



REPUBLIC OF KENYA



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Maina v Bwana (Civil Appeal E009 of 2022) [2025] KECA 1388 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1388 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E009 OF 2022
F TUIYOTI, KI LAIBUTA & GWN MACHARIA, JJA
JULY 31, 2025

BETWEEN

JAMES MURIITHI MAINA APPELLANT

AND

SHEKALE BWANA RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court at Malindi (J. O. Olola, J.) delivered on 29th January, 2021 in ELC Case No. 204 of 2014)

JUDGMENT

1. This matter is straightforward.
2. Before the trial Court, James Muriithi Maina, (the appellant), set up a case against Shekale Bwana (the respondent) on the basis of a sale agreement in respect of a house without land situate on land designated as number 49/11MN Mombasa Kisauni (the suit property). In January 2012, the respondent approached the appellant with a proposal to sell the house. To prove ownership to the appellant, the respondent produced an agreement dated 5th January, 2007, purportedly made between himself and one Mbaruk Ayub Ali, who had sold the land to the respondent. Subsequently, an agreement for the sale of the house was entered into between the appellant and one Margaret Wanjiru Morosetti (the agent) to whom the respondent had donated a power of attorney. A consideration of Kshs.1,800,000.00 was paid. Whether it was paid to the respondent directly or through the agent is a matter that we shall shortly revisit. It was a term of the agreement that vacant possession of the house, along with all benefits and liabilities, would pass to the appellant upon completion by 25th January, 2012. However, the appellant contended that, once the agreement was executed on 29th February, 2012, the respondent failed to hand over possession of the house. Later, the appellant learnt that the respondent had already sold the house to a third party. In January 2013, he learnt that one Khadija Ahmed Abdalla was also claiming ownership of the same house. The appellant's grievance is that he lost the benefit of the purchase and the income from rent due to the respondent's fraudulent



misrepresentation contending that the expected annual rent from the premises was Kshs.192,000.00, and that the amount recoverable over a period of 8 years would have been Kshs.1,536,000.00.

3. Salient to this transaction is the supposed existence of a Special Power of Attorney between the respondent and the agent. This Special Power of Attorney was prepared by one Lucy Mwelu Muli, an advocate who, at the material time, practiced under the name of Muli & Kina Advocates, and on instructions of the respondent and signed by him on 11th October 2011. It was later registered at the Lands Office in Mombasa on 4th November, 2011. This was the evidence contained in a witness statement written by Ms Muli on 21st April, 2017 and admitted into evidence by consent of the parties without requiring her to give oral testimony.
4. In the end, the appellant sought a refund of the purchase price of Kshs.1,800,000.00 and general damages together with interests, alleging that the respondent fraudulently misrepresented his ability to sell the property, having already sold it to a third party and failing to provide vacant possession.
5. In defence, the respondent denied ever owning the suit property or entering into any agreement to sell it to the appellant or any other person. In addition, he denied ever instructing or appointing Margaret Wanjiru Morosetti or any other agent to execute any document on his behalf.
6. At the trial, the two rivalling parties testified in support of their respective positions without calling any witnesses.
7. Identifying that the burden was on the appellant to prove his case, the trial court noted that, while the appellant claimed payment was made at the time of signing the agreement (29th February, 2012), the agreement itself implies it was prepared some days after the money exchanged hands. The court faulted the appellant for failing to call Ms Muli to clarify on what took place before her or, at the very least, a document examiner to confirm the authenticity of the signatures and handwritings on the relevant documents. On this basis, the trial court dismissed the suit.
8. Challenging that decision, the appellant brings this appeal rallied around the following seven grounds that:
 - i. The learned trial judge erred in both law and fact in holding that the appellant failed to prove that he paid Kshs.1,800,000/- to the respondent;
 - ii. The learned trial judge erred in both law and fact in failing to hold that the agreement of sale was a valid agreement having been executed between the appellant and Margaret Wanjiru Morosetti, the attorney of the respondent;
 - iii. The learned trial judge erred in law and fact in holding that failure to avail the advocate who executed the instrument (agreement of sale) was fatal to the appellant case;
 - iv. The learned trial judge erred in both law and fact by failing to take cognizance of the witness statement that had been filed by Lucy Muli (the advocate who drew the instrument) which statement had been produced by consent from both parties;
 - v. The learned trial judge erred in both law and fact in failing to appreciate the fact that payment was made to the respondent directly and the agreement of sale was made by the appellant and the respondent's attorney but that it was the respondent who received the entire purchase price when he was in the country;
 - vi. The learned trial judge erred in both law and fact in holding that a proper chronology of events was not tendered by the appellant in respect of this transaction while the appellant testified in court and informed the court that the respondent's attorney produced the respondent's details



(passport photo, ID card and signed the agreement of sale) at the office of Muli & Ole Kina Advocates; and

