



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyumu v Said & another (Civil Appeal E007 of 2022)  
[2025] KECA 929 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 929 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E007 OF 2022  
KI LAIBUTA, LA ACHODE & GWN MACHARIA, JJA  
MARCH 21, 2025**

**BETWEEN**

**PETER PHILIP NYUMU ..... APPELLANT**

**AND**

**SAID SALEH SAID ..... 1<sup>ST</sup> RESPONDENT**

**AWADH SALEH SAID ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Environment and Land Court at Mombasa (S. Munyao, J.) delivered on 9th November 2021 in E.L.C.A No. 7 of 2019)*

**JUDGMENT**

1. This is a second appeal from the judgment and decree of the Environment and Land Court at Mombasa (Munyao Sila, J.) dated 9<sup>th</sup> November 2021 in ELCA No. 7 of 2019 and rendered in determination of an appeal from the judgment and decree of the trial court (Hon. G. Kiage, RM) dated 9<sup>th</sup> February 2019 in Mombasa RMCC No. 1472 of 2008.
2. The genesis of the appeal before us is that the appellant (Peter Philip Nyumu) filed suit against the respondents (Said Saleh Said and Awadh Saleh Said) in Mombasa RMCC No. 1472 of 2008 vide a plaint dated 20<sup>th</sup> June 2008 and amended on 10<sup>th</sup> July 2009. The appellant's case was that, on 5<sup>th</sup> December 2007, he purchased from the respondents a house without land on Plot No. 426/1/MN (the suit property) for a consideration of Kshs 750,000; that the purchase was contracted through the respondents' duly constituted attorney; that, since he purchased the house, the appellant had been unable to take possession thereof and/or collect rent from the tenants due to persistent interference by the respondents; and that, despite numerous demands, the respondents had failed, refused and/or neglected to comply, and hence the suit.



3. By reason of the matters aforesaid, the appellant sought a permanent injunction restraining the respondents from interfering with the suit property or the tenants thereon; or, in the alternative, a refund of Kshs. 750,000 being monies had and received by the respondents and/or their agent, plus loss of income at Kshs. 20,000 per month from 1<sup>st</sup> January 2008 until the date of judgment; and costs of the suit.
4. In their Statement of Defence dated 14<sup>th</sup> July 2008 and amended on 23<sup>rd</sup> July 2009, the respondents averred that they were the registered proprietors of the suit property as well as the house allegedly sold to the respondent, but denied that they had appointed a duly constituted attorney with powers to sell their house, and that the alleged sale was without their consent and or authority. They further contended that, if the appellant had conducted a search as a prudent buyer, he would have discovered that the purported Power of Attorney had been revoked. The respondents reiterated that they had never received Kshs. 750,000 or any other monies as payment for the sale of the property from the appellant; and that they were therefore not liable to reimburse or compensate the appellant for any loss or damage or costs.
5. According to the respondent, the appellant was not entitled to the orders sought in the amended plaint since the alleged vendor could not pass any interest or ownership of the house to the appellant. They prayed that the appellant's suit be dismissed with costs.
6. In its judgment, the trial court found that the Power of Attorney produced in court showed that it was donated by Said Saleh Said and Awadh Said Saleh, and that the nominee was one Abubakar Rahul Ndira; that the Certificate of Postal Search as at 13<sup>th</sup> November 2007 indicated the owners of the suit property as Awadh Bin Saleh holding 5/9 share, Omar Bin Fauzi holding 2/9 share and Charity Cherotich Tylor (as administrator of the estate of Maria Sylvia Taylor) holding 2/9 share; that no explanation was given by either the appellant or the respondents on the apparent difference between the names appearing on the Power of Attorney and those in the Certificate of Search; and that, for that reason, the Power of Attorney was ineffectual and rendered all the transactions founded thereon futile and a nullity. Accordingly, the trial court found no merit in the appellant's suit and dismissed it with orders that the parties bear their own costs.
7. Dissatisfied with the trial court's decision, the appellant moved to the ELC on appeal in ELCA No. 7 of 2019 faulting the learned trial Magistrate for: holding that the Power of Attorney was invalid; failing to find that the purported revocation of the Power of Attorney was registered after the agreement of sale had been completed and therefore became operative in rem on the date of its registration; and for misapprehending the nature of the claim in failing to appreciate that what was being sold was not the suit property, but a house without land, so that the identity of the registered owners was irrelevant as the respondents had admitted ownership of the house in issue.
8. In its judgment dated 9<sup>th</sup> November 2021, the ELC (Munyao Sila, J.) held that the Power of Attorney was a specific power of attorney to collect rent and sue on behalf of the donors; that the additional power to buy and sell movable or immovable property under the power of attorney was tied to the power to collect rent and nothing more; and that the donee could not therefore use this power of attorney to sell the suit land or any house on the suit land. The ELC further held that the holding of the suit land by the registered owners was of undivided shares; that there was no evidence that the owners had already shared whatever is developed on the land and that it had been specified who owns what on the ground; that the sale of the land or any development thereon could only be done with the consent of all the registered proprietors of the land; and that it mattered not whether the respondents pleaded that they were the owners of the land or the house being thereon without proving their title. Accordingly, the ELC dismissed the appeal with costs.



