is seeking for the cancellation of the title document that was issued to the 1st Defendant.

92. It is the Plaintiff's case that he is the one who is entitled to the house and land by virtue of having stayed in the said house and later on having purchased the land from Ms Kobana. It is the Plaintiff's further case that neither the 1st nor the 2nd Defendants are entitled to the suit property.

93. On the other hand, the 1st Defendant's case is that he purchased the suit property from Rehema Shee, the administrator of the Estate of Ms Kobana and that he is a bona fide purchaser for value without notice.

94. As for the 2nd Defendant, his case is that he bought a portion of the suit property from the late Ms Kobana; that he constructed his house on the said portion and that in any event, he has been living on the suit property for more than 12 years.

95. The dispute as to who should occupy a house that was or is on a portion of the suit property was initially between the Plaintiff and the 2nd Defendant.

96. According to the letter that was produced by the Plaintiff as PEXB1, the District Officer, vide an undated letter informed the 2nd Defendant to vacate the house he was occupying within one week

- commencing 10th March 2004. The 2nd Defendant never vacated the house despite the said letter from the District Officer.
- 97.To support the argument that other than having been allowed to stay in the house, he also purchased it with the land, the Plaintiff produced in evidence a Tenancy Agreement between himself and Ms Kobana as PEXB 3.
- 98.The Tenancy Agreement has referred to Ms Kobana as the “Landlord” while the Plaintiff has been referred to as “ the Tenant”. The agreement is in respect of land measuring 20 M by 10 M on plot number 539/III/MN.
- 99.The agreement states that “the agreed goodwill for the plot shall be Kshs.8,000 and the monthly ground rent was to be Kshs.100. The Plaintiff was allowed to build either a commercial or a dwelling house and the rent was subject to increment with time. The Plaintiff was also required to comply with all regulations laid down by the county council.
- 100.Although the agreement is purported to have been signed by the late Kobana, the advocate who purportedly witnessed her sign the agreement has stated in the agreement that Ms Kobana never appeared before her. Instead, it is Ms Kobana's grandson, one Abdulrazaq who appeared before her and informed her that indeed it is her grandmother who had signed the Tenancy Agreement.
- 101.The signature of Ms Kobana was never attested contrary to the provisions of Section 3(3) of the Law of Contract Act. To that extent, the tenancy agreement, in so far as the same purports to pass interest in land to the Plaintiff, is invalid.
- 102.The purported agreement as between the Plaintiff and the late Ms Kobana was registered on 23rd May, 2013. The signature of the Plaintiff was witnessed on 18th April 2013. This was way after the death of Ms Kobana, a clear indication that the document must have been prepared without the knowledge of the late Ms Kobana, or even after her death in 2005.
- 103.At the bottom of the said agreement, it has been noted as follows:

“The tenant is not allowed to sell his or her house without the consent of the landlord and without a fresh agreement and a fresh goodwill payment to the landlord”.

- 104.The totality of the purported agreement, if it was valid, shows that the Plaintiff was only purchasing the house on the land, and he was required to pay the monthly rent of Kshs.100. The tenancy agreement was not in respect to the sale of land.
- 105.The concept of house without land, as I held in case of **Ali Amin Ahmed Dahman & Another Vs Athuman Sudi (2013) e KLR** , is recognised in the coastal region.
- 106.In the said case I held as follows:

“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, however, are supposed to be noted on 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 tress by a person who is not the owner of the land was and is 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 that twelve years.”

- 107.Ms Kobana did not have any intention of selling the suit property to the Plaintiff even if she had signed the Tenancy Agreement produced by the Plaintiff.
- 108.There is therefore no evidence before me to show that the Plaintiff purchased the suit property from Ms Kobana or that he was entitled to the house that he used to occupy with the permission of Ms Kobana before the same house was occupied by the 2nd Defendant upon his departure.
- 109.In any event, the issue of ownership of the house on the suit property was the subject matter in Kilifi SRMCC No. 6 of 2004 between the Plaintiff herein and the 2nd Defendant.

110. In that suit, the Plaintiff sued the 2nd Defendant claiming for the eviction of the 2nd Defendant from the house on plot number 539/III/MN.

