



**Lassie (Suing on Behalf of the Estate of Lassie Bin Abdulla - Deceased) v Mombasa & 3 others (Civil Appeal E045 of 2022) [2025] KECA 870 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KECA 870 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E045 OF 2022  
KI LAIBUTA, SG KAIRU & GWN MACHARIA, JJA  
MAY 23, 2025**

**BETWEEN**

**SOUD ABDALLA LASSIE (SUING ON BEHALF OF THE ESTATE OF LASSIE  
BIN ABDULLA - DECEASED) ..... APPELLANT**

**AND**

**LAND REGISTRAR, MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**FATMA KHAMIS JENEBY ..... 2<sup>ND</sup> RESPONDENT**

**ROQAYA ABDALLA LASSIE ..... 3<sup>RD</sup> RESPONDENT**

**LASSIE ABDALLA LASSIE ..... 4<sup>TH</sup> RESPONDENT**

*((Being an appeal from the Judgement and Decree of the Environment and Land Court of Kenya at Mombasa (Sila Munyao, J.) delivered on 26th January 2021 in ELC No. 198 of 2013))*

**JUDGMENT**

1. This appeal arises from the Judgement and Decree of the Environment and Land Court (the ELC) sitting at Mombasa (Sila Munyao, J.) delivered on 26<sup>th</sup> January 2021. At all material times, the appellant who was the plaintiff before the trial court, Soud Abdalla Lassie (suing on behalf of the Estate of Lassie Bin Abdullah (Deceased)) and the 1<sup>st</sup> respondent, Fatma Khamis Jeneby, the 3<sup>rd</sup> respondent, Roqaya Abdalla Lassie, and the 4<sup>th</sup> respondent, Lassie Abdalla Lassie, are relatives. The issue in dispute surrounds the ownership of Mombasa/Block XVI/5X9 (the suit property).
2. By a plaint dated 4<sup>th</sup> July 2023, the appellant filed a suit against the respondents seeking the following orders:
  - i. A declaration that the deceased is the proprietor of the property comprised in Title No. Mombasa/Block/5X9 as currently registered;



- ii. An order directing the 2<sup>nd</sup> respondent do rectify the Land Register by cancelling the 1<sup>st</sup> respondent's name and those of her children as proprietors of Title No. Mombasa/Block/5X9;
  - iii. A declaration that the 1<sup>st</sup> respondent was registered as proprietor of Title No. Mombasa/Block/5X9 by fraud;
  - iv. A permanent injunction restraining the respondent or any of them either by their servants, agents, or employees from presenting or registering any instrument or document against Title No. Mombasa/Block/5X9;
  - v. A permanent injunction restraining the 2<sup>nd</sup> respondent from destroying, damaging or concealing the Land Registrar in relation to Title No. Mombasa/Block/5X9 and from registering any instrument or making an entry in the register affecting the appellant's interest in the suit property without the appellant's written consent;
  - vi. A mandatory injunction compelling the 2<sup>nd</sup> respondent to provide to the appellant upon payment of necessary fees certified copies of all documents contained in the suit property and in default to make written explanation why he cannot do so;
  - vii. A mandatory injunction compelling the 2<sup>nd</sup> respondent to comply with the provisions of the *Land Registration Act* to maintain a parcel file for Title No. Mombasa/Block/5X9;
  - viii. An order of injunction restraining the 2<sup>nd</sup> respondent from making any alterations in the register while the suit is pending other than an entry showing the deceased as the registered proprietor of Title No. Mombasa/Block/5X9;
  - ix. Damages and interest against both defendants;
  - x. Costs of, and incidental to, this suit.
3. The disputed facts are that the deceased purchased a house without land from Sheikh Omar bin Abdulla Basharahil on 9<sup>th</sup> December 1952 for Kshs.5,500, and which was standing on Plot No. 113, and he started paying ground rent to the landowners on 1<sup>st</sup> January 1953; that the deceased resided on the suit property with his wife and 8 children; and that, by a letter dated 14<sup>th</sup> April 1987, the landowners' agents offered the land for sale where the houses stood for Kshs.15,000.
4. The appellant pleaded that, together with his four other siblings, they seized the opportunity and paid the proposed purchase price of Kshs.15,000; and that, they were issued with a receipt dated 4<sup>th</sup> November 1987 in the name of their deceased father. The appellant further alleged that one of his brothers, Abdalla Lassie, (deceased) tried to pursue the title from the landowners but to no avail as his deceased father's estate had no administrator. The appellant and his other siblings later discovered that the 1<sup>st</sup> respondent had transferred the title to her name after their deceased brother who was the 1<sup>st</sup> respondent's husband died.
5. The appellant pleaded that there was no time that the suit property passed onto the 1<sup>st</sup> respondent's husband since they entrusted their deceased brother to take care of it and gave him money to purchase it since he was working and residing in Mombasa; that the manner in which she obtained the title to