- vii. The learned trial judge erred in both law and fact in failing to evaluate the evidence in order to arrive at a fair determination of the case.
 1. In support of the appeal, the appellant's counsel filed short written submissions dated 22nd March, 2023. Learned Counsel Ms Otieno appeared for the appellant at the plenary hearing and elected not to highlight those submissions. Rehashing the evidence before court, the submissions give a narration of how the appellant became aware of a house for sale. Turning to the sale agreement, it is submitted that it was drawn and attested to by Advocate Lucy Muli whose witness statement was admitted as evidence by consent of the parties. It is argued that the appellant would have gladly availed this witness to testify had the defence insisted.
 2. The appellant contends that, on 11th October, 2011, the respondent appeared before Advocate Lucy Muli together with Margaret Wanjiru Morosetti and instructed the advocate to prepare a power of attorney specifically of the suit property, and that the respondent's passport photographs, passport number and PIN were provided to the said advocate. The appellant further contends that these confidential and personal documents could only have been availed by the respondent to the advocate. Further, that the amount in question Kshs.1,800,000, was paid to the respondent even before the agreement of sale was signed, and the respondent's later acknowledgment of an indebtedness of Kshs.600,000.00 align with the appellant's position that the respondent received the entire purchase price.
11. The respondent was represented at the hearing by learned counsel Mr Atiyang, who highlighted written submissions already filed in court.
12. The respondent's response rests entirely on the rules of evidence and the burden of proof. Citing section 107 of the *Evidence Act*, the respondent asserts that whoever desires a court to give judgment based on the existence of facts must prove that those facts exist. Furthermore, when a person is bound to prove the existence of any fact, the burden of proof lies on that person. Cited were the decisions of the Supreme Court in *Odinga & another v Independent Electoral and Boundaries Commission & 2 others*; *Aukot & another (Interested Parties)*; *Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & N Ndungu, SCJJ)* for the proposition that the legal and evidential burden of establishing facts and contentions means a party's case is static and requires the plaintiff to discharge the evidential burden, which only shifts to the defence if the plaintiff has adduced sufficient evidence to warrant a rebuttal.
13. The respondent highlights numerous contested facts that needed to be proved by the appellant:
 - i. The appellant alleged cash payment, but the respondent denied payment, and there was no witness to corroborate it.
 - ii. The appellant alleged that an attorney signed the agreement, but the attorney was neither called to testify nor sued.
 - iii. The appellant alleged the house was owned by the respondent, but the respondent denied ownership or knowledge of Mbarak Ayub Ali or any sale in exchange of any interest to land.



- iv. The appellant alleged that documents and signatures were identical, but the respondent denied this, explaining that he had lived with the appellant and had known him for a long time and it was possible that the appellant had used that opportunity to steal the respondent's documents and forge his signature.
- v. The appellant never called any document examiner to prove that they were not forgeries. That is, that the contested sale agreement and power of attorney were authentic.
 - 1. Therefore, based on the above controverted facts, the respondent argues that at no point was the duty and burden discharged by the appellant to warrant him to make a rebuttal.
 - 2. As this is a first appeal, we are required to re-evaluate the evidence afresh and to draw our own conclusion, expressed in *Selle & Another vs. Associated Motor Boat Company Ltd. & Others* [1968] EA 123 as follows:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955) 22 EACA 210).”
- 16. This entire appeal turns on whether the appellant proved, on a balance of probabilities, the existence of the impugned sale agreement and the disputed payment of the purchase price.
- 17. Two key actors in the case which the appellant asked the trial court to believe were Margaret Wanjiru Mosoretti and Lucy Mwelu Muli. The former was said to be a holder of a power of attorney of the respondent and entered into the agreement on his behalf. Indeed, in the written statement of 4th November 2014, the testimony of the appellant is that he paid the purchase price to Mosoretti. As the onus was on the appellant to prove his case, it was upon him to avail Mosoretti as a witness to testify on her role in the transaction or, if she was reluctant to testify, to compel her attendance through a summons. Having failed to do so, the appellant was setting himself up for failure in view of further lapses in his case, which we now allude to.
- 18. The respondent had in his defence specifically averred that both the Power of Attorney and the Sale Agreement said to be between him and one Mbarak Ayub Ali were forgeries. The two key documents



which the appellant sought to rely on having been impugned, the onus, again, lay on the appellant to prove their authenticity. In this regard, we endorse the learned trial Judge’s finding that:

“In my view, in a situation such as this where the Defendant vehemently denied appointing the person who executed the Sale Agreement on his behalf as his duly appointed attorney, it was crucial that such person be called and or the Advocate who prepared the instrument be called to testify and confirm the instructions to prepare the power.

Otherwise, the only other way was for the Plaintiff to call a document examiner to come to Court and confirm the signatures and handwritings on the document. That was not done and this Court was then left to engage in guesswork as to whether the attorney had been so appointed by the Defendant.”

19. We now turn to the argument that the trial Court should have given greater weight to the witness statement of Ms Muli which was, by consent of the parties, accepted as a testimony without the need of calling the witness. We have to disabuse the appellant that, simply because the testimony was admitted into evidence by consent, then it had to assume a high probative value. Acceptance of the testimony as evidence did not mean that the contents of the statement was accepted as the truth or proof of the facts it alluded to. The probative value of the statement would have to be reached by weighing the contents of the statement against the pleadings and the other evidence adduced. Admission of a witness statement as evidence by consent is akin to admission of a document by consent. In *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR, this Court observed of the probative value of the latter:

“... mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.”

20. We must add that by failing to place Ms Muli on the witness stand, the appellant lost the opportunity of establishing how Ms Muli was satisfied that the person who appeared before her and signed the Power of Attorney was indeed the respondent.
21. The appellant’s case, which had not fared well, was much the worse when the appellant was inconsistent on the crucial aspect of payment of the purchase price. In his written statement, he says that he paid it to Ms Morosetti “who had instructions from the defendant to deal with me”. Yet his oral testimony was,

“I paid the sum of Ksh.1.8M to the Defendant in Margaret Morosetti’s house.”

22. Then, was it not just a case of a perfect storm that the supposed payment was never acknowledged in writing or at all by the respondent?
23. As would now be clear, this appeal is without merit and is hereby dismissed in its entirety with costs.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JULY, 2025.

F. TUIYOTT

.....

JUDGE OF APPEAL



DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