9. Still aggrieved, the appellant filed the instant appeal vide a Memorandum of Appeal dated 26<sup>th</sup> January 2022 faulting the learned Judge for: erring in his appreciation of the nature and purport of the Power of Attorney; holding that the said deed was invalid for its intended purpose; holding that the scope of the Power of Attorney excluded the transaction entered into between the appellant and the respondents' attorney; allowing the respondents to run away from the effect of what was patently their deed, and to benefit from a deficiency in the deed of attorney to the detriment of the appellant; failing to appreciate that the donors of the power of attorney were, on their own evidence, the sole persons in control of the domain or portion of land whereon stood the subject house with power to deal therewith independently of the co-registered proprietor in title to the land on which the house stood; ignoring the legal effect that the deed of revocation subsequently executed by the respondents would have had in construing the power of attorney as their own deed, and their contestations to the contrary notwithstanding; failing to properly analyse or assess crucial pieces of evidence; and for denying the appellant either of the alternative remedies sought in his plaint.
10. Learned Counsel for the appellant, M/s. Moses Mwakisha & Company, filed written submissions dated 19<sup>th</sup> September 2024. Counsel cited the case of Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR, outlining the role of the court in a second appeal; and cited *Selle & Others v Associated Motor Boat Company Limited* [1968] 1 EA 123, *Jabane v Olenja* [1986] KLR 661 and *Ephantus Mwangi & Anor v Wambugu* [1982-88] 1 KAR 278, all of which set out the mandate of a first appellate court, contending that the ELC failed to discharge this mandate.
11. Counsel for the appellant elected to make submissions on two main issues, namely: whether the contested Power of Attorney was valid and effectual for the purpose of sale of the house without land; and whether the respondents should be liable to the appellant for the purchase price and consequential economic loss.
12. On their part, learned counsel for the respondents, M/s. Mogaka Omwenga & Mabeya, filed written submissions dated 6<sup>th</sup> November 2024, which we have also considered.
13. Unless otherwise provided, this Court's mandate on 2<sup>nd</sup> appeal is limited to points of law. Section 72 (1) of the *Civil Procedure Act* provides that:
  72. Second appeal from the High Court
    1. Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—
      - a. the decision being contrary to law or to some usage having the force of law;
      - b. the decision having failed to determine some material issue of law or usage having the force of law;
      - c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.
14. In *Stanley N. Muriithi & another v Bernard Munene Ithiga* [2016] eKLR, this Court held that:

“We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides



for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law.”

15. In the same vein, this Court held thus in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of *Stephen Muriungi and another vs. Republic* (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:

“We would agree with the view expressed in the English case of *Martin vs Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

16. Having considered the record of appeal, the grounds on which it is anchored, the impugned judgment, the rival submissions and the law, and having taken to mind the propositions by learned counsel on the main issues in contention, we find that two main issues commend themselves for our determination, namely: whether the learned Judge was at fault in holding that the contested Power of Attorney did not permit sale to the appellant of the suit property or the house without land; and whether sale to the appellant of the suit property was likewise a nullity for lack of consent of all the proprietors.