the suit property in the 1<sup>st</sup> respondent's name was fraudulent; and that she first obtained the title in 2009 and later filed a succession cause before the Kadhi's Court in the year 2012.

6. The appellant particularised the elements of fraud attributed to the 1<sup>st</sup> respondents as follows:
  - i. there was no transfer, transmission or any other conveyance showing how the suit property changed ownership from the deceased;
  - ii. the landowners did not sign any transfer transferring the suit property to their deceased brother;
  - iii. the Transfer which allegedly transferred the suit property to the 1<sup>st</sup> respondent, 3<sup>rd</sup> and 4<sup>th</sup> respondents is not dated or signed by the transferor;
  - iv. the Transfer that allegedly transferred the suit property to the 1<sup>st</sup> respondent offends Section 34 of the *Advocates Act*;
  - v. the title deed was issued one year before the Transfer was presented for registration against the suit property;
  - vi. the 1<sup>st</sup> respondent did not pay any purchase price to the original owners of the suit property;
  - vii. there was no conveyance showing change of ownership from the original owners to the deceased, to their deceased brother and finally to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents;
  - viii. there were no administrators to the estates of both deceased persons; without an administrator of their deceased's brother's estate, there was no way the suit property could have changed hands; and
  - ix. no stamp duty was paid on registration.
7. The appellant contended that the suit property was a family property, and that, together with his other siblings, they were the rightful beneficiaries; that the 1<sup>st</sup> respondent was also a beneficiary of the suit property by virtue of being the widow of their deceased brother; and that failure or refusal by the 1<sup>st</sup> respondent to provide to him the requisite documents deprived him of information that would establish how the 1<sup>st</sup> respondent acquired title to the suit premises.
8. In a statement of defence dated 17<sup>th</sup> September 2020, the 1<sup>st</sup> respondent stated that, Abdalla Lassie, her deceased husband, told her that he solely purchased the suit property; that the appellant and his siblings were born and raised in Nairobi, and that the allegations that they resided on the suit property with their deceased father was untrue; that she single-handedly pursued the issuance of the title of the suit property; that, if the appellant was interested in the suit property, he would have sorted out the purchase between the year 1986 when the offer was made and 2007 when her husband died; and that, by the appellant raising the issues after her husband's death, was malicious.
9. The 1<sup>st</sup> respondent averred that her deceased husband secured approval of a building plan in his name and commenced construction of a three-storey building on the suit property; that the three-storey building was only completed on the ground floor; that the appellant did not stop her late husband from constructing; and that, it was only after her husband's death that the appellant sent one of his stepbrothers to take possession of the 1<sup>st</sup> floor under the pretext that he had nowhere else to live.
10. The 1<sup>st</sup> respondent defended her possession of the suit property and denied the fraud allegations attributed to her.