111. At paragraph 3 and 4 of the Plaintiff in the lower court, the Plaintiff averred as follows:

“The Plaintiff is the owner of that house (without land) situated on plot number 539/III/MN. THAT the Plaintiff allowed the Defendant to occupy the said house and to look after it while the plaintiff was away from Mtwapa and it was agreed that in the event of the Plaintiff returning the Defendant would give vacant possession thereof on demand and without any condition....”

112. In his Defence in the lower court, the 2nd Defendant herein stated as follows:

“The Defendant further says the house in question belongs to him and he built it himself on a sub-lease from one Kobana Salim Khamisi of Mtwapa....”

113. In her decision, the learned magistrate found that the Plaintiff had not proved his case on a balance of probability. The magistrate dismissed the suit.

114. It is clear from the pleadings that were filed by the Plaintiff in the lower court that his claim was for the house that he used to occupy and not for the house and the land. The Plaintiff cannot now change that position and state that he is entitled to the house and the land having purchased the land in 1994. This position was further confirmed by the Plaintiff’s advocate’s letter addressed to Rehema Shee dated 13th September, 2010. In the letter, the Plaintiff’s advocate stated as follows:

“The issue in court has nothing to do with the interest in land. The cause of action is all about ownership of a house standing on a land tenure known as house without land....The case does not bar you from selling your land or any part thereof. You should further note that you are not a party to the court case and neither have you ever been served with any orders. You are therefore not barred by any law or restrained by any orders from selling your property.”

115. The Plaintiff has never challenged the Judgment of the lower court’s decision and the issues raised in this matter viz-a-viz the house that he used to occupy are therefore *res judicata*.

116. In any event, I have already found that the Plaintiff is not entitled to either the house or the suit property, the Judgment of the lower court notwithstanding. Furthermore, it is the Plaintiff, through his advocate, who allowed Rehema Shee (Pw 2) to sell the land on which the house he was claiming in the lower court was standing. He is estopped from turning around by alleging that the sale of the suit property by the said Rehema Shee to the 1st Defendant was unlawful and that he is the one entitled to the land.

117. The Plaintiff’s claim as against the Defendants cannot therefore succeed. Even if it is true that the 1st Defendant obtained the title document fraudulently, and that Rehema Shee did not have the legal capacity to sale the land, the Plaintiff has no proprietary interest in the suit property to challenge the title that was issued to the 1st Defendant.

118. I say so because the Plaintiff is not the administrator of the Estate of the late Ms Kobana or one of the beneficiaries of the said Estate. It is only the administrator of the Estate of the late Kobana or a beneficiary to the Estate who can challenge the title by filing a suit and raising the grounds that have been raised by the Plaintiff to challenge the title that was issued to the 1st Defendant.

119. PW2, Rehema Shee Ali, admitted that she signed the agreement dated 1st August 2008 in which she sold land to the 1st Defendant. The agreement is not specific as to the land that the said Rehema was selling and is of little or no evidential value. The signature of Rehema Shee was also not witnessed.

120. Although the said Rehema informed the court that she did not sell the whole suit property to the 1st Defendant, she has not challenged the 1st Defendant’s acquisition of the suit property.

121. The inaction by the said Rehema Shee Ali to repossess part of the suit property that she says she did not sale is further confirmed by the Transfer document that was signed by her transferring land