17. On the 1<sup>st</sup> issue with regard to the terms of the Power of Attorney, the learned Judge held that:

“8. The issues herein more or less rotate on the validity, or otherwise, of the power of attorney dated 17 March 1993... It is of course dated 17 March 1993. At the introductory part, it states as follows:-

Said Saleh Said... and Awadh Said Saleh... appoint Abubakar Rahul Ndira... to collect rents and sue on my behalf...

9. The first question I ask myself is whether, assuming that the Power of Attorney is genuine (for it was described as fake by the respondents), it gave Abubakar the power to sell the suit land or any house within the suit land. My answer is no. This was not a general power of attorney as submitted by Mr. Mwakisha, but a specific power of attorney, to collect rents and sue on behalf of the donors, and I would limit that right to sue to the power to collect rents. I am aware that within the body of the power of attorney, there are the words “and further to buy and sell movable or immovable property” but this power to buy and sell movable or immovable property is not any authority or power to sell the suit land. It is all tied to the power to collect rent and nothing more. Abubakar could not therefore use this power of attorney to sell the suit land or any house on the suit land (assuming that this was a sale of house without land). On that basis alone, this appeal must fail.”



18. Taking issue with the learned Judge’s decision, counsel for the appellant submitted: that it is beyond contest that the power of attorney was the respondents’ deed, having been registered on 20<sup>th</sup> March 1998; that it was the respondents who moved to revoke the same on 23<sup>rd</sup> November 2007; that the revocation was not registered until 18<sup>th</sup> December 2007; that the revocation followed days after the appellant had, on the strength of the deed of attorney, executed the agreement for purchase of the house without land and paid over the purchase price to the respondents’ attorney; and that, by conduct, the respondents are estopped from disclaiming the deed because they could not revoke what they had not executed.
19. According to counsel, the question as to whether this was a general or special power of attorney was not critical in the circumstances of the case. Beyond the power and authority “to collect rents and sue on my behalf” that had been typed into the general form of the Power of Attorney, the scope of powers expressed therein included the power to “buy and sell movable or immovable property; to make sign, give and receive in due and customary form, all acts or deeds of transfer of such movable or immovable property ....”.
20. On their part, learned counsel for the respondents submitted that the superior court correctly appreciated and analysed the nature and purport of the Power of Attorney; and that it was not a General Power of Attorney and that, therefore, the donee could not sell the land or the house.
21. The learned authors of Halsbury’s Laws of England (2008, 5<sup>th</sup> Edn.) have the following to say about the construction of Powers of Attorney at paragraph 31:

“ A power of attorney is construed strictly by the courts, according to well-recognised rules, regard first being had to any recitals which, showing the general object, control the general terms in the operative part of the deed. General words used in conferring the power are construed as limited by reference to the special powers conferred, but incidental powers necessary for carrying out the authority will be implied.”
22. The holding of the New South Wales Supreme Court decision in *Angelina Spina v Permanent Custodians Limited* [2008] NSWSC 561 is equally persuasive. In this case, the court had this to say:

“ 108 Powers of attorney are instruments which have traditionally been strictly construed. Recitals in a power of attorney which show its object will control general terms in the operative part of the instrument. General words in it will be construed by reference to special powers conferred...”
23. In the instant case, the Power of Attorney exhibited and produced in evidence was prepared from a standard form titled “General Power of Attorney” which set out numerous general powers to be donated to the holder in the operative part of the deed, which included the power “to receive rents and grant receipts for the same”, “to commence, prosecute, defend any action or actions, suit or suits” and “to buy and sell moveable or immovable property; to make, sign, give and receive in due and customary form, all acts or deeds of transfer of such moveable or immovable property”, just to name but a few.
24. To our mind, the general power to “buy and sell movable and immovable property” cannot be conflated with power to grant a licence to construct a house without land as known to the local community’s customary practice to which we will shortly return. It is also noteworthy that the recitals



on the deed included specific words, which were typed into the empty space allocated for the recitals so as to read as follows:

“That I the Undersigned Said Saleh Said ... and Awadh Said Saleh... do hereby ordain, nominate and appoint Abubakar Rahul Ndira... to collect rents and sue on my behalf...”