11. The 3<sup>rd</sup> and 4<sup>th</sup> respondents, being the children of the 1<sup>st</sup> respondent, filed a Joint Statement of Defence dated 5<sup>th</sup> February 2018. They denied that the suit property belonged to the deceased. They averred that the house on the suit property collapsed and their deceased father, Abdalla Mbarak Lassie, purchased vacant land. They also denied the allegations that the appellant and his siblings contributed money and gave their grandfather to purchase the suit property; and they therefore put the appellant to strict proof of their claim.
12. The 3<sup>rd</sup> and 4<sup>th</sup> respondents reiterated that their deceased father got approvals for building a storeyed house, but died while the construction was still at ground floor; that the suit property was registered in the name of the 1<sup>st</sup> respondent as their trustee; and that the suit property belongs to them, but not to their deceased's grandfather's estate.
13. The suit was heard by way of viva voce evidence. The appellant testified as PW1. He reiterated that his deceased father purchased a house without land on the suit property in the year 1953 and a transfer made to him from Sheikh Omar Abdulla for Kshs.5,500; that his deceased father was living in Mombasa, but moved to Nairobi with the whole family and the house was left to his maternal grandmother; that, in the year 1987, his deceased's brother called them and told them that the land was on sale, and that everyone was required to make a contribution towards the purchase; and that they collected the money and gave it to their deceased mother who in turn took it to Mombasa to his deceased brother who then wrote a personal cheque in favour of the land management company.
14. PW1 further testified that they did not file a succession cause in respect of his deceased father's estate because their deceased brother was taking care of the house; and that he got to know that the suit property belonged to the 1<sup>st</sup> respondent when he was summoned to appear before the Kadhi's Court in the year 2012. He denied that the title to the suit property was ever transferred to his deceased brother.
15. PW1 produced in evidence the proceedings before the Kadhi's Court (PEXH - 1), Transfer Form dated 9<sup>th</sup> December 1952 from Sheikh Omar Abdulla to the deceased (PEXH - 2), the Letter of Offer dated 14<sup>th</sup> April 1987 from the management company to all tenants (PEXH - 3), a receipt dated 4<sup>th</sup> November 1987 of Kshs.15,000 (PEXH - 4), a copy of the title document dated 13<sup>th</sup> November 2009 issued to the 1<sup>st</sup> respondent (PEXH - 5), a letter dated 12<sup>th</sup> November 2012 addressed to the land registrar (PEXH - 6), a demand letter dated 9<sup>th</sup> November 2012 (PEXH - 7), another demand letter dated 15<sup>th</sup> November 2012 (PEXH - 8) and the Limited Grant of Administration issued to the appellant in their deceased father's estate (PEXH - 9).
16. In cross-examination, PW1 stated that, together with all his siblings, they were born in Nairobi; that it would be wrong for anyone to assert that they were born and raised on the suit property; that the house was let to tenants, and that it was his deceased grandmother who collected rent; that, when he first saw the suit property in 1990s it was a Swahili house structure; that the current structure is a flat (storeyed) with only the ground floor complete; and that it is his deceased brother who applied to construct it. He further stated that the contents of the letter dated 9<sup>th</sup> March 1992 to the effect that the suit property belonged to his deceased brother was written without their knowledge.
17. PW2, Shamsa Lassie Abdalla, the appellant's sister, reiterated PW1's testimony as regards the circumstances under which they assisted in purchasing the suit property.
18. In her defence, the 1<sup>st</sup> respondent testified as DW1 and stated that she filed Kadhi Succession Case No. 126 of 2021, which concerned her deceased husband's property, but that she later withdrew it; and that her husband wrote a cheque of Kshs.15,000 and asked that the suit property be transferred to his name. She produced a letter dated 30<sup>th</sup> October 1987 written by her deceased husband; that the letter did not



state that he was purchasing the suit property on behalf of other people; that the receipt was issued in her father-in-law's name since he was the one who bought the Swahili house; and that, when she went to the management company's offices, Four Way Bureau, she was sent to their advocates, Pandya & Talati, where she paid Kshs.82,177 for purposes of land transfer and Kshs.13,724 for clearing the accumulated rates. In proof of her case, DW1 produced in evidence her list of documents dated 17<sup>th</sup> September 2020 comprising:

- a. Letter dated 30<sup>th</sup> October 1987 by Abdalla M. Lessie forwarding the cheque of Kshs.15,000 to M/s. Fourway Accommodation Bureau.
  - b. Receipt date 4<sup>th</sup> November 1987 for Kshs.15,000.
  - c. Letter dated 9<sup>th</sup> March 1987, also from Mr. Lessie to District Land Registrar by which he was asking to be issued with a title deed to the suit property.
  - d. Acknowledgement Receipt of Transfer's Legal fee by Pandya and Talati Advocates.
  - e. Municipal Land Rates Invoice dated 3rd February 2009.
  - f. Building Plan.
19. In cross examination, DW1 stated that she holds the title to the suit property in the name of her children, the 3<sup>rd</sup> and 4<sup>th</sup> respondents; that her deceased husband paid for the suit property using his personal cheque, but that the receipt was issued in the name of her deceased father-in-law since he was the tenant; that the father-in-law was deceased by then; and that, what her deceased father-in-law purchased was a Swahili house.
20. She further stated that she knew that the suit property belonged to her husband although there was no sale agreement between him and the agents; that, however, her husband wrote letters asking that the land be registered in his name; that she simply paid the advocates to conduct a transfer on her behalf; that she did not know the correct procedure for the transfer as she entrusted her lawyers to do the same; that she then filed a succession cause to distribute her deceased' husband estate in accordance with Islamic law; and that she included the appellant in the succession cause so that everyone was aware about the matter.
21. She stated that she was advised by Pandya & Talati Advocates on the two options on how to deal with the property; that it was either to have it in her husband's name or in her own name; that she could not tell if she was misadvised or not; and that the lands' office did not raise any issue when it was issuing her with the title document.
22. DW2, Lassie Abdalla Lassie, the 4<sup>th</sup> respondent, adopted the joint witness statement dated 22<sup>nd</sup> May 2019. He reiterated the events leading to his mother's acquisition of the suit property. He further testified that one of his deceased father's stepbrothers, one Mr. Badrudin who had moved into the unfinished ground floor of the suit property was then deceased; that he could not tell who was collecting rent from the occupied rooms. He further produced the list of documents in the joint list of documents dated 22<sup>nd</sup> May 2019 as (DEXH 1 - 3) comprising the 3<sup>rd</sup> and 4<sup>th</sup> respondents' identity cards, title deed to the suit property and transfer form.
23. In cross examination, he stated that the information on how his father acquired the suit property was related to him; and that he was 6 years old at that time.
24. The 2<sup>nd</sup> respondent, the Land Registrar, Mombasa, did not enter appearance or participate in the proceedings before the ELC.



25. Upon considering the evidence before him, Munyao Sila, J. concluded that the appellant's suit was not merited. In reaching this finding, the learned Judge considered that the land where the Swahili house stood was offered for sale by the agents of the landowners, Fourways Accommodation, vide a letter dated 14<sup>th</sup> April 1987; that the offer was not made to any particular person, but generally to all tenants; that at this time, the deceased had already passed on; and that, a letter of offer cannot be issued to a dead person.
26. It was held that there was nothing to support the claim by the appellant that the purchase of the suit property was made by himself and his siblings; that, notwithstanding the fact that the transaction was done in the 1980s when there were no mobile phones or emails, it would still be expected that, for this important transaction, there would be a letter or a document forwarding the money to their deceased brother, or even an acknowledgement letter; and that, apart from the oral evidence, there was nothing to back up the allegations of the monetary contribution towards the purchase of the house.
27. While referring to the letters dated 30<sup>th</sup> October 1987 and 9<sup>th</sup> March 1992 by which the 1<sup>st</sup> respondent deceased's husband was forwarding a cheque of Kshs.15,000 and asking that the title deed be issued in his name, the learned Judge held that there was nothing to suggest from the letters that the appellant's deceased brother was pursuing the suit property on behalf of a group of people; that there was nothing unusual with the payment receipt being issued in the name of the 1<sup>st</sup> respondents' deceased father-in-law, as the house without land was leased out to him; and that, it would be a stretch of imagination that the deceased was purchasing the suit property while he was not alive.
28. Aggrieved by the decision of the trial court, the appellant is now before this Court on appeal. He has raised the following grounds of appeal, namely that:
- i. the learned Judge erred in law and in fact by decreeing that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are the lawful owners of the suit property;
  - ii. the learned Judge erred in law by failing to hold that the 1<sup>st</sup> respondent obtained the title deed to the suit property fraudulently;
  - iii. the learned Judge erred in law and in fact by failing to hold that there was no valid agreement of sale between the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents and the previous owners of the suit property;
  - iv. the learned Judge erred in law and in fact by failing to hold that the appellant and his siblings contributed the purchase price money and developed the suit premises;
  - v. that learned Judge erred in law and in fact by failing to hold that the 1<sup>st</sup> respondent's deceased husband was not a tenant as at the time the previous owners of the suit premises offered it for sale to the tenant in 1987;
  - vi. the learned Judge erred in law and in fact in failing to hold that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents did not pay any part of the purchase price for the suit premises;
  - vii. the learned Judge erred in law and in fact by failing to hold that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents obtained the title deed to the suit property fraudulently and illegally;
  - viii. the learned Judge erred in law and in fact by failing to hold that no fraud or illegality was pleaded or proved against the appellant; and
  - ix. the learned Judge did to sufficiently consider, evaluate, analyse and correctly apply the evidence that was before him.