- known as subdivision number 6997 (original number 539/128) to the 1st Defendant for a consideration of Kshs.200,000. The transfer document has quoted the survey plan number depicting the land that she was selling.
- 122.Rehema Shee Ali voluntarily signed the Transfer document. It was her evidence that she signed the agreement and the transfer document in the presence of her siblings, Shamsa and Zulfa, and that she shared the proceeds of the sale with her sisters. It therefore does not matter that she is illiterate and moreso considering that she has not filed any claim to dispute the transfer of the suit property to the 1st Defendant. Her evidence as a witness that she did not sell the whole portion of land cannot invalidate the 1st Defendant's title.
- 123.She should have sought to be enjoined in the suit as a party, and not as a witness, to challenge the 1st Defendant's title to enable the court to effectually and completely adjudicate upon the proprietary of the suit property.
- 124.It is true, as argued by the Plaintiff and the 2nd Defendant that as at the time the agreement dated 1st August 2008 was signed by Rehema Shee Ali, the Estate of Ms Kobana had not been distributed by the Kadhi's court and she could not therefore transfer the suit property to the 1st Defendant.
- 125.However, the registrable instrument in this case was the transfer document that she signed. The question that this court should pose is whether as at the time the Transfer document was signed by the said Rehema Shee Ali, she had the legal capacity to do so.
- 126.The transfer document that was produced by the 1st Defendant is neither dated nor registered. This court cannot therefore make a finding on the legality of the said Transfer, considering that Rehema Shee was appointed as the legal heir of 2/3 of the Estate of Ms Kobana in Succession Cause number 126 of 2009 in Kadhi's court, Mombasa on 20th July, 2009.
- 127.The failure by the Plaintiff and the 2nd Defendant to provide to this court evidence to show that the suit property was transferred to the 1st Defendant before Rehema Shee Ali was appointed the legal heir of 2/3 of the Estate of the late Ms Kobana falls short of the requirement that fraud must be proved by the person making the allegation.
- 128.In view of the fact that the 1st Defendant is the registered proprietor of the suit property, and in the absence of evidence of fraud on the part of the 1st Defendant, the 1st Defendant's title is protected by the provisions of Article 40 of the Constitution and Section 23 of the repealed Registration of Titles Act.
- 129.The 2nd Defendant's case is that he purchased the portion of land where the house which the Plaintiff used to occupy stood. It is the 2nd Defendant's case that he should be allowed to own the portion and that in any event he has been living on the land for over 12 years.
- 130.The issue of the doctrine of adverse possession cannot arise in view of the evidence of the 2nd Defendant himself that he was allowed on the suit property by the then registered proprietor, Ms Kobana and later on purchased the land. It is trite law that one cannot obtain land by virtue of the doctrine of adverse possession if the possession of the land was with the permission of the proprietor.
- 131.It is not permissible for a party to raise the defence of adverse possession in his submissions as the 2nd Defendant's advocate has purported to do. I have perused the Defendant's defence filed on 13th August, 2012. In the said defence, the 2nd Defendant did not plead that he is entitled to the suit property by virtue of the doctrine of adverse possession. Even if he had proved that fact, which he did not, that claim could not be awarded because it was not specifically pleaded in the defence.
- 132.The 2nd Defendant produced in evidence an undated tenancy agreement to show that he purchased a property measuring 33 X 30 feet from the late Ms Kobana.
- 133.The tenancy agreement, although signed, was not witnessed. In fact, the evidence that was adduced in this court was that Ms Kobana never signed the purported Tenancy Agreement. The said agreement cannot therefore pass any interest in land in view of the fact that it was not signed by the vendor.
- 134.The 2nd Defendant's continued stay on the suit property can only be equated with that of a squatter who was staying on the land with the permission of Ms Kobana and then the 1st

Defendant after the suit property was transferred to him. In fact, Ms Rehema Shee Ali, the legal heir of the suit property, does not recognise the purported tenancy agreement that was produced as 2DEXB1, and which I have found to be invalid.

135. In the circumstances, the 2nd Defendant's claim as against the 1st Defendant cannot stand. Both the Plaintiff and the 2nd Defendant have to give way to the registered proprietor. It is the 1st Defendant who has the constitutional right to own and possess the suit property. The Plaintiff and the 2nd Defendant have no proprietary interest known in law in the suit property.

136. For the reasons I have given above, I dismiss the Plaintiff's Plaint dated 14th June, 2012 with costs and allow the 1st Defendant's counterclaim dated 1st August 2012 in the following terms:

(a) The Plaintiff and the 2nd Defendant, be and are hereby ordered to vacate from subdivision number 6997/III/MN and in default the Plaintiff and the 2nd Defendant be evicted and the structures being occupied by the Plaintiff or the 2nd Defendant be demolished at their own costs.

(b) The Plaintiff and the 2nd Defendant to pay to the 1st Defendant the costs of the counterclaim.

Dated and delivered in Malindi this 24th day of **October**, 2014.

O. A. Angote

Judge