25. As correctly observed by the learned Judge, the recital clearly showed that the general object of the Power of Attorney was to specifically grant the donee powers to collect rents and sue on behalf of the respondents. The myriad of general powers that followed in the operative part of the deed as pre-listed in the standard form were limited to only being applicable within the scope of the specific purpose of granting the power to collect rents and sue on the respondents' behalf. In effect, while the donee had power to collect ground rent or sue for recovery thereof, he had no power to sell the house without land, which attaches to a special licence that cannot be construed as movable or immovable property.
26. Even if the Power of Attorney was found to be valid, it could not be relied upon by donee to execute a binding sale agreement with the appellant for the purchase of the house in view of the fact that the transaction went beyond the scope of the general object of the Power of Attorney. Accordingly, the learned Judge correctly held that the Power of Attorney did not permit the sale to the appellant of the suit property or the house without land.
27. Turning to the 2<sup>nd</sup> issue as to whether the learned Judge was at fault in holding that the sale of the suit property was likewise a nullity for lack of consent of all the proprietors, we take to mind the learned Judge's observation that:

“ 10. The trial Magistrate was also not wrong in disregarding the power of attorney on the basis that it was not executed by the owners of the land. The power of attorney was signed by Said Saleh Said and Awadh Said Saleh, the respondents herein. The land is registered in the name of Awadh Bin Saleh 5/9 share, Omar Bin Funzi 2/9 share, and Charity Cherotich Tylor (as administrator of Maria Sylvia Taylor) 2/9 share. The holding is of undivided shares. No evidence was ever presented that the owners had already shared whatever is developed on the land and that it had been specified who owns what on the ground. It follows that in absence of this, any sale of the land, or anything developed on it, could only be done with the consent of all the registered proprietors of the land. It doesn't help the appellant to state that the respondents pleaded that they are the owners of the land and owners of the house. Registration and ownership of land is not through pleadings but through documentation. Thus, if one sues a defendant who has no title, and seeks specific performance, it matters not that in his pleadings the defendant pleads that he is the title holder of the land. The court can never issue the order of specific performance so long as the title holder is not the one sued and it is irrelevant that the defendant admits ownership. If that was not the position, then persons could collude to have a suit filed where a fraudulent person admits being owner and land is transferred without the knowledge of the title holder. In our case, a proper sale of the land or anything developed on the land, unless the shares were ascertained, could only be done with the consent of all the three proprietors of the land. Thus, even assuming that the power of attorney was valid and allowed a sale, there not being any authority to sell from Charity Cherotich Tylor and Omar Bin Funzi, and there not being any evidence that the house being sold was the actual share on the ground of the mentioned seller, the purported sale could not be given



effect. As I have mentioned, no evidence was presented about the shares on the ground. Neither did the sale agreement state whose share it was that was being sold. It never specified whether what was sold was the 5/9 share of Awadh Bin Saleh, or the 2/9 share of Omar Bin Funzi, or the 2/9 in name of Charity Cherotich Tylor.”