29. He asks that the decision of the ELC be set aside and substituted for an order granting all the prayers sought in the plaint, including that costs of the appeal to be paid by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.
30. We heard this appeal on 5<sup>th</sup> December 2024. Learned counsel Mr. Wachira King'ang'ai appeared for the appellant, learned counsel Mr. Makuto appeared for the 2<sup>nd</sup> respondent and learned counsel Mr. Odongo appeared for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents. All parties to this appeal filed their respective written submissions.
31. Mr. Wachira for the appellant orally highlighted the submissions dated 24<sup>th</sup> April 2023. Counsel reiterated the history of how the appellant's deceased father obtained the house without land, and how it was eventually offered for sale. He submitted that no succession proceedings in regard to the lessee's estate or the 1<sup>st</sup> respondent's deceased husband estate were conducted; that the 1<sup>st</sup> respondent did not produce a sale agreement and/or evidence of payment of stamp duty in respect of the suit property; and that, therefore, there was no evidence that she purchased the suit property.
32. It was submitted that the appellant agrees that the 1<sup>st</sup> respondent was entitled to a part of the suit property as a beneficiary, but that the suit property belongs to the estate of the appellant's deceased father from the purchase made in 1952.
33. The appellant asked the Court to take judicial notice of the fact that it is not at all times that family members keep minutes or record of meetings as a testament of what may be contributed in a sale transaction; that, by the time the 1<sup>st</sup> respondent was commencing succession proceedings of her deceased's husband in the year 2012, the title to the suit property was already in her name, and that, therefore, it was not possible to distribute the estate in the beneficiaries' names.
34. On behalf of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, Mr. Odongo highlighted the submissions dated 24<sup>th</sup> May 2023. Counsel submitted that the appellant did not have the locus standi to challenge the title issued to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, a fact that the learned Judge pointed out; that it was possible that the Swahili house was brought down even before the 1<sup>st</sup> respondent's father died, and that, subsequently, no house was built again; and that, therefore, the deceased's interest ceased when the Swahili house came down.
35. Counsel contended that, as at the time when the offer to purchase the land was made, the 1<sup>st</sup> respondent's father had died; that all transactions end with death of a person unless it is a land transaction under adjudication or settlement scheme previously applied for by a deceased person; and that the 1<sup>st</sup> respondent's in-laws had no interest in the suit property as they never lived in Mombasa.
36. On the assertion that PW2 contributed iron sheets for construction of the house, it was submitted that the house was a 'flat' which did not need iron sheets; that this allegation arose after the 1<sup>st</sup> respondent's husband died; and that there were letters which the 1<sup>st</sup> respondent's husband wrote to the land owner's agents asking that the title be issued in his name. Counsel drew our attention to the fact that the 1<sup>st</sup> respondent's deceased husband died 20 years after the appellant claimed he gave him money to purchase the suit property; and that he came back 10 years on after his death to claim the suit property.
37. Counsel urged us to consider the following decisions which discussed the concept that, in a case of a house without land, the interest was limited to the house bought, and which interest did not pass title to the land on which the house is bought, namely: *Alwi Mohamed Alwi vs. Swaleh Omar Awadh* [2019] eKLR by ELC at Malindi and *Malindi HCCC No. 34 of 2005 Famau Mwenye & 19 Others vs. Mariam Binti Said*.



38. On the part of the 2<sup>nd</sup> respondent, Mr. Makuto relied on written submissions dated 29<sup>th</sup> November 2024. He submitted that the appellant was seeking prayers against the property known as Mombasa/Block/5X9; that there was no evidence adduced to show that the 1<sup>st</sup> respondent obtained registration of this plot as there was no such title available at the Land Registry; that the 3<sup>rd</sup> and 4<sup>th</sup> respondents had produced a title to a property known as Mombasa/Block XVI/5X9, which is different from plot No. Mombasa/Block/5X9; and that, therefore, the appeal should be dismissed.
39. This is a first appellate court whose duty is to re-consider and re-analyse the evidence on record before the trial court and reach its own conclusion. In so doing, we bear in mind that, unlike the trial court, we do not have the advantage of either seeing or hearing the witnesses, and so observe their demeanour, for which we should give due consideration. This position is well stated in the case of *Selle & Another vs. Associated Motor Boat Company Limited & Others*, [1968] EA 123 as follows:
- “An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”
40. We have considered the grounds of appeal, the submissions of the respective parties and the law. This appeal revolves around the issue of ownership of the suit property, Mombasa/Block XVI/5X9.
41. Both parties agree, and there is no question that the deceased, the patriarch of the family, Lassie Bin Abdullah, was the lessee of the house without land on the suit property by virtue of a Lease Agreement dated 9<sup>th</sup> December 1952 between himself and Sheikh Omar bin Abdulla. The deceased died 4 years later, on 4<sup>th</sup> December 1986.
42. The concept of a house without land which is prevalent in the Coastal region of Kenya, confers ownership of a structure which, in most cases, is a semi-permanent house on a parcel of land, but not the land ownership. Ouko, J. (as he then was) observed as follows in *Famau Mwenye & 19 Others* (supra):
- “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’].”
43. This Court had this to say on the concept of ‘houses without land’ system in *Mariam Fadhili vs. Samson Maricho Otweyo & 3 others* (2016) KECA 249 (KLR):
- “Our land law regime is mainly dictated by statute and common law; both of which define land as not only the ground but the structures thereon. This is based on the Latin maxims ‘*cujus est solum ejus et usque ad coelum et ad inferos*’ which translates into ‘whoever’s is the soil, it is theirs all the way to heaven and all the way to hell’ and ‘*quic quid planatur solo solo*’



credit' (whatever is attached to the soil becomes part of it). From the two maxims, land has by and large been defined to mean the ground and all fixtures thereon. However, courts have taken judicial notice of the Mohammedan concept of ownership of 'a house without land' that is prevalent at the coast. This concept works on the premise that proprietorship of land and of the structures thereon can be mutually exclusive. A person may own one without necessarily owning the other. This proposition found support under the provisions of the Land Titles Act, Cap 282 (repealed) which governed land registration at the coast. Under the Act, interests in land required registration, with Section 55(b) recognizing houses and coconut trees as such interests or holdings whose proprietorship could be independent of the land. (See *Muhiddin Mohamed v. Jackson Muthama & 168 others* [2014] eKLR). Upon registration, a certificate of registration would issue, which would act as proof of legitimacy of the proprietor's interest."

44. A lease agreement premised on "house without land" will only confer the proprietary rights of the house without the land as its name suggests. As it is in this case, there is no dispute that the only rights which the deceased patriarch had was over the house but not the land on which the house was built. Thus, when the deceased died, his rights over the house on the suit property extinguished. We say so because the lease agreement did not confer any further rights as regards to the agreement to the deceased's assignees, successors in title or other beneficiaries.
45. By the letter dated 14<sup>th</sup> April 1987 addressed to all the tenants on Plot No. 251/XVI, the estate agents of the owners of the land offered the plots for sale for Kshs.15,000 for those residing on houses without land. For all intent and purposes, this was approximately 4 months after the death of the deceased. Again, and logically so, the offer letter could not have been issued to a deceased person. As to the person who paid money for the parcel of land on offer, it is undisputed that the 1<sup>st</sup> respondent's deceased husband issued a cheque of Kshs.15,000 towards purchase of the land offered for sale. The misfortune that arose is that the receipt acknowledging payment was issued in the name of the deceased patriarch.
46. The appellant and his witness, testified that they contributed as siblings towards the purchase of the land. A cursory glance at their witness statements attests that, neither of them confidently indicated what they particularly contributed towards purchasing of the suit land. It is trite law that a party who desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist as required under Section 107 of the *Evidence Act*. It is the appellant who so alleged and, therefore, the burden of proof rested on him. We find and hold that neither the appellant nor his witness proved the fact that they contributed money towards the purchase of the suit property.
47. When a party undertakes a construction project, it is an open secret. The appellant and his siblings did not move any court to assert their rights on the suit property when the construction was underway, and more so noting that land is an emotive issue not only in the Coastal region, but in the entire Republic of Kenya. The appellant testified that, he was an aircraft technician while PW2 testified that he was a retired accountant. By no means can we be mistaken to conclude that these are enlightened individuals who had the capacity to seek proper legal advice in the event they viewed that what rightfully belonged to them was being taken away. It is telling that they could be silent for years, only to turn around so late in the day to claim that they had an interest in their father's estate.
48. The appellant bolted from slumber in the year 2012 after he was served with summons from the Kadhi's Court in relation to his deceased brother's estate. Computing the time lapse from the year 1987 when the appellant allegedly contributed to acquisition of the suit property to the year 2012, it is a period of 25 years. The deceased brother died in the year 1997 which is 10 years after he allegedly