28. Submitting that the learned Judge was at fault, counsel for the appellant contended: that what the respondents were disposing of was their property in the house without land, which house they owned independently of the third registered proprietor of the land, one Charity Cherotich Taylor (hereinafter “Charity”); that DW1, who testified for the respondents, indeed stated that the proprietors of the houses without land separately controlled their own spheres and would not interfere with the dealings of the other, so that a transaction involving the two respondents relative to their house without land which did not affect proprietorship of the land could be concluded without involving Charity; and that, in the traditional practice of dealing with the concept of house without land as developed within the region over time, all that was required to complete the transaction was a duly executed agreement between owner and purchaser, coupled with the consent of the land owner.
29. According to counsel, the consent of the two principals (the respondents herein) was sufficient given DW1’s evidence that each proprietor controlled their particular domains on the ground, even though there was only one title to the suit property. Counsel submitted that B. W. Kenzi, the advocate who handled the transaction, testified that he had previously handled other similar transactions involving the same power of attorney, and that this transaction was similar in all aspects; that the learned judge was at fault in failing to properly analyse the evidence before him and apply the correct legal principles; and that, in the peculiar circumstances of this case, the learned Judge was at fault in holding that the power of attorney was insufficient for the purpose of the alleged sale of the house without land.
30. In rebuttal, counsel for the respondents submitted: that the learned Judge critically analysed the ownership of the Title and clearly noted that Awadh Bin Saleh owned 5/9 Share, Omar Bin Funzi 2/9 Share and Charity Cherotich Tylor 2/9 Share; that the three proprietors had not presented any evidence to demonstrate that they had shared whatever developments stood on the suit property or any movable or immovable property thereon; that their joint consent was mandatory for sale of any jointly owned movable or immovable property; that they did not consent to the alleged sale of the house without land in the instant case.
31. According to counsel, there was no evidence to show that the respondents ever benefitted from the appellant’s alleged transaction; that there was no evidence to show that they ever received the alleged purchase price; that the appellant’s claim was without basis; that the respondent never gave authority to the donee of the Power of Attorney to sell the house; that the property is owned by three persons, who were not consulted; and that, therefore, the transaction was null and void right at the outset.
32. The concept of ‘a house without land’ was elucidated by this Court in *Abdukrazak Khalifa Salimu v Harun Rashid Khator & 2 others* [2018] KECA 151 (KLR) as follows:
  - “ 1. Once again, the concept of “House without Land” is back before this Court. In coastal Kenya, a land tenure known as house without land is common. This is where a person can own a house without owning the land upon which the house stands. In *Famau Mwenye & 19 others vs. Mariam Binti Said, Malindi*



H.C.C.C. No. 34 of 2005 (Ouko, J.) (as he then was) described the concept of house without land as follows:

“The dispute arises from land tenure unique ... to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as ‘house without land’. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim, *cujus est solum ejus est usque ad coelum* [meaning, ‘whose is the soil, his is also that which is above it’].”

33. We also take to mind the decision in *Murtahar Ahmed Dahman & another v Athuman Sudi* [2013] KEELC 138 (KLR) where Angote, J. made the following informative observations:

“24. 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.

25. 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.”

34. As already observed, a licensee’s right to build a house on the property of another without any claim over the land on which it stands, and in consideration for payment of an agreed ground rent, is a customary licence not assignable to a third party without the express consent of the proprietor or proprietors of the immovable property.

35. A Certificate of Postal Search dated 13<sup>th</sup> November 2007 was produced in evidence to show that the registered owners of the suit property were Awadh Bin Saleh (the 2<sup>nd</sup> respondent), who held a 5/9 share in the suit property; Omar Bin Funzi, who held a 2/9 share; and Charity Cherotich Tylor, who held a 2/9 share thereof. In principle, any dealings in the land or in any development or movable property thereon would invariably require the joint consent and authority of the three proprietors.

36. It is noteworthy that the Power of Attorney donated to the appellant by one Said Saleh Said and Awadh Saleh Said (the 2<sup>nd</sup> respondent) did not involve the other two registered proprietors, Omar Bin Funzi and Charity Cherotich Tylor, whose joint consent was requisite to any dealings in the suit property or in any developments thereon. Moreover, express consent of the three proprietors was necessary before any licence could be granted to any person to erect a house on their land or otherwise deal therewith. In effect, the alleged authority of the appellant as the alleged donee of the contested Power of Attorney to deal with the suit property or with any development thereon on their behalf required their express joint consent in writing. Consequently, we are not persuaded by the appellant’s argument that, even though the suit property was owned by the three named in undivided shares, each of them had their own separate spheres and would not interfere with the dealings of the other and that, therefore, the respondents’ consent was sufficient to validate sale of the house.

37. In view of the foregoing, the learned Judge cannot be faulted for holding that, in addition to the invalidity of the Power of Attorney, the sale was a nullity for lack of any authority to sell from Charity Cherotich Tylor and Omar Bin Funzi, and that lack of evidence that the house sold was the actual share



on the ground belonging to the specified seller. Consequently, the appellant is not entitled to any of the reliefs sought in his amended plaint.

38. Having examined the record of appeal, the grounds on which it is founded, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed in consequence whereof the Judgment and Decree of the Environment and Land Court at Mombasa (S. Munyao, J.) delivered on 9<sup>th</sup> November 2021 is hereby upheld.

39. Cost of the appeal to the respondents. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH, 2025.**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