assisted to purchase the suit property. Interestingly, against this backdrop, no evidence was led by the appellant and his sister to demonstrate the efforts they made to acquire the title to the suit property. Instead, it is their deceased brother who made effort to ensure that the title was in his name through a letter dated 30<sup>th</sup> October 1987 which also forwarded the cheque and another dated 9<sup>th</sup> March 1992, which the appellant has not remotely suggested that they are a forgery.

49. Lastly, Mr. Odongo raised a pertinent issue of locus standi of the appellant to claim an interest in the estate of his deceased's father. We did not receive a rebuttal from the appellant's counsel on what his thoughts were on the submission by Mr. Odongo on this issue. Looking at the chronological dates and events which led to the 1<sup>st</sup> respondent's deceased's husband's acquisition of the suit property, it was offered for sale 4 months after the patriarch died. The dead have no capacity to accept and/or reject offers, enter into contracts and/or purchase anything.
50. The appellant brought the suit before the ELC in his capacity as the administrator of his deceased father's estate. Without putting much logic into it, after the patriarch died, it follows that he had no subsequent rights over the house or the land as we have already observed. Neither the land nor the house were properties to be inherited by any person from the deceased's lineage. It therefore follows that both the land and the house were free to be taken up by any other party, and the 1<sup>st</sup> respondent's deceased husband seized the opportunity to purchase the land. In essence, it is a preposterous assumption to state that the suit property automatically formed part of the patriarch's estate at any stage.
51. We also observe that, even at the time when the 1<sup>st</sup> respondent's husband died, the suit property's title was not in anyone's name, as a house without land is a separate entity from the land on which it stands. In our view, it was inconsequential if Grant of Letters of Administration in the 1<sup>st</sup> respondent's deceased husband's name were taken out. The 1<sup>st</sup> respondent, upon proving to the land agents that her husband was the rightful owner, it only follows logic that, as the next of kin, she was entitled to the suit property unless proved otherwise.
52. We can only but read mischief with the actions of the appellant and his siblings in trying to assert ownership of the suit property more than 20 years later. We find no reason to depart from the decision of the learned Judge, who had this to say:

“From my above analysis, I come to the conclusion that it was Abdalla, through his own sole effort and contribution, who purchased the suit property. He unfortunately died before the property could be transferred to him. I come to the conclusion that he was buying the property for himself, and not for or on behalf of his siblings or the estate of his late father. It follows that the plaintiff and his siblings have absolutely no stake in the suit property. they have no locus to question its proprietary and no locus to content any transfer of it. Neither can they anchor their claim on the concept of house without land for reason that the Swahili house is no more...what is there now is completely different from what existed before, moreover, there is no landlord for the old lands terminated the arrangement of house without land, when they offered the properties for sale, that relationship of holding house without land became extinguished., that land took over a new owner who now kept both house and land.”

53. It is clear to us that the action of the appellant and his siblings is a futile attempt to reap where they did not sow. Further, to the extent of even planting their step-brother who is unfortunately now deceased on the unfinished building, confirms the frustration they were determined to put the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents through.



54. The upshot of the above analysis and reasoning is that the appellant has not made out a case to persuade us to allow the appeal. In our view, the learned Judge (Sila Munyao, J.) did not err in dismissing the appellant's claim in the trial court. We thus uphold in its entirety the Judgment of the Environment and Land Court at Mombasa dated 26<sup>th</sup> January 2022. The appeal is accordingly dismissed with costs to the respondents.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF MAY, 2025.**

**S. GATEMBU KAIRU, FCIARB**

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARB, FCIARB.**

**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

**JUDGE OF APPEAL**

